



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 162 of 2011

SILVERBIRD CINEMAS LTD (NIGERIA).....PLAINTIFF

VERSUS

SILVERBIRD KENYA LTD 1ST DEFENDANT

ANTHONY S. WARD 2ND DEFENDANT

GORDON I. TRAIL 3RD DEFENDANT

R U L I N G

1. This is a ruling on two applications. The first application is dated 14th October, 2011 by the 1st and 2nd Defendants seeking security for costs against the Plaintiff. The second is an application by the Plaintiff dated 9th February, 2012 seeking to strike out the 1st and 2nd Defendants counterclaim and in the alternative for the amendment of the Plaintiff. With the consent of the parties, on 22nd March, 2012, it was ordered that both applications be heard together and one ruling be delivered therefor. The applications were therefore heard together on 1st October, 2012 and this is the ruling. I propose first to consider the Plaintiff's application dated 9th February, 2012.

2. The Plaintiff's Notice of Motion is dated 9th February, 2012 brought under Order 2 Rule 15 Sub Rule 1(b) and (d) and Order 8 Rule 3(1) of the Civil Procedure Rules. Sections 1A and 1B of the Civil Procedure Act are also cited. The motion seeks an order that the 1st and 2nd Defendant's (hereinafter "the Defendants") counterclaim be struck out and in the alternative the Plaintiff be granted leave to amend the Plaintiff. The 3rd Defendant did not participate in these proceedings and the term Defendants shall hereinafter refer to the 1st and 2nd Defendant. The grounds for the application were set out on the face of the motion and in the Supporting and Further Affidavits of Adenuke Adeyade and the Supplementary Affidavit of Kenneth Kiplagat.

3. The Plaintiff contended that the matters contained in the counterclaim arose in Mauritius which is therefore the proper jurisdiction to determine the dispute between the parties, that the Defendants had jointly and severally initiated proceedings in the Supreme Court of Mauritius on the same basis as the counterclaim, that it is therefore an abuse of court process to continue two cases in two different jurisdictions, that the filing of the counterclaim altered the nature and substance of the suit as originally instituted by the Plaintiff. The Plaintiff further contended that the matters and facts the subject of the counterclaim are the same that was relied in Mauritius Supreme Court case No. Co. 27 of 2011 wherein the Plaintiff was claiming US\$ 3m, which suit was however withdrawn. That the Defendants have

through a proxy company lodged a replica suit in Mauritius being Mauritius Supreme Court case No. 577 of 2011 claiming damages in excess of US\$10M which is a complete replica of the counter-claim herein, that the Defendants were approbating and reprobating and should be put to election. It was urged that it was just and fair if the Plaintiff was allowed to amend its Plaint so that all issues are litigated wholesale, that no prejudice will be suffered by the Defendants if the Plaint was amended and that no new matters were being introduced by the proposed amendment.

4. Dr. Kiplagat, learned Counsel for the Plaintiff submitted that it would be unconscionable for similar proceedings to proceed simultaneously in two different jurisdictions, that the subject matter of both the counterclaim herein and in the suit in Mauritius is the shareholding of the 1st Defendant company and the holding company in Mauritius and that there is also no difference between the said holding company and the Plaintiff. That the Plaintiff owns the assets of the 1st Defendant 100% and the 1st Defendant owns nothing of its own, that the 2nd Defendant is the one who had commenced proceedings in Mauritius and it will be absurd to allow him to perpetuate a fraud through a technicality.

5. On amendment, Dr. Kiplagat submitted that the Plaintiff did not contemplate the cause of action in the counterclaim, that unless the amendment was allowed, the counterclaim will proceed against the Plaintiff who will not be able to sufficiently answer the same. He concluded that the matters being introduced in the amendment and counterclaim are the same in the Mauritius case. Counsel urged that the Plaintiff's application be allowed.

6. The Defendants filed a Replying Affidavit by Anthony Ward in opposition to the Plaintiff's application. The Defendants denied that the counterclaim altered the nature and substance of the suit. They also denied that the counterclaim herein was connected to the Mauritius case by the Plaintiff against the 1st Defendant. That **Mauritius Case No. 27 of 2011** was between the Plaintiff and a Mauritius company and the 2nd and 3rd Defendant, that the **Mauritius case No. CO No.223 of 2011** was also by the Plaintiff against a Mauritius company and the 2nd Defendant, that the two suits had been dismissed, that the 3rd **Mauritius case (No. CO.557 of 2011)** (hereinafter "the Mauritius 3rd case"), was as between a Mauritius company known as Silver Bird Africa Holdings Ltd (hereinafter "the Mauritius Company") and the Plaintiff revolving around shareholding, that the Plaintiff had on 21st March, 2012 filed a counterclaim for US\$3 million in the Mauritius 3rd case which case was still pending, that the 1st Defendant herein, though a subsidiary of the Mauritius company, the two are different and distinct entities. The Defendants contended that the recital in the counterclaim of the history and interconnection between the Mauritius company and the 1st Defendant was not a part of the cause of action of the Defendants, that the deponent of the Supporting Affidavit had perjured herself, that the counterclaim herein was not being litigated in two jurisdictions, that the 1st Defendant was not at all involved in any of the Mauritius cases, that the fresh cause of action arose in Mauritius outside the jurisdiction of this court, that the matters giving rise to the cause of action in the counterclaim arose in Kenya and that the amendment will introduce a totally new cause of action.

7. Mr. Odhiambo, learned Counsel for the Defendants submitted that the order to strike out the counterclaim was predicated upon the assumption that the cause of action in the counterclaim is the same as in the Mauritius cases which was a wrong assumption. He submitted that the cause of action in the counterclaim was founded on malicious, wrongful and unlawful interference by the Plaintiff on the 1st Defendant's businesses in Kenya as well as contracts with 3rd parties, that the causes of action in the Mauritius cases was predicated upon contractual relations between the parties thereto and the shareholding of the Mauritius company, that therefore there was no correlation whatsoever between the counterclaim herein and the Mauritius cases.

8. On the prayer for amendment, Mr. Odhiambo was of the view that the proposed amendment was provoked by the counterclaim, that the suit and counterclaim emanated from different causations, that the proposed amendment was not related to either the cause of action in the suit or the counterclaim, that to allow the amendment will be to substitute a totally new cause of action from the original suit, that Order 8 Rule 3(5) only allows substitution or addition of a cause of action if the same arises out of the same facts

as the cause of action in respect of which relief has already been claimed, that the Mauritius company was not being joined in these proceedings yet the claim touched on it. Mr. Odhiambo noted that amendment is a matter of discretion which should be exercised judiciously, that since the matter is already being litigated in the Mauritius courts, it will be injudicious to allow the same to be introduced in this litigation, that allowing the amendments will be prejudicial to the Defendants as foreigners will have to be dragged here as witnesses leading to delays in the trial. Counsel relied on the cases of **Eastern Bakery –vs- Castellino (1958) E.A 461, Joseph Ochieng & 2 others -vs- First National Bank of Chicago CA No. 149 of 1991 (UR), Mohan Meakin (K) Ltd –vs- NBK NBI HCCC No. 748 of 2003 (UR)** and **Peter G. Mwanthi –vs- U.O.N. Nbi HCCC No. 6267 of 1992 (UR)**. Counsel therefore urged that the application be dismissed with costs.

9. I have considered the Affidavits on record, the written submissions and the able oral hi-lights of learned Counsel together with the authorities cited. The main prayer is for the striking out of the counterclaim. The principles under which courts consider applications to strike out pleadings were settled by the Court of Appeal in the case of **D.T. Dobie (K) Ltd –vs- Muchina (1982) KLR 1** wherein the court state at page 9 that:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of the case before it.”(Emphasis mine.)

10. How do these principles apply in this case? The Plaintiff’s contention is that the facts and/or matters constituting the counterclaim arose in Mauritius and that Mauritius is the proper jurisdiction to determine the dispute, that the Defendants have instituted proceedings in the Mauritius Court on the very same basis of the counterclaim herein and that it will be highly prejudicial to the Plaintiff to face same litigation in two (2) different jurisdictions. In order to discern the veracity of these contentions, it is important to examine the nature of the counterclaim and the cases filed in the Mauritius courts. I have examined paragraphs 17 to 35 of the counterclaim. It is clear that the allegations therein are to the effect that the Plaintiff maliciously interfered with the business of the 1st Defendant by publishing disclaimers in the Daily Newspapers in this country that led to the total collapse of the 1st Defendant’s business. That the Plaintiff also interfered with the 1st Defendant’s contracts (leases) with 3rd parties thereby seriously undermining the capacity of the 1st Defendant to carry out business. It is for those alleged wrongful acts that the Defendants counterclaimed against the Plaintiff for, inter alia, US\$5,584,651 and Kshs.102,595,850/-. It would seem that the cause of action in the counterclaim is anchored on paragraphs 22 (iii) – (viii), 23, 24, 25, 26, 27, 29, 30, 31, 32 and 33 of the counterclaim. The allegations therein are alleged to have been perpetrated in Kenya. In my view, the contents of paragraphs 17 to 22 (i) and (ii) are mere narrative background to the dispute but do not constitute a cause of action. Accordingly, I am of the view and so hold that from the material before court, the matters constituting the counterclaim arose within Kenya and not in Mauritius as claimed by the Plaintiff.

11. The other issue to consider is the nature and substance of the Mauritius cases themselves. The 1st and 2nd Mauritius case were commenced by the Plaintiff against the Mauritius company, the 2nd and 3rd Defendants in those cases. In those cases, the Plaintiff sought a refund of US\$3million for shares paid on behalf of the Mauritius company for the acquisition of the 1st Defendant herein. The Plaintiff also sought US\$10 million for damages. Those cases have since been dismissed and I think they have no effect to the current proceedings. The 3rd Mauritius case was commenced by the Mauritius company against the Plaintiff herein. The dispute is about the shareholding of the Mauritius company. In that suit, the Mauritius company claimed, inter alia, US\$3million damages and a declaration that the sum of US\$3million paid by the Plaintiff in this case was its contribution towards the share capital in the Mauritius company.

12. I have perused exhibit “AA2” being the statements of claim in the Mauritius cases, whilst the 2nd and 3rd Defendant are Defendants in two of the said cases, the 1st Defendant does not feature anywhere.

Further, a scrutiny of Mauritius case No.577 of 2011 will show that the only parties therein are the Mauritius Company and the Plaintiff herein. It is unclear how the Defendants have, through a proxy, commenced that suit as is contended by the Plaintiff. There was no evidence that was produced to show that that suit had not been commenced by the Mauritius company in its own right. I also note that the Mauritius company and the 1st Defendant are entities who are separate and distinct from each other. That each has its own Certificate of incorporation and each was separately incorporated as such in different jurisdictions. Accordingly, I am unable to agree with the Plaintiff that the parties in these suits are the very same parties in the Mauritius cases. Further, it is also clear that the suit and counterclaim here are not the same as the claims in the Mauritius cases.

13. I am therefore satisfied that the prayer for striking out is misplaced and is accordingly declined.

14. As regards the prayer for amendment, the principles applicable are well known. These were set out in the case of **Eastern Bakery –vs- Castellino (1958) EA 461** wherein the Eastern Court of Appeal held at page 462 that:-

“ amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs The court will not refuse to allow an amendment simply because it introduces a new case..... The Court will refuse leave to amend where the amendment would change the action into one of a substantially different character or where the amendment would prejudice the rights of the opposite party existing at the date of the amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ”

The main principle is that an amendment should not be allowed if it causes injustice to the other side.”
(Emphasis supplied)

15. The Plaintiff contends that the counterclaim was not contemplated and that the same had altered the nature of the suit, that unless the amendment was allowed to enable the Plaintiff reply thereto the counterclaim might proceed undefended. Mr. Odhiambo, learned Counsel for the Defendants quite rightly admitted that amendment of pleadings is in the discretion of the court and that the same if sought before trial should be freely allowed. However, he observed that such amendment can only be allowed if it will not prejudice the other party and that the same should be within the provisions of order 8 Rule 3(5) of the Civil Procedure Rules.

16. I have considered the proposed amendments to the Plaintiff. I note that the same deal with the dealings between the Plaintiff and the 2nd Defendant in respect of the Mauritius company. Indeed the entire amendments sought are in respect of the contractual dealings between the Plaintiff and the Mauritius company in relation to the issuance of shares to the Plaintiff in the latter company. As already stated, the central consideration in an application for amendment is to ensure that the other party is not prejudiced by the amendment to be introduced. The Defendants have alluded to the fact that since the cause of action arose in Mauritius, it will entail the bringing of witnesses from Mauritius which might lead to the delay of the trial. I will agree with the Defendants on this. Obviously the cause of action of the matters set out in the proposed amendments arose in Mauritius. It will be necessary to hear witnesses from that country including those of the Mauritius Company, Arusa Africa Mediainment (Proprietary) Ltd and probably Abax Nominees Ltd. These are the entities that have been named as having been involved in the complicated arrangement of the Plaintiff’s acquisition in the Mauritius company.

17. I have also considered the fact that the proposed amendments seem to be a complete replica of the Plaintiff’s cases in **Mauritius case. 27 of 2011 as well as 577 of 2011**. The Court was also told that the Plaintiff has filed a counterclaim in the **Mauritius case No. 577 of 2011** claiming the very same remedies sought to be claimed in the proposed amendment. The question that arises is, is it possible to translocate to this court a suit which is already pending before a court of competent jurisdiction in the Mauritius? Further, since the allegations in the proposed amendments seem to be majorly against the Mauritius company, is it proper to allow such amendments when Mauritius company is itself not a party to these proceedings and is not even proposed to be joined? I think the answers to these questions are in

the negative.

18. I have considered all the foregoing and the cause of action intended to be introduced by the proposed amendment. The cause of action sought to be introduced by the amendment is, in my view, not connected to either the cause of actions or reliefs sought in the main suit or counterclaim. The same constitute a shareholding dispute between the Plaintiff and the Mauritius company. This coupled with the issue of possible witnesses having to come from Mauritius, militate against granting the amendment sought. I accordingly decline the prayer for amendment.

19. This now leaves the Defendants' Notice of Motion dated 14th October, 2011 for consideration. That application is brought under Order 26 Rule 1 of the Civil Procedure Rules. It seeks an order for the Plaintiff to deposit security whose quantum the court is to determine. The same was supported by the Affidavit of Anthony Ward sworn on 14th October, 2012. The Defendants contended that the Plaintiff is a foreign company with no place of business in Kenya, that the Plaintiff has no known assets which can be attached to satisfy any decree on costs that may be passed by this court, that there will be jurisdictional hardships and prohibitive costs to recover any such costs since the Plaintiff's known assets are in the Federal Republic of Nigeria.

20. Mr. Odhiambo, learned counsel for the Defendants submitted that the Plaintiff had not denied that it was a foreign company and that it had no assets within the jurisdiction, that it is also not denied that there will be jurisdictional challenges to execute any decree passed. That the claim was for an equivalent of Kshs.40,397,045/50. He urged the court to order security for Kshs.10million. Counsel cited the cases of **Shah –vs- Shah (1982) KLR 95, Vimal Kumal Kochhar –vs- Manwell Ltd HCCC No. 489 of 2000 UR Lornho Motors E.A Ltd –vs- ICEA Nbi HCCC No. 184 of 2003(UR)** and **Parmex Ltd –vs- Austin & Parties Ltd HCCC No. 450 of 2003 (UR)** in support of his submissions and urged the court to allow the application.

21. The Plaintiff opposed the application through Grounds of Objection filed on 10th February, 2012. The Plaintiff contended that the application was without merit that it was an abuse of the court process, that the cause of action in the counterclaim arose in Mauritius where the same should be conveniently determined, that it will be an abuse of court process to have parallel proceedings in two different jurisdictions, that the parties were all foreign or foreign controlled, that security for costs should therefore be given by both parties. Dr. Kiplagat learned counsel for the Plaintiff, reiterated these grounds in his submissions.

22. An application for security for costs is in the discretion of the Court. (See **Shah –vs- Shah**). In that case, the Court of Appeal set out four principles that are applicable to such applications. Firstly, that such an application is in the discretion of the court. Secondly, that security is normally required from Plaintiff's resident outside the jurisdiction. Thirdly, that the test is not on the strength of the Plaintiff's suit but whether the Defendant has shown a bona fide Defence and fourthly, whether the Plaintiff would have assets available in Kenya to satisfy the Defendant's costs in the event the latter succeeds in the suit.

