

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

MISC. COMMERCIAL APPLICATION NO. 170 OF 2020

(Originating from Misc. Commercial Cause No. 42 of 2020)

WIA COMPANY LIMITED APPLICANT

VERSUS

WESTCON GROUP AFRICA OPERATIONS LTD RESPONDENT

RULING

B. K. PHILLIP, J.

- i. On 16th August, 2020 the respondents herein lodged in this court a petition for winding up of the applicant under the provisions of Sections 275, 279(1) (d), 281(1) and 294 of the Companies Act vide Misc. Commercial Cause No. 42 of 2020. The same is pending for hearing. The applicant herein has lodged this application under the provisions of Order XXV Rule 1(1) and Section 95 of the Civil Procedure Code, Cap 33 R.E 2019 (Henceforth "the CPC") praying for the following orders:

1) This Honourable Court be pleased to issue an order for the Respondent, within a time to be fixed by the Court, to deposit USD 20,000 as security for payment of all costs incurred and likely to be incurred by the Applicant in defending of the suit filed by the Petitioner(Misc. Commercial Cause No. 42 of 2020).

2) Costs of this application be borne by the Respondent.

3) Any other and further order(s) which the Honourable Court shall deem just to grant.

The application is supported by an affidavit sworn by Mr. Patric Nyindo the Principal Officer of the applicant who deponed as follows; That the Respondent is a foreign company registered in the United Kingdom and has no movable or immovable property in Tanzania, thus there is a reasonable probability that the respondent may not be forthcoming when called upon to pay costs in event the petition is dismissed with costs.

On the other hand, the learned advocate Francis Kamuzora swore a counter affidavit in opposition to the application. Mr. Kamuzora deponed as follows; That, Misc. Commercial Cause No. 42 of 2020 filed by the respondent against the applicant is not a suit. It is a winding up petition filed pursuant to the Provisions of the Companies Act and the Companies (insolvency) Rules, GN No. 43 of 2005. The respondent has no movable or immovable properties but it is not true that the respondent might not be able or willing to pay the costs in event the applicant is granted costs in the petition. The applicant herein is liable under a decree and compromise of a suit made in Commercial Cause No. 124 of 2018 in which the applicant is indebted to the respondent to a tune of USD 289, 125/=.

The applicant can recover his costs if any by way of set-off from the aforesaid decretal sum. The sum of USD 20,000 prayed by the applicant is on the higher side.

The applicant was represented by the learned Advocate Erick Kamala whereas the learned Advocate Francis Kamuzora appeared for the respondent. Both advocates filed skeleton arguments pursuant to Rule 64 of the High Court (Commercial Division) Procedure Rules, 2012.

Mr. Kamala started his submission by adopting the contents of the affidavit in support of this application and the skeleton arguments he filed in court. He went on to submit that the Respondent is a foreign company, registered in United Kingdom. He has no movable or immovable property in Tanzania. Thus, this is a fit case to order for deposit for security for costs as the conditions stipulated in Order XXV Rule 1(1) of the CPC have been met. It was Mr. Kamala's contention that there cannot be any set-off of the costs incurred by the applicant since the debt of USD 289, 125/= alleged by the respondent is still contested, it therefore cannot be relied upon for recovery of the applicant's costs.

Mr. Kamuzora too started his submission by adopting the contents of his skeleton arguments and went on to submit as follows; That the provisions

of Order XXV Rule 1(1) of the CPC are not applicable in the circumstances of this matter because what has been filed in court by the respondent vide Misc. Commercial Cause No. 42 of 2020 is not a suit, it is a petition. He submitted that Order XXV Rule 1(1) of the CPC is applicable in a "suit". Referring this court to the case of **Tanzania Cotton Marketing Board Vs. COGECOT Cotton Company (CA) Civil Appeal No. 60 of 1998** (unreported), in which the Court of Appeal said the following;

"Counsel who appeared for the appellant before the High Court stated categorically that "this is not a suit." That was, indeed, correct and not a slip. A petition under rule 5 and 6 of the Arbitration Rules is an application rather than a suit. Rule 5 states in part;" ... all applications made under the Ordinance shall be made by way of petition". A petition is therefore the prescribed mode of making an application under the Arbitration Ordinance, and it is common knowledge that other modes are prescribed under other laws."

Mr. Kamuzora insisted that the petition for winding up made under the Provision of Section 275, 279 (1) (d) of the Companies Act, is in line with the mode of application made under the Companies Act and it cannot be a suit.

In the alternative, Mr. Kamuzora submitted that the pending petition for winding up is based on undisputed debt of USD 289,125/= which the

applicant owes the respondent. He was of the view that in event the respondent's petition fails and costs granted to the applicant, the same can be set-off with the above stated debt of USD 289, 125/=. In addition, Mr. Kamuzora, submitted that the grant of an order for security for costs is within the court's discretion which has to be exercised judiciously depending on the circumstances of the case. He contended that, the circumstances of this matter do not necessitate the grant of an order for security for costs. To bolster his arguments he cited the case of **Cooperative Mes Artisaanaux Minierls and others Vs. Ben Ngamije Mwangachuchu T/A Societe Miniere De Busunzu Sarl**, Misc. Commercial Application No. 271/2018 (unreported).

