



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI**

Civil Case 156 of 2005

ALLIANCE MEDIA KENYA LIMITED.....PLAINTIFF

VERSUS

MONIER 2000 LTD.....DEFENDANT

RULING

The defendant by its chamber summons dated 11th May 2005 seeks an order for the plaintiff to furnish security for its costs in this suit and in the intended arbitration. The application is brought under sections 3, 3A and 63 (e) of the Civil Procedure Act, Order 25 Rules 1, 5 and 6 of the Civil Procedure Rules, sections 223 and 401 of the Companies Act and section 7 of the Arbitration Act 1995, with Rules 2 and 11 made under that Act.

By a ruling delivered by this court on 11th of May 2005, in this matter, the court order: -

“The parties are ordered to formerly appoint an arbitrator and file their respective leadings within thirty (30) days.....”.

As a consequence therefore this suit was referred for arbitration.

The defendants application for security for costs lost its ‘*sting*’ when a winding up petition that the plaintiff was facing was marked as settled on 7th June 2005.

As a result of that settlement of that petition the submissions made by defence counsel relating to that petition will not be considered in this ruling for in my finding once a matter is marked as settled, it is settled and it is not the place of the court or any one else to try to examine the reason of the settlement. Defence counsel suggested that the settlement was as a result of payment of the debt by the plaintiff but I find that is not necessary to go that way.

Order 25 (1) of the Civil Procedure Rules reads as follows: -

“In any suit the court may order that security for the whole or any party of the costs of any defendant or third or subsequent party be given by any other party.”

It is clear that this order affords the court wide discretion in an application such as the one before court. In considering the exercise of that discretion I will consider the evidence provided by the

defendant. defence argues that its defence raises a bona fide claim against the plaintiff's claim and that since the plaintiff in its pleading does not address whether the defence is 'strong' or weak that the court should accept the defence's contention that it has established a bona fide defence. The other argument raised by the defence is that the plaintiff has no fixed assets within this court's jurisdiction. Defence further said that the plaintiff's share holders are all foreign companies and in the light of this there is likelihood of the defendant not obtaining its costs in the event of succeeding in its defence.

Plaintiff submitted that even though the injunction application hereof, was dismissed the judge did direct that this matter does go to arbitration. He then stated that the defendant's application for security for costs is being brought for oppressive reasons, against the plaintiff. He further stated that the security sought by the defendant, kshs 10 million was excessive taking the amount claimed.

I have considered the defendant's application the affidavits in support and the plaintiff's affidavits in opposition. I find myself in agreement with Hon Justice Ibrahim in the case of ABDI ALI NUR – VERSUS – TRANSAMI KENYA LTD HCCC no 657 of 2003 (Milimani) where he stated: -

“For the court to make an order for security for costs there must be some credible testimony of inability to pay the costs upon conclusion of this suit.

Having examined the evidence before me I find that the defendant has failed to provide to the court credible testimony of the plaintiff's inability to pay costs that might be awarded against it, in addition having regard to all the circumstances of this case I find that it would not be just to order the plaintiff to provide security for costs.

I will therefore grant the following orders: -

- **That the application dated 11th May 2005 is dismissed and the costs thereof shall be in the cause.**

Dated and delivered this 20th September 2005.

MARY KASANGO

JUDGE