



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 261 OF 2010

NGENGI MUIGAI 1ST PLAINTIFF
JOSEPH KURIA GATONYE t/a
JEMI GENERAL CONSTRUCTION 2ND PLAINTIFF

VERSUS

SHENGLI ENGINEERING
CONSTRUCTION GROUP CO. LTD. DEFENDANT

RULING

1. Ngengi Muigai and Joseph Kuria Gatonye t/a Jemi General Construction, who are the plaintiffs in this suit seek to have the defendant Shengli Engineering Construction (Group) Company Ltd ordered to give security for costs of the plaintiffs for a sum not less than Kshs.6 million and that the money be deposited in an interest earning account in the joint names of the advocates on record.
2. The plaintiff claims that the defendant is in breach of a contract entered into between the plaintiff and the defendant. The plaintiff is seeking damages for breach of contract and the defendant has filed a defence, denying the plaintiff's claim.
3. The plaintiff is apprehensive that the defendant which is a foreign company currently undertaking some contractual work in Kenya, may complete its task and leave the country before the plaintiff's suit is heard and finalized. Since the defendant does not have any known assets which may be utilized towards settlement of any decree that may be issued by this court, if the defendant company leaves the plaintiff will be left exposed unless the defendant is ordered to deposit security for costs.
4. The defendant has objected to the application maintaining that it has a very good defence to the plaintiff's suit. The defendant further contends that it is incorporated under the Kenyan Laws and has a registered office in Kenya. The defendant's manager Tian Yunfei swears that the defendant has machinery in the country worth millions of dollars.
5. I have carefully considered this application and the authorities which were referred to by counsel. I have examined the provisions of Order 26 of the Civil Procedure Rules 2010. In my understanding the security for costs anticipated in that order is security for costs to be provided by a plaintiff, for the costs of a defendant or a 3rd party. Indeed, the case of *Shah vs Shah (1982) KLR 95* and the other 2 authorities which were cited by the defence counsel all related to applications by the defendant

for plaintiff to provide security for their costs.

6. In this case however, it is the plaintiff who has come to court seeking to have the defendant ordered to pay security for costs. Such an application cannot succeed under Order 26 of the Civil Procedure Rules 2010. It would appear to me that the plaintiff had in mind Order 39 Rule 1 and 2 of the Civil Procedure Rules 2010, under which a defendant may be called upon to furnish security for his appearance, or for the satisfaction of the decree that may be passed against him.

7. If that be the case, then, the plaintiff has not satisfied the conditions under which such an order can be issued. He has not satisfied this court that the defendant with intent to delay the plaintiff or to avoid any process of the court or obstruct the execution of any decree that may be passed against him, has disposed off its property or removed its property from the local limits of this court's jurisdiction. Nor has the plaintiff demonstrated that the defendant is about to leave the local limits of the jurisdiction of the court under circumstances which show that the plaintiff will be obstructed or delayed in the execution of any decree that he may obtain.

8. For the above reasons I find no merit in this application and do therefore dismiss it with costs.

Dated and delivered this 22nd day of June, 2011

H. M. OKWENGU
JUDGE

In the presence of: -
Kariuki for the plaintiffs
Maina H/B for Munge for the defendant
B. Kosgei - Court clerk