



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 599 OF 2011**

**KWAME KARIUKI.....1<sup>ST</sup> PLAINTIFF**

**RUTH ABRAHAM KARIUKI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MOHAMED HASSAN ALI ALIMOHAMED JANMOHAMED.....1<sup>ST</sup> DEFENDANT**

**HAMIDA MOHAMED HASSAN ALI JANMOHAMED.....2<sup>ND</sup> DEFENDANT**

**KARANJA KABAGE.....INTERESTED PARTY**

**RULING**

**The Application**

The application for determination before the court is a Chamber Summons dated 8<sup>th</sup> December 2014 brought by the Interested Party, seeking orders that the suit herein be dismissed on the ground that the Plaintiffs' have failed to provide security for costs as ordered by the Court on 20<sup>th</sup> March 2014. The application is supported by the Interested Party's supporting affidavit sworn on 8<sup>th</sup> December 2014, wherein he states that on 20<sup>th</sup> March 2014, the Plaintiffs were ordered to provide security for costs in this matter by depositing a sum of Kshs 6,000,000/- in a joint interest earning account within 30 days.

The Interested Party avers that the time allowed by the Court has elapsed and the Plaintiffs have failed to comply with the orders. The Interested Party contends that although the Plaintiffs have sought to challenge the order on appeal, no appeal has been lodged or heard. It is therefore the Interested Party's case that in the interest of justice and equity, the suit herein should be dismissed for non-compliance with the court order.

The 1<sup>st</sup> Plaintiff opposed the application through a replying affidavit sworn on 9<sup>th</sup> January 2015, wherein he averred that the orders of 20<sup>th</sup> March 2014 were to be in force pending arbitration and/or final determination of the suit herein. The Plaintiffs contend that the arbitration referred to in the ruling was concluded on 27<sup>th</sup> May 2014 when an interim award striking out the statement of claim was made, and a copy of the interim award dated 27<sup>th</sup> May 2014 has been annexed as evidence.

Further, the Plaintiffs aver that they filed a notice of motion dated 8<sup>th</sup> April 2014 seeking *inter alia* an order staying execution of the ruling delivered on 20<sup>th</sup> March 2014 pending the hearing and determination of the appeal, and a copy of a notice of appeal dated 24<sup>th</sup> March 2014 has been exhibited. The Plaintiffs state that interim stay of execution pending the hearing and determination of the application was granted and extended on 28<sup>th</sup> April 2014.

It is the Plaintiffs case that following the dismissal of the application dated 8<sup>th</sup> April 2014 in a ruling delivered on 31<sup>st</sup> July 2014, they filed Civil Application No. 209 of 2014 (UR 165/2014) in the Court of Appeal seeking to stay execution of the ruling and order of 20<sup>th</sup> March 2014 and a copy of the notice of motion dated 11<sup>th</sup> August 2014 has been exhibited. The Plaintiffs contend that the application was heard on 27<sup>th</sup> November 2014 and that ruling was scheduled for delivery on 13<sup>th</sup> February 2015.

According to the Plaintiffs, the Interested Party's application has been filed in bad faith and is intended to frustrate their application dated 23<sup>rd</sup> November 2011, and they urged the Court to dismiss the Interested Party's application.

### **The Submissions**

Parties were directed to file and serve written submissions. The Interested Party in submissions dated 28<sup>th</sup> January 2015 argued that through an application dated 26<sup>th</sup> June 2013, he sought orders to have the Plaintiffs pay into court or an interest earning account USD 133,000.00 as an interim measure of protection pending arbitration. Counsel for the Interested Party submitted that a ruling was delivered by the Court on 20<sup>th</sup> March 2014 requiring the Plaintiffs to deposit Kshs 6,000,000/- in an interest earning account to be opened in the names of the parties' advocates, pending arbitration and/or the final determination of the suit herein.

It is the Interested Party's submission that the Plaintiffs have not deposited the amount within 30 days as ordered by the Court and reference was made to Order 26 Rule 5 of the Civil Procedure Rules. Counsel submitted that the Court must act on the principles espoused in section 1A of the Civil Procedure Act in order to realize the overriding objective of facilitating just, expeditious, proportionate and affordable resolution of civil disputes.

In further submission, Counsel argued that section 3A of the Civil Procedure Act provides for the inherent power of the court to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the court. It is the Interested Party's submission that allowing the Plaintiffs who have openly defied a court order to take any step in these proceedings would be tantamount to compounding disobedience of court orders and an end to the rule of law.

Reference was made to the case of **Ceres Estate Limited vs. Kieran day and 4 others**(2013) eKLR and **Nicholas Mahihu vs. Ndima Tea Factory Ltd & Another, Nairobi Civil Application No. 101 of 2009** for the proposition that a court has the duty to ensure that its orders are not issued in vain. Counsel relied on the equity maxim that "*he who comes to equity must come with clean hands*" and argued that the Plaintiffs must obey the orders of the court from which they seek justice. Reliance was also placed on the cases of **Pancras T. Swai vs. Kenya Breweries Ltd Nairobi HCCC No. 1190 of 1994** and **Bulk Chemicals (in receivership) vs. Paramount Universal Bank & 2 Others (2012) eKLR** where the suits were dismissed *inter alia*, for non-compliance with orders requiring deposit of security for costs.

The Plaintiffs in submissions dated 25<sup>th</sup> February 2015 averred that the application before Court has no merit, is incompetent, vexatious and an abuse of the court process. It was submitted that the orders made on 20<sup>th</sup> March 2014 required Kshs 6,000,000/- to be deposited in a joint interest earning account in the name of advocates for both parties pending arbitration and/or final determination of the suit herein. Counsel argued that the order was made following an application by the Interested Party as against the Plaintiffs in which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were not parties. It is the Plaintiffs submission that the order made on 20<sup>th</sup> March 2014 was not directed at the dispute between the Plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup>

Defendants in this suit.

The Plaintiffs argued that the application before Court was not served on the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who have not been given an opportunity to present their case in as far as the application to have the suit dismissed is concerned. It is the Plaintiffs' submission that by not including the two Defendants in the said application, the Interested Party is trying to conceal certain facts from the two Defendants and trying to gain collateral advantage at the expense of the Plaintiffs. The Plaintiffs submitted that denying the two Defendants an opportunity to be heard amounts to violation of the rules of natural justice.

While submitting that the arbitration referred to in the order made on 20<sup>th</sup> March 2014 was heard and concluded, the Plaintiffs have contended that at the time the interim award was made on 27<sup>th</sup> May 2014, the orders of 20<sup>th</sup> March 2014 had been stayed through an order made on 8<sup>th</sup> April 2014 and extended on 28<sup>th</sup> April 2014. The Plaintiffs submitted that with the conclusion of the arbitration, the order requiring that Kshs 6,000,000/- be deposited in a joint account as security for costs is now spent.

According to the Plaintiffs, the application before the Court has been brought in bad faith. The Plaintiffs submitted that although the arbitration of the dispute between them and the Interested Party was concluded, the dispute between them and the two Defendants remain unprosecuted. It was submitted that dismissal of the suit would deny the two parties an opportunity to have their dispute resolved. The Plaintiffs urged that in the unlikely event of the court being inclined to consider the application, the suit herein be only dismissed as against the Interested Party.

Counsel for the Plaintiffs referred the Court to the case of **Microsoft Corporation vs. Mitsumi Computer Garage Ltd HCCC No. 810 of 2001** where the Court stated that improper and abuse of the court process occurs where the process is diverted from its purpose and is used with some ulterior motive or to gain collateral advantage which the law does not recognize as legitimate.

Reliance was further placed on the case of the **Chairman, BOG Eronge Mixed Secondary School vs. Aska Obae (2013)eKLR** where the court cited **Harlsbury's Laws of England, Fourth Edition Volume 9** at p 27 and stated that abuse of the court process occurs where proceedings which are wanting in *bona fides*, are frivolous or oppressive are initiated. Lastly, it was submitted that this was a perfect case where the provisions of section 1A (2) of the Civil Procedure Act ought to be called to play.

### **The Issue and Determination**

The issue for determination is whether the suit herein is liable for dismissal under Order 26 Rule 5 of the Civil Procedure Rules. Order 26 Rule 5 provides as follows:

**"If security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit."**

The Interested Party in this regard contends that the suit herein is liable for dismissal for the Plaintiffs' non-compliance with Court orders issued on 20<sup>th</sup> March 2014 requiring the Plaintiffs to deposit Kshs 6,000,000/- as security for costs. The Plaintiffs have on their part argued that the order dated 20<sup>th</sup> March 2014 requiring deposit of security for costs is spent since the security for costs was to be deposited pending arbitration and/or the final determination of the suit. The Plaintiffs contend that arbitration referred to in the order has since been concluded and they exhibited an arbitral award to that effect.

The Plaintiffs also submitted that the orders dated 20<sup>th</sup> March 2014 had been stayed by the time the arbitral award was issued. However, a perusal of the Court record shows that the orders of 20<sup>th</sup> March 2014 were stayed between 9<sup>th</sup> April 2014 and 31<sup>st</sup> July 2014 when this Court dismissed the Plaintiffs' application for stay. Therefore the Plaintiffs were required as from 31<sup>st</sup> July 2014 to have deposit the security ordered by the Court of Kshs 6,000,000/= within 30 days which they have not done, and this suit is therefore liable to dismissal. It is also notable in this regard that the Plaintiffs have not exhibited any

order from the Court of Appeal staying execution.

The Court in this regard notes that there is an interim award which has been made in the arbitration proceedings, and that there may be consequent proceedings that may arise from the said award hence the need to keep this suit alive. This finding notwithstanding, there is no reason why the *status quo* orders that gave rise to the application for security for costs by the Interested Party should continue to obtain. This is for two reasons.

Firstly, the interim orders that were first granted on 14<sup>th</sup> November 2011 by Ougo J. and confirmed by the *status quo* orders granted by Kimondo J. on 18<sup>th</sup> September 2012 were to obtain pending arbitration. The said arbitration is now concluded and an interim arbitral award has been made in consequence thereof, and the said *status quo* orders have therefore lapsed. Secondly, and more importantly, it is not disputed that the Plaintiff have failed to provide the security for costs that were likely to arise from the said *status quo* orders, and there is no reason why, and it would be indeed inequitable for the Plaintiff to continue enjoying the benefits of the said orders when they are not willing to provide security as ordered by the Court.

This Court therefore finds the Interested Party's application to have merit for the foregoing reasons, and hereby orders pursuant to the provisions of section 3A of the Civil Procedure Act that the interim orders granted on 14<sup>th</sup> November 2011 and the *status quo* orders granted herein on 18<sup>th</sup> September 2012 be and are hereby forthwith discharged. The prayer for dismissal of the suit is however declined.

Orders accordingly.

**Dated, signed and delivered in open court at Nairobi this \_\_\_\_24<sup>th</sup>\_\_ day of \_\_\_\_March\_\_\_\_, 2015.**

**P. NYAMWEYA**

**JUDGE**