Moreover, relying on the case of **HB World Wide Limited Vs. Godrej Consumer Products Limited, Misc. Commercial Application No. 101 of 2019** (unreported), he argued that the applicant has not proved the amount so far incurred by the applicant and likely to be incurred. As regards the amount prayed to be deposited for security for costs (USD 20,000) Mr. Kamuzora maintained that, the amount is on an extremely high side as winding up petitions are short and do not involve calling of witnesses, unlike the ordinary trials. He reminded this court that pleadings in the pending petition are complete and the same is due for hearing. He

insisted that it is not prudent to frustrate the hearing of the petition. At the end, Mr. Kamuzora invited this court to dismiss this application either on a ground that the same is made under Order XXV(1) (1) of the CPC whereas the matter pending in court is not a suit or that costs that might be granted to the applicant can be paid by way of set-off with the amount the applicant owes the respondent.

In rejoinder, Mr. Kamala insisted that security for costs in this matter is necessary. Petition is part of a suit. He cited the case of **Abdul Aziz Lalani & 2 others Vs. Sadru Mangalji, Misc. Commercial Cause No. 8 of 2015** (unreported), to cement his arguments.

From the submissions made by the learned advocates, It is obvious that I am required to start with the concern raised by Mr. Kamuzora that the Provisions of Order XXV Rule 1 (1) of the CPC are not applicable as the matter pending in court is not a suit.

First of all, I think it is important to understand that security for costs is aimed at protecting a defendant or respondent in event she is granted costs for the case/matter from encountering difficulties in realizing her costs, in particular where the other party/plaintiff/respondent is a foreigner and has no immovable property in Tanzania. The conditions for granting

the order for security for cost are well stipulated in order XXV Rule 1(1) of the CPC. I am of a settled opinion the same are applicable in any matter, not only in a suit. Whether the matter before the court is an application in form of a petition or whatever form, still, the respondent/defendant deserves to be protected for the reasons I have explained herein above.

Back to the concern raised by Mr. Kamuzora, it is true that this application emanates from a petition for winding up. So, the matter that is pending in court is a petition not a suit. It is also true as stated by the Court of Appeal in the Case of **Tanzania Cotton Marketing Board** (Supra), that a "suit" and a "petition" are different, and Order XXV Rule 1(1) of the CPC talks of a "Suit" not a "petition", but this does not negate the principle or justification behind the deposit for security for costs which I have explained earlier in this ruling. I believe, Hon. Mwambegele, J as he then was, granted an order for security for costs in the case of **Abdul Aziz Lalani** (supra) for a petition that was pending in court for hearing on the same justification I have elaborated herein above. In addition, it has to be noted that this application apart from order XXV Rule 1(1) of the CPC, it is also made under Section 95 of the CPC which provides for the inherent powers of this court. It is my settled opinion that this court has powers to grant

the order for security for costs in this matter pursuant to the provisions of section 95 of the CPC.

From the foregoing, it is the finding of this court that this application is properly filed in this court.

Coming to the merits of this application, it is not in dispute that the respondent is a foreign company and has no any immovable property in Tanzania. Therefore, the conditions for granting the order for deposit for security for costs has been met. And let me point out here that Mr. Kamuzora's contention that the applicant owes the respondent USD 289,125/= which can be used to set-off the costs in event the applicant is granted costs, is misconceived because that amount is still contested. In fact the court decree attached to the counter affidavit sworn by Mr. Kamuzora to substantiate that allegation indicates clearly that, the respondent was granted a right to re-file the petition if that amount is not paid and that is what happened, the amount was not paid, so the respondent had to re-file the petition for winding up. That amount is still contested . It is subject to the court's decision. The same cannot be relied upon to set-off the costs for the petition in a manner presented by Mr. Kamuzora.

From the foregoing, it is the finding of this court that under the circumstances, it is prudent to grant the order for security for costs. Now, what follows is the quantum to be deposited as security for costs. Having perused the affidavit in support of this application, I find myself in agreement with Mr. Kamuzora that the applicant has not mentioned and/or proved the amount so far incurred. Neither has he made any analysis how he has arrived at the amount he wants to be deposited as security for costs. This court has held in a number of cases that, a party applying for security for costs has to prove the costs so far incurred and give justification of the amount prayed to be granted as security for costs. In the case of **Dow Agrosciences Export S.A.S. Vs I. S & M (Metal) Limited, Commercial Case No. 55 of 2007** (unreported). Lady justice Mjasiri as she then was, when making a decision on an application for security for costs said the following:-

"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"

Under the circumstances, taking into consideration that the pending matter is an application and is not a complex one, I hereby order that the respondent has to deposit in court in sum Tshs 8,000,000/= as security for costs. The same should be deposited in court within forty five days from the date of this order.

It is so ordered.

Dated at Dar es Salaam on this 1st day of June 2021.




B.K. PHILLIP

JUDGE