IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

MISCLLANEOUS CIVIL APPLICATION No.41 OF 2023

(Arising from Civil Case No. 22 of 2023)

1. **DAISSY GENERAL TRADERS ..... 1ST APPLICANT**
2. **EPAK GENERAL TRADERS ..... 2ND APPLICANT**
3. **ANGELA CHARLES KIZIGHA .....3RD APPLICANT**
4. **ELVIS PETER KILINGO .....4TH APPLICANT**

VERSUS

1. **N.K IMPEX**
2. **UNIQUE TEXTILES** **suing through Power of Attorney to GAKI INVESTMENT COMPANY LIMITED..... RESPONDENTS**

RULING

29TH November & 15th December 2023

F.H. MAHIMBALI, J

The applicants in this case are defendants in Civil Case No. 22 of 2023 filed by the Respondents. It appears as per pleadings in the main case, the applicants had won a tender of supplying rolls of clothes to the Tanzania Police Force for making police uniforms. That upon a full supply of the said rolls by the respondents to the applicants who won the said tender, there was no full payment of the contractual money as per goods supplied to the applicants.

In efforts of recovering the outstanding balance, the respondents filed Civil Case No. 22 of 2023 claiming a total of 932,448.8 USD as an outstanding balance for the supplied rolls of cloth for making Tanzania Police Force uniforms between 2014 and 2015 as stated above, and further claiming for the general damages of USD 500,000/= to be assessed by the Court.

The plaintiffs being foreign companies, are now claiming the said outstanding balance through GAKI INVESTMENT COMPANY LIMITED, the Tanzanian local company based in Shinyanga.

Following the above background which led to the filing of the said Civil Case No. 22 of 2023 pending before this Court, the defendants therein, have filed this current application against the respondents (plaintiffs) claiming for the security of costs an amount of 120,000,000/= against the plaintiffs, them being foreign companies.

The said application is contested by the plaintiffs (respondents) both on legal points as well as on the merit of the application. On legal points, the contest is on the legality of the application as contravenes the scope of Order XXV, Rule 1 in which an application for security of costs should not extend to costs in an application of costs.

Since the applicants' counsel has also embodied for costs for this application, then the same is bad in law as it infringes the dictate of the law, argues Mr. Kaunda learned advocate for the respondents (plaintiffs) with the first objection i.e the application in record contravenes order XXV, Rule 1 (1) of the CPC. It has been argued that what the law provides is for costs likely to be incurred in the main case and not costs in incidental applications as suggested by the applicants' counsel. If the Parliament had intended to include any incidental or subsequent costs as suggested here, then the language of that statute would have been clear and illustrative and not otherwise. This argument is further compounded by the deponent's affidavit (para7) which is clear that the deponent herself does not include costs for this application as prayed.

On the second ground of P.O, it has been argued that is trite law and the practice of this Court in a litany of cases, that when a deponent in affidavit mentions another person, then that other person has to depose to that effect. Short of that, it amounts to hear say which is contrary to order XIX, Rule 3 of the CPC. That looking at paragraph 1 and 7 of the Applicant's affidavit, it mentions another person. So, the mention of those other 18 witnesses, as per Order XIX, Rule 3 of the CPC, there ought to be affidavits

regarding those eight witnesses that they will incur such expenses of hotel and travelling expenses. These costs in Mr. Kaunda's considered view are as received from those intended witnesses and not by her personal knowledge. He further argued that as per the deponent's affidavit, the verification clause signed is a blanket statement which bear some facts not known to her but those eight persons. He drew support of his position in the case of **Omary Ndorima and 120 Others Vs. Kilsosa District Council and Another**, Misc. Land Application No. 57 of 2022, HC Morogoro, in which His Lordship Malata made reference to **NBC LTD Vs. Super Doll Trailer Manufacturing Company Ltd**, Civil Application No. 13 of 2002, CAT held inter alia that, an affidavit which mentions another is hearsay unless that person swears as well. That principle is loud and clear.

In his response to the legal objections raised, Mr. Mpaya Kamala learned advocate for the applicants, resisted the said legal preliminary objections and the accompanying submissions for want of any legal sense to qualify the legal objections.

On the first P.O, which centers for the scope of Order XXV, it has been counter argued that, there is nothing under order XXV that the costs envisaged there in, should only be confined to the main case. In his

considered view, that is a wrong purview. In his legal view, the costs that are envisaged by Order XXV, extends up to the incidental costs as well. So long as the defendants are served with the case, then all that transpire here in between are covered by that Order XXV. He justified his legal stand, by arguing that since the CPC is full of several applications that can be entertained upon filing of any suit to its final determination, it is not the intention of the Parliament that such applications should be pro bono. He argued further that the making reliance to the referred para7 of the deposed affidavit, would be a mathematical precision that even the enabling provision itself recognizes the known and unknown costs.

In a further note, Mr. Mpaya submitted that assuming but without admitting that what Mr. Kaunda construed on the scope of order XXV is proper, that by itself does not render the application incompetent but rather the basis of exclusion of those other costs as challenged.

As regards the second limb of P.O which carries two points, it has been submitted that the P.O raised does not base on the factual position of the affidavit but rather from the bar. Reading the said affidavit, strictly there is nowhere that the deponent says being informed so by someone else. The entirety of the affidavit is silent on that proposition of being informed

by someone else. The entirety of the affidavit by the deponent is depended on what is being stated in the affidavit. All that the respondent ought to have said is that, the said information is not true. Therefore, whether that is true or not is the reliability of the information and not competence of the affidavit or application itself.

While appreciating the legal principle on a rule against hear say, the same does not suit in the current case as there is nothing told as claimed. The deponent being the one to finance the intended witnesses, it is him who knows how much costs will he incur in making them attend to Court. That fact is not, legally speaking one amongst hearsay statements. Thus, Mr. Kaunda has misconstrued the rule on hearsay. There is no such information from the witnesses but from the deponent herself. That the costs hither to are unknown, is an astonishing statement. Furthermore, what the deponent verifies is not a classified blanket statement as argued but one that is within the knowledge of the deponent, thus nothing offended as verified.

In his rejoinder submission, Mr. Kaunda reiterated his submission in chief and added that since the common words under order XXV, are*: plaintiff, Defendant and Suit,* the same were not enacted for cosmetic purposes, They same must be strictly applied in the current application as legally challenged.

What is the suit, is unfortunately not defined under the CPC. However, the word suit is defined under the Law of Limitation Act, Cap 89 (section 2). In the case of **Nadhiri Burhani Omar @ Mbagwa and 12 Others V. DPP and Another**, Misc Civil Application No. 2 of 2019, HC-Shy, at page 5 unreported, it was amplified that an application is not a suit. Thus, the Parliament in its wisdom provided for a scenario where the costs involved in a suit and not more.

Thus, in the current case, what Mr. Mpaya submitted has been considered as a mere submission from the bar and not what is stated by the affidavit in question. Para 7 is very clear and louder as to how much costs is she going to incur from parading the intending witnesses. Those witnesses named, ought to be part of the case. The CAT is very clear that once named, then the ones named must swear an affidavit to complement what the deponent provides. Since the quantification of 50,000 USD includes the costs of prospective eight witnesses, thus the verification clause suffers legal competence as well.

Having considered the arguments by both sides, considering them all, I am of the considered view that the said legal objections raised lack legal basis. As regards to the scope of XXV, a mention of incidental costs in the

current application together with the costs in the said main case cannot legally speaking be the basis of legal objection. That is a question of scope which only challenges the quantum of costs to be assessed by the court upon hearing of an application for security of costs. It just mitigates the quantum of costs to be assessed but does not render the application incompetent as argued.

Regarding the issue of hearsay and a blanket verification clause, I have the following observation. A mere saying that one will incur costs of eight witnesses in the prosecution of the claims against her, cannot be said that is a hearsay. A statement is hearsay if clearly states so that it originates from someone else. Saying that she will incur the costs of eight witnesses, it is a statement originating from the deponent herself and serves for budgetary fact and not else. Here there is nothing stated by the called eight persons for them to complement by affidavit. It is like saying by next year one will give birth to a child, then requiring that prospective child to be born to swear an affidavit complementing what the parent has stated. That is yet unknown legal principle or extension of hearsay. That is a misconception by Mr. Kaunda, and can be a new invention beyond the legal scope of the meaning of hearsay. The basis of hearsay as evidence, if one gives a statement under

oath that the information he is telling, is informed by someone else. Then, for that statement to be reliable, the original giver of that statement must swear an affidavit to complement the deponent in the second degree. The rationale is simple; it is the first person in ranking who holds reliance with the information and not the second listener. In the current case, there is nothing stated by the called eight persons. By the way, "the eight persons" is not a person, it is just a number of persons who will come to testify. In the similar vein of argument, since all that stated is the domain of the deponent i.e within the knowledge of the applicant, I had expected a clear legal contention that the said information stated in the affidavit is not within the knowledge of the deponent but of those eight persons for the said statement to be blanket verification clause.

Having disestablished the hearsay in the affidavit by the applicant and that the verification clause is not a blanket statement as contended, renders the second point of objection unfounded, thus bound to be dismissed as I hereby do.

On the merit of the application Mr. Mpaya learned counsel for the applicants submitted that pursuant to Order XXV, Rule 1 (1) of the CPC, the applicants are seeking for security of costs to an amount of 50,000/= USD

which is equivalent to 120,000,000/ at the exchange rate of 2,400/=. In support of the claims in the chamber application, under paragraph 4 of the affidavit, the amount claimed in totality is 1, 432,448.8 USD. The costs cover the legal fees as per law has been charged 3% of the claimed sum which then stands at 42, 973.46 USD. He guided this Court to be persuaded by the ruling of the CAT in **Tanzania Rent A Car Limited V. Peyer Kimuhu**, Civil Reference No. 9 of 2020, at page 12 (1st paragraph) on none production of payment receipt or electronic fiscal device receipt. The remaining sum of 7,026.54 USD will cover other expenses which includes travelling costs, hotel charges, correspondences, etc.

He further argued that since both plaintiffs are foreign entities incorporated in India and they are not known having any immovable properties in Tanzania, this application meets the legal and factual criteria as provided under XXV, Rule 1 (1) of the CPC. He clarified that this application is not intended to punish the respondents but to protect the applicants against the whims of the none-resident parties. He persuaded this to the decision of this court, in **Rajiv Bharat Ramji Vs. Power Generation Middle East FZE,** Misc Civil Application No. 37 of 2023 at page

8 while quoting the case **Enterprises Limited Vs. Islam Balhbou and 2 Others**.

In resisting the merit of the application, Mr. Paul Kaunda learned advocate for the respondents raised a very important legal point. That, for such an application to meet legal and factual criteria, there must be established two thresholds: foreign ship and the fact of none-ownership of the assets of the respondent. It has been submitted that, the fact that the respondents are foreign companies as per law is undisputed. However, as per fact of ownership of properties of the respondents, Mr. Kaunda refuted that pursuant to paragraph three of the Counter affidavit, the respondents have executed the power of attorney to the Donee GAKI Investment Company Limited to institute the suit against the applicants on their behalf. As to that fact, looking at item 5 of the said power of attorney, the Donee has been authorized to commence any action, suit/suits or defend the respondents in respect of the recovery of the afore mentioned due sum pleaded in the main suit. He is of the considered view that once a power of attorney is executed, then the Donee becomes the agent of the Donor. Thus, any deed executed by the Donee, binds the donor. In a further elaboration, he submitted that, the Donor having executed the deed and dully signed by

the Donee, then there is no difference in law between the legal status of the Donee and the Donor in respect of this case. It means the Donee GAKI Investment Company Limited being the local Company having acquired all that legal status, is competent to act for the Donor.

There being no such evidence either, it is hard to challenge that. As per para 4 of the Counter affidavit, the Donee avers that possesses a huge investment in Tanzania - Ibadakuli worth billions of shillings, the fact which is not disputed by the applicants. Thus, the two fold thresholds on foreign ship of the respondent and none-ownership of the immovable property does not suffice in the applicants' favor as she wants to convince this Honorable court. Assuming that the respondent had not executed the said deed, the applicant had a duty through a sworn affidavit to justify how that figure was arrived at (50,000/USD=). Surprisingly, what was deposed in her affidavit, is nothing but rather a blanket figure, short of that analysis.

On the necessity of depositing the security for costs, Mr. Kaunda submitted that it was once deliberated by this Court in **Tanzania Ports authority and Another Vs. African Maintenance Services Limited**, Misc Civil Application No. 149 of 2021, HC, DSM pages 7, 8 and 9. Since the applicants have failed to establish that by affidavit, he contended that what

Mr. Kamala submitted is a mere submission from the bar. He winded up his submission by arguing that this application has miserably failed, because the two folds' thresholds as per order XXV have not been jointly established, thus falling short of legal consideration.

He lastly, prayed to invite your court in the case of **Barreto Hauliers Limited and Another Vs, Mohamed Mohamed Duale**, Civil Appeal No. 7 of 2018, CAT at DSM at page 13 on the legal implication of power of attorney when dully executed by the Donner in favor of the Donee. On this submission, he prayed that this application be dismissed with costs.

In his rejoinder submission, Mr. Mpaya submitted that it is beyond controversy that the Donee has been appointed by the plaintiff to sue on their behalf. A power of attorney as an instrument, just creates a relationship between the principal and an agent - Donor and Donee. Donee in any way does not substitute a Donor in terms of legal status. The two conditions as elaborated by Mr. Kaunda are the mandatory legal conditions in which they must co-exist jointly. However, the power of attorney in any way does not change the residential status of the Donor in this case. Further, the Donee does not become the Donor in any sense but that the latter is only bound by what will result from what will be decided in place of Donee.

On the justification of the figure, Mr. Mpaya conceded to the submission by Mr. Kaunda on the reference made to the case by Justice Kakolaki in **Tanzania Ports Authority**. However, as per the current case, paragraph 4 is clear on the quantum alleged. Paragraph 6 deposes that there is an advocate engaged. An engagement of an advocate, its tariff is regulated by law. As the claimed figure is known of 3%, then what he did is a mere submission on the law and nothing more.

Furthermore, he submitted that the important question to pause now is whether this Court is provided with sufficient material to rule in favor of the application. My reply to this is YES as it is clearly stated so. The submission by Mr. Kaunda on distinction between a security for costs and an application for taxation, the reference to the **Tanzania Rent A Car** case, is just an authority how an advocate's costs, does not need proof.

He clarified further that reading the judgment in Kakolaki and that of Mkwizu JJ, there is a common feature in both cases that there is an issue of establishment of the figure. Thus, taking as a whole this application has met the legal threshold as provided. That said, he prayed for the application to be allowed with costs.

Having revisited the arguments by both Counsel, I am first grateful to their useful submissions. However, the vital question to consider is whether the application has met the legal thresholds for its grant.

To start with, I better reproduce what the enabling provision of the law (Order XXV, Rule 1 (1) of the CPC provides:

> *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 added].*

Firstly, it is true that such an order of depositing a security for costs is court's discretionary powers and not absolute powers of the court. It being discretionary, must be exercised judiciously. It can thus be exercised upon

court's suo motto or upon there being a formal application by a party (defendant). However, the conditional precedent for its grant is dependent upon there being met two important conditions: Foreignity of the plaintiff and secondly the fact of none possession of any sufficient immovable property within Tanzania other than the suit property, is the argument by Mr. Kaunda.

On the fact that the said plaintiffs are none residents of Tanzania (foreign entities) is undisputed. However, the respondents are getting shielded by their donation of their power of attorney to the local entity - **GAKI INVESTMENT COMPANY LIMITED.** Since Gaki is a local entity, and owns billions of money in the country, thus dilutes the foreign ship of the plaintiffs in the current case and the requirement of money possession of property.

I have dispassionately scanned the arguments by both sides as far as the merit of the application is concerned. The vital question in disposing of this application centers on the legal issue whether a local Donee to the deed of power of attorney assumes the liability of the foreign Donor in the event of court's decree against the Donor for purposes of legal requirements under Order XXV, Rule 1(1) of the CPC.

Mr. Kaunda relying in the case of **Barreto Hauliers Limited and Another Vs, Mohamed Mohamed Duale** submitted that it is the enabling authority of the position of the Donee in place of the Donor in cases involving power of attorney. On his part, Mr. Mpaya resisted this assertion, saying it is not the actual position of the law on the legal relationship between the Donor and the Donee where the deed of power of attorney has been dully executed and legally registered.

I agree with Mr. Kaunda that in the case of Barreto, the CAT also amongst others defined what is power of attorney and the legal status of the holder of it over the donor. The CAT while making reference to the Black's Law Dictionary, 9th Edition, at page 1290 which defines the power of attorney as follows:

> *"1. An instrument granting someone authority to act as agent or attorney-in-fact for the grantor. An ordinary power of attorney is revocable and automatically terminates upon the death or incapacity of the principal. 2. The authority so granted; specifically, the legal ability to produce a change in legal relationship by doing whatever acts are authorized."*

The CAT further considered that, flowing from the above definition, it is clear that a deed of power of attorney is executed by the principal in favour of the agent. In other words, by a deed of power of attorney, an agent is formally appointed to do all acts and deeds specified therein, on behalf of the principal, which when executed will be binding on the principal as if done by him. Essentially, a grant of power of attorney is governed by Chapter X of the Law Contract Act, Cap. 345 R.E. 2019 (the LCA) which covers the obligations and powers of the principal and the agent. It is in that respect, Lord Brooke L.J, in the case of **Gregory and Another v. Turner and Another R (on the application of Morris) v. North Somerset Council** [2003] 2 ALL ER 1114 considered *"the grant o f a power of attorney is, in principle, no more than the grant of a form of agency*."

In Tanzania, the appearance of a party in a court of law under power of attorney is not a strange thing but as regulated by Order III, Rule 1, 2(a) of the CPC. The same, is thus not absolute.

Reading the provisions of Order III, Rule 1 & 2 (a) of the CPC, and provisions of section 134 and 140 of the Law of Contract Act, Cap 345, it is clear that the created relationship between the principal and agent in the power of attorney is a contractual one in which the latter assumes the

responsibility of the former. In my close reading of the above cited sections and the law of Contract Act at large, and the instrument of power of attorney itself, there is nowhere the agent assumes the liability of the Principal. What he merely assumes are just powers to sue and act for him but not assuming the liability of the principal.

This means, the principal being the foreigner (foreign entity) her nationality status does not change by donating his power of attorney to the local entity. The principal remains one; and the agent does not assume the liability of the principal as per law.

Perhaps it is important to know why power of attorney? There are many reasons which legally allow one to make the power of attorney but the main reasons are two namely: -

Firstly, the Principal is outside the jurisdiction of the Court hence unable to attend trials. The reason of being outside the place of business means the principal is outside the country and not in another place within the country. The same was clearly explained by the Court of Appeal of Tanzania in the case of ***Georgia Celestine Mtikila v. Registered Trustees of Dar es Salaam Nursery School and International School of Tanganyika***

Ltd *[1998] TLR 512.* But also See also the case of ***Bimkubwa Issa Ali v. Sultan Mohammed Zahran [1997] TLR 295***

In this case, **Mrs. Georgia Mtikila** applied to the Court of Appeal to be allowed to grant power of attorney to her husband so her husband could conduct the appeal on her behalf on the reason that she couldn't express herself in the court because she was suffering from emotions which could make it impossible for her to conduct appeal with necessary degree of calmness and composure. The Court pointed out as hereunder:-

> *"...One may grant power of attorney to appeal in the court of Appeal only where the Grantor is not residing in Tanzania..."*

Secondly, where the Principal is unable to carry out his business in his own capacity. The inability to carryout business may be due to but not limited to the following: Accident which cause incapacitation, sudden and serious illness, loss of legal capacity due to bankruptcy, old age, Any other reasons recognized by the law as the case may be (See ***Imerimaleva and Others v. Dima Nhorongo, Hassan Marare Magori & Another v. Juma Marare & 4 others*** *[1991]TLR 1]*

"...where the person who is party to a case is unable to pursue the case himself or herself for reasons of old age, sickness or where such party is dumb or deaf, or when the party to the proceedings is away in a foreign country and getting such party back would be tedious or expensive. ... that the donor of the power of attorney must be sure the donee of the power of attorney would step into donor's shoes and that the donor of the power of attorney must accept all the consequences that may arise in the course of the litigation. ..... that the grant of the power of attorney should not be made subject to remuneration. But the power of attorney in the Court of Appeal applies only where the person to be represented is not resident in Tanzania..."

The power of attorney shouldn't be granted to the person who carries business or representation in the court for gain. The same was explained in the case of **Julius Petro v. Cosmas Raphael** [1983] TLR 346.

So taken as a whole, what is donated to the done (holder of power of attorney) is the powers of the principal and not his liabilities. That is why one of the conditions in the grant of power of attorney, the donor of it must

accept all the consequences that may arise in the course of the litigation by the donee.

So having said all this, coming to the matter at hand, it is clear that the respondents are foreigners and that their foreign status is not diluted by granting the power of attorney to the local entity. The legal liability on the outcome of case vests to the principal and not otherwise by this power of attorney. The properties of GAKI INVESTMENT COMPANY LIMITED who is the holder of the power of attorney has not substituted her proxy in the case. He still remains the principal in all the liabilities.

In that context of reasoning, the principal remains liable to undertake all the responsibility of the case. As per that finding, I find the arguments by Mr. Kaunda learned advocate that by the filed power of attorney which is dully executed and registered in favor of GAKI INVESTMENT COMPANY LIMITED, suffices also responsibility by the Donee over the Donor. I think that is a new legal invasion in which has not yet clicked into my mind for its blessing. With due respect to Mr. Kaunda, I think his line of thinking or argument on the aspect of principal and agent relationship on the deed of power of attorney, is not right as to my understanding. In my considered

view, as reasoned above, I am not prepared either to borrow or hire it for any legal use.

That withstanding, the applicants in my considered view have sufficiently established that the respondents are foreign entities and that have no known or sufficient properties in Tanzania. In their place, GAKI INVESTMENT COMPANY LIMITED cannot as a matter of law be their guarantor unless clearly stated so, otherwise, she just remains their agent with powers to sue or be sued but no more. The legal liability in it rests on them. Thus, the application by the applicants (defendants in the main case) is meritorious.

As to what extent the said security of costs is to be deposited, the same being discretionary powers of the Court, I am of the view that an amount of USD 13,000/= which is equivalent to TZS 30,000,000/= will suffice the purpose. The same be deposited in court within a period of one month from today in the appropriate Judiciary Account to be directed by the Deputy Registrar of this Court or his counter party – the Court Administrator. In the event of failure to deposit the ordered security for costs in the prescribed time, pursuant to **Order XXV, Rule 2(2) of the CPC**, the main suit shall be marked dismissed by 15th January 2023.

Parties shall bear their own costs as regards to this application.

DATED at SHINYANGA this 15th day of December, 2023.

F.H. MAHIMBALI

Judge

Ruling delivered this 15th December 2023 in the presence of Mr. Mpaya Kamala for the applicants and Ms Elizabeth Luhigo holding brief of Mr. Kaunda for the respondents.

THE HIGH COURT OF TANZANIA

F.H. MAHIMBALI

Judge