REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

CIVIL CASE NO 100 OF 2013

QAD SOFTWARE SOUTH AFRICA (PTY) LIMITIED…….....PLAINTIFF

VERSUS

RIFT VALLEY RAILWAYS INVESTMENTS (PTY) LIMITED.....DEFENDANT

RULING

1. The Defendants' Notice of Motion application dated and filed on 11th April 2013 was brought under the provisions of Order 25 Rule 1 and 6, which ought to have read Order 26 Rule 1 and 6, and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The same sought the following orders:-

i. **THAT the Plaintiff be ordered to deposit security for the Defendant's costs of this suit.**
ii. **THAT the suit be stayed pending the deposit of such security in a form acceptable to the Defendant.**
iii. **THAT costs of this application be borne by the Plaintiff.**

2. The Plaintiff did not file any affidavit to support its application which was premised on the following grounds:-
    a. **THAT the Plaintiff was a limited liability company incorporated in the Republic of South Africa and had no assets that the Defendant was aware of within the jurisdiction.**
    b. **THAT the Defendant if successful in its defence would be unable to recover the costs arising from having to defend the suit.**
3. When the matter came up in court on 24th May 2013, counsel for both parties indicated that the court could proceed to give its ruling based on their respective written submissions. They relied on Order 51 Rule 16 of the Civil Procedure Rules, 2010 (of the laws of Kenya) which provides as follows:-

"The Court may, in its discretion, limit the time for oral submissions by the parties or their advocates or allow written submissions."

4. The court allowed the counsels' application. The ruling herein is therefore based on the said written submissions.
5. In its written submissions dated 13th May 2013 and filed on 14th May 2013, the Defendant referred the court to its Statement of Defence dated and filed on 11th April 2013 in which it had denied that it was indebted to the Plaintiff as had been alleged in the Plaint or at all. It stated that the Plaint was a fatal flaw in the enforcement of a foreign judgment contrary to the provisions of the Foreign Judgments (Reciprocal Enforcement) Act Cap 43 (laws of Kenya). It was for that reason that in paragraph 3 of its Statement of Defence, the Defendant denied that this court had jurisdiction to determine this suit in so far as it related to it.
6. On 30th April 2013, Peter Neil Geddes filed a Replying Affidavit on behalf of the Plaintiff herein. The said affidavit is shown to have been sworn at Shrewsbury, United Kingdom and notarised in Amsterdam, Netherlands. The defectiveness or otherwise of the said affidavit was a major bone of contention between the parties. Purely as a pre-emptive measure, the Plaintiff filed another Replying Affidavit on 23rd May 2013, which was notarised at Shrewsbury, United Kingdom. The Defendant refused to consent to the latter Replying Affidavit remaining on record as parties had already filed their respective written submissions and what was being awaited were directions on the ruling of the Defendant's application. As the latter Replying Affidavit was filed without leave of the court, the court ruled that it would not rely on the same. The court will therefore address the issue of whether or not the Defendant's application was unopposed, as was contended by the Defendant, by considering the regularity or otherwise of the Replying Affidavit sworn on 30th April 2013.
7. In its written submissions dated 13th May 2013 and filed on 14th May 2013, the Defendant argued that the said Replying Affidavit offended the provisions of the aforesaid section and Order 19 Rule 4 of the Civil Procedure Rules, 2010 which stipulates as follows:-

   "Every affidavit shall state the description, <u>true place of abode and postal address of the deponent</u> and it the deponent is a minor it shall state his age. (The Defendant's emphasis).

8. It relied on the case of **Julia Agola Otieno vs Suleiman K Njoroge [1993] LLR 7722** where the court struck out the affidavit for having failed to comply with the provisions of Section 5 of the Oaths and Statutory Declarations Act. It submitted that the discrepancies were not merely procedural but rather they went to the heart of the admissibility of the evidence that was being offered by the Plaintiff.
9. Section 5 of the Oaths and Statutory Declarations Act provides that:-

   "Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken."

