IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 58 OF 2019

(Arising from Commercial Case No. 62 of 2017)

ZULFIKAR HAIDERALI JESSA....................................1st APPLICANT

NADIR AZIZ HAIDERALI JESSA.................................2nd APPLICANT

Versus

DIAMOND TRUST BANK KENYA LIMITED..................RESPONDENT

Last Order: 19th May, 2020

Date of Ruling: 9th July, 2020

RULING

FIKIRINI, J.

The applicants moved this Court pursuant to Order XXV Rule1 and 2 (1) of the Civil Procedure Code, Cap. 33 R.E. 2002 (the CPC), seeking for the respondent to be ordered to deposit in Court security for costs of the applicants in respect of Commercial Case No. 62 of 2017. The application is supported by a joint affidavit of the applicants: Zulfikar Haiderali Jessa and Nadir Haiderali Jessa. The respondent through Mr. Dilip Kesaria learned counsel contested the application by filing a counter-affidavit.

in Burundi, Kenya, Tanzania and Uganda. Also that the respondent was the flagship Company of the Group with total assets exceeding Two billion United States Dollars, which was approximately Tzs. 4.5 trillion. And that the Diamond Trust Bank Group maintained more than 100 branches in the East African Countries in which it was operating. In Tanzania its subsidiary is Diamond Trust Bank (T) Limited. All raised in dispute of the account that the respondent will not be in a position to reimburse the applicants for the costs incurred and likely to be incurred.

In reply to the counter-affidavit, the applicants' disputed the averment under paragraphs 4 and 5 regarding all other companies mentioned and their properties as those properties existed on their own and they were limited companies registered in the respective countries, thus less concerned with matter involving the respondent. Highlighting on the costs, it was stated that the costs incurred and likely to be incurred were to be charged at 3% of the amount claimed which in this case is Kes. 380, 226, 484. Of which 3% was to be Kes. 11, 406, 794.52 which was equivalent to Tzs. 244, 105, 402.728.

The applicants averred to be prejudiced if the application was not to be granted as it was highly impractical for the applicants to be reimbursed their costs incurred in defending this suit, in the event the matter has been decided in favour of the

applicants, while this application has been declined, and the respondent is unwilling to pay.

The application was disposed of by filing written submissions. Mr Florence Aloys Tesha learned counsel appeared on behalf of the applicants while Mr. Zachariah Daudi learned counsel appeared for the respondent. Both counsels prayed for the affidavits deponed in support of their respective position be adopted and made part of their submissions, which was agreed by this Court. It was Mr. Tesha's submission that defending of the present suit before the Court has already and will cost the applicants. The respondent being a foreign company and without any sufficient immovable properties in Tanzania will not be in a position to reimburse, if ordered by the Court, the legal fees and other disbursement incurred. On that basis and interest of justice, the applicants' were seeking for Court's assistance for the ordering of the deposit for the security for the costs already incurred and likely to be incurred, pertaining to the Commercial Case No. 62 of 2017 and Miscellaneous Commercial Case No. 229 of 2017, giving it as an example.

On the aspect of legal fees, it was Mr. Tesha's submission that they are charged at 3% of the amount as provided by the Advocates Remuneration Order, 2015 GN. No. 263 of 2015. This percentage applied to all contentious and non-contentious matter as provided under 9th Schedule which provided for scale of fees applicable

for contentious proceedings for a liquidated sum in original and appellate jurisdiction. This was more so when the amount claimed was Tzs. 400,000,000/= and above as provided under the 8th Schedule to the Order. To fortify his submission, he cited the case of **Elizabeth Mckee v 3G Direct Pay Limited, Commercial Case No. 5 of 2018, at Arusha (unreported)** (copy attached). In the present suit the amount claimed in the suit was Kes. 380, 226, 484, of which 3% was to be Kes. 11,406,794.52, which when transformed into Tanzania shillings will be approximately Tzs. 244, 105, 402.728.

Discussing paragraphs 4 and 5 of the counter-affidavit, it was his submission that the properties referred existed on their own and the companies referred were limited liabilities companies registered in the respective countries thus less concerned with the present claim advanced by the respondent against the applicants. Buttressing his position, he cited the case of **Solomon v Solomon & Co. Ltd [1897] AC 22** on liability of the company as a separate entity. Furthering his submission, he referred this Court to the cases on **Rohini Sidipra v Freny Sidipra & Others [1995] V KALR 22,** where the Court established a principle that the plaintiff has to show she had substantial assets within the jurisdiction which can be reached by the process and if she wanted to escape this, she was bound to show the property was not floating, but a fixed and permanently in

nature. The same stance being taken in the case of **Unilever PLC v Hangaya [1990-1994] EA 598, CAT.**

Since the respondent has admitted having no immovable properties within the jurisdiction of this Court and she was a foreign company registered in Kenya, hence fell short of that criterion and therefore required to deposit security for costs in favour of the applicants. Based on the submission, Mr. Tesha urged the Court to grant the application.

Mr. Daudi in response to the submission he argued that aside from the respondent not residing and having immovable properties in Tanzania, the rule required the applicants to prove the costs incurred or likely to be incurred. The applicants have failed to lead any evidence in relation to that rather have left the Court to speculate, and invited the Court to dismiss the application with costs for want of merit. Supporting his decision, he referred this Court to the cases of **Innovative Global Limited & 2 Others v Harsh M. Vora t/a Parshava Agro, Miscellaneous Commercial Application No. 276 of 2018** where the Judge made reference to the case of **Pattani v Rabheru, Miscellanous Application No. 535 of 2018.** And since the applicants have failed to support their claim on costs incurred and likely to be incurred to the tune of Tzs. 244,105, 402.728, the application should therefore be rejected and/or dismissed with costs.

Discussing on the purpose of Order XXV of the CPC, it was his submission that the rationale behind the provision was not to deny non-resident plaintiff with no immovable property in Tanzania from justice but rather intended to protect un-genuine claim from non-resident of Tanzania against the resident of Tanzania. Stressing on his submission he contended that the respondent genuine claim should be protected and the applicants not to be allowed to benefit from their own wrong. Reverting to the **Innovative Global** case (supra) and **Leila Jalaludin Haji Jamal v Sharifa Jalaludin Haji Jamal, Civil Appeal No. 55 of 2003, CAT (unreported)** where the Court underlined on the importance of equity, natural justice and fairness as always should prevail when interpreting the provision of Order XXV.

Furthering his submission Mr. Daudi observed that the order for security for costs will prejudice respondent and deny her access to justice since the amount of Tzs. 244, 105, 402.728 was so huge and if the order is granted and remain unpaid, the respondent/plaintiff claim will be dismissed. He thus urged the Court to protect the respondent's genuine claim and her access to justice and not curtail it by the order for security for costs.

Mr. Daudi as well invited this Court to examine the application by considering that Kenya and Tanzania were member states in the East Africa Community, this Court

was thus entitled to treat ease enforcement of the Court order as condition sufficient and relevant ground for denying the order for security for costs. He referred this Court to the case of **Porzelack KG v Porzelack United Kingdom Ltd [1987] 1 All ER 1074,** when the Chancery Division of England considered the application for security for costs among the European Union states members. Also he referred this Court to the case of **Shah & Others v Manurama Ltd & Others [2003] 1 EA (HCU),** where the Ugandan Court considered the similarity of the rules and the provision of the East African Community Treaty as the condition sufficient and relevant ground for denying the order for security for costs. He thus invited this Court to apply the principles enunciated in the Ugandan case, giving a number of reasons in reference to various Articles of the Treaty such as Articles 2; 5; 8 (2) (b); 8 (5); 44; 104; and 126. It was his contention more or less that all partner states have virtually identical foreign judgments (Reciprocal Enforcement) Acts, each of which extends the application of its provisions to the other States. On this he referred the Court to the case of **Vallabhdas Hirji Kapadia v Laxmidas [1960] EA 852.** Mr. Daudi went on stressing that it will not be difficult for the applicants to execute their costs incurred considering the fact that the respondent was the flagship Company of Diamond Trust Bank Group which was an African Banking Group operating in Burundi, Kenya, Tanzania and Uganda.

Discussing the cases referred by the applicants, it was his submission that the case of **Mckee** was distinguishable as in that case the respondent/plaintiff was the resident of Ireland which was different from the situation in the present application where the respondent was from Kenya where there was arrangement under the Treaty. The **Unilever** case of which a copy was not attached, the Court of Appeal in its decision stated that where there was reciprocal enforcement arrangement and the plaintiff has enough property where resident or within court's jurisdiction, no need to order for security for costs making reference top **Vallabhdas's** case. The fact there was such arrangement between Kenya and Tanzania, there was therefore no need for security for costs. The case of **Rohinin Sidipra** (supra) was not attached and the respondent had therefore no room to read and make submission on it, he thus prayed for case to be disregarded and the application be rejected and/or dismissed with costs.

The Courts are here to protect both the applicant and the respondent. It is until the matter has been heard and determined that is when it can be known that the complaint or claim before the Court is genuine or not. Likewise, that is when the Court can tell of the applicant's intention of benefiting from her own wrong. Mr. Daudi's insistence on his client's presumed genuine claim, though appreciated but prior to determination of the suit, both parties should be equally and fairly treated.

And this is more so when interpreting Order XXV Rules 1 and 2 (1) of the CPC. The cited case of **Leila Jalaludin** (supra) has said it all when it stated:

> *"That principle of equity, natural justice and fairness should always prevail when interpreting the provision of Order XXV."*

The Court's discretion bestowed upon by Order XXV Rules 1 and 2 (1) of the CPC, should be exercised mindful of acting judiciously and in accordance to the rules of reason and justice and not according to private opinion or arbitrarily. **See: Alliance Insurance Corporation Ltd v Arusha Art Ltd, Civil Application No. 33/2015, Court of Appeal of Tanzania (Unreported) Advocates** and **Kalunga & Co. Advocates v NBC [2000] T. L. R. 235.** This therefore compels the Court prior to granting the order must satisfy itself that the order deserves granting. Pursuant to Order XXV of the CPC, the applicant has to prove: **one,** that the plaintiff/respondent is a foreign company, and **two**, has no sufficient immovable property in the United Republic of Tanzania she being resident of Kenya.

From the averments in the affidavits and submissions by the counsels, there is no dispute at all that the respondent is a foreign company with its residence in Kenya. Meaning the officers of the company who reside in Kenya will be travelling back and forth during trial. Also it was an undisputed fact that the respondent had no

sufficient immovable property in the United Republic of Tanzania. Proving of these two conditions is however, not the only requirement. Although the law has not required for proof of costs incurred and/or likely to be incurred, but rules of evidence provide otherwise. Section 110 and 111 of the Tanzania Evidence Act, Cap. 6 R.E. 2002 (the Evidence Act) placed the onus of proving any fact on the one who alleges, if that person or party wants the Court to decide in her favour. **See: Abdul Karim Haji v Raymond Nchimbi Alois & Another, Civil Appeal No. 99 of 2014 (unreported).** But even simple logic would require that. The applicant by demanding the Court to order deposit of Tzs. 244, 105, 402.728, without substantiating it raises concern. The amount aside from being huge, but there were already costs incurred which the applicant should have been able to prove by furnishing the Court with receipts. This would have assisted this Court in assessing the prayer for security for costs to the tune mentioned. None has unfortunately been done as no receipts on costs incurred including filing fees, legal fees or other miscellaneous costs incurred or estimated likely to be incurred costs such as legal fees and other disbursements have been furnished to this Court.

Under paragraph 6 of the affidavit, the applicants while have anticipated costs to be incurred to include legal fees and other disbursement, but is without any further details. The 3% charged on Kes. 380, 226, 484 the amount claimed in the main

suit, of which gives the amount to be deposited as security for costs to be Kes. 11, 406, 794.52 which is equivalent of Tzs. 244, 105, 402. 728, was just a general statement and figures derived from the amount claimed pegged on 3% with no details of the costs incurred and likely to be incurred. This places the Court in an awkward position as it will have no basis of granting the prayed amount of Tzs. 244,105,402.728. Appreciating the rationale behind having Order XXV of the CPC of protecting the applicant, but it will be illogical, unjustly and against all reason to ask the respondent to deposit such huge amount without any supporting evidence. In the case of **Dow Agrosciences Export S.A.S v I.S. & M (Metals) Ltd, Commercial Case No. 55 of 2007**, the Court had this to state:

> "*Once the court is satisfied that security for costs should be given, it would consider various factors in determining the quantum, including the complexity of the case, research work load involved, costs incurred up to the time of application and after.* ***The applicant should provide sufficient material to the court showing how the figure proposed if any was arrived at"*** [Emphasis mine]

The applicants have provided none. On the contrary, Mr. Kesaria averment under paragraph 4 and 5 which for ease of reference is reproduced below:

"The respondent is part of the Diamond Trust Bank Group, which is an African Banking Group operating in Burundi, Kenya, Tanzania and Uganda. The respondent is the flagship Company of the Group with total assets exceeding Two Billion United States Dollars, which equates to approximately Tzs. 4.5. trillion.

