

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL REFERENCE NO. 182 OF 2016 AND CIVIL APPLICATION
NO. 366 OF 2018

(Arising from Civil Application No. 88 of 2016)

(Arising from Civil Appeal No. 51 of 2016)

(Arising from H.C.C.S No. 318 of 2002)

CONCORP INTERNATIONAL LTD:..... APPLICANT

VERSUS

UGANDA MUSLIM SUPREME COUNCIL:..... RESPONDENT

CORAM: HON. JUSTICE F.M.S EGONDA NTENDE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. JUSTICE REMMY KASULE, Ag, JA

RULING OF COURT

The applicant filed **Civil Reference No. 182 of 2016** against the decision of Hon. Justice Cheborion Barishaki, JA, sitting as a single Justice, in which His Lordship ordered that the applicant herein deposits within thirty days, security for the respondent's costs in the High Court and the Court of appeal which order was made on 04.08.2016 in Court of Appeal **Civil Application No. 88 of 2016**.



Thereafter, the respondent after the expiry of the thirty days without the deposit of the security for costs having been effected, filed in this Court of Appeal **Civil Application No. 366 of 2018** under **Rules 2(2), 43, 44 and 105 (3) of the Judicature (Court of Appeal Rules)** Directions seeking for orders that **Civil Appeal No. 51 of 2016 (Concorp International Ltd vs Uganda Muslim Supreme Council)** be struck out for failure by the respondent (now applicant) to deposit the said security for costs as ordered by this Court in **Civil Application No. 88 of 2016** within the stipulated time.

By way of background, the applicant herein had earlier sued the respondent in the High Court Commercial Division in **HCCS No. 318 of 2001** demanding for payment of over \$5,000,000 (five million dollars) arising out of a building contract with the respondent. The suit was dismissed and the respondent was ordered to refund \$ 2,024,442 to the Government of Uganda being the amount paid to it by the Uganda Government in excess of the contract amount. The respondent was also ordered to pay the taxed costs of the suit which were taxed at Ug.shs 626,920,569/=.

Dissatisfied with the High Court decision in **HCCS No. 318 of 2001**, the applicant appealed against the same to this Court through Court of Appeal **Civil Appeal No. 51 of 2016**. The respondent then lodged **Court of Appeal No. 88 of 2016** seeking an order of this Court that Concorp International Ltd, the applicant herein, give security for taxed costs and those yet to be incurred.



The Civil Application No. 88 of 2016 was determined by Hon. Justice Cheborion Barishaki, JA, sitting as a single Justice. The learned Justice only partly allowed the application. He ordered Concorp International Ltd to deposit in Court Ug. shs. 626,920,569/= as security for the taxed costs. He declined to grant the order for further security for costs. The applicant was dissatisfied with the Ruling of His Lordship the single Justice, by lodging **Civil Reference No. 182 of 2016** to the full bench of this Court. It is the reference which is now before us. The same is being considered together with the already stated **Civil Application No. 366 of 2018**, seeking dismissal of **Court of Appeal No. 51 of 2016**.

Representation

At the hearing, Learned Counsel Salim Makeera and Timothy Lugayizi appeared for the applicant while Kakooza Shamir appeared for the respondent.

Preliminary Objection

The respondent's Counsel raised a preliminary point of law that the **Civil Reference No. 182 of 2016** was filed out of time. Counsel submitted that a Reference filed under **Rule 55 of the Court of Appeal** Rules should be filed informally to the Justice at the time the decision, the subject of the Reference is given; or in writing to the Court Registrar within seven (7) days from the date of delivery of the said decision.



Learned Counsel argued that the decision of Hon. Justice Cheborion Barishaki, JA in **Civil Application No. 88 of 2016** was delivered on 4.08.2016 and the grounds of the Reference had been filed in Court on 18.12.2019. The Reference was accordingly filed out of time, learned Counsel so submitted.

In reply, learned Counsel for the applicant to the Reference contended that the Reference had been filed by way of a letter on the 11.08.2016 within the stipulated time and that what was filed on 18.12.2019 contained elaborate grounds that would be argued before the Court entertaining the Reference.

Rule 55(1) (b) of the Court of Appeal Rules provides that;

“55. Reference from decision of a single Judge

(1) Where under section 12(2) of the Act, any person dissatisfied with the decision of a single Judge of the Court

(b) in any civil matter wishes to have any order, direction or decision of a single Judge varied, discharged or reversed by the Court, the applicant may apply for it informally to the Judge at the time when the decision is given or by writing to the registrar within seven days after that date”. (Emphasis added)

The letter to the Registrar of the Court of Appeal on page 1 of the record of the Reference is dated and was filed in Court on 11.08.2016 which was within time. Counsel for the respondent did not challenge the authenticity of this letter. This Court accordingly accepts the same as an authentic one. It follows therefore that this Reference was



lodged in time of the requisite 7 days on 11.08.2016 against a decision of the single Justice delivered on 04.08.2016. The objection through a preliminary point of law of the Reference being lodged out of time has no merit. The same is thus over ruled.

Applicant's submissions

Learned Counsel for the applicant submitted that the learned single Justice of Appeal erred in awarding the respondent security for costs yet the applicant company was and is in receivership. Counsel maintained that when a company is impecunious, it could be a ground for granting security for costs; but if such a grant will stifle the applicant company from further carrying out its litigation in a case that has prospects of success, then an application for security for costs should not be granted.

Learned Counsel further submitted that if the security for costs is maintained, the applicant company will not be able to pursue this appeal which has a possibility of success since the learned High Court trial Judge made a gross error of ordering the applicant, who was plaintiff in **HCCS No. 318 of 2001** to pay US \$ 2,024,442 to the Uganda Government, when the Government was never a party to the said suit. Learned Counsel thus prayed this Court to allow this Reference and to dismiss the application seeking to strike out **Civil Appeal No. 51 of 2016**.



Respondent's submissions

In reply, learned Counsel for the respondent submitted that this Reference is against an exercise of discretion by a single Justice wherein jurisprudence is clear that this discretion can only be revisited if in fact the single Justice acted on a wrong principle. Counsel contended that the Hon. Single Justice considered quite pertinently the key factor, that the respondent was a foreign entity with no assets within this jurisdiction. Learned Counsel also submitted that whereas the applicant company is in receivership, its impecuniosity was not caused by the actions of the respondent. Accordingly learned Counsel prayed this Court to dismiss the Reference and also to allow **Civil Application No. 366 of 2018** by striking out **Civil Appeal No. 51 of 2016**.

Consideration of Court

We have considered the submissions by both learned Counsel as to the merits and de-merits of this Reference. **Application No. 88 of 2016** is in the nature of an appeal and therefore the duty of this Court is akin to that of a first appellate Court determining an appeal from a decision made by a trial Court. That duty is to re-appraise all the evidence and materials availed to the single Justice who determined the application from which this Reference is made, draw inferences and then arrive at an independent decision. See: **Rule 30(1) (a) of the Judicature (Court of Appeal Rules) SI 13-10**.



Rule 105 (3) of the Judicature (Court of Appeal Rules) Directions grants this Court discretion to order payment of further security for costs and security of past costs. The Rule states that;

“105. Security for costs in civil appeals.

(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 payment of past costs relating to the matters in question in the appeal.”

See also; **Kifamunte Henry vs Uganda; S.C Crim. Appeal No. 10 of 1997**. We shall bear this duty in mind while resolving the issues before us.

In the case of **Noble Builders (U) Ltd and Another Vs Jabal Singh Sandhu S.C.C.A No. 12 of 2004**, Justice Mulenga, JSC (RIP) cited **De Bry Vs Fitzgerald and Another (1990) 1 ALLER 560** on the rationale for the discretionary grant of an order for security for costs, to the effect that;

“a defendant should be entitled to security if there is reason to believe that, in the event of his succeeding and being awarded costs of the action, he will have real difficulty in enforcing that order. If the difficulty would arise from the impecuniosity of the plaintiff, the Court will of course have to take an account of the likelihood of his succeeding in his claim, for it would be a total denial of justice that poverty should bar him from putting forward what is prima facie a good claim. If, on the other hand, the problem is not that the plaintiff is impecunious but that, by reason of the way in which he orders his

affairs, including where he chooses to live and where he chooses to keep his assets, an order for costs against him is likely to be unenforceable only by a significant expenditure of time and money, the defendant should be entitled to security.”

Further, in the case of **Sir Lindsay Parkinson & Co. Ltd Vs Triplan Ltd [1973] QB1 611 at page 626**, Lord Denning M.R stated that;

“if there is a reason to believe that the company cannot pay the costs then security may be ordered. The Court has discretion which it will exercise considering all the circumstances of that particular case”.

The applicant’s ground upon which this Reference is based is that;

1. The learned single Justice of the Court of Appeal erred in the exercise of his jurisdiction when he granted to the respondent security for past costs after having found that;
 - a) The appeal is bonafide and not a sham and that it has a reasonably good prospect of success.
 - b) The applicant company is in receivership and therefore unable to pay its debts.

From the Reference record, it is undisputed that the applicant company is a foreign company and is not engaged in any known economic activity and neither has it any known income or assets. It was also submitted that the applicant company is under receivership and an order to pay costs will stifle its appeal, which appeal has reasonable good prospect of success.



In **Civil Application No. 88 of 2016**, the applicant sought payment of 10% of the Ug. shs 52 billion as security for costs, which the learned Justice of Appeal found would stifle the respondent's right to appeal. The learned Justice held that;

“In conclusion, the application succeeds in part, I direct the respondent to deposit in Court UGX 629,920,562/=, within thirty days from the date of this Ruling as security for past costs (taxed costs). Each party should bear their costs for this application.”

Having considered all the submissions, the pleadings and the legal authorities both statutory and case law, we find no reason to interfere with the learned single Justice's exercise of discretion when he held that the now respondent, Uganda Muslim Supreme Council was entitled to have security for the past costs awarded in **HCCS No. 318 of 2001** only and declined to grant an order for further security for future costs.

Whereas the applicant company is alleged to be in receivership, no evidence was led to show that the respondent caused the financial problems of the applicant forcing the applicant company to go into receivership. From the authority of **Noble Builders (U) Ltd and Another Vs Jabal Singh Sandhu (supra)**, regard has to be weighed on both sides. Should the claim of the respondent succeed, the respondent should be able to enforce the award of costs and other reliefs against the applicant. But also likewise, an award of security for costs should not stifle the applicant's appeal which is already



pending in this Court. A balancing act must be made so as to ensure justice in the matter.

We have analyzed both considerations and find that the order to deposit in Court UGX 629,920,569/= as security for the taxed costs in **HCCS No. 318 of 2001** was judiciously arrived at by the learned single Justice of this Court. We find no reason to interfere with it. We also find no convincing reason advanced for us to order the applicant to deposit further security for the yet to be determined costs that are likely to arise out of the yet to be determined, still pending in this Court, **Civil Appeal No. 51 of 2016**. We uphold the decision of the learned single Justice of not ordering the applicant, Concorp International Ltd, to further deposit more money by way of more security for future costs likely to arise from Court of Appeal **Civil Appeal No. 51 of 2016**.

As to striking out **Civil Appeal No. 51 of 2016** by reason of the applicant's failure to deposit in this Court the ordered security for costs of Ug. shs. 629,920,569/=, we appreciate the fact that the applicant, the appellant in the said appeal, has been pursuing the matters of **Civil Application No. 88 of 2016** and also those of this very Reference, all relating to the Court orders as to payment of that very security of costs.

We accordingly find it appropriate not to strike out **Civil Appeal No. 51 of 2016** by reason of the applicant, having failed to deposit the said security within the thirty days from 4th August 2016 as ordered by the learned single Justice in **Civil Application No. 88 of 2016**.



Accordingly **Civil Application No. 366 of 2018** for striking out **Civil Appeal No. 51 of 2016** is disallowed. The applicant is hereby given an opportunity by way of extension of time of thirty (30) days within which to make that deposit of security for costs.

In Conclusion, we hold that:

1. The **Civil Reference No. 182 of 2016; Concorp International Ltd Vs Uganda Muslim Supreme Council** is hereby dismissed and the orders made by the learned single Justice in Court of Appeal **Civil Application No. 88 of 2016** are hereby upheld.
2. Court of Appeal **Civil Application No. 366 of 2018; Uganda Muslim Supreme Council vs Concorp International Limited**, is hereby disallowed and Court of Appeal **Civil Appeal No. 51 of 2016** is to remain on the Register of the Court of Appeal subject to the appellant in that appeal complying with the orders herein given.
3. The applicant, Concorp International Limited is hereby ordered to deposit in this Court the security for costs of Ug. shs. 629,920,569/= within a period of thirty days (30) from the date of delivery of this Ruling.
4. In case of failure by Concorp International Limited to deposit the said security for costs in full and within the stated period of thirty (30) days from the date of this Ruling, as ordered in number 2 above, then, in such a case, unless this Court orders otherwise, **Civil Appeal No. 51 of 2016; Concorp International Limited vs Uganda Muslim Supreme Council**,



shall automatically stand struck out of the Register of the Court of Appeal with costs, by reason of the appellant, Concorp International Limited, having failed to comply with the order of this Court to deposit in this Court the ordered security for costs.

As to costs of this **Civil Reference No. 182 of 2016** and **Civil Application No. 366 of 2018**, each party shall bear its own costs in each cause.


Dated this 21st day of December 2020.


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HON. JUSTICE F.M.S EGONDA NTENDE, JA


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HON. JUSTICE STEPHEN MUSOTA, JA


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HON. JUSTICE REMMY KASULE, Ag. JA