

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC.COMMERCIAL APPLICATION NO. 184 OF 2023**

**(Arising Out of Commercial Case No. 130/2023)**

**BETWEEN**

**LAMAR COMMODITY TRADING DMCC.....APPLICANT**

**VERSUS**

**PRESTIGE INVESTMENT SA.....RESPONDENT**

**RULING**

**Date of Last Order:22/04/2024**

**Date of Ruling: 13/06/2024**

**GONZI, J.**

In the Chamber Summons, the Applicant prayed for orders that:

- 1. This Honourable Court may be pleased to issue an order compelling the Respondent /Plaintiff to deposit in Court security for costs (amounting to USD 556,494.62) in respect of Commercial Case No. 130 of 2023 between the parties herein.**

**2. Costs of this application be provided for by the Respondent.**

**3. Any other Orders as this Honourable Court deems just and fit to grant.**

The application is supported by an affidavit of Ashvind Poonyt, Principal Officer of the Applicant Company as its Finance Director. In his affidavit, briefly, he stated that the Applicant is the 1<sup>st</sup> Defendant in Commercial Case No.130/2023 which is pending in this Court wherein the Plaintiff is claiming for, among other things, release of petroleum products (diesel) amounting to 20685.61MT which, at the prevailing market prices, is worth about USD 18,549,820.77. The Applicant stated that the assessed likely legal costs to be incurred in defending the Commercial Case are 3% of the value of the disputed cargo, hence USD 556,494. 62.

The Applicant stated that since the Respondent is a company incorporated under the Laws of Burundi which carries on its business in Burundi, and does not own any fixed assets in Tanzania, it should deposit in Court USD 556,494. 62 as security for costs before its Commercial case No.130/2023 can proceed.

The Respondent resisted the application through the counter affidavit of Mr. Seni Songwe Malimi, learned Advocate for the Respondent. In essence the Respondent admits to be a foreigner without fixed assets in Tanzania and that it has sued the Applicant. The Respondent, however, disputes the requirement to deposit security for costs in the circumstances of the present case. Alternatively, the Respondent is of the view that, at any rate, the maximum amount of costs which may be ordered to be deposited as security shall not exceed USD 1000. The Respondent is of the view that there is no need to deposit security as the Applicant has demonstrated a prima facie case against the defendants in Commercial case No.130/2023, which has not been disputed by the Defendants therein including the Applicant in this case. The respondent stated that the issue relating to the value of the 20685.61 MT of gasoline was answered in favour of the Applicant by this Court in its Ruling in Commercial case No.130/2023, dated 8<sup>th</sup> December 2023 and therefore the only remaining contention is with respect to general damages which are in the discretion of the Court. Hence, USD 1000 should be enough as security for costs. He attached annexure PISA-1(a) and (b), which is a Ruling in Misc. Commercial Application No.164/2023 originating from Commercial Case No.130/2023 where this Court (Hon Nangela, J.) granted

temporary orders directed at the Applicant and another person to release the fuel in dispute to the Respondent pending determination of the suit. Therefore, the Respondent stated that there is no need for depositing security for costs, and if there is found to be such a need, the amount should not exceed USD 1000.

The application was disposed of by way of written submissions. Mr. Godwin Nyaisa, learned Advocate, represented the Applicant whereas the Respondent was represented by Mr. Seni Songwe Malimi, learned Advocate.

Mr. Nyaisa, learned Advocate, adopted the affidavit for the applicant and submitted that, having read the counter affidavit of the Respondent, the same is incurably defective for being sworn by the Advocate for the Respondent on matters not within his personal knowledge and for containing a defective verification clause. He relied on the case of **Lalago Cotton Ginnery and Oil Mills Company Limited versus Loans and Advances Realization Trust (LART)**, Civil Application No.80/2002 by the Court of Appeal of Tanzania that held that an Advocate can swear and file an affidavit in proceedings in which he appears for his client, only on matters which are in the Advocate's personal knowledge. He argued that the purpose is to prevent an Advocate to play dual roles as a counsel and a witness in the

matter. Mr. Nyaisa, learned counsel, also referred to Misc. Land Application No. 89 of 2023, **Kellen Rose Rwakatare Kuntu (as legal representative of the late Rev. Getrude Lwakatare) and Others versus Zithay Kabuga**, which stressed that by swearing an affidavit, the counsel may be liable for cross examination. Mr. Nyaisa prayed that defective counter affidavit should not be relied upon.

Mr. Nyaisa argued on the merits of the application by submitting that under Order XXV Rule 1(1) of the CPC the Court has discretion to order the deposit of security for costs if the Court is satisfied that: (i) The Plaintiff resides outside Tanzania, (ii) The Plaintiff does not possess any sufficient immovable property in the country. He submitted that in the case at hand both conditions have been satisfied. On residence outside Tanzania, Mr. Nyaisa referred the Court to paragraph 1 of the Complaint wherein the Respondent as the plaintiff therein, was described as: "*a limited liability company incorporated under the laws of Burundi and carrying its business in Burundi.*" He argued that even in counter affidavit this fact was not denied by the respondent. On the Respondent not possessing sufficient immovable property in Tanzania, Mr. Nyaisa argued that this fact was stated in paragraph 4 of the affidavit of the applicant and was not disputed by the

Respondent who, under paragraph 5 of the counter affidavit, which was responding to paragraph 4 of the affidavit, alleged that the Respondent carries most of its business in Tanzania with a valid hospitality contract with the 4<sup>th</sup> Defendant in Commercial Case no.130/2023 and hence it is easily available. Mr. Nyaisa argued that this allegation of the Respondent carrying most of its business in Tanzania, is false since the plaint shows that the Applicant carries its business in Burundi. He submitted further that the respondent has not attached any business licence to prove that it carries on its business in Tanzania. Mr. Nyaisa relied on the case of **East Africa cables (T) Limited versus Spencon Services Limited** (Misc. Application No. 42 of 2016 for the position that where the Respondent has not contested the allegation of not having landed property in Tanzania, then the undisputed fact is thereby admitted.

On the amount of security for costs to be deposited, the Applicant's Advocate referred the Court to paragraph 6 of the Affidavit where the subject matter in the suit is described as United States Dollars 18,549,820.77. From that amount claimed by the Respondent in the Plaint, the Applicant's counsel submitted that the legal fees under the Advocates Remuneration Order, 2015, is 3% thereof and thus the security for costs to be deposited in this

application should be US Dollars 556,494.62 representing 3% of the value of claim in the suit. Mr. Nyaisa relied on the 9<sup>th</sup> Schedule to the Advocates Remuneration Order GN.No.263/2015 as the basis for claiming the deposit of 3% of the value of the subject matter in the suit, as costs. He argued that the value of the disputed cargo in Tanzanian Shillings is Tshs.46,374,551,925/= which is far above the ceiling of Tshs. 400,000,000/= under the 9<sup>th</sup> Schedule to the Advocates Remuneration Order GN.No.263/2015, and therefore, the 3% rule applies. Counsel for the Applicant cited the case of **Mirage Lite Limited versus Best Tigra Industries Limited**, Civil Case No.86 of 2004 where the Court held that the amount of costs awardable are to be within the awardable costs of the suit and disbursements. The applicant's counsel referred the Court to the case of **State Oil Tanzania Limited versus Nors.SA**, Misc. Commercial Application No.103 of 2023 where the amount of claim was USD 3,894,929.94 and the Court ordered security of costs at USD 250,000 after taking into account the amount claimed on the Suit and complexity of issues likely to arise.

Mr. Nyaisa submitted that Commercial Case No.130/2023 is in infant stages of 1<sup>st</sup> PTC and thus it is not correct to say, as the Respondent said in

the counter affidavit, that the subject matter in the suit has already been determined. He submitted that the Misc. Commercial Application No.164/2023 only granted temporary reliefs. Therefore, Mr. Nyaisa prayed that the prayers in the Chamber application be granted.

Mr. Seni Songo Malimi, learned Advocate for the Respondent filed his reply submissions. In his submissions, he responded first to the preliminary points of objection raised by the Applicant's counsel on competency of the counter affidavit. He submitted that it was improper for the Applicant to raise the preliminary objections in his submissions without there being a prior notice of preliminary objections. He relied on the case of **Registered Trustees of the Baptist Convention of Tanzania @Jumuiya Kuu ya Wabaptisti versus James Kasomi and 4 others**, Misc. Civil Application No.35 of 2021 where the High Court in Mwanza held that the practice of raising preliminary objections without prior notice nor leave of the Court was unprecedented in our jurisdiction. He backed up the same position by the decision in **Gabinus Singano versus St Thomas Pre& Primary School**, Labour Revision No.8 of 2019. Also, he relied on **Commissoner General TRA versus Pan African Energy (T) Limited**, Civil Application No.206 of 2016 decided by the Court of Appeal of Tanzania. Mr. Malimi argued in



alternative that the Respondent's counsel is conversant with the facts that he deposed in the counter affidavit. Mr. Malimi distinguished the cases relied upon by the learned counsel for the Applicant in this matter, with respect to the competency of the Respondent's counsel for swear the counter affidavit.

Mr. Malimi, learned Advocate, proceeded to submit in response to the application for security for costs. He argued that Order XXV Rule 1 of the CPC uses the word "may" which signifies discretion in granting an order for security for costs. He relied on section 53 of the interpretation of laws Act and the case of **UAP Insurance Tanzania Limited versus Noble Motors Limited**, Civil Application No.260 of 2016 by the Court of Appeal of Tanzania.

Mr. Seni Malimi, learned Advocate for the Respondent argued that judicial discretion must be exercised judicially and not arbitrarily or capriciously. He referred the Court to the case of **MZA RTC Trading Company Limited versus Export Trading Company Limited**, Civil Application No.12/2015 decided by the Court of Appeal. He urged this Court, in the exercise of its discretion, to evaluate all circumstances of the case as set out in the pleadings in Commercial Case No.130/2023 and the Ruling in Misc. Commercial Application No.164/2023. The learned counsel for the

Respondent submitted his view that the circumstances of the case do not warrant imposition of the order of security for costs.

Mr. Malimi, learned Advocate, submitted that the Applicant is also a foreign company based in Dubai, the UAE and that what has brought both parties to Tanzania is the execution of the supply contract between them which was executed abroad but substantially performed in Dar es Salaam port, Tanzania. He argued that, in the circumstances, both the applicant and the Respondent are not direct beneficiaries of Order XXV Rule 1 of the CPC which is intended to protect residents of Tanzania. He argued that as both parties are foreigners in Tanzania, no party is disadvantaged in case of enforcement of any order of the Court including order of costs.

Mr. Malimi, learned Advocate submitted that in Misc. Commercial Application No.164/2024, at pages 52 and 53 thereof, the Court found that the supply contract is fully secured by irrevocable and confirmed letter of credit. He also submitted that there are serious allegations of fraud against the Applicant and the other defendants in Commercial Case No.130/2023 hence making a prima facie case in that case. Hence, he submitted that security for costs is not necessary in the circumstances of the case.

On the quantum of costs, Mr. Seni Malimi, learned Advocate, submitted that the 3% claimed is not fair in the circumstances of the case. He said that the amount of costs is also discretionary and is imposed by the Taxing Officer. He argued that the purpose of taxation of costs is to reimburse the successful party and not to punish the loser or enrich the successful party. He cited the case of **Maasai Wanderings and 2 Others versus Viorica Ilia and 2 Others**, Misc.Civil Application No.19 of 2021 decided by the High Court. He submitted that in that case the Court held that the amount awarded as costs is the discretion of the Court which will fix such sums as it thinks fit, having regard to all circumstances of the case. He argued that it is not always the practice to order security for costs on a full indemnity basis and that the purpose of security for costs order is just to protect the Defendant from being dragged into a case in which he is not able to recover his costs. He argued, relying on the foregoing decision, that the aim of security for costs is not to stifle the claims by the Respondent nor counter claim. He argued that the Applicant has not brought any skeleton Bill of costs to show how he arrived at the claimed amount of costs. Mr. Malimi prayed for dismissal of the application with costs.

By way of rejoinder submissions, Mr. Nyaisa, learned Advocate, remained adamant to his preliminary objections introduced by way of written submissions. He argued that since they were raised in the Applicant's submissions in chief, the Respondent had an opportunity to respond to them and hence, was not thereby prejudiced. He relied on the case of **Jowhara Castor Kiiza versus Yasin Hersi Warsame**, Civil Application No.604/01 of 2021 decided by the Court of Appeal for the position that there is no prejudice when the other party is given opportunity to respond to the point of objection raised without notice.

