



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT,**  
**MILIMANI COMMERCIAL COURTS, NAIROBI**  
**CIVIL CASE 1190 OF 1994**

**PANCRAS T. SWAI .....PLAINTIFF**

**V E R S U S**

**KENYA BREWERIES LIMITED ..... DEFENDANT**

**R U L I N G**

The background to this application is that by order dated 10th December, 2004, the court ordered the plaintiff to provide security for the costs in this case in the sum of US\$40,000.00 within 21 days thereof. That sum was ordered to be deposited in an interest earning account in the joint names of the plaintiff's and the defendant's advocates. The parties were also granted liberty to apply.

By this application, the plaintiff applies for orders that this court be pleased to enlarge the time for depositing the security for costs herein; that this court be pleased to review its order of 10th December, 2004, and in its place order that the applicant do provide a bank guarantee or an insurance bond of US\$40,000.00; and that costs be in the cause.

The application is expressed to be brought under Ss. 3A and 95 of the Civil Procedure Act; and O. XLIX rule 5, and O. L rule 1 of the Civil Procedure Rules. It is supported by the annexed affidavit of PANCRAS T. SWAI the plaintiff herein, and is based on the grounds that –

- (a) The court on 10th December, 2004 ordered the applicant to provide security for costs in the sum of US\$40,000.00 within 21 days thereof.
- (b) The applicant herein was hospitalised for a period of 2½ months, hence the inability to comply with the court order within the time provided.
- (c) The application herein has been filed without undue delay.
- (d) No injustice or hardship will be caused to the respondent should.

The application is opposed. On 15th April, 2005, Mr. Kibanya Nguru, an advocate of the High Court of Kenya practising as such with Ndung'u Njoroge & Kwach, Advocates having the conduct of this matter on behalf of the defendants/respondents swore and filed a replying affidavit in support of the respondent's prayer that this application be dismissed with costs. At the hearing of the application, Mr. Kyalo appeared for the applicant while Mr. Kibanya appeared for the respondent.

I have considered the application and the rival submissions of both counsel. The application seeks

mainly two orders. The first one is an order for extension of time. It is brought under O. XLIX rule 5 of the Civil Procedure Rules. This rule provides as follows –

**“Where a limited time has been fixed for doing any act ... the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed ...”**

The applicant was required to deposit the security for costs within 21 days from 10th December, 2004. To date, that order has not been complied with. The evidence on record shows that the applicant was hospitalised on 22nd December, 2004 and discharged on 18th February, 2005. This application was filed on 9th March, 2005. From the time of discharge from hospital to the date of filing of the application is less than three weeks. In the context and circumstances of a person who had just been discharged from hospital, I don't think that the delay was either inordinate unreasonable or inexcusable.

The second order sought in the application is for review of the court's order dated 10th December, 2004. From a technical perspective, the mode in which this order is sought is defective. O. XLIV of the Civil Procedure Rules provides for review of court decrees or orders. The applicant has not found it fit to invoke this Order. Instead, he has relied on S. 3A of the Act, which is an omnibus provisions merely spelling out the inherent powers of the court to make such orders as may be necessary for the ends of justice, and to prevent abuse of the process of the court. As the section does not confer any powers, it is not available for invocation where some remedy is expressly provided for in the rules. To hold otherwise would imply that one could invoke S. 3A for any remedies, thereby rendering all the 52 Orders otiose.

Secondly, it is now settled law and practice that anyone seeking the review of a decree or order of the court should attach a copy of the decree or order sought to be reviewed. That has not been done in this, and the failure to do so renders the application fatally incompetent. Worse still, the applicant has not advanced a single reason why the security ordered by the court should be changed from one mode to another. Should it be altered just for the sake of securing an alteration? Or is it that the applicant is unable to raise the US\$40,000.00? An inference to that effect may be drawn from submissions of learned counsel for the applicant when he argued that security for costs is not meant to be punitive, and that US\$ 40,000.00 is a colossal amount of money. Yes, it is a substantial amount of money, but when one takes into account the sum of US\$1.9 million which the applicant claims in the suit, then \$40,000.00 is reasonable. Unfortunately the applicant has not come clean as to whether that is the reason behind the application. We are only left to speculation, and I don't think that the court should give orders predicated on speculation. Failure to specify the reason for the alteration of the terms of the security has led counsel for the respondent to venture to say that the reason was to derail the hearing of their application dated 3rd April, 2005, seeking an order for the suit to be dismissed. Such a suggestion is not quite without merit but, again, it belongs to the realm of speculation.

By reason of the foregoing, I find that the application has not passed the test for the grant of an order for review. At the same time, I find that the applicant has established a case for enlargement of time to comply with the court order. Counsel for the respondent submitted that he had no quarrel with an extension of time, and suggested that the applicant may be granted an extension of 15 days. I don't think that two weeks is a reasonable time. If he was not able to comply within 21 days, I don't think that another 15 days will do him much good. For these reasons, I make the following orders –

1. The time for depositing the security for costs ordered on 10th December, 2004, is hereby extended for a period of 30 days from today.
2. Pursuant to the proviso to O. XLIX rule 5 of the Civil Procedure Rules, the costs of this application shall be borne by the applicant.

Dated and delivered at Nairobi this 1st day of August 2005.

**L NJAGI**

**JUDGE**