



**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 SAID .....1<sup>ST</sup> DEFENDANT**

**INDUSTRIAL DEVELOPMENT BANK LTD.....2<sup>ND</sup> DEFENDANT**

**EQUITORIAL COMMERCIAL BANK LIMITED ....3<sup>RD</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The 3<sup>rd</sup> Defendant's Notice of Motion application dated 2<sup>nd</sup> May 2013 and filed on 10<sup>th</sup> May 2013 was brought under the provisions of Order 26 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all the enabling provisions of the law. The same sought the following orders:-
  - a. **That the Plaintiff do furnish security for the 3<sup>rd</sup> Defendant's costs in this suit.**
  - b. **That the amount of Security of Costs for the 3<sup>rd</sup> Defendant to be furnished by the Plaintiff be in the sum of Kshs 300,000/=.**
  - c. **That such security for costs as was prayed in prayers number 1 and 2 herein be furnished within a period not exceeding thirty (30) days of the Order thereof.**
  - d. **That pending the Plaintiffs furnishing security there be a Stay of any further proceedings at the instance of the Plaintiffs.**
  - e. **That the costs of this Application be provided for.**
2. The grounds under which the said application was premised were that :
  - a. **The Plaintiff instituted this suit against the Defendants jointly and severally claiming Orders of Permanent Injunction, amongst other order, against the Defendants emanating from the sale of Land Reference No 36/11/1.**
  - b. **The value of the subject matter, being Land Reference No 36/11/1, Eastleigh, had been admitted by the Plaintiff at Kshs 6,000,000/=.**
  - c. **The Plaintiff's claim against the 3<sup>rd</sup> Defendant was bad in law, frivolous and lacked in merit as demonstrated in the rulings delivered so far over the subject matter in this Court and the Court of Appeal.**

- d. **The 3<sup>rd</sup> Defendant had therefore been wrongly being sued as it had no knowledge at the material time of the alleged power of attorney.**
- e. **The 3<sup>rd</sup> Defendant resided in United Kingdom and had no known attachable asset within the jurisdiction.**
- f. **It was in the interest of justice and fair in the circumstances for the Plaintiffs to furnish security for costs.**

### **AFFIDAVIT EVIDENCE**

3. The said application was supported by the Affidavit of Brian Asin, the 3<sup>rd</sup> Defendant's Legal Officer, sworn on 2<sup>nd</sup> May 2013. He averred that it was clear from the pleadings filed herein that the Plaintiff had no cause of action against the 3<sup>rd</sup> Defendant as whatever cause of action he had would be against the 1<sup>st</sup> Defendant.
4. He stated that the Plaintiff resided in the United Kingdom and that her means and assets were unknown. He contended that the Plaintiff would not be able to pay its costs and that costs awarded to it on 8<sup>th</sup> March 2013 following dismissal of her **Civil Appeal Application Number 266 of 2012** had not been paid to date.
5. The 3<sup>rd</sup> 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.
6. In her Replying Affidavit sworn on 25<sup>th</sup> May 2013 and filed on 3<sup>rd</sup> June 2013, the Plaintiff stated that she possessed adequate assets to cover any costs in the unlikely event that she lost the case and costs were awarded against her. She said that she was ordinarily resident in the jurisdiction of this court, that she had a home in Busia County, that she had adopted orphans there and that she was an aspiring Parliamentary candidate in the just concluded elections for the seat of a Senator in Busia County.
7. She averred that the issue of right of ownership that had arisen was germane and should be interrogated at hearing and that staying all further proceedings herein would be to defeat the ends of justice.
8. Further, she stated that lack of knowledge that the transfers and registration of the charge were obtained by fraud, misrepresentation and non-disclosure of facts was immaterial.
9. She prayed that the 3<sup>rd</sup> Defendant's application be dismissed in *lamina* (sic) as the same was incompetent, frivolous, bad in law and lacked merit.

### **LEGAL SUBMISSIONS BY THE 3<sup>RD</sup> DEFENDANT**

10. In its written submissions dated and filed on 3<sup>rd</sup> June 2013, the 3<sup>rd</sup> Defendant submitted that it filed the application herein following the dismissal of the Plaintiff's Notice of Motion application dated 26<sup>th</sup> October 2012 on 8<sup>th</sup> March 2013.
11. It contended that despite having been served with the application herein, the Plaintiff had not filed any Affidavit of Means stating that she was capable of paying the costs in the event she was unsuccessful. It relied on the case of **Pancras T. Swai vs Kenya Breweries Limited (2004) eKLR** where Njagi J cited the case of **Shah vs Shah (1982) KLR 85** at page 98 in which it was held that:-

**“The general rule is that security for costs is required for Plaintiffs residing out of jurisdiction.....”**

12. It also referred the court to the case of **Kibiwott and 4 others vs Registered Trustees of Monastery of our Lady of Victory (2004) eKLR** where the court ordered payment of security for costs as it was not known where the Plaintiffs therein were resident.
13. It was also its further submission that it had an arguable defence and that it had exercised its statutory power of sale in accordance with the Land Act.
14. It said that it had filed the application herein timeously and urged this court to exercise its discretion in granting it the orders it had sought.

## LEGAL SUBMISSIONS BY THE PLAINTIFF

15. In her written submissions dated and filed on 21<sup>st</sup> June 2013, the Plaintiff 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.
16. She was categorical that she was a temporary resident in Kenya and that she owned other properties other than the subject property.
17. 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.
18. She added that the onus was on the 2<sup>nd</sup> 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.**

## LEGAL ANALYSIS

19. Counsel for all parties orally highlighted their respective written submissions.
20. 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.
21. 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 the 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.”**

22. 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 claim 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.
23. Indeed, this court has noted that in his ruling of 12<sup>th</sup> 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 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. This court did not have the benefit of seeing the ruling from the Court of Appeal which, the 3<sup>rd</sup> Defendant stated, had dismissed the Plaintiff's appeal to that court and costs awarded to it.
24. 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.
25. 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 3<sup>rd</sup> 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 of this matter.
26. The court therefore finds itself persuaded by the 3<sup>rd</sup> 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 is a suitable case where the court

should exercise its discretion to order the Plaintiff to deposit security of costs.

27. 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 2<sup>nd</sup> Defendant had filed a similar application seeking security for costs in the sum of Kshs 300,000/=.

### **DISPOSITION**

28. 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 3<sup>rd</sup> Defendant's Notice of Motion 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 3<sup>rd</sup> 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.**

29. Orders accordingly.

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

**J. KAMAU**

**JUDGE**