REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HC.COMM. 128A OF 2006

W.E. TILEY (MUTHAIGA) LTD.....PLAINTIFF

VERSUS

1. DEVJI MEGJI & BROTHERS LTD

2. KENYA REVENUE AUTHORITY…….....…DEFENDANTS

R U L I N G

Outline of facts of the application

1. There is before court a Notice of Motion by the defendant dated 20th September 2016 which seeks from the court an Order that the plaintiff does within 10 days from the date of the order, give security for the 1st defendants costs for the whole of the claim.

2. That application on its face and on the affidavit sworn and filed in support thereof is premised on the grounds, among others, that the plaintiff has on own admission confirmed to have ceased operations in Kenya; the plaintiff is facing massive claims related Imperial Bank; the plaintiffs directors have been charged with criminal offences connected with conspiracy to defraud and other organized crimes; the plaintiff had previous failed to pay costs of about four (4) million; this matter has been to the court of appeal and that court has placed the blame for any loss to the plaintiff squarely at the door steps of the said defendant and that the 1st defendant has reasons to believe that the plaintiff will be unable to pay any costs awarded herein, which will be substantial if regard is had to the claim, on the basis that the plaintiff is shown to owe mammoth debts.

3. After the plaintiff filed a Replying affidavit in opposition to the application, the 1st defendant/applicant filed a further affidavit whose purpose was merely to correct the assertion that the plaintiff had previously been unable to pay costs of about four million and to confirm that the costs were indeed paid but by four instalments.

4. In opposition to the application the plaintiff did file a Replying affidavit by one FIROZ JESSA. That affidavit dwelt at length on alleged falsehood in the affidavit in support of the affidavit and sought to underscore and emphasize that the sole motivation was to soil and poison the court; mind and therefore mislead it based on false facts.

5. To the plaintiff, before the current application, the 1st defendant had in a judicial review application also sought to mislead the court and did infact achieve that purpose only for the facts to be disproved

later. However by that time damage had been done in that costs had been incurred and out of the misleading falsehood.

6. Heavy premium was also placed on the allegations that the 1st defendant is treating the court process and the plaintiff right to the equipment with impunity in that the High Court did quash the sale of the goods, some 10 years ago, a decision confirmed by the Court of Appeal more than two years ago but todate the 1st defendant continues to hold the equipment.

7. On the assertion that the suit is only relevant and tilted against the 2nd defendant, the plaintiff asserts that both High Court and the Court of Appeal have confirmed that the sale of equipment to the 1st defendant was null and void hence the liability between the parties has been determined.

8. On the law applicable to an application for security for costs, the plaintiff take the position that where, as in this case, the defendants blame each other for the injury to the plaintiff and have issued notices of contribution, it is not so much as to who between the two of them should bear what proper proportion of liability and therefore by dint of Order 26 Rule 3, no Order for security for costs may be made.

9. The last line of attack on the application by the plaintiff was summoned from no higher source than the Constitution. The plaintiff invoked articles 50(i) and 25c to emphasize the right of the plaintiff to a fair hearing and contended that to accede to this matter by grant of an order for security for costs and stay of the suit pending provision of such security would be to violate the plaintiff right to have his dispute heard and so heard fairly.

10. On the newspaper stories and matters pleaded of and concerning Charter House Bank, and Imperial Bank, the plaintiff urged the court to disregard such as non-relevant to the application for provision for security of costs.

11. The parties did, as directed by the court, file written submissions which besides citing to court the *stare-decisis* each considered to support its stand, largely reiterated the facts in the affidavits filed by both sides. The 2nd defendant also filed submissions supporting the application but did seek that the same be marked as withdrawn.

12. I have considered all the material availed and having read all and based on my own appreciation of the dispute at hand in the application, I have come to conclusion that the only substantive issue that calls for court's determination is whether or not the 1st defendant has met the pre-requisites of law so as to be entitled it to an order for security for costs to be ordered.

Analysis and determination

13. Although the plaintiff and the 1st defendant have filed very elaborated and long affidavit covering all manner of accusations evidently geared to cast each other in dim light or just in not so flattering manner, that to this court was totally uncalled for but must be understood on the otherwise constrained relationship between the two which even their counsel seen to have been drawn into. To this court, however, the matter invokes the courts discretionary jurisdiction which in all fairness must sit in consonance with the core duty of the court to do justice.

14. That duty to do justice is not only always to hear the parties and ignore what else will play out at the end of the case. It is therefore important in an application to provide security for costs to not only secure the rights of the plaintiff to be heard but also assure the Defendant that in the event that the plaintiff fails to succeeds against him and the court award to it costs, there ought to be prospects and good probabilities of recovery of such costs.

15. That to this court is the rationale why Order 26 Rule 1 is worded in the fashion it exists in our statute. That law says:-

"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".

16. My reading and understanding of that provision is that whether or not to order security for costs is a discretionary matter vested upon the court. As in all judicial discretions it must be judicious in that there must be reason and justification of necessity to make the order. Invariable the necessity is to do justice between the parties.

17. Therefore in balancing the right of the plaintiff to be heard on its claim and the competing right of the defendant that if after hearing, the plaintiff fails and the defendant is awarded costs, such costs should not be irrecoverable, the court has an arrays considerations to make. The consideration may include but not limited to; the nature of the plaintiffs case, whether it presents an arguable case and not just a frivolity, and therefore reasonable chances of success; the existence of absence of an admission by the defendant, Put the other way the *bonafides* of the defence raised; whether the application is intended to secure and answer the defendants genuine and proven fear of inability to recover costs or just to continue and contrive and stifle the plaintiffs right to be heard and lastly if the defendant has had any contribution in the misfortunes that tend to show the plaintiffs ability to pay such costs as the end of the case.

18. My understanding of these pertinent considerations, which I do not consider to be exclusive, is informed and guided by the decision in ***GULF ENGINEERING (EAST AFRICA) LTD VS AMRIK SINGH KALGI*** where the court observed and said:-

"if there is reason to believe that the company cannot pay the costs, then security may be ordered, but not must be ordered…some of the matters the court might take into account such whether the company's claim is bonafide and not a shan and whether the company has reasonably good prospects of success….."

19. The Court might equally consider whether the application for security was being used oppressively so as to stifle a genuine claim. It would also consider whether the plaintiffs want of means has been brought about by any conduct of the defendant, such a delay in payment or delay in doing their part of the work.

20. Earlier on, the Court of Appeal for Eastern Africa had stressed the need to consider the conduct of the defendant seeking security for costs in the following words:-

"…..a successful defendant……. can only be deprived of his costs when it is shown that his conduct, either prior to or during the course of the action has led to litigation which but for his own conduct might have been averted".

21. In this matter, it is put on oath by the plaintiff and not controverted by the 1st defendant that the sale of the plaintiffs goods subject of this litigation has been declared null and void by this court a finding which has been confirmed by the Court of Appeal. It also said in the same vein that inspite those determinations, by the two courts, the 1st defendant has not deemed it necessary to return the equipment even if for the purposes of mitigating on the loses.

22. Additionally, it is averred that the litigation has been broadened and costs incurred by an act by the defendant of misleading the court that the equipment had been sold a fact which was later disproved and a defendant's director charged with a criminal offence of perjury.

23. To my mind, if indeed the sale of equipment to the 1st defendant has been nullified then I think it is not unreasonable to hold even at this level that the claim is not a sham but *bonafide*. If that be the impression an impartial ampire gets upon reading the pleadings and documents to be used at trial, then the need and push towards grant of an order for security for costs has been considerably reduced. I say considerably reduced because in the event of the plaintiff showing prospects of success when compared those odds of failure, the real fear of the defendant touching on the prospects of irrecoverable costs are proportionately reduced and there would be no justification to order security for costs.

24. The second question is whether plaintiff has done anything as to create an impression that it intends to remove its assets from the jurisdiction of the court with a design to defeat any order for costs against it. To the test I think the 1st defendant has not done much towards the discharge of its onus. In the affidavit in support of the application, other than the accepted fact that the plaintiff's assets have been frozen, there was the attempt to show inability to pay by reference to costs earlier on awarded in this same matter. However that position was retracted by the 1st defendant. The only material that now stands out towards of proof of inability to pay is the admitted fact that the plaintiffs assets have been frozen pursuant to court orders issued in ***NAIROBI HIGH COURT, COMMERCIAL AND ADMIRALTY DIVISION CASE NO. 522 OF 2015***. However, I have read the order exhibited and it an interim *exparte* order issued on the 29/10/2015. That order has not fully deprived the plaintiff of those assets. They are, to this court, conservatory which may be or may not be confirmed at the *interpartes* hearing and even then they would be temporary orders pending hearing and determination of the suit.

25. To this court those orders are not determinative and final of the plaintiff's right to access and control the assets. That final determination will not come until the suit shall have been fully and finally heard and even then there would be still be possibilities of an appeal. To that extent, I hold the view and opinion that such interlocutory determination cannot be the only reason to order security for costs with the prospects that in default to deposit security, a suit founded upon and buttressed by findings by court of competent jurisdiction, may be dismissed. In that event the order shall have been used oppressively. I say oppressively because, it is not contended that the position the plaintiff finds itself was voluntarily entered into. I do find that the restraint order was as a result of a court process and remain an interim and temporary state of affairs. It would be different if there was a final decree attaching and alienating all the plaintiffs' assets and where it was a voluntary situation instigated by the plaintiff. This was not.

26. But even in the event of a final order in that Nairobi suit, and with the opinion this court entertains that the plaintiff claim is not a sham and the further fact that there are goods the defendant holds, which the plaintiff contends it is not legally justified to hold, I find that it would not be for the furtherance of the justice of the case to order security for costs.

27. Lastly, in this file, the 2nd defendant has issued a Notice against a co-defendant and the defendant has also intimated an intention to issue a Notice against co-defendant. In that scenario, it is not farfetched but only reasonable to find at this juncture that there is a substantial issue to be decided between the two defendants on who should bear what apportionment of the liability. In that event, the law, Rule 3 of Order 26, dictates that no order for security for costs may be made.

28. The foregoing analysis sums up the fact that, the plaintiffs claim seems *bonafide*, the inability to pay evident by ceasure of operation is temporarily occasioned by an interim temporary injunction yet to be finally determined and that there is a substantial question between the two defendants in the suit as to who between then should bear what proportion of the plaintiff's claim.

29. Based on the existence of those facts and circumstances, and on the decided cases cited to court which the court has opted to follow, it follows that the 1st defendants application cannot be allowed but ought to be dismissed. It is dismissed with costs to the plaintiff who opposed it.

Dated and delivered at Mombasa this 30th day of June 2017.

HON. P.J.O. OTIENO

JUDGE