IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT MWANZA

MISCELLANEOUS COMMERCIAL CAUSE NO. 8 OF 2015

(Arising from Miscellaneous Commercial Cause No. 3 of 2015)

ABDUL AZIZ LALANI
AMIN RAMJI .... **APPLICANTS**
MEHBOOB RAMJI

VERSUS

SADRU MANGALJI .... **RESPONDENT**

10th December, 2015 & 18th February, 2016

RULING

MWAMBEGELE, J.:

This is a ruling in respect of an application for an order requiring the respondent to provide security for costs in respect of Miscellaneous Commercial Cause No. 3 of 2015. The application has been taken under sections 68 (e) and 95 and Order XXV rule 1 (1) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002. It is supported by a joint affidavit sworn by the applicants Abdul Aziz Lalani, Amin Ramji and Mehbood Ramji.

The application was argued before me on 10.12.2015 during which the applicants were represented by Mr. Rwebangira Eustace, learned counsel

while the respondent had the services of Dr. Onesmo Kyauke, learned counsel.

Both learned counsel for the parties had earlier filed skeleton written arguments as dictated by the provisions of rule 64 of the High Court (Commercial Division) Procedure Rule, 2012 – GN No. 250 of 2012. At the oral hearing both learned counsel adopted the skeleton written arguments earlier filed.

Mr. Rwebangira for the applicants was the first to kick the ball rolling. In his oral submissions as well as the skeleton arguments, the learned counsel was brief but to the point. He submitted that the respondent is a foreigner; not residing in Tanzania and does not possess immovable property within the country for purposes of due performance of execution if the decree is given in favour of the applicant. He relied on ***Colgate Pamolive Company Vs Zakaria Provisions Store***, Civil Case No. 1 of 1997, ***Mirage Lite Ltd Vs Best Tigra Industries (formerly Tigra Industries)***, Civil Case No. 86 of 2004 and ***Ngoie Mubanzao t/a ETS Mubanzo Vs Tanzania International Container Terminal Services (TICTS)***, Commercial Case No. 92 of 2009; all unreported.

On the other hand, Dr. Onesmo Kyauke, learned counsel the respondent, equally brief but to the point, having adopted the counter affidavit of the respondent Sadru Mangalji and the skeleton written arguments earlier filed, submitted that for purposes of Order XXV of the CPC, the respondent possesses immovable property in Tanzania because he owns shares in Nyakato Steel Mills. The shares are worth Tshs. 360,000,000/= and according to the Articles of Association of the company, no shareholder can

transfer shares without obtaining prior consent of the Board of Directors. The Articles provide in Clause 4 (a) that Directors may refuse to transfer any shares without assigning any reason. The applicants being members of the Board of Directors may thus refuse any transfer of shares by the applicant. Thus, there is no way the respondent can transfer shares without the consent of the applicants.

The learned counsel for the respondent went on to submit that according to Order XXV rule 1 (1) of the CPC, even if the respondent resides outside Tanzania and does not possess immovable property in Tanzania, that by itself does not warrant grant of application of the deposit for security for costs. It is in the discretion of the court and that discretion must look at the surrounding circumstances of each case - in the case at hand, the respondent will be able to pay in case the suit is decided against him. In the present case, he added, the court may order that the respondent should not transfer his shares in Nyakato Steel Mills before the petition is concluded and that will be sufficient to protect the interests of the applicants in the main application.

In rejoinder, the learned counsel for the applicants stated that shares are not immovable property as the learned counsel for the respondent urges the court to believe. The learned counsel reiterated that Order XXV of the CPC provides for two conditions upon which the court may order provision for security for costs. These are: first, the petitioner or plaintiff is a foreigner not residing within the country and secondly, that he does not possess immovable property in the country.

On the question that the court should restrict transfer of the respondent's shares in Nyakato Steel Mills, the learned counsel for the applicants stated

that the prayer is made from the bar and therefore the court should disregard it.

I have subjected the submissions of the learned counsel for the parties as well the affidavit of the three applicants supporting the application and the counter-affidavit of the respondent opposing the application to serious scrutiny they deserve. The question that this ruling needs to answer is whether the applicants have shown sufficient cause to warrant this court grant. Or, put differently, whether the respondent has shown sufficient reason to warrant this court to refuse the applicants the orders sought.

I wish to state at this juncture that the present application stems from Miscellaneous Commercial Cause No. 3 of 2015. That application is a Petition in which the respondent petitions under the Companies Act, Cap. 212 of the Revised Edition, 2002 against the applicants for some orders which may not be relevant to restate here. In the present application, the applicants seek, in the main, for an order that the respondent be ordered to deposit the sum of Tshs. 100,000,000/= as security for costs in that application. That is stated at the last paragraph of the joint affidavit supporting the application.

As can be gleaned in the joint affidavit supporting the application, the applicants have advanced one main reason (with two limbs) why the sought orders should be granted - that the respondent is a foreigner with no immovable property whatsoever within the jurisdiction of this court.

The affidavit supporting the applicants' application was resisted by a counter affidavit sworn by the respondent. The main reason for the resistance is

stated at the last two paragraphs thereof; paragraphs 5 and 6 and was reiterated by Dr. Onesmo Kyauke at the oral hearing as well as in the skeleton written arguments as shown above. For easy reference, let me reproduce the two paras hereunder:

> "5. That being a shareholder in Nyakato Steel Mills Ltd which is located in Tanzania and the Applicants being co-shareholders, there is no risk of not being able to a recover their costs in the events they succeed defending the petition. I further state that there is no way I can transfer my shares without knowledge of the Applicants as they have to give consent and pass a resolution to that effect.
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> 6. That paragraph 4 of the affidavit is deputed and the Applicants are put to strict proof thereof. I further state that even if the costs for defending the petition would amount to TZS 100 Million, the Respondent's stake in the Company is by far higher than that amount."

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 that must exist before the court makes such an order. Let me, for ease of reference, 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, and as was rightly put by Mr. Rwebangira, learned counsel for the applicants, the rule stipulates two conditions; that the plaintiff (in our case the petitioner) 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 the applicants to succeed in this application for provision of security for costs, they must prove to the satisfaction of the court that the respondent resides outside Tanzania and that he does not possess in Tanzania sufficient immovable property other than the property in suit.

The respondent's counsel, as appearing in paras 5 and 6 of the counter affidavit quoted above, skeleton and oral arguments does not seem to contest the gist of the applicants' contention. At para 2 of the counter-affidavit which is a response to para 1 and 2 of the affidavit, the respondent admits the first

argument that he is not a resident of Tanzania by noting the contention. The relevant para – para 2 – of the affidavit states:

> "It is self evident from the Petition in Misc. Cause No. 3 of 2015 that the Petitioner is not a resident of Tanzania."

To this the respondent simply replies at para 2 of the counter affidavit:

> "That paragraph 2 of the affidavit is noted."

The respondent's response amounts to an admission that he, indeed, is not a resident of Tanzania. Thus, the first limb of the provisions of order XXV rule 1 (1) of the CPC under which the application has been made, has been proved. I therefore find and hold the respondent Sadru Mangalji is not a resident of Tanzania.

However, that is not the end of the matter. The respondent seems to argue that despite his not being a resident of Tanzania, being a shareholder in Nyakato Steel Mills Ltd and the applicants being shareholders, there is no risk of the latter being unable to recover their costs in case the former loses in Miscellaneous Commercial Cause No. 2015.

Before I go on to tackle the issue whether the shares fall within the realm of immovable property as stipulated by the law, let me, first, state that 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 Dr. Kyauke, 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, unless legislative history or purpose suggests material differences.

In this jurisdiction, courts have not been hesitating 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 summarized 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."

I would have rested in peace and decided in favour of the applicant if the foregoing authorities answered the question squarely. In the present instance, to reach the verdict, the issue posed above - whether the shares fall within the realm of immovable property as stipulated by the law - must be answered.

Black's Law Dictionary (Abridged 7th Edition) by Bryan A. Garner; Editor in Chief, defines the term "immovable" as:

> "Property that cannot be moved; an object so firmly attached to land that it is regarded as part of the land".

Premising my reasoning on the above definition I have no flicker of doubt that shares do not fall under the scope and purview of immovable property envisaged by the provisions of XXV rule 1 (1) of the CPC.

Guided by the foregoing principles and decisions, I am satisfied that the applicants have succeeded in establishing to the satisfaction of the court that the respondent who is the petitioner in Miscellaneous Commercial Cause No. 3 of 2014, from which this application stems, is a person with residence outside Tanzania and that he does not have any immovable property in Tanzania and hence, in the event of the respondent fails in that suit, the applicants 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 of quantum to be deposited. The applicants have prayed for Tshs. 100,000,000/=. This is evident at the last paragraph; paragraph 4 of the joint affidavit. The applicants do not give any justification for this amount but simply state it is the average of Tshs. 33,000,000/= per applicant.

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."

In the absence of the justification of the quantum to be deposited, I find the amount of Tshs. 100,00,000/= proposed by the applicants in their joint affidavit to be furnished as security for costs to be 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 be having a genuine case against the applicants. In my considered opinion, bearing in mind the entire peculiar circumstances of this case, I think the amount of Tshs. 15,000,0000/= would suffice to be furnished as security for costs in the instant case.

In the final analysis, I order and direct that Tshs. 15,000,0000/= should be deposited into this court as security for costs within twenty-one (21) 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 18thday of February, 2016.

J. C. M. MWAMBEGELE
JUDGE