

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
MISC. APPLICATION NO. 990 OF 2019
(Arising from Civil Suit No. 838 of 2019)**

**OSBERT ABIMANYA t/a]
4 MATIC LOUNGE] APPLICANT**

VERSUS

**AJIO SABUA t/a]
AJIO SABUA FAMILY ENTERPRISES] RESPONDENT**

BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO

RULING

Introduction

This application was brought by way of Notice of Motion under Order 36 Rules 3 & 4, Order 52 Rules 1 & 2 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. 838 of 2019.
2. Costs of the application be provided for by the Respondent.

Background

The Respondent sued the Applicant vide Civil Suit No. 838 of 2019 (the main suit) by way of summary procedure for recovery of Ugx. 58,925,500/= arising out of breach of contract, interest and costs of the suit.

The Applicant then filed this application for unconditional leave to and defend the main suit on five grounds. First, that the Applicant is not indebted to the Respondent at all. Secondly, that the dispute in the main suit arose out of a transaction between the Applicant and the Respondent's son, Draku Henry. The Applicant contends that the Respondent's claims in the main suit are different from what was agreed between the Applicant and Henry Draku. That as a matter of fact, the Applicant has already paid two installments worth Ugx. 20,000,000/= to Henry Draku's bank account as had been agreed upon. Lastly, that it is just and equitable that the application is granted.



instituted this application on grounds that he is not indebted to the Respondent in the sums claimed. Also that the dispute originates from an oral agreement between the Applicant and one Draku Henry, son to the Respondent for selling assorted drinks and spirits on behalf of the Respondent's family business. That the Respondent's claim is different from what was agreed between the Applicant and Draku Henry. The Applicant states that in any case he has already made two payment installments worth Ugx. 20,000,000/= to Henry Draku as had been agreed.

The Respondent filed an affidavit in reply wherein he acknowledged the oral agreement between the Applicant and his son, Henry Draku. He opposed the application thus. That the Applicant does not have a defense to the main suit against him, especially because he admits to some extent of indebtedness to the Respondent. He maintained that the application does not raise triable issues at all and is therefore frivolous, vexatious and intended to defeat the Respondent's claim for a debt owed to him.

Representation

At the hearing on 28th June, 2022, the Applicant and his counsel were both absent, but Fortunate Atujwikire, a legal assistant at Bagyenda & Co. Advocates, the Applicant's lawyers, was in the gallery. Wacha Moses appeared for the Respondent. Parties were directed to file written submissions per set timelines. However, no written submissions were filed. The court shall determine this application based on the pleadings.

Resolution

Issue: Whether the Applicant should be granted unconditional leave to appear and defend Civil Suit No. 838 of 2019.

Order 36 Rule 3(1) of the Civil Procedure Rules provides:

- (1) Upon the filing of an endorsed plaint and an affidavit as is provided in rule 2 of this Order, the court shall cause to be served upon the defendant a summons in Form 4 of Appendix A of these Rules, or in such other form as may be prescribed, and the defendant shall not appear and defend the suit except upon applying for and obtaining leave from the court.

Order 36 Rule 4 of the Civil Procedure Rules also provides

An application by a defendant served with a summons in Form 4 of Appendix A for leave to appear and defend the suit shall be supported by

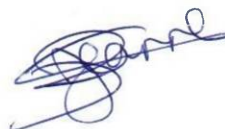
affidavit, which shall state whether the defence alleged goes to the whole or to part only, and if so, to what part of the plaintiff's claim, and the court also may allow the defendant making the application to be examined on oath. For this purpose, the court may order the defendant, or, in the case of a corporation, any officer of the corporation, to attend and be examined upon oath, or to produce any lease, deeds, books or documents, or copies of or extracts from them. The plaintiff shall be served with notice of the application and with a copy of the affidavit filed by a defendant.

The above rules are to the effect that 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 bonafide defense. See also **Africa One Logistics Ltd -v- Kazi Food Logistics (U) Ltd, Misc. Application No.964 of 2019.**

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 **Kotecha -v- Mohammed [2002] 1 EA 112.**

In this application, the Applicant proponent the following defense to the main suit. Firstly, that the main suit was instituted prematurely. This is because the Applicant had agreed with Henry Draku that he would be paying for the drinks & spirits from the Respondent's family business on a quarterly basis starting August 2018. He paid Ugx. 10,000,000/= to Henry Draku's bank account on 4th December, 2018. Following a good sales period during the 2018 Christmas holiday, the Applicant paid for the next quarter on 25th January, 2019. He paid another Ugx. 10,000,000/= to Henry Draku's bank account. The Applicant agreed with Henry Draku that he wouldn't be able to pay for the period of April to October 2019 because his business was undergoing renovations. That therefore, at the time the main suit was instituted on 4th October, 2019, the due date for the next date of payment had not yet arisen. This is stated in paragraphs 5,6,7,11,12,13 of the Affidavit in support of the application.

The other defense raised by the Applicant in its draft Written Statement of Defence (WSD) is that the Applicant is not indebted to the Respondent to the sums claimed. Also that the undated cheques that were presented to the Respondent were to act as security and not a form of payment. See paragraph



4 of the intended draft WSD. To explain this, the Applicant averred in paragraph 8 that he around October 2018 met the Respondent who introduced himself as Henry Draku's father. The Respondent then informed the Applicant that his agreement with Henry Draku should not only be oral but should be backed by security. See paragraph 9 of the affidavit in support of the application. It is then that the Applicant issued the Respondent two undated cheques to act as security for the goods supplied by the Respondent. The Applicant is emphatic in paragraph 10 of his affidavit that the cheques were intended to only act as security and not to be substituted as a form of payment for the goods provided.

Raising a triable issue is to be distinguished from mere denial and the defense raised must not be a sham defense intended to delay the Plaintiff from recovering money due. This is according to **Begumisa George -v- East African Development Bank Misc. Application No.451 of 2010**.

This application viewed wholesomely raises triable issues that warrant a full trial by this court. One of the issues raised is the concerning the sums owed. The Respondent's claim in the summary suit is for Ugx. 58,925,500/=. The Applicant on the other hand avers in paragraph 15 of his affidavit that he is indebted to the Respondent to a tune of Ugx. 38,925,500/=. This is based off payments made prior and invoices issued marked Annexures A, B, C, D & E of the affidavit in support.

There is also a question concerning the status of the cheques issued by the Applicant to the Respondent. The Applicant as narrated above maintains that the cheques were given as security and not a payment option. However, the Respondent infers in paragraph 5 of his affidavit in reply that they were meant as a form of payment for goods supplied to the Applicant. This question of fact as to the cheques can in the context of this case be sufficiently determined by hearing witness testimony on the matter. This is especially because they were introduced as part of an amendment to the earlier existing oral contract between Henry Draku and the Applicant.

Lastly, there is a question of fact as to the terms of the oral agreement between the Applicant and the Respondent's family business/Henry Draku to be determined. These questions demonstrate also a plausible defense to the Respondent's claim in the main suit.

The above questions warrant grant of this application. The law is that for as long as an application for leave to appear and defend raises a bonafide question of law or fact to be tried, the application should be granted.

Conclusion

1. The Applicant is hereby granted unconditional leave to appear and defend Civil Suit No. 838 of 2019.
2. The Applicant is ordered to file his defense to Civil Suit No. 838 of 2019 within fifteen (15) days from delivery of this Ruling.
3. Costs shall follow the outcome of the main suit.

I so order.



Jeanne Rwakakooko

JUDGE

29/07/2022

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