

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO 874 OF 2016
(ARISING FROM CIVIL SUIT NO 501 OF 2016)**

THALION UGANDA LTD}.....APPLICANT

VERSUS

UGANDA CROP INDUSTRIES LTD}RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant's application is for unconditional leave be granted to enable it defend the suit. Secondly it is for costs of the application to be provided for. The application is by notice of motion under order 36 rules 3 and 4 of the Civil Procedure Rules and other enabling rules prescribing a notice of motion as the mode of commencing this application. The grounds of the application as set out in the notice of motion and are that:

1. The Applicant has a good, bona fide and meritorious defence to the suit.
2. The Applicant raises triable issues of fact as to whether the subject matter of the agreement was a gift; whether the Respondent is a stopped from asserting any rights under the said agreement; and in any event whether a condition precedent to enforcement was made; which warrants the grant of an unconditional leave to appear and defend.
3. The Applicant denies being indebted to the Respondent.
4. It is in the interest of justice that the Applicant is granted unconditional leave to appear and defend the suit.

The application is supported by the affidavit of Mr Samash Nathu, a shareholder and director of the Applicant. He deposed that the plaintiff's sole shareholder and chairman is his father Mr Amirali Nathu and the he and others in his family had been embroiled in the corrosive family dispute since 2013. The roots of the dispute go back many years and relates to a number of family companies. Previously he worked for and run the plaintiff company which until March 2013 was a family run business. On 1 July 2016 the Respondent filed HCCS 501 of 2016 against him claiming recovery of 159,600,000/= Uganda shillings. In December 2012 is further gave him the gift of a new Toyota land cruiser Prado registration number UAS 210Q, for work which he had done in the Respondent company. The work resulted in the games worth at least US\$7

million in the preceding decade. The vehicle was routinely registered in the name of the Respondent Company and was managing the Respondent Company as a family concern. The registration was similar to other vehicles. Subsequent to the gift, the family dispute broke out and it resulted in Mr Amirali Nathu removing him from the Respondent Company. In order to transfer the vehicle to his company, the Applicant, it was necessary to assign a value to the vehicle on the Applicants accounting books. The agreement of 28th of March 2013 upon which the Respondent brought the action against him was executed in order to give effect to the gift and was not intended to give rise to legal relations or to be enforceable against the other party. For this purpose on 28 March 2013, the Respondent agreed to transfer the motor vehicle to the Applicant for the value of 120,000,000/= Uganda shillings. The agreement contained a condition precedent for payment which was not meant that is that the Applicant was to be furnished with the invoices fully raised by the Respondent prior to and in respect of each monthly payment. The condition precedent being unfulfilled, no payment was done under the agreement and as such the Applicant is not indebted to the Respondent and no interest is payable. The reason the Respondent did not raise an invoice was due to the fact that his father intended to make a gift of the vehicle to him at the time the agreement was executed. In October 2015 he delivered the vehicle to his father and the Respondent Company so as to facilitate getting an amicable solution. Due to the prevailing goodwill at the time, the Respondent through his father was the chairman insisted that the Applicant retains the vehicle as it has always been intended as a gift. The Respondent is therefore estopped from enforcing any of his asserted rights under the agreement. In order to resolve the dispute, he is willing to return the vehicle to the Respondent.

On the basis of the above facts, and upon the advice of his lawyers, the Applicants Samash Nathu deposed that there exist bona fide triable issues of law and fact that warrant the grant of unconditional leave to appear and defend the suit. Secondly, he has a good defence to the suit and ought to be allowed presented at the trial according to a copy of the draft written statement of defence attached. Thirdly, the amount claimed in the suit is not due or payable by the Applicant the Respondent and as such the Applicant is not indebted at all. Finally that it is in the interest of justice that the Applicant is given unconditional leave to appear and defend the suit on its merits.

The affidavit in reply is that of Mansoor Nadir, the managing director of the Respondent Company. He deposes that the affidavit in support of the application is marred with blatant falsehoods and the misdirection to deliberately mislead this court orchestrated by the deponent. On 28 March 2013 the Applicant company entered into an agreement to transfer the vehicle the subject matter of the suit for a consideration of Uganda shillings 120,000,000/= according to the attached agreement. The transfer of the vehicle was never made or intended as an interview with gift between father and son but rather as a business transaction between the parties to the suit who are corporate entities. The Applicant company to date or refused to honour its payment obligations under the agreement despite having taken possession of and used in the vehicle in its

operations. The application is a delaying tactic by the Applicant and meant to further evade its contractual obligations to pay the outstanding debt owed to the Respondent. The Applicant has no viable defence to the main suit premises state the grant of leave to appear and defend the suit. The Respondent is not interested in the receiving a return of the vehicle but merely the contract sum which was agreed.

On the basis of information of his Counsel, he deposes that the application is frivolous, vexatious and a waste of the courts time since it raises no triable issues of law and as such ought to be dismissed with costs.

The Applicant is represented by Messrs AF Mpanga Advocates and the Respondent is represented by Messrs Greystone Advocates. The court was addressed in written submissions.

I have carefully considered the written submissions in which the Applicant raises four issues namely:

Whether the Applicant raises triable issues of fact which warrant the grant of unconditional leave to appear and defend?

Whether the Applicant has a good, bona fide and meritorious defence to the suit?

Whether the claim for interest against the Applicant was rightly brought under Order 36?

What remedies of the parties are?

On the first issue the Applicant relied on the principles for the grant of leave to defend the summary suit as contained in the case of Miter Investments Ltd versus East African Portland Cement and Company Limited HCMA 336 of 2012 as well as the case of MMK Engineering versus Man Trust Uganda Limited HCMA 128 of 2012 and in the later case the principles are derived from Odger's Principles of Pleading and Practice in Civil Actions in the High Court of Justice Twenty Seventh Edition pages 71 – 78 that:

1. The Applicant must show the court that there is an issue or question of fact or law in dispute which ought to be tried.
2. Where the Defendant shows that there was such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the Plaintiffs claim, he ought not to be debarred of all power to defeat the demand made upon him.
3. Where the defence that is proposed is doubtful as to its good faith, the Defendant may be ordered to deposit money in court before leave is granted.

4. Whenever there is a genuine defence either in fact or in law, the Defendant is entitled to unconditional leave to defend.
5. General allegations however strongly may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice.
6. The Defendant may in answer to the Plaintiffs claim rely upon a set off or counterclaim. A setoff is a defence to the action. Where it is a counterclaim, and there is no connection with the Plaintiff's cause of action, the Plaintiff may be given leave to obtain judgement on the claim provided that it is clearly entitled to succeed upon it and will be put to unnecessary expense in having to prove it. It is within the courts discretion to stay execution up to the anticipated amount of the counterclaim pending the trial of the counterclaim or further order.

On the basis of the above principles, the Applicant submitted that the application discloses a bona fide triable issue of fact and law for trial as to whether the subject matter of the agreement was a gift and whether a condition precedent to enforcement was met.

On the second issue, the Applicants Counsel submitted that the Applicant has a good defence to the suit. He submitted that the court is not required to determine the merits of the suit but to present an opportunity for the issues to be tried according to Geoffrey Gatete and Angela Maria Kigonya versus William Kyobe Civil Appeal No. 7 of 2005. He further submitted that by the terms of the agreement, it was a condition precedent for payment of the consideration of Uganda shillings 120,000,000/= to be preceded by an invoice duly raised by the Respondent. He contended that the Respondent never raised any such invoice so as to make any payment under the contract due for payment and as such the defendant is not indebted to the plaintiff for the principle amount to let alone the interest claimed.

Furthermore he submitted that the agreement transferring the vehicle, upon which the Respondent sues, is inadmissible in evidence because it is an instrument subject to stamp duty but no stamp duty was ever paid. He contended that on the basis of the above, the Applicant seeks to raise pertinent issues and bona fide issues for trial are disclosed.

On the third point, the plaintiff according to the plaintiff claims interest at commercial court rate of 22% per annum. However interest cannot be claimed in the suit under Order 36 which has to be based on an agreement for interest in the documents sued upon or a statute according to the case of Arjabu Kasule vs. F.T. Kawesa [1957] EA 611. The agreement in question has no provision for interest at 22% and it was wrongly claimed in the summary plaint.

On the fourth ground, Counsel prayed for costs follow the event.

In reply the Respondents Counsel relies on the affidavit in reply for the facts in support of the opposition.

Firstly on the first issue whether there are bona fide issues for trial, he contended that the Applicant is being deceitful by feigning that the transaction is against when there exists a sale agreement on the letterhead signed by its own director and the company stamp. The Respondent has accordingly proved the existence of the contractual legal right by producing the car sale agreement. The Applicant is being deceitful and therefore by claiming the car was transferred as a gift in light of the transfer agreement dated 28th of March 2013 prepared by the Applicant Company. Secondly the Applicant is being fraudulent and is making false representations of matters of fact suggesting what is false calculated to deceive this court. The Applicant had a legal duty to pay the sum of 120,000,000/= Uganda shillings with a default penalty of one percent per month under the sale agreement. The Applicant has been in breach of the contract since 2013 and this has resulted into damage to the Respondent. The Respondent further avers that the Applicant does not raise bona fide triable issues of fact and law as the Applicant has been deceitful and fraudulent in making the application and should not be granted leave to appear and defend the main suit where elements of fraud are present.

As far as the Applicant also raises questions as to whether a condition precedent to the enforcement was made, the Applicant would be referring to the clause in annexure "A" which provides that payment shall be due only against invoice duly raised by Uganda Crop Industries Ltd. This amounts to an acknowledgement by the Applicant that there exists a contract but simply that an invoice was not issued. In accordance with Order 36 rule 6 of the Civil Procedure Rules, the Respondent avers that the decree should be given for the admitted contract liability subject to the issuance of an invoice. Furthermore the Respondents Counsel submitted that an invoice is simply a least sent to the purchaser containing the Applicants together with the process of such items with the reference to Black's Law Dictionary Fifth Edition at page 742. It is a writing specifying the merchandise and their prices. Furthermore, the Respondents Counsel submitted that annexure "B" to the affidavit in reply amounts to an invoice because it states the item is sold and its price addressed to the purchaser who is the Applicant and it is issued by the seller who is the Respondent on 2 December 2013. This letter was received by the Applicant Company. Therefore there is no triable issue of law or fact as to whether a condition precedent to the enforcement was met. In the premises the Applicant's application raises no triable issue of fact or law and the application ought to be dismissed.

On the issue of whether there is a good defence to the suit, Counsel submitted that in the case of Maluku Interglobal Trade Agencies Ltd versus Bank of Uganda (1985) HCB 65 it was held that a defence must be stated with sufficient particularity to appear genuine and general or vague statements denying liability will not suffice. Counsel reiterated submissions on issue one and further referred to the case of Sembule investments Ltd versus Uganda Baati Ltd HCMA 664 of 2009 citing Zola and Another versus Ralli Brothers Ltd [1969] EA 691. In the authorities the
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essence of a summary suit is to enable the plaintiff received what is due to him without unnecessary being kept by delaying tactics of the defendant from raising the same. He contended that the application is a mere delaying tactic by the Applicant to delay the Respondent from getting this payment under the sale agreement. Furthermore an Applicant for leave to defend a summary suit should disclose through evidence that there are some reasonable grounds of defence.

Regarding submissions about the non-payment of stamp duty, section 31 (3) (a) of the Stamps Act 2014 gives discretion to the judge to impound such a document if he or she thinks it fit to do so. The Respondent is willing to pay the stamp duty in accordance with section 32 (1) (b) of the Stamp Duty Act having executed the agreement in ignorance of the law. In the premises the Applicant does not raised any defence at all.

In the alternative if the court is inclined to grant leave, it should be conditional upon the Applicants depositing the full decretal sum.

On the question of interest, the Respondent concedes that it has to be based on the agreement and that the prayer for interest can be disregarded.

As far as remedies are concerned, the Respondent submitted that it is entitled to judgement.

In rejoinder the Respondent reiterated submissions that an invoice was not raised and this was a condition precedent to the payment. Mere acknowledgement of the existence of the contract does not put away, short-term which is a condition precedent to the enforcement thereof. In the main the Applicant reiterated earlier submissions that I do not need to repeat.

Ruling

I have carefully considered the Applicants application, the facts in support of the application as well as the affidavit in opposition. I have duly considered the written submissions of both parties. The principles applicable in considering an application for leave to defend a summary suit are not in issue at all and they have been properly set out by both Counsel. There is no need to repeat the principles here. I will only quote from **Souza Figuerido & Co Ltd v Moorings Hotel Co Ltd [1959] 1 EA 425** where Sir Kenneth O'Connor P who read the judgment of the Court of Appeal at Kampala said:

“We were of opinion that the extract from the Annual Practice of 1951 set out and adopted by this court at p. 79 of the report of the Kundanlal Restaurant case (2) correctly stated the law. That extract reads:

“The principle on which the court acts is that where the defendant can show by affidavit that there is a bona fide triable issue, he is to be allowed to defend as to that issue without condition (Jacobs v. Booth’s Distillery Co. (1901) 85 L.T. 262

H.L.) . . . A condition of payment into court ought not to be imposed where a reasonable ground of defence is set up . . . Since *Jacobs v. Booth's Distillery Co.* (supra) the condition of payment into court, or giving security, is seldom imposed, and only in cases where the defendant consents, or there is good ground in the evidence for believing that the defence set up is a sham defence and the master 'is prepared very nearly to give judgment for the plaintiff' in which case only the discretionary power given by this rule may be exercised (*Wing v. Thurlow* 10 T.L.R. 53, 151). It should not be applied where there is a fair probability of a defence (*Ward v. Plumbley* 6 T.L.R. 198; *Bowes v. Caustic Soda Co.* 9 T.L.R. 328) nor where the practical result of applying it would be unjustly to deprive the defendant of his defence." ..."

Does the Application raise a bona fide triable issue?

The Applicants case is that the vehicle was a gift from his father and the issue is whether it was a gift or sale. Secondly whether the condition precedent of raising an invoice before payment was not met and therefore payment was not due.

In the case of **Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (In Liquidation)** [1989] 3 All ER 74 at page 77 Parker LJ considered the purpose of a summary suit under Order 14 of the UK rules and held that:

"The purpose of Ord 14 is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. If the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived the plaintiff is entitled to judgment. If at first sight the point appears to be arguable but with a relatively short argument can be shown to be plainly unsustainable the plaintiff is also entitled to judgment. But Ord 14 proceedings should not in my view be allowed to become a means for obtaining, in effect, an immediate trial of an action, which will be the case if the court lends itself to determining on Ord 14 applications points of law which may take hours or even days and the citation of many authorities before the court is in a position to arrive at a final decision."

I am persuaded to apply the dictum as it is and the question for consideration is whether there is plainly no defence to the suit on the first two questions namely: Whether the vehicle in issue was a gift to the Applicant or transfer upon sale. Secondly whether the condition precedent of raising an invoice before payment was not met and therefore payment was not due.

On the first question the Applicant raised a technical question of whether the agreement is admissible. This is because the Respondent relies on an agreement attached as annexure "B" on the subject matter of the suit which is the vehicle in question. In other words I cannot deal with any controversy using the agreement before stamp duty is paid. This issue ought to have been

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raised as a preliminary point of law before the application is argued in writing. The question is whether I should impound the agreement pending the payment of stamp duty before considering the issue. The Respondent submitted that it is willing to pay the stamp duty. In the circumstances I am constrained to consider the issues as raised before concluding on whether judgement should be issued on the basis of the agreement or not.

As far as the agreement is concerned it was attached as annexure "B" to the affidavit in reply of the general manager of the Respondent Mr Mansoor Nadir. The Applicant also relied on the agreement by attaching the sale agreement in paragraph 9 of the affidavit in support of the application. It is the Applicant who introduced the agreement in evidence. The question of stamp duty therefore does not prejudice the Applicant and it is a question of whether the court should enable revenue by way of stamp duty to be raised before the matter is concluded. I would therefore consider the agreement as part and parcel of the application before dealing with the question of whether judgment, if any, should be issued before stamp duty.

In annexure "B" attached to the affidavit in support of the application, there is a letter dated 28th of March 2013 on the letterhead of the Applicant on the subject of an agreement to transfer vehicle. At the bottom of the document, there is the signature of a director of the Applicant Company Mr Shireen Nathu and that of the Respondent company Mansoor Nadir. It is written among other things in the agreement that the Applicant would take possession of the vehicle commencing 1st of April 2013. Secondly the Applicant would pay the Respondent Uganda shillings 120,000,000/=, inclusive of VAT, in respect of the transfer. Thirdly it is written that payment shall only be made against invoice duly raised by Uganda Crop Industries Ltd. Fourthly it was agreed that payment shall be in 12 equal monthly instalments each of Uganda shillings 10,000,000/=. Lastly it is agreed that the first instalment shall be paid not earlier than 30th of September 2013. Any balance overdue shall carry simple interest at 1% per month.

The agreement is between the Applicant and the Respondent. The question of whether it was a gift is a question between Mr. Amirali Nathu and Samash Nathu according to paragraph 5 of the affidavit in support of the application. Secondly Mr Samash Nathu deposed that the vehicle was routinely registered in the name of the Respondent Company. However, no evidence is admissible to contradict a written agreement according to sections 91 and 92 of the Evidence Act. Section 91 only permits the written document itself as evidence and not any oral testimony. Section 92 excludes oral testimony that tends to vary from the terms of the written agreement. Section 92 of the Evidence Act Cap 6 laws of Uganda provides as follows:

“92. Exclusion of evidence of oral agreement.

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted, as between

the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms;”

The conclusion is that a quick perusal of the application does not lead to any triable issue regarding whether the vehicle was a gift to the Applicant or not. That evidence contradicts the written agreement and is already excluded.

The second question relates to the terms of payment and deals with the concern as to whether the summary suit is premature.

The wording of the agreement between the parties requires the Respondent to issue an invoice before demanding for payment. At the same time the wording of the agreement is that the first instalment of Uganda shillings 10,000,000/= shall not be paid earlier than 30th of September 2013. It does not provide for a ceiling date when the first instalment ought to have been paid. It is therefore a triable issue as to whether payment is due. The Respondent has conceded to the terms of the agreement and submitted that its demand letters amount to an invoice.

Again I have carefully considered annexure "B" to the affidavit of Mansoor Nadir, the managing director of the Applicant. The first one which was received by someone called Sarah in the Applicant Company was received on 25 September 2014. It provides that the Applicant would only be transferred the vehicle upon receipt of the full amount of Uganda shillings 120 million. In the second letter received on the same day and written to the attention of Mr Yousuf Sabir, shows that it attached a copy of the agreement between the parties. It is written that the Applicant was supposed to pay Uganda shillings 120 million up to May 2014. The Respondent further wrote follows:

“Please pay outstanding principal amount & interest before end of this month.

Principal amount Uganda shillings 120,000,000/=, interest for 16 months 19,200,000/=
Total Uganda shillings 139,200,000/=.

Kindly comply with your commitment.”

There is controversy as to whether this should be construed as an invoice. After the said demand by the Respondent a summary suit was filed on 1 July 2016 more than 10 months later. On the face of it, the Respondent had made a demand for payment before transfer. Even if payments were to be made in instalments, the Applicant made no payment thereafter. The issue of whether a condition precedent was fulfilled is not a bona fide triable issue.

Last but not least, the Applicant’s application lacks merit. The question of whether stamp duty has been paid on the agreement is a technicality meant to assist the Applicant to avoid the suit. The purpose of the provisions of the Stamp Duty Act is to enhance raising of revenue for the government and nothing else. It does not prejudice the Applicant who adduced the agreement by

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way of affidavit in the first place but only enhances the revenue collection of Uganda Revenue Authority. Having been raised, and presumably in the interest of revenue collection I agree that judgment should not be entered for the Respondent until it has paid stamp duty according to the law.

Last but not least the Respondent is only entitled to contractual interest. The interest became due after the demand for payment because the principal amount became due. However what is claimed is not contractual and can be disregarded upon the concession of the Respondent abandoning the claim for interest. There is no need to try it.

In the premises the Applicants application lacks merit and is dismissed with costs. The Respondent is entitled to judgement in the summary suit upon payment of stamp duty. Judgment is effective upon payment of stamp duty

Dated at Kampala the 22nd of December 2016

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Wamimbi Emmanuel for the Respondent

No one from the Applicant in Court

Hajj Nadir Mansoor General Manager of the Respondent in court.

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

22nd of December 2016