IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 149 OF 2021

(Emanating from Civil Case No. 78 of 2020)

TANZANIA PORTS AUTHORITY.....1ST APPLICANT

THE ATTORNEY GENERAL.....2ND APPLICANT

Versus

AFRICAN MAINTAINANCE SERVICES LIMITED..... RESPONDENT

RULING

Date of last Order: 9th March, 2022

Date of Ruling: 29th April, 2022

E.E. KAKOLAKI, J.

Pursuant to Order XXV Rule 1(1) and Section 68 (b) and (e) of the Civil Procedure Code, [Cap. 33 R.E. 2019], the CPC, this court has been moved by the applicant for orders that the respondent who is the Plaintiff in Civil Case No.78 of 2020 be ordered to deposit ten percent (10%) of the suit amount as security for payment of all costs incurred and likely to be incurred by the applicants herein in defending the suit. The application is supported by an affidavit of Mr.Christian Chiduga, a State Attorney duly employed by the 1st applicant. The respondent through Mr. Khalid Rashid the principal officer filed a counter affidavit strenuously contesting the application.

Hearing of the application proceeded by way of written submission as both parties appeared represented. The applicants enjoyed the services of Mr. Hangi Chang'a and Careen Masonda learned Principal State Attorney and State Attorney respectively while the respondent hired the services of Capt. Ibrahim M. Bendera, learned advocate.

Briefly the respondent in this application and a foreign company sues the applicants in civil Case No. 78 of 2020 claiming for specific damages amounting to United Dollars Three Millions Seven Hundred and Eighty Thousand, One Hundred and Three and Twenty Cents (USD 3,421,435.80), equivalent to Tshs. 7,880,182,486.00, being the purchase price of 5000 MT of maize, over payments and for general damages, resulted from the Tanzania Revenue Authority's act of auctioning her consignment following its failure to timely clear it from Dar es salaam port.

I have carefully perused applicants' affidavit by in support of the chamber summons, the counter affidavit by the respondents as well as the fighting submissions from both parties. It is the law under Order XXV Rule 1(1) and (2) of the Civil Procedure Code that, this court has discretionary powers to grant the application upon satisfaction of two conditions that, **one**, the respondent company is a foreign company and **second** that, it possess no

or insufficient immovable property(ies) in the country to be realized by the applicant (Defendant) for recovery of the costs incurred in the course of defending the suit is case the same is decided in his favour. Order XXV Rule 1 and 2 of the CPC provides that:

> *1.-(1) Where, at any stage of a suit, it appears to the court that* ***a sole plaintiff is****, or (when there are more plaintiffs than one) that* ***all the plaintiffs are residing out of Tanzania****, and* ***that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immovable property within Tanzania other than the property in suit****,* ***the court may****, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it,* ***to give security for the payment of all costs incurred and likely to be incurred by any defendant****.*
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> *(2) Whoever leaves Tanzania under such circumstances as* ***to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of Tanzania within the meaning of sub-rule*** *(1).* (Emphasis supplied)

The above cited position of the law was adumbrated by this court in the case of **Abdul Aziz Lalani & 2 Others Vs. Sandru Mangaji,** Misc. Commercial Cause No. 08 of 2015 (HC-unreported) when cited with approval the case of

JCR Enterprises Limited Vs. Islam Balhabou and 2 Others, Commercial Case No. 77 of 2007 (HC-unreported) the position which I subscribe to where it observed 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."*

In this matter what is uncontroverted fact as gathered from respondent's counter affidavit as well both parties' submission is the fact that, the respondent is a foreign company duly registered under Kenya laws without any subsidiary company nor offices within Tanzania. Further to that, it is settled fact that, the said company does not possess any immovable property within the United Republic of Tanzania hence the two conditions cited above

are met. What remains in dispute is the issue as to whether the claimed 10% of the suit value of United Dollars Three Millions Seven Hundred and Eighty Thousand, One Hundred and Three and Twenty Cents (USD 3,421,435.80) or its equivalent of Tshs. 7,880,182,486.00 by the applicants as security for costs is justifiable. Accounting for the claimed security for costs in their joint affidavit in support of the application applicants are recorded to have averred that, they incurred and will incur various expenses in defending the case, thus if the application is not granted the Government will suffer a big loss that will not only affect the applicants but rather majority of Tanzanians whose tax will go unrecovered having wasted in defending Civil Case No.78 of 2020. The said costs were deposed in paragraph 6 of the affidavit to include stationary costs, travel to and from court and associated costs for four State Attorneys in handling main case, duty travel allowance for two witnesses stationed at Tanga and Mtwara ports, per diem and witnesses allowances to three retired employees of 1st applicant and costs for preparation of defence meetings to be held between the witnesses and state attorneys.

