**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**COMMERCIAL DIVISION, MILIMANI**

**Civil Case 144 of 2001**

**FORTUNE FINANCE LTD…………………….…………….PLAINTIFF (IN LIQUIDATION)**

**VERSUS**

**MATHAGA LIMITED……………………………..……DEFENDANT**

**RULING**

The defendant by its Notice of Motion dated 27th August 2005, has come under Sections 3 and 3A of the Civil Procedure Act, and seeks the following Order: -

> “That the plaintiff’s suit be dismissed with costs to the defendant.”
>
> The defendant has obtained two awards of costs against the plaintiff; namely in HCCC NO. 1983 of 2000 for kshs 463, 183. 70; and HCCC Misc NO. 733 of 2000, for kshs 107, 050. 00.

The defendant’s counsel argued, that in his ruling dated 21.3.2003 Justice Ombija ordered the plaintiff to pay the defendant the costs in HCCC No. 1983 of 2000 of kshs 463, 183. 70. Counsel submitted that the plaintiff had not to date paid the said amount. It was further argued by defence counsel that in HCCC Misc No. 733 of 2000 the costs were awarded as at kshs 107, 050. 00 and despite demands the plaintiff had failed to settle this amount and the amount ordered by Hon Justice Ombija. Counsel said that there is no party who comes to court who is immune from payment of costs if he loses, or withdraws a matter.

The plaintiff in response opposed the application for the plaintiff; it was argued that the application was incompetent because it purported to come under section 3A of the Civil Procedure Act. That section 3A was not available where there are specific provisions for the application brought before court. That the defendant should have moved the court under order 25, of the Civil Procedure Rules. On that grounds alone, plaintiff’s counsel argued that the defendant’s application is incompetent and misconceived.

Plaintiff’s counsel further argued that the defendant’s application was res judicata, for the reason that the application for security for costs dated 7th October 2002 was argued before Hon Ombija and the judge proceeded to deliver his ruling. That in that application the defendant, amongst other prayers, sought to stay the suit in default payment of the security by the plaintiff. That the defendant ought to have prayed for the dismissal of the suit in that former application and having failed to do so, was caught by section 7 Civil Procedure Act and explanation No. 4.

The plaintiff finally stated that the plaintiff had deposited into court the amount of kshs 568, 133. 70 into court, which was in accordance with the alternative order granted by the Hon Justice Ombija on 21st

March 2003.

Having considered those submissions of counsel I wish to start by commenting on the plaintiff's submission that the application ought to have been brought under order XXV rather than under sections 3 and 3A of the Civil Procedure Act. Plaintiffs counsel argued that section 3 A ought to only be invoked where there are no other specific provisions for an application the court of appeal has had to comment on this and in particular in the case of WANJIKU V ESSO KENYA LTD [1995 – 1995- 1 EA 332. It was held that: -

> **"The inherent jurisdiction of the High Court is a residential jurisdiction which should only be exercised in special circumstances in order to put right that which would otherwise be a clear injustice."**

It would therefore follow that the defendant's application ought to have been brought under the specific rule relating to security of costs. Order 25 rule 5 provides:

> **"If security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit.**

From the provisions of order 25 it does seem that the application for security of costs can be made in two tiers; that first, an application for security of costs can be made, and once an order is granted for provision of security of costs, and the respondent fails to make payment, the applicant is free to move under order 25 rule 5, to seek the dismissal of the suit. The defendant accordingly ought to have invoked order 25 rule 5. On that basis alone I would accept the plaintiff's submissions and hold that the defendant's application is incompetent for having invoked section 3A when there is in existence an order that it ought to have been brought under. If the application had been brought under the correct order, that is order 25 rule 5, I would not have found the application to be res judicata. The reason for so finding is because as stated before I find that an application for security of costs can be made in two tiers.

The ruling of Hon Justice Ombija of 21st March 2003 in part states: -

> **"The plaintiff will pay the defendant the sum of shs 463, 186. 70 by way of costs in HCCC NO. 1983 of 2000. Alternatively, and without prejudice to the foregoing; the plaintiff do deposit in court the said sum of shs 463, 186. 70 as security for costs of this suit. In default the hearing of this suit be stayed until payment of the aforesaid sum by way of security for costs."**

It is clear from the above that the judges order was in the alternative, and the plaintiff has paid into court the amount of shs 463, 186. 70, and hence has satisfied that order. The defendant had therefore no basis for prosecuting the application in the light of the above.

The end result is that the defendant's application must fail. The order of this court is that: -

> **(1) That the defendant's application dated 27th August 2004 is dismissed with the costs being in the cause.**
>
> **(2) By invoking the court's inherent power I do hereby set aside the stay of this suit as ordered by the ruling of 21st March 2003.**

Dated and delivered this 29th July 2005.

**MARY KASANGO**

**JUDGE**