



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 351 OF 2007**

**LABH SINGH HARMAN SINGH LIMITED.....PLAINTIFF VERSUS**

**ALFA MOTORS LIMITED.....1<sup>ST</sup> DEFENDANT**

**INTERCITY SHUTTLES LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff beseeches the court to order the 1<sup>st</sup> defendant to furnish security for satisfaction of the decree and costs. The amount sought is Kshs 7,000,000 to be paid within 15 days of the order. The plaintiff's notice of motion dated 27<sup>th</sup> February 2013 is predicated upon averments in a deposition sworn by Harjeet Sokhi on even date.
2. The plaintiff's suit is for recovery of Kshs 3,820,000. It avers that the 1<sup>st</sup> defendant is disposing of its plant and equipment. An advertisement for sale is annexed and marked 'HSS 1'. The deponent states that the directors of the 1<sup>st</sup> defendant were also the directors of another company known as Ply and Panels Limited which was wound up in similar circumstances. The plaintiff, after computing interest, avers that its claim has now risen to Kshs 7,000,000. That is the amount that the 1<sup>st</sup> defendant should thus furnish as security. There are two other grounds raised in the motion but not pleaded in the deposition: that the 1<sup>st</sup> defendant has employed delaying tactics in the suit; and that its 2 directors intend to relocate to the United Kingdom.
3. The motion is contested. The 1<sup>st</sup> defendant concedes that it has disposed off some plant and equipment with a book value of Kshs 2,066,459 representing 6% of its asset base. The 1<sup>st</sup> defendant contends that it is still in business of sale of motor vehicles and parts. There is thus no intention to defeat the decree. The apprehensions by the plaintiff are attacked as baseless. The 1<sup>st</sup> defendant denies delaying the hearing of the suit. Harbinder Bhogal, a director of the 1<sup>st</sup> defendant denies knowledge of the company known as Ply and Panels Limited. In particular, he avers that neither him nor Amrik Bhogal are directors of that company. He avers that he is a resident in Kenya, has been a resident since birth and has no intention of absconding. In the end, the 1<sup>st</sup> respondent's case is that the plaintiff's motion has not reached the threshold for grant of the reliefs sought.
4. I have heard the rival submissions. Whether or not to grant a prayer to furnish security is entirely within the discretion of the court. See *Procon Limited Vs Provincial Building Company* [1984] 2 ALL ER 368. See also *Parmex Limited Vs Austin and Partners* Nairobi, High Court case 450 of 2003 [2006] e KLR, *Mama Ngina Kenyatta and another Vs Mahira Housing Company* [2005] e KLR. See also *Nancy Wanjiru Mwaura Vs John Njoroge and another* Nairobi, High Court case 1086 of 1998 [2005] e KLR, *Abel Moranga Ongwacho Vs James Maina Ndegwa and others* Nairobi, High Court case ELC 39 of 2012 [2012] e KLR, *Ndirangu Vs Abdalla* [1984] KLR 746.

Again, the mere fact that the respondent is a foreign company is not sufficient in all cases to ground the motion. See *Jismaji Vs Saheb and another* [1990] e KLR, *Kenya Education Trust Limited Vs Katherine S.M. Whittan* Civil Appeal (application) 301 of 2009 (unreported).

5. In *Shah Vs Shah* [1982] KLR 95, at page 98, Law, J.A delivered himself thus;

*“The general rule is that security is normally required from plaintiffs 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 *Korecha Vs Bank of Baroda* (CA Civil Application No 43 of 1978, unreported)”*.

6. When I apply those principles to the facts here, I find further as follows. Although the plaintiff claims that Harbinder Singh and Amrik Bhogal, the directors of the 1<sup>st</sup> defendant intend to leave jurisdiction, no such evidence is forthcoming. I have stated that no corresponding facts are deponed to in the supporting affidavit. In the replying affidavit, Harbinder Singh depones that he is a resident and carrying on the remainder of the 1<sup>st</sup> defendant’s business. The apprehensions by the plaintiff thus remain just that: unfounded fears not borne out of credible evidence.
7. It is common ground that the 1<sup>st</sup> defendant is selling its assets. Doubt is completely removed by the advertisement of 12<sup>th</sup> February 2013 for sale of its automobile and general engineering business. The 1<sup>st</sup> defendant contends that the sale comprises 6% of its assets and that it continues to trade in motor vehicles and parts. The plaintiff did not file a further affidavit to controvert that. The basis for the plaintiff’s claim is thus in its averment at paragraph 2 of the affidavit where it is deponed as follows;

*“THAT it has been brought to my attention that (Sic) by my friends in the business circles that the 1<sup>st</sup> defendant herein is disposing of its plant, machinery and equipment. Annexed hereto is a copy of the Daily Nation advert dated 12/2/2013 marked as ‘HSS 1’ ”*.

8. The plaintiff then states that it is “convinced that once the 1<sup>st</sup> defendant disposes off its property it will close its business” and hence defeat the decree. There is hence no direct or cogent evidence that the 1<sup>st</sup> defendant is disposing of *all* or a *substantial* component of its business with *intention* to defeat the decree or that it about to close its business. There is equally no reliable evidence that its directors are about to abscond. Fundamentally, the directors remain distinct from the company. *Salomon Vs Salomon* [1897] AC 22.
9. The plaintiff has not shown a clear nexus between the 1<sup>st</sup> defendant, its directors and the other company known as Ply and Panels Limited. The 1<sup>st</sup> defendant denies any such relationship. The substratum for an order to furnish security has thus collapsed. See *Ndirangu Vs Abdalla* [1984] KLR 746. To require the 1<sup>st</sup> defendant to furnish security on information believed from undisclosed sources would be to lower the threshold set by the courts. Furthermore, and as a general rule, the court must be “extremely slow” in ordering security before judgment except in the clearest of cases. In *Kanyoko t/a Amigos Bar Vs Nderu* [1988] 2 KAR 126 at 133 the Court of Appeal held:

*“If the result of this case teaches anything, it is that courts should be extremely slow in ordering attachment of a defendant’s property before judgment, not only because it is hardly consistent with justice to exact ‘punishment’ before the defendant’s liability to execution is established but also because in view of the tardy and time consuming process of the courts, the rights and liabilities of the parties may not be determined for a long time, possibly years”*.

10. This suit was presented in court on 6<sup>th</sup> July 2007. So over 5 years have passed. Although the plaintiff states in its grounds that the “1<sup>st</sup> defendant’s directors have employed [delaying] tactics in a previous suit and finally allowed their company to be wound up” it is not predicated on a clear

deposition. Paragraph 6 of the supporting affidavit deals with a different suit brought by ICEA Limited against Ply and Panels Limited. The 1<sup>st</sup> defendant, like I stated, has distanced itself from the latter company. At paragraph 11 of the replying affidavit, the 1<sup>st</sup> defendant states that it is not to blame for the delays in this suit. It remains the primary business of the plaintiff to progress the suit. See Lord Denning's sentiments in *Fitzpatrick Vs Batger & Company Ltd* [1967] 2 ALL E.R 657.

11. In the record of the court, I can see an application by the 1<sup>st</sup> defendant to dismiss the suit for want of prosecution. The court was unanimous and offered the plaintiff a last chance. That was on 11<sup>th</sup> November 2009. The matter came up for hearing on 7<sup>th</sup> November 2011. The plaintiff had not served the 2<sup>nd</sup> defendant. It was taken out. On 31<sup>st</sup> January, 2012 and 25<sup>th</sup> July 2012, it was the 1<sup>st</sup> defendant who applied for adjournment. There is then a sense in which both parties are guilty of laches. The plaintiff is not on a higher pedestal. Clearly, the plaintiff cannot stand on the platform of delay as the foundation for the motion to furnish security.
12. Lastly, the claim in the suit is for Kshs 3,820,000. There is another defendant in the suit. The plaintiff states that the sum "has now risen to approximately Kshs 7,000,000 when interest of 12% is applied". The sum sought in security is thus based on the plaintiff's own measure of the value of the claim. The order is sought, quite unfairly in my view, against only one defendant. I have already stated that no sufficient foundation has been laid to meet the threshold of grant of an order to furnish security.
13. For all the above reasons, the plaintiff's notice of motion dated 27<sup>th</sup> February 2013 is dismissed with costs to the 1<sup>st</sup> defendant.

It is so ordered.

**DATED and DELIVERED at NAIROBI** this 26<sup>th</sup> day of April 2013.

**G.K. KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of**

Ms. A. O. Ameyo for the Plaintiff.

No appearance for the 1<sup>st</sup> Defendant.

No appearance for the 2<sup>nd</sup> Defendant.

Mr. Collins Odhiambo Court Clerk.