



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 1 OF 2004

CLEARSPAN CONSTRUCTION (A) LIMITED.....PLAINTIFF

-VERSUS-

EAST AFRICA GAS COMPANY LIMITED.....DEFENDANT

-AND-

VIKING WORLD INVESTMENT SA.....OBJECTOR/APPLICANT

RULING

INTRODUCTION

1. On 3rd November 2009, this court (M.K. Ibrahim, J. as he then was) entered judgment for the Plaintiff against the Defendant in the sum of **Kshs. 49,914,562.00** with interest thereon at Court rates from the date of filing the suit until payment in full.
2. The Plaintiff obtained Warrant of Attachment of movable property in execution of the decree on 8th March 2013 which Warrant showed that the amount due and payable as at the said date was **Kshs. 101,440,757.50**. The said Warrant of Attachment was issued to **Makini Auctioneers Agencies** (hereinafter "**the Auctioneer**").
3. Pursuant to the said Warrant of Attachment, the Auctioneer issued a Proclamation of Attachment dated 12th March 2013 by which the Auctioneer intended to sell by public auction four (4) large LPG storage tanks said to belong to the Defendant/Judgment Debtor.
4. On 18th March 2013, Viking World Investment SA (hereinafter "**the Objector**") filed a Notice of Objection under Order 22 Rule 51 of the Civil Procedure Rules 2010, objecting to the intended attachment and sale of the four LPG tanks listed in the Proclamation. The Objection is premised on the following grounds reproduced verbatim:
 - a. **The Objector has legal and equitable rights and interests in the properties proposed to be auctioned, and is as a matter of fact the owner.**
 - b. **The Objector is not a party to the suit in respect of which the execution proceedings have been commenced.**
 - c. **The Objector has first and prior proprietary rights over all the aforesaid attached**

properties.

- d. **The Objector shall suffer irreparable loss and damage if the said properties were to be sold in execution hereof on the premises *inter alia* that it shall have been denied its right to be heard before being condemned and shall be unconstitutionally deprived of its property without compensation and/or recourse.**
5. Before the Objector's Objection to execution was heard and determined, the Plaintiff, on 2nd April 2013, filed a Notice of Motion Application (hereinafter "**the Application**") in which it seeks the following orders:
 - a. **The Objector herein VIKING WORLD INVESTMENTS SA be directed and ordered to provide security for costs that may be incurred in respect of the present objection proceedings, in the sum of 95,000 (sterling pounds) within 21 days from the date of such order or within such other limited time as this Court may deem fit.**
 - b. **Pending the furnishing of such security as set out in prayer (b) above, any further proceedings on the objection filed by Viking World Investments SA be stayed.**
6. It is the Plaintiff's said Application dated 2nd April 2013 that is up for determination. It is based on the following grounds:
 - i. **The Objector is merely described as being owner of the attached tanks, with no details of its existence as a Company being disclosed, save for the averment in Paragraph 5 of the affidavit of Sarah Yar Khan that it is a holding Company of Pacific Group Ltd.**
 - ii. **The registered address, physical address and or other address (i.e postal) of the Objector are not known to the decree holder.**
 - iii. **The Objector has no registered office in Kenya, no known agent, and or subsidiary within this Court's jurisdiction.**
 - iv. **The Objector is to all intents a foreign Company, whose registration details are unknown, save that it is described as a World Investment Company.**
 - v. **The Objector itself clearly recognizes that it has no *locus standi* in bringing the present objection proceedings, and in an attempt to clothe itself with such *locus standi*, has failed to do so with any documentary or other proof to sustain such claim.**
 - vi. **In the premises, it is in the interest of fairness to the decree holder that such an entity do provide security for costs to be incurred by the decree holder in defending the objection proceedings herein.**

THE ARGUMENTS

The Plaintiff's Case

7. The Plaintiff argued that the application should be allowed and the Objector ordered to furnish security for costs because the Objector is a foreign company with no known address and has no *locus standi* to bring the objection proceedings.
8. The Plaintiff further submitted that the Objector has placed the value of the attached tanks as US \$ 4,033,004.19 (Kshs. 342,805,340.00) and DM 1,371,190.00 (Kshs. 21,939,040.00) which is the value of the subject matter for purposes of party and party costs. In the circumstances, the Plaintiff urged that its proposed quantum of security for costs of £ 95,000 is in all respect fair and a proper reflection of the value of the subject matter in contention.

9. The Plaintiff urged that in the circumstances of this case, it is in the interest of fairness that the Objector be ordered to provide security for costs to be incurred by the decree holder in defending the objection proceedings.

The Objector's Response

10. The Objector opposed the Application for security for costs on the basis of the following grounds:

- i. **The Application is untenable in law; and**
- ii. **The security of costs of £ 95,000 prayed for by the Plaintiff is excessive and unreasonable.**

11. The Objector submitted that the Application is premised on section 401 of the Companies Act and Order 26 Rule 1 and 4 of the Civil Procedure Rules which do not support the Plaintiff's contention that it is entitled to bring the Application.

12. The Objector argued that under Section 401 of the Companies Act Cap 480, a limited liability company must be a plaintiff in the suit or other legal proceedings for an application for security of costs to be brought against it and the party seeking for an order of security for its costs must be a defendant. Section 401 of the Companies Act provides as follows:

“Where a limited company is plaintiff in any suit or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.”

The Objector submitted that it is not a plaintiff for purposes of the said section and it cannot be ordered to furnish security for costs and similarly the Plaintiff herein is not a defendant.

13. The Objector further argued that under Order 26 Rule 1 and 4 of the Civil Procedure Rules, security for costs are awardable only in favour of the defendant or third or subsequent parties but not for the Plaintiff. Order 26 Rule 1 and 4 of the Civil Procedure Rules 2010 provide as follows:

“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.

4. In any suit brought by a person not residing in Kenya, if the claim is founded on a bill of exchange or other negotiable instrument or on a judgment or order of a foreign court, any order for security for costs shall be in the discretion of the court.”

14. The Objector thus submitted that the Plaintiff herein is not a defendant or third or subsequent party and is therefore not entitled to an order for security of costs under Order 26 Rule 1.

15. On the amount of costs prayed for by the Plaintiff, the Objector contended that the same is excessive and unreasonable. The Objector submits that the court must take into account the value of what is at stake. That the Auctioneer valued the proclaimed tanks at Kshs. 900,000.00 each making a total of Kshs. 3,600,000.00 for the four tanks. That the figures of US \$ 4,033,004.19 and DM 1,371,190.00 were the value of the tanks at the point of purchase in the year 2000 and they have since depreciated in value.

16. The Objector further submitted that instructions to take proceedings to establish or oppose objection proceedings as provided for in the Advocates (Remuneration) Order is Kshs. 10,000.00 only and thus security for costs of £ 95,000 is excessive and unreasonable.

17. Lastly, the Objector submitted that the Plaintiff has not shown that it **(the Objector)** is

impecunious to an extent that it will not be able to pay the costs, if it loses the objection proceedings. That the fact that a company is foreign is not reason in itself to conclude that any costs will be beyond the Objector to pay. That the Plaintiff has not even cast doubt as to the Objector's financial status but is only apprehensive that the Objector may not pay the Plaintiff's costs if the objection proceedings do not succeed because the Objector is a foreigner. To support that argument, the Objector relied on the case of **John Ngugi Mutura V Vros Produce Limited, Mombasa HCCC No. 131 of 2010 [2012] eKLR** where Ojwang, J. stated as follows:

“Relevant principles for deciding a matter such as the instant one, are set out also in *Cancer Investments Ltd. v. Sayani Investments Ltd.*, Nairobi HCCC No. 854 of 2004 [2010] eKLR (Mwera, J):

“...Has 1st defendant laid out concrete grounds on which to base a reasonable belief that the plaintiff may be unable to pay costs in the event it loses this case?

“It needs no repeating that ordering security for costs is in the discretion of the Court. But the Court must be shown that there is reason to believe that a party would be unable to pay the other’s (applicant’s) costs if the suit is successful or is lost. The Court also has discretion to set the level of the security if one has to be posted.

“In the present case the 1st defendant is only apprehensive that it may not recover costs in the event the suit is dismissed. Being apprehensive is not what it takes to get an order for security for costs. There should be [a] demonstration with evidence laid, portraying the respondent as a party in such dire financial straits that paying the costs will be difficult. The applicant did not so demonstrate and, again on that point, this application must be dismissed.”

THE ISSUES

18. In my view, there are three main issues for the court's determination:

- i. **Whether the court has power to order an objector to execution proceedings to provide security for costs of the Plaintiff.**
- ii. **Whether this is an appropriate case in which the Objector should be ordered to furnish security for the Plaintiff's costs.**
- iii. **What is the quantum of security for costs, if any, that the court should order in the instant case?**

ANALYSIS AND DETERMINATION

i) Whether the court has power to order an Objector to furnish security for costs

19. The Objector's opposition to the Application is that it is only a plaintiff who can be ordered to supply security for costs pursuant to section 401 of the Companies Act and not an objector. Further that under Order 26 Rule 1 of the Civil Procedure Rules, security for costs can only be ordered in favour of a defendant or third or subsequent party.

20. While it is true that section 401 of the Companies Act refers to instances “**where a limited liability company is a plaintiff**” and Order 26 Rule 1 of the Civil Procedure Rules refers to costs of “any defendant or third party or subsequent party”, I do not think that those provisions should be construed in an absolutely restrictive manner so as to apply only in suits where the company against which security is required is a plaintiff or the party in favour of which an order for security for costs is made is a defendant. By making provision for instances where the company is a plaintiff in “**other legal proceeding**”, Section 401, in my view, takes cognizance of the fact that a company may be a party in proceedings where the term “plaintiff” is not strictly used. Such may

be the case in, for instance, a petition where the terms “petitioner” and “respondent” are used; or originating motion where the terms “applicant” and “respondent” are used. Order 26 Rule 1 of the Civil Procedure Rules on the other hand makes a wide provision that security for costs, of not only the defendant but also third or subsequent party, may be given by any other party. The use of the terms “**Plaintiff**” and “**Defendant**” in the said provisions is, in my considered view, is intended only as a guideline and the status of a party may change from time to time, even in the same proceedings.

21. I support that view with the statement in *Halsbury's Laws of England Volume 37, Fourth Edition* at paragraph 302 page 229 where it is stated as follows in relevant part:

“On the other hand, a defendant who obtains leave to have the conduct of a cause may be ordered to give security, and so may a person who claims a right to property and applies to be admitted as a defendant in an action. A defendant in repletion (the remedy of a person whose chattels are unlawfully taken from him) is in the position of a plaintiff and may be ordered to give security.”

The implication here is that the status of a defendant who ordinarily may not be ordered to provide security for costs may change depending on the claim of that defendant in the case and therefore the defendant may be ordered to provide security for costs.

22. In the case of *Cosmos Holidays Plc v Dhanjal Investments Limited, Nairobi HCCC No. 112 of 2012 (O.S)*, Mutava, J. ordered Cosmos Holidays Plc to furnish security for costs of the applicant even though the said company was not a plaintiff. The learned judge, termed the argument that the respondent was not a plaintiff a technical one and stated as follows:

“Counsel for the Plaintiff in his submissions raised technical arguments as to whether the above provisions apply where the party to which an application for provision of security for costs is directed is not a Plaintiff but in my view, being a judgment creditor does not shield such a party from such an application in as long as the party can be shown to be unable to satisfy any costs that may be awarded against it.”

23. The above holding applies *mutatis mutandis* to the instant case where the respondent (the party to which the application for provision for security of costs is directed) is not a plaintiff but an objector to execution. In my view, the objector is not shielded from the application simply because it is not a plaintiff.

24. It is my considered opinion that in deciding whether a party should be ordered to furnish security for costs, the court should not be restricted by the terms used in the above discussed legal provisions. The court should consider each case on its circumstances and should largely be guided by whether a party against which the order for security of costs is sought has a claim or an action against the other so that the claiming party may be deemed as the “claimant” and that other party as the “respondent”. In *Re Estate of Karanja [2002] 2 KLR 34*, Khamoni, J. held at page 44 that **“security for costs may only be made against a person who is the actor and not against the one who defends the action”**. In the instant case, the Objector has brought a claim against the Plaintiff which claim is that the Plaintiff should not proceed with the execution by selling the proclaimed four tanks because they belong to the Objector. The Plaintiff has responded to the Objector's claim and seeks to have the execution proceed. The Objector therefore is the claimant or the actor against whom an order for security for costs may be made and the Plaintiff is the respondent who defends the action. That virtually puts the Objector in a similar position as a plaintiff who is claiming and the Plaintiff in the position of a defendant who is defending the claim. In my view, the provisions of section 401 of the Companies Act and Order 26 Rule 1 of the Civil Procedure Rules do not bar this court from ordering the Objector, who is standing on the way of the Plaintiff's execution, whether rightfully or otherwise, to furnish security for costs of the Plaintiff should the objection proceedings fail.

ii) Whether the Objector should be ordered to furnish security for the

Plaintiff's Costs

25. Having found that this court has the power under section 401 of the Companies Act and Order 26 Rule 1 of the Civil Procedure Rules to order a party who objects to execution to furnish security for costs of the Decree Holder should the objection proceedings fail, the next issue is whether the instant case is an appropriate one in which the Objector should be ordered to furnish security for the Decree Holder's costs.

26. The Application is brought on the main ground that the Objector is a foreign company whose registration details are unknown and it has no registered office in Kenya and no known agent and/or subsidiary within this court's jurisdiction. The Plaintiff also contends that the Objector has no *locus standi* to bring these objection proceedings because it has not furnished any documentary evidence to prove transfer of ownership of the proclaimed tanks from **Pacific Corporation Group SA** which is said to be the original owners, to the Objector.

27. It is trite law that the court's power to order for security for costs is discretionary. In the case of **Nderitu & Others t/a Trustees of African Club v Harun (No 3) [1992] KLR 417** Bosire J. (as he then was) stated as follows at page 421:

“The court's power to order security for costs of a suit is discretionary. That is what O. 25 Rule 1 of the Civil Procedure Rules says and that is what it means... Being a discretionary power it has to be exercised on the basis of evidence. That is to say the court must have a basis for ordering security for costs to be given.

The rule says that security for costs may be ordered to be given in any suit. It does not however state at what stage of the suit the order may be made. The court is left with the power to determine when security may be given. The discretion is quite wide... the courts needs to consider each case on the basis of its peculiar facts.”

28. The Objector has given its address in its Notice of Objection as **“care of 22/24 Red Lion Court, London, UK, EC 4A 3ER”**. It is therefore not true as alleged by the Plaintiff that the Objector's physical and or other address is not known. However, there is no doubt that the Objector's given address is in London, the United Kingdom. Further, the Objector did not rebut the Plaintiff's claim that it has no registered office, known agent or subsidiary in Kenya. This leads the court to conclude that the allegation that the Objector has no registered office, known agent or subsidiary in Kenya is true. It is therefore safe to conclude that the Objector is a foreign company.

29. Should a party be ordered to furnish security for costs on the basis that the party is a foreign company? The test to be applied is that which was set in the case of **SHAH –VS- SHAH [1982] KLR 95** at 98, Law JA held as follows:

“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 reasonably and judicially to refuse to order that security be given.

The test on application for security is not whether the plaintiff has established a prima facie case, but whether the defendant has shown a bona fide defence.”

30. At this stage, this court is not mandated to delve into the merits of the objection proceedings. However, in order to establish whether the Plaintiff has a *bona fide* defence or opposition to the objection proceedings, the court is under obligation to study the application, the affidavits and the evidence before it to ascertain what is each party's claim against the other. The Plaintiff's defence to the Objection proceedings is that the Objector has no *locus standi* to bring the objection proceedings. The Objector contended that it has *locus standi* to bring the objection proceedings

because it has legal and equitable rights and interests in the proclaimed tanks. In its application for stay of execution dated 20th March 2013, the Objector clarified its interest in the tanks as follows at paragraph 3 of the Application and paragraph 5 of the Affidavit of SARAH YAR KHAN sworn in support thereof:

“That initially, it was Pacific Corporation Group SA that entered into an agreement with East Africa Gas Company Ltd and financed the tanks. Over time, Pacific Corporation Group Ltd, being 100% subsidiary of Viking Investment SA, transferred all its rights to Viking Investment SA, making the latter the legal owner of the tanks by transferring ownership to them, hence our locus standi as objector in this suit.”

