



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 335 OF 2001

E. J. AUSTIN 1ST PLAINTIFF

M. E. AUSTIN 2ND PLAINTIFF

AUSTIN & PARTNERS LTD 3RD PLAINTIFF

V E R S U S

RIM GONG KYU 1ST DEFENDANT

CHON JEUM SUK KIM 2ND DEFENDANT

RULING

1. Before me are two applications.
2. I will begin by considering the Notice of Motion dated 20th June 2014. That Notice of Motion is filed by the Defendants who seek an order for security for costs to be made against the Plaintiffs. Defendants seek security of costs of Kshs. 30,000,000/-. That amount of security of costs is inflated by the Defendants including potential costs of other cases other than this one that they have with the Plaintiffs. In my view that is incorrect approach, in each such case the Defendants should seek separate application of security for costs in the respective files.
3. In the Notice of Motion dated 20th June 2014 the Defendants seek an alternative prayer that the Court do issue prohibitory order against property **Mbsa/Block XXI/216** registered in the names of the 1st and 2nd Plaintiffs.
4. The Notice of Motion is based on the grounds that the Defendants are owed costs in various bills of costs; that the Plaintiffs' only asset is the immovable property; and that they are informed, the source of that information is not disclosed, that the Plaintiffs are intending on migrating to Canada.
5. The application is opposed by the Plaintiffs. The 1st Plaintiff admitted that the 2nd Plaintiff resides in Canada. The Plaintiffs also queried the amount of Kshs. 30,000,000/- costs claimed by Defendant, which costs the Plaintiffs state were unexplained.

ANALYSIS

6. Order 26 of the Civil Procedure Rules and more particularly Rule 4 gives the Court discretion to order security for costs to be provided by the Plaintiff. That Rule provides as follows-

“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.”

The Plaintiffs relied and reproduced extract of Mulla The Code of Civil Procedure, but the Plaintiffs did not attach that extract to their submission and I am unable to confirm its authenticity.

7. The Court of Appeal in the case **PANCRAS T. SWAI –Vs- KENYA BREWERIES LIMITED [2014]eKLR** on issue of security for costs stated thus-

“The discretion of the High Court to order security for costs is explicit. Njagi, J. correctly observed:

“Wide and unfettered as this power (to order costs) may be however, it should be exercised reasonably and judiciously, having regard to all the circumstances of a particular case.”

Justice F. Tuiyott in the case **OCEAN VIEW BEACH HOTEL LIMITED –Vs- SALIM SULTAN MOLOO & 5 OTHERS [2012]eKLR** also had the following to say on application for security for costs-

“Court of Appeal in Civil Appeal No. 9 of 2005 Messina & Another –Vs- Stallion Insurance Co. Ltd [2005]1 EA 264 (CAK) embraced the principles laid down in Keary Development –Vs- Tarmac Construction [1995]3 ALL EK 534 as the guide on how a Court should exercise its discretion on whether to order a Plaintiff Limited Company to provide security for costs to a Defendant in a suit.”

The principles laid down in Keary Development Ltd are summarized as follows-

- 1. The Court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.**
- 2. The possibility or probability that the Plaintiff Company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security.**
- 3. The Court must carry out a balancing exercise. On the one hand it must weigh the injustice to the Plaintiff if prevented from pursuing proper claim by an order for security. Against that, it must weigh the injustice to the Defendant if no security is ordered and at the trial the Plaintiff’s claim fails and the Defendant finds himself unable to recover from the Plaintiff the costs which have been incurred by him in his defence of the claim.**
- 4. In considering all the circumstances, the Court will have regard to the Plaintiff Company’s prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure.**
- 5. The Court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount, it is not bound to make an order of a substantial amount.**

6. Before the Court refuses to order security on the ground that it would unfairly stifle a valid claim, the Court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled.

7. The lateness of the application for security is a circumstance which can properly be taken into account.”

8. Having in mind the Law and the legal authorities I find that the Defendant’s application is merited. The 1st Plaintiff in his replying affidavit confirmed that the 2nd Plaintiff is settled in Canada. Although an allegation was made that there were plans to sell the immovable property and thereafter the 1st Plaintiff was to migrate to Canada the 1st Plaintiff did not categorically deny the same in his Replying Affidavit. It is with that in mind that I will order that an inhibition order be issued and be registered against the immovable property.

