

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 720 of 2003

JACARANDA CHEMISTS LIMITEDPLAINTIFF

VERSUS

MESCO CONSULTANTS (K) LIMITEDDEFENDANT

AND

MADISON INSURANCE COMPANY KENYA LIMITEDTHIRD PARTY

RULING

The Third Party by a Chamber Summons dated 1st November, 2004 sought for an order against the defendant for security of costs for this suit. In this court ruling by the Honourable Justice Azangalala dated 25th January, 2005 the court ordered the defendant to provide a security for Kshs.800,000/= and the same to be by local bank guarantee or undertaking or a deposit in that sum. That security for costs was to be given within 30 days of ruling. The defendant did not give that security for costs within the period as ordered but did so later. The Third Party therefore moved this court for the dismissal of the Third Party notice and the arbitration proceedings that had been initiated between the parties. By this court's ruling by Honourable Justice Ransley dated 25th November, 2005, the court dismissed the Third Party notice for the defendant's failure to provided security as ordered and further the court stayed the arbitration proceedings. That stay was to remain in place until the defendant obtained an order setting aside the dismissal of third party notice. The defendant has now come by way of a Chamber Summons dated 31st January, 2006 which seeks the following orders:-

- a) **That the Order made on 25th November 2005 dismissing the Defendant's Third Party Notice be set aside and the order for stay of the arbitration proceedings between the defendant and the third party be vacated.**
- b) **That time for the Defendant to furnish security for the third party costs as ordered by the court on 25th January, 2005, be enlarged by 20 days and the defendant be deemed to have complied with the court order of 25th January, 2005 in time.**

The defendant relied on the affidavit in support of that application where it is stated that at the time the order was made for provision of security for costs the defendant was having differences with its advocate. That at the time the defendant instructed its then advocate to challenge the order for security for costs but however since differences arose the defendant found itself running out of time to challenge that ruling. That it was in late February, 2005 that the defendant obtained advise from a different advocate when they were advised that they had lost the right to challenge the order for the security for costs since a notice of appeal had not been filed in time. A decision was made to obtain the security for costs since the defendant was interested in having the arbitration heard. It was stated that on 4th March, 2005 the defendant managed to raise Kshs.800,000/= as security for costs. On 7th March, 2005 the defendant consulted Kenya commercial Bank with a view to obtaining a bank guarantee to be supplied to the court. That the bank needed to obtain legal advise in this regard and consequently the bank guarantee was not issued by the bank until 14th march, 2005. That the defendant was ready to file that guarantee by

the 14th March, 2005 but due to the differences between itself and its then advocate there was a two day delay in filing the same. That finally on 16th March, 2005 one of the directors of the defendant personally filed that guarantee in court. That the delay in filing that guarantee was nineteen days. The defendant therefore is seeking that this court will enlarge the period for filing the guarantee and consequently also set aside the dismissal of the third party notice and the removal of stay of the arbitration proceedings. The application was opposed. In opposition the Third Party's counsel stated that the arbitration proceedings and the third party proceedings are connected. He further stated that by the ruling of Hon. Justice Azangalala of 25th January, 2005 the defendant was given a choice of either a bank guarantee, an undertaking or a direct deposit into court of Kshs.800,000/=. That the defendant was given thirty days to do so. The Third Party stated that the defendant had not given a reasonable explanation for filing the bank guarantee 19 days late. It was argued that since that third party's application for security for costs was brought under Order XXV Rule 5(1) of the Civil Procedure Rules, the defendant needed to show prevention which was good enough to have stopped it from filing the bank guarantee in time. He questioned whether the defendant had shown sufficient proof of such prevention by merely stating that it had difficulties in its advocate or it had to consult another advocate or that the bank had to get legal advice before giving the bank guarantee. Third party's advocate said that did not show sufficient reason and accordingly the defendant had failed to meet the standards of Order XXV Rule 5(2) of the Civil Procedure Rules. Third Party's advocate stated that the defendant failed to get an extension of time even after the ruling of 25th November, 2005 by the Honourable Justice Ransley and that even though that ruling was delivered in the absence of the defendant that it was sent to the defendant's advocate on 29th November, 2005. That the defendant further delayed in moving this court by the present application which was not filed until 31st January, 2006. Third party advocate stated that that was a two months delay which has not been explained to this court. The third party relied on the case **Stanley Munga Githunguri vs Jimba Credit Corporation Limited, Civil appeal No.144 of 1998**. The reliance of this case is to support the Third party's contention that the defendant had not shown reasonable cause. The Third Party also was of the view that the defendant in consulting another advocate was not a sufficient reason to entitle the defendant to the orders sought. In this regard third party relied on the case **The Commissioner of Transport v The Attorney General of Uganda & another**.

I have considered the Chamber Summons filed by the defendant. In considering the reasons given by the defendant why there was a 19 days delay in filing the security for costs, I find that I am in agreement with the third party's argument that the defendant had options in the type of the security to be supplied. The defendant by its affidavit states that it had raised Kshs.800,000/= and there is no explanation given why that amount was not deposited in court by the 4th March, 2005. The defendant instead of depositing the amount began the process of obtaining a bank guarantee. I find that I do not have sympathy in the arguments presented on behalf of the defendant. But much more than that I have perused the bank guarantee dated 14th March, 2005 which clearly states that the guarantee would continue until 14th September, 2005. The particular paragraph of that guarantee reads as follows:-

“This Guarantee will continue in effect until 14th September, 2005 and any demand in respect thereof should reason the Bank not later than the above date after which date it shall become null and void whether the Original Guarantee is returned to us or not”.

Bearing in mind the contents of the above paragraph, it does seem that the defendant at present does not have a security for costs as required by the ruling dated 25th January, 2005. The guarantee presently before court was valid up to 14th September, 2005. This court therefore cannot grant the orders sought for extension of time to furnish security. Equally this court cannot be moved to set aside the dismissal of the Third Party proceedings nor can the court remove the stay of the arbitration proceedings. This is because the defendant has not complied with the requirements for provision of security for costs. The end result therefore, is that the defendant's chamber summons dated 31st January, 2006 is hereby dismissed with costs to the Third Party. Orders accordingly.

MARY KASANGO

JUDGE

Dated and delivered this 19th October, 2006.

MARY KASANGO

JUDGE