



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 759 OF 2001

SCHOLASTICA WANJIRU WAIHENYA 1ST PLAINTIFF
ANNE WANJIRU KING'ARA 2ND PLAINTIFF
STEPHEN MWANGI MAINA 3RD PLAINTIFF
FRANCIS MWAI NDEITHI 4TH PLAINTIFF

VERSUS

JOB KAGWE NGUNJIRI 1ST DEFENDANT
DANSON MACHARIA MWANGI 2ND DEFENDANT
GEORGE MATENJWA GACHAU 3RD DEFENDANT
DAVID WAIGANJO KOINANGE 4TH DEFENDANT
EDWARD KIARIE GACHAU 5TH DEFENDANT
BARLEY WHEAT LIMITED 6TH DEFENDANT

RULING

On 24th March, 2003 when this case came for hearing, counsel for the defendants was before another court and he sent his assistant to apply for adjournment. Plaintiff's counsel opposed the application saying that the 4th Plaintiff had found a job outside Kenya and was expected to leave the country the following month (April 2003) to take up that job. The application for adjournment was refused and the counsel who was present holding brief for the defence counsel was ordered to be ready to proceed with the hearing of the case at 11.40 am. At 11.40 am Mr Mugo was present assisted by Mrs Kipsang for all the defendants and the hearing of the case commenced but was not finalized.

Counsel for the defendants then filed an application by way of summons in chambers for orders that the 4th Plaintiff do provide security in the sum of Kshs.600,000/= or such other amount as the court shall deem reasonable for the six defendants in the suit and that the 4th Plaintiff do deposit with the court Kshs.360,000/= being the amount claimed against him in the counterclaim or do provide such security as the court may approve. This second prayer has now been abandoned. The reason for the application is that the 4th Plaintiff has informed the court through his counsel, that he intends to leave the jurisdiction of the court any time from May 2003. The defendants are apprehensive that they will not be able to recover

costs against the 4th Plaintiff should the claim by the 4th Plaintiff fail. The 6th defendant has a counter-claim of Kshs.360,000/= against the 4th Plaintiff. This ruling is in respect of this application to which grounds of opposition have been filed.

At the hearing of the application, the 2nd prayer there in was abandoned. That prayer related to an order that the 4th Plaintiff be ordered to deposit Kshs.360,000/= which is the subject of a counter-claim by the 6th defendant against the 4th Plaintiff. What is therefore left of the application is the first prayer for an order that the 4th Plaintiff be ordered to provide security. The following grounds of opposition were filed:-

1. That the application is misconceived in the light of the provisions of Order XXV Rule 3

2. That there are three other Plaintiffs in the suit who are remaining in Kenya and who would satisfactorily pay the Defendants costs if the Plaintiffs case is not successful.

3. The second prayer in the chamber summons is misconceived and is not founded on any provisions of the Civil Procedure Rules as Order XXV provides for security for costs and not security for anticipated judgment.

As the second prayer in the application was abandoned at the hearing, this last ground of opposition does not call for consideration by the court. Order XXV Rule 3 provides that:

“Where it appears to the court that the substantial issue is which of two or more defendants is liable or what proportion of liability two or more defendants should bear no order for security for costs may be made.”

The Plaintiffs herein have sued all the defendants. According to them, they have a case against the defendants. This rule will in my view be invoked by the court if the application for security is by a Plaintiff against the defendant(s), such that if the court is of the view that the substantial issue is which of the defendants are liable or what proportion of liability two or more defendants should bear, then no order for security would be made.

During the hearing of the application, counsel for the Plaintiffs informed court that the 4th Plaintiff had informed him that he will now not leave the country until this suit is finalized and that the letter of offer of employment is open and that the 4th Plaintiff has not even accepted the offer. He did not have this letter in court and the court is therefore not in a position to comment on its contents or the allegation that the 4th Plaintiff will not leave the jurisdiction of this court until this suit is determined. I suspect that the 4th Plaintiff has now seen the implications of what he had earlier told the court through his counsel. He now understands that if the defendants' application is successful, he may be ordered to furnish security. In my view, that might be the reason why he now says that he will not leave the court's jurisdiction until this suit is finalized.

Although there are four Plaintiffs in this case, the 4th Plaintiff has a separate claim against the 6th defendant in the sum of Kshs.1,200,000/= as pleaded at paragraph 9(a) of the amended Plaintiff. If that claim of the 4th Plaintiff against the 6th defendant fails when the 4th Plaintiff has already left the jurisdiction of this court, then it will be difficult for the sixth defendant to recover costs from the said 4th Plaintiff.

The four Plaintiffs however seek a common relief against the six defendants, and that is an injunction to restrain the defendants from withdrawing money, changing the signatories, changing the documents at the bank and/or in any way dealing with the savings account number 0161110172800 at Cooperative Merchants Bank of Kenya Limited. If that prayer does not succeed then all of them will be ordered to pay costs to the defendants jointly and severally in which case, the defendants cannot say that they will suffer any loss since they can recover those costs from the 1st, 2nd and 3rd Plaintiffs. However, should the Plaintiffs' suit in respect of the injunction claim succeed and that of the 4th Plaintiff against the 6th defendant fail, then the other Plaintiffs cannot be ordered to pay costs to the 6th defendant. Such costs

would be payable by the 4th Plaintiff alone, that is why he must be ordered to furnish security for the costs of the 6th defendant in so far as his separate claim for Kshs.1,200,000/= is concerned. For the rest of the suit, he will not be ordered to furnish security for costs as I have already said that the rest of the Plaintiffs would have to bear the burden.

The 6th defendant has also filed a counter-claim against the 3rd and 4th Plaintiffs. There is a specific counter-claim against the 4th Plaintiff in the sum of Kshs.360,000/=. The first prayer in the counter-claim is against the 3rd and 4th defendants. The two counsel were in agreement that under the remuneration order the minimum counter-claim fees would be Kshs.55,000/=. With disbursements and other expenses it would be more. I however take into account the fact that although on 24th March, 2003, the 4th Plaintiff had told the court that he would be leaving the court's jurisdiction in the month of April 2003, he actually has not left. I also take into account the fact that the hearing of this case has actually commenced and that the 4th Plaintiff was in court during the hearing of the application. In the circumstances, I am of the view that making an order which requires that the 4th Plaintiff provides security to the tune of Kshs.600,000/= is punitive and unnecessary because, as I have said elsewhere, for the common claim of the Plaintiffs, the rest of the Plaintiffs are not leaving the jurisdiction of the court. The issue of security arises only between him and the 6th defendant. Taking into account further, that the 6th defendant also has a counter-claim against the 3rd defendant, then should it succeed against both, it can pursue the 3rd defendant for part of its costs. In the circumstances, a sum of Kshs.40,000/= as security for part of the costs of the 6th defendant is fair.

I allow the application dated 16th April, 2003 and order that within a period of 21 (twenty one) days from the date hereof, the 4th Plaintiff shall furnish security in the sum of Kshs.40,000/= (forty thousand) only, for the costs of the 6th defendant.

The said sum shall be deposited in an interest earning account in the joint names of J M Mugo and Company Advocates for the defendants and M/s Muturi Kamande & Company Advocates for the Plaintiffs, at a reputable bank to be agreed upon. Once deposited, the money shall remain in the said interest earning account pending the determination of this suit and further orders from the court.

Delivered at Nairobi this 9th day of May, 2003

S. C. ONDEYO

JUDGE

9.5.2003