

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO 572 OF 2015
(ARISING FROM CIVIL SUIT NO 418 OF 2015)

1. CACTUS AFRICA LTD}
2. TAUPE MICHAEL}
3. MONICA KYAMAZIMA}.....APPLICANTS/DEFENDANTS

VS

KAMPALA MOTORS LTD}.....RESPONDENT/PLAINTIFF

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicants filed this application for unconditional leave to file a defence to the Respondent's summary suit filed commenced against them jointly claiming US\$ 15,400 and for costs of the application to be provided for.

The grounds of the application in the notice of motion are:

1. That the first Applicant/Defendant is not indebted to the Respondent/Plaintiff to the tune of US\$15,400 as alleged.
2. That the suit against the 2nd & 3rd Applicants is misconceived and the premature.
3. That the Applicants/Defendants have a very good defence to the whole suit, which is bound to succeed.

In support of the application the 3rd Applicant Monica Kyamazima deposed an affidavit in which she states that she is not indebted to the Respondent/Plaintiff to the tune of US\$15,400 as alleged in the summary suit. Secondly she has never ordered seven motorcycles from the Respondent/Plaintiff. Thirdly she has never received or used motorcycles from the Respondent. Fourthly the Respondent has never approached her demanding for any money. In light of the above the Respondent cannot be seen to sue for recovery of sums that are contested. She deposes that she has a valid defence to the suit because she has never ordered or received motorcycles from the Respondent. She deposed that triable issues of law and fact arise and she should be granted leave because it is just and equitable to do so and for her to appear and defend the suit.

The second affidavit in support is that of the second Applicant Mr Michael Tuape who deposed that he is the Chief Executive Officer of the first Applicant and is also the second Applicant. He deposes that the first Applicant is not indebted to the Respondent/Plaintiff to a tune of US\$15,400 as alleged in the Plaint. Secondly he as the second Applicant has never ordered for motorcycles in his individual capacity. He relies on a Local Purchase Order and delivery note for the assertion. In light of the above he deposes that the Respondent cannot be seen to sue him. He further deposes that the Respondent delivered to the first Applicant motorcycles that were defective, had leaking engines and were not fit for the purpose. The motorcycles were grounded a month after delivery. In the premises it is his opinion that it is just and equitable that this application is allowed and leave granted to the first and second Applicants to defend the suit.

There are two affidavits in reply by Mr Yasin Nkalubo who affirmed on oath in reply to the affidavit of the third Applicant that the third Applicant is indebted jointly and severally to the Respondent in the sum of US\$15,400 in so far as she acted as an agent for the first Applicant when she ordered for seven motorcycles with helmets, 12 months comprehensive insurance from the Respondent. Secondly she is jointly and severally liable in as far as she ordered, received and used motorcycles from the Respondent Company. Furthermore he deposes that the third Applicant did receive a notice of intention to sue and the various demands from the Respondent. Since January 2013 the third Applicant continued and still continues to use the motorcycles in her daily operations and has received benefit from the sale thereof. In the premises he deposes

that the third Applicant ought to be denied leave to defend the action because she does not have a justifiable defence.

In reply to the affidavit of Michael Taupe, Yasin Nkalubo deposes that as a Sales and Administration Manager of the Respondent, the Applicant is indebted jointly and severally to the Respondent in so far as he acted as an agent for the first Applicant when he ordered for seven motorcycles with helmets, 12 months comprehensive insurance from the Respondent. The second Applicant is jointly and severally liable because he ordered and received and used the motorcycles from the Respondent Company. The motorcycles were fit for the purpose since the second Applicant never raised any complaint with the Respondent as to the mechanical condition of the motorcycles whatsoever. Furthermore he deposes that if the motorcycles are found to have any defect, it was due to the improper use by the second Applicant or his agents.

Since January 2014 the second Applicant continued and still continues to use the motorcycles in his daily operations and has not returned the motorcycles upon discovery of any alleged defects in the motorcycles. He deposes that the second Applicant should be denied leave to appear and defend because he has not raised a justifiable defence. On the ground of advice of his lawyers Messieurs Verma Jivram and Associates he deposes that the application does not raise any triable issues and is only intended to delay justice as the second Applicant is indeed indebted to the Respondent in the sum of US\$15,400.

The court was addressed in written submissions which rely on the grounds and affidavit evidence of the Applicant in the application. Secondly the Applicant submitted that in the application all that the Applicant needed to prove by affidavit or otherwise was that there are bona fide triable issues of law or fact. The Applicant is not bound to show that he has a good defence on the merits at this stage of the proceedings but that there is a case to the satisfaction of court that is a prima facie triable case which ought to be tried on the merits. The court is not required to inquire into the merits of the issue raised. However if the issues so raised shall be real and not a sham. The court should be certain that if the facts alleged by the Applicant were established there would be a plausible defence. (**See Abu baker Kato Kasule versus Tomson Muhwezi (1992 – 93) HCB 212 Maluku Interglobal Trade Agency versus Bank of Uganda (1985) HCB 65, Kotecha versus Mohammed (2002) 1 EA 112 and Provincial Insurance Company of East**

*Decision of Hon. Mr. Justice Christopher Madrama Izama *~*~?+: maXimum728securityx 2016 style*

Africa Ltd versus Kivutu (1995 – 1998) 1 EA 283. According to the Applicants Counsel the following are the triable issues namely:

1. The third Applicant is not indebted to the Respondent because the Local Purchase Order ordering for the motorcycles is in the names of the first Applicant and not the third Applicant.
2. Secondly the delivery notes relied on by the Respondent does not support the assertion that the third Applicant ordered and received the used motorcycles from the Respondent Company.

He contended that the two matters are triable issues. As far as the second Applicant is concerned he is not indebted to the Respondent because he did not order for the motorcycles in his individual capacity but in the capacity of the first Applicant Company. He contended that companies are separate from the shareholders and the second Applicant is the Chief Executive Officer of the first Applicant. The issue is whether the second Applicant is liable for the debts if any of the first Applicant.

With regard to the first Applicant he contended that the motorcycles were delivered to it when they were defective and not fit for the purpose. The issue is whether the motorcycles delivered were defective and whether the Respondent is entitled to consideration for them. In the premises the Applicant's Counsel maintains that triable issues are disclosed in the application.

In reply the Respondent's Counsel agrees with the law and framed the issue as to whether the application for leave to appear and defend discloses any good defence or triable issue for determination? He relied on several judgments of this court. He submitted that to determine the issue regard should be given to averments made by the Applicants in their respective affidavits in support of the application.

As far as the second Applicant is concerned, his contention is that the Respondent cannot sue in his personal capacity. Secondly he contended that the motorcycles delivered to the first Applicant were defective. He further deposes that the motorcycles were grounded a month after delivery and the same was not proved or brought to the attention of the Respondent, despite several meetings between the parties.

In the affidavit of the third Applicant, she avers that she is not indebted to the Respondent to the tune of US\$15,400. Secondly she did not order seven motorcycles for the Respondent nor did she receive or use the motorcycles. The averments are mere allegations of fact without clear proofs provided by the Applicant to substantiate the claims and as such they raise no defence or any triable issues. The Respondent's contention in the affidavit in reply is that the motorcycles were fit for the purposes because the Applicant never raised any complaint to the Respondent as to their mechanical condition and if there were any mechanical defects to be found, it would be due to the improper use of the motorcycles by the Applicants in their daily operations.

On the other hand the Applicant relies on a Local Purchase Order showing that the first Applicant through the second and third Applicants ordered for seven motorcycles. Secondly there is a delivery note indicating that the motorcycles were indeed delivered and received by the second and third Applicants. Finally there is an invoice showing the amounts due and payable upon delivery of the motorcycles and a letter of demand. All these documents were signed for by the second Applicant. At the time of writing the submissions, the motorcycles had not been returned to the Respondent and the Respondent's Counsel submits that the Applicants are merely raising a defence in bad faith. Following the decisions of **Sembule Investments Ltd versus Uganda Baati Ltd HCMA 664 of 2009** on the rationale of Order 36 of the Civil Procedure Rules and the case of **Zola and Another versus Rali Brothers Ltd (1969) EA 694**, summary procedure enables the Plaintiff to obtain a quick summary judgment without being unnecessarily kept out of money due to the delaying tactics of the Defendant. A Defendant who wishes to resist the entry of a summary judgment should disclose through evidence that there are some reasonable grounds to grant the application such as a good defence to the suit.

The Applicants never filed an affidavit in rejoinder to the Respondent's affidavit and therefore do not dispute the fact that the motorcycles were delivered and the Applicants are indeed indebted to the Respondents and this would suffice as an acknowledgement of the debt. Counsel further submitted that the Applicants did not even annex the intended defence to the application as recommended in **UCB versus Mukoome agencies (1982) HCB 21 (CA)**.

In conclusion the Respondent's Counsel contends that the Applicants merely raised several allegations of fact in the affidavits and as such have not raised any triable issues or good defence

for them to be granted leave to defend the summary suit. In the premises he prayed that judgment be entered against the Applicants jointly and severally with interest at court rate.

In the alternative if leave to defend is granted, it should be conditional upon the Applicant depositing the contested sums in court or security of equivalent value.

Applicant's submissions in rejoinder

The Applicant's Counsel submitted that it was incorrect for the Respondent to state that the averments of the second and third Defendants were mere allegations of fact with no clear proof. The Applicant's application raises questions of law as seen in the submissions which ought to be determined by the court in the head suit.

Additionally Counsel submitted that it was misleading of the Respondent's Counsel to submit that the Applicant ordered for seven motorcycles. This is because the contents of the Local Purchase Order are very clear and not reflect that submission. Secondly it was wrong to submit that the motorcycles were delivered to the third Applicant. The delivery notes do not support this submission. The invoices also do not reflect the third Applicant anywhere.

As far as the second Applicant is concerned, all the documents clearly show that he did what he did in his capacity as the Chief Executive Officer of the first Applicant.

On the submission that the second and third Applicants are liable as agents of the first Applicant, the company is a distinct legal person liable for its debts and obligations. The members of the company, directors or employees cannot be held personally liable for the company's debts. It follows that the company's creditors can only sue the company and not its agents or the shareholders or directors. He relied on **Salmon vs. Salmon (1897)** for the proposition that a company is separate from its members. Furthermore in the Ugandan case of **Sentamu versus UCB (1983) HCB 59**, it was held that individual members of the company are not liable for the company's debts. Likewise the second Applicant who happens to be the CEO of the first Applicant is not liable for the debts of the first Applicant. Furthermore there is nothing to show that the third Applicant is even an agent of the first Applicant and in the premises cannot be liable for the debts of the first Applicant if any. Counsel further submitted that the decision in

UCB versus Mukoome Agencies (1982) HCB 21 was decided per incuriam and cannot be binding. Attaching the intended written statement of defence is a matter of practice and not of law and therefore failure to do so is not fatal.

In the premises the Applicant's Counsel contends that the application discloses both questions of fact and law which are triable in nature and the application ought to be granted for the Applicants to defend the suit.

Ruling

I have carefully reviewed the facts in support of the application as well as in the affidavit in reply. I have also considered the submissions of both Counsels which I have set out above.

Under Order 36 rule 4 of the Civil Procedure Rules, an application for leave to appear and defend the suit shall be supported by affidavit which shall state whether the defence alleged goes to the whole or part only and if so to what part of the Plaintiff's claim. To establish whether there is a defence whether in part or to the whole of the claim, the application should disclose that there are triable issues which merit serious judicial consideration. In ordinary suits triable issues are raised under Order 15 rule 1 of the Civil Procedure Rules when a material proposition of law or fact is affirmed by one party and denied by the other. According to Order 15 rule 1 (2) of the CPR, material propositions are those propositions of law or fact which a Plaintiff must allege in order to show a right to sue or a Defendant must allege in order to constitute a defence. Furthermore it is provided under sub rule (3) thereof that material propositions are proposition affirmed by one party and denied by the other which shall form the subject matter of a distinct issue. In a technical sense flat averment of a cause of action is not sufficient to disclose triable issues unless it is a proposition of law that can be tried on the face of the pleading without evidence. Affidavit evidence must contain facts disclosing the cause of action or the defence to the suit. Several judicial decisions advance the proposition that the Applicants application must disclose that there are triable issues to be determined in the suit (see **Maluku Interglobal Agency Ltd. v. Bank of Uganda [1985] HCB 65**). In **Abu Baker Kato Kasule vs. Tomson Muhwezi [1992-93] HCB 212**, it was held that "In all applications for leave to appear and defend the court must be certain that if the facts alleged by the Applicant/Defendant were

established, there would be a plausible defence in which case the Defendant should be allowed to defend the suit unconditionally. On the other hand the case of **Corporate Insurance Co. Ltd. v. Nyali Beach Hotel Ltd [1995-1998] EA 7** decided by the Court of Appeal of Kenya holds that leave to defend will not be given merely because there are several allegations of fact or of law made in the Defendant's affidavit. The merits of the issues are investigated to decide whether leave to defend should be given. Sometimes the *prima facie* issues which are preferred can be rejected as unfit to go to trial because by their very nature and as disclosed they are incapable of constituting a defence to the claim. The court has to establish whether they are *bona fide* or genuine issues for trial that will stand trial. According to **Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22nd Edition** at pages 75: "whenever a genuine defence, either in fact or law, sufficiently appears, the Defendant is entitled to unconditional leave to defend. The defence has to be stated with sufficient particularity to appear to be genuine." A general statement such as "I do not owe the money" or a vague suggestion of fraud or other misconduct on the part of the Plaintiff, will not suffice." (See page 76).

There is a vague assertion by the second Applicant that he and the first Applicant do not owe the Plaintiff the sum of US\$15,400 as alleged. Secondly he claims that he, the second Applicant had never ordered for motorcycles in his individual capacity. He however admits in paragraph 6 of his affidavit in support of the application that the Respondent delivered to the first Applicant motorcycles that were defective and leaking engines and were not fit for the purpose. Annexure "A" is a Local Purchase Order signed by the second Applicant on 9 December 2013 for US\$15,400 worth of goods with a unit price US\$1864. In annexure "B" to the affidavit of the second Applicant, he acknowledges in the delivery note 6 motorcycles and an additional 1 motorcycle being part of annexure "B" in the second page amounting to a total of seven motorcycles in a delivery note dated 17th of January 2014. Apparently the goods were delivered on 7 February 2014 in the second page of the delivery note with the consignee described as the first Applicant. In both pages the second Applicant who is the Chief Executive Officer of the first Applicant indicated that they acknowledge the receipt in full of the goods according to the details specified in the delivery note that the goods arrived in good order and condition.

The Respondent's claim in the summary suit is for recovery of US\$15,400 for failure to pay for motorcycles supplied by the Plaintiff. The Respondent's case is that the Defendant ordered for seven motorcycles according to a Local Purchase Order. On 17 January 2014 the Plaintiff delivered seven motorcycles to the first Defendant's premises and it was received by the second and third Defendants/Applicants. Consequently the amounts on the motorcycles were due and payable upon delivery according to a copy of the invoice.

I have noted that the Local Purchase Order is in the names of the first Applicant. The first Applicant is described as a limited liability company.

I have carefully considered the affidavit evidence for and against the application. I have noted that there is a bland assertion that the motorcycles were defective. There is no offer to return the motorcycles or even an attempt to reject them in the application. The motorcycles were delivered in good condition on the face of the delivery notes relied on by the Applicant annexure "B". They were delivered in early 2014. The Plaintiff filed this action more than a year later on 2 July 2015 while the motorcycles were still in the possession of the first Applicant. No evidence has been disclosed in the affidavit to the effect that there was an attempt to reject the goods or even to return them and in the premises there is absolutely no defence disclosed in the application against the Plaintiff's claim as against the first Applicant.

In the result of there being no defence against suit against the first Applicant the application of the first Applicant stands dismissed with costs. Judgment is entered against the first Applicant for the sum claimed in the Plaintiff of US\$15,400 together with costs of the suit.

Where there is no provision made in the contract for interest, or when the rate of interest not specified in the Plaintiff, the provisions of Order 9 rules 6 of the Civil Procedure Rules are applicable. Interest is awarded at the rate of 8% per annum to the date of judgment.

As far as the second Applicant and the third Applicant are concerned, they have raised triable issues of whether the liability of the first Applicant can be visited on them. I have further considered the fact that the Plaintiff filed an action against a limited liability company and both the Local Purchase Order, and delivery note clearly indicated that it is to Cactus Africa Limited. The documentary evidence relied upon by the Respondent clearly indicates that the orders for the

motorcycles and the delivery thereof where made by and delivered to a limited liability company respectively.

It is a plausible defence that members of a limited liability company are not liable for the acts of the company. Secondly the third Applicant raises yet another triable issue of whether she is even a member or director of the first Applicant. Last but not least, a defence that a member of the company or a stranger is not liable for the acts of the company is not a sham defence. In the premises the submission of the Respondent's Counsel that conditional leave be granted is not supported by any doubt as to the defence being a plausible defence which can succeed if it is proved.

In the premises the second Applicant and third Applicants have unconditional leave to file a defence to the summary action. They shall file their defence within 14 days from the date of this order. The costs of the application of the second and third Applicants shall abide the outcome of the suit.

Ruling delivered in open court on 21 March 2016.

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Raymond Byagambaki Counsel for the Respondent's

Sam Ogwang Counsel for the Applicants

Yasin Nkalubo Respondent's Sales Manager

Charles Okuni: Court Clerk

Christopher Madrama Izama

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+: maXimum728securityx 2016 style*

Judge

21st March 2016