REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.474 OF 2011

ESSAR TELECOM KENYA LIMITED ……..…...………………..PLAINTIFF

VERSUS

JOSEPH ONDONGO OKUMU &

ROSELYNE AKEYO OKUMU

T/A REGIONAL INSTITUTE OF BUSINESS MANAGEMENT…………………………………………….DEFENDANTS

RULING

The defendant's application is dated 1st September 2014. The application is brought under the provision of Order 26 Rules 1,5,and 6 of the Civil Procedure Rules, Sections 1A,1B and 3A of the Civil Procedure Act and all enabling laws.

The defendants seek orders that the plaintiff be ordered to furnish security of costs in the sum of kshs 2,000,000 within 14 days from the date of the order; which security should be deposited in an interest earning account in the joint names of the advocates on record for the plaintiff and the defendants. The defendants also pray for costs to be in the cause.

The application is predicated on the grounds that the plaintiff had commenced a process to dispose of all its assets and business in Kenya; the plaintiff has laid off its employees in Kenya; and the said employees have gone to court challenging the plaintiff's decision to terminate them, unless the orders sought herein are granted, the defendant will not be able to recover the costs it shall have incurred in their counterclaim and the plaintiff's suit herein in the likely event that they are successful against the plaintiff; the defendants have a good defence against the plaintiff's claim, together with a meritorious counterclaim with high chances of success; The Honourable court has discretion to grant the orders sought for the attainment of the ends of substantive justice in the matter for all the parties; and that the application has been brought with reasonable promptitude.

The Notice of Motion is also supported by the affidavit of Roselyne Okeyo Okumu the 2nd defendant sworn on 1st September 2014, averring that the plaintiff was until 6th March 2009 the defendant's subtenant but that it had started pulling out of Kenya's Telecommunications business, and had commenced the process of selling its infrastructure and subscribers to other communication services providers like Safaricom and Airtel Kenya.

In addition, that the plaintiff had also begun laying off its employees countrywide who have petitioned vide Industrial Court Cause No. 5/2014 at the Industrial Court Nairobi seeking a security deposit of

1.25 million for their retrenchment dues; That since the sell-buy-out is at advanced stages and the plaintiff has no other known assets in Kenya, the defendants are apprehensive that should they succeed in their counterclaim, they will not recover the costs incurred since the plaintiff's claim is a frivolous complaint against the defendants who have a meritorious counterclaim. They therefore sought for security for costs in the amount of kshs 2 million.

It is also deposed that unless the orders sought are granted, the defendants shall suffer injustice, financial prejudice and loss. The defendants annexed copy of Business Daily, Thursday April 3 , 2014 showing the planned sell-buy-off of the Yu Mobile whose majority shareholder is Essar Services of India; Business Daily Friday April 18,2014 titled " Yu workers seek travel ban against Indian boss;" Standard on Saturday August 23, 2014 " Safaricom eyeing share holders' nod for shs 7 billion Yu Mobile deal;" Business Daily Monday August 25, 2014; "Safaricom takes over Yu Mobile employees" Safaricom and Airtel to absorb 175 Yu Mobile staff."

The defendants also filed a supplementary affidavit on 11th June 2015 sworn by Velma Maumo on 9th June 2015 to the effect that the plaintiff had now completely exited the Kenyan Market after selling its Kenyan Yu Mobile to Airtel and Safaricom for USD 120,000,000 which information was available on the plaintiff's website and in the public domain.

The application is opposed by the plaintiff who swore an affidavit on 24th November 2014 by Sundararaman Pattabiraman contending that the plaintiff is a local company registered in Kenya and not a foreign Company against whom security for costs should be sought; the plaintiff's claim is money had and received by the defendants who have no defence; the application is intended to delay the hearing of this suit; and there is no question of the plaintiffs insolvency or other financial limitation as to require for security for costs from the plaintiff, since the plaintiff had sold only part of its business and had assets still worth over 20 billion after sale of assets worth over 11 billion.

The parties agreed to dispose of the application by way of written submissions. The defendant filed theirs on 5th June 2015 whereas the plaintiff filed their written submissions on 7th July 2015.

The defendants framed 3 issues for determination namely:-

i. Whether the plaintiff has exited the Kenyan market;
ii. Whether or not the defendant/applicant is entitled to the relief sought.
iii. Who should pay the costs of this application?

On whether the plaintiff had exited the market, the defendant submitted that the plaintiff had sold its telecommunications infrastructure in Kenya to its competitors namely Safaricom Ltd and Airtel Ltd at a sum of USD 120 million which fact is conceded in the replying affidavit.

