



REPUBLIC OF KENYA

High Court at Mombasa

Miscellaneous Application 459 of 2008

MAINA MURAGE & CO.

ADVOCATES APPLICANT/ADVOCATE

V

ERES N.V. AND

ERES ENTERPRISES LIMITED

RESPONDENTS/CLIENT

RULING

There are two applications in this matter one is a Chamber Summons application dated 1st October 2012 filed by the client and another dated 4th October 2012 filed by the Advocate.

On 10th October 2012 both parties appeared before my Brother Justice Mwongo whereupon it was mutually agreed by consent that there be no objection by either of the parties on the issue of leave.

The only area of disagreement was that of depositing of security.

It is common ground that there is no formal application for security by the Advocate and the prayer for such security is contained in the replying affidavit but not the application itself.

It is contended by Counsel for the client that the application before the Court is pursuant to rule 11 of the

Advocates Remuneration Order which does not provide for security for costs.

It is further contended that no decree has crystallized indicating what amounts are due and hence the application for security for costs is premature. The client contends that it has sufficient means within the Courts jurisdiction to satisfy any decree passed on it and it is able to file affidavits to that effect.

It is common ground that the client is not registered in Kenya. It also does not operate in Kenya any more and its doubtful whether it has any assets in Kenya. The taxing master of the Court and Justice Ibrahim had found that the client owed the Advocate a substantial sum of money in terms of fees for services rendered.

I have been referred to the authority of **Nairobi ELC No. 198 of 2012 Veronica Wanjiru Ngibuini & 3 Others –Vs- Leah Maria Githaiga & 7 Others** whereat Justice Kimondo outlined the principles for determining the grant of security for costs as-

(a) In determining an application for security for costs the Court has wide discretion.

(b) As a general rule, security for costs would be required from a Plaintiff who is resident outside the jurisdiction.

Counsel has also cited the authority of **Shah –Vs- Shah [1982] KLR 93** where the Court of Appeal rendered itself in this manner-

“The general rule is that security is normally required from Plaintiff resident outside the jurisdiction, however, a Court has discretion to be exercised reasonably and judicially.”

I am of the considered view that even though the issue of security of costs was not included in the body of the application but founded in an affidavit, being cognizant of the fact that parties are bound by their pleadings I do find that this is one of the cases that cries for a remedy as envisaged under Article 159 of the Constitution which provides that justice shall be administered without having undue regard to technicalities. I find justice will not be seen to be done if I refuse to order the grant of security for costs as the client does not reside within the jurisdiction and has no known assets in the county.

According, it is ordered that leave to appeal is granted to both parties. Respondents/clients leave is on condition that it deposits the sum of Kshs. 57,793,600.60 in an interest earning account in the joint names of the Advocates herein within 45 days from the date of this Ruling and to file a Notice of Appeal within the prescribed time in default of which the application stands dismissed.

Ruling read and delivered in open Court this 29th day of May, 2013.

M. MUYA

JUDGE

In the presence of:-

Mr. Gikandi - Counsel for the Advocate

Mr. Abed – Counsel for the Client holding brief for Mr.

Court clerk – Mr. Musundi