



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Suit 10 of 2007**

**BAKARI ALI OGADA & 245 OTHERS.....PLAINTIFFS**

**VERSUS**

**UNILEVER KENYA LIMITED.....DEFENDANT**

**R U L I N G**

The application is a Chamber Summons dated 17<sup>th</sup> July, 2008 brought under Order XXV rule 1, 5(1) and 6 of Civil Procedure Rules. It is brought by the Defendant seeking that the Plaintiff do provide to the Defendant security for costs of the suit in the sum of Kshs.5,495,089/- as such sum as the court may deem just. It also seeks to stay the suit until security for costs is provided for and that in case of failure on Plaintiff's part to provide security, the suit be dismissed.

The grounds for this application are cited on the face of the application namely:

- 1. The Plaintiffs in the suit are 246 individuals. In the event that the Plaintiffs' claim is unsuccessful, any order for costs made by the court would be in vain as it will not be possible to enforce the same as against each individual Plaintiff.**
- 2. The Plaintiffs have failed to provide details of their residential addresses and the Defendant does not have any details of where the Plaintiffs are resident.**
- 3. The Plaintiffs are not known by the Defendant to be in any employment or to have any regular income.**
- 4. The Defendant has in its Defence filed in response to the Plaintiffs claim inter alia denied that the Plaintiffs are entitled to payment under a Collective Bargaining Agreements negotiated with the Kenya Chemical and Allied Workers and Allied Workers Union to which none of the Plaintiffs were members and which did not apply to casual workers – the category to which all the Plaintiffs in this suit belonged.**
- 5. The Defendant herein has a good defence to the Plaintiff's claim and if this suit is dismissed, the Defendant would have no recourse against the Plaintiffs in respect of its costs.**
- 6. The Defendant is seeking protection from the Honourable Court in the event that it succeeds in resisting the claim.**

In ground 7 the Defendant provides a summary of the estimated costs it may incur in defending the sum and its justification in the sum of kshs.5,495,089/-.

The application is supported by the affidavit of Antoinette Absaloms dated 17<sup>th</sup> July, 2008.

The application is opposed. The Plaintiffs have through one of the Plaintiffs JOSPHAT ANDALO OBURENYI filed a replying affidavit in opposition thereto dated 12<sup>th</sup> August, 2008. I have considered this application together with the affidavits filed by both parties. I have also considered submissions by Mr. Muthui for the Applicant and Mr. Ngoge for the Respondent.

The brief facts of this case are that the Plaintiffs, in total 246, filed this suit against their former employer **UNILEVER KENYA LIMITED** seeking payment for unpaid wages for hours worked for by the Plaintiffs during the currency of their casual employment with the Defendant and for any other or further relief that the court deems fit and just to grant.

The Defendant's contention in this application is that it does not know the residential address of the Plaintiffs and further that it does not know whether they were in regular payment. The Defendant contends further that if an order for costs were made against the Plaintiffs, the Defendant may not be able to recover. It therefore seeks security for costs in the sum of Kshs.5,495,089/- or such sum the court may deem just. I have considered the cases cited by the Applicant in support of the case. Mr. Muthui relied on the case of **KEARY DEVELOPMENTS LIMITED VS. TARMAC CONSTRUCTION LIMITED & ANOTHER [1995] 3 ALL ER 534** for the proposition that a court must balance the interests of both parties while deciding an application of this nature. The court in **KEARY**, supra, held:

***“The court will not be prevented from ordering security simply on the ground that it would deter the Plaintiff from pursuing its claim. Instead, the court must balance the injustice to the Plaintiff if prevented from pursuing a proper claim by an order for security against the injustice to the Defendant if no security is ordered and at the trial the Plaintiff's claim fails and the Defendant finds himself unable to recover from the Plaintiff the costs which have been incurred by him in his defence of the claim.”***

Mr. Muthui relied on the case of **KIBIWOTT & 4 OTHERS VS. REGISTERED TRUSTEES OF MONASTERY OUR LADY OF VICTORY Nakuru HCCC No. 146 of 2004 [2004] eKLR** for the principle applicable in similar applications. Kimaru, J. in the cited case observed:

***“For a party to succeed in an application to have the opposing party be ordered to provide security for costs, he has to prove that the opposing party may not be in a position to pay the costs, to be awarded in the event the suit filed by such a party (or defence by such a party) is dismissed.”***

Mr. Muthui submitted that the replying affidavit by MR. OBURENYI violated Order XVIII of Civil Procedure Rules for reasons that the averments in the affidavit, while not responding to the instant application, contained unreasonable and unjustified attacks on the court.

I have also considered submissions by Mr. Ngoge for the Respondent. Mr. Ngoge submitted that the application does not lie since the Defendant's defence was struck out and that therefore they cannot ask for costs. Counsel also submitted that the application should be dismissed since the fact that a Plaintiff is not employed would not serve as a bar from coming to court.

Mr. Muthui referred court to page 1 of the Azangalala J's ruling to establish itself that indeed the Defendant had a defence on record and that the suit was awaiting hearing. I have confirmed that indeed the Defendant has a defence on record, which is the one filed on 19<sup>th</sup> day of February, 2007. The Defendant's application is quite simple and the basis upon which the application is made quite clear. The Defendant has shown, and it has not been disputed that the Plaintiffs, who are many, have not disclosed their place of residence and that neither is it known if they have a steady income. These are very valid issues which cannot be ignored. I have considered that there are 246 Plaintiffs in this case. Looking at the list of these Plaintiffs, some have given only one name. For instance Plaintiff No. 62 disclosed only one name AYODI A. while Plaintiff No. 204, 214, 225 and 243 each gave only one name. The Defendant's complaint that it may be difficult to recover any costs from some of the Plaintiffs is not therefore without merit, given the other circumstance that the place of residence and or of business has not been disclosed.

This court has to balance the interests of both parties. On the one hand are 246 Plaintiffs who have brought a suit against their former employer being aggrieved for non payment of alleged dues. They have a right to unpaid wages, if indeed they are able to establish and prove their claim. On the other hand is the Defendant, the former employer who also has an interest. The balance the court has to keep is to ensure that if the Plaintiffs loose the case, the Defendant is not unable to recover from the Plaintiffs the costs which have been incurred by him in his defence of the claim. The court cannot decline to order security on the ground that it would unfairly stifle a valid claim unless it is satisfied that the Plaintiffs can meet the costs through other services or that it is probable that the Plaintiffs claim would be stifled.

I have balanced the interest of both parties to the suit. On the one hand the Defendant has made up a case for an order of security for costs. The Plaintiffs on the other hand are not well to do and while making the order for security for costs the order made should not prevent the Plaintiffs from continuing with the litigation.

Having carefully weighed the interests of the parties herein, I will allow the application dated 17<sup>th</sup> July, 2008 as follows:

**1. The Plaintiffs do provide security for costs of this suit.**

2. **Within 60 days from date hereof the Plaintiffs shall in total deposit the sum of Kshs.306,250/-.**
3. **In case of default of (2) above the Defendants shall have leave to apply.**

**Dated at Nairobi this 31<sup>st</sup> day of October 2008.**

**LESIIT, J.**

**JUDGE**

***Read, delivered and signed in presence of:***

Mr. Muthui for the Applicant

Mr. Wainaina holding brief for Mr. Ngoge for the Respondent

**LESIIT, J.**

**JUDGE**