

**IN THE SUPREME COURT OF UGANDA**

**AT MENGO**

**CORAM: J.N. MULENGA JSC**

**CIVIL APPLICATION NO.15 OF 2002**

**BETWEEN**

1. **NOBLE BUILDERS (U) LIMITED**
2. **RAGHBIR SINGH SANDHU::::::::::::::::::::: -.APPLICANTS**

**AND**

**JABAL SINGH SANDHU:::::::::::::::::::::RESPONDENT**

**RULING.**

By a Notice of Motion dated 26<sup>th</sup> September 2002, brought under r.100 (3) of the Supreme Court Rules, 1996, the above named applicants apply for orders that -

- (a) The respondent furnishes further security for costs, past costs and costs of civil appeal No.41 of 2002 within a period determined by the court, failing which the appeal be dismissed with costs.
- (b) Costs of and incidental to this application, be provided for. The application is supported by the Affidavit of Raghbir Singh Sandhu, the 2<sup>nd</sup> applicant, sworn on 27 September 2002, and his several Supplementary Affidavits sworn on subsequent dates.

The background to the application is very brief. On 19<sup>th</sup> September 2000, in Companies Cause No.16 of 2000, the respondent petitioned the High Court for orders to wind up the 1<sup>st</sup> applicant and declare the 2<sup>nd</sup> applicant a delinquent director. The High Court entered judgment for the respondent, granting the orders for which he had applied. The applicants successfully appealed to the Court of Appeal, which on 20<sup>th</sup> May 2002, set aside the judgment of the High Court and awarded to the applicants, costs of the appeal and of proceedings in the High Court. The respondent appealed to this Court in Civil Appeal No. 13 of 2002, which has not yet come up for hearing.

In the meantime, the applicants filed bills of costs in the two lower courts. At the time of hearing this application, the applicants' bill of costs in the High Court had been taxed and allowed at shs.28,079,000/=; and on reference to a single judge of the Court of Appeal, their costs in that court, had been reduced to shs.6,085,400/=. The applicants contend that the total costs so far owing from the respondent is shs.34,164,400/=:, and that they will incur further costs in respect of the appeal pending in this Court.

Apart from asserting that the costs so far incurred in the lower courts are quite substantial, the applicants base this application on the grounds that -

- The respondent is a foreigner currently resident in Canada, without any property or investments in Uganda.
- The respondent's appeal has no likelihood of success.
- It is in the interest of justice, to order for further security for costs. In his Affidavit in Reply, Jaspal Singh Sandhu, the respondent, avers that he has not refused or failed to pay the costs, and that there is no ground for suspecting that he will be unable to pay if he loses the pending appeal as he is not impecunious. He also avers that his appeal to this Court is not devoid of merit; and that the applicants have not shown special circumstances to justify the need for further security for costs.

At the hearing of the application, Mr. Byenkya, learned counsel for the applicants submitted that the purpose for security for costs pending disposal of an appeal, is to ensure that a party who has been successful in the lower courts is not left without recourse for his costs, in the event of repeated success in the further appeal. He maintained that in the instant case the applicants had already incurred substantial costs in the sum of over shs.34m/=, which was likely to increase by about another shs.10m/=, in respect of the pending appeal. Counsel argued that because the respondent does not reside, and has no assets or investments, within the court's jurisdiction, the applicants would be left without recourse in the event of their likely success in the pending appeal. According to learned counsel, the statutory sum of shs.400,000/= deposited in court as security for costs is utterly inadequate. He stressed that a successful party should not be left to the vagaries of having to pursue costs through proceedings in foreign jurisdictions. He relied on the decision in **Atul Kumar Patel VS. American International Banking Corp.**, Civil Application No.9/89. While conceding that security for costs should not be used to stifle further appeals, he proposed that having regard to the circumstances of the instant case, the sum of shs.50m/= would be a reasonable amount for further security. Mr.Mubiru-Kabenge, learned counsel for the respondent, submitted that the order for security for costs is discretionary, and the courts use it sparingly. According to him, the order for security for costs is appropriate only where there is evidence to show inability to pay. Non-payment of past costs, residence outside of the court's jurisdiction and lack of assets or investments therein, are not evidence of inability to pay. He conceded that residence outside jurisdiction is a factor the court may take into consideration, but argued that it is not sufficient ground alone. He pointed out that Canada is within the Commonwealth, so that, pursuant to the Judgment Extension Act (Cap. 12) and the Reciprocal Enforcement of Judgments Act (Cap.21), if the applicants succeed in the pending appeal, they would not find it difficult to recover their costs in Canada. Counsel also stressed that the court should not allow an order for security for costs to have the effect of fettering the appeal process. He contended that in the instant case, an order for further security for costs could drive the respondent from the seat of justice. He submitted that though the respondent was able to