23. In the case of **Sir Lindsay Parkinson & Co. –vs- Triplan Ltd (1973) 2 All ER 273**, Denning L. J delivered himself at pages 285 – 286 thus:-

“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 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)

24. In the case of Harswell Trading Ltd –vs- Kenya Revenue authority NBI HCCC NO. 521 of 2005 (UR) I held 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 Shakhhalaga 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.”

I would consider the above to be sound principles applicable in an application for security for costs. How then do these principles apply to this case?

25. I have already found that the cause of action in the counterclaim arose in Kenya and not in Mauritius and that the causes of action in the Mauritius cases are different from the cause of action in the counterclaim. These issues were raised by the Plaintiff but having ruled on them, I will not address them again. On the ground that the application is an abuse of the process of court, this ground emanates from the contention that the counterclaim is intertwined with the Mauritius cases. That ground also fails.

26. It is not denied that the Plaintiff is a company resident abroad. In the Plaintiff, it is pleaded that the Plaintiff was incorporated in the Republic of Nigeria. It is also not denied that the Plaintiff has no assets within the jurisdiction of this court. It has also not been denied on oath or otherwise that any attempt to execute or enforce any decree for costs if it is ultimately passed against the Plaintiff might lead to jurisdictional difficulties. Indeed, Nigeria is in West Africa and there being no reciprocity in execution of Judgments between Kenya and that country under the foreign Judgment (Reciprocal Enforcement) Act Cap 43 Laws of Kenya, any decree that may be passed may contend with jurisdictional hardships. Indeed there is no material on record to show that the Defendants will be able to recover any costs from the Plaintiff, if ordered.

27. I have looked at both the Plaintiff and Defence. I cannot say that the Plaintiff is a sham, neither can I say that the Defendants’ Defence is frivolous. In my view, it has raised bona fide issues for trial. Further, I have not seen any admission by the Defendants 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 bonafide fear of inability to recover costs by the Defendants in the event the Plaintiff’s suit fails. In my view, the Defendants’ application fits in the principles set out in the cases of Shah –vs- Shah and Sir Lindsay Parkinson & Co. Ltd –vs- Triplan Ltd above.

28. The Plaintiff has contended that the 1st Defendant is likewise a foreign company and an order for security should also issue against it. I have seen the Certificate of Change of Name dated 26th June, 2009 produced as exhibit “AW2” to Mr. Anthony Ward’s Supporting Affidavit. I have also seen the Certificate of Incorporation of Silver Africa Holdings Ltd produced as “AW1”. These show that whilst the latter company was incorporated in Mauritius, the 1st Defendant is a Kenyan company. It does not matter that it is wholly owned by foreigners. It remains a Kenyan entity. In any event, this court does not have an application by the Plaintiff for the 1st and 2nd Defendant to give security. I reject that claim.

29. Turning now to the costs, the Defendants submitted for Kshs.10million. They have not shown how they reached that figure. It is good practice that when a party is seeking costs to prepare a draft bill of costs to act as a guide. Otherwise in the absence of a bill of costs to show how the proposed costs are

arrived at, the court may resort to speculation and that may not be fair. However, since the court is the one to determine the amount of security to be offered (**Supreme Court Practice 1997, page 407**), it is expected to do all it can to arrive at a reasonable and fair figure that should not be too low as to expose an applicant or too high as to shut out or stifle a genuine claim. In view of the foregoing, taking into consideration the circumstances of this case and considering the nature of the suit (not the counterclaim), my view is, a figure of Kshs.3million will be a fair estimate of costs.

30. Accordingly, I dismiss the Plaintiffs Notice of Motion dated 9th February, 2012 with costs. I allow the 1st and 2nd Defendants' application dated 14th October, 2011 with costs and direct that the Plaintiff is to deposit within thirty (30) days a sum of kshs.3,000,000/- in an interest bearing account with KCB High Court Branch, Nairobi in the joint names of the Advocates for the parties.

31. Orders accordingly.

Dated and delivered at Nairobi this 20th day of November, 2012.

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A. MABEYA
JUDGE