



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL CASE NO. 281 OF 2015**

CELINA TRADING LLC.....PLAINTIFF

VERSUS

NGAO TRADING LIMITED.....1<sup>st</sup> DEFENDANT

SALOME WANGUI NJOROGE.....2<sup>nd</sup> DEFENDANT

**RULING**

1. The Court is asked to determine the following three Applications namely the Applications of 12<sup>th</sup> May 2016, 15<sup>th</sup> June 2016 and 14<sup>th</sup> October, 2016.

2. I propose to start with the Application of 14<sup>th</sup> October, 2016. The Application is by the 2<sup>nd</sup> Defendant for setting aside an Interlocutory Judgment entered against it on 19<sup>th</sup> November, 2015. Although Objections have been taken by the Plaintiff as to whether the firm of Arwa & Change Advocates are properly on record on behalf of the 2<sup>nd</sup> Defendant and an apparent delay in bringing the Application, it seems to me that the Application is for allowing.

3. The Judgement sought to be set aside was entered as follows:-

**“Defendant Salome Wangui Njoroje having been dully served and having failed to enter appearance/file Defence and on the Application of the Advocate for the Plaintiff Enter Judgment as prayed”.**

Following that Order the Plaintiff proceeded to tax its Party and Party Bill of Costs on 3<sup>rd</sup> October 2016 and Ruling may have been delivered on 17<sup>th</sup> November 2016 had this Court not stayed its delivery.

4. Clearly the Order of 19<sup>th</sup> November 2015 was taken by the Plaintiffs as an Order for Final Judgement under the provisions of Order 10 Rule 4 which reads:-

**“4. (1) Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon**

**from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.**

**(2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim”.**

5. Yet looking at the Amended request for Judgment upon which the Deputy Registrar acted the request, although said to be made pursuant to Order 10 Rule 4, was a request for **Interlocutory Judgment**. The Amended request is reproduced hereunder;

**“The Plaintiff request for judgment against the 2<sup>nd</sup> Defendant who having been duly served with the Plaint and Summons to Enter Appearance but has failed to Enter Defence within the prescribed period.**

**This request for Interlocutory judgment for United States Dollars One Hundred and Seventy Three Thousand, Three Hundred and Ninety One and Five Cents (USD \$ 173,391.05) with interest at Court Rates and costs”.***(my emphasis)*

6. Interlocutory Judgments are requested for and entered under Order 10 Rule 6. Once entered then the Suit should be set down for Formal Proof. An interlocutory Judgment would be final in respect to liability only but interim on damages until assessed. Since the Plaintiff requested for an Interlocutory Judgment, the Deputy Registrar could not grant more than requested.

7. The Plaintiff has itself to blame for drafting the Request in the manner it did. And since the Judgment entered was only Interlocutory and not final then Arwa & Change Advocates may not have required Leave of Court before filing its Notice of Change of Advocates on 2<sup>nd</sup> June 2016.

8. It has been explained in the Affidavit of the 2<sup>nd</sup> Defendant that her previous Advocates Ogetto, Otachi & Co. Advocate filed her Defence on 9<sup>th</sup> July 2015 in the High Court Civil Registry instead of the proper Registry being the Commercial and Admiralty Division Registry. Annexed to her Affidavit is a copy of the filed Plaint and Receipt No.6902801 for payment thereof. This Court, in its discretion, accepts this explanation and excuses it for the sake of having this matter determined on merit. This discretion is exercised in favour of the 2<sup>nd</sup> Defendant notwithstanding any delay in bringing the Application because as observed earlier there is no final Judgement. Any Orders of costs may be sufficient recompense for the delay. In addition the suit against the 1<sup>st</sup> Defendant is yet to be heard. For this reason I would set aside the Interlocutory Judgment entered against the 2<sup>nd</sup> Defendant and grant Leave to her to file her Defence within 14 days hereof.

9. Let me deal shortly with the Application of 15<sup>th</sup> June 2016 by the 2<sup>nd</sup> Defendant. It is one for Security of Costs brought under the Provisions of Order 26 of The Rules which provides:-

**“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.**

And although under the Provisions of Order 26 Rule 2 such an Application can be brought before Defence is filed, the 2<sup>nd</sup> Defendant's present Application was mounted on the mistaken basis that there was a proper Defence on record. For now the Court strikes out that Application with costs. The 2<sup>nd</sup> Defendant is at liberty to file another Application after filing of Defence.

