THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: JOTHAM TUMWESIGYE, JSC.)

CIVIL APPLICATION NO. 13 OF 2011

BETWEE

1. KAKOOZA JONATHAN

2. KALEMERA FRANK ::::::::::::::::::::::::::::::APPLICANTS

AND

KASAALA CO-OPERATIVE SOCIETY LTD

RULING

Kakooza Jonathan and Kalemera Edison (1st and 2nd applicants respectively), bring this application under rule 101(3) and 42 of the Supreme Court Rules for orders that Kasaala Growers Co-operative Society, the respondent, furnishes:

1. Security for past costs relating to:-

(a) The High Court of Uganda (Commercial Division) Civil Suit No. 602 of 2002, Kakooza Jonathan and Kalemera –Vs - Kasaala Growers Co-operative Society costs of U g Shs.24,292,000/=.

(b) The Court of Appeal Civil Appeal No. 19 of 2007 Kakooza Jonathan and Kalemera Edison -V s- Kasaala Growers Co-operative Society ofUg.Shs.20,426,000/=.

(c) The Supreme Court of Uganda

(i) Misc. Application No. 24 of 2009 Kakooza and Kalemera Edison - V s- Kasaala Growers Co-operative Society costs of Ug Shs. 2,000,000/=.

(ii) Misc. Application No. 24 of 2010 Kasaala Growers Co-operative Society -Vs- Kakooza Jonathan Kalemera Edison costs of Ug of Shs. 3,500,000/=.

(iii) Misc. Application No. 19 of 2010 Kasaala Growers Co-operative Society -Vs- Kakooza Jonathan and Kalemera Edison costs of Ug Shs. 3,200,000/=;

With in such a period and upon such further conditions as may be determined by this court in the total sum of at least Ug. Shs. 53,418,000/=; failing which the appeal in this court should be dismissed with costs.

2. The respondent furnishes further security for costs of the appeal in this court in the sum of at least Ug Shs. 20,000,000/= within two weeks or such sum and time as this court deems fit, failing which the appeal should be dismissed with costs.

3. Costs of this Application be provided for.

The application is supported by the affidavit in support and affidavit in rejoinder of Kakooza Jonathan, the 1st applicant.

The background facts leading to this application are that the applicants sued the respondent for breach of an agreement with the respondent for the sale of land located in Nampiki, Luwero, measuring about 1,000 hectares (about 4 Sq miles). The agreed price was Shs. 34 million. The applicants paid a total of Shs 14,300,000/= and were left with a balance of Shs. 19,750,000/= which they did not pay. They claimed that they did not do so because the respondent sold one square mile of that land to a third party. The learned trial judge decided the suit in favour of the respondent because in her opinion the applicants failed to pay the full price and acquiesced in the sale of one square mile of the suit land to a third party. The applicants appealed to the Court of Appeal which reversed the decision of the trial Judge. The Court of Appeal held that the applicants did not acquiesce in the sale of the one square mile of land and that the respondent had instead sold it fraudulently to the third party. The respondent being dissatisfied with the decision of the Court of Appeal appealed to this court.

The applicants were represented by Ms. Kasande Vennie Murangira. In her oral submissions in court learned counsel argued that the application had been brought in time contrary to the assertion of the applicants that it was belated. She further argued that the respondent society does not seem to have any assets and in their affidavit in reply the respondent did not say that the society had any assets in order to rebut the assertion of the applicants that they didn't. That she searched and even wrote to the Commissioner for Co-operative Department to furnish them with details of the respondent's assets but they were not able to indicate their assets. She also submitted that respondent's appeal has no likelihood of success. In support of her arguments learned counsel cited *Goodman* Agencies *Lid -Vs- Hasa* Agencies **SCC.** *Application No.* 01 *of2011,* G *M* Combined *(U) Ltd -Vs- A. K. Detergents (U) Ltd SCCA* No. 34 *of* 1995, *Noble Builders (U) & Raghbir Singh Saudhu -Vs- Jabal Singh Saudhu* S C C *A No.* 15 *of 2002, Noormohamed Abdulla -Vs- Ranchhodbhai J. Patel and Another{1962} E. A.* 447 and *Lalji Gangji-Vs- Nathoo Vassanjee {1960} E. A.* 315 among others.

Learned counsel for the applicants complained that the respondent's affidavit was argumentative, did not rebut facts raised against them and was full of falsehoods. That for example Bumbakali Sande, the deponent, refers to himself as a female whereas he is a male and that this was intended to conceal his identity. She prayed that the affidavit in reply should be struck out.

