

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1157 of 2001

PIONEER PLUMBERS LTD..... PLAINTIFF

VERSUS

MORRIS & COMPANY LTD.....DEFENDANT

RULING

On 27th May 2009, this court granted the plaintiff's application which sought the defendant to furnish security for costs pending the hearing and determination of the suit. The court ordered the defendant to furnish security to the sum of Kshs.3 million by depositing the same, within thirty (30) days of the date of the order, in an interest earning account in the joint names of the counsel for the plaintiff and of the defendant. The court made a further order that should the defendant default in furnishing the said security, the plaintiff would be at liberty to make an appropriate application to court for the striking out of the defence.

On 24th July 2009, the plaintiff filed an application pursuant to the provisions of **Order XXXVIII Rule 5(1)** of the **Civil Procedure Rules** and **Sections 3A & 63(b) and (c)** of the **Civil Procedure Act** seeking orders of the court for the defendant's defence dated 27th August 1984 and filed in court on 28th August 1984 be struck out. The plaintiff further prayed for judgment to be entered in its favour for the sum of Kshs.2,889,545/= together with interest from the date of filing suit to the date of payment. The plaintiff further prayed that the suit be set down for hearing on formal proof. The plaintiff prayed to be awarded costs of the application and costs of the suit. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of Rajinder Billing, the advocate of the plaintiff. Though the application was served, the defendant did not deem it appropriate to file any papers in response to the application. Neither the defendant nor its advocate attended court during the hearing of the application. The application was therefore unopposed.

I have carefully considered the facts put forward in support of the application. As stated earlier in this ruling, the defendant was directed by this court to furnish security for costs within a specified period. The defendant did not comply with the order of this court. I have perused the proceedings that have taken place in this case. It is clear that this is a long standing dispute which ought to be brought to a conclusion. This case was partly heard by Kasango J. Since then, it is apparent that the defendant has not been keen to defend the suit. It appears that the defendant has lost interest in defending the suit. The plaintiff, who has always been keen to prosecute its case, cannot therefore be held at ransom for an indefinite period of time. Since the defendant has failed to furnish security as directed by this court, it is just and fair that the defence filed by the defendant be struck out and judgment be entered in favour of the plaintiff as prayed in its plaint. It is apparent that the defendant filed the said defence to obstruct the just determination of this suit.

As the plaintiff filed a liquidated claim, judgment is entered in favour of the plaintiff for the sum of Kshs.2,889,545/= together with interest at the prevailing court rates from the date the suit was filed to the date the decretal sum shall be paid. The plaintiff shall have the costs of the application and the cost of the suit.

DATED AT NAIROBI THIS 28TH DAY OF OCTOBER 2009

L. KIMARU

JUDGE