IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 60 OF 2021

(Arising from Civil Case NO. 166 of 2020)

CRDB BANK PLC .....1ST APPLICANT

ALLAN MAGESA T/A ALCOTS TANZANIA.....2ND APPLICANT

VERSUS

DARCO NEGOCE SA ..... RESPONDENT

RULING

Date of last Order: 16/06/2022.
Ruling date: 08/07/2022.

E. E. Kakolaki, J

In this application the applicants are seeking for an order against the respondent for deposit in this Court a total amount of USD 15,000, being security for costs likely to be incurred in the event judgment is entered in their favour in Civil Case No. 166 of 2020 instituted by respondent against them before this Court, as well as their costs in this application. The application is preferred under Order XXV Rule 1(1) and (2) of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC). It is dully supported by affidavit of one Nzaro Nuhu Kachenje, the applicants advocate. In her

response the respondent is resisting it, the resistance which is manifested in the counter affidavit duly filed by one Philemon Mutakyamirwa, the respondent's advocate.

Briefly before this Court in Civil Case No. 166 of 2020 the applicants are sued jointly and severally by the Respondent herein, a company incorporated in Switzerland, claiming for refund of USD 249,042, being an amount wrongful credited into the 2nd Respondent's account and withdrawn, the account which is maintained by the 1st Respondent. The said claim is strenuously disputed by the applicants, the result of which moved them to file this application pressing for an order for deposit of USD 15,000 by the respondent in this Court's account as security for costs.

At the hearing of the application both parties were heard viva voce. The applicants appeared represented by Mr. Nzaro Kachenje and Ms. Ruqaiya Al-Harthy, both learned advocates while the respondent hired the services of Mr. Dickson Matata. Both parties during their submission craved for leave to adopt their affidavit and counter affidavit to form part of their submission, the prayer which was granted. I will therefore consider their evidence therein in the course of composing this ruling.

This Court Order XXV Rule 1(1) and (2) both of the CPC, has discretionary powers to grant the application upon satisfaction of two conditions that, **one**, the respondent company is a foreign company and **second** that, the said company possess no immovable property or sufficient ones in the country other than the property subject of the suit, to be realized by the applicant (Defendant) for recovery of the costs incurred in the course of defending the suit, in the event the suit is decided in his favour. See also the cases of **Abdul Aziz Lalani Vs. Sadru Magaji**, Misc. Com. Cause No. 8 of 2015, **Raw Limited Vs. Adrian Van Beurden**, Misc. Commercial Application No. 6 of 2019, **Maasai Wanderings and 2 Others Vs. Viorica Ilia and 3 Others**, Misc. Civil Application No. 19 of 2021 and **Tanzania Ports Authority and Another**, Misc. Civil Application No. 149 of 2021 (all HC-unreported), to mention few.

In this matter the applicants submitted that the two conditions were established while the respondent vehemently contested that submission. Now trading under the above two conditions the issue before the Court for determination is whether the applicants have supplied material facts meeting the two conditions to warrant this court grant their prayers. Mr. Kachenje for the applicants convincingly submitted that, the proof that the respondent is

a foreign company duly incorporated and running its business from Switzerland is averred in paragraph 4 of the affidavit and exhibited the plaint annexed to affidavit. As regard to the second condition, he argued it is deposed by applicants in paragraph 7 the affidavit that, the respondent owns no known immovable property in Tanzania leave alone sufficient on, which facts were never contested by the respondent in paragraphs 2 and 5 of the counter affidavit in both conditions. He added that as regard to the ownership of any immovable property since the applicant asserted to know no any from the respondent, the respondent was duty bound under section 110 and 111 of the Evidence Act, [Cap. 06 R.E 2019] to rebut it, the duty which she failed to discharge as she claimed to own none in her counter affidavit. To him the applicant successfully established requisite conditions. As regard to the amount prayed to be deposited Mr. Kachenje submitted that apart from being in line with the Advocates Remuneration Order, 2005, the respondent in her counter affidavit never challenged it. He added, it is the position of the law that, professional fee does not require proof, as that requirement is on re-imbursement fees only. To fortify his stance this Court was referred to the case of **Maasai Wanderings and 2 Others** (supra). He therefore invited this Court to grant the application as the applicants have

sufficiently established and supplied enough materials warranting this Court exercise its discretion to grant the application.

