

**THE REPUBLIC OF UGANDA,**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**MISCELLANEOUS APPLICATION NO. 1438 OF 2021**  
**(ARISING FROM CIVIL SUIT NO. 638 OF 2021)**

**Petrom Limited.....Applicant**

**VERSUS**

**Dolphin Petroleum Limited.....Respondent**

**BEFORE: HON. MR. JUSTICE RICHARD WEJULI WABWIRE**

**R U L I N G**

**Introduction**

The Application was brought by the Applicant under S.98 of the Civil Procedure Act Cap. 71, S.33 of the Judicature Act, Order 36 Rule 4 and Order 52 rules 1 and 3 of the Civil Procedure Rules SI 171-1 for Orders that the Applicant be granted unconditional leave to appear and defend the Suit on its merits and for Costs of the Application to be provided for.

**Representation**

The Application was supported by the Affidavit of Oscar Raphael Lutaaya the Applicant's Managing Director. The Respondent filed an Affidavit in reply deponed by Mohamed Abukar, a director of the Respondent.

The Applicant is represented by M/s Jason & Co. Advocates while the Respondent is represented by Mushanga & Associates Solicitors and Advocates. The parties addressed the Court in oral submissions.

### **Preliminary objection**

The Applicant's Counsel raised a preliminary point of law which Court heard before proceeding to hear the merits of the Application.

Counsel submitted that the Respondent's Affidavit in reply offends Section 5 & 6 of the Oaths Act. That annexures A-D bear a jurat that is defective because it does not indicate the time and the place it was made. That it only has a stamp, which offends the Oaths Act and the Rules of procedure. He cited the case of **Ezama Apollo Olema versus Nile Micro finance Uganda Ltd and another, M.A NO.13/ 2017**, in which Court held that where one does not comply with Section 5 and 6 of the oaths Act, it renders the Affidavit incurably defective. Counsel prayed that the Affidavit in reply be struck out for offending the Oaths Act and the Applicant be granted leave to appear and defend the suit on its merits.

In reply the Respondent's Counsel submitted that a simple examination of the Affidavit in reply shows that the Affidavit was affirmed to by a one Muhammad Abubaker who is the Director in the company. That he affirmed it at a place called Kampala on the 4<sup>th</sup> day of April 2022. That in as far as the requirements of the oaths Act are concerned, those requirements have been met.

In rejoinder the Applicant's Counsel submitted that the jurat should indicate the exhibit no. and also indicate where it was sworn from and the date it was

sworn before a particular commissioner for oaths and prayed that the Affidavit be struck out.

## **Merits**

The Applicant's Counsel submitted that fuel was delivered to Total Uganda Ltd by a company known as Costalina Kenya Ltd. That the said company was paid and thus it would be unfair for the Applicant if they are ordered to pay money to a party that it did not contract with. That the question of who delivered the fuel and the issue of the money having been paid raises a plausible defense. Counsel cited the case of **Oscar Raphael Lutaya Versus Habib Asega and others, MA No. 507/2021** where Justice Susan Abinyo held that; where bona fide triable issues of facts or law have been raised, then Court ought to grant the Applicant leave to appear and defend.

In reply, the Respondent's Counsel submitted that the fact that the Respondent made deliveries for the fuel and was dully paid is not a defense in law. That the Applicant has not provided the sums that were paid allegedly and the dates of those payments. That the summary suit is supported by cheques drawn by the Applicant in respect to the deliveries of fuel made but that these cheques were returned unpaid yet those cheques have not been alluded to in the entire Application. He contended that Court should admit that which is not explicitly denied. That para 9 of the Affidavit in reply has an extract of the Applicant's statement at police which admits the entire claim, which demonstrates that the Applicant has no defense to the claim. That the submissions that the deliveries were made to a different party are submissions from the bar which are a departure from pleadings because that allegation appears nowhere in the Application. That this Court has held that

cheques are considered as good as cash and prayed that the Application be dismissed with costs and the claim be granted as prayed.

In rejoinder, the Applicant's Counsel submitted that annexure A to the Affidavit in reply, which is a statement by Oscar Raphael Lutaya who is also the deponent, was made after the deponent was detained for two weeks at CID headquarters and is not a confession in law to be relied on in the current matter. That the dispute is on the sums paid. That the Applicants be granted leave so that the question of what was delivered can be determined by Court. That the Applicant paid a total of 927,316,710/ while under para 10 of the Affidavit in reply the Respondent is claiming 196,539,690,000/ which dispute arises out of the disputed supply that was made. That in the absence of a delivery note from the Respondent showing what was actually delivered, the Applicant be granted leave to appear and defend so that Court can determine the issue on its merits and evidence.

### **Determination by Court.**

### **Preliminary objection.**

The Applicant submitted that the Respondent's Affidavit in reply offends Section 5 & 6 of the Oaths Act because annexures A-D bear a jurat that does not indicate the time and the place.

In the case of **Ezama Apollo Olema versus Nile Micro finance Uganda Ltd and another, M.A NO.13/ 2017** as cited by the Applicant, Justice Stephen Mubiru held that;

*"...it is indeed a mandatory requirement under both section 6 of The Oaths Act and section 5 of The Commissioner for oaths (Advocates) Act that every Commissioner for Oaths or Notary Public before whom any oath or Affidavit*

*is taken or made should state truly in the jurat or attestation at what place and on what date the oath or Affidavit is taken or made. In the jurat, the Commissioner is supposed to indicate his or her name, the date and place, then his or her signature. It is therefore very clear indeed that the jurat should contain the full address of the place where the Affidavit was sworn.”*

**S.6 of the Oaths Act** requires the commissioner for oaths before whom any Affidavit is made under this Act to state in the jurat or attestation at what place and on what date the Affidavit is made. An examination of the Affidavit in reply shows that the Affidavit was affirmed to by Mohamed Abukar at Kampala on the 4<sup>th</sup> day of April 2022.

In my view, the Affidavit in reply was deponed to in compliance with the Oaths Act. The fact that the annexures thereto did not contain the place and date when the Affidavit was made does not make the Affidavit defective as long as the jurat or attestation is in compliance with the law.

The objection is accordingly overruled.

### **Whether the Application warrants grant of leave to defend**

Once it is established that the Applicant has an arguable defence on the merits of the case, then in light of the facts and circumstances, leave to defend is granted. A defence on the merits does not mean a defence that must succeed. It simply means triable issues which raise a prima facie defence and which should go to trial for adjudication, as was held in the case of ***Patel vs Cargo Handling Services Ltd. [1994] EA 75 at 76***, where Duffas P. stated that;

*“A defence on the merits does not mean a defence that must succeed. It simply means triable issues which raise a prima facie defence and which should go to trial for adjudication.”*

That the Applicant’s defence does not have merits as claimed by the Respondent can only be proved by leading evidence. The facts as disclosed should point to the fact that the amount claimed is not precisely established from the pleadings so as to entitle the Respondent to a summary judgment.

In the case of **Kotecha V Mohamed [2002]1 EA 112** faced with a situation where the amount claimed was in dispute, Court stated that the defendant is granted leave to appear and defend if he is able to show that he has a good defence on the merits, 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.

When the foregoing dicta is applied to the facts of the instant case, the Applicant disputes the amount, which has similar circumstances as in the case of **Kanakulya Joseph versus Africa Polysack Industries Limited, MA No. 215/2011**, where Justice Irene Mulyagonja Kakooza (as she then was) granted leave to defend because the facts showed that the amount owed was not clearly defined and prima facie proved on the pleadings so as to entitle the Respondent to summary judgment.

The fact that the Applicants allege that fuel was delivered to Total Uganda Ltd by a company known as Costalina Kenya Ltd that was paid and yet is not party to this Application is a triable issue which raises a prima facie defence and which should go to trial for adjudication because it raises the

question of who delivered the fuel and who was paid if at all. Furthermore, as noted earlier, the amount claimed is not precisely established from the pleadings so as to entitle the Respondent to a summary judgment.

Since the amount claimed is disputed, this requires taking an account to determine the actual amount claimed, which according to the foregoing authorities is a basis for granting leave to appear and defend.

I accordingly, do grant the Application.

The Applicant will file their defence within 7 days from the date hereof and the Respondent/Plaintiff will, file their reply thereto, if they so wish in accordance with the timelines provided under the Civil Procedure Rules.

The costs of this Application shall be in the Cause.

I so order.

Delivered at Kampala this 21<sup>st</sup> day of April 2022.

Richard Wejuli Wabwire

**JUDGE**