

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL APPEAL NO 29 OF 2016
(ARISING FROM MISCELLANEOUS CAUSE NO. 974 OF 2015)
(ARISING FROM CIVIL SUIT NO 597 OF 2015)

UNITED BUILDERS & CONTRACTORS LTD}.....APPELLANT

VERSUS

HARISS INTERNATIONAL LTD}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Appellant appealed from the order of the learned Assistant Registrar dated 13th September, 2016 ordering the Appellant to furnish security for costs in the sum of Uganda shillings 30,000,000/= or a bank guaranteeing the sum of Uganda shillings 30,000,000/= in court within 30 days from the date of the ruling and for the order to be set aside. Secondly, the applicant prays for costs of the application to be provided for.

The grounds of the appeal are that the Appellant filed Civil Suit No 597 of 2016 against the Respondent and four others. Secondly, in Civil Suit No. 597 of 2015, the Appellant sought several orders including an order lifting the veil of incorporation of Riham Biscuits Industries (U) Ltd (in receivership), Biplous (U) Ltd and Harris International (U) Ltd, the Respondent.

The Appellant further seeks an order and declaration that the defendants in Civil Suit No 597 of 2015 jointly and severally were liable to satisfy the judgment and decree in High Court Civil Suit No. 203 of 1998; United Builders and Contractors (U) Ltd versus Riham Biscuits Industries (U) Ltd. Fourthly, the gist of the Appellants case in Civil Suit No. 597 of 2015 against the Respondent is that upon obtaining judgment in Civil Suit No 203 of 1998, Riham Biscuits Industries (U) Ltd the Respondent was incorporated to avoid the impact of the judgment, as assets of Riham Biscuits Industries (U) Ltd were transferred to the Respondent, a fact which was admitted in the pleadings. Fifthly, the other salient claim of the Appellant against the Respondent and the co-defendants is that the defendants are a single economic unit and are utilising plot 83 which the Appellant sold to Abdul Dakkik and Ezzat Kassem and transferred to Riham Biscuit Industries (U) Ltd and which is now occupied by the Respondent but registered in the names of

Biplous (U) Ltd and was decreed to revert back to the Appellant under Civil Suit No. 203 of 1998.

Sixthly, the Respondent, Biplous (U) Ltd and Riham Biscuits (U) Ltd have the same membership and are hiding under the corporate veil. On the seventh ground, the Appellant has a genuine claim and genuine grounds for lifting the veil of the defendant company including the Respondent and the Assistant Registrar erred in law and fact to order it to furnish security for costs.

On ground eight, the learned Assistant Registrar erred in law and in fact when he ordered the Appellant to furnish security for costs when the Appellant owns property within jurisdiction of this honourable court. On ground nine, the learned Assistant Registrar erred in law and fact when he ordered the Appellant to furnish security for costs when the Respondent made an admission to the Appellants claim. On ground 10, the learned Assistant Registrar erred in law and fact to order the Appellant to furnish security for costs when the Appellant's case is not frivolous and vexatious and is a genuine claim.

On ground 11, the learned Assistant Registrar erred in law and in fact when he ordered the Appellant to furnish security for costs and on the basis that the Respondent was not a party in Civil Suit No. 203 of 1998 which is not an issue for consideration as the Appellant seeks orders for lifting the veil of incorporation. On ground 12 the learned Assistant Registrar erred in law and in fact when he failed to take into consideration the pleadings which disclosed a genuine and prima facie case against the Respondent. On ground 13, the learned Assistant Registrar erred in law when it took into account irrelevant considerations and ordered the Appellant to furnish security for costs. On ground 14, the learned Assistant Registrar erred in law when he failed to take into account the relevant consideration and ordered the Appellant to furnish security for costs. On ground 15 it is just and fair and equitable that the appeal is allowed and the order for the learned Assistant Registrar is set aside with costs to be provided for.

The appeal is further supported by the affidavit of Navichandra Kakubhai Radia, a director of the Appellant Company. He deposes that he is a lawyer by training and an advocate of the High Court of Uganda and conversant with the facts of the appeal. He read the ruling of the learned Assistant Registrar and the Appellant is aggrieved by the decision ordering it to furnish security for costs. The affidavit principally repeats the grounds of the Notice of Motion save for the fact that it includes attachments such as the plaint in Civil Suit No. 597 of 2015 annexure "A", pleadings in the lower court with regard to the application for security for costs, a copy of the written statement of defence annexure "B", the application for security for costs annexure "C", a copy of the ruling of the Assistant Registrar annexure "D", the certificates of title of the Appellant disclosing that the Appellant has property within the jurisdiction of this court comprised in FRV 62 folio 8 plot 169 block 203 at Kawempe measuring four acres according to a copy of the certificates of title and search certificates annexure "E" and "F".

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Among the claims by the Appellant is for an order lifting the veil of the Respondent Riham Biscuits Industries (U) in receivership, Biplous (U) Ltd and other remedies. The learned Assistant Registrar of the court heard the application and ordered the Appellant to furnish security for costs to the tune of Uganda shillings 30,000,000/= or alternatively the Appellant was ordered to deposit in court a bank guarantee of the said sum within 30 days from the date of the ruling. The Respondent in the written statement of defence makes an admission to the Appellants claim in the suit. It was erroneous to order the Appellant to furnish security for costs when there was an admission of the Appellant's claim in the written statement of defence. The other grounds in the notice of motion are repeated in the affidavit in support of the application and I do not need to set them out again.

In reply Yasser Ahmed, a director of the Respondent Company deposed that he read the application and the affidavit in support and the reply of the Respondent is as follows:

The ruling of the learned registrar ordering the Appellant to furnish security for costs was properly made and was based on the facts and circumstances of the case as presented by both parties and the issues deposed to in the affidavit in support are unfounded. The registrar judiciously exercised his discretion to order the Appellant to furnish security for costs. The Respondent has a plausible defence to the head suit to the effect that it has never had any dealings, contractual or otherwise with the Appellant neither has it ever been a transferee or transferor of the suit land and the Respondent was not in existence when judgment in Civil Suit No 203 of 1998 was delivered on 18th October, 2004. The Appellant's remedy, assuming it is aggrieved, ought to be directed towards the parties named in the judgment it seeks to enforce. Thirdly Biplous (U) Ltd is not and was not a party to the appeal or application from which it arises and its amended memorandum of Association and copies of the annual return attached by the Appellant are therefore attached in error and ought to be struck off the record. According to the search report from the registrar of companies, the Appellant company last filed returns in the year 2013. The shareholders and directors of the Appellant according to the last annual return are indeed not known to the Respondent, neither are they known to be residents in Uganda. The Appellant did not and has not furnished any evidence to prove otherwise. The Respondent maintains that there is no known business of the Respondent within the jurisdiction of this honourable court and the Respondent did not submit any tax or other returns in Uganda as evidence of conducting business with a verifiable cash flow. This matter was raised before the learned registrar.

There was not and there is no known tax identification number (TIN) of the Respondent Company which is compulsory for any business to have. As far as the Appellants and the land are concerned, the appearance of Khetant on the certificate of title raises doubts notwithstanding the search report which is clearly disclaimed and is not conclusive. The issue of a freehold ownership by the Appellant as submitted by the Appellant remains doubtful and subject to enquiry and confirmation. There is no evidence that it has been converted to leasehold. The
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evidence by the Appellant is that it is a freehold property purportedly owned by foreigners. In the premises, the Respondent maintains that this was and is still a fit and proper case for furnishing of security for costs in case the Respondent is put to undue expense of defending a frivolous and vexatious suit and the decision of the learned registrar was proper.

In rejoinder Navichandra Kakubhai Radia depose that the ruling of the learned registrar in which he ordered the Appellant to furnish security for costs was not raised or guided by principles of law and was unfair in the circumstances. It is true that the Respondent has never had any dealings contractual or otherwise with the Appellant neither has it ever been a transferee in respect of the suit land nor was the Respondent a party to the judgment in Civil Suit No. 203 of 1998 delivered on 18th October, 2004. The Respondent's members notably Ezzat Kassem Ahmed was a party to the contract in respect of the suit plot 83. The claim against the Respondent according to the plaint is that the Respondents Biplous (U) Ltd and Riham Biscuits Industries (U) Ltd are associated companies and a single economic unit and the veil of incorporation should be lifted on account of fraud.

