THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL APPEAL NO. 071 OF 2015

(Arising from Miscellaneous Application No. 201 of 2014 & Civil Suit No. 200 of 2012 of the Chief Magistrates Court of Iganga at Iganga)

1. **MUGERENGE PETER**
2. **MUGERENGE PATRICK** :::::::::::::::::::::: **APPELLANTS**
3. **MUGALYA ALFRED**

VERSUS

ROCK GRASS ROOT INVESTMENT ENTERPRISES LIMITED :::::::::::::::::::::: **RESPONDENT**

BEFORE: THE MR. JUSTICE MICHAEL ELUBU

JUDGEMENT

This is an Appeal arising from the Ruling of Her Worship Nvanungi Sylvia in **Miscellaneous Application No. 201 of 2014** of the Chief Magistrates Court of Iganga at Iganga.

Background

The Respondent, **Rock Grass Root Investments Enterprises Ltd**, through a Specially endorsed plaint, instituted Civil Suit No. 200 of 2012 in the Chief Magistrate's Court of Iganga sitting at Iganga). The appellants **Mugerenge Peter, Mugerenge Patrick** and **Mugalya Alfred** were the defendants in that suit.

The Respondent's claim was for the recovery of Ugx. 1,000,000/=; interest; and costs of the suit. The contention was that the Respondent was a moneylending company and

the 1st Appellant (1st Defendant) applied for, and received a loan of Ugx. 1,000,000/=, in the month of August 2011. The loan was due for repayment in 3 months attracting an interest at a rate of 15% per month. That the 2nd & 3rd Appellants (2nd & 3rd Defendants) acted as guarantors of the 1st Appellant. That the 1st Appellant made a payment of Ugx. 700,000/=, which went towards settling part of the accumulated interest but he remained indebted for the sum of Ugx. 1,000,000/=. That the 1st Appellant defaulted in payments from the month of February 2012 to the date of filing of the suit. That the sum of Ugx. 1,000,000/= continued to attract an interest of 15% per month from the date of default until payment in full. That summons were issued to the Appellants requiring them to apply for leave to appear and defend. The appellants did not appear.

A Decree in Civil Suit No. 200 of 2012 was entered against the Appellants on the 7th February 2014. As a consequence, the respondent applied for execution. The Appellants subsequently filed Miscellaneous Applications No. 92 & 93 of 2014 seeking to set aside the Decree in Civil Suit No. 200 of 2012; to stay the execution of the decree against the 1st & 3rd Appellants; and finally for unconditional leave to appear and defend the suit.

On 29th August 2014, the Court granted Miscellaneous Application No. 92 of 2014 and made orders setting aside the decree in Civil Suit No. 200 of 2012. The Appellants were granted leave to file a Written Statements of Defence on condition that they cover costs of 920,000/- earlier awarded in Civil Suit No. 200 of 2012. The Court directed that the Costs of Miscellaneous Application No. 92 of 2014 would be in the Cause.

After filing a Joint Written Statement of Defence to Civil Suit No. 200 of 2012, the Appellants filed Miscellaneous Application No. 201 of 2014 praying for Orders that:

1. The Respondent/Plaintiff Company, within 30 days, furnish security for payment of all costs incurred by the Applicants/Defendants in Civil Suit No. 200 of 2012 in the sum of Ugx. 14,871,200/=;

2. On failure by the Respondent/Plaintiff Company to pay or furnish the security in Court within time, Civil Suit No. 200 of 2012 should stand dismissed with costs without further order dismissing the same; and

3. Costs be provided for.

The Grounds on which Miscellaneous Application No. 201 of 2014 was premised were that Civil Suit No. 200 of 2012 did not have a likelihood or good prospect of success; the Defendants' defence to the claim had a high likelihood of success; The Plaintiff Company is impecunious; The Respondent/Plaintiff Company has no known property in Uganda or elsewhere that belongs to it; The Defendants would have nothing to attach in the event of the Plaintiff losing the suit, which it is likely to lose; that Civil Suit No. 200 of 2012 was frivolous and vexatious; that it was just and equitable that the Orders sought be granted.

