THE REPUBLI OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]
MISCELLANEOUS APPLICATION NO.1878 OF 2018
(ARISING FROM CIVIL SUIT NO.593 OF 2016)

GODFREY KIRUMIRA KALULE::::::::::::::APPLICANT/1st DEFENDANT
VERSUS
J.S.F DEVELOPMENT::::::::::::::::::::::::::::::::::::::RESPONDENT/PLAINTIFF

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

RULING

This application was brought under chamber summons under Section 284 of the Companies Act, 2012, O.26 rr.1 &3 of the Civil Procedure Rules SI 71-1, and Practice Direction No.1 of 2003 seeking for orders that;

1. The Respondent furnishes security for all the past and present costs incurred or likely to be incurred by the Applicant in defending the suit instituted by the Respondent against the Applicant.

2. Cost for the application be provided for.

The application is supported by the affidavit of the applicant wherein he deponed as follows;

That the Respondent was incorporated in Uganda in 1986, and acquired properties including land at Kyadondo Block 244 Plot 3644

at Kisugu (hereinafter the suit land), which it later disposed of through its Attorney Mr. John Kityo, Peter Kusiima (the Lawyer) and a one Lukyamuzi Bazilio Leonard as an interested party. That in September, 2016, the Respondent commenced HCCS No.593 of 2016 against him (*hereinafter the main suit*) seeking cancellation of his certificate of title to the suit land. *A copy of the plaint and WSD was attached as "A".*

That in 2010, the Respondent had also brought a suit against him in Nakawa Chief Magistrates Court vide Civil Suit No.92 of 2010 which is similar in material particulars with the main suit. It is his evidence that he vehemently defended that suit, but that the Respondent, for unknown reasons, abandoned it leaving in abeyance for eight years. *A copy of the plaint and written statement of defence to that suit was attached as "B"***.**

Further, that in 2013, the Respondent had instituted against him another suit in the Makindye Chief Magistrates Court vide *Civil Suit No.38 of 2013*, which is also similar in material particulars with the main suit. That just like the suit it instituted in 2010, it also abandoned this suit leaving it in abeyance for five years. *A copy of the plaint and written statement of defence was attached as "C"***.** Still, that in 2013, the Respondent instituted a similar suit against him in this Court vide HCCS No.492 of 2013 which he has also vehemently defended. A copy of the plaint and written statement of defence to this suit was attached as "D1" and "D2".

It is his evidence that he has incurred expenses in defending these suits which costs he has no prospects of recovering from the Respondent given the uncertainties regarding its financial position and business. That he has been informed by his Lawyers of M/S Ligomarc Advocates that none of the Directors and Shareholders of the Respondent is a resident in Uganda. A copy of the URSB search report was attached as "E" in proof whereof.

Additionally, that his Lawyers informed him also that the Respondent neither has any known property nor place of business in Uganda. That he has arranged meetings with Mr. Peter Kusiima, who witnessed the sale of the suit land and professional colleague to Mr. John Kityo, the Respondent's Attorney, with a view to settling the dispute, and that he informed him that Mr. John Kityo is inaccessible due to physical and mental incapacitation on ground of old age. That he believes that the Respondent's attorney is incapacitated from prosecuting the main suit and other suits which are in abeyance. That he also believes that neither the Respondent nor its Attorney will be in position to meet the costs he shall incur in defending all the suit brought against him.

For those reasons, he invited Court to order the Respondent to deposit Ugshs.50,000,000/- only (*fifty million shillings)* as security for costs.

The application was opposed by the Respondent through an affidavit deponed by Mr. John Kityo. He deponed that in 2005, he discovered

that the Applicant had forcefully taken possession of the Respondent's premises comprised in Kyadondo Block 244 Plot 4036, and also was attempting to grab the adjacent plot to wit the suit land. That owing to this, the Respondent instituted Civil Suit No.92 of 2010 in the Chief Magistrates Court at Nakawa for trespass seeking eviction against the Applicant in respect of the suit land.

