

TANZANIA / JUDGMENT

MORGAN AIR SEAFREIGHT LOGISTICS KENYA LTD VS SERENGETI FRESH LTD MISC

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT ARUSHA MISC. COMMERCIAL APPLICATION NO.03/2024 (ARISING FROM COMMERCIAL CASE NO. 10 OF 2021) BETWEEN MORGAN AIR & SEAFREIGHT LOGISTICS KENYA LIMITED.....APPLICANT/DECREEHOLDER VERSUS SERENGETI FRESH LIMITED..... 1st RESPONDENT/JUDGMENT DEBTOR MITAL RANJIT PREMCHAND SHAH..... 2nd RESPONDENT HASIT SHANTILAL SHAH..... 3rd RESPONDENT

RULING

Date of Last Order: 20/05/2024 Date of Judgment: 25/07/2024 GONZI, J. The Applicant in his Chamber Summons prayed for orders which I reproduce verbatim, that:

1. This Honourable Court be pleased to lift the veil of incorporation of the 1st Respondent and see that the 2nd and 3rd Respondents being Directors of the 1st Respondent, has refused or neglected to pay USD 122,058.90 resulting from Judgment and decree in Commercial Case No. 10/2021.
2. Costs of the Application be provided for.
3. Any other orders and relief as this Honourable Court shall deem fit to grant. The Application was supported by an affidavit of Hassan S. Ruhwanya, learned Advocate for the Applicant. In his affidavit, Mr. Ruhwanya stated that the 1st Respondent is a limited liability company registered under the Companies Act, CAP 212 and carries its business in Arusha. He stated further that the 2nd and 3rd Respondent are Directors of the 1st Respondent Company according to the prevailing records from the Registrar of Companies which were attached as annexure MA-1 to the affidavit. He stated that on 24th May 2022, the Applicant and the 1st Respondent filed a Deed of Settlement in Court emanating from Commercial Case No.10 of 2021 which was between the Applicant and the 1st Respondent. On the same date this Court passed Judgment by consent and a decree ensued from the Deed of Settlement by which the 1st Respondents was ordered to pay the Applicant a total of USD 122,058.90 within 22 months

at the monthly installments of USD 4,068.63 2 from the date of signing the deed of Settlement. Copy of the Deed of Settlement accompanied by the Court Order emanating therefrom was attached as Annexure MA-2 to the affidavit. He stated that the 1st respondent defaulted to effect payment of the decretal sum as ordered by the Court and therefore the Applicant resorted into execution process by seeking court order to stop movement of the assets of the 1st Respondent Company whereby the applicant filed Misc. Civil Application No. 10 of 2021 which, however, was not granted. He attached a copy of the Ruling in Misc. Civil Application No. 10 of 2021 as annexure MA-3 to the affidavit. The applicant stated that it was after failure to enforce the decree by alternative means that he decided to make the present application for lifting the corporate veil of the 1st Respondent Company so as to make the 2nd and 3rd Respondents, as directors of the 1st Respondent Company, personally liable to satisfy the decree passed against their company. He stated that the 2nd and 3rd Respondents acted dishonestly and fraudulently in effecting the settlement deed with the Applicant Decree-holder by hiding behind the corporate veil of the 1st Respondent Judgment Debtor to enable the Judgment Debtor evade existing legal/contractual obligation against her without liability befalling them and that the 2nd and 3rd Respondents now 3 reside in Kenya. He stated that after two-year efforts of searching for properties of the 1st respondent company, no such asset whatsoever, either movable or immovable, has been found. The Applicant stated further that the Respondents have an intention to dispose of their assets and have moved some of the assets of the 1st Respondent Company to their sister company called ADL Company Limited. The Applicant attached a letter dated 27th May 2022, as an annexure MA-4, showing the 1st Respondent's intention to transfer a truck with Registration No. T723 DFF on 23rd March 2023, He stated that unless the veil is lifted the Applicant will have no other means of realizing execution of the decree and will end up with an empty decree. He stated that the dishonesty of the 2nd and 3rd Respondents was further manifested by their intention to wind up the 1st Respondent Company by filing in Court a Winding up Petition No.01/2023 which was struck out by the court for incompetence and yet the 2nd and 3rd Respondents refiled another petition for winding up of the 1st Respondent Company. He stated that the 2nd and 3rd Respondents have been the persons dealing directly with the 1st Respondent Company and are the ones who even signed the deed of settlement which resulted into decree of the court. 4 On the other hand, the Respondents filed a counter affidavit sworn by Mr. Benson Hamis Mhango, learned Advocate for the Respondents. In essence, the Respondents resisted the application and stated that the Respondents have already made some payments to the Applicant totaling to USD 24,411.50. They attached Bank Transfer details as annexure SF-1 to the Counter affidavit. They stated that the 1st Respondent had a good intention in attempting to dispose of the asset (one truck) in order to get money to pay the Applicant. The Respondents stated that the 2nd and 3rd respondents were merely fulfilling their duties as Directors of the company but never hid themselves behind the veil of incorporation. They denied any wrongdoing and stated further that it would be unfair to transfer the liability of the 1st Respondent Company to the 2nd and 3rd Respondents as its Directors. The Applicant filed an Affidavit in Reply to counter affidavit. It was also sworn by Mr. Hassan Ruhwanya, learned counsel for the

