



REPUBLIC OF KENYA



**Panalpina Airflo BV v Flower City Kenya Limited (Civil Suit E222 of 2019)
[2023] KEHC 2232 (KLR) (Commercial and Tax) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2232 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E222 OF 2019
A MABEYA, J
MARCH 23, 2023**

BETWEEN

PANALPINA AIRFLO BV PLAINTIFF

AND

FLOWER CITY KENYA LIMITED DEFENDANT

RULING

1. Before Court are two applications. The application dated 15/3/2022 by the defendant and the application dated 22/6/2022 by the plaintiff.

Application dated 15/3/2022

2. The application was brought under Order 26 rule 1,5 & 6 and order 51 rule 1 of the Civil Procedure Rules, section 1A and 3A of the *Civil Procedure Act*, CAP 21 Laws of Kenya. The applicant sought to have the plaintiff deposit security for costs amounting to Kshs 2,053,865/= in a joint interest earning account.
3. The defendant's case was that the plaintiff was a foreign company incorporated in Netherlands and had no known assets in Kenya. In the premises, the defendant was apprehensive that it would not recover the costs for defending the suit and was likely to suffer prejudice unless the orders were granted.
4. The plaintiff opposed the application vide a replying affidavit dated 6/2/2023 sworn by Peter Verner Kristensen. He stated that the plaintiff had bank accounts in Kenya where the defendant would make payments. That the plaintiff held a legal charge over property known as L.R. No 9042/63 for Kshs125,000,000/-. That the defendant had not demonstrated that the plaintiff was unable to pay costs
5. The application was canvassed by written submissions which I have considered.



6. The main issue for determination is whether the order for security of costs should. Order 26 of the Civil Procedure Rules provides: -

- “ 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.
- 2) If an application for security for costs is made before a defence is filed, there shall be filed with the application an affidavit setting out defence the grounds of the defence together with a statement of the deponent’s belief in the truth of the facts alleged.
- 3) Where it appears to the court that the substantial issue is which of two or more defendants is liable or what proportion of liability two or more defendants should bear no order for security for costs may be made.
- 4) In any suit brought by a person not residing in Kenya, if the claim is founded on a bill of exchange or other negotiable instrument or on a judgment or order of a foreign court, any order for security for costs shall be in the discretion of the court.
- 5)
 - (1) If security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit.
 - (2) If a suit is dismissed under sub-rule (1) and the plaintiff proves that he was prevented by sufficient cause from giving the required security for costs the court may set aside the order dismissing the suit and extend the time for giving the required security.
- 6)
 - (1) Where security by payment has been ordered, the party ordered to pay may make payment to a bank or a reputable financial institution in the joint names of himself and the defendant or in the names of their respective advocates when advocates are acting.”

7. The defendant’s case is grounded on the fact that the plaintiff was a company incorporated outside Kenya and had no known assets in the country. It was submitted on behalf of the defendant that the general rule is that security for costs is normally required from company’s resident outside the jurisdiction. The defendant further challenged the legal charge produced by the plaintiff stating that the plaintiff did not give a recent charge and that there was no financial statement to show the status of the loan appearing on the charge.

8. On its part, the plaintiff contended that it had property in Kenya and produced a copy of the legal charge over the property known as L.R no 9042/603. Further, that it had bank accounts in Kenya and it used to deal with the same accounts with the defendant.



9. In *Shah v Shah* [1982] KLR 95, it was held that: -

“The general rule is that security is normally required from Plaintiff’s resident outside the jurisdiction, but as was agreed in the court below, a court has discretion, to be exercised reasonably and judicially, to refuse to order that security be given”.

10. Further, in *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others*, CA No. 38 of 2013 [2014] eKLR, the Supreme Court observed that:

“In an application for further security for 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. And the onus is on the Applicant to prove such inability or lack of good faith that would make an order for security reasonable.”

11. From the foregoing, a party has to show that the opposing party may not be in a position to pay the costs of the suit. Further, a court would readily grant an order for security for costs when a plaintiff is not ordinarily resident within jurisdiction.

12. From the record, it is not disputed that the plaintiff is a company residing outside the jurisdiction of Kenya. However, it produced a legal charge as well as a certificate of title for LR. Number 9042/603 Nairobi showing that it has property in the country.

