

TANZANIA / JUDGMENT

# NUMORA TRADING PTE LTD VS PRESTIGE INVESTMENT SA MISC

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT  
PAR ES SALAAM MISC.COMMERCIAL APPLICATION NO. 172 OF 2023 (Arising Out of Commercial  
Case No. 130/2023) BETWEEN NUMORA TRADING PTE LIMITED..... APPLICANT  
VERSUS PRESTIGE INVESTMENT SA..... RESPONDENT

## RULING

Date of Last Order:22/04/2024 Date of Ruling: 13/06/2024 GONZI, J. In the Chamber Summons, the  
Applicant prayed for orders that:

1. This Honourable Court may be pleased to issue an order compelling the Respondent / Plaintiff to deposit in Court security for costs amounting to not less than USD 556,494.62) in respect of ^Commercial Case No. 130 of 2023 pending between the parties herein.
2. That Costs of this application be provided for; and 1
3. Any other Orders that this Honourable Court deems just to grant. The application is supported by an affidavit of Daniel Kariuki Maina, Principal Officer of the Applicant Company. In his affidavit, briefly, he stated that the Applicant is the 2nd Defendant in Commercial Case No. 130/2023 which is pending in this Court wherein the Plaintiff is claiming for, among other things, general damages and the release of cargo of 20685.61 MT made of gas oil (petroleum product). He attached a copy of the Plaint in Commercial Case No.130/2023 as annexure N-l. He stated that the estimated value of the fuel cargo is USD 18,549,820.77 as of 1st November, 2023. The Applicant stated that she has assessed the likely legal costs to be incurred in defending the Commercial Case to be 3% of the value of the disputed cargo hence USD 556,494. 62. The Applicant stated that since the Respondent is a company incorporated under the Laws of Burundi which carries on business in Burundi, and does not own any immovable assets in Tanzania, it should deposit in Court USD 556,494. 62 as security for costs before its Commercial case No. 130/2023 can proceed. 2 The Respondent resisted the application through the counter affidavit of Mr. Seni Songwe Malimi, learned Advocate for the Respondent. In essence the Respondent admits to be a foreigner without fixed assets in Tanzania and that it has sued the Applicant. The Respondent, however, disputes the requirement to deposit security for costs in the

circumstances of the present case. Alternatively, the Respondent is of the view that, at any rate, the maximum amount of costs which may be ordered to be deposited as security shall not exceed USD 1000. The Respondent is of the view that there is no need to deposit security as the Applicant has demonstrated a prima facie case against the defendants in Commercial case No. 130/2023, which has not been disputed by the Defendants therein including the Applicant in this case. The respondent stated that the issue relating to the value of the 20685.61 MT of gasoline was answered in favour of the Applicant by this Court in its Ruling in Commercial case No. 130/2023, dated 8th December, 2023 and therefore the only remaining contention is with respect to general damages which are in the discretion of the Court. Hence, USD 1000 should be enough as security for costs. He attached annexure P-1(a) and (b), which is a Ruling in Misc. Commercial Application No. 164/2023 originating from Commercial Case No. 130/2023 where this Court (Hon. Nangela, J.) granted temporary 3 orders directed at the Applicant and another person to release the fuel in dispute to the Respondent pending determination of the suit. Therefore, the Respondent stated that there is no need for depositing security for costs, and if there is found to be such a need, the amount should not exceed USD

1000. Mr. Malimi, in his affidavit stated further that the Respondent has a hospitality contract with Lake Oil Limited for using the facilities of the later in Tanzania and Burundi, hence the Respondent is easily accessible. The application was disposed of by way of written submissions. Mr. Nuhu Mkumbukwa, learned Advocate, represented the Applicant whereas the Respondent was represented by Mr. Seni Songwe Malimi, learned Advocate. Mr. Mkumbukwa adopted the affidavit of Daniel Kariuki, principal officer of the applicant and submitted that the Respondent company according to Paragraph 1 of the Complaint, is incorporated in Burundi and its address is in Burundi, hence a foreign entity with no immovable properties in Tanzania. He argued that reading Order XXV Rule 1 two conditions have to be met for the application to succeed and one to be ordered to deposit security for costs. These are: (a) A plaintiff residing out of Tanzania (Foreigner/Foreign Company) (b) A Plaintiff does not, or that no one of such 4 Plaintiffs does, possess any sufficient immovable property within Tanzania other than the property in suit. Mr. Mkumbukwa referred the Court to Sarkar S. Manohar, in his book Sarkar Code of Civil Procedure (11th Edition reprint 2011 at page 2014 where it was stated that: "The object of the rule is to protect the defendant in the cases specified, where in the event of success he may have difficulty in realizing his cost...the power is discretionary and ought not to be used unless it is shown that it is necessary for the reasonable protection of the defendant." He argued that the Respondent has no immovable property in Tanzania and even the property in dispute is movable and actually it does not belong to the Respondent as it is subject to contention in the suit. He submitted that the alleged hospitality agreement which the Respondent has with Lake Oil is immaterial because it is not the requirement of the law and the said Lake Oil has also been joined as the 4th Defendant in the Commercial Case No. 130/2023. He argued that the issue of the 20685.61 MT of gasoline being resolved by the Court in Misc. Commercial Application No. 164/2023, is not true and that the Commercial Case No.

