

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC CASE NO. 104 OF 2019

**LONDON DISTILLERS(K)
LIMITED:.....:PLAINTIFF/APPLICANT**

VERSUS

**MAVOKO WATER & SEWAGE
COMPANY:.....:1STDEFENDANT/RESPONDENT**

**MACHAKOS COUNTY
GOVERNMENT:.....:2NDDEFENDANT/RESPONDENT**

**ERDEMANN PROPERTY
LIMITED:.....:3RDDEFENDANT/RESPONDENT**

**NATIONAL ENVIRONMENT
MANAGEMENTAUTHORITY:.....:4THDEFENDANT/RESPONDENT**

**THE DIRECTOR
SURVEYS:.....:5THDEFENDANT/RESPONDENT**

**THE DIRECTOR PHYSICAL
PLANNING:.....:6THDEFENDANT/RESPONDENT**

**NATIONAL LAND
COMMISSION:.....:7THDEFENDANT/RESPONDENT**

**THE ATTORNEY
GENERAL:.....:8THDEFENDANT/RESPONDENT**

RULING

The application is dated 15th August 2024 and is brought under Orders 26 Rule 1, Order 39 Rule 1&5 and Order 51 of the Civil Procedure Rules, Section 1A,1B and

3A of the Civil Procedure Act, Cap 21 Laws of Kenya seeking the following orders;

- a) This application be certified as extremely urgent and heard ex-parte in the first instance.
- b) This application be heard and determined in priority to any other pending application or proceedings herein.
- c) This Honourable Court be pleased to order the 3rd defendant, respondent to deposit in Court sum of Kshs. 1,000,000,000 as security and guarantee to take care of the principal sums claimed by way of the instant proceedings together with costs of the suit and interest there upon.
- d) This Honorable Court be pleased to Order Zeyun Yang the Managing Director of the 3rd Defendant/Respondent to file before this Court an Addidavit of means to disclose the business and all the assets of the 3rd Defendant/Respondent.
- e) In default of the foregoing, This Honorable Court be pleased to issue Summons for the said Zeyun Yang to show cause security should not be furnished.
- f) This Honorable court be pleased to order that in the circumstances that the security as ordered is not furnished warrants of attachment and sale of the 3rd Defendant/Respondent's property wheresoever be issued.

g) Costs of the application be awarded to the Applicant/Plaintiff in any event.

It is based on the grounds that the instant suit was precipitated by the malicious, unwarranted and wanton destruction of the sewer line and theft of the sewer pipes of the Applicant/Plaintiff and the pouring of pre mixed concrete in its manhole connecting it to the EPZA main trunk sewer line on 17th September 2019 thus rendering the same disabled and useless. The illegal operation was spearheaded and bankrolled by the 3rd Defendant/Respondent purporting that the effluent from the Applicant/ plaintiff's distillery was polluting the environment. The Plaintiff/ Applicant conveys its pre-treated effluent from its distillery to the EPZA main trunk sewer line owned and operated by the Exports Processing Zones Authority and not into the environment pursuant to a subsisting Contract entered into between it and the said Export Processing Zones Authority and which takes cognizance of its effluent load and in respect of which it pays the sum of kshs. 225,000,000 monthly. The Exports processing zones authority receives effluent from different sewer pipes joining the EPZA main trunk sewer line from different entities including the 3rd Defendant/Respondent pursuant to different contracts it has also entered into with these entities.

That the Exports Processing Zones Authority then finally treats the effluent at its treatment plant in Kinanie before it discharges the same into the environment. The

Plaintiff/Applicant does not discharge its effluent into the environment or at all and the 3rd Defendant/Respondent and in view of the foregoing interfered with the said contract entered into between the Applicant/Plaintiff and the said Exports Processing Zones Authority. Arising from the said illegal actions of the 3rd Defendant/Respondent, the Plaintiff/Applicant was forced to shut down its distillery on account of the fact that there was now nowhere to dispose of the effluent from its processes but nonetheless had to pay its workforce from 18th September 2019 when the vandalism was carried out up to 3rd November 2019 when it finalizes the repair of its sewer line. By its actions, the 3rd Defendant/Respondent acted ultra vires and purported to take over the statutory powers of the Exports Processing Zones Authority by illegally interfering with the subsisting Contract thereby leading to loss in the sum of Kshs. 660,099,630/= made up of the cost of repairs and loss of production as claimed in the amended plaint together with interest and costs of this suit. The media is currently awash with reports of the 3rd Defendant/Respondent being heavily indebted to banks in sums running into billions of shillings and in respect of which it has been unable to make payment and its properties are now being auctioned and that it has been unsuccessful in its battles it has made up to the Court of Appeal which has dismissed its bid to stop its creditors from auctioning its immovable property.

