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. 388 OF 2022

OMARY BAWAZIRI .... APPLICANT

VERSUS

NASSAR ABDALLAH NASSIR .... RESPONDENT

(Arising from Civil Case No. 177 of 2021)

RULING

29th September & 21st October, 2022

KISANYA, J.:

By Chamber Summons predicated under Order XXV, Rule 1 (1) of the Civil Procedure Code, [Cap. 33, R.E. 2019] (the CPC), the applicant is seeking an order of this Court to direct the respondent to give security for payment of costs incurred and likely to be incurred by the applicant in defending Civil Case No. 177 of 2021. Supporting the chamber summons is an affidavit taken by Omari Bawaziri, the applicant, highlighting the facts upon which this application is predicated.

It is essential, at the outset, to take note that, in terms of the supporting affidavit, the applicant is one of the defendants in Civil Case No. 177 of 2021. It is further deduced from the plaint appended to the supporting affidavit that, other defendants in the said suit are Omary Bawaziri, Bakari

Mshoza, Sara Brown, African Transfreight Solution Limited. Although, the affidavit suggests that the suit subject to this application was instituted by the respondent, the plaintiffs named in the plaint are Nasser Abdallah Nassir and Nassar Abdallah Nassir (as Administrator of the Estate of the late Omary Abdallah Nassir). Their claim against the applicant and other defendants is for payment TZS 1,700,000,000.00, being specific damages and compensation for illegal selling of motor vehicle.

Apart from filing the written statement of defence in respect of the said suit, the applicant lodged this application. His application is based on the ground that the respondent resides outside the United Republic of Tanzania and that he does not possess sufficient immovable property within Tanzania.

Upon being served, the respondent filed a counter affidavit to contest the application. His counsel, Mr. Franco Mahena went on lodging a notice of preliminary objection on one point of law to the effect that, the application is supported by incurably defective affidavit.

When the matter was called on for hearing on 29th September, 2022, the applicant was represented by Mr. Franco Mahena, learned advocate, while the respondent enjoyed the legal services of Mr. Gerald Riwa, learned advocate.

In order to save time, this Court resolved to hear the parties on the preliminary objection and the main application on the understanding that, there would be no need of determining the application on merit if the preliminary objection is found meritorious.

Mr. Riwa submitted first in support of the preliminary objection. He argued that the preliminary objection is based on the provisions of section 44(2) of the Advocates Act and the case of **Asajile vs Juma Njije**, Misc. Land Application No. 56 of 2020, HCT at Mbeya (unreported). It was his argument that, section 44 of the Advocates Act, Cap. 341, R.E. 2019 bars admission of document which does not show the names and address of the drawer. Making reference to the **Black's Law Dictionary**, the learned counsel submitted that a person means human being or cooperation having duties of human being. He further submitted that a law firm is not a person. It was therefore, his argument that the affidavit drawn and filed by a law firm is defective if the name of the drawer is not shown. On that account, Mr. Riwa moved me to strike out the affidavit and the application.

In reply, Mr. Mahena submitted that the chamber summons and affidavit were drawn and signed by Omary Ali Ngatanga, a practicing advocate from Mzizima Law Associates. He, therefore, contended that the affidavit was not drawn by unqualified person who is required to indicate his

or her name under section 44 of the Advocates Act. To cement his contention, Mr. Mahena cited the case of **George Hamba vs James Kasuka**, TBR Civil Application No. 1 of 2005 and **Kassim Ahmed Mbingwa vs Mtepa Bajari,** Misc. Land Application No. 14 of 2016 (unreported). In that regard, he prayed that the preliminary objection be overruled.

In a short rejoinder, Mr. Riwa submitted that the requirement of indicating the name of the drawer of document applies to qualified and unqualified persons. He submitted further that the affidavit stands on its own and thus liable to be struck-out for failure to indicate the drawer's name.

With regard to the main application, Mr. Mahena adopted the supporting affidavit to form part of his submission. He went on to submit that the application of this nature is granted upon meeting two conditions set out under Order XXV Rule 1 of the CPC. According to him, the conditions are to the effect that the plaintiff must be residing outside Tanzania and having no sufficient property in Tanzania.

On the first condition, Mr. Mahena submitted that paragraph 2 of the plaint shows clearly that the respondent's residence is outside Tanzania. It was his further argument that even if the respondent is a citizen of Tanzania, the first condition has been met due to his of residence.

As for the second condition, the learned counsel submitted that the respondent has no sufficient immovable property in Tanzania. He further submitted that the respondent's contention that he owns a piece of land is not supported with evidence. It was also his view that the applicant ought to have appended a copy of the title deed.

