



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO 404 OF 2010**

**NEXTECH LIMITED.....;.....PLAINTIFF**

**VERSUS**

**BEDAN CHEGE T/A BEDANAUCTIONEERS SERVICES.....1<sup>ST</sup> DEFENDANT**

**YOUNG BINIRIONI INVESTORS LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The 2<sup>nd</sup> Defendant's Notice of Motion application dated 30<sup>th</sup> September 2014 and filed on 1<sup>st</sup> October 2014 was brought pursuant to the provisions of Order 26 Rules 1, 5(1) and 6 and Order 51 (1) of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. It sought the following orders:-
  1. **THAT the Plaintiff does within thirty (30) days give security for the Second Defendant's costs of defending this suit in the sum of Kshs 10,000,000/= or such other sum as this Honourable Court may deem sufficient.**
  2. **THAT the Plaintiff be ordered to deposit the sum of Kshs 10,000,000/= in a joint interest earning account to be in the joint names of the Plaintiff's and Second Defendant's advocates within thirty (30) days from making of such order.**
  3. **THAT the court be pleased to order that should the Plaintiff fail or default in providing the security for the costs deposited within thirty (30) days, the Plaintiff's suit be dismissed with costs without further application to the court.**
  4. **THAT costs of this application be provided for.**

**THE 2<sup>ND</sup> DEFENDANT'S CASE**

2. The 2<sup>nd</sup> Defendant's application was supported by the Affidavit of Evanson Kamau Munira, a Shareholder and Director in the 2<sup>nd</sup> Defendant company. It filed its initial Written Submissions dated 9<sup>th</sup> December 2014 on even date. Subsequently, it filed another set of written submissions in response to the Plaintiff's Written Submissions. The same were dated and filed on 26<sup>th</sup> January 2015.
3. The 2<sup>nd</sup> Defendant was apprehensive that the Plaintiff would not be able to pay its costs in the event the suit herein was dismissed. It said that it had conducted a search at the Companies

- Registry and established that the Plaintiff had a nominal share capital of Kshs 400,000/= and that it had not filed annual returns over the years.
4. It stated that, as at the time the Plaintiff was being evicted from the subject premises it had rented from the 2<sup>nd</sup> Defendant, the Plaintiff was in rent arrears in the sum of Kshs 501,000/=. It averred that this made it impossible for the Plaintiff to carry out business whose value was in excess of Kshs 5,000,000,000/= as it had alleged. In addition, it contended that the Plaintiff's failure to provide documentary evidence of the said amount only led to the inference that the Plaintiff lacked capacity to carry out the value of the business it had purported to carry out.
  5. It pointed out that on 3<sup>rd</sup> May 2012, Mutava J had found that the Plaintiff's case had little prospects of success. It also stated that in any event, the 2<sup>nd</sup> Defendant's caretaker and the 1<sup>st</sup> Defendant had been acquitted of criminal charges that had been instituted at the instance of the Plaintiff at Kibera Law Courts.
  6. It therefore urged the court to allow its said application for the interest of justice, fairness and equity to be met.

### **THE PLAINTIFF'S CASE**

7. In opposition to the said application, Eugene Victor Wandera swore a Replying Affidavit on behalf of the Plaintiff herein on 10<sup>th</sup> November 2014. The same was filed on 11<sup>th</sup> November 2014. The Plaintiff's Written Submissions were dated 16<sup>th</sup> January 2015 and filed on 19<sup>th</sup> January 2015.
8. The Plaintiff was emphatic that it had always been ready and willing to proceed with the hearing of the suit herein and that on 10<sup>th</sup> June 2014, it was ready to proceed but that the matter was taken out to enable it and the Defendants agree on a joint Statement of Agreed Issues. The said issues were subsequently duly filed and the matter certified as ready for hearing.
9. It pointed out that the suit herein was filed in 2010 yet the present application was filed in 2014. It was its contention that the filing of the present application was an afterthought, an abuse of the court process as the same had been made against the spirit of the provisions of Section 1A and 1B of the Civil Procedure Act. It was categorical that the said application was an attempt to drive it out of the seat of justice and to prevent it from being heard in this matter.
10. It denied being a person of straw as it had continued to meet its legal costs in the prosecution of the suit herein. It was emphatic that it was ready to meet such reasonable sums that might be found to be due and owing from it to the 2<sup>nd</sup> Defendant. It averred that the 2<sup>nd</sup> Defendant had not fulfilled all the salient requirements and principles and was thus not entitled to be granted the orders it had sought in its application. It therefore urged the court to dismiss the present application with costs to it.

### **LEGAL ANALYSIS**

11. The 2<sup>nd</sup> Defendant spent considerable time submitting that a judge had power under Section 401 of the Companies Act 486 (Laws of Kenya) to order for provision of security by a plaintiff company.
12. Notably, Section 401 of the Companies Act provides as follows:-

**“Where a limited company is a plaintiff in any suit or other legal proceeding, any judge having jurisdiction in the matter, may if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.”**

13. While the court noted the 2<sup>nd</sup> Defendant's extensive submissions on this issue and the Plaintiff's response regarding the same, the court attached no weight to the said submissions as the 2<sup>nd</sup> Defendant's application had been brought pursuant to the provisions of Order 26 Rule 1 of the Civil Procedure Rules, 2010 and not Section 401 of the Companies Act.
14. Order 26 Rule 1 of the Civil Procedure Rules provides as follows:-

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

15. There is no particular ground given in Order 26 Rule 1 of the Civil Procedure Rules under which a court is obligated to grant an order for security of costs. The basis under which the said order is to be granted can be derived from several principles espoused in developed jurisprudence. In the case of **Ocean View Beach Hotel Limited vs Salim Sultan Moloo & 5 Others [2012] eKLR** that was relied upon by the 2<sup>nd</sup> Defendant, Tuiyott J held that:-

**“The purpose for an order of security of costs is to protect a party from incurring expenses on a litigation which it may never recover from the losing side. It is not to deter the Plaintiff from pursuing his claim.”**

16. The court also considered the case of **Lonrho Motors E.A Limited vs Insurance Company of East Africa** (unreported) that was relied upon by the Plaintiff where Mutungi J (as he then was) stated thus:-

**“... for purposes of security of costs, we need go into the merits of the suit itself, unless it can be determined one way or the other, that there is high degree of probability for success or failure. If there is a strong prima facie presumption that the Defendant will fail in his defence to the action, the court may not grant such a Defendant security for costs...”**

17. The court’s discretion to grant or not to grant an order for security for costs is not exercised in a vacuum. It must be hinged on cogent, objective and measurable facts. The probability of success or failure weighed against the fact of whether the losing party would be able to meet the costs of the winning party would be a critical and pertinent factor that the court would consider in deciding whether or not to grant an order for security of costs.

18. The court had due regard to the order of 21<sup>st</sup> May 2010 that was issued by the Business Premises and Rent Tribunal (BPRT) in **BPRT Case No 756 of 2009 Nextech Limited vs Young Bibirioni Investments Limited & Another**. The 2<sup>nd</sup> Defendant stated that this was annexed to its Bundle of Documents filed on 3<sup>rd</sup> August 2011. The court confirmed this fact and from looking at the court record and noted the distress for rent was levied under the provisions of Section 12 (1) (h) of the Distress of Rent Act (Amended by Act No 5 of 1996). The court also considered the nature of the Plaintiff’s claim, the evidence the Plaintiff submitted to rebut the 2<sup>nd</sup> Defendant’s present application and the acquittal of the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant’s caretaker in the criminal matter.

