



REPUBLIC OF KENYA

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

Civil Case 552 of 2006

MARTIN ERNEST.....PLAINTIFF

VERSUS

DEL MONTE KENYA LIMITED.....DEFENDANT

RULING

By a chamber summons dated 11th March 2007, the Defendant Company seeks orders:

- 1) That the Plaintiff do within a time to be fixed give security in sum of Kshs.500,000/= for the Defendant's costs of this suit.
- 2) That if the Plaintiff fails to give security for the Defendant's costs as aforesaid then the Plaintiff's suit should be dismissed **with costs to the Defendant.**

The application is expressed to be brought under Order XXV Rules 1, 5 and 6 of the Civil Procedure Rules and under the Inherent Power of the Court.

The grounds for this application are on the face of the chamber summons which are:

- i) **The Plaintiff has claimed a liquidated sum of Sterling £88,971 which is equivalent to Kshs.12,277,998/=.**
- ii) **the Plaintiff is a foreigner**
- iii) **the Plaintiff has no known assets in Kenya.**
- iv) **if the Plaintiff does not succeed and is ordered to pay costs to the Defendant it is highly unlikely that the Plaintiff would be able to pay the costs to the Defendant which would be in the region of Kshs.500,000/=.**

The application is supported by the affidavit of LUDOVICK O. KEZZAH. The application is opposed. The Respondent has sworn a replying affidavit dated 18th June, 2007 and filed on the same day. The Respondent, inter alia, challenges the merits of the application for having been brought late, seven months after the suit was filed. The Respondent also avers that since 2002, he has been resident in Kenya and that he held substantial positions with reputable Companies in Kenya on a long term basis, whose particulars he has also provided. The Respondent depones that he is in a position to satisfy any costs in the unlikely event that the defence was to succeed.

The Respondent has also filed grounds of opposition in which six grounds are cited generally showing that the Respondent is a man of means, that the application is in bad faith, that the defence is unsustainable and that the suit should proceed with expedition.

Ms. Kirimi argued the application for the Applicant while Mr. Magotsi argued the Respondent's case.

I have considered the application, the affidavits by the parties and grounds of opposition. I have also considered the submissions by counsel and the cases each have relied upon. It is evident that both counsel are quite clear on what tests should be applied in an application of this nature. Both Counsel relied on the Court of Appeal case of **SHAH VS SHAH [1982] KLR 95**, which sets out the tests as follows:

“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.”

The Court's power to allow the application is discretionary not mandatory, but which should be exercised judicially. It is admitted that the Plaintiff is a foreigner living in Kenya since 2002. From the Plaintiff, the residence was taken up after the Plaintiff was employed locally by Cirio Del Monte Foods International Limited. The Plaintiff has since lost his job and that is the reason he filed this suit. Even though he has shown that he holds various positions in various Companies in Kenya, I agree with the Applicant that one, those positions are transient and, two, the Applicant has not shown it owns any fixed assets locally. Even though the Plaintiff may not be a “journey man” as Mr. Magotsi contends he is not, there is a real likelihood of the Plaintiff leaving Kenya at any time.

On the other hand, the Applicant's defence is arguable. The defendant has denied it ever contracted with the Plaintiff and also raises the issue of the Court's jurisdiction. There is a high chance that the defence may succeed.

On the basis of my analysis of the evidence placed before me, I am satisfied that a case has been made for this Court to exercise its discretion and order security for costs.

There is an issue of whether the amounts sought in this application are costs based on the higher scale. The basis of the amount sought was given in the supporting affidavit and it has not been controverted. The Law talks of security for costs and I am satisfied that what the Applicant have shown in its supporting affidavit, are costs it will incur in defending the suit.

I will allow the Applicant's application dated 11th March, 2007 in the following terms:

- 1) The Plaintiff do within 30 days from date herein deposit the sum of Kshs.500,000/= with the court as security for the Defendant's costs.
- 2) The Plaintiff to pay the costs of this application.
- 3) The Defendant has leave to apply in case of default.

Dated at Nairobi this 9th November, 2007.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of:

Ms Babu for Applicant

Mr. Imende for Respondent

LESITT, J.

JUDGE