



REPUBLIC OF KENYA



**Carvahlo & another v Dry Associates Limited & another (Civil Suit E493 of 2020)  
[2024] KEHC 66 (KLR) (Commercial and Tax) (11 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 66 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E493 OF 2020  
JWW MONG'ARE, J  
JANUARY 11, 2024**

**BETWEEN**

**JOE CARVAHLO ..... 1<sup>ST</sup> PLAINTIFF**

**SUSAN SCULL-CARVAHLO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**DRY ASSOCIATES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**BAHATI MWAMUYE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before the Court is the 2<sup>nd</sup> Defendant's Notice of Motion dated July 21, 2021, brought under Section 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 26 Rules 1 and 6 of the [Civil Procedure Rules](#), seeking the following orders: -
  - (1) That the Plaintiffs/Respondents do within seven (7) days, give security for the 2<sup>nd</sup> Defendant/Applicant's costs for an amount of Kshs.3,998,299/- being the legal fee charged to Defend this matter, and to be deposited in a joint interest earning bank account opened and operated jointly by the Advocates for the 2<sup>nd</sup> Defendant/Applicant and the Advocates for the Plaintiffs/Respondents herein.
  - (2) That the suit against the 2<sup>nd</sup> Defendant/Applicant be struck out with costs in default of the provision of the said security within the prescribed period.
  - (3) That the costs of this Application be provided.
2. The application is supported by the grounds set on its face, the supporting affidavit sworn by the Applicant on the same date and a supplementary affidavit sworn on January 17, 2022. In summary,



the grounds are that the Applicant has reason to believe that the Respondents will be unable to pay costs in the likely event that he is successful in view of the fact that, the Respondents are not Kenyan citizens and neither do they have any registered or known assets within the jurisdiction of this Court capable of satisfying an order for costs.

3. The Applicant highlighted that in their communication dated March 19, 2019 to the 1<sup>st</sup> Defendant, the Respondents have expressly stated that they are in dire financial constraints and are even unable to meet their living expenses; that the suit filed by the Respondents is manifestly misconceived and frivolous and the same has no prospects of success; that he has a formidable defence that is likely to succeed and that it is in the interest of justice and fairness and for purposes of ensuring that an order for costs that will likely be given by the courts do not go in vain.
4. In response, the respondents put in a replying affidavit sworn by the 1<sup>st</sup> Respondent on September 21, 2021 and a further affidavit sworn by their Advocate, Mary Otieno, on March 25, 2022. The core of the depositions was that the suit against the applicant is based on the fact that he misrepresented the fact of the insurance status of the Dry Notes that him and the 2<sup>nd</sup> respondent had purchased, which truth, as the Note Trustee, he ought to have been aware of, and was as a consequence aware of when he misrepresented their status to them. That the applicant has not in his affidavit or defence stated that he did not author the emails forming part of the claim but rather has attempted to explain their purport.
5. It was also further submitted that the respondents' suit is neither frivolous nor vexatious. That there was evidence in the form of a redacted list from the applicant clearly showing that the respondents' Notes were insured which information the applicant later withdrew clearly showing prima facie culpability on his part.
6. It was further contended that the applicant's defence lacks bona fides; that the 1<sup>st</sup> respondent is gainfully employed and the applicant should not be allowed to lock him out from the seat of justice owing to the defendants' collective misrepresentation. That poverty should not be a bar towards justice. In any event, the applicant has not substantiated his claim that the Plaintiffs would be unable to pay any costs should they be called upon to do so, at the end of litigation. For these reasons, the respondents urged the Court to dismiss the instant application with costs.
7. The application was disposed through written submissions with oral highlights. The Applicant filed written submissions dated February 10, 2022 while the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed written submissions dated September 19, 2022.

### **Analysis and Determination**

8. I have considered the application, the grounds, the rival affidavits and the submissions. To my mind, the only issue for determination is “whether the Applicant has made out a case for grant of an order for payment of security for costs by the Respondents.
9. Order 26 Rule 1 of the *Civil Procedure Rules* provides as follows: -
  - “Security for costs.
    1. In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party.”



10. The Court’s power to grant an order for security for costs is discretionary and must be exercised judiciously, considering the unique circumstances of each case. In *Shah v Shah* [1982] KLR 95 the Court of Appeal pin-pointed that:-

“The general rule is that security is normally required from plaintiff’s resident outside the jurisdiction, but as was agreed in the court below, a court has a discretion, to be exercised reasonably and judicially, to refuse to order that security be given; see *Kotecha v. Bank of Baroda* (CA Civil Application No. 43 of 1978, unreported).”

11. The Court of Appeal in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* Civil Appeal (Application) No. 38 Of 2013 [2014] eKLR, also enunciated that:-

“In an application for security for costs, the Applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a Respondent will be unable to pay costs in the event that he is unsuccessful....

The rationale for security for costs is to ensure firstly, that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty; secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party. In *Noormohamed Abdulla -vs- Ranchboddhal J. Patel & Another* (1962) E.A. 448, it was held:-

“The order for security for costs in such a case is not directed towards enforcing payment of the costs as such, but is designed to ensure that a litigant who by reason of near insolvency is unable to pay the costs of the litigation when he loses, is disabled from carrying on the litigation indefinitely except upon terms and conditions which afford some measure of protection to the other parties..”

12. The Applicant submitted that he has met the threshold for the grant of orders of security in that the Plaintiffs are not Kenyan citizens, not gainfully employed and their sources of income unknown; that he has a formidable defence that is more likely to succeed and that the instant application was made without any undue delay. He contended that there is no evidence to prove that the Plaintiffs are gainfully employed as deposed in their replying affidavit. He pointed out that, contrarily, in their pleadings, the Plaintiffs claim to retirees claiming that they cannot be trusted to pay costs for taking divergent positions. The Applicant thus contended that it will be difficult for him to recover the costs to be incurred in defending the suit against him as entitled if successful. On the other hand, the Plaintiffs will not be shut out of the reliefs sought due to poverty as they have described themselves as persons of means.
13. I have looked at the record and from my assessment, the Respondents have a bona fide case. Although the Applicant claimed that he had reasons for apprehension that the Respondents would be unable to meet his costs in respect of the of the suit, I am not convinced. The Respondents produced the 1<sup>st</sup> Respondent’s certificate of permanent residence dated August 14, 2020, the 2<sup>nd</sup> Respondent’s work/residence permit issued on 5<sup>th</sup> October 2020, a certificate of incorporation and a CR12 of Josujani Company Ltd showing that the Respondents are its directors and shareholders, a certificate of lease certifying that Josujani Company Ltd is the registered proprietor of the property known as Title No. Kwale/ Diani Beach Block/105 in Kwale County, a registered transfer of Sub-lease and a certificate of



search indicating that the 1st Respondent is the registered proprietor of Plot No. F7 on Land Ref. No. 24880 of Section 1 Mainland North, Kilifi.

14. Accordingly, I find that this is not a suitable case for the grant of orders of deposit of security as the Respondents have shown that irrespective of their citizenship and retirement status, they are residents and have property within the jurisdiction of the court.
15. The upshot of the above finding is that the application dated 21st July 2021 is without merit and that the same is dismissed with costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11<sup>TH</sup> DAY OF JANUARY, 2024.**

**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

Mr. Karani for the Plaintiff.

Ms. Macharia for the 1<sup>st</sup> Defendant.

