IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KIMARO,J.A., MASSATI,J.A., And MUGASHA,J.A.)

CIVIL APPLICATION NO. 171 OF 2015

1. JOHN PAUL SHIBUDA
2. TANZANIA INTERNATIONAL AGRI INPUT CO-LTD.....APPLICANTS

VERSUS

NORDOX INDUSTRIER AS.....RESPONDENT

(Application for deposit of the amount of security for costs equivalent to Tanzania shillings three hundred million (300,000,000) ordered in the decree of the Court dated 10th December, 2010)

(Rugazia, J.)

dated 10th December, 2010

in

Civil Case No.181 of 2008

.....

RULING OF THE COURT

12th November & 23rd,day of December, 2015

KIMARO,J.A.:

The applicants succeeded in a suit they filed in the High Court claiming for damages for unlawful termination of distributor agency agreement entered between the first applicant and the respondent. They were granted an amount of Tanzania shillings 300,000,000/= general damages for the termination of the agency agreement.

The respondent was aggrieved by the decision of the High Court. She filed Civil Appeal No.116 of 2014 which is still pending. Fearing that

the applicant may end up losing if the appeal fails, the applicants filed an application under Rules 4(1), 4(2) (b) & 4(2) (c) of the Court of Appeal Rules, 2009 requesting the Court to make an order compelling the Respondent to deposit security of costs equivalent to the amount of Tanzania shillings three hundred million (TZS. 300,000,000/=) ordered in the decree of the trial court dated 10th December, 2010 (plus the accrued interest) as a condition precedent for the hearing of the appeal.

The grounds for filing the application are as follows:

1. The respondent is a foreign company (Norwegian Company) without any property (movable or immovable) in Tanzania.
2. The Applicant will have nothing to realize the fruits of the decree given in their favour by the trial court let alone the costs incurred in defending the appeal before the Honourable Court in the event that the Respondent's appeal fails.
3. It is imperative that the Respondent makes a deposit for the security of costs equivalent to the amount of Tanzania Shillings three hundred million (TZS 300,000,000/=) ordered in the decree of the Court dated 10thDecember 2010 (plus accrued interest) to enable the Applicants recover their costs in defending

the present Appeal and costs awarded by the decree of the Court.

The application is supported by an affidavit sworn by John Paul Shibuda. He deposed at paragraphs 6 and 7 of the affidavit that the respondent is a body corporate registered in Norway hence its operations are governed by the laws of Norway. It has no property in Tanzania be it movable or immovable. That the Respondent has not furnished the security of Tanzanian shillings 300,000,000/= that was ordered by the Trial Court. The deponent fears that if the Respondents' appeal fails; he will lose not only the costs for defending the appeal but also the decretal amount that was granted to them by the trial court.

The Respondent filed a preliminary objection to the effect that the application is incompetent for failure by the applicants to move the Court under the appropriate provision of the Rules which cover the subject matter of the application.

When the application came up for the hearing, the applicants were represented by Nduluma Majembe learned advocate, assisted by Mr. John Mhozya, learned advocate. Mr. Sinare Zahran, learned advocate, represented the respondent.

Arguing in support of the preliminary objection, the learned advocate for the Respondent, Mr. Zahran, said the application was incompetent for improper citation of the relevant rule governing the kind of the application the applicants have filed. He said the proper rule of the Court Rules which the applicants ought to have cited is rule 120 (3) of the Court of Appeal Rules. He said Rule 4 is irrelevant in this application. Giving reasons for saying so, the learned advocate said Rule 4 (1) can only be invoked by the Court to give directions on how to deal with a certain situation in Court for meeting out the interest of justice. Rule 4(2) on the other hand, caters for a situation where no specific Rule is provided in the Rules, while Rule 4(3) is intended to be used for preventing the parties from abusing the Court process. He said the application before the Court has a specific rule to deal with the kind of the prayers which the applicant wants the Court to give and that is Rule 120(3) of the Court Rules. He cited the cases of **Chama Cha Walimu Tanzania Vs the Attorney General** Civil Application No.151 of 2008 and **China International Co-operatives Group V Salvand K.A. Rwegasira** Civil Reference No.22 of 2005 (both unreported) to support his submissions. He prayed that the preliminary objection be upheld and the application be struck out with costs.

Responding to the preliminary objection, the learned advocate for the applicants, Mr. Mhozya, said what the applicants are praying for, is for the respondent to deposit the amount of the decree so that if the appeal fails the applicants will be able to realize the fruits of the appeal. He said Rule 4 of the Court of Appeal Rules which is cited is the correct provision of the law dealing with the issue at hand and not Rule 120(3) which has been refered to by the learned advocate for the respondent. He was also of the opinion that Rule 120(3) cannot be read in isolation to Rule 128 of the Court of Appeal Rules. He said the case of **Chama Cha Walimu** (supra) is distinguishable. His learned colleague, Mr. Nduluma added that the respondent is a foreign company and if it loses the appeal it, will be hard for the applicants to recover the costs. He prayed that the preliminary objection be dismissed and the application be heard on merit.

A brief rejoinder by the learned advocate for the respondent is that Rule 120(3) is independent from Rule 128 and that is the applicable provision for the application which has been filed by the applicants. Non – citation of that rule makes the application incompetent. He prayed that the preliminary objection be upheld and the application be struck out.

This application need not detain us. It is apparent that what the applicants are praying for is deposit of security for costs. The notice of motion says and we quote:

"TAKE NOTICE that on..... the day of.....2015 at.....in the morning

or as soon as thereafter as the case may be heard the Applicants will move the court for orders that:-

a) The Honourable Court be pleased to make an order compelling the Respondent to **deposit the security of costs equivalent to the amount of Tanzania shillings three hundred million (300,000,000/=) ordered in the Decree of the Court dated 10th December 2010 (plus the accrued interest) as a condition precedent for the hearing of the Appeal."**

It is clear from the notice of motion that the application by the applicants is for deposit of **security** but the amount of security they are asking the Court to order the respondent to deposit should be equivalent to the amount of the decree they were granted in the judgment of the trial court plus the accrued interest. So long as the applicants are praying for deposit of security for costs, we agree with the learned advocate for the

respondent that the applicants had to cite Rule 120(3) of the Court of Appeal Rules. The Rule reads:

> *"The Court may, at any time it thinks fit, direct that further security for costs be given and may direct that security be given for the payment of past costs relating to the matters in question in the appeal."*

Under Rule 120 (1) of the Court Rules, for any civil appeal, the appellant is required to deposit security for costs amounting to Tanzania shillings two thousand. This means that the respondent may under Rule 120(3) of the Rules request the Court to consider increasing the amount of security for costs. **As long as the notice of motion requests for an order for deposit of security for costs,** the applicants had to cite Rule 120(3) of the Court of Appeal Rules as the enabling rule. Rule 4 is therefore not applicable as there is a specific provision given to cater for the situation. A question to ask is whether the applicants are asking this Court to perform duties of an executing Court or they are asking the Court to order the applicant deposit security for costs? Why should the appellant deposit the decretal amount as security for costs. It is not true as deposed by Mr. Shibuda in his affidavit at paragraph 6 that the judgment of the trial Court ordered the respondent to deposit security equivalent to

the decretal amount. Technically that would amount to execution. The Court of Appeal is not an executing Court. Modes of execution are provided for under the Civil Procedure Code. The appellant is entitled to be heard. That is a right provided for by the law. Section 5(1) of the Appellate Jurisdiction Act, [CAP 141 R.E.2002] confers a right of appeal to proceedings of civil nature under the Civil Procedure Code in the High Court in its original jurisdiction. That observation made, let we proceed dealing with the preliminary objection.

In the case of **China Henan International Co-operation Group Vs Salvand K.A. Rwegasira**, (supra) cited to the Court by the learned advocate for the respondent the Court when dealing with a situation of non-citation of the relevant provision dealing with the issue which was before the Court held that:-

> *"Here the omission in citing the proper provision of the Rule relating to a reference and worse still the error in citing a wrong and inapplicable rule in support of the application is not in our view a technicality falling within the scope of Article 107A(2) of the Constitution. It is a matter which*

goes to the very root of the matter. We reject the contention that the error was technical."

In the case of **Chama Cha Walimu Tanzania Vs the Attorney General** (supra) the Court held that where a party fails to cite the relevant provision of the law that is applicable to the type of the remedy he/she is asking the Court to grant the Court has to strike out the application. We therefore uphold the preliminary objection and strike out the application with costs.

DATED at DAR ES SALAAM this 17th day of November, 2015.

N.P. KIMARO
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

S. A. MUGASHA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL