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THE REPUBLIC OF UGANDA  
 IN THE HIGH COURT OF UGANDA AT KAMPALA  
 MISC. APPLICATION NO. 1088 OF 2019  
 [Arising from Misc. Application No. 494 Of 2018]  
 [Arising from Civil Suit No. 463 Of 2019]

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RAJIV KUMAR SABHARWAL  
 GLOBAL WIRE INDUSTRIES LTD :::APPLICANTS

VERSUS

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RAJENDRA KUMAR JAYANILA THAKKAR ::: RESPONDENT

BEFORE: HON. DR. JUSTICE HENRY PETER ADONYO

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RULING

1. Introduction:

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This application was brought under section 126(2) (2) € of the 1995  
 Constitution, section 98, 79 (1) (b) of the Civil Procedure Act cap. 71,  
 section 33 of the Judicature Act Cap and Order 50 rule 8 of the Civil  
 Procedure Rules that;

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- a) The learned Deputy Registrar's Order dismissing Misc. Application No. 494 of 2019 was contrary.
- b) The learned Deputy Registrar' Order dismissing the application for security for costs be furnished and costs be granted.




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- 5 c) Misc. Application No. 494 of 2019 be allowed and orders sought therein, that security for costs be furnished and costs be granted.
- d) Costs of the application be provided for.

The grounds of the application are that;

- 10 i. The Applicant / Defendant files Miscellaneous Application No. 494 of 2019 seeking for an order for costs that may be incurred by the Applicant in defending HCCS No. 463 of 2019.
- 15 ii. However, the learned Deputy Registrar dismissed the application on grounds that it was too early in the case to grant the order for payment for security for costs.
- iii. the Applicant had failed to satisfy the conditions for the grant of an order of security for costs.
- 20 iv. The learned Deputy Registrar ignored the fact that the 1<sup>st</sup> Respondent was being given latitude to come to court without clean hands therefore given a green card to pursue serious allegations against the defendants without concrete proof but mere baseless statements without real evidence or substantiated facts.
- 25 v. The learned Deputy Registrar erred in law and fact ignoring the fact that the 3<sup>rd</sup> respondent acknowledges having only honoured cheques duly signed by both parties and full consultation with the Plaintiff each time of such payment, hence no prima facie case existed.

  
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- 5       vi.    The learned Deputy Registrar erred in law and fact ignoring  
the fact that the 4<sup>th</sup> Respondent acknowledges only honored  
registration of duly signed resolution for bearing signatures  
fully in conformity with their records hence no prima facie  
case existed.
- 10       vii.   The learned Deputy Registrar erred in law and fact when she  
failed and/ or refused to preserve the subject matter of the  
suit to enable a logical conclusion of the suit.
- 15       viii.  The learned Deputy Registrar erred in law and fact when she  
alluded to principles of stay of execution in determining an  
application for temporary injunction thereby wrongly  
dismissing it.
- 20       ix.    The learned Deputy Registrar erred in law and fact when he  
ignored the fact that the Plaintiff has no known assets in  
Uganda but instead recognized merely being a 50%  
shareholder in the 2<sup>nd</sup> defendant company sufficient security  
given company being believed functional and she dismissed  
the application for grant of the order for payment for security  
for costs.
- 25       x.    The learned Deputy Registrar erred in law and fact when she  
found that the Applicant did not attach any evidence of proof  
of any payments to the Plaintiff as alleged in his pleading yet  
passed over money to the Plaintiff company and which it did  
not deny and instead court failed to recognize that  
nonetheless the Plaintiff took benefit of the money passed  
30       over to his company.

  
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- 5 xi. The learned Deputy Registrar erred in law and fact in finding that the balance of probability as she did, favored dismissing the application ignoring the fact that it would be inconvenient if the main case is determined in favour of the applicant/ 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant and the Plaintiff is nowhere to cater for the costs incurred.
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- xii. It is in the interest if justice that the ruling *vide* Misc. Application No. 494 of 2019 be set aside and the application be allowed to meet the ends of justice.

Mr. Rajiv Kumar Sabharwal, the 1<sup>st</sup> Applicant and director of the 2<sup>nd</sup> Applicant company swore an affidavit in support of the application. In his averments, he states that the learned Deputy Registrar erred in law and fact when she found that the Applicant did not attach any evidence of proof of payments to the Plaintiff as alleged in pleadings yet it was true that he passed over money to the Plaintiff company with the lower court failing to recognize that as a matter of fact yet the Plaintiff took benefit of that money passed over to his company thus unjustly enriching himself and fleecing the defendants.

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Mr. Rajiv Kumar Sabharwal further averred that the learned Deputy Registrar erred in law and fact in finding that the Applicant had not proved that the Respondent had a foreign background thus lacking a fixed place of abode within the jurisdiction of this court or that the alleged lack of assets warrants the issuance of the orders sought thus summarily dismissed his application yet these should have been taken into account.

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5      2. Applicant's submissions:

The Applicant submits that this court ought to re-examine the merits of the application for security for costs and grant an order for payment of security for costs by the Respondent.

10      It was argued that the Respondent has no known assets in Uganda which can be pursued where he to lose the case. That the reasoning by the court that the Respondent has a known place of address every time he is in the country, does not amount to a permanent place of abode or residence and address; within the meaning of the law, and it is proof that the Plaintiff / Respondent is not resident in Uganda.  
15      That he can only be treated as guest in the home of Jaigarh Chandarane but is not a tenant since no evidence was furnished at all to prove thus

Counsel for the Applicant argued that the Court relied heavily on the affidavit in Jaigarh Chandarane and gave it too much weight which  
20      eventually biased the finding of the court to the detriment of the Applicant, yet it is not in dispute that the Plaintiff/ Respondent is a foreigner and is not actively resident in Uganda. On this, the Applicant relied on ***Jubilee Insurance Co. Ltd vs Krediet Geneve Inc. HCMA No. 338 of 2001.***

25      Counsel also relied on the case of ***GM Combined (U) Ltd vs A. K Detergents (U) ltd SCCA 34 of 95*** where it was held that;

***“the power to order security for costs is purely a discretion if court, exercised in very special circumstances of the***



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5 ***case that is the likelihood of success of the Plaintiff's case  
as major considerations. And in weighing the merits, court  
considers whether Applicant is not being put to undue  
expense defending a frivolous and vexatious case."***

10 That considering the nature of the claim, which is serious, and yet  
false in the absence of a police investigation, presents a clear position  
that the Plaintiff / Respondent has limited chances of success. That,  
the Respondent should provide security of costs and accordingly pay  
a deposit of Ug. Shs. 500,000,000/= in light of the value of the claim.

3. Respondent's submissions:

15 In its submissions, the Respondent raised preliminary objections in  
relation to the time limitations for filing the appeal. Counsel referred  
to section 79 (1) (b) of the Civil Procedure Act which requires that  
every appeal is to be entered within seven days from the date of the  
order of the Registrar and submitted that the appeal in this case was  
20 filed thirty-three (33) days after the orders of the Registrar and  
without the leave of court.

That, the Applicant had also failed to extract an order and record of  
proceedings, as well as attach the court proceedings as required  
under section 79 (2) of the Civil Procedure Act Cap. 71. Another  
25 preliminary objection raised by the Respondent is that the affidavit  
is argumentative and prolix contrary to Order 19 3 (2) of the Civil  
Procedure Rules.

  
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- 5 On the merits of the application, on the issue whether the learned deputy registrar erred in law and fact when she made orders dismissing the application for security for costs, counsel submitted that it is difficult to determine whether a suit is frivolous and vexatious without going into the merits of the main suit.
- 10 In relation to the Applicant's arguments that the Respondent is a foreign national with no assets within the jurisdiction of the court and no fixed place of abode, it was argued that lack of assets is not a ground to consider when granting an order for security for costs. On this issue, counsel cited the case of **Charles Serunkuma Kiggundu**
- 15 **& Others vs Ssempijja Muwanga Jonathan H.C.M.A No 140 of 2018.**

4. Decision:

I have taken into account the submissions of both parties. The Respondent raised three preliminary objections. The first is that the

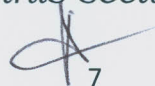
20 Applicant had filed its appeal out of time. Section 79 (1) (b) of the Civil Procedure Act provides that;

*Except as otherwise specifically provided in any other law, every appeal shall be entered*

(a)....

25 (b) *within seven days of the date of the order of a registrar;*

*As the case may be appealed against; but the appellate court may for good cause admit an appeal though the period of limitation prescribed by this section has elapsed.*



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5           (2) *In computing the period of limitation prescribed by this section, the time taken by the court or registrar in making a copy of the decree or order appealed against and of the proceedings upon which it is founded shall be excluded.*

Having carefully perused the record, the ruling of Her Worship Lillian  
10 Bucyana which was delivered on the 23<sup>rd</sup> October 2019 I note that the order was extracted on the 13<sup>th</sup> November 2019 and subsequently the appeal was instituted on the 25<sup>th</sup> November 2019.

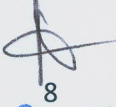
This act of extraction is beyond the time limit prescribed under section 79 of the Civil Procedure Act and I am indeed in full  
15 agreement with counsel for the Respondent that the appeal was filed out of time.

Moreover, as required under section 79 of the Civil Procedure Act, no reasonable explanation was offered for filing the appeal after the limitation period had elapsed.

20 In **Nakiriba Agnes & Others vs Kalemba Edward Miscellaneous Application No. 403 of 2018** it was held that any appeal lodged out of time and without the leave of court is incompetent.

Guided by this principle, I would accordingly find that the appeal was filed out of time.

25 The other issue raised by the Respondent is that no record of proceedings was attached to the appeal. Section 79 of the Civil Procedure Act requires this this be done for the extraction of a record of proceedings just like extraction of an order is part of the

  
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5 requirements of an appeal process and it must be prepared, with the time taken for doing so not considered as part of the limitation period as was pointed out in the case of **Asadi Weke vs Livingstone Oola [1985] HCB 50** which requires that a record of proceedings must be attached to the appeal.

10 In the present case, it is clear to me that the record of proceedings was not extracted and neither is there a letter for requesting for the same leaving the is matter not to comply with the clear provisions of the law cited above. That being the case this matter would be collapse on its face.

15 section.

The other issue raised by counsel the Respondent relates to the affidavit in support of this application as it is contended that it is argumentative and longwinded.

20 Order 19 rule 3 of the Civil Procedure Rules is the law which guides the design of an affidavit of this nature for it provides that an affidavit shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory application, on which statements of his or her belief may be admitted provided that the grounds thereof are stated and that every affidavit shall not  
25 unnecessarily set forth matters of hearsay or be argumentative. This position was confirmed in the case of **Wadri Mathias and Others vs Dranilla Angella Civil Revision No.0007 of 2019** where it was held that an affidavit should adduce evidence by laying out factual matters and should not argue the application or the case.



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5 In the instant matter Mr. Rajiv Kumar's affidavit is clearly argumentative as seen from paragraphs 3, 4, 5, 6, 7, 8, 9, 10 and 11 where it even proceeds to argue the grounds of appeal.

This argumentative fact is borne out of a lengthy narrative with little or no evidential value yet in his affidavit, the Applicant should have  
10 adduced the evidence which he intends to rely on but alas this was not to be thus falling short of the holding in **Wadri Mathias (cited above)** which provides that an affidavit should restrict itself to the stating of factual matters but not go to the extent of arguing out a case and should avoid being argumentative.

15 Therefore, the fact that Mr. Rajiv Kumar proceeds to argue out the case through his very wordy affidavit without pointing to any evidence he is to rely on means that his affidavit offends the provisions of Order 19 rule 3 of the Civil Procedure Rules with the consequence his affidavit would be struck out thus rendering no  
20 competent application before this court.

This application on the basis of the finding above, I would find that falls short of the requirement of section 79 of the Civil Procedure Act as the matter before me was filed thirty-three (33) days after the date of the orders of the Registrar whereas it should have been filed within  
25 seven days thus clearly out of time in addition to no reasonable explanation being offered for doing so on top of no leave of court to file out of time being sought.

Other legal irregularities which I have noted with regard to this application includes the fact of the e Applicant failing to extract the

  
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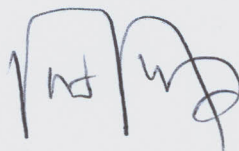
5 order including attaching the court proceedings from which this application is based in addition to the fact that even the affidavit in its support offends the provisions Order 19 rule 3 of the Civil Procedure Rules for it is argumentative without restricting itself to stating factual matters.

10 I would thus find that this application lacks merit and it is accordingly dismissed.

5. Orders:

- a. This application lacks merit and it is accordingly dismissed.
- b. The decision of the learned Registrar is upheld
- 15 c. The costs of this application is awarded to the Respondent.

I so order.



*Hon. Justice Dr. H. P. Adonyo*

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Hon. Dr. Justice Henry Peter Adonyo

Judge

27<sup>th</sup> October 2020