

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

MISCELLANEOUS APPLICATION NO 99 OF 2017

(ARISING FROM CIVIL SUIT NO 992 OF 2016)

SURE TELECOM UGANDA LIMITED}.....APPLICANT/DEFENDANT

VERSUS

ZTE UGANDA LIMITED}.....RESPONDENT/PLAINTIFF

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant Company filed this application for leave to defend this suit on the merits and for costs of the application to be provided for. The grounds of the application are further contained in the affidavit of Mr Paul Mwebesa but are also set out in the notice of motion as follows:

1. That the Applicant/Defendant does not owe the Respondent/Plaintiff the sums claimed in the plaint.
2. That the Applicant disputes the Plaintiffs claim as stated in the plaint and is in the process of verifying the same.
3. That the Respondent/Plaintiff has no cause of action against the Defendant.
4. It would be in the interest of substantive justice if this honourable court would permit the Applicant/Defendant to appear and defend a suit on the merits.

In the affidavit in support of the application Paul Mwebesa deposed that he is the Corporation Secretary and the Head Legal Services of the Applicant and in that capacity deposed to the contents as follows:

The Applicant/Defendant does not owe the Respondent/Plaintiff the sums claimed and is in the process of verifying the authenticity of the Plaintiff's claims. Secondly, the documents provided by the Plaintiff/Respondent are in the process of being verified. Thirdly on the ground of advice of the Applicant's lawyers Messieurs Birungyi Barata & Associates, the Defendant has a valid strongly founded defence to the suit. Fourthly, he believes that it is in the interest of justice that the application is granted.

The application was filed on 8th February, 2017 and fixed for hearing on 4th of May 2017 at 11.30 am.

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The reply of the Respondent is that of Mr Henry Duan, the Commercial Director of the Respondent conversant with the transactions in the suit having supervised and managed the debt recovery process of the transactions, the subject matter of the suit.

He deposed as follows:

On 2nd May, 2011 the Applicant issued to the Respondent purchase order number 16/SURE/5/04/2011 for the provision of installation services in the sum of US\$400,000 according to the purchase order annexure "A1". The Respondent accepted the Applicants purchase order and supplied the services and was issued with a final acceptance certificate by the Applicant on 28th of May 2015 and the certificate is annexure "A2" to the plaint. The Applicant only paid US\$171,933 and has not paid the balance of US\$245,941 in accordance with the purchase order. The Applicant confirmed indebtedness in the above sum on various dates in the document termed as 'confirmation of account receivables' which is attached to the plaint as annexure "A3 (a) & (b)". The Respondent provided the core network support services to the Applicant from January 2016 and this was regularised by the Applicant on 12th April, 2016 pursuant to issuance of a purchase order number 0000000819 in the sum of US\$220,538 according to the purchase order annexure "B1". Payment for the services was to be made by the Applicant on a quarterly basis. The Respondent provided the services from January to October 2016 but the Applicant did not provide for the same and is indebted to the Respondent in the sum of US\$165,403. On 24th April, 2014, the Applicant issued to the Respondent a purchase order number 67/SURE/ZTE/OP/2014/0 for the services indicated therein in the sum of US\$338,159. The purchase order is marked as annexure "C1" to the plaint. The Respondent supplied the services for the periods indicated therein and the Applicant has not paid for the services.

He deposed that the Applicant admitted indebtedness to the Respondent on various dates in a document termed as "confirmation of account receivables" and that document was attached as annexure "C2 & C3" to the plaint. Finally he deposed that having signed the "confirmation of account receivables" for the transactions indicated in the affidavit in reply, the Applicant is barred by the doctrine of estoppels from denying liability in the main suit.

When the matter came for hearing on the 4th May, 2017 Counsel Dorothy Bishagenda represented the Applicant while Counsel Siraj Ali appearing with the Counsel Terrence Kavuma represented the Respondents when the parties agreed to meet for purposes of negotiating an amicable settlement. When the amicable resolution of dispute failed the matter finally proceeded by way of written submissions by agreement of Counsel.

The Applicants Counsel addressed the question of whether the suit against the Applicant discloses any triable issues. Secondly, she addressed the issue of whether the Applicant has a plausible defence or defences to the suit.

The Applicants Counsel submitted that the following triable issues should be determined on the merits and the Applicant should be given leave to appear and defend the suit namely:

- Whether the documents that the Respondent seeks to rely on are valid?
- Whether the amount prayed for by the Respondent is the correct amount in the purchase order?
- Whether the Plaintiff/Respondent performed its obligations under purchase order number 00000000000819?
- Whether the Applicant is indebted to the Respondent.

On the first question of whether the documents that the Respondent seeks to rely upon are valid, Counsel contended that the documents are in contention and have not been verified and should not be relied upon. The Applicant ought to be heard on the issue.

On the second question it is averred in the plaint that the purchase order was for a total of US\$400,000 and the Defendant had paid only US\$171,933 leaving a balance of US\$245,941. If the allegation is true, then the balance would be US\$228,067 and not US\$245,941. She contended that this was a clear indication that there was a need to hear the Applicant.

On whether the Plaintiff/Respondent performed its obligations under the purchase order, the Plaintiff did not prove that it had performed its obligations under the purchase order. The burden is on the Plaintiff to do so. There was therefore a bona fide triable issue of fact to be tried by the court.

On the question of whether the Applicant is indebted to the Respondent, the Applicant has not proven all facts it alleges including the exact amount of money due to be paid, the performance of the instructions in the purchase order exhibit D1 and the validity of the documents sought to be relied upon by the Plaintiff.

On whether the Applicant has a plausible defence, the Applicants Counsel submitted that the Applicant denies the Respondents claims for recovery of US\$749,403 and submitted that the Respondent are not entitled to any of the remedies sought against the Defendant/Applicant. The Respondent did not prove performance of the contract.

In reply the Respondents Counsel submitted that the Applicants reply to certain particular issues were evasive denials and ought not to be allowed because they offend the provisions of Order 6 rule 8 of the Civil Procedure Rules. Under the said rule, it will not be sufficient for the Defendant in his or her written statement of defence to deny generally the grounds alleged in the statement of claim but each party must be specifically deal with each allegation of fact of which he or she does not admit the truth of except damages. Counsel relied on the case of **Scorpion Holdings Limited and Two Others versus Bank of Baroda Uganda Ltd** where a similar defence was dismissed for merely making blanket allegations without any elaboration. Furthermore, Counsel

submitted that ever since the amounts are prohibited by Order 6 rule 10 of the Civil Procedure Rules.

With reference to the submissions on the merits of the application the Respondent's Counsel submitted as follows:

On whether the documents that the Respondent seeks to rely upon are valid, the denials of the Applicant are not premised on evidence before the court. They are based on the affidavit in support of the application that the documents provided by the Plaintiff are in the process of being verified. This is also reiterated in paragraph 8 of the attached written statement of defence and in ground two of the application. Nowhere in the Applicant's pleading is it averred that the documents are denied so as to raise any triable issue in respect of the documents.

Secondly, if the documents are not verified yet, on what basis are they being denied by the Applicant in submissions to raise triable issues?

Thirdly, the defence that the documents presented by the Respondent are being verified is dishonest. The application was filed on the February 2017, and five months later in June 2017 the documents are still being verified. Furthermore who is supposed to verify the documents? Is it the court during the trial or the Applicant before filing the application? It was the duty of the Applicant to verify the documents before filing the application.

On the question of whether the claim in the plaint was supposed to be US\$228,067 and not US\$245,941, the purchase order marked A1 provided for interest which was to be computed by the parties. There is therefore no triable issue in respect of that issue.

On whether the Respondent performed its obligations under the purchase order 0000000819, a purchase order of US\$338,159 is pleaded and attached and marked as annexure C1 having been issued by the Applicant to the Respondent. The pleading for performance of the services is made. The confirmation of Congress syllables acknowledging indebtedness is also pleaded and attached as annexure C2 as having been signed by the Applicant. Again the defence is that the Applicant does not owe the sums claimed and the documents provided for by the Plaintiff are in the process of being verified. The same arguments are reiterated.

Furthermore the Respondents Counsel submitted that the Applicant has not made any specific response in respect of the assertions in paragraph 4 (c) of the plaint.

The facts are that the Applicant signed the "confirmation of accounts receivables" which is an admission of indebtedness for which the Respondent is entitled to judgment and which also operates as estoppels against the denial of liability for the sums indicated therein.

In rejoinder, the Applicants Counsel submitted that the basis for denying the documents of the Plaintiff/Respondent is that they are invalid which is why the Applicant is trying to verify it. The

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Respondent on the other hand failed to show that it seeks to rely on valid documents. Counsel reiterated submissions on the burden of proof being on the person who alleges.

With regard to the purchase order 0000000 819, the Respondent failed to prove performance of the obligations under the purchase order.