9. The second application before me for consideration is brought by Housing Finance Company of Kenya Ltd (HFCK), entitled in that application as affected party.

BACKGROUND

10. Judgment was entered in favour of the Plaintiffs against the Defendants on 19th October 2006. The Defendants were aggrieved by that judgment and accordingly filed an appeal to the Court of Appeal being **Mbsa Civil appeal No. 265 of 2010**. The Defendant filed in this case an application before this Court for stay pending the hearing and determination of that appeal. Stay was granted on 18th February 2010 on condition that the Defendants would deposit Kshs. 6,000,000/- in interest earning joint account of the parties Advocates.

By then the Defendants were represented by Kanyi J. & Co. Advocates while the Plaintiffs were then and are still represented by Kamoti & Co. Advocates.

11. From the records in the file it seems that the said deposit of Kshs. 6,000,000/- was deposited in the joint names of those Advocates at an account opened at HFCK.

12. The Defendants were successful in challenging judgment against them at the Court of Appeal. Judgment of the Court of Appeal was delivered on 7th October 2013. Having succeeded in the Court of Appeal the Defendants have not to date received the amount held in the joint interest account of the Advocate which the Court ordered be opened as a condition for stay pending appeal.

13. The Defendants were in my view ill advised to file a suit against HFCK for an order of disclosure of the amount held in the joint account of Kanyi, J and Kamoti & Co. Advocates. Defendant filed that case being **Mbsa Misc. Application No. 178 of 2014 (OS)**. Defendants had sued HFCK as the 1st Defendant, Kanyi J & Co. Advocates as the 2nd Defendant and Kamoti & Co. Advocates as the 3rd Defendant. The suit was vigorously opposed by the Defendants and judgment was delivered on 28th August 2014. The finding of the Court is captured by the following extract-

“I find and hold that Applicant was not a party to the contract between the Respondents and was not to benefit from the terms thereof and therefore cannot enforce any term in that contract. It is important to state that looking at that contract there is no provision of the rate of interest applicable to the contract. In any case Applicant has no locus to bring this action.

I also make a finding that in view of the provisions of the Banking Act reproduced above the 1st Respondent is estopped from making the disclosure Applicant seeks.

This is a case without merit. It is hereby dismissed with costs to the

Respondents.”

14. By letter dated 12th September 2014, the following consent was recorded in this matter by the Deputy Registrar on 17th September, 2014-

“12th September 2014

The Deputy Registrar

High Court of Kenya

MOMBASA

Dear Sirs,

RE: HCCC NO. 335 OF 2001

E. J. AUSTINE & OTHERS –VS- KIM JONG KYU & ANOR

We the undersigned shall be grateful if the following consent is recorded.

“By Consent” the sum of Kshs. 6,000,000/- deposited in Housing Finance Co. Limited A/c No. TD 300-0011294 in the names of Kanyi J. & Co. Advocates and Kamoti & Co. Advocates be released as follows.

Kshs. 4,500,000/- with all added accrued interest be released to Kim Jong Kyu and balance of Kshs. 1,500,000/- be deposited in joint interest earning account in the name J. A. Abuodha & Co. Advocates and Gikandi & Co. Advocates pending the outcome of the taxation of the Bills of Costs filed by Gikandi & Co. Advocates.

Yours faithfully,

KAMOTI & CO. ADVOCATES

ADVOCATES FOR THE PLAINTIFF

KANYI & CO. ADVOCATES

FORMER ADVOCATES FOR THE DEFENDANT

J. A. ABUODHA & CO. ADVOCATES

ADVOCATES FOR THE DEFENDANT

GIKANDI & CO. ADVOCATES

ADVOCATES FOR THE APPLICANT.”

It is important to state that the firm of Gikandi & Company Advocates acted for the Defendants before the Court of Appeal, when Defendants succeeded in having the High Court judgment against them set aside. It is also important to state that the firm of J. A. Abuodha & Company Advocates is now representing the Defendants in this case in place of Kanyi & Company Advocates.

