

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL CASE NO. 27 OF 2000 (O.S)

JOHN FRANCIS MUYODI PLAINTIFF/RESPONDENT

VS

1. PETER LUNANI ONGOMA.....1ST DEFENDANT/APPLICANT

2. MARIKO AYIEKO ONGOMA 2ND DEFENDANT/APPLICANT

R U L I N G

The applicants invoked the provisions of Order XXV rules 1, 5, 6 and 7 of the Civil Procedure rules and prayed for the plaintiff to be ordered to deposit security for costs in the sum of Ksh.100,000/= Prior to the hearing and determination of the application dated 25th November 2003. The summons was supported by the affidavit of Kennedy O. Owiti sworn on 9th February 2004

. The applicants are of the view that the plaintiff may not be able to pay costs when he loses this case. It is argued that the taxed costs in the sum of Ksh.81,445/= in respect of Busia H.C.C.C. No. 27 of 2000 which was struck out has not been settled by the plaintiff and that the defendants may not recover the same because it is alleged that the plaintiff has transferred all his attachable properties to his children.

The plaintiff resisted this application by filing a replying affidavit he swore on 23rd February 2004. The plaintiff denied having failed to pay the amount of costs assessed at Ksh.81,445/= due to inability but averred that he filed a reference under the Advocates Remuneration Order which is still pending before this court. The plaintiff also denied having transferred his property to his children or any other person.

It is a cardinal principle in law that where a plaintiff in any action or other proceedings appears that he will be unable to pay the costs of the defendant if successful in his defence, he will be required to give sufficient security for costs and proceedings shall be stayed until such security is provided. However the court has a wide discretion whether to order security or not. There is no burden one way or the other but it will depend on the circumstances of each case. It should be born in mind that the court should consider whether the application for security was commenced with a view of being used to oppress, so as to try and stifle a genuine claim.

I have examined the pleadings presented to me. I have also considered the submissions of both learned counsels. I am of the view that the defendants have not met out a strong case to convince me to exercise my discretion in their favour. There is not reliable evidence to show that the plaintiff has disposed of his property or that he is unable to pay costs when ordered to do so. It is not denied that there is a pending reference pursuant to the provisions of paragraph 11 (2) of the Advocates Remuneration Order. For these reasons I am unable to shut out the plaintiff from pursuing his claims against the defendants.

Consequently the chamber summons dated 9th February 2004 is ordered dismissed with costs to the plaintiff.

DATED AND DELIVERED ON THIS 7th DAY OF May 2004

J.K. SERGON

JUDGE