REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC CIVIL CASE NO 536 OF 2008

MICROSOFT MOBILE OY.....PLAINTIFF/RESPONDENT

-VERSUS-

MUSIMBA INVESTMENTS LIMITED.....DEFENDANT/APPLICANT

RULING

1. By a Notice of motion dated **23rd** September 2020, the defendant seeks an order that this court strikes out the Plaintiff's amended Plaint dated **20th** December 2019 and by extension this suit for non-compliance with the provisions of Order **4** Rule **1(2)** and **(4)** of the Civil Procedure Rules, 2010. The said provisions provide that:-

> *(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1) (f) above.*
>
> *(4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.*

2. Alternatively, the defendant prays that pending any further proceedings, this court orders the Plaintiff to deposit security for costs assessed at **Kshs 7,778,039.68** together with **Kshs 200,000/=** being reserve for disbursements and attendances in court or into a joint interest account in the names of advocates for both parties. Lastly, the defendant prays that the costs of the suit be awarded to the defendant.

3. The defendant argues that the verifying Affidavit accompanying the Plaintiff's Plaint did not conform to above provisions for want of authority under seal authorizing the deponent to swear the affidavit on behalf of the company. The defendant states that on or about **29th** November 2019, the Plaintiff was granted leave to substitute Nokia Corporation with Microsoft Mobile OY as the Plaintiff, and, subsequently, the Plaintiff filed an Amended Plaint dated **20th** December 2019 wherein it describes itself as a limited liability company. However, the defendant states that the amended Plaint was not accompanied by a verifying affidavit or an authority by the Plaintiff company authorizing the filing of the suit.

4. The defendant states that it is a requirement under the above provisions that every Plaint must be accompanied by a verifying affidavit and where the Plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company. The defendant argues that the said provision is couched in mandatory terms, so, since the Plaint was amended substituting a party, it was prudent that the new party affirms the contents of the amended Plaint to conform with the rules.

5. Further, the defendant states that the Plaintiff describes itself as a limited liability company incorporated in Finland having its registered office in Espoo Finland, hence it is a risk to the jurisdiction of this court, and, the general rule is that security is normally required from a Plaintiff outside the jurisdiction of the court. The defendant contends that the Plaintiff has not provided the court with evidence confirming whether it has an office or any known assets within the jurisdiction of this court and its general financial standing and wellness is unknown.

6. Further, the defendant states that the Plaintiff's witness testifies that she was employed by Nokia Middle East & Africa FZ LLC as a Legal Counsel from May 2012 to April 2014 when the Nokia phones and accessories business was acquired by the Plaintiff; but since Nokia Middle East & Africa FZ LLC is not the company which instituted this suit; and since there is no indication that it is related to Nokia Corporation, the defendant states that it is apprehensive that it may not recover costs from the Plaintiff in the event the suit is unsuccessful.

The Plaintiff's Replying affidavit

7. Mr. Otilia Estere Phiri, employed by Microsoft East Africa, as Attorney, Emerging Markets swore the Replying affidavit in opposition to the application. He deposed that the application is an impediment to just, expeditious, proportionate and affordable resolution of the suit and

is only meant to delay the trial which has been pending for the last **2** years because of reasons attributed to the defendant.

8. He deposed that these proceedings were commenced on **9th** September 2008 under the old Civil Procedure Rules hence the defendant cannot rely on the Plaintiff's non-compliance with provisions of Order **4** Rule, hence, **(1)** and **(4)** of the Civil Procedure Rules, 2010 as a basis for seeking orders striking out the suit. He deposed that in compliance with Order **VII** Rule **1 (2)** of the Old Civil Procedure Rules, the Plaint was accompanied by a verifying affidavit sworn by Gerand John Brandes, the Plaintiff's then General Manager in charge of the East Africa. Also, he deposed that the Old Civil Procedure Rules did not provide for filing authority of a company under seal for its officer to swear an affidavit on its behalf, but the said requirement is a creation of the Civil Procedure Rules, 2010, hence, Order **4** Rule **(1)** and **(4)** of the Civil Procedure Rules, 2010 cannot apply retrospectively.

9. He deposed that an amended Plaint need not be accompanied as a mandatory requirement by a verifying affidavit or authority of a company under seal because the suit already existed at the time of the amendment. Additionally, he deposed that the failure to file the amended Plaint together with verifying affidavit and authority of the Plaintiff under seal is not fatal to the suit because the defect can be remedied by filing and serving the same.

10. Further, he deposed that the authority may be filed at any time before the suit is fixed for hearing because there is no requirement that the same be filed at the same time as the suit, and its absence is therefore, not fatal to the suit. Additionally, he deposed that the Plaintiff has since filed a verifying affidavit sworn by himself together with the Plaintiff's authority under seal authorizing him to swear affidavits on behalf of the Plaintiff, hence, the said verifying affidavit and authority to swear should be deemed as properly filed in support of the amended Plaint dated **20th** December 2019.

11. Mr. Phiri deposed that the failure to file the amended Plaint together with a verifying affidavit and the Plaintiff's authority to swear affidavits under seal is an excusable mistake which should not be visited on the Plaintiff who has at all times been desirous of prosecuting its case. He deposed that under Article **159(2)(d)** of the Constitution, courts shall endeavor to do justice without undue regard to procedural technicalities.

12. Further, he deposed that under Rule **8** of the Advocates Practice Rules, Advocates are not permitted to swear affidavits on behalf of their clients in contentious matters, and, that, the issue whether security for costs should be paid is a contentious matter and, in the circumstances, the supporting affidavit sworn by the defendant's advocates on behalf of the defendant should be struck out for being defective.

13. Further, he deposed that the fact that the Plaintiff is a foreign company does not automatically entitle the defendant to security of costs, nor has the defendant satisfied the required test for security for costs. He averred that the Plaintiff is a reputable multinational technology company with international presence spanning several decades and no cause has been shown for the order for security for costs. Further, he deposed that apart from stating that the Plaintiff is a foreign company, the defendant has not set out any justifiable reasons that would allow this court to exercise its discretion and order security for costs.

14. Further, he averred that the application has been made after an inordinate delay of over **12** years since the commencement of the suit and it is meant to delay the expeditious hearing of the suit.

The defendant's/applicant's advocates submissions

15. The defendant's/applicant's advocate argued that because the Plaintiff was substituted and the Plaint was amended, the authority and the verifying affidavit were necessary. He relied on *Josephat Kipchichir Sigilai v Gatob Sanik Enterprises Ltd & 4 others**[1]*** which held that the rationale of filing a verifying affidavit is intended to make the Plaintiff own the averments and to pin down the Plaintiff to them making them part of the evidence. Buttressed by the above decision, he submitted that the "new" Plaintiff must swear a verifying affidavit in order to own every averment in the Plaint and failure to swear the affidavit renders the averments in the pleadings of no evidentiary value.

16. He argued that considering that the defendant's advocate only came on record on **29th** January 2020, the application was filed without delay. He also pointed out that the Plaintiff filed the authority to swear the affidavit sworn on **20th** October 2020 together with a verifying affidavit sworn on **13th** November 2020 after the instant application was filed.

17. Additionally, counsel argued that Order **4** Rule **1 (2)** and **(4)** of the Civil Procedure Rules, 2010 is couched in mandatory terms, hence, the amended Plaint is incompetent and the same ought to be struck out.

18. Regarding the prayer for security, the defendant's/applicant's counsel submitted that the said prayer is anchored on Order **26** Rule **1** of the Civil Procedure Rules, 2010, which provision protects a defendant in the event of success and who may experience difficulties in realizing the costs incurred. He relied on ***Ocean View Beach Hotel Ltd v Salim Sultan Moloo & 5 Others.***[2] Counsel argued that the prayer is founded on the basis that the defendant has a good defense to the Plaintiff's case and if it succeeds, it may be difficult to get the resultant costs from the Plaintiff because it has no residence or assets in Kenya. He argued that the Plaintiff is a foreign company incorporated in Finland having its registered office in Espoo Finland so it is a risk to the jurisdiction of this court and its financial standing and wellness is unknown. He argued that the defendant is apprehensive that it may not be able to recover any costs from the Plaintiff in the event the suit is unsuccessful.

19. Additionally, the applicant's counsel submitted that the grant for orders for security for costs is a matter of judicial discretion. He cited *Shah v Shah**[3]*** which held 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." He* submitted that the discretion is to be exercised reasonably and judicially by making reference to the circumstances of the case.

20. Additionally, counsel relied on Section 401 of the Companies Act Cap 486. (**this act as repealed, so its not clear why counsel cited it)**.

Additionally, the defendant's counsel urged the court to embrace the principles in *Keary Development v Tarmac Construction**[4]* cited in *Ocean View Beach Hotel Ltd v Salim Sultan Mollo & 5 Others**[5]* thus: -

> *a) "The court has a complete discretion, whether to order security, and accordingly it will act in the light of all the relevant circumstances.*
>
> *b) The possibility or probability that the plaintiff company will be deterred from pursing its claim by an order for security is not without more a sufficient reason for not ordering security.*
>
> *c) The court must carry out a balancing exercise. On one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant If no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.*
>
> *d) In considering all the circumstances, the court will have regard to the plaintiff's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure.*
>
> *e) The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount, it is not bound to make an order of a substantial amount.*
>
> *f) Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled.*
>
> *g) The lateness of the application for security is a circumstance which can properly be taken into account."*

21. Regarding costs, counsel cited Section **27 (1)** of the Civil Procedure Act and *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another*[6] which cited *Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd* which held that the issue of costs is the discretion of the court and that the basic rule on attribution of costs is that costs follow the event and are not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case. Also, the court held that it is imperative to bear in mind the steps taken by the parties and to appreciate the trouble taken by both parties since the suit was filed.

Plaintiff's/advocates submissions

22. The Plaintiff's/Respondent's counsel argued that these proceedings were commenced on **9th** September 2008 under the old Civil Procedure Rules and Order VII Rule **1 (2)** of the old Civil Procedure Rules provided as follows: -

> *"(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint."*

23. He submitted that it was not a requirement under the old Civil Procedure Rules for the verifying affidavit to be sworn by an officer of the company duly authorized under the seal of the company. He argued that the said requirement was introduced by the Civil Procedure Rules, 2010. To buttress his argument, he cited *Swaleh Gheithan Saanun v Commissioner of Lands & 5 others**[7]* which held: -

> *"…The express provision therefore is that the plaint must be accompanied by a verifying affidavit. It the Legislature wanted an amended plaint to also be so accompanied, it would have provided so. In my opinion therefore, an amended plaint need not be accompanied by a verifying affidavit since the suit already exists in a given form, and any ordered or taken amendments are specified in form and extent. In my view the verifying affidavit filed with the plaint takes care of the mischief targeted by the legislature. I would therefore also hold that it is not necessary and definitely not imperative that an amended plaint should be accompanied with a verifying affidavit. (Underlining ours)"*

24. Additionally, counsel cited *Sammy Manzi Maluki v Johnes Mwasia Kamuti**[8]* in which the court cited *Saanun v Commissioner of Lands and 5 others**[9]* which held that "if the legislature wanted an amended plaint to be so accompanied, it would have provided so. Agreeing with the above reasoning, the court in the above case observed that there is no legal requirement that an amended plaint be accompanied by a verifying affidavit, if there is already a valid verifying affidavit on record.

25. Additionally, counsel argued that the foregoing notwithstanding, the omission can be remedied by filing and serving a verifying affidavit. He relied on *Abdullahi Sheikh Ahmed v Mandera County Government*[10] in which the court cited D.*T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another*[11] which held that a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Further, the court in the cited case held that "no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

26. Additionally, the court in *Abdullahi Sheikh Ahmed v Mandera County Government(supra)* was emphatic that the court in exercising such discretion on whether or not to order strike out a pleading that is non-compliant with the rules ought to be alive to its obligations under Article **159** of the Constitution to see to it that justice is administered without undue regard to procedural technicalities. Also cited in the above case is *Kenya Commercial Finance Company Limited vs Richard Akwesera Onditi**[12]* which held *inter alia* that before striking out a

pleading, the court will look at available alternatives.