That during the pendency of that suit, it was discovered that the Chief Magistrates Court at Nakawa had no territorial jurisdiction and henceforth withdrew that suit and filed a similar suit vide Civil Suit No.38 of 2013 in the Chief Magistrates Court at Makindye.

Further, that during the pendency of the suit at Makindye Court, it became apparent that the suit land had been illegally and fraudulently transferred to the Applicant in 2012 by Damba Wilson/J.S.F Development. That it then became clear that the reliefs sought in Civil Suit 38 of 2013 at the Makindye Court could not conclusively determine the dispute anymore hence necessitating the institution of the main suit in this court to seek for an order of cancellation of title, among other reliefs**.** *A copy of the plaint to then main suit was attached as "A".*

With regard to HCCS No.492 of 2013, it is his evidence that the same is in respect to a different cause of action and another land comprised in Kyadondo Block 244 Plot 4036 and, that as such**;** the Applicant's prayer for costs premised on the same is not maintainable in law. Further, that the Applicant's averment that none of the Respondent's

Directors is in Uganda is false because annexture "E" to the Applicant's affidavit clearly indicates that Mr. John Kityo is a director of the Respondent.

In addition to that, that since that Applicant pleaded in his written statement of defence to the main suit that he acquired the suit land from the Respondent itself, it is unclean of him to assert that he does not know of the Respondent's directors or premises. Additionally, that the Respondent has neither been declared insolvent nor is it undergoing any insolvency proceedings to necessitate an order for security for costs. It was his evidence also that the Respondent has on two occasions attempted to settle both suits in this Court without the willingness of the Applicant. *Copies of correspondences relating to the said attempted settlement were attached as "D1", "D2" and "D3".*

For those reasons, he invited me to dismiss the Applicant's application with costs.

In further support of his application, the Applicant filed a rejoinder to the Respondent's affidavit. He averred therein in that he is the owner of the suit land having obtained the same from the Respondent with the involvement of its agents. That he has been put to undue expenses of defending various suits by the Respondent which Court ought to take into account and order security for costs against the Respondent.

Further that he believes that Mr. John Kityo is not the deponent of the affidavit in reply on ground that the signature thereon is not one of his. *For comparison, he attached a copy of the Respondent's Memorandum of Association and Statement of Nominal Capital bearing Mr. John Kityo's signature as "A" and "B".*

Counsel for both parties filed written submissions in this Court which I shall consider in the determination of this application. The issues for determination in this application, as Counsel for the Respondent suggested in his submissions, are;

1. Whether the application meets the conditions for the grant of an order for security for costs against the Respondent?

2. Whether the parties are entitled to the reliefs sought?

Issue No.1:

Whether the application meets the conditions for the grant of an order for security for costs against the Respondent?

As far as this issue is concerned, both Counsel agreed that the governing law is **O**.26 r1 of the Civil Procedure Rules. They also agreed that the considerations for grant of an order of security for costs were considered in ***Namboro & Fabiana Waburo versus Henry Kaala (1975) HCB 315*** and these are;

a. Whether the Applicant is being put to undue expenses by defending a frivolous and vexatious suit,

b. That he or she has a good defence to the suit which is likely to succeed.

According to the same case, it is only after the above two elements have been considered that factors like inability to pay may be taken into account. In considering the factor of inability to pay, Counsel for the Applicant invited me to add a consideration of Section 284 of the Companies Act, 2012. However, as Counsel for the Respondent, I also found the Section inapplicable here for the reason that it only applies to cases of this nature if the Respondent is a limited liability company. This is unlike in the case at hand since it clearly appears in annexure "E" of the Applicant's affidavit that the Respondent is unlimited Company.

In determining whether the two considerations above have been proved, the observations of *Oder JSC (RIP)* in ***G.M. Combined (U) Ltd versus A. K. Detergents (U) Ltd. SCC.A. No. 34 of 1995***, are instructive. He observed thus;

> *"In a nutshell, in my view, the court must consider the prima facie case of both the plaintiff and the defendant. Since a trial will not yet have taken place at this 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 security for costs and any other material available at this stage."*

I shall therefore proceed to determine whether the Applicant and the Respondent have a prima facie case by only looking at their respective pleadings and affidavits. I must note that the Respondent Counsel made scanty submissions in regard the two main considerations for an order for security of costs as he dwelt much on that factor of inability to pay costs. Having noted that this factor comes last, I shall consider the submissions of the Respondents regarding the two main considerations.

Whether the Applicant is being put to undue expenses by defending a frivolous and vexatious suit.

Counsel for the Respondent started off by citing the case of ***R versus Ajit Singh s/o Vir Singh (1957) EA 822 at 825*** wherein a *frivolous* and *vexatious* suit was defined as one that is;

> *"Paltry, trumpery; not worthy of serious attention; having no reasonable ground or purpose." He further cited the case of* ***United Builders & Contractors Ltd versus Harris International Ltd HCCA No.29 of 2016*** *wherein Madrama J., (as he then was) quoted the observation of* **Oder JSC** *in* ***GM Combined (U) Ltd versus AK Detergents (U) Ltd (1992)2 E A 94 as*** *regard 0.26 r.1* to state that;
>
> *"…a major matter of consideration is the likelihood of the plaintiff's case succeeding. If there is a strong presumption that the defendant will fail in his defence to the action, the court may*

refuse security for costs. It may be a denial of justice to order a plaintiff to give security for the costs of the defendant who has not defence to the claim…."

Premised on the above authorities, Counsel submitted that the main suit relates to the illegal and fraudulent transfer of the suit land to the Applicant by a fictitious person, a one Damba Wilson/JSF Development, during the pendency of another suit for trespass. That the Respondent's evidence shows inconsistencies in the Applicant's cases in that whereas the defendant claims purchasing the suit land from the Respondent, the transfer instrument leading to his registration shows that the transferor was Damba Wilson/JSF Development.

He also disputed that the Respondent's suit is frivolous on the ground that by the time the suit land was transferred, the Applicant was already aware that his occupation and ownership of the same was contested by the Respondent in the Courts of law. Accordingly, he submitted that the Respondent's suit discloses bonafide triable issues with a likelihood of success against the Applicant. He thus invited me to find that the Applicant has failed to prove this consideration.

On the other hand, Counsel for the Applicant disputed these submissions, in his rejoinder. His view was that the main suit is frivolous because it was brought during the pendency of other suits. His disputation was supported by Section 6 of the Civil Procedure Act

which bars Court from entertaining a matter whose issues are directly or substantially pending before another court.

I have looked at the plaint to the main suit and, it is clear that the Respondent's cause of action is one of recovery of the suit land based on fraud. Having looked at the annexture "B", "C" and "D" on the Applicant's affidavit in support of the application, I note that the cause of action from the main suit is distinct from that in the suits filed elsewhere by the Respondents against the Applicant. In that regard, I reject the Applicant Counsel's submission premised on Section 6 of the Civil Procedure Act for the reason that the questions of law in the main suit are substantially different from those in the rest of the suits.

In its plaint and the affidavit in reply to this application, the Respondent has clearly indicated that the suit land was transferred from its name into the Applicant's during the pendency of a court controversy pertaining the Applicant's possession and ownership of the same. Crucial to this is that whereas the Applicant claims to have bought the suit land from the Respondent, the transfer instrument, *attached as annexure "A"* to the plaint, indicates Damba Wilson/JSF Development as the transferor.

This alone, in my view, poses two triable questions that is; how did the Applicant become registered on the suit land through another person unknown to the Respondent? and; why was the transfer of the

suit land effected during the pendency a court controversy? Having regard to this, it cannot be said that the Respondent's case is frivolous and vexatious.

Ultimately, I am in agreement with the Respondent's Counsel that the Applicant's proof of this consideration must fail.

That the Applicant a good defence to the suit which is likely to succeed

As regards this element, Counsel for the Respondent cited ***GM Combined (U) Ltd versus AK Detergents (U) Ltd*** *(supra),* and noted the observations of **Oder JSC** *(RIP)* pertaining the finding of a prima facie defence. He then argued that the defendant has no good defence to the main suit on ground that the person he claimed to have bought from was neither the registered proprietor nor had the authority to deal with the land. He added that what appears in the written statement of defence are falsehoods because what is contained therein is different from what the Applicant claims.

He also attacked the Applicant for not mentioning in his affidavit the Respondent's "authorised agents" he claims were involved in the purchased of the suit land. It was his view that the Applicant's title is tainted with fraud. Ultimately, he invited me to find that this element has also not been proved.

In rejoinder to the above, Counsel argued that the Applicant has a complete defence of bonafide purchaser for value to the Respondent's suit.

In paragraph 5 of his written statement of defence, the Applicant pleaded that he *"lawfully acquired the suit property from the Plaintiff [Respondent] with the involvement of the Plaintiffs' authorised agents and accordingly obtained good title to the suit property."*

In furtherance of this claim, he averred ***i***n his affidavit in support of the Application that the suit land was disposed of by the Respondent through its Attorney Mr. John Kityo, Peter Kusiima (*the Lawyer*) and a one Lukyamuzi Bazilio Leonard as an interested party. This claim is however disputed by the Respondent.

According to the copy of the certificate of title attached to the plaint, the suit land was formerly registered in the name of the Respondent Company. As such, it could only be transferred by the Respondent through its agents. What, however, appears in annexure "A" to the plaint is that the suit land was transferred by Damba Wilson/JSF Development whom the Respondent pleads to be ignorant of. I am also mindful that that Mr. John Kityo whom the Applicant claims to have been involved in the suit land transaction has also vehemently protested the Applicant's ownership in the affidavit in reply.

All the above considerations work against the Applicant.

Having considered the above, 0I shall now address whether the Respondent will be unable to pay costs to the Applicants in case judgment in the main suit is passed against it.

According to the Applicant's Counsel, the Respondent will be unable to meet costs of the main suit on ground that it neither has any property nor has any known place of business in Uganda. Having stated so, he invited me to consider that these facts have been proved on ground that they were not disputed by the Respondent in its affidavit in reply.

In support of this submission, he cited that case of ***Samwiri Musa versus Rose Achen (1978) HCB 297*** for the proposition that where facts are deponed to in an affidavit and they are not rebutted, they are deemed as admitted by the opposite party.

I was also encouraged by Counsel to grant the order of security for costs for the reason that courts have considered the absence of property and Respondent within the jurisdiction as sufficient to justification. In support of this, I was referred to the case of ***Noble Builders (U) Ltd & Anor versus Jabal Singh Sandu*** **SCC** ***Application No.15 of 2012***. Counsel also invited me to take account of the fact that the Respondent has filed several suits against the Applicant which, according to him, is the reason why it will be unable to pay costs.

The other ground he gave as justification for the order sought was that the Respondent lacks interest in prosecuting the main suit, and that the Applicant is doubtful Mr. John Kityo's capacity to represent the Respondent. He grounded the reason for the doubt on the averment that Mr. John Kityo is incapacitated, and that he did not depone the affidavit in reply to the application but someone else. Ultimately, Counsel invited me to order the Respondent to pay Ugshs.50,000,000/- only as security for the Applicant's costs.

On the other hand, Counsel for the Respondent argued the Applicant's claim that the Respondent will be unable to pay costs of the main suit is speculative on because no proof was adduced to prove this. That notwithstanding, he cited the case of ***Bank of Uganda versus Joseph Nsereko & 2 Others SCC Appl. No.7 of 2002*** wherein it was observed that *lack of knowledge on the part of the Applicant cannot amount to evidence of the Respondent's inability to pay costs.* Premised on this authority, Counsel labelled the Applicant's claim that the Respondent is unable to pay costs as baseless.

His ground for the label was because the Applicant showed no proof that the Respondent is subject to any insolvency proceeding or has an unsatisfied decree. He also reminded me that impecuniosity is not a ground for ordering a party to pay costs. Considering all the foregoing submission, he argued that the Applicant wants to use this

Court as an execution Court in order to recover costs he incurred in others suits founded on different causes of action.

