

## MUSSA SHAIBU MSANGI

v.

## SUMRY HIGH CLASS LIMITED AND ANOTHER

5.

HIGH COURT OF TANZANIA (COMMERCIAL DIVISION)  
SONGORO, J

30<sup>TH</sup> OCTOBER, 2015

10. (MISC. COMMERCIAL CAUSE NO. 20 OF 2012)

*Civil practice and procedure – Decrees – Execution of decree –  
Whether an appeal is a bar to execution of a decree.*

15. *Civil practice and procedure – Applications – Application for  
execution of decree – Procedure for filing applications for  
execution.*

20. *Company law – Corporate legal personality – Doctrine of –  
Whether absolute.*

*Company law – Veil of incorporation – Lifting of corporate veil –  
Circumstances where the courts may lift the corporate veil.*

25. The applicant sought for orders of arrest and detention as a civil  
prisoner, Mr. Hamoud Mohammed Sumry, a director of the  
judgment debtor's companies, for his failure and neglect to pay the  
decretal sum. The applicant, a decree holder, for a period of one year  
had been trying, rather unsuccessfully, to execute the decree against  
30. the judgment debtors, the respondents. This application was  
vehemently opposed by Mr. Sumry, who argued that, although he  
was one of the directors of judgment debtor's companies, he was  
not, in his personal capacity, a party to the proceedings giving rise to  
the decree sought to be enforced against him. He further argued that  
35. since the company to which he is a director, is a separate legal entity  
from him as a director, the decree in question cannot be executed  
against him. The respondent further submitted that the decree was  
not enforceable because the judgment debtors had already instituted  
an appeal, which was pending, to the Court of Appeal. The court  
40. framed two issues for determination. First, whether the application

was properly filed before it and, secondly, whether special  
circumstances existed to warrant the invocation of court's inherent  
power to lift the corporation veil and hold the directors or  
shareholders liable for the company's debts. 5.

**Held:**

- (1) In terms of Order XXI Rules 9 and 10 of the Civil Procedure  
Code, the decree holder who wants to execute a decree, has  
to apply to the court indicating the mode of execution and  
the court is duty bound to facilitate the execution against the  
judgment debtors. 10.
- (2) The mere fact that there is a pending appeal, without order  
for stay of execution, does not bar the execution of a court  
decree. 15.
- (3) Since the decree was issued one year ago and until today, it  
has not been honoured, the court is highly persuaded that the  
respondent and its directors are neglecting to pay the  
decretal sum. 20.
- (4) The long-standing principle of corporate personality, as was  
held in *Salomon v Salmon & Company* and reflected under  
section 15(1) and (2) of the Companies Act, No. 2 of 2002,  
that a company has a legal personality separate and distinct  
from its shareholders (or directors), is not absolute and there  
are special circumstances where courts use their inherent  
powers to lift the veil of incorporation and hold directors of  
the company personally liable for the debts of their  
companies. 25.
- (5) Since companies act and transact their business through  
their directors, and since Mr. Sumry is one of the directors  
of judgment debtors companies which has not honoured the  
court decree for one year now, the court cannot permit Mr.  
Sumry to hide under the corporation veil to evade his legal  
obligation as a director to pay the decretal sum. 35.
- 40.

- (6) In view of neglect, which has been demonstrated by the judgment debtors companies, their directors including Hamoud Mohammed Sumry, the court applies and invokes its inherent powers, vested in it under section 95 of the Civil Procedure Code, Cap. 33 [R.E. 2002] to lift the two veils of respondents companies (Sumry High Class Limited and Sumry Bus Services Limited) which covers the directors, and hold Hamud Mohammed Sumry, who is director of the two companies, accountable and liable to pay the decretal sum.

**Cases referred to:**

1. Yusuf Manji v Edward Masanja and Another [2006] TLR 127
2. Salomon v Salomon & Co. [1897] AC 22
3. Tanzindia Assurance Company Ltd, High Court of Tanzania, Commercial Division, Commercial Case No. 37 of 2006 (unreported)
4. Vitafoam (T) Ltd v Lumumba Street Godoro Store, High Court of Tanzania, Commercial Division, Commercial Case No. 34 of 2002 (unreported)

**Statutory provisions referred to:**

1. Civil Procedure Code, Cap. 33 [R.E. 2002], section 95, Order XXI, Rules 9 and 10
2. Companies Act No. 2 of 2002, section 15(1) and (2)

- Ms. Philip for the applicant.  
Mr. Aboubakari for the respondent.

