THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

MISCELLANEOUS APPLICATION NO. 1843 OF 2022

[ARISING FROM CIVIL SUIT NO. 1061 OF 2022]

EMORU & CO. ADVOCATES] APPLICANT

VERSUS

ISS GLOBAL FRIEGHT FORWARDING COMPANY] RESPONDENT

UGANDA SMC LIMITED]

Before: Hon Justice Ocaya Thomas O.R

RULING

Background

This is an application for unconditional leave to appear and defend by the Applicant. The Respondent filed HCCS 1061 of 2022 ["the main suit"] seeking recovery of USD 31,200. It is alleged that the above stated sums were paid to the Applicant firm by a creditor of the Respondent for onward transmission to the Respondent but the same was never done.

According to the Respondent, it engaged an advocate known as Moses Byaruhanga who was a partner in the Applicant firm to recover money from some debtors of the respondent. Prior to the engagement, the said advocate shared the firm profile of the Applicant firm leading to the execution of an engagement letter on 11th February 2022 between the Respondent and the Applicant firm. It was understood that the engagement was to be carried out principally by Moses Byaruhanga assisted by another partner, Yonna Massa Mafuko. Under the engagement, the Respondent would pay disbursement fees of USD 1,200 and earn a professional fee of 10% of the sums

recovered. The Respondent asserts that it transferred the above-stated amount to the Applicant's account details indicated in the engagement letter.

According to the Respondent, upon receipt of the disbursement sums, the Applicant firm began writing to all the debtors demanding the sums due to the Respondent. In the course of carrying out the engagement, the Applicant firm recovered a total of USD 38,818 from the Respondent's creditors which was paid to Moses Byaruhanga's USD account held with Stanbic Bank Uganda, Main Branch.

The Respondent contends that on 13 July 2022, its officer received an email from Moses Byaruhanga admitting that the above-stated sums were received from one of the Respondent's debtors, Coil (U) Limited but misappropriated by him. Mr. Byaruhanga promised to refund the same.

The Respondent contends that it engaged M/s AF Mpanga advocates who wrote a demand letter to the Applicant resulting in Mr. Byaruhanga refunding USD 3,000 and being afforded an indulgence of 10% of the sum due, leaving an outstanding balance of USD 31,200. The Respondent contends that the above stated sum was not paid, which caused the Respondent to file a summary suit by specially endorsed plaint.

The Respondent contends that the said Moses Byaruhanga was or held himself out as a partner of the Applicant, used an email generated using the applicant's email domain, generated a fee note using the applicant's insignia, had payments from the Respondent made to the applicant's account and held meetings with the Respondent at the Applicant's office premises and was included in the applicant's firm profile as a partner.

For the Applicant, a different version of events was presented. Mr. Emmanuel Emoru, the Managing Partner of the Applicant contended that sometime in December 2021, he was approached by Moses Byaruhanga with the idea of merging his firm M.G Byaruhanga & Partners with the Applicant firm. The reason was that the said Moses Byaruhanga was going to pursue master's studies in South Africa and did not want to

lose the clients he had obtained, thus the need for a merger. While the merger idea was being discussed, Mr. Byaruhanga informed Mr. Emoru of the Respondent, his client who needed debt recovery services and proposed that the Applicant firm undertakes these instructions pending the conclusion of the merger discussions. The Applicant contends that against this background, an engagement letter was made by Mr. Byaruhanga where he appointed himself lead contact person and in charge of the client.

The Applicant recognizes that the Respondent paid to it the capped disbursement of USD 1,200 after which the Applicant firm wrote demand letters to the Respondent's debtors but none of them paid. The Applicant contends that the proposed merger didn't work out and in March 2022, the said Moses Byaruhanga said he was taking back his client. Mr. Emoru stated that he didn't hear about the Applicant again until about the 16th of June 2022 when he got a call from a one Brian Kalule about the funds in issue. He says he called Mr. Byaruhanga to inform him about this conversation and Mr. Byaruhanga said that the same was a personal matter which he would handle and sort out.

Mr. Emoru contends that the next time this matter came up was a demand letter from AF Mpanga advocates demanding payment of USD 38,818 allegedly received by the Applicant firm from Coil (U) Ltd. This letter was also forwarded to Mr. Byaruhanga who contended that he had engaged the Respondent and undertaken to repay the money as an individual.

According to the Respondent, at the time of receipt of the funds, Mr. Byaruhanga was not a partner or in any way associated with the Applicant firm, was not practising under the same name and style as the Applicant firm, had not been authorized to receive money for and on behalf of the Applicant firm for onward transmission to the Respondent and was acting on the frolic of his own.

