REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Appeal 31 of 2003

DAVID NGUKU MUTWEIA……..……APPELLANT

AND

JOEL KITONYI NZIOKI……RESPONDENT

(Being an appeal from the Ruling of the Machakos Senior Resident Magistrate's Court Mr. S.M. Kibunja dated 31/03/2003 in Civil Case No. 132 of 2002)

J U D G M E N T

1. The appellant herein, **David Nguku Mutweia**, was the defendant in Machakos SRMCC No.132 of 2002 in which the respondent (as plaintiff) made a claim against the defendant for compensation arising from some alleged defamation of the plaintiff by the defendant on the 24/01/2001 at a clan meeting at which the defendant allegedly referred to the plaintiff as a witch, adulterer, envious not forward looking, not fit to be a member of a decent community and one who should be shunned by other people. The plaintiff in the lower court asked for:

(a) General damages for defamation

(b) Costs and interest of this suit

(c) ***Blank***

The plaint in the lower court was filed on 15/02/2002.

2. The defendant entered appearance on 21/02/2002 and filed defence on 1/03/2002. In the defence, the defendant denied all the allegations as per paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 of the plaint and put the plaintiff to strict proof. The defendant also denied that he uttered the words complained of and that he was at the for at which the alleged defamatory words were uttered.

3. On the 9/01/2003, the plaintiff/applicant filed a chamber summons application dated 8/01/2003 brought under Order 38 Rules 1 and 2 of the Civil Procedure Rules and section 3A of the Civil Procedure Act seeking orders

(a) THAT the Defendant be arrested and brought before court to show cause why he should not furnish security for his appearance.

(b) THAT the Defendant be ordered to deposit with the court Kshs.200,000/= as security for his

appearance and/or his passport.

(c) <u>THAT</u> costs of this application be provided.

4. The application was premised on the grounds that the defendant was a resident in Germany and that as such he was due to leave the country on 4/02/2003; that the applicant would be obstructed and frustrated in executing any decree against the defendant if the defendant should leave the jurisdiction of the court and that in the circumstances, the applicant would suffer prejudice if the defendant did not furnish either cash or his passport as security for costs.

5. The application was opposed on the ground that the defendant had his home in Kilembwa village of Wamuyu Location, Yathui Division of Machakos District and that though he often travelled to Germany on business trips, he had so many other interests in Kenya that he could not just abandon them because of the suit facing him.

6. The learned trial magistrate considered the application and found that on two occasions, namely 16/10/2002 and 29/11/2002, the case could not proceed because the defendant was absent from the jurisdiction of the court. The court therefore ordered the defendant/appellant to deposit security with the court of a property valued at Kshs.200,000/= within 30 days or in the alternative deposit Kshs.200,000/= in an interest earning account in the joint names of his Advocates and that of the plaintiff's advocate.

7. The defendant/appellant, being aggrieved by that ruling applied for and obtained a stay of execution of those orders and also appealed against the ruling. The Memorandum of Appeal filed in court on 30/04/2003 raises 4 grounds of Appeal:-

1. ***The Learned Senior Resident Magistrate erred in both law and fact in allowing the Respondent's application dated 8.1.2003 and ordering provision of security by the Appellant when the Respondent had NOT demonstrated that the granting of such order was, under both the Law and Rules of Civil Procedure, deserved.***

2. ***The Learned Senior Resident Magistrate erred in both law and fact in shifting unto the Appellant the burden of proof of whether or not Orders sought were deserved, when the Respondent had NOT proved his allegations.***

3. ***The Learned Senior Resident Magistrate erred in both law and fact in Ordering the depositing of Kshs.200,000/= as security by the Appellant, when such move was NOT in any way justified.***

4. ***The Learned Senior Resident Magistrate erred in both law and fact in ignoring the grounds advanced by the Appellant in opposition of the said application, and in particular failing to note that the hearing of the suit before him had been adjourned only twice, and for clear good reasons.***

8. At the hearing of the appeal, Mrs. Nzei contended that the learned trial magistrate had erred in both law and fact by allowing the plaintiff's application for security for costs when in fact one of the two adjournments (the one of 16/10/2002) was caused by the respondent herein. Mrs. Nzei contended further that if the learned trial magistrate had considered the appellant's Replying Affidavit in opposition to the application dated 8/01/2003, he would have found that the plaintiff's allegation that the appellant was about to abscond were unfounded and that infact the appellant had been arrested from his home in Wamunyu location of Machakos District long after the respondent had alleged that the appellant could abscond. Mrs. Nzei also complained on behalf of the appellant that the court shifted the burden of proof

onto the appellant and that the court had failed to make a finding that the applicant/plaintiff had failed to prove his case against the respondent/appellant on the application dated 8/01/2003.

