REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 9 OF 2005

BETWEEN

IGNAZIO MESSINA AND C.P.S.A. …….. APPLICANT

AND

STALLION INSURANCE COMPANY LTD …….. RESPONDENT

(An application for an Order for security for costs pending an intended appeal from the High Court of Kenya at Milimani Commercial Court, Nairobi (Ransley, J) dated 16th May, 2005

in H.C.C.C. NO. 216 OF 2001)

in

****

R U L I N G

This is an application under Rule 42 (1) and 104 (3) of the Court of Appeal Rules for four main orders thus:

> ***"1. …***
>
> ***2. The respondent/appellant do provide security for the payment of the applicant/respondents costs awarded in High Court Civil Case No. 216 of 2000 in the sum of Kshs.775,265.00.***
>
> ***3. The respondent/appellant do provide security for the payment of the applicant/respondent's costs in Civil Appeal No. 18 of 2001 in the sum of Kshs.2,000,000.00. 4. In default of provision of security as prayed in 2 and 3 above, the appeal do stand dismissed with costs.***
>
> ***5. Pending the provision of a security as prayed in (2) and (3) above the hearing of Civil***

Appeal No. 18 of 2001 be stayed".

The application is brought on the main ground that the applicant is reasonably apprehensive that it may not recover its costs of the High Court proceedings and in the appeal as the superior court made a Winding Up Order on 15th November, 2001 to wind up the respondent on the ground that it was insolvent and/or incapable of paying its debts.

The application is supported by the affidavit of Captain Ginseppe Fedele, the country representative of the applicant. It is opposed on the grounds contained in the replying affidavit of Marshal T. Osanya, the liquidator of the respondent. Marshal T. Osanya (Osanya), deposes among other things that, a similar application, being Civil Application No. Nai. 229 of 2001 was dismissed by this Court (Kwach JA) on 15th August, 2001; that the applicant is estopped from re-opening the matter again; that the applicant is guilty of inordinate delay in bringing the application; that the application is made for the sole purpose of obstructing the hearing of the appeal and that there are insurance bonds deposited as security whose value exceed the amount being claimed as costs.

The background facts as stated in the supporting affidavit and in the Ruling dated 15th August, 2001 in Civil Application No. Nai. 229 of 2001 (supra) are briefly as follows: In 1999 the applicant Ignazio Messina and C.S.P.A., sued the respondent in H.C.C.C. No 1524 of 1999 to recover Shs.45,501,095.20 alleged to be due and payable under a guarantee given to the applicant by the respondent for the benefit of another company. The respondent did not enter appearance and a default judgment was entered on 1st October, 1999 and a Decree ensued. The costs of the suit were assessed at Shs.775,265. The respondent thereafter filed an application to set aside the default judgment which application was dismissed by the superior court on 16th May, 2001. The respondent applied for stay of execution pending appeal. The superior court allowed the application on terms that the respondent do provide security bonds in the sum of Shs.22,000,000. The respondent in compliance with the order for provision of security furnished security bonds from four insurance companies as follows:

(a) Concord Insurance Co. Ltd. - Kshs. 5,000,000.00

(b) Invesco Insurance Co. Ltd. - Kshs. 3,000,000.00

(c) Lakester Insurance Co. Ltd. - Kshs.10,000,000.00

(d) Intra Africa Assurance Co. Ltd. - Kshs. 3,500,000.00

The respondent filed Civil Appeal No. 18 of 2001 on 30th January, 2001 which appeal is fixed for hearing in this Court for 19th April, 2005. On 4th September, 2001 the Commissioner of Insurance acting pursuant to the provisions of Insurance Act (Cap 487) filed a Winding Up Cause No. 42 of 2000 in the superior court seeking a winding up order in respect of the respondent on the grounds, inter alia, that the company was insolvent; that it was unable to pay its debts; and that it was unable to meet the reasonable expectations of the policy holders. The respondent did not oppose the application and a winding up order was made on 15th November, 2001. Similarly, Lakestar Insurance Co. Ltd which provided a bond for Shs.10,000,000.00 has been wound up.

The application for security for costs is brought under ***Rule 104 (3)*** of the Court of Appeal Rules which provides:

"The Court may at any time if it thinks fit direct that further security for costs be given and may direct that security be given for the payment of past costs relating to the matters in question in the appeal".

On the institution of an appeal every appellant is by virtue of ***Rule 104 (1)*** required to deposit Kshs.2,000.00 in court as security for the costs of the appeal unless the deposit of security has been waived by court under ***Rule 112 (i) (b)***. Thus ***Rule 104 (3)*** empowers the court to order additional security for costs of the appeal and also security for "past costs" relating to the matters in question in the appeal be provided.

