**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 100 OF 2012**

**IN THE MAIN SUIT**

**RAJNIKANT VELJI SHAH & SUNIL RAJNI SHAH**

**T/A HITESH (HD) SHAH & CO.........................PLAINTIFFS**

**=VERSUS=**

**GALOT INDUSTRIES LIMITED.............1ST DEFENDANT**

**MOHAN GALOT........................................2ND DEFENDANT**

**M.G PARK LIMITED.................................3RD DEFENDANT**

**BY WAY OF COUNTERCLAIM**

**GALOT INDUSTRIES LIMITED.................1ST PLAINTIFF**

**MOHAN GALOT..........................................2ND PLAINTIFF**

**VERSUS**

**RAJNIKANT VELJI SHAH......................1ST DEFENDANT**

**SUNIL RAJNI SHAH................................2ND DEFENDANT**

**PRAVIN GALOT.......................................3RD DEFENDANT**

**PAVAN GALOT........................................4TH DEFENDANT**

**RULING**

What is before the court is a Notice of Motion application dated 24th July, 2017 brought by the defendants in the main suit seeking the following orders;

1. That the Honourable court be pleased to order the plaintiffs in the main suit to deposit in court within 30 days a sum of Kshs.5,000,000/= or such security as is sufficient to cover the costs of the defendants in the main suit.

2. That the Honourable court be pleased to order the plaintiffs in the main suit to provide an undertaking and/or security for damages arising from the order of the court issued on 28th February, 2012.

3. That in default, the suit be dismissed.

4. That costs of the application be borne by the plaintiffs in the main suit.

The applicants' case:

The application was brought on the grounds set out on the face thereof and on the affidavit of the 2nd defendant in the main suit, Mohan Galot sworn on 24th July, 2017. The defendants in the main suit (hereinafter referred only as "the applicants") averred that the plaintiffs in the main suit (hereinafter referred to only as "the plaintiffs") brought this suit claiming among others that they were tenants of the 1st applicant on L.R No. 209/2663(hereinafter referred as "the suit property") by virtue of a tenancy agreement/lease dated 1st February, 2012.

The applicants contended that the plaintiffs' claim against the applicants is bad in law, frivolous and lacks merit as demonstrated in the ruling that was delivered by the Business Premises Rent Tribunal on 3rd February, 2012 in BPRT Case No. 752 of 2010, Rajnikant Velji Shah & Another vs. Galot Industries Ltd. The applicants averred further that in the said ruling of the tribunal, the tribunal held among others that there was no landlord and tenant relationship between the plaintiffs and the 1st applicant. The applicants contended that the tenancy agreement/lease dated 1st February, 2012 on which the plaintiffs' suit was grounded was fraudulent, illegal and a gross conspiracy to defeat the cause of justice. The applicants averred further that the 1st applicant did not sign the purported lease with the plaintiffs and that the purported lease dated 1st February, 2012 was a forgery created after 8th February, 2012 to help the plaintiffs to retain possession of the suit property. The applicants contended further that the 3rd and 4th defendants in the counter-claim did not have authority of the 1st applicant to execute the purported lease dated 1st February, 2012. The applicants contended further that the 1st applicant was incorporated on 21st June, 1979 as a limited liability company with a share capital of Kshs. 1,000,000/= divided into 2 management shares and 98 ordinary shares of Kshs.10,000/= each respectively.

The applicants contended that Article 10 of the 1st applicant's Articles of Association, contained powers, authority and privileges of the Governing Director which included, power to appoint and remove any other directors as deemed necessary. The applicants contended further that on 29th January, 2016, the Registrar of Companies made a finding that valid directors of the 1st applicant were Mohanlal Pusharam Galot and Lalchand Pusharam Galot. The applicants averred that the lease that was signed by the 3rd and 4th defendants in the counterclaim on behalf of the 1st applicant was null and void for lack of authority. The applicants averred further that as a result of the fraudulent and illegal actions by the 3rd and 4th defendants in the counterclaim, the 1st applicant had been unlawfully deprived of its right to use and enjoy the suit property and to benefit from its equity. The applicants contended that the plaintiffs were not in a hurry to prosecute this suit because its pendency gave them a licence to continue using the suit property unlawfully.

The applicants contended further that in the event that the plaintiffs' suit was dismissed and the 1st applicant's counterclaim was allowed, the damages and the resultant costs will be high and the plaintiffs may not be in a position to pay the same. The applicants averred that the 1st applicant claims from the plaintiffs a sum of Kshs. 400,000/= per month for the loss of user of the suit property with effect from 1st March, 2012 which if computed to date, comes up to approximately to Kshs. 24 million. The applicants averred that the 1st applicant was also claiming damages from the plaintiffs for the additional costs it will incur to erect a proposed modern office complex on the suit property on account of the delay occasioned by the purported lease dated 1st February, 2012. The applicants averred that an undertaking as to damages should be ordered to offer protection to the applicants for injury they are likely to suffer should the court eventually find that the interlocutory order of injunction in force ought not to have been issued in the first place.

The applicants annexed to their affidavit in support of the application among others; a copy of a ruling that was made by the Business Premises Tribunal on 2nd February, 2012 in Nairobi BPRT Case No. 752 of 2010, a copy of a certificate of incorporation of the 1st applicant, Galot Industries Ltd. together with its Memorandum and Articles of association and, a copy of a letter dated 29th January, 2016 by Senior Deputy Registrar of Companies addressed to Mohan Galot and Pravin Galot.

The plaintiffs' case:

The application was opposed by the plaintiffs through a Notice of Preliminary Objection dated 13th September, 2017 and grounds of opposition dated 7th December, 2018. In my view, the plaintiffs' Notice of Preliminary Objection was subsumed in their grounds of opposition that was filed subsequently. In their grounds of opposition, the plaintiffs contended that the application had no merit, was in incurably defective and amounted to an abuse of the process of the court. The plaintiffs contended further that the applicants had not satisfied the relevant principles for granting of the orders sought. The plaintiffs contended further that the 1st applicant was not a party to the application as it was not represented by the firm of advocates who drew the application more particularly after the withdrawal on 18th September, 2018 of the Notice of Notion application dated 31st August 2016 that had been filed to determine the issue of legal representation of the 1st applicant. The plaintiffs averred further that no allegation had been made in the application to the effect that the plaintiffs were nonresidents. The plaintiffs contended that they had a good case against the applicants and that the applicants' application was speculative as there was no evidence whatsoever that the plaintiffs would be incapable of meeting either the costs or damages that may be awarded against them if at all in the suit. The plaintiffs contended further that the 1st applicant had admitted the existence of a tenancy agreement with the plaintiffs over the suit property. The plaintiffs contended further that granting of the orders sought by the applicants would be contrary to the word and spirit of Articles 48 and 51 (1) of the constitution. The plaintiffs contended that the application was merely intended to obstruct and delay the final determination of this suit since the applicants had no defence whatsoever to the plaintiffs' claim. The plaintiffs contended that the application had been filed after inordinate delay and no explanation had been given for the delay. The plaintiffs urged the court to dismiss and/or strike out the application with costs.

The applicants' submissions:

The application was argued by way of written submissions. The applicants filed their submissions on 18th March, 2019 while the plaintiffs filed their submissions on 10th December, 2018. In their submissions, the applicants contended that the orders sought were discretionary and that the principles for granting orders for security for costs were set out in the case of Keary Development *v* Tarmac Construction (1995) 3 ALL ER 534 that was cited with approval in the case of Winnie Wanjiku Mwendia *v* Catherine Wangari Mwendia & 3 Others [2015] eKLR as follows;

**1. The court has a complete discretion whether to order security and accordingly it will act in light of all the relevant circumstances.**

**2. 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.**

**3. The court must carry out a balancing exercise. On 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 claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.**

**4. In considering all the circumstances, the court will have regard to the plaintiff's prospect of success. But it should not go into the merit in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure.**

**5. The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount, it is not bound to make an order of a substantial amount.**

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

**7. The lateness of the application for security is a circumstance which can properly be taken into account.**

The applicants submitted that the plaintiffs had based their claim on a fraudulently executed leased dated 1st February, 2012 and that the dismissal of the plaintiffs' suit would render the defendants who were seeking a substantial sum of money from the plaintiffs for loss of user of the suit property without recourse. The applicants submitted that their claim against the plaintiffs from 1st March, 2012 up to the date of filing of the application was in the region of Kshs. 33,600,000/=. The applicants submitted that if the plaintiffs' claim failed, the applicants would be entitled to recover from the plaintiffs the said amount of Kshs. 33,600,000/= plus damages. The applicants submitted that given the precarious nature of the plaintiffs' suit that had a fraudulent lease dated 1st February, 2012 as its foundation, an order for security as prayed for in the application was warranted and necessary to protect the applicants from the frivolous suit. The applicants cited the case of Patrick Ngete Kimanzi *v* Marcus Mutua Muluvi and 2 others, High Court Election Petition No. 8 of 2013 where it was held that:

**"Security for costs ensures that the respondent is not left without recompense for any costs or charges payable to him. The duty of court is therefore to create a level ground for all parties involved. That is the proportionality of the right of petitioner to access justice vis-à-vis the respondent's right to have security for any costs that may be owed to him and not have vexatious proceedings brought against him."**

The applicants also cited the case of Ocean View Beach Hotel Limited *v* Salim Sulutan Mollo and Others [2012] eKLR that was cited in the case of Winnie Wanjiku Mwendia (supra) where the court stated that:

**"The purpose of an order for security for costs is to protect a party from incurring expenses on a litigation which it may never recover from a losing side and it is not to deter the plaintiff from pursuing her claim."**

The applicants submitted that the orders sought in the application were not intended to prevent the plaintiffs from pursuing their claim but rather to protect the applicants against the expenses incurred by them in this frivolous claim. The applicants urged the court to allow the application with costs.

The plaintiffs' submissions:

In their submissions in reply, the plaintiffs contended that the general rule was that security is normally required from a plaintiff resident outside the jurisdiction of the court. In support of this submission, the plaintiffs cited the case of Shah *v* Shah [1982] KLR 95. The plaintiffs submitted that there was no allegation in the application that the plaintiffs were not residing within the jurisdiction of the court. The plaintiffs submitted that in their verifying affidavit they had stated that they were residing in Parklands, Nairobi. The plaintiffs submitted that since they were residing within the jurisdiction of the court, the provisions of Order 26 rule 4 of the civil Procedure Rules on which the applicants' application was brought was not applicable. The plaintiffs submitted further that even if they were not residing within the jurisdiction of the court, the orders sought by the applicants would still not issue for a number of reasons. The plaintiffs cited the case of Jayesh Hasmukh Shah *v* Navin Haria & Another [2015] eKLR where the court stated as follows:

**"The law is settled that an order for security for costs is a discretionary one under Order 26 of the Civil Procedure Rules. The discretion is, however, to be exercised reasonably and judicially by making reference to the circumstances of each case. Such matters as; absence of known assets within the jurisdiction of the court; 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 circumstance or conduct of the plaintiff or the defendant. The conduct by the plaintiff will include activities which may hinder recovery of costs, for instance, recent closure or transfer of bank accounts and disposal of assets. And the conduct of the defendant includes, filing of application for security for costs as a way of oppressing or obstructing the plaintiff's claim, for instance, where the defence is mere sham, or there is an admission by the defendant of money owing or that there is a deliberate refusal or delay to pay money owing or refusal to perform its parts of the bargain."**

The plaintiffs submitted that an order for security for costs is discretionary and that in making the order, the court would act in light of all the relevant circumstances. The plaintiffs submitted that they had a good case which was set out in their amended plaint dated 9th March, 2012 and in the supporting affidavit and further affidavit of Rajnikant Velji Shah sworn on 27th February, 2012 and 23rd March, 2012 respectively and the documents annexed thereto.

