



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCC NO. 206 OF 2019

UNION DE BANQUES ARABES ET FRANCAISES-U.B.A.F.....PLAINTIFF

VERSUS

CHASE BANK KENYA LIMITED.....1ST DEFENDANT

KENYA DEPOSIT INSURANCE CORPORATION.....2ND DEFENDANT

(as the Receiver of Chase Bank Kenya Limited (in receivership))

SBM BANK KENYA LIMITED.....3RD DEFENDANT

RULING

Brief Facts

1. This ruling is in respect to the application dated 11th November 2019 in which the 1st and 2nd defendants seek the following orders: -

1) SPENT.

2) THAT the plaintiff be ordered to furnish security for costs in the sum of Kshs 16,270,000.00 by way of a bank guarantee or depositing the money in court within 14 days of the order of this honourable court pending the hearing and determination of this suit.

3) THAT they be a stay of any further proceedings until the Plaintiff complies with prayer number two or any order of the court for security for costs.

4) THAT the costs of this application be awarded to the 1st and 2nd defendants.

2. The application is brought under Order 39 Rules 5, 6, & 7 of the Civil Procedure Rules and Sections 1A, 1B & 3A of the Civil Procedure Act. It is supported by the affidavit of the 2nd defendant's Chief Executive Officer Mr. **Mohamud A. Mohamud** and is premised on the grounds that;

1) THAT the plaintiff is a foreign banking institution incorporated in France with its headquarters in Paris as pleaded in paragraph 1 of the plaint

2) THAT the plaintiff has filed a suit against the defendants in this honourable court seeking recovery of the sum USD 4,999,888.30 together with costs and interest at 6.7% per annum

3) THAT, the plaintiff is a foreign company with no known assets within the Republic of Kenya and if the 1st and 2nd defendants are successful in this suit, it will be difficult to recover costs from the plaintiff bank. It is therefore imperative and in the interest of justice that this honourable court directs the plaintiff bank to furnish security of costs.

3. The respondent/plaintiff bank opposed the application through the replying affidavit of its Head of Legal **Mr. Ahlija Romaric** who avers

that the 1st and 2nd applicants admitted that they owe the plaintiff money to the tune of Kshs. 541 Million that was paid to the 1st defendant pursuant to the Trade Credit Agreement dated 27th January 2016. He states that the contention between the parties is whether the sum was held in trust or whether the plaintiff was a normal creditor. He further states that should the defendants be awarded costs then they would easily set off the same from the amount due to the plaintiff. He also states that the plaintiff is an international banking institution with adequate financial capacity to settle any costs.

4. Parties canvassed the application by way of written submissions.

5. Counsel for the 1st and 2nd defendant submitted that the plaintiff's assertion that it has the financial capacity to settle any costs did not discharge its evidentiary burden to show that they had assets within Kenya. It was submitted that the filing of proceedings for recognition and enforcement of foreign awards would defeat the purpose and intent of Order 26 of the Civil Procedure rules 2010. For this argument, counsel referred to the case of *Cosmos Holidays PLC v Dhanjal Investments Limited* [2020] eKLR where the court allowed an order for security of costs because the Company had no known assets in Kenya.

6. The plaintiff, on the other hand, reiterated the contents of its replying affidavit and maintained that the application did not meet the threshold for the granting of orders for security pending the hearing and determination of the suit.

7. I have considered the pleadings filed herein, the rival arguments made by the parties and the authorities that they cited. I find that the main issue for determination is whether the defendants have made out a case for the granting of an order for security of costs.

8. The law governing orders for security of costs is set out under Order 26 of the Civil Procedure Rules which 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.

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 subrule (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.

9. In *Patrick Ngetakimanzi v Marcus Mutuamuluvi & 2 others*- High Court Election Petition No. 8 of 2013 Majanja J. held that: -

“Security of costs ensures that the respondent is not left without recompense for any costs or charges payable to him. The duty of the court is therefore to create a level ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access to justice vis-a-vis the respondent's right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him.”

10. In *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others*, CA No. 38 of 2013 [2014] eKLR, the Supreme Court emphasized 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. 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”.

12. 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 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 being dismissed.

13. Similarly, in *Aggrey Shivona v Standard Group Plc* [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 principle that emerges from the above cited authorities is that an order for security of costs is discretionary and ought to be exercised reasonably and judicially. The court has to consider the place of residence of the plaintiff, the conduct of the parties and the ability of the plaintiff to pay the costs. The court has to satisfy itself that it will be just to make an order of costs in the circumstances of each case.

15. It was not disputed that the plaintiff has no known assets within Kenya. The plaintiff’s status as an international banking institution was also not disputed. I have perused the court record and I note that the applicant has not stated that the plaintiff will not be able to satisfy an order of costs. In *Europa Holdings Limited v Circle Industries (UK) BCLC 320 CA*, it was held that it must be proved that the Plaintiff would not be able to pay the costs at the end of the case.

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

17. In the present case, the plaintiff averred that the defendants owe it a colossal amount of money which averment 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. I also find that the Applicant has not established that the Plaintiff will be unable to meet its obligations for costs should it lose the suit. My finding is that the application is unmerited 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 13TH DAY OF MAY 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:

Mr. Musyoka for Kago for Defendants/Applicants.

Ms Njuguna for Rimui for Plaintiff/Respondent.

Court Assistant: Sylvia.