IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 276 OF 2014

(Arising from Commercial Case No. 121 of 2014)

ECOBANK TANZANIA LTD ..... APPLICANT

VERSUS

MULTISOL MAURITIUS LTD ..... RESPONDENT

31st March & 10th April, 2015

RULING

MWAMBEGELE, J.:

This is a ruling in respect of an application for deposit of security for costs made by ECOBANK Tanzania Limited (henceforth "the applicant") against Multisol Mauritius Limited (henceforth "the respondent"). The application has been taken under the provisions of Order XXV rule 1 (1) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 henceforth "the CPC"). The application stems from Commercial Case No. 121 of 2014 in which the applicant is the first defendant and the respondent is the plaintiff. The applicant seeks, in the main, for an order that the respondent be ordered to deposit the sum of USD

15,000.00 as security for costs incurred or likely to be incurred in defending the suit; that is, Commercial Case No. 121 of 2014. The application is supported by an affidavit sworn by one Eric Frank Ringo; Legal Manager and Company Secretary of the applicant.

As can be gleaned in the said affidavit, the applicant has advanced two main reasons why the sought orders should be granted. First, that the applicant has incurred some USD 7,000 and further USD 2,500 as, respectively, instruction fee and other expenses that may be, or likely to be, incurred by the applicant's advocates for defending the suit. The second reason advanced by the applicant is that the respondent is a foreign company which has no immovable property whatsoever in the jurisdiction of the United Republic of Tanzania. It is deposed that the applicant may be exposed to the risk of not being secured in terms of costs in the event the main suit and applications thereof are decided in its favour.

The affidavit supporting the applicant's application was resisted by a counter affidavit sworn by Mafuru Mafuru; learned counsel for the respondent.

The application was heard before me on 31.03.2015 during which the applicant and respondent were represented by, respectively, Mr. Martin Matunda and Mr. Mafuru Mafuru; learned advocates of this court. This oral hearing was preceded by both learned counsel filing their respective

skeleton arguments well before the date set for the oral hearing as required by the provisions of rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012. At the oral hearing both learned counsel for the parties prayed to adopt their respective skeleton arguments without additions or interpolations. Except that Mr. Mafuru; learned counsel for the respondent who had reiterated what he stated in the skeleton arguments to the effect that an order for security for costs is discretional which discretion should be exercised judiciously.

In their respective skeleton arguments which both learned counsel for the parties sought to adopt and rely on at the oral hearing, they presented what ought to have been amplified at the oral hearing. Mr. Matunda, learned counsel for the applicant argues that the respondent is a foreign company which does not own any immovable property within the United Republic of Tanzania and that the respondent has conceded to this averment as evident at para 7 of the counter affidavit. He adds that in the event the applicant succeeds in the suit, he will be subjected to great inconveniences in recovering costs that will be incurred hence the application for deposit of security of costs.

Regarding the quantum of the security, Mr. Matunda argues that the sum involved in the suit is USD 93,115.20 which is quite colossal. He adds that the documentation involved in the suit; several agreements and documents, are very voluminous. These include the Distribution

Agreement, The Lieu Agreement, Commercial Invoices, Packing Lists, Bills of Lading, Importation Permits, Tax Invoices, Port Clearance Certificates, Release Orders *et cetera*. In the same vein, the counsel for the applicant argues that the applicant's defence is based on several agreements which are the Banking and Credit Facilities, the Field Warehousing and Storage Facility and its annextures, the Fleet and Floating Debenture and its Registration, the Deed of Assignment of Receivables, the Letter of Pledge, the Charge Over Collection Account, The Trust Receipt and the Weekly Stock Position Field Reports and Tally Sheets. All these documents, Mr. Matunda argues, will have to be produced copies to back up pleadings in the suit and the flanking applications which will have to be disposed of prior to going into the main suit. It is added that the suit will involve the parties visiting the godown with a view to witnessing the stock-taking exercise which is bound to take some days to complete. Mr. Matunda surmises that the suit is complicated and time-involving.

In his skeleton arguments, Mr. Mafuru for the respondent argues that the power to order payment of security for costs is within the discretionary powers of the court and that the discretion has to be exercised judiciously. He goes on to argue that payment of security for costs can only be made in accordance with the established principles, whereas the chargeable sum of USD 7,000.00 as fees is not in accordance with the chargeable scales of remuneration of advocates which is pegged at 3% on contentious matters. To reinforce this

argument, the learned counsel refers the court to **Sarkar's Law of Civil Procedure Vol. 2** page 1216 through to page 1217 and the Advocates Remuneration and Taxation of Costs Rules; GN. No. 515 of 1991 particularly schedule ix thereof.