NOTICE OF MOTION DATED 9TH OCTOBER 2014

15. That consent reproduced above provoked the Notice of Motion dated 9th October 2014 by HFCK. HFCK seek that the Court do “***set aside the purported Court order issued on 17th September 2014 for being a nullity in Law.***” That is that the Court do set aside the Consent.

16. HFCK has relied on various grounds in support of their prayer.

17. On the ground that the Defendant have lodged an appeal against the judgment in **Mbsa Misc. Application No. 178 of 2014(OS)** and to effect the consent would, according to HFCK, lead to the “**death**” of that appeal has no basis at all. The very parties who were holders of the account at HFCK have consented to the release of the funds held by HFCK. These are Kamoti & Co. Advocates and Kanyi & Company Advocates. Much more I believe there are important legal issues which were the subject of the judgment in **Misc. Application No. 178 of 2014 (OS)** which the Court of Appeal would deal with in that appeal and which issues would not be affected by the consent.

18. The fact that the Court by its judgment in **Misc. Application No. 178 of 2014 (OS)** declined to order release of information on fund or order release of the funds to Defendant is not an impediment to giving effect to the parties consent. Further, this Court is not *functus officio*. Again I repeat Kanyi J & Co. Advocates and Kamoti & Co. Advocates, in whose account the funds are held at HFCK have consented to the release of those funds. HFCK is merely holding those funds to their account and if those firms of Advocates consent to release of those funds to Defendants there can be no basis for refusing to such release.

19. On the whole I have considered parties affidavit, their submissions and legal authorities. The Defendants’ Learned Counsel Ms. J. A. Abuodha is right to have relied on the case **SKYVIEW PROPERTIES LIMITED –Vs- ATTORNEY GENERAL & 2 OTHERS [2009]eKLR**. That is a case on point in regard to the facts in this case. The Court in that case referred to often cited case of **FLORA N. WASIKE** (supra) as follows-

“The principles governing variation of consent judgments/orders was settled in the case of Flora N. Wasike –Vs- Destimo Wamboko Court of Appeal at Kisumu reported in (1982-88)1 KAR 625. The Court held inter alia that-

‘... a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract for example fraud, mistake or misrepresentation.’

And further that-

“The Court would not readily assume that a judgment recorded by a Judge as being by consent was not so unless it was demonstrably shown otherwise.”

20. The following cases were also cited **in JAMES MURIUNGI M/MWIRICHIA –Vs- AGNES NTHANGI MWIRICHIA BUNDI [2014]eKLR** viz-

“In PURCELL VERSUS FC TRIGELL LTD (1970)3 ALL ER 671 WINN LJ SAND at 676-

‘It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of material matters by legally competent persons, and I see no suggestion here that any matters that occurred would justify the setting aside or rectification of this order looked at as a contract.’

In HIRANI VERSUS KASSAM (1952)19 EACA 131 at page 134 Court of Appeal stated-

‘The mode of paying the debt is part of the consent judgment that being so the Court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding on contract between the parties. No such ground is alleged here

‘Prima facie, only order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court ... or if the consent was given without sufficient material facts, or in general for a reason which would enable the Court to set aside an agreement.’

CONCLUSION

21. The only way I can conclude the Ruling of the application of 9th October 2014 is by citing the Affidavit of Kim Jong Kyu one of the Defendants as follows-

“That there are no tangible grounds given by the affected party on why they can’t release the money after the consent of all parties to do so and after the Court Ruling, the consent judgment is binding.”

22. In the end the following are the orders of this Court-

(a) On the Notice of Motion dated 20th June 2014 an inhibition order is hereby issued as per Section 68(1) and (2) of the Land Registration Act 2012 to be registered against the property MOMBASA/BLOCK XXI/216 until further orders of this Court.

(b) The Defendants are awarded costs of Notice of Motion dated 20th June 2014.

(c) On Notice of Motion dated 9th October 2014 the Court orders Housing Finance Company Limited to release funds as ordered by the Consent issued by this Court on 17th September 2014, within seven (7) days from the date of this Ruling.

(d) The Defendants are awarded costs of Notice of Motion dated 9th October 2014 to be paid by Housing Finance Company Limited.

It is so ordered.

DATED and DELIVERED at MOMBASA this 5TH day of MARCH, 2015.

MARY KASANGO

JUDGE