

TANZANIA / JUDGMENT

20161017 TZCA Dar es Salaam

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IN THE HIGH COURT OF TANZANIA. :,{CO;MMERCIAL DIVISION)· : ATDAR.ES SALAAM · - MISCELLANEOUS COMMERCIAL CAUSE NO. 11 OF 2013 · '< !N THE MATIER eF Tf'IE ARBITRATION ACT (CAP. 1s R.E. 2002J ~· AND IN , · TH ii--MA · · TIER: „1 :.,;,, i OF.ARB!\"TRATION ,'. ' ! · ---BETWEEN· NAUTILUS Lif\\JlrfED _..... ,. DECREE HOLDER - : ' , _ _ AND 'RULING · MWAMBEGELE, J.: Nautilus Limited; the decree holder, is armed with 'a decree of this court dated . . -t, !· 05.06.2014. That decree has not been executed. The decree holder..has filed: an application for execution seeking the assistance of this court in ·'executing the decree. The ·mode in which the assistance of the court is sought is th.at: "the Managing Director, AMETAN CONTRACTORS · . LIMITED, Mr. JAMES.ERIC AIKEN to be summoned to show cause-why he should _not be committed to civil prison for failing to pay the decretal amount". 1 ti The application for execution was filed in this court on 03.09.2015. . - - ' - - r ~=- The court summoned the said James Eric Aiken to show cause why he should ; i ~i:- not be committed to civil prison for failing to satisfy the/ decree. After several !: defaults of appearance in person, Mr. James Eric! Aiken appeared on ' . · It t; ,· 24.05.2016. His advocate; Mr._ Tairo, through whom he spoke, was also E .. · · · ~ - ~-~-. · · · · · · . · - ~\$.- present. Ms. Libby Ringo, learned counsel appeared forthe decree ho:lder. ~ _ r~ ; . I must state at the outset that this ruling ought to hav~. been pronounced on lf• - ~ 23.06.2016 but because I was out of the station for two consecutive months ~ t for a ·special assignment which ended on 22.09,.201p, that could not be r. possible. P''''' I!~' . . : ,.. In showing why he should- not be committed to_ priso:n Mr.- Aiken, who, as !~ aforesaid, spoke through Mr. Taira, learned counsel ad~an~d several reasons ; _ · · · _ -why he should not be taken to ~ civil prison. Ftrst, that !the decree is disputed . - ! i- ,_, - ,_~.. E...: · · . because the same is not against his company; Arnetan·contractors Company i:_ : · !- · Limited but against Ame-Tan Contractors Limited or Ametan Contractors. He i , : argues that the names bear some resemblanc~ but they -are not the same. : · · Failure to _sue _the right person or use of the _ _ correct name of· the f · · defendant/ respondent renders the proceedings incompetent, he argues. On : this proposition, several decisions have been cited: These are Dar es Salaam Green Acres Intern_ational School & another Vs the

