IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 61 OF 2019

(Arising from Commercial Case No. 62 of 2017)

PRIMECATCH EXPORTS LIMITED.....APPLICANT

Versus

DIAMOND TRUST BANK KENYA LIMITED.....RESPONDENT

Last Order: 19th May, 2020

Date of Ruling: 9th July, 2020

RULING

FIKIRINI, J.

The applicant moved this Court pursuant to Order XXV Rule1 and 2 (1) of the Civil Procedure Code, Cap. 33 R.E. 2002 (the CPC), seeking for the following order that the respondent be ordered to deposit in Court security for costs of the Commercial Case No. 62 of 2017. The application is supported by an affidavit of Mr. Zulfikar Haiderali Jessa, who is a director of Prime Catch Exports Limited also a defendant in Commercial Case No. 62 of 2017. The respondent through Mr. Dilip Kesaria learned counsel contested the application by filing a counter-affidavit.

In his brief affidavit, Mr. Jessa averred that the applicant is defendant in Commercial Case No. 62 of 2017 in which the respondent is suing for payment of Kenya shillings 380, 226, 484.71 equivalent to Tanzania shillings 8, 216, 694, 334 583 as an outstanding debt. The deponent also averred the respondent is a Kenyan company without any immovable properties within the United Republic of Tanzania. And that the Officers of the Company do not reside in Tanzania. He also averred that there is a possibility that in the event the Court decides in favour of the applicant/defendant it might be difficult for the applicant to get reimbursed by the respondent costs of the case incurred.

The respondent filed a counter- affidavit through Mr. Dilip Kesaria.. Countering the application the Counsel didn't contest his client being a foreign company with its residence in Kenya, but disputed that it would not fail to reimburse the applicants legal costs of the case in event it loses the case averring that, the respondent was part of the Diamond Trust Bank Group, which is an African Banking Group operating in Burundi, Kenya, Tanzania and Uganda. Also that the respondent was the flagship Company of the Group with total assets exceeding Two billion United States Dollars, which was approximately Tzs. 4.5 trillion. And

that the Diamond Trust Bank Group maintained more than 100 branches in the East African Countries in which it was operating, and Diamond Trust Bank (T) Limited was its subsidiary.

In reply to the counter-affidavit, Mr. Jessa controverted the respondent's averment regarding the assets and properties including more than 100 branches as unsubstantiated and subjected to strict proof. As for the request for security deposit for the costs of the case of Tzs. 244,105,402.728 anticipated to be reimbursed to the applicant in the event the respondent loses the case, based on the respondent's averment that is having assets worth 4.5 trillion, that in a way was an admission of the fact that was capable and willing to make deposit for security for costs.

The application was disposed of by way of written submission. Through Mr. Ezron Jasson, learned counsel the applicant filed her written submission, stating that under Order XXV Rules 1 and 2 of the CPC, the plaintiff was not a resident of Tanzania and did not possess sufficient immovable property within Tanzania other than the property in the suit. The Court may on application by the defendant/applicant order the plaintiff/respondent to furnish security, for payment of all costs incurred or likely to be incurred by the applicant in defending the suit. Supporting his submission, the cases of **Cooperative Mes Artisaanaux Miniers & Others v Ben Ngamije Mwangachuchu t/a Societe Miniere De Busunzu**

Sari, Miscellaneous Commercial Application 271 of 2018 and **Gerald Jordaan v E.R. Mwakasala, Civil Case No. 398 of 2001 (unreported)** (copies attached). The applicant was therefore urging the Court to exercise its discretionary powers vested under Order XXV Rule1 of the CPC.

Reacting to the submission Mr. Zacharia Daudi learned counsel for the respondent, contended that the applicant apart from proving the respondent reside outside Tanzania and has no sufficient immovable property has equally to prove costs incurred and likely to be incurred. The applicant has failed to establish and prove that but has left the Court to speculate on what was incurred or likely to be incurred. He thus urged the Court to dismiss the application. In support of his stance he cited the case of **Innovative Global Limited & 2 Others v Harsh M. Vora t/a Parshava Agro, Miscellaneous Commercial Application No. 276 of 2018** which referred the case of **Pattani v Rabheru, Miscellaneous Application No. 535 of 2018.**

Mr. Daudi went on submitting that the amount stated of Tzs. 244, 105, 402. 728 as costs of the case was without any proof, which made the application unmerited and that it should be rejected and dismissed with costs. Submitting further Mr. Daudi submitted that the purpose of Order XXV Rule 1 and 2 (1) of the CPC, was not to deny non-resident such as the plaintiff with no immovable property in Tanzania

from justice but rather intended to protect un-genuine claim from non-resident of Tanzania against the resident of Tanzania. The respondent's genuine claim should therefore be protected and applicant be stopped to benefit from her own wrong. The cases of **Innovative** (supra) and **Leila Jalaludin Haji Jamal v Sharifa Jalaludin Haji Jamal, Civil Appeal No. 55 of 2003, (unreported), p. 17,** were cited to reinforce the submission.

