REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 47 of 2008

JOHN KUNGU KIARIE…….…....……...PLAINTIFF

VERSUS

DYER AND BLAIR INVESTMENT BANK LTD…....1ST DEFENDANT

STANBIC KENYA BANK LTD…….……..…..2ND DEFENDANT

RULING

The 1st and 2nd defendants filed two identical applications under the provisions of Order XXV rules 1, 2,5 and 6 of the Civil Procedure Rules seeking orders of the court to compel the plaintiff to furnish security for costs pending the hearing and determination of the suit. According to the 1st defendant, the plaintiff had no known income or capital assets. The 1st defendant was apprehensive that the plaintiff would be unable to satisfy any order for payment of costs which may be made against him. The 1st defendant was of the view that the plaintiff's suit had no chance of success in light of the defences put forward by the defendants which alludes to the fact that the bulk of the plaintiff's claim is based on unfounded speculation. On its part, the 2nd defendant was of the view that the claim by the plaintiff was sham and had no reasonable prospect of success. The 2nd defendant contends that the pleadings filed by the plaintiff did not disclose any contractual relationship between the said plaintiff and the 2nd defendant. The 2nd defendant argues that it would be in the interest of justice for the court to secure the costs that may be awarded to the 2nd defendant prior to the hearing and determination of the present suit. The applications are supported by affidavits sworn respectively by Mohamed Hassan, the managing director of the 1st defendant and Alfred Mugambi, the head of legal services of the 2nd defendant.

The application is opposed. The plaintiff swore a lengthy replying affidavit in opposition to the applications. In the said affidavit, he deponed that the defendants' applications should be considered by the court in light of their past conduct where they had filed numerous applications in a bid to frustrate the plaintiff from prosecuting his case. The plaintiff deponed that he was a man of means and would be able to pay any costs that may be awarded to the defendants in the event that he lost the case. The plaintiff narrated the frustrations that he had been subjected to in the hands of the defendants and their counsels who, in view, were unwilling to co-operate in preparing the suit for hearing. He maintained that the applications had not been filed in good faith and therefore should be dismissed with costs. The plaintiff listed some of his property as evidence that he was not a man of straw and should therefore be allowed to prosecute his suit without the shackles of being required to provide security for the defendants' costs.

Prior to the hearing of the application, the parties to this application agreed by consent to file written submissions. I have considered the pleadings filed by the parties to this application including the said written submissions. I have also considered the oral arguments made by Mr. Ogunde for the 2nd defendant, Miss. Mbugua for the 1st defendant and Mr. Otieno for the plaintiff. The issue for determination by this court is whether the defendants established a case to entitle this court order the plaintiff to provide security for costs. According to the defendants, the plaintiff will be unable to pay their costs if they are successful in the defence of the suit. Under Order XXV Rule 1& 5(1) of the Civil Procedure Rules this court has discretion to order any party to a suit to provide security for costs pending

the hearing and determination of a suit. This court has unfettered discretion to order a party to a suit to provide security of costs if it is satisfied that the interest of justice would be served. Our Civil Procedure Rules are not as elaborate as the Rules of Supreme Court of England which provide instances where security of costs may be ordered. For instance, under Order 23 of Rules of Supreme Court security for costs may be ordered where a party is resident out of the jurisdiction of the court; where the plaintiff is an insolvent company; where the company is based out of the jurisdiction of the court but has property in England; where a nominal plaintiff has filed suit; where a person under disability has filed suit through a next friend; where either the plaintiff or the defendant is a person of unknown residence; where the plaintiff has no visible means of paying costs, and where it is established that the opposing party may be unlikely to recover its costs if the suit is determined in its favour (*see* The supreme court Practice, 1999, Vol. 1 at page 428-44, Sweet & Maxwell, London 1998).

In Shah Versus Shah [1982] KLR 95, the Court of Appeal held that as a general rule security is normally required from plaintiffs resident outside the jurisdiction; however, a court has a discretion, to be exercised reasonably and judicially, to refuse to order that such security be given. The test on an application for security for costs is not whether the plaintiff has established a *prima facie* case but whether the defendant has shown a *bona fide* defence. In Wetfarm Ltd & Anor versus ABN Amro Bank Nairobi HCCC No.526 of 2003 (*unreported*) Emukule J listed the circumstances which the court may take into account when determining whether or not to allow an application for security for costs. The circumstances include whether the plaintiff's claim is *bona fide* and not a sham, whether the plaintiff has a reasonable chance of success, whether there is an admission by the defendants on the pleadings or elsewhere that money is due, whether there is a substantial payment into court or an "open offer" of a substantial amount, whether the application for security was being used oppressively, for instance so as to stifle a genuine claim, whether the plaintiff's want of means has been brought about by any conduct of the defendants such as delay in payment or in doing their part of the work, or whether the application is made at a late stage of the proceedings.

In the present application, having had a cursory look at the pleadings filed by both the plaintiff and the defendants, it cannot be said that the said pleadings are sham to an extent that either party would be entitled to invoke this court's jurisdiction to seek to obtain security of costs from the other party. I think it is trite law that a party is entitled to lay his claim in his pleadings in a manner that he deems fit. The law requires such a claimant to lay his claim in full and not to litigate by installments. In the present application, while the defendants may have some justification in arguing that the plaintiff's claim appears on the face of it, to be exaggerated, my evaluation of affidavit evidence on record leads me to the conclusion that the defendants' applications have not been made *bona fide*. It appears that the defendants desire to put all sorts of hurdles at the litigation path of the plaintiff in order to frustrate him from prosecuting his case.

I think it is now settled that poverty of a plaintiff *per se* may not be a sufficient ground for a court to order that he provides security for costs pending the hearing of his case. In the present application, it was evident that the plaintiff has honestly sought to prosecute his case as expeditiously as possible. However, it appears that the defendants are not keen on the present suit being prepared and made ready for hearing. The present applications will not be considered outside the context of the events that have transpired in this suit prior to the defendants filing the present applications. The plaintiff has satisfied the court that he is a man of means and in the event that he loses the case, he will be in a position to pay the costs that may be assessed as due to the defendants. The costs of the defendants, even if this court were to be generous, will not exceed the value of the property that the plaintiff has disclosed to the court.

In the premises therefore, this court is of the considered opinion that the present applications have been brought by the defendants to frustrate the full hearing of the case. I find no merit with the two applications. I proceed to dismiss them with costs to the plaintiff.

DATED at NAIROBI this 22ND DAY OF JULY, 2009.

L. KIMARU

JUDGE