The plaintiffs submitted that their claim against the applicants was based on the tenancy agreement over the suit property dated 1st February, 2012. The plaintiffs submitted that the 1st applicant had admitted the existence of the said tenancy agreement. The plaintiffs submitted further that the ruling of the tribunal in BPRT Case No. 752 of 2010 was inconsequential in view of the fact that there was a new tenancy agreement dated 1st February, 2012 between the 1st applicant as the landlord and the plaintiffs as tenants which agreement had been admitted by the 1st applicant. The plaintiffs submitted that the applicants' contention that the said tenancy agreement dated 1st February, 2012 was fraudulent and illegal was baseless as it was not backed by any evidence or facts.

The plaintiffs submitted that the 2nd and 3rd applicants had no bona fide defence to the plaintiffs' claim. The plaintiffs submitted that if the orders sought were granted, the 2nd and 3rd applicants would benefit from their own unlawful acts. The plaintiffs submitted further that nothing had been adduced before the court by the applicants to show any financial limitation on the part of the plaintiffs to meet the costs of the applicants in the event that they succeeded in their counterclaim against the plaintiffs. The plaintiffs submitted that they had no burden to establish that they had means of meeting the said costs and that there was nothing on record showing that the conduct of the plaintiffs would hinder the recovery of costs. The plaintiffs submitted that there was no likelihood that they would not be able to pay costs of the suit should their claim fail. The plaintiffs cited the case of Concord Insurance Company Ltd. *v* NIC Bank Ltd. [2015] eKLR where the court while dismissing an application for security for costs stated that:

> **"Even if it was unable to pay costs, on a prima facie basis, its claim is bona fide and deserves a hearing without unnecessary restriction."**

The plaintiffs submitted further that the applicants' application was brought for the sole purpose of oppressing and/or obstructing the plaintiffs' claim. The plaintiffs submitted that the application added to a list of numerous applications of similar nature filed by the applicants with the sole aim of stalling the hearing of the main suit. The plaintiffs submitted further that the applicants' application was brought after inordinate delay. The plaintiffs submitted that the application was brought 6 years after the case was filed and 3 years and 6 months after the filing of the counterclaim and that no reasons for the delay had been given by the applicants. The plaintiffs submitted that the application was brought in bad faith and was an afterthought aimed obstructing the plaintiff claim.

In conclusion, the plaintiffs submitted that applicants had not satisfied the relevant principles for the grant of the discretionary orders sought in the application. The plaintiffs urged the court to dismiss the application.

Determination:

I have considered the applicants' application together with the affidavit filed in support thereof. I have also considered the plaintiffs' notice of preliminary objection and grounds of opposition filed in opposition to the application. Finally, I have considered the written submissions by the parties' respective advocates and the authorities cited in support thereof. The main issue that arises for determination in the application before the court is whether an order for security for costs should be made against the plaintiffs in favour of the applicants. In their application, the applicants had also sought an order that the plaintiffs do provide undertaking and/or security for damages arising from the order that was issued by the court on 28th February, 2012. The applicants' application was brought under Order 26 Rules 1 and 4 and Order 40 Rule 2 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law.

I am of the view that the applicants' prayer for the plaintiffs to provide undertaking and/or security for damages arising from the order that was issued by the court on 28th February, 2012 is coming late in the day having regard to the fact that the order on account of which the undertaking and/or security for damages has been sought was made on 28th February, 2012; more than five years before the present application. No reason has been given by the applicants as to why it took them five years to seek an undertaking as to damages under Order 40 Rule 2 of the civil procedures rules. I have also noted from the record that the application in which the order of 28th February, 2012 was given is yet to be heard inter partes. In my view, it will be at the inter partes hearing of the said application if the parties still wish to pursue it that the applicants can urge the court to order security or undertaking as to damages. In the circumstances, I find no merit in this prayer.

