

TANZANIA / JUDGMENT

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I, t 1... ' Eage ~ of 12 IN THE HIGH CO RT OF TANZANIA COMMER IAL COURT AT DAR BS SALAAM I . I MISC COMMERCIAL CCAUSE NO 20 OF 2012 BET EEN MUSSA .SHAIBU MSANGI -----'-----PLAINTIFF/DECREE HOLDER VE SUS. SUMRY HIGH CLASS LIMITED ----- DEFENDANTS/DECREE DEBTOR SUMRY BUS SERVICE LTD-----,--- ----DEFENDANT/DECREE DEBITOR RUIL.ING Date of Hearing: 20/8/2015 · Date of Ruling; 30/10/2015 SONGORO, J Mussa Shaibu Msangi, a Decree holder has a 'court decree of shs 179,379,980/- and interests passed in his favour by this court against Sumry High Class Limited and Su I ry Bus Servic~, Judgment debtor~. He wants to execute it, in order t ·get his monies. Thus on the 30/10/2014, the Dec ee holder applied to attach 5 buses which belong to the Judgment ebtors, but his 'application did not bear any fruit. Later on the 25 th February, 2015, Decree holder filed the instant application under Order XXI Rul s 9 and 10 of the Civil . Procedure Code, cap 33 [R.E 2002] applied 1o execute his court decree. I ~ I Page2of12 , -----= ----- '-----:-----"-----_:____:____~ , - - On mode of execution, the Decree holder applied for· arrest, and ·; detention of Hamoud Mohammed Sumry, who is the Managing Director of the Judgment Oebtors Companies as civil prisoner for his failure, and neglects to pay the Decretal sum. In the light of the Application made by the Decree holder, Hamqud Mohammed Sumry appeared before the court and filed an affidavit to oppose the application. In his affidavit, he explained that, he is. the one of the directors of Judgment debtors companies, but denie~ that, .he not a party in Commercial Case. No 20 of 2012 and for th,at,

- .,.' reasons the court decree cannot be executed against him. · He t~en elaborated in his affidavit that, the Judgment debtors are his . companies which under the law are separate legal entity from its directors. For this reasons and other he contested that, he may not be held liable. For that, reasons, he prayed to the court to dismiss the application. In view of the application for execution of the court decree, and denial made by Hamoud Mohammed Sumry, the application was called for hearing ~ on the 20/8/2015. ·At the hearing, Ms Phillip, Learned Advocate appeared for· Decree ·holder and pursued· the application whereas Mr Aboubakary, Learned Advocate appeared for. Hamoud Mohammed Sumry and o·pposed the Appl!catlon. · ' Page 3 of 12 :on her part, Ms. Philip relying-on the applicatipn c;!nd paragraphs ~ ahd s·ofhe·r "count~r affidavit" filed on the 18/S./2015, she informed the court- that, --Mussa Msangi has a court decree of about shs 179,379,980/- .which also carries interests. She then explained that, ' - - th~,Decree holder has attempted to execute it against

Summary High Court, I.O. v. Class Limited and Sumry Bus Service, who are Judgment debtors but that, his attempt to execute has failed. The Plaintiff/ briefed the Court that; due to the facts Judgment debtors. The company operates through its directors, then Hamoud Mohammed Sumry who is the Managing Director and has a legal obligation to comply with the court order and pay the Decretal Sum. She then clarified to the court that, in essence the Decretal sum was supposed to be paid by Sumry High Class Limited, and Sumry Bus Services or by its Managing director but they have not honoured the court Order and pay the Decretal sum. It was the argument of the Decree holder that, since, Hamoud is the director of Judgment Debtors' companies' which they have refused to comply with the court order, and pay Decretal sum, then the court may lift corporate veils of two companies, and held Hamoud Mohammed Sumry, liable, and order his arrest and detention as a civil prisoner, for a failure and neglected to pay the Decretal sum. The Counsel then insisted that, under the circumstances where director of the company is not willing to comply with the court order, the courts are permitted to lift corporate veils and held directors liable. He then clarified that, this also a right case under which the court may lift the corporate veils and grant the orders sought in application. To substantiate her point that, the court is permitted to lift the corporate veil and held director of a company liable, Ms. Philip drew the attention of the court to case to the case of Yusuf Mallji. Versus Edward Masanja and another T.L.R 2006 at page 12], where the

