

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 82 OF 2019

CLAIRMONT INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

CHINA COMMUNICATIONS

CONSTRUCTION COMPANY LIMITED.....DEFENDANT

RULING

The Application before Court for determination is the Plaintiff's Notice of Motion dated the 17th September, 2019 brought pursuant to section 1A, 1B, 3A of the Civil Procedure Act as well as Order 51 Rule 1 of the Civil Procedure Rules. The Plaintiff seeks for the Defendant to be compelled to provide security of Kshs. 25 million for the performance of the Decree that may ultimately be binding together with costs thereat. In the alternative, an amount of Kshs. 25 million in the Defendant's Bank Account at Standard Chartered Bank Account Number [...] be retained and deposited in court as security for performance of any Decree against it. The Application is premised on the grounds on the face of it and the supporting affidavit of JOHN GITATA MWANGI its Director where he deposes that in this suit, the Plaintiff seeks compensation against the Defendant for the current value of land parcel number Kajiado/ Kitengela/ 16776 as a result of its illegal as well as wrongful construction of a septic tank on the said land. He contends that the Defendant is a foreign company contracted by the government with the construction of the Standard Gauge Railway from Mombasa to Naivasha that has finalized its work and packing up to leave the country. He claims the Defendant has no known assets in the country and therefore execution of a Decree against it will be fruitless. Further, the Defendant has no local office and the amount sought is liquidated.

The Defendant filed Grounds of Opposition dated the 18th October, 2019 where it avers that contrary to Order 39 Rule 5 of the Civil Procedure Rules, the affidavit sworn by the Plaintiff does not contain any material or evidence showing that the Defendant intends to obstruct or delay execution of any Decree. Further, that under Order 26 Rule 1 of the Civil Procedure Rules, security for costs can only be ordered in favour of a Defendant or a third or subsequent Party and not the Plaintiff. It contends that the Plaintiff does not have any evidence or material showing that the Defendant has a Bank Account at Standard Chartered Bank Account Number [...] and the said account has Kshs. 25 million.

The Plaintiff and the Defendant filed their respective submissions to canvass the instant application.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 17th September, 2019 including the supporting affidavit, Grounds of Opposition and parties' submissions, the only issue for determination is whether the Defendant should be compelled to offer security of costs amounting to Kshs. 25 million.

The Plaintiff in its submissions reiterated its claim and relied on the case of **Juanco SPS Limited Vs Dominion Farms Limited (2018) eKLR** to buttress its arguments. The Defendant in its submissions averred that no material has been placed before the court to prove that the Defendant intends to obstruct or delay the execution of any Decree that may be passed against it. Further, that no evidence has been presented in court to prove the Defendant owns the aforementioned account. It relied on the case of **Christopher Musyoka Musau V Katherine Brown (2018) eKLR** to buttress its arguments.

Order 26 Rule 1 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 or subsequent party be given by any other party”.

While Order 39 Rule 5 of the Civil Procedure Rules stipulates that: “ (1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him— (a) is about to dispose of the whole or any part of his property; (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security. (2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof. (3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.”

In the case of **Shah V Shah [1982] KLR 95** the Court stated 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”.

In the current scenario, the Plaintiff claims that the Defendant is packing up and leaving the country which fact it has not substantiated. Further, it claims the Defendant holds the aforementioned account at Standard Chartered Bank but has not presented any documents to that effect. The Plaintiff has also not demonstrated that the Defendant intends to dispose of the whole or any part of its property or is about to remove its property from the local limits of this court’s jurisdiction. The Defendant has reiterated that it has a local office and no materials have been placed before court to prove the Plaintiff’s averments. From a reading of Order 26 Rule 1 of the Civil Procedure Rules, it is evident that it is actually the Defendant or a third party who should be applying for security for costs and not the Plaintiff. In the case of **Juanco SPS Limited Vs Dominion Farms Limited (2018) eKLR** which the Plaintiff relied upon, it differs from the circumstances at hand as there were invoices including delivery notes evidencing that there was a claim due and owing against the defendant company. Further, the defendant company was experiencing financial difficulties as supported with the public Auction where its assets were advertised for sale . Based on the circumstances at hand as well as the legal provisions cited above while associating myself with the decisions of **Sakafu Limited v Flowcrete East Africa Limited 2019] eKLR and Christopher Musyoka Musau V Katherine Brown (2018) eKLR** where the Judges declined to grant security for costs as against the Defendants therein, I am not satisfied that the Plaintiff has fulfilled the threshold where the Defendant deserves to grant it security for costs at this juncture.

It is against the foregoing that I find the Notice of Motion dated the 17th September,2019 unmerited and will proceed to dismiss it with costs.

Dated Signed and Delivered via email this 26th Day of May, 2020.

CHRISTINE OCHIENG

JUDGE