

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**MISCELLANEAOUS APPLICATION NO. 87 OF 2011**  
**(ARISING FROM LDCS NO. 26 OF 2011)**

**M/S BUSINGYE & CO LTD.....APPLICANT/DEFENDANT**

**VERSUS**

**MAYIMUNA MUYE AMIN.....RESPONDENT/PLAINTIFF**

**BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE**

**RULING**

This was an application for orders that the Applicant be granted leave to appear and defend *LDCS No. 26 Of 2011 Mayimuna Muye Amin V M/S Busingye & Co Ltd*, and that costs be provided for. The application is supported by the affidavit of Arthur Busingye Director of the Applicant/Defendant company.

The Respondent did not file any affidavit in reply. However her Counsel appeared at the hearing of the application and made oral submissions opposing the application. The Applicant's Counsel did not object to it.

In his submissions, Counsel Steven Musisi for the Applicant relied on the affidavit of Arthur Busingye the Director of the Applicant company. The Applicant's affidavit evidence and its annexures more or less repeats the grounds highlighted in the application. In a nutshell the affidavit evidence is to the effect that the Applicant purchased the suit property from the Lint Marketing Board in 1995 as leasehold interest. The Lessor at the said time, as proprietor of freehold land FRV 210 Folio 11 land at Mbuya out of which the lease was created, was the Uganda Land Commission (ULC). The Applicant/Defendant sub divided the property in 1997

after obtaining consent from the ULC. The Applicant has only dealt with the ULC in matters relating to the land. The Respondent only claimed ownership and demanded for rent in 2010. The ULC has denied transferring the freehold interest to the Respondent/Plaintiff. The ULC has applied to the Commissioner Land Registration for cancellation of her ownership of the freehold and reinstatement of the ULC. The Applicant/Defendant who has very substantial developments on the property, is willing to pay rent but only to the lawful owner and is willing to deposit the said rent in court.

Counsel for the Applicant/Defendant submitted that the application raises triable issues as to who is the actual owner of the land and to whom ground rent should be paid. He also contended that the suit does not fall within the ambit of Order 36 rule 2(b) of the Civil Procedure Rules (CPR) as there is no definite claim for rent by the Respondents/Plaintiffs against the Defendants/Applicant's.

Opposing the application, Counsel Richard Kiboneka for the Respondent/Plaintiff submitted that the application should fail. He argued that a certificate of title is conclusive evidence of ownership under section 59 of the Registration of Titles Act, cap 230, and that this alone would make ULC's denial of having transferred the land to the Respondent/Plaintiff of no effect. He stated that the errors of the Applicant dealing with the wrong person should not prevent the Respondent from applying for an order of vacant possession. He maintained that it is not open to the Applicant to start challenging the title of its *de facto* landlord. On the Applicant's contention that there is a triable issue as to who is the owner of the freehold title, Counsel argued that the question of ownership can only be determined under interpleader proceedings, and that if the Applicant is a willing tenant he can take out an Originating Summons to determine the question of who should pay the rent. He maintained that the instant application is different from the situation in the case of **Maluku Interglobal Trade Agency V Bank of Uganda [1985] HCB 65** cited by the Applicant/Defendant's Counsel, that in the said case there is a registered proprietor with a registered proprietor of leasehold interest. He argued that in the circumstances, the issue is that the Applicant has refused to pay rent and ought to pay it, and that is all. On the point of law that the suit does not fall under Order 36 of the CPR, Counsel for the Respondent/Plaintiff contended that the prayer in the plaint is for recovery of land by giving vacant possession, which makes it fall under the ambit of Order 36 rule 2(b) of the CPR.

Learned Counsel for the Applicant/Defendant by way of final reply submitted that the claim for vacant possession by the Plaintiff arises from non payment of rent. He argued that this rent is not known as it has not been stated. He argued that actions like these are meant to enforce payment of rent. He submitted that the Applicant is willing to pay the rent to a lawful owner. He contended that the Applicant could not ignore serious objections raised by the ULC on the purported ownership of the freehold interest in the land despite the provisions in section 59 of the RTA.

The suit the Applicant/Defendant seeks to defend is *civil suit no. 26 of 2011 Mayimuna Muye Amin V Busingye & Co Ltd*. It was instituted by the Respondent/Plaintiff against the Defendant/Applicant for recovery of land by delivery of vacant possession, mesne profits and costs of the suit. The Applicant/Defendant is the registered proprietor of the leasehold interest in the land comprised in LRV 748 Folio 3 plots 14, 16 and 18 Serunkuuma road for a term of 99 years with effect from 1<sup>st</sup> August 1969, having purchased it from Lint Marketing Board. The Defendant acquired the lease and registered it on 6<sup>th</sup> December 1995, after which he sub divided it into eleven plots. At that time the owner of the freehold interest was the Uganda Land Commission. The Plaintiff eventually got registered as the freehold proprietor of the land, which is comprised in FRV 210 Folio 11 at Mbuya.

Order 36 rule 2(b) of the CPR provides as follows:-

***“All suits---***

***(a).....***

***(b) being actions for recovery of land, with or without claim for rent or mesne profits by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non payment of rent, or against the person claiming under the tenant,***

*may, at the option of the plaintiff, be instituted by presenting a plaint in the form prescribed endorsed “Summary Procedure Order XXXVI” and accompanied by an affidavit made by the Plaintiff, or by any other person who can swear positively to the*

*facts, verifying the cause of action, and the amount claimed, if any, and stating that in his or her belief there is no defence to the suit.”* (emphasis mine).

The prayer in the plaint is for recovery of land by giving vacant possession. There is no claim as to rent. Summary procedure under Order 36 rule 2 of the CPR clearly envisages actions for recovery of land, rent or mesne profits. The wording of the rule is clear. The action can be “*for recovery of land, with or without claim for rent or mesne profits*”. This infers that the claim for recovery of land can stand on its own under summary procedure. In my opinion, this makes the instant case clearly fall under the ambit of Order 36 rule 2(b) of the CPR. I do not agree with the submissions of the Applicant/Defendant’s Counsel therefore that there has to be a definite claim for rent by the Plaintiff against the Defendant. In view of the wording of the rules, a claim for recovery of land alone can also be instituted by way of summary procedure under Order 36(2) of the CPR. It provides an ideal quick remedy to the landlord to recover possession of the property or rent due.

This brings me to the question of whether leave should be granted to the Applicant/Defendant to defend *civil suit no. 26 of 2011*. There are case decisions to the effect that before leave to appear and defend is granted, the Defendant must show by affidavit or otherwise that there is a bona fide triable issue of fact or law. When there is a reasonable ground of defence to the claim, the Plaintiff 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 should not enter upon the trial of the issues disclosed at this stage (**Maluku Interglobal Trade Agency V Bank of Uganda, supra**).

In the instant case the Applicant has raised a case that the Plaintiff/Respondent’s proprietorship of the lease is challenged by the ULC, the former proprietor of the freehold interest. He attached to his affidavit annexures namely a copy of a statutory declaration by the ULC filed in the Lands Office denying having ever transferred the freehold interest to the Respondent/Plaintiff. On the other hand the Respondent/Plaintiff insists through her Counsel that she is the *de facto* landlord entitled to the remedy of recovery of land by giving vacant possession against the Applicant/Defendant through summary procedure.

In my opinion, without going into trial of the issues disclosed on proprietorship of the freehold interest, I find that the circumstances of this application, as revealed in the Applicant's affidavit evidence, indicate the existence of a *bona fide* triable issue. The triable issue evolves around the Applicant/Defendant's disputing the Respondent's proprietorship of the freehold out of which the suit property, land comprised in LRV 748 Folio 3 plots 14, 16 and 18 Serunkuma Road, Mbuya, were created. I am satisfied that the Applicant/ Defendant's defence, which does not have to be a good defence on the merits, amounts to a reasonable ground of defence to the claim. This therefore negates the Plaintiff's entitlement to summary judgment under Order 36 rule 2(b) of the CPR. It justifies that leave to defend the summary suit should be granted to the Applicant/Defendant.

In that regard, for the above reasons, and in the interests of justice, leave is hereby granted to the Applicant/Defendant to defend *civil suit no. 26 of 2011 Mayimuna Muye Amin V Busingye & Co. Ltd.* The Applicant/Defendant should file a Written Statement of Defence within the time required under the CPR.

The costs of this application will be in the cause.

**Dated at Kampala** this 9<sup>th</sup> day of February 2012.

Percy Night Tuhaise

**JUDGE.**