130/2023 is still pending. If the Ruling in that case had finalized the main suit, the Respondent would have dropped its claims in that suit. The present application would not have been necessary then. Mr. Mkumbukwa cited the case of *Zulfikar Haiderali Njessa and Another vs Dimond Trust Bank Ltd* (Misc. Commercial Application 58 of 2019) [2020] TZHCComD 2009 (9 July 2020) to buttress his argument that the only requirements under Order XXV Rule 1 of the CPC are the respondent being a foreigner and not having sufficient immovable property. He also cited the case of *Dow Agrosience Export S.A.S versus I.S & M (Metals) Limited*, Commercial Case No.55 of 2007, which established the rule that: "Once the Court is satisfied that security for costs should be given, it would consider various factors in determining the quantum, including 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." Mr. Mkumbukwa, learned Advocate, submitted that the legal basis for claiming the amount of USD 556,494.62 is the 9th Schedule to the Advocates 6 Remuneration Order, GN.No.263 of 2015 whereby the amount claimed as security for costs represents 3% of the value of the subject matter claimed in the main case. He submitted that as the application has met all statutory requirements, it be granted with costs. Mr. Malimi, learned Advocate, proceeded to submit in response to the application for security for costs. He argued that Order XXV Rule 1 of the CPC uses the word "may" which signifies discretion in granting an order for security for costs. He relied on section 53 of the Interpretation of Laws Act and the case of *UAP Insurance Tanzania Limited versus Noble Motors Limited*, Civil Application No.260 of 2016 by the Court of Appeal of Tanzania. Mr. Seni Malimi, learned Advocate for the Respondent argued that judicial discretion must be exercised judicially and not arbitrarily or capriciously. He referred the Court to the case of *MZA RTC Trading Company Limited versus Export Trading Company Limited*, Civil Application No.12/2015 decided by the Court of Appeal. He urged this Court in the exercise of its discretion to evaluate all circumstances of the case as set out in the pleadings in Commercial Case No. 130/2023 and the Ruling in Misc. Commercial Application No. 164/2023. The learned counsel for the Respondent submitted his view that the circumstances of the present case do not warrant imposition of the order of security for costs. Mr. Malimi, learned Advocate, submitted that the Applicant is also a foreign company based in Dubai, the UAE and that what has brought both parties to Tanzania is the execution of the supply contract between them which was executed abroad but substantially performed in Dar es Salaam port, Tanzania. He argued that, in the circumstances, both the applicant and the Respondent are not direct beneficiaries of Order XXV Rule 1 of the CPC which is intended to protect residents of Tanzania. He argued that as both parties are foreigners no party is disadvantaged in enforcement of any order of the Court including the order of costs. Mr. Malimi, learned Advocate submitted that in Misc. Commercial Application No. 164/2024, at pages 52,53,54 and 55 thereof, the Court found that the supply contract is fully secured by irrevocable and confirmed letter of credit to which more than USD 15 Million has been deposited for the last consignment. He argued that the Applicant and other defendants in the main suit have the money paid for the consignment hence it is not fair to demand more money from the