Further, Counsel submitted that in the event I am inclined to order security for costs; I ought to reconsider and decline that because the Applicant failed to attach a skeleton bill of costs to justify the quantum of Ugshs.50,000,000/- only.

In support of his view, he relied on the case of ***G M Combined (U) Ltd*** *(supra)* for the proposition that the amount of security required must be equal to that probable amount of costs payable.

Regarding the claim that Mr. John Kityo was incapacitated, Counsel found this as an embarrassing claim. The reason he gave was that there was no evidence adduced by the Applicant that Mr. John Kityo has ever been adjudged as mentally incapacitated under the law. The claim that Mr. Kityo John did not sign on the affidavit in reply was labelled as speculative by Counsel. Ultimately, he urged me to find this issue in that negative.

In rejoinder, Counsel for the Applicants maintained that the Respondent will be unable to pay costs because it does not have a known place of business, or property and that its shareholders are not within the jurisdiction of Court. With regards to the affidavit in reply, he maintained that this ought to be struck out on ground that it was sworn and signed by another person other than the deponed, Mr. John Kityo.

In his view, the forgery of Mr. John Kityo's signature was admitted by because it was not rebutted by the Respondents. He invited me to determine that Mr. John Kityo is incapacitated and unable to represent the Respondent Company because he has never appeared in Court. In arguing so, I was referred me to the case of ***Thomas Makumbi versus Josephine Katumba HCMA No.316 of 2014***. Ultimately, he invited to order the Respondent to pay security for costs.

I have had a benefit of appreciating the evidence and submissions of both Counsel on record, and I determine this factor as follows;

In considering this factor, I am mindful, as Counsel for the Respondent, that the mere poverty of the Plaintiff is not by itself a ground for ordering security for costs. *See* ***Anthony Namboro and Anor versus Henry Kaala [1975] HCB 315.***

In the case before me now, **t**he Applicant claims that the Respondent has no known property and that neither its shareholders nor directors lives within this Court's jurisdiction and therefore unlikely to pay costs. This claim is, however, been refuted as being speculative.

As observed by *Mulenga JSC*., in ***Bank of Uganda versus Joseph Nsereko & 2 Others Civil Application No. 7 of 2002*****,** the lack of knowledge on part of the Applicant cannot amount to evidence of the respondent's inability to pay costs.

This was likened by the Learned Justice as '*a fishing expedition, namely putting in the application as a challenge to the respondent to disclose their 'whereabouts' and value of their assets, if any.'*

In view of the authority, I find the Applicant's claim that the Respondent will be unable to pay costs, premised on his ignorance of the whereabouts of its property, directors and shareholders, as fishing expedition. It suffices to add that the claim that the Respondent has filed several suits against the Applicant holds no substance especially in the absence of evidence of any unsatisfied decree or order arising from any of those suits. Consequently, I agree with Counsel for the Respondent that the factor that the Respondent will be unable to pay costs has also not been proved by the Applicant.

Before taking leave of the issue, I must denounce the Applicant's allegation that Mr. John Kityo is incapacitated and unable to represent the Respondent. My reason is that the Applicant adduced no proof that Mr. John Kityo has ever been adjudged to be of unsound mind. It is thus absurd and unfortunate that the Applicant and his Advocate chose to make Mr. John Kityo's non-appearance a subject herein. If in any case Mr. John Kityo's nonappearance was suspicious, the Applicant's remedy was to seek the leave of court to have him cross examined on his affidavit. Then would the Applicant have his appearance to clear his doubt.

Having not done so, I find his claims baseless and unwarranted. In that sense, I also find the claim that the signature on the affidavit in reply is not one of Mr. Kityo misplaced.

In conclusion and after consideration of the circumstances of this case, I find it inappropriate to order the Respondent to furnish security for costs. The application is henceforth dismissed with costs to the Respondent.

……..

Henry I. Kawesa

JUDGE

8/07/2019

8/07/2019

Martin Kakuru for the Applicant.

Applicant present.

Respondent absent.

Counsel absent.

Court:

Ruling communicated.

……..

Henry I. Kawesa

JUDGE

8/07/2019