

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
MISCELLANEOUS APPLICATION NO. 0065 OF 2018
(Arising from Civil Suit No. 44 of 2017)

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1. PRINSLOO THOMAS KIMINTA
2. STEVEN LEONARD WILLIAMS
(Executors of the Estate of the Late John
Charles Palgrave Simpson) }**APPLICANTS**

10 **VERSUS**

1. MARIA GORRETI KAGWERA
(Executor of the Estate of the late John Lockhart Smith) } **RESPONDENTS**
2. JOHN MAYOMBO
(Suing through Samuel Okwakol Atubet his Lawful Attorney)

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BEFORE: HIS LORDSHIP HON. MR. WILSON MASALU MUSENE

Ruling

The Applicants, Prinsloo Thomas Kiminta and Steven Leonard Williams, (Executors of the Estate of the late John Charles Palgrave Simpson) filed this Application against the Respondents, Maria Gorreti Kagwera (Executor of the Estate of the late John Lockhart Smith) and John Mayombo (Suing through Samuel Okwakol Atubet his Lawful Attorney).

The Application by Chamber summons was brought under **Section 98** of the Civil Procedure Act, **Order 26 Rules 1, 2(2) & 3** of the Civil Procedure Rules. It was seeking for orders that:-

- a. The 1st and 2nd Respondents jointly and/or severally be ordered to furnish security for costs in Civil Suit No. 44 of 2017 and all matters arising therefrom that were filed in this Honourable Court.
- b. Costs of the Application be provided for.

5 The Application was supported by the affidavit of Prinsloo Thomas Kiminta, the following paragraphs are pertinent:-

1. That I am an adult male Ugandan of sound mind and the Co-Applicant herein; fully conversant with all factual matters pertaining to this Application and I depone this Affidavit as a co-executor of the Estate of the Late John Charles Palgrave Simpson
10 and on behalf of myself and my Co-executor to the said Estate with full authority.
2. That the Respondent filed a suit vide Civil Suit No. 44 of 2017 against the 1st and 2nd Applicants herein and Kijura Tea Company Limited, seeking for the recovery of special, punitive and general damages arising from the alleged fraudulent and/or negligent and unlawful transfer of shares and non-remittance of proceeds of sale and
15 dividends.
6. That I am advised by our lawyers to wit:- M/s Kasirye, Byaruhanga & Co. Advocates whose advice and information I verily believe to be true and correct, that Civil Suit No. 44 of 2017 is a frivolous suit with a low likelihood of success.
7. That I am further advised by our lawyers that the 2nd Respondent has no cause of action
20 against the Applicants because at law, only the 1st Respondent holds legal authority to bring a suit as Executor of the Estate of the John Charles Palgrave Simpson.
8. That further, I am advised that prima facie the suit is unlikely to succeed because the entire foundation of the suit is based on a presupposition that the Late John Lockhart Smith never received payments for shares whereas there is prima facie evidence that he
25 was paid and duly acknowledged.
10. That I am aware that the 2nd Respondent who claims to be beneficiary and who is behind the current suit, has lived in the United Kingdom for the last ten (10) years and does not have any assets or property within the jurisdiction of this Honourable Court that can be attached to satisfy an order for costs and his means are largely unknown.

13. That in light of this reality, it is proposed that this Honourable Court orders the Respondents to jointly and/or severally furnish security for costs in the amount of UGX 130,000,000/= (Uganda Shillings One Hundred thirty million only) to cover this instant Application and Civil Suit No. 44 of 2017, which are both matters within the jurisdiction of this Honourable Court and attract substantial legal fees and disbursements for defending the suit through expert witnesses, auditors and accountants travelling to Fort Portal.

The Respondents, on the other hand, filed an affidavit in reply opposing the Application of Security for costs. The affidavit was sworn by Samuel Okwakol Atubet, and the pertinent paragraphs are:-

3. That I have been advised by my lawyer M/s Acellam Collins & Co. Advocates whose advice I verily believe to be true that this Application is misconceived and profoundly absurd, an afterthought brought in bad faith to frustrate the ends of justice.

8. That the Applicants have been in the habit of delaying or frustrating the hearing of this case by filing several applications and this is one such attempt at preventing the commencement of the hearing of the case on its merits.

9. That in reply to paragraph 6 it is not true that the Respondent's suit is frivolous on the contrary the suit has a high likelihood of success as it is based on the fraudulent transfer of shares of the late John Charles Palgrave Simpson, long after his death and without accounting to the estate of the deceased.

11. That the suit has a very high likelihood of success as the Applicants have not advanced any plausible defense to the claim save for Annexure "D" which document is purportedly signed by the Late Charles John Lockhart Smith on the 1st day of February 2003 whereas the deceased passed away on the 20th day of May 2002.

13. That I verily believe that the Application for security for costs is brought in bad faith and is intended to frustrate the hearing of the case and deny the 2nd Respondent from accessing justice by making a claim for the shares bequeathed to him.

Both Advocates on either side filed written submissions which are on record and have been considered by this Court. Before deciding whether or not an order of security for

costs should be awarded or not, this Court has taken into consideration the brief background to this case, and the claim under Civil Suit No. 44 of 2017.

Under Para 3 of the Plaint, the Plaintiffs' claim against the Defendants jointly and severally is for recovery of special damages, punitive damages and general damages arising out of unauthorised fraudulent and/or negligent and unlawful transfer of shares and non-remittance of proceeds of sale and dividends.

The Plaintiff set out detailed facts constituting the cause of action under paragraph 4 of the Plaint, and they set out particulars of fraud and negligence. One of the fundamental issues raised is that Annexure "D" to the written statement of Defence, was allegedly signed by the late Charles John Lockhart Smith on the 1st day of February 2003, when the deceased passed away 20/5/2002.

That raises a very crucial issue to be investigated by this Court during the hearing, among other alleged particulars of negligence and fraud. To the mind of this Court, there is a prima facie case stated and the same cannot be said to be frivolous or vexatious.

Advocates on both sides have made reference to the case of **G.M.Combined (U) Ltd versus A.K. Detergents (U) Ltd, S.C.C.A No. 34 of 1995**. In that case, the matter of security for costs was extensively considered and their Lordships and it was concluded as follows:-

"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 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 or in opposition to the Application for security for costs and any other material available at this stage."

So whereas one of the reasons advanced is that the Applicants are incurring expenses on Court attendance in Fort Portal and legal fees for their Advocates based in Kampala, it does not prevent this Court from inquiring into the merits of the case, particularly the rather serious allegations of fraud raise. The law is very clear on payment of costs by a losing party and can be enforced not only through attachment of Assets of the judgment debtor, but also by confirming such a judgment debtor to Civil Prison.

Secondly, although this is a case of 2017, this Court will take into account the fact that an earlier suit No. 18 of 2013 had been filed and handled and so to avoid further expenses, it will be fast trucked.

5 Thirdly, Advocates on both sides, particularly Counsel for the Applicant has raised detailed matters in their submissions which will be considered by this Court in the main judgment and not at this stage.

10 So, to avoid stifling the Respondents' suit, and to administer substantive justice as stipulated under the Constitution of the Republic of Uganda, 1995, I decline to allow this application of security for costs. Let the case be heard on the merits and whoever wins will be entitled to costs and the case shall be fast trucked.

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WILSON MASALU MUSENE

JUDGE

15 **19/12/2018**