

**IN THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION
AT ARUSHA**

MISC. COMMERCIAL CASE NO. 5 OF 2018

ELIZABETH MCKEE.....APPLICANT

VERSUS

3G DIRECT PAY LIMITED.....RESPONDENT

RULING

Date of Submissions: 12/02/2019

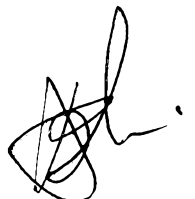
Date of Delivery: 15/02/2019

AMOUR S. KHAMIS, J:

3G Direct Pay Limited is a corporate body registered under the laws of the Republic of Ireland.

In Commercial Case No. 7 of 2017, which is currently pending, the company sued Elizabeth Mckee for payment of USD \$ 72,064.00 being loss that it allegedly suffered due to her unlawful interference with the company's business interests, general damages as may be assessed by the Court "*but not less than USD \$ 300,000.00*" and costs of the suit.

Following institution of Commercial Case No. 7 of 2017, Elizabeth Mckee filed the present application for an order that 3G Direct Pay Limited to deposit to this Court a



sum of Tshs. Forty Million (Shillings 40,000,000/=) as security for costs.

The application was preferred by way of chamber summons under Order XXV Rule 1(1) and Section 95 of the Civil Procedure Code, Cap 33 R.E 2002.

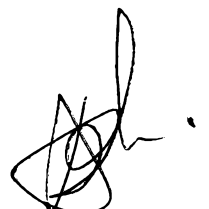
An affidavit of Salim Mushi, learned advocate, supported the application.

Salim Mushi deposed that being a foreign company with its registered office at Ulysses House, Foley Street, Dublin 1, Ireland, 3G Direct Pay Limited does not have any immovable property in Tanzania to guarantee payment of costs incurred or likely to be incurred by Elizabeth Mckee in the event that the main suit is decided in her favour .

He stated that there was a possibility that 3G Direct Pay Limited would not be forthcoming to the Honourable Court whenever called upon to pay costs of the suit should it be decided in favour of Elizabeth Mckee.

On behalf of Elizabeth Mckee, learned advocate Sinare Zaharan, filed a counter affidavit disputing the company's allegations.

Mr. Sinare Zaharan stated that there was a track record in Court proving that the company has been attending since the case was instituted without failure and that the applicant had not supplied any factual basis suggesting as to why the company will not be forthcoming



to Court when called upon for taxation proceedings and eventual payment of costs.

It was further deposed that the sum of money prayed for by the applicant was excessive to the regulated instruction fees and other charges applicable to the case.

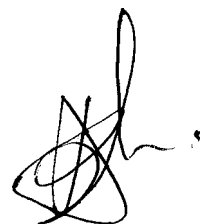
It was asserted that the reasons stated by Salim Mushi could not warrant the Honourable Court exercise its discretionary powers in favour of the applicant.

The application was canvassed before me viva voce. Mr. Salim Mushi, learned advocate, appeared for the applicant while Mr. Obeid Mwandambo, learned advocate, acted for 3G Direct Pay Limited.

In support of the application, Mr. Salim Mushi adopted his affidavit and relied on a decision of this Court in Commercial Case No. 19 of 2008: CHEMICAL INITIATIVES (PTY) LTD V THE OWNER OF MARINE VESSEL MV SALINA (unreported).

He also cited LAKE DULUTI ESTATES LIMITED V MRS YONNIE VIRGINIA RUTH CHOPRA, COMMERCIAL CASE NO. 3 OF 2008 (unreported).

The learned advocate contended that the main suit was complex in nature as it revolves around electronic evidence for the emails sent in and outside Tanzania and thus attract additional fees.



In his reply, Mr. Mwandambo did not dispute that 3G Direct Pay Limited was a foreign company with no immovable property in Tanzania.

However, the learned advocate strongly challenged the sum of Tshs. 40,000,000/= sought by the applicant in the chamber summons.

He contended that the figure was not realistic with instruction fees computed on the general damages among others contrary to the law that required computation on the principal sum only.

He referred to decisions in TANZANIA INTERNATIONAL CONTAINER TERMINAL SERVICES LTD V GLENCORE INTERNATIONAL AG, MISC. COMMERCIAL CASE NO. 106 OF 2014 (unreported), UNILEVER PLC V HANGAYA (1990 – 1994) E. A 598 and G.M COMBINE REPUBLIC V A. K DETERGENT LTD (1999) 2 E.A 94.

Order XXV Rule 1 (1) of **THE CIVIL PROCEDURE CODE, CAP 33, R.E 2002** provides that:

“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.”

In **SHAH AND OTHERS V MANURAMA LTD AND OTHERS (2003) 1 E.A**, it was stated that the power of the Court to order a plaintiff to pay security for costs is entirely a discretionary matter for the Court.

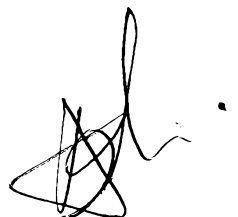
The Court went on observing that in exercising that discretion, the Court must take into account all the circumstances of the particular case.

In the matter at hand, the issue is whether the respondent is liable to deposit Tshs. 40,000,000/= as security for costs.

In **NOBLE BUILDER (U) LTD AND ANOTHER V SANDHU (2004) 2 E.A 228**, the Supreme Court of Uganda held that:

“It is well settled that the burden lies on the applicant to show sufficient cause why the respondent should furnish further security for costs over and above the amount fixed by the rules.”

The relevant rules are the **ADVOCATES REMUNERATION ORDER, 2015, G.N NO. 263 Of 2015.**



The Order applies to the remuneration of an advocate by a client in contentious and non-contentious matters.

The Ninth Schedule provides applicable Scale of Fees for Contentious Proceedings for Liquidated Sum in Original and Appellate Jurisdiction.

Item 7 of that Schedule provides that where the claim is between Tshs. 150,000,000/= and Tshs. 400,000,000/=: the applicable scale for charging instruction fees is 3 – 7% of the sum in dispute.

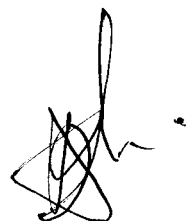
In the instant case, the plaintiff's claim is for payment of USD \$ 72,064.00.

The dispute is on a claim for general damages of which the plaintiff specified it to be:

".....as may be assessed by the Honourable Court but not less than USD \$ 300,000.00..."

The question is, should the sum of USD \$ 300,000.00 be regarded as part of the plaintiff's claim in computing the instruction fees?

I must say that, I am surprised by this claim in the Plaint. I have no doubt that the learned advocates for the Plaintiff are fully aware that general damages are in the discretion of the Court and parties cannot quantify them.

A handwritten signature in black ink, consisting of a stylized, cursive script with a prominent vertical stroke and a horizontal base.

As general damages cannot be quantified by a party and the Court is not bound to award a figure suggested by a party, I am of the firm view that the sum of USD \$ 300,000.00 was wrongly placed by the plaintiff and that, in law, cannot form a claim in the suit.

That being the case, I take it that the plaintiff's claim is limited to USD \$ 72,064.00.

Mr. Salim Mushi contended that the applicable exchange rate was Tshs. 2,220.00 per dollar. Using that rate against USD \$ 72,064.00, the plaintiff's claim in local currency is Tshs. 159,982,080.00.

The applicable scale of instruction fees is 3 – 7% of the sum of Tshs. 159,982,080.00. Assuming the highest scale of 7% is applicable, then the instruction fees is pegged at Tshs. 4,799,462.40.

On inspection of the file of Commercial Case No. 7 of 2017, I noted that the applicant had paid Tshs. 60,000,000/= as filing fees for the Written Statement of Defence and its annextures.

Furthermore, the applicant paid Tshs. 20,000/= as fees for filing skeleton arguments in support of the preliminary objection, Tshs. 120,000/= as fees for filing additional list of documents intended to be relied upon and Tshs. 170,000/= for filing the witness statement.



In **CHEMICAL INITIATIVES (PTY) LIMITED V THE OWNER OF MARINE VESSEL MV SALINA, COMMERCIAL CASE NO. 19 OF 2008** (unreported), this Court at page 10 held that:

“....as stated earlier, the costs involved are court costs. In my view court costs are costs either payable direct to the court and or costs which are direct linked to the court process.....”.

Apart from the court fees, the Court observed other chargeable costs, that:

“However there can be no doubt about the costs payable direct to the Court, problem may be on the costs that are linked to the Court processes and I would think that these should comprise costs of litigating the matter in a Court of law and consequential costs....”.

With those two branches of the applicable costs, I find that the instruction fees of Tshs. 4,799,462.40 is the highest in the list.

As shown above, so far, the applicant has parted with a total sum of Tshs. 370,000/= as fees towards filing of assorted documents. That makes a total of Tshs. 5,169,462.00.



Considering that it is impossible to foresee and or predict all attendant costs in the process of litigation, I am of the view that a maximum sum of Tshs. Ten Million (Tshs. 10,000,000/=) would suffice as security for costs in this matter.

Mr. Salim Mushi is on record that Commercial Case No. 7 of 2017 is complex in nature and deserves an extra charge of fees.

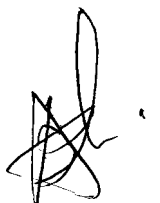
I find that submission unjustified and without base since it has no origin in the affidavit in support of the application.

The same was made in the course of parties' submissions and remains to be an assertion from the bar.

Even assuming that the allegation was deposed in the affidavit of Salim Mushi in support of the application, I still find it difficult to accept the same because it is too early to predict complexity of the suit before it is determined.

I say so because, a suit can be disposed of on full trial or on a preliminary point of law. When a suit is determined on a preliminary objection, it is not correct to say that it was complex in nature.

Even in trial, several factors must be considered to conclude if the case was complex or not.



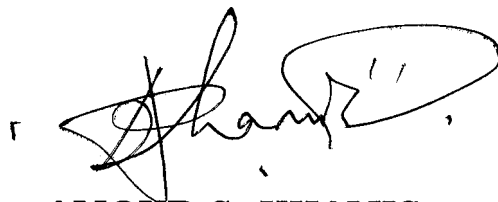
These include the area of the law involved, number of parties in the case, number of witnesses who testified, documents produced and or admitted, the length of trial, the number of objections and applications involved, lengthy of testimonies by witnesses etc.

For those reasons, it is only safe to make such a conclusion upon finality of a suit.

With these reasons, the application is partly granted to the extent that the respondent is liable to deposit a sum of Tshs. Ten Million (Tshs. 10,000,000/=) only as security for costs in Commercial Case No. 7 of 2017.

In terms of Order XXV Rule 1(1) of the Civil Procedure Code, Cap 33 R.E 2002, the said sum of money should be deposited in Court within thirty (30) days from the date of delivery of this ruling.

Each party to bear own costs. It is so ordered. It is so ordered.

A handwritten signature in black ink, appearing to read 'Amour S. Khamis', with a large, stylized flourish at the end.

AMOUR S. KHAMIS
JUDGE
15/02/2019