REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL CASE 421 OF 2006

MENNO TRAVEL SERVICES LTD.....PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED.....DEFENDANT

R U L I N G

The defendant has brought this application pursuant to Order 25 rules 1, 6 and 7 (1) of the Civil Procedure Rules.

The application seeks an order that the plaintiff be directed to provide security for the defendant's costs, in such sum as the Court may consider appropriate. The sum to be provided as security, if the order should be given, is to be deposited in a joint account held by the advocates for the two parties to the suit.

Meanwhile, pending the provision of the security, the defendant asks this court to stay any further proceedings.

And if the security is not provided by the time stipulated by the court, the defendant asks that there be issued an order which would result in the dismissal of the suit, with costs.

In the alternative, the defendant asks that this suit be stayed until the plaintiff settles the costs of **(Milimani) HCCC, No. 391 of 2004.**

When canvassing the application, the defendant reiterated the fact that pursuant to the provisions of Order 25 rule 1 of the Civil Procedure Rules, this court has a discretion on whether or not to order that security be provided.

However, it stated that in the circumstances prevailing, the court ought to order that the plaintiff provides security for costs. The most significant factor in this case is said to be the fact that the plaintiff had previously instituted another suit against the defendant.

The cause of action in that previous suit is said to have been exactly the same as the one in this current suit.

The said previous suit was struck out on the basis of a finding that the advocate who had filed it, did not hold a valid practicing certificate, at the material time. Thereafter, the defendant's costs were taxed and allowed in the sum of KShs. 537,908/=

That sum has not been paid todate. Meanwhile, the defendant says that it is also aware that the plaintiff is indebted to the firm of Kembi Gitura & Company Advocates, for over KShs. 19.0 million, following an arbitration award.

To the best knowledge of the defendant, the plaintiff is said to own no assets other than shares in Menno Plaza Limited. And those assets had already been attached. Therefore, the defendant believes that the plaintiff would be unable to meet its costs, if this suit should fail.

In response to that contention, the plaintiff states that it is in a position to meet any order for costs. That statement is made on oath, in the replying affidavit of Wilfred Dickson Katibi.

The question is whether or not these proceedings should be stayed until the plaintiff pays the costs of the previous suit. And, should the plaintiff be ordered to provide security for costs?

The plaintiff believes that there is absolutely no reason why it should have to provide security for costs. The main reason for that belief is that the costs of the previous suit were not payable by the plaintiff.

In order to understand where the plaintiff was coming from, it is to be noted that after the previous suit had been struck out, the defendant had its Bill of Costs taxed. Thereafter, the defendant applied for and was granted orders to enable it recover the taxed costs from the advocates who represented the plaintiff in the previous suit.

To my mind, once the defendant obtained an order that the costs be paid by the advocates, they must be deemed to have more than one source from which to recover the costs of the previous suit. The two sources were the plaintiff herein and Peter Leo Onalo practising as Onalo & Company Advocates.

Therefore, even if the plaintiff were unable to meet the costs of the defendant in the previous suit, the defendant has not demonstrated why it has been unable to recover the costs from Peter Onalo.

In the case of **FUJI AUTO TRADING CO. LIMITED Vs** NATIONAL BANK of KENYA, HCCC No. 3459 of 1995, the Hon KULOBA J. said;

> "**What all these considerations mean is that unless it be shown that an order for security is necessary for the protection of the defendant, the court ought not to make an order for security. As it is almost uniformly said in major reference books, the basic principle is that poverty is itself no ground for ordering security for costs, and a poor person is not to be debarred from suing merely because if he lost the suit he could not pay the defendant his costs."**

In this case, I find that the defendant did succeed in procuring protection, in the Form of the order requiring Peter Onalo to pay the costs of the previous suit. I call it protection because even if the plaintiff herein failed to pay those costs, the defendant can have recourse against Peter Onalo.

Therefore, in my considered view, the defendant has failed to demonstrate that an order for security for costs is necessary for its protection herein.

It is also noteworthy that the defendant did not challenge the bona fides of the plaintiff's claim. I would therefore assume, for the purposes of the application before me, that the bona fides of the claim by the plaintiff is not in doubt. That being the case, even if the plaintiff may be unable to meet the defendant's costs, in case the suit was ultimately unsuccessful, I hold the view that it would be unreasonable to shut out the plaintiff from pursuing its legitimate claims, simply because it lacked resources.

Access to justice should not be pegged to the size of the plaintiff's wallet. If that were allowed to happen, the corridors of justice would be closed to people who had genuine claims but who did not have sufficient assets to provide security for the costs of the defendants. That must never be allowed to happen.

In that regard, I am in agreement with the Hon. Todd J., who held as follows in the case of **GULF ENGINEERING (EAST AFRICA) LTD V AMRIK SINGH KALSI [1978] KLR 277 at 282;**

> "**I find that it is unlikely that the plaintiff company will be able to pay the first defendant's costs, if he should happen to be successful in the suit, but I am not prepared to shut out the plaintiff company from pursuing his claims against the first defendant for the reasons already given.**"

The reasons he had given were primarily that the plaintiff had a bona fide claim, with a reasonable chance or prospect of success, at least in part.

Having declined the plea for an order that security for costs be provided, I now need to consider whether or not these proceedings should be stayed.

In **JAMES M'CABE (PAUPER) V THE GOVERNOR AND COMPANY of THE BANK of IRELAND (1889) 14 APPEAL CASES 413,** it was held that where a plaintiff having failed in one action, brings a second action for the same cause of action, the second action must be stayed until the costs in the first have been paid.

However, as is expressly stated in the headnote to that decision, that is the rule in Ireland and in England.

A similar decision was arrived at by the Hon. GOULDING J. in the case of **THAMES INVESTMENTS AND SECURITIES PLC V BENJAMIN & ANOTHER [1984] 3 ALL E.R**. **393**, when he stayed two applications until such time as the respondents would have paid the costs of the earlier application. As I understand it, the applications were stayed because they were similar to an earlier one which had been dismissed in default of appearance. As costs for the dismissed application had not yet been taxed, the learned judge held the view that it would be fair and reasonable to the respondents, to stay the subsequent applications until the applicant paid into court, the court's estimate of the costs of the first application.

As already indicated, the two cases above were determined on the basis of the rules prevailing in Ireland and in England. However, neither of the two cases set out the wordings of the relevant rules. Therefore, I am unable to tell whether or not the said rules were similar to our own Order 25 rule 1 of the Civil Procedure Rules, which provides as follows;

> "**In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party."**

A perusal of the said rule shows that it makes no reference to stay of proceedings. Therefore, in my understanding, the substantive prayer which the defendant could have been entitled to, pursuant to that rule, is for security for costs. If that order were made, the proceedings could have been stayed until the security was provided.

In other words, the stay of proceedings was to have been pegged to the order for the provision of security. Similarly, the dismissal of the suit, in the event that security was not provided within such time as stipulated by the court, would have been pegged to the order that the plaintiff provides security.

In the circumstances, as the court has declined to order that security for costs be provided before the suit could proceed further, it is not open to me, to separately order that the proceedings be stayed. Accordingly, the application dated 6th February 2006 is dismissed with costs.

Dated and Delivered at Nairobi this 27th day of November 2006.

FRED A. OCHIENG

JUDGE