

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 183 OF 2022

THE REGISTERED TRUSTEES OF TANZANIA

PRESBYTERIAN CHURCH APPLICANT

VERSUS

JUNG HWAN KIM 1ST RESPONDENT

SANG K NAM 2ND RESPONDENT

(Arising from Civil Case No. 28 of 2022)

RULING

10th and 11th August, 2022

KISANYA, J.:

Before me is an application for security of costs. It is made under Order XXV, Rule 1 and 2(1) of the Civil Procedure Code, [Cap. 33 R.E. 2019] (the CPC) and supported by an affidavit sworn by Patrick Sylvester Muna, who introduced himself as Trustee of the applicant herein.

The facts leading to this application can be summarized as follows: The respondents in this application are citizens of the Republic of Korea. The duo are plaintiff in Civil Case No. 20 of 2022 which was instituted against the applicant herein. Their claims against the applicant include, permanent injunctive orders, special damages amounting to TZS 1,417,152,600 and

general damages to the tune of TZS 300,000,000/=. In terms of the plaint, the respondents claim to be the founders, owners and financiers of Rainbow Nursery and Primary School located at Tuangoma, Dar es Salaam which is the crux of the matter. In addition to the foresaid case, the respondents filed an application (Misc. Civil Application No 96 of 2022) in which they asked this Court to issue an order for permanent injunction against the applicant from releasing, terminating, confiscating of assets, chattels and all other schools' properties and causing them to be repatriated pending determination of the main case.

In view of the said cases, the applicant filed the present application moving this Court be pleased to order the respondents to furnish in court Tshs. 100,000,000/= or such amount as the Court shall deem just, being security for costs incurred and/or likely to be incurred by the Applicant. The respondents filed a joint counter affidavit contesting the application.

When this application was called on for hearing, Mr. Paschal Kamala, learned advocate appeared for the applicant, whilst Mr. Daniel Lianga, learned advocate represented both respondents.

Arguing the application, Mr. Kamala adopted the contents of the supporting affidavit to form part of his submission. He submitted that the basis of the application for security for costs is the fact that the respondents

are not residents of Tanzania who possess no immovable properties in Tanzania as deposed in paragraph 3 of the supporting affidavit. He urged this Court to consider that the said fact was not disputed by the respondents.

It was Mr. Kamala's further submission that the respondents' permits were revoked by the Immigration after submitting false documents and that they have not produced evidence to prove their residence in Tanzania. The learned counsel challenged the e-cards appended to the counter affidavit on the reason that the same display that the respondents were granted permit for purposes of attending this case.

Citing the case of **Maasai Wanderlings and 2 Others vs Viorica Ilia** and 2 Others, Misc. Civil Application No. 19 of 2021 (unreported), Mr. Kamala argued that the amount prayed by the applicant is equitable in the circumstances of this case. That said, he prayed that the application be granted.

Mr. Lisanga prefaced his submission in reply by adopting the facts deposed in the counter-affidavit. Although the learned counsel admitted that the respondents are Korean citizens, he contended that they have been living Tanzania for 12 years. Mr. Lisanga went on contending that the respondents are reliable persons who entered into Tanzania as missionaries and that they are founders of the school which is the core dispute between the parties. He

further admitted that at one point in time the respondent's working permits were revoked. However, he submitted that their residence permits were renewed as averred in paragraph 7 of the counter affidavit.

It was his further submission that this Court has discretion to grant the application for security for costs. To bolster his submission, the learned counsel cited the case of **Cooperatives Mes Artisaanuck Miniers and 4 Others, vs Ben Ngamije Mwangachuchu t/a Societe Miniere De Busunzu Sari**, Misc. Commercial Application No. 19 of 2021 (unreported). He was of the view that the amount sought by the applicant is too huge and that the respondents will not be able to run the school. Making reference to the case of **Cooperative Mes Artisaanuck Minier** (supra,) Mr. Lisanga argued that the amount to be deposited should not be a burden to the respondents who have a genuine case.

Submitting further, the learned counsel contended that the applicants have not proved that the respondents are not reliable. Therefore, he invited this Court to dismiss the application for want of merit. He also prayed for costs.

