



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**(MILIMANI COMMERCIAL & TAX DIVISION)**  
**CIVIL SUIT NO. 624 OF 2007**

**KANYOTTA HOLDINGS LIMITED.....PLAINTIFF**  
**VERSUS**  
**KENYA SHELL LIMITED.....DEFENDANT**

**R U L I N G**

On 9<sup>th</sup> March, 2009 Hamilton Harrison & Mathews, the Defendant's advocates filed a chamber summon application under order 25 Rules 1, 5 and 6 of the Civil Procedure Rules and Section 401 of the Companies Act. The said application seeks the following prayers.

- 1. The plaintiff does within a time to be fixed, give security in the sum of Kshs. 625,123/- for the defendant's cost of this suit.**
- 2. If the plaintiff fails to give security for the defendant's costs as aforesaid then the plaint be struck out with costs to the defendant.**
- 3. The defendant do pay to the plaintiff the costs of this application.**

In his submission, the applicant's counsel Mr. Kimani stated that the power given to the court as to whether the plaintiff should or should not furnish security is discretionary. Besides the above, he also submitted that the court has to balance two interests:

- (a) the plaintiff's right to access the court without being unduly burdened by an order for security
- (b) the protection of the defendant in the event that it succeeds in defeating the claim and the plaintiff is unable to pay the costs.

In support of his submissions, the learned counsel quoted the following authorities.

- Aggrey Peter Thande vs. ABN AMBRO Bank & 2 Others eKLR
- DJ Lowe & Co. Limited vs. Indosuez [1997] LLR 797 HCK
- Industrial Plant (EA) Limited (In receivership) vs. Stanbic Bank (K) Limited & Another [2008] eKLR.
- GM combined (U) Limited vs. AK Detergents Limited [1992] 2 EA 294
- Shah & Others vs. Manurama Limited & Others [2003] 1 EA 294

It was the contention of the applicant's counsel that in the last authority the court held that the powers of the court are entirely discretionary. Further to the above, the applicant's counsel also submitted that the defendant has already prevailed in another claim by the plaintiff thus.

- (a) The plaintiff's claim was struck out by the arbitrators.
- (b) The defendant seriously disputes the plaintiff's claim.
- (c) The plaintiff took over 13 months to pay costs awarded in Misc. 172 of 2007 which were awarded to the defendant. The costs were Kshs. 1,819,741/- .According to the learned counsel the said costs were paid in full about 28 months after the arbitrator had filed his award.
- (d) The plaintiff concedes that it has been going through a difficult period. The above fact is clearly shown on page 12 of the annexures which refer to a letter from Mr. K'Opere.

(e) The Plaintiff claims that it has assets but it does not produce evidence to that effect. It was his contention that the burden of proving ownership of property is on the person claiming the same. That apart he has also submitted that an application of this kind is founded on fear on the part of the defendant. In conclusion, the applicant's counsel submitted that there are reasonable grounds by the defendant that he may not be able to recover costs if the defence prevails. To support the above, he quoted the case of **Surgipharm limited vs. Asher Pharmacy Limited. HCC No. 295 of 2005.**

On the other hand the plaintiff/respondent has opposed the application while relying on six grounds of opposition. Mr. K'opere who appeared for the plaintiff reminded the court that the application was brought on one ground; that the plaintiff has failed to settle the costs awarded to the defendant in relation to arbitration between the parties. He also recalled that it was stated on the body of the application that the plaintiff had paid only Kshs. 400,000/- out of a total of Kshs. 1,819,741/-. According to the respondent's counsel that was factually misleading. The respondent's counsel further submitted that as of 28<sup>th</sup> February, 2009 the plaintiff had already paid the sum of Kshs. 650,000/- which was acknowledged by their letter dated 3<sup>rd</sup> March, 2009. He estimated that to be one week before they had filed this application. Secondly, the respondent's counsel has contended that by 30<sup>th</sup> June, 2009 those costs (Kshs. 1,819,741/-) had fully been paid. The effect of the above is that the entire substratum of the application had been washed away. Thirdly, on that realization the defendant sought to introduce a further affidavit dated 9<sup>th</sup> July 2009. That is the further affidavit that the defendant had asked the court to consider as duly served and filed. In his opinion, the respondent's counsel stated that Order 50 rule 16 (2) of the Civil Procedure Code is clear that leave to file a further supplementary affidavit can only be granted to allow an applicant to file a replying affidavit. He concluded that therefore, no leave can be granted. In addition to the above, he also submitted that the further affidavit purports to introduce a new ground to the application as is contended in paragraph 6. He pointed out that the above introduces the issue of assets that was never part of the application and was merely being introduced to give the application a ground to stand on. Subsequently, the respondent's counsel referred to order 25 rule 1 and stated that the same does not specify the grounds upon which security for costs should be granted. He further submitted that the courts have set certain perimeters within which they should be granted:

- (a) Where a company is foreign and has no local asset or office.
- (b) Where a company is in liquidation due to insolvency.
- (c) An individual facing bankruptcy proceedings
- (d) Or somebody who is impecunious.

