

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)**

**MISC. APPLICATION NO. 2141 OF 2023  
(ARISING OUT OF CIVIL SUIT NO. 0807 OF 2023)**

**THE CAPITAL TIMES LIMITED.....APPLICANT/DEFENDANT  
VERSUS**

**EVA LYNETTE KAKYOMYA .....RESPONDENT/PLAINTIFF**

**BEFORE: HON. LADY JUSTICE PATIENCE T.E. RUBAGUMYA**

**RULING**

**15** Introduction

This application was brought by Notice of Motion under Order 36 rules 2, 3 and 4 and Order 52 rules 1,2 and 3 of the Civil Procedure Rules SI 71-1 seeking orders that:

- 20** a) This Honourable Court be pleased to grant the Applicant unconditional leave to appear and defend Civil Suit No. 0807 of 2023.
- b) Costs of this application be provided for.

**25** Background

The application is supported by an affidavit of Mr. Nabimanya Isaac, a Director in the Applicant Company and its grounds are summarised below;

- 30** 1. That the Respondent hatched a plan to illegally terminate the Applicant's tenancy agreement using this Honourable Court through the following ways;

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(i) The Respondent earlier instituted HCCS No. 16 of 2023 in this Honourable Court by way of specially endorsed plaint demanding rent for six months amounting to UGX 72,000,000 /= (Uganda Shillings Seventy-Two Million Only).

(ii) The Applicant disputed the rent demanded by filing M.A No. 081 of 2023 for leave to appear and defend the suit wherein it referred to the tenancy agreement signed with the Respondent which put monthly rent at USD \$ 1800 (around Uganda Shillings Six Million Only per month) and in six months it would have been UGX 36,000,000/= and not UGX 72,000,000= claimed in the specially endorsed plaint.

(iii) The Applicant further attached mobile money and account statements reflecting recent payment of rent to the Respondent hence the Learned Trial Judge found that the Applicant had a plausible defence and granted it leave to file a written statement of defence and further ordered for mediation to settle and reconcile all issues concerning outstanding rent.

(iv) The Respondent did not file an affidavit in reply to the Applicant's application for leave to appear and defend after the Applicant had unearthed her falsehoods in the specially endorsed plaint and affidavit in support.

(v) The Respondent illegally and unlawfully evicted the Applicant during Court vacation using her present lawyers.

2. That the Applicant has since reported a case of trespass and theft at Jinja Road Police station against the Respondent's present lawyers vide Jinja Road Police Station CRB 730/2023.

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3. That the Applicant shall disapprove its indebtedness to the Respondent through obtaining an order of audit of all the payments it has been effecting to the Respondent through cash basis, mobile money and bank account which can only be done in the main suit and not at this stage.

4. That the Applicant further disputes the amount demanded by the Respondent, as the monthly rent according to the tenancy agreement is USD \$ 1800 (approximately Uganda Shillings Six Million Only per month) and there is no way it can accumulate to UGX 54,000,000/= in six months.

In reply to the application, the Respondent in her affidavit contended in summary that;

1. The Applicant did not appear for mediation and the same was closed due to lack of interest by the Applicant.

2. Legal re-entry with notice was made and the Applicant's Manager Mr. Dan Ankunda was present and he picked all the stock and the properties belonging to the Applicant, save for the generator, 2 televisions and a shade that are in the possession of the Respondent.

3. The Applicant was in arrears for 8 months; that is from January up to August when she instituted Civil Suit No. 807 of 2023 and that is how the amount accumulated up to UGX 54,000,000.

In its affidavit in rejoinder by Mr. Nabimanya Isaac, the Applicant maintained that the Respondent's lawyer Mr. Jason Kiggundu collected rent (by cash) for six months (December 2022 – May 2023) from the Applicant's cashier Mr. Twongyeirwe Robert Kagangisa at the suit

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premises and that the CCTV footage can be retrieved from the suit premises.

The Applicant also filed a supplementary affidavit deponed by Mr. Twongyeirwe Robert Kagangisa its cashier, briefly stating that Mr. Jason Kiggundu collected rent by cash for six months.

Both parties filed their written submissions in Court which I have taken into consideration.

**Representation**

The Applicant was represented by M/s Sebbowa & Co. Advocates and the Respondent was represented by M/s Jason & Co. Advocates.

**Issues for determination**

1. Whether the Applicant raised sufficient grounds to warrant the grant of leave to appear and defend the suit?
2. What remedies are available?

**Consideration of the preliminary points of law**

Counsel for the Applicant sought to raise a preliminary objection to strike off the Court record the Plaintiff's plaint for failure to disclose a cause of action against it due to the following reasons:

- a) The tenancy agreement is inadmissible in evidence for failure to comply with the Stamp Duty Act, 2014.
- b) The Respondent's statement of account is inadmissible under the Evidence Act and Evidence (Bankers' Books) Act Cap 7.
- c) The Respondent neither attached the Plaint and her affidavit in reply, a demand notice for rent issued to the Applicant nor attached URA

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rental tax returns to prove that the Applicant has not paid rent from January to July.

5 d) Seek indulgence of Court to order Mr. Jason Kiggundu to recuse himself from representing the Respondent/Plaintiff in this matter.

10 Counsel for the Applicant submitted that the above preliminary objections/issues of law point to defects in the Respondent's plaint which this Court should not overlook to condemn the Applicant unheard on merits.

15 This Court has taken note of the points of law as raised by Counsel relating to the alleged defects in the Respondent's/Plaintiff's plaint in the main suit HCCS No.0807 of 2023. I find that the three preliminary points (a-c) are matters which require interpretation of the law and cannot be determined in this application. The objections are premature and I will therefore not delve in determination of these points.

20 Counsel further raised an issue about the Respondent's lawyer Mr. Jason Kiggundu being a potential witness and that he should therefore recuse himself. He relied on Regulation 9 of the Advocates (Professional Conduct) Regulations SI 267-2 and on the Supreme Court case of **Uganda Development Bank Vs Kasirye, Byaruhanga & Co. Advocates, SCCA NO. 35/1994**, judgement of **Wambuzi CJ** (as he then was) where it was held that,

*"It is generally accepted that the main intention of this regulation is that an Advocate should not act as Counsel and witness in the same case".*

30 The Applicant in paragraph 7 of the affidavit in rejoinder avers that Mr. Jason Kiggundu received rental arrears for six months in cash and

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therefore he is a key witness in the resolution of the facts in dispute. Accordingly, it is only proper that Mr. Jason Kiggundu recuses himself from representing the Respondent/Plaintiff in this matter in accordance with Regulation 9 of the Advocates (Professional Conduct) Regulations SI  
5 267-2.

On the objection raised by Counsel for the Respondent about the supplementary affidavit in rejoinder, paragraph 7 of the Applicant's affidavit in rejoinder averred that money for rent had been paid. My view is that the supplementary affidavit in rejoinder provides more relevant  
10 details about this assertion to enable Court evaluate the same in the interest of justice. Furtherstill, since it was filed on the same day as the Applicant's affidavit in rejoinder, I will order that the Applicant's supplementary affidavit in rejoinder is maintained on Court record.

15 I will now proceed to the determination of the merits of the instant application.

### **Resolution**

#### **Issue 1**

20 **Whether the Applicant raised sufficient grounds to warrant the grant of leave to appear and defend the suit?**

I have considered the evidence of the parties adduced in their affidavits, the submissions of Counsel for the parties herein, and the cases cited to find as hereunder:

25 The law under Order 36 rule 3 (1) of the Civil Procedure Rules SI 71-1, provides that a defendant served with summons, issued upon the filing of an endorsed plaint and affidavit under rule 2 of this Order endorsed

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“Summary procedure”, shall not appear and defend the suit except upon applying for, and obtaining leave from Court.

5 The law governing applications for leave to appear and defend a summary suit is that an Applicant/Defendant must show by affidavit or otherwise that there is a bona fide triable issue of fact or law.

A triable issue is one capable of being resolved through a legal trial, that is to say, a matter that is subject or liable to judicial examination in Court.  
10 It has also been defined as an issue that only arises when a material proposition of law or fact is affirmed by one party and denied by the other (**see *Jamil Senyonjo Vs Jonathan Bunjo, H.C. Civil Suit No. 180 of 2012***).

15 Further, in the case of ***Kotecha Vs Mohammed [2002] 1 EA 112***, the Court of Appeal held that where a suit was brought under summary procedure on a specially endorsed plaint, the Defendant is granted leave to appear if he or she is able to show that he or she has a good defence on merit, or that a difficult point of law is involved; or a dispute as to the facts  
20 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.

In the case of ***Geoffrey Gatete & Anor Vs William Kyobe, Supreme Court Civil Appeal No.7 of 2005***, Court held that;  
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*“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”.*

In the instant case, the Applicant contends that the monthly rent according to the tenancy agreement is USD\$ 1800 (approximately Uganda Shillings Six Million Only per month) and that there is no way it can accumulate to UGX 54,000,000/= in six months. The Respondent however  
5 under paragraph 9 of her affidavit in reply avers that the claimed amount of UGX. 54,000,000 is for a period of eight months.

This fact cannot be reconciled now without Court considering the evidence because on the one hand the Applicant claims in the affidavit in rejoinder  
10 under paragraph 7 that the Respondent's lawyer Mr. Jason Kiggundu collected rent by cash for six months from Mr. Twongyeirwe Robert Kagangisa who states in the supplementary affidavit under paragraphs 4 and 5 that payment was made in the presence of some witnesses.

15 Therefore, there is a dispute on the facts specifically on the amount outstanding. Court at this point is not in position to hear the testimony of the other parties and especially from Mr. Jason Kiggundu who the Applicant alleges received the rent money for six months, to determine whether or not the rent being demanded was indeed paid. The Applicant's  
20 facts of payment and the Respondent's total demand for the arrears is evidently not reconciled and this creates a triable issue of facts therein since the Applicant claims that it does not owe the Respondent rent to the tune of UGX 53,000,000 as stated in the affidavit in rejoinder under  
paragraph 13.

25 This Court has also noted inconsistencies in the amounts claimed. According to the earlier suit HCCS No. 16 of 2023, the claim is for UGX 72,000,000 for six months. However, in the instant application the claim is for eight months and the sum being claimed is UGX 54,000,000, yet the

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claims are all under the tenancy agreement dated 26<sup>th</sup> June 2019 where the monthly rent is stated as USD\$1800.

5 Furthermore, the Applicant has raised an issue relating to eviction and sale of its property. The Respondent claims under paragraph 4(f) of the affidavit in reply that the Applicant's Manager picked all the property save for the generator, 2 televisions and a shade that are in the possession of the Respondent. The Respondent does not provide any reason as to why the aforementioned property is still in her possession and what she  
10 intends to do with it. The Applicant disputes the indebtedness to the Respondent with a counterclaim of UGX 347,767,00= . I find that the issue of the counterclaim, eviction and the property attached ought to be investigated and determined on the basis of evidence so as to avoid multiplicity of suits on the same or related subject matter. The Court at  
15 this stage should not enter upon the trial of the issues disclosed as was held in the case of **Maluku Interglobal Trade Agency Ltd Vs Bank of Uganda [1985] HCB 65**. It is therefore in the interest of justice that the Applicant is allowed to defend the suit.

20 Furthermore, I have noted that Civil Suit No.16 of 2023 filed by the Respondent against the Applicant in respect of the subject matter herein with similar facts though with differences in the amounts being claimed, is pending in the High Court Commercial Division for determination.

Order 11 rule 1(a) of the Civil Procedure Rules S.I 71-1 stipulates that;

25 *"Where two or more suits are pending in the same Court in which the same or similar questions of law or fact are involved, the Court may, either upon the application of one of the parties or of its own motion, at its discretion, and upon such terms as may seem fit –*

30 a. order a consolidation of those suits; and

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b. direct that further proceedings in any of the suits be stayed until further order.” (**See the case of Stumberg & Anor Potgeiter (1970) EA 323**).

In the circumstances and in the interest of justice, avoidance of  
5 multiplicity of suits and the possibility of contradictory findings, I order  
that Civil Suit No.16 of 2023 and Civil Suit No. 807 of 2023 be  
consolidated.

**Issue 2: What remedies are available?**

10 In the premises, I find that the Applicant has raised triable issues that  
merit the granting of this application to appear and defend the suit.

I accordingly grant this application with the following orders:

1. The Applicant is hereby granted unconditional leave to appear and  
defend **Civil Suit No. 0807 of 2023**.
- 15 2. The Applicant is ordered to file its Written Statement of Defence  
within fourteen (14) days from the date of this order.
3. Civil Suit No.16 of 2023 and Civil Suit No.807 of 2023 are hereby  
20 consolidated.
4. Costs of this application shall be in the cause.

I so order.

25 Dated, signed and delivered this **24<sup>th</sup>** day of **October, 2023**.

  
Patience T. E. Rubagumya

**JUDGE**

30 **24/10/2023**



Ruling read in Chambers:

10am

24<sup>th</sup> October 2023

5 Counsel Patrick Mugisa holding brief for Counsel Francis Sebbowa for the Applicant.

There is no representative from the Applicant.

Counsel Gloria Abaruhanga for the Respondent.

Respondent is in Court.

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Patience T. E. Rubagumya

**JUDGE**

**24/10/2023**

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10:20am