The Diamond Trust Bank Group maintains more than 100 branches in the East African Countries in which it operates. Its subsidiary in Tanzania is Diamond Trust Bank (Tanzania) Limited."

The two paragraphs are simply an admission that the respondent though has no immovable properties in the United Republic of Tanzania, but is capable of depositing security for costs if ordered owing to having assets worth approximately Tzs. 4.5 billion.

The only issue under the circumstances which needs to be determined is the amount, after the Court has satisfied itself that two conditions set out under Order XXV Rule 1 and 2 (1) of the CPC have been proved.

Mr. Daudi exhibited apprehension in his submission, that ordering for deposit for security for costs will prejudice the respondent and will deny her access to justice since the amount is huge and in case the respondent fails to deposit the amount the suit will definitely be dismissed. The apprehension is indeed deserved, but as pointed out earlier on in this ruling that both parties deserve Court's protection. So this Court will consider the application having in mind, both parties position and protection justified for each of the parties.

Mr. Daudi has as well brought on board the existence of the East African Community Treaty, which he invited the Court to apply. Tanzania and Kenya are undoubtedly both member states of EAC, but I want to believe each remained autonomous and with independent judicial system. Furthermore, since there has not been any amendment to Order XXV Rules 1 and 2 (1) of the CPC so far therefore, the applicability of the Articles of the Treaty, though welcomed but time has not come yet for the Treaty to have force of law in each partner states yet. This Court cannot therefore act on objectives of the Treaty which have not yet been implemented by the Parliament of the United Republic of Tanzania by way of amendment of Order XXV Rules 1 and 2 (1) of the CPC.

Pressing on the stance that security for costs should not be granted based on existence of the Treaty, referring this Court to the case of **Porzelack KG and**

Shahand Vallabhdas Hirji (supra), I wish to highlight what was stated in the cases **of National Microfinance Bank v Leila Mringo & 2 Others, Civil Appeal No. 30 of 2018, CAT-Tanga, p. 21** and **National Microfinance Bank v Victor Modest Banda, Civil Appeal No. 29 of 2018, CAT-Tanga, (both unreported),** but specifically quoting from the **Banda** case the Court had this to say that:

> *"In our considered opinion, it was not proper for the learned Judge* ***to import and rely on authorities from other jurisdictions,*** *while the law of Interpretation Act is expressly, elaborate and clear on that aspect."*[Emphasis mine]

Order XXV of the CPC is in my view clear and elaborate such that there was no need of resorting to foreign decision.

The applicant has not provided any supporting document or information as to the expenses already incurred or anticipated. The amount of Tshs. 244, 105, 402.728, gotten after charging the 3% on the main claim, which is considered exorbitant, has not been substantiated at all by any proof. The 3% though legally provided for but it does not mean the Court should act blindly. Fairness require that there should be evidence especially for the costs already incurred as this are actual and estimated to be incurred costs which can be accompanied by invoices and expected tasks which would be involving as far as defending the suit is concerned.

All circumstances pondered, this Court in its wisdom and for the interest of justice which has to see the applicants will be able to execute their costs incurred and likely to be incurred in the event the decision is in their favour and at the same time protect the respondent from being denied access to justice only because she is a foreigner with no sufficient immovable properties in the United Republic of Tanzania. In all fairness this Court finds the amount of Tshs. 50,000,000/= (Fifty Million Only) should suffice as security for costs. The amount of Tzs. 50,000,000/= be deposited with the Judiciary Deposit Account within twenty-one (21) days as from date of this ruling.

The application is hereby granted to the tune of Tzs. 50,000,000/= as security for costs in respect of the applicants, Zulfikar Haiderali Jessa and Nadir Aziz Haiderali Jessa. It is so ordered.

P. S. FIKIRINI

JUDGE

13th JULY, 2020