



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 474 OF 2011**

**ESSAR TELECOM LIMITED.....PLAINTIFF**

**- V E R S U S -**

**JOSEPH ODONGO OKUMU..... 1<sup>ST</sup> DEFENDANT**

**and**

**ROSELYN AKEYO OIKU T/A REGIONAL**

**INSTITUTE OF BUSINESS MANAGEMENT.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The subject matter of this ruling is the Notice of Motion dated 15<sup>th</sup> March, 2017 taken out by the defendants. The brief background of facts leading to the filing of the motion is as follows:

The plaintiff instituted this suit via the plaint dated 24<sup>th</sup> October, 2011. It is alleged in the plaint that the defendants through their agents offered to lease the plaintiff a commercial space located on the ground and 1<sup>st</sup> floor of Bidco Towers, Moi Avenue, Nairobi for a period of 6 years, subject to a formal lease. The offer was made through a letter of offer dated 16/10/2008. The plaintiff then made payments to the defendants a total of ksh.9,000,000/= made up of:

- i. Security deposit ksh.1,000,000/=*
- ii. Advance rent ksh.1,500,000/=*
- iii. Stand premium/goodwill ksh.6,500,000/=*

2. The plaintiff sought for inter alia a refund of the security deposit and the goodwill sums. The defendants entered appearance on 20<sup>th</sup> January 2012 and filed their amended defence and counter claim on 25<sup>th</sup> August 2014. The defendants then realised that the plaintiff had commenced a process to dispose of all its assets and businesses in Kenya and had laid off its employees. The defendant filed a notice of motion application dated 1<sup>st</sup> September 2014 seeking for inter alia

***1. That the plaintiff does furnish security for costs in the sum of ksh.2,000,000/= within 14 days from the date of the order.***

***2. That the security for costs be deposited in an interest earning account in the joint names of the***

***advocates on record for the plaintiff and the defendant.***

3. The Hon. Lady Justice Aburili allowed the defendants' application on the 15<sup>th</sup> October 2015, and ordered the plaintiff to deposit the sum of kshs.2,000,000/= in an interest earning account within 21 days from the date of the ruling. The plaintiff never complied with the orders of the court upon lapse of the 21 days. The defendant filed the notice of motion dated 23<sup>rd</sup> November, 2015 seeking to have the plaintiff claim against the defendant to be dismissed. On that material date for hearing, 11<sup>th</sup> February 2016, the plaintiff filed grounds of opposition to resist the defendants' application and filed a notice of motion application dated 10<sup>th</sup> February 2016 seeking for inter alia the extension of time to deposit security for costs.

4. On 25<sup>th</sup> November 2016 this court delivered a ruling granting the plaintiff an extension of 30 days within which to deposit security for costs in the sum of ksh.2,000,000/=.

5. The defendants/applicants have now taken out the motion dated 15<sup>th</sup> March, 2017, the subject matter of this ruling in which they sought for the following orders:

***1. The plaintiff's claim as against the defendant be dismissed.***

***2. Costs of and incidental to this suit be awarded to the defendant/ applicant.***

6. The motion is supported by the affidavit of Velma Maumo. There is no replying affidavit on record to oppose the motion. I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavit filed in support of the motion.

7. The applicants aver that 30 days have long lapsed and the plaintiff has failed to deposit security for costs as ordered by the court. Accordingly the defendants are of the opinion that this is a blatant disregard of court orders by the plaintiff. That the failure by the plaintiff to deposit security for costs is prejudicial to the applicants who are incurring costs in legal fees, and is uncertain whether they will be able to recover the same should judgment be entered in favour of the defendants, thus the plaintiff claim should be dismissed.

8. The applicant in the subject motion are seeking for this court's indulgence to dismiss the plaintiff's suit against them for its failure to furnish security for costs as ordered by the court.

9. Order 26 rule 5(1) of the Civil Procedure Rules provides that:

**If security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall upon application dismiss the suit.**

10. Where security for costs is not given within the time ordered by the court, it shall upon application dismiss the suit. The motion by the defendants falls within the provisions of Order 26 rule 5(1) of the Civil Procedure Rules. The defendant's motion is found to be meritorious. The same is allowed as prayed. Consequently, the suit is hereby dismissed with costs to the defendants.

**Dated, Signed and Delivered in open court this 23<sup>rd</sup> day of February, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendants