

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
MISC.COMMERCIAL APPLICATION NO. 79 OF 2021
(Arising from Commercial Case No. 65 of 2021)

GLOBAL AGENCY LIMITED..... APPLICANT
VERSUS
TARBIM TARIM TEKSTILL GIDA SAN VETIC
LIMITED RESPONDENT

RULING OF THE COURT

K.T.R MTEULE, J.

05/10/2021 & 7/12/2021

The applicant **GLOBAL AGENCY LIMITED** has filed this application under **Order XXV, Rule 1(1) of the Civil Procedure Code CAP 33 R.E 2019** read together with **Rule 2 (2) of the High Court (Commercial Division) Procedure Rules, GN. No. 250 of 2012** as amended. The applicant is praying for the order that TARBIM TARIM TEKSTILL GIDA SAN VE TIC LIMITED, the respondent and the plaintiff in the original suit deposit to this court a sum of USD 25,000.00 equivalent to Tanzanian shillings sixty million only (TZS 60,000,000/=) as security for costs pending determination of the main suit, **Commercial Case No. 65 of 2021**. The applicant is further praying for cost and any other relief.

The affidavit to support this application has been sworn by one **FIDELIS BASHASHA** the Managing director for the applicant. The respondent filed his Counter affidavit sworn by **BAKARI JUMA** to contest the application.



A brief background to this application is that on 26th day of May 2021 the respondent filed **Commercial Case No. 65 of 2021** claiming for an order for the applicant to pay sum of USD 607,000.00 among other prayers. Upon being served with necessary documents, the applicant filed her Written Statement of Defense as well as this Misc. Commercial Application No. 79 of 2021 inviting this Court to grant an order that the Plaintiff/Respondent deposit to this court a sum of USD 25,000.000 equivalent to Tanzanian shillings sixty million only (TZS 60,000,000/=), as security for cost pending determination of the main suit.

In the affidavit the applicant swore that the Plaintiff pleaded in the plaint that she is a company registered under the Laws of Turkey hence it is a foreign Company which is liable to pay security for costs. That the respondent does not have any immovable property within Tanzania sufficient to guarantee payment of costs to the applicant in the event that the main suit is decided in favor of the Defendant.

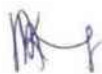
In the counter affidavit, the Respondent disputed the allegation that she does not own any property within the United Republic of Tanzania. According to the counter affidavit, the Applicant has not demonstrated any proof that no Respondent immovable properties within Tanzania. It is deponed in the counter affidavit that the respondent conducts its business within the united Republic of Tanzania and shall it be decided that she pays costs of the suit, she will be able to pay it.

From the contents of the affidavit and counter affidavit, the issue in dispute is **whether the applicant has established sufficient cause to order the Respondent to deposit TZS 60,000,000.00 as security for costs in Commercial Case No. 65 of 2021.** The application was heard by a way of written submissions in which the applicant and the respondents filed their

submissions through their learned advocates. The applicant enjoyed the services of the learned advocate Ngasa Ganja while the respondent was represented by the Learned Advocate Bakari Juma.

Having adopted the Applicant's affidavit, it is Mr. Ganja's view that since it is not disputed that the respondent is foreign company, then it is a legal requirement under Order XXV Rule 1 (1) of the CPC that the plaintiff with no possession of immovable property within Tanzania to give security for costs. He rested on the Respondent the burden to prove any such possession of immovable property in Tanzania while challenging the counter affidavit for not demonstrating evidence of any sufficient immovable property. While acknowledging this power to be a discretion of the court he urged the court to consider all the circumstances of the case and allow the application.

In a bid to justify the amount claimed, Mr. Ganja submitted that security for costs are court costs, payable directly to the court and or to advocates in accordance with **Advocate Renumeration Order, 2015 GN No. 263 of 2015**. Referring to item 8 of the Nineth schedule to GN No. 263 of 2015, the applicant submits that the instruction fees for the plaintiff's claim of USD 607,000.00 is USD 18,210.00 equivalent to TZS 42,000,000.00 plus the instruction fees for this application which TZS 1,000,000.00 making the total of TZS 43,000,000.00 for instruction fees. That considering that it is impossible to foresee and or predict all attendance costs the applicant estimated sum of USD 6,970.00 equivalent to TZS. 17,000,000.00 making the entire total to be of USD 25,000.00 altogether giving a total of TZS 60,000,000/= as the entire costs of the suit. Mr. Ganja referred the Court to the case of **Elizabeth McKee vs. 3G Direct pay Limited, Misc. Commercial; case no.5 of 2018, High court of Tanzania at Arusha (unreported)**



