REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 475 of 2007

ECO-NEWS AFRICA ……..……..PLAINTIFF

VERSUS

GEORGE OKONGO ANYONGA AND 4 OTHERS ….....…..……DEFENDANTS

RULING

On the 15th day of August 2008 this court, delivered two rulings herein. The one relevant to the current ruling is the one titled first ruling. The relevant portion is found at page 9 of the said ruling line 8 from the top and it runs thus:-

" *for the reasons given the court orders that the plaintiff deposit Ksh. 100,000.00 as security for costs in this matter, within 30 days from the date of the reading of this ruling, either in court, or in a joint interest earning account in the joint names of counsels of both parties in a sound financial institution of their choice.*

(2) In default the plaint if any is restored, shall stand dismissed with costs to the defendant.

(3) The applicant will have costs of the application"

The applicant has come back to this court under certificate of urgency by way of an application by way of a chamber summons brought under order XXV rule 5 of the CPR and section 3A and 95of the CPA. Four (4) prayers are sought.

(1) Spent

(2) That the honourable do extend time for a further 60 days within which to give the security for costs as ordered.

(3) That in the alternative the honourable court do review and extend her orders made on the 15/8/2008 upon the application dated 3.7.2008.

(4) That costs be in the cause.

The grounds in support as gathered from the grounds in the body of the application, supporting affidavit and oral submission in court, are as follows:-

- They are willing to comply with the said court order.

- Applicant was not able to comply because it depends on the donor funds.

- The donors usually insist on expenditure being based on what has been budgeted for and approved in the approved budget.

- The issue of security of cost ordered herein is not one of the items budgeted for hence the need for the same to be budgeted for and have the same placed before the donors for approval.

- The donors have been informed and this expenditure is due to be discussed in a meeting to be held on 26/11/2008.

- The applicant is sure the same will be approved as they understand the implication of non compliance namely they stand to loose a claim of 10million.

- The court, is urged to uphold a candid principle of this court should strife at all times to hear parties on their merits as opposed to having them disposed off on technicalities.

- This is a proper matter to be heard on merit in view of allegation of fraud of 10 million.

In response the defendant has put in 6 grounds of opposition namely:-

(1) That the application is an abuse of the due process of the court.

(2) That the applicant has not complied with this honourable courts order.

(3) That the applicants are still not ready to comply with the court order as they are applying a condition to the same.

(4) That there is no direction from the court of appeal in whatever nature or at all.

(5) That the court, can not Act in vain.

(6) That this application is defective and same should be dismissed with costs to the 1st and 2nd, respondent.

In her oral high lights, counsel for the respondent stressed the following points:-

- Applicants have no excuse because when they came to court, in the first instance, they gave an undertaking that they were in a position to pay costs. It is surprising that they have turned around to claim that the money needs to be budgeted for.

- They maintain that the order was made 3 months ago. No explanation has been given as to why the said budget has not been approved. For this reason they believe that the court, is just being taken for a ride.

- That the amount ordered by the court is, reasonable and there is no justification for the applicants' failure to meet that obligation.

- Prayer 2 cannot be granted because the orders lapsed before the applicant came to court, and as such there is nothing to be extended.

- The applicant are not ready to comply with the court orders as they are giving the court, conditions namely until the amount is approved by donors condition which they did not raise when the matter was argued earlier in that they had to seek the donors consent more so when they exhibited a certificate of registration demonstrating the ability to sue and to be sued.

- For the reasons given the court, is urged not to be conditioned to any anticipated meeting by the donors which should not be a pre condition for this court, to grant the relief sought.

- They further ask the court to note that no proof of negotiation has been exhibited herein by the applicant or any communication from the alleged donors that they are going to deliberate upon the said issue.

- Further the budget to be discussed has not been exhibited.

- Applicants are taking the legal process round and round as they have not even paid costs ordered lawfully in favour of the defendant.

- That the correct position in law is that security for costs must be complied with before a party can be heard.

- It is wrong for the applicant to fain poverty and then at the same time express a willingness to comply with the court orders on deposit of security.

- The court, is urged not to act in vain by failing to uphold and give effect to its own orders.

- They also claim that review is not available to the applicant as no new facts have been presented to the court, on this account, the entire application is incompetent and its bound to fail and the same should be dismissed with costs to them..

In response counsel for the applicant stated that:-

(i). The undertaking was given by the former director and to them an undertaking is not the same as a deposit which calls for immediate action.

(ii). They are definite, when they state that the directors will have a meeting on the dates stated.

(iii). That the court, has jurisdiction to extend time for compliance where the same has lapsed.

(iv). The court is urged to take into consideration the amount of money involved.

On case law the court, was referred to the CASE OF TRADE BANK LIMITED IN LIQUIDATION VERSUS L.Z ENGINEERING AND CONSTRUCTION LIMITED AND DEPOSIT PROTECTION FUND NAIROBI CA NO 14 OF 1998. It concerned security for costs under rules 104 (3) of the court of appeal rules on account of proceedings concerning a company that was being wound up. Herein the scenario is different as the applicant is not being wound up, and the rules applicable are different though the principles are the same namely to ensure that should the litigant on whose behalf, the order for security is being ordered, is not left remediless on the issue of costs should he succeed. Ultimately the court, was also referred to a digest on the same case law at page 269 in the digest on civil case law and procedure by G.V Odinga (L.L.B .Hons) published by law Africa. The case is digested under digest number 655. The principles put forward are:-

(a). The powers to order further security for costs under rule 104 (3) of the court of appeal rules is not mandatory but discretionary and is to be exercised after considering all the circumstances of the case.

