



REPUBLIC OF KENYA



**Gohil v Fatania & 7 others (Insolvency Cause 14 of 2018)
[2023] KEHC 21769 (KLR) (Commercial and Tax) (28 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21769 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE 14 OF 2018
JWW MONG'ARE, J
AUGUST 28, 2023
IN THE MATTER OF THE INSOLVENCY ACT
IN THE MATTER OF TREGO APARTMENTS LIMITED**

BETWEEN

VIJAY KUMAR DAVALJI K GOHIL PETITIONER

AND

SURESH MOHANLAL FATANIA 1ST DEFENDANT

SHANTILAL KARSANDAS VARIA 2ND DEFENDANT

SUNILKUMAR POPATLAL DAVDA 3RD DEFENDANT

CHUNILAL SHANTILAL KHIMASIA 4TH DEFENDANT

AMEET DIPAK BHATTESSA 5TH DEFENDANT

JAYANTILAL JETHA HARJI PARMAR 6TH DEFENDANT

JAYANTILAL K. HARIA 7TH DEFENDANT

MAHENDRA K. PATHAK 8TH DEFENDANT

RULING

1. Before the court is a Notice of Motion application dated August 31, 2021 filed jointly by the Defendants. It was brought inter alia under Order 26 Rule 1, 5 and 6 of the [Civil Procedure Rules](#).
2. The Defendants sought an order to direct the Petitioner to furnish the sum of Kshs 10,000,000/- or any other amount the court deems fit within 30 days of the Order of the court as security of costs and



- an order to have this suit and all other suits filed by the Petitioner dismissed if he fails to furnish the security within the specified time.
3. The grounds of the application were that the Petitioner had kept the Defendants in court for over 15 years and had filed numerous suits against them draining them financially and the Defendants are apprehensive that they will not be able to recover their costs in the suit.
 4. The Defendants averred that they have properties registered in their names whereby execution can be carried out against however there is no known property registered to the Petitioner as his property is still registered in the company's name which is owned by the Defendants and they cannot execute against themselves. That the Petitioner has deliberately refused to register a lease for his portion of the property in order to defeat the ends of justice.
 5. The Defendants are apprehensive that in the event that they are successful, they will lose out due to lack of security of their costs by the Petitioner thus it would be in the interest of justice to have the court order that security of costs be allowed on a full indemnity basis as it is not fair for the Defendants to suffer through endless suits filed by the Petitioner.
 6. The Petitioner opposed the instant application through a preliminary objection dated September 17, 2021 and a replying affidavit sworn on the same date.
 7. In the replying affidavit, the Petitioner averred that this court does not have the jurisdiction to delve into matters that are pending before other forums. That the instant application is defeated by the defendants' assertion that the Petitioner is a 50% shareholder in the company. And that the Applicants were previously ordered to pay the Petitioner costs taxed at Kshs 84,970/- in HCCC No. 64 of 2006 which they have been unable to pay the same.
 8. Further the petitioner argued that an order to have the Petitioner provide security for costs to members of the same company is legally untenable.
 9. The issue for consideration is "whether the court ought to grant an order for security of costs," Order 26 Rule 1 of the Civil Procedure Rules states:-

"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."
 10. Similarly, the Court of Appeal in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR held as follows:-

"In an application for security for costs, the Applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proven."
 11. In this case, the Defendants claim that the Petitioner has no known assets that could be used to settle the costs of this suit and the other suits instituted by the Petitioner on the same subject matter. The Defendants have however failed to establish that the Petitioner would be unable to settle the costs due to poverty as set out under the *Gatirau Peter Munya Case*(supra). On the contrary, the record indicates and the Applicants have reiterated in their pleadings herein that the Petitioner owns half of the company's assets. To my mind, this therefore means that the petitioner being a 50% shareholder of the Company herein, in the event he is required to pay costs, the said shares can be utilized to pay the said costs or any other expenses that the court may order against him.



12. Further I note that the court is being invited to make decision or get involved in matter not before it and whose jurisdictions vests in other courts or tribunal. In my view, it is improper for the parties herein to invite the court to make orders in matters not before it as it lack the requisite power or jurisdiction to delve into matters pending before other forums nor can it make orders for security of costs or for their dismissal. The application for costs must be made in each matter and evidence tendered for each respective court or tribunal to determine if it is necessary to do so. In the matter before this court, the court is satisfied that the petitioner shall be in a position to utilize his shareholding in the company to pay on costs if ordered to do so by this court and finds no valid reason to order for costs at this stage of the matter.
13. The upshot is that the instant application lacks merit and is dismissed in its entirety. Each party shall meet their costs to this application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF AUGUST 2023.

.....

J. W. W. MONG'ARE
JUDGE

In the Presence of:-

Mr. Wachira holding brief for Mr. Kingara for the Petitioner.

Ms. Koki for the 2nd & 3rd Applicants/Defendants.

Mr. Okeyo for 4th Applicant/Defendant.

Lucy - Court Assistant

