REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 24 OF 2019

FRANCIS THUO KAMAU

T/A SEGERO CLUB & BAR.....APPELLANT

VERSUS

JUSTINE PETER ODHIAMBO.....1ST RESPONDENT

PANVILLA COMPANY DISTRIBUTORS.....2ND RESPONDENT

KENYA BREWERIES LTD.....3RD RESPONDENT

RULING

1. By an application dated 3rd August 2020 expressed to be brought inter-alia under ***Rule 3 of the High Court (Practice & Procedure) rules, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 26 rule 1 and Order 51 Rule 1 of the Civil Procedure Rules 2020,*** **JUSTINE PETER ODHIAMBO, PANVILLA COMPANY DISTRIBUTORS and KENYA BREWERIES LTD** (the respondents) seek that:

a) **FRANCIS THUO KAMAU T/A SEGERO CLUB & BAR** (appellant) be ordered to deposit security for costs amounting to Kshs. 947,863.68 pending the admission of the appeal

b) The appellant to pay the 1st and 3rd respondents costs amounting to Kshs. 212,920 being party and party costs that were awarded in the lower court and which remain unsettled, pending admission of the appeal.

2. The background to this matter is that the applicant filed a **Civil Suit No 513 of 2007** against the 1st and 3rd respondents in the Chief Magistrate's Court in Eldoret seeking orders compelling the respondents to supply him with **Senator keg brew, damages for loss of business and custom plus costs and interest of the suit**. In the suit, the appellant averred that he entered into a series of agreements with the 2nd respondent, a distributor of keg beer on behalf of the 3rd respondent, for the supply of keg beer. The appellant further averred that upon delivery of 26 keg beer barrels to the 2nd respondent for refilling, the 2nd respondent retained 24 of the barrels and released only 2 barrels which in breach of their agreement and resulting in massive losses to his businesses. Upon conclusion of the matter, the magistrate dismissed the suit with costs to the respondents amounting to Kshs. 212,920 which remain unsettled. That judgement is the subject of the pending appeal.

3. The application was canvassed by way of written submissions.

The application is premised on grounds that the appellant has no known assets nor fixed abode that is verifiable which could satisfy an order for costs if such an order was ultimately made in favour of the applicant/respondents, taking into account the huge amounts involved in the appeal. It is argued that it is only fair and just that the applicants/respondents be allowed to have insurance for the huge amount of money that is to be spent in the prosecution and defence of this appeal and its incidentals, before subjecting them to more costs and expenses.

4. The 1st and 3rd applicants/respondents further depose that the appellant has not made any efforts to pay the Kshs 212, 290/- which was assessed by the lower court since the 31st of July 2019 despite a certificate of costs being issued thereto. They are apprehensive that they will have a difficult time in recovering the costs totaling to Kshs. 947,863.68 plus the outstanding lower court costs of Kshs. 212,290 in the event that the appeal is dismissed, hence the request for orders that the appellant to deposit security before court and pay the outstanding amount from the lower court.

5. In opposing the application, the appellant/respondent l through a replying affidavit avers that the current application has been presented

in bad faith and its intended to diminish or stifle the appellant from enjoying his inalienable right of access to justice under Article 48 of the Constitution of Kenya. He states that the 1st and 3rd respondents are motivated by desire to delay the expeditious conclusion of appeal having filed the current application at the end of 1 year since the record of appeal was filed and served and also at a time when the appellant was seeking directions as to the disposal of the appeal.

6. It is his contention that the applicants herein have not made any demand for payment of the assessed costs in the lower court nor have the applicants attempted to execute the said costs in vain. Further, that the applicants have not proved that he is insolvent and therefore unable to pay costs and the mere allegation is not sufficient for the court to grant the orders sought. He thus prays that the application be dismissed with costs.

Issues for determination

7. Upon considering the Applicants' application, the appellant's replying affidavit in opposition thereto as well as the written submissions of the parties and the material on record, the following issues arise for determination herein:

a) Whether court can order the appellant to make payments assessed by the lower court pending admission of appeal

b) Whether the applicants/respondents' have made a case for security of costs pending admission of the appeal

c) Costs of the application.

