IN THE SUPREME COURT OF UGANDA
AT MENGO

BEFORE J.N. MULENGA J.S.C

CIVIL APPLICATION NO. 7 OF 2002

Between

BANK OF UGANDA::::::::::::::::::::::APPLICANT

And

1. **JOSEPH NSEREKO }::**
2. **KISUKYE SARAH } ::::: : RESPONDENTS**
3. **HAJI MUNGI & OTHERS }::**

(Application arising out of Supreme Court Civil Appeal No.l of 2002: Joseph Nsereko & Others vs Bank of Uganda)

RULING OF MULENGA J.S.C.

This is an application by Notice of Motion, in which the Bank of Uganda asks for orders, that the respondents give security for costs incurred in the lower courts, and further security for costs in this Court, in respect of Civil Appeal No. 1 of 2002. The application, brought under rule 100(3) of the Rules of this Court, is supported by an Affidavit of William Kasozi and a Supplementary Affidavit of David E.K. Mpanga.

The background to the application is as follows. The respondents, who are former employees of the applicant, filed a suit in the High Court against the applicant *for recovery of gratuity, insurance and or pension money with arrears, and in the alternative prayed for a declaration that they were entitled to pension insurance money under the applicant's existing scheme.* They also prayed for general damages, interest and costs. The High Court entered judgment for them. The applicant successfully appealed to the Court of Appeal which set aside the High

Court judgment and awarded costs in both courts to the applicant. Against that decision, the respondents, on 9th January 2002, filed Civil Appeal No.l of 2002 in this Court.

In the meantime, the applicant filed bills of costs in the High Court and the Court of Appeal. After taxation hearing, the applicant filed this application on 21st March 2002. The bills were subsequently taxed and allowed at shs.12,104,500/= and shs.60,441,000/= respectively. On 2nd April 2002, the Registrar fixed the hearing date for the appeal to be 14th May 2002, but subsequently removed it from the cause list of that day, and fixed this application in its place. The appeal is still pending hearing.

In the Notice of Motion were listed five grounds of the application for security for costs, but the substantive grounds are that-

1. The Respondents' whereabouts are unknown to the Applicant and the Respondents have no assets of which the Applicant is aware sufficient in value to cover the taxed costs of the High Court and of the Court of Appeal

2. ***The costs of the second appeal are likely to be in excess U.Shs.100 million.***

3. ***It is in the interest of justice that security be provided by the Applicant*** *(sic)* ***for the (past) costs and that further security be provided for the costs of this second appeal....***

In his affidavit in support of the application William Kasozi more or less repeats those grounds verbatim, without elaboration.

Mr. Masembe Kanyerezi, counsel for the applicant, submitted that the costs incurred in the two lower courts which were awarded to the applicant, had not been paid, and that because the whereabouts of the respondents could not be ascertained, and therefore, their assets could not be traced, no efforts to recover the costs through execution proceedings had been initiated. He disclosed that no demand for payment had been made because the bills of costs were taxed *inter partes,* and the respondents knew or ought to have known, that they were liable to effect payment forthwith. With regard to the costs in the Supreme Court, counsel submitted that although the statutory security for costs in the sum of Shs. 400,000/= had been

deposited into court, it was inadequate to meet the actual costs likely to be incurred. He maintained that on the whole, as averred in the supporting affidavit of William Kasozi, the respondents were impecunious, and that this was a proper case to grant an order for security for costs. He conceded the principle that a party should not be thrown away from the seat of justice on ground of poverty, but submitted that this had to be balanced with the other principle that a party should not be dragged into court if his expenses were not going to be met. In this connection he volunteered that in the interest of justice, in order that the appeal should not be stopped, the security need not be, as is the normal practice, by way of depositing money into court, because the sums involved were very large. Counsel pointed out that there had been no delay in bringing the application. In response to submissions by the respondents' counsel, he strenuously argued that it was not shown that the respondents' current financial constraints had resulted from the applicant's refusal to pay to them the pension they claimed.

Mr. Matovu, counsel for the respondents, submitted that the applicant had not discharged the burden to show that an order for security for costs ought to be made in this case. He relied on three main arguments. First, he maintained that the respondents' financial constraint resulted from the applicant's wrongful act of denying the respondents their pensions. Secondly, in the alternative, counsel maintained that the applicant ought to have made effort to recover the costs before resorting to court for an order for security for costs. Thirdly, counsel submitted that there had been delay in bringing the application, to the prejudice of the respondents. He submitted that the court had very wide discretion in the matter, and that the discretion should be exercised sparingly so as not to stop the appeal from proceeding, as the order prayed for would do, if granted. Finally, (in response to my prompting and after consulting his clients) counsel informed me that if I was inclined to grant the order, the respondents would be willing to offer as security for costs, the more than 100 certificates of title to land which are already variously mortgaged to the applicant.

