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

HCT - 00 - CC - MA - 214 - 2012
(Arising From H.C.C.S. No. 154 of 2011)

STANBIC BANK UGANDA LIMITED ……. APPLICANT

VERSUS

MILLENIUM STONE SUPPLIES LTD …… RESPONDENT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

R u l i n g

This application arises out of a suit against the Applicant for alleged negligence and loss occasioned upon the Respondent/Plaintiff following the unlawful sale of his stone quarry business after defaulting against the Applicant's loan facility.

The application is brought under the provisions of **Section 404 of the Companies Act Cap 110** and **O. 38 r. 5(d) of the Civil Procedure Rules** for orders that:-

i) The respondent furnishes sufficient security for costs;
ii) The proceedings of main suit be stayed until the respondent furnishes security for costs;
iii) The costs of the application are provided for.

The grounds are that:-

i) The respondent which is the plaintiff in the main suit is not carrying on any business and there is no known asset owned by the respondent/plaintiff within the jurisdiction of this court that may be attached and sold to recover the applicant's costs in the main suit in the likely event that the applicant is successful in its defense.
ii) It is only just and fair that the respondent is ordered to give security for payment of costs before the trial commences.

The application is supported by the Affidavit of Gertrude Wamala Karugaba Head Legal and Company Secretary of the applicant bank sworn on 27th April, 2012.

The application is opposed by the affidavit Abdalla Kiwanuka a director of the respondent company.

The Respondent in response to the application seeks that the same is dismissed with costs to the respondent. It is the case for the respondent that this application is time barred under O 12 r. 3(1) of the Civil Procedure Rules (CPR). Furthermore that the application is an after-thought and is overtaken by events as the case had already been fixed for hearing and that to allow this application would be prejudicial to the Respondent/Plaintiff.

The Respondent also states that the Applicant is in breach of paragraphs 27, 28 and 29 of the joint scheduling memorandum filed by the parties, where the parties agreed that there would be no other/related proceedings prior to the hearing of the main suit and is therefore estopped from bringing this application.

The Respondent also states that the Applicant has not exhausted the legal grounds for the grant of an Order for security for costs.

It is the case for the Respondent that their suit is premised under **Section 24(5) of the Mortgage Act No. 8 of 2009** which places liability on the mortgagee in possession for any injury or damage and/or loss suffered on the mortgage security which they claim arose from the unlawful sale of the Respondent's securities due to the Applicant's negligence and breach of duty of care which resulted to damages and loss to the Respondent.

It is also the case for the Respondent that this application for security for costs is being used oppressively and it is intended to stifle the Respondent's genuine claim. The Respondent also states that the Applicant is responsible for the Respondent's financial state of affairs by continuously frustrating it by selling its business in contempt of the lawful court orders. The Respondent finally states that the suit is not res judicata.

The applicant was represented by Mr. J F Kanyemibwa while the respondent was represented by Mr. Kimanje Nsibambi.

From the submissions of both counsels, three issues can be identified namely:-

i) ***Whether the application is time barred and therefore should be dismissed with costs to the Respondent;***
ii) ***Whether the application was an afterthought being used oppressively to stifle the respondent's genuine claim and therefore in breach of paragraphs 27,28 and 29 of the scheduling memorandum;***
iii) ***Whether the Respondent should furnish security of costs***

Before I address these issues it is important for me to state that the submissions of both parties went beyond the justification for the grant and/or refusal of the orders sought under an application of this nature and attempted to resolve issues of the main suit.

In the case of **Uganda Moslem Supreme Council V Sheikh Kagimu Mulumba [1980]HCB Astana, J** (as he then was) held that *" if a relief sought in an Interlocutory Application was in effect the same relief as the relief sought in the main suit, it should not be granted"*.

That being the position of the law then the issues of res judicata and negligence being the main reason for the suit cannot and will not be addressed in this ruling.

Whether the application is time barred and therefore should be dismissed with costs to the Respondent;

O.12r.3 (1) of the Civil Procedure Rules (CPR) requires that all interlocutory applications be filed within 21 days from the date of completion of Alternative Dispute Resolution (ADR) and where there has been no ADR, within 15 days after the completion of the scheduling conference. That date is referred to as the cut-off date. Whereas the Respondents state in their written submission that the scheduling memorandum was filed on the 29th of March 2012, and the hearing date set on 21st June 2012, the Applicant indicate that the scheduling conference was completed on 23rd April 2012 and the application was filed on 27th April 2012 four days after the scheduling conference and therefore this application is within time.

Whether the application was an afterthought being used oppressively to stifle the respondent's genuine claim and in breach of paragraphs 27, 28 and 29 of the scheduling memorandum;

The Respondent states that the Applicant is in breach of paragraphs 27, 28 and 29 of the joint scheduling memorandum filed by the parties, where the parties agreed that there would be no other/related proceedings prior to the hearing of the main suit and is therefore estopped from bringing this application.

The scope of the Court in the grant of an Order for security for costs in an application like this was discussed in the Supreme Court case of **G. M Combined (U) Ltd V A.K Detergents (U) Ltd CA No. 34 of 1995** where the court held that Section 404 was not mandatory but gave court the discretion whether or not to order security for costs having regard to all the circumstances of the particular case where there were special circumstances like lateness of the application and such delay must not be prejudicial to the respondent. Put differently the grant of an Order for security for costs is an exercise of judicial discretion.

Interlocutory Applications are made incidental to the main suit. Good guidance can be found in Section 64 of Part VII of the Civil Procedure Act of Uganda (Cap 71) which provides that Interlocutory Applications (referred therein as supplementary proceedings) are made principally to prevent the ends of justice being defeated. Interlocutory applications are therefore made out of urgency which cannot ordinarily wait for the normal hearing of the main suit. Interlocutory applications are therefore a tool in case management. In this regard I agree with the submissions of counsel for the applicant that the application should be viewed as for the benefit of the court in the

managing of the suit and are not to create any rights in favor of any of the parties or to deprive any of the parties thereto their rights under the CPR.

Reading the application as a whole and the exercise of my discretion I find that it is only fair that the Applicant is given an opportunity to be heard if this will lead to the better management of this case and to ensure that the ends of justice are not defeated.

Before I leave this issue I need to point out that estoppel would not apply in this case as there is no evidence that the respondent in anyway changed its position to its detriment by reason of the joint scheduling memorandum.

Whether the Respondent should furnish security of costs?

Section 404 of the Companies Act provides that the court has the power to order payment of sufficient security to be given for costs and the proceedings stayed until such security is furnished where it appears credible testimony that the plaintiff company will be unable to pay costs of the defendant if successful in his or her defence.

The applicant's grounds for this application have already been stated above. As pointed out in the case of **G. M Combined (U) Ltd (Supra)** the grant of an Order for security for cost is discretionary having regard to all the circumstances of the particular case.

The case of **Namboro & Waburoko V Kaala [1975] HCB 315** summarizes the law on security of costs. The main considerations for the grant of security for costs are whether the applicant is being put to undue expense by defending a frivolous and vexatious suit. Secondly, whether he has a good defense to the suit and thirdly whether he is likely to succeed.

The Applicant states that the respondent is not carrying out any business and has no any known assets.

Ms Karugaba in the Affidavit in support states that the Respondent stopped carrying on the stone quarrying business on Haji Abdalla Kiwanuka's land comprised in Kyaggwe Block 80 Plot 189 at Buntaba, Mukono in April 2010 when the Applicant took over the said property which had been pledged to the applicant as security for a loan, to realize the security in order to recover the debt the respondent was defaulting on. That sometime in October 2010, the respondent and its Managing Director Haji Abdalla Kiwanuka resolved to sell the quarry machinery and all its movable assets to M/s Lamba Enterprises Ltd which they introduced to the bank. The said purchaser settled the debt and redeemed the title leaving the respondent with no other known assets. The Applicant seeks to rely on the same to prove that the respondent will not be able to settle the costs that may be ordered in the suit.

Counsel for the Applicant submits that the respondent in its affidavit in reply did not deny the sale of the business and its assets and that the respondent's managing director participated in this sale.

Furthermore though the affidavit in reply states that the respondent is carrying on business in Mukono no particulars were given which this renders their averment unreliable.

Counsel for the applicant relied on the decision of the English Court of Appeal in **Pearson and Another V Naydler and others** [1997] 3 All ER 531 which was cited with approval by the Supreme Court in **G.M Combined Limited V A.K Detergents Uganda Limited** Civil Application No. 34 of 1995 in which the Supreme Court discussed the provisions of S. 447 of the English Companies Act which has similar wording with Section 404 of the Companies Act of Uganda and held that:-

> ***"…. A man may bring into being as many limited companies as he wishes, with the privilege of limited liability; and Section 447 provides some protection for the community against litigious abuses by artificial persons manipulated by natural persons. One should be as slow to whittle away this protection as one should be to whittle a natural person's right to litigate despite poverty…"***

Counsel for the Applicant submitted that the circumstances of the matter now before court clearly show that the respondent company is a shell company and is being manipulated by its managing director to pursue the main suit against the applicant well knowing that in the event that the suit is dismissed with costs, the respondent will not suffer any prejudice since it has no assets to be attached to satisfy the order for costs and further that the managing director not being party to the suit, his assets and himself will be immune from the execution process under the suit. Counsel for the Applicant further submitted that according to **Pearson's Case** (Supra), this court is enjoined to protect the community from such litigious abuse.

Counsel for the applicant further referred Court to the Judgment of Sir **Lindsay Parkinson & Co. Ltd vs. Triplan** [1973] 1 QB 609 wherein it was held that:-

> ***"...the inability of the plaintiff company to pay the defendant's costs is a matter which not only opens the jurisdiction but also provides substantial factor in the decision whether to exercise it. It is inherent in the whole concept of the Section that Court has power to do what the company is likely to find difficulty in doing, namely, to order the company to provide security for costs which ex-hypothesis it is likely to be made to pay. At the same time the court must not allow the section to be used as an instrument to oppression, by shutting out a small company from making a genuine claim against a large company…"***

The applicant submitted that the respondent has no genuine claim against the applicant in the suit and that the applicant has a very good defense to the claim.

On the likelihood of success of the respondent's/ plaintiff's suit, counsel for the applicant relied on the tests which court should apply in an application for security of costs in the case of **G.M Combined Limited** (Supra).

Counsel for the applicant, relied on Paragraph 4 of Ms Karugaba's affidavit which states that the applicant has a very good defence to the respondent's claim in the main suit. Briefly, the affidavit states that:-

i) The respondent's complaint that the applicant undersold their assets was finally dealt with in Miscellaneous Application No. 346 of 2009 hence the said claim is res judicata;
ii) The respondent was a co- plaintiff in H.C.C.S No. 40 of 2010 wherein the respondent sought to recover damages to the tune of UGX 4,876,922,800/= for alleged vandalism, damage and waste to its property when the said property was still in possession by Laxicon Enterprises Ltd who had purchased the same from the applicant. The basis of the claim was a report by M/s Kakande & Co of 28th December 2009 and the same is the basis for the current suit H.C.C.S No. 154 of 2011 before court.

iii) That H.C.C.S 40 of 2010 was settled by compromise and the consent filed in court and the case withdrawn, therefore the respondent is wrongly resurrecting the claim for the same amount which was the subject of withdrawal which the applicant believed was to its detriment that all the disputes touching the allegations of damage and vandalism of the respondent's property had been finally resolved and that the respondent is estopped from pursuing the current case against the applicant.

Counsel for the applicant points out that the averments in the affidavit in support are not disputed at all by the respondent in its affidavit in reply and prays therefore that court finds that the same are truthful, and that the respondent's suit is not bonafide and is a sham.

The Applicant's counsel attached their Bill which totals to UGX 67,063,934/=. Ug 49,596, 728/= in item 1 is the party to party instruction fees that would be allowed on a claim of UGX 4,876,922,800/- under item 1 (a) (iv) of Schedule 6 to the Advocates Remuneration (Amendment of Schedule) Rules, 1996. The bill was compiled according to the said rules.

I have addressed my mind to the submissions of both counsel for which I am grateful.

The applicant prayed for security of costs to the tune of UGX 67,063,934/=, stay of the main suit, H.C.C.S No. 154 of 2011 and costs to this application.

It would appear to me from the evidence on record that this dispute has been the subject of previous litigation in this same Court leading to the settlement and withdrawal of H.C.C.S No. 40 of 2010. It is also clear that the suit land which comprised the business of the respondent company was sold with the corroboration of the Managing Director of the respondent company. There is no evidence provided to Court as to what business the respondent company is now engaged in even as files the head suit. To my mind there is evidence of continuous litigation in this dispute and the possibility of the inability of the plaintiff company to pay the defendant's costs which opens the jurisdiction is therefore substantial factor in the decision whether or not that Court should exercise its discretion.

I find that it is right and proper that given the circumstances of this case that an order for security for costs be granted for Shs 67,063,934/= on the following conditions

1. That the respondent company do furnish the said security within 90 days
2. That the respondent company may provide cash or such other security as will be acceptable to the Register of this Court (not being post dated cheques).
3. Thereafter the case will be fixed for hearing or if there is default then the case will stand dismissed

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Geoffrey Kiryabwire

JUDGE

Date: 18/04/13

18/04/13
10:08

Judgment read and signed in open court in the presence of;

- Nsimbe for the Respondent
- Ibalu h/b for J.F. Kanyemibwa for Applicant

In court

- MD Mr. Kiwanuka for Respondent
- Senoga Legal Manager of Applicant
- Rose Emeru – Court Clerk

……..…

Geoffrey Kiryabwire

JUDGE

Date: 18/04/2013