

5                                   **THE REPUBLIC OF UGANDA**  
                                  **IN THE HIGH COURT OF UGANDA AT KAMPALA**  
                                  **(COMMERCIAL DIVISION)**  
                                  **MISC. APPLICATION NO. 0003 OF 2024**  
                                  **(ARISING OUT OF CIVIL SUIT NO. 1683 OF 2023)**

10                   **TETRA TECHNICAL SERVICES (U) LTD                   :.....: APPLICANT**

**VERSUS**

**PSI ENGINEERING (U) LIMITED                   :.....: RESPONDENT**

15                   **BEFORE: HON. LADY JUSTICE PATIENCE T.E. RUBAGUMYA**

**RULING**

Introduction

20   This application was brought by Notice of Motion under **Section 98 of the Civil Procedure Act, Cap.71, Order 36 Rules 3 and 4 and Order 52 Rules 1 and 3 of the Civil Procedure Rules SI 71-1** seeking orders that:

- 25                   1. Unconditional leave be granted to the Applicant to appear and defend Civil Suit No. 1683 of 2023.
2. Costs of this application be provided for.

30   Background

                                  The background of this application is contained in the affidavit in support of the application deposed by Mr. Byaruhanga Gadson, the Technical Director of the Applicant, and is summarized below:

- 35   1. That the Applicant entered into a service contract with the Respondent dated 4<sup>th</sup> August, 2022, for execution of two (2) projects that is Nagongera-Butaleja 11KV reliability improvement and Tororo

*ptw*

5 Main-Busia 33KV reliability improvement at a cost of UGX 732,053,574.30/= and UGX 675,455,354/= respectively.

2. That the Applicant substantially paid the above contractual sum leaving a balance of only UGX 61,505,539.30/=.

10 3. That the amount claimed in the main suit is not the actual sum due and owing from the Applicant.

15 4. That the Applicant is not under any legal or moral obligation to pay the Respondent the unjustified sum claimed under the plaint.

20 5. That consequently there are serious triable issues which would warrant the grant of this application for the same to be adjudicated upon by this Court in a trial.

In reply to the application, the Respondent through its Managing Director Mr. Ian Sedirimba, opposed the application contending that:

25 1. On 4<sup>th</sup> August, 2022, the Applicant contracted the Respondent to execute two (2) projects namely; Tororo Main-Busia 33KV reliability improvement at a sum of UGX 679,455,367.60/= (Uganda Shillings Six Hundred Seventy-Nine Million Four Hundred Fifty-Five Thousand Three Hundred Sixty-Seven and Sixty Cents Only) inclusive of VAT  
30 and for Nagongera-Butaleja 11KV reliability improvement at a sum of UGX 732,053,574.30/= (Uganda Shillings Seven Hundred Thirty-Two Million Fifty-Three Thousand Five Hundred Seventy-Four and Thirty Cents Only) inclusive of VAT.

35 2. Upon ascertaining the hindrances in the execution of the projects, the Applicant and the Respondent on 26<sup>th</sup> October, 2022 and 7<sup>th</sup>

*phwé*

5 November, 2022, respectively; agreed to a variation of the projects which added a cost as follows;

i. For Tororo Main-Busia 33KV Reliability improvement, a variation sum of UGX 133,049,140.38/= inclusive of VAT,  
10 was agreed upon and approved; and

ii. For Nagongera-Butaleja 11KV Reliability improvement, a variation sum of UGX 133,732,005.38/= inclusive of VAT was agreed upon and approved.

15 3. The Respondent performed and completed its part of the projects by 31<sup>st</sup> December, 2022, and on 24<sup>th</sup> February, 2023, was issued with partial completion certificates for both contracts confirming completion, commissioning and handover of the projects to the Applicant.

20 4. On 30<sup>th</sup> June, 2023, the Respondent concluded with the defects liability period without any notification of default from the Applicant and that on 10<sup>th</sup> August, 2023, the Applicant undertook to settle the outstanding sums of UGX 447,700,580/= in four equal instalments, although it was exclusive of VAT but to no avail.

25 5. Upon being served with the demand letters and the pleadings of the Court on 19<sup>th</sup> December, 2023, the Applicant on 21<sup>st</sup> December, 2023, made a partial payment of UGX 200,000,000/= to the Respondent. As such the outstanding sum would be UGX 317,119,766.83/=.

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5 In rejoinder, Mr. Byaruhanga Gadson disputed the Respondent's affidavit  
in reply contending that:

1. It is not true that the parties ever agreed to a variation of the two  
projects contracts (Tororo Main-Busia 33KV reliability improvement  
and Nagongera-Butaleja 11KV reliability improvement) as alleged on  
10 26<sup>th</sup> October, 2022 and 7<sup>th</sup> November, 2022 respectively.
2. The attached documents "B1" and "B2" which the Respondent refers  
to as the variation of contract are UMEME service orders with  
different amounts to the ones stated by the Respondent as variation  
15 costs.
3. In the absence of proof of the alleged variations, the Respondent's  
demands in the sum of UGX 517,119,766.30/= as due and owing to  
it for the Applicant cannot stand and the Respondent has never  
20 executed any works in respect of the said unpaved variations to the  
ongoing works contracted.
4. The Applicant's payment plan for the outstanding balance executed  
between it and the Respondent was made in respect of the two  
25 contracts executed between the parties and not the alleged  
variations, and that the payments thereunder were substantially  
paid.
5. The Applicant has substantially paid the known contractual sum for  
30 the two projects and the only amount that remains unpaid to the  
Respondent is a sum of UGX 61,305,539/=.
6. The disparity between the known UGX 61,305,539.30/= and the  
unproven/unsubstantiated claim of UGX 517,119,766.83/= (now

*phwé*

5           stated to be UGX 317,119,766.83/= in the Respondent's affidavit is  
a humongous one that calls for Court's interrogation and  
investigation by calling for evidence from the parties at a full trial.

### Representation

The Applicant was represented by M/s Maldas Advocates while the  
10 Respondent was represented by M/s A.F. Mpanga Advocates.

The parties were directed to file written submissions which they did and  
the same have been considered by the Court.

### Issues for determination

1. Whether the Applicant raised sufficient grounds to warrant the grant of  
leave to appear and defend Civil Suit No.1683 of 2023?
2. What remedies are available to the parties?

### Applicant's submissions

Counsel for the Applicant submitted that for an Applicant to be granted  
25 leave to appear and defend, he/she has to show that there is a bonafide  
triable issue of fact or law. That the Applicant is not bound to show a good  
defence on merits but should satisfy that there is an issue or question in  
dispute which ought to be tried. Counsel for the Applicant referred the  
Court to the case of **Maluku Interglobal Trade Agency Vs Bank of**  
30 **Uganda [1985] HCB 65.**

Counsel for the Applicant also submitted that the Applicant approves the  
execution of the agreements evidenced by annexures "A1" and "A2" to the  
plaint but not the variation of the said Agreements as reflected in

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5 annexures “**B1**” and “**B2**” to the affidavit in reply and the amount of the unpaid money in respect of the projects.

While relying on **Sections 60-72 of the Evidence Act, Cap. 6**, Counsel for the Applicant opposed the admissibility of annexures “**B1**” and “**B2**” contending that the Respondent is not the author and has no connection  
10 with the said documents as they are neither addressed to it nor referred to in the contracts above. That the annexures are marked UMEME service orders and the amounts indicated under paragraph (4) of the affidavit in reply as constituting the variations do not match/tally with those indicated in the said annexures.

15 Counsel for the Applicant further submitted that in its application and affidavit in support thereof, the Applicant attached proof of payment to the Respondent of the substantial contract sum in respect of the two projects, leaving a balance of UGX 61,505,539.30/= an amount that was not controverted by the Respondent. Referring to the case of **James Ham**  
20 **Ssali and Anor Vs Commissioner for Land Registration HCMA 859 of 2012**, Counsel submitted that any uncontroverted evidence shall be taken as admitted by the party against which it is brought.

In conclusion, Counsel for the Applicant submitted that the Applicant has disclosed a bonafide issue that cannot be tried solely on an affidavit basis.  
25 Counsel submitted that the triable issues disclosed are;

1. Whether the parties ever agreed to and/or executed any variation deeds to the two (2) main contracts?
2. Whether the Respondent ever executed any additional works under  
30 the alleged variations?

*phwé*

5        3. Whether the Applicant is liable to pay the Respondent the amount claimed?

Counsel for the Applicant prayed for the grant of this application.

Respondent's submissions

10        In reply, Counsel for the Respondent first clarified the Applicant's assertions regarding the difference in the amount of money as claimed in the plaint and the affidavit in reply. Counsel for the Respondent explained that on 19<sup>th</sup> December 2023, the plaint was filed for payment of a sum of UGX 517,119,766/=. However, on 21<sup>st</sup> December 2023, the Applicant transferred to the Respondent's account a sum of UGX 200,000,000/=  
15        which reduced the amount to UGX 317,119,766/= as reflected under annexures **"D1"**, **"D2"** of the affidavit in reply and annexure **"SD"** to the affidavit in support.

20        Counsel for the Respondent further explained that the above outstanding sum included the amount of the variation and that annexure **"SD"** shows an account of payments on 21<sup>st</sup> June, 2023, leaving a balance of UGX 261,505,539/= but those were the Applicant's calculations. Counsel submitted that on 10<sup>th</sup> August, 2023, through annexure **"E"** to the affidavit in reply, the Applicant wrote to the Respondent accepting to clear the outstanding sum of UGX 447,700,580/= in four instalments. Counsel for  
25        the Respondent, however, contended that though this was the right amount, it omitted VAT of 18%.

30        Counsel also explained that according to the Applicant, on 21<sup>st</sup> June, 2023, a sum of UGX 261,505,539/= was outstanding but on 10<sup>th</sup> August, 2023, the Applicant confirmed that the outstanding sum was UGX 447,700,580/=. That going by the Applicant's own account, upon payment

*phw*

5 of UGX 200,000,000/= on 21<sup>st</sup> December, 2023, the outstanding sum ought to have been UGX 247,700,580/= not UGX 61,505,539.30/= as claimed.

Counsel for the Respondent submitted that the sum of UGX 447,700,580/= rightly admitted by the Applicant as the outstanding sum  
10 as of 10<sup>th</sup> August, 2023, was without VAT of 18%. That the said VAT of 18% would attract UGX 80,586,104.4/= totaling UGX 528,286,684/=.

Counsel for the Respondent further submitted that the Respondent has proved that there was a variation of works for the two projects which attracted additional amounts. Counsel submitted that in its affidavit in  
15 rejoinder, the Applicant has not attached any document to show that the variation was not agreed on and that the Respondent attached annexures “B1”, “B2”, “B3” and “B4” as evidence of the approved variations.

Counsel for the Respondent also submitted that the Applicant’s submission on the inadmissibility of documents based on **Sections 60-72**  
20 **of the Evidence Act** is misconceived as the Act does not apply to affidavits as reflected under **Section 1 of the Act**. Counsel contended that what is applicable here is **Order 19 Rule 3 (1) of the Civil Procedure Rules**.

In conclusion, Counsel prayed for the dismissal of the application, and further submitted that should Court be inclined to grant it, then it should  
25 order for payment of UGX 247,700,580/= according to the Applicant’s calculations, as the outstanding amount together with costs of the application and go for the trial for the balance of UGX 69,419,186/=.

#### Applicant’s submissions in rejoinder

Counsel for the Applicant contended that there is no documentary proof  
30 of the alleged variations that the Respondent alleges to have executed and

*phwé*



5 over which they now seek payments. Counsel argued that Court is duty bound to interrogate the issue on whether there were any variations to the original contract and whether the Respondent ever executed the same. Counsel contended that this is a triable issue which calls for evidence to be adduced.

10 Counsel for the Applicant further submitted that the Applicant did not in any way or anywhere concede to owing the Respondent Company the sum of UGX 317,119,766= and that their submission that judgment be entered for this amount in the Respondent's favour lacks basis.

Counsel further contended that the submission by the Respondent  
15 Company and the calculations therein show why this honorable Court must investigate this matter against cogent evidence being adduced at the trial.

In conclusion, Counsel for the Applicant reiterated the prayer that the matters raised in the application clearly require further interrogation by  
20 this Court and cannot be decided on affidavit evidence alone. Counsel contended that the works/variations allegedly executed must be proven at trial, the outstanding amounts are disputed and an analysis of the same needs to be done through providing relevant evidence.

25 Analysis and Determination

Issue No.1: Whether the Applicant raised sufficient grounds to warrant the grant of leave to appear and defend Civil Suit No. 1683 of 2023?

**Order 36 Rule 3 (1) of the Civil Procedure Rules**, stipulates that a Defendant served with summons, issued upon the filing of a specially  
30 endorsed plaint and affidavit under **Rule 2** of this Order shall not appear

*phwé*

5 and defend the suit except upon applying for, and obtaining leave from Court.

For leave to appear and defend a summary suit to be granted, an Applicant must show by affidavit or otherwise that there is a bona fide triable issue  
10 of fact or law. The principles governing the grant of unconditional leave to appear and defend were laid down in the case of **Maluku Interglobal Trade Agency Ltd Vs Bank of Uganda (supra)**, in which Court held that:

“Before leave to appear and defend is granted, the defendant must show by affidavit or otherwise that there is a bonafide triable issue  
15 of fact or law. When there is a reasonable ground of defence to the claim, the plaintiff is not entitled to summary judgment. The defendant is not bound to show a good defence on the merits but should satisfy Court that there was an issue or question in dispute which ought to be tried and the Court should not enter upon the  
20 trial of the issue disclosed at this stage.”

Further in the case of **Jamil Ssenyonjo Vs Jonathan Bunjo, H.C. Civil Suit No. 180 of 2012**, it was stated that a triable issue is one that only arises when a material proposition of law or fact is affirmed by one party and denied by the other. It is, therefore, capable of being resolved through  
25 a legal trial that is, a matter that is subject or liable to judicial examination in Court.

A defence so raised by the Applicant should not be averred in a manner that appears to be needlessly bald, vague or sketchy. A triable issue must  
30 be differentiated from a mere denial. Therefore, the defence raised must not be a sham intended to delay the Plaintiff from recovering his/her money. If the defence is based upon facts, in the sense that material facts alleged by the Plaintiff in the plaint are disputed or new facts are alleged

*phwé*

- 5 constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. In essence, where the Applicant raises a good defence, the Plaintiff is barred from obtaining summary judgment.
- 10 In the case of **Kotecha Vs Adam Mohammed [2002] 1 EA 112**, it was held that where a suit is brought under summary procedure on a specially endorsed plaint, the Defendant shall be granted leave to appear if he/she can show that he/she has a good defence on merit, or that a difficult point of law is involved; or a dispute as to the facts which ought to be tried; or a
- 15 real dispute as to the amount claimed which requires taking an account to determine; or any other circumstances showing reasonable grounds of a bona fide defence.
- 20 Furthermore, in the case of **Maluku Interglobal Trade Agency Vs Bank of Uganda (supra)**, the Court noted that in such a case;

25 *“The defendant is not bound to show a good defence on the merits but should satisfy the Court that there was an issue or question in dispute which ought to be tried and the Court shall not enter upon the trial of issues disclosed at this stage.”*

In the instant case, the Applicant does not dispute its indebtedness to the Respondent but the amount claimed. It contends that it substantially paid the contractual sum leaving a balance of only UGX 61,505,539.30/= instead of what is claimed in the plaint.

- 30 The Applicant also disputes ever agreeing to a variation of the two agreements as stated by the Respondent in its affidavit in reply and that the attached documents “**B1**” and “**B2**” which the Respondent refers to as the variation contracts are UMEME service orders which have different

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5 amounts from the ones stated by the Respondent as variation costs. In his  
submissions, Counsel for the Applicant disputed the admissibility of  
annexures “**B1**” and “**B2**” contending that they would be best presented  
by a UMEME official during trial to fulfil the requirement under Section  
60-72 of the Evidence Act. However, Counsel for the Respondent while  
10 referring to Section 1 of the Evidence Act contended that the Evidence Act  
does not apply to affidavits.