The 3rd Defendant/Respondent's bid in Civ. Appl. No. Nai E042 OF 2024 Edermann Property Ltd vs Kenya Commercial Bank to stop the auction to by Kenya Commercial Bank to recover Kshs. 2,001,845,844 was dismissed by the Court of Appeal on 29.04.2024. In yet another case, the Court of Appeal has by its decision rendered on 26.07.2024 in Civ. Appl. No. Nai. E112 of 2024 Edermann Property ltd vs Credit Bank dismissed the 3rd Defendant/ Respondent's application dated 11.03.2024 seeking to stop the sale of its immovable property charged to Credit Bank to recover Kshs. 817,819,352.06 as at 16.08.2023 holding that indeed the 3rd Defendant/ Respondent was indebted to the Bank.

One Zeyun Yang who is the brain behind the 3rd Defendant/Respondent swore the Affidavit in the two applications before the Court of Appeal describing himself as its Managing Director. From the latest CR12 Certificate of the 3rd Defendant/Respondent, though the share capital shown thereon is kshs. 1,000,000,000 it is shown to be indebted by way of the encumbrances as per the charge registered as against its immovable property is in the sum of kshs. 922,300,000 which it has borrowed from different financial institutions and which sums must be attracting interest at commercial rates and it is therefore clear that the 3rd Defendant/Respondent's liabilities far exceed its assets. The Applicant/ Plaintiff is unaware of any other free assets of the 3rd Defendant/Respondent within this country and which can be able to satisfy the sum of Kshs. 660,099,630/= made

up of the cost of repairs and loss of production which the Applicant/Plaintiff has claimed and together with interest thereon since 2019 in view of its current indebtedness in excess of Kshs. 2 billion. The said Zeyun Yang though mentioned as a director and being the mind behind the destruction of the Applicant/Plaintiff's sewer pipes and which precipitated the losses claimed and subject of the instant suit, holds no shares in the company. The majority shareholder is a limited liability Company with no known assets in this country. Since the 3rd Defendant/ Respondent is already heavily indebted as clearly shown in CR12 where its property is subject of 5 encumbrances by way of charges, 2 of which are respectively dated 16th September 2019 in the sums of Kshs. 425,750,000 and Kshs. 42,550,000 another charge dated 26th August 2020 in the sum of Kshs. 54,000,000, yet again another charge dated 9th September 2020 in the sum of Kshs. 200,000,000 and the last known charge dated 2nd June 2022 also in the sum of kshs. 200,000,000 in the aggregate principal sum of Kshs. 922,300,000 as at the date of the respective instruments exclusive of the interest, and which are now being sold in realization of the securities as per the a foresaid rulings of the Court of Appeal, there is no guarantee that the Applicant/Plaintiff will be able to successfully execute the decree resultant from the instant proceedings.

There is now a high risk and likelihood that if the judgment is entered in favour of the Application/ Plaintiff, the 3rd Defendant/ Respondent will not be in a position to

satisfy such decree and as well as costs since it is already indebted to the 2 financial institutions in excess of Kshs. 2,819,665,196 exclusive of the attendant interest whereas its share capital is only Kshs. 1,000,000. There is a high likelihood that the assets of the 3rd Defendant/Respondent will be sold or transferred to third parties to avoid its liabilities. It is met and just that this Honourable Court orders the 3rd Defendant/ Respondent to deposit the sum of Kshs. 1,000,000,000 as security and guarantee to take care of the principal sums claimed by way of the instant proceedings together with costs of the suit and the interest there upon. It is also met and just that the said Zeyun Yang be ordered to file an affidavit of means to disclose the business and all the assets of the 3rd Defendant/Respondent.

In default of the foregoing it is equally met and just that this Honourable Court do issue summons for the said Zeyun Yang to show cause why security should not be furnished and in default he be committed to civil jail. In circumstances that the security is not furnished this Honourable Court should issue warrants of attachment and sale of the 3rd Defendant/Respondent's movable property wheresoever.

The 3rd Defendant/Respondent stated that the Plaintiff is most underserving of the reliefs it seeks, as from a public interest point of view, protection of a clean and healthy environment must take prominence over any narrow sectarian, selfish,

commercial interest, the former advanced by the Defendants. And the latter by the Plaintiff.

That the National Assembly has vide the Report prepared by the departmental Committee on Environment & Natural Resources dated 20th of August 2018; and consequently, adopted by the whole house on 11th October 2018, undertaken inquiries into complaints of environmental pollution at the Plaintiff's factory, and made various adverse findings against them. That it is also a fact that the National Assembly has vide the report prepared by the National Assembly's Select Committee on implementation of the House Resolutions.

That the National Environment Management Authority (NEMA), the Water Resource Management Authority (WAEMA), EPZA as well as the 1st and 2nd Defendants herein, essentially any and all concerned lead agencies, on matter environmental protection- have all made adverse findings about the Plaintiff's compliance levels, and even the Plaintiffs own supposed agreement for off-take effluent confirms on such. This renders the instant motion most undeserving in light of the precautionary principle, and the polluter pays principle, security should in fact issue against the Plaintiff.

The 3rd Defendant stated that they are engaged in disparate and completely unrelated litigation with its financiers, those commercial disputes concerns

adequately secured facilities, and the merits or lack of merit in those suits is subject of separate litigation before courts of competent jurisdiction. Critically, the correct factual position is that injunctions were issued in CoA Civil Application E175 of 2025 Erdemann Property Ltd V Credit Bank Ltd, preventing any interference with the subject property. In Machakos HCCC No. E007 of 2024 Mwita Francis & Others v EPL, and KCB, the court has similarly enjoined any interference with the suit property. In any event the disputes obtaining thereon are unrelated hereto.