**SONGORO, J**, delivered the judgment of the court.

- Mussa Shaibu Msangi, a decree holder, has a court decree of Tshs. 179,379,980 and interest passed in his favour by this court against Sumry High Class Limited and Sumry Bus Service, judgment debtors. He wants to execute it, in order to get his monies.

- Thus on 30/10/2014, the decree holder applied to attach 5 buses which belong to the judgment debtors, but his application did not bear any fruit.

Later, on the 25<sup>th</sup> February, 2015, decree holder filed the instant application under Order XX1 Rules 9 and 10 of the Civil Procedure Code, Cap. 33 [R.E. 2002] for execution of his court decree.

On mode of execution, the decree holder applied for arrest and detention of Hamoud Mohammed Sumry, who is the Managing Director of the judgment debtors companies as civil prisoner for his failure and neglect to pay the decretal sum.

Hamoud Mohammed Sumry appeared before the court and filed an affidavit to oppose the application. In his affidavit, he explained that, he is one of the directors of judgment debtors companies, but denied that, he is a party in Commercial Case No. 20 of 2012 and for that reason the court decree cannot be executed against him.

He then elaborated in his affidavit that, the judgment debtors are his companies, which under the law are separate legal entities from its directors. For this reason and others, he contested that he may not be held liable. So, 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 20/8/2015. At the hearing, Ms. Philip, learned advocate, appeared for the decree holder and pursued the application whereas Mr Aboubakary, learned advocate, appeared for Hamoud Mohammed Sumry and opposed the application.

On her part, Ms. Philip, relying on the application and paragraphs 4 and 5 of her "counter affidavit" filed on 18/8/2015, informed the court that, Mussa Msangi has a court decree of about Tshs. 179,379,980 which also carries interest. She then explained that, the decree holder has attempted to execute it against Sumry High Class Limited and Sumry Bus Service, who are judgment debtors but his attempt to execute has failed.

She then briefed the court that, due to the fact that judgment debtors companies operate through their directors, then Hamoud

5. Mohammed Sumry who is the Managing Director of the said companies has a legal obligation to comply with the court order and pay the decretal sum.

10. 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 paid the decretal sum.

15. It was the argument of the decree holder that, since Hamoud is the director of judgment debtors companies which have refused to comply with the court order and pay decretal sum, then the court may lift the corporate veil of the two companies, and hold Hamoud Mohammed Sumry, liable, and order his arrest and detention as a civil prisoner, for failure and neglect to pay the decretal sum.

20. The counsel then insisted that under the circumstances where a director of the company is not willing to comply with the court order, courts are permitted to lift corporate veil and hold directors liable. She then clarified that, this is the right case under which the court may lift the corporate veil and grant the orders sought in the application.

25. To substantiate her point that, the court is permitted to lift the corporate veil and hold director of a company liable, Ms. Philip drew the attention of the court to the case of *Yusuf Manji v Edward Masanja and Another* [2006] TLR at page 127 where 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.

30. Then relying on the fact that, Hamoud Mohammed Sumry is the Managing Director of judgment debtors companies and the fact that he is the one who conducted the business transactions which led to companies' liabilities, and did not offer any defence in his affidavit, then he must be held liable to pay his companies' liabilities. Finally,

Ms. Philip prayed to the court to grant the application and order arrest and detention of Mr. Hamoud.

5. Responding to the application, Mr. Aboubakari, learned advocate relying on the affidavit filed by Hamoud Mohammed Sumry, opposed the application and advanced several reasons. First, he 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. 10.

15. 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 is not liable for the wrongs committed by his company, the counsel drew the attention of the court to the decision in the case of *Salomon v Salomon & 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 may not be compelled to pay decretal sum, which is due and payable by judgment debtors. 20.

25. Responding to the argument and request from judgment creditor of lifting a corporate veil, Mr. Aboubakari submitted that, that may be done, only if there is evidence of fraud on the part of directors, or where there is evidence that directors are maneuvering or blocking the company from performing its statutory obligations. 30.

35. 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 the instant application. 40.

40. Counsel then argued that, since Mr. Hamoud is not the Managing Director of any of the judgment debtors' companies, then it would not be proper to order his arrest and detention, while compelling him to pay the decretal sum. On the basis of what he

submitted, Mr. Aboubakari prayed for dismissal of the application for lack of merit.

5. In her 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 basis at all because it was not pleaded in his affidavit. For that reason, she prayed the application be granted.

10. The court has carefully considered the application and response made by the counsel of Hamoud Mohammed Sumry and finds there are matters which the court needs to put into proper legal perspective, before it considers to grant or not to grant the application.

