



Showcase Properties Limited v John Mugambi t/a Mugambi and Company Advocates (Civil Case E938 of 2021) [2023] KEHC 1574 (KLR) (Commercial and Tax) (6 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1574 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E938 OF 2021
DAS MAJANJA, J
MARCH 6, 2023**

BETWEEN

SHOWCASE PROPERTIES LIMITED PLAINTIFF

AND

**JOHN MUGAMBI T/A MUGAMBI AND COMPANY
ADVOCATES DEFENDANT**

RULING

Introduction and Background

1. The Defendant has filed a Notice of Motion dated 21st February 2022 made, inter alia, under Order 26 Rule 1 and 5 of the Civil Procedure Rules (“the Rules”) seeking that the Plaintiff be ordered to deposit security for costs of the suit in the sum of Kshs. 8,267,000.00 to cover such costs as may be suffered by the Defendant in defending this suit, within 30 days from the making of the order. Further, that the Court should order that unless security for the costs is deposited within the time limits set out above or within such other time as the Court may determine, the Plaintiff’s suit be dismissed with costs.
2. The application is supported by the grounds on its face and the supporting affidavit and supplementary affidavit by the Defendant sworn on 21st February 2022 and 24th May 2022 respectively. It is opposed by the Plaintiff through the replying affidavit of its Director Francis Muhoro Gachanja sworn on 8th April 2022. The parties’ advocates made brief oral submissions in support of their positions.
3. The facts giving rise to this application and the suit were highlighted by the court in its ruling of 28th October 2022. The Plaintiff commenced this suit by a plaint dated 2nd December 2021 and Amended on 10th February 2022 against the Defendant who was its advocate in a matter; HC COMM No. 577 of 2011; Showcase Properties Limited v Bamburi Special Products Limited where it claimed Kshs. 50,066,851.00 for breach of contract. It accuses the Defendant of professional negligence in the



manner he handled the suit and seeks a declaration in that regard. It also seeks a declaration that due to professional negligence, the Plaintiff was coerced into filing another suit HC COMM No. 305 of 2015; Showcase Properties Limited v Kenya Commercial Bank Limited. The Plaintiff also seeks a declaration that the Defendant should not be permitted to benefit from professional fees for negligently handling HC COMM No. 577 of 2011 and HC COMM No. 305 of 2015 and a declaration that the Defendant is liable to compensate the Plaintiff for excess interest charged by Kenya Commercial Bank Limited on the Plaintiff's loan account. The Plaintiff further seeks a declaration that the Defendant had benefitted from employing underhand methods to obtain a fraudulent decree and has continued to cause on the Plaintiff continuous wrongs in a quest for fraudulent benefits.

The Application

4. Turning to the present application, the Defendant avers that the Plaintiff was the defendant in the suit HC COMM No. 436 OF 2017; John Mugambi t/a Mugambi and Company Advocates and Beatrice Kariuki t/a Beatrice Kariuki and Associates Advocates v Showcase Properties where a final Decree has been issued against it in favor of the Defendant herein for Kshs. 28,063,325.00 plus interest and costs of the suit. That the Defendant also has a Certificate of Costs in his favor as against the Plaintiff arising from taxation of a Bill of Costs in HC COMM MISC. Application 232 of 2019; Mugambi & Co. Advocates v Showcase Properties Ltd for the sum of Kshs. 23,899,854.60 which certificate has not been set aside and that it then follows that the Plaintiff owes the Defendant upwards of Kshs. 51,963,179.69 which amount remains unpaid and is due and owing.
5. The Defendant states that the Plaintiff has participated in the proceedings giving rise to the aforesaid amounts which it has failed to settle but has instead continued to file multiple applications which have been dismissed with costs. The Defendant avers that the Plaintiff has only one known asset being L.R. NO. 2/61 (Register Number Vol. N 88 Folio 31 File 1821) which is scheduled to be auctioned by Kenya Commercial Bank Limited as Chargee, to recover a debt owed to it by the Plaintiff. That if this property is sold, the Defendant will have no other means of recovering his costs in the event his suit succeeds. In addition, the Defendant avers that the Plaintiff has no known sources of income sufficient income to cover the outstanding decretal sum and costs owed to the Defendant and that it is therefore correct to state that any costs that may arise from this suit may equally not be paid.
6. The Defendant submits that it has a bonafide defence to the Plaintiff's claim and further, the suit as pleaded and filed has no chances of success and that it is clear from its conduct, that the Plaintiff will not only be unwilling, but also unable to settle any costs that may ultimately arise from the instant suit. The Defendant therefore urged the court to allow its application in order to safeguard it from the prejudice it may suffer as a result of this suit.

