

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

AT DAR ES SALAAM

CONSOLIDATED MISC. LAND APPLICATION NO. 273 & 281 OF 2022

(Arising from Land Case No. 152 of 2008)

MOHAMED ISMAIL MURUDKER 1ST APPLICANT

THE COMMISSIONER FOR LANDS 2ND APPLICANT

THE ATTORNEY GENERAL 3RD APPLICANT

VERSUS

FATHIA BOMANI RESPONDENT

RULING

Date of last Order: 14.06.2022

Date of Ruling: 20.06.2022

A.Z. MGEYEKWA, J

The applicants (Defendants in the main suit), made this application pursuant to Order XXV Rule 1 (1), (2), and (3) of the Civil Procedure Code, Cap.33 [R.E 2019], seeking for the Court to order the respondent (Plaintiff in the main suit) to furnish security for costs likely to be incurred by the applicant in the conduct of Land Case No. 152 of 2008, pending before this Court for

the sum of USD 15,000 and are requesting security at a tune of Tshs. 20,000,000/= .

The application is supported by an affidavit sworn by Crescencia Rwechungura and Captain Ibrahim Bendera, the learned counsel for the 1st applicant, and Joyce S. Yonazi, State Attorney for the 2nd and 3rd applicants. The 2nd respondent resisted the application and demonstrated his resistance by filing a counter-affidavit deponed by Fathia Bomani, the respondent.

At the hearing of the application, Mr. Captain Bendera, learned Advocate appeared for 1st applicant. The 2nd and 3rd applicants were represented by Mr. Edward Joshua, learned State Attorney assisted Ms. Joyce Yonazi, learned State Attorney and the respondent had the legal service of Mr. Romani Lamwai, learned counsel.

Mr. Edward was the first one to kick the ball rolling. He prayed for this court to adopt the 2nd and 3rd applicants' joint affidavit to form part of his submission. The learned State Attorney is praying for the respondent to be ordered to deposit Tshs. 20,000,000/= as security of cost likely to be incurred by the applicant in defending Land Case No. 152 of 2008. He submitted that there are two conditions that must be established as stated under Order XXV Rule 1 of the Civil Procedure Code Cap.33. He added that as per the said

Order the court can order the Plaintiff to furnish costs where the Plaintiff is not a resident of this country or if he /she is not in possession of any immovable property within Tanzania. To support his submission he attached a copy of the respondent's passport. He went on to submit that they have not managed to find any other immovable property owned by the Plaintiff in the country. He went on to submit that respondent in his affidavit did not dispute the fact that he is not a resident of Tanzania. The learned State Attorney contended that the respondent did not indicate in his counter-affidavit any immovable property which she owns. In such a situation, he submitted the application before this court has merit and has met the conditions stated under Order XXV Rule of the Civil Procedure Code Cap. 33.

The learned State Attorney continued to submit that it is entirely at the discretion of the court to grant the application and in exercising the discretion this court is required to take to account other factors as stipulated in the case of **Abdula Aziz Lalani & 2 others v Sabru Mwangali**, Misc. Commercial Cause No.8 of 2015. It was his justification that the case is complex, the same compels the applicants to do thorough research and they will consume more time in research. He added that the complexity of this matter justifies the claimed amount of Tshs. 20,000,000/= and considering that the

applicants have incurred costs in preparing pleadings, research, and hearing of the case.

On the strength of the above submission, the learned State Attorney believed that the applicants have met the conditions under the provision of the law. Therefore, he urged this court to allow the application with costs.

Captain Bendera, confirmed the submission made by the learned State Attorney. He added that the 1st applicant in his affidavits stated that the respondent has stated lies. He referred this court to the counter affidavit deponed by Brian that there is a document which reads second marriage and the attached document is reflected on page 108 of the Court of Appeal of Tanzania records there is an affidavit of Mohamed Omary Khamis claiming to be the husband of the respondent. He added that there is an attached copy of a Marriage registered on 20th June, 2012. To support his submission he cited the case of Jadili Muhumbi v R, Criminal Appeal No. 229 of 2021.

In conclusion, Captain. Bendera urged this court to allow the application and the costs to be borne by the respondent.

In reply, Mr. Roman urged this court to adopt the counter affidavit of the respondent and form part of his submission. The learned counsel for the respondent's confutation was strenuous. He came out forcefully and resisted

the application. Mr. Roman submitted that in awarding security for costs; the plaintiff must be residing outside the country and she/he must not possess immovable property within the country. He contended that looking at the applications and affidavits each party is moving the burden of proof to the respondent and the applicants are shifting the burden of proof to the applicants. He added that the applicants are saying that the respondent is not residing in Tanzania. To fortify his submission he referred this court to paragraph 4 of the 2nd 3rd joint affidavit where Joyce does not show where the respondent is living and there is no proof where the respondent is living in the USA.

It was his submission that merely being a foreigner is not a reason is not a good reason to consider the party to pay costs. Mr. Roman went on to submit that the respondent on her counter-affidavit specifically paragraphs 2 (g),(h), and (i) has put the applicants in proof. He contended that it is a mandatory requirement of the law that who allege must prove. Supporting his submission he cited sections 110 (1) & (2) of the Evidence Act, Cap.6. He asserted that the applicants did not go to USA Embassy to inquire where the respondent resides. Insisted that the applicants have failed to secure any property and there was no any search of documents conducted or any investigation. He added that the ones who deponed the affidavits are the

counsels, not the parties. He was certain that the applicants' grounds cannot move this court to grant their applications. Mr. Roman invokes this Court's jurisprudence in the case of **Global Agency Ltd v Tarbon Tarom Tekstill Gida San Vetic**,, Misc. Commercial Application No. 79 of 2021.

In the alternative, Mr. Roman submitted that the application is contrary to the scheduling order since there was no any leave of the court to depart from the scheduling order thus it was his view that the application should not be allowed.

He did not end there, he submitted in length that there was no any false information given by the respondent. He submitted that the respondent had the status of second marriage. He added that Colum 4 of the certificate shows that the respondent was a widow and there is no other marriage. He urged this court to disregard this ground.

On the strength of the above submission, Mr. Roman beckoned upon this court to dismiss the application with costs and allow parties to proceed with the trial as scheduled.

In their rejoinder, the learned State Attorney and Capt. Bendera reiterated their submission in chief that the applicants have met the conditions

established under the law. Mr. Edward added that it is upon the respondent to prove if she owns any other immovable properties since the burden to proof shifts to the respondent. He submitted that the scheduling order of the court was not violated since this court issued leave to parties to file the said applications. Supporting his submission he referred this court to Order VIII Rule 28 of the Civil Procedure Code Cap.33 that the court can depart from its order.

Capt. Bendera distinguished the cited cases cited by Mr. Roman that in the case of Litega the matter was raised as a preliminary objection and in the Global's case Global is a Company and the issue was whether they had properties or not while in the case at hand the respondent is a resident of USA. He insisted that the respondent's counter-affidavit is full of lies. He submitted that this court after hearing the concern of the parties found that the departure from the scheduling order was necessary. He urged this court to grant the application with costs.

Before embarking on the merit of the application, I find it is prudent to address the concern raised by Mr. Lamwai that there was no any order to vacate the court schedule. In my considered view, this matter was required to be raised before the hearing of the application on merit. However, since

the court issued leave to the parties to depart from scheduling orders the same suffices.

Back on the wagon, the above being the substance of the submissions made by the learned counsels and the State Attorneys, I wish to state at the outset that in the exercise of its powers of review, the Court is guided by the laid down principles which emanate from the provision of Order XXV Rule 1 (1) of the Civil Procedure Code Cap. 33 [R.E 2019] provides as follows:-

" Where, at any stage of a suit, it appears to the court that the 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 one of such plaintiff does, possess any sufficient immovable property within Tanzania other than the property suit, the court may, either of its own motion or on the application for any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all cost incurred and likely to be incurred by any defendant."

From the provision three ingredients have to be fulfilled in order for security for costs order to be granted: first, that the plaintiff is residing outside Tanzania, second, that he possesses no any sufficient immovable property within Tanzania, other than the property in dispute, and third, that the court on its own motion or on application by the

defendant ordered the plaintiff within a time fixed by the court to give security for payment of all costs incurred and likely to be incurred by any defendant. Also see the cases of **Nitten RatilalPattani & Another v Ashwinkumar Jagjivan Rhaberu**, Civil Application No. 535 of 2018, High Court of Dar es Salaam (unreported).

I will determine the application and find whether the two conditions stipulated under Order XXV Rule 1 (1) of the Civil Procedure Code Cap.33 [R.E 2019] were met to qualify for the grant of orders of security for costs. Starting with the first condition whether the Plaintiff is a resident of America. In their submission, Capt. Bendera alleged that the respondent has stated lies in regard to her second marriage. The respondent in his counter-affidavit specifically paragraph 4 stated that she is married to a Tanzanian man currently living with him in their resident home at Dar es Salaam and the fact that she is not a resident is unfounded.

In my considered view, the fact given by Captain Bendera and the respondent in regard to the respondent's marriage status, this kind of evidence need to be corroborated by other evidence to prove the respondent's evidence. Considering the fact that the respondent has

stated that she is residing with her husband in their resident home in Dar es Salaam.

On their side, the learned State Attorney alleged that the respondent is not a resident nor a citizen of Tanzania. To support their allegation, the applicants have attached a copy of the respondent's passport they claim that she is an American resident. In my opinion, the documentary evidence is a mere paper. The attached copy of the passport is not certified to prove if it was made from the original document. Therefore, this condition crumbles.

In regard to the second condition, whether the respondent does not possess immovable property within the country. In their submission, the State Attorney in his submission was not able to prove if the respondent possess any immovable property in the country. He asked the respondent to prove the allegations while in reality, they are the ones who raised the allegations. In the case of **Abdul Aziz Lalani** (supra), the Court clearly illustrated the need to prove the existence of the two conditions in issuing security for costs when it stated:-

*“Thus, for the applicants to succeed in this application for the provision of security for costs, **they must prove to the satisfaction of the court that the respondent resides outside Tanzania and***

that he does not possess in Tanzania sufficient immovable property other than the property is suit.” [Emphasis added].

Applying the above authority in the matter at hand, it is vivid that the applicants have failed to prove the two conditions stipulated under Order XXV Rule (1) of the Civil Procedure Code Cap.33. Therefore, the first and second conditions were not met to qualify for the grant of orders for security for costs.

In the upshot, I dismiss the applications. No order as to costs.

Order accordingly.

Dated at Dar es Salaam this 20th June, 2022.




A.Z.MGEYEKWA

JUDGE

20.06.2022

Ruling delivered on 20th June, 2022, in the presence of Captain Ibrahim Bendera, learned counsel for the 1st applicant, Ms. Edward Webiro, learned State Attorney for the 2nd and 3rd applicants and Ms. Mary Lamwai, learned counsel for the respondent.




A.Z.MGEYEKWA

JUDGE

20.06.2022