REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 405 OF 2008

GRAHAM VETCH……..…..……....…PLAINTIFF

-VERSUS-

CALVIN BURGESS ……..……...1ST DEFENDANT

DOMINION FARMS……..2ND DEFENDANT

RULING

1. The application before this Court is a Notice of Motion dated 11th November, 2012. The application is brought under Order 26 rule 1 and Order 51 rule 1 of the Civil Procedure Rules and section 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya.

2. The applicant seeks the following orders;

i. That the plaintiff herein provides security for costs of this suit by depositing Kshs. 500,000/- within the next fourteen days, in a joint interest earning account opened by the plaintiff in both names of counsels for the plaintiff and defendant pending the hearing and determination of this suit.
ii. That in default of (a) above the plaint herein be struck out with costs to the defendants or alternatively the proceedings be stayed until the security is provided.
iii. That such other or further orders as the Court may deem fit and just.
iv. That costs of this application be provided for.

3. The Motion was based on the grounds that the plaintiff is not a Kenyan citizen and is currently residing in Tanzania since 2009 and the defendant does not know of any property and assets in Kenya which belong to the Plaintiff capable of being attached; that the plaintiff has not established a cause of action and this suit is an abuse of the court process; that the defendant has established a bona fide defence in this suit and are likely to succeed; that there is a likelihood, that in the event of success, the defendant's will suffer undue hardships, delay and expense in recovering costs from the plaintiff; that it is fair, equitable, justifiable and within the overriding objective of this Court that the application is granted.

4. The application was supported by the sworn affidavit of Calvin Burgess dated 11th November, 2012. The application is opposed and there is a replying affidavit sworn by Graham F. H. Vetch dated 12th February, 2013.

5. The applicant in the supporting affidavit reiterates the grounds as set out on the face of the application and further avers that the plaintiff although a British national no longer resides in Kenya and has since re-located to Tanzania; that the plaintiff has not prosecuted this suit for about 4 years provoking an application for dismissal of suit for want of prosecution; that on 19th October, 2012 the Court ordered the plaintiff to list the suit for hearing; that the Cessina 185 air craft owned by the plaintiff crashed hence he no longer has any assets capable of being attached.

6. The respondent in his replying affidavit depones that he is a Kenyan citizen residing near Nakuru with his wife Yolanta Volak Vetch; that he also holds a British passport; that he intends to apply for Kenyan citizenship alongside his British citizenship; that not being a citizen does not impede his right to file and prosecute proceedings in a Court of law and that the plaintiff application seeks to trample on his right to access justice as guaranteed under Article 48 of the Constitution; that pursuant to an arbitral proceedings an award was made in his favor and that the defendant is indebted to him in the tune of Kshs. 1,006,129.87; that his residence in Tanzania is incidental as he works there but he is domiciled in Kenya; that the defendant's claim that his defence discloses a prima facie defence is a mere allegation and there has been no findings by any court to that effect and in any event Order 26 of the Civil Procedure Code does not make any reference to a prima facie defence; that the amount of Kshs. 500,000/- is arbitrary without any foundation; that the plaint discloses a prima facie case as he was successful in the arbitral proceedings before Mr. Stephen Gatembu.

7. Parties filed written submissions which I have carefully read and considered.

8. The defendant/applicant's submitted that main issue is whether the plaintiff should provide security for the defendant's cost; that the plaintiff instituted this suit on 9th September, 2008 claiming the defendant defamed him but took no further action to prosecute his suit prompting the defendant to make an application for its dismissal; that the plaintiff does not dispute he is not a Kenyan citizen nor that he does not have any immoveable assets in Kenya; that the tenancy at Roy Sambu Ranch is of no value as it does not offer security for costs; that the arbitral award was paid to the respondent on 5th February, 2012 but he has failed to disclose the same in his replying affidavit; that he relies on Order 26 rule 1 of the Civil Procedure Code 2010 which provides that;

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

He argued that the test to be applied was set out in the case of ***Shah v Shah [1982] KLR 95*** where it was held that;

"the general rule is that security is normally required from the plaintiffs reside outside the jurisdiction; however, a court has a discretion to be exercised reasonably and judicially, to refuse to order that security be given. The test on an application for security of costs is not whether the plaintiff has established a prima facie case but whether the defendant has shown a bona fide defence."

He also referred the court to the following cases; In the case of ***Keary Development vs Tarmac Construction [1995] 3 ALL EK 534***, where it was held that;

"The Court will not be prevented from ordering security simply on ground that it would deter the plaintiff from per suing its claim. Instead, the Court must balance the injustice to the plaintiff if prevented from per suing a proper claim by an order for security of costs against the injustice to the defendant if no security of cost is ordered and at trial the plaintiff claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in defence of the claim". The case of ***Klaus Jurgen Thiele & Another –vs- Joseph Muya Njuru & 10 Others [2012] Eklr,*** where it was held that;

"as a general rule , security would be required of plaintiffs who ordinarily are not residents of this Court's jurisdiction". The case ***Joel Kibiwott & 4 Others –vs- The Registered Trustees of our Lady***

of Victory HCCC 146 of 2004, it was held that;

"in the absence of evidence by the Plaintiff that he can pay costs , security for costs would be ordered."

He submitted that the amount of security of costs at Kshs. 500,000/- was reasonable.

