

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 590 of 2003

NDAFARA COMPANY LIMITED..... PLAINTIFF

VERSUS

PAUL KIBUGI MUTE.....1ST DEFENDANT

GEORGE KANG'ETHE WARUHIU.....2ND DEFENDANT

MBAGE NJUGUNA NGANGA.....3RD
DEFENDANT

RULING

Before me is an amended chamber summons made by the 1st and 3rd defendants pursuant to the provisions of **Section 401** of the **Companies Act**, **Sections 3A** and **63(e)** of the **Civil Procedure Act** and **Order XXV Rules 1** and **6** of the **Civil Procedure Rules**. The said defendants seek to compel the plaintiff to give security for the whole of the 1st and 3rd defendants costs to the tune of KShs.520,000/= or any other sum that the court may deem just and fair. The 1st and 3rd defendants further prayed that pending the deposit of security of costs, the proceedings herein be stayed. The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavit on Mbage N. Ng'ang'a, the 3rd defendant. The application is opposed. John Chege Mumu, the chairman of the plaintiff's company swore a replying affidavit in opposition to the application. The court allowed Mr. Ngugi on behalf of the 2nd defendant to make submissions in support of the application on points of law as the 2nd defendant had not filed any papers either in support or in opposition to the application.

At the hearing of the application, Mr. Thangei for the 1st and 3rd defendants urged the court to order the plaintiff to provide security for costs since in the said defendants' view the plaintiff company was not engaged in any income generating activity and did not have any assets which could be attached to settle the 1st and 3rd defendants' costs in the event that they would be successful in their defence of the plaintiff's suit. He submitted that the plaintiff had failed to file any returns at the companies registry since its incorporation. He maintained that the plaintiff's suit against the defendants was time barred. Under **Section 401** of the **Companies Act**, he explained, the court had discretion to order any company to furnish security for costs for any suit filed in the company's name alone. He submitted that the said defendants were apprehensive that were they to be successful in their suit, the plaintiff would be unable to meet their costs. He reiterated that the defendants should be insulated in the event that they are successful in the suit. He urged the court to exercise its discretion in favour of the said defendants as they had established that their application was meritorious. Pending the deposit of the security, he urged the court to stay the proceedings herein. Mr. Thangei reiterated that the 1st and 3rd defendants had demonstrated sufficient grounds to enable this court grant the orders sought since their application was grounded on substantive law.

Mr. Ngaruiya for the plaintiff opposed the application. He was of the view that the application was filed by the defendants purposely to frustrate the plaintiff from prosecuting the suit. He submitted that it was

clear from the pleadings that the defendants were seeking security for costs in order to stop further proceedings in the matter. He reiterated that security for costs was a matter within the discretion of the court. For the court to exercise its discretion, it must be established that the request for such an order was justified. In the case of the defendants, Mr. Ngaruiya submitted that the plaintiff was claiming a sum which it had deposited with the defendants who were partners in a firm of advocates. The said sum was a deposit for a purchase of land. He explained that the defendants had admitted liability and had in the recent past undertaken to refund the said amount deposited to the plaintiff. In the circumstances, he maintained that the 1st and 3rd defendants had failed to demonstrate that they had a bonafide defence that were likely to be successful in the event that the suit was heard and determined on its merits. He submitted that the issue as to whether the plaintiff's suit was barred by provisions of **Limitation of Actions Act** has already been considered by the court in an application filed by the 1st and 3rd defendants and disallowed. He urged the court to look at all the circumstances of the case and disallow the application.

Mr. Ngugi for the 2nd defendant supported the 1st and 3rd defendants' application. He submitted that the defendants had raised a bonafide defence regarding whether the plaintiff's suit was filed within the limitation period, and which issue in his view went to the jurisdiction whether the court could hear the case. He reiterated that the issue of limitation had not at any time been considered by the court and in any event the defendants were dissatisfied with the ruling of Kasango J and had filed an appeal against the said decision. He urged the court to disallow the application.

I have carefully considered the rival submissions made by the parties to this application. I have also considered the pleadings filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the defendants established a case to enable this court make an order compelling the plaintiff to furnish security for costs pending the hearing and determination of the suit. **Order XXV Rule 1** of the **Civil Procedure Rules** grants this court unfettered discretion to order any party to furnish security for costs pending the hearing and determination of the suit. The court is however guided by **Order XXV Rule 4** of the **Civil Procedure Rules** on the circumstances that it can order a party to furnish security for costs. The court may order a party who is not resident within its jurisdiction to furnish security for costs. This court is aware that the instances in which a court may order a party to furnish security for costs depends on the circumstances and the justice of each case.

In England, under **Order 23 of Rules of Supreme Court Practice**, security for costs may be ordered where a party resides out of the jurisdiction of the court, where the plaintiff is 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 unlikely 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 Kenya, **Section 401 of the Companies Act** provides that:

“Where a limited company is plaintiff in any suit or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.”

It is the 1st and 3rd defendants' case that since the plaintiff does not have any assets and is no longer trading, the court should order the plaintiff to furnish security for costs of the said defendants in the event that the said defendants are successful in the defence of their case. The plaintiff opposes the application basically on the ground that the application had been filed in bad faith by the said defendants with a view to frustrating the plaintiff from prosecuting its case. Having perused the proceedings in this suit, it is evident that the plaintiffs have in the past applied all tactics and tricks in the book with a view to frustrating the plaintiff from prosecuting its case.

Taking into consideration that one of the defendants had indeed acknowledged being indebted to the plaintiff, the application brought by the said defendants is not made in good faith. The basis of the plaintiff's suit is that it deposited certain sums of money with the defendants in their capacity as advocates and stakeholders in a conveyancing transaction. The defendants failed to refund the money to the plaintiff when the sale transaction failed. Since the plaintiff filed suit, the defendants have lunched from one application to the other in a bid to ensure that the plaintiff does not have its day in court. The present application for security of costs must be seen in that light.

The said defendants failed to persuade the court that there were sufficient grounds to justify the court to order the plaintiff to provide security for costs pending the hearing and determination of the suit. I think the defendants should be told in no uncertain terms that their conduct, considered in general, amounts to an abuse of the due process of the court. If the defendants are genuinely interested in prosecuting their defence, they should fix the suit for hearing and ventilate the said defence instead of engaging in sideshows.

It is clear from the foregoing that the 1st and 3rd defendants' application is for dismissal. It is hereby dismissed with costs to the plaintiff.

DATED at NAIROBI this 12th day of NOVEMBER, 2008.

L. KIMARU

JUDGE