IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 151 OF 2023

(Originating from the Resident magistrate's Court of Dar es salaam in Misc. Civil application No. 92 of 2022)

MUSADIK MOHAMEDHUSSEIN MOHAMEDALI..... APPELLANT

VERSUS

FARID H. DALLA..... RESPONDENT

JUDGMENT

22nd November & 05th December, 2023

BWEGOGE, J.

The respondent herein above named commenced civil proceedings against the appellant in the Resident Magistrates' Court of Dar es Salaam claiming for principal sum of TZS 93,800,000/=, among others, for breach of contract. Consequently, the appellant filed an application in the trial court praying for security of costs of, and incidental to, the suit likely to be incurred by the same in defending the suit to the tune of TZS

15,000,000/=. The appellant in validating his prayer, he deposed in his affidavit supporting the application the facts that the respondent was residing in foreign country (Canada) and had no immovable property in Tanzania. The trial court, in dismissing the prayer, reasoned that the application ought to have been supported by evidence, such as the Canadian passport to convince the court that the respondent resided in Canada permanently. Likewise, the trial court found that the applicant/appellant herein didn't state any thing in the deponed affidavit pertaining to fact that the plaintiff doesn't own any immovable property in Tanzania to substantiate his claim for deposit of security for costs. The appellant was not amused. Hence, this appeal.

Seeking to defeat the decision of the trial court, the appellant lodged three grounds of appeal as thus:

1. *The trial magistrate grossly erred in law and fact when he held that the appellant didn't state anything in the affidavit in respect of the allegation that the respondent does not own any immovable property in Tanzania.*

2. *The trial magistrate erred in law and fact when he held that there was no proof of any supporting document in the appellant's affidavit such as Canadian passport to prove that the respondent resides in Canada permanently and doesn't own property in Tanzania, despite the respondent admitting he doesn't reside in Tanzania and has no immovable property in Tanzania.*

3. *That the trial magistrate erred in law and fact in finding that in absence of documentation and further proof, it was hard to grant the sought prayer by the appellant.*

The appeal herein was heard by written submissions whereas Ms. Jacqueline Rweyongeza, learned advocate, argued the appeal for the appellant and Mr. Taher Muccadam, learned advocate, contested the appeal for the respondent.

Ms. Rweyongeza, in substantiating the 1st ground of appeal argued that the gist of the impugned decision of the trial court was that the applicant had not stated anything in his affidavit in respect of the allegation that the respondent/plaintiff doesn't own any immovable property in Tanzania to substantiate the prayer for security of costs. That the trial magistrate failed to consider the fact that the respondent in his counter affidavit didn't dispute the relevant fact. That paragraph 4 of the counter affidavit speak volumes in this fact. The counsel charged that the trial magistrate overlooked the deposed facts in the counter affidavit and invented his own version in refusing the prayer for costs.

In the same vein, the counsel asserted that the appellant in praying for costs in respect of the suit filed by the foreigner, the respondent herein, invoked the provisions of Order XXV, rule, 1 (1) and section 68 (e) of the CPC (Cap. 33 R.E. 2019) which was unjustifiably dismissed. That, apart

from the respondent own admission in his deposed facts, the averment in the plaint filed, likewise, states that the plaintiff is a natural person who works for gain and lives in the Edmonton Alberta in Canada. That the trial magistrate applied a blind eye to the above deponed and pleaded facts which were in favour of the application for security of payment of costs.

With regard to the 2nd and 3rd grounds of appeal, the counsel argued that the trial magistrate strayed into an error in demanding documentary evidence for proof of respondent's residence in foreign land and wanting possession of the immovable properties inside the country contrary to the evidence in the pleadings filed by the respondent which supported the appellant's prayer for costs. On the above grounds, the counsel for the appellant prayed this court to allow the appeal and set aside the decision of the trial court.

Contrarywise, Mr. Muccadam, in responding to the 1st and 2nd grounds of appeal, contended that basing on the provisions of Order XXV, rule 1(1) of the CPC, there must be evidence or proof in the supporting affidavit sworn by the applicant in that the plaintiff resides outside the country and doesn't possess any sufficient immovable property within Tanzania before the court grants the prayer for the payment of security for costs likely to be incurred by the defendant in contesting the suit. That the appellant's

affidavit merely contained the allegation that the respondent was a residing in foreign land and without immovable properties inside the country without evidence or proof to that effect upon which the trial magistrate would base his grant. Hence, the trial magistrate was right in dismissing the application for security for costs. The counsel cited the case of **Shah & Others vs. Manarama Ltd & Others** [2000] 1 EA 204 to pad the point.

In tandem to above, the counsel asserted that the grant of security for costs is discretionary power of the court of which is exercised based on the circumstances of the case in question. The counsel cited the case of **Shah & Others vs. Manarama Ltd & Others** (supra), in borrowing the holding that:

> *"The power of the court to order the plaintiff to pay security for costs is entirely a discretionary matter, for the court. In exercising of its discretion, the court must take into account all circumstances of the particular case."*

That in the case of **GM Combined (U) Ltd vs. A.K. Detergents** (U) Ltd [1999] 2 EA 94 (SCU) three factors for consideration for grant of security for costs were expounded, among others;

1. *The likelihood of the success of the plaintiff 'case.*

2. *If there is a strong prima facie presumption that the defendant will lose in the defence to the action, the court may refuse security for costs.*

3. *Whether there is an admission by the defendant in the pleadings or elsewhere that money is due.*

And, the respondent's counsel insinuated that based on the facts averred by the appellant in his defence, there is likelihood of success of the plaintiffs' case as well as strong *prima facie* presumption that the appellant herein would lose.

In respect of the 3rd ground of appeal, the counsel reiterated the argument that the affidavit sworn by the appellant was supposed to be supported by the documentary evidence to support the prayer for payment of security for costs. The counsel cited the case of **Bruno Wenslaus Nyalifa vs. Permanent Secretary Ministry of Home Affairs** (Civil Appeal 82 of 2017) [2018] TZCA 297 in which it was held:

> *"An affidavit is evidence and the annexture thereto is intended to substantiated the allegations made in the affidavit.*

On above premises, the counsel opined that the appeal herein is devoid of merit, hence should be dismissed with costs.

In rejoinder, the appellant's counsel replicated the earlier submission of which I need not reiterate herein.

Having scrutinized the grounds of appeal advanced by the appellant, this court apprehends that the central issue for determination is whether the decision of the trial court in refusing the prayer for security for costs is erroneous *per-se.*

From the outset, I find constrained to reproduce the relevant provision of Order XXV, rule 1 (1) of the CPC which is the mainstay of the applicant's prayer in the trial court, as thus:

> "*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.*

The provision reproduced above is plainly clear in that where, it appears to the court that **a sole plaintiff is residing out of Tanzania**, and that such plaintiff **does not possess any sufficient immovable property within Tanzania**, the court **may, order the plaintiff to give security for the payment of all costs incurred and likely to be incurred by any defendant**. Unarguably, the grant of the security for costs is discretionary power to be exercised by the trial court based on the circumstances of the case.

It is uncontroverted fact that the trial magistrate in refusing the prayer for grant of security for costs reasoned that the application ought to have been supported by evidence, such as the Canadian passport to convince the court that the respondent resided in Canada permanently. Equally, the trial court found that the applicant/appellant herein didn't state anything in the deponed affidavit pertaining to fact that the plaintiff doesn't own any immovable property in Tanzania to substantiate his claim for deposit of security for costs.

Admittedly, it is the law of this land that generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour in terms of the provisions of section 110 and 111 of the Law of Evidence Act. See the case of **Antony M. Msanga vs. Penina (Mama Mgesi) &**

Another (Civil Appeal 118 of 2014) [2015] TZCA 556, among others. I therefore, agree with the counsel for the respondent in one aspect in that the appellant having pleaded that the respondent resided in the foreign land and possesses no immovable property in this land was obliged to substantiate the facts pleaded to enable the court to be seized with materials upon which it could exercise her discretionary power.

However, my approbation notwithstanding, I refuse to purchase the argument by the respondent's counsel that the appellant herein failed to substantiate the deponed facts in that the respondent was residing in foreign land and doesn't possess real properties in this land. It is settled law that parties are bound by their pleading. See the cases; **Martin Fredrick Rajab vs. Ilemela Municipal Council & Another** (Civil Appeal 197 of 2019) [2022] TZCA 434 and **Metropolitan Tanzania Insurance Co. Ltd., vs. Frank Hamadi Pilla** (Civil Appeal 191 of 2018) [2019] TZCA 281. And, as rightly conceded by the respondent's counsel, the sworn affidavit is tantamount to evidence in law [**Bruno Wenslaus Nyalifa vs. Permanent Secretary Ministry of Home Affairs (supra)**]. One of the annextures forming part of the record of this appeal is the plaint instituted by the respondent in the trial court. Paragraph number one of the respective pleading encompasses the averment that:

"The plaintiff is a natural person who works for gain and lives in Edmonton, Alberta in Canada."

Nowhere this averment has been retracted. Likewise, the paragraph number 4 of affidavit which supported the appellant's application for security of costs bear deposition that:

"That, the respondent/plaintiff does not reside in Tanzania and has no immovable property in Tanzania. The respondent/ plaintiff resides in Edmonton, Alberta in Canada."

And, the corresponding paragraph in the counter affidavit deposed by the respondent herein, bear facts thus:

"Respondent doesn't dispute the content of paragraph 4 of the applicant's affidavit as being substantially true."

Likewise, this deposition has never been repudiated. And, it is noteworthy that the respondent's counsel never responded to the appellant's submission in that the above averment and deposition amounted to admissions to the pleaded facts, apart from clinging to the contention that further evidence was required for proof. It suffices to point out that deponed facts amounts to sworn evidence. Therefore, respondent is held

to have admitted to the fact that he resides in the distant land and posses no immovable properties in this land.

While subscribing to the respondent's counsel in respect of the principle enunciated in **GM Combined (U) Ltd vs. A.K. Detergents case** (supra), I have observed that the trial magistrate didn't apply any of the three factors in refusing prayer for security for costs. There is nowhere in the impugned decision the trial magistrate opined that the respondent was likely to succeed in his action or otherwise the appellant was bound to fail. Therefore, the rule is inapplicable in the circumstances of this case.

Based on the foregoing, I purchase wholesale the submission by the appellant's counsel in that the trial magistrate strayed into an error in holding that the application ought to have been supported by evidence, such as the Canadian passport to convince the court that the respondent resided in Canada permanently; and, that the applicant/appellant herein didn't state anything in the deponed affidavit pertaining to fact that the plaintiff doesn't own any immovable property in Tanzania to substantiate his claim for deposit of security for costs. With due respect, I am afraid that the trial magistrate might not have gone through the counter affidavit and pleadings filed by the respondent in the relevant cases he presided.

The above discussion disposes of all three grounds of appeal above mentioned.

I, in the result, find the appeal herein meritorious. I hereby allow the appeal herein in its entirety. For clarity, I enter orders as under:

1. The decision of the trial court and orders entered in refusing the application for payment of security for costs is hereby quashed and set aside.

2. The application for payment of security for costs is hereby granted to the tune of TZS 12,000,000/=

3. The respondent to effect deposit of the above-mentioned security for costs within the period of 45 days from the date of this order.

4. The appellant shall have his costs.

So ordered.

DATED at **DAR ES SALAAM** this 05th day of December, 2023

O. F. BWEGOGE

JUDGE