

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

MISC APPLICATION NO 1206 OF 2016

(ARISING FROM CIVIL SUIT NO 917 OF 2016)

SSENGOBA JOHN BAPTIST T/A ASUACO LTD}.....APPLICANT

VERSUS

MESSRS KIBOKO ENTERPRISES LTD}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Plaintiff commenced this application seeking unconditional leave to appear and defend the main suit brought as a summary suit against him and for costs of the application to be provided for.

The grounds of the application disclosed in the Notice of Motion are as follows:

The Respondent has no cause of action against the Applicant as alleged or at all. The Applicant has never dealt with the Respondent as alleged or at all. There is no consideration for the cheques referred to in the plaint. In the alternative and without prejudice to the above averments, the Applicant contends that the Respondent dealt with an entity known as Asuaco Ltd. Secondly, the said company duly paid the Respondent against deliveries made. Thirdly, the sums claimed in the suit by the Respondent as against the Applicant were not due and outstanding and finally that it is just and equitable that the application is granted.

The application is supported by the affidavit of John Baptist Sengoba or deposed as follows. He has read the contents of the summary suit brought against him and he agrees that he is the managing director of Asuaco Enterprises. He has never dealt with the Respondent in his individual capacity in respect of the alleged supplies mentioned in this suit. There is no cause of action against him as alleged. The statement of account attached to the plaint is unknown to him.

Additionally, the Respondent dealt with an enterprise known as Asuaco Enterprises which is a duly registered company under the laws of Uganda with capacity to sue or be sued. The said company had dealings with the Respondent and he recalled that around the second quarter of 2013 the company applied for and obtained goods from the Respondent on credit. The Respondent demanded for security cheques against the supplies from him as one of the top

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$#\$ xtra+
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officials of the company and as a guarantee for payment and he obliged by signing and dating personal Orient bank cheques which were returnable upon receipt of payment for goods supplied to the company. From his recollection, the company duly cleared the entire debt as against the above supplies but the Respondent unreasonably neglected to return his cheques and in support of the Applicant attached copies of receipts to justify payments as annexure "A". All other subsequent dealings between the company and the Respondent were independent of the earlier transaction and all deliveries made were paid for immediately upon delivery to the company. It followed that the sums claimed in the suit are not outstanding.

On the basis of advice of his lawyers, he deposed that this suit cannot be disposed of in a summary manner without conducting reconciliation to ascertain what is rightly due to the Respondent and this requires evidence.

In reply Mr Raymond Muntu, the Respondent's Company Brand Protection Manager deposed an affidavit in reply in which he states as follows:

He was advised by the Respondent's lawyers Messieurs KMT advocates that the Applicant's application does not have or show any probable defence to the claim to warrant the orders sought. No proposed written statement of defence evidencing such a probable defence has been attached to the application.

In general response to the Applicants application, the Respondent company has a claim of Uganda shillings 78,000,000/= out of which Uganda shillings 36,000,000/= is in respect of bounced cheques issued by the Applicant personally and not of his company Asuaco Ltd to clear part of the goods that he personally ordered from the Respondent. The other part of the claim is Uganda shillings 42,000,000/= which was similarly ordered for personally by the Applicant who promised to settle the outstanding sum. The dealings referred to in the affidavit in support of the application between the Respondent Company and the Applicants Company are independent of and have nothing to do with this claim. Indeed the documents attached to the affidavit in support of the application belong to Asuaco Ltd and not the Applicant and are dated 2016 way after the Respondents personal claim arose. The cheque amounts as well as the outstanding remains due and owing as against the Applicant who has not shown or adduced any evidence to prove that he settled his debt. The Applicant is simply confusing transactions and is hiding behind the umbrella of his companies dealings with the Respondent to mislead this court and to avoid payment of what is due. The allegations in the affidavit in support of the application that the cheques were issued as security and were undated are false, unsubstantiated and legally untenable. The cheques issued by the Applicant company to the Respondent were payable on demand and were duly signed and dated by the Applicant and it is not proof in the application and accompanying affidavits to prove otherwise. In the premises, he deposed that that the application is frivolous and an abuse of the process of court as well as a mere attempt to delay the payment of the Respondent's monies which are due and owing.

In rejoinder the Applicant deposes an affidavit having read the affidavit in reply in which he states as follows: that there were no separate dealings between himself and the Respondent on the one hand and Asuaco Ltd and the Respondent on the other hand. The averments of the Respondent are erroneous and meant to mislead the court. The Respondent did not attach any evidence to show that the Applicant personally placed an order for goods worth Uganda shillings 78,000,000/= as claimed in the suit. Furthermore he never dated the cheques the subject matter of the suit. The cheques were issued as security and the supplies which were secured by the cheque were cleared between 18th of January 2016 and 9th February, 2016 and the Respondent issued receipts for payment. The Respondent has not denied receiving the sum of money indicated on the receipts.

He additionally attached the receipts to justify settlement against the goods supplied to the company. In the premises, the total sum claimed by the Respondent is not due.

Counsel Mohammed Golooba represented the Applicant while Counsel Mutyaba represented the Respondent and the court was addressed in written submissions.

According to the Applicant after referring to the law and the facts disclosed in the Applicant's application and supporting evidence, the Applicant raises the following triable issues namely:

1. Whether the goods in question were supplied to the Applicant or to Asuaco Enterprises Ltd?
2. Whether this suit discloses a cause of action against the Applicant?
3. Whether the Applicant can't be held liable to pay company debts if any?
4. Whether the Applicant was a proper party to be sued in these proceedings?
5. In any case whether the sums claimed were due and outstanding and against whom?

In reply the Respondent submitted that the Applicant seeks to recover the sum of Uganda shillings 78,000,000/= partially secured by three cheques totalling to Uganda shillings 36,000,000/= issued by the Applicant/Defendant against supplies made to him by the Respondent. The second claim is in relation to the unsecured balance of Uganda shillings 42,000,000/=. The cheques were banked by the Respondent on the due dates but were dishonoured due to insufficient funds on the Applicants account hence the suit. He contended that the Applicant's application is devoid of merit and the plaint discloses a cause of action.

He submitted that the application does not disclose any triable issue because the cheques issued in the Respondents favour for the sum of Uganda shillings 36,000,000/= were payable on demand and is not proof adduced by the Applicant to suggest otherwise.

On the contention as to whether the cheques were issued as security, the allegation is not substantiated and no evidence was availed to show that he signed the undated personal Orient bank cheques as a guarantee for payment of supplied goods. He relied on the case of **Sembule**

Investments Ltd versus Uganda Baati Ltd Miscellaneous Application No. 006 of 2009 for the proposition that a Bill of Exchange is there an unconditional order in writing for the payment of a fixed sum. It is not written anywhere that the cheques were offered as security and ought to have been an agreement to that effect to support such a defence. Secondly copies of receipts attached by the Applicant amount to Uganda shillings 38,000,000/= and not Uganda shillings 78,000,000/= claimed by the Respondent. Counsel submitted that the Applicant cannot be believed to have settled the debt of Uganda shillings 78,000,000/= presenting alleged evidence of payment of Uganda shillings 38,000,000/=. The attached the receipts are payments in the names of Asuaco Ltd and not the Applicant. The law on corporate personality clearly distinguishes the company from its directors/shareholders except where there is a lifting of the corporate veil. He contended that the Applicant was clearly trying to buy time by bringing the application which should be denied.

Alternatively if the court is inclined to grant the application, it ought to be made unconditionally or on the ground that the Applicant has not provided documentary proof that the entire sum outstanding was fully paid for and if his availed documentation is to be believed there is still an unpaid sum of Uganda shillings 42,000,000/= that is not catered for.

Secondly, this lack of evidence to support the allegation by the Applicant that the cheques issued in the sum of Uganda shillings 36,000,000/= were only meant to be security.

In the premises, the Applicant should deposit security equivalent to the uncontested sum of Uganda shillings 42,000,000/.

Ruling

I have carefully considered the Applicant's application and the principles upon which the court would consider an application for leave to defend a summary suit and which are not in dispute. The question is whether the Applicant, by the application raises a bona fide triable issue of fact or law which merits trial. Secondly, that the issues raised are not frivolous or vexatious. Thirdly, that any point of law raised is not of such a nature as can be disposed off summarily but will be required to be addressed fully.

I have accordingly considered the summary plaint in which the Plaintiff brought a suit against the Applicant entitled as trading as Asuaco Ltd. The amount claimed is a sum of Uganda shillings 78,000,000/=. The Applicant who is the Defendant in the main suit is alleged to have ordered for and was supplied with the goods and merchandise by the Plaintiff company totalling to Uganda shillings 78,000,000/= according to the copy of invoices jointly attached as annexure "A" and the financial statement attached as annexure "B". I have considered annexure "A" which is a tax invoice and the particulars in the invoice relating to the buyer of the goods are not very

clear and the name of the Defendant to the main suit/Applicant in this application is not in evidence. On the other hand the financial statement annexure "B" shows that the supplier's name is Asuaco Enterprises. The name does not indicate whether the said Asuaco Enterprises is a limited liability company or not and it shows that it owes Uganda shillings 78,870,900/= which is outstanding.

In paragraph 4 (b) of the plaint it is written that the Defendant deposited on the outstanding sums by issuing three Orient bank Ltd cheques dated 23rd of August 2016 while the sum of Uganda shillings 42,000,000/= remained unsecured. The cheques were attached collectively as annexure "C". I have accordingly considered the cheques annexure "C" and the cheques were issued by Sengoba Baptist in favour of the Plaintiff.

The question is whether, these cheques were issued as security for the supply to Asuaco Enterprises.

The way the Defendant has been described does not indicate whether the Defendant is a human person or a business name. The Applicant in this application claims that the Defendant namely Asuaco Co Ltd is a limited liability company. The plaint is entitled as Sengoba John Baptist trading as Asuaco Ltd. the plaint itself in paragraph 2 writes as follows:

"the Defendant is a male adult Ugandan presumably of sound mind. Service of court process upon him will be effected by the Plaintiff company's advocates."

Having considered the invoices which are in the names of Asuaco Enterprises, the question of who is the proper Defendant to the main suit has popped up. Either the Applicant is sued in his own personal capacity or Asuaco Enterprises Ltd is sued as a limited liability company. Paragraph 2 of the plaint indicates that the Applicant was sued as a natural person trading as a limited liability company. This by itself raises a point of law as to whether a limited liability company can be sued as if it is an enterprise in whose name a party may trade.

In the premises the application raises a bona fide triable issue and the Applicant is entitled to leave to defend the suit which ought to be tried on the merits.

Lastly I have considered the contention that the cheques were used as security. The cheques were issued to the Plaintiff and bounced. They were issued by a natural person and not by Asuaco Company Ltd or enterprise. In the premises, the Applicant as a natural person would ordinarily be liable. However because he has raised the question as to the context in which the cheques were issued, I hesitate to make an order recognising that the Applicant is liable in the suit as a natural person. The issue itself raises a point of law and the question is whether it can be disposed of in a summary manner without further arguments from Counsel.

I have duly considered the case of **Kotecha vs. Mohammed [2002] 1 EA 112**: The Court of appeal of Uganda held that:

“the Defendant is granted leave to appear and defend if he is able to show that he has a good defence on the 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 an account to determine; or any other circumstances showing reasonable grounds of a bona fide defence.”

They further held that the situation is different if the Plaintiff sued on a cheque.

“The law in that regard; as stated by the learned authors of Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes; is:

“Order 14 Proceedings: where an application is made for a summary judgment in respect of a claim on bill of exchange, cheque, or promissory note the general Rule is that leave to defend will not be given save in exceptional circumstance”.

The English authorities, particularly *James Lamont and Company Limited v Hyland Limited* [1950] 1 KB 585; *Brown, Shipley and Company Limited v Alicia Hosiery Limited* [1966] Rep 668, establish that a Bill of Exchange is normally to be treated as cash. The holder is entitled in the ordinary way to judgment. If he is a seller who has taken bills for payment, he is still entitled to judgment: no matter that the Defendant has a cross claim for damages under the contract of sale or under other contracts. The buyer must raise those in a separate action. There may be exceptions to the rule and the Respondent claim that this case is an exception”.

The Court of Appeal of Uganda further held that a guarantor is only liable if the principal debtor fails to pay. The Court of Appeal considered the contract of guarantee and allowed the application for leave. They further held that the appellant had information that the principal debtors had paid off the loan and therefore he is released from his obligation. On that basis they found that there was a triable issue.

“It seems to me that the Respondent here was able to establish special circumstance that would entitle him to be granted leave to appear and defend.”

The conclusion is that in special circumstances, even a bill of exchange can be defended. One of the special circumstances is if it was issued by a guarantor which is what the Applicant is alleging in this suit. The Respondent's answer is that even if that was the case, the cheques only amount to a sum of Uganda shillings 36,000,000/= and it is not an answer the claim of Uganda shillings 42,000,000/=. On the other hand it is admitted that the alleged receipts evidencing payment for the goods cover payments of up to Uganda shillings 38,000,000/=.

I do not think that the matter can be resolved in a summary suit. On the other hand the Applicants defence does not go to the entire sum.

In the premises, the Applicant has conditional leave to file a defence within 14 days from the date of this order.

The defence shall be filed on condition that the Applicant shall within 45 days, deposit in court a sum of Uganda shillings 10,000,000/= as security.

The costs of the application shall abide the outcome of the main suit.

Ruling delivered in open court on the 16th of June 2017.

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Counsel Mohammed Matovu for the Respondent

Counsel Musa Nsimbe for the Applicant

Muntu Raymond Credit Controller of Respondent in court

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge

16th June, 2017