15. The first point is that, going by Order XXI Rule 9 of the Civil Procedure Code, Cap. 33 [R.E. 2002], if a holder of a decree wants to execute it, all that he is supposed to do is to apply to the court as the applicant did for execution and indicate the mode of execution he prefers.

20. 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 to facilitate its execution against judgment debtors who are Sumry High Class Limited and Sumry Bus Services. Regarding liabilities of directors of the companies *vis-à-vis* the company itself, this court partly agrees with the argument of Mr. Aboubakari, that, in the case of *Salomon v Salmon & Co.* [1987] AC 22, it was held that, a company like Sumry High Class Limited or Sumry Bus Services is a separate legal entity from its directors. This principle is reproduced in section 15(1) and (2) of the Companies Act, No. 2 of 2002 which provides that, after incorporation, the company becomes a legal entity, separate from its shareholders.

35. But it is important to note that, there are court decisions which state exception to the principle stated in the case of *Salomon*. Such court decisions are like the case of *Tanzindia Assurance Company*

*Ltd Commercial Case No. 37 of 2006, Vitafoam (T) Ltd v Lumumba Street Godoro Store Commercial Case No. 34 of 2002 (unreported) and the case of Yusuf Manji v Edward Masanja and Another [2006] TLR at page 127.* 5.

In the cited decisions, in exceptional circumstances, courts are allowed to use their inherent powers to lift the veil of incorporation and hold directors of companies personally liable for the debts of their companies. 10.

So going by the above mentioned court decisions, it is certain that, the principle stated in the case *Salomon v Salomon* has an exception in the sense the director and the company may be treated as one and the same when it comes to payment of certain companies' liabilities. 15.

The circumstances under which such treatment of lifting the veil may be done are many. The point for consideration in this application is whether those exceptional circumstances of lifting the veil also exist in the present application. I will pause here and return to this point. 20.

Now moving to another argument of Mr. Aboubakari, that judgment debtors have instituted an appeal to the Court of Appeal and the said appeal is pending, it was the direct argument of the learned advocate that, since there is an appeal which is pending it is not ideal to enforce a court decree against the judgment debtors or Hamoud Mohammed Sumry. 25. 30.

The court has carefully weighed and considered the above-mentioned argument. The court does not dispute that there is a pending appeal. However, the court would like to emphasize that, an appeal 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. Where there is an order of stay of execution, the decree holder may be temporarily restrained from executing the court decree. Since there is no order for stay, I find the application is quite proper. 35. 40.

5. Now reverting to the question whether there are circumstances which may warrant the lifting of corporate veil and hold Hamoud Mohammed Sumry liable to pay the decretal sum, I find that in paragraph 1 of his affidavit filed in this court on 7<sup>th</sup> August, 2015, Hamoud admitted that, he is one of the directors of judgment debtors companies. 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, he assumes a legal obligation of complying with the court orders on behalf of his companies. I find that obligation even extends to payment of decretal sum by virtue of his position as a director. The court takes into account that companies act and transact their business through their directors.

10. Now bearing in mind that 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 "a single cent" by the judgment debtors companies and even by its directors, including Hamoud Mohammed Sumry, the court is highly persuaded, that, Sumry High Class Limited and Sumry Bus Services Limited and its directors are neglecting to pay the decretal sum.

15. In view of such neglect, which has been demonstrated by judgment debtors companies, their directors, including Hamoud Mohammed Sumry, the court applies and uses its inherent powers, vested in it under section 95 of the Civil Procedure Code, Cap. 33 [R.E. 2002] to lift the two veils of Sumry High Class Limited and Sumry Bus Services Limited which covers the directors, and hold Hamoud Mohammed Sumry who is director of the two companies accountable and liable to pay the decretal sum.

20. The court action of lifting veils and holding of Mr. Hamoud liable to pay decretal sum takes into account the fact that companies act and conduct their business transactions, including that, of paying court decretal sums through their directors, Mr. Hamoud being one of them.

25. Secondly, the lifting of veils has been done to ensure that Hamoud Mohammed Sumry as a director of two judgment debtors

companies does not use the two veils, to evade his legal obligation as a director to pay the decretal sum.

5. After lifting the veil of incorporation of the two companies, the court finds and decides that Hamoud Mohammed Sumry is accountable and liable to pay the decretal sum as a director of judgment 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.

10. In view of the above, I order, Hamoud Mohammed Sumry to pay the decretal sum within 30 days from today, and report to the court on such payments.

15. In the event of Hamoud Mohammed Sumry's default to pay the decretal sum, the applicant is at liberty to file a fresh application. The application partly succeeds. Since the case is at the execution stage, I make no order as to costs.

20. *Application partly granted.*