IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUANDA, J.A., MZIRAY, J.A. And MWAMBEGELE, J.A.)

CIVIL APPLICATION NO. 354/16 OF 2017

ADVATECH OFFICE SUPPLIES LIMITED.....APPLICANT

VERSUS

MS. FARHIA ABDULLAH NOOR .....1ST RESPONDENT
BOLSTO SOLUTIONS LIMITED.....2ND RESPONDENT

(An Application for Deposit of security for costs by the Applicant in Civil Application No. 270/16 pending in the Court of Appeal of Tanzania arising from Commercial case No. 167 of 2014)

(Mruma,J.)

dated 3rd day of May,2017

RULING OF THE COURT

30th October & 10th November, 2017

MZIRAY, J.A.:

Before this Court is an application expressed to be brought under Rule 4(1),4(2)(a), 4(2)(b), 4(2)(c) and 120(3) of the Tanzania Court of Appeal Rules, 2009 (the Rules), seeking the respondent to deposit security for costs in the tune of twenty thousand United States Dollars for the hearing of Civil Application No. 270 of 2017 pending before this Court, on the ground that the respondent is a foreign national (a citizen of Somalia) without any tangible property movable and

immovable in Tanzania which is known to the applicant. The affidavit of Mr. Hassan Kiangio, is in support of the application. To buttress the motion, the applicant has filed written submissions.

The application has been challenged by the respondent through the affidavit in reply of **Farhia Abdullah Noor,** the first respondent, premised on two grounds; **First**, that the Court is not properly moved for the non- citation of an enabling provision of the law. **Second**, the application is without merit.

At the hearing of the application, the applicant was represented by Mr. Nduruma Majembe, learned counsel. The respondents were represented by Dr. Kibuta Ong'wamuhana, learned counsel assisted by Mr. Wilson Mukebezi, learned Counsel. Mr. Majembe adopted his affidavit, written submission and list of the authorities and briefly submitted that in as far as Rule 120(3) is cited alongside with Rule 4(2)(a) of the Rules then, the application is competent and properly before this Court.

As to the merit of the application, the learned counsel submitted that the 1st respondent is a Somali national and not a Tanzanian. In that case, the applicant is seeking for an order that the respondent be

compelled to deposit security for costs in the tune of twenty thousand United States Dollars, which amount the applicant will incur in defending Civil Application No. 270/6 of 2017 pending in this Court. The applicant is claiming security for costs in a fear that the first respondent being not a Tanzanian and having no sufficient properties in the country may run away leaving the applicant without being reimbursed. The learned counsel however, disagreed with the resident permit, share certificate and a class "A" permit to work in Tanzania attached to the affidavit in reply. He argued that unless the bank guarantee is issued, the documents attached do not provide guarantee to the applicant that will have its costs in prosecuting Civil Application No. 270 of 2017.

On his part, Dr. Ong'wamuhana urged the Court to dismiss the application because the Court has not been properly moved. He pointed out that it was not proper for the applicant to cite both applicable and inapplicable provisions and leave it to the Court to pick and choose which provision vests the Court with the requisite jurisdiction. He however, attacked the provision of Rule 120(3) by stating that the provision is inapplicable in the circumstance of this case as it deals only with security for costs in appeals and not in applications.

As to the merits of the application, the learned counsel submitted that there is no requirement in law demanding a foreigner to have immovable property in the Country. The only requirement is for a foreigner to have property be it movable or immovable.

Arguing the issue of depositing security for costs, the learned counsel submitted that for an application seeking to deposit security for costs to be successful, it must be explained and proved that the respondent is in a state of poverty or insolvency to meet the costs. To bolster his argument the learned counsel referred this Court to the cases of **Noor Mohamed Abdulla V. Ranchhodbhai J. Patel and Another**,[1957] E.A 447 and **Marco Tool and Explosives Ltd V. Mamujee Brothers LTD** [1986-1989] E.A 337 **.**

Based on the cited authorities, the learned counsel submitted that apart from the first respondent being a Somali national, a fact which is not denied, there is nothing in the applicant's affidavit suggesting that the first respondent is in the state of poverty or insolvency. The learned counsel strongly submitted that the first respondent is a person of substance. She holds a first class work permit and owns substantial amount of assets in the country including shares in two companies; M/S Accomondia Company and Pimak Limited. In the absence of evidence

proving insolvency and poverty of the first respondent, the learned counsel urged the Court to dismiss the application for lack of merit.

We have carefully considered the submissions of both parties on the cited enabling provision of the law. With great respect, on this, we should be guided by the decision of this Court in the unreported case of **Bitan International Enterprises Ltd V. Mished Kotak,** Civil Appeal No. 60 of 2012 quoting with approval the case of **Abdallah Hassani V. Juma Hamis Sekiboko**, Civil Appeal No. 22 of 2007 in which among other things, the Court held;

> *"We have gone into details of the provisions of section 44 because we are satisfied that the appellant's application for revision was wrongly entitled. He should have indicated section 44 (1) (b) only. Although the court should not be made to swim in or pick and choose from a cocktail of sections of the law simply heaped up by a party in an application or action, in the present situation we are satisfied that citing subsection (a) as well was superfluous but that this did not affect competency of the application for subsection (b) is clearly indicated."*

Since the applicant cited Rule 4(2)(a) in the application which is an enabling provisions there is no specific provision in the rules and the current position of the law being clear in the case of **Bitan International Enterprises Ltd V. Mished Kotak** (supra) to the effect that a mere citation of the inapplicable provisions where the correct provision moving the court is cited, the application does not become incompetent. On that basis, we buy the argument of Mr. Majembe that the citation of inapplicable provisions in the case at hand alongside Rule 4(2)(a) of the Rules cannot make the application inept. The application therefore is competent and properly before this Court.

We now turn to the merits of the application. It is deponed in the affidavit in reply at paragraph 5 and 6 and submitted that the first respondent holds a resident permit No AC/340/145A and a class A work permit to conduct business in Tanzania. It was further submitted that the first respondent indeed has two limited liability companies; M/S Accomondia Company and Pimak Limited, where she owns shares. These averments are not in anyhow challenged by the applicant's learned Advocate.

Considering these undisputed deponed facts and guided by the decisions in the cases of **Noor Mohamed Abdulla V. Ranchhodbhai**

J. Patel and Another, [1957] E.A 447 and **Marco Tool and Explosives Ltd V. Mamujee Brothers LTD** [1986-1989] E.A 337, cited as authorities, of which we cherish, it is aptly clear that in depositing security for costs, poverty is the underlying limit. One has to prove and satisfy the court that the respondent is in state of poverty or bankruptcy to meet the litigating costs. In the case at hand, given the extent of her investments and business undertakings in Tanzania and the fact that the first respondent is holding a working permit which had been regularly renewed, we have no flicker of doubt in our mind that the first respondent is a person of substance and therefore capable of meeting the costs of litigation.

We would have ended up here, but, since the application is for depositing security for costs in the tune of twenty thousand United States Dollars, then, we say albeit in brief, as rightly pointed out by Dr. Ong'wamuhana that the amount to be deposited is without justification. The requirement of the law in terms of Rule 120(1), to which we take inspiration, is clear that security for costs in civil appeals is in the sum of two thousand shillings only. However, we are of the considered view that this amount is in the lower side and by any standard it has been

overtaken by events. In the foregoing, we propose a reasonable figure be considered in the Rules.

In sum, we find the application as a whole to have no merit. We accordingly dismiss it in its entirety with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 7th day of November, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

E.F.FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL