

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO.271 OF 2018

(Originating from Commercial Case No.62 of 2018)

COOPERATIVE MES ARTISAANAUX MINIERS

DU CONGO.....1ST APPLICANT

JOHN E. CRAWLEX.....2ND APPLICANT

CHRISTOPHER HUBER.....3RD APPLICANT

STAR DRAGON CORPORATION LIMITED.....4TH APPLICANT

VINMART (T) LIMITED.....5TH APPLICANT

VRS

BEN NGAMIJE MWANGACHUCHU T/A

SOCIETE MINIERE DE BUSUNZU SARL..... RESPONDENT

RULING

B.K. PHILLIP, J

Before me is an application made under the provisions of Order XXV rule 1 and 2, and section 95 of the Civil Procedure Code, Cap 33, R.E 2002, (herein after to be referred to as "the CPC").The applicants are praying that the respondent be ordered to deposit in this honourable Court a sum of United States Dollars Five million (USD 5,000,000.00) as security for costs incurred and/ or likely to be incurred by the applicants herein in

Commercial Case No. 62 of 2018 and any application which may arise out of the Case.

The application is supported by two affidavits, the first one is sworn by the learned advocate Mr. George Mpeli Kilindu of Kilindu Giattas & Partners, a law firm which represents the fourth applicant, while the second one is sworn by the learned advocate Mr. Jimmy Mrosso who represents the first, second, third and fifth applicants. The application is resisted. A counter affidavit affirmed by the learned Advocate Abdallah R.M Matumla who previously was representing the respondent, was filed in court in opposition to the application. The learned advocate Kheri Mbiro represents the respondent.

A brief background to this application is that in the year 2018 the respondent lodged a case against the applicants herein vide Commercial case no 62 of 2018 claiming for among other things, payment of USD 11,044,456:= being specific damages and USD 7,000,000:=as general damages for containers of tantalum alleged to have been smuggled by the applicants from the Democratic Republic of Congo. In his amended Plaint filed in this court on the 30th day of May 2018, the respondent stated categorically that he is a resident of Goma, Kivu Province and a Citizen of the Democratic Republic of Congo, holding a passport No 0P0036827, issued by the Democratic Republic of Congo, trading as Societe Miniere De Busunzu Sarl with registration No.GOM/RCCCM/14-B-0009 issued under the relevant laws of the Democratic Republic of Congo. It is due to the above facts which demonstrates that the plaintiff is not a resident and citizen of Tanzania, the applicants decided to file this application.

The contents of the affidavit in support of this application are similar. The deponents in both affidavits have briefly stated the following; That the respondent is neither a citizen nor a resident of Tanzania and has no immovable assets in Tanzania. That on 17th May 2018, the respondent

obtained an ex-parte court order in which this court restrained the applicants, their agents and/or employee from removing from Dar Es Salaam Port, two containers marked as MRKU 4642281 with reference No.DMC/NK/0000006 and MSKU 088975(8) with reference No.DMC/NK/0000007 belonging to the 4th applicant, containing minerals (Tantalum) worth USD 3,155,376:=-, as a result the fourth applicant has failed to deliver the said minerals to his clients in the Peoples' Republic of China within the agreed period. The deponent stated further that by failure to sell the aforesaid consignment of minerals the fourth applicant has incurred loss to a tune of USD 35,736.00 and as on 2nd August, 2018, according to the analysis on world mineral prices the current consignment that is kept at Dar Es Salaam Port will cause the 4th applicant to suffer a minimum loss of USD 392,132.20. That all respondents have incurred and are still incurring costs for transport to and from Tanzania for the purpose of overseeing the case and accommodation. It is stated in the first affidavit specifically that the fourth applicant has already spent a sum USD 290,000 for transport, accommodation and legal fees. Moreover, the affidavits reveal that there is a higher likelihood of the applicants incurring more losses in respect of the minerals in the containers at Dar Es Salaam Port, as such the sum of Tshs 250,000,000/= that was deposited by the respondent for the security for the consignment is little compared to the losses that are going to be incurred by the applicants, thus the respondent should be ordered to deposit at least USD 5,000,000/=.

