REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E158 OF 2019

SUNFUNDER INC.....PLAINTIFF

VERSUS

MAYFAIR INSURANCE COMPANY LIMITED.....1ST DEFENDANT

UNDERWRITING AFRICA LIMITED.....2ND DEFENDANT

RULING

1. Through the application dated 23rd August 2019, the 1st Defendant/ Applicant seeks orders that: -

> ***1. Spent***
>
> ***2. The respondent do provide security for costs in the sum of Kshs 30,000,000/- or such sum as the court may order within fourteen (14) days of the order.***
>
> ***3. That the security be deposited in an interest earning account in the joint names of the Applicant's and Respondent's advocates.***
>
> ***4. That in default of the security for costs being provided, the respondent's suit be dismissed with costs to the applicant.***
>
> ***5. Costs for this application be provided for.***

2. The application is supported by the affidavit of the applicant's Legal Manager –claims **Ms Emma Mwangi** and is premised on the grounds that: -

> ***a) The Respondent instituted this suit seeking the sum of USD 2,250,000 emanating from the alleged breach of the Provisional Cover Note and Policy No. 01/01/046/00007/2017.***
>
> ***b) The Respondent is not a resident of the Republic of Kenya and has no known attachable assets within the jurisdiction.***
>
> ***c) The applicant is apprehensive that it will not recover its costs in the event that costs are awarded against the Respondent.***
>
> ***d) It is just and fair that the Respondent do provide for security for costs***.

3. The plaintiff opposed the application through the Replying Affidavit of **Mr. Ritesh Shah** who avers that the plaintiff is a leading international expert in solar finance providing innovative debt financing for solar enterprises working in emerging and frontier markets.

4. He further states that the plaintiff has substantial assets and solid financial bases and will therefore be able to meet the defendant's costs should they eventually be victorious.

5. On its part, the 2nd defendant filed a Preliminary Objection to the plaintiff's suit on the basis that the plaintiff was not a party to the insurance contract which forms the basis of the suit and therefore lacks the *locus standi* to bring the claim against the defendants.

a) Parties canvassed the application by way of written submissions which I have considered. I find that the main issues for determination are whether the Preliminary Objection is merited and whether the 1st Defendant has made out a case for the granting of orders for security for costs.

Preliminary Objection.

6. It is now a well settled principle that a preliminary objection must be on pure points of law not blurred by any factual details liable to be contested or proved through the production of evidence. In other words, a matter that requires investigation or the production of evidence for authentication does not qualify as a point to be raised in a preliminary objection.

7. What constitutes a Preliminary Objection was discussed in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696,** where it was held that:

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

8. The question which then arises is whether the Preliminary Objection raised herein is on pure points of law. The plaintiff's claim is that the 2nd defendant brokered the issuance of a Trade Credit Insurance Policy by the 1st Defendant in its favour. The Plaintiff seeks the following orders in the plaint: -

> ***a) A declaration that the 1st Defendant is bound to compensate the plaintiff the insured sum of USD 2,250,000.00 under Policy No. 01/01/046/00007/2017.***
>
> ***b) A declaration that the 1st Defendant refusal to respond to the plaintiff's claim as communicated on 31st July, 2018 is in breach of the Provisional Cover Note issued on 3rd August, 2017 and Policy No. 01/01/046/00007/2017.***
>
> ***c) USD 2,250,000.00, being the insured percentage of USD 2,500,000.00, together with interest at court rates from due date until payment in full.***
>
> ***d) General damages for breach of contract.***
>
> ***e) Costs of this suit together with interest thereon.***

9. A perusal of the averments contained in the pleadings filed by the parties herein shows that the existence of the insurance contract is an issue that is hotly disputed as while the 1st defendant claims that no such contract existed, the 2nd defendant asserts that there was a valid insurance cover in place at all material times. In my considered view, the existence of an insurance contract, the terms thereof and the parties thereto are not pure points of law but are matters of fact that can only be ascertained after receiving and considering the evidence from all the parties.

10. When faced with a similar scenario in ***David Onjili & Another v Lilian Isigi Muyeshi & 3 Others*** [2011] eKLR, the court held as follows: -

> ***"The 1st ground of objection is that the originating summons and the application are incompetent as no privity of contract exists between the plaintiff and the 1st and 2nd defendants. It is evident that a determination of this ground must involve ascertaining of fact which facts are in any event not agreed…. The second ground of objection is that the applicants lack locus –standi to invite the court to determine the existence or validity of the sale agreement dated 22nd September 2006 as they are not parties to it. How can a determination of this ground be made without a consideration of the said agreement? The existence, or validity of the said sale agreement can only be determined on a consideration of the evidence. Facts therefore have to be ascertained."***

11. Guided by the above cited cases, I am not persuaded that the preliminary objection raised over the plaintiff's *locus standi* and privity of contact in respect to the insurance cover in question falls under pure points of law as envisaged by the decision in ***Mukisa Biscuits*** case (supra). I therefore find that the preliminary objection is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the main suit.

Security for costs.

12. Order 26 Rules 1, 5 and 6 of the Civil Procedure Rules stipulates as follows: -

> ***"[Order 26, rule 1.] Security for costs.***
>
> ***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."***

[Order 26, rule 5.] Effect of failure to give security.

"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."

[Order 26, rule 6.] Investment of 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."

13. In ***Aggrey Shivona v Standard Group PIc*** [2020] eKLR it was held: -

"In an application for 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. The same must be proven. This was the holding in the case of Kenya Education Trust vs Katherine S.M. Whitton Civil Appel No. 310 of 2009."

14. The 1st defendant herein seeks security for costs on the basis that the plaintiff is a foreign company not resident in Kenya and has no known attachable assets within this jurisdiction. The applicant is therefore apprehensive that it will not be able to recover its costs should it eventually be successful in the suit.

15. On its part, the plaintiff argued that the 1st defendant did not adduce any evidence to show that it will be unable to meet any costs that may be ordered against it. It was the plaintiff's case that besides making mere allegations of that the plaintiff will be unable to settle its costs, the 1st defendant did not discharge the evidential burden placed on it by the law and that the defendant's apprehension was therefore merely speculative.

16. My finding is that the mere fact that the plaintiff is a foreign company does not necessarily connote that it lacks financial muscle to meet orders for costs that may be made against it thus entitling the defendant to an order for security costs. A similar position was adopted in ***Stratosat Datacom (Proprietary) Ltd v Raadgevend Bureau Krijger Services (Kenya) Limited & Another*** [2012] eKLR.

17. In the present case, I note that the plaintiff averred that it is a reputable company with substantial assets and finances, an averment that was not controverted by the defendants. I am therefore not persuaded that the instant application meets the threshold set for the granting of orders for security for costs.

Consequently, I find that the application dated 23rd August 2019 is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the main suit.

Dated, signed and delivered via Microsoft Teams at Nairobi this 4th day of March 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Ogolla for 1st defendant

No appearance for plaintiff

Court Assistant: Sylvia.