

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT KAMPALA

[Coram: Tsekooko, Katureebe, & Kitumba, JJSC.]

Civil reference No.01 of 2011

BETWEEN

GOODMAN AGENCIES LTD.....APPLICANT

AND

HASA AGENCIES (K) LTDRESPONDENT

{Reference from the ruling of a single judge at Kampala (G,M. Okello, JSC.) dated 27th January, 2011, in the Civil Application No.1 of 2011}

RULING OF THE COURT

Goodman Agencies Ltd, (the applicant) has made this reference from the ruling of Okello, JSC, sitting as a single judge of this Court. The reference is made under section 8(2) of the **Judicature Act** and Rules 41(2) and 52(1)(b) of the Rules of this Court. Originally the reference was initiated within the prescribed period of seven days by a letter of the applicant's advocates dated 31st January, 2011.

Although counsel for the applicant instituted the reference under the correct Rule [Rule 52(1) (b)] the procedure adopted subsequently on 15/02/11 by counsel, contravenes that very rule in as much as it was instituted by a Notice of Motion to which was annexed fresh evidence by way of affidavit and very many other documents. We shall say more later. Be that as it may, the principle order sought by the applicant is for us to **vary, discharge or reverse** the decision of the single judge made on 27th January, 2011 dismissing an application for an order that **Hasa Agencies (K) Ltd** (the respondent) provides further security for costs and security for past costs.

The grounds in support of this reference are set out in the notice of motion and are reproduced in identical terms in the supporting affidavit sworn on 31st January, 2011, by Nicholas Were, the Managing Director of the

Applicant. We note that the grounds in support of the motion are vague, some are repetitive, and most are exceedingly circumlocutory and indeed argumentative.

We summarise the relevant grounds as follows:-

- (1) The summary of ground 2 in the notice of motion is that the single judge erred in dismissing the applicant without properly evaluating or re-appraising the evidence in support of the application.
- (2) What we got from the 4th ground is that the learned single Judge erred by not accepting unchallenged evidence of the applicant would not be able to recover its costs because the respondent, a foreign company, has no known address nor assets in Uganda and Kenya from which the applicant can recover its costs.
- (3) In the 5th ground, the complaint is that the learned single Judge failed to properly interpret legal authorities presented to him during the hearing of the application.
- (4) The complaint in the 6th ground is that the single Judge erred when he held that the applicant failed to prove that the respondent's appeal has no reasonable prospect of success and therefore it would be a denial of justice to order the respondent to provide security for costs. In substance grounds 7, 8 and 9 in the notice of motion raise similar complaint
- (5) In ground 7, the applicant faults the single judge for his holding that the applicant did not include in the application the record of proceedings in Constitutional Court Petition to enable the judge verify the prospect of success of the pending Constitutional Appeal.
- (6) In the ground 8 and 9 the learned single judge is criticized for alleged failure to evaluate evidence adduced by the applicant to the effect that the appeal is unlikely to succeed.
- (7) The complaint in 10th ground is that the judge erred in law and fact when he ruled that there was a review of the consent judgment in the High Court when the High Court never set aside the said the said judgment.
- (8) In the eleventh ground, the applicant asserts that the respondent's claim was properly settled by the Constitutional Court and therefore the pending appeal had no prospect of success because it is not bona fide and is a sham.

We do not appreciate why in both the notice of motion and in Mr. Were's affidavit the applicant is referred to as applicant/appellant.

Because of the nature of the application, no affidavit in reply was filed. Indeed as pointed out earlier, Rule 52(1) (b) of the Rules of this Court, like its predecessor, envisages this type of application to be simple and, preferably made by an oral application informally in Court immediately after the single judge delivers a ruling, or in writing within seven days after the single Judge's ruling has been delivered. This Court emphasized this procedure in **A.KP.M. Lutaaya vs Attorney General** (*Supreme Court Civil Application No. 01 of 2007*).

The relevant sub-rule (1) (b) of Rules 52 reads thus:-

52 (1) "Where under-section 8(2) of the judicature Act, any person who is dissatisfied with the decision of a single judge of the Court-

(b) in any civil matter wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the court, the applicant may apply for it informally to the judge at the time when the decision is given, or by writing, to the registrar, within seven days after the date.

(2) At the hearing by three judges of the court of an application previously decided by a single judge, no additional evidence shall be adduced except with the leave of the court.

The sub-rule introduced a simple procedure whose purpose is to expedite the hearing of the reference. Unfortunately some members of the bar have adopted, as in this reference, a laborious procedure which in effect defeats the purpose of the rule and contribute to delay in determining the reference. In **Lutaaya's** case (Supra) a recent decision in which **Mr. Sembuya** himself represented the applicant (Lutaaya), we approved the practice prescribed by the Rule. We are disappointed that in spite of that ruling, which is binding on advocates, Mr. Semuyaba persists defiantly in this practice. This Court restated the procedure to be followed by anybody making a reference to three judges. At the risk of being lengthy we quote what this Court stated at pages 8 and 9 in its Lutaaya ruling-

Second, an alternative, an aggrieved person who fails or omits to make an oral application at the time a single judge delivers a ruling may apply by writing to a Registrar within seven days after decision of a single Judge asking for reference to be made. Again, no evidence is needed. Only materials on the file are sufficient. The applicant can however seek leave of the Court to adduce

additional evidence. As mentioned earlier, after the judge read his ruling, the applicant correctly made an oral application for a reference to be made which the Judge granted. Therefore the Notice of Motion in this reference was made in violation of Rule 52 in that even though an oral informal application had been properly made on 13th June 2007, a fresh application was again made by Notice of Motion accompanied by additional evidence (affidavit) together with all manner of annexures, making the whole reference different from what is envisaged under Rule 52.

A study of previous rules on the same subject namely reference from a decision or orders by a single Judge of the Court and its predecessors, shows that essentially the three Justices are expected to have a record which was before a single Judge, placed before them for study to decide whether on the materials available before him, the single Judge made the right decision.

Whereas in the original Rule 19 of the Eastern Africa Court of Appeal Rules, 1954, it was explicitly stated that what had to be placed before the full Court were copies of the record before the single judge, the current rule only stipulates that no additional evidence is to be filed except with leave. In our view, the purport of the current rule is the same as that of that of the original rule.

The court continued-

“When this reference came up for hearing, we drew the attention of Mr. Semuyaba, counsel for the applicant, to the fact that the procedure he adopted of filing a notice of motion in addition to the oral was erroneous and inconsistent with Rules 52 of the Rules of the Court. In response learned counsel argued that the procedure was in order as it enables the applicant to clearly articulate the grounds of the reference in the notice of motion. In addition he submitted that it was the procedure commonly practiced. In support of the latter submission, he cited the ruling in Motor Mart (U) Ltd. Vs. Yona Kanyomozi (Supreme Court Civil Application No. 6 of 1999) (unreported) and Kabogere Coffee Factory Ltd. And Hajji Bruhan Mugerwa vs. Hajji Twaibu Kigongo (Supreme Court Civil Application No.10 of 1993) (unreported). We think that although the two rulings relate to extension of time, they do not in any way decide that a reference under Rule 52 of Rules of this Court must or should be made by a notice of motion. Even if a number of similar applications have previously come before this Court or its predecessors by way of notice of motion, that does not establish a modification of the procedure envisaged and specified under Rule 52 itself.

We must stress that the Rule 52 is a special rule with its own mode of operation regulating the conduct of applications specified therein. It comes towards the end of the rules regulating institution of applications in the Court and especially, well after Rule 42, which sets out the general form in which other applications to Court are to be instituted. Rule 42 in fact specified states that applications to this Court shall be by motion save those which under any other rule may be made informally.”

If a reference under Rule 52 had to be made by notice of motion there would have been no need for direction in Rule 52 that the application had to be made either informally, orally or by application in writing to the Registrar. The rule provides a simple procedure for a simple process whereby the substantive application which was heard and determined by a single Judge should be referred to and be reviewed by the Court. Therefore we hold that the procedure adopted by Mr. Sembuya which is apparently commonly practiced by other members of the bar is wrong and must be discontinued.

