



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 28 OF 2012

NYANZA SPINNING & WEAVING MILLS LTD. PLAINTIFF

VERSUS

CREDIT BANK LIMITED 1ST DEFENDANT

VIPUL SHAH 2ND DEFENDANT

KAMAL SHAH 3RD DEFENDANT

R U L I N G

1. On the 24th May 2012, the first Defendant/Applicant herein filed a Notice of Motion dated the day before seeking Orders that the Plaintiff/Respondent be ordered to deposit the sum of Shs. 25,000,000/-or such other sum as the Court should consider fit, as security for the first Defendant/Applicant's costs. This Application was shortly followed by a similar Notice of Motion dated 11th June 2012 and filed herein on 15th June 2012 by the second and third Defendants seeking Orders that the Plaintiff/Respondent be ordered to deposit the sum of Shs. 38,000,000/-or such other sum as the Court may order. Both Applications were brought under the provisions of **Orders 26 and 51** of the *Civil Procedure Rules, 2010*.
2. The first Defendant's said Application was based on the grounds that the Plaintiff/Respondent had filed this suit seeking a sum of Kenya shillings 2,316,914,9 30/-together with interest thereon and costs. The first Defendant's party/party costs were estimated to be in excess of Shs. 25,000,000/-. It maintained that the Plaintiff/Respondent does not have any assets to its name sufficient to meet such costs as the first Defendant was aware that the assets/machinery had been vandalised. As a result, should the Plaintiff/Respondent's case not succeed there would be an overwhelming likelihood that the first Defendant would not be able to recover its costs. The second and third Defendant's grounds in respect of their said Application noted that the Plaintiff was already indebted to the first Defendant for more than Shs. 60,000,000/-at the time when the Plaintiff's Receiver/Manager was appointed and, in any event, such indebtedness had already been admitted in the Plaintiff's financial statements. A consent Order as to payment had been recorded in Court, the terms of which were not honoured by the Plaintiff. By the time that the said Receivers/Managers were appointed, the Plaintiff had ceased operations and does not have any source of income. The only asset which the Plaintiff owns is land registered as L. R. No. 2787/517. Finally, the second and third Defendants maintained that the conduct of the Plaintiff had been to frustrate the Defendants from carrying out their duties by extracting incorrectly drawn Orders and filing frivolous suits to stay the hearing of the main suit as well as other applications adverse to its interest.

3. One **Francis Wainaina**, a Legal Officer of the first Defendant swore the Supporting Affidavit in support of the first Defendant's said Application, on 23rd May 2012. The deponent confirmed the amount of the suit sum. He detailed that he had been advised that the first Defendant had a good defence to the Plaintiff's claim in that the suit is *res judicata* and barred by laches, did not disclose any reasonable cause of action and was incurably defective for misjoinder. The Plaintiff was also heavily indebted to the first Defendant. In relation to the suit sum, the deponent maintained that he had been advised that given the nature of the case and the complex issues raised by the pleadings, the minimum amount of costs to which it may be entitled should the Plaintiff's suit be not successful would be Shs. 37,101,249/-. Such would include the instruction fees on party/party costs to defend the suit as well as the fees for getting up for trial. Mr. Wainaina was unaware of any other assets of the Plaintiff other than vandalised plant and machinery which, together with the land upon which it was situate, was charged to the first Defendant. It was in his opinion, in the interests of justice that the Plaintiff/Respondent should be ordered to pay security for first Defendant's costs.
4. The Supporting Affidavit in respect of the second and third Defendant's Application was sworn by one **Kamal Shah**, the third Defendant on 11th June 2012. The deponent noted that the Plaintiff herein had filed a another suit being *HCCC No. 407 of 2005* dealing with the same subject matter. The deponent went on to record details of monies advanced to the Plaintiff by the first Defendant secured by a Charge over L. R. No. 2787/517, Nanyuki as well as a Debenture dated 23rd April 1998 and a Supplementary Debenture dated 18th December 1999. Thereafter Mr. Shah went through the history of the litigation brought by the Plaintiff in relation to the said suit *HCCC No. 47 of 2005*. Such involved applications before **Waweru J** as well as **Emukule J** and an application to the Constitutional Court being Misc. Cause 1003 of 2005. The proceedings as related by Mr. Shah dragged on so that finally on 30th January 2007 a Consent Order was entered into as follows:

“1) Judgement be entered for the 1st Defendant against the Plaintiff's for the sum of Kshs. 60,000,000.00 which amount shall attract interest at 10% per annum at the monthly rates from 24th December 2004 until payment in full...