Applicant, wherein he insisted that the other modes of execution of the decree have failed. He stated that the only available remedy to the Applicant is to lift the veil of incorporation of the 1st Respondent Company and hold the 2nd and 3rd Respondents personally liable so that they can be committed as civil 5 prisoners. He stated that the 2nd and 3rd Respondents have been dishonest by stopping to effect payment of the decretal sum and by attempting to have the 1st Respondent Company wound up by court order so as to evade its liability. With leave of the court, the application was argued by way of written submissions whereby the Applicant enjoyed the services of Mr. Hassan S. Ruhwanya, learned Advocate. The Respondents on the other hand enjoyed the services of Mr. Benson Hamis Mhango, learned Advocate. I thank both counsel for their insightful and useful arguments. Mr. Hassan S. Ruhwanya, learned Advocate, adopted the Applicant's affidavit in support of the application and argued that court orders must be respected and complied with. He cited the case of Karori Chogoro versus Waitihache Merengo, Civil Appeal No.164 of 2018 for this rule. He argued that the Respondents have neglected to respect the Court Order by stopping to effect payments by installment as it was agreed in the deed of settlement which upon registration turned into decree of the court. He argued that although a company is a legal entity, pursuant to the rule in Salomon versus Salomon & Co. Limited, it transacts business through its directors who are the 2nd and 3rd Respondents. He argued that the two directors have 6 an obligation to comply with the court order but they have failed to comply with it and therefore it is justifiable for the court to lift the corporate veil of the company and hold the 2nd and 3rd Respondents as directors, liable to repay the decretal sum. Mr. Hassan Ruhwanya, learned counsel submitted that lifting the veil is the only available remedy to the Applicant because the 2nd and 3rd Respondents have been using the corporate veil of the 1st Respondent to avoid honouring the court decree thereby concealing some assets, disposing of some assets and even going as far as try to wind-up the 1st Respondent Company vide Winding Up Petition No.5 of 2023. The learned counsel for the Applicant cited the case of Yusufu Manji versus Edward Masanja and another (2006) TLR page 127 where, he argued, the Court of Appeal held that: "it is our view the respondent would be left with an empty decree.... we think it would not serve the interest of justice in this case to shield the appellant behind the veil of incorporation." Mr. Ruhwanya, learned counsel, submitted that in the case at hand the ground relied upon for lifting the veil is disposition of the company's assets 7 by its directors and their attempting to have the 1st Respondent Company be wound up by order of the court. He cited the case of Jackson Sifael & Others versus the DPP, Civil Appeal No. 180 of 2019 where the Court of Appeal of Tanzania held that lifting the corporate veil entails looking behind the person in control of the company not to take shelter behind legal personality where fraudulent and dishonest use is made of the legal entity. Mr. Ruhwanya, learned Advocate relied on the case of Mussa Shaibu Msangi versus Sumry High Class Limited and Another, Commercial Case No.20 of 2012 decided by the High Court where at page 10 the court held that: "in view of such neglect which has been demonstrated by judgment debtor companiesthe court applies and uses its inherent powers vested to it.....and lift the two veils.....which covers the directors and hold.....director of the two companies accountable and Hable pay the decretal sum ". In conclusion, Mr. Ruhwanya,

