

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NO. 67 OF 2016

STANBIC BANK UGANDA LIMITED APPLICANT

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VERSUS

- 1. MUDDU AWULIRA ENTERPRISES LIMITED**
- 2. SENTONGO PRODUCE & COFFEE FRAMERS LTDS**
- 3. GODFREY SENTONGORESPONDENTS**

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CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA

(Single Justice)

RULING

20 This application came before me for hearing on 16th June, 2016 and upon hearing the parties, I dismissed it with costs. I undertook to give the detailed reasons for my decision, which I now hereby give. I regret the inordinate delay in doing so.

25 This is an application by Notice of Motion, in which Stanbic Bank Uganda Limited asks for orders, that the respondents give security for costs incurred in the lower Court and further security for Costs in this Court, in respect of *Civil Appeal No. 32 of 2016*. The application is brought under *Rules 105 (3), 43* and 44 of the Rules of this Court and is supported by an affidavit of Mr. David Mukiibi Semakula.

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Brief background

The respondents filed a suit in the High Court against the applicant alleging breach of loan agreements executed between themselves. They sought for declarations, orders discharging the 2nd respondent's cross guarantees among others, a permanent injunction, special and general damages, interest and costs. By way of Counter- Claim, the applicant sought for recovery of Ug. Shs. 84,708,138/= from the 1st respondent, Ug. Shs. 1,411,030,223/= from the 2nd respondent and Ug. Shs. 124,404,316 from the 3rd respondent, plus interest at 24% per annum from the date of filing of the suit. The High Court entered Judgment in favour of the 1st respondent against the applicant in the sum of Ug. Shs. 254,366,923/= with interest of 20%/= per annum from the date of judgment till payment in full. Judgment was also entered in favour of the applicant against the 2nd and 3rd respondent in the sum of Ug. Shs. 1,059,298,072/= which was to be set off Ug. Shs. 101,638,085/= leaving an outstanding of Ug. Shs. 967,659,987/= as the amount due to the applicant with interest of 20% per annum from the date of Judgment till payment in full. As for costs, the 1st respondent having partially succeeded was entitled to a quarter of the costs, and the applicant was awarded three quarters of the costs of the suit.

The grounds of the application are specifically set out in the affidavits but briefly are that;-

1) *The Applicant was awarded Ug. Shs. 280,033,489/= as the High Court costs which the respondents have failed to settle to date.*

2) *The High Court Judgment that the Respondents seeks to reverse on appeal awarded the applicant the sum of Ug. Shs. 957,659,987/= with interest*

thereon at the rate of 20% per annum from the date of Judgment till payment in full. Further the respondents seek on appeal an award of Ug. Shs. 23,622,777,419/= claimed in the Plaint but disallowed in the High Court Judgment made up of as to Ug. Shs. 19,336,047,401= claimed for the 1st respondent, Ug. Shs. 3,613,972,077/= claimed for the 2nd respondent and Ug. Shs. 712,757,941/= claimed for the 3rd respondent. According, the value of the subject matter of the Appeal being the total of the sum sought to be awarded and the sum sought to be reversed is Ug. Shs. 24,580,437,406/=.

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3) The respondents are not engaged in any economic activity and as such have no know income. Further neither the 1st, 2nd nor 3rd respondents have any known assets from which the applicant's past costs in the High Court and the costs of this Appeal would be recoverable.

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4) The costs of the Appeal based on the value of the subject matter indicated above and a 10% costs award (being a guide on quantum of costs in taxation Jurisprudence in the Court of Appeal) would be in excess of the sum of Ug. Shs. 2,400,000,000/= and it is just and equitable that the respondents give security for both the sum and the High Court taxation award as past and further costs being a total security sum of Ug. Shs. 2,400,000,000/=.

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In his affidavit in support of the application Mr. David Mukiibi Semakula repeats the above grounds almost verbatim I find no reason to reproduce them.

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Representations

At the hearing of this application learned Counsel *Mr. Harnest Sembatya* and *Mr. Bwoji Kalibala* appeared for the applicant while learned Counsel *Mr. G. S Lule*, *Mr. Jimmy Walabyeki* and *Mr. Peter Allan Musoke* appeared for the
10 respondents.

Applicant's case

Counsel for the applicant submitted that, the applicant seeks for the following orders set out in the Notice of Motion;-

- 15 a) *The respondents do give security for payment of the Applicant's costs of the High Court.*
- b) *The respondents do give further security for costs of the Appeal.*
- c) *Costs of this application be provided for.*

Mr. Harnest Sembatya submitted that the costs incurred in the lower Court which were awarded to the applicant had not been paid and that the
20 respondents are not engaged in any known economic activity presently and as such they have no known source of income. He contended that they ought to deposit security for costs

Mr. Bwoji submitted that in the event that the appeal does not succeed, additional costs would be awarded, yet the applicant is not aware of any
25 business being conducted or of any assets held or owned by the respondents. He argued that, the respondents have no resources to cater for the costs resulting from the appeal in the event that it is dismissed. Further that, the respondent's appeal has no reasonable prospect of success and as such its likely that costs would only be awarded against them.

He asked Court to allow the application and grant the orders sought in the motion.

Respondents' reply

10 Mr. Lule opposed the application. He submitted that the applicant's application has no merit and is intended to bar the respondents from pursuing their appeal at this Court. Further that, it would be unjust and denial of the respondents' Constitutional right for this Court to deny them a right to pursue their appeal on account that they do not have assets. He argued that this Court should be inclined to hear parties on merit regardless of the financial status.

15 He asked Court to dismiss the application with costs to the applicant and for the appeal to proceed. He concluded that that the respondents' appeal has very high chances of success and that the applicant failed to show sufficient cause to justify for security for costs.

Resolution

20 I have carefully listened to both Counsel, I have read of the Notice of Motion and the affidavits annexed thereto, I have read the affidavits in reply and in rejoinder. The Notice of Motion sets out four grounds.

It seeks this Court to exercise its discretion to order the respondents to deposit Ug. Shs. 2.4 Billion as security for costs in this Court and at the High
25 Court.

Rule 105 (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.”

I agree that this Court does have very wide and virtually unfettered discretion pursuant to *Rule 105 (3) supra* under which this application was brought. The only fetter is that I have to exercise that discretion judicially. In that regard I should at the outset, state that I find the issues Counsel addressed me on, to be of little significance in the circumstances of the case. The basis for this application is a contention that the respondents are likely to fail to meet the legal costs already awarded at the High Court and those likely to be awarded to the applicant in the pending appeal. It contended that the costs are also likely to be substantial.

Ground 3 thereof states that the respondents are not engaged in any economic activity, have no known source of income and have no known assets from which the applicant can recover costs here and at the High Court, in the event that the appeal is dismissed.

The contention is founded on the averment in Mr. David Mukiibi Semakula’s affidavit that the respondents are not engaged in any known economic activity presently and as such they have no known source of income from which the costs be realized.

It is well settled that an applicant for security for costs has a burden to satisfy the Court that the circumstances of the case justify making the orders sought. *See Lalji Gangji Vs Nathoo Vasanjee (1960) E.A. 315.*

From the above it is clear that the only ground for this application is that the respondents are impecunious, this has never been a ground for the order being sought. Even the poor require protection of the law and Justice demands that the poor are not sent away from its gates. The gates of justice must be open to all even more so considering that over 90% of Ugandans are considered poor.

To order security for costs on ground of poverty would be wrong in principle as it tantamount to turning Court into the arena of only the rich. Poverty and lack of assets are not grounds for ordering for security for costs. Justice should not be the preserve of the rich. See *In Mohamed Vs Madani (1953) 30 EACA 8 at page 11, Noor Mohamed Abdulla Vs Patel (1962) 441 at 453*

In this particular case, the respondents had a number of properties of very high value. These properties were mortgaged to the applicants as security for a loan, the subject of this appeal. Having taken over the respondents' properties, the applicants cannot turn around and contend that the respondents have nothing.

In the whole, no sufficient ground has been established to justify an order for security for costs in this application.

I find no merit whatsoever in this application which is hereby dismissed with costs to the respondents.

Dated at Kampala this12..... day ofJanuary.....2018.

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HON. KENNETH KAKURU
JUSTICE OF APPEAL