



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO 175 OF 2011

CONCORD INSURANCE CO LIMITED.....PLAINTIFF

Versus

NIC BANK LIMITED.....DEFENDANT

RULING

Security for costs

[1] This is an application by the Defendant for security for costs to be provided by the Plaintiff in the sum of KES 1,587,173.00. The application is by way of a Motion dated 12th of July 2013. The reason for applying is that the Plaintiff was placed under statutory management by the Insurance Regulatory Authority with effect from 6th February 2013 due to its failure to meet its financial and statutory obligations and therefore may be unable to pay costs of the suit should their case fail.

[2] According to the Defendant, the effect of Section 40 of the Companies Act is that, where credible evidence is adduced that a company will be unable to pay costs if it is unsuccessful in litigation, the court will require it to provide security for costs of the successful litigant. It is submitted, therefore, that the insolvency of the Plaintiff is the dominant consideration in the instant application. This submission was supported by the reasoning expressed in **Industrial Plant Limited Versus Stanbic Bank & Another (2008) e KLR** where the court, citing with approval, the case of **Person Vs Nydler (1977) 3 ALLER 531**, held that, even though it seemed case law had evolved the principle that poverty should not bar litigation, this principle did not, on the face of it take away express statutory authority of a judge to order for security for costs to be furnished by a plaintiff who it is shown will likely be unable to pay costs of the litigation. The Plaintiff in ground 5 dated 9th of March 2015 admitted it is insolvent. And there is no material presented by the Plaintiff, to show that the Plaintiff will emerge from Statutory Management or proffer any prospect or means of settling costs if the Plaintiff fails in this litigation. The Plaintiff is happy to expose the Defendant to a substantial claim of over Kshs 75 Million which carries significant costs with no prospect of the Plaintiff ever paying the costs if its case fails. This factor is important for the court when exercising discretion. The Defendant argued that there is no evidence that the case by the plaintiff has very high prospects of succeeding as alleged. The averments in the Supporting affidavit of Lillian Sogo filed on the 12th of July 2013 are admitted.

[3] The Defendant denied that Plaintiffs inability to meet its financial obligations was brought about by the defendant. They said that no evidence is adduced to support this claim. They also said that they do not

know what the overall debt burden of the Plaintiff is and there is no disclosure of that fact by the statutory manager by way of affidavit. It is not clear what effect, if at all any, the claim in this matter had on the Plaintiff's over all financial position.

[4] The Defendant averred that this application was filed timeously. A public notice that the Plaintiff was under statutory management was made in February 2013 while this application was filed in July 2013. The Defendant would reasonably have to let a little time to run to see if the regulatory action to place the Plaintiff under statutory management would be long term. They prayed for their application to be allowed.

Application opposed

[5] The Plaintiff opposed the application. The Plaintiff revisited the nature of its case which they said is for a claim *inter alia* of specific damages of about Kshs. 79 million on the basis alleged negligence on the part of the Defendant in dispensing its professional duties to the Plaintiff which negligence made the Plaintiff to suffer substantial financial loss. The Defendant averred that it filed a defence denying these allegations. In its grounds of opposition to the application, the Plaintiff argued that the major grounds of the application are that the suit is a sham and the alleged insolvency of the Plaintiff which portends its inability to pay costs in the unlikely event the Plaintiff is unsuccessful in its suit. According to the Plaintiff the issues in controversy are not sham as claimed by the Defendant but substantial issues which can only be discerned in a hearing. They submitted further that an order for security for costs is a matter for the discretion of the court which ought to be exercised judiciously and with regard to certain well settled guidelines and/or principles. They cited the case of **Two Tone Branding Africa Ltd vs. Coca-Cola East & Central Africa Pty Ltd [2013] eKLR**.

[6] The Plaintiff submitted that the Court should determine whether the Plaintiff has a bonafide case and/or claim against the Defendant. The Court should, however, not delve into the merits of the case, and so it only examines the pleadings of the parties to determine whether the Plaintiff has a bona fide case against the Defendant. The pleadings show that there existed a banker-customer relationship between the Defendant and the Plaintiff. The pleadings also show that this is a claim of professional negligence arising from a breach of duty of care by the bank which gave rise to substantial financial loss stated in the plaint. These are bonafide issues. The Plaintiff ought to be allowed to pursue this claim to conclusion without having unnecessary and oppressive conditions thrown against it.

[7] The guiding principle is that a man ought not to benefit from his own wrong. The unsatisfactory status of the plaintiff being placed on statutory management was as a result of the wrong committed by the defendant. Therefore, the Defendant should not be allowed to use its own wrongdoing to continue frustrating the Plaintiff from prosecuting a claim against it. The court should protect the Plaintiff's right to have the claim against a Defendant heard and determined without unnecessary burdens being placed upon the Plaintiff. See the **Indigo Garment's case** below. In any case, the Plaintiff stated that this case is not frivolous or vexatious. Thus, the courts have stated that the purpose of an order for security for costs is to protect a party from incurring expenses on a litigation which it may never recover from the losing side. It is not to deter the Plaintiff from pursuing a claim (see **Lake Jipe case** *infra*).

