



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 280 OF 2003

ELIZE BIZOU AHOUANMENO PLAINTIFF

VERSUS

THE AFRICAN TRADE INSURANCE AGENCY DEFENDANT

RULING

I have before me an application by way of Chamber Summons dated 28th May, 2003 filed by the Defendant seeking security for its costs in default of which the Plaintiff's suit be dismissed. The application is made under Order 25 Rules 1, 4, 5 and 7 of the Civil Procedure Rules and Section 3 of the Civil Procedure Act (Cap 21) Laws of Kenya. The application is supported by an affidavit sworn by one CAROLI OMONDI on 28th May, 2003.

The Plaintiff on 2nd July, 2003 filed a Replying affidavit. Her advocates had however filed Grounds of Opposition on 25th June, 2003. The defendant through Caroli Omondi filed a supplementary affidavit in response to the Plaintiff's replying affidavit.

When the hearing of the said Chamber Summons commenced on 27th January, 2004, the Plaintiff and her Counsel did not attend although counsel had been served. No submissions were therefore made on the Plaintiff's behalf.

Mr Hassan Counsel for the defendant prays for security in the sum of Kshs.1,000,000/= to be deposited in a joint account of the Advocates instructed in his case. In the event of default Mr Hassan urged that the suit be dismissed with costs. He relied on the grounds set out in the body of the Chamber Summons and the supporting affidavit thereof sworn on 20th May 2003 by the said Caroli Omondi. The defendant in the said supporting affidavit and the defence which was filed on 9th June, 2003 avers that it enjoys immunity from the suit under the Privileges and Immunities Act Chapter 179 Laws of Kenya. Mr Hassan further submitted that the Plaintiff is not in the country at present and she does not have any assets in Kenya. He further submitted that the Plaintiff's claim is huge. The costs to the defendant if the suit is eventually dismissed are accordingly enormous. To fortify his submissions, Mr Hassan cited **FARRAB INCORPORATED VS BRIAN JOHN ROBSON & OTHERS (1957) E A** page 441 in which security for costs was ordered against the Plaintiff company registered outside the country and had a place of business in Tanganyika as it then was. He further relied on **NAIROBI C A NO 58/1 of 1991 – ABDULLAHI JAMA BARRE & ANOTHER VS ERIC ROHNER**. In this case the defendant enjoyed immunity under the Privileges and Immunities Act Cap 179 Laws of Kenya. The court held that it had no jurisdiction to entertain the Plaintiff's suit which suit was struck out.

It is common ground that the Plaintiff is not a Kenyan and resides out of Kenya. She admitted this fact in her Replied affidavit sworn on 27th June, 2003 at paragraph 3 thereof.

The Court of Appeal in **SHAH VS SHAH (1982) KLR 95** held inter alia:-

“2. The general rule is that security is normally required from Plaintiffs resident outside the jurisdiction; however a court has a discretion to be exercised reasonably and judicially to refuse to order that security be given.”

3. The test on an application for security for costs is not whether the Plaintiff has a prima facie case but whether the defendant has shown a bona fide defence ...”

In my view the defendant has a bona fide defence. At paragraph 3 of the defence filed under protest on 9th June, 2003 the defendant claims protection from legal proceedings under the Privileges and Immunities Act Chapter 179 of the Laws of Kenya. At paragraph 4 the defendant avers that under Article 16 (1) (b) of the Agreement establishing it no action against the defendant can be brought in respect of personnel matters. The Plaintiff's claim is for damages for breach of a contract of service. I therefore hold that the test set out in the SHAH VS SHAH case above has been satisfied by the defendant.

Having made the above findings should I exercise my discretion in favour of the defendant? I am aware that the discretion I have is wide. But I must exercise it reasonably and judicially. Besides the Plaintiff residing outside the jurisdiction of this court, she says she is an international citizen. At paragraph 7 of the Replied affidavit sworn on the 27th June, 2003, she deposes:-

“That wherever I shall go to work either in my country of origin or elsewhere, I will still be within the reach of this court's jurisdiction as an international citizen ...”

It appears from the Plaintiff's own admission that the globe is her operational stage. This in my view makes it nigh impossible to recover any sums by way of costs that may be awarded to the defendants should the Plaintiff's case eventually be dismissed.

I have already found that the defendant has a bona fide defence particularly if it succeeds on the plea of immunity from the suit. I therefore have no hesitation in exercising my discretion in favour of the defendant. I accordingly order that the Plaintiff shall provide by way of security for the defendant's costs a local banker's guarantee or undertaking, or an insurance bond or a deposit in the sum of Kshs.400,000/= in an interest earning account in the joint names of the advocates acting for the parties within thirty (30) days from the date of service of this order. In the interim this suit is stayed. In default the defendant is at liberty to proceed under Order XXV Rule 5 and 6 of the Civil Procedure Rules.

The defendant shall have the costs of the application. It is so ordered.

Dated and delivered at Nairobi this 20th day of February, 2004.

F. AZANGALALA

JUDGE

20.2.2004