

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

MISCELLANEOUS APPLICATION No. 972 OF 2013

[ARISING OUT OF CIVIL SUIT No. 614 OF 2013]

ANITA AMONG APPLICANT/2ND
DEFENDANT

VERSUS

**NDAGIRO INNOCENT NDAAGA :::::::::::::::::::::::::::::: RESPONDENT/
PLAINTIFF**

BEFORE: HON JUSTICE B.KAINAMURA

RULING

The applicants brought this application under the provisions of Order 36 rule 3 & 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. 614 of 2013 now pending in this court and for costs of the application to be in the cause.

The application was supported by the affidavit of the applicant; Anita Among.

The respondent filed an affidavit to oppose the application deposed by the respondent; Ndagi Innocent Ndaaga.

In the summary suit the respondent/plaintiff claims recovery of UGX 120,000,000/= jointly and severally from the applicant and four others being

money had and received from the plaintiff to secure him land and a deed print for the same which he never received; hence the suit.

The brief grounds in the Notice of Motion are that;

The applicant has a good defence against the claim and intends to raise a preliminary point of law.

There are triable issues of fact and law that need to be resolved by filing a defence.

It is just and equitable that leave be granted to the applicant to appear and defend the suit on its merits.

The affidavit in support of the Notice of Motion sworn by the applicant Anita Among stated that;

The applicant is not in any way indebted to the respondent as alleged.

The plaintiff approached the applicant and the four other defendants and was interested in acquiring land measuring 10 acres at Namanve.

They agreed with the plaintiff that the total contract price for surveying and acquiring the deed print of the land would cost him UGX 120,000,000/=.

The plaintiff made a deposit of UGX 15, 000,000/= to enable them commence with the work and the balance of UGX 105, 000,000/= would be paid in a period of two weeks.

It was a major term of the agreement that the said deed print for the land would be handed over to the plaintiff after full payment of the contract price.

The plaintiff defaulted in making the payment and for that reason the plaintiff's work was not done as agreed.

The defendants agreed with the plaintiff to have the sum of UGX 15,000,000/= initially deposited refunded.

The applicant personally paid UGX 10,000,000/= to the plaintiff by cheque through Global Construction Co. Ltd for which he acknowledged receipt and the balance was to be paid by the other defendants.

The conduct of the plaintiff is unfair and is with the intension of unjust enrichment.

The fact that the applicant has never received UGX 120,000,000/= from the plaintiff raises triable issues.

In the affidavit in reply Mr. Ndagi Innocent Ndaaga deposed that;

The applicant together with the other four defendants are indebted to him in the sum of UGX 120,000,000/=.

The applicant and the rest of the defendants were paid the full contract price of UGX 120,000,000/= but failed to avail the land and also failed to refund the money he paid them.

The applicant/2nd defendant introduced the deponent to one Mr. Johnson Mpande of DFCU Bank who helped him obtain UGX 90,000,000/= in a short time, which he topped up with more money to make UGX 105,000,000/= which was handed over to the applicant personally at DFCU Bank in the presence of Atugonza Francis the 4th defendant.

The defendants including the applicant promised to make an acknowledgement but later promised to refund the money upon failure to secure the land they were meant to sell to him.

The applicant again later sent messages that they were pursuing the land.

It is not true that the applicant ever refunded the sum of UGX 10,000,000/= to the respondent through Global Construction Co. Ltd as claimed.

The application is incurably defective and the applicant and the other defendants have no defence to the claim for the refund of the money paid to them.

The respondent filed a supplementary affidavit in reply in which he stated that;

After obtaining the bank overdraft, DFCU Bank filed Civil Suit No. 372 of 2013 against him which was settled through a consent judgment entered on the 6th August 2013.

Under the said consent judgment, the respondent paid heavily for an overdraft plus interest for an amount of money which he did not enjoy.

In rejoinder, the applicant deposed that;

The respondent's averments in the affidavit in reply are contradictions of the pleadings of the head suit, a complete departure therefrom whereof it shall be prayed that the affidavit be struck out.

The payment of the purchase price of UGX 120,000,000/= is unfounded legally and factually and there is no evidence whatsoever to confirm the alleged land sale transaction.

The respondent now concedes to depositing UGX 15,000,000/= allegedly to commence the process of acquisition yet in the original plaint withheld that fact from Court.

The respondent has never engaged the applicant in obtaining an over draft and neither has she ever introduced the respondent to the alleged Johnson Mpande.

A sum of UGX 10,000,000/= was refunded by cheque No. 000069 drawn on the account of the applicant on her Bank account No.113815800 in Standard Chartered Bank.

The applicant is not aware of the alleged phone messages to the respondent pursuing the alleged land or refund since she paid up the UGX 10,000,000/= leaving the balance to be refunded by her colleagues.

The respondent defaulted in paying the balance and connived with Atugonza Francis and stealthy managed to secure a deed print for Plot 479 which they subdivided; a fact withheld from court.

The fact that the respondent acquired the land through his Company M/S Global Construction Ltd and caused it to be sold off is evidence of an intension to unjustly enrich himself by making baseless claims against the applicant.

Applicant's Submissions

Counsel for the applicant first raised a preliminary objection and applied to have the supplementary affidavit filed by the respondent struck out. Counsel contended that the application is based on the following grounds;

- a. The respondent had no right at law to file any supplementary affidavit in reply without leave of court and cited the case of **Southern Investments Ltd Vs Mukabura Investments Ltd HCMA No. 105/ 2004** to support the argument.*
- b. Secondly that the said supplementary affidavit in reply is prejudicial to the applicant and therefore should be struck out.*

Addressing the merits of the application, Counsel for the applicant submitted that the principles that govern the grant of unconditional leave to appear and defend were laid down in the case of ***Broadband Company Ltd Vs Joram Mugume HCMA No. 363/2013***. Counsel further stated that the threshold to be satisfied was equally settled in ***Bibagamba Vs Mungereza HCMA No. 103/2012***. Counsel for the applicant submitted that in light of the foregoing principles; the only question for determination is whether this is a matter that merits the grant of unconditional leave to defend the suit. Counsel submitted that it is clear from the plaint and annexure thereto that there is no liquidated claim upon which the respondent is entitled to a summary judgment. Counsel further cited **Order 36 rule 2(a)** of the CPR submitting that a claim can only be brought by summary suit where it is a liquidated demand, founded on a written contract or acknowledgement between the parties or at least by the applicant/defendant. Citing the case of ***Sterling Travel and Tour Services Ltd Vs Millennium Travel Tours Services Ltd HCMA No.116/2013***, Counsel further stated that where the claim is not liquidated within the meaning of Order 36 that alone is enough ground to grant the application for leave to appear and defend the suit on its merits. Relating to the facts in the suit, Counsel submitted that in absence of a written contract or acknowledgment of receipt of UGX 120,000,000/=, it is not possible for the court to determine whether the respondent ever paid the alleged amount in the summary suit. Referring to the case of ***Broadband*** (supra) Counsel for the applicant submitted that where there is no undertaking or written contract attached but disputed by the defendants, leave should be granted. Counsel submitted that on this ground alone, the applicant should be granted unconditional leave to appear and defend.

Counsel for the applicant submitted further that the application raises triable issues of fact and law. Counsel stated that while the applicant denies being indebted to the respondent in the affidavit in support because she refunded the respondent UGX 10,000,000/= leaving the rest to be paid by her colleagues, the respondent insists that he paid the balance of UGX 105,000,000/= to the applicant. Counsel therefore stated that the applicant has made a case for the grant of unconditional leave to appear and defend the suit since the facts therein raise contentious questions of fact and law.

In conclusion, Counsel for the applicant prayed that leave to appear and defend the suit be granted to the applicant and also prayed for costs.

Respondent's Submissions

Counsel for the respondent first addressed the preliminary objection on the propriety of the supplementary affidavit in reply. Counsel submitted that the affidavit contains information necessary for the respondent to set out all factual aspects of the case to enable court fully determine the real issues in controversy between the parties. Praying for the validation of the supplementary affidavit, Counsel stated that court is under **Article 126(2) (e)** enjoined to deliver justice without undue regard to technicalities. Counsel accordingly prayed that the preliminary objection be disregarded as a mere technicality intended to defeat justice.

Addressing the merits of the application, Counsel for the respondent submitted that the applicant has no defence to the claim in Civil Suit No. 614 of 2013. Counsel argued that the applicant is lying to court by denying receipt of the UGX 120, 000, 000/= claimed by the respondent. Counsel submitted that the applicant should be denied unconditional leave to appear and defend. Citing a number of cases, Counsel for the respondent submitted that the test for grant of leave to appear has evolved. Counsel quoted the case of ***Maluku Interglobal Trade Agency Ltd Vs Bank [1985] HCB 65*** in which Court held that;

“Before leave to appear and defend is granted the defendant must show by affidavit or otherwise that there is a bonafide triable issue of fact or law. When there a reasonable ground of defence to the claim, the plaintiff is not entitled to summary judgment. The defendant is not bound to show a good defence on the merits but should satisfy court that there was an issue or question in dispute which ought to be tried and the court should not enter upon the trial of the issue disclosed at this stage.”

Counsel therefore submitted that the applicant has no defence whatsoever and the only available remedy is to dismiss the application. Counsel for the respondent further submitted that in so far as the issue of whether there is a liquidated demand is concerned, there is no dispute that there was a contract for the purchase of land from the applicant and her co-defendants at a cost of UGX 120,000,000/=. Counsel argued that this shows that there is a liquidated demand and added that a contract can be oral or implied.

In conclusion, Counsel prayed that the application be dismissed with costs for lack of merit and judgment entered in favour of the plaintiff.

Applicant's Submissions in Rejoinder

Counsel for the applicant submitted that the preliminary objection goes to the root of the matter and is not a mere technicality and therefore reiterated the earlier submissions and prayers in respect of the objection.

Counsel further submitted that the allegation that the applicant has no defence is devoid of merit. Counsel further submitted that the purpose of leave application for to file a defence is for an opportunity to be heard and court cannot at this stage pre-judge the merits of the applicant's defence as Counsel for the respondent appears to suggest. Counsel cited the case of **Rwabuganda Godfrey Vs Bitamisi Namuddu CACA No. 23/2009** where court held that;-

“for court to determine whether or not an applicant has a very meritorious defence, before she is allowed one, is to effectively deny the applicant a right to be heard”.

In conclusion, Counsel submitted that in view of the contentious questions of fact pointed out and the initial submissions and in absence of any cogent documentary evidence in support of the respondent's claims, this is a proper case meriting the grant of unconditional leave to the applicant to appear and defend the suit.

Decision of Court

I have perused the Notice of Motion and the affidavit in support and that in opposition and considered the arguments of both Counsel. The respondent's claim is for UGX 120,000,000/= a price initially agreed upon by the respondent /plaintiff and the applicant and the other defendants as consideration for land at Namanve.

Counsel for the applicant raised an objection regarding a supplementary affidavit filed by the respondent which I will first address. Counsel for the applicant relying on the decision of **Southern Investments Ltd Vs Mukabura Investments Ltd** (supra) submitted that the respondent had to first apply for leave of court to file a supplementary affidavit after he had filed the

rejoinder. I agree with the decision of court in that case that the practice of this court has always been for parties to file affidavits in rejoinder to affidavit in reply and ordinary filing further affidavits require leave of court.

However, if the error of Counsel in filing a supplementary affidavit without leave does not go to the root of the application and does not affect the competence of the summary suit then such affidavit should be allowed as stated by the Learned Judge in ***Southern Investment*** (supra).

“I am cushioned in any decision by Section 98 of the CPA, section 4 of the Judicature (Amendment) Act 2003 and Article 126 of the 1995 Constitution; which enjoin this court to ensure that substantive justice is administered without undue regard to technicalities.....”

I am equally cushioned as above and will accordingly overrule the objection and go ahead to consider the merits of the application.

The application was brought under Order 36 rule 3 and 4 of the CPR which covers liquidated claims. **Black’s Law Dictionary 8th Edition** defines a liquidated amount as a figure readily computed, based on an agreement’s term.

Counsel for the applicant urged that there was no evidence of acknowledgement of receipt of the money in issue by the applicant or contract for the matter to fall under O 36 CPR.

It is my considered opinion that based on the definition of a liquidated amount above and the facts of the case there was an agreement between the parties for the sale of land at an agreed sum and accordingly the claim of the respondent is for a liquidated claim.

It is court’s duty at this level of the suit to establish whether there is a plausible defence. The facts as stated above show that while the applicant in her affidavit admits only receipt of UGX 15,000,000/= of which she deposed to have refunded UGX 10, 000,000/=, the respondent argues that he first paid UGX 15,000,000/= and later paid UGX 105,000,000/=. In my view a dispute as to the facts in issue exists.

The conditions that ought to first be met before leave is granted have been long settled in a number of decisions like the case of ***Kotecha Vs Mohammed [2002]1 EA 112***, where 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.”

In the result, I find that the applicant has raised some triable issues that merit the grant of this application. The applicant is entitled to unconditional leave to appear and defend the suit and it is accordingly granted. The applicant shall file a written statement of defence within ten days from the date of this ruling.

Costs shall be in the cause.

I so order.

B. Kainamura

Judge

23.11.2015