IN THE COURT OF APPEAL

AT NAIROBI

CORAM: J. MOHAMMED, J.A. (IN CHAMBERS)

CIVIL APPEAL (APPLICATION) NO. 188 OF 2012

BETWEEN

MOSES WACHIRA …..……APPLICANT/1ST RESPONDENT

AND

NIELS BRUEL ……...…….……1ST RESPONDENT/APPELLANT

HELMUTH RAME …….……...…2ND RESPONDENT

AIR TRAFFIC LIMITED …….……3RD RESPONDENT

(An application for an order for security for costs and joinder of parties pending the hearing and determination of an appeal from the judgment of the High Court of Kenya at Nairobi (Okwengu, J) dated 30th March, 2011

in

HCCS NO. 16 OF 2006)

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RULING

Background

1. This notice of motion was heard in Chambers on 16th April 2015. The application dated 22nd September 2014 was brought pursuant to ***Rules 77(1), 90(2), 107(2)&(3) of the Court of Appeal Rules 2010; S. 3A of the Civil Procedure Act*** and ***S. 3A and 3B of the Appellate Jurisdiction Act***.

2. In his application, the applicant seeks orders that: the 1st respondent/appellant be compelled to effect service of the notice of appeal dated 31st March, 2011 and the record of appeal dated 10th August, 2012 on other parties who may be directly affected by the appeal and who did not participate in the proceedings in the High Court; the appeal be stayed pending the said service; that the 1st respondent/appellant be ordered to provide security for the applicant's costs of the suit in the sum of

KShs. 2 million within 30 days to be held in an interest-bearing account in the joint names of the advocates; the appeal be stayed pending the deposit of such security; or in the alternative the appeal be struck out with costs.

3. The application is supported by the affidavit of Charles Kanjama, learned counsel for the applicant, sworn on 22nd September 2014. He depones that the applicant (plaintiff in the High Court) in his further amended plaint dated 2nd May 2007 sought various orders, including attachment of four aircrafts: 5Y EKO, 5Y BMA, 5Y BMC and 5Y NBB. Before judgment was rendered, the applicant filed an application seeking the attachment of the four aircrafts. This application was heard and determined by Warsame, J (as he then was) on 4th July 2007 and the order sought was granted. After a full hearing of the suit, judgment was delivered on 30th March 2011, where Okwengu, J (as she then was) found in favour of the applicant, granting him the decretal sum against the 1st respondent. It is further deponed that the 1st respondent purported to transfer aircraft number 5Y BMC to his son, **Anders Bruel t/a Queenscross Aviation** in 2007 for USD 145,000 in order to frustrate the applicant's attempts at execution of the decree.

The deponent further avers that aircraft number 5Y NBB has been grounded for 13 years and stripped of engines, propeller and all its components. That Anders Bruel purported to lease the aircraft to Capital Airlines who unsuccessfully sought to be joined in the proceedings vide its application dated 22nd March, 2012.

4. The deponent further averred that in a bid to have Okwengu, J (as she then was) hear the 1st respondent's review application, the file moved to various court offices and the bill of costs of KShs.1,918,970.00/= remained untaxed; that taxation has also been made difficult as the respondent resides outside the jurisdiction of this Court and has no known assets within Kenya except aircrafts number 5Y EKO and 5Y BMA.

5. To satisfy the decree, the applicant sought attachment orders of the aircrafts by an application dated 9th March 2012 since the aircrafts 5Y EKO and 5Y BMA are still registered to Anders Bruel trading as Queenscross

Aviation. That Queenscross Aviation filed a constitutional petition in the High Court in *HC Petition No. 243 of 2012 Anders Bruel t/a Queenscross Aviation v Kenya Civil Aviation Authority & Another*, seeking to be declared as the legal owner of the aircrafts. This petition was dismissed. Queenscross Aviation also sued the applicant's previous advocates, M/s Musyimi & Co Advocates in ***HCCC 374 of 2012 Anders Bruel t/a Queenscross Aviation V Nyambura Musyimi & 2 others*** claiming that they had falsely and deliberately misrepresented injunctive reliefs in a letter that they wrote to the Managing Director of Phoenix Aviation.

6. Counsel for the applicant further deponed that the 1st respondent has applied to the High Court through an application dated 29th November, 2014 seeking orders to compel Kenya Civil Aviation Authority to transfer the said aircrafts to Queenscross Aviation. As a result, the applicant urges that the intended appeal also affects other parties, namely: Anders Bruel t/a Queencross Aviation, Capital Airlines, Musyimi and Co. Advocates, Kenya Civil Aviation Authority and Phoenix Aviation, being interested parties since any orders made by this Court will have a direct impact on the said parties.

7. The applicant's counsel further depones that should the High Court accede to the 1st respondent's request to compel Kenya Civil Aviation Authority to transfer the aircraft to Queenscross Aviation, then there will be no other known assets sufficient to meet the costs within the jurisdiction of this Court.

The applicant avers that it may prove impossible to collect costs from the respondent should this Court award the same unless security for costs is provided.

8. The 1st respondent, in opposing the application, filed a replying affidavit sworn on 2nd December 2014. Learned counsel, Allen W Gichuhi, having the conduct of the matter and authorised to file the

affidavit by the 1st respondent, avers that the notice of appeal was filed and served on the parties who participated in the proceedings before the High Court.

9. The applicant sets out several applications filed by the 1st respondent which are still pending before the High Court: the bill of costs application dated 20th February 2012, a motion seeking to institute contempt proceedings dated 20th February 2012 and a motion dated 9th March 2012 seeking execution of the decree by attachment of the aircrafts number 5Y EKO and 5Y BMA.

10. It is further deponed that the applicant is not a resident of Kenya having averred during the hearing at the High Court that he resides in the United States of America. The hearing of the appeal and cross appeal having been adjourned on several previous occasions despite being given a priority hearing date, the 1st respondent depones that this application has been brought in bad faith and is an abuse of the court process.

11. The 1st respondent also depones that the present application has been brought after considerable delay in that it was filed over two years since the appeal was filed. Further, that it has not been shown that the 1st respondent is incapable of paying costs since the same has not been taxed. The 1st respondent denies that it requires leave to dispense with service of the Notice of Appeal on persons who did not participate in the proceedings. The 1st respondent urges this Court to dismiss the application.

12. The 2nd and 3rd respondents also oppose the application in a replying affidavit sworn on 10th December 2014. The 2nd respondent, Helmuth Rame, who is a director of Air Traffic Limited, the 3rd respondent, herein, avers that the present application is an abuse of the Court process. Further, that it is a frivolous attempt to delay the hearing and final determination of the appeal since no reason has been put forward by the applicant why this motion has been brought to this Court at this late stage. It is also deponed that the applicant is also an American citizen and is not resident in Kenya and has no known assets in Kenya. The 2nd respondent further depones that the proceedings have cost him and the 3rd respondent considerable amounts of time and money. Consequently, the 2nd and 3rd respondents urge the Court to dismiss the application to pave way for the appeal to be heard and determined expeditiously.

Submissions by counsel

13. When this application came up for hearing in chambers, all the parties were represented by learned counsel. Mr Charles Kanjama represented the applicant, while Mr Allen Gichuhi represented the 1st respondent and held brief for Mr Harrison Kinyanjui, learned counsel for the 2nd and 3rd respondents.

14. Mr Kanjama in support of his application, submitted that this Court has broad discretionary powers in determining whether to award further security for costs as provided for under ***Rule 107(3) of the Court of Appeal Rules***.

Counsel submitted that in order to grant an award for further costs, this Court has, in the past, considered: whether the successful party in the appeal will be able to recover costs; in the case of a company whether there are attachable assets and whether the parties are resident in Kenya. Counsel argued that they have demonstrated that the 1st respondent is not resident in Kenya; that immediately after judgment was delivered, the 1st respondent attempted to transfer assets to his son, a 3rd party who is also not resident in Kenya; that past conduct shows that the 1st respondent has defeated the process of execution of the judgment for the last four years and as a result it is clear that the applicant will be unable to recover costs in the event that this application is dismissed.

15. Counsel further submitted that although the bill of costs remains untaxed in the High Court, KShs.2 million is sufficient to cover past costs as well as costs of the appeal. Counsel urged the single Judge to rely on the authorities submitted in support of his application.

16. In opposition, Mr Gichuhi relied on his replying affidavit and urged the Court to look at the history of

the matter. Counsel conceded that it was not in dispute that the 1st respondent does not reside in Kenya. However, in view of the applicant's cross-appeal and the fact that the applicant is also not resident in Kenya, the 1st respondent chose not to apply for security for costs so as to proceed with the main appeal. Counsel submitted that there had been several adjournments sought with the effect of delaying the hearing of the main appeal despite the 1st respondent's readiness to proceed with the appeal. Counsel urged the Court to be guided by ***Article 159 of the Constitution*** as well as the overriding objective as set out in the Appellate Jurisdiction Act, in order to set aside this application which, in his view, is aimed at derailing the main appeal. Counsel urged the single Judge to also consider the Replying Affidavit filed by the 2nd and 3rd Respondents in opposition to this application. Counsel urged the Court to rely on the authorities filed in opposition to this application. 17. In reply, Mr Kanjama argued that the applicant has attachable assets, being a citizen of Kenya unlike the 1st respondent who is a foreign national. Contrary to the 1st respondent's argument, counsel argued that the applicant tried to make recovery of the decretal amount and for costs in the High Court which has occasioned the two year delay in filing the present application.

Determination

18. After consideration of the application and the affidavits in support, the

replying affidavits and the submissions made by the parties, the issues for determination are: [a] whether security of costs should be awarded and [b] whether the notice and record of appeal should be served on the parties identified by the applicant as being affected by the appeal.

19. On the issue of payment of further security for costs, ***Rule 107, Court of Appeal Rules, 2010*** provides as follows:

> ***"107. (1) Subject to*** *rule 115****, there shall be lodged in Court on the institution of a civil appeal as security for the costs of the appeal the sum of two thousand shillings.***
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> ***(2) Where an appeal has been withdrawn under rule 96 after notice of cross-appeal has been given, the***
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> ***Court may, on the application of any person who is a respondent to the cross-appeal, direct the cross-appellant to lodge in Court as a security for costs the sum of two thousand shillings or any specified sum less than two thousand shillings, or may direct that the cross-appeal be heard without security for costs being lodged.***
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> ***(3) <u>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.</u>***
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> ***(4) Where security for costs has been lodged, the Registrar may pay out the same either by consent of the parties or in conformity with the decision of the Court and having regard to the rights of the parties thereunder."*** (Emphasis added).

20. It is trite law that the exercise of this Court's power under ***Rule 107*** is discretionary. The Court of Appeal for Eastern Africa (the predecessor of this Court) stated as follows in the case of ***<u>NOOR MOHAMMED ABDULLA V PATEL, [1962] EA 447</u>*** at page 453 para E:

> ***"In Kenya so far as we know (for the point was not mentioned in argument) security is not ordered in the supreme court on the ground for poverty. In the circumstances, it would appear something of an anomaly if they were ordered to be secured upon appeal, though of course the principle to be applied is not the same. It is right that a litigant, however poor should be permitted to bring his proceedings without hindrance and have case decided. But when it has been decided by the court set up by law for the purpose, other considerations entered into the question whether he should be permitted unconditionally to carry the matter further."***

This Court in the case of ***MARCO TOOLS & EXPLOSIVES LTD V MAMUJEE BROTHERS LTD, [1988] KLR 730*** held:

"As the cases show the Court has unfettered judicial discretion to order or refuse security.

Much will depend upon the circumstances of each case, though the guidance from Noor Mohamed's case is that the final result must be reasonable and modest."

21. It was stated in the case of ***GATIRAU PETER MUNYA V DICKSON MWENDA GITHINJI AND 2 OTHERS, CA (APPLICATION) NO. 38 OF 2013 [2014] eKLR*** that in an application for further security for costs, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful. In ***Marco Tools & Explosives Ltd v Mamujee Brothers Ltd (supra)*** it was further held that *"the onus is on the applicant to prove such inability or lack of good faith that would make an order for security reasonable"*.

22. The applicant's case for making this application is that the 1st respondent is a foreign national who is not resident in Kenya. The question to be answered is whether the fact that the 1st respondent is not resident in Kenya, or within the jurisdiction of this Court, is sufficient to warrant the grant of the orders sought to furnish further security for costs.

23. The fact that the 1st respondent resides out of the jurisdiction of this Court is a factor to consider but not the only one that is considered by the Court. This Court in ***KENYA EDUCATIONAL TRUST LIMITED V KATHERINE S.M WHITTON, CA (APPLICATION) NO. 301 OF 2009 [2011] eKLR*** determined that it was not a sufficient ground that the party against whom the security is sought resides outside the jurisdiction of the Court. In the Court of Appeal case of ***MAMA NGINA KENYATTA AND ANOTHER V MAHIRA HOUSING COMPANY, CIVIL APPLICATION NO. NAI 256 OF 2003 [2005] eKLR*** this Court listed some considerations taken into account when the Court is exercising its discretionary power under ***Rule 107(3).*** The Court appreciated that the single Judge of Appeal who determined a chamber application seeking deposit of further security of costs, was guided by principles set out in the judgment of Lord Denning M.R in ***SIR LINDSAY PARKINSON AND COMPANY LIMITED V TRIPLAN LTD, [1973] 2 WRR at p. 684***:

i. whether the claimant's claim was bona fide and not a sham;

ii. whether the claimant had a reasonably good prospect of success;

iii. whether there was admission by the defendant on the pleadings or elsewhere that money was due;

iv. whether there was a substantial payment into court or an "open offer" of a substantial amount;

v. whether the applicant for security was being used oppressively, for example so as to stifle a genuine claim;

vi. whether the claimant's want of means had been brought about by the conduct of the defendant's, such as delay in payment or in doing their part of the work;

vii. whether the application for security was made at a late stage in the proceedings.

24. The case of ***KEARY DEVELOPMENTS V TARMAC CONSTRUCTION, [1995] 3 All ER 534*** lays down the modern and pragmatic principles (though not exhaustive) which should guide the Court in exercising its discretion whether to order a plaintiff limited company, to provide security for costs of a defendant in a suit. The said principles are:

1. *The court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.*

2. *The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without a more sufficient reason for not ordering security. It is implicit that a company may have difficulty meeting an order.*

3. *The court must balance the injustice to the plaintiff prevented from pursuing a proper claim against the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover his costs. The power must neither be used for oppression by stifling a claim particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity, nor as a weapon for the impecunious company to put pressure on a more prosperous company.*

4. *The court will look to the prospects of success, but not go into the merits in detail.*

5. *In setting the amount it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount.*

6. *Before refusing security the court must be satisfied that, in all the circumstances, the claim would be stifled. This might be inferred without direct evidence, but the court should also allow that external resources might be available.*

7. *The lateness of the application can properly be taken into account.*

25. The Court in ***Mama Ngina Kenyatta and another v Mahira Housing Company (Supra)*** determined, in not interfering with the single judge's decision that the applicant had not proved that the respondent was unable to pay costs. The single judge dismissed the application on the grounds, *inter alia* that he was:

> ***"satisfied that there was no attempt to execute the decree for costs; that it was not established by satisfactory evidence that the respondent company was insolvent; that the appeal is not frivolous; and that since the appeal had been fixed for hearing on 28th June (that is in three days) it would be oppressive and unfair to order security for costs."***

26. The same argument is applicable in this present application. The appeal is not frivolous and the applicant and the 1st respondent both reside outside Kenya. Further, the applicant's bill of costs is yet to be taxed and is still pending in the High Court, in addition to other applications which include his motion to attach the aircrafts 5Y EKO and 5Y BMA in satisfaction of the decree by the High Court before the costs awarded are ascertained by way of taxation of the bill of costs. The applicant has not proved or shown that the respondent is unable or unwilling to pay the costs that may be due to him. In the case of ***Keary Developments v Tarmac Construction (supra)*** and approved by this Court in the case of ***Mama Ngina Kenyatta and another v Mahira Housing Company (supra)*** it was determined that the lateness of the application can properly be taken into account. I take cognizance of the fact that this application was filed over two years after the appeal was filed.

In the case of ***BAMBURI CEMENT CO LTD V LAWI DUDA & 21 OTHERS, CIVIL APPLICATION NO. NAI 6 OF 2013***, it was held that:

> ***"The reasoning appears to be that a litigant, however poor, should be permitted to bring his proceedings without hindrance and have his case decided. The letter and spirit of our Constitution appears to support this position.*** *Article 48* ***provides that:***
>
> > ***The state shall ensure access to justice for all persons and, if any fee is required it shall be reasonable and shall not impede access to justice.***

The Article is couched in mandatory terms.

Similarly and further in *Article 50 (1) of the Constitution****, it provides that:***

> ***Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

We are therefore of the persuasion that a litigant is not to be shut out because of his/her impecunious position, as this may lead to discrimination based on the size of one's pocket."

In view of the foregoing and in the circumstances of this case, the applicant has fallen short of satisfying me that it stands to lose costs in the event that the appeal fails.

27. The second issue for determination is that the notice and record of appeal should be served upon Anders Bruel t/a Queencross Aviation, Capital Airlines, Musyimi and Co. Advocates, Kenya Civil Aviation Authority and Phoenix Aviation as interested parties.

28. The Supreme Court has had occasion to pronounce itself on who an interested party is. In ***COMMUNICATIONS COMMISSION OF KENYA AND 4 OTHERS V ROYAL MEDIA SERVICES LIMITED & 7 OTHERS, PETITION NO. 14 OF 2014 [2014] eKLR*** it was held that:

> *"**In determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this Court's decision in the***
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> *Mumo Matemo case* ***where the Court (at paragraphs***
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> ***14 and 18) held:***
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> > ***[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause*** *ab initio****. He or she is one who will be affected by the decision of the***
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> > ***Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.***
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> ***Similarly in the case of*** *Meme v Republic, [2004] 1 EA 124****, the High Court observed that a party could be enjoined in a matter for the reasons that:***
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> > ***(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;***
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> > ***(ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;***
> >
> > *(iii)* ***Joinder to prevent a likely course of proliferated litigation.***
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> ***We ask ourselves the following questions: a) what is the intended party's stake and relevance in the proceedings? And b) will the intended interested party suffer any prejudice if denied joinder?****"*
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> *(Emphasis added).*

29. The parties, alleged to be crucial to the appeal entered into the matter after judgment was delivered. In ***REPUBLIC V THE INTERIM INDEPENDENT BOUNDARIES REVIEW***

COMMISSION AND 13 OTHERS*, *CIVIL APPEAL NO. 64 OF 2012, Koome, JA stated:

> ***"This is an appeal like any other before the Court of Appeal and the assumption is that only the parties who participated in the High Court should naturally have audience."***

In the circumstances of this case, I am not satisfied that substantial prejudice will be suffered by the applicant if the application for joinder is denied at this stage.

30. Accordingly, it would not be a proper exercise of my discretion to allow this application. For these reasons, I dismiss the Notice of Motion dated 22nd September, 2014. The costs thereof shall abide by the outcome of the appeal.

Dated and delivered at Nairobi this 12th day of June, 2015.

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR