



HAWKWIND CORPORATION.....PLAINTIFF

VERSUS

AFRICA MARINE & GENERAL ENGINEERING COMPANY LIMITED.....DEFENDANT

RULING

1. I have before me the Defendant's notice of motion application dated 14th April, 2011. It seeks that the Plaintiff furnish security for costs in the amount of Kshs. 5,400,000/= to the Defendant within thirty (30) days. In default the Defendant seeks that the Plaintiff's suit be dismissed. The application is supported by the Affidavit of Shezmeer Jiwan, director of the Defendant.
2. The application is premised essentially on the grounds that the Plaintiff, being a Panamanian company, it has no means within this jurisdiction with which to satisfy a decree for the defendant's costs. It's only asset was said to be the Motor Vessel Kairos which caught fire and was extensively damaged. The amount sued for is US \$ 3,712,845 (Kshs. 315,591,825) on which the instruction fee is calculated at Kshs.3,993,898/= and getting up fees for hearing the suit would be Kshs.1,331,297= . Coupled with an expert witnesses costs, the fees will altogether exceed 5,400,000/=.
3. The application was filed under urgency granted by Honourable Justice Ojwang on 15th April, 2011. It was subsequently stood in abeyance on 4th May, 2011 after both parties appeared before the court on the Plaintiff's urgent application of 3rd May, 2011. By consent, the Plaintiff's Affidavit in support of its Notice of motion of 3rd May, 2011 was adopted as its reply to the Defendant's present application. Parties were then ordered to file written submissions.
4. The Defendant's submissions repeat the grounds in its application. The circumstances surrounding the claim are that it was made following a fire on board the Kairos on 4th July, 2008, whilst it was undergoing repairs at the Defendant's dry dock. The plaintiff asserted that the fire was caused by welding works by the Defendant's staff, which is denied. The Defendant instead asserts that the fire was caused by defective wiring above the ceiling panels in the vessel's over-deck, unconnected to the repairs.
5. The Defendant submits that the plaintiff's only known asset is the damaged ship, registered in Panama. That country is not listed amongst those that enjoy reciprocity with Kenya under the Foreign Judgments (Reciprocal Enforcements) Act of Kenya. It is on this ground that the Defendant fears that even the sale proceeds of the damaged ship would be inaccessible. This is the basis for their claim for security for costs.
6. The Plaintiff opposes the application, not least because it was filed on 15th April, 2011 too close to the hearing which had been scheduled for 25th and 26th May, 2011. Plaintiff cites **Cancer Investments Ltd Vs Sayani Investments Ltd** (2010) e KLR which reiterated the long-standing principle that though an order for security can be made at any stage of a suit, it should be made at the earliest opportunity. The closer to the hearing the order is sought, the more critical it is that the explanation for delay is watertight if it is not to be refused.

7. Plaintiff was of the view that no explanation had been given by the Defendant for the delay in seeking the order. The Plaintiff further pointed out that the suit had been pending for a long time, and it would be unjust to prevent the plaintiff from pressing its claim on the pretext of furnishing security for costs.

8. After careful consideration of the parties' submissions I make the following findings.

The award of security for costs is always in the absolute discretion of the court. In order for the court to exercise its discretion in favour of the applicant, evidence of the following circumstances should be shown to its satisfaction:

- a) **That the Plaintiff Company is impecunious or will be unable to meet an order for costs if the defendant succeeds.**
- b) **That the plaintiff is ordinarily outside the jurisdiction of the court.**
- c) **That the party moving for security has not delayed too long in the proceedings before making its application.**
- d) **Whether if an order is made it would effectively shut any party out of the relief according to law in circumstances where that party's impecuniosity may be cured by the litigation.**

9. The Plaintiff admits, through the supporting affidavit of Paul Ogunde that it has been facing serious financial constraints (paragraph 16). However it is also the case that the Defendant is in possession of the salvage of the MV Kairos, which can in the event be disposed off to meet costs. As such, it is asserted that, even at throw away price, the salvage of the Mr. Kairos would be worth no less than US \$ 100,000 (according to the Plaintiff).

10. The role of the court is to balance the parties' rights. In this case this would be to ensure that the Defendant's costs would be met in the event it wins, whilst not placing the Plaintiff in such a position as to feel it is being unduly muzzled by the requirements to provide security for costs.

I accept the Plaintiff's arguments that the Defendant's delay in bringing the application has not been adequately explained.

In particular I note from the plaint filed on 24th November 2008 that the Defendant has all along been aware from the plaint of the facts that:

- The plaintiff is registered in Panama outside the court's jurisdiction paragraph 1 -3
- The Plaintiff owns no other sea-faring asset other than the Kairos – paragraph 6
- The Plaintiff is unable to mitigate the loss of profits from lost charters as it has no income or resource to acquire another ship or re-finance its operation.

11. Taking all the foregoing into account, and bearing in mind that the salvage of the Mr. Kairos is in the possession of the Defendant, I am not persuaded that this is a proper case for grant of an order for security for costs. The application is therefore hereby dismissed with costs.

Dated, signed and delivered this 31st day of August, 2012.

**R.M. MWONGO
JUDGE**

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Read in open court

Coram:

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

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d)