13. That may be the case but there was no evidence to show that the charge may not be discharged during the pendency of the suit. That the plaintiff will still be having a presence within jurisdiction until the conclusion of the suit. Further, owning of bank accounts per se cannot be said to be adequate assets in a security for costs application. This is so because money is a very fluid asset. It can be liquidated with a stroke of a pen. The long and short of it is that the plaintiff is a corporation that is resident out of jurisdiction and there is no assurance that it will still be around until the suit is determined.

14. Accordingly, I find that the application dated 15/3/2022 is meritorious and I allow the same.

Application dated 22/6/2022

15. The plaintiff brought this application under sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 13 Rule 2, and Order 51 Rule 1 of the Civil Procedure Rules. The application sought for judgment on admission against the defendant on its indebtedness together with costs of the suit.

16. The application was based on the grounds on the face of it and the supporting affidavit sworn by Peter Verner Kristensen. It was the plaintiff’s case that the plaintiff was in the business of providing freight services for some Kenyan products across the world and the defendant was its customer. It was contended that the plaintiff carried some consignments for the defendant on diverse days between 16/11/2018 and 15/5/2019 but the defendant failed to make the required payments.

17. That on several occasions, the officers of the defendant admitted the debt and additionally issued a payment proposal dated 25/7/2019 for a sum of Euros 808,219.87.

18. The application was opposed by the defendant through a replying affidavit sworn on 28/1/2023 by Kanchanbhai Patel. It was contended that the plaintiff had relied on emails that were authored by Panalpina Airflo Ltd which was a distinct entity from the plaintiff and a stranger to the defendant. He averred that the defendant had in its defence and witness statements denied the averments in the plaint.



19. That the plaintiff had previously brought up allegations on admissions and the defendant termed them as forgeries on the grounds that the defendant had not exchanged text messages confirming to pay the alleged debt and that the plaintiff did not provide freight services to the defendant. It was the defendant's contention that the plaintiff had previously raised the issue of admissions before Court and in the ruling dated 30/9/2021, the Court declined that claim.
20. The application was canvassed by written submissions which I have considered.
21. I have considered the pleadings, the responses and the submissions. The main issue for determination is whether there has been admission by the defendant for which judgment should be entered.
22. Order 13 Rule 2 of the Civil Procedure Rules, 2010 provides as follows: -

“Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment as the court may think just.”
23. The plaintiff's contention is that the defendant has admitted the debt. The admission is stated to be based on the correspondences between the parties before the institution of the suit. It was contended by the plaintiff that the defendant in several emails had admitted to the debt and went ahead to give a payment proposal.
24. In the *Choitram vs Nazari* (1984) KLR 327 Madan JA (as he then was) stated thus:-

“For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties. In considering the matter, the judge must neither become disinclined nor lose himself in the jungle of words even when faced with a plaint such as the one in this case. To analyse pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuses to do so, he fails to give effect to the provisions of the established law by which a legal right is enforced. If he allows or refuses an application after having done so that is another matter. In a case under order XII rule 6 he has then exercised his discretion for the order he makes falls within the court's discretion. The only question then would be whether the judge exercised his discretion properly either way. If upon a purposive interpretation of either clearly written or clearly implied, or both, admissions of fact the case is plain and obvious there is no room for discretion to let the matter go to trial for then nothing is to be gained by having a trial.



The court may not exercise its discretion in a manner which renders nugatory an express provision of the law.”

25. From the foregoing, for judgment on admission to be entered, it has to be unequivocal clear and unambiguous. It is my view that the admission should present a clear and deliberate act to be bound by it.
26. In this regard, I have perused the correspondence produced and an email dated 5/8/2019 from Purity Murage to the plaintiff. It admitted owing a sum of 800,000 Euros. Further, the plaintiff relied on a letter dated 25/7/2019 from the defendant in which the defendant gave a payment plan for the debt owing. In its response, the defendant contended that the said emails were as a result of forgery and thus could not be bound by them.
27. It would seem that the documents relied on by the plaintiff are contested. Their authenticity has been questioned. In such circumstances, it would be difficult on affidavit evidence to ascertain and draw any conclusions thereon. Tested testimony would be the best option to enable the Court make impressions and draw conclusions on the contested documents.
28. In the premises, I find no merit in the application dated 22/6/2022 and the same is dismissed with costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH, 2023.

A. MABEYA, FCIArb

JUDGE

