THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 1121 OF 2019

(ARISING FROM CIVIL SUIT NO. 916 OF 2019)

1. VICTORIA SEEDS LIMITED :: APPLICANTS
2. OKOT JOSEPHINE

VERSUS

LAWBERT CONSULTS AND AGENCIES (U) LTD :::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] This application was brought by Notice of Motion under Section 98 of the Civil Procedure Act, Order 36 Rules 3 & 4 and Order 52 Rules 1, 2 & 3 of the Civil Procedure Rules, seeking orders that;

a) The Applicant be granted unconditional leave to appear and defend Civil Suit No. 916 of 2019.

b) Costs of the application be provided for.

Brief Background

[2] It is claimed that on 19th April 2018, the 1st Applicant/Defendant entered into a sale agreement with the Respondent for sale of land comprised in Busiro Block 260 Plot 2553 for a consideration of UGX 35,000,000/= which was paid by the Respondent in full and the latter took possession of the said land (hereinafter referred to as **"the subject property"**). After sometime, the 1st Applicant (vendor) allegedly rescinded the transaction on account that the transaction had not been sanctioned by the Company through a resolution. The 2nd Applicant (one of the Directors of the 1st Applicant) offered to refund the purchase price to the Respondent who is said to have refused. The

Respondent later filed a summary suit in this court for recovery of UGX 35,000,000/= and a liquidated interest of 20% per month from the date of the agreement until full payment. The Applicants/Defendants thus filed this application for leave to appear and defend the said suit.

Grounds of the Application and Reply by the Respondent

[3] The grounds of the application are laid out in the Notice of Motion and in an affidavit in support of the application deponed to by **Okot Josephine**, the Managing Director of the 1st Applicant Company who is also the 2nd Applicant. Briefly, the grounds are that it is not true that the Applicants are indebted to the Respondent and the Respondent's demands are baseless and a wastage of the court's time and the claim is thus frivolous and vexatious. The Applicants stated that while it is true that the 1st Applicant executed a sale agreement with the Respondent in respect of the subject property, the Respondent illegally took possession of the subject land and destroyed the 1st Applicant's properties on the said land. The deponent stated that on the 25th of May 2018, the Respondent was informed of anomalies in the sale transaction and was requested to hand over vacant possession upon an offer of refund of the purchase price and one month's interest. The Respondent refused the said offer and instead destroyed the 1st Applicant's properties worth UGX 48,550,000/= on the land prompting the 1st Applicant to institute a civil action for recovery of special and aggravated damages in the Chief Magistrates Court at Wakiso. The deponent further states that the Respondent illegally took possession of the Applicants' maize, beans and coffee thereby causing enormous loss to a tune of UGX 69,000,000/= for which the Applicant shall file a counter claim seeking recovery of the same and mesne profits. She concluded that the Applicants are desirous of defending the claim in the main suit and it is in the interest of justice that this application is allowed.

[4] The Respondent opposed the application through an affidavit in reply affirmed by **Nyanzi Umar**, a legally appointed attorney for the Respondent Company, in which he stated that the motion is bad in law having been brought out of time without leave of court and the same ought to be dismissed. The deponent stated that he personally inspected the court register and observed that the case was fraudulently registered; out of manipulation of another case of Kizito Abdul & 3 Ors vs Musaazi. He further stated that on 6th December 2019, the Respondent's lawyers inspected the file and the court system and no application for leave to appear and defend had been filed by 4:30 PM when the documents are said to have been received. He stated that the Respondent specifically admits the sale agreement and the interest payable thereby. He further stated that the Respondent lawfully took vacant possession of the subject land although the Applicants refused to surrender the owner's copy of title and transfer forms within the agreed period. He concluded that the Applicants have no plausible defense to the claim in the main suit.

[5] The Applicants did not file an affidavit in rejoinder. Instead, at the time of filing their submissions on 2nd November 2020, they filed a supplementary affidavit deponed to by **Abalo Arleen Cesca Okot**. This supplementary affidavit was filed when pleadings had long closed and without leave of the Court. Such an affidavit is incompetent and cannot be accepted and relied upon by the Court. See: ***Surgipharm (U) Ltd vs Uganda Investment Authority & Another, HCMC No. 65 of 2021*** and ***Oyiki Sirino Kassiano & Others vs Kampala University, HCMC No. 0129 of 2022***. In that regard therefore, the said supplementary affidavit is struck off the record.

Representation and Hearing

[6] At the hearing, the Applicants were represented by **Mr. Musimami Idris** while the Respondent was represented by **Ms. Kemigisha Maureen**. It was agreed that the matter proceeds by way of written submissions which were

duly filed by Counsel for both parties. I have reviewed the submissions and taken them into consideration in the course of determining this matter.

Preliminary Objections

[7] Both Counsel raised preliminary objections in their submissions which I intend to first deal with.

Preliminary Point One: The Affidavit in Reply makes general and evasive denials.

[8] Counsel for the Applicants submitted that the Respondent's affidavit in reply made general denials instead of specifically dealing with each of the allegations. Counsel relied on the case of ***Talituka v Nakendo [1997] HCB 275*** to the effect that bare denials in a written statement of defence are unacceptable and allegations in a plaint must be specifically or by necessary implication denied. Counsel argued that the Respondent in paragraphs 3, 4, 5, 6, 7, 8 and 9 of the affidavit in reply merely raises objections of law and fact, and then pleads generally in paragraphs 10-13. Counsel prayed that the affidavit in reply be struck out.

[9] For the Respondent, Counsel submitted that the Respondent did not only deny by necessary implication but also addressed all issues in the affidavit. Counsel cited paragraphs 10, 11, 12 & 13 and submitted that they cannot be categorized as general or evasive denials.

[10] Order 6 Rule 8 of the CPR provides that it *"shall not be sufficient for a defendant in his or her written statement to deny generally the grounds alleged by the statement of claim, or for the plaintiff in his or her written statement in reply to deny generally the grounds alleged in a defense by way of counter claim, but each party must deal specifically with each allegation of fact which he or she does not admit the truth, except damages."*

[11] In the present case, the gist of the allegations in the Applicants' affidavit in support is that the claim in the main suit is baseless, frivolous and vexatious; that the Applicants are not indebted to the Respondent in the amount claimed; that a sale agreement was executed with the Respondent; that the Respondent illegally took possession of the land and destroyed property belonging to the Applicants; that the Respondent was requested to hand over vacant possession and offered to be refunded her purchase price with payment of interest for one month and they refused. On its part, the Respondent raised issues of law regarding the application in paragraphs 3 – 9 of the affidavit in reply; then in paragraph 10, replied to the averments in paragraphs 6 and 9 of the affidavit in support by admitting the sale agreement and the interest giving rise to the suit. In paragraphs 11 and 12, the Respondent replied to paragraphs 7 – 14 of the affidavit in support by stating that the Respondent had lawfully taken vacant possession of the subject land in accordance with the agreement although the Applicants had refused to surrender the copy of the certificate of title and transfer forms within time as agreed. In paragraph 13 of the affidavit in reply, the Respondent states that the Applicants have no plausible defence to the claim in the main suit.

[12] It ought to be appreciated that while the gist of the averments in the affidavit in support is to establish that the Applicants have a plausible defence to the main suit, the gist of the averments in the affidavit in reply is to establish that the Applicants have no such plausible defence. As such, the reply by the Respondent must be viewed in that light. While the reply may appear to the opposite party to be insufficient, such does not necessarily mean that it is general or evasive. It is clear in the present case that the Respondent made some specific denials and admissions. In my view, whether the averments raise a formidable defence to the application goes to the sufficiency of the defence and not to the manner of pleading. I find that the affidavit in

reply does not offend the provision under Order 6 rule 8 of the CPR. This objection by the Applicants' Counsel is, therefore, overruled.

Preliminary Point Two: There is a pending Civil Suit No. 023 of 2018 between the same parties over the suit land at Wakiso Chief Magistrates Court.

[13] It was submitted by Counsel for the Applicant that there is a pending Civil Suit No. 023 of 2018 between the parties for illegal possession of the suit land that was filed by the 1st Applicant in which the Respondent filed a counter claim claiming to be the rightful owners of the land and, as such, the main suit violates the provisions of Section 6 of the CPA. In response, it was submitted for the Respondent that it withdrew its counter claim to the suit before filing the instant suit as the Magistrate's Court no longer had jurisdiction over the matter due to the accumulated interest on the subject matter. Counsel attached a copy of the notice of withdrawal.

[14] It should be noted that this objection is directed at the main suit as it raises competency of the main suit on account of whether it is barred by law. An objection cannot be raised against a suit that is not before the court for trial and determination. What is before the Court is the application for leave to appear and defend. The Applicants cannot use the present application to impeach the competency of the main suit. Such objection would be better handled by the Court when the suit comes up for trial in case leave to defend is granted. In the circumstances, this objection is misconceived at the present moment. The same is disregarded.

Preliminary Point Three: The Application was brought outside the prescribed time without leave of court.

