



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI**

**Civil Case 1086 of 1998**

**NANCY WANJIRU MWAURA..... PLAINTIFF/APPLICANT**

**VERSUS**

**JOHNNJOROGÉ..... 1ST DEFENDANT/RESPONDENT**

**LOISE NJERI ..... 2ND DEFENDANT/RESPONDENT**

**RULING**

The plaintiff's application by Chamber Summons, dated 22nd July, 2005 and filed on 11th August, 2005 was brought under Order XXV, rules 1 and 5(1) of the Civil Procedure Rules. It carried one substantive prayer, that —

***“The defendants do deposit with a reputable bank in the joint names of the plaintiff's advocates and the defendant parties, the sum of Kshs.50,000/= as security for the plaintiff's costs of this suit within 30 days of the making of this order, and in default thereof the defence do stand struck out and dismissed with costs.”***

The grounds in support of that application are, in the first place that the defendants, despite being notified to supply their address for service and to describe their fixed place of abode, to facilitate service of process, have failed to provide their details of address. This gives the plaintiff apprehensions that she will be left without cover for her costs if the defendant's case is dismissed. The defendants are not known to be in any employment or to have any regular income; and the plaintiff apprehends that they are speculating on the outcome of the suit to benefit financially. It is stated that, the defendant has in the past changed advocates several times, and at present, they are appearing in Court in person. In these circumstances the plaintiff apprehends that she may suffer loss, in the event this case is successful as against the defendants. Although the plaintiff is not informed as to the reasons why the defendants had to change advocates so many times and then end up acting by themselves, she believes that a plea for security for costs is warranted, and the order sought herein is expedient.

In her supporting affidavit the plaintiff states her concern that the defendants, whose abode is not specially identified and who have no known source of income, cannot be relied on to pay her costs, in the event her case is upheld by the Court. The defendants have not supplied their physical address for service, and the deponent apprehends that if she succeeds in her suit she will be unable to serve any Court orders as required by law. It is deponed that the defendants had at first retained M/s. P.S. Gatimu Advocates, but later replaced them with M/s. P.N. Nduati & Co. Advocates, who were themselves later replaced by M/s. Oluoch & Co. Advocates, and even this firm was later replaced with M/s. F.N. Mulwa & Co. Advocates; and subsequently the defendants were acting in person. Their acting in person is of concern to the plaintiff, firstly because they have not met the basic requirement of having an address for service, and secondly because there is no certainty that these defendants acting by themselves, will be able to handle

technical issues of law such as may arise in the course of litigation.

The fact that the defendants have not sought an order to proceed with the trial as paupers, has occasioned the plaintiff's prayer for order against the defendants for security for costs.

The deponent states her belief, that in the event the Court will require the defendants to deposit sums of money in a joint account, as security for costs, such money will not accrue to her, to the prejudice of the defendants, unless and until the Court so determines, at the end of the proceedings. Such money can ultimately also accrue to the defendants, rather than the plaintiff, depending on the outcome of the case. The deponent believes that any such interests as may accrue from such money deposited as security, will inure to the benefit of the defendants.

The 1st defendant's replying affidavit is dated 13th October, 2005 but filed on 12th October, 2005. Bad form is evident also in the fact that the affidavit does not state the name or address of the person who has filed it, though it gives the particulars of those upon whom it is to be served — M/s. J. Harrison Kinyanjui & Co., Advocates.

The replying affidavit falls into another grave error; its first paragraph reads:

“THAT we are the defendants in the above case”; then at the end it bears two signatures, with the description, 1st and 2nd defendant[s], whose names, however, are unspecified. The sworn statement is the evidentiary basis for resolving the instant interlocutory matter. Such a statement claims to be truthful, and it is on that basis that it can be relied on, in making Court orders. In case of doubts as to veracity, the deponent can be subjected to cross-examination, as a basis for admission or rejection of the averments, and possibly as a basis for establishing whether the deponent has pajured himself and so the matter should go to the criminal side of the judicial process. How can such courses of action be taken if two persons purport to depone to one affidavit? Who is responsible for that affidavit — the 1st or the 2nd defendant? A composite affidavit of such a kind offends against Order XVIII, rule 5 which reads: “Every affidavit shall be drawn in the first person...”

For the reasons I have set out above, “the first person” must mean “the first person singular”.

Although it may be tempting to receive a defective affidavit from lay persons such as the defendants herein, I am unable to accept the composite nature of the affidavit, as it does not represent a commitment by either defendant to tell the truth. There is no truthful affidavit before me, and, accordingly I hereby strike out the replying affidavit by unnamed 1st and 2nd defendants, dated 13th October, 2005 and, puzzlingly, filed on 12th October, 2005.

What I am left with is the unopposed application by the plaintiff. It is clear that utter professional failure by the defendants to draw and file a proper affidavit is the reason why I have had no option but to strike out what was filed as the replying affidavit. This fact by itself, gives credence to the apprehensions of the Plaintiff that the defendants herein are parties who should furnish security against costs.

It has been urged, and I have so noted from the record, that on 24th June, 2004 Lady Justice Aluoch had directed that service upon the defendants be effected through the Chief, Kabete Location. It has now become quite clear that that is an ineffective route of service; it has led to difficulty of service, denials that service has been effected, and has proved to be a factor of delay and mischief, in the conduct of litigation in this matter.

Therefore, I now vacate the Court's order of 24th June, 2004 and make the following orders:

**1. The defendants shall make proper arrangements for their participation in the trial, and within 21st days of the date hereof they shall serve the plaintiff with particulars of their address for service.**

**2. Within 30 days of the date hereof the defendants shall deposit the sum of Kshs.50,000/= as**

**security for costs, in a joint interest-earning account held by themselves and the advocates for the plaintiff.**

**3. If the defendants shall fail to comply with the first two orders herein, the plaintiff shall be at liberty to apply.**

*Orders accordingly*

**DATED and DELIVERED** at Nairobi this 25th day of November, 2005

**J.B. OJWANG**

**JUDGE**

**Coram: J.B. Ojwang, J.,**

**Court Clerk: Mwangi**

**For the Plaintiff/Applicant: Mr. Kinyanjui, instructed by M/s. J. Harrison**

**Kinyanjui & Co., Advocates**

**Defendants in person**