

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT-00-CC-MA- 0231 OF 2005

(Arising from HCT-00-CC-C.S 0180 of 2005)

SAM ENGOLA

APPLICANT

Versus

ES-KO INTERNATIONAL INC.

RESPONDENT

BEFORE THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. The applicant seeks from this court unconditional leave to appear and defend the main suit filed against him by the respondent. In his application he puts forth four grounds. Firstly that the applicant is the wrong party to the suit. Secondly that the applicant is not indebted to the respondent/plaintiff. Thirdly that he has a good defence to the suit and that there are triable issues of law and fact in this case. Lastly that it is in the interests of justice that the applicant be allowed unconditional leave to appear and defend the suit on the merits.
2. This application is supported by an affidavit sworn by the applicant. I shall reproduce the relevant portions of the same below.
 - “2. I am a Managing Director in the applicant company.*
 - 3. That I have received the summary suit on plaint in this case and read the supporting affidavit.*
 - 4. That paragraph 3 of the (s)aid affidavit is false as I am not indebted to the respondent.*
 - 5. That I am the wrong party to H.C.C.S. No. 180 of 2005.*
 - 6. That the said advance was made to Showa Traders Limited (copies of the cash advance and receipt of the advance are attached to affidavit in support of plaint).*
 - 7. That according to the principle of corporate personality I am not party to the above suit.*
 - 8. That in May of 2004 the plaintiff/respondent advanced to Showa Traders Limited a sum of US\$10,000.00 (Ten thousand US dollars) as an advance for air charter costs for transporting cargo on*

behalf of PAE/ES-KO from Entebbe to Kindu in DRC.

9. That the applicant duly reimbursed the money advanced to it.

10. That I am to provide proof of payment of applicant by fax from Kinshasa. (Copy of the fax is attached hereto and marked annexure 'A').

11. The applicant has a strong defence to the suit and ought to be allowed to appear and defend."

3. The respondent opposed this application and filed an affidavit in reply sworn by Serujongi Brian the company secretary of the respondent. In effect he stated that Sam Engola was the right party as the money had been paid to Sam Engola trading as Showa Trade Air Cargo. A search of the company and business name registry had shown no such name or company registered or incorporated in Uganda.
4. Mr. Kenneth Kakuru, learned counsel for the applicant, submitted that this application raised two grounds. Firstly that the money in issue was loaned to a limited liability company of which the applicant was the managing director. This was Showa Trade Air Cargo Ltd. In support of this he referred to the three annexures to the plaint. This raises a triable issue as whether the money in issue was paid to the applicant or Showa Trade Air Cargo Ltd. Secondly that the money claimed in the suit was already paid to Mr. Fataki Ishimael by the company.
5. Mr. Samuel Mugisa, learned counsel for the respondent, opposed this application. Firstly he submitted that court should take note of the discrepancy in the names of the company. In the affidavit of the applicant it was referred to as Showa Traders Ltd and in counsel's address, it was referred to as Showa Traders Air Cargo Ltd. In any case a search at the registry of business names and companies had revealed that neither of the above companies were registered as business names or incorporated as companies.
6. Mr. Mugisa further submitted that according to the agreement the money was payable in Uganda and that it is strange that the money was alleged to have been paid in Congo and in any case not to the respondent, but a third party. He submitted that there was no evidence of payment, and the purported fax was a sham. He submitted that the applicant had failed to show a bona fide triable issue, and this application should be dismissed.
7. Order 33 Rule 4 of the Civil Procedure Rules sets out what a defendant must show in seeking leave to appear and defend. It states,

"An application by a defendant served with 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,"

8. The defendant is required to show whether he alleges a defence to the whole or only part of the plaintiff's claim. The requirement to do this by affidavit shows that the defendant is required on evidence to show the court that he has a defence to the claim. The duty and burden of proof is upon the defendant in this regard.
9. When is this burden discharged? There is abundant case law on the subject. But before I refer to it, I wish to refer to Order 33 Rule 7 of the Civil Procedure Rules which seems to provide guidance in this regard. It states in part,

“If it appears to the court that any defendant has a good defence to or ought to be permitted to appear and defend the suit, and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to appear and defend, and the plaintiff shall be entitled to issue a decree against the latter..”

10. For a defendant to be allowed to defend he must show the court, that it appears he has a good defence or ought to be permitted to appear and defend, failing which judgement would be entered against him. This does not mean that he has to prove the ‘good’ defence but that he must show a reasonable possibility for the existence of the good defence. It is not enough to just assert that there is a defence to the claim, without providing particulars, which prove the possibility of the existence of a reasonable defence.
11. It is now fairly established that the defendant will have discharged the burden upon it when it shows that there is a triable issue of fact or law arising on the pleadings and evidence. See *Hasmani v Banque du Congo Belge* (1938) 5 EACA 88, *Toro & Mityana Tea Co. Ltd v Ibingira Charles HCCA* No. 11 of 1995 (unreported). Nevertheless the application of this principle is not without trouble.
12. The words of Sir Graham Paul, V-P, in *Churanjila and Co v A. H. Adam* (1) (1950) 17 EACA 92, at Page 92 easily come to mind. He stated,
“There is no difficulty about the principles to be applied in deciding this appeal. The law on the point is clear and only its application to the facts gives any trouble. It is desirable and important that the time of creditors and of Courts should not be wasted by the investigation of bogus defences. That is one important matter but it is a matter of adjectival law only, embodied in the Rules of Court, and cannot be allowed to prevail over the fundamental principle of justice that a defendant who has a stateable and arguable defence must be given the opportunity to state it and argue it before the Court. All the defendant has to show is that there is a definite triable issue of fact or law.”
13. Mr. Kenneth Kakuru referred to the three annextures to the plaint as establishing that the applicant was not the right party to be sued. I will set out below Annexure C in full.

“The Republic of Uganda

Agreement for Settlement of Claim

This agreement for settlement of claim is made this 30/11/2004 day of November 2004 between Mr. Serunjogi Brian the corporation secretary of ES-KO International Ltd and on the one part and Mr. Sam Engola of Showa Trading Company Limited on the other part and herein states as follows;

Mr Sam Engola agrees to pay ES-KO International \$10,000.00 which sum is in respect of money advanced by ES-KO to Showa Traders through Mr. Engola in May 2004.

This money is to be paid in instalments of \$2,000 every end of month by Mr. Engola to the corporation secretary of ES-KO and failure to pay this money with the first week of the new month will be deemed a breach of this agreement which will then be taken as

repudiated.
Sam Engola for Showa Traders
Serunjogi Brian for ES-KO”
mine)

(Signed)
(signed)
(emphasis is

14. It is clear in the first paragraph of the above agreement that Sam Engola agreed to pay the sums outstanding and undertook to do so by monthly instalments of \$2000.00 in the second paragraph of the agreement. He was committing himself personally to meet this claim. I am satisfied that he was properly sued as he gave his own personal promise to pay and undertaking to do so in monthly instalments. Regardless of whether the money in issue was advanced to Showa Traders Ltd as claimed by the applicant or to Showa Trade Air Cargo Transporters, the name mentioned in Annexure B to the plaint, or to Showa Trade Air Cargo mentioned in Annexure A, Sam Engola undertook to pay the said sum in Annexure C to the plaint. This is sufficient to found authority to recover from Sam Engola. No triable issue arises whatsoever as to whether Sam Engola was or was not the right party to be sued in this regard. The first ground that Sam Engola is not the right party therefore fails.
15. I now turn to the second ground of this application, and that is whether the money in issue was paid or not. The applicant relies on paragraph 9 and 10 of his affidavit in support of this application. He stated,
- “9. That the applicant duly reimbursed the money advanced to it.
10. That I am to provide proof of payment of applicant by fax from Kinshasa. (Copy of the fax is attached hereto and marked annexure ‘A’).”*
16. Annexure A referred to above is a letter from one Fataki Ishimael of B.P. 350 Kinshasa dated 15.12.2004. It is addressed to Mr. Sam Engola of P O Box 460 Kampala. It reads,
- | | |
|--|------------------------|
| <i>“ Dear Sir,</i> | <i>RE:</i> |
| <i>US\$10,000 (Ten Thousand US Dollars)</i> | <i>This is to</i> |
| <i>confirm that I have received in cash US\$10,000 (Ten Thousand US Dollars) from Showa Air Cargo being payment of money owned to ES-KO INTERNATIONAL INC.</i> | |
| <i>Thank You,</i> | <i>Yours</i> |
| <i>faithfully,</i> | <i>(signed) FATAKI</i> |
| <i>ISHIMAEEL ”.</i> | |
17. It is noteworthy to mention that this fax does not bear any originating fax number nor does it bear the receiving fax number as is traditionally common. It is just a copy of a word processed document with no feature to suggest that it is a fax at all. On the face of it, I am unable to look at it as a fax, without explanation as to the missing fax features commonly associated with fax messages. Evidence submitted to this court must be, on the face of it, credible. This Annexure C is not intrinsically credible as a fax message
18. The respondent denies that it has been paid. Even if one found the evidence of the applicant as credible at face value with regard to the issue of payment, it still fails to support the claim that payment of the money in issue was paid to the respondent. The receipt (Annexure C to the affidavit of the applicant) by way of the letter above referred to is given by a one Fataki Ishimael of Kinshasa. No connection is shown between him and the respondent. Sam Engola undertook, prior to the date of this letter, in Annexure C to the plaint, to pay the outstanding sums of money to Serunjogi Brian, the Company

Secretary of the respondent. He has not done so. He claims to have paid somebody else outside of this jurisdiction, without mentioning at whose behest, especially as it was in breach of his own undertaking.

19. I am satisfied that the respondent has failed to raise a triable issue as to whether or not the money in issue was paid to the respondent. Clearly the money was not paid to the respondent. On the evidence before me, Sam Engola did not pay the respondents as he undertook to do. Neither has Showa Traders Ltd, or Showa Trade Air Cargo, or Showa Trade Air Cargo Transporters, or any other firm or company by whatever name called, paid to the respondent the money in issue. The applicant has failed to show that he has a reasonable ground of defence to this claim as alleged. Accordingly I dismiss this application for leave to appear and defend as without merit.
20. Judgement is entered for the respondent/plaintiff in the sum of US\$10,000.00 (United States Dollars ten thousand) only and costs of this suit.

Dated in Kampala this 13th day of April 2005.

FMS Egonda-Ntende
Judge