learned Advocate submitted that the 2nd and 3rd Respondents are using the corporate veil to evade their legal obligation as directors to pay the decretal sum, thus it is fair for the veil of 8 incorporation to be lifted so that the order of the court can be complied with by the two directors by paying the decretal sum. In his reply submissions, Mr. Benson Hamis Mhango, learned Advocate for the Respondents, adopted the counter affidavit and submitted that the application is unfounded and misleading because up to the date of filing the reply submissions, the 2nd and 3rd respondents had taken measures to ensure that the 1st Respondent Company had effected payment of USD 24,411.50 to the Applicant pursuant to the decree of the court emanating from the Deed of Settlement. He submitted further that the Misc. Civil Application No. 10 of 2021 which formed annexure MA-3 to the affidavit, was not an application for execution of the decree emanating from the consented Judgment. It was an application for temporary injunction pending determination of the main suit. Mr. Benson Mhango, learned Advocate, submitted that the rule that court orders should be respected or complied with requires the specific persons against whom the orders are directed, to comply with those orders. He argued that the court orders in the Decree emanating from Consent Settlement Order, were directed at the 1st Respondent Company and not the 2nd and 3rd respondents personally. He argued therefore that requiring 9 strangers to the court orders to comply with the court orders would be unfair and legally unsound. Mr. Benson Hamis Mhango, learned Advocate, submitted that a company is a different person in law distinct from its shareholders and directors. He referred the court to the case of *Salomon versus Salomon & Co. Limited* (1897) AC 22, for the rule that a Company is at law a different legal person altogether from the subscribers. He went on to submit that the assertion by the Applicant's counsel attempting to hold the 2nd and 3rd Respondents, who are directors of the 1st respondent, personally liable to comply with the Court order, is a misapprehension of corporate law which regards a company as an independent person responsible for its own debts and obligations. He argued that the 1st respondent Company merely transacts business through the 2nd and 3rd respondents as its directors but the 2nd and 3rd Respondents are not the 1st respondent Company simply for being its Directors. Mr. Benson Hamis Mhango, learned Advocate, submitted that the law requires that he who alleges must prove. He referred to section 110 of the Evidence Act. He submitted that the Applicant has not proved the allegations of concealment or disposition of properties of the 1st Respondent Company. io Mr. Mhango submitted that even the attempt to have the 1st Respondent Company wound up was not done so as to avoid liability to pay. He argued that the true reasons for the winding up petition were stated in the petition and that the Applicant was notified of the petition as a creditor of the 1st Respondent company and he entered an appearance and contested the winding up petition No.5 of 2023. Mr. Mhango, learned Advocate, distinguished the case of *Yusufu Manji versus Edward and another* (2006)TLR in that the court in that case was satisfied that there was concealment of Company's properties by the directors while there is no such proof in the case at hand. He referred the court, also, to the case of *Chongquin Lifan Industry (Group)Impo &Expo Co. Ltd versus M/S I&M Bank Tanzania Limited and Locus Debt Management Limited*, Misc. Civil Application No.386 of 2019 for the rule that a director can be made personally liable where

he has committed misfeasance or breach of fiduciary duty in relation to the company. He argued that the mere mentioning of concealment of the company's properties does not suffice, rather, the Applicant should have substantiated that allegation. He prayed for dismissal of the application with costs. That was the end of submissions by learned counsel for both parties. li Essentially, this is an application for lifting of the corporate veil of the 1st Respondent Company so as to make the 2nd and 3rd Respondents, as directors of the 1st respondent Company, personally liable to satisfy the decree passed against the 1st respondent Company. Before going into the intricacies of the application at hand, the law should be set in its proper perspective. In company law, when the initial shareholders - known as subscribers - form the company, they allocate themselves shares in the company. After signing the Memorandum of Association and Articles of Association, the same are registered with the Registrar of Companies together with the other required accompanying documents. Section 18(1) of the Companies Act, CAP 212 provides that "the memorandum and articles shall, when registered, bind the company and the members to the same extent as if they respectively had been signed and sealed by each member." The memorandum of association contains covenants on the part of each member to observe all the provisions of the memorandum and of the articles. It is the registration of the memorandum and articles of association by the Registrar of Companies which marks the birth (incorporation) of a company as an independent legal entity distinct from its subscribers. This is reflected under section 15(1) and (2) of the Companies Act Cap 212, which provides: 12 S. On the registration of the memorandum of a company the Registrar shall certify under his hand that the company is incorporated and, in the case of a limited company, that the company is limited, and, in the case of a public company, that the company is a public company.

- (2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers to the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as provided for in this Act. (underlining supplied). When the company is formed (i.e. incorporated) a new legal person is thereby created. That legal entity has all of the attributes of an individual - a human, except that the company attains maturity on its birth. There is no period of minority - no interval of incapacity. Just like a natural person, the company can own property; buy, sell and own land and any other asset such as shares; just like an individual it can sue and be sued; when legal threats are made, they are made against the company. When legal claims are made, they are made by the company. The company can borrow money: ie incur debts. If the company is wound up, at that point the shareholder who has not paid up fully for his shares, must pay the total amount due in respect of his unpaid up shares. That is the extent that the shareholder is liable to pay if it all goes wrong for the company. The concept of separate legal personality is not eroded, even if the shareholders and directors of the company are the same persons. The concept of limited liability is the concept that gives rise to - or is - the corporate veil.

