



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCOMM CIVIL CASE NO. E 293 of 2020

VIREN D. M. JOSHI.....PLAINTIFF/RESPONDENT

VERSUS

BAGS AND BALERS MANUFACTURERS (K) LTD.....1st DEFENDANT/APPLICANT

BIPINCHANDRA HAMITLAL VORA.....2nd DEFENDANT/APPLICANT

RULING

Introduction

1. This ruling determines the defendants' application dated 4th December 2020 in which they pray for an order that the Plaintiff provides security for costs in the sum of **Kshs. 5,000,000/=** or any other sum the court deems fit and sufficient. The defendants also pray for an order that the said sum of **Ksh. 5,000,000/=** or any such other amount as this court may deem just and sufficient be placed in a joint interest earning account in the name of the party' advocates within **30** days of the order. Also, the defendants pray that this suit be stayed pending provision of such security for costs. Lastly, the defendants pray for costs of the application to be provided for.

Grounds relied upon

2. The application is predicated on the grounds that the defendant's statement of defence dated 18th November 2020 raises triable issues which go to the root of this case. In particular, the defendants state that in their defence they challenge the plaintiff's claim as a shareholder in the 1st defendant and his capacity to file this suit. The defendants maintain that the Plaintiff does not have any known and identifiable financial assets or business operations within the Republic of Kenya, and that he is of unknown financial standing and currently he is unemployed hence he will not be able to cater for costs of the suit in the event the suit is dismissed. Lastly, the defendants state that the Plaintiff will stand to suffer no prejudice if the orders sought are granted.

Plaintiff's Replying Affidavit

3. The Plaintiff, Mr. Viren D. M. Joshi swore the Replying Affidavit dated 2nd February 2021. He deposed that the prayer for security for costs is aimed at oppressing and obstructing his claim and that the defence is a mere sham and a deliberate effort to camouflage their fraudulent practices. Mr. Joshi averred that the application is made in bad faith and it's intended to bar him from enjoying his inalienable right of access to justice. Additionally, he deposed that the instant application can only be allowed where there is anxiety if a party is a foreigner without any known assets in Kenya.

4. Additionally, Mr. Joshi deposed that he has a strong claim supported by documentary evidence which has high chances of success as opposed to the defence which is full of speculations, assumptions and distortion of facts. He deposed that he is currently employed and working for gain at Maruti Print Limited in Nairobi within the Republic of Kenya, hence, the instant application is aimed at delaying the course of justice. He attached a copy of his payslip as an exhibit to his affidavit showing a net monthly pay of **Kshs. 381,650/=**.

5. He deposed that the application is based on speculation that the he has no source of income or known assets in Kenya. He averred that the applicant should establish that in the event of the case being unsuccessful, he would not be able to pay costs due to poverty. He averred that it is not enough to allege that he will be unable to pay costs, but the allegation must be proved. Also, he deposed that the defendants have failed to discharge the evidential burden of proving the allegations.

6. He averred that Article 50 of the Constitution guarantees every person the right to have his dispute resolved by the application of the law in a fair and public hearing before a court or if appropriate, an independent and impartial tribunal or body, hence, allowing this application will amount to denying him his right.

7. Mr. Joshi deposed that the only way the court can establish the veracity of the assertions in the Plaintiff and the defence is by taking evidence at the main trial, hence, it would be unfair in the circumstances of this case, to order the Plaintiff to deposit the security sought. Lastly, he deposed that courts are required to ensure that parties with just claims are not prevented from accessing the seat of justice.

Defendant's/applicant's submissions

8. Mr. Nyiha, the defendant's/applicant's counsel submitted that the Plaintiff instituted this suit acting on a misguided and misconstrued belief that he is a minority shareholder in the 1st defendant, and, that, he alleges breach of fiduciary duties by the 2nd defendant which allegedly led to the 1st defendant being defrauded and occasioning it loss and damage.

