

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**MISCELLANEOUS APPLICATION NO. 244 OF 2011**  
**ARISING FROM CIVIL SUIT NO. 104 OF 2011**

1. **JAMES KATAZA**  
2. **ROBINAH NAKIRWOWA.....APPLICANTS**

**VERSUS**

1. **SYLVIA NAMUSISI**  
2. **GODFREY OJAMBO.....RESPONDENTS**

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

**RULING**

This was an application for orders that the applicants be granted leave to appear and defend the claim against them in Civil Suit No. 104 of 2011, and that costs be provided for. It was brought under Order 36 rules 3 & 4 and Order 52 rules 1 & 3 of the Civil Procedure Rules (CPR). The application is supported by the affidavit of **James Kataza** the 1<sup>st</sup> applicant.

At the time this application was called for hearing court drew it to the attention of both Counsel that there was no affidavit in reply on the court record. However court was informed by both Counsel that the applicant's Counsel had been served with an affidavit in reply by the respondent's Counsel. Counsel were then given time schedules within which to file their written submissions.

In his written submissions, Counsel Mugenyi Asa for the applicants relied on the affidavit of **James Kataza** the 1<sup>st</sup> applicant. The said 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 on 2<sup>nd</sup> July 2010, the applicants entered into an agreement with the respondents for the sale of land comprised in Busiro Block 401 Plot 39 at Kikusa & Mawanyi measuring about 0.60 acres valued at U. Shs. 50,000,000/= (fifty million). The applicants were not aware of any dispute on the said property as they bought the property from Kawesi John who had earlier purchased it from their late father Mpima Livingstone Kataza. That the subsequent transaction with the respondents is still a valid transaction the applicants are committed to completing as vendors. That they never agreed to pay interest in the event the plaintiff revoked the sale. That the applicant has a defence to the whole of the plaintiff's claim and should be granted unconditional leave to appear and defend the suit, and that it is in the interests of justice and is reasonably necessary for the purpose of determining all questions in controversy arising under the agreement between them and the plaintiff.

Counsel for the applicants/defendants submitted that the application raises triable issues on interest between the plaintiffs and defendants which needs to be determined upon hearing both parties. He also submitted that the 1<sup>st</sup> applicant has portrayed in the affidavit in support that he has a good defence to the respondents' claim in the main suit. He concluded that the suit cannot be concluded by way of summary procedure, and that it is in the interests of justice that the application should be granted.

Opposing the application, Counsel for the Respondent/Plaintiff submitted that the application was filed to delay justice and is an abuse of court process. He maintained that though it is not in contention that the applicants received U. Shs. 50,000,000/= from the respondents as consideration for purchase of the suit property, the applicants have never executed a transfer of the same in favour of the respondents neither have they refunded the money paid to them by the respondents. He maintained that after execution of the sale agreement and receipt of the money, the applicants informed the respondents that the transfer was frustrated due to a dispute over the property by one of the family members who lodged a caveat. The respondents therefore demanded for a refund of the money. Several meetings were held among the parties to resolve the matter and the respondents informed the applicants that they had taken out a loan with Standard Chartered Bank to purchase the land. The respondents also informed the applicants that any delay in refunding the money would cause them undue detriment in servicing the loan. That the interest rates were raised in 2011 which affected the respondents' interest by raising it to

from 18.8% to 32%. On the applicants' prayer that they be granted leave to appear and defend the entire suit to determine the issue of whether they should pay the interest or not, the respondents' Counsel submitted that the principle of interest is not a triable issue, but is up to the decision of court.

The suit the applicants/defendants seek to defend is *civil suit no. 104 of 2011 Sylvia Namusisi & Anor V James Kataza & anor*. It was instituted by the respondents/plaintiffs against the defendants/applicants for payment of U. Shs. 50,000,000/=, interest of 18.8% from the date of receipt of the money and costs of the suit. On 2<sup>nd</sup> July 2010, the applicants entered into an agreement with the respondents for the sale of land comprised in Busiro Block 401 Plot 39 at Kikusa & Mawanyi measuring about 0.60 acres valued at U. Shs. 50,000,000/= (fifty million). The applicants aver that they were not aware of any dispute on the said property as they bought the property from Kawesi John who had earlier purchased it from their late father Mpima Livingstone Kataza; that the subsequent transaction with the respondents is still a valid transaction they are committed to completing as vendors; and that they never agreed to pay interest in the event the plaintiff revoked the sale. The applicants/defendants also aver that they have a defence to the whole of the plaintiffs/respondents' claim.

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

*“All suits---*

*(a) where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising –*

*(i) upon a contract, expressed or implied (as, for instance, on a bill of exchange, hundi, promissory note, or other simple contract debt);*

*(ii).....*

*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 for payment of U. Shs. 50,000,000/=, interest of 18.8% from the date of receipt of the money and costs of the suit. Summary procedure under Order 36 rule 2 of the CPR clearly envisages actions for recovery of debt or liquidated demand upon a contract. The wording of the rule is clear. The action can be “*for recovery of debt or liquidated demand in money...upon a contract*”. In my opinion, this makes the instant case clearly fall under the ambit of Order 36 rule 2(a)(i) of the CPR. It provides an ideal quick remedy to recover a liquidated debt due.

This brings me to the question of whether leave should be granted to the applicants/defendants to defend *civil suit no. 104 of 2011 Sylvia Namusisi & Anor V James Kataza & Anor*. 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. See **Maluku Interglobal Trade Agency V Bank of Uganda [1985] HCB 65; Abubaker Kato Kasule V Tomson Muhwezi [1992 – 93] HCB 212 ; Zora & Anor V Ralli Brothers & Anor [1969] EA 690.**

In the instant case the respondents/plaintiffs’ claim against the applicants as per the 1<sup>st</sup> respondent’s affidavit in reply and the summary plaint includes payment of U. Shs. 50,000,000/= as well as interest of 18.8% from the date of receipt of the money. On the other hand, as is evident from paragraph 5 and 7 the applicants’ supporting affidavit the transaction between them and the respondents is not denied, but it is averred that they never agreed to pay interest in the event that the sale is revoked. The sale agreement, annexure “**A**” to the supporting affidavit, does not have a clause concerning payment of any interest. However Counsel for the respondents submitted that the issue of interest is not a triable issue and that it is up to the discretion of court to determine. He cited **Shine Pay (U) Ltd V Kiyonga Francis HCCS No. 547 of 2004** to support his position.

In my opinion, without going into trial of the issues disclosed on the agreement of sale of land, I find that the circumstances of this application, as revealed in the applicants’ affidavit evidence, indicate the existence of a *bona fide* triable issue. With respect, I do not share the respondents’

Counsel's contention that the issue of 18.8 % interest is not a triable issue. It is clearly in issue as to whether the applicants should be made to pay an interest set between the respondents and their bankers when repaying a debt originating from a contract that does not mention such interest. This situation is distinguishable from that of **Shine Pay (U) Ltd V Kiyonga Francis, supra**, cited by the respondents' Counsel. In that case court was deliberating on awards of interest set by court. In this case the interest talked about was apparently set between the respondents and their bankers on a loan and the respondents are seeking to have it paid by the applicants. The applicants however aver that they did not agree to the said interest. I am satisfied that the applicants/ defendants' 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 plaintiffs' 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 applicants/defendants.

In that regard, for the above reasons, and in the interests of justice, leave is hereby granted to the applicants/defendants to defend *civil suit no. 104 of 2011 Sylvia Namusisi & Anor V James Kataza & Anor*. The applicants/defendants 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 8<sup>th</sup> day of November 2012.

Percy Night Tuhaise

**JUDGE.**