IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Platt, Gachuhi JJA & Masime Ag JA)

CIVIL APPEAL NO 107 OF 1986

BETWEEN

MARCO TOOL & EXPLOSIVES LTD.............................. APPELLANT

AND

MAMUJEEBROTHERS LTD..RESPONDENT

(Appeal from a Ruling of the High Court at Mombasa, Bhandari J)

JUDGMENT

January 29, 1988 **Platt, Gachuhi JJA & Masime Ag JA** delivered the following Judgment.

The applicant, who was the plaintiff at the trial, and finally succeeded in getting judgment against the defendant, now respondent, finds that the latter has taken an appeal from the High Court's decisions. The applicant has attempted to execute the High Court's decree, but has recovered nothing. The applicant then resorted to an old game whereby if security for costs is ordered, and such security is not provided, then the appeal cannot proceed to hearing.

But the application dated 4th September 1986 was dismissed by a single judge of this Court. The applicant has thus referred the matter to the full Court, under Rule 54 of the Court of Appeal Rules. The application is brought under Rule 104 of the Court of Appeal Rules.

It prays for an order that further security for the past costs of the High Court be given as well as the costs of the appeal, because the respondent/appellant did not appear to have any property or assets from which the costs could be recovered. That follows the terms of Rule 104 (3) which provides:

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

The applicant relied on two decisions published in the 1961 volume of the East African Series. It appears that the careful approach of Sheridan, J (as he then was) was rejected in favour of the English decision in *Hall v Snodon Hubbard & Co* [1899] 1 Q.B. 593 at p 594, where it was remarked that:

> "The ordinary rule of this Court is that, except in applications for new trials, when the respondent can show that the appellant, if unsuccessful would be unable through poverty to pay the costs of the appeal, an order for security for costs is made."

The effect would be that until security was given the appeal would not be allowed to be heard. But we shall see that aspect of Sheridan J's judgment will bear fruit later. The decision was that the costs of the appeal and past costs were to be secured.

The next case *Siri Ram Kaura v Morgan*, [1961] EA 462 resulted in security being ordered. A distinction was made between mere non-payment of costs in the court below and proof of the appellant's inability to pay. The order was severe. Security was to be provided within 14 days, during which time the hearing of the appeal was stayed, and in default of compliance, the appeal was to be dismissed.

The respondent relies on the difficult but thoughtful and humane judgment in *Noormohamed Abudulla v Patel*, [1962] E.A. 447. The final conclusion was based on the dilatoriness of the first respondent in making the application, which he had not shown would not prejudice the appellant.

The application was refused. But the reasoning affords a valuable insight into an emergent fresh approach. It was laid down that the rule for security for costs was a departure from the English law. Hence some differences might arise consequent on the wider powers conferred by the rules on the Court of Appeal, although many of the principles might remain relevant.

The main difference was that in Kenya security for the costs of the appeal must always be deposited. While "past costs" included costs in the lower court, such costs would only be secured sparingly.

Moreover, since costs of the appeal had been provided for, further security would only be ordered in exceptional circumstances. It was a difficult question in what circumstances the costs in the High Court and on appeal would both be ordered to be secured. It would be difficult to visualize a case when both sets of costs would be ordered to be secured in full.The automatic provision of costs (in the present Rule 104 (1)) gives rise to the inference that only a reasonable amount would be ordered. Sheridan J had warned that the circumstances must be exceptional. There has been no reported Court of Appeal decision since 1962 on this topic.

We may ask what it was that was causing Sir Travor Gould Ag VP such anxiety? It was that he and his brothers did not wish to depart from the decision in *Siri Ram Kaura* (*supra*), yet there was a greater principle of stake than merely putting a procedural bar to further proceedings. He said (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."

As against that shining principle, the procedural difficulty followed:

> "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."

We must agree that these questions do raise principles which are difficult to reconcile. But we would say that it should not be poverty alone which brings down the procedural bar upon the impoverished head. Indeed, in one case, it is recognized that if the poverty is due to the allegedly wrongful act complained of, it cannot be relied on. Similarly if costs have been incurred before the application is brought, that is a factor to be considered.

Again some weight may be given to the obvious success of an apeal if that is the case, even though the appellant is impecunious.

On the other hand, any activity of an appellant which smacks of bad faith, in taking advantage of a respondent may well tip the scales in favour of ordering security. It may not ultimately be of advantage to continue the appeal.

As the cases show the Court has an unfettered though judicial discretion to order or refuse security. Much

will depend upon the circumstances of each case, though the guidance from Noormohamed's case is that the final result must be reasonable and modest. We would observe at once therefore that we would not be inclined to agree with Mr Kasmani that the full shs 75,000 that he estimated would cover the total of both High Court and appellate Court costs, should be secured.

On the facts which are disputed, we are inclined to agree with Mr Obhrai that not more than failure to pay the debt or costs has been proved. The onus is on the applicant to prove such inability or lack of good faith, that would make an order for security reasonable. Such allegations as that the company has no registered office clearly failed. The company may still have some business. But the suit business seems to have been of doubtful legality, involving both parties.

When all the circumstances are taken into account, we think that the learned single judge of this court could reasonably have concluded that it was inappropriate to give directions as to security. At any rate we cannot say that he was wrong to rely only on the mandatory security in the costs of the appeal, relying as we do on the principle set out in *Noormohamed's* case. Consequently the reference is dismissed with costs.

Dated and delivered at Mombasa this 29th day of **January , 1988**

H.G PLATT

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL

J.RO MASIME

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Ag. JUDGE OF APPEAL