



REPUBLIC OF KENYA



KENYA LAW
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**Kokoko v Equity Bank Limited & 2 others (Civil Case 235 of 2016)
[2021] KEHC 230 (KLR) (Commercial and Tax) (28 October 2021) (Ruling)**

Neutral citation: [2021] KEHC 230 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 235 OF 2016
WA OKWANY, J
OCTOBER 28, 2021**

BETWEEN

DAVID KHAYO KOKOKO PLAINTIFF

AND

EQUITY BANK LIMITED 1ST RESPONDENT

**CREDIT REFERENCE BUREAU AFRICA LIMITED T/
ATRANSUNION 2ND RESPONDENT**

SCHOLASTICA INDIMBO SHIME-CHERO 3RD RESPONDENT

RULING

1. This ruling is in respect to the application 1st October 2019 wherein the 1st Defendant's seeks orders that: -
 - a. The Plaintiff be ordered to deposit security for the whole cost of the 1st Defendant in the sum of Kshs. 30,000,000 to be held in court or in a joint bank account in the names of the advocates on record for the Plaintiff and the 1st Defendant or such other security be given.
 - b. That there be an order for stay of proceedings in the matter until security is furnished by the Plaintiff.
 - c. That costs of this application be provided for.
2. The said application is supported by the affidavit of the 1st Defendant's Relationship Officer Mr. Eric Shimechero and is premised on the main ground that the plaintiff has no known business brand locally or internationally and has no known or attachable assets that the Defendant can fall back on should



the Plaintiff's suit be dismissed. It is the 1st Defendant's case that the only known asset belonging to the Plaintiff is motor vehicle Registration No. KBK 402U which the Plaintiff has hidden with a view to defeating its realization.

3. The Plaintiff opposed the application through his replying affidavit dated 14th November 2019 wherein he states that the application is a sham, an abuse of the court process and a delay tactic intended to derail his quest for justice. He further states that he has more than sufficient means to cover any liability for costs that may be issued against him should he be unsuccessful in the case. He faults the 1st Defendant for filing the instant application too late in time considering that the suit was filed in 2016.
4. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the granting of order for security for costs. An order for security for costs is provided for under Order 26 Rule 1 of the Civil Procedure Rules which states as follows: -

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.

5. In *Westmont Holdings SDN. BHD vs Central Bank of Kenya* [2017] eKLR the Court of Appeal endorsed the decision in *Keary Developments Limited vs Tarmac Construction Limited and Another* [1995] 3 ALL ER and held as follows on security for costs: -
 - i. The court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.
 - ii. 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.
 - iii. 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.
 - iv. In considering all the circumstances, the court will have regard to the plaintiff's 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.
 - v. 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 normal amount, in all the circumstances, it is probable that the claim would be stifled.
 - vi. The lateness of the application for security is a circumstance which can properly be taken into account.



6. In *Patrick Ngeta Kimanzi vs Marcus Mutuamulovi & 2 others*- High Court Election Petition No. 8 of 2013 it was held: -

“Security of costs ensures that the respondent is not left without recompense for any costs or charges payable to him. The duty of the court is therefore to create a level ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access to justice vis-a-vis the respondent's right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him.”

7. In *Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others*, CA No. 38 of 2013 [2014] eKLR, the Supreme Court emphasized that: -

“In an application for further security for costs, the Applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a Respondent will be unable to pay costs in the event that he is unsuccessful. And the onus is on the Applicant to prove such inability or lack of good faith that would make an order for security reasonable.”

8. In *Shah vs Shah [1982] KLR 95* it was held that; -

“The general rule is that security is normally required from Plaintiff's resident outside the jurisdiction, but as was agreed in the court below, a court has discretion, to be exercised reasonably and judicially, to refuse to order that security be given”.

9. In *Kibiwott & 4 others vs The Registered Trustees of Monastery of Victory Nakuru*, HCCC No 146 of 2004 the court observed that for a party to succeed in an application for security of costs he has to prove that the opposing party will not be able to pay the costs to be awarded in the event of the suit filed by such a party being dismissed.

10. From the above cited authorities, it is clear that an order for security of costs is discretionary but that such discretion should be exercised reasonably and judiciously. In determining whether or not to issue an order for security for costs, the court has to consider the plaintiff's place of residence, the conduct of the parties and the inability of the plaintiff to pay the costs. This is to say that the court has to satisfy itself that it will be just to make an order of costs in the circumstances of each case.

11. In the present case, the 1st Defendant seeks an order for security for costs on the basis that the Plaintiff is a man of straw with no known attachable assets. The Plaintiff, on the other hand, countered the 1st Defendant's averments on his financial capability and stated that he owns both movable and immovable properties. The Plaintiff attached copies of his titles as annexures marked DKK-2 to DKK-5 to the replying affidavit in support of his averments.

12. I note that the applicant did not tender any proof of its allegation that the plaintiff had no known assets and that, to the contrary, the plaintiff demonstrated that he has sufficient means to meet any liability for costs should the same be awarded to the applicant.

13. It did not also escape this court's attention that the applicant did not offer any explanation for filing the instant application in 2019, more than 3 years after the filing of the case, thus lending credence to the plaintiff's position that it is a belated attempt to delay or derail the determination of the main suit.



In *Harswell Trading Limited vs Kenya Revenue Authority* [2012] e KLR the court stated as follows regarding the timing of an application for security for costs: -

“...although an application for security for costs may be made at any stage of the proceedings, it should be made as promptly as possible and it should not be made too late or too close to trial, since unless there is a reasonable explanation on the delay it may be refused.”

14. Having regard to the findings and observations that I have made in this ruling, I find that this is not a proper case for the granting of orders for security for costs and I therefore dismiss the application dated 1st October 2019 with no orders as to costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 28TH DAY OF OCTOBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Bwire for the Plaintiff.

Mr. Kisinga for 2nd Defendant.

Ms Watitu for Mahinda for 1st Defendant/Applicant.

Court Assistant: Margaret

