THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: OKELLO, JSC

CIVIL APPLICATION NO. 1 OF 2011

BETWEEN

GOODMAN AGENCIES LTD: ::APPLICANT

AND

HASA AGENCIES (K) LIMITED: ::RESPONDENT

RULING OF OKELLO, JSC:

By Notice of Motion dated 4th January 2011, brought under rule 101(1) & (3) of the Rules of this court, and section 404 of the Companies Act (Cap. 110), the applicant seeks orders that:

(a) The respondent furnishes further security for costs, past costs and the applicant's costs in Constitutional Appeal No. 05 of 2010, within the period determined by the court:, and that costs of this application be provided for. The application is supported by the affidavit of Nicholas Were, Managing Director of the applicant company sworn on 4h January 2011, and his subsequent affidavit in rejoinder sworn on 13th *January 2011*.

Background:

The background to the application is this: the applicant and the respondent filed High Court Civil suit No. 719 of 1997 against Attorney General to cover shillings 12,485,842= plus costs. Subsequently, the respondent was struck off and ceased to be a party to the suit. The applicant later reached a settlement agreement with the Attorney General. The agreement was approved by the High Court and consent judgment dated 02-09-05 was filed in court and was sealed.

Later, the High Court re-joined the respondent to the consent judgment and allotted to it a portion of the settlement agreement.

The applicant which claimed that the High Court re-joined the respondent to the consent judgment, without any notice to and hearing of the applicant, petitioned the Constitutional Court, vide 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 it a portion of the settlement agreement without any notice to and hearing of the applicant were unconstitutional. 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 die 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.

The respondent argued that it applied for a review of the consent judgment to be reinstated as a party to the suit, and that the applicant took part in the proceedings. When 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 hearing the application, the taxation ruling on the applicant's two bills of costs in the Constitutional Court was not yet delivered. The total untaxed bills of cost,; 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 10,000,000,000=. The costs in the High Court awarded in the consent 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=.

Mr. Semuyaba, who appeared with Mr. James Okuku for the applicant contends that the costs of the applicant so far incurred are substantial.

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

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

At the hearing, Mr. Semuyaba contended that the affidavit of Mr. Nicholas Were shows that a search into the Registry of Companies in Nairobi, Kenya, revealed that the respondent has 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 cited *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.*

He prayed that the application be allowed with costs and that if the security for costs and past costs are not paid or furnished within the period determined by the court, the appeal should be dismissed.

In the affidavit in reply, sworn by Emmanuel Bakwega, the respondent reputed the applicant's claim that the respondent's appeal has no reasonable prospect of success. It asserted that the appeal in fact has very high chances of success as the learned Justices of the Constitutional Court erred when they failed to properly evaluate the evidence before them and thereby came to a wrong conclusion.

At the hearing, Mr. Didas Nkurunziza for the respondent, relied on the affidavit in reply sworn by Emmanuel Bakwega and argued that the learned Justices of the Constitutional Court held for instance, that the High Court judge joined the respondent to the suit and to the consent judgment without giving notice to or hearing the applicant. Learned counsel submitted that that was not true as the record shows overwhelming evidence to the contrary.

He further pointed out that the learned Justices of the Constitutional Court held that the High Court judge, acted contrary to articles 26(2) and 28(1) of the Constitution when he joined the respondent to the suit and to the consent judgment also without giving notice to and hearing of the applicant. Counsel submitted that on the contrary the record shows that the applicant was in fact given a fair hearing. He submitted that in these circumstances, the respondent's appeal has very high chances of success.He contended further that a review of a judgment cannot amount to a compulsory deprivation of property as envisaged in Article 26(2) of the Constitution.

It was asserted in the affidavit in reply of Bakwega that the costs in the High Court were awarded against the Attorney General only but not against the respondent. Learned counsel argued that the respondent therefore, has no liability in that. He contended that the issue in the Constitutional Appeal No. 05 of 2010 is not about money but about the interpretation of articles 26 and 28 of the Constitution, and when a judge becomes functus officio in a matter.

