



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO 128 OF 2019

POSCO INTERNATIONAL CORPORATION.....PLAINTIFF

VERSUS

MAYFAIR INSURANCE COMPANY LIMITED.....DEFENDANT

RULING

BACK GROUND

The Plaintiff (**Posco International Corporation**) instituted a suit against the Defendant (**Mayfair Insurance Company Limited**) pursuant to a Deed of settlement dated 16th June 2017, between the Plaintiff and Afrikon Limited (defined as the “**Buyer**” in the Payment Guarantee). It was agreed that in order to purchase goods from the Plaintiff, the buyer shall provide an on demand guarantee issued by a reputable insurance company in favour of the Plaintiff for payment of USD 900,000 (the “**Claim Amount**”).

By a written instrument of Guarantee dated 24th August 2017 (the “**payment Guarantee**”) entered into between the Plaintiff and the Defendant pursuant to the Deed of Settlement, the Defendant unconditionally and irrevocably undertook and agreed to guarantee that in the event of a breach of the Deed of Settlement by the Buyer, it would discharge the damages sustained by the Plaintiff. It was an express term of the Guarantee that inter alia:

The Guarantor guarantees to the Exporter that in the event of breach of the Agreement by the Buyer, the Guarantor shall subject to the provisions of this Guarantee Bond satisfy and discharge the damages sustained by the Exporter as established and ascertained pursuant to and in accordance with the provisions of or by reference to the Settlement Agreement and taking into account all sums due or to become due to the Exporter.

The Plaintiff alleges upto date, Afrikon Limited (the Buyer) has failed to make payment of the Claim Amount despite demand for the Claim Amount being made pursuant to the Payment Guarantee.

By a written notice dated 1st June 2018, the Plaintiff notified the Defendant of default in payment by the Buyer and proceeded to demand payment from the Defendant of USD 900,000 being the Claim Amount due under the Settlement Agreement. The Defendant has neglected, refused and/or failed to pay the said sum or any part thereof and persists in such neglect, refusal and/or failure.

By a further written notice dated 29th January 2019, the Plaintiff’s advocates demanded payment from the Defendant of USD 900,000 being the Claim amount due under Settlement Agreement but the Defendant continued to neglect, refuse and/or have failed to pay the said sum or any part thereof and persists in such neglect, refusal and/or failure.

DEFENCE

The Defendant, subject to paragraph 1 of its defence, admitted that Posco Daewoo International Corporation (**the Supplier**), entered into a Deed of Settlement whereby Afrikon Limited (**the Purchaser**) was to purchase 18 units of UZ Man Tractors. The Deed of Settlement, inter alia, also provided that:-

- a) Upon issuance of a Payment Guarantee, the Supplier would deliver the tractor units to the Purchaser.
- b) The purchaser was to make payment to the Supplier by 31st January 2018 in default of which the Supplier would make a call on the Guarantee.

That in breach of the Settlement deed, the Supplier did not supply the tractors to the Purchasers and in the circumstances, no payment is due under the Guarantee for want of consideration.

The Guarantee provided it would apply to a Settlement Agreement between the Seller and Purchaser dated 13th March 2015.

That in the event of default of the Purchaser failing to fulfil its financial obligations, the Seller would notify the Defendant, as Guarantor, within 30 days of the expiry period set out in the Settlement Agreement.

That the validity period of the Guarantee would be from 24th August 2017 – 23rd February 2018.

NOTICE OF MOTION DATED 22ND JULY 2019

By a Notice of Motion Application dated 22nd July 2019, brought by the Defendant/ Applicant pursuant to **Order 26 Rules 1, 5 and 6; Order 51 Rule 1 of the Civil Procedure Rules; Sections 1A and 3A of the Civil Procedure Act** and all other enabling provisions of the Law, the Applicant/Defendant sought orders;

- a) That the proceedings herein be stayed pending the hearing and determination of this application
- b) That the Respondent provides security for costs in the sum of Ksh 10,000,000/- or such sum as the court may order within fourteen (14) days of the order.
- c) That the security be deposited in an interest earning account in the joint names of the respective advocates.
- d) That in default of the security for costs being provided, the Respondent's suit be dismissed with costs to the Applicant.
- e) Costs for this application be provided for.