(b). Where a limited liability company the plaintiff in any action or other legal proceedings, a judge having jurisdiction in the matter may if it appears by credible testimony that there is a reason to believe that the company will be unable to pay the costs of the defendants, if successful in his defence order that sufficient security be given and order stay for proceedings until security is given, but this does not apply to an unlimited company even if in winding up or to enable the liquidator to give security even if he has no means where he is applying for misfeasance summons or in exercise of other statutory duty.

(c). Poverty is no bar to litigation."

In the courts' assessment of the facts herein, it is clear that there is no dispute that indeed the defendant respondent applied for an order for security for costs which orders were given on 15/8/2008. The plaintiff applicant was given 30 days within which to comply failing which the plaint which the applicant had sought to reinstate would stand dismissed.

It is not disputed that the said 30 days lapsed before the plaintiff applicant would comply with the said orders. The applicant has come back to this court, seeking refuge under the provision of law cited. One of them is section 3A of the CPA. This court has judicial notice of and it is now trite law that this provision is a fountain for the inherent jurisdiction of the court, available at the invocation of a litigator exercisable by the court, on its own motion. Its sole purpose is to prevent abuse of the due process of the court, and injustice to the litigant. Section 95 deals with the enlargement of time. It reads:-

" *where any period is fixed or granted by the court, for the diary of any act prescribed or allowed by this act, the court, may in its discretion from time to time enlarge such periods even though the period originally filed or granted may have expired"*

Order 25 rule 5 CPR on the other hand provides:-

"*order XXV rule 5 (1) if security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court, shall upon application dismiss the suit (2) if a suit is dismissed under sub rule (1) and the plaintiff proves that he was prevented by sufficient cause from giving the required security for costs the court, may set aside the order dismissing the suit and extend the time for giving the required security"*

This courts, construction of these two provisions is that indeed there is jurisdiction to make an order requiring the plaintiff to give security in the manner made by this court.

(ii) This court, is also satisfied that there is jurisdiction on the part of the court, to order the dismissal of the suit due to non compliance with an order to furnish security for costs. The dismissal is supposed to be upon an application, upon failure to furnish the same. Herein there is no application made by the respondent for such dismissal because was effective immediately upon default. It therefore follows that as at the time the applicant came to court, to present the current application under consideration, the time allowed for compliance had lapsed and was therefore in default and by virtue of that default the suit stood dismissed.

(iii) There is also jurisdiction for the court to revisit such a matter upon application by the aggrieved party and there is no doubt that the applicant is invoking this jurisdiction on that account.

(iv) There is also jurisdiction to extend time within which to comply. There is however a condition attached to this exercise, namely proof that sufficient cause has been shown and secondly that the said exercise is discretionally. On other hand, it is a judicial exercise of its discretion like all other judicial discretions; it has to be exercised judiciously and with reason. The just cause provided by the applicant in an attempt to earn this courts' discretion, is that funds sought to be deposited are donor funds, whose expenditure needs to be budgeted for. That this item had not been budgeted for. That the issue has been put to the donors who have agreed to meet, deliberate on the issue and then approve the same.

However as submitted by the respondent, proof of such negotiations budget proposal to be approved by the donors, has not been exhibited and as such the possibility that the court is being taken round and round and its process being abused can not be ruled out. The applicants' rejoinder to that is that none the less the court, to be mindful and take note of what is meant to be adjudicated between the parties and also bear in mind cardinal principle that courts' should strive to dispose off disputes on their merit as opposed to strangling them in their insecurity. This suit is infact in its own infancy as even the pretrials have not been done. Indeed the claim to touch on issue of funds involving a large sum of money. This is one of the considerations that this court, took into consideration when it ordered the suit be reinstated, therefore

the court, will be going contrary to that, should it shut the door in the face of the plaintiff unless and until forced to.

Indeed reasons, for not taking action are not plausible, they also appear to the hinge on an internal matter within the plaintiff, which should not be employed to the detriment of the defendant. It is however noted that apart from complaining about the laxity of the applicant, in the conduct went of their affairs, nothing has been mentioned that the defendant will be seriously prejudiced if the applicant is granted an extension of time within which to comply at the pain of costs. This being the case, and in view of issues raised in the plaint, the court, is inclined to give the applicant one more chance to comply.

For the reasons given in the assessment, the court, moves to make the following orders.

1. prayer 2 is dismissed as the orders lapsed before the application was presented and as such there's nothing to be extended. See this courts' own ruling delivered on the 31st day of July 2008 in the case of EDWIN ASAVA MAJANI AND 2 OTHERS VS TELCOM KENYA LTD. NAIROBI HCC 460 OF 2007.

2. Prayer 3 is allowed on condition the said compliance be effected within 30 days from the date of delivery of the ruling.

3. The respondent will have costs of the application

4. To avoid further mischief on the part of the applicant, the applicant is advised to pay all cost ordered in favour of the respondent so far incurred and as ordered by the court, before the presentation of or taking any other steps in the matter save for purposes of complying with the order or deposit of security.

5. The said costs as ordered in number 3, 4 above, to be agreed or assessed by the deputy registrar in the usual manner.

DATED, READ AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2008.

R.N. NAMBUYE

JUDGE