In rebuttal submission Capt. Bendera, advocate for the respondent, countered that the applicants' submission on the claimed security for costs

are misconceived, wanting and based on unjustified aversions. As to what amounts to security for costs Mr. Bendera referred the court to the definition provided in the **Black's Law Dictionary**,8th Ed, at page 1387 which defines the term as money, property or bond given to court by a plaintiff or an appellant to secure the payment of court costs. It was his argument that, any claimed amount for security for costs by the applicant must justified something which in this matter the applicant failed to do as the court is not told on how such claim of 10% of the suit amount is arrived at and how can the court tax it without the costing basis being deposed in the applicants' affidavit. He further questioned as to how could litigation conducted by non-practising advocates who are paid salaries by the government and the public corporation caused the applicants to incur such claimed costs? It was his argument that, only practising advocates are paid remuneration for representing their clients in accordance to the Advocates Remuneration Order, 2015 GN. NO.63 of 17th July 2015 and not otherwise. That the Orders do not provide remuneration fees for advocates who are not allowed to practice and who do not charge their clients including the two state Attorneys who drew and filed the submission and make appearance representing the applicants herein.

Capt. Bendera went on submitting that, in justifying the claimed 10% of the suit amount as security for costs, applicants in paragraph 6 of their joint affidavit listed tasks and functions to be performed without costing. According to him there is absolutely no connection between 10% of suit amount of Tshs. 7,880,182,486.00 and the expected expenses to be incurred by the applicant (termed as big loss) if the application is not granted, which costs as per respondent's costing is estimated not to exceed Tshs. 3,720,000.00. It was Capt. Bendera's argument that, since the respondent's claimed consignment was auctioned the fact which implies that, the obtained amount of Tshs. 7,880,182,486.00 is in possession of the applicants, then the alleged claimed security for costs by the applicant on the property whose money is in their possession is unfounded one. On the strength of his submission, he prayed for the Court to strike out the application with costs as the same is untenable and rests on unfounded claims.

It is true and I am at one with Capt. Bendera that, as a matter of law the claimed security for costs by the applicant must be justified by establishing its base. It is also a fact that, Government lawyers who are paid salaries are not covered by the provisions of Advocates Remuneration Order, 2015 as it is the State Attorney duties to appear and defend the Government case in

court. However what is apparent in record is that applicants are not claiming for lawyers remunerations among the listed costs incurred and likely to be incurred referred in paragraph 6 of their affidavit as Capt. Bendera would like this court to believe as they have claimed for other costs. Instead what is listed as costs which Capt. Bendera seems not to dispute save for costing which is lacking are normal and acceptable costs incurred or likely to be incurred such as per diem and allowances for witnesses coming from outside Dar es salaam and the traveling costs, defence meetings preparations and stationaries which the respondent went further to estimate its cost to the tune of Tshs. 3,720,000.00. It follows therefore that since the two conditions as dictated in Order have been established by the applicants I don't find difficulties in holding that they entitled to security for costs proved to have been incurred and those which are likely to be incurred in defending the main suit. Now the following question is whether the estimated amount by the respondent is sufficient enough to cover the claimed security for costs by the applicants or they are entitled to 10% of the suit amount? In my view the claimed of 10% of the suit amount by the applicants to be deposited as security for costs without justification on the costing which is estimated to be more than Tshs. 78,800,000.00 is on the hire side and contravenes the

settled principle of the law under section 110 of Evidence Act that, he who alleged carries the onus of proving existence of the alleged fact. However that does not defeat the fact that the applicants has incurred and is likely to incur more costs as stated in paragraph 6 of the application in which I find the estimated costs by the respondent to be on the lower side too. This court when dealing with an application of this nature in the case of **Firoz Haidera4li Jessa and two Others v Diamond Trust Bank Kenya Limited**,Misc. Commercial Application No.56 of 2019, quoted with approval the decision in case of **Dow Agrosciences Export S.A.S v I.S & M (Metals) Ltd,**Commercial Case No.55 of 2017,where the factors for consideration before determining the quantum to be awarded as security for costs was discussed. The Court held that:

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

In this matter as alluded to and rightly submitted by Capt. Bandera the applicant have failed to establish in figure the costs incurred or likely to be incurred despite of the fact that truly have incurred and will be incurring more costs in the course of defending the main suit. I have taken in t consideration the fact that this is one of the moderate case which will involve research and preparation including calling witnesses outside Dar es salaam. I have also considered the fact that summoned witnesses will be entitled to allowances and perdiem as well as refund of the travel costs. All considered I finds it just and fairly for the Respondent to deposit Tshs. 20,000,000/= (Twenty Million Only) as a security for costs. The said amount of Tshs. 20,000,000/= be deposited with the Judiciary Deposit Account within twenty-one (21) days from date of this ruling.

There application is therefore granted to that extent.

I order each party to bear its own cost in this application.

It is so ordered.

DATED at Dar es salaam this day of 29th Day of April, 2022

E. E. KAKOLAKI

JUDGE

29/04/2022.

The Ruling has been delivered at Dar es Salaam today on 22nd day of April, 2022 in the presence of Mr. Charles Shija for the applicants, Capt. Ibrahim Bendera advocate for Respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
29/04/2022