

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]**

**MISCELLANEOUS APPLICATION NO. 13 OF 2020
(ARISING FROM CIVIL SUIT NO. 1030 OF 2019)**

GALLAD ABI SAMATAR ::: APPLICANT

VERSUS

MOHAMUD ABDULE MOHAMMED ::: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] This application was brought by Notice of Motion under *Order 36 Rule 4 of the Civil Procedure Rules S.I 71 – 1* seeking orders that:

- a) The Applicant be granted leave to appear and defend Civil Suit No. 1030 of 2019 on the merits.
- b) Costs of the application be provided for.

Brief Background

[2] It was indicated by the Respondent/Plaintiff in the specially endorsed plaint that on 21st December 2017, the Respondent/Plaintiff and the Applicant/Defendant executed a deed of acknowledgment in which the Applicant acknowledged his indebtedness to the Respondent in the sum of USD 46,000 being a refund of money that had been pooled for joint investment in importation of petroleum consignments. The parties agreed that the said sum was to be paid in installments. A copy of the deed of acknowledgment was annexed to the plaint. It was further averred in the plaint that the Applicant only made payment of USD 26,000 and had not cleared the balance despite a demand notice dated 29th November 2019. The Respondent/Plaintiff therefore brought the summary suit for recovery of the balance.

Grounds of the application and response by the Respondent

[3] The Applicant/Defendant therefore brought the present application seeking the orders indicated above. The application was supported by an affidavit deposed by the Applicant himself which, together with the Notice of Motion, sets out the grounds of the application. Briefly, the grounds are that:

(a) The joint business venture agreed to between the parties was to be carried out through Gogas (U) Ltd, a private company holding Petroleum Importation and Distributorship Licenses; in which company, the Applicant is a shareholder and Director.

(b) Pursuant to the business venture agreement, the Applicant and Respondent jointly raised a sum of USD 66,000 for the joint investment. However, the business made consistent losses, upon which the Applicant bound himself in good faith to indemnify the Respondent in the sum of USD 26,000 which he subsequently paid to the Respondent.

(c) The Applicant has never executed any deed of acknowledgment as alleged by the Respondent and if any exists, it is a forgery.

(d) It is in the interest of justice that the Applicant be granted unconditional leave to appear and defend the summary suit.

[4] The Respondent opposed the application vide an affidavit in reply and a supplementary affidavit in reply both deposed by the Respondent. The gist of the averments in both affidavits are as follows:

(a) The Respondent made a contribution of USD 46,000 to the joint venture business, which business failed after two years and the Applicant undertook to indemnify the Respondent in the sum of USD 46,000 payable in 5 (five) installments which agreement was evidenced in a deed of acknowledgment endorsed by the parties in presence of the Applicant's lawyers. Each installment was secured through a Stanbic Bank postdated Cheque.

(b) The Applicant made payment of the first three instalments and the postdated cheques in respect of those amounts were returned to the Applicant.

The 4th and 5th installments were not paid by the Applicant leaving an outstanding balance of USD 26,000 as of January 2019 and the Respondent remained in possession of the two postdated cheques in respect thereof, copies of which he annexed to the affidavit in reply.

(c) Between October 2018 and December 2018, the Applicant made payment of another USD 5,150 in two installments leaving an outstanding balance of USD 20,850. On 30th March 2020, after commencement of the summary suit, the Applicant made a further payment of USD 6,000 leaving an outstanding balance of USD 14,850, which is due and owing at the time of filing the supplementary affidavit in reply.

(d) The Applicant has not presented any plausible ground of defence and has not attached to his application any draft written statement of defence. The application for leave to defend the suit ought to be dismissed with costs.

[5] No affidavit in rejoinder was filed by the Applicant.

Representation and Hearing

[6] When the matter came up for hearing, the Applicant was represented by **Mr. Kaggwa Michael** while the Respondent was represented by Mr. Enyimu Elijah and Mr. Wamimbi Emmanuel. It was agreed that the hearing proceeds by way of written submissions and a schedule was set. However, according to the record, neither Counsel for the parties filed any submissions. I have therefore decided to write this Ruling without any input from the parties' advocates in the form of submissions.

Issue for Determination by the Court

[7] Only one issue is up for determination by the Court, namely; **Whether the application discloses any triable issues as to justify grant of leave to defend the main suit.**

Determination by the Court

[8] The position of the law is that under *Order 36 rule 4* of the *Civil Procedure Rules*, unconditional leave to appear and defend a suit will be granted where the applicant shows that he or she has a good defence on the merits; or that a difficult point of law is involved; or that there is a dispute 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. The applicant should demonstrate to court that there are issues or questions of fact or law in dispute which ought to be tried. The procedure is meant to ensure that a defendant with a triable issue is not shut out. (See *M.M.K Engineering v. Mantrust Uganda Ltd H. C. Misc Application No. 128 of 2012*; and *Bhaker Kotecha v. Adam Muhammed [2002]1 EA 112*).