pay, he would find it imprudent to tie so much money in court instead of putting it to profitable use. In support of his submissions, counsel cited **U.C.B. vs. Multi Constructors Ltd.** Civil Appeal No.29/94 (SC); **Bank of Uganda vs. Joseph Nsereko & Others,** Civil Application No.7/02 (SC); **Porzelack KG vs. Porzelack (UK) Ltd** (1987) 1 All ER 1074 and **De Bry vs. Fitzgerald and another** (1990) 1 All ER 560.

Rule 100 of the Supreme Court Rules, 1996 provides as follows -

*(1) Subject to rule 108, there shall be lodged in Court on the institution of a civil appeal as security for the costs of the appeal the sum of shs.400, 000.*

*(2) Where an appeal has been withdrawn.....the Court may,....direct the cross-appellant to lodge in the Court as security for costs, the sum of shs. 400, 000 or ... less....*

*(3) The Court may, at any time, if the Court thinks fit, direct that further security for costs be given and may direct that security be given for the payment of past costs relating to the matters in question in the appeal.*

Under r.108 the Court may, on application, exempt an appellant from depositing security for costs if it is satisfied that the appellant lacks the means to pay, and that the appeal has a reasonable possibility of success.

I deduce from those two rules that the general principle is that an appellant should provide security for costs of the appeal, unless the Court exempts him due to inability. It is noteworthy that even a party who files a cross-appeal with no obligation to deposit any security for costs, may subsequently be required to do so if the main appeal is withdrawn. In addition, the Court may direct the appellant, in appropriate circumstances, to increase the security for costs of the appeal; and/or to deposit security for past or earlier costs. All this tends to portray security for costs in civil appeals as the norm rather than the exception. Nevertheless, it is well settled that the burden lies on the applicant to show sufficient cause why the appellant should furnish further security for costs, over and above

the amount fixed by the rules. What amounts to sufficient cause, is a matter for the Court's discretion, depending on the circumstances of the case before it.

One of the grounds of this application is that the respondent's appeal has no reasonable chance of success. I am inclined to the view that demonstrable lack of reasonable chance of success for an appeal is sufficient cause for the court to order an appellant to furnish, not only further security for costs of the appeal, but also security for past costs. In the instant case, however, the applicant's contention that the appeal has no reasonable chance of success is countered by the respondent's contention that his appeal is not devoid of merit. Neither party has advanced its contention, by evidence or argument, beyond the mere claim, albeit by affidavit, that it hopes to succeed. I cannot place reliance on either contention. Secondly, although Mr. Mubiru-Kabenge sought to make his client's ability to pay the costs an issue, the application is not based on any allegation that the respondent is unable to pay. Perhaps what is nearer to the point is the respondent's willingness to pay the costs, since he has not paid the costs so far incurred. What is more, I do not accept that inability to pay *per se* is the only ground for ordering security for costs. I therefore do not need to consider whether the respondent is able to pay the costs in the event of losing the pending appeal.

The significant ground in support of the application is the assertion that the respondent is a foreigner who resides in Canada, and who has no property or investments in Uganda. The respondent does not expressly admit or deny the assertion. He merely contends in paragraph 7 of his affidavit in reply, that, *"the assertion is not supported by any evidence and is no proof of inability to pay"*. The 2<sup>nd</sup> applicant retorts in his supplementary affidavit of 14 Nov. '04 - *"4. In reply to paragraph 7 of the respondent's affidavit in reply.... I personally know the respondent and he has lived in Canada with his family since the early 1990's and I know of no assets that belong to him in Uganda against which execution can issue should we be successful in the appeal. 5.1 verily believe that his lack of property in Uganda is the reason why he does not name any assets that belong to him in his affidavit in reply."*

All this is affidavit evidence, which the respondent does not contradict. In my view, it is sufficient proof that the respondent is a foreigner, who is ordinarily resident outside the court's jurisdiction, and who has no assets in this country. This factor is significant because it lends weight to the applicants' fear that if they succeed in the pending appeal, they might not readily recover the costs awarded to them. In default of voluntary payment of the costs, neither the person nor the assets of the respondent would be available within the court's jurisdiction for attachment.

The respondent's principal response is that in case of such default, the applicants would be able to enforce the orders for costs through execution proceedings in a Canadian court, by virtue of provisions of the Judgments Extension Act, (Cap. 12) and the Reciprocal Enforcement of Judgments Act, (Cap.21). Cap.12 makes provision for the execution, in Uganda through Uganda courts, of decrees and warrants issued by the courts of Kenya, Malawi and Tanzania. Cap.21 makes similar provision for judgments of superior courts in the United Kingdom and the Republic of Ireland. Each of the two Acts empowers the Minister, by statutory order, to extend the application of the Act to judgments of courts in any other Commonwealth country. In the view of the respondent's counsel, a Ugandan court order would be enforceable in Canada - a Commonwealth country, without difficulty. It is in this context, that learned counsel invited me to follow the two English decisions in Porzelack KG vs. Porzelack (UK) Ltd (supra) and **De Bry vs. Fitzgerald and another** (supra), in each of which the defendant's application for security for costs on the ground that the plaintiff was a foreigner resident outside the court's jurisdiction, was rejected. In rejecting the application, the court took into account *inter alia* the Civil Jurisdiction and Judgments Act 1982 of the U.K., which gave effect to a convention on enforcement of judgments within EEC countries. Under that convention, enforcement of judgments of courts of one EEC member country in other member countries is relatively easy.

I am not persuaded to follow those decisions for two reasons. First, the applications in those cases were rejected on basis of several considerations, which are not applicable to the instant case. In the **Porzelack's case**, the court noted that under the convention the defendant was availed "*substantial and improved rights*" to enforce an order for costs in West Germany and considered that to be "*an important but not decisive*" factor. One of the other factors it took into consideration was that if it ordered the security for costs on the scale requested, the plaintiffs action would be stifled. In **De Bry's case**, the Court of Appeal set aside an order for security for costs made by the lower court. It criticised the judge of first instance for failing to appreciate that by virtue of the said convention, enforcement of an English judgment within the EEC was prima facie relatively cheap and effective. In addition to that, however, the court took into account the fact that the plaintiff had, within the court's jurisdiction, a considerable fund, albeit of yet unascertained value, which could be used to satisfy any order for costs made against him. The circumstances of the two cases are distinguishable.

My second reason is that the respondent has not laid any foundation for his submission on this aspect. While it is not disputable that Canada is a Commonwealth country, the respondent does not show, by affidavit or otherwise, that the Minister ever extended application of either Cap. 12 or Cap.21 to judgments of Canadian Courts. More importantly, the respondent does not show that judgments of Ugandan courts are enforceable in Canada without difficulty. It is noteworthy that before making a statutory order under Cap.21, the Minister must be satisfied that the legislature of such other Commonwealth country has made reciprocal provisions. Unlike the courts in the two English cases, I am unable to say that enforcement of a Ugandan court order for costs in Canada, is prima facie easy, let alone cheap.

In **De Bry's case** (supra), Lord Donaldson M.R., referred to Order 23 of the English RSC, which provides for security for costs, and at p.565 g-i, said that its rationale is that -

*" a defendant should be entitled to security if there is reason to believe that, in the event of his succeeding and being awarded costs of the action, he will have real*

*difficulty in enforcing that order. If the difficulty would arise from the impecuniosity of the plaintiff the court will of course have to take an account of the likelihood of his succeeding in his claim, for it would be a total denial of justice that poverty should bar him from putting forward what is prima facie a good claim. If, on the other hand, the problem is not that the plaintiff is impecunious but that, by reason of the way in which he orders his affairs, including where he chooses to live and where he chooses to keep his assets, an order for costs against him is likely to be unenforceable, or enforceable only by a significant expenditure of time and money, the defendant should be entitled to security."*

In my view, that rationalisation is equally applicable to r. 100 of the Rules of this Court. And I am constrained to add that having regard to what I said earlier in this ruling about security for costs in appeals, the court should even more readily grant such security in an appeal where the respondent has incurred substantial costs, which remain unpaid.

In the instant case, the problem that the applicants anticipate or fear is because the respondent chooses to live in Canada and to have no assets in Uganda. His attitude, as disclosed by his counsel, that he would rather put his money to more profitable use than to secure payment of costs in a litigation he initiated, which is bound to exacerbate the applicants' fear, is also a matter of choice. In the circumstances, I think that this is a fit case where the applicants should be accorded further security. I therefore allow their application. I direct that the respondent give further security for costs of the appeal and for payment of past costs, by depositing in court, within thirty days from the date of this ruling, the sum of shs.40,000,000/-. I also order that the applicants shall have the costs of this application.

***DATED at Mengo this 4th of March 2004***



***J.N. MULNGA***

***JUSTICE OF THE SUPREME COURT***