



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

CIVIL SUIT NO. 341/2011

**MISCELLANEOUS APPLICATION No. 730 OF 2020
(ARISING FROM CIVIL SUIT No. 691 of 2020)**

OMONY WILLIAM WATMON ::: APPLICANT

VERSUS

HABIB BAR & LOUNGE LIMITED ::: RESPONDENT

BEFORE THE HON. MR. JUSTICE RICHARD WEJULI WABWIRE

RULING

This Application is brought under Section 98 of the Civil Procedure Act Cap 71 and Order 52 Rules 1 & 2 of the Civil Procedure Rules S.I 71-1 (CPR).

The Applicant seeks for unconditional leave to appear and defend Civil Suit No. 691 of 2020.

The grounds on which this Application is premised are not well articulated in the Notice of Motion however, they can be discerned from the Affidavit in support deponed by Omony William Watmon, the Applicant.

According to the Applicant, on 10th February 2020 he entered into an Agreement to acquire the business of the Respondent situated at Kyadondo Block 254 Plots 757 and 758 at Kansanga-Nabutiti Road at a consideration of UGX 150,000,000/= (Uganda Shillings One

Hundred Fifty Million Only). That at the execution of the said Agreement he paid UGX 15,000,000/= (Uganda Shillings Fifteen Million Only) to the Respondent.

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The Applicant avers that he also deposited four cheques in the sum of UGX 20,000,000/= (Uganda Shillings Twenty Million Only) each and in total amounting to UGX 80,000,000/= (Uganda Shillings Eighty Million Only) with the Respondent as security for payment of the balance. That he subsequently paid UGX 55,000,000/= (Uganda Shillings Fifty-Five Million Only) to the Respondent and took possession of the business premises. That he started carrying out renovations to the premises, but was stopped by a one Ayebazibwe Immaculate on grounds that he was not known to the landlord. That the Applicant raised this issue to the Respondent, but the directors of the Respondent instead demanded for the balance and cashed the security cheques without consulting him as agreed.

In reply Jitendra Lakhani, a director of the Respondent deponed an Affidavit opposing this Application. According to Jitendra Lakhani, the Applicant's Affidavit does not evidentially prove grounds upon which an Application for leave to file a defence should be premised. That the draft written statement of defence does not in any way raise triable issues which is a legal requirement and that thus this Court has no basis to believe that the Applicant has a good defence. In further reply Jitendra Lakhani stated that the Respondent had a right to cash the security cheques availed by the Applicant upon his failure to pay the outstanding sums within the agreed period. That it is fair and in the interest of justice that this honourable Court finds the Application devoid of merit and be pleased to dismiss the same.

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I have carefully considered the Application and the respective Affidavits in support and opposition thereto and taken into account the submissions by respective Counsel and the authorities cited.

65 Counsel for the Applicant submitted that for leave to defend to be granted, an Applicant has to only prove that there is a *bona fide* triable issue of law or fact. Counsel cited the case of **Isse Shekhnor Roble & Anor vs. M.M.M Agro Dealers Limited HCMA No. 514 of 2014** where Justice Madrama held that,

70 *“the principles are that the Defendant must show by Affidavit that there is a bona fide triable issue. Where there is a bona fide triable issue of fact or law, the Defendant would be allowed to defend unconditionally. The Defendant is not bound at this stage to show a good defence on the merits but that there is an issue*
75 *or question in dispute which the Court ought to try but the Court should not try the issues in the Application. Where there is reasonable ground of defence, the Plaintiff is not entitled to summary judgment. The Court ascertains where there is plausible defence or a sham defence.”*

80 Counsel for the Applicant argued that in his Affidavit, the Applicant demonstrated that the Agreement of sale of the Bar business signed between the parties lacks force of law as the Respondent did not seek consent as required under the Agreement upon which the Respondent acquired the property on which she established a
85 business which she sold to the Applicant. Counsel submitted that under clause 2 of the Tenancy Agreement upon which the Respondent rented the property, the Respondent is prohibited in anyway, without the consent of the landlord, from subletting or dealing in the property.

90 This is a fundamental clause in the relationship between the parties. Where the transaction has been vitiated then there is no more demand for money.

Counsel submitted that this Court cannot investigate to the fullest, matters relating to complaints raised in regard to the transaction in
95 this present Application. That it is therefore the reason as to why fairness and justice would demand that leave be granted and the defendant allowed to enter appearance in the main suit so that he

can ably defend himself on matters of law and fact raised about the impugned transaction. He then submitted that the Applicant has, to
100 the required standards, proved to the Court that there exists fundamental issues of law and fact which ought to be investigated in order to reach a just and fair conclusion as provided under the law. He prayed that the Applicant be granted unconditional leave to defend Civil Suit No. 691 of 2020 and costs of the Application be
105 provided for in the cause.

In reply Counsel for the Respondent submitted that the Applicant has failed to prove grounds to be granted leave to defend the suit and that the Application is brought in bad faith as a ploy to deny and
110 delay paying the Respondent the outstanding sums. Counsel for the Respondent argued that a critical perusal of the Applicant's defence clearly shows that it is not plausible and does not raise any triable issue worth wasting Court's precious time to determine.

Counsel for the Respondent also submitted that the parties entered
115 into a transaction as evidenced in a Memorandum of Agreement dated 10th February 2020 and that under clause 4 thereof, the Applicant was obliged to pay the outstanding balance UGX 80,000,000/= within the month of April 2020, which he breached. The duration was courteously extended by the Respondent to early
120 July 2020 within which to pay the outstanding sum but the Applicant again refused, failed and or ignored to pay hence the summary suit.

He cited the case of **Francisco Mugabe vs. Greenland Bank Limited**
125 **HCMA No. 146 of 2012** where Justice R.O Okumu Wengi held that;

*"...where leave ought to be given generously it has always been the practice to look at the possible defence of the defendant. In this case the debt was negotiated and set a figure, part of which
130 was paid off leaving a balance.... It is only reasonable to*

conclude that the applicant has no reasonable defence to this suit. His Application for leave to defend fails and dismissed with costs and a decree... is entered against him....”

135 He prayed that this Court be pleased to dismiss this Application with costs and enter a default judgment and decree pursuant to Order 36 Rule 3(2) of the Civil Procedure Rules S.I 71-1.

Decision of Court

140 **Order 36 Rule 3 (1)** provides that upon the filing of an endorsed plaint and an Affidavit, the Court shall cause to be served upon the defendant summons and the defendant shall not appear and defend the suit except upon applying for and obtaining leave from the Court.

145 The law governing an Application for leave to appear and defend a summary suit is set out in Oder 36 of the Civil Procedure Rules and summarised in **Odgers’ Principles of Pleading and Practice in Civil Actions in the High Court of Justice, 22nd Edition pages 71 – 78.**

150 In the case of **Maluku Interglobal Trade Agency Ltd vs. Bank of Uganda [1985] HCB 65** Court held that in a summary suit before leave to appear and defend is granted, the defendant must show that there is a *bona fide* triable issue of fact or law and secondly whether
155 there is a reasonable ground for defence of the claim.

In **M.M. K Engineering v Mantrust Uganda Ltd HCMA 128 of 2012** Justice Christopher Madrama observed that the principles for determination of whether leave should be granted to the Defendant
160 to appear and defend a summary suit are:

- a) *An Application for leave to defend a suit under order 36 of the Civil Procedure Rules, must disclose bona fide issues for trial of questions of law or fact.*

165 b) *Where the Applicant shows a state of facts which leads to the inference that at the trial of the action, he may be able to establish a defence to the Plaintiffs claim, he ought not to be debarred of all power to defeat the demand made upon him.*

170 c) *Where the 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 is granted.*

175 d) *Whenever there is a genuine defence either in fact or in law, the Defendant is entitled to unconditional leave to defend.*

180 e) *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.*

I have carefully scrutinised the Affidavits in support of the Application and the one in reply.

185 I would like to point out that counsel for the Applicant failed to properly present in a clear and straight forward manner the grounds necessary to be proved in Application for leave to appear defend in a summary suit. However, this Court upon conducting a wholistic and thorough review of the notice of motion and the Affidavit in support noted that the Application presents potential grounds though poorly articulated or presented by Counsel for the Applicant.

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In the case of **Hikimanay Kyamanywa vs. Sajjabi Chris C.A.C.A No. 1 of 2006** Justice L.E.M Mukasa-Kikonyogo, DCJ (as she then was) held that,

195 *“...for effective administration of justice, the Courts are enjoined to investigate all the disputes and decide them on merit. Errors*

or lapses of the Counsel should not be visited on litigants who have no control over Advocates.”

200 This honourable Court is further enjoined by the Constitution of the Republic of Uganda, 1995 under Article 126 (2) (e) to render justice without undue regard to technicalities. It is also my firm belief that the inadequacies or inefficiency of counsel should not be visited on a litigant to bar a litigant from accessing justice.

205 A thorough review of the pleadings in this Application reveals that the Applicant is indebted to the Respondent to a tune of UGX 80,000,000/= (Uganda Shillings Eighty Million Only). The Respondent filed a summary suit vide Civil Suit No. 691 of 2020 to recover the above sum from the Applicant. In seeking for leave to
210 appear and defend the Applicant avers that there is a triable issue to be determined by Court on grounds that the tenancy Agreement for the business premises which the Applicant purchased from Respondent barred the Respondent from parting with possession of the premises without the consent of the landlord and that the
215 Applicant was stopped from carrying out renovations on the premises by a one Ayebazibwe immaculate on grounds that the Applicant was not known to the landlord.

This Court finds that there are bona fide issues for trial in this matter
220 which cannot be exhaustively determined in this Application. Secondly, the Applicant has raised a set of facts which leads to an inference that at the trial of the action, he may be able to establish a defence to the Plaintiffs claim. It would be a clog to justice if this honourable Court denied the Applicant an opportunity to defend the
225 suit.

In the premises I find that this matter can only be judiciously handled upon hearing both parties on merit and I allow the Application.

The Applicant is hereby granted leave to appear and defend Civil Suit No. 691 of 2020.

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Costs for the Application shall be in the cause.

The Applicant shall file and serve his written statement of defence within 15 days from the date of this Ruling.

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I so order.

Delivered at Kampala and signed copies for the parties placed on file this 1st day of March, 2021.

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RICHARD WEJULI WABWIRE
JUDGE

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