



**COPY**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 533 OF 2011**

**OCEAN VIEW BEACH HOTEL LIMITED ..... PLAINTIFF**

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

**SALIM SULTAN MOLOO .....1ST DEFENDANT**

**ALI SAI (KENYA) LIMITED .....2ND DEFENDANT**

**FIDELITY COMMERCIAL BANK LIMITED .....3RD DEFENDANT**

**SAI HOLDING LIMITED .....4TH DEFENDANT**

**THE COMMISSIONER OF LANDS .....5TH DEFENDANT**

**THE REGISTRAR OF TITLES, MOMBASA ..... 6TH DEFENDANT**

**RULING**

The application herein was made on 17th of September 2012 by the 3rd defendant against the plaintiff. The same prays for orders that the plaintiff do provide security for the 3rd defendant costs in defending this suit.

The application is supported by an affidavit of one Sukhesha Dabholkar who is an employee of the third defendant and who swears he has authority to swear the supporting affidavit.

Mr. Dabholkar demands that the plaintiff to furnish Kshs. 5,000,000 as security for costs. He states that the third defendant has a charge registered against the suit property. He says the charge is for Kshs. USD 1,000,000. He argues that the third defendant's prayers are based on Section 401 of the Companies Act which gives the High Court to grant such orders. He further argues that the plaintiff company appears to have no assets to meet an order for costs if made against it. He says that the minimum costs would be about Kshs. 2,500,000. Learned Counsel Mr. Rimui appeared for the plaintiff. He argued that it is in the interest of justice that litigants should freely access justice without impediments and that impediments should be frowned upon. That Article 48 of the Constitution is clear on the point. He said that there was currently an order for payment of Kshs. 5 million for security of costs for the 1st, 2nd and 4th defendants. He argued that this application for costs was a scheme to prevent the plaintiff from the alter of justice.

He argued that the sum ordered to be deposited in Court in the sum of Kshs. 5 million was sufficient and

that the Court should exercise its discretion and limit the order to that sum. He said that there was eminent danger of other defendants filing applications demanding similar amounts as security for the costs. There was a further allegation that the 3rd defendant had not filed his defence and was therefore not entitled to costs.

Mr. Kinyanjui Learned Counsel for the applicant argued that there is a statement of defence filed by the third defendant on 26th October, 2011 and that this application was anchored on Section 401 of the Companies Act and that the provisions under Order 26 of the CPA and Companies Act are different. That under the Companies Act, a list of the assets must be attached to affidavit in support. He argued that Article 48 entails bringing parties to Court. The defendants were brought to Court by the plaintiff and that Article 48 was therefore met.

This application is brought under Section 401 of the Companies Act that provides as follows

*"401. Where a limited company is plaintiff in any suit or other legal proceedings, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given."*

It is quite clear from the above that the Court's power herein is discretionary.

The issue as to whether the plaintiff company has any assets was very exhaustively dealt with by Tuiyott J in his ruling herein dated 19th July 2012. I need not repeat the principles of granting the security for costs, as Tuiyott J clearly summarized them, as they are laid down in **Keary Development Limited vs Tarmac Construction 1995 3ALL EA 534**. The Judge argued that the plaintiff failed to show any other asset or source of finances. This position was not demonstrated to have changed when Mr. Rimui argued this application before me. Indeed he did not at any one moment state or show that they had any other assets.

The only claim Learned Counsel made was that the Kshs. 5 million deposited as security for costs for the 1st, 2nd and 4th defendants was sufficient to cover the 3rd defendants claim.

I am afraid I am not convinced by that argument. The 3rd defendant is as equally entitled to security for costs as 1st, 2nd and 4th defendants. Indeed in assessing Kshs. 5,600,000 as enough security for the 1st, 2nd and 4th defendant, the Court said

*"I note that the application before the Court is by three out of six defendants sued. There is no knowing whether the other three will come forward with similar applications and I must bear this in mind."*

Trying as much as I can, not to stifle the suit by the applicant and balancing the concerns of the defendant on the issue of costs, I make an order for the security of costs in the sum of Kshs. 1,500,000.

The final orders herein shall therefore be:-

1. The plaintiff shall deposit a sum of Kshs. 1,500,000 (Kenya shillings one million five hundred thousand) to an interest earning account to be held in the joint names of the plaintiff and the 3rd defendant Counsels.
2. This amount shall be deposited within 60 days of today's date.
3. In default of such deposit the 3rd defendants shall be at liberty to apply for the dismissal of the same under Order 26 rule (5) CPR.
4. Costs of the application shall abide in the suit.

**Dated and delivered in open Court at Mombasa this 21st day of February, 2014**

**S.N.MUKUNYA**

**JUDGE**

**21.2.2014**