31. An agreement dated 25th February 2000 between PACIFIC CORPORATION GROUP SA and EAST AFRICA GAS LTD (the Defendant herein) is annexed to the Objector's said application. The Agreement shows that the former company was to deliver 4 x 2000 tonnes LPG tanks to a site in Mombasa and the latter company, the Defendant herein, would pay the former for the tanks. It is therefore true that the contract for the supply of the subject tanks was between the Defendant and PACIFIC CORPORATION GROUP SA.

32. The Objector on a prima facie basis did not produce any evidence to prove its allegations that it had taken over the contract for the supply of the tanks. There is no evidence that PACIFIC CORPORATION GROUP SA transferred all its rights to the Objector and therefore clothing the Objector with legal and/or equitable rights and interests in the subject tanks. In my view, since the contract for the supply of the tanks was between the Defendant and another company (Pacific Corporation Group SA), it was very material for the objector to create a clear nexus between itself and that other company. That required documentary backing rather than mere averment because, I believe, an issue as important as transfer of rights from one company to another ordinarily is done in writing and sometimes requires resolution of shareholders or directors, notification to the relevant regulatory authority and execution of relevant documentation to effect the transfer. The Objector did not exhibit any such documents. The conclusion I arrive at is that since the Objector did not exhibit any evidence to support its allegations as to transfer of rights over the tanks, the Plaintiff's defence that the Objector lacks *locus standi*, is a *bona fide* defence.

33. The Objector's *locus standi* and interest in the subject tanks is further cast in doubt by the Objector's contradictory averments contained in its affidavits as to exactly who financed the purchase of the tanks. The contradictions have been highlighted at paragraph 14 of the Plaintiff's Replying Affidavit sworn by ANTHONY DICKINSON on 26th March 2013 as follows:

“That the conclusion reached in paragraph 13 above is further vindicated by the fact that the objector has not in any way in its affidavit shown/proven that it is the owner of the subject tanks because:

(a) ...

(b) The averments in Paragraph 5 and 6 of the supporting affidavits directly contradict each other. In Paragraph 5, the objector states:

5. That initially, it was Pacific Corporation Group SA which entered into an agreement with East Africa Gas Company and financed the tanks.

And in Paragraph 6 of the same affidavit it is deponed:

6. That it (Viking World Investment SA) financed the tanks and placed a caveat on the said tanks.

The objector does not seem to know who financed the tanks if at all there is any truth in its contention. Also, evidence of existence of the caveat referred to in Paragraph 6, and

where such caveat was registered, if at all, are not provided.

(c) The averments in Paragraph 8 of the supporting affidavit by the objector are as follows:

8. That the request to finance the tanks was made to it (Viking World Investment SA) by Gas Company Ltd...

This statement is also in contradiction of averments in Para 5 of the same affidavit that states that it was Pacific Corporation SA that financed the tanks.”

34. The requirement as to *bona fide* defence is therefore, in my opinion,

demonstrated by the Plaintiff. In the **Cosmos Holidays Plc Case** (supra) the High Court held that it would be uneconomical, inconvenient and time-consuming to recover costs from a company domiciled in the United Kingdom. Mutava, J. stated as follows:

“The next issue arising is whether Cosmos has any known assets or place of business in Kenya upon which execution for recovery of costs can be levied. From the material placed before the court, there is no evidence of ownership of assets by Cosmos locally nor existence of a place of business in Kenya. Recovery of such costs would require execution against Cosmos, a company domiciled in the United Kingdom. This would be, as already observed above, uneconomical, inconvenient and time-consuming given the amounts entailed. Consequently, I would exercise my discretion under Order 26 Rule 4 aforesaid and order that such security for costs be provided by Cosmos here in Kenya.”

35. In the case of **Parmex Limited v Austin & Partners Limited, Nairobi HCCC No. 450 of 2003 [2006] eKLR**, Ochieng, J held as follows:

“I nonetheless find that notwithstanding the existence of the Foreign Judgments (Reciprocal Enforcement) Act, pursuant to which decrees issued in Kenya can be enforced in the United Kingdom, the defendant would be materially disadvantaged if it were to succeed in the suit, and thereafter have to take steps to recover the same in the United Kingdom.”