The procedure which is to be followed is as follows: Where an oral application for a reference is made before a single Judge, that Judge should pass the file to Registrar with direction that the number of appropriate copies of pleadings and proceedings before him or her be produced so that the application is fixed for hearing by three Justices. Where an application in writing is made to the Registrar, the Registrar shall ensure that an appropriate number of copies of the pleadings and proceedings before the single Justice is produced after which the application is fixed for hearing. Thereafter the parties should be served with hearing notices. In either case, no additional evidence must be filed without leave of the Court.

As **Lutaaya’s** case, the procedure adopted here is wrong but we will consider the application because of the fact that the application was initiated by written application to the Registrar. In this matter the applicant is represented in these proceedings by two separate firms namely Messrs. Okuku & Co., Advocates, and Messrs Semuyaba, Iga& Co, Advocates. From the former firm, Mr. James Okuku and from the latter firm Mr. Sembuya jointly argued the application before us. The respondent was represented by Mr. D. Nkurunziza of Didas Nkurunziza & Co, Advocates. Each side made oral submissions.

Background:

The background facts are found in the judgment of the Constitution Court, the record of the single judge and the Notice of Motion and the accompanying documents. The applicant and the respondent jointly filed High Court Civil Suit No. 719 of 1997 against the Attorney General to recover a certain sum of money.

Subsequently, the respondent was struck off and ceased to be a party to the suit. The applicant later reached a settlement with the Attorney General. The agreement was reduced into a consent judgment and was approved by the High Court and a consent judgment dated 02-09-05 was filed in the High Court. On 6/9/2005 the consent judgment dated 02-09-05 was filed in the High Court and was sealed. The amount of settlement was Shs.14,485,547,842/=. Apparently on 12/19/2005 the respondent applied to High Court to be made a party to the Consent judgment. On 14/9/2005, the High Court promptly re-joined the respondent to the consent judgment and allotted to it a portion of the settlement agreement. On the same day a decree was signed and sealed and it included the respondent as one of the decree holders.

The applicant, who claimed that the High Court wrongly joined the respondent to the consent judgment, challenged the actions of the Judge of the High Court by petitioning the Constitutional Court, in Constitutional Petition No.03 of 2008. In the petition, the applicant contended that the acts of the High Court judge in joining the respondent to the consent judgment and allotting to the respondent a portion of the settlement agreement without any notice to and hearing of the applicant were unconstitutional. It further contended that allotting to the respondent a portion of the consent judgment agreement in that manner amounted to compulsory deprivation of the applicant's property contrary to Article 26 of the Constitution. Secondly, that joining the respondent to the consent judgment in the manner stated above amounted to denying the applicant a fair hearing contrary to Article 28 of the Constitution.

Apparently and judging from the affidavit of Bakwega in the Constitutional Court, the respondent argued that it applied for review of the consent judgment so that it (respondent) be reinstated as a party to the suit, and that the applicant took part in those proceedings. The respondent appears to have also stated that after the High Court ruled to join the respondent to the consent judgment, the applicant was dissatisfied and sought leave to appeal but later withdrew.

The Constitutional Court believed the applicant's version of the story and allowed the petition with costs against the respondent and the Attorney General. It also gave to the applicant a certificate for two advocates.

Dissatisfied with the decision of the Constitutional Court, the respondent filed in this court, Constitutional Appeal No. 05 of 2010. The appeal is still pending hearing.

In the meantime, the applicant filed two bills of costs one for each of the two counsel who represented it in the Constitutional Court. At the time of the hearing the application by the a single judge, the taxation ruling on the applicant's two bills of costs in the Constitutional Court had not yet been delivered. The total untaxed bills of costs stood at Shs.6, 744,766/=. The applicant also filed a skeleton bill of costs for the estimated costs of the applicant in defending the Constitutional Appeal No. 05 of 2010 in this Court estimated to be 100,000,000/=. The costs in the High Court awarded in the consent judgment in favour of applicant were Shs.300, 000,000/=. The total of the judgment in favour of the applicant were Shs.300,000,000/=. The total of the bills of costs plus the costs in the High Court is estimated at Shs.17, 044,766,900/=

Before the single Judge, Mr. Semuyaba, who, like now, appeared with Mr. James Okuku, for the applicant contended that the costs of the applicant so far incurred were substantial.

