

TANZANIA / JUDGMENT

ELIZABETH NYAGAYA V

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM MISCELLANEOUS APPLICATION NO. 24263 OF 2024 ELIZABETH P. NYAGAYA.....
APPLICANT VERSUS EVAREST FREIGHT LIMITED 1ST RESPONDENT BAHMAN SALIM HEMED..... 2ND RESPONDENT EXPARTE RULING Date of Last Order: 12/11/2024 Date of Ruling: 26/11/2024 B. E. K. Mganga, J. Elizabeth P. Nyagaya, the herein applicant, filed this application praying the Court to issue the following orders namely, (a) that this Honourable Court be pleased to lift the Veil of Incorporation of the 1st Respondent (Judgment Debtor), (b) that having so lifted, this Honourable Court be pleased to order for the arrest and detention of the 2nd Respondent, the majority shareholder and Managing Director of the 1st Respondent/Judgment Debtor, as a civil prisoner and (c) any other relief(s) as this Honorable Court may deem fit and just to grant. Facts behind this application are that; applicant was an employee of the 1st respondent. It happened that, the 1st respondent terminated 1 employment contract of the applicant, as a result, the latter filed Labour Dispute No. CMA/DSM/ILA/565/2021/58/22 before the Commission for Mediation and Arbitration (CMA) complaining that termination of her employment was unfair. The arbitrator (Hon. Mbeyale, R) having heard evidence of the parties concluded that, termination was unfair. With those findings, the arbitrator ordered the 1st respondent to pay applicant TZS 57,882,500/= as compensation for unfair termination. The 1st respondent was not satisfied, as a result, she filled Revision Application No. 409 of 2022 before this court. On 31st March 2023, this court (Hon. K.T.R. Mteule, J) revised the said award and reduced the said amount to TZS 37,882,500/=. The said TZS 37,882,500/= that was decreed by this court has not been satisfied. In support of the application, applicant filed her affidavit in which she deponed inter-alia that, the 2nd respondent is a major shareholder, company director and the managing director of the 1st respondent. Applicant also deponed that, the decree was passed almost one year and half ago but it has remained unyielded. She further deponed that, the 2nd respondent has refused to honour the court decree and has hindered execution of the decree through the following acts, (a) after the 2 appointment of the Court Broker in executio No. 151 of 2023, he removed from the 1st respondent's yard and hide all motor vehicles namely T. 747 DFB, T.709 DFB and T. 747 DFN that were ordered to be attached and sold hence the said motor vehicles are untraceable, (b) he (2nd respondent) has rebranded the offices which until the date of the decree were being used by the 1st respondent as her operational offices to read "lyan group insurance", (c) 2nd respondent has rebranded most tracks/cars then under the 1st respondent to ready "lyan Group" thereby concealing the identity and or

connection with the 1st respondent to the said tracks and (d) 2nd respondent has resorted to all trickeries to shield and eschew the 1st respondent from its legal responsibilities to prevent the end of justice. Both the 1st and 2nd respondents though served through substituted service through Mwananchi and Daily newspapers, neither filed the notice of opposition, the counter affidavit nor entered appearance. With proof of service, this application was heard *ex parte* hence this *ex parte* ruling. When the application was called on for hearing, Mr. Oscar Kizuguto, Advocate for the Applicant, entered appearance and argued the application on behalf of the applicant. Submitting in support of the application, counsel 3 for the applicant referred to what was deposed by the applicant in her affidavit in support of the application, as pointed out hereinabove. Mr. Kizuguto submitted that, in October 2023 applicant filed execution No. 151 of 2023 against the 1st respondent as a result, the court broker was appointed to execute the decree but reported that he was unable to execute the decree because the motor vehicles that were supposed to be attached could not be found. He also submitted that, the 2nd respondent, who is director of the 1st respondent, was concealing the property of the 1st respondent. He added that, the only property of the 1st respondent that were known are the motor vehicles at the Yard located at plot No. 52 along Mandela Road, Tabata area within Ilala Municipality which was the operational offices of the 1st respondent. Counsel for the applicant further submitted that, 2nd respondent participated fully in the proceedings at CMA but, immediately after the decree, he was responding that the company is closed and that, he is no longer the director of the 1st respondent. Counsel added that, official search (annexture EP4 to the affidavit) shows that the 2nd respondent is the director of the 1st respondent. He added that, 2nd respondent has concealed all property of the 1st respondent and branded the office to read 4 Iyan Group Insurance purporting to show that the said person now belongs to a different person. He went on that, official search of Iyan Group Insurance (EP7) has revealed that the said company is owned by the brother of the 2nd respondent. Counsel for the applicant further submitted that, the 2nd respondent being the director of the 1st respondent, can be held liable to satisfy the decree of this court. He further submitted that, under special and exceptional circumstances, the director can be held liable for the acts of the company. He added that, special and exceptional circumstances are concealment of the property of the company. To cement on his submissions, counsel cited the case of Yusuf Manji v. Edward Masanja and Abdallah Juma [2006] TLR 127 (CAT). He also submitted that, in Manji's case (*supra*), the application for lifting the corporate veil was unnecessary and the court of Appeal confirmed the order of arrest and detention due to concealment of property of the company. He further cited the case of Xiao Long Zhang v. Chines Hotel and another, Revision application No. 129 of 2023, HC (unreported) to support his submissions that this court can lifting the corporate veil and issue the order of arrest and detention. 5 Mr. Kizuguto also cited the case of Rosemary M. Hamilton v. Dr. George Oreku & Another, Civil Application No. 15/01/of 2023, CAT (unreported) and submit that, the decree holder should enjoy the fruits of the decree as soon as possible. He added that, in the application at hand, the decree has not been satisfied due to the conduct of the 2nd respondent. He therefore prayed the court to order for arrest of 2nd respondent and be brought before this court to show cause. He strongly submitted that, a director of company cannot hide on incorporation of the company to escape liability. To cement on his submission to that effect, counsel cited the case of Sheikh Hashimu Mbonde v.s Tiptop

connection co. Ltd & Hamis Shaban Taletale, Miscellaneous Civil Application No. 467 of 2022, HC(unreported). I have examined evidence of the applicant in the affidavit in support of the application and I should point out, albeit briefly that, this being a miscellaneous application, must be decided based on evidence in the affidavit and the counter affidavit. As pointed out hereinabove, respondents though served, did not file the counter affidavit. That being the position, there is no evidence to contradict what was deposed by the applicant in the affidavit. Therefore, the only evidence to be considered is the affidavit of the applicant in support of the application. I have carefully considered evidence of the applicant in the affidavit in support of the application and I am convinced that, that evidence is strong and justifies the grant of this application. In fact, annexure EP4 identifies the 2nd respondent as one of the directors of the 1st respondent hence a connection between 1st respondent and 2nd respondent. In the application at hand, applicant is praying the court to lift the corporate veil of the 1st respondent so that the 2nd respondent can be held liable to satisfy the decree of this court. It is my view that, evidence in the affidavit of the applicant that the 2nd respondent has concealed the aforementioned motor vehicles after the order of attachment and sale, in my view, are special circumstances justifying the grant of the order. The Court of Appeal had an advantage of discussing a similar issue in the case *Yusufu Manji vs Edward Masanja* and another (Civil Appeal No. 78 of

2002) [2005] TZCA 106 (15 November 2005) (2006) T.L.R. 127 (CAT) 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:- 7 “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 circumstances, it is our view that the respondents would be left with an empty decree as it were, against the company, Metro Investment Limited. 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. 8 In the case of *(T) International Container Terminal Services Ltd vs A & D Co. Ltd* (Misc. Commercial Application No. 130 of 2023)

[2024] TZHC Com. D 225 the commercial court after referring to the decision in Yusuph Manji vs Edward Masanja & Another (2006) T.L.R. 127 held that: - “Before the decree holder succeeds in having the veil of incorporation lifted for purposes of execution of a decree he has to prove that, according to the circumstances prevailing at the time of making an application for execution of his decree, there is no real separation between the company and its owners. The decree holder has also to prove the company's actions which are wrong and fraudulent, say, concealing assets of the company or doing other acts calculated to obstruct execution of the decree against it and that, unless the veil of incorporation is lifted, the decree holder stands to suffer for not enjoying what the court decreed in his favour (emphasis is mine).” Since it has been proved that the decree of this court has not been satisfied, I lift the veil of the 1st respondent and order that the 2nd respondent is liable, as director of the 1st respondent, to satisfy it. I therefore order that; 2nd respondent should pay applicant a total of TZS 37,882,500/= that 1st respondent was ordered to pay the applicant. I further order that, 2nd respondent should be arrested and brought before 9 this court to show cause as to why he should not be arrested and detained as a civil prisoner. Dated at Dar es Salaam on this 26th November 2024 B. E. K. Mganga JUDGE Exparte ruling delivered on this 26th November 2024 in Chambers in the presence of Oscar Kizuguto, Advocate for the Applicant but in the absence of the Respondents. B. E. K. Mganga JUDGE 10

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