The Plaintiff's Response

7. The Plaintiff opposes the application on the ground that granting the application will violate its right of access to justice guaranteed under Article 48 of *the Constitution*.
8. The Plaintiff contends that its claim is for an unliquidated amount therefore there is no basis for the proposed security amount of Kshs. 8,267,000.00 as such an amount can only await the outcome of the suit. It brands the application as an attempt by the Defendant to use illegal and unlawful methods and sharp practice in court so as to instigate placement of funds under guise of security for costs, and after isolation of the funds, swoop to obtain payment of money from the Plaintiff without following any due process as happened in HC COMM 436 of 2017. It states that in that case, the Court through ruling dated 24th August 2020 ordered the Plaintiff to deposit a bank guarantee of Kshs. 5,000,000.00 in favor of Defendant which was done on 13th October 2020 and the Defendant confirmed with the



issuing bank on 14th October 2020 but on 13th November 2020, the Defendant through secret private communication with the Deputy Registrar reinstated a default judgment on grounds the Plaintiff had not furnished the guarantee. That the encashment of the Plaintiff's guarantee using the judiciary coercive machinery was made in total absence of any attempt at pretense to any due process and the Defendant having perfected the art and skill of misusing the judicial system to his advantage, the Defendant is rearing to replicate a similar exploit.

9. The Plaintiff dismisses the decree and certificate of costs relied on by the Defendant and avers that the same was obtained through fraud, mischief and judicial misconduct and that the same has been challenged in the Court of Appeal. It denies that it owes the Defendant Kshs. 51,963,179.69 and terms it "speculative" that it has only one known asset scheduled to be auctioned by Kenya Commercial Bank as chargee and that the Defendant is not privy to the efforts being made by the Plaintiff to arrest the alleged auction. That the Court should therefore not use the auction to institute hurdles against the Plaintiff in order to facilitate the Defendant escape liability for a wrong it committed against the Plaintiff.
10. The Plaintiff states that the demonstrated risk of circumvention of the processes laid down in Law by the Defendant should be among the deciding factors in whether the Plaintiff should be ordered to provide the said security for costs. The Plaintiff beseeches the Court in light of the controverting facts adduced above, to dismiss the application with costs and allow as similarly grounded by the Defendant, the suit to proceed as per the court's overriding objective in the *Civil Procedure Act*.

Analysis and Determination

11. As stated, the Defendant seeks that the Plaintiff be ordered to deposit security for costs of the suit in the sum of Kshs. 8,267,000.00, to cover such costs as may be suffered by the Defendant in defending this suit. The Defendant has rightly relied on Order 26 Rule 1 of the Rules which is the applicable law in an application for security for costs and 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
12. The use of the word 'may' above indicates that the grant for an order for security of costs is a matter of judicial discretion. Recently, the Supreme Court, in *Westmont Holdings SDN BHD v Central Bank of Kenya & 2 Others*; SCK Petition No. 16(E023) of 2021 [2023] eKLR accepted that an order for security for costs was not necessarily a violation of the Article 48 of *the Constitution*. It proceeded to set out the guiding principles which are meant to assist the court when considering an application by a defendant or respondent for security for costs. The apex court stated that in determining whether it is appropriate to make an order that a party gives security for costs, the court may have regard to the following matters and such other matters as it considers relevant in the peculiar circumstances of each case:
 - i. the prospects of success or merits of the proceedings
 - ii. the genuineness of the proceedings
 - iii. the impecuniosity of the plaintiff
 - iv. whether the plaintiff's impecuniosity is attributable to the defendant's conduct
 - v. whether the plaintiff is effectively in the position of a defendant
 - vi. whether an order for security for costs would stifle the proceedings and/or impede access to justice



- vii. whether the proceedings involve a matter of public importance
 - viii. whether there has been an admission or payment in court
 - ix. whether delay by the plaintiff in commencing the proceedings has prejudiced the defendant
 - x. the costs of the proceedings
 - xi. whether the security sought is proportionate to the importance and complexity of the subject matter in dispute
 - xii. the timing of the application for security for costs
 - xiii. whether an order for costs made against the plaintiff would be enforceable within the republic of Kenya
 - xiv. the ease and convenience or otherwise of enforcing a Kenyan court judgment or order in the country of a non-resident plaintiff or appellant.
 - xv. if the plaintiff is a natural person, an order for security for costs cannot be made merely on account of his or her impecuniosity.
 - xvi. security for costs is to be given in such manner, at such time and on such terms (if any) as the court may by order direct.
 - xvii. if the plaintiff fails to comply with an order under this rule, the court may order that the proceeding on the plaintiff's claim for relief in the proceedings be dismissed.
 - xviii. the provisions of any Act under which the court may require security for costs to be given such as the *Elections Act*
 - xix. a second motion for security for costs will not succeed unless there is an unforeseen and material change in circumstances since the first order for security. An example of an unforeseen and material change in circumstances might be where a plaintiff has come into a sum of money sufficiently large that they could no longer make an impecuniosity argument.
 - xx. the defendant seeking increased security bears the onus of demonstrating a significant gap between the security ordered and the actual expenses which were not foreseeable and that in hindsight the original request for security for costs was based on an assessment of the complexity of the case which hindsight has established was not realistic.
 - xxi. the jurisdiction to increase or decrease the amount of security already ordered should not be exercised lightly or be used to second guess the court that made the original order, whether on consent or otherwise, unless the gap between what was ordered and what later appears to be necessary is significant
13. The Supreme Court in its guideline judgment on security for costs accepted the court's holding in *Kibiwott & 4 others v The Registered Trustees of Monastery of Victory Nakuru*, HCCC No 146 of 2004 [2004] eKLR where the court held that for a party to succeed in an application for security for costs, it has to prove that the opposing party will not be able to pay the costs to be awarded in the event of the suit filed by such a party is dismissed. In this case, I find that the Defendant's apprehension is real that the Plaintiff might not be able to settle its costs if at all the Plaintiff's suit is unsuccessful and it is ordered to pay the Defendant's costs. The Defendant has been able to demonstrate, by way of evidence in its deposition, that the Plaintiff only has one asset registered in its name, that is LR 2/62 Nairobi (Vol. No. 88 Folio 31 File 1821) and that the same is encumbered with Kenya Commercial Bank Limited which



has since advertised the property for sale because of an outstanding debt of Kshs. 561,859,427.32. The Plaintiff has adduced any evidence to the contrary or that it is in position to meet the costs.

14. As I understand, the Plaintiff appears to be regurgitating arguments made in HC COMM 436 of 2017 in which it implies that the Defendant has used sharp and unorthodox practice to drive him from the seat of justice. I hold that these allegations have been adjudicated by the court and are now the subject of appellate proceedings.
15. I am therefore inclined to agree with the Defendant that the Plaintiff might not be in a position to cover any consequent costs that may arise if the suit is unsuccessful particularly given that its only property is a security for a bank and is charged to secure yet other costs. As to whether the Kshs. 8,267,000.00 sought as security is excessive, I am persuaded by the Plaintiff that the sum of Kshs. 400 million on which it is based is not explicitly sought or pleaded by it and is speculative. It is thus left to the court to determine what amount would be sufficient as security in the circumstances. Since the Plaintiff's suit does not seek a liquidated amount and taking into account the circumstances of the case, I find that an amount of Kshs. 500,000.00 would be appropriate for this purpose

Disposition

16. I allow the Defendant's application dated 21st February 2022 on the following terms:
 - a. The Plaintiff shall to deposit in court the sum of Kshs. 500,000.00 or provide a Bank Guarantee in favour of the Defendant from a reputable bank as security for costs in this suit within 45 days of this ruling.
 - b. In default of compliance with (a) above, the suit shall stand dismissed with costs to the Defendant.
 - c. The Plaintiff shall bear the costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MARCH 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Kalande instructed by Mungai Kalande and Company Advocates for the Plaintiff.

Mr Mbobu with him Mr Makhandia instructed by Makhandia and Makhandia Advocates for the Defendant.