9. Mr. Nyiha argued that the Plaintiff claims to have suffered loss and damage as a result of the alleged breach of fiduciary duty, and that he is attempting to bring his claim as a derivative action which can only be brought on behalf of the company by minority shareholders against the directors of the company for alleged breach of fiduciary duties by the directors. He argued that such an action can be brought on an individual capacity by a director on behalf of the company by minority shareholders when directors breach fiduciary duties leading to and damage in a company, and, it is the company that suffers loss and damage and not the shareholders. He argued that the Plaintiff was the 1st defendant's Managing Director at the material time, hence, any loss suffered by the company during his tenure is attributable to him. He argued that the defendants have presented a strong defence against the Plaintiff's claim or against his capacity to institute the claim.

10. He submitted that since the Plaintiff left the company, he has not secured employment nor is he engaged in any known business, nor does he have known or identifiable assets within the Republic from which the defendant can recover costs in the event he loses his case. He submitted that the Plaintiff has produced a pay slip showing that he earns **Ksh. 381,650/=** which is insufficient to cater for costs which may exceed **Kshs. 2,500,000/=**.

11. Mr. Nyiha cited *Gatarau Peter Munya v Dickson Mwenda Kithinji & 2 others*^[1] which held that the test in an application for security for costs is not whether the Plaintiff has established a *prima facie* case but whether the defendant has shown a *bona fide* defence. He submitted that the defendants' defence raises triable issues such as his *locus standi*, his claim as a minority shareholder, and his claim of payment of shares in the 1st defendant.

12. Additionally, Mr. Nyiha submitted that the Plaintiff has not been in active employment since he left the 1st defendant, and, that, he will not only be unable to cater for the defendants' costs but also it will be difficult for the defendants to receive the same from him.

Plaintiff's/Respondents advocates submissions

13. Mr. Kimakia, the Plaintiff's/Respondent's counsel submitted that the application is founded on speculation that the Plaintiff is unemployed and that he has no known source of income in Kenya, hence, he may not be able to settle the costs in the event he loses the suit. He argued that the application is made in bad faith to prevent the Plaintiff from accessing the court. He argued that an application of this nature is only sustainable if the Plaintiff is a foreigner and has no known assets in Kenya. He argued that the defence which is based on speculations, assumptions and distorted facts, the Plaintiff's case is strong.

14. He argued that the Plaintiff provided a payslip to demonstrate that he is employed and working for gain in the Republic of Kenya and therefore he is a man of means. He cited *Scotch Whisky Association & 2 others v Africa Spirits Limited*^[2] which cited *Kibiwott & 4 others v The Registered Trustees of Monastery of Victory*^[3] for the proposition that for a party to succeed in an application for security of costs he has to prove that the opposing party will not be able to pay the costs in the event of the suit being dismissed.

15. He also cited *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others*^[4] in which the Supreme Court stated that "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. And the onus is on the Applicant to prove such inability or lack of good faith that would make an order for security reasonable."

16. In declining the application, the Supreme Court in the above case held: -

"...I note that the defendant did not furnish this court with any evidence to support its claim that the plaintiffs are financially unstable so as to justify its claim that it will experience difficulties in recovering costs from the plaintiffs should it be successful in the suit. In other words, no material was placed before this court to show that the plaintiffs are in dire straits such that they will be unable to meet their financial obligations for costs should they lose the case...I find that the application for security for costs on unmerited and I therefore dismiss it ..."

17. Mr. Kimakia also cited *Aggrey Shivona v Standard Group Plc*^[5] which cited Article 50(1) of the Constitution which guarantees the right to a fair hearing and referred to *Shakalanga Jirongo v the Board of National Social Security Fund*^[6] which held that poverty is not a sufficient ground for issuing an order for security for costs. The court in the above case cited *Noornamohammed Abdullah v Ranchorbhai*^[7] which held that a litigant, however poor should be permitted to bring his proceedings without hindrances and have the case decided.

18. The court in the above also cited *Keystone Bank Limited & 4 others v I & M Holdings Limited & another*^[8] which held: "in an application for security of 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...The court notes that the applicant has just made a general statement that the Respondent may not be able to settle the costs in the event that he does not succeed in his suit. To that extent, it did not discharge its evidential burden.”

19. Mr. Kimakia submitted that the Plaintiff raises serious triable issues and the only way the court can establish the veracity of the Plaintiff and the defence is by hearing the case. He argued that it would be unfair in the circumstances of this case, to order the Plaintiff to deposit security for costs, and, that, courts are required to ensure that parties with just claims are not prevented from accessing the seat of justice.

20. Mr. Kimakia argued that the application is sham, made in bad faith and is geared at oppressing and obstructing the Plaintiff's claim and to intimidate the Plaintiff to hinder his right to access to justice. He urged the court to focus on the merits of the case as opposed to the defendant's sideshows. He urged the court to dismiss the application with costs to the Plaintiff. Lastly, he argued that the defendants will not suffer any prejudice if the orders sought are not granted.

Determination

21. The starting point is that any application for security for costs is an exception to the rule. In *Farrell v. Bank of Ireland*^[9] Clarke J. explicated the law with impressive clarity. He said:

“... the jurisprudence in relation to all of the areas where security for costs is considered ... starts from a default position that, in the absence of some significant countervailing factor, the balance of justice will require that no security be given. The reasoning behind that view is that, if it were otherwise, all impecunious parties might, in substance, be shut out from bringing cases or pursuing appeals. Such a balance would be untenable and disproportionate. It is for that reason that there must be some additional factor at play before an order for security for costs can be made.”

22. In exercising its discretion to order security for costs, a court will consider the circumstances of each case and in particular whether it is fair and equitable, to both the parties, to require the furnishing of security.^[10] When considering the circumstances of each case the court will take into account the financial status of the litigant and whether an order for security for costs may effectively preclude a Plaintiff from proceeding with his case.^[11] The courts will also guard against placing unreasonable barriers in the way of either litigant to the extent that justice may be denied.^[12] The court must bear in mind the following :-

- a. *Article 159 of the Constitution vests judicial authority in the judiciary and prescribes the manner in which it should be exercised.*
- b. *The Constitution vests the courts with the inherent power to regulate their own proceedings and such discretion should be exercised in order to give effect to fairness and the interests of justice.*
- c. *Courts should not adopt a position that forms part of our law, if it would infringe on the Constitution or constitutionally guaranteed rights.*
- d. *Section 7 (1) of the Sixth Schedule to the Constitution provides that all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.*
- e. *Courts are required to balance the interests of a plaintiff who is prevented from pursuing a litigant by virtue of an order for security for costs against the injustice that will befall a defendant who is unable to recover costs.*
- f. *When developing the common law, courts must promote the spirit, purport and objects of the Bill of Rights in terms of Article 259 of the Constitution.*
- g. *Article 50(1) of the Constitution provides that “every person has the right to have any dispute resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body.”*

23. In determining an order for security for costs the onus lies on the party seeking security for costs to go beyond merely showing that the Plaintiff is unable to meet an adverse costs order. The applicant must satisfy the court that the main action is vexatious, reckless or otherwise amounts to an abuse. An action will be vexatious if it is obviously unsustainable. A reading of the Plaintiff leaves me with no doubt that the Plaintiff is not vexatious, reckless or otherwise amounts to an abuse. The issues raised in the Plaintiff and the defence are matters which warrant resolution in a full hearing.

24. It is trite law that the courts have a discretion to grant or refuse an application for security and, in coming to a decision, the court should have due regard to the particular circumstances of the case and considerations of equity and fairness to both parties. There must be some special fact, inherent to the action itself, which will persuade a court to exercise its discretion in favour of the applicant. The court should exercise its discretion in favour of granting the order only sparingly and in exceptional circumstances.

25. It is, however, necessary to consider what the effect of granting an order for security would be. The court should consider whether the order would have the effect of preventing the plaintiff from accessing justice or infringe his right guaranteed by Article 50 (1) of the Constitution.

26. The courts' discretion must be exercised in a manner which is not discriminatory. In this context at least, I consider that all persons are equal before the law. It would be both discriminatory and unjustifiable to exercise the courts discretion in a manner that may hinder a citizen from accessing justice just because he is alleged to be poor. Poverty or unemployment should not be the sole ground to unleash such a drastic

order which has the potential of impinging on a citizen's constitutional rights. The discretion should be exercised in a manner reflecting its rationale, not so as to put a litigant at a disadvantage compared with the defendant.

