



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO. 405 OF 2010**

**INVESCO ASSURANCE COMPANY.....PLAINTIFF**  
**VERSUS**  
**CITY HOPPER LTD.....1<sup>ST</sup> DEFENDANT**  
**CFC BANK LTD..... 2<sup>ND</sup> DEFENDANT**  
**CFC STANBIC BANK LTD.....3<sup>RD</sup> DEFENDANT**

**RULING**

This Ruling is delivered in two applications filed by the Defendants against the Plaintiff as follows:

1. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants Chamber Summons dated 5<sup>th</sup> August 2010, seeking orders that the Plaintiff do furnish security for their costs in the sum of Kshs 739,902.00/- within 14 days of the Court's Order; that further proceedings by the Plaintiff be stayed pending their furnishing of costs and, for the extension of the time within which the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant should file their defences to the action.
2. The 1<sup>st</sup> Defendant's Chamber Summons dated 8<sup>th</sup> December 2010 seeking an Order that the Plaintiff do furnish security for the 1<sup>st</sup> Defendant's costs in the sum of Kshs 916,313.00/= within 14 days of the Court's order and that the security so furnished be deposited in an interest bearing account in the joint names of the respective Counsel.

Both applications are brought under Order XXV Rules 1,2, 5,6, and 7 as cited in the applications, Section 1A, 1B, 3A and 3B of the Civil Procedure Rules (2009 Revised Ed.) and Section 401 of the Companies Act. They are founded on the ground, mainly that the Respondent Company, having just emerged from Statutory Management, has moved the Court to stop the enforcement of several awards made against it, a fact the Applicant considers sufficient to make one conclude that it is highly doubtful that the Plaintiff/ Respondent would be in a position to meet the costs of this litigation in the event that the applicants are successful in their defence thereto. According to the 1<sup>st</sup> Defendant, the Respondent faces a real risk of collapse by virtue of the fact that several claims worth more than Kshs 300,000,000.00 Million have been made against it.

The 1<sup>st</sup> Defendant/ Applicant's application is supported by an Affidavit sworn by its Managing Director on 8<sup>th</sup> December 2010 while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant/ Applicants' application is supported by an Affidavit sworn by the 3<sup>rd</sup> Defendant/ Applicants' legal counsel on 5<sup>th</sup> August 2010, on behalf of both Defendants. The costs in respect of which security is sought represent the estimated scale fees chargeable in respect of the Plaintiff's claim against the Applicants in the sum of Kshs 43,145,538.00/= as prayed in the Plaint filed on 10<sup>th</sup> June 2010.

The applications are opposed on the strength of the affidavits sworn by one Geoffrey Njenga, the Managing Director of the Plaintiff on the 8<sup>th</sup> November 2010 and 31<sup>st</sup> January 2011. He depones, inter alia, that the Applicants' fears are unfounded since the Respondent has now obtained a new lease of life through the pumping in of more capital after being acquired by new investors, as is clearly demonstrated by the fact that Statutory Management has been lifted and the Company has been allowed to resume trading.

The Deponent states that the orders obtained to stop the various claims, were so obtained to cushion itself against fraudulent and/ or fictitious claims made against it, while settling all genuine claims after due investigations are carried out. It is the Respondent's position, as stated in the Respondent's application that the 1<sup>st</sup> Applicant for instance, having filed a counter claim in the suit, should be deemed to believe in the sound financial standing of the Respondent particularly since it has not sought to move the Court for a judgment before trial. The Respondent further contends that the amount of costs sought as security are exaggerated and no tabulation or calculation as been tendered to support the same.

Brief written submissions were filed herein and later highlighted. Both Applicants submitted that the Plaintiff, having stated in an Affidavit sworn on its behalf that it faced a risk of collapse (unless an order was made stopping several claims against it) and that its chances of survival rested on the Plaintiff's orders being granted, it was clear that it would not be in a position to meet the costs of litigation.

The 1<sup>st</sup> Respondent added that, in stating that the reason behind the proceedings to stop the various claims was to afford itself time to investigate them and cushion itself from fraudulent claims, is a clear indication that the Plaintiff is driven by ulterior motives in preferring this suit. The 1<sup>st</sup> Plaintiff asks the Court to evaluate the pleadings and peruse the documentation filed and to find that the 1<sup>st</sup> Defendant does not owe the money claimed by the Respondent as outstanding Premium.

On its part, the Respondent has submitted that the applicants' fears are unfounded since the Respondent is a Resident Company and has all the investor confidence necessary to trade profitably and meet all of its financial obligations as may become due, including the Applicants' costs, should the same be awarded against it.

Citing the authorities of **SHAH versus SHAH [1982] KLR 95**, **MAGIRI NGUTHARI versus GIDEON KIMATHI M'NGUTHARI [2010] eKLR** and **BRIAN JOHN ROBSON & OTHERS, [1957] EA 441**, **CANCER INVESTMENTS LTD versus SAYANI INVESTMENTS LTD [2010] eKLR** and **ALLIANCE MEDIA KENYA LTD versus MONIER 2000 LTD [2005] eKLR** the Respondent has submitted that the orders sought are not merited in the circumstances of the case.

After due consideration of the arguments herein in light of the law, and having regard to all the circumstances, I am not satisfied that the circumstances of this case do justify the exercise of this court's discretion in favour of the Applicants. Discretion to order Security for Costs is never exercised as of course. Even as the Court is not required to go into the merits of the case, it is trite that; just as the purpose to order Security is to prevent injustice to the applicant; the law recognizes the need to avoid injustice to a respondent who has a meritorious claim.

There is nothing concrete placed before this Court to satisfy me that the Respondent's case is unmeritorious. Considering that the Respondent has only recently risen from the ashes of Statutory Management and is currently trading, I am of the view that injustice would accrue to it if the orders sought are granted in the circumstances. The legal test applicable being, not whether the Plaintiff may be unable to pay costs but whether it will not be able to pay the costs of the suit, I find that the decisions of MWERA J., in **CANCER INVESTMENTS LTD versus SAYANI INVESTMENTS LTD [2010] eKLR** and that of Kasango J. in **ALLIANCE MEDIA KENYA LTD versus MONIER 2000 LTD [2005] eKLR** do support the Respondent's position in opposing the application.

Accordingly, the applications are dismissed with an order that be costs in the cause.

**DATED, SIGNED and DELIVERED AT NAIROBI this 21<sup>st</sup> DAY of OCTOBER, 2011**

**M.G. MUGO**

**JUDGE**

In the presence of:

No Appearance

Mr. Ngatia

No Appearance

For Plaintiff/Respondent Mr..Khalwale holding brief for

For the 1<sup>st</sup> Defendant/Applicant

For the 2<sup>nd</sup> & 3<sup>rd</sup> Respondent