On his part Mr. Matata from the outset came out clearly resisting the application submitting that, the same is misplaced and misconceived hence deserves dismissal in its entirety with costs. He said, this Court having discretionary powers on whether to grant the application or refuse, the same has to be exercised judiciously. He argued, in this matter the applicants have failed to supply the Court with enough material facts to enable it exercise its discretion judiciously as the mere assertion that, the respondent is a foreign company is not sufficient for this court to grant the application as other circumstances have to be considered. The case of **Shah and Others Vs. Mvunama Ltd and Others** (2003) EA1 294, on the need of the Court to consider other circumstances was cited to the Court.

Attacking the applicants' contention that, the respondent is a foreign company with no branch in Tanzania, he said paragraph 1 of the plaint does not state so as it only provides for her headquarters which is in Switzerland as she trades globally, the jurisdiction of this Court inclusive for having a contract with a Tanzanian Company (Gaki Investment Company Ltd) based in Shinyanga Region. Therefore recovery of costs by the applicants in case

judgment is entered in their favour will not be rendered impossible for having guarantee based on the said contract between GAKI Co. Ltd and the respondent. As regard to the amount sought to be deposited as security for cost, he argued, what the applicants submitted for consideration was a blanket figure of USD 15,000 without any justification or itemization of the exact costs incurred or likely to be incurred. Despite the fact that professional fees need not be proved as stated in the case of **Tanzania Rent A Car Limited Vs. Peter Kimuhu**, Civil Reference No. 9 of 2020 (CAT-unreported), Mr. Matata insisted the alleged costs ought to be strictly proved by the applicants as provided under section 111 of the Evidence Act, by providing EFD receipts, the bill submitted to the client, list and number of witnesses intended to be summoned in court and costs of stationaries, transportation and accommodation of witnesses if any. In absence of that evidence, the amount claimed could not be justified as the amount granted by the court as security for costs must be realist and fairly quantified, Mr. Matata stressed. Cases of **Raw Limited** (supra) and **Tanzania Ports Authority and Another** (supra) were referred to by Mr. Matata to support his position. Further to that he stated, as per the Written Statement of Defence this application is aiming at frustrating the respondent from

pursuing her rights as the applicants have to strictly prove the two conditions which duty they have failed to discharge. It was therefore his call to this court to dismiss the application with costs for want of merit.

In his brief rejoinder Mr. Kachenje reiterated his submission in chief. He however added that, in essence the respondent was admitting not to be a resident company though tried to link itself to the resident company, GAKI Co. Ltd through the contract of business undertaking between them. He said, the referred contract in annexure DNS1 to the plaint does not provide for principal and agent relationship between them to entitle the respondent claim to have established herself within the jurisdiction, hence a proof of her inexistence in the country as the company's address has to be traceable within the jurisdiction. With regard to the assertion of lack of sufficient immovable property in the country he said, the respondent has failed to address or prove its existence if any, hence an adverse inference be drawn against her that, she possesses no any immovable or sufficient movable property in Tanzania. As regard to the disputed amount sought to be deposited as security for costs he argued, the respondent has to distinguish between instruction fees and reimbursable fees in which former is in line with the provision of Advocates Remuneration Order, 2005 GN. No. 264 of

2005. He added, the case of **Tanzania Rent Car Ltd** (supra) is a good authority on none proof of professional fees through receipts as it is calculated from the liquidated sum under claim in the suit. He final maintained his stance urging the court to grant the applicants' prayers.

