

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISC. APPLICATION NO.0309 OF 2024
(ARISING OUT OF CIVIL SUIT NO. 0137 OF 2024)

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SADIK ALI ::::::::::::::::::::: APPLICANT

15

VERSUS

ASTRA PHARMA (U) LIMITED ::::::::::::::::::::: RESPONDENT

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

RULING

20 Introduction

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

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1. The Applicant be granted unconditional leave to appear and defend HCCS No.0137 of 2024.

2. Costs of this application be provided for.

Background:

The background to this application is contained in the affidavit of Mr. 30 Sadik Ali the Applicant, and is summarized below:

1. That the Respondent filed a summary suit vide HCCS No. 0137 of 2024 seeking to recover UGX 69,991,645/= (Uganda Shillings Sixty Nine Million Nine Hundred Ninety One Thousand Six Hundred Forty-Five Only) against the Applicant.

- 5 2. That the Applicant has a good defence on the merits with a difficult point of law involved.
- 10 3. That the Applicant's defence raises bonafide triable issues both in law and fact and these include that:
- 15 a) The Applicant was employed as the branch Manager of the Respondent from 2014 to sometime in October, 2023 when he was asked to leave office and allow an audit on the financial accounting system used by the Respondent, without any hearing.
- 20 b) The Applicant has never been served with the Audit Report and/or proof that the Respondent suffered financial loss of UGX 45,467,400/= (Uganda Shillings Forty-Five Million Four Hundred Sixty-Seven Thousand Four Hundred Only) as alleged.
- 25 c) The Applicant never obtained a salary advance of UGX 9,096,300/= (Uganda Shillings Nine Million Ninety-Six Thousand Three Hundred Only) from the Respondent.
- 30 d) The Applicant never made cash shortages amounting to UGX 6,607,345/=, UGX 3,400,000/= and UGX 5,020,045/= respectively.
- 35 e) The Applicant issued blank cheques No. 0011002 and 0011003 to Mr. Suhel Gulamali Lakhani, a co-worker at the Respondent's pharmacy as security for a friendly loan which he never provided to-date.

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- 5 f) There is need for a proper audit of the Respondent's Books of Accounts and accounting systems before any conclusion can be arrived at.
- 10 g) The Applicant is not indebted to the Respondent to the tune of UGX 69,991,645/= as an employee and/or in any way whatsoever.
- 15 4. That the nature of the dispute between the Applicant and the Respondent is related to employment which ought to be adjudicated upon as such by the appropriate Court.
- 20 5. That the Respondent's purported financial loss cannot be attributed to the Applicant who is an employee, without any trial.
- 25 In reply, the Respondent through Mr. Azizali Bhaibani, its Director, opposed the application contending that:
1. The application lacks a basis for consideration because it is tainted and riddled with malicious falsehoods and is a mere abuse of the Court process intending to subvert justice.
 2. The Applicant was employed as a Cashier and not as a branch Manager as indicated in the purported letter confirming his alleged appointment.
 - 30 3. Annexure "B1" attached to the application is a forgery and the Respondent has never at any time issued such a document and the Applicant's intent of procuring such is only to subvert and delay justice.

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- 5 4. The Respondent suffered a loss which the Applicant admitted to paying back as per the deed of undertaking attached to the plaint as it was his responsibility and the Applicant further issued security cheques for the payment which subsequently bounced.
- 10 5. There was no need for an Audit report as the statements of accounts were reconciled in the presence of the Applicant's Head of Accountants and the line Manager and the Applicant consented to the results and signed a deed of undertaking to pay the claimed sums.
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The Respondent also filed a supplementary affidavit in reply deponed by Mr. Suhel Gulamali Lakhani, its Operations Manager, contending that:

- 20 1. He is not a money lender nor does he have a money lending company.
2. He has never attempted to enter into a friendly loan agreement with the Applicant and neither has he ever executed any friendly loan agreement with the Applicant.
- 25 3. He received cheques No. 0011002 and 0011003 from the Applicant as security for the payment of sums in the deed of undertaking signed by the Applicant and Respondent's representatives but not as security for a friendly loan to him.

In rejoinder, the Applicant disputed the Respondent's affidavit in reply and

30 supplementary affidavit in reply contending that:

1. The Respondent's affidavit in reply and supplementary affidavit in reply affirm/confirm that the Respondent is not entitled to a summary judgment in HCCS No. 0137 of 2024 as there are bonafide issues of law and fact.

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- 5 2. Allegations of fraud or forgery cannot be resolved by way of affidavit but rather by the production of evidence to that effect which can only be done through the production of witnesses.
- 10 3. The Applicant has a claim against the Respondent for coercing him into signing an undertaking under duress, unlawful dismissal, unpaid salary and entitled wages, NSSF remission claims, repatriation claims, unpaid vacation ticket claims, severance pay and gratuity claims.
- 15 4. The Respondent ought to accord the Applicant an opportunity to be heard over allegations of causing financial loss with a fair trial as per the law.

Representation

The Applicant was represented by M/s Tuhimbise & Co. Advocates while
20 the Respondent was represented by M/s Taskk Advocates.

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

Issues for Determination

In accordance with **Order 15 Rule 5 (1) of the Civil Procedure Rules**,
25 this Court has rephrased the issues to read as follows:

1. Whether the Applicant has raised sufficient grounds to warrant the grant of unconditional leave to appear and defend Civil Suit No. 0137 of 2024?
- 30 2. What remedies are available to the parties?

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- 5 Issue No. 1: Whether the Applicant has raised sufficient grounds to warrant the grant of unconditional leave to appear and defend Civil Suit No. 0137 of 2024?

Applicant's submissions

Counsel for the Applicant relied on **Order 36 Rules 3 (1) and 4 of the Civil Procedure Rules** together with the cases of **Roko Construction Limited Vs Ruhweza Transportation and Construction (U) Limited HCMA No. 831 of 2020** and **Maluku Interglobal Trade Agency Ltd Vs Bank of Uganda [1985] HCB 65**, which set out the legal tests to be applied for the grant of leave to appear and defend.

- 15 Counsel for the Applicant submitted that pursuant to paragraphs 1-12 of the affidavit in support of the application and paragraph 3 of the affidavit in rejoinder, the Respondent is not entitled to a summary judgment as several questions and issues require trial by the Court such as;
- 20 a) Whether the Applicant is indebted to the Respondent to a tune claimed in the specially endorsed plaint?
- b) Whether cheques No. 0011002 and 0011003 issued to Mr Suhel Gulamali Lakhani were security for a loan or as payment for a debt to the Respondent?
- 25 c) Whether the letter of appointment of the Applicant into the Respondent Company is a forgery?
- 30 d) Whether the Applicant's position in the Respondent Company was a Cashier or a branch Manager?

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- 5 Counsel for the Applicant while relying on the cases of **Wandera Stephen Vs Goodman Agencies Limited and 2 Others Misc. Application No.680 of 2021** and **Adam Yacob Muhammed and Anor Vs Madaya Rogers HCT-04-CV-MC-0014-2013**, further submitted that it is now settled law that allegations of forgery as alleged by the Respondent, cannot be proved
10 by way of affidavit but by hearing of the parties on merit.

In conclusion, Counsel for the Applicant submitted that there are numerous triable issues to determine making it a proper case where unconditional leave to appear and defend should be granted.

Respondent's submissions

- 15 Counsel for the Respondent submitted that for the Applicant to be granted leave to appear and defend, he must be able to show that he has a good defence on merit, or that there is a difficult point of law involved or a dispute as to the facts which ought to be tried and that leave to appear and defend will not be granted merely because there are several allegations
20 of fact made in the Applicant's affidavit.

- Counsel for the Respondent relied on the cases of **Maluku Interglobal Trade Agency Ltd Vs Bank of Uganda (Supra)**, **Agony Swaibu Vs Swalesco Motor Spare and Decoration Dealers HCCA No. 48 of 2014**, **Uganda National Roads Authority Vs Vivo Energy Uganda Ltd HCMA No. 209 of 2014** and **Corporate Insurance Co. Ltd Vs Nyali Beach Hotel Ltd [1995-1998] EA 7**.

- 30 Counsel for the Respondent contended that the Applicant has fallen short of the threshold for the grant of leave to appear and defend on grounds that the Applicant's defence is a sham, premised on grave and material falsehoods. Counsel further contended that the Applicant's averments are

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5 not supported by any evidence yet as was held in the case of ***Angwee Kalanga Vs Odongo Milton & Another HCCS No. 65 of 2011***, he who asserts must affirm as the onus is on the party who asserts to prove an assertion.

In conclusion, Counsel for the Respondent submitted that the Applicant
10 has not presented a plausible, bonafide and good defense and thus the Court should dismiss the application with costs and enter a summary judgment in the main suit in favour of the Respondent.

Counsel further prayed that should the Court be inclined to grant the Applicant leave to appear and defend, the same should be conditional and
15 the Applicant should be ordered to deposit the claimed sums in Court.

Submissions in rejoinder

Counsel for the Applicant reiterated that there are several questions for determination on merit. Counsel for the Applicant argued that the Respondent did not prove that an audit report has ever been availed to
20 ascertain the liability of the Applicant and that there is a dispute as to the actual amounts owed, if any.

Counsel for the Applicant also reiterated that the Applicant has proved that he has a bonafide defence to the main suit and that there are triable issues that require Court's determination. Counsel, in conclusion,
25 submitted that this is a proper case where unconditional leave to appear and defend ought to be granted.

Analysis and Determination

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

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

As was held in the case of **Maluku Interglobal Trade Agency Ltd Vs Bank of Uganda (Supra)**, for leave to appear and defend a summary suit to be granted, an Applicant must show by affidavit or otherwise that there
10 is a bona fide triable issue of fact or law.

Further in the case of **Jamil Ssenyonjo Vs Jonathan Bunjo, H.C. Civil Suit No. 180 of 2012**, 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, hence, capable of being resolved through a legal trial that
15 is, a matter that is subject or liable to judicial examination in Court.

Therefore, 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 be differentiated from a mere denial. The defence raised must also not be a sham intended to delay the Plaintiff from recovering his/her
20 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 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.

25 Further, 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 is able to 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
30 to be tried; or a real dispute as to the amount claimed which requires

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- 5 taking an account to determine; or any other circumstances showing reasonable grounds of a bonafide defence.

Furthermore, in the case of **Maluku Interglobal Trade Agency Ltd Vs Bank of Uganda (Supra)** the Court noted that in such a case:

10 *"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."*

15 In the instant case, the Applicant disputes indebtedness to the Respondent. According to **annexure "C"** to the affidavit in support relied upon by the Respondent to claim a summary judgment, the Applicant signed an undertaking stating that he would pay back the money that would be missing. Though the Applicant acknowledges signing **annexure "C"**, he contends that it was obtained by coercion and duress and thus does not owe the Respondent the sums claimed in the summary suit.

20 I have carefully reviewed **annexure "C"** referred to hereinabove and it essentially illustrates that the Applicant pledged to pay a sum of UGX 45,467,400/= to the Respondent, as money that was missing. However, the Applicant disputes the annexure on grounds of coercion and duress. This point in my view is a matter that can only be resolved by hearing the evidence of both parties. In my considered view, this is a triable issue of fact which merits Court's consideration in a trial.

The Applicant also contends, under paragraphs 5, 7 and 8 of the affidavit in support of the application that financial loss cannot be attributed to him without proof and a trial.

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- 5 According to the specially endorsed plaint marked **annexure “A”** and attached to the Applicant’s affidavit in support, the Respondent seeks to recover UGX 69,991,645/= from the Applicant. However, according to **annexure “C”** to the specially endorsed plaint, the Applicant allegedly acknowledged to pay only UGX 45, 467,400/= which is now disputed.
- 10 Given the varying amounts in issue, it would be in the interest of justice for Court to hear the matter in a trial.

The Respondent has not adduced any clear evidence to show how they ascertained the liquidated sum being sought to be recovered from the Applicant.

- 15 I have also considered the other claims stipulated under paragraphs 4(c)-(k) of the plaint and the same are reflected under paragraphs 6, 7, 8, 9 and 10 of the affidavit in support of the summary plaint and observed that;

Paragraph 8 of the affidavit in support of the summary plaint shows a claim of UGX 3,400,000/=as money received from customers but not deposited on the Respondent’s account. **Annexures “F”, “G” and “H”** were attached as evidence. The said annexures are receipts which cannot stand on their own without any further evidence linking the same to the Applicant and providing further evidence to prove that the Applicant should be held responsible for the amount in dispute. As analyzed above, the facts and the evidence adduced by the parties and submissions by Counsel for the Applicant disclose issues that need to be proved to ascertain whether there is any money owed to the Respondent and if so, how much.

- As portrayed above, the documents presented in evidence by the Respondent in the plaint require clarification and further explanation which can only proficiently be done during the trial.

As was held in the case of ***Twentsche Overseas Trading Co. Ltd Vs Bombay Garage [1958] EA 741***, summary procedure is only resorted to in clear and straightforward cases where the demand is liquidated and there are no issues for determination by the Court except for the grant of
10 the claim.

In the circumstances, the facts and evidence adduced by the Applicant disclose triable issues of law that ought to be determined by the Court. The facts as stated in this application also need to be proved to ascertain the amount outstanding, if any, which therefore places the plaint outside
15 the ambit of **Order 36 of the Civil Procedure Rules.**

In the premise, issue No. 1 is resolved in the affirmative.

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
20 and arguable defence must be allowed to state and argue it before the 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 that the Applicant has raised triable issues of law and fact that merit the grant of this application. Therefore, the Applicant
25 is entitled to unconditional leave to appear and defend the main suit.

Accordingly, the application is granted with the following orders:

1. The Applicant is hereby granted unconditional leave to appear and defend Civil Suit No.0137 of 2024.

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- 5 2. The Applicant is ordered to file his 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.

10 Dated, signed and delivered electronically this **4th** day of **April, 2024**.



Patience T. E. Rubagumya

JUDGE

4/04/2024

7:30am

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