[8] According to the Plaintiff, the fact that a company is insolvent and unable to pay costs or even in liquidation is not decisive to make a court grant an order for security for costs. The Plaintiff is still in business albeit it has been placed under statutory management. The Plaintiff has made great efforts and strides in recovering from statutory management. The Plaintiff thus submits that the mere fact that it is under statutory management does not in itself and by itself afforded the Defendant the order of security for costs. In the case of **Indigo Garments (E P Z) Ltd (In Receivership) vs. Apex Apparels (E P Z) Ltd [2004] eKLR** this honourable Court stated:

...receivership may suggest financial difficulty but it is not conclusive evidence of want of means as liquidation is.

No conclusively proof that the Plaintiff will be unable to pay any costs in the very unlikely event that the

Plaintiff loses the suit against the Defendant. See also the case of **LakeJipe Safari Lodge Limited vs. Kenya Wildlife Service [2007] eKLR** where the court stated:

...mere poverty of a plaintiff is not itself a ground for ordering security for costs, if this were so poor litigants would be deterred from enforcing their legitimate rights through the legal process.

[9] The Plaintiff beseeched the court that an order for costs is and will only be detrimental to the recovery of the Plaintiff as well as an impediment to the Plaintiff's right to prosecute its claim.

DETERMINATION

[10] This is a case for security for costs. Needless to state that the law on this subject is settled; it is a matter for the discretion of the court to order or refuse to order the plaintiff to furnish security for costs. The applicable law is found in Order 26 rule 1 of the Civil Procedure Rules. The way I understand the law is that, even where a company is insolvent, the court would still refuse to order security for costs if circumstances do not support lodgment of security. The discretion is, however, to be exercised reasonably and judicially by making absolute reference to the circumstances of each case. Such matters as; absence of known assets within the jurisdiction of court; absence of an office within the jurisdiction of court; insolvency or 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 circumstance or conduct of the Plaintiff or the Defendant, are relevant considerations. And the list is not, and I do not pretend to make it exhaustive. In the latter category, conduct by the Plaintiff will include activities which may diminish the chances of or makes recovery of costs very difficult, for instance recent close or transfer of bank accounts, close or minimizing of operations, and disposal of assets. And the conduct of the Defendant includes, filing of application for security for costs as a way of oppressing or obstructing the Plaintiff's claim, for instance, where the defence is mere sham, or there is an admission by the Defendant of money owing except there is deliberate refusal or delay to pay money owing or refusal to perform its part of the bargain. On these things, consider the following passage in **GuffEngineering (East Africa) Ltd vs. Amrik Singh Kalgi**, at page 281 quoting the dictum of **Lord Denning MR** in *Sir Lindsay Parkinson & Co. Ltd (1973) 2WLR 632* and at page 284 quoting Maughan L J in *Gill All Weather Bodies Ltd Vs All Weather Motor bodies Ltd* that;

“...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 matter which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has reasonably good prospects of success. Again it will consider whether there is an admission by the Defendant on the pleadings or elsewhere that money is due.

...the court might also consider whether the application for security was being used oppressively – so as to stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the Defendants, such as delay in payment or delay in doing their part of the work.

[11] The Plaintiff is under statutory management. This is a statutory fact which the court takes judicial notice of and must consider in application such as this. Any order of security for costs will jeopardize recovery plan of the plaintiff. From casual look at the pleadings, the plaintiff's claim is not mere sham or frivolous or scandalous. There is also no conclusive evidence that it cannot pay costs despite its present status. I agree entirely with the observation by Azangalala J (as he then was) in the case of **Indigo Garments (E P Z) Ltd (In Receivership) vs. Apex Apparels (E P Z) Ltd [2004] eKLR** that:

...receivership may suggest financial difficulty but it is not conclusive evidence of want of means as liquidation is.

Even if it was unable to pay costs, on prima facie basis, its claim is *bona fide* and deserves a hearing

without unnecessary restrictions. This fact then brings to bear the right of a party to prosecute the case without undue hindrances. The court should always respect that tenet of fair trial. In this case, the plaintiff claims that its unsatisfactory status was a result of the negligence of the Defendant. This, case should be given a chance to be heard without placing any other restrictions on the path of the Plaintiff. I do not see any reason to order the plaintiff to provide security for costs. The upshot is that I dismiss the application for security for costs. I will not make an order for costs of the application in view of what I have observed above. It is so ordered.

Dated, signed and delivered in court at Nairobi this 29th day of July 2015.

F. GIKONYO

JUDGE