\The single Judge identified the three basic grounds in the application before him to be:-

(1) *The respondent is a foreign company without any known address and assets within Uganda and Kenya to cover the costs.*

(2) *The respondent's appeal has no reasonable prospect of success.*

(3) *It is in the interest of Justice to order for further security for costs and past costs.*

During the hearing of the application by the single Judge Mr. Sembuya contended that the affidavit of Mr. Nicholas Were showed that a search into the Registry of companies in Nairobi, Kenya, revealed that the respondent had no returns in its file to reflect its financial status. He submitted that that position coupled with the fact that the respondent has no known address and assets in Uganda and Kenya, make this a fit and proper case to order for further security for costs and past costs. He relied on a number of authorities including ***G.M. Combined (U) Ltd. –Vs- A.K. Detergents (U) Ltd, Supreme Court Civil Appeal No. 34 of 1995*** and ***Noble Builders (U) Ltd. And Anor – Vs – Jabal Singh Sandhu, Civil Appeal No. 15 of 2002.*** The learned single Judge distinguished these cases and declined to grant the application.

Arguments by Counsel

The summary of the arguments before us by counsel for the applicants is this. After the respondent's withdrawal from the suit filed in the High Court, the suit was settled in favour of the applicant by way of a consent judgment. The parties to the consent judgment were the applicant as judgment creditor and the Attorney General as judgment debtor. After the consent judgment had been sealed, the respondent applied and Tabora, J., allowed the application and rejoined the respondent as co-judgment creditor. This forced the applicant to file Constitutional Petition No.3 of 2008 in the Constitutional Court in which it was claimed that Tabora, J., had kept under lock and key the file containing the consent judgment the draft of which judgment was lodged in Court on 2/9/2005. That the judge violated Articles 28(1) and 26 of the Constitution. That since consent judgment was on 2/9/2005, the learned judge became functus officio.

That Tabora, J., subsequently signed a decree in the case after hearing only the respondent and without hearing the applicant, the genuine decree holder.

The applicant asked the Constitutional Court to declare that the proceedings held by Tabora J. after consent judgment was filed are null and void and also to grant an order to expunge the learned judge's proceedings conducted after consent judgment.

The Constitutional Court granted the prayers. The respondent appealed to this Court. The applicant then applied to the single judge for an order for security for costs. The application was rejected. Hence, this reference.

Mr. Okuku and Mr. Semuyaba repeated the arguments they made before the single judge and prayed that the respondent should be ordered to provide security for costs because:-

- (a) It has known address in Kenya and Uganda.
- (b) It has no assets in both Kenya and Uganda out of which the applicant could get its costs if it successfully opposes the appeal in this Court.
- (c) The respondent here has no respect of success in the appeal particularly so as the respondent was not a party to the consent judgment in the High Court before Tabora, J., ordered for the respondent to be a co-judgment-creditor.

(d) The financial status of the respondent is unknown Counsel cited among other authorities, **GM. Combine Vs. Detergents** (Sup. Court Civil Appeal No.34 of 1995 and S.404 of the **Companies Act**. Both the case and Section 404 indicate the exercise of discretion by court in the grant of an order for security for costs.

(e) Counsel pointed out that during the hearing before the single judge, Mr. Nkurunziza, counsel for the respondent there security for costs at Shs.700,000,000/=

For the respondent, Mr. Nkurunziza, opposed the application. He relied on Bakwega's affidavit which was sworn in reply to that of applicant when the matter was before the single judge. He added that by January 2011, the respondent had lodged in Court its written arguments in support of the pending appeal where it has raised important points such as application of the *funtus officio* rule and is now waiting for judgment by this Court.

Mr. Nkurunziza argued that before the single judge, the respondent had contended that the applicant had substantially failed to show that the appeal was unlikely to succeed. Learned counsel that the single judge properly considered this aspect of the appeal as well as the fact that the respondent did not have sufficient assets to guarantee payment of costs.

He conceded that before the single judge he suggested the figure of Shs.700,000,000/= as security for costs. However, he appeared to suggest that this figure should be shared by two appellants (his client and presumably Attorney General) in the pending appeal. He asked for the application to be dismissed.

In rejoinder Mr. Okuku submitted that the respondent's appeal has no prospect of success foremost because the respondent was a party to the consent judgment. He also relied on an affidavit by Ms. Margret Apiny, a Senior State Attorney, sworn in H.C. Misc application No.605 of 2005 explaining that the respondent's part of the case in HCCS No.719 of 1997 had been dismissed for non-attendance and that the respondent never followed up the matter and therefore Mr. and Okuku contended that this showed that the respondents' constitutional appeal had no prospect of success. This affidavit is part of the material before us. Mr. Okuku contended, correctly. That the respondent's affidavit sworn by Mr. E. Bakwega (in the application before the single judge) did not show that the applicant has any assets. Mr. Okuku finally submitted (we think erroneously) that the Attorney General is not a party to the appeal, so Attorney General cannot pay costs nor provide security for costs.

Consideration of Argument

We have perused the record of the application from which this reference emanates. That record includes Bakwega's affidavit. Bakwega is an advocate in the firm of Mr. Nkurunziza. We have also perused the ruling of the learned single judge. We note that the facts placed before the learned single judge and the arguments (except criticism of his ruling for and against the application before him are substantially the same as those before us. Therefore the main question before us is whether the single judge was wrong or correct when he dismissed the application before him. We should state that the contention in the Notice of Motion that the single judge failed to evaluate evidence and that he failed to interpret legal authorities is not quite correct.

On the evidence before us and the arguments put forth by counsel, for both sides, it is clear that there is no dispute that the respondent has no known address in Uganda except that of his counsel. There is obviously no doubt that the respondent has no known assets either in Uganda or in Kenya. In his affidavit filed in the application before single judge, Bakwega says nothing about this important question of lack of assets. Again there is no doubt that originally the respondent was not a party to the consent judgment between the applicant and the Attorney General in HCCS No.719 of 1997. This was because although the respondent was originally a co-plaintiff, It ceased to be such co-plaintiff long before the consent judgment was agreed upon. It was a judge of High Court who decided to add the respondent as a co-judgment-creditor after the respondent was apparently jerked into action because of the consent judgment. This gave rise to the Constitutional Petition, the decision on it by the Constitutional Court and the Constitutional Appeal to this Court from which these proceedings emanate.

Furthermore there is no dispute and this was accepted by Mr. Nkurunziza, learned counsel for the respondent could has now retreated by saying that his offer was hinged on the fact that there were two appellants. This implies the "two appellants" were to share the burden of providing security for costs. In our view that appears to be an afterthought. True we are not determining the appeal now. So we cannot consider its decisive merits which will be done at the appropriate time. However, in our opinion the fact that the respondent wormed its way into the judgment after it had ceased to be a co-plaintiff in the case and apparently opened an independent suit in the Commercial Court prima facie raises doubts about the possibility of the success of the appeal.

In the **G.M Combine** case (*supra*), the trial judge had ordered a plaintiff to deposit Shs.50/= as security for costs before the suit could be tried. The trial judge relied on the old Order 23 Rule 1 of the Civil Procedure Rules which states.

“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 second enactment relied on in that case is S.404 which applies in cases where a plaintiff is a limited liability company. The Section reads-

“Where a limited company is plaintiff in any suit or other legal proceeding, any judge having jurisdiction in this 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”

Under the Rules of this Court every appellant must provide security for costs. See Rule 101. Further by Rule 101(3)

“the Court may at anytime, if the Court thinks fit, direct that further security for costs be gives and may direct that security be given for the payment of past costs relating to matters in question in the appeal”.

If the respondent has neither a known address nor any apparent assets from which a successful litigant can recover costs, it is the more necessary that a sure way of recovery of costs must be guaranteed. The principle of requiring appellants to provided costs is old and has a basis in reason. That explain why our legal system, an appellants who has a good case and is poor is eligible for relief from depositing security for costs. Thus Rule 109 (1) states-

(1) Ifin any appeal from the Court of Appeal in any civil case the court is satisfied on the application of an appellant that he or she lacks the means to pay the required fees or to deposit the security for costs and that the appeal has a reasonable possibility of success, the court may, or order, direct that the appeal may be lodged-

(a) Without prior payment of fees or on payment of any specified amount less than the required fees; or

(b) Without security for costs being lodged, or on lodging of any specified sum less than the amount fixed by rule 101 of Rules, and may order that the record of appeal be prepared by the Court of Appeal without any payment for it or on payment of any specified sum less than the fee set out in the second Schedule to these Rules, conditionally on the intendedappellant undertaking to pay the fees or the fees or the balance of the fees out of any money or property he or she may recover in or in consequence of the appeal.

