

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law JA)

CIVIL APPEAL (APPLICATION) NO. 19 OF 1980

BETWEEN

GARNET MINING LTD.....APPELLANT

AND

MUGO.....RESPONDENT

RULING

This is an application by the respondent in an appeal which has been filed, but not yet set down for hearing, for further security to be given by the appellant, under rule 104(1) of the rules of this court. The appellant is a limited liability company, incorporated under the Companies Act of Kenya, which was ordered to be compulsorily wound-up. The petitioner was the respondent. The petition was strongly opposed by the appellant. The record of appeal consists of 665 pages; the judgment alone occupies 81 pages. I shall refer to the appellant as “the company” and to the respondent as “Mrs Mugo”. As a result of the winding-up order, the company is now in liquidation, the liquidator being the Official receiver. The company is not precluded from appealing, although a liquidator has been appointed (*In re Diamond Fuel Company* (1879-80) 13 Ch D 400), and the company has in fact appealed alone without joining anyone personally responsible for costs, and in these circumstances an application for security for costs will be entertained (per James LJ at page 412 in the *Diamond Fuel Company* case (supra)).

Mr Fraser, for Mrs Mugo, submits that this is a case in which further security should be ordered, both in respect of past and future costs. Mrs Mugo’s costs in the High Court were taxed on March 2, 1979, at Kshs 83,656.20, and notwithstanding repeated requests addressed both to the liquidator and to the company’s advocates, these costs remain unpaid. Mr Fraser estimates that, if the appeal fails, further costs of about Kshs 70,000 will be involved. In his supporting affidavit to the application for further security, Mr Le Pelley stated that the appeal is being promoted by two gentlemen who are both resident outside the jurisdiction. Mr Muli for the company, does not dispute that this is so. He opposes this application on the ground that there is no evidence that the company will be unable to pay costs if it loses the appeal. He points out that the company is a legal entity, and in the same position as an individual, and submits that there is no risk here of Mrs Mugo not recovering costs from the company. I observe that Mrs Mugo is a 50% shareholder in the company, so that even if she is successful and is awarded costs on the appeal, and these costs are paid by the company, she will in effect be paying half these costs. I am also impressed by the fact that none of Mrs Mugo’s costs in the High Court have been paid to her. I prefer to be guided by what Begallay LJ had to say *In re Photographic Artists’ Co-operative Supply Association* [1883] 23 Ch D 370, at page 371, that the general rule is that where a company appeals from a winding-up order, security for costs “must be given, to adopt any other view would encourage frivolous appeals.” A more modern authority, to which Mr Fraser has drawn my attention, is *In re EK Wilson and Sons Ltd* (1972) 1 WLR 791, in which it was held that it would be wrong, if the appeal failed, for the contributory petitioner to be liable to pay any proportion of the costs of the appeal, and that an order should be made ensuring that security be procured from those concerned with promoting the appeal. Mrs Mugo is a contributory, and is entitled to be protected from having to pay any proportion of her own costs if successful in the appeal. I consider this to be a proper case in which to order further security, and I allow this application with costs. Mr Fraser has suggested a figure of Kshs 150,000, and the reasonableness of this figure has not been challenged by Mr Muli. Following the *EK Wilson* case (supra) I make the following order, adapted to include security for past costs -

That the company do on or before October 7, 1981, procure some sufficient person on their behalf to give security (to the satisfaction of the Deputy Registrar of the Court of Appeal in case the parties differ) in the sum of Kshs 150,000 conditioned to answer costs in case any shall be awarded to be paid by the company to the petitioner upon the said appeal, and to secure the costs ordered to be paid by the company to the petitioner in the High Court and in default of the company so procuring such security by the time aforesaid it is ordered that upon the advocates for the petitioner certifying such fact in writing to the aforesaid Deputy Registrar the said appeal be thereupon struck out without further order and thereupon it is ordered that the company do pay to the petitioner her costs occasioned by the said appeal including her costs in the High Court and the costs of this application, the costs of the appeal and of this application to be taxed if not agreed.

I remind the parties of their Right under rule 54 to have this decision referred to the full court if dissatisfied therewith.

Dated and Delivered at Nairobi on this 7th day of July,1981

E.J.E.LAW

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JUDGE OF APPEAL

I certify that this is a true copy
of the original.

DEPUTY REGISTRAR