IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: LAKHA, J.A)

CIVIL APPEAL/APPLICATION NO. 14 OF 1998

BETWEEN

TRADE BANK LIMITED

(IN LIQUIDATION)…….....……PLAINTIFF

AND

L.Z. ENGINEERING CONSTRUCTION

LIMITED & 2 OTHERS….....….RESPONDENTS

(Appeal from a Judgment and Preliminary Decree of the High Court of Kenya at Nairobi (Justice Pal1) dated both November, 1997 in H.C.C.C. NO. 3791 OF 1993)

RULING

There are two summonses before me, made in this pending appeal, One by the successful plaintiff, L.Z. Engineering Construction Limited, asking for an order for security of the Y plaintiff's costs in this appeal against the appellant Trade Bank Limited (in liquidation) and also for security for the payment of costs already awarded to it in the superior court on a higher scale with a certificate for two advocates on the claim and the counterclaim and another by the second defendant Yaya Towers Ltd asking for similar orders for costs awarded and of this appeal. The summonses raise two Issues The first issue is a matter of general importance On what principle should security for costs be awarded? The second issue is that once It is decided that security should be awarded, on what principle should the amount of that security be determined?

Each of these summonses has five affidavits: two in support and three in opposition to the summonses. By consent of the counsel, all the affidavits filed within the prescribed time or otherwise have been accepted and admitted by consent. What is more, the two applications before me have been consolidated and they are also consolidated with two similar applications filed in a pending Civil Appeal he- 39 of 1998.

In the action before the superior court, the plaintiff is a limited liability company incorporated in Kenya having its registered offices in Nairobi. There were three defendants. The first is a limited liability company incorporated in Kenya and at all material times to the action carried on business as a Banker in Nairobi. It is now the appellant in the appeal. The second defendant is also a limited liability company incorporated in Kenya and having its registered offices in Nairobi, while the third defendant is a body corporate with perpetual succession established it under ***section 36 of the Banking Act,*** Cap . 488

The action is plainly substantial and the pleadings are not far short of forty pages long Put very shortly, the action relates to a venture in property development known as Yaya Towers .At the centre of the proceedings Is an agreement between the plaintiff f and the first def enfant whereby the plaintiff f agreed to sell to the first def enfant the entire share capital in Yaya comprising 50,000 ordinary shares of K .Shs .20 each at the price of Shs 600 million. The plaint alleges that the said agreement was void and illegal f or reasons set out in the plaint and sought a declaration that the plaintiff was is the beneficiary owner of the share capital of Yaya and that the charge and guarantee given by the plaintiff to the appellant are Illegal and void and for consequential injunctive reliefs. There are various claims for declarations and costs. There is also a counterclaim by the appellant against the plaintiff for specific performance. Although the main features of the pleadings were briefly dealt with during the argument, was accepted on both sides that there was no need to examine them in any detail; and think that what have said suffices to provide a background for the contentions on the summonses.

The applicants main basic contention is simplicity itself. The appellant company is admittedly in financial straits which would prevent from paying the applicants' costs the appeal fails**. Rule 104(3)** of the Rules of this Court provides as follows:

> "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"

It is plain that the power not mandatory but is discretionary and is to be exercised after to make an order under the above rule is considering all the circumstances of the case. The circumstances of this case, says counsel for the applicants, point to the order of security being made, basis of the application in each of the two summonses with which I and so an order ought to be made. The am concerned is that the appellant company is in compulsory liquidation and hopelessly insolvent.

The summonses are opposed by Mr. Okwach for the appellant company basically on the ground that the appellant in liquidation has a special character and obtained leave of the superior court under **section 2**41 of the Companies Act, Cap. 486 to institute the appeal and relies on three decisions of the English Courts to support his opposition. It is not, think, seriously disputed that if this were a simple and ordinary case, an order for security for costs would follow almost as a matter of course. Also, it is conceded and, in my view, rightly conceded that have a discretion whether or not to make orders for security. But what is said is that in the present case, I ought to exercise my discretion by declining to make any order for security for costs, and in this connection I was referred, amongst others, to three cases which will mention briefly.

The first was the **UNITED PORTS AND GENERAL INSURANCE COMPANY VS. HILL AND ANOTHER** (1870) L.R. 5 Q.B. 395 and very briefly reported. The headnote states-

> "Where a company, registered as an unlimited company is being wound up, and an action is brought in the name of the company, under the Directions of the official liquidator, against a debtor of the company, the Court will not make an order that the plaintiffs give security for the defendants' costs."

It is clear that the defendants were in no worse position than any other defendant who is sued by an insolvent plaintiff unable to meet costs If unsuccessful.

