



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
COMMERCIAL NUMBER 18 OF 2010

1. AHMED KULIMYE BIN.....1ST PLAINTIFF
2. ALI SHAIBU T/A GAGO STORES.....2ND PLAINTIFF
3. INLAND AFRICA LOGISTICS.....3RD PLAINTIFF

VERSUS

1. KENYA REVENUE AUTHORITY.....1ST DEFENDANT
2. KENYA PORTS AUTHORITY.....2ND DEFENDANT

RULING

1. The application before me is the 2nd Defendant's Chamber Summons of 8th October, 2010 seeking orders that the first and second Plaintiffs do provide security for the whole of the second Defendant's costs. Failing security for provision of such costs within a time prescribed by the court, the second Defendant seeks that the suit against it be struck out with costs.

2. The application is premised on the following grounds:

“ (a) The first plaintiff is a natural person residing and or working for gain in the Republic of Somalia, outside the jurisdiction of this court.

(b) Somalia is a failed state, politically unstable and insecure.

(c) The Second Defendant has no way of knowing the precise address or other contact details of the first Plaintiff and therefore of tracing whether the First Plaintiff has any assets or other means of paying the costs of this suit in the event that this suit is dismissed against the second Defendant.

(d) Given the present political and security situation in Somalia, even if the First Plaintiff were to disclose any assets in Somalia, the same would be outside the jurisdiction of this Honourable Court and the Second Defendant would be unable to rely on any official legal process in Somalia to execute against the First Plaintiff.

(e) The Second Plaintiff is a natural person carrying on business in a specific name within the Republic of Tanzania, outside the jurisdiction of this Honourable Court.

(f) The Second Defendant has no way of knowing the precise address or other contact details of the Second Plaintiff and therefore of tracing whether the second Plaintiff has any assets or other means of paying the costs of this suit in the event that this suit is dismissed as against the Second Defendant.

(g) The Plaintiff's claim as against the Second Defendant is at best weak and at worst an abuse of the process of the court for reasons set out in the Second Defendants Written Statement of defence dated 6th July, 2010 and filed herein on 9th July, 2010.

(h) It is just and equitable to grant relief."

3. The application is supported by the Affidavit of Michael Sangoro, Principal Legal Officer of second Defendant. In addition to essentially, restating the averments in the grounds in support of the application, the Applicant adds at paragraph 10 of his affidavit:

"That the second Defendant has already disclosed in its written statement of Defence its intention to have the suit dismissed early on grounds that the plaint does not disclose any reasonable cause of action against the second Defendant and that the statutory jurisdiction of this court has been ousted by Section 62 of the Kenya Ports Authority Act Chapter 391."

4. The Plaintiff filed Grounds of opposition dated 16th November, 2011, together with the lists of, and authorities, thereof. Their grounds of opposition are:

"1. That there are no good grounds advanced in support [of security for costs] as the Plaint is for a joint action.

2. That the 3rd Plaintiff is a Limited Liability Company incorporated in Kenya.

3. The application is frivolous and scandalous [and] intended to intimidate and frustrate the plaintiff[s].

4. The Application seeks prayers which if granted amounts to condemning the Plaintiffs before being heard on merits and is contrary to the right to a fair trial."

5. The 1st Defendant filed grounds in support of the 2nd Defendants chamber summons. At the hearing of the application Mr. Nurali, for the 2nd Defendant, held brief for the 1st Defendant.

6. The hearing was held on 22nd February, 2012. Mr. Nurali for the 2nd Defendant, relied on the following authorities:

- **Shah vs Shah** [1982] KLR 95, under which the general rule is that security is normally required from plaintiffs resident outside the jurisdiction, but that a court has a discretion, to be exercised reasonably and judicially to refuse to order that security be given. The test on an application for security is not whether the plaintiff has established a *prima facie* case but whether the Defendant has shown a *bona fide* defence.

- **VH Kapadia vs Thakersy** [1960] EA 852, which was followed in **Shah vs Shah** and

- **Shah and Others vs Manurama Ltd and others**[2003] E.A 2949HCU) which held, inter alia, that the power of a court to order a plaintiff to pay security for costs is an entirely discretionary matter for the court.

7. In addition, Mr. Nurali had filed a supplementary list of authorities, namely: **Slazengers Limited and others Vs Seaspeed Ferries International Limited, The Seaspeed Dora** (1987) 2 All ER 905, and **Manning Industries Inc. and Another Vs Jamaica Public Service Co. Ltd.** (unreported) Supreme

In **The Seaspeed Dora**, the English Commercial Court held:

“There is no rule of law that an order for security for costs will not be made under RSC Order 23 against a foreign Plaintiff if there is a co-plaintiff resident in England. Furthermore, if there is a rule of practice that security will not be ordered against a foreign plaintiff if there is an English Co-plaintiff, that rule only applies if the Co-plaintiffs rely on the same cause of action and each plaintiff is bound to be held liable for all costs ordered to be paid by the other Plaintiff to the Defendant.”

In that case, the Supreme Court Practice 1985 Volume 1 paragraph 23/1-3/3 provides that:

“No order will be made if there are co-plaintiffs resident in England.”

It may be noted that no similar provision sits in the statute books or subsidiary legislation of Kenya.

8. Mr. Nurali also pointed out that the 2nd Defendant had pleaded a statutory defence (paragraph 19 of their Defence) in which they would raise a preliminary objection on the grounds that: The court lacks jurisdiction; that the 3rd Plaintiff cannot sue the 2nd Defendant in its capacity as an agent of a disclosed principal; and that the Plaintiff’s cause of action was extinguished under Section 66 of the Kenya Ports Authority Act.

9. The 1st Defendant in its grounds in support of the 2nd Defendant’s application stated, *inter alia*, that there was doubt whether the 1st and 2nd Plaintiff’s in fact exist, and that it may be impossible for the 3rd Plaintiff to compensate the Defendants to the extent of the sums claimed. The 1st Defendant’s list of authorities included:

- **Pancras Tswai vs Kenya Breweries Ltd** [2004] e KLR and **Peter Thande vs ABN AMRO Bank and 20 others** [2005] e KLR; in both of which the court exercised its discretion to order security after: (a) having weighed the merits and demerits of ordering security; and b) taking steps to balance the injustice to the Plaintiff if prevented from pursuing a proper claim by an order for security, against the injustice to the Defendant if no security is ordered at the trial, and the Plaintiff’s claim fails and the Defendant finds himself unable to recover from the Plaintiff the costs incurred in his defence.

10. The Respondents, represented by Mr. Mogaka, strongly opposed the application. Counsel stated he was intending to amend the Plaint to clarify that the 2nd Plaintiff is a resident of Magongoni Island in Zanzibar, carrying out business as Gago Stores, a business enterprise. This amendment would not be opposed by the Defendants.

Essentially his arguments were in three parts: First, that the suit is a joint action with one plaintiff; Second that the 3rd Plaintiff is a Kenyan registered company and there was no allegation that it is not able to pay the costs; Third, that the 2nd Plaintiff is a citizen and resident of Tanzania residing in Zanzibar; Fourth, that the 2nd and 3rd Plaintiffs are citizens of the East African Community which countries operate the East African Court of Appeal and there was no allegation that a Kenyan judgment cannot be executed easily within the East Africa Community countries.

11. Mr. Mogaka referred to **Shah vs Shah** and pointed out that it was also held there that the refusal by a judge to order security for costs is not an unreasonable or unjudicial exercise of his discretion. Referring to the case of **Vallabhdas Hirji Kapadia vs Thakersy Laximidas**[1960]EA 852, counsel pointed to the holding that:

“the Defendant would be at no material disadvantage, if successful, in taking steps to recover his

costs either in Zanzibar or Tanganyika where the plaintiff also had property.”

There, the court found that the evil against which the rule as to security seeks to remedy, largely disappears in view of the provisions of the Zanzibar Judgments Extension Decree. Under that enactment, an order adverse to the Plaintiff could be as effectually executed against him in Zanzibar as if he were a resident in Kenya.

12. Counsel also referred to ***Shah vs Manurama Limited and Others***, [2003] E.A 294(HCU) in which the Ugandan High Court declining to grant an order for security, held:

“In East Africa, thee can no longer be an automatic and inflexible presumption for the courts to order payment of security for costs with regard to a Plaintiff of the East African Community.”

and also that:

“There is no inflexible rule or practice to the effect that a Plaintiff resident abroad will, by that reason alone, be ordered to give security for costs.”