10. It is evident from the provisions of Section 5 of the Oaths and Statutory Declarations Act Cap 15 (laws of Kenya) that an affidavit must state the place and the date where the oath was taken. In its written submissions dated 22nd May 2013 and filed on 23rd May 2013, the Plaintiff explained that the deponent of the said Replying Affidavit received the said affidavit at his United Kingdom address but that since he was travelling abroad, he had the same notarised in Amsterdam. The Plaintiff contended that this in itself depicted the said deponent as an international businessman. The Plaintiff further submitted that the said affidavit clearly stated the true abode of the deponent and where it was notarised and that in fact the Notary Public in Amsterdam certified that the signature on the affidavit belonged to the deponent herein and declared the said affidavit to be legal in the Netherlands.
11. It was the Plaintiff's submission that the said Replying Affidavit did not have any glaring defects and that in any event the Oaths and Statutory Declarations Act did not apply to affidavits which were notarised abroad and where they were wholly valid in the jurisdiction they were sworn in. The Plaintiff therefore argued that it had therefore satisfied the test in the case of **Re: Julia Agola Otieno (Supra)**.
12. The court has noted the Defendant's submissions on what ought to be contained in an affidavit.

However, the court also does take cognisance of the provisions of Order 19 Rule 6 of the Civil Procedure Rules, 2010 which provide the instances when the court may order an affidavit to be struck out. A court may order that any matter in an affidavit be struck out for being scandalous, irrelevant or oppressive but an affidavit cannot, however, be struck out merely on technicalities. This position is well set out in Order 19 Rule 7 of the Civil Procedure Rules, 2010 which stipulates as follows:-

"**The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect of misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality."**

13. In the case of **Rajput vs Barclays Bank of Kenya Limited & 3 others [2004] 2 KLR**, Emukule J dealt with a similar issue in which he held as follows:-

"… failure to comply with the provisions of law, the Oaths and Statutory Declarations Act and the Rules thereunder is a matter of substance and not form. It is not a matter that is curable about which the court should take a lenient view…"

14. The court has carefully perused the Replying Affidavit herein and notes that the same was sworn by the deponent at Shrewsbury United Kingdom. The certificate to confirm the signature was the true signature of the deponent by a Notaries Public was contained on that page but it was not signed. The Notaries Public stamped and signed on a separate page which was annexed to the Replying Affidavit. The Notarial Certificate therein bore the following words:-

"Seen for legalization of the signature of Mr Peter Neil GEDDES by me, Marcel Dirk Pieter Anker, Civil Law Notary in Amsterdam, the Netherlands on this day of 25 April 2013."

15. The Verification Affidavit sworn by the said Peter Neil Geddes on 18th February 2013 also adopted the same format as that of the said Replying Affidavit. There is nothing to suggest that the Defendant was objecting to the said format of attestation of the Verification Affidavit. It cannot be that the Defendant is not objecting to the validity of the said Verification Affidavit, which is the leg on which a suit stands, but is objecting to the Replying Affidavit sworn on 30th April 2013. In other words, a party that acquiesces that a Verification Affidavit is properly drawn cannot in the same vein object to subsequent affidavit that were notarised in the same manner as being irregular and of no consequence.
16. In the circumstances, in the absence of any proof by the Defendant that the said Replying Affidavit would not have been admissible in a court in the United Kingdom and the Netherlands where it was notarised, the court finds that the irregularity was more on form and not substance which would not go to the substance of the matter herein. Indeed, the Replying Affidavit herein has raised very substantial issues which the court finds would cause great injustice to the Plaintiff if the same were not considered. The court finds that the Defendant has not demonstrated what prejudice it would suffer if the said Replying Affidavit was held to be valid for the purposes of the determination of its application.
17. This court has departed from the finding in the **Rajput vs Barclays Bank of Kenya Limited** (Supra) as, notably, it was decided before the promulgation of the Constitution of Kenya, 2010 which has changed the whole essence of technicalities during litigation. Article 159 (2)(d) of the Constitution of Kenya, 2010 which was relied upon by the Plaintiff mandates the court to be guided by the principle that:-

