



REPUBLIC OF KENYA



Rotam Agrochemicals Company Limited v Twiga Chemical Industries Limited (Civil Case 553 of 2011) [2022] KEHC 255 (KLR) (Commercial and Tax) (31 March 2022) (Ruling)

Neutral citation: [2022] KEHC 255 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 553 OF 2011
DAS MAJANJA, J
MARCH 31, 2022**

BETWEEN

ROTAM AGROCHEMICALS COMPANY LIMITED PLAINTIFF

AND

TWIGA CHEMICAL INDUSTRIES LIMITED DEFENDANT

RULING

1. The application for consideration by the court in this ruling is the Defendant's application dated 11th June 2021 seeking security for costs from the Plaintiff in the sum of KES. 10,000,000 and consequential orders dismissing the suit in the event the order is not complied with. The application is made under Order 26 Rule 1 of the 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."
2. The application is supported by the affidavit of the Defendant's director, Anantharaman Ramamurthy, sworn on 11th June 2021. It is opposed by the Plaintiff through the replying affidavit of Michael Mungai Macharia, the Regional Manager of Rotam Subsaharan Africa Limited, the Plaintiff's local agent and associated company, sworn on 10th November 2021. The application was disposed of by written submissions.
3. The Defendant's case is that the Plaintiff is a limited liability company incorporated in Hong Kong, China. Its claim against the Plaintiff is for USD 597,600 together with interest at the rate of 18% p.a. The Defendant points out that in opposition to the Motion, Michael Mungai Macharia alleges that he is the Regional Manager of "Rotam Subsaharan Africa Limited, the Plaintiff's local agent and associated company" yet he has not demonstrated how Rotam Subsaharan Africa Limited is associated with the Plaintiff and neither has he provided authority from the Plaintiff authorizing him to swear the



- affidavit on behalf of the Plaintiff. It submits that in the absence of such crucial evidence, it is evident that Rotam Subsaharan Africa Limited is not the Plaintiff and cannot purport to make averments on behalf of the Plaintiff. It therefore urges that in effect, the Plaintiff has not opposed the Motion.
4. On the substance of the application, the Defendant submits that the Plaintiff has admitted that it is incorporated in Hong Kong and has not produced any evidence to show that as a foreign company, it has known assets in Kenya hence the Defendant is entitled to an order of security for costs. The Defendant states that the Plaintiff ought to have filed an affidavit of means which it has failed to do. It rejects the Plaintiff's attempt to rely on the alleged existence of an office of a purported agent of the Plaintiff known as Rotam East Africa Limited as no evidence has been adduced to prove that the alleged Rotam East Africa Limited is an agent of the Plaintiff. It further submits that even if Rotam East Africa Limited is an agent of the Plaintiff, it cannot be held liable for any judgment or order for costs as it is not party to the legal proceedings.
 5. While the Plaintiff concedes that the court has the discretion to order security for costs, it contends that the Defendant has not made out a case for such an order. It submits that the Defendant has not provided any proof that the Plaintiff is financially unsound, insolvent or would in any way be unable to settle costs if the same are awarded. The Plaintiff maintains that the Defendant must prove that the Plaintiff will be unable to pay the costs in the event that it is unsuccessful. The Plaintiff complains that the Defendant, besides asserting that the Plaintiff is a foreign registered company with no known assets, has not in any particular way demonstrated the Plaintiff's inability to pay costs.
 6. As regards the argument that the Defendant ought to provide security as it is a foreign registered company, the Plaintiff submits that this alone does not make it mandatory. It argues that in any case, the Plaintiff is a global conglomerate with presence in Kenya for over two and a half decades and it is unlikely it will close shop in order to defeat paying costs arising from such a case. It adds that whereas the Plaintiff is incorporated in Hong Kong, the sale and delivery, of the products that are subject to this action, were all done by Rotam East Africa Limited, the Plaintiff's local agent and associated company with offices in Nairobi and therefore with a fixed address known to the Defendant. In addition, it urges that the Plaintiff has fastidiously and diligently attended to this matter since its inception and has not shown any intention, express or by conduct, to waver on its duty to attend court and to comply with court orders. It maintains that there is nothing presented by the Defendant or any trait shown in the conduct of the Plaintiff that it can go to the extreme of closing shop for purposes of avoiding an order for costs against it.
 7. The Plaintiff also submits that the Defendant has brought the application in bad faith with the intention to diminish and frustrate its right of access to justice. It states that the application is motivated by malafides as it is filed 10 years after the filing of this suit. It contends that the delay is inordinate, unexplained and thus inexcusable and an abuse of the court process intended to delay disposal of the suit.
 8. Both parties cited several authorities to support their respective positions including *Shah and Others v Shah and Others* [1982]eKLR, *Alice Aloo Betty Were Thompson v Said Mohamed Said and Others* [2014]eKLR, *Anitha Karaturi and Another v CFC Stanbic Bank Limited and Others* [2021]eKLR, *Scotch Whisky Association and Others v Africa Spirits Ltd* [2020]eKLR and *Keystone Bank Ltd and Others v I & M Holdings Ltd and Another* [2017]eKLR. The common thread running through the decided cases is that the court has discretion to order security for costs. That discretion though, must be exercised judiciously taking into account a multiplicity of factors as illustrated by Gikonyo J., in



