

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

M.A No. 40 of 2021

[Arising from Civil Suit No. 1086 of 2020]

ROKO CONSTRUCTION LIMITED:::::::::::::::::::::::::::::::::APPLICANT


VERSUS

CITY OIL UGANDA LIMITED:::::::::::::::::::::::::::::::::RESPONDENT

BEFORE: HON. JUSTICE DUNCAN GASWAGA

RULING

- [1] This is a ruling on an application for leave to appear and defend brought under S98 of the CPA Cap 71, Order 36, rule 3 & 4 & Order 52 rule 1, 2 & 3 of the Civil Procedure Rules that the applicants be granted leave to appear and defend HCCS No. 1086 of 2020 and costs of the application be provided for.
- [2] The grounds for this application were expounded on in the affidavit of **Mark Koehler** filed in support of the application and these are that; the applicant/defendant is not indebted to the respondent/plaintiff in the

 1

sum claimed; the applicant/defendant contracted the respondent/plaintiff to supply fuel in November and December 2019 but following the delivery, the applicant paid the monies due to the respondent/plaintiff for the delivered items; that the respondent/plaintiff delivered adulterated fuel which was rejected and returned by the applicant/defendant to the respondent/plaintiff however it is part of the sum claimed by the respondent; that the suit is barred in law, does not disclose a cause of action against the applicant and it should be struck out with costs; the applicant has a good defense to the whole suit that is bound to succeed and that the applicant/defendant's application raises triable issues and it would be just and equitable to grant the applicant/defendant leave to appear and defend the suit on its merits.

- [3] This application raises one issue;

Whether the applicant satisfies the conditions for the grant of orders for leave to appear and defend Civil Suit No. 1086 of 2020.

- [4] Counsel for the applicant submitted by way of written submissions. Counsel submitted that the grounds for the grant of unconditional leave to appear and defend have been enunciated under case law in **Benon Tamusange & Timothy Justin Rover Mathew vs Exim Bank (U) Ltd M.A No. 1213 of 2016** where Billy Kainamura , J, stated that, "*the settled law is that for an application for leave to defend to be granted, the applicants have to show that there is a bonafide triable issue of fact or law that they will advance in defence of the suit.*" He went further to cite **Makula Interglobal Trade Agency vs Bank of Uganda [1985] HCB 65, at 66** while considering the above rule held 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 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."

- [5] That as per paragraph 4 of the affidavit of Mark Koehler the fuel that the respondent claims to have delivered was in fact adulterated and of no use to the applicant and further that some of the fuel was never delivered and this was in breach of Section 15(2) (b) of the Sale of Goods and Supply of Services Act, 2018 which is to the effect that there is an implied condition that the goods supplied under a contract are reasonably fit for that purpose where the buyer expressly or by implication makes known to the seller, the particular purpose for which the goods are required so as to show that the buyer relies on the skill or judgement of the seller whether the seller is the manufacturer or not. Further that there is a triable issue as to whether the applicant is indebted to the respondent to the tune of Ugx 237,600,000/= since the applicant requested for fuel to be delivered to various sites for work and the fuel delivered was adulterated while some was never delivered. Also that there is a triable issue as regards interest at a commercial rate of Of 25% considering that the interest was not contractual and as such does not fall in the ambit of a summary suit as was held in the case of Begumisa George Vs East African Development Bank M.A No. 451 of 2010.



- [6] The applicant further submitted that it had attached a draft written statement of defence and that it has met the required conditions for the grant of leave to appear and defend and that costs also be granted to the applicant.
- [7] In reply thereof, the respondent stated that this court held that for leave to appear and defend to be granted the defence must be shown positively by affidavit evidence. That if there is a denial of indebtedness, but there is positive evidence to show indebtedness, then the denial becomes a sham. See **Kabagenyi Teddy Onyango Vs Fina Bank (u) Ltd H.C.C.S No. 710 of 2012**. That the applicant's denial of the debt and claims that some of the fuel supplied was adulterated and some was not supplied are merely assertions not backed by evidence. The applicant must prove these allegations without which the same ought to be rejected by court. That the applicant has failed to meet its burden of proof and the application should fail. See **Corporate Insurance Company Ltd Vs Nyali Beach Hotel [1995-1998]**.
- [8] Further that contrary to the applicant's assertions, fuel was delivered and in good condition and receipt of the same was acknowledged by the applicant. See delivery notes marked "D" in affidavit in reply. As such, there is no doubt that the respondent fully performed its part of the contract. The respondent further stated that the applicant has not presented any evidence to contradict the respondent's statement of account. See paragraphs 3, 4, 5,6,7,8 and 9 of statement of account marked "B" in the affidavit in reply which the applicant has not presented any document to contradict, that the evidence of Mark Koehler is a sham and that this court should reject it as he seeks to



convince the court that the payment proposal and admission of the debt was made in error and that the delivery notes were signed negligently. The respondent prayed that court exercises its powers judiciously and dismisses the application with costs and enters judgment in favour of the respondent.

- [9] In a rejoinder, the applicant stated that it had proved that there are triable issues that warrant grant of leave to appear and defend the suit. That the delivery notes do not speak to fitness for purpose of the goods that were delivered since some of the fuel was adulterated and ended up unused. Further that the court ought to disregard the respondent's prayer that conditional leave be granted and the applicant be asked to deposit the disputed sum in court.

- [10] The court of Appeal in the case of **Kotecha Vs. Mohammed [2002] 1 EA 112** stated thus;

"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."

- [11] The applicant herein intimated to this court that the fuel supplied to it by the respondent was adulterated and that there is a dispute as to the sums demanded by the respondent. The respondent on the other hand asserts that it fully complied with the contract, delivered the fuel and the same was acknowledged by the applicant and delivery notes signed for it. Save for a general denial as to the delivery notes, the applicant does not provide any evidence to rebut the respondent's

assertion that the applicant indeed acknowledged payment and signed on the said delivery notes. No complaint about the quality of the fuel has ever been raised until the time of these proceedings. This must be an afterthought.

[12] For the applicant's case to be convincing at least he ought to have presented some evidence of the actual invoices he intends to rely on or concrete evidence of payment. The applicant presents a very vague and unclear picture regarding the payment of the outstanding claim, stating that a reconciliation of accounts ought to be done. This, after contesting the delivery of the fuel by the respondent and further asserting that some fuel delivered was adulterated and never used. The applicant presents no proof to back these allegations. The applicant also denies any indebtedness to the respondent but presents no evidence or proof of having fully settled its invoices. Moreover, all these assertions were raised in the same affidavit which I find to be tainted with falsehoods and contradictions.

[13] The grounds advanced by the applicant cannot therefore be said to have raised any real or bonafide or triable issue worth entertaining by Court. The grounds are actually mere allegations, sweeping statements and or a sham incapable of constituting a plausible defense. **See Abubaker Kato Kasule Vs Tomson Muhwezi [1992-1993] HCB 212.** The application is calculated and aimed at evading Justice and payment of the respondent's money.

[14] In the case of **Corporate Insurance Co. Ltd Vs Nyali Beach Hotel Ltd [1995-1998], EA** the Court of Appeal of Kenya ruled that;

"Leave to appear and defend will not be given merely because there are several allegations of fact or law made in the



defendant's affidavit. The allegations are investigated in order to decide whether leave should be given. As a result of the investigation even if a single defence is identified, or found to be bonafide, unconditional leave should be granted to the defendant."

- [15] Resultantly, this court finds that this application is devoid of merit and hereby dismisses it. Costs shall be awarded to the respondent.

I so order

**Dated, signed and delivered at Kampala this 3rd Day of September
2021**


Duncan Gaswaga

JUDGE