



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

**Civil Suit 450 of 2003**

**PARMEX LIMITED .....PLAINTIFF**

**VERSUS**

**AUSTIN & PARTNERS LIMITED .....DEFENDANT**

**RULING**

On 12<sup>th</sup> October 2005, the defendant filed two applications, both of which bear the date 7<sup>th</sup> October 2005.

The first application is for security for costs, and is said to have been made pursuant to the provisions of Order 25 rules 1 and 6 of the Civil Procedure Rules.

The second application seeks to strike out the Amended Plaintiff dated 25<sup>th</sup> April 2005, on the grounds that it discloses no reasonable cause of action. The said application was made pursuant to Order 6 rules 13 (1) (a) and 16 of the Civil Procedure Rules.

Both applications were set down for hearing on 20<sup>th</sup> January 2006. However, when called upon to prosecute the said applications, the defendant applied for the adjournment of the second application. Although the plaintiff did oppose the application for adjournment, the court allowed it. The main reasons for allowing the adjournment of the second application were as follows;

**"I hold the view that it should never have been set down for hearing at the same time as the application for security for costs. To my mind, the two applications are not compatible.**

**If the court were to order that the plaintiff should provide security for costs, that order could only be complied with for as long as the plaintiff still has a claim. Or, to put the issue differently, if the plaintiff were struck out, the court could not simultaneously order the plaintiff to provide security for costs."**

Following the adjournment of the application to strike out the Amended Plaintiff, this Ruling is now only in relation to the application for security of costs.

The applicant pointed out that the plaintiff is a foreign company, which is incorporated in the United Kingdom. According to the defendant, there is an express statement in the Amended Plaintiff, by which the plaintiff concedes the fact that it is incorporated in the United Kingdom.

Secondly, the plaintiff did not appear to contest the assertion that it was incorporated in the United Kingdom. Indeed, the parties herein proceeded to argue the application herein on the presumption that the plaintiff was incorporated in the United Kingdom.

However, when the court perused the Amended Plaintiff, it did not contain any statement that could confirm that the plaintiff was a company incorporated in the United Kingdom. If anything, paragraph 1 of the Further Amended Plaintiff reads as follows;

**"The Plaintiff is a limited liability company incorporated in Kenya the United Kingdom and having registered its office at Nairobi in the United Kingdom."**

Clearly, the said pleading is a complete muddle, as there is no country called "**Kenya the United Kingdom**". Similarly, I believe that there is no city as "**Nairobi in the United Kingdom**".

But, in view of the fact that the plaintiff did not deem it necessary to file an affidavit, in response to the affidavit of Erach Jehangir Austin, it must be deemed to have accepted the accuracy of the deposition on the following terms;

**"The plaintiff is incorporated in the United Kingdom where it has its registered office, and where it carries on business. It is a foreign entity."**

As that statement by the defendant's Managing Director has not been controverted, I do accept it as reflecting the correct factual position. Accordingly, I hold that it is an undisputed fact that the plaintiff is a foreign company, incorporated in the United Kingdom.

Secondly, the plaintiff has not contested the following statement, which is to be found at paragraph 3 of the affidavit of Erach Jehangir Austin;

**"THAT to the best of my knowledge, the Plaintiff has no assets whatsoever within the jurisdiction of the court which recourse can be had to recover costs of the Defendant, should the court order that the Defendant's costs of the suit be paid by the Plaintiff."**

In the light of that deposition, the defendant submitted that, if the plaintiff were ordered to pay costs, the defendant would suffer a loss of difficulties in the recovery thereof. For that reason, the defendant asked the court to order the plaintiff to provide security for costs, in the sum of Kshs.250,000/=. Such an order was said to be incapable of occasioning any prejudice to the plaintiff, if the court were to grant it.

In answer to the application, the plaintiff submitted that if this application had been filed prior to the filing of a defence, the court could have had to require the defendant to show that he had a good defence. But in this case, as the defendant had already filed a defence, it was submitted that the court ought to ascertain whether or not, in the light of the said defence, the plaintiff had a weak case.

It is the plaintiff's contention that unless the plaintiff's claim was shown to be weak, the court ought not to order the plaintiff to furnish security for costs.

The plaintiff then went on to point out that its claim was for money had and received. That claim was originally filed in respect of the alleged unpaid purchase price, for goods which the plaintiff had sold and delivered to the defendant. However, when the defendant filed an application dated 23<sup>rd</sup> December 2003, seeking to set aside the *ex parte* judgement which had been entered against it, it expressly stated, through the affidavit of its Managing Director, Mr. Erach Jehangir Austin, as follows;

**"The defendant had in or about the year 1997 borrowed a sum of approximately Pound Sterling 20,000 from a company known as Parmex Limited a company registered in England with its registered office in Middlesex, England. It is that company, Parmex Limited, registered in England that the defendant transacted business with, and it was not a sale of goods. The English Company has regularly been sending statements of accounts to the defendant. Copies of some of the statements of account are annexed."**

It is the plaintiff's contention that a perusal of the statement of accounts which were exhibited by the defendant, reveals that the defendant admitted being indebted to the Plaintiff. In the circumstances, the

plaintiff contends that there would be no justification for ordering it to provide security for costs, whilst the case against the defendant was obviously strong.

It is the plaintiff's contention that this application was only intended to impede the hearing of this application for summary judgement.

In any event, the plaintiff asserts that it does have assets in Kenya. The said assets, which the plaintiff contends could be utilised as security, if any such security for costs were deemed necessary, was the debt which the defendant owes the plaintiff.

Finally, the plaintiff submitted that simply because it was a foreign company was not reason enough to warrant an order against it, to provide security for costs.

To my mind, it is very clear that what the plaintiff has, at present, is no more than a claim against the defendant. Until such time as the court gives a judgement confirming that the defendant owed the sum claimed, or any part thereof, the same cannot be deemed to be a debt.

The "Concise Oxford Dictionary" 9<sup>th</sup> Edition, defines debt as:

**"(1) Something that is owed, especially money. (2) a state of obligation to pay something owed."**

At present, there has been no adjudication by the court on the plaintiff's claim against the defendant. Therefore, no obligation has arisen, on the defendant's part, to pay anything to the plaintiff.

In the event that the court had already made a finding that the defendant did owe money to the plaintiff, then only would the plaintiff be right to contend that it had an asset, in the form of a debt that was due and payable by the defendant. Therefore, the plaintiff is not right to assert that its claim against the defendant is an asset.

I also hold the considered view that, in the circumstances of this case, it would be wrong for me to make any conclusions on the strengths or weaknesses of the defence on record. I say so because there is a pending application, by the plaintiff, for summary judgement. If I were to express views, such as the plaintiff has invited the court to do, I would have effectively pre-empted that application. I decline to do so.

However, I do find, without, any fear of contradiction, that in principle, the test on an application for security for costs is not whether the plaintiff has established a prima facie case, but whether the defendant has shown a bona fide defence. In **SHAH –VS- SHAH [1982] KLR 95** at 98, Law JA held as follows;

**"The general rule is that security is normally required from plaintiffs resident outside the jurisdiction, but as was agreed in the court below, a court has a discretion, to be exercised reasonably and judicially to refuse to order that security be given.**

**The test on application for security is not whether the plaintiff has established a prima facie case, but whether the defendant has shown a bona fide defence."**

The Court of Appeal did observe that in applying the foregoing test, the court had a full and unfettered discretion.

In this case, when the plaintiff instituted proceedings, it first described itself, in the plaint, as a company incorporated in Kenya. I have been unable to find any explanation by the plaintiff in relation to that misleading pleading. I therefore cannot help but wonder whether the said action was intended to deliberately mislead the court.

I also remind myself that in general, plaintiffs who were resident outside jurisdiction should ordinarily provide security for costs, even though the court may decide otherwise.

Is there any reason here, why the plaintiff should not provide security for costs?

In **VALLABHDAS HIRJI KAPADIA –VS- THAKERSEY LAXMIDAS [1960] E.A. 852** at 853, Edmonds J. held as follows;

**"The defendant will be at no material disadvantage, if successful in this suit, in taking proceedings for the recovery of his costs in Zanzibar and Tanganyika. I will therefore exercise my discretion in favour of the plaintiff and decline the application."**

That decision was informed by the fact that there existed, as between Kenya and Zanzibar, the Judgement Extension Decree Act, Cap 23, of the Laws of Zanzibar, pursuant to which the defendant could transfer to Zanzibar, a decree obtained in Kenya, for execution as if the decree had obtained in Zanzibar.

Whilst that may be a valid consideration, in principle, I nonetheless find that notwithstanding the existence of The Foreign Judgements (Reciprocal Enforcement) Act, pursuant to which decrees issued in Kenya can be enforced in the United Kingdom, the defendant would be materially disadvantaged if it were to succeed in the suit, and then thereafter have to take steps to recover the same in the United Kingdom.

But, at the same time, in the light of the material already before the court, I am not persuaded that the defendant has demonstrated a bona fide defence.

In the circumstances, the order which commends itself to me, as meeting the ends of justice is as follows;

- (i) The plaintiff's application dated 2<sup>nd</sup> December 2004 be heard and determined as soon as possible.**
- (ii) In the event that the said application, dated 2<sup>nd</sup> December 2004, was successful, the plaintiff would not need to provide any security for costs.**
- (iii) In the event that the court declined to grant summary judgement in favour of the plaintiff, the said party would then be required to provide security for the defendant's costs. The said costs are assessed at Kshs.200,000/=, and would have to be paid within TWO WEEKS of the dismissal of the plaintiff's application for summary judgement.**
- (iv) The sum for the security for costs may be deposited in court, or alternatively can be held in an interest-earning account, in the joint names of the advocates for the parties herein.**
- (v) The costs of the application dated 7.10.05 shall abide the outcome of the application dated 2<sup>nd</sup> December 2004.**

Dated and Delivered at Nairobi this 21<sup>st</sup> day of July 2006

**FRED A. OCHIENG**

**JUDGE**