**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL CASE NO 2558 OF 1975**

**GULF ENGINEERING (EAST AFRICA) LTD …….... PLAINTIFF**

**VERSUS**

**AMRIK SINGH KALSI**

**MUTER & OSWALD (KENYA) LTD ……..…….. DEFENDANT**

**JUDGMENT**

The application now before me is by way of chamber summons on behalf of Amrik Singh Kalsi trading as Systems Design, the first defendant, invoking order XXV of the Civil Procedure Rules and section 401 of the Companies Act for the following orders to be made against the plaintiff, Gulf Engineering (East Africa) Ltd:

1. That the plaintiff may be ordered to give security for the payment of all costs incurred or to be incurred by the first defendant within such time as the Court may prescribe.

2. In the event of such security not being furnished within the time fixed, the plaintiff's suit against the first defendant may be dismissed with costs. Alternatively, until the security is given, all proceedings in the suit may be stayed.

3. The plaintiff may be ordered to pay the first defendant's costs of this application.

The application is made on the ground that there is reason to believe that the plaintiff company will be unable to pay the costs of the first defendant if successful in his defence and the first defendant relies upon his affidavit in support of his application and filed together with it on 30th January 1976.

On behalf of the plaintiff company an affidavit in reply to the first defendant's affidavit was sworn to by Mr David Stanley Hardy, the managing/executive director of the plaintiff company and filed on 23rd February 1976. A further affidavit sworn by the defendant in reply to Mr Hardy's affidavit was filed on 22nd April 1976.

During the course of the arguments before me, I was referred by Mr Vadgama for the plaintiff company, to Mr Hardy's affidavit sworn on 4th December 1975, in support of an application by the plaintiff company by way of chamber summons dated and filed on 4th December 1975, invoking order XXXIX, rules 1, 2, 3, and 8, of the Civil Procedure Rules and the inherent jurisdiction of the court and all other enabling jurisdiction and, in particular, to three exhibits annexed thereto being exhibits H1 and two letters

in exhibit H2 dated 18th August 1975 and 28th July 1975. I was also referred to the plaint and I looked at the defence.

I was also referred to three other documents which were admitted by consent, namely a document marked GS P1 exhibit 1 (a photocopy), a letter marked exhibit 2 (also a photocopy: these two at the request of Mr Pall) and a further document (a photocopy) at the request of Mr Vadgama, not unfortunately marked by the Court, which appears to be a landlord's notice to terminate or alter the terms of tenancy and purporting to be addressed to Kenya Building & Civil Engineering Contractors Ltd. Mr GS Pall appeared for the first defendant while Mr Vadgama appeared for the plaintiff company in this application.

It is not in dispute that after this application was filed, on 30th January 1976, the plaintiff company went into receivership and that Messrs Leslie and Sinclair, chartered accountants and partners in the firm of Messrs Coopers & Lybrand, were appointed joint and several receivers and managers by Barclays Bank International Ltd (vide exhibit 1) as holder of a debenture; and, as argued by Mr Pall, the financial position of the plaintiff company today is different from when Mr Hardy swore his affidavit.

Mr Pall went on to argue that the application now before me had been made by him under section 401 of the Companies Act which I think it would be convenient to quote:

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 Pall argued that the only test for this application was the ability or inability of the plaintiff company to pay the costs of the first defendant if he was successful in his defence; and I was referred to an order made by Simpson J on 30th September 1976, when application was made that Mr Sinclair (in his capacity as joint receiver and manager of the plaintiff company) should be ordered to disclose the financial position of the plaintiff company to the Court. Simpson J made no such order but apparently, according to Mr Pall, did order that Mr Vadgama would keep Mr Sinclair available to attend Court if so ordered.

Mr pall then went on to quote from *Modern Company Law* (3rd Edn) by LCB Gower at the bottom of page 435 and top of page 436. Finally, he produced exhibit 2 which was admitted by consent being a letter from Mr Sinclair of Coopers & Lybrand dated 5th October 1976 and the relevant portion of which reads:

I can, however, confirm that according to the information we have there will be no surplus money available for payment of the unsecured creditors.

Mr Pall then applied to the Court for an order that Mr Sinclair appear before the Court unless Mr Vadgama accepted that the plaintiff company was insolvent. Whereupon Mr Vadgama said that the plaintiff company did appear to be insolvent and poor.

