

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
HIGH COURT MISCELLANEOUS APPLICATION No. 594 OF 2015
(FROM HCT-00-CS-CS-No. 461 OF 2015)

GEORGE MUKUYE SALONGO.....APPLICANT

VERSUS

MK CREDITORS LIMITED.....RESPONDENT

BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI

RULING

This is an application by notice of motion under O.52 rr. 1 and 3 and O. 36 r.3 of the Civil Procedure Rules (CPR), and S. 98 of the Civil Procedure Act (CPA), for unconditional leave to appear and defend Commercial Division High Court Civil Suit No. 461 of 2015, and that costs of the application be provided for.

The application arose out of a suit brought by the respondent under summary procedure on a specially endorsed plaint, O.36 r. 2 of the CPR, for recovery of a sum of sh. 71,010,000= arising out of breach of contract by the applicant. The applicant filed this notice of motion for leave to defend that civil suit No. 461 of 2015.

The application was supported by the affidavit of the applicant George Mukuye Salongo. There is an affidavit in reply deposed by Male H. Mbirizi K. Kiwanuka the Managing Director of the respondent company.

Four grounds were set out in the notice of motion as follows,

- 1) The same parties and substantially the same matter and facts are pending in a court of competent jurisdiction in Chief Magistrates court of Makindye.

- 2) The instant suit, before the disposal of Makindye Originating Summons No. 78 of 2014 MK Creditors Ltd. v. Mukuye George Salongo, is irregularly, illegally and wrongfully before this court.
- 3) The applicant has a good defence to the whole of the respondent's claim.
- 4) It is fair, just and equitable that the applicant is granted unconditional leave to appear to the summons and defend the suit.

In the respondent's submissions two matters were raised regarding the competence of the affidavit in support of the motion. I will deal with these first before going to the merits of the application.

The first point of objection was that the affidavit in support of the motion was not dated. This made it defective and it ought to be struck off. That would leave the motion without any evidence from which the court could make a decision whether or not there are triable issues to warrant grant of the application for leave to appear and defend the suit.

O. 36 r. 4 CPR provides, among other things that an application by a defendant 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 of the plaintiff's claim. This is a mandatory requirement of the law.

The affidavit of Mukuye George Salongo in support of his application was signed by himself. It was also duly signed and stamped by Ayebazibwe Makorogo Alexio, the commissioner for oaths, apparently at Kampala. It had a certification by the same commissioning Counsel, of translation of the contents of affidavit to the deponent from the English language into the Luganda language, meaning that the applicant was illiterate. The affidavit was however not dated.

It was pointed out that the failure to date the affidavit offended the Commissioners for Oaths (Advocates) Act, which in S. 5 thereof provides that,

'Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and what date the oath or affidavit is taken or made'.

The cases of Balikudembe Jumba Peter & 2 others v. Jjagwe Mbuga & another HC MA No. 976 of 2012, and Ms. Job Connect (U) Ltd. v. DFCU Bank Ltd HC MA No. 627 of 2014 were cited in support. In the Balikudembe case, the suit was filed in the Land Division and Murangira J., dismissed it holding it ought to have been filed in the Family Division. He also found the affidavit in support defective for not bearing the date and place where the oath was administered from. In the Job Connect case, Helen Obura J, (as she then was), dismissed the suit where the motion was devoid of an affidavit in support, the same having been struck out for being commissioned by an advocate whose license to practice was still suspended.

The case before me differs from the above. It comes out clearly that the applicant was an illiterate. The contents and meanings of the affidavit he signed had to be explained to him by the Commissioning advocate. The affidavit stated that the affidavit was sworn at Kampala, meaning the place was not unknown. The non compliance was only with regard to the date.

The provision in Section 5 of the Commissioners for Oaths (Advocates) Act above cited enjoins the commissioning advocate to ensure full compliance therein. That duty is not placed on the deponent. I believe that the adverse effects of non compliance ought not to be placed on the deponent, especially an illiterate one like in the present case.

I found that this was one of those cases where Article 126 of the Constitution which enjoins courts to administer justice without undue regard to technicalities to be of relevance. I therefore dismissed that objection.

The second objection to the affidavit in support was that there was non compliance with O.6 r.2 CPR, in so far as there was non annexure thereto of a summary of evidence, list of authorities, witnesses, document, and authorities to be relied on. Egonda Ntende J, (as he then was) dismissed Hon. Minister of Internal Affairs v. Kaggwa Andrew & others HC MA No. 0660 of

2002 for, among other reasons, failure to comply with the above rule. I found that the list of matters required in the Order was attached to the notice of motion. That objection was also overruled.

Now on the merits of the application, in an application for leave to appear and defend a suit which has been brought under summary procedure by the provisions of O. 36 CPR it ought to be shown by affidavit or otherwise that there is good defence on the merits; or that a difficult question of law is involved; or that there is a dispute which ought to be tried or a real dispute as to the amount which requires taking an account to determine or any other circumstances showing reasonable grounds of a bona fide defence. See Bhaker Kotech v. Adam Muhammad CA Civil Appl. No. 48 of 2001. There must be a bona fide triable issue of fact or law. Where there is a reasonable ground of defence to the claim, the plaintiff is not entitled to summary judgement. In the words of Duffus, P, in the case of Patel V. Cargo Handling Services [1974] EA 75, “ a triable issue is an issue which raises a prima facie defence and which should to go to trial for adjudication.”

In the application such as the one before me, the defendant is not required to show a good defence on the merits, but to satisfy court that there is an issue or dispute in question, which ought to be tried. The court is not, at this stage required to engage in the trial of the issues raised. As Akiiki Kizza J, pointed out in Sulaiman Nsambu V. Fred Balinda HCMA No. 289 of 1998 (unreported), once triable issues have been shown to exist from the affidavit in support of the application, then in such a case, leave to appear and defend will be granted.

In the present case, the applicant argued that the suit was not one fit to be brought under O. 36, as the demand was not liquidated. It was not specific. I noted that the demand was on a daily interest, and it kept changing by the day. The demand in the plaint stated that it was sh. 71,010,000= ‘as of 13th August 2013’. From the evidence on court record, this arose from a loan of sh. 1 million. The applicant deposed that he had paid all plus interest. He therefore had a good defence to the suit.

That argument needed consideration in a trial of the suit, where a party claimed that he borrowed sh.1 million which he repaid with interest of sh. 500,000/=, but who was facing a demand of more than sh. 71 million. That was a triable issue.

The applicant argued that the respondent filed an Originating summons in court against him over the same matters now before court, and it was determined in his favour. The respondent appealed and the appeal was yet to be determined by the High Court.

The respondent submitted that the matter in the Originating Summons was seeking a determination of questions regarding foreclosure and sale of the security in the mortgage. That it did not rule on or rule out the liability of the applicant regarding the unpaid loan amount in terms of the contract. In any event, the trial court ordered the filing of the current suit.

I found that argument rather contradictory. The respondent herein did not just file suit, but proceeded to file an appeal against the decision of the trial court in the Originating Summons. The question for determination in the Originating Summons would end, if successful to the applicant therein, in the sale of mortgaged property in order to recover the loan amount. The current suit from which this application arises would, if successful to the current respondent end up in enforcement of recovery of the loan amount. Would that not be double jeopardy, for these matters to proceed against the applicant simultaneously? I believe that is a triable issue.

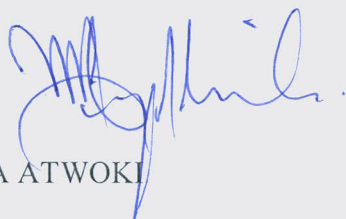
In the case of *H.D. Hasmani V. Banque Du Congo Belge* (1938) 5 EACA 89, the court held that, “even if there is only one triable issue in the affidavit supporting the application for leave to appear and defend, then the appellant is entitled to leave to appear and defend unconditionally.”

As I stated earlier, court is not at this stage required to go into the merits of the defence, or to decide whether or not the defence will be successful. Suffice that there is on the face a defence which is worth consideration by the court. The applicant has showed this. I would for the above reasons allow the application.

The applicant asked court to consider the affidavit in support of the head suit, that it contravened the law and that this was an illegality. He cited the much used and oftentimes misused holding in Makula International v. His Eminence Emmanuel Cardinal Nsubuga & Another [1982] HCB 11, that once an illegality was brought to the attention of court, it overrode all questions of pleadings. He asked court to dismiss the head suit. The short answer to that prayer was that this was not part of the matters for consideration in this case. He would have the opportunity to raise such issues in the appropriate forum, if he so wished.

Having decided as I have that there are triable issues in the suit, it is clear that it is just and equitable that the application be granted. I accordingly allow this application. In the event, the following orders are hereby made.

1. The applicant is hereby granted unconditional leave to appear and defend the suit.
2. The applicant shall file his defence within 10 days from date of reading this ruling to the parties.
3. Costs of this application shall abide the results of the suit.



RUGADYA ATWOKI

JUDGE

24/09/2017.

Court: The Registrar of the Commercial Division shall read this ruling to the parties.




RUGADYA ATWOKI

JUDGE

24/09/2017.

11/10/17 Mr. Male Mubizi (MLO) of the Reg. present
Mr. Mubunge Salago (anal) present in ch.
Mr. Bukeya - ch. Clerk present
At ruling delivered on request of Hon.
Justice Rugadya



11/10/17