Clearly, therefore, the Rules of this Court require that an appellant pays Court fees as well as providing security for costs.

The relevant rules and S.404 of the Companies Act emphasize of judicial discretion by judges. With the greatest respect to the learned single judge, it is our considered opinion that he erred when he held that to order for security for costs amounts to a denial of justice. Some of the principles governing the exercise of costs amounts to discretion before granting or refusing an application for security for costs or further security are set out in a number of decided cases such as **G.M Combine Case**(*supra*)**Lalji Ganji Vs. NahooVassanjet** (1960) EA315 ; **Official Receiver Vs. Narandes N. Chandrani** (1961) EA 107; **Banco Arabe Espanola Vs Bank of Uganda** (*Supreme Court Civil Appeal No.08 of 1998*), **Noble builders (U) Ltd- and Another Vs Jabal Singh Sandhee** *Civil Application_No. 15 of 2002* (single judge). The learned single judge considered these decisions.

The learned single judge considered the provision of S.404 and Rule 101 (1) and (3) of the Rules of this Court and correctly stated that these provision require to exercise judicial discretion in deciding whether or not to order or refuse to grant an order for security for costs.

The learned judge in effect accepted the contention by the applicant that the respondent did not challenge the contentions of the applicant that the respondent neither has known address and assets in Uganda and Kenya nor known financial status. He stated it this way-

“This gives reason for belief that the respondent will be unable to pay the applicant’s costs if the applicant succeeds in its defence against the appeal.”

The learned single judge considered some authorities including G.M Combine (*Supra*) before he stated that existence of credible evidence for reason to believe that the respondent will be unable to pay the applicant’s cost if it the respondent lost the appeal is a factor that strengthens the applicant’s case, for example. Satisfying court that the respondents appeal has no reasonable prospect of success. He held that some statement in the replying affidavit of the respondent’s agent (Bakwegga) demonstratedly show the reasonable prospect success of the respondent’s appeal. He made this conclusion because the applicant did not include in the application a record of proceedings in the Constitutional Court to enable him (Single Judge) verify some of the facts. The conclusions led the applicant to contend that the learned Judge should have called for the record of appeal which is in the registry to peruse. We think that was unnecessary. We are satisfied that the fact that the respondent who had ceased to be a co-plaintiff in the suit before the consent judgment was filed, became a co-

decree holder under controversial circumstances raises a prima facie case of difficulties regarding the success of appeal. Consequently we would allow the reference and set aside the order of the single judge.

We would add that the amount of Shs.400,000/= in rule 101 as security for cost was fixed fifteen years ago in 1996. Since then the value of the shilling has changed enormously. Considering that the respondent was prepared to offer Shs.700m/= as security for costs when the application was before the judge, we order that the respondent must deposit Shs.200m/= within forty five days from the date of this ruling as security for costs. This figure is based on the fact that the respondent has nothing to do with costs in High Court.

Before leaving this case, we are obliged to comment on the poor manner of preparing the record of this reference. We pointed this out to counsel for the applicant during the hearing. Sub rule (4) of Rule 14 states-

“The pages of every application and criminal appeals, of the record of appeal and, in civil appeal, of the memorandum and record of appeal, shall be numbered consecutively”.

This provision is very clear and mandatory. All litigants and particularly advocates must do what the provision for. For one thing it makes it easy for judges or any participant in the proceedings to easily trace any document or page referred to.

Consequently we allow this reference with costs to the applicant.

Delivered at Kampala the2nd..... day of ...August.....2011

JWN Tsekooko.

Justice of the Supreme Court.

B.M. Katureebe.

Justice of the Supreme Court

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C.N.B. Kitumba

Justice of the Supreme Court