

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT COURT OF ARUSHA**

**AT ARUSHA**

**EXECUTION NO. 66 OF 2014**

**(Originating from CMA/ARS/ARB/160/2013)**

**OLYMPIA SIRIWA..... DECREE HOLDER**

**VERSUS**

**NIELEZE SAFARI COMPANY LIMITED..... JUDGMENT DEBTOR**

**RULING**

16/2/2022 & 2/6/2022

**ROBERT, J:-**

Before me is an application lodged by the Decree Holder, Olympia Siriwa, seeking orders of arrest and detention as a civil prisoner against one Guru Sykes, the Managing Director and Share Holder of Nieleze Safari Company Limited, the Judgment Debtor in Labour Dispute No. CMA/ARS/ for neglecting to pay the awarded sum.

The application is brought vide execution form No. CC. 10 and is being pursued under Rule 48 (3) Labour Court Rules and Order XXI Rule 9 and 10 (2) of the **Civil Procedure Code**, Cap. 33 (R.E 2002).

Prior to the hearing of this application, parties in this matter grappled with a myriad of preliminary objections which were all decided

by this Court. This is yet another set of preliminary objections raised by the learned counsel for the Judgment Debtor to the effect that:

- 1. That, the Application for Execution is incompetent since there is no prayers for lifting a veil of incorporation in order to attach a director (individual) as civil prisoner for the liability of the Company.*
- 2. That, the Decree Holder improperly moved this Honourable Court.*
- 3. That, the Award is uncertain, for contravening section 40 (3) of Employment and Labour Relations Act, 2004.*

At the request of parties, the Court allowed parties to dispose of the points of preliminary objections by way of written submissions. **Mr. Allen Godian**, learned counsel represented Mr. Guru Sykes, the Managing Director of Nieleze Safari Company Limited, against whom an order for arrest and detention is sought whereas **Mr. Emmanuel Shiyo**, learned counsel appeared for the Decree Holder.

Highlighting on the first point of preliminary objection regarding the alleged lack of prayers to uplift the corporate veil, Mr. Godian submitted that the Decree Holder in this case claims against the Judgment Debtor, a company by the name of Nieleze Safari Company Limited, the amount of TZS 54,187,500/= as compensation from the CMA award. Hence, he decided to arrest and detain the director of the Company as one of the modes of execution of a decree.

However, he submitted that a company as a legal entity should be separated from its members under the principle of separation of corporate personality. He maintained that, since members of the Company do not carry company business, they do not owe its debts. He argued that, in circumstances where the principle of corporate personality may be exempted by way of lifting corporate veil as explained in the famous case of **Solomon vs Solomon and Company Ltd (1897) AC 22 HL**, the court needs to be moved properly and the reasons for seeking such lifting must be adduced.

He argued that, in this application the Decree Holder was supposed to lift a corporate veil before asking the court to arrest and detain a director and a shareholder. To support his argument, he cited the case of **Harel Mallac Tanzania Limited vs Junaco (T) Limited and Justin Lambert**, Misc. Commercial Application No. 144/2016 (arising from Commercial case No 150/2014) and prayed for this application to be dismissed for lack of a prayer to lift the corporate veil.

Responding to the first ground of preliminary objection, Mr. Shio contended that, the point of objection raised does not pass the test of being raised as a point of preliminary objection since the cases upon which the preliminary objection stems deals purely with facts or factual aspects

and not matters of law. He submitted that a preliminary objection should be made purely on a point of law and not mixed with facts which needs evidence to prove. To bolster his argument He cited the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd** (1969) EA 696.

He argued further that, since the preliminary objection raised is based on matters of facts, the objection raised is misconceived, vexatious and an abuse of the court process. Hence, it is irrelevant and time wasting. Further to that the Judgment Debtor cited the cases which are not applicable in the present matter to back up his objection instead of citing a provision of the law which is violated. He maintained further that, Form No. CC10 filed in this case contains all the relevant information including the mode of assistance required from the court. He maintained that procedures in labour matters differ from other civil executions hence, there was no need for the decree holder to file application of lifting a corporate veil. He maintained that, there is no merit on this ground.

On the second ground of preliminary objection, the Judgment Debtor submitted that the court was not properly moved. He argued that Order XLIII Rule 1 (j) of the Civil procedure Code [Cap. 33 R.E 2019] gives power to the judge to issue a warrant of arrest. However, Rule 2 clearly

states that an application to the court under this code is by Chamber summon supported by affidavit. (See **Antony Ngoo and Davis Ngoo vs Kitinda Maro**, Execution No. 17 of 2010 (Unreported) where the application was filed by way of chamber summons supported by an affidavit.

The learned counsel for the Judgment Debtor submitted that, at first this application was placed before the Deputy Registrar where the preliminary objection was raised to the effect that, the DR had no mandate to entertain the application. The preliminary objection was sustained and the Deputy Registrar held that he had no mandate to entertain the application and ordered that the matter be placed before a Judge. Surprisingly, when they received a summons to appear before the court to Hon. Judge the application was the same while it was supposed to be by way of chamber summons supported by an affidavit. Thus, the judgment debtor is wondering how the court got moved without any application by way of chamber summons supported by an affidavit. In the end he prayed for the application to be dismissed for being improper.

Responding on the second point of preliminary objection, Mr. Shio argued that an application for execution arising from labour matters is required to be made by filling Form No. CC10 under Rule 48 (3) of the

Labour Court Rules and Order XXI Rule 9 and 10 (2) of the CPC where the Decree Holder is required to fill the mode of execution of which the assistance of the court is required.

He argued further that, before the Deputy Registrar the Managing Director one Guru Sykes through her advocate consented to pay the Decree Holder into two instalments, however later they raised a preliminary objection that the Deputy Registrar had no power over the matters and prayed for the application to be placed before a Judge. Thus, there is no merit on this ground too.

