



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

CIVIL CASE 184 OF 2003

LONRHO MOTORS E.A. LIMITED.....PLAINTIFF

VERSUS

INSURANCE COMPANY OF EAST AFRICA.....DEFENDANT

R U L I N G

On 28/5/03, the applicant, by way of Chamber Summons sought the following orders: That the Plaintiff do provide security for the payment of the Defendant's costs of this suit in such sum and within such a period as this court may direct; in default of failure to provide such security for the Defendant's costs the suit be dismissed with costs; pending provision of security above mentioned by the Plaintiff all further proceedings in this suit be stayed and, then costs of this application. The application is brought under Order 25 rules 1 and 5 of the Civil Procedure Rules, and Section 3A of Cap. 21, Laws of Kenya. Its supported by an Affidavit by Ms Lucy Marigu Muriithi of 29/5/03 and on the grounds that:

1. The Plaintiff is under receivership; 2. Despite being served with a request for particulars, the Plaintiff has failed/neglected to disclose the specific damages suffered and repairs on each vehicle as pleaded in paragraph 4 of the plaint; particulars of the goods allegedly stolen, as per paragraph 7 of the Plaintiff; Plaintiffs indebtedness to the creditor or party that put it under receivership, nor any assets available for payment of such costs.

3. By the Plaintiff's admission in its answer to particulars concedes that; the claim under Paragraph 4 of the Plaintiff arose on 30/9/1996 thereby being statute barred; the claims of theft under paragraph 7 of the plaint arose in 1994 and thereby are statute barred. 4. The applicant/Defendant has raised substantial defences to the suit, including limitation period, with overwhelming chances of success.

In opposition, the Plaintiffs, in their Replying Affidavit dated 19/6/03, aver inter alia that; the particulars sought by the Defendant/applicants constitute evidentiary matter which the Plaintiff company will adduce at the hearing of this case, that the defence filed by the Defendant is a mere denial that does not raise any bona fide trial issues; that the Plaintiff maintains a fleet of several motor vehicles all of which are under insurance cover by the Defendant company. The Defendant provides cover over all the assets of the Plaintiff Company; and finally, that the Plaintiff company has adequate assets and the demand for security for costs has no merit and should be dismissed with costs.

I have carefully studied the pleadings and submissions by counsel for both sides, and the authorities cited by the learned counsels in the cause of their submissions in this application, and I have reached the following findings and conclusions. I begin by the statement of the law that for the purposes of security for costs, we need not go into the merits of the suit itself, unless it can be demonstrated one way or the

other, that there is a high degree of probability for success or failure. If there is a strong prima facie presumption that the defendant will fail in his defence to the action, the court may not grant such a defendant security for costs. This is the law as per THE SUPREME COURT PRACTICE 1991 Vol. 1 Part 1 at page 412. And as was held in the case of SHAH V. SHAH, Civil Appeal No. 34 of 1981 [1982] KLR 95:-

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. Applying the above principles of law in the present case and application, the applicant/Defendant has a strong defence based on two factors, which are related. These are that the Plaintiff's claims are, on the face of it, statute barred; and if that be the case, the suit should not have been filed without first applying and obtaining the leave of this court to institute the suit out of time. My perusal of the file does not show anywhere that such leave was sought and or obtained.

On the assets of the Plaintiff company, from which the Defendants costs could be recovered in the event of the plaintiff failing in its claim, the Replying Affidavit by Victor Majani, dated 19/6/03, at paragraph 8, is interesting in light of the grounds for the application for security for costs. That paragraph is double edged. It shows that the Defendant/applicant knows the Plaintiff's assets, as it insurer. But the flip side of that is that that is how the Defendant knows that the Plaintiffs assets may not be sufficient to meet the costs of the suit in the event of failure of the claim by the Plaintiff, and this is more so given that the Plaintiff company is in Receivership.

All in all therefore, and because of the above reasons, this Court grants the application herein and orders as follows: 1. The Plaintiff do deposit K.Shs.1.5m as security for costs, in an interest earning account, in the joint names of counsel for both sides, within two (2) month from the date of this order.

2. If the Plaintiff defaults or fails to provide the security for the Defendant's costs, as herein above, the suit to be dismissed with costs. 3. Pending the provision of security abovementioned by the Plaintiff, all further proceedings in this suit be stayed. 4. Plaintiff/Respondent to pay the costs for this application.

DATED and delivered in Nairobi, this 10th day of June, 2005.

O.K. MUTUNGI

JUDGE