

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 407 OF 2000

HAJI SULEIMAN KASULE PLAINTIFF

VERSUS

NAOMI WAIRIMU KIARIE 1ST DEFENDANT

MOHAMED NAZIR EBRAHIM ADAT 2ND DEFENDANT

RULING

The First Defendant in this case states that the Plaintiff in this case is a foreigner ordinarily residing outside jurisdiction in the United States of America where he is a citizen. He has no property in Kenya known to the first defendant and that the Plaintiff is not capable of paying the First defendant's costs should the first Defendant succeed in the suit. Because of all the above, she has filed this application in which she is seeking that the Plaintiff be ordered and compelled to give security for costs in the sum of KSh.400,000/- or such higher sum as the court may order. She is also seeking costs to be provided for. The supporting affidavit sworn by the Applicant/Defendant shows in the annexures that the Plaintiff is a holder of U.S.A. passport bearing a serial No.103306683 . The same Affidavit also states that the Plaintiff does not own property in Kenya; that her advocate had advised her that the total cost if she succeeds would be the sum of KSh.5000,000/- or higher amount; that the country of origin of the Respondent has no reciprocity agreement under the law with Kenya; that the Respondent is a man of straw who has borrowed money from the Applicant on a number of occasions to meet his daily needs and has been unable to purchase a return air ticket when his return air ticket purchased earlier on expired and that she does not know the plaintiff's physical address in the U.S.A.

The Respondent was served with the hearing notice for this application but was not in attendance on the hearing day. I have not seen any grounds of opposition against the same application nor had my attention been drawn to any Replying Affidavit filed by the Respondent in respect of this application.

I have considered this application. It is not denied that the Respondent is not a citizen of this country. The allegation that he owns no business in Kenya is not challenged. There is no dispute that he has no property in Kenya, and it is not in dispute that his country has no reciprocal arrangements with this country. These being the allegations and the Respondent having not appeared before me to dispute them or even to adduce any evidence to cast a doubt on the allegations, I have no alternative but to accept them as valid. Valid as they are, I do feel the Applicant would clearly be disadvantaged if this case is decided in her favour in that whatever victory she may gain will be a pyrrhic victory as she will not be able to recover any costs from the Respondent/Plaintiff who may very well decide to run back to his country immediately the judgment in the entire case is delivered and the Applicant will be left with nothing to lay her hands on by way of execution for costs.

I do agree that the application for security is genuine and I will grant it. However, security in what sum? Applicant in his application seeks security in the sum of KSh.400,000/- and her learned counsel attempts to justify this by saying that the instructions fee above is about KSh.102,000/- as the sum claimed is KSh.1,800,000/- together with other claims. Her counsel says there is also attendance fee and I believe getting up fee etc. In her affidavit however, the Applicant says she has been advised the costs would be in the sum of KSh.500,000/- and above. There is clear discrepancy in these two figures. I do feel however, that the sum should not in any way be punitive nor should it be such sum as in the mind of the court may make it impossible for the hearing to proceed in view of the inability of the Respondent to raise it. If the instruction fee is KSh.102,000/- then I do not think getting up fee, attendant fee would push

the total figure to KSh.400,000/-. I do feel a fair figure should be KSh.250,000/-.

I do allow the application in terms of prayer 1 except the Plaintiff/Respondent will give security for KSh.250,000/- and not KSh.400,000/-. Same security to be given within 30 days of the date hereof.

Costs of this application will be paid by the Respondent. Orders accordingly.

Dated and delivered at Mombasa this 7th Day of March 2003.

J.W. ONYANGO OTIENO

JUDGE