

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 47 OF 2012

1. SOLOMON BAGANJA}
2. MABEL NANSUBUGA}PLAINTIFFS

VS

HENLEY PROPERTY DEVELOPERS LTD}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This ruling arises from a preliminary objection by the Defendant on points of law namely, whether the claim for general damages arising out of a summary suit is properly before court and can be tried by the court. Secondly whether the Plaintiffs have a cause of action against the Defendants for interest?

The Plaintiff is represented by Edmund Kyeyune while the Defendant is represented by Michael Mafabi. Counsels filed written submissions on the points raised in the objection to the suit.

The Defendant's case is that the Plaintiffs filed this suit under summary procedure against the Defendant for a refund of US\$26,000, general damages, and interest at the rate of 25% per annum on the sum from 12 January 2011 until payment in full and costs of the suit. In Miscellaneous Application Number 63 of 2012 which was an application for leave to defend the suit filed by the Defendant, the application came for hearing on 21 March 2012 on which date of the court entered partial judgement for the Plaintiffs for the sum of US\$26,260 and granted the

Defendant conditional leave to defend the suit on the aspects of general damages, interests and costs of the suit. The Defendant duly paid the amount entered as partial judgement against it inclusive of interest to the Plaintiffs in accordance with the agreement signed between the parties. The Defendant raises objections to the claim for general damages and interest claimed.

Whether the claim for general damages is properly before the court and can be tried by the court?

The Defendants Counsel contends that the Defendant's claim for general damages which was reserved for trial by the court cannot be tried in the present proceedings. He submitted that the claim under Order 36 of the Civil Procedure Rules is for recovery of a liquidated debt or demand in money payable by the Defendant, with or without interest. Under Order 36 rule 2 of the Civil Procedure Rules, the class of suits to which the Order applies is indicated. Counsel relied on the case of **Zola and Another versus Ralli Brothers Ltd and Another [1969] EA 691 and 694**; it was observed that Order 36 is intended to enable the Plaintiff with a liquidated claim to which there appears to be no good defence to obtain a quick and summary judgement. The wording of Order 36 rule 2 is restrictive as to what claims can be brought under Order 36 of the CPR. Claims not otherwise provided for under the Order are excluded. Counsel relied on the case of **Uganda Transport Company Ltd versus Count De la Pasture (1954) EACA 163 at 168** where it was held that the word "only" under that rule meant that anything else added to the liquidated demand would not come within claims as defined and which may be by way of a summary suit using a specially endorsed plaint (writ).

General damages cannot be claimed under Order 36 of the CPR. This is because general damages cannot be ascertained or quantified at the time of filing the suit. A claim for general damages is therefore an unliquidated demand or debt falling outside the scope of Order 36 of the CPR. In the case of **Uganda Transport Company Ltd versus Count De La pasture** (supra) a claim for damages for salary and allowances alleged to be due under the contract was held to be a claim for unliquidated damages. In the application annexure "D" to the plaint constituted a binding contract between the Plaintiffs and the Defendant by virtue of clause 9. It was on the basis of that clause that the Plaintiffs sued the Defendant for refund. The contract makes no provision for liquidated damages.

Counsel further submitted on the question of whether a court upon granting leave to appear and defend the action proceeds to try a claim for general damages originally brought under summary suit. He submitted that the court should consider the holding of the Court of Appeal in **Uganda Transport Company Ltd versus Count De La Pasture** (supra) to the effect that in a plaint endorsed for summary procedure which contains correctly endorsed claims and other claims not falling under the provisions for summary procedure, the court may deal with the claims correctly endorsed as if no other claim had been included therein and allow the action to proceed with regard to the residue of the claim because the court has no power to strike out any part of the claim but not being unable to give summary judgement for relief not within the scope of summary procedure. The holding of the Court of Appeal presupposes that the court has discretionary power either to allow the action to proceed or not. Counsel contended that it would defeat the purpose of Order 36 of the CPR if the court went ahead to try particular classes of action not within the terms of the Order.

Counsel further submitted that issues for trial ought to be confined to classes of causes of action falling within the ambit permitted by Order 36. Leave is only granted to defend an action for matters falling under Order 36 of the CPR. He contends that order 36 does not envisage discretion where the residue of the claim would be general damages.

Counsel further submitted that the rationale is that leave is granted on the basis of ascertainment of triable issues correctly falling under Order 36 of the Civil Procedure Rules. In the case of **Caltex oil (U) Ltd versus Kyobe [1988 – 1990] HCB 141** the applicant's case was that the amount of money claimed was not the amount of money he owed to the Plaintiff. Consequently leave was granted for the applicant to defend part of the Plaintiff's claim which he was disputing. Similarly interest which is contractual can be claimed in a summary suit. Consequently matters reserved for trial fell directly under Order 36 or were a disputed part of the liquidated demand.

The Defendants Counsel contends that in the matter before the court, the court reserved the issue of general damages is one of the issues for trial. His submission is that general damages are excluded claims under Order 36 of the Civil Procedure Rules. Even if leave was granted, it is the claim that is untenable because the claim was not specially endorsed. It cannot therefore be considered as a residue of the Plaintiffs claim to be tried. Counsel further contends that there is a lacuna in the law in that Order 36 does not expressly provide for a suit to be converted into an

ordinary suit where leave has been granted. Secondly the issue could not have been raised at the hearing of the application for leave because it was on the merits of the suit. In the case of **Uganda Transport Company Ltd versus Count De La Pasture** (supra) it was held that the court does not have power to strike out a plaint in an application for leave to appear and defend a summary suit.

Whether the Plaintiffs have a cause of action against the Defendant for interest?

The Defendants Counsel submitted that for there to be a proper cause of action within the meaning of Order 36 of the CPR, the Plaintiff must show that the interest payable is payable under a contract while in the case of a bill of exchange, it ought to be an amount fixed by statute according to the case of **EM Cornwell and Company Limited versus Shantaquari Dahyabhai Desai (1941) 6 ULR 103**. According to annexure "D" which is the contract in issue, clause 2 thereof of the standard terms and conditions provides for interest at 1%. Under paragraph 3 of the plaint, the prayer is for refund of US\$26,000. Court entered partial judgement on 21 March 2012 for a sum of US\$26,260 which was admitted by the Defendant inclusive of the 1% interest per annum at that time as provided for under clause 2 of the contract. Obligation to pay interest on the decretal sum ought to be discharged by the Defendant in accordance with the contract. Consequently the Plaintiffs have no further claim of interest at the rate of 25% per annum which is untenable. The claim for interest ought to fail.

Costs

Counsel relied on annexure E3 which is a letter to the Plaintiff dated 23rd of January 2012 in which the Defendant wrote to the Plaintiff advising that under clause 2 of the standard terms and conditions of the contract, she would refund the deposit of US\$26,260 by 29 February 2012 at the very latest. However, the suit was filed on 7 February 2012. Consequently the Plaintiff acted in bad faith because there was a promise and in fact an assurance by the Defendant to refund the money on a stipulated date. The Plaintiffs were in possession of the letter at the time the suit was filed on 7 February 2012 and it was annexed to the plaint. Consequently the court should be pleased to determine the suit finally at this stage and strike out the entire remainder of the suit with costs to the Defendant.

In reply the Plaintiff's case is that the Plaintiff filed a summary suit against the Defendant for refund of US\$26,000, general damages, interest at the rate of 25% per annum on the claimed sum from 12th of January 2011 until payment in full and for costs of the suit. Subsequently in miscellaneous application number 63 of 2012 for leave to appear and defend the suit, the Defendant's application was granted on aspects of general damages, interest and costs of the suit. Upon the Defendant's own admission of indebtedness, the court further entered partial judgement for the Plaintiffs for the payment of US\$26,260 with costs of the application to be in the cause and leaving all other issues to be determined upon the hearing of the main suit.

The Plaintiff's Counsel agrees that the Defendant paid the decreed amount in accordance with the agreement signed between the parties pending determination of the main suit.

Whether the claim for general damages arising out of a summary suit is properly before court and can be tried by the court?

Counsel further raised the question of whether the Defendant can raise points of law not raised in or after the application for leave to defend a summary suit has been disposed of.

According to the Plaintiff's Counsel, Order 36 of the Civil Procedure Rules in general prescribes the procedure for a summary suit and the manner in which the Defendant may appear and defend the suit after obtaining the leave of court. If the Defendant wanted to stop any irregular proceedings under Order 36, he or she must on general terms do so at the first opportunity or may waive his right by taking a step in the action without objecting. Counsel relied on the judgement in **Uganda Transport Company Ltd versus Count De La Pasture [1953] EACA 168**. Consequently the Defendant must object to the specially endorsed plaint or any part thereof at the first instance while applying or before applying for leave to appear and defend the summary suit. On that basis the point of law ought to be dismissed with costs.

As far as the evidence is concerned, the Defendant's application for leave to defend the suit was granted on 21 March 2012 when the Defendant was given leave to defend the suit on aspects of general damages, interest and costs of the suit. In the affidavit in support of the application, the Defendant did not raise any point of law under Order 36 rule 3 of the Civil Procedure Rules against the specially endorsed plaint and is precluded from doing so at this stage of the proceedings.

The court granted the applicant/Defendant leave to appear and defend the main suit on aspects of general damages, interest and costs of the suit upon application by the Defendant. The Defendant cannot at this stage submit that the summary suit/procedure was not tenable.

Whether a claim for general damages arising out of a summary suit is properly before the court and can be tried by the court?

The Plaintiff's Counsel submits that in the case of **Hanani Moezali vs. Moez Ramani HCCS number 416 of 2001** honourable Justice Ogoola held that summary procedure is valid only as long as the Defendant is denied leave to file a defence to the suit. Where a suit starts as a summary suit and leave to defend is granted, the suit becomes an ordinary suit. Once the Defendant was granted leave to appear and defend civil suit number 47 of 2012, it ceased being a summary suit and became an ordinary suit and the court can entertain any claims such as the claim for general damages, interest and costs of the suit against the Defendant.

Whether the Plaintiffs have a cause of action against the Defendant for interest?

Counsel submitted that paragraph 4 of the plaint clearly sets out the facts constituting the cause of action. The facts are not disputed by the Defendant and also made the ingredients of a cause of action as defined in the case of **Auto Garage versus Motokov (1971) EA 514**.

Costs

On this question Counsel submitted that the evidence demonstrates that the Defendant only made payment after the intervention of court. Prior to that the Plaintiff had on several occasions engaged the representatives of the Defendant but the Defendant was not willing to pay.

In the premises Counsel prayed that the preliminary objections of the Defendant are dismissed with costs.

In rejoinder the Defendants Counsel contends that while they concede that where leave is granted, a suit is tried in an ordinary manner as if it were an ordinary suit, the issues for trial must always remain within the ambit of Order 36 of the Civil Procedure Rules. General damages are not one of those matters and the court still has an opportunity to strike out the plaint on the basis that the cause of action does not fall within the ambit of Order 36 of the Civil Procedure

Rules. Counsel contends that the suit becomes an ordinary suit upon leave being granted only for purposes of trying matters flowing from a specially endorsed suit which has to comply with the requirements of Order 36 of the Civil Procedure Rules.

In the case of **Hanani Moezali vs. Moez Ramani High Court civil suit number 416 of 2001**, the court dealt with the aspect of interest. That was precisely the dispute. However, as argued earlier, interest claimed has to be envisaged under Order 36 of the Civil Procedure Rules. In the instant case the interest that was agreed upon by the parties was 1% and is considered by the Plaintiff as fully paid. The Plaintiff cannot in the circumstances claim further interest.

Finally Counsel submitted that failure to raise an objection under the application for leave to appear and defend the suit is not fatal. An objection can be raised at any time.

Ruling

I have duly considered the Defendant's objection to the Plaintiff's suit. I have also considered the provisions of Order 36 of the Civil Procedure Rules and authorities cited by the Counsels.

In miscellaneous application number 63 of 2012 arising out of civil suit number 47 of 2012, the applicant who is the Defendant in the main suit sought the leave of court for unconditional leave to appear and defend civil suit number 47 of 2012. On 21 March 2012 Counsel Andrew Munanura appeared for the applicant while Counsel Edmund Kyeyune appeared for the respondent. Counsels informed the court that it was agreed by the parties that the applicant/Defendant pays the contractual sum of US\$26,000 and 1% as penalty fees. They informed the court that they had not agreed on the issue of costs and that the Plaintiff wants costs, interest and general damages.

The recording of the court was that by agreement of both Counsels for the parties and in the presence of representatives of the parties, partial judgement is entered for a sum of US\$26,000 and 1% as penalty fees against the Defendant. The court further ordered that conditional leave is granted to the applicant/Defendant to file a defence in respect of the remainder of this suit to try the issues of general damages, interests and costs. I must emphasise that there was no agreement on the question of costs, general damages or interest.

The objection of the Defendant is therefore that the question of general damages or interest does not arise from a suit filed under Order 36 of the Civil Procedure Rules. The contention of the Defendant is that the surviving suit for which it has been given leave to appear and defend is incompetent for not being within the causes of action permitted by Order 36 of the CPR and permitted to be filed as summary suits.

The sole authority relied upon for the proposition of law that the surviving suit of a summary suit has to be compliant with causes of action permitted by Order 36 is the Court of Appeal for East African decision in **Uganda Transport Company Ltd versus Count De La Pasture (1954) EACA 163**. In that case the Plaintiff/Respondent sued the Defendant/Appellant for salary and allowances alleged to be due to him and for unliquidated damages. It was noted that the plaint was irregularly presented under Order 33 (the equivalent of Order 36 of the revised Ugandan Civil Procedure Rules). There was an application by the Defendant for leave to appear and defend the suit. The Plaintiff additionally filed without leave an amended plaint increasing the claims. The amended plaint was purportedly filed under Order 6 rule 19 which permits a Plaintiff to file without leave an amendment within 21 days from the date specified in the summons for the appearance of or the entry of appearance by a Defendant. The Defendant applied for orders that the Plaintiffs suit brought as a summary plaint was irregular and should be dismissed with costs. Secondly the amended plaint filed by the Plaintiff ought to be disallowed and rejected. Thirdly and in the alternative the Defendant Company be at liberty to appear and defend the suit. The order of the court was that the Plaintiff's paragraph 15 of the amended plaint is deleted. Secondly the Defendant Company should be at liberty to appear and defend the suit. Thirdly that a written statement of defence should be filed within 14 days and lastly that the costs of the day should be costs in the cause. There was no order for the suit to be dismissed for irregularity. In the course of the proceedings, there was a prayer for dismissal founded on the application for leave to appear and defend. On appeal it was contended that the High Court ought to have dismissed the suit. The Court of Appeal found that the suit was irregularly brought under Order 33 rule 2 (Order 36 rule 2 revised edition of the Ugandan Civil Procedure Rules). The court observed that there was no example in England of a successful application to set aside service of a specially endorsed writ for irregularity but honourable Briggs J A observed that he saw no reason why such an order should not be made. He quoted authorities to the effect that departure from the correct form of endorsement may vitiate the service of the writ. He held as follows:

"I see no power under the Order to strike out any part of the claim, though summary judgement could not be given for any relief not within the scope of rule 2"

It is expressly clear that the decision of Briggs JA of the East African Court of Appeal found that there was no power to strike out any part of the claim brought irregularly by summary procedure under the equivalent of Order 36 of the Civil Procedure Rules. In other words summary judgement should not be issued where the claim does not fall within the parameters of Order 36 rule 2 of the Civil Procedure Rules. The correct remedy should be for the registrar not to issue the writ or summons where the claim does not fall under Order 36 rule 2 of the Civil Procedure Rules. He ought to refuse issuing a specially endorsed plaint and let the matter from its inception proceed as an ordinary plaint. It must be emphasised there where leave is not applied for the only orders that may be made can grant the claims which falls under order 36 rule 2 and not those not falling within. Where the matter comes before the judge upon an application for leave to defend the suit, it is obvious that in such cases and according to the decision in **Uganda Transport Company** (supra), the correct order to make is to give unconditional leave for the Defendant to appear and defend the suit. Secondly the Court of Appeal considered the amendment of the plaint without leave under Order 6 rule 19 of the Civil Procedure Rules. They observed that it was apparent from the wording of the first part of the rule that it does not cover suits brought by summary procedure since there is no time limited for appearance or entry of appearance by the Defendant. Briggs JA held that the matters raised by the Defendant Company were clearly of such a nature as to entitle it to unconditional leave to appear and defend, but the defence will be made to the original and not the amended plaint. Sir Newham Worley concurred. He agreed that there was no discretion to allow a claim to be brought by summary procedure if it is not precisely within the terms of Order 33 rule 2 (revised Order 36 rule 2). In other words the registrar should not sign the specially endorsed writ or unconditional leave to defend should be granted.

It is abundantly clear that the Court of Appeal for East and Africa held that where a claim does not fall under summary procedure in terms of Order 36 rule 2, the claim should not be allowed under the Order. The question then is what is the remedy? The obvious remedy according to the same court is not to strike out the claim but to treat it as an ordinary plaint and allow the Defendant unconditional leave to appear and defend the suit. The submission of the Defendants Counsel lacks merit because where a claim does not fall under the ambit of Order 36 rule 2 of the

Civil Procedure Rules, the remedy is not strike out the claim. The plaint would be treated as an ordinary plaint and considerations of Order 36 rule 2 would not apply to it. Order 36 rule 8 of the Civil Procedure Rules provides that:

"Leave to appear and defend a suit may be given unconditionally, or subject to such terms as to payment of monies in court, giving security, or time or mode of trial or otherwise, as the court may think fit."

What is crucial is that where leave is given conditionally, it may be to terms which are just such as payment of monies in court, order giving security or the time or mode of trial as would secure for the Plaintiff in the circumstances some of the benefits of summary procedure. Whatever the case may be, as far as the further conduct of the suit is concerned, regard must be heard to Order 36 rule 10 of the Civil Procedure Rules which provides as follows:

"Where leave, whether conditional or unconditional, is given to appear and defend, the court shall have power to give all directions and make all orders as to pleadings, issues, and any further steps in the suit as may then appear reasonable or necessary, or may order the suit to be immediately set down for hearing."

In this particular case, partial judgement was entered by consent of the parties. The parties failed to agree on the other issues. The court granted conditional leave for the issues of interest, damages and costs to be tried. The leave was conditional because the amount agreed upon by the parties of US\$26,000 and 1% penalty fees ordered by the court by consent of the parties was further ordered to be paid within one week from the date of the consent. Costs were ordered to be costs in the cause and are yet to be determined. Consequently the court directed that the question of general damages and interests together with costs would be tried. Indeed it would be tried as if it was an ordinary plaint. Where leave has been granted, the Plaintiff is not entitled to summary judgement and it is immaterial what the claim may be. This is because where the claim does not fall under Order 36 rule 2 of the Civil Procedure Rules, unconditional leave would be granted because the Defendant would be entitled to it. The Defendant would defend the suit as if it was an ordinary suit and evidence will not be led by affidavits but true viva voce evidence. The flipside would be that the Plaintiff would not be entitled to summary judgement on the basis of a claim that does not fall within the four corners of Order 36 rule 2 of the Civil Procedure Rules. In

other words because there was no power to strike out the Plaintiffs claim, the Defendant would be entitled to unconditional leave to defend the entire claim as it is on the merits.

In the premises, the Defendant's objection lacks merit and is overruled with costs. The suit shall proceed for hearing. Before I take leave of the matter, the court held that upon the Defendant filing a defence within 14 days from the date of the order, the suit will be sent for mandatory court annexed mediation following the procedure of an ordinary suit. If mediation has not been attempted, then the suit shall be referred back for mediation as originally ordered by the court when leave was granted for the Defendant to file a defence. In case there was any mediation attempt, then the matter would be fixed for scheduling and trial as if it was an ordinary suit as directed by the court when leave was granted.

Ruling delivered in open court this 18th day of October 2013

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Munanura Andrew Kamuteera holding brief for Mafabi Michael for the defendant

Lutaya Alex for the plaintiff

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

18 October 2013