

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT NAKAWA
MISCELLANEOUS APPLICATION NO. 478 OF 2014
(Arising out of Civil Suit No. 266 of 2014)**

**CHINA NATIONAL AERO- TECHNOLOGY
INTERNATIONAL ENGINEERING CORPORATION:..... APPLICANT
VERSUS
KENAM CONSTRUCTION
SERVICES LIMITED:.....
RESPONDENT**

**BEFORE: HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA
RULING**

This Application was brought by Notice of Motion under Order 36 rules 3(1) & 4 and Order 52 r. 1 & 3 of the Civil Procedure Rules. The Application is for Orders that unconditional leave be granted to the Applicant to appear and defend Civil Suit No. 266 of 2014 and costs of the Application be provided.

The Applicant was represented by Mr. Noah Wasige of M/s Kirunda & Wasige Advocates whilst Mr Dennis Katumbuka (Managing Director of the Respondent) appeared for the Respondent. The Respondent's lawyers were not in Court notwithstanding the fact that they were aware of the hearing date. But they did file their documents.

The Application was supported by the Affidavit of Mr. Williams Amani (the Assistant Managing Director of the Applicant) which reiterates the grounds in the Application but briefly they are; the Applicant executed an Agreement for conditions of External Works for Gem International School Project at Butabika whereupon the Respondent was appointed a sub contractor to carry out works at the Applicant's client's site at Butabika. That pursuant to the Sub contract, the Respondent was to complete the

works on 9th April 2013 or be liable to pay liquidated damages of 1% of the contract sum for every day of continuing default to the Applicant. The aforesaid sum of money was to be deducted from the monies that would become due to the Respondent. Notwithstanding the above, the Respondent completed works on 29th May 2014 which is 415 (four hundred and fifteen) days after the agreed upon date of completion. The Applicant issued an Interim Certificate in that respect. This attracted a penalty of UGX 2, 330, 433, 330/= (Uganda Shillings Two Billion Three Hundred Thirty Million Four Thirty Three Thousand Three Hundred Thirty) in liquidated damages. That consequently, the Applicant does not owe the Respondent the claimed sum of money. That it is rather the Respondent who owes the Applicant approximately a sum of UGX 2, 285, 158, 237/= (Uganda Shillings Two Billion Two Hundred Eighty Five Million One Hundred Fifty Eight Thousand Two Hundred Thirty Seven) of the Respondent's monies under the Interim Certificate dated 29th May 2014. That the Applicant has a good defence to the Respondent's claim under the suit and it is in the interests of justice that the Applicant be granted leave to appear and defend the suit.

In reply, the Respondent filed an Affidavit which was deposed by Mr. Kenneth Katatubuuka (Director of the Respondent) opposing the Application. Mr. Katatubuuka stated that the Applicant is indebted to the Respondent in the sums claimed in the Plaintiff that is UGX 68, 306, 097 (Uganda Shillings Sixty Eight Million Three Hundred and Sixty Thousand Ninety Seven). He denied that the Respondent ever breached any work as undertaken. That in fact the work was completed on time and handed over to the Applicant. Mr. Katatubuuka averred furthermore that the Applicant's claim is frivolous and vexatious and it is intended to delay the Respondent from receiving its money. He contended that the Applicant has no defence to the Respondent's claim in the main suit. That the proposed written statement of defence should be struck out with costs for being a mere denial.

Resolution

I have paid due consideration to the submissions of Counsel and the respective law.

Order 36, r 3(1) of the CPR provides that upon the filing of an endorsed plaint and an Affidavit as is provided in rule 2 of this Order, the Court shall cause to be served upon the defendant a summons in Form 4 of Appendix A of these in such other form as may be prescribed, and the Defendant shall not appear and defend the suit except upon applying for and obtaining leave from the Court.

The question for determination is whether this Application for unconditional leave to appear and defend be granted in the circumstances.

It is trite law that before leave to appear and defend is granted, the defendant must show by affidavit that there is a bona fide triable issue of fact or law.

According to **G.F Harwood, in “Odgers on Pleadings and Practice”, 12th Edition, at page 66**, *the defendant in proceedings of this nature is not bound to show a good defence on merits, he must 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 of the claim.* The same position has been followed by Ugandan Courts. **See Maluku Interglobal Agency Ltd vs. Bank of Uganda [1985] HCB 65, Kasule vs. Muhwezi [1992-93] HCB 212.**

The practice is that an intending defendant can satisfy that there are bona fide issues which merit Court’s determination by accompanying the Application for unconditional leave to appear and defend with a copy of their Written Statement of defence. This was followed by the Applicant at

hand. I have perused through the Applicant's Affidavit in support of the Application and I find that it does raise triable issues to wit;

- a) Whether the Applicant is entitled to UGX 2, 285, 158, 237/= from the Respondent being monies arising out of the Interim Certificate.
- b) Whether the Respondent performed the contract in accordance within the stipulated time as agreed upon in the contract.
- c) There are also issues as to how the Interim Certificate operated and whether it is applicable to the facts.

Therefore, from the foregoing, I am convinced that the Application raises triable issues for determination of this Court. Therefore the application is granted and it is ordered;

1. The Applicant files its written statement of defence within 14 days of this order.
2. Costs of the application in the cause.

Signed

Hon. Lady Justice Elizabeth Ibanda Nahamya

Judge

27th AUGUST, 2014