

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
MISC. APPLICATION NO. 139 OF 2020
(Arising from Civil Suit No. 41 of 2020)

MUSUMBA ISAAC ISANGA APPLICANT

VERSUS

QUID FINANCIALS LTD RESPONDENT

BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO

RULING

Introduction

This application was brought under Section 98 of the Civil Procedure Act, Cap 71, Order 36 Rules 3 & 4 of the Civil Procedure Rules, SI 71-1 for orders that:

1. The Applicant be granted unconditional leave to appear and defend Civil Suit No. 41 of 2020
2. Costs of this application be in the cause.

Background

The Respondent sued the Applicant by summary procedure vide Civil Suit No. 41 of 2020 (the main suit) to recover a liquidated demand of UGX. 425,000,000/= and costs of the suit. The sum claimed in the main suit arose from sale of land comprised in Kyadondo Block 214 Plot 1149, land at Kisasi (the suit land) by the Applicant to the Respondent, but the Applicant failed to deliver vacant possession of the land. The Applicant signed a document acknowledging the UGX. 425,000,000/= owed to the Respondent.

The Applicant brought this application on grounds that the main suit is frivolous and vexatious as it discloses no cause of action. That he intends to raise this as a preliminary objection in the main suit, and prays that for this reason he be granted unconditional leave to appear and defend the same. The Applicant also claims that he has a meritorious and substantial defense to the main suit. That the application raises a number of triable issues that can only be dealt with at a trial.

The Respondent's Manager, Okecha Charles swore an affidavit in reply opposing this application thus. He stated that the affidavit in support of the application is incompetent and that it flouts the rules in Order 7 of the Civil Procedure Rules,



and neither is it supported by the Applicant's evidence. Also that the application does not disclose any triable issues or a plausible defense. That it was brought in bad faith with the sole purpose of delaying the Respondent from obtaining judgment from this court.

Representation

At the hearing, the Applicant was represented by Paul Aheebwa Byamukama, while Kafeero Alexander appeared for the Respondent. The parties were directed to file written submissions per a set court schedule. Only the Respondent filed submissions in line with the court schedule.

Issues for Determination

1. Whether the application was filed out of time and should be struck out.
2. Whether the affidavit in support of the application sworn by Barenzi Johnny Patrick is defective.
3. Whether the Applicant should be granted leave to appear and defend Civil Suit No. 41 of 2020.

Resolution

Issue One: Whether the application was filed out of time and should be struck out.

The events pertaining to this issue are as follows. The Respondent filed the main suit on 17th January, 2020, and summons in a summary suit was issued by this court on 20th January, 2020. The summons and accompanying documents were served onto the Applicant on 23rd January, 2020 by WhatsApp Messenger. See affidavit of service sworn by Muhiga Hamza, a court process server, on 2nd February, 2020. It has been held by this court that service by WhatsApp Messenger, e-mail or any other electronic means is permissible, especially in cases where a litigant is evading service of court processes on him or her. See **Male H Mabirizi -v- Attorney General, Misc. Application No. 918 of 2021**. Such service is effective as it does the job of notifying the litigant of the hearing date or of pending court proceedings against him or her.

Muhiga Hamza attested to this service in paragraphs 3-7 of his affidavit of service. He stated that he called the Applicant on 21st January, 2020 and explained to him the purpose of his call, and his desire to serve him with court processes. The Applicant asked him to meet him the following day at 10am. The process server tried to reach the Applicant on the 22nd and 23rd January in vain. He then informed the Plaintiff. The Plaintiff reached the Applicant and the two reached an arrangement. The Plaintiff informed Muhiga Hamza to send the court documents to the Applicant via WhatsApp Messenger, which he did on 23rd January, 2020. The same were also sent to the Applicant's email. Excerpts of



these communications were marked annexures A & B to Hamza Muhiga's affidavit of service. The Applicant therefore was for all intents and purposes effectively served with the summons and summary suit.

