



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

Civil Suit 423 of 2005

**TANGANYIKA INVESTMENTS OIL & TRANSPORT COMPANY
LIMITED.....PLAINTIFF**

VERSUS

**MOBIL OIL KENYA LIMITED1ST
DEFENDANT**

**MOBIL OIL EAST AFRICA LIMITED2ND
DEFENDANT**

**MOBIL OIL AFRICA SALES INC.....3RD
DEFENDANT**

**BENJAMIN G. KINGORI.....4TH
DEFENDANT**

**MACHARIA IRUNGU5TH
DEFENDANT**

**SAMUEL NJOROGE6TH
DEFENDANT**

**NDERITU.....7TH
DEFENDANT**

R U L I N G

There are three (3) Applications before court. All three are similar in their prayers save for the amounts sought as to security for costs. The first (1st) is that dated the 18th December 2006 brought on behalf of the 2nd and 3rd Defendants by M/s Omar Kemal Amin & Company Advocates. It is supported by the Affidavit of STEPHEN KIIYURU MBUGUA the legal officer of the 1st Defendant who depones that he swears it on behalf of both the 2nd and the 3rd Defendants. This application was filed in court on the 18th December 2006.

The second (2nd) application is dated the 25th July 2006 and is brought on behalf of the 4th defendant by M/s Muthoga Gaturu & Company Advocates. It is supported by the Affidavit of BENJAMIN G. KINGORI the said 4th Defendant and it is sworn on the 17th September 2007.

There is then the third (3rd) application brought on behalf of the 5th, 6th and 7th Defendants also by M/s Muthoga Gaturu & Company Advocates. It is also dated the 25th July 2006 and is supported by the Affidavit of **MERCY NDERITU** the 7th Defendant on her own behalf and on behalf of the 5th Defendant. It was sworn on the 17th September 2007 and the 2nd and 3rd applications were filed in court on the 20th September, 2007. There is no Affidavit sworn on behalf of the 6th Defendant.

The Application on behalf of the 2nd and 3rd Defendants is brought under Order XXV Rules 5(1), 6 and 7(1) of the Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Act and all other enabling provisions of the Law. The Applications on behalf of the 5th, 6th and 7th Defendants are brought under Order XXV Rules 1,4,5,6 and 7 of the Civil Procedure rules and Sections 3 and 3A of the Civil Procedure Act and all other enabling provisions of the Law. They all are based on the grounds that the plaintiff is a limited liability company incorporated in the Republic of Tanzania and that it has no known realizable substantial property within the jurisdiction of this court.

The Plaintiff filed neither grounds of opposition nor a Replying Affidavit. The Applications were argued in the absence of either the Plaintiff or its Advocates an application for adjournment made on behalf of counsel for the Plaintiff having been strenuously opposed by both counsel for the 2nd and 3rd Defendants and for 4th, 5th, 6th and 7th Defendants.

Mr. Amin learned Counsel for the 2nd and 3rd Defendants urged his clients' case first. He stated that the plaintiff is registered in Tanzania and has its offices in Morogoro Tanzania. He said further that the Plaintiff has no known assets within the jurisdiction of the court and in the event that the 2nd and 3rd Defendants successfully defend the suit against them they would not be in a position to recover costs thereby suffering irreparable harm and financial loss. He urged the court to order for security for costs in the sum of Ksh.8,112,180/= which he said was arrived at under the Advocates Remuneration Order based on the liquidated claim in the plaint against the 2nd and 3rd Defendants. For the Law relevant to his application he referred the court to order XXV of the Civil Procedure Rules under which the Application is brought and also referred to the case Law of **HCCC No. 20.25 AGGREY PETER THANDE –VS- ABN AMRO BANK & 2 OTHERS; KEARY DEVELOPMENT –vs- TARMAC CONSTRUCITON [1995] 3 ALLER; page 536-539 and also ORDER 23- SUPREME COURT PRACTICE 1995** to reinforce his position.

Mr. M. Gitau learned counsel for the 4th, 5th, 6th and 7th Defendants on his part started by fully adopting in the main, submissions by counsel for the 2nd and 3rd Defendants. He submitted that the Plaintiff was resident outside the jurisdiction of the court and had no known assets within the jurisdiction. His clients' case is that there was no written Agreement between the plaintiff and themselves shown and there is therefore no open and shut case against them and that the bulk of the claim being based on fraud which is a very complicated matter to prove and the claim being premised on speculation is unlikely to succeed. He further submitted that the plaintiff has also used a multiplicity of suits merely to harass the defendants and counsel further added that demand for security was made to the plaintiff and no response was received. He urged that this is a proper case where security for costs must be ordered and stated that even if it was a Kenyan citizen resident abroad an order for security for costs would be granted. The security for costs of Ksh.3,690,000/= of the 4th Defendant and for the 5th, 6th and 7th Defendants is what is sought. Counsel for the 4th, 5th, 6th and 7th Defendants relied on substantial case law and emphasized the cases of **FARRAB INCORPORATED –VS- BRIAN JOHN ROBSON AND OTHERS CIVIL CASE NO. 725 07 1957; THE SUPREME COURT PRACTICE 1995; and AERONAVE SPA AND ANOTHER –VS- WESTLAND CHARTERS LTD AND OTHERSS.**

I have applied my mind to this matter, to submissions by both counsel appearing herein and to case Law. It is not in doubt that the court has statutory power to order a plaintiff limited liability company to give security for costs. Such power is discretionary and such discretion must be exercised after having regard to all the circumstances of the case. There is no dispute that the plaintiff herein is resident out of the jurisdiction of the court. The plaintiff has not shown that although resident out of the jurisdiction of the court it has substantial fixed or permanent, or certain property within the jurisdiction which can be

accessed by judicial process should the Defendants succeed in defending the claim against them and get an order for their costs. It is not right that they should have to go to Tanzania to enforce the order as there could be all sorts of difficulties in obtaining execution there. The Plaintiff being resident out of jurisdiction and having no known substantial fixed or permanent or certain assets or property within the jurisdiction of the court makes a prima facie case for requiring it to give security for costs. The justice of this case demands that security for costs be ordered. Having perused the pleadings herein I consider that the Defendants have made out a case for costs to be ordered as prayed and accordingly order as follows:-

- 1. The Plaintiff do provide security for costs of the 2nd and 3rd Defendants in the sum of Ksh.8,112,180/= within TWENTY ONE (21) days of service of this order.**
- 2. The Plaintiff do provide security for costs of the 4th, 5th, 6th and 7th Defendants in the sum of Ksh.3,690,000/= within TWENTY ONE (21) days of service of this order.**
- 3. Such security be in the form of a performance bond provided by a reputable financial institution or a cash deposit in the joint names of the Advocates for the Plaintiff and those for the 2nd and 3rd Defendants and in the joint names for the Plaintiff's Advocates and those of the 4th, 5th, 6th and 7th Defendants in the respective sums in (1) and (2) above.**
- 4. In default of the plaintiff giving the security for costs as in (1) and (2) above the 2nd 3rd 4th 5th 6th and 7th Defendants be at liberty to apply for the dismissal of the suit against them.**
- 5. In the interim all further proceedings of this suit are stayed.**
- 6. The plaintiff do pay to the 2nd 3rd 4th 5th 6th and 7th Defendants the costs of this application.**

It is so ordered.

DATED and DELIVERED in open court at **NAIROBI** this **4th** day of **April 2008**

In the presence of:-

Mrs. Ndune holding brief for Mr. Gitau for 1st, 4th, 5th, 6th and 7th Defendants.

Mr. Gichuki Kingara holding brief for Mr. Amin for the 2nd and 3rd Defendants.

P. M. MWILU

JUDGE

4TH APRIL, 2008