



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL SUIT NO 268 OF 2002**

**EXPRESS ESCORT LTD ..... PLAINTIFF**

**VERSUS**

**SECURITY SERVICES LTD ..... DEFENDANT**

**RULING**

The Defendant in its application dated 6th January, 2004 brought by way of Chamber Summons seeks the following orders:-

- 1. That the Honourable court be pleased to order the Plaintiff to furnish security for the defendant's costs in the sum of Kshs.209,408.04 within ten (10) days.***
- 2. That failure thereto the Plaintiff's suit hereto be dismissed. Alternatively proceedings be stayed until security is provided.***
- 3. That the Honourable court be pleased to order that the said costs be depo sited in the joint names of the Plaintiff's and the defendant's advocates in an interest earning account with the Standard Chartered Bank Koinange Street Branch.***

The application is made under Order XXV Rule 1, 5 (1) and Rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act (Cap 21) Laws of Kenya. The application is supported by an affidavit sworn by one SIMON GRANT on 6th January, 2004.

The Plaintiff has not filed a replying affidavit or grounds of opposition. The Plaintiff did not send a representative at the hearing of the Chamber Summons. The defendant's chamber summons therefore was not opposed.

Mr Atudo counsel for the defendant submitted that the Plaintiff filed this suit on 1st March, 2002. By a Kenya gazette notice No. 5064 dated 2nd August, 2002 the Registrar of Companies advertised a list of companies that he intended to dissolve pursuant to Section 339 (3) of the Companies Act (Cap 486) of the Laws of Kenya. The plaintiff company was one of the companies so listed. The said gazette notice is exhibited in the affidavit of the said SIMON GRANT as "S.C 1".

The Companies listed in the said gazette notice were notified that at the expiration of three (3) months from the date of the gazette notice the names of the companies would unless cause be shown to the contrary be struck off the register of Companies and that the companies would be dissolved.

Mr Atudo submitted that the defendant believes that the Plaintiff may be unable to pay its costs should the Plaintiff's suit be dismissed.

The registrar has given the notice under Section 339 (3). The registrar believes that the Plaintiff Company is not carrying on business or in operation. The defendant fears that if the Plaintiff is not in operation it may even cease to exist. Under the circumstances it is necessary for the Plaintiff to furnish security for the defendant's costs should the defendant succeed in its defence.

The defendant believes that it has a strong defence against the Plaintiff's claim.

In the light of the above, I hold that the defendant's belief that the Plaintiff may not be able to pay its costs if it succeeds in its defence is well founded. The gazette notice of 2nd August, 2002 referred to above suggests that the registrar of companies believes that the Plaintiff is not in operation. The Plaintiff has not responded to the defendant's allegations. The allegation stands uncontroverted.

I have also perused the written statement of defence and in my view the defendant has a bona fide defence. The Court of Appeal in **SHAH VS SHAH (1982) KLR 95** held inter alia that:

***“The test on an application for security for costs is not whether the Plaintiff has a prima facie case but whether the defendant has shown a bona fide defence.”***

I am aware that I am being asked to exercise a discretion in favour of the defendant. I must exercise it reasonably and judicially. No other material has been placed before me by the Plaintiff. I am satisfied that my discretion should in the circumstances of this case be exercised in favour of the defendant. I accordingly order that the Plaintiff shall provide by way of security for the defendant's costs, a local bankers guarantee or undertaking or an insurance bond or a deposit in the sum of Kshs.180,000/= in an interest earning account in the joint names of the parties respective advocates within thirty (30) days from the date of service of the order.

In the meantime this suit is stayed. In default the defendant is at liberty to proceed under Order XXV Rule 5 and 6 of the Civil Procedure Rules.

The defendant shall have the costs of this application. It is so ordered.

Dated and delivered this 2nd day of March, 2004.

**F. AZANGALALA**

**JUDGE**

**2.3.2004**