

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**[COMMERCIAL DIVISION]**  
**MISC. APPLICATION NO. 391 OF 2010**  
**(Arising out of Civil Suit No. 208 of 2010)**

**EDCO LIMITED} .....APPLICANT**

**VERSUS**

**PETER SERUNJOGI}**

**NOAH WASIGE}.....RESPONDENTS**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA**

**RULING**

The applicant brings this application under order 36 rules 3 (1) and 4 of the Civil Procedure Rules and section 98 of the Civil Procedure Act cap Laws of Uganda for orders that the applicant be granted unconditional leave to file a defense to the respondent's suit and for costs. The grounds of the application are that the applicants property comprised in Busiro Block 452 Plots 13 and 27 at Nangabo was bought by Messrs Centum Investment Company limited; that the respondents did not find and/or introduce the purchaser to the applicant; that by the time the commission agreement between the applicant and the respondents under which the respondents based their claim was executed on 23<sup>rd</sup> March 2010, the applicant and the purchaser had already executed a memorandum of understanding on 3 March 2010 by which the applicant undertook to hold the property off the market in favour of the purchaser to enable the parties conduct a due diligence search of the property, amongst other things. That the respondents are not entitled to brokerage fees of United States dollars 267,500 or to any

amount. And that the applicant has a good and valid defense to the whole of the respondents claim. The applicant's application is supported by the affidavit of Patrick Tumwine Director of Applicant, Mr. James Mworio a director Pearl Marina Estates Ltd, and an affidavit in rejoinder by Patrick Tumwine. The Respondents filed several affidavits in reply one by Mr. Noah Wasige the second respondent, Ms Faith Nassali the lawyer to Messrs Centum Investment Ltd and Evarist Turyakira an agent/broker involved in the sale of the suit property.

Counsels Moses Kimuli and Deepa Verma appeared for the Applicants while Isaac Walukaga appeared for the Respondents.

### **Submissions of Counsel**

Lead counsel for the applicant Mr. Moses Kimuli submitted that in the suit, the Respondents claim US\$ 267,500 as commission for finding and introducing a buyer to the applicant. Referring to paragraph 4 of the affidavit of Patrick Tumwine he submitted that the respondents neither found the purchaser nor introduced the purchaser to the applicants. Furthermore, paragraph 5 of the affidavit of Tumwine avers that by the time the commission agreement dated 23<sup>rd</sup> March 2010 was executed the purchaser had already executed a memorandum of understanding on the 3<sup>rd</sup> of March 2010 by which the ultimate purchaser had made a commitment to purchase the property subject to carrying out due diligence. Therefore the purchaser and the seller or applicant were in touch and executed a memorandum of understanding before the commission agreements were made with the respondents. For emphasis he submitted that the date of the memorandum of understanding is the 3<sup>rd</sup> of March 2010 while the commission agreement is dated the 23<sup>rd</sup> March 2010. He further referred to the affidavit of Mr. James Mworio a director of Pearl Marina Estates Ltd, the purchaser of the land in issue filed in support of the applicant's application and particularly paragraphs 4, 7 and 8 thereof. Under paragraph 7 James Mworio states that "he was not introduced to EDCO by either Peter Sentongo or Noah Wasige working jointly or individually. In paragraph 8 he avers "I have never dealt with Peter Sentongo and Noah Wasige, either jointly or individually, as commission agents for EDCO in the transaction for the purchase of the land."

The applicants submit that the law in an application for leave to defend is that the defendant has to show by affidavit or otherwise that there is a bona fide triable issue of fact or law to be tried. He referred to the case of **Maluku Trade agency vs Bank of Uganda 1985 HCB 65** for the holding that where there are triable issues leave should be granted. Counsel also cited the cases of **Kundanlal Restaurant vs Devshi & Company Civil Appeal No. 76 of 1951 (1952) 19 EACA 104** for the holding that where a reasonable ground of defense has been set up a conditional payment into court ought not to be imposed. Counsel also cited the case of **KASULE V MUHWEZI [1992 – 1993] HCB 212** for the holding that the applicant who seeks leave to appear and defend is not bound at this stage to show that he has a good defense on the merits of the case, but ought to satisfy court that there was prima facie a triable issue in dispute which the court ought to determine between the parties.

