

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)**

**MISCELLANEOUS APPLICATION NO 387 OF 2015**

**ARISING FROM CIVIL SUIT NO 103 OF 2015**

- 1. OILNET PETROLEUM (U) LTD}**  
**2. HASSAN ABDULLAHI HAJJI}.....APPLICANTS**

**VS**

**FUTURES ENERGY CO LTD}.....RESPONDENT**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**RULING**

The Applicants commenced this application for unconditional leave to defend Civil Suit No 103 of 2015 and for costs of the application to be provided for. The Applicant moved under the enabling provisions of Order 36 rule 4 of the Civil Procedure Rules. The grounds of the application averred in the notice of motion are that the Applicants have a good and tenable defence to the Respondent's claim. Secondly the Applicants are not in any way indebted to the Respondent in the amount or sums claimed in the plaint. Thirdly there are serious questions which exist and which can only be disposed of only if the Applicant is granted unconditional leave to appear and defend the summary suit. Lastly it is in the interest of justice, and it is fair that the Applicants are not debarred from appearing and defending the suit on the merits.

The Application is supported by the affidavit of Hassan Abdullahi Hajji the second Applicant who is a Kenyan citizen and Managing Director of the first Applicant in which capacity he deposed to the affidavit. His evidence is that the Applicants entered into a contractual arrangement with the Respondent for the supply of petroleum products up to the value of Uganda shillings 240,000,000/=. As security the Respondent was issued with a cheque of the contract price which was to act as security for the supply of the petroleum fuel products. The issued cheque was not to be banked until the Applicants had given stern instructions to the Respondent to do so to which the Respondent agreed. The Respondent reneged on the contractual arrangement and supplied fuel which was less than the amount claimed by the Respondent. Not only did the Respondent supply less fuel but it went ahead and banked the cheque which was issued as security contrary to the agreement of not banking it at all till after the Applicants had given permission to do so. The fuel supplied under the contractual arrangement was not the value of the sums of money of Uganda shillings 126,053,560/= claimed in the summary suit. In the

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premises the Applicants have a good, tenable defence to the Respondent's demand which are inconsistent and unfounded.

In reply the Respondent's Finance Manager deposed in the affidavit in reply to that of the second Applicant that it is not correct that the Applicants are not indebted or liable to the Respondent in the sums claimed in the plaint. He contends that on various occasions the Respondent supplied the first Applicant service station with petroleum products worth Uganda shillings 126,053,560/= pursuant to the contract of the parties and according to copies of delivery notes attached. The security for payment for the petroleum products was a cheque for Uganda shillings 240,000,000/= issued by the first Applicant according to a copy of the cheque annexed. Thirdly the cheques were subsequently dishonoured upon presenting them to the Respondent's bankers according to copies of the bounced cheques attached. It was false to say that the cheques were banked prematurely as they were supposed to be banked upon default of payment for the petroleum products supplied. The Respondent made numerous demands on the Applicants to settle the outstanding amount but it failed, refused and neglected to settle their indebtedness or obligations to the Respondent and the Respondent therefore banked the cheque after the Applicant's failure to pay the money it owed. In the premises he contends that the Applicants have no plausible defence to the Respondents claim and application is intended to waste the time of court and frustrate the Respondent from recovering the sum of Uganda shillings 126,053,560/= being the value of fuel products supplied to the first Applicant.

The Applicant is represented by Counsel David Wesley Tusingwire while the Respondent is represented by Counsel Diana Ibalu.

The court was addressed in written submissions as is the practice and the Applicants Counsel raised a preliminary objection to the affidavit in reply on the ground that it was filed out of time. As far as facts are concerned he submitted that the application was served on the Respondent on the 29th of May 2015 but an affidavit in reply was only filed on 22 June 2015 which was 24 days later without leave of court. He submitted that the law was that the affidavit in reply had to be filed within 15 days of service of the application and that it was by 15 June 2015. He relied on Order 12 rule 3 of the Civil Procedure Rules as well as the case of **Stop and See (U) Ltd versus Tropical Bank High Court Miscellaneous Application Number 333 of 2010**. He invited the court to strike out the affidavit in reply. Furthermore he submitted that striking out the affidavit in reply would render the facts in support of the Applicant's application uncontroverted. Counsel further relied on the case of **Spring Wood Capital Partners Ltd versus TWED Consulting Company Ltd HCMA 746 of 2014** where an affidavit in reply filed out of time was struck out and the Applicant's application granted.

On whether the Applicants can be granted unconditional leave to appear and defend, the Applicant's Counsel submitted that the Applicants have a good and tenable defence because they are not indebted to the Respondent in the amounts claimed and triable issues exist. The

application is supported by the affidavit of the second Applicant which is to the effect that the cheque was to act as security and was not supposed to be banked. The Respondent supplied less fuel than agreed and the fuel supplied was less than the value of Uganda shillings 126,053,460/=. There is an admission on the part of the Respondent that the cheque was meant to act as security. Furthermore the Respondent seeks to rely on delivery notes that there is no evidence to indicate that they amount to the sums claimed in the plaint.

Counsel relied on the principles for the grant of leave as applied in the cases of **Kotecha versus Mohammed [2002] 1 EA 112; Sigma Mep Services (U) Ltd and 3 Ors vs. ABC Capital Bank HCMA 224 of 2015**. Finally he contends that the Applicant has a plausible defence and there are triable issues which exist to be tried. Inasmuch as fuel was supplied, the cheque was meant to act as security. The Applicants disputed the amounts being claimed by the Respondent and the same have never been proved to be due to it from the Applicants. Furthermore there is no evidence to show that the delivery notes gives rise to the total claimed sum of Uganda shillings 126,053,560/=. The Applicant's contention is that what was supplied was far less.

In reply the Respondent's Counsel contended that the reply was signed by the Finance Manager of the Respondent on 15 June 2016 but the affidavit was signed and presented to the clerk for filing within time. However the clerk delayed to file the affidavit in reply as had been instructed. The mistake of the clerk ought not to be visited on the litigant. He further prayed that the court applies article 126 of the Constitution to administer substantive justice without undue regard to technicalities. Counsel also invoked section 98 of the Civil Procedure Act and submitted that it gives this court inherent powers to make orders as may be necessary for the ends of justice. He submitted that the lawyers did not seek leave of court to file the affidavit in reply out of time because they were not aware that the affidavits had been filed later than 15 June 2015. Had this information come earlier, they would have done the beautiful thing of seeking leave. He prayed that the affidavit in reply is admitted. He further submitted that the mistakes and omissions or failures of Counsel should not be visited on the Applicant who is yearning for justice according to the case of **Mutaba Barisa Kweterana vs. Bazirakye Yereimiya and Another Civil Application No. 158 of 2014**. As well as the case of **Tropical Africa Bank Ltd vs. Grace Were Muhawana Supreme Court Civil Application Number 3 of 2012** that the mistakes or inadvertence of Counsel should not be visited on the litigant.

On whether the Applicants can be granted unconditional leave to appear and defend the suit, Counsel submitted that the Applicant's application does not disclose any plausible defence or triable issues. The defences in the application are only intended to delay justice and waste the time of the court. He submitted that the Applicants contend that they are not indebted because the fuel supplied was not worth the amount claimed in the plaint. They do not deny having received some fuel. The annexure to the affidavit in reply being the delivery note shows the fuel received on 17 July 2014 and the amounts applied in the annexure is 35,000 L wherein a litre was sold at Uganda shillings 3601.53/= giving rise to the claim of Uganda shillings

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126,053,560/=. The said annexure bears the stamp of the Applicant. Counsel further relied on the case of **Bunjo vs. KCB Bank (U) Ltd HCMA No. 174 of 2014** where honourable justice Wilson Masalu Musene found that the Applicants defence was unsustainable and not valid. No genuine or plausible triable issues were raised by the application for leave to appear and defend and application was dismissed with costs to the Respondent. In the case of **Sembule Investments Ltd vs. Uganda Baati HCMA 664 of 2009** Hon Lady Justice Irene Mulyagonja held that the summary procedure is intended to enable the Plaintiff with a liquidated demand in which there is clearly no defence to obtain a quick and summary judgment without being unnecessary kept from what is due to him by delaying tactics of the Defendant. The Defendant who wishes to resist the entry of a summary judgment should disclose through evidence that there are some reasonable grounds of defence.

The Respondent's Counsel submitted that the Applicant's application does not show that he has a good defence. The Applicants alleged that the supply under the contractual agreement was not to the value of Uganda shillings 126,053,560/= and therefore it means that they do not deny having received the supply. The Respondent has not attached any evidence to support the claim. On the other hand annexure "A" to the Respondent's affidavit in reply bears the stamp of the Applicant showing that they received the fuel that is indicated. In the premises the application ought to be dismissed with costs to the Respondent.

### Ruling

Upon a careful consideration of the Applicant's application together with the affidavit evidence for and against the application as well as the submissions of Counsel and authorities cited, the first matter to be resolved is whether the affidavit in reply by Mr Keith Muturi should be struck out. This is on the ground that it was filed out of time and without the leave of court under the provisions of Order 12 rule 3 (2) of the Civil Procedure Rules. The rule provides that an affidavit in reply to the application by the opposite party shall be filed within 15 days from the date of service of the application and shall be served on the Applicant within 15 days from the date of filing of the reply. This application was filed on the 22nd of May 2015 and served on the Respondent's Counsel on the 29<sup>th</sup> of May 2015. The affidavit in reply was filed on court record on 22 June 2015. The Respondents Counsel does not contest the question of fact that the affidavit in reply was filed outside the 15 days prescribed by Order 12 rule 3 (2) of the Civil Procedure Rules for the filing of the reply upon service of the application on the Respondent.

The only matter to be considered is what happens to the affidavit in reply. The Respondent's Counsel prayed that the court validates the late filing by extension of time under the inherent jurisdiction of the court to make such orders as are fit for the ends of justice under section 98 of the Civil Procedure Act. The Respondent's Counsel also relied on article 126 (2) (e) of the Constitution of the Republic of Uganda which provides that substantive justice shall be administered without undue regard to technicalities.

The only matter for consideration in my view is whether the court has jurisdiction at this time of the proceedings to enlarge the time within which the affidavit in reply should be filed and therefore validated as having been filed in time.

Similar matters have been raised in the courts before and the primary question to be considered is whether the Applicant had suffered any prejudice by the late filing of the affidavit in reply. Whereas it is true that the affidavit in reply was filed out of time, it was filed on 22 June 2015 and served on the Applicant's Counsel. Thereafter the Applicant filed an affidavit of service of the application on 22 September 2015 about three months later apparently with the intention of raising this objection under consideration. The application was initially fixed for hearing on 30 September 2015. Thereafter the Applicant sought an adjournment because Counsel handling the application was indisposed. It came again on 26 November 2015 and it was indicated that Counsel for the Applicant was appearing in another company cause in the High Court. The matter was mentioned on 15 December 2015 when the Applicant's Counsel was present and the Applicant's Counsel informed the court that negotiations were underway so he sought adjournment to 1 February 2016. On 1 February 2016 there were indications that the parties were negotiating an out of court settlement and they still sought an adjournment to facilitate negotiations. It is only on 15 February 2016 that the matter commenced and schedules were agreed upon and given for Counsels to file written submissions of the application. In the submissions the Applicant's Counsel objected to the affidavit in reply but in the alternative addressed the court on the merits of the application. In other words if the affidavit in reply is not struck out, the matter can be handled on the merits and no prejudice would have been occasioned to the Applicant who had ample opportunity to peruse the affidavit in reply and even to file a rejoinder if they so wished. A similar matter was handled by Hon Lady Justice Helen Obura in **Western Uganda Cotton Company Limited versus Dr George Asaba and three others** in High Court Civil Suit No. 353 of 2009 where the Plaintiff helped himself to the pleadings of the defence but was not formally served. She held that where a Plaintiff or Defendant helps himself or herself to a pleading and is not formally served, the purpose for service has been fulfilled. The object of service was achieved by Counsel for the Plaintiff's action of helping himself to the counterclaim on the record and a preliminary objection relating to service on the Plaintiff of the counterclaim was overruled.

In the Supreme Court judgment in **Mukasa Anthony Harris versus Dr Bayiga Michael Philip Lulume** Election Petition Appeal Number 18 of 2007, the appellant had helped himself to a copy of the petition probably and had pre-empted the service and did in effect enter appearance unconditionally. It was held that the purpose for service had been achieved. In both instances the Courts have applied the provisions of article 126 (2) (e) of the Constitution to apply substantive justice.

As far as the High Court is concerned, the court is dealing with two rules namely order 51 rules 6 and order 51 rule 7 of the Civil Procedure Rules. Rule 6 provides as follows:

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"Where a limited time has been fixed for doing any act or taking any proceedings under these rules or by the order of the court, the court shall have power to enlarge the time upon such terms, if any, as the justice of the case may require, and the enlargement may be ordered although the application for it is not made until after the expiration of the time appointed or allowed; except that the costs of any application to extend the time and of any order made on the application shall be borne by the parties making the application, unless the court shall otherwise order."

The Supreme Court in the case of **Crane Finance Company Ltd vs. Makerere Properties Ltd Civil Appeal number 11 of 2001** the Court held that a document filed on the court record out of the prescribed time can be validated by an order of enlargement of time.

Considering the fact that the Applicant had not been prejudiced, the application for extension of time for filing the reply succeeds with costs to be borne by the Respondent in any event under the provisions of Order 51 rules 6 of the Civil Procedure Rules.

As far as the merits of the application are concerned, the principles of law for the grant of leave to defend a summary suit are not in contention. The question is whether a serious question or a triable issue has been raised that constitutes a plausible defence to the summary suit.

The submissions of the Applicant and the affidavit in support of the application leave a lot to be desired in terms of Order 36 rule 4 of the Civil Procedure Rules. It provides that an application by a Defendant for leave to defend a summary 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 Plaintiffs claim. Under Order 36 rule 6 of the Civil Procedure Rules, if the defence set up by the Defendant applies only to a part of the Plaintiffs claim or if part of the claim is admitted, the Plaintiff is entitled to a decree for such part of his or her claim as the defence does not apply to.

The Applicant admits that it was supplied with the petroleum products but makes a vague statement that the amount claimed by the Plaintiff/Respondent is much more than the price of what was supplied.

That notwithstanding what needs to be considered is what the evidence discloses for the court to come up with a just decision that is consistent with the rules of procedure as well as the dictates of justice. The Applicant does not deny that it was supplied with some petroleum products but has merely omitted to indicate how much it admits. In paragraph 8 of the affidavit in support of the application the second Applicant deposed that the fuel supplied under the contractual arrangement was not the value of the sums of Uganda shillings 126,053,560/=. The obvious question is how much was supplied? Failure to plead the actual value of the amount supplied contravenes Order 36 rule 4 of the Civil Procedure Rules.

According to **Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22nd edition** at pages 75 and 76 whenever a genuine defence, either in fact or law, sufficiently appears, the Defendant is entitled to unconditional leave to defend. The learned author notes that the Defendant is not bound to show a good defence on the merits. Secondly the court should be satisfied that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial. Thirdly the defence should be made in good faith. Fourthly the defence must be stated with sufficient particularity, as appear to be genuine. These principles have been applied variously in **Maluku Interglobal Trade Agencies Ltd versus Bank of Uganda [1985] HCB 65; Abu Baker Kato Kasule vs. Tomson Muhwezi [1992-93] HCB 212. In Abu Bakr Kato vs. Tomson Muhwesi (supra)** 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 for the Defendant to be given leave to defend unconditionally. In the case of **Corporate Insurance Co. Ltd. v. Nyali Beach Hotel Ltd [1995-1998] EA 7** the Court of Appeal of Kenya held that it was not sufficient deny the claim or make an averment of a defence. The court has the duty to investigate the issues raised and decide whether leave should be granted.

In this application there is non-compliance by the Applicant with Order 36 rule 4 of the Civil Procedure Rules which makes it mandatory for the Applicant to support the application with affidavit evidence and which shall state whether the defence alleges goes to the whole or part of the Plaintiffs claim. The real question in this application is how much of the claim does the Applicant admit?

