



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 623 OF 1998**

**HACO INDUSTRIES KENYA LTD.....PLAINTIFF**

**-versus-**

**MARK ADEMBA OKUMU & ANOTHER.....PLAINTIFF**

**RULING**

The plaintiff has filed a suit against the defendant claiming a sum of Kshs. 5,722,083/90 being the sum due and owing by the defendant to the plaintiff in respect of goods sold and delivered between 1996 and 1997.

The plaintiff has now moved the court by way of Chamber Summons under Order 38 Rule 5(1) (a) of the Civil Procedure Rules and section 3A of the Civil Procedure Act for an order that the defendant provides security for any decree that may be passed herein.

The application is supported by grounds stated therein and an affidavit sworn by Wamaitha Kangethe the plaintiffs company secretary. The same is opposed and there are grounds of opposition and a replying affidavit sworn by Mark Ademba Okumu - a defendant in the suit. both learned counsel have also addressed the court on the application.

The basis for granting an order for provision of security is the apprehension on the part of the applicant that the defendant may not be in a position to satisfy the decree that may be passed against him. The order is discretionary and the court is guided by affidavit evidence or otherwise.

The learned counsel for the defendant has cited Badri Prasad (objector) -v- Chokhe Lal (Applicant) Indian Law Reports - Allahabad series vol. 48 1926 p.510.

Dalal J. in that case said:

***“ The plaintiff ought to be able to satisfy the court of the practical certainty of his success, and of the existence of grave danger, and of a real fear that a dishonest defendant, undoubtedly liable is making away with the probable fruits of the judgment.”***

The plaintiffs case is backed by invoices, sales receipts, statements and cheques. There is a defence on record which was filed after the present application. The plaintiff's claim is denied and if any money was ever due and payable the same was duly paid. It is a cannon principle that he who alleges must prove. The defendant has alleged payments. No receipts have been annexed.

I find that, as of now the plaintiff has shown practical certainty of success in the suit. I must now address

the second limb of the test, whether or not the defendant is likely to make away with the probable fruits of the judgment.

Annexed to the application is a bundle of correspondence which points to some arrangement intended to accommodate the defendant not only on his indebtedness to the plaintiff but also on the recovery of some debts in which he was owed by others. It is clear to discern that the plaintiff's counsel participated and was kept posted on the developments of that arrangement.

There is evidence that the defendant was paid a sum of Kshs. 3.5 million by one of the debtors through his lawyers but not a single cent was passed over to the plaintiff on account of the present debt. That alone constitutes grave danger and real fear that the defendant may not honour his obligation to the plaintiff if it comes to be.

The only guarantee is to order provision of security which in the instant case I deem necessary. Accordingly, I find that the application succeeds. The following shall be the orders:

***(a) The sum of Kshs. 3.5 million deposited in the defendants account at Barclays Bank (K) Ltd. Muthaiga Branch is hereby attached.***

***(b) The sum of Kshs. 2,000,000/- held by the Kibera Law courts, in respect of Criminal Case No. 1975 of 1997 on account of the defendant is also attached.***

The total sum of Kshs. 5,500,000/- shall be removed and banked into an interest earning account of both advocates appearing in this case until further orders of this court. The costs shall be in the cause. Orders accordingly.

**Dated and delivered at Nairobi this 24th day of April, 1998.**

**A. MBOGHOLI MSAGHA**

**JUDGE**