I have taken time to peruse both the affidavit and counter affidavit as well as internalized both counsels fighting submission. What is gleaned from their submission is that, both are at one on the fact that, for the application of this nature to succeed two conditions as stipulated under Order XXV Rule 1(1) of the CPC, must be established by the applicant. They are also in agreement that, this Court is seized with discretionary power to either grant the application upon being supplied with material facts, as the discretion has to the exercised judiciously. What remains in contention amongst them is the issue as to whether the applicants have supplied sufficient materials to enable this Court exercise its discretion judiciously.

To start with the first condition and in response to the above raised issue this court is satisfied that, the same has been sufficiently established by the applicants. As rightly deposed by the applicants in paragraphs 3 and 5 the affidavit in support of chamber summons, it is proved the respondent is a foreign and non-resident company dully incorporated in Switzerland, since

the said averment was never rebutted by the respondent. As such the respondent in paragraph 3 and 4 of the counter affidavit admits the fact that, she is not residing within the jurisdiction of this Court, though claims to trade in importation and exportation of agricultural produce from various parts of the globe, Tanzania inclusive. Much as there is an admission that she does not maintain any physical address or office or claim to have any agent within the jurisdiction of this Court, no doubt the first condition has been established. I so find as the alleged contract between her and GAKI Company Limited (Purchase contract) is neither agency agreement nor does it provide for respondent's physical address in Tanzania apart from buy and sale terms between the two parties.

As regard to the second condition, the applicants in paragraph 7 of the counter affidavit testified that, the respondent has no immovable property let alone sufficient one to cover their costs should they be successful in the main suit. In applications of this nature the applicant having asserted not to know any immovable property owned by the respondent within the jurisdiction of the court, the onus of proof section 111 of the Evidence Act, automatically shifts to the respondent to prove that she possesses sufficient immovable property to satisfy the decree as the object of security for costs

is to protect the applicant (opposing litigant) against any cost incurred or likely to be incurred in defending the action. On the other side Mr. Matata for the respondent leaning on the averment in paragraph 6 of the counter affidavit contended that, apart from the fact that respondent's physical office is known, she is also trading in Tanzania with **Gaki Investment Company Ltd** located in Shinyanga Region as exhibited in the agreement between them (annexure DNS-1 to the plaint). I had a glance of an eye to the said agreement. With due respect to Mr. Matata that is not an agency agreement as it is the purchase contract containing selling and buying terms only. In no any stretch of imagination can the same be construed to be agency agreement or guarantee that, the respondent's shall be traceable in the country through GAKI Investment Co. Ltd and therefore possesses immovable property through it. The issue of ownership of immovable property being a factual issue is not automatically assumed by the court as Mr. Matata would like this court to believe. The same ought to have been sufficiently deposed in the respondent's counter affidavit as evidence, the duty which she failed to discharge for relying on the purchase contract which is already discounted. It is from that fact I am convinced that, the applicant have successfully established the respondent possesses no sufficient

property within the jurisdiction of this Court. This Court in the case of **Abdul Aziz Lalani & 2 Others Vs. Sandru Mangalji,** Misc. Commercial Cause No. 08 of 2015 (HC-unreported) held the position which I subscribe to, that the two conditions must be met before the application is granted. In so doing the Court observed at page 6 that:

> *"…for the applicants to succeed in this application for provision of security for costs**, they must prove to the satisfaction of the court that the respondent resides outside Tanzania and that he does not possess in Tanzania sufficient immovable property other than the property in suit**." (Emphasis supplied)*

The Court went on at page 9 to state that:

> ***In this jurisdiction, courts have not been hesitating to allow an application for security for costs if the applicant has proved existence of two ingredients of Order XXV Rule 1(1) of the CPC.*** *This was aptly summarized by this court [Massati J. (as he then was)] in **JCR Enterprises Limited Vs. Islam Balhabou and 2 Others,** Commercial Case No. 77 of 2007 (Unreported) as follows:*
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> > *"Where a foreign company does not have sufficient immovable property in Tanzania the Court should grant the order for security for costs. The purpose of the law*

is to protect the opposing litigant against any cost likely to be incurred in defending the action, be it a suit or counter claim." (Emphasis supplied)

