



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

Civil Case 482 of 2006

SANGO TRADING COMPANY LIMITED1ST PLAINTIFF

MASOLE LIMITED2ND PLAINTIFF

SAMAN DEVELOPERS LIMITED3RD PLAINTIFF

BAIA ENTERPRISES LIMTIED4TH PLAINTIFF

MARINO ENTERPRISES LIMTIED5TH PLAINTIFF

GTILERA LIMITED6TH PLAINTIFF

KOIT DEVELOPERS LIMITED7TH PLAINTIFF

KENETE LIMITED8TH PLAINTIFF

LINSALA ENTERPRISES9TH PLAINTIFF

VERSUS

CYRUS JIRONGO1ST DEFENDANT

BETHLEHEM TRADING COMPANY (E.A.) LIMITED2ND DEFENDANT

NATIONAL BANK OF KENYA LIMITED3RD DEFENDANT

RULING

The present application is brought by the 3rd Defendant by way of Chamber Summons dated 13th October, 2006. The application is brought under Order XXV Rules 1, 5 and 6 of the Civil Procedure Rules and Section 401 of the Companies Act. The application seeks that the Plaintiffs do within a time to be fixed by the court give security for the sum of Kshs.8.5 million for the 3rd Defendant's costs of this suit. The other prayer is that if the Plaintiffs fail to give security as aforesaid that the Plaintiffs be struck out. The affidavit in support of the application was sworn by a Manager of 3rd Defendant. He stated that the advocate for the 3rd Defendant had carried out a search at the companies' registry and had found that the files in respect of the 1st and 4th Defendant was not available at the said registry. In respect of the 2nd, 3rd, 5th, 6th, 7th, 8th and 9th Plaintiff the files were available and they revealed that all these Plaintiffs had

not filed their annual returns since incorporation. The total share capital of all those plaintiffs except Plaintiff No.9 was found to be Kshs.120,000/= and that search also revealed that all those Plaintiffs had created individual charges in favour of 3rd Defendant to secure sum of Kshs.20 million each. Plaintiff No.9 had created a charge in favour of 3rd Defendant to secure a sum of Kshs.40 million. It was deponed that the party and party costs for defending this suit would exceed Kshs.8 million. Indeed the 3rd Defendant worked out the breakdown of those fees and arrived at total figure of Kshs.8,353,333/=. The deponent stated that the 3rd Defendant had not been able to find any other assets owned by the Plaintiffs other than the properties charged individually by those plaintiffs in favour of the 3rd Defendant.

Additionally that affidavit in support stated that the Plaintiffs had failed to pay the 3rd Defendant's costs in respect of other suits that had been litigated before namely Court of appeal case No.213 of 2000 the costs thereof were Kshs.238,129.50. The Court of Appeal case No.232 of 2000 the costs awarded were Kshs.237,814.50. The Milimani High court case No.777 of 1998 the costs awarded are Kshs.1,069,176/=. The deponent stated that in view of the above the Plaintiffs may not be able to pay 3rd Defendant's costs if the 3rd Defendant was to succeed in this action.

The application was opposed and replying affidavit was filed by one of the director of the Plaintiffs Companies. He started by saying that the Plaintiffs have a bona fide claims against the defendants. He stated that the 3rd Defendant despite the disclosed nominal share capital of the Plaintiffs had granted facilities to the Plaintiff for Kshs.60 million. He was of the view that the present application is oppressive and unfair to the Plaintiffs.

Section 401 of the Companies Act provides as follows:-

“Where a limited company is plaintiff in any suit or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given”.

By that section the Applicant is required to show credible testimony that there is reason to believe that the Plaintiffs would be unable to pay costs of 3rd Defendant. The 3rd Defendant by affidavit evidence has shown that the Plaintiffs have failed to pay costs that have been awarded to the 3rd Defendants in previous suits totaling Kshs.1,545,120/=. That averment was not denied by the Plaintiffs. Further the Defendant stated that the Plaintiffs do not have any other assets other than the properties charged to the 3rd Defendant. That too was not denied by the Plaintiffs. That information is in the court's mind credible evidence that the Plaintiffs may not be able to pay the 3rd Defendant's costs of this suit. The 3rd Defendant filed a defence in this action. The court has perused the same and finds that it is a bona fide defence to the Plaintiffs' claim. The most important aspect of that defence is that 3rd Defendant has pleaded the doctrine of *res judicata*. The 3rd Defendant had also brought the present application under Order XXV. In the case of **Shakhalaga Khwa Jirongo & another v the Board of Trustee of National Social Security Fund HCCC No.957 of 2000** the court found in respect of Order XXV Rule 1 as follows:-

“The power donated by O XXV Rule 1 is discretionary. The order does not lay the burden on either party it is discretion to be exercised in the circumstances of the case”.

The court having in mind what is stated hereinbefore is of the view that it is just to order the Plaintiffs to provide security for costs of 3rd Defendant in this matter. The amount however, stated in the 3rd Defendant's application are higher than the court is willing to order. The court grants the following orders:-

(1) that the Plaintiffs do provide security for costs for the 3rd Defendant by providing and filing in this court a bank guarantee for the amount of Kshs.5 million within 30 days from this date

hereof.

(2) Until such filing of a bank guarantee by the Plaintiffs as stated in (1) above this suit in respect of the 3rd Defendant is hereby stayed.

(3) The 3rd Defendant is granted costs of Chamber Summons dated 13th October, 2006 as against the Plaintiffs.

MARY KASANGO

JUDGE

Dated and delivered this 30th day of November, 2006.

MARY KASANGO

JUDGE