- i Registered Trustees of Parents Association of Tanzania, Civil Case No. i 16 of 2013 (HC unreported), Registered Trustees of Umoja wa Wazazi Tanzania Vs Re_gn,as Construction co. Ltd & anoth_er, Miscellaneous i Commercial Application No. zss of 2014 (HC unreported), National Oil Vs! Aloyce Hobokela, Misc. Labour Application No. 21~ of 2013 (HC
- unreported), Christina Mrin1i Vs Coca Cola Kwanza Bottlers Ltd, Civil.- 2 Appeal No. 112 of 2008 (CAT unreported). and NBC.Vs Thomas K. Chacha, ~ ... ~..... Civil Application No; 3 of 2000. (CATtinreported) .. It is submitted that Ametan ~ ContractC?rs Cornpany Limited was n~ither~a party. inthe :arbitral proceedings ii ' nor the present execution proceedings. t ti... ~,, , r, The second reason advai-1ced for resisting the application for execution is that i the arbitral award th@t ,r~sl31te~t into, th~ decree. sought to be. executed has~ . . E never been registered by this court. His argument ~is that under section 17 of~ . -~.. \ ; - . if the Arbitration Act, Cap. 15 of the Revised Editipn, 2002 an award is E.' : . . ; enforceable after a specific order to have 1treglster@d as~ a decree is made. t , :> : " He gives an example of Luxury Apattf!lents: Vs; Dr. Edwarg Ngwale, t~ : . ~-, Miscellaneous Commercial Cause No. 175 of 2014 (HC unreported) in which ii ~ ,
- ••••• .
- 1 • : _ ; . ' ••• ' . .. ~ . , . ' ~ ; ~ ; - an order was given to the following effect: !~ - . ' . .. ~, : . : , ' ~ . : ; . •• "I accor:di:ligly herebWorder thaethe arbitral award<•• 0 forwarded~ to this court be. and ~is hereby . regj:~tered as 1f itvvas a decree of this court". The records of this matter, he argues, do not show that the award was ever; registered. , ' , . f' 1 The third reason for re~isti1lg-the.execution is thatthe Managing Director Mr. James Eric Aiken was not a party to the proceedings which led to the decree sought to be executed. He relies on J. H. Rayner {Mincing Lane) Vs Dept ; . ' •• 1"• of Trade and Industry [1989] 3 WLR 969 for the propositidn that members '•• of a company are not liable to pay the company's debts and Salomon Vs Sa/oma11 and Co. [1895 _: 99] All ER 33 for the stance. th~t an incorporated [company is a distinct entity separate from its shareholders and directors. It is, subtnitted that there is no evidence that the veil of incorporation has been lifted to hold individual shareholders/directors personally liable. 3 It is thus submitted that the applic?tion to have Mr. .James Eric Aiken committed to civil prison for failing to pay. 1,JSD 398,223 and Tshs. 25,139,432/04 is without merit and should be dismissed with costs. On the other hand, MS; 'Libby Ringo, learned counsel for 'the decree holder urges the court to disregard the submissions of the learr~ed counsel for the judgment debtor because they. are intended to obstruct justice .. ~She-argues~ that all along the judgment debtor .. submitted to the . jurisdiction of the • . . arbitrator under the name of Ametan Contactors Limited and consequently a . decree issued. Whatvvas the basis ~of Mr. Ja~es EricAiken~ appearing before . . the Arbitrator and giving evidence in the matter if the matter did not concern him?, she. asked. T~1e learned counsel submitted that Mr. James Eric Aiken gave evidence in the Arbitration 'Proceedings as appearing at p. 5,8 of th_e proceedings and admitted~ at pp 33~~~ 84 that-the wor~ done \flfas 70% and the~ . . . : Contract reads. Ametan -Contractors Limited> .The counter-claim was .in the . very name and was signed by the ~ ver\t James

Eric Aiken. The closing submissions, the list of documents to be relied upon, the Petition filed by the judgment debtor after the decree holder filed the award in this court and the judgment debtor's application for extension of time to appeal against the decision of Nyangarika, J. all were in the name of Ametan Contractors Ltd. The learned counsel thus submits that the argument to the effect that the judgment debtor was not a party to the arbitration proceedings is but an afterthought. Ms. Ringo conceded that a company has a distinct personality from its shareholders and directors but that there are people who had been entrusted in running and conducting the activities for which the company was formed and Order XXI rule 30 (2) of the CPC which states that a decree may be executed by detention of directors as civil prisoners does not speak of lifting ... I decree holder allowing the detention of Janes Eric Aiken, as a civil prisoner and that the decree holder undertakes, to pay his subsistence allowance as required by the provisions of Order XXI rule 38 of the CPC. She added that other modes of execution have not worked as the judgment debtor has not filed its account with BRELA and that with the fiduciary relationship between the judgment debtor and its banker, the latter could not divulge any useful information. She stated that the mode of assistance sought for is a last resort.

- Conceding that the Arbitration and Conciliation Act, 1996 has been amended by the Arbitration and Conciliation (Amendment) Act, 2015, the learned counsel submitted that the award is not enforceable because it is not registered as a decree of this court and therefore it remained an award. I ... He added that despite the fact that it is true that companies are managed by directors, there must be followed a specific procedure to proceed to execute a decree against a person by lifting the veil of incorporation. On the argument on Order XXI rule 30 (2) of the CPC, the learned counsel rejoined that the provision is not applicable because the matter here is not for specific performance. Neither is it one for injunction. I have heard the arguments by both learned counsel. There seem to be three issues which this ruling must answer. The first is whether the defendant is a stranger to the arbitration proceedings. The second is whether the arbitral award that resulted in the decree sought to be executed has never been registered by this court and the third is whether the Managing Director, Mr. James Eric Aiken was a party to the proceedings which led to the decree sought for to be executed and therefore the veil of incorporation should be lifted to grant the order sought. Let me state at this juncture that the issues, for determination in this ruling, have taxed my mind a great deal. I have asked myself a question if it is appropriate for me to entertain the application without any evidence by the parties or their counsel. The learned counsel for the decree holder, for instance, has submitted from the bar that the other modes of enforcing the decree have failed hence a resort to the decree.
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the mode of assistance sought; F. detention of the _man~sii~'g dir~ctor_ of the jud~;,,ent debtor a~ a civil prisoner; :: ,. . . T:h~, learned counsel forth~)ud~rner1t:debto'r, as well; ~as explained from the;_ ' - . ~ bar wllly the, alleged director of the judgment debtor's company should not be i~ sent to a civil prisor~. But I found solace in the provisions of Order XXI rule 10 ~. . . (2) (j) which enlists the ingredients of the mode in Which the assistance of the,_ court is required in execution of a decree and Order' XXI rule 10 (2) U (iii);- , thereof is about "by. the· arrest and detention in prison of any person". Under! ~ . ; I the sub-rule, there Ts no : requirement · of an - affidavit. · Under the 1 411 circumstances, I think it'is appropriate to proceed with the application for! · execution, without any eviderrce by affidavit. The, foregoing said, let me· now proceed to the determin~tion of the questions. posed above. = · On the first question, it is the judgment debtor's argument that Ametan . . . Contractors Company Limited against which the decree is sought to be· 6 executed was not . a . p~r:ty.~J:0 the ., -arbitration proceedings a.nd its ultimate\, . decree.· It is argued.that- the ~ompany .a.gain~t which the decree is sought to!- be executed is Ametan Con.tractors Company Limited while arbitrationi' the', u'lti~at~,' deciee ther~of were ' against Ametanl~ proceedings and . . ~ , _ - : : ~ , _ ~ .. : 'i , : . r , : : . . . : : : . - - - - - _ - . . ~ . . . , . . L Contractors Limited:- ·rhe learned counsel for the judgment debtor hasii .<":

