



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC CASE NO. 171 OF 2018

NAKUMATT HOLDINGS LIMITED.....PLAINTIFF

VERSUS

SOUTH COAST HOLDINGS LTD..... DEFENDANT

RULING

1. For determination is the defendant's notice of motion dated 29th November 2018 brought under Section 1A, 1B, 3A and Order 26 of the Civil Procedure Act and Rules. The defendant/applicant seeks orders that;

(a) Spent;

(b) The plaintiff be ordered to deposit security in the sum of Kshs150,847,196/= in joint account between the plaintiff's advocate and the defendant's advocates.

(c) Further proceedings be stayed pending the hearing and determination of this application.

(d) The security prayed for be deposited within 14 days of the date of order.

(e) The administrator of the plaintiff be restrained from paying any legal fees to the plaintiff's advocates until he deposits security for defendant's costs.

(f) Costs of the application be provided for.

2. The application is premised on the grounds inter alia, that;

(a) The plaintiff is insolvent.

(b) The plaintiff is using the court process to harass and intimidate the defendant.

(c) The defendant already had judgment against the plaintiff for arrears of rent and service charge which judgment the plaintiff is unable to satisfy.

(d) The defendant's costs are insecure.

3. In support of the application is an affidavit deposed to by Mr. Sultan Khimji. Mr. Khimji deposes that according to the report by PKF – an audit firm at the request of the administrator confirmed Mr Peter Obondo, the plaintiff has liabilities as at 10th March 2018 amounting to Kshs35,825,973,058/= against assets of Kshs6 billion as at 31st December 2017(annex SM 1). That from this report, there are no assets assigned to the plaintiff's Diani branch.

4. Further that the report has made no provision for unsecured creditors hence the defendant will have no chance of recovering his costs in this suit. The defendant proceeded to itemise on how its legal costs has arisen in paragraph 10 of the supporting affidavit i.e the same is based on instructions fees on the sums of monies being demanded by the plaintiff in the suit.

5. The application is duly opposed by the plaintiff by filing of a replying affidavit and grounds of opposition. The plaintiff argues that the

notice of motion is defective. It also deposed through its director Mr. Ankoor Shah that the orders sought are contrary to the orders of this court given on 12th November 2018 and the orders issued in Nairobi Insolvency Cause NO. 10 of 2017 on 22nd January 2018. Further Mr Shah deposed that the defendant having made admissions that the fixtures and furnitures on the suit premises belong to the plaintiffs is not entitled to the grant of orders he is seeking.

6. The plaintiff placed reliance in the decision of **Two Branding Africa Ltd –versus- Coca Cola East and Central Africa Pty Ltd (2013) eKLR** where it was stated that the power of the court to grant security for costs is couched in discretionary terms mentioning that the factors the court should consider were set out in the Ugandan Case of **Mavid Pharmaceuticals Ltd & Another –versus- Royal Group of Pakistan & 2 Others Civil Appeal No 26 of 2012**.

7. The criteria set out in the above case requires the court to consider whether the plaintiff has a prima facie case or where the defendant does not have a good defence. That the fact of the plaintiff being impecunious should not prevent such a plaintiff from presenting a genuine claim against the defendant. In the case of **Magiri Nguthari –versus- Gideon Kimathi (2010) eKLR** the court took the view that it was not proper case for an order of security for costs. If the respondent and his legal advisors thought the appellants claim was frivolous, the alternative procedure was an application for striking out the plaint rather than force a litigant to be made to pay for security for costs.

8. I have taken the facts as presented into consideration. I have also taken into account the principles to be considered in an application such as this. It is in the public domain/knowledge that the plaintiff is undergoing financial challenges. The plaintiff has admitted its financial challenges by filing of the Nairobi Insolvency Cause No. 10 of 2017 where certain orders were made.

9. From the pleadings as presented, there is an admission that the defendant does not own the fittings, furniture and equipments which forms the genesis of this case. It is also apparent that the defendant had given a proposal to the plaintiff before the filing of this suit the terms on which the fittings, furniture and equipments were to be released. The defendant had allowed the plaintiff to collect its stock which it did collect. Although the stocks are still part of this claim, the particulars thereof have not been provided in the application and the suit.

10. The defendant has provided an audit report to demonstrate that indeed the plaintiff will not be able to pay its costs. The plaintiff has not made any submissions on its financial ability to meet the defendants costs in the event the suit fails. Further, while filing this suit, the plaintiff was well aware of the proposal given to it by the defendant. The plaintiff has not explained whether this offer/proposal made was within or outside the lease agreement to warrant the filing of the case No. 10 of 2017. The plaintiff is thus hiding under the guise of the Insolvency Cause to bring more suits instead of pursuing her claim if any in the existing suits between the defendant and herself. The plaintiff thus want to have his cake and eat it.

11. I am alive to the rights of parties to be given an opportunity to pursue their claims in court but such rights must be guaranteed while taking into account the rights of others. In this case both the claims by the plaintiff and the defendant have a probability of succeeding. Since the financial status of the plaintiff to meet the defendant's costs is in doubt, it serves the interest of justice that they be ordered to provide security for costs. For this reason, I am persuaded to find that the application as presented has merit. I do allow it on the following terms;

(a) The plaintiff is directed to deposit security in the sum of Kshs40 million (forty million) in a joint account to be opened in names of the plaintiff's advocates and the defendant's advocates within 60 days of this order.

(b) The proceedings herein shall be stayed until the deposit has been paid into the said account.

(c) Each party to bear their own costs of the application.

(d) Prayer (e) of the motion is declined.

Dated, Signed and Delivered at Mombasa this 11th day of June 2019.

A. OMOLLO

JUDGE.