



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NUMBER 191 OF 2019**

**AGGREY SHIVONA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**THE STANDARD GROUP PLC.....DEFENDANT/APPLICANT**

**RULING**

The Defendant/applicant herein has moved this court by way of an application dated the 5<sup>th</sup> November, 2019 seeking for the following orders;

- (1) The Plaintiff/ Respondent be ordered to give security for costs for KS 1,235,135 or any other sum the court deems fit into a joint interest earning account to be opened by the Advocates herein, as security for the costs of the Defendant within 30 days of the order.
- (2) The suit be struck out with costs in default of the provision of the said security within the prescribed period.
- (3) Costs of the application.

The application is mainly made on the ground that the plaintiff has no known assets which could satisfy an order for costs if such an order was ultimately made in favour of the Defendant, taking into account the huge amounts involved in the suit. That it is only fair and just that the applicant is allowed to have insurance for the huge amount of money that is to be spent in the prosecution and defence of the matter and its incidentals, before subjecting it to more costs and expenses.

The Respondent has opposed the application on the grounds that the application has been presented in bad faith and its intended to diminish or stifle him from enjoying his inalienable right of access to justice. That the instant application would only arise where there is anxiety if the plaintiff is a foreigner without any known assets in Kenya which would give rise to the genuine concern that the Defendant would not be in a position to recover its costs from such a plaintiff.

The application was canvassed by way of written submissions which the court has duly considered together with the supporting affidavit and the grounds of opposition.

The applicable law in an application for security for costs is order 26 Rule 1 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”.***

As rightly submitted by the Defendant/applicant, grant for orders sought herein is a matter of judicial discretion as the court held in the case of ***Shah and others Vs Manurama Limited and others (2003) E.A 294*** Cited with approval in the case of ***Ahmed Kulimye Bin & 2 others Vs Kenya Revenue authority & another (2012) eKLR***. The same position was taken by the court in the case of ***Cancer Investments Limited Vs Sayani Investments Limited (2010) eKLR***.

The rationale for security for costs was discussed in the case of ***Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 others (2014) eKLR*** as follows;

“The principles applicable in an application for security for costs are clearly enunciated in a number of cases but to cite a few ***Lalji Ganji Nathoo Vs Nathoo Vassanje (1960) EA, 315, Boor Mohammed Abdulla Vs Reinchodbhal J. Patel & Another (1962), Musera & another Vs Stallion Insurance Company Limited 2005, 1 KLR 431, that of Kearly Development Vs Tarmac Construction (1995) 3 ALL ER 534 and ocean view Beach Hotel Limited Vs Salim Sultan Molio & others (2012) Eklr***

The test in an application for security for costs is not whether the Plaintiff has established a prima facie case but whether the Defendant has

shown a bonafide defence. This was the holding in the case of Shah Vs Sheti Civil Appeal No.34 of 1981.

The same principles were espoused in the case of *Jayesh Hasmukh Shah Vs Narin Haira & another (2015) eklr* in which the court held;

***“It is now settled Law the order for security for costs is a discretionary one as long as that discretion is exercised reasonably, and having regard to the circumstances of each case. Such factors as absence of known assets in the Country, absence of an office within the jurisdiction of the court, inability to pay costs; the general financial standing or wellness of the plaintiff; the bonafides of the plaintiff’s claim, or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account”.***

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 same must be proven. This was the holding in the case of **Kenya Education Trust Vs Katherine S.M. Whitton Civil Appeal No 310 of 2009**.

It should, however, be noted that much will depend on the circumstances of each case though the final result must be reasonable and modest. In the case of Marco Trols & Explosive Limited Vs Mamunje Brothers Limited (1988) Eklr 730 this point was enunciated by the court in the following terms;

***“The exercise of the court’s power is discretionary. However, the onus is on the applicant to prove such inability or lack of good faith that would make the order for security reasonable”.***

Being guided by those legal principles, the only issue for determination is whether or not an order for security for costs can issue against the plaintiff. As discussed above, one of the principles to consider is the ability of the plaintiff to pay the costs in the event that he is not successful and that, is one of the grounds relied upon by the Defendant. In this regard the applicant has cited several authorities which include that of **Jaribu Credit Limited Vs CFC Stanbic Bank Limited (2004)** and that of **Pearson & another Vs Naydler & others (1977) 3 ALL ER 531**.

On his part, the Respondent cited Article 50 of the Constitution which provides that;

***“Every person has the right to have his dispute that can be resolved by the application of the Law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body”.***

In his submissions he has relied on the case of **Shakalanga Jirongo Vs the Board of National Social Security Fund HCC No 957 of 2000** in which the court held that;

***“Poverty is not sufficient ground for an order for security for costs”.***

He has also cited the case of **Noornamohammed Abdullah Vs Ranchorbhai J. Patel (1962) EA 447** wherein the court held that;

***“It is right that a litigant, however poor should be permitted to bring his proceedings without hindrances and have the case decided”.***

However, the court notes that the same were decided many years ago. The applicant also cited a more recent case of **Keystone Bank Limited & 4 others Vs I&M Holdings Limited & another (2017) Eklr** where the court held;

***“In an application for security of 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 same must be proven”.***

The court notes that the applicant has just made a general statement that the Respondent may not be able to settle the costs in the event that he does not succeed in his suit. To that extent, it did not discharge its evidential burden.

On the issue of whether the defendant has a bonafide defence, the court has perused the defence as filed. As was held in the case of **Shah Vs Shah (supra)**, the test in an application for security for costs is whether the defendant has a bonafide defence. I am alive to the fact that at this stage, the court should not consider the merits of the case or the defendant’s defence as that is the mandate of the court that will hear the matter. I note that the defendant does not dispute the plaintiff’s claim of Copyright in the subject articles, but denies that it published the same without the consent of the plaintiff. It further denies that the articles were sent by the Plaintiff to it based on any promise or inducement, which facts the Plaintiff has denied in his Reply to Defence. The only way the court can establish the veracity of those assertions is by taking evidence at the main trial. It would be unfair in the circumstances of this case, to order the plaintiff to deposit the sought for, security for costs.

In view of the foregoing, I am of the considered view that the application is not merited and the same is hereby dismissed. The costs shall abide the outcome of the suit.

Dated, signed and delivered at Nairobi this 9<sup>th</sup> day of July, 2020.

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**L. NJUGUNA**

**JUDGE**

**In the presence of**

.....for the Defendant/ Applicant

.....for the Plaintiff/ Respondent