- The learned counsel for the decree holder, does not seem to dispute that the name of a party to a suit should be clear, so that the suit or proceedings will be struck out. Ms. Ringo, learned counsel for the decree holder, does not seem to dispute that the name of the company against which the decree is sought to be executed is Ametan. Contractors Limited. The word "Company" is missing in the latter, she submits that the judgment debtor, 0 submitted itself to the arbitration and jurisdiction of this court under the name of Ametan Contractors Limited. All documents filed in this court including the counterclaim were in this name. It is her view that the decree holder should be heard at the execution stage to dispute the name under which, not that he defended the arbitration proceedings and filed the relevant documents thereof in this court. I have subjected the arguments by both learned counsel on this point to a proper sieve. I have also read the authorities cited by the learned counsel for the judgment debtor. I think the law on the point is fairly settled and is as stated by Mr. Taira, learned counsel for the judgment debtor. The position of the law on this point has been lucidly stated by my brothers and the Bench in the three cases - Dar es Salaam Green Acres International School, Registered Trustees of Umoja wa Wazazi Tanzania and, Aloyce Hobokela - cited by Mr. Tait (whose reasoning and conclusion I find myself highly persuaded with and in Christina Mrimi also cited by the learned counsel which binds me). The hallmark of these decisions is that correct names are of paramount importance in judicial proceedings. In Christina Mrimi the court of appeal stressed: - "Companies, like human beings, have to have their names. They are known

and differentiated by their registered names: In the instant case it is apparent that 'Coca Cola-Kwanza Bottles'; Coca-Cola Kwanza Bottlers Ltd' or Coca-Cola Bottles Ltd' have been used interchangeably. Although, the appellant wants this court to hold that they mean one and the same Company strictly, this view cannot be accepted without some risk of inexactitude. For the removal of doubts, the Court of Appeal went further to state that it is alive to the provisions of article 107A of the Constitution of the United Republic of Tanzania, 1977, which requires courts to give purposive interpretation to laws and not encourage provisions of the law on mere technicalities which impede justice. It concluded that this kind of irregularity does not fall within the purview of the article. Flowing from the above, the discrepancy of names of the judgment debtor in the arbitration proceedings and other documents filed in this court and the name of the company against which the decree is sought to be executed is not trivial as Ms. Ringo would like this court to believe. The names Ametan Contractors Company limited and Ametan Contractors Limited, as per authorities cited above, are not one and the same. I therefore am in agreement with Mr. Taira, learned counsel that Ametan Contractors Company Limited against which the decree is sought to be executed is a stranger to the arbitration proceedings from which the decree stems. It is elementary law that a decree cannot be executed against a stranger to legal proceedings. The foregoing disposes this matter. I am aware, as alluded to above that Mr.

- The appellant also challenges the decree that the arbitral award was not registered as a decree of this court. I think, this is not a proper forum to challenge the decree of this court. As for lifting the veil of incorporation before proceeding against a director of a company, I do not wish to address it as will not have any value addition to the outcome of the application. That may be done at another opportune moment. Having so found and held, I state that the decree against Ametan Contractors Limited cannot be executed against Ametan Contractors Company Limited. Thus, the mode of assistance sought by the decree holder; that is, to commit Mr. James Eric Aiken; managing director of Ametan Contractors Company Limited to civil prison, is refused. The circumstances of the present matter are such that there should be made no order as to costs. No order is made as to costs in the present application. Order accordingly. DATED at DAR ES SALAAM this 17th day of October, 2016. J. C. M. MWAMBEGELE. JUDGE

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