The forerunner of rule ***104 (3)*** is ***rule 60*** of the Eastern African Court of Appeal, 1954 Rules which provided:

"The court or a judge or a registrar may at any time, in any case where it, or he thinks fit, order further security for costs to be given, and may order security to be given for the payment of past costs relating to the matters in question in the appeal".

The Court of Appeal for Eastern Africa (the predecessor of this Court) in construing that rule in the case of ***Lalji Ganji v Nathoo Vassanjee*** [1960] EA 315 said in part at page 317 from paragraph F – 1:

"under rule 60, the burden lies on the applicant for an order for further security, as it normally lies on any applicant to a court for any relief, to show cause why that relief should be granted, and that he cannot merely by averring that the security already deposited for costs of the appeal is inadequate, or that costs in the action below, ordered in his favour, have not been paid, impose any obligation upon the court or judge or registrar to grant his application.

> ***……***
>
> ***Under rule 60, the court or judge or registrar has a discretion to order further security "in any case where it or he thinks fit". This discretion is unfettered, subject only to the implied fetter upon all such discretions namely, that they should be exercised judicially. Again the words "at any time" in rule 60 do not mean tat a Registrar is precluded from taking into account any delay on the applicants part in making his application as a factor to be placed in the scales whose tilt may determine whether or not he will exercise his discretion in the applicant's favour.***
>
> ***They only mean that no amount of lateness in the lodging of an application shall in itself preclude the registrar from granting the application …".***

In ***Noor Mohamed Abdulla v Patel*** [1962] E.A. 447 the same court while adopting that construction of rule 60 further construed the words "past costs" to include costs ordered to be paid in the court below but hastened to say that the power to order security in respect of costs ordered to be paid in the court below should be sparingly exercised.

In the ***Noor Mohammed Abdulla*** (supra) the court said at page 453 para E:

> ***In Kenya so far as we know (for the point was not mentioned in argument) security is not ordered in the supreme court on the ground for poverty. In the circumstances, it would appear something of an anomaly if they were ordered to be secured upon appeal, though of course the principle to be applied is not the same. It is right that a litigant, however poor should be permitted to bring his proceedings without hinderance and have case decided. But when it has been decided by the court set up by law for the purpose, other considerations entered into the question whether he should be permitted unconditionally to carry the matter further".***

The ***Noormohamed Abdulla*** case (supra) was applied by this Court in ***Marco Tools & Explosives Ltd v Mamujee Brothers Ltd*** [1988] KLR 730 in the construction of the current rule 104 (3) of the Court of Appeal Rules.

In my regretful view, the ambit of Rule 104 (3) and the principles which apply in application for further security for costs of appeal and past costs as against a natural person are correctly spelt out in the cases of ***Lalji Ganji v Nathoo Vassanje; Noormohamed Abdulla v Patel; Marco Tools & Explosives Ltd v Mamujee Brothers Ltd*** (all cited above) and do not require restatement or emphasis.

However, the law seems to treat a natural person and a limited company differently in relation to provision of security for costs against them as plaintiffs in an action. With a few exceptions, the law does not require an individual plaintiff to give security for costs on the grounds of insolvency or poverty. The policy of the law seems to be that the poverty of an individual plaintiff should not deny him access to justice to pursue a genuine claim in a court of law. In contract, in the case of a limited company, an artificial creature, section 401 of the Companies Act requires them, without exception, as plaintiffs in a suit to give security for costs in the discretion of the court. This fine distinction between individual plaintiffs and limited companies as plaintiffs is lucidly analyzed by Megarry V.C. in ***Pearson v Naydler*** [1977] 3 All E.R. 531 at page 535 – paragraphs b – g.

Section 401 of the Companies Act provides:

> ***"Where a limited company is a plaintiff in any suit or other legal proceedings any judge having jurisdiction in the matter may if it appears by credible testimony that there is reason to believe the company will be unable to pay the costs of the defendant, if successful in his defence require sufficient security to be given for the costs and may stay the proceedings until the security is given".***

But even where it is established or admitted that the plaintiff company would be unable to pay the costs of a defendant, if successful, the court, nevertheless, has a complete discretion whether to order security for costs (***see Sir Lindsay Parkirson & Co. Ltd v Triplan Lt***d [1973] 2 All ER 273; ***Gulf Engineering (East Africa) Ltd v Amrik Singh Kalgi*** [1976] KLR 277; ***Keary Developments v Tarmal Construction*** [1995] 3 All ER 534. The latter case (***Keary Developments Ltd)*** lays down the modern and pragmatic principles (though not exhaustive) which should guide the court in exercising its discretion

whether to order a plaintiff limited company, to provide security for costs of a defendant in a suit.