In the Counter affidavit in opposition to this application, the deponent has admitted that the respondent is neither a citizen nor a resident of Tanzania. The deponent disputed all the allegations on the losses alleged to be incurred by the applicants. Furthermore, the deponent stated that, the amount requested to be deposited as security for costs is too high compared to the amount claimed in this case and unreasonable. The deponent stated further that the applicant has already deposited a sum of Tshs 250,000,000/= as security for costs, thus this court cannot issue two

orders for security for costs as that will be unconstitutional and injustices to the respondent.

I ordered the application to be disposed of by written submissions. In his written submission the learned advocate Mrosso submitted that, it is not in dispute that the respondent is not a resident of Tanzania and has no immovable property in Tanzania thus, he deserves to be ordered to deposit security for costs. Mr. Mrosso submitted further that the amount of Tshs. 250,000,000/= that has been mentioned by the respondent's advocate in his Counter affidavit was deposited as security for Port charges, storage and demurrage. Mr. Mrosso contended that, the deposited amount (Tshs 250,000,000/=) is extremely insufficient to cover all the costs incurred and likely to be incurred by the applicants, and this court has never determined any application for security for costs, hence the amount deposited by the respondent was not for security for costs. Mr. Mrosso contended further that, the security for costs sought in this application will cater for the expenses and costs incurred by the applicants in pursuing the main case and losses due to fluctuations of the value of minerals. Furthermore, Mr. Mrosso submitted that due to the fluctuations in the prices of minerals the 4th applicant will incur losses to a tune of USD 392,132.20. It was the contention of Mr. Mrosso that basing on the amount claimed in the main case which is USD 11,004,456 his Law Firm (Lexicon Attorneys) that has been instructed by the 1st, 2nd, 3rd and 5th applicants is entitled to charge a professional fees to a tune of USD 331,333.68 for each applicant which makes a total of USD 1,325,334.72 for all applicants. Mr. Mrosso contended that the applicants have already spent USD 262,244.00 for legal services and accommodation costs, and Tshs 460,000/= for court fees. Other costs mentioned by Mr. Mrosso to have been incurred by the applicants are costs for stationeries and fare for attending court sessions, which he submitted that now stand at a tune of USD 1000.00.

The submission by the learned advocate Benjamini Marwa who filed the same for the fourth applicant was similar to the one filed by Mr. Mrosso, he

only added few points to wit; That to date the 4th applicant has incurred the following expenses, Tshs. 260,000/= as filing fees on the main suit and Miscellaneous application No.116 of 2018,USD 1000 as costs on stationeries and USD 29,343.50 as Port and demurrage costs paid to Tanzania Ports Authority, Tanzania Revenue Authority and Tanzania International Container Terminal Services Limited. Mr. Marwa also invited this court to grant order for security for costs to a tune of USD 5,000,000:=-

In rebuttal the learned advocate Kheri Mbiro started his submission by expounding the scope of the application and submitted that this application is for security for costs incurred or likely to be incurred by the applicants and not otherwise. He submitted further that according to Black's Law Dictionary 18th Edition, "*cost is defined as the amount paid or charged for something, price or expenditure*" while '*security for costs*' is defined as "*money, property or a bond given to a court by a plaintiff or an appellant to secure the payment of Court costs if that part loses*". Mr. Mbiro proceeded to submit that the application for security for costs does not in any way relate to losses and damages resulting from a case. Mr. Mbiro contended the applicants' submissions which included claims for losses and damages as things to be considered in this application are misconceived and irrelevant. Mr. Mbiro invited this court to disregard part of the submissions made by the applicants' advocates on the complaints on losses and damages likely to be incurred by the applicants.

