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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION No. 1588 OF 2021
(ARISING FROM CIVIL SUIT No. 0744 OF 2021)

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BUKENYA HILLARY APPLICANT

VERSUS

HERMIS COFFEE FACTORY UGANDA LIMITED RESPONDENT

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BEFORE: HON. LADY JUSTICE SUSAN ABINYO

RULING

Introduction

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This application was brought by Notice of Motion under the provisions of section 98 of the Civil Procedure Act, Cap 71, section 33 of the Judicature Act, Cap 13, and Order 36 Rules 3 & 4, and Order 52 Rules 1 & 3 of the Civil Procedure Rules SI 71-1, seeking for orders that:

1. The Applicant be granted unconditional leave to appear and defend Civil Suit No. 744 of 2021.
2. Costs of this application be provided for.

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Facts:

The application is supported by an affidavit of the Applicant, deponed in paragraphs 1-16; briefly the grounds are summarized as follows: -

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That sometime in June 2021, the Respondent through its Director Mukiibi Joseph, entered into an oral contract with the Applicant for supply of twenty metric tonnes of Robusta coffee from Tanzania, and made a deposit of UGX 138,000,000 (Uganda Shillings One Hundred Thirty Eight Million only).

5 That the Applicant paid a total sum of UGX 285,000,000(Uganda Shillings Two Hundred Eighty Five Million only) to Link Power Tanzania Limited to make purchases, and deliver to the Respondent, as seen in the copies of the payment slips, and agreement attached marked Annexure "A".

10 That the Applicant delivered seven metric tonnes to the Respondent, and the goods were inspected upon delivery, and accepted by the Respondent.

That the Respondent sometime in August 2021, in an attempt to frustrate the Applicant's contract with Link Power Tanzania Limited, terminated the oral contract, and demanded for the return of the purchase price despite having knowledge that the Applicant had already paid for the coffee.

15 That the Respondent informed Link Power Tanzania Limited that they had terminated the oral agreement for supply of Coffee, and as a result Link Power declined to release the Coffee.

20 That the Applicant is not indebted to the Respondent in the sums claimed or at all, and that the Applicant has a good and plausible defence to Civil Suit No. 744 of 2021.

The Respondent filed an affidavit in reply, deposed in paragraphs 1-18 by Jamila Opondo, and summarized as follows: -

25 That the Applicant agreed to supply 20 tonnes of coffee to the Respondent at an agreed consideration of UGX 138,000,000 (Uganda Shillings One Hundred Thirty Eight Million only), and not UGX 285,000,000(Uganda Shillings Two Hundred Eighty Five Million only), as claimed to have been paid to Link Power Tanzania Limited by the Applicant.

30 That it is true that the Applicant delivered 7 metric tonnes of coffee but it is not true that the Respondent attempted to frustrate the Applicant's contract with Link Power Tanzania Limited.

That the Applicant failed to comply with the agreement he had entered into with the Respondent, and that it was upon that failure that Applicant and the Respondent later executed a refund agreement dated 20th August, 2021, which the Applicant still violated.

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- 5 That with the advice of the Respondent's Advocates of KRK Advocates, the agreement in issue is the refund agreement and not any other, and that the allegations of illegality are not particularized in either the affidavit or the draft defence, which does not amount to a plausible defence.

Representation

- 10 The Applicant was represented by Counsel Jason Kiggundu of Jason & Co. Advocates, and the Respondent was represented by Counsel Simon Muhumuza of KRK Advocates.

Issues for determination

- 15 In accordance with Order 15 Rule 3 of the Civil Procedure Rules, SI 71-1, this Court framed issues for determination as below:

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

Decision

- 20 Issue No.1: Whether the Applicant disclosed sufficient grounds to merit the grant of leave to appear and defend the suit?

I have considered the evidence adduced by the parties in their respective affidavits, and the Law applicable to find hereunder:

- 25 The law as provided under Order 36 Rule 3 (1) of the Civil Procedure Rules SI 71-1, is that a Defendant served with summons, issued upon the filing of an endorsed plaint, and an affidavit under Rule 2 of this Order endorsed "Summary procedure", shall not appear and defend the suit except upon applying for, and obtaining leave from Court.

- 30 It is settled law that in an application of this nature, the Applicant has to show by affidavit or otherwise that there is a bonafide triable issue of fact or law and a plausible defence to the suit.

In the case of **Maluku Interglobal Trade Agency Ltd Vs Bank of Uganda [1985] HCB 65, at 66**, the Court held that:

- 35 *"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.*

5 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." [Emphasis is mine]

10 I have taken into further consideration the Court of Appeal decision in **Kotecha v. Mohammed [2002] 1 E.A 112**, where the Court held that;

15 "The summary procedure on specially endorsed plaint under Order 33 of our Civil Procedure Rules is similar to a writ specially endorsed under Order 3, rule 6 (Order 14, rule 1) of the English Rules of the Supreme Court. Therefore, English authorities on that rule are of persuasive authority and provide (a) useful guide. 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(s); 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. See *Saw V Hakim* 5 TLR 72; *Ray v Barker* 4 Ex DI 279." [Emphasis is mine]

25 In the instant case, the Plaintiff's claim (Respondent herein) in Civil Suit No. 744 of 2021 is for recovery of UGX 96,880,000 (Uganda Shillings Ninety Six Million Eight Hundred and Eighty Thousand Shillings Only) being the total refund balance, interest and costs of the suit.

30 The issue as to whether the Defendant (Applicant herein) is indebted to the Respondent in the sums claimed; the question as to whether the said money was paid to Link Power Tanzania Limited by the Applicant, and the legality of the transaction between the Applicant, and Respondent, all amount to bonafide triable issues, and a plausible defence to the suit.

35 It's trite law that the Court is not required to determine the merits of the case at this stage, and that the Applicant has to be given the opportunity to prove the questions of fact or law by filing a defence, and adducing evidence during trial. **(See Geoffrey Gatete & Anor Vs William Kyobe, SCCA No.7 of 2005 [2007] UGSC 7)**

For reasons above, this issue is answered in the affirmative.

5 Issue No. 2: What remedies are available?

This Court having found issue (1) above in the affirmative, further finds that the application has merit.

10 Accordingly, this application is allowed, and Court makes the following Orders that:

1. The Applicant is granted unconditional leave to appear and defend in Civil Suit No. 744 of 2021.
- 15 2. The Applicant shall file a written statement of defence within 10 days from the date of this order.
3. The costs of this application shall be in the cause.

Ruling delivered electronically this 13th day of June, 2023.



20 SUSAN ABINYO
JUDGE
13/06/2023

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