IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Miller JJA & Kneller Ag JA)

CIVIL APPEAL NO. 34 1981

Between

SHAH & 2 OTHERS.....APPELLANTS

AND

SHAH & 2 OTHERS.....RESPONDENTS

JUDGMENT

Law JA By an originating summons dated November 8, 1978, taken out under section 91 of the Probate and Administration Act, the three plaintiffs, who are resident in England, and are beneficiaries under the will of their deceased father, Ranmal Virpar Shah, sued the three defendants in their capacity as executors and trustees of the will, praying that a sale of one third share of land and building in Nairobi, part of the deceased's estate, the first and second defendants being the purchasers and the three defendants the vendors, be declared null and void and the assignment of the said property registered in the Land Registry at Nairobi be set aside and cancelled and for consequential reliefs.

On February 22, 1979, by chamber summons stated to be taken out under Order XXV rule 1 of the Civil Procedure Rules, the first two defendants applied for an order that the plaintiffs do give security in the sum of Kshs 20,000 for the first two defendants' costs, on the grounds that the plaintiffs were ordinarily resident in England out of the jurisdiction of the High Court of Kenya. This application was heard by Sachdeva J who on October 6 delivered his ruling dismissing the application with costs and refusing to order the plaintiffs to furnish security for the first two defendants' costs.

From this decision the first two defendants, represented by Mr DN Khanna, have appealed. I will refer to these defendants hereinafter as the appellants and to the plaintiffs, who are represented by Mr Satish Gautama, as the respondents.

One of the grounds of appeal, 1(b), relied on by Mr Khanna reads as follows, that Sachdeva J, misdirected himself:

> "in failing to note, save in suits on a bill of exchange, negotiable instrument, or a foreign judgment, Order XXV rule 4 takes away discretion of the Court, in dispensing with security in the case of a plaintiff, not residing in Kenya."

Mr Gautama took objection to this ground, as raising for the first time on appeal, an entirely new case, one which not only was not argued or even mentioned in the court below, but which was contrary to Mr Khanna's clear and unambiguous agreement in the course of the proceedings before Sachdeva J. There

Mr Khanna is recorded as having said:

> "General rule: security within court's discretion. Normal to order security where defendants outside jurisdiction".

The reference to defendants is clearly an error, it should be to plaintiffs. Mr Gautama is recorded as saying:

> "Agree respectfully that the court has unfettered discretion."

and it was on this agreed basis that the matter was left to the court below.

Rule 1 of Order XXV reads as follows:

> "In any suit the court 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."

Rule 4 reads as follows:

"In any suit brought by a person not residing in Kenya, if the claim is founded on a bill of exchange or other negotiable instrument or on a judgment or order of a foreign court, any order for security for costs shall be in the discretion of the court".

Rule 4 was prescribed by an amendment to Order XXV introduced in 1975. Does rule 4 have the effect of fettering or restricting the very wide discretion vested in the court by rule 1? If so, I would have expected rule 1 to have been correspondingly amended, for instance by inserting the words "Subject to rule 4" at the beginning thereof. I do not think that the interpretation now contended for by Mr Khanna is a matter suitable or proper for decision for the first time on appeal, especially as it was not relied on in the court below and we have not had the benefit of the views of Sachdeva J on the point. If rule 4 had the effect of depriving the court of the jurisdiction to exercise the unfettered discretion as to ordering or refusing to order security for costs conferred by rule 1, we would have to give effect to it, but I am not convinced that it does. Rule 1 stands unamended, notwithstanding the subsequent enactment of rule 4. Rule 1 was accepted by the parties as conferring an unfettered discretion on the court in this case. In my view Mr Gautama's objection to this ground of appeal is sound, and I would not allow ground 1(b) in the memorandum of appeal to be raised at this late stage. This appeal must be decided on the basis on which the matter was left to the learned judge, that is to say that he had a full and unfettered discretion whether to order security or not.

The general rule is that security is normally required from plaintiffs resident outside the jurisdiction, but as was agreed in the court below, a court has a discretion, to be exercised reasonably and judicially, to refuse to order that security be given; see *Kotecha v Bank of Baroda* (CA Civil Application No 43 of 1978, unreported).

Sachdeva J gave three reasons for exercising his discretion in favour of the respondents. Firstly, he held that the respondents have shown a *prima facie* case with a reasonable probability of success "almost in the same manner as an applicant for an interlocutory injunction is bound to do". Secondly, he held that whether the appellants were to be treated as executors or trustees, it was they who were seeking an exercise of the court's discretion in their favour, and accordingly, it was for them to disclose whether they had completed the administration of the estate and whether or not they held any funds of the estate and this they had failed to do. Thirdly, it was not in dispute that the appellants controlled a bank account in the sum of Kshs 48,000 representing the estate of the deceased widow of the respondents' deceased father, to which the respondents and the third appellant were entitled as sole beneficiaries and that this sum would be available in Kenya to satisfy any costs to which the appellants might be entitled if they succeeded in the suit.

As regards the first of these reasons, I agree with Mr Khanna that the analogy with interim injunctions

made by the learned judge was inappropriate and unfortunate. The test on an application for security, is not whether the plaintiff has established a *prima facie* case, but whether the defendant has shown a *bona-fide* defence. But even if the learned judge misdirected himself in his approach to this matter, I do not think this misdirection was fatal. The learned judge clearly was not impressed with the *bona-fides* of the appellants' case. He said so in specific terms in his ruling. They were parties to a sale to themselves, by all three defendants, of property belonging to a deceased's estate which they were administering. Such a transaction is voidable at the instance of the beneficiaries, see section 91 of the Indian Probate and Administration Act, which applies to Kenya. As regards the second reason, the learned judge did not think that the appellants had made a full disclosure of the facts. In this connection, Mr Gautama has referred to an affidavit made by the second appellant, in which he deponed that the impugned transaction was done at the "behest and entreaties of the beneficiaries" and consented to by them "in writing". No such document has been exhibited or shown to the court. As Mr Gautama commented, if such a document exists and if it binds the respondents, why has it not been produced? It would have put an end to the originating summons. As regards the third reason, Mr Khanna submitted that the widow's estate did not represent property in Kenya which was available to satisfy the appellants' costs in the event of their succeeding in the suit. The respondents, who are apparently entitled together with the third defendant, have not taken out letters of administration. The appellants could not apply the money in the Savings Account to their use. The learned judge was not impressed by these arguments. He thought that these assets could, if necessary, be attached. I see no misdirection in all this.

Mr Khanna also submitted that the procedure by way of originating summons was inappropriate and misconceived in the circumstances of this case, which did not involve the answering of a question or questions based on agreed facts. A suit would have been the correct procedure. The learned judge considered this objection to be premature on an application for security. I agree with the learned judge. *Prima facie* the matter falls within rule 1 of Order XXXVI. I do not think that the procedure by way of originating summons in Kenya is limited to matters in which the facts are agreed. If that were so, there would be no need for rule 10 of Order XXXVI, which empowers a judge to adjourn the hearing of an originating summons into court "for hearing of evidence *viva voce* or hearing arguments." It is only at that stage that the judge can, if he sees fit, refer the parties to a suit in the ordinary course.

To recapitulate, it seems to me that on the basis on which the matter was left to the learned judge, that is to say of a full and unfettered discretion, it cannot be said that he exercised his discretion unreasonably or unjudicially in refusing to order security. He had regard to the fiduciary relationship between the parties, he was not impressed by the *bona fides* of the appellants' case, he certainly did not consider the respondents' case to be frivolous and he was satisfied that there was property in Kenya which could be made available to satisfy any costs recoverable by the appellants.

I would accordingly dismiss this appeal, with costs. As Miller JA and Kneller Ag JA agree, it is so ordered.

There is one other matter I should mention. Mr Gautama objected to the record of appeal being inflated by the inclusion of copies of three unreported judgments of this Court and of a reported judgment. These documents add eighteen pages to an already overloaded record. I agree with Mr Gautama. Judgments in other cases have no place in a record of appeal. If the appellant intends to rely on these judgments, he should produce and place before the court, as and when he cites them in the course of his argument, copies of unreported judgments, and the relevant volume in the case of reported judgments. The practice of including these judgments as part of a record of appeal is to be deprecated and should be discontinued.

Miller JA. I have read in draft the judgment of Law JA in this appeal.

I agree with it and that the appeal be dismissed.

Kneller Ag JA. I have read the judgment of Law JA in draft and I agree that this appeal should be dismissed with costs for the reasons he has set out in it.

When I first read Order XXV rule 4 again I thought it might mean that in any suit brought by a person not

residing in Kenya, if the claim is not founded on a bill of exchange or other negotiable instrument or on a judgment or order of a foreign court, any order for security for costs should not be in the discretion of the court (which is putting the converse of this order and rule) and the learned judge should have made an order for security. Looking at the history of the Order, I now think that is wrong, though I prefer, for the reasons given by Law JA, not to deal with the matter finally today since it was not raised before the learned Judge in the High Court.

There used to be in England an inflexible rule of practice under the English Order and rule of 1892 that security should be ordered against a foreign plaintiff on a foreign judgment or any other cause of action: see Lord Justice Lopes in *Crozat v Brogden* [1894] 2 QB 30, 34, 35A.

This was changed in 1920 when Order LXV rule 6 of the English Rules of the Supreme Court gave the courts there a limited discretion because it said:

> "In actions brought by persona resident out of the jurisdiction, when the plaintiff's claim is founded on a judgment or order or on a bill of exchange or other negotiable instrument, the power to require the plaintiff to give security for costs shall be in the discretion of the Court or Judge."

Later still in 1962 the relevant English Order and rule was Order XXIII rule 1 and the relevant portion of that was:

> "Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court -
> (a) that the plaintiff is ordinarily resident out of the jurisdiction,
> (b) ……
> (c) ……
> (d) ……
> then if having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just."

and so there in all actions where the plaintiff is ordinarily resident outside the jurisdiction, the discretion of the court or judge to make an order for security of costs is a general one. *Banque du Rhone SA v Fuerst Day Lawson Ltd, Promat SA (Third Parties)* [1968] *2* Lloyd's Rep 153 CA.

Lord Denning MR in that case explained the effect of the English Order XXIII rule 1 in 1968 in this way:

> "It is a matter of discretion in all cases, including the case of a foreign judgment or a bill of exchange.
>
> It was suggested that there was a rule of practice that in the case of a bill of exchange, if the plaintiff was outside the jurisdiction, he should not be ordered to give security for costs. Mr Justice Donaldson, who is very experienced in these matters, said he knew nothing of such a practice. I agree with him. There is not any practice one way or another. It depends on the particular case.
>
> How does it stand? In the ordinary way, when a plaintiff brings an action on a bill of exchange we treat it as cash. If it is an action by a foreign seller against an English buyer on a bill given for the goods and then the buyer does not challenge the bill itself, but says the goods are not up to contract, or something of that kind, we would not dream of ordering security to be given by the foreign plaintiff. The dispute as to the quality of the goods can be thrashed out in a counterclaim or cross action. But this is not such a case. In this case the bill itself is not challenged. The acceptance is said to be vitiated by fraud. So much so that it is, I think, a proper case for security."

with all of this Davies and Winn L JJ agreed.

Returning to Kenya now, I find that Order XXIII rule 1 of the Civil Procedure Rules, 1927 was this:

> "The Court if it deems fit may order a plaintiff in any suit to give security for the payment of all costs incurred by any defendant."

This was simple and conferred a general discretion in each case wherever the plaintiff was residing. Sheridan J held in *Karm Elahi v Ahmed Mohamed* (1929-30), 12 KLR 49 that the discretion of the court under this order should be exercised in accordance with English practice. The Order and rule was repeated in Order XX rule 1 of the Civil Procedure (Revised) Rules 1948 and the discretion of the court was general no matter where the plaintiff resided or what his claim was founded upon and the discretion of the court was still exercised it would seem in accordance with the English practice: see for example, Connell J in *Farrab Incorporated v Brian John Robson and others* [1957] EA 441 (K) and Edmonds, J in *Vallabhadas Hirji Kapadia v Thakersey Laxmidas* [1960] EA 852 (K).

Whence came the Kenya Order XXV rule 4? It says:

> "In any suit brought by a person not residing in Kenya, if the claim is founded on a bill of exchange or other negotiable instrument or on a judgment or order of a foreign court, any order for costs shall be in the discretion of the court."

This is almost in the same terms as the 1920 English Order LXV rule 6 set out above but it first appeared here in Kenya in the Civil Procedure (Amendment) Rules, 1973 (LN 66 of 1973) and was probably a late reflection of the English Court of Appeal's decision in *Banque du Rhone, SA v Fuerst Day Lawson Ltd, Promat SA (Third Parties)* (ibid) and might be meant, therefore, to lay to rest any notion that there is a rule of practice that for a claim on a bill of exchange or other negotiable instrument or on a judgment or order of a foreign court by a plaintiff not residing in Kenya he should not be ordered to give security for costs and instead to leave the discretion completely unfettered in each particular case.

Dated and delivered at Nairobi this 26th day of August , 1982.

E.J.E LAW

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JUDGE OF APPEAL

C.H.E MILLER

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JUDGE OF APPEAL

A.A KNELLER

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR