

TANZANIA / JUDGMENT

masoud kikula vs benson j semsa others 2020 tzhcld 62 8 may 2020

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT PAR ES SALAAM MISCELLANEOUS
APPLICATION NO. 579 OF 2018 BETWEEN MASOUD KIKULA.....
APPLICANT VERSUS BENSON J. SEMSA..... 1st RESPONDENT CDJ CLASIC
GROUP LTD.....2nd RESPONDENT FAST PACE C/F CO. LTD.....3rd
RESPONDENT

RULING

Date of Last Order: 24/04/2020 Date of Ruling: 08/05/2020 S.A.N. Wambura. J. This is an application filed by the applicant under a Certificate of Urgency objecting to the Warrant of Attachment issued by this Court on 16th July, 2018 on the house located at Pugu Kichangani Dar es Salaam. The application is made by Notice of Application supported by an Affidavit affirmed by the applicant MASOUD k i k u l a , under the provisions of Rule 55(1)(2), 24 (1) (2) (9) (b) (c) (d) (e) (f) and 24 (3) (a) (b) (c) (d) and 24 i

(2) (f), 24 (11) of the Labour Court Rules, GN No. 106 of 2007, Order XXI Rules 57 (1), 58 and 59 of the Civil Procedure Code [Cap 33 R.E 2019] and any other enabling provisions of the law. Mr. BENSON 3. s e m s a the first respondent filed counter affidavit challenging the application. A brief background of this matter is that, the applicant being dissatisfied with the decision of Hon. Simfukwe filed Misc. Appl. No. 332 of

2018. The matter was struck out for being incompetent by Hon. Nyerere. J. The applicant was granted leave to refile the same within seven days. When the matter was refiled it was assigned to Hon. F. Mtarania, DR who in the course of preparing the ruling discovered that she had no jurisdiction I to preside over in a matter which was in respect of the decision of her sister Deputy Registrar. On reassignment, I ordered parties to file their submissions afresh. Whereas the applicant filed his written submissions, the respondents did not file the same. Therefore the Court proceeded in their absence under the provisions of Rule 37(1) of the Labour Court Rules which provides that:- "Where no response has been filed within the prescribed period or any extended period granted by the Court within which to file a response, the presiding Judge in chamber may enter judgment by default provided that the respondent may request on good cause shown the presiding Judge to raise up the

default". Arguing in support of the application Zaidi Jumanne Muliro, Applicant's Personal representative submitted that, the applicant was not a party in Labour Dispute No. 209/2016 before CMA therefore he does not have any reasonable cause to be involved in execution proceedings No. 308/2016 before this Court. That the decree debtor in CMA's award issued on 08/06/2017 is *fast pace C/F CO. Ltd* and not the applicant herein. 1 Mr. Muliro, argued that, the conducted execution process was void abinitio due to the fact that the decree debtor changed from *FAST PACE C/F CO. LTD* to Masoud Kikula and Hon. Simfukwe, DR proceeded to order attachment of the house of Masoud Kikula. He stated that, the executed property belongs to the family of Masoud Kikula who was not party before CMA. That, by selling the disputed house it is an automatic violation of justice. 3 He submitted that, Order XXI Rule 57 (1) of [CAP 33 RE 2019] provides that, where any claim is preferred to any objection is made to the attachment of any property attached in execution of a decree on the ground that such property is not liable to such attachment the Court shall proceed to investigate on the objection raised. Therefore in the matter at I hand the Court should concentrate on the question of possession of the property in question which is the subject matter of this dispute. Hence he prayed for the Court to set aside the warrant of attachment dated 16/07/2018 delivered by Hon. Simfukwe and an Order to restrain the 1st and 2nd respondents, their agents or any other person in execution of the disputed property. After considering the applicant's submission and Court records I believe the issues for determination are:-

1. Whether the disputed house was properly attached in Execution No. 308/2016.
2. To what reliefs are the parties entitled. With due diligence this court has gone through the court records of this matter and noted that the impugned application for Execution No. 308/2016 before Hon. Simfukwe, Deputy Registrar was dismissed for want of prosecution with leave to refile on 26/3/2019. Meanwhile the third respondent herein had filed Misc. Appl. No. 407 of 2017 applying for the Court to lift the order of execution in respect of Proclamation of Sale of the House situated at Pugu Kichangani before the same Deputy Registrar Hon. S.H. Simfukwe. The said application was not granted on the ground that the properties of the said Company are nowhere to be found. Therefore the said house was properly attached due to the fact that the owner is one of the Directors of the said Company. Therefore, the applicant herein ought to contest against Misc. Appl. No. 407 of 2017 and not Execution No. 308/2016. I am not sure if it was accidentally or whether because the applicant wanted to hide this fact. Be it as it may be, since the matter is still undetermined and was filed in 2018, this court has decided to proceed to determine the same.
1. Was the disputed house properly attached in Execution No. 308/2016? It is an undisputed fact that before CMA the 1st respondent filed a dispute against *fast pace c/f CO. Ltd*, the 3rd respondent herein. The 5 applicant was not a party to that dispute. In his counter affidavit the 1st respondent avers that the applicant herein was joined in the execution process on the reason that he was the Managing Director of the said Company. It is a trite law that a Company once incorporated, it acquires legal personality distinct from its members, it can

sue and be sued on its own. This principle is well elaborated in a famous case of *Salomon v. Salomon I & Co. Ltd* (1897) A.C.22. Briefly the facts of the case were that: Salomon had initially carried on prosperously the business of a leather merchant. Later on he converted the business into a Limited Company which ran into difficulties. The Company went into liquidation and its assets 'i were sufficient to discharge the debenture, but nothing was left for the unsecured creditors. The Court of Appeal held Salomon liable but the House of Lords reversed the decision holding that the Company being a legal person its members including Salomon were not liable for its debts. As per Lord Macnaghten the House of Lords at page 49 inter alia held:- "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 o f them. Nor are subscribers, as members liable, in any shape "or form, except to the extent and in the manner provided by the Act" None the less, in certain special and exceptional circumstances, the Court may go beyond the purview of this principle by what was described in Salomon's case (supra) as lifting of the veil. This principle is incorporated under Section 15 of the Companies Act, Act No. 12 of 2002 and has been cited in various cases including that of *Yusuf Manji Vs. Edward Masanja and Abdallah Juma* [2006] TLR 127 (CAT). .i In the matter at hand I have gone through Misc. Appl. No. 407 of 2017 and the reasons advanced by Deputy Registrar for lifting the veil of incorporation and I believe they are justifiable. This is because the applicant's Company was refusing to be served and it's properties were nowhere to be found. Since the applicant was one of the shareholders and Managing Director of the said Company, in my view he is the responsible person who could identify the assets of the said Company. If this court sets aside the said order of attachment the first respondent would be left with an empty decree. This was also the position in the case of *Yusuf Manji* (supra). Again in the case of *Chongqing Lifan Industry (Group) Impo & Exp Co. Ltd Vs. M/s I & M Bank Tanzania Ltd and Another*, Misc. Civ. Appl. No. 386 of 2019 it was held that:- "Section 382 does not automatically lift the veil. The veil is lifted by the Court upon satisfaction that indeed the Director misapplied the money or assets o f the Company or that, he or she has been guilty o f misfeasance, breach a fiduciary or other duty in relation to the company". Therefore on the basis of the above discussion the applicant's property was properly attached in Execution No. 308/2016. As for the allegation that the disputed house is a matrimonial home I believe it has no merit. This is because all the documents attached in Misc. Appl. No. 407 of 2017 indicated that the house was registered in the name of MASOUD KIKULA, the applicant herein. The fact that it is in the name of other family members was never raised before the Deputy Registrar and therefore cannot be entertained now.

2. What are the reliefs entitled of the parties? The applicant prayed for this Court to invoke its powers vested under Order XXI Rules 57 (1), 58 and 59 of [Cap 33 R.E 2019] which I have gone through and it is my findings that the property was properly attached. In the circumstances, I have no reason to fault the Deputy Registrar's Order that the attachment order will only be revoked on the condition that the applicant together with other

shareholders of f a s t p a c e c /f CO. l t d enter deposits in Court or pay the decretal sum to the respondent and not otherwise. The applicant cannot be left to escape the liability of paying th£ first respondent. In the result this application lacks merit and is hereby dismissed. JU D G E 08/05/2020 9

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