In that case, the Plaintiffs were residents of Nairobi outside of the jurisdiction of the Uganda High Court. The court in considering all the relevant circumstances to enable it to exercise its discretion, noted, *inter alia*, that:

“...the Plaintiffs have averred that they own certain property in Kenya. The fact of the existence and ownership of this property was not challenged at all. Instead, learned counsel for the Defendants only challenged whether the particular property was substantial...”

13. Counsel therefore concluded that the facts that the 2nd Plaintiff was resident in Tanzania and the 3rd Plaintiff a Kenyan company, and that the Plaintiffs constituted a joint cause of action were sufficient reason to satisfy the court against granting the orders sought by the Applicant.

14. I have carefully considered the application the parties’ arguments thereon, the affidavits supporting the same, and the authorities relied upon.

The application was made under Order XXV Rule 1 of the old Civil Procedure Rules which is in exactly similar terms as Order 26 Rule 1 of the revised 2010 Civil Procedure Rules. The rule simply reads:

“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.”

This gives the court a wide discretion, as propounded in ***Shah vs Shah***, to grant security for costs from a Plaintiff outside the jurisdiction, subject to reasonable and judicial exercise of that discretion.

15. The issues to consider then in this case, are as follows:

- Whether the fact that the Plaintiff’s action is a joint action enables the Kenyan plaintiffs; the third Plaintiff, to shoulder any costs burden thereby shielding the other plaintiffs from the need to provide security;
- Whether the 2nd Plaintiff, as a citizen of Tanzania affords sufficient cushioning to thwart the 2nd Defendant’s demand for an order security for costs.

16. On the first issue, I have carefully perused the Plaintiffs. It is indeed presented as a joint plaint on behalf of all three plaintiffs. A careful scrutiny of it, however, shows that the 1st and 2nd plaintiffs are the importers of *disparate* cargoes of sugar. In the case of the 1st Plaintiff it was 96 metric tones of 4×20 Swaziland VHP sugar packed in 1,920 polylined 50 Kilogrammes bags, under bill of Lading number MP

704021 and customs entry number 2007 Mombasa 820049. The 2nd Plaintiff imported 3,900 bags of South African Brown sugar under Bill of Lading Number DR 707964 and Customs entry number 2007 Mombasa 820206. The losses of the 1st and 2nd Defendant are stated at paragraph 18 of the Plaintiff and the particulars of loss in respect of and “**due to the Defendant’s aforestated negligence**” are stated at paragraph 19 of the Plaintiff. These are tortious claims. The composite amounts claimed in paragraph 19 are prayed for jointly and severally by the Plaintiffs in prayers a, b, and c, and prayer d is for interest on the amounts prayed for as losses incurred by the 1st and 2nd Plaintiffs.

17. The case of the 3rd Plaintiff although stated in the Plaintiff to be joint and several is really stipulated at paragraph 20 of the Plaintiff. There, it is contended that the 1st Defendant wrongly failed or refused to discharge or cancel in favour of the 3rd Plaintiff a Bond Number GB136225/07 in the amount of Kshs. 2,620,095 and Bond Number GB13624/07 for Kshs. 6,402,202 in respect of the 1st and 2nd Defendants’ respective custom’s entries for their respective cargoes. The 3rd Plaintiff’s prayers are at paragraph (e) wherein they seek an order compelling cancellation of the two bonds.

18. It is clear from the foregoing that, although the Plaintiff is presented as a joint and several action of all three Plaintiffs, each Plaintiff’s cause of action is distinct and separable. The actions are, so to speak, not joined by a single umbilical cord so that the life-blood of success or failure of one would be the failure or success of the others. The 3rd Plaintiff’s claim is further removed from the actions of the other two, as it is an action purely in contract.

