



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 115 OF 2017

WADE COX.....PLAINTIFF/RESPONDENT

VERSUS

GEORGE ODHIAMBO OKELLO.....DEFENDANT/APPLICANT

RULING

- 1) This ruling is the outcome of two applications. The first application is the chamber summons dated 23.2.2021 taken out by the defendant whereof he prays for an order directing the plaintiff to provide security for costs to the defendant within 7 days. The summons is supported by the affidavit sworn by Nicholas Ngumbi to oppose the application
- 2) The parties were directed to file written submissions. I have considered the grounds set out on the face of the summons plus the facts deponed in the rival affidavits. I have also considered the rival written submission. The defendant has argued that he has reason to believe that the plaintiff will not be in a position to pay his costs when required since he has no assets domiciled in Kenya.
- 3) It is also stated that the plaintiff has no fixed abode in Kenya therefore the defendant is reasonably apprehensive that the plaintiff will not be in a position to pay the defendant's costs in the event the suit is dismissed.
- 4) The plaintiff opposed the summons arguing that the defendant has failed to show that the plaintiff is financially unable to costs. The plaintiff stated that he is the coordinator general of the Christian Churches of God, which is a global organization and therefore he is a man of means hence capable of settling costs.
- 5) The applicable law in an application for security of costs is order 26 rule 1 of the Civil Procedure Rules which mandates the court to order a party to provide security for the whole or any part of the costs of any defendant or third or subsequent party given by any other party.
- 6) Having considered the rival arguments, the question is whether the defendant has properly founded his application seeking for an order directing the plaintiff to provide security for costs. In response to the defendant's application, the plaintiff respondent has demonstrated that he is the coordinator general of the Christian Churches of God, Kenya, an affiliate of Christian Churches of God which is a religious organization with worldwide presence.
- 7) The plaintiff has further shown that he is actually authorized to bring or defend proceedings on behalf of the organization. It has also been shown by the plaintiff that the organization he represents is registered and with offices in Kenya. The defendant has not demonstrated that those offices have been closed.
- 8) The plaintiff has further demonstrated that the organization he represents own ten (10) acres of land in Isiolo county at Eremet location which assertion the defendant failed to controvert. The plaintiff has further established that the organization he represents holds two bank accounts at the Cooperative bank of Kenya, Donholm branch.
- 9) It is clear that the plaintiff has demonstrated that the organization he represents is domiciled in Kenya and has financial assets. In the end I find no merit in the defendant's chamber summons dated 23rd February 2021. It is dismissed with costs to abiding the outcome of this suit.
- 10) The second application is the motion dated 16th March 2021 taken out by the plaintiff in which he sought for leave to file and serve additional witness statements and evidence the plaintiff intends to rely during the hearing of the case.
- 11) The plaintiff filed in support of the application, the affidavit sworn by Nicholas Ngumbi, the plaintiff's advocate. The defendant strenuously opposed the application. Parties were directed to file written submissions. I have considered the grounds stated on the face of the motion plus the facts deponed in the rival affidavits. I have also taken into account the written submissions of the plaintiff that the additional evidence is very crucial to the plaintiff's case and will greatly assist this court to resolve the case.

12) The plaintiff also pointed out that the defendant is yet to comply with Order 11 of the Civil Procedure Rules. The defendant opposed the motion arguing that there has been an inordinate delay of 7 years in prosecuting the suit without any justification. The defendant urged this court to instead dismiss the suit for want of prosecution pursuant to the provision of Order 17 rule 2 of the Civil Procedure Rules.

13) In response the plaintiff blamed the defendant for the delay in prosecuting the suit. It is stated that the defendant went into hiding in Uganda and South Africa thus failing to participating in the matter. The defendant stated that even if he was outside Kenya, there are provisions of law which would have allowed the plaintiff effect process upon the defendant.

14) Having considered the rival submissions, it is clear that the motion dated 16th March 2021 is an application taken out by the plaintiff who specifically seeks for leave to file and rely on new witness statements and evidence over and above those already filed.

15) The provisions of Order 17 rule 7 of the Civil Procedure Rules envisages a party who seeks to have a suit dismissed for want of prosecution to file a formal application. The defendant has instead of filing a formal application decided to rely on his response to the plaintiff's motion to apply for the suit to be dismissed for want of prosecution.

16) I decline to entertain the invitation and instead proceed to consider the merits or otherwise of the plaintiff's motion. The plaintiff expressly stated that the evidence he proposes to introduce as additional evidence will bolster his case and assist the court in determining the dispute.

17) The defendant did not contest this assertion. I am convinced that the evidence proposed to be introduced are important to the plaintiff's case and will assist this court to properly adjudicate the case. If application is allowed, the defendant will not be prejudiced in any way since he is entitled to file further evidence and witness statements to answer or counter those freshly introduced by the plaintiff.

18) In the end, I find the plaintiff's motion dated 16th March 2021 to be meritorious. It is allowed as prayed save that costs shall abide the outcome of this suit.

19) For the avoidance of doubt, the summons dated 25th February 2021 is dismissed with costs abiding the outcome of this suit. On the other hand, the motion dated 16th March 2021 is allowed with costs abiding the outcome of this suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF OCTOBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant