IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 409 OF 2021

(Arising from Civil Case NO. 130 of 2020)

HB WORLDWIDE LIMITED .....APPLICANT

VERSUS

ARAJANA KEITA COMPANY ..... RESPONDENT

RULING

Date of Order: 03/03/2022.

Ruling date: 18/03/2022.

E. E. Kakolaki, J

In this application the applicant is seeking for issuance of an order against the respondent for deposit in this Court a sum of Tanzania Shillings Fifty Million (Tshs. 50,000,000/=) being security for all costs incurred and likely to be incurred by the applicant in respect of Civil Case No. 130 of 2020, as well as costs of this application. It is preferred under Order XXV Rule 1 and 2 of the Civil Procedure Code, [Cap. 33 R.E 2019] hereinafter referred to as CPC, supported by affidavit on one **Mohamed Ramzanali Virani**, principal officer of the applicant. In her response the respondent has strenuously resisted it and filed the counter affidavit to that effect through one Keita

Kounda, the respondent's director. As both parties are represented it was mutually agreed the application be disposed of by way of written submissions in which its filing orders were complied with to the letters. The applicant appeared represented by Ms. Hawa Tursia learned advocate whereas the respondent enjoyed the services of Mr. Zidadi Mikidadi, learned advocate.

Briefly the Respondent in this application, a company incorporated under Tanzanian Laws and agent of a Chinese Company Zhongshan Lanju Daily Chemical Industries Company Limited and manufacture of pesticides known as Lanju, which is dully distributed by the Respondent, is suing the Applicant claiming for Tanzanian Shillings Three Hundred Million (Tshs. 300,000,000/) being general damages for Trademark Infringement and or passed off of the Business Mark of Lanju Products, in Civil Case No. 130 of 2020, pending before this court. The said claims are vehemently disputed by the applicant the result of which prompted her to file this application pressing for an order for deposit of the costs incurred and likely to be incurred as alluded to here in above.

I wish to state from the outset that, the applicant when moving this court improperly cited the enabling provision as Order XXV Rule 1 and 2 instead of Order XXV Rule 1(1) and (2) both of the CPC. Since the anomaly has not

been raised by the respondent and given the fact that this court has powers to entertain the application, I ignore the anomaly and proceed to entertain it. It is the law under Order XXV Rule 1(1) and (2) of the CPC 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 immovable property 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****.*
>
> *(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 position of the law in the above cited provision was well 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 when 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 the light of the above cited law and cases in this application, it behoves the applicant to prove the two above named ingredient as sections 110 and 111 of Evidence Act, [Cap. 6 R.E 2019], require the one who alleges to prove and the burden of proof lies to the person who would fail if no evidence at all is given on either side.

To start with the first ingredient as to whether the respondent is a foreigner, Ms. Tursia argued it is. She said it is undisputed fact that, the Principal Company in which the respondent is purporting to act on her behalf as an agent is a foreign company, without certificate of incorporation or compliance and with no branch in our jurisdiction, leave alone the fact that, it has no cause of action against the applicant. She referred the court to paragraph 1 of the plaint as a proof of that fact and invited the court to find the first ingredient is established by the applicant.

In rebuttal Mr. Zidadi while adopting the respondent's counter affidavit challenged the applicant's submission on the point that, the respondent (plaintiff) is not residing in Tanzania. He said, the applicant ought to have proved that the respondent is not residing in the country in which she failed. He contended, as per the annexed documents in the counter affidavit, Memorandum and Articles of Association of the Company, the Permit to

Import a Pesticide from Tropical Pesticide Research Institute Arusha, Certificate of Incorporation, Certificate of Registration for Taxpayer Identification Number (TIN), Pesticide Registration Certificate, Registration Certificate from Government Chemist Laboratory Authority and Tanzania Bureau of Standard, the respondent is a local company duly registered under Tanzanian Laws. He contended, it is legally registered for dealing with importation of pesticide spy known as LANJU products as shown in the documents annexed to the counter affidavit, capable of bearing any liabilities arising from the main case. As to the issue of lack of cause of action as raised by the applicant he submitted, the same is baseless as it needs evidence to be proved which fact cannot be entertained and determined in this application but rather in the main case. In so doing he opined, in the main case this court will be called upon to determine the issue as to whether there was violation of section 30 of the Trademarks and Social Mark Act, [Cap. 326 R.E 2002]. He therefore implored the court to find the applicant has failed to establish the first ingredient hence dismiss the application.

