THE REPUBLIC OF UGANDA

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

HCT-00-CC-MA-0471-2006
(ARISING OR OF HCT-00-CC-0378-2006)

ROBERT OKIZA …… APPLICANT

VERSUS

AHIMBISIBWE ISRAEL ……. RESPONDENT

Legislation referred to:

1. *Civil Procedure Rules*

Cases cited:

1. *Maluku Interglobal Trade Agency Ltd Vs Bank of Uganda (1985) HCB 65,*
2. *Abubaker Kato Kasule Vs Tomson Muhwezi (1992 – 1993) HCB 212*.

BEFORE HON. MR. JUSTICE LAMECK N. MUKASA

RULING:

This application is brought by Notice of Motion under Order 36 rules 3 and 4 of the Civil Procedure Rules for Orders that:

1. Unconditional leave be granted to the defendant to defend the suit.

2. Costs of and /or incidental to this application be granted to the applicant.

The grounds for this application are that:

1. The applicant has a counter-claim against the respondent and that the respondent is the one in breach of the sale agreement between him and the applicant.
2. There are bonafide triable issues of both fact and law covering the progress of this suit transaction as the debt due.
3. It is just and equitable that the orders sought be granted.

In the suit brought by summary procedure the respondent's claim is that on 19th December 2005 the applicant sold motor vehicle Reg. No. UAG 600X to the respondent at Shs18, 000,000/=. That the respondent has to date paid a total sum of Shs.8, 850,000/= In breach of agreement the applicant has refused to park the vehicle or give or show it to the respondent for the payment of the balance of Shs. 9,150,000/= The applicant has refused to collect the final payment and give the vehicle with its log book to the respondent. In the suit the Respondent is seeking to recover the sum of Ugshs8, 850,000/= plus costs of this suit.

For leave to be granted under Order 36 rules 3 and 4 CPR the applicant must show by affidavit or otherwise that there is a bonafide triable issue of fact or law. The applicant at this stage is not bound to show a good defence on merits but should satisfy the court that there is an issue or question in dispute, which ought to be tried. Court should not at this stage inquire into the merits of the issues disclosed but it must ascertain that the grounds raise a real issue and not a sham one. Court must be certain that if the facts alleged by the applicant were established there would be a plausible defence in which case the applicant should be allowed to defend the suit. See *Maluku Interglobal Trade Agency Ltd Vs Bank of Uganda (1985) HCB 65, Abubaker Kato Kasule Vs Tomson Muhwezi (1992 – 1993) HCB 212*.

This application is supported by an affidavit sworn by the applicant Robert Okiza Obita. In paragraphs 3 to 9 the applicant avers that he entered into an agreement whereby he agreed to sell the vehicle to the respondent at Shs18, 000,000. Contrary to the agreement on 19th December

2005 the respondent paid Shs6, 000,000/= only and promised to pay the balance in full on 29th December 2005. The applicant was to keep custody of the vehicle and the log book until full payment. That full payment of the balance was not made as agreed. Two months later the respondent paid a sum of shs2, 000,000/= and later in March 2006 paid another sum of Shs800, 000/=. That he had kept the vehicle packed at his place. In paragraphs 11 and 12 the applicant avers that he treated the agreement as materially repudiated and breached; and has since pledged the vehicle for a loan.

The respondent filed an affidavit in reply where in paragraph 4 he avers that the applicant agreed to keep the vehicle at his place and not to be driven till payment is settled. Further it was not agreed that the balance was payable in a lump sum. In paragraph 5 of his affidavit the respondent admits that the balance was supposed to have been completed on or before 29th /December 2005 but contends that by virtue of the acknowledgement of the 22nd January 2006 where the applicant agreed further to keep the vehicle the terms of the agreement of 19th December 2005 were automatically varied. Further in paragraph 6 of his affidavit the respondents contends that by the applicants averment in his affidavit in support that he had pledged the vehicle for a loan the applicant has thereby repudiated the terms of the acknowledgement of 22nd January 2006, thus entitling the respondent to a refund of the sum of shs8,850,000/=.

I have studied the documents referred to by the parties in their respective affidavits. The memorandum of sale dated 19th February 2005 provides that the purchase price was Shs18, 000,000/= and shs6, 000,000/= was paid on that date. The vehicle was provided to be delivered on 29th December 2005. Then it provided:

> "The remaining balance will be agreed on delivery of the motor vehicle"

The wording of the documents raises an issue as to the intention of the party. That is whether the intention of the parties was that the balance was payable upon delivery of the vehicle on 29th December 2005 or some other time to be agreed upon on delivery of the vehicle.

In this affidavit the respondent admits that the balance was payable on or before the 29th December 2005 and both parties are in agreement that further payments were made after that date in the total sum of shs2,850,000/= receipt whereof is acknowledged in the document dated 22nd January 2006.

In that document the applicant stated:

> "I further state that I have remained with the log book together with the vehicle as agreed by the buyer until the final payment is done"

The document did not give the date of delivery of the vehicle. This raises the issue whether the terms of the first agreement were varied and the vehicle was to be delivered to the respondent upon the payment of the final payment.

In their letter dated 29th May 2006 the respondent's lawyers requested the applicant's lawyers to advise the applicant to produce the vehicle at the applicant's lawyer's chambers for inspection and receipt of the balance of Shs9,050,000/= before 6th may 2006. It is apparent that this was not done. But averments in his affidavit show that by then the applicant already regarded the agreement as repudiated or breached by the respondent and he had pledged the vehicle for a loan. As a result of that applicant failure to produce the vehicle as demanded in that letter the respondent averred that he also regarded the agreement as repudiated by the applicant thus the suit whereby he demands refund of the money paid. This raises the issue of whether the agreement was a breached or repudiated and if so by who.

These are matters which ought to be tried. Court at this style is not required to inquire to the merits of the issues raised. This is an appropriate case which warrants the applicant to be allowed to defend the suit.

Leave is accordingly granted. The applicant will file a written statement of defence within 14 days from the date of this ruling. Costs for this application shall be in the cause of the main suit.

I so order.

Hon. Mr. Lameck N. Mukasa
Judge
11/9/2006