

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

Civil Case 532 of 2006

INDUSTRIAL PLANT (E.A.) LIMITED (IN RECEIVERSHIP).....PLAINTIFF

VERSUS

STANBIC BANK KENYA LIMITED.....1ST DEFENDANT

**GRAHAM SILCOCK AND JOHN STANLEY WARD (Joint Receivers and
Managers of INDUSTRIAL PLANT E.A. LIMITED).....2ND DEFENDANT**

R U L I N G

The defendants brought an application under the provisions of **Order XXV Rules 1, 2, 5(1) and 6** of the **Civil Procedure Rules** and **Section 401** of the **Companies Act** seeking an order of this court to compel the plaintiff to furnish security for costs for the suit within fourteen (14) days of the order of the court. The defendants further prayed for the filing of the defence and proceedings herein be stayed pending compliance with the order of the court as regard furnishing of security for costs. The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavits of Nahashon Maina and Graham Silcock. The application opposed. The plaintiff filed grounds in opposition to the application.

Before the hearing of application, Mr. Gichuhi counsel for the defendant and Mr. Kurgat counsel for the plaintiff agreed by consent to file written submissions in support of their respective clients' cases. The said written submissions were filed. Mr. Gichuhi and Mr. Kurgat highlighted salient aspects of the said written submissions during the hearing of the application. They further relied on several statutes and decided cases in support of their respective positions.

I have carefully considered the said rival submissions made. I have also read the pleadings filed respectively by the defendants and the plaintiff in support of their opposing positions. The issue for determination by this court is whether the defendants have established a case to enable this court make an order compelling the plaintiff to furnish security for costs for the suit pending the hearing and determination of a suit. **Order XXV Rule 1** of the **Civil Procedure** rules grants this court unfettered discretion to order any party to furnish security for costs pending the hearing and determination of a suit. The court is however guided by **Order XXV Rule 4** of the **Civil Procedure Rules** on the circumstances it can order a party to furnish security for costs. The court may order a party who is not resident within its jurisdiction to furnish security for costs. This court is aware that the instances in which a court may order a party to furnish security for costs depends on the circumstances and the justice of each case.

In England, under **Order 23 of Rules of Supreme Court Practice** security for costs may be ordered where a party is resident out of the jurisdiction of the court, where the plaintiff is an insolvent company, where the company is based out of the jurisdiction of the court but has property in England, where a nominal plaintiff has filed suit, where a person under disability has filed suit through a next friend, where either the plaintiff or the defendant is a person of unknown residence, where the plaintiff has no visible means of paying costs, and where it is established that the opposing party may be unlikely to recover its costs if the suit is determined in its favour (see **The Supreme Court Practice, 1999, Vol. 1 at page 428 – 44, Sweet & Maxwell, London 1998**).

In Kenya, **Section 401** of the **Companies Act** provides that:

“Where a limited company is plaintiff in any suit or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.”

Certain facts are not in dispute in this case. It is not disputed that the plaintiff is a company which was placed under receivership by the 1st defendant on account of its alleged failure to repay some amount which was advanced to it. The assets of the plaintiff company were charged to the 1st defendant. Proceedings were brought before court by a company called Airduct Engineering Limited against the Plaintiff Company and Graham Silcock (2nd defendant and the receiver manager of the plaintiff company) claiming certain assets that were in possession of the plaintiff company. This court allowed the said company’s application to remove the said assets from the premises of the plaintiff company. The defendants assert that the plaintiff company has no assets which could be attached to settle costs in the event that the plaintiff company failed in its suit against the defendants. The defendants contend that the plaintiff is a shell company with no assets. The plaintiff does not seriously dispute this assertion by the defendants due to the fact that the basis of its case was the decision by the 1st defendant to place the plaintiff company under receivership. The plaintiff further claimed that its assets were lost when the 1st defendant appointed the 2nd defendants as receivers and managers of the company. The plaintiff conceded that it did not have assets which could be attached to settle any costs that may be awarded to the defendants in the event that they are successful in their defence of the suit.

This court is aware of its duty not to lock out a litigant from the seat of justice on the basis of his poverty or impecuniosity. One way by which a litigant may be prevented from presenting his case to the court is by requiring him to furnish security for cost before the hearing of such suit. This court also has a duty to protect a defendant who has been sued by a plaintiff where it is apparent that in the event the suit is dismissed such a plaintiff may not be in a position to settle the costs that he would be required to pay. This is more so in the case of a company where it is difficult for the veil of incorporation to be lifted in light of statutory provisions. In the present application, the plaintiff company is under receivership. Prima facie, it has been established that it does not have any assets which may be attached to settle any costs that may be awarded by the court in the event that the defendants are successful in their defence of the suit. The plaintiff, through its directors have filed the present suit against the defendant seeking a not insubstantial amount of KShs.161,500,000/= and 3,000,000 Swiss francs. I agree with the dictum of Megarry V.C. in **Pearson –vs- Naydler [1977] 3 All ER 531** at page 535 when he held that:

*“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 the present suit, it is clear that there is a possibility that the defendants would be seriously prejudiced if the plaintiff does not provide security for costs. I therefore hold that this is one case where an order for the furnishing of security for costs must issue. I direct the plaintiff to deposit the sum of KShs.10,000,000/= in an interest bearing account in the joint names of the counsel for the plaintiff and the counsel for the defendant within thirty (30) days of today’s date as security for costs. I further stay proceedings in this suit pending compliance of the order of this court. In the event that the plaintiff shall fail to furnish the said security for costs ordered by this court, the defendants shall be at liberty to apply

for further appropriate orders.

The defendants shall have the costs of the application.

DATED at **NAIROBI** this **20th** day of **FEBRUARY, 2008**.

L. KIMARU

JUDGE