

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

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 79 OF 2019

(Original Commercial Case No. 59 of 2015)

MAWALLA ADVOCATES.....APPLICANT

Versus

FOSUNWOOD TANZANIA LIMITED.....RESPONDENT

Last Order: 12th Nov, 2019

Date of Ruling: 24th Feb, 2020

RULING

FIKIRINI, J.

Mawalla Advocates, brought this application by way of chamber summons supported by an affidavit of Mr. Denice S. Tumaini- advocate, under Order 5 (2) of the Advocates Remuneration Order, 2015 and section 95 of the Civil Procedure Code, Cap. 33 R. E. 2002 (the CPC), praying for the payment of Tzs. 3, 500, 000/- (Tanzania Shillings Three Million Five Hundred Thousand). The amount is a remaining balance due on agreed instruction fees from the respondent after the applicant had instituted and prosecuted Commercial Case No. 59 of 2015; Fosunwood Tanzania Limited v Salum Mbaruku Omar, on behalf of the respondent. *DSK*

Another prayer was for Tzs. 7,000,000/- (Tanzania Shilling Seven Million) being costs incurred by the applicant in pursuit of payments owed by the respondent as well as any other orders deemed fit and just to grant by this Court. The respondent through the counter affidavit of one Mr. Godlove Godwin, an advocate filed a counter affidavit opposing the application.

The applicant filed skeleton argument which was prayed they be adopted and the affidavit deponed, while the respondent did not file any skeleton argument but did file counter affidavit which they prayed be adopted and be part of the submission contesting the application. On the date set for hearing, Mr. Claudio Msando entered appearance on behalf of the applicant and Mr. Geoffrey Mbepera appeared for the respondent. They both submitted in respect of their positions. Whereas, Mr. Msando insisted on the applicant being paid the remaining balance of Tzs. 3,500,000/=, Mr. Mbepera was of the submission that no payment can be made for the applicant's failure to perform their obligation to the respondent as well as to the Court. He further argued that on the contrary the respondent was the one deserving refund of Tzs. 3,500,000/= for the applicant's failure to comply to paragraph 11 of the remuneration agreement entered.

The applicant therefore prays for the Court to order the applicant to be paid the balance due while on the other the respondent contests the payment for the

applicant's failure to perform, and instead the respondent be refunded the Tzs. 3,500,000/= already paid.

The Court is thus invited to decide one way or the other.

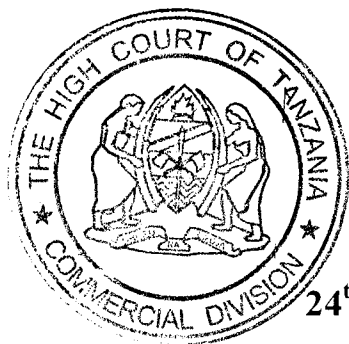
From the records of proceedings and submissions made there is no controversy at all that there was a contractual agreement between the applicant and the respondent. The agreement which was reduced into writing and duly signed by the parties on 15th March, 2015 as exhibited by MAA-1 referred in paragraph 4 of Mr. Denice S. Tumaini's affidavit in support of the application. There is equally no dispute that the applicant was only paid instruction fees amounting to Tzs. 3,500,000/- for the institution and prosecution of Commercial Case No. 59 of 2015 between Fosunwood Tanzania Limited v Salum Mbaruku Omar. The suit which was dismissed on 15th March, 2019 for want of prosecution under Order XVII Rule 2 read together with Order IX Rule 8 of the CPC with costs as exhibited in annexeture MAA-2 as indicated in paragraph 8 of the affidavit of Mr. Denice S. Tumaini. The respondent does not at all dispute that there is a balance due of Tzs. 3,500,000/- but contended that the applicant does not deserve the payment of the amount for failure to perform her duty of representing the respondent.

Ordinarily parties are bound by their signed agreement. And if there is any dispute then besides contacting the other party to the agreement, the displeased party has a

right or recourse of instituting a claim against the party who has failed to perform as per their agreement, in courts. To raise the point disputing the payment of the balance due at this juncture, which requires proof and which so far none was provided, if allowed will be tantamount to speculation which is completely discouraged by this Court. The Counter affidavit filed in particularly paragraphs 7 and 9 are not in line with how should the affidavit be. Under XIX Rules (1), (2) and 3 of the CPC it has been clearly illustrated what matters the affidavit/counter-affidavit should be confined to. The cases of **Assand and Sons (Uganda) Ltd v East African Ltd (1959) E.A. 360** and **Commissioner of Prisons ex parte Matovu (1966) E.A. 514**, have well covered that aspect of the affidavits, that it should not contain extraneous matters, arguments, opinion and conclusion. If I opt to expunge paragraphs 7 and 9, the remaining part of the counter affidavit says nothing contesting the application apart from general refutation.

Admitting that the balance of Tzs. 3,500,000/- has not been paid, for whatever reason is not a defence worth consideration in the absence of evidence, which, I, however consider this as not the correct forum. The agreement signed should govern the parties and within the signed agreement they should act. In case of any issues then proper channels should be opted such as instituting a suit in respect of of the claim put forward in the counter affidavit and later through oral submission made to this Court.

In light of the above, I find the application deserving and proceed to grant it to the tune of Tzs. 3,500,000/= admitted not paid for the claimed reasons stated with the costs of this application. It is so ordered.



A handwritten signature in black ink, appearing to read "P. S. FIKIRINI".

P. S. FIKIRINI

JUDGE

24th FEBRUARY, 2020