



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Miscellaneous Civil Application No. 134 of 2016

In the matter between

CHILDREN OF AFRICA APPLICANT

VERSUS

SARICK CONSTRUCTION LIMITED RESPONDENT

Heard: 23 April, 2019.

Delivered: 16 May, 2019.

Civil Procedure — Summary Suit — application for unconditional leave to appear and defend the suit—whether unconditional leave should be granted where the requirement for full disclosure of the nature and grounds of the defence, and the material facts on which it is based, has not been satisfied—Leave will be granted conditionally where the material facts on which the defence is based are not disclosed.

RULING

STEPHEN MUBIRU, J.

Introduction:

[1] This is an application made under Order 36 rule 4 of *The Civil Procedure Rules*, by which the applicant seeks leave to appear and defend the suit. The background to the application is that on 15th October, 2015 the parties entered into a building contract by which the respondent undertook to construct six blocks of classrooms, dormitories, laboratories, patient wards and offices at the cost of shs. 28,880,336,335/= The applicant failed or refused to pay the interim certificate of completion in the sum of shs. 7,727,690,810/= prompting the respondent to file a suit under summary procedure for the recovery of that sum

and accumulated interest thereon of shs. 669,733,308/= from the date the amount fell due up to the time of filing the suit, and additional inters thereon at the rate of 26% per annum from the date of filing the suit until payment in full.

[2] The applicant contends it has a plausible defence to the suit and that there are triable issues to be considered. The applicant contends that in executing the underlying construction contract, the respondent fraudulently caused issuance of an interim certificate of completion, yet its work on the project was not proper, was poorly done with poor quality material and defects in workmanship. It therefore had a plausible defence to the suit.

[3] The respondent has opposed the application on grounds that when the respondent doubted the credibility of the certificate in issue, the respondent retained the services of an independent expert who re-examined the work done and reviewed the claim contained in the certificate. That expert verified the technical specifications and found that there was no fraud involved in its issuance. It is on that basis of that report that another interim certificate of completion was issued, on 7th July, 2016 bearing the same figures as those contained in the one that was refuted by the respondent. By an email dated 18th August, 2016 the applicant undertook to pay as soon as funds were remitted by their donors. The application does not disclose any defence or triable issue and should therefore be dismissed.

Submissions in support of the application;

[4] In his submissions, counsel for the applicant argued that the triable issues are;- whether the interim certificate of completion was issued under fraudulent circumstances; and whether the works executed by the respondent are in accordance with the specifications in the contract. The defence to be presented by the respondent is that "the respondent completely failed to comply with the contract specifications as she has done shoddy work contrary to the agreement

descriptions as there are now several imminent defects on some of the completed parts of the sub-structure vide cracks, and the certificate of completion issued was fraudulently obtained.... the materials used by the respondent in the construction were of low grade and poor quality. All the materials used by the respondent did not meet the contract specifications, and the damage on several parts is so grave." The interest claimed by the respondent is as well exorbitant. These issues and the defence merit a trial, and therefore the application ought to be allowed, or alternatively the dispute be referred to arbitration.

Submissions for opposing the application;

[7] In response, counsel for the respondent submitted that there is no longer any matter to send to arbitration since the interim certificate of completion that was queried by the applicant was eventually cleared of any wrongdoing by an independent expert engaged by the applicant. The grounds raised by the applicant are made in bad faith. The proposed issues and defences are not genuine and therefore the application should be dismissed. In the alternative, if the application is to be allowed, it should be conditional on the applicant depositing the amount claimed, in court.

General considerations;

[8] Under Order 36 rule 4 of *The Civil Procedure Rules*, unconditional leave to appear and defend the suit will be granted where the applicant shows that he or she has a good defence on the merits; or that a difficult point of law is involved; or that there is a dispute which ought to be tried, or a real dispute as to the amount claimed which requires taking an account to determine or any other circumstances showing reasonable grounds of a bona fide defence (see *M.M.K Engineering v. Mantrust Uganda Ltd H. C. Misc Application No. 128 of 2012*; *Bhaker Kotecha v. Adam Muhammed [2002]1 EA 112*; and *Makula Inter global Trade Agency v. Bank of Uganda [1985] HCB 65*). The applicant should

demonstrate to court that there are issues or questions of fact or law in dispute which ought to be tried. The procedure is meant to ensure that a defendant with a triable issue is not shut out.

