

TANZANIA / JUDGMENT

# EExecution No 26139 of 2024 Yorkshire Ruling

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM EXECUTION NO. 26139 OF 2024 (Arising from Commercial Case No. 170 of 2017) BETWEEN EAST YORKSHIRE COMMERCIAL LIMITED ..... DECREE HOLDER VERSUS BOCCO GENERAL TRADING LIMITED..... JUDGMENT DEBTOR

## RULING

Date of last order: 28/11/2024 Date of the ruling: 07/02/2025 AGATHO, J.: The Applicant East Yorkshire Commercial Limited has filed this application citing as enabling provisions Order XXI Rule 20 (1) of the Civil Procedure Code [Cap 33 R.E. 2019]. She is specifically imploring that one Biseko Nyagabona, judgment Debtor's Liquidator appears to show cause why he should not be sent to prison as a Civil Prisoner for failure to pay the decretal amount which is due to the judgment debtor, amounting to sterling pounds 266,975 which is equal to TZS 28,570,000 and in case of failure to show cause, he be sent to prison as a Civil Prisoner. 1 The decree holder is represented by Mr. Gaspar Nyika from IMMA Advocates, while Mr. Kay Mwesiga Felician, Advocate of K.M. Felician & Co. Advocates is standing for the Respondent. A summons to show cause was issued against Mr. Biseko Nyagabona of SBN Attorneys, a liquidator of Bocco General Trading Limited, the judgment debtor in this case who entered appearance in obedience to the summons. Mr. Nyagabona filed an affidavit sworn by himself to counter the prayers made in the chamber summons. In the said affidavit the judgment debtor's liquidator deponed that he was duly appointed as the Liquidator of Bocco General Trading Limited by the members of the company in accordance with the provisions of the Companies Act, 2002. Acting in his capacity as a Liquidator, he invited Yorkshire, the sole creditor of Bocco General Trading Limited and the decree holder to attend a meeting for the purpose of discussing the financial situation of the company, as well as the settlement of outstanding debts. However, the decree holder refused to attend the meeting or engage in any discussions regarding the matter. The liquidator further deponed that he was shocked to learn of a raid and unlawful seizure of assets belonging to the company, orchestrated by the creditor/decreed holder, Yorkshire. He added that 2 Yorkshire seized the assets of the company in a manner that was unlawful and despite his numerous attempts to recover those assets through legal means including formal communication to Yorkshire's attorneys, he was unable to retrieve them. He attached as Annexure B, a copy of the demand

letter sent to the attorneys of the decree holder demanding the return of the seized assets. It is further an assertion of the liquidator that the decree holder has not disclosed the exact amount they have recovered from the seized assets, despite being obligated to provide such information to him. On her side, the decree holder filed a counter affidavit sworn by her advocate Mr. Gaspar Nyika literally opposing all the contents of the affidavit except for the 1st and 2nd paragraphs. Mr. Nyika wanted this court to bear in mind that when this liquidator took over the company, the same was still solvent. Moreover, their own research shows that the appointed liquidator is not doing anything material in his capacity as a liquidator hence purposely halting the process of winding up the company. The decree holder who is also the sole company creditor denied of being called to any meeting and refused. She also negated the fact that the decree holder ever acquired properties of the company unlawfully 3 and to cement this, the decree holder attached copies of requisite letters from court and the court broker and a proclamation of sale. On 28/11/2024, parties were allowed to file their submissions for and against the application by way of writing submissions beginning with the judgment debtor's liquidator showing cause as to why he should not be detained as a civil prisoner. While adopting his earlier filed affidavit in support of the application, the judgment debtor's liquidator mostly reiterated what was in the affidavit in opposition and stressed that the Decree Holder being the sole creditor, was invited to present her claim but refused to do so. Also, that the Decree Holder, with the assistance of Police and one Court broker named Mr. Abdallah Makata of sensitive Auction Mart initiated an unlawful raid to the Judgement Debtors Yard and took properties (More than Four Trucks and their Trailers) and other properties such as New Truck Tires belonging to the Judgement Debtor as well as other companies affiliated with the Judgement Debtor. He finally submitted that, the action of the Decree Holder seizing the assets and refusing to cooperate with the Liquidator not only violates the principles of good faith and fair dealing but also frustrates the legal process set forth for the winding up of a company. As for the decree holder while citing Order XXI Rule 28 read together with Section 42 (c) of the Civil Procedure Code Cap 33 R.E. 4 2019 ("the Civil Procedure Code") provisions which are to the effect that every decree for the payment of money, may be executed by the detention as a civil prisoner of the judgment debtor upon an application by the Decree Holder. The Decree Holder submitted further that he had neither heard from the Judgment Debtor's liquidator nor received any payment for settlement of the decretal sum. Still making her point clear, the applicant asserted that the Judgement Debtor's liquidator has never sent any notice to the Decree Holder as the Creditor to invite her to attend the creditors meeting for purposes of settling the decretal sum. On the contrary it is the Decree holder who decided to write to the Judgment Debtor's Liquidator through a letter dated 15 July 2021 informing the judgment debtor's liquidator of the outstanding amount and demanded payment thereof. Surprisingly there was no response from the judgment debtor's liquidator. The decree holder attacked the judgment debtor's liquidator's submission that the resolution to wind up the judgment debtor was published on 28th May 2020 in the Daily News Newspaper. He stated that this fact was not there in the Liquidator's affidavit. He submitted further that the Judgment Debtor's Liquidator ought to have attached an extract from the said newspaper and the gazette that the intention of the winding up the company was published. Mr. Nyika added that the inactions of the liquidator are clear indicators of bad faith on part of the judgment debtor and the

liquidator for failure to perform his duties effectively in order to ensure the Decree Holder as the only creditor of the judgment debtor is paid off her decretal sum. He kept on submitting that the Decree Holder has never been required by the Liquidator to present her claim and in fact it is the Decree Holder who has tried to reach to the liquidator by informing him of the outstanding debt vide a letter dated 15 July 2021 but there was no response from the liquidator. Regarding the Liquidator's assertion that the decree holder and the Court Broker Mr. Abdallah Makata of Sensitive Auction Mart with the assistance of the police unlawfully raided the judgment debtor's yard and took properties that belongs to the judgment debtor, he moved the court to take those submissions as misleading and incorrect. It was his submission that the Decree Holder has never made any unlawful raid on the judgment debtor's properties but the attachment process was conducted lawfully by the Court Broker as per the proclamation of sale 6 issued by this Honourable Court and every information regarding the sale is available before this honourable Court as the Executing Court. The decree holder in conclusion told this court that since the Judgment Debtor was solvent as admitted by the Liquidator, then it should be taken that the Liquidator wilfully refused to pay the decretal amount. It is his opinion that the Liquidator has failed to show cause as to why the application should not be granted as prayed so this honourable court should just allow the decree holder's prayer for issuance of an order requiring Biseko Nyagabona the Judgement Debtor's liquidator to be sent to prison as Civil Prisoner for failure to pay the decretal amount. I have judiciously considered the Applicant's application as unveiled in the pleadings. From the arguments of both sides there is no dispute that Mr. Biseko Nyagabona was appointed as the Liquidator of Bocco General Trading Limited through a members' voluntary resolution on 19th May 2020 in accordance with the provisions of the Companies Act, 2002 and to be specific Section 340(1) of the same. Such appointment was made following a resolution passed by the members in a meeting duly convened. It is also undisputed that the 7 company was solvent when the current liquidator took it over. This was self-confessed by the liquidator himself under para 3 of his affidavit in opposition. This only implies that the company was not placed under liquidation for failure to repay its creditors. The record is also loud that the decree holder herein is the sole creditor of the judgment debtor company. It is without doubt that the liquidator's appointment was for the purpose of winding up the affairs and distributing the assets of Bocco General Trading Limited. Among the main affairs expected to be taken care of during the winding up period was expected to be payment of creditors. Section 358 of the Companies Act provides for powers and duties of liquidator in voluntary winding up. Subsection 2 provides that the liquidator shall pay the debts of the company and shall adjust the rights of the contributories among themselves. The applicant in this case who also happens to be the sole company creditor, complains that despite being solvent at the time of being appointed a liquidator, Mr. Biseko never made any action regarding payment of the debt which stands at sterling pounds 266,975 equal to 8 TZS 28,570,000/= which stemmed from a decree in Commercial Case No 170 of 2017. The liquidator claims that he invited Yorkshire to attend a meeting for the purpose of discussing the financial situation of the company, as well as the settlement of outstanding debts but the decree holder refused to attend the meeting or engage in any discussions regarding the matter. This fact is totally disputed by the decree holder. I have perused the record to find any document such as proof of service of notice from the liquidator to the decree holder to substantiate this proposition

but found none. Since the liquidator did not substantiate this averment with any documentary evidence to prove that the creditor was really notified of any meeting it remains a statement from the bar. In contrast, record of this case reflects that it is the Decree holder who wrote to the Judgment Debtor's Liquidator through a letter dated 15th July 2021 informing the judgment debtor's liquidator of the outstanding amount and demanded payment thereof. A letter which received no response from the judgment debtor's liquidator although it was received on the same date 15th July 2021. It goes without saying therefore that Mr. Biseko as an appointed liquidator failed to perform his duties for which he was appointed, the 9 main being discharging creditor's debts. Further he has failed to show any cause as to why execution of the decree against the judgment debtor should not be executed against him. Now, what the court is to do in such a situation is somewhat challenging. The decree holder is urging this court to send the liquidator to prison as a Civil Prisoner upon failure to show cause. He is moving the court under Order XXI Rule 20 (1) of the Civil Procedure Code, [Cap 33 R.E. 2019]. He has however not cited any precedent where the court in our jurisdiction followed the path he implores this court to follow. I have considered the mode of execution sought for along with the nature of this application and found that the Companies Act, Cap 212 of 2002 provides a specific remedy to a creditor in this situation. The remedy is available under Section 359 of the Act. The same provides that: - The court may, on cause shown, remove a liquidator and appoint another liquidator. It is my considered view that the applicant in this case ought to have made use of Section 359 of the Companies Act so as to have the liquidator be dealt with by the court executing the decree. Since there is 10 a specific remedy under the law which covers this situation then this court will elude from issuing any other order to the contrary. That said, the application to detain the judgment debtor's liquidator as a civil debtor fails. The applicant is advised to follow a proper trail of holding the liquidator responsible for his inaction. No costs provided. Order accordingly. DATED at DAR ES SALAAM this 7th Day of February 2025. U. J. AGATHO JUDGE 07/02/2025 Court: Ruling delivered today, this 7th February 2025 in the presence of Libent Rwazo, Advocate for the decree holder together with Simon Singlton, and Ms. Debra Elcock directors of the decree holder. But in the absence of the judgment debtor. 11 U. J. AGATHO JUDGE 07/02/2025 12

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