The applicants' application to the extent that its seeks security for costs was brought under Order 26 Rules 1 and 4 of the Civil Procedure Rules. Order 26 rule 1 of the Civil Procedure Rules provides that:

> **"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."**

Order 26 Rule 4 of the Civil Procedure Rules provides that:

> **"In any suit brought by a person not residing in Kenya, if the claim is founded on a bill of exchange or any other negotiable instrument or on judgment or order of a foreign court, any order for security for costs shall be in the discretion of the court."**

I am in agreement with the submissions by the plaintiffs that the applicants' application does not lie under Order 26 Rule 4 of Civil Procedure Rules. There is no evidence that the plaintiffs are not residing within the jurisdiction of the court. The plaintiffs claim is also not founded on a bill of exchange or other negotiable instruments or on a judgment or order of a foreign court. The provisions of Order 26 Rule 4 of the Civil Procedure Rules are in the circumstances not applicable. The application falls for consideration under Order 26 Rule 1 of the Civil Procedure Rules that I have reproduced above.

It was common ground that an order for security for costs is discretionary and that the discretion must be exercised reasonably and judiciously having regard to the circumstances of each case. As the court observed in the case of Ocean View Beach Hotel Limited *v* Salim Sulutan Mollo and Others (supra), the purpose of an order for security for costs is to protect a party from incurring expenses in litigation which it may never recover from the losing party and not deter a plaintiff from pursuing his claim. The burden was on the applicants to establish that the plaintiffs would not be able to pay their costs in the event that their suit fails at the trial. In the case of Gatirau Peter Munya *v* Dickson Mwenda Kithinji & 2 others [2014] eKLR, the court stated as follow:

> **"In an application for security for 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. See Hall -vs- Snowdon Hubbard & Co. (I), (1899) 1 Q.B 593, the learned Judge at page 594 stated:- "The ordinary rule of this court is that, except in applications for new trials, when the respondent can show that the appellant, if unsuccessful, would be unable through poverty to pay the costs of the appeal, an order for security for costs is made." In Marco Tool & Explosives Ltd – vs- Mamujee Brothers Ltd. (supra), this Court expressed itself thus:- "The onus is on the applicant to prove such inability or lack of good faith that would make an order for security reasonable."**

From the material before me, I am not satisfied that the applicants have discharged this burden. The applicants placed no evidence before the court of the plaintiff's inability to pay their costs in the event that the suit is dismissed at the trial. The onus was not on the plaintiffs to demonstrate their ability to meet the applicants' costs. In the absence of any evidence that the plaintiffs would be unable to pay the applicants' costs in the event that they fail in their claim at the trial, I find no merit in the applicants' application.

The applicants' application fails also for another reason. This suit was filed in 2012 while the present application was brought five years later, in 2017. No explanation was given for the delay in bringing the application. The applicants are guilty of laches and as such are not entitled to a discretionary remedy. The applicants submitted at length that the plaintiffs did not have a bona fide claim against them since the plaintiffs' claim was based, according to them, on a forged and fraudulent lease. On the material before the court, I am unable to determine at this stage the merit of the plaintiffs' claim. The much I can say is that, the plaintiffs' claim is not frivolous, vexatious and an abuse of the process of the court as claimed by the applicants.

In the final analysis and for the foregoing reasons, I find no merit in the Notice of Motion application dated 24th July, 2017. The application is dismissed with costs to the plaintiffs.

**Dated and Delivered at Nairobi this 14th Day of November 2019**

**S. OKONG'O**

**JUDGE**

**Ruling delivered in open court in the presence of**

Ms. Muyai h/b for Mr. Mugambi for the plaintiffs

Ms. Muthie h/b for Mr. Tiego for the Defendants

Phylis - Court Assistant