

TANZANIA / JUDGMENT

kcb bank tanzania vs kigamboni oil company ltd 2016 tzhccomd 2029 2 june 2016

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2 June 2016

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT PAR ES SALAAM
COMMERCIAL CASE NO. 31 OF 2008 KCB BANK TA N Z A N IA PLAINTIFF/
DECREE HOLDER VERSUS KIGAMBONI OIL COMPANY LTD ... DEFENDANT/JUDGMENT
DEBTOR 17th February & 2nd June, 2016

RULING

MWAMBEGELE, J.: The background history of this matter is rather chequered. The Decree Holder KCB Bank was the plaintiff in this suit and the Judgment Debtor Kigamboni Oil Company Ltd, was the defendant. The suit was finalized on 10.10.2008 by consent of the parties before my brother at the Bench Mruma, J. and a decree thereof extracted on 25.02.2009. It appears the decree holder attempted to execute the decree against the judgment debtor to no avail. Thus, on 24.09.2013, the decree holder filed in this court Miscellaneous Commercial Cause No. 111 of 2013 seeking the indulgence of this court to lift the corporate veil of the judgment debtor with a view to proceeding to execute the decree thereafter. By a ruling of this court dated 17.03.2014, my brother Makaramba, J. dismissed the application with costs for want of merit. Undeterred, the decree holder filed this application for execution on 17.07.2014 seeking to execute the decree with the help of Islam Ali Saleh, Saleh Ali Saleh and Ali Ahmed Saeed; the Directors of the judgment debtor. The mode of assistance for which the court was required to offer is couched in the following terms: "1. An order summoning Directors of the judgment debtor to show cause why they have not paid the decretal amount to date 2. An order compelling the judgment debtor to satisfy the decree 3. An order to Appoint Receiver Manager over the Judgment Debtor". The record shows that, on 28.11.2014, the Directors of the judgment debtor, through an affidavit of Saleh Ali Saleh, filed in this court an affidavit disputing the mode of execution opted by the decree holder stating in the main that the application and the mode of execution for which the assistance of the court is sought is intended to circumvent the order of this court (referred to above) refusing to lift the veil of incorporation of the defendant/judgment debtor. Prior to that, on 19.11.2014 to be exact, counsel for the judgment debtor, filed a preliminary objection whose contents were, in the main, the same as those of the affidavit of the said Saleh Ali Saleh referred

