



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. CASE NO. 559 OF 2011

GREENVIEW LODGE LTD.....PLAINTIFF

VERSUS

HARIT SHETH (T/a Harit Sheth Advocates).....1ST DEFENDANT

MAGNUM PROPERTIES LTD.....2ND DEFENDANT

RULING

Coming up before me for determination are two applications, namely the 1st Defendant's Notice of Motion dated 18th November 2015 (hereinafter referred to as the "First Application") and the 2nd Defendant's Notice of Motion dated 27th January 2016 (hereinafter referred to as the "Second Application").

In the First Application, the 1st Defendant is seeking for this court to order the Plaintiff to furnish security for his costs in the sum of Kshs. 20 million within 30 days of the order being made while in the Second Application, the 2nd Defendant is seeking for this court to order the Plaintiff to furnish security for its costs in the sum of Kshs. 30,887,920/- to be deposited in an account in the joint names of counsel on record for the 2nd Defendant and the Plaintiff failing which this suit be dismissed with costs to the 2nd Defendant.

The First Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the 1st Defendant, Harit Amritlal Sheth, sworn on 18th November 2015, in which he averred that he is an Advocate who had personal conduct of the transaction being challenged in this suit for both the Plaintiff and the 2nd Defendant. He further averred that the said transaction involved the sale by the Plaintiff and the purchase by the 2nd Defendant of the property situated along Processional Way known as Land Reference Number 209/3850 (hereinafter referred to as the "suit property"). He further stated that the transaction was completed by the successful registration of the transfer in favour of the 2nd Defendant on 3rd September 1992. It was his further averment that the Plaintiff now claims in this suit that the said transaction was carried out fraudulently and seeks for an order for cancellation of the said transfer and a declaration that it is still the rightful owner of the suit property. He added that the Plaintiff prays in the alternative for judgment against him and the 2nd Defendant jointly and severally for the market value of the suit property which is indicated to be Kshs. 1.2 billion. He averred that the claim against him is

frivolous, baseless and an abuse of the process of the court but he is compelled to defend himself by instructing counsel. He stated that the cost of defending this suit based on the amount of Kshs. 1.2 billion claimed by the Plaintiff comes to about Kshs. 20 million all inclusive. He pointed out that the Plaintiff is not engaged in any gainful activity having closed down its only business of a restaurant and accommodation situated on the suit property after selling the same to the 2nd Defendant. He added that he was not aware of any assets held by the Plaintiff that may be attached to recover the costs and expressed the opinion that the Plaintiff would not be able to meet his costs in the likely event that this suit is unsuccessful. On those grounds he sought for this Application to be allowed.

The First Application is opposed. The Plaintiff filed the Replying Affidavit of Jennifer Nthenya Wambua, its director, sworn on 4th March 2016, in which she averred that the First Application was filed after inordinate delay considering that this suit was filed in 2011. She averred further that the Plaintiff has various assets within jurisdiction including the suit property should it be called upon to shoulder any costs it shall be able to do so. She further added that the amount of Kshs. 20 million is grossly exaggerated. She further averred that the Plaintiff's suit is well grounded and has a high likelihood of success and it's right to prosecute this suit should not be clogged by an order for security for costs. On those grounds, she sought for the First Application to be dismissed.

The Second Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Amit Doshi, its Director, sworn on 27th January 2016, in which he averred that it is undisputed that the Plaintiff sold the suit property to the 2nd Defendant which became the registered owner thereof since 1992. He then stated that belatedly as an afterthought, the Plaintiff filed this suit in the year 2011 alleging that the value of the suit property is Kshs. 1.2 billion. He further stated that the 2nd Defendant proceeded to appoint counsel to defend it against the claim which is likely to cost it Kshs. 30,387,920/- in legal costs. He pointed out that he was unaware of any assets of the Plaintiff that they could resort to for recovery of the costs in the event the Plaintiff's suit is dismissed with costs. On that ground, he sought for the Second Application be allowed.

