REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 27 OF 2015

NSEJJERE SPORTS LLC.....PLAINTIFF/RESPONDENT

-VERSUS-

ALLAN KASAVULI.....1ST DEFENDANT/RESPONDENT

PATRICK NGAIRA.....2ND DEFENDANT/APPLICANT

GEORGE ALADWA.....3RD DEFENDANT/APPLICANT

ESTHER LUVEMBE.....4TH DEFENDANT/RESPONDENT

TIMOTHY LILUMBI.....5TH DEFENDANT/APPLICANT

(Sued in their capacity as officials of AFC Leopards Football Club)

AFC LEOPARDS FOOTBALL CLUB.....6TH DEFENDANT/ APPLICANT

RULING

1. The 2nd, 3rd ,5th and 6th defendants/applicants in this instance took out the Notice of Motion dated 28th January, 2019 and sought for an order that the plaintiff to deposit security for costs in a joint interest earning account between the applicants' and the plaintiff's advocate and any other orders necessary for the ends of justice.

2. The Motion is supported by the grounds presented on its face and the facts stated in the affidavit of advocate Sylvia Matasi.

3. To resist the Motion, Isaac Nsejjere Gayi Mayanja swore a replying affidavit on 3rd April, 2019 on behalf of the plaintiff/ respondent.

4. When the Motion came up for interparties hearing before the court, the parties were directed to file and exchange written submissions.

5. I have considered the grounds laid out on the face of the Motion, the facts deponed in the affidavits supporting and resisting the Motion, and the contending written submissions and authorities relied upon.

6. To give a brief background of the matter, upon my perusal of the record it shows that the plaintiff filed suit against the defendants by way of a plaint dated 20th January 2015 in which it sought, inter alia special damages in the total sum of USD 22,387,250 general damages for breach of contract as well as costs of the suit and interest.

7. The suit was premised on claims that that the respondent and officials of the 6th applicant/defendant, AFC Leopards Football Club, who are named as the 1st to 5th defendants, entered into an exclusive supplier agreement with the club (6th applicant/defendant) to the effect that the applicant would be the only company that would manufacture and supply the club with various sports apparel, accessories, equipment, and promotional materials for a period of seven years from the date of execution of the agreement, which was 7th July 2011.

8. The respondent averred that the applicants thereafter broke the terms of the contract by, among other things, refusing to accept items that had been created and transported to Kenya in response to an order placed by the 6th applicant/defendant, and by utilizing products made by the applicant's rival during the contract's duration.

9. Upon being served with summons, the applicants failed to enter appearance and file their statements of defence within the time limited by the law and interlocutory judgment was entered against them. They filed applications seeking to set aside the said judgment which applications were allowed vide a ruling delivered by this court on 31st July 2018. In that ruling, the defendants were directed to file and serve their respective statements of defence within 14 days of that date.

10. The court record shows that the 2nd, 3rd, 5th and 6th applicants filed their joint statement of defence on 2nd August 2018 while the 1st and 4th defendants/respondents filed theirs on 14th September 2018.

11. In the grounds supporting the motion, the applicants state that the respondent is a foreign company and in the event the case is dismissed with costs, the 2nd, 3rd, 5th and 6th applicants will not be able to recover its costs from the plaintiff.

12. The applicants aver that by depositing the security for costs shall not be prejudicial to the respondent but the applicants will suffer prejudice and may not recover their costs.

13. In its submissions, the applicants stated that respondent moreover claims a colossal sum of USD 22,387,250 from the applicants and in the event the suit is dismissed, the applicants will not recover the costs and that the court should ensure that the applicants do not remain exposed considering that the respondent is a foreign company with no registered office or assets in Kenya.

14. The applicants submitted that the United States of America is not a reciprocating state under the foreign judgments (Reciprocal Enforcement) Act Cap 43 Laws of Kenya in which case if the applicants succeed in defending the claim, they will be forced to institute proceedings in the US for recovery of costs. The applicants relied on the case of **Cosmos Holdings PLC v Dhajal Investments Limited (2012) eKLR**, the Court highlighted that where a party will be forced to file proceedings in a foreign court, the same will be unnecessarily expensive and time consuming.

> 15. The applicants submit that Order 26 Rule 6 of the Civil Procedure Rules, 2010 provides for the investment of security. That the said provision stipulates that where security by payment has been ordered, the Party ordered to pay may make payment to a bank or a reputable financial institution in the joint names of himself and the defendant, or in the names of their respective advocates when advocates are acting.