In this suit the Appellant contends that the Respondent was incorporated purposely to avoid the contract and execution of the judgment in Civil Suit No. 203 of 1998. The Respondent acquired assets and business of Riham Biscuits Industries (U) Ltd illegally after judgment and the said acquisition is challenged. In this suit the Appellant contends that the receivership process of Riham Biscuits Industries (U) Ltd is a sham calculated to avoid the judgment. Furthermore the Respondent in its written statement of defence admits acquisition of the assets and submission of Riham Biscuits Industries (U) Ltd and purports to hold an agreement on which it acquired the assets and business. In light of the above, the suit against it is not frivolous or vexatious. It is true that Biplous (U) Ltd is not a party to the appeal or application but it is a party to the suit. Finally the facts against the associated companies including the Respondent which the learned registrar should have seen in the pleadings are as follows:

- The Appellant sold plot 83 (leasehold tenure to Abdul Azziz Ahmed Dakik) and Ezzat Kassem Ahmed.
- The purported balance in form of bounced cheque was paid by Ali Kassem Ahmed.
- The Appellant transferred the suit land plot 83 to Riham Biscuits Industries (U) Ltd.
- The shareholders of Riham Biscuits Industries (U) Ltd were Ali Kassem Ahmed and Abdul Azziz Ahmed Dakik.
- The debentures were created by Riham Biscuits Industries (U) Ltd and guaranteed by Biplous (U) Ltd.
- The shareholders of Biplous (U) Ltd were Ali Kassem Ahmed, Ezzat Kassem Ahmed and Abdul Azziz Dakik.
- Plot 83 was converted into freehold and registered in the names of Biplous (U) Ltd.
- Upon receivership of Riham Biscuits Industries (U) Ltd the assets of Riham Biscuits Industries (U) Ltd were transferred to Harris International (U) Ltd.

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- The shareholders of Harris International (U) Ltd are Chad Kassem Ahmed and Mahmoud Ahmed.
- The new shareholders of Harris International (U) Ltd are Yasser Kassem Ahmed, Chadi Kassem Ahmed and Ezzat Kassem Ahmed.
- Biplous (U) Ltd and the Respondent both use plot 83 as collateral for loans and the Respondent occupies plot 83.

The Appellant is a resident company in Uganda. Even when the Appellant filed Civil Suit No 203 of 1998 against Riham Biscuits Industries (U) Ltd, it was successful and a holder of a decree and is not required to furnish security for costs.

The residents of the Appellant's shareholders and directors is irrelevant to an application for security for costs and that is where the learned registrar erred in law because it is not based on any particular principles of law. The ground of not furnishing of tax identification numbers, annual returns of business is not based on any known principles of law and this is where the learned registrar failed to act judicially and abused his discretion by ordering the furnishing of security for costs. That the asset plot 169 FRV 62 folio 8 the property of the Appellant has no encumbrance and any deliberate misreading to show that Khelant has an interest in it is an absurdity according to the certificate of repossession. The Appellant is a resident company in Uganda with assets within the jurisdiction and with a valid claim against the Respondent and this is not a proper case for the furnishing of security for costs. Finally he deposed that the Appellant is the holder of a decree for US\$240,000 and even an alternative remedy of obtaining plot 83 Kawempe from Riham Biscuits Industries (U) Ltd or Biplous (U) Ltd and as such should not be ordered to furnish security for costs.

The Appellant is represented by Messieurs Ayiguhugu & Company Advocates and Solicitors while the Respondent is represented by Messieurs Nangwala, Rezida & Company Advocates. Both Counsels addressed the court in written submissions.

Judgment

I have carefully considered the written submissions together with the pleadings.

An application for security for costs as against a limited liability company can proceed under **Order 26 rule 1 of the Civil Procedure Rules** which is of general application to all plaintiffs whether limited liabilities companies or not or under **section 404 of the Companies Act cap 110** (repealed) or **section 284 of the Companies Act, 2012 Act 1 of 2012** which replaced it. Order 26 rule 1 of the CPR provides that the Court may if it deems it fit order a plaintiff in any suit to give security for the payment of all costs incurred by any defendant. On the other hand section **284 of the Companies Act 2012** provides:

“284. Costs in actions by certain limited liability companies.

