



**Avenews Kenya Limited v Eastmeat Supplies Limited; Quickmart
Limited (Interested Party) (Commercial Case E473 of 2023)
[2024] KEHC 12964 (KLR) (Commercial and Tax) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12964 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E473 OF 2023
JWW MONG'ARE, J
OCTOBER 25, 2024**

BETWEEN

AVENEWS KENYA LIMITED PLAINTIFF

AND

EASTMEAT SUPPLIES LIMITED DEFENDANT

AND

QUICKMART LIMITED INTERESTED PARTY

RULING

Introduction and Background

1. What is before the court for determination is the Notice of Motion dated 22nd April 2024 filed by the Defendant under the provisions of Order 26 Rule 1, 4 and 5 and Order 51 Rule 1 and 3 of the *Civil Procedure Rules, 2010* and section 3A of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) principally seeking that the Plaintiff be ordered to deposit in Court a sum of Kshs 5,000,000.00/= or such security as is sufficient within 30 days from the making of the order to cover the cost of the Defendant in the suit and that the court dismisses the suit upon failure of the Plaintiff to deposit such security with the court within the time limits set out above or within such other time as the Court may determine.
2. The application is supported by grounds set out on its face together with the supporting affidavit sworn on 22nd April 2024 by the Defendant's director, Cleophas Mwanzia Mulevu. The Plaintiff opposes the application through the Grounds of Opposition dated 14th June 2024. In addition to its pleadings, the Plaintiff has also filed written submissions which I have considered and will make relevant references to in my analysis and determination later on.



The Application

3. The Defendant contends that the Plaintiff has instituted this suit seeking inter alia, an order compelling the Defendant to pay to it sum of Kshs 34,904,715.00/=. That the Plaintiff is wholly owned by Avenews GT Holding (PTY) Limited based in South Africa and that the Plaintiff has closed down its Kenyan office for failure to secure a license to trade from the Central Bank of Kenya. The Defendant claims that the Plaintiff has no known immovable or movable asset in Kenya and that its suit is misconceived with no prospects of success frivolous since it is maliciously instituted. The Defendant avers that it has filed a bonafide defence dated 20th February 2024 and that it is likely to suffer loss arising from costs of the defense of this suit when the Plaintiff's claim fails at the trial. As such, the Defendant states that this application is brought in good faith and in honest pursuit of justice it will only be fair if the same is allowed and that if the court does not guarantee costs of the suit, the Defendant will be burdened to suffer from the costs incurred in defense and render its imminent victory over the Plaintiff's frivolous and misconceived suit hollow.

The Plaintiff's Response

4. The Plaintiff states that on a perfunctory perusal of the application, the Defendant does not disclose a prima facie arguable case for the reason that the grounds on which the application is premised are too general and vague. That further and without prejudice to the forgoing, the Plaintiff bears the onus of proving the inability or lack of good faith of the Plaintiff that would make the order for security reasonable which remains to be unproved by the supporting affidavit and the grounds on the face of application. The Plaintiff avers that the Defendant has not discharged the legal burden of proof by providing evidence to show that if the judgment is entered against the Plaintiff, which is highly unlikely, the costs of litigation will not be easily borne by the Plaintiff and thus is putting the cart before the horse.
5. The Plaintiff claims that the Defendant is aware that the Plaintiff's residence and domicile is in Kenya within the jurisdiction of the Court and that the Plaintiff would be forthcoming whenever called upon to pay costs from the resultant litigation. That the Defendant has impeccably failed to demonstrate how it arose at its advocates legal fees of Kshs 5,000,000.00/= and that the same would be failed to be met by the Plaintiff who is not a pauper litigant.
6. The Plaintiff reiterates that the application is a gross abuse of the court process, frivolous, ex-facie incompetent and fatally defective and that it is brought in bad faith and is merely meant to frustrate, delay and/or disrupt the ongoing litigation. That the arguments intended to be advanced in the application are untenable and that Plaintiff invites the Court to dismiss the application with costs to the Plaintiff.

Analysis and Determination

7. I have carefully considered the application, the response and submissions of the Plaintiff. I note that the issue for the court's determination is "whether the Court should grant an order for security for costs of Kshs 5,000,000.00/= or any sum that the Court deems fit". The Defendant's application is brought inter alia under Order 26 rule 1 of the Civil Procedure Rules which provides that "In any suit the Court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party." I am in agreement with the Plaintiff's submission that the wordings of this Rule connote an element of discretion by the court in granting an order for security for costs. I am in further agreement that authoritative guidance on the principles that should assist this court when considering an application by a defendant or respondent for security for costs



was given by the Supreme Court in *Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others* [2023] KESC 11 (KLR) as follows:

63.Thus, in determining whether it is appropriate to make an order that a party gives security for costs, the court may have regard to the following matters and such other matters as it considers relevant in the peculiar circumstances of each case: –
- i. the prospects of success or merits of the proceedings,
 - ii. the genuineness of the proceedings
 - iii. the impecuniosity of the plaintiff
 - iv. whether the plaintiff's impecuniosity is attributable to the defendant's conduct
 - v. whether the plaintiff is effectively in the position of a defendant
 - vi. whether an order for security for costs would stifle the proceedings and/or impede access to justice
 - vii. whether the proceedings involve a matter of public importance
 - viii. whether there has been an admission or payment in court
 - ix. whether delay by the plaintiff in commencing the proceedings has prejudiced the defendant
 - x. the costs of the proceedings
 - xi. whether the security sought is proportionate to the importance and complexity of the subject matter in dispute
 - xii. the timing of the application for security for costs
 - xiii. whether an order for costs made against the plaintiff would be enforceable within the republic of Kenya
 - xiv. the ease and convenience or otherwise of enforcing a Kenyan court judgment or order in the country of a non-resident plaintiff or appellant
 - xv. if the plaintiff is a natural person, an order for security for costs cannot be made merely on account of his or her impecuniosity.
 - xvi. security for costs is to be given in such manner, at such time and on such terms (if any) as the court may by order direct
 - xvii. if the plaintiff fails to comply with an order under this rule, the court may order that the proceeding on the plaintiff's claim for relief in the proceedings be dismissed.
 - xviii. the provisions of any Act under which the court may require security for costs to be given such as the *Elections Act*



- xix. a second motion for security for costs will not succeed unless there is an unforeseen and material change in circumstances since the first order for security. An example of an unforeseen and material change in circumstances might be where a plaintiff has come into a sum of money sufficiently large that they could no longer make an impecuniosity argument.
- xx. the defendant seeking increased security bears the onus of demonstrating a significant gap between the security ordered and the actual expenses which were not foreseeable and that in hindsight the original request for security for costs was based on an assessment of the complexity of the case which hindsight has established was not realistic.
- xxi. the jurisdiction to increase or decrease the amount of security already ordered should not be exercised lightly or be used to second guess the court that made the original order, whether on consent or otherwise, unless the gap between what was ordered and what later appears to be necessary is significant.

64. We agree with the jurisprudence from other jurisdictions that a court ought to take into consideration several factors before making an order for security for costs. [My emphasis]

8. From the above, in as much as the apex court provided guidance on what ought to be considered in application for security of costs, it was also clear that the aforementioned list was not exhaustive and this court can still consider “... such other matters as it considers relevant”. As stated, the Defendant’s position is that the Plaintiff has no known immovable or movable assets in Kenya and that its suit has no prospects of success. I note that in its defence, the Defendant admits the Plaintiff’s averment that it is a Kenyan technology company in the agri-business sector whereby it provides assistance to agribusiness such as small-scale farmers, stockists and suppliers/distributors in money management tools, access to financial lending and much more. The Plaintiff has denied that it is in financial distress or that it is unable to pay the Defendant’s costs should it be ordered to do so. I agree with the Plaintiff’s submission that it is the applicant who is to demonstrate that the respondent is unable to pay but that the Defendant herein has not demonstrated this in respect of the Plaintiff. I am also not persuaded that a company offering such services as stated above is unable to pay such costs as ordered by the court unless contrary evidence is presented, which has not been done.
9. In any event, my wholistic finding is that there is nothing to demonstrate that the Plaintiff will be unable to pay costs to the Defendant if ordered to do so. I am unable to find that the Plaintiff is impecunious so as not to satisfy a money decree from the court. I am also inclined to agree with the Plaintiff that the Defendant have taken close to 7 months from the time it entered appearance to file the present application in as much as it had filed other pleadings in this case before the present application. As such, this application appears to be an afterthought. Kasango J., in *Shakhalaga Khwa Jirongo & Sololo Outlets v Board of Trustees of National Social Security Fund* [2005] KEHC 910 (KLR) held that an application for security of costs should be brought very soon after the suit is filed and that if brought later, there ought to be sufficient explanation for the delay. No such explanation has been given by the Defendant as to why it participated in defending the Plaintiff’s application for an injunction and why it never raised the issue that the Plaintiff was unable to pay costs then.



10. In the foregoing and having analyzed positions of the parties and circumstances of this case, my impression out of the above analysis is that there is no reasonable cause why the court should exercise its discretion in favour of the Defendant and I find no justifiable reasons why it should call up for any security for costs from the Plaintiff at this stage as such an order, especially for the sum sought by the Defendants which I find unreasonable and unjustified, would stifle the proceedings and completely lock out the Plaintiff out of the doors of justice.

Conclusion and Disposition

11. In the upshot, I find no merit in the Defendant's application and hereby dismiss the same in its entirety. Costs are in the cause. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF OCTOBER 2024

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J.W.W. MONG'ARE

JUDGE

In the presence of:-

1. Mrs. Mwaniki holding brief for Ms. Ouma for the Plaintiff/Respondent.
2. Mr. Ekisa for the Defendant/Applicant.
3. Ms. Kioge holding brief for Ms. Kayugira for the Interested Party.
4. Godfrey - Court Assistant

