THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

MISCELLANEOUS APPLICATION No. 370 OF 2015

[Arising Out of Civil Suit No. 256 of 2015]

KOBIL UGANDA LIMITED :: APPLICANT

VERSUS

TURYATEMBA WILLIAM :: RESPONDENT

BEFORE: HON MR. JUSTICE B. KAINAMURA

RULING

The applicants brought this application under the provisions of 0rder 36 rule 4 and Order 52 rule 1 & 2 of the CPR. The applicant seeks orders for unconditional leave to appear and defend C.S No. 256 of 2015 and that costs of the application be in the cause.

The application was supported by the affidavit of Allan Kyakuwa a Company Secretary of the applicant.

The respondent filed two affidavits in reply one by the application and another deponed by Byamukama Rogers the Manager of the Kobil Highway Kabale.

In the summary suit the respondent claims recovery of UGX 71,689,216.80 being monies due and owed by the defendant for unpaid licence fees and costs of the suit.

The grounds of the application are set out in the affidavit sworn by Mr. Allan Kyakuwa on behalf of the applicant and are that;

The parties entered into dealership contract under which the respondent is the applicant's dealer at its station trading as "Kobil Kabale Highway" and the applicant has fulfilled all the terms of the dealership.

The applicant is not aware of any alleged losses caused by the transporters as is alleged.

The applicant denies all the emails attached to the suit as they do not belong to its employees and without prejudice, all decisions on credit notes issuable by the applicant to its clients are approved and signed off by the general manager or other authorised official at that time.

The applicant has carried out the necessary tests with the tanks belonging to its station on which the respondent is its dealer, and the same remain intact. The obligations of wrong calibrations are false.

The applicant has a good and valid defence according to the attached draft statement of defence marked annexure “A”.

There are triable issues in this suit that cannot be resolved in a summary manner.

The respondent filed an affidavit in reply in which he deposed that;

He had authorised his manager Mr Byamukama Rogers to swear an affidavit on his behalf on matters he was more conversant with.

The Notice of Motion and its affidavit in support are incurably defective, speculative and bad in law.

The applicant did not within the 10 days apply for leave to appear and defend the suit as stipulated by law and judgement was applied for.

The contents of paragraphs 1,3,4,5,6,7,8,9,10 and 12 in the affidavit in support are baseless hearsay as Allan Kyakuwa has never been to Kobil High way Kabale for all the time the matters in the suit took place.

In specific reply to paragraphs 3 and 4 the contents thereof are pure lies as the applicant breached the dealership agreement as stipulated and Allan Kyakuwa was never party, signatory or present when the same was made and during the operation of the dealership.

In further reply, Allan Kyakuwa has not attached the dealership agreement or shown how his allegations of compliance were done by the applicant and the same allegation remains unsubstantiated.

The deponet maintains the contents of paragraphs 3 and 4 of the plaint and attachments thereto to substantiate it.

The contents of paragraph 6 and 7 are false and the credit note received required signatures of the officials of the applicant who thereby admitted the applicant's indebtness in 2013 but to date have not paid.

The same Allan Kyakuwa who denies the existence of the same officials or any breach of the dealership agreement belatedly in paragraph 6 admits them but seeks to hide behind the excuse that not all signed.

Allan Kyakuwa was not involved in the day to day operations of the applicant and has no capacity to identify the emails, signatures and titles of the applicant's officials.

That, the General Manager does not sign credit notes and the persons who signed them had authority to sign and the credit notes were issued by the applicant.

Allan Kyakuwa tells lies in paragraph 8 and does not attach any calibrations carried out on its stations and found intact as alleged and the wrong calibration continues as stated in the plaint.

No good and valid defence can arise from unsubstantiated baseless general denials of the applicant and the attached proposed defence is a sham and of no legal effect and it is just and fair that the application is dismissed with costs.

In further reply, Mr. Byamukama Rogers the Manager of Kobil High way Kabale deposed that;

The contents of paragraphs 1,3,4,5,6,7,8,9,10 and 12 in the affidavit in support are baseless hearsay as Allan Kyakuwa has never been to Kobil High way Kabale for all the time the breach took place.

The bare allegations of Allan Kyakuwa do not erase the credible documentary evidence attached to the plaint that demonstrate the losses caused by the transporters which are endorsed on the delivery notes attached as collective on which he as the manager and the respective drivers who delivered the fuel and wrote in pen confirming the losses and endorsed with their signatures and names.

In specific reply about the emails attached to the plaint as Annexure “A” they belong to the applicant’s staff who are known to the deponet.

The credit notes received required signatures of the officials of the applicant who thereby admitted the applicant’s indebtedness to the respondent in 2013 but to date have not paid.

The same Allan Kyakuwa who in Paragraphs 3, 4, and 5 denies the existence of the same officials or any breach of the dealership agreement belatedly in paragraph 6 admits them but seeks to hide behind the excuse that not all signed.

