



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 124 OF 2015

IMPERIAL BANK LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

PETER KIRONJO MWAURA.....1ST DEFENDANT/RESPONDENT

FOTON EAST AFRICA LIMITED.....2ND DEFENDANT/APPLICANT

RULING

1. This ruling relates to a notice of motion application dated 19th November 2015 filed by the 2nd Defendant (herein “the Applicant”); seeking for orders that:-

- (a) *The Plaintiff do furnish security of costs in the sum of Kshs. 6,214,073 within fourteen (14) days from the date of the order;*
- (b) *The sum of costs for security be deposited in an interest earning account in the joint names of the Advocates on record for the Plaintiff and the 2nd Defendant;*
- (c) *In default, the Plaintiff's suit against the 2nd Defendant do stand dismissed with costs; and*
- (d) *That costs of the application be borne by the Plaintiff*

2. The application is based on the provisions of; Section 1A, 1B & 3B of the Civil Procedure Act, Order 26 Rules 1, 5 and 6 and Order 51 Rule 1 of the Civil Procedure Rule, 2010. It is supported by the grounds thereto and an affidavit sworn of even date by George Osewe, the Applicant's General Manager. He avers that the Plaintiff/Respondent was placed under Receivership by Central Bank of Kenya due to unsafe and unsound business conditions. It has closed its business operations and is in the danger of winding up all together.

3. In consequence of the aforesaid and in the interest of the public and to protect investors, the Capital Market Authority has directed the Nairobi Stock Exchange to suspend the listing and trading of the corporate bond issued by the Plaintiffs, which closed on 17th September 2015. However, the investors have failed to comply with the Central Bank of Kenya's proposals and intent to facilitate recovery and re-opening of the Bank. As a result, it is unlikely that the Plaintiff/Respondent will meet the Applicant's costs in the likely even that the suit against the Applicant fails.

4. However, the Respondent filed a Replying affidavit dated 8th February 2016, sworn by its appointed Receiver Manager, Mr Mohamud Ahmed. He deposed that, although the Plaintiff has been placed under Receivership, it is not undergoing liquidation. The Receivership is scheduled to last up to a maximum of twelve (12) months only. That the appointed Receivers and Kenya Deposit Insurance Corporation (KDIC) have declared a Moratorium to business for all Plaintiffs' stakeholders during the Receivership period. However that does not incapacitate the Receivers from meeting its legal obligations such as legal costs (if any) is ordered by a court of law.

5. The Plaintiff/Respondent described the application as oppressive, lacking in merit and meant to defeat its genuine claim of Kshs. 6,214,073.23 payable to the Plaintiff and that there is no counter-claim to the same, therefore the claim of the same as security for costs lacks merit. In the alternative and at the remote chance, any costs awarded would be in accordance with provisions of the Advocates Remuneration Order and will not be colossal sum as per the circumstances of the present case. Further no evidence has been adduced that the Plaintiff/ Respondent lacks capacity to pay the costs if any are ordered. The Application is thus merely meant to delay the hearing of the main suit.

6. The parties deposed of the application by filing submissions which I have considered herein. The Applicants submitted that, the court of

Appeal in the cases of: Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others (2014) eKLR and Noormohamed Abdulla vs Ranchhodbhal J. Patel & Another (1962) E.A. 448, stated that the purpose of security for costs is to offer protection to the successful party, in the event the unsuccessful party is unable to pay costs due to poverty. The Applicant further referred to the principles to consider in an application seeking for an order for security for costs as laid down in the case of; Keary Development vs Tarmac Construction (1995) 3 ALL ER 534, and submitted that, the circumstances of this case, warrant the grant of the orders sought. as the Applicant has a good defence against the Plaintiff's claim.

