



OCEAN VIEW BEACH HOTEL LIMITED PLAINTIFF

V E R S U S

SALIM SULTAN MOLOO 1ST DEFENDANT

AL SAI (KENYA) LIMITED 2ND DEFENDANT

FIDELITY COMMERCIAL BANK LTD 3RD DEFENDANT

SAI HOLDINGS LIMITED 4TH DEFENDANT

THE COMMISSIONER OF LANDS 5TH DEFENDANT

THE REGISTRAR OF TITLES, MOMBASA 6TH DEFENDANT

RULING

1. On 8th March 2012, the 1st, 2nd and 4th Defendants filed a Notice of Motion seeking the following prayers-

(b) The Plaintiff be ordered to furnish security in the sum of Kshs. 960,040,144.19 to cover such damage as may be suffered by the 1st and 4th Defendants in the event that the application for injunction is dismissed within 60 days from the making of such order.

(c) The Plaintiff be ordered to deposit the sum of Kshs. 10,200,000.00 into a joint interest

earning account to be opened by the Plaintiff's and the 1st, 2nd and 4th Defendants' Advocates as security for the costs of the 1st, 2nd and 4th Defendants within 30 days from the making of such order.

(d) The Court be pleased to order that unless security for the injunction and for the costs is deposited within the time limits set out in (b) and (c) above or within such other time as the Court may determine the Plaintiff's suit be dismissed with costs.

2. When the application came before court for hearing on 7th June 2012 the Applicants asked that prayers (b), and prayer (d) in so far as it touches on prayer (b), be held in abeyance. What was argued, and is before court for determination is a prayer that the Plaintiff furnishes security of costs in the sum of Kshs. 10,200,000/- and in default the suit be dismissed with costs.

3. The application is mainly anchored on the provisions of Section 401 of The Companies Act, Chapter 486, Laws of Kenya. That Section provides:-

“Where a limited company is a Plaintiff in any suit or other legal proceedings any Judge having jurisdiction in the matter may if it appears by credible testimony that there is reason to believe the company will be unable to pay the costs of the Defendant, if successful in his defence require sufficient

security to be given for the costs and may stay the proceedings until the security is given.”

4. This Court is told that the Plaintiff has no assets and is not engaged in any income generating activity. For this reason this Court is asked to require the Plaintiff to deposit the sum of Kshs. 10,200,000/- in an account to be held jointly by the Plaintiffs and 1st, 2nd and 4th Defendants Counsel. The sum of Kshs. 10,200,000/- is said to represent a conservative amount of costs that would be payable to the 1st, 2nd and 4th Defendants if the action were to fail.

5. The Plaintiff filed a reply through an affidavit sworn on 28th May 2012 by one of its Directors, Ameerally Rahemtulla Kassim-Lakha. The Plaintiff reads *mala fides* in the application. The Plaintiff says that it is well asseted because it is the bona fide owner of the property under dispute. That by advancing financial assistance to the Plaintiff, it must be assumed that the Defendants had faith that the Plaintiff has an income.

6. The Plaintiff thinks that the application is intended to subjugate it from prosecuting its claim and that the timing of the application is evidence of its bad faith. That it was not filed expeditiously and then only after the 1st, 2nd and 4th Defendants effort by way of a preliminary injunction to have the suit dismissed was rejected by Court.

7. The Court of Appeal in **Civil Appeal No. 9 of 2005 Messina & Another –Vs- Stallion Insurance Co. Ltd [2005]I EA 264(CAK)** embraced the principles laid down in **Keary Development –Vs- Tarmac Construction [1995]3 ALL EK 534** as the guide on how a Court should exercise its discretion on whether to order a Plaintiff Limited Company to provide security for costs to a Defendant in a suit.

8. The principles laid down in **Keary Development Ltd** are summarized as follows:-

“1. The Court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.

2. The possibility or probability that the Plaintiff Company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security.

3. The Court must carry out a balancing exercise. On the one hand it must weigh the injustice to the Plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the Plaintiff’s claim fails and the defendant finds himself unable to recover from the Plaintiff the costs which have been incurred by him in his defence of the claim.

4. In considering all the circumstances, the Court will have regard to the Plaintiff company’s prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure.

5. The Court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount.

6. Before the Court refuses to order security on the ground that it would unfairly stifle a valid claim, the Court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled.

7. The lateness of the application for security is a circumstance which can properly be taken into account.”

These principles (though not exhaustive) will guide my hand in determining this matter.

9. The first question I need to determine is whether there is credible testimony to believe that the Plaintiff

is unable to pay costs of the Defendants. The 1st Defendant says that he knows the Plaintiff well as they interacted in business and says this in paragraph 2 of his affidavit-

“To the best of my knowledge the Plaintiff has no assets. The Plaintiff has no income generating activity. I know the Plaintiff’s Directors. Mr. Ameerally Rahemtullah Kassim-Lakha and Mr. Aziz Kassim-Lakha. I also know that the Plaintiff had no other business apart from the business it carried out in the suit property until 2004, 8 years ago. The property that it had is the subject matter of these proceedings. It transferred that property to the 4th Defendant.”

He further states that the very reason the property was transferred was because of the Plaintiffs inability to repay the loan (then standing at Kshs. 249,000,000) owed to him.

10. The Plaintiff responded as follows to the allegations that it is in financial distress (paragraph 6 & 7 of plaintiff's affidavit of 28th May, 2012)-

“(a) That accordingly , it is patently false for the 1st, 2nd and 4th Defendants to intimate that the Plaintiff has no known assets or source of income in view of the fact that the Plaintiff is the bona fide owner of the suit property.

(b) That further, if the 1st Defendant verily believed that the Plaintiff would not have any income after the 2nd Defendant took over management of the Property in 2004 then it is highly improbable that the Plaintiff would have advanced any financial assistance to the Plaintiff herein.”

11. The Plaintiff, in my view, has failed to displace the Defendants allegations. First it cannot base its assets or source of income in the suit property which is currently registered in the name of Windstorm Properties Ltd and in the control and possession of the 4th Defendant. The property is the subject of this litigation and there is no telling where the chips will fall. The Plaintiff ought to have shown the Court another asset or source other than the suit property.

12. Second, the question posed by this application is about the current ability of the Plaintiff not its past fortunes. Reference of the Plaintiff to its affairs in 2004 is, in the Courts view, unhelpful.

13. On the available evidence, there is credible testimony, which is not displaced, that the Plaintiff will be unable to pay the costs of the Defendants in the event of such an order. I, nevertheless, have a complete discretion as to whether or not to order for security of costs and I must consider other factors.

14. This suit was filed on 3rd October 2011, and upon service of plaint and summons, the 1st, 2nd and 4th Defendants promptly filed a Notice of Preliminary Objection challenging the jurisdiction of this Court. The decision on the objection was delivered on 29th February 2012 when Okwengu J (as she then was) overruled it. Following that, the 1st, 2nd and 4th Defendants filed their Statements of Defence on 6th March 2012 simultaneously with the application now before court. I give this short chronology to show that this application has been brought promptly. It is a trite that an issue of jurisdiction should be taken up at the earliest opportunity as the Defendants did. Once this was out of the way, then they brought this application promptly. The Defendants score positively on this point.

15. Pending before this Court for hearing is the Plaintiffs’ application for injunction. The Court will have to assess the prospects of the Plaintiffs’ suit in deciding that application. The less I say about the merits of the Plaintiffs’ action the better as that would be more critical in deciding the application for injunction. What the Court observes however is that the suit may turn on the authenticity and/or validity of the Agreement for Sale (undated) and the Transfer dated 31st December 2010.

16. The Court has noticed the somewhat inconsistent positions taken by the Plaintiff on these two documents. In the affidavit of 3rd October 2011 Mr. Kassim-Lakha (on behalf of the Plaintiff) says in paragraph 26-

“That I know of my own knowledge that the aforesaid assignments, transfers and registration of encumbrances are patently fraudulent, illegal, null and void in view of the fact that the Plaintiff, its directions and/or officer were neither aware of nor did they ever sign, endorse and/or ratify any assignment, transfer or such other agreement conferring or purporting to confer ownership of the property to any other party.” (emphasis mine)

In this affidavit the Plaintiff denies executing any agreement or transfer in respect to the change of ownership of the property. This is in stark contrast to what Mr. Kassim-Lakha says on paragraph 9 of his supplementary affidavit of 25th May 2012-

“That in order to facilitate the disbursement of the loan of Kshs. 126,000,000/- the Plaintiff executed the Agreement for sale and blank transfer forms which were then handed over to the 1st Defendant.”

17. All I would say for now is that this inconsistency does not further the Plaintiff’s cause. It may well be a drawback!

18. For the reasons discussed above, the Court is inclined towards granting an order for security of costs. The Court is however concerned that whatever order it will make must not have the effect of stifling the Plaintiffs’ claim and of driving the Plaintiff away from the seat of justice, whatever the prospects of the claim. This will influence the nature of the order I make.

19. The subject matter of this litigation is LR No. 4709 (Original No. 4707/4) Section 1. The Plaintiff has placed the market value of the property at Kshs. 600,000,000/- (see paragraph 15 of the plaint). It is for this reason that it would be difficult to begrudge the 1st, 2nd and 4th Defendants estimate of party and party cost at Kshs. 10,200,000/-. The Defendants seek that this amount be deposited in court within 30 days.

20. The purpose of an order for security of costs is to protect a party from incurring expenses on a litigation which it may never recover from the losing side. It is not to deter the Plaintiff from pursuing its claim.

21. I note that the application before Court is by three out of six Defendants sued. There is no knowing whether the other three will come forward with a similar application and I must bear this in mind. This Court must not make an order that will have the effect of casting an unbearable burden on the Plaintiff. For this reason and in my discretion I make an order for security of costs in the sum of Kshs. 5,000,000/-.

22. These now are my orders-

(a) The Plaintiff shall deposit the sum of Kshs. 5,000,000/- (Kenya Shillings five million) into an interest earning account to be held jointly by the Plaintiffs and the 1st, 2nd and 4th Defendants Counsel or furnish a Bank Guarantee for the sum of Kshs. 5,000,000/- (Kshs. Shillings five million).

(b) Compliance with (a) above shall be within 90 (ninety) days of today.

(c) In default the 1st, 2nd & 4th Defendants shall be at liberty to apply for the dismissal of this suit under Order 26 Rule 5 (Civil Procedure Rules).

(d) Costs of the application of 7th March 2012 to the 1st, 2nd and 4th Defendants to be paid by the Plaintiff.

Dated and delivered at Mombasa this 19th day of July, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

No appearance for the Plaintiff but Court issued Notice

Kinyua for 1st, 2nd and 4th Defendants

Court clerk - Moriasi

F. TUIYOTT
JUDGE