[26] Yet again, the law is settled in this area that an order for security for costs is a discretionary one. Order 26 rule 1 of the Civil Procedure Rules actually confers discretion on the court, which is recognition that there may be many cases where a call for security for costs may be refused. In fact, even where a company is insolvent, the court would still refuse to order security to be lodged if circumstances do not support any lodgment of security. The discretion is, however, to be exercised reasonably and judicially by taking absolute reference to the circumstances of each case. Such matters as; absence of known assets within the jurisdiction of court; absence of an office within the jurisdiction of court; insolvency or inability to pay costs; the general financial standing or wellness of the Plaintiff; the bona fides of the Plaintiff's claim; or any other relevant circumstance or conduct of the Plaintiff or the Defendant. And the list is not, and I do not pretend to make it exhaustive. In the latter category, conduct by the Plaintiff will include activities which may diminish the chances of or makes recovery of costs very difficult, for instance recent close or transfer of bank accounts, close or minimizing of operations, and disposal of assets. And the conduct of the Defendant includes, filing of application for security for costs as a way of oppressing or obstructing the Plaintiff's claim, for instance, where the defence is mere sham, or there is an admission by the Defendant of money owing except there is deliberate refusal or delay to pay money owing or refusal to perform its part of the bargain.

9. The Court of Appeal in *Mama Ngina Kenyatta and Another v Mahira Housing Company* CA Civil Application No. NAI 256 of 2003 [2005] eKLR cited with approval the decision in *Keary Developments v Tarmac Construction [1995] 3 All ER 534* which set out some pragmatic, though not exhaustive, factors which should guide the Court in exercising its discretion whether to order security for costs as follows:
- (a) The court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.
 - (b) The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without a more sufficient reason for not ordering security. It is implicit that a company may have difficulty meeting an order.
 - (c) The court must balance the injustice to the plaintiff prevented from pursuing a proper claim against the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover his costs. The power must neither be used for oppression by stifling a claim particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity, nor as a weapon for the impecunious company to put pressure on a more prosperous company.
 - (d) The court will look to the prospects of success, but not go into the merits in detail.
 - (e) In setting the amount it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount.
 - (f) Before refusing security the court must be satisfied that, in all the circumstances, the claim would be stifled. This might be inferred without direct evidence, but the court should also allow that external resources might be available.



- (g) The lateness of the application can properly be taken into account.
10. There is no dispute that the Plaintiff is a Hong Kong registered corporation without any assets in Kenya. Further, its interests in Kenya appear to be protected by Rotam East Africa Limited, which is a different company. The Plaintiff submits that the Defendant must be able to prove that it would be unable to pay the costs but in the face of such facts, would the Defendant be required to prove more? To require the Defendant to go further and delve into the matter in Hong Kong would impose an undue burden on it. While it is true that the Defendant must provide some evidence that the Plaintiff is not in a position to pay costs if ordered, the Plaintiff bears the evidential burden of showing that it has such assets or is in position to satisfy claim for costs against it as this is a matter peculiarly within its knowledge as required by section 112 of the *Evidence Act (Chapter 80 of the Laws of Kenya)* (see *National Industrial Credit Bank Ltd v Aquinas Wasike and Another [2006] eKLR*).
11. Although the lack of assets within jurisdiction is a major consideration in the exercise of discretion, I do not think it is a decisive consideration. As the cases I have quoted show, the duty of the court is to carefully balance the right to the Plaintiff to have its case heard without undue impediment and for the Defendant to be protected from an award of costs. In this regard and in refusing the Defendant's plea, I am influenced by two considerations. First, it has not been alleged or suggested that the Plaintiff's suit is entirely frivolous or lacks bona fides. Second and more importantly, this case has been on the court rolls for a period of more than a decade. The fact that the Plaintiff is a foreign corporation together with the accompanying incidents have been known to the Defendant since the suit was filed in 2011. I do not see why the Defendant waited for 11 years to mount a claim for security for costs after having incurred costs to defend the matter.
12. For the reasons I have stated, dismiss the Defendant's application dated 11th June 2021 with costs to the Plaintiff.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mungai instructed by Kinoti & Kibe Advocates for the Plaintiff.

Mr Ngatia instructed by Ngatia and Associates Advocates for the Defendant.

