REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NUMBER 531 OF 1999

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA …….. 1ST PLAINTIFF

PHOENIX ASSURANCE COMPANY OF NEW YORK ……. 2ND PLAINTIFF

MARINE OFFICE OF AMERICA CORPORATION …….. 3RD PLAINTIFF

VERSUS

KENYA AIRFREIGHT HANDLING LIMITED ……... 1ST DEFENDANT

SWISS AIR TRANSPORT COMPANY LIMITED ……... 2ND DEFENDANT

RULING

This application has been brought under O. XXV rules 1, 5 and 6 of the Civil Procedure Rules by the 1st defendant for orders requiring the plaintiffs to give security for the 1st defendant's costs in the sum of Shs.1,800,000/= and in default of giving such security the plaint to be struck out or the proceedings stayed until such security is provided. The application is supported by an affidavit sworn on 24.3.2000 by Mr. Jared Omedi, who is the Controller Aviation Insurance of the 1st defendant according to which the 1st defendant's party and party costs for defending the suit will amount to Shs.1,784,000/=. Details as to how the figure is arrived at are given in the affidavit.

Briefly, the facts giving rise to the application are that on 4.5.1999, the 3 plaintiffs, all foreign companies incorporated in the United States of America, and carrying on business in New York and elsewhere instituted this suit against the 1st defendant (a locally incorporated company) and another company for the recovery of special damages in the sum of US Dollars 1 million as well as some unspecified general damages. The 1st defendant filed its defence on 4.5.1999 (it was later amended on 7.9.1999) in which liability is denied. Following the close of the pleadings, the 1st defendant lodged an application to strike out the plaint but the application was dismissed by this court on 28.1.2000. Two months after the dismissal of that application, the 1st defendant lodged this application.

As far as I can see the application for security for the 1st defendant's costs is made upon one ground only namely that the 3 plaintiffs are foreign companies without any business in Kenya or any other interest and consequently the enforcement of any judgment for costs against the 3 plaintiffs in the event of their suit being dismissed would be difficult and costly to enforce in view of the fact that they are all based in the U.S.A.

The power of this court to order security for costs is contained in O. XXV rule 1, which is the rule under which the application has been made. The rule provides:-

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

That the court has power to order security for costs in suitable case is a principle which has been recognised and accepted for a long time. Jessel MR. in the case of In Re Percy Kelly Nickel, Cobalt and Chrome Iron Mining Company (1875-76) Ch. Division page 531 stated:-

> ***"The principle is well established that a person instituting legal proceedings in this country, and being abroad, so that no adverse order could be effectually made against him if unsuccessful, is by the rules of the Court compelled to give security for costs. That is a perfectly well - established and a perfectly reasonable principle."***

The above principle has stood the test of time and has not changed. It is however to be applied only if having regard to all the circumstances of the case, the court thinks it is just to do so (see Halsburys Laws of England, 4th Edition Vol. 37 at page 230).

> ***"The cou rt may order security for costs, in the cases in which power to do so exists, only if, having regard to all the circumstances of the case, it thinks it just to do so".***

The plaintiffs do not however consider that the circumstances of this case justify the making of an order for security for costs. To prove that point, they have caused to be filed on their behalf an affidavit sworn on 27.4.2000 by one Anthony J. Pruzinsky an Attorney at Law in the State of New York U.S.A.

The affidavit of Mr. Pruzinsky reveals that the three plaintiffs are leading international companies operating throughout the world with substantial assets and solid financial bases. In respect of the 2nd plaintiff, Mr. Pruzinsky depones that the company has its operations in Kenya located at Royal Insurance Company of East Africa Ltd., Royal Ngao House, Hospice Road Nairobi. But whether the local company can be held liable to meet the legal obligations of the 2nd plaintiff has not been sufficiently established to enable this court determine whether or not the alleged existence of the local company changes the status of the 2nd plaintiff from a foreign company to a local one; neither for that matter has it been shown that the alleged existence of the local company implies that the 2nd plaintiff can be treated as having a place of business or interest in Kenya. In my view therefore

Mr. Pruzinsky's statement about the local company lacks any substance and therefore changes nothing. The position remains that to all legal intents and purposes, the 2nd plaintiff remains a foreign company without any assets in this country.

Because of the considerable assets at the plaintiffs' disposal, Mr. Pruzinsky further contends that the plaintiffs are in a position to meet the 1st defendant's costs in the event that the 1st defendant is successful in defending the claim. That may well be so but it is besides the point. The issue before this court is not whether or not the plaintiffs are in a position to meet the 1st defendant's costs but rather whether the 1st defendant will find itself unable to recover from the plaintiffs the costs which may be incurred in defending the suit.

Mr. Pruzinsky further depones, on advice by the plaintiffs advocate, that:-

> (a) the 1st defendant has not provided any or sufficient evidence to indicate that the plaintiffs would not be in a position to bear the 1st defendant's costs in the suit;
>
> (b) there has been unreasonable delay on the part of the 1st defendant in bringing this application;
>
> (c) the 1st defendant has waived any right it might have had to apply for security for costs and is therefore precluded from bringing the application;

(d) the 1st defendant has not complied with practice and procedure which requires that an application for security for costs be proceeded by a written requests for provisions of security for costs.; and

(e) in the circumstances the application is premature, misconceived and an abuse of the process of the court.

Mr. Kiragu for the 1st defendant submitted that the object of O. 25 of the Civil Procedure Rules was to avoid a situation where a successful defendant would be forced to chase an unsuccessful foreign plaintiff for costs. Consequently, he further submitted, in an application of this nature the financial status of the plaintiff was not a relevant consideration. In support of that contention he cited the case of Farrab Incorporated V. Brian John Robson and Others (1957) E.A. 441, a case involving a company registered in Tangier and having a place of business at Tanganyika which sued a defendant in Kenya. The defendant applied for security for costs on the ground that the plaintiff was based abroad. There was no affidavit in support of the application. In granting the application, Connell, J. quoted from the White Book 1957 at page 1507 where it is stated:-

"An affidavit in support (of the application for security for costs) is generally necessary, though not where the ground for requiring security is that the plaintiff is resident out of the jurisdiction…."

The learned judge also referred to page 1501 of the White Book Commentary to RSC 65 rule 6 which is the English equivalent of our O. 25 where it is stated:-

"The ordinary ground on which security is ordered is residence abroad and subject to the exceptions hereinafter mentioned, the rule is inflexible."

In response to Mr. Kiragu's submissions on the above point, Miss Absoloms for the plaintiffs stated that the fact that a plaintiff was a foreign company was not a factor which should determine an application. She cited the case of Thune and Another V. London Properties Ltd. & Others (1990) 1 All E R 972 which she submitted supported her contention. However, having carefully considered the matter, I am unable to agree with Miss Absoloms' contention. The decision in Thune is on an appeal from an order of the High Court refusing to grant an application for security for costs. In reversing that decision of the High Court, Bingham L J who wrote the leading judgment in the Court of Appeal cited at page 977 the decision of Parker L J in the case of Berkeley Administration Inc. V. McClellard (1990) I All ER 958 which summaries the legal position in England with regard to an application for security for costs. The relevant part reads:-

"As I have already stressed, residence abroad merely confers jurisdiction. Havi ng acquired jurisdiction the court must then consider whether in all the circumstances it would be just to make an order. The English authorities make it plain that residence abroad is not per se a ground for making an order. At to current practice, it i s, I accept, common for orders to be made on little, if anything, more than fact of residence outside the jurisdiction, but this is because it is also commonly the case that it is obvious from the pleadings that enforcement of any judgment for costs in the event of the plaintiff's action being dismissed would be difficult and costly to enforce."

In my view, the above passage as well as the other authorities already referred to establish that financial status is not a major factor in the consideration of an application for security for costs against a plaintiff residing abroad and that what is of significance is whether the defendant's recovery of its costs, if it is successful in the litigation, would be difficult and costly. That I think is the correct test to apply in an application of this nature.

