



**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL COURT DIVISION)**  
5 **MISCELLANEOUS APPLICATION NO. 668 OF 2019**  
**[ARISING FROM CIVIL SUIT NO. 505 OF 2019]**

**ISUBIKALU TENYWA T/A LAFTAZ COMEDY LOUNGE ===== APPLICANT**  
**VERSUS**

10 **NALONGO ESTATES LIMITED ===== RESPONDENT**

**BEFORE: HON. MR. JUSTICE RICHARD WEJULI WABWIRE**

**RULING**

15 This is an Application for leave to appear and defend the respondent's  
summary suit, Civil Suit No. 505 of 2019 for recovery of rent arrears,  
vacant possession and costs of the suit. That suit was brought under  
**Order 36, rules 1&10** of the **Civil Procedure Rules, SI 71-1**. The  
Application is supported by the Affidavit of Brian Isubikalumu, the  
20 General Manager of the Applicant.

The facts presented in the specially endorsed plaint and the Affidavit  
in support of Sarah Kizito, a director of the respondent company are  
briefly as follows: sometime back in 2014, the Applicant rented part  
of the premises comprised in Plot 96-100 Kitante Road, Kampala  
25 known as Centenary Park operating thereon a bar and restaurant  
business t/a Laftaz Comedy Lounge. That at the time of taking the  
premises it was agreed by the parties that the defendant would pay  
a monthly rent of **UGX 4,000,000 (Uganda Shillings Four Million)**  
only. That by the 17<sup>th</sup> day of December 2018, the Applicant had  
30 failed, neglected and/ or refused to pay the agreed rent which was in

arrears amounting to **UGX 54,000,000 (Uganda Shillings Fifty-Four Million)** only.

35 It was further deponed that upon issuing a demand notice to the Applicant, the Applicant issued cheques to the respondent (in the names of Nalongo Estates) totaling to the sum of **UGX 30,000,000 (Uganda Shillings Thirty Million)** which cheques were dishonored and notice of dishonor duly communicated to the Applicant. That despite repeated reminders, the Applicant has failed to pay the sum due.

40 The respondent then filed Civil Suit No. 505 under summary procedure, in this Court, to recover the said outstanding rent arrears from the Applicant.

The Applicant was represented by M/s Namakiika & Nsiyona Advocates while the Respondent was represented by M/s Godfrey S. Lule Advocates.

45 When this Application came for hearing on 08<sup>th</sup> June 2020, timelines were set for filing written submissions which the parties complied with.

I will now consider submissions of the parties.

#### 50 **Applicant's Submissions**

The Applicant raised a preliminary objection on a point of law and prayed that the Application be dismissed as against it with costs. The preliminary objection raised is that that there is no known contract between the Applicant and the respondent and therefore there is no cause of action against the Applicant.

55 It is the Applicant's submission that he has never in his personal capacity entered into a tenancy agreement with the respondent as stated in the plaint, and that the tenancy agreement was at all material times between Fortius Limited and/ or with Laftaz Comedy lounge both of which the Applicant is neither a director nor subscriber but a mere employee (General Manager).

Counsel submitted for the Applicant that it is trite that a company is an entity distinct from its shareholders and its directors as was stated in the case of **Salmon v Salmon Co. Ltd (1897) A.C.** A  
65 company is an independent person with its rights and liabilities appropriate to itself and making the Applicant liable for the company's debt is irregular, unfair and an abuse of court process.

That although the respondent has legal grievances, severally against Fortuis Limited, it chooses to proceed only against the Applicant.  
70 Counsel submitted that in as much as a person can sue anyone to get a remedy, the Applicant maintains that the lawful tenant since 2012 is Fortuis Limited as the principal and, that the respondent has not adduced evidence or otherwise that there is a contractual relationship between the parties.

75 Counsel submitted that the respondent's suit is defective in law and should be dismissed with costs.

Turning to the Application for leave to appear and defend, counsel for the Applicant cited the governing law and a myriad of cases namely; **Geoffrey Gatete & Another v William Kyobe SCCA No. 07  
80 of 2005, Uganda Micro Enterprises Association Ltd & 2 Ors v The Micro Finance Support Centre Ltd, HCMA No. 125 of 2005, Rwabuganda Godfrey v Bitamisi Namuddu, CACA No. 23/ 2009, Kasule v Muhwezi [1992-1993] HCB 212, and Maria Odido v Barclays Bank of Uganda Ltd, HCMA No. 645 of 2008.**

85 Counsel submitted that the grounds of the Application are stated in the Notice of Motion and Affidavit in Support.

First, that the Applicant has a good, *bona fide* and meritorious defence to the suit. Secondly, that the Applicant is not indebted to the respondent since the Applicant issued undated cheques in 2018  
90 which the respondent dated and banked before filing this suit in 2019. The third ground is that the sum claimed is not a liquidated sum capable of being recovered under summary procedure. Lastly, that it is just, fair and equitable that the Applicants that the

95 Applicants are granted unconditional leave to appear and defend the suit.

Counsel submitted on each of the aforementioned grounds. Counsel defined what amounts to a plausible defence by relying on the case of **Remco Ltd v Mistray Jadbra Ltd (2002) (1) EA** to mean bona fide triable issues in the suit, submitting that the Applicants have a plausible defence to the suit and it would be in the interest of justice if the suit is heard on its merits. It was the Applicant's contention that:

- 105 a) The Tenant (Fortuis Limited) pursuant to clause 2(d) of the tenancy agreement, constructed temporary trade fixtures for its business on the vacant spaces with the express consent of the Landlord through its representative, a one Arnold Mulindwa.
- 110 b) All fixtures which are temporary wooden and grass thatches, were done with the intention and oral understanding with the respondent's representatives throughout the tenancy, that at the point of separation the trade fixtures would be valued and sold to the next tenant or be removed by the tenant.
- 115 c) To the tenant's dismay, the landlord claimed that the trade fixtures were its property and denied Fortuis access to remove its trade fixtures or sell them to the next tenant. The respondent proceeded to rent the trade fixtures to another tenant without the Applicant's consent which is grossly unfair to the tenant.

Counsel further submitted that at the determination of any tenancy agreement, the tenant has to yield to the landlord the demised premises duly painted, repaired after removing all its extensions, additions and improvements inclusive of any fixtures and fittings other than those which belonged to the landlord. That, this is to ensure that the demised premises are returned fit for use by the landlord after the tenant has made good any or all damages occasioned on the demised premises. This common law position guarantees the tenant rights to remove its lawful fixtures generally.

To buttress his point, counsel relied on the case of **Spear House Limited v Barclays Bank Uganda Limited, HCCS No. 236 of 2008**, where **Justice Henry Adonyo** cited *WoodFalls Law of Landlord and Tenant, 24<sup>th</sup> Ed. (Revised and Re-modeled)* by Leonel A. Blundell, Sweet and Maxwell, 1939 at page 764 which states that:

*'It is a principle of law applicable to fixtures as well as other things that individuals on entering into a contract may agree to vary the strict position in which they would otherwise legally stand towards each other, where no absurdity or general inconvenience would result from the transaction and if the Landlord wishes to restrict his tenants' ordinary right to remove trade machinery or fixtures he must do so in plain language...' (our emphasis)*

Further still, the case of **Clemmer Steel Craft Technologies Inc. v Banor Meals Corp. 2009 ONCA 534 (CanLII)** stated this position that in order for a fixture to be considered a trade fixture which belonged to the tenant, then such fixture should be that which was introduced to the land and affixed thereto by the tenant and was particular to the tenant's business or trade and thus the tenant would have the right to then at common law.

On this point, Counsel finally submitted that it is clear that the Applicant has a good and plausible defence to the suit, and that the respondent has not addressed itself to the issue of compensation in its Affidavits on record and it is now up to this honorable court to determine this issue upon the circumstances that surround it.

On the second and third ground, counsel submitted that although the plaintiff does not expressly state that it brings the suit under Order 36, rule 2(a) of the Civil Procedure Rules, the plaintiff which is not specially endorsed states only rule 1), it is our assumption that the suit was brought under Order 36 rule 2 which covers liquidated claims and proceeded to reproduce the provision. Counsel cited **Black's Law Dictionary, 8<sup>th</sup> Edition**, for the definition of a

liquidated amount as a figure readily computed, based on an agreement's term.

160 Counsel opined that there was no evidence of how the respondent computed the rent arrears to the tune of UGX 54,000,000 as alleged. The Tenant disputes the amount due and to the best of its knowledge and that it does not owe the respondent that money.

165 As seen in the plaint and respondent's Affidavit in reply, it is stated that the outstanding rent was UGX 54,000,000 at the time of filing the suit in June 2019 but the Applicant issued cheques of UGX 30,000,000 purportedly in April 2019 and yet the rent suddenly jumped to UGX 54,000,000 at the time of demand on 17<sup>th</sup> May 2019.

170 That it was apparent from the plaint and annexure thereto that there is no liquidated claim upon which the respondent is entitled to a summary judgment. Reliance was placed on the case of ***Sterling Travel and Tour Services Limited vs Millennium Travel Tours Services Limited, HCMA No. 116/2013***, which ***states*** that where the claim is not liquidated within the meaning of Order 36 that alone is enough ground to grant the Application for leave to appear and defend the suit on its merits. In para. 7 of her Affidavit in reply on behalf of the respondent, Ms. Sarah Kizito (Director) states that *'the respondent instituted HCCA No. 55 of 2019 against the Applicant seeking for UGX 54,000,000 being rental arrears as had been accumulated at the date of filing the suit, and costs of the suit. The claim was partly premised on dishonored cheques.'*

185 Counsel further submitted that there is no statement or schedule of rental arrears attached to the plaint and it is not possible for the Court to determine from the directors' submission what constitutes rental arrears, or how the costs were arrived at. That the cheques referred to in the plaint were deposited by the Applicant on the request of the respondent through Ms. Kizito not as security but as a commitment by the tenant. That, when issuing the cheque, the Applicant did not make representation to the respondent that there

were funds on the account. The agreement between them was that  
190 the cheques would be returned upon clearance of rent by the tenant  
as had been the norm throughout the tenancy period. When issuing  
the cheques, both parties knew that there were no funds on his bank  
account as the Applicant was financially distressed at that point in  
time.

195 In the case of ***Abdullah v Republic [1970] E. A 657***, it was held *inter  
alia* that ‘*the giving of a postdated cheque is not representation that  
there are sufficient funds to meet the cheque*’

Counsel then submitted that the questions and gaps above require  
further investigation by this Court beyond what is stated in the plaint  
and this removes this case from the ambit of liquidated demand as  
200 defined in *Order 36 rule 2(a) of the CPR*. Relying on ‘***The Supreme  
Court Practice ‘1996, Sweet & Maxwell, London (as cited in  
Sterling Travel and Tour Services Ltd vs Millennium travel  
Tours Services Ltd, HCMA No. 116/2013)***, counsel advanced the  
205 position that;

‘...if ascertainment of a sum of money even though it be specified  
or named as a definite figure, requires investigation beyond mere  
calculations, then the sum is not a debt or liquidated demand but  
constitutes damages’

210 Counsel prayed therefore that this honorable Court finds that the  
respondent’s claim is not properly brought by summary plaint  
because there is no undertaking or written contract for payment of a  
liquidated amount. That, the suit requires proof by adducing more  
evidence which entitles the Applicants to leave to appear and defend  
215 because they raise triable issues as to whether or not the Applicants  
owe the respondent that amount or at all.

Lastly, counsel submitted that it is just, fair and equitable that the  
Applicants are granted unconditional leave to appear and defend the  
suit in accordance with Section 98 of the Civil Procedure Act, Cap.

220 71

225 Counsel prayed that this Honorable Court be pleased to find merit in the Application to grant unconditional leave for the Applicant file leave to defend the suit against him as per the authorities highlighted above. Counsel also prayed that Court allows the Application without costs.

### **Respondent's Submissions**

230 Counsel for the respondent responded to the preliminary objection by the Applicant by submitting that while the Applicant disputes indebtedness by alleging that he has no tenancy agreement or contract with the respondent, he does not dispute issuing cheques to the respondent worth **UGX 30,000,000 (Uganda Shillings Thirty Million)** only which were all dishonored by the bank and referred to para. 15 of the Affidavit in support of the motion.

235 Counsel submitted that it is trite law that a cheque is payment in form of cash and it is not subject to the defence of lack of consideration. To buttress this point counsel relied on the case of **Kotecha v Mohammed [2002] 1 EA 112** cited with approval in **Sembule Investments Limited v Uganda Baati Limited, HCMA No. 664 of 2009 (unreported)** where the court had the opportunity 240 to discourage the practice of issuing cheques as security in the following terms:

245 *“And as I observed in Dembe Trading Enterprises v Bidco (U) Ltd, JJA HCMA N. 28/2008, the practice among businessmen and women in Uganda of issuing cheques as security with the instructions that they should not be banked or negotiated should be strongly discouraged because it goes against the very nature of such negotiable instruments. One cannot have a trade custom or practice that purports to turn the law completely on top of its head and for that reason the courts should not have countenance*  
250 *customs such as ‘show me the money’. Although the drawer may avoid payment of a cheque by ensuring that there are no funds*



on their account that should not absolve him/ her in the event of a suit such as this one based on the cheque”

255 Counsel submitted therefore that considering the above, the suit is partly premised on dishonored cheques and the Applicant admits to issuing the said cheques. Counsel prayed that the Court enters judgment for **UGX 30,000,000 (Uganda Shillings Thirty Million only)** since the Applicant has not raised any known defence in law against a cheque which is a bill of exchange by its nature. That as  
260 regards the issue of lack of contract or tenancy agreement which according to the Applicant’s submission seems to be his plausible defence to the suit, the Applicant in his submission particularly states:

265 *“That he has never in his personal capacity entered into a tenancy agreement with the respondent as stated in the plaint. That the tenancy agreement was at all times between Fortius Limited and/or Laftaz Comedy Lounge both of which the Applicant is neither a director nor a subscriber but a mere employee (General Manager)”*

270 Counsel’s submission was that the question the Court should ask itself is on what account and/ or ground was the Applicant issuing the cheques to the respondent upon demand for rent being made on him and therefore in the absence of any explanation as to why he issued the cheques to the contrary of lack of a contract then the Court should find that there is in existence a contract since the  
275 Applicant does not even dispute the outstanding sums.

Counsel contended that, as it may be, the Applicant raises three *bona fide* triable issues in his submissions which seem to be the gist of his Affidavit, namely:

- 280 1. That the tenant (Forties Limited) pursuant to clause 2 (d) of the tenancy agreement constructed temporary trade fixtures for its business on the vacant spaces with the express consent of the landlord through its representative a one, Arnold Mulindwa.

- 285 2. That all trade fixture which are temporary wooden and grass  
thatches were done with the intention and oral understanding  
with the respondent's representative throughout the tenancy  
that at the point of separating the trade fixtures would be valued  
and sold to the next tenant or be removed.
- 290 3. That to the tenant's dismay. The landlord claimed that the trade  
fixtures were its property and denied Fortius Limited access to  
remove its trade fixtures or sell them to the next tenant. The  
respondent proceeded to rent the trade fixtures to another  
tenant without the Applicant's consent which is grossly unfair  
to the tenant.

295 Counsel argued that these three issues seem to set up a counterclaim  
for Fortius Limited which is not part of this Application. Counsel  
contended that this could not stand since the alleged tenancy  
agreement was for a period of one year and there seems not to be  
another agreement extending the said tenancy nor does a counter-  
claim absolve the Applicant from paying the outstanding sums which  
300 are not disputed anyway.

Counsel for the respondent declined to respond to that Applicant's  
purported issues since the suit before Court is against the Applicant  
and not Fortius Limited, which is not a party to the suit,

305 In the premises, therefore counsel prayed that this Application be  
dismissed for lack of merit since the Applicant has failed to  
demonstrate before Court which issues shall be tried by Court when  
given an opportunity.

### **Resolution**

310 I have perused the pleadings, submissions and evidence presented  
by the parties in this matter, which is an Application for grant of  
unconditional leave to appear and defend brought under **Order 36,**  
**rules 3, 4** and **8** of the **Civil Procedure Rules, SI No 71-1** and  
**Section 98** of the **Civil Procedure Act, Cap 71**

315 The Application is supported by an Affidavit deponed by the Applicant, Brian Isubikalulu which raises grounds of the Application to justify grant of unconditional leave to appear and defend Civil Suit No. 505 of 2019 brought by the respondent to recover rent arrears.

**Order 36, rule 2** of the **Civil Procedure Rules** under which the respondent brought its suit provides:

320 **“2. Special endorsement on plaint**

**All suits \_**

**(a) Where the plaintiff seeks to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising –**

325 **(i) upon a contract, expressed or implied (as, for instance, on a bill of exchange, hundi, promissory note or cheque, or other simple contract debt);**

330 **(ii) on a bond or contract written for payment of a liquidated amount of money;**

**(iii) On a guaranty where the claim against the principal is in respect of a debt or liquidated amount only;**

**(iv) On a trust; or**

335 **(v) Upon a debt to the Government for income tax; or**

340 **(b) Being actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for nonpayment of rent, or against persons claiming under the tenant,**

345 **may, at the option of the plaintiff, be instituted by presenting a plaint in the form prescribed endorsed “Summary Procedure Order XXXVI” and accompanied by an Affidavit made by the plaintiff, or by any other person who can swear positively to the facts, verifying the cause of action, and the amount claimed, if any, and stating that in his or her belief there is no defence to the suit.”**

350 The import of Order 36 was espoused in the case of **Post Bank v Abdu Ssozi, SCCA No. 08 of 2015** which provided that:

355 *“Order 36 was enacted to facilitate the expeditious disposal of cases involving debts and contracts of a commercial nature to prevent defendants from presenting frivolous or vexatious defences in order to unreasonably prolong litigation. Apart from assisting the courts in disposing of cases expeditiously, Order 36 also helps the economy by removing unnecessary obstructions in financial or commercial dealings.*

360 *Defendants in cases which fall under Order 36 are protected by being given the right to apply to court for leave to appear and defend the suit. When the court receives their Application and is satisfied by the defendant’s Affidavit that the defendant has raised a genuine triable and not a sham or frivolous issue, it will grant the defendant leave to appear and defend the suit. (Order 36 rule 4).*

365 *If the court is not satisfied that the defendant has raised a triable issue, it will refuse to grant leave to appear and defend the suit, and the plaintiff will be entitled to a decree in the amount claimed in the plaint with interest, if any. (Order 36 rule 5)*

.....

370 *There is no doubt that Order 36 rule 2 restricts suits to claims based only on contract or land as spelt out in rule 2. Therefore,*

*any claim based on a different cause of action would have to be brought by way of an ordinary suit and not under Order 36.”*

375 Para. 3 of the Respondent’s plaint (under Order 36, rules 1&10 of the CPR) reads:

*“The Plaintiff’s claim against the defendant is for recovery of a liquidated sum of **UGX 54,000,000 (Uganda Shillings Fifty-Four Million only)** being rental arrears, vacant possession and costs of the suit.”*

380 A liquidated sum in rental arrears is claimed by the respondent which is defined in **Black’s Law Dictionary, 8<sup>th</sup> Edition**, as a figure readily computed, based on an agreement’s term.

The Applicant was served with summons but did not file any pleadings within the prescribed 10 days from receipt of summons.  
385 However, the Applicant then filed an Application for enlargement of time to seek Court’s leave to appear and defend out of time which was allowed on 04<sup>th</sup> October 2019.

By way of motion dated 10<sup>th</sup> November 2019, the Applicant filed the Application for grant of unconditional leave to appear and defend the  
390 suit; and costs of the Application. Briefly, the grounds relied upon by the Applicant include:

1. That the Applicant has a good, *bona fide* and meritorious defence to the suit.
2. That the Applicant is not indebted to the respondent
- 395 3. The claim by the plaintiff is fraudulent and or made in bad faith
4. That it is in the interests of justice that the Applicant be granted unconditional leave to appear and defend the suit.

The Affidavit in support of the Applicant further supports these grounds and raises some issues which counsel for the respondent  
400 cited in his submissions and which I will consider in determining this Application. These include:

1. That the tenant (Forties Limited) pursuant to clause 2 (d) of the tenancy agreement constructed temporary trade fixtures for its business on the vacant spaces with the express consent of the landlord through its representative a one, Arnold Mulindwa. (para. 6 of the Applicant's Affidavit in support)
2. That all trade fixtures which are temporary wooden and grass thatches were done with the intention and oral understanding with the respondent's representative throughout the tenancy that at the point of separating the trade fixtures would be valued and sold to the next tenant or be removed. (para. 7 of the Applicant's Affidavit in support)
3. That to the tenant's dismay, the landlord claimed that the trade fixtures were its property and denied Fortius Limited access to remove its trade fixtures or sell them to the next tenant. The respondent proceeded to rent the trade fixtures to another tenant without the Applicant's consent which is grossly unfair to the tenant. (para. 9 of the Applicant's Affidavit in support)

**Order 36, rule 4** of the **Civil Procedure Rules**, provides as follows:

*"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."* (Emphasis mine)

For an Application for leave to appear and defend to be granted, the Applicant has to show that there is a *bona fide* triable issue of fact or law that he will advance in defence of the suit.

435 Counsel relied on the decision of **Makula Interglobal Trade Agency Ltd vs Bank of Uganda [1985] HCB 65** at, page 66 in which it was held that:

440 *‘Before leave to appear and defend is granted, the defendant must show by Affidavit or otherwise that there is a bona fide triable issue of fact or law. When there is a reasonable ground of defence to the claim, the defendant 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 was an issue or question in dispute which ought to be tried and the court shall not enter upon the trial of issues disclosed at this stage.’*

445 Furthermore, in the case of **Geoffrey Gatete (supra) the Supreme Court** held that:

450 *“....an Application for leave to appear and defend a summary suit, the court is not required to determine the merits of the suit. The purpose of the Application is not to prove the Applicant’s defence to the suit but to ask for opportunity to prove it through a trial. What the court has to determine is whether the defendant has shown good cause to be given leave to defend. Apart from ineffective service of summons, what the courts have consistently held to amount to good cause is evidence that the defendant has*

455 *a triable defence to the suit.*

*From the Application and the Affidavits in support thereof, in the instant case, it is evident that the appellants wish to defend the suit on the principal ground that the loan agreement is not binding on them.”*

460 The three issues raised regarding fixtures and the preliminary objection raised by the Applicant that he is not the rightful liable party to recover the rent arrears from, suffice as plausible defences to support grant of leave to appear and defend the respondent’s suit.

465 It would be in the interest of justice for Court to investigate further into the issues raised and resolve the claim on its merits.

Regarding the issue of fixtures, the Applicant stated that the value of fixtures retained by the respondent would be more than sufficient to offset the rent arrears. Secondly, there is a point of law raised on who the rightful liable party is, whether it is the Applicant or Fortius Limited. These issues ought to be explored further.

The Applicant raises both issues of law and fact that this Court cannot ignore.

475 At this stage, it is not the duty of Court to delve into the merits of the defence but rather offer an opportunity to the Applicant to adduce evidence.

In the premise, the Application succeeds.

The Applicant is granted unconditional leave to appear and defend the suit.

Costs shall be in the cause.

480 Delivered at Kampala by email to Counsel for the respective parties and signed copies for the parties placed on file this 22nd day of December, 2020.

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485 RICHARD WEJULI WABWIRE

JUDGE