

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO 91 OF 2017
[ARISING OUT OF CIVIL SUIT NO 42 OF 2017]

TUF FOAM (U) LIMITED}.....APPLICANT

VERSUS

FTF PARTNERS LIMITED}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This ruling arises from an application by the Applicant for leave to file a defence against a summary suit in Civil Suit No. 42 of 2017 and for costs.

The grounds of the application are that upon investigation by the Applicant, it was discovered that the depressed sales arose from the fact that the materials supplied by the Respondent were 100% polyester. Accordingly, the products were not marketable because it was not fit for consumption since it was 100% polyester. As a result, the material could not be used for the purpose they were intended for and there was frustration of purpose. The Applicant informed the Respondent by telephone that the goods were unusable for the purpose they were intended for and the standard of the law required that the mattress covers should have not less than 50% cotton. At all material times the Respondent knew of this impossibility and agreed to vary the terms of the contract by permitting the Applicant to dispose of the materials so as to realize the consideration and the Applicant has a good defence to the suit.

The application is supported by the affidavit of **Okbamicael Ymesgen** the Managing Director of the Applicant. In addition to the grounds stated in the notice of motion he deposed that he read the contents of the plaint filed in Civil Suit No. 42 of 2017 and noted the allegations therein. The plaint disregards some important aspects of the transaction referred to therein. He knows the Respondent Company as one of the many suppliers of the Applicant/Tuffoam (U) Limited. At all material times the Respondent knew the nature of the Applicant's business and the purpose of their supplies. It is true that the Respondent supplied the Applicant with goods being material for mattress covers described as:

- a. 69744, 70 GSM brushed Fabrics 100% polyester Micro Fibre
- b. 69291, 70 GSM brushed Fabrics 100% polyester Micro Fibre
- c. 8,484, MT, MG Kraft Paper 90 GSM DIA
- d. 145095 LM 70 GSM Brushed Fabric 100% polyester Micro Fibre

The total consideration for the supplies as undertaken by the Applicant was US \$158,828.88 and the Applicant paid US\$ 34,523.28 to the Respondent as part payment of the consideration. The Applicant sent an email to the Respondent in May 2016 requesting for a payment plan for the balance outstanding and highlighted the element of depressed sales in the market to the Respondent. The Applicant proceeded to have the materials tested by the Uganda National Bureau of Standards accordingly and the same failed the test since the goods were not at least 50% cotton. Still by way verbal communication, the Applicant suggested to the Respondent that it shall find buyers for the material so as to enable the Applicant to pay the amount due to the Respondent. The Respondent agreed to the suggestion of the Applicant and is actively searching for buyers of the materials but has not yet succeeded to sell the goods. The Applicant through its attorneys wrote to the Respondent's lawyer seeking for a meeting. However, the letter was without prejudice and so was the meeting that followed and as such the allegation that the meeting gives an inference of absolute indebtedness of the Applicant is wrong. At the said meeting he informed the lawyers of the Respondent about the issues arising and that the Applicant was still looking for buyers for the polyester material they could not use. Accordingly the lawyers communicated a one month extension of time and to date the materials are within the Applicant's possession and unused as they try to find buyers of the materials at a price sufficient to cover what is owing to the Respondents. At all the material times, the Respondents have been aware of the impossibility of putting the materials to use for the purpose intended and there was a mistake by both parties in the ordering of the consignment. At all the material times the Respondents have been aware and in fact agreed to the suggestion that the material should be disposed of to enable the Applicant collect the money that was agreed upon in the invoices. The plaintiff portrays indebtedness of the Applicant, but ignores the changes in the agreement of the parties upon discovery that the materials were not fit for the purpose. The changes modified the agreement between the parties. The plaintiff attaches email as the correspondence between the parties but ignores the various phone conversations between the parties where the Applicant's concerns were brought to the attention of the Respondent.

The claim of the Plaintiff/Respondent is premature and unsustainable as the parties agreed that the Applicant disposes of the goods and the goods are yet to be sold. The Plaintiff's suit is brought in an inappropriate manner as what it claims is not a simple debt. The Applicant has a defence to the allegations therein and should be granted the leave to defend the suit. The Respondent is not entitled to summary judgment because this would create an injustice against the Applicant who has a good defence to the suit.

In reply **Amitabh Arya**, the director of the Respondent deposed to an affidavit in reply on 31st March, 2017 in which he admitted the contents of paragraphs 1,2,4,6,7,5(a, b and c) and denied the rest of the paragraphs of the affidavit in support of the application. In reply to paragraph 3 he stated that the claim is true, correct and bona fide. In reply to paragraphs 8, 9, 10, 11, 12 and 13 he deposed as follows:

The Respondent/Plaintiff supplied the goods/materials according to the orders and specifications of the Applicant/Defendant. Proforma Invoices for goods/materials with specifications as demanded and ordered by the Applicant/Respondent were issued to the Applicant/Defendant and duly accepted by Mr. Okbamicael Ymesgen, the Managing Director of the Applicant/Defendant.

After delivery or supply of goods with specifications as ordered by the Applicant or Defendant the Respondent/Plaintiff issued invoices corresponding to respective Proforma Invoices referred to and which invoices were accepted by the Applicant/Defendant. At all material times, the Applicant/Defendant promised to pay for all the goods/materials supplied and indeed made part payment of US\$ 34,523.28 out of the total amount of US\$ 158,828.88 (leaving outstanding US\$ 124,305.88 claimed by the Respondent/Plaintiff in the main suit), without raising any issue as to the quality and specifications of the goods/materials supplied by the Plaintiff/Defendant. The allegation of depressed sales resulting from the specifications and quality of the goods/materials is not verified, has never been in issue, or alternatively cannot be attributed to the Respondent/Plaintiff who supplied goods/materials as demanded and ordered for by the Applicant/ Defendant. The allegations in the application are an afterthought and made in bad faith. The allegations do not disclose a good and *bona fide* defence. Furthermore, the allegation of testing of the goods/ materials by Uganda National Bureau of Standards is new to the Respondent/Plaintiff, strange, untenable and whether it was the goods/materials supplied by the Respondent/Plaintiff that were tested, is not verifiable even from the annexure A and B to the Affidavit in support. The agreement between the Applicant/Defendant and the Respondent/Plaintiff inferred therein was not an agreement and the only agreement was for extension of time of payment up to 23rd May, 2016 as requested by the Applicant/Defendant. The only reason advanced by the Applicant/Respondent in further seeking for extension of time for payment, was that the Applicant/Plaintiff had applied for, and was in the process of obtaining a financing facility. In specific reply to paragraphs 16, 17, 18, 19, 20 and 21 of the Affidavit in support he deposed as follows:

- a) The allegation that the goods or materials supplied are unusable and that the Applicant/Defendant is looking for buyers for the same is unknown to the Respondent/Plaintiff is unverifiable, untenable and cannot be a defence to the claim of the Respondent/Plaintiff.
- b) There was never a change in the agreement save for the extension of time for payment of up to 3rd May, 2016 requested by the Applicant/Defendant and granted by the Respondent/Plaintiff.
- c) The Applicant/Defendant having promised to pay the invoices; having made only part payment; and having refused to pay the balance even after obtaining extension of time within which to pay, it is fair and just that the claim of the Respondent/Plaintiff in the main suit be entertained and granted, and it is not in any way premature.

The claim of the Respondent/Plaintiff is properly brought by way of summary procedure for payment of a simple debt duly acknowledged by the Applicant and the Applicant/Defendant made part payment leaving a balance of US\$ 124,305.88 unpaid. The Applicant undertook to pay the same by 23rd May of 2016 (but defaulted). The application does not raise any *bona fide triable issue* and is not tenable. It is fair and just that the application to appear and defend the main suit is disallowed.

In rejoinder the Applicant deposed an affidavit and firstly asserts that there was no admission of the claim in the Respondent's plaint. Secondly, the Respondent withheld information that the parties at various occasions had verbal discussions and the Applicant informed the Respondent Company that the actual slump in sales was due to the unsuitability of

the material supplied. Thirdly, in fact, the Applicant informed the Respondent of the reports by the Uganda National Bureau of standards and further informed them of the impracticability to use the materials for the purpose. As a result and in order to mitigate the loss, the Applicant suggested to the Respondent Company that it shall find a market for the products for alternative use and has since done so. The Applicant made part payment on the material but that payment was made prior to the discovery of the flaw in the fabric and prior to the oral agreement to mitigate the loss. The suit is for recovery of a simple liquidated claim as the obligations of the parties were altered by agreement between the parties in a bid to mitigate the loss.

At the hearing of the application Counsel **Shafir Yiga** represented the Applicant while **Counsel John Kabandize** represented the Respondent and they addressed the court in written submissions.