Creditors of the company are not able to recover debts from the personal assets of the shareholders, directors or employees. They must recover them from the assets of the company, and the company alone. In this way, incorporation creates an invisible barrier around the personal assets of the shareholders and directors. The veil of incorporation protects personal fortunes in the event of insolvency. However, the protection of corporate veil is assured only provided that nothing is done by the shareholders to expose themselves to personal legal liability. Directors are those persons through whom a company acts and does its business. In terms of section 39 (1) and (2) of the Companies Act, Cap 212, 14

- (2) a deed is executed by the company under its common seal and if signed by a director and the secretary of the company, or by two directors of the company. When one deals with the Company's directors in their capacity as such, he is actually dealing with the company which the respective directors manage. One meets the company as a corporate person when he meets the directors thereof. A company is a legal person living only in the eyes of law. It is a formulation of law which lacks both body and mind. It cannot act on its own. It can act only through some human agency, that is, its directors. In order for the court to lift or pierce the corporate veil and make shareholders and or directors personally liable for the debts of their company, enough evidence must be presented to activate the legally known grounds for lifting or piercing the corporate veil. It must be remembered that lifting the veil is an exception and not the rule. Section 15(1) and (2) of the Companies Act, CAP 212 accords the subscribers of the company the status and privilege of corporate veil, therefore, an applicant seeking to move the court to disregard the corporate veil, lift it and make the directors and or shareholders of the company personally liable for the debts of the company must make a cogent case justifying departure from the statutorily recognized corporate veil. The question is whether or not it is justifiable to allow that 15 application for the reasons disclosed by the applicant in the affidavit in support of this application? The most common grounds for judicial lifting or piercing of the corporate veil are fraud, where the company is a sham or facade, instrumentality rule, alter ego doctrine, concealment and evasion. Gathered from the affidavits and the submissions, I have gathered the following grounds upon which the Applicant has brought the application and the following is my determination thereof. Firstly, it was alleged that the Directors of the 1st Respondent Company are the ones who signed the Deed of Settlement which resulted into Judgment by consent and Decree which remains not fully satisfied by the 1st Respondent Company to date. On my part, I find that, absent any wrongdoing, the execution of the Deed of Settlement by the 2nd and 3rd respondents as Directors for and on behalf of the 1st respondent Company, was a proper discharge of their duties under the law. In fact, if the 2nd and 3rd respondents, being the only directors of the 1st Respondent Company, had not executed the deed of settlement for and on behalf of the 1st Respondent, the deed of settlement would not have come into existence at all. Without the deed of settlement, there would not have been a consent settlement order and decree giving the rights which the applicant is seeking to enforce now. In terms of section 39 (1) and (2) of the Companies Act, Cap 212, (2) a deed is valid if executed by the company under its common seal and if signed by a director and the secretary of the company, or by

two directors of the company. In this regard, I am not convinced at all with the argument advanced by Mr. Ruhwanya, learned counsel for the Applicant, that by the 2nd and 3rd respondents acting in their official capacity as directors of the 1st respondent company, and signing the deed of settlement that resulted into the compromise decree, they thereby incurred personal liability and that they should be held personally liable to satisfy the decree of the court which was otherwise expressly entered against the 1st respondent company only. In my settled view, the 2nd and 3rd respondents were simply discharging their legal mandate and functions as directors of the 1st respondent company. To condemn the bonafides directors of a company with the liability of personally satisfying the decree passed against their company for the mere reason that they acted as directors for the company, would be purposeless cruelty and highly irrational. If directors were to shoulder the liabilities of the companies they manage simply for performing 17 their statutory duties under the relevant company laws, no person of sound mind would accept to be a director of a company. And if appointed, directors would not discharge their functions for the fear of liabilities of the company they manage being shifted to them personally. Such approach would paralyze corporate governance in Tanzania and be counterproductive to economic development. I refuse the argument by Mr. Ruhwanya, learned Advocate on this ground. The second ground advanced by the Applicant for lifting the corporate veil in this case is that the Directors of the 1st respondent company have concealed the assets of the company such that even after searching for them for two years the Applicant has not been able to trace either movable or immovable assets of the 1st Respondent. I agree with Mr. Benson Mhango, learned Advocate for the respondents that the Applicant has not even attempted to prove, leave alone succeeding to prove, his allegations of concealment of the 1st Respondent's assets by the 2nd and 3rd respondents as its directors. Strikingly, the Applicant has been very self-contradictory in respect of this ground. In one hand, he has alleged concealment insinuating as if the directors are hiding properties of the 1st respondent company. On the other hand, he has attached annexure MA-4 which is a letter dated 27th 18 May 2022 written by Advocates of the Respondents addressed to Mr. Hassan S. Ruhwanya, the learned counsel for the applicant, in which the Respondents addressed the learned counsel for the Applicant as follows: " in the spirit of amicable settlement, our client wishes to request yours to allow the first installment to be paid on 3Gh June 2022 to enable ours realize one of the assets from whose proceeds our client intends to make a lump sum payment". I find that by this letter, the 1st Respondent was transparent enough to the Applicant by making it clear that it possesses some properties and which it wished to sell and use the proceeds thereof to repay the Applicant. The letter was more a disclosure than hiding or concealment as the Applicant's counsel called it. I have also noted that the Applicant has complained that the 2nd and 3rd Respondents have been transferring assets of the 1st respondent company so as to defeat execution of the decree. I should hasten to say that as the company is still a going concern, it is entitled to transact business in the normal way including transfer of its assets. By winning a case against the company, the Decree-holder does not thereby automatically become the new owner of the assets of the company. He cannot thereby make the 19 indebted company halt all its business activities. Continuation of the company's business

