

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO.257 OF 2018

**MANDHIR CONSTRUCTION
LIMITED.....PLAINTIFF/APPLICANT**

-VERSUS-

**ONE RIVERSIDE DRIVE LIMITED.....
DEFENDANT/RESPONDENT**

RULING

1. This is a Ruling arising out of the Plaintiff/Applicant's Application by way of a Notice of Motion dated 22nd April, 2025. It seeks for deposit of Security pending arbitration.

Background Facts

2. The Applicant filed the Motion dated 22nd April 2025 seeking the following orders;
 - a) *The Defendant/Respondent be and is hereby ordered to provide security in the sum of Kes.99,160,243.37 to be deposited in Court.*
 - b) *The Defendant/Respondent be and is hereby ordered to provide appropriate security to be deposited in Court.*

c) The costs of this application be borne by the Defendant/Respondent.

3. The Application was supported by the Affidavit of **AJMERA MANISHKUMAR DILIPKUMAR**. He depones that the Plaintiff/Applicant has been unable to trace the physical location or fixed abode of the Defendant/Respondent. It has also been unable to identify any assets belonging to the Defendant/Respondent. As a result, the Plaintiff/Applicant anticipates significant challenges in enforcing the arbitral award against the Defendant/Respondent. In these circumstances, the Plaintiff/Applicant contends that it is reasonable and just for the Defendant/Respondent, having filed an application to set aside the arbitral award, to provide appropriate security to be deposited in Court pending the determination of the matter.

4. In response, the Defendant/Respondent has sworn a Replying Affidavit of **Janakan Murugesan** sworn on 5th May, 2025. The Defendant states that the Plaintiff has falsely asserted that the Defendant did not have a physical address within the Republic of Kenya. This is despite numerous

correspondences between the Plaintiff and the Defendant's Holding Company.

5. The Defendant earlier filed an application by way of a Notice of Motion dated 5th November, 2024 seeking orders of setting aside the Arbitral Award of Kshs. 99,160,243.37. This has in turn triggered the Application for furnishing of security.

Issues for determination

6. The Court has considered the Application, the response, the written submissions and the oral highlights by Counsel for the parties. The Court frames the following single issue for determination;

(a) Whether the Respondent should be ordered to provide security.

Analysis

7. In its submissions, the Plaintiff/Applicant maintained that it has never entered into any contract with **AMS Properties Ltd** in relation to the dispute before the Court. That therefore any reference to that entity by the

Defendant/Respondent is misleading, irrelevant, and intended to distract from the issues in dispute. The Plaintiff/Applicant further states that the Defendant/Respondent's Replying Affidavit confirms that it does not have a fixed abode or identifiable assets of its own. That it instead refers to the physical address and assets of **AMS Properties Ltd**, which is a separate and distinct legal entity and not a party to these proceedings. The Plaintiff/Applicant also submits that the Defendant/Respondent has admitted that all units previously constructed have already been sold, demonstrating that it lacks assets and that any assets have long been dissipated. In these circumstances, the Defendant/Respondent has not shown how depositing the awarded sum in Court as security would occasion any prejudice.

8. In contrast, the Respondent maintained that it has demonstrated it has a physical presence in the country and it has the ability to pay the impugned arbitral award. As a result, the Plaintiff/Applicant has not proved to the Court that there is risk of default by the Defendant/Respondent.

(a) Whether the Respondent should be ordered to provide security.

9. **Section 37(2) of the Arbitration Act** gives provision for security. It states as follows;

"(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1)(a)(vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.

10. The Court has considered the authorities cited by the Plaintiff/Applicant in **Alexandria Cotton & Trading Company (Sudan), Ltd v. Cotton Company of Ethiopia, Ltd [1965] 2 Lloyd's List Law Reports; SA & Others -v- BH & GC HKCFI 1357** and **Claimant v Respondents, Judgment of the Court of First Instance of the High Court of Hong Kong [2024] HKCFI 3052, 1 Nov 2024**. On the other hand, the

Defendant/Respondent relies upon **Jayesh Hasmukh Shah vs. Narin Haira & Another (2015) eKLR** and **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others (2014) eKLR.**

11. The Court has considered the decision in **360 Degrees Court Apartments Residents Association suing through Nelson Mukora & 2 others v Join Ven Investments Limited & 2 others [2021] KEELC 3036 (KLR).** **Angote J.** stated the following;

“That being the case, and the Plaintiff having filed an Application seeking to set aside the Arbitral Award, and this court being seized of the Application to enforce the Award, the court has the discretion of ordering for security before hearing the Plaintiff’s Application pursuant to the provision of Section 37(2) of the Arbitration Act.....

..... The reading of Section 37(2) of the Arbitration Act shows that the court has the discretion to order for security before hearing an Application to set aside an Award. It should not be lost to any party what the

*rationale for security for costs is. In the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others (2014) eKLR** the court held as follows:*

*“The test in 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. This was the holding in the case of **Shah vs. Sheti Civil Appeal No. 34 of 1981.**”*

*39. 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 bona fides of the plaintiff's claim, or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account."

40. In the case of **University of Nairobi vs. Multiscope (2020) eKLR** the Court of Appeal held as follows:

"On the flipside, the Respondent's contention that it may also be prejudiced if the orders are granted as the applicant had demonstrated inability to pay the arbitral fees which was a much lesser amount is not without substance. In the circumstances we find it necessary to protect the interest of both parties by issuing an order of stay of proceedings on condition that the applicant shall deposit half the amount awarded by the arbitrator into an interest earning account in the joint names of the parties' advocates within 90 days from the date hereof."

41. It is not in dispute that the Arbitral Tribunal made an order for costs in favour of the Defendant. The Award on Quantum for costs stems from the Final Award of the Arbitrator. The said Award is what the Plaintiff has challenged.

42. The Plaintiff has not denied that it is an Association whose finances are generated from service charge paid by the owners of the units on the suit property. The Plaintiff has not placed before this court the mechanisms that have been put in place to meet the arbitral costs and the costs of these proceedings in the event it does not succeed in setting aside the Award. Indeed, no resolution has been placed before this court to show that the Plaintiff's members sanctioned the filing of the Application to set aside the Award or that the Plaintiff generates income that is sufficient to offset the Award."

12. It is not lost to this Court that the Arbitration process carries with it some finality. It is a process that parties bound themselves to, nay they chose it themselves. It is also not lost to the Court that there exists an Arbitral Award published on 27th August, 2024.
13. It is also clear to the Court that Section **37(2) of the Arbitration Act** does give this Court some latitude to grant orders of security. This is despite the fact that parties have chosen a dispute resolution forum away from this Court.
14. The Plaintiff's fear is that there may be nothing to this Special Purpose Vehicle that is the Defendant by the time the Arbitration comes to an end. On the other hand, the Defendant relies heavily on the financial backing by **AMS Properties Ltd.** The letter from **KCB Bank Ltd** dated 2nd May, 2025 paints a picture of a well healed and financially able **AMS Properties Ltd** with facilities in excess of Kshs.350 million. However, **AMS Properties Ltd** does not appear to be a party to this case.
15. This is a case where the Court has a discretion to award deposit of security if it finds it proper to do so. The Court is

persuaded that the Applicant has made out a good case for security. The Defendant, save from seeking to hide behind the financial might of a bigger sister, has not placed any materials to show it is capable of meeting any Arbitral award that may result. The threat or risk profile presented by the Special Purpose Vehicle in this case makes it worth the while to grant the orders sought. There are no financial statements or lists of assets or letters of comfort from a financial institution to lessen this risk profile.

16. At the same time the Court has to balance between the desire for security by the Applicant and the right not to be prejudged as well as the right of access to justice on the part of the Respondent. The Court has at all times be cognizant of the fact that in granting the orders sought it does not stifle or limit these rights.

17. By its own admission in its Affidavit, the Respondent acknowledged that the Defendant is a development company and was registered with the sole purpose of undertaking the development at hand. For clarity, the

Defendant was a Special Purpose Vehicle (SPV) to undertake the project on LR. No. 205/52 Riverside Drive.

18. It is noteworthy that the Defendant relies on the physical address of **AMS Properties Ltd**, which is not a party to the suit herein. Therefore, the Court agrees with the Applicant that the Respondent does not have a fixed abode and, in that case, might face challenges in the enforcement of the arbitral award.
19. On the other hand, the Court takes note that the Plaintiff has filed an application dated 4th October, 2024 for enforcement of the Arbitral Award. The Court had given directions for filing of submissions to that application as well as the one for setting aside dated 5th November, 2024. This application for security has been filed on the back of those two applications that were ripe for hearing. It would augur better if such an application was to be filed as soon as an application for setting aside is filed.
20. In light of the above provision of **Section 37(2) of the Arbitration Act** and in the exercise of the Court's discretion, the Court hereby finds that it is proper for the

Respondent provide security but for Kshs.20,000,000/=. The security may be in form of monies or a bank Guarantee to be furnished within Forty-Five (45) days from the date of this Ruling.

21. As to costs, the same follow the event and are awarded at the discretion of this Court. The same are awarded to the successful Applicant.

Determination

a. The Plaintiff/Applicant's Application by way of a Notice of Motion dated 22nd April, 2025 is allowed in the following terms;

a) The Defendant/Respondent be and is HEREBY ordered to provide security in the sum of Kshs.20,000,000 to be deposited in a joint interest earning account in the names of the Counsel for the Parties within the next Forty-Five (45) days from the date of this Ruling. In the event the Advocates cannot agree on the modalities of opening a joint

account within the Forty-Five (45) days set out herein, the Respondent to deposit the monies in Court within Five (5) upon expiry of the said period.

b) In the alternative and in lieu of monies/cash deposit as set out above, the Defendant/Respondent be at liberty to provide and furnish to the Court a Letter of Bank Guarantee from a Bank for the said sum of Kshs.20,000,000.00, within the next Forty-Five (45) days from the date of this Ruling. The said Letter of Guarantee to be directed to the Deputy Registrar of this Court and copied to the Plaintiff/Applicant's Advocates.

c) The costs of this application be borne by the Defendant/Respondent.

22. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MILIMANI THIS 27TH
DAY OF APRIL, 2026.**

**NJOROGE BENJAMIN K.
JUDGE**

In the presence of;

Mr. Biyogo for the Plaintiff/Applicant.

Mr. Mwangi for the Defendant/Respondent.

Mr. John Paul - Court Assistant.