

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISCELLANEOUS APPLICATION NO. 49 of 2020

[Arising from CIVIL SUIT NO.215 OF 2020]

- 1. GOLDEN LEAVES [U] LTD**
- 2. MRS. ZHANG NAN**
- 3. MR. ZHAN NAN:.....: APPLICANTS**

VERSUS

ISMAIL DABULE:.....: RESPONDENT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The applicant brought this application under Order 36 rules 3 & 4, O.52 rules 1 & 3 of the CPR. He sought for orders that this court grants unconditional leave to appear and defend Civil Suit No. 215 of 2020 and costs of the application be provided for.

The application was supported by the affidavit of the applicant; FANG LIU.

The facts leading to this Application are that the Applicants entered into a tenancy agreement with the respondent wherein the Applicants operated a restaurant known as The Great Chinese Wall under Golden Leaves [U] Ltd. The Applicants were to pay a monthly rent of Ugshs. 5,000,000/= [Uganda Shillings Five Million]. The Respondent alleges that the 2nd and 3rd

applicants operating under the 1st applicant did not pay rent for a period of over 12 months from May 2018 to April 2019 making the money to accumulate to the tune of Ugshs. 60,000,000/= [sixty million shillings].

It is alleged that the applicants for a period of 12 months kept on promising to pay rent to no vein and vacated the premises without the knowledge of the respondents. The Respondents aggrieved by the actions of the Applicants, filed a summary suit vide civil suit No. 215 of 2020 claiming payment of the Ugsh 60,000,000/= being rent arrears, payment of interest at a commercial rate of 25% per annum from cause of action till payment in full and cost for the suit.

In response to the above, the Applicant has filled this application for unconditional leave to appear and defend the suit.

The grounds of the application disclosed in the Notice of Motion are as follows:

- That the Applicants are not indebted to the Respondent in the sum claimed in the plaint or any other sum.
- The suit is incompetent and bad in law as it does not disclose a cause of action against the applicants and a non-existent party [2nd applicant] was sued.
- The suit against the 2nd and 3rd Defendants is incompetent on grounds that they were sued in their capacity as directors of the 1st defendant whereas by law they are not personally liable for acts of the 1st defendant.
- There is no written tenancy agreement on which the respondent premises its claim of over UGX60, 000,000.

- The Applicants have a good and plausible defence to the claim filed by the respondent as any rent obligations to the Respondent were settled and the said tenancy lapsed in February 2019 and not April 2019 as alleged by the respondent.
- That any rent obligation outstanding as of February 2019 were settled by the kind gesture of the 1st defendant handing over the restaurant with its goodwill clientele and assets to the respondent with no cost.
- There are triable issues that warrant the filing of the defence as these issues cannot be determined in a summary manner.
- That it is only just, fair and equitable that the applicants be granted unconditional leave to appear and defend the suit.

He additionally attached the receipts to justify settlement against rent obligation for previous months and payment of all utilities bills.

According to the Applicant after referring to the law and the facts disclosed in the Applicant's application and supporting evidence, the Applicant raises the following triable issues namely:

1. *Whether the Applicants have by Affidavit disclosed a triable issue of fact or law.*
2. *Whether the 2nd and 3rd defendants can be sued in their capacity as directors for the acts of the 1st defendant.*
3. *Whether the Affidavit accompanying the plaint by not having a court stamp was not filled as required by law.*
4. *Whether this matter was filed in a wrong division of the High Court of Uganda.*
5. *Whether the claim for Ushs 60,000,000 is backed by any written evidence as required by law.*

The applicant was represented by *Ms Abio Patience* while the respondent was represented by *Mr. Omongole Richard*. The parties filed written submissions which I have perused and considered in this ruling.

Determination

Whether the applicants have by affidavit disclosed a triable issue of fact or law?

The plaintiff in summary suit is entitled to summary judgment on liability if there is no issue which can be truly disputed and no other reason why there should be a trial.

The foundation for applications for leave to appear and defend is premised under order 36 rules 3 and 4 of the civil Procedure Rules which provides that upon the filing of an endorsed plaint and consequent service on the defendant, the defendant shall not appear and defend the suit except upon applying for and obtaining leave from court.

Order 36 rule 4 of the CPR further provides that the application for leave to appear and defend the suit shall be supported by affidavit which shall state whether the defence alleged goes to the whole or to part only and if so to what part of the plaintiff's claim.

The above provisions are premised on the fact that the plaintiff has failed to establish a prima facie case for summary judgment and thus the summary judgment should not be granted or entered. The defendant (applicant) is required to satisfy the court that *"there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial"*

The settled law is that for an application for leave to defend to be granted, the applicants has to show that there is a bonafide triable issue of fact or law that he will advance in defense of the suit. In the case of *Maluku Interglobal Trade Agency vs Bank of Uganda [1985] HCB 65, at 66* while considering the above rule court held 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.”

In the case of ***Bunjo vs KCB (Uganda) Ltd (Misc. Application No. 174 of 2014)*** while considering the same principle court held that;

*“It is generally accepted that the court should not enter upon a trial on any of the issues raised. However, in the case of **Corporate Insurance Co. Ltd vs Nyali Beach Hotel Ltd [1995-1998]**, EA7 the Court of Appeal of Kenya ruled that leave to appear and defend will not be given merely because there are several allegations of fact or law made in the defendant’s affidavit. The allegations are investigated in order to decide whether leave should be given. As a result of the investigation even if a single defence is identified, or found to be bonafide, unconditional leave should be granted to the defendant”.*

If the applicant raises a triable issue or if there is a good reason why there should be a trial, he will be given unconditional leave to defend. If he is not able to show that there is a triable issue or cannot satisfy the court why the case should be tried, then the plaintiff will be granted a summary judgment. See ***Rankine Bernadatte Adeline v Chenet Finance Ltd [2011] 3 SLR 756; PM Credit Opportunities Fund v Tantoo Tiny [2011] 3 SLR 1021***

The applicant does not need to satisfy the court that he is more likely to succeed on the issue or question. He/she merely has to satisfy the court that there is a question or issue which can only be properly determined at a proper trial. It is not for the court hearing the application to determine or investigate the merits of the issues raised by the applicant. The court should only ascertain whether an issue has been raised which should be tried. The duty of the court is to carefully examine the facts in order to ascertain whether there is truly a triable issue.

The power to give a summary judgment is intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where it is inexpedient to allow a defendant to defend for mere purposes of delay. The courts should be robust in their approach to applications for leave to defend by carefully scrutinizing defences to ensure that the respondent/plaintiff is not improperly deprived of a judgment in commercial transactions 'where cash flow is the lifeblood to make commerce work'. See *Habibullah Mohamed Yousuff v Indian Bank* [1999] 2 SLR (R) 880; *MP-Bilt Pte Ltd v Oey Widarto* [1999] 1 SLR (R) 908

In the instant case, the respondent submits that the suit does not raise any triable issues of law or fact and it's just an attempt to waste court's time. However, the applicants submit that there are serious questions of fact and law that ought to be answered as laid out in the affidavit of Fang Liu wherein the applicants state that they are not indebted to the respondent in the sum claimed and also went ahead to adduce receipts of payment made during the tenancy and date on which they vacated the premises leaving all its clientele, Goodwill and assets to the respondents at no costs.

In addition, the applicants also add that there was no tenancy agreement to verify such a contract and that the respondent sued a non-existent party and went ahead to file this matter in the wrong division.

In my view, the applicants have already demonstrated that they have a defence to the claim that is brought under summary procedure.

These are all triable issues of law and fact that cannot be settled in a summary suit.

I accordingly allow the application for unconditional leave to appear and defend the suit.

The applicants should file a defence to the suit within 15 days of the ruling.

Costs shall abide the outcome of the main suit.

I so Order

Ssekaana Musa

Judge

15th June 2021