



**Cape Suppliers Limited v Sinohydro Corporation Limited (Civil Case 848 of 2010)  
[2023] KEHC 2666 (KLR) (Commercial and Tax) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 2666 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 848 OF 2010  
DAS MAJANJA, J  
FEBRUARY 24, 2023**

**BETWEEN**

**CAPE SUPPLIERS LIMITED ..... PLAINTIFF**

**AND**

**SINOHYDRO CORPORATION LIMITED ..... DEFENDANT**

**RULING**

1. On June 22, 2022, the court dismissed this suit for want of prosecution. On September 29, 2022, the plaintiff filed an application seeking to reinstate it, which application was conditionally granted on December 21, 2022 to the effect that the plaintiff was directed to deposit within 30 days, the sum of Kshs 9,474,982.00 into a joint interest earning account held between the parties' advocates at the time, failure to which, the suit stood dismissed ("the Order").
2. The plaintiff has now filed the notice of motion dated January 16, 2023 seeking to vary the order by allowing it to deposit, in court, a bank guarantee issued in favor of the defendant for the sum of Kshs 8,068,569.00 in place of cash. The application is supported by the grounds on its face and the supporting affidavit by Kinaro Kibanya, the Plaintiff's director sworn on January 16, 2022. It is opposed by the Defendant through the replying affidavit sworn by its director, Xia Anquan, on January 30, 2023.
3. The Plaintiff avers that it is incapable of providing security in financial form as ordered by the court as its business has been affected by a myriad of factors brought on by, *inter alia*, the Covid-19 pandemic. It therefore prays that the Court do alter/vary the Order and in its place, accept a bank guarantee in favour of the Defendant from its bankers, Equity Bank of Kenya Limited ("Equity Bank") for Kshs 8,068,569.00 as security in addition to the Kshs 1,406,413.00 previously deposited in a joint interest earning account at Bank of Africa, Account No 011XXXX02 (Waweru Gatonye & J Gachie Advocates).



4. The Plaintiff contends that should the suit stand dismissed for non-compliance with Order, it would be unfairly locked out from the seat of justice with the Defendant unjustly benefiting from the funds already deposited in the joint account. It submits that the Defendant will not suffer any prejudice should the orders sought be granted. That it is in the interests of justice and fairness to grant the orders in order to avert a miscarriage of justice which would result if the suit is dismissed without affording it an opportunity to be heard.
5. The Defendant opposes the application on the ground that the Plaintiff has not made out a proper basis or grounds to warrant the review of the Order and that the application is an abuse of the court process. It points out that while the Plaintiff prays that the court exercises its equitable discretion in its favour, it has engaged in wanton disobedience of the court orders issued on May 14, 2014 which had in fact granted it a conditional order to defend the suit. It submits that the Plaintiff has not even attempted to comply with the order to deposit the account.
6. The Defendant states that Plaintiff's proposal for issuance of a bank guarantee is not supported by cogent evidence. It further states that the Plaintiff has deliberately concealed the statements for the account it holds at Equity Bank which has supposedly issued the guarantee. It contends that Equity Bank would only issue such a guarantee for such amount on a liquid or active account and that furthermore, the validity of the guarantee is restricted to 30 days from delivery of judgment by the court. The Defendant adds that the said guarantee is problematic to the extent that if the Defendant is unable to make a demand under the guarantee within 30 days of a judgment of the court, the said guarantee shall lapse and thus the Defendant would not be able to benefit under the same guarantee.
7. I have considered arguments made by the parties in respect of the application seeking to vary the order of December 21, 2022 by having the court direct that the Plaintiff issue a bank guarantee in place of cash in performance of the pre-condition necessary for the suit to be reinstated. Essentially, the Plaintiff is seeking an order for review, which is grounded under section 80 of the *Civil Procedure Act* (Chapter 80 of the Laws of Kenya). I am of the view that the court has wide discretion to review its orders for the reasons therein including for any sufficient cause. Such orders are discretionary in nature and the court has power to issue such directions as it deems fit based on the application before it.
8. The Plaintiff has argued that due to various adverse economic factors, it is unable to satisfy the order of the court in cash form. The Plaintiff has attached various termination letters of its contracts with third parties and also attached a Statement of Account from one of its bankers which indicates that it has a debit balance. Whereas the Defendant has argued that these contracts with third parties were terminated way before the Covid-19 pandemic and that the Plaintiff has not issued its Statement of Account from Equity Bank, which the Defendant contends is liquid, it should not be lost that security for the due performance of a decree or order does not have to be in the form of cash for it to be deemed as adequate.
9. In *Gitabi and another v Warugongo* NRB CA Civil Appl No 3 of 1988 [1988] eKLR the Court of Appeal accepted the following view taken by Parker, LJ, in *Rosengren v Safe Deposit Centres Ltd* (1984) E ALL ER 198 that:

The process of giving security in one which arises constantly ... So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way which is the least disadvantageous to the party giving that security. It may take many forms. Bank guarantee and payment into court are but two of them... so long as it is adequate, then the form of it is a matter which is immaterial.



10. In this case, I hold that what is important is that the alternative security offered must be adequate and binding and that a bank guarantee is as good as depositing money. Once a reputable bank has bound itself to pay a particular amount if called to then it has to do so then this would suffice as security (See *Lochab Brothers Ltd v Lilian Mumbi Nganga & 2 others* ELD HCCA No 114 of 2006 [2007] eKLR and *Khalsa Schools & 2 others v Samuel Odhiambo Otieno* NRB ELRC Misc Application No E042 of 2020 [2021] eKLR).
11. The Plaintiff has attached a guarantee from Equity Bank dated January 16, 2023 which is binding upon the Bank and the Defendant and is adequate security of the deposit ordered by the court. As regards the issue that the suit stands dismissed since the time for compliance of the orders lapsed on January 22, 2023, I note from the record that Mabeya, J granted an order on January 17, 2023 directing that the suit was to remain alive pending further orders of the court. Therefore, the suit does not stand dismissed as contended by the Defendant. In any case where the court has power to extend time, the court has general power under section 59 of the *Interpretation and General Provisions Act* (Chapter 2 of the Laws of Kenya) to so even after the time for doing the act has lapsed.
12. In sum, I find that a bank guarantee from a reputable bank is adequate security in lieu of the case deposit already ordered. The application dated January 16, 2023 is therefore allowed on the following terms:
  - a. The order of this court dated December 21, 2022 is varied on terms that the Plaintiff shall provide an irrevocable guarantee from Equity Bank Kenya Limited for the sum of Kshs 9,474,982.00 in favour of the defendant which is valid for the pendency of this suit and subject to any court order.
  - b. The guarantee shall be provided within 7 days and in default of compliance with the aforesaid order and should the Guarantee so issued lapse for any reason, the suit shall stand dismissed with costs.
  - c. The plaintiff shall bear the costs of this application assessed at Kshs 30,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**DS MAJANJA**

**JUDGE**

**Court Assistant: Mr M. Onyango**

**Ms Kiiru instructed by Omusolo Mungai and Company Advocates for the Plaintiff.**

**Mr Wanga instructed by Waweru Gatonye and Company Advocates for Defendant.**

