



## REPUBLIC OF KENYA

### Southern Oil Supplies Co Ltd v SGS Kenya Ltd

High Court, at Mombasa

February 5, 1991

Wambilyangah J

Civil Case No 724 of 1985

***Civil Practice and Procedure*** - security for costs – court's discretion in making an order for security – order XXV rule 1 of the ***Civil Procedure Rules*** - section 401 Companies Act - onus of proof in an application for security for costs.

The defendants brought an application seeking security for costs under Order XXV rule 1 and section 401 of the Companies Act. It was argued on behalf of the plaintiff that its poverty should not be used as a bar to prevent it from pursuing its rights. It was however deponed by the applicant that on two occasions the plaintiff had been unable to satisfy two court decrees passed against it and also that it had ceased its operations in Mombasa.

It was not disputed between the parties that the plaintiff's hopes of winning substantial damages against the defendant were dashed when Shields J ruled that he could only win nominal damages in respect of the action.

#### **Held:**

1. Under rule 1 of order XXV the court has discretion to order that security be furnished in any case where it thinks fit.
2. The discretion is unfettered, subject only to the implied fetter upon all such discretions, namely that they should be exercised judicially.
3. There is a burden on the applicant for security to show cause why the relief should be granted.

#### **Cases**

No cases referred to.

#### **Statutes**

1. Civil Procedure Rules (cap 21) sub leg order XXV rule 1
2. Companies Act (cap 486) section 401

#### **Advocates**

*Mr Shah* for the Defendant/ Applicant.

*Mr Nanji* for the Plaintiff/ Respondent.

February 5, 1991, **Wambilyangah** J delivered the following Judgment.

This is an application by the defendants in these proceedings in which I am asked to order that the plaintiff do furnish security for all costs of the defendant. The application is brought under order XXV r1 of the Civil Procedure Rules and s 401 of the Companies. Nothing specifically turns on the rules under which the application has been filed. The only question raised for decision is whether the order which is sought for in the application should be made against the plaintiffs.

Under rule 1 of order XXV the court has discretion to order that security be furnished in any case where it thinks fit. The discretion is unfettered, subject only to the implied fetter upon all such discretions, namely that they should be exercised judicially. As I see it there is a burden on the applicant for security to show cause why the relief should be granted.

In paragraph 3 of his supporting affidavit Mr Shah for the applicant has cited 2 instances which undoubtedly show that the plaintiff has already been unable to satisfy 2 court decrees passed against him and it is clear that this was so because the plaintiff has ceased to operate and has got no assets in Mombasa. This is also shown in a document made out by the court broker who failed to levy the execution in one of the decrees which I have referred to above. Mr Nanji for the plaintiff has not sought deny these averments by Mr Shah. His main contention is that the poverty of a litigant should not be used as a bar to prevent him from pursuing his rights. It does therefore follow that those rights of the bankrupt or insolvent ought to be real and strong before the litigant is allowed to pursue them by a court action. In the present case it is a common ground between the parties that the plaintiff's high hopes for a large award in the case were dashed by the ruling of Shield J to the effect the suit disclosed only a cause of action for nominal damages. This ruling has tremendously weakened the plaintiff's claim in the suit and at the end of the day the claim for the anticipated nominal damages may be lost. It is not of course, legitimate for me to indulge myself into profoundly speculation as the final outcome of the case. Certainly that is not within my province of this application. What I am called upon to decide is whether the defendants should be insured as to their costs of the suit, owing to the admitted insolvency of the plaintiff. The answer to the question must in the affirmative especially after the plaintiff's chances of winning in the suit has been cleared on in adverse terms in the ruling of Shields J.

Mr Nanji made a suggestion to the effect that the anticipated nominal damages may be no more than 2000/=, and so he asked that the value of the security to be furnished by the defendant should be of congruent low value. That suggestion obviously overlooks the fact that up to recently the defendants have been defending a claim for over 7 million shillings. They would want to claim for costs on what was sued for – and how much will be finally allowed to them by the taxing master should not really concern me in this application, in the same way as I should not deal with the exact amount of the damages which will be granted to the plaintiff. The plaintiff has given notice of intention to appeal against the ruling of Shields, J and the defendants in opposing the appeal, should one be eventually filed, will inevitably incur costs. It is my view that if the plaintiff was not expecting to win much money out of the case, he should have asked that the case be referred to the magistrate's court for determination.

After taking all these matters into account, and more especially the fact that the plaintiff has become insolvent, I fix the value of the security at Kshs 80,000/= and I allow 2 months from the date of this ruling within which this order is to be complied with. It is ordered accordingly.