



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 339 OF 2006**

**DARABI LIMITED.....PLAINTIFF**  
**- VERSUS -**  
**GLOBEX FREIGHT & LOGISTICS INTERNATIONAL LTD ..... 1<sup>ST</sup> DEFENDANT**  
**SIKANDER KHALIFA .....2<sup>ND</sup> DEFENDANT**  
**FARAJ ALIAS “STING”.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. I have before me a notice of motion dated 8<sup>th</sup> March 2011. The plaintiff prays for order:
  - a) **THAT** the 1<sup>st</sup> Defendant/Respondent be ordered to provide security for the Plaintiff/Applicant’s costs in the sum of USD. 9,000 in respect of the Counter-Claim filed herein within fourteen (14) days.
  - b) **THAT** the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be ordered to furnish security in the sum of USD 15,000 for their appearance in court and/or satisfaction of the decree that may be passed against them in the Plaintiff’s suit within fourteen (14) days.
  - c) **THAT** the said sum of USD. 9,000 and USD 15,000 respectively be deposited in this honourable court until the suit is heard and determined.

The plaintiff also prays that costs be in the cause. The primary grounds disclosed in the affidavit of Steve Wragg sworn on even date are that the 1<sup>st</sup> defendant company is incorporated in the United Arab Emirates with its registered offices in Dubai outside this court’s jurisdiction.

2. The 2<sup>nd</sup> defendant in turn is its director and resides in Dubai and he and the company have no assets in Kenya capable of attachment to satisfy any ensuing decree in the suit. As the plaintiff may be awarded costs in the counterclaim by the defendants, and there is no assurance the defendants will submit fully to jurisdiction of the court, it is then just to grant the orders.
3. The 1<sup>st</sup> and 2<sup>nd</sup> defendants contest the application. A replying affidavit sworn by Sikandar Khalifa on 6<sup>th</sup> May 2011 takes up cudgels with the allegations by the applicant. It is deponed that this suit dates back to year 2005 and the present application is an abuse of process. The 2<sup>nd</sup> defendant says he resides both in Dubai and Mombasa, Kenya. He says the plaintiff is indebted to it as prayed in the counterclaim and there is no likelihood that the counterclaim will fail to warrant the request for attachment before judgment or for security for costs. Reference there is made to a consent entered on 2<sup>nd</sup> December 2005 where goods hitherto held as lien were released to the plaintiff and the plaintiff deposited in court insurance security

bonds for USD 30,000 as security to the 1<sup>st</sup> and 2<sup>nd</sup> defendants. This the 1<sup>st</sup> and 2<sup>nd</sup> defendants, submit, shows the plaintiff may be liable to them and has a poor defence to the counterclaim. The application thus has no merit and should be dismissed.

4. The 3<sup>rd</sup> defendant did not appear for these proceedings and is not affected by the orders sought.
5. After hearing the parties, studying the pleadings and depositions as well as the written submissions of both counsel and list of authorities annexed, I am of the following considered opinion.
6. It is conceded that the 1<sup>st</sup> defendant is domiciled out of jurisdiction. The 2<sup>nd</sup> defendant admits he is a director of the 1<sup>st</sup> defendant but he is based in both Dubai and Mombasa, Kenya. From the private investigation report (annexture SM 2) attached to the affidavit of Steve Wragg, it is acknowledged that the 2<sup>nd</sup> defendant “is usually in the country on and off as he frequently flies to Dubai to source for business”. I thus conclude that the 2<sup>nd</sup> defendant is not beyond the reach of the court’s jurisdiction. That same investigation report by the applicant states that the 1<sup>st</sup> defendant company has a business address at Mlaleo – Bamburi on Mombasa’s north coast with a displayed sign for Globex Freight and Logistics International at a go-down.

The plaintiff has not put before the court sufficient evidence then to demonstrate the 1<sup>st</sup> defendant only operates out of jurisdiction of court or as, it alleges, is a briefcase company. That fear was borne partly out of the fact that the plaintiff, on failing to get the defendants for service of summons, had to get leave of court to serve by advertisement. The defendants have since filed defences. The 1<sup>st</sup> and 2<sup>nd</sup> defendant have also pleaded a counterclaim. Now, since the filing of the original suit on 3<sup>rd</sup> October 2005 and the close of pleadings, this motion has only been filed on 10<sup>th</sup> March 2011, over 5 years later.

7. Orders 26 rule 1, 5 and 6 as read together with order 39 rules 1 and 2 of the Civil Procedure Rules as well as section 1A and 1B of the Civil Procedure Act give this court wide latitude and discretion to make an order to furnish security. The court may order arrest under order 39, if satisfied the offending party may abscond, is about to leave jurisdiction, is disposing of assets to defeat the potential decree or is delaying or obstructing justice or avoiding process and so forth. The offending party would still need to show cause why arrest should not be ordered. The present application by the plaintiff, though citing order 39, makes no such prayer.

8. It seems to me well settled that delay in bringing an application such as the one highlighted earlier is perilous and the courts will not grant the prayers sought. See *Halsbury’s Laws of England* 4<sup>th</sup> Edition Vol 37 paragraph 305, *Mama Ngina Kenyatta and another Vs Mahira Housing Company* [2005] eKLR, *Sir Lindsay Parkinson & Company Ltd Vs Triplan Ltd* [1973] 2 ALL ER 273, *Cancer Investments Limited Vs Sayani Investments Ltd* [2010] eKLR.

As no explanation for that delay is forthcoming, I am not inclined to exercise my discretion in fairness to the plaintiff.

9. Again on the law, even assuming, which has not been fully supported, that the 1<sup>st</sup> defendant is based entirely abroad, it is not sufficient in all cases to order furnishing of security. See *Jismaji Vs Saheb and another* [1990] eKLR 732, *Kenya Education Trust Limited Vs Katherine S.M. Whittan* Civil Appeal (application) No 301 of 2009 (unreported). The bottom line is that it is entirely in the discretion of the court. See again the decisions in *Procon Ltd Vs Provincial Building Company* [1984] 2 ALL ER 368.

From my analysis of the facts surrounding the application and the suit, I am unable to say that the defendants have sought to defeat the decree apart from merely being domiciled out of jurisdiction. I would be of the opinion that the plaintiff has not in the circumstances met the threshold for grant of an order to furnish security. That, coupled with the inordinate delay in bringing the application, have proved fatal to success of the motion.

10. The upshot is that the plaintiff's notice of motion dated 8<sup>th</sup> March 2011 has no merit and the same is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this 18<sup>th</sup> day of November 2011.

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

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

Mr. Mutinda for Kangethe for the Plaintiff.

Mr. Mubea for 1<sup>st</sup> and 2<sup>nd</sup> Defendant.

No appearance for 3<sup>rd</sup> Defendant.