



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 1394 OF 1998

YUSUF ABDALLAH GITHAU PLAINTIFF

VERSUS

THE BUILDING CENTRE (K) LTD DEFENDANT

RULING

1. On the 5th of February, 2009 by consent of both parties, this matter was fixed for full hearing for 2 days, the 24th and 25th of May, 2009.
2. On the 6th of March, 2009 the Defendants filed an application by way of a Chamber Summons under Order XXV Rule 1, 5, 6, and 7 of the Civil Procedure Rules seeking for security of costs in the sum of **Kshs.310,775/=** & in default of payment of the same the suit be struck out with costs.
3. On the 1st day of hearing, the 24th of June, 2009 **Mr. Fred Ngatia** for the Defendants asked the court to hear the application first before the matter could proceed for hearing. This ruling is on the said application.
4. **Mr. Ngatia** for the Defendant submitted as follows; that the 2nd Defendant is a company in the United Kingdom and was joined to the suit because it is a shareholder in the 1st defendant. That 3rd Defendant a local company was also joined for the same reasons. The 4th and 5th were joined by virtue of being Directors in the 1st Defendant company. That Plaintiff had been employed by the 1st Defendant. The defence counsel further submitted that the application has been necessitated by the Plaintiff having claimed substantial amounts that have made the case unnecessarily protracted. That the defendants do not know of the Plaintiff's assets and may not recover their costs in the event they successfully defended the suit.
5. The Plaintiff appearing in person vehemently opposed the application. He did not file any Replying Affidavit. He submitted orally. He argued that the application is bad in law, it seeks to delay the course of justice has been brought late in the day and it is meant to shut him from pursuing his case.
6. I have considered the submissions by the counsel for the defendants and the Plaintiff. For consideration before me is whether or not to allow for the security of costs.

In order to determine the issue at hand, the court has to consider all the relevant facts and circumstances surrounding this case.

7. The plaint herein was filed on 25th day of June, 1998. The defendant filed a defence and counter – claim on the 22nd of July, 1998. A reply to the defence counter-claim was filed on 30th of July, 2009. On the 2nd of February, 2006 the Plaintiff filed an application to amend the plaint and leave to join the 3 other defendants. The application was granted and an amended plaint filed on the 20th of June, 2008. An amended defence and counter claim was filed on 25th July, 2008.

8. Order XXV Rule 1 has used the word “may” giving the court wide discretion whether or not to order for security of costs. The court has to use this wide discretion reasonably and Judiciously taking into account all circumstances surrounding a case, including whether the application is being used oppressively see **Sir Lindsay Parkinson & Co. Ltd vs. Triplan Ltd** (1973) 22 L. R. 632 the Judgment of Lord Denning L.R. at 644 Locally in **Gulf Engineering (E.A) Ltd vs. Amrik Singh Kalsi** (1976) K.L.R. at 277 – Todd J held –

“That section 110 of the Companies Act gave the court a wide discretion whether or not to order security for costs in any case, and, the court being satisfied that the Plaintiff’s claim was bona fide and had a reasonable prospect of success, it would not order the company to provide security for costs even though it would be unlikely to be able to afford the first defendant’s costs should he be successful.”

In **Cowell vs. Taylor** (1855) Ch D. 35 it was held –

“The insolvency or poverty of a Plaintiff is no ground for requiring him to give security for costs.”

9. Although Order XXV rule 1 does not cite the stage at which an application for security of costs ought to be made, Courts have held that such an application ought to be made early during the duration of the case and where such an application is made late, adequate reasons be given. I rely on **Shakhalaya Khwa Jirongo & Another vs. Board of Trustees, National Social Security Funds**. H.C.C.C. No. 957 of 2000 & **Mama Ngina Kenyatta & Another vs. Machira Housing Company Ltd**. (2005) eKLR

10. Firstly I am of the view that the defendants have not explained why this application was not made much earlier in the suit and why the same was filed after the main case was fixed for hearing. I take note of the fact that the case herein was filed over 11 years ago, although I do appreciate that the amendments to the plaint came much later.

Secondly it is quite obvious to me that asking the Plaintiff herein to pay costs because of the reasons given i.e. he is not known to have any assets would be suggesting that one with no assets or means is to be shut out of his pleadings.

11. Having stated as above, I find that the application for security for costs has been brought late and without sufficient explanation for the delay, and I also find that the application is prejudicial to the Plaintiff. I accordingly decline to grant the orders.

Dated and delivered at Nairobi this 23rd day of July, 2009.

ALI- ARONI

JUDGE