9. Mrs. Nzei brought up other matters during the hearing but respectfully some of those issues go beyond the appeal. Mrs. Nzei also argued that the order requiring the appellant to deposit the sum of Kshs.200,000/= in an interest earning account in the joint names of the two advocates on record was made in error and is contrary to Order 38 Rule 1 of the Civil Procedure Rules. It is helpful at this stage to set out the provisions of Order 38 Rules 1 and 2 of the Civil Procedure Rules which read:-

"***(1) where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (l) of section 12 of the Act, the court is satisfied by affidavit or otherwise –***

(a) that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him –

(i) has absconded or left the local limits of the jurisdiction of the court; or

(ii) is about to abscond or leave the local limits of the jurisdiction of the court; or

(iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or

(b) that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance,

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court (emphasis mine)

(2) (1) where the defendant fails to show such cause, the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to rule.

(2) Every ----------"

10. The appeal was opposed. Mr. B.M. Mungata for the respondent contended that the order for security was made on sound legal principles as set out in the case of **Shah –vs- Shah [1982] KLR 95** in which three plaintiffs who were beneficiaries under a will of their deceased father sued the executors and trustees of the will praying among other things for an annulment of a sale of a certain part of the deceased's estate. The first two defendants applied that the plaintiffs do give security for their costs on the ground that the plaintiffs were ordinarily resident in England which was out of the jurisdiction of the High Court of Kenya. This application was dismissed with costs and the applicants appealed. It was held (Court of Appeal at Nairobi), *inter alia*, that:-

1. ----------

2. The general rule is that 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 security be given. It cannot be said that the judge exercised his discretion unreasonably or unjudicially in refusing to order security.

3. 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 The judge had not been satisfied with the bona fides of the appellant's case.

11. On whether or not there was an error on the part of the court in ordering that the sum of Kshs.200,000/= be deposited in an interest earning account in the joint names of the advocates on record, Mr. Mungata submitted that no error was committed and that in any event, there was no misuse of discretion by the court below in granting the order for security for costs.

12. At this stage, it is now my duty to reconsider the evidence on record and the law with a view to reaching my own conclusions as to whether the order for security for costs made by the lower court was soundly made and whether or not the learned trial magistrate exercised his discretion judicially.

13. It is not in doubt that what prompted the plaintiff to make his application dated 8/01/2003 was the fact that the case could not proceed to hearing on the 16/10/2001 and 10/12/2002. From the record, the court noted that the case could not proceed to hearing on 16/10/2002 on the application of the plaintiff. The plaintiff is the respondent in this appeal. The matter was stood over generally with costs to the defendant/appellant. On the 10/12/2002, the case was adjourned on the application of the defendant's counsel who informed the court that because they had been served with the hearing notice only on 29/11/2002, the period was too short for her to communicate with her client who was based in Germany. She also informed the court that she had received the hearing notice under protest. The fact that defendant's counsel had received the hearing notice under protest was not disputed.

14. A look at the ruling dated 31/03/2003 reveals that the learned trial magistrate erroneously concluded that the defendant had been absent both on 16/10/2002 and 29/11/2001. The record is clear that it was the plaintiff who applied for adjournment on 16/10/2001 so that it was wrong for the learned trial magistrate to hold the defendant liable for the adjournment of the case on that day. Secondly, there is no evidence that the matter came up again on 29.11.2001. The record shows that after the order of 16/10/2002 the matter next came up on 6/11/2002 when the parties representatives appeared in the court registry for fixing of fresh hearing dates and the matter was thenfixed for hearing on 10/12/2002. In my view therefore, I am in agreement with counsel for the appellant that the trial court fell into error when he failed to appreciate the reasons given for the adjournment of the suit on the two occasions when the case came up for hearing and could not proceed namely on 16/10/2002 and 10/12/2002. On the latter occasion, the appellant clearly stated through his counsel that the hearing notice was received under protest and that he had therefore not been given sufficient time to appear for the hearing of the case.

15. I have also considered the other grounds of appeal and find that under Order 38 Rule 1 of the Civil Procedure Rules, any security, if it be by cash, ordered by the court, is to be deposited with the court pending the hearing and determination of court. In this case, the court ordered that the sum of Kshs.200,000/= be deposited in an interest earning account in the joint names of the advocates on record. There is no provision for such an arrangement under the relevant rules. Further, I do find and hold that the court did not address itself to the bona fides of the defendant's/applicant's defence. Mrs. Nzei contended that if the learned magistrate had addressed his mind to this issue he would have found that the defence was such that the plaintiff's/applicant's application would have failed the test for ordering security for costs. (see **Shah –vs- Shah** (above). I do find and hold that the there was no evidence before the lower court that the defendant was about to or had absconded from the jurisdiction of the court.

16. In the result, I am satisfied that the appellant's appeal has merit. The same is allowed. The order dated 31/03/2003 requiring the defendant/appellant to furnish security be and is hereby set aside. Costs of this application shall be paid to the appellant.

It is so ordered.

Dated and delivered at Machakos this 14th day of May 2008.

R.N. SITATI

JUDGE

Delivered by Lenaola J

In the presence of:-

Mrs. Nzei for the Applicant

Mr. Mung’atta for Respondent