



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 1806 OF 2000**

**SALIM ALHAMED ALI .....1<sup>ST</sup> PLAINTIFF**  
**MOHAMED SALIM ALHAMED .....2<sup>ND</sup> PLAINTIFF**  
**- VERSUS -**  
**EMAG AG ..... DEFENDANT**

**RULING**

1. This is the plaintiffs' chamber summons dated 25<sup>th</sup> July 2011. It is expressed to be brought under order 26 rule 1 of the Civil Procedure Rules. It prays, in the main, that the defendant do provide security for the costs of the plaintiff in the event of a favourable decree. The principal grounds are espoused in an affidavit of Salim Ali sworn on even date. The plaintiffs aver that the defendant is a company domiciled in Switzerland outside the jurisdiction of the court. It is alleged that it has no assets in Kenya. Service upon the defendant was effected by the Ministry of Foreign Affairs out of jurisdiction. The plaintiffs are thus apprehensive that if they are successful in the suit and considering the nature and value of the suit, they would lose substantial costs as the defendant has no attachable or tangible assets in the country.

2. The defendant contests the application. A replying affidavit has been filed. It is sworn by its counsel of record Michael Mutuku Maweu on 5<sup>th</sup> October 2011. At paragraph 10, it is deponed that the "defendant's ability to pay any costs adjudged in favour of the plaintiff has not been doubted". It is there deponed that the company is a going concern and financially sound and in a position to satisfy the eventual decree. The defendant states that it has previously financed the plaintiffs for large sums of money, that there are other parallel proceedings in Nairobi HCCC No 1806 of 2000 and that in all the circumstances of these cases there is no merit in the application.

3. I take the following view of the matter. Order 26 rule 1 of the Civil Procedure Rules provide as follows;

"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".

From a plain meaning of those words, security for costs are primarily sought by a defendant or third party as against the person suing. The application here is in the reverse. The application has been brought by way of chamber summons. Order 51 of the Civil Procedure Rules 2010 provides that all applications to court shall be by way of Notice of Motion except where otherwise provided. Since order 26 is silent on the procedure, it *ipso facto* meant that the plaintiff should have moved the court by notice of motion. The plaintiff has submitted three authorities in support of the application. The copy of decision in Rimpex

S.A.R.L Vs Hapa Enterprises and another Mombasa HCCC No 221 of 1997 is titled at the top “draft”. It is thus not a reliable source. I agree with the decision in Parmex Limited Vs Austin and Partners Nairobi HCCC No 450 of 2003 [2006] eKLR that it is entirely within the discretion of the court to order security for costs and that the general rule as espoused in Shah Vs Shah [1982] KLR 98 is that security for costs is normally required for plaintiffs domiciled outside the jurisdiction. Where there are reciprocal enforcement rights for decrees in that jurisdiction, the court will be more reluctant. See Mohamed Vs Mohamed and others Mombasa HCCC No 331 of 1996 [1996] LLR 32.

4. But I hold the view that the mere fact of a party residing outside jurisdiction is not a sufficient ground in all cases for an order for security for costs. Here, I am well guided by the decisions in Jismaji Vs Saheb and another [1990] e KLR, and Kenya Education Trust Limited Vs Katherine S.M. Whhittan Civil Appeal (application) No 301 of 2009 (unreported). It is entirely in the discretion of the court. See again Procon Limited Vs Provincial Building Company [1984] 2 ALL ER 368.

5. I have noted that this suit dates back to the year 2000. It was filed by the plaintiffs who now seek security for costs. I am unable to countenance the laches. The delay in bringing the application over 10 years later is inordinate and inexcusable. The authorities hold that such delay is perilous to grant of the orders sought. See Halsburys Laws of England 4<sup>th</sup> Edition Vol 37 paragraph 305, Mama Ngina Kenyatta and another Vs Mahira Housing Company [2005] e KLR, Sir Lindsay Parkinson and Company Limited Vs Triplan Limited [1973] 2 ALL ER 273, Cancer Investments Limited Vs Sayani Investments Limited [2010] e KLR and my recent decision in Darabi Limited Vs Globex Freight & Logistics International Limited and others Nairobi HCCC 339 of 2006 (unreported).

6. For all of those reasons I am not inclined to order security for costs. But before leaving the matter, I must comment on the replying affidavit of Michael Mutuku Maweu. He is a lawyer for the defendant. He is ill-placed to depone to the financial status of the defendant or its ability to satisfy any decree. It is an affidavit on matters outside the personal knowledge of the lawyer. Some averments are pure hearsay. I appreciate that in interlocutory proceedings, such averments may be entertained under order 19 rule 3. But that is an exception to the general rule. Counsel should not depone to contentious matters such as the ones at play in this application. See M’ Kiara M’Mbiyiwe Vs Frankline Mugambi and others [2007] e KLR. See also Small Enterprises Finance Company Limited Vs George Gikubu Mbutia Nairobi HCCC No 3088 of 1994 (unreported). I have thus found the replying affidavit of little probative value and a poor traverse to the application. As the plaintiffs application lacks merit, I order that the same be dismissed. As the defendant’s replying affidavit was impugned, I decline to order costs.

It is so ordered.

**DATED and DELIVERED** at **NAIROBI** this 16<sup>th</sup> day of January 2012.

**G.K. KIMONDO**  
**JUDGE**

**Ruling read in open court in the presence of**

Mr. Thiga for Taibjee for the Plaintiffs.

Mr. Maweu for the 1<sup>st</sup> Defendant.