It was also Mr. Daudi's contention that ordering the respondent to deposit Tzs. 244, 105, 402.728 as security for costs would prejudice the respondent. He said this was due to the fact that if the application is granted and the respondent ordered to deposit the amount but failed to pay or remained unpaid, it means the suit will be dismissed. He thus prayed for the respondent to be protected and her access to justice on her genuine claim not to be curtailed by the order for security for costs.

Adding to his submission Mr. Daudi invited the Court to take into account that the respondent is a resident of Kenya who together with Tanzania are member states in East Africa Community. Considering that fact the Court was thus entitled to treat ease enforcement of Court order as a condition sufficient and relevant ground for denying the order for security for costs. The case of **Porzelack KG v Porzelack United Kingdom Ltd [1987] 1 All ER 1074,** was what the Chancery Division of England considered the application for security for costs among the European

Union States members. He as well cited the case of **Shah & Others v Munarama Ltd & Others [2003] 1 EA (HCU)** to fortify his submission and invited this Court to follow the principles enunciated in the case which mainly discussed similarity of the Rules and provision of the East African Community Treaty, as the condition sufficient and relevant ground for denying the order for security for costs. The following Articles were referenced: Article 2 on Establishment of the East African Community; Article 126 on unification and harmonization; Article 44 on judgments of the East African Court of Justice; Article 5 on underlying objectives; Article 104 on free movement of persons, labour, services and the right of establishment and residence. The partner states were under obligation to ensure the enjoyment of these rights by their citizens within the community; Article 8 (2) (b) that the Court was to be mindful of the fact that the East African Community Treaty has the force of law in each partner state and that the treaty law has precedence over national law as per Article 8 (5). He also contended that all the partner states had virtually identical foreign judgments (Reciprocal Enforcement) Acts, each of which extended the application of its provisions to the other two partner states. Mr. Daudi cited the case of **Vallabhdas Hirji Kapadia v Laxmidas [1960] EA 852**, in support of his argument.

Stressing on his position and in reference to the cited cases, provisions of the Treaty and in relation to the facts of this application, he argued that, it was evident that it will not be difficult for the applicant to execute their incurred costs considering the undisputed fact that the respondent is the flagship company of Diamond Trust Bank Group which is an African Banking Group operating in Burundi, Kenya, Tanzania and Uganda.

Discussing the cited case of **Cooperative Mes Artisaanaux Miniers DU Congo** (supra), he submitted the case to be distinguishable as in that case the plaintiff was a resident of Mozambique while in the present application the plaintiff/respondent was a Kenyan resident with whom Tanzania have arrangement.

On the strength of his submission he prayed for the Court to reject and/or dismiss the application for want of merit.

The Courts are here to protect both the applicant and the respondent. It is until the matter has been heard and determined that is when it can be known that the complaint or claim before the Court is genuine or not. Likewise, that is when the Court can tell of the applicant's intention of benefiting from her own wrong. Mr. Daudi's insistence on his client's presumed genuine claim, though appreciated but prior to determination of the suit, both parties should be equally and fairly treated.

And this is more so when interpreting Order XXV Rules 1 and 2 (1) of the CPC. The cited case of **Leila Jalaludin** (supra) has said it all when it stated:

> *"That principle of equity, natural justice and fairness should always prevail when interpreting the provision of Order XXV."*

The Court's discretion bestowed upon by Order XXV Rules 1 and 2 (1) of the CPC, should be exercised mindful of acting judiciously and in accordance to the rules of reason and justice and not according to private opinion or arbitrarily. And in order for the Court to do so there has to be guideline or requirement which if satisfied the Court will then act accordingly. Under the provision of Order XXV of the CPC, in order for security for costs application can be granted the applicant has to prove: **one,** that the plaintiff/respondent is a foreign company, and **two**, has no sufficient immovable property in the United Republic of Tanzania since she is resident of Kenya,

From the averments in the affidavits and submissions by the counsels, there is no dispute at all that the respondent is a foreign company with its residence in Kenya. Meaning the officers of the company will be travelling back and forth from Kenya during trial. Also it was an undisputed fact that the respondent had no sufficient immovable property in the United Republic of Tanzania. Proving of these two

conditions is however, not the only requirement. Although the law have not required for proof of costs incurred and/or likely to be incurred, but rules of evidence provide otherwise. Section 110 and 111 of the Tanzania Evidence Act, Cap. 6 R.E. 2002 (the Evidence Act) placed the onus of proving any fact on the one who alleges. **See: Abdul Karim Haji v Raymond Nchimbi Alois & Another, Civil Appeal No. 99 of 2014 (unreported).** But even simple logic would require that. The applicant by demanding the Court to order deposit of Tzs. 244, 105, 402.728, ought to have been substantiated. The amount aside from being huge, but there were already costs incurred which the applicant should have been able to prove by furnishing the Court with receipts. Invoices on legal fees, to be paid, from the advocate having conduct of the case or the detailed anticipated undertaking would have assisted this Court in assessing the prayer for security for costs to the tune mentioned. None has unfortunately been done as no receipts on costs incurred including filing fees, legal fees or other miscellaneous costs incurred or estimated likely to be incurred costs such as legal fees and other disbursements have been furnished to this Court.

