



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 201 OF 2019

ALICE MUMBI.....PLAINTIFF/RESPONDENT

- VERSUS -

BOL RONALD GERDINUS.....1ST DEFENDANT

BOL HOLDINGS AFRICA CO. LIMITED.....2ND DEFENDANT

RULING

1. The Notice of Motion application dated 22nd November 2019 is filed by the plaintiff, **ALICE MUMBI**. It is brought under Order 26 Rule 1 of the Civil Procedure Rules. The plaintiff seeks for an order that **BOL RONALD GERDINUS**, the 1st defendant be ordered to deposit within 30 days the sum of Ksh 30 million or such security as is sufficient to cover the plaintiff's costs in the counter claim. Further in default of the 1st defendant making such deposit as prayed for, the counter claim be dismissed.

2. The plaintiff deponed, in support of the prayers in the application that the 1st defendant filed his defence and counterclaim whereby he counterclaimed against the plaintiff for Ksh 50 million. That the 1st defendant was charged with a criminal offence, before the Kiambu Chief Magistrate's Court being Criminal Case No 1617 of 2019. The 1st defendant failed to attend court for that criminal case on 15th October 2019 whereupon the Kiambu criminal Court issued warrant for his arrest. The plaintiff then deposed:

"7. That clearly, the 1st defendant is currently a fugitive running away from the law and may not be keen on clearing his name before the court..."

"10. That the 1st defendant has no known assets in this country and in the event his counterclaim against me is unsuccessful, I may not be able to recover costs from him."

3. The application is undefended by the 1st defendant.

ANALYSIS

3. Order 26 Rule 1 of the Civil Procedure Rules provides:

"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."

4. The court in the case **Opulent Trade Links (K) Limited v Ngenda Location Ranching Company Limited (2019) eKLR** in discussing the Rule under which the court will order security of costs be provided stated:

"In Bayusuf Grain Millers vs Bread Kenya Limited (2005) eKLR, the Court held as follows:

"What is the Plaintiff required to establish under the provisions of Order XXXVIII (now Order 26) of the Civil Procedure Rules? The Plaintiff is required to prove that the Defendant with the internet to delay the Plaintiff or to avoid the process of the Court or to obstruct or delay the execution of any decree that may be passed against him has either disposed off or removed from the local limits of the jurisdiction of the Court his property or is about to abscond or leave the local jurisdiction of the Court. In Savings & Loan Kenya Ltd versus Eustace Mwangi Mungai Nairobi HCCC No.75 of 2001 (Milimani) unreported, Ringera J

(as he was then) stated at page 5 when a similar application for attachment before judgment was made:

“Be that as it may, I think that howsoever well-grounded the Plaintiff’s apprehension might appear to be, it remains just that; well-grounded apprehension. Without evidence that the Defendant intends to do what is feared, the Court cannot grant the Order of pretrial attachment of the Defendants property or ask him to furnish security. Is there any such evidence here? I fear not. There is no deposition of any positive fact tending to show that the Defendant intends to dispose of his assets. Such positive facts might have included the fact that the Defendant either negotiating the sale of his properties or entering into an agreement to sell the same.”

5. The Court of Appeal had this to say in the case **Upward Scale Investments Co. Ltd & 7 Others v Mwangi Keng’ara & Co Advocates (2017) eKLR:**

“14. The nature of security for costs is to ensure firstly, that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty; secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party. See *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR*.....

16. Did the learned Judge err in granting the orders for security for costs? We believe he did. We say so because, by the very nature of an order for security for costs, it is not directed towards enforcing payment of the costs as such. It is designed to ensure that a litigant, who by reason of near insolvency is unable to pay the costs of the litigation should he lose, is disabled from carrying on the litigation indefinitely except upon terms and conditions which afford some measure of protection to the other parties. The onus is on the applicant to prove such inability or lack of good faith on the part of the respondent that would make an order for security for costs reasonable. This much was restated in *Noormohamed Abdulla -vs- Ranchhodbhal J. Patel & Another [1962] E.A. 448* thus,

“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.” Emphasis added.

6. Bearing the above jurisprudence, I find that the plaintiff gave very scanty information which is not enough to move the court to grant prayer she seeks. To re-cap the plaintiff relies on the fact that a warrant of arrest was issued by a criminal court against the 1st defendant. The order of the criminal court the plaintiff relies on, issued on 8th November 2019 is as follows:

“That the case against the Accused be and is hereby withdrawn under section 87 (a) of the C.P.C pending execution of warrant of arrest.”

7. That alone, does not satisfy the burden of proof required. The plaintiff needed to prove that the 1st defendant was intent to delay the plaintiff or to avoid process of the court or to obstruct or delay execution of any decree that may be passed against him. The plaintiff failed to provide evidence under which the court can exercise its discretion. The plaintiff also needed to show her estimate costs of this suit which the defendant would need to meet, which she did not.

8. It is because of the above finding that the plaintiffs Notice of Motion dated 22nd November 2019 is dismissed. There shall be no order as to costs to that application.

DATED, SIGNED and DELIVERED at NAIROBI this 8th day of JULY 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Plaintiffs:

For the Defendants:

ORDER

This decision is hereby virtually delivered this 8th day of July, 2020.

MARY KASANGO

JUDGE