



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**HCCC NO. E 119 OF 2018**

**ALPHA FINE FOODS LIMITED.....PLAINTIFF**

**VERSUS**

**HORECA KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**CHERRYPIK INVESTMENTS LIMITED.....2<sup>ND</sup> DEFENDANT**

**CHERRY DISTRIBUTORS KENYA LIMITED.....3<sup>RD</sup> DEFENDANT**

**ALEX KUTAI KHASAKALA.....4<sup>TH</sup> DEFENDANT**

**JULIUS KIBET BEIGON.....5<sup>TH</sup> DEFENDANT**

**(In the Counterclaim)**

**CHERRYPIK INVESTMENTS LIMITED.....1<sup>ST</sup> PLAINTIFF**

**ALEX KUTAI KHASAKALA.....2<sup>ND</sup> PLAINTIFF**

**JULIUS KIBET BEIGON.....3<sup>RD</sup> PLAINTIFF**

**-VERSUS-**

**HORECA KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**ALPHA FINE FOODS LIMITED.....2<sup>ND</sup> DEFENDANT**

**ALYKHAN KURJI.....3<sup>RD</sup> DEFENDANT**

**MINAZ KURJI.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. What remains contested in the Notice of Motion dated 29<sup>th</sup> January 2019 are the following prayers:-

1. That this honourable Court be pleased to issue an order that the 2<sup>nd</sup> Defendant, in the original action, does furnish security for costs, to the Plaintiff, in the original, as well as the 3<sup>rd</sup> and 4<sup>th</sup> Defendants in the counterclaim, in the sum of Kshs.40,118,000.
2. That the claim for withheld salaries made by the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs in the counterclaim be struck out with costs.
3. That costs of this application be borne by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs in the counter claim.

2. I begin by considering the prayer that Cherrypik Investments Limited (Cherrypik) furnishes security for costs in respect to the Counterclaim it has mounted against Alpha Fine Foods Limited, Alykhan Kurji and Minaz Kurji. It is an application brought by the three premised on the provisions of Order 26 Rule 1 of the Civil Procedure Rules:-

**“[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”.**

3. These provisions have been the subject of repeated judicial discussion and the principles upon which to grant or decline an order for security for costs in old hat. Before restating them, the Court makes an observation which may well be obvious. In these proceedings the Alpha Fine Foods Limited (Alpha) commenced a civil action against Horeca Kenya Limited (**Horeca**), Cherrypik (**Cherrypik**), Cherry Distributors Kenya Limited (**Cherry**), Julius Kibet Beigon (**Julius**), and Alex Kutai Khasakala (**Alex**). Alongside with filing their Defence, Cherrypik, Alex and Julius filed a Counterclaim against the current applicants. The provisions of Order 26 Rule 1 would ordinarily be to the favour of a Defendant or third or subsequent party. In this matter, the current applicants are the Defendants to a Counterclaim brought by amongst others Cherrypik and so they would be entitled to bring the current application.

4. In Johnstone Muchemi Gichema v Moses Wekesa [2017] eKLR, my brother Hon. Joel Ngugi J comprehensively sets out the parameters to be considered by Court in an Order 26 Rule 1 application. The Judge stated:-

**15. The purpose of an order for security for costs is to ensure justice between the parties, and in particular to ensure that unsuccessful proceedings do not disadvantage defendants.**

**16. Our case law has established the contours and principles the Courts used to determine when the Courts will use their discretion to order payment of security for costs. The following are germane:**

**a. First, the Rule gives the Court discretion to order security for costs but the discretion must be used judiciously not whimsically. In particular, the Court must be careful to balance between the need for access to justice for the Appellant and the need to ensure that a successful Respondent is not unduly disadvantaged.**

**b. Second, some of the factors that the Courts consider include “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” per Gikonyo J. in *Saudi Arabian Airlines Corporation v Sean Express Services Ltd [2014] eKLR*.**

**c. Third, in the exercise of its wide discretion, a Court might still refuse to order lodgment of security even where an individual litigant is impecunious or company insolvent. See *Saudi Arabian Airlines Corporation Case (supra)*.**