With regard to the quantum of security for costs, he submitted that the Court is guided by the principles governing taxation and security for costs. He fortified his submission by citing the case of **Maasai Wandering and 2 Others vs Viorica Ilia and 2 Others**, Misc. Civil Application No. 19 of 2022, HCT at Musoma (unreported). Mr. Mahena submitted that the amount for security for costs is awarded at the discretion of the Court having regard to the scale provided for by the Advocates Remuneration Order. Referring the Court to the cases of **Maasai Wandering** (supra), **Hardar Bin Mohamed El-mary and Others vs Hadija Bin Suleiman** (1956) Vol. 25 EACA 313, **Tanzania Rent Car Limited vs Peter Kihumu,** Civil Reference No. 9 of 2020 (unreported), he pointed out that other factors for consideration are complexity of the case, importance of the suit, time and energy spent in the research. He then submitted that TZS 51,000,000 prayed for in this application is 3% of the respondent's claim which is charged by the applicant as instruction fees. He further contended that the applicant will incur attendance fees and filing fees.

On foregoing submission, Mr. Mahena urged this Court to grant the application.

In rebuttal, Mr. Riwa prefaced his submission by adopting the facts deposed in the counter-affidavit to form part of his submission. He submitted that the objective of security for costs under Order XXV Rule 1 of the CPC is to protect the defendant in a suit where the plaintiff fails to pay the costs after instituting a suit which is decided in favour of the defendant. However, he was of the view that the provision is limited to foreigners who are likely to go back to their countries. He contended that the respondent is a citizen of Tanzania with a permanent residence in Korogwe Tanga where he visits regularly each year. It was his further contention that the respondent will pay the costs likely to be incurred by the applicant.

On the second condition, Mr. Riwa submitted that the respondent deposed to have sufficient immovable property in Tanzania. Citing the provisions of section 110 of the Evidence Act, Cap. 6, R.E. 2019, he argued that the applicant was duty bound to prove his allegation that the respondent has no sufficient movable property. To buttress his argument, he cited the case of **Global Agency vs Tarbin Tarm Tektil Gida San Vetic Ltd**, Misc. Commercial Application No. 79 of 2019. That said, the learned counsel implored this court to dismiss the application for want of merit. In alternative,

he urged the Court to order the respondent to furnish a bank guarantee, if the application is found meritorious. He also stated that the applicant has not proved the claimed amount was paid to his advocate.

In a brief rejoinder, Mr. Mahena reiterated that what is considered in determining application of this nature is residence and not citizenship of the plaintiff. As regards the issue whether the respondent has sufficient immovable property in Tanzania, he submitted that the respondent was duty bound to prove that fact after alleging the same in the counter affidavit. On the argument that the applicant has not proved to pay instruction fees, Mr. Mahena submitted that there was no need of proving the same because the fees is paid in accordance with the Advocates Remuneration Order (supra).

I have dutifully considered the rival submissions made by the learned counsel for both parties. As hinted earlier and in view of the practice of this Court, I have to determine first whether the preliminary objection has merit. In the event the preliminary objection is found meritorious, there will be no need of determining the main application.

Flowing from the submission of Mr. Liwa, the point of objection is based on the ground that the affidavit in support of the application lacks the name of the drawer thereby contravening section 44 (2) of the Advocates Act. It is my understanding that section 44(2) of the Advocates Act bars

admission of document made under subsection (1) if the respective document does bear the name of the drawer. Reading further from the provision of section 44(1) of the Advocates Act referred to in sub-section (2) which is the basis of the preliminary objection, I agree with Mr. Mahena that it deals with unqualified person who prepare the documents for gain, fee or reward. I am also fortified by the case of **Beatrice Mbilinyi vs Antony Mabkhuti Shabiby**, Civil Application No. 475/01 of 2020 (unreported) in which the Court appeal underlined as follows:

> *"We have dispassionately read the provisions of section 44 (1) in the light of the arguments of the learned advocates for both parties. Having so done, we have understood it to be referring to unqualified persons drawing documents for gain, fee or reward as mentioned under section 43 (1) thereof.*

The Court of Appeal went on citing with approval its previous decision in the case of **George Humba** (supra) where it stated that:

> *"Assuming that section 44 (1) in the Advocates Ordinance, Cap. 341 of the Revised Laws is the correct version and it refers to instruments as mentioned in s. 43 (1), we would then say that the section deals with unqualified persons who prepare those documents for gain, fee or reward. Surely, Mr. Kayaga could not be an unqualified person for purposes of preparing the Notice*

of Motion and the accompanying affidavit for filing in Court."

In the present case, it is common ground that the name of the drawer of the affidavit in support of the application is Mzizima Law Chambers. In view of the above position of law, the question that arises is whether the affidavit in support of the application was drawn by unqualified person. As good luck would have it, this issue was discussed in the case of **Beatrice Mbilinyi** (supra) and the Court of Appeal held:-

> *"This application which was drawn by a firm of advocates by the name Bitaho Legal Advocates and Consultants cannot be said that it was drawn by an unqualified person. Moreover, Mr. Msemwa did not prove that the documents were drawn by an unqualified person as envisaged under sections 43 and 44 of the Advocates Act. This limb of objection also fails."*

Similar position was stated by this Court (Twaibu, J, as he then was) in the case of **Kassim Ahmed Bingwe** (supra) as follows:

> *"In such a situation, therefore, the issue would not be the business name so indicated, but simply who drew the document. If it is clear from the document that a qualified advocate drew the document then in terms of George Humba vs James Kasuka supra), such advocate is not a person targeted by the aforesaid provision.*

> *I took a similar position in the case of Faith Mohamed Mtambo vs Zuberi Mohamed Kuchauka & 2 Others, Misc. Civil Cause No. 2 of 2015 (High Court, Mtwara Registry, unreported). I held, inter alia, that the omission to name the advocate concerned would not render the pleadings incurably defective, such that the pleadings would be liable for order of striking it out.*

Being guided by the above provision, I find no reason to hold that the affidavit in support of the application was drawn by unqualified person referred to in section 44(1) of the Advocates Act. Thus, the preliminary objection lacks merit and must fail.

Turning to the main application, I find it apposite to reproduce the provision of Order XXV Rule 1(1) of the CPC, which is the basis of this application. It reads: -

> *"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."*

My reading of the above cited provision is that application for security for costs is granted at the discretion of the trial court. Further to this, and as rightly argued by Mr. Mahena, the provision set out two conditions to be met before granting an application for security for costs. The first condition is to the effect that all plaintiffs in the main suit reside outside Tanzania. Another condition is that apart from the property in dispute, the plaintiff or any of the plaintiff must possess no sufficient immovable property within Tanzania. See also the cases of **Maasai Wandering** (supra) and **Abdul Aziz Lalani vs. Sadru Magaji**, Misc. Com. Cause No. 8 of 2015 (unreported)]. In former case, this Court went on underscoring security for costs aims at protecting the opposing litigant against any cost likely to be incurred in defending the action laid against him.

The issue is whether the application meets the above two conditions. Starting with the first condition, the plaint appended to the affidavit shows that the respondent resides and works for gain in Coventry United Kingdom. Although the main suit has two plaintiffs, the respondent is also suing as administrator of estate of the late Omary Abdallah Nassir. Therefore, much as his residence is outside Tanzania, I agree with Mr. Mahena that the first condition has been met. Mr. Riwa's contention that the respondent is a citizen of Tanzania lacks legal basis. The issue for consideration is whether the plaintiff or all plaintiffs resides outside Tanzania. Had the Parliament

intended the issue of citizenship to be considered, it would have stated so in the above cited provision.

As for the second condition, the principle of evidence under section 110 of the Evidence Act requires the person alleging on existence of certain facts to prove the same. In view of thereof, the applicant was duty bound to prove to the satisfaction of this Court that the plaintiff or any of the plaintiffs in the pending suit have no sufficient immovable property. In the case of **Mohamed Ismail Murudkker and 2 Others vs Fathia Bomani,** Consolidated Misc. Land Application No. 273 & 281 of 2022 (unreported), this Court (Mgeyekwa, J) cited the case of **Abdula Aziz Lalani & 2 others v Sabru Mwangali,** Misc. Commercial Cause No.8 of 2015 (unreported) where it was held that:-

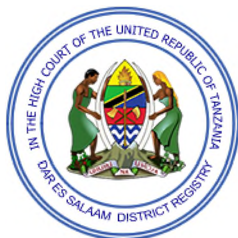
> *"Thus, for the applicants to succeed in this application for the provision of security for costs, they must prove to the satisfaction of the court that the respondent resides outside Tanzania and that he does not possess in Tanzania sufficient immovable property other than the property is suit."*

In our case, the applicant stated in paragraph 4 in his affidavit that the respondent does possess sufficient immovable within Tanzania. He did not demonstrate how he arrived at that finding. As if that was not enough, the applicant did not file a reply to the counter-affidavit to dispute the

respondent's statement that he has sufficient immovable property within Tanzania. Considering the respondent is a citizen of Tanzania, the applicant ought to have demonstrated, for instance, whether that record of the Ministry of Land and Human Settlement or any Government institution confirmed that the respondent has no land or immovable property within Tanzania. Since the applicant did not discharge his duty, the onus to prove the fact alleged by him cannot shift to the respondent. Therefore, I hold the view that the second condition for grant of application for security for costs has not met. This renders the applicant not meritorious because the stated two conditions are proved cumulatively.

Ultimately, this application is hereby dismissed for want of merit. Costs to follow the event in the main suit.

DATED at **DAR ES SALAAM** this 21st day of October, 2022.



S.E. KISANYA
JUDGE
21/10/2022