REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 521 of 2005

HARSWELL TRADING LIMITED……...……PLAINTIFF

VERSUS

KENYA REVENUE AUTHORITY ……..……DEFENDANT

R U L I N G

1. Harswel Trading Ltd ("the Plaintiff") is a limited liability company registered as such in the United Kingdom. On 22nd September, 2005 the Plaintiff filed the present suit against the Defendant claiming a sum of Kshs.14,093,516/- together with interest and costs. The said sum was allegedly for compensation for loss of certain goods as well as consequent loss of business for the aforesaid loss. In a detailed defence, filed on 25th November, 2005, the Defendant denied the Plaintiff's claim in toto and prayed that the Plaintiff's claim be dismissed with costs.

2. On 6th February, 2006, the Plaintiff took out a summons under Order 6 Rule 13(1)(b) & (c) of the former Civil Procedure Rules and sought to strike out the Defendant's defence. From the record, it would seem that that application was never heard. The matter came up twice for hearing on 7th December, 2010 and 27th March, 2012 but was taken out by the parties. On the latter date, it was taken out to enable the Defendant file an application for security for costs. That application is a motion on Noticed dated 11th April, 2012 and is the subject of this ruling.

3. In its application, the Defendant has sought an order that the Plaintiff do provide security for the Defendant's costs, that the said costs be deposited in an interest earning account with the respective Advocates for the parties herein and in default the suit be struck out. The Defendant contended that it had a good defence to the Plaintiff's claim based on the fact that there was no enforceable agreement between the Plaintiff and the Defendant, that the costs of defending the suit would be in excess of Kshs.2 million, that the Plaintiff is a foreign entity with no assets in Kenya and its true financial position is unknown. It was submitted for the Defendant that there was no evidence produced to show that the Plaintiff company is actually registered in the UK, its location thereat is unknown, that the Defendant will be left exposed if the suit is dismissed as costs will be unrecoverable, that the Plaintiff had not shown that the order sought will stifle the claim, that the Defendant had acquiesced to the filing of the application, the Defendant is a public body charged with collecting public funds. The Defendant relied on the cases of **Shah –vs- Shah 1982 KLR 95** and **Kenary Developments –vs- Tarmac Construction Ltd (1995) 3 All ER 534** in support of its contentions.

4. The Plaintiff opposed the application by filing Grounds of Opposition. The Plaintiff contended that there was inordinate delay in the bringing of the application, that the order sought was discretionary which discretion should be exercised for the ends of justice, that there was no evidence to show the Plaintiff will not meet the costs, that in any event costs would be recoverable under Cap 43 of the Laws of Kenya, that the application was intended to stifle a valid claim, that the defence was perverse, that it had not been shown how the amount of security was arrived at, that the Defendant as a public body was enjoined to respect and promote the bill of rightsand in particular the one regarding access to justice. The Plaintiff relied on not less than fourteen (14) authorities all which I have carefully considered.

5. I have considered the Affidavit in support, Grounds of Opposition, written submissions and the authorities relied on. An application for security for costs is in the discretion of the court (See **Shah –vs- Shah (Supra**). The Court of Appeal in that case after reserving the court's discretion seems to have established three principles, that the general rule is that security is normally required from Plaintiffs resident outside the jurisdiction, that the test is not on the strength of the Plaintiff's suit but whether the Defendant has shown a bona fide defence and that it should be considered whether the Plaintiff would have assets available in Kenya to satisfy the Defendant's costs in the event the latter succeeds in the suit.

6. In applications for security for costs, further help may be obtained from the English decision of **Sir Lindsay Parkinson & Co –vs- Triplan Ltd (1973) 2 All ER 273 at** page 285 and 286 Denning LJ held:-

"Turning now to the words of the statute, the important word is 'may'. That gives the judge a discretion whether to order security or not. There is no burden one way or the other. It is a discretion to be exercised in all the circumstances of the case…….

So I turn to consider the circumstances ….. Some of the matters which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospects of success……. Whether there is an admission by the Defendants on the pleadings or elsewhere that money is due …… the court might also consider whether the application for security was being used to oppressively – so as to try and stifle a genuine claim…….. Whether the company's want of means has been brought by any conduct by the Defendants such as delay in payment or delay in doing their part of the work." (Emphasis added)

From the foregoing and the many authorities cited by learned Counsel, it may be safe to state, and without attempting to lay any general rule that, in considering an application for security for costs the court would consider whether the Plaintiff is a foreign resident and the nature of the defence offered (**Shah –vs- Shah [supra]),** whether the claim is bona fide and not a sham, whether there is an admission of the claim by the Defendant, whether the application is being made to stifle a genuine claim, whether the Plaintiff's inability to pay has been brought about by the actions of the Defendant (**Lindsay Parkinson & Co. Ltd –vs- Triplan Ltd [supra]**), that the application should be made promptly and if there is delay or is brought too close to the trial there has to be an explanation for the delay (**Halsburys Laws of England, 4th Edition, Vol.37** and **Shakhalaga Khwa Jirongo & Anor –vs- Board of Trustee NSSF (2005) e KLR),** it is the court to determine the amount of security to be offered (**Supreme Court Practice 1997, page 407**), if a Plaintiff is resident abroad and has disclosed his place of abode and revealed his earnings or assets, it is not necessary to order security for costs **(Kenya Educational Trust Ltd –vs- Katherine M. Whitton (2011) e KLR)** and that the Plaintiff's residence broad is not reason alone to order security (**Acronave SPA –vs- Westland Charters Ltd (1973) 3 All ER 531.**

7. How do these circumstances apply in this case? It is not denied that the Plaintiff is a company resident abroad, the Plaintiff pleaded in the plaint that it is registered in the United Kingdom. It has been submitted on behalf of the Defendant that there is no evidence of the Plaintiff's existence or registration in the UK or that it has any assets capable of satisfying the Defendant's costs if the suit fails. This submission goes contrary to the Defendant's pleadings. In its Defence filed on 25th November, 2005, the Defendant admitted the description of the Plaintiff as set out in the plaint. Further, in paragraph 5 of the Affidavit in support of the application Paul Muema Mutuku has sworn:-

"5. THAT further I verily believe that since the Plaintiff is a foreign entity incorporated under the

Laws of United Kingdom, the Defendant would be forced to pursue the Plaintiff outside the jurisdiction of this Honourable court to recover its costs."

That was an admission that the Plaintiff exists as an entity in the United Kingdom.

8. One issue that the court has agonized over is the averment that the financial position of the Plaintiff is unknown and that if costs were to be ordered the Defendant may be prejudiced as it may not recover the same. Whilst it is true that the United Kingdom is one of the countries to which the Foreign Judgments (Reciprocal Enforcement) Act, Cap 43 Laws of Kenya applies, there is no evidence on record that the Defendant will be able to recover any costs if ordered. This court would have expected that the Plaintiff would shed some light on this issue by way of Affidavit, but it chose not to. In the cases it relied on of **Kenya Education Trust Ltd –vs- Katherine S.m. whitton (supra) and Vallabhas Hirji kapadia –vs- Thakersey Laxmindas (1960) EA 852,** there was evidence before court that the Plaintiff's had assets capable of defraying any costs if ordered. I will revert to this fact at a later stage of this ruling.

9. I have looked at both the Plaint and the Defence of the Defendant. I cannot say that the Plaintiff's claim is a sham. I cannot also say that the Defendant's Defence is frivolous. It has raised bona fide issues for trial. For example, the issue of limitation has been raised which was not denied by way of a Reply and cannot therefore be said to be light. Further, I have not seen any admission by the Defendant of the Plaintiff's claim. There is also no evidence to show that the application is being used oppressively – to stifle the Plaintiff's claim. The same is based on a genuine and bona fide fear of inability to recover costs by the Defendant in the event the Plaintiff's suit fails. On the foregoing, it would seem that the Defendant's application to some extent fits in the principles and circumstances set out in the **Shah –vs- Shah and Sir Lindsay Parkinshon & Co. Ltd –vs- Triplan Ltd** above save for delay.

10. As regards the application of Article 48 of the Constitution, I agree with the Defendant that the term "fees" therein refers to the court fees meant to originate a proceeding for the protection of the rights under the bill of rights. I do not think that the same is applicable here.

11. One thing that heavily weighed upon the court in considering this application is the delay in the making of the same. It is true that the Plaintiff acquiesced to its making which aborted the hearing of the matter on the 27th March, 2012. The Defendant has contended that this fact acts as an estoppel against the Plaintiff raising the issue of delay. I do not think so. Agreeing to the making of the application is not akin to accepting its validity. The Plaintiff in my view was entitled to raise the issue. Even if the Plaintiff never raised it, this court would still have raised it on the basis of the overriding objective of civil litigation as provided for under Sections 1A and 1B of the Civil Procedure Act.

12. This suit was filed on 22nd September, 2005, the Defence was filed on 25th November, 2005 and it is expected that pleadings closed shortly thereafter. The Plaintiff filed an application to strike out the Defence in February, 2006. That application was never pursued and it would seem that the same was abandoned as the suit has twice been listed for full trial, that is, on 7th December, 2010 and 27th March, 2012, respectively. In the circumstances, is the Defendant's application well intentioned? Is it proper to bring such an application at such a late stage of the proceedings, indeed after the suit has twice been listed for trial? I think not. To my mind, a vigilant Defendant should be able to move the court at the earliest opportunity for such an order. In the present case, all the matters relied on by the Defendant were within its knowledge seven (7) years ago. In any event, the Defendant did not even feel obligated to explain the delay. My view on this is well informed. In **Halsbury's Laws of England, 4th Edition Vol. 37,** the learned writers have observed in paragraph 305 thus:-

"***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 too late or too close to the trial, since unless there is a reasonable explanation on the delay it may be refused". (Emphasis added).***

In the case of **Jirongo –vs- NSSF (supra),** Hon. Kasango J held:-

"An application for security of costs should be brought very soon after the suit is filed if brought latter

there ought to be sufficient explanation for the delay."

13. Turning now to the issue of costs, the amount of Kshs.2 million has been sought as security. Whilst it is the court to determine the amount of security, a basis for such an amount must be laid by the applicant. 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 fixed. Some scientific or basis must be laid by way of a draft bill of costs. That will enlighten the court as to the likely costs to be awardable at the trial as costs. It will be imprudent, in my view, for the court to pluck from the air or to fix a figure as security for costs without proper basis. This might lead to an injustice as a speculative figure if too huge may lead to a party's pleading being struck out. I do not accept the submission that the costs of Kshs. 2 million is a proper estimate of costs in the circumstances of this case.

14. I am alive to the fact that the Defendant is a public body and that if costs were to be awarded and not recovered, it will be public funds that would have been lost. I am also alive to the fact that the Plaintiff did not bother to explain its financial position and that if the suit is dismissed any costs awarded to the Defendant may not be recovered as has been contended by the Defendant. However, weighing those factors against the delay I have alluded to and the failure by the Defendant to show the basis for or how it arrived at Kshs.2million as the costs to be ordered, I am unable to exercise my discretion in favour of the Defendant.

15. Accordingly, the Defendant's application dated 16th May, 2012 is dismissed with costs to the Plaintiff.

DATED and **DELIVERED** at Nairobi this 28th day of September, 2012.

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A. MABEYA
JUDGE