



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL NO. 83 OF 2009

HERBINDER SINGH SETHIPLAINTIFF

VERSUS

STEPHEN OMONDI OWINO & ANR DEFENDANTS

Coram: Mwera J

Kipkorir for plaintiff

Owino for 1st defendant

Noworjee for 2nd defendant

Njoroge court clerk

RULING

About to follow is a composite ruling covering 2 chamber summonses asking the plaintiff to give security for costs. The first application dated 24.6.09 was filed by the 1st defendant. It was brought under the now repealed Order XXV rules 1, 6 of the Civil Procedure Rules. The 2nd defendant filed a similar application dated 11.8.09. Each one of them prayed:

i) that the plaintiff do give security for costs to the satisfaction of the court within seven (7) days.

While the 2nd defendant put forth only one ground that the reason the security for costs was being demanded of the plaintiff was because he did not reside within the jurisdiction of this court and he had no known assets in Kenya, the 1st defendant added that the claim herein was misconceived, frivolous and unlikely to succeed. Each defendant swore a supporting affidavit.

The first defendant, an advocate of this court, deponed that he knew the plaintiff for more than 10 years having acted for him in various matters. In 2002 the plaintiff and his family moved from Kenya to live and work in South Africa. The plaintiff occasionally visited Kenya and gave the 1st defendant matters to handle for him. His residential address was given as:

112 4th St.Parkmore Sandton, South Africa

He had no known assets in Kenya. The 1st defendant had filed a bona fide defence in this cause. The plaintiff lived abroad and therefore could not be reached if any adverse orders were made against him here. When his advocates *M/s Kipkorir, Titoo & Kiara* were asked by letter of 15.5.09 whether the plaintiff would provide security for costs, there has been no reply. Therefore the 1st defendant/applicant asked this court to order that the plaintiff do deposit sh. 2,342,836/= (as per a draft bill of costs sent to his

lawyers) as the said security in 7 days.

The 2nd defendant also an advocate of this court read the application herein filed by the 1st defendant and repeated how well the 1st defendant knew the plaintiff and that the plaintiff migrated to South Africa leaving no known assets in Kenya. On the 2nd defendant's part, he was in possession of a letter the plaintiff's lawyers wrote for a firm of advocates on 19.5.08 which was copied to the plaintiff (annexed) at:

Rakhee Investments,
P. O. Box 4707
Rivonia 2128
SANDTON, South Africa

The 2nd defendant supported the draft bill sent to the plaintiff's advocates on 15.5.09 saying that a sum of sh. 2,343,836/= was fairly correct and similarly that should be deposited as security for costs for this applicant.

In a replying affidavit sworn by the plaintiff he gave the residential address as **P. O. Box 18837 – 00500 Nairobi** and also **P. O. Box 4707 RIVONIA South Africa**, holding a Kenyan passport No. 000229. He deponed that he held substantial interests in **Pan Africa Builders & Contractors Ltd, Crest Properties Ltd, Coronation Builders (1974) Ltd, Elantra Properties Ltd** and **Continental Traders & Marketing**. He resided at his house on plot No. NRI/BLOCK 94/11, Kitsuru NRI – all worth millions of shillings. May it be observed at this point that there was no evidence placed before the court regarding the plaintiff's shareholding in the limited liabilities companies above or that he was the lease owner of NRI/BLOCK 94/11. It is in the name of Coronation Builders (1914) Ltd. And to him the defendant/applicants had not met the requirements of Order XXV of Civil Procedure Rules.

In submission it was stated on behalf of the plaintiff. That he owned substantial interest in the companies/firms stated in the replying affidavit, a thing known to the 1st defendant and not refuted at all. Four cases of **Vallabhdas Hirji Kapadia Vs Thakersey Laxmidas** (1960) EA 852, **Shah Vs Shah** [1982] KLR 95 **Shah & Ors Vs Manurama Ltd & Ors** [2003] EA 294 and **Timothy Manyara & Ors Vs Pyrethrum Board of Kenya** Nakuru HCCC 108/04 were cited to support the position *inter alia*, that security for costs cannot issue where the plaintiff has assets that can be attached where he resides; the order to give security for costs is discretionary and if it is easy to enforce court orders on the plaintiff an application the type herein must be dismissed. And an order for security cannot issue where the plaintiff's abode is known. So the court was asked to dismiss the two applications because the defendant/applicants had not shown that they had bona fide defences, they did not controvert the point that the plaintiff resided both in Nairobi and Johannesburg, with substantial assets in Nairobi. Or that they could not serve process on him at both or either of the addresses. Or that Kenya and South Africa did not have reciprocal agreements to enforce each other's court orders.

The 1st defendant filed and served a further affidavit to the effect that plot No. NAIROBI BLOCK 94/11 is in fact on this Drive Nyari Estate Nairobi and not Kitusuru and that it had no residential house except a caretaker's shelter. Then he proceeded to submit that one could not be resident at two different addresses in Nairobi and South Africa. The plaintiff was resident in South Africa since 2002 when he left Kenya. Indeed that was clear from the replying affidavit which stated that the residential house was at Kitsuru while the 1st plaintiff whose brother occupies NAIROBI/BLOCK 94/12 knew that the estate was Nyari Estate. So the plaintiff had sworn falsely. There was no evidence that the plaintiff owned substantial interests in the companies/firms be named or that the 1st defendant knew that as a fact. And in any event if the plaintiff had shares in those entities, mostly ltd liability companies, the defendant could not reach such shares if they had orders against the plaintiff personally. In short it should be taken than the plaintiff resided in South Africa and he had no known assets in Kenya. After reproducing the new Order 26 rule 1 Civil Procedure Rules (as it was in the now repealed provisions) the 1st defendant distinguished the cases listed by the plaintiff to the effect that they did not avail him.

The second defendant urged the court to note that the plaintiff had attached a lease title to his replying

affidavit, claiming it to be his residential place. Yet the certificate was not in his name at all. He added as the 1st defendant did that there was no evidence that he held shares in the several Kenyan companies he cited. Such shares if owned do not avail a 3rd party either. The plaintiff resided in South Africa - a country that had no reciprocal foreign judgements enforcement with – Kenya. The defence filed herein set out a case against the plaintiff.

The plaintiff filed the suit herein claiming jointly and severally a sum of sh. 106,034,478/80. They filed defence. Then this chamber summons came along. The old Order XXV rules 1, 6 whose powers the 2 defendants invoke in their applications read: (new Order 26 rule 1)

“ 1. 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.”

And rule 6 goes on to say that where security by payment has been ordered such can be made in a bank or a financial institution in the joint names of parties or their advocates.

The defendant/applicants asserted and with the personal knowledge of or acquaintance with the 1st defendant particularly, he once resided in Kenya but moved to South Africa where he resides at Sandton. The applicants gave two different addresses and indeed the plaintiff confirmed that he lived in Sandton and also at Nairobi. Even as one is left wondering how one can reside in the two countries at the same time, it transpired that the plaintiff who stated in the replying affidavit:

“That my residential house stands on title No. NAIROBI/BLOCK 94/11 Kitsuru,”

ended up exhibiting a certificate of lease for that plot but in the name of Coronation Builders (1974) Ltd – not himself! As if that was not enough the 1st defendant still acting on personal knowledge brought evidence to the court that the said plot was actually located close to his own brother’s property on this Drive, Nyari Estate Nairobi, and it was vacant except for a guard’s shelter! That fact remained uncontroverted. If the plaintiff wants the court to believe that he had assets in Nairobi then he failed miserably, even verging on perjury and falsehoods to demonstrate that to the court. That was a duty incumbent on him and not the applicants.

It is not for this court at this time to determine whether the defences herein have bona fides or otherwise. That is for the trial court. Court processes could be effected in South Africa but what about enforcing court orders and decrees. It was again incumbent on the plaintiff to show that such could be possible. He did not place evidence before court that Kenya and South Africa had a mutual foreign judgements laws. So all in all the defendants claims that the plaintiffs lives outside the jurisdiction of this court and he has no known assets in Kenya are justified.

In sum the plaintiff is ordered to give security for part of the costs of the 2 defendants/applicants in a total sum of sh. 2.5m in the next 21 days to be deposited in the joint income – earning accounts of lawyers of both sides. If that is done, the parties to move to prepare the suit herein for trial as provided for in Civil Procedure Rules 2010.

Costs to the applicants.

Delivered on 12.5.11.

J. W. MWERA
JUDGE