The Applicant's Counsel relied on Order 36 Rule 4 of the CPR for the submission that for leave to be granted in such an application, the Applicant ought to establish that it has a defence and further establish whether the defence goes to the whole or part only of the claim. He relied on **Maluku Interglobal Agency vs. Bank of Uganda [1985] HCB 65** where the court held that before leave is granted the Defendant must show by an affidavit or otherwise that there is a bona fide triable issue of fact or law and where there is a reasonable ground of defence to the claim, the Plaintiff is not entitled to summary judgment. The Defendant is not bound to show a good defence on the merits but should satisfy the court that there is an issue or a question in dispute which ought to be tried and the court should not enter upon the trial of the issues disclosed at this stage. In the case of **Abdul Malik Mugisha vs. Equity Bank Ltd Misc. Application No. 228 of 2014** and **Maria Odido vs. Barclays Bank (U) Limited High Court Misc. Application No. 0645 of 2008** the court applied the holding in **Maluku Interglobal** (Supra) and granted the Applicants leave to file a defence.

Counsel submitted that in this particular case, the Applicant is entitled to an order for leave to file a defence because there are triable issues disclosed and accordingly the Plaintiff is not entitled to summary judgment. According to the affidavit in support of the notice of motion and in rejoinder thereto, the Applicant has stated that this is not a simple liquidated demand as portrayed by the Respondent. The Applicant admits that it received goods from the Respondent but however states that the goods were found to be unsuitable for the purpose. The parties were not aware of the material requirements of the Uganda National Bureau of Standards. The Applicant informed the Respondent by phone conversation and the agreement was varied by the parties that the Applicant should find a buyer of the material in the market. This was therefore not a simple liquidated demand on a contract of supply as portrayed in the specially endorsed plaint but rather the contract was varied and the Respondent's suit is premature.

There are triable issue of fact and law in that there are issues in respect to the nature of the contract between the parties; the variation of the contract and the obligations that arose from the variations and the remedies available to the parties. As such, there ought to be a trial of fact and law between the parties to establish and resolve these issues. In conclusion Counsel emphasized that at the heart of all litigation the fundamental intent is to have the parties to the suit heard. He contended that Order 36 of the Civil Procedure Rules had this fundamental in perspective when

it permitted the Plaintiff to bring a suit by way of summary suit and as such stated the threshold for claims that fall there under. The Applicant's Counsel submitted that to ensure that the fundamental is protected, the law as stated in the Order gives the intended Defendant the right to file an application such as this to demonstrate to the court that it has a defence and if such is established, the Plaintiff is not entitled to the judgment. The plaint as submitted by the Respondent does not satisfy this threshold. Clearly, by affidavit, the Applicant established that it has a triable and bona fide defence. The defence is bona fide and not a sham and is one that is founded on the usual conduct of business and communication between the parties. The Applicant having established the required standard under Order 36 of the Civil Procedure Rules, it is the Applicant's prayer that this application is granted and the Applicant is granted leave to file its defence.

The Respondent's Counsel in reply submitted as:

The undisputed facts are that the Applicant ordered for goods from the Respondent. The exact goods ordered were delivered to and duly received by the Applicant in four consignments between November 2015 and February 2016. The Respondent then issued four (4) invoices payable by 13th February, 2016, 17th February, 2016, 21st March, 2016, and 6th May, 2016 respectively. By 23rd May, 2017, the Applicant had not made payment and through email requested for extension of time and undertook to pay US\$ 34,523.28 by 5th June, 2016; US\$ 34,299.05 by 19th June, 2016; US\$ 19,635.75 by 3rd July, 2016; and US\$ 70,371 by 12th July, 2016. Subsequently, the Applicant paid US\$ 34,523.28 on 9th June, 2016, leaving a balance of US\$ 124,305.88 unpaid to date.

The Respondent's Counsel submitted that the law on applications for leave to appear and defend, as expounded by courts in Uganda, is indeed well settled. The Applicant must disclose bona fide issues for trial of questions of law or fact as held in *Makula Interglobal Agency Ltd vs. Bank of Uganda [1985] HCB 65*. While the courts are not to go into the merits of the defence at this stage, the court nevertheless, ought to investigate whether the issues raised by the Applicant for trial are bona fide and not a sham. Counsel cited the case of *Miter Investments Ltd vs. East African Portland Cement Company Ltd, MA NO. 0336 of 2012* where court observed that:

"in Uganda, it has been held that in all applications for leave to appear and defend under Order 36 Rule 3 and 4, the court must study the grounds raised to ascertain whether they disclose a real issue and not a sham one, i.e. the court must be certain that if the facts alleged by the Applicant/Defendant were established, there would be a plausible defence"

The Respondent's Counsel submitted that the present application does not present *bona fide* issues of law or fact for trial. Black's Law Dictionary, 4th Edition, defines "*bona fide*" as "good faith, integrity of dealing and sincerity. He submitted that the grounds in the Applicant's application fall short of good faith, integrity of dealing and sincerity and was a sham.

Counsel submitted that it is clear in the affidavit in Support of Application, the affidavit in reply and affidavit in rejoinder on record, that the Applicant ordered for goods and the Respondent delivered exactly as ordered. The Respondent is one of the many suppliers of the Applicant and having been in its business in Uganda for some time, the Applicant must have known what

exactly they were ordering for. This cannot be a case where the Applicant was relying on the Seller's skill and judgment. The Applicant duly acknowledged receipt of these goods without raising any issues as to quality. The Applicant went to ask for extension of time within which to pay, and subsequently went ahead to make part payment for the goods, without raising any issues as to quality of the goods. The Applicant has never rejected the goods, neither does it intimate in the pleadings and in the submissions that goods are to be rejected not until the filing of the Respondent's claim in the main suit, did the Applicant raise the issue of fitness for purposes of the goods supplied.

Furthermore, the Respondent's Counsel submitted that the affidavit in support and the affidavit in rejoinder contain contradictions and inconsistencies, which go to show that issues raised by the Applicant for trial are a sham. For instance, under paragraph 5 of the affidavit in rejoinder, it is stated that the Respondent supplied the Applicant with goods, being materials for mattress covers. However, under that paragraph, the goods included 8,484, MT, MG Kraft Paper 90 GSM DIA supplied to the Applicant, which are not fabrics which means, that in any case, the allegations of testing by Uganda National Bureau of Standards (UNBS) under paragraphs 10 and 11 of the Affidavit in Support, cannot by any means apply to them. Secondly, it is stated in paragraph 8 and 9 of the affidavit in support that the depressed sales arose from the fact that the materials supplied by the Respondent was 100% polyester, and as such the products were declined by the market because the material was not fit for consumption. The import of paragraphs 5, 8, 9, 10, 11, 12 and 13 of the affidavit in support, is that there is a distinction between "the material" and "the product". He submitted that the "material" is what the Applicant bought from the Respondent and the "product" is what the Applicant produced using the "the material". Indeed what was allegedly tested and what was already put on the market and declined must have been "the material" and not "the product". The alleged "depressed sales" under paragraph 8 of the affidavit in support, must have been sales of "the product" and not "the material". Yet under paragraph 21 of the affidavit in support, the Applicant alleges agreement with the Respondent to find a customer to buy the goods ("the material"). The question is, if "the material" was already turned into "the product", which materials are there to sell? Thirdly, in paragraph 13 of the affidavit in support, it is alleged that the Applicant is searching but has not yet succeeded in getting a buyer for the materials. However, under paragraph 5 of the affidavit in rejoinder, the Applicant states that: "...the Applicant suggested to the Respondent Company, that it shall find a market for the products on the market in other fabric industries that can use it for alternative means, and has since done so" _

Counsel submitted that the above implies that the argument of looking for buyers for the materials supplied and which is irrelevant and not tenable in any case, has also been settled and can no longer, in any case, be relied on by the Applicant, since by its own admission, the Applicant has found a buyer. This means, sham or no sham, there is no longer any issue for trial to be considered by this Honourable Court in the present application. Furthermore, the Applicant contends that by phone conversations, it was agreed that the Applicant disposes the materials to realize funds for payment of the debt to the Respondent. The Respondent has shown that no such agreements ever took place. The only agreement was for extension of time as requested by the Applicant. The question for the Applicant is who requested for extension of time to pay in writing, how come that there is nothing in writing to show that there was a discussion or

agreement to find the buyer of the goods? Secondly, that the parties are corporate bodies, how did such oral agreement take place and between whom? These questions point to the fact that the issues raised as triable are *not bona fide* they are indeed, a sham.

The Respondent's Counsel submitted that the Applicant in its pleadings and by submissions raises the issue of "fitness for purpose" of the goods supplied by the Respondent. Even as an after-thought, this issue is not tenable at law as a good defence, and cannot be a subject of trial by this Honourable Court. It is clear in this case, that there was no defect in the quality of the goods. The argument that the goods did not meet the standards set by the UNBS it is not tenable at all. Secondly, what the Applicant ordered is what was specifically supplied. Thirdly, even if it were to be proved that the materials did not meet the standards of UNBS, the Respondent cannot be liable under the law on implied warranty of fitness for purpose. It is the Applicant who ought to have known the very standards before making specific orders. He stated that a similar scenario is discussed by Atiyah in "Sale of Goods", 12th Edition, page 193 as follows:

'Where the Seller is selling for export ... to some country overseas, the mere fact that he knows the buyer is buying for import into a foreign country does not show that the buyer relies on the seller's skill and judgment with respect to the suitability of goods for that particular country. In such a case, it is the buyer who would normally be presumed to have the necessary knowledge of the conditions of the country of import and reliance may thus be disapproved or, alternatively, may be held to be unreasonable'

Furthermore, the English case of **Teheran-Europe Corp vs. St. Belton Ltd, [1968] 2 QB 545**, reinforces the application of this principle. In that case a Persian Company doing business in Iran imported machinery from a United Kingdom Company, for purposes of resale in Persia. Goods were delivered as per description on order. Later, it was found that the goods could not meet the standards for resale in Persia. The Persian Company sued, and among other things pleaded that the goods were not fit for purpose. Court held as follows:

"It would be contrary to common sense to infer that when a foreign buyer bought goods by description, for the particular purpose of reselling them in his own market, about which he knew everything and the seller might not know nothing, he was relying on the seller's skill and judgment and not on his own skill and judgment to supply goods fit for that particular purpose."

The Respondent's Counsel submitted that the Applicant did not attach a proposed defence. Although, it is merely good practice that a proposed defence should be attached to the application, it is not by coincidence that the Applicant has not attached one. Such a defence would further show clearly that the Applicant has no defence. The Authorities relied on by the Applicant in its submissions; in particular, the case of Abdul Malik Mugisa vs. Equity Bank (U) Ltd and the case of Maria Odido vs. Barclays Bank of Uganda Ltd are distinguishable. In those cases, unlike this one there were clear issues of law or fact for trial. For instance in Abdul Malik Mugisa vs. Equity Bank (U) Ltd, there was an issue of whether or not the Applicant is indebted to the Respondent in the sum claimed. There was also an allegation of fraud. In **Maria Odido vs. Barclays Bank of Uganda Ltd**, there were issues such as whether the Respondent charged interest arbitrarily; whether the Respondent breached the loan agreement by failing to disburse

all the loan monies, and several others issues. In the instant case, the question is what the bona fide issues of law or fact are that justify trial by the court?

On the issue of whether the debt in the main suit is a simple debt the he contended that the debt is the simplest of debts. The debt is not denied but admitted by the Applicant, and the Applicant is not even denying liability to pay. The Applicant only alleges that there was an oral agreement that the Applicant first finds the buyer for goods in order to pay. The question is, whether such is a bona fide triable issue? Such an issue is not bona fide but a sham and notwithstanding, the Applicant has even by Affidavit in rejoinder stated that a buyer for the materials was found. Counsel prayed that this application is dismissed with costs to the Respondent, and a decree be entered for the Respondent as prayed in the main suit. Alternatively, but entirely without prejudice to this prayer if court is inclined to grant the application, leave to appear and defend the Respondent's claim, should be on condition that the Applicant deposits into court, the sum of US\$ 124,305.88. In the case of **Miter Investments Ltd vs. East African Portland Cement Company Ltd MA No. 0336**, the court held as follows:

"Where court is doubtful whether the proposed defence is being made in good faith, the court may order the Defendant to deposit money in Court before leave can be granted"

In rejoinder the Applicant's Counsel started by reiterating their submissions in support of the application. Secondly, in specific and pertinent response to the content in the submissions of the Respondent's Counsel he submitted that there are in fact triable issues that need to be tried hence the need for leave to be granted. With reference to the content in paragraph 3 of the submissions, they are argumentative and delve into facts that have not been substantiated as clear proof that there is need for the court to conduct a hearing of the evidence and determine the rights and the disputes between the parties. Counsel submitted that the position of the law is that in this application the Applicant needs to show that there are triable issues and that these issues are bona fide. Counsel noted with reference to the case of **Miter Investments Limited vs. East African Portland Cement Company Limited MA No. 336/2012** cited by the Respondent that the triable issues ought to be real and not a sham and that the court ought to establish that there is a plausible defence. He submitted that the facts as presented by the Applicants show a plausible defence. The court cannot at this stage delve into the facts alleged by the Respondent. Furthermore, the queries by the Respondent are nothing but testimony from Counsel. No evidence other than the affidavits was presented. No cross examination of the deponents took place and as such, the evidence before the court is what is contained in the affidavits of the parties. The arguments by Counsel such as the fitness of purpose, the nature of the debt, the oral agreements clearly disclose that there is a plausible defence by the Applicant. Counsel prayed that the application for leave to file a defence is granted and the Applicants are given the opportunity to be heard on the merits of the case.

Ruling

I have carefully considered the Applicant's application together with the documentary evidence and the affidavits in support and in opposition. I have also considered the written submissions of Counsel and the authorities referred to in the submissions on considerations for the grant of leave to file a defence to a summary suit.

The Applicant needs to prove by affidavit that it has a bona fide triable issue of fact or law or that it has a plausible defence to the summary suit.

The crux of the Applicant's application is that upon investigation by the Applicant it was discovered that the materials supplied by the Respondent were 100% polyester which led to a depression of sales. It is averred that the Applicant could not use the materials for the purpose they were intended for and there was a frustration of the purpose for which the materials were to be used. Thirdly that the parties had modified their obligations and rights and it was agreed to vary the terms permitting the Applicant to dispose of the materials so as to realise the consideration.

A careful analysis of the grounds of the application indicates that it was because the materials were lacking a minimum of 50% cotton that there was a depression in sales. Secondly the parties altered their obligations in a previous contract and the Applicant was permitted to dispose of the materials so as to realise the consideration. The affidavit in support of the application does not dispute the supply of goods by the Plaintiff/Respondent as specified in the plaint. It is admitted in paragraph 6 of the affidavit in support that the total consideration for the supplies undertaken by the Applicant was US\$158,828.88 and the Applicant paid US\$34,523.28 to the Respondent as part payment for the total amount due. In paragraph 7 of the affidavit in support, the Applicant in May 2016 by e-mail sent a payment plan for the outstanding amount and highlighted the element of depressed sales to the Respondent. It further transpired that the Applicant by phone informed the Respondent that the materials were unusable for the purpose due to the fact that mattress covers were less than 50% cotton. The materials are still in possession of the Applicant.

On the other hand the affidavit in reply has attachments which include pro forma invoice which clearly indicates that the goods were 100% polyester microfiber. Other materials are Kraft paper. The bill of lading also clearly describes the materials. In annexure "C" to the affidavit in reply is an e-mail from the Applicant's Managing Director requesting for extension of payment for invoice numbers 15379, 15381, 15423, 16031. The e-mail is dated the 31st of May 2016. The reason given for the depressed sales is that depressed sales had naturally constrained cash flow and ability to pay the invoices. The e-mail makes reference to a meeting held on the 23rd May, 2016. The Applicant sought an extension of time by only two weeks and proposed a payment plan ending 17th July, 2016.

In the summary suit, the Respondent relies on the various invoices and the suit was filed on 19th January, 2017. The Respondent also relies on the pro forma invoices. In the summary suit, the Plaintiff attached later correspondence between the parties. Starting from the e-mail of 23rd May, 2016 annexure "B". In a letter dated 7th October, 2016, the Respondent's lawyers wrote to the Applicant's lawyers on the subject of indebtedness of the Applicant and noted that the debt was not disputed. On 21st October, 2016, the Applicant's Counsel wrote to the Respondent's Counsel requesting for a meeting. On 31st October, 2016 the Respondent's lawyers wrote to the

Applicant's lawyers another letter on the question of indebtedness of the Applicant and in that letter they clearly indicate that they would allow the Applicant in maximum of one month within which to pay the debt of US\$124,305.88 as instructed by their client/the Respondent.

The only issue seems to be whether the Applicant was given more time within which to pay pursuant to 'verbal conversations'. This is against the written acknowledgement contained in the e-mail of the Applicant proposing timelines to pay. There is no written agreement between the parties modifying the right of the Plaintiff/Respondent to receive the full amount claimed in the plaint.