He submitted that the exorbitant amounts of costs were contested by both the Attorney General and the respondent at the taxation proceedings and that the taxed costs allowed remained uncertain. He contended that high costs should not be used as a tool for oppression to stifle the respondent's appeal as it is being done in this case. He cited *G. M Combined (U) Ltd* (supra); ***Bank*** *of Uganda - vs - Joseph Nsereko and Others Civil Application No. 07 of 2002.*

He concluded that the respondent's appeal has very high chances of success and that the

applicant has failed to show sufficient cause to justify orders for further security for costs and past costs.

He prayed that the application be dismissed with costs in the cause. *Rule 101 (3) of the Rules of this court provides that:*

"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 matter in question in the appeal."

Clearly, the above provision of the rule gives very wide discretion to the court to order further security for costs. The only fetter to that discretion is that which applies to all judicial discretion, namely, that it must be exercised judicially.

It is worth pointing out at this time that it is well settled that in ail application for further security for costs, like the instant one, the applicant bears the burden to satisfy court that the circumstances of the case justify making the orders sought In *Lalji Gangji - vs - Nathod Vasanjee (1960;E4.* 315, *Windham,* Windham, *JA,* considered the application of rule 60 of the Rules of the then Court of Appeal for Eastern Africa which was in "*pari material*" with rule 101 (3) of the Rules of this court and on page 317 said:

"- - - - - *under rule 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 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.*"The above statement was cited with approval in a number of cases in this court, including by Oder JSC (RIP) in *Patel - vs - American Express International Banking Corporation, Civil Appeal No.9 of* 1989 and by Mulenga, JSC, (as he then was), in ***Bank*** *of Uganda - vs - Joseph Nsereko and* 2 *Others, Civil Application No. 07of 2002.*

The imposing pertinent question to ask in this application at this time is, has the applicant made out a case for orders for further security for costs and past costs?

The first significant ground of the application is that the respondent is a foreign company with no known address and assets in Uganda and Kenya from which the costs could be recovered if the respondent lost its appeal. This ground was founded on the averment of Nicholas Were in his affidavit in support of the application (paragraph 7). Nicholas Were also averred in paragraph 9 of his said affidavit that a search in the Registry of Companies in Nairobi, Kenya, where the respondent was registered, revealed that there were no returns in the respondent's file to reflect its financial status. The applicant submitted that, that evidence shows that the respondent's financial status is not known.

Section 404 of the Companies Act (Cap. 110) provides that:

"where a limited company is plaintiff in any suit or other legal proceedings, any judge having jurisdiction in the 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 defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given."

The above section empowers court where the plaintiff is a limited liability company and it appears on credible evidence that there is reason to believe that the company will be unable to pay the defendant's costs if it succeeds in its defence, to require the company to give sufficient security for the defendant's costs and may stay all proceedings until the security is furnished.

Mr. Semuyaba submitted that there is affidavit evidence of Nicholas Were shown on 4th January 2011, which shows that the respondent, a limited liability company, has not only no known address and assets in Uganda and Kenya, but also has no returns in its file in the Registry of Companies where it is registered, reflecting its financial status. According to Mr. Semuyaba, this is credible evidence from which there is reason to believe that the respondent will be unable to pay the applicant's costs if it succeeds in defending the respondent's appeal. Learned counsel submitted that this is therefore, a fit and proper case in which to order further security for costs and past costs.

In *Noble Builders (U) Ltd, (supra),* the respondent chose to live in Canada with no assets in Uganda. It admitted that it had money but would prefer to put it to a more profitable use than to secure payment of costs in a litigation it started. This attitude increased the applicant's fear. It this circumstance, security for costs was ordered.

The admission and the negative attitude shown in *Noble Builders (U) Ltd* case were not available in the instant case. However, there is credible evidence for reason to believe that the respondent in the instant case may be unable to pay the applicant's costs if the applicant succeeds in its defence against the appeal.

In *Sir Lindsay Parkinson & Co. Ltd. - vs - Triplan,* (1973) *I* ***QB*** *609,* cited in *G. M Combined (U) Ltd.* (supra), section 447 of the Companies Act of England which was in *"pari materia" with* section 404 of our Companies Act was considered. It was stated in that case that the discretion given in section 447 was so unfettered that even if a plaintiff or an appellant was in financial problem and therefore, unable to pay the costs of the suit or appeal if the suit or the appeal failed, the court may still refuse to order security for costs considering other circumstances of the case. For example, if there is strong prima facie presumption that the defendant or the respondent to the appeal will fail in his defence to the suit or appeal, the court may refuse him security for costs. The reason being that it will be a denial of justice to order the plaintiff or the appellant to give security for costs of the defendant or respondent who has no likelihood of success in his defence against the plaintiff's claim or appellant's appeal.