The Respondent who is the plaintiff in the matter, opposed Miscellaneous Application No. 201 of 2014.

On 4th of May 2015, the Trial Magistrate made her Ruling in Miscellaneous Application No. 201 of 2014 in which she dismissed the Application with Costs in the cause.

Being dissatisfied with the findings of the trial court, the Defendants filed this appeal with six grounds namely:

1. The Learned Trial Magistrate erred in law and in fact when she exercised her unfettered discretion unjudicially, thereby, erroneously dismissing Miscellaneous Application No. 201 of 2014 with costs in the cause to avoid further delays.

2. The Learned Trial Magistrate erred in law and in fact when she found and held that Miscellaneous Application No. 201 of 2014 lacked merit and a waste of

Court's time, thereby, erroneously dismissing Miscellaneous Application no. 201 of 2014 with costs in the cause to avoid further delays.

3. The Learned Trial Magistrate's Ruling is riddled with fundamental misdirections and or non-directions in law and fact.

4. The Learned Trial Magistrate misconstrued and or misapplied the law relating to security of costs, thereby, leading to an erroneous finding and holding that Miscellaneous Application No. 201 of 2014 lacked merit and a waste of court's time.

5. The Learned Trial Magistrate erred in law and in fact when she failed or refused to grant the Appellants the Orders sought in Miscellaneous Application No. 201 of 2014.

6. The Decision complained against occasioned a substantial miscarriage of justice.

The Appellants prayed that:

1. The Appeal be allowed.

2. The Ruling and decision or Orders of the Court below be set aside.

3. The Judgment be given here and in the Court below for the Appellants.

4. The Appellants be granted costs here and in the Court below.

Submissions

Counsel for the Parties were granted leave to file written submissions. Only Counsel for the Appellants filed submissions.

Resolution

The Appellant argued **Grounds 1-5** together and then **Ground 6** separately.

The argument was that the decision of the lower court was based on that Court's exercise of its discretion. That an Appellate Court will not interfere with such a decision unless it was arrived at non judiciously. That the tests for determining whether the Trial Court exercised its discretion judicially are: whether the Trial Court misdirected itself or acted on matters on which it should not have acted, or it failed to take into consideration matters which it ought to and in so doing arrived at a wrong conclusion. The applicant cited **Banco Arabe Espanol v Bank of Uganda [1999] KALR 354** at **374** and **Mbogo v Shah [1968] EA 988**.

The submission on Grounds 1 to 5 collectively was:

On **Ground 1**, it was submitted that a trial Court may exercise its discretion for or against, in an application by a defendant for security for costs, based on the merit of the respective cases of the parties. That in determining that merit, the Court assesses the pleadings, affidavits filed in support or against the Application and any other material available. The appellant relied on **G.M Combined (U) Ltd v A.K Detergents (U) Ltd [1996]1 KALR 51 at page 63**.

It was argued that the Trial Magistrate did not consider 6 points raised by the Appellants regarding the merits of Civil Suit No. 200 of 2012: the 1st Appellant did not receive any loan facility from the Respondent in August 2011 nor did the 2nd & 3rd Appellants guarantee repayment of that loan as alleged in paragraph 5 of the plaint; secondly, if the Respondent meant the loan granted and received on the 5th of July 2011, then it was fully and wholly discharged. Besides the 1st Appellant overpaid by 250,000/= and he did knowledge that this suit had been filed. He accordingly filed a counterclaim for that

amount against the Appellants; the Respondent and the 1st Appellant did not agree an interest rate payable on the principal loan amount, in event of default in repayment within the 3 month repayment period. It was therefore unenforceable against the Appellants; that the 2nd & 3rd Appellants guaranteed that the 1st Appellant capacity to repay the loan but not his ability to pay in case of default; that the Respondent's suit against the 2nd & 3rd Appellants was incompetent or premature because they were not served a notice of the 1st Appellant's default to repay amount; that the Respondent was not licensed to lend money at the time it lent money to the 1st Appellant. The Respondent did not rebut the six points in their pleadings.

