



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 352 of 2012**

**FTG HOLLAND.....PLAINTIFF**

**- VERSUS -**

**AFAPACK ENTERPRISES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**AFA CHEMICALS LIMITED .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is the defendants' notice of motion dated 19<sup>th</sup> July 2012. The defendants pray for a warrant of arrest against the plaintiff's directors to show cause why they should not furnish security for the counterclaim in the sum of € 118,731.5. In a nutshell, the applicants have filed a counterclaim in this suit for that sum. The applicants contend that the plaintiff is a company domiciled in Holland and with no known assets in Kenya. They thus pray for security by deposit of that sum or a suitable bond or guarantee issued by a Kenyan bank. Those matters are buttressed further in the affidavit of Aleem Fazal sworn on 19<sup>th</sup> July 2012.

2. The motion is contested by grounds of opposition dated 4<sup>th</sup> October 2012. They are three – pronged: first, that Order 39 does not contemplate furnishing of security for a counterclaim; that mere apprehension of delay in prosecuting the suit is not a good ground for the motion; and thirdly, there is no evidence that the plaintiff intends to delay or avoid the process of court. The plaintiff has not filed a replying affidavit.

3. I have considered the defendants' written submissions dated 23<sup>rd</sup> October 2012, plaintiff's submissions dated 18<sup>th</sup> October 2012 as well as the brief address by both counsels at the hearing. At paragraph 2 of the deposition of Aleem Fazal, it is deposed that FTG Holland, the defendant in the counterclaim, is a foreign company domiciled in Holland. The plaintiff has not controverted that fact. Doubt is completely removed by the pleading at paragraph 1 of the plaint: the plaintiff is described as a company incorporated in The Netherlands. No evidence has then been provided to show that the plaintiff has any attachable assets in Kenya. At paragraph 4 of the plaint, it is pleaded that the plaintiff operates through flower shops and kiosks ran by its resellers in Africa.

4. The plaint here was filed on 31<sup>st</sup> May 2012. The defence and counterclaim were filed on 20<sup>th</sup> July 2012, the same date with the motion to furnish security. I find there has been no delay in bringing the motion which would have prejudiced the motion. See *Halsbury's Laws of England* 4<sup>th</sup> Edition Vol 37 paragraph 305, *Mama Ngina Kenyatta and another Vs Mahira Housing Company* [2005] e KLR, *Sir Lindsay Parkinson & Company Ltd Vs Triplan Ltd* [1973] 2 ALL ER 273, *Cancer Investments Limited Vs Sayani Investments Ltd* [2010] e KLR.

5. Whether or not to grant a prayer to furnish security is entirely within the discretion of the court. See Procon Limited Vs Provincial Building Company [1984] 2 ALL ER 368. See also Parmex Limited Vs Austin and Partners Nairobi, High Court case 450 of 2003 [2006] e KLR, Mama Ngina Kenyatta and another Vs Mahira Housing Company [2005] e KLR. Again, the mere fact that the respondent is a foreign company is not sufficient in all cases to ground the motion. See Jismaji Vs Saheb and another [1990] e KLR, Kenya Education Trust Limited Vs Katherine S.M. Whittan Civil Appeal (application) 301 of 2009 (unreported).

6. In Shah Vs Shah[1982] KLR 95, at page 98, Law, J.A delivered himself thus;

“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; see Korecha Vs Bank of Baroda (CA Civil Application No 43 of 1978, unreported)”.

7. As a general rule it is for the defendant to establish a *bona fide* defence. In the present case, *prima facie*, the defendant has set up a counterclaim for € 118,731.5 that seems to be *bona fide*. The plaintiff has not filed an affidavit to controvert the averments in the supporting affidavit. I am alive to the notion that the court should execute a delicate balancing act in order not to stifle the plaintiff’s claim or prejudice the rights of the parties. But in a matter of this nature, it would have been incumbent upon the plaintiff company, which is domiciled abroad, to demonstrate its means to meet the counterclaim or costs. As I stated earlier, the plaintiff concedes that it trades through flower shops and kiosks ran by its resellers in Africa. I think that is too general a proposition in the circumstances. I am not saying that the defendants’ counterclaim will succeed. And I am not saying either that the plaintiff’s suit will prevail. That is the true province of the trial court. All that I am saying is that the defendants are facing a foreign company trading in Kenya through third parties or resellers and with no proof of attachable assets in the jurisdiction of the court. The apprehensions expressed by the defendants that the plaintiff may abscond or not meet the counterclaim and costs are not then far fetched or ill founded. The burden of proof of course rests with the applicant. See Kuria Kanyoko t/a Amigos Bar & Restaurant Vs Francis Kinuthia Nderu and 2 others (1988) 2 KAR 126. The respondent has shot itself in the foot by failing to file a deposition to rebut those averments by the applicants.

8. The defendants have moved the court under Order 39 rule1 for arrest of the plaintiff’s directors to show cause why they should not furnish security. It was open to the defendants to move the court under rule 5 for an order to furnish security. Under both rules however, the defendants required to show that the plaintiff has absconded, or about to abscond from local limits of the Court, or disposed of its property with intent to delay or obstruct execution of a decree. But considering the plaintiff is domiciled abroad and has no attachable assets in Kenya, the defendants have laid a basis for furnishing of security but not for the arrest of the unnamed directors of the plaintiff. In the interests of justice, I would then avoid technicalities and order for furnishing of security as known under order 39 rule 5 of the Civil Procedure Rules 2010. I do so because the motion is also presented under sections 1A, 1B and 3A of the Civil Procedure Act. This is in tandem with the overriding objective of the court to do substantial justice without undue regard to technicalities.

9. For all the above reasons, I order as follows;

1. **THAT** the plaintiff shall within 30 days of the date hereof furnish security in the sum of € 118,731.5 or the equivalent in Kenya shillings by either depositing the sum in court or by a bond or bank guarantee (unlimited in time) issued by a reputable bank carrying on business in Kenya.

2. **THAT** in default the plaintiff’s moveable properties to the value of that sum shall be attached and held to the order of the court, and at the plaintiff’s expense, until conclusion of the suit.

3. **THAT** the plaintiff shall pay the defendants the costs of this application.

It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this 19<sup>th</sup> day of March 2013.

**G.K. KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of**

Mr. D.O. Ochach for the Plaintiff.

Mr. G.M. Mwangi for the Defendants.