to above. I take note that, upon the advice of this court on 20.11.2014, the preliminary objection was withdrawn by counsel for the judgment debtor and in its stead the affidavit to contest the application for execution was filed. This is the affidavit of Saleh Ali Saleh referred to hereinabove which was filed on 28.11.2014. 2 It is worth noting that Mr. Kibatala, learned counsel for the decree holder, has, on several occasions indicated that the judgment debtor was prepared to pay the decree holder and has been asking for time within which to make that payment in satisfaction of the decree. That was done before Mruma, J., Makaramba, J. Mwarija, J. (as he then was) and before me. Equally evident is the bare fact that the learned counsel and his clients have never walked the talk all the times they promised to satisfy the decree. With the above background, the application was heard before me on 17.02.2016. Mr. James Bwana and Mr. Kibatala, learned advocates represented the decree holder and judgment debtor respectively like they did in the suit. The learned counsel for the parties had earlier filed skeleton written arguments as required by rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 - GN No. 250 of 2012. Both counsel for the parties adopted these skeleton arguments as part of their submissions at the oral hearing. Mr. Kibatala for the judgment debtor sought to adopt the affidavit of Saleh Ali Saleh as well. I accorded time to Mr. Kibatala to start the ball rolling. He submitted in the main that the mode sought from the court to summon the Directors of the judgment debtor why they have not satisfied the decree and compelling them so to do, is inappropriate as the course is a disguised attempt to circumvent the ruling of this court which, on 17.03.2014, dismissed the decree holder's application for lifting the judgment debtor's corporate veil. On the third prayer of appointing the receiver manager the learned counsel for the judgment debtor was, initially, of the view that this should not be granted in that it is not part of the execution process; it is a separate 3 procedure. However, on a second thought upon reconsideration in rejoinder, withdrew his submission on this point; stating that the procedure opted by the learned counsel of the decree holder to pray the appointment of a receiver manager in this application for execution was but in order. On his part, Mr. Bwana, learned counsel for the decree holder started with the background facts as narrated at the beginning of this ruling. He then, briefly but to the point, submitted that the application does not in any way circumvent the order of this court refusing to lift the veil of incorporation of the judgment debtor. The learned counsel stressed that the judgment debtor speaks through her directors. The fact that the application for lifting the corporate veil was refused, does not mean that the applicant is precluded from seeking recourse in this court to execute the decree and that that can be only done with the help of the Directors of the judgment debtor through which she (the judgment debtor) speaks. Otherwise, he submitted, the Directors of the judgment debtor should be held responsible for contempt of court as was the case in *G APCO Tanzania Limited Vs Khoshed A. Mulla Trading Company Limited*, Commercial Case No. 47 of 2003 (unreported). I have considered the rival arguments by the learned counsel for the parties. I must state from the outset that I am in agreement with the submissions of Mr. Bwana, learned counsel for the decree holder. The decree holder is armed with a decree which must be executed to reap the fruits of litigation despite the order of this court refusing to lift the veil of incorporation. This can only be possible with the help of the Directors of the judgment debtor through which she acts. I am not ready to buy Mr. Kibatala's argument which argument was supplied to the deponent Saleh Ali

Saleh by way of legal advice and deposed in the affidavit to the effect that the application is intended to circumvent the order of this court refusing to lift the corporate veil. I say so because the applicant does not seek to execute the decree by attaching the Directors' properties. What he seeks from this court is to subpoena the Directors of the judgment debtor so that they tell the court why they have not satisfied the decree. This procedure is quite apposite - see: the G APCO case (supra). In that case, Massati, J. (as he then was - now Justice of Appeal) was faced with an identical situation; a decree had been passed against a company and the director was served to show cause why he should not be sent to prison for contempt of court for disobeying a lawful order of this court; a consent settlement order like the one in the instant case. There was fronted an argument to the effect that the Director of the decree holder was a stranger to the suit and that it inappropriate to summon him. The court held: "... at this stage, what is sought by the applicant is the issue of court process, which could be served on any director, and there is no dispute that the 2nd respondent is a director of the 1st Respondent." The foregoing quotation speaks it all and supports my finding and holding above. This is a matter of a court process in the process of satisfying the decree which, as already alluded to above, can be executed with the help of Directors of the judgment debtor and it is not disputed that Islam Ali Saleh, Saleh Ali Saleh and Ali Ahmed Saeed are Directors of the judgment debtor. Summoning them to court so that they tell the court why the decree which is now long overdue is not satisfied is quite in order. In the same token, compelling the Directors them to satisfy the decree is quite appropriate. 5 As for appointment of the receiver manager, the prayer, it seems, has been made in the alternative which can only be resorted to upon failure of the main prayer. Luckily, the learned counsel for the parties are at one that the course taken by the learned counsel for the decree holder is but appropriate. The above said, I grant the decree holder's prayer; that is, the Directors of the judgment debtor - Islam Ali Saleh, Saleh Ali Saleh and Ali Ahmed Saeed - should show cause, on a date to be slated today, why they have not satisfied the decree which now is long overdue. It is upon their showing such cause that the court will compel them to satisfy the decree, appoint a receiver manager and/or deal with the matter the way it deems fit in the interest of justice. This application is allowed to the extent stated above. Costs to follow the event. Order accordingly. DATED at DAR ES SALAAM this 2nd day of June, 2016. J. C. M. MWAMBEGELE JUDGE 6

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