



IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 45 OF 2012

WILLIAM ZULU MATELONG PLAINTIFF/APPLICANT

VERSUS

SIRGOI HOLDING LIMITED DEFENDANT/RESPONDENT

RULING

The application for determination is Notice of Motion dated 25th September, 2012. It is filed by the Defendant and prays that the Plaintiff be ordered to deposit security for costs.

It is premised on grounds that:-

- (i) *The Plaintiff has instituted another suit against the Defendant which was struck out.***
- (ii) *This case relates to internal management of the company and courts do not interfere with the management of a company.***
- (iii) *It is fair and just that the application be allowed.***

It is supported by the affidavit of Elnathan Chuma, the Secretary of the Defendant company sworn on 27th August, 2012. The said supporting affidavit reiterates the grounds upon which the application is based.

The application is opposed by way of a Replying Affidavit sworn by William Zulu Matelong, the Plaintiff herein on 10th October, 2012. The Plaintiff confirms that he filed another suit against the Defendant which suit was dismissed for want of jurisdiction. He states that the suit concerns the mismanagement of a public company and the infringement of his rights as a shareholder perpetrated by unlawfully elected directors of the company. He further states that the application is made in bad faith, is incompetent and not merited. He urges the court to dismiss the same.

The application was canvassed by way of oral submissions. Learned counsel, Mr. Maritim represented the Applicant. He submitted that the court cannot interfere with the management of a private company.

He submitted that the Plaintiff had filed two other suits in the Magistrate's court. One was struck out with no orders as to costs while the other was dismissed with costs yet there is also another suit pending before the High Court, being High Court Civil Case No. 233 of 2012. He submitted that the fleet of suits against the Defendant are too expensive on its part. According to Mr. Maritim, parties in all the aforementioned suits are the same, and that, in order to mitigate against costs, it is only fair that the Plaintiff be ordered to deposit security for costs.

The Plaintiff on the other hand submitted that the Defendant is a public company of which he is a member and holds 39 shares which are sufficient security for costs. He submitted that the court has authority to deliberate on disputes of a registered company.

He further submitted that the suit that was pending before the Magistrate's court was transferred to the High Court after the Magistrate's court ruled that it had no jurisdiction to determine the dispute.

The application is basically brought under Order 26 Rule 1 of the Civil Procedure Rules 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 important to note that Order 26 Rule 1 of the Civil Procedure Rules (2010) is *peri materia* with the former Rule 1 of Order XXV of the old Civil Procedure Rules. While interpreting the old Order XXV Rule 1 the Court of Appeal (Law, Miller JJA & Kneller, Ag JA.) laid down the principles governing the granting of the order on security for costs in the case of SHAH -VS- SHAH (1982) KLR, 95-103 AT PAGE 98-99. It said as follows:-

“The general rule is that security is normally required from Plaintiffs resident outside the jurisdiction, but as was agreed on the court below, 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, is not whether the Plaintiff has established a prima facie case, but whether the defendant has shown a bona fide defence.”

In a court of concurrent jurisdiction while reiterating the principles in SHAH -VS- SHAH (Supra) Justice Kimondo in ABEL MORANGA ONGWACHO -VS- JAMES PHILIP MAINA NDEGWA & 3 OTHERS (2012) @ KLR further stated that;

“The other test on an application of this nature is not whether the Plaintiff has established a prima facie case, but whether the Defendant has shown a bona fide defence’ Shah -Vs- Shah (Supra) at 99. Again, the court should not stifle the right of the Plaintiff purely because of impecuniosity. See TIMOTHY MANYARA & 144 OTHERS -VS- PYRETHRUM BOARD OF KENYA (2005) e KLR. But there is no fetter on the court to order for security for costs merely because it will deter the Plaintiff from pursuing his claims. There must then be a balancing act that also considers the injustice the defendant would suffer by being unable to recover costs. See KEARY DEVELOPMENTS LTD -VS- TARMAC CONSTRUCTION LTD & ANOTHER (1995) ALL ER, 534. Consequently, it is for the Plaintiff to satisfy the court that his claim will be defeated by the order for security for costs. As a corollary, the Plaintiff must show he has the means to meet the costs. The court however has discretion to order lesser costs than those sought or to refuse them entirely. KEARY DEVELOPMENT LTD CASE (Supra).

Going by the above principles, it cannot be gain said that the matter on security for costs is entirely the discretion of the court. And each case must be decided depending on its circumstances.

In the instant case, the Applicant majorly argues that the Respondent had instituted other suits which were not terminated in his favour. It is said that one was struck out with no orders of costs while the other was dismissed with costs. Those two suits, it is submitted were filed before the Magistrate's court. While the Respondent admits that there was only one suit before the Magistrate's Court which was struck out for want of jurisdiction, the burden lay on the Applicant to provide evidence of the final orders of the Magistrate's court.

Annexed to the supporting affidavit exists only a copy of the plaint and a verifying affidavit in respect of Eldoret Chief Magistrate's Civil Suit No. 110 of 2012. The unanswered questions are; is this the suit that was struck out or the one that was dismissed? What are the particulars of the other suit and what was the claim? Without the answers to these questions, it begs how the court would

link the instant suit to those which the Applicant referred to.

Again, the Applicant has also submitted that a third suit is pending before the High Court being Eldoret High Court Civil Case No. 233 of 2012. The claim in the latter suit was not distinguished with the claim herein. So then, how would the court deduce that there exists a duplication of claims.

I also note that the Applicant did not contest the Respondent's contention that the suit before the Magistrate's court is the one that was transferred to the High Court. Although he did not expound on whether the instant suit is the one that was transferred, the burden of demonstrating otherwise lies with the Applicant.

It is important to note that once a suit has been struck out, the claimant is at liberty to institute a similar suit. Only in situations in which a suit is dismissed that another similar to the dismissed one cannot be instituted.

Further, a party is also at liberty to sue one party for different claims.

There is also no basis in law to argue to that the court cannot interfere with the management of a company. By dint of Article 165 (3) of the Constitution, this court has original jurisdiction to entertain any matter except as stipulated by Article 165 (5) being matters that are a reserve of the Labour and Environment and Land Courts.

Furthermore, the Plaintiff resides in Kenya and so execution for costs would be without difficulties of finding the Judgment debtor – See **SHAH -VS- SHAH** (Supra) at page 98;

***“The general rule is that security is normally required from Plaintiffs resident outside the jurisdiction*”**

It then follows that this is not a case meriting the orders sought.

In the end, and in exercise of my discretion, this application must fail. I dismiss it with costs in the cause.

DATED and DELIVERED at ELDORET this 17th day of June, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

No appearance for the Defendant/Applicant

No appearance for the Plaintiff/Respondent