THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 1964 OF 2023
ARISING FROM CIVIL SUIT NO. 0685 OF 2023

GAN PINGJUAN :: APPLICANT

VERSUS

HUANG HEXIN :: RESPONDENT

(Before: Hon. Justice Patricia Mutesi)

RULING

Background

The respondent filed Civil Suit No. 0685 of 2023 ("the summary suit") in this Honourable Court seeking to recover the liquidated sum of 1,400,000 Yuan which is equivalent to UGX 700,000,000 from the applicant.

The Application

The applicant then filed this application by Notice of Motion under **Section 98** of the **Civil Procedure Act Cap 71** and **Order 36 rules 3** & **4** and **Order 52 rules 1** & **2** of the **Civil Procedure Rules, S.I. 71-1** for unconditional leave to appear and defend the summary suit on grounds that she has a good defence to it. The application is supported by an affidavit sworn by the applicant.

The applicant stated in her affidavit that in around 2016, she incorporated Xing Mao International Ltd and Jiuxing Group Company Ltd to carry out explosives and ore development in Uganda with the respondent. However, a dispute soon arose between her and the respondent over the management of finances. The 2 parties went for mediation before the Zhejiang Oversees Chinese Association Uganda ("the Association").

The applicant stated that the Association advised them to use the assets of the companies as collateral to repay the companies' debts. After the mediation, the parties signed a Mediation Agreement ("the agreement") on 19th April 2017. The respondent ignored the agreement and sued the applicant in the Chinese courts seeking the recovery of the same debt claimed in the summary suit. The Chinese

courts heard and determined that suit on its merits and this renders the claim in the summary suit unmaintainable in law.

The respondent filed an affidavit in reply opposing the application. He clarified that the agreement stated that the applicant was supposed to pay 1,200,000 Yuan to him within a period of 1 year from 19th April 2017. This was not done as the applicant only paid 100,000 Yuan. He acknowledged that the matter has been handled by the Chinese courts but that it was the applicant herein who took the matter there seeking to set aside the agreement which those courts upheld. He confirmed that the applicant has not paid him as they agreed.

The applicant filed an affidavit in rejoinder claiming that she paid 300,000 Yuan to the respondent on the day of the execution of the agreement. She accepted that she refused to complete the payment but explained that this was because the respondent had also refused to hand over the company properties to her as he was obliged to do under the agreement. She maintained that it was the respondent who sued her first in China and that she only later appealed to a higher Court. She confirmed that the judgments of those courts are valid and still standing. She reiterated that the summary suit is unmaintainable due to the previous proceedings in the Chinese courts over the same debt.

Issue arising

Whether this application discloses a bonafide defence or a triable issue in the summary suit.

Representation and hearing

At the hearing, the applicant was represented by Mr. Atuhumwize Collin of M/s Mark Mwesigye & Co. Advocates while the respondent was represented by Mr. Steven Galabuzi and Ms. Kaitesi Winnie of M/s Premier Advocates. I have considered all the materials on record, the submissions of the counsel and the laws and authorities they cited.

Determination of the issue

Whether this application discloses a bonafide defence or a triable issue in the summary suit.

Order 36 rules 3 and 4 of the Civil Procedure Rules S.I. 71-1 allow a defendant in a summary suit to apply for leave to appear and defend the suit. In **Maluku Integlobal Trade Agency v Bank of Uganda [1985] HCB 65,** it was 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 of fact or law. Where 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 the court that there is 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 ..."*** Emphasis mine.

In any application of this nature, it is incumbent upon the applicant to present a plausible defence. Leave will be denied where the Court is of the opinion that the grant of leave would merely enable the applicant to prolong the litigation by raising untenable and frivolous defences. (See **Agony Swaibu v Swalesco Motor Spare and Decoration Dealers, HCCA No. 48 of 2014**).

The ascertained facts of this matter are that the parties had an arrangement in which the respondent would invest money into their companies while the applicant sets up shop and runs those companies in Uganda. The respondent gave a little over 1,700,000 Yuan to the applicant for this purpose. A dispute soon arose between the parties with the respondent accusing the applicant of financial mismanagement. The parties referred the dispute to the Association for mediation. The mediation succeeded and the applicant agreed to refund most of the respondent's money but she has since reneged on that agreement.

This application raised 2 main points of contention. The first point concerns the quantum of the debt due to the respondent. In Clause 2 of the agreement, it was agreed that the applicant would refund 1,200,000 Yuan to the respondent within 1 year from 19th April 2017. Clause 5 of the agreement prescribed that, any breach of the agreement attracted a penalty of 300,000 Yuan.

In the summary suit, the respondent asserts that the applicant paid him only 100,000 Yuan at the time of execution of the agreement. On the other hand, the applicant asserts in her affidavit in rejoinder that she paid 300,000 Yuan to the respondent at the time of signing the agreement. I am inclined to believe the

respondent's account because Clause 2 of the agreement recognised that 100,000 Yuan was payable on the day of signing the agreement. As a general rule, extrinsic evidence explaining or varying the contents of a document is inadmissible (See **Section 91 of the Evidence Act**). If the applicant had indeed had paid 300,000 Yuan at the time, she should not have signed the agreement which states that she paid a lower sum.

The applicant admitted in para. 7 of her affidavit in rejoinder that she refused to comply with the payment plan in Clause 2 of the agreement because the respondent had refused to hand over certain property as agreed. However, the agreement clearly prescribed that a 300,000 Yuan penalty was payable upon breach. If the respondent was in breach, the applicant's proper recourse was to demand for this penalty and not to resort to arbitrary self-help measures.

It is, therefore, evident that the applicant admitted to breach of the agreement in para. 7 of her affidavit in rejoinder. The court finds that the debt due to the respondent is 1,400,000 Yuan being the unpaid balance on the principal debt (1,100,000 Yuan) and the penalty for the applicant's deliberate breach of the payment plan prescribed in Clause 2 of the agreement (300,000 Yuan).

The second point of contention is the effect of the court proceedings in China regarding the claim in the summary suit. I realised that the agreement did not bear a dispute resolution clause prescribing the forum in which disputes arising during its performance would be presented. It also omitted to prescribe the law that would be applicable to any such dispute.

This application revealed that in 2021, the respondent filed a case against the applicant in The People's Court of Wenling City Province, China. The parties agreed to apply the laws of China in those proceedings. After a full trial, the said court decided in favour of the respondent and ordered the applicant to pay the entire debt of 1,400,000 Yuan along with costs of the suit to the respondent. The applicant's subsequent appeal to The Taizhou Intermediate People's Court, Zhenjiang Province, China in 2022 failed.

Relying on those proceedings in China, the applicant avers that the summary suit is *res judicata* since it has already been finally determined. The applicant argues that this makes *res judicata* a bonafide defence and a triable issue in the

summary suit. In my opinion, that argument is an oversimplification of the facts and legal issues at hand.

It is true that **Section 7 of the Civil Procedure Act** bars the trial of any suit in which the matter directly in issue has been directly and substantially in issue in a former suit between the same parties which was conclusively determined. This provision reflects the common law doctrine of *res judicata* which ensures the finality of litigation. As a general position, Section 7 of the CPA applies to cases handled by Ugandan courts.

It is a well-known general rule of public international law that municipal laws do not have any extraterritorial application. Due to the principle of state sovereignty, a state is generally prohibited from applying its national laws beyond its territory. In the same spirit, our law on civil proceedings limits the relevance of foreign judgments, especially when they deal with causes of action which arose in Uganda.

The applicability of foreign judgments is also highly regulated. **Section 10 of the CPA** provides that certified copies of such judgments must be adduced before the Court can presume that they were pronounced by courts of competent jurisdiction. **Section 9(c)** and **(f)** of the CPA also renders a foreign judgment to be inconclusive if it appears to be founded on a refusal to recognise the law of Uganda in cases in which that law is applicable and if it sustains a claim founded on a breach of any law in force in Uganda.

The impugned judgments appear to have ignored the fact that Ugandan law gives Ugandan courts the jurisdiction over disputes arising from contracts made in Uganda. The judgments also sustained the respondent's claim against the applicant and this claim had been based on breach of the agreement which was legally enforceable in Uganda. This renders Section 9(c) and (f) of the CPA applicable, with the result that the said judgments were not conclusive on the dispute in the summary suit.

I therefore find that *res judicata* cannot be a bonafide defence or a triable issue in the summary suit. The applicant's failure to produce certified copies of the judgments from the Chinese courts means that this Court cannot presume that those courts had competent jurisdiction to decide the dispute. Besides, the

cumulative import of Sections 7 and 9 of the CPA is that res judicata cannot apply when the foreign judgment in the former suit was not conclusive.

I am satisfied that pursuant to **Section 15(c) of the CPA** and Explanation 3(a) thereof, this Court has the jurisdiction to determine disputes arising from the agreement since the agreement was made in Uganda. I am also satisfied that it is convenient for the dispute to be determined in the Ugandan courts because the businesses from which it arose are in Uganda. Since the applicant's known assets are also in Uganda, any award in the summary suit will not be in vain.

It would unfair for this Court to leave the respondent stranded. The applicant conceded that she refused to pay his debt in full even after the proceedings in the Chinese courts. The respondent's cause of action still survives because he has not been paid in full. This Court would have failed in its duty to do justice if it were to decline to exercise its clear jurisdiction yet the respondent has not recovered all his money from the applicant. As long as the respondent is yet to enjoy the fruits of the judgments from the Chinese courts, there is nothing that stops this Court from giving him relief.

In light of the foregoing, this application must fail because it failed to disclose a bonafide defence or a triable issue in the summary suit. Consequently, I make the following orders:

i. This application is hereby dismissed.
ii. In accordance with Order 36 rule 5 of the Civil Procedure Rules S.I. 71-1, a summary judgment is hereby entered in favour of the respondent in **Civil Suit No. 0422 of 2023**
iii. The applicant shall pay UGX 700,000,000 to the respondent.
iv. The costs of this application and those of the summary suit are awarded to the respondent.

Patricia Mutesi

JUDGE

(27/02/2024)