The application was based on grounds;

- a) That the Respondent is not a resident of the Republic of Kenya and has no known attachable assets within the jurisdiction.
- b) That the Applicant was apprehensive that it would not recover its costs in the event that costs were awarded against the Respondent.

REPLYING AFFIDAVIT

The Manager, Business Development Section of the Plaintiff/Respondent Mr. Julius Towett deposed as follows ;

1. He read and understood the meaning and import of the following documents:

- a) *The Application dated 22nd July 2019 (hereinafter "the Application"); and*
- b) *The Supporting Affidavit sworn by Emma Mwangi on 23rd July 2019 (hereinafter the "Supporting Affidavit").*

2. THAT the said Application sought to have the Plaintiff deposit the sum of Kshs. 10,000,000 as security for costs with respect to the suit herein.

3. THAT contrary to the allegations contained in paragraphs 4 and 5 of the Supporting Affidavit, the Plaintiff Company though incorporated in Korea has a physical office in Kenya located at International House, 5th Floor, Mama Ngina Street, Nairobi. The Defendant's apprehension that it may be unable to recover costs in the event that costs are awarded against the Plaintiff is therefore misconstrued and is not sufficient reason to warrant the court to order the furnishing of security for costs.

4. Annexed hereto and marked "JT" are copies of a certificate of registration of a workplace and a unified business permit issued by the County Government of Nairobi in relation to the Plaintiff's Physical Office.

5. THAT he was advised by their Advocates, that the party and party costs taxable in relation to this suit under the Advocates Remuneration Order, 2014 will be approximately Kshs. 2,061,500. The security for costs in the sum of Kshs. 10,000,000 sought by the Defendant is therefore not only excessive but also meant to frustrate the Plaintiff's efforts to enforce a legitimate right.

6. THAT further, the Defendant's prayer seeking to compel the Plaintiff to provide the security for costs within fourteen (14) days is untenable taking into account the period it would take to open a bank account and facilitate the transfer of funds into that account.

7. THAT he was further advised by the Plaintiff's Advocates that in the circumstances, the Application is designed to act as a clog to the Plaintiff's right of access to justice contrary to the provisions of **Article 48 of the Constitution**. It provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

DEFENDANT/APPLICANT'S SUBMISSIONS

The Defendant submitted that, the sum being sought in the application as security is Ksh 10,000,000 or such sum as the court may order. In Replying affidavit sworn by Julius Towett in response to the application, he approximated the party and party costs at Ksh 2,061,500. With respect this amount is in respect to basic instruction fees and does not take into account appearances before this Court, disbursements, filing of any other supplementary documents and/or pleadings. They submitted that the sum of Ksh 10,000,000 would be a sufficient amount commensurate to the subject matter.

In *Ocean View Beach Hotel Limited vs Salim Sultan Moloo & 5 Others*[2012]eLKR the court laid down the principles as held in *Keary Developments Limited vs Tarmac Construction Limited and Another* (1995)3 All E.R 534 for the consideration in award of security of costs;

a) The court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.

b) 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.

c) 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.

d) 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.

e) 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.

f) 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.

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

The Defendant submitted that it is for the Plaintiff to demonstrate, as per its contention, that an order for security would have the effect of stifling its claim against the Defendant. Merely stating that the amount sought is excessive is not enough. As stated elsewhere above, there was no assurance given in the Replying Affidavit by Julius Towett as to how any costs arising herein would be paid by the Plaintiff. The Plaintiff has also not specifically disclosed a place of business in Kenya or tangible assets to cater for the Defendant's costs, should it be called upon to pay such costs.