The submission on **Ground 2** was that the Trial Magistrate erroneously shifted the burden to prove that the Respondent was impecunious to the Appellants. That the Respondent ought to have evidence of a bank statement or other documents showing what money the Respondent has

Then on Grounds 4 & 5 the contention was that the Respondent had no known property belonging to it. The Appellants would therefore have nothing to attach in the event that it lost the suit. That there was no indication of where the Respondent's registered office was located or who the Directors and Company Secretary were. That it was a requirement of the law for a company to have a registered office and postal address stipulated in Sections 115 (1) and 116 (1) of the **Companies Act, 2012**. That Annexures "C" and "D" of the affidavit in reply show the Respondent office as located in Lambala Trading Centre, Luuka District, yet originally registered office was stated to be in Iganga Town with a branch at Namungalwe also in Iganga District. that there was never a notice of change of registered office filed with the Registrar of companies. That this was an illegality which contravened Section 116 (1) of the **Companies Act, 2012**.

The Respondent has neither held an Annual General Meeting nor filed an Annual return from the 28th of February 2009 to the date of filing the affidavit in reply - which was a period of over 5 years. That it was an illegality which the court cannot sanction.

The sum of the appellant's submission on Ground 6, was that that the Respondent's suit against the Appellant was frivolous and vexatious.

As stated earlier the Respondent did not file written submissions.

Determination.

Miscellaneous Application No. 201 of 2014 was commenced under Section 284 of the **Companies Act, 2012** and Order 26 Rules 1, 2 & 3 of the **Civil Procedure Rules SI 71-1**. The grounds on which the application is premised are set out above.

Section 284 of the **Companies Act, 2012** stipulates that:

> 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.

Order 26 Rule 1 of the **Civil Procedure Rules SI 71-1** provides that:

> The court may if it deems fit order a plaintiff in any suit to give security for the payment of all costs incurred by any defendant.

The decision of the Supreme Court in **G.M. Combined (U) Limited v A.K. Detergents (U) Limited (supra)** is the leading authority on security for costs. I will reproduce the relevant part as a guide to the application of Section 284 of **the Companies Act;** the holding also sets out the principles that Court employs in determining whether there is merit in any defendant's application for security for costs:

> The powers given to the courts by these statutory provisions are absolutely discretionary. The discretion under Order 23 Rule 1 (now Order 26 Rule 1 of the CPR) appears wider in that it applies to any plaintiff, whether a company or an individual. Secondly, the court may order for payment of all costs incurred by the Defendant "if it deems fit" to do so. No specific conditions or criteria are imposed before the court can exercise the discretion.

The discretion under Section 404 (now Section 284 of the Companies Act 2012), on the other hand, is limited in its application. It applies only to plaintiffs that have limited liability. Secondly, it is exercisable if the judge believes by credible testimony that the Plaintiff company will be unable to pay the costs of the Defendant if successful in his defence. The Judge must first believe that the Plaintiff's company will be unable to pay the Defendant's costs before he may order security for costs, not before.

The Court went on to state:

the summary of the position regarding the merit of the plaintiff's case or that of the defendant as a factor in exercising the Courts discretion under O. 23 r. l and section 404 of the Companies Act in favour or against an application by a defendant for s.f.c., may be stated as follows:

1. A major consideration is the likelihood of success of the plaintiff's case; put differently, whether the plaintiff has a reasonably good prospect of success; or whether the plaintiff's claim is bona fide and not a sham;

2. If there's a strong prima facie presumption that the defendant will fail in his defence to the action the Court may refuse him s.f.c.; it may be a denial of justice to order a plaintiff to give s.f.c. of a defendant who has no defence to the claim;

3. Whether there's an admission by the defendant on the pleadings or elsewhere that money is due;

4. If the defendant admits so much of the claim as would be equal to the amount for which security would have been ordered the Court may refuse

him security for he can secure himself by paying the admitted amount into Court.