27. Additionally, the Plaintiff's/Respondent's counsel cited *Chandaria Industries Ltd v Malplast Industries Ltd*[13] in which addressing a similar objection held *inter alia* the mere failure to file a company resolution does not invalidate the suit. The court in the said case cited *Republic v Registrar General and 13 Others**[14]*** which held that a resolution by the Board of Directors of a company may be filed any time before the suit is fixed for hearing; that there is no requirement that the same be filed at the same time as the suit; and that the absence of the resolution is not fatal to the suit. Counsel also cited *Benel Development Limited v First Community Bank Limited*[15] in which held: -

> *"(28) I find that the defective nature of the Verifying Affidavit to this suit is not fatal to the entire suit. I am fortified in this finding by the provisions of Article 159(2) Constitution of Kenya which exhorts Courts to administer substantive justice without undue regard to technicalities.*
>
> *(29) In the premises I strike out the Verifying Affidavit dated 13th November 2019 and direct the Plaintiff / Respondent to file and serve a fresh compliant Verifying Affidavit within fifteen (15) days of the date of this Ruling."*

28. Similarly, the Plaintiff's/Respondent's counsel cited *Geoffrey K. Mathiu & 10 Others v Clerk County Council Meru Central & Another*[16] which held: -

> *"I hold the view…, that a verifying affidavit has a separate life independent of the plaint it verifies. It does not go to the root of the dispute which is contained in the plaint. That failure to file a proper and regular verifying affidavit or at all can be rectified with the court's leave.*
>
> *See also Microsoft Corporation V. Mitsumi Computer Garage Ltd & Another, HCCC Nai. 810 of 2001. Furthermore, Order VII rule 1(3) does not impose a compulsory duty on the court to strike out any plaint not accompanied by a verifying affidavit. It simply provides that: -*
>
> *"(3) The court may of its own motion or an application of the defendant order to be struck out any plaint which does not comply with sub rule (2) of this rule." (emphasis mine).*

29. Fortified by the above decision, counsel submitted that striking out the suit on the grounds cited is a draconian step which should only be done when a suit id frivolous.

30. Regarding the prayer for security, counsel took issue with the fact that the founding affidavit was sworn by the advocate instead of the client. He submitted that advocates are not permitted to swear affidavits on behalf of their clients in contentious matters. He argued that the issue whether security for costs should be furnished is a contentious matter. He relied on *Barrack Ofulo Otieno v Instarect Limited**[17]*** in which the court relied on a passage extracted from *Halsbury's Laws of England**[18]*** thus: -

> *"Affidavits filed in the High Court must deal only with facts which a witness can prove of his own knowledge, except that, in interlocutory proceedings or with leave, statements as to a deponent's information or belief are admitted, provided the sources and grounds thereof are stated…*
>
> *However, under our law (Advocates Practice Rules) Rule 9 Advocates are not permitted to swear affidavits in contentious matters. The issue of whether security for costs should be paid is a contentious matter. I think it was improper for Counsel to have sworn the supporting affidavit."*

31. Buttressed by the above excerpt, counsel invited the court to strike out the paragraphs **14, 15, 16, 18** and **19** of the founding affidavit of Phoebe Mwaniki, advocate.

32. Additionally, counsel referred to *Jayesh Hasmukh Shah v Navin Haria & another**[19]*** which highlighted the applicable principles in applications seeking provision of security thus: -

> *"The principles on which a court exercises its discretion in an application for security of costs were considered in the case of **Keary Development v. Tarmac Construction (1995) 3 ALL ER 534**. F. Tuiyot., J in **Ocean View Beach Hotel Ltd v. Salim Sultan Mollo & 5 Others (2012) e KLR** as follows: -*
>
> *',1. The court has a complete discretion, whether to order security, and accordingly it will act in the light of all the relevant circumstances.*
>
> *2. The possibility or probability that the plaintiff company will be deterred from pursing its claim by an order for security is not without more a sufficient reason for not ordering security.*
>
> *3. The court must carry out a balancing exercise. On one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant If no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.*
>
> *4.In considering all the circumstances, the court will have regard to the plaintiff's prospects of success. But it should not go into the*

merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure.

5.The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount, it is not bound to make an order of a substantial amount.

6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled.

7. The lateness of the application for security is a circumstance which can properly be taken into account.t'"

33. Counsel submitted that apart from stating that the Plaintiff is a foreign company that did not initially initiate this suit, the defendant has not set out any justifiable reasons that would allow this court to exercise its discretion in its favour to grant orders for security for costs. He relied on *Sunfunder Inc v Mayfair Insurance Company Limited & another*[20] which stated that: -

"…the mere fact that the plaintiff is a foreign company does not necessarily connote that it lacks financial muscle to meet orders for costs that may be made against it thus entitling the defendant to an order for security costs. A similar position was adopted in Stratosat Datacom (Proprietary) Ltd v Raadgevend Bureau Krijger Services (Kenya) Limited & Another [2012] eKLR.

17. In the present case, I note that the plaintiff averred that it is a reputable company with substantial assets and finances, an averment that was not controverted by the defendants. I am therefore not persuaded that the instant application meets the threshold set for the granting of orders for security for costs."

34. Further, counsel relied on *Saudi Arabian Airlines Corporation v Sean Express Services Ltd*[21] in which the court declined to order security for costs stating that the applicant had not established a basis for granting such an order. He argued that the application has been made after a inordinate delay of **12** years and relied on *Barrack Ofulo Otieno v Instarect Limited* (Supra). Lastly, counsel questioned how the amounts claimed were arrived at. He urged the court to dismiss the application with costs.

Determination

35. Before me is a prayer to strike out the Amended Plaint and terminate the life of this suit. The ground cited is that the amended Plaint is incurably defective because it was not accompanied by a verifying affidavit and authority to swear the affidavit duly sealed by the Plaintiff company. The said argument is attractive. However, decided cases are in agreement on the applicable principles to guide the courts in striking out pleadings. These principles were set out with sufficient clarity in *D T Dobie & Company (K) Ltd v Muchina*[22] cited by the Plaintiffs' counsel. The ratio decidendi of the said is that no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.

36. The above decision has been cited so many times in this country such that it is correct to say that it has assumed the singular distinction of the force of law. Even though judge C.B. Madan CJ in his characteristic wisdom made the above pronouncement **28** years prior to the promulgation of the 2010 Constitution his spirit, wisdom and charisma seems to have influenced the drafters of our 2010 Constitution as I will allude shortly.

37. In *V.K. Construction Co. Ltd v Mpata Investment Ltd**[23]*** Ringera J confronted with a similar question stated that "the jurisdiction to strike out pleadings is to be exercised cautiously and sparingly and only where the cause of action is so obviously bad and almost incontestably bad. For the remedy is a draconian one and where life can be injected in the plaint by an amendment the plaintiff should be given a chance to do so." Ringera J proceeded to add that "the discretion of the court in such a scenario is unfettered and the learned magistrate should have exercised that discretion in favour of the plaintiffs/applicant and failure to revive the suit occasioned a travesty of justice."

38. Decisional law leaves no doubt that if a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it. The rationale for this reasoning is due to a realization that the exercise of the powers of summary procedure are draconian, coercive and drastic. And because a party may thereby be deprived of his right to a plenary trial, the court exercises those powers with the greatest care and circumspection and only in the clearest of cases as regards the facts and the law. The summary procedure should therefore only be adopted when it can be clearly seen that a claim or case is clear and beyond doubt unarguable and the judicial system would never permit a party to be driven from the judgement seat without any court having considered his right to be heard, except in cases where the cause of action was obviously and almost incontestably bad.

39. Striking out a pleading is a draconian act which may only be resorted to in plain cases. Whether or not a case is plain is a matter of fact. A court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment[24] or where a pleading is vague or frivolous. An argument that a pleading is vague and embarrassing strikes at the formulation of the cause of action and its legal validity. It need not be directed at a particular paragraph within a cause of action but it is directed at the cause of action as a whole which must be demonstrated to be vague and embarrassing.

40. A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks *bona fides* and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses.[25] A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action.[26] In *Madison Insurance Company Limited v Augustine Kamanda Gitau**[27]*** the court stated : -

11. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day, it may not succeed then the suit ought to go to trial. However, where the suit is without substance or groundless of fanciful and or is brought is instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

41. In *Yaya Towers Limited v Trade Bank Limited (In Liquidation)*[28] the court stated: -

"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved...If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits...It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment."

42. As stated above, striking out a pleading is a drastic and draconian step that should be resorted to in and clear circumstances where a pleading is hopeless and incurably defective. *First*, the omission to file the verifying affidavit is curable by filing it. *Second*, it has not been shown that the Plaint has a defect which incurable by way of an amendment. *Third,* as the authorities cited by the Plaintiff's counsel suggest, had Parliament intended the stringent construction suggested by the defendant's counsel, it would have done so in clear terms. *Fourth,* striking out a suit without a plenary hearing impinges on the constitutional right to a hearing and access to justice, hence the interpretation of the rules adopted by the defendant's counsel is itself an affront to these constitutionally guaranteed rights.

43. *Fifth*, the right to access justice is now entrenched in the Constitution. Any law, rules of procedure or reasons which may impact on that right must surmount an Article **24** analysis test. *Sixth,* the court is obligated to interpret the Constitution in a manner that promotes the Bill of Rights and *inter alia* permits the development of the law (Article 259). *Seventh*, Article **20 (3)** of the Constitution obligates courts in applying a provision of the Bill of Rights to develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom and (4) to promote the spirit, purport and objects of the Bill of Rights. Lastly, exercise of judicial authority is now entrenched in the Constitution. Article **159 (2)** to be guided by the principle that justice shall be guided without undue regard to procedural technicalities. It is these constitutional imperatives which I earlier on opined that they are discernible in justice C.B. Madan's earlier cited case determined 28 years before the birth of our 2010 Constitution. By now it is beyond argument that the invitation to this court to strike out the Plaintiff's suit premised on the reasons offered is contra well established jurisprudence on the subject and above all it is an affront to the above-mentioned constitutional dictates.

44. I now turn to the alternative prayer sought. The defendants counsel invited this court in the alternative to order that the Plaintiff deposits the sums stated in his application as security. *First,* it is not clear how the said sums were arrived at nor did the defendant's counsel attempt shed light on the basis upon which the said sums were arrived at. *Second,* and more important is the question whether the defendant has laid any basis to warrant the said prayer.

45. The starting point is that an application for security for costs is an exception to the rule. In *Farrell v. Bank of Ireland*[29] Clarke J. explicated the law with impressive clarity. He said:

"… the jurisprudence in relation to all of the areas where security for costs is considered … starts from a default position that, in the absence of some significant countervailing factor, the balance of justice will require that no security be given. The reasoning behind that view is that, if it were otherwise, all impecunious parties might, in substance, be shut out from bringing cases or pursuing appeals. Such a balance would be untenable and disproportionate. It is for that reason that there must be some additional factor at play before an order for security for costs can be made."

46. In exercising its discretion to order security for costs, a court will consider the circumstances of each case and in particular whether it is fair and equitable, to both the parties, to require the furnishing of security.[30] When considering the circumstances of each case the court will take into account the financial status of the litigant and whether an order for security for costs may effectively preclude a Plaintiff from proceeding with his case.[31] The courts will also guard against placing unreasonable barriers in the way of either litigant to the extent that justice may be denied.[32] The court must bear in mind the following :-

*a. Article **159** of the Constitution vests judicial authority in the judiciary and prescribes the manner in which it should be exercised.*

b. The Constitution vests the courts with the inherent power to regulate their own proceedings and such discretion should be exercised in order to give effect to fairness and the interests of justice.

c. Courts should not adopt a position that forms part of our law, if it would infringe on the Constitution or constitutionally guaranteed rights.

*d. Section **7 (1)** of the Sixth Schedule to the Constitution provides that all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.*

e. Courts are required to balance the interests of a plaintiff who is prevented from pursuing a litigant by virtue of an order for security for costs against the injustice that will befall a defendant who is unable to recover costs.

*f. When developing the common law, courts must promote the spirit, purport and objects of the Bill of Rights in terms of Article **259** of the Constitution.*

*g. Article **50(1)** of the Constitution provides that "every person has the right to have any dispute resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body."*

47. In determining an order for security for costs the onus lies on the party seeking security for costs to go beyond merely showing that the Plaintiff is unable meet an adverse costs order. The applicant must satisfy the court that the main action is vexatious, reckless or otherwise amounts to an abuse. An action will be vexatious if it is obviously unsustainable. A reading of the Plaint leaves me with no doubt that the Plaint is not vexatious, reckless or otherwise amounts to an abuse. The issues raised in the Plaint and the defence are matters which warrant resolution in a full hearing.

48. It is not enough to allege that a Plaintiff is foreign company nor does a company become a risk to court's jurisdiction simply because it is a foreign company. The defendant did not explain the nomenclature it deployed, namely that "the plaintiff is a foreign company and risk to the jurisdiction of the court." A person so alleging must demonstrate that the company either is planning to cease operating in the country or has no known assets or abode within the jurisdiction. A litigant, whether local or foreign is entitled to the constitutional and procedural safeguards which guarantee a fair trial.

49. It is trite law that the courts have a discretion to grant or refuse an application for security and, in coming to a decision, the court should have due regard to the particular circumstances of the case and considerations of equity and fairness to both parties. There must be some special fact, inherent to the action itself, which will persuade a court to exercise its discretion in favour of the applicant. The court should exercise its discretion in favour of granting the order only sparingly and in exceptional circumstances.

50. It is, however, necessary to consider what the effect of granting an order for security would be. The court should consider whether the order would have the effect of preventing the plaintiff from accessing justice or infringe his/its right guaranteed by Article **50 (1)** of the Constitution. The Civil Procedures Rules requiring provision of security before trial must be viewed from the prism of the Constitution such that the provisions should not be used to inhibit access to justice.

51. The courts' discretion must be exercised in a manner which is not discriminatory. In this context at least, I consider that all persons (whether local or foreign) are equal before the law. It would be both discriminatory and unjustifiable to exercise the courts discretion in a manner that may hinder a citizen or a foreigner from accessing justice just because he is alleged to be poor or a foreigner. Poverty, unemployment or being foreign should not be the sole ground to unleash such a drastic order which has the potential of impinging on a litigant's constitutional rights. The discretion should be exercised in a manner reflecting its rationale, not so as to put a litigant at a disadvantage compared with the defendant.

52. In this connection, I do not consider that one can start with any inflexible assumption that any person who is poor, unemployed or a foreign company should provide security for costs. Merely because a person is alleged to be unemployed or poor or foreign does not necessarily mean that enforcement will be more difficult in the event the person loses the case. The onus lies on the person alleging to persuade the court that it would be impossible to recover the debt. In the instant case, the Plaintiff described itself as a reputable company with international presence. The defendants failed to discharge the burden placed upon it by the law to demonstrate that the Plaintiff may not be able to pay any sum or costs payable to the defendant should it lose the case nor did the defendant establish a basis to support their apprehension that the Plaintiff may exit the jurisdiction of this court. The foregoing is consistent with the considerations listed in paragraph **46** above. The defendant should furnish evidence to support its claim that the plaintiff is financially unstable so as to justify its claim that it will experience difficulties in recovering costs from the plaintiff should it be successful in the suit.

53. The exercise of the courts' discretion should not be either automatic or inflexible. If the discretion to order security is to be exercised it should therefore be on objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular Plaintiff. Impecuniosity of an individual or a company within the jurisdiction is not the sole basis for seeking security. Other considerations include substantial obstacles to enforcing the judgment. None of these was cited or demonstrated.

54. In so far as impecuniosity may have a continuing relevance it is not the only ground showing that the Plaintiff lacks apparent means to satisfy any judgment but on the ground that the effect of the impecuniosity would be either (i) to preclude or hinder or add to the burden of enforcement against such assets as do exist or (ii) as a practical matter, to make it more likely that the Plaintiff would take advantage of any available opportunity to avoid or hinder such enforcement.

55. There can be no inflexible assumption that there will in every case be substantial obstacles to enforcement against a Plaintiff or wherever his, her or its assets may be. If the discretion is to be exercised in favour of the applicant, there must be a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden (such as costs or the burden of an irrecoverable contingency fee or simply delay).

56. It is incumbent on an applicant to show some basis for concluding that enforcement would face any substantial obstacle or extra burden meriting the protection of an order for security for costs. Even then it seems to me that the court should consider tailoring the order for security to the particular circumstances. If, for example, there is likely at the end of the day to be no obstacle to or difficulty about enforcement, but simply an extra burden in the form of costs (or an irrevocable contingency fee) or moderate delay, the appropriate course could well be to limit the amount of the security ordered by reference to that potential burden. Certainly, no evidence has been put before me to suggest that the defendants would, or even could, face any real obstacle of difficulty of legal principle in enforcing in the recovery for costs against the Plaintiff.

57. If the discretion to order security is to be exercised it should therefore be on objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular Plaintiff. It may be incumbent on an applicant to show some basis for concluding that enforcement would face substantial obstacle or extra burden meriting the protection of an order for security for costs.

58. Taking all these into consideration, I am of the view that to accede to the defendants' application will be to place obstacles in the plaintiff's quest for justice. Such an obstacle in the circumstances of this case if allowed cannot pass constitutional muster. The upshot is that the defendants' application dated **23rd**September 2020 is dismissed with costs to the Plaintiff.

Orders accordingly

SIGNED AND DATED AT NAIROBI THIS 11TH DAY OF MAY 2021

JOHN M. MATIVO

JUDGE

---

[1] Civil Appeal No. 98 of 2003 (U.R.).

[2] **{2012} e KLR.**

[3] {1982} KLR 95.

[4] {1995} 3 ALL ER 534.

[5] {2012} e KLR**.**

[6] {2016} e KLR

[7] {2002} e KLR.

[8] {2016} e KLR.

[9] {2002} 2 KLR 271.

[10] {2019} e KLR.

[11] {1980} e KLR.

[12] Nairobi Civil Application No. 329 of 2009.

[13] {2019} e KLR.

[14] {2005} e KLR

[15] {2021} e KLR

[16] {2008} e KLR.

[17] {2015} e KLR.

[18] 3rd Edition, Paragraph 845.

[19] {2015} e KLR.

[20]{2021} e KLR.

[21] {2014} e KLR

[22] {1982} KLR 1.

[23] HCC 257/2003.

[24] See *Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa* Civil Appeal No. 54 of 1999.

[25] See *Kivanga Estates Limited v National Bank of Kenya Limited* {2017} e KLR.

[26] See Trust Bank Limited v Amin Company Ltd & Another (2000) KLR 16.

[27] {2020} e KLR.

[28] Civil Appeal No. 35 of 2000.

[29] {2012} IESC 42, at para. 4.17.

[30] See *Magida v Minister of Police* 1987 (1) SA 1 (A) and *Blastrite (Pty) Ltd v Genpaco Ltd*; *In re: Genpaco Ltd v Blastrite (Pty) Ltd* (4530/15) [2015] ZAWCHC).

[31] See Vanda v Mbuqe & Mbuqe; Nomoyi v Mbuqe 1993 (4) SA 93 (TK)).

[32] See Silvercraft Helicopters (Switzerland) Ltd and Another v Zonnekus Mansions (Pty) Ltd, and Two Other Cases 2009 (5) SA 602 (C)).