

**THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**[IN THE DISTRICT REGISTRY OF ARUSHA]**

**AT ARUSHA**

**MISCELLANEOUS CIVIL APPLICATION NO. 81 OF 2022**

*(Originating from Civil Case No. 24 of 2021)*

**GEORGE NGOLLA MBWAMBO..... APPLICANT**

**VERSUS**

**BIRGIT WELLNER.....RESPONDENT**

**RULING**

28<sup>th</sup> October & 22<sup>nd</sup> November, 2022

**TIGANGA, J.**

This application is basically for security for costs. It is preferred under Order XXV, rule 1(1) of the Civil Procedure Code, [Cap. 33 RE 2019] and any other enabling provisions of the Law. The court was moved by the chamber summons supported by the affidavit sworn by the applicant George Ngolla Mbwambo.

The order for security for cost is sought pending hearing and determination of the main suit to wit, Civil Case No. 24 of 2021 hereinafter the main suit. The applicant in this application is the defendant in the main suit, while the respondent, herein is the plaintiff in the main suit. The applicant prays before this Court for an order for

the respondent (the plaintiff in the main suit) to furnish security for the cost amounting Tshs. 33,000,000/- quantified from the total sum of the claim by the respondent to the applicant, in the main suit. According to the record, the respondent claims Euro 403,558= equivalent to Tshs. 1,047,669,054.42/- and USD 4,000 equivalent to Tshs. 9,208,558/- whose total sum is Tshs. 1,056,877054.42/-

According to the counsel for the applicant, the computation of the said security for costs is based on item 8 of the 9<sup>th</sup> Schedule to the Advocates Remunerations Order, 2015 under which the chargeable amount by the Advocate is 3% of the total claimed amount which exceeds 400,000,000/=.

Following such calculations, the applicant estimates the chargeable fee for legal representation to be at the amount of 31,706, 311.63 and other incidental cost including transport, accommodation and meals for two witnesses, one from German and the other from Tanzania to approximately be Tshs. 1,293,688.37/- in total bringing the abovementioned amount of which the applicant prays this court to order the respondent to furnish as security for costs.

With leave of the court and consent of the parties, the hearing was conducted by way of written submissions. At the hearing Ms. Lilian

Joely, learned Advocate represented the applicant whereas Ms. Happy Herbert Mlacha, also learned Advocate, represented the respondent. Both Advocates filed their respective submissions in time. In their respective submissions, they adopted their affidavits to form part of their submissions.

Supporting the application, Ms. Lilian Joely, was of the view that, the said amount of 33,000,000/- was incurred and or is likely to be incurred by the applicant. Therefore, the respondent be ordered to furnish the said amount as security for costs pending hearing and determination of the main suit. The reasons for so praying are that, the main requirement for issuing the order for security for costs to the respondent are; **firstly**, that the plaintiff should be residing outside Tanzania and **secondly** that, the plaintiff have no any sufficient immovable properties within Tanzania.

That, the concession that the respondent is a foreigner, but she owns shares in the company called Heart and Soul Limited and further that, she is alleged to have been married to a Tanzanian man by the name of Joseph Paulo Gurti and thus, possessing matrimonial properties is not sounding. As deposed in the counter affidavit and supplementary affidavit is of no help because the law does not require mere properties

but rather immovable one and shares are not within such category of immovable properties. To buttress the argument, she cited the case of **Macaurea versus Northern Assurance Company Limited** [1925] AC 619 and **Solomon versus A. Solomon & Co. Ltd** [1896] UKHL 1, [1897] AC 22 and Section 19(2) and 20(1) of the Land Act, [Cap 113 RE 2019].

On the issue of marriage, Ms. Lilian argued that, the contention that, the respondent is married to a Tanzania man, has a resident permit and that she denounced her German citizenship and thus, possess matrimonial properties in Tanzania does not hold water. Further arguing in support of the application, she submitted that, there is nothing to prove that there is a marriage between the respondent and Mr. Gurti as contended. That it is only through a valid title deed of land ownership it can be proved that, the respondent owns immovable properties in Tanzania and not submission of pictures which can be taken at anyhow.

With regard to justifying the costs incurred or likely to be incurred by receipts or any other documentary evidence, Ms. Lilian argued that, it is no longer a good law in our jurisdiction for the requirements being

taken away by the case of **Tanzania Rent a Car Ltd versus Peter Kimuhu**, Civil Reference No. 9 of 2020.

Arguing against, Ms. Mlacha submitted that, the respondent is now a resident of Tanzania for having a dependant passport acquired after being married to a Tanzanian male husband one Joseph Paulo Gurti. She went on quoting such dependant passport as to have No. 0021969 with reference No. KRT/IMM/DN/DP/VOL 1/2022, the copy being attached to the supplementary counter affidavit. In the event she argued, criteria provided under Order XXV, rule (1)(1) and (2) of the CPC were not met by the application because the provisions apply to a plaintiff who resides outside Tanzania. That even if the Court certainly rules that the respondent does not have immovable properties in Tanzania still, the order for security for costs can not be granted on the basis that the respondent is the resident of Tanzania.

Strengthening her argument, she cited a persuasive authority of the case of **HB Worldwide Limited versus Arajana Keita Company**, Misc. Application No. 409 of 2021 at DSM (unreported) which among others provided that, for the order to be granted all ingredients and conditions provided for under Order XXV, rule 1(1) of the CPC should be established.

In the rejoinder, the applicant's Advocate reiterated her position in the submission in chief which I consider to be tautological if reproduced in this decision. But of course, shall be considered jointly in the determination of the application as it stands hinging with remembrance features with those of the submission in chief.

In this application the question apparently demanding determination by this court is whether, it has passed the litmus test provided for under Order XXV rule 1(1) of the CPC. For best appreciating the conditions set forth by the law, i.e Order XXV rule 1(1) of the CPC, I will reproduce the said provisions of the law for ease of reference, to wit;

*"Where, at any stage of a suit, it appears to the court that, **a sole plaintiff is**, or (when there are more plaintiffs than one) that all the plaintiffs are **residing out of Tanzania, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immovable property within Tanzania other than the property in suit**, the court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant."*(Emphasis added).

According to the underlined percept of the law, it is crystal clear that, the plaintiff whose order for security for costs should be made is the one who is living outside Tanzania and does not possess any sufficient immovable property within Tanzania other than the property in suit. The phrase does not accommodate the plaintiff who is the foreigner only, but also any other person who resides outside Tanzanian and has no immovable property(ies) in Tanzania. In the circumstances also the provision encompasses even a Tanzanian person who at the time of the civil suit lives outside Tanzania and s/he has no immovable property in within Tanzania. Thus, the question which follows is whether the respondent lives outside Tanzania. To put things right, I reverted to the affidavit sworn by the applicant George Ngolla Mbwambo particularly paragraphs 4 and 6. The said paragraphs are hereby quoted in verbatim. Paragraph 4 is written:

*That, said Civil Case No. 24 of 2021 is still pending before this honourable court, and it is in the applicant's knowledge that the respondent herein is a foreigner who owns no property in Tanzania and her reliable source of income is unknown.*

Paragraph 5 of the said affidavit is also expressed in the following words:

*"That, the applicant believes that if the respondent will run away from Tanzania before the conclusion or after the conclusion of the main case, it will be detrimental to the applicant in circumstances where the case is ruled in his favour."*

Reading between the lines these two paragraphs, the following two facts can be deduced. **One**, the respondent is the foreigner. **Two** she is currently in Tanzania. As said above, being a foreigner alone is not the only conditional precedent provided under the provision of Order XXV, rule 1(1) of the CPC. The provision can be applied only where the plaintiff lives outside Tanzania and has no sufficient immovable properties in Tanzania which is not the case in the matter at hand. For the foregoing, this application falls short of merits as it has failed to meet the tests of the minimum threshold of the requirements provided under Order XXV rule 1(1) of the CPC. On that base, the application is hereby dismissed. The costs to follow event.

It is ordered accordingly.

**DATED** at **ARUSHA** on this 22<sup>nd</sup> day of November 2022.



A handwritten signature in blue ink, appearing to read "J.C. Tiganga".

**J.C. TIGANGA**

**JUDGE**