On the part of the Respondent, having adopted the counter affidavit as part of her submission, Mr. Bakari Juma attacked the applicant's contention that the Respondent need to prove ownership of possession of immovable property in Tanzania. He considered this as shifting the burden to prove since this fact ought to have been proved by the applicant who is alleging. In his view, he who allege must prove. He cited Section 110 (1) and (2) of the Evidence Act Cap 6 [R.E 2019] which provides: -

"110-(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2)When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person".

Mr. Bakari Juma challenged the computation done by the applicant to arrive at the figures claimed for lacking any proof such as receipts to demonstrate that the monies were really charged by the advocate. He challenges lack of any explanation on the predicted costs of attendance . He cited some cases where the jurisprudence has insisted that he who alleges must prove. These cases are: - **Geita Gold mining Ltd and another vs. Ignas Athanas Civil appeal no.227 of 2017 CAT (unreported)**; **Antony M. Msanga vs. Penina (Mama Mgesi) and another Civil appeal No. 118 of 2018 (unreported)** page 5 and 6. He refuted the applicability of the case of **Elizabeth Mc Kee vs. 3G Direct pay limited, Misc. comm case no.5 of 2018 HC (unreported)** on account that it is distinguishable from the instant case. The respondent concludes by submitting that the applicant herein cannot be awarded the sum of TZS 60,000,000.00 as prayed as there is insufficient evidence to prove her allegations.

At this point, to answer the issue as to **whether the applicant has established sufficient cause to order the Respondent to deposit TZS**



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60,000,000.00 as security for costs in Commercial Case No. 65 of 2021, it is pertinent to highlight the contents of **Order XXV Rule 1 (1) of the CPC** which guide granting of security for costs. It provides: -

“1.-(1) 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”

The key issues to note in this provision are;

1. Plaintiff residing outside the country,
2. The plaintiff does not possess immovable property within the country

The above two conditions need to be met to qualify for the grant of orders for security for costs. Having analyzed the contents of the affidavit, counter affidavit and all the submissions made by the two sides, it is not disputed that the plaintiff/respondent is a foreign Company. What is in dispute is whether the plaintiff/respondent has any immovable properties here in Tanzania.

None of the parties has adduced any tangible evidence to prove Respondent's possession of immovable property or otherwise apart from their sworn statements which verbally adduce distinct facts challenging each other. The applicant alleged nonexistence of immovable property and wanted the respondent to prove that she has it in the country. On the other hand, the Respondent claimed to have immovable property and wanted the Applicant to

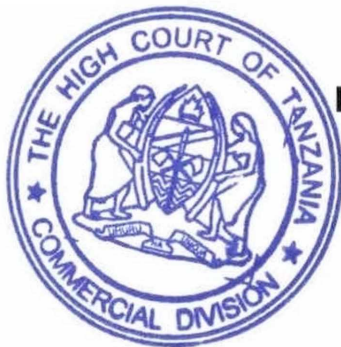
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prove nonexistence of it. The Respondent contended that he who alleges must prove.

In this kind of a situation, further evidence is needed to corroborate the sworn statements of the affidavit and counter affidavit with regards to respondent's ownership of immovable property in the country. This will have to take us to the provision of Section 110 (1) and (2) of the Evidence Act which is the foundation of the principle of "he who alleges must prove". In this application, it is the applicant who is alleging. Demanding the Respondent to prove nonexistence of the immovable property is as shifting the burden of proof. It is the duty of the Applicant to prove nonexistence of respondent's immovable property in Tanzania. Since there is no such a proof then the second condition of Order XXV Rule 1 (1) of the CPC is not met.

The foregoing conclusion is sufficient to dispose the application therefore I don't find reason to proceed with other debated issues. Therefore the issue as to whether **the applicant has established sufficient cause to order the Respondent to deposit TZS 60,000,000.00 as security for costs in Commercial Case No. 65 of 2021** is answered in the negative. Consequently, the application is dismissed with cost

Dated At Dar Es Salaam This 7TH Day December 2021.



KATARINA T. REVOCATI MTEULE

JUDGE

7/12/2021