IN THE HIGH COURT OF UNITED REPUBLIC OF THE TANZANIA

(COMMERCIAL DIVISION)

AT DAR-ES-SALAAM

MISC.COMMERCIAL APPLICATION NO.56 OF 2020

(Arising from Commercial Cause No.2 of 2020)

JITESH JAYANTILAL LADWA.....1st APPLICANT
INDIAN OCEAN HOTEL LIMITED.....2nd APPLICANT

VERSUS

DHIRAJLAL WALJI LADWA.....1st RESPONDENT
CHANDULAL WALJI LADWA .....2nd RESPONDENT
NILESH JAYANTILAL LADWA .....3rd RESPONDENT

RULING

Date of the Last order: 8/2/2023
Delivering this Ruling: 8/3/2023

NANGELA, J.,:

As it may be noted hereabove, the current application arises from Commercial Cause No.2 of 2020, a Petition brought by the Respondents, and which has long overstayed in this Court for well know reasons to the parties and which I need not refer to herein. In that Petition, the Petitioners are seeking for the following orders and reliefs, namely:

1. An Order of this Court, declaring that, the conduct and operations of the 1st Respondent were

unlawful and prejudicial to the interests of the company and the petitioners as shareholders, directors and members of the Company.

2. An Order of this Court, restraining the 1st Respondent permanently from taking part in the management of the affairs of the company and an order directing the management of the company to be placed in the hands of the petitioners.
3. An Order of this Court directing and authorizing civil proceedings to be brought for, and on behalf of, the company by any of the petitioners or the petitioners jointly to compel the 1st Respondent make good all losses and business distortions incurred as a result of misappropriation of the company's funds and mismanagement of the company by the 1st Respondent.
4. An Order compelling the 1st Respondent to vacate the office and business premises to be used by the company only and relocate

his personal business ventures from the company's premises.

5. Payment of general damages to the Petitioners as the Court may assess.
6. Costs of the suit be borne by the 1st Respondent.
7. Any other relief or order the honourable Court shall deem fit and proper to grant.

Based on the provisions of Order XXV Rule 1 of the Civil Procedure Code, Cap.33 R.E 2019, the Applicants herein have brought up this an application by way of a chamber summons supported by an affidavit sworn by the 1st Applicant and they seek for the following orders of this Court:

1. That, this Honourable Court be pleased to order the 2nd and 3rd Respondents to deposit a sum of US$ 100,000 each, being security for costs incurred or likely to be incurred by the Applicants in Commercial Cause No.2 of 2020 (main case) and/or any other Application likely to be brought by the Respondents related to the main case.
2. An Order that, not any application either made formally or orally either to be made personally or

through by their Advocate(s) shall be entertained by this Court until security for costs is deposited in Court by the 2nd and 3rd Respondents;

3. Costs of this Application be provided for; and
4. Any other order or relief that the Hon. Court shall deem fit and just to grant in the circumstances.

The Respondents have vehemently opposed this application by way of filing a counter affidavit of the 1st Respondent, Mr. Dhirajlal Walji Ladwa, who has deposed that he is duly authorized to represent the rest of the Respondents. In court, the parties are represented by advocates, and when this matter was called for its hearing on the 14th day of December 2022, this Court directed the parties to dispose it of by way of filing written submissions. I did give them a schedule of filing and they duly complied with it.

I will, therefore, consider their submissions and the affidavits filed in this Court before I render my verdict on the prayers sought by the Applicants. In terms of representations, the Applicants enjoyed the services of Mr. Jeremia Mtobesya and Mr. Sisty Bernard, learned counsels while Mr. Robert Rutaihwa, as well learned counsel, represented the Respondents.

As I stated herein above, this Court invited the learned counsels for the parties herein to dispose of the current

application by way of filing written submission. Much as I appreciate for their due compliance with the orders of the Court in that respect, I find apposite to hasten a confession that, I will not be able to recite each and every detailed argument they brought forth in their submissions. Rather, I will only be fastidious and only recount, albeit in brief, their respective disputations as I find them to be conveniently relevant and sufficient for the disposal of the matter at hand.

In his submission, Mr. Bernard started off by setting out the purpose of this application which I have already set out at the beginning of this ruling. He adopted the contents of the supporting affidavit as forming part of his submission and contended that, this application having been premised on Order XXV Rule I of the Civil Procedure Code, Cap.33 R.E 2019 can only be granted if the Applicant fulfils three ingredients, namely:

(i) That, the Applicants are residing outside Tanzania;
(ii) That, they possess no any sufficient immovable property within Tanzania, other than the property in dispute;
(iii) That, the Court on its own motion or on an application by the defendant order the Applicants within time fixed by the Court to give security for payment of all

costs and likely to be incurred by
the Respondents.

In a bid to expound on those grounds he had set out, it was Mr. Bernard's submission that, as per the disclosures under paragraph 7 of the 1st Respondent's counter affidavit, there is a concession that, the Respondents herein are not resident of Tanzania. He also referred to the annexure to the affidavit supporting the application at hand.

