



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 465 OF 2011
DANISH ORGANISATION FOR
SUSTAINABLE ENERGY ::::::::::::::: PLAINTIFF/RESPONDENT
VERSUS
KENYA ORGANISATION FOR
ENVIRONMENTAL EDUCATION ::::::::::::::: DEFENDANT
AND
NON-GOVERNMENTAL ORGANISATIONS
CO-ORDINATION BOARD ::::::::::::::: INTERESTED PARTY

R U L I N G

1. This Ruling relates to the Defendant's Notice of Motion dated **28th March 2013** and filed in Court on **18th April 2013**. The Application is taken out under **Order 26 rules 1, 5(1) and 6, Order 51 Rule 1** of the **Civil Procedure Rules** as well as **Section 3A** of the **Civil Procedure Act**.
2. The Application is seeking for orders that the Plaintiff be ordered to deposit the sum of Kshs. 1,500,000/= or such other sum as this Court may direct as security for costs pending the hearing of this suit. In default of the foregoing, it is the Defendant's prayer that this suit be dismissed with costs.
3. The Application is premised on the grounds stated therein and is supported by the affidavit of **DORCAS OTIENO** sworn on **28th March 2013**.
4. The deponent, who is described as the Executive director of the Defendant, avers that the Plaintiff has no registered office in Kenya. She further avers that the Plaintiff is not registered in Kenya as an International Non-governmental Organisation. In the circumstances, it is the deponent's assertion that the Plaintiff's capacity to bring and maintain this suit is seriously in doubt. The deponent avers that since the Defendant does not have offices in Kenya it is not capable of supervision by this Court.
5. It is averred by the deponent that this Court observed that the question of capacity to sue will be critical to at the hearing of this matter. It is therefore the Defendant's case that if the Court finds that the Plaintiff had no capacity to maintain this suit, they will have no opportunity to recover

- their costs. This is because, according to the Defendant, the Plaintiff has no attachable assets to be found within Kenya.
6. In essence the defendant's current application is for security of costs so as to cushion itself from expenses incurred in defending the suit. The Defendant is apprehensive that if the suit against it fails then it shall have no recourse to recover its costs as the Plaintiff has acknowledged having no office or attachable assets in Kenya.
 7. The application is opposed. The Plaintiff filed a Replying affidavit sworn by Erik Junge on **5th March 2014** and filed in Court on **11th March 2014**.
 8. Erik Junge, described as the International Projects Coordinator of the Plaintiff, avers that the application is an afterthought as it was not made in the first instance when the suit was instituted. He further avers that the Defendant has not demonstrated that there has been any change in the circumstances from the time the suit was filed to warrant imposition of security of costs.
 9. It is the deponent's contention that the Defendant's allegation that the Plaintiff may not have capacity to bring these proceedings owing to its non-registration in Kenya is without any basis in law. Mr. Junge also avers that the Defendant's contention that the suit may not succeed at the trial is a speculation and the same is improper. He further avers that the Defendant has not availed evidence of any sort to show that the Plaintiff would not be able to pay costs.
 10. In explaining the Plaintiff's capacity and ability to comply with any adverse orders given by this Court, it is the deponent's assertion that the Plaintiff continues to support various community projects through collaborative partnerships. On that same note, the deponent avers the grant of orders for security of costs will adversely impact on the implementation of the said community projects.
 11. Mr. Junge avers that the Plaintiff is working as a humanitarian organisation and has therefore filed the current suit for the benefit of the communities who were adversely affected by embezzlement of funds granted to the Defendant. It is the Plaintiff's case that the figure of Kshs. 1, 500,000/= prayed for as security for costs is grossly excessive and no basis has been provided in support thereof. It is further the Plaintiff's case that in the event that the current application is granted, a bank guarantee ought to be sufficient.
 12. In conclusion, the deponent urges this Court to dismiss the application with costs.
 13. The application was prosecuted by way of written submissions.
 14. I have considered the pleadings herein, the affidavits on record as well as submissions filed by both parties. The main issue for determination is whether the Defendant is entitled to security for costs pending the hearing and determination of this suit.
 15. It is the Defendant's case that the Plaintiff's capacity to bring and maintain this suit is seriously in doubt. This is a preliminary issue that should be addressed at the preliminary stage of a suit. That said, this Court in its ruling dated 7th December 2012 observed that the Plaintiff's capacity to bring these proceedings was a triable issue. The same could not be determined at the interlocutory stage as there was need for more evidence with regard to the registration formalities required of the Plaintiff. I will therefore not say more on that issue. The same will be addressed at the hearing of the suit.
 16. The Plaintiff submits that the Defendant has taken a long time to bring the present application. According to the Plaintiff the current application is an afterthought. I wish not to delve much into this for the reason that the law as stipulated under Order 26 of the Civil Procedure Rules does not provide for time frames within which to bring such an application. It therefore means that the application should be brought within a reasonable time. In the current case, the suit has not been set down for hearing. In that case this application has been brought within a reasonable time.

17. The other issue is with regard to the Plaintiff's physical location. It is the Defendant's case that the Plaintiff has no registered office in Kenya which fact has been admitted by the Plaintiff. It is the Plaintiff's position that they have 'presence' in Kenya through collaborative partnerships. The Plaintiff has also submitted that in funding projects for the local communities in Kenya, they have continued presence and continues to be under the jurisdiction of the Honourable Court.

18. On the other hand, it is submitted for the Defendant that a decree for costs cannot be enforced against the so-called partners as they are distinct legal entities with no nexus to this suit.

19. It is my view that the Plaintiff's collaborative partnerships in Kenya are not a guarantee that the Defendant will realise its costs in the event that the Plaintiff loses this suit.

20. However, it is worthy to note that the Plaintiff has submitted itself to the jurisdiction of this Court. Furthermore, the pleadings on record reveal that the Defendant was dealing with the Plaintiff despite the fact that the Plaintiff is not registered in Kenya. The Defendant received grants from the Plaintiff based on the funding agreements that it had entered into with the Plaintiff. It is therefore inconceivable that the Defendant should be apprehensive of the Plaintiff's capacity to pay costs or even challenge its capacity to institute the current proceedings.

21. The grant for an order of security for costs is a matter of discretion. This is provided for under **Order 26** of the **Civil Procedure Rules**. The general provision is to be found at Rule 1 of the said Order 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.”

22. The general rule is that security is required for Plaintiffs residing out of jurisdiction. To every general rule there is an exception. It therefore means that the fact that a Plaintiff is based outside the jurisdiction of the court does not automatically entitle the Defendant to order for security.

23. In view of the above findings, I have come to the conclusion that the Defendant has not given any compelling reasons for the grant of security for costs.

24. In the upshot, the Defendant's Notice of Motion dated **28th March 2013** and filed in Court on **18th April 2013** is hereby dismissed. The costs of the application shall be for the Respondent.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 19TH DAY OF DECEMBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Njoroge for the Plaintiff

No appearance for the Defendant

Teresia – Court Clerk