REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 3 of 2012

ABN AMRO BANK N.V.....PLAINTIFF/ RESPONDENT

VERSUS

KENYA PIPELINE COMPANY.....DEFENDANT/ APPLICANT

RULING

1. The defendant's application dated 21st June, 2012 seeks the following orders, **THAT**:-

"1. The Plaintiff be and is hereby ordered to deposit a sum of Kshs.100, 000,000.00 or such sums as this Court may deem fit as security for the Defendant's costs within a period of thirty days from the date of this order.

2. In default of compliance with the order to furnish security for the Defendant costs, the Plaintiff's suit be dismissed with costs to the Defendant.

3. In the alternative and without prejudice to (ii) above the hearing of the suit be stayed until such time as costs are secured.

4. Costs of this application be in the cause."

2. The application was brought under **Section 27** of the **Civil Procedure Act, Cap 21, Section 401** of the **Companies Act, Cap 486, Orders 26(1)** and **(5)** and **51, Civil Procedure Rules; Section 3** and **3A, Civil Procedure Act, Cap 21** and all the enabling provisions of the law.

3. The application was supported by an affidavit sworn by **Gloria Khafafa**, the defendant's Acting Company Secretary.

4. The application was opposed by the plaintiff on the grounds that;

"1. The Defendant/Applicant has not made out any credible grounds for the allegation that the Plaintiff/Respondent will be unable to pay costs if the same were awarded as against the Plaintiff.

2. The Plaintiff Company is a reputable company with international presence and a history spanning 3 centuries. It has no history of failure to obey court orders, particularly where it is

participating in proceedings before the very same courts.

3. The Defendant/Applicant has not set out any justifiable reasons that would allow this Honourable Court to exercise its discretion in its favour to make the orders prayed for.

4. The alleged costs that would arise from this matter have been extraordinarily exaggerated by the Defendant/ Applicant and do not bear any relation to the costs suggested in the Advocates Remuneration Order."

5. On 5th January, 2012, the plaintiff filed a suit against the defendant for negligence and breach of fiduciary duty wherein it alleged that it had suffered loss as a result of the defendant's negligence, breach of fiduciary duties and conversion in the performance of its duties.

6. The plaintiff alleges that the defendant owed it fiduciary duty and duty of care not to release discharged petroleum products to Triton without the plaintiff's authorization.

7. The plaintiff now claims inter alia, a sum of **US$17,105,970.15** as damages for conversion. That claim is denied by the defendant in an elaborate statement of defence. Without delving into the merits of that defence I can state that it is not a frivolous one.

8. The defendant, in its application, seeks an order for security for costs against the plaintiff on grounds that the plaintiff has filed the suit to pursue damages in the sum of **US$17,105,970.15** and further, that in the event the plaintiff fails to succeed in its case, there exists a likelihood that the defendant will either not be able to recover the costs or will suffer undue delay/ expense in enforcing an order for security of costs.

9. The defendant further states that the plaintiff is a foreign bank incorporated in the Republic of Netherlands where it carries on business and that there are no known assets belonging to the Plaintiff within the jurisdiction on this Honourable Court or within the Republic of Kenya.

10. The plaintiff, through its director, Risk and Portfolio Management, in the Energy, Commodities, Transportation Department, **STEPHANUS GERHARDUS ELFERINK,** filed a replying affidavit and stated, *inter alia*, that, whereas it is true that the plaintiff is a foreign bank registered and headquartered in the Netherlands, the bank is an internationally renowned bank which has been in existence for over 300 years and further that the bank operated internationally and has dealings with clients all over the world including in Kenya and it is regulated by the Dutch Central Bank. It would also not risk the reputational harm of failing to pay sums that may be adjudged to be due from it in the event this court so orders.

11. He added that he had been advised by the plaintiff's advocates that the basic instruction fees under the Advocates Remuneration Order for the principal sums claimed in the Plaint would be approximately **Kshs. 18 Million** and not **Kshs. 100 Million** as claimed.

12. Mr. Nyaoga for the defendant made submissions in support of the application. He stated that the plaintiff is a foreign company with no known assets within our jurisdiction. He stated that security is required from the plaintiff as it is resident out of the court's jurisdiction and that the court ought to consider that the plaintiff has no assets or evidence of the same in Kenya or elsewhere. He further submitted that the plaintiff relies on self-professed reputation and asset base.

13. Counsel made reference to the case of **SHAH vs. SHAH, Civil Appeal No.34 of 1981**, where it was held by the Court of Appeal that:-

"The general rule is that security is normally required from plaintiffs resident outside the jurisdiction….a court has discretion, to be exercised reasonably and judicially, to refuse to order that security be given."

The court further held that:

"The test on an application for security for costs is not whether the plaintiff has established a prima facie case, but whether the defendant has shown a bona fide defence."

In his view, the defendant has established a bona fide defence.

14. He further submitted that the plaintiff's claim was predicated upon a claim against Triton Energy, a Company which the defendant had no dealings with.

15. With regard to the issue of quantum of costs which the plaintiff is seeking security for, he submitted that the sum of Kshs.100 million was based on the Advocates Remuneration Order and further that the plaintiff's claim was for over **US$17 Million**.

16. Mr. Njogu for the plaintiff opposed the application and made submissions in support of the grounds of opposition aforesaid. He submitted that it is a matter of discretion by the court on a matter to matter basis to decide whether security for costs ought to be provided. He made reference to **GULF ENGINEERING vs. A SINGH KALSI[1976-80]1 KLR 348**, where it was held that:-

"Section 401 of the Companies Act gave the Court a wide discretion whether or not to order security for costs in any case and, the Court being satisfied that the plaintiff company's claim was *bona fide* and had a reasonable prospect of success, it would not order the company to provide security for costs even though it would be unlikely to be able to afford the first defendant's costs should he be successful."

17. He further submitted that security for costs is not automatically given where the plaintiff is out of the court's jurisdiction and made reference to **MAMA NGINA KENYATTA & ANOR v. MAHIRA HOUSING COMPANY LTD [2005] eKLR, KEARY DEVELOPMENTS LTD v. TARMAC CONSTRUCTION LTD AND ANOR [1995]3 ALL ER 534** and **SIR LINDSAY PARKINSON & CO. LTD v. TRIPLAN LTD [1973] 2 ALL ER 273.**

18. He also submitted that the bona fides of the plaintiff's claim ought to be considered and that the plaintiff financed purchase of oil products which went missing from the defendant's custody. He stated that there was no evidence that the plaintiff would be unable to pay costs if they are awarded against it, and made reference to the case of **ALLIANCE MEDIA KENYA LTD V. MONIER 2000 LTD**, **[2005] eKLR**. In that case, Kasango, J. cited the decision of Ibrahim, J. (as he then was) in **ABDI ALI NUR vs. TRANSAMI KENYA LTD HCCC NO. 657 OF 2003** (unreported) where the learned judge held:

"For the court to make an order for security for costs there must be some credible testimony of inability to pay the costs upon conclusion of the suit."

He stated that no credible evidence of inability to pay had been provided. He added that the plaintiff had not conceded that security for costs ought to be provided, it had merely stated that Kshs. 18 Million would be the costs that can be awarded if the suit is dismissed, and not Kshs.100 Million.

19. Mr. Njogu further submitted that the conduct of the defendant was also another consideration and made reference to the exaggerated figure of costs, the unsubstantiated belief that the plaintiff is not able to pay any costs that may be awarded and the defendant's stand regarding their application to amend the plaint. He added that the plaintiff has been in existence for over three hundred years and has assets worldwide including Kenya, and that the financing of the oil purchase was well after the plaintiff had moved out of Kenya.

20. He concluded by stating that the defendant does not have a *bona fide* defence both under the **Banking Act** and the **Energy Act.** There is therefore no substance in stating that the plaintiff's suit was likely to be dismissed, counsel added.

21. I have considered the submissions made by all the parties as well as the pleadings on record.

22. **Order 26 (1)** of the **Civil Procedure Rules** 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 or subsequent party be given by any other party."

It should be noted thus, that it is an entirely discretionary matter for the court to order security for costs, having regard to all the circumstances of the case.

23. In **SIR LINDSAY PARKINSON & CO LTD V TRIPLAN LTD [1973] QB 60**, it was held that even where the requirements of the section are met, the court still has a discretion whether or not to order security against a company. In the words of **Lord Denning MR (at p 627):**

"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…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 to 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."

24. The plaintiff's registered office is at Amsterdam, Netherlands, and carries on business in Netherlands but having various branches and operations worldwide. Further, the plaintiff has been in existence for over three hundred years with extensive international repute.

25. In considering the principles as laid out by **Lord Denning MR, (Supra)** I am not inclined to exercise my discretion in favour of the defendant. There is no evidence that the plaintiff will be unable to pay the defendants costs in the event that the plaintiff does not succeed in its case. The plaintiff is a very reputable bank and in this day and age of modern business when corporates are trading all over the globe, it has not been shown that if any costs were to be awarded to the defendant it would be difficult to recover the same.

26. In view of the foregoing, the defendant's application is dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF OCTOBER, 2012.

D. MUSINGA
JUDGE

In the presence of:

Irene – Court Clerk
Mr. Njogu for Plaintiff
Mr. Wetangula for Defendant