



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 109 OF 2019**

**WAFAA INDUSTRIES LIMITED.....PLAINTIFF**

**VERSUS**

**NIC BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**APEX STEEL LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction:**

1. In the Application dated 18<sup>th</sup> March, 2020, the 2<sup>nd</sup> Defendant has prayed for the following reliefs:

- a. That the Plaintiff do provide security for the legal and other costs of the 2<sup>nd</sup> Defendant in the sum of Kshs. 68,927,200.00.*
- b. That the Plaintiff do provide the aforesaid amount by way of Cash Deposit or Bank Guarantee or in any other manner that the Honourable Court shall deem fit within thirty (30) days of the above order;*
- c. That in default of the Plaintiff furnishing security within the prescribed period issued by the Honourable Court the suit as against the 2<sup>nd</sup> Defendant be dismissed with costs;*
- d. That the Honourable Court do provide such other orders and directions as it may deem fit and just to grant;*
- e. That the costs of this Application be provided for.*

2. The Application is supported by the Affidavit of the 2<sup>nd</sup> Defendant's Director who deponed that on 18<sup>th</sup> April, 2017, he purchased parcel of land title number Mavoko Municipality/6/853 at a public auction and that he paid 25% of the purchase price while the 1<sup>st</sup> Defendant acquired the 75% remainder of the purchase price by charging it.

3. According to the 2<sup>nd</sup> Defendant, the suit property is charged to a tune of Kshs. 1,300,000,000 plus a further sum of US\$ 16,500,000; that the 2<sup>nd</sup> Director of the Plaintiff, Mr. Tahir Sheikh Said Ahmed, passed away on 10<sup>th</sup> January, 2017 and that unless a party has a clear security over the Plaintiff, it would be a tall order to recover from the Plaintiff.

4. It is the 2<sup>nd</sup> Defendant's case that it will incur great costs to defend the suit property which it legally acquired through the correct procedure; that the 2<sup>nd</sup> Defendant has proceeded to invest heavily on the suit property by getting into contractual agreements with financiers and consultants and that the estimated party and party costs is Kshs. 68,927,200.

5. The 2<sup>nd</sup> Defendant's Director finally deponed that the Plaintiff has no known assets capable of settling the costs in the event of dismissal of the suit and that the 2<sup>nd</sup> Defendant is uncertain as to the Plaintiff's means or ability to meet any award of costs.

6. In reply, the Plaintiff filed Grounds of Opposition in which it averred that the Defendant bears the onus of proving the inability to pay or lack of good faith of the Plaintiff for an order for security to issue and that the Defendant/Applicant has not discharged the legal burden of proof by providing evidence to show that if Judgment is entered against the Plaintiff, which is highly unlikely, the costs of litigation will not be easily borne by the Plaintiff.

7. It was averred by the Plaintiff that the Defendant/Applicant is aware that the Plaintiff's residence and domicile is in Kenya and that the Plaintiff would be forthcoming whenever it may be called upon to pay costs from the resultant litigation.

8. It is the Plaintiff's case that it is not a pauper litigant; that the Application is a gross abuse of the court process, frivolous, *ex-facie* incompetent and fatally defective; that the Application is brought in bad faith and is merely meant to frustrate, delay and/or disrupt the ongoing litigation and that the arguments intended to be advanced in the Application are untenable.

#### **Submissions:**

9. In his submissions, the 2<sup>nd</sup> Defendant's advocate submitted that the 2<sup>nd</sup> Defendant/Applicant is the *bona fide* purchaser of the suit property; that the 2<sup>nd</sup> Defendant has demonstrated a *bona fide* Defence and that the Defence meets the *bona fide* purchaser's standard set in the case of ***Katende vs. Haridar & Company Limited (2008) 2 E.A 173.***

10. Counsel submitted that according to the Plaintiff's deposition, there is a clear indication that the directorship and management of the Plaintiff is in contention; that the Plaintiff has not been vigilant in conducting the affairs of the Plaintiff and that the Plaintiff has not disclosed whether the legal status of the company has been dealt with since the demise of the Plaintiff's Director, leaving a legal gap of the Plaintiff's ownership and management.

11. The 2<sup>nd</sup> Defendant's counsel submitted that the Plaintiff has neither demonstrated whether currently it has the financial capability to dispel the 2<sup>nd</sup> Defendant's averments of inability to pay nor has it provided an alternate asset to demonstrate its capability to pay the costs.

12. While relying on the case of ***Ocean View Beach Hotel Limited vs. Salim Sultan Moloo & 5 Others (2012) eKLR***, the 2<sup>nd</sup> Defendant's counsel urged that the purpose of an order for security for costs is to protect a party from incurring expenses on a litigation which it may never recover from the losing side and is not to deter the Plaintiff from pursuing its claim.

13. On his part, the Plaintiff's advocate submitted that the principles for the grant of an order for security were outlined in the case of ***Ocean View Beach Hotel Limited (supra)***; that the current Application is unmerited as it is grounded on mere apprehensions and that the 2<sup>nd</sup> Defendant only aims to stifle the Plaintiff's claim.

14. Counsel submitted that it was the onus of the Defendants to prove that the Plaintiff would be unable to meet the costs of litigation; that a mere apprehension is not sufficient to warrant a prayer for security for costs and that the 2<sup>nd</sup> Defendant has neither demonstrated that the financial muscle of the Plaintiff is wanting nor shown that there are insolvency proceedings against the Plaintiff. Counsel relied on the cases of ***Henry Shikonga Wamukoya vs. Sylvester Makokha, Civil Appeal Number 16 of 2015.***

15. The Plaintiff's counsel submitted that the Plaintiff presents the subject matter of the dispute as one founded on forgery of the signature of the Directors of the Plaintiff leading to the executed charge over the Plaintiff's property and that the question of forgery has been avoided in the 2<sup>nd</sup> Defendants' Defence.

#### **Analysis and findings:**

16. This suit was commenced by way of a Plaint dated 2<sup>nd</sup> October, 2019. In the Plaint, the Plaintiff alleged that in May, 2017, it was informed by its security guard that an individual had approached the suit property and informed him that the said property had new owners.

17. It is the Plaintiff's case that after conducting a search, it discovered, that the 1<sup>st</sup> Defendant had registered a transfer charge and transferred the suit property to the 2<sup>nd</sup> Defendant.

18. The Plaintiff has averred that in May, 2018, it was discovered that Mr. Aweys Ahmed Mohamed and Mr. Zein Ahmed Mohamed had forged the signatures of the Directors of the Plaintiff and that the two individuals have since been charged with the offence of making a false document.

19. The Plaintiff has particularized the alleged negligence on the part of the 1<sup>st</sup> Defendant to include: failure to exercise due care and diligence and failing to exercise due care by providing to the Plaintiff a statement of account for the loan amount together with statutory notices and auction reports.

20. The Plaintiff has sought for the following prayers in the Plaint:

- a. *Cancellation of the title in the 2<sup>nd</sup> Defendant's name;*
- b. *In the Alternative to (a) an order directing the 1<sup>st</sup> Defendant to pay the Plaintiff a sum equivalent to the fair market value of the property based on a valuation by the government valuer;*
- c. *General damages for negligence;*
- d. *Aggravated damages for loss of use of Title No. Mavoko Municipality Block 6/853;*
- e. *Costs of the suit;*

f. Interest on prayers (b), (c), (d) and (e);

g. Any other relief this Honourable Court deems it fit to grant.

21. In its Defence, the 2<sup>nd</sup> Defendant has disputed the contents of the Plaintiff. According to the 2<sup>nd</sup> Defendant, it is a *bona fide* purchaser for value without notice of any defect to the title through a legally sanctioned legal public auction.

22. In the current Application, the 2<sup>nd</sup> Defendant is seeking for security for costs in the sum of Kshs. 68,927,200 on the ground that it will incur huge costs in defending the suit; that the Plaintiff has no known assets capable of settling costs in the event its suit is dismissed and that the Application has not been filed for the purpose of stifling the Plaintiff's claim.

23. The grounds upon which an order for security for costs may be issued have been stipulated in numerous decisions of the High Court and the Court of Appeal. In **Ahmed Kulimye Bin & 2 Others vs. Kenya Revenue Authority & Another (2012) eKLR**, the court quoted the case of **Shah vs. Shah (1982) KLR 95** where it was held as follows:

*"... a court has a discretion to be exercised reasonably and judicially to refuse to order that security be given. The test on an application for security is not whether the Plaintiff has established a prima facie case but whether the Defendant has shown a bona fide Defence..."*

24. The reasons why the court may order for security for costs were stated in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others (2014) eKLR** as follows:

*"The rationale for security for costs is to ensure firstly that a person is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty; secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party..."*

25. Order 26 Rule 1 of the Civil Procedure Rules which is pertinent in the determination of this Application provides as follows:

*"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."*

26. Indeed, as was held in the case of **Ocean View Beach Hotel Limited vs. Salim Sultan Moolo & 5 Others (2012) eKLR**, the court has a complete discretion whether to order security or not.

27. The burden to prove that the Plaintiff will be unable to pay costs in the event he loses the suit is always on the Defendant. In the case of **Kenya Educational Trust Limited vs. Katherine S.M. Whitton, Civil Appeal (Application) No. 301 of 2009**, the Court of Appeal stated as follows:

*"...It is not enough to allege that a Respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proven."*

28. In the case of **Marco Tool & Explosives Limited (1988) KLR 730**, the Court of Appeal held as follows:

*"The onus is on the Applicant to prove such inability or lack of good faith that would make an order for security reasonable."*

29. While considering whether to order for security or not, the court has to weigh the injustice that may be occasioned 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 itself unable to recover from the Plaintiff the costs which have been incurred by it in its Defence of the claim (See **Ocean View Beach Hotel Case (supra)**).

30. I have perused the Plaintiff. At paragraph 10 of the Plaintiff lists some of the immovable properties associated with the Plaintiff. The Defendant has not shown that the assertion by the Plaintiff that it owns other properties in association with other entities is false.

31. Furthermore, there is no evidence before this court to show that the Plaintiff is insolvent, or that the Plaintiff does not legally exist. Indeed, the 2<sup>nd</sup> Defendant did not make any attempt to show that the Plaintiff is an entity of straw. As was held in **Henry Shikonga Wamukoya vs. Sylvester Makokha**, mere apprehension that the Plaintiff may not be able to pay costs if it lost the suit is not enough.

32. Article 50 of the Constitution provides for the right of access to justice. At the heart of this provision is that a person who approaches the citadel of justice should not be impeded in pursuing his rights which can be discerned, *prima facie*, on the face of the pleadings.

33. The Plaintiff has presented its claim as one founded on forgery of the signatures of the Directors of the Plaintiff leading to the execution of a charge over the suit property. This is not a frivolous plea. Indeed, this plea can only be rebutted successfully by the 1<sup>st</sup> Defendant and after evidence has been adduced.

34. That being the case, and in the absence of evidence to show that the Plaintiff is insolvent, the Plaintiff should be allowed to prosecute the

suit without being stifled.

35. For those reasons, I dismiss the Application dated 18<sup>th</sup> March, 2020 with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 21<sup>ST</sup> DAY OF MAY, 2021.**

**O. A. ANGOTE**

**JUDGE**