



IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E068 OF 2018

BETWEEN

SUN PIL LIMPLAINTIFF

AND

DIAMOND TRUST BANK KENYA LIMITEDDEFENDANT

RULING

1. This decision relates to an appeal from the decision of the Deputy Registrar delivered on 22nd October 2019 dismissing the defendant's application dated 11th March 2019 made under **Order 26 rule 1** of the *Civil Procedure Rules* ("the **Rules**") seeking an order directing the plaintiff to furnish security for costs. The appeal is based on the following grounds of appeal set out in the memorandum of appeal dated 29th October 2019:

1) *The Deputy Registrar erred by failing to hold, as she should have, that the defendant had met the requisite test in its application for security for costs. In particular, the deputy registrar failed to consider that: -*

a. It was not in dispute that the plaintiff is a foreign national with no fixed assets in Kenya.

b. In an application for security for costs, the onus of proof shifts to the plaintiff to show that it is capable of satisfying an order for costs and the plaintiff in this case failed to discharge this burden; and

c. There was every reason to order the plaintiff to give security for the defendant's costs.

2) *The deputy registrar failed to appreciate the prejudice that the defendant will suffer should it succeed in defendant the suit and fail to recover the costs from the plaintiff.*

2. Apart from reiterating the grounds of appeal set out in the memorandum of appeal and the submissions made before the Deputy Registrar, counsel for the defendant submitted that the plaintiff was a Korean national and did not disclose any assets within the jurisdiction as such the court ought to have ordered her to provide security for costs. Counsel further submitted that the Deputy Registrar exercised her discretion wrongly and arrived at an erroneous conclusion and not within the law in light of the applicable principles. He added that the Deputy Registrar did not explain why she departed from the settled principle of law that where the plaintiff is a foreign national security for costs ought to be provided.

3. Counsel for the plaintiff submitted that the defendant has not shown that the Deputy Registrar erred in the exercise of her discretion. He contended that the Constitutional provisions on a fair trial and access to justice applied to everyone including foreigners and that the plaintiff should not be denied justice on that account. He argued that the court evaluated the relationship between the parties and came to the conclusion that this was not an appropriate case for ordering security for costs. Counsel maintained that the court took all factors into consideration hence this appeal ought to be dismissed.

4. Before I consider whether the Deputy Registrar erred in the exercise of discretion, it is important to set out the background of the matter. The Plaintiff's case was that she was the defendant's customer where she maintained a savings account. The gravamen of her claim was that the bank through negligence and fraud occasioned her a loss of Ksh. 56,344,520.55/- which she claimed together with interest and costs. The defendant entered appearance and filed a defence denying the claim.

5. Thereafter, the defendant filed the application seeking orders that the plaintiff furnish security for costs in the sum of Ksh. 3,000,000/-. The defendant argued that the plaintiff was a foreigner with no known assets in Kenya and was thus apprehensive that in the event that it was successful in defending the suit and was awarded costs, she would not satisfy such costs.

6. The plaintiff filed a replying affidavit in which she deponed that she was married to one Young K. Roh, the President of Safari Park Hotel and Casino and a permanent resident in Kenya. She deponed that she and her husband have a home in Nairobi and were ordinarily resident within the jurisdiction of the court. She further deponed that that she was a director of Daehan Pharmaceuticals Limited, a company incorporated in Kenya, established to trade in pharmaceuticals and related products. Her case was that the plaintiff was intent on denying her right of access justice and fair hearing guaranteed under **Articles 48** and **50** of the Constitution and that mere apprehension by the defendant of her inability to pay costs should not be ground for ordering security for costs.

7. After hearing the parties, the Deputy Registrar rendered her ruling dated 22nd October 2019. As the facts before the court were largely undisputed, she held as follows:

[11] The Applicant and the Respondent have had a customer bank relationship since the year 2015. They are therefore not strangers to each other. The relationship has been frustrated by circumstances which will be subjected to a trial. The Applicant does not deny that the Respondent has been living at Safari Park Hotel since the year 2015. During the course of their relationship, the Respondent banked with the Applicant more than Kshs. 3,000,000/-. It is doubtful that the Respondent will be unable to satisfy the Applicant's costs in case of a successful defence of the suit.

8. It is the aforesaid decision that has now precipitated this appeal. Since this appeal challenges the exercise of discretion by the Deputy Registrar, the guiding principle in was set out in **Mbogo and Another v Shah [1968] EA 15** as follows:

An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.

9. This brings me to the law or principles governing the security for costs in civil cases. **Order 26 Rule 1** of the **Rules** provides as follows:

Security for costs [Order 26, rule 1.]

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. Both parties in their oral and written submissions before the Deputy Registrar and this court cited several decisions where the courts have dealt with the issue of security for costs. In **Shah v Shah [1982] KLR 95**, the Court of Appeal (Per Law JA) stated as follows regarding discretion to order security for costs:

[F]ull and unfettered discretion whether to order security or not. The general rule is that security is normally required from plaintiffs resident outside the jurisdiction, but as was agreed in the court below, a court has a discretion, to be exercised reasonable and judicially, to refuse to order that security be given.

11. The onus of proving that the plaintiff would be unable to pay costs if the suit fails lies squarely on the defendant as the applicant. The Court of Appeal in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others NYR CA Civil Appeal (App) No. 38 of 2013 [2014] eKLR** observed 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.

12. The plaintiff has placed much emphasis on violation of her right to a fair hearing and access to justice protected under **Articles 48** and **50** of the Constitution. In the **Gatirau Peter Munya Case (supra)**, the Court of Appeal discussed the rationale of ordering security for costs while balancing the plaintiff's constitutional right to be heard as follows:-

The rationale for security for costs is to ensure firstly, that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty; secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party It is therefore imperative in consideration of an application for security of costs, for the court to balance the competing rights of the parties, that is the right to access to justice and the right to security for costs.

13. At the end of the day, the court has to exercise its discretion balancing the rights of the plaintiff and defendant and taking into account the circumstances of the case as illustrated by the following passage in **Saudi Arabian Airlines Corporation v Sean Express Services Ltd ML HCCC No. 79 of 2013 [2014] eKLR** where Gikonyo J., observed as follows:-

[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. [Emphasis mine]

14. I now turn to consider whether in light of the principles I have set out, the defendant has established that this court may interfere with the discretion of the Deputy Registrar. The defendant's case was founded on the fact that the plaintiff is not a Kenyan citizen and that she does not have any known assets within the country. Those facts are not in dispute. However, as the cases cited show, it is not automatic that the court will grant orders for security for costs.

15. The Deputy Registrar correctly pointed out that the plaintiff and the defendant had had a customer bank relationship since 2015. They were not strangers to each other. In that time, the defendant transacted with the customer for sums well beyond the Kshs. 3 million claimed as security for costs. Given the already established relationship, the court was entitled to take this fact in to account as stated by Gikonyo J., in the **Saudi Arabian Airlines case (Supra)**. That the plaintiff was married to a Korean National, who is a permanent resident and working as the President of a reputable establishment in Kenya was not disputed.

16. For the reasons I have set out, I have arrived at the conclusion that the Deputy Registrar exercised her discretion properly. The defendant has not surmounted the threshold established in **Mbogo and Another v Shah (Supra)** to enable this court intervene in the decision.

17. The appeal is dismissed with costs to the plaintiff.

DATED and DELIVERED at NAIROBI this 31ST day of JANUARY, 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango

Mr Mwenda for Muriungi and Company Advocates for the plaintiff.

Mr Owiti instructed by Hamilton, Harrison and Mathews Advocates for the defendant.