In *Cosmos Holidays PLC vs Dhanjal Investment Limited* [2012]eKLR Hon. Justice Mutava (as he then was) held as follows;

"The next issue arising is whether Cosmos has any known assets or place of business in Kenya upon which execution for recovery of costs can be levied. From the material placed before the court, there is no evidence of ownership of assets by Cosmos Holding nor existence of a place of Business in Kenya. Recovery of such costs would require execution against Cosmos; a company domiciled in the United Kingdom. This would be, as observed above, uneconomical, inconvenient and time consuming given the amount entailed. Consequently, I would exercise my discretion under Oder 26 Rule 4 aforesaid to order that such security of costs be provided by Cosmos herein in Kenya."

PLAINTIFF/RESPONDENT'S SUBMISSIONS

The Plaintiff/Respondent submitted that Posco International Corporation (the Plaintiff) which was founded in 1967 is Korea's largest trading company and it has a solid financial standing and would therefore have no difficulty in settling any award of legal costs should it be necessary. It is therefore without doubt that the Defendant/Applicant could adequately be compensated its legal costs in the event that it is successful at trial and the value of legal costs is ascertained.

The Plaintiff submitted that the party and party costs taxable in relation to this suit under the Advocates Remuneration Order, 2014 is approximately Ksh 2,061,500. The security for costs in the sum of Ksh 10,000,000/- sought by the Defendant is therefore not only excessive but also meant to frustrate the Plaintiff's efforts to enforce a legitimate right.

The Plaintiff relied on the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others* [2014]eKLR, where the court found that it was premature and speculative to award costs that had not been assessed. The Court observed as follows;

"It is imperative to note that security costs are awarded on the basis of the subject matter and the scale provided for in the Advocates Remuneration order.

The Court further held as follows on the issue of security for costs:

“in an application for security for cost, 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 Snowden 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 *Noormohamed Abdulla –vs Ranchhobhal J. Patel & Another (1962) E.A 448*, it was held;

“The order for security for costs in such a case is not directed towards enforcing payment of the costs as such, but is designed to ensure that a litigant who by reason of near insolvency is unable to pay the costs of the litigation when he loses, is disabled from carrying on the litigation indefinitely except upon terms and conditions which afford some measure of protection to the other parties.”

The Plaintiff submitted that in view of the excessive amount sought as security for costs, the Application is designed to act as a clog to the Plaintiff’s right of access to justice contrary to the provisions of **Article 48 of the Constitution** which provides that **‘the state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.’**

The Plaintiff relied on the case of *Stratosat Datacom (proprietary) Limited vs Raadgeved Bureau Krijger Services (Kenya) Limited & Another [2012]eKLR*, where the court opined that an application for costs ought not to be used as a weapon against the case of a Plaintiff. A party who applies for security for costs should at least annex a draft bill of costs to enable the court to evaluate how the amount sought is arrived at. In this case the Defendant has not done so.

DETERMINATION

The Court considered the pleadings and submissions by Counsel and finds as follows on the issue of grant of Security of Costs under **Order 26 CPR 2010**;

Order 26, Rule 1 CPR 2010 provides;

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.

Order 26, Rule 4 CPR 2010 provides;

In any suit brought by a person not residing in Kenya, if the claim is founded on a bill of exchange or other negotiable instrument or on a judgment or order of a foreign court, any order for security for costs shall be in the discretion of the court.

These provisions provide for security of costs in whole or in part and if a Plaintiff is not residing in Kenya among other issues to be considered when the Court may exercise its discretion. Both Parties through Counsel illuminated by case-law the legal principles that entail exercise of such discretion. The Plaintiff/respondent relied on the case of *Pancras Swai vs Kenya Breweries Limited (KBL) eKLR* the Court observed;

“the Court’s wide and unfettered power to order costs should be exercised reasonably and judiciously, having regard to all the circumstances of a particular case.”

In *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] e KLR* it was noted that;

“It is imperative to note that security of costs are awarded on the basis of the subject matter and scale provided for in the Advocates Remuneration Order....”

The Defendant/Applicant relied on the case of; *Ocean View Beach Hotel Limited vs Salim Sultan Moloo & 5 Others[2012]eLKR supra* which provides the laid down principles to be considered in granting security costs. On 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. There is no evidence adduced to establish obstacles in pursuit of the claim or unfairly stifling a valid claim created by grant of security of costs in favour of the Defendant.

The Defendant/Applicant also relied on *Indemnity Insurance Co of N America, Phoenix Assurance Co New York & Marine Office of America Co vs Kenya Airfreight Handling Co [2001] eKLR* where the Court held;

“The principle is well-established that a person instituting legal proceedings in this Country and being abroad, so that no adverse order could be effectively made against him if unsuccessful, is by rules of the Court compelled to give security for

Costs. That is a perfectly reasonable principle.”

The pleadings disclose that the Plaintiff Company is domiciled in Korea and has a physical office in Kenya located at International House, 5th Floor, Mama Ngina Street, Nairobi.

The Plaintiff's substance of the claim is USD 900,000 claimed from the Defendant Insurance Company that was to settle the Payment Guarantee, in breach of the Agreement by the Buyer/Afrikon Limited and the Plaintiff Company. There is no evidence on record of the Plaintiff's known assets in Kenya upon which execution for recovery of costs can be levied so as to settle Party to Party Costs when litigation is concluded. See; ***Cosmos Holidays PLC vs Dhanjal Investment Limited [2012]eKLR supra***

It is possible litigation shall prolong if or when other relevant parties are joined to the suit to enable the court consider fully the matter(s) in issue in final determination of the claim. In that time circumstances may change, the Plaintiff may fold up its local office in Kenya or expand to other markets and the Defendant may not recover costs awarded within the country. Therefore, in light of all these possibilities, whereas the Court ought to facilitate access to justice for all persons and right to fair hearing and not curtail these rights by imposition of colossal amounts, the Court shall exercise discretion to grant security for costs. This shall secure the Defendant's right and availability of Costs at the end of litigation and also allow the Plaintiff while present in Kenya to pursue its claim within the justice system.

The Defendant/applicant urged the Court by cited case-law to consider the Defence if *bona fide* and issues raised are not idle but weighty. The Defendant posits that the Defence raises a *bona fide* claim that requires interrogation at trial and not necessarily that it ought to succeed.

The Court considers the subject matter of the suit enforcement of a Payment guarantee by the Plaintiff and payable on demand by the Defendant on the Buyer's breach of Settlement Agreement. The Defendant raises issues of validity of the Guarantee and alleges it has expired. The Defendant also claims that the Plaintiff/Seller failed to deliver goods purchased to the Buyer a party not in these proceedings at this stage. Clearly, at this stage, in the absence of a trial to test veracity of evidence adduced and read both the Agreement and Guarantee in full, these are all triable issues to be ventilated at full trial.

The Defendant's Defence raises triable issues. It is not contested that costs shall be based on the Advocates Remuneration Order on taxation of Party to Party Bill of Costs which shall include the value of the claim. On the other hand, it should not be an exorbitant amount to stifle the pursuit of the claim by dismissal of the suit in default of the deposit of the amount. The Applicant submitted an amount of Ksh 10,000,000/- as security of costs. The Respondent submitted the taxable amount would be Ksh 2,061,500/-. The Applicant stated that this amount was exclusive of court appearances, disbursements, filing documents and pleadings. With all these factors in mind, the fact of the Plaintiff not having any known assets in Kenya tilts discretion to award Ksh 3,000,000/-.

DISPOSITION

From the totality of circumstances considered above, the Court exercises its discretion by granting the Defendant's application for security of Costs in the following terms;

- 1. The Plaintiff/Respondent shall deposit in a joint interest earning Account to be held by both parties advocates on record a sum of Ksh 3,000,000/- within 90 days from the date of delivery of the Ruling.**
- 2. The Defendant's application is granted with costs.**

DELIVERED DATED & SIGNED IN OPEN COURT ON 17TH AUGUST 2020 (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MS KADIMA H/B CHACHA ODERA FOR THE PLAINTIFF

LJA ASSOCIATES LLP ADVOCATES FOR DEFENDANT – N/A

COURT ASSISTANT – TUPET

MS KADIMA: We seek leave to appeal the Ruling

COURT: The application for leave to appeal is granted. The parties shall be availed certified copies of the proceedings and ruling after payment of requisite fees.

M.W. MUIGAI

JUDGE