On whether the defendant is entitled to the relief sought it was submitted that the defendant had satisfied the requirements of Order 26 Rule 1 of the Civil Procedure Rules 2010, whose purpose is to protect the defendant in the event of success and who may experience difficulties in realizing the costs incurred as was reiterated in the case of **Ocean View Beach Hotel Ltd V Salim Sultan Moloo & 5 Others (2012) e KLR;** that the purpose of an order for security for costs is to protect a party from incurring expenses on a litigation which it may never recover from the losing side and not to deter the plaintiff from pursuing its claim. The defendants also relied on **Shah V Shah (1982) KLR 85** which espoused the principle that ***" the general rule is that security is normally required from plaintiffs resident outside the jurisdiction……the court has the discretion to be exercised reasonably and judiciously to refuse to order that security be given. The test on application for security is not whether the plaintiff has established a prima facie case, but whether the defendant has shown a bonafide defence."***

On whether the plaintiff is resident outside the jurisdiction it was submitted that with the sale of the business to its rivals, the plaintiff had exited the Kenyan Market, information which is readily available on their website.

On whether the defendant has a bonafide defence on record it was submitted that the plaintiff had not tendered evidence to demonstrate its ability to meet is financial obligations including costs in this case, having closed its business in Kenya. Further, that the plaintiff has not denied or controverted the counter claim against it in the sum of kshs 1.5 million.

On the exercise of discretion of the court the defendant relied on **Pancras T. Swai V KBL Ltd (2014) e KLR ; Messina & Another V Stallion Insurance Company Ltd (2005) IEA 264(CAK)** citing **Keary Development V Tarmac Construction (1995) 3ALL ER 534** that in the exercise of discretion:

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 a 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's 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 upto the full amount claimed by way of security, provided that it is more than a simply normal amount, in all the circumstances , it is probable that the claim would be stifled.***
6. ***The lateness of the application for security is a circumstance which can properly be taken into account."***

The defendants maintain that they have a bonafide defence on record as well as a counterclaim which the plaintiff has not denied hence the application should be allowed since it has been brought with immense promptitude, to protect the defendant on costs, citing Section 401 of the Companies Act Cap 486 Laws of Kenya.

On costs, the defendants contended that the plaintiff should pay since it concealed material facts of its exiting the Kenyan market.

The plaintiff/respondent filed its submissions on 7th July 2015 contending that Order 26 Rules 1,5 and 6 of the Civil Procedure Rules gives this court the discretion to make orders for security for costs and that the general rule laid down in **Shah V Shah (supra)** is that security is normally required from Plaintiffs resident outside the jurisdiction. They contended that the plaintiff is a locally registered company and continues to carry out its business operations in Kenya and its unlikely that it will close its business in Kenya in order to defeat paying costs of this suit.

Further, it is submitted that the defendants have no bonafide defence since they held out themselves as owners of premises capable of granting the plaintiff a lease but after receiving payment from the plaintiff, they could not agree on the terms since the defendants were tenants whose lease had only 3 years to expire hence they could not give the desired 6 years. That the plaintiff is therefore entitled to a refund of the consideration. The plaintiff invited the court to peruse the pleadings and find that the plaintiff's claim is bona fide with good chance of success. The plaintiff further submitted that the defendant's defence and counterclaim are not bonafide.

Further, that the application was brought late to frustrate the expeditious disposal of the suit hence the defendants do not deserve the exercise of discretion by this court. The plaintiff relied on **Mama Ngina Kenyatta V Malira Housing Company CA 266/2003; and HCC 79/2013 Saudi Arabian**

Airlines Corporation V Sean Express Services Ltd and urged the court to dismiss the application with costs.

I have carefully considered the application, the replying affidavit, the annextures and the rival submissions and authorities relied on by the parties' advocates. In my view, the only issue for determination is whether the defendants have made out a case for an order of security for costs.

The applicable law on an application for security for costs is Order 26 Rule 1 of the Civil Procedure Rules which provides that:

1. *In any suit the court may order that security for the whole or any part of the costs of any defendant or third on subsequent or third party be given by any other party.*
2. *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 an application, dismiss the suit.*
3. *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.*

The principles upon which a court exercises its discretion in an application for security for costs were considered in the case of **Keary Development V Tarmac Construction (1995) 3 ALL ER 534 and Ocean View Beach Hotel Ltd V Salim Sultan Mollo (supra)** as outlined above.

The general rule is that security for costs is required from plaintiffs residing out of jurisdiction (see **Shah V Shah (supra).** However, it does not mean that the court may not refuse to grant such an order as long as the court exercises its discretion judiciously.