Respondent as security for costs. He also submitted that there are series allegations of fraud in against the Applicant and the 8 other defendants in Commercial Case No. 130/2023 hence making a prima facie case in that case. Hence, he submitted that security for costs is not necessary in the circumstances of the case. On the quantum of costs, Mr. Seni Malimi, learned Advocate, submitted that the 3% claimed is not fair in the circumstances of the case. He submitted that though the amount of the claim is higher in the main case, the entire case is based on declaratory orders. He said that the amount of costs is also discretionary and is imposed by the Taxing Officer. He argued that the purpose of taxation of costs is to reimburse the successful party and not to punish the loser or enrich the successful party. He relied on Wambura Chacha versus Samson Chorwa, (1973) LRT 4 for this. Mr. Malimi submitted that the Applicant has failed to substantiate the costs already incurred in the main case neither the likely future costs. He relied on Silvanus B. Mlola versus Ruth Twissa and 6 Others, Misc. Civil Application No.543 of 2017, decided by the High Court where 5 cumulative conditions were stated for one to be entitled to the order of security for costs. These are that the Plaintiff being resident outside Tanzania; his not possessing sufficient immovable property in Tanzania other than the property in dispute; the application coming from the Court itself or 9 from the Defendant; Payment being made by plaintiff within the time fixed by Court and giving security for all costs incurred and likely to be incurred by the defendant. He cited the case of Maasai Wanderings and 2 Others versus Viorica Ilia and 2 Others, Misc. Civil Application No. 19 of 2021 decided by the High Court. He submitted that in that case the Court held that the amount of costs awarded is the discretion of the Court which will fix such sums as it thinks fit, having regard to all circumstances of the case. He argued that it is not always the practice to order security on a full indemnity basis and that the purpose of security for costs order is just to protect the Defendant from being dragged into a case which he is not able to recover his costs. He argued, relying on the foregoing decision, that the aim of security for costs is not to stifle the claims by the Respondent nor counter claim. He argued that the Applicant has not brought any skeleton Bill of costs to show how he arrived at the claimed amount of costs. Mr. Malimi prayed for dismissal of the application with costs. Mr. Mkumbukwa made rejoinder submissions where he reiterated his submissions in chief and added in particular that residence of the defendant has never been a criterion for the grant of order of security for costs. He also argued that the alleged triable issues disclosing fraud are matters in contention in the main suit and statement by Advocate from the bar is not evidence. He distinguished the case of Silvanus Mlola (supra) in that the respondent therein was found to be resident of Tanzania. The law on the order of security for costs is straight and settled under Order XXV Rule 1 of the Civil Procedure Code. The provision of Order XXV Rule 1 of the Civil Procedure Code, [Cap 33 R.E 2019] reads; "...Where, at any stage of a suit, it appears to the Court that a sole plaintiff, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of Tanzania, and that such plaintiff does not possess any sufficient immovable property within Tanzania other than the property in suit, the Court may...order the plaintiff...within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant..." As correctly argued by Mr.

Mkumbukwa, learned counsel for the Applicant, under Order XXV Rule 1 of the CPC, there are only two cumulative 11 conditions before the Court may order deposit of security for cost; these are:

- (i) that the plaintiff is residing outside Tanzania; (ii) that the Plaintiff possesses no sufficient immovable property within Tanzania, other than the property in dispute. The 5 ingredients stated by Mr. Seni Malimi, in his submissions with reference to the case of Silvanus Mlola (supra) are merely extensions and illustrations of the two statutorily prescribed requirements. The Respondent has not disputed being resident of Burundi. Also, the Respondent has not disputed the fact that it has no sufficient immovable properties in Tanzania. The Respondent has argued that though it doesn't possess immovable properties in Tanzania, it has a hospitality agreement with the Lake Oil, the 4th Defendant in Commercial Case No. 130/2023 and that it performs its activities largely in Tanzania. In other words, the Respondent was trying to advance an argument that it possesses some other type of property in terms of good will in Tanzania. I asked myself whether Order XXV Rule 1 of the Civil Procedure Code allows any other type of property other than possession of immovable property, for a foreign plaintiff to be excused from an order to deposit security for costs? My answer is in the negative. In the case of *Prismo Universal Italians s.r.l vs 12 Termcotank (T) Ltd* (Commercial Case No. 42 of 2004) [2007] TZHCComD 32 (3 August 2007), at page 2, this Court held that: "...construction equipment's, however heavy and/ or costly they may be, do not constitute "immovable property" within the legal meaning of the words ...the lack of possession of immovable property within Tanzania would work to its disadvantage, in so far as applications of a similar nature are concerned..." The above case is an authority for the legal position that under Order XXV Rule 1 of the Civil Procedure Code, the only properties which are acceptable so as to excuse a foreign plaintiff from the order of security for costs are immovable properties in Tanzania. Therefore, the argument by Mr. Malimi, learned Advocate for the Respondent that the Respondent has a hospitality contract with the 4th Defendant in Commercial Case No. 130/2023 or that the Respondent is easily available, does not hold water in law. I find that the Respondent herein as the Plaintiff in the Commercial Case No. 130/2023 is liable to pay security for costs. I stand by the rule in the case of *Maasai Wanderings and 2 Others versus Viorica Ilia and 2 Others*, Misc. Civil Application No. 19 of 2021 decided by the High Court that the 13 purpose of security for costs order is to protect the Defendant from being dragged into a case in which he is not able to recover his costs. In that regard, as the Plaintiff is a foreigner and as the Plaintiff owns no immovable properties in Tanzania, the Applicant herein who is the Defendant in Commercial Case No. 130/2023, deserves to be secured in respect of possible costs in that case. The Respondent's argument that the supply contract in the main suit is fully secured by irrevocable and confirmed letter of credit to which more than USD 15 Million has been deposited for the last consignment, is misplaced. The letter of credit secures the contractual sum in respect of the consignment of fuel which is allegedly worth USD 18,549,820.77 as of 1st November 2023 in this case. Security for costs on the other hand secures the likely costs of the suit the Defendant may incur in defending it. While the letter of credit is a contractual