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

This provision was interpreted in **GM Combined (U) Ltd vs. AK Detergents (U) Ltd [1999] 2 EA 94 (Supreme Court of Uganda)** by Oder JSC when considering section 404 of the repealed Companies Act Cap 110 which has the same wording. With regard to Order 26 rule 1 of the Civil Procedure Rules, he held:

“...a major matter for consideration is the likelihood of the plaintiff’s case succeeding. If there is a strong prima facie presumption that the defendant will fail in his defence to the action, the Court may refuse him security for costs. It may be a denial of justice to order a plaintiff to give security for the costs of a defendant who has no defence to the claim. Again, if a defendant admits so much of the claim as would be equal to the amount which security would have been ordered the Court may refuse him security for he can secure himself by paying the admitted amount in court. Further where the defendant admits his liability, the plaintiff will not be ordered to give security.”

As far as section 404 of the Companies Act cap 110 ((repealed) and replaced by the same provision in section 284 of the Companies Act 2012) is concerned, the court would take into account the following circumstances:

1. Whether the plaintiff’s claim is bona fide and not a sham;
2. Whether the plaintiff has reasonably good prospects of success;
3. Whether there is an admission by the defendant on the pleadings or elsewhere that money is due;
4. Whether there is a substantial payment into court or an “open offer” of a substantial amount;
5. Whether the application for security was being used oppressively, eg so as to stifle a genuine claim;
6. Whether the plaintiff’s want of means has been brought about by any conduct by the defendant, such as delay in payment, or in doing their part of the work;
7. Whether the application for security is made at a late stage of proceedings.”

The likelihood of success of the Plaintiff's suit against the Defendant is a relevant consideration and hence the issue of whether the plaintiffs action is frivolous or vexatious is a matter of principle and can stand in its own right to grant the defendant an order for payment of security for costs by the Plaintiff.

The genesis of this matter is the ruling of the Assistant Registrar dated 13th September, 2016 for the Plaintiff to deposit in court a sum of **Uganda shillings 30,000,000/=** in cash within one month of the ruling or in the alternative provide a bank guarantee from a reputable bank in a similar amount within the same period failure for which the provisions of Order 26 rule 2 (1) of the Civil Procedure Rules shall come into play. The order followed the filing of **Miscellaneous Application Number 974 of 2015 arising from Civil Suit No. 597 of 2015** by the Appellant. Before I proceed further I need to set out the gist of the suit from which the application for security for costs arose and that gave rise to this appeal against the order to furnish security for costs.

High Court Civil Suit No. 597 of 2015 is a suit brought by **United Builders & Contractors Ltd (the Appellant) against Abdul Azziz Dakik, Ezzat Kasem Ahmed, Biplous (U) Ltd, Hariss International (the Respondent) and Riham Biscuits Industries (U) Ltd (In receivership)**. The Appellant filed this suit on 15th September, 2015 and in paragraph 6 thereof claims against the defendants jointly and severally for an order and declaration that the defendants are jointly or severally liable to satisfy the judgment and decree in **High Court Civil Suit NO. 203 of 1998 United Builders & Contractors Ltd versus Riham Biscuits Industries (U) Ltd, Riham Biscuits Ltd and Ezzat Kassem Ahmed** in which the plaintiff is a judgment creditor. Secondly, the suit is for declaration that the receivership process of Riham Biscuits Industries (U) Ltd is fraudulent and a sham. Thirdly, it is for an order of lifting the veil of incorporation of Riham Biscuits Industries (U) Ltd in receivership the 5th defendant, Biplous (U) Ltd, the 3rd defendant and Harris International Ltd the 4th defendant.

This suit is also alternatively for a declaration that the members of the third and fourth defendants are liable to satisfy the judgment and decree in Civil Suit No. 203 of 1998 (cited above). It is for a further declaration that the third defendant obtained the registration of land comprised in FRV 360 folio 10 plot 83 at Kawempe by fraud. It is for an order directing the Chief Registrar of Titles/Commissioner for land registration to cancel the certificate of title held by the third defendant in respect of land comprised in FRV 360 folio 10 plot 83 Kawempe, general damages, interests and costs.

The Respondent is the fourth defendant to **H.C.C.S. No. 597 of 2015**. In paragraph 16 of the plaint it is averred that judgment in this suit was passed on 18th October, 2004 in favour of the Appellant in which Riham Biscuits Industries (U) Ltd was ordered to pay the sum of US\$240,000 with interest at 6% per annum from the date of breach of contract which is 15th July, 1996 until payment in full, costs and alternatively cancellation of Riham Biscuits Industries (U)

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Ltd from proprietorship of plot 83 Bombo road Kawempe. A copy of the judgment and decree was attached. The order of the court is found at page 21 of the judgment. The alternative order is for cancellation of the first defendant, reinstatement of the plaintiff as the registered proprietor, general damages for fraud. The alternative prayer for cancellation of the first defendant Riham Biscuits Industries (U) Ltd on LRV 244 folio 7 plot 83 Bombo road Kawempe Kyadondo and reinstatement of the plaintiff as the registered proprietor was decreed as an alternative remedy to the award of the US\$240,000 in special damages together with interest thereon and costs of the suit. Secondly, to the alternative judgment is an award of general damages of Uganda shillings 20,000,000/=. In paragraph 17 of the plaint it is averred that the plaintiff did not know about the judgment and decree of the court until the year 2015 and the judgment remained unsatisfied to date. It is in the paragraph 18 that the plaintiff came to learn that Riham Biscuits Industries (U) obtained loan facilities from Crane Bank by pledging the same property as security.

With regard to the Respondent's application for the Appellant to furnish security for costs, the learned registrar at page 1 of the ruling held as follows:

"The crux of the Applicant's case according to Mr Rezida was that because the applicant was not a party or at all to Case No. 203 of 1998, there was no way the Respondent would not bring a suit (Civil Suit No. 597 of 2015) against the applicant to recover what was decreed in its favour in Case No. 203 of 1998.

In his argument for the Respondent, Counsel did not come out clearly to rebut this allegation neither did the affidavit of Mr Kalubha Radia sworn in reply to the application. Court was left with a strong impression that the Applicant was indeed never a party to civil suit No. 203 of 1998. ..."

There were other considerations which relate to the status of the Appellant in this appeal as to whether its shareholders are known or resident in Uganda and with ability to pay costs if a decree was passed against it in Civil Suit No. 597 of 2015.

I have carefully considered the submissions of Counsel and have particularly taken note of the fact that the Respondent alleges that the suit against it is frivolous and vexatious. The submissions are at pages 4 and 5 of the written submissions of the Respondent's Counsel. On the other hand is the reply to the submissions of the Appellant's Counsel at page 13 of the submissions that the learned registrar was not concerned about the status of the Appellant and did not evaluate the plaint which shows that this suit against the Respondent was not frivolous and therefore he did not act judicially and clearly misdirected himself and failed to take into account matters he should have taken into consideration which is that the claim of the Appellant is a genuine claim.

According to the Respondent, in the submissions in reply and relying on the case of **R versus Singh [1957] EA at page 822**, a frivolous suit is one considered not to be "not worthy of serious

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attention having regard to all facts." On that basis the Respondent's Counsel submitted that the Respondent has never had any dealings contractual or otherwise with the Appellant and it was not a party to the suit where the Appellant is a judgment creditor namely **H.C.C.S. No. 203 of 1998**. Secondly, it was non-existent at the time of the judgment. It has never been a transferor or transferee in respect of the suit property. When it was incorporated it did not assume the liabilities of the parties **H.C.C.S. No. 203 of 1998**. Thirdly, the Appellants action ought to be directed at the parties named in the judgment it seeks to enforce. Fourthly, it is not shown that there is a suit against the receiver and the entity or person that appointed a receiver. Fifthly, with regard to lifting of the corporate veil, the aspect of liability against the Respondent is not shown anywhere. Last but not least the Respondent is not a party to **H.C.C.S. No. 203 of 1998** whose decree is the basis of the suit.

The Appellant at page 8 of the submissions in rejoinder agrees with the definition of a suit that is frivolous or vexatious as held in the case of **R versus Singh** (supra). He submitted that when fraud and illegality are alleged against a party and specifically pleaded, it suffices that such allegations are worthy of serious attention and should be investigated. The court cannot say that the suit is frivolous without looking at the plaint. The allegations against the Respondent and its associates are clearly pleaded and most of them are not denied. He further submitted that the suit is for lifting the veil of incorporation of the Respondent and its associated companies. The contention is that the Respondent was incorporated purposely to defeat the judgment in **H.C.C.S. No. 203 of 1998**.

