

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI
MISCELLANEOUS APPLICATION NO. 060 OF 2016

(Arising from Civil Suit No. 026 of 2016)

PLINTH TECHNICAL WORKS LTD.APPLICANT

VERSUS

G-GREAT COMPANY LTD.RESPONDENT

RULING

This is an application brought by chamber summons under S. 98 CPA, and S. 285 Companies Act, and under O. 26 rr. 1 and 3, and O. 50 rr. 1 and 3 CPR. It seeks orders that the respondent furnishes security for costs estimated to be around sh. 246,154,737/=-, and that costs of the application be provided for.

The respondent sued the applicant in this court Civil Suit No. 060 of 2016 for special damages of sh. 2,461,547,372/=-, general and exemplary damages and costs, for breach of contract.

The applicant was contracted by Hoima Municipal Council to construct roads in the Municipality. The applicant subcontracted some of the works under the contract to the respondent. Later, the applicant terminated the sub contract to the respondent for the reasons of failure to execute the contract within the stipulated time. The respondent sued as stated above hence this application for orders for security for costs.

The grounds of the application were set out in the chamber summons as follows;

1. The respondent instituted a suit against the applicants vide Civil Suit No. 086 of 2016 for recovery of UGX. 2,562,475,802/=- as special damages for allegedly breach of contract which is still pending before this honourable court.
2. The respondent has no known assets or physical address of service within jurisdiction of this court.
3. The respondent's suit against the applicant is frivolous and vexatious and applicant has a good defence to the head suit with a likelihood of success.

4. The applicant will be put to undue expenses defending frivolous and vexatious suit and will not be able to recover costs incurred in defending the suit.
5. It is just and equitable that court be pleased to allow this application.

The chamber summons was supported by the affidavit of one John Bosco Kasasira. Mr. Ataya learned counsel for the applicant submitted that the suit was a mere waste of courts time as it had no chance of success. He submitted that the applicant had a good defence to the suit, yet the respondent did not have any known assets or even an address in Uganda. Communication with them was by phone contact.

Mr. Baryabanza for the respondent argued that the respondent was a viable company, with a known address otherwise the applicant would not have subcontracted to them works worth more than 2 billion shillings. He submitted that the respondent's suit was likely to succeed as it was based on breach of an un denied contract. What was more the applicant also filed a counter claim. All these matters needed to go for trial without any fetter of payment of security for costs.

O.26 CPR gives court powers to order payment of security for costs where it deems it fit to do so. The power is discretionary, but obviously must be exercised judiciously. Ssekandi Ag. J., in Anthony Nambooro and Fabiano Waburo-Lio v. Henry Kaala [1975] HCB 315 held that the main consideration to be taken into account in an application for security for cost are;

- a) *Whether the applicant is being put to undue expenses by defending a frivolous and vexatious suit;*
- b) *That he has a good defence to the suit;*
- c) *That he is likely to succeed.*

Only after these factors have been considered would factors like inability to pay come into account.

Mere poverty of a plaintiff is not by itself a ground for ordering security for costs. If this were so, poor litigants would be deterred from enforcing their legitimate rights though the legal process.

Oder JSC in G.M. Combined (U) Ltd v. A.K. Detergents (U) Ltd. C.A. No. 34 of 1995 considered the matter of security for costs extensively and citing among others Anthony Namboro (supra), concluded that;

In a nutshell, 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 this 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 security for costs and any other material available at this stage.

In the present case, the applicant deposed that he subcontracted road works to the respondent. Copy of the agreement was attached to the affidavit. In that agreement, there was a time frame stipulated within which the works were to be completed. The applicant stated that the respondent failed to meet those timelines forcing him to terminate the contract.

The respondent on reply deposed that the agreement for the works with the applicant did not specify any time limits. He attached a copy where the space for time limits was blank. He argued that on the contrary, the main works were to be completed by the applicant before he could come in, but the applicant failed to carry out its part of the contract, hence the delay to complete the subcontracted works.

Each party was adamant about the truth of their depositions. At this stage of the proceedings, it would be difficult for court to make a determination on the truth of those depositions either way. There would be need for examination and cross examination so as to establish the truth. One thing is certain, if the respondent was to prove either or both of his two assertions, he would succeed. What this means is that there is a prima facie case against the applicant.

The need for the matter to go for trial is made more so by the fact that the applicant filed a counter claim in this suit.

The applicant argued that the respondent has no known assets nor an address in Uganda. That is rather surprising because the applicant was the main contractor for road works in Hoima Municipality. He sub contracted some of these works worth more than sh. 2 billion to the respondent. Upon termination of the contract, he states that the respondent is a shell company.

But he conceded that the respondent carried out some work in satisfaction of the contract. He also conceded that he even made payments for some of the works carried out by the respondent. Surely he could not have been dealing with a shell company in all that. If that were so, the applicant would be to blame for not having carried out due diligence prior to engaging the respondent in the sub contract.

Section 284 of the Companies Act provides that;

‘Where a limited 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 a 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.’

That power is discretionary, but must be exercised judiciously. The depositions of the applicant in this regard were that the respondent not having a known address in Uganda, he would not be in position to pay the cost if the suit does in favour of the applicant. He attached the anticipated bill of costs amounting to sh. 246,950,737/= million. Of this amount, sh. 245,154,737/= being instruction fees.

In opposition it was submitted that absence of knowledge of a plaintiffs assets was not proof of his inability to pay. Mulenga JSC., in Bank of Uganda v. Joseph Nsereko & 2 Others Civil Application No. 7 of 2002 held that lack of knowledge on part of the applicant cannot amount to evidence of the respondent’s inability. The learned Justice of the Supreme Court likened this to *‘a fishing expedition, namely putting in the application as a challenge to the respondent to disclose their ‘whererabouts’ and value of their assets, if any.’*

Apart from the postal address which appeared to belong to someone other than the respondent, but which the respondent was using, I was not shown sufficient evidence of the respondent s inability to pay if the suit was to go against them. The applicant for security for costs has the burden to satisfy court that the circumstances justify the order being made. As I noted above, the respondent’s suit was not frivolous.

As Mulenga JSC., in the above case said, the suit (sic)

‘was not shown to be so devoid of merit as to render it probable that it will not succeed’.

There was another matter which I found of relevance. During earlier proceedings, the applicant was ordered by court to pay sh. 1 million as costs to the respondent before the subsequent hearing, but to the date of hearing this application, he had not complied with that court order.

If a party seeks courts discretionary power, such a party ought to ensure full compliance with court orders given earlier. One cannot expect court to make orders in his favour, but close its eyes where that same party does not or is not willing to obey orders issued by the same court against him.

After a full consideration of the circumstances of this case, I found that discretion of court ought not to be exercised by making orders that may fetter a party from accessing justice.

In the result, this application is dismissed with costs to the respondents.

Rugadya Atwoki

Judge

13/10/2017.

Court: The A/Registrar of the court shall deliver this ruling to the parties.

Rugadya Atwoki

Judge

13/10/2017.