



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 309 OF 2017

AECOM ROA (PTY) LIMITED.....PLAINTIFF

-VERSUS-

KENYA NATIONAL HIGHWAYS AUTHORITY.....DEFENDANT

RULING

1. The defendant, Kenya National Highway Authority, has filed the Notice of Motion dated 16th October 2019. The defendant seeks the plaintiff to be ordered to deposit Ksh 3.5 million as security for costs. The application is brought under Order 26 Rule 1 of the Civil Procedure Rules. The application is premised on the following grounds:

(1) The Honourable Court has set down the matter for hearing on 11th November 2019.

(2) The Defendant/Applicant filed a counterclaim dated 1st September 2017 wherein the Defendant/Applicant seeks prayers against the Plaintiff/Respondent for payment of sums paid to substitute service providers to correct the defects in the plaintiff's designs; damages for breach of contract, costs of the suit and interests thereto.

(3) The defendant/Applicant has expended a lot of time and heavy costs in defending the instant suit.

(4) The Plaintiff/Respondent is a foreign entity with neither a known physical address in Kenya, a known business in Kenya nor a business, contract, service known to the defendant/applicant that can guarantee its continued presence in Kenya.

(5) The plaintiff does not have any property in Kenya that can be attached and or held to the order of this Honourable Court in the case of default of payment of the costs.

(6) The defendant/applicant would have no recourse in the event that its counterclaim succeeds with costs against the plaintiff/respondent.

2. The plaintiff AECOM South Africa Holding (PTY) Limited has opposed the application. The following is what the plaintiff stated in its replying affidavit:

“I can confirm that the plaintiff is a financially solvent company and a going concern. I verily believe therefore, that the mere fact that the plaintiff is a foreign entity is insufficient cause for an order for security for costs to be made against it.

The plaintiff is part of a global conglomerate, which is regarded as the world's premier infrastructure firm that is passionate about development in Africa and has enhanced its presence in Africa with centres in Botswana, Kenya, Lesotho, Nigeria, South Africa, Tanzania and Uganda.

The financial results of the plaintiff's parent company, AECOM for the year between 1st January 2018 to 31st December 2018 indicate that its turnover is \$20156 (million) with after tax profit of \$136 (million) A copy of the plaintiff's financial report is annexed hereto as exhibit “NM-1”.

Further, the plaintiff and its group companies have been operating in Kenya for approximately ten (10) years. The plaintiff successfully completed the provision of consultancy services to the defendant as provided in the consultancy contract dated 24th October 2012, in issue in these proceedings. This demonstrates the plaintiff's presence in Kenya and therefore the question on whether or not it has physical presence in Kenya is not relevant and should not be used as a ground for this honourable court to

grant the orders sought in the application.

The plaintiff has a global reputable image which it could never risk by failing to provide costs if required by a competent court to do so.”

3. It is worthy to mention that the plaintiff’s claim against the defendant is for judgment for USD 316,047,000 and Ksh 5,538,333.40. This claim arises from what the plaintiff pleaded was a breach of contract. The defendant filed a defence and counter claimed alleging that the plaintiff breached the contract and as a consequence the final drawings provided by the plaintiff could not be used by the defendant. The defendant does not quantify the claim in that counter claim.

4. What should guide a court in an application for security of costs was discussed by the court of appeal in the case **Westimont Holdings SDN BHD v Central Bank of Kenya (2017) eKLR** thus:

“11] We have also drawn some further insights from another English case which has for several years now been regarded as modern and pragmatic guide in a matter for security for costs in the case of; Keary Developments V. Tarmac Construction, [1995] 3 All ER 534 . The guidelines enunciated therein were to guide a court while exercising discretion on whether to order a plaintiff which was a limited liability company, to provide security for costs to a defendant in a suit. The said principles are:-

- 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 a more sufficient reason for not ordering security. It is implicit that a company may have difficulty meeting an order.*
- 3. 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.*
- 4. The court will look to the prospects of success, but not go into the merits in detail.*
- 5. 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.*
- 6. 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.*
- 7. The lateness of the application can properly be taken into account.”*

5. The court, as will be seen from the above guidelines, has complete discretion. In considering such an application the court must also balance injustice to the plaintiff with ensuring not to prevent the plaintiff pursuing its case. But I believe the most pertinent guideline is the lateness of the application. This suit was filed in 2017 and the defendant waited, without explaining why it waited, until 2019 before making the application for security of costs. On the whole bearing in mind the soundness of the plaintiff, well demonstrated in its replying affidavit, and because the defendant filed its application late I find no merit in the application.

6. The application dated 16th October 2019 is therefore dismissed with costs. Parties will now be reminded that this case is fixed for full hearing on 31st March 2020.

DATED, SIGNED and DELIVERED at NAIROBI this 11th day of March, 2020.

MARY KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

.....for the Plaintiff

.....for the Defendant