

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 252 OF 2016

MARCO RITZ.....RESPONDENT/PLAINTIFF

VERSUS

NATION MEDIAL GROUP LIMITED....APPLICANT/DEFENDANT

RULING

The plaintiff herein sued the defendant claiming damages for what he claimed was a defamatory publication by the defendant against him. The plaint was filed on 27th September, 2016 and upon service of summons to enter appearance, the defendant filed a defence on 30th November, 2016 denying the plaintiff's claim which was followed by a reply to the defence filed by the plaintiff on 18th February, 2017.

The record shows that both parties have complied with Order 11 of the Civil Procedure Rules and procedurally therefore, this suit is ready for hearing. By an application dated and filed on 20th June, 2018 the defendant has sought orders that the plaintiff be ordered to deposit a sum of Kshs. 1,000,000/= or such sum as the court may deem adequate as security for costs; in default of compliance thereof the suit should stand dismissed, and that the costs of the application be awarded to the defendant.

The application is under Order 26 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act. There are grounds set out on the face of the application. The thrust of which is that the plaintiff is a German national whose source of income is unknown to the defendant, and that the defendant has raised a bona fide defence to the plaintiffs' claim and will most likely not recover the costs of defending the suit should the plaintiff's claim fail. In that event the defendant will suffer substantial loss.

The application is also supported by an affidavit sworn by the Legal Officer of the defendant to which a replying affidavit has been sworn by the plaintiff opposing the application. In the reply, the defendant is faulted for filing the application after an inordinate delay whose reasons have not been explained and in any case it is premature, baseless, lacking in merit and a gross abuse of the court process, only meant to delay the conclusion of the case.

Both parties have filed submissions which I have considered alongside several authorities cited therein.

This application should have been filed before the Deputy Registrar who has jurisdiction to hear and determine such an application under Order 49 Rule 7 of the Civil Procedure Rules. That notwithstanding, this court also has jurisdiction to hear such an application. It is not lost to this court that before this application was filed on 5th June, 2018 this suit was certified ready for hearing. Soon thereafter this application was lodged.

Just like the defendant submits it has a *bona fide* defence to the plaintiff's claim, so it is the plaintiff's averment that he has sustainable cause against the defendant. In an application of this nature the party applying, and who alleges the other does not have either known source of income or physical domicile, should be in a position to justify such allegation. It may be true as in this case, that the plaintiff is a foreigner. However, the fact that a party is a foreigner should never be used as a yard stick for determination of applications of this nature, otherwise no foreigner shall have a smooth access to justice in this country. Courts must be careful in approaching this issue because some orders may have the effect of driving out parties from the seat of justice before they are heard.

The orders sought are discretionary and in deciding this application, I am aware that there is the law that allows execution of judgments beyond the jurisdiction of the court. A successful party therefore has the protection of law to pursue their rights in the circumstances of such a case. Foreign Judgments (Reciprocal Enforcement) Act No. 43 Laws of Kenya provides for such a situation.

As matters stand now, evidence is yet to be adduced by both parties. It is not easy to determine at this stage which of the two parties has a stronger case against the other. If an order were to be given at this stage, and the plaintiff is unable to comply for whatever reasons, the prayer to strike out his suit shall called into being, thereby denying him access to justice guaranteed under the constitution. Access to justice in my view outweighs the recovery of costs which is an order that comes at the tail end of litigation.

There has been some delay in lodging this application and whereas the plaintiff alleges it is an afterthought, there is room to raise doubt as to why the same was lodged two years after the suit was filed. Guided by the authorities cited, and the quest to balance the interests of both parties, I am not persuaded that this is an order to grant at this stage of this case. Accordingly, the application is dismissed with costs to the plaintiff.

Dated, signed and delivered at Nairobi this 14th Day of March , 2019.

A. MBOGHOLI MSAGHA

JUDGE