9. The Plaintiff/respondent's advocate submitted that the plaintiff has availed evidence to prove that he is domiciled in Kenya and his residence in Tanzania is ancillary to his work. He relied on the case of ***Vallabhadas Hirji Kapidia v Tharkersey Laxmidas (1960) 852 EA 853*** it was held that;

"The defendant will be at no material disadvantage, if successful in this suit, in taking proceedings for the recovery of his costs in Zanzibar and Tanganyika. I will therefore exercise my discretion in favour of the plaintiff and decline the application."

He further submitted that a decree passed by the Court in Kenya could be registered in Tanzania; that the provisions of the Foreign Judgments (Reciprocal Enforcement) Act Chapter 43, Laws of Kenya provides that, "*a decree passed in Kenya can be registered and executed in the United Republic of Tanzania*"; that the Civil Procedure Code does not obligate a person to disclose his property and assets in Kenya; that under Order 26 rule 3 of the Civil Procedure Code it is provided that;

"Where it appears to the court that the substantial issue is which of two or more defendants is liable or what proportion of liability of two or more defendants should bear no order for security for costs may be made."

He denied that the defendant had made any application seeking to strike out the plaint and since the words complained of were defamatory the matter should be left to the Court to adjudicate. He submitted that the defendant has not demonstrated how they are likely to suffer hardship in executing the decree if he succeeds. He contended that steps have been taken by the plaintiff is prosecuting the matter and indicated that the plaintiff took out a Mention Notice dated 6th November, 2012 in respect of pre-trial directions but the file was taken out of the hearing list on 19th November, 2012 and parties were asked to take a hearing date at the registry but before the plaintiff could do so the defendant filed the current application; that the overriding principle contemplated by Section 1A, 1B and 3A is contemplated to facilitate just and timely determination of the proceedings and that the defendant's application is brought in bad faith. He further submitted that the plaintiff being outside the jurisdiction of the Court is not the *ratio decidendi* of ***Shah -v- Shah*** and suggested that discretion needs to be exercised reasonably and judiciously and further added that the application had been filed too late in the day for prayers sought; that in ***Keary Development vs Tarmac Construction (Supra),*** the Court must observe balance, the injustice to visited upon the plaintiff i he is prevented from pursuing a proper claim against the injustice to be visited on a defendant who is prevented to recover costs; that the defendant's anxiety are not only unfounded and can be fully attended to by the Foreign Judgment (Reciprocal Enforcement) Act. He distinguished the case of ***Joel Kibiwott & 4 Others –vs- The Registered Trustees of our Lady of Victory HCCC 146 of 2004*** that the plaintiff had filed an earlier suit and had been forced to deposit security for costs of Kshs. 250,000/- and the Honourable judge found no reason to deny plea for security of costs and that a large number of plaintiff's residence was not known was a factor in allowing a plea for security.

10. I have considered the pleadings, affidavits, annexures and submissions by all parties. The defendant/applicant has brought this application under ***Order 26 Rule 1*** Civil Procedure Rules 2010 which provides that;

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

It is not in dispute that the plaintiff/respondent resides in Tanzania where he is currently working. I note that the plaintiff has not disclosed if he has any immoveable assets in Kenya and although he

argues that if the defendant succeeds he can execute the said decree in Tanzania as the said country as reciprocal as provided under section of the Foreign Judgments (Reciprocal Enforcement) Act Chapter 43, Laws of Kenya. In the case of ***Parmex Limited V Austin & Partners Limited [2006] eKLR*** it was held that;

"the existence of the foreign Judgments (Reciprocal Enforcement) Act pursuant to which decrees issued in Kenya can be enforced in the United Kingdom, the Defendant would be materially disadvantaged if it were to succeed in the suit, and then thereafter have to take steps to recover the same in the United Kingdom."

In the case of ***Sir Lindsay Parkinson & Co. Ltd –vs- Triplan Ltd [1973] 2 All ER 273 QB 609***, the court held that;

"*the court has a complete discretion whether to order security, and accordingly it will act in light of all the relevant circumstances."*

After considering all the circumstances of this case, I find that should the plaintiff's claim fail the defendant will be caused a lot of hardship and expense in executing for his costs bearing in mind that he has not disclosed his assets in Kenya. The sum of Kshs. 500,000/- is a reasonable amount. In exercising my discretion I have come to the conclusion that the 1st Defendant's application is merited and the same is allowed in the following terms:-

That the plaintiff herein shall provide security for costs of this suit by depositing Kshs. 500,000/- within 30 days, in a joint interest earning account opened by the Plaintiff in both names of counsels for the plaintiff and defendant pending the hearing and determination of this suit.

Bearing in mind that this matter was filed in year 2008 the plaintiff is advised to take steps in prosecuting the same to avoid it being struck out for want of prosecution. Parties to comply with provisions of Order 11 of the Civil Procedure Rules and fix this matter for hearing. Costs shall be in the cause.

Orders accordingly

Dated, signed and delivered this *28th* day of *April* 2014.

R. E. OUGO

JUDGE

In the presence of:-

…….…….....For the Plaintiff/Respondent

…….…….……...For the 1st Defendant/Applicant

…….……..…….…….…….....For the 2nd Defendant

……...……..……..…..……..….Court Clerk