Counsel concluded that the affidavits in support and rejoinder raise a bona fide triable issue which is whether the respondents did find and introduce a buyer for the applicant's property? Consequently he submitted that the applicant is entitled to unconditional leave to appear and defend the suit. He prayed that unconditional leave to defend the suit be granted with costs in the cause.

Counsel for the respondents Mr. Walukaga Isaac strongly opposed the application and referring to the three affidavits in opposition to the application. He submitted that as far as the law is concerned, the issue for this court to establish is whether the application raises triable issues. According to him no triable issues have been raised.

He submitted that the affidavit of Tumwine admits that the applicants executed a commission agreement with the respondent for payment of a sum of **US\$ 267,500**. That the second issue is that the applicants point out that they were already in touch with the buyers at the date of the signing of the commission agency agreement in issue. Their issue is that the commission agreement is dated 23<sup>rd</sup> of March 2010 while the memorandum of understanding is dated 3<sup>rd</sup> of March 2010. He submitted that there was an error in the date as explained in the affidavit of Noah Wasige paragraph 10 thereof. He submitted that is rational that

one cannot execute a commission agreement to sell land when there is a purchaser. The dates were calculated to deny the Respondents what is due to them. In truth the commission agreements were signed on the 26<sup>th</sup> of Feb as in paragraph 8 and 10 of Noah Wasige Affidavit. Referring to the averment of James Mworira that he was introduced to the seller by Ms Nassali Faith, he submitted that Nassali was representing Centum Investments the ultimate purchasers. In her affidavit she acknowledges the fact that it was the respondents who introduced the applicants to Centum. He referred to paragraphs 5, 8, and 9 of the said affidavit and submitted that they had not been denied by the by the applicant. Furthermore that the affidavit in rejoinder contradicts that the affidavit of James Mworira which affidavit acknowledges the commission agreements. Mworira further states that Ms Nassali Faith acting on behalf of Centum Investments Ltd introduced the applicants to the ultimate purchaser.

That the averment of James Mworira is to the effect in paragraph 4 thereof Mr. Turyakira was the commission agent who was introduced to the applicant. On the other hand Mr. Turyakira's affidavit in paragraph 4 thereof acknowledges that they jointly introduced the buyer to EDCO. Mr. Turyakira is the agent who is acknowledged by the applicant. This same person deposes in paragraph 8 that there were two commission agreements executed by applicants. These commission agreements were executed on the 26<sup>th</sup> Feb of 2010 which dates tally with that in Noah Wasiges affidavit. He avers in this affidavit that in one commission affidavit the applicant was to pay US \$ 267,257 to the Respondents, while they were to pay 10 percent to Turyakira and his colleague. One of the commission agreements was honored and another dishonored. Counsel referred to paragraph 13 of the affidavit of Mr. Turyakira which avers that the Respondents introduced the applicants to the ultimate purchaser of the property. He submitted that what the affidavit in rejoinder merely avers is that Mr. Turyakira's affidavit is inconsistent. He contended that this affidavit was consistent with the affidavits of Noah Wasige and Nassali Faith. The affidavits are also consistent with the dates. Counsel emphasized that one cannot sign a commission agreement to sell land when one has a purchaser already. He drew my attention to the memorandum of understanding between EDCO and the

purchaser. It effectively commits the applicant to earmark land for the purchaser as due diligence is done. The applicant was certain he had got a purchaser. There was no need to go and sign a commission agreement.

The respondents counsel submitted that in summary the application is premised on 2 grounds, namely:

1. That the commission agreement was signed after the 3<sup>rd</sup> of March 2010. That does not deny that the respondent linked respondents to buyer and they executed agreement for commission fees.
2. Mr. Mworira denies having met the respondents. This is sufficiently addressed by Nassali Faith who was representing Centum Investments Ltd. She acknowledges the role of respondents and confirms that the respondents linked them to the ultimate purchaser.

He prayed that the application is dismissed with costs and judgment is entered for the respondents.

In rejoinder Kimuli counsel for the applicant submitted that the submissions raise another triable issue as to what the date of the commission agreement is. In support of the claim in the plaint is the date of 23<sup>rd</sup> March 2010. The commission agreement attached to the plaint is dated 23<sup>rd</sup> March 2010. Though his learned colleague from the respondents submits that the date of the commission agreement is the 26<sup>th</sup> Feb 2010, he contended that it is critical that this issue is resolved. In his contention this fact is tied to the second response of analogy of not entering to a commission agreement when there is a buyer already. He pointed out that the memorandum of understanding is dated 3<sup>rd</sup> of March 2010. This is not a sale but a commitment to hold the property for 2 weeks. It was possible to engage another commission agent. Consequently there is no inconsistency because in case the other did not buy, another buyer could be sourced.

He contends that the affidavit of Noah Wasige paragraph 9 onwards especially paragraphs 14, 15 and 16 try to disown a document attached to the plaint dated

23<sup>rd</sup> of March 2010. Counsel contends that no one could believe that allegation especially from a member of the noble profession. As far as the averments of Nassali were not denied, the affidavit in rejoinder does that. He submitted that part of affidavit of Nassalli is hearsay. There is something untrue in saying that Mr. Mworira is not talking about the commission agreement but the memorandum of understanding subsequently.

Lastly, counsel submitted that Turyakira acknowledges that he introduced the buyer jointly with the respondents. He contended that this meant two things. Firstly the affidavit of Turyakira does not say jointly but that each agent has a separate agreement. If this is true, one can argue that they have been paid and this raises another triable issue. He concluded that the defendant has raised triable issues and that being the case the applicant is entitled to unconditional leave to defend a substantial amount of money

Verma in further rejoinder further states that paragraph 12 of Faith Nassali's affidavit refers to various commission agreements. The emails attached therein are correspondence between her and her principals. The next time she appears is when she draws a memorandum of understanding on 3<sup>rd</sup> March 2010 and annexure "B" to application.

### **RULING OF COURT**

I have carefully perused the application and the numerous affidavits in support and opposition of the application. I have also considered the rather spirited arguments of both counsels. Order 36 rules 2 allows a plaintiff who seeks to recover a debt, liquidated demand or money payable by the defendant with or without interest arising from a contract express or implied to apply for summary judgment. In the application for summary judgment the plaintiff is supposed to indicate that in his or her belief, there is no defense to the suit. The summons in form 4 of appendix A of the Civil Procedure Rules provide that the defendant shall not appear and defend the suit except upon applying for and obtaining leave of the court.

The provisions do not give the circumstances in which leave of court may be obtained. Case law however has established that all that the applicant has to prove is that there are arguable points of fact or law that merit judicial consideration before such leave may be granted. The defendant who applies may be examined under oath as prescribed by rule 4 of order 36 of the Civil Procedure Rules.

The applicant does not deny that it contracted with the respondents in an agreement for payment of a commission upon the respondents identifying and sourcing a buyer for the applicants land. What is denied is the date of the commission agreement. On the one hand, the respondents allege that the commission agreement is dated 26<sup>th</sup> of February 2010 in answer to the applicant's assertion that it is dated 23<sup>rd</sup> of March 2010. This agreement is attached to the further affidavit in reply of Mr. Evarist Turyakira sworn on 11 February 2011. He avers that he was involved as an agent/broker in the preliminary stages leading to the purchase of land comprised in Busiro block 452 plots 13 and 27 by Centum Investment Company Ltd. In paragraph 3 of his affidavit he states that about May 2009 the applicant instructed him to market the land in terms and conditions later reduced in writing in the form of the commission agreement dated 26 February 2010. In paragraph 4 he avers that he informed the second respondent to whom he availed a copy of a certificate of title and later took him around seeing the magnificent view as well as the boundaries of the land. That on the 26 February second respondent informed him that he had found through another person a buyer who would be interested in the land and consequently asked me to find the fastest means to the land. The second respondent also introduced him to Ms Faith Nassali. He confirms in paragraph 8 of that the agreements were executed on 26 February 2010 one after the other by Dr Dinguri N. Mwaniki and Mr. Patrick Tumwine. In paragraph 13 he avers that the respondent played a vital part in marketing and eventually selling the land as it was the act/effort that linked the applicant and Centum Investment Company Ltd through Ms Nassali and I and eventually enabling the applicant to sell and Centum Investment Company limited to buy the land.

On the other hand the second respondent Noah Wasige avers in the affidavit in reply that sometime in 2009 one Evarist Turyakira informed him that the applicant had land comprised in block 452 plots 13 and 27 that was up for sale and that he could earn a commission from the vendor if he finds a buyer. The second respondent eventually informed Faith Nassali about the land. It was through Faith Nassali that they got in touch with the ultimate buyer. On the 3<sup>rd</sup> of March 2010 the buyers of the representatives executed a memorandum of understanding for the purchase of the land in question. In paragraph 16 of his affidavit he avers that the commission agreement with the second respondent was signed on 26 February 2010 before the memorandum of understanding was signed and prior to knowledge by Centum Investments of who the vendor of the land was. The relevant documents are attached to the affidavit.

A further affidavit in reply is sworn by Faith Nassali on 11<sup>th</sup> of February 2011. In paragraph 5 thereof she avers that the respondents, particularly the second respondent called and asked her to visit a couple of pieces of land including the land then on sale and understanding the description of the land of her client Centum Investment Company Ltd wanted, she decided on the land of the applicant. In paragraph 8 she avers that it was after this that she met with one Evarist Turyakira together with the second respondent when they went to the land. She also confirms that the commission agreements were made on 26<sup>th</sup> of February 2011. (See paragraph 12). In paragraph 17 thereof she avers "that I swear that the respondents did in fact find and lead me to the land as the then lawyer of Centum Investment Company Ltd and I in turn introduced the respondents and centum investment company Ltd as such way before the latter's purchase of the land;" in paragraph 19 thereof she avers that the respondents commission agreement was signed before the memorandum of understanding between Centum Investment Company Ltd and the vendor.

Initially, the basic ground of the applicants defense is contained in paragraph 5 of the affidavit of Patrick Tumwine sworn on 11 March 2011: "that by the time the commission agreement, on which the respondents base their claim for brokerage fees, was executed on 23 March, 2010, the applicant and the purchaser had already executed a memorandum of understanding on 3 March 2010 by which



the applicant was to hold the property off the market in favour of the purchaser to enable the purchaser conduct a due diligence search of the property, amongst other things."

Another affidavit in support is that of James Mworira sworn on 29<sup>th</sup> November 2010. He avers that during the course of the site visit Ms Faith Nassali introduced him to Mr. Evarist Turyakira as sellers commission agent acting on behalf of the applicant was looking for a buyer of the land. He also avers that he is a director of Pearl Marina Estates Ltd. In paragraph 5 he avers that following the site visit, he signed a memorandum of understanding with the applicant on 3 March 2010 regarding the purchase of the land followed by an agreement for sale signed on 26 March 2010. Furthermore he avers that the transaction was successfully concluded sometime in July 2010 with the transfer of title to Pearl Marina Estates Ltd. He concludes in paragraph 7 and 8 of his affidavit that he was not introduced to the applicant by the respondents working jointly or individually and he has never dealt with the respondents as commission agents for the applicant in the transaction for the purchase of the land.

Patrick Tumwine filed a further affidavit in rejoinder sworn on 11 March 2011 and filed in court record on 16 March 2011.

James Mworira confirms that he was led to the property by Faith Nassali. Faith Nassali is the lawyer of the buyer Centum Investment Company Ltd.