2) That the Plaintiffs to pay to the 1st Defendant, within 30 days of filing this Consent Order, the sum of Kshs. 500,000.00 and thereafter, a further payment of Kshs 1,000,000.00 within 75 days of this Consent Order.

3) That the amount outstanding thereafter inclusive of interest be paid by 31st July 2007.”

5. The deponent noted that after making the Shs. 1,500,000.00 payment as above, the Plaintiff, just before the final payment was due on 31st July 2007, refused to pay the same on the grounds that the machinery at the suit property had been vandalised. Sometime later, the Plaintiff filed an application seeking orders that the Consent Order of 30th January 2007 be marked “settled” on the grounds of alleged mismanagement of the suit property by the second and third Defendants. That Application was heard and allowed by Apondi J. by a Ruling dated 7th October 2010 which the first Defendant has appealed against. Then Mr. Shah noted that the Plaintiff made a another application seeking leave to execute the Orders made by Apondi J. which was refused by this Court on 31st January 2012. However, the deponent noted that on the file for *HCCC No. 407 of 2005* there is yet another Application filed by the Plaintiff seeking a discharge of the first Defendant's securities but the same is pending determination. Mr. Shah went on to say that he felt that the issues and parties in the present suit before Court are the same as in *HCCC No. 407 of 2005* and as a result, this suit is *res judicata*. Finally, Mr. Shah set out as to the costs that he had been advised by his advocates on record in relation to the second and third Defendant defending this suit. He had come to the conclusion that the Plaintiff and/or its directors should deposit a sum of Shs. 38,000,000.00 as security for his and his Co-defendant's costs.

6. A director of the Plaintiff company **Mitesh Fulchand Shah** swore a Replying Affidavit on behalf of the Plaintiff dated 14th June 2012. He noted that at all material times, the 1st Defendant

through the 2nd and 3rd Defendants were in control and possession of the Plaintiff's properties at Nanyuki when the value thereof was in excess of Shs. 290 million. This came about as a result of the 2nd and 3rd Defendants being appointed joint Receivers/Managers by the 1st Defendant on 20th January 2005. Access to the Plaintiff's properties at Nanyuki was denied to the Plaintiff and only after the intervention by Court by Order dated 29th June 2009 was access thereto finally allowed. The Plaintiff thereafter instructed an independent firm of valuers – McLarens Young International to prepare a report, which it did, detailing that the whole plant, machinery and buildings of the Plaintiff had been vandalised to the extent that there was nothing salvageable left in the Plaintiff's said premises. Thereafter, the deponent referred to this Court's Ruling of 31st January 2012 in *HCCC No. 407 of 2005*. The deponent maintained that the Court had clearly detailed in that Ruling that the 1st Defendant bore responsibility for the Plaintiff's said factory premises. Mr. M. F. Shah maintained that the 1st Defendant had made the Plaintiff impecunious and was now seeking security of costs so as to try to stymie the Plaintiff's rights of redress against it. He truly believed that this attempt by the 1st Defendant to try to get security for costs was to stop the Plaintiff from exercising its constitutional right to be heard.

7. The First Defendant's submissions in relation to its said Application were filed herein on 17th July 2012. The Court considered that what the first Defendant detailed as the background to this suit was useful to Court as follows:

“2. This is not the first suit between the parties herein over the subject matter. The Plaintiff herein is the Plaintiff in HCCC No. 407 of 2005 Nyanza Spinning and Weaving Mills & 2 Others and so are the Defendants. Also, the issues raised in the instant suit are the same issues raised in HCCC No. 407 of 2005 Nyanza Spinning and Weaving Mills & 2 Others which is now pending hearing in the Court of Appeal (Civil Appeal No. 233 of 2001, Credit Bank Limited vs. Nyanza Spinning and Weaving Mills Limited). The 1st Defendant is now compelled by the Plaintiff to defend a similar suit over the same subject matter which fact has compelled it to ask for security for costs. It had not asked for security for costs in the first suit”.

Although not detailed in the heading to its Application, the first Defendant referred to **section 401** of the *Companies Act* which reads as follows:

“Where a limited company is plaintiff in any suit or other legal proceedings, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given”.

To amplify its position on the law the first Defendant further referred this Court to the case of **Pearson & Anor. v Naydler & Ors. (1977) 3 All ER 531** where the English court detailed:

“the court must not show reluctance to order security for costs so that this becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on a more prosperous company. Litigation in which the defendant will be seriously out-of-pocket even if the action fails is not to be encouraged.”

8. The 2nd and 3rd Defendants filed their submissions herein on 27th September 2012. They maintained that it was not in dispute that the Plaintiff had ceased operations and were **“financially ailing for a considerable period”**. They detail several reasons for this submission but roundly denied that the vandalism and loss at the Plaintiff's premises at Nanyuki were their fault and the

loss, if any, had been due to the conduct of the Plaintiffs. The 2nd and 3rd Defendants recited the various matters coming before these Courts and concluded that although *HCCC No. 407 of 2005* has not been determined, the Plaintiff had, nevertheless, filed this suit seeking similar redress from the same Defendants. They made the valid point that the Plaintiff had not provided evidence that it could meet costs of the Defendants if such were awarded to them. Turning to the law, these Defendants also referred to **section 401** of the Companies Act as well as **Order 26** of the *Civil Procedure Rules, 2010*. They further relied upon the cases of **Marshall Osanya v Kenya Courts Authority (2005) eKLR**, **Attorney General v. Africa Cooperative Society Ltd (2002) EA 325** and, more particularly, **Ocean View Beach Hotel Ltd v Salim Sultan Moloo & 5 Ors (2012) eKLR**. In concluding their submissions, the 2nd and 3rd Defendants detailed that it was obvious that the Plaintiff did not object to the amount sought as security for costs against it as it had not disputed the same.

9. In turn, the Plaintiff in its submissions, summarised matters that had come before Court preferring to rely upon the findings in various rulings of **Apondi J., Khaminwa J.** as well as this Court. It picked up on the finding of **Khaminwa J.** in her Ruling of 29th June 2009 –

“A valuation made on 08.05.2002 by the first defendant (the Bank) showed the fixed assets valued at Shs. 219,591 350/-and including all other assets totals to K Shs. 298,602,979.”

The Plaintiff maintained that in essence the Defendants (all of them) left the Plaintiff with nothing salvageable from a factory valued at Shs. 300,000,000/-(by the Bank) and hence it was rendered almost impecunious by the Defendants’ neglect and mismanagement. The Plaintiff referred the Court to the following authorities: **Elegant Colour Labs (Nbi) Ltd v Housing Finance Company (Kenya) Ltd & 2Ors. HCC ELC No. 192 of 2010, Shah v Shah (1982) KLR 95** as well as **Gulf Engineering (East Africa) Ltd. v Kalsi 1 KLR (1976 – 80) 348**. More particularly, the Plaintiff referred to the **Gulf Engineering** case quoting the *ratio descendi* thereof as per **Todd J** at page 355 as follows:

“... If there is reason to believe that the company cannot pay the costs, then security may be ordered, but not must be ordered. The Court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstances. Mr. Levy helpfully suggests some of the matters which the Court might take into account, such as whether the company’s claim is bona fide and not a sham and whether the company has a reasonably good prospect of success. Again it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into Court of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim), that, too, would count. The Court might also consider whether the application for security was being used oppressively – so as to try and stifle a genuine claim. It would also consider whether the company’s want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing their part of the work”.

The Plaintiff also noted that **Todd J.** had referred to the Supreme Court Practice 1976 Vol.1 earlier in his Judgement to the effect that:

“The fact that a corporation is insolvent, and that a receiver of the profits of its undertaking has been appointed, is no ground for requiring it to give security (*Dartmouth Harbour Commissioners v Mayor of Dartmouth*)”.

Similarly, the Plaintiff considered a further quote from **Todd J.** as pertinent wherein he stated in the same case:

“The court might also consider whether the application for security was being used oppressively - so as to try and stifle a genuine claim. It would also consider whether the company’s want of means has been brought about by any conduct by the defendants...”

10. In response to the Plaintiff’s submissions the 1st Defendant submitted that:

“Even though parties have a right to access justice, such a right must be qualified so that in its enjoyment other persons are not prejudiced. The right is not absolute and the court has discretion to guard against abuse of court process by imposing such terms and conditions as it deems fit.”

That was a quotation from **Majanja J.** in the case of **Bidco Oil Refineries Ltd v. The Attorney General & 4 Ors HC Petition No. 177 of 2012**. Similarly, the 1st Defendant quoted again from the Judgement of **Majanja J.** in **Tambo Michael Ouma & 2 Ors v The Attorney General HC Petition No. 3 of 2012** to the extent:

“I am aware that litigants ought to be given an opportunity to make their case to the fullest extent that this must be balanced with the costs and burden that this kind of suit imposes on the parties and the court.”

Finally, the 1st Defendant submitted that based on the Court of Appeal decision in **Shah v Shah** (supra) the tests to be applied when determining an application such as this one before Court was whether the Defendants had shown a *bona fide* defence. It noted that it had raised in its opinion two *bona fide* defences namely *res judicata* and limitation.

11. Out of all the authorities referred to this Court by the parties, I consider that the finding of the Court of Appeal in **Civil Appeal No. 9 of 2005 Messina & Anor. v Stallion Insurance Co. Ltd** (2005) 1EA 264 (EAK) which embraced the principles laid down in **Keary Development v Tarmac Construction** (1995) 3 All ER 534 referred to in the Ruling of my learned brother **Tuiyott J.** in the **Ocean View Beach Hotel** (supra) as offering the most guidance to this Court in deciding the Application before it. The principles laid down in **Keary Development Ltd** were summarised as follows:

“The Court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.

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.

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 himself unable to recover from the Plaintiff the costs which have been incurred by him in defence of the claim.

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.

The Court in considering the amount of security that might be ordered will bear in mind that it can pay any amount up to the full amount claimed by way of security, provided that it is more than any nominal amount; it is not

bound to make an order of a substantial amount.

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

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

12. I have considered the prayers of the Plaintiff as per the Plaint filed herein on 19th January 2012. The Plaintiff seeks damages as a result of the Defendants’ neglect as regards the Plaintiff’s factory premises at Nanyuki. It alleges that while under the receivership and the managership of the 2nd and 3rd Defendants, the said factory premises were vandalised to the extent that there is nothing left of any value thereat. In my opinion, that claim is different from what the Plaintiff was claiming in *HCCC No. 407 of 2005*. In that suit, the Plaintiff claimed for:

“i. An order for accounts to be taken between and/or rectification be done of accounts of the Plaintiff and the 1st Defendant.

ii. A declaration that the Plaintiff is not indebted to the 1st Defendant on the Debenture or Supplementary Debenture or all.

iii. A declaration that the appointment of the 2nd and 3rd Defendants by the 1st Defendant as joint Receivers and Managers of the Plaintiff is unlawful now and void and that the same be set aside.”

The claim in this suit arises out of the receivership and managership, is in my opinion, an entirely different matter. As a result, it is not my position to pre-judge what the trial Judge will make of this position but, in my view, the joint defences of the *res judicata* and limitation may be difficult for the Defendants to establish. Further, I have perused the documents produced by the Plaintiff at letter “H” of its list and bundle of documents in respect of this suit. I note that on a site visit to the premises at Nanyuki on 8th September 2009, hand written notes of an inventory taking session has been recorded which commences by way of general observation:

“The compound and the buildings are in a neglected status with grass over growing and buildings were broken into. Inside the go downs it was not possible to tick item by item since there was no expert but the general state was that of massive and widespread neglect and vandalism with cables all over.”

That session was attended by four officers from the 1st Defendant bank and three representing the Receivers and Managers plus security from G4S.

13. All these facts lead to my conclusion that I consider the Plaintiff to have a strong case as against the Defendants. Indeed I would go so far as to say that although it would seem that the Plaintiff company appears to be unable to pay the costs of the Defendants, if they are successful, there still remains a discretion with the Court which may be exercised in special circumstances. Although it would appear that the fixed assets at the premises at Nanyuki may well be unsalvageable, the Plaintiff still has the asset of the land which may be disposed of at a substantial price in view of the considerable development in that area. For that reason, I consider this to be a case in which I may exercise my discretion taking into account the special circumstances of the matter. Accordingly, I decline to award security for costs as against the Plaintiff and I dismiss the Notice of Motion of the 1st Defendant dated 23rd May 2012 as well as the Notice of Motion of the 2nd and 3rd Defendants dated 11th June 2012 with costs to the Plaintiff.

DATED and delivered at Nairobi this 9th day of October, 2013.

J. B. HAVELOCK

JUDGE