

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO 671 OF 2015
(ARISING OUT OF HCCS NO 531 OF 2015)**

DECO TILES UGANDA LTD}.....APPLICANT

VERSUS

DHL GLOBAL FORWARDING LTD}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant's application is for leave to defend the main suit namely HCCS No 531 of 2012 brought against it by the Respondent who claims a sum of US\$ 55,894.43 and for costs of the suit. The application is brought under Order 36 rules 2, 3, 4 and Order 52 rules 1, 2 and 3 of the Civil Procedure Rules by Notice of Motion supported by the affidavit of Gregory Magezi, the Managing Director of the Applicant. The grounds disclosed in the Notice of Motion are as follows.

The Applicant contracted the Respondent to transport its cargo from Mombasa to Kampala within the usual business time of one week but the Respondent failed to do so resulting in business losses to the Applicant. Secondly a recent end of financial year audit for the period June 2014 to the end of June 2015 established that the Applicant suffered a loss of approximately USD 78,000 on account of delay/failure by the Respondent to promptly deliver its cargo as contracted. As a result the Applicant is entitled to a set off of the said amount from the Respondent's claim and is entitled to counterclaim the same from the Respondent and is therefore not indebted to the Respondent. Lastly, the Applicant's application discloses issues for trial which warrant the grant of the application for leave to defend.

In the affidavit in support of the application the Applicant's Managing Director disposed to the following facts and grounds. He reiterated the grounds set out in the Notice of Motion and added that the Applicant contracted the Respondent/Plaintiff to transport its cargo from Mombasa to Kampala within an agreed usual business delivery time of seven days but the Respondent/Plaintiff failed to do so despite repeated demands. As a consequence of the delay the Respondent occasioned the Applicant business losses. The amount payable to the Respondent is supposed to be US\$55,000 but the Applicant has counterclaim/set-off against the Respondent of approximately US\$78,000 on account of the said delays leading to losses suffered by the Applicant in the said amount.

In reply the Respondent's Country Manager Mr. Humphrey Pule deposed that the Applicant in plain English language and well knowing its indebted to the Respondent entered into an agreement in which it agreed to pay a debt of US\$ 60,684.43. The Applicant paid US\$ 5,000 and subsequently paid another US\$ 1,500. The Applicant is barred by the doctrine of estoppel by deed from denying indebtedness to the Respondent in the amount of US\$ 54,184.43. Furthermore the Applicant has not shown good cause for granting the Application and as such the application lacks merit and ought to be dismissed with costs.

The Applicant is represented by Messieurs Nuwagaba and Mwebesa Advocates while the Respondent is represented by Messieurs Kaggwa and Kaggwa Advocates. Both Counsels addressed the court in written submissions.

Submissions of the Applicant's Counsel

Counsel reiterated the facts in the notice of motion and the affidavit in support thereof and submitted that the set off is a defence and discloses a definite triable issue. This defence is disclosed in the proposed defence attached as Annexure RJ to the said affidavit.

The Applicant's Counsel submitted in applications for leave to defend the Applicant must show that there is a bona fide triable issue of law or fact which ought to be tried. The Applicant's Counsel relies on two authorities. The first is **Maluku Interglobal Trade Agency versus Bank of Uganda (1985) HCB 65**, where it was held that the Defendant is not bound at this stage to show a good defence on the merits but that there is an issue or question in dispute which the court ought to try and the court should not try the issues in the application. Secondly, he relied on **Kotecha vs. Mohammed (2002) 1 EA 112** and **Sembule Investments Limited vs. Uganda Baati HIMA No. 0664 of 2009** for the proposition that a Defendant who has an arguable defence must be given opportunity by the Court to present.

Furthermore, the Applicant's counsel submitted that a set off or counterclaim is regarded for all intents and purposes as a defence to the claim. Where a Defendant has a set off, Order 8 rule 2 of the Civil Procedure Rules provides that a Defendant is entitled in an action to set up a set off or counterclaim in his defence so that the set off or counterclaim are tried together.

In the premises the Applicant invited court to find that the counterclaim/set off raised by the Applicant is a defence which court is entitled to try together with the Plaintiff's claim and this should be found a proper matter where the Applicant ought to be granted leave to appear and defend.

In reply the Respondent submitted **on** a preliminary point of law that the Applicant's Affidavit in rejoinder was filed out of time and ought to be struck off the record. The Applicant was served with the Respondent's Affidavit in reply on 21st October, 2015 and an affidavit of service thereof was filed in court on 27th October, 2015. The Applicant however, filed its Affidavit in Rejoinder on 22nd January, 2016 more than 3 months from the date of service of the Affidavit in reply which is well outside the 7 days as envisaged by the law and no application for enlargement of

time to file the affidavit in rejoinder out of time was made (See **Stop and See (U) vs. Tropical Africa Bank Ltd, Misc. Application No. 333 of 2010.**)

In reply to the Applicant's submissions the Respondent's Counsel contends that the Applicant has not shown any good cause for granting of this Application. In the case of **Enskon Ltd versus Cable Corporation Ltd Misc. Application No. 76 of 2013** court held among other principles for the grant of leave to defend a summary suit that the proposed defence has to be attached to the application. In this case the Applicant did not attach the proposed defence to the application. Secondly, the Applicant admits that they owe the Respondent money and the Applicant's only contention is that a recent financial investigation established that the Respondent caused it loss due to delays. He contended that this is a ploy to deny the Respondent's payment.

The Respondent's Counsel submitted that on 29th June, 2015, the Applicant and the Respondent entered into an agreement in which the Applicant herein acknowledged being indebted and a schedule was drawn up as to how this money would be paid. In line with that agreement, the Applicant paid the Respondent US\$5,000 and subsequently US\$ 1,500 towards reduction of this debt. The Applicant in paying the rest of the sum (US\$ 54,184.43) as had been agreed in the written agreement. The Applicant is stopped under Section 114 of the Evidence Act, from raising the issue of an investigative report. This was on account of estoppels by deed and conduct. **Black's Law dictionary 7th edition** defines estoppels by deed to mean estoppels that prevents a party to a deed from denying the deed if the party has induced another to accept or act under that deed. In the premises the Applicant cannot deny that it is indebted to the Respondent in the sum claimed by proposing a set off. The Respondent in the agreement signed between the parties acted upon it by giving the Applicant time within which to pay the sum therein. The Respondent further relies on section 91 and 92 of the Evidence Act and submitted that the agreement dated 29th June, 2015 has terms to the effect that the Applicant will pay the Respondent a sum certain in money. The audit report contradicts the terms of this agreement and as such cannot be introduced into evidence in terms of sections 91 and 92 of the Evidence Act. Whatever happened prior to the signing of the agreement dated 29th June, 2015 cannot be raised after the signing of the deed and a look at the dates on the emails attached by the Applicant show that they were all written prior to the signing of the Agreement dated 29th June, 2015 and the Applicant was well aware about these and still went ahead to sign the agreement.

Counsel for the Respondent further submitted that the Applicant herein failed to honour the terms of the agreement and the Respondent's lawyers wrote to it a demand on the 6th July, 2015 requesting for the entire sum and upon the Applicant's failure to pay, the Respondent filed a summary suit on 19th August, 2015, and served on the Applicant on the 20th August, 2015. On the day of service of the plaint and summons, a report was allegedly written according to annexure E to the Applicant's Application which report amounts to a ploy to deny the Respondent its money. For the above reasons the Respondent's Counsel submitted that the Applicant has not raised any triable issues and prays that the Application is dismissed and judgment entered for the Respondent on the liquidated sum with costs.

In reply to the preliminary point of law raised by the Respondent, Counsel for the Applicant submitted that the provisions of Order 12 rule 3 do not apply to this matter because Order 36 is a

special procedure with its own rules. The application for leave to appear and defend cannot by any means be interlocutory in nature as those provisions only come into play after leave has been granted. If for instance the court dismissed the application the rule would not apply. In any case court has the discretion to extend time within which to file the affidavit in rejoinder so that the interests of justice can be served.

In further reply, Counsel relied on **Waziri & 2 others vs. Opportunity Bank (U) Limited Miscellaneous Application No. 599 of 2013** where court agreed with the dictum in **Stop and See (U) Limited vs. Tropical Bank**. Pleadings in an application follow the same pattern as that of a plaint and a written statement of defence. The court went ahead and extended the time within which the affidavit in reply could be filed by validating the same affidavit filed out of time in the interest of justice. Counsel invited court to apply the same principles by finding that this application does not strictly fall under Order 12 rule 3 of the Civil Procedure Rules and that court has power to extend time within which the affidavit in rejoinder could be filed.

In rejoinder to Applicant's counsel submitted that the Applicant has clearly shown good cause for granting the application as there is a clear proposed written statement of defence that indicates that there is a set off to the suit. The Applicant is entitled to set off US\$ 78,000. In the case of **Ready Agro Suppliers Ltd & Others vs. UDB C.C 03779 of 2005** it was held that a Defendant is entitled in an action to set up a counterclaim in his defence so that the claim and set off or counterclaim are tried together and the counterclaim would be regarded as a defence.

He further submitted that even in the absence of the affidavit in rejoinder it is clear in paragraphs 5 and 6 of the affidavit in support of the application that the Applicant is entitled to a set off and the aspect of estoppels dwelt on by the Applicant does not apply. What is important is that the set off has been pleaded and indeed it is prima facie genuine and in any case the principle of law is that estoppels is a shield not a sword. The Respondent did not deny in the affidavit in reply that the Applicant is entitled to a set off of US\$ 78,000 which is a much higher sum than the Respondent's claim and the Audit report does not contradict the terms of the agreement as it only says that the Respondent also owes money to the Applicant without disputing the agreement referred to by Counsel.

In the premises he invited court to find that the issue raised by the Applicant gives rise to definite triable issues which would warrant court to grant leave to appear and defend the suit and it is fair and just for this honourable court to grant the Applicant's application for leave to defend the suit with costs in the cause.

Ruling

I have carefully considered the Applicant's application together with the affidavits in support and in reply. I have also considered the written submissions summarised above.

Regarding the preliminary point of law on the timeliness of the affidavit in rejoinder, I agree with the Respondent's counsel that it was filed out of time. The only question that remains is whether, time should be extended for the affidavits in rejoinder to be validated as having been

filed in time. I see no reason to depart from the holding of this court on timelines in the case of **Stop and See (U) Ltd versus Tropical Africa Bank Ltd HCMA 333 of 2010**. Just like pleadings, a reply to a defence has to be filed within 15 days from the date of service of the defence. The same applies to an affidavit in rejoinder. The consideration should be whether the Respondent would be prejudiced if the affidavit in rejoinder is validated by extension of time under Order 50 rules 6 of the Civil Procedure Rules.

I have carefully gone through all the documents on the court record and for some reason that is no affidavit in rejoinder on the court record. This is unfortunate and I am forced to go ahead to consider the application on the basis of the affidavit in reply and in support of the application without reference to the affidavit in rejoinder.

The principles court considers in applications for leave to defend a summary claim were considered in **MMK Engineering versus Man Trust Uganda Limited HCMA No. 128 of 2012** wherein the court extracted principles from **Odger's Principles of Pleading and Practice in Civil Actions in the High Court of Justice Twenty Seventh Edition** pages 71 – 78. Among other principles I will refer to three namely:

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. Whenever there is a genuine defence either in fact or in law, the Defendant is entitled to unconditional leave to defend.
3. 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 judgment 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.

The only question for consideration is therefore whether there is a bona fide counterclaim or set off to the Plaintiff's action. This is because the Applicant does not dispute the Plaintiff's claim in the summary suit. In other words there is no defence to the action as such and the Respondent is entitled to judgment. What the Applicant has set up is a counterclaim or setoff and that is the only matter to consider as to whether the Respondent would be put to unnecessary expense to prove it and whether the Applicant should be permitted to set up a counterclaim or setoff in this suit by way of leave to defend.

The affidavit in support of the application by Gregory Magezi is to the effect that the Applicant's external auditors for the period June 2014 to the end of 2015 established that the

Applicant/Defendant suffered loss of approximately US\$78,000 on account of delay by the Respondent to deliver to the Applicants its cargo in the times contracted or agreed upon.

The Respondent on the other hand relies on the doctrine of estoppels by agreement and submitted that the Applicant acknowledged its indebtedness to the Respondent in the sum of US\$60,654.43 and went ahead to pay US\$5000 in fulfilment of the agreement. I have not seen the agreement attached to the affidavit in reply. The agreement relied upon is in the summary suit and attached as annexure "A". The agreement is dated 29th of June 2015. In the recitals it is written that the Applicant admits its indebtedness to the second party who is the Respondent in the sum of US\$60,894.43 and agreed to pay the Respondent in instalments. A demand notice was issued to the Applicant on 6th of July, 2015 and the summary suit was filed on 19th of August, 2015 upon failure by the Applicant to honour the agreement. The Applicant's application for leave was filed on 31st of August, 2015. Ground two of the notice of motion provides that at the end of financial year audit for the period June 2014 to the end of June 2015 it was established that the Applicant/Defendant suffered loss of approximately US\$78,000. A copy of the audit report which gives the contents of an auditor's opinion was attached as annexure "E". Annexure E is dated 20th of August 2015. The opinion is that due to delays, there was loss of profit which resulted from breach of contract on account of delays in delivery in respect of 10 containers.

At this stage of the proceedings, I cannot establish the merits of the claim. I cannot even conclude that it is a delaying tactic. The opinion of the auditors came after the agreement of the parties and is not related to the agreement of the parties. It follows that the doctrine of estoppels does not apply. Secondly, because the agreement and indebtedness is not denied by the Applicant, sections 91 and 92 of the Evidence Act are inapplicable since the agreement is not contradicted.

In the premises the Respondent is entitled to judgment in the sum claimed in the summary suit. Judgment is entered for the Respondent in the sum of US\$55,894.43 together with costs of the suit.

In line with the principles written above, a stay of execution issues and the Applicant has leave to file a counterclaim or set off against the Respondent's judgment which will be the subject matter of the trial to avoid a multiplicity of proceedings. The stay of execution shall abide the outcome of the intended counterclaim or setoff proposed by the Applicant.

The counterclaim/shall be filed within 15 days from the date of this order. The costs of the application shall abide the outcome of the intended counterclaim/setoff. Upon any failure to file the counterclaim, the stay of execution shall lapse and the Respondent would be entitled to realise the full amount in the judgment.

Ruling delivered in open court on the 16th of December 2016

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Ogwang Sam for the Respondent

Christine Tuhairwe for the Applicants

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

16th December 2016