10. The Notice of Motion dated 12<sup>th</sup> May 2016 by the 1<sup>st</sup> Defendant seeks that the Plaintiff do provide security for costs in the sum of Kshs.600,000/= or such sum as the Court may order. It is said to be brought under the provisions of Order 26 Rules 1,4 and 6 of The Civil Procedure Rules. In an Affidavit of Florence Ndungu sworn on 12<sup>th</sup> May 2016 in support of that Application she deponed that the 1<sup>st</sup> Defendant has an arguable Defence with good chances of success. The apprehension of the 1<sup>st</sup> Defendant is that the Plaintiff is a foreign Company with no known assets in Kenya and that it will not recover its costs in the event of failure of its claim.

11. In opposing the Application the Plaintiff on 21<sup>st</sup> July 2016 filed the following grounds of Opposition:-

**1. THAT the Application is an abuse of the process of this Honourable Court and should be dismissed for reasons that there is valid Court Order made on 19<sup>th</sup> November 2015 in which there is judgement against the 2<sup>nd</sup> Defendant who has also been condemned to pay all costs;**

**2. THAT this Honourable Court's Order of 19 November 2015 have neither been reviewed nor varied.**

**3. THAT there are demonstrable chances of success by the Plaintiff as against the 1<sup>st</sup> Defendant.**

**4. THAT the 2<sup>nd</sup> Defendant's Application is an abuse of the Court Process, mischievous and frivolous.**

12. This Court has considered the submissions by the Parties herein. From the cases cited to me ( which include **KENTRO SYSTEMS LTD V. SUPERIOR PRINTERS LTD** [2013] eKLR) the following are the principles applicable to the Application before me:-

(i) Although an Application for security of costs may be made at any stage of the proceedings, it should be made as promptly as possible ie it should not be made too late or too close to trial.

(ii) The General Rule in that security is normally required from Plaintiffs resident outside the jurisdiction of Court and without assets within jurisdiction but the Court has discretion which should be exercised reasonably and judiciously

(iii) The test in an Application for security is not whether the Plaintiff has established a prima facie case but whether the Defendant has shown a bona fide Defence.

(iv) Before the Court refuses to order security on the ground that it would unfairly stifle a valid claim, the Court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled.

13. Applying these tests, I take the following view of the matter. Although the Application was brought about 10 months after the 1<sup>st</sup> Defendant filed its Statement of Defence, the Pre-trials herein are yet to be complete and the matter has not been certified ready for hearing. In that sense the Application does not come too close to the Trial and cannot be said to be brought late or at any rate unduly late.

14. On the prospects of its Defence, the 1<sup>st</sup> Defendant submitted that its Statement of Defence speaks for itself. The Court being reminded that a bona fide Defence is not one that must succeed at trial but rather one that raises issues which require interrogation by way of trial.

15. Briefly stated the Plaintiffs Claim against the 2<sup>nd</sup> Defendant is for a sum of US\$ 119,669.30 being the value of goods sold by the Plaintiff to the 2<sup>nd</sup> Defendant on credit. The Plaintiff avers that it was the understanding between the 2<sup>nd</sup> Defendant and the Plaintiff that the property in the goods would not pass to the 2<sup>nd</sup> Defendant unless and until the 2<sup>nd</sup> Defendant paid the invoice sum within the credit period.

16. The complaint by the Plaintiff against the 1<sup>st</sup> Defendant is that it accepted and took possession of a consignment (in Container No. MRKU 5277753) valued at US\$.53,725.15 as security for a sum advanced to it to the 2<sup>nd</sup> Defendant. In paragraph 19 of the Plaint, the Plaintiff sets out the following as particulars of the 1<sup>st</sup> Defendant's Negligence and/or Connivance:-

**a) Failing, neglecting and or refusing to do due diligence on the consignment before accepting it as a security for an advance to the 2<sup>nd</sup> Defendant;**

**b) Accepting the consignment from the 2<sup>nd</sup> Defendant as a security for an advance of Kshs.1,600,000 while knowing or having reason to believe that the 2<sup>nd</sup> Defendant did not have title to the consignment.**

**c) Charging usurious interest on the said advance with intent to retain and dispose of the said consignment.**

17. The Plaintiff then seeks the following orders against the 1<sup>st</sup> Defendant:-

**a) A permanent injunction against the Defendants either through themselves, servant, agents and or attorneys from any way disposing, selling, transferring, charging, pledging and or dealing or alienating the consignment shipped in via container number MRKU5277753.**

**b) Mandatory injunction against the Defendants compelling the Defendants to release the consignment shipped in via container number MRKU5277753 to the Plaintiff.**

**c) The value of the consignment shipped in being US\$ 53,721.75.**

**d) The costs of this suit.**

18. The 1<sup>st</sup> Defendant answer to the Plaintiff's Claim is simply that at the time of financing the 2<sup>nd</sup> Defendant and accepting the consignment as security it never had notice of the alleged arrangement between the Plaintiff and the 2<sup>nd</sup> Defendant and states as follows in paragraph 9 thereof:-

**“1<sup>st</sup> Defendant further states from the time of the loan application, disbursement and clearance of Container No. MRKU5277753, the 1<sup>st</sup> Defendant was unaware of the Plaintiff’s alleged interest in subject goods consignment in the said Container No. MRKU5277753. The 2<sup>nd</sup> Defendant had all the original title documents and was in possession of the consignment/goods which under sale of goods infers legal ownership had passed into the 2<sup>nd</sup> Defendant as purchaser from the Plaintiff. The 1<sup>st</sup> Defendant acted in good faith and with utmost due diligence and care as required at all times and had no reason to doubt the 2<sup>nd</sup> Defendant’s title to the goods in the stated container and its consignment”.**

19. The Court has looked at the Plaintiff’s Bundle of Documents and notes that the Invoice in respect to container No.MRKU 5277753 is in the name of the 2<sup>nd</sup> Defendant as the Customer. In similar vein, the 2<sup>nd</sup> Defendant is the consignee to the Goods in the Bill of Lading. While the Plaintiff is the Shipper.

20. Given these set of facts, the Defence by the 1<sup>st</sup> Defendant that it did not have notice of the Plaintiffs claimed interest in the consignment is not a trifle and is in fact bona fide.

21. As earlier noted the Plaintiff chose to respond to the Application by simply filing Grounds of Opposition. Two critical assertions by the 1<sup>st</sup> Defendant are therefore uncontroverted. Firstly that the Plaintiff is a foreign Company based in United Arab Emirates (UAE) and secondly that it has no known assets in Kenya.

22. Importantly as well is that the Plaintiff does not assert or prove that the Order for Security of Costs could impede or stifle its claim.

23. This Court finds that the 1<sup>st</sup> Defendant has made out a good case for an Order for Security of Costs. The amount sought is Kshs.600,000/= or such sum as the Court may order. I take a view that the amount sought is not unreasonable given that after obtaining judgment against the 2<sup>nd</sup> Defendant, the Plaintiff had filed a Party and Party Bill of Costs dated 17<sup>th</sup> February 2016 for **Kshs.1,747,662.65**. The amount in that Bill reflects the Plaintiff’s view of the quantum of Party and Party Costs herein. The Security requested by the 1<sup>st</sup> Defendant is about one third of that amount.

24. The 1<sup>st</sup> Defendants Motion of 12<sup>th</sup> May 2016 is merited and the Court hereby directs that the Plaintiff does furnish Security in the sum of Kshs.600,000/= (Six Hundred Thousand)by way of cash Deposit into Court or an irrevocable Bank guarantee in favour of the Court. Such Security shall be furnished within 21 days of this Order. Costs of the Application to the Applicant.

25. For clarity, I restate the Orders in respect to the other two Applications,

25.1. The Application of 14<sup>th</sup> October 2016 is allowed with costs. The 2<sup>nd</sup> Defendant is granted leave to file and serve her Defence within 14 days hereof.

25.2. The Application of 15<sup>th</sup> June, 2016 is struck out with costs to the Plaintiff.

**Dated, Signed and Delivered in Court at Nairobi this 10<sup>th</sup> day of February ,2017.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Ojiambo for Simiyu for Plaintiff

Karani for Mulani for 1<sup>st</sup> Defendant

Omondi for Sichangi for 2<sup>nd</sup> Defendant

Alex - Court Clerk