

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CIVIL APPLICATION NO 225 OF 2014**

**(ARISING FROM CIVIL APPEAL NO 222 OF 2013)**

**(ARISING FROM HIGH COURT CIVIL SUIT NO 009 OF 2009)**

**MUHAMMED SWALEH ALI :::::::::::::::::::::::::::::::::::APPLICANT**

**VERSUS**

**KELLEN: MUHIMBISE:::::::::::::::::::::::::::::::::RESPONDENT**

**CORAM: HON.MR. JUSTICE CHEBORION BARISHAKI, JA (SINGLE JUSTICE)**

**RULING**

This Application was brought by way of Notice of Motion under Rules 2(2), 105(3) and 43 of the Judicature (Court of Appeal rules) Directions SI 13-10 for orders that; The Respondent do give further security for the costs of the Applicant in respect of Civil Appeal No 222 of 2013 in the Court of Appeal and costs of this Application be provided for.

The grounds of the Application are expounded in the affirmation of Muhammed Saleh Ali dated 2<sup>nd</sup> of June 2014, the Applicant herein and was opposed by the Respondent in her Affidavit in Reply dated 9<sup>th</sup> of December 2015.

When this matter came up for hearing, the Respondent had not filed an Affidavit in Reply which Counsel for the Respondent blamed on the Applicant's Counsel that he had not been served. He applied for

extension of time and prayed for an adjournment to file a reply. Both the application for extension of time and adjournment were granted and court directed both parties to file written submissions one week apart. It is unfortunate that the time frame directed by the Court was not respected by both Counsel hence the delay in the ruling.

The respondent sued the Applicant, Cairo Bank and George Begumisa in the High Court at Fort Portal seeking among other reliefs, cancellation of the Applicant's title and a declaration that he acquired the suit land comprised in LRV 3658 Folio 13 plot No 10 Lugard Road, Fort Portal, Kabarole District) fraudulently. The parties entered a Consent vide **HCMA 035/2009** whereby the Respondent agreed to deposit in Court **Shs 750,000/= [Seven Hundred Fifty Thousand Shillings Only]** per month effective August 2010 in respect of the suit property until disposal of the main suit. Judgment in the main suit was delivered on 24<sup>th</sup> September 2013 in favour of the Applicant. The Respondent appealed to this Honourable Court and obtained an interim order for stay of execution **vide** CAMA No. 409 of 2013 on the 25<sup>th</sup> day of April 2014. She has not obtained a stay of execution in the main application (MA No .408 of 2013). The Applicant then filed this Application on the 2<sup>nd</sup> day of June 2014 and it only came up for hearing on the 3<sup>rd</sup> day of December 2015.

The Applicant was represented by Mr Okello-Oryem while the Respondent was represented by Mr Emoru Emmanuel

In his written submissions, Counsel for the Applicant relied on the case of **GM Combined (U) Ltd v AK Detergents (U) Ltd SCCA No. 34 of 1995** in support of the Application where Justice Oder held at page 18 that;

*From the many authorities I have considered above, the summary of the position of the merit of the plaintiff's case or that of the defendant as a factor in exercising the Courts discretion under 0.23 r.1 and section 404 of the Companies Act in favour or against an application by a defendant for s.f.c. 3 may be stated as follows*

- 1. A major consideration is the likelihood of success of the plaintiffs case; put differently, whether the plaintiff has a reasonably good prospect of success; or whether the plaintiffs claim is bona fide and not a sham;*
- 2. If there's a strong prima facie presumption that the defendant will fail in his defence to the action the Court may refuse him s.f.c.; it may be a denial of justice to order a plaintiff to give s.f.c. of a defendant who has no defence to the claim;*
- 3. Whether there's an admission by the defendant on the pleadings or elsewhere that money is due;*
- 4. If the defendant admits so much of the claim as would be equal to the amount for which security would have been ordered the Court may refuse him security for he can secure himself by paying the admitted amount into Court.*
- 5. Where the defendant admits his liability the plaintiff will not be ordered to give s.f.c.;*
- 6. Where there is a substantial payment into Court or an "Open offer" of a substantial amount, an order s.f.c. will not be made.*

*In a nut-shell, in my view, the Court must consider the prima facie case of both the plaintiff and the defendant. Since a trial will not yet have taken place at that stage, an assessment of the merit of the respective cases of the parties can only be based on the pleadings, on the affidavits filed in support of or in opposition to the application for s.f.c. and any other material available at that stage.*

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Counsel submitted that it is basically grounds 1 and 2 which apply to this application and therefore concentrated on them.

He submitted that the Respondent's case was already tried by the lower court and was accordingly dismissed with costs. It follows therefore, that the Respondent's case was already assessed by a competent court and found to be without merit. That on this basis alone, an order for security for costs would properly issue as sought by the Applicant.

