



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL CASE NO.228 OF 2014**

MASOLE ENTERPRISES LIMITED.....1<sup>ST</sup> PLAINTIFF  
BALA ENTERPRISES LIMITED.....2<sup>ND</sup> PLAINTIFF  
GILERA LIMITED.....3<sup>RD</sup> PLAINTIFF  
KOIT DEVELOPERS LIMITED.....4<sup>TH</sup> PLAINTIFF  
SAMAN DEVELOPERS LIMITED.....5<sup>TH</sup> PLAINTIFF  
KENETE ENTERPRISES LIMITED.....6<sup>TH</sup> PLAINTIFF  
MARIMO ENTERPRISES LIMITED.....7<sup>TH</sup> PLAINTIFF  
LISALA ENTERPRISES LIMITED.....8<sup>TH</sup> PLAINTIFF

**VERSUS**

SHAKHALAGA KHWA JIRONGO.....1<sup>ST</sup> DEFENDANT  
BETHLEHEM TRADING COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT

**RULING**

(1) By way of the Notice of Motion dated 20<sup>th</sup> February 2019 BETHLEHEM TRADING COMPANY EAST AFRICA LIMITED (the 2<sup>nd</sup> Defendant/Applicant) seeks for Orders that:-

**“1. The Honourable Court be pleased to dismiss the Plaintiff’s suit against the 2<sup>nd</sup> Defendant.**

**2. In the alternative the Honourable Court be pleased to order the Plaintiffs jointly and severally to produce security for the 2<sup>nd</sup> Defendants costs in this suit in the sum of Kshs.16,753,200 or such amount as the Court may deem adequate and just under the Advocates Remuneration Order 2014 in view of subject matter of Kshs.700,000,000 claimed by the Plaintiffs in this suit.**

**3. The Court do make such directions and consequential orders as it may deem just and fit in the circumstances of this suit.**

**4. Cost of this application be in the cause.**

(2) The application which was premised upon **Section 3A of the Civil Procedure Act, Order 2 Rule 15(1) (b)(c) and d, Order 2b of the Civil Procedure Rules** and all enabling powers and provisions of law, was supported by the Affidavit of even date sworn by **HARON OMEKE MOKOMBA** a Director of the 2<sup>nd</sup> Defendant.

(3) The Plaintiff/Respondents being **MASOLE ENTERPRISES LIMITED** and 7 others opposed the Application and in doing so relied upon the Replying Affidavit dated 18<sup>th</sup> March 2019 sworn by **SAMMY BOIT ARAP KOGO** a Director in all of the Plaintiff Companies.

(4) The Application was canvassed by way of written submissions. The 2<sup>nd</sup> Defendant/Applicant filed its written submissions on **4<sup>th</sup> April 2019** whilst the Plaintiff/Respondents filed their submissions on **20<sup>th</sup> May 2019**.

## **BACKGROUND**

(5) By way of the Plaint dated **27<sup>th</sup> May 2014**, the Plaintiffs filed a suit against the 1<sup>st</sup> Defendant **Bethlehem Trading Company Limited**, claiming the sum of **Kshs.700,000,000** for an alleged breach of a contract dated **12<sup>th</sup> September 2013**. The Plaintiffs obtained judgment in default of defence and proceeded to enforce that judgment as against the 1<sup>st</sup> Defendant, by way of Bankruptcy proceedings in **Bankruptcy Cause No.3 of 2017**. The Plaintiffs also obtained warrants of Arrest against two shareholders of the 2<sup>nd</sup> Defendant Company.

(6) Vide a Ruling delivered on **2<sup>nd</sup> August 2018**, **Hon Lady Justice Olga Sewe** set aside the default judgment entered against the 2<sup>nd</sup> Defendant on **28<sup>th</sup> July 2014** and also set aside the decree dated **28<sup>th</sup> July 2014** and all consequential orders there to. The Defendants were then granted an opportunity to file a Defence to the suit.

(7) The 2<sup>nd</sup> Defendant/Applicant then filed this present application seeking to have the Plaintiffs suit against them struck out, or in the alternative that the Plaintiff/Respondents be ordered by the Court to furnish security for the 2<sup>nd</sup> Defendants costs in the amount of **Kshs.16,753,200**.

(8) In their written submissions the Applicants have listed the following grounds upon which their application is based:-

**“(i) The Plaintiff’s suit against it is weak, frivolous, tenuous and misconceived with little if any prospects of success.**

**(ii) The Plaintiffs are admittedly impecunious companies with no known assets yet Bethlehem Trading Company East Africa Limited is compelled to spend high sums of money in costs defending itself against the Plaintiff’s suit.**

**(iii) The Plaintiffs have previously sued Bethlehem Trading Company East Africa Limited Company the 1<sup>st</sup> Defendant and National Bank of Kenya Limited on similar facts before this court for the sum of Kshs.205,000,000/= in HCCC NO.482 OF 2006 SANGO TRADING COMPANY LIMITED AND 8 OTHERS –VS- CYRUS & 3 others but abandoned that suit when they were ordered to provide security for costs for National Bank. Bethlehem Trading Company East Africa Limited was then exposed in costs in excess of Kshs.6,000,000/= which it has never recovered from the Plaintiffs.”**

(9) In opposing the application the Plaintiff/Respondent submit that a suit cannot be defeated by reason of misjoinder or non-joinder of a party(s). That the 2<sup>nd</sup> Defendant is a necessary party to the proceedings and that the prayer for security of costs is not tenable.