36. This case has been going on between the Plaintiff and the Defendant, both companies registered in Kenya. The Objector has come at a later stage when the Plaintiff is meant to enjoy the fruits of its judgment. The Objector, being a foreign company based in the United Kingdom, I am persuaded that the Plaintiff may be disadvantaged in recovering its costs in the United Kingdom should the objection proceedings fail. This therefore is an appropriate case in which the court shall order the Objector to furnish security for the Plaintiff's costs, should the objection proceedings fail.

iii. What is the quantum of security for costs that the court should order?

37. The Plaintiff prayed that the Objector be ordered to furnish £ 95,000 as security of its costs. The Objector argued that that amount is excessive and unreasonable. The Plaintiff urged the court to consider that the value of the subject tanks is US \$ 4,033,004.19 (Kshs. 342,805,340.00) and DM 1,371,190.00 (Kshs. 21,939,040.00). The Objector on the other hand stated that the value of the tanks has depreciated and the court should be guided by the figure of Kshs. 900,000.00 which the Objector says is what the Auctioneer has affixed to each tank. I have looked at the Proclamation by the Auctioneer. The Auctioneer has quoted the value of the tanks as Kshs. 9,000,000.00 each, making a total of Kshs. 36,000,000.00 for the four tanks.

38. The amount of security for costs that a party should be ordered to furnish is the court's discretion. The same should be commensurate with the subject matter of the proceedings as was held in the

case of **Cosmos Holidays Plc Case** (supra) where the learned judge stated as follows:

“While Dhanjal has urged the court not to apply any conventional approach in fixing the amount of security for costs to be provided, I take the view that the court should allow security that is reasonably commensurate with the subject matter of the proceedings over which the costs being secured relate. I know that the subject matter of the application to set aside is a judgment of a sum equivalent to Kshs. 52.5 Million or thereabouts. However, the application before the court is not a suit for the said amount. I am therefore not bound to consider the subject matter to be Kshs. 52.5 Million and therefore to base my estimation of costs on the same under the scale set in the Advocates Remuneration Order in a claim for that amount.”

39. Although the amount of security for costs is the court's discretion and should be commensurate with the subject matter, the court should be mindful of the fact that it is not always the practice to order security for costs on a full party and party basis or on an indemnity basis. I am guided by the holding at page 53 in **Re Estate of Karanja** (supra) as follows:

“If on the other hand it is held that an order for security for costs should be made against the objector, I should go back to Halsbury's Law of England (ibid) paragraph 307 at page 232 where it is stated that the amount of security for costs ordered to be given is in the discretion of the court, which will fix such sum as it thinks just to do so, having regard to all the circumstances of the case. It is not the practice to order security for costs on a full party and party, still less on an indemnity basis.”

CONCLUSION

40. I have stated that the value of the subject tanks as fixed by the Plaintiff's own Auctioneer is Kshs. 36,000,000.00. This should have ordinarily be the subject matter the basis upon which the costs should be pegged. However, these are not proceedings to recover the value of the subject tanks. They are proceedings relating to objection to execution under Order 22 Rule 51 of the Civil Procedure Rules 2010. Under Schedule VI paragraph 13 of the Advocates (Remuneration) Order the fees to oppose objection to execution proceedings is prescribed as Kshs. 10,000.00. It appears the fee is not pegged on the subject matter of the proceedings. However, there are other costs and expenses that may be awarded outside the prescribed fees. In my view, considering the circumstances of this case, I consider a sum of Kshs. 200,000.00 to be sufficient security for costs in this matter.

41. According the following are the orders of the Court-

- a. **The Objector, Viking World Investment S.A shall deposit within twenty one (21) days in Court Kshs. 200,000/- as security of costs in respect of objection proceedings. Failure to so deposit that amount as ordered the objection to execution shall stand as struck out.**
- b. **Plaintiff's costs of Notice of Motion dated 2nd April 2014 shall be paid by the Objector.**

DATED and DELIVERED at MOMBASA this 31ST day of JULY, 2014.

MARY KASANGO

JUDGE