It is now settled law that the order for security for costs is a discretionary one as long as that discretion is exercised reasonably, and having regard to the circumstances of each case. Such factors such as absence of known assets in the country, absence of an office within the jurisdiction of the court, inability to pay costs; the general financial standing or wellness of the plaintiff; the bona fides of the plaintiff's claim, or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account.(see **Jayesh Hasmukh Shah V Narin Haira & Another (2015) e KLR** per Sergon J.

The conduct of the plaintiff may include activities that may hinder recovery of costs, for instance, recent close or transfer of bank accounts, **and disposal of assets**; and the conduct of the defendant include filing of application for security for costs as a way of oppressing or obstructing the plaintiff's claim, for instance, where the defence is a mere sham, or there is an admission by the defendant of money owing or that there is a deliberate refusal or delay to pay money owing or refusal to perform its part of the bargain.

The reasons advanced by the defendants are that the plaintiff had embarked on the process of selling all its telecommunications infrastructure in Yu Mobile in the country to its two main competitors Safaricom Limited and Airtel Kenya Limited. The defendants annextures to the supporting and supplementary affidavit all confirm that position, including evidence that the plaintiff's employees had sought orders restraining the departure of the plaintiff's Chief Executive Officer from the country until the plaintiff discloses to them terms of an alleged retrenchment plan.

When the court asked the parties to disclose the current status of the plaintiff, the defendants availed documentation from the plaintiff's website showing that the sale deal with Airtel Kenya Limited and Safaricom Limited for the sum of kshs UDS 120 million had been sealed. Those allegations and facts were not controverted by the plaintiff in any way. The plaintiff's submission is that yes it is selling its interests but not because of this case to defeat payment of costs.

Further, that it is a locally registered company with assets worth over 11 billion. Further, that the defendants owe it money advanced as deposit for lease that never was.

From the above circumstances and situation analysis, this court finds overwhelming evidence that the plaintiff has exited the Kenyan Market after selling all its shares in Yu Mobile its main investment in Kenya , to its two rivals Safaricom and Airtel Kenya Limited. The plaintiff did not file any affidavit of means to show what specific assets are available in Kenya which could be liable to attachment to recover costs of the suit should their claim fail. This is not to say that the suit is frivolous, but that there is no evidence that the plaintiff has after selling its assets in the telecommunication infrastructure has any other assets left capable of settling costs of the suit herein as well as the claimed counterclaim should its claim be dismissed, especially where the defendants have a counterclaim against them. There is no admission of the plaintiff's claim by the defendant, going by the statement of defence filed on 15th February 2012 and as amended , incorporating counterclaim in 19th August 2014 to which latter claim by the defendants, the plaintiff has not filed any defence.

Albeit this application was brought in September 2014 whereas suit was filed in 2011, I find that the application was brought at the right and opportune time, a time when the defendants learnt that the plaintiff was planning to exit the Kenyan Market. Therefore, there is in my view, no delay in bringing the application. In addition, I do not find any bad faith or bad intention on the part of the defendants in bringing this application. The plaintiff has not demonstrated that the application is an afterthought or brought in bad faith or intended to delay or frustrate/obstruct or oppress the plaintiff's claim. Furthermore, I do not find any prejudice being occasioned by an order for security for costs, which if ordered, will be secured by a deposit either in court or in both parties' advocates' joint interest earning account in accordance with the dictates of Order 26 Rule 1 (3) of the Civil Procedure Rules.

For the foregoing reasons I hereby allow the defendant's application for security for costs and order that the plaintiff Essar Telcom Kenya Ltd do furnish security for costs in the sum of kshs 2,000,000 within 21 days from the date hereof. The security for costs to be deposited in an interest earning reputable bank account to be opened and operated in the joint names of the firms of Atonga Miyare & Associates Advocates and Njuguna & Partners Advocates within the said 21 days from dated of this ruling. In default, the defendants may apply under Order 26 Rule 5(1) of the Civil Procedure Rule.

I order that costs shall be in the cause.

Dated, signed and delivered at Nairobi this 15th day of October 2015.

R.E. ABURILI

JUDGE

15/10/2015

Coram R.E. Aburili J

C.A Adline

Mr Kamenju holding brief for Mr Njuguna for plaintiff /respondent

Miss Maumo for defendant/applicant.

Court – Ruling read and delivered in open court. Ruling to be typed.

R.E. ABURILI

JUDGE

15/10/2015

Mr Kamenju- I seek for stay of the deposit.

Miss Maumo- I pray for copy of the ruling.

Mr Kamenju- I wish to withdraw the application for stay.

R.E. ABURILI

JUDGE

COURT- The application for stay of deposit is marked as withdrawn. Ruling to be typed and supplied upon payment of the requisite court fees.

R.E. ABURILI

JUDGE

15/10/2015