Kyakuwa Allan was not involved with the day to day operations of the applicant and has no capacity to identify the emails, signatures, and titles of the applicant’s officials who the deponent is personally familiar with because of dealing with them regularly.

The General Manager does not sign credit notes and the persons who signed were authorised officials of the applicant who always signed them and credit notes were issued by the applicant.

No good and valid defence can arise from unsubstantiated baseless general denials of the applicant and the attached proposed defence is a sham and of no legal effect and it is just and fair that the application is dismissed with costs.

In rejoinder, Mr. Anthony Galandi Operations Manager of the applicant deposed that;

The respondent has not attached any power of attorney or evidence showing the authorization of Mr. Byamukama Rogers to swear the affidavit in support of the summary suit on his behalf. The applicant shall thus raise a preliminary objection that the summary suit is fatally defective and ought to be struck out.

The applicant had the 10 days within which to file its reply but the 10th day fell on a Saturday and the applicant filed on Monday the 18th day of May.

Mr. Allan Kyakuwa works with the applicant’s Lawyers and usually handles matter related to the applicant.

In response to paragraphs 8 and 9 of the affidavit of the applicant states the deponent who swore the affidavit in his capacity as Company Secretary and deposed to the facts within his knowledge as he deals with and advises the client on a day to day basis.

In response to paragraph 12, 13 and 15, the alleged credit notes were not signed by the General Manager and cannot be binding on the Company.

The emails attached do not belong to any of its employees.

The calibration tests done on the tanks have shown that the tanks are in good order and are still intact.

There are various triable issues raised in the matter from which the applicant ought to be given a chance to defend itself in this matter.

Applicant's Submissions

Counsel for the applicant first sought court's indulgence for having filed submissions after the date set by court and indicated it was on account of the absence of Counsel handling the matter.

Counsel then raised a preliminary objection with regard to the fact that the affidavit in reply was filed out of time by the respondent in this matter and was filed and served out of time. Counsel in support of this cited **Order 12 rule 3(2) of the CPR** which is to the effect that service to an opposite party in interlocutory applications shall be done within 15 days from the date of filing the reply. Counsel further cited the case of ***Stop and See (U) Ltd Vs Tropical Africa Bank Misc. App 333 of 2010*** where Court held that the affidavit in reply that had been filed out of time was incurable in absence of leave to file the said reply out of time. Counsel also quoted the decision of court in ***Springwood Capital Partners Ltd Vs Twed Consulting Co. Ltd Misc. App. 746 of 2014*** where the applicant's objection on the ground of filing out of time was sustained. Counsel prayed that the affidavit in reply be struck out and the application allowed to proceed without any objection.

Addressing the grounds of the application, Counsel submitted that as was held in the case of ***Rajiv Kumar Vs Patel Misc. App No.815 of 2014*** the applicant is enjoined to show that there are

triable issues. Counsel submitted further that there are various questions that ought to be determined by court which include;

- *Whether the defendant was in breach of the dealership agreement*
- *Whether there are any losses at the station and if so, if such losses are attributable to the defendant*
- *Whether the plaintiff is entitled to the claim of UGX 71,689,216 from the defendant as claimed*
- *Whether the plaintiff is entitled to the claim of UGX 3,500,000/= the same being a reward from the plaintiff.*

Counsel in conclusion prayed that the application be allowed with costs.

Respondent's Submissions

Counsel for the respondent submitted that the application was premised on obvious falsehoods and dilatory conduct. Counsel further urged that there was no proof of travel as alleged. Counsel additionally stated that it is a fact brought to Court's attention that Mr. Mwasame Nicholas was in office and was served with the respondent's submissions which he refused to acknowledge. Counsel stated that the same were never replied to or controverted but instead, the applicant hurried to file the belated prejudicial submissions. Counsel thus prayed that the application for extension of time within which to file submissions be rejected and the application dismissed with costs and judgment entered in the main suit.

Counsel in reply to the applicant's preliminary objection submitted that the matters about service which are matters of fact cannot be raised at this stage when pleadings were closed long ago without the applicant raising them in the pleadings. Additionally Counsel urged that the applicant had to raise the question of service of the affidavit in reply by its pleadings as it is a matter of proof and not evidence from the bar.

In reference to the case of ***Stop and See (U) Ltd*** (supra) relied on by Counsel for the applicant Counsel argued that this application Counsel falls outside the provisions of **Order 12 of the CPR.**

Counsel further submitted that the applicant's preliminary objection does not go to the heart of the dispute and would be a type curable under **Article 126 (2) (e) of the Constitution of Uganda** as it is not of a fundamental nature and no prejudice to the case. Counsel prayed that the preliminary objection be overruled and prayed that court proceeds to consider the respondent's submissions on the merits of the application.

Counsel for the respondent submitted that the applicant has deliberately not addressed all the preliminary points of law raised by the respondent in his submissions. Counsel further more invited Court to adopt the ratio in the case of ***Samwiri Massa Vs Rose Achen (1978) HCB 279*** where and uphold the unchallenged submission of the respondent that the application lacks merit and ought to be dismissed.