[15] Counsel for the Respondent submitted that the Applicants had no locus to bring this application since it was brought 18 days after service of summons

thus violating the 10-day requirement under Order 36 rule 3. Counsel submitted that the Applicants were served with summons on 18th day of November 2019 and were bound to file the instant application by 29th November 2019. They however filed on 6th December 2019. Counsel relied on the case of ***Uganda Telecom Ltd vs Airtel Uganda Ltd, HCMA No. 3 of 2011*** to the effect that the requirement to file an application for leave to appear and defend within 10 days is not a directive but mandatory. Counsel submitted that non-compliance with the time lines fixed by statute and actions done outside the time fixed by statute without seeking leave to extend time are a nullity. There was no response by the Applicants' Counsel since no submissions in rejoinder were filed.

[16] Order 36 Rule 3 (1) of the CPR provides as follows;

> *"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."* [Emphasis added]

[17] According to the summons in Form 4 of Appendix A of the Rules, a defendant is required to seek leave of the court to defend the suit within 10 days from the date of service of the summons. As was stated in ***Uganda Telecom Ltd vs Airtel Uganda Ltd, HCMA No. 30 of 2011***, the requirement to file the application within 10 days albeit laid out in the appendix is part and parcel of the Rules and is mandatory. It should further be noted that while the court has power to enlarge time set by the Rules in accordance with Order 51 rule 6 of the CPR, that is only applicable where an applicant approaches the court to seek enlargement of such time. Where the applicant simply files

outside the time set by the rules, the power of the court to enlarge such time is not available and whatever is filed is time barred and thus invalid.

[18] In the instant case, there is evidence that the Applicants/ defendants were served with the summons on summary plaint on 18th November 2019. The Applicants only filed the present application on 6th December 2019, which was outside the 10 days, and without seeking leave of the court to file outside the prescribed time. This makes the application fatally defective and invalid. On this ground, the application would be struck out. Nevertheless, for completeness and in the greater interest of justice, I intend to explore the merits of the application; and also, so as to avoid any further wastage of time in case the Applicants were to choose to bring other applications.

Preliminary Point Four: The Application is unsustainable in law because it is based on fraud.

[19] Counsel for the Respondent submitted that the current application was fraudulently registered by court. Counsel argued that the application was filed on 6th December 2019 but it was signed by the Registrar on 28th January 2020. Counsel stated that M.A No. 1121 of 2019 was first registered in the names of Kizito Abdul vs Musaazi which was transferred and re-registered on 22nd December 2019. Counsel submitted that gaps are left in the court register so that cases are fraudulently registered.

[20] This matter concerns alleged conduct of the court staff. It ought to have been investigated administratively and would call for disciplinary action in case the alleged facts are proved. It is not a matter that can be determined judicially. It certainly cannot be a basis for an adverse decision against one of the parties in a given matter. The Respondent, therefore, ought to have filed a complaint to the Registrar of the Court over the alleged conduct as this is such a gross allegation that requires investigation and action. As far as the present

case is concerned, however, the issue does not constitute a preliminary objection and the same is disregarded.

Issue for Determination by the Court on Merits of the Application

[21] Only one issue is up for determination by the Court, namely; **Whether the application discloses any triable issues as to justify grant of leave to defend the summary suit.**

Applicants' Submissions

[22] Counsel for the Applicant relied on the decisions in ***Abdul Malik Mugisha vs Equity Bank HCMA No. 228 of 2018; Maluku Interglobal vs Bank of Uganda [1985] HCB 65; George William Semivule vs Barclays Bank HCMA No. 267 of 2008*** and ***Geoffrey Gatete & Anor vs William Kyobe SCCA No. 7 of 2005*** for the position of the law on an application of this nature. Counsel relied on the proposed Written Statement of Defence and paragraphs 5, 6, 7, 10, 11 and 14 of the affidavit in support of the application and submitted that the application discloses triable issues to wit; whether the Applicants are indebted to the Respondent in the alleged amounts; whether the Respondent/plaintiff breached the contract; whether the Respondent should be ordered to perform the contract as per the terms; and whether the Respondent took vacant possession of the subject land wrongly. Counsel argued that the above issues require conducting a full trial and invited the court to allow the application. Counsel concluded that the Applicants have a good defence to the suit and prayed that the Court finds that the Applicants have proved all the conditions necessary for grant of the application with costs.

Respondent's Submissions

[23] Counsel for the Respondent relied on the cases of ***Miter Investment Ltd vs East African Portland and Cement Company*** cited in ***M.M.K Engineering vs Mantrust Uganda Ltd HCMA 128 of 2012;*** and ***Maluku***

Interglobal Agency vs Bank of Uganda [1985] HCB 65 on the principles for determination of whether an applicant should be granted leave to appear and defend a suit. Counsel submitted that the Applicants having admitted the sale have no plausible defence and the rest of the issues can be handled in an entirely different matter. Counsel argued that although the Applicants state in the affidavit in support that they will file a counter claim, the proposed defence attached to the application does not contain a counter claim. Counsel further submitted that the claims by the Applicants regarding the Respondent taking possession of the suit land are contradictory and cannot pass the test of a plausible defence in law. Counsel argues that while the Applicants fault the Respondent in paragraphs 7-14 of the affidavit in support for taking possession of the suit land, clause 2 of the Agreement clearly gives the Respondent automatic vacant possession upon signing of the agreement. Counsel invited the Court to consider the entire agreement and reach a conclusion that taking possession did not extinguish the remedies for breach of contract. Counsel prayed that the application be dismissed with costs.