In this matter having found the applicants have successfully established existence of two conditions as provided under Order XXV Rule 1(1) of the CPC, I am of the settled mind that the applicants are entitled to security for costs. The next contentious issue is what amount should be granted. Mr. Matata says the prayed USD 15,000 must be proved by receipts, such as remuneration agreement, submission of stationaries cost, list of witnesses to be called and their transport and accommodation costs if any. Mr. Kachenje holds a contrary view that USD 15,000 being advocate's instruction fees not provable by receipt as per Tanzania Rent A Car Limited should not be confused with reimbursement costs which requires proof. I am at one with Mr. Kachenje that there is no requirement of proving instruction fees. It is enough for the applicant to establish that the quantum of fees/costs is in accordance with the provided statutory scales. It was stated in the case of **Tanzania Rent A Car Limited** (supra) when considering whether in taxation of bill of costs there is a need of proof of instruction fees by presentation of receipts, vouchers and/or remuneration that it is not mandatory. It was the Court's observation that:

> *"…I am in agreement with Mr. Kobas that in taxation of bill of costs* ***there is no need of proof of instruction fees by presentation of receipts, vouchers and/or remuneration agreement because the taxing officer, among others, is expected to determine the quantum of the said fees in accordance with the cost scales statutorily provided for*** *together with the factors enumerated above."* (Emphasis added)

The above cited case though was dealing with bill of cost I find the principle therein relevant and therefore applicable to this matter as the born of contention therein was whether instruction fees has to be proved by presentation of receipts and other documents or not. As to the other factors to be considered mentioned therein are such as the greater the amount of work involved, the complexity of the case, the time taken up at the hearing including attendances, correspondences, perusal and the consulted authorities or arguments. I find the same not applicable in the circumstances of this matter as it would have been the requirement though in estimation if the quantum of costs claimed would have involved the reimbursable costs which is not at contest now. Since the disputed costs is on instruction fees, I find myself called to determine the same, as I proceed to do hereunder.

It is Mr. Kachenje's submission the requested instruction fees is 3% of the total claim of USD 249,042 in the main suit as provided for under Advocates Remuneration Order, 2005. In deed that fact is deposed in paragraph 11 of the affidavit in support of this application. Item 8 of the 9th schedule to the Advocates Remuneration Order, 2005, GN. No.256 of 2005 provides for advocate's fee of 3% of the liquidated sum claimed for an amount exceeding Tshs. 400,000,000/-. The simple mathematics of 3% of USD249,042 is USD 7,471.26 the approximation of which is USD 7,471 and not USD 15,000. Had it been that the applicants intended the costs to cover documentation, verification, duty/taxes, witnesses travel costs, transportation and allowances and other related costs I hold the same ought to have been proved by presenting the list of witnesses, expected costs of travel, allowance, transportation and accommodation costs, and any other cost likely to be incurred, in which he failed to do. It was held in **Raw Limited** (supra) and **Tanzania Ports Authority and Another** (supra), that such costs must be proved for the court to consider and grant not only reasonable but also fair security for costs basing on the principle of equity, natural justice and fairness. I therefore find the only proved cost likely to be incurred is instruction fees to the tune of USD 7,471 only.

All said and done, the application is granted. I order the respondent to deposit USD 7,471 or its equivalence in Tanzanian shillings at the Bank of Tanzania exchange rate on the day of payment. The amount should be deposited with the judiciary Account within twenty-one (21) days of this ruling.

I order each party bear its own costs.

It is so ordered.

DATED at Dar es Salaam this 08th day of July, 2022.

E. E. KAKOLAKI

JUDGE

08/07/2022.

The Ruling has been delivered at Dar es Salaam today 08th day of July, 2022 in the absence of both Applicants and Respondent and in the presence of Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
08/07/2022.