I have duly considered certificates of analysis attached to the affidavit in support of the application by Uganda National Bureau of Standards. The sample examined in annexure "A" and "B" all relate to among other "flexible polyurethane foam mattress" and a foam mattress cover submitted together with it for analysis. The analysis indicates that the sample failed to meet the requirements for mattress covering material content as specified in the Ugandan Standard US 202 – 2: 2015 Flexible Polyurethane foams Part 2 Mattresses Specifications.

In the analysis it is indicated that a mattress cover shall not be less than 50% cotton. However, the Respondent's invoices clearly specified that it would be 100% polyester. That is what the Applicant ordered and that is what was supplied. Frustration as alleged cannot be attributed to the supply of 100% polyester fibre material. Secondly, the disclosed negotiations relate to failure to sell the mattresses. It is clearly indicated in the analysis that the Applicant had foam mattresses which had mattress covering. The dispute relates to the materials used for the mattress covering. In the summary of facts, it is the Applicants case that the materials were unusable because they were 100% polyester as opposed to the industry standard of a minimum of 50% cotton.

In paragraph 5 of the affidavit in support of the application, the Applicant's Managing Director deposed that it is true that the Respondent supplied the Applicant with goods being the material for mattress covers. The Applicant's complaint is that the product was unusable. The question is not whether the product was unusable but whether it is the material which was ordered according to the specifications of the Respondent. In annexure A to the summary plaint, the Respondent invoiced for the supply of materials which included 100% polyester microfiber. What the Respondent invoiced is what the Respondent supplied. In paragraph 16 of the affidavit in support of the application the Managing Director of the Applicant deposed that the materials were in the possession of the Applicant and is unused and they are trying to find buyers for the material at the price sufficient to cover the consideration of the Respondent. In paragraph 18 he deposed that the Respondent agreed to the suggestion that the material should be disposed off to enable the Applicant collect the money that was agreed upon in the invoices.

Inasmuch as the Applicant raises questions as to how to dispose of the materials, it has not rejected the materials supplied and they still agreed to pay the consideration. The only controversy would be the period within which to pay. Was payment conditional upon the sale of the materials by the Applicant? This is because in paragraph 21 the Managing Director of the Applicant deposed that the suit was premature and unsustainable because the parties agreed that the Applicant disposes of the goods and the Applicant has yet to find customers accordingly. No written evidence was attached. The written evidence attached to the plaint speaks about negotiations for the period within which to pay. No agreement was reached and the Respondent filed a suit.

An acknowledgement of debt leads to the accrual of a fresh cause of action. For purposes of the limitation, section 22 (4) of the Limitation Act Cap 80 laws of Uganda provides that where any right of action has accrued to recover any debt or other liquidated pecuniary claim and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of the claim, the right shall be deemed to have accrued on and not before the date of the acknowledgement or the last payment. Under section 23 of the Limitation Act the acknowledgement has to be in writing and signed by the person making the acknowledgement.

In the Court of Appeal Case of **Jones vs. Bellegrove Properties Ltd [1949] 2 All ER 198**, Goddard CJ considered section 23(4) of the Limitation Act, 1939 of the UK in pari materia with the above cited provision of the Uganda Limitation Act and held that:

“Whether or not the document is an acknowledgment must depend on what the document states, and a balance sheet presented to a creditor at a meeting of the company, as happened in this case, fulfils all the requirements of s 24. The signed accounts show that the company admits that it owes a certain sum, and parole evidence was admitted, and rightly so, which showed that part of that sum was owed to the Plaintiff. The statute does not extinguish a debt. It only bars the right of action.”

In **Dungate vs. Dungate [1965] 3 ALL ER 393** a letter written by a deceased person: “keep a check of totals and amounts I owe, and we will have an account now and then” was held by Edmund Davis J to be quite unqualified and amounted to a totally unqualified admission of indebtedness. The cause of action was held to have accrued from the time of acknowledgment of the indebtedness. In this case the Plaintiff/Respondent is entitled to rely on acknowledgement of indebtedness of the Applicant.

In the premises, the Applicant’s application does not disclose a bona fide triable issue and is accordingly dismissed with costs.

Ruling delivered in open court on the 5th June, 2017

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Mukasa Albert holding brief for John Kabandizi for the Respondent

Rita Kenkwanzi holding brief for Yiga Counsel for the Applicant

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge

5th June, 2017