

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION No. 773 OF 2015

[ARISING OUT OF CIVIL SUIT NO. 604 OF 2015]

VICTORIA SEEDS LTD ::: APPLICANT/ DEFENDANT

VERSUS

KINYERA GEORGE CANDANO ::: RESPONDENT

BEFORE: HON MR. JUSTICE B. KAINAMURA

RULING

The applicant applied to this court by Notice of Motion under Order 36 rules 1, 3(1), & 4, O.52 Rule 1 & 3 of the CPR for unconditional leave to appear and defend Civil Suit No. 604 of 2015 and costs.

The brief background to the application is that the respondent filed a summary suit to obtain judgment for recovery of UGX 118,401,400/=. The applicant filed this application to seek leave to appear and defend the suit.

The grounds of the application as set out in the Notice of Motion and affidavit in support deposed by Mrs. Cesca Abalo Okot one of the directors of the applicant briefly are that;

It is not true that the applicant is indebted to the respondent to the tune of UGX 118,401,400/= as alleged by the respondent.

The respondent failed to perform part of the contract.

The respondent was contracted by the applicant to supply groundnuts which met the standards set out in the Local Purchase Orders of minimum germination of 85% and purity of 99%.

After receiving the red beauty groundnuts seeds that were supplied to them by the respondent, they subjected them to the germination test but part of the consignment failed the germination test.

The respondent was informed about the consignment which did not pass the prescribed standards and it was mutually agreed that instead of rejecting the said consignment, the respondent would be paid by the ultimate buyer of the said goods, the Food Agricultural Organization (FAO).

To date, FAO has not paid for the said goods and the suit is accordingly premature.

The applicant paid for the consignment which passed the germination test as admitted by the plaintiff in his summary plaint.

The applicant has a good defence to the main suit and it seeks court to allow so it defend the suit so that its defence is put across.

The respondent filed an affidavit in reply sworn by Kinyera George Candano the respondent who deposed that;

The application is incompetent, misconceived and brought out of time and his advocates shall raise a preliminary objection and have it dismissed with costs.

The affidavit in support of the application for leave to file a defence is full of falsehood and blatant lies and should not be accepted by court.

It is not true that he failed to perform the contract and he has no knowledge of the alleged germination test being performed to his supplies; he never received any communication that his products failed any test.

The allegations in paragraphs 4, 5, 6 and 7 of the affidavit are mere after thoughts meant to deliberately deny the respondent of his payment because the defendant had promised to make payments within 60 days to his account in Centenary Bank in the names of Aero Nyero Produce Processing Works.

When his lawyers issued a demand notice to the applicant/ defendant on 20th August, 2015 for payment of UGX 167,279,000/= which was due at the time, the defendant paid him UGX 50,000,000/= leaving a balance of UGX 117,279,000/= the subject of the present suit.

He has never entered a mutual agreement with the applicant regarding supplies of his goods and it is not true that the applicant paid for the consignment which passed the germination test. All the supplies were certified as in good condition as evidenced by the applicant commodity receipts sheet.

The respondent does not know about the consignment which was accepted and the one that was denied.

The applicant has no triable issues in the matter and the applicant is just buying time.

It is in the interest of justice that this application be dismissed for lack of merit and being frivolous and intended to evade liability.

The applicant has no defence whatsoever to the main suit and should be dismissed with costs.

Counsel for the applicant submitted that **Order 36 rules 3(1) and 4 of the Civil procedure rules** gives court power to grant unconditional leave to appear and defend the suit. Counsel cited the case of *Begumisa George Vs East African Development Bank M.A 451 OF 2011* in which court held that an applicant who comes seeking for leave to appear and defend the suit under Order 36 must show that he or she has a good defence on merits or that in the circumstances there is a bona fide defence. Counsel argued that the applicant set out a good defence in the affidavit of Mrs. Okot in paragraph 10 and should therefore be granted leave to appear and defend the suit. Counsel added that Mrs. Okot's affidavit contains triable issues which the applicant should be allowed to put across if the ends of justice are to be met in this case. Counsel in conclusion prayed that court grants the orders sought in the application as set out in the Notice of Motion and that costs be granted to the applicant.

In reply, Counsel for the respondent submitted that the law is clear on what court considers in an application for leave to appear and defend. Counsel cited the case of *Zola & Anor Vs Ralli Bros Ltd & Anor (1969) E.A 694* in which court held that Order 36 is intended to enable a plaintiff with a liquidated claim, to which there is clearly no good defence, to obtain a quick summary

judgment without being unnecessarily kept from what is due to him by the delaying tactics of the defendant. Counsel for the respondent argued that the applicant clearly has no good or *bonafide* defence because it produced no proof of the quantity which passed the germination test and that which did not, and no documentary proof that the respondent was informed that his goods had failed the germination test and yet the whole transaction was documented in form of receipts and purchase orders. Further there is no proof that the partial payment made by the applicant was for the supply that had been accepted. Counsel argued that the application is therefore frivolous, incompetent and lacks merit and should be dismissed. Counsel in addition stated that the applicant did not file an affidavit in rebuttal which proves that there is no defence to what they claim. Counsel therefore prayed that the application be dismissed and judgment entered for the respondent/plaintiff.

In rejoinder, Counsel for the applicant stated that the application raises triable issues as submitted earlier. In addition, Counsel argued that he disagreed with the notion that failure to file an affidavit in rejoinder implies that the applicant neither contests the respondent's assertions nor has a defence. Counsel added that Order 12 rule 3 of the CPR provides for the application such as this but does not provide for an affidavit in rejoinder as a mandatory requirement. In conclusion, Counsel prayed that the applicant be granted the prayers set out in the application.

Decision of court

I have considered the pleadings and submissions of both Counsel. The respondent supplied the applicant on several occasions with red beauty (unshelled groundnuts) for a period from 23rd March to 15th May 2015. The plaintiff paid only UGX 178,000,000/= out of UGX 296,401,400/= and committed by a letter dated 29th May 2015 to clear the outstanding balance of UGX 118,401,400/=. The amount was never paid hence this summary suit.

In the case of *M.M.K Engineering Vs Mantrust Uganda Ltd MA 128 of 2012* the principles for determination whether leave should be granted were stated to include;

- a. The applicant must demonstrate to court that there are issues or questions of fact or law in dispute which ought to be tried.

- b. Where the applicant shows a state of facts which leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim, he ought not to be debarred of all power to defeat the demand upon him.
- c. Where court is in doubt whether the proposed defence is being made in good faith, the court may order the defendant to deposit money in court before leave is granted.
- d. Wherever there is a genuine defence either to fact or law the defendant is entitled for leave to appear and defend.
- e. The defendant may in answer to the plaintiff's claim rely upon a setoff or counterclaim.

Mrs. Cesca Abalo Okot in the affidavit in support of the application stated that groundnuts had to meet the standards set out in the Local Purchase Orders of minimum germination of 85% and purity of 99%. She deposed that part of the consignment did not meet the standard and the applicant paid for what met the standards. Counsel for the applicant submitted that the arguments set in the affidavit in support constitute a good defence.

Counsel for the respondent on the other hand argued that the respondent had no good defence and seeks to waste court's time.

The intention of summary procedure is that a claimant will obtain judgment to recover a debt or liquidated amount payable by the defendant arising from a contract where the defendant has no defence. I also need to point out that depending on the circumstances, leave can be given either conditionally or unconditionally under **Order 36 rule 8 of the CPR**. The applicant needs to prove that there is a defence which entitles the applicant to be granted leave to appear and defend.

I note from the LPO's appearing as annexures "A" and "B" to the specifically endorsed plaint that the groundnuts had to be of the specifications stated in para 5 of Ms. Okot's affidavit.

That being the case, it is my opinion that question whether groundnuts supplied met the set test necessitate a trial to determine if the consignments did indeed not meet the standards as alleged by the applicant. Such an allegation regarding standards, in my opinion requires this court to properly investigate the alleged facts at a full trial of the suit.

Accordingly, the applicant is granted unconditional leave to appear and defend Civil Suit No. 604 of 2015. The applicant is hereby ordered to file its defence within 14 days from the date of this ruling.

Costs of this application will be in the cause.

I so order

B. Kainamura

Judge

26.02.2016