



**Hall Equitorial Limited v Titus Makhanu and Associates Advocates (Civil Suit E829 of 2021) [2024] KEHC 5405 (KLR) (Commercial and Tax) (6 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5405 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E829 OF 2021  
JWW MONG'ARE, J  
MAY 6, 2024**

**IN THE MATTER OF ADVOCATE/CLIENT RELATIONSHIP**

**BETWEEN**

**HALL EQUITORIAL LIMITED ..... PLAINTIFF**

**AND**

**TITUS MAKHANU AND ASSOCIATES ADVOCATES ..... RESPONDENT**

**RULING**

1. On 10<sup>th</sup> September 2021, the Plaintiff moved this honourable Court by an Originating Summons Application seeking the following orders against the Defendant:-
  1. The Defendant do pay the Plaintiff the sum of Kshs.3,352,525.88/= with interest at Court rates from 19<sup>th</sup> January, 2021 until payment in full.
  2. That the Defendant do bear the costs of this summons.
2. Subsequently, the Plaintiff moved the court and a summary judgment was entered as per the summons against the Defendant. By an application dated 28<sup>th</sup> January 2022, the Defendant successfully challenged the said entry of judgment and was by a ruling delivered on 17<sup>th</sup> July 2023, the said ex-parte judgment was set aside and the Defendant allowed to defend this Originating Summons. The Defendant then filed its response dated 24<sup>th</sup> July 2023 together with its Grounds of Opposition to the summons of even date and a further affidavit dated 7<sup>th</sup> November 2023.
3. In addition, the Defendant also filed a Notice of Preliminary Objection dated 24<sup>th</sup> July 2023 seeking to expunge from the record documents annexed to the supporting affidavit and marked as AK2 & AK3 and CW4 and AK5 in the supporting affidavit, relating to transmission of funds subject matter of the Originating summons. The Defendant argues that these annexures violate the requirements of



Section 106B of the Evidence Act as they are not accompanied by a digital certificate authenticating the same. Further, the Defendant states that there is not produced by the Plaintiff a Board resolution authorizing the filing of the present suit or the appointment of legal counsel to represent the Plaintiff.

4. Further, the Defendant also filed an application dated 6<sup>th</sup> October 2023 seeking security for costs at Kshs.1,500,000/= pending the hearing and disposal of the Originating summons. The Defendant argues that the Plaintiff has no known assets and in the event the Defendant is successful, there would be no attachable assets or sources of income or revenue since the Plaintiff has caused to be registered an All-Assets Debenture against its assets in favour of Southern Shield Holdings Limited and that the Plaintiff does not a known place of business.
5. Both the Preliminary Objection and the Application by the Defendant are opposed and the Plaintiff filed its responses through the replying affidavits of Abdulali Kurji sworn on 23<sup>rd</sup> October 2023.
6. Upon the directions of the Court, both parties filed their written submissions. Having carefully considered the Notice of Preliminary Objection and the Application filed by the Defendant and the affidavits in support and opposition thereto, two issues emerge for determination by this court; to wit:-
  - i. Whether the Preliminary Objection is merited?
  - ii. Whether this court should for security for costs.
7. As to “Whether the Notice Objection is merited,” I note that in its response the Defendant argues that the Objection is not raised on a pure point of law as is the required by law. In determining a Preliminary Objection, the court is guided by the Court of Appeal decision in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696 at page 700 paragraphs D-F Law JA, as he then was, had this to say on Preliminary Objections:-

....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

At page701 paragraph B-C Sir Charles Newbold, P. added the following:-

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....

8. I have perused the Notice of Objection and note that the Defendant is seeking that the court expunge documents annexed to the Plaintiff’s application from the record for failing to meet the threshold set out under section 106B of the Evidence Act. Section 106B of the said Act provides as follows:-

“

“ 106B

- (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to



as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.”

Section 106B (2) provides that: –

“The conditions mentioned in sub section (1) in respect of a computer output, are the following-

1. the computer output containing the information was produced by the computer during the period over which the computer was used to store or process the information for any activities regularly carried out over that period by a person having lawful control over the use of the computer
2. during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in ordinary course of the said activities; throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly was out of the operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.”

Section 106 (A) and (B) means that any information stored in a computer which is then printed or copied to optical media such a CD in this case, shall be treated like documentary evidence and will be admissible as evidence without production of the original. However, Section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in that provision are satisfied, Section 106B (4) provides: –

“In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following –

- (a) identifying the electronic record containing the Statement and describing the manner in which it was produced
- (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
- (c) dealing with any matters to which conditions mentioned in subsection (2) relate; and
- (d) Purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter



stated in the certificate and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it.”

9. I have considered the above section of the law and the holding in the Mukisa case (supra) cited above and I agree with the Plaintiff that the objection raised herein does not meet the threshold of a Preliminary Objection. For the court to determine that the documents sought to be expunged from the record do not meet the threshold set out under Section 106B of the *Evidence Act*, the Court will be forced to consider evidential material in order to arrive at that determination.
10. The second limb of the Objection is failure by the Plaintiff to annex company resolutions authorizing the filing of this suit and instructing the present counsel to act for the Plaintiff. I note that the Defendant does not cite the specific section of the law that require the production of the said resolutions by a party as part of its documentation. I also note that for the court to make a finding that these resolutions are necessary and have not been provided, the court will be called upon to examine the material availed in order to arrive at that conclusion. I am therefore persuaded by the arguments put forward by the Plaintiff that the Preliminary Objection herein raises matters of fact and not of law and therefore does not satisfy the threshold required for the same to be upheld. I therefore find and hold that the Preliminary Objection is not merited and I dismiss the same with costs to the Plaintiff.
11. The second issue set out by the court for determination is “Whether this court should issue an order for security for costs.” The Defendant has argued that he stands the risk of being unable to collect its costs in the event that he is successful since the Plaintiff has pledged all its assets to a different entity known as Southern Shield Holdings Limited vide an All-Assets Debenture dated 24<sup>th</sup> July 2016 and therefore all assets of the Defendant are encumbered and unavailable for attachment in satisfaction of a court award. The Defendant further argues the Plaintiff has no known address.
12. In opposing the said application, the Plaintiff has argued that Southern Shield Holdings Limited and the Plaintiff are two different legal entities and that there is no nexus between the actions of Southern Shield Holdings Limited and the Plaintiff. The Plaintiff further states that the application for security of costs is brought prematurely as the suit between the Plaintiff and the Defendant has not been finalized and that there is no guarantee that the Defendant will be the successful party. The Plaintiff argued that there was no material placed before the court to confirm that indeed the Plaintiff was incapable of settling any costs awarded to the Defendant at the conclusion of this suit.
13. Courts have held that the burden of proof on whether a party should be ordered to provide a security for costs rests with the applicant in the matter lies with the party seeking such orders. As was held in the case of *Keystone Bank Limited & 4 others Vs I&M Holdings Limited & another* (2017) eKLR that:-

“In an application for security of costs, the Applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. 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”.
14. The court notes that the Applicant has made a general statement that the Respondent may not be able to settle the costs in the event that he does not succeed in his suit. To that extent, the Defendant has not discharged its evidential burden of providing evidence that the Plaintiff is a pauper incapable of meeting its financial obligations. It is trite that he who alleges has the obligation to provide evidence to back up his allegation. This has not been done in the present suit. I am therefore not persuaded that the Plaintiff should be ordered to provide the sum of Kshs. 1,500,000/= as security for costs pending the hearing and determination of the suit herein.



**Final Disposition**

15. Flowing from the above findings, the court therefore finds and holds that the Preliminary Objection raised by the Defendant herein is not merited and the same is dismissed in its entirety with costs to the Plaintiff. Similarly, the application by the Defendant requiring the Plaintiff to provide security for costs has failed. The same is therefore dismissed with costs to the Plaintiff.

It is so ordered.

**DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 6<sup>th</sup> DAY of MAY, 2024.**

.....

**J.W.W. MONG'ARE**

**JUDGE**

**In The Presence Of**

- 1. Mr. Wainaina for the Plaintiff.
- 2. Mr. Makhanu for the Defendant.
- 3. Amos- Court Assistant