**d. Fourth, 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. See *Hall -vs- Snowdon Hubbard & Co. (I), (1899) 1 Q.B 593*, the learned Judge at page 594 stated:-**

**“The ordinary rule of this court is that, except in applications for new trials, when the respondent can show that the appellant, if unsuccessful, would be unable through poverty to pay the costs of the appeal, an order for security for costs is made.”**

In *Marco Tool & Explosives Ltd – vs- Mamujee Brothers Ltd. (supra)*, Court of Appeal expressed itself thus:-

**“The onus is on the applicant to prove such inability or lack of good faith that would make an order for security reasonable.”**

5. In Ocean View Beach Hotel Limited v Salim Sultan Moloo & 5 others [2012] eKLR, I had occasion to consider the principles applicable for the grant of security of costs under the provisions of Section 401 of the repealed Companies Act and which would be relevant and applicable to the provisions of Order 26 Rule 1. I observed as follows:-

**“The purpose of an order for security of costs is to protect a party from incurring expenses on a litigation which it may never recover from the losing side. It is not to deter the Plaintiff from pursuing its claim”.**

6. These observations was made after the Court had embraced the following principles laid down in Keary Developments Ltd v Tarmac Construction Ltd [1995] 3 All ER 534 as a guide on how a Court should exercise its discretion in granting or refusing an order of costs under the repealed Companies Act (and from which an Order 26 Rule 4 application could borrow):-

**“1. The Court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.**

2. The possibility or probability that the Plaintiff Company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security.

3. The Court must carry out a balancing exercise. On the one hand it must weigh the injustice to the Plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh 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 from the Plaintiff the costs which have been incurred by him in his defence of the claim.

4. In considering all the circumstances, the Court will have regard to the Plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure.

5. The Court in considering the amount of security that might be ordered will bear in mind that 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.

6. Before the Court refuses to order security on the ground that it would unfairly stifle a valid claim, the Court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled.

7. The lateness of the application for security is a circumstance which can properly be taken into account."

7. So how does the application fare against the principles outlined above and in **Johnstone Muchemi Gichema (supra)**? It is common ground that in better times Alpha, in conjunction with Cherrypik, incorporated Horeca. So, Alpha and Cherrypik are the shareholders of Horeca. There has been a misunderstanding between the two shareholders and the affairs of Horeca are in doldrums. Indeed, the affairs of Horeca have been placed under provisional liquidation.

8. The Plaintiffs to the Counterclaim asserted that the two Kurjis have breached their fiduciary duties as directors of Horeca and Alpha and set out the following particulars:-

**The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs aver that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants breached their fiduciary duties as directors of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally.**

**PARTICULARS OF 3<sup>RD</sup> AND 4<sup>TH</sup> DEFENDANTS' BREACH OF DIRECTORS FIDUCIARY DUTY.**

a) Failure to disclose actual and potential conflict of interest in their dealing as shareholders of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

b) Frustrating 1<sup>st</sup> Defendant's Business with a view of aiding 2<sup>nd</sup> Defendant's business.

c) Failure to approve any payments to settle employee's salaries and to offset other expenses further crippling the business of the 1<sup>st</sup> Defendant.

9. They are also accused of committing fraud and acts of negligence in running the affairs of Horeca. Alpha and the two Kurjis are further accused of breaching the terms of the joint venture Agreement and unilaterally deciding to opt out of the JVA and Horeca. In the end the Plaintiffs to the Counterclaim seek the following prayers:-

a) 1<sup>st</sup> Plaintiff's special damages being Kshs.2,000,000,000/=

b) 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs' withheld salaries.

c) General damages.

d) Interest on (a) (b) and (c) thereon at Court rates.

