



**Nakumatt Holdings Limited (Under Administration) v Southcoast Holdings Limited
(Civil Appeal 104 of 2019) [2022] KECA 1223 (KLR) (4 November 2022) (Judgment)**

Neutral citation: [2022] KECA 1223 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 104 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
NOVEMBER 4, 2022**

BETWEEN

**NAKUMATT HOLDINGS LIMITED APPELLANT
UNDER ADMINISTRATION**

AND

SOUTHCOAST HOLDINGS LIMITED RESPONDENT

*(An appeal from the ruling and orders given by the Environment & Land
Court at Mombasa (Omollo, J.) on 11th June 2019 in ELC Case No. 171 of 2018)*

JUDGMENT

1. In a ruling, the subject of this appeal, delivered on June 11, 2016, the Environment and Land Court (ELC) (A. Omollo, J.) allowed an application by the respondent and ordered the appellant to deposit security for costs in the amount of Kshs. 40 million in an account in the joint names of the advocates for the parties within sixty days of that order. In the same ruling, the ELC ordered a stay of proceedings pending compliance with the order for the payment of the deposit.
2. The appellant complains, in this appeal, that the Judge erred in granting those orders against it while an earlier and similar order for security for costs made against the respondent had not been complied with, varied, or set aside. It is contended that the Judge misapplied the principles for making an order for security of costs.
3. The background, in brief, is that by a plaint dated July 23, 2018, the appellant, Nakumatt Holdings Limited (under Administration), commenced suit before the ELC against the respondent, Southcoast Holdings Limited, in which it complained that the respondent, as landlord, illegally and unlawfully evicted it from leased premises on Title Number Kwale/Diani Beach Block/818. The appellant sought judgment against the respondent for, among other reliefs: Kshs. 120,000,000 for loss of fixtures, fittings, furniture and equipment; Kshs. 69,355,848 for loss of stock; staff release cost of Kshs.



- 12,500,000; loss of income for the unexpired term of its lease at the rate of Kshs. 8,804,349.47 per month; an order compelling the respondent to hand over the fixtures, fittings and machinery; and general damages and mesne profits.
4. Simultaneously with the plaint, the appellant made an application, also dated July 23, 2018, seeking interim and mandatory injunctive orders to compel the respondent to hand over the fixtures, fittings, furniture, and equipment in the leased premises pending the hearing and determination of the suit.
 5. That interlocutory application was scheduled for hearing on November 12, 2018 when counsel for the respondent applied for its adjournment. Counsel for the appellant opposed the adjournment. The ELC however allowed the adjournment. In doing so, the court imposed a "...condition that the respondent does make a deposit of Kshs. 20 million to be held in an escrow account to be opened in the joint names of the advocates on record." The respondent did not comply with that order for payment of the deposit and there was distasteful and uncongenial exchange of correspondence between counsel for the parties in that regard.
 6. The respondent then presented an application before the ELC dated November 29, 2018 citing Sections 1A, 1B, 3A of the *Civil Procedure Act* and Order 26 of the *Civil Procedure Rules*. It sought orders for the appellant to deposit security for costs in the sum of Kshs. 150,847,196.00 on grounds, *inter alia*, that the appellant is insolvent; and that its liabilities are more than Kshs. 35 billion against its assets of Kshs. 6 billion. In an affidavit sworn in support of that application, Sultan Khimji, a director of the respondent, deposed that the appellant's suit is incompetent; that in view of the insolvency of the appellant, and the fact that it was under administration, the respondent would have no chance of recovering costs from the appellant should the suit fail; that the respondent's costs of the suit on instruction fees and getting up fees alone would be Kshs. 150,847,196.00; and that the appellant should be ordered to deposit security for those costs.
 7. In opposition to the application for security for costs, Ankoor Shah, a director of the appellant his affidavit in reply sworn on February 12, 2019 deposed that the respondent's application was made in bad faith, misconceived and an attempt by the respondent to circumvent its obligations under the lease and under the orders given on November 12, 2018.
 8. After considering the application and after hearing counsel for the parties, the learned Judge delivered the impugned ruling on June 11, 2019. The Judge expressed that it was in the public domain that the appellant was undergoing financial challenges and had commenced insolvency proceedings; that the respondent had prior to the commencement of the suit given a proposal to the appellant regarding the terms on which the fittings, furniture and equipment would be released; that the appellant had been allowed to collect its stock; that the respondent had provided an audit report which demonstrated that the appellant would not be able to pay the respondent's costs; that the appellant had not submitted on its ability to meet the respondent's costs in the event of the suit failing; that the appellant was hiding under the guise of insolvency proceedings to institute more suits instead of pursuing its claim in other existing proceedings; that even though the parties have a right to pursue their claims in court, the appellant's financial status to meet the respondent's costs is in doubt and that in the interest of justice the order for security of costs was merited.
 9. Aggrieved, the appellant, as already stated, filed this appeal. Learned counsel for the appellant Mr. Ngonze in his written and oral submissions urged that the orders made by the ELC on November 12, 2018 and on June 11, 2019 are inconsistent and conflicting; that the order made on November 12, 2018 in favour of the appellant requiring the respondent to secure Kshs. 20 million was still alive when the court made the subsequent order in favour of the respondent on June 11, 2019 ordering the appellant to deposit Kshs. 40 million as security for the respondent's costs.



10. In support, counsel referred to provisions of the *Civil Procedure Act* and the *Civil Procedure Rules* in reference to decrees and cross-decrees and execution of decrees. Counsel also cited authorities relating to abuse of court process on account of multiplicity of suit and on inconsistencies in decrees, among them, the High Court decisions *Omega Enterprises (Kenya) Limited vs. Kenya Tourist Development Corporation & 2 others* [1998] KLR and *Peter Nganga Muiruri vs. F. M. Gikanga t/a Expeditionary General Merchants & another* [2014] eKLR; and decisions of this Court in *Nairobi City Council vs. Thabiti Enterprises Limited* [1997] eKLR; *Sanitam Services (EA) Limited vs. Rentokil (K) Limited and another* [2019] eKLR. Respectfully, however, counsel did not demonstrate the relevance of those provisions and precedents to the matter at hand.
11. It was submitted further for the appellant that the Judge erred in the application of legal principles pertinent to applications for security for costs. Citing the decision of the Court in *Moses Wachira vs. Niels Bruel & 2 others* [2015] eKLR, it was submitted that under Order 26 Rule 1 of the *Civil Procedure Rules*, the court has complete discretion whether to order security; that poverty of a party to litigation should not be a bar to accessing justice; that other considerations include whether the claim is bona fide and not a sham; whether the claimant has reasonably good prospects of success; whether application for security of costs is being used oppressively, as for example to stifle a genuine claim. Counsel also cited the decision of the Court in *Magiri Nguthari vs. Gideon Kimathi M'Nguthari* [2010] eKLR; and the Supreme Court decision in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others* [2014] eKLR.
12. According to counsel, the learned Judge erred in that in making the order for security for costs, the Judge only considered the appellant's financial status and did not exhaustively consider the factors the court should have considered. It was urged that the Judge exercised her discretion whimsically and capriciously and that the appeal should therefore be allowed.
13. Learned counsel for the respondent Mr. Kinyua in his written and oral submissions in opposition to the appeal submitted that there is no contradiction or inconsistency between the orders made by the ELC on November 12, 2018 and on June 11, 2019 as contended by the appellant; that the former was made as a condition for adjournment of appellant's application while the latter was an order to secure the respondent's costs of the suit; that in any event the order of November 12, 2018 has since been overturned by this Court in Civil Appeal No. 160 of 2018; that the Judge properly applied the pertinent legal principles by striking a balance between access to justice and the right to secure costs as there is no prospect of the respondent ever recovering its costs of defending the suit.
14. According to counsel, the appellant was well aware, at the time of filing suit, that it had no chance of success; that it was a tenant of the respondent and was unable to pay rent; that at the time the High Court appointed an administrator, the liabilities of the appellant exceeded Kshs. 35 billion; that in making the application for security for costs, the respondent justifiably apprehended that it would never be able to recover costs of the suit; and that the court properly exercised its discretion in allowing the application and in ordering the appellant to provide security in the amount of Kshs. 40 million and in staying proceedings pending furnishing of security.
15. It was submitted that the respondent was entitled to the order for security of costs as the appellant's suit was an abuse of the process of the court with no chances of success; that at the time of filing suit, the appellant was already insolvent. Counsel stressed that the impugned order did not contradict the earlier unjustified order for payment of Kshs.20 million in favour of the appellant reiterating that it had been set aside by this Court on appeal. It was urged that there are no grounds for this Court to interfere with the exercise of discretion by the learned Judge in ordering security for costs and that the appeal should be dismissed with costs to the respondent.