Concerning the fact that the 1st and 3rd Respondents lack sufficient movable property in Tanzania, he contended that, by looking at paragraph 8 of the Respondents affidavit it is clear that they have failed to provide evidence to show that they own immovable properties since shares owned in companies including in the 2nd Applicant are not immovable properties.

As regards the third point, he argued that, the rationale of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case and not merely as a penal measure to enable a successful litigant to recoup expenses to which he has been put to fight a matter in Court. He also asserted that, security for costs covers the Defendant against a foreign party who instituted action in the Tanzanian Courts from incurring expenses which the Defendant will never recover.

He surmised, therefore, that, in case the Applicants are successful in the main Petition and its ancillary proceedings, the Respondents being non-residents, it will be difficult for the Applicants to recover costs they have incurred or likely to incur.

Mr. Bernard told the Court that, award of costs is dependent of various factors taken into consideration such as the complexity of the case, and value of the subject matter. He contended that, the subject matter of the dispute is 700 shares valued at 47,000,000 TZS per share as per the 6th paragraph to the main petition. He contended, therefore, that, the value is around TZS 30,000,000,000. He contended that, in this application, the Applicants applied for US$ 100,000 from each, which is about TZS 235,000,000/-.

He contended, therefore, that, it will be fair and just on the reasons that, item 8 of the nineth schedule to the Advocates Remuneration Order provides for scale of 3% of the value and that, a 3% of the estimated value of all shares in TZS 900,000,000/=.

To back up his submission, Mr. Bernard referred to this Court the unreported cases of **IPTL vs. Mechmar Corporation (Malysia) Berhad (In Liquidation) & Another**, Misc. Civil Application No.136 of 2014 (un reported); M**EIS Industries Company Ltd vs. The Government of Libya** (Libya Case), Misc. Civil Application No.163 of 2012**; Computers & Programs Africa, Pty Ltd vs. TANESCO,** Commercial Case No.129 of 2005 (unreported); **Philip Debeau vs. Usangu Safaris Ltd & Others,** Civil Case No.185 of 2008 (unreported) and **Multichoice Africa Ltd vs. Burudani,** Commercial Case No. 152 of 2008 (unreported).

On the account of the authorities cited hereabove, he urged this Court to find that this application is meritorious and should be granted.

Responding to the Applicant's counsel's submissions, Mr. Robert Rutaihwa, learned advocate for the Respondents commenced his reply submissions by adopting the counter affidavit filed in Court by the 1st Respondent on behalf of himself and the rest of Respondents. Mr. Rutaihwa fronted a spirited submission that, in the first place, the current application should have been wisely withdrawn from the Court following the filing of the Respondents' counter affidavit.

To back up his reasoning on that, Mr. Rutaihwa argued that, a careful reading of Order XXV Rule 1 upon which this application is premised envisages two scenarios: one is where there is a sole Plaintiff (Applicant) and two, where there are more Plaintiffs (Applicants). He contended that, each of these scenarios attracts different conditions attached to them. He submitted that; the current application falls under the second category of the scenarios posited herein.

Mr. Rutaihwa submitted that, under the second scenario, where the Plaintiffs (Petitioners) are more than one, the conditions to be fulfilled are just the same as those which apply to a scenario where the Plaintiff (Applicant) is alone. These are: **first**, all Plaintiffs (petitioners) are foreigners residing outside Tanzania; **two**, no one of such Plaintiffs (Petitioners) possesses

any sufficient immovable property and, **third**, the court invokes its discretion or any party applies for deposit of security of costs.

Mr. Rutaihwa submitted that; the present application does not meet the conditions. He contended that, in the matter at hand, the Court will not exercise its discretion where all Petitioners are residents of Tanzania and have been participating in the proceedings in Court now and then. He contended further that, more so, the Court will not exercise its discretion where one of the Plaintiffs (Petitioners) is a permanent resident and a Tanzanian citizen who has been here for the past 70years and possesses immovable properties as stated in para 9 of the counter affidavit. He contended that, Court's discretion is to be exercised judiciously and, hence, on failure to meet the last two conditions, this Court should not exercise its discretion.

To support his contentions stated hereabove, Mr. Rutaihwa referred to this Court the decision made by His Lordship and my brother Judge, Kisanya, J., in the case of **The Registered Trustees of Tanzania Presbyterian Church vs. Jung Hwan Kim and Another**, Misc. Civil Application No. 183 of 2022, HC (DSM) (unreported) where the Court stated that the three conditions must be met. He as well relied on the decision of Her Ladyship Fikirini J., (as she then was) in the case of **Target International (T) Ltd vs. Godrej Consumer Products Ltd**., Misc. Commercial Application No.86 of 2019 (unreported).

Mr. Rutaihwa submitted that, the Applicants are labouring under a misconception since, they are seeking for security for costs against the 1 and 3rd Respondents and not from the 2nd Respondent, a fact which he contended to be against the spirit of Order XXV Rule 1 of the CPC. He submitted that, the dictates of the law are such that, all Plaintiffs (Petitioners) must be foreigners and have no immovable property in Tanzania. He reiterated that, since the 2nd Respondent is a resident in Tanzania and has sufficient immovable property, the conditions upon which the application is premised have not been fulfilled.