The respondent's affidavit in reply was sworn by Bumbakali Sande who was granted Powers of Attorney by the respondent society to do so on its behalf.

Bumbakali Sande also swore a supplementary affidavit stating that he is a male adult Ugandan and not a female and that the word 'female' contained in the affidavit in reply was an inadvertent typing error.

During the hearing of the application the respondent was not represented by counsel and Bumbakali Sande was not present in court. So no oral submissions were made on behalf of the respondent. However, Mr. Joseph Kyazze who was counsel for the respondent before he withdrew from the application for lack of instructions had filed the respondent's list of authorities which included Goodman *Agencies*

Ltd - Vs- Hasa agencies (supra), *Bank of Uganda - Vs- Joseph Nsereko & Others* see Application No. 01 of 2011, *G.M. Combined (U) Ltd - Vs- A. K. Detergents (U) Ltd* (supra), *Lalji Gangji - Vs Nathoo Vasanjee* (supra) *Patel -Vs- American Express International Banking Corporation* SCCA No. 9 of 1998 and *UCB - Vs- Multi - Constructors Ltd* See SCCA No. 29 of 1994.

I will first deal with the issue raised by learned counsel for the applicants that the respondent's affidavit in reply is argumentative and offends the law and should be struck out, and that the same affidavit should be rejected because it contains a falsehood in that Bumbakali Sande describes himself in the affidavit as "a female adult of sound mind" whereas he is a male adult Ugandan.

With respect, I do not agree with counsel for the applicants that Bumbakali Sande's affidavit in reply is argumentative. Most of the paragraphs complained about such as para. 6, 7, 10, 12 are statements of belief which he states originated from the advice of his former counsel, Mr. Joseph Kyazze, and other paragraphs such as paragraphs 4 and 5 are statements of fact within the knowledge of the deponent that could have been controverted by the applicants in their affidavit in rejoinder, if they had wanted to do so. Others are his statements of belief. So I think that the affidavit is proper and I find no good reason to strike it out.

I equally find no sound reason for rejecting the affidavit in reply on the ground that Bumbakali Sande described himself as a female adult Ugandan whereas he is a male. Bumbakali Sande swore a supplementary affidavit stating that that he is a male adult and that the word "female" in

his affidavit in reply was an inadvertent typing error

and I see no good reason to disbelieve him. Moreover, in several other affidavits filed in court in connection with other applications that relate to the same matter and which constitute a basis for the applicants' instant application, Bumbakali Sande described himself as a male adult Ugandan. So he would be deceiving no-one, let alone the applicants, by describing himself as a female at this late stage. I find no merit in counsel for the applicants' argument that it should be rejected.

This application is brought under Rule 101(3) of the Rules of this court which provides:-

> "**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." [Emphasis mine].**

It is clear that the sub-rule gives the court discretion to give security. However, the rule does not offer guidance as to how this discretion is to be exercised, so guidance has to be sought from decided cases.

Both parties filed a list of authorities which were shown earlier in this ruling and which have been helpful. For example, in *Goodman Agencies Lid Vs Hasa Agencies (K)* which was decided by a single judge, the court refused to order the respondent to give further security for costs. *"It would 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,"* the learned judge stated in his ruling.

In a reference to a coram of three justices of this court, however, the court reversed the decision of the single judge and ordered the respondent to give further security for costs. In reaching this decision the court was influenced by four factors, namely (1) that the respondent in that application had no known address in Uganda except that of his counsel, (2) that the respondent had no known assets in Uganda or Kenya, (3) that the respondent had suggested before the single judge that the respondent could offer Shs. 700,000,000/= as security for costs, and (4) that contrary to the opinion of the single judge, prima facie there were doubts about the success of the respondent's appeal.

In **G. *M. Combined (U) Ltd - Vs- A. K. Detergents (U) Ltd*** **(supra)** Oder, JSC, after considering several cases on the question of security for costs was of the view that the determining factor in allowing or not allowing such applications was the prospect of success, whether or not the applicant was likely to succeed in the substantive case. *"It may be* a *denial of justice to order* a *plaintiff to give security for costs of* a *defendant who has no defence to the claim,"* the judge stated:-

In ***Lindsay Parkinson Ltd - Vs- Tiplan Ltd*** **(supra)** Lord Denning M. R. stated:-

> ***"Turning now* to *the words of the statute, the important word* is *"may". That gives the judge discretion whether* to *order security or not. There* is no *burden one way or the other. It* is *a discretion* to *be exercised* in *all the circumstances of the case if there* is *reason* to *believe that the company cannot pay the costs, then security may be ordered, but not must be ordered. The court has discretion which* it *will exercise. The court has a discretion which* it *will exercise considering all the circumstances of the particular case whether the***

***Company's claim* is *bona fide and not* a *sham and whether the company has* a *reasonably good prospect of success. Again* it *will consider whether there* is an *admission by the defendant* on *the pleadings* or *elsewhere that money* is *due. If there was* a *payment* into *court of a substantial sum* *of money* *(not merely* a *payment* into *court* to *get* rid *of nuisance* *claim), that too would count. The court might also consider whether the application for security was being used oppressively* so as to *try and stifle* a *genuine claim.....* ".**

In the above - cited case Lord Denning was considering the equivalent of Section 404 of the Companies Act which, on the face of it, seems to bind a court to order security for costs "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", to quote the words of that section. In the instant application Section 404 of the Companies Act is not even relevant because Section 83(1) of the Cooperative Societies Act under which the respondent co-operative society was registered provides that the provisions of the Companies Act other than those mentioned in Section 58 (dealing with winding up) and Section 66 (dealing with closure of a co-operative society by liquidation) shall not apply to a registered society. Rule 101(3) of the rules of this court does not specifically mention inability to pay costs as a ground for ordering security of costs. This does not of course mean that it excludes inability to pay as a factor for consideration.

In the case of ***Namboro - Vs- Kaala*** [1975] H C B 315 Sekandi, Ag. J., as he then was, held, among others, that the main considerations to be taken into account in an application for security for costs are: - (a) whether the applicant is put to undue expenses by defending a frivolous

and vexatious suit, (b) that he has a good defence to the suit and he is likely to succeed and (c) that mere poverty of a plaintiff is not by itself a ground for ordering security for costs for if it were so, poor litigants would be deterred from enforcing their legitimate rights through the legal process.

As indicated earlier, however, under rule 101(1) of the rules of this court security for costs of Shs. 400,000/= is mandatory for civil appellants unless they are excused under rule 109. Taking into account the present value of the Uganda shilling this amount of Shs. 400,000/= cannot be considered as reasonable security for costs that would satisfy most successful respondents in this court. Even when this amount was fixed in 1996, Shs. 400,000/= was not much being no more than US.$350. The policy behind fixing this amount as security for costs is difficult to understand considering its insufficiency in covering most respondents' taxed and awarded costs in this court. It should be reviewed.

In applications for further security for costs or past costs the burden lies on the applicant to show why that relief should be granted. **In *Lalji Gangji- Vs- Nathoo Vassanjee*** (supra) the court stated the position thus:-

> ***"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, has not yet been paid, impose any obligation upon the court or judge or registrar to grant his application…"***

Taking into account guiding principles contained in the cases cited above, let me now turn to the instant application. The applicants' main grounds in support of this application are contained in the Notice of Motion and in the 1st Applicant's affidavits. The substantial ones are (1) that the respondent has to-date refused or neglected to pay the costs which were awarded and taxed, (2) that the respondent has no assets of which the applicants are aware, sufficient in value to cover the past taxed costs and the costs to be incurred in the appeal before this court, (3) that this application for past costs and for further costs has been made without delay and the respondent's appeal has no likelihood of success, and (4) that it is in the interest of justice that security be provided by the respondent for past costs and costs of this appeal.

The 1st applicant's affidavits contain an accurate record of costs which have been taxed and awarded to the applicants. They also contain averments that letters were written to the respondent to pay the costs awarded but which the respondent did not pay. The letters of demand in the record, however, are only related to the misc. Applications and not to the High Court Civil Suit or Court of Appeal Civil Appeal connected to the same matter. Therefore, out of a total of Shs. 53,418,000/= taxed and awarded only Shs. 8,700,000/= relating to the Misc. Applications was demanded. Apart from the demand letter to the former counsel for the respondent threatening bankruptcy proceedings against the respondent no further action has been taken to secure payment of these costs.

On the issue that the respondent has no assets of which the applicants are aware, the action which was taken by the applicants to find out what assets the respondent owns was a letter written by the applicants' lawyer

dated 26th April 2011, addressed to the Commissioner for Co-operative Department, asking him to provide the lawyer with the following information on the respondent society: Date of registration; registration number; the registered offices; bank accounts; property owned; and proprietors, members and / or other principal officers of the society. In a letter received by the applicants' lawyer on 18th May 2011 replying her letter the Registrar of Co-operative Societies gave the following information to the lawyer: Name: Kasaala Growers Co-operative Society; Date of registration: 24.01.1952; Registration number: 456/ RCS; Address: P.O. Box 73 Musale, Luwero.

Bumbakali Sande, in his affidavit in reply para. 10 avers:-

> *"That I* am *advised that by the respondent's said legal counsel that the application is premature* as *the applicants have not showed that they have invoked any of the available modes of execution under the law and failed to recover the said costs, thereby rendering this application,* a *fishing expedition, seeking to merely challenge the respondent to disclose its available assets and finances. "*

And in paragraph 8 of his affidavit in reply BumbakaIi Sande states:

> *"That further the subject matter of the pending appeal is* a *land dispute involving land of over* 4 *square miles in which both parties claim an interest, and in all fairness, the parties should be allowed to exhaust their proper legal rights on the appeal and should not be driven from the seat of justice, especially where they are in the final appellate court for final and conclusive determination of their rights.*

I agree with the advice given by Bumbakali's lawyer that the application for security for past costs is premature. Apart from the fact the substantial amount of those costs has not yet been formally demanded by the applicants from the respondent, the steps so far taken by the applicants to recover the costs through execution are inadequate. What the application states is merely that the awarded costs have not been paid and, therefore, security for those costs should be provided. This according to the case of ***Lalji Gangji****-Vs-* ***Nathoo Vassanjee*** (supra) cannot be enough and I agree. Security for past costs under rule 101(3) of the Supreme Court Rules was not intended to be a substitute for or an alternative to execution.

(supra), Platt, JSC. stated:-

> ***As the authorities show non-payment by itself*** **is** ***not sufficient. What was needed was failure of execution, or some other step to show that the appellant cannot pay, or an admission*** **on** ***his part.****"*

There was no admission on the part of the respondent in the instant application. Therefore, in the circumstances execution or some other concrete step should have been taken to recover the costs.

The averment of the 1S[t] Applicant that the respondent has no assets of which the applicants are aware is based on the letter their lawyer received from the Registrar of Co-operative Societies in reply to hers. That letter did not give any information concerning the respondent's bank accounts and property owned. On the basis of this letter the applicants' lawyer seems to have drawn the conclusion that the

respondent has no assets sufficient in value to cover the past taxed costs and the costs to be incurred in the appeal. A court of law cannot draw an inference based only on the Registrar's letter to conclude that the respondent has no assets to cover the applicants' costs. Moreover under the Co-operative Societies Act, members of a registered co-operative society, past members (two years from the date of ceasing to be members) and estates of deceased members (one year from the time of their decease) are all liable for the debts of the society. Therefore, I find that the information the applicants have provided in their affidavit to show that the respondent has no assets is inadequate.

Even if I was to accept the averments of the 1st Applicant that the respondent does not have assets to satisfy their costs this would not be enough ground to order security. Learned counsel for the applicants relied heavily on the case of ***Goodman Agencies Ltd - Vs- Hasa Agencies Ltd*** (supra) for the principle that security for costs will be ordered where the respondent has no known assets to satisfy the applicant's costs. However, the decision of this court in that case was not based on the question of assets alone. It was also based on the ground that the respondent in that case had no known address in Uganda, and on the respondent's offer of Shs. 700,000,000/= in court as security for costs (both of which do not apply in this application). But perhaps most importantly, it was based on the ground that the respondent had wormed its way into the consent judgment after it had ceased to be a co-plaintiff and that this raised doubts about the possibility of the success of the respondent's appeal. Therefore, while lack of assets is an important factor to consider, it is not a sufficient factor especially in relation to persons that do not fall under Section 404 of the Companies Act.

The next ground on which the applicants based their application is contained in paragraph 13 of the 1st Applicant's affidavit and it is that the application for security for past costs and for further security for costs has been made without delay and the respondent's appeal has no likelihood of success. I think this ground should have been split into two as the issue of delay in filing the application and the respondent's appeal having no likelihood of success are not related in any way.

In paragraph 11 of the respondent's affidavit in reply he avers that the application is belated, an afterthought by the applicants only intended to stifle the meritorious appeal pending before this court.

Rule 101(3) of the Rules of this court under which this application was filed provides that the court may "at any time" direct that further security for costs or past costs be given. While this rule may appear to allow applications for security to be lodged in court "at any time", a number of cases indicate that lateness in filing an application for security may be a factor to consider against the applicant. See, for example, *Lalji Gangji - Vs- Nathoo Vassanjee* (supra) and *Noormohamed Abdulla - Vs- Rauchhodbhai J. Patel* (supra).

In Premchand -Vs- Quarry Ltd [1971] E.A 172 the court when it was considering an application for security for costs stated:-

> *".....but I direct myself* **in** *accordance with the decisions of this court* **in** *Lalji Gangji - Vs- Nathoo Vessanjee [l960] E. A. 315 and Noormohamed Abdulla - Vs- Patel* **[1962]** *E. A. 447 that delay* **in** *making applications of this nature* **is a** *material consideration: that the onus* **is on** *the applicant to show that such*

delay has not been prejudicial to the applicant; and that the power to order security* in *respect of payment of past costs* is *one which should be sparingly exercised. "

Contrary to paragraph 13 of the 1st Applicant's affidavit, the documents available in the record indicate that this application was filed late. This application was filed in court on 17th June, 2011. The memorandum of appeal was filed as number 14 of 2010, *Kasaala Growers Cooperative* Society *Versus Kakooza Jonathan and Kalemera Edison*, on 15th June 2010. A year passed from the date of filing the appeal to the date of filing the application. It is difficult to see why the applicants state that this application has been made without delay. In *Premchand -Vs- Quarry* Services *Ltd* [1971] E.A the appeal was filed in August 1970 and the application was filed on 2~h November 1970 for further security for the costs of the appeal and for past costs. The difference in dates was a period of about four months. It was held that there was delay in applying for security and that the applicant had to show that the delay was not prejudicial to the respondent. In *Lalji Gangji -Vs- Nathoo Vassanjee* (supra) a period of about five months was held to be a delay in filing the application for security. In *Noormohamed Abdulla -Vs- Ranchhodbhai J. Patel and Another* (supra) there was a delay of about 15 months in filing the application. It was held that there was inordinate delay in making the application and since the onus to show that this delay did not prejudice the appellant had not been discharged, the application must be refused. Therefore, in the instant application, instead of the applicants saying that there was no delay, they should have admitted it and showed that it was not prejudicial to the respondent. They did not do so.

The next ground to consider is the averment of the 1st Applicant that the respondent's appeal has no likelihood of success. No elaboration of this ground is contained in the affidavit. In her submission in court learned counsel for the applicants stated that elaboration of the 1st Applicant's averment that the respondent's appeal had no likelihood of success would mean going into the merits of the appeal. She did not try to elaborate it.

On the other hand the respondent's affidavit in paragraph 6 states as follows: *"That I have been advised by the respondent's said legal counsel that the applicants have not showed demonstrable lack of reasonable chance of success of the respondent's pending appeal, neither* is *there any cogent evidence that the pending appeal* is so *devoid of any merit* as *to render it probable that it will succeed."* And paragraph 7 of the same affidavit states: *"That on the contrary, and basing myself on the advice of the respondent's said legal counsel, Civil Appeal No. 14/2010, now pending before this honourable court has* a *high likelihood of success* as *it raises quite* a *number of pertinent legal and evidential questions for resolution by the full bench of this court*.. .... *"* and it goes on to list the legal and evidential questions to be resolved by the court.

Counsel for the applicants should have shown how, in her opinion, the respondent's appeal has no likelihood of success. It is true that at this stage it was not necessary to go into the merits of the appeal. But as Oder, JSC, stated in *G.M. Combined (U) Ltd -Vs-A.K. Detergents (U) Ltd* (supra) about consideration of a prima facie case in security for costs applications, *"the court must consider the prima facie case of both the plaintiff and the defendant*. *Since* a *trial will not yet have taken*

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Place at that stage, an *assessment of the merit of the respective cases of the parties can only be based* on *the pleadings,* on *the affidavits filed* in *support of or* in *opposition to the application for sf.c. and any other material available at that stage."* There is no material in the applicants' affidavits or in the submissions of counsel for the applicants to show that the respondent's appeal stands little chance of success. Instead, going by paragraph 7 of the respondent's affidavit in reply, I am led to believe that the appeal has reasonable grounds and is not devoid of merit.

In paragraph 14 of the 1st Applicant's affidavit in support of the application he states that it is in the interest of justice that further security for costs and past costs be provided. However, as I have indicated earlier, the applicants have not succeeded in showing why security should be ordered. In my view, therefore, I find that it would not be fit to order security for further costs or for past costs in this application.

In the result this application is dismissed. Since the respondent was not represented no costs are awarded.

Dated at Kampala this 13th day of January 2012

JOTHAM TUMWESIGYE
JUSTICE OF THE SUPREME COURT