Mr Vadgama in his reply to Mr pall argued that section 401 of the Companies Act imposed on the Court a wide discretion. Mr Vadgama agreed that the Court would have to consider on credible testimony whether or not there was reason to believe that the company would be unable to pay the costs of the first defendant if successful in his defence. Mr Vadgama went on to make reference to the inherent discretion of the court under section 3A of the Civil Procedure Act and said that if a company is insolvent (vide exhibit 2) then the poverty of the plaintiff company and the insolvency of the plaintiff company was no ground for ordering security for costs of the defendant if he were successful. He then cited *Cowell v Taylor* (1885) 31 Ch D 34, 36, 38 and 40 (last paragraph). The note in the *Supreme Court Practice* 1976, Vol I, at page 388 states:

Insolvency or Poverty no ground for security – The insolvency or poverty of a plaintiff is no ground for requiring him to give security for costs (*Cowell v Taylor*).

I was next referred to *Dartmouth Harbour Commissioners v Mayor of Dartmouth* [1866] 55 L JQB 488. A reference is made to this case in the *Supreme Court Practice* 1976, Vol 1, at page 388 states:

The fact that a corporation is insolvent, and that a receiver of the profits of its undertaking has been appointed, is no ground for requiring it to give security (*Dartmouth Harbour Commissioners v Mayor of Dartmouth*).

During the course of Mr Vadgama's address to the Court Mr pall conceded that the appointment of a receiver pursuant to an instrument of debenture was in no way a bar to the claim of the plaintiff company by itself.

Mr pall in reply to Mr Vadgama argued that there were two provisions for the order for security for costs, namely order XXV, rule 1, and section 401 of the Companies Act, and that the general provisions under the Civil Procedure Rules were inapplicable to this case as there were specific provisions in section 401 of the Companies Act which applied in this case since the plaintiff was a limited company. Why then did Mr Pall invoke order XXV of the Civil Procedure Rules on the chamber summons filed by him on 30th January 1976? Perhaps as a safeguard. However, I find that section 401 of the Companies Act applies in this case. Mr Pall went on to argue that since *Cowell v Taylor (supra)* was not a case involving a limited company then it was no authority for saying that insolvency or poverty was no ground for security and that, since *Dartmouth Harbour Commissioners v Mayor of Dartmouth* involved a statutory corporation and not a limited company (as the plaintiff company here is), the latter case was not authority for the proposition that an insolvent limited company which had a receiver of the profits of its undertaking appointed was no ground for requiring it to give security.

Mr Pall argued that the general law of insolvency of a plaintiff was not a good ground for security of costs not to be ordered in the case of a limited company. He referred again to section 401of the Companies Act and said there should be credible testimony for the Court to believe that the company would be unable to pay the costs of the defendant if successful in his defence and that there was such testimony in this case taken together with exhibit 1 and 2 and Mr Vadgama's concession.

Mr Pall then went on to argue the rights of the plaintiff company to having its goods distrained, but here I interposed to remark that it seemed to me that Mr Pall was going into the merits of the case which he could not do on the application presently before me.

Mr Pall repeated that under the provisions of section 401 of the Companies Act the plaintiff company could not proceed with its claim unless it gave security. Mr Pall then cited from *6 Halsbury's Laws of England* (3rd Edn) Commencing at page 451, paragraph 875, which I quote:

Security for costs by company. Where a limited company is plaintiff in any action 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 Pall argued that once the Court is so satisfied it must require sufficient security for the costs of the defendant if successful in his defence and may stay all proceedings until security is given. Mr Pall added that all the cases in the White Book dealing with insolvency or poverty related only to unlimited companies or individuals and not to limited companies. Mr Pall then went on to argue that the plaintiff company in the present case was only the nominal plaintiff since the plaintiff company was in receivership and the case it presented was only for the benefit of the debenture-holder and not for the company itself directly; and that, for this reason, security for costs of the first defendant if successful should be ordered; but in referring to *Universal Aircraft Ltd v Hickey* (1943) unreported it is said in the *Supreme Court Practice* 1976, Vol I, at page 389:

But the mere fact that a company has issued a debenture charging all its assets to secure the repayment of all moneys then or at any time owing to a particular person was not considered to be a sufficient reason

for ordering security.

I think that the answer to the main question in this application is to be found in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 2 WLR 632 and particularly in the judgment of Lord Denning M R commencing at page 644. I quote, however, from page 284 *et seq*:

On 26th October 1972 the appeal by Triplan Ltd came before the judge. Mr Tackaberry for Parkinsons again submitted that once it was shown that there was reason to believe that Triplan Ltd would be unable to pay the costs if Parkinsons were successful, the Court had no discretion but had to order security.

This point is so important that I must deal with it. Section 447 of the Companies Act 1948 provides [This is almost identical to section 401 of the Companies Act of Kenya]: 'Where a limited company is plaintiff or pursuer in any action 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.'

Does that section mean that the Court must order security, or is it only that the Court may in its discretion? There are some observations to the effect that it is mandatory. Thus in *Northampton Coal, Iron and Wagon Co v Midland Waggon Co* (1878) 7 Ch D 500, 503- 504, James LJ said: '… I consider security for costs to be *ex debito justitiae*, and it is a very important matter whether a suitor is likely, if successful, to be able to obtain payment of his costs.'

