Republic of Kenya

In the High Court of Kenya

at Nairobi

March 14, 2002

Kuloba, Judge

Civil Case No 4616 of 1993

Pan African Bank Ltd

v

Jasop Limited braham Kiptanui & another

March 14, 2002 R Kuloba, Judge delivered the following ruling. This is an application made under Order 25, rules 1 and 6 of the Civil Procedure Rules, by which orders of this court are sought requiring the plaintiff bank (in liquidation) to provide security for the costs of the second and third defendants, and that time be limited for the provision of such security.

Both in the written grounds and affidavit in support of the application, it is said that the plaintiff's claim is strenuously disputed and denied, that in defending this action the defendants expect to incur substantial legal costs which are likely to exceed Shs.1,000,000, that the plaintiff being a financial institution in liquidation is for that reason going to be unable to pay the legal costs incurred n defending the action, as the plaintiff "is hopelessly insolvent".

The applicants say that they have a good defence; that they have already incurred enormous costs and will further incur a colossal amount of money in defending this suit. Adds the defendants; "the plaintiff is admittedly insolvent and will consequently be unable to pay the second and third defendants' costs should they succeed in defendant this suit. At the hearing of the application, the learned advocate for the defendants repeated these very assertions.

In reply to these assertions, it was said on behalf of the plaintiff that while it is true that the bank is in liquidation, it is also a fact that its affairs were taken over by the Deposit Protection Fund pursuant to the Banking Act and the Fund is solvent, and there is no evidence of fact that the plaintiff will be unable to pay costs. It s said on behalf of the plaintiff, that in other litigation over the years, the Fund has never been unable to pay any successful litigant; and in another suit the second defendant sought security for costs but his application was dismissed, and so the present application is not a bona fide one.

The suit in respect of which an order for security for costs in sought, is against the second and third defendants as guarantors of a loan and credit facilities and other financial accommodation made by the plaintiff to the first defendant. The sum claimed against the second and third defendants under their guarantee is Shs.2,408,781.15 together with interest on it. The second and third defendants filed two but identical defences. In them they pleaded that the suit is not maintainable and is incompetent because the

plaintiff is in liquidation and as such it has no status in law to pursue this suit; but in the alternative, the action is not maintainable because of alleged non-compliance with section 241 of the Companies Act (cap 486) and for that reason the plaintiff does not have a locus standi . It is also said that the claim is barred by the statute of limitation.

Admitting the giving of the guarantee, the defendants, the two defendants allege that their liability under it was limited to a sum of Shs1,616,500 only on condition that the plaintiff would not give facilities to the first defendant in excess of the sum guaranteed, i.e Shs1,616,500, without their written agreement, but the plaintiff "made further advances to the first defendant at its own risk".

It is worthwhile mentioning here, that there is silence in those defencies, on whether even the limited guaranteed sums were paid or not, and if not, why they have not been paid. It is also a saving on time to mention at once, that by an order of this court made on 15th March, 1995 and issued on 28th of that month, leave was granted to the liquidator of the plaintiff to proceed with this suit. So, the second and third defendants' allegations in their written defences in that regard are of no value for the present purpose. A decision whether to order a party to furnish security for costs, or to decline such an order, is in the discretion of a judge. The discretion is a judicial one, exercised on sound principles, in the light of the circumstances of the case in hand, and in accordance with the law of the of the land, paying due regard to the inhabitants of this country and their circumstances, but without undue regard for technicalities for their own sake. This position is obvious from the language of Order 25, rule 1 of the Civil Procedure Rules under which this instant application as filed by the defendants (applicants). It reads:

"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".

By this rule, the rules-making authority has left absolute discretion to the court, and has done so without prescribing any rules for its exercise. The discretion given by the rule is very wide. In these circumstances no straitjacket rules can be formulated in advance by any judge as to how the discretion shall be exercised. It depends entirely on the circumstances of each particulars case. The discretion, being a judicial one, it means that it must, of course, be exercised judicially, which means that in each case the judge has to inquire how, on the whole, justice will be best served, whether by ordering the furnishing of security for costs and, if so, to what extent, or by letting free litigation by the plaintiff or other party.

No judge can properly formulate iron-clad rules controlling the unqualified discretion conferred by the rules-making authority. The court hearing an application under this provision is to consider all the circumstances and the conduct of the parties, before it reaches its decision on the application. When a statute or a statutory rule is so express to provide a wide discretion, meaning, no doubt, to prevent one person from forfeiting what in fair dealing belongs to some one else, by taking an unfair advantage of a situation in the absence of irreparable damage, it is not advisable to lay down any rigid and strait waistcoat rules for guiding that discretion. It cannot be laid down that there are certain cases in which orders for security for costs will be ordered and others in which they will not be made no matter what the circumstances. It is true that sometimes cases may be cited as showing how the court will exercise its discretion in particular circumstances. These, however, do not bind the court, and, as the circumstances are never identical in any two cases, propositions enunciated in the earlier cases are only useful in general and in general they reflect the point of view from which judges would regard an application for relief. They afford an application for relief. They afford illustrations of

circumstances proper to take into consideration in judicially exercising the court's discretion. But it ought to be distinctly understood that there may be cases in which any or all of those illustrations may be disregarded. If it were otherwise the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is no part of the functions of the court to place conditions upon a free discretion entrusted by statute to the court where the conditions are not based upon statutory enactment at all. It is not safe to say that the court must and will always insist upon certain things when the statute does not require them, and the facts of some unforeseen case may make the court wish it had kept a free hand. The object of Order 25, rule 1 clearly is to provide for the protection of defendants in certain cases where in the event of success they may have difficulty in realizing their costs of the suit.

This protection arises from the view taken by our law, that it is up to a plaintiff to decide whether or not to sue a party who may not be good for costs, and whether he runs the risks is a matter for him; but a defendant has no comparable choice, and consequently the law regards him more favourably, although only slightly so.

Accordingly, the court is given a discretionary power to order a person in the position of plaintiff to furnish security for the costs of his opponent. As general principles of general application, when, therefore, litigation is harassing and vexatious, or where the real plaintiff is not before the court, or where, though liable in certain events for the defendant's costs, the plaintiff is a person of no means, in such cases the court would doubtless exercise this power for the protection of the defendant. But there are cases in which the plaintiff in a suit for money (the claim being real and open to no objection) cannot be rendered liable for the defendant's costs of the suit. For example, one may refer to an administration suit by a creditor or legatee where the claim is admitted, or to a suit on a mortgage or promissory note, where there is no defence to speak of genuinely. Is it to be supposed that it was intended that the defendant n such cases should be in a position to ask as a mater of absolute right that security may be given for costs that he may choose to incur needlessly? It surely was not intended by Order 25 rule 1, that a perverse litigant should have the right of calling on the court to assist him in throwing an obstacle vexatiously and unnecessarily in the way of a plaintiff desirous of presenting and prosecuting a just claim.

The power given under this rule is discretionary and one which the court ought or ought not to exercise according to the circumstances of each case; and, unless it is shown clearly that the exercise of its power is necessary for the reasonable protection of the defendant, the court ought not to interfere It is in the light of the circumstances of each case that the court determines whether and, if so, to what extent or for what amount, a plaintiff may be ordered to provide security for costs, as the court thinks it just to order. Each case must be decided on its own facts. But usually, a matter affecting the status of a person is very different from on merely affecting him peculiarity. Where liberty is in question or where highly penal consequences are entitled, that would be a very important circumstance to take into account.

It goes without saying, that the circumstance that the plaintiff who is instituting or prosecuting legal proceedings is within the reach of the arm of our law, so that an adverse order against him if he is unsuccessful, can be made and effectually executed against him, may tilt the scales in favour of such party. Likewise, the circumstance that the plaintiff has substantial property whether real or personal, within the jurisdiction of the court, or there are goods and chattels of his within our jurisdiction, which are sufficient to answer the possible claim of the defendant, and which would be available to execution, may be considered for letting the plaintiff to litigate without providing security for the defendant's costs. The court will consider whether the defendant will be at some material disadvantage, if successful in the suit, in taking steps to recover his costs. If there exists some legislative provision by which the evil against which the rule for security for costs seeks to guard largely disappears, the court is entitled to pay its attention to it. These are propositions which may be formulated from the cases of Farrab Incorporated v Robson [1957] EA 441, (K); and Kapadia v Laxmidas , [1960] EA 852, (K); and the various authorities referred to in those cases. I have presided over the civil court for a long time, and I have heard many applications for orders to require plaintiffs to provide security for costs, on the grounds either that the plaintiff is poor, or in the case of corporate bodies, that the plaintiff company is in liquidation and insolvent. The latter has been the main ground urged before me on this application. It is a ground on which too many applications are now notoriously made against companies for security for costs. In this connection, let me make it as clear as it can possibly be, that every plaintiff, irrespective of the size and contents of his wallet, and every plaintiff, irrespective of his or its mercantile fortunes and misfortunes, who has a bona fide claim reasonably made against anyone, should normally be afforded every facility to litigate to have his legitimate rights vindicated.

