IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUANDA, J.A., MZIRAY, J.A., AND MWAMBEGELE, J.A.)

CIVIL APPLICATION NO. 353/17 OF 2017

ADVATECH OFFICE SUPPLIES LIMITED ..... APPLICANT

VERSUS

MS. FARHIA ABDULLAH NOOR.....1ST RESPONDENT
BOLSTO SOLUTIONS LIMITED ..... 2ND RESPONDENT

[Application for deposit of security for costs in Civil Application No. 261/16 of 2017 pending in the Court of Appeal of Tanzania arising from the decision of the High Court of Tanzania (Commercial Division) at Dar es Salaam]

(Mruma, J.)

dated the 3rd day of May, 2017
in
Commercial Case No. 167 of 2014

RULING OF THE COURT

30th October & 9th November, 2017

MWAMBEGELE, J.A.:

By Notice of Motion, the applicant Advatech Office Supplies Limited filed the present application seeking, *inter alia*, an order of this Court compelling the respondent to deposit security for costs to the tune of USD 20,000 or as it may be determined by the Court as a condition precedent for the hearing of Civil Application No. 261/16 of 2016 which

is pending in this Court. The application has been taken under rule 4 (1) and (2) (a), (b) and (c) and 120 (3) of the Tanzania Court of Appeal Rules, 2009 (hereinafter "the Rules"). It is supported by an affidavit deposed by Hassan Kiangio, principal officer of the applicant company.

The application is resisted by an affidavit in reply deposed by Ms. Farhia Abdullah Noor, the first respondent.

At the hearing of the application on 30.10.2017, both parties were represented. Mr. Nduruma Keya Majembe, learned counsel, represented the applicant, Dr. Kibuta Ong'wamuhana and Mr. Wilson Kamugisha Mukebezi, learned counsel, joined forces to advocate for both respondents.

The applicant, through her learned counsel, had earlier filed written submissions which she sought to adopt as part of the oral submissions along with the affidavit supporting the application. The first respondent had filed an affidavit in reply which she also sought to adopt as part of her oral submissions. She did not file any reply submissions. The learned counsel for the parties, having so adopted the Notice of

Motion, affidavit, written submissions and affidavit in reply, as the case may be, were very brief in their oral arguments.

We haste the remark that the Court prompted the applicant to address it on the propriety of the provisions under which the Court was being moved. Our concern anchored on the fact that rule 120 (3) under which the application has, *inter alia*, been made is in respect of appeals while the rest of the provisions relied upon cater for a situation where no provisions are provided for by the Rules.

To this question, Mr. Majembe, having failed to convince us on the propriety of moving the Court using all the provisions cited, conceded, at long last, that the proper provisions to move the Court should have been only rule 4 (2) (a) of the Rules. The learned Counsel submitted that in view of the fact that applicable provisions have been cited to move the Court together with the inapplicable ones, the application was competently in Court. He thus beckoned upon us to proceed hearing the application on its merits.

On his part, Dr. Ong'wamuhana was of a different stance. To him, for that ailment, was of the stern view that the application was incompetent and that it should be struck out.

Having pondered over the matter, we found substance in Mr. Majembe's argument to the effect that the application, having cited applicable as well as inapplicable provisions of the law to move the Court, had enough legs on which to stand in Court. We promised to give reasons thereof in this Ruling which we are now set to give.

For reasons that will be apparent shortly, this issue will not detain us. The provisions of rule 120 (3) of the Rules under which the present application has, *inter alia*, been made, caters for appeals. This can be made out from the ordinary and natural meaning of words used in the very sub-rule. Let the sub-rule paint the picture; it reads:

> *"The Court may, at any time if it thinks fit, direct that* ***further security for costs*** *be given and may direct that security be given* ***for the payment of past costs relating to the matters in question in the appeal.***"

[Emphasis ours].

Our reading of the sub-rule has it that, in its ordinary and natural meaning, its import is that the Court has been given power to order provision of further security for costs for the payment of past costs relating to appeals. The catch words, as far as the present argument is concerned, are found in the last three words in the sub-rule – "in the appeal". The express use of the words "in the appeal", by virtue of the principle encapsulated in the Latin maxim *expressio unius est exclusio alterius*, impliedly excludes the applications.

By the same parity of reasoning, we do not think the provisions of rule 4 (1) and (2) (b) and (c) of the Rules are applicable. While rule 4 (1) provides that the Rules should be followed and that the Court may at any time depart from them in the interests of justice, rule 4 (2) (b) and rule 4 (2) (c) empower the Court to make any order for better meeting the ends of justice or preventing an abuse of the process of the Court, respectively. In our considered view, these provisions do not fit in well with the present situation.

As rightly submitted by Mr. Majembe, the proper provision under which the present application should have been made is only rule 4 (2) (a) of the Rules. This provision bestows upon the Court the power to make any order for purposes of better meeting the ends of justice. As there is no provision in the Rules to cater for provision of security for costs in applications, seeking recourse under rule 4 (2) (a) of the Rules was quite appropriate in our view.

We are certain that Mr. Majembe cast his net too wide by citing all the provisions in the apprehension of fear that he might leave out any provisions that would perhaps be useful. His, if we may say, was a guesswork and has been resorted to by members of the bar very often, especially in the recent past. This emerging practice of leaving us to pick the grain from the chaff is discouraged by the Court as it is tantamount to not only making the Court an extension of the advocates' instructions but also wastes a lot of the precious time of the Court. We urge the bar to mute this undesirable emerging practice at once.

Be that as it may, we are of the considered view that, the application, having cited applicable as well as inapplicable provisions of

the law to move us, can still have its day in Court. Mr. Majembe was right when he stated that there were decisions of the Court which fortify the proposition. He could not, however, readily cite to us any, having been prompted by the Court to his surprise. But we think Mr. Majembe had in mind our fairly recent decision of **Bitan International Enterprises Ltd v. Mished Kotak**, Civil Appeal No. 60 of 2012 (unreported); a decision we rendered on 16.11.2015. In that appeal, there arose an issue whether the High Court was right to strike out an application for revision which cited applicable as well as inapplicable provisions of the law to move the High Court. Relying on our previous decision of **Abdallah Hassani v. Juma Hamis Sekiboko**, Civil Appeal No. 22 of 2007 (unreported), we stated that citing applicable and inapplicable provisions of the law to move the court was not fatal. We cited the following paragraph from the **Abdallah Hassan** case (supra):

> *"...We have gone into the details of the provisions of section 44 because we are satisfied that the appellant's application for revision was wrongly entitled. He should have indicated section 44(1) (b) only. Although the*

court should not be made to swim in or pick and choose from a cocktail of sections of the law simply heaped up by a party in an application or action, ***in the present situation we are satisfied that citing subsection (a) as well as was superfluous but that this did not affect competency of the application for subsection (b) is clearly indicated.***"

Thus, the present Notice of Motion citing applicable along with inapplicable provisions of the law to move the Court, did not make the application incompetent. It still had enough legs on which to stand in Court through the cited applicable provisions. It was for these reasons we allowed the parties to argue the application on its merits.

We now revert to the merits of the application. But before we dwell on it, we find it apt to narrate, albeit briefly, the material background facts leading to this application. They go thus: the applicant is a decree holder in Commercial Case No. 167 of 2014 determined by

the High Court (Commercial Division). The first respondent has filed in the Court Civil Application No. 261/16 of 2017 seeking to have that decision revised. That application is yet to be determined; it still is pending in this Court.

The applicant has filed the present application craving for orders as stated at the beginning of the present Ruling. The application is pegged on the grounds that the first respondent is a foreign national who has no tangible property movable or immovable known to the applicant and therefore, in the event that application fails, she (the applicant) will not be able to recover its costs in defending Civil Application No. 261/16 of 2017 pending in Court.

The applicant, after extensively narrating the background to the application which runs in about eleven pages, has argued in the written submissions and deposed in the affidavit that the present application is meritorious as the first respondent has all along been inhibiting the applicant to enjoy the fruits of the decree in High Court (Commercial Division) in Commercial Case No. 167 of 2014. The applicant argues that through her conducts, the first respondent has committed acts of

bankruptcy and demonstrated that she is dishonest and financially unstable. The learned counsel has urged the Court to follow the observation in **Noormohamed Abdulla v. Ranchhodbhai J. Patel and another** [1962] 1 EA 447 in which it was observed at page 451 that an order for security for costs is intended to ensure that a litigant who, by reason of near insolvency is unable to pay the costs of the litigation in case he loses. It is some kind of protection to the other party.

The applicant has also relied on **Uniliver PLC v. Hangaya** [1990–1994] 1 EA 598 in which it was held that the plaintiff must show that he has enough assets in the country and **Marco Tool and Explosives Ltd v. Mamujee Brothers Ltd** [1986–1989] 1 EA 337 in which the Court of Appeal of Kenya observed that the impecunious nature of the appellant and bad faith of the appellant in taking advantage of the respondent were held to be circumstances to be taken into account in determining an application for security for costs.

The applicant has not submitted on the issue whether the Court may issue any other order for the good ends of justice on the situation which is the second ground on the Notice of Motion.

On the first respondent's part, as already alluded to above, there was filed an affidavit in reply but no written submissions in response to the applicant's were filed. At the oral hearing, relying on what has been deposed in the affidavit in reply and which Mr. Ong'wamuhana sought to adopt, it was submitted that the first respondent, indeed, is a Somali national but that she is neither a pauper nor a person near bankruptcy but a person of substance. Mr. Ong'wamuhana added that the first respondent owns a substantial amount of assets in Tanzania through two companies: M/S Accomondia Company Limited and M/S Pimak Limited. He also added that the first respondent is living and working for gain in Tanzania holding a Class A work permit issued by the Ministry responsible for labour matters and that she is a holder of a Resident Permit No. AC/340/1454A issued by the Immigration Department.

We have subjected the rival arguments by the learned counsel for the parties to the proper scrutiny they deserve. We wish to state at the

very outset that, in applications of this nature, it is in this Court's discretion to order or not to order provision of security. This discretion, as was stated in the case of **Lalji Gangji v. Nathoo Vassanjee** [1960] 1 EA 315 and reiterated in **Noormohamed Abdulla** (supra), is unfettered, subject only to the implied fetter upon all such discretions, namely; that they should be exercised judicially.

We have no hesitation to state at the very outset that the present application, on a balance of probabilities, is wanting in merit. We are certain from the evidence we could glean from the affidavit and affidavit in reply as well as the written submissions of the applicant and oral submissions of both learned counsel at the hearing, that the applicant is just in apprehension of fear that she may not recoup her costs should the first respondent fail in her application for revision pending in the Court. This apprehension of fear is pegged on the alleged fact that the first respondent is a foreign national who has no tangible movable and immovable property in the jurisdiction of the Court. It is also pegged on the alleged gimmicks played by the first respondent to block execution of the decree in Commercial Case No. 167 of 2014. To this allegation, the first respondent, who does not deny that she is a Somali

national, has countered, sufficiently in our view, that she has a Resident Permit No. AC/340/1454A issued by the Immigration Department and that she is living and working for gain in Tanzania holding a Class A work permit issued by the Ministry responsible for labour matters. The first respondent has also deposed that she owns a substantial amount of assets through M/S Accomondia Company Limited and Pimak Limited.

Circumstances under which an application of this nature may succeed and therefore an order for provision of security for costs may be given by the Court, were, as rightly submitted by the applicant's counsel in a passage reproduced in his written submissions and readily conceded by the respondents' counsel, articulated in the **Noormohamed Abdulla** case (supra). At page 451 of that case, the Court of Appeal for East Africa articulated:

> *"The order for security in such a case as this is not directed towards enforcing the payment of the costs as such, but is designed to ensure that a litigant who by reason of near insolvency is unable to pay the costs of the*

litigation when he loses, is disabled from carrying on the litigation indefinitely except upon terms and conditions which afford some measure of protection to the other parties. In a proper case therefore the order can be made in respect of costs unpaid whatever may have been the outcome of the execution proceedings in the court below."

And in **Marco Tool and Explosives** (supra) which decision we find ourselves persuaded with, it was observed, and to our mind rightly so, that the impecunious nature and bad faith of the appellant (the first respondent herein and applicant in Civil Application No. 261/16 of 2017) are some of the matters that have to be taken into consideration in applications of this nature.

The first respondent's insolvency or near insolvency or impecuniosity or bad faith or inability to pay the costs of the application for revision pending in the Court was strenuously countered by Counsel for the respondents. The learned counsel for the respondents reiterated

what the first respondent deposed in the affidavit in reply, contents of which have already been stated above.

We are ready to accept the submissions of Mr. Majembe that as was stated in the persuasive decision of the Court of Appeal of Kenya in **Marco Tool and Explosives** (supra), impecunious nature and bad faith of the appellant (in our case, the first respondent; the applicant in Civil Application No. 261/16 of 2017 pending in this Court) are matters to be taken into consideration. However, having weighed the applicant's affidavit evidence as against that of the first respondent in the affidavit in reply, we are not comfortable to hold with certainty that the first respondent is truly in the state of near bankruptcy. Neither are we comfortable to hold with certainty that the first respondent has been acting in bad faith. We cannot as well hold with certainty that the first respondent is impecunious as to be unable to pay the costs of Civil Application No. 261/16 of 2017 in the event she loses in that application. What is evident as far as we can decipher from the available evidence before us is a hefty legal battle between the parties each one of them struggling to employ the legal machinery to win it. We could not in our evaluation of the affidavit evidence decipher anything as to suggest that

the first respondent would not be able to pay the costs of the pending Civil Application No. 261/16 of 2017 in case she loses.

As was stated in **Lalji Gangji** (supra):

> *"The burden lies on the applicant for an order for further security and he cannot merely by averring that the security already deposited for costs is inadequate, or because the costs in the court below, ordered in his favour, have not yet been paid, impose any obligation upon the court or a judge or the registrar to grant his application."*

The applicant's affidavit evidence falls short of proof to the required standard; that it is on the preponderance of probabilities, the first respondent's impecuniosity, bad faith and inability to pay costs of the application the subject of this application. In the premises, we find ourselves loathe to block the first respondent to seek recourse in the Court by having the order of the High Court (Commercial Division) of 03.05.2017 in Commercial Case No. 167 of 2014 revised. The first

respondent has not been declared bankrupt. Neither, from what we could glean from the evidence before us, is she near insolvency or impecunious as not to be able to pay the costs of the pending Civil Application No. 261/16 of 2017 in case she loses. The burden lies on the applicant to prove that the respondent is in such a state to warrant us make the order sought by the applicant. As far as the evidence before us is concerned, the first respondent's insolvency or near insolvency or impecuniosity or bad faith or inability to pay the costs of the application for revision pending in the Court has not been sufficiently been established. It was incumbent upon the applicant to establish these facts to the required standard; that is, on a balance of probabilities.

We are certain in our minds that, in the circumstances of this case, justice will smile if the first respondent is accorded the opportunity to challenge, by way of revision, the order of the High Court (Commercial Division) of 03.05.2017 in Commercial Case No. 167 of 2014 unreservedly.

In the upshot of the above, we think the balance of probabilities tilts in favour of the first respondent. That is the reason why we find this application wanting in merit and dismiss it with costs.

Order accordingly.

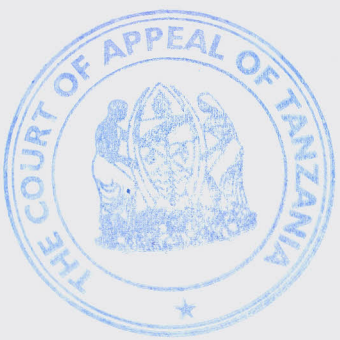
DATED at **DAR ES SALAAM** this 7th day of November, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



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