REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 854 of 2004

CANCER INVESTMENTS LTD .....PLAINTIFF

VERSUS

SAYANI INVESTMENT LTD .....DEFENDANT

RULING

Coram Mwera J

Nyakundi for Plaintiff/Respondent

Omwanza for Makori for 1st Defendant/Applicant

For determination is the 1st defendant's chamber summons dated 23.11.09 brought under Order 25 Rule 1, 5, 6 Civil Procedure Rules and section 3 A Civil Procedure Act for the orders that:

a) within 14 days the plaintiff do give security for costs in the suit in the sum of Sh. 1,591,681/=; and

b) in default of (a) above the plaint herein be struck out with costs to the 1st defendant or alternatively the proceedings be stayed until the security is provided.

Grounds were set out that the 1st defendant was apprehensive that in the event this suit is dismissed it will not recover its costs because the plaintiff had admitted that its business had been suffering losses, which losses have adversely affected the plaintiff's ability to meet the said costs. A director of the 1st defendant swore an affidavit to support the summons.

It was deponed that the plaintiff sued to be granted a permanent injunction against the 1st defendant who had instructed the 2nd defendant to levy distress for rent wherein goods claimed to be worth Sh 80,811,156/= were proclaimed. Further, that party-to-party costs in such a suit would exceed Sh 1,591,681/=. That the plaintiff had pleaded that the defendants' acts had greatly and adversely affected the former's operations resulting in losses. So if the suit is dismissed the 1st defendant would not recover its costs. Both parties filed submissions whose substance will be attended to presently.

It was not readily traced on the file but the plaintiff's submission referred to a replying affidavit sworn by one Mukhtar Parker. It claimed that the plaintiff company was still in business save for the acts of the 1st defendant which threatened to disrupt that business. It had no rent arrears at all and any loss attended to was due to the 1st defendant's acts complained of. The applicants' claims of likely inability to pay over any costs in the event the suit was lost were speculative with no evidential basis. There should be no fear about such event and the 1st defendant should not bring it up only to oppress and punish the plaintiff. Although, if ordered, the plaintiff could put up security for costs but such order was not merited in the circumstance. The plaintiff was a going concern and could pay costs if it lost this case.

In its submission the 1st defendant contented that it was of the view that the plaintiff may be unable to pay it costs because it had said in the plaint that it was incurring losses in its business. There were sums of outstanding /unpaid rents and that is why the notice to distrain for rent was served. It was nothing to do with breach of contract. Thus the 1st defendant had a bona fide defence against the plaintiff's claim and therefore it should get orders as prayed or it will have real difficulty in recovering the costs in case the plaintiff lost the case (**see De Bry Vs Fitzgerald & Anr** [**1990] 1 All ER 560).** It was stressed that here the 1st defendant was apprehensive that it could have difficulties to recover costs when the plaintiff loses this case.

It was in the discretion of this court to award any sum to be security for costs which the applicant here pegged on the sum a party will pay for the suit to be defended.

Turning to the replying affidavit the plaintiff's stand was taken as having been based on denials with no concrete evidence eg. audited accounts to show its ***"stable"*** financial position.

On the plaintiff's part, it too alluded to the court's discretion in cases like this: if there was reason to believe that a party would be unable to pay the others costs, then it would either order security for them or not.

The court was urged further to note that the 1st defendant had been guilty of an unreasonable delay in bringing this application. That such applications should be brought as promptly as possible yet, since pleadings closed on 25.11.08 the application only came on record on 7.12.09 with no explanation what-soever. It was in fact served on 7.12.09 when the suit was set down for trial on 10.12.09.

The court heard that the 1st defendant had not placed before court sufficient evidence as to the inability of the plaintiff to pay costs. So all was based on assumption and nothing concrete. The plaintiff made losses, as any business concern could, but these were allegedly due to the 1st defendant's acts complained of. This application has no merit.

In deciding this summons the court focused on two points: the promptitude with which this application was brought and the basis on which it was grounded.

On the first ground, it is not in dispute that the suit was filed way back in 2004 and after amendments and filing of the defence, reply to defence pleadings were closed on 25.11.08. The suit was then ripe for trial. It was fixed for hearing

on 10.12.09. Three days earlier, on 7.12.09, this application which was dated 23.11.09 was filed and, it was said, served. On the issue of promptitude of filing applications of such nature, Halsbury's Laws of England 4th Edn Vol 37 paragraph 305 states:

> **"305. Application for Security for Costs: 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 for the delay it may be refused."**

And in Sir Lindsay Parkinson & Co. Ltd Vs Triplan Ltd [1973] 2 All ER 273, 286, Denning MR observed:

> **" And when one adds to that the fact that this application was made at a late hour on the Thursday when the arbitration was due to start on the Monday, I am quite clear that it was not a case for ordering Triplan to provide any security for costs at all."**

In the case of Shakhalaga Jirongo & Anr Vs Board of Trustees, National Social Security Fund [2005] e KLR, Kasango J expressed herself:

> **" I accept the plaintiff's submission that an application brought so many years of filing the suit is prejudicial to the plaintiff. An application for security of costs should be brought very soon after the suit is filed. If brought later there ought to be sufficient explanation for the delay. There is no such explanation here."**

In this case it was not filing the applicantion after many years. From 25.11.08 when pleadings closed and 7.12.09 when this application was filed, was just about a year. But that there has been no explanation for that delay at all, and adding to that the fact that indeed the application was filed and probably served, on the 7.12.09 when the trial was set for 10.12.09, all was prejudicial for the plaintiff and so the order sought ought to be refused. Indeed the plaintiff justifiably considers the move as intended to oppress, harass and punish it.

The application however, is to end the way it will on the other ground: Has the 1st defendant laid out concrete grounds on which to base a reasonable belief that the plaintiff may be unable to pay costs in the event it loses this case? It needs no repeating that ordering security for costs is in the discretion of the court. But the court must be shown that there is reason to believe that a party would be unable to pay the other's (applicant) costs if the suit is successful or is lost. The court also has discretion to set the level of the security if one has to be posted.

In the present case the 1st defendant is only apprehensive that it maynot recover costs in the event the suit is dismissed. Being apprehensive is not what it takes to get an order for security for costs. There should be demonstration with evidence laid, portraying the respondent as a party in such dire financial straits that paying the costs will be difficult. The applicant here did not so demonstrate and again on that point this application must be dismissed. And even with that, it is assumed that the plaintiff will be up-to-date all the time with rent payments until this matter is determined or further orders issue.

In the result the orders are refused with costs.

Orders accordingly.

Delivered on 19.4.2010

J. W. MWERA

JUDGE