The Second Application is contested. The Plaintiff filed the Replying Affidavit of its Director, Jennifer Nthenya Wambua, sworn on 4th March 2016, in which she averred that the Second Application was filed after inordinate delay considering that this suit was filed in the year 2011. She also mentioned that the Plaintiff has various assets within Kenya including the suit property which can be resorted to for meeting the legal costs of the 2nd Defendant should this suit be dismissed with costs. She also averred that this suit is in any event well-grounded and would very likely succeed. On that ground, she sought for the Second Application to be dismissed with costs.

Essentially, both the First and Second Application seek for security for costs of the amounts set out. The issue before this court is whether or not to order the Plaintiff to furnish security for costs to the Defendants for the amounts specified. The law on security for costs as found in Order 26 rule 1 of the Civil Procedure Rules, 2010 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.”

This legal provision gives the court wide latitude on the granting of an order for payment of security for costs. The cardinal principles applicable in an application to furnish security for costs were well laid out in the case of **Shah versus Shah (1982) KLR 95**, at page 98, Law J.A. delivered himself thus:

“The general rule is that security is normally required from the plaintiffs resident outside the jurisdiction but as was agreed in the court below, a court has a discretion, to be exercised reasonably and judicially, to refuse to order that security be given.”

Kimaru, J. in **Industrial Plant (EA) Ltd (In Receivership) versus Stanbic Bank Kenya Limited (2008) eKLR** has this to state:

“This court is aware of its duty not to lock out a litigant from the seat of justice on the basis of his poverty or impecuniosity. One way by which a litigant may be prevented from presenting his case to the court is by requiring him to furnish security for cost before the hearing of such suit. This court also has a duty to protect a defendant who has been sued by a plaintiff where it is apparent that in the event the suit is dismissed such a plaintiff may not be in a position to settle the costs that he would be required to pay. This is more so in the case of a company where it is difficult for the veil of incorporation to be lifted in light of statutory provisions.”

The main assertion by both Defendants in this suit is that the Plaintiff is not involved in any gainful activity and does not have any assets which they can resort to in order to recover the legal costs they are bound to incur in defending this suit. In response to that assertion, the Plaintiff has stated that it does have various assets within Kenya including the suit property which can be resorted to pay the Defendant’s legal costs in the unlikely event of this suit being dismissed with costs. The Plaintiff did not however attach any documents to prove that it does indeed own various assets in Kenya which can be resorted to. Kimondo, J. addressed a similar situation in the case of **Abel Moronga Ongwacho versus James Philip Maina Ndegwa & 3 Others (2012) eKLR** where he stated as follows:

“The Plaintiff has then attached a single business permit for the above company, its certificate of incorporation and Memorandum and Articles. There is nothing there to show its financial standing. In any event, the company is not the plaintiff. The plaintiff may be a shareholder or director, but the company remains an independent and distinct legal entity. Salomon vs Salomon (1897) AC 22. There is thus a paucity of evidence that the plaintiff can meet the cost of the 1st defendant. True, the suit land under contest is a valuable asset. But it remains under contest in the suit. It cannot be the answer for capacity to meet the costs. I am not saying the 1st defendant’s counterclaim will succeed. And I am not saying the plaintiff’s suit will prevail. That will be for the trial court on tested evidence”

Going by this decision, the Plaintiff has not supplied to this court any evidence of assets it owns which can be used to settle the legal costs incurred by the Defendants should this suit be dismissed with costs. The claim by the Plaintiff that it can use the suit property for this purpose also fails for the reason that the suit property is contested. I find that the Defendants are entitled to security for their costs in the circumstances. I accordingly order that the Plaintiff deposit a sum of Kshs. 10 million in respect of the First Application to be held in a joint account in the names of counsel for the Plaintiff and the 1st Defendant. The Plaintiff is also ordered to deposit the sum of Kshs. 15 million in respect of the Second Application to be held in a joint account in the names of counsel for the Plaintiff and the 2nd Defendant. These sums are to be deposited by the Plaintiff within 45 days from the delivery of this Ruling failing which this suit stands dismissed with costs to the Defendants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2017.

MARY M. GITUMBI

JUDGE