"…justice shall be administered without undue regard to procedural technicalities…"

18. It is for that reason that this court finds itself in agreement with the finding of Ringera J (as he then was) in **Microsoft Corporation vs Mitsumi Computer Garage Limited & Another (2001) KLR 470** at 482 when he stated as follows:-

" Deviations from or lapses in form and procedure which do not go into the jurisdiction of

the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected, in those instances, the court should rise to the higher calling to do justice by saving the proceedings in issue."

19. For the reasons foregoing, this court is not persuaded by the Defendant's objections to the admissibility of the Plaintiff's Replying Affidavit filed on 30th April 2013 and instead holds that it will consider the said affidavit in making a determination of the Defendant's application as it was not fatally defective to warrant it being struck out from the court records.
20. In the said Replying Affidavit filed on 30th April 2013, Peter Neil Geddes deposed that the Defendant had stated that it was not a resident of Kenya and it could therefore not seek orders for security for costs as both the Plaintiff and it were in equal position as regards the recovery of costs in respect of the suit herein.
21. He further stated that the Plaintiff had obtained a judgment in Kwazulu- Natal High Court, Durban in the Republic of South Africa in respect of the subject matter of this suit but it could not execute the same against the Defendant as the Republic of Kenya does not have a reciprocal arrangement with the Republic of South Africa for enforcement of foreign judgments. He therefore contended that the present application was insincere as the Defendant had refused to pay the Plaintiff's costs emanating from the aforesaid judgment.
22. It was the deponent's further averment that the Defendant had not shown that it had a bona fide defence or tendered any evidence to support its Defence. It was the Plaintiff's case that depositing of the security for costs was tantamount to denying it justice as it would cause it to incur additional financial hardship making it difficult for it to pursue its claim against the Defendant. The Plaintiff urged the court to dismiss the Defendant's application as it lacked merit and was a waste of court's time and resources and it had been filed with the purpose of frustrating the present proceedings.
23. The Defendant argued that Order 26 Rule 4 of the Civil Procedure Rules, 2010 gave the court discretionary powers to order for security for costs in:-

"…Any suit brought by a person not residing in Kenya if the claim is founded on a bill of exchange or any negotiable instrument or on a judgment or order of a foreign court."

24. It relied on the case of **HCCC No 4616 of 1993 Pan African Bank Limited vs Jasop Limited Abraham Kiptanui & Another** (unreported) where the court held as follows:-

"**A decision whether to order a party to furnish security for costs or to decline such an order is in the discretion of a judge. The discretion is a judicial one, exercised on wound principles in the light of the circumstances of a case…. The object … is clearly to provide the protection of defendants in certain cases where in the event of success they may have difficulty in realising their costs of the suit…"**

25. It was the Defendant's submission that the enforcement of foreign judgments, which the Plaintiff had failed to acknowledge, was an important issue of law. It argued that its denial of indebtedness to the Plaintiff in the sum of USD 693,304.00 constituted a bona fide defence with probability of success. Consequently, having established a *prima facie* case, it argued the court could therefore order for security for costs. It referred the court to the case of **Shah vs Shah (1982) KLR** where the Court of Appeal held as follows:-

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

26. The Defendant further submitted that its prayer for the stay of the proceedings was anchored on the provisions of Section 401 of the Companies Act Cap 486 (laws of Kenya) which stipulates as follows:-

" Where a limited company is plaintiff in any suit or other legal proceedings, any judge having jurisdiction in the matter may, if it appears by credible evidence 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."