7. However, the Plaintiff however submitted that, the Applicant has failed to prove its inability to pay the costs and mere allegations are not sufficient. The cases of; Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others (supra) and Marco Tool & Explosives Ltd vs Mamunye Brothers Ltd (1988) KLR 730, were referred to. It was further submitted that, Receivership per se is not a ground for granting security for costs. Reference was made to the case of; Indigo Garments (EPZ) Ltd (In Receivership) vs Apex Apparels (EPZ) Ltd (2004) eKLR. The Plaintiff/Respondent argued that the statement of defence filed is a mere denial and has no chance of succeeding.

8. I have considered the application, the grounds and the affidavit in support thereof. I have also considered the affidavit in opposition thereto and the submissions filed by the respective parties. I find that, as well stated in the authorities cited by the parties, the grant of an order for security for costs is at the discretion of the court depending on the circumstances of each case. One of the factors to consider while exercising the discretion without delving into the merits of the case is, the prospects of success of the Plaintiff's case.

9. In the instant case, the Plaintiff seeks for judgment against the Defendants for a sum of Kshs. 6,214,073.23 plus interest on the same at a rate of 9% per annum and in default, penalty rate of 4% per annum last applied on 6th June 2011 plus costs of the suit. The Plaintiff avers that the sum claimed arises out of a credit facility of Kshs. 6,800,000 advanced to the 1st Defendant by the Plaintiff and guaranteed by the 2nd Defendant. The credit facility was used to purchase a Foton Tipper Truck registration No. KBP 783K from the 2nd Defendant on Hire Purchase Agreement. That the 2nd Defendant also signed a Buy-Back Guarantee Agreement dated 24th May 2011, with the Plaintiff; to re-purchase the truck in case of default by the 1st Defendant.

10. It is averred that, the 1st Defendant has never serviced the loan after disbursement and has defaulted on the same and that the 2nd Defendant promised to pay the loan vide a letter dated 26th September 2014, but did not pay. Hence the suit.

11. However, the 2nd Defendant/Applicant avers that, the Plaintiff has no valid and/or enforceable Buy-Back Guarantee Agreement and that none exists between it and the Plaintiff as alleged or at all. Further the Plaintiffs claim is against the 1st Defendant. The liability of the 2nd Defendant if at all, is not was possible to conclude at this stage, in that the Plaintiff has no case on a prima facie basis. Neither can it be argued that the defence is hopeless.

12. That the sum claimed was extinguished due to laches by the Plaintiff to recover the debt from the 1st Defendant and/or allowing the 1st Defendant time to pay the debt without the Applicant's knowledge, thus varying the terms of the facility and consequently discharging the Applicant. Similarly, the Applicant was discharged by the Plaintiff failure to repossess the motor vehicle in good time and present it for re-purchase.

13. From the aforesaid pleadings, it is clear that the court has to determine, inter alia, the existence and/or validity of the alleged Buy-Back Guarantee Agreement, and whether the Plaintiff has discharged the Applicant from liability as argued. These issues can only be determined from evidence. In that case, without going into the merit of the case, it cannot be concluded on affidavits evidence that the Plaintiff has no valid claim against the 2nd Defendant or the 2nd Defendant's defence is hopeless.

14. Be that as it may, the other issue to consider is whether the Plaintiff will be able to pay the costs if any is awarded. In that regard I find that it is a fact Plaintiff/Respondent is under Receivership and/or the management of the appointed Receivers Kenya Deposit Insurance Corporation. The Receivers are responsible for defending any claim against the Plaintiff and therefore liable to pay for any costs ordered. There is no evidence that, if the Applicant succeeds, the Plaintiff will be unable to pay any costs ordered. Even then the sum claimed as security for costs is the sum sought for by the Plaintiff's. The Applicant has not justified why the claim for that sum in particular.

15. Therefore, taking into account the circumstances of the entire case herein, I find that, there are no sufficient reasons to grant the orders sought for and I dismiss the application with costs to the Plaintiff/Respondent.

16. It is so ordered.

Dated, delivered and signed in an open court this 16th day of October 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Ms. Mutua for the Plaintiff/Respondent

No appearance for the Defendant/Applicant

Dennis

-----Court

Assistant