- The Court of Appeal said and emphasized that, in the circumstances a Court Decree has not been Paid, and the company is indebted, the law allows in exceptional circumstances, the lifting of veil, and holding of directors of the company accountable. Then relying on the fact that; Hamoud Mohammed Sumry is the Managing Director of Judgment debtors companies and the fact that, is the one who conducted the business transactions which lead to companies court liabilities, and did not offer any defence in his affidavit, then he must be held liable to pay his companies court liabilities; Page 5 of 12 liabilities: Finally, Ms Phillip and prayed to the Court to grant the
- application and order arrest and detention of Mr. Hamud. Responding to the Application, Mr. Aboubakari Learned Advocate on the Affidavit filed by Hamud, Mohammed. Filing: J. Sumry, () opposed the application and advanced several reasons. The Plaintiff informs the court that, his client was not a party to the suit. Secondly he is not a decree debtor. Thirdly, he is not the Managing Director of the Judgment Debtors Companies. Fourthly, he contested that, Judgment debtors are companies which are separate legal entity from its directors, and from the legal point of view he may not be liable. To support his argument that, Hamoud Mohammed Sumry not be liable for the wrongs committed by, his solicitor, the Counsel drew the attention of the court to the decision in the case of Salmon Versus Salmon & CO [1897] AC 22 which laid down a legal principle that, a company is a separate legal entity from its directors. So, Hamoud Mohammed Sumry being a director is not be compelled to pay Decretal sum which is due and payable by Judgment debtors. Responding to the argument and request from Judgment Creditor of

lifting; a corporate veil, Mr. Aboubakari submitted that, may be done, only if there is evidence of fraud on the part of directors, or _____:e_age 6 of 12 .where there is evidence that, directors are maneuvering, or: blotk~hg the company from performing its statutory obligations. The Counsel then pointed out that, the Judgment creditor Was allowed by the court to execute the court decree by attaching company's properties, and was in the process of doing so;. But so far there is no explanation as to why he did not complete the execution process, and resorted to filing instant application. Counsel then argued that, since Mr. Mahmoud is not the managing . : director of any of the Judgment debtors' company, then it will not be proper to order his arrest and detention, while compelling him to pay Decretal sum. On the basis what he submitted, Mr. Aboubakari prayed for dismissal of the application for lack of merit. In his brief rejoinder, Ms Philip responded that, the argument presented by Mr. Aboubakari, that, Hamoud Mohammed Sumry Is not the managing director of Judgment debtors companies has no bc;lsis at because it was not pleaded iri his affidavit_ For lhat, .reasons/ she prayed the application . ' be granted; , The court has carefully considered the application, . and r~sponse . made by the Counsel of Hamoud Mohammed ,Surrfry ~ . and ' :find there matters which the court need to put them. intb proper. legal Page 7 of 12 . perspective, 'before it consider to. grant or not to grant the i !!--.. apl?l,_ic:a~lon!.. _ _.,_., . < ' T,b,e .fir\$t; point. is .that, 9-oing _~Y- Order XXI Rule 9 of 'tHe Civil Procedure Code, '[Cap 33.R;E 2002] if a .hqlder . . of the decree wants to . :. ' . :... _ _ . . . ; . . !" . : . " , execute .it, _all ,what is \$Upposed to do is to apply to the court as the

- . - . i' ~ . . ' . . . applicant. did for _execution and indicate the mode of execution he prefers. Also, it ,is important to note that, where the Decree is for payment of ~ ,. ' monies, then under Order XXI Rule 10 of the Civil Procedure Code, Cap 33 [R. E 2002] the court has facilitate its execution against Judgment debtors who are Sumry High Class Limited, and Sumry Bus Services. Regarding liabilities of director's of the companies vis a vis the company itself, _ court partly agrees with the argument of Mr. Aboubakarr, tliat, in the case of Salomon versus Salmon [1987] AC
- . . ' .z2_, '-it was'held that, a company like Sumry High Class Limited, and Sumry Bus Services is separate legal entity from lts director. It means a company ' has to be treated different with its directors. That, . . Prindpl~ is even reproduced in Section 15 (l) and (2) of the .. Companies Act' No 2 of 2062 where .it said thati after incorporation,
- the company becomes a legal entity, separate from its shareholders But it is important to note that, there are court pecisions which states exception to the principle stated in the case of SALMON. Such court decisions are like the case of Tanzindia Assurance Company Ltd. ' Commercial case No 37 of 2006, Vitafoam (T) Ltd Versus. Lumu_mba . . , Street Godoro Store Commercial Case No 34 of 2002 (Unreported) and the case of Yl:lsuf Manji Versus Edward Masanja and another T.L.R 2006 at page 127 In the cited decisions, courts in exceptional circumstance i~ allowed to use their inherent powers, ~n~d lift the veil of incorporation and held directors of the company personally liable . on the debts of .their . ' companies .. ,... So going by the above mentioned courts decisions, ~ . it is certain . -that, ' . -

