Bruton Gold Trading LLC v Amadi t/a Amadi & Associates Advocates & 6 others (Civil Case E211 of 2023) [2024] KEHC 14384 (KLR) (Commercial and Tax) (20 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14384 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E211 OF 2023

A MABEYA, J

NOVEMBER 20, 2024

BETWEEN

BRUTON GOLD TRADING LLC ..... PLAINTIFF

AND

ANNE ATIENO AMADI T/A AMADI & ASSOCIATES ADVOCATES ..... 1ST DEFENDANT

BRIAN OCHIENG AMADI ..... 2ND DEFENDANT

ANDREW NJENGA KIARIE ..... 3RD DEFENDANT

KIKANAE ADRIAN TOPOTI ..... 4TH DEFENDANT

DANIEL NDENGWA KANGARA ALIAS DANIEL MURIITHI .... 5TH DEFENDANT

EDWARD TAYLOR ALIAS MBORONDA SEYENKULO SAKOR .... 6TH DEFENDANT

AFRICAN BANKING CORPORATION LIMITED (AKA ABC BANK) ..... 7TH DEFENDANT

RULING

1. By a Motion on Notice dated 26/2/2024, the 1st Defendant sought security for costs of Ksh.10,835,319/30 from the plaintiff. That the said sum be deposited in a Joint Account in the names of the Advocates for the Plaintiff and 1st Defendant within 30 days of the order, in default, the suit against her be dismissed with costs.

2. The Motion was made under sections 1A, 1B, 3A and 27 of the *Civil Procedure Act* and Order 26 Rules 1, 5 (1) and 6 of the *Civil Procedure Rules*.

3. The grounds were set out in the body of the Motion and the Supporting Affidavit of the 1st Defendant of even date. These were that; the Defendant's claim was for US $1,642,206.48 (Ksh.257,826,417/=). That she had filed a defence to the same and she will incur substantial expenses estimated at Ksh.10,835,319/30 in defending the claim. That the plaintiff is a Company incorporated and carrying business outside the jurisdiction and had no known assets within Kenya.

4. The 1st Defendant expressed fear that if she were to be successful, the Plaintiff may be incapable or unable to meet her costs hence the need to provide the security. That the application had not been brought to stifle the claim.

5. The Plaintiff opposed the Motion vide the Replying Affidavit of Demetrios Bradshow sworn on 5/6/2024. He deposed that the application had been brought to stifle or diminish the Plaintiff from enjoying its right to access to justice.

6. That is determining the Motion, the Court should exercise its discretion with the dictates of the *Constitution* in mind as to fairness to parties before it. That the applicant had not demonstrated that the Plaintiff would be unable to pay the costs if she were successful and only relied on the fact that the Plaintiff is incorporated and carries on business outside this Court's Jurisdiction.

7. That the application was speculative as it purported to pre-empt the outcome of the main suit. That to grant the orders sought would amount to impending the Plaintiff's right to access to justice. That it was meant to delay the determination of the main suit. That the court had determined that the 1st Defendant was a necessary party to the proceedings.

8. I have considered the rival contestations. This is an application for security for costs. Firstly, an order for security for costs is in the discretion of the court. Secondly, an application for security for costs is an exception rather than the rule.

9. In *Farell v Bank of Ireland* (2012) IESC 42, Clauke J. held:-

> "……the jurisprudence in relation to all of the areas where security for costs is considered….starts from a default position that, in the absence of some significant countervailing factor, the balance of justice will require that no security be given. The reasoning behind that view is that, if it were otherwise, all impecunious parties, might, in substance, be shut out from bringing cases or pursuing appeals. Such a balance would be untenable and disproportionate. It is for that reason that there must be some additional facts at play before an order for security for costs can be made."

10. In *Alpha Fine foods Limited v Horeca Kenya Ltd & 4 Others* (2021) eKLR, Mativo J (as he then was) held:-

> " In exercising its discretion to order provision of Security for costs, a court will consider the circumstances of each case and in particular whether it is fair and equitable, to both parties, to require the furnishing of security….the court will take into account the financial status of the litigant and whether an order for security for costs may effectively prelude a plaintiff from proceeding with his case. The Courts will also guard against placing unreasonable barriers in the way of either litigant to the extent that justice may be denied."

11. In view of the foregoing, it is clear that in exercising its discretion, the Court is required to balance the interests of the parties before it, that is, the plaintiff who may be prevented from pursuing a litigant by virtue of an order for security for costs against the injustice that may befall a defendant who may be unable to recover his costs. The court should have due regard to the particular circumstances of the case and considerations of equity and fairness to the parties before it.

12. The court should exercise its discretion in favour of granting the order sparingly and in exceptional circumstances. The applicant must demonstrate that the action is vexatious or amounts to an abuse. The discretion is to be exercised fairly, proportionately and not discriminately. The onus lies on the applicant to prove that the costs, if ordered, would be unrecoverable. The applicant must demonstrate the basis for concluding that a enforcement order would face substantial obstacle or extra burden meriting the protection of an order for security for costs.

13. In *Westmont Holdings SDN BHD v Central Bank of Kenya & 2 Others* (Pet. No. 16 (E016) of 2021) the Supreme Court of Kenya set out the Principles to be applied in an application for security for costs. Some of these are; the prospects of success or merits of the proceedings, the impecuniosity of the Plaintiff, whether an order for security would stifle the Plaintiff's claim, the costs of proceedings, whether that order for costs would be enforceable in Kenya, the ease and convenience or otherwise of enforcing a Kenya Court Judgment or Order in the Country of a non-resident plaintiff among others.

14. In the present case, the only grounds advanced were that the plaintiff is a company incorporated and carrying business outside the Jurisdiction. There was no averment that it is impecunious. Given the plaintiff has no known assets within the Jurisdiction. Can that be the only basis for ordering security for costs?

15. In my view, from the Authorities cited above, the Court has to consider the circumstances of each case individually. The court notes that the claim by the Plaintiff is genuine. Large sums of monies were allegedly paid through the Accounts of the 1st Defendant. Although the monies may not have been received by the 1st Defendant, the Plaintiff lost its money through her accounts or accounts operated or opened by her. The claim cannot be said to be frivolous.

16. The court has also considered that there was no material evidence to show that the Plaintiff is impecunious. The fact that it carries business outside jurisdiction cannot per se be the basis for ordering security for costs. Other considerations to show the inability or difficulties that may be involved in recovering the costs should have been demonstrated. This was not.

17. In view of the foregoing, the Court holds that the application is not meritorious and the same is dismissed with costs. The parties should now take steps to have the suit prosecuted on merit.

    It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH NOVEMBER 2024.

A. MABEYA, FCI ARB

JUDGE