



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 270 OF 2007**

**FOSCA ABOLI DONDO & CALEB OTIENO DONDO**

**(SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE**

**OF REV. MADARA EVANS O. ODONDO).....APPLICANTS**

**VERSUS**

**HOUSING FINANCE CORPORATION OF KENYA LTD.....1ST DEFENDANT**

**ROBERT MAINA NGURU T/A NGURU ENTERPRISES.....2ND DEFENDANT**

**THE ATTORNEY GENERAL ON BEHALF OF**

**THE DISTRICT LAND REGISTRAR, NAKURU.....3RD DEFENDANT**

**KIARIE NGANGA.....4TH DEFENDANT**

**RAJNI SHETH ADV. T/A SHETH & WATHIGO ADV. ....5TH DEFENDANT**

**HOUSING FINANCE COMPANY LIMITED.....6TH DEFENDANT**

**HOUSING FINANCE OF KENYA LIMITED.....7TH DEFENDANT**

**RULING**

The application is brought under the provisions of **Order 26 Rule 1** of the **Civil Procedure Rules**. The Applicant seeks the following orders:

1. That the plaintiffs/respondents provide security on account of the 5th Defendant/Applicant's expenses incidental to the suit herein estimated at Kshs.1,000,000/=.
2. That the aforesaid security be deposited in an interest earning account jointly held in the plaintiffs/Respondents and the 5th Defendant/Applicant's counsel's names.
3. That the plaintiffs/Respondents be condemned to bear the costs of this application.

The application is predicated on the grounds on the face of the application and supported by an affidavit made by RAJIN SHETHE made on the 3rd September, 2012.

Counsel for the applicant submitted that the 5th Defendant who is the applicant herein was an agent

of a disclosed principle and that the Plaintiffs/Respondent ought not to have enjoined him in the suit. Counsel referred this court to the particulars of the claim and the fraud and contends that the particulars of the alleged fraud are attributed to various defendants. That no specific allegation in the pleadings is attributed to the 5th Defendant/Applicant and reiterated the fact that the Plaintiffs/Respondents had needlessly enjoined him.

The 5th Defendant/Applicant now resides in Perth Australia which is outside the jurisdiction and that to attend court in Kenya, the applicant will incur substantial costs and that there was a likelihood of the costs being unrecoverable from the plaintiffs/respondents after completion of the case.

Reference was made and reliance was placed on the following cases:

- i. **Ocean View Beach Hotel Limited V. Salim Sultan Moloo & Others**, HCCC No.533 of 2011 and
- ii. **Klaus Jurgen Thiele & Another V. Joseph Muya Njuru & Others**, HCCC No.223 of 2010.

In conclusion, counsel urged the court to find that the application had merit and proposed an award of Kshs.1,000,000/ as costs taking into consideration the country of residence of the 5th Defendant/Applicant.

The application was opposed by counsel for the Respondent, who relied on the Replying Affidavit made by the Respondent and dated 25th April, 2013. Counsel argued that costs always abide by the outcome of any suit and that security for costs ought to be given in very unique circumstances, normally where the plaintiff is resident outside the jurisdiction. That the plaintiff resided in Kenya and was also a Kenyan Citizen and further that the applicant had not averred anywhere that the Plaintiff/Respondent was financially incapable and therefore incapable of meeting the costs.

Counsel contended that the test on an application for security for costs was not whether the plaintiff had made out a *prima facie* case but whether the applicant had shown that he had a *bona fide* defence.

Counsel further contended that an application of such a nature ought to be done promptly and that in this instance, the application was filed after four (4) years.

Reference was made to the case of **Pabeco Enterprises Limited V. Hi-tech Creations Limited and 3 others** [2006] eKLR, where the court ruled that where there were triable issues, an application ought not to be entertained. The court was urged to dismiss the application as it had been brought with the sole aim of derailing the disposal of the case. That the case ought to be heard and determined and the costs should be consequential.

After taking into consideration, the submission of both counsel, this court finds that there are three (3) issues for determination which are:

- a. the fixed abode of the applicant and respondent and financial capability of the Plaintiff/Respondent;
- b. whether there are triable issues raised in the plaint and there is a *bona fide* defence raised;
- c. whether to grant the order for security for costs.

### **ANALYSIS:**

On the first issue, this court notes, after perusal of the court record that at the time of filing the Further Amended Plaint the applicant is described as an advocate of the High Court of Kenya formerly practising in the name and style of Sheth Wathigo & Company Advocates at Nakuru within the Republic of Kenya. In his Amended Statement of Defence dated the 7th day of March, 2012 and filed in court on the 9th March, 2012, the applicant admits the descriptive contents of paragraph 6 of the Further Amended Plaint and gives his address for serve as Nakuru in the Republic of Kenya.

Likewise, the Plaintiff/Respondent at the time of filing the Further Amended Plaint states that he resides and works for gain at Nakuru within the Republic of Kenya. The verifying Affidavit contains his postal address being P. O. Box 3016, Nakuru within the Republic of Kenya.

This court finds that the issue of the Applicant's new residence in Australia does not obtain as he himself has admitted in his pleadings that his address for service is Nakuru and nowhere in his pleadings is it indicated his new residence was within the knowledge of the Plaintiff/Respondent. The law provides that the Plaintiff files suit where the cause of action arose or the last known place of residence of the Defendant, which from the pleadings would be Nakuru, Kenya.

Secondly, on the issue of the Respondent's abode, this court concurs with the submissions of counsel for the Respondent that the applicant had failed to show to the satisfaction of the court that the place of abode of the respondent is unknown and that there is a likelihood of the applicant being unable to trace the respondent so as to recover any costs envisaged.

Thirdly, from the submissions made by the applicant, this court finds that the applicant has not tendered any evidence to establish to the satisfaction of the court that the Respondent is financially incapable and may not be able to raise the costs awarded were the applicant to succeed in having the suit dismissed.

On the second issue, this court states that it has had occasion to peruse the Amended Plaint and the 5th Defendant's Amended Statement of Defence. From the perusal of the Amended Plaint, it is noted that there are allegations of fraud made against the various defendants. The court further notes that the applicant was enjoined to the suit by virtue of the role he played in the transaction.

The 5th Defendant/Applicant in his response in his Amended Statement of Defence does not deny having drawn, attested and having registered the documents relating to the suit property being the subject matter of the suit. He further avers that he acted as an agent of a disclosed principal.

This court opines that the allegations made and the admissions raise triable issues and the respondent's suit cannot be mishandled away as being frivolous..

### **FINDINGS:**

For the reasons stated above, this court makes the following findings:

1. The Applicant's current place of abode is a non-issue as it was established at the commencement of the suit.
2. The applicant has failed to establish to the satisfaction of the court that the respondent's place of abode is unknown and also the applicant has failed to establish the respondent's financial incapability.
3. The court finds that triable issues are raised and that the plaintiff's suit is not frivolous.
4. This court finds no reasons to grant an order for security for costs.

### **CONCLUSION**

This application lacks merit and it hereby dismissed.

Costs are awarded to the plaintiff/respondent

It is so ordered.

**Dated, Signed and Delivered at Nakuru this 9th day of June, 2014.**

**A. MSHILA**

**JUDGE**