16. In reply, the respondent stated that it would be unfair and unjust for this Honourable Court to allow the applicants herein to benefit from their deliberate and or negligent acts by condemning the respondent to furnish security for costs.

17. The respondent has pointed out that the 1st and 4th had proposed an amount of Kshs.25,450,000/= as the amount to be furnished as the security for costs by the respondent, the said amount is unreasonable,unmerited,unfounded and manifestly excessive and as such the respondent will not be in a financial position to furnish the same if so ordered due to its unsatisfactory financial status that was substantially contributed by the negligence or deliberate conduct of the applicants.

18. The respondent contends that the applicant's are using this instant application for security of costs oppressively so as to unfairly and unjustly stifle the respondent's bona fide claim against them and escape liabilities in the agreement with impunity knowing very well that the respondent's unsatisfactory financial status was as a result of their deliberate and or negligent conduct.

19. The respondent avers that the mere fact that they are a foreign company does not automatically entitle the applicants to security for costs and that the applicants have not given any other reason to justify the grant of orders for security for costs other than the fact that the respondent is resident abroad.

20. The respondent further avers that the application is without merit and should be dismissed with costs to allow the respondents to pursue its claim to conclusion without having unnecessary and oppressive conditions thrown against it.

21. In considering an application for security for costs the court would consider whether the Plaintiff is a foreign resident and the nature of the defence offered (**Shah –vs- Shah [1982 KLR 95),** whether the claim is bona fide and not a sham, whether there is an admission of the claim by the Defendant, whether the application is being made to stifle a genuine claim, whether the Plaintiff's inability to pay has been brought about by the actions of the Defendant.

22. How do these circumstances apply in this case? It is not denied that the respondent is a company resident abroad, the respondent pleaded in the plaint that it is registered in the United States of America. It has been submitted on behalf of the applicants that the respondent does not have any assets in Kenya.

23. The applicants stated that since the respondent is a foreign entity incorporated under the Laws of United States of America, the applicants would be forced to pursue the respondent outside the jurisdiction of this Honourable court to recover its costs.

24. One issue that the court has agonized over is the averment that the financial position of the respondent is unknown and that if costs were to be ordered the applicants may be prejudiced as it may not recover the same. The respondent stated that it may not be in a financial position to furnish the same if so ordered by the court due to the unsatisfactory financial status that was substantially contributed by the conduct of the applicants.

25. The respondent stated that this application for costs has been used by the applicants so as to unfairly and unjustly stifle the applicant's bonafide claim against them and escape liabilities and further to that they contend that they should have instituted after the close of pleadings and no explanations has been offered by the applicants for the unreasonable delay.

26. I have looked at both the Plaint and the Defence of the applicants. I cannot say that the respondent's claim is a sham. I cannot also say that the Defence is frivolous. It has raised bona fide issues for trial. For example it has raised the issue of whether the applicants entered into an agreement with the respondent and whether the goods were delivered and whether the 6th applicant has capacity to be sued. The same is based on a genuine and bona fide fear of inability to recover costs by the applicants in the event the applicant's suit fails.

27. Turning now to the issue of costs, the amount of Kshs.25,450,000/= had been proposed as security. Whilst it is the court to determine the amount of security, a basis for such an amount must be laid by the applicants. An applicant cannot pluck a figure from the air and throw it to the court and expect the court to grant the same or speculate on the amount to be fixed. Some scientific or basis must be laid by way of a draft bill of costs. That will enlighten the court as to the likely costs to be awardable at the trial as costs. It will be imprudent, in my view, for the court to pluck from the air or to fix a figure as security for costs without proper basis.

28. I do not accept the submission that the costs of Kshs. 25,450,000 million is a proper estimate of costs in the circumstances of this case. The failure by the applicants to show the basis for or how it arrived at Kshs.25,450,000/= as the costs to be ordered, I am unable to exercise my discretion in favour of the applicants.

29. In view of the foregoing, I am of the considered view that the application dated 28th January 2019 has no merit, the same is hereby dismissed with costs abiding the outcome of the suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF MARCH, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

…….... for the Plaintiff

…….... for the 1st Defendant

…….... for the 2nd Defendant

…….... for the 3rd Defendant

…….... for the 4th Defendant

…….... for the 5th Defendant

…….... for the 6th Defendant