



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

**AT NAIROBI**

**CIVIL SUIT NO. 1164 OF 2000**

**KELILI OLE KUNA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**JONATHAN OLE NGOUWA.....DEFENDANT/APPLICANT**

**RULING**

The Defendant's application by Chamber Summons was brought under Order XXV rules 1 and 5(1) of the Civil Procedure Rules, and filed on 21st November, 2003. The application carries two prayers:

- (a) that the Plaintiff do deposit with a reputable Bank in the joint names of the Advocates for the parties, the sum of Kshs.50,000/= as security for the Defendant's costs of the suit within 30 days of the making of this Order, and in default the suit do stand dismissed with costs;
- (b) that costs in the Motion be borne by the Plaintiff.

The grounds in support of the application are, firstly, that an early exchange of documents between the parties has shown that the Plaintiff lacks essential documents in support of his own case, and that while this could lead to failure of the suit, there was evidence that the Plaintiff was likely to be unable to pay costs in favour of the Defendant, in the event these are ordered to be so paid. Secondly, the Defendant apprehends that he will suffer irreparable loss, in the event that the Plaintiff's case is dismissed.

The application was supported by an affidavit of the Defendant, Jonathan Ole Nguowa, the main elements of which may be set out as follows:

- (a) the Plaintiff is not known to be of any means such as would enable him to pay costs of the suit in the event of not being successful;
- (b) the Defendant has conducted a private investigation on the Plaintiff's means of livelihood, and has also inquired with villagers among whom the Plaintiff lives; and the outcome is that the Plaintiff has no source of income and has no pension or any known assets;
- (c) such information has caused the Defendant apprehension that in the event the Plaintiff should fail in his suit, there may be no costs paid to the Defendant, and enforcement of any Orders on costs may prove still more expensive and possibly unproductive;
- (d) a briefing with the Plaintiff's Advocates on record has already revealed that the Plaintiff will be unable to produce certain documents that are essential to his case; and this would tend to reveal a

case that could fail, ultimately;

(e) the Defendant has already spent some money on professional charges, and would wish to be protected against further costs that may not be discharged in the event of the suit being unsuccessful;

(f) a deposit of money for the Defendant's likely costs in an escrow account would be an appropriate mode of responding to the Defendant's apprehensions.

When this application came up for hearing on 5th December, 2003 counsel for the Defendant/Applicant was ready to proceed whereas counsel for the Plaintiff/Respondent was not. On the basis of the submissions of counsel, a Ruling was made which partly set the contentions in context, as follows:

"It is quite clear that counsel for the Plaintiff is not ready to proceed. He requests: (i) leave to file an affidavit; (ii) time to have his client swear the affidavit. This is inconvenient to the Defendant/Applicant. For an equitable disposal of the matter I make the following Orders:

(1) I grant leave to the Plaintiff/Respondent to have an affidavit sworn and to file and serve it;

(2) the matter is stood over to Friday, 19th December, 2003.

(3) The Plaintiff/Respondent to bear the costs of this adjournment, and the costs of the Defendant/Applicant."

On 19th December, 2003 counsel for the Plaintiff/Respondent was unable to be in Court until after counsel for the Defendant/Applicant had made his submissions, the burden of which was as set out in the following paragraphs.

Counsel submitted that the parties had appeared in a related application before the Honourable Lady Justice Angawa on 22nd October, 2003, and on that occasion certain issues of credibility touching on documents, had been remarked in relation to the Plaintiff/Respondent's case. On this account, the learned Judge had granted liberty for the present application to be lodged, regarding a deposit of security against the Defendant's costs, by the Plaintiff.

Counsel for the Defendant/Applicant submitted that the Plaintiff seemed to be speculating as to the eventual outcome of the suit, as there was evidence that he lacked any stable or credible source of income; and this posed a substantial risk to the Defendant, in the event that the suit did not succeed. Counsel submitted that the prudent course was to have the Plaintiff give security against costs, rather than to proceed on to a possibly unsuccessful suit, and then have to deal with the costs question through such drastic methods as applications for committal to civil jail.

