



**REPUBLIC OF KENYA**

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

**ELC SUIT NO.109 OF 2014**

**ADAN KASSIM HUSSEIN.....1<sup>ST</sup> PLAINTIFF**

**IBREN KASSIM HUSSEIN.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**GAPCO KENYA LIMITED.....DEFENDANT**

**RULING**

The Plaintiffs brought this suit on 26<sup>th</sup> September, 2013 against the Defendants seeking among others, the recovery of a sum of Kshs.2,465,400,000/= being the loss the Plaintiffs claimed to have suffered as a result of the Defendant's alleged breach of two (2) lease agreements both dated 1<sup>st</sup> December, 1999 over L.R. No.Kajiado/Meto/249 and L.R. No. Kajiado/Meto/250. The Defendant filed a statement of defence on 28<sup>th</sup> October, 2013 denying the Plaintiffs' claim in its entirety. The suit is pending hearing.

What is now before me is the Plaintiffs' application brought by way of Notice of Motion dated 22<sup>nd</sup> June, 2016 in which the Plaintiffs have sought several prayers. Prayers 1, 2, 3 and 6 are spent. The prayer that is pending is prayer 5 which is framed on the following terms.

*“THAT pending the hearing of the suit, the Defendant/Respondent herein do within seven (7) days from the date of filing this application, be ordered to give security for the above claim to the tune of Kenya shillings Two Billion Four Hundred Sixty Five Million and Four Hundred Thousand (Kshs.2,465,400,000), being the amount claimed in the above matter.”*

The Plaintiffs' application was brought under Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, Order 26 rules 1, 2, 5(1) and 6(1) of the Civil Procedure Rules, 2010. The application was brought on the grounds set out on the face thereof and on the affidavit and further affidavit of the 1<sup>st</sup> Plaintiff sworn on 22<sup>nd</sup> June, 2016 and 9<sup>th</sup> August, 2016 respectively. The application was opposed by the Defendant through a replying affidavit and supplementary affidavit sworn by Subhasish Mukherjee on 6<sup>th</sup> July, 2016 and 2<sup>nd</sup> March, 2017 respectively.

**The Plaintiffs' case:**

The Plaintiffs have contended that they have a claim against the Defendant for a sum of Kshs.2,465,400,000/= for breach of the lease agreements the Plaintiffs had entered into with the Defendant which claim is still pending hearing and determination before this court. The Plaintiffs have averred that it has come to their knowledge that the Defendant is selling its shares to Total Petroleum Company limited (“Total”) and that the sale is in its final stages. The Plaintiffs have averred that they have opposed the takeover of the Defendant by Total and that the orders which they have sought are intended to protect and preserve the dignity and process of this court and will serve the interest of justice and fairness. The Plaintiffs have averred that the Defendant's employees have already filed a suit against the Defendant as a result of the said intended takeover of the Defendant by Total. The Plaintiffs have contended that if the transfer of the Defendant's shares to Total is completed, the Defendant will not be capable of being sued and no recovery proceedings would be capable of being instituted against it. The Plaintiffs have contended that if the orders sought are not granted, the Defendant would close down its business without meeting their claim herein a situation that would result in a miscarriage of justice. The Plaintiffs have averred that the Defendant had refused to furnish them with a copy of the agreement which they have entered into with Total in respect of the said sale of shares. The Plaintiffs have also contended that the Defendant has not disclosed the transaction to the regulatory authorities.

**The Defendant's case:**

The Defendant has denied that it is selling its shares to Total. The Defendant has averred that it is a wholly owned subsidiary of Gulf Africa Petroleum Corporation (“the parent Company”) whose shareholders are, Reliance Exploration and Production DMMC which owns 76% of the shares and Fortune Oil Corporation which owns 24% of the shares. The two companies shall be referred to hereinafter as “the shareholders of the parent company.” The Defendant has averred that in the year 2015, the shareholders of the parent company decided to sell their shares in the parent company to Total Outre Mer S.A (“Total S.A”). The Defendant has contended that it is not a party to the said transaction. The Defendant has averred that the sale of the shares held by the shareholders of the parent company in the parent Company will

not affect the Defendant which will remain a going concern capable of meeting all its pending claims. The Defendant has denied that as a result of the sale of the shares in the parent company, it shall cease to exist. The Defendant has contended that the Defendant being a corporate body is separate and distinct from its shareholders. The defendant has averred that even if it is assumed that the Defendant would cease to exist, the leases that are the subject of this suit bind the Defendant, its successors and assigns. The Defendant has averred that the Defendant's legal claims and liabilities are not affected by the change in shareholding of the parent company that owns the Defendant. The Defendant has contended that the Plaintiffs' application has no basis and that the same has been brought on the basis of erroneous information.

#### The submissions:

The parties filed written submissions which they highlighted before me on 20<sup>th</sup> July, 2017. In their submissions, the Plaintiffs based their arguments on Order 26 rules 1 and 5 of the Civil Procedure Rules which deals with security for costs. The authorities that were cited by the Plaintiffs were all on security for costs. The Plaintiffs submitted that they had satisfied the conditions for granting of security for costs and urged the court to order the Defendant to furnish security for their entire claim amounting to Kshs.2,465,400,000/=. The Plaintiffs submitted that they had placed credible evidence before the court showing that if the Defendant is not ordered to furnish security for costs before the sale of its shares then there will be no property left for the Plaintiffs to attach in the event that they are successful in their claim against the Defendant.

In its submissions in reply, the Defendant argued that the Plaintiffs had failed to establish the grounds for grant of an order for security for costs. The Defendant submitted that since the Plaintiffs' application was brought under Order 26 of the Civil Procedure Rules which deals with security for costs, the Plaintiffs were under a duty to meet the threshold under that order for grant of the orders sought. The Defendant submitted that the security sought by the Plaintiffs was not for costs but for the Plaintiffs' entire claim. The Defendant submitted that under Order 26 of the Civil Procedure Rules, the security envisaged is for costs only and not for the entire claim of a party. The Defendant submitted that the Plaintiffs' prayer was defective. The Defendant submitted further that the Plaintiffs had not demonstrated that the Defendant would be unable to meet their costs in the event that their claim was successful. The Defendant submitted further that under Order 26 of the Civil Procedure Rules, the Plaintiffs had no right to seek security for costs. The Defendant cited the case of Beta Healthcare International Limited vs. Grace Mumbi Githanga & 2 others (2016) eKLR and Shah vs. Shah (1982) KLR 95 and submitted that under Order 26 rule 1 of the Civil Procedure Rules, only a Defendant or a subsequent party to a suit can seek security for costs. The Defendant submitted that the Plaintiffs had no right to seek security for costs from the defendant. The Defendant submitted that even if the Plaintiffs were entitled to seek security for costs, they had not put forward valid grounds that would justify the grant of the order. The Defendant submitted that the Plaintiffs' only ground for bringing the application was that the Defendant was disposing of its shares. The Defendant submitted that it had demonstrated that it was not disposing of its shares and that practically it was incapable of disposing of its own shares. The Defendant contended that it was its shareholders who had sold their shares and that the Defendant as a corporate entity was intact. The Defendant submitted that it was not a party to the said transaction for the sale of shares. The Defendant submitted that the transfer of its shares did not remove it from the jurisdiction of the court and did not affect any claims or liability that could exist as against it as at the date of such transfer. The Defendant submitted that the Plaintiffs did not explain in what way the sale of the Defendant's shares would affect the Plaintiffs' claim against the Defendant. The Defendant submitted that the Plaintiffs' application would still fail even if it was deemed to be an application for attachment before judgment since the grounds for such attachment had not been disclosed.

#### Analysis and determination:

I have considered the Plaintiffs' application and the replying affidavits that were filed in opposition thereto. I have also considered the submissions of counsel and the authorities that were cited in support of the same. The Plaintiffs' application was expressed to have been brought under Order 26 rule 1, 2, 5(1) and (6) (1) of the Civil Procedure Rules. Order 26 of the Civil Procedure Rules deals with security for costs. In their written and oral submissions before the court, the Plaintiffs left no doubt that what they were seeking was security for costs. I am in agreement with the Defendant's submission that a plaintiff has no right under Order 26 Rule 1 of the Civil Procedure Rules to seek security for costs from a Defendant. The only parties allowed by the rule to seek security for costs are the defendant and subsequent parties to the suit. I was surprised that although the issue was covered extensively by the Defendant in its written and oral submissions, the Plaintiffs did not respond to the same. It is my finding arising from the foregoing that the Plaintiffs' prayer for security for costs is misconceived.

The other objection that was raised against the Plaintiffs' application was that the Plaintiffs sought not only the security for costs but for the Plaintiffs' entire claim. Even if the application was properly before the court, under Order 26 of the Civil Procedure Rules, the court can only order security for costs and not for the entire claim of a party. I am of the view that a Plaintiff seeking security for his entire claim should move the court under order 39 of the Civil Procedure Rules and satisfy the conditions set out under rules 1, 2, 5 and 6 thereof.

Those findings alone would have been sufficient to dispose of the application before me. I wish however to deal with the merit of the application lest I be accused of determining the application on mere technicalities. Assuming that the Plaintiffs' application for security for costs was properly before the court, did the Plaintiffs satisfy the conditions set out in Order 26 for granting of such order? The parties agreed that the order is discretionary. The cases of Keary Development Ltd. vs. Tarmac Construction (1995) 3 All ER 534 that was cited by the Plaintiffs and Beta Healthcare International Limited vs. Grace Mumbi (supra) that was cited by the Defendant contain the principles applied by the courts in applications for security for costs. In the Beta Healthcare case, the court stated as follows:-

*“The law is settled in this area that an order for security for costs is a discretionary one. Order 26 rule 1 of the Civil Procedure Rules actually confers discretion on the court, which is recognition that there may be cases where a call for security for costs may be refused. This discretion is however, to be exercised reasonably and judicially by taking absolute 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, insolvency or inability to pay costs.....”*

The Plaintiffs' application was brought on the ground that the Defendant was selling its shares to Total and as such would cease to exist thereby making it impossible for the Plaintiffs to recover the sum of Kshs. 2,465,400,000/- claimed herein by the Plaintiffs. I am in agreement with the Defendant that the onus was upon the Plaintiffs to prove this allegation. I am not satisfied from the evidence on record

that the Plaintiffs have discharged this burden. The averments by the Defendant in the replying affidavit that it was not selling its own shares and that it was the shareholders in its parent company who were selling their shares has not been rebutted. The Plaintiffs have also not convinced me that the Defendant would cease to exist after the sale of the Defendant's shares by its current shareholders to Total S.A. or Total.

I am also in agreement with the Defendant that even if the Plaintiffs' application is taken to have been brought under order 39 of the Civil Procedure Rules which deals with attachment before judgment, the same would still not succeed. The Plaintiffs have not satisfied the conditions set out under order 39 rules 1, 2, 5 and 6 of the Civil Procedure Rules. There is no evidence that the Defendant has absconded or left the jurisdiction of the court or is about to abscond or leave the jurisdiction of the court or has disposed of or removed its property or any part thereof from the jurisdiction of the court or is about to dispose of the whole or any part of its property from the jurisdiction of the court. In the case of Kuria Kanyoko t/a Amigos Bar and Restaurant vs. Francis Kinuthia Nderu & others (1988) 2 KAR 126 the court stated that:

*“The power to attach before judgment must not be exercised lightly and only upon clear proof of mischief aimed at by order 38 rule 5 namely, that the Defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him.”*

The Plaintiffs have not established the grounds that would warrant the attachment of the Defendant's properties or an order for the defendant to furnish security for the Plaintiffs' entire claim herein.

Conclusion:

In conclusion, it is my finding that prayer 5 in the Plaintiffs' application dated 22<sup>nd</sup> June, 2016 is not for granting. The application is dismissed as concerns that prayer. The defendant shall have the costs of the application.

**Dated and Delivered at Nairobi this 2<sup>nd</sup> day of February 2018**

**S. OKONG'O**

**JUDGE**

Ruling delivered in open court in the presence of:

Mr. Muchoki for the Plaintiffs

Mr. Thangei for the Defendant

Catherine Court Assistant