



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

Civil Case 2283 of 1991

NGEMWA TRADING COMPANY LIMITED.....PLAINTIFF

VERSUS

MBO-I-KAMITI FARMERS CO- LIMITED.....1ST DEFENDANT

MURANGA COUNTY COUNCIL..... 2ND DEFENDANT

RULING

By interlocutory chamber summons (ex-parte) application dated 04.05.07 stated to be brought under Order XXV rules 1, 6 and 7 of the Civil Procedure Act, Cap.21, the 2nd defendant applied for the following orders, namely, that:-

1. The plaintiff do give security for all the costs of the 2nd defendant.
2. Time within which security is to be given be fixed.
3. The said security be in the form of money to be deposited in an interest earning bank account in the joint names of the respective advocates of the plaintiff and the 2nd defendant or be in such other form easily convertible into cash as this honourable court may consider sufficient and proper.
4. Pending the provision of security all proceedings herein be stayed.
5. Costs of this application be provided for.

The grounds upon which the application is based are that:-

- a) The plaintiff is a limited liability company which has no known assets which could satisfy an order for costs if such an order was ultimately made against the plaintiff in favour of the 2nd defendant;
- b) The 2nd defendant is a local authority which relies on public and Government funding for its activities;
- c) It is incumbent upon the 2nd defendant, and is by law so enjoined, to ensure that its funds are properly used in the interest of the inhabitants of its area of jurisdiction and that any moneys payable to it are recovered;

- d) The 2nd defendant has incurred costs and continues to incur costs in defending this case which costs it hopes to recover from the plaintiff in the event that its defence succeeds;
- e) Unless the plaintiff gives sufficient security for costs at this stage, the plaintiff could eventually avoid paying costs since such costs can only be recovered by the attachment of its assets which as aforesaid are unknown to the 2nd defendant and the plaintiff is unlikely to reveal or disclose its assets for the purposes of attachment;
- f) In the special circumstances of this suit, this honourable court should make an order for the provision of security for costs.

The application is supported by the affidavit of the Clerk to Council of the 2nd defendant, Isaac Nderitu Githui sworn on 02.05.07.

On 02.07.07 the plaintiff company filed grounds of opposition of the same date to the 2nd defendant's application for security for costs and concurrently filed a replying affidavit by the plaintiff's Managing Director, Samuel Ngugi Gichara in reply to the affidavit of the 2nd defendant's Clerk to Council, Isaac Nderitu Githui sworn on 02.07.07 in support of the 2nd defendant's application for security for costs. On 04.07.07 the 2nd defendant filed notice of preliminary objection to the presentation by the plaintiff of both grounds of opposition and a replying affidavit to the 2nd defendant's application for security for costs. On the same 04.07.07 the 2nd defendant filed notice under Order XVIII rule 2 of the Civil Procedure Rules seeking to cross-examine the Managing Director of the plaintiff company, Samuel Ngugi Gichara on his replying affidavit sworn on 02.07.07. Next day, i.e. on 05.07.07, the plaintiff company filed notice of withdrawal of its grounds of opposition to the 2nd defendant's application for security for costs thereby leaving only the plaintiff company's Managing Director's replying affidavit to the 2nd defendant's application for security for costs.

The grounds contained in the replying affidavit of Samuel Ngugi Gichara, plaintiff company's Managing Director are broadly as follows:-

- a) That the 2nd defendant's application for security for costs is frivolous, vexatious and an abuse of the court process.
- b) That the plaintiff is a duly registered limited liability company in Kenya with financial capability to satisfy any award for costs in the event that it loses the case.
- c) That the 2nd defendant made the application too late in the day, 16 years down the line, with the sole purpose of deliberately delaying the hearing of the case; that if the 2nd defendant was serious about seeking security for costs, it ought to have done so long before the case commenced for hearing.
- d) That there are no adequate grounds disclosed in the entire affidavit of the 2nd defendant's Clerk to Council, Isaac Nderitu Githui to warrant the granting of orders for security for costs.
- e) That security for costs is not a matter of right but it is at the court's discretion which is to be exercised reasonably and judiciously, having regard to all the circumstances of a particular case.
- f) That the 2nd defendant's application is merely an afterthought meant to derail the hearing of the case despite the progress made so far.
- g) That this is a very old case and that it is the policy, good morals and jurisprudence to put litigation to an end at some point, otherwise litigants would literally spend their entire lives in court.

The plaintiff company prayed that the 2nd defendant's application for security for costs be dismissed with

costs to the plaintiff.

At the hearing on 11.07.07 of the 2nd defendant's chamber summons application dated 04.05.07, the 2nd defendant was represented by learned counsel, Mr P. Wamae; the 1st defendant was represented by learned counsel, Mr J. Kouna; while the plaintiff was represented by learned counsel, Mr W.M. Kamau.

For the record, when this matter came up for mention on 28.05.07, counsel for 2nd defendant asked the court to consider granting security for costs in the sum of Kshs.500,000/=. Plaintiff's counsel challenged that figure on the basis that it was not reflected in the chamber summons dated 04.05.07 and submitted that the matter should be canvassed at the hearing of the chamber summons.

The 2nd defendant's counsel asked the court to direct that the plaintiff company's Managing Director, Samuel Ngugi Gichara be cross-examined on his replying affidavit sworn on 02.07.07. The 1st defendant's counsel reserved his right also to cross-examine Samuel Ngugi Gichara. Plaintiff's counsel raised no objection to the proposed cross-examination of the plaintiff company's Managing Director, Samuel Ngugi Gichara and the latter was duly cross-examined on his replying affidavit sworn on 02.07.07. This is permitted by Order XVIII rule 2.

Samuel Ngugi Gichara's testimony upon being cross-examined may be summarised as under. The plaintiff company has two directors, i.e. he, Samuel Ngugi Gichara as Managing Director plus his wife, Mary Gichara as the other Director. The plaintiff company is a limited liability company owned by himself and his aforesaid wife. The business of the plaintiff company has been distribution of water pipes and other water development equipment. The company also carried out general trading. On the issue of assets, Samuel Ngugi Gichara told this court that the plaintiff company has landed property in Nyahururu and in Kiambu. The landed property in Nyahururu comprises 33 plots. The plaintiff company bought land and subdivided it to build an estate but eventually the plaintiff company never got requisite development finances. Initially there were 39 plots but the plaintiff company sold 6 and remained with 33 plots. The plaintiff company has entered into an agreement with another company to sell the plots to anybody. The value of the 33 plots is estimated at Kshs.6 million. The plaintiff company has not produced accounts for the last 2 – 3 years because business has been very low. That is why the plaintiff company is trying to dispose of some of its landed properties. The plaintiff company does not, however, have debts. The plaintiff company has been filing returns with the Registrar of Companies and with the Kenya Revenue Authority (KRA). The plaintiff company has not made money for the last 2 – 3 years, so it is trying to dispose of some of its properties to try and invest in another line. Samuel Ngugi Gichara clarified that when he averred in his replying affidavit that the plaintiff company has financial capability to satisfy an award made in the present case, he meant that the company would sell some of its properties to raise money to satisfy the award. He also said the Directors of the plaintiff company have savings to go towards satisfying an award if need be. He acknowledged that an order for costs against the plaintiff company is not an order for costs against the Directors as individuals. He added, though, that the Directors would do anything to bail the plaintiff company out. He assumed that if costs are awarded against the plaintiff company, such costs would be reasonable. He added:

'If, for instance, the costs awarded are at Kshs.500,000/=:, and I hope they will not be that high, I would expect to raise the said costs even if by selling some of the plots now offered for sale.'

With or without selling the plots, we have other ways of raising funds, e.g. from Directors' savings.'

Samuel Ngugi Gichara said he could not avail Land Reference Numbers of the 33 Nyahururu Plots off - head but that such numbers are available in the plaintiff company's records. He said the registered office of the plaintiff company is in Maendeleo House, Nairobi.

Samuel Ngugi Gichara also said he is the registered owner of House No. H.172 A, Ngumo Estate, Nairobi. He could not remember its Land Reference Number off - head but said such number is available in the plaintiff company's records. He said that he and his wife charged the Ngumo House and the Kiambu property to secure debts of the plaintiff company when the need arose. He said the plaintiff

company has been having bank accounts but they are not active at the moment.

During his re-examination by his counsel, Samuel Ngugi Gichara said that if the plaintiff company were ordered to pay costs of Kshs.500,000/=, that would be within the company's means to pay and that the plaintiff company has resources or assets it can use to satisfy a court order for costs.

In support of the 2nd defendant's application for security for costs, 2nd defendant's counsel cited Keary Development Ltd -vs- Tarmac Construction Ltd & Another [1995] 3 All ER 534 where the following general guiding principles regarding security for costs were enunciated:-

1. The court has a complete discretion whether to order security and that it has to act in the light of all the relevant circumstances.
2. The possibility or the probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security.
3. The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might itself have been a material cause of the plaintiff's impecuniosity.
4. In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. But it should not go into the merits in detail unless it can be clearly demonstrated that there is a high degree of probability of success or failure.
5. The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount.
6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. The court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its Directors, etc. As this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation.

On the other hand, plaintiff's counsel opposed the application for security for costs. He relied on Samuel Ngugi Gichara's replying affidavit sworn on 02.07.07. Plaintiff's counsel submitted that security for costs is normal for plaintiffs whose residence is outside jurisdiction. He relied for this proposition on Shah -vs- Shah [1982] KLR 95, in particular holding 2 where the Kenya Court of Appeal held that the general rule is that security is normally required from plaintiffs resident outside but that a court has a discretion, to be exercised reasonably and judicially, to refuse to order that security be given.

Plaintiff's counsel noted that the suit was filed on 14.05.91 and that the application for security for costs was brought 16 years later. In his view no explanation was offered for the belated application. He submitted that on that basis alone the application should be dismissed. He cited Noormohamed Abdulla -vs- Ranchhodbhai J. Patel & Another [1962] E.A. 447 to make the point that dilatoriness or inordinate delay on the part of an applicant for security for costs would work against the applicant.

In reply, 2nd defendant's counsel pointed out that under Order XXV rules 1 and 2, there is no requirement for an applicant for security for costs to show that the person to provide such security resides outside jurisdiction. He submitted that the court has wide powers to order provision of security for costs in

appropriate cases. With regard to Shah's case alluded to by plaintiff's counsel, the 2nd defendant's counsel submitted that the case is distinguishable on facts. In his view, delay is not an impediment although it is a factor the court can take into account.

The 2nd defendant's counsel submitted that both Shah's case and Noormohamed's case cited by plaintiff's counsel are distinguishable on facts. The 2nd defendant's counsel pointed out that the reason for delay in bringing the application for security for costs is shown in paragraph 12 of the supporting affidavit of 2nd defendant's Clerk to Council, i.e. his having been unsuccessful in tracing any assets of the plaintiff company.

The 2nd defendant's counsel urged that security for costs be ordered in such sum as the court deems fit and recommended a sum of Kshs.500,000/= because instruction fee comes to Kshs.294,676/= and also because the plaintiff claims general damages.

I have given due consideration to the rival pleadings, affidavit evidence plus the oral evidence of the plaintiff company's Managing Director, Samuel Ngugi Gichara when he was cross-examined regarding the financial standing of the plaintiff company. I have likewise given due consideration to the rival submissions of the parties through their respective advocates.

Does an application for security for costs have to be premised on the person required to provide security for costs being a resident of outside jurisdiction? Order XXV rule 1 provides as follows:

'1. In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party.'

There is clearly nothing in this rule restricting the success of an application for security for costs to the person required to provide security for costs being a resident of outside jurisdiction. Shah's case sought to be relied upon by the plaintiff in opposing the 2nd defendant's application for security for costs, although decided by the Kenya Court of Appeal, is no authority for the plaintiff's contention that security for costs can be required only from a plaintiff resident outside jurisdiction. In that case the plaintiffs were beneficiaries under a Will of their deceased father. They sued the executors and trustees of the Will. The first two defendants applied for an order that the plaintiffs do give security for their costs on the ground that the plaintiffs were ordinarily resident in England which was out of the jurisdiction of the High Court of Kenya. The application for security for costs was dismissed by the High Court. The plaintiffs appealed to the Court of Appeal and their appeal was also dismissed. Holding 2 in the Court of Appeal judgment is instructive in that it pronounced a general rule that security is normally required from plaintiffs resident outside the court's jurisdiction but the Court of Appeal added that a court has a discretion, to be exercised reasonably and judicially, to refuse to order that security be given. Holding 4 of the Court of Appeal Judgment is equally instructive. It is in the following terms:

'4. The appellants had failed to make a full disclosure of the facts and the money they held out of the estate of the deceased widow of the respondents' deceased father would be available in Kenya to satisfy any costs to which they might be entitled.'

The central consideration in deciding whether security for costs should be provided seems to me to be whether costs can be recovered from a litigant who loses and that if there is doubt about the matter, the court would be perfectly entitled to order the provision of security for costs whether the litigant in question is from within jurisdiction or from outside. The court has to exercise its jurisdiction having regard to the circumstances of a given case.

