THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISC. APPEAL NO. 215 OF 2004

ARISING FROM MISC. APPLICATION NO. 111 OF 2004 AND HCCS NO. 796 OF 2000.

1. JOHN HOPE MUKASA]
2. M/S LITHO PACK LTD]::APPELLANTS

VERSUS

M/S SRIJAYA LTD::RESPONDENT

BEFORE: <u>HON. MR. JUSTICE GEOFFREY KIRYABWIRE</u>

<u>R U L I N G:</u>

This is a ruling on an appeal brought under 046 r8, 048 r 2 and r 3 of the Civil Procedure Rules S165 – 3, and section 98 of the Civil Procedure Act Cap 71, against the decision of the Registrar in Miscellaneous Application No. 111/04 refusing an order for security for costs, brought under 023 R 3 of the civil Procedure Rules.

The grounds of the appeal as set out in the Notice of Motion are that: -

1. The learned Registrar misdirected herself in holding that absence of any known property for the Respondent is not sufficient reason to order for security for costs.
2. The Learned Registrar misdirected herself when she ruled that the long residence of the Respondents managing Director in Uganda was sufficient proof that the Respondent would meet the costs of the suit.
3. The Learned Registrar misdirected herself when she failed to appreciate that the Respondent was an independent legal person whose rights and liabilities are different from those of its directors and Directors other Companies.
4. The Respondent failed to prove that she had property to pay for costs in the event she has lost the suit.
5. There was ample evidence that the Respondent suit is frivolous.
6. There was ample evidence that the Respondents Managing Director gave a dishonoured cheque.
7. The Learned Registrar misdirected herself when she ruled that the first applicant loans stand was never raised at the trial court, when in fact no trial has yet taken place.

Counsel for the appellant Mr. Ndyomugabe urged court to order security to be furnished by the Respondent as the Managing Director of the Respondent Company was purporting to use assets of another company not party to the

original suit. Counsel cited the authorities of **WANI** V. **UGANDA TIMBER AND JOINDERY** HCCS 989 OF 1972 to illustrate that it was wrong for the Learned Registrar to hold that the assets of the said company could be used as security for costs, which the company was different legal entity from its Directors.

Counsel for the appellant further cited **G.M COMBINED** v. **A.K. DETERGENTS (U) LIMITED CA 34/95;** to show that if a company cannot pay costs it should provide security for costs. He argued that the Respondent has made no returns since incorporation to prove its ownership, physical location, assets, tax and credit liabilities and that the poverty of the Respondent goes to the root of the trial.

Mr. Mugisha learned counsel for the Respondent opposed the appeal, which he described as misconceive. He contended that there are principles which court has to base itself upon in considering whether or nor to grant an order for security for costs and it is only after these have been addressed that court can look at ones inability to pay as mere poverty is not by itself a ground for security for costs to be granted. He distinguished **G.M COMBINED (U) LIMITED** V **A.K. DETERGENTS (U) LIMITED** C.A NO. 34/95 from the instant case as the appeal in the former was under both 023 r 1, of the Civil Procedure Rules and section 404 of the Companies Act whereas the latter is under 023 solely. The company in **G.M COMBINED (U) LIMITED** V. **A.K. DETERGENTS (U)**

LIMITED C.A NO. 34/95 was under receivership so its financial position was uncertain which is not so here.

He further cited the case of **BANCO ARABE ESPANOL** v. **BANK OF UGANDA C.A NO. 8/98** in support of the contention that where discretion is exercised, as was exercised by the Registrar, the appellate court has to see if the decision was reached judiciously.

I have considered evidence in this case, the submissions on either side and the relevant law on the point. The purpose of security for costs as provided under Order 23r 1 of the Civil Procedure Rules S1 65-3 is to secure a defendant who may incur costs to defend a suit instituted by a plaintiff who cannot pay his costs.

Both counsel addressed me on my powers and role as an appellate court in this matter. Both counsel agreed and I too accept that the grant of an order for security for costs is one of judicial discretion. That being the case the trial court is under duty to exercise its discretion Judiciously on due inquiry of the evidence brought before it at the time of trial of the issue.

The role of the appellate court was well put by Justice Order (JSC) in the case of Banco Arabe Espanol v Bank of Uganda (Civil Appeal 8 of 1998) as follows: -

"It is trite that on an appeal against a decision made in exercise of discretion the appellate court will not interfere with the trial court's decision unless it was arrived at unjudicially. In such a case therefore the primary duty of the appellate court is to consider whether or not the trial court exercised its discretion Judicially. Although the appellate court would for that purpose have to consider the evidence, its concern is not to re-appraise or re-evaluate it with a view to coming to its own conclusion but whether there is evidence in support of the trial court's conclusion."

In this regard the Learned Judge, followed court of Appeal for East Africa decision in **Mbogo** vs. **Shah [1968] EA** 98 where **Sir Clement de Lestang** (VP) held that a court would not interfere with the exercise of Judicial discretion unless satisfied that the decision is clearly wrong because;

i) The court clearly misdirected itself.

ii) The court clearly acted on matters, which it should not have acted.

iii) The court failed to take into consideration matters, which it should have taken into consideration. **Justice Sir Charles New bold** (p) in the same case at P 96 (G-H) further added

the following tests for interfering with the exercise of Judicial discretion.

iv) It is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and as a result there has been misjustice.

These are the parameters I must limit myself to. Of course in this case the appeal is from a decision of a Registrar not a Judge. This is because of the expanded Jurisdiction granted to Registrars by The Hon. The Chief Justice under Practice Direction No. 1 of 2002 entitled Judicial Powers of Registrars.

I hold that the principles and parameters outlined above are equally applicable on appeal from decisions of Registrars under their expanded Jurisdiction and so I will apply them accordingly in this appeal.

From the authorities it would appear to me that the leading case in Uganda on the tests to be considered in deciding whether or not grant an order for security for costs is that **Ssekandi Ag. J.** (as he then was) in **Anthony Namboro and Fabiano Waburo-Lio** -Vs- **Henry Kaala** [1975] HCB 315 and these are:

(a) Whether the applicant is being put to undue expense by defending a frivolous and vexatious suit.

(b) That he has a good defence to the suit.

(c) That he is likely to succeed.

These are the first tier of tests that have to be met. It is only thereafter that a second tier of tests can be considered namely:

i) Inability to pay.

ii) Poverty but that mere poverty is not by itself a ground for ordering security for costs, it this were so, poor litigants would be deterred from enforcing their legitimate rights through the legal process.

iii) Where the respondent has a triable cause of action against the applicant and there is a likelihood of him succeeding.

The principles to guide court in determining applications for security for costs, were reiterated in **G.M COMBINED (U) LIMITED** v. **A.K. DETERGENTS (U) LIMITED** (supra), are as follows: -

1. The major consideration is the likelihood of success of the plaintiff's case; put differently whether the plaintiff has a reasonably good prospect of success; or whether the plaintiffs claim is bona fide and not a sham.
2. If there is a strong prima facie presumption that the defendant will fail in his defence to the action the court may refuse him security for costs of a defendant who has no defence to the claim.
3. Whether there is an admission by the Defendant on the pleadings or elsewhere that money is due.
4. If the Defendant admits so much of the claim as would be equal to the amount for which security would have been ordered the court may refuse him security for he can secure himself by paying the admitted amount into court.
5. Where the Defendant admits his liability the plaintiff will not be ordered to give security for costs.
6. Where there is a substantial payment into court or 'an open offer' of or substantial amount; an order for security for cases will not be made.

A Defendant may in certain cases ask for an order to compel the Plaintiff to give security for the costs of the action, for example where the plaintiff is ordinarily resident abroad, and has no substantial property, real or personal properly within the jurisdiction of court. It is important to note that at this stage a trial will not have taken place so an assessment of the merits of the application can only be made based on the pleadings, the affidavits for and against the application and other relevant material brought before court.

On the issue of property it is incumbent for the appellant to prove that the Respondent does not have sufficient property, as he who alleges must prove. Other than submissions from the bar there is no evidence on the court record to support the claim that Respondent has no known property. The company returns talked about are public records and yet there was no independent confirmation from the company registry or any other registry for that matter of this allegation. As such grounds 1 and 4 must fail.

As to the residence of the Respondents Managing Director, Sir George JesseL MR. In **REPERCY & KELLY NICKEL, COBALT & CHROME IRON MINING COMPANY** (2) (1876) 2 CH.D 531, spoke thus of the principle under lying the requirement of a foreign plaintiff to provide security:

> "*The principle is well established that a person instituting legal proceedings in this country and being abroad, so that no adverse*

order could be effectually made against him if unsuccessful; is by the rules of the court compelled to give security for costs."

The position is further stated by Lord Halsbury is RE APPOLLINARIS COMPANY'S TRADEMARKS [1891] 1 CH D 1 that;

" His being so resident that is abroad makes a prima facie case for requesting him to give security, but it is subject to a well known ordinary exception that if there are goods and chattels of his in this country, which are sufficient to answer the possible claim of the other litigant, and which would be available to execution the courts will not order him to give security for costs."

The general rule thus seems to be that where a plaintiff is a non-resident, security for costs bearing in mind other factors, will usually be granted to the applicant. This however is not without exception, that is, where such non-resident has property that may satisfy a possible claim, within the jurisdiction, security for costs may not be ordered. Be that as it may, I am conscious of the fact that the Managing Director and the Respondent are different entities; as held in **SALOMON vs. SALOMON & COMPANY LIMITED** [1897] AC 22 and **WANI vs. UGANDA TIMBER AND JOINDERY HCCS 989 OF 1972**.

Counsel for the appellant though conscious of the same misdirected himself when applying the principle to the set of facts before this court. The fact that the company is incorporated in Uganda is sufficient. In other words, the residence or otherwise of the Respondents Managing Directors is irrelevant, since the Respondent and not its Directors is the party in the original suit. Consequently, whereas I agree with the substance in grounds 2 and 3 in the Notice of Motion I do not see how the same can compel me to grant an order for security for costs.

With regard to 'frivolous action', there is an inherent power in every court to stay and dismiss actions or applications, which are frivolous and vexatious and abusive of the process of the court. In order to bring a case within the description it is not sufficient merely to say that the plaintiff has no cause of action. It must appear that the Respondents alleged cause of action is one, which on the face of it is clearly one, which no reasonable person could properly treat as bona fide; and contend that he had a grievance, which he was entitled to bring before the court. This position was stated by Lush J in **NORMAN** vs. **MATHEWS** (1916) 85 LJKB 857 AT 859.

A perusal of the respondents plaint filed in civil suit No. 796 of 2000, does not satisfy the aforementioned test. In any event if it was the initial feeling of the appellants that the suit against them was frivolous, they had an option to apply

for striking out of the plaint under 07r 11(e) of the Civil Procedure Rules S1 65 – 3 over three years ago, which was never exercised. I agree that Mr. Ndyomgabe has just come on record as counsel for the Defendant in the Main Suit and things have moved since then but that does not exonerate the first counsel for the Defendant Nangumya & Co. Advocates from having taken the suggested action. Accordingly, I dismiss ground 5 of this appeal.

Agreeably, mere poverty is not itself a ground for ordering for security for costs. This point is reiterated in **KARIM ELAHI v AHMED MOHAMMED** (1929 –30) **ULR**, that inability of the plaintiff to pay his debts is not sufficient reason to order security for costs. As such ground 6 must fail.

Ground No. 7 was not fully argued before me so I was not guided to make a finding so I make none.

For the reasons given above I am not able to make the order sought. In the result this appeal fails and is accordingly dismissed with costs to the Respondents.

Hon. Justice Mr. Geoffrey Kiryabwire

27th May 2004