



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

**Civil Suit 184 of 2003**

**LONRHO MOTORS E A LIMITED (in receivership).....PLAINTIFF**

**VERSUS**

**INSURANCE COMPANY OF EAST AFRICA LIMITED....DEFENDANT**

**R U L I N G**

Before me is a Chamber Summons dated 9<sup>th</sup> May 2007, seeking to have plaintiff's suit dismissed with costs under Order XXV Rule 1 and 5 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act.

The background to the application is as follows: -

On the 10<sup>th</sup> June 2004, the plaintiff was ordered to provide security for the defendant's costs in the suit in the sum of Kshs.1,500,000/=, within two months from that date. In default of such security being provided, the plaintiff's suit was to stand dismissed with costs to the defendant. In the meantime pending compliance of the court order, all proceedings in the suit were stayed.

On 28<sup>th</sup> November 2005, an order was made under Order XLIX Rule 5 of the Civil Procedure Rules, enlarging time for the plaintiff to provide security as ordered on 10<sup>th</sup> June 2005, within two months from 28<sup>th</sup> November 2005. The court further granted an order staying the order made on 10<sup>th</sup> June 2005, for provision of security pending the hearing and determination of the plaintiff's intended appeal.

It is contended that to date, the plaintiff has not made any payment or deposit of Kshs.1,500,000/=, as security of the defendant's costs as ordered nor has the plaintiff made any application or obtained leave to file the appeal out of time. It is maintained that the plaintiff/respondent has taken no steps since 28<sup>th</sup> November 2005, and has therefore been in blatant disregard of the court orders and ought not to be allowed to keep the suit in limbo.

The plaintiff has responded to the application through a replying affidavit sworn by Erastus Muriuki the Credit Controller of the plaintiff's Company. It is contended that the plaintiff has filed an application for leave to appeal out of time, and that the plaintiff has an arguable and meritorious appeal. It is further contended that there have been on-going negotiations with the defendant on a without prejudice basis.

The defence counsel noted that no application for leave to appeal has been exhibited to the court. He pointed out from the Bar that the plaintiff did file Civil Application Number 134 of 2007, in the Court of Appeal, but that the application was dismissed by Hon. Omolo J.A. It was therefore submitted that the orders granted on 28<sup>th</sup> November 2005, have been spent. Counsel found support for his submissions on paragraph 23/1-3/30, of the Supreme Court Practice 1991 Rules, wherein it is stated *inter alia* as follows:  
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***“The power to dismiss an action for default by a plaintiff in complying with an order for security derives from the inherent jurisdiction of the court and applies as much to an order for security.....the court has power to dismiss the action where it is satisfied that: -***

- (i) the action is not being pursued with due diligence;***
- (ii) there is no reasonable prospects that the security will be paid and***
- (iii) the time limit prescribed by the court for the giving of security has been disregarded.”***

For the plaintiff, it was submitted that the dismissal by the Court of Appeal was by a single Judge and that the plaintiff intends to refer the matter to a full bench. It was further submitted that the defendant’s application was misconceived as defendant ought to have applied for review of the orders of 25<sup>th</sup> September 2005.

From the above, it is apparent that by the order granted on 28<sup>th</sup> November 2005, the order for security was stayed pending appeal. As of now, there is no appeal pending as the plaintiff’s attempts to obtain leave to file the appeal out of time have hit a rock. By virtue of the dismissal of that application, the order of stay granted on 28<sup>th</sup> November 2005, was spent and could not be kept alive by a simple intention on the part of the plaintiff to refer the matter to a full bench.

Moreover, the order for stay of the order of security pending appeal was made over 2 years ago. It is evident that the plaintiff has not pursued the matter with due diligence, and this is prejudicial to the defendant. The plaintiff has further made no efforts to provide the required security since his intended appeal became still born. In the circumstances, the order for stay having lapsed and the plaintiff having failed to provide the security as directed, I do hereby order that the default orders shall take effect and the plaintiff’s suit is accordingly dismissed with costs.

Those shall be the orders of this court.

***Dated, signed and delivered this 3<sup>rd</sup> day of December 2007.***

**H. M. OKWENGU**

**JUDGE**