The respondent made no response either by oral submission or by affidavit in reply to the applicant's assertion that the respondent neither has known address and assets in Uganda and Kenya nor known financial status. This omission could be construed as an admission by the respondent that it has neither known address nor assets in Uganda and Kenya nor known financial status. This gives reason for belief that the respondent will be unable to pay the applicant's costs if applicant succeeds in its defence against the appeal.

I have considered *G. M Combined (U) Ltd* (supra), and *Noble Builders (U) Ltd. And Raghbir Singh Sandhu* (supra) both of which were referred to me by counsel for the applicant I found that both these cases are distinguishable from the instant case on their facts.

In *G.M Combined (U) Ltd*, the appellant was under receivership because it could not pay its debenture holders; it was also under liquidation as it was unable to pay a judgment creditor and was indebted to many creditors; it was involved in a multiplicity of suits. None of these was brought about by the conduct of the respondent. In these circumstances this court held on appeal that the order for security for costs was justified. All those circumstances do not obtain in the instant case save the existence of credible evidence for reason to believe that the respondent will be unable to pay costs of the applicant if it lost the appeal.

I am persuaded by the above interpretation. I adopt it. Justice should not be the preserve of the rich. Existence of credible evidence for reason to believe that the respondent will be unable to pay the applicant's costs if the respondent lost the appeal is a factor that strengthens the applicant's case for an order for further security for costs depending on other circumstances of the case, for example, satisfying court that the respondent's appeal has no reasonable prospect of success.

The next significant ground which I am proceeding to consider is that the respondent's appeal has no reasonable prospect of success. This ground is contained in paragraph (f) of the Notice of Motion and founded on the averment of Nicholas Were in paragraph 15 of his affidavit in support of the application. In support of that ground, Mr. Semuyaba submitted that as there was consent judgment already registered and the High Court had become *"functus officio" in* the matter, there is no way the respondent's appeal can succeed. It has no chance of success.

The respondent controverted the applicant's claim that the respondent's appeal has no reasonable prospect of success. It asserted that the respondent's appeal has very high chances of success. This assertion was founded on the averment of Mr. Emmanuel Bakwega's affidavit in reply where he deponed in paragraph 10 thereof that:

*"Having perused the judgment of the Constitutional Court and taken part in the preparation of this appeal and the said statement of the appellant's arguments in support of the appeal, **I** do verily believe that this appeal has very high chances of success. "*

The above statement was followed by further statements which set out specific points which the respondent considered were wrongly decided by the Constitutional Court and required intervention of the appellate court for correction. These statements demonstrably show the reasonable prospect of success of the respondent's appeal. For example, one of such statements states that:

"The learned Justices of the Constitutional Court erred in law when they held that the High Court judge acted contrary to the provisions of Articles 26(2) *and* 28(1) *of the Constitution and without jurisdiction when he joined the respondent to the suit and to the consent judgment yet the applicant was in fact given a fair hearing and, in law, review of a judgment by a court cannot amount to compulsory deprivation of property as envisaged in Articles* 26(2) *and* 28(1) *of the Constitution. "*

The above statement appears to suggest that there were review of judgment proceedings in the High Court in which the applicant took part. The materials available to me in this application do not include the record of proceedings in the Constitutional Court to enable me verify some of the facts. The onus is on the applicant to show that the appeal of the respondent has no reasonable prospect of success. Unfortunately, the applicant has not demonstrably established that. Mr. Semuyaba did not elaborate on his submission that as there was consent judgment already registered and the High Court had become *"functus officio"* in the matter the respondent's appeal has no reasonable prospect of success. In these circumstances, I find that this is not a fit and proper case to order security for further costs. It will be a denial of justice to order the respondent to give security for costs of the applicant which has no likelihood of success in its defence against the respondent's appeal.

In the result, the application is dismissed with costs to abide the outcome of the appeal.

Dated at Kampala this *27th day of January 2011*

C.M OKELLO

JUSTICE OF THE SUPREME COURT