Are the provisions of section 401 of the Companies Act and the principles of law which have been involved by courts relating to liability by limited companies as plaintiffs in a suit to provide security for costs of a defendant applicable in applications for security for costs in an appellate court where a limited company is the appellant"

Section 401 of the Companies Act is the statute law governing the provision of security for costs where a limited company is a plaintiff. Although the language of section 401, seem to refer specifically to cases where the company is plaintiff in a suit, there is no good reason why the same law and the principles of law developed concerning provisions of security by limited companies should not apply to cases where a limited company is the appellant in an appeal and security for costs of the appeal is being sought against such company.

As I have pointed out before, the application is brought solely on the ground that applicant is reasonably apprehensive that it may not recover its costs a winding up order has been made against the respondent company. Osanya, the liquidator of the respondent company refers in the replying affidavit to the previous application for security for costs made by the applicant which was dismissed by Kwach JA remarking in part:

"It would be unjust to place additional financial burden on the respondent with the sole object of making it difficult or impossible for it to prosecute its appeal".

Osanya deposes that since the applicant did not challenge that decision the applicant is estopped from re-opening the matter again. In addition Mr. Mbigi, learned counsel for the respondent submitted that nothing has really changed much since the dismissal of the previous application. With respect I do not agree with Mr. Mbigi's view.

When the previous application was made, the respondent had been placed under statutory management by the Commissioner of Insurance under section 67 C of the Insurance Act and had ceased trading.

This Court (Kwach JA) observed that the appointment of a statutory manager does not mean that the respondent is under liquidation. The situation has now changed because three months after the decision of the court a winding up order was made against the respondent. The fact that the respondent company is in liquidation is prima facie credible testimony that it will be unable to pay the applicants costs of the appeal and past costs (if successful) unless evidence to the contrary is given.

The making of the winding up order against the respondent company has drastically changed its legal status. The respondent company has in effect ceased to exist.

So, in the circumstances, the fact that the applicant had made a similar application being Civil Application No. Nai. 229 of 2001 which was dismissed, does not preclude the applicant from bringing another application for the discretion of the Court is exercised at any time according to the circumstances obtaining at the time of making the application and can be exercised again if circumstances materially change (***see Siri Ram Kaura v Morgan*** [1961] EA 462 and ***Keary Developments Ltd v Tarmac Construction Ltd & Another*** [1995] 3 All ER 534.

Thus this application is competent and the Court has jurisdiction to entertain it. It is another matter whether in the circumstances of the case, the court should exercise its discretion in favour of the

applicant.

I should say at the outset that, in my view, this is not a proper case for directing that security for past costs be given for the reason that the superior court has granted an order for stay of execution of the decree and the respondent company has given security in the form of bonds from Insurance Companies as security for the due performance of the decree. The decretal sum includes the taxed costs of the suit. The taxed costs in the superior court has thus been secured. It would be improper to require the respondent to provide additional security for past costs.

It is true that the respondent provided security bonds for the sum of Shs.21,500,000 and that Lakestar which provided a security bond of Shs.10,000,000 is in liquidation. The valid security bonds (for a total sum of Shs.11,500,000) are security for due performance of the decree in the superior court and cannot be converted to security for costs in the appeal. In any case the decretal sum is far in excess of the value of the security bonds. It is not correct therefore, to say, as Mr. Mbigi contends, that the security bonds are sufficient security for the applicant's costs of the appeal.

The respondent contends that this application has been filed close to hearing date of the appeal with the sole purpose of obstructing the hearing of the appeal. The prospects of the respondent's appeal is a relevant factor.

Although the respondent has not attempted to show that the appeal is meritorious, I have taken into account the fact that that the respondent was a defendant in the suit and not the plaintiff and that the respondent is appealing against an order refusing to set aside an exparte judgment for a very substantial amount.

This application was filed three years after the winding up order was made. Mr. Karori, learned counsel for the applicant disclosed in the course of the hearing of the application that the winding up order in law automatically stayed the proceeding but that an order has been made allowing the appeal to proceed at the instance of the applicant thereby paving the way for the filing the present application.

The orders made in respect of the appeal after the winding up order was made have not been shown to the Court. The court does not know the precise nature of those orders. I do not know if the applicant has obtained leave of the court under section 228 of the Companies Act to bring this application. I also do know if the liquidator has obtained the sanction of the court under section 241 of the Companies Act to continue with the appeal and to appoint an advocate. But if it is the applicant who has facilitated the continuation of the appeal by obtaining the sanction of the court, then, it is paradoxical that the applicant is seeking an order for the security for costs of the appeal which respondent is unlikely to raise and which would impede the prosecution of the appeal. The appeal is slated for hearing in a week's time.

In the all the circumstances of this case it would not be a proper exercise of the court's discretion if the court were to allow the application at this stage.

For these reasons, I dismiss the application with costs to the respondent.

Dated and delivered at Nairobi this 14th day of April, 2005.

E. M. GITHINJI

……

JUDGE OF APPEAL

I certify that this is atrue copy of the original.

DEPUTY REGISTRAR