The plaintiff company, through its counsel, pointed out that the present suit was filed on 14.05.91 and noted that the application for security for costs was made vide chamber summons dated 04.05.07, i.e. some 16 years later. He submitted that the delay in making the application was inordinate and that on that ground alone the application ought to be dismissed. He relied on Noormohamed's case for that proposition. The central question to be addressed in the present case is whether there was inordinate and

unexplained delay in bringing the application for security for costs. In this connection paragraphs 5, 6 and 12 of the supporting affidavit of the 2nd defendant's Clerk to Council, Isaac Nderitu Githui are relevant. In those paragraphs the deponent made the following averments:

'5. That as the Chief Executive of the 2nd Defendant I have made discreet enquiries about the assets of the Plaintiff.

6. That my said enquiries have not brought to light any assets of the Plaintiff which could satisfy an award for costs in favour of the 2nd Defendant in the event that this suit is ultimately dismissed against it.

12. That having been unsuccessful in tracing any assets of the Plaintiff which could satisfy costs that might be awarded to the 2nd Defendant, if the suit against it is eventually dismissed, I have sought the counsel of any advocates on record, which advice I verily believe to be true, that the only means of ensuring that costs that might be awarded to the 2nd defendant are recovered is by way of applying for security for costs as prayed in the 2nd Defendant's application hereof.'

The message of these averments is that the 2nd Defendant through its chief executive discovered only recently that the plaintiff company appeared to have no tangible assets to satisfy an award against it in case the said plaintiff company loses the suit. There was no delay in bringing the application after the discovery was made. Right now the plaintiff company has called only its first witness who is still testifying. When this case first came before me on 05.10.05, plaintiff's counsel informed the court that he would call 3 witnesses on behalf of the plaintiff company while counsel for the 2nd defendant said he would call 1 witness on behalf of the 2nd defendant. It is too early to assess the relative strengths or weaknesses of the evidence which will eventually fall from the lips of the witnesses in this case and I do not at this stage wish to engage in speculation as to which anticipated evidence will outweigh the other.

The plaintiff company's Managing Director, Samuel Ngugi Gichara put the following facts on record when he was cross-examined about the plaintiff company and its financial status:- That the plaintiff company, a limited liability company, has two Directors, i.e. himself and his wife; that the plaintiff company owns some 33 plots in Nyahururu which the company intended to develop into a housing estate but that intended housing project did not materialise owing to lack of finances and that the company has put up the plots, or at least some of them, for sale to any willing buyer; there is no evidence before court at this stage whether any tangible offers to buy the plots have been made yet; that business has been low and the plaintiff company has not made money and has not produced accounts for the last 2 – 3 years; and that this is why the plaintiff company has put up the 33 Nyahururu plots for sale. Samuel Ngugi Gichara also told the court that he is the registered owner of House No. H.172 A at Ngumo Estate, Nairobi but that the said house and an unspecified property in Kiambu were charged to secure debts of the plaintiff company when the need arose. Samuel Ngugi Gichara estimated that if the 33 Nyahururu plots are sold, they may fetch about Kshs.6 million. The court notes that that could, however, take time. He also said that he and his wife have savings but their magnitude is not known to the court. In any case he acknowledged that since the plaintiff company is a limited liability company, an order for costs made against the plaintiff company cannot be enforced against its Directors in their personal capacities outside the assets of the company *qua* company.

Given the foregoing scenario, the position of the plaintiff company seems to be that it is in a precarious state in terms of its assets and their worth. That vindicates the 2nd defendant's concern and belief that the plaintiff company may have difficulty in readily meeting an award of costs made against it if it loses the suit. I have taken cognisance of the general guiding principles governing the granting of security for costs laid down in Keary Development Ltd -vs- Tarmac Construction & Another (*supra*) and I am persuaded that, on balance, the scales tilt in favour of granting an order for security for costs. I make the following orders:-

1. The plaintiff company shall provide security for all costs of the 2nd defendant and the said security

for costs is currently estimated at Kshs.400,000/= (four hundred thousand).

2. The aforesaid security shall be deposited in an interest earning bank account in the joint names of the respective advocates of the plaintiff and the 2nd defendant within 45 (forty-five) days.

3. This matter shall be mentioned on 28.01.08 for further orders.

4. Costs of the present application shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 28th day of November, 2007.

B.P. KUBO

JUDGE