Determination by the Court

[24] The position of the law, in accordance with Order 36 rule 4 of the Civil Procedure Rules, is that unconditional leave to appear and defend a suit will be granted where the applicant shows that he or she has a good defence 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 defence. The applicant should demonstrate to court that there are issues or questions of fact or law in dispute which ought to be tried. The procedure is meant to ensure that a defendant with a triable issue is not shut out. (See ***M.M.K Engineering v. Mantrust Uganda Ltd H. C. Misc. Application No. 128 of 2012; and Bhaker Kotecha v. Adam Muhammed [2002]1 EA 112).***

[25] In ***Maluku Interglobal 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."

[26] It is a further requirement under the law that in an application for leave to appear and defend a summary suit, there must be sufficient disclosure by the applicant, of the nature and grounds of his or her defence and the facts upon which it is founded. Secondly, the defence so disclosed must be both bona fide and good in law. A court that is satisfied that this threshold has been crossed is then bound to grant unconditional leave. Where court is in doubt whether the proposed defence is being made in good faith, the court may grant conditional leave, say by ordering the defendant to deposit money in court before leave is granted. (See ***Children of Africa vs Sarick Construction Ltd H.C Miscellaneous Application No. 134 of 2016).***

[27] On the case before me, the claim in the summary suit is based on the agreement dated 19th April 2018; whose contents are admitted by both parties. It is clear from the agreement that the Respondent herein purchased the subject property from the 1st Applicant at a purchase price of UGX 35,000,000/= which the Respondent paid fully. By the Applicants' own evidence, the Applicants rescinded the contract and offered to refund the full purchase price together with interest for one month at the agreed rate of 20%

per month. It is claimed by the Applicants that the Respondent refused the offer and instead took possession of the suit land as if the agreement had not been rescinded. This is what led to the current dispute.

[28] In the affidavit in reply by the Respondent, it is admitted that the Respondent took possession of the subject property in accordance with the agreement. However, in their submissions, Counsel for the Respondent attempts to lead evidence from the bar in contradiction of the above averment. Counsel states that the Respondent was not in possession which is evidenced by the fact that the Applicants had instituted another suit in the Land Division against another party in relation to the same land. Unfortunately, this allegation did not come before this Court in the form of evidence. The statement by Counsel from the bar cannot constitute evidence and is accordingly inadmissible. As far as the evidence before the Court is concerned, the Respondent took possession of the subject land. There is no evidence as to whether the Respondent vacated the subject land and, if so, when they did so. This therefore raises the question as to why the Respondent would want to have back the money and at the same time remain in possession of the subject land. This raises a triable issue of law and fact.

[29] The other question concerns the issue of interest. According to clause 5.0 of the contract, in case of failure of the contract for circumstances stated therein, the vendor (the 1st Applicant) undertook to indemnify the purchaser in full at a rate of 20% per month from the date of payment of the purchase price till payment in full. It is clear from the evidence before the Court that the parties intended and understood the said clause to mean that the vendor would refund the full purchase price together with interest of 20% per month. Indeed, at the time the Applicants purported to rescind the contract on 25th May 2018, they were willing and offered to refund the full purchase price with one month's interest which is the period that had passed by then. It is the

above circumstance that led to the Respondent's claim in the main suit for the sum of UGX 119,000,000/= being interest at the agreed rate of 20% per month from the 19th April 2018 when the agreement was signed, to the date of filing the suit (7th November 2019).

[30] Although the above claim for interest is based on contract and could properly be sought under summary procedure, it raises a question as to its legality. Interest of 20% per month amounts to 240% per annum. Such would not only be highly extortionate but out rightly illegal. This, as well, constitutes a bona fide triable issue of fact and law that would entitle the Applicants to being granted leave to defend the summary suit.

[31] In light of the above findings, the Applicants have satisfied the Court that bona fide triable issues exist as would entitle them to being granted leave to appear and defend the summary suit. On the merits, the application is allowed with the following orders:

(a) The Applicants are granted unconditional leave to appear and defend Civil Suit No. 916 of 2019.

(b) The Applicants shall file their Written Statement of Defence within 15 days from the date of delivery of this Ruling.

(c) The costs of this application shall abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered by email this 24th day of January, 2023.

Boniface Wamala

JUDGE