

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO 1038 OF 2016
(ARISING FROM CIVIL SUIT NO 778 OF 2016)**

- 1. **OBURU BENARD** }
- 2. **APOYA JOYCE** }
- 3. **OWINO GLORIA** }
- 4. **NYAKECHO RACHAEL** }
- 5. **PURA INTERNATIONAL LTD}**.....**APPLICANTS**

VERSUS

- 1. **MIYABELE ATANANI FIDEL}**
- 2. **ALAIN MUSENE MWEPA}**
ACTING THROUGH ATTORNEY
TABU MAWA CHADRI}.....**RESPONDENTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This ruling arises from an application for leave to defend a summary suit brought by the Applicants under the provisions of Order 36 rule 1 and Order 52 rule 3 of the Civil Procedure Rules. It is also for an order that provision is made for costs of the application. The grounds of the application set out in the notice of motion are:

Firstly, that the Applicants are not indebted to the Respondents. Secondly, the amount of US\$30,000 which the Respondents are falsely claiming is unknown to the Applicants. Thirdly, the first, second, third and fourth defendants have been sued wrongly and should be given an opportunity to appear and defend the suit. Fourthly, the Respondents have been fraudulent by declaring a forged receipt that does not belong to the fifth Applicant. On the sixth ground that the purported power of attorney of the Respondents has not been attached for confirmation. Lastly, it is in the interest of justice that leave to appear and defend is granted to the Applicants. The application is further supported by the affidavit of Bernard Oburu, the first Applicant herein. He deposed that he is the Managing Director of the fifth Applicant and the first Applicant to the application. Secondly, the fifth Applicant is a duly registered Ugandan company. Around January 2016, the first Respondent approached the fifth Applicant and asked it to supply sugar

worth 20 tonnes to be exported to the DRC via South Sudan. The parties agreed that the first Applicant loads sugar for a total sum of over US\$13,000 to be paid in cash but after the sugar was loaded, the first Respondent paid US\$8,000 on 9th February, 2016 and promised to pay the balance of US\$5000 within a period of three weeks. The Respondents did not pay the money within the agreed time and became elusive. On 30th June, 2016 the plaintiff came to the offices when he was not around and called him to inform him that he had brought the balance of the money owed to the fifth Applicant and he told him to give it to the second Applicant who is an administrator at the office. The first Respondent gave the second Applicant US\$7000 being payment of the balance of the previous transaction and US\$2000 being the deposit on a fresh transaction. When he got to Kampala, he called the first Respondent and told him that he was back in the DRC and wanted him to dispatch another 20 tons of sugar which he would come and pay upon receipt of the sugar.

Because of the previous conduct of the Respondents, the first Applicant declined to dispatch the sugar and requested the Respondents to either pay or collect the US\$2000 which the company would refund him. The Respondents reported a criminal case which was closed for being a civil matter where it was claiming US\$17,000 and not US\$30,000. The Respondents filed a trumped up case to defraud the fifth Applicant and issued powers of attorney to avoid answering critical questions and accountability so that this court dwells on hearsay. The sugar for the transaction the Respondents is claiming he paid for was purchased and delivered as clearly indicated in the Uganda Revenue Authority customs papers attached. In the premises, the Respondents are trying to defraud the Applicants and have made a receipt which does not belong to the company and declared it to court for which the Applicant intends to counterclaim for fraud. The Applicants have a good defence to the suit and it is in the interest of justice that the application for leave to defend the suit is granted.

The second affidavit in support of the application is that of Nyakecho Rachael, a director of the fifth Applicant and the fourth Applicant as well. The deposition is that she has not been involved in the day-to-day running of the fifth Respondent but has been served with summons on the summary plaint in Civil Suit Number 778 of 2016. On the basis of information of her Counsel, she maintains that she was sued wrongly because she was not involved in the daily operations of the company and therefore her liability in the matter can only be explained by the Respondents in an ordinary suit. Nothing has been done against the interest of the creditor warranting suing of the directors and shareholders of the fifth Applicant. The second Applicant is an office administrator working in the course of her employment with the fifth Applicant. The third Applicant is a minor shareholder of the fifth Applicant and cannot be sued. The fifth Applicant is a legal person that can sue and be sued in its own behalf and the Applicants intend to raise preliminary objections to the effect that they were wrongfully sued together with the fifth Applicant. The summary suit shows no cause of action against the first, second, third and fourth Applicants and warrants leave to be granted. In the premises, she maintains that all the

Applicants have a good defence to the suit and it is in the interest of justice that the application for leave to defend is granted.

The application was lodged in court on 20th October, 2016. The affidavit in reply was filed on 27th January, 2017 and is that of Mr Chadri Tabu Mawa. He deposes that he read and understood the Notice of Motion and affidavit in support and that the grounds raised in the application that the Applicants are not indebted to the plaintiff are false and fraudulent. He further deposed that the averment that US\$30,000 is unknown to the Applicant is false/fraudulent and a deliberate attempt to mislead the court. He is aware that the total supply amount agreed upon was US\$57,520 of which US\$30,000 was paid in advance to the Applicants who would supply and deliver Thailand Brown sugar and biscuits and the Applicants shall be put to strict proof of their assertions. Furthermore the ground that the first, second, third and fourth Applicants are wrongly sued are false and a deliberate attempt to mislead the court as the matter in question involves fraud by the parties who either participated directly or indirectly in the fraud or otherwise are beneficiaries of the proceeds of the fraud and as such cannot escape liability. The application for leave to defend was filed out of time and the Applicant has tampered with the file by backdating the application and the same cannot be allowed to proceed on an illegality. The powers of attorney of the Respondents are on record. The application is tainted with illegality of uttering false documents, forgery, tampering with the file, fraud and the Applicant shall be asked to explain his illegal actions and as such the application must fail. The Respondents admit additional payment of US\$7000 to the second Applicant for which the receipt was issued. The criminal case was reported for un-receipted amounts that the Applicants failed to issue receipts. The matter was more criminal than the civil un-receipted sum of US\$13,000.

There was evident fraud in this matter of obtaining money by the Applicants and there was no limitation to the ability (to any of the Applicants (whether the advertisements, directors or shareholders and as such all the parties involved in fraud must be held liable. The minor contracted through the adult director and his liability could not be limited. The third Applicant owns 50% of the shares in the fifth Applicant Company through the fraudulent actions of the first Applicant and also owns 50% shares and must not escape liability.

Lastly he deposed that in a deliberate intention to defraud the unsuspecting clients the fifth Applicant was formed and incorporated. It is a fraudulent briefcase company with no address, assets or even stock in dealing in import or export as claimed except defrauding unsuspecting clients. By claiming to be importers and exporters' of products and obtaining US\$30,000 from unsuspecting clients, there is a cause of action against all the parties involved in the fraud whether they are minors, directors or workers. Lastly the application was intended to deny/delay justice to the Respondents and must fail for being out of time, is fraudulent and the Applicants have not even paid the court fees for the same.

At the hearing of the application Rachael Nyakecho represented the Applicants while Mawa Tabu/holder of powers of attorney represented the Respondents. The court was addressed in written submissions.

Ruling

I have carefully considered the written submissions and the following issues arise from the submissions namely:

1. Whether the money claimed by the Respondents according to the pleadings of US\$30,000, is in dispute and whether it is a liquidated demand in terms of the definition of **Black's Law Dictionary, Ninth Edition page 1015** as well as the case of **Valery Alia vs. Alionzi John HCCS No 157 of 2010**. Counsel submitted that there was a dispute as to whether this money owed at all because the Applicants deposed that the money did not owe. In the premises, the Applicant should be given leave to appear and defend the suit. The Applicant also represented that it has supplied all the goods the subject matter of the payment.
2. The Applicant does not need to show a good defence on the merits according to the cases of **Maluku Interglobal Trade Agencies Ltd versus Bank of Uganda [1985] HCB 65; Kotecha versus Mohammad [2002] 1 EA 112; and Photo Focus (U) Ltd versus Group Four Security Ltd Civil Appeal Number 30 of 2000**.
3. Triable issues included misjoinder of parties against whom the suit should be dismissed. The plaintiff went into an agreement for supply of goods with the fifth Applicant/defendant but joined the first, second, third and fourth Applicants as parties to the suit. A company is a legal person separate from the shareholders/directors (see **Salim Jamal vs. Uganda Oxygen Ltd Civil Appeal Number 64 of 1995 Oder JSC**).

On the other hand the Respondents raised the following matters for consideration namely:

1. The Applicants were served on 11th October, 2016 according to the affidavit on court record and ought to have applied by 21st of October 2016. The Applicants claimed to have filed the application on 20th October, 2016 but the plaintiff had appeared before the registrar for hearing of Miscellaneous Application No. 993 of 2016 on 24th October, 2016 for orders for the defendants to deposit security in the court for attendance. The court noted that the Applicants failed to apply for leave as required by Order 36 rule 3. They filed the application for leave illegally after 30 days of being served. The Respondents contended that the Applicants deliberately tampered with the filing and illegally smuggled the application before the court and therefore it should be dismissed for being time barred.
2. The Applicant did not pay filing fees for the application. Receipt number 0002221440 was stamped by the customs office in the notice of motion as being payment for the

application and is fraudulent and non-existent and does not relate to the payment for the application fees. Commercial court has not received filing fees in the application. The cashier could not have received filing fees for payment of the application as signed by him when he was posted to this station in mid October 2016 where the receipt is dated 13th of April 2016 for the sum of Uganda shillings 4800 when the previous cashier was in office.

3. There is a false affidavit sworn by the first and fourth Applicants. The signatures to the affidavits are not the signatures in the registered resolutions of the company signed by the two.
4. The application lacks merits because no evidence was provided by the Applicants to move the court for the grant of the application.
5. Representation by Counsel Rachael Nyakecho is illegal because she made an affidavit in support of the notice of motion. The illegalities brought to the attention of the court rendered the application a nullity (see **Makula International vs. His Eminence Cardinal Nsubuga & another [1982] HCB**)

In rejoinder the Applicants Counsel submitted as follows:

1. Concerning the court clerks receiving and backdating the applications, the Respondent should be held accountable for his statement. He should not simply malign registry staff without proving his case.
2. On the question of non-payment of filing fees, filing fees were paid and allegations can only stand if the Respondents can prove to the court that the receipt was found to have been used in another transaction and the court was not able to realise money from the receipt tendered.
3. Regarding affidavit by Counsel, she did not have to personally sign the application for it to be valid. The signature can only be challenged on the basis of the handwriting expert report but not on allegations which were not even raised in the affidavit in reply.
4. Regarding enlargement of time, the application was filed within the prescribed time.
5. Regarding the representation by Counsel Rachael, the Respondents does not give any authority to support his assertion that she cannot appear as an advocate in this application despite his acknowledgement that she is an advocate.
6. The Respondent's affidavit in reply raises issues of fraud, forgery and purported declaration of false documents that are clearly triable issues and therefore the application ought to be granted.

I have carefully considered the Applicants application. The Respondents raised a preliminary objection to the application on the ground that it was filed about 30 days from the date of receipt of summons. On the face of it, the application was received by the court registry staff on 20th October, 2016. It was however issued by the registrar on 15th November, 2016.

In the affidavit in reply, the only assertion is in paragraph 8, that the application for leave to appear and defend was filed out of time. That the Applicant has tampered with the file by backdating the application. No evidence was attached.

The record shows that Civil Suit No. 778 of 2016 was filed on 10th October, 2016 and summons was issued the same day. Affidavit of service was filed on 11th October, 2016. It is the affidavit of Lubega Frank, a process server of the High Court of Uganda attached to the commercial court. He deposed that on 11th October, 2016 he received summons and plaint from the High Court and on the same day he proceeded in the company of the plaintiff at Plot 13/14 Kataza Close, Bugolobi at Maria House where the defendants have an office/business premises. In the third floor he found the offices of the fifth defendant and found one Milly Athango who affirmed that she is an employee/administrative/secretary authorised to receive company documents. The first defendant was out of office and he also informed the process server that she knew the second, third and fourth defendants. She received the summons and plaint on behalf of the defendants. Summons was acknowledged by the said Milly Athango on 11th October, 2016 on behalf of all the defendants.

On 24th October, 2016, the plaintiff applied for judgment in default of an application for leave to defend the summary suit. The obvious question that has been raised by the Respondents is; where the application was when the Respondents applied for judgment in default? I have carefully considered the minutes in the file of Miscellaneous Application currently before the court and it is endorsed by the registrar on 20th October 2016. It shows that a Notice of Motion was filed by Messieurs Atubo & Company Advocates. In the absence of the information from the registrar as to whether he did endorse the minutes or not, and in the absence of evidence that the application was not duly filed on the said date in terms of payment of the requisite fees, the record shows that the application had been filed by 20th October, 2016. There is therefore no proof that this was a false endorsement or a forgery.

I have also considered the objection to Counsel on the basis presumably of Regulation 9 of the **Advocates (Professional Conduct) Regulations SI 267 – 2**. Regulation 9 thereof which forbids an advocate who is likely to be required to appear as a witness from appearing as Counsel in the matter as well. It provides as follows:

“9. Personal involvement in a client’s case

No advocate may appear before any court or tribunal in any matter in which he or she has reason to believe that he or she will be required as a witness to give evidence, whether verbally or by affidavit; and if, while appearing in any matter, it becomes apparent that he or she will be required as a witness to give evidence whether verbally or by affidavit, he or she shall not continue to appear; except that this regulation shall not prevent an

advocate from giving evidence whether verbally or by declaration or affidavit on a formal or non-contentious matter of fact in any matter in which he or she acts or appears.”

The rule bars an advocate from being Counsel and a witness at the same time. The court was addressed in written submissions and I cannot for the moment conclude that the rule has been violated. Counsel Rachel Nyakecho is a potential witness and is required to desist from further appearing in the matter. The application is not avoided by virtue of the affidavit because the rule only prescribes that she may not appear as Counsel in the same matter. For that reason I have considered the application on the merits.

I have carefully considered the application together with the evidence in support and in opposition as well as the submissions filed on court record. The respondents on numerous grounds deposed that the Applicants should be put to strict proof of their allegations in the application. If that is so strict proof can only be enforced in a trial where there are controversies. An Applicant’s application for leave to defend a summary suit should disclose in the application itself and the affidavit in support that he or she has a plausible defence to the claim in the summary suit and that the action is not frivolous or vexatious. According to **Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22nd Edition** at pages 75 – 76 whenever a genuine defence, either in fact or law, sufficiently appears, the Defendant is entitled to unconditional leave to defend. The Applicant is not bound to show a good defence on the merits. 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. The defence should be made in good faith and must be stated with sufficient particularity, as appear to be genuine (See **Maluku Interglobal Trade Agencies Ltd vs. Bank of Uganda [1985] HCB 65** and **Souza Figuerido & Co Ltd vs. Moorings Hotel Co Ltd (1959) EA 426**).

In the summary suit it is alleged that on or about 9th February and 30th March, 2016 the first plaintiff advanced the first defendant a total of US\$30,000 for the supply of 72 tons of Thailand Brown sugar and biscuits. It is further alleged that the defendant/first Applicant did not supply any of the products. Secondly, the defendants have not refunded the money paid by the plaintiffs/Respondents.

There is a receipt dated 9th February, 2016 showing that the fifth defendant received US\$13,000 being payment for 20 tons of Thailand Brown sugar. On the other hand the Defendants have not adduced any documents to prove that they supplied the sugar.

I have duly considered Order 36 rule 2 of the Civil Procedure Rules and the submissions of the Applicants Counsel that the summary suit does not seek to recover a liquidated demand. Order 36 rule 2 (supra) permits a plaintiff who seeks to recover a debt or liquidated demand in money payable by the defendant with or without interest which arises upon a contract express or implied, a bond or contract written for payment of a liquidated amount of money; on a guarantee

where the money claimed against the principal in respect of a debt or liquidated amount only, on a trust or other debts to file an action for recovery of the money. In this case there is no contract for the payment of money but a contract for the supply of goods. The above itself raises a plausible defence to the effect that the plaintiff did not choose the appropriate procedure to bring the action.

Secondly, the alleged contract is with the fifth defendant which is a limited liability company. For it to proceed against the other 1st, 2nd, 3rd and 4th defendants, it must be demonstrated that they are liable personally after lifting the veil. This cannot be done in a summary suit. It is an elementary principle of company law that shareholders of a company are separate from the company itself. The company enjoys legal personality and can sue and be sued in its own name and is liable for its own acts. It therefore raises a triable issue and the first, second, third and fourth defendants/Applicants cannot be condemned on the basis of a contract the plaintiffs had with the fifth defendant. They have a right to defend themselves before a final order can be issued.

In the premises, the Applicant's application succeeds with costs to abide the outcome of the main suit. All the Applicants have unconditional leave to file a defence against the Respondent's suit within 14 days from the date of this order.

Ruling delivered in open court on 27th April, 2017

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Mawa Tabu the Attorney of the Respondents in Court

Oburu Bernard the first Applicant and Director of 5th Applicant

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge

27th April, 2017

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$# xtra+ maximum735securityx 2017 style*