

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

**CORAM: HON. JUSTICE S.B.K. KAVUMA, JA.**

**Civil Application No. 16 of 2007**

**(Arising from Civil Appeal No. 74 of 2003)**

SEREFACO CONSULTANTS LTD}.....APPLICANT

VERSUS

1. EURO CONSULT BV }
2. ARCADIS EURO CONSULT }.....RESPONDENTS

**RULING OF THE COURT:**

This application was brought by way of Notice of Motion under Court of Appeal Rules 2 (2), 105 (3), 43 and 44, S. 1 13 – 10 for orders that: -

**(a) “The Respondents, the Defendants in High Court Civil Suit No. 509 of 1999, Serefaco Consultants Ltd. Vs. Euro Consult B.V. and Arcadis Euro Consult furnish security for:-**

**(a) Payment of -**

- (i) The sum decreed by the High Court in HCCS No. 509 of 1999.**
- (ii) All the costs incurred by the applicant in prosecuting that suit.**

**(b) That the Respondents furnish further security for the costs likely to be incurred by the Applicant in opposing the appeal.**

**(c) The costs of this application be provided for.”**

The application is based on the following grounds: -

- a) **“The Respondents are foreign companies with no known assets within the jurisdiction of this honourable Court.**
  
- b) **The High Court decree of 1<sup>st</sup> March, 2002 in favour of the Applicant for the sum of Dutch Florins 816,505.98 (Euro 422,733.27) with interest at the rate of 6% from March 2000 till payment in full together with costs of the suit remains wholly unsatisfied.**
  
- c) **That despite the best efforts of the Applicant, it has proved impossible to execute the High Court decree against the Respondents.**
  
- d) **That the applicant may not recover anything against the Respondents in the event that this appeal is dismissed and the respondents refuse/fail to pay.**
  
- e) **That the Applicant company has good reasons to oppose the appeal which is unlikely to succeed on the**

**merits.”**

The application is supported by an affidavit sworn by Mr. Chaapa K. Karuhanga, the Chairman of the applicant Company. The relevant contents of the said affidavit are as follows: -

1. **“That I am an adult male Ugandan of sound mind and the Chairman of Serefaco Consultants Ltd, the Respondent in the main appeal and I make this affidavit on behalf of the Applicant having been duly authorized to depone this affidavit.**
2. **That I am conversant with the facts of the appeal and H.C.C.S No. 509 of 1999 having at all material times been involved in the prosecution of the applicant company’s claims.**
3. **That the Applicant herein sued Euro Consult B. V. and Arcadis Euro Consult in the High Court of Uganda vide Civil Suit No. 509 of 1999.**
4. **That on the 1<sup>st</sup> day of March, 2002 Judgment was entered in favour of the Applicant for the sum of Dutch florins 816,505.98 with interest at the rate of 6% p.a. from March 2000 to the date of payment in**

**full together with costs of the suit.**

5. **That a decree was issued and to date the whole amount and interest equivalent to Euro 422,733.27 together with Ug. Shs.13,088,759/= (Thirteen Million Eighty Eight Thousand Seven Hundred Fifty Nine only) as taxed costs of the suit is still unsatisfied. A copy of the decree and certificate of taxation are attached thereto marked “A” and “B”.**
6. **That sometime in My 2003, I received information that the Respondents had ongoing projects with the Ministry of Finance and Kampala City Council for which they were about to get payment.**
7. **That the Applicant obtained a garnishee order nisi from the High Court attaching the payments that accrued during the course of implementation of the projects. A copy of the Order Nisi is attached and marked annexure “C”.**
8. **In a ruling delivered on 23<sup>rd</sup> June, 2003 the High Court declined to make the order absolute on grounds that the companies that had contracts with**

**Government/Kampala City Council were separate legal entities from the Respondents herein.**

9. **That since that unsuccessful attempt to execute the decree, I have been on the look out for any attachable properties belonging to the Respondents but to date I have failed to locate any.**
10. **That I am advised by the Company's lawyers M/S Kwesigabo, Bamwine and Walubiri Advocates and I verily believe that the Applicant has good reasons to oppose this appeal.**
11. **That the costs to be incurred by the Applicant herein in this appeal by way of professional fees, expenses and disbursements are likely to be in excess of Ug. Shs.80,000,000/=. A copy of the draft/skeletal bill of costs is attached hereto and marked "D".**
12. **That the Respondent companies are as can be seen from page 53 of the Record of Appeal, incorporated and registered in the Netherlands and their domicile is in the Netherlands beyond the jurisdiction of this Honourable Court.**

13. **That the Respondents have no known assets within the jurisdiction of this Honourable Court to which the Applicant can have resort to recover its decretal award and costs should the Respondents fail in this appeal and refuse or fail to pay.**
14. **That I am advised by the Company's lawyers M/S Kwesigabo, Bamwine and Walubiri Advocates, and I verily believe their advice, that the said appeal against the well reasoned judgment of the High Court has little chance of success and was made in bad faith.**
15. **That in the interest of justice the Respondents should deposit security for the decretal sum, costs in the High Court and costs in this Court.**
16. **That I swear this affidavit on behalf of the applicant in support of application for security to be furnished by the Respondent companies.**
17. **That I depone to the facts herein stated to the best of my knowledge save for the contents of paragraph 10**

**and 14 which are true to the best of information from the Applicants advocates and which I verily believe to be true.”**

There is no affidavit in reply filed in Court.

I now proceed to consider the rules of the Court under which the application was brought which provide as below.

**Rule 2 (2)**

“Nothing in these Rules shall be taken to limit or otherwise affect the inherent power **of the court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent abuse of the process of any court caused by delay.”**

**Rule 105 (3),**

“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.**

**Rule 43**

**(1) “Subject to subrule (3) of this rule and to any other rule allowing informal application, all applications to the court shall be by motion, which shall state the grounds of the application.**

**(2) A notice of motion shall be substantially in Form A in the First Schedule to these Rules and shall be signed by or on behalf of the applicant.**

**(3) This rule shall not apply –**

- (a) to applications made in the course of a hearing, which may be made informally; or**
- (b) to applications made by consent of all parties, which may be made informally by letter.”**

**Rule 44**

**(1) “Every formal application to the court shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts.**

**(2) An applicant may, with the leave of a judge or with the consent of the other party, lodge one or more supplementary affidavits.**



**(3) Application for leave under subrule (2) of this rule may be made informally.**

**(4) Every formal application for leave to appeal shall be accompanied by a copy of the decision against which it is desired to appeal and, where an application has been made to the High Court for leave to appeal and the application has been refused, by a copy of the order of the High Court refusing the application.”**

The jurisdiction of this Court to entertain the application as provided for in Rules 2 (2) and 105 (3) is not disputed and clearly, all the formal and procedural requirements as laid down in Rules 43 (1) and (2) and 44 (1) are duly satisfied and complied with by the application. Rules 43 (3), 44 (2), (3) and (4) however, do not, in my view, apply to this application.

In his brief submission, Mr. Peter Walubiri, learned counsel who represented the applicant emphasized that the affidavit in support of the application was not contraverted. The averments in that affidavit, therefore, counsel contended, stood unchallenged. He prayed Court to take them as correct and true. Counsel, further, prayed Court to allow the application

with costs and issue the orders sought.

Mr. Chris Bwanika, learned counsel who represented the respondents, in his submission conceded that although service of court process in the matter had been effected upon his chambers, no affidavit in reply was filed into court. Counsel conceded, further, that the respondent companies are registered in the Netherlands, outside the jurisdiction of this Court and have no property within that jurisdiction. Counsel contended, however, that despite this, the respondents are companies of great reputation and firm standing capable of meeting their obligations when finally determined.

I carefully listened to the submissions of both counsel and made a thorough perusal of the pleadings on record. I have also carefully considered the authorities cited in the matter before Court.

It is trite that the burden lies on the applicant to show sufficient cause why the appellant should furnish further costs over and above the amount fixed by the Rules of Court. What amounts to sufficient cause is a matter for the Court's discretion. See **Noble Builders (U) Limited & Raghbir Singh Sandhu V Jabal Singh Sandhu S.C.C. Application No. 15 of 2002.**

In the application before me, there is the uncontroverted affidavit evidence of Mr. Chaapa Karuhanga, the chairman of the applicant company. It is settled law that if the applicant supports his application by affidavit or other evidence and the respondent does not reply by affidavit or otherwise, and the supporting evidence is credible in itself, the facts stand as unchallenged. See **H.G. Gandesha and Kampala Estates Ltd and G.J. Lutaya, SC Civil Application No. 14 of 1989.**

I find all the averments in Mr. Karuhanga's affidavit in support of this application strong unconraverted affidavit evidence of the applicant Company. I find that evidence and the affidavit credible and not intrinsically unreliable or contradictory. There are no discrepancies in it. I am, therefore, satisfied and find that the averments in the affidavit of Mr. Karuhanga in support of the application remain on record unchallenged. I also accept them as correct and true.

In the circumstances, the situation presented in the application before me, therefore, is one of foreign companies registered in the Netherlands, which is outside the jurisdiction of this Court and they have no assets in that jurisdiction. This significantly lends weight to the applicants' fear that if it succeeds in the pending appeal, it may not readily recover anything from the

respondents and there will be no assets to attach.

I am not persuaded by counsel for the respondents' submission that the respondents are companies of great reputation and firm standing with ability to meet their obligations if determined. This was an assertion by counsel from the bar not supported by any evidence on record. Further, I have not come across any law, and none has been cited to Court, that judgments, decrees and orders of this Court, or indeed of other courts in Uganda, are readily enforceable in the Netherlands.

In the circumstances, I hold that the respondents are foreign Companies with no assets within the jurisdiction of this Court. I hold, further, that judgments, decrees and orders of this Court are not readily enforceable against the respondents in the Netherlands. Consequently, the applicant has shown sufficient cause why the appellants should furnish security for payment of the decretal sum in HCCS No. 509 of 1999, the taxed costs of that suit and further security for costs over and above the Shs.200,000/= they have deposited in Court for this appeal.

**Nobel Builders (U) Ltd & Raghbir Singh Sandu V Jabal Singh Sandhu (supra).**

This application is, therefore, allowed with costs to the applicant and the following orders shall issue: –

**(a) That the respondents, who are the appellants in Civil Appeal No. 74/2003 pending before this Court do furnish security for payment of the decretal sum in High Court Civil Suit No. 509 of 1999 in the sum of Dutch Florins 816,505.98 (Euro 422,733.27) or the equivalent thereof in Uganda Shillings with interest at 6% p.a. from March 2000 till payment in full.**

**(b) That the respondents pay into this Court the taxed costs of Shs.13,088,759/= incurred by the applicant in prosecuting HCCS No. 509 of 1999.**

**(c) That the respondents furnish further security for the costs in Civil Appeal No. 74/2003 pending in this Court in the sum of Shs.50,000,000/= (fifty million) only.**

**(d) That the respondents pay to the applicant the costs of this application.**

**(e) That all the payments ordered in (a), (b), (c) and (d) above shall be made within forty five (45) days from the date hereof.**

It is so ordered.

Dated at Kampala this 13<sup>th</sup> day of December, 2007.

**S.B.K. Kavuma**

**JUSTICE OF APPEAL.**