

TANZANIA / JUDGMENT

mohamed mbaruku another vs mbuyeku enterprises ltd 2023 tzhcld 1340 15 june 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA LABOUR DIVISION AT PAR ES
SALAAM CONSOLIDATED MISC. APPLICATIONS NOS. 440 AND 441 OF 2022 BETWEEN
MOHAMED MBARUKU 1st APPLICANT MARIAM ADAM..... 2nd APPLICANT MBUYEKU
ENTERPRISES LTD 1st RESPONDENT JOYCE MBUYEKU 2nd RESPONDENT

RULING

12th - 15th June, 2023 x;;;,jg OPIYO, J <_ % On the same day both applicants filed their respective applications to lift the corporate Veil of the first respondent (judgment debtor) for the second respondent who is alleged to be the managing director of the first respondent to be held responsible to pay the applicants their respective awarded amounts as decree holders. Request is also for an order for the i judgement debtor to show cause as to why she should not be committed to prison as a civil prisoner for failure to pay the decretal sum. Historically; applicants were employed by the 1st respondent on the same year 2010. Also, both were terminated in the same year 2019. Aggrieved, /'£***. they filed for a labour dispute at CMA of which the award was on their favour as it was determined that they were terminated unfairly. Mr. Mohamed Mbaruku was awarded TZS. 11,056,846/= and Ms. Mariam Adamu was awarded TZS. 6,569,230/=. The amount awarded was not paid by the decree debtor to the decree holders,5 hence the filing of this at ■ application. Because of the similarities in prayers and historical connections as awards emanated from the same labour dispute on 21st March, 2023 the applications%were consolidated upon parties requests. The matter proceeded by wa\$:iof written submissions. Both parties were represented. Applicants were represented by Mr. Michael Deogratius Mgombozi from Tanzania Union of Private Security Employees (TUPSE) while the respondent was represented by Advocate John James from Creo Advocates. 2 Mr. Mgombozi submitted that applicants seeks for this court to issue an order for the judgement debtor to show cause as to why she should not be committed to prison as a civil prisoner for failure to pay the decrial sum. He stated that applicants were employed by the 1st respondent, they were later terminated, and later took the matter to CMA which gave the award in their favour. The second respondent filed an application at CMA for setting aside the CMA award and it was dismissed. That, the respondents were aware of the

award and the reason that the company was wound up is an after thought. In his view the respondent should not hide under the umbrella of liquidating the company to make the applicants loose their rights. He further added that the act of the respondent to file to the labour court asking to suspend the application for the implementation of the award proves that she was aware of the award. Thus, she is required to V pay applicaiW Mr. Mgombozi submitted further that as the respondents have not brought to court any plans for execution of the award, the court should order for distribution of the assets she got from the company and pay to the applicants considering the fact that the order was given before bankruptcy of the company. In his view, for respondent's failure to pay the award she should be kept in detention. He also prayed for the counter affidavit to be 3 dismissed as it has not shown good cause by the decree debtor. It is used to delay the process of execution of the decree. He submitted that, all applications made by the respondent were delaying tactics in wasting valuable time of the court. He finally supported his points by referring to cases of Shaizad Bhanji vs Raju Mwambungu & 161 Others and W Group 7 Pty vs Corporate Security Service, Revision No, 182 of 2022, Dar es Salaam Registry. A Against the application, Mr. James submitted that before the award was satisfied the first respondent was wound up by the order of the court in Miscellaneous Civil Cause No. 62 of 2020 and Mr. Ngingite was appointed as interim liquidator. He continued that applicants filed for applications for % % execution No. 87 of 2020, 492 of 2021 and 507 of 2021 after the first respondent being wound up and the liquidator has already assumed the office. Those facts were addressed in court and the applications failed and that is vyhy this application emerged. The raised concern on the competency of the matter before the court, he submitted that the laws used for filing of these application do not have mandate to grant any of the prayers sought. He was of the view that, wrong citation as well as non citation of the enabling provision of the law 4 renders the application incompetent. To support his point he referred to the case of Hussein Mgonja vs Trustee of the Tanzania Episcopal conference, Civil Revision No. 02 of 2002, CA (unreported). He then prayed for both applications to be struck out for the court being improperly moved. & .A X % He continued that the respondents at this time are not in position to make any orders against the company as the first respondent is under liquidation and as section 299 of the Companies Act provides that, once the interim liquidator is appointed by the court then he becomes the custodian of all the properties of the company which the company is entitled to. He cited section 349(2) of the s^me Act where it is provided that when the liquidator is appointed all the directors and officers of the company powers come to an end. In the process, Mr. Mohamed Ngingite assumes all powers in the company after his appointment and everything now runs under him. Further, he|submitted that, the liquidator has power to prosecute and defend the suit, therefore, respondents are not responsible at this point. It is the liquidator who is responsible. He finalized by submitting that, if the applicants are aggrieved by the conduct of the liquidator they have to 5 apply to the court presiding the winding proceedings. He then prayed for the applications to be dismissed with costs. Before determination of the application at hand, the advocate for the respondent raised the issue of jurisdiction stating that the application is improperly filed which makes this court incompetent to try the matter. On that notion the court cannot proceed until the determination of the jurisdiction matter raised. The same was held in the case of Patrick William Magubo vs Lilian Peter Kitali, Civil Appeal No. 41 of 2019, CAT at Mwanza at pages 9-10 which

held "From the above extract and considering the fact that jurisdiction of courts is conferred and prescribed by law, it is therefore a primary duty of every court, before venturing into a determination of any matter before it, to first satisfy itself that it is vested with the requisite jurisdiction to do so." The advocate for the respondent stated that this court is incompetent as the application has been brought under wrong provisions of law but in saying so he did not identify those proper provisions. The court in going through the provisions under which the application has been brought, they are found to be relevant because there is no specific provision of law under 6 the labour laws providing for application for lifting corporate veil arrest and detention. The provisions of the civil procedure Code cited including Order XXI rule 38, rule 35(1) and (2), rule 36 read together with section 44 and 95 of the same Code suffices to bring the matter properly before the court. It is therefore the finding of this court that the objection on the jurisdiction of this matter fails. This gives us a room of proceeding with the determination of the application. After going through parties submissions, it is found "Xv Kw. that this court has been SW 'v>. called to determine whether the applicant's application for lifting veil is viable in the circumstances of this matter. For a start, it is best to know what the application entails in simple terms. The corporate veil is an imaginary curtain separating a company from its members. In the case of Salomon vs Salomon & Co. Ltd (1987) A.C. 22 as it was referred in the case of Mrs. Georgia Celestine Mtikila vs PG Associates Ltd and Another, Misc. Civil Application No. 154 of 2020, High Court at Dar es Salaam at page 8 it was held that: - "The Company is at law a different person altogether from subscribers ..., and, though it may be that after incorporation the business is precisely the same as it was before, and the same 7 persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers,..." This means, members of the company cannot be liable of the actions done by the company. That is where the doctrine of lifting of corporate veil comes into play as it operates in making sure that directors do not hide under the shield of corporate veil in evading liabilities. The same was held in the case of Saguda Magawa Salum & 3 Others vs Nam Company Limited and Another, Misc. Civil Application No. 34 of 2021, High Court at Dodoma at page 6 that: - :k. ® "The doctrine of lifting of corporate veil refers to the situation where a shareholders is held liable for its corporation's debts despite the rule of limited liability and/or separate personality." ■ The applicant herein through her representative stated that, the second respondent knew about award granted to the applicant by CMA before the winding up of the company and that she should not hide under the umbrella of liquidation of the company to run from the liabilities. On the other hand, the advocate for the respondents stated that, the first respondent has already wound up by the order of the court in the Misc. Civil Cause No. 62 of 2020. For that he continued to submit that, the company is under the liquidator, one, Mr. Mohamed Ngingite. Perusing the 8 pleadings, it is revealed that even the counter affidavit on behalf of the respondents was affirmed by the said Mohamed Ngingite as an appointed official liquidator who was entrusted by the obligation of administering the affairs of the respondent at that time attaching the decision of the court in Misc. Civil Cause No. 62 of 2020 dated 28th day of June 2021 issuing winding up order against the respondent. That means the respondent is indeed under liquidation as stated in the affidavit of the liquidator and submission of John James. Under section 299 of the Companies Act [CAP. 324:01 2022] states what happens when the company is under liquidation as follows: - "Where a winding up order has

been made or where an interim liquidator has been appointed, the liquidator or the interim liquidator, as the case may be shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled." Also section 301(l)(a) of CAP. 212 R.E. 2002 provides for the powers of the liquidator in the following words:- 301(1) "The liquidator in a winding up the court shall have power with the sanction either of the court or of the committee of inspection- fa) To bring or defend any action or other legal proceeding in the name and on behalf of the company." 9 The above section also answers all the questions as to why the liquidator is the one who filed the counter affidavit in this matter as the law gives him power to defend any case of the company he/she is liquidating. In this circumstance, there is no dispute that the first respondent is now under liquidation following the parties admission and also the attachment of the case Misc. Civil Cause No. 62 of 2020, (supra) on 28th June, 2021 appointed Mr. Mohamed Ngitinge as an official liquidator of the first respondent. The law under section 301(3) of CAP. 212 R.E. 2002 directs on how any creditor should be taken care of in the circumstance. For easy reference here is the provision "The exercise by a liquidator in a winding up by the court of the powers conferred by this section shall be subject to the control of the court, and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of those powers. This provision states clear that the matter concerning the company under liquidation has to be taken to the court which appointed such liquidator. Since this is not the court which appointed the liquidator and there is no dispute that the first respondent is under liquidation; I find the application is lingering before a wrong court and against the wrong party as the proper party to be sued is the appointed liquidator as we have seen above. This court therefore lacks the jurisdiction to entertain the matter. I therefore, dismiss this application as this court do not have jurisdiction to 11

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