



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 488 OF 2007

JAYESH HASMUKH SHAH.....PLAINTIFF

VERSUS

1. NAVIN HARIA

2. MANU SHAH.....DEFENDANTS

RULING

1. Before this Court is the Defendants' Notice of Motion dated 3rd April, 2013 expressed to be brought under Section 34 of the Civil Procedure Act and Order 26 Rules 1, 4 and 6 of the Civil Procedure Rules. The Defendants seek for orders that the Plaintiff does within seven (7) days give security for the Defendants' costs of KShs. 1,000,000/= to the satisfaction of this court based on scale of the claim.

2. The application is based on the grounds stated on the body of the application and the facts deponed in the supporting affidavit of the 1st Defendant sworn on 3rd April, 2013. He deponed that he has reason to believe that the Plaintiff will be unable to pay the Defendants' costs in the likely event that the Defendants succeed in defending this suit considering that the Plaintiff is not domiciled in Kenya and has no immovable property within Kenya. It is averred that due to the Plaintiff's position, the Defendants will be unable to realize the fruits of judgment. The Defendants produced a bill of costs for the services rendered and the costs incurred so far.

3. The application was opposed by the Plaintiff's replying affidavit sworn on 21st August, 2013. He contended that this application was served on his advocates four (4) months after filing and filed six (6) years after the filing of this suit. He stated that the Defendants have always known that he is not domiciled in Kenya as disclosed in the plaint. The Plaintiff termed this application as an afterthought intended to impede or otherwise delay the hearing and determination of this suit.

4. The application was canvassed by way of written submissions. It was the Defendants' submissions that the Plaintiff is a prime candidate to be ordered to pay security of costs for the reason that he is a Zimbabwean national with no assets in Kenya. That the claim arises from a judgement before an Ethiopian court against, primarily a limited liability company operated by three parties to the suit and that chances of succeeding through this Court is not a requirement for the success or failure of this application. The Defendants relied on Order 26 Rules 1, 4 and 6 of the Civil Procedure Rules which provide the factors to be considered by court in granting an order for furnishing security for costs.

5. It was the Plaintiffs submissions that Section 34 of the Civil Procedure Act relied on by the

Defendants is irrelevant for it does not relate to security of costs. It was his position that the provisions of Order 26 Rule 4 which is the relevant provision must be exercised judicially. The Plaintiff cited the case of **Shah v. Shah (1982) KLR 95** where it was held that discretion to order or refuse security for costs must be exercised reasonably and judicially. In **Noormohamed Abdulla v. Ranchhodbhai J. Patel & Another (1962) 1EA 447** it was held that there should not be an inordinate delay in bringing an application for order for provision of security and in **Shakhalaga Khwa Jirongo & Another v. The Board of Trustees of National Social Security Fund (2005) e KLR**, the court dismissed an application for security for costs that had been made four (4) years after the suit was filed.

6. The principles on which a court exercises its discretion in an application for security of costs were considered in the case of **Keary Development v. Tarmac Construction (1995) 3 ALL ER 534**. F. Tuiyot., J in **Ocean View Beach Hotel Ltd v. Salim Sultan Mollo & 5 Others (2012) e KLR** as follows:-

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1. *The court has a complete discretion, whether to order security, and accordingly it will act in the light of all the relevant circumstances.*
2. *The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security.*
3. *The court must carry out a balancing exercise. On one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.*
4. *In considering all the circumstances, the court will have regard to the plaintiff's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure.*
5. *The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount, it is not bound to make an order of a substantial amount.*
6. *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.*
7. *The lateness of the application for security is a circumstance which can properly be taken into account."*

7. The law is settled that an order for security for costs is a discretionary one under Order 26 of the Civil Procedure Rules. The discretion is, however, to be exercised reasonably and judicially by making reference to the circumstances of each case. Such matters as; absence of known assets within the jurisdiction of court; absence of an office within the jurisdiction of court; inability to pay costs; the general financial standing or wellness of the Plaintiff; the bona fides of the Plaintiff's claim; or any other relevant circumstance or conduct of the Plaintiff or the Defendant.

8. The conduct by the Plaintiff will include activities which may hinder recovery of costs, for

instance, recent close or transfer of bank accounts, and disposal of assets. And the conduct of the Defendant includes, filing of application for security for costs as a way of oppressing or obstructing the Plaintiff's claim, for instance, where the defence is a mere sham, or there is an admission by the Defendant of money owing of that there is a deliberate refusal or delay to pay money owing or refusal to perform its part of the bargain.

9. The factors advanced by the Defendants are that the Plaintiff is not domiciled in Kenya and that he does not have any immovable assets within Kenya. These are some factors that may hinder settlement of a decree, however, despite having such information, the Defendant opted to bring this application too late in the day which in my view seems to be an afterthought. It would appear the application is not brought in good faith. No reason for such delay has been advanced by the Defendant. In light of the cases of **Noormohamed Abdulla v. Raohhodbhai J. Patel & Another** and **Shakhalanga Khwa Jirongo & Another v. The Board of Trustees of National Social Security Fund** (supra) I decline to grant the orders sought. The upshot is that this application is dismissed with costs to the Plaintiff.

Dated, Signed and Delivered in open court this 10th day of March, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff.

..... for the Defendant.