



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 1190 of 1994**

**PANCRAS T. SWAI.....PLAINTIFF**

**-V E R S U S-**

**KENYA BREWERIES LTD.....DEFENDANT**

**R U L I N G**

This is an application by way of a chamber summons dated 27<sup>th</sup> July, 2004 and filed in court on 5<sup>th</sup> August, 2004. It is brought under O.XXV Rules 1,2,4,6 and 7 of the Civil Procedure Rules S.3A of the Civil Procedure Act, and all other enabling provisions of the law. By the application, the defendant/applicant seeks the following orders from the court-

1. THAT the plaintiff do provide security for costs in the sum of US\$1,937,012.00 or such sum as the court may order within fourteen (14) days thereof
2. THAT the security be deposited in an interest earning account in the joint names of the plaintiff's and the defendant's advocates.
3. THAT in default of the security being provided the plaintiff's suit against the defendant be struck out with costs to the defendant.
4. THAT the costs of this application be provided for.

The application is based on the grounds-

- (a) THAT it is not certain what the capacity of the plaintiff is between that of a partnership or an individual
- (b) THAT the plaintiff's claim has shot from US\$142,741.00 to US\$1,937,012.00 and there is no account furnished to show how the figure was arrived at.
- (c) THAT the defendant will be prejudiced unless security for costs is provided as the plaintiff does not have assets in Kenya which can be attached should their suit be dismissed with costs.

The application is further supported by the annexed affidavit of SHEILA NGARI, an Assistant Company Secretary of the defendant company.

The plaintiff/respondent has filed both grounds of opposition as well as a replying affidavit. His grounds of opposition are that-

- (i) Security for costs is a discretionary remedy which discretion is exercised judicially
- (ii) The defendant has been trading with the plaintiff's US\$22,990.00 and 10,688 crates of beer being the plaintiff's property since 13<sup>th</sup> January, 1994 which is adequate security for costs.
- (iii) The capacity in which the plaintiff sues the defendant is obvious from the further amended plaint.
- (iv) The amendment of the plaintiff's claim from US\$142,741 to US\$1,937,012.00 is meant to take stock of the length of time during which the defendant has held on the plaintiff's property.
- (v) The plaintiff has a bona fide claim with the probability of success
- (vi) The application herein is being used oppressively to stifle  
the plaintiff's otherwise valid claim.
- (vii) The defendant's application is affected by the doctrine of laches
- (viii) The collapse in the plaintiff's business and the subsequent impecuniosity were induced by the defendant

The contents of the replying affidavit echo the grounds of opposition.

At the oral canvassing of the application, Mr. Kibanya appeared for the defendant/applicant while Mr. Kyalo appeared for the plaintiff/respondent. Mr. Kibanya argued that the plaintiff is a foreigner from Moshi, Tanzania, and if the suit is dismissed with costs to the defendant, then the defendant will have difficulty in realising those costs. The initial action was commenced by a partnership in which the plaintiff was not a partner. Pleadings have now been amended to show that the plaintiff is an individual – how does a partnership become an individual? He posed. He then referred the court to **FARRAB INCORPORATED v. BRIAN JOHN ROBSON & ORS** [1957] E.A. 441 in which the facts were similar and the court ordered security for costs. He also referred to the Civil Procedure Rules, second Edition, 1999 and submitted that it is prima facie just to require a foreign claimant to give security for costs, and that this was a proper case for costs.

Oposing the application, Mr. Kyalo said in response that security for costs is not a matter of right but is at the court's discretion. In exercising that discretion, one of the principles to guide the court is that the application should be made promptly. In this instance, the application was made more than 10 years after commencement of the action which renders the applicant guilty of laches. Secondly, it should be shown that the defendant has a bona fide defence. Counsel then referred the court to **SHAH v. SHAH** [1982] KLR 95 and submitted that this is a straightforward claim by the plaintiff who paid to the defendant US\$22,990 and deposited 10,688 crates of beer which the defendant declined to supply.

The plaintiff has attached documents to show that the defendant is in possession of both the money and crates belonging to the plaintiff since 1994, and upon that ground Mr. Kyalo submitted that these were adequate security. Regarding the true identity of the plaintiff, Mr. Kyalo further said that this had been clarified by the further amended plaint. He concluded by inviting the court to find that the plaintiff's claim is bona fide, and that it is not disputed that the defendant has been holding the plaintiff's property since 1994 which is enough to pay costs. He then asked the court to dismiss the application with costs.

In reply, and referring to the delay in bringing this application, Mr. Kibanya contended that the court record will show that the plaintiff has filed five applications in 10 years, and that the defendant brought this application with speed after the date of the last ruling. He then argued that paragraph 5 of the defence raises the issue of the plaintiff's true capacity as this has not been disclosed, and also the issue of fraud against him. He finally submitted that the defence cannot rely on property which is disputed and asked the court to exercise its discretion and grant such security as it would deem fit.

I have heard the rival submissions of both parties. O.XXV rule 1 of the Civil Procedure Rules, being one of the rules upon which the application is made, states-

“In any suit the court may order that security for the which the whole or any part of the costs of any defendant or third or subsequent party be given by any other party.”

Rule 4 thereof, being another rule under which the application is brought, further states-

“In any suit brought by a person not residing in Kenya, if the claim is founded on a bill of exchange or other negotiable instrument or on a judgment or order of a foreign court, any order for security for costs shall be in the discretion of the court.”

In rule 1 above, the phrase used is “the court may order...” This gives the court a discretion whether to order or not to order security for costs. In rule 4, any order for security for costs is expressly at the court’s discretion. The total sum of these rules is that whether the plaintiff is resident or non resident in Kenya, provided the conditions set out in rule 4 are satisfied, it is the court’s discretion which finally rules whether security for costs should be ordered or not. Rule 4 poses an unanswered question – what is the lot of a non-resident whose claim is not founded on a bill of exchange or other negotiable instrument or on a judgment or order of a foreign court? Stimulating as it may be, this question need not be answered here as the matter under consideration does not fall under R.4.

In the case of SHAH v. SHAH [1982] KLR 95, Law, JA., said, at p.98-

“The general rule is that security is normally required from plaintiff’s resident outside the jurisdiction, but as was agreed in the court below, a court has a discretion, to be exercised reasonably and judicially, to refuse to order that security be given; see Kotecha v. Bank of Baroda (C.A. Civil Application No. 43 of 1978, unreported).”

Unless the general rule stated by his Lordship above is a rule of practice, it does not seem to be stated in O.XXV. Otherwise there does not seem to be an inflexible or rigid rule that a plaintiff who is non-resident in Kenya should, by that fact alone, be required to provide security for costs. Wide and unfettered as this power may be however, it should be exercised reasonably and judiciously, having regard to all the circumstances of a particular case.

The case before this court raises some interesting issues. The first one surrounds the identity of the real plaintiff in this matter. The record shows that this suit was first filed by a plaint dated 22<sup>nd</sup> March, 1994 and filed in court on 25<sup>th</sup> March, 1995. the plaintiff was described as a partnership both in that plaint and also in the amended plaint filed in court on 16<sup>th</sup> January, 2003. The mater stood that way until the filing of the further amended plaint on 4<sup>th</sup> May, 2004 when the plaintiff was described as an adult male person of sound mind. Between 25<sup>th</sup> March, 1994 and 4<sup>th</sup> May, 2004, some documents were filed in court which question the present plaintiff’s membership of that original partnership. What would happen if the plaintiff is non suited? His answer is simple. It was amplified by his counsel along the line that the defendant is still clinging to his US\$22,990.00 and 10,688 beer crates which would form adequate security for costs. The defendant’s case is that the sum of US\$22,990.00 was not paid by the plaintiff, but by a third party. It is also the defendant’s case that the plaintiff did not deposit a total of 10,688 empty beer crates as alleged. The defendant has also raised the issue of the plaintiff being time barred as he is a new party by amendment over 10 years after the alleged cause of action arose and the filing of the suit by an alleged partnership in which he was not a partner. The issues raised by the defendant are weighty, and to that extent their defence is not idle. It is a bona fide defence.

As regards the defendant being guilty of laches, it is to be noted that until the filing of the further amended plaint, the defendant was contended as it was dealing with a partnership whose members were, prima facie, Kenyans, claiming US\$142,741. Suddenly, a foreign national takes over as the plaintiff and immediately claims a whopping US\$1,937,012.00 which is more than 10 times what the partnership was claiming. This foreign national does not even pretend to own anything in Kenya except his investment

which is contested. On the contrary, he describes himself as impecunious and quickly blames his impecuniosity on the defendant. These are the circumstances of this case.

In my view, the defendant was not guilty of laches. It was driven into making this application by the plaintiff himself. If I understand its case properly, it was plodded into filing this application by the filing of the further amended plaint on 4<sup>th</sup> May, 2004. And the defence is not a sham. It raises some very pertinent issues. Taking into account all the circumstances of this matter, I am satisfied that this is a fair and proper case in which to exercise the court's discretion and order security for costs. It is therefore ordered as follows-

1. That the plaintiff do provide security for costs in the sum of US\$ 40,000.00 within twenty one (21) days hereof
2. That the security be deposited in an interest earning account in the joint names of the plaintiff's and the defendant's advocates.
3. Parties be at liberty to apply.

The defendants will also have the costs of this application in any event.

Dated and delivered in Nairobi this 10<sup>th</sup> day of December 2004

L. NJAGI

JUDGE