



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 302 of 2007

RUTH WANJIRU KIBICHA.....PLAINTIFF

VERSUS

KIOGORA MUTAI & CO. ADVOCATES.....DEFENDANT

RULING

This suit was instituted by way of an originating summons filed on 15<sup>th</sup> June, 2007. In it the Plaintiff/Applicant seeks an order directed at the Defendant to refund the deposit of 20% of value of a house the Plaintiff was buying from the Defendant paid by the Plaintiff to the Defendant, less any loss or expenses. The deposit amount was Kshs.560,000/=.

In the Chamber Summons application before me, the Defendant in the case seeks an order directed at the Plaintiff requiring her to provide security for the Defendant's costs of the suit and for costs of this application. The application is brought under Order XXV rule 1,6 and 7 of Civil Procedure Rules and Section 3A of Civil Procedure Act. There are two grounds given in support of the application; that the Plaintiff is out of the jurisdiction of the court and that the Defendant' if he succeeds in his defence, will be unable to recover his costs and secondly that the Defendant has a very strong defence against the suit.

The application is opposed. The Plaintiff has filed a replying affidavit. The gist of the affidavit is that the sum of money which the Defendant/Applicant continues to retain and which was the subject matter of the suit, was sufficient to cover any costs that may be ordered by the court; that the plaintiff has a strong defence; and that the Defendant has yet to substantiate the grounds of retaining the entire deposit or the costs and expenses he claims to have incurred.

Mr. Muturi argued the application on behalf of the Defendant/Applicant while Mr. Kimathi opposed the application on behalf of the Plaintiff. I have considered the submissions by both Advocates. Mr. Kimathi relied on the case of **G. M. COMBINED (K) LIMITED VS A. K. DETERGENTS (K) LIMITED [1999]2 EA 94** in which **Odoki, Oder** and **Tsekooko** Justices of the Supreme Court of Uganda held:

*“The Principles that the Court should consider in exercising its discretion under Order 23, rule 1 and Section 404 of the Companies Act to order for security of costs are:*

- a) the likelihood of success of the Plaintiff's case;*
- b) if there is a strong prima facie presumption that the Defendant will lose in its defence to the action*

*the Court may refuse security for costs;*

*c) whether there is an admission by the Defendant in the pleadings or elsewhere that money is due;*

*d) if the Defendant admits so much of the claim as would be equal to the amount for which security would have been ordered the Court may refuse him security for he can secure himself by paying the admitted amount to court;*

*e) where there is a substantial payment into court or an open offer of a substantial amount, an order for security for costs will not be made.”*

In this application, the Defendant has not indicated how much money he would require as costs. It is admitted however that the Plaintiff deposited Kshs.560,000/= with the Defendant/Applicant which sum was 20% of the value of a property the Plaintiff intended to buy from the Defendant. It is not disputed that the balance of the purchase price was to be paid in four equal installments on pre-determined dates. It is also not denied that the Plaintiff failed to pay the first installment as agreed. It is also not denied that the Defendant refused to refund any part of the money he received as deposit and that he has to date not substantiated why he retained the entire sum.

The sale agreement signed by the parties to the suit is annexed to the supporting affidavit sworn by the Plaintiff, in support of the Originating Summons. Clause 10 of the agreement stipulates:

*“10) If the purchaser shall be unable to take possession for whatever reason within three months, upon being informed at her last known address that the flat is ready for possession, the Purchaser will be liable to pay interest at the existing Commercial Bank Rate on outstanding amount and after three months the Vendor shall be at its liberty to sell the same at a price available in local market and refund the deposit (less, loss and expenses) to the Purchaser only after the unit has been resold.”*

Apart from this clause which talks of refund for reason of failure to take possession of the suit property, there is no clause which deals with the issue of what would happen if the Purchaser is unable to meet any party of the installments agreed. I will leave that for the trial court to determine. However, it is clear that the Defendant/Applicant has admitted holding a large sum of money paid to him as 20% of the purchase price for the suit property and further that he has failed to substantiate what loss or expenses justified him to retain the entire sum. For the record, and as mentioned earlier, the Defendant has not stated what sum of money should be paid as security for costs.

The test applicable to a case of this nature was spelt out clearly in **Shah vs Shah [1982] KLR 95 thus:**

*“The general rule is that security is normally required from Plaintiff’s resident outside the jurisdiction; however, a Court has a discretion, to be exercised reasonably and judicially, to refuse to order that 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 the instant case, the Plaintiff resides in the United Kingdom and that is not in dispute. As for the Defendant’s defence on record, he admits that he is holding a substantial sum of money, which he received from the Plaintiff, and for which he has failed to given any substantiation to show the reason of holding the entire sum. Having admitted withholding money from the Plaintiff, which money he is yet to be accounted for, I do not find that the order for security for costs is a fit order to make in this case. I decline to make the order.

The application dated 9<sup>th</sup> August, 2007 is therefore dismissed with costs.

**Dated at Nairobi this 16<sup>th</sup> day of November, 2007.**

**LESIIT, J.**

JUDGE

Read, signed and delivered in the presence of:

Kimathi for Applicant

N/A for Respondent

**LESIIT, J.**

JUDGE