10. It is not disputed that Cherrypik is a limited liability company incorporated and registered in the Cayman Islands. In the face of the application, Cherrypik responded by way of a replying affidavit of the Barbra Aromo who is its legal manager. In that replying affidavit, the deponent does not reveal any real presence of Cherrypik by way of local assets or business. It would seem that Cherrypik is a foreign Company and non-resident in Kenya. This weighs somewhat as against Cherrypik, given the following statement by Law **J. A in Shah vs Shah [1982] KLR 95.**

**"The general rule is that security is normally required from plaintiff's resident outside the jurisdiction, but that a court has a discretion, to be exercised reasonably and judicially to refuse to order that security be given. The test on an application for security is not whether the plaintiff has established a *prima facie* case but whether the Defendant has shown a *bona fide* defence".**

11. Yet as even observed in that short proposition in Shah (*supra*) residency outside jurisdiction alone would not be the end of the road for a non -resident such as Cherrypik. Other factors can still be considered, factors that can still sway the Court against granting the order. One

such factor could be that, although non-resident, the Respondent reveals earnings or assets which can still be reached if it is ultimately required to pay up. By example, the Court may be reluctant to require the giving of security by a foreigner who has assets in a country with which Kenya has reciprocal execution arrangements.

12. On assets or earnings elsewhere, other than Kenya, Cherrypik is equally silent and is unable to find favour on this account.

13. Before the Court turns away on this aspect, it has to consider the following submissions made by counsel for Cherrypik;

**“Ultimately the 1<sup>st</sup> Plaintiff is entitled to the assets of the 1<sup>st</sup> Defendant in liquidation therefore the argument that the 1<sup>st</sup> Plaintiff has no traceable assets in Kenya is not true as they have not established that it will be impossible to execute the said assets in case the Counterclaim fails and defray their costs. Further the 1<sup>st</sup> Plaintiff has strong case with a high probability of success and the defence to the Counterclaim strings together a line of denials as regards the averments in the Counterclaim”.**

14. This would seem to be an attractive argument, yet whether there are any assets owned by Horeca which is in liquidation is a question of evidence that cannot simply be made from the bar. Even without going into too much detail, Cherrypik should have given some evidence that Horeca has assets to which it would be entitled on liquidation and which can be available to meet any order of costs against it. On this, the replying affidavit of Barbra Aromo is singularly silent.

15. Nevertheless, it has to be always borne in mind that an order for security of costs should not unfairly stifle a valid and bonafide claim. For that reason, an order which may for other reasons be deserving will not be made if the Plaintiff demonstrates that its claim has prospects of success. Whilst the Court should not engage in a full-fledged examination of the merits of the Plaintiffs claim, it may nevertheless resolve the matter in favour of the Plaintiff if it provides evidence that its claim has a fair chance or probability of success.

16. In his oral submissions made in supplement of the written submissions, Counsel for Cherrypik, Mr. Irungu, argued that his client had a good case because the Defence filed was bare as it was not accompanied by a list of documents or written statements. Counsel Wafula for the applicant responded that summons invite a Defence and not statements and documents. He then argued that the Defence filed substantially and materially addressed the various allegations raised In the Counterclaim.

17. A Defence to a Counterclaim is akin to a Defence to a main claim and for that reason the manner it is filed would have to comply with the provisions of Order 7 Rule 5 which reads:-

**[Order 7, rule 5.] The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—**

**(a) an affidavit under Order 4 rule 1(2) where there is a counterclaim; (b) a list of witnesses to be called at the trial:**

**(c) written statements signed by the witnesses except expert witnesses; and**

**(d) copies of documents to be relied on at the trial.**

**Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.**

18. Clearly then at the time of filing the Defence to Counterclaim, the Applicant should have filed a list of witnesses they intend to call and copies of documents to be relied on at trial. However, for purposes of examining the prospects of the claim of Cherrypik the mere failure by the applicant to provide the list and documents does not exonerate Cherrypik from discharging its onus. Once there has been sufficient rebuttal of the allegations in the statement of claim, then the claimant bears the responsibility of demonstrating the strength of the claim on the basis of some evidence. Even undefended matters can fall on their own if not established by evidence.

19. However, to be emphasized is that at this stage the Court should not conduct a mini-trial. A detailed examination of the evidence is not called for and is undesirable. The Plaintiff merely has to demonstrate that the claim is bona fides and not a sham. On this aspect, neither in the replying affidavit nor in the submissions does the Respondent point out the evidence in the documents filed alongside the Counterclaim that demonstrate the strength of the claim.

