



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 346 OF 2015**

**BADMINTON CONFEDERATION OF AFRICA.....PLAINTIFF**

**VERSUS**

**PETER GACHERU.....DEFENDANT**

**RULING**

1. This ruling relates to a notice of motion application dated 30<sup>th</sup> July 2019, brought under the provisions of; Order 26 Rules 1 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya, and all other enabling provisions of the law.

2. The Applicant is seeking for orders;-

*(a) That the Honourable court be pleased to make an order directing the Plaintiff to provide security for the Defendant's costs of this suit in the sum of Kshs. 1,500,000 within thirty (30) days from the date of the Order to be held in an interest earning account in the joint names of the Advocates pending the hearing and determination of the suit;*

*(b) That costs of the application be awarded to the Defendant.*

3. The application is premised on the grounds on the face of it and an affidavit in support dated 30<sup>th</sup> July 2019, sworn by Peter Gacheru, the Defendant herein. He states that, the Plaintiff is an organization that is resident in the Republic of Mauritius and has no known assets in the Republic of Kenya.

4. That the Plaintiff has failed and/or neglected to produce for inspection the following documents listed in his notice to produce documents dated 9<sup>th</sup> November 2016;

*(i) Certified documents evidencing the due process of registration and incorporation of Badminton Confederation of Africa in the Republic of Mauritius;*

*(ii) Certified minutes of all Executive Council Meetings held from the year 2008 to 2013.*

5. That the documents subject to discovery are essential in knowing the full nature of the case he must meet and are crucial in defending himself against the allegations raised by the Plaintiff. Moreover, they are vital in assisting this court to fairly and conclusively determine the issues in dispute. Further, the Plaintiff's claim is based on an allegation of fraud allegedly perpetuated during the period from 1999 to 2014 when the Applicant served as the treasurer of the Plaintiff's organization.

6. The matter has now been fixed for hearing of the suit on 7<sup>th</sup> February 2019 and 12<sup>th</sup> February 2019 and the court record will show that the inordinate delay in the proceedings was solely caused by the Plaintiff's failure neglect and/or refusal to comply with the notice to produce documents dated 9<sup>th</sup> November 2016. The Applicant is therefore seeking for security for costs as he is apprehensive that the Plaintiff will not pay the costs of defending the suit if its claim fails at the trial.

7. The Applicant denied the allegation of filing this application as a way of oppressing or obstructing the Plaintiff's claim and averred he has a bona fide defence to the Plaintiff's case and a reasonably good prospect of success. That, any subsequent order for payment of costs would require execution against the Plaintiff which is domiciled in the Republic of Mauritius. This would be uneconomical, inconvenient and time

consuming. That in view of the complexity of the matter and the amount claimed by the Plaintiff in its suit, the amount of security prayed for is commensurate with the subject matter over which the costs being secured relate to.

8. However, the Respondent filed grounds of opposition dated 7<sup>th</sup> February 2019, and objected to the application on the grounds that, no material has been presented to show that the Plaintiff cannot settle any costs that may be awarded. It was argued that the ordinary security for costs are ordered when evidence is furnished to show that it is doubtful whether the Plaintiff can pay costs. That the issue of the documents claimed to be missing has already been canvassed by the Honourable court that saw it fit to give parties a hearing date for the main suit as the documents being sought for had been established to be missing and/or already furnished as evidence. Further, affidavit in support of the application is fatally defective. In addition under Order 26 Rule 4 of the Civil Procedure Rules the orders sought are entirely discretionary and the conduct of the Defendant herein does not entitle him to an equitable relief as such the application is frivolous, vexatious and an afterthought only aimed at misleading the Honourable court into issuing favourable orders to the Applicant. That the amount sought as security of Kshs. 1,500,000 is exorbitant, exaggerated and sought for without any kind of jurisdiction.

9. However, the Applicant filed a supplementary affidavit dated 17<sup>th</sup> January 2019, sworn by the Applicant. He states that, he became aware of certain facts relevant to the dispute herein, which as a party to the suit, is under an obligation to the court to make full disclosure of all material facts within his knowledge and he will hereunder set out these material facts. That it has recently come to his knowledge that the Badminton World Federation, the international governing body for the sport of Badminton and recognized as such by the International Olympic Committee (hereinafter referred to as "BMF"), conducted investigations into Mr. Gaya's conduct for the alleged misuse of funds during the period between the years 2011 and 2017.

10. The investigations, by BMF appointed an independent Ethics Hearing Panel (the "BMF Panel) to hear and determine the case against Mr. Gaya. In the decision delivered on 21<sup>st</sup> November 2018, the BMF Panel made the following orders:-

(i) *Raj Gaya is banned from performing any function in Badminton for life.*

(ii) (a) *Raj Gaya is ordered to pay a fine of USD 50,000*

(b) *out of this amount of USD 50,000, USD 600 is to be paid to Hassenkhan Hyderkhan and USD 5,000 to Kate Foo Kune by BMF;*

(iii) *the parties are to bear their own costs and other costs with respect to the proceeding*

11. That the decision of the BMF Panel is also relevant as it goes to the credibility and integrity of Mr. Gaya, who is the Plaintiff's sole witness. Accordingly, the Applicant is reasonably apprehensive that Mr. Gaya may not attend court on 7<sup>th</sup> February 2019 and 12<sup>th</sup> February 2019 when the matter has been fixed for hearing. Further, Mr. Gaya is resident in the Republic of Mauritius, which is outside the jurisdiction of this court. He is therefore not a compellable witness. Based on the foregoing, the Applicant is further apprehensive that should the Plaintiff's claim fail at trial, it may prove impossible to get the resultant costs of defending this suit unless security for costs is provided for.

12. I have considered the arguments advanced vide the various documents filed and relied on. I find that, the Applicant has relied heavily on the grounds that, the Plaintiff has on several occasions declined to respond to the notices served upon it to produce documents. The entire affidavit sworn by the Applicant in support of this application details out the history of the matter and the numerous occasions and/or orders/directions given by the court for production of documents, which the Plaintiff disobeyed and or neglected.

13. The Applicant has sworn a further supplementary affidavit to the effect that, the Plaintiff's main witness Mr. Raj Gaya has been subjected to investigations by BWF and found culpable vide a decision made on 24<sup>th</sup> November 2018. The Applicant avers that, he is apprehensive that the witness may not come to testify and the Plaintiff's case will collapse. He also questions the credibility and integrity of the witness.

14. The question that arises is whether, the Applicant has adduced adequate reasons for the grant of orders sought. The prerequisite for security for costs have settled. First and foremost, it is a discretionary power of the court to assess whether it is appropriate to grant the order or not. In exercising this discretion, the court will consider inter alia:-

(i) *The means of those standing behind the proceedings;*

(ii) *The prospects of success or merits of the proceedings;*

(iii) *The genuineness of the proceedings;*

(iv) *Impecuniosity (not having money) of a corporation(?);*

(v) *Whether the Plaintiff's impecuniosity is attributable to the Defendant's conduct;*

(vi) *Whether the order for security would be oppressive;*

*(See the case of; Keary Development vs Tarmac Construction (1995) 3 ALL ER 534)*

15. The purpose of the security for costs order is to offer protection to the successful party, in the event the unsuccessful party is unable to pay costs due to poverty.

16. It suffices to note the general principle that guides issuance of an order for security for costs is that, "there is a significant risk of the Defendant suffering an injustice by having to defend the proceedings; with no real prospects of being able to recover his costs if he is eventually successful. (See the decision in the case of; Berkeley Administration Inco. & Others vs Maclelland & others. A Plaintiff being a resident abroad is not per se a ground for making an order. (See the case of; Danilina vs Chernukhiri & Others (2018) EWCA 1802, which applied the sliding scale.

17. The discretion should be exercised in a non-discretionary manner which requires a consideration of objectively justified grounds to the obstacles to, or the burden of, enforcement of costs order in the context of the particular foreign claimant or country concerned. Where grounds exist to show that there is a real risk of either non-enforcement and/or additional burdens of enforcement. The order should be tailored based on the relevant risk. Where the risk is limited to additional costs or delay, security should usually be ordered by reference to that extra burden of enforcement.

18. The Applicant referred to the principles to consider in an application seeking for an order for security for costs as laid down in the case of; Keary Development vs Tarmac Construction (1995) 3 ALL ER 534, and submitted that, the circumstances of this case, warrant the grant of the orders sought. As the Applicant has a good defence against the Plaintiff's claim. Offer protection to the successful party (cases of; Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others (2014) eKLR and Noormohamed Abdulla vs Ranchhodbhal J. Patel & Another (1962) E.A. 448).

19. The court will not just order for security for costs because a party is outside its jurisdiction or ordinarily resident outside the jurisdiction of the court. Although non-resident claimant with no assets in the court's jurisdiction will likely be required to put up the security for costs of the Defendant.

20. In conclusion, I find that the Respondent did not file a replying affidavit to rebut the factual matters deposed to by the Applicant. The grounds cited are unsupported and indeed compliance with the notice to produce documents has been thorny/unresolved issue. It is admitted the Plaintiff is domiciled out of the court's jurisdiction with no known assets in Kenya. Though the pleadings indicate a viable claim subject to proof the grant of an order for security for costs in the sum of Kshs. 500,000 will not prejudice the Plaintiff. Therefore, I hereby grant the same to be provided before the hearing date. Costs of the application to abide outcome of suit.

21. It is so ordered.

Dated, delivered and signed in an open court this 4<sup>th</sup> day of November 2019.

G.L. NZIOKA

JUDGE

In the presence of;

Mr. Otieno for Change for the Plaintiff

Ms. Ndirangu for Nderitu for the Respondent

Dennis -----Court Assistant