I agree that this Court does have very wide and virtually unfettered discretion pursuant to the provisions of rule 100 (3) under which this application was brought. The only fetter is that I have to exercise that discretion judicially. In that connection, I should at the out set, state that I find two of the issues counsel addressed me on, to be of little significance in the circumstances of this case. I will only refer to them in passing. First, I am not inclined to attach any importance to the time taken to make the application. In my view, the delay, if it

was a delay at all, was not so inordinate as to prejudice the respondents, or to otherwise disentitle the applicant from security for costs. Secondly, I have not been given sufficient material on which to determine what effect the applicant's decision not to pay the pension claimed had on the respondents' financial capabilities. I find support for this view in the judgment of the Court of Appeal for East Africa in **Noormohamed vs Patel (1960) E**.A. 447 where the court said at p.453:-

> **"…security will not be ordered if the appellant's impecunious circumstances arose from the allegedly wrongful act complained of in the action. The appellant in his affidavit, alleged that this was the case here, the allegedly wrongful act being the distraint the legality of which was in issue in the action. We think that a mere assertion in such a matter is inadequate and that a certain amount of supporting detail should have been given. The allegation was not denied however, and, as far as it goes the argument provides some support for the appellant's case. We are not inclined to attach much weight to it in the circumstances."**

In my view the substantial question in this application, which I shall proceed to consider, is whether a case has been made out for granting an order for security for past costs and/or for further security for the costs in this Court.

The basis for this application is a contention that the respondents are likely to fail to meet the substantial costs already awarded, and those likely to be awarded to the applicant in the pending appeal, which are also likely to be substantial. The contention is founded on the averment in William Kasozi's affidavit that the applicant does not know the whereabouts of the respondents, nor if they have valuable assets from which the costs could be realised. Clearly lack of knowledge on the part of the applicant cannot amount to evidence of the respondent's inability. The applicant ought to have provided more substantial evidence on which a court can base a decision. In the course of his submissions, counsel for the applicant stressed that the averment by William Kasozi had not been contradicted. I do not think that that elevated the weight to be attached to the averment. Even if I were to hold that failure to deny the averment amounted to admitting it, the result would be that the respondents admitted that the applicant did not know their whereabouts or their assets! I am constrained to the view, that the applicant was on a fishing expedition, namely putting in the application as a

challenge to the respondents to disclose their "whereabouts" and the value of their assets, if any. With due respect, the relief of security cannot have been intended for that purpose.

I think it is well settled that an applicant for security for costs has a burden to satisfy the court that the circumstances justify an order being made. In **Lalji Gangji vs Nathoo Vasanjee (1960) E.A. 315,** Windham J.A., considered the application of rule 60 of the rules of the then Court of Appeal for East Africa which was in similar terms as rule 100 (3) of the rules of this Court. At p.3**17** he said:-

> **" under r.60 the burden lies on the applicant for an order for further security, as it normally lies on any applicant to a court for any relief, to show cause why that relief should be granted, and that he cannot, merely by averring that the security already deposited for costs of the appeal is inadequate, or that costs in the action below ordered in his favour, have not been paid, impose any obligation upon the Court to grant his application"**

That statement was cited, with approval, by Gould Ag. V.P. in **Noormohamed**'s case (supra) and by Oder J.S.C. in **Patel vs American Express International Banking Corporation,** Civil Appeal No. 9 of 1989. In the former case, the application for security was refused mainly because there was inordinate delay in making the application, and the applicant did not discharge the onus on him to show that the delay did not prejudice the respondent. In the latter case, the application was allowed because of the peculiar circumstances of the case. Pursuant to an earlier order the respondent, a foreign corporation, had paid into court as security for passed costs shs.4,279,444/=. As a result of currency reform, the amount was reduced to shs.42,794/= It was virtually common ground that the amount of costs would far exceed what was held in court, with the result that the costs were no longer secured. Oder J.S.C. concluded:-

> ***"In the circumstances I think Mr. Patel has* shown *cause why he should have further security for costs."***

I am unable to say the same in respect of the applicant in the instant case. Although there was no delay in bringing the application, and the applicant suspects that the respondents might fail to pay the costs if their appeal in this Court also fails, the suspicion was not shown to be well

founded. The least I would have expected is for the respondent to attempt to recover the costs, starting with a demand through the respondents' advocates whose whereabouts were undoubtedly known.

I am constrained to add that the circumstances of the case as a whole do not appear to me favour the order prayed for. The respondents' appeal to this Court was not shown to be so devoid of merit as to render it probable that it will not succeed. Secondly, although a successful party awarded cost is entitled to have them taxed and recovered, I find it a little puzzling for a party to act with such haste when there is a pending appeal, unless the appeal is clearly taken as a means of delaying the ends of justice.

I am aware that strictly these two are not grounds for rejecting the application, but I think they are legitimate considerations capable of tilting the balance in the exercise of my discretion.

In the result, I dismiss the application, with costs to the respondents.

Dated at Mengo this 4th day of July 2002.

J. N. Mulenga
Justice of the Supreme Court.