IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Law JA)

CIVIL APPLICATION NO. 31 OF 1980

BETWEEN

KENYA FLAMINGO AIRWAYS LIMITED.....APPLICANT

AND

1. ERIC SNOWBALL

2. THORNEYCROFT.....RESPONDENTS

RULING

This is an unusual application. The applicant is Kenya Flamingo Airways Ltd, a subsidiary of Kenya Airways Ltd, and is represented in these proceedings by Mr Suttill of the Attorney-General's Office. The respondents are two persons who reside and carry on business in England. They are represented in these proceedings by Mr Fraser. The respondent instituted a suit (Civil Case No 4027 of 1979) against the applicant by plaint filed in the High Court on December 14, 1979 claiming total specific damages of Kshs 273,108.30 in respect of the alleged wrongful seizure by the applicant of certain goods belonging to the respondents at Jomo Kenyatta Airport. Service on the applicant was effected by registered post, but owing to the default of an employee of the applicant, the registered article was not collected by the employee from the post office although he was notified that the article was ready for collection. In the result the plaint and summons never reached the applicant. Service however was effective in terms of rule 2(b) of Order V of the Civil Procedure Rules. The applicant having failed to enter an appearance, the respondents requested judgment for the specific amount claimed, with interest and costs, under Order IXA rule 3(1), and judgment was duly entered in their favour "as prayed" by a Senior Deputy Registrar on January 29, 1980. On February 28, 1980, the Attorney-General filed a chamber summons asking —

(a) under Order IXA rule 10 for the judgment and decree to be set aside, and

(b) under Order XXI rule 22 for execution of the decree to be stayed.

The summons was supported by the affidavit of one Mr Kamau in which he deposed inter alia that there was a good defence to the claim in that the goods had been retained as security for a debt. The summons was heard by Harris J on March 28, 1980. Mr Suttill for the applicant made it his main ground for setting aside the judgment that Order IXA rule 3(1) applies to a "liquidated demand" only; that the claim in the plaint, although quantified, was not for a "liquidated demand" but for damages for the tort of conversion; that a "liquidated demand" can arise only out of a claim in contract or quasi-contract; that the judgment

was accordingly irregular; and that the applicant had established the existence of a triable issue and should be given leave to defend. Mr Fraser for the respondents submitted that Order IXA should not be read as confined to contract, but to all claims for a liquidated amount which expression he submitted meant any quantified or specified sum arising whether in contract or tort. Harris J in a carefully considered "Order" delivered on May 23, 1980 held that the sum claimed in the plaint constituted a liquidated demand within the meaning of Order IXA rule 3, and that no good reason had been shown for disturbing the judgment obtained by the respondents. He accordingly dismissed the application with costs. On a subsequent application by the present applicant, Harris J extended time for filing notice of appeal against his "Order" until June 20, and suspended execution of the decree on condition that the applicant within 14 days produced a guarantee from the Kenya Commercial Bank for payment of the decretal amount in the event of the appeal being unsuccessful. These conditions have been complied with, and the record of appeal was timeously filed on August 9, 1980. Unfortunately the record is defective. It does not comply with rule 85 of the rules of this Court, as it does not contain the formal order expressing Harris J's adjudication of March 28, 1980, the subject of the appeal. For some reason, although a draft order had been sent by Mr Fraser to the Attorney-General's office on July 8, 1980, no action was taken by that office to agree and extract the formal order with the result that no formal order was even in existence at the time the appeal was filed. It is common ground that in these circumstances the appeal is, in its present form, incompetent, and if called on for hearing, would have to be struck out. It would be open to the applicant to apply to have it restored, as was done in *Beth Mugo v Garnets Mining Co* (Civil Application No 8 of 1979), or to apply for an extension of time in which to lodge a further appeal after the original appeal was struck out, as was done in *Belinda Murai and others v Wainaina* (Civil Application No NAI 9 of 1978). This is what the present application seeks to do, although the appeal has not yet been struck out. Mr Suttill appreciates that it is incompetent. He seeks an extension of time in which to file a new appeal, in which case he would withdraw the existing appeal. He does not dispute that the failure to include the formal order was due to a mistake on the part of his office and in no way due to any default on the part of the Registry.

The principles governing the grant of an extension of time in which to file a further appeal, when the first is incompetent, and where the error leading to incompetency was not due to any default on the part of the registry, are that I must be satisfied —

(a) that there has been no delay on the part of the applicant's legal adviser (*Harnam Singh v Mistri* [1971] EA 122).

(b) of the public importance of the matter; and

(c) of the prospects of success of the appeal.

As to this, I am satisfied that there has been no undue delay, and that the applicant and his advisers have done all within their power to expedite the hearing of the appeal and to regularize the defect arising from their failure to extract and include the formal order in the record. As regards the public importance of the matter, this element is completely lacking. The suit consists of a private dispute between owners of goods which they claim were wrongfully seized by the respondent airline operators. It was an isolated incident, affecting the parties and no one else, and involving no general principles affecting the commercial community or the public at large. As to the prospects of success, the impugned judgment is that of a senior and experienced judge. His decision that the expression "liquidated demand" is not restricted to claims arising out of contract, or quasi-contract only, but extends to fixed and ascertained sums claimed in tort as well, is in accordance with the highly persuasive authority of *Baker v Barclay's Bank* [1956] I WLR 1409 in which the Court of Appeal in England upheld judgments in default of appearance entered against two defendants for exact sums claimed as having been fraudulently converted, these sums being properly treated as "liquidated demands", although the cause of action was in tort. It is clear from Order IXA rule 5 that Order IXA is not restricted to contract but applies generally to all plaints making a liquidated demand. It is true that Harris J did not specifically deal with the question whether or not a triable issue had been shown to exist. Having held that the impugned judgment was regular "and should not be disturbed," I assume that he was not impressed by the possible defence referred to in the most superficial way in Mr Kamau's affidavit. He does not specify the amount of the debt, how the debt arose,

or even by whom it is owed.

In the event, taking all these factors into consideration I do not consider that I would be justified in exercising my discretion in favour of the applicant. I dismiss this application, with costs to the respondent, which by consent of the parties I fix at Kshs 150.

I remind Mr Suttill of his right to have this decision referred to a full Court.

Dated and Delivered at Nairobi this 17th day of September 1980.

E.J.E.LAW.

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JUDGE OF APPEAL

I certify that this is a true copy of the

original.

DEPUTY REGISTRAR