

UGANDA / JUDGMENT

KCB Bank (U) Ltd v Formula Feeds Ltd and 3 Others (Civil Application 38 of 2020) [2021] UGSC 47 (14 September 2021)

[2021] UGSC 47

COURT

Supreme Court of Uganda

BEFORE

Arach-Amoko, JSC

CASE / FILE NUMBER

Civil Application 38 of 2020

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THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KOLOLO

CIVIL APPLICATION NO. 38 OF 2020

(ARISING FROM SUPREME COURT CIVIL APPEAL NO.13 OF 2020)

BETWEEN

KCB BANK (U) LIMITED :::::::::::::::::::::::::::::: 10

AND

1. FORMULA FEEDS LTD 2. GICHOHI NGARI 3. SAMSON NGARI 4. ANNE WANGUI GICHOHI

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RULING OF ARACH-AMOKO, JSC

KCB Bank (U) Limited (hereinafter referred to as "the applicant"), filed this Notice of Motion under Rules 42 $\$(1)\$$ and $\$(2)\$$, 43 $\$(1)\$$ and 101

- (3) of the Judicature (Supreme Court) Rules seeking for orders from 20 this Court that:
- a. The Respondents furnish further security for costs in Supreme Court Civil Appeal No.13 of 2020.

- b. The Respondents furnish security for payments of past costs.
- c. Costs of this Application be provided for.

The application is premised on the grounds that:

The costs in High Court Civil Suit No.289 of 2014 have $\$ \overline{\text{I}} \$$ been taxed and certified in the sum of 71,726,801 (Uganda shillings seventy-one million seven hundred twenty-six thousand eight hundred one)

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- II. The costs in Court of Appeal Civil Appeal No.76 of 2016 have been taxed and certified in the sum of 695,650,700 10 (Uganda shillings six hundred ninety-five million six **hundred fifty thousand seven hundred**)
- III. The Respondents have failed to pay the said costs.
- The Respondents are Kenyan Nationals with no assets in IV. Uganda capable of satisfying the award of costs in the 15 lower courts.
- $\$ \mathbf{V} \$$. The Respondents' appeal has no likelihood of success.
- That the statutory sum for security for costs is utterly $\$ \text{VI} \$$ inadequate in the circumstances.

It is just and equitable that this application be granted. 20 VII.

The application is supported by an affidavit sworn by Nassif Mubiru, the Legal Manager of the applicant on the 30th October, 2020. He explained that on the 10th February, 2016, the High Court entered judgment against the respondents in High Court Civil Suit No.289 of 2014 in the sum of shs. 4,272,740,118 (Uganda 25 Shillings four billion, two hundred and seventy-two million, seven hundred forty thousand, one hundred and eighteen) with interest at

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21% per annum from the date of judgment. The costs were taxed $\$ \text{S} \$$ and allowed at 71,726,801 (Uganda Shillings seventy one million seven hundred and twenty-six thousand, eight hundred one). The respondents appealed to the Court of Appeal vide Court of Appeal Civil Appeal No.76 of 2016 but that Court dismissed the appeal with costs which were taxed and allowed at 695,650,700 (Uganda 10 shillings six hundred ninety-five million six hundred fifty thousand seven hundred). He believes that the costs in this Court will be in excess of shs. 100,000,000 (Uganda Shillings one hundred million shillings), given the value of the subject matter, yet the respondents have not even paid the costs in the lower courts or the Consent 15 judgment of shs. 2,159,000,000 (Uganda Shillings two billion, one hundred and fifty-nine million) that was entered against the respondents at the commencement of the proceedings per the copy of the partial judgment attached as "D".

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He further averred that the respondents are Kenyan nationals with 20 no assets in Uganda capable of satisfying the aforesaid costs as per their witness statements before the trial Court attached as "E" and "F". He added that Supreme Court Civil Appeal No. 13 of 2020 that is pending before this Court is unlikely to succeed. That the statutory sum of \$400,000/\$ = that was deposited by the respondents 25 in this Court is utterly inadequate to compensate the applicant in case the appeal is disallowed. He pleaded that it is just and equitable, given the foregoing, that this application is granted as prayed.

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- The respondents opposed the application and relied on the affidavit S in reply sworn by the second respondent on 24th November, 2020, where he raised a preliminary objection that the application is misconceived, frivolous and vexatious, barred by law and an abuse of the court process and should be dismissed with costs in that:
- a) The costs of Court of Appeal Civil Appeal No.76 of 2016 10 were taxed ex-parte and the respondents have challenged the decision vide Court of Appeal Civil Application No 325 of 2019 which was pending a Ruling by that Court.
- b) The respondents permanently reside in Uganda and have assets both in Uganda and Kenya, a fact well known to the applicant.
- c) The application is premature and brought in bad faith with the intention to stifle the respondents' appeal.
- He denied that the respondents had failed to pay the taxed cost in the lower courts and averred that although the respondents were 20 dissatisfied with the decision of the lower courts and have appealed to this Court, they had so far paid costs of shs. 30,000,000 (thirty million) to the applicant as evidenced by the copies of the acknowledgment receipts attached to his affidavit.
- He added that his lawyers had advised him that this application is 25 untenable since it is intended to be an alternative to execution yet no formal demand for the costs in the lower courts had been made and no formal execution process has been undertaken by the applicant. He stated that the estimated costs of shs. 100,000,000

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- (Uganda Shillings one hundred million) and the averment by the S applicant that the respondents' appeal is unlikely to succeed are speculative, baseless and unfounded. He contended that the said appeal has high chances of success.
- He further denied the allegation that they had no assets in Uganda that were capable of satisfying any award of costs in the lower 10 courts and averred that the respondents do have assets worth over shs. 3,000,000,000 (Uganda Shillings three billion) that are well known to

the applicant, some of which the applicant had actually attempted to illegally sell, but the sale was set aside by the High Court in HCMA No.208 of 2020 as per the copy of the Ruling 15 attached as annexure "D". He further averred that the applicant and its proxies are still in possession of the certificates of title in which the respondents have an interest and have never deposited the same in court, despite the Ruling aforementioned. He also asserted that although the respondents are Kenyan nationals, the 20nd and 4th respondents had resided in Uganda for over 20 years and the 3rd respondent had resided in Uganda for over 14 years.

Lastly, he averred that the applicant has not demonstrated any special circumstances to warrant an order for further security and 25 payment of past costs. His prayer is that it would thus be in the interest of justice that this application be dismissed.

Background

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As can be discerned from the scanty information on record, S particularly the affidavits and their annexure, the applicant is a financial institution registered under the laws of Uganda. The respondents are Kenyan nationals who were conducting business in Uganda at the material time. Sometime in 2011, they obtained from the applicant credit facilities totaling Shs. 4,531,000,000 (Uganda 10 Shillings four billion, five hundred thirty one million). They secured the said facilities with a mortgage over a piece of Mailo land comprised in Kyadondo Block 101, Plots 190,259-265,266-270 and Kyadondo Block 101 Plot 258 and 275, Land at Watuba that 15 was registered in their names.

Apparently, the respondents failed to repay the said credit facilities. They then sued the applicant vide High Court Civil Suit No.289 of 2014 for breach of contract and also challenged the legality of the securities on the ground that they were not entitled to own mailo land under Uganda laws as foreigners. In the course of the proceedings the respondents admitted indebtedness to the applicant in the sum of Shs. 2,159,000,000 (Uganda Shillings two billion, one hundred and fifty-nine million). As a result, a Consent Judgment for the said sum was entered in favour of the applicant.

The High Court subsequently held that the mortgages were null and void since the respondents were not entitled to be registered on Mailo land under the law. The Court nullified the mortgages and entered a final judgment against the respondents in the sum of Shs. 4,272,740,118 (Uganda Shillings four billion two hundred

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- seventy two million, seven hundred forty thousand, one hundred S eighteen) with interest of 21% per annum from the date of judgment (10th February, 2016) with costs. The costs at the High Court were taxed at Shs. 71,726,801/= (Uganda Shillings seventy one million, seven hundred twenty six thousand, eight hundred one) out of

which the respondent had paid shs. 30,000,000 (Uganda Shillings 10 thirty million) to the applicant, leaving a balance of Shs. 41,726,801 (Uganda Shillings forty one million, seven hundred twenty six thousand, eight hundred one) by the time of filing the instant application.

- The respondents were dissatisfied by that decision and appealed to the Court of Appeal vide Civil Appeal No. 76 of 2016 but the appeal was dismissed with costs, as earlier stated by the applicant. The costs in the Court of Appeal were taxed and allowed at Shs. 695,650,700 (Uganda Shillings six hundred and ninety five million, six hundred fifty thousand seven hundred) but had not yet been paid as the respondents have challenged the same vide Court of Appeal Civil Application No. 325 of 2019 which was pending a Ruling by that Court. By the time of drafting this Ruling I received a copy of a Ruling through a letter from the respondents' counsel that the taxation Ruling in the Court of Appeal was set aside by Musota, 25 JA because it had been issued ex-parte. The learned Justice ordered that the taxation be done inter parties.

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The respondents have appealed to this Court against the decision of the Court of Appeal in the main appeal vide Supreme Court Civil Appeal No. 13 of 2020.

According to the applicant, the value of the decretal sum as at 16th November, 2020, stood at shs. 8, 534, 798, 386 (Uganda Shillings eight billion, five hundred and thirty four million, seven hundred and ninety eighty thousand, three hundred and eighty six.) and the estimated costs are likely to be over Shs. 100,000,000 (Uganda Shillings one hundred million).

Hence this application for further security for costs and security for payment of past costs by the applicant. 15

Representation

At the hearing of this application, the applicant was represented by Mr. Kavuma Terence while Mr. Ambrose Tebyasa, Mr. Bazekuketa Derrick and Mr. Edwin Okum appeared for the respondents.

20 Submissions

Referring to the Court's discretionary powers under the Companies Act and Rule 101 of the Supreme Court Rules as well as decisions of this Court in similar cases, learned Counsel for the applicant submitted that the applicant had made out a case for the grant of the order sought in that:

- a) The respondents' appeal has no likelihood of success since the respondents did not dispute that they were indebted to the applicant and undertook to make regular payments towards

settlement of the indebtedness but had since reneged on the same. $\$$ He argued further that the respondents had failed to pay the sum of Shs. 2,159,000,000 (Uganda shillings two billion, one hundred fifty nine million) for which judgment was entered by consent of the parties as well as the taxed costs in the lower courts. Counsel argued that this was evidence that the respondents are unable to pay the costs of the appeal in this Court and was sufficient reason to order security for costs. Counsel referred to the case of Noble Builders (U) Ltd & Anor v Jabal Singh Sandhu, Civil Application No.15 of 2002(SC) to support this submission.

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Counsel submitted that a judgment on admission by consent of the 15 parties is incapable of being a subject of appeal as per section 67(2) of the Civil Procedure Act.

- b) The respondents are Kenyan nationals with no assets in Uganda. He submitted that although they claimed that they had resided in Uganda for 20 years and 14 years respectively, they had not attached documentary proof from the Immigration Department. He contended further that, nonetheless, since they are Kenyans, execution against them in Kenya would certainly be costly and difficult.
- c) The assets mentioned by the respondents in the affidavit in reply 25 were not available for attachment, since the both lower courts had pronounced that they had been acquired illegally. Since the respondents had no legal interest in the assets, they therefore had no any property for recourse in case the appeal is lost. Counsel
 - referred to the case of Noble Builders (U) Ltd & Anor v Jabal $\$$ Singh Sandhu (Supra) where this Court granted an order for further security for costs where the appellant was a Canadian citizen with no assets in Uganda.
 - In addition to the foregoing, the respondents had even gone ahead and obtained a permanent injunction against the applicant 10 restraining it from dealing with the said properties. Even if the said properties were available for attachment, they could not cover the applicant's decretal sum of over Shs. 8,534,798,386. (Uganda Shillings eighty billion, five hundred thirty four million, seven hundred ninety eight thousand, three hundred eighty six)
- d) The statutory sum of shs. 400,000, that the respondents had deposited in this Court when filing their appeal for security for costs is too low in the circumstances of this case since the respondents seek to set aside the decretal award of Shs. 4,272,740,118/= (Uganda Shillings four billion two hundred seventy two million, 20 seven hundred forty thousand, one hundred eighteen) with interest of 21% per annum from the date of judgment. Even the sentiments from this Court is that the sum of Shs. 400,000 is inadequate and should be revised. Therefore, Court ought to grant the application taking into account the subject matter of the appeal. Counsel relied 25 on the cases of Goodman Agencies vs Hassa Agencies (K) Ltd, Civil Reference No.1 of 2011 and Kakooza Jonathan & Another vs Kasaala Cooperative Society Ltd, Civil Application No.13 of 2011, where this Court observed that the

sum of Shs. 400,000 was

inadequate as security for costs compared to the current value of $\text{Shs. } 400,000$ the Uganda Shilling.

Finally, counsel prayed that Court be pleased to order the respondents to deposit Shs. 100,000,000 (Uganda Shillings one hundred million) as security for costs in this Court and Shs. 200,000,000 (Uganda Shillings two hundred million) as security for past costs in the lower courts. Counsel also prayed for costs of the application.

Counsel for the respondents on the other hand opposed the application and prayed for its dismissal. Basing on the affidavit in reply, Counsel raised a preliminary objection against the 15 application on the ground that it was premature since there was a pending application before the Court of Appeal to set aside the exparte taxation ruling of Shs. 695,650,700 (Uganda Shillings six hundred and ninety five million, six hundred fifty thousand seven hundred) in Court of Appeal, Civil Appeal No. 76 of 2016. 20 Therefore, the respondents could not be said to have refused or failed to pay the said costs.

Counsel further submitted that the applicant had never made any formal demand for the said past costs or taken any steps to recover the same through a lawful execution process. Counsel argued that 25 since the applicant had so far received over 42% of the past costs this application is premature, an abuse of the court process and an intended alternative to execution to which the Court should not turn a blind eye.

Counsel referred to the case of *Kakooza Jonathan & Anor v Kasaala Cooperative Society Ltd.* Civil Application No.13 of 2011 (SC) and submitted that an application for further security for costs or past costs cannot be used as an alternative to execution.

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In the alternative but without prejudice to the above submissions, counsel argued the grounds of the application and contended that 10 the respondents had been residents in Uganda for over 2 decades and have assets within Uganda. That the applicant is in possession of certificates of title for properties belonging to the respondents worth over three billion shillings despite having been ordered to deposit the said certificates in court but has not done so. On that 15 account this application should not have been filed and ought to be rejected summarily.

He further contended that the applicant had failed to demonstrate how the respondents' appeal had no success and according to counsel, the applicant was merely speculating. Counsel submitted 20 that the appeal had a likelihood of success and that part of the respondents' appeal is to contest the legality of the consent judgment whose foundation is premised on illegal mortgages.

Regarding failure to pay the costs in the lower courts together with the consent judgment, counsel contended that the application is a 25 disguised alternative to execution of the disputed decree which Rule 101(3) did not envisage and should not be entertained by this Court. Counsel argued that there is also a pending application to set aside a taxation ruling in the Court of Appeal and the

respondents had so far paid 42% (shs.30,000,000) of the $\$$ undisputed taxed costs to the applicant's counsel. The applicant is therefore speculating and does not have cogent evidence to show inability to pay costs by the respondents. Counsel relied on the case of *Bank of Uganda v Joseph Nsereko & 2 Ors*. Civil Application No. 7 of 2002 (SC) in support of his submissions on this point. 10

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Counsel further maintained that the respondents have assets in Kenya and Uganda some of which the applicant attempted to illegally sell and that the certificates of title belonging to the respondents which the applicant is in possession of are worth seven billion shillings. Further that the applicant did not demonstrate how execution in Kenya would be difficult and the fact that they are Kenyans was in total disregard of the East African Community. Counsel relied on the case of *Deepak K. Shah & 3 Ors v Manurama Ltd & 2 Ors*, HCMA No. 361 of 2001.

Counsel also submitted that the case of **Noble Builders** (Supra) was 20 not applicable since the respondents have properties in Uganda and Kenya and both the applicant and the respondents are all within the partner states of the East African Community with reciprocal arrangements for the enforcement of judgments and decrees unlike the case of **Noble Builders** where such arrangement was not 25 available between Uganda and Canada despite both being Commonwealth countries.

In respect of the statutory sum of Shs. 400,000, counsel argued that before Court can inquire into the insufficiency of the said sum,

the applicant ought to have satisfied Court that the respondent had 5 no known assets from which costs may be recovered if the appeal failed and that the appeal had no likelihood of success, which the applicant had failed to do in the instant application.

Based on the foregoing arguments, counsel invited Court to dismiss the application with costs to the respondents. 10

In his brief rejoinder, the applicant's counsel reiterated his earlier submissions and in addition submitted that although the mortgages were declared illegal, the loan agreements and personal guarantees executed by the $\$2^{\text{nd}}$ to the $\$4^{\text{th}}$ respondents were still

valid. 15

Counsel asserted that the respondents had not shown the Court any assets that they have in Uganda or Kenya. Counsel further contended that the certificates of title referred by the respondents are Mailo land titles which the lower courts had found to be illegally held by the respondents.

Counsel further submitted that even if the respondents had paid shs. 30,000,000 (Uganda Shillings thirty million) of the costs in the trial Court, to date the balance of shs. 41,726,801 (Uganda Shillings forty one million, seven hundred twenty six thousand eight hundred one) remains unpaid. He further argued that even the sum

consented to remains unpaid.

In reply to the argument by the respondents that they had not paid the taxed costs in the Court of Appeal since there was a pending

application to set it aside, it had never been set aside. He contended 5 that, being financially constrained by the decretal award which is still unpaid, the respondents will certainly be unable to pay costs in this Court given that the costs in the lower courts were not fully paid by the time of filing the instant application.

10 The Law

The application was brought under Rule 101 of the Supreme Court Rules which deals with security for costs, specifically sub-rule (3) which provides for further security of costs and payment of past costs. The Rule reads as follows:

"101. Security for costs in civil appeals. 15

- (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.
- (2) Where an appeal has been withdrawn under rule 90 of 20 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 25 shillings, or may direct that the cross-appeal be heard without security for costs being lodged.
- (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.**
- (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."

(the underlining is provided for emphasis)

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This Court has entertained several similar applications under Rule 101 as exemplified by the authorities cited by both Counsel 15 hereinabove. From the jurisprudence, it is a settled principle that the Rule gives Court unfettered jurisdiction to order for further security for costs and security for past costs in appropriate cases. It is gainsaid, however, that the exercise of the Court's power under the above Rule must, just like any other discretionary power, be exercised reasonably and judicially, having regard to the circumstances of each case and balancing the parties' rights.

It is settled as well, that in an application for further security for costs or past costs, just like in all applications, the burden lies on the applicant to show sufficient cause why the Court should grant such an order. In *Kakooza Jonathan & Anor v Kasaala Cooperative Society Ltd*, Civil Application No. 13 of 2011(SC), Tumwesigye JSC, (as he then was), stated the position clearly thus:

"The burden lies on the applicant for an order for further security, as it normally lies on any applicant to a court for any relief, to show cause why that relief should be granted, and that he cannot, merely by averring that the security already deposited for costs of the appeal is inadequate, or that costs in the action below, ordered in his favour, has not yet been paid, impose any obligation upon the court or judge or registrar to grant his application..."

The rationale for security for costs was stressed by this Court in the case of *Noble Builders (U) Limited & Anor vs Jabal Singh 15 Sandhu*, Civil Application No. 15 of 2002(SC) as follows:

> "a defendant should be entitled to security if there is reason to believe that, in the event of his succeeding and being awarded costs of the action, he will have real difficulty in enforcing that order. If the difficulty would arise from the impecuniosity of the plaintiff the court will of course have to take an account of the likelihood of his succeeding in his claim, for it would be a total denial of justice that poverty should bar him from putting forward what is prima facie a good claim. If, on the other hand, the problem is not that the plaintiff is impecunious but that, by reason of the way in which he orders his affairs, including where he chooses to live and where he chooses to keep his assets, an order for costs against him

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is likely to be unenforceable, or enforceable only by a significant expenditure of time and money, the defendant should be entitled to security."

The Court has in a number of cases laid down guiding principles to be taken into account while exercising its discretion in such applications. They include: absence of known assets within the jurisdiction of court; absence of known address within the jurisdiction of court; insolvency or inability to pay costs by the respondent; the general financial standing or wellness of the

appellant; unpaid substantial costs incurred by the respondent; the bona fides of the appellant's claim; the prospect of success of the 15 appeal; the conduct of the respondent or any other relevant circumstance. Some of the cases where the principles that are relevant to this application were discussed include:

- a) The case of *Goodman Agencies Ltd v Hasa Agencies (K) Ltd*.

Civil Reference No. 01 of 2011(SC), where this Court held that; 20

"If the respondent has neither a known address nor any apparent assets from which a successful litigant can recover costs, it is more necessary that a sure way of recovery of costs must be guaranteed".

- b) The case of *Noble builders (U) Limited (supra)*, where the Court 25 stated that:

"a demonstrable lack of reasonable chance of success for an appeal is sufficient cause for court to order an

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appellant to furnish not only further security for costs of the appeal but also past costs."

It also observed that:

"inability to pay per se is not the only ground for considering ordering for security for costs."

And further that guided that: 10

"the Court should even more readily grant such security in an appeal where the respondent has incurred substantial costs, which remain unpaid."

- c) In *Kakooza's case (supra)* Tumwesigye, JSC (as he then was), after considering at great length the considerations that our courts 15 should take into account in determining such applications, stated as follows, on the issue of success of the appeal:

"It is true that at this stage it was not necessary to go into the merits of the appeal. But as Oder, JSC, stated in *G. M. Combined (U) Ltd -Vs- A. K. Detergents (U) Ltd (supra)* about consideration of a prima facie case in security for costs applications, "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 that 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

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application for sf.c. and any other material available at that stage."

(the underlining was added for emphasis)

In addition to the above, this being an application by a limited liability company, Section 284 of the Companies Act, 2012 further reinforces the Court's discretion in such applications. It 10 provides that:

> "Where a limited liability company is plaintiff in a suit or legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is a reason to believe that the company will be unable to pay costs of the defendant if successful in his or her defence, require sufficient security to be given for those costs and may stay all proceedings until security is given."

(the underlining was added for emphasis)

Consideration of the Application 20

have carefully considered the application and read $\mathbf{I}$ the submissions as well as the authorities from both counsel. Guided by the legal principles set out above, the issue for determination is whether the applicant has satisfied the conditions for the grant of the order sought in this application.

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I will start from the preliminary objection which was intended to knock out the application without delving into the merits.

- I do not find this application premature since the past costs for S which security is being sought are not only in relation to the costs in the Court of Appeal but also those of the High Court. Rule 101(3) of the Rules of this Court earlier reproduced in this Ruling is very clear, it gives this Court unfettered discretion to order further security for costs and security for payment of past costs at any time 10 in appropriate circumstances. It is of utmost importance to always bear in mind that no two cases are the same. Each case must therefore be determined on the basis of its peculiar facts.
- I am further not persuaded by the submission that this application is an alternative to execution. The security being sought for is for 15 the taxed costs in the High Court and the Court of Appeal which the applicant has shown in its affidavit to be colossal. The applicant has also demonstrated in its affidavit that given the colossal sums arising from the decretal sum together with interest which continues to accrue till payment in full, the Shs. 400,000 statutory 20 security for costs that the respondents have deposited in this Court will be inadequate at the end of the day to refund its costs, if the appeal fails.

The applicant is also worried that the respondents do not have assets that they could rely on to recover costs in that event. It fears 25 that the execution will also be costly and difficult since they are Kenyans. All these are grounds that can be properly raised and determined in an application of this nature.

I therefore find that the application is not premature or S misconceived and accordingly overrule the preliminary objection.

Merit of the application

I now turn to the grounds for the application.

The main issue to resolve here in my view is whether the respondents' appeal has a likelihood of success or the applicant is 10 being made to defend a frivolous appeal at a great cost.

From the record of the lower courts, it is undisputed by the parties that the respondents were offered a credit facility by the applicant, which was worth about Shs. \$4,531,000,000/\$ = (Uganda Shillings

four billion five hundred thirty-one million). It is also clear that the 15 respondents have failed to repay the loan. They even admitted partial liability and the Consent Judgment for over two billion shillings was entered against them that still remained unpaid up to the time of this application. The respondents are therefore indebted to the applicant.

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It is also a fact that the respondents had secured these credit facilities with a mortgage over land comprised in Kyadondo Block 101, Plots 190,259-265,266-270 and Kyadondo Block 101 Plot 258 and 275, Land at Watuba. The said mortgage was found to be illegal since the land was registered under Mailo land tenure yet the respondents are Kenyan nationals. This means that the respondents deliberately uttered an illegal title in order to obtain credit from the applicant. They then turned round to point out the

illegality of their own title in High Court Civil Suit No.289 of 2014 \$5\$ from which these proceedings originated.

A perusal of the record shows that the respondents' Memorandum of Appeal filed in this Court in Supreme Court Civil Appeal No.13 of 2020, indicates that the said illegality of the Mortgages is a subject of appeal. This puts their credibility in doubt and in my judgment raises doubt about the success of their appeal in this Court. More so, after both lower courts have ruled against them.

Regarding the assets, the respondents do not dispute the fact that they are Kenyan nationals but further state that they have been residents in Uganda for the last two decades with assets in Uganda 15 and Kenya. This allegation is heavily disputed by the applicant. I agree with the applicant's counsel that the respondents have not proved that they own any assets in this country

that are capable of being attached to recover costs. Instead, the respondents have adduced evidence to the effect that the assets they purportedly own 20 in Uganda are the ones under dispute and they have even obtained a temporary injunction against the applicants from attaching them. It is also noteworthy that the respondents are silent about any assets in Kenya. They have also not adduced any documentary evidence to prove their residence in Uganda as alleged.

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I take judicial notice of the fact that Kenya is a member of the Commonwealth and the East African Community. Therefore, it would be possible to execute the judgment from this Court against the respondents in case their appeal fails since both countries have

provision for reciprocal enforcement of judgments. However, I agree S with counsel for the applicant that such execution is likely to be not only difficult but costly as well to the applicant.

From the available brief record on this application, the assets

available from which the credit facilities were obtained were found to be illegal by both lower courts. The current registration of the \$10\$ respondents as mailo owners is illegal and unless it is changed, the land therefore remains illegal and cannot be said to be property belonging to the respondents. Apart from the said illegal mortgages, there is no other property or assets that have been adduced by the respondents whether in Uganda or Kenya and on that note I concur 15 with the applicant that the respondents have no assets in Uganda.

I also take note of the fact that the respondents were unsuccessful parties in the High Court and the Court of Appeal.

In my view, this state of affairs lends credence to the applicant's anxiety regarding its ability to recover costs in the event that the 20 appeal is unsuccessful. This is compounded by the fact that the applicant has established that there are past costs that were partly paid as well as a Consent Judgment of over two billion shillings that have not been satisfied by the respondents who have instead resorted to litigation to challenge their indebtedness from credit 25 facilities that they applied for themselves and obtained from the applicant.

For the foregoing reasons, I am satisfied that this is a suitable case to order the respondents to deposit past security and further

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- security to guarantee the costs of the appeal. I therefore allow the S application and order as follows:
- 1. The respondents shall deposit a sum of shs. 100,000,000 (Uganda Shillings One hundred million) in this Court as further security for costs.

- 2. The respondents shall deposit shs. 200,000,000 (Uganda 10 Shillings two hundred million) as security for payment of past costs.
- 3. The sums in 1 and 2 shall be deposited within 45 days from this order.
- 4. Civil Appeal No. 3 of 2020 shall stand dismissed if the 15 respondents fail to comply with order 1, 2 and 3.
- 5. I also award costs of this application to the applicant.

Dated at Kampala this ... / 4 day of September ... 2021

HON. M. S. ARACH-AMOKO JUSTICE OF THE SUPREME COURT

\$25\$

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CASE PAGE <https://chat.esheria.ai/case-law/uganda/kcb-bank-u-ltd-v-formula-feeds-ltd-and-3-others-civil-application-38-of-2020-2021-ugsc-47-14-september-2021-unknown-topic-unknown-court-2021>

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