The second case to which was referred was **RE W. POWELL & SONS** (1896) 1 CH. 681. The headnote says this:

> "In a compulsory winding-up a small dividend only had been paid to the debenture-holders, and there was enough to pay another small dividend to them. The official receiver and liquidator took out a misfeasance summons against officers of the company, and they applied for security for their costs of the summons, the application being opposed by the official receiver and liquidator."

Clearly, this was a case where the official receiver in liquidation took out a misfeasance summons against officers of the company, the security for their costs was rightly refused because the principle of law is well settled. it is stated in VOL.7 of Halsbury's Laws of England (4th Edn) para 779 as follows:-

> "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 lf successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given. This provision does not apply to an unlimited company, even if it is in winding up, or enable security to be ordered to be given by the liquidator of a company, even where he has no means, either when he is applying by misfeasance summons or is coming to the court in exercise of any other statutory duty"

And the third case I was referred to was **RE STRAND WOOD COMPANY LTD** (1904) 2 Ch.1. The headnote reads as follows: -

> "It is not the practice of the Court to require a liquidator on the ground of poverty to give security for the costs of a misfeasance summonses.

This is dealt with by the passage from Halsbury above cited. In my judgment, therefore, there is nothing in any of the three cases to which I was referred of any value to the objection by the appellant Company.

Counsel for the appellant company, in addition, invited me to say that the liquidator in this appeal should be accorded special treatment. Speaking for myself, I see no reason for doing so. The fact that the appellant obtained leave of the superior court ex- parte to institute the appeal is no legal impediment to the making of an application for security or the grant of an order an appropriate case. Nor does such leave take away the power of the Court to make orders for security for costs in a proper case.

It was also submitted that the appellant has a claim against the plaintiff for the recovery of Shs.600 million. This was claimed in the letter of February 1998 on behalf of the appellants annexed to the affidavit of Mr. Entail and filed on May 20: 1998. No suit has been filed and, as Mr. Gautama rightly submitted, this claim is now barred by the provisions of The Limitation Act. In this regard 1 note from the Order of the superior court made on February 6, 1998 that an application was made under Certificate of Urgency of the same date. The affidavit of Peter Mbuthia Gachuhi sworn on February 5, 1998 filed in support has not been produced. But I feel sure that if this is called up and examined, it may throw some light on the limitation period of Claim.

It is not in dispute that the appellant is liquidation and is hopelessly insolvent. The litigation has lasted 41 years and is of a complex nature. The subject-matter involved is Shs.600 million and, according to Mr. Gautama, who appears as leading counsel shillings. on January subject-matter in dispute was at least Shs. 1.2 billion Summonses, value has exceeded billion the superior court, its final judgment delivered 1998 the learned Judge held that the value the not much more. Okwach for the appellant concedes to all this except the value. The hearing lasted about 80-90 days. There no material before me show what is the appellant's stand as the alleged cash asset of about 45 million shillings in the liquidator's hands. Nor there any material before me from the appellant as the state liquidation what possible good claims has or the amount of cash assets has. Mr. Okwach, however, did say that, required, the appellant would be position furnish security by way bond from either a bank insurance company either of which will need some security to back up issue assess these factors, bond such amount. Doing the best. that come back to the words of **rule 104(3)** the Rules of this Court. seems plain enough that the inability of the appellant company to pay the applicants' cost matter which only opens the jurisdiction also provides a substantial factor in the decision whether to exercise is inherent, the whole concept the rule that the court K have power to do what the company is likely to find difficulty in or ' doing, namely, costs which ex ***hypothesi*** it As likely to be unable to pay. At the same time, the Court must not allow the rule to be used as an instrument of oppression, as by shutting out a small company from making a genuine claim against a large company. As against that, the court must not show -such a reluctance to order security for costs that this becomes a weapon whereby the Impecunious company to order the company to provide security for

the can use its Inability to pay costs as a means of putting unfair pressure defendant will be seriously out-of-pocket even if the action fails on a more prosperous company. Litigation In which the is not to be encouraged. While fully accept that there is no burden of proof one Way or the other, I think that the court ought not to be unduly reluctant to exercise its power to order security for costs in cases that fall squarely within the rule.

The basic rule that a natural person who sues will not be ordered to give security for costs, however poor he Is, ancient and well established. As BOWEN, L.J. said in COWELL V. TAYLOR (1885) 35 C H. D. 34 at 38, both at law and in equity, *'the general rule is that poverty is no bar to a litigant'*. But where a limited company is the plaintiff in any action or other proceeding, and 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 , the court may require sufficient ' security to be given f or those costs , and may stay all proceedings until the security is given . Prima facie, a company is regarded as being unable to pay the dependently costs it is in liquidation unless the contrary is proved. Security will not be ordered where the liquidator takes out a misfeasance summons even he is impecunious. If in a pending appeal the respondent shows that the appellant if unsuccessful will be unable through poverty or insolvency to pay the costs of the appeal, the practice is generally to order security for costs to be given. And the power conferred by **rule 104(3**) of the Rules of this Court to order security for payment of repast costs includes power to order security for costs **N- ABDBLLA V PATEL & ANOTHER** (1962] E.A. 447.

As was said by Sir Trevor Gould, Ag V.P. (196) E.A. at p. 453

> "It is right that a litigant, however poor, should be permitted to bring his proceedings without hindrance and have his case decided. But when it has been decided by the Court set up by law for the purpose, other considerations enter into the question whether he should be permitted unconditionally to carry the matter further ....."

In the end, looking at the matter as a whole, I have reached the conclusion that I do not find any valid objection having been made In opposition to the summons and that, on balance ' I ought to make an order f or security f or costs. All I propose to say about the matter is this, that, taking into account all the circumstances here, propose to exercise my discretion by ordering security on both summonses

That raises the question of quantum. There is a bill of costs before me which has been f fled in the superior court on behalf of the first respondent. This pointed to 40 million shillings as having been incurred already including costs on the counterclaim.

I can see no sensible reason why the court should not order security in the sum which likely court considers it just to do so. considers the applicants would be to recover on taxation on a party and party basis if the of course, for the party before the court material that seeking an order for security to put will enable the court to make an estimate of the costs of the litigation. In the normal course of things, it is to be expected that the court will, to some extent, discount the figure is asked award. Allowance will have to be made for the unquenchable fire of human optimism and the likelihood that the figure of taxed costs put forward would not emerge unscathed after taxation.

On the particular facts of the present case, the bulk of the costs for which security has and I have had the opportunity of looking at been asked has already been incurred the bill and had the affidavit of a highly reputable commercial lawyer to support assertion that these costs had already been Incurred. seems to me in these circumstances that this was a case Where Justice demanded that the estimate of costs should be based on that which the applicants were already out of pocket. It is a matter for the discretion of the Judge to consider the particular figures, bringing to them his experience in this field of work. In my discretion and, for the reasons have given, in my view, the applicants are fully entitled to an order for security of costs in the sum of K. Shs . 40 million on the basis of awarding costs equivalent to my best estimate of the taxed costs which had actually been incurred including the costs of the appeal likely to be incurred.

I, however, feel no doubt that some discount must be made on this figure to reflect the uncertainties of all litigation, including, in relation to costs not yet incurred, the possibility of some compromise being

reached. I find impossible to give reasoned explanation of the precise figure at which I arrive in the end. To a considerable extent, as in the assessment of general damages in many cases, one is forced to rely on the "feel" of the case after considering the relevant factors.

As for the costs of the second respondent, Mr. Manek asked for Shs. 5 million. There is no bill of costs before me and this figure is a mere global estimate. I bear in mind the submissions of counsel on both sides.

Doing the best can, I order the appellant company to give security for the first respondent's costs - not the full costs but what find reasonable - in the sum of K.Shs 30 million and for the second respondent's costs Shs. 3 million to be deposited into court in cash within 30 days from today. I would further order, as did Sir Dermot Sheridan. C.J in **MAWAGOLA V. KAYANJA** (1971) E.A.108 and the Court of Appeal in **KAURA V. MORGAN** (1961) E.A. 462 that this appeal and Civil Appeal No.. 39 of 1998 are stayed pending compliance with this order and that in default of such compliance within the period stipulated both the appeals do stand dismissed with costs without further orders. Each of the applicants shall have the costs of this application.

I would only add this, that K.shs. 30 million may seem a very daunting figure but it is in fact only approximately 2% of the sum at stake in this vast and complex litigation. I doubt it would be considered an adequate basis for a contingency fee on the other side of the Atlantic or in some other jurisdictions.

Finally, having given most anxious consideration to all the factors and in the exercise of my discretion it is not just to make additional orders for security as asked for in Civil Appeal No. 39 of 1998 as this is sufficiently covered by the earlier order and is included therein. Civil Appeal No. 39 of 1998 will, however, stand dismissed with costs without further orders in default of compliance with the order for security earlier made.

I would like to express my gratitude to all counsel for the very full and helpful affidavits and submissions that they have put to me.

Dated and delivered at Nairobi this 12th day of June, 1998.

A.A. LAKHA

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JUDGE OF APPEAL