REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 292 OF 2015

GRECO INTERNATIONAL LIMITED.....PLAINTFF

- VERSUS -

RIFT VALLEY RAILWAYS LIMITED.....DEFENDANT

RULING

1. The application before me was brought pursuant to Order 26 Rule 1; Order 39 Rules 1 and 5 of the Civil Procedure Rules, as read together with part 8 of the 6th Schedule Clause 74 of the Companies Act.

2. It is an application that the plaintiff be ordered to provide security for costs in the sum of Kshs. 2,000,000/-.

3. The applicant further seeks an order to compel the plaintiff, *(in its capacity as a Defendant to the Counter-claim)*, to provide security for the Counter-claim, in the sum of USD 284,936.84.

4. The defendant prays that the sums to be provided as security should be made available within 30 days of the order.

5. If there should be a failure by the plaintiff to provide security within the period prescribed, the defendant prays that these proceedings be stayed.

6. The primary reason for seeking those orders was that the plaintiff is a company incorporated in the United Kingdom.

7. Secondly, the defendant said that the plaintiff has no known attachable assets in Kenya.

8. Therefore, the defendant feared that if the plaintiff's suit was unsuccessful, the defendant would be unable to recover its costs for defending the suit.

9. The defendant also feared that if its counter-claim was successful, the defendant would be unable to recover the sums claimed by it.

10. It is common ground that the plaintiff, **GRECO INTERNATIONAL LIMITED** is incorporated in the United Kingdom.

11. According to the defendant, security will be required from plaintiffs resident outside the jurisdiction

of the court. However, the defendant acknowledged that the requirement for security was subject to the discretion of the Court.

12. As far as the defendant was concerned, proof that attachable assets were within the jurisdiction of this court was a crucial aspect in determining whether or not to order the plaintiff to provide security.

13. It was the defendant's submission that the *onus* was on the plaintiff to prove that if the defendant was successful in the case, the said defendant would not be left holding onto a paper Decree.

14. The rationale for that submission was that it was the plaintiff who had knowledge as to whether or not it had any attachable assets.

15. In this case, the defendant submitted that the plaintiff had failed to discharge the burden of proving that it had attachable assets.

16. In **SHAH Vs SHAH [1982] KLR 95,** the Court of Appeal noted that when the court was called upon to determine whether or not to order that a plaintiff who is resident outside jurisdiction ought to provide security, the court had;

> **"…a full and unfettered discretion whether to order security or not.**
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> **The general rule is that security is normally required from plaintiffs resident outside the jurisdiction, but as was agreed in the court below, a court has a discretion, to be exercised reasonable and judicially, to refuse to order that security be given".**
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> - Per Law J.A, at page 98.

17. The defendant also relied upon the decision of the Court of Appeal in **ABDINASIR YASIN AHMED & 2 OTHERS Vs AHMED IBRAHIM ABASS & 2 OTHERS, CIVIL APPEAL No. 294 of 2013,** to reiterate that in an application for security for costs, it was the respondents who know what they own. The learned Judges of Appeal said;

> **"In the circumstances, where a respondent is faced with an allegation like the one raised by the applicant in this application, that he comes from the same area as the appellants and knows for a fact that they have no identifiable assets, our respective (sic!) view, pursuant to Section 112 of the Evidence Act, the burden shifts to the appellants to show that they have means of settling the costs, if any, that may be awarded against them.**
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> **Other than asserting that they were able to pay the deposits required for the petition and this appeal, the appellants have not placed any evidence before us that they have means of settling any order for costs that may be made against them".**

18. It is to be noted that in that case, the appellants had personal knowledge of the respondents so well that they stated, as a matter of fact, that the respondents did not have any identifiable assets. In those circumstances, the court held that the respondents should have made available proof of their assets.

19. I say so because the Court of Appeal did also say, in that same case that;

> **"In an application like this, for security for costs, the burden is upon the applicant to establish his case. We do not agree with Mr. Kanjama that in that respect all the applicant needs to do is to assert, even without proof, the impecuniosity of the petitioner. He has to prove the basis and the allegations in support of his case".**

20. In the case of **FTG HOLLAND Vs AFAPACK ENTERPRISES LIMITED & ANOTHER Hccc No. 352 of 2012,** Kimondo J. noted that the plaintiff had not filed an affidavit to controvert the averments in the supporting affidavit.

21. The learned Judge went on to state as follows;

> **"I am alive to the notion that the court should execute a delicate balancing act in order not to stifle the plaintiff's claim or prejudge the rights of the parties".**

22. Nonetheless, Kimondo J. reiterated that the burden of proof rests with the applicant.

23. In this case, the plaintiff pointed out that Kenya and the United Kingdom have a reciprocity agreement under the Foreign Judgement *(Reciprocal Enforcement)* Act. Therefore, the plaintiff submitted that if the defendant was successful, it should not have any difficulties in executing the Decree both for its claim and for the costs.

24. The defendant acknowledged the existence of the reciprocal enforcement of foreign judgements, as between Kenya and the United Kingdom. But the defendant complained that the process of enforcement of a foreign judgement would be time-consuming, inconvenient and costly.

25. In **ALICE ALOO BETTY WERE THOMPSON Vs SAID MOHAMED SAID & 2 OTHERS Hccc No. 6 of 2011,** J. Kamau J. ordered the plaintiff to pay security for costs after holding that;

> **"A lot of hardship could be caused to the 3rd Defendant to trace her whereabouts in UK if she was to lose this case. The court does observe that she did not file an Affidavit of Means which could have assisted this court to arrive at a just decision of this matter".**

26. In this case the plaintiff's **VIRESH PATEL** swore a Replying Affidavit. He deponed that the operations of the plaintiff would be extremely prejudiced if the plaintiff was ordered to come up with the substantial sum which the defendant was asking for in the nature of security.

27. The defendant contends that the plaintiff's said fears made it even more important that the plaintiff be required to provide security.

28. In my considered opinion, the plaintiff's opinion is a realistic statement about the consequences of requiring any person to come up with substantial sums of money, which would then be held as security until a pending case was heard and determined.

29. Kshs. 2,000,000/- plus USD 284,936.84 constitute substantial amounts of money. In all probability if the plaintiff had to take such sums of money from their operations, that would impact negatively on the plaintiff's operations.

30. Considering that at this stage, the court was not yet required to give consideration to the merits of the case presented by either party, I hold the view that the probable negative impact of an order for the provision of security, is a relevant consideration in an application of this nature.

31. I also take note of the fact that the application for security of costs was brought about 8 months after the Defence and Counter-claim were filed in court. By that time, the plaintiff had taken steps that were leading up to the stage of Case the Management Conference.

32. Pursuant to the Practice Directions that govern pre-trial procedures in the Commercial Division of the High Court, the Case Management Conference is the final step just before a case is certified ready for trial.

33. In order to achieve certification of readiness for trial, any party who has complied with all the pre-trial procedures may move the court, appropriately.

34. The defendant had not complied with the provisions of Order 7 Rule 5 of the Civil Procedure Rules, which spells out the documents which must be filed along with the Defence and counter-claim.

35. In the absence of those documents, the defendant could not be allowed to adduce evidence to support its Defence.

36. All the rules of procedure are now designed to ensure that no party is ever ambushed when faced with a court case. Each party is obliged to lay on the table, the evidence which supports his case.

37. The defendant had failed to file its Bundle of Documents and its Witness Statements. In effect, the defendant was withholding information which it should have made available. Such conduct is obstructive rather than supportive to the expeditious determination of the dispute between the parties.

38. When the defendant engages in such obstructive conduct, yet asks the court to exercise its discretion favourably, there is a problem. I so find because any party who seeks equity must act equitably. And obstructive conduct is not equitable.

39. The defendant said that it will comply with the set timelines and directions when the court issued Directions and sets timelines.

40. The timelines for filing of Bundles of Documents and Witness Statements is already provided for in the rules. The court does not need to set them.

41. In the result, although the plaintiff is a company incorporated in the United Kingdom, I find that the defendant has not discharged the onus of proving that the plaintiff should be compelled to provide security. I so find because this case revolves around a contract in which the plaintiff supplied goods to the defendant.

42. The defendant confirms issuing Purchase Orders, pursuant to the contract.

43. The value of the contract was substantial, as confirmed by both parties.

44. As it is the plaintiff who sold and delivered the goods to the defendant, I hold the considered view that the financial ability of the plaintiff was not in doubt.

45. Of course, the defendant says that some goods did not meet the specifications, and also that some of the goods which the defendant had ordered for, were not delivered.

46. The position taken by the defendant was that the suit was premature, because the plaintiff was supposed to justify the sums claimed, to facilitate a bilateral and final reconciliation of accounts.

47. Indeed, the defendant said that if the plaintiff made available the requisite information, figures and documents, the dispute would be resolved.

48. In those circumstances, I find that there is no sound reason in law or in fact, for compelling the plaintiff to come up with security for costs.

49. Meanwhile, as regards the prayer for the plaintiff to secure the whole sum claimed in the Counter-claim, I note that the defendant has failed to respond to the plaintiff's Request for Particulars, which was served on 30th October 2015.

50. In effect, whereas the defendant was accusing the plaintiff of moving to court prematurely, and of failing to provide the requisite information, figures and documents, it is the defendant who has failed to provide particulars, when asked to do so.

51. On its part, the plaintiff had already filed and served a Witness Statement together with over 600 pages of documents.

52. Once again, the conduct of the defendant was obstructive.

53. In any event, the defendant has not met the requirements under Order 39 of the Civil Procedure Rules. That Order deals with issues of *"Arrest and Attachment before Judgement"*.

54. In a nutsell, the court may order a defendant to furnish security for appearance during the proceedings in the case. However, before the court can order the defendant to furnish security for his appearance, the plaintiff has to satisfy the court that;

> **"a) the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay execution of any decree that may be passed against him -**
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> **i) has absconded or left the local limits of the jurisdiction of the court; or**
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> **ii) is about to abscond or leave the local limits of the jurisdiction of the court; or**
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> **iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or**
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> **iv) that the defendant is about to leave Kenya in circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit…"**
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> **- Order 39 Rule 1.**

55. The defendant says that the plaintiff has never had assets in Kenya. Therefore, there is no way that the plaintiff can have taken steps to remove its assets from Kenya, to obstruct the course of justice.

56. Indeed, the defendant has not advanced any contention that the plaintiff has had any intention to obstruct or to delay the execution of any decree which may be passed against it.

57. In the result, there is no merit in the application dated 17th March 2016. It is therefore dismissed, with costs to the plaintiff.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **29th day** of **September** 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

James Tugei for the Plaintiff

Mwihuri for the Defendant

Collins Odhiambo – Court clerk.