



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO 832 OF 2010

JARIBU CREDIT TRADERS LIMITED.....PLAINTIFF

VERSUS

CFC STANBIC BANK LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Defendant's Notice of Motion application dated and filed on 3rd August 2012 was brought under the provisions of Order 26 Rules 1, 5 (1) and 6 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and Section 401 of the Companies Act together with all other enabling provisions of the law. The application sought the following orders:-
 - i. **THAT the Plaintiff do furnish security for costs of the Defendant for the sum of Kshs 5,851,154/= within 14 days of the Order of the Court.**
 - ii. **THAT pending provision of such security by the Plaintiff all further proceedings by itself be stayed.**
 - iii. **THAT the costs be in the cause.**

THE PLAINTIFF'S CASE

2. The Defendant's application was supported by the Affidavit of Kenneth Kanyarati that was sworn on 3rd August 2012. The upshot of its case was that the Plaintiff's properties were subject to various proceedings and had been claimed by one Suresh Kantaria pursuant to a judgment that was delivered in **Divorce Cause No 6 of 1997 Mradula Kantaria vs Suresh Kantaria**. It was apprehensive that it would be exposed to colossal costs on account of the Plaintiff's suit which had sought a sum of Kshs 351,069,355/= if the Plaintiff did not deposit its costs pending hearing and determination of the case herein.
3. It was its argument that the Plaintiff would not suffer any prejudice if the Plaintiff was ordered to deposit into an interest earning account, a sum of Kshs 5,851,154/= being the instruction fees and getting up fees calculated under Schedule VI of the Advocates (Remuneration) (Amendment) Order, 2009.

PLAINTIFF'S CASE

4. In response to the Defendant's application, on 2nd May 2013, Keval Kantaria, a son to the parties

to the aforementioned Divorce Cause, swore a Replying Affidavit on behalf of the Plaintiff. The same was filed on even date. The Plaintiff's case was it was still trading and that it owned several assets one being L.R. No 209/7994/7. The deponent contended that the said property, which was no longer owned by his parents, had a monthly rental income of Kshs 1,011,319.60 and was valued at Kshs 93,500,000/= as per a copy of the Valuation Report that he had attached to the said Replying Affidavit.

5. It was its argument that being ordered to pay the said sum of Kshs 5,851,154/= before the case was heard would cause it to suffer great prejudice and would impede its constitutional right to access to justice which was enshrined in Article 48 of the Constitutions of Kenya, 2010. It urged the court not to allow the Defendant's application which it said was merely intended to delay the hearing of the matter herein.

LEGAL ANALYSIS

6. The Defendant's argument that its application was unopposed as the Plaintiff had not filed a Replying Affidavit by 11th December 2012 does not reflect the correct position for the reason that as at the time of determining the application herein, there was a Replying Affidavit on the court record. The court will therefore treat the Defendant's application as opposed and proceed to determine the merits of each party's case.
7. The court has noted the arguments and the case law advanced in the Defendant's written submissions dated and filed on 13th December 2012 and those of the Plaintiff dated 12th May 2013 and filed on 13th May 2013.
8. Section 401 of the Companies Act 486 (laws of Kenya) which the Defendant relied upon to support its application provides as follows:-

“Where a limited company is a 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, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.”

9. Under Order 26 of the Civil Procedure Rules, 2010 under which the present application was also premised, there is no particular ground given under which a court can grant an order for security of costs. The basis under which the said order is to be granted can be derived from several principles espoused in numerous cases that were relied upon by both the Plaintiff and the Defendant herein- See- **Pearson & Another vs Naydler & Others [1977] 3 All ER 531, Northampton Coal, Iron and Waggon Company Limited vs Midland Wagon Company (1878) Ch. D (Vol VII) 500, Keary Developments Ltd vs Tarmac Construction Ltd & Another [1995] 3 All ER 534, Sir Lindsay Parkinson & Co Ltd vs Triplan Ltd [1973] 2 All ER 273, Wetfarm Ltd vs Amro** Bank (unreported) amongst other cases.
10. The common thread in the cases cited hereinabove and those that were relied upon by the Defendant was that the plaintiff must have been shown to have been unable to pay a defendant's costs in the event such a defendant was successful at the conclusion of the case as it would suffer a great deal in defending the plaintiff's case.
11. In the case of **Shah vs Shah [1982] KLR 95** the Court of Appeal considered the principle of the presence of a *bona fide* defence when it held as follows:-

“the generaltest in an application of this nature is not whether the Plaintiff has a *prima facie* case with a probability of success but whether the Defendant has shown that it has a *bona fide* defence.”

12. The court's power to order security for costs is thus a discretionary one and is not a case that one glove fits all. It depends on the peculiar circumstances of each case. The onus of proving a particular fact lies on the party that alleges that fact.
13. The Plaintiff annexed a copy of the Valuation Report in respect of L.R. No 209/7994/7 showing that the aforesaid property generated a monthly rental income of Kshs 1,011,319.60 and was

- valued at Kshs 93,500,000/= which would enable it meet any costs that were found to be due and owing to the Defendant.
14. The case of **Northampton Coal, Iron and Waggon Company Limited vs Midland Wagon Company** (Supra) cited by the Defendant was thus distinguishable from the facts of this case as the company in that case was in liquidation while in this instant case, the Plaintiff was said to have still been carrying on business.
 15. As the court understands it, the gist of the Defendant's application was that properties owned by the Plaintiff were subject of various legal proceedings and having been claimed by the said Suresh Kantaria, it would not be able to recover its costs in light of the litigation surrounding the said properties. There was no evidence placed before this court either by way of Bundle of Documents or attachment of relevant documentation in its present application to show that the properties in question belonged to the Plaintiff and that the same were tied up in litigation.
 16. Indeed, it does not appear to this court that the only recourse to the Defendant would be that it would have to sell the Plaintiff's immovable assets so as to recover its costs if it succeeded in this case as opposed to attaching its movable assets. In any event, the Defendant did not also demonstrate or satisfy the court show that the only asset it could recover its costs from would be from the immovable assets that were subject of the Divorce Cause cited hereinabove. If that were the case, it ought to have provided such proof to this court, which this court finds it failed to do.
 17. The adverse findings made against the directors of the Plaintiff by Onyancha J in **Mradula Suresh Kantaria vs Suresh Kantaria & Jaribu Credit Traders Limited [2007] eKLR** are not binding on this court as the same were made by a court of equal and competent jurisdiction. The above notwithstanding, they were findings of fact which this court cannot ignore them as the learned judge heard the representations of the parties and came to the conclusion that he did. However, the same related to movable properties that had been attached in satisfaction of the decree that had been obtained by Suresh Kantaria in the aforesaid Divorce Cause.
 18. The court was thus not entirely convinced by the Defendant's arguments that the fact that the Plaintiff's immovable assets were tied up in litigation would be the basis for the granting of an order for security of costs in its favour.
 19. Whereas, the Plaintiff did not file an Affidavit of Means showing that it would be able to meet the Defendant's costs in the sum of Kshs 5, 851,154/=, the Defendant had a duty in the first instance to clearly demonstrate that the Plaintiff would not be able to meet its costs.
 20. It was not for the Plaintiff to demonstrate that it would be able to pay the Defendant's costs as the Defendant alleged but rather it behoved the Defendant to show that the Plaintiff would be unable to pay its costs at the conclusion of the case herein causing it to suffer out of pocket, an issue that was considered in the case of **Pearson & Another vs Naydler & Others** (Supra).
 21. While dismissing an application for costs in the case of **HCCC No 27 of 2000 (O.S) John Francis Muyodiv's Peter Lunani Ongoma & Another** (unreported) for security, the court observed as follows:-

“...However, the court has a wide discretion whether or not to order security or not. There is no burden one way or the other but it will depend on the circumstances of each case. It should be borne in mind that the court should consider whether the application for costs was commenced with a view to being used to oppress, so as to try and stifle a genuine claim...”
 22. In addition to establishing whether or not a Defendant has a *bona fide* Defence, this court is of the view that it must go further to interrogate whether or not there exists compelling circumstances that would persuade it to order for security for costs in favour of a defendant.
 23. If this were not so, it would mean that every time a plaintiff filed suit, it would be required to furnish security for a defendant's costs. Such a provision would clearly be discriminatory against plaintiffs and stifle claims especially if the plaintiffs were not financially stable. The circumstances surrounding each case would guide a court in determining whether or not it should exercise its discretion.
 24. A major consideration that is given by the court is that an order for security for costs should not be granted so as to stifle a plaintiff's case. This does not, however, in any way seem to suggest that the said order could not be granted if the resultant effect was that a plaintiff's case would be stifled

- if the circumstances of the case so required that such an order be granted to balance the interests of a defendant who would suffer injustice if such an order was not granted.
25. The Plaintiff's reliance on Article 48 of the Constitution of Kenya, 2010 would not have been an automatic bar for this court not to make an order for security for costs if the circumstances so required that the said order be granted. In any event, the court does not believe that the Plaintiff's case would have been stifled if the orders were to be granted for the reason that it had on its own admission stated that it derived a monthly income of more than Kshs 1,000,000/=. Paying security would therefore not have stifled its claim as it was a corporate person with means.
26. However, having considered the circumstances of this case, the court finds that the Defendant did not discharge its burden of proof to the required standard. No exceptional circumstances or concrete evidence was adduced by the Defendant to persuade this court to grant its application.
27. As was rightly pointed out by the Plaintiff which relied on the case of **Cancer Investments Ltd vs Sayani Investments Ltd [2010] eKLR**, mere apprehension that a plaintiff will not be able to meet a defendant's case is not sufficient. The problems bedeviling the shareholders and directors of the Plaintiff Company ought not to be visited upon the Plaintiff Company which has a distinct legal entity. The Defendant's apprehension that it would not recover costs from the Plaintiff was therefore not sufficient.
28. The Defendant was required to satisfy the court that at the conclusion of the case herein, it would have incurred out of court expenses and other costs that it would never recover from the Plaintiff as it had nothing that could be executed against. The court finds that the Defendant failed to discharge its burden in this regard.

DISPOSITION

29. For the reasons foregoing, the Defendant's Notice of Motion application dated and filed on 3rd August 2012 was not merited and the same is hereby dismissed with costs to the Plaintiff.
30. It is so ordered.

DATED and DELIVERED at NAIROBI this 16th day of September 2014

J. KAMAU

JUDGE