I must state at the outset that the oral hearing on 31.03.2015 did not have much useful to add to the skeleton arguments earlier filed by the parties. This is exhibited by the fact that, at the oral hearing, both counsel, essentially, said nothing to amplify what was presented in the skeleton arguments. As the term "skeleton" connotes, skeleton arguments are meant to provide a sketchy picture of what is expected to and must be amplified at the oral hearing. Leaving the skeleton arguments unamplified, as happened in this application, means unnecessarily burdening the court by starting to search what the parties meant in their skeleton arguments. Let me give an example. In para 1.3 of the counsel for the respondent's skeleton arguments it is provided as follows:

> "On payment of security in accordance with the established principles for costs to be granted in the event of success for reasonable protection of the Defendant – is supported by the following position of the law.

- When the Plaintiff is liable [Ref. Sarkar's The Law of Civil Procedure Vol 2 pg 1216 – 1217].
- Advocates scale over the 3.00 million is 3% [Advocates Remuneration and Taxation of Costs Rules – GN No. 515 of 1991 – sch. ix]".

As can be gleaned in the above skeleton submission, it appears there is stated in the referred to book as well as in the provisions of the Advocates Remuneration and Taxation of Costs Rules – GN No. 515 of 1991 – sch. ix which sketchily supports the respondent's contention. It was therefore incumbent upon counsel for the respondent to go a step further at the oral submissions to tell the court what the referred to text and provision of the law had in support of his argument. That was not done and the whole thing lands on the desk of this court.

The applicant's counsel burnt a lot of fuel by dwelling on the tasks that will be involved in the main suit as well as other pending applications including the present one; the subject of this ruling. He is right, for it was his duty to justify the quantum of the security for costs prayed for. Indeed, to call this part of the applicant's counsel argument as "skeleton" is but a misnomer because he has been quite explicit in the arguments. I was not surprised, therefore, when he opted to say nothing in amplification of the same. In fact, the way he presented the

skeleton arguments, failure to amplify the same at oral hearing, did not have much of a negative effect on his part.

As for respondent's counsel, apart from telling this court that such an order for security for cots is discretional and must exercised judiciously, he does not expound on how such discretion should be so judiciously exercised. That could have been done by expounding the provisions he referred in his skeleton arguments. He then moves to challenge the amount asked for by the applicant as being the instruction fee as well as other expenses and jots down some principles and references which he did not bother to expound at the hearing. To say the least, what has been exhibited in the present application by both learned counsel for the parties, amounts to a total abdication of their duties as officers of the court. It need not be over-emphasised that advocates have a particular duty to their clients and a general duty to the court to see to it that the court reaches at a just and fair decision. It is therefore the duty of advocates to assist the court to reach a just and fair decision. This is an unfortunate situation which the court would not wish to recur.

The law regarding security for costs is very lucidly stated by the provisions of Order XXV rule 1 (1) of the CPC as to the conditions precedent that must exist before the court makes such an order. Let me reproduce this sub-rule hereunder:

> "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."

As can be deciphered in the above quoted sub-rule, the same stipulates two conditions; that the plaintiff should reside outside Tanzania and that he; the plaintiff, does not possess sufficient immovable property in Tanzania other than the property in suit. Thus, for an applicant to succeed in an application for provision of security for costs, he must prove to the satisfaction of the court that the plaintiff resides outside Tanzania and that he does not possess in Tanzania sufficient immovable property other than the property in suit. Apparently, from my understanding of the sub-rule, the fact that the plaintiff does not reside in Tanzania cannot, in itself, suffice; it must also be proved that he does

not possess in Tanzania sufficient immovable property other than the property in suit.

The respondent's counsel, as appearing in para 7 of the counter affidavit, does not seem to contest the kernel of the counsel for the applicant's contention. The relevant para – para 7 – of the affidavit states:

> "That the Respondent/Plaintiff is a foreign company and it does not own or possess any immovable property in the United Republic of Tanzania."

To this the respondent's counsel simply replies in para 7 of the counter affidavit:

> "The contents of paragraph 7 of the affidavit is (sic) noted."

The response of the respondent's counsel above speaks for itself and is pregnant with meaning. The fact that the contents of the said paragraph which form the cornerstone of the application, if read together with the provisions of order XXV rule 1 (1) of the CPC under which the application has been made, are simply noted. That goes with the admission thereof. In the actual fact it is an admission in disguise.

In the premises, I take it that the respondent's counsel admits that his client is a foreign legal person with residence outside Tanzania and that it has not sufficient immovable property in Tanzania. That is the reason why I have stated earlier that the respondent's counsel, in principle, concedes to the application. The only qualm, I suppose, is on the amount to be deposited.

As rightly put by Mr. Mafuru, learned counsel for the respondent, the provisions of schedule ix to the Advocates Remuneration and Taxation of Costs Rules – GN No. 515 of 1991, are relevant here. These provisions peg the scale of fees in suits whose subject matter is over three million shillings at 3% unless the defendant admits the claim and does not file a defence in which case it is pegged at two-thirds of the fees. For the avoidance of doubt, these provisions stipulate:

> "Over 3 million 3%
> Provided that where the defendant does not dispute the claims and does not file a defence, the scale of fees should be two-thirds of the fees above."

