

April 2017, the expected date of delivery, the cargo had not been delivered to the said Client.

[3] On 26th April 2017, the Client cancelled the contract of supply of tiles with the Applicant and threatened to sue. The Applicant engaged the Client for an amicable settlement and it was agreed that the Applicant avails Spanish tiles which were more expensive than the previously ordered tiles but suited to the Client's purpose. The Applicant eventually received the Brazilian tiles on 8th May 2017 and, in order to mitigate loss, the Applicant sold them over a period of many months at a discounted price. It is claimed by the Applicant that owing to the above developments, it suffered business loss, recovery of which the Applicant intends to seek by way of a set off and counterclaim against the Respondent.

[4] Meanwhile in the main suit brought by the Respondent, the Plaintiff sought for payment of USD 49,196, interest and costs accruing from an agreement between the parties for the Respondent/Plaintiff to handle, store, transport and deliver the Applicant's several consignments of ceramic tiles to Kampala from Mombasa. The Respondent stated that payments for the said services were supposed to be made on demand. The consignments were duly delivered by the Respondent but the Applicant failed to pay as agreed and was thus in breach of contract. The Respondent thus brought the main suit against which the Applicant seeks leave to defend vide this application.

Grounds of the application and response by the Respondent

[5] The grounds of the application are set out in the Notice of Motion and in an affidavit in support of the application deposed by **Gregory Magezi**, a Director of the Applicant. Briefly, the grounds are that the Respondent (Plaintiff in the main suit) without lawful justification unlawfully held unto the Applicant's (Defendant in the main suit) business cargo causing substantial loss to the Applicant amounting to USD 43,105. The Applicant is entitled to a set off and is entitled to raise the same as a defence against the Respondent's claim. The Applicant paid USD 9,600 out of the USD 14,361 it

knows to be outstanding on account of the Respondent's unlawful acts leaving USD 4,761 due and payable which sum the Applicant is willing to pay. The substantial loss set off and payments above referred raise triable issues that warrant leave to be granted to the Applicant to defend the main suit. The law and justice of the case require that the Applicant be afforded an opportunity to appear and defend itself against the Respondent's claim.

[6] The Respondent opposed the application vide an affidavit in reply deposed by **Nilesh Kanabar**, who stated that he works with the Respondent's office in Kampala with capacity to swear the affidavit. The deponent, however, did not disclose his position in the Respondent Company and, as such, his capacity cannot be ascertained. Nevertheless, the deponent stated that the Respondent diligently and duly carried out the contractual obligations and all the Applicant's consignments were delivered to their designated destinations but the Applicant refused or neglected to pay. He further stated that in this very application, the Applicant admits that they are indebted to the Respondent over and above the amounts claimed. The deponent stated that the Respondent is entitled to judgment on admission, the application has no merit, discloses no triable issues or any plausible defence and the same ought to be dismissed with costs.

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

Representation and Hearing

[8] When the matter came up for hearing, the Applicant and Counsel were not in Court. The Respondent was represented by Ms Alinda Ikanza. The Applicant's Counsel had, however, written a letter to the Court explaining their inability to attend the hearing. Earlier on, when service of the hearing notice had been effected upon the Applicant's Counsel, he had received the service under protest noting the same reason as to why they could not be available on the said date. As such, although I noted that the Applicant's Counsel had not employed any acceptable means of securing an adjournment of the matter, I considered it in the interest of justice to allow

them audience to make arguments in the matter. I therefore set a schedule for filing of written submissions which I directed the Respondent's Counsel to communicate to the Applicant's Counsel. The same was communicated and the submissions were duly filed. I have taken the submissions into consideration in the course of determination of the issue before the Court.

Issue for Determination by the Court

[9] 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

[10] Let me first address a matter that was raised by Counsel for the Applicant in their submissions in rejoinder relating to the late filing of the submissions in reply by the Respondent's Counsel. Because the matter was raised in the submissions in rejoinder, the Respondent's Counsel had no opportunity to respond to the same. Nevertheless, I will make a consideration over the same going by the facts and circumstances as they are before me. As well noted by Counsel for the Applicant, the fixed schedules were interrupted by the break-out of the Covid-19 pandemic. Although Counsel for the Applicant asserts that the lockdown was lifted in May 2020, and the Respondent's Counsel ought to have filed their submissions by 20th June 2020, I am not prepared to take that line of argument. This is because the Covid-19 lockdown affected people vastly and in different ways. Since the Applicant had opportunity to respond to the belated submissions, I do not find any prejudice suffered by the Applicant owing to the late filing of the Respondent's submissions. I will therefore disregard this point raised by the Applicant's Counsel.

[11] The second point I want to address before considering the merits of the application is in regard to the affidavit in reply deposed on behalf of the Respondent. As I have indicated in paragraph 6 above, the deponent does not disclose his status in the Respondent Company and, as such, his

capacity to depone to the affidavit cannot be ascertained. He merely states that he works with the Respondent's office in Kampala. Under the law, not every worker of a company can depone to an affidavit on behalf of a company. Such capacity is possessed by a person who is either a Director, Secretary, other principal officer of the company or an authorized agent, say a holder of a power of attorney or such other authority. In absence of proof that Nilesh Kanabar falls in any of those categories, his capacity to depose to the facts herein becomes questionable. However, since the Applicant's Counsel did not raise this matter, the Respondent were not alerted to the omission or defect. Perhaps they would have indicated the proper capacity of the deponent. That being the case, I will give the benefit of doubt to the Respondent and leave the affidavit in reply to stand.

[12] Turning now to the merits of the application, 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***).

[13] 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.”

[14] 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***).

[15] In the present case, the major contention by the Applicant is that the Applicant has a claim for a set off which they want to seek against the Respondent by way of a counterclaim. The Applicant sets out the facts disclosing the set off and counterclaim in paragraph 7 of the affidavit in support quite elaborately. Surprisingly, the Respondent in the affidavit in reply makes no rebuttal or even mention of the said facts. Under the law, facts contained in an affidavit which are not denied by the opposite party are deemed to be true. The said facts disclose that the Applicant has a claim in breach of contract against the Respondent. The Applicant further indicate that although they are aware that the Respondent claims from the Applicant USD 4,761 which the Applicant is willing to pay, the Applicant on the other hand claims USD 43,105 for business loss occasioned by the non-timeous delivery of the tiles to the Client.

[16] Taking the above into consideration, what comes out as the Applicant's case is that there was no way they would pay the Respondent's claim of USD 4,761 when they have a claim of up to USD 43,105 against the same

Respondent. They would therefore want the sum of USD 4,761 set off and claim the balance by way of a counterclaim. In absence of facts controverting this claim by the Applicant, it is in my view a legitimate claim and one that requires investigation by the court through a trial. The law is that a defendant may in answer to the plaintiff's claim rely upon a set off or counterclaim. A set off is a defence to an action. This was well articulated in the case of ***MMK Engineering Vs Man Trust Uganda Ltd HC M.A No. 128 of 2012*** while relying on the text from **Odger's Principles of Pleading and Practice in Civil Actions in the High Court of Justice, 27th Edition, pages 71-78.**

[17] Counsel for the Respondent invited the Court to take the same approach as was taken by **Justice Madrama** (as he then was) in the case of ***Deco Tiles Uganda Ltd Vs DHL Global Forwarding Ltd HC M.A No. 671 of 2015***. In that case, the Learned Judge having found that the applicant/defendant had grounds for a counterclaim, he further found that the same did not constitute a defence to the main claim. The Judge thus entered judgment in the summary suit, stayed execution and granted leave to the defendant to file a counterclaim or set off against the respondent's judgment which would be the subject matter of the trial.

[18] As submitted by Counsel for the Applicant in their submissions in rejoinder, the facts and circumstances in the above cited case of ***Deco Tiles Uganda Ltd Vs DHL Global Forwarding Ltd*** are different from those of the present case. In the ***Deco Tiles case***, the Applicant did not dispute the plaintiff's claim in the summary suit and the counterclaim was based on a different cause of action. In the instant case, while the Respondent in the main suit claims for a sum of USD 49,196 with interest and costs, the Applicant only admits to USD 4,761; in respect of which the Applicant claims a right to a set off. Clearly in my view, these are quite different facts and circumstances. True, the route taken by **Madrama J.** (as he then was) in the ***Deco Tiles case*** is available under the law according to the extract from the **Odger's Principles** as cited in ***MMK Engineering Vs Man Trust***

Uganda Ltd (supra). The Court in **MMK Engineering Vs Man Trust Uganda Ltd (supra)** stated:

“Where it is a counterclaim, and there is no connection with the Plaintiff’s cause of action, the Plaintiff may be given leave to obtain judgement on the claim provided that it is clearly entitled to succeed upon it and will be put to unnecessary expense in having to prove it. It is within the court’s discretion to stay execution up to the anticipated amount of the counterclaim pending the trial of the counterclaim or further order.”

[19] The Court in the **Deco Tiles case** took the above path. Clearly that approach was based on the facts and circumstances of that case. It was by no means intended to be an approach suggesting a rule of general application. As already shown herein above, the facts and circumstances of the present case are distinctly apart from those in the above cited case. The Court cannot therefore arrive at the same conclusion as that in the **Deco Tiles case**.

[20] On the facts and circumstances of the present case, therefore, having taken the law as set out above into consideration, my finding is that the Applicant has disclosed plausible grounds of defence and bona fide triable issues of law and fact which are sufficient to justify the grant of leave to appear and defend the main suit. The Applicant deserves an opportunity to put forth and prove their grounds for a set off and counterclaim upon the alleged facts.

[21] In the circumstances, this application is therefore allowed with the following orders:

- (a) The Applicant is granted leave to appear and defend the main suit vide Civil Suit No. 598 of 2019.
- (b) The Written Statement of Defence shall be filed within 15 days from the date of delivery of this Ruling.
- (c) The costs of the Application shall abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered by email this 16th day of August, 2021

A handwritten signature in blue ink, appearing to read 'Boniface Wamala', with a long horizontal flourish extending to the right.

Boniface Wamala
JUDGE