



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 129 of 2012

STRATOSAT DATACOM (PROPRIETARY) LIMITED.....PLAINTIFF

VERSUS

RAADGEVEND BUREAU KRIJGER SERVICES(KENYA) LIMITED.....1ST DEFENDANT

PIETER CORNELUS JACOB KRIJGER.....2ND DEFENDANT

RULING

1. By a Motion on Notice dated 8th June, 2012, the Defendants applied to this Court under Order 26, Rules 1, 5 and 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for an order that the Plaintiff do within 14 days furnish security in the sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=) and, that in default the Plaintiff's suit be dismissed with costs. The Defendants also sought the costs of the application. The grounds for the application were set out on the face of the motion. They include, the fact that the Plaintiff is not resident in Kenya and that ostensibly the Plaintiff has no known assets in the Country. The Defendants contended that they have a substantial claim against the Plaintiff and that they may be exposed to a substantial claim for costs should the Plaintiff's claim be unsuccessful. The Motion is supported by the Affidavit of Pieter Jacob Cornelius Krijger, the 2nd Defendant and a director of the 1st Defendant, sworn on 11th June, 2012 who reiterated the grounds aforesated.

2. The Motion was opposed by the Plaintiff through a Replying Affidavit sworn on 24th July 2012 by Alan Stanley Geldenhuys, a director of the Plaintiff. In it, the Plaintiff contends that it is a limited liability company incorporated in the Republic of South Africa, that it has a duly registered subsidiary, Stratosat E.A Limited incorporated in Kenya in 2010. The Plaintiff also contended that the Defendants do not have a bona fide defence as they had acknowledged the debt owed to the Plaintiff. It contends that the nature of the claim is not complicated as alleged by the Defendants as the same is merely based on a contract of sale. That the costs together with disbursements of Kshs. 500,000/= is excessive which has no basis if assessed according to the Advocates Remuneration Order. The Plaintiff also contended that the Application was made in bad faith and did not assist the Court in achieving the overriding objective of achieving justice, as the Defendants have not offered the Court any evidence in support of their unsubstantiated fears. As such, the Plaintiff urged the court not to order security for costs and that in the event it does, the same should for an amount not exceeding Kshs. 180,000/=.

3. I have carefully considered the Supporting and Replying Affidavits of the respective parties. I have also considered the submissions of the learned counsels and the accompanying authorities. A brief background of the matter reveals that the Plaintiff filed the instant suit vide a Plaint dated 29th February, 2012 seeking special damages of USD 45,432/94 together with interest and costs of the suit. The Plaintiff

alleged in its claim that on diverse dates in the months of September and July 2010, it supplied goods on credit to the 1st Defendant in the sum of USD 46,828/66, that the 1st Defendant defaulted in payment for the goods delivered and therefore became indebted to the Plaintiff. That vide a Debt Repayment Agreement and Personal Guarantee and Indemnity dated 27th January, 2012, the 1st Defendant admitted its indebtedness to the Plaintiff and additionally, that the 2nd Defendant unconditionally and irrevocably guaranteed due payment and discharge of the principal debt and to indemnify the Plaintiff against all losses, damages, costs and expenses incurred by the Plaintiff. On the other hand the Defendants through their statement of Defence dated 18th April 2012 denied the Plaintiff's claim in total. The Defendants also alleged that the Plaintiff acted in breach of their agreement by directly supplying customers within the 1st Defendant's territory in contravention to their agreement that the Plaintiff would only supply their goods exclusively to the 1st Defendant within Kenya.

4. The Application is predicated on Order 26 Rules 1, 5 and 6 of the Civil Procedure Rules which provides for the taking of security for costs of a suit. The purpose of this rule is to provide protection of a defendant in certain cases where in the event of success, a defendant may have difficulties realising the costs incurred in a litigation. This power is a discretionary power and is only exercised in exceptional circumstances. It is only to be used for the reasonable protection of the interests of a defendant and not capriciously or whimsically.

5. In the Case of **Shah and Others –vs- Manurama Ltd and Others (2003) 1 EA 294** the Court held that the granting or denying the order applied for security of costs was a discretion of the court to be exercised as the court sees fit in light of the circumstances of the case. Then 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 Shakhлага 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 abroad 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?

6. In the present case, it is not denied that the Plaintiff is a Limited Liability Company incorporated in the Republic of South Africa. A certificate of incorporation number CPR/2010/17427 dated 4th February 2010 for a Company known as Stratosat EA Limited, which the Plaintiff claims to be its subsidiary in Kenya was produced. I believe that according to the Plaintiff, this is supposed to serve as an indication that it has some sort of presence within the Kenya Territory. I do not agree with that contention. Stratosat EA Ltd is an independent entity by itself. Even if the said company was wholly owned by the Plaintiff, which is not the case and has not been alleged to be the case, it still remains a separate and distinct legal entity as far as the law is concerned.

7. The general rule is that the fact that the Plaintiff is a foreign company, does not automatically entitle the Defendants to security of costs. An applicant needs to satisfy the court that it has a defence to the claim, that the costs if ordered may be irrecoverable. I have considered the facts that it is not denied that the Plaintiff has no known assets within the jurisdiction. I do not think that the Foreign Judgments Reciprocal Act Cap 43, Laws of Kenya applies to the Republic of South Africa. In my view therefore,

there may arise jurisdictional difficulties in the event the Defendants sought to recover any costs if ordered against the Plaintiff in this case.

8. On the issue of the defence, it is noteworthy that the Plaintiff claims that the Defendants have not demonstrated any bona fide defence as no material has been placed before the Court to show a basis for the allegations set out in the defence. However, I have read the said Defence and I do find the same to be arguable. The defendant has denied owing the Plaintiff the sum of USD 46,828/66. It also raises the issue of duress and misrepresentation and whether indeed the contested Agreement was executed properly in accordance with the Law or the requirements of the Companies Act. This court cannot at this stage dismiss that defence as being frivolous. Any alleged admission is negated by the averments of duress, misrepresentation and irregularity pleaded in the Defence. I can therefore not rule out that the Defendants may have a bona fide defence. On the timing of the application, i note that there was no delay in brining the same. All in all, there is nothing on record to suggest that the application is being made to stifle the Plaintiff's claim.

9. There is also an issue of whether the amounts sought in this application are costs based on the higher scale of the Advocates Remuneration Order. The basis of the amount sought was given in the supporting affidavit of the 2nd Defendant, specifically in paragraph 4 of the same as being the costs together with disbursements of defending the suit. The figure has been controverted by the Plaintiff. Going by the Plaintiff's argument, I do agree the same seems excessive given the minimum instructions fee on a claim of USD 45,392/94 is approximately Kshs.120,000/-. An application for costs ought not to be used as a weapon against the case of a Plaintiff. I have always entertained the view that a party who applies for security for costs should at least annex a draft bill of costs to enable the court evaluate how the amount sought is arrived at. In this case the Defendant has not done so. My view is, the sum of Kshs.500,000/- claimed as security may in the circumstances be excessive. The same should be reduced accordingly. While the Defendant has demanded Kshs.500,000/-, the Plaintiff has offered a conservatory figure of kshs.180,000/- a difference of Kshs.320,000/-. I will assess the same at Kshs.340,000/-.

10. On the basis of my analysis of the material placed before me, I am satisfied that a case has been made for this Court to exercise its discretion and order security for costs.

11. Accordingly, I will allow the Applicant's application dated 8th June, 2012 in the following terms:

- 1) The Plaintiff do within 45 days from date hereof deposit the sum of Kshs.340,000/= in an interest earning account in the joint names of Counsels for the respective parties in this suit as security for the Defendant's costs.
- 2) The Plaintiff to pay the costs of this application.
- 3) In default the suit shall stand dismissed.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 18th day of December, 2012.

.....
A. MABEYA

JUDGE