transactions is helpful to enable it generate income by which the decretal sum can be paid. If there is a transfer of the company's assets subsequent to issuance of a decree against the company, it will still be necessary for the decree holder to prove that the transfer was done with ill-motive so as to evade payment of the decretal sum. The Applicant has not substantiated that allegation in his affidavit. While I find that the Applicant has failed to substantiate his allegation of concealment of assets of the 1st respondent company by the 2nd and 3rd respondent directors, it must also be underscored that the very basis of that ground of concealment for lifting the corporate veil was misconceived by the Applicant. Therefore, the Applicant has not only failed to substantiate the ground of concealment in the erroneous conception of the word as he used in this application, but also, he has failed to prove the ground of concealment as it is properly understood in applications for lifting the corporate veil of a company. In company law, for purposes of piercing the corporate veil, the ground of concealment applies where a shareholder or director uses the company to conceal what is otherwise his individual or personal liability incurred by him independent of the company. It does not at all entail the 20 taking away of the properties of the company and hiding them outside the company. Concealment involves bringing into the company personal asset of the director or shareholder so as to disguise it and make it look like it is the property of the company. In that regard, the corporate veil may be pierced and the true state of affairs in the company can be established. The learned authors James Wibberley, Guildhall Chambers & Michelle Di Gioia, Gardner Leader in their online article Lifting, Piercing and Sidestepping the Corporate Veil, at page 9 thereof they state that: "The historic cases have made mistakes of ciassicization and have described the veil as being pierced when it is not. The court should distinguish between piercing of the veil and its mere lifting. The former will be very rare and usually accompanied by the latter. Lifting the corporate veil applies where a company is being used to conceal the identity of the true actors. Obvious examples of this are where a company receives funds for an individual, and where an activity is carried out in the name of a company to hide the fact it is actually being carried out by an individual." 21 To give the above passage a judicial flavor, I will refer to the decision by the Supreme Court of the United Kingdom in *Prest v Petrodel Resources Limited* [2013] UKSC 34. Lord Sumpton JSC stated: "The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases, the court is not disregarding the "facade", but only looking behind it to discover the facts which the corporate structure is concealing, (underlining supplied for emphasis). In the circumstances of the present case, the allegations of concealment would make sense if the Applicant had alleged that he had won the case against the 2nd and 3rd Respondents personally in their individual capacities due to their own individual misdeeds as such, but that in order to avoid their personal legal liability for their own deeds or to avoid execution of the decree passed against them in respect of their personal assets, the 2nd and 3rd respondents have disguised their own deeds as deeds of the company or have concealed their personal assets in the 1st Respondent 22 company so as to conceal them. In that

regard, the doctrine of concealment would have applied so as to lift the veil of incorporation and reach to what it conceals. Again, concealment would apply if the Applicant was seeking to lift the veil of the alleged sister company namely ADL Company Ltd on the allegations that concealment of properties of the 1st Respondent Company was being done by using ADL Ltd's Corporate veil. However, in the case at hand, it has been the position of the Applicant that it is the 1st respondent company which incurred the legal obligation to pay the Applicant the decretal sum and that the 2nd and 3rd Respondents as its directors, have been disposing of the company's assets so as to evade the 1st Respondent's obligation to pay the decretal sum due to the Applicant. In that regard, my standpoint is that, even if that allegation were proved, it wouldn't have constituted "concealment" as to justify lifting or piercing the corporate veil of the 1st Respondent company. Itself Even logically, one should reason that, if the company's assets are transferred, it means they are taken out from it therefore leaving no assets inside the corporate veil of the company. Now, if concealment principle were to apply in respect of a company whose properties have been transferred what would be the practical utility of lifting the company's veil for such a company whose assets would have already been transferred away from its ownership? To make sense, in such a situation, lifting or piercing the veil would have to be done not in the company from which the assets would have been transferred; but rather in the recipient company to which the assets would have been so transferred. The Applicant in this case is adamant that the 2nd and 3rd Respondents have transferred properties from the 1st Respondent company, and that the liability under the decree was incurred by the 1st Respondent company, yet the Applicant wants to lift the corporate veil of the 1st Applicant company, which if successful will not give the Applicant any access to the concealed properties therein nor to the real actors whose duty and obligation it is to satisfy the decretal sum in favour of the Applicant. Lifting or piercing the corporate veil under the ground of concealment, presupposes that the corporate veil is used or abused to shield some property inside the company which is tied to a preexisting legal liability before incorporation of the company and which property is now being disguised as being owned by the company as a separate person thereby hindering its being accessed easily by those who, in absence of the corporate veil, would have easily accessed it. In such a situation, the veil is pierced so as to reach to the property concealed in the company. The Applicant has misconceived that Law in this aspect. Therefore, in its proper context, concealment as a ground for lifting or piercing the corporate veil of the company would not even apply to the Applicant's circumstances. I believe that there was misconception of corporate law in this aspect. I concur with that, as it was argued by Mr. Benson Hamis Mhango, learned counsel for the Respondents. I therefore decline to grant the application on the allegations of concealment as argued. The third reason advanced for lifting the veil is that all efforts to use other modes of execution have failed as the Applicant attempted to seek an order to stop movement of the assets of the 1st Respondent company vide Misc. Commercial Application No. 10/2021 but which ended against the Applicant. To this argument, my first finding is that the Applicant was not sincere when he made this allegation. The Applicant himself attached Annexure MA-3 to the affidavit in support of this application. It is a Ruling on an application for temporary

injunction during the pendency of the main suit which later gave rise to the judgment by consent and the decree resulting therefrom. Reading annexure MA-3, which is Ruling of this Court delivered on 26th October 2021, it starts with: "The Applicant Morgan Air & 25 Sea Freight Logistics Kenya Limited made this application for temporary injunction under Order XXXVII Rule 1(b) and section 68(e) and 95 of the Civil Procedure Code..... " The Ruling ends with the words: "Tn the upshot this application for temporary injunction is hereby dismissed". In the present application, the Applicant has relied on the above Ruling on temporary injunction to advance an argument that all his attempts to enforce the decree by other modes like attachment and sale have failed and that he has now resorted to lifting the corporate veil so as to imprison the 2nd and 3rd respondents as civil prisoners unless they personally satisfy the decree passed against the company they manage. But when was the decree issued? According to the Applicant's Annexure MA-2 the consent Judgment was entered on 24th May 2022. So one wonders how conceivably would the Applicant state under oath of his Advocate that the application for temporary injunction, made and decided one year prior to the issuance of the court's decree, was an attempt to execute that decree by other means such that the Applicant should be taken to have exhausted all alternative ways of execution and thus be allowed to lift the corporate veil and seek civil imprisonment of the 2nd and 3rd respondents, as the last resort available to the Applicant!? The Applicant was overzealous and the Applicant's counsel 26 did not live to his professional oath. That allegation is baseless. I decline to grant the application on that aspect. The fourth reason advanced by the Applicant for lifting the corporate veil was that the Directors have shown an intent to transfer assets of the 1st Respondent company by disposition including transferring the same to a sister company of the 1st respondent named ADL Co. Limited. For this allegation to hold water the application should have been seeking to lift the veil of the said ADL Co. Ltd. That is not the case. My stand point on this is that, he who alleges must prove. The 1st respondent company is not debarred from making transfer of its properties in the ordinary course of business simply because there is a decree against it. Incurring and paying debts including judgment debts, is part and parcel of the normal business of a company. The Applicant was supposed to prove that the alleged transfer was done with a view to avoiding payment of the decretal sum by the 1st Respondent company. No such evidence was brought by the Applicant. To the contrary, the Applicant presented in Court a letter by the 1st Respondent Company directed to the Lawyer of the Applicant company intimating that the 1st Respondent was about to dispose of some of its assets so as to pay the Applicant some of the installments under the decree. Annexure MA-4 27 expressly stated that the 1st Respondent was intending to dispose of one of its assets so as to make a lumpsum payment to the Applicant. The Applicant has relied on this same letter to argue that the Respondents are disposing of the 1st respondent's assets so as to evade the liability to pay the decretal sum. The evidence brought by the Applicant on this aspect, defeats the very argument he has made on this aspect. I decline to grant the application on this regard. The fifth ground advanced for lifting the veil was that the Directors of the 1st Respondent company have twice attempted to have the 1st Respondent Company wound up by order of the court so as to evade its liability to pay the Applicant, the decretal sum. This argument is

misconceived as well. In Company law, inability by the company to pay its debts, is one of the statutorily prescribed grounds for the member of the company or its creditors to petition for winding up of the indebted company. That is the import of section 279(l)(d) of the Companies Act, CAP 212 of the Laws of Tanzania. The provision stipulates that: "279. -(1) A company may be wound up by the court if

