



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**CIVIL CASE NO. 248 OF 2008**

**MOHAMMED BASHIR.....PLAINTIFF**

**- VERSUS -**

**SHAUKAT FAROOQ SHEIKH.....DEFENDANT**

**RULING**

The Defendant brought an application by way of Chamber Summons dated 14<sup>th</sup> October 2010 under Order XXV Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act praying for orders:-

- 1. That the Plaintiff gives security for the costs of the Defendant,*
- 2. That the security be paid before the matter is fixed for hearing by the Plaintiff.*
- 3. That the prohibitory order obtained by the earlier Plaintiff (Collection House) before substitution be vacated, and*
- 4. That the costs of this should be provided for.*

The grounds in support of the application are stated on the face of the application. The Defendant states *inter-a-alia* that the Plaintiff resides abroad and therefore enforcement of costs, if awarded against the Plaintiff would be difficult to realize, and that the prohibitory order was obtained by Collection House Ltd, which is no longer a party to these proceedings and that in the interest of fairness and justice the application should be allowed. The application is supported by the annexed affidavit of Shaukat Farooq Sheikh.

In reply the Plaintiff Mohammed Bashir opposes the application. He dismisses the grounds in support of the application. He states that the fact that he lives outside Kenya is no ground at all as the Defendant also stays outside the Republic. The Plaintiff further states that he is in good health, that the prohibitory order is valid and must remain. He further states that this court had ruled that since the Defendant resides abroad and had no known assets in Kenya that could be attached if judgement was entered against him, the learned Judge ordered that the prohibitory order must remain in place.

I have looked at the argument of both parties, and the submissions of counsel and I believe the following are issues to be determined by this court.

1) *Is a need for security for costs for the Defendant established?*

2) *Is the prohibitory order obtained by the earlier Plaintiff (Collection House Ltd) still properly in place?*

To answer the first issue, I have considered the counsel submissions on the matter, and the following clear facts emerge *viz*; that the Plaintiff resides outside the Republic of Kenya as is evident from the Plaintiffs' own affidavit executed on 1<sup>st</sup> June 2010. The Plaintiff has also admitted that he is advanced in years and is not having the best of health. The Defendant, on the basis of these two grounds may have a legitimate fear that should he be awarded costs of the suit it may be difficult for him to execute in the event that the Plaintiff is well outside the jurisdiction of Kenya. It is not enough to grant this prayer on the basis of ill health or advanced years alone. However, in my view this court must assure a litigant before it that should costs be awarded, these costs would be payable. For this reason alone I rule that the Defendant has established a need for security of costs as prayed.

On the second issue, i.e. the continued existence of the prohibitory order against the Defendants property L.R. No. 209/1210/17, I have noted that in his Ruling dated 15<sup>th</sup> March 2010, L. Kimaru J, while giving orders setting aside the *ex-parte* judgement, made it conditional. The court directed that the said prohibitory order remains in place pending the hearing and determination of the suit. I will not interfere with that direction for two reasons. Firstly, as I have already said, the court directed that the prohibitory order remains in place until the determination of the suit. The order has not been appealed against. Secondly, in my view, the prohibitory order is properly in place despite the amendment of the Plaintiff which brought in the current Plaintiff. The pleadings clearly show that Collection House was at all times appointed as an assignee of the debt. The subject matter of the suit at all material times remained the valid property of the assignor in this case the Plaintiff. The revocation of assignment cannot be deemed to operate to discharge the prohibitory order. Further, the parties, at the time they amended the Plaintiff, did not make any reference to the prohibitory order. In my view this was not an oversight. It was clear to both parties that the prohibitory order had a life of its own and needed not be interfered with. The prohibitory order must therefore remain until the hearing and determination of the suit.

It has also been argued by both counsels that the parties in this matter are blood brothers. If that is so, it is in my view appropriate that one should give the security for the suit while the other provides security for the Defendants costs. In that respect I will not award costs of this application to any party.

In the upshot, I grant prayer number 1 and 2 and order that the Plaintiff do give security for the costs of the Defendant and the said security be paid before the matter is listed for hearing by the Plaintiff. The amount of security to be assessed by the appropriate organs of this court.

It is so ordered

**DATED, READ AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF OCTOBER 2011.**

**E. K. O. OGOLA**  
**JUDGE**

**PRESENT:**

..... *FOR PLAINTFF*

..... *FOR DEFENDANT*  
*IRENE – COURT CLERK*