

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 28 OF 2015

- 1. UGANDA GINNERS & COTTON EXPORTERS ASSOCIATION LTD**
- 2. COTTON DEVELOPMENT ORGANISATION (QDO)**
- 3. JOLLY SABUNE**
- 4. BRUCE ROBERTSON**
- 5. HITESH PANCHAMATIA**
- 6. PATRICK ORYANG**
- 7. AMDHAN KHAN**
- 8. ADAM BWAMBALE**
- 9. RATI LAL JAIN**
- 10. OYUGI JACKSON**
- 11. KARL MARK OBOTE ACCELLAN:.....APPLICANTS**

VERSUS

MUDDU AWULIRA ENTERPRISES LTD.....RESPONDENTS

CORAM: HON. MR. JUSTICE REMMY KASULE, JA
HON. LADY JUSTICE FAITH E.K MWONDHA , JA

HON. MR. JUSTICE KENNETH KAKURU, JA

RULING OF THE COURT

This is an application by notice of motion in which the applicants are seeking leave to appeal against the Ruling of *Hon. Lady Justice Flavia Anglin Ssenoga J* in *Miscellaneous Application No. 1008 of 2014 dated 30th January 2014*.

Brief background:

This application and the intended appeal appear to have had a checkered history. The respondent herein instituted a suit against the applicants at the Commercial Division of the High Court on 29th April 2013.

The written statement of defence was filed on 14th May 2013. It appears from the record that the original plaint was amended and an amended one was filed on 28th May 2013. It was served upon the respondent's counsel on 30th May 2013.

On 12th June 2013 before the suit was set down for scheduling conference, the applicants filed an application by chamber summons under **Order 26** of the Civil Procedure Rules (CPR).

That application sought the following orders

- 1) An order doth issue requiring the respondent to furnish security for costs to the tune of Shs. 500,000,000/= (Five hundred million Shillings) which the Applicant would incur in defending the Respondent's suit.**
- 2) Costs of this Application be provided for.**

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The brief grounds upon which the application was based are set out in the Chamber summons as follows

- (i) That the respondent's claim as at the time of filing it was about Shs. 64 billion shillings and the security of Shs. 500,000,000/- (Five hundred million shillings) being sought is less than the instruction fees for this amount under the Advocates (Remuneration and Taxation of Costs) Regulations.**
- (ii) That the respondent's suit has no likelihood of success and the applicant shall be put to undue expenses by defending it.**
- (iii) That the Applicant has a good defence to the suit with high likelihood success.**
- (iv) That the Respondent has no known assets within the jurisdiction of this Honourable Court and the Applicant honestly believes that it will be unable to**

recover costs incurred from it awarded by this Honourable Court.

(v) *That the Applicant is not responsible for the Respondent's financial difficulties.*

(vi) *That it is just and equitable.*

The application was supported by the affidavit of one Adam Bwambale. Paragraphs 2, 14 and 17 of that affidavit which are pertinent here state as follows

“(2) That the Respondent filed Civil Suit No. 222 of 2013 claiming joint and/or several recovery of liquidated sums amounting, at time of filing it inclusive of compound interest at 25% per annum from 1999 to about Shs. 64,000,000,000/= (Sixty four billion Uganda Shillings) together with further compound interest at 25% per annum until payment in full against the 12 defendants/applicants purporting that it was imposed and collected by the Applicants as an illegal levy from 1999 to 2004 which fact the Applicants deny in toto.

(14) That the Respondent was until 2004/2005 season a cotton ginner and exporter and has since ceased to do that or any other known business having faced very grave financial problems since that time and the Respondent has no known assets within the jurisdiction of this Honourable Court to resort to recover in the very likely event of the applicants obtaining a decree in their favour.

(17) That it is just and equitable that this Honourable Court orders the Respondent to furnish security for costs in this sum of Shs. 500,000,000/= which as per skeleton Bill of costs is much less than what the applicants are likely to pay and incur. ”

The chamber summons were also supported by an additional affidavit deposed to by one Asaba Arthur which stipulates in part as follows

“I, ASABA ARTHUR of the Hem Associates, King Fahad Plaza, 4th Floor, Kampala Road, Kampala Tel. No. 0775 897744/0703 308020 do make oath and state as follows;-

1. THAT I am a holder of a Degree my qualifications are B.Com. Degree of Makerere University Business School (MUBS) and Certified Public Accountant (CPA), ICPAU.

2. THAT M/S Barya, Byamugisha & Co. Advocates, orally requested me to calculate for them the total amount as at end of April, 2013 on Shs. 2,612,795,040/- compounded annually at the interest rate of 25% from January 1999.

3. THAT applying the standard formula which appears in relevant text books interalia "Financial Management and Policy" 10th Edn, page 13. By James C. Van Home, I calculated the amount which came to Shs. 64,358,754,571/- (sixty four billion three hundred fifty eight million seven hundred fifty four thousand five hundred seventy only). A photocopy of the extract of the relevant page of the text book is Annexure "A". My report containing the results of the calculation is Annexure "B"."

The application was heard by His Worship Opesen, Assistant Registrar, at the Commercial Court. At the hearing both Adam Bwambale and Asaba Arthur were cross examined on the contents of their respective affidavits.

During cross examination Mr. Asaba admitted that he had not completed his studies and as such he was not a qualified certified Public accountant as he had deponed. He also denied knowledge of the annexure "A" to his affidavit.

Mr. Bwambale on his part denied having been authorized to swear an affidavit on behalf of Cotton Development Organisation (CDO) the 2nd applicant. He also stated that he had no evidence that the respondent was in grave financial problems as he had deponed in paragraph 14 of his affidavit in support of the chamber summons. On 12th December 2014 the learned Assistant Registrar then proceeded to dismiss the application on account that it was supported by false affidavits.

The applicants herein on 20th February 2014 then made a reference to the Judge against the decision of the Assistant Registrar under **Order 50 Rule 8** of the Civil Procedure Rules.

The notice of motion is set out as follows

"TAKE NOTICE that on the 9th day of April 2014 at 9.00 am O'clock in the forenoon or so soon thereafter as Counsel for the Appellant can be heard, this Court will be moved for orders that:-

(a) the appeal be allowed with costs and

(i) *the respondent be ordered to pay deficient filing fees and security for costs.*

(ii) *the learned Judge does hear and determine the other issues of law raised in M.A No. 477 of 2013 as if the same were referred to him/her under Order SO rule 7 of the Civil Procedure Rules and dismisses HCCS No. 222 of 2013 with costs.*

TAKE FURTHER NOTICE *that the grounds of this Application are contained in the pleadings, typed record of proceedings, written submissions and ruling and authorities cited in M.A No. 477 of 2013 as stated in and as annexed to the Affidavit in Support of DR. JOHN - JEANBARYA, Esq., but are mainly that:*

(i) *The learned Registrar erred in law and fact when he failed to properly evaluate the evidence and apply the law and order the respondent to pay deficient court filing fees.*

(ii) *The learned Registrar erred in law and fact in failing to order the respondent to deposit security for costs.*

(iii) *The learned Registrar erred in law and fact and failed to properly exercise his discretion and jurisdiction when he failed to find that certain matters of fact and law which were argued before him were proper for reference to the Judge and to refer the matters to the Judge for determination accordingly.*

(iv) *It is in the interest of justice and expedition.*

The motion is supported by the affidavit of Dr. John-Jean Barya paragraphs 13 and 14 of which stipulate as follows

“13 THAT *the arguments in favour of granting the application as appear in the pleadings and Annexures "A" to "G" inclusive, interalia, were that the respondent's case did not have a likelihood of success and the respondent did not have sufficient financial or other means to pay the appellants' costs in the very likely event that it lost the suit on grounds of undisputed facts and/or law, interalia, that:*

(i) *insufficient filing fees was paid in respect of the suit.*

(ii) *the suit against the 2nd defendant was not maintainable for lack of a mandatory statutory notice contrary to the provisions of The Civil Procedure & Limitation (Misc. Provisions) Act (“the Act”) (Cap 72....)*

(iii) *the suit against the 2nd defendant was time barred by reason of Section 3 of the said Act.*

