

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL CASE NO. E079 OF 2025**

**DAVID ADELEKE.....PLAINTIFF/RESPONDENT**  
**-VERSUS-**  
**MEDIAMAX NETWORK LIMITED.....DEFENDANT/APPLICANT**

**RULING**

**The Application**

1. This ruling relates to the Notice of Motion dated 7.08.2025 (the Motion) brought by **Mediamax Network Limited** (the Applicant). The Motion is anchored on Sections 1A and 3A of the Civil Procedure Act (CPA) and Order 26, Rules 1 and 4 of the Civil Procedure Rules (CPR). It is supported by the grounds set out on the face of the Motion and in the Supporting Affidavit of the Applicants' Chief Executive Officer (CEO), **Ken Ngaruiya** sworn on 7.08.2025.
2. The Motion seeks an order directed at **David Adedeji Adeleke** (the Respondent) to deposit security for costs in the sum of Kenya Shillings Three Million (Kshs. 3,000,000/-)

within 14 days of the order, failing which the present suit shall stand dismissed. The Applicant has also sought costs of the Motion.

3. The Applicant has deposed in the Supporting Affidavit that the Respondent, in the Complaint dated 2.04.2025, is seeking general, exemplary, aggravated and special damages in the sum of 700,000 US Dollars, arising from a claim of defamation; that the Respondent has described himself in that Complaint as a resident of both the United States of America (USA) and Nigeria and that the Respondent has no known or ascertainable assets in Kenya or known ties to Kenya; that the Applicant has a strong defence in this matter and is apprehensive that unless the orders sought are granted, the Applicant may be unable to recover its costs from the Respondent should the suit be dismissed; that the Applicant has no certain means of pursuing any orders that will be made against the Respondent given his non-residential status in Kenya and that the Applicant is at risk of suffering great prejudice, while the Respondent does not stand to be prejudiced if the Motion is allowed as prayed.

## **The Replying Affidavit**

4. The Respondent has opposed the Motion through Replying Affidavit sworn by his advocate, **Conrad Maloba**, on 23.10.2025. The Respondent has urged court to not grant the orders sought in the Motion. He has stated that the Applicant's statement of defence was filed out of time and without leave of the court; that the instant Motion is an afterthought given that the Respondent's residence and nationality status were clearly set out in the plaint and yet the Applicant chose to wait until the matter was scheduled to come up for pre-trial directions on 7.08.2025, to file this Motion and that it is clear that the Motion is a delaying tactic and an abuse of the court process.
5. It is further stated that in order for the Motion to succeed in any event, it must be demonstrated that the opposing party is a flight risk or may be unable to meet the costs of the suit; that the Applicant herein has not met the required threshold for benefiting from an order for provision of security for costs by the Respondent; that the Respondent is a well-known international artist and there is nothing on record to

demonstrate that he would not be able to meet the costs of the suit if called upon to do so by the court.

### **Oral Submissions**

6. Pursuant to the directions given by the court on 23.10.2025 the Motion was argued orally. Submitting in support of the Motion, **Mr. Khaseke**, learned counsel for the Applicant, submitted that the court is permitted by law to grant a prayer for provision of security for costs in appropriate circumstances and that the Applicant herein has established such circumstances, namely, that the Respondent is neither a resident within the court's jurisdiction nor a Kenyan national or citizen; that in view of this, the Applicant is apprehensive that if the suit fails and the defence consequently succeeds, there is a likelihood that the costs may not be recoverable from the Respondent since he has no known assets within the court's jurisdiction.

7. Counsel submitted that the special damages sought in the plaint are colossal in nature and would therefore attract high costs. He relied on various authorities constituting the Applicant's list and bundle of authorities dated 7.11.2025

including the case of **Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others (Petition 16 (E023) of 2021) [2023] KESC 11 (KLR) (17 February 2023) (Judgment)** where the Supreme Court laid down the guiding factors to be considered by a court when faced with an application seeking an order for provision of security, which factors are similar to those set out in the Motion and reiterated above.

8. It was submitted that no explanation has been given as to why the Respondent did not personally swear the Replying Affidavit and that no material has been availed to ascertain the Respondent's financial ability to settle costs of the suit if called upon., drawing reliance on **Ibrahim & another v Zumzum Investment Limited & another (Civil Application E058 of 2024) [2024] KECA 862 (KLR) (26 July 2024) (Ruling)** where the Court of Appeal restated the legal principle that advocates should not swear affidavits in contested matters, which position was echoed in the case of **Republic v Attorney General [Sued for and on behalf of the Ministry of Lands] & 2 others ex parte South and**

**Central Thika Investments Limited [2015] KEHC 7560**

**(KLR).** Counsel maintained that the instant Motion was timeously filed; that leave had previously been granted for the Applicant to file its statement of defence and that it would, therefore, serve the interest of justice for the court to order the Respondent to provide security for costs, as prayed.

9. **Mr. Hashawa**, learned counsel for the Respondent, argued that the Replying Affidavit was competently sworn by an advocate upon his client's instructions; that security for costs does not apply automatically and that in considering whether to grant security for costs, the court must exercise its discretion judiciously; that the Applicant herein has not demonstrated that the Respondent lacks the means to meet the costs of this suit should the need arise and that the Respondent is a public and widely known personality.

10. In rejoinder, **Mr. Khaseke**, whilst acknowledging the discretionary power of the court in determining an application of such nature, maintained that the Respondent is a non-resident and has no known property in Kenya, thereby necessitating the orders sought.

## **Analysis and Determination**

11.I have considered the Application, the Replying Affidavit and the oral submissions. The Applicant, through his counsel, has raised the issue touching on the competency of the Replying Affidavit sworn by the Respondent's advocate, **Conrad Maloba**, in opposing this Motion. **Rule 8** of the Advocate (Practice) Rules provides that:

***"No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:***

***Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious***

**matter of fact in any matter in which he acts or appears**” (emphasis added).

12. I have perused the contents of the Replying Affidavit. I take the view that the matters deposed to by **Mr. Conrad Maloba** are matters within his personal knowledge as counsel seized of the conduct of the matter on behalf of the Applicant. While it is always desirable for parties to personally swear affidavits in support of their applications, in this instance, the court is not persuaded that the Applicant’s objection would stand.

13. The position that an advocate can depose to matters that are not contentious was reaffirmed by the Court of Appeal in **Hakika Transporters Services Ltd v Albert Chulah Wamimitaire [2016] eKLR** citing its decision in **Salama Beach Ltd v Mario Rossi, CA. No. 10 of 2015** thus:

***“As regards the appellant’s objection regarding the affidavit supporting the application, it is clear that Mr. Munyithya has deposed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily counsel is obliged to refrain***

*from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (See Pattni v. Ali & 2 Others, CA. No. 354 of 2004 (UR 183/04). Rule 9 of the Advocates (Practice) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters.”*

14. Consequently, I see no reason to deem the Replying Affidavit sworn by **Conrad Maloba** in support of the Motion incompetent.

15. The Applicant is seeking, in the instant Motion, provision of security for costs by the Respondent to the tune of Kshs. 3,000,000/- and an order that the said sum be deposited within 14 days of the order, failing which the present suit be dismissed.

16. Provision for security for costs is anchored on **Order 26** of the **CPR**, which provides that:

***“Rule 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.*

....

