REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

Civil Suit No. 542 Of 2012

Two Tone Branding Africa Ltd. ...…….…... PLAINTIFF

VERSUS

Coca-Cola East & Central Africa Pty Ltd. ..…. DEFENDANT

R U L I N G

1. Before the Court is an application dated 20th May, 2013 filed by the Defendant/Applicant, brought under the provisions of **Order 26 Rules 1 and 5** of the *Civil Procedure Rules* and **Section 401** of the *Companies Act*. The Applicant prays for:

> **"1. The Plaintiff do within a fixed time give security in respect of this suit;**
>
> **2. The Plaintiff do within a time to be fixed give security in the sum of Kshs. 1,800,000/- for the Defendant's costs of this suit;**
>
> **3. If the Plaintiff fails to give security and/or for the Defendant's costs as aforesaid then the Plaintiff's claim be dismissed with costs to the Defendant and the Defendant be allowed to continue with the counterclaim".**

2. The application is based on the grounds that the Plaintiff is unlikely to pay the Applicant the amount of the counterclaim or the costs of the Applicant in the event that the Applicant is successful in this suit. The application is supported by the Affidavit of **Antoinette Absaloms**, the Operations Counsel for the Applicant, sworn on 21st May, 2013. The deponent avers that the Plaintiff, in its Plaint dated 28th March, 2012 at paragraph 14 (a) and in the Witness Statement by **Ronald Maina** dated 10th May, 2012 at paragraph 18, admits that the Plaintiff's business has collapsed and subsequently closed down. It is contended that due to this admitted fact, the Applicant is apprehensive that the Respondent is unlikely to be able to pay the Applicant the amount claimed for in the Counterclaim and/or the costs of the suit, should the Applicant be successful.

3. The application is opposed. In the Affidavit of Ronald Maina, the Director of the Plaintiff/Respondent, sworn on 27th June, 2013 in response to the application, it is deponed that the Applicant is, by this application, trying to shut out the Respondent from its genuine claim against it. The sum claimed by the Applicant as costs for the suit in the sum of Kshs. 1,800,000/- is grossly inflated and does not constitute costs of the Respondent's claim. It is further contended that the Respondent cannot be compelled to pay security for costs for the Applicant's speculative counterclaim and that the impecuniosity in the matter does not justify for an order for security of

costs.

4. In submitting on the application, Mr. Otava referred to paragraph 6 of the Respondent's Affidavit in which the deponent states that it is no longer trading and has since shut down. He submitted that the same is reiterated in the Replying Affidavit sworn on 27th June, 2013 at paragraph 3. He further submitted that it would be just and fair if the Respondent be ordered to furnish security for costs and that the Applicant has a very strong Defence supported by the Counterclaim. By the admission of shutting down its business, the Respondent should be compelled to furnish security for any eventual costs.
5. In rebutting the submissions, counsel for the Respondent Mr. Githaiga submitted on the issue of the Kshs. 1.8 Million, which the Applicant seeks as security for estimated costs. He submitted that the amount sought has no basis and is calculated on the Counterclaim, whereas the amount can only be based on the amount in the claim by the Plaintiff. It is also submitted that the order for security for costs is discretionary, and as such, the Court should exercise its jurisdiction and powers judicially, and not merely on the whims of the Applicant.
6. Having perused the Application, the Responses thereto and the affidavits sworn and submissions filed by the parties, it is the Court's determination on the issue of security for costs as hereunder. The application is premised under **Order 26 Rules 1 & 5** of the *Civil Procedure Rules* and **Section 401** of the *Companies Act*. **Order 26 Rule 1** reads:

> **"In any suit the Court *may* order that security for the whole or part of the costs of any defendant or third party or subsequent party be given by any other party".**

The power of the Court to order security for costs is couched in discretionary terms, in that the Court has to act judicially and in the best interests of all the parties concerned. The factors that the Court has to take into consideration are well set out in the Ugandan case of **Mavid Pharmaceuticals Ltd & Another v Royal Group of Pakistan & 2 Others Civil Appeal No. 26 of 2012**. The Ugandan Court relied on the authority of **G.M Combined Uganda Ltd v A.K Detergents (U) Ltd Civil Appeal No .34 of 1995; (1999) 2 E.A 94** and held that:

> **"The above Supreme Court decision is binding on the High Court and gives very important guidelines for determining this appeal. I agree with the appellant's submission which is consistent with the Supreme Court authority that the court must first consider, in an application by a defendant for security for costs, whether the plaintiff/ counterclaimant has a prima facie case and whether the defendant has a prima facie defence. The rationale for considering the case of the appellant/counterclaimant is to assess the possibility of success of the case. In other words a genuine claim should be disclosed by the pleadings and not a sham. The Supreme Court also directed that it would be injustice to order security for costs where the defendant does not have a good defence or admits the claim. In other words in certain cases it would be immaterial whether the plaintiff is impecunious. The fact that the plaintiff is impecunious should not prevent such plaintiff from presenting a genuine claim against the defendant.** (emphasis added)."

7. The Court of Appeal in **Civil Appeal No. 302 of 2004 Magiri Nguthari v Gideon Kimathi M'Nguthari (2010) eKR**, allowed the appeal, setting aside the superior Court's order for security for costs on the grounds that the Respondents had not laid sufficient basis for such orders for security of costs. The Court determined that:

> **"… we are of the view that it was not a proper case for an order of security for costs. If the respondent and his legal advisers thought that the appellant's claim was frivolous, the alternative procedure should be an application for striking out the plaint rather than force a litigant to be made to pay security for costs in order to pursue what he thinks is a rightful claim."**

8. The upshot is that the Applicant has not satisfied the Court that an order for security for costs in the amount of Kshs. 1.8 Million would be the best way in ameliorating the instant suit. The mere

fact that the Respondent's business has shut down is not enough to prove that it is or may in any event, be unable to pay costs that may arise out of the suit. In following the Ruling of **Shah v Shah (1982) KLR 95** above referred to and adopting the Ruling in **Magiri Nguthari v Gideon Kimathi M'Nguthari** (supra), the Court has to exercise its discretionary power to order security for costs judicially and reasonably.

9. In my opinion, the Applicant has not satisfied or laid down sufficient a basis for an order for the provision of security or security for costs by the Plaintiff. I am satisfied that the Plaintiff has a prima facie case to put before Court at the hearing of this suit. I am also concerned at the delay by the Defendant/Applicant in bringing its Application before Court. Accordingly, the application is hereby dismissed. Costs follow the event and are awarded to the Plaintiff/Respondent.

DATED and delivered at Nairobi this 3rd day of October, 2013.

J. B. HAVELOCK

JUDGE