



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 35 OF 1997**

**D.J. LOWE AND COMPANY LIMITED.....APPLICANT**

**VERSUS**

**BANQUE INDOSUEZ.....RESPONDENT**

**RULING**

**Outline of the facts**

1. Sometimes on the 23/3/1999 the court granted to the Defendant an Order that the plaintiff do provide security for costs in the sum of Kshs.300,000/= by way of a bank guarantee or insurance bond. The timelines for compliance was total 30 days from the date of the order.

2. On 13/8/1999 Ms. Invesco Insurance Co. Ltd did give to court a guarantee dated the same day and worded as follows:-

**“In accordance with the court under dated 25/3/1999 are hereby guarantee to give a payment of Kshs..300,000/= for costs or subject of the court order”.**

3. The first question the application poses is whether this constituted compliance. Subsequent to the order and said guarantee being given, the plaintiff did seek leave and was granted an order to amend the plaint and the plaint was amended to seek sum of Kshs.13,101,307/= and USD842,669,184.

4. The defendant contends that the order for security was never complied with and that due to the subsequent developments by the amendment, the sum ordered as security for costs has now become insufficient.

5. For those reasons the defendant prayed:-

**1. “That the Plaintiff’s suit be dismissed for failure to comply with the Order for Security for Costs made herein on the 23<sup>rd</sup> March 1999.**

**IN THE ALTERNATIVE**

**2. That the Plaintiff be ordered to furnish security for costs of the Defendant to this suit in the sum of Kshs.8,493,256.00 or in such sum and within such time as this Honourable Court may deem just, failing which this suit stand dismissed with costs.**

**3. That the costs for this application be provided for”.**

6. The other grounds for the application are that the plaintiff as early on 9<sup>th</sup> October 1996 confirmed inability to pay to the defendant the sum then due and that the plaintiff now does not own any asset as may be available on attachment to meet any costs, this court may award ultimately because all its assets have been sold in execution or pursuant to other legal processes.

7. The plaintiff opposed the application by the Notice of Preliminary Objection dated 24/01/2018. That Notice faults the Application for being *res-judicata*, for being a cunning way to defeat the court orders of 10/5/2017 giving directions on the matter being heard on the merits and for being supported by a defective affidavit of counsel canvassing contested matters and sworn without the authority of the company for the deponent to smear the affidavit.

8. Parties filed respective submissions with the Defendants’ being dated 6/2/2018 while those by the plaintiff are dated 5/3/2018 and I have

had the benefit to peruse and consider both submissions and the law applicable.

### **Analysis and determination**

9. I have had the advantage of reading not only the application and the Notice of Preliminary Objection but also the submissions filed and the authorities cited in support of respective and rivaling positions. From my perusal of those documents, there are only two issues that present themselves for determination.

- **Did the plaintiff comply with the Order of 23/3/1999?**
- **Is the alternative prayer asking for fresh security *res-judicata*?**

10. I take the view that I must consider and determine the substantive prayer and only if I disallow it would it be necessary to consider the alternative prayer. If however, I accede to the defendants request in the substantive prayer then there would be no need to consider the alternative prayer.

### **Did the plaintiff comply with the court order of 23/3/1999 ordering it to deposit security within 30 days?**

11. While the defendant contends that the letter by Invesco Insurance dated 13/8/1999 is not an insurers bond, I do not agree. To this court the letter as it guarantees the payment of the sum quoted pursuant to the disclosed order and the guarantee made to last the pendency till determination of the suit fits the definition of an insurance bond.

12. However, the order by Waki J, as he then was, was not ambiguous on how and when it was to be complied with. The Judge set and limited the time allowed for compliance to be thirty days from the date of the order. The extracted order shows it was given on 23/3/1999. That gave the plaintiff upto the 22/4/1999 or utmost 23/4/1999, noting that the month of March has 31 days, to comply.

13. The letter shown as evidence of compliance is dated 13.8.1999 meaning there was never compliance by the order as directed by court. To that extent I am unable to find that the plaintiff did comply with the court orders.

14. Under Order 26 Rule 5, the consequence of failure to comply with the order to provide security for costs is expressed to be that the court "shall on application dismiss the suit".

15. That being the position and being of the learning that court orders must be obeyed for the dignity of the court to be upheld, I do find that by the time the guarantee was availed and submitted to court, time to avail it had long passed with the consequence that there was never compliance with the court order.

16. The consequence is that he who fails to meet the demands of a court order meets the consequence and the consequence of failure to provide security for costs when ordered is that the suit be dismissed.

17. Accordingly I do allow the application dated 12/01/2018 and dismiss the suit with costs to the defendant.

18. Having do so there is not suit pending to merit the consideration of the alternative prayer.

Dated and delivered at **Mombasa** this **19<sup>th</sup>** day of **March 2018**.

**P.J.O. OTIENO**

**JUDGE**