



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 251 OF 2017

BETWEEN

ANITHA KARUTURI..... 1ST PLAINTIFF

SAI RAMAKRISHNA KARUTURI 2ND PLAINTIFF

AND

CFC STANBIC BANK LIMITED 1ST DEFENDANT

ICICI BANK LIMITED 2ND DEFENDANT

IAN SMALL 3RD DEFENDANT

KIERIAN DAY 4TH DEFENDANT

KOLLURI VENTAKA SUBBARAYA KAMASASTRY 5TH DEFENDANT

RULING

The Applications

1. In the following applications, the Defendants have moved the court, inter alia, under **Order 26 rule 1** and 5 of the **Civil Procedure Rules** (“the **Rules**”) seeking orders that the Plaintiff do furnish security for costs within a period as the court may determine and in default the plaint be struck out with costs to them:

(a) The 2nd Defendant’s application dated 20th December 2017 and supported by the affidavit of Sriram Bulusu, its Assistant General Manager, sworn on the same day.

(b) The 5th Defendant’s application dated 2nd October 2017 and supported by the 5th Defendant’s affidavit sworn on 2nd October 2017.

(c) The 1st Defendant’s application dated 28th February 2019 and supported by the affidavit of Paul Ogunde, a partner in the firm of Walker Kontos Advocates, which is the firm in conduct of the suit on the 1st Defendant’s behalf.

2. The 1st Plaintiff opposed the application dated 20th December 2017 through the affidavit of Anitha Karuturi sworn on 12th March 2018. The 2nd Plaintiff filed a replying affidavit sworn on 8th May 2019 in response to the application dated 28th January 2019. The parties through their respective advocates filed written submissions which they adopted in their respective oral highlights. Since the Defendants raised the same issues, I shall deal with their arguments together.

Background

3. In their amended Plaint, the Plaintiffs state that they are residents of Bangalore, India while the 2nd Plaintiff states that he also resides in

Kenya. They are both directors of Karuturi Limited (Under Liquidation), Surya Holdings Limited, Rhea Holdings Limited and Yeshoda Investments Limited (“the Companies”). The 1st and 2nd Defendants advanced banking facilities to the Companies which were secured by debentures and charges over all the assets, moveable and immovable, of the Companies. In due course, the 1st and 2nd Defendants appointed the 3rd, 4th and 5th Defendants as receiver managers over the Companies and their business undertaking.

4. The Plaintiffs’ case is that on 10th March 2015, the 3rd, 4th and 5th Defendants acting in connivance with the 1st and 2nd Defendants and without any colour of right, maliciously and without reasonable cause demolished a property known as *Masdam House*. They contended that *Masdam House* stood on Plot No. 9352/3 Naivasha which was not part of the securities offered by the Companies. The Plaintiffs stated that they are the assignees of the right to perpetual enjoyment and use of *Masdam House* which they utilized as a wild life and bird watching lodge and a venue patronized by high profile and high value individuals.

5. Following the demolition, the Plaintiffs suffered loss and damage which they now claim in the Amended Plaintiff. The claim includes the replacement value of *Masdam House* amounting to USD 300,000.00, loss of invaluable arts, artifacts, Persian carpets, jewelry, home ornaments and crockery all valued at USD 314,536.75.

6. The substance of the Defendants’ defence is that the 1st and 2nd Defendants did not unlawfully appoint the 3rd, 4th and 5th Defendants unlawfully. They also denied that they demolished *Masdam House* as the demolition orders were issued by Water Resources Management Authority (“WRMA”). They added that *Masdam House* was not owned by the Plaintiffs and was part of the securities offered by the Companies.

Defendants’ Case

7. The common thread running through the Defendants’ applications is that the Plaintiffs are foreign nationals who reside in Bangalore, India and it would be in the interests of justice that the Plaintiffs be ordered to furnish security for costs as they do not have any assets. That in the event the suit is unsuccessful, they may not recover any costs from the Plaintiffs as they are residents in India.

8. The 2nd and 5th Defendants filed their application before the filing of the Amended Plaintiff. Their case is that the Court has absolute judicial discretion to call for security for costs where the plaintiff resides outside Kenya, or where the plaintiff does not have sufficient assets within Kenya. They cited the case of *Shah v Shah [1982] KLR 95* where the Court of Appeal held that as a general rule, security for cost ought to be ordered where the plaintiff resides outside the court’s jurisdiction. In this case, the Defendants submitted that the Plaintiffs admitted in the Plaintiff and submissions that they were resident in India.

9. The 2nd and 5th Defendants submitted that the Plaintiffs, in their filed replying affidavits, did not present any evidence to show that they own any assets in Kenya in their personal capacity. That stated that Plaintiffs simply laid claim to assets belonging to the Companies in which they are directors and that those Companies are in receivership and one of them is now in liquidation. They further submitted that the onus is on the Plaintiffs to prove that they have assets in Kenya but they failed to do so in their depositions hence the application should be allowed.

10. The Defendants submitted that under **Order 26** of the **Rules**, what is important is for the Defendants to show that it has a *bona fide* defence which is one that need not succeed but one that is arguable. In this respect, they submitted that the Plaintiffs did not establish, by any evidence, that they owned *Masdam House*. They averred that from their own documents, *Masdam House* was erected on the property belonging to other parties. They relied on the pleadings in **Naivasha PMCC No. 108 of 1995 Sher Agencies Limited v. Naivasha Municipal Council, Ministry of Health and the Attorney General** through which the Plaintiffs claim evidence of their ownership of *Masdam House* were initiated by Sher Agencies Limited which later changed its name to Karuturi Limited and not the Plaintiffs. That in those proceedings, the issue of *Masdam House* having been erected on riparian land and having been constructed without Naivasha Municipal Council approval were raised. That in light of those proceedings there is sufficient evidence to support their contention that the demolition order was issued by WARMA.

11. The Defendants also urged the court to consider that the Plaintiffs as directors of Karuturi Limited consented to the winding up of the Company by an order issued on 30th March 2016 in Winding Up Cause No. 12 of 2010 thus demonstrating the impecunious nature of the Plaintiffs. The Defendants submitted that they have made out a case to warrant the grant of an order for security as the Plaintiffs are resident in India, they have no known assets in Kenya within the jurisdiction of this court. They concluded that the Plaintiffs’ claim of USD. 614,536.75 exposes the Defendants to colossal legal costs in defending this claim.

Plaintiffs’ Case

12. The Plaintiffs contended that an order for deposit for security for costs cannot be made in this suit on the grounds that the Plaintiffs’ suits seeks damages against the Defendants jointly and severally liable for the loss and damage arising out of the unlawful demolition of the *Masdam House* hence under **Order 26 rule 3** of **Rules** the court cannot order security for costs in the absence of apportionment of liability.

13. The Plaintiffs submitted that the Defendants have not made out a case for the grant of orders on the ground that every person, regardless of their financial status, has the right to access justice. Counsel for the Plaintiffs cited *Bamburi Cement Co. Ltd v Lawi Duda & 21 Others, CA Civil Application No. Nai 6 OF 2013* where the Court of Appeal held that under **Article 48** of the Constitution, which protects the right of access to justice, is couched in mandatory terms hence the court should not condition the Plaintiffs’ right of access to justice on the deposit of a colossal amount of money.

14. The Plaintiffs submitted that contrary to the Defendants’ position that the 1st Plaintiff has no known assets in Kenya, is resident out of jurisdiction, and that the Defendants will be unable to recover costs should they successfully defend the suit, the Plaintiffs pointed to the fact that the 2nd Plaintiff is not only resident in Kenya but also has vast investments and business interests in the country consequently, the court

should not order security.

15. Counsel for the Plaintiffs submitted that the Plaintiff's foreign residence is not the only consideration in making an order for security as the court is enjoined to consider all the relevant factors. Counsel cited the ***Johnstone Muchemi Gichema v Moses Wekesa KBU HCCA No. 180 of 2016 [2017] eKLR*** to support this proposition.

16. Counsel cited the following factors which the court ought to consider. First, that the Defendants have not discharged their burden of proof that they will be unduly disadvantaged in the unlikely event that they successfully defend the suit. Counsel referred to the decision of the Court of Appeal in ***Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others CA No. 38 of 2013 [2014] eKLR*** where the court stated that, "*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.*" In the circumstances, counsel urged that without proof, the court should not impose condition on the right of access to justice.

17. Second, that the Defendants have not tendered any material evidence to negate the bona fides of the Plaintiffs' claim, relevant conduct, or the Plaintiffs' willingness and ability to pay costs. Counsel cited ***Marco Tool & Explosives Ltd v Mamujee Brothers Ltd [1988] KLR 730*** where the Court of Appeal held that the onus is on the applicant to prove such inability or lack of good faith that would make an order for security reasonable hence in the absence of the aforesaid proof, as in the present case, an order for security will be unreasonable.

18. Third, the Defendants have admitted the demolition of the House, save that they allege that it was done and or sanctioned by WARMA. The Plaintiffs contest this allegation hence the Plaintiffs' claim cannot be said to be unfounded and a mere sham. Fourth, that the suit is a direct result of the Defendants' unlawful conduct which should not be rewarded by allowing the Defendants' applications as they are clearly a cloaked attempt to obstruct and frustrate the Plaintiffs' only avenue for remedy through the Courts which is part of the right guaranteed under **Articles 48 and 50** of the Constitution.

19. Lastly, the counsel submitted that the Plaintiffs are renowned international business people with business interests across the globe hence, the Court's exercise of discretion should militate against the holding up of the Plaintiffs' capital over an apprehension that they may be unable to pay costs. Counsel maintained that it is unlikely that the Plaintiffs will close shop to evade payment of unascertained costs, if any hence an order for security for costs is completely unnecessary.

Determination

20. It is not in dispute that the court has discretion to order security for costs under **Order 26 Rule 1** of the **Rules** which provides that:

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.

21. Before I proceed to consider the aforesaid provision, I propose to deal with the primary objection by the Plaintiffs to the Defendants' application on the basis of the Constitution. The Plaintiffs rely on **Articles 27 (1)** and **48** of the Constitution which provide as follows:

27(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

and

48. 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.

48. Counsel relied on the decision of the Court of Appeal in ***Bamburi Cement Co. Ltd v Lawi Duda & 21 Others (Supra)*** where it observed as follows:

[A] litigant, however poor, should be permitted to bring his proceedings without hindrance and have his case decided. The letter and spirit of our Constitution appears to support this position. Article 48 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 Article is couched in mandatory terms.

49. Although the right of access to justice in **Article 48** is couched in mandatory terms, it does not mean that the right cannot be limited in certain cases. The provisions regarding security of costs are still subject to **Article 24** of the Constitution which permits limitation of certain fundamental rights provided those limitations are justified under the Constitution. Whether or not the provisions for security for costs are justified under the Constitution was considered by the Court of Appeal in ***Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others (Supra)*** where it was argued that an order for security for costs would impede the right of access to justice. The court stated 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. In ***Noormohamed Abdulla v Ranchhodbhal 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..

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. **Article 24 (1) (d) of the Constitution**, provides:-

24 (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-

.....

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others;

50. In the aforesaid decision, the Court of Appeal cited with approval the decision of the High Court in **Johnson Muthama v Minister of Justice and Constitutional Affairs and Others NBI Petition No. 198 of 2011 [2012] eKLR** which rejected the petitioner's contention that **section 78 of the Elections Act** requiring the provision of security for costs was unconstitutional on the ground that it violated **Article 48 of the Constitution** as follows:

[69] Provision of payment of costs by a party coming before the court does not in my view, violate any provision for the constitution. It is a common practice in civil proceedings intended to safeguard the interests of the party against who a claim is brought and to prevent abuse of the court process. Given the nature of elections, it serves a useful and rational purpose of ensuring that only those who have a serious interest in challenging the outcome of an election do so.

51. The Court of Appeal also approved the decision in **Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 Others-MKS HC EP No. 8 of 2013 [2013] eKLR** where the court held that:

Security of costs ensures that the respondent is not left without recompense for any costs or charges payable to him. The duty of the court is therefore to create a level ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access to justice vis-a-vis the respondent's right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him.

52. The aforesaid decisions show that the provision for security for costs are justified and the exercise of discretion, which is governed by established principles, maintain a balance between the plaintiff, who wishes to prosecute his or her suit without any impediment and defendant, who must be protected from incurring costs which may never be recovered if the suit fails. I now turn to consider whether the Defendants have made out a case for the grant of an order for security for costs but before I do let me deal with two technical issues raised by counsel for the Plaintiffs.

53. First, counsel for the Plaintiffs, submitted that the 2nd and 5th Defendant's applications, having been filed on the basis of the original plaint, could not stand as the Plaint was subsequently amended to expand the claim and join the 2nd Plaintiff. I do not think that the amended plaint, of itself is insufficient to undermine the application since the claim by the Plaintiffs remains and in any case, there is still the application by the 1st defendant against both Plaintiffs.

54. Counsel for the Plaintiffs attacked the Defendants application based on the provisions of **Order 26 rule 3 of the Rules** which provides as follows:

Where it appears to the court that the substantial issue is which of two or more defendants is liable or what proportion of liability two or more defendants should bear no order for security for costs may be made.

55. Counsel argued that the claim against the Defendants is joint and several hence the court should not issue an order for security for costs. I disagree with this submission as it would mean that a plaintiff may evade the provisions for security merely by making a claim against multiple defendants and then contend that it is case where liability may be apportioned. This is why the rule is prefaced by the "Where it appears" meaning the court must consider the nature of the claim and whether its admits apportionment of liability. The court can only apportion liability where one or more of the Defendant has filed a Notice of Claim or Indemnity against the Co-defendant. The Defendants have not made claims against each other and there is nothing in their respective defences to suggest that they are blaming each other for the demolition of *Masdam House*. There would therefore be no basis for apportionment of liability hence it does not appear to the court that liability will be apportioned hence **Order 26 rule 3 of the Rules** is not applicable to this case.

56. As regards the substance of the Defendants' application, the starting point for consideration is the dicta of Law JA., in **Shah v Shah** (Supra) that, "The general rule is that security is normally required from Plaintiff's resident outside the jurisdiction, but as was agreed in the court below, a court has discretion, to be exercised reasonably and judicially, to refuse to order that security be given" still remains correct since it recognises the court retains ultimate discretion. A more nuanced approach to the issue of security for costs is now accepted in taking into account all the facts before the court as illustrated by the cases cited by the parties and which I need not rehash.

57. In **Mama Ngina Kenyatta and Another v Mahira Housing Company CA Civil Application No. NAI 256 of 2003 [2005] eKLR** cited with approval the decision in **Keary Developments v Tarmac Construction [1995] 3 All ER 534** which set out some pragmatic, though not

exhaustive, factors which should guide the Court in exercising its discretion whether to order security for costs as follows:

- (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 a more sufficient reason for not ordering security. It is implicit that a company may have difficulty meeting an order.
- (c) 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.
- (d) The court will look to the prospects of success, but not go into the merits in detail.
- (e) 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.
- (f) 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.
- (g) The lateness of the application can properly be taken into account.

58. Although that case concerned a limited liability company, I think the principles are equally applicable to this case. By their own pleadings and depositions, the Plaintiffs have admitted that they are resident in India. Although the 2nd Plaintiff stated that he has vast interest in Kenya, neither him nor the 1st Plaintiff showed or put before the court any evidence that they owned property in Kenya capable of satisfying the decree. While it is true that the Defendants must provide some evidence that the Plaintiffs are not in a position to pay costs if ordered, the Plaintiffs bear the evidential burden of showing that they have such assets as this is a matter peculiarly within their knowledge.

59. In this case, the relationship of the Plaintiffs and the Defendants was through the Companies in which they were directors. One of the Companies is under liquidation and the others are in financial distress. When confronted with an application for security for costs, the Plaintiffs had the opportunity to show that they have the wherewithal to meet the Defendants' costs if the suit fails more particularly since the Plaintiffs claim of USD 614,536.75 which is slightly over Kshs. 1,261,000,000.00 is not an insubstantial sum. The Plaintiffs' depositions are threadbare and lacking in this respect.

60. As regards the substance of the Plaintiff's claim, the Defendants have contended that first, *Masdam House* does not belong to the Plaintiffs. In other words, they claim that the Plaintiffs do not have any claim to the property. Second, that the demolition of the *Masdam House* was authorised by or carried out with the authority of WRMA. At this stage I am not required to make any conclusive findings but only decide whether the Defences raised are bona fide or worthy of trial. In this respect, I would only point to the proceedings in **PMCC No. 108 of 1995 *Sher Agencies Limited v Naivasha Municipal Council & Others***, which seem to suggest that *Masdam House* belonged to the Sher Agencies Limited which later changed its name to Karuturi and that the order for demolition originated from WARMA. On this basis I cannot say that the Defendants do not have a bona fide defence.

61. Taking all the aforesaid factors into consideration, I am satisfied that this is a case where the Plaintiffs should provide security for costs. The Defendants have pegged the amount to be secured on Party and Party Costs under **Schedule VI** of the **Advocates Remuneration Order** based on USD 614,536.75 claimed. As I have stated elsewhere, in setting the amount, the court can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount but it is not bound to make an order of a substantial amount. I of course have in mind, the fact that the court should not put an undue impediment on the Plaintiffs' right to pursue its claim.

62. I therefore allow the applications dated 20th December 2017, 2nd October 2017 and 28th February 2019 on the following terms:

- (a) The Plaintiffs shall each provide security to the amount of Kshs. 10,000,000.00 each to the 1st Defendant and to the 2nd and 5th Defendants respectively within a period of sixty (60) days from the date hereof.
- (b) Such security may be in the form of a cash deposit in court or a joint account in the names of the respective advocates or in the form of a bank guarantee from a reputable bank agreed upon by the parties.
- (c) In default of compliance with the provisions of such security, the Plaintiffs claim shall be struck out with costs to the Defendants.
- (d) That the Plaintiffs shall bear the costs of the application.

DATED and DELIVERED at NAIROBI this 23RD day of OCTOBER 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Ngatia instructed by Ngatia and Associates Advocates for the Plaintiffs.

Mr Ogunde instructed by Walker Kontos Advocates for the 1st Defendant.

Mr Nyaribo instructed by Muthaura Mugambi Ayugi and Njonjo Advocates for the 2nd and 5th Defendants.