



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 172 of 2000**

**JOHN KIPKEMBOI KILEL.....PLAINTIFF**

**VERSUS**

**DIAMOND TRUST BANK & OTHERS.....DEFENDANTS**

**RULING**

This application has been brought by the 1<sup>st</sup> Defendant, pursuant to the provisions of Order 25 rules 1, 5 and 6 of the Civil Procedure Rules. It seeks orders to compel the plaintiff to furnish security for costs within such time as the court may set. It also seeks a temporary stay of the proceedings during the period which the court may allow for the provision of the security.

The principle reason for the application is that the plaintiff has no known assets within the court's jurisdiction, and is therefore thought to be unlikely to meet the applicant's costs, if the same are to be awarded to the applicant.

It has been contended that the plaintiff is unable to meet such costs as may be awarded to the applicant because he has already failed to pay the applicants costs in another case. The said other case is **JOHN KIPKEMBOI KILEL V DIAMOND TRUST (K) LTD & 2 OTHERS, KISUMU HCCC NO. 335 of 1997**.

In the light of that past experience on the part of the applicant, it feels that it would be difficult for the plaintiff to satisfy any order for costs.

It is noteworthy that when the application came up for hearing before me, on 19<sup>th</sup> July 2006, the plaintiff was not in court, nor was he represented. However, I allowed the application to proceed, as I was satisfied that the plaintiff's advocates had been served with both the application as well as an appropriate Hearing Notice.

Even though the application was served upon the plaintiff's advocate on 19<sup>th</sup> August 2005, the plaintiff had filed no replying affidavit or grounds of opposition by 19<sup>th</sup> July 2006, when the matter came up for hearing.

In effect, the plaintiff has not disputed the applicant's assertion that he has no known attachable assets. I therefore hold that it is true, that the plaintiff does not have any known attachable assets.

Secondly, the applicant has demonstrated to my satisfaction that this is the third case which the plaintiff has instituted against the 1<sup>st</sup> defendant.

On 26<sup>th</sup> April 2001, the Hon. A. G. RINGERA J. (as he then was) made a ruling in this very case. After taking note of the fact that the plaintiff had in existence another suit, (being Kisumu, HCCC No. 355/97), the learned judge said;

**“I cannot but feel that the plaintiff has been trying to play lottery with the Judicial process. That is an abuse of the process of the court. It is insufferable.”**

I could not agree more.

And because these proceedings caused the 1<sup>st</sup> defendant to incur expenses, yet there is a probability that the 1<sup>st</sup> defendant may be unable to recover costs from the plaintiff, even if the said 1<sup>st</sup> defendant should successfully defend the suit, I hold that it is in the interests of justice to provide some security for the 1<sup>st</sup> defendant, with regard to costs.

In arriving at that decision, I have reminded myself that financial inability should never be a basis for shutting out a plaintiff who otherwise has a claim which was made in good faith. And in my view, if the plaintiff's claim was in good faith, he would not need to file three separate suits against the same party, for the same subject matter. By filing several suits in respect to same matter is not only, as the Hon. RINGERA J. has held, an attempt to play lottery with the judicial process, but it also causes oppression on the defendant, by straddling him with a multiplicity of proceedings.

If the plaintiff is causing the 1<sup>st</sup> defendant to face up to the many suits, I feel that the plaintiff should be made to have a re-think about his actions. The only reasonable way to cause that to happen is by directing the plaintiff to raise security in this suit.

And finally, the application herein has not been brought at a late stage in the proceedings.

Those considerations have been derived by me from the decision of the HON. KHAMONI J. in the case of **IN RE ESTATE of KARANJA [2002] 2 KLR 34 at page 52**, whereat he quoted the following passage from HALISBURY'S LAWS of ENGLAND, 4<sup>th</sup> Edition, Vol. 38, at paragraph 305:

**“The following guidelines have been laid down as to the circumstances which the court ought to consider on granting or refusing security for costs.**

- “1. Whether the plaintiff's claim is made in good faith and is not a sham;**
- 2. Whether the plaintiff has a reasonably good prospect of success;**
- 3. Whether there is an admission by the defendant on the pleadings or otherwise that money is due;**
- 4. Whether there is a substantial payment into court or an open offer for a substantial amount;**
- 5. Whether the application for security was being used oppressively, for example so as to stifle a genuine claim;**
- 6. Whether the plaintiff's want of means, especially in the case of a limited company, has been brought about by any conduct by the defendant, such as delay in payment, or in doing his part of the work; and**
- 7. Whether the application for security is made at a late stage of the proceedings.”**

Having given due consideration to the said requirements, I find that this a fit and proper case to warrant an order for security for costs. I therefore order that the plaintiff shall provide security for costs.

The 1<sup>st</sup> defendant has asked me to set the sum at KShs. 600,000/=, as that is said to be the minimum instruction fee payable on the sum of Kshs. 4,665,684/=, which was the sum that had been earlier awarded to the plaintiff herein, before the 1<sup>st</sup> defendant succeeded in setting aside the judgement.

By my calculations, the instruction fee would amount to about KShs. 415,000/=. Bearing in mind that sum, and also being mindful of the need to allow reasonable access to the plaintiff, for purposes of prosecuting his suit, I do hereby order that he shall be required to raise the amount of KShs. 350,000/= as security for costs.

The plaintiff is allowed a period of NINETY (90) DAYS from today, to raise the said security. If it is raised, the sum may either be deposited in court or may be held in a joint interest-earning account, in the names of the advocates for the plaintiff and the advocates for the 1<sup>st</sup> defendant.

The costs of this application shall be awarded to the 1<sup>st</sup> defendant.

Finally, both the plaintiff and the 1<sup>st</sup> defendant are granted liberty to apply.

Dated and Delivered at Nairobi, this 18<sup>th</sup> day of October 2006.

**FRED A. OCHIENG**

**JUDGE**