In addition to the above, Mr. Mbiro submitted as follows; That the order for security for costs is within the court's discretion, that is why the statute uses the word "*may*". That the facts that the respondent neither resides in Tanzania nor possesses immovable property in Tanzania by themselves do not warrant an order for security for costs to be granted. The order is granted under the discretion of the court and the same has to be exercised judicially by considering the circumstances of the case. Mr. Mbiro submitted that none of the applicants have indicated that there will be difficulty in enforcing the order of this court in case they are awarded

costs. Mr. Mbiro contended that the respondent has already deposited Tshs 250,000,000/= as security for Port charges and demurrage, this demonstrates that he can comply with the court orders. Mr. Mbiro was of the view that the applicants have failed to meet the test of "necessity" to warrant the deposit for security for costs by the respondent. To cement his arguments he referred this court to the case of **Abdul Aziz Lalani & 2 others Vrs Sadru Mangalji, Misc cause No.8 of 2015**, in which this Court said the following;

"... and the powers being discretionary, the discretion, as rightly put by Dr Kyauke learned counsel for the respondent, must be exercised judiciously"

and a quotation from text book by **P.M Bakshi in Mulla :Code of Civil Procedure (abridged-13th Edition,2000**, in which at page 1196, it states as follows;

"The power of the court though discretionary should not be exercised in favour of a defendant who does not act bona fide or properly. Nor in favour of an applicant who has not acted promptly in filing the petition....."

Mr. Mbiro proceeded to submit that security for costs should not be used to bar the respondent from pursuing any genuine claim. He referred this Court to the case of **Dow Agrosiences Export S.A.S Vs I.S & M (Metal) Limited, Commercial Case No.55 of 2007** (unreported) in which Hon Mjasiri, J. as she then was said the following;

"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. Mbiro was of the view that the requested sum of USD 5,000,000:= as security for costs is unreasonable and imposing that amount to be deposited by the respondent as security for costs will be tantamount to arbitrary imposing a burden on respondent who may have a genuine claim against the applicants. He referred this court to the case of **Eco Bank Tanzania Limited Vs Multisol Mauritius Limited, Misc Commercial Cause No. 276 of 2014** in which Hon Mwambegele J as he then was said the following;

"Ordering the deposit of the amount proposed in my view, is tantamount to arbitrarily imposing the burden on the respondent who might have a genuine case against the applicant".

Furthermore, Mr. Mbiro submitted that no receipts have been submitted to prove the costs mentioned by the applicant's advocate in their submission and the same applies to the advocates' fees indicated in the submission. Moreover, Mr. Mbiro submitted that, the advocate for the 1st, 2nd, 3rd and 5th applicant has erroneously attached additional evidence in his written submission. He invited this court to ignore the said annexures and referred this court to the case of **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd Vrs Mbeya Company Ltd and National Insurance Corporation (T) Limited , Civil Case No 315 of 2000**, in which Hon Masati, J. as he then was said;

"It is now settled that a submission is a summary of arguments. It is not evidence and cannot be used to introduce evidence. In principle all annexures, except extracts of judicial decisions or text books, have been regarded as evidence of facts and where there are such annexures to written submissions, they should be expunged from the submission and totally disregarded".

In conclusion Mr. Mbiro was of the view that, since the respondent has already deposited Tshs. 250,000,000/= in court, the applicants are claiming security for costs in respect of losses incurred or likely to be incurred instead of costs in defending the suit and have attached payment vouchers for Tshs 410,000/= only, no receipts have been attached to prove the filing and advocates fees indicated in the applicants' submissions and the application was not filed promptly when the case was instituted, then this application has no merits.

Mr. Marwa filed a rejoinder to his submission. In his rejoinder he submitted that, applicants have met the prerequisite conditions for grant of an order for security for costs as stipulated in Order XXV Rule 1 of the CPC. To cement his argument he referred this court to the case of **Abdul Aziz Lalani** (Supra). That the respondent has admitted that the sum Tshs. 250,000,000/= deposited in court is not for security for costs. Also, Mr. Marwa submitted that receipts for the alleged costs are not mandatorily required to be produced in court. He referred this court to Order 58(1) of the Advocates Remuneration Order of 2015. Mr. Marwa insisted that according to item 8 of the 9th schedule of the Advocates Remuneration Order the correct fees to be considered by this court is 3% of the value of the subject matter, which is USD 331,333.68, thus the respondent should be ordered to deposit the requested amount for security for costs that is USD 5,000,000.00

