IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM.

MISC. COMMERCIAL APPLICATION NO. 101 OF 2019

(ORIGINATING FROM COMMERCIAL APPEAL NO. 2 OF 2019)

HB WORLDWIDE LIMITED ..... APPLICANT

VERSUS

GODREJ CONSUMER PRODUCTS LIMITED ..... RESPONDENT

Date of last Order: 18/02/2020.

Date of Ruling: 28/02/2020.

RULING.

MAGOIGA, J.

The applicant, HB WORLDWIDE LIMITED by chamber summons made under the provisions of Rule 2 (2) of the High Court (Commercial Division) Procedure Rules, 2012 and Order XXV Rule 1(1) of the Civil Procedure Code [Cap 33 R. E 2002] accompanied with affidavit of HAIDERALI CHANDOO instituted the instant application against the above named respondent praying for the following orders, namely:-

(i) The Honourable court may be pleased to order the respondent to deposit in Court the sum of Tanzania shillings 19,440,000/= VAT inclusive as security for payment of costs incurred or likely to be incurred by the applicant in defending the appeal.

(ii) The Honourable Curt may be pleased to fix the time within which the respondent should furnish the security prayed for in prayer number (i) above.

(iii) Costs of this application be borne by the respondent.

(iv) The Honourable Court may be pleased to make any further orders as the interest of justice may require.

Upon being served with the chamber summons and affidavit in support of the application, the respondent through his legal counsel filed counter affidavit deposed by KRISHNA KISHORE stating the reasons why the prayers in the chamber summons should not be granted. Simultaneously, the learned counsel for respondent raised a preliminary objection on point of law to the effect that:-

"the counter affidavit of HAIDERALI CHANDOO is bad in law and incurably defective for contravening section 8 of the Notaries Public and Commissioner for Oaths Act, [Cap 12 R.E 2002] as amended by the Written Laws (Miscellaneous Amendments) (no.2) Act, 2016. The said section 8 requires that every Notary Public and Commissioner for Oaths before whom any oath is or affidavit is taken or made under this Act shall insert his name and

state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made. The jurat in HAIDERALI CHNDOO's affidavit does not state the name of the commissioner for oaths before whom the oath was taken."

When this application was called for hearing, I ordered that the parties' learned advocates argue both the substantive application and the preliminary objection, so that in my ruling the survival of the main application will depend on the outcome of the preliminary objection. I directed that learned counsel for applicant to start, then in reply, the learned counsel for respondent start with preliminary objection, then reply to the substantive application and vice versa will follow suit.

The applicant at all material time has been enjoying the legal services of Mr. Edwin Webiro, learned advocate. On the other hand, the respondent has been enjoying the legal services of Mr. Francis Kamzora, learned advocate.

I find imperative to determine first the merits or otherwise of the preliminary objection. In support of the preliminary objection, Mr. Kamzora argued that following the amendment of the Notary Public and Commissioner for Oaths Act, [Cap 12 R.E.2002] by Act no 2 of 2016, in particular section 8 was amended imperatively and mandatorily requiring that the name of the

attesting officer before whom an oath is taken to be inserted in the jurat of attestation among others. According to Mr. Kamzora, the affidavit in support of the application is incurably defective and obviously offends the mandatory provisions of section 47 of the Written Laws (Miscellaneous Amendments) (No. 2) of 2016. Mr. Kamzora cited the case of DARUSI GIDAHAMA v. REPUBLIC, CRIMINAL APPLICATION NO. 1 OF 2011 (ARUSHA) CAT (Unreported) which was decided after the amendment and an affidavit that was without the name of the authority who administered the oath was found and held to be incurably defective for contravening the provisions of section 8 as amended. In this regard the Court of Appeal held in strong terms that:-

> **" In the instant application the Commissioner for Oaths has failed to insert his name in the jurat which is contrary to section 8 of the Notary Public and Commissioner for Oaths Act, Cap 12. R.E 2002 as amended by section 47 of the Written Laws (Miscellaneous Amendments) (no.2) Act, 2016, such a defect renders the affidavit in support of the notice of motion incurably defective."**

Consequently, the Court of Appeal struck it out for being incurably defective. Another case cited by Mr. Kamzora is the case of MOHAMED L.A.ABDUL

HUSSEIN v. PITA KEMPAP LIMITED [2005] TLR 283 in which it was, among others, held that a stamp impression on the attesting Notary Public and Commissioner for Oaths placed at the foot of the applicant's affidavit is not part of the jurat of attestation of the said affidavit.

On the strength of the above reasons the learned counsel for respondent invited this Court to find the accompanied affidavit incurably defective and proceed to strike it out with costs.

On the other hand, Mr. Webiro in reply to the preliminary objection submitted that the raised objection on appoint of law is misconceived and vehemently submitted that the impugned affidavit is proper. According to Mr. Webiro, the case of DARUSi GIDAHOSI v. Republic (Supra) is distinguishable to this instant application because the name of the Notary Public and Commissioner for Oaths is there and in support of his respective stance, the learned counsel cited the case of MOTO MATIKO MABANGA v. OPHIR ENERGY PLC AND TWO OTHERS, CIVIL APPLICATION NO. 463/01 OF 2017, (DSM) CAT (Unreported) in which the Court of Appeal distinguished the case of of DARUSI which had no name at all and found that once the name is there then the affidavit is at home and proper. According to Mr. Webiro, in the instant application, the name of the Commissioner for Oaths was inserted. On the reasons given

above, the learned counsel for applicant equally prayed that the preliminary objection be overruled with costs.

In rejoinder, Mr. Kamuzora argued that the two cases of the Court of Appeal have different binding nature; that is for the case of DARUSI was decided by three judges and while the case of MOTO MATIKU MABANGA (supra) was decided by a single judge. According to Mr. Kamzora, the case decided by three justices takes over an upper hand to the one of a single judge. The learned counsel eventually reiterated his earlier prayers.

That was the end of the rival arguments of the learned counsel parties' submissions in support of their respective stances on the preliminary objection raised. The task of this Court now is to determine the merits or otherwise of this preliminary objection. However, it should be noted at the outset that in 2016 there was an amendment of section 8 of the Notary Public and Commissioner for Oaths Act, [Cap 12 R.E. 2002] by Written Laws (Miscellaneous Amendments) (no.2) Act, 2016. Equally important to note is that, in that amendment, it was mandatorily and legally provided that the' **name'** of the Notary Public and Commissioner for Oaths before whom any oath/affirmation or affidavit is taken or made under the Act shall be inserted in

the jurat of attestation. Equally in the jurat of attestation has to mandatorily state truly at what place and date the oath was taken.

The above amendment was aimed as rightly held in the case of DARUSI to cure the conflicting decisions of the Court of Appeal in the cases of DPP v. DOLI KAPUFI, CRIMINAL APPEAL NO. 11 OF 2008 (Unreported) and PAUL MAKARANGA v. REPUBLIC, CRIMINAL APPLIACATION NO 3 OF 2010 (Unreported) on whether the name of the authority which administered the oath or affirmation was to be inserted in the jurat or not. The Court of Appeal in the case of DARUSI at page 7 of the typed judgement had this to say:-

> **" section 8 of Cap 12 (supra) was amended to resolve the conflicting decisions on the issue of the name of the authority to be inserted in the jurat."**

Following the amendment which is not in dispute between learned counsel for parties, the relevant section 47 of the Written Laws (Miscellaneous Amendments) (no.2) Act of 2016 section 8 of the Notary Public and Commissioner for Oaths Act now provides as follows:-

> **Section 8- Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall insert his name and state truly in the jurat of attestation at**

<u>what place and date the oath or affidavit was taken.</u>" (underline mine).

The plain reading of the above provisions of the above cited section is clear as day light now that in our statute books the insertion of the name of the authority which administered the oath or affirmation in the jurat of attestation is no longer an option but a mandatory legal requirement. The immediate question now is, where is the name to be inserted in the jurat? Another equally important question is, did the affidavit in question complied with the law? The production of the jurat of attestation of HAIDERALI CHANDOO will assist this court in doing justice to this legal argument. The said jurat was drafted this way:-

"AFFIRMED at Dar es Salaam by the said HAIDERALI CHANDOO who is known to me personally/ been identified to me by Edwin Joshua Webiro this 29th day of August 2019."

BEFORE:

Name: JOSEPH SAMWEL

Signature: signed **<u>stamped</u>**

Address: P.O. Box 7609 Dsm.

Qualification: Commissioner for Oaths.

Therefore, there is no gain saying that the above jurat is, in law at home and dry for containing the name of the authority who administered the affirmation in the jurat (Joseph Samwel). The case of MOHAMED I.A. ABDUL HUSSEIN v. PITA KEMPAP LIMITED (Supra) which was cited by learned counsel for respondent to show that stamp impression of the Notary Public and Commissioner for Oaths placed at the foot of the applicant's affidavit is not part of jurat of the said affidavit may be true in that case because that affidavit was found defective for want of place place where it was taken. However, in our instant application and the respective impugned affidavit, the place where it was taken was shown to be at Dar es Salaam. Hence, makes it distinguishable in the circumstances.

In law as of now, therefore, in my respective opinion three things must be shown in the jurat. One, is the place where the oath or affirmation was taken. Two, the date, month and year in which the oath or affirmation was administered. Three, the name of the officer/authority who administered the oath or affirmation.

Therefore, from the above it is my firm considered opinion that the phrase **"BEFORE ME"** and all that is inserted there are part and parcel of the jurat of

attestation and without which the whole oath or affirmation becomes incurably defective. This is where to my further considered opinion the name of the authority/notary public and commissioner is to be inserted. Hence, once the name is inserted there the jurat of attestation is complete and at home with the law.

The learned counsel for parties' had diametrical rival view despite the obvious above and each has cited Court of Appeal case to support their respective stance on the issue. Mr. Kamzora has urged this Court to follow suit the case of DARUSI for reason that it was decided by three justices of Court of Appeal and the case of MOTO was decided by a single justice. I have taken my time to read both judgements of the Court of Appeal which I found were each correctly decided depending on the issue that was before the Court. However, before I decide on this issue I find apposite to know what is a jurat. The word jurat is not defined in the Act, Cap 12 R.E 2002. However, in the Black's Law Dictionary, 10th edition define the word jurat is defined to mean:-

> **"a certificate added to an affidavit or deposition stating when and <u>before what authority the affidavit or deposition was made.</u> A Jurat typically says Subscribed and sworn to before me this ... day of .... 20.....and the officer (usually a notary public) thereby**

certify three things. 1. That the person signing the document did so in the officer's presence. 2. That the signer appeared before the officer on the date indicated, 3. And that the officer administered an oath or affirmation to the signer who swore to or affirmed the contents of the document.(Underline mine).

From the above definition it is my firm considered opinion and apparent that jurat of attestation to be proper must include the name of the authority before whom the affirmation was taken, place where it was administered and the date, month and year when it was administered without forgetting the qualification of the Notary Public and Commissioner for Oaths. Decisively, there are two categories of the person who can administer oaths in our country; these are Notary Public and Commissioner for Oaths. Notably, therefore, all advocates in Tanzania are both Notary Public and Commissioner for Oaths.

Back to the instant preliminary objection with the above position in mind, I will start with the case of DARUSI GIDAHOSI(supra) cited after reading it between the lines and along the lines, I realized and found that the Court of Appeal held that the Commissioner for Oaths failed to insert his name in the jurat and by that rendered the affidavit incompetent and as such I agree with the

learned counsel for applicant that the affidavit in that case is distinguishable from the one we have which has the name and the title of the Commissioner for Oaths. Also is my other firm considered opinion that where the name is to be placed was not the concern of the parliament but what is required is that a name must be there. It is further my considered opinion that the words **"BEFORE ME" and the contents therein** are part of the jurat of attestation and once the name is inserted there, it suffices for the day and makes affidavit in question to be proper. The reason am fortified saying so is that in that part of the jurat is where the Notary Public and Commissioner for Oaths introduces himself/herself and his/her capacity in which he/she administered the Oath/affirmation and as such authenticate the affidavit or oath/affirmation.

On that note and for the reasons stated above I find the even the case of MABANGA (supra) was correctly decided and am bound to follow it in the circumstances. That said and done the instant preliminary objection is found unmerited and I consequently proceed to overrule it.

Following the above holding, this Court is enjoined now to determine the merits or otherwise of the application for security for costs. The learned counsel for applicant, Mr. Webiro in support of the application started his submissions by reciting the provision under which the instant application was

preferred and stated that reasons for preferring and grant of this application are as contained in the affidavit in support of the application which he prayed to form part of the submissions he is making. According to Mr. Webiro, for an application of this nature to be granted, the applicant is duty bound to prove or establish that the party who is required to pay security of costs is residing outside Tanzania and is not in possession of any immovable property in Tanzania than the one in dispute. On that note, the learned counsel for applicant submitted that there is no dispute that the respondent is not a resident of Tanzania and possess no property in Tanzania.

Further submission by learned counsel for applicant was that what the applicant is also to prove are all costs incurred and costs likely to be incurred. According to Mr. Webiro, the costs incurred are Tshs. 8,000,000/= as instruction fees, Tshs.5,000,000/= costs incurred for disbursement and costs likely to be incurred was pegged at Tshs. 5,000,000/=, which costs will cover travels, disbursement, telephone calls, secretarial service and expert consultation fees. He eventually prayed that this Court be pleased to grant this application by ordering the respondent to deposit in this Court Tshs. 18,000,000/= as security for costs and fix a time within which amount should be deposited in Court.

On the other hand, Mr. Kamzora strongly resisted this application by stating that though there is no dispute that the respondent is a foreign company but according to him the amount stated in the affidavit have not been proved by particulars, such as receipts to justify the grant of such amount. Further reply by the learned counsel for respondent was that the other amount of TShs. Ten million was exaggerated. However, the learned counsel was of the strong view that in case this court grants this application, then the amount should not be more than 10 million to cover all costs.

In rejoinder, Mr. webiro had no much to submit but reiterated what he earlier submitted.

This marked the end of hearing of this hotly contested application for security for costs under Order XXV Rule 1 (1) of the CPC [Cap 33 R.E. 2002].

The task of this Court now is to determine the merits or otherwise of the instant application.

This Court has on several occasions faced with similar applications gave directions of what should be proved for such an application to be granted. These cases are; MORDEN HOLDING (EA) LTD v. EXPORT CREDIT BANK OF TURKEY. Misc. Commercial Application no 5 of 2019, (HC) ARUSHA (Unreported), NITTEN RATLAL PATTANI AND ANOTHER v. ASHWINKUMAR

JAGJIVAN RHABERU, Misc. Civil Application no. 535 of 2018 (HC) DSM (Unreported) and INNOVATIVE GLOBAL LIMITED AND 2 OTHERS v. HARSH M. VORA t/a PARSHA AGRO, Misc. Commercial application no 276 of 2018 just but few to mention, in which the court in strongly terms repeatedly observed that:

> **" In order for the court to grant the order for security for costs, the defendant/applicant must prove the following cumulative ingredients, namely:-**
>
> **i. That the plaintiff is residing outside Tanzania**
>
> **ii. That he possesses no any sufficient immovable property within Tanzania, other than the property in dispute**
>
> **iii. The court in 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 <u>all costs incurred and likely to be incurred by any defendant.</u>"(Emphasis mine).**

Guided by the above legal position, factors one and two are easily proven. But there is no dispute given what was submitted and the affidavit in proof of the application that in the instant application, **all costs already incurred were not proved and no iota of evidence was led to show how much so far, have been incurred and likely to be incurred.** In the PATTANI V.

RABHERU (supra) this Court faced with similar situation held **"that it is not enough to mention the amount of Tshs. 400,000,000/= as amount to be ordered to be deposited as security for costs, the applicants were legally required to prove the amount so far incurred out of the four hundred million and project the other costs likely to be incurred to entitled the court to decide in their favour. ..... it is not enough to alleged but the proof must be there. The law is very clear that he who alleges must prove, see section 110 of Tanzania Evidence Act, [Cap 6 R.E. 2002]. In the absence of any proof as to how the four hundred million was arrived between the already incurred costs and the likely to be incurred, this court cannot make a guess work to unproved amount of four hundred million. The order for payment of security for costs must be pegged on realistic amount and fully explained to the satisfaction of the court how same was arrived by the person who desire the court to grant the said order in his favour."**

Guided by the above stance and direction of the Court, the applicant's affidavit and submissions only allege but no proof of the Tshs. 15,000,000/= was ever proved. The applicant if true had incurred any expenses he ought to have annexed in the application receipts to prove all already incurred costs which could have give a way forward to gauge the likely costs to be incurred. In the

absence of such proof without much ado this ingredient or factor of all costs already incurred makes the application is akin to fail.

The need to decided applications under Order XXV judiciously cannot be escaped so as to preserve equality before law (court) given the consequences of the order in case one fails to deposit the ordered costs. The order, to my opinion can be granted in proper cases upon proof of all ingredients. The application must be realistic and must be proved to the standard require in civil law regard being the security for costs are specific in nature. The Court of Appeal of Tanzania in the case of LEILA JALALUDIN HAJI JAMAL V. SHARIFA JALALUDIN HAJI JAMAL, CIVIL APPEAL NO 55 OF 2003. (CAT) DSM, (unreported) this point was underscored and it was held **"that principle of equity, natural justice and fairness should always prevail when interpreting the provisions of Order XXV.**

The above principal was the reasons why the applicant was legally obliged to prove the already incurred costs, which in a way projects the likely costs to be incurred. In this application this was not done at all. The mere claiming of Tshs. 18,000,000.00 without proof of the same renders the instant application not proved at all.

That said and done and for the reasons given above both the preliminary objection and the instant application stand to fail to their entirety. Given the fact that the preliminary objection failed and equally the instant application failed, all are hereby dismissed with no order as costs.

It is so ordered.

Dated at Dar es Salaam this 28th day of February 2020.

S. M. MAGOIGA

JUDGE

28/02/2020