



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 02 OF 2019

SAKAFU LIMITED.....PLAINTIFF

VERSUS

FLOWCRETE EAST AFRICA LIMITED.....DEFENDANT

RULING

1. This ruling is in respect to the application dated 4th March 2019 wherein the applicant/plaintiff seeks orders that the defendant be ordered to furnish security sufficient to satisfy the whole of the plaintiff's costs pending the hearing and determination of the suit.

2. The application is supported by the affidavit of the applicant's Director **Salima Antonio Fernandes** sworn on 4th March 2019 who avers that the defendant is in the process of winding up its operations in Kenya and is in the process of handing over its business to a third party.

3. He further states that the defendant has no substantial assets or property of fixed or permanent character within the Republic of Kenya such that any adverse order that may be eventually made against it may not be successfully or effectively enforced.

4. It is the plaintiff's case that unless the defendant is ordered to furnish security for the costs, the defendant will not be able to pay the costs in the event that the suit is determined in the plaintiff's favour.

5. The defendant opposed the application through the grounds of opposition dated 12th June 2019 in which it listed the following grounds.

1. The application is fatally defective and ought to be struck out on the basis that an application under Order 26 of the Civil Procedure Rules, 2010 may only be made by a defendant or a third party or subsequent party but not a plaintiff.

2. Without prejudice to the foregoing, the allegations by the plaintiff that the defendant is winding up are untrue, unsubstantiated and unsupported by evidence.

3. While the defendant has scaled down its operations in Kenya, it will continue to conduct business in Kenya. For the avoidance of doubt, the defendant is still a going concern with a registered office in Kenya and a tax payer registered with the Kenya Revenue Authority.

4. Quite apart, the defendant has a bona fide defence and by its defence dated 5th March 2019, the defendant has denied the allegations that the products were defective and has averred that the performance of the products was occasioned by the poor application technique of the plaintiff. The defendant has also challenged whether the alleged damage occurred in view of the fact that the plaintiff never invited the defendant's representatives to some of the project sites where the alleged damage occurred in accordance with usual trade practices.

5. These are issues which ought to be ventilated in a trial and the defendant should not be penalized to pay for costs on the basis of unfounded allegations by the plaintiff when it has a bona fide defence and it is still operational in Kenya.

6. It is therefore in the best interest of justice that the application be dismissed with costs to the defendants.

6. The defendant also filed a replying affidavit of its Director one **Craig Blintenhall** in response to the application. The defendant's deponent avers that the defendant is not winding up or liquidating its assets and will continue to operate as a going concern in Kenya. He states that the defendant is a company duly registered in Kenya and is part of a leading global manufacturer of poly urethane acrylic and epoxy resin floor coatings and specialist adhesives, mortars, and grouts across the Sub-saharan region.

7. It is the defendants case that it has a bona fide defence with high chances of success and that it should therefore not be penalized to pay costs before the issues before the court are ventilated at a full hearing.

8. Parties filed written submissions to the application which I have carefully considered.

9. The main issue for determination is whether the defendant herein should be ordered to furnish security for costs.

10. Courts have held the view that the costs ensure that a level playing field so that the respondent is not left without recompense for any costs or charges payable to him at the end of the case.

11. In the present, the applicant's case was that the defendant should furnish security for costs as it is not only a foreign company but is also in the process of winding up its operations such that the plaintiff, if successful in the suit, will be unable to enforce the court's orders against it.

12. The defendant's position, on the other hand, was that under Order 26 Rules Civil Procedure Rules, order to furnish security for costs can only be granted against the plaintiff and not against a defendant. Order 26 Rule 1 of the Civil Procedure Rules stipulates as follows:

“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.”

13. On its part, the plaintiff maintained that the orders sought herein are akin to an order for attachment before judgment under Order 39 Rules 5 of the Civil Procedure Rules which stipulates as follows:

“(1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—

(a) is about to dispose of the whole or any part of his property;

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.”

14. My finding is that the provisions of Order 26 of Rule 1 Civil Procedure Rules are specific on which party may apply for orders for security for costs. In the case of **Shah v Shah** [1982] KLR 95, the court stated thus:

“The principle general rule is that security is normally required from plaintiffs resident outside the jurisdiction, however, a court has a discretion to be exercised reasonably and judicially, to refuse to order the security be given. The test on an application for security of costs is not whether the plaintiff has established a prima facie but whether the defendant has shown a bona fide defence.”

15. The fact that it is a defendant who may benefit from the provisions of Order 26 Rule 1 is further confirmed by the provisions of Order 26 Rule 5 which stipulate that:

“(1) If security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit.”

16. I therefore find that the instant application is misconceived in the sense that allowing it will give rise to the absurd outcome of benefitting the defendant through dismissal of suit should the provisions of Order 26 Rule 5 Civil Procedure Rules kick in upon the failure in upon the failure by the defendant to furnish the requisite security.

17. It therefore follows that a proper application the plaintiff ought to have been initiated under Order 39 Rule 5 of the Civil Procedure Rules which I have already highlighted in this ruling.

18. In this case I find that even assuming in the interest of dispensing substantive justice that the applicants application was initiated under Order 39 Rule 5, the applicant has not fulfilled any of the conditions under which an order for attachment before judgment can be made. In other words apart from the unconfirmed claim that the defendant is winding up its operations, the applicant has not established that the defendant is intends to obstruct or delay the execution of the decree or that it is about to dispose the whole or any part of its property or is about to remove its property from the local limits of this courts jurisdiction.

19. In a nutshell, I am not satisfied that the instant application is merited and I therefore dismiss it with costs to the defendant/respondent.

Dated, signed and delivered in open court at Nairobi this 28th day of November 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Ochieng for the plaintiff/applicant

Miss Mulindi for Omondi for the defendant

Court Assistant-Sylvia