The learned counsel also contended that there has been no evidence which have been brought to court to prove the above elements. Impecuniosity *per se* does not warrant an automatic grant for an order for security of costs. In support of his submissions, the learned counsel quoted the following authorities.

- Menno Travel Services Limited vs. Co-operative Bank of Kenya Limited Civil Case No. 421 of 2006.
- James Muchene Ngei vs. Stephen Viljoen Ivor Mathee & BOC Kenya Limited – Civil Case No. 1321 of 2001
- Aggrey Peter Thande vs. ABN AMRO Bank & 2 Others [2005] eKLR

Mr. K'opere pointed out that the issues in this case are totally different from the quoted authorities. Besides the above, he also reminded the court the costs were taxed in May 2008 and Certificate of Costs was issued in August 2008. Consequently the payments commenced in September 2008 and were cleared in June 2009. He calculated that period to be ten months. To him the question of delay in recovering the costs for 28 months does not arise. In the case of **Lowe & Co. vs. Indosuez [1997] LLR at page 979** the defendant was not even able to pay its rent. However, Justice Waki as he then was gave a conditional order for depositing a security of costs but stayed the proceedings. However, he did not dismiss the case. On the other in the case of **Industrial Plant (EA) Limited (In receivership) vs. Stanbic Bank of Kenya**, the court gave an order for deposit of costs and stayed the proceedings pending compliance. To conclude his submissions, the respondent's counsel quoted the following two authorities.

- A.K. Detergents (U) Limited [1992] 2 EA 294
- Shah & Others vs. Manurama Limited & Others [2003] I EA 294

In the last case the court stated that it is a discretionary leave and should not be used as a weapon to oppress any party. According to the respondent's counsel the issue of success of these proceedings cannot be determined at this stage as this is a heavily disputed matter. He clarified that the plaintiff referred to the general economy. That does not affect him alone. It was the opinion of the respondent's counsel that the defendants have not demonstrated sufficient grounds to order for an order of security for costs. On the

basis of the above arguments the counsel has urged this court to dismiss the application. This court has carefully considered the opposing submissions by the learned counsels. The court notes that Order 25 rule 1 states as follows:

***“In any suit the court may order that security for the whole or any part of the cause of any defendant or third or subsequent party be given by any other party.”***

It is obvious from the above, that the powers granted to this court are purely discretionary in nature. However, those powers must be exercised fairly and judiciously. In the case of **Shah & Others vs. Manurama Limited and Others**, the court held as follows:

***“The power of the court to order a plaintiff to pay security for costs is entirely a discretionary matter for the court. In exercising its discretion, the court must take into account all the circumstances of a particular case. Sir Lindsay Parrinto and Company Limited vs. Triplan Ltd. [19763] QB 609 adopted.”***

In addition to the above, in the case of **Pearson vs. Naydler [1977] 3 All ER 531, at page 535**, Megarry V.C. held as follows:

***“In the case of a limited company, there is no basic rule conferring immunity from any liability to give security for costs. The basic rule is the opposite; s 447 applies to all limited companies, and subjects them all to the liability to give security for costs. The whole concept of the section is contrary to the rule developed by the cases that poverty is not to be made a bar to bringing an action. There is nothing in the statutory language (the substance of which goes back at least as far as the Companies Act 1862, s 69) to indicate that there is any exception to what is laid down as a broad and general rule for all limited companies. Nor is it surprising that there should be such a rule. A man may bring into being as many limited companies as he wishes, with the privilege of limited liability; and s 447 provides some protection for the community against litigious abuses by artificial persons manipulated by natural persons. One should be slow to whittle away this protection as one should be to whittle away a natural person’s right to litigate despite poverty.”***

In this particular case it is apparent that the parties had previously had an arbitration between them. However, the applicant’s counsel did not give an accurate period in which the plaintiff in this case paid the costs. Whereas the applicant’s counsel had claimed that the costs were paid within a period of 28 months the evidence revealed by the respondents counsel is that the said costs were actually paid within a period of 10 months. Having carefully gone through the plaint the court finds that the amount being claimed is quite substantial. It is in the interest of justice and fair play that the plaintiff/respondent should be allowed to proceed with his case to allow the court to make an informed and impartial judgment. Taking all the circumstances of this case into consideration, I hereby decline to grant the orders being sought in the application.

The upshot is that, I hereby dismiss the application since the same has no merits at all. Costs to the respondent in any event.

**MUGA APONDI**

**JUDGE**

**Ruling read, signed and delivered in open court in the presence of:**

Mrs. Otaba for Kiragu Kimani - Applicant’s counsel

K’Opere - Respondent’s counsel

**MUGA APONDI**

**JUDGE**

**9<sup>TH</sup> JULY, 2010**

**Mrs. Otaba:**

I pray for leave to appeal.

**K’Opere:**

We are not opposed to the application

**Court:**

The applicant is hereby granted 28 days leave to appeal against my ruling.

**MUGA APONDI**

**JUDGE**

**9<sup>TH</sup> JULY, 2010**