Under paragraph 5 of the reply to the counter-affidavit, Mr. Jessa while estimated costs to be incurred to include legal fees, filing fees, transport and living expenses and other incidental costs in defending the suit, which is claimed would be 3% of

the amount claimed in the main suit, which in this case is Kes. 380, 226, 484, and that the 3% charge would be equal to Kenya shillings 11, 406, 794.52, which is approximately equivalent to Tanzania shillings 244, 105, 402. 728, but without any proof. This places the Court in an awkward position as it will have no basis of granting the prayed amount of Tzs. 244,105,402.728. Appreciating the rationale behind having Order XXV of the CPC of protecting the applicant, but it will be illogical, unjustly and against all reason to ask the respondent to deposit such huge amount without any supporting evidence. In the case of **Dow Agrosciences Export S.A.S v I.S. & M (Metals) Ltd, Commercial Case No. 55 of 2007**, the Court had this to state:

> *"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"*** [Emphasis mine]

On the contrary, this Court has alike considered Mr. Kesaria averment under paragraph 4 which for ease of reference is reproduced below:

"The respondent is part of the Diamond Trust Bank Group, which is an African Banking Group operating in Burundi, Kenya, Tanzania and Uganda. The respondent is the flagship Company of the Group with total assets exceeding Two Billion United States Dollars, which equates to approximately Tzs. 4.5. trillion."

This is admission as averred in paragraph 6 of the reply to the counter-affidavit, that the respondent is capable and willing to make deposit for security for costs. I am not sure about the willingness but definitely certain that the respondent has means, if ordered to deposit as security for costs the amount to be ordered by the Court. Of course the issue which will remain to be determined is the amount, otherwise, the Court concurs with the applicant on the aspect that the respondent has means if ordered to deposit security for costs.

Mr. Daudi exhibited apprehension in his submission, that ordering for deposit for security for costs will prejudice the respondent and will deny her access to justice since the amount is huge and if the respondent fails to deposit the amount the suit will definitely be dismissed. This is indeed correct, but as pointed out earlier on in this ruling that both parties deserve Court protection. So this Court will consider the application having in mind, both parties position.

Mr. Daudi has as well brought on board the existence of the East African Community Treaty, which he invited the Court to apply. Tanzania and Kenya are undoubtedly both member states of EAC, but as submitted by Mr. Mkumbukwa each remained autonomous and with independent judicial system, the submission which I agree to. Furthermore, there has not been any amendment to Order XXV Rules 1 and 2 (1) of the CPC so far. Therefore, the applicability of the Articles of the Treaty, though welcomed but time has not come yet for the Treaty to have force of law in each partner state. This Court cannot therefore act on objectives of the Treaty which have not yet been implemented by the Parliament of the United Republic of Tanzania by way of amending Order XXV Rules 1 and 2 (1) of the CPC.

Pressing on the stance that security for costs should not be granted based on existence of the Treaty, referring this Court to the case of **Porzelack KG and Shahand Vallabhdas Hirji** (supra), I wish to highlight what was stated in the cases **of National Microfinance Bank v Leila Mringo & 2 Others, Civil Appeal No. 30 of 2018, CAT-Tanga, p. 21** and **National Microfinance Bank v Victor Modest Banda, Civil Appeal No. 29 of 2018, CAT-Tanga, (both unreported),** but specifically quoting from the **Banda** case the Court had this to say that:

> *"In our considered opinion, it was not proper for the learned Judge* ***to import and rely on authorities from other jurisdictions,*** *while the law of Interpretation Act is expressly, elaborate and clear on that aspect."*[Emphasis mine]

Order XXV of the CPC is in my view clear and elaborate such that there was no need of resorting to foreign decision.

Now coming to the actual application whether to grant or not grant the application for deposit of the security for costs. The applicant has not provided any supporting document or information as to the expenses already incurred or anticipated. The amount of Tshs. 244, 105, 402.728 gotten from charging the 3% on the amount claimed on the case by the respondent, which is considered exorbitant has not been substantiated at all. Considering that no information or reasons were availed to this Court as to how the amount was arrived or why should the Court grant the amount requested, but as well considering that the applicant deserves protection and the respondent as averred in paragraph 6 of the counter-affidavit will not be prejudiced if ordered to deposit security for costs as she has means, the question that remains is how much should be deposited as security.

All circumstances pondered, this Court in its wisdom and for the interest of justice find the amount of Tshs. 50,000,000/= (Fifty Million Only) should suffice as

security for costs. The amount of Tzs. 50,000,000/= be deposited with the Judiciary Deposit Account within twenty-one (21) days as from date of this ruling.

The application is hereby granted to the tune of Tzs. 50,000,000/= as security for costs in respect of the applicant, Primecatch Exports Ltd. It is so ordered.

P. S. FIKIRINI

JUDGE

13th JULY, 2020