**Rule 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.”***

17. The burden lies on the Applicant to demonstrate that the Respondent is unable to pay costs should his case collapse. This position was stated by the Court of Appeal considered in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** where it rendered itself thus:

***“In an application for security for costs, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be***

***unable to pay costs due to poverty. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proven. See Hall -vs- Snowdon Hubbard & Co. (I), (1899) 1 Q.B 593, the learned Judge at page 594 stated:-***

***“The ordinary rule of this court is that, except in applications for new trials, when the respondent can show that the appellant, if unsuccessful, would be unable through poverty to pay the costs of the appeal, an order for security for costs is made.”***

***In Marco Tool & Explosives Ltd - vs- Mamujee Brothers Ltd. (supra), this Court expressed itself thus:-***

***“The onus is on the applicant to prove such inability or lack of good faith that would make an order for security reasonable.”***

18. The same court pronounced itself on the rationale for providing security for costs in the above case in the following terms:

***“The rationale for security for costs is to ensure firstly, that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty; secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party. In Noormohamed Abdulla -vs- Ranchhodbhal J. Patel & Another (1962) E.A. 448, it was held:-***

***“The order for security for costs in such a case is not directed towards enforcing payment of the costs as such, but is designed to ensure that a litigant who by reason of near insolvency is***

***unable to pay the costs of the litigation when he loses, is disabled from carrying on the litigation indefinitely except upon terms and conditions which afford some measure of protection to the other parties..”***

19. The Supreme Court reaffirmed the above position in the case of **Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others (Petition 16 (E023) of 2021) [2023] KESC 11 (KLR) (17 February 2023) (Judgment)** relied on by the Applicant’s counsel, when it reasoned that:

***“...The purpose of security for costs order is to alleviate the concerns of potential difficulties in seeking to recover costs. An applicant of such an order, is required to establish that the respondent, if unsuccessful in the proceedings will be unable to pay costs. The objective is to protect a party from circumstances where one is dragged to court and made to incur costs due to***

***litigation. It is meant to prevent frivolous and vexatious litigation.***

...

***The rationale for security for costs therefore is aimed at balancing the overarching objectives in the administration of justice as expressed under articles 48, 50 and 159 of the Constitution , that courts should aim to dispense justice. As such, the costs protect the defendant or a respondent against the risk that a costs order made in its favour may be rendered ineffective by the plaintiff's impecuniosity. An order for security for costs will normally affect the interest of plaintiff's access to the court system, regardless of their financial status; shield a successful defendant from litigation costs; and conserve the courts processes: costs and security for costs may discourage frivolous claims, and encourage the***

***parties to conduct litigation in a manner that is proportional to the matters at issue.”***

20. It is clear from the foregoing, that whether or not to grant an order for security of costs is discretionary, upon weighing the competing interests of the parties before the court.

21. The premise upon which the Applicant seeks an order for security for costs is that there is a likelihood that it may be unable to recover the said costs if the suit is dismissed, since the Respondent is a non-resident and non-citizen of Kenya, with no known assets within the court's jurisdiction. To counter these assertions, the Respondent has argued that no evidence has been tendered indicating his inability to meet the said costs in the unlikely event that the suit fails, stating that he is a renowned international artist and has the means to settle the costs in any event.

22. The Applicant has failed, in my considered view, to demonstrate that the Respondent is financially incapable of settling the costs, in order for this court to exercise its discretion in the Applicant's favour.

23. I have considered that the damages sought in the plaint are colossal. However, it is not sufficient for the Applicant to claim that the Respondent will not be able to pay costs of this litigation should the need arise because he does not reside in Kenya and is not a Kenyan citizen or national, and does not own any known assets within the court's jurisdiction. The burden of proof lies with the Applicant to demonstrate by cogent evidence, that the Respondent may be unable to settle the costs.

24. In view of all the foregoing circumstances, I am not persuaded to exercise my discretion in the manner sought. Consequently, the Notice of Motion dated 7.08.2025 is not merited and is hereby dismissed. I make no order as to costs.

25. It is so ordered.

**Dated, signed and delivered this 21<sup>st</sup> day of January 2026.**

**S. N. MUTUKU  
JUDGE**

**In the presence of:**

1. Mr. Khaseke for the Defendant/Applicant

2. Mr. Hasham for the Plaintiff/Respondent

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