

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]**

MISCELLANEOUS APPLICATION No. 435 of 2015

(Arising Out Of Civil Suit No. 329 of 2015)

MICHEAL SEKUYENJA :::::::::::::::::::::::::::::::::::APPLICANT/DEFENDANT

VERSUS

1. NJAGALA MOHAMED

**2. KAYELIMA GENERAL HARDWARE LTD ::::::::::: RESPONDENTS/
PLAINTIFFS**

BEFORE: HON. MR. JUSTICE B. KANINAMURA

RULING

The applicant, Micheal Sekuyenja, brought this application under the provisions of Order 36 rules 3, 4 and Order 52 rules 1 and 2 of the Civil Procedure Rules S.1 71-1.

The applicant seeks orders for;

1. *Unconditional leave to appear and defend in Civil Suit No. 329 of 2015.*
2. *Costs of this Application to be provided for.*

The application is supported by the applicant's affidavit dated 10th June 2015. The respondent filed an affidavit in reply deposed by the respondent dated 6th July 2015.

Briefly the facts upon which the main suit is based as laid out in the amended plaint are that the plaintiff/respondent demands UGX 127,675,000 /= and interest thereto at 10% arising from a contract for supply of building materials made on the 18th day of July 2014 between the plaintiffs and the defendant/applicant. That the respondents entered into a Memorandum of Understanding with the applicant for the supply of building materials worth UGX 100,000,000/= on credit. The respondent supplied the building materials to the applicant who has since failed to pay UGX 127,675,000 as at 21/03/2015 being the cost of the building materials. Additionally, it is the plaintiff/respondent's case that the defendant/applicant pledged his land at Kasubi Lubya Village as security and provided a

copy of the land sale agreement. Despite the best efforts of the plaintiff to recover the stated amounts from the defendant, he refused and or neglected to pay. The respondents then filed Civil Suit No. 435 of 2015 under Order 36 and Order 52 of the CPR. The applicant now brings this application for unconditional leave to appear and defend that
5 suit.

The respondents filed an affidavit in reply in which the 1st respondent stated that his advocates thought it prudent to file an amended plaint which they did on 10th June 2015 and duly served the applicant's advocate on 12th June 2015, and the advocate duly
10 received the amended pleadings. He added that the applicant in effect never replied to the amended pleadings as required by Law.

The deponent further stated that the gist of the applicant's application is that he never dealt with the 1st respondent but the said explanation was rendered untenable, when the
15 2nd respondent was brought in to the proceedings, since the 1st respondent in the agreement acted on behalf of the 2nd respondent.

He further stated that there is no reply in respect of the amended pleadings as required under the Law.
20

Counsel for the applicant submitted that Order 36 rule (3) of the CPR prescribes application for leave to appear and defend with leave of court. Counsel relied on the case of *Maluku Interglobal Trade Agency Ltd Vs Bank of Uganda [1985] HCB 65* which considered conditions to be considered before leave to appear and defend is granted
25 which include; a triable issue of fact or law and that the applicant has a good defence. Counsel submitted that whenever there is a genuine defence either in fact or in law, the defendant is entitled to unconditional leave to appear and defend. Counsel argued that the applicant has never received monies from the respondents or goods worth the said amount from the respondents and if allowed to defend himself, the respondents shall be
30 tasked to produce delivery notes showing the applicant as beneficiary of any money and

or goods from the respondents. In conclusion, Counsel submitted that there are triable issues for the consideration of court.

Counsel for the respondents submitted that the applicant's application stems from the
5 initial plaint and therefore there is no substantive application for leave to appear and
defend pursuant to the amended plaint which was properly filed in court and served in
time on the applicant. Counsel submitted further that the applicant seeks to delay the suit
to the plaintiff's detriment and prayed that this court finds it fit to dismiss the application
with costs and grant judgment as prayed for in the summary suit. Counsel relied on a
10 number of decisions among which is the case of ***Balinda Collins Vs Higenyi Ronald***
Misc Appl. 482/2013 where it was held that since it was the applicant who personally
received the money and entered in agreement with the respondent he should bear the
burden of repayment. Counsel argued that the applicant did not even attach a proposed
written statement of defence and therefore did not prove that there are any triable issues.
15 Counsel prayed that the application be dismissed and in the alternative conditional leave
be granted on such conditions as court deems fit as was held in the case of ***Mulenga***
Christopher Vs Stanbic Bank Misc. Appl. 200/2013.

In the submissions in rejoinder, Counsel for the applicant submitted that the applicant
20 filed this application for leave within the prescribed time by law and indeed served the
respondent with the pleadings. Counsel added that by the time the respondent amended
the plaint and served the applicant, the applicant had already taken a step by filing an
application for leave to appear and defend and therefore any amendment had to be with
leave of court. Counsel cited Order 6 rule 22 of the CPR which allows Court to disallow
25 an amendment if it is satisfied that justice of the case requires it. Counsel also stated that
it is not mandatory to attach a written statement of defence and it does not mean that
there are no triable issues. Counsel relied on the decision of ***Sterling Travel & Tour***
Services Ltd & Anor Vs Millennium Travel & Tour services Ltd Misc Appl. No. 116 of
2013. Counsel prayed that the amendment be disallowed and the application be granted.
30 ***Decision of Court***

The application was brought under Order 36 rule 3 & 4 of the CPR. This is a liquidated claim for UGX 127,675,000 /= which the applicant denies.

I will first address the concern raised by the applicant that the respondent amended the
5 plaint without leave of court which contravened Order 6 rule 12 CPR. Counsel for
respondent in response pointed to the fact that the applicant did not file a reply to the
amended plaint. In the case of ***Ziriyo Edison & 2 others t/a St. Catherine Clinic Vs
Kampala Capital City Authority & Kampala District Union of People with Disabilities
Ltd Civil Suit No. 396 of 2012*** where amendments were done without leave of court,
10 court among others held that;

*“Courts exist to adjudicate the real substance of disputes and to ensure
that justice is administered without undue technicalities in the context of
Article 126(2) (e)”*

The rationale was that the objection does not go to the root of the case and it was
15 overruled. I agree and, I hold similarly that the amendment does not go to the root of the
case and will move on to consider the merits of the application.

This is an application for leave to appear and defend. The courts have laid down the
conditions to be considered before leave to appear and defend the suit is granted. In the
20 case of ***Kotetcha Vs Mohammed [2002] E.A 112*** court held that where a suit was brought
under summary procedure, the defendant is granted leave to appear and defend if he is
able to show that he has a good defence on merit, or that a difficult point of law is
involved; or a dispute as to the facts which ought to be tried; or a real dispute as to the
amount claimed which requires taking into account to determine; or any other
25 circumstance showing reasonable grounds of bonafide.

Counsel for the applicant argued that the applicant has never received monies from the
respondents or goods worth the said amount from the respondents. That if allowed to
defend himself, the respondents shall be tasked to produce delivery notes showing the
30 applicant as beneficiary of any money and or goods from the respondents. In my view

there is a dispute as to indebtedness which means that there is a triable issue at hand which requires full trial.

Accordingly, leave to appear and defend is granted to the applicant. The applicant shall
5 file a defence within 14 days from the date of this ruling. The costs of this application shall be in the cause.

10 **B. Kainamura**
Judge
07.07.2017