



Munene v White Rhino Ventures Ltd t/a Betboss Gaming & 3 others (Civil Case E478 of 2020) [2021] KEHC 225 (KLR) (Commercial and Tax) (14 October 2021) (Ruling)

Neutral citation: [2021] KEHC 225 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E478 OF 2020
WA OKWANY, J
OCTOBER 14, 2021**

BETWEEN

DERRICK MWANIKI MUNENE APPLICANT

AND

WHITE RHINO VENTURES LTD T/A BETBOSS GAMING .. 1ST RESPONDENT

ANDREW REGINAL KARL WILSON 2ND RESPONDENT

MARTIN FRANCIS QUINLAN 3RD RESPONDENT

WINNIE WANJIRU MWANGI 4TH RESPONDENT

RULING

1. This ruling determines two applications; the Plaintiff's application dated 26th August 2020 (hereinafter "the 1st Application") and the Defendant's application dated 8th March 2021 (hereinafter "the 2nd Application").

Application 26th August 2020.

2. The Plaintiff seeks the following orders in the 1st application: -

- 1) Spent.
- 2) THAT the veil of the 1st defendant be lifted by the court because the 1st respondent is being operated by the 2nd, 3rd and 4th respondents as a sham to induce members of the public to participate in betting for purposes winning a fortune, only for the respondents fail to honour payments for the bets won.



- 3) THAT the 1st, 2nd, 3rd and 4th Respondents be ordered to furnish security by depositing the sum of Kshs. 100,000,000/= in court within 3 days of service of his order or their movable and immovable assets including all monies in their bank accounts be attached pending the hearing and determination of this suit.
 - 4) THAT in the alternative, pending the hearing and determination of the suit, the money in all the respondents bank accounts in Kenya be attached and the monies therein be held in the accounts until hearing and determination of this suit.
 - 5) THAT the costs of this application be borne by the respondent.
3. The application is supported by the Applicant's affidavit and is premised on the following grounds: -
- a. The 1st defendant has failed to pay the plaintiff the prize of the monies he has won.
 - b. The 1st defendant is operated as a sham by the 2nd, 3rd and 4th defendants to defraud gullible Kenyans.
 - c. The 1st defendant is likely to wind up its operations in Kenya due to the government's directives to revoke licenses of betting firms who allegedly do not pay taxes.
4. The 1st respondent opposed the application through the replying affidavit of its General Counsel Mr. George Gerald Mearly who states that the application is misconceived and a blatant attempt to defraud the 1st defendant. He avers that the plaintiff has not given any plausible reason or evidence to warrant lifting the corporate veil. He contends that the Plaintiff's prayer for security of costs is misguided as the mere fact that the 2nd and 3rd defendants are foreigners is not sufficient basis for the grant of an order of security for costs. He further states that the freezing order is not warranted as the Plaintiff has not demonstrated that the respondents are disposing or removing their property from the court's jurisdiction.

Application dated 8th March 2021

5. The defendants filed the 2nd application seeking orders that: -
- I. The Plaintiff be ordered to provide security for the Defendants' costs of this suit in the sum of Kshs. 1.7 Million or such other sum or in such other manner as may be approved, within seven (7) days of the Order herein or such other period, as the court may order, to be held in an interest-bearing account in the joint names of the Advocates for the Plaintiff and the Defendants herein;
 - II. The Plaintiff's suit as against the Defendants herein be stayed pending the deposit of such security to be held in a manner acceptable to the Defendants;
 - III. Alternatively, in default of compliance with prayer (1) above, the Plaintiff's suit as against the Defendants be dismissed with costs;
 - IV. The costs of this Application be borne by the Plaintiff.
6. The Application is supported by the affidavit of George Gerard Mealy and is premised on the grounds that: -
- a) The Plaintiff, despite being a Kenyan citizen, has no known assets within the jurisdiction of this Honourable Court, which could satisfy an order for costs if such Defendants' Security for Costs order was ultimately made in favour of the Defendants, taking into account the astronomical subject matter of the suit;



- b) The Plaintiff's case is for, inter alia: that judgment be entered jointly and severally against the Defendants for Kshs. 100 Million accompanied by general damages among other reliefs, interest and costs of the suit;
 - c) The Defendants' contention is, inter alia; that the impugned text communication founding the present suit is a forgery, abstracted and or illegally amended from its Original state to facilitate fraud against the 1st Defendant, as no such record appears on the 1st Defendant's system and as such the said communication was not sent by the 1st Defendant, that the BET ID cited in the impugned text communication does not match the 1st Defendant BET IDs numbering system and that in any event, the Plaintiff had not met the primary mandatory terms and conditions of the Jackpot for him to claim the sum of Kshs. 100 Million being the Super Jackpot sum, which deficiencies are openly evidenced in the Plaintiff's own Plaint herein, and the Defendants' pleadings and documents;
 - d) On the premise, the Defendants have filed a bona fide Defence.
 - e) The Defendants are reasonably apprehensive that if their Defence is successful they will be unable to recover the costs of such event.
 - f) This Honourable Court has jurisdiction and discretion under Order 26 of the *Civil Procedure Rules* to grant the Order for security for costs;
 - g) It is necessary and shall be just, in the circumstances of the present case that the present application is heard urgently and in priority before the suit proceeds and the Defendants continue to incur more costs in the matter;
 - h) It shall no doubt be in the interests of justice to grant the reliefs of the application.
7. The Plaintiff opposed the application through his replying affidavit sworn on 22nd March 2021 wherein he avers that the application is an afterthought and a scheme to drive him from the seat of justice. He states that the defendants have not tendered any evidence to show that he will be unable to pay costs should he be unsuccessful in the case and adds that the law does not envisage that a party with a legitimate claim will be denied justice on the basis that he has no assets.
8. The applications were canvassed by way of written submissions which I have considered. The main issue for determination is whether the parties herein are entitled to an order for security of costs. The law governing the granting of orders for security of costs is set out under Order 26 of the Civil Procedure Rules which provides as follows:
- “ 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 defence the grounds of the defence together with a statement of the deponent's belief in the truth of the facts alleged.
 - 3. 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.
 - 4. In any suit brought by a person not residing in Kenya, if the claim is founded on a bill of exchange or other negotiable instrument or on a judgment or order



of a foreign court, any order for security for costs shall be in the discretion of the court.

5

- (1) If security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit.
- (2) If a suit is dismissed under subrule (1) and the plaintiff proves that he was prevented by sufficient cause from giving the required security for costs the court may set aside the order dismissing the suit and extend the time for giving the required security.

6.

- (1) Where security by payment has been ordered, the party ordered to pay may make payment to a bank or a reputable financial institution in the joint names of himself and the defendant or in the names of their respective advocates when advocates are acting.

9. Both parties seek orders for security of costs. While the plaintiff seeks the deposit of the sum of Kshs 100,000,000/= by the defendants, the defendants, on the other hand, seek orders to compel the plaintiff to deposit the sum of Kshs 1.7 Million.
10. The plaintiff's case was that the 1st defendant is a sham company operated by the 2nd, 3rd and 4th defendants with the sole aim of defrauding unsuspecting Kenyans. The plaintiff submitted that the 1st defendant is a foreign company that is likely to wind up its operations in Kenya due to government's decision to revoke licenses of betting firms.
11. The defendants' case was that they are apprehensive that should the defence be successful, they will be unable to recover their costs from the Plaintiff who is a man of straw with no known assets within the jurisdiction of Kenya.
12. In *Patrick Ngetakimanzi vs Marcus Mutuamuluvi & 2 others- High Court Election Petition No. 8 of 2013* it was held: -

“Security of costs ensures that the respondent is not left without recompense for any costs or charges payable to him. The duty of the court is therefore to create a level ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access to justice vis-a-vis the respondent's right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him.”

13. In *Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others, CA No. 38 of 2013 [2014] eKLR*, the Supreme Court emphasized that: -

“In an application for further 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. And the onus is on the Applicant to prove such inability or lack of good faith that would make an order for security reasonable.”



14. *In Shah v Shah [1982] KLR 95* it was 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 discretion, to be exercised reasonably and judicially, to refuse to order that security be given”.

15. In *Kibiwott & 4 others vs the Registered Trustees of Monastery of Victory Nakuru, HCCC No 146 of 2004* the court observed that for a party to succeed in an application for security of costs he has to prove that the opposing party will not be able to pay the costs to be awarded in the event of the suit filed by such a party being dismissed.

16. From the above cited authorities, it is clear that an order for security of costs is discretionary which discretion must be exercised reasonably and judicially. In determining whether or not to issue an order for security for costs, the court has to consider the plaintiff’s place of residence, the conduct of the parties and the inability of the plaintiff to pay the costs. This court has to satisfy itself that it will be just to make an order of costs in the circumstances of each case.

17. In the present case, both the plaintiff and the defendants seek the court’s intervention with regard to an order for the deposit security of costs. I note that the defendant alleges that the plaintiff is a man of straw without furnishing any proof of his averments. In the same breath the plaintiff alleges that the defendant is likely to wind up its operations in Kenya which allegation is not supported by evidence. My finding is that, in the circumstances of this case, it will be in the interest of justice that the parties be allowed to prosecute their respective cases conclusively.

18. In sum, I find that the 2 applications are not merited and I therefore dismiss them with no orders as to costs.

Dated, signed and delivered via Microsoft Teams at Nairobi this 14th day of October 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mshindi for Wandaka for Plaintiff/Applicant

Mukuha for Bwire for Defendant.

Court Assistant: Margaret