On the merits of the application, Counsel for the respondent submitted that the applicant cannot claim a good defence because there are no issues or questions of fact or law in dispute which ought to be tried.

Counsel for the respondent in his submission raised the following issues;

- *Whether the applicant's application is competent*
- *Whether the applicant is entitled to leave to appear and defend Civil Suit No.16 of 2012*
- *What remedies are available*

Addressing issue one; whether the application is competent, Counsel submitted that the applicant belatedly filed submissions and Court granted the respondent leave to raise a preliminary point of law as part of the written submissions.

Counsel for the respondent submitted that the applicant was served summons on the 6th of May 2015 and the reply filed on 18th May 2015 which was out of time. Counsel quoted the decision of court in the case of ***Pinnacle Projects Ltd Vs Business in Motion Consultants Ltd Misc App No. 362 of 2010*** where court *inter alia* held that there is need to determine when time starts running in dealing with such an issue and the number of days within which to apply for leave to appear and defend is ten days from the date of service of summons.

Further, Counsel submitted that the applicant should have sought leave to apply for leave to appear and defend the suit since it was out of time. Counsel submitted that as held in the Supreme Court decision of ***Geoffrey Gatete and Angella Maria Nakigonya Vs William Kyobe SCCA No.7 of 2005***, there was effective service since the result of having the other party aware of the suit was achieved and proved. Counsel prayed that Court finds that the application was filed out of time and judgment be entered in favor of the respondent/plaintiff.

Addressing issue two; whether the applicant is entitled to leave to appear and defend Civil Suit No.16 of 2012, Counsel submitted that the issue should be answered in the negative based on the grounds that;

The applicant failed to discharge its burden of proof which is on a balance of probabilities.

The applicant did not file for leave to apply for leave to appear and defend the suit yet it was out of the statutory required time within which to file.

The applicant has no defence or triable issue given that the applicant admits that there were numerous correspondences.

Regarding issue three; what remedies are available, Counsel invited Court to find that the applicant has failed to raise a triable issue as to whether or not the money in issue was paid to the respondent. Counsel invited Court to adopt the ruling in ***Sam Engola Vs ES-KO International INC. HCT-MA-231 OF 2005*** and prayed for the dismissal of the application, judgment and costs be entered for the respondent.

Decision of Court

I have read carefully the pleadings and arguments of both Counsel. The applicant seeks leave to appear and defend the summary suit filed against it for recovery of UGX 71,689,216.80 being monies due and owed to the respondent/plaintiff for unpaid licence fees and costs of the suit.

Both Counsel raised preliminary objections which i will first address. Counsel for the applicant raised an objection regarding filling and service of the affidavit in reply out of time. I agree with the position adopted in the case of ***Springwood Capital Partners Ltd Vs Twed Consulting Co. Ltd Misc. App. 746 of 2014*** where court held that;-

> *".....there being no application for extension of time to validate the filing of the affidavit in reply out of time, I cannot on my own motion extend the time to validate the affidavits in reply of..... The objection of the Applicant's counsel on the ground of late filing of the affidavit in reply of the respondent is sustained."*

Counsel for the respondent did not deny filing the affidavit in reply late but rather stated that it can be cured under Articles 126 (2) (e) of the 1995 Constitution of Uganda. However, the tendency of defaulting litigants relying on Article 126 was sufficiently addressed in the Supreme Court decision of ***Kasirye Byaruhanga & Co. Advocates Vs UBD SCCA No. 2 of 1997*** where court *inter alia* held that;-

> *"…… A litigant who relies on Articles 126 (2) (e) must satisfy court that the circumstances of a particular case before the court was not desirable to have undue to the relevant technicality. Article 126 (2) (e) is not a magic wand in the hands of defaulting litigant.*

Accordingly for the reasons above, the applicant's preliminary objection is sustained and I will not rely on the affidavit in reply as it was filed.

The objection raised by Counsel for the respondent was to the effect that the application for leave to appear and defend was filed late without applying for extension of time. Counsel for the respondent submitted that service of summons was done on 06/05/2015 and the applicant filed on 18/05/2015.

Application for leave to appear and defend the suit should have been filed ten days from the service of summons.

I note that the service of summons was made on 6th May 2015. Considering that 9th June 2015 was a public holiday then the application was clearly filed in time. In the premises the preliminary objection fails.

I will now consider the application on its merits. In application of this nature, what court has to determine is whether the defendant/applicant has shown good cause in order to be granted leave to appear and defend. Good cause has been held to be if the defendant has tenable defence to the

suit. In the affidavit in support of the application, the applicant states that he obliged by all his obligations under the dealership agreement, the applicant further denies issues of Credit notes and e-mails relied on by the defendant/respondent to prove its case.

To my mind, the applicant has raised triable issues which should be investigated by court during a full trail of the case.

In the premises the application is granted.

The applicant should file his defence to the suit within ten days.

Costs will be in the cause.

B. Kainamura
Judge
20.11.2015