27. In this connection, I do not consider that one can start with any inflexible assumption that any person who is poor or unemployed should provide security for costs. Merely because a person is alleged to be unemployed or poor does not necessarily mean that enforcement will be more difficult in the event the person loses the case. The onus lies on the person alleging to persuade the court that it would be impossible to recover the debt. In the instant case, the Plaintiff availed a payslip demonstrating that he is employed. The defendants failed to discharge this burden. The foregoing is consistent with the holding of the Supreme Court in the above cited case that the defendant should furnish evidence to support its claim that the plaintiff is financially unstable so as to justify its claim that it will experience difficulties in recovering costs from the plaintiffs should it be successful in the suit.

28. The exercise of the courts' discretion should not be either automatic or inflexible. If the discretion to order security is to be exercised it should therefore be on objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular Plaintiff. Impecuniosity of an individual within the jurisdiction is not the sole basis for seeking security. Other considerations include substantial obstacles to enforcing the judgment.

29. In so far as impecuniosity may have a continuing relevance it is not the only ground showing that the Plaintiff lacks apparent means to satisfy any judgment but on the ground that the effect of the impecuniosity would be either (i) to preclude or hinder or add to the burden of enforcement against such assets as do exist or (ii) as a practical matter, to make it more likely that the Plaintiff would take advantage of any available opportunity to avoid or hinder such enforcement.

30. There can be no inflexible assumption that there will in every case be substantial obstacles to enforcement against a Plaintiff or wherever his, her or its assets may be. If the discretion is to be exercised in favour of the applicant, there must be a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden (such as costs or the burden of an irrecoverable contingency fee or simply delay).

31. It is incumbent on an applicant to show some basis for concluding that enforcement would face any substantial obstacle or extra burden meriting the protection of an order for security for costs. Even then it seems to me that the court should consider tailoring the order for security to the particular circumstances. If, for example, there is likely at the end of the day to be no obstacle to or difficulty about enforcement, but simply an extra burden in the form of costs (or an irrevocable contingency fee) or moderate delay, the appropriate course could well be to limit the amount of the security ordered by reference to that potential burden. Certainly, no evidence has been put before me to suggest that the defendants would, or even could, face any real obstacle of difficulty of legal principle in enforcing in the recovery for costs against the Plaintiff.

32. If the discretion to order security is to be exercised it should therefore be on objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular Plaintiff. It may be incumbent on an applicant to show some basis for concluding that enforcement would face substantial obstacle or extra burden meriting the protection of an order for security for costs.

33. Taking all these into consideration, I am of the view that to accede to the defendants' application will be to place obstacles in the second plaintiff's quest for justice. The up shot is that the defendants' application dated 4th December 2020 is dismissed with costs to the Plaintiff.

Orders accordingly

Signed and Dated at **Nairobi** this 17th day of **March** 2021

John M. Mativo

Judge

[1] {2014} e KLR.

[2] {2020} e KLR.

[3] Nakuru, HCCC No 146 of 2004.

[4] CA No. 38 of 2013 {2014} e KLR.

[5] {2020} e KLR

[6] HCC No 957 of 2000.

[7] {1962} EA 447.

[8] {2017} e KLR.

[9] {2012} IESC 42, at para. 4.17.

[10] See *Magida v Minister of Police* 1987 (1) SA 1 (A) and *Blastrite (Pty) Ltd v Genpaco Ltd; In re: Genpaco Ltd v Blastrite (Pty) Ltd* (4530/15) [2015] ZAWCHC).

[11] See *Vanda v Mbuqe & Mbuqe; Nomoyi v Mbuqe* 1993 (4) SA 93 (TK).

[12] See *Silvercraft Helicopters (Switzerland) Ltd and Another v Zonnekus Mansions (Pty) Ltd, and Two Other Cases* 2009 (5) SA 602 (C).