- (d) the company is unable to pay its debts;" 28 The Applicant in this application is complaining that the 1st Respondent Company has not paid the Applicant's debts under the decree. In my view, it would not be unusual for the members of such a company to seek to have it wound up on the ground that it is unable to pay its debts. The Applicant has expressed his worry that if the company is wound up the Applicant would not be paid the decretal sum. That is not a genuine fear, in law winding up is a long process and during which there is a stage where all the debts of the company under liquidation will have to be identified and the creditors thereof be paid by the liquidator through a process under judicial supervision. In my view, the allegation that winding up of the 1st Respondent Company was a sign of an ill intent by the 2nd and 3rd Respondent to evade the duty by the 1st Respondent company to settle the decretal sum, is unfounded and baseless. As it was submitted by the learned counsel for the Respondents, the Applicant as a proven creditor of the 1st Respondent company may appear in the winding up proceedings and closely follow up the process thereby preserving his rights during the winding up process. That sixth argument by the Applicant for lifting the veil is that in the event that the lifting of the veil is not granted, the Applicant will end up with an empty decree. This is not a tenable argument. If accepted, it would 29 justify the imposition of liability on any person not anyhow connected with the case just to make sure that the decree is anyhow satisfied by someone. That would be very unfair. In this case, the Applicant has actually presented evidence and made allegations indicating that the 1st Respondent company possesses some assets including the one asset that was referred to in Annexure MA-4. I also take notice of the fact that likelihood of the decree holder ending up with an empty decree, is not among the grounds for lifting the corporate veil of a company. In tandem with this allegation, the Applicant has also argued that after two years since delivery of the decree emanating from judgment by consent, the Applicant is not yet paid the decretal sum in full and that there are no assets in the name of the 1st Respondent company. The words of Hon. Churna,!, which words I fully subscribe to, in Sheikh Hashim Mbonde versus Tip top Connection Company Limited and another, Misc. Civil Application No. 467 of 2022 were that: "The mere fact that the applicant cannot trace the properties of the company cannot constitute exceptional circumstances. There must be tangible evidence to prove that the respondent director was involved in concealing the properties of the company 30 and that he was acting as an alter ego or agent of the company and hence inseparable from it." The last argument advanced by Mr. Ruhwanya, learned Counsel for the Applicant was that the 2nd and 3rd Respondents acted dishonestly and fraudulently in effecting the settlement deed with the Applicant Decree- holder by hiding behind the corporate veil of the 1st Respondent Judgment Debtor to enable the Judgment Debtor evade existing legal/contractual obligation against her without liability befalling

them. This argument is unfounded and it was not well thought of. If the Court were to believe the learned counsel for the Applicant that the 2nd and 3rd Respondent in signing the Deed of Settlement acted dishonestly and fraudulently, then the outcome would be to nullify the very deed of settlement signed by the 2nd and 3rd Respondents as directors of the 1st respondent. If that were to happen, the Decree emanating from the Consent Settlement Order which the Applicant relies upon and is seeking its execution, will also thereby collapse. The argument that the 2nd and 3rd Respondents are hiding behind the corporate veil also makes no logic because in the first place the decree was made against the 1st Respondent Company only and not against the 2nd and 3rd Respondents, individually. There was no personal existing legal/contractual obligation or liability by the 2nd and 3rd Respondent's directors as to make them hide in the shelter of the 1st Respondent's corporate veil. The Applicant has not presented any evidence for existence of such personal liability in favour of the Applicant by the 2nd and 3rd Respondents and which personal liability is now being fraudulently and dishonestly being confused as if it were the liability of the 1st Respondent Company. The argument of fraudulent and dishonest conduct is unsubstantiated, confused and misconceived by the Applicant. As I pen down, I wish to end with the previous allegation by the Applicant that the Applicant may eventually end up with an empty decree in hands if the corporate veil is not lifted. The Applicant ought to have had in mind the rule or principle best described as "caveat creditor" that a party who, under the circumstances, could reasonably be expected to conduct an investigation of the credit of a corporation before entering into a contract, will be charged with the knowledge such an investigation would have yielded. Sometimes this becomes an additional criterion, which must be fulfilled to pierce the corporate veil in a breach of contract case and would apply in particular to parties which are "capable of protecting themselves." The principle distinguishes those persons who involuntarily find themselves as creditors of the company like the tort victims in one hand, from those persons who voluntarily become creditors of the company like the ones who enter into contractual arrangements with the company on the other hand. Voluntary creditors include the Applicant herein whose relationship with the 1st Respondent company emanates from a contract between the Applicant and the 1st Respondent by which the Applicant transported the Defendant's goods on credit. The Applicant had all the avenues to make official search with the office of Registrar of Companies like he did belatedly at the time of seeking execution of the decree where he obtained annexure MA-1 (Register of Companies Detailed Information) of the 1st Respondent Company. Had the applicant conducted an official search or conducted sufficient due diligence, she would not have found herself with an unsecured debt of USD 122,058.90 with a company which has no assets registered in its name, whose goods the Applicant was transporting and which could have actually constituted a good security as a floating charge. The Companies Act has a lot of disclosure provisions which make any person intending to deal with a company to be fully informed of its financial position. These include section 113 of the Companies Act, where the company is required in its official publications to state in prominent position and conspicuous characters, the amount of the capital which has been subscribed and the amount paid up. A person dealing with a

company is therefore given an implied prior notice of the financial position of the company at the very outset. Also, section 130 of the Companies Act, requires a Company to file annual returns with the Registrar of Companies showing, inter alia, the total number of issued shares of the company at the date to which the return is made up and the aggregate nominal value of those shares. The records maintained by the office of the Registrar of Companies are accessible to members of the public after following the laid down procedures. There is no reason for a prudent person doing business with a company not to avail himself of the financial status of the company in terms of its value of share capital for both issued and non-issued shares. Under Section 132 the annual returns are supposed to be annexed with copies of the accounts laid before the company in a general meeting. The Officers of the company are obliged, at the threat of a penalty, to disclose a lot of relevant financial information by attaching them to the annual returns. This makes the financial status of a company known to anyone including voluntary creditors who may wish to avail themselves of the financial capacity of the company they intend to deal with. When entering into the transportation on credit Agreement with the 1st Respondent, the Applicant had an opportunity to do a prior due diligence of the 1st Respondent company. The Applicant couldn't have found herself in a pity position that the 1st Respondent company is actually, ultimately, unable to pay its debts to her despite having secured a court decree. The applicant as a decree holder and judgment creditor, had other options available to her under the Companies Act. The Applicant could have made himself a secured creditor by entering into a debenture agreement with the company at the time of entering into the contractual relationship of transporting goods of the 1st Respondent on credit. The Applicant could have demanded a personal guarantee by the 1st Respondent Company's Members and directors before entering into the transportation agreement with the 1st respondent company. In other words, the alleged efforts of conducting due diligence done by the Applicant after obtaining a decree against the 1st respondent company, prudently, ought to have been done prior to entering into the transportation agreement with the 1st Respondent or at the time of signing the deed of settlement which essentially was also an agreement in which parties were free to design the terms of the settlement the way they liked, subject only to legal validity of the settlement. That the Applicant opted to enter into the transportation contract on credit with the 1st Respondent company as unsecured creditor, and even at the time of executing the deed of settlement, the Applicant still made himself an unsecured creditor, means that the Applicant himself assumed the risk which is haunting him now. He cannot complain of his susceptibility to ending up possessing an empty decree against the 1st Respondent Company because that is a fate of his own making. Much as the court is desirous to see that its decrees are executed and decree holders get paid their decretal sums, the court cannot go to the extent of violating all the established legal principles in order to ensure that the decree is satisfied by whoever the Decree holder may wish to impose upon the obligation to satisfy the decree. When the shareholders chose a limited liability company as the mode of doing their business and the directors accepted to manage a limited liability company, they consciously were thereby legally sheltering themselves personally from the risks of their business. One of such risk is the liability incurred towards other persons in the course of doing business

like the judgment and decree in this case. 36 Lifting the corporate veil of their company and making them personally liable for the debts of their company for no wrongdoing on the part of the shareholders or directors, would be a legal deception to them and would make the law on corporate veil unpredictable. It would make the corporate veil accorded by the Companies Act, useless. An individual should know beforehand how he stands as against the law so that he can organize his affairs accordingly. If the law becomes un-predictable, then it will fail in one of its key purposes namely social control. Shareholders and directors of a company decide to trade under the limited liability company on the understanding that any risks attributed to their business will not be personally incurred by them so long as there is no wrong-doing on their part that would lead to the lifting of the corporate veil. When a company operates as a limited liability company, it doesn't mean that such a company cannot incur liabilities or debts. It only means that where such liabilities and debts are incurred, absent any wrong doing on the part of the shareholders and directors, the liabilities and debts would attach only to their company as a fictitious legal person and that the liability of the members of the company is limited to the extent of their un-paid-up shares only. When a company is formed, the word "Limited" forms part of the company's name. The use of 37 the word "Limited" in the companies' names was originally required as a warning to those doing business with the company that the liability of those involved with the company did not have an unlimited extent. All in all, the Application at hand is dismissed with costs. It is so ordered. _ A. H. GONZI JUDGE 25/07/2024 Ruling is delivered in court this 25th day of July, 2024 before Hon. Ag. Deputy Registrar, K. J. Ndomba, in the presence of Mr. Hassan Ruhwanya Advocate present online for the Plaintiff and Mr. Benson Mhango, Advocate present online for the Defendant. K. J. NDOMBA Ag. DEPUTY REGISTRAR 25/07/2024 38

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