This application was filed on 17th February, 2020. The Applicant on 1st July, 2020 before hearing of this application filed Misc. Application No. 428 of 2020 seeking orders that the time for filing Misc. Application No. 139 of 2020 be enlarged and hence the application be validated, and costs be provided for. This court heard Misc. Application No. 428 of 2020 on 28th June, 2022 in the presence of counsel for both parties. Counsel Byamukama for the Applicant submitted that his client wished to withdraw the application, to which counsel Kafeero for the Respondent did not object. Court then ordered for withdrawal of Misc. Application No. 428 of 2020.

Mindful of the above set of events, I shall now consider the law on time within which to file an application for leave to appear and defend a summary suit. Order 36 Rule 3(1) of the Civil Procedure Rules provides that upon filing a summary suit, the court shall cause to be served upon the Defendant a summons in the format of Form 4 of Appendix A to the rules or in such other form as may be prescribed. The summons in Form 4 of Appendix A to the Civil Procedure Rules requires a Defendant to within ten days from the date of service of the summons to file an application for leave to appear and defend the suit. By that requirement of the law, the Applicant was required to file this application for leave to appear and defend the main suit within ten days from 23rd January, 2020; that is by close of business on 3rd February, 2020. This time is computed in accordance with Section 34 of the Interpretation Act, Cap 3.

This application was filed on 17th February, 2020 which was out of time, and the Applicant did so without leave of court. It appears that upon realizing this mistake, counsel for the Applicant unscrupulously attempted to correct the same by filing Misc. Application 428 of 2020. This however, was of no consequence as it was withdrawn. It could not anyway have corrected the breach of the rules.

Therefore, I find that this application was filed out of time and should therefore be struck out. Issue one is answered in the positive.

Issue Two: Whether the affidavit in support of the application sworn by Barenzi Johnny Patrick is defective.

This application was supported by an affidavit sworn by Barenzi Johnny Patrick, one of the Applicant's lawyers. He deposed in paragraph 1 of his affidavit that he was instructed by the Applicant who was not in Uganda at the time, to depone the affidavit on his behalf. Later, on 1st July, 2020, without leave of court, the Applicant himself deposed an additional affidavit in support of the application.



I shall comment on the legality of the additional affidavit in support filed without leave of court. The manner in which the Applicant filed the additional affidavit was disrespectful of court processes. This affidavit was filed almost four months after the Affidavit in Reply had been filed. However, having read the additional affidavit in support and the affidavit in reply, the affidavit in reply as it responds to the merits of the application raised in the additional affidavit. Therefore, the Respondent does not stand to be prejudiced in this matter if the additional affidavit were admitted. Therefore, in my discretion under Section 98 of the Civil Procedure Act, this additional affidavit in support of the application is admitted on this ground. Additionally, it does not depart from the grounds laid out in the notice of motion or introduce new grounds for the application.

The Applicant in his additional affidavit in support of the application attempted to explain his relationship with the Barenzi Johnny Patrick. What this court can collect from this additional affidavit is that Mr. Barenzi is the Applicant's lawyer. That Johnny Patrick's averment in paragraph 1 of his affidavit that at the time of his affidavit the Applicant was not in the country is untrue. The stamps in the Applicant's passport marked Annexure A to the Applicant's additional affidavit in support prove that on 17th February, 2020 the Applicant was within the country. Paragraphs 5-7 of the additional affidavit in support also prove the Applicant was in the country on 17th February, 2020.

Secondly, the Applicant's additional affidavit reveals that Mr. Barenzi swore an affidavit in support of the application without the requisite authority. That is, he was not an appointed agent of the Applicant, but was simply given instructions as counsel for the Applicant. He was not given authority by the Applicant to depone an affidavit in this application on his behalf as claimed in paragraph 1 of Barenzi's affidavit in support. Mr. Barenzi was on 17th February, 2020 instructed by the Applicant to "further progress the progress of this case." See paragraphs 2 & 7 of the Applicant's additional affidavit in support of the application.

The law is that a person swearing an affidavit on behalf of another/others must present their authority in writing, and attach the same to the affidavit. This was set out by this court in **Makerere University -v- St. Mark Education Institute & Ors, Civil Suit No. 378 of 1993**, and **Bishop Patrick Baligasiima -v- Kiiza Daniel & Ors, Misc. Application No. 1495 of 2016**. Mr. Barenzi did not present any such evidence, and the additional affidavit of the Applicant himself further proves that Mr. Barenzi swore his affidavit purportedly on behalf of the Applicant without the requisite authority. Mr. Barenzi purports to swear to facts which in all truth he has no knowledge of. For that reason, the affidavit in support of the application is defective and struck off. See also Order 19 Rule 3 of the Civil Procedure Rules, and **Kaheru Yasin & Anor -v- Zinorumuri David, Misc. Application No. 82 of 2017**.

Issue two is answered in the positive. In turn, the application is struck out.

Issue Three: Whether the Applicant should be granted leave to appear and defend the Civil Suit No. 41 of 2020

Having resolved issues 1 & 2 in the positive, it follows that this application is not granted. As already stated above, I find that the application was filed out of time, and that the affidavit in support of the application was defective. This court struck out Mr. Barenzi's affidavit in support of the application together with its attachments because it was sworn without authority. However, the Applicant's additional affidavit in support at the discretion of the court, stood.

In there, the Applicant avers that he has a plausible defense to the main suit and that his application raises triable issues. See paragraphs 10 & 12 of the additional affidavit in support. He however does not expound on this. He makes mere assertions that are not substantiated upon.

In **Kotecha -v- Mohammed [2002] 1 EA 112**, the Court of Appeal of Uganda explained and held:

"Under the English Rule 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 bonafide defence."

The underlined parts of the above holding point to a requirement by the Applicant/Defendant to prove to the court that he or she possesses a good defense to the main suit or his application raises triable issues. Indeed, as the Supreme Court stated in **Geoffrey Gatete & Anor -v- William Kyobe, SCCA No. 7 of 2005** the purpose of the application is not for the Defendant to prove his or her defense. But simply to show that there is such a defense or triable issue. Mere assertions not expounded upon in affidavit do not make the cut. The Applicant did not clarify to this court what triable issues his application raises, or even what his defense is. He simply claimed that he has a defense.

I find such averments insufficient to prove to this court that the Applicant has a good defense or that his application raises triable questions of law or fact. For that reason, the application fails. Issue three is answered in the negative.

Conclusion


In the premises, Order 36 Rule 5 of Civil Procedure Rules provides that once leave to appear and defend is denied, the Respondent/Plaintiff is entitled to a decree in the summary suit against the Applicant/Defendant as is stated in

A handwritten signature in blue ink is written over a circular official stamp. The stamp contains the text "JUDICIAL MAGISTRATE" and "KAMPALA DISTRICT" around the perimeter, with a central emblem. The signature is stylized and appears to be "S. S. S."

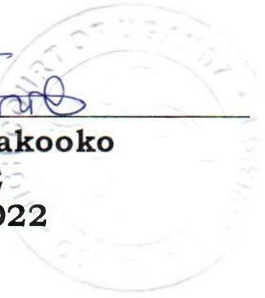
Order 36 Rule 3 particularly Rule 3(2) of the Civil Procedure Rules. What these rules read together infer is that once an Applicant is denied leave to appear and defend the main suit, the Respondent/Plaintiff is then automatically entitled to a decree for an amount not exceeding the sum claimed in the plaint and costs. In this case, the Respondent is entitled to the UGX. 425,000,000/= claimed in the specially endorsed plaint, and costs.

1. This application is denied.
2. The Respondent/Plaintiff is hereby granted judgment in Civil Suit No. 41 of 2020.
3. The Respondent/Plaintiff is hereby awarded UGX. 425,000,000/= as money owed to it by the Applicant/Defendant.
4. Costs of this application and in the main suit are awarded to the Respondent/Plaintiff.

I so order.



Jeanne Rwakakooko
JUDGE
29/07/2022



This Ruling was delivered on the 29th day of July, 2022