He further submitted that the trial court already established that the Respondent's claim to the property is a sham. He submitted that the Memorandum of Appeal filed by the Respondent in her Appeal, doesn't offer any grounds upon which the Court can set aside the finding of the trial court that the Applicant herein was a bonafide purchaser for value and without notice of any fraud. That the Memorandum does not state the fraud committed and how the Applicant herein was either aware of it or a party to it. That rather, the grounds of Appeal are simply generic and without actual complaint regarding fraud on the part of the Applicant or his knowledge thereof. It follows that there is absolutely no likelihood of success of the appeal as against the Applicant herein.

Counsel submitted that the Respondent has failed or refused to deposit in Court the **750,000/= [Seven Hundred Fifty Thousand Shillings Only]** effective from August 2010 being mean profits in respect of the suit property, that she is not engaged in any known economic activity from which she derives an income. That the Respondent shall not be able to pay costs of prosecuting the appeal by two different Law firms and also pay mesne profits and past costs in the lower court.

Counsel submitted that as much as the Respondent in her Affidavit in reply claims to have been depositing the said amount of 750,000/ in court, she has not made any payments since 2013.

Counsel for the Respondent in his reply submitted that no case has been made out for an order for further security for costs by the Applicant in the instant Application. He submitted that the grant of an order for further security for costs is a matter of judicial discretion and that the burden lies on the Applicant to satisfy court that the circumstances justify an order being made. He referred to the case of **Bank of Uganda V Joseph Nsereko & Ors SCCA No 7 of 2002** to fortify his submission.

Counsel further submitted that there has been inordinate delay in filling (sic) and prosecuting this Application. He noted that Judgment was given against the Respondent on the 27<sup>th</sup> day of August 2013(sic); the Respondent filed Civil Appeal No 222 on 27<sup>th</sup> November 2013. The Applicant served the Respondent with this Application on or about the 1<sup>st</sup> of December 2015 yet it was filed on 2<sup>nd</sup> of June 2014. He equally pointed out that the Application was signed by the Registrar Court of Appeal on 23<sup>rd</sup> December 2014 and fixed for hearing on 3<sup>rd</sup> of December 2015. He submitted that these set of facts are not consistent with a litigant who really wants further security for costs. That the dilatory conduct on the part of the Applicant smirks of sheer lack of interest in the Application and it is just a gimmick to further elongate or prolong the Appeal. He relied on the case of **Transroad Ltd V Bank of Uganda SCCA No 43/95** to support his contention and alluded to Paragraph 11 of the Respondent's Affidavit in Reply. He submitted that this Application is prejudicial in so far as the Respondent will need some time to comply

with such an order which will result in the delay of disposal of the appeal or it may lead to the dismissal of the appeal all together. He therefore prayed that the Application be dismissed on this ground alone.

Counsel further<sup>»</sup> submitted that the Respondent's appeal is meritorious and has a high likelihood of success. He listed grounds of appeal as they appear in the memorandum of appeal and submitted that the Respondent's case basically revolves around fraud committed by the Applicant in collusion with his co-defendants in the main suit. The Respondent contends that the learned trial Judge failed to properly evaluate the evidence on court record hence arriving at the wrong finding

He also submitted that the application contains material falsehoods especially **Paragraph 2** of the Affidavit in Support where the Applicant deponed that the Respondent by her own Consent was ordered to deposit in court shs 750,000/= effective August 2010 being mean(sic) profits in respect of the suit property but has failed to do so

It is Counsel's submission that the Respondent has capacity to pay costs (if any) which is supported by Paragraph 4 of her Affidavit in Reply where she listed her various properties. He points out that this evidence was not rebutted by way of an affidavit in rejoinder. He referred to the case of **Non-Performing Assets Recovery Trust v General Industries (U) Ltd CACA 25/96 F19971 KALR 423**

Counsel pointed out that the Applicant in his submission attempted to smuggle in the issue of past costs which were not prayed for in the application and this Court should reject it. He submitted that the Consent Order to pay 750,000/= to Court was not to pay costs

Counsel submitted that in case this Court grants the Order prayed for, the quantum put by the Applicant at 50,000,000/= is unreasonably high and excessive and he proposed an amount of 1,000,000/= as fair and reasonable

I agree with Counsel for the Respondent and the authority of *BANK OF UGANDA v JOSEPH NSEREKO & 2 Ors (Supra)* that this Court does have very wide discretion pursuant to the provisions of *Rule 105(3)* of the Rules of this Court under which this application was brought to order payment of further security for costs. The discretion has to be exercised judicially. I find it relevant to reproduce the said rule;

***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***

Indeed it is now well settled that an applicant for security for costs has a burden to satisfy court that the circumstances that justify the grant of the order exist. In *Lalii Gangfi vs Nathoo Vasanfee (1960) E.A. 315*, Windham J.A., considered the application of rule 60 of the rules of the then Court of Appeal for East Africa which was in similar terms as rule 105 (3) of the rules of this Court. At p.317 he said:-

***"under r.60 the burden lies on the applicant for an order for further security, as it normally lies on any applicant to a court for any relief, to show cause why that relief should be granted, and that he cannot, merely by averring that the security already deposited for costs of the appeal is inadequate, or that costs in the***

***action below ordered in his favour, have not been paid, impose any obligation upon the Court to grant his application "***

I need to point out the interchangeable use of the words "**security for costs**" and "**further security for costs**" by the Applicant's Counsel. Security for costs in this Court is mandatory for all Appellants and is fixed at 200,000/= under rule 105(1) for civil appeals while further security for costs is granted at the discretion of court upon application by the Respondent as provided under rule 105(3) (supra). It is unclear what Counsel for the Respondent meant in his submission when he said "**Applications for further security for costs are considered on the basis that security has already been paid but the Applicant wants court to order further security for costs.**" To me, he is saying one and the same thing that further security for costs is ordered by Court. Be it as it may, in Paragraph 11 of the Affidavit in Reply, the Respondent depones "*that I already paid security for costs at the time of filling (sic) the current appeal as prescribed by law*". Therefore the Applicant's Application for further security for costs is rightly before this Court.

Counsel for the Respondent invited Court to reject the authority of GM Combined (Supra) which was cited by the Applicants as it is not applicable in this case. I am unable to accept Counsel's contention because considerations for security for costs and further security for costs tend to overlap and yet they are distinct and separate. Indeed in the GM Combined case, Justice Oder had this to say at page 13;

***"Turning to the local scene, the majority of the decisions appear to deal mainly with further security for costs or past costs relating to***



*matters in question on appeals... Some are relevant to the issues we are dealing with in the instant case and some are not.”*

On the issue of inordinate delay raised by Counsel for the Respondent, he rightly described the history of this Application. For an Application which was filed over six months after the appeal was instituted, signed by the Registrar five months later and fixed for hearing the following year and yet the Respondent was served a day before the hearing is simply inconceivable. There was definitely inordinate delay in filing this Application but more so in prosecuting it. Having found that, the next issue is if this inordinate delay is prejudicial to the Respondent? Counsel submitted that this Application is prejudicial in so far as the Respondent will need some time to comply with such an order which will result in the ' delay of disposal of the appeal or it may lead to the dismissal of the appeal all together. However, I find this contradictory to his later submission that the Respondent has the capacity to pay costs (if any). But looking at this case as a whole, the Respondent is in occupation of the suit property (commercial building with shops) from which she derives some income, she obtained an interim order staying execution from this Court and she also lodged a caveat on the suit property. I do not think granting this Order would prejudice her.

That said, the substantial question in this application is whether a case has been made out for granting an order for further security for the costs in this Court.

In regard to Court establishing a prima facie case, it was the contention of the Applicant's Counsel that the Respondent's case was already tried by the lower court and was accordingly dismissed with costs. It follows

therefore that the Respondent's case was already assessed by a competent court and found to be without merit. That on this basis alone, an order for security for costs would properly issue as sought by the Applicant. With respect I disagree with Counsel on his submission because it is not true that once a party has been successful in a lower court, that alone is sufficient ground for an Appellate Court to grant an order for further security for costs. The circumstances spelt out in ***GM Combined (U) Ltd v AK Detergents (U) Ltd (supra)*** and other authorities for that matter have to be assessed. I have already pointed out that this Court does have very wide and virtually unfettered discretion pursuant to the provisions of rule 105(3) to either grant or refuse to grant an order for further security for costs.

And in regard to the consideration of whether the Respondent/Appellant's claim is bonafide and not a sham, Counsel for the Applicant submitted that the trial court already established that the Respondent's claim to the property is a sham. He further submitted that Memorandum of Appeal filed by the Respondent in her Appeal, doesn't not offer any grounds upon which the Court can set aside the finding of the trial court that the Applicant herein was a bonafide purchaser for value and without notice of any fraud. That the Memorandum does not state the fraud committed and how the Applicant herein was either aware of it or a party to it.

***The Law dictionary defines "bonafide" to mean "In or with good faith; honestly, openly, and sincerely; without deceit or fraud. Truly; actually; without simulation or pretence. Innocently; in the attitude of trust and confidence; without notice of fraud, etc."***

Upon perusal of the Memorandum of Appeal, the Appellant's claim does not seem to be a sham.

I find the submission of the Applicant's Counsel that the Memorandum does not state the fraud committed and how the Applicant herein was either aware of it or a party to it problematic. Formulation of grounds (for civil appeals) is guided by **Rule 86(1)** of the Rules of this Court and if the grounds were formulated as Counsel has suggested, it would have offended the Rules. Besides, it is the duty of this Court to reappraise evidence and come to its own conclusion.

I shall now turn to the main grounds in support of this Application. From the Affidavit in Support to the Applicant's submissions, I see that the basis of this Application is the contention that the Respondent has no known asset whatsoever and is not engaged in any known economic activity from which she derives an income and therefore, in the absence of any known asset of the Respondent who is not engaged in any known economic activity from which she derives an income, the Applicant shall have no recourse and will be unfairly prejudiced in the event of dismissal of the appeal.

That the Respondent in her own consent in **HCMA 035/2009** was ordered to deposit in Court Shs **750,000/= [Seven Hundred Fifty Thousand Shillings Only]** effective August 2010, being mean profits (I believe he meant mesne profits) in respect of the suit property, but has failed or refused to do so from August 2010.

The Respondent attached Receipts to show that she kept on depositing money in the High Court of Uganda at Fort Portal although not in the stipulated amounts. Some receipts have less money and others have

more but since the amount is not an issue, I will not delve into that. But most importantly, Counsel for the Applicant misdirected himself on the issue of the Consent Order. I agree with Counsel for the Respondent that the Consent Order clearly stated that the Respondent was to deposit the said amount of 750,000/= “every month effective August 2010 till the final disposal of the suit” [Emphasis mine]. It is therefore perplexing that Counsel still expects the Respondent to keep on depositing the said amount even after the suit was finally disposed of on the 24<sup>th</sup> day of September 2013 (not on 27<sup>th</sup> August 2013 as Counsel for the Respondent indicated in his submissions) when Judgment was delivered. And I also agree with Counsel for the Respondent that the said Order does not mention anything to do with mean or mesne profits. So I do not find any merit in this contention.

Regarding the issue of past costs, I agree with Counsel for the Respondent that they were not prayed for in the Application although Counsel for the Applicant alluded to it in his submissions. Indeed there is no evidence of the Applicant’s costs being taxed and failure of the Respondent to pay the same. In the circumstances, the issue of past costs is untenable.

Turning to the first contention, the Applicant has not produced any evidence to show that the Respondent has no known asset whatsoever and is not engaged in any known economic activity from which she derives an income. In the case of **BANK OF UGANDA v JOSEPH NSEREKO & 2 Ors (Supra) , Justice Mulenga, JSC (RIP)** while handling a similar Application where the Applicant alleged that the Respondents whereabouts and assets were unknown, held that;

***“Clearly lack of knowledge on the part of the applicant cannot amount to evidence of the respondent's inability.***

***The applicant ought to have provided more substantial evidence on which a court can base a decision”***

***Counsel for the Applicant contradicted himself on this issue on page 5 of his submission where he said "...The Respondent who claims to have substantial income and properties to meet the costs will not suffer any injustice because she can afford it...”[Emphasis mine]***

Counsel for the Applicant submitted that the Respondent had capacity to pay costs (if any). Indeed the Applicant in her Affidavit in Reply (Paragraph 4) rebutted the Applicant’s allegation and deponed that she has different properties (3 pieces of land and a car and attached Sale Agreements in proof thereof) and also deponed that she is a maize farmer in Fort Portal. In the written submissions, Counsel for the Applicant noted with concern that none of the properties is actually in the Respondent’s names though she purported to have bought them long ago. I do agree with Counsel that none of the properties is registered in the Respondent’s name but that does not mean that they don’t belong to her. She has equitable interest in them and I must add that I am not aware of any law which stipulates that you cannot be the owner of property if you are not registered or the time frame for a person to register/transfer land or a car they have bought in their name. Before taking leave of this issue, I do not agree with Counsel for the Respondent’s argument that **“some of the properties owned by the Respondent are by their nature owned by way of a sale agreement as the document of title. For instance, for the two kibanja.**

**holdings, no other documents of title are necessary to prove ownership and so is the motor vehicle** It is erroneous to say so because people own properties in other ways such as gift inter vivos or through inheritance. And no other documents of title would be necessary to prove ownership if the Respondent had legal title to the property. But as I had indicated above, the Respondent has equitable interest in the property which is recognized under the law.

The applicant's suspicion that the respondent might fail to pay the costs if her appeal in this Court fails, is not shown to be well founded.

In conclusion, I decline to grant the order for further security for costs and this Application is therefore dismissed. Each party should bear their costs. I so order.

Dated this 9<sup>th</sup> day of March 2016.

Hon.Mr. Justice. Cheborion Barishaki,JA