

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

M.A.No. 412 of 2020

(Arising from M.A. No. 548 of 2019)

(Arising from Civil Suit No. 504 of 2019)

KARE DISTRIBUTION LTD:.....APPLICANT

VERSUS

NTAKE BAKERY AND CO. LTD:.....RESPONDENT

RULING

BEFORE: HON. JUSTICE DUNCAN GASWAGA

- [1] This is an application brought under, Section 98 CPA, Section 33 of the Judicature Act, Order 50 r 8 CPR for orders that; an order dismissing the applicant's application vide M.A No. 548 of 2019 arising from Civil Suit No. 504 of 2019 be set aside; the applicant be granted unconditional leave to appear and defend and / or file her written statement of defence in the main suit and that the costs of this application be provided for.
- [2] The grounds of this application are set out in the affidavit of **Sserunkuma Faruku** and are that; the applicant was sued for Ugx 129,300,000/=; that the applicant filed her application seeking leave to appear and defend the said suit on 05/07/2019; that the applicant's application was dismissed and the summary judgement was entered against the applicant and she was ordered to pay to the respondent

Ugx 129,300,000/=; that the learned trial Registrar never considered the applicant's submissions; that the application by the applicants herein before the learned Registrar was premised on genuine grounds which among others include; that the respondent disorganized the applicant's business, they threatened to forcefully lock the applicant's place of work and or bakeries; the respondent's agents invaded the applicant's place of work and withdrew the supplied goods; the respondent's agents could come at the applicant's supermarket to block and or deny access to the applicant's customers; that the respondent's agents took back the goods they had earlier supplied to the applicant without any accountability of the said goods, that the applicant denies the impugned debt of Ugx 129,300,000/= to the respondent since most of the goods they supplied to the applicant they were taken back and that it is in the interest of justice and fairness that this application be allowed with costs against the respondents.

[3] This application raises two issues to wit;

(i) Whether this application discloses sufficient cause to set aside the order dismissing M.A No. 548 of 2019

[4] Counsel for the respondent raised a preliminary objection to the effect that the instant application is manifestly irregular, incompetent and improperly before court and ought to be struck out with costs. That the application for leave to appear and defend having been disposed off under Order 36 rule 5 CPR, and a decree consequently entered under Order 36 rule 3 CPR, the proper course for the applicant was to apply to set aside the decree under Order 36 rule 11 CPR. That Order 36 on summary suits is self-contained and this court does not have jurisdiction to entertain the instant application under Order 50 rule 8 CPR in so far

as it is res judicata and as such the application is incurably defective and bad in law. Counsel further stated that Order 50 rule 8 applies where the Registrar only makes an order but not in an instance where the order gives rise to a decree which in effect brings the suit to finality. That the applicant ought to have appealed against both the order and decree to the court of appeal or had recourse to Order 36 rule 11 CPR. That in the alternative, the applicant could have applied for review of the summary judgment/decreed. Counsel concluded by praying that the same be struck out with costs.

[5] In response, Counsel for the applicant stated that the objection raised by the respondent is a misconception of Law and prayed that the same be disregarded for lack of merit. That the confirmed position is that where an application for leave to appear and defend is dismissed inter-party, the remedy available to the aggrieved party is an appeal and not another application as was held in the case of **ZamZam Noel & Others Vs Post Bank Ltd Misc. Appn No.530/08**. Further that an appeal is a creature of statute and the same cannot be imagined as such the proper procedure to follow hereof was an appeal against the orders of the Registrar under Order 50 rule 8. That whereas a Registrar is in the High Court, the Registrar does not amount to the High Court, See Section 13 of the Judicature Act Cap 13 and **Attorney General and Anor Vs James Mark Kamoga and Anor S.C.C.A No.8 of 2004**. Counsel concluded by submitting that the objection lacks merit and the same should be disregarded.

[6] Order 36 rule 11 is to the effect that;

11. Setting aside decree.

After the decree, the court may, if satisfied that the service of the summons was not effective, or for any other good cause, which shall be recorded, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit.

- [7] From reading the above it is clear that the drafters of the Civil Procedure Rules envisioned a situation where the defendant in a summary suit had not filed an application for leave to appear and defend. This court is further persuaded by the decision in **Zamzam Noel & Ors Vs Post Bank Ltd** (supra) where Arach Amoko, J as (she then was) held that;

“Rule 11 clearly meant for an applicant who did not apply for leave to appear and defend a suit within the prescribed time and judgment in default of application for leave was entered against him as a result under Order 36 rule 3 in the instant case, where an application for leave to appear and defend was dismissed the only remedy is in my view an appeal against the dismissal order”

- [8] **Order 50 rule 8 CPR** states that; *“Any person aggrieved by any order of a Registrar may appeal from the order to the High Court. The appeal shall be by motion on notice.”* Following the discourse above, and the import of the above order, the applicant is rightly before this court. Accordingly this preliminary objection is dismissed and I shall proceed to determine the application/appeal on its merits.

Appeal/Application.

[9] Counsel for the applicant argued grounds 1,2,3 and 4 jointly and these were that; The learned Registrar erred in law and fact when she failed to properly evaluate evidence before her, hence arriving at a wrong decision that the applicant is indebted to the respondent to the tune of Ugx 129,300,000/=;The learned Registrar erred in law and fact when she held that the applicant's application has no plausible / bonafide defence; The learned Registrar erred in law and fact when she held that the applicant did not show a good cause to be granted leave to defend; The learned Registrar erred in law and fact when she dismissed the applicant's application seeking leave to appear and defend the respondent's summary suit. Counsel further stated that there was overwhelming evidence for the grant of unconditional leave to appear and defend. Counsel referred court to paragraph 6 of the affidavit in support of the application whereof it was satisfied that the respondent disorganized the applicant's business when they went with a truck and took the goods they had supplied which evidence was not considered by the registrar at all.

[10] In response thereof, Counsel stated that the case of **Francis Wazarwahi Bwengye Vs Haki Bonera HCCA No.39** was cited out of context by Counsel for the applicant considering that the applicant was given an opportunity to justify the grant of leave to appear, there was no error or lapses and as such no party was condemned unheard. That the learned Registrar properly dealt with the application and found no genuine or plausible triable issues to warrant grant of leave to appear and defend. that this decision was arrived at following these reasons; that it was not in dispute that wheat flour worth Ugx 129,330,000/= was supplied and delivered to the applicant and the applicant acknowledged

receipt thereof; the applicant issued cheques worth Ugx 129,300,000/= in consideration for the goods, to be banked on due dates in succession. The applicant counter-manded the cheques before the respondent could effect payment for the goods delivered. That the reason for the countermand was that the applicant's machinery had broken down and he had not received payments for some supplies effected to Rwanda which in no way related to the alleged withdrawal of stock by the respondent from the applicant. The applicant did not also attach evidence of withdrawal of stock from its premises and neither did it show the quantity of the allegedly withdrawn stock and used stock. Further that the property in the goods passed to the applicant upon delivery in accordance with Section 25 of the Sale of Goods and supply of services Act 2017 and the respondent was entitled to be paid.

- [11] Counsel for the respondent further submitted that, just as there was evidence of delivery, the applicant also ought to have attached evidence of withdraw of the goods by the respondent, See **Bunjo Vs KCB Bank (U) Ltd HCMA No. 174 of 2014** where Masalu, J held that

"A defendant who wishes to resist the entry of a summary judgment should disclose through evidence that there are some reasonable grounds of defence. That resisting of summary judgment should not be based on mere assertions of probable defences available to the defendant but rather the defendant should take step further and show court the evidence he or she intends to rely on to prove his or her defence which was not the case."

- [12] That the learned Registrar fully evaluated the emails attached to the affidavit in reply in **M.A No. 548 of 2019** and Counsel called upon this

court to evaluate the same emails which are annexure "C" and "D" to the affidavit in Reply. Counsel concluded by submitting that whatever the applicant raised herein was dully considered by the learned Deputy Registrar. Counsel prayed that the application be struck out and or dismissed with costs.

[13] In a brief rejoinder Counsel for the applicant stated that the submission of Counsel for the respondent , other than being evasive did not address the applicant's biggest contention that justice in this matter can only be served or seen to be achieved when the appellant has been given an opportunity to defend itself. That the paragraphs relied on in the paragraph of Gloria Mujoyawimana present a contentious argument which merits courts consideration upon a full trial but not in a summary manner. That the question before court is whether the goods were taken for delayed payments and that the explanation given with the emails raises a serious contentious issue. That it is not in dispute that the respondent's agent with impunity surrounded the applicant's business premises and caused business sabotage and loss for which the applicant has a counter claim against the respondent.

[14] According to the case of **Kifamunte Henry v Uganda, Criminal Appeal No. 10 of 1997,**

"The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."

[15] **Order 36 rule 8 of the Civil Procedure Rules** provides for leave to appear and defend the suit which may be given conditionally or unconditionally, or subject to such terms as to the payment of money into court, giving security, or time or mode of trial or otherwise, as the court may think fit. In the case of **Miter Investments Ltd Vs. East African Portland Cement Co. Ltd, M.A No. 0336 of 2012** it was held that;

“In order to avoid judgment being entered for the plaintiff, the defendant must show that there is a triable issue or that for some other reason, there ought to be a trial. Where the defendant raises a triable issue on his affidavit, he must not at this stage be shut out, and must have leave to defend, although his case may appear to be a weak one. On the other hand, mere denials of the plaintiff's case are insufficient. The defendant must clearly disclose the nature and extent of his defense in a clear language.”

[16] From the facts stated above it is important to note that the applicant disputes the sums claimed in the specially endorsed plaint i.e. Ugx 129,300,000/=. The applicant claims that some of the goods delivered by the respondent were subsequently withdrawn by the agents of the respondent. The respondent however claims that in an email correspondence they indicated the need to withdraw the goods but failed to do it. This is a contentious matter at the root of the dispute and the same ought to have been considered by the learned Registrar. From the foregoing, it is apparent to this court that what needs to be done is a reconciliation of both the applicant and respondent's accounts and determine what amount is due and owing. This can only be done

once the parties have been granted leave to appear and defend the claim against them.

[17] In the circumstances therefore, this application is hereby allowed with the following orders;

- (i) the order entered in Civil Suit No. 504 of 2019 is hereby set aside and the matter re-instated.**
- (ii) the applicant is ordered to file a written statement of defence within fifteen days from now and serve the respondent as prescribed by law.**
- (iii) costs shall be provided for.**

I so order

Dated, signed and delivered this 20th day of April 2021



Duncan Gaswaga

JUDGE