



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 309 OF 2016

NEW MILIMANI SACCO LIMITED.....PLAINTIFF

VERSUS

SACCO SOCIETIES REGULATORY AUTHORITY (SASRA).....DEFENDANT

RULING

INTRODUCTION

1. The Defendant's Notice of Motion application dated 15th June 2017 and filed on 4th July 2017 was filed pursuant to the provisions of Order 26 Rules 1, 5 (1) and 6 (1) of the Civil Procedure Rules, 2010, Section 63 of the Sacco Societies Act No 14 of 2008 and such other or further provisions of law as are relevant and applicable. It sought the following orders:-

A. THAT the Honourable court be pleased to order the Plaintiff/Respondent to deposit the sum of Kenya Shillings Twenty Five Million (sic) (Kshs 25,000,000/= or other sum this Honourable Court deems fit into court as security for costs within seven (7) days.

B. THAT this Honourable court be pleased to order that the aforementioned Kenya Shillings Twenty Five Million (Kshs 25,000,000/=) be deposited in a joint account in the name of Rachier & Amollo Advocates and Maina Rogoi & Company Advocates.

C. THAT the Honourable Court be pleased to order that unless the security for costs is deposited herein then this Honourable court may determine the Plaintiff/Respondent's suit as dismissed with costs.

D. THAT the Honourable Court be pleased to prohibit the Plaintiff/Respondent from carrying on deposit taking business forthwith until the determination of the suit herein.

E. THAT the Honourable Court be pleased to allow and direct the Defendant/Applicant or in the alternative the Commissioner of Cooperatives to step in and investigate and confirm to this Honourable Court that the Respondent has ceased doing deposit taking business.

F. THAT the costs of this application be provided for.

2. The Defendant's Written Submissions were dated 19th October 2018 and filed on 31st October 2018 while those of the Plaintiff were dated 5th November 2018 and filed on 6th November 2018.

3. Parties requested the court to render its decision based on its Written Submissions which it relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE DEFENDANT'S CASE

4. The Defendant's present application was supported by the Affidavit of John Mwaka, that was sworn on 15th June 2017. His Further Affidavit was sworn on 30th October 2017 and filed on 2nd November 2017.

5. Its contention was that it was a Statutory Corporation established under Section 4 of the Sacco Societies Act Cap 490B (Laws of Kenya) which had the mandate to License Sacco Societies to undertake deposit- taking Saccos and to regulate and supervise Saccos.

6. It stated that although the Plaintiff had submitted applications for a deposit taking license, the same was rejected. Concerns were brought to its attention during three (3) meetings to the effect that the Plaintiff was representing itself to members of the public and other government agencies as conducting deposit taking Sacco business yet it was not licenced.

7. The Plaintiff therefore filed suit against it on the ground that it had suffered due to its defamatory publications which resulted to losses amounting to Kshs 522,302,287/=, which included Kshs 123,991,701/= loss arising from mass withdrawal of members. The Plaintiff also stated that there was a withdrawal of special deposits amounting to Kshs 45,000,000/= and further losses amounting to Kshs 13,787,707/=. As a result, it was financially in the red and was not making profits in its operations. It was its case that the liquidated sum of Kshs 500,000/= would attract legal fees in excess of Kshs 20,000,000/= under the Advocates Remuneration Order.

8. It averred that the Plaintiff was relying on members deposits and loans which could not be considered as money or expended to legal costs. It added that the loss of over five hundred million shillings (Kshs 500,000,000/=) well exceeded the Plaintiff's assets and cash in hand.

9. It therefore urged this court to allow its application.

THE PLAINTIFF'S CASE

10. In response to the said application, the Plaintiff's Chairman, Julius Kiburi Wambugu, swore a Replying Affidavit on its behalf filed on 1st August 2017.

11. It stated that it had in excess of Seventy thousand (70,000) members with eleven (11) branches but that the Defendant rejected its application for deposit-taking business. It averred that the Defendant further published in the Daily Nation of 11th September 2015 warning members of public that it was not licensed to take deposits leading to losses amounting to Kshs 533,308,287/=.

12. It stated that it filed an application in the Judicial Review Division where Odunga J directed the Defendant to issue it with a license within thirty (30) days and to pull down all publications. However, the Defendant had not complied with the orders at the time of filing its application and had continued to harass it in its operations.

13. It said that its net worth was Kshs 1,000,000,000/= which assets could be used to pay the Defendant's costs in the event it was to succeed in the matter herein.

14. It therefore urged this court not to allow the application herein.

LEGAL ANALYSIS

15. The court has carefully analysed the parties' Written Submissions and case law and noted that they were both in agreement the circumstances under which security of costs could be ordered and further that it was a matter of discretion of the court to order the same.

16. The Defendant relied on the cases of **Alice Aloo Betty Were Thompson vs Said Mohamed Said & Others [2014] eKLR**, **Cosmos Holidays PLC vs Dhanjal Investments Ltd HCCC No 112 of 2012 (O.S) (unreported)** amongst several other cases where the common thread was that security of costs will be ordered to be paid to a defendant where it was proved that a plaintiff would not be able to pay costs of the defendant if the plaintiff was to lose its case and costs were awarded to the defendant.

