

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM MISCELLANEOUS
APPLICATION NO. 22845 OF 2024 ASIFIWE P. NGAO.....
APPLICANT VERSUS JOSEPH BUTAMO NCHECHE.....1ST RESPONDENT
JUDITH JOSEPH.....2ND RESPONDENT BETHANIA PRE &
PRIMARY SCHOOL.....3RD RESPONDENT

RULING

Date of Last Order: 31/10/2024 Date of Ruling: 22/11/2024 B. E. K. Mganga, J. Asifiwe P. Ngao, the herein applicant, filed this application praying the court to lift the corporate veil so that Joseph Butamo Ncheche and Judith Joseph, the 1st and 2nd respondents respectively, who are the directors of Bethania Pre & Primary School, the herein 3rd respondent, can satisfy an award of TZS 5,438,462/= issued on 15th April 2024 by Hon. Stanslaus H, Arbitrator, before the Commission for Mediation and Arbitration(CMA) in labour dispute No. CMA/DSM/TEM/09/2014 in favour of the applicant for unfair termination. In addition to the prayer to lift the corporate veil, in the notice of application, applicant has also prayed 1 that, both the 1st and 2nd respondents be arrested and detained as civil prisoners and any other relief this court may deem fit and just to grant. In the affidavit in support of the application, applicant stated inter- alia that, he filed labour dispute No. CMA/DSM/TEM/09/ 2014 against the 3rd respondent who terminated his employment unfairly. That, the said dispute was heard ex parte, as a result, on 15th April 2015, in the ex parte award, he was awarded to be paid TZS 5,438,462/= by the 3rd respondent. Applicant further deposed that, both the 1st and 2nd respondents are directors of the 3rd respondent. Applicant further deposed that, he filed execution No. 133 of 2015 to execute the said ex parte CMA award and that, when respondent the 1st appeared in court, he promised to pay the said amount but he has not. He also deposed that, he filed execution No. 19947 of 2024 praying the 1st respondent be arrested and detained as civil prisoner because he concealed or transferred property of the 3rd respondent. Applicant further deposed that that he has failed to get property of the 3rd respondent hence this application so that both 1st and 2nd respondents can be held liable to satisfy the award. In opposing the application, respondents filed the notice of opposition and the counter affidavit sworn by Sarah Michael Kironde, Advocate. In the said counter affidavit, the deponent deposed inter-alia 2 that, 1st respondent died on 5th October 2023. In the said counter affidavit, the deponent admitted that, applicant filed execution No. 133 of 2015 and execution No. 19947 of 2024 praying the 1st respondent be arrested and detained as civil prisoner as he has

concealed property or transferred property. The deponent did not dispute the fact that, both the 1st and 2nd respondents are the directors of the 3rd respondent. In the said counter affidavit, the deponent disputed all other remaining facts deponed by the applicant and put the latter to strict proof. When the application was called on for hearing, Mr. Jimmy Mneni, from CHAWAMATA, a trade union, appeared and argued for and on behalf of the applicant while Sarah Kironde, advocate, appeared and argued for and on behalf of the respondents. Arguing in support of the application, Mr. Mnkeni submitted that, applicant was an employee of the 3rd respondent but was terminated in December 2013. He submitted further that, applicant filed the dispute at CMA but the 3rd respondent, though served, did not enter appearance as a result, an exparte award was issued that 3rd respondent should pay applicant a total of TZS 5,438,462/=. He added that, in 2015, applicant filed Execution No. 133 of 2015 seeking the Court to execute the said award. He went on that, Mr. Joseph Butamo Ncheche, the 1st 3 respondent, entered appearance in execution No. 133 of 2015 and promised to pay but did not honour his promise. Mr. Mnkeni submitted further that, both the 1st and 2nd respondents who are the owners and directors of the 3rd respondent, were aware of the award and the said execution No. 133 of 2015. He also submitted that, applicant attempted to attach property of the 3rd respondent but in vain because, her property are not traceable. He added that, having failed to get property of the 3rd respondent, applicant has filed this application seeking an order of the court so that both 1st and 2nd respondents can be personally liable to satisfy the award. He cited the case of Adventina Mganga and Another v. Dr. Luther Mwamkoa and Another, Miscellaneous Application No. 524 of 2022(Unreported) and Yusuf Manji v. Edward Masanja & Another, Civil Appeal No. 78 of 2002, CAT(Unreported) and submit that, this court can issue an order requiring the 1st and 2nd respondents to be personally liable to satisfy the award. With those submissions, he prayed the application be allowed. Resisting the application, Ms. Kironde, advocate for the respondents submitted that, the 1st respondent died on 5th October 2023 hence the order against him cannot be enforced. She added that, according to paragraph 2 of the counter affidavit, the 1st respondent has 4 supplied information to the said counter affidavit. When probed, counsel conceded that, in the verification clause, she verified that all information is according to the information received from the 1st, 2nd, and 3rd respondents. She further conceded that, the counter affidavit is defective save for introductory paragraph that relates to her personal knowledge. With those submissions, counsel prayed the court to expunge paragraph 1 of the counter affidavit in which she stated that 1st respondent is deceased. Ms. Kironde also submitted that, there is no relationship between the 3rd respondent on one hand, and the 1st and 2nd respondents on the other hand. She further submitted that, applicant has not filed official search to prove that 1st and 2nd respondents are directors of the 3rd respondent. To support her submissions that applicant was supposed to file official search to prove the relationship between the 1st and 2nd respondents on one hand and the 3rd respondent on the other, counsel cited the case of Stephen Mahendeka Mganga v. Best way Capital Management Limited, Miscellaneous Application No. 2779 of 2024, HC(unreported). Counsel for the respondents further submitted that, in order to lift corporate veil, there must be fraud. She cited the case of Ebony and Company Limited v. Watumishi Housing Company Limited, Civil 5 Appeal No. 29 of 2021, CAT(Unreported). She added that, in the application at hand, applicant has not stated that there is fraud. She went on that,

applicant has a duty to prove existence of fraud and cited Ebony's case (supra). Ms. Kironde further submitted that, in order the court to lift the veil, it must be proven that the company is a sham or evades tax. She cited the case of Tanzania Assurance Company Ltd

- v. RABCO Tanzindia Limited, Commercial case No. 37 of 2006, HC(unreported) to support her submissions. Counsel for the respondents further submitted that, applicant was supposed to attach bank account or other property of the 3rd respondent before praying an order for the 1st and 2nd respondents to be personally liable. In her submissions, counsel for the respondents conceded that, that Judith Joseph, the 2nd respondent is onr of the directors and shareholders of the 3rd respondent. With those submissios, counsel for the respondents prayed that the application be dismissed for want of merit. Mr. Mnkeni did not have a rejoinder submissions. I have considered evidence of the parties both in the affidavit in support of the application and the counter affidavit in oppossion thereof and rival submissions made on behalf of the parties. 6 In disposing this application, I will start with the prayer by counsel for the respondent to expunge paragraph paragraph 1 of the counter affidavit in which she stated that 1st respondent is deceased. That prayer was not resisted on behalf of the applicant as such, I have no reason not to grant it. I therefore expunge paragraph 1 of counter affidavit. I should point out that, without the prayer to expunge the said paragraph, the whole counter affidvit would have been defective because in the verification clause the deponent deponed that all information were from the 1st, 2nd and 3rd respondents. In that circumstances, counsel for the respondent would have prayed this court to strike out the counter affidavit and file a proper one but she opted to pray paragraph 1 of the counter affidavit be expunged. Without expunging paragraph 1 of the counter affidavit, the crucial issue would be, how did the deponent got those information from the person who died prior to the deponent deponing on the matters that are in the counter affidavit. To put it in a different way, how did the deponent of the counter affidavit communicate with the 1st respondent who, it is said, died on 5th October 2023 before applicant filing this application on 13th September 2024. Expunging paragraph 1 from the counter affidavit has only served the said counter affidavit from liability of being struck out as it was incompetent. Therefore, after expunging paragraph 1 from 7 the counter, there is no evidence showing that 1st respondent is dead. In short, both 1st and 2nd respondents are alive and an order can be issued against them. It was submitted by counsel for the respondents that, there is no relationship between the 3rd respondent on one hand, and the 1st and 2nd respondents on the other hand and that applicant has not filed official search to prove that 1st and 2nd respondents are directors of the 3rd respondent. With due respect to counsel for the respondents, the requirement to file official search to prove that 1st and 2nd responents are directors of the 3rd respondent cannot apply in the application at hand because, in her counter affidavit, she did not deny that fact. In fact, in her counter affidavit, counsel stated inter-alia that, the contents of paragraphs 2.3 and 2.4 are not disputed. In paragraph 2.3 and 2.4 of the affidavit in support of the application, applicant deponed that both 1st and 2nd respondents are directors of te 3rd respondent. That being evidence of the parties, in fact, being admission of the facts, I have no reason to doubt it. I hold that there is

relationship amongst the respondents and that both 1st and 2nd respondents are directors of the 3rd respondent. It was submitted by counsel for the respondents relying on the decision in *Ebony & Company Limited vs Watumishi Housing 8 Company Limited* (Civil Appeal No. 29 of 2021) [2024] TZCA 173 (11 March 2024) that, in order the corporate veil to be lifted there must be proof that the company committed fraud. Counsel for the respondents also cited the *RABCO's* case (*supra*) and submitted that for the corporate veil to be lifted, it must be proved that a company is sham or it evades tax. With due respect to counsel for the respondents, I have ready *Ebony's* case (*supra*) and find that, the Court of Appeal did not lay as fast and hard rule that, in every application of lifting the corporate veil, applicant must prove existence of fraud for the application to be granted. Again, in *Tanzidia Assurance Co. Ltd vs Rabco (T) Ltd* (Commercial Case No. 37 of 2006) [2007] TZHCComD 54 (13 November

2007) this Court did not state that tax evasion or the company being a sham are the only conditions for corporate veil to be lifted. In *RABCO's* case (*supra*), this court held inter-alia that:- "The circumstances in which courts in other jurisdictions have thought it fit to lift the veil corporation, are varied. They include where the veil is used to evade legal or contractual obligations, or where the companies are formed merely as cloaks, shams, devices, masks or facets of control or to evade payment of taxes, or to conceal the true facts... In the course of hearing, *BARAKA ABDU* the Defendant's Managing Director, admitted that the money was "stolen" by his staff. I do not think, that in its memorandum of association, one of the objects of the judgment debtor Company was to "steal" the money that came in by virtue of such insurance agency. 9 It is only its officers who could steal. It is therefore a clear case where the corporate identity is about to be abused, to evade, legal or contractual obligations. The court cannot sit by and loose sight of the realities on the ground... As Managing Director of the judgment debtor Company, I think *BARAKA ABDU* cannot hide behind the veil of incorporation." It is clear from the above quoted decision of this case in *RABCO's* case(*supra*) that reasons for lifting corporate veil are varied. Therefore, in an application similar to the one at hand, in granting or refusing it, the court must consider many factors and circumstances of each case. Those factors are not closed to the corporate being sham or evading tax. It was submitted by counsel for the respondents that, prior to filing this application, applicant was supposed to attach bank statement or any other property of the 3rd respondent before praying to lift the corporate veil. This arguemnt cannot be entertained in this application because, in the affidavit in support of the application, applicant stated that 1st respondent has concealed or transferred property of the 3rd respondent and that due to the said concealment or transfer, he has failed to get property of the 3rd respondent. That evidence in the applicant's affidavit was not contested by the respondents in the counter affidavit. With that evidence, I find that submissions by counsel for the respondents requiring applicant to trace property of the 3rd respondent 10 before filing this application lacks merit. Applicant cannot be demanded to do more than what he has done in tracing property of the 3rd respondent prior to filing this application. It is my view that circumstances in this application justifies the grant of the application. In fact, circumstances in the application

at hand has similarity with what happened in Yusufu Manji vs Edward Masanja and another (Civil Appeal No. 78 of 2002) [2005] TZCA 106 (15 November 2005) cited on behalf of the applicant. In Manji's case (supra) the Court of Appeal having considered evidence of the parties in both the affidavit and counter affidavit and liability of companies and directors held inter-alia that:- "The company is at law a different person altogether from the subscribers, and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee of them. Nor are subscribers, as members liable, in any shape or form, except to the extent and in the manner provided by the Act...In our view, and as correctly held by the learned judge, in certain special and exceptional circumstances, the court may go beyond the purview of this principle by what it was described in Salomon (supra) lifting the veil." The Court of Appeal went on that:- "Were there such circumstances in his case, we pose to ask....there was effort to conceal the assets and identity of the company. This allegation was not specifically denied by the appellant by way of a counter-affidavit. In the 11 circumstances, it is our view that the respondents would be left with an empty decree as it were, against the company, Metro Investment United. Furthermore, it is apparent that the company's managing director was at the time the appellant, who, as said before was alleged to be involved in concealing the assets of the company. For this reason, we think it would not serve the interest of justice in this case to shield the appellant behind the veil of incorporation." In Manji's case (supra) the Court of Appeal having found that the director of the company was concealing property of the company concluded that it was justifiable for the High Court to lift the corporate veil. I have pointed out hereinabove that in the application at hand, applicant deposed in his affidavit that 1st respondent has concealed property of the 3rd respondent and that the said property are untraceable. That evidence was not contested. I therefore find that the application is merited. For the foregoing, I allow the application and order that both 1st and 2nd respondents who are directors of the 3rd respondent, are liable to satisfy the award of TZS 5,438,462/= issued by CMA in favour of the applicant. Therefore, applicant is at liberty to attach property of the 1st and 2nd respondents to satisfy the said award. If property of the 1st and 2nd respondents cannot be traced, then, they should be arrested and brought before this court to show cause as to why they should not be committed to prison as civil prisoners. 12 Dated at Dar es Salaam on this 22nd November 2024. B. E. K. Mganga JUDGE Ruling delivered on this 22nd November 2024 in Chambers in the presence of Jimmy Mnkeni, from CHAWAMATA, a Trade Union for the Applicant and Saraha Kironde, Advocate for the Respondents B. E. K. Mganga JUDGE 13

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