

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
COMMERCIAL DIVISION  
MISC. APPLICATION NO. 1031 OF 2021  
(Arising from Civil Suit No. 116 of 2021)**

**MAKO WAREHOUSE CO. LIMITED ..... APPLICANT**

**VERSUS**

**TOTAL UGANDA LIMITED ..... RESPONDENT**

**BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO**

**RULING**

Introduction

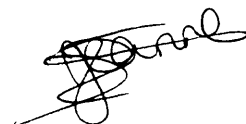
This application was brought by way of Notice of Motion under Order 36 Rule 3(1) & 4, Order 52 Rules 1,2 & 3 of the Civil Procedure Rules, SI 71-1 for orders that:

- (a) The Applicant be granted unconditional leave to appear and defend Civil Suit No. 116 of 2021
- (b) Costs of this application be provided for.

Background

The Applicant and Respondent entered into a lubricants distributorship agreement in 2014 wherein the Applicant was an authorized distributor in the Northern region. The lubricants were supplied by the Respondent, sometimes on credit, to the Applicant. The Respondent sued the Applicant in Civil Suit No. 116 of 2021 (hereafter referred to as the main suit) by summary procedure for recovery of Ugx. 66,416,298/= as balance for breach of contract.

The Applicant claims that it is not aware of the purported outstanding invoices from the Respondent since the Respondent intentionally breached the contract by stopping its supply of lubricants to the Applicant as agreed in March 2018. The Applicant claims that the Respondent terminated the contract and appointed another distributor in the Northern Region without the Applicant's knowledge. That to date the Applicant is stuck with a consignment worth Ugx. 28,632,247/= in its stores and yet the Respondent has appointed another distributor. This has affected the Applicant financially. The Applicant also contends that the contract between the parties provided that all disputes arising



out of it should be settled by arbitration, and so this court does not have jurisdiction to hear the matter.

The Respondent opposed the application stating that the Applicant failed to pay for consignments advanced to them on 2<sup>nd</sup> March, 31<sup>st</sup> March, and 13<sup>th</sup> July 2018 worth Ugx. 57,938,526/=, Ugx. 8,409,914/=, and Ugx. 8,409,914= respectively. The Applicant made a payment of Ugx. 6,474,180/= on 31<sup>st</sup> July, 2018 bringing the outstanding debt to Ugx. 66,416,298/=. That the Applicant is aware of the outstanding invoices and sums demanded but has not cleared it. Additionally, that the Applicant acknowledged its debt and proposed a payment plan but that did not yield. The Respondent contends that the Applicant is using this application to delay the Respondent from recovering its money. That the Applicant indeed has no defense nor does the application raise any triable issues. Lastly, that this court has jurisdiction to hear the matter.

### Representation

The Applicant was represented by Peter Mulongo at the hearing, while the Respondent and its advocates were not present. Nonetheless, both parties filed written submissions as had been directed by the Registrar.

### Issues for Determination

1. Whether the Applicant should be granted unconditional leave to file a defense in Civil Suit No. 116 of 2021.
2. What remedies are available to the parties?

### Resolution

**Issue One:            Whether the Applicant should be granted unconditional leave to file a defense in Civil Suit No. 116 of 2021.**

Under Order 36 of the Civil Procedure Rules, leave to appear and defend a suit may be granted where the applicant shows that he or she has a good defense 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 defense

Unconditional leave to appear and defend a suit may further be applied for and granted to a Defendant who shows that his/ her defense raises a triable issue or questions of fact or law with which ought to be determined at trial. To the extent that the Defendant raises a triable issue in his Affidavit, he must not be shut out and should be granted leave to formulate his defense and adduce evidence of the



triable issue raised. See **MM.K Engineering -v- Mantrust Uganda Ltd Misc. Application No. 128 of 2021** and **Bhaker Kotecha v Adum Muhammed [2002] 1 EA**

In **Maluku Inter Global 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.” (Underlined for emphasis.)

The Applicant attached a draft Written Statement of Defence (“WSD”) to its application which relayed the Applicant’s would be defense. In its WSD, the Applicant raises three preliminary objections, contends that it was instead the Respondent in breach of contract, and denies knowledge by the sums claimed.

The Applicant intends to raise a preliminary objection that the main suit is barred by law for want of service. Secondly, that the plaint does not disclose a cause of action since it is based on breach of contract and the Plaintiff has not attached the contract relied upon. The last preliminary objection is that this court is not the appropriate forum to adjudicate over a dispute between the parties.

Linking the above potential preliminary objections back to the affidavit in support, Otim Geoffrey Mickey, Managing Director of the Applicant company states in paragraphs 15 & 16 of his affidavit in support of the application that the appropriate forum for the dispute is arbitration in line with the contract. Particularly, he avers in paragraph 16 that:

*“Further, I know that the agreement between the parties provided for disputes to be settled through arbitration but, the Applicant has never been notified of the dispute or proposal for appointment of an arbitrator.”*

The Respondent in paragraph 10 of Sophia Wadda’s (Legal Officer at Total Uganda Limited) affidavit in reply that this court has jurisdiction to handle the main suit. I find that a question on the jurisdiction of this court is a triable issue sufficient enough to warrant grant of the unconditional leave to appear and defend. However, the Applicant has not attached the agreement relied upon to make the assertion that the proper forum for dispute resolution is arbitration.



I agree that at this stage the court is not required to determine the merits of the suit. The court is not to prove the applicant's defense to the suit but to ask for the opportunity to prove it through a trial. What the court has to determine is whether the defendant has shown good cause to be given leave to defend. See **Geoffrey Gatete & Another -v- William Kyobe, Supreme Court Civil Appeal No.7 of 2005**. However, the Applicant still has a duty to prove on a balance of probabilities the averments made in its application. The court does not take as gospel truth every assertion made in the affidavit in support of the application, especially where the assertion makes reference to a critical document. It is expected that the Applicant attaches the relevant agreement for this court to scrutinize as part of the application. The Applicant did not and this left the court at a loss in determining this point.

Nonetheless, the application raises triable issues as to whether the sums claimed arose after the agreement between the parties had been terminated. This question depending on its resolution would have an impact on the sums claimed by the Respondent in the main suit. There is also the question of whether the main suit raises a cause of action as raised by the Applicant in its draft WSD.

I therefore find that there are triable issues raised by this application that warrant grant of leave to the Applicant to appear and defend the main suit.

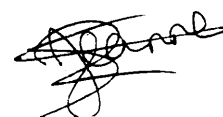
**Issue Two: What remedies are available to the parties?**

The Applicant seeks unconditional leave to appear and defend the main suit, and for costs of the application to be provided for.

On record is Annexure E to the Affidavit in Reply which is a letter dated 28/06/2018 from the Applicant's Managing Director to the Respondent's Commercial Manager. In there, Mr. Otim Geoffrey Mickey explains the reason for the delayed payment and proposes a payment plan. The Respondent contends that by this letter, the Applicant admitted to the sums claimed. Counsel for the Respondents prayed that if court is inclined to grant the Applicant leave to appear and defend, then it should be conditional leave subject to the Applicant depositing the amount claimed in the main suit.

Paragraph 2 of the letter marked Annexure E to the Affidavit in reply states:

"My second option in case the above payment doesn't come in time, is to pay from the business within 60 days from now. I will be paying 33m each and every month starting with the month of July 2018. This will be my other option though I am very optimistic it will come through soon."



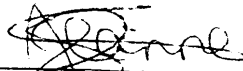
The contents of the above letter are best understood upon the Applicant tendering witness testimony clarifying on the same. Therefore, this court cannot at this point in the trial make conclusions on it and base off of it to grant conditional leave.

In the premises, the Applicant having proved that there are triable issues to be determined by this court, the application succeeds.

Conclusion

1. The Applicant is hereby granted unconditional leave to appear and defend Civil Suit No. 116 of 2021
2. The Applicant is hereby ordered to file its defense in Civil Suit No. 116 of 2021 within fourteen days from date of this ruling
3. Costs shall abide the outcome of the main suit.

I so order.



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**Jeanne Rwakakooko**

**JUDGE**

**12/04/2022**

This Ruling is delivered on this \_\_\_\_ day of \_\_\_\_\_, 2022