THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEAL NO 22 OF 2011

[ARISING FROM MISCELLANEOUS APPLICATION NO 330 OF 2011]

(ARISING FROM CIVIL SUIT NO 13 OF 2010)

1. **BOKOMO UGANDA LTD]**
2. **MICHAEL RICHARDSON]……APPLICANTS**

VERSUS

MR RAND BLAIR]

T/A MOMENTUM FEEDS]…… RESPONDENT/PLAINTIFF

BEFORE HONOURABLE JUSTICE CHRISTOPHER MADRAMA

RULING

This is an appeal made under section 79 (1) of the Civil Procedure Act, order 44 rule 1 (u) of the Civil Procedure Rules and article 126 (2) (e) of the Constitution of the Republic of Uganda for orders that:

1. The registrar's decision dismissing the appellant's application for security for costs be reversed.
2. That the registrar be directed to hear the application for security for costs and determine the same on its merits.
3. Costs of the appeal be borne by the respondent/plaintiff.

The grounds of the appeal are contained in the notice of motion are:

1. The registrar erred by considering and evaluating the submissions made by the appellants advocates.

2. The registrar erred by not scrutinising the court file to establish the state and stage of pleadings on the record.

The appeal was brought by Notice of motion under S. 79 (1) of the Civil Procedure Act, O.44 r 1(u) of the Civil Procedure Rules and Art 126(2) (e) of the Constitution for orders that; the Registrar's decision dismissing the appellants application for security of costs be reversed, the Registrar be directed to hear the application for security for costs and determine the same on its merits and costs.

The motion is supported by the affidavit of Mr. Michael Richardson, the second appellant in this case.

The main grounds for the appeal are that; the Registrar erred in not considering and evaluating the submissions made by the appellant's advocates, the Registrar erred in not scrutinising the court file to establish the state and stage of pleadings on the record.

The brief background to this application is that the applicants filed an application for security of costs; MA No. 330 of 2011, by chamber summons under O. 26 r 1 and 3 of the Civil Procedure Rules and Legal Notice No. 4 of 2003. At the hearing of this application on 26th September 2011 before the Registrar, Counsel for the respondent objected to the application on the ground that it was barred time barred, under O.12 r 3(1) of the Civil Procedure Rules, which provides that all remaining interlocutory applications should be filed within 15 days from the ADR reference. Counsel submitted that the suit was filed on 15th January 2010, the defence was filed on 3rd February 2010 and mediation took place on 26th May 2010, when it failed and the matter was referred to the court for trial. Counsel for the respondent argued that the application should have been filed by 17th June 2010, but it was filed on 21st June 2011. Mr. Muyanja filed a written response to the objection in which he submitted that the mediation took place under the Judicature (Commercial court Division) (Mediation) Rules S.I 55 of 2007, made under S. 41 of the Judicature Act Cap 13, and therefore it is not proper to say that the mediation proceedings were pursuant to O.12 r 3 of the CPR and that mediation under 0.12 can only take place under the supervision of court. Furthermore, that there had never been a scheduling conference.

The respondent emailed a copy of the reply to the applicant's submissions to Counsel Muyanja. The respondent's counsel argued that O. 12 r 3 of the CPR provides that all interlocutory applications must be filed within 21 days of completion of ADR and that the mediation that took place is a form of ADR, it takes place at the commercial court and therefore, time started to run on the completion of the mediation and that the time can only start to run after the scheduling conference if there has been no mediation.

The registrar ruled on the 7th November 2011, that O.12 r 3 (1) of the CPR is mandatory and that the application time barred.

In the affidavit in support of the motion, Mr. Michael Richardson deposed inter alia that he was advised by his advocate that the registrar's ruling does not indicate that the Registrar considered the submissions of Counsel Muyanja, opposing the preliminary objection and that the ruling of the Registrar does not indicate that the Registrar examined the court file to establish the state and stage of the pleadings. Examination of the court file was necessary to establish which version of the facts argued before the Registrar was true.

At the hearing of the appeal the Appellant was represented by learned Counsel Jimmy Muyanja while the Respondent was represented by Learned Counsel Titus Kamya. Both counsel agreed to put in written skeleton arguments and also clarify on the submissions orally in court.

Written submissions of the Appellants

It is an undisputed fact that no scheduling conference has ever taken place hitherto, in the main suit High Court civil suit number 13 of 2010. The court record indicates that conference scheduling had been set down for the 2nd of May 2012. The registrar has set down miscellaneous application number 3030/2011 for hearing on 26th of September 2011. This was an application for security for costs given that the respondent/plaintiff is no longer resident in Uganda. The respondents counsel raised a preliminary objection to the effect that security for costs application was filed out of time since mediation was concluded on the 26th of may 2011. The respondents counsel raised this preliminary

objections submissions based on order 12 rule 3 (1) of the Civil Procedure Rules and relied on the case of **Stop and See vs. Tropical Africa Bank** Miscellaneous Application number 333/2010. The applicants filed a written response to the preliminary objection on 26 September 2011. It is presumed that the respondent filed a written reply with the court (annexure C) this is because the respondent never served this in reply upon the applicants. The registrars ruling dated 17 November 2011 upheld the preliminary objection and the appellant decided to bring this appeal.