16. We have considered the appeal and the submissions. There are two issues for consideration. The first is whether the impugned order given on June 11, 2019 is in conflict with the earlier order given on November 12, 2018 and if so, whether the Judge thereby erred in granting the order for security for costs on June 11, 2019. The second issue is whether the Judge wrongly exercised her judicial discretion in allowing the respondent's application and in ordering the appellant to furnish security for costs and in ordering stay of proceedings in the meanwhile.
17. As regards the first issue, we have carefully reviewed the record. As already noted, the appellant's application for interlocutory relief dated July 23, 2013 that was filed alongside the suit was scheduled for hearing on November 12, 2018. On that day, counsel for the respondent applied for adjournment which was resisted by counsel for the appellant. In allowing the adjournment the court, on its own motion, required the respondent, as a condition for allowing the adjournment, to deposit Kshs. 20 million in an account in the joint names of the advocates for the parties. The extracted order in that regard is in the record of appeal.
18. On the other hand, the impugned order made on June 11, 2019 was made pursuant to the respondent's application under Order 26 of the *Civil Procedure Act* on security of costs which provides in Rule 1 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".
19. It cannot be, as the appellant suggests, that having granted the respondent an adjournment with respect to the appellant's application for interlocutory injunction on condition of securing an amount of Kshs. 20, million, the Judge could not thereafter entertain or allow the respondent's application for security for costs. We discern no contradiction or conflict in the two separate and unrelated orders made by the Judge. The provisions of the *Civil Procedure Act* and Rules and the precedents cited by counsel for the appellant, mainly on abuse of process of court, multiple actions and on inconsistent decrees, are with respect, not relevant to the matter at hand. There is, therefore, no merit in the complaint that the judge gave conflicting or contradictory or incongruous order.
20. As to whether, as contended by the appellant, the Judge failed to exhaustively take into account the factors that ought to have been considered in ordering the appellant to furnish security for costs, it is common ground that under Order 26 of the *Civil Procedure Code*, the trial court had unfettered discretion. The circumstances in which this Court can interfere with the exercise of judicial discretion by the judge are limited. In *United India Insurance Co. Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs. East African Underwriters (Kenya) Ltd* [1985] eKLR: the Court stated that:

"The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong." See also *Mbogo & Another vs. Shah* [1968] E.A 93.
21. In *Moses Wachira vs. Niels Bruel & 2 others* [2015] eKLR, the Court (J. Mohammed, JA) cited with approval the English decision in *Keary Developments vs. Tarmac Construction* [1995] 3 All E R 534 regarding the principles, (albeit not exhaustive) which should guide a court in exercising its discretion whether to order provision for security for costs. It was expressed in that decision that the court has complete discretion exercisable in light of all the relevant circumstances; that the possibility or probability that the plaintiff will be deterred from pursuing its claim by an order for security is not,



without more, sufficient reason for not ordering security; that 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 the plaintiff's claim fails at the trial; that the power must not 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; that the court will look into the prospects of success without going into the merits in detail.

22. In the present case, the learned Judge was satisfied, based on an audit report that was provided that the appellant "will not be able to pay its costs" and neither had it made any submissions on its financial ability to meet the respondent's costs in the event of the suit failing. The Judge was also alive to the insolvency proceedings relating to the appellant. The Judge also expressed that she was alive to the rights of the parties to have an opportunity to pursue their claims in court before stating that "since the financial status of the plaintiff to meet the defendant's costs is in doubt, it serves the interest of justice that they be ordered to provide security for costs."
23. The appellant has not demonstrated that the Judge misdirected herself or that she misapprehended the facts or that she took account of considerations of which she should not have taken account; or that she failed to take account of considerations of which she should have taken account, or that her decision is plainly wrong. We have no basis for interfering with her decision.
24. The appeal fails and is dismissed with costs to the respondent.

DATED AND DELIVERED A MOMBASA THIS 4TH DAY OF NOVEMBER 2022.

S. GATEMBU KAIRU, FCIArb

.....
JUDGE OF APPEAL

P. NYAMWEYA
.....

JUDGE OF APPEAL

J. LESIIT
.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