[9] In *Maluku Interglobal Trade Agency v. Bank of Uganda [1985] HCB 65*, the court stated that:

“Before leave to appear and defend is granted, the defendant must show by affidavit or otherwise that there is a bonafide 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.”

[10] It is a further requirement under the law that in an application for leave to appear and defend a summary suit, there must be sufficient disclosure by the applicant, of the nature and grounds of his or her defence and the facts upon which it is founded. Secondly, the defence so disclosed must be both bona fide and good in law. A court that is satisfied that this threshold has been crossed

is then bound to grant unconditional leave. Where court is in doubt whether the proposed defence is being made in good faith, the court may grant conditional leave, say by ordering the defendant to deposit money in court before leave is granted. (See ***Children of Africa vs Sarick Construction Ltd H.C Miscellaneous Application No. 134 of 2016***).

[11] In the present case, the Applicant admits existence of a joint business arrangement between the Respondent and himself. He also admits to pooling of money to support the said business venture. The Applicant further admits to failure of the business venture and to making an undertaking to indemnify the Respondent. The only disagreement is as to the amount the Applicant agreed to refund and as to whether the agreement to refund any monies was by way of a deed of acknowledgment of indebtedness or not. While the Respondent claims that the sum agreed to be refunded was USD 46,000, the Applicant claims it was USD 26,000. Secondly, while the Respondent presents evidence by way of a copy of a deed of acknowledgment, the Applicant denies having executed such a deed and avers that if any exists, it is a forgery. The Applicant however makes no effort to lead any evidence capable of establishing that the said deed of acknowledgment is a forgery.

[12] It should be noted that the copy of the deed of acknowledgment is attached to the summary plaint and the affidavit in reply. On the affidavit in reply is also attached copies of two post-dated cheques alleged to have been issued by the Applicant to the Respondent pursuant to the said deed of acknowledgment. The Applicant does not deny issuing the said cheques. A visual look at the cheques indicates no obvious dissimilarity between the signatures on the copies of the cheques on the one hand and on the deed of acknowledgement on the other. There is therefore no prima facie evidence of forgery of the deed of acknowledgement. If the Applicant wanted the Court to find or discern any possibility of a forgery, the Applicant ought to have laid some material before the Court pointing to such a conclusion beyond the bare allegation that the

said deed may have been forged. Since the Applicant pointed to no such reasonable possibility, such a bare allegation cannot constitute a ground of a plausible defence on the part of the Applicant.

[13] Turning to the dispute as to the amount, as has been indicated above, the Applicant has no evidential basis for claiming that he only agreed to refund USD 26,000. On the other hand, the Respondent's claim that the sum agreed to be refunded was USD 46,000 is backed by a deed of acknowledgment in respect of which the Applicant has established no possibility of impeaching the same. As such, there is ample evidence before me that the agreement between the parties was that the Applicant would refund the sum of USD 46,000; out of which, the Applicant refunded USD 20,000 in instalments agreed upon in the deed of acknowledgement and USD 5,150 in two other instalments, leaving the outstanding balance of USD 20,850 that is claimed in the summary plaint. I find these to be the ascertainable facts. I find no plausible dispute over these facts that is capable of raising a bona fide triable issue of either law or fact.

[14] In the circumstances, the Respondent's claim of USD 20,850 as laid out in the summary plaint would be established. But the Respondent showed further that while this suit was pending before this Court, the Applicant made a further payment of USD 6,000 which reduced the outstanding balance to USD 14,850. The Court is therefore in position to ascertain that the Respondent is entitled to the sum of USD 14,850 which is a downward adjustment of the sum claimed in the summary plaint.

[15] In light of the foregoing, therefore, my finding is that the Applicant has disclosed no plausible grounds of defence and/or any bona fide triable issues of either law or fact which can sufficiently justify the grant of leave to appear and defend the main suit. In the circumstances, the application by the Applicant bears no merit and is accordingly dismissed. Consequently,

judgment and decree are entered in the summary suit in accordance with Order 36 Rule 5 of the CPR. I therefore make the following orders:

(a) The Application for leave to appear and defend the main suit vide Civil Suit No. 1030 of 2019 is dismissed.

(b) Judgment and decree are entered in the main suit for the Plaintiff/Respondent against the Defendant/Applicant for recovery of the sum of USD 14,850.

(c) The costs of the application and of the main suit shall be paid by the Defendant/Applicant to the Plaintiff/Respondent.

It is so ordered.

Dated, signed and delivered by email this 1st day of November, 2021



Boniface Wamala

JUDGE