Analysis and Determination

Whether the court can order the appellant to make payments assessed by the lower court pending admission of appeal

9. In the case of **Noormohamed Abdulla -vs- Ranchhodbhal J. Patel & Another, the Court of Appeal (1962) E.A. 448** the predecessor to the Court of Appeal noted that the court has power to order security **"for payment of past costs relating to the matters in question in the appeal." This position was subsequently cited with approval by the Court of Appeal in Westmont Holdings SDN. BHD v Central Bank of Kenya [2017] eKLR.**

This position finds support in **Simon Wanga Tumo and others v Attorney General and another Civil Case No.87 of 2002 [2002] LLR 8327 (HCK),** where Kariuki GBM (J) held that**:**

> **"A court has power to stay a subsequent suit until the costs in the former suit are paid. This power is however discretionary and though there is no hard and fast rule that the court must in all cases order stay of such subsequent suit, the court will normally do so where the parameters of the rules are met for the simple reason that the scales of justice must be balanced so that while the right of a plaintiff to assert his claim in court is unfettered, the defendant must be protected from frivolous suits through award of costs and where litigation is duplicated, an order of stay of such subsequent proceedings until the costs are paid."**

By analogy, it is my view, and I hold that the High Court does have power to order security for payment of past costs relating to the matters in question in the appeal, otherwise, the rules for security of costs would be redundant if the intention was not to include power to order security for unpaid costs in the court below.

Whether the applicants/respondents' have made a case for security of costs pending admission of the appeal

10. The applicable law in an application for security for costs is ***order 26 Rule 1 of the Civil Procedure Rules*** which 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".***

As rightly submitted by the applicants/respondents, it is trite law that the grant for orders of security of costs remains a matter of judicial discretion. This position was affirmed in the case of **Shah and others Vs Manurama Limited and others (2003) E.A 294** and cited with approval in the case of **Ahmed Kulimye Bin & 2 others Vs Kenya Revenue authority & another (2012) eKLR**.

11. In adopting this position, the court in **Marco Tools & Explosives Ltd v Mamujee Brothers Ltd**, **[1988] KLR 730** held:

> ***"…. the Court has unfettered judicial discretion to order or refuse security. Much will depend upon the circumstances of each case, though the guidance is that the final result must be reasonable and modest".***

12. The discretion must however be exercised reasonably and judiciously taking into account the circumstances of each case as was held by the court in **Aggrey Shivona v Standard Group Plc [2020] eKLR**.

13. In exercising this discretion therefore, the court must be satisfied that the applicant has demonstrated that the respondent/defendant will not be able to satisfy an order for costs made at the end of trial should he lose the appeal. The rationale behind this is to ensure a party is not left with an unenforceable cost after defending a costly court battle. As such, an order for security for costs on an appeal serves to ensure that a respondent is protected for costs incurred for responding to the appeal and defending the proceeding.

14. In ***Europa Holdings Limited v Circle Industries*** **(UK) BCLC 320 CA,** the court held that it must be proved that the defendant/respondent would not be able to pay the costs at the end of the case. Similarly, in ***Kibiwott & 4 others v The Registered Trustees of Monastery of Victory Nakuru,*** **HCCC No 146 of 2004** the court observed that for a party to succeed in an application for security of costs, he or she has to prove that the opposing party will be unable to pay the costs to be awarded in the event of the suit filed by such a party is dismissed.

15. However, it is not sufficient to say that a party is unable to pay costs. The same has to be proved by the applicant. This position was cited with approval by the court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR.***

16. In ***Hall -vs- Snowdon Hubbard & Co. (I), (1899) 1 Q.B 593***, as cited by the learned judge in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*** (supra) the learned Judge at page 594 stated***: -***

> ***"The ordinary rule of this court is that, except in applications for new trials, when the respondent can show that the appellant, if unsuccessful, would be unable through poverty to pay the costs of the appeal, an order for security for costs is made."***

17. It is only when an applicant has demonstrated that the respondent/defendant is unable to pay costs that the court can deem an order for security reasonable. However, inability of a party to pay costs must not be the first consideration in an application for security of costs. As the court held in ***Namboro and another v Kaala [1975] HCB 315***, the main consideration to be taken into account in an application for security for costs are:

i. Whether the applicant/appellant is being put to undue expenses by defending a frivolous and vexatious suit

ii. That he has a good defence to the suit and

iii. That he is likely to succeed.

See also **Odunga's Digest on Civil Case Law and Procedure, Volume II, 2nd Edition, 2010 pg 1173**

18. It is only after the above factors have been considered that factors like inability to pay come into account. It thus behoves the court to exercise caution in granting orders for security by taking into account the interests of both parties. In **Henderson v. Wright 016 ONCA 89**, the Ontario Court of Appeal affirmed that in deciding whether to order security for costs of an appeal, the court has to balance the need to uphold the respondent's right to be protected from the risk that the appellant may not be able to satisfy the costs of the appeal with the appellant's right to access the courts.

19. It is on account of such considerations that courts have held that poverty is not sufficient grounds to grant an order for security of costs due to the ripple effect that this will have in access to justice especially for the indigent. This position finds support in **Shakalanga Jirongo vs the Board of National Social Security Fund HCC No 957 of 2000** and **Noornamohammed Abdullah vs Ranchorbhai J. Patel (1962) EA 447-448** where the court held that**;**

> ***"It is right that a litigant, however poor should be permitted to bring his proceedings without hindrances and have the case decided…the applicant ought to establish that the respondent, if unsuccessful in the proceedings would be unable to pay costs due to poverty…".***

20. I am alive however, that in a recent case, the court seemed to suggest that poverty may serve as sufficient ground for an order of security of costs as demonstrated in **Keystone Bank Limited & 4 others Vs I&M Holdings Limited & another (2017) eKLR** where the court held;

> ***"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".***

21. With the greatest of respect to that court, I hold a different view, because poverty should never be a bar to litigation, and indeed if the courts were to adopt such a position, poor litigants would be deterred from enforcing their legitimate rights through legal process. I echo the sentiments expressed in **Bamburi Cement Co Ltd v Lawi Duda & 21 Others Nrb Civil Application No 6 of 2013** where the court pointed out that a litigant should not be shut out because of his impecunious position as that would lead to discrimination based on the size of one's pocket**.** Of course, court must consider the balance of interest so as also not to prejudice a respondent/defendant after considering all the circumstances of the case.

22. In **GM Combined (U) Ltd v AK Detergents(U) Ltd [1999] 2 EA 94; [1996] I KALR 51 (SCU),** the court highlighted circumstances that the court may take into consideration. These include:

i. Whether the plaintiff/appellant claim is bona fide and not sham

ii. Whether the plaintiff/appellant has reasonably good prospects of success

iii. Whether there is an admission by the defendant/respondent on the pleading or elsewhere that money is due

iv. Where there is a substantial payment into court or an 'open offer' of a substantial amount

v. Whether the application for security was being used oppressively e.g. so as to stifle a genuine claim

vi. Whether the plaintiff/appellant want of means has been brought about by any conduct by the defendant/respondent, such as delay in payment, or in doing their part of work and lastly,

vii. Whether the application for security is made at a late stage of the proceedings

23. Being guided by these legal principles, the only issue for determination is therefore whether or not an order for security for costs can issue against the appellant. As discussed above, one of the principles to consider is the ability or lack thereof of the appellant to pay the costs in the event that he is not successful. It is critical to balance between the needs for access to justice and the need to ensure that the respondent is not unduly disadvantaged – see **Johnstone Muchemi Gichiema v Moses Wekesa [2017] eKLR**

24. The applicant's apprehension that the appellant may not be able to settle the costs in the event that he does not succeed in his suit, informed by the fact that the appellant has not settled lower court costs as assessed since the 31st of July 2019. Furthermore, the 1st and 2nd respondent have submitted that they attempted to execute warrants of attachment for costs assessed by the lower court but the said warrants were returned as the appellant has no known assets. They have attached annexure marked ***JPO 2*** to prove the same. The authenticity of the same has not been contested by the appellant in his replying affidavit or submissions.

25. On his part, the appellant has not indicated that he is unable to pay the costs of the former suit or that he is indigent or that he is unable to pay into court security of costs if ordered by this court, although he does not make an effort to demonstrate that he is not a man of straw! Does delay by the appellant to make payment of costs assessed by the lower court in the former suit despite attempts by the applicants/respondents to attach properties of the appellant demonstrate that he is indigent? There is the converse, that the applicants may be making such demands so as to frustrate admission and subsequent hearing of the appeal.

26. I draw from the decision by the Court of Appeal in **Upward Scale Investments CO. Ltd & 7 Others v Mwangi Keng'ára & Co Advocates [2017] Eklr where the court pointed out that:**

> ***"…by the very nature for an order for security for costs, it is not directed towards enforcing payment of such costs. It is designed to ensure that a litigant, who by reason of near insolvency, is unable to pay the costs of litigation should he lose, is disabled from carrying on the litigation indefinitely, except upon terms and conditions which afford some measure of protection to the other parties…"***

27. In the case of **Johnstone Muchemi Gichema (supra)**, Prof Ngugi (J) stated that some of the factors to consider include ***"… absence of known assets within the jurisdiction of the court, … the general financial standing…, the bona fides of the claim."*** I take not that in this instance the claim that warrants were returned as the appellant has no known assets as shown in JPO 2 has not been contested by the appellant in his replying affidavit or submissions.

28. I note that the applicants have shown that the appellant has delayed in making payment assessed by the lower court, and also the fact that the warrants of attachment returned are on the basis that the appellant has no attachable property. Due to the foregoing and the muted silence from the appellant regarding the veracity of the contents of the warrant of attachment, I find merit in the prayer sought to the extent. The application is merited and the same be and is hereby allowed. However, taking into account the sums involved, and taking judicial notice of the current economic downturn resulting from the effects of the C19 pandemic, I find it reasonable to direct that the appellant deposits half the sum so ordered.

Costs of this application

29. It is trite law that costs follow the cause/event. **Section 27 of the Civil Procedure Act** provides that this ought to be followed. In particular, Section 27 states:

> **(1)Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:**
>
> **Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.**

30. In **Republic v. Rosemary Wairimu Munene (Ex parte Applicant) v. Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2004** Mativo J. held that the issue of costs is the discretion of the Court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party. This position was adopted by the court in **Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another [2016] eKLR.**

31. **In Morgan Air Cargo Limited v Evrest Enterprises Limited [2014] eKLR the court noted that:**

> ***"The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Cost follow the event'' was driven by the fact that there could be no ''one-size-fit-all'' situation on the matter. That is why section 27(1) of the Civil Procedure Act is couched the way it appears in the statute; and even all literally works and***

judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

32. This discretion must however be exercised judiciously. **Halsbury's Laws of England, 4th Edition (Re-issue), {2010}, Vol.10. para 16, notes:**

> **"The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice".**

33. Any departure from this trite law can only be for good reasons which the Supreme Court in ***Jasbir Singh Rai & Others vs Tarlochan Rai & Others {2014} eKLR*** noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain.

34. The question therefore that the court must ask is what are the determining factors that should be taken into consideration in determining the costs of any suit. This issue was addressed by the learned judge ***in Morgan Air Cargo Limited v Evrest Enterprises Limited (Supra)*** to include:

(i) the conduct of the parties

(ii) the subject of litigation

(iii) the circumstances which led to the institution of the proceedings

(iv) the events which eventually led to their termination

(v) the stage at which the proceedings were terminated

(vi) the manner in which they were terminated

(vii) the relationship between the parties and

(viii) The need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution.

35. Noteworthy, the list is not exhaustive. In other words, the court must be guided not only by the conduct of the parties in the actual litigation, but also other matters including likely consequences of the order for costs.

36. In the present case, there are no special circumstances to warrant a departure from this trite law. It is therefore my opinion that costs be awarded to the successful party in this case, the 1st and 3rd applicants/respondents.

Conclusion

37. Consequently, due to the afore-going reasons, I hold and find that the application is merited and the court be pleased to issue the following orders:

(1) The appellant/respondent be ordered to give half the security for costs amounting to Kshs. 473,931/- being security for his claim of Kshs.8,681,592 or any other sum the court deems fit into a joint interest earning account to be opened by the Advocates herein, as security for the costs of the respondents within 30 days of the order and pending admission of the appeal herein.

(2) That costs of Kshs. 212,920 being party costs that were assessed and awarded in the lower court shall abide the outcome of the pending appeal if admitted.

(3) Costs of the application awarded to the 1st and 3rd applicants'/respondents.

E-Delivered and dated this 9th Day of March 2021

H. A. OMONDI

JUDGE