



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**HIGH COURT CIVIL DIVISION**

**CIVIL CASE NO. E081 OF 2020**

**SOLOMON ODONGO MUYEKA ALUBALA.....PLAINTIFF**

**-VERSUS-**

**RICARDO BADOER.....DEFENDANT**

**RULING**

The application dated 19<sup>th</sup> March 2021 seeks the following orders:-

- 1. THAT the Plaintiff Respondent be ordered to give security for costs within a period of 30 days of the order:**
- 2. THAT the security for costs be assessed at Kshs. 1,000,000/- or any other sum the Court deems fit since the award being sought by the Plaintiff/Respondent is over Kshs 30,000,000/**
- 3. THAT the Plaintiff/Respondent be ordered to give security for costs in form of a bank undertaking/Guarantee or depositing the said sum into a joint interest earning account to be opened by the Advocates herein;**
- 4. THAT the suit be struck out with costs in default of the provision of the said security within the prescribed period.**
- 5. THAT the Costs of this Application be in the course.**

The applicant's supporting affidavit sworn on the same date supports the application. The plaintiff filed grounds of opposition dated 30<sup>th</sup> March, 2021. Parties relied on their respective pleadings.

Counsel for the applicant submitted that the application seeks security for costs. The respondent has no known assets that would pay any awarded costs. The amount claimed is enormous and this has made the defendant incur costs in form of legal fees and other expenses. The applicant has a bona fide defence.

Counsel for the respondent opposed the application. It is submitted that the defendant has not proved that the plaintiff is not capable of paying costs. Counsel referred to Article 48 of the Constitution on access to justice and Article 50 on the right to have a dispute determined by the court. According to the plaintiff, the defendant is trying to stifle the plaintiff's case. Being unemployed does not mean that one cannot meet the costs. The plaintiff maintain that the defendant is trying to use technicalities to impede justice.

**ANALYSIS AND DETERMINATION**

The application is brought under Order 26 Rules 1 and 2 of the Civil Procedure Rules. The Rules states:-

- 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.**
- 2. If an application for security for costs is made before a defence is filed, there shall be filed with the application an affidavit setting out the grounds of the defence together with a statement of the deponent's belief in the truth of the facts alleged.**

The applicant's main contention is that the plaintiff is not employed. The amount being claimed in the plaint is enormous and this has made

the defendant/applicant incur high legal fees and other expenses.

In his plaint dated 28<sup>th</sup> August, 2020, the plaintiff states that he was the founder of Wazito Football Club in 2011 until 2018 when the defendant approached him with the intention of joining the team. The plaintiff is claiming Kshs.30million as special damages for lost opportunities, general damages for libel and slander and exemplary damages for defamation. The plaintiff admits that the defendant is not a Kenyan.

While dealing with the issue of security for costs, the Court of Appeal for East Africa in the case of **NOORMOHAMED ABDALLA –V- PATEL (1962) E.A 447** observed as follows at page 452:-

**“While we have held that we have the power to make the order asked for in this application and therefore accept that it is a power to be exercised if circumstances warrant, we have had the benefit of fuller argument than was tendered in the earlier cases, and have reached the conclusion that the power should be sparingly exercised. In England the poverty of a plaintiff is no ground for ordering security for costs in the suit except in the case of a nominal plaintiff; nor have we found any case in which the costs in the court below have been included in the security on appeal. A similar rule applies to suits in India, though in India, as noted above, an appeal court has specific power to include the costs of the suit in an order for security. In Kenya so far as we know (for the point was not mentioned in argument) security is not ordered in the Supreme Court on the ground of poverty. In the circumstances it would appear something of an anomaly if they were ordered to be secured upon appeal, though of course the principle to be applied is not the same. It is right that a litigant, however poor, should be permitted to bring his proceedings without hindrance and have his case decided.”**

In the case of **KEARY DEVELOPMENT –V- TARMAL CONSTRUCTION (1995) 3 ALL E.R. 534, at 540** the court stated the principles to be considered by the court when dealing with an application for security for costs. These are:-

- 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 pursuing 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 the 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. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity.**
- 4. In considering all the circumstances, the court will have regard to the plaintiff company'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. There may be cases where this can properly be inferred without direct evidence.**

The two parties herein know each other. They were involved in Wazito Football Club together. There are companies where the two held shares and were also directors. The pleadings show that the two were directors in **MADGOAT TELEVISION LTD, URSARIA SPORTS LIMITED, RED LION SPORTS MANAGEMENT LIMITED** and **BADOER TALENT AGENCY LIMITED**.

In my view, the plaintiff is not a busy body who has no relation whatsoever with the defendant. Although a claim for security for costs is lawful, it should be utilized carefully such that such orders are not used to scare away potential litigants who would like to ventilate their disputes in court. Security for costs should not be a pre-requisite to accessing justice. A party should not be barred from court on the basis of claims by his adversary that he will not be able to pay costs. That should only happen when the case is clearly weak on the face of it and one brought for purposes of settling scores or to annoy the defendant. In my view, any party who approach the court contending that he has a lawful claim against another party should be heard on the substance of his claim and not given pre-conditions before being heard. I do find that the application for security for costs dated 19<sup>th</sup> March, 2021 is not merited and is hereby dismissed. Costs shall follow the outcome of the main suit.

Dated and Signed at Nairobi this 8<sup>th</sup> day of July, 2021.

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**S. CHITEMBWE**

JUDGE