19. Of particular interest to the court was the fact that the Plaintiff did not annex any documentation to demonstrate its ability to meet its financial obligations, including the ability to meet the 2<sup>nd</sup> Defendant’s costs if its suit was to be dismissed. This was critical as the Particulars of Loss and Damage shown in the Amended Plaint dated 8<sup>th</sup> April 2011 and filed on 11<sup>th</sup> April 2011 indicated that it was seeking Special damages in excess of Kshs 5,000,000,000/=. It had also sought General Damages, Damages for unlawful attachment, Damages for loss of business, Damages for unlawful eviction, Exemplary damages for unlawful violent eviction, Damages for unlawful closure of the Plaintiff’s business Costs and Interest thereon.

20. Although the 2<sup>nd</sup> Defendant did not annex a copy of the order from the Business Premises Rent Tribunal to its application or proceedings from the Kibera Law Courts evidencing acquittal as aforesaid as exhibits as was expected, the court could only accept that those were the correct facts. This is because a careful perusal of the Plaintiff’s affidavit evidence showed that it did not seem to rebut the facts that had been adduced by the 2<sup>nd</sup> Defendant.

21. Evidently, the claims herein were subject to strict proof. This meant that the Plaintiff had no guarantee that it would succeed on any or all claims. Whichever way one looks at it, there was no doubt in the mind of the court that the 2<sup>nd</sup> Defendant would definitely incur hefty legal fees due to the colossal amount that had been claimed by the Plaintiff. This is because Paragraph 1 (a) of

Schedule VI of the Advocates Remuneration Order provides as follows:-

**“The fee for instructions in suits shall be as follows, unless the taxing master in his discretion shall increase (unless otherwise provided) reduce it:**

**To sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion)... where the value of the subject matter can be determined from the pleadings, judgement or settlement between the parties (emphasis court)....”**

22. Where a defence or denial had been filed as in the instance case, the fee prescribed in Paragraph 1(b) of Schedule VI would be as follows:-

**That value exceeds But does not exceed 750,000 1,000,000/= Kshs 77,000/=1,000,000  
20,000,000 fees as for Sh. 1,000,000 plus an additional 1.5 per cent**

**Over 20,000,000 fee as for 20,000,000 plus an additional 1.25 per cent**

23. Using Schedule VI Rule 1(b) of the Advocates Remuneration (Amendment order) 2006 a calculation of the 2<sup>nd</sup> Defendant's instructions fees based on the conservative value of Kshs 5,000,000,000/= would come to about Kshs 62,250,000/= computed as follows:-

<b>For the 1<sup>st</sup> kshs 1,000,000/=</b>	<b>Kshs 77,000.00</b>
<b>1.5% x Kshs 19,000,000/=</b>	<b>Kshs 285,000.00</b>
<b>1.25 x Kshs 4,980,000,000/=</b>	<b><u>Kshs 62,250,000.00</u></b>
<b>Total</b>	<b><u>Kshs 62,612,000.00</u></b>

24. If one was to use Schedule 6(a) Paragraph 1(b) of the Advocates Remuneration Order 2014, the calculation would be as follows:-

<b>For the 1<sup>st</sup> Kshs 1,000,000/=</b>	<b>Kshs 120,000/=</b>
<b>2% of Kshs 19,000,000/=</b>	<b>Kshs 380,000/=</b>
<b>1.5 of Kshs 4,980,000,000/=</b>	<b><u>Kshs 74,700,000/=</u></b>
<b>Total</b>	<b><u>Kshs 75,200,000/=</u></b>

25. It is therefore crystal clear that, if the taxing master was to exercise her discretion not to reduce the instruction fees, the 2<sup>nd</sup> Defendant's advocates would be unable to recover their fees from the 2<sup>nd</sup> Defendant which would be burdened by such colossal fees. Similarly, the 2<sup>nd</sup> Defendant would also not be able to recover its costs from the Plaintiff. Appreciably, a sum of over Kshs 60,000, 000/= as basic instruction fees would be back breaking to any person irrespective of their social status.

