



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 173 of 2009**

**YASH PLASTOMET (PVT) LTD. ....APPELLANT**

**VERSUS**

**FRIENDSHIP CONTAINER MANUFACTURERS LTD.....RESPONDENT**

**RULING**

1. By a notice of motion dated 18<sup>th</sup> March, 2009, Friendship Container Manufacturers Ltd, who are the respondent in this appeal (hereinafter referred to as the applicant), seek orders under Order XLI Rule 9 and 32 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act as follows: -
  - (i) That the appellant do give security for the whole of the costs of the appeal herein that may be awardable to the respondent if the appeal is unsuccessful.
  - (ii) That the security to be so given be in the form of money and at least of Kshs.1,000,000.00 to be either deposited in court or in an interest earning bank account in the joint names of the advocates for the parties herein and which sum shall in any event be released to the successful party upon determination of the appeal.
  - (iii) That the costs of this application be awarded to the respondent.
2. The application is anchored on grounds which have been stated on the body of the application and an affidavit sworn by a director of the applicant Nilesh Devchand Jivraj Dodhia. In short, the applicant is apprehensive that the appellant which is a company registered in India having no known property in Kenya or any of its directors resident in Kenya, will not be able to pay the applicant the costs of the appeal should the appeal be unsuccessful.
3. The applicant explains that its suit filed in the Industrial Property Tribunal, which is subject of this appeal, relates to a dispute of an industrial design the value of which runs into millions. During the course of the proceedings in the Industrial Property Tribunal, the appellant was aggrieved by a ruling made by the Tribunal on a preliminary issue, and proceeded to file the current appeal. The applicant therefore urges the court to order the appellant to provide security for costs.
4. Counsel for the applicant has submitted that the costs of the appeal considering the subject matter of the appeal under the Advocates Remuneration Order, would be in excess of Kshs.1 million. Counsel for the applicant relied on ***HCCA No.476 of 2005 Adela Rwabudariko vs Farmers Choice Ltd.***
5. The application is opposed through a replying affidavit sworn by Pankaj Kanubhai Sheth, a director of the appellant. The appellant disputes the applicant's contention that the value of the subject matter in the Industrial Property Tribunal is Kshs.20 million. The appellant further contends that the costs of the appeal currently would be no more than 13,440/= which it is ready and willing to deposit. Counsel for the appellant submitted that the appeal is based on a point of law, and therefore legal costs under the Advocates Remuneration Order would not be more than Kshs.13,440/=. Counsel relied on the following authorities:
  - ***Keary Developments Ltd vs Tarmac Constructions Ltd & Another [1953] 3All ER 534.***
  - ***Aggrey Thande vs ABN Amro Bank & 2 others [2005] eKLR.***
6. Having given due consideration to this application, I do note that this court has discretion under Order XLI Rule 9 of the Civil Procedure Rules, to order the appellant to provide security for the whole or any part of the costs of the appeal. In this case, it is not

disputed that the appellant is a company which is neither incorporated in Kenya nor does it carry on business in Kenya, nor does any of its directors reside in Kenya. The applicant's apprehension that it may have difficulties recovering its costs in the event that the appeal is unsuccessful is not unfounded. Indeed, the bone of contention between the parties appears to be the amount of the security to be offered.

7. Although the applicant has valued the subject matter before the Industrial Property Tribunal at Kshs.20 million, the applicant has not provided any proper basis for this valuation. In any case, at this stage the applicant is not seeking security for the suit which is still pending in the Industrial Property Tribunal or for an appeal against a judgment in respect of the suit, but is simply seeking security for costs of the appeal pending before this court, which appeal is only on a preliminary issue, the main suit still being pending in the Industrial Property Tribunal.
8. In the circumstances, it would be improper to base the costs of the appeal on the value of the pending suit. I find that a sum of Kshs.100,000/= would be sufficient security for costs of this appeal. Accordingly, I order the appellant to provide security by way of deposit of Kshs.100,000/= into this court within 21 days from the date hereof. Those shall be the orders of this court.

**Dated and delivered this 10<sup>th</sup> day of February, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Miss Opiyo for the appellant/respondent

Ngugi for the respondent/applicant