



Melina Investments Limited v Sassi & another (Environment & Land Case 221 of 2017) [2024] KEELC 299 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEELC 299 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 221 OF 2017
FM NJOROGE, J
JANUARY 31, 2024**

BETWEEN

MELINA INVESTMENTS LIMITED PLAINTIFF

AND

GIOVANNI SASSI 1ST DEFENDANT

PIERMARCO CICCIO 2ND DEFENDANT

RULING

1. The 1st and 2nd Defendants/Applicants' Notice of Motion dated November 15, 2023 seeks the following orders: -
 - a. Spent
 - b. That the Plaintiff/Respondent does within seven days from the date hereof, give/deposit/furnish security for the 1st and 2nd Defendant/Applicants' costs in the sum of Kshs. 2,502,898 or otherwise to the satisfaction of this honourable court.
 - c. That pending the hearing and determination of the instant application and subject to the Respondent depositing security for costs in the sum of Kshs. 2,502,898 as per the attached bill of costs, an order of injunction do issue restraining the Respondents, its servants, agents and or assigns from disposing off/transferring any of its properties or its shares particularly those that touch on all that property described as Chembe/Kibabamshe 402.
 - d. That pending hearing and determination of the instant application and subject to the Respondent depositing security for costs in the sum of Kshs. 2,502,898 as per the attached bill of costs, an order of injunction do issue restraining the respondent, its servants, agents and or assigns from disposing of any of its properties or its shares particularly those that touch on any or all of its shares or all that property described as Chembe/Kibabamshe 402.



- e. That costs of this application be in the cause.
2. The Application is premised on the grounds on its face and the supporting affidavit of Hamisi Abdalla Kabate, sworn with the authority of the 1st and 2nd defendants, who deponed that the Applicants were sued by the Plaintiff Company in this suit and the suit was dismissed and the Plaintiff ordered to pay costs of the suit to the defendants. It was stated that a decree is in the process of being extracted. Mr. Hamisi Kabate further stated that the Plaintiff Company is no longer actively operational in the country and has no other known assets within the jurisdictional limits of this court apart from Plot No. Chembe/Kibabamshe/402 which the Applicants have learned that the Plaintiff is in the process of disposing.
 3. In response, the Plaintiff filed a replying affidavit sworn by Giuseppino Valesia a Director of the Plaintiff Company who deponed that the instant Application is misconceived, unmeritorious as it amounts to an abuse of the court process. He stated that the Plaintiff instituted a suit vide a Plaint dated October 27, 2017 which suit was heard and determined and the suit was dismissed vide the judgment dated June 2, 2023. It was also stated that the orders sought are untenable for reasons that the Plaintiff Company was duly incorporated under the law and has known assets within the jurisdiction of this court. Further, that the application is premature since the purported Bill of Costs has not been taxed and by ordering the Plaintiff to deposit the proposed sum will amount to the court validating a Bill of Costs that is yet to be taxed. Mr. Guiseppino Valesia also stated that the application lacks factual basis to demonstrate that the plaintiff is closing down and in the process of disposing off its assets and further that the plaintiff is capable of fulfilling the amount as may be taxed.
 4. The application was disposed of by way of written submissions. Counsel for the Applicant submitted that the orders sought are discretionary as was held in the case of *Jayesh Hasmukh Shah v Narin Haira & Another* [2015] eKLR and under Order 26 Rule 1 of the *Civil Procedure Rules*. Counsel further submitted that while the Respondent Company is incorporated in Kenya its beneficial owners and directors are all foreign nationals and can at any time leave the country with the sole aim to defeat the costs awarded. The case of *Pausalis, UAB v Systemedia Technologies Limited* (Civil Appeal E034 of 2021) [2022] KEHC 298 KLR. It was also submitted that whilst property and rights situate on Chembe/Kibabamshe/402/19 were the subject matter of this case, there is no proof that the Respondents own any other property and the said suit property is at risk of being disposed of.
 5. Counsel for the Plaintiff submitted that have not satisfied the well laid down principles to warrant the court exercise its discretion to grant the orders to deposit and/or furnish security as provided for under Order 26 Rule 1 of the *Civil Procedure Rules 2010* and as per the guidelines set out in *Jayesh Hasmukh Shah v Navin Haria & Another* [2015] eKLR and *Kibiumwiri Farmers Company Limited v Breeze Investments Company Ltd & 3 Others* [2019] eKLR. It was also submitted that there is no evidence to demonstrate that the Plaintiff cannot meet its day to day costs or it has stopped its business dealings and transactions in Kenya.

Disposition

6. I have considered the application, the rival affidavits, submissions as well as the authorities relied upon. The Applicant has moved this court under Order 26 Rule 1 of the *Civil Procedure Rules* which provides as follows:

“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.”



7. Granting of an order of security for costs is entirely the court's discretion which discretion must be exercised judiciously. While considering the principles laid down under Order 26 Rule 1, I am alive to the fact that the state has an obligation under Article 48 of the Constitution to ensure access to justice for all persons, the right to a fair hearing under Article 50 of the Constitution as well as the duty of the court under Article 159 of the Constitution to exercise judicial authority in such a manner as to ensure that justice is done to all without delay and without undue regard to procedural technicalities. The Court of Appeal considered the principles applicable to an application such as the present one in the case of Westmont Holdings SDN. BHD v Central Bank of Kenya [2017] eKLR and stated thus:

“We have also drawn some further insights from another English case which has for several years now been regarded as modern and pragmatic guide in a matter for security for costs in the case of; *Keary Developments v. Tarmac Construction*, [1995] 3 All ER 534. The guidelines enunciated therein were to guide a court while exercising discretion on whether to order a plaintiff which was a limited liability company, to provide security for costs to a defendant in a suit. The said principles are: -

1. The court has a complete discretion whether to order security, and accordingly it will act in the 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 a more sufficient reason for not ordering security. It is implicit that a company may have difficulty meeting an order.
3. The court must balance the injustice to the plaintiff prevented from pursuing a proper claim against the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover his costs. The power must neither be used for oppression by stifling a claim particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity, nor as a weapon for the impecunious company to put pressure on a more prosperous company.
4. The court will look to the prospects of success, but not go into the merits in detail.
5. In setting the amount 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 refusing security the court must be satisfied that, in all the circumstances, the claim would be stifled. This might be inferred without direct evidence, but the court should also allow that external resources might be available.
7. The lateness of the application can properly be taken into account.”

8. In the instant case, the Applicant anchors his claim on the fact that the Plaintiff Company is incorporated in Kenya and its beneficial owners and directors are all foreign nationals and can at any time leave the country. Further, that the Plaintiff's directors are in the process of disposing off Chembe/Kibabamshe/402 the only known asset belonging to them in Kenya. The security sought by the Applicant is in regard to a Bill of Costs filed by the Applicant which is yet to be taxed. The Plaintiff denied the Applicants' averment's and stated that it has known assets in the jurisdiction of this court



and that there is no factual basis to demonstrate that the Plaintiff is in the process of disposing of its assets or that the Plaintiff is not capable of paying the costs upon taxation.

9. While I am mindful to the Applicants' apprehension that the Plaintiff may not pay the costs, I am of the view that the Application is premature for reasons that the Bill of Costs is yet to be taxed. As such, I am unable to condemn the Plaintiff to a blanket security for costs. In any case, the plaintiff has demonstrated through the documents annexed in its affidavit that it still has assets within the jurisdiction of this court. This is the Plaintiff's own admission and implicit undertaking that it is not going to dispose of the said assets in the foreseeable future. In addition, I am not convinced that the Applicant has demonstrated that the Plaintiff is in the process of disposing of the said assets.
10. The upshot of the above is that the application dated 15/11/2024 fails for want of merit and the same is hereby dismissed with no orders as to costs. Further, the parties are hereby ordered to appeal before the Taxing Master on 7/2/2024 for appropriate directions on how to expedite taxation of the Bill of Costs dated November 15, 2023.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 31ST DAY OF JANUARY 2024.

MWANGI NJOROGE

JUDGE, ELC MALINDI