When Mr. Kamala rose to rejoin, he contended that the submission by the respondents' counsel that the respondents have been in Tanzania for twelve years and that they are owners of the school in dispute was not

deposed in evidence. He further submitted that the respondents have not proved that their permit were revoked for wrong information and that they were cleared by the Immigration Department. Reiterating his submission in chief, Mr. Kamala urged me to grant the application with costs.

I have considered the rival submissions and gone through the supporting affidavit, counter affidavit as well as the pleadings in Civil Case No. 28 of 2022 and Misc. Civil Application No. 96 of 2022. It is vivid that the issue for my determination is whether the application is meritorious.

My starting point is on the principles or conditions to be considered in determining the application for security for costs. The same are provided for under Order XXV Rule 1(1) and (2) of the CPC which was cited in the chamber summons. The said provisions stipulate: -

"Where, at any stage of a suit, it appears to the court that the 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 one of such plaintiff does, possess any sufficient immovable property within Tanzania other than the property suit, the court may, either of its own motion or on the application for any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all cost incurred and likely to be incurred by any defendant."

As it can be glanced from the above cited provision, this court has discretionary powers of granting the application for security for costs. In order to grant the application for security for costs, the court must be satisfied that the following conditions exist; *first*, that all plaintiffs in the pending suit reside outside Tanzania; *two*, that the plaintiffs possess no any sufficient immovable property within Tanzania, other than the property in dispute, and *third*, that the court on its own motion or upon application by the defendant has ordered the plaintiff to give security for payment of all costs incurred and likely to be incurred by any defendant. [See also the case of **Abdul Aziz Lalani vs. Sadru Magaji**, Misc. Com. Cause No. 8 of 2015 (unreported)].

It is settled law that the purpose of requiring the defendant to furnish security is to protect the opposing litigant against any cost likely to be incurred in defending the action laid against him. I am also fortified by the decision of this Court in the case of **Maasai Wanderlings and 2 Others vs Viorica Ilia and 2 Others**, Misc. Civil Application No. 19 of 2021 (unreported) where my learned brother Kahyoza, J, held that:

"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 the present case, the evidence adduced by the applicant in support of the application is reflected in paragraphs 3, 4, 5, and 6 of the supporting affidavit. For ease of reference, I find it appropriate to reproduce the said paragraphs. They read as follows:

3. That Respondents are South Korean nationals.

4. The Respondents above named have no any known offices and neither do they own any known asset or property within the local limit of this Court's jurisdiction.

5. In the circumstances, it would be impractical for the Applicant to enforce any order for costs that may ultimately be passed in its favour.

6. That it is fair and just being a foreigner with no assets or office within the limits of jurisdiction of this Hon. Court, the Respondent be ordered to provide security for costs as applied for."

In the light of the foregoing, it is apparent that the applicant did not depose whether the respondents reside outside Tanzania. Indeed, paragraphs 1 and 2 of the plaint in which it was stated that each respondent is a "Korean national working for gain in Dar es Salaam" was not disputed by the defendant in her written statement of defence. The fact that the respondents are foreigners whose office is not known to the applicant is by itself not sufficient to conclude that they reside outside Tanzania. On the

other hand, the respondents have produced e-permits issued by the Immigration Department. Both permits will expire on 7th August, 2023. That being the case, I hold that the first condition for grant of security for costs has not been met.

With regard to the second condition, the applicant gave a general statement that the respondents possess no properties within Tanzania. It is settled law enshrined under section 110 of the Evidence Act, Cap. 6, R.E 2022, that a person alleging on existence of certain fact is duty bound to prove the same. That position of law applies to application for security for costs. I subscribe to the case of **Abdula Aziz Lalani & 2 others v Sabru Mwangali**, Misc. Commercial Cause No.8 of 2015 (unreported) cited with approval in **Mohamed Ismail Murudkker and 2 Others vs Fathia Bomani**, Consolidated Misc. Land Application No. 273 & 281 of 2022 in which this Court stated that:

"Thus, for the applicants to succeed in this application for the 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 is suit."

Being guided by the above position, I hold the view that the applicant has not proved the first and second conditions for grant of application for

security costs. Therefore, this Court cannot exercise its power and order the respondents to deposit the security for costs.

In the result, the application is hereby dismissed for being devoid of merits. Each party shall bear its own costs.

DATED at DAR ES SALAAM this 11th day of August, 2022.



S.E. Kisanya
JUDGE

11/08/2022