**Kanyeihamba JSC** in the case of **Kakooza John Baptist Vs Electoral  
Commission and Yiga Anthony Supreme Court Election Petition  
Appeal No.11 of 2007**, stated that;

15 *“In my opinion, therefore, rules that apply to affidavit evidence do  
not necessarily apply to annextures to those affidavits. The reason  
for this view is that the affidavit contains the facts to which the  
deponents swears to be true because he or she has personal  
knowledge of them. This cannot be true of annextures to  
20 affidavits.”*

**Order 19 Rule 3 (1) of the Civil Procedure Rules** provides for matters to  
which affidavits shall be confined to include such facts as the deponent is  
able of his or her knowledge to prove, except on interlocutory applications,  
on which statements of his or her belief may be admitted, provided that  
25 the grounds thereof are stated.

Considering the above authorities, I have analyzed annexures “**B1**” and  
“**B2**”, together with “**B3**” and “**B4**” as annexed to the affidavit in reply.  
“**B1**” and “**B2**” are titled UMEME service orders for the two projects dated  
30 9<sup>th</sup> December, 2022 and 18<sup>th</sup> November, 2022 respectively while “**B3**” and  
“**B4**” are change of request forms for both projects respectively. These

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documents are stated to be proof of a variation of the original agreement by the Respondent. However, their contents do not disclose information to that effect and the same are disputed by the Applicant. Paragraph 4 of the affidavit in reply that introduces “**B1**” and “**B2**” does not disclose how the documents were obtained.

The information contained therein requires a further explanation of the existence of the variation which can only be handled during the trial. Therefore, given the nature of this application, the determination of the admissibility of the said documents in such a case is irrelevant as it raises questions on the amounts pleaded by the Respondent and hence can be formulated into a triable issue which cannot be determined in this instant application.

I have also considered annexure “**E**” to the affidavit in reply which is a payment plan dated 10<sup>th</sup> August, 2023. According to the annexure, by 10<sup>th</sup> August, 2023, the outstanding sum was UGX 447,700,580/= (Uganda Shillings Four Hundred Forty-Seven Million Seven Hundred Thousand Five Hundred Eighty Only). The said amount was to be paid in four instalments.

Annexure “**F1**” to the affidavit in reply is a payment ledger dated 20<sup>th</sup> February, 2024 and shows an outstanding balance of UGX 248,179,552.80/= for the Nagongera-Butaleja project.

It is also the Respondent’s contention under paragraph 8 of the affidavit in reply that on 21<sup>st</sup> December, 2023 after filing the suit, the Applicant effected a payment of UGX 200,000,000/= leaving a balance of UGX

*phw*

5 317,119,766/=-, which the Applicant now disputes. These all raise questions about the outstanding debt.

10 The principle espoused in the authorities discussed above and as laid out in the case of ***Twentsche Overseas Trading Co. Ltd Vs Bombay Garage [1958] EA 741***, is that summary procedure is resorted to in clear and straightforward cases where the demand is liquidated and there are no issues for determination by Court except for the grant of the claim.

15 As analyzed above, the facts and the evidence adduced by both Counsel disclose triable issues that need to be proved. This Court has to inter alia determine whether there was a variation of the original agreements to establish the sum of money owing to the Respondent if any, in the  
20 circumstances. Accordingly, the Applicant has shown that it has a defence to the suit hence placing the plaint outside the ambit of **Order 36 of the Civil Procedure Rules**.

25 Issue No.2: What remedies are available to the parties?

The East African Court of Appeal in the case of ***Churanjila & Co. Vs A.H Adam (1) (1950) 17 EACA 92***, held that a Defendant who has a stateable and arguable defence must be allowed to state and argue it before the  
30 Court and that all the Defendant has to show is that there is a definite triable issue of fact or law.

In the premises, I find the Applicant to have raised triable issues that merit the grant of this application. The Applicant is therefore entitled to  
35 unconditional leave to appear and defend the main suit. Accordingly, the application is granted with the following orders:

*phwé*

1. The Applicant is hereby granted unconditional leave to appear and defend Civil Suit No.1683 of 2023.

2. The Applicant is ordered to file its Written Statement of Defence within fourteen (14) days from the date of this Ruling.

3. Costs of the application shall be in the cause.

I so order.

Dated, signed and delivered electronically this **14<sup>th</sup>** day of **March, 2024**.

*Patience*  
Patience T. E. Rubagumya

## JUDGE

14/03/2024

7:20am

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