the principle stated in the case *Salmon Versus Salmon* has_ an exception in the sense the director _and the company may be :treated ~. ; ~ as one and the same once, it comes to payment of certain companies liabilities. The circumstances under which such treatment of lifting the veil _may be done are many. The point for consideration in this application is if those exception circumstances of lifting the veil .also · exist in <the· present application I will pause here and return to this point ·. ·. ·. Page 9 of 12 ; ::N-0»1 . ~ m,ovin·g . ~- oh .. another aOrgurrien~, of . Mr.. Abbubakari, . the cou'rt , :: :He told th~ court that, Jucfgment debtors have instituted an appeal to ' the· Co,urt Of Appeal and the said .appeal is pen.ding. It was the :: dir~ct ::argument 'of the Learned Advocate that, since there is an ;:apl)eal ·which· is pending it is not ideal to enforce a .court decree ::a·g~instthe J'udgment debtors Qr Hamoud Moha'mmed Sumry. The court has carefully weighed, and considered the above :·mentioned argument and find.that, it does not dispute if there is a 'pending appe·ai. Ho~ever, the ·court would like emphasis that, an a\,ipea'I is not a ·bar for execution of a' court decree. , It is only an order for stay of execution, which stays execution of the court decree. So unl_ess · there is an order of stay of execution, that, is where the ! , · Decree· h()lder may be temporary restrained from executing.the court : decree: Since there is no order for stay, ,I find the application is quite proper. · Now reverting back to the question,· if there are circumstances which may w~rrant the lifting of corporate veils and held Hamoud Mohammed Sumry liable to pay the decretal sum, I find in paragraph ·!. ·1 of nis ~ffidavit filed to this court on the 7 August, 2015, he has th .~ admitt.ed tha"t, is one of· the directors of . ·Judgment debtors companies.· Page 10 of 12 ~-----" Next the court finds, Hamoud Mohammed Sumry, even if he, is not the managing director of the companies, being a director in the two companies still has a legal obligation of complying with the court orders on behalf of his companies. I find that obligation even extend to payment of Decretal sum by virtue of his p9sition as a direct9r. That, court finding takes into account that, companies acts, and transaction their business through their directors .. Now bearing in mind the Court Decree was issued on 13/8/2014 which is about "one solid year .. · from today and it has not been honoured even by i·a single cent" by the Judgment . debtors companies and even by its director including Hamud Mohamm~d Sumry, the court highly is persuaded, th~t, the:Sumry i-ilghCJ.ass. :!.. Limited and Sumry Bus Services Limited and its directors are' , · neglecting to pay the Decretal sum ... In view of such neglect which has been demonstrated by Judgment· · debtors companies, their direct9rs .including Hamoud MohafTlmed Sumry, the court applies and uses · its inherent powers,, vested to it under Section 95 of the Civil Procedure Code Cap 33 [R.E.2002] and lift the two 'veils of Sumry High Class Limited and Sumry Bus Services Limited which covers the dir~ctors, and hold Hamud Mohammed . Sumry who is director of the two companies accountable and liable to pay the Decretal sum.· . ' ,'. :.,. ,. : : ~'j ·'·7 Page 11 of 12 The . ~curt action of lifting veils and holding of Mr. Hamoud liable to ' ~ pay decretal. . . sum takes . into accodnt the . fact th~t, companies acts I ·. , ; J' , ~ and conducts their business transactions including that, of paying ~curt . decree . through its directors, ., . ' Mr Hamud being one of them. ' · -l. S.ec:onoly, the: lifting of veils had:. been done to ensure that, Ha mud M9~ammed Sumry as a ~irector ·of two Judgment Debtors companies, do not use two veils,· to evade his legal 9~ligati~n

- as a direct'r to, pa~ the Decretai sum . . 'l . ~--'. 'After lifting the Veil of incorporation of two companies , and the court .. ' . { . ' . r ~ . . . ; . . . find and decides that Hamoud Mohammed Sumry is accountable / ,2;-.-. ;.. : . and' liable to pay the Decretal sum . as a dir.ector of Ju'dgment .. debtors company. That being the case, I find it is fair that he should be given time to pay the decretal sum instead of ordering his immediate arrest, and imprisonment .In view o~ the above, I Order , Hamoud Mohan:,med Sumry to pay . . . the Decretal' Sum within 30 days from today, and report to the ' court on such payments. In the event of Hamoud Mohammed Sumry default to pay the dec;:re_tal sum, the Applicant is at ! ibility to file a fresh application. The. application partly succeeded. Since the case is at the execution stage, I make no order as to costs. Dated at Dar es Salaam thi~ 30 th day of October, 2015 H.T.SONGORO JUDGE ... Delivered at Dar es Salaam this• 30 th October, 2015 H.T.SONGORO . JUDGE The Ruling was delivered in the presence of Ms Philip Learned Advocate of Decree holder, Presence of Decree holder himself and Mr. 'Aboubakari Learned Advocate of Mr. Hamoud Mohammed Sumry and Judgment Debtors .

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