Having analyzed the rival submissions made by the learned advocates, I wish to start my findings by point out that , I entirely agree with Mr Mbiro that the submissions made by both advocates for the applicants have gone beyond the ambit of law on security for costs and the prayers made in the chamber summons, since they contain extensive submissions on losses incurred by the applicants and more losses likely to be incurred due to fluctuations of the prices of the minerals at the world market. With due respect Mr. Mrosso and Mr. Marwa, their submissions on the fluctuations of prices of minerals at the world market are irrelevant in this

application, since the purpose of security for costs is not to cover the losses or damages claimed in a case, instead, it protects the defendant from the risk of failure to recover the costs for the case [see the case of **JCR Enterprises Limited Vrs Islam Balhabou & 2 others, Commercial case No.77 of 2007** (unreported)].

As correctly pointed out by all counsels in their submissions an order for deposit for security for costs is within the court's discretion and the conditions for granting the same are well stipulated in Order XXV rule 1 of the CPC, that is the plaintiff has to be residing out of Tanzania and does not possess any sufficient immovable property within Tanzania other than the property in the suit. In this case, it is a common ground that the respondent is not a resident of Tanzania and does not possess immovable property in Tanzania. I am also alive that the above two conditions do not automatically entitle the applicant to be granted the order for security for costs. I have considered the arguments raised by Mr Mbiro that the applicants have not established the necessity for the order to be granted bearing in mind that the respondent has been obedient to this court's order by depositing the sum of Tshs 250,000,000:= as security for demurrage and other Port costs, however, I am of a settled view that under the circumstances of this case whereby the respondent does not have any immovable property in Tanzania, there is a need to accord the defendants the protection provided under Order XXV rule 1 of the CPC as far as the costs of the case are concerned, since the court's records indicate clearly that the sum of Tshs 250,000,000:= that was deposited by the respondent is for demurrage and Port charges, so they cannot be used to cover the costs of the case in event need arises.

Having made the above finding that it is prudent to grant the security for costs, now what follows is the quantum of the security to be deposited. As I have pointed out earlier in this ruling, the applicants justification for the requested amount of USD 5,000,000:= is the losses incurred and likely to be incurred by the applicants due the fluctuations in the prices of minerals

at the world market. I have already made it clear that the security for costs does not cover the losses or damages claims in the case. I am also inclined to agree with Mr. Mbiro that receipts attached by Mr Mrosso in his submission cannot be put into consideration, since submission do not form part of evidence. Mr. Mrosso was supposed to attach his documentary evidence if any for the justification of the amount requested in the affidavit in support of the application. I am of settled view that the amount of USD 5,000,000:= is on a high side and if accepted will have the effect of stifling the respondent's case which is contrary to the intended purposes of the law (see the case of **Dow Agrosciences Export S.A.S vrs I.S & M (Metals) Limited, Commercial Case. 55 of 2007**).In addition to the above no proof or justification for the same has been brought forwarded by the applicants. In the case of **Niten Ratilal Pattani and Nishit Ratilala Patani Vrs Ashwinkumar Jagjivan Rabheni, Misc Application No. 535/2018** (unreported) my brother Hon Magoiga J when dismissing an application for security for costs had this to say;

".... am of the considered opinion that it is not enough to allege but proof must be there. The law is very clear, he who alleges must prove the order for payment of security for costs must be pegged in realistic amount and full explained to the satisfaction of court how the same we arrived by who desires the court to grant the said order....."

I am inclined to agree with Mr. Mbiro that the applicants have not managed to justify how they reached at the requested amount of USD 5,000,000 as security for costs for the case. I have also taken into consideration the fact that the main case has started to be heard, therefore it is evident that this application has been filed in court as an afterthought after hearing of the case had started, in fact there is a pending ruling in the main case. I believe it is not prudent to frustrate the hearing of the case by imposing unto the respondent huge amount of money for deposit for security for costs. Under the circumstances It is my

settled view that a sum of Tshs. 20,000,000:= would suffice to be furnished as security for costs in the instant case and the same has to be deposited within fourteen (14) days from the date of this order. It is so ordered.

Dated at Dar Es Salaam this 30th day of April 2019.



A handwritten signature in blue ink, appearing to read "B.K. Phillip".

B.K.PHILLIP

JUDGE