

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

MISCELLANEOUS APPLICATION No. 544 OF 2014

(Arising Out Of Civil Suit No. 399 of 2013)

SPENCON SERVICES LTD :::::::::::::::::::: APPLICANT

VERSUS

VEHICLE & EQUIPMENT LEASING LTD :::::::::::::::::::: RESPONDENT

BEFORE: HON JUSTICE B.KAINAMURA

RULING

The applicants brought this application under the provisions of Order 36 rule 3 (1) & 4, Order 52 rule 1, 2 & 3 of the CPR and section 98 of the CPA. The applicant seeks orders for unconditional leave to appear and defend Civil Suit No. 399 of 2014 now pending in this court and for costs of the application.

The application was supported by the affidavit of the Accountant of the applicant; Mr. Raghava Reddy Munnangi.

The respondent filed an affidavit to oppose the application deponed to by the Country Manager of the respondent; Doreen Sembeguya.

In the summary suit the respondent claims recovery of USD 216,274.7 being the outstanding rentals, interest and early termination costs together with Ug.shs 71,764,500/= for repossession and repair costs plus costs of the suit.

The grounds of the application as set out in the affidavit sworn by Mr. Raghava Reddy Munnangi the Accountant of applicant are that;

The applicant has a meritorious defence that goes to the whole of the respondent's claim in the main suit and a reasonable cause to appear and defend the suit.

The applicant hired a number of trucks and browsers in accordance with the terms of Rental Agreement made between the applicant and respondent on 19th October 2010.

One of the essential terms of the Rental Agreement [clause 9.1(a)] was that the applicant was required to pay rental instalments either on time or on a date mutually agreed at the exercise of the option by the applicant.

The parties to the rental agreement are aware of the fact that the applicant's ability to timely pay was contingent on an anticipated release of funds by the Government of Uganda.

Despite the applicant's best endeavours to secure the release of funds from Government of Uganda, the Government authorities frustrated these efforts and the monies sought were not released.

The applicant exercised the option provided under the contract and informed the respondent that due to an event of frustration it was unable to make timely payment of the rental sums stipulated due to the frustrating event of the inaction by the Government of Uganda and requested that the parties discuss a mutually agreeable date for payment.

Despite exchanging several correspondences regarding the matter, the respondent instead of good faith interaction decided to unilaterally confiscate the hired machinery thereby frustrating the object and purpose of the Rental Agreement and repudiating the same.

The respondent's claim that the machinery was in need of repair at the time of repossession is disputed and the liability for the cost of such alleged repair is unacceptable.

The process of removing the hired machinery from the applicant's possession was supervised and conducted solely by the respondents.

The applicant is accordingly not responsible for any damage done by the respondent's agents.

The applicant has always been willing to settle the matter out of court but the respondent's conduct has been such as to wholly frustrate the rental agreement.

The applicant has a meritorious defence with reasonable chances of success.

It is in the interest of justice, equity and fairness that the applicant is granted unconditional leave to defend Civil Suit No. 399 of 2014.

In the affidavit in reply, Doreen Sembeguya the Country Manager of the respondent deposed that;

The applicant has no defence to the suit as it breached the conditions of the Rental Agreements and despite several reminders and various undertakings to clear the outstanding amounts has since defaulted on the same.

The said clause 9.1(a) is to the effect that the applicant would pay all rental instalments on time or on a mutually agreed date following request made within a reasonable time from the actual date of payment.

There was never any alternative schedule agreed upon as demonstrated by “annexure C” which are the repayment schedules served on the applicant, and at no time was there an alternative schedule to demonstrate the applicant’s allegations of an alternative mutually agreed repayment schedule.

As opposed to the alleged option to pay at a later date, the respondent demanded for payments to be made on time and the applicant did not at any one time make timely payments hence the termination of the lease agreement attached as annexure “D”.

The repayment of the facility was never pegged on Government payments.

The respondent, subsequent to the inspection of the trucks, raised concern that the trucks were in very bad condition as they were not being maintained and serviced as agreed in the lease agreement.

The applicant was asked to return the leased trucks following failure to meet the rental payments which they absconded and or refused, forcing the respondent to instruct bailiffs to impound/ reposes the leased trucks.

The trucks were in poor mechanical condition at the time of repossession hence the expenses incurred by bailiffs in repairing and mobilising the trucks to move the same.

Applicant's submissions

Counsel for the applicant submitted that the governing principles of applications of this nature are well settled and are that;

- a) There is a triable issue or arguable point of fact or law which the court ought to determine.*
- b) The applicant must satisfy court that the allegations so raised amount to a plausible defence.*

Counsel for the applicant further submitted that the facts of the dispute give rise to the following triable issues for court's consideration;

- a) Whether the applicant exercised the option under clause 9(1)a of the agreement*
- b) Whether the respondent frustrated/repudiated the master rental agreement*
- c) Whether the applicant is liable for the early termination costs*
- d) Whether the applicant is liable for repossession and repair costs*

Counsel submitted that the applicant concedes that there are sums owing to the respondent in respect of outstanding rental arrears for the period that the vehicles were in its possession and use. He however stated that the applicant requests that the exact amount owed should be determined after reconciling accounts to ensure no further excess charging.

Counsel also submitted that the applicant concedes that there may be sums owing to the respondent in respect of interest on delayed payment but prays that the exact amount owing can only be determined after a thorough process of reconciling the accounts of the parties.

In regard to clause 9(1) of the agreement, Counsel for the applicant submitted that the delay to make payments was caused by a non-release of funds by the Government of Uganda in 2013. Counsel also stated that the applicant attempted to reschedule the payment of the rental instalments with the respondent but was hamstrung in the attempts by the actions of the respondent in unilaterally withdrawing the hired vehicles. Counsel contended that the actions of

the respondent amounted to breach of an essential term of the agreement and amounted to an effective repudiation of contract disentitling the respondent from claiming early termination costs.

With regard to the amounts due as rental arrears, interest and early termination costs which aggregated into a lump sum of USD 216,274.7, Counsel submitted that the respondent is not entitled to a summary judgment for this amount.

On the claim for repossession and repair costs, Counsel submitted that the respondent is suing to be paid money lost by a third entity i.e. Ryan Holdings that is neither a party to the contract in question nor a party to the suit. Counsel stated that no known doctrine, principle, or rule of contract law permits such a recovery.

Counsel submitted that notwithstanding Clause 13 of the agreement, the respondent took it upon itself to unilaterally repossess the hired vehicles. Additionally, the respondent undertook this activity while assuring the applicant that it was not going to repossess the vehicles and that the parties were in good faith negotiations to maintain the rentals. In conclusion, Counsel submitted that in light of the respondent's behaviour, it would be unjust to foist the expenses incurred in the course of the repossession process upon the applicant.

Finally regarding repair costs, Counsel submitted that the applicant maintains that while the hired vehicles were in its possession the applicant kept the equipment in good repair and disclaims that the vehicles when collected were in dire need of repair. Counsel submitted that the respondent is responsible for any damage that may have been caused by its agents in the course of repossession. Counsel submitted that there is no nexus between the vehicles hired and the receipts submitted as annexure "E" of the summary plaint. He submitted that several of these receipts do not even have the details of the vehicle being repaired and the respondent has not given court sufficient details of the vehicle and whether they relate to the same vehicles that were hired under the agreement. Counsel submitted that this raises the issue of whether the applicant should be liable to meet the costs at all.

In conclusion, Counsel submitted that the applicant ought to be granted leave to appear and defend the suit and prayed that the application be granted with costs.

Respondent's submissions

Counsel for the respondent submitted that the rationale for **Order 36 of the CPR** was stated in **Zola & Another Vs Ralli Brothers Ltd & Another [1969] EA 691** where court held that;

“.....Normally a defendant who wishes to resist the entry of summary judgment should place evidence by way of affidavit before the judge showing some reasonable ground of defence to the claim.”

Counsel also cited **Kotecha Vs Mohammed [2002]1 EA 112** where Court held that;

“.....the defendant is granted leave to appear and defend if he is able to show that he has a good defend on the merit(s).”

Counsel opined that the applicant must have a good defence on the merits to the respondent's claim for leave to appear and defend to be granted.

Counsel for the respondent questioned the issues raised by Counsel for the applicant arguing that the applicant framed its own issues. Counsel submitted that issue 1 has been shown as being misguided and with the intention to mislead Court. Counsel further stated that issues 2, 3, and 4 are not raised in the affidavit in support of the application and are a submission at the bar.

Counsel urged that the application be dismissed with costs as it does not disclose a triable issue. Further that as a fact the applicant admitted the indebtedness. Counsel prayed that judgment be entered in favour of the respondent. In the alternative, Counsel prayed that the application may be granted on condition that judgment is entered on the admitted sum of USD 216,275.51 or such sums as security or a bond for payment of sums agreed upon before a mediator.

In rejoinder, Counsel for the applicant relying on the position in the case of **Begumisa George Vs East African Development Bank Misc Appl. No.451 of 2010** submitted that the onus is on an applicant to show that there is a triable issue of fact or law. Counsel further submitted that the applicant's submissions did not go outside the pleadings. He submitted that the issues flow directly from the respondent's primary claim for compensation for early termination costs.

Counsel for the applicant additionally submitted that the applicant's defence relates to the exercise of its right under **Clause 9(1) (a)** of the agreement to suspend and reschedule the rental

payment date. Counsel stated that the defence of the applicant is that instead of renegotiating in good faith, the respondent gave the appearance of negotiating while frustrating the contract by withdrawing the vehicles.

Counsel further submitted that credit notes were indeed issued in favour of the applicant but this was done precisely because of excessive charges made by the respondent. Counsel added that this is the reason why the applicant requests for proper reconciliation of accounts to determine the correct amount owing.

Counsel further submitted that, the applicant vigorously disputes any liability for early termination costs. Counsel urged that due to amalgamation coupled with the respondent's error prone accounting, the applicant submits that the respondent is not entitled to summary judgement for USD 216,274.7.

Counsel further urged that the failure of the parties to reach an alternative payment date is part and parcel of the applicant's defence; the fault for which is placed upon the respondent.

In respect of the anticipated release of funds by government, Counsel submitted that the applicant presumed that the respondent accepted the representations that there was delay by government as truth.

On the issues for determination raised by the applicant, Counsel submitted that the applicant was merely outlining its understanding of the issues that are likely to arise in the summary suit. Counsel further stated that for avoidance of doubt, the applicant framed a single issue for the purpose of the application i.e; ***whether there are any triable issues of fact or law which the court ought to determine.***

In conclusion, Counsel submitted that substantive issues of fact and law do arise in the dispute between the parties and that the respondent is not entitled to a summary judgment. Counsel therefore prayed that the applicant be granted unconditional leave to appear and defend HCCS 399 of 2014.

RULING

I have read through the pleadings of the parties and submissions of both Counsel. The plaintiff's claim is for recovery of USD 216,274.7 being the outstanding rentals, interest and early termination costs together with Ug.shs 71,764,500/= for repossession and repair costs and costs of the suit. The applicant and respondent executed a vehicle and equipment rental agreement in which they agreed that the respondent would avail the applicant with vehicles and equipment for rent at a rate provided for in the rental agreement. The applicant and respondent executed more rental schedules. However, the respondent later on terminated the lease agreement by letter and repossessed the trucks and browsers and filed a summary suit for a liquidated demand which the applicant seeks to defend.

An application for leave to appear and defend a suit is provided under **Order 36 rule 4 of the CPR**. The conditions that ought to first be met before leave is granted have long been settled. In ***Kotecha Vs Mohammed [2002]1 EA 112***, court held that;

“Where a suit is brought under summary procedure on a specially endorsed plaint, the defendant is granted leave to appear and defend if he was able to show that he had a good defence on merit, or that there is a difficult point of law involved; or a dispute as to the facts which ought to be tried; or a real dispute as to the amount claimed which requires taking into account to determine; or any other circumstances showing reasonable grounds of bonafide defence.”

Counsel for the applicant admitted the indebtedness of the applicant. However Counsel submitted that the respondent frustrated the rescheduling of the payments as provided for under clause 9(1) (a) of the agreement. Counsel submitted that the respondent was claiming excessive charges and urged that the amounts due should first be well computed. Counsel further stated that the applicant disagreed with the figure of USD 216,274.7 being the outstanding rentals, interest and early termination costs.

Counsel for the respondent contended that there is no plausible defence. This was simply because the applicant admitted being indebted to the respondent.

I note that the applicant's main argument in this application is premised on the import of Clause 9 (1) (a) of the Rental Agreement entered into between the parties on 19th October 2010. The clause provided:-

“9.1 The following terms are fundamental and essential terms:-

a) *That you pay all rental instalments on time or on a mutually agreed on date following your request to make payment within a reasonable date from actual date of payment.”*

In the affidavit in support of the Notice of Motion, One Raghava Reddy Munnangi deposed in paragraph 9 and 10.

“9 *That the applicant exercised the option provided for under the contract and informed the respondent that due to an even of frustration it was unable to make timely payments of the rental sums stipulated due to the frustrating event of the situation by Government of Uganda and requested that the parties discuss mutually agreeable date of payment.*

“10 *That despite exchange of several correspondences regarding the matter (see emails sent by the applicant on 6th August 2013 and 16th September 2013 annexed to the respondent’s plaint) the respondent instead of entering into good faith interaction aimed at discussing a mutually agreeable repayment date of the rental instalments decided to unilaterally confiscate the hired Machinery thereby wholly frustrating the object and purpose of the rental agreement and repudiating the same”.*

In my view the email of particular interest in that of 16th September 2013 which stated in part:-

*“..... since they are not paying in time we could not pay your instalments. We confirm that GOU is scheduling to pay us substantial amount (\$ 4.5 million) **in the fourth week of October** from the second quarter release. Meanwhile we will arrange to pay some cash this week. We can think of additional security acceptable to you” (emphasis mine)*

I further note that CS No. 399 of 2014 was filed on 17th June 2014 some eight months after the contemplated release of funds from Government. Would one be correct to say, as the applicant alleges, that the respondent wholly frustrated the rental agreement? Surely not. Further, would one be correct to say that there was a disagreement as to the amounts due? Again surely not.

Accordingly this application must but jail with regard to claim of the amount due for the rental, and interest. In the result judgment is entered for the plaintiff/respondent in the sum of USD 216,275. 21 (United States Dollars Two Hundred Sixteen Thousand, Two Hundred Seventy Five and Fifty One Cents) plus costs.

The above said, the plaintiff had also claimed UGX 71,764,500/= (Uganda Shillings Seventy One Million Seven Hundred Sixty Four Thousand Five Hundred) being repair costs of the trucks and bowers after repossession including repossession costs. In my view this does not fall under the scope of O 36 r 2 of CPR. It is not specifically provided for as a liquidated sum in the Rental Agreement and neither did the parties expressly agree on it. In the circumstances leave to appear and defend this claim should be granted.

My decision under this head is fortified by the position taken in ***Uganda Transport Co. Ltd Vs Count de La Pastus (3) (1954) 21 EACA 163*** where it was held:-

“when a plaint endorsed for summary procedure contains claims correctly endorsed and other claims, the court may by O 33 rule 3,7 and 10 deal with the claims correctly specifically endorsed as if no other claim had been included therein and allow the action to proceed as respects the residue of the claim, the court having no power under O 33 to strike out any part of the claim but being unable to give summary judgment for any relief not within the scope of O 33 rule 2 aforesaid”

Accordingly leave to appear and defend prayer ii of the plaint being the claim for repossession and repair costs is granted. The defendant/applicant should file WSD within ten days of this ruling.

Costs of this application to abide the outcome of prayer ii of the plaint in C.S No. 399 of 2014.

B. Kainamura

Judge

08.10.2015