THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS APPLICATION NO.268 OF 2021

(ARISING FROM Originating Summons NO.002 of 2020)

PETER KATUTSI----------APPLICANT

VERSUS

1. **SULAIMAN MUKASA & SONS LIMITED**
2. **KARUROKO RANCH LIMITED----------RESPONDENTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant brought this application by way of Chamber Summons against the respondents under Section 64(b) and Section 98 of the Civil Procedure Act, Section 33 of the Judicature Act and Order 26 rules 1, & 3 of the Civil Procedure Rules, for orders that;

1. Each of the Respondents furnishes security for costs for Civil Suit (Originating Summons) No. 2 of 2020 in favour of the applicant before the hearing of the main of the main suit(Originating Summons).

2. Costs of the application be provided for.

The grounds in support of this application are set out in the Notice of motion and affidavit of Peter Paul Katutsi dated 30th March 2021 of 20 paragraphs which briefly states;

1. That the applicant was one of the advocates representing the successful plaintiffs in HCCS No. 103 of 2010; Sheema Cooperative Ranching Society & 32 Others versus Attorney General from which Civil Revision No. 23 of 2018 and Misc. Application No. 2028 of 2018 arose. The Settlement Deed is the subject of Originating Summons No. 002 of 2020 arises from the said applications.

2. That M/s Sulaiman Mukasa & Sons Ltd an applicant in the main suit-Originating Summons was not a party in HCCS No. 103 of 2010 and a claim for the proceeds of HCCS No. 103 of 2010 is therefore redundant and misplaced.

3. That the 2nd respondent are very aware that their award from HCCS No. 103 of 2010 was withheld by government on the advice of the Attorney General as a result of the family dispute in HCCS No. 111 of 2019; Mary Karungi Chantal vs Karuroko Ranch Limited & 9 others and directors were duly informed.

4. That the deed of settlement , the basis of the respondent's claim in Originating Summons is void ab initio because it was vitiated by illegality, irregularity and unenforceable.

5. That the Originating Summons is a frivolous and vexatious matter without any possibility of success.

6. The applicant has a good defence to the suit as the respondents have absolutely no cause of action against him.

7. The respondent companies do not possess any assets or a registered place of business or offices or postal address assets within the jurisdiction of this court or elsewhere to pay the applicant's costs in the event they lose the main suit.
8. That the companies are dormant and shell companies with doubtable legal status since they have not filed any annual returns and tax returns for a considerable number of years.

In opposition to this Application the Respondents through Frank Kanduho, Clive Nsiima Mutambuka and Geoffrey Tayebwa briefly stating that;

1. That Frank kanduho is the company secretary of Sulaiman Mukasa & Sons Limited and the contention that he is not the company secretary is a ploy to perpetuate the scheme of swindling his clients' money.

2. That the execution of the deed of settlement was informed by the fact that SULAIMAN MUKASA & SONS CO LTD is the registered proprietor of ranch No. 32 which is the ranch in the respect of which the award was made by court. As far as ranch No. 32 is concerned there is no other party that its registered proprietor who is entitled to receive the compensation award for the 4(four) square miles of land it lost to government.

3. That Sulaiman Mukasa & Sons Co. Ltd did not change the identity of the parties in Kampala HCCS No. 103 of 2010 by executing a deed of settlement under challenge. The deed of settlement ensured that Katutsi Peter and his fellow lawyers pay the respondent all the money received on account of ranch 7 and

ranch 32, unfortunately, katutsi has todate not accounted for let alone paid to them.

4. That M/s Arcadia Advocates acted with instructions from M/s Karuroko Ranch Ltd and Sulaiman Mukasa & Sons Co. Ltd.

5. That Katutsi has no plausible defence to originating summons No. 002 of 2020 this in so far as;
   (a) He bound himself to account for all the money remitted on his law firm ban account in respect of part of ranch 32 which he has not done.
   (b) The decision not to prosecute Civil Revision No. 23 of 2018 was informed by the execution of settlement deed which settled the fears of the applicants therein.
   (c) He does not deny that he has refused to pay the said money to proprietors of ranch number 32 and ranch number 7.
   (d) He bound himself to pay for himself and for the two colleague layers. The said costs to-date remain unpaid.

6. There are no circumstances warranting the grant of an order for security for costs. The respondents are seized with valuable property capable of putting the applicant's fears to rest.

Clive Nsiima Mutambuka in her affidavit in reply contended that; The application has no merit-

(a) He is fully aware that at all material times he was and still the retained lawyer who received payment from Ministry of Finance and chose to squander it and this part of the concern raised by Karuroko Ranch Ltd.

(b) That the applicant is aware that as counsel for Karuroko Ranch Ltd he owed the company money and still owes it a duty to account for how he dealt with and continues to deal with all the money he has so far received from Ministry of Finance.

(c) That the applicant has never paid any single coin to Karuroko Ranch Ltd notwithstanding that he has received close to 19,000,000,000/= part of which was meant for Karuroko Ranch Ltd.

(d) The applicant is fully aware that he cornered Karuroko Ranch Ltd into forfeiting 400,000,000/= disguising it as costs 'inadvertently omitted from the bill of costs' yet all costs emanating from HCCS No. 103 of 2010 were fully paid.

(e) That at the retained lawyer is fully in the know of the fact that it is propertied and he knows that Karuroko ranch Ltd owns land whose certificate of certificate of title is part of the materials used as evidence in the prosecution of the suit.

(f) That Karuroko Ranch Ltd merits accountability from Peter Katutsi and payment by him of the proceeds of judgment already variously deposited unto his law firm bank account all of which he squandered with reckless abandon.

