REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 849 of 2010

KENTRO SYSTEMS LTD. ……..……. PLAINTIFF

VERSUS

SUPERIOR PRINTERS LIMITED ……..…… DEFENDANT

R U L I N G

1. The Defendant, a company incorporated in Kenya, has brought this Application by way of Notice of Motion dated 27 February 2012, seeking Orders that the Plaintiff, a company incorporated in India, do furnish security for costs in the amount of Shs. 3 million. The Defendant also seeks Orders that in default of the Plaintiff furnishing such security, its suit should be dismissed with costs. Further, pending the provision of such security, the Defendant prays that all further proceedings in this suit be stayed. The Grounds upon which he Application is brought are principally that the Plaintiff is a non-resident and has no place of business in Kenya. The Plaintiff had not shown that it had substantial fixed or permanent assets or any property within the jurisdiction of this court. As a consequence, the Plaintiff had no known realisable or attachable assets in Kenya. In the event that the Defendant succeeded in defending this suit, its right to payment of costs would be defeated thereby causing irreparable harm and financial loss to the Defendant.

2. The Application was supported by the Affidavit sworn by **Seifudin A. Bhaijee** dated 27th of February 2012 but not filed herein until 17 September 2012. The deponent stated that he was a Director of the Defendant Company. He noted that the suit had been instituted as per the Plaint dated 9 November 2010 and that the Defendant Company had filed a Defence on the 14 February 2011, denying the Plaintiff's claim. He recorded that the Plaintiff was not resident in Kenya but rather in India where it was incorporated and has its registered office as per the Plaint. Thereafter, the Affidavit in support reiterated the grounds in support of the Application and the deponent maintained that it was imperative that security for costs to the Defendant should be awarded in the sum of Shs. 3 million. The deponent went on to say that the Defence entered herein was *bone fide* although he did not say that it set up triable issues.

3. The Replying Affidavit of **Vineet Kanwar** was sworn in Noida, Nagar, India on 6 December 2012. The deponent detailed that he was a Senior Manager of the Plaintiff Company authorised under seal to swear to matters in connection with this suit and that he was competent so to do. He detailed that he had read the Affidavit in support of the Defendant's Application which he felt sought the Orders prayed on two grounds – first that the Plaintiff was not resident in Kenya and secondly that the Plaintiff had not shown that it had substantial assets within Kenya. Although the deponent did not state that the Plaintiff

Company had any assets within the jurisdiction of this court, he did detail that the Plaintiff is a well-established company of sound financial standing and to this end, he attached a copy of the Plaintiff's last audited accounts. He also stated that he was aware that in the had a local statute known as the Foreign Judgements (Reciprocal Enforcement) Act which he detailed was an Act that facilitated enforcement in India of judgements given in other countries India. He deponed to the fact that, in his view, the Plaintiff's case was strong with a good chance of success. He also maintained that the Defendant's Application was meant to delay the quick hearing of the suit in that the Affidavit in support of the same was sworn on 27 February 2012, yet the Application itself was not filed in this court until 17 September 2012.

4. The parties agreed to deal with the Defendant's said Application by way of written submissions, the Defendant filing its submissions on 10 January 2013 while the Plaintiff filed its submissions on 21 January 2013. The Defendant, in its submissions, having set out the background to its Application, emphasised that the Plaintiff Company was a foreign entity and that it had no registered office in Kenya and no known assets within Kenya. The Defendant submitted that if it successfully succeeded in its Defence and was awarded costs by this court, the same may not be recovered without undue difficulty. In its opinion, it was likely to suffer irreparable harm and financial loss stating that its necessary costs would be Shs. 3 million and/or any other sum as the court may order be furnished by the Plaintiff. Where the Defendant's submissions were silent, was as regards how it had calculated the figure of Shs. 3 million that it was asking this court to award by way of security for its costs. The Defendant whereupon commented that it appeared from the Replying Affidavit that the Plaintiff had intimated that there would be no problem to use the Reciprocal Enforcement Act to enforce any Order for costs that may be granted. It further noted that the copies of the accounts annexed to the Replying Affidavit only amounted to 2 pages and there were no comments detailed thereon by the Plaintiff's auditors. Thereafter, the Defendant referred the court to 4 authorities as follows:

"1. HCCC No. 309 of 2011 (MSA) New Tradeco Investments 2000 Ltd. –vs- Anyang Senli Trade Co. Ltd. & 2 Others.

2. HCCC No. 423 of 2005 (Milimani Commercial Courts NRB) Tanganyika Investments Oil & Transport Co. Ltd. –vs- Mobil Oil (K) Ltd. & 6 Others 2008 eKLR.

3. HCCC No. 759 of 2001 (Milimani Commercial Courts NRB) Scholastica W. Waihenya & 3 Others –vs- Job Kagwe Ngunjiri & 5 Others.

4. HCCC No. 280 of 2003 (Milimani Commercial Court NRB) Elite B. Ahouanmenou –vs- The African Trade Insurance Agency".

5. The Plaintiff, in response, set out the synopsis and detail of the Application of the Defendant as well as the Orders sought. It noted that in the Court of Appeal case **Kenya Educational Trust Ltd versus Katherine S. M. Whitton (2011) e KLR** that the court had found that an award for security for costs: **"…… Is a discretional remedy which can be granted if special circumstances permit."**

The Plaintiff submitted that the Defendant herein was not deserving of the Orders that it sought as a matter of right but only upon demonstrating that there were special circumstances that warranted the issuance of such orders. The Plaintiff drew the attention of the court that what had been sought by the Plaint was declaratory reliefs only and there was no any prayer for liquidated damages. Consequently, it queried as to where or how the Defendant had arrived at the figure of Shs. 3 million that it was demanding should be put up security for costs purposes. It referred to three decisions contained in the Defendant's List of Authorities being the **New Tradeco**, the **Tanganyika Investments** and **Scholastica Waihenya** cases in which the amount of the claim was either ascertained or ascertainable which had resulted in a credible estimate of what costs would amount to. The Plaintiff was of the view that the Defendant had failed to show to this court how its figure of Shs. 3 million as proposed by way of security for its costs, had been arrived at. In so doing, the Plaintiff referred to the decision of my learned brother **Mabeya J.** in **Harswell Trading Ltd versus Kenya Revenue Authority (2012) eKLR** in which the Judge had noted:

"An applicant cannot pluck a figure from the air and throw it to the court and expect the court to grant the same or speculate on the amount to be filed. Some scientific basis must be laid by way of a draft bill of costs…."

In the opinion of the Plaintiff, the Defendant had arrived at a greatly exaggerated sum.

6. The Plaintiff continued with its submissions by stating that it had demonstrated its *bonafides* to the court by attaching a summary of its latest audited accounts to the Replying Affidavit. That summary had shown that the net worth of the company in terms of its asset base was in excess of Indian Rupees 2.6 billion as compared to its liabilities of Rs 590 million. It noted that the summarised Balance Sheet had been signed by the Managing Director of the Plaintiff Company and authenticated by the Company's auditors. It submitted that in the event that the Defendants succeeded in its claim, the Plaintiff was very well able to satisfy any award of costs. Further in that connection, the Plaintiff submitted that the Indian Foreign Judgement (Reciprocal Enforcement) Act accorded reciprocal treatment to judgements delivered in Commonwealth countries for the purposes of enforcement in India. There was no reason why the Defendant should not avail itself of such procedure in the event of costs being awarded against the Plaintiff. Finally, the Plaintiff adopted the citation in **Halsbury's Laws of England 4th Edition Volume 37 at para 305** which was adopted in the **Harswell Trading** case (supra) by **Mabeya J.**:

"Although an application for security for costs may be made at any stage of the proceedings it should be made as promptly as possible and it should not be made to relate or too close to the trial since unless there is a reasonable explanation on the delay it may be refused."

The Plaintiff noted that the suit had been set down for hearing on 27 November 2012 but the filing of this Application had interfered with the prosecution of the suit. In his view, the Application was meant to delay the expeditious disposal of this case.

7. The "daddy" of all cases dealing with security for costs is that of **Farrab Incorporated versus Brian John Robson & Ors (1957)EA 441**. That was a case in which security for costs was ordered against the Plaintiff company which was registered outside Kenya but had a place of business in Tanganyika (as it then was). More recently, this court finds itself bound by the Court of Appeal's decision in **Shah versus Shah (1982) KLR 95** in which it was held as quoted in the Ruling of my learned brother **Azangalala J**. in the **Ahouanmenou** case (supra):

"2. The general rule is that security is normally required from Plaintiffs resident outside the jurisdiction; however a court has a discretion to be exercised reasonably and judicially to refuse to order that security be given.

3. The test on an application for security for costs is not whether the Plaintiff has a *prima facie* case but whether the defendant has shown a *bone fide* defence…."

In my view, I did not receive much assistance from the other authorities cited by counsel on both sides. Each application for security for costs must necessarily be treated on its own merits and each case has its own individual circumstances. **Shah versus Shah** (supra) to my mind is along the lines of what this court should be considering in relation to this Application.

8. I have perused the contents of the Defence filed herein on 14 February 2011 as well as the Replying Affidavit. To my mind the Defence strings together a line of denials as regards the averments in the Plaint. However 2 particular paragraphs stand out being paragraphs 12 and 13 thereof. Paragraph 12 states that the Defendant denies each and every allegation and particulars of infringement in relation to the Plaintiff's water purifier product – "Kent mineral RO water purifiers". On the other hand, paragraph 13 reads as follows:

"The Defendant avers that save that it registered trademark for 'Kent mineral RO water purifiers in Kenya, the same only related to importation, distribution and wholesaling and not manufacturing and in any event the Plaintiff had not registered any trademark in Kenya."

All that is as may be in relation to the Plaintiff's said trademark but then I had occasion to examine the Certificate of Registration of Trade Mark being document no. 2 in the Defendant's List of Documents dated 15 August 2012. That Certificate details the water purifiers as having been registered as Trade Mark No 62302 in Class 11 (Water purifying machine/installation.). The said Certificate details the registered proprietor as SUPERIOR PRINTERS LTD., Importers, Distributors, W/salers of P. O. Box 90181 – 80100 GPO,MOMBASA, Kenya. The effective date of registration is detailed as 1 November 2007 and it expires on 1 November 2017. As I read that Certificate, it relates to manufacture of the water purifying machine/installation not the importation, distribution and wholesaling thereof.

9. By pointing out that there may be differing interpretation as to what the said Certificate of Registration of Trade Mark may mean, I am not convinced that the Defendant has a *bone fide* defence but then it may be right that the Plaintiff has no registered trademark for its water purifier in Kenya. Only time will tell when this matter comes to trial. Having made that observation, should I exercise my discretion in favour of the Defendant? Obviously my discretion is wide but I must exercise it both reasonably and judicially. The Plaintiff is incorporated and has its main place of business in India. I am satisfied that it is a prosperous company with a good asset base as per the Balance Sheet and Profit and Loss Account annexed to the Replying Affidavit. I don't see that the Defendant's point as to the excerpt from the Plaintiff's Accounts, bearing no recommendation or report from the auditors/accountants, has much bearing on the matter. However, I am not really appreciative of the Plaintiff's submission that if the Defendant was awarded costs it could chase the Plaintiff for the same by utilising the provisions of the Indian Foreign Judgement (Reciprocal Enforcement) Act. Having to take legal action in a foreign jurisdiction is invariably an expensive and time-consuming business. Further, I take cognizance and have sympathy with the observation of **Mwilu J.** in the **Tanganyika Investments** case (supra) when she stated in her finding:

"It is not in doubt that the court has statutory power to order a plaintiff limited liability company to give security for costs. Such power is discretionary and such discretion must be exercised after having regard to all the circumstances of the case. There is no dispute that the plaintiff herein is resident out of the jurisdiction of the court. The plaintiff has not shown that although resident out of the jurisdiction of the court it had substantial fixed or permanent or certain property within the jurisdiction which can be accessed by judicial process should the Defendants succeeded in defending the claim against them and get an order for their costs. It is not right that they should have to go to Tanzania to enforce the order as they could be all sorts of difficulties in obtaining execution there. The plaintiff being resident out of jurisdiction and having no known substantial fixed or permanent or certain assets or property within the jurisdiction of the court makes a *prima facie* case for requiring it to give security for costs. The justice of this case demands that security for costs be ordered." (Underlining mine).

10. I adopt the finding of **Lady Justice Mwilu** as above. If the Plaintiff had assets within the jurisdiction of this court, my Ruling may have been different. However, I do find that the circumstances of this case require that security for costs be ordered. I do concur with the Plaintiff's submissions that the figure put on such security by the Defendant of Shs. 3,000,000/-is on the high side bearing in mind that there is no liquidated demand made in the Plaint. Accordingly, I order that the Plaintiff do provide security for the costs of the Defendant in the amount of Shs. 1 million within 30 days of service of this Order. Such security shall be in the form of a performance bond provided by a reputable financial institution or insurance company or a cash deposit in the joint names of the advocates for the Plaintiff and the advocates for the Defendant to be placed in an interest-bearing account as agreed by the parties. In default of the Plaintiff giving security for costs as above, the Defendant will be at liberty to apply for the dismissal of this suit as against it. In the interim all further proceedings as regards this suit are stayed. The Defendant will have the costs of this Application. It is so ordered.

DATED and delivered at Nairobi this 28th day of March 2013.

J. B.HAVELOCK
JUDGE