- (iv)** *the claim against defendant No. 3 was not maintainable under Section 4 of the said Act for being time barred.*
- (v)** *the suit against the 2nd- 12th defendants inclusive was incompetent in so far as they were added to the suit by an amendment of the plaint without first seeking and obtaining the consent of the then existing defendant or the Court.*
- (vi)** *the plaintiffs claim arose out of voluntary contributions for the benefit of the contributants including itself and the plaintiff having voluntarily and actively contributed to the fund and benefited from it more than other ginnners cannot recover on the basis that the contributions were illegal (even assuming they were, which is denied) for to do so would be to benefit from an illegality to which it was equally a party.*
- (vii)** *The plaintiffs suit is based on a cause of action which arose between 1999/2000-2003/4 and is therefore, time bared under the Limitation Act.*
- (viii)** *the learned Registrar was seized with jurisdiction to order the respondent to pay deficient court fees to take effect from the date of filing and at the same time properly exercise its discretion and jurisdiction to make the order granting the application for security for costs and also under Order 50 rule 7 of the Civil Procedure Rules to refer the adjudication of the other points of law which were raised to a Judge.*
- (ix)** *A court of justice cannot sanction an illegality once it is brought to its notice however irregularly and to do so would also offend public policy.*

THAT in his ruling (Annexure "1") the learned Registrar dismissed the application on the basis of what he termed contradictions in the three affidavits of Adam Bwambale and Asaba Arthur going to the roots of the application and declined to make a finding or rule on all points of law and/or to refer them to the Judge for adjudication or directions even when he was prayed to do so, hence this appeal.

On 28th October 2014 the learned Judge in her Ruling, erroneously referred to as a Judgment, dismissed the reference and ordered the suit to proceed. The applicants then filed a motion under **Order 44 Rule 4** of Civil Procedure Rules on 11th November 2014 seeking leave to file an appeal to this Court against her Ruling . The Judge dismissed that application with costs and once again ordered the parties to proceed with the scheduling of the main suit. The applicants on 12th February 2015 filed this application seeking leave to appeal to this Court.

The notice of motion herein is set out as follows

“NOTICE OF MOTION

(Under Order 40(2), 43(1) and (2) and Rule 2 of this Court)(Application from the Ruling of High Court at Kampala before the Honourable Lady Justice Flavia Anglin Ssenoga in Misc. Application No. 1008 of 2014)

TAKE NOTICE that on the day of. 2015 at O'clock in the morning/afternoon or as soon thereafter as he can be heard, Dr. John - Jean Barya, advocate for the above named applicants will move the Court for an order.

(a) that leave be granted to the applicants to appeal the decision of the learned appellate Judge of the High Court in Miscellaneous Appeal No. 97 of 2014 arising from High Court Miscellaneous Application No. 477 of 2013 which the learned appellate Judge refused to grant in Miscellaneous Application No.1 008 of 2014 and;

(b) the proceedings in HCCS No. 222 of 2013 be stayed until final disposal of this application.

(c) Costs of the application be provided for on the grounds that-

i) This Court and the High Court have concurrent jurisdiction to grant leave to appeal.

ii) The applicants informally applied for the leave to appeal but the learned appellate Judge advised that a formal application be filed.

iii) Miscellaneous Application No. 1008 of 2014 was filed seeking the leave to appeal but the application was disallowed and the parties ordered to prepare for trial of HCCS No. 222 of 2013.

iv) There are issues of law and fact that constitute grounds of appeal which require serious judicial consideration by this Court.

v) It is in the interest of justice.

The application will be supported by the affidavit of Byamugishsa Nester Esq. Sworn on the 10th day of February 2015 or any other affidavits that may be filed in due course.”

This application is supported by the affidavit of Mr. Nester Byamugisha who is stated to be an advocate with Barya- Byamugisha and Co. Advocates. The relevant paragraphs 3,4,5,6 and 7

stipulates as follows

3. That in HCCS No. 222 of 2013 which was filed on the 3/5/2013 main relief sought against the respondents jointly and/or severally is for a liquidated sum of UShs. 2,612,795,040/= (two billion six hundred twelve million seven hundred ninety five and fourty) together with

25% compounded annually from 1999 till payment in full but the plaintiff paid filing/court fees for the suit based on Shs. 2,612,795,040/= only. A photocopy of the amended plaint (without annexures) is "A".

4. That the applicants filed Miscellaneous Application No. 477 of 2013 for an order for the respondent to furnish security for costs and while arguing the application before the Registrar I raised several objections in law regarding the competence of the suit, particularly one relating to failure by the respondent to pay sufficient fees upon filing the main suit. A photocopy of the application with supporting affidavits only with the necessary annexures is "B1", "B2" and "B3".
5. That I based this argument on the reasoning that the nature of the relief sought was monetary; that filing/court fees on a monetary claim is charged on the value of the subject matter at the time of filing which, in this case, should have been the aggregation of the specific sum claimed of Shs. 2,612,795,040/= after applying the compound interest rate as claimed at the time of filing the suit.
6. that I relied inter alia on the Affidavit of Asaba Arthur, a B.Com Graduate and CPA (Level Three) student who, applying a standard formula for calculating compound interest, in, inter alia, a book entitled "Financial Management and Policy" by James C. Van Home found that the total claim by the respondent at the time of filing the suit was Shs. 64,358,754,571/=. (As per annexure "B2" (Supra).
7. That the learned Registrar dismissed Misc. Application No. 477 of 2013 on the sole basis that the affidavits of, inter alia, Asaba Arthur contained falsehoods which rendered the application a nullity but he did not consider the argument as to insufficient fees at all or refer to the other points of law to the Judge for determination or guidance as I had requested him to do since the effect of the objection on points of law being upheld would render the suit to be dismissed which the learned Registrar did not have jurisdiction to do. A photocopy of the typed record (without accompanying materials) is "C". A photocopy of the ruling is Annexure "C2"

The respondent filed an affidavit in reply deposed to by Peter Allan Musoke an advocate with Godfrey S. Lule Advocates. It generally refutes the allegations set out in the affidavit in support of the motion. It is dated 7th April 2015.

When this application came up for hearing the applicants were all represented by **Dr. John-Jean Barya**, while the respondent was represented by **Mr. Godfrey Lule** who appeared jointly with **Mr. Peter Allan Musoke**.

Dr. Barya submitted that this was an application for leave to appeal the decision of the **High Court in Miscellaneous Application 1008 of 2014**, and is also seeking orders staying the hearing and determination **High Court Civil Suit No. 222 of 2013** from which this application arises.

He submitted that this Court has jurisdiction to hear and grant the orders sought since the High Court had declined to grant them in similar application. He submitted further that there are important issues of law and fact which required serious judicial consideration by this Court.

He stated that the main issue for judicial consideration in this application is “*whether or not the compound interest at 25 % per annum from 1999 to the date of filing the suit ought to be computed and added to the claim for special damages of shs. 2.6 billion in order to determine the actual value of the subject matter.*”

He submitted that this issue had been raised before both the Assistant Registrar and the Judge but it had not been resolved. That the Judge misdirected herself when she relied on **Section 26** of the Civil Procedure Act to resolve the issue, which section was not applicable.

He submitted that the main principle in an application of this nature for leave to appeal is whether there is a *prima facie* case and whether there are issues of law and fact that constitute the grounds of appeal. He submitted that the issue of the fees payable in the circumstances outlined above in this case constituted an important point of law that ought to be considered on appeal by this court.

He asked Court to grant the application.

Mr. Lule opposed the application. He submitted that it was not brought in good faith. That the issue which the applicants are seeking this court to resolve on appeal should await the full trial and thereafter may be determined on appeal against the final Judgment. He submitted that there is no principle for determination of court fees as submitted by the respondent’s counsel. That counsel’s arguments are based on speculation and conjecture. He submitted further that court is a revenue collecting

department of Government and that Court fees constitute Government revenue or tax and that tax can only be imposed by law. That court fees are determined by statutory instruments and there is no law that supports the applicant's contention that court fees are determined by legal principles.

That the Judge had addressed the issue of fees and determined it. That the same issue had also been determined by the Supreme Court in *Attorney General Vs Virchard Mithalal and Sons Ltd, Supreme Court Civil Appeal No. 20 of 2007*.

He submitted that there were no serious issues for determination by this court, the issue having been determined by the Supreme Court. He asked this Court to dismiss the application and to order the main suit to proceed in any event.

In rejoinder Dr. Barya submitted that the Supreme Court decision cited by Mr. Lule was not relevant to the question for determination on appeal in this case. That the issue for determination is in respect of computation of court fees and not liability on interest which the Supreme Court determined in *Attorney General Vs Virchard Mithalal case* (Supra).

He retaliated his earlier submissions and prayers.

Resolution of issues:

We have been constrained to write a rather lengthy ruling because both parties at this court and at the High Court dwelt at length on the issue of the value of the subject matter and the court fees payable, which issues were largely irrelevant to the resolution of the application from which this application for leave to appeal emanates.

We considered it important to discuss at length the history of this application, and how it metamorphosed from an application for security of costs to an appeal in the High Court in respect of the law and principles governing the determination of court fees in a civil matter and to an application for leave to appeal in this court. We are making a rather exhaustive ruling because we feel too much time has been rather wastefully spent by the parties to this application on these

preliminary applications instead of having the real controversies in dispute determined by having the substantive *High Court Civil Suit No. 222 of 2013* heard and determined on merits by the High Court as the trial Court.

The applicant's arguments in this application, as we understood them, were that the applicants deserve to be granted leave to appeal to this court because

- . The applicants having filed an application for security for costs, the High Court Assistant Registrar ought to have granted it and ordered the respondent to pay security for costs amounting to Shs.500,000,000/= and that he erred when he summarily dismissed it.
- . The respondent's suit has no likelihood of success as, *inter-alia*, no notice of intention to sue was issued upon the 2nd applicant as required by law.
- The suit is time barred.
- . The amended plaint was filed without leave of Court and or consent of the defendants and as such the suit is not maintainable.
- . The respondent paid insufficient filing fees and as such the suit is a nullity.
- . The respondent has no means of meeting the legal costs of the applicants in the event that the suit is dismissed as the respondent has been experiencing financial problems.

The instructions fees likely to be awarded to applicants upon the dismissal of the suit would be based on the value of the subject matter.

- . The value of the subject matter is shs.2.612,795,040/= plus interest at 25% per annum from 1999 to May 2013 when the suit was filed making a total value of shs. 64,358, 754,571/ = .

Filing fees payable by the respondent ought to have been calculated on the basis of the value of the subject matter inclusive of the interest.

. The learned Judge erred when she dismissed the reference and when she also declined to grant the applicants leave to appeal.

This application ought to be granted as the intended appeal *prima facie* raises important issues of law to be determined by this Court on appeal.

As we have already stated above this application arises from an order of the Assistant Registrar of the High Court dismissing an application for security for costs.

The application for security for costs had been brought under **Order 26** of Civil Procedure Rules and had nothing to do with payment of court fees.

The issue as to what amount ought to have been paid as filing fees by the respondent at the filing of the suit was not one of the grounds set out in chamber summons from which this application eventually emanated.

The orders sought and the grounds relied upon in that application have already been reproduced above and they did not include the issue of filing fees.

It appears to us that the issue of filing fees was brought up later to support the applicants' argument that the respondent would not afford to pay instruction fees in the event of the suit being dismissed. That argument was expanded and extended to include the determination of the value of the subject matter which was stated to be 2.6 billion shillings in the plaint. In order to enhance the value of the subject matter the applicant sought to add interest of 25% from 1999 to the date of filing the suit as set out in the plaint. The applicants' argument was that the respondent should have paid filing fees based on 64 billion shillings as the value of the subject matter. That the respondents have paid insufficient fees based on the wrong value of 2.6 billion shillings and that this in itself rendered the suit a nullity. Therefore there was sufficient reason for court to grant the application for security for costs.

With respect, we do not find this argument tenable. An application to reject a plaint on account of

failure to pay sufficient filing fees cannot be brought by way of chamber summons under **Order 26** of the Civil Procedure Rules.

In any case **Section 97** of Civil Procedure Act allows parties with the permission of Court to pay filing fees at any time, if it is determined that either no fees were paid or that the fees paid were insufficient. That Section stipulates as follows;-

“97 Power to make up deficiency of court fees.

Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom the fee is payable to pay the whole or part, as the case may be, of that court fee; and upon the payment the document, in respect of which the fee is payable, shall have the same force and effect as if the fee had been paid in the first instance. ”

From the above law failure to pay sufficient Court fees cannot in anyway render a suit a nullity. In this case however, the court itself was satisfied that sufficient fees had been paid.

Be that is it may, we accept Mr. Lule’s submissions that court fees constitute Government revenue. Taxes and non tax revenue can only be determined by law. The public cannot pay any taxes or other revenue to Government unless the same has been set out by law. The law setting up payment of court fees is the **Judicature (Court fees) Rules, Statutory Instrument No. 13-1**. That law is made under the provisions of the Judicature Act (CAP 13). There is nothing in that law that requires filing fees to be computed in the manner suggested by counsel for the applicants. In other words, we find that there is no requirement that where a claim includes interest, that interest ought to be computed and added on to the claim in order to determine the court fees payable.

This Court in the case of Uganda Revenue Authority Vs Siraje Hassan Kajura, Court of Appeal Civil Appeal Number 26 Of 2013, (Unreported) held as follows in regard to tax statutes;-

“one traditional and cardinal principle to the interpretation of taxing statutes must be

borne in mind and should always be the starting point for any tax assessment. This principle was espoused in the English case of Cape Brady Syndicate v IRC (1921) K.B 64. where Rowlatt, J held that:

“In a taxing Act, one has merely to look at what is clearly said. There is no room for an intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used”

This is the literal approach whose effect is that a tax provision must be interpreted strictly. A subject is not to be taxed without clear words from a taxing statute for that purpose. ”

We think the above principle applies to tax and none tax revenue payable to Government.

We therefore, find that the argument of Dr. Barya in this regard that there is a principle of law that governs the computation of court fees in the manner he has described above untenable and we reject it.

In any event, the issue of filing fees was irrelevant in the determination of an application for security for costs from which this application to appeal emanates and therefore cannot in anyway constitute a basis for an appeal.

We accordingly find, on the basis of the above reasons that the issue of adequacy of the court fees paid filing in court ***High Court Civil Suit No. 222 of 2013*** is not a valid and /or sufficient ground for granting leave to the applicants to appeal to this court.

We also observe that in the determination of whether to grant or not grant an order for security for costs under ***Order 26*** of the Civil Procedure Rules the value of the subject matter is not the determining factor. The amount that may be payable as instruction fees is not the determining factor either. They both constitute some of the factors court may take into account while exercising its discretion to grant or not to grant the order.

The applicants belabored to prove that the respondent was impecunious and as such could not afford to pay legal costs in the event of the suit being dismissed. Impecuniousness is not a ground for ordering a party to pay security for costs. If it were so, justice would only be for the rich. It would

amount to sending the poor away from the seat of justice. This would offend **Article 21** of the Constitution which guarantees equality before the law irrespective of a person's economic and social status. It would also offend the provisions of **Article 126 (2) (a)** of the Constitution.

The argument therefore that the applicants be granted leave to appeal so as to contend that the respondents should have been ordered to pay security for costs simply because it had no known assets within the jurisdiction of court and that it was facing financial problems is misconceived.

It would probably have been tenable had the applicants proceeded under **Section 404** of the **Companies Act (CAP 110)**. It states as follows

“404. Costs in actions by certain limited companies.

Where a limited company is plaintiff in any suit or other legal proceeding, any Judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his or her defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given. ”

It appears to us that in cases like this where the plaintiff, now respondent, is a limited liability company, court in its discretion may grant an order for security for costs if it is satisfied by credible evidence that there is reason to believe that the plaintiff company will be unable to pay legal costs. ***See; Development Finance Company of Uganda and 2 other Vs Uganda Polybags Ltd Court of Appeal Civil Appeal No. 24 of 1999.***

In this case, however, this application for security for costs was not brought under the Companies Act. It was brought under **Order 26** of Civil Procedure Rules in which the court has wider powers and unfettered discretion to grant or not to grant an order for security for costs. No foundation has been established, in our considered view, why leave to appeal should be granted to the applicants where it has not at all been shown that the trial Judge wrongly exercised her discretion when she refused to grant an order for security for costs.

In any event, the affidavits relied upon by the applicants in **Miscellaneous Application No. 477 of**

2013 before the Assistant Registrar were found to be false. The relevant parts of those affidavits have been reproduced above. Mr. Asaba confirmed upon cross examination that his affidavit was false in material facts relating to his qualifications. Mr. Bwambale also confirmed under cross examination that his affidavit was false in so far as it related to his knowledge of the respondent's financial status. These were key material facts without which the application was unsustainable. It would still have been unsustainable had it been brought under **Section 404** of the **Companies Act** reproduced above. That section requires an applicant for an order for security for costs to provide the Court credible evidence that the respondent company would not be able to pay costs of the defendant. In this case clearly there was no such evidence, the application having been based on false affidavits.

The Assistant Registrar correctly in our view rejected them. Having rejected the affidavits he was left with no other alternative but to dismiss that application. The reference to the Judge could not have cured those deficiencies.

The power to grant an order for security for costs both under Civil Procedure Rules and the Companies Act is discretionary. An appellate court would only interfere with such discretion where the trial Judge acted contrary to the established principles.

We have found nothing to suggest that the Judge who heard the reference acted on a wrong principle. We have therefore, no reason to interfere with her discretion. The issues raised by the applicant before her were largely irrelevant. She was justified in rejecting them and in dismissing the reference. There is no plausible reason given the above, why leave should be granted to the applicants to lodge an appeal against the decision of the trial Judge. An appeal would be a waste of time and resources. We find that the applicants and respondent should instead pursue the hearing of the substantive *High Court Civil Suit NO. 222 of 2013*.

Unfortunately the Judge was lured into irrelevant issues regarding filing fees, by counsel for the applicants. She ought to have restricted herself to the issue as to whether or not an order for security

for costs ought to have been granted. Nevertheless she still held that there were no grounds for grant of such orders.

The other grounds that had been advanced by counsel for the applicant for grant of an order for security for costs were that the suit was frivolous and had no likelihood of success and that the applicants had a good defence to the suit.

Counsel for the applicants had contended that a Statutory Notice of intention to sue had not been issued upon the 2nd applicant as required by the law.

It is perplexing to us that Dr. Barya and Mr. Nester Byamugisha both being Senior Advocates and law lecturers are unaware of the decision of this court in ***Kabandize and 20 Others Versus Kampala Capital City Authority Court of Appeal Civil Appeal No. 28 Of 2011*** which declared that statutory notices are no longer a legal requirement. In any event, in this particular case, the statutory notice would have been in respect of only one party. The suit would still have been maintainable against all the other defendants. That argument is therefore devoid of merit and as such warrants no grant of leave to appeal to this court.

The other contention was that the suit is time barred and that this was a possible ground of appeal.

Whether or not a suit is time barred as contended by counsel is an issue that cannot be resolved in an application for security for costs brought under **Order 26** of the Civil Procedure Rules. That issue ought to have been raised separately as a preliminary objection or, a formal application, ought to have been brought under **Order 7 Rule 11** of the Civil Procedure Rules which states as follows:-

“11. Rejection of plaint.

The plaint shall be rejected in the following cases-

- (a) *where it does not disclose a cause of action;***
- (b) *where the relief claimed is undervalued and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do***

so;

(c) *where the relief claimed is properly valued but an insufficient fee has been paid, and the plaintiff, on being required by the court to pay the requisite fee within a time to be fixed by the court, fails to do so;*

(d) *where the suit appears from the statement in the plaint to be barred by any law: (Emphasis added).*

(e) *where the suit is shown by the plaint to be frivolous or vexatious*

Court cannot reject a plaint on account of its being barred by limitation and at the same time grant application for security for costs. An application for security for costs ought to be granted where the suit is likely to proceed on merits. Where there is no likelihood of the suit proceeding on merit then the defendant ought to apply for its immediate dismissal or for the rejection of the plaint.

Therefore, this argument is also untenable and we reject it as a basis for granting leave to the applicants to appeal to this court.

Again it was contended that the amended plaint was filed without leave of court or consent of the defendant and therefore it was necessary to appeal to this court. No evidence was provided to support this assertion. Even if it were so, the remedy would not lie in the grant of an order for security for costs. In any event rejecting an amended plaint would not on its own have nullified the suit. The suit would still have been maintainable under the original plaint. All the above arguments were clearly misconceived.

This application and High Court Miscellaneous Applications No.

1008 and 97 of 2014 all appear to have been brought to delay or derail the hearing of the main suit.

A suit which was filed in 2013 could by now have been heard and determined but it is still pending because of the applications of this nature.

We find no merit whatsoever in this application as it is frivolous, vexatious and an abuse of court process.

Accordingly we hereby dismiss it with costs.

Dated at Kampala this 27th day of May 2015

HON. REMMY KASULE

JUSTICE OF APPEAL

HON. FAITH E.K MWONDHA

JUSTICE OF APPEAL

HON. KENETH KAKURU

JUSTICE OF APPEAL

HON. KENETH KAKURU

JUSTICE OF APPEAL