Representation

The Applicant represented itself while the Respondent was represented by M/s AF Mpanga Advocates.

Evidence and Submissions

The Applicant led evidence by way of an affidavit in support deponed by Mr. Emmanuel Emoru while the Respondent led evidence by way of an affidavit in reply deponed by Ronald Kahuma, its accountant.

Both parties made submissions in support of their respective cases which I have considered in arriving at my decision below but have not found it necessary to reiterate.

Decision

As noted above, the main suit was commenced by way of specially endorsed plaint under the provisions of **Order 36 Rule 2** of the Civil Procedure Rules["CPR"]. This procedure is used to originate liquidated or certain claims for which it is believed that the Defendant does not have a defence to the claim.

In this procedure, there is no automatic right to defend. The right to defend is only conferred by the leave of court, upon an application by the Defendant in the summary suit.

Under the provisions of **Order 36 Rule 3** of the CPR, a defendant to a summary suit, who is served with summons, ought to file an application for leave to appear and defend within the timelines indicated in the summons. Failure to do so will entitle the plaintiff to a judgment in default for the sums claimed. Equally so, when an application for leave to appear and defend fails, the plaintiff is entitled to judgment without further proof of the claim. [See **Order 36 Rule 5** of the CPR]

The rationale for summary procedure has been summarised in the long standing decision of **Post Bank (U) Ltd v Abdul Ssozi SCCA 8/2015** where the Supreme Court held thus:

"Order 36 was enacted to facilitate the expeditious disposal of cases involving debts and contracts of a commercial nature to prevent defendants from presenting frivolous or vexatious defences in order to unreasonably prolong litigation. Apart from assisting the courts in disposing of cases expeditiously, Order 36 also helps the economy by removing unnecessary obstructions in financial or commercial dealings."

See also **Zola & Another v. Ralli Brothers Ltd. & Another [1969] EA 691, 694**.

The Applicant brought this application for unconditional leave to appear and defend the main suit. **Order 36 Rule 4** of the CPR provides thus:

"An application by a defendant served with a summons in Form 4 of Appendix A for leave to appear and defend the suit shall be supported by affidavit, which shall state whether the defence alleged goes to the whole or to part only, and if so, to what part of the plaintiff's claim, and the court also may allow the defendant making the application to be examined on oath. For this purpose, the court may order the defendant, or, in the case of a corporation, any officer of the corporation, to attend and be examined upon oath, or to produce any lease, deeds, books or documents, or copies of or extracts from them. The plaintiff shall be served with notice of the application and with a copy of the affidavit filed by a defendant."

As I said, summary procedure presupposes that the defendant does not have a defence and that there is no matter to try. It follows that if the defendant shows that it has a defence or that there is a matter to try, summary procedure is untenable. In **Kotecha v. Mohammed [2002] 1 EA 112**, the threshold for grant of leave to appear and defend was laid out:

"Therefore English authorities on that rule are of persuasive authority and provide a useful guide. Under the English Rule the Defendant is granted leave to appear and defend if he is able to show that he has a good defence on the merit(s); or that a difficult point of law is involved; or a dispute as to the facts which ought to be tried; or

a 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. See Saw v Hakim 5 TLR 72; Ray v Barker 4 Ex DI 279."

See also **Churanjilal & Co. v. A. H. Adam (1950) 17 EACA, 92, Hasmani v. Banque du Congo Belge (1938) 5 EACA 89 at 89**, **Pamela Anyoti v Root Capital Inc HCMA 844/2023**

It follows that it is not sufficient to simply deny indebtedness. Some older decisions such as the decision of the majority **in Photo Focus (U) Ltd. v. Group Four Security Ltd CACA 30/2000** suggest that a mere denial of indebtedness, without more, is a good defence. I do not think this to be the case. This is because, first a general denial of indebtedness is not itself a valid defence under the CPR. [See **Order 6 Rule 8 of the CPR, Ecobank Uganda Limited v Kalson's Agrovet Concern Ltd & Anor HCCS 573/2016**]

If the reasoning in the Photo Focus decision was to be applied, it would mean that summary procedure would never work since the defendant could easily bring an application for leave to appear and defend with three paragraphs; one introducing himself, a second indicating he or she or it denies indebtedness and a third indicating that he believes all the averments are true and the application would have to succeed.

Second, the purpose of an application for leave to appear and defend is to show that there is something to try, such that granting of a summary judgment is not in the interests of justice.

Third, and as observed by Justice Irene Mulyagonja *(as she then was)* in **George Begumisa v East African Development Bank HCMA 451/2010**, the decision in Foto Focus has been departed from by the Court of Appeal which issued it, as evidence in the Kotecha Decision.

The sum total of the above is that an Applicant must show one of two things; either that they have a defence to the claim, or that there is a there is a matter to try. <u>This can</u>

be summarised by saying that an Applicant for leave to appear and defend must show that there is a triable issue whether this is a contestation caused by their defence to the claim or some other issue of fact or law affecting the matter.

Having established the threshold for determination of applications of this nature, I must now turn to the applicant's defence/grounds for the application for leave to appear and defend.

The Applicant's defence

The Applicant attached a draft defence, Annexure B to their affidavit in support which goes to the whole of the Respondent's claim. The gist of the applicant's defence is that the time the said Moses Byaruhanga received the funds in issue, he was not in any way associated with the Applicant, much less as a partner in the firm. Further, the Applicant contends that it never authorized Mr. Byaruhanga to receive money on behalf of the Respondent for onward transmission to it and accordingly, Mr. Byaruhanga was acting on the frolic of his own.

The Applicant, at paragraph 21 of its affidavit in support, also intimated that its defence sought to raise the following triable issues:

(a) Whether the suit is brought against a wrong party.
(b) Whether the Respondent has a cause of action against the Applicant.
(c) Whether in the circumstances, the partners of the Applicant are vicariously liable for the actions of Mr. Byaruhanga.
(d) Whether Mr. Byaruhanga should be held personally liable for funds received on his personal account on behalf of the Respondent company.
(e) What remedies are available to the parties?

A partnership is a relationship between partners who agree to share the profits of the business. The business can be carried on by all of them or any of them acting for all. The law of agency applies to partnership law. Mutual agency between the partners is one of the essentials to create

partnership. Every partner is an agent of the partnership for the purpose of its business. An agent can make contracts on behalf of a principal under three types of authority: express, implied, and apparent. Express authority is that explicitly delegated to the agent, implied authority is that necessary to the carrying out of the express authority, and apparent authority is that which a third party is led to believe has been conferred by the principal on the agent, even though in fact it was not or it was revoked. Consequently, every partner is an agent of the firm and his or her other partners for the purpose of the business of the partnership. Hence, a partner embraces the character of both, the principal and the agent. Therefore, if a partner acts for himself or herself and in his or her own interest in the common concern of the partnership, then he or she is acting as a principal. On the other hand, if he or she acts for and in the interest of his or her partners, then he or she is acting as an agent. In a general partnership, such as the applicant, each partner is an agent of the partnership for the purpose of its business; each partner's acts that apparently carry on partnership business in the usual way bind the partnership. Every partner having the capacity to act as firm's agent, the act done by any partner renders the whole firm liable towards a third party. The whole of the firm, which means all the partners of the firm become liable for an act of the firm done by any partner See **Section 4 of the Partnerships Act, Jackie Pimer v Isaac Bakayana & Ors HCCS 319/2019, Dinesh Kotak v. Jagdish Kotak Royal Bank of Scotland Plc (Third Party) Bowbridge Ltd [2017] EWHC 1821 (Ch), Digital Displays Limited v TM Construction Company Ltd & Ors HCCS 21/2015.**

In determining whether the act binds a firm, one needs to consider whether the act or omission done was done in the ordinary way to carry on the business of the firm and whether the said partner had actual or implied authority to bind the firm by way of undertaking the said act or omission. See **Jackie Pimer v Isaac Bakayana & Ors HCCS 319/2019**

I have considered Annexure F of the affidavit in reply which shows that the first instalment of the payments from Coil (U) Ltd was made on 11th April 2022 and the last instalment on31st May 2022. These documents were not disputed by the Applicant.

Whereas the Applicant asserts that Mr. Byaruhanga was nolonger a party by the time the said funds were received, the email correspondences show the said Mr. Byaruhanga sending emails using an email address tied to the applicant's domain (moses.byaruhanga@emoruadvocates.com) until 13th July 2022 which email signature represented Mr. Byaruhanga as, still a partner.

It is certainly typically that partners in law firms use work email addresses tied to the firm domain (owned by or paid for by the firm) with standardized email signatures reflecting the partner's name and position in the firm. It would certainly be odd, or at least imprudent, for a firm to not retain control of a firm email address after a partner left, leaving the partner to still be able to send emails using the email from a firm they nolonger work with. In today's world, the email has found acceptance as a valid and legitimate mode of communication, especially in corporate matters, including in communications between law firms and their clients.

I have therefore not found the ground that Mr. Byaruhanga was nolonger a partner when he received the money, and could not bind the Applicant firm as, from the evidence on record, he had access to the work tools that a partner typically has access to and which could and should have been retained by the Applicant the moment Mr. Byaruhanga left.

It must also be noted that the fact that Mr. Byaruhanga left the firm, would not, by itself alone, operate to mean that the firm would not be bound by obligations he bound them to when he was still partner. Further, even if Mr. Byaruhanga was not a partner, if he was held out as so, he would be liable together with the Applicant's partners as correctly noted by counsel for the Respondent. See **Section 6(1) and 16 of the Partnerships Act**

Regarding the question of cause of action and the propriety of the suit against the applicant, I note that a cause of action was defined as a bundle of facts which if taken together with the law applicable to them give the plaintiff a right to a relief against the

defendant. See **Attorney General v David Tinyefuza CCCP 1/1997, Auto Garage v Motokov 1971 EA 514**

As noted in **Jackie Pimer v Isaac Bakayana & Ors HCCS 319/2019T,** a party who alleges that they have incurred harm owing to the act of a partner in the normal course of the business of the partnership has a cause of action against all the partners of the firm, as the act of one partner binds the firm unless the exceptions at law exist.

A review of the specially endorsed plaint shows that the action is for recovery of monies diverted by Mr. Byaruhanga in the normal course of his work as a partner in the Applicant firm, and in the normal course of the applicant's business. I find that the Applicant has a cause of action, and resultantly that because of this, the Applicant is a proper party to the main suit. It follows that these two grounds of defence don't raise a triable issue.

The Applicant contended it cannot be liable for funds received by Mr. Byaruhanga in his own account and diverted by him. The thrust of this argument is that the Applicant's firm policy does not allow for the deposit of client funds on personal accounts from which the said funds were diverted by the said Moses Byaruhanga. It is true that the laws and rules governing legal practice require the creation of a client account unto which money due to clients, interalia is deposited. See **Section 40 and Schedule II to the Advocates Act**.

As noted above, an advocate is an agent of his or partners. Therefore, the partners will not be liable if the infraction of the advocate is not for and on behalf of the partners (being the principals). See **Fredrick JK Zaabwe v Orient Bank SCCA 4/2006**

Accordingly, in my view, it is necessary to try the issue in procuring the deposit of the Respondent's recovered sums on Mr. Byaruhanga's personal account and the consequent diversion of the same places liability on the Applicant. I have also found that the question as to whether Mr. Byaruhanga was held out as a partner one that requires trial.

Owing to the above, I find that, whereas parts of the Applicant's intended defence are prima facie unsatisfactory, the draft defences raises triable issues warranting determination.

Security

Order 36 Rule 8 of the CPR provides thus

"Leave to appear and defend the suit may be given unconditionally, or subject to such terms as to the payment of monies into court, giving security, or time or mode of trial or otherwise, as the court may think fit."

In my view, some of the situations where this provision can be invoked where the defence has, in its presentation at this stage, been somewhat doubtful or less persuasive or barely met the legal threshold. See **Joseph Muyinza Bunoli v William Tumusiime HCMA 820/2023, Pamela Anyoti v Root Capital Inc HCMA 844/2023**

As noted above, the Applicant's defence is doubtful and not entirely persuasive but raises a few triable issues that require adjudication. I accordingly find that this is a proper case for the grant of conditional leave to appear and defend as indicated below in my orders.

Conclusion

In the premises, the Applicant's application succeeds and I make the following orders:

(a) The Applicant is given leave to appear and defend in HCCS 1061/2022, conditional on the satisfaction of the condition in (b) below.

(b) The Applicant shall pay into court 25% of the sums claimed in the specially endorsed plaint being US$ 7,800.00 within forty-five (45) days from the date of this ruling.

(c) The Applicant shall file and serve its defence in the main suit within fifteen (15) days from the date of this ruling.

(d) The Respondent shall file and serve its response to the defence, if any within fifteen (15) days from the date of service of the Applicant's defence.

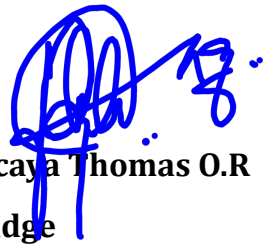
(e) Thereafter, the Respondent shall undertake the necessary pre-hearing processes.

(f) Where the condition in (b) above is not satisfied within the stipulated timeframe, applicant's leave to appear and defend in HCCS 1061/2022 shall be revoked, any pleadings or documents filed struck off the record and default judgment shall be entered for the Respondent.

(g) The costs of this application shall be in the cause.

I so order.

Delivered electronically this 8th day of January 2024 and uploaded on ECCMIS.



Ocaya Thomas O.R

Judge

8th January, 2024