Mr. Nyaisa, learned counsel, proceeded to respond to the submissions in respect of the main application. He argued that the only applicable factors to be considered in applications for security of costs are two and that they are both stated under Order XXV Rule 1 of the CPC. He reiterated that the conditions are namely that the Plaintiff is resident outside Tanzania and that the Plaintiff does not have sufficient immovable properties in Tanzania. He argued that under Order XXV Rule 1 CPC, residence of the defendant in the suit, is immaterial. He submitted that it is residence of the Plaintiff that matters.

Mr. Nyaisa submitted that the application at hand is in relation to the Commercial Case No.130/2023 and not the determined Misc. Commercial Application No.164/2023. He reiterated his submissions in chief.

In determination of the present application, I will be brief. Applications for depositing security for costs are a common type of interim applications which are least controversial. In this case, there was an issue raised by the Applicant's counsel regarding competency or otherwise of the counsel for the respondent to swear the counter affidavit hence seemingly playing dual roles as a counsel and as a witness. On this I agree with Mr. Seni Malimi, learned counsel for the Respondent that if the Applicant had issues with the validity of the counter affidavit, he should have brought a preliminary objection in that respect. The Applicant's counsel ought to have raised it as a Preliminary Objection at the very beginning when he was served with the counter affidavit challenging competency of the counter affidavit. To raise it amid submissions, without the prior leave of the Court was un-procedural. I am alive to the fact that the objection raised by Mr. Nyaisa was not a jurisdictional issue which could be raised at any time. Also, it is not among the grounds for an application of security for costs which is the matter

currently on the menu. I will not determine it. The Court cannot allow Counsel to divert the course of proceedings unilaterally.

As regards the order of security for costs sought by the Applicant, the law is straight and settled under Order XXV Rule 1 of the Civil Procedure Code. The provision of Order XXV Rule 1 of the Civil Procedure Code, [Cap 33 R.E 2019] reads;

***"...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 possess any sufficient immovable property within Tanzania other than the property in suit, the Court may...order the plaintiff...within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant..."***

As correctly argued by Mr. Nyaisa, learned counsel for the Applicant, there are two cumulative conditions before the Court may order deposit of

security for cost; these are: (i) that the plaintiff is residing outside Tanzania; (ii) that the Plaintiff possesses no sufficient immovable property within Tanzania, other than the property in dispute. These are the only conditions.

The Respondent has not disputed being resident of Burundi. Also, the Respondent has not disputed the fact that it has no sufficient immovable properties in Tanzania. The Respondent has argued that though it doesn't possess immovable properties in Tanzania, it has a hospitality agreement with the 4<sup>th</sup> Defendant in Commercial Case No.130/2023 and that it performs its activities largely in Tanzania. In other words, the Respondent was trying to advance an argument that it possesses some other type of property in terms of good will in Tanzania. I asked myself whether Order XXV Rule 1 of the Civil Procedure Code allows any other type of property other than possession of immovable property, for a foreign plaintiff to be excused from order to deposit security for costs? My answer is in the negative. In the case of **Prismo Universal Italiana s.r.l vs Termcotank (T) Ltd** (Commercial Case No. 42 of 2004) [2007] TZHCComD 32 (3 August 2007), at page 2, this Court held that:

***"...construction equipment's, however heavy and/ or costly they may be, do not constitute "immovable***

***property” within the legal meaning of the words ...the lack of possession of immovable property within Tanzania would work to its disadvantage, in so far as applications of a similar nature are concerned...”***

The above case is an authority for the legal position that under Order XXV Rule 1 of the Civil Procedure Code, the only properties which are acceptable so as to excuse a foreign plaintiff from the order of security for costs are immovable properties in Tanzania. Therefore, the arguments by Mr. Malimi, learned Advocate for the Respondent that the Respondent has a hospitality contract with the 4<sup>th</sup> Defendant in Commercial Case No.130/2023 or that the Respondent is easily available, do not hold water in law. I find that the Respondent herein as the Plaintiff in the Commercial Case No.130/2023 is liable to pay security for costs. I stand by the rule in the case of **Maasai Wanderings and 2 Others versus Viorica Ilia and 2 Others**, Misc. Civil Application No.19 of 2021 decided by the High Court that the purpose of security for costs order is to protect the Defendant from being dragged into a case in which he is not able to recover his costs. In that regard, as the Plaintiff is a foreigner and as the Plaintiff owns no immovable properties in Tanzania, the Applicant herein who is the Defendant in



Commercial Case No.130/2023, deserves to be secured in respect of possible costs in that case on the quantum of costs, the parties are again at logershead. The Respondent's learned counsel has argued that the value of the subject matter in the Commercial Case No.130/2023 is uncertain as only an issue of general damages remains undetermined and that the subject matter in dispute, namely the fuel cargo has already been determined in the Misc. Commercial Application No.164/2023. The Applicant has disputed this. The Applicant's counsel has urged the Court to assess the costs on the basis of 3% of the value of the subject matter in dispute in line with the Advocates Remuneration Order, 2015.

In determining whether or not to grant the order of security for costs and of quantum of costs, the Court has discretion. In the case of **Zulfikar Haiderali Njessa and Another vs Dimond Trust Bank T. Ltd** (Misc. Commercial Application 58 of 2019) [2020] TZHCComD 2009 (9 July 2020), at page 10, where the Court held that;

***"...the Court's discretion bestowed upon by Order XXV Rules 1 and 2 of the CPC, should be exercised mindful of acting judiciously and in accordance to***

***the rules of reason and justice and not in accordance  
to private opinion or arbitrarily...”***

In the case at hand, I have taken into account the facts that already the Applicant as the Defendant in Commercial Case No.130/2023 has filed pleadings and entered appearances therein. Also, the amount involved in that case is colossal United States Dollars 18,549,820.77 which is the estimation of over Tanzanian Shillings is Tshs.46,374,551,925/=. The case in my view, inevitably, involves a complex contractual dispute based on a contract executed outside Tanzania by parties who are not Tanzanians but performed in Tanzania for a product intended to be consumed outside Tanzania, in Burundi. That is complex dispute and the amount of costs should reflect that. Mr. Seni Malimi, learned counsel for the Respondent argued that the issue relating to the subject matter in the suit has already been determined and that there remain a few issues only relating to general damages. This has been disputed by Mr. Nyaisa, learned Advocate for the Applicant. At any rate, this application cannot conclusively determine that issue as it belongs to the main case and which is before another Judge. I cannot determine that issue.

While I see the need for the Respondent to deposit security for costs before his Commercial Case No.130/2023 can proceed, I am also mindful that the Plaintiff has a constitutional right to be heard. Regardless his being a foreign national not resident in Tanzania, and regardless of not having immovable properties in Tanzania, his access to Court to remedy what he considers to be his rights should not be made difficult or curtailed. I understand also that when the Commercial Case No.130/2023 is ultimately finalized, the party entitled to costs will present its Bill of Costs where the correct amount will be assessed. In my Ruling, I do not attempt to impose an order for costs on indemnity basis as there is no material to help the Court at this stage to embark on that exercise. In the exercise of my discretion, therefore, I find that USD 20,000.00 (Twenty Thousand United States Dollars) or its equivalent in Tanzanian Shillings as per the prevailing exchange rates of the date of this Order, is a reasonable amount for the respondent to deposit in Court as security for costs in Commercial Case No.130/2023. As parties are still engaged in proceedings in the main case, I exercise my discretion to order no costs in this respect of application, I now determine.

In the end, I grant the application and make the following orders:

- (a) I do hereby issue an order compelling the Respondent to deposit in Court security for costs amounting to USD 20,000.00 (United States Dollars Twenty Thousand only) or its equivalent in Tanzanian Shillings as per the prevailing exchange rates of the date of this Order in respect of Commercial Case No. 130 of 2023 between the parties herein.
- (b) The Respondent shall deposit the costs in (a) above within 14 days from the date of this Ruling.
- (c) Each party to bear its own costs in this application.



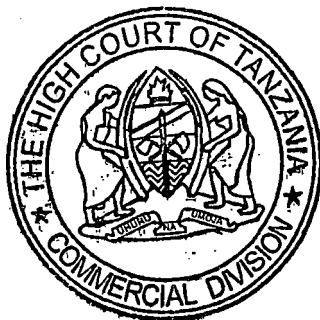
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**A. H. GONZI**

**JUDGE**

**13/06/2024**

Ruling is delivered in Court this 13<sup>th</sup> day of June 2024 in the presence of Ms. Beatha Telly, learned Advocate for the Applicant and Mr. Ibrahim Kibanda, learned Advocate for the Respondent.



A handwritten signature in black ink, appearing to read "A. H. Gonzi", written over a horizontal line.

**A. H. GONZI**

**JUDGE**

**13/06/2024**