



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 267 OF 2015

KEYSTONE BANK LIMITED.....1ST PLAINTIFF/RESPONDENT
PHILLIP IZEAKOR.....2ND PLAINTIFF/RESPONDENT
HAFIZ OLOLADE BAKARE.....3RD PLAINTIFF/RESPONDENT
SAM N. OKAGBUE.....4TH PLAINTIFF/RESPONDENT
LAURA OMOLOLA IKWUAGWU.....5TH PLAINTIFF/RESPONDENT

VERSUS

I & M HOLDINGS LIMITED.....1ST DEFENDANT/APPLICANT
ARUN S. MATHUR.....2ND DEFENDANT/APPLICANT

RULING

The defendants/applicants have moved this court by way of Notice of Motion dated the 6th day of October, 2016 seeking orders that;

1. The plaintiffs be ordered to provide security for the defendants costs in the sum of Kshs. 150,000,000 or any other amount as the court may deem just and sufficient.
2. The plaintiffs do deposit the said sum of Kshs. 150,000,000/=or any other such amount as the court may deem just and sufficient as security for defendants costs in a joint account in the name of the parties' advocates, within 30 days of the date of the order.
3. The suit herein be stayed pending provision of such security as may be ordered by this honourable court.

The application is premised on the grounds set out on the body of the application and on the annexed affidavit sworn by Arun S. Mathur on the 6th day of October, 2016. The application is opposed vide a replying affidavit sworn by Hafiz Olalade Bakare on 8th day of February, 2017.

The application is made mainly on the grounds that the plaintiffs are foreigners and that they have no assets within the jurisdiction of this honourable court, that as at the time the application was made, the defendants had been made aware that the first plaintiff had been barred from inter-bank foreign exchange market at the Central Bank of Nigeria for failure to remit funds and that the Asset Management

Corporation of Nigeria (Amcon) was in the process of conducting a sale of the first plaintiff which was expected to be completed within the next 14 days as it was in an advanced stage.

The respondents have opposed the application mainly on the grounds that the defendants at all material times knew that the plaintiffs are foreigners, that the first plaintiff was being sold and that it was an afterthought on the part of the defendants to bring the application herein.

The application was canvassed by way of written submissions which parties highlighted on the 3rd November, 2017. In his submissions, counsel for the defendants submitted that the need for security for costs is to ensure that the defendants if successful in defending the claim will be able to recover their costs. The court is being asked to ensure that the defendant are not exposed considering that the plaintiffs are foreigners and have no assets in Kenya.

It was also submitted that Nigeria is not a reciprocating Nation under the foreign judgments (Reciprocal Enforcement) Act Cap 43 Laws of Kenya in which case, if the defendants succeed in defending the claim, they will be forced to institute proceedings in Nigeria for recovery of costs.

To support that point, the applicants referred the court to the case of **Cosmos Holdings PLC Vs. Dhajal Investments Limited (2012) Eklr** which highlights that point that where a party will be forced to file proceedings in a foreign country, it will be expensive and time consuming.

It was submitted that the applicants' major concern in bringing the application is not the fact that the first plaintiff was barred by the Central Bank of Nigeria from foreign exchange transactions but the reasons for the bar, which was because of concealment and failure to remit US dollar 2.3 billion of Nigeria National Petroleum Corporation to the government of Nigeria. That though the bar was lifted, it was not because the first plaintiff was exonerated but its because the first plaintiff was said to have entered into an arrangement with the bank of Nigeria for payment of that amount but the reason of non-payment remains.

It was further submitted that the defendants learnt about the sale of the first plaintiff on the 6th day of October, 2016 and upon sale, the shareholders become the material principal persons making decisions. That the revelation about the bar of the first plaintiff came about in the month of August, 2016 less than a month to the hearing and it was confirmed at the hearing.

On whether there was a delay in filing the present application, it was submitted that the same was filed less than two months after the media report, which was within reasonable time. The case of **Essar Telcom Kenya Limited Vs. Joseph Ondungo Okomo (2015) eklr** was cited in which an application for security for costs was made three years after the filing of the suit and the court held that it was filed at the opportune time.

Finally, it was submitted that the plaintiffs would suffer no prejudice if the orders are granted as they have told the court that they are of means and repute and after all, the money is to be deposited in court.

On his part, counsel for the plaintiffs/Respondents submitted that an order for security for costs is at the discretion of the court. He relied on the case of **Cancer Investments Limited Vs. Sayani Investments Limited (2010) eKLR** and that an application of this nature ought to be made promptly as possible and if filed late, there has to be a good explanation for the delay. That it is not a reason for the applicant to say that they are apprehensive but there has to be evidence that the applicant will experience difficulties in recovering costs.

He further submitted that although the foreign residency is one of the factors that the court should consider, it is not decisive. In support of this contention, he relied on the case of **Moses Wachira Vs. Niels Bruel & 2 others (2015) eKLR**. He told the court that the defendants at all material times, knew the plaintiffs were foreigners and they dealt with them as Nigerians (foreigners) in respect of a transaction based in Uganda. That it has not been denied that the plaintiffs are not persons with assets in Kenya but the application herein was not filed at the inception of the suit and having participated in the proceedings for a whole year before filing the present application, the defendants acquiesced to the fact that the

plaintiffs' lack of assets within the jurisdiction were not matters of concern to them.

On the issue of conduct of the first plaintiff with regard to the bar and the sale, it was submitted that the two do not warrant the orders sought. He contended that the bar had been caused by the plaintiffs' inability to source for US dollars, that the new administration had imposed deadlines and a new remitting system and that there was no concealment on the part of the plaintiffs. That the ban was lifted one week thereafter and it was reported three months before the hearing of the suit and therefore it was within the defendants' knowledge and the same manner they learnt about the ban, was the same manner the ban was lifted as it was publicized.

With regard to the issue of sale, the court was told that the first plaintiff was sold as a going concern. That the management and the company are separate legal entities and the fact that it was sold, does not affect its ability to pay the costs in the event the same is awarded.

In his concluding remarks, he submitted that the application was not made in good faith and that the sum of Kshs. 150,000,000/- that the defendants seek to have deposited in court is high and in the unlikely event that the court is inclined to order security for costs, the court should order amounts that will not stifle the proceedings and urged the court to order security in the form of a bank guarantee to be made in favour of the court.

The court has considered the application, the affidavits and the submissions made by the learned counsels for the respective parties. The rationale for security for costs was discussed in the case of **Gatirau Peter Munya Vs. Dickson Mwenda Kithinji & 2 others (2014) eKLR** as follows:-

” The principles applicable in an application for security for costs are clearly enunciated in a number of cases but to cite a few Lalji Ganji Nathoo Vs. Nathoo Vassanjee (1960) Ea, 315, Boormohammed Abdulla Vs. Reinhhodbhal J. Patel & Another (1962), Musera & Another Vs. Stallion Insurance Company Limited 2005, 1 KLR 431, that of Keary Development Vs Tarmac Construction (1995) 3 All ER 534 and ocean view Beach Hotel Ltd Vs salim Sultan Molio & 5 others (2012) eklr.”

The applicable law on an application for security for costs is order 26 Rule 1 of the Civil Procedure Rules which provides: -

“(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.”

The general rule is that security is normally required from plaintiffs' who are foreigners, however, a court has discretion, to be exercised reasonably and judicially, to refuse to order that security be given.

The test on an application for security for costs is not whether the plaintiff has established a prima facie case but whether the defendant has shown a bonafide defence. This was the holding in the case of **Shah Vs. Sheti Civil Appeal No. 34 of 1981**.

The same principles were espoused in the case of **Jayesh Hasmukh Shah Vs. Narin Haira & Another (2015) eklr** in which the court held;

“It is now settled law that the order for security for costs is a discretionary one as long as that discretion is exercised reasonably, and having regard to the circumstances of each case. Such factors as absence of known assets in the country, absence of an office within the jurisdiction of the court, inability to pay costs; the general financial standing or wellness of the plaintiff; the bona fides of the plaintiff's claim, or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account”.

In an application for security for costs, 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. This was the holding in the case of **Kenya Education Trust Limited Vs. Katherine S. M. Whitton Civil Appeal No. 301 of 2009**.

It should, however, be noted that much will depend on the circumstances of each case though the final result must be reasonable and modest. In the case of **Marco Trols & Explosive Ltd Vs. Mamunje Brothers Ltd (1988) klr 730** this point was enunciated by the court in the following terms: -

“The exercise of the courts’ power is discretionary. However, the onus is on the applicant to prove such inability or lack of good faith that would make the order for security reasonable.”

The application before the court is based on the grounds firstly; that the respondents /plaintiffs are foreigners and they do not have assets here in Kenya. These facts have not been disputed by the respondents and their only contention is that the defendants were aware of the same since the filing of the suit yet they took long to file the present application.

The other ground is that at the time the application was filed, the asset management corporation of Nigeria (AMCON) had announced that it will conduct the sale of the 1st plaintiff which sale has since been concluded. I wish to start by appreciating the fact that, the first plaintiff is a limited liability company which in law, is a separate legal entity from the directors. This is a long well settled legal principle. The applicants avers that the fact of sale of the first plaintiff came to the fore after the matter had been listed for hearing. They have submitted that the sale of the first plaintiff is a material development in the corporate governance of the first plaintiff that may have far reaching consequences which may have an effect on the first plaintiff and the defendants should not be made to wait to see or hazard a guess on the recovery of their costs should they succeed in defending the suit.

While this court appreciates that the sale of the 1st plaintiff may affect its performance, either way, it may be too early to speculate what kind of effect it will have. This court cannot therefore make a conclusive finding on the issue as the same would merely be speculative.

I now turn to the issue of the conduct of the first plaintiff. This is relevant in this case with regard to the ban which had been imposed on it by the Central Bank of Nigeria due to its failure to remit government funds as a result of which the first plaintiff was barred from interbank foreign exchange market. According to the applicants, their material concern is not the bar per se but the reason for the same, being non-remittance of a sum of Ksh. 2.12 billion belonging to the Nigerian national Petroleum Corporation. Counsel for the applicant argued that, though the ban was lifted, no explanation whatsoever has been offered by the plaintiffs why it failed to remit the funds in issue. Through Counsel for the plaintiffs submitted that the bar was lifted before the suit was filed, the question that begs is, what was the reason for the ban? The court was told that it had something to do with the ability to source US. Dollars and that the new administration had imposed a new remitting system. The court has noted that these assertions are not captured in the supporting affidavit and therefore were not made under oath but from the bar. There is no doubt that this has a bearing on their probative value. Am persuaded by the applicants’ contention that the conduct by the first plaintiff in this regard may have been suspect and worth considering in determining this application and noting, as I have done hereinabove, that no explanation was given under oath for the said conduct.

The other issue that this court has to consider is whether the defendants have a bona fide defence to the plaintiff’s claim. As was held in the case of **Shah Vs. Shah (Supra)**, the test on an application for security for costs is not whether the plaintiff has a prima facie case but whether the defendant has shown a bona fide defence. Am alive to the fact that, at this stage, the court should not consider the merits of the case or the defendants defence as that is the mandate of the court that will hear the matter but having perused the defence filed herein, this court forms a considered opinion that it is a bona fide defence. However, I hasten to add that a bona fide defence is not necessarily a defence that must succeed at the hearing as courts have variously held. I note, the defendants have pleaded the defence of justification among other defences but this court does not wish to go into the merits of the defence as doing so would be encroaching on the territory of the court that will hear the matter.

The court has also considered the fact that Nigeria is not a reciprocating Nation under the foreign Judgments (Reciprocal Enforcement Act Cap 43 Laws of Kenya and if the defendants succeed in defending the claim, they shall be forced to institute proceedings in Nigeria to recover the costs which will escalate the costs further and at the same time it will be time consuming.

On the issue of the delay in bringing the application, the same cannot be said to be unreasonable.

Having considered the application and all the material before the court, I hereby allow the defendants' application for security for costs dated 6/10/2015 and order that the plaintiffs jointly and/or severally do furnish security for cost in the total sum of Ksh. 80 Million within 30 days from the date hereof. The money to be deposited in an interest earning account with a reputable bank to be opened in the joint names of both advocates within 30 days. In default, the defendants shall be at liberty to apply for further orders under order 26 Rule 5(1) of the Civil Procedure Rules.

Cost of the application shall be in the cause.

Dated, signed and delivered at Nairobi this 31st day of **July, 2017**.

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L. NJUGUNA

JUDGE

In the presence of

..... *for the 1st Plaintiff/Respondent.*

..... *for the 2nd Plaintiff/Respondent*

..... *for the 3rd Plaintiff/Respondent*

..... *for the 4th Plaintiff/Respondent*

..... *for the 5th Plaintiff/Respondent*

..... *For the 1st Defendant/Applicant.*

..... *For the 2nd Defendant/Applicant.*