I have carefully considered two lines of argument with regard to the above state of affairs. The first line for consideration is the fact that a judgment could be enforced against directors who have been found liable on the grounds for lifting the veil of incorporation. Proceedings have to be brought against the directors and fraud proved against them for the veil of incorporation to be lifted. The veil of incorporation can be lifted at the execution stage as was considered in the case of **Corporate Insurance Company Limited vs. Savemax Insurance Brokers Ltd [2002] 1 EA 41**. The Milimani Commercial Court of Kenya at Nairobi per Kingera J held at page 46.

"... it is a well known principle of company law that the veil of incorporation may be lifted where it is shown that the company was incorporated with or was carrying on business as no more than a cloak, mask or sham, a device or stratagem for enabling the directors to hide themselves from the eye of equity. That may well be so if on the evidence it is clear that the directors have dealt with the assets and resources of the company as their personal bounty for use for their own purposes. Such facts may well be disclosed in the examination of the directors or in affidavits filed. Counsel for the Respondents submitted that the veil of incorporation could not be lifted during execution proceedings and that a separate suit for the purpose had to be filed. He was unable to cite any authority for his proposition. And I know of none. On principle I see no reason why

the veil of incorporation cannot be lifted at the execution stage. I would have no difficulties in doing so in an appropriate case.”

His Lordship in the above case suggested that the veil of incorporation can be lifted at the execution stage. The veil of incorporation was also lifted in the Tanzanian case of **Yusuf Manji versus Edward Masanja and Abdallah Juma Civil Appeal No. 78 of 2002, [2005] TZCA 83** the Court of Appeal of Tanzania sitting in Dar es Salaam agreed that the corporate veil had been properly lifted and execution proceedings directed at the directors of a company in a case brought against the company. They considered the fact that the directors in question were involved in concealing the assets of the company. The Appellant against whom the veil of incorporation had been lifted was the managing director of the company.

In relation to the submission that the Respondent was incorporated solely for purposes of acquiring the assets of the judgment debtor in **H.C.C.S. No. 203 of 1998**, the question is the Respondent as an artificial person, who are behind such an alleged cause of action? Are they not the proper parties to proceed against? Secondly, would it be a fresh cause of action or a cause of action in the original suit?

Order 43 Rule 20 of the Civil Procedure Rules permits the High Court to base its decision on appeal on other grounds other than that on which the trial court proceeded even if it means re-evaluation of evidence. Similarly, a decision which proceeds on other grounds which may be erroneous may be supported on another ground by the record and the decision would stand. Order 43 rule 20 of the Civil Procedure Rules provides that:

“20. Where evidence on record sufficient High Court may determine case finally.

Where the evidence upon the record is sufficient to enable the High Court to pronounce judgment, the High Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the High Court proceeds.”

This principle is captured on the case of **Peters v Sunday Post Limited [1958] 1 EA 424** Court of Appeal sitting at Nairobi when Sir Kenneth O’Connor P held that:

“An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand.”

That brings me to the second line of argument which has to do with whether such proceedings can be maintained as a fresh suit. Section 34 of the Civil Procedure Act bars a separate suit for enforcement of a decree. It provides as follows:

“34. Questions to be determined by the court executing the decree.

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(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, that question shall, for the purposes of this section, be determined by the court.”

All questions relating to the execution, discharge or satisfaction of a decree is to be determined by the court which passed the decree and not by a separate suit. I must add that the Respondent is an artificial person and an artificial person is not responsible without the mind and will of the directors as observed by Lord Denning in the case of **HL Bolton Co vs. TJ Graham and Sons [1956] 3 ALL ER 624**, at page 630:

“A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. *Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company.*” (Emphasis italicised)