27. In that regard, the Defendant referred the court to the case of **HCCC No 531 of 1999 Indemnity Insurance Company of Northern America vs Kenya Airfreight Handling Limited** (unreported) in which the court held as follows:-

"The issue before the court is not whether or not the plaintiffs are in a position to meet the 1st defendant's costs but rather whether the 1st defendant will find itself unable to recover from the plaintiffs the costs which may be incurred in defending that suit…a defendant who has unnecessarily been dragged to court is entitled to protection against the plaintiff in the event he succeeds in resisting the claim."

28. On its part, the Plaintiff submitted that the Defendant could not rely on Section 401 of the Companies Act as it had failed to provide credible testimony that it would not be able to pay the Defendant's costs in the event the Defendant was to succeed. It distinguished the cases cited by the Defendant and stated that each case had to be decided depending on the particular circumstances of each case.
29. The Plaintiff urged this court to find that this is not a suitable case where the court could exercise its discretion to order for security for costs because both it and the Defendant were foreign companies with no assets in the Republic of Kenya. It had a bona fide claim against the Defendant and it could therefore not be said that it had unnecessarily dragged the Defendant to court.
30. The court has noted the parties' submissions on the issue of reciprocity of foreign judgments and in particular the Plaintiff's argument that it followed the correct procedure by filing the suit herein as the Foreign Judgments (Reciprocal Enforcement) (Extension of Act) Order did not include the Republic of South Africa which is an issue that ought to be ventilated during the main trial of the suit herein. Suffice it for the court to state that the said Order lists Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, United Kingdom and the Republic of Rwanda as the only reciprocating countries with the Republic of Kenya. The court finds that the question of whether or not there was such reciprocity of foreign judgments between the two (2) countries would not constitute a *bona fide* issue in an application for security for costs as has been argued by the Defendant.
31. As was rightly pointed out by both parties, the word "may" in Order 26 Rule 1 of the Civil Procedure Rule, 2010 connotes that the granting of an order for security for costs by the court is discretionary. The said order provides as follows:-

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 part be given by any other party.

32. The court must be very cautious not to stifle the Plaintiff's claim. In the case **HCCC No 27 of 2000 (O.S) John Francis Muyodi vs Peter Lunani Ongoma & Another** (unreported) while dismissing an application for security for costs, 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…"

33. A mere denial of a debt by a Defendant would not constitute a *bona fide* defence where there is supposedly, a judgment delivered by a High Court in another country. It was evident from the Replying Affidavit herein that the Defendant herein had not satisfied the judgment that was delivered in the High Court in the Republic of South Africa. It is not clear to this court whether or not the Defendant appealed against the said judgment or what the current status of the said case is or what the dispute was all about as a copy of the said judgment was not furnished to this court.

However, this court wants to point out that its jurisdiction to hear any dispute between the parties herein emanates from Article 50 of the Constitution of Kenya, 2010 which protects the right of any person to have any dispute that can be resolved by the application of law to be decided in a fair and public hearing, on its won merits.

34. This court is not satisfied that the Defendant has provided any credible testimony to show that the Plaintiff would not be able to pay its costs, if it was to succeed in this suit or that it had been dragged unnecessarily in court and the mere fact that a company is not resident in Kenya is not a good reason to make such an order.
35. The Defendant opted to rely on grounds to support its application and not to file a Supporting Affidavit where it could have provided credible testimony of the Plaintiff's inability to pay its costs. To that extent, the court finds that Section 401 of the Companies Act does not provide much assistance to the Defendant's case.
36. After weighing the Defendant's Defence against the Plaintiff's rights to access to justice, this court finds that this is not one of those cases that it should exercise its discretion to grant an order for security for costs in favour of the Defendant. The Plaintiff must be allowed to prosecute its claim without being stifled. Both companies are not resident in the Republic of Kenya and must therefore be treated on equal footing.
37. For the reasons foregoing, the court finds that the Defendants' Notice of Motion application dated and filed on 11th April 2013 was not merited and in the circumstances, the same is hereby dismissed with costs to the Plaintiff.
38. Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 30th day of August 2013

J. KAMAU

JUDGE