On the last ground of preliminary objection, Mr. Allen submitted that, the award of the CMA was uncertain for contravening section 40 (3) of the Employment and Labour Relations Act, 2004. Section 40 (3) of the ELRA provides that;

*"Where an order of reinstatement or re-engagement is made by an arbitrator or court and the employer decides not to reinstate or reengage the employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment."*

Based on the quoted provision, if the employer does not want to reinstate the employee she is required to pay the employee compensation of 12 months' wages in addition to wages due and other benefits accrued

from unfair termination such as notice, transportation, leave and any benefits if any. However, in the case at hand, the arbitrator's order is as follows:

*"In that regards the complainant is awarded reinstatement from the date she was unfairly terminated and further order the employer have to pay the employee all wages from the 16<sup>th</sup> July, 2013 at the rate of shillings 722,000/=*

*Alternatively, if the employee does not want to reinstate the complainant shall pay her all wages from 16/07/2013 to the date of final payment, pay compensation of twelve month @ 722,500/= and 28 days' salary in lieu of notice."*

He maintained that the quoted order contravenes section 40 (3) of the Employment and Labour Relations Act which provides clearly that payment of twelve months compensation in addition to wages due, and not payment of all wages from termination date to the date of final payment. He added that, the arbitrator failed to differentiate wages due and other benefits.

He submitted further that, based on his calculation, the Decree Holder was supposed to be paid TZS 18,785,000/= however, he was only paid TZS 26,315,500/= which was paid to the employee's account and USD 3900 paid through garnishee order by this court. Thus, the amount paid to the employee was almost double the amount which was supposed

to be paid if the award could be certain. Hence, he argued that, there is merit to this preliminary objection and prayed that the application should be dismissed.

Responding to the last ground, Mr. Shio submitted that, the application before the court is for execution and not revision nor appeal and the counsel for the judgment debtor is trying to mislead this Hon. Court to discuss things that are not supposed to be discussed at this stage. Further to that, if he wish to challenge the award of the CMA, he could have followed proper procedure including filing an application for revision before this court. For that reason, he maintained that, there is no merit on this point of preliminary objection and prayed for the points of Preliminary objections to be dismissed with costs.

In a brief rejoinder, counsel for the judgment debtor reiterated the arguments in the submissions in chief and added that the 1<sup>st</sup> point of preliminary objection is a pure point of law and met all the criteria of being raised so. He argued that, the Decree Holder wants to arrest and detain the Director of the company without first lifting the corporate veil while the law recognizes a company as a separate legal entity. He maintained that, the argument does not require any evidence or need one to ascertain facts.



Having examined closely the submissions made by the learned counsel for both parties, I will now deliberate on the points of objection raised by the counsel for the Judgment Debtor in a regular order.

On the first ground of objection, this Court join hands with the counsel for the Judgment Debtor's that this is a pure point of law. Lifting a corporate veil in order to enforce a decree against a director or a shareholder of a company which is a Judgment Debtor by arresting and detaining a director of the Company as a Civil Prisoner is a pure point of law.

Now turning to the point of objection, counsel for the Judgment Debtor alleged that the Decree Holder was required to lift the corporate veil prior to file an application to arrest and detain the director as a civil prisoner whereas the Decree Holder was of the view that, since this is a labour matter the requirement of lifting a corporate veil was not necessary.

From a legal point of view a company is a legal person different from its members (see *Salomon vs Salomon & co. Ltd (supra)*). The effect of this principle is that, the Company has a corporate personality which is distinct from its members and therefore members cannot be held personally liable for debts owed by the company unless the Court pierces

the company's corporate veil and impose personal liability on the members, directors or shareholders.

Courts have often held that, before enforcing a decree against the directors or shareholders of the Judgment Debtor Company, the Decree Holder is required to institute an application to lift the corporate veil. This Court in the case of **Musa Shaibu Msangi vs. Sumry High Class Limited and another** (2016)TLS LR 430 confirmed that, the principle of corporate personality is not absolute and can be lifted in exceptional circumstances.

Similarly, in a persuasive decision of a Ugandan case of **Jimmy Mukasa v Tropical Investments Ltd & 3 others**, Civil Suit No. 232 of 2007 (unreported), it was held that:

*"Directors of such company are not immune from being followed up in execution of decree against their company.... The best method of enforcing execution against Directors of such Company is not by instituting a fresh plaint... but by making the application for lifting corporate veil....."*

Therefore, since the applicant did not make an application to lift the corporate veil in order to enforce the execution against the director of the company, this application is unmaintainable and untenable in the eyes of the law. I therefore find merit in this point of objection.

Coming to the second ground of preliminary objection, this court is in agreement with the argument raised by the judgment debtor's counsel that the application of this nature is filed by using Form No. CC10 and not by way of chamber summons supported by an affidavit as alleged by the counsel for the Judgment Debtor. However, since the application was already struck out by the Deputy Registrar for being incompetent and observed that the Decree Holder was at liberty to file a fresh application to be entertained by a Judge, the Decree Holder was supposed to file a fresh application before the court for it to be placed before a judge and not to forward the same file which was before Hon. Deputy Registrar to the Hon. Judge. That said, I find merit on this ground of preliminary objection.

With regards to the third point of objection that the award was uncertain for contravening order 40 (3) of the ELRA, this Court agrees with the counsel for the Decree Holder that this argument can only be raised through an application for revision and not as a point of preliminary objection at the stage of execution. Therefore, I find no merit on this point of objection.

In the premises, the first and second points of preliminary objection are sustained. The application is accordingly struck out with no order as to costs.

It is so ordered.



K.N. ROBERT  
JUDGE  
02/6/2022