

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0048 OF 2014

**(Arising from Arua Grade One Magistrate’s Court Civil Application No. 005 of 2013 and
Civil Suit No. 0065 of 2010)**

AGONY SWAIBU APPELLANT

VERSUS

**SWALESCO MOTOR SPARE
AND DECORATION DEALERS RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

In the court below, the respondent sued the appellant by way of summary suit for recovery of shs. 7,380,000/= being partly money borrowed in cash from the respondent (shs. 5,000,000/=) and spares sold on credit to the appellant (shs. 2,800,000/=). Subsequently, the appellant committed himself in writing to pay the outstanding amount in full before the 24th of November 2012. The appellant later issued the respondent with a cheque which bounced and the appellant was duly notified of this. The respondent later filed a suit before the Grade One Magistrate’s Court at Arua. Upon being served with summons and the specially endorsed plaint, the appellant filed an application for unconditional leave to appear and defend the suit.

In his application, the appellant contended that he had a defence to the suit and that the claim raised some triable issues, mainly that he had offset the entire debt and was no longer indebted to the respondent. In his affidavit in reply to that application, the respondent’s Managing Director more or less re-stated the facts as pleaded in the specially endorsed plaint.

Relying on the appellant’s written commitment to pay the outstanding amount in full before the 24th of November 2012, and the appellant not having presented any proof that he made any

payments subsequent to that undertaking, the trial Magistrate found the appellant had not raised any plausible defence to the suit or any issues for trial and therefore dismissed the application with costs to the respondent. The court then entered judgment in the sum of shs. 7,380,000/=, interest thereon at court rate from the date of judgment and costs in favour of the respondent
5 against the appellant.

The appellant has appealed that decision on the following grounds;

1. The learned trial Magistrate erred both in law and fact and misdirected herself when she failed to properly evaluate the evidence on record thus arriving at an erroneous decision.
- 10 2. The learned trial Magistrate erred both in law and fact when she failed to consider that the appellant had paid the respondents shs. 5,000,000/=

In his written submissions, the appellant argued that the attachments to his affidavit in support of the application for unconditional leave to appear and defend contained documents, including a
15 cheque and payment vouchers, which indicated that he had offset the debt which evidence was not considered by the trial magistrate. He further argued that the affidavit in support of the specially endorsed plaint filed by the respondent was defective in that it appeared to have been sworn by two deponents.

20 On a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. The appellate court is under an obligation to re-hear the case by subjecting the proceedings before the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three others v. Eric Tiberaga SCCA 17of 2000*; [2004] KALR 236).

25 Article 126 (2) of *The Constitution of the Republic of Uganda* enjoins courts to administer “substantive justice without undue regard to technicalities.” It is at the discretion of the judge to decide whether in the circumstances of a particular case and the dictates of justice, a strict application of the law, should be avoided (see *Byaruhanga and Company Advocates v. Uganda
30 Development Bank, S.C.C.A No. 2 of 2007*). I have considered the anomaly in the affidavit that accompanied the specially endorsed plaint and the explanation offered by the respondent

attributing it to a typographical error. It is in my view a technical error that does not go to the validity of the affidavit or the root of the dispute between the parties. I find this to be a proper case where strict application of the law should be avoided.

5 Although irregularly brought to my attention, I have considered the payment vouchers and cheque the appellant has presented as part of his submissions in this appeal. These documents were neither attached nor referred to in his application for unconditional leave to appear and defend the suit. They are respectively dated; 20th March 2011 and 25th March 2011. The cheque is dated 15th February 2011. This evidence provided by the appellant predates his written
10 commitment of 9th October 2012 by which he undertook to pay the outstanding amount in full before the 24th of November 2012. The trial magistrate cannot be faulted for failure to consider documents which were in the first place not placed before her as part of the appellant's pleadings. I further find that even if the appellant had attached them and the trial magistrate had considered them, she still would have come to the conclusion that she did.

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Despite the fact that at the hearing of an application for unconditional leave to appear and defend the court is not required to determine the merits of the proposed defence, it is incumbent upon the applicant to present a plausible defence. Leave is declined where the court is of the opinion that the grant of leave would merely enable the applicant to prolong the litigation by raising
20 untenable and frivolous defences. The test is whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the applicant are established there would be a good or even a plausible defence on those facts. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to
25 entitle the applicant to interrogate the plaintiff or to cross-examine the plaintiff's witnesses, leave should not be denied. Where also, the applicant shows that on a fair probability he or she has a bona fide defence, leave ought to be granted.

Although the court will not at that stage reject the defence of the applicant merely because of its
30 inherent implausibility or inconsistency, a plausible defence is one that raises issues capable of being tried. The test is whether if the facts alleged by the applicant are established there would be

a fair dispute to be tried, issues of such a nature as would entitle the applicant to interrogate the plaintiff or to cross-examine the plaintiff's witnesses. I have not found any misdirection on the part of the trial magistrate in the way she went about considering the appellant's proposed defence. She addressed the right principles and applied them correctly to the facts before her.

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The jurisdiction to grant leave or to refuse the same is exercised on the basis of the affidavit filed by the applicant for unconditional leave to appear and defend the suit. I have myself re-evaluated the appellant's pleadings he placed before the trial court. In paragraph 3 of his affidavit he deponed that he had a plausible defence to the suit a copy of which he attached as annexure "A".

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In paragraph 4 of that defence, the appellant averred that he had fully offset his obligations to the respondent regarding the shs. 5,000,000/= borrowed in 2010. In paragraph 5, he denied having ever been supplied with tyres. In paragraph 6, he denied owing the respondent any money. In paragraph 9, he stated that he had overpaid the respondent by shs. 980,000/=. In none of those averments did he make any reference to any documentary proof, such as that which he annexed to his submissions to this court. Even if he had annexed that documentation, it does not explain away the undertaking he made on 9th October 2012 to pay the outstanding amount in full before the 24th of November 2012, yet this formed the crux of the claim against him. In addition, the offsets, payments and over-payments he alluded to in his defence are not time specific. This was clearly a sham defence.

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Upon consideration of material placed before the trial Court, I have come to the conclusion as the trial court did, that the defence is illusory, a sham and highly improbable. Where such a defence is presented, the plaintiff is entitled to judgment and the trial court was justified in entering judgment against the appellant in the terms it did. In the final result, I do not find any merit in the appeal and it is hereby dismissed with costs to the respondent.

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Dated at Arua this 6th day of July 2017.

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Stephen Mubiru
Judge
6th July 2017