THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
(COMMERCIAL COURT)

MISCELLANEOUS APPLICATION NO. 361 OF 2001
(ARISING FROM H.C.C.S NO. 354 OF 2001)

1. DEEPAK K. SHAH
2. AMOOLI J. NATHWANI
3. CRANE BANK LIMITED
4. CRANE FINANCE COMPANY LIMITED ……APPLICANTS /PLAINTIFFS

VERSUS

1. MANURAMA LIMITED
2. SUPPLY CENTRE LIMITED
3. KAMLESH MANSHKIIAI DAMJI …….RESPONDENTS/DEFENDANTS

BEFORE: HONOURABLE MR. JUSTICE JAMES OGOOLA

RULING

Plaintiffs in the underlying suit to this application are ordinarily resident in Nairobi, Kenya-outside the jurisdiction of this Court. Defendants in that suit are residents of Uganda. Accordingly, Defendants have applied to Court for an order requiring Plaintiffs to pay security for costs. The application was brought under the provisions of 0.23 of the Civil Procedure Rules (CPR). That Order provides, in its rule 1, as follows:

> "1. The court may if it deems fit order a plaintiff in any suit to give security for the payment of all costs incurred by any defendant."

In support of Defendants' application, learned counsel (Joseph Byamugisha, SC, and Masembe Kanyerezi, Esq.) argued several joint grounds — as follows:

(1) The fact of Plaintiffs' residence abroad, is a *prima facie* ground for ordering payment of costs [see Ebrard v Gassier (1885) 28 Ch.D 232]. Such a Plaintiff may escape payment of security, if he owns property within this Court's jurisdiction — Plaintiffs in this instant application own no property at all in Uganda. (3) Even if Plaintiffs did own property in Uganda (which they do not), the permissible property for purposes of escape must be substantial, fixed, permanent, and not of a "floating" nature. Plaintiffs appear to own some property in Kenya, but comprising some company shares only. Such property lacks permanence, as it can be freely sold/transferred any time; and, in any case, its value, is totally unknown (i.e. has not been divulged at all by Plaintiffs).

For his part, learned counsel for the Plaintiffs (Mr. Kituuma — Magala), advanced the following arguments: (1) The order for payment of security should not become a weapon of oppression against Plaintiffs' action. (2) Plaintiffs' case has great likelihood of success **[Perzelack KG v Perzelack (UK)**

Ltd [1987] 1 All ER 1074]. (3) Granting or denying the order applied for is discretion of the Court, to be exercised as it sees fit, in light of the circumstances of this case. (4) Given the re-establishment of the East African Community, the question of "residence" for purposes of ordering Plaintiffs to pay security for costs should be re-examined.

A fundamental consideration, in my view, is the fact that the power of the Court to order a Plaintiff to pay security for costs is entirely a discretionary matter for the Court. There is no longer any inflexible rule or practice to the effect that a Plaintiff resident abroad will, by that reason alone, be ordered to give security for costs — see **Aeronave SPA v. Westland Charters Ltd [1971] 3 All ER 531 C.A.; Sidpra v. Sidpra, Supreme Court Civ. Appeal No. 60 of 1995** (per ODER, JSC, p.14).

Rather, Court in exercising its power under 0.23 of the CPR, takes into account all the circumstances of the particular case — see LORD DENNING M.R. in Sir Lindsay Parrinton & **Co, Ltd v. Triplan Ltd [1973] QB 609, at pp.** 626-627.

