



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 20 of 2005

AGGREY PETER THANDEPLAINTIFF/RESPONDENT

VERSUS

ABN AMRO BANK1ST DEFENDANT/APPLICANT

GITAU NGANGA T/A SHEFLO AUCTIONEERS ..2ND DEFENDANT/APPLICANT

SAMUEL K. MWAURA3RD DEFENDANT

RULING

The Applicant applies for the following orders:-

- 1. THAT the Plaintiff do furnish security for costs of the 1st and 2nd Defendants for the sum of Kshs.311,973/= within seven (7) days of the Order of the Court.**
- 2. THAT pending provision of the said security and additional payment of the sums of Kshs.536,378 being the total costs in respect of costs in Milimani HCCC Nos.2265 of 1997 and 526 of 2003 owed by the Plaintiff the present proceedings be stayed until the Plaintiff deposits the said amounts of money.**
- 3. THAT the costs of this application be provided for.**

The grounds on which it is brought is that in the event that Plaintiff's suit is dismissed the Defendants will be unable to recover its costs. This is based on the fact that the Applicant failed to pay costs in a previous suit which had been dismissed with costs to the Respondents herein.

Also in a later case the Applicant failed to pay a sum of Kshs.311,973.00 which he had been ordered to pay in respect of an application for security for costs.

The application was opposed by Mr. Kahonge for the Respondent He relied on the case of **Keary Developments versus Tarmac Construction Limited {1995} 3 ALL ER page 534** in which it was held:-

“The court will not be prevented from ordering security simply on the ground that it would deter the

Plaintiff from pursuing its claim. Instead, the court must balance the injustice to the Plaintiff if prevented from pursuing a proper claim by an order for security against the injustice to the Defendant if no security is ordered and at the trial the Plaintiff's claim fails and the Defendant finds himself unable to recover from the Plaintiff the costs which have been incurred by him in his defence of the claim."

He also relied on the case of **Noor Mohammed Abdulla v Ranchhodbhai J. Patel and another {1962} EA page 447** in which it was held that the court had no jurisdiction to order payment of the costs ordered to be paid by another court.

Mr. Kahonge also referred to the ruling of Mr. Justice Njagi of the 4.7.2005 in this suit. The learned Judge found that the issues raised in this suit are different in terms from those raised in the two previous suits between the parties.

The previous suits dealt with matters prior to the sale of the suit premises by the 1st Respondent pursuant to its statutory power of sale whereas this suit seeks to set aside the sale by public auction, which in the earlier suits the Applicant had failed to get orders to stop, on the grounds of fraud.

The jurisdiction to make an order for security for costs is contained in Order 25 rule 1 which states as follows:-

"In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party."

The principles on which the court will exercise its discretion to order security are set out in the **Keary Developments case (Supra)** referred to above which although only persuasive in my view lays down several principles which a court can take cognisance of.

I am bound to weigh the merits and demerits of ordering security. In this case the Respondent does not claim that he is impecunious. It is his contention that he has an arguable case and it would not be just to order security for costs. On the other hand, the Applicant is of the view that the claim is specious and is apprehensive that its costs will not be paid if the suit is dismissed and it is awarded costs. The Applicant prays in aid the fact that the Respondent has not paid previous costs awarded against him.

In so far as those previous matters are concerned the Applicant's remedy lies in those proceedings. The Applicant has, however, asked this court for assistance in the recovery of those costs.

I am of the view that this is a case where there is some doubt not only as to the merits of the Respondent's case but also that if he fails he will be unable to pay costs.

I bear in mind the decision in the **Keary Developments case (Supra)** that the court is not bound to order the full amount claimed.

I therefore, order the Respondent to pay by way of security for costs a sum of Kshs.100,000/= to be deposited in an interest earning account in the names of the parties advocates with a reputable bank within 30 days from today. I do not grant prayer 2 of the Chamber Summons of the 7/3/2005. Costs in cause.

Dated and delivered at Nairobi this 24th day of November, 2005.

P. J. RANSLEY

JUDGE