



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL DIVISION, MILIMANI**  
**CIVIL SUIT 957 OF 2000**

**SHAKHALAGA KHWA JIRONGO...1ST PLAINTIFF/RESPONDENT**

**SOLOLO OUTLETS LTD.....2ND PLAINTIFF/RESPONDENT**

**VERSUS**

**THE BOARD OF TRUSTEE OF NATIONAL**

**SOCIAL SECURITY FUND .....DEFENDANT/APPLICANT**

**R U L I N G**

At the commencement of the hearing the court ordered that two applications be heard at the same time; namely plaintiff's application dated 19th March 2004 and the defendant's application dated 24th February 2004.

The plaintiff's counsel began to argue the application dated 19th March 2004 but some way through the arguments counsel for the plaintiff sought an adjournment citing the need to reorganize himself. The court adjourned the matter.

At the resumed hearing the plaintiff's counsel abandoned any further argument of that application on the basis that the plaintiff desired to amend the same. The court accordingly proceeded to hear the application dated 24th February 2004.

Defendant's learned counsel; Mr. Mereka abandoned some of the prayers in that application and indicated that he was only proceeding with prayer (b) and (c) and was relying on Order XXV Rule 1 of the Civil Procedure Rules. Prayer (b) sought

**“That .....the plaintiff be ordered to furnish security for costs to the defendant in the sum of kshs 100,000,000 (Kenya shillings one hundred million.”**

Prayer (C) sought costs of the application.

Defence counsel in support of the application submitted that the 2nd plaintiff is in receivership and the 1st plaintiff although had deponed that he is a proprietor of several real estate he had failed to provide evidence of such assets. Further that the suit, namely HCCC NO. 914 of 1994, which was stayed by Justice A B Shah with an order that the plaintiffs do pay the defendants, costs. Defence counsel stated that those costs had not been paid by the plaintiffs. He therefore submitted that the plaintiffs will not be able to pay the defendant's costs in the event the defendant does succeed in its counter claim. That the value of the plaintiffs claim and the value of the counter claim was kshs 8 billion, and the basic instruction fees is kshs 158 million, and accordingly the defendant was justified in claiming kshs 100 million as security for costs.

The defendant relied on the following cases:

· HCCC (MILIMANI) 1158 OF 2001 EXCLUSIVE ESTATE LIMITED VERSUS KENYA POST & TELECOMMUNICATIONS AND ANOTHER; where Hon Justice Ombija stated

**“A defendant who has been unnecessarily dragged into court is entitled to protection against the plaintiff in the event that he succeeds in resisting the claim.”**

· HCCC (MILIMANI) NO. 255 of 2000 FRESHCO INTERNATIONAL LTD VERSUS PIONEER OVERSEAS CORPORATION.

The application was opposed by the Learned counsel for the plaintiffs, Mr. Koyoko. Counsel began by drawing the courts attention to the fact that the instruction fee is obtained by combining the plaintiff's claim and the defendant's counter claim. Counsel argued that a counter claim being in the nature of a suit, security of costs cannot be ordered against a party who defends such a suit.

He further argued that the defendant had failed to prove the poverty of the plaintiff but in any case, that it was trite law that poverty is not a sufficient ground for an order of security of costs. That the plaintiff had bona fide claim against the defendant.

Plaintiff further argued that the suit was filed in 1999, and the defendant had failed, to file the present application immediately the suit was filed, and on that basis that the defendant is disqualified from obtaining the orders sought. Counsel relied on two cases, which he said they showed that to grant orders sought, it was in the discretion of the court, but that, that discretion should be exercised sparingly.

- · NOORMOHAMED ABDULLA VERSUS RANCHHODBAI J. PATEL [1962] E.A. 447 and GULF ENGINEERING (EAST AFRICA) LTD VERSUS AMRIK SINGH KALSI KLR [1976] 277.

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

The plaintiff filed this case in 1999; it is now four years later, that the defendant seeks an order for security of costs. I accept the plaintiff's submission, that an application brought after so many years of filing the suit, would be prejudicial to the plaintiff. An application for security of costs should be brought very soon after the suit is filed if brought latter there ought to be sufficient explanation for the delay. There is no such explanation here. It is pertinent to note that the 2nd plaintiff was under receivership at the time of filing of this suit, consequently there has not been changes in that regard, to justify the application being brought so late in the day.

In the exercise, therefore, of my discretion, I find that in all the circumstances of the case an order that the plaintiff company give security for costs should not be made, and the defendant's application must fail.

The order of this court is that the defendant's application dated 24th February 2004 is dismissed with costs to the plaintiff.

Dated and delivered this 18th day of July 2005.

**MARY KASANGO**

**JUDGE**