In the interest of time the respective counsel made brief oral submissions and i have considered the respective submissions. The applicant was represented by *Mr. Francis Niinye* and *Mr. Jude Kamukama* whereas the respondents were represented *Mr. Paul Kuteesa and Mr. Frank Kanduho* as both Company Secretary for the 1st respondent and Counsel.

Whether the respondents should furnish security for costs in Originating Summons No. 002 of 2020.

The applicant's counsel submitted that for the Applicant the Originating Summons is frivolous and vexatious and there have been several court matters dismissed arising out of the same set facts. Secondly, that the deed of settlement out of which this main suit arises was found unenforceable since the 1st respondent was never a party to the court proceedings and it was therefore illegal. Thirdly, the persons who executed the deed of settlement where never authorised by the 1st respondent.

That the said companies are impecunious and are dormant and shell and have not filed the necessary company documents. Lastly, that the companies are entangled in several court matters and litigation which will decimate the little that they have. They relied on the case **of *G.M. Combined v A.K.Detergents SCCA No. 34 0f 1995.***

The respondent's counsel submitted that court is supposed to establish whether the respondents' case is a sham. The applicant represented the respondents and failed to account for over 18,000,000,000/=. They later entered into a deed of settlement and made obligations to pay under the deed which they have failed to fulfil. The respondents came to court for interpretation of the deed of settlement so that the applicant can account for the money due to the respondents. Therefore the suit before court is not a sham and that the companies (respondents) are not impecunious as the applicant alleges or contends.

This application was brought to stifle the hearing of the matter since the applicant does not want to account for the respondents money received from Ministry of Finance. The applicant does not deny receiving the said money but rather contends that the deed of settlement is unenforceable.

Analysis

As a defendant incurs costs as a consequence of the legal proceedings brought against him, it may be just to require that he be provided with security for their recovery in the event that he succeeds or is otherwise awarded costs.

Although it is a fundamental principle that a person who asserts a claim should have access to justice, there are particular circumstances in which he should be required to provide security (if such an order is just in the circumstances of the case) because of the risk that the defendant may not otherwise recover his potential costs.

Whether or not to order a deposit for security for costs is an exercise of discretion and the discretion must be exercised judiciously. The 'overriding policy consideration' in an application for security for costs is the defendant's entitlement to costs should the plaintiff companies fail in their claim. Once a court finds that the company is impecunious, the court ought to grant security for costs unless there are 'special circumstances' indicating the contrary.

One of the main considerations is whether the plaintiff's claim is a sham and not bonafide in court. Although the strengths and weaknesses of the parties respective cases constitute a relevant consideration, this has no application where it is unclear on the facts which party has the stronger case, as is often the case when the facts are unclear. See ***Elbow Holdings Pte Ltd Marina Bay Sands Pte Ltd [2014]SGHC 219***

The applicant has a duty persuade the court that there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so. There must be genuine lack of good faith with regard to the proceedings. The applicant must equally prove the facts which establish plaintiff's intention to evade the payment of costs due to lack of address or intentional change of address. ***See Civil Procedure and Practice in Uganda by M & SN Ssekaana page 280***

The applicant has argued that the respondents lack postal address and he is not likely to find them to recover costs. The facts of the present case are quite peculiar and apply strictly to the current circumstances. The applicant represented the respondents directly or indirectly in the original suit HCCS No. 103 of 2010 and by that time he was fully aware of the address the respondent could be found or contacted. After receiving the money on their behalf, he should not be allowed to raise an issue of lack of postal address since it may appear at all material times they never had any address. There is no evidence adduced to show that the respondents have changed address intentionally to evade payment of costs.

It is necessary to distinguish between impecunious companies and natural persons for purposes of security for costs. This is because of the potential harm or abuse which may arise when a company is used to initiate litigation behind the cover of limited liability. In such a case, " *the high likelihood that the successful defendant's costs will be unrecoverable requires the law to give greater protection to the defendant rather than the plaintiff"*. See ***Ho Wong On Christopher v ECRC Land Pte Ltd [2006] 4 SLR (R) 817***

The respondents in this case have not used the company shield to insulate themselves against recovery of costs but rather the companies are the *bonafide* aggrieved parties that are seeking to recover money owed and recovered by the applicant and for which has he refused to account or surrender to them. The respondents' alleged impecuniosity (if any) could on the other hand be attributable to the applicant who has refused to account or remit their money according to the deed of settlement. See ***G.M Combined (U) Ltd v A. K Detergents (U) Ltd SCCA No. 34 of 1995***

The court must consider all the circumstances of the case in order to determine whether it is just to order that the security be provided. One of such considerations should be the conduct of the parties in the matter before a just order is made for security. The courts have emphasized that the impecuniosity of the plaintiff is always not a basis on which the court would order security for costs. The reasoning here is that an order for security on this ground alone would prevent access to justice because of a party's pecuniary position(despite the established principle that poverty must not be a bar to litigation) and may be arbitrary considering that the plaintiff may subsequently derive the means to satisfy his potential liability for the costs.

The court ought to consider further whether the defendant is responsible for the impecunious status or have contributed to the plaintiffs' lack of means. This as noted earlier is a relevant factor against ordering security particularly if the plaintiffs' claim has reasonable chance of success. The applicant has not raised any genuine defence to the accountability sought by the respondents in this matter rather is trying to rely to technicality to stifle their access to court for a remedy.

The respondents are seeking court's interpretation of the deed of settlement and an order to account for money received on their behalf by their former lawyer. It would be greater absurdity to deny them access to the temple of justice. The application for security in this case is being used oppressively to stifle justice. See ***Sembawang Engineering Pte Ltd v Priser Asia Engineering Pte Ltd [1992] 2 SLR (R) 358***

This application for the reasons herein above fails and is dismissed with costs.

It is so ordered.

SSEKAANA MUSA

JUDGE

27th/04/2021