



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

**Civil Case 364 of 2005**

**MARSHALL T. OSANYA .....PLAINTIFF**

**(Court Appointed Interim Liquidator**

**Stallion Insurance Company Limited in**

**Liquidation)**

**VERSUS**

**KENYA PORTS AUTHORITY .....DEFENDANT**

**RULING**

The Applicant which is the Defendant in the suit applies for security for costs under Order 25 rules 1 and 6 of the Civil Procedure Rules which gives the court a discretion to order security for costs.

The Applicant's ground for seeking this Order is that the Respondent/Plaintiff is in liquidation.

The Applicant further relies on Section 401 of the Companies Act which states:-

*“Where a limited company is plaintiff in any suit or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.”*

Mr. Gachuhi for the Applicant also relied in the case of ***Attorney General v Africa Cooperative Society Ltd. (2002) E.A. page 325*** a case in which Mpagi – Bahigeine JA of the Uganda Court of Appeal stated at page 328, relying on two English cases, that it has been held that where a company is in liquidation, this fact, in the absence of evidence, to the contrary, gives the court sufficient reasons to believe that if the Defendant were successful in his Defence the assets of the Company would be insufficient to pay his costs.

The fact of the Respondent being in liquidation is apparent from the pleadings.

In a Replying affidavit the interim liquidator Mr. Marshall Tito Osanya depones that the Applicant is ignorant of the Respondent's assets and cannot prove its inability to pay.

Annexed to the Affidavit is a Certificate of Balance showing that there is a sum of Kshs.3,120,628.15 to the credit of the Respondent. However, there is no statement of its liabilities annexed.

I accept the statement made in the case cited above that where a Company is in liquidation the onus of showing it can pay costs in a suit instituted by it lies on it. It is not for the Applicant to prove what its assets and liabilities are.

It is axiomatic that a Company in liquidation is unable to pay its debts otherwise it would not be in liquidation.

In this case the Applicant has been brought to court and it is only just that it should be assured of its costs in the event that its Defence succeeds.

In this case in the exercise of my discretion, I rule that the Respondent provides security for costs in the sum of Kshs.400,000/=, which the Respondent has not challenged as being reasonable, within two weeks from today by either depositing this sum in an interest earning account in the names of parties advocates or producing a Bank Guarantee by a reputable bank for this sum conditioned on payment in the event the Applicant succeeds in its defence. Costs in cause.

Dated and Delivered at Nairobi this 18<sup>th</sup> day of October, 2005.

**P. J. RANSLEY**

**JUDGE**