THE REPUBLIC OF UGANDA,

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 011 OF 2022

(ARISING FROM SUPREME COURT CIVIL APPEAL NO. 20 OF 2021)

(ARISING FROM COURT OF APPEAL CIVIL APPEAL NO. 161 OF 2017)

(ARISING FROM HCMA NO. 591 OF 2016)

(ARISING FROM HIGH HOLDEN AT JINJA CIVIL SUIT NO 34 OF 2016)

S.M. SEBOWA & FAMILY LTD} ..... APPLICANT

VERSUS

MANNA HARVESTORS INTERNATIONAL LTD} .....RESPONDENT

RULING OF CHRISTOPHER MADRAMA IZAMA, JSC

The Applicant company lodged this application citing rules 101 (3), 42 and 43 of the Judicature (Supreme Court Rules) Directions for orders that the Respondent furnishes further security for costs in the Supreme Court Civil Appeal No. 20 of 2021. Secondly, for an order that the Respondent furnishes security for payment of past costs. Thirdly for an order that the costs of the application be provided for.

The application is supported by the affidavit of Kabunga Dan, a director of the Applicant. The grounds averred in the Notice of Motion are that:

a) The Applicant filed a suit in the High Court HCCS No. 034 of 2016 against the Respondent for recovery of land by way of eviction upon failure to pay outstanding premium of over US$ 204,000 and annual ground rent of Uganda shillings 2,000,000/= per annum and a default judgment was entered for the Applicant.

b) Costs in HCCS No. 034 of 2016 was taxed and allowed and the sum of Uganda shillings 48,955,000/= out of which Uganda shillings 22,250,000/= was recovered leaving a balance of Uganda shillings 26,705,000/= Outstanding up to date.

c) That the Applicant has failed to trace any other movable and immovable properties of the Respondent for the purpose of attachment to recover the said outstanding balance of the costs.

d) That the Respondent filed Miscellaneous Application No. 591 of 2016 in the High Court to set aside the said default judgment which the false judgment was set aside by the said court and the Applicant was dissatisfied with the said setting aside of the default judgment which resulted into the filing of an appeal by the Applicant against the order in Court of Appeal Civil Appeal No. 161 of 2016.

e) The said Court of Appeal Civil Appeal No. 161 of 2016 was decided by the Court of Appeal in favour of the Applicant with costs to the Applicant.

f) The Applicant has since filed the bill of costs in the Court of Appeal against the third Respondent in respect of the Court of Appeal Civil Appeal No. 161 of 2017 which appeal was drawn for Uganda shillings 596,298,264/= and is pending taxation.

g) There is a likelihood that the Respondent will not be able to pay the outstanding costs in both the High Court and the Court of Appeal as the Respondent does not have any known properties in Uganda.

h) The Respondent is a company incorporated in Uganda and its major shareholder is Bill Joseph Mayer who is an American citizen, which company and its major shareholder have no known assets within Uganda capable of satisfying the costs of the lower courts and this court.

i) That the Respondent does not have a known address in Uganda and neither has it filed with the Companies registry its notice of registered address as required by law.

j) That the Respondent was incorporated on 27/02/2013 and since then it has never filed any annual returns with the Registrar of Companies to date.

k) That the genesis of the High Court suit was that the Respondent's failure to pay despite several reminders, outstanding premium of USD 204,000 and total failure to pay annual rent of Uganda shillings 2,000,000/= which led to termination of the lease and consequently repossession of the land by way of eviction.

l) That the Respondent's appeal has no likelihood of success.

m) The statutory sum for security for costs is utterly inadequate in the circumstances.

n) That it is in the interest of justice that the application be granted.

The application is supported by the affidavit of Kabunga Dan, a director of the Applicant which confirms the averments of fact in the Notice of Motion and attaches the supporting documents. The documents attached disclose that the Applicant filed a summary suit against the Respondent in the High Court of Uganda in HCCS No 034 of 2016 on 3rd November 2016. Payments were to be made to the Applicant in accordance with a lease agreement duly registered for a term of 49 years commencing in 2013. By letter dated 27th January 2016, the Applicant gave notice of termination of lease and sued for recovery of land for failure to pay the premium and ground rent for the lease. The summary suit was granted and a decree of eviction of the Respondent issued with costs of the suit on 29th November 2016. Costs were taxed whereupon the court issued an eviction warrant and attachment for costs of Uganda shillings 48,955,000/=

The High Court default decree was set aside and the Applicant appealed in Civil Appeal No. 161 of 2017 whereupon by order of the Court of Appeal the appeal succeeded and the ruling and orders of the trial judge dated 20th February 2017 was set aside with costs in the Court of Appeal and the High Court. The appeal was resolved in a judgment dated 31st May, 2021. In August 2021 the Applicant extracted a warrant of attachment and sale of movable property against the Respondent. The return of Harris Auctioneers and

Bailiffs dated 17th September 2021 and filed in the High Court on the 22nd of September 2021 discloses that they successfully auctioned 3 tractors and realised shillings 22,250,000/=.

The Applicant filed a bill for 596,298,260/= in the Court of Appeal which has not yet been taxed.

In reply the Respondent through the affidavit in reply of Beth Kyarayende, a shareholder and director of the Respondent opposed the application. On the basis of advice of the Respondent's counsel Messieurs Magna Advocates, Mrs Beth Kyarayende deposed that the appeal from which the application arises was filed and served on the Respondent in August 2021 and the application of the Applicant was filed in October 2022, a period of over one year and two months which is inordinate delay, and that the intention of the application was to frustrate and stifle a meritorious appeal filed by the Respondent. That since August 2022, the Applicant had taken no step to have the application fixed for hearing and until the appeal was fixed for prehearing. And therefore the intention of the Applicant is to frustrate the appeal. Further, she deposed that the Applicant does not satisfy the conditions precedent for the grant of an order for furnishing further security for costs.

She deposed that the Applicant's application is premature because the Applicant has not demonstrated with any proof the alleged failure to trace the properties of the Respondent and the instant application is a fishing expedition, seeking to merely challenge the Respondent to disclose its available assets and finances. In addition, that the Applicant has not demonstrated that they have not invoked all the available modes of execution under the law and failed to recover the said costs, thereby rendering it necessary to file this application.

On the basis of her knowledge of the subject matter, the dispute involves land comprised in Block 58, Plot 3, Bugerere Ssabaddu, Namirembe Bbale Kayunga district measuring approximately 1000 acres in which both parties claim an interest, and in all fairness, the Respondent should be allowed to

exhaust its proper legal rights on the appeal and should not be driven from the seat of justice, especially where the appeal has been fixed for final and conclusive determination of the rights of the parties.

This is a legal advice of her counsel, she deposed that the allegation that the Applicant has failed to trace any immovable properties of the Respondent for purposes of attachment to recover the outstanding amount is merely speculative, rendering the application a fishing expedition. Further the Respondent is still a going concern, has not been deregistered by the company's registry neither are there any ongoing pending proceedings for its winding up on account of any accrued liabilities. In addition, the Applicant concedes to have recovered Uganda shillings 22,250,000/= from the Respondent but has never invoked all available remedies in execution for recovery of the alleged balance. The Judgment and decree upon which the claim for costs is premised were set aside by the High Court in HCMA No. 591 of 2016 which resulted in Civil Appeal No. 161 of 2016. Though the appeal in the Court of Appeal was determined in favour of the Applicant, it is now the subject matter of SCCA No. 20 of 2021 which has been fixed for hearing by this Court. Neither the Respondent nor its legal counsel have been served with the purported bill of costs in the Court of Appeal alluded to by the Applicant. The Applicant and the Respondent transacted in the suit land and executed a lease agreement Applicant was well aware of the registration status of the Respondent and of its physical address at Namirembe, Baale, Kayunga district.

She further stated that where there are no known prescribed timelines for filing annual returns at the companies' registry and it is an irrelevant consideration in an application for furnishing further security for costs. The Respondent is a company incorporated in Uganda and involved in commercial farming in Uganda with a variety of assorted and valuable agricultural machinery and incidental assets. As a shareholder, and local director of the Respondent, her co- directors and shareholders travel in and out of the country to attend to the business of the Respondent and the other international engagements. Other than conjecture and speculation,

the Applicant has not demonstrated the legal and factual basis for its suspicion that the Respondent will not be able to meet its obligations in terms of payment of costs in the unlikely event that the appeal does not succeed.

Further, Judgment was entered against the Respondent in default of appearance and the strip was not determined upon the merits. The alleged default is on the payment of premium and ground rent which is the subject matter of a pending appeal in this court. Further the data costs are unknown and insufficient to warrant the grant of further security for costs. The Applicant is a fishing expedition inviting the Respondents to disclose assets and finances, which is not the purpose for such applications.

On the basis of advice of her lawyers, she stated that the Applicant has not shown or demonstrated any chance of success of the Respondents pending appeal neither is there any cogent evidence that the pending appeal is devoid of any merit as to render it probable that it will not succeed. In addition, the appeal stems from two inconsistent decisions of the lower court, the High Court having ruled in favour of the Respondent and the Court of Appeal having ruled in favour of the Applicant by a majority of 2 to 1 with a dissenting decision by one justice of the Court of Appeal panel thereby meriting a consideration by the Supreme Court as the final appellate court. In addition, the grounds of appeal as set out in the memorandum of appeal, prima facie, raised strong and pertinent questions of law, overlooked by the Court of Appeal and meriting adjudication in finality by the Supreme Court.

Further she deposed that there are alternative available remedies and which the Applicant is entitled to resort to, for recovery any costs in the unlikely event that the appeal fails, without ingeniously attempting to use this court to consider an application for execution proceedings disguised as one for security for costs.

The belated filing of the application by the Applicant demonstrates the intention to stifle the Respondent's meritorious appeal and it is in the

interest of justice that the application be declined and the appeal heard and determined on its merits.

The documents attached in support of the opposition to the application include the memorandum and articles of association of Manna Harvesters International Ltd annexure "A". Secondly, the lease agreement between the parties' annexure "B". Thirdly, a letter dated 7th June, 2023 inviting the Appellant and Respondent to attend an appeals pre-hearing conference annexure "D" and lastly the memorandum of appeal of the Respondent annexure "E".

Representation:

The parties addressed the Court in written submissions through their legal representatives according to the directions issued by court. The Applicant is represented by Messrs Okalang Law Chambers while the Respondent is represented by Messrs Magna Advocates.

The Court record shows that the Applicant's counsel filed written submissions on 26th June, 2023. The Respondent filed a reply on record on the 3rd of July, 2023. The Respondent further filed its list of authorities and the authorities on the 10th of July 2023. On 7th July 2023 the Messrs Magna Advocates wrote a letter and filed on record the same day stating that their reply which was attempted to be served on the Applicant's counsel had been rejected. On the 10th of July the Applicants counsel wrote and filed a letter on court record giving their version that the Respondents reply was served on the 3rd of July when it was supposed to have been filed and served by the 30th of June 2023. Thereafter they found a copy of the Respondent's submissions on the court record and they served themselves of a copy and rejected them same. They prayed that the reply be ignored without there being an extension of time being applied for and granted.

I have not accessed any court order on record and infer that the parties were given directions by the registrar giving them time schedules to file their written submissions as stated by counsel in their correspondence of court record. I see no prejudice suffered by the Applicant as they were able

to access the written submissions of the Respondent but opted not to reply to the same. This court ought to administer substantial justice. The purpose of service was notice of the submissions and the Applicant was not prejudiced and could have filed any rejoinder if it so wished. The Respondent's submissions were already on record and an application for extension of time to reschedule the service of those submissions and give further timelines for any rejoinder would involve the court in further delays to the prejudice of both parties. This is an application for furnishing further security for costs and payment for past costs and the court has been addressed by way of written submissions which will be handled on the merits.

Submissions of Counsel

After making reference to the facts, the Applicants counsel submitted that the issue is whether the Applicant has made a case for granting the orders sought. He submitted that the main considerations before granting an order to furnish further security for costs and security for payment of past costs were well laid out in **KCB bank (U) Ltd vs Formula Feeds Ltd; SCCA No. 38 of 2020** and include: the absence of known assets within the jurisdiction of the court; the absence of known address within the jurisdiction of the court, inability to pay past costs by the Respondent, the general financial standing or wellness of the Appellant, and substantial costs incurred by the Respondent, the bona fide's of the Appellant's claim and prospect of success of the appeal as well as the conduct of the Respondent or any other relevant circumstances.

The Applicants counsel submitted that the evidence demonstrates that the Applicant failed to trace any other movable or immovable properties of the Respondent for purposes of attachment to recover outstanding balance of costs. Secondly the Respondent's major shareholder Mr Bill Joseph Mayer it is an American citizen whose physical address in Uganda is unknown. Further the Respondent and its major shareholders have no known assets within Uganda capable of satisfying the costs. He contended that the affidavit in reply of the Respondent is fake on the aspect that the

Respondent is involved in commercial farming in Uganda but no further evidence is given about this. Further it is asserted that the Respondent has a variety of assorted and valuable agricultural machinery and incidental assets but still no tangible evidence was presented to court.

With regard to whether there was absence of known address within the jurisdiction of the court, the Applicants counsel submitted that a search was conducted at the companies' registry and it was established that the Respondent does not have a known address in Uganda and has never filed company returns or company notice of registered address as required by law. On the other hand, the affidavit of the Respondent referred to above indicates that the address of the Respondent is at Namirembe, Baale, Kayunga district. Counsel submitted that this was all very wide and has no specific address to show that the Respondent is carrying out any business and the late address. Counsel relied on section 115 (1) of the Companies Act 2012 for the proposition that the company shall from the date on which it commences to carry on business or from the 14th day after the date of its incorporation have a registered office and a registered postal address to which all communications and notices may be addressed.

The Applicants counsel emphasised that the Respondent's majority shareholders are American citizens and under article 237 (1) of the Constitution of the Republic of Uganda, it is provided that land in Uganda belongs to the citizens of Uganda. He further referred to section 40 (7b) of the Land Act cap 227 for the definition of citizen for purposes of land ownership in a company and that it refers to situations where the majority shareholders are noncitizens. In the premises, he submitted that the Respondent company is a noncitizen by virtue of its majority shareholders being American citizens.

Counsel further contended that the evidence demonstrates that the Respondent was unable to pay costs in HCCS No. 034 of 2016, where costs were taxed and allowed at Uganda shillings 48,955,000/= out of which 22,250,000/= was recovered leaving a balance of 26,705,000/= which remained outstanding. Secondly, the Applicant's counsel relied on a bill of

costs which was filed in the Court of Appeal claiming a total sum of 596,298,260/= in the Civil Appeal No. 161 of 2017 where costs were awarded. He relied on **G.M. Combined (U) Ltd vs AK Detergents (U) Ltd; SCCA No. 34 of 1995** for the holding that an Applicant for security for costs should attach the bill of costs guide the court in deciding the appropriate quantum for security for costs.

The Applicant's counsel contends that the said costs are very substantial and remain unpaid and the Respondent has not shown any intention to pay the same and in the premises a quantum of Uganda shillings 800,000,000/= as security for costs would suffice for the costs in the High Court, the Court of Appeal and the Supreme Court.

The Applicants counsel further submitted that the purpose for an order of security for costs is to protect the defendant from situations in which he has been brought to court and made to lose even the costs of the litigation and is meant to prevent frivolous and useless litigation (see **Paul Nyamarere & 3 Others Vs Dison Okumu and 6 others; SCCA No 35 of 2020** and **Kakooza Jonathan & Another Vs Kasaala Cooperative Society Ltd; SCCA No. 13 of 2011**.) Counsel submitted that the sum of 400,000/= which is the statutory security for costs is inadequate in the circumstances and the Respondent should be ordered to pay further security for costs and security for past costs.

The Applicant's counsel also emphasised called the general financial standing of awareness of the Appellant as well as the conduct of the Respondent or any other relevant circumstances in that the Respondent failed to pay us the 204,005 total failure to pay annual ground rent of Uganda shillings 2,000,000/= which led to the termination of the lease and consequently repossession of the land by way of. This showed failure to meet financial obligations

The Applicant's counsel also submitted on what he called the bona fides of the Appellant's claim and the prospects of success of the appeal. Counsel submitted that there was an order issued by the High Court setting aside

the Judgment of the High Court in the Civil Suit No. 34 of 2016 and secondly the Applicant had prayed for an order that the Applicant who is now the Respondent be accorded the opportunity or time be extended to allow the Applicant to lodge an application for leave to appear and defend Civil Suit No. 34 of 2016 and for costs of the application to be provided for. That the learned trial judge granted leave for the Applicant to appear to the summons and file a defence which was a prayer that had not been sought in the application. This was one of the major grounds in the Civil Appeal No. 161 of 2017 based on the proposition that the court cannot grant what is not pleaded with reference to the decision of this court in **Ms Fang Min Vs Belex Tours and Travel Ltd; SCCA No. 6 of 2013** consolidated with **Civil Appeal No. 1 of 2014; Crane Bank Ltd Vs Belex Tours and Travel**. The Court of Appeal found that the learned trial judge erred in granting the orders not prayed for by the Applicants.

The Applicant's counsel submitted that in the premises the appeal is frivolous and vexatious with no chance of success.

Counsel further submitted that it is not true that the Applicant belatedly filed the application as deposed to by the Respondent. Secondly the application is not meant to stifle the hearing of the appeal. The Respondent to the appeal filed the application to protect itself from a situation where it has been dragged to prosecute a frivolous appeal and made to lose even the cost of the litigation which is the rationale for the grant of further security for costs. In conclusion the Respondent has no movable or immovable properties, no known address and the majority of its shareholders are American citizens with no known address in Uganda. Beth Kyarayende the deponent who deposed to an affidavit on behalf of the Respondent company has only one share and no assets to cater for the outstanding costs. He prayed that the application is allowed with costs to follow the event.

In reply Magna Advocates on behalf of the Respondent submitted after setting out the relevant facts that the Respondent strongly opposed the application. The Respondent relied on the affidavit in reply and urged court to consider the contents of the affidavit.

Counsel submitted that the burden lies in the Applicant to show why security for costs should be granted over and above the security for costs prescribed by the Supreme Court Rules. Secondly the Applicant appears to suggest that because some of the directors of the Respondent are sometimes out of the country, then security for costs must be granted. The rest of the grounds advanced are speculative and without merit.

The Respondent's counsel submitted that it was incumbent on the Applicant to show sufficient cause why the Respondent should furnish further security for costs over and above the amount fixed by the rules. He submitted that the power of this court to grant the order is therefore discretionary and will only be exercised in befitting circumstances. It is not a must that security for costs should be ordered but rather that it may be ordered (see **GM Combined Ltd vs AK Detergents (U) Ltd** (supra)). Further security for costs is not an entitlement but the Applicant must satisfy the conditions precedent for the grant of the order.

The Respondent's counsel submitted that what amounts to sufficient cause to warrant the grant of the order depends on court's discretion and on the circumstances. The facts in the decisions cited, are distinguishable from the current matter. It would therefore be a wrong criterion for such an order. In discharging the burden of proof, the Applicant for further security for costs must show why the relief should be granted. It is not sufficient to merely aver that the security already deposited for costs is inadequate because the costs in the court below, or that in the Applicant's favour, has not yet been paid in order to impose any obligation upon the court or judge to grant the application (see **Lalgi Gangi Vs Nathoo Vassanjee (1960) EA 315**).

In summary the Applicant's application is that the costs deposited at the time of filing the appeal is an adequate and that part of the past costs have not been recovered after partial execution. The Respondent's counsel submitted that this is not sufficient or a compelling reason for the court to order security for costs against an Appellant who is exercising an unrestricted right of appeal to the final court of appeal in the land. The law is that the parties must be allowed to exhaust their remedies especially in

land matters at the level of the Supreme Court and the court should be slow in granting orders capable of driving parties away from the seat of justice rather than allow them to exhaust their proper legal rights on appeal (see **Kasaala Growers Coop society vs Jonathan Kalemera Edson (Civil Application No. 24 of 2010) [2011]**).

On the conditions precedent, the Respondents counsel submitted that it must inter alia be proved that the application has not been inordinately delayed. Secondly that the Respondent's appeal has no likelihood of success and that the Applicant is being made to defend a frivolous appeal at a great cost. Thirdly the Applicant must prove that the Respondents appeal is not bona fide but a mere sham, with no reasonable prospects of success. Fourthly, the application for security is not being used for the purpose of stifling a genuine claim. On the fifth ground, the issue is whether the defendant, if successful would be in unable to recover the costs through execution on the ground that the plaintiff has no assets within the jurisdiction of the court to recover from.

The Respondent's counsel submitted that though the Supreme Court Rules does not prescribe the time limit for filing the application, it has been held that the Applicant must prove that the application had been filed without unreasonable delay and the rationale is to prevent the Respondents in an appeal to use the security for the purpose of stifling a genuine claim. Further, the belated filing of an application for security is a significant factor to consider against the Applicant (see **Lalji Ganji vs Nathoo Vasanjee** (supra)). Further it is settled law that delay in making an application is a material consideration and the onus is on the Applicant to show that there was no in ordinate delay in the circumstances. (See **Premchand vs Quarry Ltd [1971] EA 172; Lalji Gandhi vs Nathoo** (supra)).

The Respondent's counsel submitted that in the instant application, the memorandum and record of appeal of the Respondent was filed and served upon the Applicant in August 2021 and the application of the Applicant was filed in October 2022 which was a period of over one year and two months. No reason was advanced by the Applicant for the delay.

The Respondent's counsel submitted that the period of six months has been considered inordinate delay in the cases cited by the Applicant.

On the question of the bona fides of the Appellant and the prospect of success of the appeal, the Respondent's counsel submitted that there was a blanket averment in the Notice of Motion and affidavit in support of the application that the appeal has no likelihood of success. He submitted that it is not enough for the Applicant to merely allege that the appeal has no likelihood of success, the Applicant must also demonstrate that the appeal is indeed frivolous and raises no genuine grounds of appeal before concluding that it has no likelihood of success (see **Kakooza Jonathan and another vs Kasaala Cooperative society** (supra)). Further, the Respondents counsel submitted that there is no presumption that the appeal would fail and the court should therefore grant the order on account of the blanket averments of the Applicant. The ground that the appeal is one that is unlikely to succeed must be pleaded in the Notice of Motion, elucidated in the affidavit in support and on which the submissions may be based.

The Respondent's counsel submitted that other allegations support the assertion that the appeal has no likelihood of success and it has no legal or factual basis. The Applicant did not challenge any of the grounds of appeal as being vexatious or frivolous and neither is there any averment that the appeal is a nonstarter with no merit.

To the contrary in the affidavit in reply, the Respondent explained that they filed substantive grounds of appeal in the memorandum of appeal. The crux of the grounds relates to the right to be heard, the illegal procedure of filing the suit, the incompetence of the summary suit and the fact that a default judgment was entered and the Respondent was not afforded a hearing at all. Further, the decision of the Court of Appeal was not a unanimous decision and there was a very strong dissenting opinion.

Because of the inconsistent findings of law and fact, the Court of Appeal decision has to be considered by the Supreme Court which is empowered

under Rule 30 (1) of the Judicature (Supreme Court Rules) directions to determine matters of law or mixed law and fact.

The Respondent's counsel submitted that the appeal arises from a land dispute involving land as described. The Judgment was entered in default without the Respondent being heard on the merits of the claim. The appeal by the Applicant to the Court of Appeal was in any case incompetent. This was because it arose from the ruling of the High Court under Order 36 Rule 11 of the Civil Procedure Rules and such appeals require leave of court under section 76 and Order 44 rules 1 & 2 of the Civil Procedure Rules. The Court of Appeal did not interrogate the competence of the appeal, which is a matter of law that the court cannot overlook whether there was a competent memorandum of appeal or not.

Firstly, the Respondents counsel submitted that the Supreme Court is the final appellate court where the parties would be afforded an opportunity to have a determination on the merits of the appeal. Rights to property ought to be determined by the court and this is against the effort of the Applicant to stall the appeal through a flimsy application for further security for costs and past costs.

In relation to the alleged absence of known address or assets within the jurisdiction of this court, the Applicant has an averment in the Notice of Motion and in the accompanying affidavit in support. But no evidence by way of any search in the land office or companies' registry was adduced. There is no evidence that there is no bank account with no funds and therefore there was no proof of the failure of execution or some of the steps to show that the Appellant could not pay. It has not been demonstrated that all forms of execution prescribed under section 38 of the Civil Procedure Act were attempted. (See **Premchand another vs Quarry services** (supra)).

Further the subject matter of the appeal is not essentially a money claim that land in which both parties claim an interest. It was not the role of the Respondent to highlight where these assets are situated. The allegation that the assets are not known is not only speculative but also indicative of the

lack of effort on the part of the Applicant which conceded to have recovered a substantial amount and costs in the sum of Uganda shillings 22,250,000/=. Further the mere fact that the shareholders of the Respondent American citizens is not a good ground for ordering security for costs C. The Respondent was incorporated in Uganda and has been operating business in Uganda.

Regarding the alleged absence of any known address, the Applicant sued the Respondent and stated that the Respondent/defendant's address in the Specially Endorsed Plaint. The Applicant is bound by its pleadings and cannot seek to disregard its own averments which were never contested by the Respondent.

On the need to prove the inability of the Respondent to pay costs and unpaid substantial costs, the ground is premature and premised on conjecture and speculation. It is a time-tested principle of law that courts of law act on credible evidence adduced before them and do not indulge in conjecture, speculation, attractive reasoning or fanciful theories (see **Advocates Coalition for Development and Environment and others vs Attorney General and another; Constitutional Petition No. 14 of 2011**). The Respondent's counsel maintains that apart from the recovery of costs, the steps taken by the Applicant to recover costs are in adequate. There is no evidence of an application of any of the alternative modes of execution that is available under the rules of court.

Further, the Respondents counsel submitted that rule 101 (3) of the Judicature (Supreme Court Rules) Directions was not intended to be a substitute or an alternative to execution. According to Platt JSC in **Kakooza Jonathan and another vs Kasaala Cooperative Society Ltd** (supra) 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.

The Respondent's counsel submitted that there was no admission by the Respondent that it cannot pay. The assertion that the Respondent has no

assets of which the Applicant is aware of is based on a search allegedly conducted at the companies' registry. No details of the Respondent's assets are can logically be within the knowledge of the company registry. It is not incumbent on the Respondent to disclose its assets to the Applicant and more so in an application of this nature. The letter of the Registrar General does not disclose any information as to the absence of assets or at least a lack of funds or operations of the Respondent and did not give any information concerning the bank accounts of the Respondent or of any property owned.

On the contrary, the letter confirms that the Respondent has never been deregistered by the company registry and there is no evidence that the Respondent company is not a going concern or is subject to receivership, administration or liquidation or is insolvent. This is based on the Applicant's assertion but there is no ground for stating that the Respondent will not be able to pay the costs in the unlikely event that the Respondents appeal which is now pending before the court is unsuccessful.

On the question of the general financial standing and wellness of the Appellant and the conduct of the Respondent or other relevant circumstances, the Respondents counsel submitted that there is no such consideration that ought to be proved before the grant of an order for further security for costs. The Applicant advanced the argument that there was a failure on the part of the Respondent to pay an outstanding premium of the USB 204,000 and annual rent in the sum of Uganda shillings 2,000,000/= which allegedly led to the termination of the lease and the re-entry of the Applicant on the suit. However, the Applicant stated that it has incurred costs, expenses of photocopying and binding yet the Respondent has previously not met its financial obligations. The gist of the application should not be determined solely on the averment that the Respondent failed to pay costs the Respondent and which the Respondent has substantially complied. It should not be determined in isolation of the grounds on which the Respondent preferred its appeal which is now pending before this court. In the premises, the Respondent's counsel submitted that the Applicant has

not met the threshold for the grant of an order for security for costs. Such power ought to be sparingly exercised and not used to stifle a meritorious appeal. The Respondent prayed that the application be dismissed with costs.

Consideration of the application.

I have carefully considered the Applicant's application, the affidavit in support as well as the affidavit in reply and in rejoinder. I have also considered and taken into account the submissions of counsel for both parties. The Applicant's application was brought under rule 101 and it seeks for an order for the Respondent to furnish further security for costs and for past costs. Rule 101 of the Rules of this Court provides that:

> 101. Security for costs in civil appeals.
>
> (1) Subject to rule 109 of these Rules, there shall be lodged in court on the institution of a civil appeal as security for the costs of the appeal the sum of 400,000 shillings.
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> (2) Where an appeal has been withdrawn under rule 90 of these Rules, after notice of appeal has been given, the court may, on the application of any person who is a Respondent to the cross-appeal, direct the cross Appellant to lodge in the court as security for costs the sum of 400,000 shillings, or any specified sum less than 400,000 shillings, or may direct that the cross-appeal be heard without security for costs being lodged.
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> (3) 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.
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> (4) Where security for costs has been lodged, the registrar may pay it out with the consent of the parties or in conformity with the decision of the court and having regard to the rights of the parties under it.

This application was further fixed for hearing before a single justice of this court to exercise the powers of the Supreme Court in interlocutory matters pending appeal before the Supreme Court under section 8 (1) of the Judicature Act cap 13 laws of Uganda which provides that:

"(1) A single justice of the Supreme Court may exercise any power vested in the Supreme Court in any interlocutory cause or matter before the Supreme Court."

In the course of submissions, the Respondent's counsel raised a point of law to the effect that the Appellant's in the Court of Appeal, who are now the Applicants in current application, never sought leave of the High Court or the Court of Appeal to lodge an appeal in the Court of Appeal. He argued that the appeal arose from an order issued under Order 36 rule 11 of the Civil Procedure Rules which requires leave before an appeal could be validly lodged in the Court of Appeal. In other words, the Respondent's Counsel contended that one of the grounds of the appeal in this Court is that the appeal in the Court of Appeal was incompetent and proceedings thereunder are null and void.

Obviously, an incompetent appeal cannot give rise to a competent order. Further it is a point of law as to whether the matter currently fixed before me court can entertained by a single justice because of the preliminary nature of the point of law which touches on the jurisdiction of the Supreme Court as I shall demonstrate hereunder.

When the matter came for consideration I noted that counsel for the applicant had submitted that the Respondent's appeal in this court does not raise any reasonable grounds of appeal and that the grounds of appeal do not have any likelihood of success. It is in that context that the Respondents reply was that the one of the issues in the appeal is whether the Applicant has sought and obtained leave of the High Court or the Court of Appeal, to lodge its appeal in the Court of Appeal. Obviously, if leave was not sought as submitted by the Respondents Counsel, it is something for consideration in the appeal to determine whether there was a competent appeal in the Court of Appeal, and this is a matter that should be handled by the Supreme Court as constituted in civil appeals and not by a single justice of the Court.

The question is whether can be no appeal from an order issued in an incompetent appeal. The precedent I have considered hold that where no genuine steps are taken to apply for leave either in the High Court or in the

Court of Appeal before an appeal which requires such leave is lodged, there would be no competent appeal before the Court of Appeal and by extension before this Court from an order of the Court of Appeal. This holding can be found in the decision of Katumba JSC in **Sheik Ahmed Mohammed Kisuule vs Greenland Bank (in liquidation) (Civil Appeal No. 11 of 2010) [2011] UGSC 132**. In that application there was a second appeal arising from the decision of the Court of Appeal which confirmed the High Court decision in a miscellaneous application. The Respondent objected to the application on the ground that it contravened the provisions of Order 44 (1) and (2) of the Civil Procedure Rules because the Appellant had not sought for and obtained leave to appeal from the High Court or the Court of Appeal to appeal against the order of the High Court in High Court Miscellaneous Application No. 616 of 2007 which order dismissed his application for review the Judgment. After considering the law, Katumba JSC stated that:

> Additionally, where leave is required to file an appeal that is not obtained the appeal filed is incompetent and cannot even be withdrawn as an appeal. See ***Makhangu Vs Kibwana*** [1995 – 1998] 1 EA 175.
>
> It is not merely a procedural matter but an essential step envisaged by Rule 78 of the Rules of this court. I am unable to appreciate the argument by Appellant's counsel that because the first appellate court failed in its duty to re-evaluate the evidence, therefore, the appeal was against the whole Judgment and leave to appeal was not therefore necessary. If such an argument were to be accepted, it would make a mockery of the rules of procedure.
>
> I am, mindful of the law that generally the court will grant leave to appeal in civil proceedings, where it appears on the face of it that there are grounds of appeal which deserve serious consideration, see ***Sango Bay Estates Ltd Vs Dresdner Bank A***.... (1971) EA 17.
>
> However, in the instant appeal no genuine steps were taken to apply for leave to appeal either in the High Court or in the Court of Appeal. Consequently, there was no competent appeal before the Court of Appeal. Similarly, there is no competent appeal before this court.

In other words, the point of law raised by the respondent also directly relates to and affects the competence of the Respondent's own appeal

before this Court on the merits. Being a point of law of the nature that affects the jurisdiction of this Court, it has to be determined first to enforce the principle of economy of time and enable the court not to waste time on issues which could potentially be rendered null and void. In **Nalongo Burashe vs Kekitiibwa Mangadalena; Court of Appeal (Civil Appeal No. 89 of 2011) [2014] UGCA 270**; the Court of Appeal in its persuasive judgment held that it lacked jurisdiction to entertain a matter in which leave to appeal is required but has not been sought or granted.

The Court of Appeal further relied on **Attorney General vs Shah No. 4 [1971] EA 50** for the proposition that appellate jurisdiction springs only from statute. They further cited Odoki CJ in **Baku Raphael Obudra and Obiga Kania vs Attorney General (Constitutional Appeal No. 1 of 2005) [2006] UGSC 56** where Odoki CJ stated that:

> Appellate jurisdiction must be specifically created by law. It cannot be inferred or implied.

I have accordingly considered the relevant laws dealing with appeals from orders. Section 76 of the Civil Procedure Act, provides for the specific orders from which an appeal lies. The orders from which an appeal lie are envisaged under section 76 (1) (a) to (h) as set out by section 76 of the Civil Procedure Act which provides that:

> 76. Orders from which appeal lies.
>
> (1) An appeal shall lie from the following orders, and except as otherwise expressly provided in this Act or by any law for the time being in force from no other orders—
>
> (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;
>
> (b) an order on an award stated in the form of a special case;
>
> (c) an order modifying or correcting an award;
>
> (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

(e) an order filing or refusing to file an award in an arbitration without the intervention of the court;

(f) an order under section 65;

(g) an order under this Act imposing a fine or directing the arrest or detention in prison of any person, except where the arrest or detention is in execution of a decree;

(h) any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under this section.

The relevant law conferring jurisdiction in the circumstances is section 76 (h) of the Civil Procedure Act which imports Order 44 of the Civil Procedure Rules. In other words, an appeal shall lie as of right from an order under rules where it is provided that the appeal shall lie as of right or with the leave of court.

Order 44 (1) (a) – (u) of the Civil Procedure Rules, sets out all the rules from which an appeal shall lie as of right and none of them includes Order 36 rule 11 of the Civil Procedure Rules. The applicable rule is therefore Order 44 rule 1 (2) of the Civil Procedure Rules which allows an appeal to lie with leave of Court which issued the order or the Court to which an appeal lies and as provides that:

(2) An appeal under these Rules shall not lie from any other order except with leave of the court making the order or the court to which an appeal would lie if leave were given.

The appeal against the order of the High Court in the circumstances of this application and that of the main appeal from which it arises, was an order issued under Order 36 rule 11 of the Civil Procedure Rules and it was therefore necessary to obtain leave of either the High Court or the Court of Appeal before instituting the appeal in the Court of Appeal. This observation does not determine the question of fact as to whether leave was sought and granted. Secondly, Rule 39 (2) of the Rules of this court imports the rules of the Court of Appeal for the granting of leave and therefore provides that

where an appeal lies with the leave of the Court of Appeal, application for the leave shall be made informally at the time when the decision is given or formally within 14 days after the decision. Or, the application has to be made to this Court if leave is denied. The point being that even the Respondent's appeal would be in danger of being struck out save perhaps for the point of law as to whether there was a competent appeal before the Court of Appeal.

I have checked the record of appeal in Civil Appeal No. 20 of 2021 and no order granting leave to appeal was included in the record. The same argument that there was a legal requirement to obtain the leave of the High Court or the Court of Appeal to appeal the order of the High Court to the Court of Appeal, also applies to the Respondent's appeal from a decision of the Court of Appeal irrespective of whether the appellant in the Court of Appeal had actually obtained an order granting leave to appeal.

The above notwithstanding, the Supreme Court would have to decide whether section 76 (2) of the Civil Procedure Act also applies to the Respondent's appeal in this court because its effect is to bar second appeals from orders made on appeal from the relevant orders of the High Court. It provides that no appeal shall lie from any order passed in appeal under section 76 of the Civil Procedure Act. The rules of court made under section 76 (h) of the Civil Procedure Act, allows leave to be sought under Order 44 rule 1 (2) of the Civil Procedure Rules and section 76 (2) of the Act also applies to such scenarios where an order is made on appeal by the Court of Appeal.

Having considered the matter in detail, this application is not an appropriate application for consideration and determination by a single justice and the issues raised by the Respondent with its implications on the point of law I have discussed above has the potential of disposing of both of the appeals in this Court and in the Court of Appeal and it ought to be decided by the full bench of this court. Further, it is a point of law brought to the attention of court and this Court ought to handle it first.

I accordingly issue an order that this application be placed before the full bench of five Justices of the Supreme Court together with the Respondent's Appeal in Civil Appeal No. 20 of 2021 for resolution of the Respondent's point of law which has implications on whether there is any jurisdiction to hear an appeal in this matter.

I further order that the costs incurred thus far shall abide the outcome of the determination of the matters referred to the Supreme Court.

Dated at Kampala the 2nd day of August 2023

Christopher Madrama Izama

Justice of the Supreme Court