THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

[Coram: Katureebe, Kitumba, Tumwesigye, Kisaakye, JJSC.; Odoki, Tsekooko & Okello, Ag. JJSC]

Constitutional Application No. 01 of 2012

Between

GOODMAN AGENCIES LTD. ..... APPLICANT.

And

1. ATTORNEY - GENERAL
2. HASA AGENCIES (K) LTD. .....
RESPONDENTS.

{An application arising from a ruling of the Supreme Court (Tsekooko, Katureebe & Kitumba, JJSC) dated 02nd August, 2011 in Supreme Court Civil Reference No. 01 of 2011.}

COURT RULING BY MAJORITY:

Goodman Agencies Ltd., the applicant, instituted an application by Notice of Motion under Rules 2(1), (2),(3); 42(1); 43; 52(2); 78; 87 and 101(3) of the Rules of this Court seeking orders, *inter alia,* that—

"The first and second Respondent's Notices of Appeal and the entire Record and Memorandum of Appeal in Constitutional Appeal No. 05 of 2010 and the first Respondent's Notice of Cross-appeal be dismissed on the grounds that no appeal lies or some essential step in the proceedings to wit depositing Shs.200,000,000/= as security for costs has not been done or has

not been done within the prescribed 45 days time by the second respondent as was ordered by the Supreme Court in *CIVIL REFERENCE NO. 01 OF 2011.*"

The Notice of Motion is supported by an affidavit which was sworn on 30th January, 2012, by Nicolas Were, the Managing Director of the Applicant. We are forced to point out straight away that the contents of the affidavit are virtually wholly reproduced in the Notice of Motion. This is bad practice and must stop. The Notice of Motion is supposed to briefly and clearly set out the orders sought and any salient grounds in support. It is the supporting affidavit which must set out basic reasons in support of the motion. This is evident from a proper reading and understanding of Rule 42 of the Rules of this Court read together with **"Form A"** of the First Schedule to these Rules.

The application was opposed by the respondents. Batanda Gerald swore an affidavit on behalf of the First Respondent opposing the application and explaining why. Charles Rwamushana, the Attorney for the Second Respondent, swore an affidavit in reply to that of Mr. Were, opposing the application by pleading that the Second Respondent was unable to deposit the money because of the Second Respondent's financial difficulties. He further deponed, erroneously, that the Second Respondent has a constitutional entitlement to appeal and so is not bound by the Rules of this Court.

Background:

The brief background to this application as gathered from the various court records available inclusive of the affidavits filed in this application is as follows—

The Applicant and the Second Respondent (Hasa Agencies Ltd.) together with other persons instituted High Court Civil Suit No. 719 of 1997 against the First Respondent (the Attorney-General) seeking to recover damages because of ten lost trucks. The second Respondent was struck out of the suit before it was disposed of. At some stage later, the applicant and the first respondent settled the suit and a

consent judgment dated 02nd September, 2005, was filed in the High Court on 06th September, 2005. The amount of damages which the consent judgment contained as settlement was Shs.14,485,543,842. It did not indicate any rate of interest on that amount. Apparently the Second Respondent was jerked by the settlement because on 12/09/2005, after the consent judgment had been filed in the High Court and sealed, the Second Respondent hurriedly moved the High Court to be included in the consent judgment and within two days the High Court on 14th September, 2005 added the second respondent to the consent judgment as one of the judgment-creditors. On the same day, the decree was signed and sealed. The applicant who appears not to have been involved in the process that led to the inclusion of the Second Respondent as one of the decree-holders successfully petitioned the Constitutional Court challenging the whole process resulting in the Second Respondent's inclusion as one of the decree-holders. The Constitutional Court ruled that the High Court erred when it added the Second Respondent to the consent judgment. The same Constitutional Court awarded the applicant interest on the decretal amount at the rate of 24% p.a.. Consequently, the Second Respondent filed a Constitutional Appeal to this Court.

Before the appeal could be heard, the applicant instituted Civil Application No. 01 of 2011 in this Court seeking for orders, *inter alia,* that the Second Respondent be ordered to deposit cash as further security for costs. On 27th January, 2011, a Single Judge of this Court declined to grant the application. The applicant made a reference from that decision which reference was heard and allowed by a panel of three Justices of this Court. On the 02nd August, 2011, the three Justices ordered that in the circumstances of the case, the Second Respondent should deposit in Court cash of Ug. Shs.200,000,000/= as security for costs within forty five days from the date of the Court ruling. To date the Second Respondent has not deposited the money nor any part thereof. Consequently, the applicant filed this application seeking for, *inter alia,* orders to strike out the pending Constitutional Appeal and the cross-appeal of the First Respondent.

As pointed out earlier in this ruling, legal practice seems to be deteriorating. One of the results is the poor drafting of court pleadings by some advocates without observing the applicable relevant Rules. Thus although Rule 42 read together with "Form A" of the first schedule to the Rules of this Court set out the type of the format of the Notice of Motion, in this case, the applicant's advocates made the grounds in support of the Motion unnecessarily too long and windy by virtually reproducing in the Notice of Motion in detail the contents of the supporting affidavit of Mr. Were. Perusing the notice is amusing, to say the least. We pointed this out to the parties when the application was mentioned on 07th October, 2013.

Be that as it may, the gist of the orders sought are set out in paragraph 1 of the Notice of Motion which we have quoted already. We consider it unnecessary to reproduce the contents of the affidavits of respective deponents.

Mr. James Okuku and Mr. Semuyaba jointly appeared for the applicant. Mrs. Robina Rwakojo, Director of Legal Affairs in the Attorney-General's Chambers, assisted by Mr. Kodoli Wanyama, a Principal State Attorney (PSA,) represented the Attorney-General, (1st Respondent), while Mr. Didas Nkurunziza represented the Second Respondent.

When the application came up for hearing on 07th October, 2013, parties were ordered to file fresh written statements of their respective arguments because, like the Notice of Motion, the ones filed earlier did not comply with the Chief Justice's **Practice Direction** No. 02 of 2005. Those fresh statements of arguments are now on the Court record. We proceed to consider the merits of the application after thorough consideration of those written arguments.

The question which this Court is to decide is whether in the circumstances of this case it is proper and just to strike out either the appeal alone or the appeal as well as the First Respondent's Notice of Cross-Appeal.

In their written arguments, counsel for the applicant argue that the appeal and the Cross-Appeal be struck out. On the other hand, counsel for the respondents opposes the striking out. Each side has advanced its arguments.

Rule 101 which is the relevant rule of the Rules of this Court about security for costs reads as follows—

"101(1) Subject to Rule 109 of these Rules there shall be lodged in Court on the institution of a civil appeal as security of costs of the appeal, the sum of four hundred thousand shillings.

"101(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.

Rule 78 of the Rules of this Court gives the Court power to strike out appeals under certain circumstances. It is couched this way—

'A person on whom a Notice of Appeal has been served may at any time, either before or after the institution of appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken within the prescribed time.'

In their written arguments, counsel for the applicant contended that as the Second Respondent has neither deposited the security for costs as ordered by the Court, the Second Respondent has disobeyed a Court order and, therefore, the Court should strike out the appeal. The applicant's counsel further argued that the Second Respondent did not even seek leave to have the time within which to deposit the money extended. Learned counsel relied on Rules 78 (*supra)* and 2(2) of the Rules of this Court. Counsel further relied on a number of decided cases especially Uganda Court of Appeal **(*Civil Application No. 109 of 2008)***

GOYAL VS. GOYAL & OTHER (2009) EA 148 in which the Court of Appeal held that failure to deposit further security for costs as ordered by Court is not a mere technicality that can be ignored. Counsel also relied, *inter alia,* on ***G.M. Combined (U) Ltd. Vs.* A.K. DAETERGENTS (U) Ltd*. (Supreme Court Civil Appeal No. 34 of 1995).*** Learned counsel further argues that if the appeal is struck out, the cross-appeal will in effect have no basis for its existence and, therefore, it too should be struck out.

The First Respondent in its written arguments opposes the application to strike out its Notice of Appeal and its Notice of Cross-Appeal. Indeed counsel for the Second Respondent supports the Attorney-General on this aspect. In its written statement of arguments, the First Respondent relied on Rule 77(1) and (2) and contended, correctly, that because his Notice of Appeal was filed after that of the Second Respondent, his Notice of Appeal became Notice of Address for service within the meaning of Rule 76 of the Rules of this Court. With regard to the Notice of Cross-Appeal, the Attorney-General contends, again correctly, that in fact it is not appealing against the consent judgment. Rather it is cross-appealing against the Order of the Constitutional Court which awarded the applicant interest at 24% during the determination of the constitutional petition on the decretal amount at the rate of 24% p. a.. The learned Attorney- General correctly contends that if the Second Respondent's appeal is struck out, the Cross-Appeal, which is the equivalent of a counter-claim in civil suits, should remain valid and be decided on its merits. The Attorney-General relied on ***Musonge Moses Masah vs. Muwonge Peter (Supreme Court Civil Appeal No. 11 of 2004)*** as well as on Rule 91 of the Rules of this Court. (That Rule deals with the rights of a respondent where an appellant withdraws an appeal. According to Rule 91(2) , unless it is withdrawn, the notice of Cross-Appeal remains valid and is to be heard.)

Further, the Attorney-General opposes the application by the applicant's counsel for certificate for two counsel.

Counsel for the applicant filed a rejoinder to the reply by the Attorney-General. In the rejoinder, counsel for the applicant contends in effect that the Attorney-General never filed a Cross-Appeal and, therefore, the Notice of Cross-Appeal should be struck out. Learned counsel criticises the Attorney-General for failure to pay the consent judgment damages. Counsel relies on ***Uganda Association of Women Lawyers vs. Attorney-General (Constitutional Petition No. 02 of 2003) and Olive Casey Jaundo vs. Attorney-General of Guyana (1971) AC972 ,*** for the proposition that the Constitutional Court had power to make the order to pay interest on the damages awarded under the consent judgment. (With respect, we do not think that these two authorities are quite relevant in this application.)

In his written arguments, Mr. Didus Nkurunziza, counsel for the Second Respondent, quite correctly, agrees that the authorities cited by counsel for the applicant apply to ordinary civil applications for security for costs. He, however, contends that because we are dealing with a Constitutional Appeal where the Second Respondent is allegedly "entitled" under Art.132(3) of the Constitution to appeal to this Court, the Rules of this Court are inapplicable and, therefore, the Court's order in Civil Reference no. 01 of 2011 was made per *incuriam* and, is of no effect. He states that it does not bind the Second Respondent who is allegedly entitled to file Constitutional Appeal without being subjected to the procedures stipulated in the Rules of this Court. Learned counsel blamed both himself and counsel for the applicant for their failure to raise this strange view during the hearing of the said Reference by the three Justices of this Court. We are forced to reproduce counsel's strange arguments in his own words. Learned counsel states at page 7 of his written arguments—

> *"Consequently, unlike ordinary civil appeals from the Court of Appeal to this Court where the right to appeal is to be as prescribed by, and therefore subject to, law the entitlement to appeal against a decision of the Court of Appeal sitting as a Constitutional Court is unconditionally granted by the Constitution itself and therefore that entitlement is not subject to or*

conditioned by law. On the contrary, it is the law and the procedures governing the appeals to this Court that ***are subject to that entitlement*** *given to a party aggrieved with the decision of the Court of Appeal sitting as a Constitutional Court to this Court. Any law, rule or order that purports to subject* ***that entitlement to appeal*** *to conditions to be fulfilled first are, it is submitted, inconsistent with the Constitution which gives that entitlement and such law, rule or order must make way for the exercise of that entitlement.*

It is further submitted that had the framers of the Constitution intended to have the entitlement to the appeal to this Court against a decision of the Court of Appeal sitting as a Constitutional ***Court subjected to law, rules or orders to the Court they would have specifically stated so in the Constitution*** *in the same way that they did in relation to ordinary appeals from the Court of Appeal to this Honourable Court. The fact that Article 132(3) ends with the phrase "and accordingly, an appeal shall lie to the Supreme Court under clause (2) of this Article" actually emphasizes the entitlement as given in the Article and only provides a follow through enabling procedures for the exercise of such entitlement, (but not its existence), to be prescribed for by law." (Emphasis added because of what we shall say later.)*

Let us first consider the issue of whether the Notice of Cross-Appeal can survive a striking out of an appeal.

With due respect to counsel for the applicant, we find their argument that if the main appeal is struck out the Attorney-General's Notice of Appeal ceases to exist without foundation. First of all their contention that the First Respondent never filed a memorandum of appeal shows that learned counsel does not understand Rule 87 of the Rules of this Court particularly subrules (1) and (3) which read as follows—

"87 (1)A respondent who desires to contend at the hearing of the appeal in the court that the decision of the Court of Appeal or any part of it should be varied or reversed, either in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of his or her contention and the nature of the order which he or she proposes to ask the Court to make, or to make in that event, as the case may be.

(3) A Notice of Cross-Appeal shall be substantially in Form G in the first schedule to these Rules and shall be signed by or on behalf of the respondent.

Clearly, subrules (1) and (3) (*supra)* do not require a cross-appellant to file a memorandum of appeal. The Attorney-General's Notice of Cross-Appeal, a copy of which is attached to the affidavit of Batanda Gerald, obviously conforms to these provisions and will stand whether or not the appeal itself is struck out. If the appeal is struck out, in our opinion, the effect of striking out the appeal is for practical purposes the same as when the appeal fails after an ordinary hearing of any appeal. Indeed as pointed out already, under Rule 91 (2) where an appeal is withdrawn, a Cross-Appeal can be heard as if it was an appeal. We think this similarly applies where an appeal is truck out. .

With due respect to the learned counsel for the Second Respondent, we find his interesting interpretation of Art. 132 (3) and the situation without any basis under our Constitution and or under any other law.

The Constitution was promulgated in October, 1995. The Judicature Act and the Rules of this Court were enacted in 1996 after the Constitution had come into existence. Nowhere does the Constitution state that Supreme Court Rules do not apply to the hearing of Constitutional Appeals. Furthermore, we think, with due respect to Mr. Nkurunziza, that he has put an absurd construction to Article 132 of the Constitution. The Article is about the jurisdiction of the Supreme Court both in

ordinary Civil Appeals and in Constitutional Appeals. Clauses (2) and (3) of Article 132 (2) and (3) read thus—

"132 (2) An appeal shall lie to the Supreme Court from such decision of the Court of Appeal as may be prescribed by law.

(3) Any party aggrieved by a decision of the Court of Appeal sitting as a Constitutional Court is entitled to appeal to the Supreme Court against the decision; and ***accordingly, an appeal shall lie to the Supreme Court under clause (2) of this Article!***

In our considered opinion, clause (2) confers general appellate jurisdiction on the Supreme Court. Further it is our opinion that clause (3) merely emphasizes that even in constitutional matters, any aggrieved party has a right of appeal to the Supreme Court under clause (2). We do not read anything in clause (3) which exempts any appellant in constitutional appeals from being governed by the Rules of the Supreme Court.

We have no doubt in our minds that clause (3) ensures that constitutional appeals shall be made basically like those of the Civil Appeals. This is made clearer by subrule (3) of Rule 2 of the Rules of this Court which states:—

"(3) An appeal from the Constitutional Court to the Court shall *be heard as a civil appeal in accordance with these rules."*

We are satisfied that the Supreme Court Rules regulating the filing, the procedure and hearing of Constitutional Appeals were properly enacted in accordance with the Constitution. The Constitution upon which our learned sister the Hon. Lady Justice Dr. Kisaakye Kitimbo, JSC., relies in her dissenting Ruling and on which counsel for 2nd respondent relies in his arguments is very clear. Thus by Article 129 (3), the Constitution states "**Subject to the provisions of this Constitution, Parliament may make provision for the Jurisdiction** and **Procedure of the courts.**

Consequently, in 1996, Parliament enacted the Judicature Act whose preamble states—

> *"An act to consolidate and revise the Judicature Act to take account of the provisions of the Constitution relating to the Judiciary."*

Various sections of that Act spell out, *inter alia,* the jurisdiction of the Supreme Court, the jurisdiction of the Court of Appeal and the jurisdiction of the High Court. It is unnecessary for us to reproduce those provisions here.

Further part VII of the same Judicature Act provides for the **Practice and Procedure of Courts.** Section 40 of the Act establishes the Rules Committee. Section 41 sets out the functions of that Rules Committee. Subsection (1) of section 41 states—

> ***The Rules Committee may ,by Statutory Instrument, make rules for regulating the practice and procedure of the Supreme Court, the Court of Appeal and the High Court of Uganda and for all other Courts in Uganda subordinate to the High Court.***

Learned counsel's contention that the Rules of the Supreme Court do not regulate Constitutional Appeals is therefore misconceived, to say the least. We should point out that the hearing of Constitutional Petitions is regulated by the Constitutional Court (Petitions and References) Rules 2005 (S.I. 2005 No.91). These Rules were made by the Rules Committee under the authority of S. 41 of the same Judicature Act and in our considered view fully complies with the provisions of Art. 129 (3) of the Constitution. Rule 23 of those Rules states that the Civil Procedure Act and Rules apply with necessary modification. Rule 23 (2) which is about Constitutional Appeals states in very clear terms that—

> "*(2) For purposes of appeals against decisions of the Court,* ***the Supreme Court Rules*** *shall apply with such modifications as shall be necessary."*

In her draft dissenting ruling, our learned sister also states that we used improper language in our ruling. With due respect, we find nothing wrong with the words we used.

With due respect, it is our considered opinion that the learned counsel for the Second Respondent seems to be ignorant of subrules (4) and (5) of Rule 79 of the Rules of this Court. These subrules state—

> *(4) Notwithstanding subrule (1) of this rule, an appeal from the Constitutional Court shall be instituted by lodging in the registry within fifty days from the date when the notice of appeal was lodged —*
>
> *(a) the memorandum of appeal;*
>
> *(b) the record of appeal.*
>
> *(c) the prescribed fee; and*
>
> ***(d) security for the costs of the appeal.***
>
> *(5) Notwithstanding subrule (2) of this rule, in appeals from the Constitutional Court, for the purpose of guaranteeing the expedition in constitutional matters required under article 137 (7) of the Constitution, the Notice of Appeal shall contain a request for the copies of the proceedings and judgment, within ten days after the date of the Notice of Appeal.*

In our opinion, the word "Entitlement" as used in Clause (3) does not confer any special constitutional privilege or right to any appellant in constitutional matter which privilege or right is different from the privileges or rights which any other appellant in non constitutional matter does not enjoy. That is why Clause (3) of Article 132 states "*accordingly an appeal shall lie to the Supreme Court under Clause (2) of this Article.*"

Clearly, neither the Constitution nor the Rules exempt any appellant in Constitutional Appeals from paying fees or costs or providing security for cost. Therefore counsel's arguments stretching the meaning of the word "entitled" are without any logic or foundation whatsoever.

It is quite evident from the affidavit in support of the Second Respondent's opposition to the application, the Second Respondent has been in and will probably continue to face financial difficulties. That means it cannot afford to pay possible costs in the event the appeal does not succeed. The Second Respondent has not made any effort to seek leave to appeal without providing security for costs as provided for by Rule 109 (1) (b) of the Rules of this Court.

The manner in which the Second Respondent found its way into the consent judgment raises doubts as to whether the appeal has any probability of success. It may well be that the Second Respondent would like to prolong the determination of this matter for as long as possible. In these circumstances and where the Second Respondent has confessed of being in financial difficulties, it is fair and just that we allow this application. We therefore order that the appeal be struck out. Nevertheless, the Attorney-General's Cross-Appeal remains unaffected.

Counsel for the applicant applied for a certificate for two counsel. We are not satisfied that the circumstances of this application in anyway justify an award of a certificate of costs for two counsel. We order that the applicant be paid costs in respects of only one counsel.

Dated at **Kampala** this **……3rd……** day of **…July…… 2014.**

————————————

B.M. Katureebe.
Justice of the Supreme Court.

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J. Tumwesigye
Justice of the Supreme Court.

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E. Kisaakye.
Justice of the Supreme Court.

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B.J. Odoki.
Ag. Justice of the Supreme Court.

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J.W.N. Tsekooko.
Ag. Justice of the Supreme Court.

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G.M. Okello.
Ag. Justice of the Supreme Court.

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C.N.B. Kitumba
Ag. Justice of the Supreme Court.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: KATUREEBE, KITUMBA, TUMWESIGYE, KISAAKYE, JJ.S.C.; ODOKI, TSEKOOKO & OKELLO, Ag. JJSC)

CONSTITUTIONAL APPLICATION NO. 01 OF 2012

BETWEEN

GOODMAN AGENCIES LTD. ::::::::::::::::::::::::::::::::
APPLICANT

AND

1. **ATTORNEY GENERAL**
2. **HASA AGENCIES (K) LTD::::::::::::::::::::::::::::**
   RESPONDENTS

[An Application arising from a Ruling of the Supreme Court (Tsekooko, Katureebe & Kitumba, JJSC) dated 02nd August, 2011 in Supreme Court Civil Reference No. 01 of 2011.]

RULING OF DR. KISAAKYE, JSC. (DISSENTING IN PART).

I have had the benefit of reading in draft of the Ruling of the Court in this Application.

I agree with the Ruling of the Court that the cross-appeal of the first respondent, the Attorney General, should survive even where the appeal of the second Respondent, is dismissed.

However, with regard to the ruling of the Court to the effect that the **Judicature (Supreme Court) Rules** apply to Constitutional Appeals and Applications, I agree with it to the extent that the said Rules only do apply where they do not conflict with the provisions of the Constitution of Uganda granting a right of appeal to persons aggrieved by a decision of the Constitutional Court.

I also disagree with the Ruling of the Court that this Application should be allowed and that Constitutional Appeal No. 5 of 2010 should be struck out on grounds that an essential step in the proceedings has not been taken, namely, the deposit by the second respondent of

200,000,000/= Uganda Shillings as further security for costs which this Court ordered it to pay.

My reasons for this partial dissent appear later in this judgment.

Background

The following background to this Application is relevant for the issues I will be tackling in my ruling.

This Application was brought by the Applicant, (Goodman Agencies Ltd.) under Rule 78 of the **Judicature (Supreme Court) Rules**, which provides for the striking out of appeals as follows:

> ***"A person on whom a notice of appeal has been served may at any time, either before or after the institution of the appeal, apply to the court to strike out the notice of appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time."***

The applicant is seeking for orders from this Court, among others, to strike out Supreme Court Constitutional Appeal No. 5 of 2010 which was filed by the second respondent and the first respondent's Notice of Cross Appeal. The applicant is also seeking for costs in defending the appeal, the cross-appeal and applications filed there under.

The Applicant based its application on the ground that the second respondent, (Hasa Agencies Ltd.) who is also the appellant in Supreme Court Constitutional Appeal No. 5 of 2010 failed to take an essential step in the proceedings. According to the applicant, the essential step in the proceedings the second respondent was supposed to take but

which they did not take, was the depositing of 200,000,000/= Uganda shillings as further security for the applicant's costs in this Court as the Supreme Court ordered in ***Goodman Agencies Ltd. v. Hasa Agencies (K) Ltd.; Supreme Court Civil Reference No. 1 of 2011***.

Supreme Court Constitutional Appeal No. 5 of 2010 arose from the decision of the Constitutional Court rendered in Constitutional Petition No. 3 of 2008, where the applicant was the appellant. In the said Constitutional Petition, the applicant (then appellant) successfully challenged the constitutionality of the trial judge's decision in High Court Civil Suit No. 719 of 1997 when he ordered that the second respondent share in the consent judgment entered into between the applicant, some other parties and the Attorney General.

Under the consent Judgment which was reached in 2005, the first respondent (the Attorney General) agreed to pay the applicant (Goodman Agencies Ltd.) Uganda Shillings 14,485,543,842/=, being the value of 10 Trucks which had been confiscated by soldiers and damages for lost income. The consent judgment did not provide for any interest to be paid to the applicant. However, the Constitutional Court, in disposing of the appeal, awarded interest on the decretal sum of 24%.

<u>Counsels' Arguments</u>

Counsel for the applicant contended that the Order to pay 200,000,000/= Uganda Shillings was valid and was an essential step in the prosecution of the second respondent's appeal. Counsel for the applicant also contended that the second respondent's non-compliance with the Court's Order called for dismissal of the Appeal which was filed by the second respondent. He also contended that any further delay to

dispose of this matter would be an abuse of the court process and a breach of fair hearing and principles of natural justice.

With regard to counsel for the second respondent's arguments, counsel for the applicant contended in reply that the procedure for Constitutional proceedings is provided for by the **Constitutional Court (Petitions and References) Rules 2005**, which provide that the Supreme Court Rules shall apply to Constitutional Appeals with such modification as may be necessary.

In further reply to the second respondent's submissions, counsel for the applicant reiterated their submissions and contended that the second respondent's contentions about denial of justice were ***res judicata*** as those arguments had been raised and resolved by this Court in the decision it rendered in Civil Reference No. 1 of 2011.

Lastly, counsel for the applicant contended that the second respondent was only seeking to "worm" itself into a consent judgment signed between the applicant and the first respondent, the Attorney General.

Counsel for the applicant prayed that the Court also dismiss the first respondent's notice of cross appeal and the second respondents' appeal and the pending application, and also sought for an award of costs incurred in the Supreme Court and in the courts below. Counsel also prayed for a consequential Order confirming the judgment of the Constitutional Court.

Counsel for the applicant relied on the pleadings and several decisions of this Court which dealt with the principles governing security for costs and the consequences of non-payment of further security for costs

when ordered by the Court. The authorities relied on include **G. M. Combined (U) Ltd, Supreme Court Civil Appeal No. 34 of 1995**; **Mawogola Farmers and Growers Ltd v. Kayanja and others, (1971) E.A. 108; Banco Arabe Espanol v. Bank of Uganda, Civil Appeal No. 876 of 1998 and** the Court of Appeal decision **of Goyal v Goyal and Others, (2009) 2 EA 143**.

I will not highlight the submissions of the first respondent, the Attorney General, for reasons that I agree with the Ruling of the Court with respect to the cross appeal. I will now turn to highlight the submissions of counsel for the second respondent.

Counsel for the second respondent opposed this application. He contended that the second respondent's compliance with the Order of the Supreme Court rendered in ***Goodman Agencies Ltd. V Hasa Agencies (K) Ltd. Civil Reference No. 1 of 2011***, to deposit 200,000,000/= Uganda Shillings as further security for costs within 45 days, is not an essential step in the proceedings of the appeal. The proceedings referred to are Constitutional Appeal No. 05 of 2010 pending before this Court.

Counsel for the second respondent, in their written submissions dated 1st October 2013, submitted at length on their contention that this application should not to be granted. I have deemed it necessary to reproduce verbatim the relevant parts of counsel for the second respondent's submissions.

> ***"4. Due to financial difficulties and not to stubborn refusal as alleged, the 2nd respondent was unable to comply with that Order to deposit security for costs. The 2nd***

respondent concedes that, had this been an ordinary civil appeal, complying with the order for deposit of security for costs would have been an essential step in the proceedings, the omission of which could result in the striking out of the Notice of Appeal and the Appeal.

5. However, it is the contention of the second respondent that in this instance compliance with that Order is not an essential step in the proceedings. ... this is because, pursuant to Article 132(3) of the Constitution, a party who is aggrieved by a decision of the Court of Appeal sitting as a Constitutional Court is "entitled to appeal to the Supreme Court against the decision". This is an entitlement granted in unequivocal terms by the Constitution of the Republic of Uganda.

6. … The right to appeal against decisions of the Court of Appeal is only to the extent provided by Parliament passing laws. … That right to appeal, once given by those laws, is therefore subject and subservient to those laws and the conditions they impose such as deposit of security for costs.

7. Consequently, unlike ordinary civil appeals from the Court of Appeal to this Honourable Court where the right to appeal is to be as prescribed by, and therefore subject to law, the entitlement to appeal against a decision of the Court of Appeal sitting as a Constitutional Court is unconditionally granted by the Constitution itself and therefore that entitlement is not subject to or conditioned by law. On the contrary, it is the law and the procedures governing appeals to this Honourable Court that are subject to that entitlement

given to a party aggrieved with a decision of the Court of Appeal sitting as a Constitutional Court to appeal to this Court . Any law, rule or order that purports to subject that entitlement to appeal to conditions to be fulfilled first are, it is submitted, inconsistent with the Constitution which gives that entitlement and such law, rule or order must make way for the exercise of that entitlement.

8. … had the framers of the Constitution intended to have the entitlement to appeal to this Court against a decision of the Court of Appeal sitting as a Constitutional Court subjected to law, rules or orders of Court they would have specifically stated so in the Constitution in the same way that they did in relation to ordinary appeals from the Court of Appeal to this Honourable Court. The fact that Article 132(3) ends with the phrase "and accordingly, an appeal shall lie to the Supreme Court under clause (2) of this Article" actually emphasizes that entitlement as given in the Article and only provided a follow through enabling procedure for the exercise of such entitlement, (but not its existence), to be prescribed for by law.

9. …. Article 132(3) of the Constitution was not brought to the attention of the learned Justices of this Court who ordered the 2nd respondent to deposit security for costs. For that reason, … their decision was therefore rendered per incuriam.

…..

… A decision of the Court of Appeal sitting as a Constitutional Court involves the interpretation of the

Constitution of the Republic of Uganda which is the Grundnorm governing all and therefore if a party is aggrieved by it, such party must be given free opportunity to present that grievance to the final court of the land, the Supreme Court, so that the interpretation of the Constitution on the point in issue is resolved once and for all. If the party aggrieved elects not to appeal or, having appealed, decided to withdraw it, then that is his or her privilege. However once such party elects to appeal and does so, then, the appeal must be heard and determined. It is for that reason that the Constitution itself, and not just statutory law, guarantees that a party is entitled to appeal to the Supreme Court against a decision of the Court of Appeal sitting as Constitutional Court. The respondent therefore takes the position that the Order of a division of this Honourable Court that directed it to deposit security for costs, in so far as it relates to the constitutionally granted entitlement to appeal to this Honourable Court and to the continued existence of that appeal, is not an essential step in this constitutional appeal, it is per incuriam and therefore of no consequence to the existence of the said appeal."

Consideration of the Application

As I mentioned earlier in this partial dissent, the Ruling of the Court agrees with the submissions of counsel for the applicant and is to the effect that the application should be granted. I respectfully disagree. I am fully aware that the underlying dispute before the High Court between the applicant and the respondents was a civil matter. The dispute, however, assumed a constitutional character when the applicant filed Constitutional Petition No. 3 of 2008 to challenge the

decision and actions of the trial Judge when he allowed the second respondent to be a beneficiary to the consent judgment. The Constitutional Court duly rendered its decision and it is this decision that the second appellant appealed against in this court and in which the Attorney General filed a Notice of Cross Appeal. It is therefore not true, as counsel for the applicant argued, that Constitutional Appeal No. 5 of 2010 is an appeal against the Consent Judgment entered into between the applicant and the Attorney General.

Arising from the arguments of the parties, particularly the applicant and the second respondent, this Court is required, in my view, to apply the Constitution of Uganda to resolve two key questions. The first question is whether the Court should have ordered the second respondent, as a constitutional appellant, to pay further security of costs in light of the provisions of Article 132(3) of the Constitution. The second question is whether the failure by the second respondent to deposit the 200,000,000/= Uganda Shillings they were ordered to pay is an essential step in the prosecution of their Constitutional appeal, to warrant dismissal of their Constitutional Appeal before this Court.

Further security for costs is provided for under Rule 101(3) of the **Judicature (Supreme Court) Rules**, as follows:

> ***"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."***

I do not agree with a blanket application of the **Judicature (Supreme Court) Rules,** which are specifically applicable to civil Appeals and Applications to also apply wholesale to Constitutional matters without

any exception or modification. I am fully aware of the following four provisions which have been cited as supporting non-distinction of this Court of Constitutional Appeals with Civil Appeals. The first one is a clause at the end of Article 132(3) of the Constitution of Uganda, which provides as follows:

> ***"…accordingly, an appeal shall lie to the Supreme Court under clause 2 of this article."***

The second provision is Rule 23 (2) of the **Constitutional Court (Petitions and Reference) Rules 2005 (Statutory instrument 91 of 2005)**, which provides as follows:

> ***"For the purpose of appeals against a decision of the court, the Judicature (Supreme Court) Rules shall apply with such modifications as may be necessary."***

The third provision is Rule 2 (3) of the ***Judicature (Supreme Court) Rules,*** which provides as follows:

> "***An appeal from the constitutional court to the court shall be heard as a civil appeal in accordance with these Rules***.**"**

There is yet a fourth provision, namely Rule 79 (4) of the **Judicature (Supreme Court) Rules,** which provides for Constitutional Appeals as follows:

> "***Notwithstanding sub rule (1) of this rule, an appeal from the constitutional court shall be instituted by lodging in the registry within fifty days from the date when the notice of appeal was lodged-***

a) the memorandum of appeal;

b) the record of appeal;

c) the prescribed fee; and

d) security for the costs of the appeal."

It has been argued that the four provisions cited above provide not only a constitutional but also a legal basis for the Court Order that was issued in Civil Reference No.1 of 2011 requiring the second respondent to deposit further security for costs to the tune of Ug. Shs 200,000,000/= in accordance with Rule 101(3) of the **Judicature (Supreme Court) Rules**. This Rule provides as follows:

"***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."***

In spite of the four provisions cited earlier above, it is my view that Rule 101(3) of the **Judicature (Supreme Court) Rules** conflicts with Article 132(3) of the Constitution, unless the Court construes it with such necessary modifications as required by Rule 23(2) of the **Constitutional Court (Petitions and Reference) Rules 2005 (Statutory instrument 91 of 2005).** Such a construction would, in my view, require that this Rule would not apply to Constitutional appeals. However if Rule 101(3) is construed to also apply to Constitutional Appeals , as the Ruling of the Court holds, then the Rule would not, in my view, stand the constitutional test.

I do not agree with the position that we should not make a distinction between appeals to the Supreme Court arising from decisions of the

Constitutional Court as opposed to appeals to this Court arising from decisions of the Court of Appeal.

I do not agree that the clause "***accordingly an appeal shall lie to the Supreme Court under Clause (2) of this Article"*** appearing at the end of Article 132(3) erased the unconditional entitlement to appeal against that decision granted by Article 132(3) of the Constitution.

In ***Hon. Theodore Ssekikubo and Others v. The Attorney General and others, Constitutional Application No. 06 of 2013*** *(Kisaakye, JSC partially dissenting)* this Court upheld the "unrestricted" right of appeal granted to persons aggrieved by a final decision of the Constitutional Court under Article 132(3) of the Constitution. While holding that the applicants, as intending appellants, who had yet to lodge their appeal before the Court, had an unrestricted right to appeal which this Court had a duty to protect by ensuring that it is not rendered nugatory, the Court observed as follows:

> ***"… appellate jurisdiction and right of appeal are creatures of statute. The intention of the framers of the Constitution in Article 132(2) was to create appellate jurisdiction of the Supreme Court over decisions of the Court of Appeal as prescribed by law. In clause 3 thereof, the intention was to create a right of appeal to a person aggrieved by a decision of the Court of Appeal sitting as a Constitutional Court, and to confer appellate jurisdiction over such a decision on the Supreme Court.***
>
> ***….***
>
> ***Learned Counsel for the … respondents conceded, rightly in our view, that decisions on interpretation of provisions of the Constitution by the Constitutional Court are***

appealable as of right. …The applicants therefore may appeal against those decisions as of right."

Similarly in this case, I find merit in the submissions of counsel for the second respondent that the right of a party aggrieved with a decision of the Constitutional Court to lodge an appeal before the Supreme Court is an unfettered right preserved by Article 132(3) of the Constitution.

Furthermore, I agree with counsel for the second respondent that the right to appeal which is granted under Article 132(3) against a final constitutional decision of the Constitutional Court cannot be taken away, directly or indirectly, by any Rule of the **Judicature (Supreme Court) Rules.**

For ease of reference and the discussion to follow, I will cite the relevant provisions in the Constitution relating to constitutional appeals and those relating to civil appeals.

Article 132(3) of the Constitution provides for appeals from the Constitutional Court to the Supreme Court as follows:

"***Any party aggrieved by the decision of the Court of Appeal sitting as a Constitutional Court is entitled to appeal to the Supreme Court against the decision; and accordingly, an appeal shall lie to the Supreme Court under clause (2) of this article***."

On the other hand, the right of a party to lodge an appeal against decisions of the Court of Appeal before this Court is provided for by Article 132(2) of the Constitution, which provides as follows:

"***An appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as may be prescribed by law***."

It is evident from the above two articles that the Constitution separately and clearly provided for Constitutional and Civil Appeals in Article 132(3) and Article 132(2) respectively. It is incumbent on this Court to maintain this clear distinction.

My view is premised on the fact that while civil appeals are primarily between the parties and focus on personal interests of the litigants, constitutional petitions and appeals are by their nature not always confined to the personal interest of the petitioner/appellant. Rather, the primary objective of any Petition lodged under Article 137 of the Constitution is to seek a constitutional interpretation and declaration regarding an alleged violation of the Constitution either arising from an Act of Parliament or any other law, OR any act or omission by any person or authority. This is why, in my view, the framers of the Constitution opted out of the ordinary civil litigation regime that requires a litigant to prove legal standing (*locus standi*) to a Constitutional regime that gives the right to lodge a petition to any person who is alleging a Constitutional violation.

On the other hand, by allowing "any person who alleges that either any Act of Parliament, or any other law or anything in or done under authority of law" or any act or omission by any person or authority is inconsistent with any provision of the Constitution, the Constitution adopted an open model which give all persons a right to raise "a red flag" whenever they believe that a violation of the Constitution has

taken place, by lodging a Petition under Article 137(3) of the Constitution.

My view is reinforced by the an undisputable fact that when the Constitution of Uganda was debated and promulgated, it was deemed fit to provide for a Constitutional Court which was specifically charged with the responsibility of interpreting the Constitution. The same Constitution, which set up the Court of Appeal under Article 134 of the Constitution to deal with Civil and Criminal Appeals from High Court decisions as may be prescribed by law, set up a Constitutional Court under Article 137 and gave the right to any person who alleges a violation of the Constitution to file a Constitutional Petition seeking for a declaration to that effect and/or redress from the Court. It is immaterial that the Constitution provided that the Court of Appeal would constitute itself as a Constitutional Court whenever it would be dealing with questions relating to the interpretation of the Constitution. The jurisdiction, Coram and rules of the two courts are different and are separately provided for. Lastly, it is the same Constitution under Article 132(3) that gave the right to any party aggrieved by a decision of the Constitutional Court to appeal to the Supreme Court.

It is therefore inconceivable to me that the same Constituency Assembly Delegates who debated and eventually promulgated the 1995 Uganda Constitution could have intended, as Rule 2(3) of the ***Judicature (Supreme Court) Rules*** would appear to require, that once a Constitutional Appeal is lodged at the Supreme Court, it should lose its distinctive character as a Constitutional Appeal and be handled in all cases as an ordinary Civil Appeal. In my view, the requirement imposed by Rule 2(3) ***Judicature (Supreme Court) Rules*** that a Constitutional appeal “shall be heard as a civil appeal”, only makes sense if it

construed to refer to hearings of appeals and not construed in a broad sense to justify a holding that constitutional appeals should in all respects be treated in exactly the same way as civil appeals.

It is even further inconceivable that the same Uganda Constitution, which opened the doors of the Constitutional Court to all Ugandans, whether natural or corporate, to lodge Constitutional Petitions under Article 137 thereof where they allege a violation of the Constitution, intended that the doors of the Supreme Court of Uganda could be closed to appellants aggrieved by a decision of the Constitutional Court on grounds that they are unable to pay further security for costs. A case in point is the present constitutional appellant (the second respondent) who was ordered to pay a hefty sum of money of 200,000,000/= Uganda shillings, as further security for costs and failed to pay the amount so ordered.

Requiring a constitutional appellant to pay further security for costs, as was ordered by this Court in the Civil Reference, before such appellant's Constitutional appeal can be heard, has the effect of creating a barrier in the path of an appellant aggrieved by a decision of the Constitutional Court. The barrier in turn has the effect of negating the right of appeal guaranteed by Article 132(3). This is, in my view, constitutionally impermissible.

The Court's Order made under Supreme Court Civil Reference No. 1 of 2011, which required the second respondent to deposit 200,000,000/- Uganda Shillings as further security for costs, is also, in my view, in conflict with the provisions of Articles 132(3), in as far as it made the payment of the further security a condition precedent to hearing the appellant's Constitutional Appeal No. 05 of 2010.

If the Supreme Court were to turn away an appellant who is dissatisfied with a decision of the Constitutional Court and to strike out a Constitutional Appeal without hearing its merits merely because the appellant has not deposited further security for costs as was ordered by the Court in this case, this would be contrary to not only the spirit, but also the letter of the Constitution, as clearly provided for under Article 132(3). Access to the Supreme Court of Uganda, sitting as a final appellate court to determine constitutional appeals or applications, should not depend on how deep a constitutional appellant's pocket is. Otherwise, it would mean that those who are loaded with cash will have their constitutional appeals heard by this Court because they can overcome the financial barriers imposed by an order of the Court requiring payment of further security for costs of the other party.

On the other hand, the "have- nots", that is the poor, who would be aggrieved by any decisions of the Constitutional Court and who would be seeking the same protection afforded by the Constitution of Uganda, through its guarantee of equal protection and treatment under the law, would be turned away from this Court, whenever the respective respondent successfully moves the Court to order that such an appellant should first deposit in Court further security for costs. This is because such economically disadvantaged appellants would most likely fail to pay the further security for costs, not out of their refusal or neglect, but out of their inability to do so. Such an outcome, where constitutional appellants who are economically disadvantaged are turned away from the Court would run contrary to the letter and spirit of the Constitution and the Judicial Oath, where we, as Judicial Officers undertook to render justice by doing right to all manner of people. Instead, we would end up as only rendering justice to the rich!

I wish to add that by entrusting appellate constitutional jurisdiction in the Supreme Court, the Constitution also vested this Court with the duty

to protect the Constitution, by adjudicating on constitutional appeals brought before it to determine those with merit and those without merit. I wish to restate the observation I made in ***Hon. Theodore Ssekikubo and Others v. The Attorney General and Others, Constitutional Application No. 06 of 2013***, where I noted as follows:

> ***"…The Constitutional Court is charged with not only the responsibility of protecting the sanctity of the Constitution of Uganda, as expressed in the various Constitutional provisions contained therein. Inherent in this responsibility is the underlying duty vested not only in the Constitutional Court but also in this Court of protecting the values, norms and aspirations of the people of Uganda who agreed to be governed by this Constitution."***

The Constitution of Uganda does not spell out what values, norms or aspirations Judicial officers are expected to protect while they are exercising judicial power in accordance with Article 126 thereof. Therefore, Justices will, from time to time, continue to unearth the values, norms and aspirations of the people of Uganda which they are expected to protect while adjudicating on matters brought before them. Limiting myself to values, norms and aspirations that are, in my view, relevant to resolving the issues arising in this application, I believe that some of the values, norms and/or aspirations of the people of Uganda, which are either directly expressed in the Constitution or can be deduced from the Uganda Constitution (as amended) include the following:

(i) The Constitution of Uganda is the Supreme law of the land and that it shall prevail over any law that is inconsistent with it, and

that such other law shall be void to the extent of the inconsistency. [*Article 2*];

(ii) Any person who believes that there is a Constitutional violation can lodge a petition before the Constitutional Court for a declaration to that effect [*Article 137*];

(iii) Any person aggrieved by a decision of the Constitutional Court is entitled to appeal to the Supreme Court against that decision [*Article 132 (3)*];

(iv) Judicial power is derived from the people and that Courts established under the Uganda Constitution are required to exercise this power in the name of the people of Uganda and in conformity with the law [*Article 126 (1)*];

(v) All persons are equal before and under the law [*Article 21(1)*];

(vi) All persons "shall enjoy equal protection of the law" [*Article 21(1)*];

(vii) A person shall not be discriminated against on the ground of economic standing…" [*Article 21(1) &(2)*];

(viii) Courts shall, in adjudicating disputes before them, adhere to the principle that justice shall be done to all persons, irrespective of their economic status [*Article 126(2)(a)*]; and

(ix) That substantive justice shall be administered without undue regard to technicalities [*Article 126(2)(e)*];

It is my view therefore that, in light of the specific Constitutional provisions discussed and the values highlighted above, the Supreme Court is constitutionally bound to dispose of all Constitutional Appeals filed before it on their respective merits, unless the appellant opts to withdraw the appeal or not to prosecute the appeal when he or she is afforded the opportunity to do so.

Lastly, I also wish to address myself to the argument that the **Judicature (Supreme Court) Rules**, were properly made by the Rules Committee which was set up under the Judicature Act and that this therefore makes the Rules Constitutional.

Article 2 of the Constitution provides for the supremacy of the Constitution. Secondly, Article 274 of the Constitution, while saving the operation of existing law at the time the Constitution was promulgated, also required that the existing law should be construed with such necessary modifications as may be necessary to bring the laws in conformity with the Constitution.

The Rules of the Supreme Court were enacted after the Constitution came into force. It is inconceivable that the same Constitution which specifically requires modification of existing law to rhyme with it, would be the same Constitution that would allow Rules of the Court enacted after its promulgation, which are either directly inconsistent with it or have the effect of negating the rights guaranteed under it, to stand.

Article 2 of the Constitution is written in the present and applies to all laws and rules, irrespective of the time they were written or when they came into force.

I am aware of the authority of ***Goyal v Goyal & Others (2009) 2 E.A 143***, which counsel for the applicant relied on, where the Court of Appeal decided that failure by a party to deposit further security for costs as ordered by the court was a condition precedent which must be

obeyed as ordered unless it is set aside or waived. The Court further held that payment of further security for costs was not a mere technicality that can be ignored. In so holding, the Court noted as follows***:***

> ***"If we allowed court orders to be ignored with impunity, this would destroy the authority of judicial orders which is the heart for all judicial systems."***

The court proceeded to strike out the respondent's appeal with costs to the applicant in the Court of Appeal and in the High Court, arguing that the respondents failed to take an essential step with respect to their appeal when they refused to obey the court's order for the payment of further security for costs.

It should be noted that ***Goyal* (supra)** was a Civil Appeal and not a Constitutional Appeal. It is therefore distinguishable from the present case where the Court has been requested to strike out a Constitutional Appeal on grounds of the appellant's failure to pay further security for costs.

Let me now turn to address the argument that the second respondent failed to move the Court for relief from paying further security for costs. Rule 109(1) of the **Judicature (Supreme Court) Rules** provides a window for indigent appellants to prosecute their appeals, by providing as follows:

> ***"If in any appeal from the Court of Appeal in any civil case the court is satisfied on the application of an appellant that he or she lacks the means to pay the required fees or to deposit the security for costs and that the appeal has a reasonable possibility of success, the court may, by order, direct that the appeal may be lodged-***

(a) without prior payment of fees or on payment of any specified amount less than the required fees; or

(b) without security for costs being lodged, or on lodging of any specified sum less than the amount fixed by rule 101 of these Rules, and may order that the record of appeal be prepared by the registrar of the Court of Appeal without any payment for it or on payment of any specified sum less than the fee set out in the Second Schedule to these Rules, conditionally on the intended appellant undertaking to pay the fees or the balance of the fees out of any money or property he or she may recover in or in consequence of the appeal."

I am also aware and it has also been pointed out in the Ruling of the Court that the second respondent did not lodge any application before this Court seeking for an Order to relieve it from paying the further security for costs either before or after the expiry of the 45 days it was granted to make the payment. On the face of it, one would be inclined to fault the second respondent for having failed to take advantage of Rule 109(1) (b) by making the necessary application to this Court, when it realized that it was not in position to pay the further security for costs.

I do not intend to speculate about the reasons why the second respondent opted not to make this application. However, given the Rules of this Court, particularly Rule 109(1) of the ***Judicature (Supreme Court) Rules*** and the precedents of this Court with respect to the reasons Court takes into account before it grants an order for further security, these reasons are not difficult to decipher. It is indeed ironical and interesting to note that the second respondent, as the appellant, would have to prove to the Court that it lacks the means to

pay in order to succeed for a waiver of payment of security for costs under Rule 109(1). Yet, if proved, this is the very ground on which an Order for further security for costs would either have already been ordered or could be made under Rule 101(3) of the Judicature (Supreme Court) Rules and section 404 of the Companies Act (now repealed).

Besides, such an application would still not have taken care of the arguments raised by the second respondent regarding the impediments posed by the Rule 101(3) of the ***Judicature (Supreme Court) Rules*** for an aggrieved party's entitlement to appeal from a decision of the Constitutional Court. Even if the second respondent had invoked Rule 109(1) (b), the problem of the constitutionality of the Rule 101(3) on further security for costs would not have been resolved.

Furthermore, it is clear from the wording of Rule 109(1), in my view, that the Rule was intended to apply to civil appeals and not constitutional appeals. Otherwise, it does not make constitutional sense why access to this Supreme Court by indigent appellants, which is constitutionally guaranteed under Article 132(3), would have to be subject to proof that a constitutional appellant is indigent. This is even particularly so, considering that such an appellant may not even be pursuing an appeal for his/her own personal interest, gain or benefit, but rather, a matter of public interest intended to prevent a violation of the Constitution.

I wish to address myself to the applicant's arguments that the second respondent is simply interested in prolonging the determination of the matter for as long as possible. I do not find substance in theses contentions for the following reasons.

First, there is no guarantee that even if the second respondent had not lodged Constitutional Appeal No. 5 of 2010, the first respondent, the Attorney General would not have done so. As the Ruling of the Court acknowledges and I agree with it, even if the appeal of the second respondent were to be struck out, the cross-appeal of the first respondent, the Attorney General, on the issue of the Constitutional Court's order to award interest and costs to the applicant will continue to be heard and be disposed of on its merits. The reasons for the survival of the first respondent's cross-appeal are well laid out in the Ruling of the Court and I agree with them.

Secondly, it is clear from the record of appeal in this application that it is actually the applicant, and not the second respondent that has engaged in conduct which has prolonged the hearing and final disposal of this matter by this Court. For example, it is the applicant that filed the Supreme Court Application seeking for the second respondent to pay further costs, which was heard and dismissed by a single Justice of the Supreme Court. The applicant then filed Civil Reference No. 1 of 2011, appealing against the Order of the single Justice of this Court. The Orders arising from Civil Reference No. 1 of 2011 partially resulted in the stalling of the prosecution of Constitutional Appeal No. 5 of 2010. The applicant filed yet another application, No. 2 of 2010 and lastly this application No. 1 of 2012, which is under consideration.

While the applicant may argue that it has been exercising its rights provided for under the ***Judicature (Supreme Court) Rules,*** the litigation strategy it has pursued of preferring interlocutory applications over a litigation strategy of allowing Constitutional Appeal No. 5 of 2010 to be heard and disposed off on its merits, has necessarily resulted into undue delay in disposing of Supreme Court Constitutional Appeal No. 5 of 2010. This has wasted not only the parties' time but also Court's

time. The applicant's strategy has also increased the costs of the parties. Since 2010 – to date, this Court has held several Constitutional sessions in which the substantive appeal would have been heard and determined. The applicant, if successful, would have already reaped the fruits of its judgment.

Given the litigation strategy that the applicant opted for, it should not then be heard to cry foul and blame the second respondent for causing the delays. It is my view that the ends of justice would have and can still be best served if Constitutional Appeal No. 5 of 2010 is heard on its merits and quickly disposed off.

Thirdly, even where the appeal of the second respondent survives, it should be expected, like any other appellant or indeed litigant, to be alive to the possibility of being ordered by the Supreme Court to pay costs to the successful party, if the Court, in its discretion, sees it fit to do so.

Besides the second respondent's awareness of the possibility of being ordered to pay costs if it lost the appeal, I find the logic of allowing such an application for further security of costs filed under Rule 101(3) questionable, even in ordinary civil matters, when one takes into account the general principles governing litigation, and the award and taxation of a successful party's costs.

First, there is no guarantee that a party to any appeal will be successful. Secondly, there is also no guarantee that a successful party will automatically be awarded costs by the court. Thirdly, even if costs are awarded, the magnitude of those costs cannot be pre-determined or estimated in advance. This is because neither the parties nor the courts can predict with certainty, at least in our jurisdiction, the time it will take for a given court to hear and to dispose of any appeal before it.

The usual practice is for costs to be ascertained after the conclusion of the appeal or application and after the successful party's final bill of costs has been either agreed upon or filed in Court and taxed by the Registrar of the Court. At each of these proceedings, both parties to an appeal or application are entitled to be represented and to challenge the Bill of Costs.

If there is no guarantee that a successful party will recover the costs of the appeal and in some cases the costs incurred in the lower courts from the losing party, the question that arises is why should the Supreme Court established under the Constitution, deem it fit to engage in speculation about the outcome of a given matter before it, by ordering one party to deposit security for costs before hearing the appeal? The Court in so doing would, in my view, be putting economic/financial barriers in the way of litigants coming before it, even before it hears the substantive matter.

Yet, in my view, the primary task and responsibility of a Court is to adjudicate on legal disputes between the parties in order to determine their respective rights. Once that determination has been made, then the Court should look into the question of compensation for any losses or damages suffered or incurred as a result of a party's unlawful acts and make the necessary orders for redress, inclusive of costs, which are awarded at the discretion of the Court.

Given this responsibility, it would be more logical, in my view, for this Court to hear and determine an appeal on its merits, make the relevant orders including those related to costs, allow time for the costs, if awarded, to be taxed. If the unsuccessful party is unable to pay the judgment debt and the costs awarded, then the successful party will be at liberty to apply to the Court for execution, using all the available legal channels provided for under our law. That way, justice will not only have been done but will also be seen to have been done to all parties,

as it will be clear, even to the unsuccessful party, that he/she too, had his/her day in court.

In ***Margaret Kato v Nulu Nalwoga, Civil Misc. Application No. 11 of 2011***, the respondent requested this Court to order the applicants (appellant) to deposit Uganda Shillings 50,000,000/= as security for due performance of the Decree. They argued that the amount should be ordered as a pre-condition for the court's ordering of a full stay of execution pending the hearing and disposal of the appeal. The respondent based their prayer on the fact that the applicants were not resident in Uganda and did not have any known assets to attach in the event that they lost their appeal. This Court declined to grant the respondent's prayers, due to among other reasons, the fact that granting such an Order "would have the undesirable effect of blocking the applicants, as unsuccessful litigants, from pursuing their right of appeal before the final appellate court."

In ***Kato, supra***, this Court found it fit to preserve the applicants intended Civil Appeal. It is only fair that even in this case, the second respondent should be given the benefit of doubt and opportunity to argue its appeal, which is not a civil appeal but a constitutional appeal, so that it can be disposed off on its merits.

<u>The likelihood of the second respondent's chances of success of appeal</u>

I also wish to comment on this standard of probability of success *vis a vis* the question whether the second respondent's appeal should be struck out or not. Counsel for the applicant contended that "the second respondent is only seeking to 'worm' itself into the consent judgment, hence questioned the probability of the second respondent's appeal.

The Record of Appeal that was provided to us for the present application does not contain all the relevant documents, such as the Order of the Trial Judge which gave rise to the Constitutional Petition from which Appeal No. 5 of 2010 arose. It is therefore premature for this Court to hold the view that the second respondent's appeal has almost no "reasonable probability of success" before it has the full record and before it hears the parties out. Courts are supposed to be impartial when hearing matters that are brought before them and should only reach decisions after hearing both sides and carefully considering the arguments for and against granting of the prayers sought. In the present case, we do not have the full Record of Appeal before us to enable us to reach an informed decision about the second respondent's chances of success on appeal. Although we were availed a copy of the Judgment of the Constitutional Court ruling in favour of the applicants, this is not enough for this Court to form an informed opinion on the second respondent's probability of success on appeal. Besides, if the merits of a respective appeal were to be decided by looking at a partial/incomplete Record of Appeal, what then is the rationale of allowing parties to an appeal to file a full record of appeal and to appear before the court to prosecute their appeals?

It is in my view immaterial that the Constitutional Court ruled in favour of the applicants. This Court has, on numerous occasions affirmed decisions of the Constitutional Court. Similarly, on many other occasions, this Court has reversed, wholly or in part, the decisions of the Constitutional Court. Given that this Court has neither been availed the Ruling of the Trial Judge which allowed the second respondent to be rejoined to the proceedings that led to the consent judgment, nor heard Constitutional Appeal No. 5 of 2010 on its merits, it is, in my view, premature and very prejudicial for this Court to pronounce itself on the prospects of success of the second respondent's appeal No. 5 of 2010.

It may well be that the second respondent's appeal will fail, just like other appeals to this Court sometimes do. But this is a question that this Court should and will answer after hearing the merits of the appeal and not before.

The second respondent admitted that it had been unable to comply with this Court's Order to pay further costs due to financial difficulties. This Court is not in position to ascertain whether the second respondent's poor financial situation is a direct result of the acts that gave rise to the High Court Civil Suit, which gave rise to the Constitutional decision and the resultant appeal to this Court. It may well be that. We should therefore not loose sight of the unfairness arising in the application of our Rules on further security for costs and also those on seeking a waiver in the event of inability to pay, which is clearly evident here. Rule 101(3) demands the Court's analysis is supposed to focus exclusively on the financial inability of the second respondent to pay the applicant's costs if the former lost the appeal.

What then is the legal basis for this Court to assume that the applicant will be successful? The other question that arises here is why should the Court Rules only put the spotlight on the second respondent's financial status and not the applicant's? What about the financial situation of the applicant? Would the applicant have been in position to have deposited 200,000,000/= if it had been ordered to do so by this Court? Will the applicant be in position to pay the Attorney General's costs if it loses the cross appeal? Given that the applicant is not required under Rule 101(3) and did not also find it necessary in this application, to file in this Court any list of its assets, bank statements and any other proof of its financial standing, what basis does the Court have to assume that it too has the means to pay the costs of either or both the first respondent or second respondent, even if it wholly or partially lost the appeal? How is the Court expected to reach this

assessment without the Rules requiring the applicant to provide this information? If no assessment can be made, what is the Courts' basis for striking out the second respondent's Constitutional appeal on the basis that it cannot pay the applicant's costs if it lost the appeal when the applicant's ability to pay the costs if it loses the appeal is neither ascertainable nor guaranteed?

The more fundamental question that we need to ask ourselves is that does it serve the interests of justice for our Rules to give a right to one party to lodge an application before us seeking for orders that the Court closes its doors to the opposing party on appeal before hand, because of the other party's financial standing at the time of either lodging the appeal or hearing an application for further security for costs?

In my view, applications for further security for costs lodged by a party to litigation are camouflaged applications intended to result into a short cut to justice or conclusion of legal disputes. The net effect of Rule 101(3) of the *Judicature (Supreme Court) Rules* is to make the Courts to endorse this short cut to justice, while denying equal protection of the law to the other party in a matter before the Court. The Constitution of Uganda provides for a right to a fair hearing in the determination of civil rights and obligations under Article 28(1), which the Rule 101(3) providing for further security clearly violates. The Constitution further provides under Article 44 that the right to a fair hearing shall not be derogated from. If it ever served any purpose, Rule 101(3) currently does not serve a useful purpose in Uganda's current constitutional order.

I am aware that the second respondent did not move this Court to formally challenge the Court's decision which ordered them to deposit 200,000,000/= Uganda shillings in this court as further security for costs. It is also true that the second respondent did not raise its concerns regarding the constitutionality or otherwise of all or some of

the Rules governing appeals in this Court as embraced in the **Judicature (Supreme Court) Rules** in a timely manner and that it only raised the constitutional challenges in response to the application to dismiss their appeal.

However, for all the reasons I have discussed in this partial dissent Ruling, I would not allow the application to dismiss the second respondent's constitutional appeal on grounds of its failure to deposit the 200,000,000/= Uganda Shillings as further security for costs. Dismissing a constitutional appeal on grounds of a party's failure to deposit further security for costs would, in my view, set a dangerous precedent that would have the effect of not only locking out the second respondent as a Constitutional appellant from being heard, but also future intending Constitutional appellants, as well as other resource constrained civil appellants, due to their inability to pay further costs.

That precedent would, in my view, be far more dangerous than the one this Court would set, if it declined to dismiss Constitutional Appeal No. 05 of 2010, and instead proceeded to dispose of the said appeal on its merits despite the second respondent's failure to comply with the disputed Order issued in Civil Reference No. 1 of 2011 or and its failure to formally apply to the Court to set aside in good time. In this partial dissent Ruling, I have clearly laid out the constitutional justification for declining to grant the application.

Furthermore, Rule 2(2) of the ***Judicature (Supreme Court) Rules*** vests this Court with inherent powers to make such orders as may be necessary for achieving the ends of justice. It further provides that the Supreme Court's inherent power extend to setting aside judgments which have been proved null and void after they have been passed.

The Ruling made in Civil Reference No. 1 of 2011, cannot stand in view of the constitutional challenges that the second respondent put up against it. The ends of justice demand that we invoke our powers under Rule 2(2). I would accordingly invoke this Rule.

In taking the positions that I have taken in this partial dissent ruling, I am fully aware that the original jurisdiction to interpret the Constitution is vested in the Constitutional Court. This Court is however vested with powers not only to apply the Constitution but to also exercise appellate constitutional jurisdiction. In my view, the Court would therefore be exercising the jurisdiction vested in it by the Constitution of Uganda. But even if I had not held this view, the solution for this Court would still not be to grant the application to dismiss the second respondent's Constitutional appeal. Rather, the proper procedure would then have been to refer these questions to the Constitutional Court for interpretation in accordance with Article 137(5)(a) of the Constitution.

Conclusion

In conclusion, I would hold, for the reasons already given in this partial dissenting Ruling, that this Court's Order issued in ***Goodman Agencies Ltd. v. Hasa Agencies (K) Ltd., Supreme Court Civil Reference No. 1 of 2011***, be vacated and declared of no effect on grounds that it was issued *per incuriam,* without due consideration to Article 132(3) of the Constitution of Uganda. The Supreme Court, like any other Court can make errors. That is why the Constitution of Uganda under Article 132(4), gave this Court the right to depart from a previous decision when it appears to us right to do so. I believe it would be right for us to invoke this right in this resolution to this application.

I would also further order, for the reasons already given in this judgment, that the deposit of 200,000,000/= shillings in court as further security for the costs of the applicant, is not an essential step in the proceedings to be fulfilled before Supreme Court Constitutional Appeal No. 5 of 2010 can be heard on its merits.

I would accordingly dismiss this application with no order as to costs and would order that Constitutional Appeal No. 5 of 2010 and the cross appeal filed by the first respondent both be heard and disposed of, on their own respective merits.

Before I take leave of this matter, I would like to comment on two pertinent matters.

The first matter concerns the need for the ***Judicature (Supreme Court) Rules*** to separately provide for Rules governing Constitutional Appeals and Applications filed before this Court in a manner that is consistent with the provisions of the Constitution of Uganda. This Application has clearly exposed some of the gaps in the ***Judicature (Supreme Court) Rules*** that need to be addressed. I therefore call upon the Rules Committee to look at these areas and to make the necessary interventions.

The second matter relates to the need for the Supreme Court and indeed all other courts in the country, to treat litigants and their Counsel with respect not only during the hearing of the matters brought before the courts, but also in the language and words we use in our Judgments and Rulings.

The Ruling of the Court contains disrespectful language, which in my view, is inappropriate in a Ruling of the Supreme Court, which, is he highest court in this country. This is an emerging trend which is also noticeable in some judgments and rulings of other lower courts.

I agree that the argument of Counsel for the second respondent that the ***Judicature (Supreme Court) Rules*** do not wholly apply to Constitutional appeals was not valid and therefore lacked merit. However, the arguments and submissions of counsel for the second respondent challenging the constitutionality of the Supreme Court Rules, in as far that they claimed that the Rules of this Court unlawfully impede on the right of appeal provided for under Article 132(3) of the Constitution, should not have been dismissed as lacking in logic, even if the Court did not accept them. The issues raised by these arguments have far reaching constitutional implications for not only the second respondent (the appellant) in this case, but also for access to this Court by parties aggrieved by any final decision of the Constitutional Court.

There is nothing strange or without logic about the arguments raised by counsel for the second respondent regarding the constitutionality or otherwise of the Supreme Court Rules governing payment of further security for costs; the equating of constitutional appeals with civil appeals, or even the argument that the Order given in Supreme Court Civil Reference No. 1 of 2011 was given *per incuriam.* On the contrary, the arguments of counsel for the second respondent, in my view, raised very serious issues for this Court's determination and also underscored the supremacy of the Constitution; as well as the need to distinguish between Constitutional Appeals and Civil Appeals; and the implications for access to justice and for constitutionalism if this Court were to

dismiss a Constitutional Appeal on grounds of an appellant's failure to pay further security for costs.

Courts should desist from using language which could have the effect of either intimidating, scaring or demeaning litigants and/or their counsel. Such language can in the long run, not only prevent litigants and/or their counsel from advancing arguments before the court which they deem fit in support of their case, but could also drive away litigants and/or their counsel from court, for fear of being embarrassed, abused or ridiculed by the Judges or other Judicial Officers.

Worst still, litigants and/or their counsel could also easily pick a leaf from the court's language and retaliate in a similar manner. This could, in turn result into chaotic and disorderly courtrooms and court proceedings.

Even where a litigant's claims, pleadings, arguments or contentions are devoid of merit, it is still possible and indeed incumbent on the Courts and the Judicial Officers presiding over such disputes which may be between the State and its citizens or between private citizens, to remain above reproach while disposing of these matters, among other things, by using appropriate but respectful language not only during the hearing but also in our Rulings and Judgments. This Court needs to set the bar for other courts to follow.

Dated at Kampala this .....3rd..... day of .....July..... 2014.

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HON. DR. ESTHER KISAAKYE

JUSTICE OF THE SUPREME COURT