19. The facts are similar to those pertaining in respect of **the Seaspeed Dora**, highlighted earlier. There, 115 Plaintiffs (of whom 51 were resident outside jurisdiction) claimed damages against the Defendant for breach of contract and/or duty in or about the handling of Plaintiff’s cargo and carriage from Rotterdam to Jeddah, on board the Defendants vessel Seaspeed Dora which capsized at Jeddah in 1977. There were 71 bills of lading and the Plaintiffs resisted the application for security in reliance on the Supreme Court Practice Rule that: “**No order will be made if there are Co-Plaintiffs in England.**”

20. The English commercial court found in that case that no two Plaintiffs had an identical cause of action even though, as in this case, the rights of two of them, at least, depended on the cause of loss. The Court also found that, given the wide discretion which the trial court has, it would be difficult to predict that any particular outcome would be inevitable, or that the court would be likely, in the event of the Plaintiffs losing, to order the Defendants’s costs to be paid by any one of the Plaintiffs. Although the case is only persuasive, it demonstrates and clearly argues the point that the rule that security will not be ordered against a foreign co-plaintiff if there is an English co-plaintiff as the rule only applies if the co-plaintiffs rely on the same cause of action, and each Plaintiff is bound to be held liable for all costs ordered to be paid by the other Plaintiffs to the Defendant. I am persuaded by the argument in the **Seaspeed Dora** and adopt it in this case, to the extent that where the co-plaintiffs do not rely on the same cause of action, each Plaintiff is not bound to be held liable for all the costs of the others.

21. On the second issue, the fact that the 2nd Plaintiff is a Tanzanian and the argument that the states membership of the East African Community (EAC) and the East African Court of Appeal make it easier for the Defendants to recover in Tanzania through the legal systems in place, I have this to say. The argument is weak because it was not even suggested by the Plaintiff that the 2nd Defendant had any property or assets that could be resorted to, to cover the Defendant’s costs in the eventuality of the Plaintiffs failing in their suit.

It was not shown that there is a reciprocal statute between Kenya and Tanzania by which cross-border execution of judgments was effectuated. If that were shown, it is clear from the **Vallabdhhas Hirji Kapadia case**, that an argument could be sustained that the 2nd Defendant would be at no material disadvantage if successful, in taking steps to recover his costs in Tanzania. In **Vallabdhhas** it was found that because of the Judgments Extension Decree the evidence guarded against by the order for security effectively disappeared.

22. The Kenyan situation was stated clearly in the **Parmex Limited** case where Justice Ochieng found 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 then thereafter have to take steps to recover the same in the United Kingdom.”

Against this is of course the holding in the **Vallabhdhas case** which, however, relied on the existence of a statute supportive of cross-border execution of judgments.

Against this also, is the **Shah vs Manurama** holding that it cannot any longer be an automatic or inflexible presumption for the courts to order security for costs with regard to a plaintiff of the East African Community. However, as earlier pointed out, in that case, the Plaintiffs had shown uncontroverted evidence of ownership of property. A situation which has not been broached at all in this particular case, and weakens the Plaintiff’s defence to that extent.

23. For the foregoing reasons, I am persuaded that the first and second Plaintiffs ought to provide security for costs the 2nd Defendant’s, and I will so order.

24. The amount of security sought by the 2nd Defendant was Kshs. 1,000,000/=, based on the Advocates Remuneration Order. As argued by the 2nd Defendant, the total amount claimed in the plaint was converted into Kenya Shillings at the approximate exchange rate for the day, and amounted to Kshs. 27.5 Million. Instructions fees and getting up fees of one third were then calculated at Kshs. 960,000/= and another Kshs. 40,000/= was set aside on contingency for other costs and disbursement all totaling to Kshs.1,000,000/=.

Given that security for costs is only being ordered as against the 1st and 2nd Plaintiffs, I order that two-thirds of the amount of security sought be secured by both 1st and 2nd Plaintiffs. This amounts to Kshs.666,666/= which is Kshs. 333,333/= is to be secured by **each** of the 1st and 2nd Plaintiffs.

25. The order will therefore read as follows:

a) The 1st and 2nd Plaintiff shall provide security for the 2nd Defendant’s costs in the amount of Kshs.333,333/= each, to be deposited in court or, alternatively, in an interest earning account in the joint names of the advocates for the Plaintiffs and the 2nd Defendants.

b) The security shall be provided within Twenty one (21) days of the date hereof, failing which the 1st and 2nd Plaintiff’s suit against the 2nd Defendant shall be struck out with costs.

Costs of this application to be borne by the Plaintiff’s.

Orders accordingly.

Dated and delivered this 23rd Day of March 2012

R.M. MWONGO

JUDGE

Read in open court

Coram:

1. Judge: Hon. R. Mwongo
2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

a)

b)

c)

d)