In 1890, in *Pure Spirit Co v Fowler* (1890) 25 QD 235, 237, Denman J said: '… the Court is bound to order security for costs where the company is in liquidation, and there is no evidence to rebut the inference that the assets will be insufficient to pay the defendant's costs if he succeeds.'

Those observations seem to have been the basis of a note which was contained in the *Annual Practice* until 1966. The note said that the wide discretion conferred in the Court in other cases 'does not apply to security ordered under section 447'.

I do not think those observations are correct. I prefer to follow the cases which are to be found in the notes in 76 LJ 204 [*Ebury Garages Ltd v Agard*] and 77 LJ 123 [*Gill All Weather Bodies Ltd v All Weather Motor Bodies Ltd*] Scrutton LJ said that there were too many applications against companies for security for costs.

In his view "the powers of the section should be carefully used'. Maugham LJ said: 'The section only confers discretion on the Court. There may be many cases where a company is insolvent, and yet the Court would not order security to be lodged'.

I would add a case in 1962 in the Supreme Court of Eire. It is *Peppard & Co Ltd v Bogoff* IR 180. Kingsmill Moore J said at page 188: '… the section does not make it mandatory to order security for costs in every case where the plaintiff company appears to be unable to pay the costs of a successful defendant, but that there still remains a discretion in the Court which may be exercised in special circumstances.'

Turning now to the words of the statute, the important word is 'may'. That gives the judge a discretion whether to order security or not. There is no burden one way or the other. It is discretion to be exercised in all the circumstances of the case. Mars Jones J, in a full and careful judgment, took that view. He upset the master's order. He refused to order security for costs. Mr Tackaberay for Parkinson asked for leave to appeal. He put it on the ground that it was an important point whether or not the Court had discretion. It was so important that four or five solicitors were waiting in the Court to hear the result of it. The judge gave leave to appeal.

… If there is reason to believe that the company cannot pay the costs, then security may be ordered, but not must be ordered. The Court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstances. Mr Levy helpfully suggests some of the

matters which the Court might take into account, such as whether the company's claim is *bona fide* and not a sham and whether the company has a reasonably good prospect of success. Again it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into Court of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim), that, too, would count. The Court might also consider whether the application for security was being used oppressively – so as to try and stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing their part of the work.

I respectfully adopt and apply what was said by Lord Denning MR in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd (supra)*. I find that Lord Denning has only mentioned some of the circumstances which a Court might take into account in considering the question as to whether or not a plaintiff limited company should be ordered to give security for costs. Now looking at the plaintiff company's claim, as set out in its plaint and the letter of authority (exhibit H1 attached to the affidavit of Mr Hardy, a director of the plaintiff company) and at the contents of a letter from G S Sandhu & Co, advocates, dated 28th July 1975 (who were then apparently acting for the first defendant), together with a further letter from G S Sandhu & Co dated 18th August 1975 (both such letters forming part of exhibit H2 attached to Mr Hardy's affidavit filed on 4th December 1975 in support of the plaintiff company's application by way of chamber summons, also dated and filed on 4th December 1975), and also the first defendant's defence, and the notice addressed to Muter & Oswald (Kenya) Ltd (the second defendant) by the first defendant dated 26th January 1976 and filed on 28th January 1976, I consider from a sight of such documents that the plaintiff company seems to have a *bona fide* claim and to have a reasonable chance or prospect of success, at least in part. I find that to go any further into the matter on this application, as Mr Pall would have me do, would be going into the merits of the case which should not be done on this application.

I therefore exercise my discretion and find that, in all the circumstances of this case, an order that the plaintiff company give security for the costs of the first defendant should he be successful in his defence should not be made.

I find that it is unlikely that the plaintiff company will be able to pay the first defendant's costs, if he should happen to be successful in the suit, but I am not prepared to shut out the plaintiff company from pursuing his claims against the first defendant for the reasons already given. In this regard, I respectfully adopt and apply what was said by Lawton LJ, who was the third member of the Court in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] WLR 632, 648:

I agree with Lord Denning M R that the effect of section 447 is that once it is established by credible evidence that there is reason to believe that the plaintiff company will be unable to pay the costs of the defendants if they are successful in their defence, the Court has a discretion, and that discretion ought not to be hampered by any special rules or regulations, nor ought to be put into a straitjacket by considerations of burden of proof. It is a discretion which the Court will exercise having regard to all the circumstances of the case.

For the reason herein given I dismiss the first defendant's application by way of chamber summons filed on and dated 30th January 1976, with costs to the plaintiff company.

*Summons dismissed with costs.*

Dated at Nairobi this 10th day of November 1976.

**J.H.S. TODD**

**…….....…..**

**JUDGE**