

TANZANIA / JUDGMENT

Execution No 20891 of 2024 Petrofuel

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA COMMERCIAL DIVISION AT DAR ES SALAAM EXECUTION NO. 20891 OF 2024 (Originating from Commercial Case No. 46 of 2016) PETROFUEL TANZANIA LIMITEDAPPLICANT/DECREE HOLDER VERSUS GRAND CONFECTIONARY'S BAKERY LTD....RESPONDENT/DECREE DEBTOR

RULING

Date of Last Order:12.12.2024 Date of Ruling:07.03.2024 AGATHO, J.: The decree holder is moving this court for orders of arrest and detention of Youssef Malek Jabber and Sami Jaffar Ghaddar, as civil prisoners. They are Principal Officers (Directors) of the Judgment Debtor. The application is preferred under Order XXI Rule 35 (2) of the Civil Procedure Code, Cap. 33 R.E. 2019 (the CPC). It is supported by an affidavit of Anoop S. Kumar, Principal Officer of the Decree Holder. Of the two directors sought to be detained as civil prisoners, only one, Youssef Malek Jabber was found and filed his affidavit to show cause. In reply thereto, the decree holder filed her counter affidavit affirmed by Anoop S. Kumar. As only Youssef Malek Jabber was brought to this Court for the aforementioned relief, then this ruling is in respect of him alone as 1 opposed to Sami Jaffar Ghadda who had never entered appearance in court to show cause. Brief facts of this matter as can be discerned from the parties' affidavits are that, the present application has been preferred with a view of executing a decretal sum of TZS. 914,760,649/=, emanating from a default judgment and decree in respect of Commercial Case No. 46 of 2016 (the Commercial Case). In that Case, parties were the decree holder and the judgment debtor. Youssef Malek Jabber's depositions (paragraphs 5, 9,10 and 15) are to the effect that, he was not party to the Commercial Case. As such, he is not satisfied with the mode of execution opted by the decree holder. To him, the said mode is improper because the default judgment and decree were passed against the respondent, a legal person separate from him. He deponed further that, since he is not directly involved with the liability of the respondent/judgment debtor in respect of the Commercial Case and that, since the default judgment and decree was passed against the latter, then execution thereof ought to have been brought against her. Hearing of the application was by way of written submissions. Messrs. Alex Mashamba Balomi and Benedict Ishabakaki, learned counsel represented the decree holder. Oppositely, Youssef Malek Jabber was under representation of Mr. Stephen Mosha, learned counsel. 2 Submitting against the application, the counsel commenced by praying to adopt the affidavit and reply to counter affidavit of Youssef Malek Jabber as part of their submission. They then proceeded to argue. Submissions relevant to this matter were to the

effect that it is a settled principle of law that a company is an independent entity with separate personality from its shareholders and directors. Regarding this position reference was made to the case of *Salomon vs. Salomon and Co. Ltd*,

(1897) AC No. 22. In line with the above position, it was further argued that, it is only under special circumstances, a director can personally be held liable for liabilities of a company. With this line of argument therefore, the counsel asserted that, in the matter at hand, the decree holder has not established any special circumstances so as to hold Mr. Youssef Malek Jabber personally liable for the decree passed against the judgment debtor. In furtherance he argued that since the decree sought to be executed was passed against the judgment debtor who is a limited liability company, then the said Youssef Malek Jabber is a stranger to the Commercial Case which gave rise to the instant matter. Regarding the liability of directors as against liability of a company, reference was made to the case of *Adamas Conglomerates Ltd vs. Taashi Consulting 3 Ltd*, Commercial Case No. 187 of 2020 (unreported). Therein, this Court held at pages 11 and 12 that; ‘.....the directors and/or shareholders can only be reached under special circumstances as illustrated in the case of *Yusuf Manji v Edward Masanja and Another* [2006] T.L.R. 127. No special circumstances have been adduced leading to lifting of veil of incorporation which would have allowed directors/shareholders to be liable on behalf of the company. The judgment debtor being a limited liability company is a separate legal entity which can sue and be sued. The judgment debtor’s veil of incorporation has not been lifted to warrant the arrest and detention of its directors who are the ones having the conduct of the company business on daily basis.’ Therefore, from the position of law stated above, the counsel prayed for the application at hand to be struck out. In reply submissions, the decree holder acknowledged the fact that the judgment and decree the subject of the matter at hand was passed against the judgment debtor herein as opposed to Youssef Malek Jabber who was never party thereto. He further, acknowledged the position of the law that, a company is an independent entity. He however asserted that, the principle is 4 misconstrued by the judgment debtor. To him, a company is separate entity from its shareholders and not from its directors. He went on to distinguish the *Salomon’s* case (*supra*) with the case at hand stating that, in the former, the decree holders aimed at arresting shareholders and not directors of the company, but in the matter at hand, the decree holder intended to seek help of the court for arrest and detention of directors of the company as they are responsible for day- to-day activities of a company. In that case, the counsel maintained that Youssef Malek Jabber being the principal officer of the decree holder herein, is responsible for the latter’s day-to-day operations including payment of her debts. He also submitted that, an arrest of a director of a company does not need him to be part of the suit. On this regard, reference was made to Sections 182 and 185 of the Companies Act No. 12 OF 2002 which impose upon directors a duty to act with good faith. He further argued that, only two reasons can stop execution. One, satisfaction of the decree by the decree holder and two, an order staying execution. To buttress this position reliance was placed upon the case of *DB Shapriya & Co. Ltd vs. Gulf Concrete & Cement Products Co. Ltd*,

