IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 86 OF 2019

(Arising from Miscellaneous Commercial Application No. 60 of 2019 and

Miscellaneous Commercial Application No. 54 of 2019)

BETWEEN

TARGET INTERNATIONAL (T) LIMITED.....APPLICANT

Versus

GODREJ CONSUMER PRODUCTS LIMITED.....RESPONDENT

Last Order: 11th Nov, 2019

Date of Ruling: 24th Feb, 2020

RULING

FIKIRINI, J.

The applicant/defendant, made this application pursuant to Order XXV Rule 1(1) of the Civil Procedure Code, Cap 33 R.E 2002 (the CPC), seeking for the Court to order the respondent/plaintiff to furnish security for costs already incurred and which is likely to be incurred by the applicant in the conduct of Commercial Case No. 60 of 2019, pending before this Court for the sum of Tzs. 49,500,000/=.

Mr. Haidersli Chandoo filed an affidavit in support of the application for the security for costs, while Mr. Krishan Kishore filed counter affidavit contesting the application and Mr. Mohamed Ramzanali Virani filed a reply to the counter affidavit. Apart from filing skeleton arguments, parties had their day in Court for oral submissions. At the hearing of the application, Mr. Francis Kamuzora learned advocate appeared for the respondent while the applicant enjoyed the legal services of Mr. Edwin Webiro learned advocate.

The applicant is praying for the respondent to be ordered to deposit Tzs. 49,500,000/= as security of cost incurred or likely to be incurred by the applicant in defending Commercial Case No. 60 of 2019 as well as Miscellaneous Commercial Application No. 54 of 2019. From the law cited in an application for security of costs, the applicant was required to prove two things: one, that the plaintiff resides outside of United Republic of Tanzania, and two, that the plaintiff does not possess any immovable property in Tanzania other than the properties in the suit.

It was Mr. Webiro's submission that it was beyond controversy that the plaintiff is a foreign company incorporated in India. This fact is clearly pleaded in the pleadings. In additional the applicant is not aware of any immovable properties owned by the plaintiff in Tanzania.

Extending his submission Mr. Webiro contended that the applicant has engaged the services of G.Y Hassan & Co. Advocates for legal representation and the said advocates have accepted the brief on the understanding that, they will charge the applicant's instruction fee of Tzs. 43,000,000 in defending the main suit as well as Miscellaneous Commercial Application No. 54 of 2019. This amount is exclusive of Tzs. 1,500,000/= which covers disbursement. The amount charged is also exclusive of Tzs. 5,000,000/=which will cover other expenses such as phone calls, secretarial works, witness transport, accommodation, expert consultation fees and any other costs associated which amounts to Tzs. 49,500,000/=

Considering that this matter is complex and threatened the applicant's existence the amount of Tzs. 49,500,000/= charged is thought reasonable, submitted Mr. Webiro. To cement his arguments he referred this Court to the case of **Abdul Aziz Lakani v Sadan Mangachi, Miscellaneous Commercial Application No. 8 of 2015 p.11,** that the Court would consider complexity of the case, research workload involved, costs incurred up to the time of the application and after, similar to the matter in hand which is complex and sensitive. The applicant based on the submission prayed for the grant of the application for security of costs.

Essentially, Mr Kamzora was not opposing for the grant of the application and order for deposit of security for costs, but contested the amount prayed for. His

protest was centered on the fact that the amount of Tzs, 49,000,000/= which is almost Tzs. 50,000,000/= has not been substantiated. Expounding on the point, it was Mr. Kamuzora's submission that application for security of costs must be guided by the Advocates Remunerations, specifically the 11th Schedule Second Column which refers to the rate of Tzs. 500,000/=and not exceeding Tzs. 5,000,000/=. While in support of the decision by the Honourable Mwambegele, but was of the position that the decision should be examined in the context of the Advocate Remunerations Order. From the applicant's submission, nothing warranting Tzs. 49,500,000 as security of costs was established, he submitted.

He thus prayed the Court to order deposit of security for costs in line with 11th Schedule and the amount should not exceed Tzs. 20,000,000/= and should be by a way of Bank guarantee.

Rejoining the submission it was the applicant submission that the matter is so complex based on documents annexed to the plaint, affidavit and reply to the counter affidavit. In the counter affidavit the respondent has annexed copies of certificates of registration from almost ten (10) different countries like Mozambique, Zambia, Burundi, India , Indonesia and so many others. And in order to properly defend the suit before this Court the applicant's counsel will have to

verify the authenticity of the document attached which might require travelling outside the country.