26. Clearly, if the instructions fees were to be assessed based on the value of the subject matter herein, the same would be in excess of the sum of Kshs 10,000,000/= the 2<sup>nd</sup> Defendant has sought. In the absence of any evidence to the contrary, it did therefore appear to the court that in the event the Plaintiff was to lose the case herein, it would not be able to meet the 2<sup>nd</sup> Defendant's costs.

27. As the court's power to order security for costs is discretionary and it is not a case that one glove fits all, the court was thus satisfied that the peculiar circumstances of this case made it lean more in favour of the 2<sup>nd</sup> Defendant that such an order ought to be made to safeguard its interests. Indeed, the 2<sup>nd</sup> Defendant was able to discharge the onus of proving that it was deserving of the

- orders that it had sought.
28. In view of the colossal sums being claimed by the Plaintiff herein, the 2<sup>nd</sup> Defendant was able to demonstrate that the Plaintiff would be unable to pay its costs at the conclusion of the case herein causing it to suffer out of pocket, an issue that was considered in the case of **Pearson & Another vs Naydler & Others [1977] 3 All ER 531**.
29. Similarly, in the case of **HCCC No 4616 of 1993 Pan African Bank Limited vs Jasop Limited Abraham Kiptanui & Another** (unreported), it was held that:-
- “A decision whether to order a party to furnish security for costs or to decline such an order is in the discretion of a judge. The discretion is a judicial one, exercised on sound principles in the light of the circumstances of a case.... The object ... is clearly to provide the protection of defendants in certain cases where in the event of success they may have difficulty in realising their costs of the suit...”**
30. There is nothing to suggest that an order for security for costs cannot be granted if the resultant effect was that a plaintiff’s case would be stifled if the circumstances of the case so required that such an order be granted to balance the interests of a defendant who would suffer injustice if such an order was not granted.
31. Appreciably, unlike in the case of **Cancer Investments Ltd vs Sayani Investments Ltd [2010] eKLR** where the court held that mere apprehension that a plaintiff would not be able to meet a defendant’s case was not sufficient for the court to grant an order for security for costs, the court was satisfied that the 2<sup>nd</sup> Defendant’s apprehension was real and not perceived.
32. Accordingly, having considered the pleadings, the affidavit evidence, written submissions and the case law in respect of the respective parties’ cases, the court found and held that there existed compelling circumstances that persuaded it that it would be in the interest of justice and fairness to grant an order for security for costs for the reason that the Plaintiff did not provide any evidence that would have dissuaded it from coming to such a conclusion.
33. The court came to the aforesaid conclusion despite the 2<sup>nd</sup> Defendant having made its application very late in the day, a major critical to be taken into by a court consideration before it can grant an order for security for costs. It was the view of the court that an order for security for costs would have to be made in this matter to protect the 2<sup>nd</sup> Defendant’s costs notwithstanding the fact the resultant effect would be to stifle the Plaintiff’s case. While exercising this discretion, the court also ought to order reasonable sums so as not to stifle the Plaintiff’s claim.

#### **DISPOSITION**

34. For the reasons foregoing, the 2<sup>nd</sup> Defendant’s Notice of Motion application dated 30<sup>th</sup> September 2014 and filed on 1<sup>st</sup> October 2014 was merited and the same was hereby allowed in the following terms:-
- a. **THAT the Plaintiff be and is hereby ordered to deposit the sum of Kshs 5,000,000/= in an interest earning account to be in the joint names of the Plaintiff’s and 2<sup>nd</sup> Defendant’s advocates within ninety (90) days from making of this order.**
  - b. **THAT in the event the Plaintiff shall fail or default in providing the security for the costs in terms of Prayer No 34(a) herein, the Plaintiff’s suit shall stand dismissed with costs to the 2<sup>nd</sup> Defendant without further application to the court.**
  - c. **THAT the costs of this application shall be in the cause.**
35. It is so ordered.

**DATED and DELIVERED at NAIROBI this 23<sup>rd</sup> day of April 2015**

**J. KAMAU**

**JUDGE**