Courts do not require security for costs merely because a plaintiff is a pamper. The mere fact that a plaintiff is a poor man, probably without any means at all, and that he is even being assisted by others in obtaining funds for the purpose of carrying on the litigation, and that he has parted with a portion of his property or his interest in the subject matter of the suit for the purpose of obtaining funds to carry on the suit, is no sufficient ground to ask that security for the costs of the suit may be required of him. However, it is otherwise where he is not the real litigant, but a mere puppet in the hands of others. That is to say, the

courts do not require merely because the plaintiff is a pamper but they do require security when they find that he is not the real litigant but a puppet plaintiff: if he is suing for another, security is required, the real question being whether the plaintiff is suing for himself or for another. If the plaintiff has a substantial interest in the subject-matter of the suit, and the suit has been instituted by him on his own behalf, and, on the affidavits or other evidence the court finds as a fact that the suit is really the plaintiff's suit and that his name is not used by others for their own purposes, that he is actually suing for himself and not for anyone else, security for costs should not be ordered on account only for his poverty. As it was succinctly put by Sir Trevor Gould, Ag V-P in Abdul la v Patel , [1962] EA 447, at 453, " it is right that a litigant, however poor, should be permitted to bring his proceedings without hindrance and have his case decided," And as Lakha, JA, said in Trade Bank Ltd (in liquidation) v L Z

Engineering Constru ction, Ltd, Civil Appeal/Application No 14 of 1998 (12.6.1998):

"The basic rule that a natural person who sues will not be ordered to give security for costs, however poor he is, is ancient and well established. As Bowen, L J, said in Cowell v Taylor , (1885), 35 Ch D 34 at 38, both at law and in equity, 'the general rule is that poverty is no bar to a litigant'."

These, and many other authorities leave no doubt, that mere poverty is no ground for requiring a plaintiff to give security for the costs of a defendant and possibly thereby deprive the plaintiff of his right to pursue his bona fide claim. If you choose to harm a poor man, or to deny him his legitimate right, why should his poverty per se deprive him of his free access to justice and to sue?

In the case of a limited company as a plaintiff, in addition to the general principles, there is a special provision in Section 401 of the Companies Act (cap 486), whose marginal note is "costs in actions by certain limited companies." That section reads this way: 401. Where a limited company is plaintiff in any suit or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and many stay all proceedings until the security is given.

Again, even here, the section does not say that the court must order security, but that the court may in its discretion do so. It is not mandatory to order security for costs to be furnished by a plaintiff limited company. From its clear language, section 401 only confers discretion on the court, and there may be many cases where a company is insolvent, and yet the court will not order security to be lodged because there are circumstances against such an order being made. It is not a provision written in words making mandatory to order security for costs in every case where the plaintiff company appears to be unable to pay the costs of a successful defendant; clearly, there still remains a discretion in the court which may be exercised in accordance with particular circumstances.

The important word in that section is "may". That word gives the court 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. There should be no misapprehension on the matter at all; and if there has been any such wrong view of that section, then the sooner it is put right the better. If there is reason to believe that the company cannot pay the costs of a successful defendant, then security may be ordered, but not must be ordered. The court has a discretion which it will exercise considering all the circumstances of the particular case.

Some of the matters which the court may take into account include things like, whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success. It will also consider whether there is an admission by the defendant on the pleadings or elsewhere that the plaintiff's claim is well founded. If there was a payment into court of a substantial sum of money or an open offer of a sum (not merely a payment into court to get rid of a nuisance claim, that, too, would count. The court might also consider whether the application for security was being used oppressively – so as to try to stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendant, such as delay in payment or delay in doing his part. A payment into court, or an open offer, is a matter which the court can take into account, because it goes

to show that there is substance in the claim, and it would not be right to deprive the company of the money by insisting on security for costs. The court is also fully entitled to take into account the fact that an application for security was made a late hour.