arrangement between the parties, the order for depositing security for costs is a Court order. The two serve different purposes and have different legal basis. On the quantum of costs, the parties are again at loggerheads over it. The Respondent's learned counsel has argued that the value of the subject matter in the Commercial Case No. 130/2023 is uncertain as only an issue of 14 general damages remains undetermined and that the subject matter in dispute, namely the fuel cargo has already been determined in the Misc. Commercial Application No. 164/2023. The Applicant has disputed this. The Applicant's counsel has urged the Court to assess the costs on the basis of 3% of the value of the subject matter in dispute in line with the Advocates Remuneration Order, 2015. In determining whether or not to grant the order of security for costs and of quantum of costs, the Court has discretion. In the case of Zulfikar Haiderali Njessa and Another vs Dimond Trust Bank T. Ltd (Misc. Commercial Application 58 of 2019) [2020] TZHCComD 2009 (9 July 2020), at page 10, where the Court held that; "...the Court's discretion bestowed upon by Order XXV Rules 1 and 2 of the CPC, should be exercised mindful of acting judiciously and in accordance to the rules of reason and justice and not in accordance to private opinion or arbitrarily..." In the case at hand, I have taken into account the facts that already the Applicant as the Defendant in Commercial Case No. 130/2023 has filed pleadings and entered appearances therein. Also, the amount involved in 15 that case is colossal United States Dollars 18,549,820.77 which is the estimation of over Tanzanian Shillings is Tshs.46,374,551,925/=. The case in my view, inevitably, involves a complex contractual dispute based on a contract executed outside Tanzania by parties who are not Tanzanian but performed in Tanzania for a product intended to be consumed outside Tanzania, in Burundi. That is complex dispute and the order of costs should reflect that. Mr. Seni Malimi, learned counsel for the Respondent argued that the issue relating to the subject matter in the suit has already been determined and that there remain a few issues only relating to general damages. This has been disputed by Mr. Mkumbukwa, learned Advocate for the Applicant. At any rate, this application cannot conclusively determine that issue as it belongs to the main case and which is before another Judge. I cannot determine that issue. While I see the need for the Respondent to deposit security for costs before his Commercial Case No. 130/2023 can proceed, I am also mindful that the Plaintiff has a constitutional right to be heard. Regardless his being a foreign national not resident in Tanzania, and regardless of not having immovable properties in Tanzania, his access to Court to remedy what he considers to be his rights should not be made unduly difficult or curtailed. I 16 understand also that when the Commercial Case No. 130/2023 is ultimately finalized, the party entitled to costs will present its Bill of Costs where the correct amount will be assessed. In my Ruling, I do not attempt to impose an order for costs on indemnity basis as there is no material to help the Court now to embark on that exercise. In the exercise of my discretion, therefore, I find that USD 20,000.00 (Twenty Thousand United States Dollars) or its equivalent in Tanzanian Shillings as per the prevailing exchange rates of the date of this Order, is a reasonable amount for the respondent to deposit in Court as security for costs in Commercial Case No. 130/2023. As parties are still engaged in proceedings in the main case, I exercise my discretion to order no costs in this application for security for costs. In the end, I grant the application and make the following orders:

- (a) I do hereby issue an order compelling the Respondent to deposit in Court security for costs amounting to USD 20,000.00 (United States Dollars Twenty Thousand only) or its equivalent in Tanzanian Shillings as per the prevailing exchange rates of the date of this Order in respect of Commercial Case No. 130 of 2023 between the parties herein. 17
- (b) The Respondent shall deposit the costs in (a) above within 14 days from the date of this Ruling.
- (c) Each party to bear its own costs in this application. JUDGE 13/06/2024 Ruling is delivered in Court this 13th day of June 2024 in the presence of Mr. Samson Lukumay, learned Advocate for the Applicant and Mr. Ibrahim Kibanda, learned Advocate for the Respondent. JUDGE 13/06/2024 18

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