



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO 6 OF 2011

ALICE ALOO BETTY WERE THOMPSON.....PLAINTIFF

VERSUS

SAID MOHAMED SAID1ST DEFENDANT

INDUSTRIAL DEVELOPMENT BANK LTD.....2ND DEFENDANT

EQUITORIAL COMMERCIAL BANK LIMITED.....3RD DEFENDANT

RULING

INTRODUCTION

1. The 2nd Defendant's Chamber Summons application dated 22nd March 2013 and filed on 2nd April 2013 was brought under the provisions of Order 26 Rule 1 Civil Procedure Rules, 2010. The same sought the following orders:-
 - a. **That the Plaintiff do give security for the 2nd Defendant's costs of defending this suit in the sum of Kshs 300,000/= or such other sum as the court may deem sufficient.**
 - b. **That the costs of this application be in the cause.**
2. The ground under which the said application was premised was that the 2nd Defendant was apprehensive that the Plaintiff would not be able to pay the costs of defending the suit herein as she resided in United Kingdom and her means and source of income was unknown.

AFFIDAVIT EVIDENCE

3. The said application was supported by the Affidavit of Priscilla Njuguna, the 2nd Defendant's Legal Manager, sworn on 22nd March 2013. She averred that it was clear from the pleadings filed herein that the Plaintiff had no cause of action against the 2nd Defendant as whatever cause of action she had, would be against the 1st Defendant.
4. The 2nd Defendant therefore prayed for a deposit by the Plaintiff of a sum of Kshs 300,000/= or such other sum the court would deem fit to grant to cover its costs of defending the suit herein.
5. In her Replying Affidavit sworn on 25th May 2013 and filed on 3rd June 2013, the Plaintiff stated

- that the 2nd Defendant's application was incompetent, frivolous, bad in law, and lacked merit and that she read *mala fides* in the said application as the suit had good prospects of success.
6. She contended that she instructed the 1st Defendant herein to purchase a property namely L.R No Nairobi/Block 125/854 (hereinafter referred to as "the subject property") on her behalf having donated to him a Power of Attorney of which the bank (not specified which) was aware of her claim in the subject property. She said that the 2nd Defendant fraudulently charged the said property as it was aware that the 1st Defendant was holding the same as a beneficial owner.
 7. It was therefore her argument that the issue of right of ownership that had arisen was germane and should be interrogated during the hearing.
 8. She also averred that the transfer and registration of the charge upon the subject property was fraudulent, illegal, null and void in view of the fact that neither she nor assignees were aware and/or signed and/or ratified the agreement.
 9. In view of the dispute as to the ownership, she stated that it would be unfair to apportion costs at this stage. She added that although she had business interests in Britain, she was ordinarily resident in Kenya and that she held other properties and bank accounts in the Republic of Kenya.
 10. She said that she was an aspiring candidate in the just concluded elections for the post of Senator in Busia Country and that she had adopted orphans in Busia and that there seemed to have been a deliberate attempt by the 2nd Defendant to dispossess her of her property.
 11. She prayed that the said application be dismissed with costs to the Respondents.

LEGAL SUBMISSIONS BY THE 2ND DEFENDANT

12. In its written submissions dated and filed on 5th June 2013, the 2nd Defendant argued that the subject property was sold in a public auction to liquidate a loan of Kshs 5,062,814/=. In view of the fact that the property could be valued at over Kshs 5,000,000/=, it said costs of defending the suit herein would be Kshs 300,000/=.
13. The 2nd Defendant submitted that the Plaintiff did not give full particulars of her home in Busia, her other properties or bank accounts in Kenya. It averred that the 2nd Defendant should never have been joined in the suit herein as it sold the subject property in a *bona fide* auction in pursuance of its power of sale as a charge. It therefore said it had a *prima facie* defence.
14. It contended that the general rule is that security for costs is normally required from a Plaintiff resident outside the court's jurisdiction but added that the court had power to exercise its discretion judiciously. It said the court should order that the Plaintiff deposit a sum of Kshs 300,000/= as she had stated in her Complaint and Verifying Affidavit that she resided on Medusa Road in London, UK.
15. It referred the court to the case **of Abel Moranga vs James Phillip Ndegwa and 3 others (2012) eKLR** to buttress its point.

LEGAL SUBMISSIONS BY THE PLAINTIFF

16. On her part, the Plaintiff filed her written submissions dated 21st June 2013 on the same date. She argued that the issue of the *bona fide* owner of the subject had not yet been ventilated and that her suit raised salient, pertinent and serious issues. It was her contention that it is only after judgment that the liability of costs should be made.
17. She was categorical that she was a temporary resident in Kenya and that she owned other properties other than the subject property.
18. It was her argument that mere apprehension of a Plaintiff's inability to pay costs should not be a ground for ordering for security for costs and that the court has to exercise its discretion to order for such security, judiciously. She referred the court to the cases of **Civil Case No 722 of 1989 Jiwaji vs Saheb** (unreported) and **CA No 43 of 1978 Korecha vs Bank of Baroda** (unreported) and **Shah vs Shah [1982] KLR** and several others which laid out the principles of awarding security for costs.
19. She added that the onus was on the 2nd Defendant to prove that a Plaintiff was ordinarily resident out of the jurisdiction and that if there was a strong *prima facie* presumption that the Defendant

would fail in its defence to its action, the court could refuse him any security for costs as was held in the case of **Crozart vs Brogden (1984) 2 QB 30 at 33.**

20. She prayed that the 2nd Defendant's application be dismissed as it was brought by Chamber Summons as opposed to a Notice of Motion. She relied on the case of **Edward Steven Mwiti vs Peter Irungu and 2 others [2012] eKLR** where Kimondo J dismissed an application that had been brought by way of a Chamber Summons application instead of a Notice of Motion.

LEGAL ANALYSIS

21. Counsel for all parties orally highlighted their respective written submissions.

22. The court finds that the issue of how the court was moved to be important. Under Order 51 Rule 1 of Civil Procedure Rules, 2010, the procedure of moving the court is clearly spelt out. The same provides as follows:-

“All applications to the court shall (emphasise mine) be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide.”

23. The Civil procedure Rules, 2010 do also provide that there are certain applications that are to be heard by way of summons in chambers. It therefore follows that the mandatory couching of Order 51 Rule 1 of Civil Procedure rules, 2010 requires that the applications that are to be commenced by motion shall be commenced in such manner.

24. Having said so, it would be important to look at Article 22 (3) (d) of the Constitution of Kenya, 2010 which provides that:-

“The court, while observing the rules of natural justice shall not be unreasonably restricted by procedural technicalities.”

25. Whilst this Article would not be very relevant in the circumstances of this case as the said Article concerns itself with proceedings for enforcement of Bill of Rights, Article 159 (2) (d) of the Constitution of Kenya does mandate the court to administer justice without regard to procedural technicalities.

26. Going further, Order 51 Rule 10(2) of the Civil Procedure Rules, 2010 stipulates that:-

“No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.” Order 2 Rule 14 of the Civil Procedure Rules, 2010 does also state that no technical objection may be raised to any pleading on the ground for want of form.

27. It is therefore the view of this court that although the 2nd Defendant brought its application by way of a Chamber Summons application as opposed to a Notice of Motion, the technicality does not affect the substance of the application herein.

28. The court has noted the holding by **Edward Steven Mwiti vs Peter Irungu and 2 others** (Supra) which is not binding on this court but rather it is of a persuasive nature and takes the view that the want of form in the 2nd Defendant's Chamber Summons application does not go to the substance of the application herein. Save for the heading and introduction of its application, the 2nd Defendant's application contains all the ingredients of a Notice of Motion application and clearly spells out the provisions under which it has been brought.

29. This court has taken cognisance of the fact that Section 1A and 1B of the Civil Procedure Act Cap 21 (laws of Kenya) imposes on it a duty to facilitate the just and expeditious resolution of disputes and to handle all matters presented before it to attain the efficient disposal of the business of the court and timely disposal of the proceedings.

30. For the foregoing reasons, this court will not attach much weight to the Plaintiff's submission that the 2nd Defendant's application ought to be dismissed on the ground that it was brought by way of a Chamber Summons as opposed to a Notice of Motion application but will instead consider the merits of the same purely to dispose of the business of the court in an expeditious manner.

31. As has been rightly submitted by both parties, the court is required to exercise its discretion judiciously when faced with an application for security for costs. The fact that a Plaintiff resides outside the jurisdiction of the court would not automatically lead a court into ordering a deposit for security for costs against a Plaintiff. That is but just one of the issues to take into account.
32. The court is required to look at different issues, one being the number of Defendants in a matter to determine whether or not it should order security for costs against a Plaintiff. This is seen in Order 26 Rule 3 of Civil Procedure Rules, 2010 where it is stated as follows:-

“Where it appears to the court that the substantial issue is which of two or more defendants is liable or what proportion of liability of two or more defendants should bear no order for security for costs may be made.”

33. It is difficult to know which of the Defendants herein was liable in this matter or the proportion of liability of the Defendants from the Plaintiff as drafted. The Plaintiff has not given the particulars of fraud, misrepresentation or negligence as required under Order 2 Rule 10 of the Civil Procedure Rules, 2010.
34. Indeed, this court has noted that in his ruling of 12th September 2012, Njagi J, did dismiss the Plaintiff's application for an injunction on the ground that she had failed to establish a *prima facie* case against the 2nd and 3rd Defendants. This court did not have the benefit of seeing the ruling from the Court of Appeal which, the 2nd Defendant stated, had dismissed the Plaintiff's appeal to that court and costs awarded to it.
35. In the absence of facts that show that the substantial issue is which of the Defendants herein is liable or the proportion of liability of Defendants, the court therefore finds that security of costs can be ordered.
36. Whereas there is in place the Foreign Judgments (Reciprocal Enforcement) Act Cap 43 (laws of Kenya), this court cannot be blind to the fact that the Plaintiff has not disclosed her assets or bank accounts. She merely stated that she had other properties other than the subject property but did not provide any proof. A lot of hardship could be caused to the 2nd Defendant to trace her whereabouts in UK if she was to lose this case. The court does observe that she did not file an Affidavit of Means which could have assisted this court to arrive at a just decision in this matter.
37. The court therefore finds itself persuaded by the 2nd Defendant's submissions that in the absence of any proof of assets held by the Plaintiff which fact this court has considered against the backdrop of the ruling by the learned Judge, this court finds that this is a suitable case where the court should exercise its discretion to order the Plaintiff to deposit security of costs.
38. On the other hand, the Plaintiff has a right to be heard under Article 50 of the Constitution of Kenya, 2010. No fetters should be imposed to prevent her from prosecuting her case. Indeed, whilst ordering security for costs, the court will also bear in mind that the 3rd Defendant had filed a similar application seeking security for costs in the sum of Kshs 300,000/=.

DISPOSITION

39. Accordingly, having considered the oral and written submissions by the parties and the case law in support of their respective cases, this court has come to the conclusion that the 2nd Defendant's Chamber Summons application is merited and the same is allowed in the following terms:-
- i. **The Plaintiff shall furnish or cause to be furnished, a sum of Kshs 250,000/=, in an interest earning account to be opened in a reputable bank in the Republic of Kenya to be held in the joint names of her advocates and the advocates of the 2nd Defendant pending the hearing and determination of this suit.**
 - ii. **Bearing in mind that the Plaintiff is outside the jurisdiction of this court, it is hereby directed that the Plaintiff shall furnish or cause to be furnished with her advocates the said sum of Kshs 250,000/= to facilitate the opening of the said account in any event not later than sixty (60) days from the date of this ruling.**
 - iii. **Costs in the cause.**

40.Orders accordingly.

DATED SIGNED and DELIVERED at NAIROBI this 14th day of March 2014

J. KAMAU

JUDGE