17. It also submitted that it had demonstrated a good case for the Plaintiff to be restrained from carrying on deposit-taking business. It was emphatic that it had a *prima facie* case with high chances of success. It relied on the case of **Giella vs Cassman Brown & Co Ltd [1973] EA 358** and **Kenya Breweries Ltd & Another vs Washington O Okeya [2002] eKLR** to buttress its argument why it ought to be granted an interlocutory, as well as a mandatory, injunction .

18. On the other hand, the Plaintiff relied on the cases of **Kearry Developments vs Tarmac Construction [1995] 3 All ER 534**, **Gulf Engineering (East Africa) Ltd vs Amrik Singh Kalsi & Another [1976] eKLR** amongst other cases where the holdings were generally that security for costs should not be awarded against a plaintiff if the effect was to stifle a plaintiff not to pursue a genuine claim. It averred that it should only be granted when a claim was frivolous. It denied ever having offered FOSA services to its clients and urged this court to be allow it to pursue its claim to conclusion without any hindrance in form of paying costs.

19. Order 26 of the Civil Procedure Rules, 2010 provides as follows:-

“In any suit, the court may order that security for the whole or any part of the costs of any defendant or third party or subsequent party be given by any party.”

20. The use of the word “**may**” connotes that security of costs is not ordered to be paid as a matter of course but rather it is a discretionary power that must be exercised judiciously. It is a delicate balance between not stifling a plaintiff from pursuing a genuine claim against a defendant and at the same time not leaving the defendant exposed with no possibility of ever recovering any costs should it successfully defend the suit against it.

21. The parties herein delved at length on the merits or otherwise of the Plaintiff's case. This court was hesitant to jump into those submissions as there was a risk of arriving at an erroneous conclusion because the bulk of the evidence was in the parties' Bundle of Documents to be submitted during trial and not in the Affidavit evidence that was submitted by the parties herein. That was an issue for determination by the Trial Court.

22. A cursory look at the Plaintiff's claim shows that it was claiming a sum of Kshs 522,308,287/= from the Defendant herein. That was a colossal sum. The party and party costs herein would and eventually the legal costs definitely be colossal. It would be foolhardy to leave the Defendant herein without any form of protection in case it was to successfully defend the suit herein.

23. Similarly, it would be a violation of the Plaintiff's constitutional right under Article 50 of the Constitution of Kenya, 2010 not to give it an opportunity to freely ventilate its case fairly without being stifled. Balancing the right of the Defendant not to be deprived its economic rights should the Plaintiff lose the case herein and the Plaintiff's right to a fair hearing and to access court, it was the considered opinion that this would be an appropriate court to order for payment of security for costs. Indeed, this court also noted that the Defendant had filed a Counter-claim which it could also lose if it did not prove the same.

24. As the Defendant correctly pointed out, the Plaintiff had placed reliance on members deposits. However, this did not mean that it was liquid or that it could liquidate its assets that it valued at Kshs 1,000,000,000/= immediately the Defendant was to demand its costs, if at all it successfully defended the suit herein and was awarded costs.

25. In arriving at the said conclusion, this court associated itself with its holding in the case of **Alice Aloo Betty Were Thompson vs Said Mohamed Said & Others** (Supra) where it exercised its discretion and ordered the plaintiff therein to pay security of costs. As the Plaintiff's assertion that Odunga J directed the Defendant to issue it with a deposit-taking license and the same had not been complied with as at the time of the filing of the application herein and bearing in mind that the Defendants Counter-claim, could also be dismissed, if not proven on a balance of probability it was the considered view that a sum of Kshs 10,000,000/= would be adequate to safeguard the Defendant's interests pending the hearing and determination of the suit herein.

26. As the Plaintiff averred that it had assets well over Kshs 1,000,000,000/=, it was the considered view of this court that a sum of Kshs 10,000,000/= as deposit for security for costs would not be substantial so as to stifle the Plaintiff's right to pursue its claim against the Defendant herein.

27. This court was not persuaded that it should grant an interlocutory or mandatory injunction as the Defendant had prayed for as the facts which relied upon to support its prayer were highly contested. They were best determined during trial.

DISPOSITION

28. For the foregoing reasons, the upshot of this court's decision was that the Defendant's Notice of Motion application dated 15th June 2017 and filed on 4th July 2017 was merited and the same is hereby allowed in the following terms:-

1. THAT the Plaintiff shall deposit into a joint interest earning account in the name of its advocates and the name of the Defendant's advocates a sum of Kshs 10,000,000/= within sixty (60) days from today i.e by 17th July 2019

2. THAT in the event the Plaintiff shall not comply as aforesaid, the Defendant will be at liberty to take such appropriate steps to safeguard its interests.

29. It is so ordered.

DATED and DELIVERED at NAIROBI this 16th day of May 2019

J. KAMAU

JUDGE