20. Bearing all the circumstances of this matter, the Court is inclined to make an order for granting of security for costs against Cherrypik. This Court is asked to order security in the sum of Kshs.40,118,000. The Court will make an order for kshs.30,000,000. The Counterclaim is for a sum in excess of Kshs.2,000,000,000/=. On party and party costs, instruction fees for a defended claim of Kshs.2,000,000,000/= is just over Kshs.30,000,000. Although this does not include getting up fees, the Court is alive to the philosophy that the intention an order of this nature is not to stifle a claim and for that reason it need not make an order for the full amount of anticipated costs.

21. I turn to the second limb of the Application which is that the claim for withheld salaries made by the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs in the Counterclaim be struck out with costs. That the claim can only be against their employer, the 1<sup>st</sup> Defendant and for that reason it can only be maintained before the Employment and Labour Relations Court.

22. On this question of Jurisdiction, counsel for the applicants asked this Court to give regard to Article 162(2) of the Constitution of Kenya 2010 which provides for establishment of Court with the status of the High Court to hear and determine disputes relating to employment and labour relations. That Court, it would be common ground, is the Employment and Labour Relations Court.

23. Section 12(1) of the Employment and Labour Relations Court Act, 2011 is also cited to buttress the argument and it provides:-

**(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends**

**jurisdiction to the Court relating to employment and labour relations including—**

**(a) disputes relating to or arising out of employment between an employer and an employee;**

**(b) disputes between an employer and a trade union;**

**(c) disputes between an employers' organisation and a trade union's organisation;**

**(d) disputes between trade unions;**

**(e) disputes between employer organisations;**

**(f) disputes between an employers' organisation and a trade union;**

**(g) disputes between a trade union and a member thereof;**

**(h) disputes between an employer's organisation or a federation and a member thereof;**

**(i) disputes concerning the registration and election of trade union officials; and**

**(j) disputes relating to the registration and enforcement of collective agreements.**

24. Finally this Court was referred to the Court of Appeal decision in Wellington Nzioka Kioko –vs- Attorney General [2018] in which the Court of Appeal held:-

**“....We note that the appellant had also claimed withheld salary, emoluments, terminal benefits and pension under the guise of a constitutional claim. That was a claim that could only be entertained in the Employment and Labour Relations Court pursuant to Articles 162(2), and 165 (5) of the Constitution”.**

25. For the Respondents it was submitted as follows:-

**“It is our submissions that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs in the Counterclaim have a cause of action against the 2<sup>nd</sup> Defendants in the Counterclaim as their salaries were withheld due to failure by the directors from the 2<sup>nd</sup> Defendant in the Counterclaim to approve any payments to settle employees' salaries and to offset other expenses thus crippling the business of the 1<sup>st</sup> Plaintiff. This amounts to breach of the directors' duty to promote the success and more particularly the duty to have regard to the interests of the employees of the company and as such the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs in the Counterclaim are entitled to the common law remedy of damages both special and general. In the premises we submit that their claim is valid and this Honourable Court has the Jurisdiction to hear and determine their claim”.**

26. This is the view I take of the matter. From my reading of the Counterclaim, the basis for the claim of withheld salaries is found in various parts of the Counterclaim. In Paragraph 10(f) of the Counterclaim it is one of the particulars of breach of fiduciary duty of the Directors of Alpha and it reads:-

**[10e]Failure to approve any payments to settle employee's salaries and to offset other expenses further crippling the business of the 1<sup>st</sup> Defendant.**

27. This is again repeated as follows in Paragraph 11(f) of the same pleading.

**[11f]Failure by directors from the Plaintiff's Company to approve any payments to settle employee's salaries and to offset other expenses thus crippling the business of the 1<sup>st</sup> Defendant.**

28. Lastly it is set out as a particulars of breach on the Plaintiff (Presently Alpha) in Paragraph 12 as follows:-

PARTICULARS OF BREACH ON PART OF THE PLAINTIFF

**a) Failing and/or neglecting to supply the 1<sup>st</sup> Defendant with the products despite 1<sup>st</sup> Defendants having placed Local Purchase Orders (LPO) on various occasions.**

**b) Unilaterally deciding to bar the 1<sup>st</sup> Defendant from being stockist and supplier of the Plaintiff.**

c) Unilaterally deciding to opt out of the Joint Venture Agreement and the 1<sup>st</sup> Defendant Company.

d) Supplying 2<sup>nd</sup> Defendants products directly to the market disregarding the provisions of the joint venture agreement restricting competition and on exclusive supply of the products of the Plaintiff by the 1<sup>st</sup> Defendant to the market consequently crippling the business of the 1<sup>st</sup> Defendant.

e) Failure by directors from the Plaintiff's Company to approve any payments to settle employee's salaries and to offset other expenses thus crippling the business of the 1<sup>st</sup> Defendant.

f) Failing to collect debt and or approve collection of debt by 1<sup>st</sup> Defendant's employees hence the accumulation of bad debt book.

g) Failing to clear imports and or pay transports hence ruining the company's reputation.

29. Finally, in the prayers, the claim for withheld salaries is made against not just the Directors but also Alpha itself.

30. As I understand it, the common thread running as the basis for the claim is the failure by Directors to approve any payments to settle employee salaries. Whether a claim so framed will eventually succeed is not the business of this Court at the moment. What is to be noted is that the claim by Alpha against the Khasakala and Beigon is that they surreptitiously orchestrated a scheme to preclude it (the Plaintiff) from making recovery from Horeca and diverted funds from Horeca to themselves or for their benefit. The prayers against the two and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to the main claim is as follows:-

a) As against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, a declaration do issue that they have surreptitiously and fraudulently orchestrated a scheme to preclude the Plaintiff from making recovery from the 1<sup>st</sup> Defendant of the aforesaid sum that is owed to the Plaintiff and have dissipated or sought to dissipate the assets of the 1<sup>st</sup> Defendants for their benefit.

b) An injunction do issue restraining the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants from, removing, disposing off, interfering with, transferring, charging, or otherwise dealing the assets of the 1<sup>st</sup> Defendant in any way whatsoever until the sum claimed by the Plaintiff, in this suit against the 1<sup>st</sup> Defendant is paid in full.

c) Any inquiry into the accounts of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants be undertaken to trace and attach any asserts of the 1<sup>st</sup> Defendant in satisfaction of the Plaintiff's claim against the 1<sup>st</sup> Defendant.

31. It has to be remembered that the 4<sup>th</sup> and 5<sup>th</sup> Defendants are employees of Horeca and not Alpha. On the other hand, Alpha and Cherrypik are shareholders of Horeca. In that way the 4<sup>th</sup> and 5<sup>th</sup> Defendant are not employees of Alpha and so there is no employer-employee relationship between Alpha in the one hand and the 4<sup>th</sup> and 5<sup>th</sup> Defendants on the other. It would seem that the 4<sup>th</sup> and 5<sup>th</sup> Defendants blame their predicaments on salary not on their employer, Horeca, but on Alpha as its shareholders and the Kurjis as directors of Alpha.

32. Whatever the strength of that Counterclaim by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the matter is for this Court and not for the Employment and Labour Relations court.

33. The application of 29<sup>th</sup> January 2019 has partly succeeded and partly failed. Each party shall bear its own costs. For clarity, Cherrypik Investments Limited shall furnish security of costs in the sum of Kshs.30,000,000 in favour of Alpha Fine Foods Limited, Alykhan Kurji, and Minaz Kurji. The security shall be in either a cash deposit for the said amount in Court or a bank guarantee or insurance bond for the said amount made in favour of the applicants. The order to be complied with within 45 days hereof.

**Dated, Signed and Delivered in Court at Nairobi this 24<sup>th</sup> Day of January 2020.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Chacha for Ogunde for Applicant

Ouma for Kangata for 1<sup>st</sup> Defendant

Court Assistant: Nixon