Miss Absolom's second point of objection to the grant of the order for security was that a request for particulars should have been made to the plaintiffs before the application was filed. She cited

Halsburys Laws of England 4th Edition, Volume 37 paragraph 304-308 and Atkin's Court Forms, 2nd Edition, Volume 13 page 72 as her authorities for the proposition. In Halsburys Laws of England (paragraph 305) it is stated:-

> ***"Although an application for security for c osts may be made at any stage of the proceedings, it should be made as promptly as possible, and it should not be made too late or too close to the trial, since unless there is a reasonable explanation for the delay it may be refused." "…. it should ordina rily be preceded by a written request to the plaintiff's solicitor. ……. The summons or affidavit should indicate the amount of security required, and a skeleton bill of costs should be prepared to show how that amount is made up."***

The same point is made in Atkins Court Forms, 2nd Edition, Volume 13 at page 74 where the learned author states:

> "Before application is made to the court (for security for costs) a written request should be sent to the plaintiff asking him to give security in a reasonable sum."

In support of the above statement the writer refers to Form 1 which is a formal request for security for costs containing notice that if such security is not given within a specified time the applicants will be obliged to apply to Court. The form that follows Form 1 namely Form 2 is the summons for security for costs. Given the fact that we do not have such forms in our Civil Procedure Rules, I do not think that there is any basis in law for saying that a written request for security for costs must first be made before filing an application for security for costs for clearly that is not part of our procedural law. Consequently, in my view the applicant's failure to make the written request for security for costs is not fatal to this application. And in any case given the plaintiff's opposition to the application, it is clear that any written request would have made no difference because if what has transpired in this matter is anything to go by, it is obvious that such a request would have been rejected.

To summarise my observations on the above point, I say that we do not have anything equivalent to Form 1 in this country. Similarly O. XXV of the Civil Procedure Rules does not require that a written request be made first before an application for security for costs can be lodged. For those reasons I do not think what Miss Absoloms said represents a correct statement of the law in this country.

Miss Absoloms also cited Halsburys Laws of England 4th Edition Vol. 37 at page 231 for the proposition that the application should have been brought promptly. The passage reads:-

> ***"Although an application for security for costs may be made at any stage of the proceedings, it should be made as promptly as possible, and it should not be made too late or too close to t he trial, since unless there is a reasonable explanation for the delay it may be refused."***

It is plain from the wording of the passage that an application for security for costs can be made at any stage of the proceedings. In the instant case Miss Absoloms concedes that the application was made 11 months after the filing of the suit. Prior to the lodging of the application, the parties were involved in another contested interlocutory application which as aforesaid was not finalised until 28.1.2000. The current application was filed exactly two months after finalisation of the earlier application. Given those circumstances there is no justification for claiming that there has been inordinate delay in bringing the application.

> ***"the power to order security is discretionary and may be exercised at any time according to the circumstances existing at the time of the hearing of the application, and can be exercised again if circumstances materially change." (***see Sir Ram Kaura v. M. J. E. Morgan (1961) E.A. 462)

There is no evidence to show that the application has been made in bad faith or that it is an

afterthought and Miss Absoloms submissions to that effect lack substance. As to the likelihood or otherwise of success of the suit, I do not consider it appropriate to go to the merits of the case at this stage. As was observed in the case of Keary Developments Limited V. Tarmac Construction Limited and Another (1995) 3 All E.R. 534:-

> ***"The court will not refuse to order security on the ground that it would unfai rly stifle a valid claim unless it is satisfied that in all the circumstances, including whether the company can fund the litigation from outside sources, it is probable that the claim would be stifled. In this regard it is for the plaintiff company to sa tisfy the court that it would be prevented by an order for security from continuing the litigation."***

Considering the substantial assets said to be at the disposal of the plaintiffs, I do not think it can properly be said that an order for security in the relatively small sum mentioned in the application will in any way adversely affect the plaintiffs' ability to prosecute this suit.

Accordingly, to conclude this matter, I reiterate that the power to order provision of security for costs is discretionary and may be exercised at any time. In the instant case the plaintiffs are foreign companies based in the U.S.A. albeit with worldwide business interests. None of them is however incorporated in Kenya and none appear to have any assets in this country. In those circumstances, it is clear that the defendant, a local company, may be delayed in the recovery of or unable to recover, the costs it will incur in defending this suit. For those reasons, I am of the opinion that an order for security for costs ought to be made. I therefore allow the application and order security for costs in the sum of Shs.1.8 million, such security to be agreed by the parties and in default of agreement to be approved by the Registrar of this court. The costs of this application will be in the cause.

Dated at Nairobi this 19th day of January, 2001.

T. MBALUTO

JUDGE