Commercial Case No. 23 of 2015. 5 From the above position, it was the counsel's submission that none of the two reasons have advanced in the matter at hand. Thus, he conclusively prayed for grant of the application with costs. He further prayed for detention of Mr. Youssef Malek Jabber as a civil prisoner in execution of the decree the subject of this matter. Rejoinder submissions on the other hand substantially reiterated the submissions in chief. Upon meticulous consideration of the application, parties' affidavits and their rival submissions, the issue for determination is whether Youssef Malek Jabber has shown good cause for not being detained as a civil prisoner. It is not in dispute herein that the said Youssef Malek Jabber was not party to the Commercial Case from which the decree sought to be executed emanates. Further, it is not contested that he is one of the directors of the judgment debtor herein. The contention is however, on his liability towards the decree of a case which he was not a party. On this position, it is the decree holder's stance that, since the said Youssef Malek Jabber is one of the directors of the judgment debtor, then he is directly liable to satisfy the subject decree regardless of whether or not he is a party thereto. To the applicant, it is the other way round as hinted earlier. 6 Taking into consideration the above line of arguments from both parties, I am in accord with Mr. Youssef Malek Jabber that he is not liable towards the decree sought to be executed. This is for obvious reasons. One, as rightly submitted, he is not party to the decree sought to be executed. In other words, he is not the judgment debtor thereto. The mode of execution sought by the decree holder in this matter (Civil imprisonment) is limited to judgment debtors. This is in accordance with Section 44(1) of the CPC. It provides as thus:- "44. -(1) A judgment debtor may be arrested in execution of a decree at any hour and on any day and shall, as soon as practicable, be brought before the court, and the court may order his detention..." Two, the judgment debtor in this matter is a limited liability company hence, separate from Mr. Youssef Malek Jabber as one of her directors. This is in line with the principle of separate corporate personality laid down in the renowned case of *Salomon vs. Salomon* (supra). On this position, the applicant contended that the principle only separates shareholders from a company as opposed to directors. With respect, I decline to subscribe to this position because it has no legal backup. In fact, the principle itself suggests that, once a company is incorporated it becomes a person of its own, not only separate from its shareholders but also from anybody else including its directors. Thus, directors only become supervisors of this legal person. Hence, their supervisory role in my view, does not make them inseparable from it as they are its mere agents. That is why under this very doctrine lies another twin principle of corporate veil which can under special circumstances such as the present, be lifted in order to deal directly with directors. The same principle applies to execution of decrees like the one in the instant matter. It is my considered view that for the applicant to succeed in an application for execution against director(s) of a company, he/she must first apply to court for lifting or piercing the corporate veil in order to make them personally liable to the debts of the judgment debtor. See *Adamas' case* (supra). It is only when the veil of incorporation of the judgment debtor is successfully lifted, then an application for execution like the one at hand may be sought. Unfortunately, this was done in this matter.

Simply put, the instant application is prematurely brought before this court. For the foregoing reasons and analysis, the issue raised is answered in affirmative. Thus, the application is disallowed with costs. Further to that, Youssef Malek Jabber shall be set free, and his Title Deed No. 178046, Plot No. 291 Block D Amani Gomvu Area Kinondoni Municipality 8 within the City of Dar es Salaam that he surrendered as condition for his release on bail shall be returned to him immediately. It is so ordered. DATED at DAR ES SALAAM this 7th March Day of March 2025. U. J. AGATHO JUDGE 07/03/2025 Court: Ruling delivered by Hon. Joyce Minde, Deputy Registrar, today, 7th March 2025 in the presence of the parties. U. J. AGATHO JUDGE 07/03/2025 9

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