Concluding his submission Mr. Webiro submitted that section 54 of the Advocates Act, Cap. 341 R.E.2002 (The Advocates Act), the advocate is at liberty to conclude an agreement with the client for payment of an amount which is even higher than what is provided under the Rules. And in determining costs to be paid the Court always consider the complexity of the matter, amount of time taken to conduct the research, sensitivity or importance of the matter.

The provision of Order XXV Rule 1 (1) of the CPC 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 the 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 order 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: Nitten RatilalPattani & Another v Ashwinkumar Jagjivan Rhaberu, Civil Application No. 535 of 2018, High Court of Dar Es Salaam (unreported).**

Granting of security for costs is powers exercised discretionary by the Court albeit judiciously, basically geared towards protecting the defendant who has been subjected to the jurisdiction of the courts in this country after a suit instituted against him/her. In the case of **Stanbic Bank Tanzania Limited v Plexus Cotton Limited, Civil Application No.111 of 2006,** the Court of Appeal clearly illustrated the necessity of security for costs when it stated:

> *"That by respondent submitting to the jurisdiction of this country it will be fair and prudent the process reaches a finality in the court of this country. That this would be an appropriate case in which to make an order for deposit of*

amount of money as security. Such an order would allay any fears that the respondent might have on the applicant"

Once the **first** and the **second** conditions are proved then **third** condition, grant of order is imperative to protect the defendant from fears of realizing costs in the case, the suit fails.

Since the respondent does not contest the application except for the amount to be deposited as security for costs. The only task this Court has is determining whether the amount prayed is reasonable warranting granting of the application.

When considering grant of the application, reality dictates that the security of costs to be ordered must be realistic, reasonable and fair in relation to the matter at hand. The exercise is not automatic on the party of the defendant because the costs claimed must be specifically proved.

According to the defendant the amount of Tzs. 49,500.000/= prayed as security for costs was pegged on complexity, sensitivity and amount of research to be done. This position was well elucidated in the case of **Dow Agrosciences Export S.A.S v M(Metals) Limited, Commercial Case No. 55 of 2007** (unreported) which was cited in the case of **Abdul Azizi Lalani** (supra), where it was held that:

> "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 law is very clear that he who alleges must prove. Section 110 of the Tanzania Evidence Act, Cap. 6 R.E. 2002 (the Evidence Act) has provided for that, when it compelled a person to prove existence of any claimed facts which he asserts, he must thus prove that those facts exist. Despite pointing out that the matter is complex and sensitive and the expenses to be incurred included expenses such as phone calls, secretarial works, witness transport, expert consultation fees, but has never justified or submit evidence to prove the costs already incurred and anticipated costs likely to be incurred. The certificates of registration referred to be part of the pleadings though mentioned but to *per se* rely on them at this stage is discouraged. This is because those are just documents annexed to the plaint and not yet exhibits forming part of the proceedings. Mr. Webiro's submission in this regard is found lacking and in particular in relation to costs already incurred which

he could easily prove. Guided by the the Court of Appeal decision in the case of **Leila Jalaludin Haji Jamal vs Sharifa Jalarudin Haji Jamal, Civil Appeal No. 55 of 2003**, the decision I agree to, that:

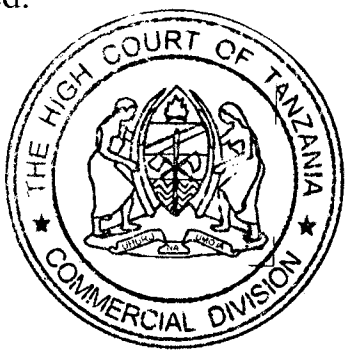
> *"Principle of equity, natural justice and fairness should always prevail when interpreting the provision of order XXV of the Civil Procedure Code, Cap 33 R.E 2002"*

Without such evidence it will be hard for this Court to fairly, reasonably and realistically determine and grant the application with relief sought.

Furthermore, the fact that section 54 of the Advocates Act allowed the advocate to enter into an agreement with the client for the payment of amount which is even higher than what is provided in the rules as submitted by the applicant's counsel never do away with the requirement of giving justification of the higher amount claimed when required to do so. Otherwise, agreement without justification of costs can be unfair, unjust and should be discouraged in the interest of justice.

All circumstances pondered, the amount of Tzs. 49,500,000/= is considered exorbitant and this Court in its wisdom and for the interest of justice find the amount of Tzs. 15,000,000/= (Fifteen Million only) should suffice as a security for costs of this application.

In the light of the above, I hereby proceed to order the respondent to deposit Tzs. 15,000,000/= (Fifteen Million only) as security for costs into the Court account within 30 (thirty) days from the date of this ruling. Costs to follow event. It is so ordered.



P.S FIKIRINI

JUDGE

24th FEBRUARY, 2020