A major circumstance or ground in the instant application is the uncontested fact that Plaintiffs are ordinarily resident outside the jurisdiction of this Court. As it turns out, Plaintiffs are residents of Nairobi, Kenya: a Partner State (along with Uganda and Tanzania) of the re-established East African Community. In my view, this fact of East African Community residents begs for a fresh re-evaluation of our judicial thinking in relation to such matters as the implementation of 0.23 of our CPR (i.e. the need to order a Community resident to pay security for costs) — an order which, as discussed above, is entirely within the discretion of the Court, having regard to all the circumstances of the particular case that is before such a Court. In this regard, a number of considerations come to mind:

First, the initial practice of English Courts used to be dictated by the principle enunciated in the ancient case of Ebrard v. Gassier *(supra),* to the effect that the fact of a Plaintiff's residence abroad was a *prima facie* ground for ordering him to pay security for costs. From that venerable principle, English courts have had to swing to a different position in cases involving European Community residents. In **Landi Den Hartog B v. Stopps [1976] FSR 497,** Court refused to order payment for security of costs, stating that: in exercising its discretion to order security, Court may take into account the fact that a Plaintiff is resident within the Community. The underlying philosophy here is to the effect that now that the United Kingdom is a member of the EC, it ought not to be presumed that fellow members of that Community will not honour orders made by the courts of England.

Second, in **Porzelack KG v Porzelack UK** *(supra),* Court held that in exercising its discretion whether or not to order security for costs, Court is entitled to treat ease of enforcement as a sufficient and relevant ground for denying the order, provided other relevant factors are not ignored. In the case of England, the procedure for enforcing judgments under the 1968 Convention was brought into force on 1/1/87 by the Civil Jurisdiction Judgments Act of 1982 (see **White Book, 1995 edition, Vol. 1, Para 23/1** — 3/3, **p.** 420). In the case of the East African Community, the following considerations are important and pertinent factors that ought to be taken into account by this

Court:
(1) The provisions of 0.23 of Uganda's CPR are similar to, if not identical with, the corresponding rules in

Kenya (0.25 CPR) and Tanzania — see ODER, JSC in **Sidpra v Sidpra** *(supra)* p.12.

(2) All the three countries of Uganda, Kenya and Tanzania are Partner States in the East African Community ("EAC").

(3) The EAC Treaty (like the EC Treaty) seeks to establish a Customs Union, a Common Market, and a Monetary Union — as integral elements of the Community; and, ultimately, Political Union among the Partner States. In particular, the Treaty makes express provision for the unification and harmonisation of the laws of the Partner States, including "standardisation of the judgments of courts within the Community" (Article 126); establishment of a common bar (i.e. cross- border legal practice) in the Partner States. In this regard, Court notes that there is already in existence an East African Judges and Magistrates Association, as well as an East African Law Society; not to mention the East African Court of Justice, which is similar to the Court of Justice of the European Community. Under the Treaty, the judgments of the E.A. Court of Justice are to be enforced through the national courts of the Partner States (Article
44).

(4) The underlying objective of undertaking all the initiatives described above — and many more not discussed in this Ruling — are stated in Article *5* of the Treaty as being the need:

> *"to develop policies and programmes aimed at widening and deepening cooperation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs for their mutual benefit."* [emphasis added]

(5) All the Partner States have virtually identical Foreign Judgments (Reciprocal Enforcement) Acts — each of which extends the application of its provisions to the other two Partner States: see **Vallabhdas Hirji Kapadia v. Laxmidas (1960] EA 852.**

(6) Under the aegis of the Capital Markets Development Committee of the EAC, there are mutual understandings in place, among the capital markets of the three Partner States, to facilitate the trading of company shares on each other's stock exchange — a factor which, among other things, makes transparent the ownership and transfers of certain assets within and between the Partner States.

(7) Article 104 of the Treaty provides for the free movement of persons, labour, services, and the right of establishment and residence. The Partner States are under obligation to ensure the enjoyment of these rights by their citizens within the Community. In this regard, Court is mindful of the fact that the Treaty has the force of law in each Partner State (Article 8 (2) (b)); and that this Treaty law has precedence over national law (Article 8(5)).

Due consideration of all the above factors leaves this Court with but one conclusion: the ancient ant venerable principle of **Ebrard v Gassier** must yield to the realities of today. In East Africa, as was the case with the United Kingdom (see the **Landi** case above), there can no longer be an automatic and inflexible presumption for Court to order payment for security of costs with regard to a Plaintiff who is a resident of the East African Community. Accordingly, in the present application, I am prepared to

disregard the fact of Plaintiff's residence as a factor in the consideration of whether or not to order payment of security for costs.

Nonetheless, resolution of the fact of residence is not in and of itself dispotive of the central issue in this application. In exercising its discretion as to whether or not to order security for costs, Court must consider all the other circumstances of the case. In the instant application, Plaintiffs have averred that they own certain property in Kenya.

The fact of the existence and ownership of this property was not challenged at all. Instead, learned counsel for Defendants only challenged whether that particular property was substantial or not; whether it was valuable or not; whether it was of a permanent or "floating" nature; and whether it was located in Nairobi or elsewhere.

In my view, these considerations are relevant, but only to property held within the jurisdiction of the Court by a Plaintiff who is resident abroad. In the instant application, I have held that Plaintiffs' residence in Kenya is of no consequence to the determination of the issue at hand (i.e. payment of security for costs), since such residence is residence within the East African Community. In other words, there is no presumption here that Plaintiff should pay security for costs. Accordingly, Plaintiff needs no escape route (i.e. does not have to own any property within this Court's jurisdiction). The position, therefore, is analogous to the English case of a Plaintiff who had a residence in Scotland, but had no property in England. Court held that:

> *"Where a plaintiff is a natural person resident in Scotland or Northern Ireland, security for costs will not be required from him ' —* ***Raeburn v. Andrews (1874) L.R. 9QB 118; Re Howe Machine Co. (1889) 41 Ch.D 118; Wilson Vehicle Distribution Ltd v. Colt Car Co. Ltd 11984JBCLC93.***

In D.S.Q. Property Co. Ltd v Lotus Cars Ltd [19871 1 WLR 127, MILLET J held that the true ratio of **Raeburn's** case *(supra)* was that irrelevant circumstances should be ignored, and that where a Plaintiff was an individual, with or without means, his residence in Scotland or Northern Ireland was irrelevant because he was within reach of the Court's process, and security should not be ordered against him any more than it would be against an individual Plaintiff resident in England.

Alternatively, the position of Community residence is analogous to a Plaintiff who lives within the Court's jurisdiction, but who has no property at all (i.e. who is poor, insolvent or, even, bankrupt). In such cases, the law is trite. The insolvency or poverty of a plaintiff, is no ground for requiring him to give security for costs — [**see Cowell v. Taylor (1885) 31 Ch B 34],** even where such a Plaintiff is an undischarged bankrupt **[Cook v. Whellock (1890) 24 QBD *658];*** nor is possible or even probable bankruptcy any ground (**Rhodes v. Dawson (1886) 16 QBD** 548]. If even paupers are not required to give security, then *a fortiori* Plaintiffs in this instant case whose ownership of property in Kenya is unchallenged, must not be required to give any security for costs.

In light of all the above considerations, Court is persuaded by the arguments advanced by learned counsel for the Plaintiff (Mr. Kituuma-Magala) to the effect that (i) the order applied for, should not become a

weapon of oppression against the Plaintiffs' action; and (ii) Plaintiffs' case has a high likelihood of success. [For both arguments see **Porzelack's** case *(supra)]*.

The application is hereby denied. The costs of this application are to be costs in the cause.

Ordered accordingly.

James Ogoola
JUDGE
05/02/02

DELIVERED IN OPEN COURT, BEFORE:
Mr. Kituuma-Magala, Esq. — Counsel for the Respondent/Plaintiffs
Ms Claire Ssamula, Esq. (holding brief of Joseph Byamugisha, SC) — Counsel for Applicant/Defendants
Mr. J.M. Egetu — Court clerk

James Ogoola
JUDGE
05/02/02