



REPUBLIC OF KENYA

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

CIVIL CASE 2180 OF 1994

ROBBERT MURRAY WATSONPLAINTIFF

VERSUS

RENT A PHONE LIMITED

MICHAEL VLADIMIR N SETON

BRYAN WALTER SHEPARDDEFENDANTS

RULING

Before me is an application by the 1st defendant primarily for security for costs expressed to be brought under Order XXV Rules 1, 4, 5 and 6 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions of the law. The application which is supported by an affidavit sworn by the 1st defendant is based on the grounds that the plaintiff is a foreigner with no known or fixed address in any foreign country and has no known residence or attachable assets in Kenya. The 1st defendant further contends that the plaintiff's case has very little likelihood of success.

The application as stated is supported by the 1st defendant's affidavit which elaborates the above grounds. In the premises, the 1st defendant fears that if the plaintiff loses the case, it will be difficult for him to recover his costs.

The application is opposed and there is a replying affidavit sworn by the plaintiff. It is deponed in the affidavit *inter alia* that the plaintiff's family is resident in Kenya in a house the plaintiff has occupied since 1988 to-date. It is also, deponed that two of the plaintiff's children attend school in Nairobi and are Kenyan Citizens and so is their mother. The plaintiff also swears that he has on-going business activities involving aviation in Kenya and East Africa. He has also deponed that he is resident in Vietniane Laos and has offices in the United Kingdom which addresses are known to the 1st defendant. The plaintiff believes that his case has good chances of success and his amended plaint attests to that fact.

The 1st defendant responded to the plaintiff's replying affidavit by filing a further affidavit. In the affidavit the 1st defendant makes reference to the reasons for adjournment given by Counsel for the plaintiff on 12.3.2007 when this application came up for hearing and avers that the Replying affidavit was filed out of time. That is however, water under the bridge as the application was argued on the basis that the replying affidavit was properly on the record. The 1st defendant swears that he is not a personal friend of the plaintiff and has no knowledge of allegations in the replying affidavit with respect to the plaintiff's personal circumstances. He maintains however that the plaintiff operates outside Kenya and has no

known foreign fixed abode and no office in Kenya as alleged.

I have considered the application and the affidavits filed by both the plaintiff and the 1st defendant. I have also given due consideration to the submissions of counsel. Having done so, I take the following view of this matter. Under Order XXV Rule 1 the court has a discretion to order that security be given for a defendant's costs. The discretion is wide and there are no time limitations. However, I am of the view that a defendant who desires that the court's discretion be exercised in his favour should move the court with dispatch as soon as he is seized of knowledge or circumstances which show that security should be given. This case was filed way back in 1994. The plaintiff has tendered his testimony in part and has attended court whenever the case has been fixed for hearing save for once and on that occasion his counsel explained his absence. There are therefore no new circumstances that have provoked this application. The record shows that most of the applications for adjournment have been at the behest of the defendant. In the event, costs incurred as a result of the adjournments are self inflicted so to speak.

The 1st defendant has argued that the plaintiff's suit is unlikely to succeed. The plaintiff thinks otherwise. It is the word of the 1st defendant against that of the plaintiff. But if the 1st defendant believes that the plaintiff has no case, he is at liberty to apply that the same be struck out.

The plaintiff has sworn that his wife and two of his children are Kenyan Citizens and reside in Kenya. In my view the plaintiff's visits are not merely those of a touring businessman but of a person with strong links with Kenya. His access to justice should not be impeded by an order to furnish security in a case that has been on our shelves for 13 years and in which he has substantially testified.

In the premises, I am of the view that no case has been made by the 1st defendant for security for his costs. The application must fail. It is hereby dismissed with costs to the plaintiff.

It is so ordered.

DATED and DELIVERED at NAIROBI this 5th day of December 2007.

F. AZANGALALA

JUDGE

Read in the presence of:- Muriithi holding brief for Kibet for the plaintiff.

F. AZANGALALA

JUDGE

5/12/07