



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 474 OF 2011

ESSAR TELCOM KENYA LIMITED..... PLAINTIFF

V E R S U S –

JOSEPH ODONGO OKUMU &

ROSELYNE AKEYO OKUMU

T/A REGIONAL INSTITUTE

OF BUSINESS MANAGEMENT.....DEFENDANTS/RESPONDENTS

RULING

1. The two motions which are the subject of this ruling include one dated 23rd November 2015 and another dated 10th February 2016. The court directed on 23rd February 2016 that the two applications be argued together. In the first application, the applicants/defendants have sought the following orders:

- 1. The plaintiff/respondent's claim as against the defendant/applicant be dismissed with costs.***
- 2. The honourable court be pleased to give directions on the hearing of the defendant/applicant's counter-claim dated 19th August, 2014.***
- 3. Costs of and incidental to this suit/application be awarded to the defendant/applicant.***

While in the second application, the plaintiff/applicant has sought orders to wit:

- 1. THAT the court extend the period of time for deposit of the security of costs ordered by this court on 15th October 2015.***
- 2. THAT the costs of the application be provided for.***
- 3. Any other orders that this honourable court may deem fit to grant.***

2. When the motions came up for hearing learned counsels appearing in the matter consented to have the two applications disposed of by way of written submissions. I have considered the submissions, grounds set out on the face of motions, plus the facts deponed in the affidavits filed for and against the application and grounds of opposition. The defendant avers that Hon. Lady Justice Aburili J. following her ruling dated 15th October 2015 ordered the plaintiff to deposit the sum of ksh.2,000,000/= in an interest earning account within 21 days from the date of the ruling in default, the defendant to apply under order Rule 5(1)

of the Civil Procedure Rule. They argued that the plaintiff has not complied with the orders of the honourable court since the 21 days have since lapsed. They contended that orders are not issued in vain and that the court should dismiss the suit for want of security for costs. They averred that Order 26 Rule 5 of the Civil Procedure Rules is couched in mandatory terms and consequences of failing to furnish security for costs should result in the dismissal of the suit. They submitted further that the court has no discretion to exercise in this matter hence no other alternative than to dismiss the suit. They further argued that the plaintiff ought to have filed an extension of time application filed on 11th February 2016 before expiry of 21 days. The defendants also stated that the plaintiff has not adduced reasonable grounds for failure to furnish security for costs and that the plaintiff's assertion that it is still processing money for payment of security of costs is not candid but is a ploy to delay the matter and engage the defendant in a series of unlimited litigation. They added that the supporting affidavit is incurably defective for being deponed by the advocate instead of the plaintiff's Director or its employee. They concluded that the plaintiff should meet the costs having prompted the filing of the current application.

3. On its part the plaintiff submitted that having filed an application for extension of time within which to pay security for costs, then its claim should not be dismissed, since it has good reason for the delay in furnishing the security of costs. It relied on Order 26 Rule 5(2) and stated that it has sufficient cause for not giving the required security and further said that the court has discretion to extend time. It averred that the suit should not be dismissed since it has a counter claim against the plaintiff dated 19th August 2014. The plaintiff further submitted that it is in the process of procuring money for the payment of the security for costs and it is willing and able to pay the deposit of the costs within 30 days. It added that the plaintiff is a multinational company and several approvals from various persons are required before payment is made and that one of the signatories to the plaintiffs' accounts is unavailable hence the delay. It further claimed that it is in the process of removing this person as a signatory of the account after which the funds will be released. It invoked Section 95 of the Civil Procedure Act which provides that the court has discretion from time to time to enlarge such period even though the period that was originally fixed or granted may have expired. It concluded that the defendant can be compensated by way of costs and prayed that its application be allowed.

4. Looking at the court record, it is evident that the defendants filed their application dated 1st September 2014 which was heard and determined by **R. E. Aburilli J.** Indeed as intimated by the parties, in that ruling, the plaintiff was directed to furnish security for costs in the sum of kshs.2,000,000 within 21 days from the date of judgement being 15th October 2014, but it failed to do so prompting the defendants to file their current application seeking to have the suit dismissed and proceed to hear the counter claim dated 19th August 2014. On its part the plaintiff claims that the delay in depositing the sum of kshs.2,000,000 as ordered by the court was caused by the fact that it's a multinational corporation which has complex operations in that it must obtain several approvals from several people before money is released and paid. It therefore sought the courts leniency in the matter and invoked Order 26 Rule 5(2) of the CPR and stated that it will pay within 30 days.

5. Order 26 rule 5 (1) and (2) of the CPR provides 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.

2. If a suit is dismissed under sub rule (1) and the plaintiff proves that he was prevented by sufficient cause from giving the required security for costs, the court may set aside the order dismissing the suit and extend the time for giving the required security."

In this case the suit is not yet dismissed, however, where the plaintiff has given sufficient cause, then the court is required to extend the time.

6. I have considered the reasons advanced by the plaintiff that the multinational corporation has a complex set up hence its challenge in obtaining approvals to remit the security of kshs.2,000,000/= required. It has further intimated that it's in the process of eliminating the challenge by removing one of

the signatories to their monies who has caused the delay. I find this reasons valid and understandable which reasons are sufficient. The plaintiff has further prayed for an extra 30 days within which it will furnish the security costs.

7. In the interest of justice therefore, I hereby allow the plaintiffs application and grant the plaintiff an extension of 30 days from the date of this judgement within which it will furnish it security for costs in the sum of kshs.2,000,000/= as ordered by **R. E. Aburili J.** in her judgement dated 15th October 2015 save for costs of the application.

8. For the reasons above the defendants application is hereby dismissed. They will however have the costs of both applications.

Dated, Signed and Delivered in open court this 25th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant