

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**MISC.CIVIL APPLICATION NO. 68 of 2020**

**(Emanating from Civil Case No. 135 of 2018)**

**LITENGA HOLDING LTD ..... APPLICANT**

**VERSUS**

**METTALL IMPEX GMBH ..... RESPONDENT**

**RULING**

12<sup>th</sup> May & 05<sup>th</sup> June 2020.

**E. E. KAKOLAKI, J.**

The applicant in this application a company incorporated in Tanzania is seeking for security for costs against the respondent which is a company incorporated in Germany and has her place of business in Munich Germany. The application has been preferred under section 95, Order XXV Rule 1(1) and Order XLIII Rule (2) of the Civil Procedure Code, [Cap. 33 R.E 2002] supported by the affidavit of Charles G. Lugaila learned advocate for the applicant. The application is emanating for the main case Civil Case No. 135 of 2018 which is pending in this Court. The application has been contested by the respondent who filed counter affidavit through on Chacha Bhoke Murungu learned advocate for the respondent. Further

to that a Notice of Preliminary Objections was filed by the respondent containing three points speaking a follow:

1. That the application is incompetent for violating Order VIIIIB Rule 23 of the Civil Procedure Code, (Amendment of First Schedule) Rules, 2019, GN. No. 381 of 2019 as it has been made without leave of the Court to depart from or vary the scheduling Conference Order dated 22 October, 2018 which was made by Hon. Mutungi, J when the applicant declared that pleadings are complete and that it will not make any further application.
2. The application is not made promptly and is intended to stifle the suit.
3. The application is an abuse of court process as the applicant claims excessive amount of security for costs than that provided by the law.

As per the filed affidavit and counter affidavit in support and against the application, briefly the respondent who is the plaintiff in the main case sued the defendant and applicant in this application for breach of contract, specific performance of the said contract and order for re-possession of the security for loan which is in applicant's possession. It is from that suit the respondent filed this application seeking for court's order to direct the respondent to deposit security for costs of at least 45% of the value of the Loan Agreement purported to have been breached to be deposited in the Judiciary Account to cover the applicant's costs should the main suit be decided in her favour.

The applicant in this application is represented by Mr. Charles G. Lugaila learned advocate whereas the respondent is enjoying the services of Dr.

Chacha Bhoke Murungu learned advocate. Parties agreed to dispose of first the preliminary objections raised by way of written submission the agreement which was condoned by the court.

Submitting on the first point of objection Dr. Murungu argued that this application is incompetent for violating Order VIIIB Rule 23 of the Civil Procedure Code, (Amendment of First Schedule) Rules, 2019, GN. No. 381 of 2019 because the application for security for costs has been made without first obtaining leave of the Court to depart from or vary the scheduling Conference Order dated 22 October, 2018 which was made by Hon. Mutungi, J when the applicant through its advocate Mr. Innocent Mushi, declared that pleadings were complete and that the applicant will not make any further application to this court. That, the provisions of Order VIIIB Rule 23 of the Civil Procedure Code, (Amendment of First Schedule) Rules, 2019, GN. No. 381 of 2019 prohibits departure from scheduling order unless the party seeking to depart from it has first sought leave of the court. That the court relying on the applicant's declaration that pleadings were complete and she will not file any further application proceeded to set the suit for speed truck III. He insisted that orders of the court should not be defaulted without stern legal measures taken. He was of the argument that once pre-trial conference is held and directions issued by the court then parties are obliged to comply with the court's direction, failure of which may result in dismissal/striking out of the application made subsequent to the scheduling conference order. He stemmed his submission by referring the court to the case of **Bridgeways Logistics Limited Vs. Triple "A" Haulers Limited**, Misc. Commercial Application No. 287 of 2017.

In opposition to the preliminary point of objections raised in general Mr. Lugaila for the applicant applying the case of **Karata Ernest & Others Versus Attorney General**, Civil Revision No. 10 of 2010 (CAT-unreported) submitted that all grounds of objections by the applicant raised lack merit and should be dismissed with costs. Using that case which cited the case of **Mukisa Biscuits Manufacturing Co. Ltd Versus West End Distributors Ltd** (1969) E.A 696 he was of the view that preliminary objections being a pure point of law cannot be raised if any fact has to be ascertained or if what is sought is the exercise of the judicial discretion. That under Order XXV Rule 1(1) of the Civil Procedure Code, [Cap. 33 R.E 2002] at any stage of the suit the court may either of its own motion or on the application of any defendant order the plaintiff to give security for costs incurred or likely to be incurred by any defendant. Therefore what the applicant is seeking before the court is in discretion of the court thus no point of objection can be raised on that. With regard to the first point Mr. Lugaila was of the argument that as per their recollection, on the 17/02/2020 right after ruling of the Court on its competence to entertain the Main Suit (Civil Case No. 135 of 2018) the court ordered the defence counsel to file a formal application for security for costs and the plaintiff's side never objected as to the violation of Order VIIIIB Rule 23 of the Civil Procedure Code. He was therefore of the submission that the applicant did not file the application out of blue or without leave of the court, but was in compliance with court's order. He submitted further that the court can move itself and determine the amount to be deposited by the plaintiff before the matter can proceed. On this stance he relied on the case of **Gerard Jordaan Versus E.R. Mwakasala**, Civil Case No. 398 of 2001 (HC-Unreported). In his rejoinder

submission on the assertion by the applicant that the application was filed in pursuance to the court's order Dr. Murungu averred that, that line of argument is a total misconception of the order of this Court since the same was in respect of applicant filing a formal application for security and not departure from scheduling order. That the applicant should have applied for an order of the court to depart from the scheduling order before making an application for security for costs. Therefore the position of the scheduling order dated 22/10/2018 remained intact since no order of its amendment was made to depart from it. On the discretion of this court to grant costs on its own move he was of the view that the same should be read together with item 7 and 8 of the Schedule of the Advocate Remuneration Order, 2015, GN No. 264 of 17/07/2015 which is applicable in the scale for charging instruction fees and set at 3-7% of the sum in dispute. That the claimed 45% is exorbitant under any stretch of imagination. Otherwise he reiterated what he had submitted in chief by praying for dismissal of the application.

The issue before the court in this ground of objection is whether the application is incompetent for contravening the provisions of Order VIIIB Rule 23 of the Civil Procedure Code, (Amendment of First Schedule) Rules, 2019, GN. No. 381 of 2019. The applicant is challenging the ground in that as per the case of **Mukisa Biscuits** (supra) it does not qualify to be a pure point of law for the order of security for costs sought from the court by the applicant is discretionary in nature. And further that the application is properly before the court as it was made out of this court's order or leave issued on 17/02/2020. I am in agreement with the applicant on the fact that as provided in **Mukisa Biscuits** which I consider to be a good law that no any point of objection can raised on a fact that has to

be ascertained by court or its exercise is in the discretion of the court like the issue of security for costs. However, I hold the view that the said position of the law is not applicable under the circumstances of matter at hand as rightly submitted by Dr, Murungu. The matter before the court is not whether the applicant can apply for order for security for costs which order is issued at the discretion of the court as the applicant would like the court to perceive, but rather whether the applicant sought leave of the court or not to depart from the scheduling conference order of 22/10/2018 before filing the present application which the respondent is submitting that she did not.

Mr. Lugaila submitted that the law under Order XXV Rule 1(1) of the CPC allows the applicant at any stage of suit to apply for the orders of security for costs, therefore the applicant when filing this application was in compliance of the court's order dated 17/02/2020 that granted leave for filing this application. Mr. Murungu challenges that argument by contending that the same is misconceived as what the court ordered on that day was with regard to the filing of formal application of security for costs and not departure from the court's scheduling conference order of 22/10/2018. I agree with Mr. Lugaila and take it that, there is no dispute that the law under Order XXV Rule 1(1) of the CPC allows the applicant at any stage of suit to apply for the orders of security for costs. But the novel question remains did she comply with the requirement of the law before filing the application. The provisions of Order VIIIB Rule 23 of the Civil Procedure Code, (Amendment of First Schedule) Rules, 2019, GN. No. 381 of 2019 now cited as [Cap. 33 R.E 2019] as per GN, No. 140 published on 28/02/2020 provides:

*"23. Where a scheduling conference order is made, **no departure from or amendment of such order shall be allowed unless the court is satisfied that such departure or amendment is necessary in the interest of justice** and the party in favour of whom such departure or amendment is made shall bear the costs of such departure or amendment unless the court directs otherwise."* (emphasis supplied)

As I can read from the above cited provision, the law puts it mandatory that where the scheduling conference order is made no departure from or amendment of such order shall be allowed unless the court is satisfied that such departure or amendment is necessary in the interest of justice. That means there must be an application for an order of departure from the scheduling conference order duly made, heard and determined by the court before any departure is made. The order dated 17/02/2020 relied upon by applicant to file this application in my opinion did not originate from any form of application by the applicant under Order VIII B Rule 23 of the Civil Procedure Code, [Cap. 33 R.E 2019]. As rightly submitted by Dr. Murungu that order was for filing a formal application of security for costs after the court was informed by the applicant that he was intending to do so. This finding is also supported by the fact that in the chamber summons it is not indicated that the application is made in pursuant to the alleged order of the court dated 17/02/2020. As already found above the applicant could have file the application at any stage of the suit as it was ordered on 17/02/2020 but that does not mean in violation of the law that requires her to make an application first for departure from the scheduling conference order dated 22/10/2018 during the first pre-trial

conference. The pre-trial conference has its purpose as it was held in the case of **Bridgeways Logistics Limited** (supra) the decision which I subscribe to:

*"The purpose of holding pre-trial conference is to consider amongst other things the possibility of settlement of all or any of the issues in the suit or proceedings; to require parties to furnish to the Court with any information that the court give directions as to what the court considers fit; to give direction as to the court may consider necessary or desirable in order to secure just, expeditious and economical disposal of the suit or proceedings and for settling of the speed track ....*

*If any party defaults in complying with any of the directions given the court is empowered to dismiss the suit or strike out defence or counter claim or enter judgment or make such other orders as it considers fit."*

Applying the principle in the above cited case in this matter, I am of the findings that it was mandatory under Order VIII B Rule 23 of the Civil Procedure Code, [Cap. 33 R.E 2019] for the applicant to apply for departure of the scheduling conference order dated 22/10/2020 before filing this application. Her act of defaulting to comply with the law renders this application incompetent and she therefore deserves to suffer the consequences. The first point of objection is therefore sustained. This point having disposed of the matter I see no pressing issue that calls for determination of the rest of the points of objection as doing so would be academic exercise which at the moment I am not prepared for.

In the event, and for the foregoing reason, I am inclined to hold that this application is incompetent and is hereby struck out with costs. The applicant is at liberty to re-apply in accordance with the law.

It is so ordered.

DATED at DAR ES SALAAM this 05<sup>th</sup> day of June, 2020.



E. E. KAKOLAKI

**JUDGE**

05/06/2020

Delivered at Dar es Salaam today on 05/06/2020 in the presence of Mr. Charles G. Lugaila advocate for the Applicant, Dr. Chacha Murungu advocate for the respondent and Ms. Lulu Masasi, Registry Officer.



E. E. Kakolaki

**JUDGE**

05/06/2020