In the instant suit, it is not denied by the respondent that it does not "reside" in Tanzania. Neither has the respondent pleaded to possess any immovable property in Tanzania. In the circumstances, and as it would appear from the arguments raised by counsel for the respondent

in the counter affidavit and skeleton arguments, the qualm remains to be at what rate should the security be fixed.

The reason why these provisions were enacted is stated by Sudipto Sarkar and VR Manohar in **Sarkar: Code of Civil Procedure** (11th Edition Reprint 2011) at page 1214 in the following terms:

> "The object of the rule is to protect the defendant in the cases specified, where in the event of success he may have difficulty in realising his costs ... The power is discretionary and ought not [to] be used unless it is shown that it is necessary for the reasonable protection of the defendant ..."

And the power being discretionary, the discretion, as rightly put by Mr. Mafuru, learned counsel for the respondent, must be exercised judiciously. Referring to the decision of the Full Bench of Calcutta High Court of ***secretary, West Bengal Council of Higher Secondary Education Vs Soumyadeep Bamyerjee***, AIR 2010 Cal 161 , Sir Dinshah Fardunji Mulla in **Mulla: the Code of Civil Procedure** (18th Edition 2011) states at page 2947 as follows:

> "... it is an absolute discretion of the court depending upon facts and circumstances of

> the case, either to ask for pre-trial deposit or not, but not as a matter of rule or compulsion. It was observed [in the ***West Bengal*** case (supra)] that the discretion ought to be exercised judiciously, bearing in mind that the same does not operate as hardship against whom the order is passed."

For the avoidance of doubt, the provisions of our Order XXV of the CPC are *in pari materia* with Order XXV of the Indian Code of Civil Procedure, 1908. It is a salutary principle of statutory interpretation that similar statutes should be interpreted similarly.

In this jurisdiction, courts will not hesitate to allow an application for security for costs if the applicant has proved existence of the two ingredients of Order XXV rule 1 (1) of the CPC. This was aptly summarised by this court (Massati, J. - as he then was) in ***JCR Enterprises Limited Vs Islam Balhabou & 2 Others*** Commercial Case No. 77 of 2007 (unreported) as follows:

> "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 costs likely to be

> incurred in defending the action, be it a suit or a counterclaim."

Guided by the foregoing principles and decisions, I am satisfied that the applicant has succeeded in establishing to the satisfaction of the court that the respondent Multisol Mauritius Limited who is the plaintiff in Commercial Case No. 121 of 2014, from which case this application stems, is a foreign company with residence outside Tanzania and that the said company has not any immovable property in Tanzania and hence, in the event of success, the applicant may have difficulty in realising its costs. I, in exercise of discretionary powers bestowed upon me by the provisions of Order XXV rule 1 (1) of the CPC, would allow this application.

Let me now turn to the question how much amount should be deposited. The applicant has prayed for USD 15,000.00. The applicant's counsel has given reasons for pegging the same at that amount. The principle is that security for costs should not be used to stifle the plaintiff from any genuine claims he may be having against the Defendant. As was observed in by this court (Mjasiri, J. - as she then was) in ***Dow Agrosciences Export S.A.S Vs I.S & M (Metals) Limited***, Commercial Case No. 55 of 2007 (unreported):

> "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 work load involved, costs incurred up to the time of application and after. The Applicant should provide sufficient material to the court showing how the figure proposed if any was arrived at."

Mr. Matunda; counsel for the applicant, in his skeleton arguments, has spent some considerable time in justifying the quantum of security for costs prayed for. The justification only, runs on about two typed pages. The reasons ascribed for praying for USD 15,000.00 as security for costs are, as already alluded to above; first, the amount involved in the main suit is a substantial sum of USD 93,115.20, secondly, the suit is founded on several agreements and documents which are very voluminous which must all the same be subjected to in-depth scrutiny, thirdly, the said voluminous documents will have to be produced copies thereof to attach with pleadings and fourthly, the suit involves other applications which will have to be argued before going into the main suit. The applicant has termed the suit as complicated and time involving.

I agree with the applicant's counsel. Indeed Mr. Matunda; learned counsel for the applicant has supplied enough material upon which he has pegged the quantum of the security for costs prayed for. However, I find the amount of USD 15,000.00 proposed by the learned counsel to

be furnished as security for costs to be a bit on the high side. Ordering the deposit of the amount proposed will, in my view, tantamount to arbitrarily imposing the burden on the respondent who might have a genuine case against the applicant. In my considered opinion, bearing in mind the entire circumstances of this case, 5% of the principal amount claimed in the suit by the plaintiff would suffice to be furnished as security for costs in the instant case.

I consequently order and direct that an amount equivalent to 5% of the principal amount claimed in the main suit by the respondent should be deposited into this court as security for costs within fourteen days from the date of this ruling. Costs in this application shall be costs in the cause.

Order accordingly.

DATED at DAR ES SALAAM this 10th day of April, 2015.

J. C. M. MWAMBEGELE
JUDGE