In her brief rejoinder Ms. Tursia almost reiterated her submission in chief while insisting that, since it is uncontroverted fact the respondent/plaintiff sued as an agent and on behalf of the Principal Company which is a foreign

company, then the application for deposit of costs is appropriate as there is no traces of Principal's immovable property in out jurisdiction.

I have taken time to consider the fighting arguments from both parties on the proof or otherwise of the first ingredient as well as to thoroughly peruse the pleadings herein. It is Ms. Tursia argument that, the respondent is a foreign company for suing as agent and on behalf of the Chinese company without certificate of incorporation or compliance and with no branch in our jurisdiction. She relies on paragraph 1 of the plaint. To the contrary Mr. Zidazi is of the opposite view that, it is not for being a locally incorporated company capable of bearing its liabilities particularly in the main suit. Paragraph 1 of the plaint relied on by the applicant reads:

> *"1.That the plaintiff is a legal person incorporated in Tanzania and is an agent of Chinese Company Zhongshan Lanju Daily Chemical Industries Company Limited manufacturer of Pesticides known as Lanju, distributed by Plaintiff here in Tanzania…"*

A close look at the above cited paragraph, the same does not in my opinion prove that, the respondent is suing for and on behalf of her Principal, a Chinese owned and foreign company. I so opine as the mere fact that, the respondent deposed to be an agent of the foreign company without

specifically stating that, she is suing for and on behalf of the Principal, does not conclusively connote that, it is a foreign country for the purposes of Order XXV Rule 1(1) of the CPC. I therefore distance myself from Mr. Tursia's proposition that the respondent is a foreign company for only one reason that, being a company duly incorporated under Companies Act, 2002 and certified by responsible authorities to import chemicals as exhibited in the annexures to the counter affidavit, including **Lanju Spray Aerosol**, whose trademark is at contest in the main suit, has a right to sue or be sued in her own name as agent of the foreign company, as longer as she does not do so, for and on behalf of her Principal. Since in the main suit the respondent has sued the applicant in her own name and not for and or on behalf of her Principal, I find the first ingredient is not established by the applicant.

As regard to the issue of cause of action as rightly stated by Mr. Zidadi that, the same calls in proof by evidence leave alone the fact it cannot be entertained by court in this application as it ought to be determined in the main suit. In view of the above finding, the next issue for determination is proof of the second ingredient in which Ms. Tursia is contending the respondent as a foreign company has no known immovable property for realising the costs should the court decide the main suit in favour of the

applicant. Citing the cases of **Abdul Aziz Lalani and 2 Others** (supra), **Dow Agrosciences Export S.A.S Vs. I.S & M (metal) Limited,** Commercial Case No. 55 of 2007 (HC-unreported) as referred in the case of **Cooperative Mes Artisaanaux Miniers Du Congo and 4 Others Vs. Ben Ngamije Mwangachuchu t/a Societe Minier De Businzu Sarl**, Misc. Commercial Case No. 62 of 2018 (HC-unreported), she argued that, the purpose of security for costs is not to stifle the respondent/Plaintiff from any genuine claims he may have against the defendant but rather assure applicant/defendant of recovery of his costs should the suit be finalized in his favour. And that, in determination of the quantum the court has to consider several factors such as complexity of the case, research workload involved, costs incurred during the application and after, the factors she stated are justified in this application, to warrant this court grant the application.

Contesting Ms. Tursia's submission, Mr. Zidadi asserted, the second ingredient has not been established by the applicant as she has failed to establish the necessity of this court granting her prayer taking into consideration that the respondent is resident company. On the cited case of **Cooperative Mes Artisaanaux Miniers Du Congo and 4 Others** (supra)

relied on by the applicant in his submission he argued, the facts therein are distinguishable to that of the present matter where the respondent is a Tanzanian company, as in that case like what was the case in **Lazarus Abel Sanga and Others Vs. Lloyd Marthinsen Otto**, Misc. Civil Application No. 702 of 2018 (HC-unreported), respondent companies were residing outside Tanzania. With regard to the quantum of the prayed costs by the applicant, he argued, the claim of Tshs. 50,000,000/= is on higher side and baseless as it is without any legal justification as the court is not told as to why the respondent should deposit such huge amount of money. He lamented, the applicant has supplied no explanation as to whether the case is a complex one and that, it will consume time leave alone involvement of research as opposed to the true fact that, it is a very straight one which does not need research nor does it expect to consume much time to both parties. He opined, it was mandatory for the applicant to prove to the court as to how he arrived to such amount for the court to consider her prayer by providing receipts justifying the claims. To fortify his stance, the court was referred to its decision in the case of **Niten Ratilal Patani and Nishit Ratilla Patani Vs. Ashwinkumar Jagjivan Rabhen**, Misc. Application No. 535 of 2018 (unreported) as cited in the case of **Cooperative Mes Artisaanaux**

Miniers Du Congo and 4 Others (supra), where my brother Magoiga J had the following observations:

> *"… am of the considered opinion that it is not enough to allege but proof must be there. The law is very clear, he who alleges must prove …* ***the order for payment of security for costs must be pegged in realistic amount and full explained to the satisfaction of court how the same were arrived by who desires the court to grant the said order****…".*

Basing on the above cited case Mr. Zidadi urged this court to find the applicant not only has failed to prove to the court as to how she arrived to such exorbitant amount but also the two conditions as set out in Order XXV Rule 1(1) of the CPC. He thus prayed the court to dismiss the application with costs. In her rejoinder submission Ms. Tursia apart from reiterating what she submitted in her submission in chief, she added on the issue of proof of quantum as claimed by the applicant. She said, the submission by Mr. Zidadi is without merit as no authority or provision of the law has been cited to cement that requirement, hence this court is enjoined to consider it as correctly justified by the applicant. Otherwise she maintained her prayers for grant of the application as prayed.

Having considered both parties' submission I think the above issue need not detain this court much as both conditions as provided under Order XXV Rule 1(1) of the CPC, must all be established to the satisfaction of the court before the application for security for costs is granted. It is not sufficient for the applicant to prove one condition only. In this matter the first condition as to whether the applicant is the foreign company has been determined in negative. Since determination of the second condition depends on positive proof of the first condition, and since in this matter the first issue has been found in negative, it is the findings of this court that, the applicant has failed to establish the second condition as under of Order XXV Rule 1(1) of the CPC, the requirement of proving the respondent has immovable property does not exist for being a resident company duly incorporated under Company Act. It follows therefore that even the cases by both parties in proof and against the second condition are inapplicable under the circumstances of this matter, hence a finding that, the second condition has not been established by the applicant.

In the premises and for the fore stated reasons I am satisfied that the applicant's application is devoid of merit and the same is hereby dismissed.

I order that costs should follow the event.

It is so ordered.

DATED at DAR ES SALAAM this 18th day of March, 2022.

E. E. KAKOLAKI

JUDGE

18/03/2022.

The Ruling has been delivered at Dar es Salaam today on 18th day of March, 2022 in the presence of Mr. Hawa Turusia, advocate for the applicant, who is also holding brief for Mr. Zidadi Mikidadi, advocate for the Respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
18/03/2022