



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 610 OF 2014

ELEX PRODUCTS EAST AFRICA LIMITED.....PLAINTIFF

VERSUS

BUSINESS PARTNERS INTERNATIONAL KENYA SME FUND...1ST DEFENDANT

BUSINESS PARTNERS INTERNATIONAL LIMITED.....2ND DEFENDANT

RULING

[1] The Notice of Motion dated **25 October 2016** was herein filed by the firm of **Liko & Anam Advocates** on behalf of the Defendants pursuant to **Order 26 Rules 1 and 5** and **Order 51 Rules 1 and 5** of the **Civil Procedure Rules, 2010**, for orders that:

[a] Spent

[b] Spent

[c] That the Plaintiff do give the Defendants security of **Kshs. 10,000,000/=** or the whole of the costs of the suit to the Defendants or other such amounts to the satisfaction of the Court;

[d] That in breach of Order No. 3 above the suit against the Defendants be dismissed with costs;

[e] That the costs of this application be borne by the Plaintiff.

[2] The application was founded on the grounds that the claim against the Defendants jointly and severally is for **Kshs. 104,304,069/=** and **Kshs. 2,597,637.87**; and that in a Supplementary Affidavit filed on record on **31 March 2015**, the Plaintiff confirmed at page 2 of the exhibit marked as "**GMM2**" that the Plaintiff as at **5 September 2014** had very low cash flow and requested for the 1st Defendant to allow the Plaintiff upto 6 months moratorium to pay monthly loan instalments. It was further the contention of the Defendants that the Plaintiff has since then and todate, unilaterally stopped making loan repayments as per the Loan Agreement, and as at **20 October 2016**, the total outstanding balance was **Kshs. 26,098,856.02** while the total arrears was **Kshs. 20,217,847.30**. Thus, it was the contention of the Defendants that they had reason to believe that the Plaintiff would not be able to pay their costs in the event that they turn out successful herein.

[3] The application was supported by the affidavit of the 1st Defendant's Chief Investment Officer, **Ms. Sally Gitonga**, sworn on **25 October 2016** together with its annexures. That affidavit is, in effect, a reiteration of the grounds aforementioned and has annexed to it a copy of the Statutory Notice that was issued by the Defendants pursuant to **Section 220 of the Companies Act, Chapter 486 of the Laws of Kenya**, (now repealed) which precipitated this suit, as well as the Plaintiff's Supplementary Affidavit filed on **31 March 2015** (marked **Annexures BP2 and BP3**, respectively). In addition, the Defendants relied on the Plaintiff's account statements (marked **Annexure BP4**) to demonstrate that the Plaintiff has since unilaterally stopped making the loan repayments in accordance with the Loan Agreement, and that as at **20 October 2016**, the total outstanding balance was **Kshs. 26,098,856.02**.

[4] It was further the averment of **Ms. Gitonga** that the Defendants had made reasonable efforts in vain through their advocates on record to request the Plaintiff to make payments under the loan agreements and or in the event of any dispute thereof, to deposit the same in a joint interest earning account pending the resolution of the same. Thus, it was the contention of the Defendants that they have reason to believe that the Plaintiff will be unable to pay their costs herein in the event the suit is dismissed, granted that they have not been able to repay the loan for the one year preceding the filing of the application; and it is in the interest of justice that their application be allowed.

[5] The application was opposed by the Plaintiff vide the Replying Affidavit of its Managing Director, **Mr. Gabriel Muindi Muli**, sworn on **30 January 2017**. The Plaintiff's stance was that the application is misplaced and out of time, as any such application ought to be filed promptly upon service of summons. It was further averred that the fact that the Plaintiff experienced cash flow problems in or about **31 March 2015** cannot and should not be construed to mean that the Plaintiff is in a permanent financial quagmire. To the contrary, it was contended, the Plaintiff's business is now stable and experienced very healthy turnovers for **2014 to 2016**, and copies of its audited accounts were exhibited in support of the contention as Annexure "**GMM1**"; and that in any event, poverty on the part of a litigant should not be used as a basis for an order for security for costs, for otherwise, the courts would become the preserve of the rich.

[6] It was further asserted by the Plaintiff that, contrary to Paragraph 7 of the Supporting Affidavit, their refusal to repay the outstanding loan is on account of the professional advice received from their financial advisors that the loan had been fully repaid; and if anything, it is the Defendants who owe it the sum of **Kshs. 104 million**. To this end, the Plaintiff relied on a Report of the **Interest Rates Advisory Centre (IRAC)** dated **15 October, 2014** (marked "**GMM2**"). Accordingly, it was averred that it is the Plaintiff who should be having sleepless nights pursuing such a substantial claim against Defendants who do not have any tangible assets in Kenya, without any form of security; and that in a claim for general damages of **Kshs. 104 million**, it is inconceivable that the Defendants' legal costs would amount to **Kshs. 10 million**.

[7] In their written submission filed herein pursuant to the directions of the Court, given on **31 January 2017**, the Defendants' Counsel argued that, the Court having dismissed the Plaintiff's application for a temporary injunction on **20 November, 2015** on the grounds, inter alia, that no prima facie case had been made out, coupled with the trend of default by the Plaintiff that has continued to date, the likelihood that it would not be able to meet their costs should this case turn out in favour of the Defendants was real and more probable. Reliance was placed in this connection, on a letter dated **5 September 2014**, marked **Exhibit BP3**, to the Supporting Affidavit in which the Plaintiff stated that it had very low cash flow and requested the 1st Defendant to allow it a moratorium of up to 6 months.

[8] The Defendant discounted the value of the **IRAC Report** vis-a-vis the instant application, contending that, quite apart from the fact that the said report was unsuccessfully relied upon by the Plaintiff in the injunction application, a cursory glance at it confirms that all Addenda to the agreements including the **2011 and 2014 Restructuring Documents** were not taken into consideration by **IRAC**; and therefore, the Report is not credible. Thus, the contention of the Defendants was that they have a bona fide defence to the Plaintiff's claim; and that the Plaintiff is only using the pendency of this proceedings to perpetuate a breach of a clear contractual obligation to repay its debt.

[9] The second limb of the Defendants' argument is that the Plaintiff has not in any way demonstrated

what assets it holds; and that this is not to say that justice is a preserve of the rich. It was argued by Counsel that, much as there had been effort to show banking, the same were presented in contravention of the Evidence Act, and in particular, **Sections 177** thereof, which provides that:

"(1) a copy of an entry in a banker's book shall not be received in evidence unless it be first proved that--

(a) The book was, at the time of making the entry, one of the ordinary books of the bank; and

(b) The book is in the custody and control of the bank; and

(c) The entry was made in the usual and ordinary course of banking business; and

(d) The copy has been examined with the original entry, and is correct.

(2) Such proof may be given by an officer of the bank, or, in the case of the proof required under subsection 1(d), by the person who has performed the examination, and may be given either orally or by an affidavit sworn before a Commissioner for Oaths or a person authorized to take affidavits."

[10] To bolster the foregoing argument, the Defence Counsel relied on the cases of **Guardian Bank Limited vs. Skyflyers Travel and Tours Limited [2004] eKLR** and **Kenya Commercial Bank Limited vs. James Kuria Njine [2002] eKLR**. Sections 705, 706 and 708 of the **Companies Act, 2015** were also cited for the purpose of questioning why the Plaintiff did not deem it fit to avail its statutory and audited financial statements to prove its assertion that its business had significantly improved over time since 2011. Thus, the Defendants were of the posturing that what has been presented to the Court by the Plaintiff to show its financial position does not meet the minimum requirements of the law. The Court was accordingly urged to allow the application.

[11] The Plaintiff's written submissions dated **22 February 2017** were filed herein on **23 February 2017**. Its argument was that the Court has unfettered discretion to grant or refuse an application for security; the general rule being that security of costs would only be pertinent in situations where the Plaintiffs reside out of jurisdiction. Counsel relied on the cases of **Marco Tool & Explosives Ltd vs. Mamujee Brothers Ltd [1988] KLR 730** and **Shah vs. Shah [1982] KLR 85** to support the argument that it is the Plaintiff in this matter who should be pursuing security for costs, granted that the Defendants reside outside the jurisdiction of the Court.

[12] It was further the submission of the Plaintiff that the onus was on the Defendants to prove that it will be unable to pay and satisfy an order for costs likely to be made in this suit, and that that responsibility has not been discharged in this matter. On the authority of **Marco Tool & Explosives Ltd case** (supra) and **Hall vs. Snowdon Hubbard & Co. (I)[1899] 1 QB 593**, Counsel contended that the applicant ought to have adduced evidence to establish that the Plaintiff, if unsuccessful in the proceedings, would be unable to pay costs due to poverty; and that it is not enough to merely allege that a party would be unable to pay costs in the event that he is unsuccessful.

[13] The Plaintiff also urged the Court to reflect on the conduct of the Defendants and find from the following facts that they are not beyond reproach:

[a] that it was the Defendant's business strategy that drove the Plaintiff's business to the ground in the first instance;

[b] Having failed to achieve the desired results the Defendants stepped aside to watch the Plaintiff's business from a safe distance;

[c] That the Plaintiff's indigenous directors abandoned the Defendant's business strategy in **2013**;

[14] The Plaintiff thus contended that it would be inequitable for the same Defendants to apply for security for costs when their plans were the cause of the Plaintiff's problem in the first instance. It urged the court to find that the application is merely intended to stifle the Plaintiff's claim. Counsel relied on the case of **Keary Development vs. Tarmac Construction [1995] 3 ALLER 534** in which the applicable principles were discussed, namely:

[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.

[15] In addition thereto, Counsel relied on **Articles 24, 48 and 159(2)(a)** of the **Constitution of Kenya, 2010** which guarantee the right to access to justice and urged the Court to find that the amount sought as security by the Defendants constitutes an unreasonable impediment to the Plaintiff's fundamental right of access to justice. To buttress this argument, the Plaintiff relied on the cases of **Martha Wambui vs. Irene Wanjiru Mwangi & Another [2015] eKLR**; **Noormohamed Abdulla vs. Ranchhodbhal J. Patel & Another [1962] EA 448** and **Abdalla vs. Patel & Another [1962] EA 447** in urging the Court to address and stop the oppressive action of the Defendants by dismissing their application with costs.

[16] Needless to say that the Court does have the jurisdiction, under **Order 26 Rule 1** of the **Civil Procedure Rules**, to make an order for the payment of security for costs, notwithstanding that the Respondent is a local resident. That provision states as follows:

“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.”

And therefore, it cannot be argued that to make such an order would be to impede the access to justice by the Plaintiff. Indeed, in the case of **Noormohamed Abdulla -vs- Ranchhodbhal J. Patel & Another (1962) E.A. 448**, it was held that:

“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..”

[17] As matters stand, the Plaintiff's application for injunction has been dismissed on the ground that no *prima facie* case with a probability of success had been made out. The Court made an observation, and it is not disputed that the Plaintiff had stopped making loan repayments to the Defendants, in breach of the loan agreement signed by the parties. The Plaintiff has admitted as much herein but averred that this was based on the financial advice given by **IRAC** that the loan had been fully repaid; and contended that its business is now experiencing healthy turnovers. Accordingly, the depositing of security should not be an issue for it; and therefore to provide a level playing field for the parties, I would allow the Defendants' application for the provision of security by the Plaintiff.

[18] The Defendants have prayed that the Plaintiff do give a security to the tune of **Kshs. 10,000,000/=** or the whole of the costs of the suit. However, the said sum of **Kshs. 10,000,000/=** as security for costs has not been premised on any concrete basis, and appears to have simply been plucked from the air as it were. Even assuming that the Plaintiff would be entitled to the general damages to the tune of **Kshs. 104,304,069 as claimed, under Schedule 6 of the Advocates Remuneration Order, 2014**, which provides for party and party costs in the proceedings at the High Court, the amount of instruction fees would be much less as it provides for **Kshs. 1,000,000** plus 2% plus 1.5%, which roughly would come to about **Kshs. 2,000,000/=** Accordingly, I would consider an amount of **Kshs. 2,000,000/=** to be reasonable in the circumstances.

[19] In the premises, the orders that commend themselves to the Court are as hereunder:

[a] That the Plaintiff be and is hereby ordered to deposit security for costs in the sum of **Kshs. 2,000,000/=** in a joint interest earning account in the names of Counsel on record herein **within 30 days** from the date hereof.

[b] In default of [a] above, the Defendants be at liberty to apply for the dismissal of this suit in accordance with **Order 26 rule 5 (1) of the Civil Procedure Rules;**

[c] The costs of the application be borne by the Plaintiff.

Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF OCTOBER, 2017

OLGA SEWE

JUDGE