So, no person can have any sensible doubt about this section. Once it is established by credible evidence that there is reason to believe that the plaintiff company will be unable to pay the costs of the defendant if he is successful in his defence, the court has a discretion, and that discretion ought not to be hampered by any special rules or regulations, nor ought it to be put into a straitjacket by considerations of burden of proof. It is a discretion which the court will exercise having regard to all the circumstances of the case. These are the views expressed by two eminent judges, Lord Denning, MR and Lawton, LJ, in the English Court of Appeal, in Sir Lindsay Parkinson & Co, Ltd v Triplan , Ltd [1973] QB 609. It is obvious that this case is not binding on any court in this country, but I have found it a persuasive authority on the interpretation of a statutory provision which is worded identically to our own, and I have not found any sound principle and approach which may justify a different view from those expressed by those views because they happen to coincide with my own understanding and opinion, that they are sound.

Proceeding on those principles, I look at the facts and circumstances of this case. Apart from the defendants saying that they strenuously dispute and deny all the claims made by the plaintiff against them in this action, it is nowhere suggested that the claim is a sham one and lacking in bona fides. It is only said that the defendants shall defend this action and in so doing they expect to incur substantial legal costs, and based on discussions with their advocates the said costs are likely to exceed Shs 1,000,000. This was an oath; but during their oral presentation at the hearing of this application, the defendants (without anybody having questioned them) startled us by scaling it down to a half i.e to Shs 500,000. But either figure has no basis, and is only speculative. It is true that the plaintiff company is in liquidation; but I is cushioned by the Deposit Protection Fund, which has not been shown not to be in funds. The Fund has not been shown to be failing to pay off the liabilities of the company, or that it will in future fail to do so in respect of costs in this suit if the defendants successfully defend.

It is openly stated without contrary evidence, that the Deposit Protection Fund, has taken over the affairs of the plaintiff; that the Fund is solvent; that the Fund has over the years been involved in litigation on behalf of other institutions and it has not been unable to pay any successful litigant. Clearly, it seems that the plaintiff has a credible institution underwriting it. There is also this factor: the defendants, especially the second one, did not disclose to this court, that, a similar application had been made by the second applicant (defendant), seeking security, and it had been dismissed by this court in October 1999. In this regard, the defendants were in breach of their duty of candour, necessary in these matters.

Bold assertions are made by the applicants without credible testimony to back them up. The only driving force for bringing this application seems to be the fact that the plaintiff is in liquidation. That is all. Otherwise no credible evidence is furnished from which the court it is made to appear that there is reason to believe that the company will be unable to pay the costs of the defendants if successful in their defence. We have no law or even a sound principle which ordains that in Kenya, being in liquidation equals to inability to pay costs.

Having regard for all the circumstances of this case, the court has found no credible testimony by which it appears that there is reason to believe any inability of the company as to payment of costs. Yes, I have seen the mere assertions that the plaintiff is in liquidation (a fact truly admitted); but I have not been given testimony that there are circumstances pointing to inability to pay. The plaintiff is not a nominal plaintiff: it has an interest of its own in the subject-mater of the suit; the suit s not a sham. Yes, I have seen the written defences filed. They partly plead lack of the sanction of the court for the suit to be filed; but this court's order of 15th March, 1995 issued on 28th March, 1995, giving leave raises substantial questions about that plea, having regard for the amended plaint thereafter, amended on 15th December, 1995. Then there is this unexplained delay of some five or seven years in filing this application in the year 2000 when the fact of the plaintiff company being in liquidation has always been within the knowledge of the applicants. There would be no fairness to put this hurdle in the plaintiff's way at so late an hour. It may merely delay the fair hearing and determination of the case. This sudden but belated application late in the day if upheld would appear to be an unjust attempt to stifle the plaintiff's case.

On the foregoing principles, in the present circumstances of this particular case, this is not a proper case in which security for costs may be ordered. On the foregoing principles, in the present circumstances of this particular case, this is not a proper case in which security for costs may be ordered.

The application is dismissed. There is no good reason for having brought this application; and so, there is no good reason to deny the plaintiff the costs of this application. Accordingly, the applicants shall pay the plaintiff (respondent herein) the costs of this application in any event. It is so ordered.