5. Where the defendant admits his liability the plaintiff will not be ordered to give s.f.c.;

6. Where there is a substantial payment into Court or an "Open offer" of a substantial amount, an order s.f.c. will not be made.

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

In an Australian text on Civil Procedure, **Adrian Zuckerman & Ors**, ***Zuckerman on Australian Civil Procedure*** **(Lexis Nexis Butterworths, 2018)** the matter is explained in the following terms at pages 408-410

An Order for security for costs is a protective jurisdiction. It is designed to protect a defendant against the risk that a costs order in its favour may be of no value because an unsuccessful plaintiff is impecunious or has no assets in the jurisdiction against which the order can be enforced. An Order of security for costs directs that unless the plaintiff (or exceptionally), the Defendant provides a security that will underwrite any liability for costs that it may incur towards the defendant, the Plaintiff will not be allowed to proceed with the claim. A plaintiff is generally not protected in the same fashion because, as the party commencing the litigation, it has voluntarily assumed the risk that the defendant will be unable to meet any costs order or judgment against it.

At Pages 414, the above text adds:

> In an application for security of costs, the party making the application bears the legal onus of proving why the order should be made. Once the party discharges its onus of demonstrating that the court has reason to believe the Plaintiff corporation will be unable to meet the applicant's reasonable costs, the court's power to order security is triggered. The Plaintiff corporation (Respondent in the Application) then bears an evidentiary burden of raising for consideration any relevant matters that speak against an order of security; for example, because such an order would stifle the litigation. (See **Adrian Zuckerman & Ors, *Zuckerman on Australian Civil Procedure* (Lexis Nexis Butterworths, 2018)** at **page 414**.

In the same way, the burden lay on the Appellant in this instant case, to prove to the Court with 'credible evidence' that the Respondent would not be able to cover its anticipated reasonable costs. The appellant had to persuade the Court that in the circumstances, the evidence on record indicated that the respondent would not be able to meet it costs in the event that it lost this claim.

From the pleadings in the main suit, and the affidavit evidence adduced in M.A. Application 201 of 2014, the Respondent has attached a copy of the alleged loan agreement between the appellants and respondent. While the appellant claims it has discharged its obligations the respondent states that there are sums owing. On this matter this court cannot take a decision which would require proof. The question of the merit of the suit is therefore a matter for trial on the merits.

Although the appellant argued otherwise in Grounds 2 to 5, the law places the onus on the appellant to show that the respondent was impecunious. This is clear from a reading of Section 284 of **the Companies Act** and principles laid down in case law. In any event, he who alleges must prove (Section 103 of **the Evidence Act).**

To this end it stated that when costs were awarded to the respondent in M.A. No 92 of 2014, it sought to recover them. As such this is alleged to be proof of the poor financial state for the respondent. That assertion is dismissed out right by this court. A successful

party shall not be barred from realising the fruits of its litigation. And if it did, that cannot be used against it as proof of poor financial state.

The other argument is that the respondent had no known assets or property. The appellant stated it was worried the respondent would not be able to pay costs of the defendant were it successful in defending itself. The matter was dwelt on by the submission on the appellant's behalf. Nevertheless, the onus was always on the appellant to adduce credible evidence to establish this claim. This court was not furnished with any. I have also thoroughly combed the pleadings and all the affidavit evidence on record, there is nothing that corroborates the claim of a lack of assets or impecuniousness.

In sum thereof, there was no merit in the application to warrant an award of an order for security for costs to be made by the Trial Magistrate. The lowers courts findings are confirmed.

This Appeal therefore fails, and is dismissed with costs to the Respondent.

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Michael Elubu

Judge

19.01.2023