Although a Ruling could have been made on the basis of counsel's submission, it became necessary after an inter partes hearing on 16th January, 2004 to accommodate counsel for the Plaintiff/Respondent who on 26th January, 2004 made submissions for his client.

Mr. Ngala for the Plaintiff/Respondent opposed the Defendant/Applicant's application, submitting that the application could only serve to delay the prosecution of the case. Counsel maintained that the Plaintiff was not coming to Court a despondent party with no expectations to win, and that the application amounted to the motions of justice-delivery being pegged to the ability to pay counsel's costs. He submitted that applications such as the present one could only scare litigants, and on this account it should be dismissed. He moreover challenged the figure of Shs.50,000/= proposed as security for costs as having no basis in its mode of estimation.

Mr. Kinyanjui for the Defendant/Applicant submitted that no authority had been cited to show that the Court had been disinclined to grant Orders such as the one proposed, under Order XXV of the Civil Procedure Rules. He argued with respect, correctly, that Order XXV should be perceived as an existing

legal platform for responding to prayers such as that made by the Defendant.

Counsel submitted that the Respondent's case had failed to address the key questions in the application, and more particularly this: given that the evidentiary material for the disposal of the matter is in the form of affidavits, and the Applicant's affidavit had asserted that the Plaintiff lacked the means for a livelihood and was a habitual drunk, the Plaintiff's counsel ought to have addressed this question. There had been no response to the clear apprehensions of the Defendant which were set out in the Defendant's affidavit. Counsel submitted that a deposit of a security for costs in the sum of Kshs.50,000/= would in no way be prejudicial to the Plaintiff/Respondent, since this money would be refunded to the Plaintiff in the event of the success of the suit.

The Defendant had moved the Court with an application carrying prayers to be heard and, hopefully, granted. The prayers were properly made within the framework of the law in place, and more specifically, Order XXV of the Civil Procedure Rules. The application, therefore, is correctly made, and is supported by evidence that is not controverted, revealing a clear apprehension on the part of the Defendant, that he could come to grief if not accorded a certain measure of protection in the form of a deposit of security against costs, by the Plaintiff.

The nub of the Plaintiff's response is that, to make a demand for security against parties' costs in this manner would have adverse effects on the process of litigation. It is also protested that the Plaintiff is quite serious with his suit and is positive in his entertainment of expectations to win.

The flaw in the Plaintiff's position is that it does not take on, and respond to the specific assertions of the Defendant, which show a real cause to apprehend difficulty in recovering costs if the Plaintiff's case should not succeed.

Straightaway, therefore, it can be said that the balance of probabilities in the cogency and persuasiveness of the two contending positions is in favour of the Defendant/Applicant. A decision in favour of the Applicant, moreover, will not prejudice the reasonable expectations of the Plaintiff.

Accordingly, I determine this matter in favour of the Defendant/Applicant, and Order as follows:

- (1) The Plaintiff shall deposit with a reputable bank in the joint names of the Advocates of the parties the sum of Kshs.50,000/-, as security for the Defendant's costs of this suit, within 30 days of the making of this Order.
- (2) The Plaintiff's suit shall stand dismissed with costs to the Defendant if the Plaintiff shall fail to comply with the first Order set out above.
- (3) The costs in this Chamber Summons application shall be borne by the Plaintiff.

DATED and DELIVERED at Nairobi this 20th day of February, 2004.

**J. B. OJWANG**

**Ag. JUDGE**

**Coram: Ojwang, Ag. J.,**

**Court Clerk: Mwangi**

**For the Defendant/Applicant: Mr. Kinyanjui, instructed by J. Harrison Kinyanjui & Company**

**Advocates**

**For the Plaintiff/Respondent: Mr. Ngala Instructed by M/s. Rumba Kinuthia & Co. Advocates.**