Counsel contended that the compulsory court connected mediation which took place, falls outside the purview of order 12 of the civil Procedure Rules. This is because compulsory court connected mediation is governed by the Judicature (Commercial Court Division) (Mediation) Rules. Therefore learned counsel contended that his colleagues preliminary objection to the application was misconceived when he submitted that the court connected mediation had taken place pursuant to order 12 rules 3 of the Civil Procedure Rules. Learned counsel submitted that mediation arises under order 12 of the Civil Procedure Rules in two instances namely:

- Firstly if the court deems it fit under order 12 rules 1 of the Civil Procedure Rules. This regression was the first declaration on compulsory reference to mediation by court. Unlike mediation under the mediation rules, which rules are limited to the Commercial Court Division.
- Secondly counsel contended that if the parties agree, the matter before court may be referred to mediation under order 12 rules two of the Civil Procedure Rules.

Learned counsel for the appellant further contended that whatever the case mediation under order 12 of the Civil Procedure Rules is commenced pursuant to a court order while mediation under the mediation rules is made and a statutory directive. It is common knowledge that reference to alternative dispute resolution under order 12 of the CPR includes mediation. Learned counsel contended that the time lines set out in order 12 rule 3 only apply in two instances:

Firstly where a scheduling conference has taken place and secondly where during the conference the court has referred the matter to alternative dispute resolution. Counsel submitted that the suspension of time under rule eight (4) of the mediation rules only applies to mediation, carried out pursuant to court orders issued under order 12 of the Civil Procedure Rules.

Learned counsel therefore prayed for orders that:

- The Registrars order dismissing the Appellants application for security for costs be reversed.
- The Registrar be directed to hear the application for security for costs and decision on its merits.
- Costs of this appeal be borne by the Respondent/Plaintiff.

Respondent's skeleton submissions

Learned counsel for the respondent submitted that the application before court is bad in law. He contended that under order 50 rules 8, the appeal is from the order of the registrar. No order was extracted before the appeal was lodged rendering the appeal incompetent. Learned counsel referred to the case of WTM Kisule versus Nampewe [1984] HCB 55 where it was held that an appeal to the High Court must be against a Magistrate Grade 1 decree or order. The decree or order must be extracted and be filed together with the memorandum of appeal. Learned counsel for the respondent submitted that therefore the respondents appeal was improperly before the court.

Secondly learned counsel contended that the learned registrar duly considered the views and submissions of both counsel in making her ruling. The ruling of the registrar was correct and there been no need to tamper with that decision. In this regard, learned counsel contended that order 12 rule 3 (1) requires interlocutory applications be filed within 21 days from the date of the completion of the alternative dispute resolution and where there has been no alternative dispute resolution, within 15 days after the completion of the scheduling conference. That date is the cut-off date. Consequently learned counsel maintained that the respondent's submission is that the mediation conducted by the court appointed

mediator is done under the permission or authorisation of the court for which the trial judge expects to get a report before he can schedule the case. Counsel contended that this court arranged mediation is a form of alternative dispute resolution (ADR) envisaged by order 12 rules 3 of the Civil Procedure Rules.

Learned counsel submitted that under order 8 rule (4) of the Judicature (Commercial Court Division) Mediation Rules 2007 reference is made to order 12 rule 2 (2) of the Civil Procedure Rules which provides for the timelines of carrying out the alternative dispute resolution. It enlarges this time. Clearly these rules were later rules and affected order 12 thereby creating an alternative dispute resolution mechanism of mediation under order 12.

Learned counsel submitted that the crux of the appeal is an interpretation question. In addressing this interpretation question, he contended that the mischief rule is relevant. Quoting Haydon's case (1584) 3 Co. Rep. 7a, as reported by Lord Coke the court in the interpretation of statutes whether penal or not is to consider:

1. What was the common law before the making of the Act?
2. What was the mischief or defect for which the common law did not provide?
3. What remedy the Parliament has resolved in appointed to cure the disease of the Commonwealth?
4. The provisions of the remedy

In the construction of an Act as enunciated in Salkeld v. Johnson (1848) 2 Ex 256 it is necessary to consider:

a. the Act in the ordinary sense, and to alter or modify the words as far as is necessary to avoid the manifest ambiguity;
b. the state of the law which the Act purposes or purports to deal with;
c. the mischief which the Act is intended to remedy;
d. the nature of the remedy proposed; and
e. The statutes in pari materia as a means of explaining the Act.

Learned counsel submitted that under the mischief rule of statutory interpretation, the direction/rules envisaged under order 12 rule 2 (3) of the CPR to be sanctioned by the Chief Justice. The Judicature (Commercial Court Division) Mediation Rules 2007 were promulgated under section 41 of the Judicature Act which provides for a rules committee mandated to make rules regulating procedure and practice before the High Court. It is noteworthy that under section 40 the Chief Justice is a member of this rules committee and by extension the directions of the Chief Justice were reduced into these rules making it unnecessary to come up with any practice direction. This rules affected order 12 by qualifying the alternative dispute resolution to the mediation in respect of the commercial court.

When order 12 rule 1 (1) is analysed, the court is supposed to foster mediation or any other form of settlement. Under order 12 rules one (one) (B) this mediation, arbitration or alternative dispute resolution was expected to be held within 28 days from the last pleadings filed under order 8 rule 5. This time, could only be extended by court. The spirit of this rule is to hasten the time within which mediation, arbitration or alternative dispute resolution and scheduling would take place so as to expedite the trial. Indeed it is in this spirit that order 12 rule 2 (2) of the Civil Procedure Rules provided for a limited time of 21 days for conducting the ADR which time was extended by rule 8 (4) until after the date of the report filed in court completing the mediation. It should be noted that rule eight (four) relates the mediation in the commercial court to the ADR referred to in order 12 (2) of the CPR. It is in the same spirit that order 12 rule 3 was drafted to provide that all interlocutory applications must be filed within 21 days from the date of completion of the ADR. Clearly it was the laws intention to hasten the procedures for hearing interlocutory applications such that justice is not delayed in the spirit of article 126 of the constitution.

Counsel submitted that it would be a result so capricious and absurd, one that would defeat common sense and the spirit of both the mischief behind the enactment of order 12 of the civil procedure rules and the Judicature (Commercial Court Division) Mediation Rules 2007, to hold otherwise by saying that order 12 envisages another mediation and scheduling before the timelines

can begin to run. If this was so, this would unnecessarily prolong and delay trials by unnecessary mandatory procedures of mediation and ADR when another could be ordered at scheduling especially in the commercial court against the spirit of the enabling laws, rules and constitution of Uganda. In applying the Golden of statutory interpretation, in criminal versus Clark (1883) 8 Appeal Cases 114 at 131 it was held to be a useful rule in the construction of statutes to "adhere to the original meaning of the words used, and to the grammatical construction unless, it is at variance with the intention of the legislature to be collected from the statute itself, or leads to a manifest absurdity or repugnance, in which case the language of the statute may be varied or modified so as to avoid such inconvenience, but no further". Therefore the court should in the present case strain every nerve to avoid the result that will create an absurdity by rendering void the time spent by the parties in the mediation and that the commercial court and delaying justice by permitted endless applications outside stipulated time limits of court.

Regardless of the fact that order 12 of the Civil Procedure Rules applies to all courts, it should be noted that order 12 is modified by the Judicature (Commercial Court Division) Mediation Rules in as far as the Commercial Court Division of the High Court is concerned. Furthermore rule 11 and 12 (12) (d) (e) of the Judicature (Commercial Court Division) Mediation Rules provides for the extension or abridgement of time under order 12 rule 2 (2) of the Civil Procedure Rules there by modifying order 12 of the Civil Procedure Rules to provide for the ADR as the mediation envisaged by the law. It is noteworthy that rule 10 requires an express order of the court before a party can be exempted from mediation. This is therefore mediation with the full authorisation or order of the court under order 12 of the Civil Procedure Rules.

Counsel contended that the matter before court is affected by both legislation. Considering the fact that compulsory court assisted mediation is the preserve of the Commercial Court Division and not any other court he submitted that to this extent the ADR envisaged under order 12 is that already carried out by a court mediator under the Judicature (Commercial Court Division) Mediation Rules 2007.

He submitted that where there is an active a subsequent and related legislation, it is deemed that it was the intention of the lawmakers to create modifications in the law. Therefore since the Judicature (Commercial Court Division) Mediation Rules is the most recent, the intention of the lawmakers was to implement the application of order 12 with the necessary modifications in as far as the commercial court is concerned. Learned counsel submitted that the commercial court was initially intended to be a pilot project to be hopefully rolled out to the whole country.

Learned counsel submitted that in this case the mediation had already taken place. Mediation is one of the forms of alternative dispute resolution adopted by the commercial court and envisaged under order 12 rule 3 (1) of the CPR. The mediation proceedings in the commercial court are sanctioned by the commercial court and where they failed, the matter is referred to the judge for trial. Indeed the mediation was conducted by his worship Arutu as mediator and closed the mediation when the parties failed to agree.

Learned counsel submitted that for the time to start running after the scheduling conference is only applicable where there has been no mediation or any other form of alternative dispute resolution. In this case there was one and therefore the fact that the scheduling is not concluded is immaterial or irrelevant.

Learned counsel submitted that there was inordinate delay in filing the application. The application was filed out of time. The suit was filed on 15 January 2010, the defence was filed on 3 February 2010 and mediation in the case was concluded on 26th of May 2010. When the mediation failed in the case was referred for hearing. This application was supposed to be filed within 21 days of the date of closure of mediation by 17 June 2010 but instead the applicants filed the application on 21st of June 2011 over a year later. The only remedy to the appellants existed under order 51 rules 6 to apply for enlargement of time to file the application which they did not do. Learned counsel referred to the case of Stop and See (U) Ltd Versus Tropical Africa Bank Ltd miscellaneous application number 333 of 2010.

Learned counsel contended that no injustice is caused to the appellants nor would there be a miscarriage of justice if this appeal was not granted since there was inordinate delay by the applicant to bring the application for security for costs of a year from the completion of the mediation". Inordinate delay is a strong factor considered by the court when declining to grant an application for security for costs. Regardless to the timelines relating to alternative dispute resolution and scheduling, the appellants have at all times since filing their defences in 2010 failed to apply for security for costs. In the result learned counsel prayed that the appeal is dismissed with costs and the suit be heard on merits.

Appellant's submissions in rejoinder

In rejoinder learned counsel for the appellant submitted as far as the preliminary objection that the decree has not been extracted as follows: that an order from the registrar, the extracted as a decree under section 2 (C) of the civil procedure act which excludes from the definition of the decree "any adjudication from which an appeal lies as an appeal from an order".

Furthermore court directed mediation under order 12 rules 3 of the Civil Procedure Rules only arises when a judge has considered the file during conference scheduling in the presence of the parties.

Under rule 8 (3) of the Mediation Rules 2007, the registrar is vested with administrative powers to divert or five mediation in the absence of a challenge against referral of the case to edition under rule 9 or 10 of the Mediation Rules 2007. The policy of the alternative dispute resolution under the Mediation Rules reflects the multi-door policy of the Commercial Court Division.

The registrars administrative decision to divert the case to mediation cannot be challenged under rules 8 (3) of the Mediation Rules 2007. Learned counsel submitted that it can be recorded as a fact that neither the appellants nor the respondents challenged the registrar's referral of the instant case the mediation.

Reply to paragraph seven respondent's reply:

Learned counsel submitted that it is instructive to note that his worship Arutu who handled the mediation in issue is the registrar appointed pursuant to rule 3 of the Mediation Rules 2007. That is why an application for extension of time under rule 11 Mediation Rules 2007 will be considered by his worship Arutu and not her worship Margaret Tibulya. Learned counsel submitted that all cases mediated under the Mediation Rules 2007 are deemed to have taken place under the registrar's direction -rule 8 (3) – and this evidence is available on the record shows that a judge referred the matter to mediation under order 12 of the Civil Procedure Rules or rules 8 (3) Mediation Rules 2007. The court is vested with powers to refer the matter to petition when it objects any motion filed by a party for exemption from mediation, pursuant to rule 10 of the Mediation Rules 2007.

Learned counsel for the appellant further submitted that whereas any court order referring the case to mediation can be found on the case file, the registrar's reference under the Mediation Rules 2007 cannot be found on the case file.

This is because the mediation under the Mediation Rules 2007 through an independently of the court case flow process and is protected by the confidentiality rule 21 Mediation Rules 2007.

The confidentiality rule explains two things, about the case file and the consideration by this court.

- Firstly why parties can today, only communicate the fact of the mediation having taken place before his worship Arutu under rule 21 (1) (a) of the Mediation Rules 2007.
- Secondly, why if any settlement, partial or final is concluded, can be filed within the case file under rule 20 of Mediation Rules 2007.

Ruling

I have carefully considered the pleadings of the parties, and the record of the appeal. I have also taken into account the written and oral submissions of learned counsels for both parties.

This appeal arises from the ruling of the registrar dated 17th of November 2011. In the written arguments of learned counsel for the respondent, there is a preliminary objection to the appeal on the ground of its competence.

Learned counsel for the respondent submitted that under order 50 rules 8 of the CPR, the appeal is from the order of the registrar. No order was extracted before the appeal was lodged rendering the appeal incompetent. Learned counsel did not quote any rule that required an order to be extracted before an appeal is lodged under order 50 rules 8 of the Civil Procedure Rules. Rule 8 provides as follows:

> "Any person aggrieved by any order of the registrar may appeal from the order to the High Court. The appeal shall be by motion on notice."

Learned counsel for the respondent relied on the case of **Kisule versus Nampewo [1984] HCB 55** where it was held that an appeal to the High Court must be against the decree or order of a Magistrate Grade 1. The decree or order must be extracted and be filed together with the memorandum of appeal. Consequently the court held that there was no appeal properly before it and struck out the appeal. This case is clearly distinguishable on the ground that the court was considering the provisions of section 232 (1) (4) of the Magistrate's Court Act No. 13 of 1970 which was quoted in the decision as follows,

> "Subject to the provisions of any written law and save as provided in this section, an appeal shall be:
>
> (a) from the decree or any part of the decree and for orders of the Magistrate's Court presided over by the Chief Magistrate or a Magistrate Grade 1 in the exercise of its original civil jurisdiction to the High Court."

The office of a Registrar is not a Magistrates Court but a constitutional post created under the Constitution of the Republic of Uganda article 145 thereof. Secondly there is a specific provision under the Civil Procedure Rules which caters for appeals from the orders of a registrar. The provisions for appeals from the orders of a registrar are separate and distinguishable from provisions relating to appeals to the High Court under the Civil Procedure Rules. Appeals to the High

Court are governed by order 43 of the Civil Procedure Rules. Order 43 rules 1 provides for the form of the appeal and may be read together with the provisions of the Magistrate's Court Act. The Magistrate's Court Act does not apply to registrars. Every appeal is preferred in the form of a memorandum of appeal setting out the grounds of objection to the decree appeal from. On the other hand the Civil Procedure Rules order 50 rule 8 provides for the procedure and the form of an appeal. An appeal shall be by motion on notice. While the appellant applied by notice of motion supported by affidavit as contained in order 52, it cannot be said that the appeal is incompetent. Appeals from orders of a registrar to the High Court are instituted within seven days from the date of the order appealed from under section 79 (1) (b) of the Civil Procedure Act. Section 79 (3) of the Civil Procedure Act provides for the preparation of proceedings before the registrar for purposes of appeals. It provides that:

> "In computing the period of limitation prescribed by this section, the time taken by the court or the registrar in making a copy of the decree or order appeal against and of the proceedings upon which it is founded shall be excluded."

In this particular case the notice of motion is supported by the affidavit of Michael Richardson and it attaches annexure A2 which is entitled “proceedings and the ruling”. No order was extracted from the ruling as envisaged by section 79 above. This is however not fatal. An order is extracted from a ruling and the ruling of the court was attached together with the record of proceedings. Section 2 of the Civil Procedure Act makes that clear. The word "order" means "the formal expression of any decision of a civil court which is not a decree, and shall include a rule nisi”. Under order 50 rules 6 of the Civil Procedure Rules the proceedings before the registrar are deemed to be proceedings in a civil court. In the premises the registrar as the civil court made a ruling from which an order could have been extracted. No order was extracted but the ruling was attached. No prejudice has been occasioned. This is because an order is extracted from a ruling, failure to attach an order is not fatal as the ruling from which it is to be extracted is attached. The requirement for attaching the order implicit under section 79 (3) of the Civil procedure Act is in the circumstances met by attachment of the order as

embodied in the ruling. Moreover the preparation of the order and record of the proceeding is a task to be performed by the Court or the Registrar. The preliminary objection of learned counsel for the respondent on the ground that no decree or order was extracted or attached is accordingly overruled.

The gist of the appeal is that the learned registrar erred in law when she held that the application of the appellant for the defendant to furnish security for costs was time barred under order 12 rule 3 (1) of the Civil Procedure Rules which provides that an application should have been filed within 21 days from the completion of the alternative dispute resolution reference. The question is what is meant by 21 days from the alternative dispute resolution reference? This is in light of separate provisions for mandatory mediation under the Judicature (Commercial Court Division) (Mediation) Rules, 2007 SI 2007 No. 55 rule 8 thereof which provides for mandatory reference to mediation.

The ruling of the registrar set out herein below:

> "I have carefully considered the submissions of both parties, and I think for the reason the affidavit in reply was expunged from the court, the application cannot stand. Order 12 rule 3 (1) CPR is mandatory that the application should have been filed within 15 days from the ADR conference. This application was clearly filed out of time. It is, therefore, dismissed with costs."

The record annexure A2 to the notice of motion shows that the respondent had objected to the application for security for costs under order 12 rule 3 (1) of the CPR. His contention was that the civil suit was filed on 15 January 2010, the defence of the applicant was filed on 3 February 2010, and mediation was concluded on the 26th of May 2010 when the suit was referred back to the judge. Learned counsel submitted that the applicant should have filed the application for security for costs by 17 June 2010 but instead filed it on 21 June 2011 over a year and out of time. Counsel referred the registrar to the judgement of this court in **Stop and See Uganda Ltd vs. Tropical Africa Bank Ltd M.A. No. 333/2010** arising from civil suit number 105/2009. In that case the court applied the timelines in order 12 and struck out an interlocutory application filed out of time.

The interesting point in this controversy is the fact that where mandatory mediation has been carried out under the rules of this court and it is not successful, the registrar in charge of mediation refers the suit for trial and hence also for scheduling.

There seems not to be no controversy about the fact that order 12 of the Civil Procedure Rules which deals with the scheduling conference and alternative dispute resolution, and rule 8 of the Mediation Rules 2007 both apply to the commercial court division. For purposes of analysis it is necessary to set out the respective rules starting with the relevant provisions of the Civil Procedure Rules under order 12. This is order 12 rule 2 which provides as follows:

> "2. Alternative dispute resolution
>
> (1) Where the parties do not reach an agreement under rule 1(2) of this Order, the court may, if it is of the view that the case has a good potential for settlement, order alternative dispute resolution before a member of the bar or the bench, named by the court.
>
> (2) Alternative dispute resolution shall be completed within twenty-one days after the date of the order; except that the time may be extended for a period not exceeding fifteen days on application to the court, showing sufficient reasons for the extension.
>
> (3) The Chief Justice may issue directions for better carrying into effect alternative dispute resolution.

Rule 2 cited above becomes applicable at the scheduling conference where the court holds a scheduling conference to sort out points of agreement and disagreement, the possibility of mediation, arbitration and any other form of settlement under order 12 rule 1. To understand the rule 2, it is necessary to refer back to rule 1 which provides for the scheduling conference. This is because under rule 2 where the parties have not reached an agreement, the court may order an alternative dispute resolution. Order 12 rule 1 provides as follows:

> 1. Scheduling conference.

(1) The court shall hold a scheduling conference to sort out points of agreement and disagreement, the possibility of mediation, arbitration and any other form of settlement—

(a) within seven days after the order on delivery of interrogatories and discoveries has been made under rule 1 of Order X of these Rules; or

(b) where no application for interrogatories and discoveries has been made under rule 1 of Order X of these Rules, then within twenty-eight days from the date of the last reply or rejoinder referred to in rule 18(5) of Order VIII of these Rules, except that the time may be extended on application to the court, showing sufficient reasons for the extension.

(2) Where the parties reach an agreement, orders shall immediately be made in accordance with rules 6 and 7 of Order XV of these Rules.

The rule speaks for itself and I have tried to capture the gist of it. First of all, the provision for holding a scheduling conference by the court is mandatory. This provision applies to all divisions of the High Court. Secondly the intention for holding a scheduling conference is to sort out points of agreement and disagreement, the possibility of mediation, arbitration and any other form of settlement. For purposes of this analysis it is not necessary to set out the timelines for the holding of a scheduling conference by the court. The question of when the court should hold a scheduling conference is not the subject of controversy in this appeal. What is material is that it is under the direction or control of the court and the court sorts out points of agreement and disagreement between the parties. There are two cases scenarios dealing with the party's agreement. The first case scenario is provided for under order 12 rules 1 (2) which provides that where the parties reach an agreement, orders shall immediately be made in accordance with rules 6 and 7 of order 15 of the Civil Procedure Rules. Order 15 rule 6 deals with agreement on questions of law or fact which may be stated in the form of issues to be tried between them. Rule 7 on other hand deals with the powers of the court upon being satisfied and making such inquiries as is proper that the agreement was duly executed by the parties and that the question is fit to be tried and decided, the court will try the issue and

issue judgment according to the terms of the agreement and upon the judgment so pronounced a decree shall follow.

It follows that rule 2 of order 12 only apply where the parties at the scheduling conference do not reach an agreement in the manner stated above. It is also clear that the court has discretion where the parties fail to reach an agreement in the manner stipulated above to make an order that the case be referred for alternative dispute resolution before a member of the bar or the bench named by the court. The court evaluates whether the case has potential for settlement notwithstanding that the parties have failed to reach an agreement. What is material is that the alternative dispute resolution firstly is ordered by the court upon evaluation of the suit during the scheduling conference and secondly the alternative dispute resolution shall be before a member of the bar or the bench to be named by the court. What can be concluded is that once the court appoints a member of the bar or the bench to conduct an alternative dispute resolution effort between the parties, timelines are applied after the completion of the alternative dispute resolution. It is further material in this controversy that the registrar in her ruling relied on rule 3 of order 12 of the Civil Procedure Rules. The rule provides for certain timelines which are set out below:

> 3. Interlocutory applications.
>
> (1) All remaining interlocutory applications shall be filed within twenty-one days from the date of completion of the alternative dispute resolution and where there has been no alternative dispute resolution, within fifteen days after the completion of the scheduling conference; that date shall be referred to as the cutoff date.

Order 12 rule 3 (1) of the Civil Procedure Rules provides for the timelines within which to file all remaining interlocutory applications from the date of completion of the alternative dispute resolution and where there has been no alternative dispute resolution within 15 days after the completion of the scheduling conference. Within the context of order 12, the other applications which could have been dealt with are applications for interrogatories and discoveries specifically referred to under order 12 rule 1 (1) of the Civil Procedure Rules.

Applications are filed within 21 days from the date of completion of the alternative dispute resolution ordered by the court or 15 days from completion of scheduling conference. The controversy in this appeal arises from the fact that there was no scheduling conference conducted in terms of order 12 of The Civil Procedure Rules. Instead mediation was concluded on the 26th of May 2010 under the new rules of the commercial court, namely the Mediation Rules 2007. Before setting out the provisions of the new rules, it should be noted that the provisions inserting the scheduling conference and alternative dispute resolution provisions were introduced by way of amendment of the Civil Procedure Rules in 1998 by the Civil Procedure (Amendment) Rules 1998 S.1. No 26 of 1998.

Rule 8 of The Judicature (Commercial Court Division) (Mediation) Rules, 2007, provides as follows:

> 8. Mandatory reference to mediation.
>
> (1) A party may not opt out of mediation except where allowed by an order of the court, if the matter is brought to the attention of the court.
>
> (2) In every action filed in or referred to the court after the commencement of these Rules, each party shall indicate in its pleadings, which category of mediator the party prefers to mediate in his or her case.
>
> (3) Notwithstanding any rule in the Civil Procedure Rules to the contrary, appeal, review or other form of challenge shall not be permitted from the referral order of the Registrar or the Judge made under this rules referring a case to the Court for mediation.
>
> (4) Where a matter is referred to mediation the time limits set out in the rule 2 (2) of order 12 (Scheduling Conference and Alternative Dispute Resolution) of the Civil Procedure Rules, or other relevant rules shall cease to run from the date of the referral order, until after the report of the neutral person has been filed in the Court upon completion of the mediation process.

Learned counsel for the appellant submitted that compulsory court connected mediation under the Mediation Rules 2007 falls outside the purview of order 12 of the Civil Procedure Rules. On the other hand, learned counsel for the respondent submitted that order 12 is read with the necessary modifications introduced by the Mediation Rules 2007. His contention is that the mandatory mediation is an alternative dispute resolution mechanism envisaged under order 12 of the Civil Procedure Rules. Secondly, under order 12 the Chief Justice has powers to issue directions for better carrying out of the provisions of order 12 with regard to alternative dispute resolution. In his opinion the Mediation Rules 2007 fulfilled the purpose of the Chief Justice under order 12 rules 2 of the Civil Procedure Rules and it became unnecessary to issue practice directions. I have carefully read and listened to the submissions of both counsel on this question and have set out the skeleton arguments above.

Under the Mediation Rules 2007 the term "court" means the Commercial Court. Secondly, rule 2 applies the rules of all civil actions filed in or referred to the court. Rule 2 gives us the key to understanding rule 8 (4) which is an express attempt to harmonise the Mediation Rules 2007 and order 12 of the Civil Procedure Rules as far as time limits set out therein are concerned. It is clear from the foregoing provisions that there are two kinds of commencement of mediation envisaged by the rules. The first type of mediation is the mandatory mediation which applies to all civil actions filed in the Commercial Court Division of the High Court. As far as the mandatory mediation is concerned, a party may not opt out of mediation except where allowed by the court. The head note of the rule 8 clearly stipulates that it deals with a mandatory reference to mediation. It is a practice of the Commercial Court Division to refer civil actions filed in the court for mediation. Secondly, rule 8 (2) makes it clear there is a distinction between an action that is filed in the Commercial Court Division or referred to the court after commencement of the Rules. In this respect two aspects of the rules must be brought into sharp focus. Rule 8 deals with actions filed in the Commercial Court Division and at the same time deals with actions referred to the Commercial Court Division from other divisions of the High Court under the Civil Procedure Rules.

An important distinction must be made. The Commercial Court Mediation Rules 2007 deals specifically with mediation. It provides that the parties who have filed their actions or are referred to mediation in the Commercial Court Division cannot opt out of mediation. Reference to the Civil Procedure Rules under rule 8 of the Mediation Rules 2007 has the narrow meaning of mediation proceedings only. Mediation is only one of the alternative forms of ADR. It does not include negotiation, arbitration or any other form of ADR. Order 12 of the Civil Procedure Rules is wide enough to incorporate other forms of ADR such as arbitration and negotiation. In other words, rule 8 of the Mediation Rules 2007 incorporates the provisions of the Civil Procedure Rules in general sense of referring to mediation that has been commenced by a reference from another division of the High Court. In this context therefore rule 8 (4) ensures that the provisions of order 12 rule 2 (2) which provides for the time limits exempts the application of the limits in those rules until after completion of the mediation process. What is even material is that the time shall cease to run from the date of the "referral order" until after the report of the neutral person has been filed in the court upon completion of the mediation process. A referral order is made under order 12 rules 2 sub rule 2 of the Civil Procedure Rules. In other words actions filed in the commercial court division do not require a referral order at the commencement of the action. That notwithstanding, the commercial court may make a referral order during the scheduling conference after mandatory mediation has failed. Such a referral order may be for arbitration or negotiation or even mediation. I shall further build on this point.

The question remains as to whether mediation under the mandatory provisions of the Mediation Rules 2007 amounts to the ADR envisaged under order 12 of the CPR. An answer to this question will determine whether rule 3 (1) of order 12 of the Civil Procedure Rules can be invoked upon completion of a mandatory mediation in actions filed at the commercial court division.

What must be borne in mind is that scheduling in the commercial court is commenced after mediation has failed. Rule 20 of the Mediation Rules 2007 provides that where there is no agreement between the parties during the mediation or after the mediation the mediator shall refer the matter back to

court. Because mediation is mandatory, it is automatically sent after the pleadings have been closed and before the matter has been sent to the judge. It follows that the trial judge would not have had any opportunity to evaluate the suit.

It is possible to argue and it is indeed an attractive argument to hold that the mandatory mediation under the Mediation Rules 2007 should be construed as an alternative dispute resolution under order 12 of the CPR and therefore timelines under this order are applicable. A strict construction of order 12 rules 2 of the CPR on the other hand provides for reference of parties to ADR by the court, namely the judge before whom the scheduling conference is conducted. The rule allows the judge to evaluate whether the suit has a good potential for settlement. Secondly it permits the judge and the parties to choose the kind of alternative dispute resolution mechanism to be applied for possible resolution of the suit. Thirdly, the rule preserves the discretion of a judge whether to refer the matter for alternative dispute resolution or not. To hold that the mandatory mediation under the Mediation Rules 2007 and specifically applicable to the commercial court division as an ADR envisaged by order 12 would erase the above qualities of order 12 rule 2 of the Civil Procedure Rules. It would imply that where mediation has failed, the court would no longer exercise its discretion as envisaged under the CPR. Much as this is an attractive argument, a deeper analysis of order 12 is required.

I have accordingly considered the timelines provided for under order 12 of the CPR. These timelines come into operation the moment pleadings are closed. In other words the scheduling conference is supposed to be held immediately and within seven days after the order on delivery of interrogatories and discoveries has been made. Where no application for interrogatories and discoveries has been made under order 10 of the rules, the scheduling conference is to be held within 21 days from the date of the last reply or rejoinder referred to under rule 18 (5) of order 8 of the Civil Procedure Rules. In the case of **Stop and See vs. Tropical Africa Bank** (supra) I considered the question of timelines under order 12 of the Civil Procedure Rules. The intention of the rules is to expedite proceedings. It permits the parties alternative and expeditious and convenient methods of dispute resolution through the ADR provision. This is done under the general

direction of the judge conducting the trial. The introduction of the Mediation Rules 2007 to the commercial court division should be construed as a supplementary and beneficial piece of legislation to be construed in harmony with the true intention for the amendment of the Civil Procedure Rules by introducing the scheduling conference and alternative dispute resolution.

The purpose of alternative dispute resolution or the scheduling conference provisions in the CPR like similar provisions in other jurisdictions particularly Canada and the UK (where there are rules for summons for directions) is meant to secure the just, expeditious and economical disposal of the suit. According to Odgers' on Principles of Pleadings and Practice in Civil Actions in the High Court of Justice 22nd edition at page 254 pre-trial conferencing or summons for directions (in the case of the United Kingdom) tends to cheapen the cost of litigation by reducing the number of interlocutory applications and secondly by providing a stock taking process before the action comes to trial so that the parties shall not incur unnecessary expense at the trial. This intention is in harmony with the purpose for which the Commercial Court was established under rule 2 of The Constitution (Commercial Court) (Practice) Directions. The rule provides that the commercial court division was established to address and put in place effective measures for streamlining the machinery for judicial resolution of commercial disputes. It is meant to deliver to the commercial community an efficient, expeditious and cost-effective mode of adjudicating disputes that affect directly and significantly the economic, commercial and financial life of Uganda. The Commercial Court Practice Directions are meant to further increase the efficiency, expedition and cost-effective mode of adjudication of disputes. It therefore adds to order 12 of the Civil Procedure Rules and does not subtract from its intention.

It follows that where mediation has been concluded under the mandatory rules of the commercial court division, timelines provided for under order 12 rule 3 (1) of the CPR comes into operation. This construction does not prejudice the scheduling conference and maintains the intention of expedition by promulgation of order 12 rule 3 sub rule 1 in the CPR. Order 12 rule 3 (1) of the CPR ensures that applications other than those applications mentioned in order 12 rule 1 of the CPR are dealt with in an expeditious manner. Because the scheduling

conference comes after the mandatory mediation in the commercial court division, it adds additional days to the timelines envisaged by order 12 of the CPR. Yet the rules of the commercial court division are meant to speed up the process. There will be no damage to the language used by the Rules Committee if order 12 rule 2 of the CPR is construed to include mandatory mediation under the Mediation Rules 2007. What the Mediation Rules 2007 does is to make a reference to mediation mandatory. Mediation is merely a specific form of ADR.