## **ANALYSIS AND DETERMINATION**

(10) I have carefully considered the written submissions filed by both parties as well as the relevant law. The following issues arise for determination:-

(i) Should the Plaintiffs suit as against the 2<sup>nd</sup> Defendant be struck out?

(ii) If not ought the court order the Plaintiffs to deposit security for costs.

## **STRIKING OUT**

(11) The Applicant has submitted that the Plaintiff’s suit against it is weak, frivolous, tenuous and misconceived. The court is mindful of the fact that striking out is a draconian measure and one that ought only be exercised very sparingly. In **DT DOBIE & COMPANY (KENYA) VS MUCHINA 1982 eKLR** it was held as follows:-

**“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”**

(12) Further in **ALUMARK INVESTMENTS LIMITED –VS- TOM OTIENO ONYANGO & 4 OTHERS [2018] eKLR**, **Hon Justice Benard Ebooso** stated as follows:-

**“It is settled also that the court’s power to strike out pleadings is to be exercised sparingly and cautiously, because the court exercises the power without being fully informed on the merits of the case through discovery and evidence.”**

(13) The first issue which the Applicant raises is its identity. In this suit the 2<sup>nd</sup> Defendant is named as **Bethlehem Trading Company**. This is the Company named in the Agreement dated **12<sup>th</sup> September 2013**, which forms the basis of the Plaintiff’s suit and is consistently referred to in all documents. However the 2<sup>nd</sup> Defendant avers that its correct name is **“Bethlehem Trading Company East Africa Ltd”** and avers that it is a stranger to the company known as **Bethlehem Trading Company Limited**. Annexed to the Supporting Affidavit dated **28<sup>th</sup> February 2019** is a Certificate of Incorporation for **Bethlehem Trading Company East Africa Limited (“HOM 1”)**. The Applicant

avers that it was only compelled to defend itself in this matter as service was effected against its shareholders and execution proceedings were commenced against it.

(14) The Respondent submits that they intended to sue **Bethlehem Trading Company East Africa Limited** but inadvertently omitted the words **"EAST AFRICA"** from the pleadings. They submit that such omissions are not fatal and in any event can be cured by amendment. The Respondents cite **Order 1 Rule 9 of the Civil Procedure Rules** which provides that:-

**"No suit shall be defeated by reason of the misjoinder or non-joinder of parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."**

(15) I do agree that the erroneous naming of the 2<sup>nd</sup> Defendant is not fatal to the suit and is an error that can be corrected by amendment. I note that **Bethlehem Trading Company East Africa Limited** did enter appearance in the matter, have engaged counsel to represent them and have fully participated in the proceedings up to the present time. This is a matter which ought to have been raised as a preliminary point. In any event I find that this error alone does not merit the dismissal of the suit.

(16) The next question to be determined is whether the Plaintiff's suit against the 2<sup>nd</sup> Defendant is for striking out. The basis of the Plaintiff's claim against the Defendants in this suit is the Agreement dated **12<sup>th</sup> September 2013**. The 2<sup>nd</sup> Defendant's position is that were not parties to the said Agreement and therefore cannot be sued under that contract.

(17) I have perused the Agreement dated **20<sup>th</sup> February 2019** and find that it makes no mention of the 2<sup>nd</sup> Defendant. However in their Replying Affidavit dated **18<sup>th</sup> March 2019**, the Plaintiffs have annexed another Agreement which is styled **"Irrevocable Memorandum of Agreement"** dated **3<sup>rd</sup> October 1994** (Annexure **"SBK-4"**). This second Agreement does mention the 2<sup>nd</sup> Defendant and it is arguable that this second agreement may confer rights and obligations upon the 2<sup>nd</sup> Defendant. The Plaintiffs ought to be allowed an opportunity to prove their claim. In deciding whether or not to dismiss a suit the question is not whether the suit has a likelihood of success, the question is whether triable issues have been raised. My assessment is that this suit does raise triable issues and therefore does not merit dismissal and I decline to grant that order.

#### **SECURITY FOR COSTS**

(18) The Applicants have sought that the Plaintiffs be ordered to furnish security for costs. They submit that the Plaintiffs previously filed **HCCC NO.482 OF 2006** in which they claimed a sum of **Kshs.205,000,000**. The Applicant's claim that they were exposed to paying large amounts in legal costs to defend that suit yet the Plaintiffs abandoned that suit when they were ordered by the court to provide security in the amount of **Kshs.5.0 Million**. The Applicants state that to date they have been unable to recover from the Plaintiffs their costs amounting to **Kshs.6,000,000/=** in defending that first suit.

(19) The Plaintiff/Respondents submit that the question of security for costs is discretionary and urge the court to exercise that discretion with the utmost caution taking care not to prejudice the Plaintiffs quest for justice. That condemning the Plaintiffs to pay security for costs may result in dismissal of their suit which would amount to a fatal miscarriage of justice.

(20) I have considered the history of this matter. This is not the first suit the Plaintiffs have filed against the Defendant. The 1<sup>st</sup> suit was **HCCC 482 OF 2006 SANGO TRADING COMPANY LIMITED & 7 OTHERS –VS- CYRUS JIRONGO, BETHLEHEM TRADING COMPANY E.A. LIMITED & NATIONAL BANK OF KENYA LIMITED** which had been instituted by **Mr. Kogo's** Companies for recovery of **Kshs.205 Million** on an alleged breach of contract to repay a loan facility guaranteed by the Plaintiffs on behalf of **Bethlehem Trading Company E.A Limited**. That suit was dismissed due to failure by the Plaintiffs to provide security for costs for the 3<sup>rd</sup> Defendant (National Bank of Kenya Ltd) in terms of the Ruling delivered on **30<sup>th</sup> November 2006**. The 2<sup>nd</sup> Defendant engaged counsel to represent them and expended monies on legal costs only to have that suit abandoned. The Plaintiffs then filed this second suit against the 2<sup>nd</sup> Defendants.

(21) This court is mindful of the fact that the question of security for costs is discretionary. In **FOOTBAL KENYA FEDERATION –VS- KENYA PREMIER LEAGUE LIMITED & 4 OTHERS [2015]EKLR**, the Court held thus:-

**"Whether the Applicant should deposit security for costs.**

**On the 1<sup>st</sup> Defendant's prayer for security for costs, the commencement point is Order 26 of the Civil Procedure Rules which provides:-**

**"In any suit the court may order that security for the whole or part of the costs of any defendant or third or subsequent party be given by any other party."**

**In GATIRAU PETER MUNYA VS DICKSON MWENDA KITHINJI & 2 OTHERS [2014] eKLR the Court of Appeal held that in an application for security for costs, the Applicant ought to establish that the Respondent, if unsuccessful in the proceedings would be unable to pay costs in the event that is unsuccessful."**

(22) The case of **KEARY DEVELOPMENT VS TARMAC CONSTRUCTION, (1995) 3 ALL ER 534** lays down principles which should guide the Court in exercising its discretion whether to order a plaintiff limited company, to provide security for costs of a Defendant in a suit. Though not exhaustive the list included the following:-

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 a more sufficient reason for not ordering security. It is implicit that a company may have difficulty meeting an order.
3. The Court must balance the injustice to the Plaintiff prevented from pursuing a proper claim against 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 his costs. The power must neither be used for oppression by stifling a claim particularly when the failure to meet that claim might in itself have been a material cause of the Plaintiff's impecuniosity, nor as a weapon for the impecunious company to put pressure on a more prosperous company.
4. The court will look to the prospects of success, but not go into the merits in detail.
5. In setting the amount 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 refusing security the court must be satisfied that, in all the circumstances, the claim would be stifled. This might be inferred without direct evidence, but the court should also allow that external resources might be available.
7. The lateness of the application can properly be taken into account."

(23) The fact that the Plaintiffs when ordered to deposit security for costs in **HCC NO.482 OF 2006** failed and/or declined to do so leading to dismissal of the suit is in my view a demonstration that the same Plaintiffs may well be unable to meet the costs of this second suit which they have filed against the same 2<sup>nd</sup> Defendant. In the case of **SHAKHALAGA KHWA JIRONGO VS THE BOARD OF TRUSTEE OF NATIONAL SOCIAL SECURITY FUND HCCC NO.957 OF 2000** the Court stated that:-

**"The power donated by OXXV Rule 1 is discretionary. The order does not lay the burden on either party it is discretion to be exercised in the circumstances of the case."**

(24) Premised on the above it is my view that in the circumstances of this case this is a case where the court ought to exercise its discretion in favour of granting security for costs. Accordingly I do order that the Plaintiff/Respondent do provide security for costs in this matter.

(25) Finally this court makes the following Orders:-

- (i) Prayer (1) seeking dismissal of this suit is disallowed.
- (ii) The Plaintiff/Respondents to provide security for costs for the 2<sup>nd</sup> Defendant by providing and filing in this court a bank guarantee for an amount of **Kshs.5,000,000** within forty (40) days of the date of this Ruling.
- (iii) Until the filing of the Guarantee as stated in (ii) above the suit against the 2<sup>nd</sup> Defendant is hereby stayed.
- (iv) Each party to meet its own costs for this application.

Dated in **Nairobi** this **20<sup>th</sup>** day of **December 2019**.

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**Justice Maureen A. Odero**