

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

HIGH COURT MISCELLANEOUS APPLICATION NO.999 OF 2014

(ARISING FROM CIVIL SUIT NO.742 OF 2014)

WASSWA PRIMO.....APPLICANT

VERSUS

MOULDERS (U) LTD.....RESPONDENT

BEFORE THE HON. MR. JUSTICE HENRY PETER ADONYO

RULING

1. Background:

This is an application brought by way of notice of motion under Order 36 and Order 52 of the Civil Procedure Rules and section 98 of the Civil Procedure Act.

In this application, the Applicant seeks for orders that he be granted leave to appear and defend the claim in High Court Civil Suit No.742 of 2014 and for the costs of this application be in the cause.

2. Grounds for the Application:

The grounds in support of this application are contained in the affidavit in support deposed by the Applicant himself but briefly are that the Applicant and the Respondent's directors met in Southern Sudan where they were involved in construction works and it was where the alleged financial relationship arose making the suit to not only be misconceived as the alleged breach

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arose out of the jurisdiction of this Honorable Court but that it was just, equitable and in the interest of justice that court grants this application.

The Respondent filed an affidavit in reply through its director one Rodney Williams Nsubuga who deposed that the Respondent's claim is based on an agreement that was entered between the parties in Uganda where the Applicant borrowed United States Dollars 82,000 and that as a result of the said agreement the Applicant did hand over to the Respondent his certificate of title of land comprised in Block 14, plot 662 as security for the loan with the Applicant later trying to make some payments in respect to the debt owed to the Respondent wherein he instructed his bank to transfer money by RTGS but the bank dishonored the payment and so upon default by the applicant to pay the sums borrowed, the Respondent commenced foreclosure proceedings and it was when that the Applicant's wife one Susan Adenzu filed a suit alleging that the property mortgaged was matrimonial property which was mortgaged without her consent. The Respondent further states that the affidavit in support of this application is full of falsehoods and so the application should be dismissed with costs.

3. Submissions:

At the hearing of the application, Mr. Caleb Alaka appeared jointly with Mr. Asasira Bosco for the Applicant and Mr. Shafir Iga appeared for the Respondent.

It was submitted for the Applicant that there are triable issues in the main suit in that the mortgage agreement in which the suit is based is disputed with the transaction alleged therein in the main suit having arisen in Southern Sudan. The Applicant further state that arising from the very lengthy affidavit in reply filed by the Respondent it thus indeed go to show that there is a dispute in addition to the fact that there is the contention that the property mortgaged was matrimonial property making its circumstance to be one such that the court should find that this is a proper case showing that there are triable issues.

The Respondents in response submitted that the law as regards applications for leave to appear and defend is well stated in the case of **Maluku Trade Agency v KCB** where it was held that before leave is granted, an applicant ought to show that there are triable issues. That in regards to the instant matter, the Applicant had shown that there are no triable issues at all. The Respondent avers that the head suit is based on a mortgage agreement and the fact of an RTGS money

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transfer both of which are on record with the affidavit in reply showing that pursuant to the stated agreement for a loan the Applicant freely handed over title to the suit land as security for the loan with no contest from the wife to the applicant at that time. That even criminal proceeding was commenced against the Applicant arising from the RTGS money transfer with the affidavit in support of this application not being accompanied by any documents to raise or prove that there are triable issues and thus in the circumstances, the court should find that this was a suitable application deserving a dismissal on that basis and thereafter the entering judgment in the favour of the Respondent in the main suit.

The Respondent further states that in the alternative if court were to be inclined to grant the prayers of the Applicant then the stated leave should be granted conditionally in that the suit amount to be deposited in court by the Applicant.

In rejoinder, Mr. Alaka responded that since paragraph 14 of the affidavit in reply talks of proceedings between the Applicant's wife and the parties in the current application vide Nakawa High Court Civil Suit No.742 of 2014 and that there is an interim order issued by Nakawa Court on the 7th day October 2015 2014 restraining the parties herein from dealing with the mortgaged property until the main suit is disposed off clearly showed that there are triable issues and that it is this dispute which is reiterated by the Applicant. That even the Applicant was convicted in criminal matters relating to the RTGS which is claimed as a false cheque with the said conviction being on appeal and the conviction and thus since the mortgaged property is disputed and the place of the contract is Southern Sudan the dispute between the parties requires proof and so the matter ought to be heard in order for the court to resolve real dispute between the parties and that thus at this stage it would be unfair for the court to order the Applicant to deposit the sums stated in the main suit for indeed he raises a strong defence against the claim of the Respondent.

4. Resolution of this Application:

Order 36 rule 3(1) of the Civil Procedure Rules S.I. 71-1 provides that a defendant who has been sued under summary procedure must seek the leave of court if he or she intends to defend or has a defence to the said the suit. This legal provision has been further clarified by the Supreme Court in the case of **Geoffrey Gatete and Another v William Kyobe SCCA No.7 of**

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2005 when it pointed out that in an application of such nature what the court was required to determine is whether the defendant has shown good cause for such a leave to defend to be given.

Indeed the atmosphere of this requirement point was further expanded by Justice Yorokamu Bamwine J as he then was in the case of **Uganda Micro Enterprises Association Ltd & 2 others v The Micro Finance Support Centre Ltd HCMA No. 125 of 2005**, while citing with approval the decision in **Maluku InterGlobal Trade Agency Ltd v Bank of Uganda [1985] HCB 65** where the learned judge stated that before such a leave to appear and defend is granted a defendant ought to show by affidavit or otherwise that there is a bonafide triable issue of fact or law raised and thus when the defendant proves the position that there is a reasonable ground of defence to a claim against him or her by the plaintiff then the plaintiff would not be entitled to a summary judgment.

Relating the above to the instant matter from the pleadings, the Applicant raises the issue that the contract which is the subject of the head suit was not concluded in the Republic of Uganda where this court has jurisdiction but in the Republic of the Southern Sudan. By making this allegation the Applicant is in effect making it known to this court that it indeed had no jurisdiction to entertain the current matter for the same arose outside jurisdiction. This is a serious allegation which would necessitate thorough investigations by this court.

In addition, the Applicant avers that the stated mortgaged property which is at the core of the dispute between the parties herein as subject of the loan between the Applicant and the Respondent forms the central content in a dispute by the Applicant's wife and the parties herein for the same is the subject of a suit at Nakawa High Court in High Court Civil Suit No. No.742 of 2014 where there is a pending claim for determination that the suit land is a matrimonial property with the law requiring that before such a property is mortgaged then spousal consent ought to first be obtained whereas for the instant matter this was never done from making the claim of the Respondent over the suit property to be one which is a contest.

The necessity for a court to cloth itself with jurisdiction has since determined by the Supreme Court in the case of **Bank of Uganda v TransRoad Ltd Supreme Court Civil Appeal No. 3 of 1997** for the Supreme Court while quoting learned author **Mulla on the Code of Civil Procedure, 14th Edition at page 225** defined *jurisdiction* in the following words;

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“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted and may be extended or restricted by the like means. If restriction or limits is imposed the jurisdiction is unlimited.

From the affidavit of the Applicant, there has been raised the issue of the competence of this court to handle this matter since this court is stated to lack the necessary jurisdiction to do so. This is a deposition clearly pointed out in the affidavit in support of this application wherein it is stated that the cause of action for which the Respondent is suing the Applicant arose in the Republic of Southern Sudan which is an exterior jurisdiction in which this court has no authority and power to handle matters arising from. When this contention is put in the context of the Supreme Court definition of the meaning of jurisdiction in the case of Bank of Uganda v TransRoad (above) it is apparent that where there is an allegation as to the competence of a court to try a matter is raised arising from the fact that it lacks jurisdiction then that fact ought to be investigated since jurisdiction is a creature of the statute. This allegation would therefore warrant further investigations proving that indeed there are triable issues raised. That alone would warrant the grant of this application.

The second question raised by the Applicant relates to a legal challenge which has been mounted by the Applicant's wife on the mortgage itself for it is stated in that the same is being contested in court having been created over a matrimonial property yet according to **Section 6 of the Mortgage Act** it is provided that such property if it is said to be matrimonial property then spousal consent has to be sought first before the creation of such a mortgage.

Arising from the affidavit evidence on record, it is apparent that it is not disputed that the mortgage on the property in question is a subject of a legal challenge in a court of law for it is even indicated that indeed the wife of the Applicant in the instant application has obtained an interim order from the High Court at Nakawa which order restrains both the Applicant and the Respondent who are parties in this very application from dealing with the mortgaged property until the disposal of the legal challenge by that court. The fact that this point is not contested at all points to the fact that there ought to be exercised caution in dealing with the dispute where

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the said property is a subject matter thus clearly pointing to the fact of the existence of a triable issue that requires thorough investigation before this court can proceed to pronounce itself on the matters raised in the head suit meaning that this fact can only be concluded where there is indeed the production of the necessary evidence by either side for the trial by this court in order for it to conclusively resolve the dispute between the parties herein and such evidence can only be produced wherein the Applicant is allowed to file his defence to the main suit .

Thus I am satisfied that since that seems to be the case, then it is believable that the Applicant has raised plausible two triable issues which require investigations which I find indeed to be bonafide. Noting that those two issues go to the very core of the main suit, it would not be in the interest of the justice of the case to require that the applicant granted this application conditionally for to do so would be placing unnecessary impediments to the realization in the footpath to the justice of this matter. I thus would decline to grant the alternative order sought by the Respondent.

5. Orders:

- a. This application for leave to defend the main suit is granted unconditionally
- b. I do make consequential orders that the intended defence to be filed within the statutory required period of fifteen (15) days from the date of this ruling
- c. The costs of this application to abide the outcome of the main suit.

I do so order accordingly.

Henry Peter Adonyo

Judge

1st June, 2015