Mr. Rutaihwa submitted that, contrary to the Applicants' submissions, all Respondents are residents of Tanzania and have been here in Tanzania for quite some times. He submitted that, the 1st and the 2nd Respondents are the ones who raised the 1st Applicant herein Tanzania and, that, the 2nd Respondent owns immovable Properties include Plot.No.2159 Tloma Area in Karatu District in Arusha, Tanzania, which fact is disclosed in paragraph 9 of the Counter Affidavit.

As regards the deposit of US$ 100,000 each, by the 1st and 3rd Respondents as security for costs, it was Mr. Rutaihwa's contention that, what is being sought in the Petition are declaratory orders against the conducts of the Applicants herein and there is no liquidated sum sought to be recovered as suggested. He, equally, denounced any reliance on the 8th Schedule of the Advocates Remuneration Order arguing that, the

8th schedule applies to liquidated sums which is ordinarily the figure sought to be recovered from the opposite party.

He contended that, the figure has to be pleaded and has to be specific. He contended that, there is no figure pleaded in the main petition. He contended further that, in the **Target's case** (supra) at page 8, the Court was of the view that, the Applicant has to show material sufficient to prove how the figure proposed was arrived at.

He, however, distinguished the rest of case relied on by the Applicants noting that, the **IPTL case** (supra), did not consider whether the 2nd Applicant had properties or not and, that, in the **MEIS case,** (supra), **The Computer & Program case** (supra), **Philip Dubeau's case** (supra) as well as **Multichoice case** (supra) contending that, they discussed the matter of security for costs on the basis of their circumstances. He urged me to, thus, dismiss the application.

The Applicants rejoinder submission was that, the learned counsel for the Applicants reiterated his earlier submission in chief. He noted that, in paragraph 3 of the counter affidavit, there is a concession that, the 1st and 3rd Respondents are non-residents. He referred this Court to Annexures attached to the supporting affidavit which include a resident permit of one Dhirajlal Ladwa, the 1st Respondent which he argued, has long expired.

He contended further that, the current application is against the 1st and 3rd Respondent and not the 2nd Respondent.

He contended that, liability may be jointly or severally. He contended that, the cases referred to by the Respondents are distinguishable as one was because the Respondents were Koreans and had resident permits while in the other case the Court used its discretion to determine the quantum.

I have dispassionately considered the rival submissions and the issue I am confronted with is one, whether the conditions set out under Order XXV Rule 1 of the Civil Procedure Code, Cap.33 R.E 2019 have been satisfied. I will, for clarity purposes, reproduce the respective provision hereunder. It reads:

ORDER XXV SECURITY FOR COSTS

" 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."
> (Emphasis added).

Based on the above provision, I am in total agreement with the submission made by the learned counsel for the Respondents that, the above provision does provide for two scenarios, one where the Plaintiff is alone and is a non-resident with no movable property in Tanzania, and, second, where the Plaintiffs are many and all are non-residents and own no property in Tanzania.

In the Petition under which the current application is premised, the Petitioners are three (the Respondents herein). As rightly contended by Mr. Rutaihwa, a rightful or correct interpretation of Order XXV Rule 1 of the CPC is that, the conditions set therein applies equally to both scenarios, meaning the Order applies to a situation where the Plaintiff is one as it would apply to a situation where the Plaintiffs are many.

In his submission, Mr. Rutaihwa submitted that, as per the 3rd paragraph of the counter-affidavit of the 1st Respondent, the 2nd Petitioner is a Tanzanian. He has refereed to paragraph 9 of the counter affidavit and, as submitted by Mr. Rutaihwa, the 2nd Respondent being a Tanzanian resident and owns an immovable property in Tanzania, it means the conditions set out under the law have not been fulfilled. The law provides that:

> "(when there are more plaintiffs than one) [and] that all the plaintiffs are residing out of Tanzania, and ...that **no one of**

such plaintiffs does, possess any sufficient immovable property within Tanzania other than the property in suit, the court may…." (Emphasis added).

If the above underlined words are looked at in the context of the facts disclosed under paragraph 9 of the Counter Affidavit and as correctly submitted by Mr. Rutaihwa, the conclusion would be that, the 1st and 2nd conditions set out by Order XXV Rule 1 have not been met.

In my humble view, once the conditions are not met, the application cannot sail through. Since the application cannot sail through, I see no reasons why I should proceed any further to consider the rest of the submissions made. That would be a waste of the precious energy and time of this Court.

In the upshot of the above, and for the reasons stated hereabove, this Court settles for the following orders:

(i) That, this application is hereby dismissed for want of merits.

(ii) That, the dismissal is with an order that the Applicants should pay costs to the Respondent.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 8th DAY OF MARCH 2023

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DEO JOHN NANGELA

JUDGE