

TANZANIA / JUDGMENT

BWIGANE HEZRON 0001

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (DAR ES SALAAM SUB-REGISTRY) AT DAR ES SALAAM EXECUTION NO. 94 OF 2023 (Originating from Misc. Civil Application No. 263 of 2023, before Hon. H. Mwanga Judge) BWIGANE HEZRON MWAKAPEMBA APPLICANT/DECREE HOLDER VERSUS MADSON PROPERTY LIMITED RESPONDENT/JUDGEMNT DEBTOR

RULING

Date of Last Order: 04/09/2024 Date of Ruling : 30/10/2024 NGUNYALE, J. Ttre Applicant herein moved this court by way of chamber summons supported by an affidavit sworn by the applicant praying this honourable court to grant the following orders:

1. That this Honourable court may be pleased to make an order as to show cause as to why Directors of the judgement debtors who are Dickson Jacob Sanga and Madson Skylerk Madson, should not be committed to civil prisoners for their failure to satisfy the court order dated 16th of December 2021.
2. That costs of this application be provided for. M
3. That the Honourable Court grant any order it deems fit. The application was brought under Order XXI Rule 28 and 35 (1) of the Civil Procedure Code, Cap. 33 (R.E 2019). Following non-appearance of the respondent proved by the affidavit of service, the application was heard ex-parte against the respondent. Itle applicant was enjoying the service of Mr. Robert Makwaia, advocate. Ttre application was heard by way of written submissions. Before going into the submissions of the parties, I find it pertinent to summarize the gist of the application at hand as depicted from the affidavit. The applicant was the plaintiff in Civil Case No. 115 of 2020 suing the respondent before Kinondoni District court where judgement was entered in his favour of the respondent to some of his prayers. Being dissatisfied with the trial court judgement, the applicant/decree holder preferred Civil Appeal No. 123 of 2021 to challenge the judgment and decree. Fortunately, before the appeal could be heard on merit the parties decided to settle the matter by filing a settlement deed upon which a decree of settlement was drawn. According to the consent decree, the respondent/ judgement debtor was to pay the applicant a total of Tshs. 33,000,000/= but only managed to pay Tshs. 6,500,000/= Following the default, the applicant/decree holder took action by filing

an application to lift the corporate veil through IWC. Civil Application No 263 of 2023 so that the respondent/judgment debtors' directors Dickson Jacob Sanga and Madson Skylerk Madson could be held responsible in their personal capacity. The application to lift veil was granted and he immediately preferred the present application for the directors of the judgment debtor to be arrested and detained as civil prisoners. In his submissions in support of the application, Mr. Makwaia submitted that the provisions of Order XXI, Rule 35(1) of the Civil Procedure Code requires the judgment debtor to show cause as to why he should not be committed to civil prison before an order of arrest warrant is issued to him. However, the judgment debtor herein was not traced. It was his prayer that this court to issue an arrest warrant as per the dictates of Order XXI, Rule 35(2) of the Civil Procedure Code against the judgment debtor so as to satisfy the decree of the court on the settlement deed. Appreciating the submissions of the applicant, this court is invited to determine whether the application has merit or not. I have keenly considered the affidavit supporting the application together with the submission by Mr. Makwaia for my determination of the application, I am in a position to decide the matter. As the application stands, the applicant aims to execute the decree of the court; there are several means in which the decree holder may obtain and enjoy the award including the mode of execution by arresting and detention of the judgment debtor as a civil prisoner. However, before issuing the order of arrest and detention as a civil prisoner the court should be satisfied that the applicant/decreed holder has met the conditions stipulated under Order XXI Rule 39 (2) of the Civil Procedure Code and other conditions relevant for the same. Case law through interpretation of the above provision have given good guidance in implementing execution process by mode of arrest and detention of the judgment debtor as a civil prisoner. I wish to be guided by the Court of Appeal case of Grand Alliance Ltd vs. Mr Wilfred Lucas Tarimo and four others. Civil Application No. 187/16 of 2010 (unreported) which provides for the conditions to be met before the court enters an order of arrest and detention of a civil prisoner. The case provides in part; "It follows then that the imprisonment of a judgment debtor in execution cannot be ordered unless the conditions and limitations are satisfied. One of those conditions is that there must be an application for execution of a decree for payment of money by arrest and detention in prison of a judgment debtor (See sections 42 and W 44 and Order XXI Rule 10 of the code). After receipt of the application, the executing court has discretion to issue a notice to show cause to the person against whom execution is sought, on a date to be specified in the notice, why he should not be committed to prison or to issue a warrant of his arrest (See Order XXI Rule 35(1) of the Code). The purpose of this warrant is to bring the judgment- debtor before the executing court and it is not an automatic order for committal as civil prisoner because the executing court is required to be satisfied with the conditions stated under Order XXI Rule 39 (2) of the Code before committing a person to prison. " The above position directs that the executing court prior to ordering the judgment debtor to be arrested and detained as a civil prisoner there must be conditions to be met. It is now high time to consider as to whether those conditions were met. The first condition requires presence of an application for execution of a decree for payment of money by arrest and detention in prison of a judgment debtor as provided under Order XXI Rule 10 and Section

