



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

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 248 OF 2008**

**MOHAMMED BASHIR.....PLAINTIFF**

**VERSUS**

**SHAUKAT FAROOQ SHEIKH.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Application before the Court is the Plaintiff's Notice of Motion dated **11<sup>th</sup> March 2015** and filed on even date. It is expressed to be brought under the provisions of **Sections 1A, 1B and 3A** of the **Civil Procedure Act** as well as **Order 45 Rules 1 and 2 (2)** and **Order 51 Rule 1** of the **Civil Procedure Rules**. The Application sought for the following orders;-

1. *Spent*
2. *Spent*
3. *That the Court be pleased to review its Orders of 19<sup>th</sup> May 2014 and set them aside.*
4. *That the Court be pleased to deliver a considered full Judgment on the merits of the case.*
5. *That the costs of this application be in the cause.*

**THE PLAINTIFF'S CASE**

2. The application is based on the grounds set out therein and is supported by the Affidavit of NANCY GITHII, an Advocate of the High Court of Kenya, sworn on 11<sup>th</sup> March 2015.
3. The Plaintiff's case is that the Court's order that the Plaintiff deposit Kshs. 2 million as security was most excessive and the same has had the effect of driving the Plaintiff from the seat of justice. The Plaintiff adds that the bill of costs filed by the Defendant, which is yet to be taxed, is for Kshs. 800,000/= and not Kshs. 2 million demanded by the Court. According to the Plaintiff, the decision by the Court to dismiss the suit on the basis of failure to deposit Kshs. 2 million when the parties were only awaiting for a full judgment was cruel punishment.
4. It is also the Plaintiff's case that he has been denied the benefit of a Judgment on the merits. The Plaintiff's advocate informed the court that the Plaintiff was very ill and had travelled to Kenya for hearing under very difficult circumstances owing to his medical condition. The Plaintiff's advocate further averred that the Plaintiff was unable to provide the security for costs for reasons that his health had deteriorated due to his advanced stage of cancer and therefore he was not in a position to raise the money.

5. In view of the foregoing, the Plaintiff urged the Court to allow the application.

### **THE DEFENDANT'S CASE**

6. In opposition to the application, the Defendant filed the Grounds of Opposition dated 23<sup>rd</sup> March 2015 on even date.
7. It is averred by the Defendant that on 19<sup>th</sup> May 2014 the Court gave the Plaintiff the last chance to comply with the orders to deposit security for costs. The Court further indicated that if the Plaintiff failed to comply with the said orders, it would proceed with the matter as if the applicant had never participated in the proceedings. It is the Defendant's contention that despite being granted several opportunities to comply with the said orders the Plaintiff failed to comply thereby prompting the Court to dismiss the suit vide the Judgment dated 30<sup>th</sup> May 2014. The Defendant further contended that the Plaintiff never gave any reasons for non-compliance with the Court orders neither did he seek extension of time to enable him comply with the said Orders.
8. It is the Defendant's case that Order 26 rule 5 of the Civil Procedure Rules, 2010 authorises the Court to dismiss a suit on application by a party for failure of depositing security for costs within a prescribed time.
9. The Defendant therefore urged the Court to dismiss the application with costs.

### **ANALYSIS**

10. I have considered the application, the affidavits in support and opposition to the application as well as the written submissions by Counsel. Having done so, I take the following view of the matter.
11. The current application is one for review having been brought under Order 45 of the Civil Procedure Rules. The principles upon which a Judgment or a Ruling can be reviewed are well settled as provided for under **Order 45 Rule 1** of the **Civil Procedure Rules**. It provides as follows:-

***“Any person considering himself aggrieved—***

***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***

***(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay. Underlining supplied***

12. It is obvious in this matter that there has been no discovery of new evidence and that there was no error apparent on the face of the record. Therefore, what remains for this Court is to determine whether the Plaintiff has established any sufficient reason(s) to warrant the grant of application for review of the orders of 19<sup>th</sup> May 2014.
13. The Plaintiff's case is that he was unable to provide the security for costs for reasons that his health had deteriorated due to his advanced stage of cancer and therefore he was not in a position to raise the money.
14. It is however not clear when the Plaintiff or his Advocates got to learn of the Plaintiff's illness. I believe the said illness has always been within their knowledge. In any case, the Plaintiff or his advocates had the opportunity to make an application before this Court for a review of the orders to deposit security in light of his ill health. In addition, this was not the first time this Court was making such an order of security for costs. This Court's ruling of 27<sup>th</sup> October 2011 directed the

- Plaintiff to deposit security for costs. However, the Plaintiff disregarded such orders prompting the Court to make similar orders of security for costs on 19<sup>th</sup> May 2014. Even so, the Plaintiff did not comply with such orders until Judgment was delivered in this matter on 30<sup>th</sup> May 2014 dismissing his suit.
15. In the circumstances, this Court only complied with the law as provided for under Order 26 Rule 5 of the Civil Procedure Rules in dismissing the Plaintiff's suit. The Defendant had asked the Court to dismiss the suit on account of the Plaintiff's disobedience to the Court's Orders of depositing security. The Plaintiff had never come to Court to explain why he could not comply with the Court orders up until now after the suit was dismissed. Therefore, the Plaintiff's allegation that the dismissal of this suit on the basis of failure to deposit security for costs was cruel punishment has no basis.
  16. It is evident that in disregarding the Court orders, the Plaintiff had taken the Court process for granted and only decided to take it seriously when his suit was dismissed. In that case the Plaintiff cannot blame the court for lawfully dismissing his suit. The overriding objective of the Civil Procedure Act as provided for under Section 1A of the Civil Procedure Act is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes. In the said section 1A (3) the parties to a suit have a corresponding duty to assist the Court to further the overriding objective of the Act and this includes compliance with the directions and orders of the Court. In this case, the Plaintiff time and again failed to comply with the Court Orders.
  17. The above notwithstanding, the fact that this is a family matter, the court is inclined to grant the parties a Judgment on its merits. This Court is also alive to the provisions of Section 1B of the Civil Procedure Act which enjoins it to ensure the just determination of the proceedings and the efficient disposal of the business of the Court. It is only fair and efficient to both the parties and this Court that a Judgment be delivered on its merits for the reason that the full hearing was already conducted and the parties had filed written submissions.
  18. On the issue of security for costs, this Court is required to balance the rights of both parties in regard to access to justice on the one hand and the costs to be paid to the Defendant in the event that the suit against him does not succeed. It was the Plaintiff's case that the Court's order to deposit Kshs. 2 million has impeded the Applicant's access to justice contrary to Article 48 of the Constitution. The Plaintiff argued that the amount was beyond his financial capability owing to his ill health. As much as the Court sympathizes with the Plaintiff's illness, justice must also be done to the Defendant. The issue of security for costs has been outstanding since 2011. It was always open to the Plaintiff to bring to the attention of the Court his inability to provide for security for costs but he failed to do so. In any case, though the Plaintiff is ill and this Court is very much aware that treatment for cancer can be expensive, no tangible evidence was presented to Court to show that he was unable to provide security for costs. Without saying more, it is trite law that court orders should not be issued in vain and therefore the Defendant is still entitled to the security for costs. The court will however consider reviewing the amount to be deposited as security from Kshs. 2,000,000 to a lower amount, in view of the fact that the Bill of costs as filed by the Defendant is for a sum of Kshs. 877,291/=.

## **DISPOSITION**

19. In the circumstances foregoing, the upshot of this court's ruling is that the Plaintiff's Notice of Motion dated 11<sup>th</sup> March 2015 and filed on even date is allowed in the following terms:-
  - a. ***The Orders of this Court of 19<sup>th</sup> May 2014 are hereby reviewed and set aside.***
  - b. ***The Judgment delivered on 30<sup>th</sup> May 2014 is hereby set aside.***
  - c. ***The Plaintiff to deposit Security for costs in the sum of Kshs. 800,000/= within 14 (fourteen) days of this ruling.***
  - d. ***In the event that the Plaintiff fails to comply with order (c) above, Orders (a) and (b) will not take effect.***
  - e. ***The Plaintiff to bear costs of this application.***

Orders accordingly.

**READ, DELIVERED AND DATED AT NAIROBI THIS 29TH DAY OF MAY 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Mr. Kiriaria holding brief for Ms. Githii for Plaintiff

Mr. Mangi for Defendant

Teresia – Court Clerk