From the affidavits on record and the pleadings of the parties what is in contention are the following;

1. Whether the commission agreement was made on 26 February 2010 and not on 23 March 2010.
2. Whether the respondents introduced the buyer to the applicant.

The issue for trial is whether the commission agreements the applicant made with the respondents were made on 26 February 2010 or whether they were made on 23 March 2010. Annexure A to the plaint attaches the commission agreement dated 23<sup>rd</sup> of March 2010. The respondents at this stage cannot rely on a

commission agreement dated 26<sup>th</sup> of March 2010 without adducing evidence. Order 36 rule 1 assumes that the facts pleaded in the plaint are not in dispute and the defendant has no defense to the claim. In this case as I have observed above the main defense of the applicant is that the agreement was made on 23<sup>rd</sup> March 2010 after the sale agreement or memorandum of understanding between the applicant and ultimate purchaser had been made on 3 March 2010.

The authorities are very clear that the court cannot decide on the merits of the case at this stage. To find that the agreement was made on 26<sup>th</sup> February 2010 and not on 23<sup>rd</sup> March 2010 contrary to the pleadings in the plaint would be a decision on the merits. A decision under order 36 to enter judgment for the plaintiff without defense assumes that the material propositions of fact are true. An application for leave is an application to be heard and not to determine facts in controversy which would end up deciding the suit on its merits. Reference may be made to the East African Court of Appeal case of **Kundanlal Restaurant vs Devshi & Company (1952) EACA 77 at page 79** where the East Africa Court of appeal agrees with the English Practice under their then order 14 rule 6 of the Rules of the Supreme Court, 1883 where they said:

“the principle on which the court acts is that where the defendant can show by affidavit that there is a bona fide triable issue, he is to be allowed to defend as to that issue without condition... A condition of payment into court ought not to be imposed where a reasonable ground of defense is set up... A condition of payment into court, or giving security, is seldom imposed, and only in cases where the defendant consents, or there is a good ground in the evidence for believing that the defense set up is a sham defense and the master is prepared very nearly to give judgment for the plaintiff in which case only the discretionary power given by this rule may be exercised. It should not be applied where there is a fair probability of a defense or where the practical result of applying it would be unjustly to deprive the defendant of his defense.”

Consequently, it is my humble ruling that the question of whether the agreement was made on 23<sup>rd</sup> of March or on 26 February 2010 is a triable issue of fact. This

triable issue of fact has implications on whether the buyer was sourced before the applicant came into contact with the buyer or afterwards. The second issue would arise from the admission of the applicant that one Evarist Turyakira had been paid. Yet, Turyakira states in his affidavit that it was the second respondent who sourced the buyer in question and linked the buyer with the applicant. This position seems also to come from the affidavit of Faith Nassali. She avers that it is the second respondent who sourced the land and hence the applicant in the transaction in question. It is the second respondent who linked her to Mr. Evarist Turyakira. I agree with the applicant's counsel that the question arises as to who of the commission agents should be paid or whether both of them should be paid jointly or not. The applicant claims that he has paid one commission agent. Should the applicant pay another commission agent if at it did without being given a hearing? In those circumstances, leave to appear and defend the suit is granted on condition that Mr. Evarist Turyakira is made a party to the main suit. The truth of the transactions referred to in this application simply beg to be established through an ordinary suit. The defendant shall file its defense within seven days from today. Costs shall abide the final outcome of the main suit.

Ruling delivered in open court.

Hon. Mr. Justice Christopher Madrama

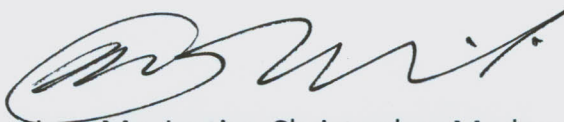
Judge

Ruling delivered in the presence of

Moses Kimuli, with Deepa Varma Jivra  
for Applicants

- Isaac Wabukaga for Respondent

- Ojamba - Court Clerk.

 8/4/2011

Hon. Mr. Justice Christopher Madrama

Judge