42 (c) of CPC. Essentially, this condition was properly met by the decree holder when he filed this application for execution. In his application he suggested mode of execution of arrest and detention of the judgment debtor in order to compel them to pay the decretal sum. This condition has been met. The second condition was for notice to show cause to be issued as provided for under Order XXI Rule 55 (1) of the Civil Procedure Code. The very provision provides; - "Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention as a civil prisoner of a judgment debtor who is liable to be arrested in pursuance of the application, the court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison," In the present case the respondent directors were issued with summons to appear and show cause but unfortunately their whereabouts was not traced for them to appear before the court and show cause. Proof of service was brought to court that they have been served to appear and show cause but they were not found. The fact that they were not found does not mean that the execution process faces natural death. The procedure to show cause is waived for the good reason that the application has been heard Ex Parte but still it remains a discretion of the court to either give them chance for showing cause or not before being sent to prison. Execution process of matters of civil nature measures of criminal elements are considered a last resort. Therefore, upon arrest they may be presented before a Judge of the High Court or the Deputy Registrar depending on a circumstance in order to show cause. When cause is shown or payment is made the order to serve as a civil prisoner may be vacated. Having said and done, the said Dickson Jacob Sanga and Madson Skylerk Madson as directors of the judgment debtor are liable to serve as civil prisoners unless the whole decretal sum is paid. The directors of a company carries liability on their shoulders as an exception to the principle that a company is essentially regarded as a legal person separate from its directors, shareholders, employees or agents. This ancient principle was laid in the UK case of *Solomon versus Solomon & Company Ltd* [1896] UKHL 1[1897] AC 22. Since the directors are the mind of the company responsible with managing the company affairs and its resources under the umbrella of the corporate entity, they face the consequences of their inaction for the companies' liabilities once the corporate veil is lifted. In the present case the Directors cannot avoid such liability. In reference to section 46 (1) (a) of the Civil Procedure Code, I order that, unless the whole decretal amount of TZS 26,500,000/= (Tanzania Shillings Twenty Six Million Five Hundred Thousand Only) and interest is paid in whole within 30 days from today, the said Dickson Jacob Sanga and Madson Skylerk Madson shall be arrested and detained as civil prisoners for the period of six (6) months in execution of a consent decree pronounced in Civil Appeal No. 123 of 2021 before this court. The applicant (the decree holder) shall pay subsistence allowance for the judgment debtor's upkeep per each month in which the judgment debtor's Directors will be in prison in terms of Order XXI Rule 38 (1) and (2) of the CPC. It is so Ordered. Dated at Dar es Salaam this 30th day of October, 2024 JUDGE Ruling delivered this 30th day of October, 2024 in presence of Mr. Robert Makwaia for the applicant. JUDGE 8

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