

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MUSOMA
AT MUSOMA**

MISCELLANEOUS CIVIL APPLICATION NO. 19/2021

MAASAI WANDERINGS1ST APPLICANT
BRENDON CREMER.....2ND APPLICANT
TUSK PHOTO.....3RD APPLICANT

VERSUS

VIORICA ILIA 1ST RESPONDENT
FLORIAN-GABRIEL ILIA 2ND RESPONDENT
RADU-VLAD ILIA (Minor and Suing through next friend and Father
FLORIAN-GABRIEL ILIA)..... 3RD RESPONDENT

RULING

28th February, 2022

Kahyoza, J.:

Before this Court is an application for security of costs instituted under Order XXV r. 1 (1) and (2) of the **Civil Procedure Code**, [Cap. 33 R.E. 2019] (the **CPC**). The applicants prayed the respondents, to deposit to this Court Tzs, 728,505,486.03 being 3% of the claimed amount.

The genesis of the application is that Viorica Ilia, Florian-Gabriel Ilia and Radu-Vlad Ilia (Minor suing through next friend and father Florian-Gabriel Ilia), (**the respondents**), instituted a suit against Maasai Wanderings, Brendon Cremer and Tusk Photo (**the applicants**) claiming inter alia, for specific damages to the tune of Tzs. 8,094, 505, 401/=, general damages of Tzs. 6,495, 318, 155/=, exemplary damages to the

tune of Tzs. 7,000,000,000/=, interests, costs and any other reliefs deemed just and fit by this Court.

The respondents filed a joint counter affidavit and raised a preliminary point of law that the application was bad in law for being supported by a defective affidavit, through their advocate. The respondents' advocate alleged that the affidavit is defective for not showing the date of verification in accordance with the rule of verifying affidavits.

We heard the application by way of written submission. The applicants' advocate complied with the order and filed the submission as ordered. To my dismay the respondents' advocate did not reply to the submission. He did not also wish to argue the preliminary objection. I dismissed the preliminary objection and proceed to determine the application for security for costs *ex parte*.

The applicants' advocate submitted that there are two conditions, which must be proved before a court orders the Plaintiff deposit security for costs; **one**, that the Plaintiffs are residing outside Tanzania; **two**, that the Plaintiff has no sufficient immovable property in Tanzania. He prayed the application to be granted as the applicants surpassed the test. To support his position, the applicants' advocate referred to **Abdul Aziz Lalani v. Sadru Magaji**, Misc. Com. Cause No. 8 of 2015.

Undeniably the respondents, the Plaintiffs in Civil Case No. 5/2020 reside outside Tanzania. It is also undisputed that rule 1 of Order XXV of the **CPC** bestows discretionary powers to the court to order or otherwise a

plaintiff who resides out of Tanzania, to give security for payment of costs. The only issue to be considered is the quantum of security for costs.

The objective of requiring foreign Plaintiff to deposit security for costs is to reimburse the defendant in case the Plaintiff is not successful. I am of the firm opinion therefore, that the principles governing taxation of bill of costs do render assistance when considering the application for security for costs. In other words, the principles of taxation have a direct bearing on determination of an application for depositing security of costs.

One of the established principles of awarding costs in litigation is that costs are awarded to redress a winning party for expenses he would not have incurred unless for prosecuting that case. This position was taken in the persuasive decision of the Kenya Court in **Jasbir Singh Rai & others V. Tarlochan Singh Rai & 4 others [2014] KLR** the court relied on Justice Kuloba's Judicial Hints on Civil Procedure at page 94 where the latter commented that-

"the objects of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure..... Costs are means by which a successful litigant is recouped for expenses to which he has been put in fighting an action."

It follows from the above principle that the purpose of an order for security for costs is the same as the purpose of awarding costs to a winner at the conclusion of a trial. The only difference is that one is determined and ordered to be deposited before trial and the other one is awarded after

trial. The intention of ordering the plaintiff to deposit security is to protect the defendant in a suit instituted by a plaintiff who is not residing in Tanzania, from incurring expenses on a litigation which the defendant will never recover. In **Wambura Chacha Vs. Samson Chorwa** [1973] LRT no. 4 the Court stated that-

"the purpose of taxation is to reimburse the successful party and not to punish the loser or enrich the successful."

The purpose of an order for depositing security for costs was also expounded in **Princeton Chemicals Ltd v. Ram Soap Ltd** Commercial case No.55 of 2001(unreported) where Bwana J. (as he then was) quoted with approval comments in the Supreme Court Practice (1991) Vol. 1.P.421et. seq., which I associate myself with that -

*" the amount awarded is in the discretion of the court, which will fix, such sum as it thinks just, having regard to the circumstance of the case. It is not always the practice to order security on a full indemnity basis. If security is sought, as it often is, at any early stage in the proceedings, **the court will be faced with an estimate made by a solicitor or his clerk, of the costs, likely in future to be incurred; and probably the costs already incurred or paid will only be the fraction of the security sought by the applicant...**it is of great convenience to the court to be informed what are the estimated costs, and for this purpose skeleton bill of costs affords a ready guide..... "*

As to the quantum, the applicants' advocate submitted that the amount claimed is the apparent, imminent, and likely to be incurred by the applicants being professional fees charged at 3% of the claimed liquidated sum. He argued that the amount was based on the **Advocates Remuneration Order, 2015 G.N. 263/2015**. He added that it is the position of the law that professional fees are not required to be proved. To buttress his argument, he cited the case of Tanzania Rent Car Limited v. Peter Kimuru Civil Ref. No.

As stated, the purpose of the Court to order the plaintiff to deposit security for costs is just to protect the defendant by ensuring he is not dragged into a case, which he is not able to recover costs. An application for order to deposit security is therefore, not a counter-claim. An order for security for costs is not meant to stifle a litigant from approaching the doors of justice. This was the position expressed by the Court of Appeal in **Abdallah v. Patel & Another** [1962] E.A. 447 that-

"It is right a litigant, however poor, should be permitted to bring his proceedings without hindrance and have his case decided."

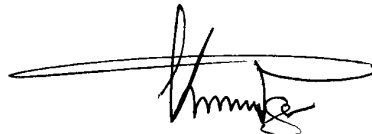
I have, considered the fact that a big part of the Plaintiff's claim is for general damages. The Court of Appeal and this Court have held times without number that general damages cannot be the bases of determining pecuniary jurisdiction of the court. The rationale being that general damages are awarded at the discretion of the Court. On the same vein, I do not think the general damages must be the basis of assessing the quantum to be furnished as security for costs. I also minded of the fact

that the Respondents should not be denied access to the doors of this Court by ordering them to furnish exorbitant security for costs.

Eventually, I find it just to order the Respondents to deposit security of costs to the tune of Tzs 240,000,000/= or USD equivalent.

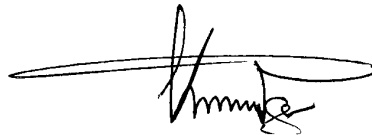
Costs of this application shall follow the outcome in Civil Case No. 5/2020. Should the respondents fail to deposit security, the suit will be dismissed and the applicants will be entitled to claim costs of this application.

It is ordered accordingly.



**J.R. KAHYOZA,
JUDGE
28/2/2022**

COURT: Ruling delivered in the virtual presence of the applicants' advocate Mr. Kagirwa and in the absence of the respondents and their advocate. B/C, Ms. Neema present virtually.



**J.R. KAHYOZA,
JUDGE
28/2/2022**