In paragraph 6 of the affidavit of Hassan Abdullahi Hajji in support of the Application the Applicants admit that the Respondent supplied fuel but which was less than what was contracted. In the summary suit the Respondent claims Uganda shillings 126,053,560/= together with interest for petroleum products supplied to the Applicant. In paragraph 5 of the Complaint the Respondent disclosed that the first Applicant had issued to the Plaintiff a Stanbic Bank cheque No. 006552 for a total of Uganda shillings 240,000,000/=.

What the Respondent claims in the Complaint is less than the face value of the cheques by Uganda shillings 113,946,440/=. While the Applicant asserts that the Respondent presented the cheque which it was not supposed to do, the Plaintiff/Respondent's case is clearly not for the face value of the cheque and therefore the Applicant's assertion in that regard does not constitute a plausible defence to the suit. Annexure "A" demonstrates that the basis of the suit is firstly a contract. It is further expressly averred that it is for recovery of the price of petroleum products supplied to the First Applicants station in Kampala. Secondly the dishonour of the cheque is on the ground that the drawers consent is required and is not material to the defence as the claim in the complaint is not for the face value of the dishonoured cheque. In paragraph 4.3 of the contract the Applicant undertook to pay the Respondent within 7 days of the date of loading the product. Finally coupled with the Applicant's own admission, the Respondents Finance Manager in

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paragraph 4 of the affidavit in reply deposed that on various dates the Respondent supplied the first Applicant with petroleum products according to copies of the delivery notes attached. The Applicant acknowledged receipt of 34,942 litres of the “petroleum products” in annexure A dated 17<sup>th</sup> July and 35,002 litres in annexure A dated 24<sup>th</sup> July 2014 to the affidavit of Keith Muturi. The real question is therefore what happens when there is non – compliance with Order 36 rule 4 of the Civil Procedure Rules by not admitting the price of the goods admitted?

Firstly the Respondent is entitled to judgment for the goods supplied under Order 36 rule 6 of the Civil Procedure Rules which provides that:

6. Judgment for part of claim, defence as to residue.

If it appears that the defence set up by a Defendant applies only to a part of the Plaintiff’s claim, or that any part of his or her claim is admitted, the Plaintiff shall be entitled to a decree immediately for such part of his or her claim as the defence does not apply to or as is admitted, subject to such terms, if any, as to suspending execution or the payment of any amount realised by attachment into court, the taxation of costs or otherwise, as the court may think fit; and the Defendant may be allowed to appear and defend as to the residue of the Plaintiff’s claim.

The Applicant has not plausible defence to the claim for the price of 34,942 litres and another delivery of 35,002 litres of the ‘petroleum product’ supplied and acknowledged. The only question left is what the price per litre is. The Applicant contests the value in paragraph 8 of the Affidavit in support of the application but does not specify his own value or price.

According to **Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22nd edition** page 77 the Defendant must state whether the alleged defence goes to the whole of part only and if so what part (See Order 36 rule 4). He writes that if there is a dishonest Defendant who admits that something is due but seeks to evade a judgment against him by avoiding any actual mention of figures, the possible course is to ask the court to adjourn the matter for the Defendant to file a further affidavit specifying in figures how much he admits. The Defendant may be examined in person.

In the premises the Applicant’s Application lacks a plausible defence and the Respondent is entitled to the price of the goods supplied which were to be paid within 7 days of loading the supply. The price is provided for under clause 5 of the contract between the parties and the Applicant is to be billed on the basis of competitive market prices. What is a competitive market price?

In the premises the issue remaining is what the market price at the time of loading the product was. The Applicant admitted the supply but did not specify the price. In the premises judgment



on the price is stayed and the 2<sup>nd</sup> Applicant is ordered to file an affidavit specifying the exact value of the petroleum products supplied and proved by the Respondent in the affidavit in reply.

The affidavit shall be filed within 7 days and the 2<sup>nd</sup> Applicant may be further examined on the next hearing date if the affidavit is found not to be sufficient at the option of the Respondent. The affidavit shall be served on the Respondents Counsel within 7 days from today. This application is adjourned to the 13<sup>th</sup> of April 2016 at 2.30 pm.

Ruling delivered in open court on the 1<sup>st</sup> of April 2016

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Nalugya Ramula holding brief for Tusingwire for the Applicants

Nobody for the Respondent

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

**1<sup>st</sup> April 2016**