



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MALINDI

MISC. APPLICATION NO. 5 OF 2013

IN THE MATTER OF: OF THE COMPANIES ACT, CAP 486 OF THE LAWS OF KENYA

AND

**IN THE MATTER OF: AN APPLICATION FOR APPOINTMENT
OF INSPECTORS BY COURT UNDER SECTION 166 OF THE
COMPANIES ACT,**

AND

IN THE MATTER OF: NASSAU LIMITED, C.121413

AND

TASMAC LIMITED.....PLAINTIFF

=VERSUS=

ROBERTO MACRI.....1ST DEFENDANT

RUGGERO SCIOMMERI.....2ND DEFENDANT

SHALIN CHITRANJAN GOR.....3RD DEFENDANT

NASSAU LIMITED..... 4TH DEFENDANT

BLUE MARLIN SPORTING RESORT LIMITED.....INTENDED INTERESTED PARTY

RULING

Introduction:

1. What is before me is the 1st, 2nd and 3rd Defendants’/Applicants’ Application dated 12th September 2013 filed pursuant to the provisions of Order 26 Rules 1 and 6 of the Civil Procedure Rules. The Application is seeking for following orders:

- a. The Plaintiff/Respondent does within seven (7) days give security for the 1st, 2nd and 3rd Applicants’/Defendants’ costs to the tune of Kshs. 31,075,000/= which is the scale fees in this

- matter, or such other reasonable amount as this court may order;
- b. That in default the entire proceedings are terminated;
 - c. That the costs of this Application be awarded to the Applicants/Defendants.

The Defendant's/Applicant's Case:

2. The Application is supported by the Affidavit of the 2nd Defendant/Applicant who has deponed that he is one of the directors of Nassau Limited, the intended 4th Defendant.
3. According to the 2nd Defendant/Applicant, the Plaintiff/Respondent should provide security for costs in this matter because it is a company duly registered in Mauritius under a category 2 Global Business Licence which protects the disclosure of the directors to the public.
4. It is the 2nd Defendant's/Applicant's deposition that under the Mauritius laws, the Plaintiff/Respondent is exempt from the requirement of a director being a natural person; that the Plaintiff/Respondent is not required to pay taxes on foreign income, submit books for auditing or file annual accounts or returns and that should the Applicants be successful in the suit, it will be impossible for the Applicants to know with any amount of certainty who or the whereabouts of whom will pay their costs.

The Plaintiff's/Respondent's case:

5. The Plaintiff/Respondent, through its director, Giancarlo Bottini swore a Replying Affidavit and deponed that the Application as drawn and filed presupposes the Applicants as directors and or shareholders of Nassau Limited which issue is pending determination by this court; that it is not in dispute that Tasmac Limited owns 48% shares in Nassau Limited and that if the Defendants/Applicants were to succeed against the Plaintiff/Respondent, the Defendants/Applicant can attach the Plaintiff's investments.
6. The Plaintiff's/Respondent's director further deponed that the Defendants/Applicants have not provided any evidence to support the allegation that their investment in Nassau Limited amounts to Kshs. 800,000,000 to entitle them to costs of Kshs. 31,075,000/=.

The 2nd Defendant's/Applicant's Further Affidavit

7. The 2nd Defendant/Applicant filed a Further Affidavit on 11th December 2013 and stated that he received a Forensic Document Examination Report from the Directorate of Criminal Investigations indicating that the signature contained in the Plaintiff's Verifying Affidavit and the Replying Affidavit to the current Application together with a signature purported to be under seal by Giancarlo Bottini were forged and did not belong to the purported deponent; that the people who are said to have commissioned those documents had denied that they commissioned them and that it is only fair and just that the said affidavit and authority be expunged from the record of the court.

Submissions:

8. The Defendants'/Applicants' advocate filed his written submissions on 27th November 2013 while the advocate for Blue Marlin Sporting Resort Limited, the interested party, filed his submissions on 5th December 2013. The Plaintiff advocate did not file any submissions. Mr. Gikera, counsel for the Defendants/Applicants appeared before me on 20th February 2014 and highlighted his submissions.
9. Although the Defendants/Applicants' submissions are in respect to the Application dated 12th September 2013 and the Preliminary Objection dated 7th November 2013, the record shows that what was coming up for hearing on 27th November 2013 was the Defendant's Application dated 12th September 2013 and not the Preliminary Objection. I shall therefore not address my mind on the said Preliminary Objection.
10. The Defendants' counsel submitted that the asset in dispute is valued at Kshs.800,000,000 and

- that the Defendants are apprehensive that if the Plaintiff does not give security for costs, the court will act in vain in the event the suit is decided in favour of the Defendants.
11. The Defendants' counsel further submitted that the Plaintiff is an offshore company, registered in Mauritius. As a matter of practice, it was submitted, the courts will always exercise their discretion in favour of a Defendant where the Plaintiff is a foreigner. Counsel relied on the cases of **PARMEX LIMITED VS AUSTIN & PATNERS LIMITED (2006) e KLR** in which it was held as follows:

“I also remind myself that in general, Plaintiffs who were resident outside jurisdiction should ordinarily provide security for costs, even though the court may decide otherwise.”

12. Counsel also relied on the case of **Pacras T. Swai -Vs- Kenya Breweries Ltd. (2004) e KLR and Indemnity Insurance Company of North America & Others -Vs- Kenya Airfreight Handling Ltd. & Another, Civil Case Number 531 of 1999** in which the court quoted Jessel M.R. in the case of **In Re Percy Kelly Nickel, Cobalt and Chrome Iron Mining Company (1875-76) CLD 531** who stated as follows:

“The Principle is well established that a person instituting legal proceedings in this country, and being abroad, so that no adverse order could be effectually made against him if unsuccessful, is by the rules of the court compelled to give security for costs. That is a perfectly well established and a perfectly reasonable principle.”

13. The Defendants' counsel finally submitted that the Plaintiff's representative that signed the Supporting Affidavit dated 3rd May 2013 and the Replying Affidavit dated the 4th November 2013 was not in the country to swear the Affidavit dated 4th November 2013 and therefore could not have presented himself to the Commissioner of Oaths for swearing of the said Affidavit. Counsel submitted that the Affidavit in response to the Application should be struck out for illegality and for being an abuse of the court process.
14. The Interested Party's counsel filed his submissions on 5th December 2013. Counsel submitted that under O.26 of the Civil Procedure Rules, the court has discretion to order for security for costs in any suit before it.
15. However, it was submitted that the discretion can only be exercised in favour of the Defendants if the Defendants show that the Plaintiff does not have a *prima facie* case with chances of success and that Plaintiff is impecunious.
16. The Interested Party's advocate submitted that the Defendants have not shown that the Plaintiff's prayers for investigations to determine the *bona fide* directors and or shareholders of Nassau Limited are hopeless. It was further submitted that the Applicants have not shown that the Plaintiff will not be able to pay costs in view of the fact that the Plaintiff is a shareholder in Nassau Limited which owns some apartments at Blue Marlin Resort worthy Millions of shillings. Counsel relied on the cases of **Two Tone Building Africa Ltd. -vs- Coca cola East & Central Africa Pty Ltd, NRB Hccc. No. 542 of 2012 and Cosmos Holidays Plc -vs- Dhanjal Investments Limited, NRB Hccc No. 112 of 2012** to buttress his arguments.

Analysis

17. According to the record, what was coming up for hearing, as I have already stated above, is the Defendants' Application dated 12th September 2013 and not the Defendants' Preliminary Objection. I shall therefore not address my mind on the Defendants' Preliminary Objection dated 7th November 2013, which, in any event, cannot be heard simultaneously with the Application for security for costs.
18. The background of this matter is that on 10th May 2013, the Plaintiff filed a Notice of Motion pursuant to the provisions of sections 165 and 166 of the Companies Act. In the suit, the Plaintiff has complained that although it holds 48% shares in a company known as Nassau Limited, the

- Defendants have refused to allow its agents to access the premises, documents and information at Blue Marlin Resort, a resort owned by Nassau Limited.
19. The Plaintiff has further alleged that it is not aware how the 1st, 2nd and 3rd Defendants became shareholders and or Director in Nassau Limited and further that an inspector should be appointed by this court to establish the financial position and the shareholding of Nassau Limited.
 20. Indeed, the substantive prayer in the suit is for an order of the court to appoint Abdulahid Aboo, a Certified Public Accountant or such other competent inspector as the court may deem fit as an inspector to inspect the affairs of the Company (the 4th Defendant) and make a report to the court.
 21. The Summary of the Plaintiff's claim is that it holds 480 shares of the 1000 shares in Nassau Limited. The said Nassau Limited acquired several properties including land in Malindi whereof it contributed to the development of the same.
 22. It is the Plaintiff's contention in the suit that out of the said investment, it has been kept out of the dark on the affairs pertaining to the Company and that it has not been afforded a chance to participate in the running of the company through its representatives.
 23. The Plaintiff has further alleged that the Defendants, who are purporting to be directors of Nassau Limited, were not duly appointed as provided in law. According to the Plaintiff's director, the Plaintiff was not given any notice to participate in any meeting to sanction the appointment of the new directors (the Defendants).
 24. The Plaintiff has also alleged in the Notice of Motion that the Articles and Memorandum of Association of Nassau Limited have not been followed and that the transfer of shares of Nassau Limited to the defendants was done without its sanction.
 25. The Plaintiff annexed on the Supporting Affidavit the Certificate of Incorporation of Nassau Limited. The said Certificate shows that the company was registered in Kenya on 27th December 2005. The Plaintiff also annexed the Memorandum and Articles of Association of Nassau Limited.
 26. Clause 5 of the Memorandum of Association shows the Nominal Share Capital of Nassau Limited to be Kshs. 100,000/= divided into 1,000 ordinary shares of Kshs. 100/=. Clause 3 of the Company's Articles of Association provides that no share in the company shall be transferred unless and until the right of pre-emption shall have been exhausted.
 27. Clause 5 of the Article of Association of Nassau provides as follows:

“Every member or other person entitled to transfer who intends to transfer shares hereinafter called vendor shall give notice in writing to the Board of Directors of his intention.....”

28. The Plaintiff also annexed on the Notice of Motion CR/12 which shows the shareholding of Nassau as at 8th June 2006. As at that date, the Plaintiff held 479 shares in Nassau Limited, Pecame Limited had 250 shares, Whiteout Limited had 229 while Giancarlo Verriccho had 40 shares. There are two Kenyans who held 2 shares in the company. According to the Indenture annexed on the Plaintiff's Notice of Motion, Nassau limited purchased portion number 603 on 14th June 2006.
29. It would appear that the shareholding of Nassau changed at different points, thus this suit. However, it is the Plaintiff's contention that as at the time of filing the Motion, the Plaintiff held 480 shares in Nassau Limited.
30. The Defendants/Applicants have admitted in their Replying Affidavit in a response to the main suit filed on 12th September 2013 that the Plaintiff holds 480 shares in Nassau Limited. The Defendants have annexed on the Replying Affidavit the letter from the Registrar of Companies dated 25th July, 2013 which shows that position. A company known as Caledonian Limited is indicated to hold 520 shares while the 1st, 2nd and 3rd Defendants are non-director shareholders.
31. The Defendants/Applicants have further admitted that Nassau Limited owns a property known as L.R.No. 12069 and plot number 603 that houses Blue Marlin Resort.
32. The main ground of the Defendants' response to the suit is that the Plaintiff is not a naturalised or legal entity in Kenya and lacks *locus standi* to file this suit; that the Plaintiff is not capable of suing or being sued by virtue of the fact that it is registered in Mauritius.
33. The Defendants have further stated in their defence that the rights of a minority can never

supersede the rights of the majority and that the Plaintiff should have pursued its claim through a derivative action.

The Law:

34. 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. The said order gives the court the discretion to order for security for costs. It has been held in a long chain of authorities that the said discretion has to be exercised reasonably and judicially having regard to all the circumstances of the case (see **Shah Vs Shah (1982) KLR 95**).

35. In Halsbury's Laws of England, 4th Edn. Vol. 37 at page 304 the author states as follows:

“The court may order for security for costs, in cases in which power to do so exists, only if, having regard to all circumstances of the case, it thinks it just to do so.”

36. Some of the circumstances that a court is supposed to inquire into before allowing or disallowing an application for security of costs is the residence of the Plaintiff, the nature of the Plaintiff's claim and whether the Defendant's defence raises a *bona fide* defence.

37. In **Crozat Vs Brogden (1894) 2 Q B 30 at 33, Collins L.J** held that if there is a strong *prima facie* likelihood that the defendant will fail in his defence, he may be refused security for costs.

38. In the case of **Thune and Another Vs London Properties Ltd. & Others (1990) 1 ALL ER 972, Bingham L.J.** Cited the decision of **Barkely Administration Inc. Vs Mc. Clerllard (1990) 1 All ER 972** which summarized the legal position in England as follows:

“As I have stressed, residence abroad merely confers jurisdiction. The Court must then consider when in all the circumstances it would be just to make an order. The English authorities make it plain that residence abroad is not per se a ground for making an order. As to the current practice it is, I accept, common for orders to be made on little, if anything, more than the fact of residence outside the jurisdiction, but this is because it is also commonly the case that it is obvious from the pleadings that the enforcement of any judgment for costs in the event of the Plaintiff's action being dismissed would be difficult and costly to enforce.”

39. It is therefore the practice of the courts to order for security for costs against a Plaintiff who resides abroad to avoid the difficult and costly process that the Defendant may encounter when executing for costs. It is not so much that the Plaintiff is impecunious or that its registration is shielded in mystery and secrecy.

40. The Court of Appeal came up with a further criterion on the test to be applied by the court while determining whether or not the Plaintiff should be ordered to tender security for costs in the case of **Shah Vs Shah (1982) KLR 95** as follows:-

“The general rule is that security is normally required from 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. The test on application for security is not whether the Plaintiff has established a prima facie case, but whether the defendant has shown a bona fide defence.” (emphasis mine).

41. It is because of this second test, that is of establishing if the Defendant has a *bona fide* defence, that I have reproduced in the preceding paragraphs the Plaintiff's and the Defendants' cases as pleaded.

Findings:

42. Having analysed the pleadings by the parties in this matter and the law, I take the view that although the Plaintiff is registered in Mauritius and considering that the Plaintiff owns 480 shares which has been admitted by the Defendant out of the 1000 shares in Nassau Limited, and view of the fact that Nassau Limited is the proprietor of LR No. 12069 and portion number 603 Malindi which the parties have estimated to be worthy 800 million, the Plaintiff has known assets which can be attached to defray any costs that may be awarded to the Defendants.
43. If a foreign company has known assets within the jurisdiction of this court, I take the view that an order for security for costs need not be made on the basis that the Plaintiff is registered outside the jurisdiction of the court. I say so because an order for security for costs is normally awarded where the Plaintiff's residence is in a foreign company and where it is shown that recouping the costs would be difficult and costly.
44. However, where the company has assets within the jurisdiction of the court, like in this case, it cannot be said that in the event the Defendants succeed, it will be difficult and costly to recover their costs. All that they will do is to attach part of the 480 shares that the Plaintiff holds in Nassau Limited which is registered and domiciled in Kenya.
45. As I have already stated above, the Plaintiff's claim as a shareholder in Nassau Limited is for an explanation as to how the Defendants acquired directorship in the company (Nassau Limited) without involving the Plaintiff. The Plaintiff is also asking for an order to be allowed to inspect the books and accounts of Nassau Limited in accordance with the provisions of section 165 and 166 of the Companies Act.
46. Section 165 of the Companies Act provides that the Court may appoint one or more competent inspectors to investigate the affairs of a company and to report thereon in such manner as the court directs in the case of a company having a share capital, on the application either of not less than 200 members or of members holding not less than one-tenth of the shares issued.
47. I have looked at the Defendants Replying Affidavit (Defence) filed on 12th September 2013. The said Replying Affidavit does not categorically state how the shareholding of Nassau Limited changed from the initial shareholders to the Defendants and whether the Plaintiff was or was not consulted pursuant to the provisions of clause 3 and 5 of the Company's Articles of Association before the said change.
48. In its defence, the Defendants have taken the position that the Plaintiff does not have the *locus standi* to raise the issues in the present suit because it is Registered in Mauritius with category 2 Global Business Licence and that being a minority shareholder, the Plaintiff should have commenced the suit as a derivative action.
49. That may be true, although no authority was placed before me to show that a foreign company cannot hold shares in a Kenyan company and that such a company cannot sue as a shareholder in case it is aggrieved. A *derivative* action is a suit brought by a shareholder on behalf of a company against other directors. A derivative action can only be commenced with the leave of the court.
50. The Defendants have not stated in their Replying Affidavit that this suit has been commenced by the Plaintiff on behalf of Nassau Limited as against them as directors of Nassau Limited. Indeed, one of the issues for determination in the suit is whether the Defendants were procedurally appointed as shareholders/ directors of Nassau Limited.
51. The Plaintiff has raised serious issues which I have pointed out above in its Notice of Motion which in my view the Defendants need to respond to. Consequently, I find and hold that the Defendants have not shown a *bona fide* defence vis a vis the Plaintiff's claim, and in line with the Court of Appeal decision in the **Shah** case (*supra*), I decline to make an order for security of costs.
52. Although the Defendants stated in their Further Affidavit that the signature of the Plaintiff's Replying Affidavit in response to the current Application was forged, the Defendants did not make an application to have the said Replying Affidavit expunged from the court record. Indeed, the Defendants should have filed the application to expunge the said Replying Affidavit before arguing the current Application.
53. In any event, and as I have indicated above, the Defendants' Application for security for costs has failed not on the basis of the impugned Replying Affidavit but on the basis of the averments in the Plaintiff's main Motion and the Defendant's Replying Affidavit (Defence) to the main Motion.
54. For the reasons I have given above, I dismiss the 1st, 2nd and 3rd Defendants' Application dated 12th September, 2013 with costs.

DATED AND DELIVERED IN MALINDI THIS 11TH DAY OF APRIL, 2014.

O. A. Angote

Judge