IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

Misc Civil Application N0. 37 OF 2023

(Arising from Civil Case No.145 of 2022 Before Hon. Mkwizu J)

RAJIV BHARAT RAMJI..... APPLICANT

VERSUS

POWER GENERATION MIDDLE EAST FZE ..... RESPONDENT

RULING

8th March & 21st April 2023

MKWIZU, J

Before this Court is an application for security for costs instituted under Order XXV Rule 1 (1) 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, the Plaintiff in Civil Case No.145 of 2022 deposit before the court the sum of USD 155,000 equivalent to Tsh. 361,735,450/= is as security for costs incurred and likely to be incurred by the applicants herein in defending the suit. The application is supported by an affidavit of the applicant affirmed on 23/1/2023. The respondent through Mr. Mpaya Adalbet Kamara the respondent's advocate filed a counter affidavit contesting the application.

The root of this application is a claim of United State of America Dollars Three Hundred and Ten Thousand (310,000 USD) equivalent to Tanzania shillings seven Hundred and Twenty-three Million four, Hundred and Sixty-

Eight Thousand and nine Hundred (Tshs 723,468,9000.00) as a principal sum based on a breach of contract, damages, interest, and costs of the suit initiated by the respondent **POWER GENERATION MIDDLE EAST FZE** against the applicant via Civil Case No. 145 of 2022.

Hearing of the application proceeded by way of written submission The applicants enjoyed the services of Mr. Joseph M. Msengezi learned to advocate while the respondent had the services of Mr. Mpaya Kamara also a learned advocate.

I have given due consideration to the affidavit for and against the application and the rival arguments and the authority cited by the party's counsel. Luckily, the pursued order is well-guided by the law. Order XXV Rule 1(1) of the Civil Procedure Code 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 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. (Emphasis added)*

The above provisions bestow upon this court discretionary power to grant the application. However, for the applicant to succeed he must

prove to the satisfaction to the court that the respondent resides outside Tanzania and that he does not possess in Tanzania sufficient immovable property other than the property suit. See: **Abdula Aziz Lalani & 2 others v Sabru Mwangali**, Misc. Commercial Cause No.8 of 2015 (unreported)

Both, the applicant's affidavit, and submissions are to the effect that, the respondent is a foreign company owning no immovable property in Tanzania. Mr. Mapaya Kamara admits that the respondent who has instituted the main suit is a foreign company having offices in Ajman and Dubai, United Arab Emirates (UAE) but, through his averment in paragraph 6 of the counter, the affidavit suggests that the respondent owns 100 shares in Pumutitu Trust Limited, a company registered in Tanzania with fixed assets in the country. I will reproduce paragraph 6 of the counter affidavit for ease of reference.

> *"6. I take note of the deposition made out in paragraph 5 of the affidavit only to the extent that the respondent is a foreign company and further depose that the Respondent is a duly registered single shareholder company the shareholder whereof is* ***Hardeep Kaur Chaggar*** *who also owns respectively 49%(directly) and 51% (indirectly) of all shares in* ***Pamutitu Trust Limited****("the Company"), which is duly registered in Tanzania; the company owns fixed assets. I annex hereto collectively marked "R-1" being copies of the current Search Report of the Company from Brela as well as a certificate of Titles for the company's properties worth more than USD 600,000."*

I think this second point should not delay the court further. It has long been established that, in law, a registered company is a separate legal entity from its shareholders and has distinct rights and liabilities as an autonomous legal person. A company, as a separate legal entity, owns its assets and is responsible for its liabilities. This principle of company law was laid down in the famous case of **Salomon v Salomon & Company Ltd** [1897] AC 22 where the House of Lords Held that:

> *"The company is at law a different person altogether from the subscribers, and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee of them. Nor are subscribers, as members liable in any shape or form, except to the extent and in the manner provided by the Act"*

It is therefore correct to resolve that the Respondent in this application and Pamutitiu Trust Company Limited and/or its Director Hardeep Kaur Chaggar are different legal entities separate from each other with dissimilar rights, and liabilities. In other words, the two companies cannot own the same assets unless otherwise legitimately agreed to by the two companies the evidence which is missing in this application. Like the applicant's counsel, this court is convinced that the respondent owns no immovable properties in Tanzania.

The two elements stipulated under order XXV (1)(1) of the CPC are therefore met warranting the granting of the requested security for costs in respect of the main suit. I am on this fortified by the case of **Abdul**

Aziz Lalani & 2 Others Vs. Sandru Mangaji, Misc. Commercial Cause No. 08 of 2015 (HC-unreported) 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 the existence of two ingredients of Order XXV Rule 1(1) of the CPC"*

The above conclusion narrows down the points for determination to only whether the applicant has made out a case that merits the grant of USD 155,000 as security for costs claimed for in the chamber summons.

The factors for consideration in assessing the quantum to be awarded as security for costs were well explained in the case **Dow AgroSciences Export S.A.S v I.S & M (Metals) Ltd**, (supra) cited by the respondent counsel. In that case, the court held:

> *"Once the court is satisfied that security for costs should be given, it would consider various factors in determining the quantum, including the complexity of the case, research workload involved, and 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.'*

The Applicant's counsel has submitted that the granting of security for costs by the court needs no proof. Relying on the decision of **Independent Power Tanzania Ltd V Mechamar Corporation (Malaysia) Berhad(In liquidation) and Another**, (2015) TLR 365 and **Tanzania Ports Authority V The Attorney Genera**l, Misc. Civil Application No 149 of 2021 (Unreported), he said, the Instruction fees

are statutorily provided for under the current Advocate Remunerations Order 2015 particularly item 8 of the 9th schedule which provides for 3% of the liquidated sum claimed in the main case and that the rest of the items are awarded in estimate forms.

Mr. Kamara was of the view that the amounts of USD 150,000 as security for costs are unreasonable. Citing to the court the cases of cooperative **Cooperative Mes Artisaanau Miniers Du Congo &4 others v Ben Ngamije Mwangachuchu t/a Societe Miniere Du Busunzu Sari**, Misc. Commercial Application No. 271 of 2018; Abdalla **Vs Patel & Another** [1962] E. A 447; **Adul Aziz Lalan & 2 others Vs Sandru Mangalji,** Misc. Cause No. 8 of 2015 and **Dow AgroSciences export S.A.S v I.S and M (Metal) Limited**, Commercial case No 55 of 2007 (all unreported), he said, an order for security for costs is not meant to silence a litigant from approaching the doors of the justice. To him granting or otherwise of an order for security for costs is a discretion of the court, which must be excised judiciously after considering the complexity of the case, research workload involved, costs incurred up to the time of application and after, and that the applicant is duty bound to establish how the proposed figure was arrived at.

He maintained that the amount of USD 155, 000 asked for by the applicant though mentioned in the chamber summons is not corresponding with any depositions in the entire affidavit in support of the application let alone how they are arrived at except for an averment in the reply to counter affidavit where the amount claimed is said to cover legal fees, disbursement, study and research of the case, analysis of the case, court fees, stationaries costs and transport. While inviting the court to find the

statement is the reply affidavit as an after sought, Mr. Kamara submitted that all essential materials ought to have been deposed in the affirmed affidavit in support of the application in consonance with the tenets of Order XLIII Rule 2 of the Civil Procedure Code which requires a chamber summons to be supported by an affidavit and/or a supplementary affidavit to which the respondent would have an opportunity to file a counter affidavit and not in a reply affidavit.

He stressed that even assuming that the depositions in the reply affidavit are correct, still that information would not have advanced the applicant's case for the figures fronted are compounded without a breakdown on what amount goes to which item and without details on how the same was arrived at.

Responding to the applicability of 3% as the charges for instruction fees introduced by the applicant in the written submissions, Mr. Kamara was of the view that that is a statement from the bar which is not evidence and that in any case, the appropriate provisions would have been Order 41 of the Advocate remunerations Order under which costs incurred in a contentious matter is taxed in accordance to the rates prescribed in the 10th and 12th schedules and not Order 9 as suggested by the applicant's counsel. He invited the court to be guided by the decision of **Abdala v Patel and Another** (Supra).

Indeed, the figures of USD 155, 000 requested by the applicant in the chamber summons are not orchestrated with any testimonies in the affidavit in support of the application. And the enumeration of the items generating the above figure was introduced later in the reply to the

counter affidavit but again without a proper breakdown of what amount covers which activity leaving the proposed figure unjustified.

Nevertheless, having considered the objective of the law in this aspect and the nature of the main case in which this application is grounded, it is certain that the applicant has incurred and will incur numerous expenses in defending Civil Case No 145 of 2022. There is no doubt that the applicant has as reflected in this application engaged an advocate who is entitled to instruction fees under the Advocate's Remuneration Order, 2015. Being a contentious matter, research is inevitable which goes along with stationaries material. The respondent is also likely to incur transport costs for himself, his counsel, and the intended witnesses plus requisite court fees all of which need to be reimbursed.

I am conscious that the sole purpose of granting security for costs in our jurisdiction is to protect the opposing litigant against any cost likely to be incurred in defending the action, be it a suit or counterclaim. See **Enterprises Limited Vs. Islam Balhabou and 2 Others***,* Commercial Case No. 77 of 2007 (Unreported) and **Maasai Wanderlings and 2 Others vs Viorica Ilia and 2 Others**, Misc. Civil Application No. 19 of 2021 (HC- unreported). In this later case, this court, Kahyoza J said:

> *"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 litigation which the defendant will never recover.*

Guided by the above-cited authorities, this court finds that an amount of Tshs. 50,000,000/= (Fifty Million Only) will sufficiently cover all incurred and anticipated costs in a Civil case. No 145 of 2022. The respondent is to deposit Tshs. 50,000,000/= (Fifty Million Only) as security for costs to the Judiciary Deposit Account within one month's period from the date of this ruling.

Costs of this application shall follow the outcome in Civil Case No. 145/2022. Order accordingly.

Dated at **Dar es Salaam**, this 21st April 2023

E. Y Mkwizu
Judge
21/4/2023