IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 56 OF 2019

(Arising from Commercial Case No. 62 of 2017)

FIROZ HAIDERALI JESSA.....1st APPLICANT

SALIM HAIDERALI JESSA.....2nd APPLICANT

NASIR HAIDERALI JESSA.....3rd APPLICANT

Versus

DIAMOND TRUST BANK KENYA LIMITED.....RESPONDENT

Last Order: 19th May, 2020

Date of Ruling: 13th July, 2020

RULING

FIKIRINI, J.

By way of chamber summons supported by an affidavit of Mr. Firoz Haiderali Jessa on behalf of the other two applicants namely Mr. Salim Haiderali Jessa and Nasir Haiderali Jessa, all three referred as 1st, 2nd, and 3rd applicants', and pursuant to Order XXV Rule 1 and 2 (1) and section 95 of the Civil Procedure Code, Cap. 33 R. E. 2002 (the CPC) are praying for the following orders:

1. That this Honourable Court may be pleased to issue an order compelling the plaintiff to deposit in Court security for costs amounting to Tzs.

246,500,830/= in respect of Commercial Case No. 62 of 2017 between parties herein;

2. Costs be provided for; and
3. Any other orders this Court may deem just to grant.

In brief Mr. Jessa in his affidavit has averred that they have been sued by the respondent in Commercial Case No. 62 of 2017 for a claim which involves a colossal amount of money of Kes. 380,226.484.71 equivalent to Tzs. 8,216,694,334.58. He also averred that the applicants have incurred costs, and that were likely to incur more costs in defending the said suit, which possibly could be lost, in the event the applicants wins, which need to be protected by way of a security deposit. The amount of Tshs. 244,105,402.728, asked to also be deposited is based on the 3% supposed to be charged, as legal fees, on the amount of the suit.

Countering the application Mr. Dilip Kesaria learned counsel filed counter-affidavit opposing the application. Though he admitted the respondent is a Kenyan company, but stated that the respondent was part of Diamond Trust Bank Group, which is African Banking Group operating in Burundi, Kenya, Tanzania and Uganda, and that the respondent was the flagship company of the Group with total assets exceeding two billion United States Dollars, equivalent of Tzs. 4.5 trillion. Also that the respondent has more than 100 branches in East Africa and has the

respondent, its subsidiary Diamond Trust Bank (T) Ltd. Disputing the copies of exchequer receipts filed he averred that some of the receipts were repeated three (3) times to inflate the amount. Aside from that the amount totaling Tzs. 1 million, there was no fee invoices and receipts on instruction fees annexed.

Discounting that the applicants will be prejudiced, Mr. Kesaria averred that the respondent was a regional bank and capable of paying such legal costs. He as well underscored the fact that while the applicants deserve a fair chance to defend the suit, the same logic be applied and the respondent should not be stifled from pursuing its claims against the applicants for repayment of loans availed to Primecatch Exports Ltd, of which the applicants' were sued jointly and severally liable as guarantors.

The application was argued by way of written submissions. Mr. Nuhu Mkumbukwa learned counsel filed written submission and rejoinder on behalf of the applicants while Mr. Zakaria Daudi learned counsel did so, on behalf of the respondent. Both counsels prefaced their submissions by praying to adopt the affidavits of Mr. Jessa on behalf of the applicants and that of Mr. Kesaria deponed on behalf of the respondent.

It was the applicants' submission that the respondent was a foreign company with no immovable assets in Tanzania other than the property in the suit. And that the

amount claimed was colossal and the applicants have already and will further incur costs to defend the suit to its finality. Challenging the averment in paragraphs 3 & 4 of the counter-affidavit, it was Mr. Mkumbukwa's submission that the averment was misplaced and it was misunderstanding of Order XXV Rule 1 of the CPC, ascribing the following reasons: that the purported assets worth Tzs. 4.5 trillion its existence were unknown and status and not owned by the respondent or located in Tanzania. He went on submitting that the respondent purported to be a subsidiary of the Diamond Trust Bank Group was a separate legal entity from the respondent such that it cannot assume liability of the latter in the suit in which it was not a part. In short the respondent has no properties or assets owned in Tanzania, disclosed in the counter-affidavit. Defining what amounts to immovable assets, Mr. Mkumbukwa referred to **Black's Law Dictionary 9th Ed, p. 817** which defined the term as:

> *"Property that cannot be moved; an object so firmly attached to land that it is regarded as part of the land."*

To support his position that the respondent was a foreign company with no assets in Tanzania, he cited the case of **JCR Enterprises Ltd v Islam Balhabou & 2 Others, Commercial Case No. 77 of 2007** (unreported) which was cited in **Abdul Aziz Lalani & 2 Others v Sadru Mangaji, Miscellaneous Commercial Cause No. 8 of 2015**, where the Court illustrated when security for costs can be ordered.

Furthering his submission, he referred this Court to **Sudipto Sarkar and V.R. Manohar in Sarkar's The Code of Civil Prodecure 11th Ed, 2006 Vol. 2. P. 2014,** on why Order XXV Rule 1 and 2 were enacted.

Submitting on the costs incurred Mr. Mkumbukwa, informed the Court that costs has already been incurred in Commercial Case No. 62 of 2017 as well as Miscellaneous Commercial Cause No. 178 and 228 of 2017. And this was in terms of disbursements and instruction fees and other costs likely to be incurred up to the conclusion of the suit. On this point he cited the case of **Elizabeth Mckee v 3G Direct Pay Limited, Miscellaneous Commercial Case No. 5 of 2018** which cited with approval the case of **Chemical Initiatives (PTY) Limited v The Owner of Marine Vessel Mv Salina, Commercial Case No. 19 of 2008, p.8** to fortify his submission.

On the amount requested, it was his submission that according to 9th Schedule item 8 to the Advocates Remuneration Orders, GN. No. 263 of 2015, the amount of Kes. 380,226, 484.71 attracted the legal fee at 3% which was approximately Kes.11,406,794.52 which was equivalent to Tzs. 244,105,402.728. Some of the costs have already been incurred in the main suit and miscellaneous applications resulting therefrom, but also there will be other upcoming costs such as transport and accommodation costs for applicants who reside upcountry and witnesses in defending the main suit. The counsel therefore urged the Court to use the costs

already incurred as a yard stick in determining costs likely to be incurred. The amount considered as being reasonable.

Persuading the Court further, it was Mr. Mkumbukwa's contention that on the balance of convenience the respondent will not be prejudiced if the application was to be granted compared to the applicants, who need protection and be able to get back all their incurred costs.

Expressing his position on the Court's discretion based on the wording of Order XXV Rule 1, which used the word "may", he submitted that the Court has discretion to grant the application and prayed for it to exercise the discretion bestowed upon it albeit judiciously to avoid end of justice or making sky the limit. He once again referred this Court to the **Abdul Aziz Lalani** case (supra) and pressed that the application be granted and security for costs to the tune of Tzs. 246, 500,830, be granted.

Countering the submission by Mr. Mkumbwa on behalf of the applicants, Mr. Daudi, admitted that the respondent was a foreign company but maintained that the Court exercise its discretion provided under Order XXV and decline the application. Inviting the Court to do that, it was his submission that the Court should look at its own material facts before it and the spirit of Order XXV Rule 1 and 2 (1) of the CPC, that it did not intend to deny non-resident 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, and urged the Court to protect the respondent genuine claim and disallow the applicants to benefit from their own wrong. Mr. Daudi cited two cases in support: **Innovative Global Limited & 2 Others v Harsh M. Vora t/a Parshava Agro, Miscellaneous Commercial Application No. 276 of 2018,** which cited with approval the Court of Appeal decision in **Leila Jalaludin Haji Jamal v Sharifa Jalaludin Haji Jamal, Civil Appeal No. 55 of 2003,** (copies attached). He went on submitting that the order for the security for costs will prejudice the respondent and also deny her access to justice since the amount requested as security for costs was huge and if the order is granted and remain unpaid, the respondent/plaintiff claim will be dismissed. He thus prayed for the Court to dismiss the application and protect the respondent's genuine claim and her access to justice not be curtailed by the order prayed.

Mr. Daudi further invited the Court to consider that Tanzania and Kenya where respectively, the applicants and the respondent are residents, both countries were members of the East Africa Community (EAC). Therefore, this Court should treat ease enforcement of Court orders as a condition sufficient and relevant ground for denying the application. To reinforce his submission, he cited the case of **Porzelack KG v Porzelack United Kingdom Ltd [1987] 1 All ER 1074,** (copy

attached), where the Chancery Division of England considered in that way the application for security for costs among the European Union state members. Further fortifying his stance, he referred this Court to the case of **Shah and Others v Manurama Ltd and Others [2003] 1 EA (HCU),** (copy attached) where the Court interpreted Order XXIII of the Ugandan Civil Procedure Code which is the same as Order XXV of the CPC, and pressed the Court to apply the principles in that case for the following reasons: the order was same as Order 26 of the Kenyan Civil Procedure Code, (a copy attached). That all these three were member states of the EAC as per Article 2 of the Treat for the Establishment of the EAC (the Treaty), (copy attached) which contained express provision of unification and harmonization of the laws of the partner states, including standardization of judgments of Courts as per Article 126 and that under Article 44 the judgments of East African Court of Justice were to be enforced through national courts of the partner states (copy attached). He as well cited Article 5 of the Treaty on developmental policies and programmes aimed at widening and deepening cooperation among the partner states in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit (copy attached).

He continued his submission submitting that all EAC partner states have almost identical foreign judgments (Reciprocal Enforcement) Acts, which extended

application of its provisions to the other two partner states. On this point he cited the case of **Vallabhadas Hirji Kapadia v Laxmidas [1960] EA 852** and **Unilever PLC v Hangaya [1990] 1 EA 598 (CAT)** (copies attached). Besides the Treaty has also covered other things as free movement of persons and other areas and enjoyment of rights by their citizens within EAC, the Court was thus mindful of the fact that the Treaty has the force of law in each partner state as per Article 8 (2) (b). Also it was submitted that the Treaty has precedence over national law, as per Article 8 (5) (copy attached). Based on his submission on the EAC Treaty, and other factors related to the respondent, he stressed that it will not be difficult for the applicants' to execute the order for reimbursement of their costs incurred.

Discussing the cited case by the applicants, it was his submission that the **Mckee** case (supra) was distinguished as the respondent/plaintiff in that case was resident of Ireland where the respondent in this case is the resident of Kenya where there was an existing arrangement under Treaty. The same way he treated the **Abdul Aziz Lalani's** case (supra), as the respondent/plaintiff's residence was not disclosed throughout the ruling, which was different in the present instance as the respondent/plaintiff company is a foreign company from Kenya so principles stated in **Shah's** case (supra) were encouraged compared to **Abdul Aziz Lalani's** case (supra), which disregarded the most important requirement of proving the costs incurred and likely to be incurred costs as fatal.

Rejoining the submission, Mr. Mkumbukwa, opposed all the submissions regarding genuineness of the suit and/or that the applicants benefited from their own wrong doing. Responding to the cited case of **Innovative Global** (supra), he contended the case was distinguishable as in that case the Court had to decide on a plaintiff who could not give a security for costs, which was different in the present case. In the present case under paragraph 3 of the counter-affidavit the respondent has demonstrated to own assets worth more than Two billion USD. Thus defeating the respondent's submission that granting of the application for security of costs of more than Tzs. 300,000,000/= if requested by the applicants will not erode any principle of natural justice as per the decision in **Innovative Global** case (supra)

Discussing the EAC Treaty, it was his submission that as much as Tanzania and Kenya were member states but each remained sovereign with independent judicial systems. So far no changes in laws for security for costs have been effected in Tanzania. Otherwise the Parliament would have said so, by introducing amendment to Order XXV of the CPC, if there was any change. And that underscore the difficulties the applicants will face in executing their incurred costs. Picking on **Porzelac KG** case (supra), he contended that it was the United Kingdom 's case not restating the position of our current law. Buttressing his point, he cited the cases of **NMB v Leila** and NMB v **Victor Banda** (supra), where unnecessary borrowing of leaf from another jurisdiction was discouraged. The

same fate he submitted should befell the **Shah** case (supra), due to the fact that similarity in law was baseless as difficulties and inconviniences foreseen by law cannot be lessened simply because of similarity in laws on the subject matter. Also the fact the two countries were partner states of the EAC and its Treaty, did not outlaw Order XXV of the CPC. All what have been submitted on regarding the Treaty were mere objectives of the EAC which to date is yet to be implemented. Unless the Parliament of the United Republic of Tanzania had acted, the Court cannot act on objectives of the regional bilateral treaties.

He ended up urging the Court to grant the application.

Prior to embarking on determining this application let me start by pointing out well settled principles already in place. *First*, like in any other situations where the Court is bestowed with discretionary powers, but fairness demands those powers be exercised judiciously. See: The only caution to be made is that the discretion must be exercised according to the rules of reasons and justice. The cases of **Alliance Insurance Corporation Ltd v Arusha Art Ltd, Civil Application No. 33/2015, Court of Appeal of Tanzania (Unreported) Advocates** and **Kalunga & Co. Advocates v NBC [2000] T. L. R 235,** have both clearly illustrated that.

Therefore, in the present application the Court as stipulated in the **Leila Jalaludin's** case (supra) will have to make sure that equity, natural justice and

fairness are fully applied in construing Order XXV of the CPC, upon which this application is pegged.

Second, once there is an application for security for costs, the plaintiff is expected to show that she had substantial assets within the jurisdiction which can be reached in course of executing costs incurred by the applicants. This is applied so as to deter the plaintiff from escaping. The property must be fixed and permanently and not floating as illustrated in **Unilever PLC** case (supra).

Third, apart from the two propounded principles under Order XXV Rule 1 and 2 (1) of the CPC, the applicants are expected to prove the incurred costs as well as the likely to be incurred costs. So long they are realistic, reasonable, just and fair as observed in the **Innovative Global** case (supra). Although the facts of this case do not fit those in the present application, yet the principles highlighted above are not only relevant but are sensible.

Fourth, reliance or borrowing a leaf from foreign jurisdiction decision as did the respondent can only be entertained if our laws are having the same provisions and also that there is no previous decision by this Court or the highest Court in the land. The cases of **Porzelack** and **Shah** (supra), though valid, but can only be resorted to when our law is not clear and ambigious. Our law in respect of

depositing security for costs has no ambiguity as the conditions stipulated are simple and certain.

Fifth, in the absence of amendment to Order XXV Rules1 and 2 (1) of the CPC, reference and invitation to this Court to rely on the East Africa Community Treaty, is in my view misplaced.

Now coming to the application before this Court, *first and foremost*, the respondent does not dispute that she is a Kenyan company hence foreign and *secondly*, she is without any immovable properties in Tanzania. This makes her fail the test provided under Order XXV of the CPC which requires:

> *"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 one of such plaintiffs 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 costs incurred and likely to be incurred by any defendant"*[Emphasis mine]

The respondent reliance on the fact that she is part of Diamond Trust Bank Group, which is an African Banking Group operating in a number of countries including

Tanzania, and flagship company of the Group with total assets exceeding two billion USD which is almost Tzs. 4.5 billion, sounds persuasive, but the assertion has been challenged by the applicants. The challenge which I fully embrace. The respondent is a limited liability company registered in Kenya and those other mentioned companies are equally limited liability companies registered in their respective countries. It is a legal position that a limited liability company is separate entity so each of those mentioned companies are separate legal entities, for the respondent to be fully covered in the event the decision is not in her favour. **See: Yusuf Manji v Edward Masanja & Abdallah Juma, Civil Appeal No. 78 (2008) T.L.R 127** and **Solomon v Solomon & Co. Ltd [1897] AC 22.**

The account that she is the flagship company of to the Group, and that though she is a foreign company and without any sufficient immovable properties, but she should not be denied access to justice. Underscoring her stance, she stressed for the protection of her genuine claims and that the applicants be stopped from benefiting from their own wrong. While it is not disputed that the respondent deserve protection the same way the applicants are, but at this juncture, it is difficult to conclude if the claims are genuine and that the applicants were trying to benefit from their own wrong. Confirmation on either of the situation can come later after parties have been heard and matter determined and not otherwise. The two cited

cases of **Innovative Global** and **Leila Jalaludin**, have both stated valid principles but do not fit the situation in the present application.

For being a foreign company and without sufficient immovable property within the jurisdiction the respondent has to find herself a casualty.

Furnishing of security for costs though a well-known practice provided under the law, but that said, the Court in exercising its discretion in granting the application has to be considerate, lest it find itself scaring the respondent who might have a genuine claim against the applicants. In the case of **Dow Agrosciences Export S.A.S v I.S. & M (Metals) Ltd, Commercial Case No. 55 of 2007**, when the Court was faced with the issue had this to say which I subscribe to:

> *"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]

The applicants on the other hand have as well failed to meet the test. The onus of proving the alleged claimed amount to be deposited as security for costs lies with the applicants. This is pursuant to section 110 of the Tanzania Evidence Act, Cap.

6 R.E. 2002. **See: Pauline Samson Ndawavya v Theresia Thomas Madaha, Civil Appeal No. 45 of 2017, CAT-Mza (unreported).**

For the already incurred costs the applicants have supplied receipts worth Tzs, 1 million annexed as PD2. For the likely to be incurred costs, it was not an impossible task as well for the applicants to validate their demand for payment of security for costs amounting to Tzs. 246,500,830 as reflected in the chamber summons, but nothing has been stated in the affidavit. In the reply to the counter-affidavit, and under paragraph 6, the costs to be incurred has been stated to include the legal fees equivalent to 3% of the amount claimed in the main suit of Kes. 380, 226, 484, which in Kenya Shillings the amount is 11, 406, 794.52, and equivalent to 244,105.402.728 in Tanzania shillings. This amount has not been at all substantiated by the applicants, the exercise which could have assisted the Court to verify the proof and decide. Instead the Court has been left to speculate.

Appreciating the rationale behind having Order XXV of the CPC of protecting the applicants, but it will be illogical, unjustly and against all reasons 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 paragraphs 3 and 4 which for ease of reference is reproduced below:

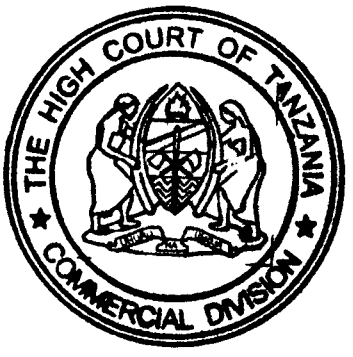
> *"The respondent is part of the Diamond Trust Bank Group, which is an African Banking Group operating in Burundi, Kenya, Tanzania and Uganda. The respondent is the flagship Company of the Group with total assets exceeding Two Billion United States Dollars, which equates to approximately Tzs. 4.5. trillion.*
>
> *The Diamond Trust Bank Gropu maintains more than 100 branches in the East African Countries in which it operates. Its subsidiary in Tanzania is Diamond Trust Bank (T) Limited."*

This is admission that the respondent has assets of approximately Tzs. 4.5 trillion and therefore is capable to deposit security for costs if ordered and without being prejudiced or her access to justice hindered as insinuated. Of course the issue which will remain to be determined is the amount, which the Court will now

embark on assessing after it has satisfied itself of the two conditions spelt out under Order XXV Rules 1 and 2 (1) of the CPC existed, but also that the respondent has means and the Court order will not prejudice her unless the Court acted arbitrarily and unfairly.

All the above put together this Court is of a considered view that an order that the respondent deposit Tzs. 50,000,000/= (Fifty Million) as security for costs will not be exorbitant neither prejudice the respondent nor deny it access to justice in pursuit of her claim against the applicants.

The application is thus allowed for deposit of Tzs. 50,000,000/= as security for costs within twenty-one (21) days from the date of this ruling, in respect of the applicants, Firoz Haiderali Jessa, Salim Haiderali Jessa and Nasir Haiderali Jessa. It is so ordered.



P. S. FIKIRINI

JUDGE

13th JULY, 2020