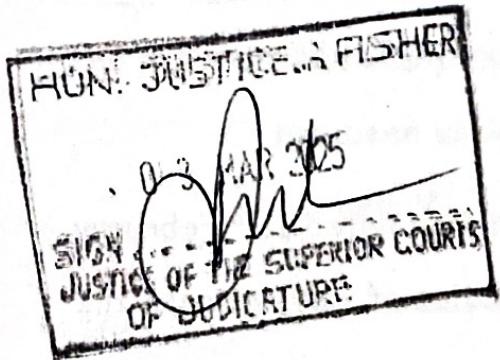


Case NO: C.C 64/2023

IN THE HIGH COURT OF JUSTICE
HOLDEN AT FREETOWN
GENERAL CIVIL DIVISION



Law Court Building
Siaka Stevens Street
Freetown

Date: 3 March 2025

Before:

THE HONOURABLE MR JUSTICE FISHER J

Between:

Memunatu Kamara

Plaintiff

-and-

David Akeredolu

Respondent

Ms ES Banya of counsel (A Alie Esq judgement only) for the plaintiff
Mr ENB Ngakui and B Ndomahina of counsel for the defendant

Hearing dates: 17-24 February 2025

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APPROVED ORDER

I direct, that copies of this version as handed down may be treated as authentic.

THE HONOURABLE MR JUSTICE FISHER J

The Honourable Mr Justice Fisher J:

1. In pending proceedings before me, the trial of the action had just commenced, and the plaintiff had stated to give her evidence when she changed solicitors.
2. Subsequently, the defendant filed a notice of motion dated 12th February 2025, seeking security for its costs. The said notice of motion seeks the following orders:
 1. That this court orders the plaintiff to give security for the costs of the defendants within such time as the court deems fit, in the sum of N1e500,000 or as the court may deem fit.
 2. That the court grants a stay of all proceedings pending the hearing and determination of this application.
 3. That all action be stayed in the said matter until the security is fulfilled by the plaintiff.
 4. That in default of such security been given within the appointed time, the plaintiff's claim is dismissed, and the court orders the counterclaim of the defendant to proceed.
 5. Any further order the court deems just.
3. The application is supported by the affidavit of David Akeredolu sworn to on the 12th day of February 2025, with two exhibits attached. I shall set out the details of the affidavit in summary form and where relevant. He deposed to the following matters:
 1. That he is the defendant and makes the affidavit on his own behalf.

2. That this action was commenced by writ of summons dated 18th April 2023.
3. That on receipt of the said summons he instructed solicitors to enter an appearance on his behalf.
4. That his previous solicitors kept telling him that the matter had not been assigned to a judge and that they had done all filings on his behalf.
5. That he was not served with any judgement from the court but was arrested and brought before the court for security to be taken.
6. That he then instructed his wife Fatmata Tarawally (now deceased) to contract his present solicitors Ngakui and Partners to act on his behalf since he was in prison at the time.
7. That he was informed by his wife and verily believes that to secure his release, his wife spent nLe20000, as was demanded by the plaintiff's solicitor Leon Jenkins Johnston esq.
8. That as per the writ of summons, the plaintiff sued in his personal capacity with an address in Freetown shown as 16 Annie Walsh Street, but it has become clear that the plaintiff is ordinarily resident in the UK, which caused the court to lead her in evidence through a video link on Tuesday 11th February 2025.
9. That he has been informed by his solicitors Messrs Ngakui and Partners, and he verily believes that a plaintiff who is ordinarily resident out of the jurisdiction would be required to by law to provide security for the defendant's costs.

10. That he verily believes the plaintiff has no assets in the country that he may fall upon in the event that he succeeds in the said action, and he is awarded costs.

4. The new solicitors, for the plaintiff filed an affidavit in opposition, which was sworn to by Emma Sombo Banya, a barrister and solicitor, on the 19th day of February 2025, with two exhibits attached. In summary, she deposed to the following matters:

1. That she is the managing partner of ES Banya and Co and duly authorised to make the affidavit.
2. That she is in charge of the matter and the facts she deposes to are within her knowledge and based on documents in her possession.
3. That contrary to para 7 of the defendant's affidavit, the sum of nLe20000 was not parted with by the defendant as there is no evidence before the court that any such sums were parted with by the defendant on the instructions of the plaintiff and that cannot be a reason to seek security for costs.
4. That the address shown on the writ of summons is the resident address of her client, the plaintiff in Freetown and she is currently out of the country on a temporal basis and not ordinarily resident in the UK.
5. That contrary to para 9 of the affidavit in support, the defendant has not provided an address in the UK where the plaintiff lives neither has he provided any evidence to show the plaintiff is ordinarily resident in the UK and not in Sierra Leone.

6. That contrary to paragraph 10 of the affidavit in support, the defendant has not provided any evidence for his belief that the plaintiff has no assets in Sierra Leone.
7. That in the ruling of the court dated 8th November 2023, the learned judge records the facts that the defendant in his own affidavit sworn to on the 15th day of August 2023, alluded to the fact that the plaintiff contributed towards the construction of three shops and two apartments on the ground floor. This admission gives the plaintiff gives the beneficial interests to the properties, thus rendering a security for costs application otiose.
8. That in the event judgement is not given in her client's favour, she has an interest in a lease property at 153 Circular Road which was confirmed by the defendant in para 10,11 and 12 of his defence.
9. That the court should order the defendant to pay security for costs as he is a Nigerian National with a Nigerian Passport who may well fell the jurisdiction without fulfilling any costs application.
10. That the affidavit is sworn to in opposition to the application and in the interest of justice

5. When the matter resumed before me, Mr Ngakui for the defendant prayed in aid of Order 26 subrule 1 of the High Court Rules 2007 and relied upon the Court of Appeal decision in John Michael v Castrol Limited and Abu Kabba which were not provided to this court. He however submitted that the costs should be lodged with the court and that the plaintiff has been collecting rent since 2011. There is a defence and counterclaim, and the costs should be paid as security.

6. Ms ES Banya for the plaintiff argued that no grounds had been provided, and no alternative address had been provided. The plaintiff is not a nominal plaintiff. She is the principal contrary to para 10 of the affidavit in support, the plaintiff has property in Sierra Leone. As far as the plaintiff was concerned, he is a Nigerian National to which Mr Ngakui objected. He stated that the defendant has a British Passport but not a Nigerian passport.
7. Ms Banya further argued that the application should be withdrawn, and they should be awarded costs against the defendant if they insist on going ahead with the application. They cannot show that the plaintiff is ordinarily resident overseas.
8. Mr Ngakui in response added that the provision is specific and refers to the plaintiff who should prosecute the action. He argued that the plaintiff has never attended any court proceedings in this country and since the commencement of the action she has never shown up. That is the reason why they require security for costs. He however alluded to the fact that nLe250,000 is sufficient for present purposes. The interest in the property claimed by the plaintiff has not been determined.
9. Ms Banya further reiterated that there is no reason to ask for security for costs as the plaintiff has a business here in Sierra Leone. The fact that she has not shown up is not a good reason to seek security of costs.

Disposal

10. In matters such as this, the court should be careful in ordering security for costs as this may raise an access to justice issue which might have the effect of impeding access to justice. Where a court orders security for costs against a plaintiff, such a discretion must be exercised on solid

legal principles. The starting point for consideration is the legal framework, which is set out in Order 26 of the High Court Rules 2007 and provides as follows:

1. (1) Where, on the application of a defendant to an action or other proceeding in the Court, it appears to the Court -

(a) that the plaintiff is ordinarily resident out of the jurisdiction.

(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so;

(c) subject to subrule (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated in it, or

(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,

then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.

11. The security for costs regime gives the court the power to exercise a discretion if the conditions precedent are met. In summary, the defendant who is seeking security for costs must fulfil the following:

1. That the plaintiff is ordinarily resident out of the jurisdiction.
2. That the plaintiff is a nominal plaintiff who is suing for the benefit of some other person, AND there is reason to believe that he will be unable to pay the costs of the defendant is ordered to do so.
3. That the plaintiff's address is not stated on the writ or is incorrectly stated, or
4. Has changed address.

12. The first hurdle the defendant has to satisfy is that the plaintiff is ordinarily resident out of the jurisdiction. The plaintiff has asserted that her address is 16 Annie Walsh Street, Freetown. This address is the address used on the writ of summons. The defendant has not provided an alternative address outside of the jurisdiction save for the fact that the defendant has never attended court in Freetown and is giving her evidence by video link from the UK. This court must firstly consider the meaning of the words "ordinarily resident"

Ordinarily resident

13. The words "ordinary resident" has not been defined in any statute. However, in **R v Barnet LBC ex parte Shah, 1983 1 All ER**, the concept was held by the House of Lords to imply the following:

1. *Ordinary residence is established if there is a regular habitual mode of life in a particular place "for the time being", "whether of short or short or long duration", the continuity of which has persisted apart from temporary or occasional absences. The only provisos are that the residence must be voluntary and adopted for "a settled purpose.*
2. *A person can be ordinarily resident in more than one country at the same time. (Lord Scarman described this as "an important factor distinguishing ordinary residence from domicile".*
3. *Ordinary residence is proven more by evidence of matters capable of objective proof than by evidence as to state of mind*

14. The Shah case requires further analysis. Lord Scarman firstly observed that "Though the meaning of ordinary words is, as Lord Reid observed in

Cozens v. Brutus [1973] A.C. 854, a question of fact, the meaning to be attributed to enacted words is a question of law, being a matter of statutory interpretation."

15. The learned judge went further to say that, determining a person's place of "ordinary residence" involves establishing both a physical presence element and a mental element. The physical presence element is largely denoted by identifying the place of a person's residence and the mental element involves whether the person is "ordinarily" resident at that place. There must be a degree of settled purpose.

16. Further in *Fox v Stirk 1970*, Lord Denning observed that a man can have two residences whereas a home is only one place and relied on three principles as follows:

"The first principle is that a man can have two residences. He can have a flat in London and a house in the country. He is resident in both. The second principle is that temporary presence at an address does not make a man resident there. A guest who comes for the weekend is not resident. A short stay visitor is not resident. The third principle is that temporary absence does not deprive a person of his residence. If he happens to be away for a holiday or away for the weekend or in hospital, he does not lose his residence on that account.

17. The difficulty in this case in assessing where the plaintiff is ordinarily resident, is that the affidavit in support does not establish to the required degree the subjective mental element to be attributed to the plaintiff being in the UK. Whilst the plaintiff is physically present in the UK, it is not enough to conclude that she is ordinarily resident in the UK.

In any event the Shah decision establishes that a person can be ordinarily resident in more than one country at the same time.

18. The address she has used on the writ of summons is a Sierra Leone address. There is no evidence before this court as to when she left Sierra Leone or what her purpose of being in the UK is. The court must be satisfied that she is ordinarily resident out of the jurisdiction, before the security for costs regime is engaged.
19. It must firstly be recognised that the fact that a plaintiff is ordinarily resident outside the jurisdiction will not necessarily result in an order for security for costs, the question remains as to how justice will best be served in the circumstances of the case. I shall now deal with the case of John Michael Motors relied upon by Mr Ngakui. This case can be distinguished on the basis that it relates to Rule 15 of the Court of Appeal Rules 1985. Rule 14 of the said rules makes it mandatory for the appellant to provide security for costs in such sum as the registrar shall determine.
20. Rule 15 gives the court a discretion to impose additional security for costs in addition to that provided for under rule 14. That is not the same situation as in Order 26 where the discretion to be exercised by the court is taken afresh and the court is required to determine whether security for costs should be paid in the first instance. The John Michael decision is therefore not relevant to this case and cannot therefore be relied upon or followed by this court in this instance.
21. In exercising a discretion to order security for costs, the exercise of such discretion must be governed by sound principles. This issue was

determined in *Rex v. Wilkes* (1770, K. B.) 4 Burr. 2527, 2539 when Lord Mansfield referred to the exercise of discretion as follows:

"Discretion when applied to a court of justice, means sound discretion guided by law. It must be governed by rule not by humour; it must not be arbitrary, vague and fanciful, but legal and regular."

22. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law. Judicial discretion is one of the important powers of the judiciary where the judges can take decisions in some matter without following any fixed rule or established law. The concept of discretionary power is an instance which shows the independence of the judiciary. Judicial discretion is the power of the judiciary to make some legal decisions according to their discretion.