I am further persuaded in this approach by the fact that alternative dispute resolution under rule 2 of order 12 of the CPR is not limited to mediation but include other alternative dispute resolution mechanisms or methods. After mandatory mediation fails the file can be sent to the judge for scheduling conference. The judge after evaluation of the dispute may refer it to another kind of alternative dispute resolution. The judge is not precluded from referring it to a second mediation attempt by the order of the court. By that time, an application for security for costs should have been made within the time provided for under order 12 rule 3 (1) of the CPR. The application cannot prejudice the scheduling conference. If anything, the trial judge may take it into account at the preliminary hearing under rule 6 of the Constitution Commercial Court Practice Directions.

Before I close this matter, it is not disputed that there has been no scheduling conference in this case. In that regard the ruling of the registrar is erroneous in so far as she refers to a time of 15 days from the date of the ADR conference. This may have influenced the premises from which the appellant argued the appeal. Order 12 rule 3 (1) of the Civil Procedure Rules provides for two timelines. The first timeline is 21 days from the date of completion of the alternative dispute resolution. The second time line specifies that where there has been no alternative dispute resolution, all remaining interlocutory applications shall be filed within 15 days after completion of the scheduling conference. On the basis of the first timeline, it is not in dispute that there has been mandatory mediation. In other words there has been an alternative dispute resolution attempt to resolve this suit. The second aspect of the rule is in the alternative in that it provides where there has been no alternative dispute resolution then time is reckoned from the date of completion of the scheduling conference. For

emphasis there has been no scheduling conference in this case. Last but not least, the timelines provided for in the above quoted rule only give a framework for the filing of interlocutory applications and must be read in conformity with order 12 rule 1 (1) which gives timelines within which a scheduling conference is supposed to be held. The timelines in order 12 rule 3 (1) read together with the rest of the rules gives a predictable timescale within which interlocutory applications are expected to be filed. The only unpredictable part is how long an alternative dispute resolution would take if it has been ordered by the court under order 12 rule 2 of the CPR. Last but not least the rule assumes two things, namely an order of the court to hold an alternative dispute resolution effort in the absence of which, the holding of a scheduling conference. These are events which are presumed to have taken place under order 12 rule 3 (1) for purposes of applying the timescale provided for in the rule. Looking beyond that presumption is the fact that the scheduling conference would have taken place within a predictable time provided for by rule 1 of order 12 of the Civil Procedure Rules. To conclude the point, the intention of the rule-making authority is fulfilled if any alternative dispute resolution is carried out within the timescale as envisaged by order 12 rules 1 and 2 of the CPR. By carrying out mandatory mediation under the Mediation Rules 2007 the event envisaged by rule 3 of order 12 of the Civil Procedure Rules is deemed to have occurred. For the timelines to come into operation would fulfil the intention of the rule-making authority for setting time limits within which to file all remaining interlocutory applications after the completion of an alternative dispute resolution effort. The remaining part of the rule dealing with scheduling conference would not apply for purposes of timelines. Unless a party is exempted from mandatory mediation under the Mediation Rules 2007, all interlocutory applications in any matter other than those which arise after the suit has been filed have to be filed within 21 days from the date of completion of mandatory mediation under the Mediation Rules 2007 as far as the Commercial Court Division is concerned.

I further agree with the submissions of learned counsel for the respondent that in any case there was in ordinate delay in that the application for security for costs was filed over a year after the mandatory mediation. Yet under order 12 of the

Civil Procedure Rules such applications are to be filed within 21 days after completion of the ADR. An application for security for costs should be made without delay. In Miscellaneous Civil Appeal Number 689 Of 2011 (Arising Out Of Miscellaneous Application Number 527 Of 2011 And HCCS No 319 Of 2009) Royal Group of Pakistan Vs. Mavid Pharmaceuticals Ltd I observed that an order for security for costs provides protection for the defendants in cases where in the event of success it would be difficult to realise costs from the plaintiff. According to Mulla in the "Code of Civil Procedure" 16th edition volume 30 at page 3242:

> "... security for costs can be ordered only in exceptional circumstances on some established principle and not merely because court in its first impression opines the suit as not bona fide."

The question of whether a suit has been filed bona fide should be assessed at the earliest opportunity. In other words, the defendant should have assessed whether the suit was made bona fide and the circumstances of the defendant immediately after the suit had been filed. Order 17 of the Civil Procedure Rules which deals with the prosecution of suits and adjournments assumes that a suit would not be adjourned for more than 12 months from the last adjournment without it being fixed for hearing. Under order 17 rule 5 of the CPR, a defendant is entitled to apply to court to dismiss the suit if the plaintiff does not fix it for hearing within 8 weeks from the delivery of the defence or within 10 weeks from the delivery of the counterclaim for want of prosecution. To wait for over a year when several steps ought to have been taken in the prosecution of the suit before filing an application for security for costs amounts to ordinate delay.

In the premises, I agree with the prayers of the learned counsel for the respondent and hold that the appeal lacks merit. I have taken into account the fact that the appeal raises important questions about practice and therefore questions of public importance. In the premises the appeal is dismissed with each party to bear its own costs.

Ruling delivered at Kampala this 13th day of April 2012.

Christopher Madrama

Judge

Judgment delivered in the presence of:

Jimmy Muyanja for the Appellant,

Holding brief for Ms Deepa Verma Jirva,

Linda Nabalende

Holding brief for Titus Kamya is Martha Namutebi counsel for the Respondent

Ojambo Mokoha Court Clerk

Hon. Justice Christopher Madrama

13th of April 2012.