The act of incorporating another company such as the Respondent and transferring assets to it can only be found in the directing mind and will of the directors and managers of the company who were allegedly faced with a judgment debt. It cannot be found in the artificial person they incorporated as part of the stratagem. The artificial entity is separate from its members and was incorporated after the alleged fraud. Even if it is a nominal defendant against whom any order may be enforced, it may not be accountable for any cause of action that arose and predates its incorporation. Any fraud alleged is the fraud of the directors who incorporated it. The question of transfer of property or concealment of property by directors of a limited liability company can be visited against the directors in the proceedings in which the directors are added within the suit and not by a separate suit. This was my ruling in the case of **Jimmy Mukasa vs. Tropical Investments Ltd, John Mary Mpagi, Joseph Mulindwa and Equator Technical Agencies Limited Civil Suit No 232 of 2007**. I held that proceeding in a separate suit on the matter of enforcement of the judgment against directors of the defendant by way of lifting the veil was

barred by section 34 of the Civil Procedure Act. In that case I cited the interpretation of Mulla on a provision in *pari materia*. Mulla in **Mulla the Code of Civil Procedure 17th Edition volume 1 page 707** wrote that:

“It’s well settled that no suit shall lie on an executable judgment. The only remedy to enforce such a judgment is by way of execution. The section prohibits any relief being granted in a separate suit which will interfere with the conduct of proceedings by the court executing the Decree. This section lays down the general principle that matters relating to execution, discharge or satisfaction of a Decree arising between the parties including the purchaser of the sale in execution should be determined in execution proceedings and not by a separate suit. It matters not whether such a question arises before or after the Decree has been executed. The object of the section is to provide a cheap and expeditious procedure for the trial of such questions without recourse to a separate suit and to take needlessly litigation. ... The questions must relate to the execution, discharge, or satisfaction of the Decree. The parties must be the parties to the suit or their representatives. If both of these conditions are fulfilled, the question must be determined in execution proceedings and a separate suit will be barred.”

In other words the subsequent alleged actions of concealment of property is the action of the parties to the suit and can be enforced against the directors who are the directing mind and will behind the acts complained about. If the suit is brought against other parties, then it must be a separate cause of action not based on the judgment or decree of the court but existing on its own having arisen as a fresh cause of action after the Respondent was incorporated. Furthermore, a transfer without consideration can be traced in execution proceedings in the names of the innocent recipient used as a vessel of fraud. I further note that the Appellant was required by the decree sought to be enforced to proceed either against the parties/judgment debtors for enforcement of a money decree or alternatively move for acquisition of land and enforce cancellation of title ordered and not enforce both remedies which are alternative remedies as we noted in the relevant decree. The decree for cancellation of title is enforceable in the suit where the decree was issued and issues of transfer of land decreed by court are matters arising in the enforcement of the judgment.

For that reason I agree with the submissions of the Respondent’s Counsel that even the receiver who is alleged to be party to the incorporation of the Respondent ought to be made party if he acted in any fraudulent arrangement. However, this is not the case and the issue is therefore about whether this suit can stand against the Respondent.

For the above reasons I do not have to consider the lengthy submissions on the question of the propriety of the order to furnish security for costs. The learned Registrar clearly took into account the fact that the Appellant had brought the suit to execute a judgment in another suit to which the Respondent was not a party. He therefore used a principle that is relevant without

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having considered in detail whether the suit is frivolous or vexatious. Moreover both Counsels of the parties addressed the court on the question of whether the suit is frivolous or vexatious and which issue can be considered on its own merits in the main suit. I further agree that where an action is found to be frivolous and vexatious, the relevant order of striking out ought to be made in an application to strike out and not in an application for security for costs. The issue is whether the Registrar erred on a matter of principle to make the order he did. As far as this application or appeal is concerned my finding is that the honourable Registrar came to the right finding that the Respondent was not a party to the suit and the decree in that suit sought to be enforced in **H.C.C.S. 203 of 1998**.

The bar to proceedings in another suit for enforcement of a judgment under section 34 of the Civil Procedure Act supports the registrar's decision and it can stand. A legal bar cannot aid any admission of the claim except in enforcement proceedings brought in the same suit. In the premises the appeal stands dismissed with costs without prejudice to any right of execution of the decree by the judgment creditor or hearing the main suit on the merits.

Ruling delivered in open court on the 31st of March 2017

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Counsel Deus Nseginyunva for the Appellant

Counsel Daniel Haguma for the Respondent

Julian T. Nabaasa: Research Officer Legal

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

31st March 2017