23. I have also had regard to the decision in *BJ Crabtree v GPT Communication Systems* [1990] 59 BLR 43 at 52, in which LJ Bingham with whom LJ Parker agreed in the Court of Appeal the following:

"It is... necessary, as I think, to consider what the effect of an order for security in this case would be if security were not given. It would have the effect, as the defendants acknowledge, of preventing the plaintiffs pursuing their claim. It would, however, leave the defendants free to pursue their counterclaim. The plaintiffs could then defend themselves against the counterclaim although their own claim was stayed. It seems quite clear - and indeed was not, I think, in controversy - that in the course of defending the counterclaim all the same matters would be canvassed as would be canvassed if the plaintiffs were to pursue their

claim, but on that basis they would defend the claim and advance their own in a somewhat hobbled manner, and would be conducting the litigation (to change the metaphor) with one hand tied behind their back. I have to say that that does not appeal to me on the facts of this case as a just or attractive way to oblige a party to conduct its litigation."

24. This point was again re-echoed by Sonai Proudman QC sitting as a deputy judge of the High Court in *Thistle Hotels Ltd v Gamma Four Ltd & Ors* [2004] EWHC 322 (Ch), [2004] 2 BCLC 174, at [28]:

"The policy behind the jurisdiction to order security for costs is to counter the prejudice suffered by a defendant who is unsuccessfully pursued by a claimant unable to meet an order for costs. It is not intended to counter prejudice to a claimant in meeting a defence that proves unsuccessful. It is the claimant's business if he chooses to sue a defendant who is not good for costs. An impecunious defendant is not to be prejudiced in defending the main claim by an order for security on the counterclaim. In *CT Bowring v Corsi* [1995] 1 BCLC 148 at 153 Dillon LJ said that there was:

"...a strongly established rule of practice that a person who is in the position of a defendant is to be at liberty to defend himself and is not to be called upon to give security... I regard this as a rule of practice, and not a mere matter of discretion to be determined on the facts of each individual case - although of course any decision even to order a plaintiff to give security is a matter for the court's discretion... I regard this rule of practice as of the same class as the rule of practice under which any litigant other than the Crown or a public authority as law enforcer, who

obtains an interlocutory injunction is required to give a cross-undertaking in damages. That is not a matter for discretion in the individual case."

25. I have carefully considered the decision of court in Neck and Taylor 1893 1 QB 560, in which Lord Esher MR had this to say. "

"Where however, the counterclaim is not in respect of a wholly distinct matter, but arises in respect of the same matter or transaction upon which the claim is founded, the court will not, merely because the party counterclaiming is resident out of the jurisdiction, order security for costs; it will in that case consider whether the counterclaim is not in substance put forward as a defence to the claim, whatever form in point of strict law and of pleading it may take, and, if so, what under all the circumstances will be just and fair as between the parties; and will act accordingly."

26. With these principles in mind, I have carefully considered the plaintiff's claim. Order 26 rule 1 clearly requires the court to have regard to all the circumstances of the case and to consider whether it is just to do so, order the plaintiff to give security for the defendant's costs. The justice of the case requires I have regard to the plaintiff's case in outline. Notwithstanding my doubts about the ordinarily resident status of the plaintiff in the UK, the plaintiff's claim is for recovery from the defendant. I am satisfied that to award costs against the plaintiff without ordering one against the defendant would be injurious to justice as the defendant would be free to pursue his counterclaim without having to provide security for prosecuting such a claim whilst the plaintiff may well have barriers in prosecuting the main claim., if security for costs were ordered.

27. The substance of the plaintiff's claim amongst others, is that leased property was fully developed into dwelling apartments and shops which were rented out by the defendant and rents collected by him, which he has not accounted for. These properties are here in Sierra Leone. Should security for costs be ordered, these properties are still within the reach of the defendant who will be able to proceed with the counter claim against the plaintiff.

28. Such a state of affairs where security for costs are ordered, would be inimical to the interest of justice. It is apparent that the interest of justice requires that this matter proceeds to trial and the interest of justice demands that both parties have an opportunity to prosecute and defend their respective cases.

29. The application for security for costs would be refused in this instance. The defendant has simply not made a case for one on the facts of the case.

30. I shall therefore grant the following orders

UPON Hearing Ms E S Banya of Counsel for the plaintiff, and Mr ENB Ngakui for the defendant;

IT IS HEREBY ORDERED AS FOLLOWS:

1. The application by the defendants for security for costs against the plaintiff in the sum of nLe500,000 is refused.
2. That the application to stay all proceedings pending the hearing and determination of this application is refused.

3. That the application that the action is stayed until the security is fulfilled by the plaintiff is refused.
4. The matter is adjourned to **Wednesday 12th March 2025** for further proceedings.
5. The costs of this application summarily assessed at nLe2500 shall be paid by the defendant to the plaintiff.

