



A.O Basid Limited v Synergy Industrial Credit Limited; Synergy Industrial Credit Limited (Applicant); A.O Basid Limited & 2 others (Defendant) (Civil Case E394 of 2018) [2024] KEHC 2872 (KLR) (Commercial and Tax) (18 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2872 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E394 OF 2018
JWW MONG'ARE, J
MARCH 18, 2024**

BETWEEN

A.O BASID LIMITED PLAINTIFF

AND

SYNERGY INDUSTRIAL CREDIT LIMITED DEFENDANT

AND

SYNERGY INDUSTRIAL CREDIT LIMITED APPLICANT

AND

A.O BASID LIMITED DEFENDANT

ABDI BASID OMAR SHEIKH ALI DEFENDANT

HAFSA KASSIM SHEIK ALI DEFENDANT

RULING

1. The Defendant/Applicant, Synergy Industrial Credit Limited, has by a Notice of Motion application moved this Honourable Court on 16th February 2023 seeking the following orders.
2. The Applicant is seeking inter-alia that orders do issue compelling the Respondents to deposit the sum of Kenya shillings Two-Hundred and Seventeen Million Two-Hundred and Forty Six Thousand Seven Hundred and Fifteen (Kshs 217,246,715/=) being the sum claimed in the counterclaim, in a joint interest earning account, pending the inter-partes hearing; or in the alternative, the Respondent be compelled to render security of an amount equivalent to Kenya Shillings Two-Hundred and Seventeen Million Two-Hundred and Forty Six Thousand Seven Hundred and Fifteen (Kshs 217,246,715/=)or



such other or further orders as may be just be made to meet the ends of justice and to safeguard and protect the dignity of this Honourable Court plus costs.

3. The application is opposed and the Plaintiff/Respondent has filed a replying affidavit sworn by Abdi Basid Sheikh Omar Ali on 20th April 2023.
4. It is the Applicant's position that it is now necessary to secure the counterclaim by having the sum claimed therein, deposited in an interest earning account or a security equivalent of the claim of Kshs 217,246,715/=, provided by the Plaintiff in order to protect the interest of the Defendant who is the Plaintiff in the counterclaim.
5. The Applicant argues that the Plaintiff has failed and or ignored the orders of this court issued on 12th November 2019 and 23rd September 2022 requiring the vehicles, subject matter of the suit, to be held in a safe location pending the determination of the suit. The Applicant further argues that the only way it can be sure to recover their claim as per the counterclaim is by having a monetary security made available by the Plaintiff, before the matter can proceed to full trial.
6. The Plaintiff has opposed this application by the Defendant. The Plaintiff argues that he has all along been ready and willing to comply with the orders of the court which required that the parties first meet and agree on the disputed amount and only thereafter if they disagreed were the subject vehicles to be parked at a neutral place.
7. The Plaintiff contends that efforts to hold the meeting as directed by the court were frustrated by the Defendant who instead filed this present application seeking for a security for costs in terms of the sum claimed in the counterclaim. The Plaintiff argues that the application seeks to curtail his constitutional right to a fair hearing and a judgment on merit since the act of depositing the said funds presupposes that he is liable for the counterclaim and yet the suit is yet to be heard by the court. He urges the court to set the main suit for hearing as the same is ripe for hearing. In addition, the Respondent has taken issue on the manner in which the court has now been moved without recourse to a substantial order or section of the law being referred to.
8. The Plaintiff argued that the orders sought are being sought in a vacuum and the court cannot issue them as prayed. Since the Applicant is seeking security for costs, the Plaintiff urged the court to be guided by the supreme court decision in the case of *Westmont Holdings SDN BHD v Central Bank of Kenya* (Civil Application 10(EO17) of 2021) [2021] KESC 3 (KLR) (8 October 2021) that has set out the litmus test for grant of orders for security for costs. The Plaintiff argues that this case has not met the threshold set therein and should therefore be dismissed.

Analysis and Deteremination

9. I have carefully considered the pleadings as filed and the rival submissions by the parties. I note from the onset that this court has on two occasions considered interim applications and made substantive orders and directions in the manner in which the matter was to proceed. In the ruling of 12th November 2019, the court directed that this matter be disposed off expeditiously and that parties were to agree on the disputed accounts failing which the vehicles, subject matter of the suit were to be held in a neutral yard. Subsequently and pursuant to a second motion, this court on 23rd September 2022, in dismissing the application by the Defendant for judgment on admission, gave directions that the orders issued on 12th November 2019 were to be complied with and the parties proceed to pre-trial compliance for purposes of hearing the dispute on merit.
10. In considering the present application, I have sought for a demonstration that the Applicant made any attempt to enforce or ensure that the orders of the court previously issued in its favour, were complied



with. I note that the Applicant has not placed before the court to demonstrate that the Applicant before moving the court for the present orders being sought, did make an attempt to enforce the orders previously issued by this court. I did not come across any application for contempt against the Plaintiff by the Applicant in an effort to get the orders complied with, nor any correspondence confirming that the parties met to agree on the disputed accounts, as directed by the court.

11. I have carefully perused both rulings previous issued by this court and I have noted that in both applications and since 2019, the court has directed that this matter be heard on merit, to allow the court evaluate the evidence and determine with finality the matters in issue. Instead of moving the matter forward to trial, I note that this present application by the Defendant, seeks interim reliefs which will not dispose of the matter but rather hold the matter longer in the court corridors. This is not what the court orders intended to achieve, in my view.
12. I note that the orders being sought herein in the present application, being an order to deposit of the full amount being sought in the counterclaim are, in my view, incapable of being granted at this stage as they amount to entering judgment for the Defendant as sought in the counterclaim, without first determining the matter on merit. In any event, no material has been placed before this court to demonstrate that the Plaintiff is a flight risk and/or, that at the conclusion of this matter, it will be impossible for the Defendant, if they succeed on the counterclaim, to enforce the judgment against the Plaintiff.
13. From the record, the court has previously urged the parties to move this case to the next level and have the same determined on merit upon tabling of evidence by the parties. I find therefore the application herein is without merited. The same is hereby dismissed with costs to the Plaintiff. The court further directs the parties to comply with pre-trial compliance and set the main suit down for hearing as previously ordered by this court.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF MARCH, 2024

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Anganya for the Plaintiff/Respondent.

Mr. Towett holding for Asli Osman for the Defendant.

Amos - Court Assistant