Ruling

I have carefully considered the Applicants application for leave to defend the summary suit filed by the Respondent. I have noted that the affidavit in support of the summary suit is the same as the affidavit in reply to the application and in fact the summary suit is attached to the affidavit in reply to the application.

The governing rule for applications for leave to appear and defend a suit is Order 36 rule 4 of the Civil Procedure Rules which provides as follows:

“4. Application to be supported by affidavit and served on Plaintiff.

An application by a Defendant served with a summons in Form 4 of Appendix A 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 to part only, and if so, to what part of the Plaintiff’s claim, and the court also may allow the Defendant making the application to be examined on oath. For this purpose the court may order the Defendant, or, in the case of a corporation, any officer of the corporation, to attend and be examined upon oath, or to produce any lease, deeds, books or documents, or copies of or extracts from them. The Plaintiff shall be served with notice of the application and with a copy of the affidavit filed by a Defendant.”

The above cited rule requires the Applicant for leave to defend a summary suit to indicate in the affidavit in support of the application whether the defence goes to the whole of the Plaintiff’s claim or to part only. If it is to a part of the claim, it should show which part of the claim. The requirement to do this is mandatory because of use of the word "shall". Secondly, this information is required to be set out in the affidavit in support of the application.

I have carefully considered the affidavit in support of the Notice of Motion and it comprises of seven paragraphs. The first paragraph gives the identity of the deponent Mr Paul Mwebesa. In paragraph 2 of the affidavit, he deposed that the Applicant does not owe the Respondent/Plaintiff the sums claimed and is in the process of verifying the authenticity of the Plaintiff’s claims.

Paragraph 2 clearly indicates that the Applicant is in the process of verifying authenticity. In ordinary English this means to find out whether the claim is genuine or not. The averment does not amount to an admission or a denial and is therefore redundant.

In paragraph 3 he deposed that the documents provided by the Plaintiff/Respondent are in the process of being verified. What is the purpose of verifying the documents provided for by the Plaintiff? The issue to be answered is whether there is a defence to the Plaintiffs claim and secondly whether it is to the whole claim or part of the claim.

In paragraph 4 he is advised by his lawyers that the Defendant has a valid and strongly founded defence to the suit. However paragraph 4 does not indicate which defence is a strongly founded defence to the suit. In paragraph 5 it is averred that it is in the interest of justice that the application is granted. This does not amount to an averment in terms of Order 36 Rule 4 on whether the defence goes to the whole or part of the Plaintiff's claim. Finally in paragraph 6 he states that whatever is stated above is true and correct to the best of the knowledge and belief of the deponent and as advised by the lawyers. Paragraph 7 merely says that the affidavit is in support of the application to permit the Applicant/Defendant to appear and defend the suit on the merits or in the alternative to allow the Applicant to pay the sums in instalments. Paragraph 7 is lukewarm to say the least because in the same breath the Applicant is saying that he should be allowed to appear and defend the suit on the merits and in another breath to be allowed to pay the sums in instalments. Paragraph 7 does not meet the requirements of Order 36 rule 4 of the Civil Procedure Rules.

Submissions were made on the basis of a draft written statement of defence that was attached. No reference is made in the affidavit to any draft written statement of defence. There is therefore no evidence by way of affidavit in terms of Order 36 rule 4 of the Civil Procedure Rules incorporating the draft WSD as part of the application. Nonetheless the draft WSD contains the statements in the affidavit in support of the application apart from denying the allegations in the plaint it does not contain any facts. The Applicant's submissions are not supported by facts in an affidavit which should found the basis of the submissions.

In the premises, there is no material to establish whether triable issues have been raised in the application itself. The Plaintiff's claims are supported by purchase orders of the Applicant. It is also supported by a confirmation for accounts receivables indicating that certain sums of money were not paid by the Applicant. The total amount of the unpaid sums is US\$825,397.75. In the plaint itself, Mr Henry Duan indicates that the Applicant paid US\$171,933 out of US\$400,000. Several other documents are proved in the affidavit in support giving a total of US\$749,503.

In the premises, I find no merit in the Applicant's application for failure to specify whether there is an actual defence to the particular claims of the Plaintiff/Respondent. Such defence cannot be contained in submissions which are from the bar but must be disclosed in the affidavit.

The Applicant's application is accordingly dismissed with costs and judgment entered for the Plaintiff/Respondent as claimed in the plaint for a sum of US\$749,503 with costs of the suit.

Ruling delivered in open court on 30th of June, 2017

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Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Siraj Ali appearing with Terrence Kavuma for the Respondents

Applicants are not in court or represented by Counsel

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge

30th June, 2017