The 3rd Defendant is a going concern and able to settle all its obligations and when they accrue, any supposition to the contrary is hyperbolic sensationalization, calculated at insulting and disparaging the 3rd Defendant.

That the requirements of security for costs should not be used as an instrument that would deter a party to pursue a legitimate claim as a result to deposit the required security. That the Applicant has not met the evidential burden of proof in establishing that the 3rd Defendant/Respondent would be unable to pay costs if unsuccessful in the proceedings, especially in the context of the public interest proceedings being pursued in the instant proceedings. That an applicant seeking an order for security for costs must demonstrate the inability of the 3rd Defendant/Respondent to pay the costs and the burden must be discharged to the requisite stand in law. That the 3rd Defendant is not the Plaintiff, neither is it the

principal Defendant in light of the very admissions by the 1st Defendant, and the totality of the circumstance is of this suit does not support a finding to allow the Application as drawn.

The application was canvassed by way of written submissions which the court has duly considered. The applicable law in an application for security for costs is order 26 Rule 1 of the Civil Procedure Rules which provides as follows;

“(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”.

As rightly submitted by the Plaintiff/Applicant, grant for orders sought herein is a matter of judicial discretion as the court held in the case of Shah and others vs Manurama Limited and others (2003) E.A 294 Cited with approval in the case of Ahmed Kulimye Bin & 2 others vs Kenya Revenue authority & another (2012) eKLR. The same position was taken by the court in the case of Cancer Investments Limited vs Sayani Investments Limited (2010) eKLR.

The test in an application for security for costs is not whether the Plaintiff/Applicant has established a prima facie case but whether the 3rd Defendant/Respondent has shown a bonafide defence. This was the holding in the case of Shah vs Sheti Civil Appeal No.34 of 1981.

The same principles were espoused in the case of Jayesh Hasmukh Shah vs Narin Haira & another (2015) eklr in which the court held;

“It is now settled Law 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 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 bonafides of the plaintiff’s claim, or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account”.

In an application for security for costs, the Plaintiff/Applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay any decree rendered due to depletion of its assets and which amounts to acts of insolvency. It is not enough to allege that a Respondent will be unable to pay in the event that they are unsuccessful. The same must be proven. This was the holding in the case of Kenya Education Trust vs Katherine S.M. Whitton Civil Appeal No 310 of 2009.

It should, however, be noted that much will depend on the circumstances of each case though the final result must be reasonable and modest. In the case of Marco

Trols & Explosive Limited vs Mamunje Brothers Limited (1988) Eklr 730 this point was enunciated by the court in the following terms;

“The exercise of the court’s power is discretionary. However, the onus is on the applicant to prove such inability or lack of good faith that would make the order for security reasonable”.

Being guided by those legal principles, the only issue for determination is whether or not an order for security for costs can issue against the 3rd Defendant/Respondent. As discussed above, one of the principles to consider is the ability of the 3rd Defendant/Respondent to pay the costs in the event that they are not successful and that, is one of the grounds relied upon by the Applicant. Article 50 of the Constitution provides that;

“Every person has the right to have his dispute that can be resolved by the application of the Law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body”.

In the case of Shakalanga Jirongo vs the Board of National Social Security Fund HCC No 957 of 2000 in which the court held that;

“Poverty is not sufficient ground for an order for security for costs”.

In the case of Noornamohammed Abdullah vs Ranchorbhai J. Patel (1962) EA 447 wherein the court held that;

“It is right that a litigant, however poor should be permitted to bring his proceedings without hindrances and have the case decided”.

In the case of Keystone Bank Limited & 4 others vs I&M Holdings Limited & another (2017) Eklr where the court held;

“In an application for security of costs, the applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proven”.

The court notes that the Applicant stated that the Respondent may not be able to settle the costs in the event that there is a decree against them due to the depletion of their assets and being heavily indebted to several financial institutions. I find that the above mentioned cases are unrelated to this matter and the 3rd Defendant/Respondent is still a going concern. To that extent, it did not discharge its evidential burden.

On the issue of whether the 3rd Defendant has a bonafide defence, the court has perused the Defence as filed. As was held in the case of Shah vs Sethi (supra), the

test in an application for security for costs is whether the Defendant has a bonafide defence. I am alive to the fact that at this stage, the court should not consider the merits of the case or the 3rd Defendant's defence as that is the mandate of the court during the trial. The only way the court can establish the veracity of those assertions is by taking evidence at the main trial. It would be unfair in the circumstances of this case, to order the 3rd Defendant to deposit security for the sought sums claimed in the suit and costs.

In view of the foregoing, I am of the considered view that the application is not merited and the same is hereby dismissed. The costs shall abide the outcome of the suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 24TH DAY OF MARCH 2026.

N.A. MATHEKA

JUDGE

ORIGINAL