[9] In an application of this nature, there must be sufficient disclosure by the applicant, of the nature and grounds of his or her defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. To this end, the applicant cannot merely rely on conclusions in law but must set out actual evidence. A court that is satisfied that this threshold has been crossed is then bound to grant unconditional leave. Where court is in doubt whether the proposed defence is being made in good faith, the court may order the defendant to deposit money in court before leave is granted.

[10] Wherever there is a genuine defence either to fact or law the defendant is entitled for leave to appear and defend. The applicant is not at this stage required to persuade the court of the correctness of the facts stated by it or, where the facts are disputed, that there is a preponderance of probabilities in their favour, nor does the court at this stage endeavour to weigh or decide disputed factual issues or to determine whether or not there is a balance of probabilities in favour of the one party or another. The applicant must show a state of facts which lead to the inference that at the trial of the suit he or she may be able to establish a defence to the plaintiff's claim, in which case he ought not to be debarred of all power to defeat the demand upon him. The court merely considers whether the facts alleged by the applicant constitute a good defence in law and whether that defence appears to be bona fide. In order to enable the court to do this, the court must be apprised of the facts upon which the defendants rely with sufficient particularity and completeness as to be able to hold that if these statements of fact are found at the trial to be correct, judgment should be given for the defendant.

- [11] The applicant, in his or her affidavit in support of the application, must fully disclose the nature and grounds of the defence and the material facts on which it is based. The applicant must depose to facts which, if accepted as the truth or proved at the trial, would constitute a defence to the plaintiff's claim. While it is not incumbent upon the applicant to formulate the defence with the precision that would be required in evidence, nonetheless the applicant must do so with a sufficient degree of clarity to enable the court to ascertain whether the applicant has deposed to a defence which, if proved at the trial, would constitute a good defence to the suit.
- [12] Such a defence should not be averred in a manner that appears to be needlessly bald, vague or sketchy. If the defence is based upon facts, in the sense that material facts alleged by the plaintiff in the plaint are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. If the defence is averred in a vague, bald or sketchy manner, that may be taken into account when determining whether the applicant has a bona fide defence or not.
- [13] On the other hand, a triable issue is one capable of being resolved through a legal trial i.e. a matter that is subject or liable to judicial examination in court. It has also been defined as an issue that only arises when a material proposition of law or fact is affirmed by the one party and denied by the other (see *Jamil Senyonjo v. Jonathan Bunjo, H.C. Civil Suit No. 180 of 2012*). A judgment under summary procedure is based upon a contention that all necessary factual issues are settled or so one-sided that they need not be tried. Leave to appear and defend must be given only if the court is satisfied that there is a triable issue in the sense that there is a fair dispute to be adjudicated. The issue raised should not be illusory or sham or practically moonshine. Consequently when an application for leave to defend is made on basis of the existence of triable issues

of fact, the applicant must fully disclose the nature and scope of the material facts to be tried.

- [14] The law requires that the defendant, in his affidavit supporting the application, must fully disclose the nature and grounds of the defence and the material facts on which it is based. In the instant case, the applicant states that his defence and triable issues are based partly on fraud and partly on poor workmanship. As regards the claim of fraud, the particulars are not stated in the proposed written statement of defence attached to the affidavit in support of the motion. As regards the alleged breach of contract, the proposed written statement of defence lists them as follows;- failure to comply with the technical specifications of the contract; failure to use the recommended materials for the project; fraudulently requesting for a certificate of completion before completion of the first phase; and conniving with the Project Manager to acquire a certificate of completion fraudulently.
- [15] The court has to decide whether the applicant has in the matter under consideration crossed the threshold that requires pleading the material facts on which the defence is based rather than pleading its defence in a vague, bald or sketchy manner. It has to determine whether there been a full disclosure of the defence and the material facts upon which the applicant relies as a defence to respondent's claim. All that the court enquires, in deciding whether the applicant has set out a bona tide defence, is: (a) whether the applicant has disclosed the nature and grounds of its defence; and (b) whether on the facts so disclosed the applicant appears to have, as to either the whole or part of the claim, a defence which is bona tide and good in law.

Leave will be granted conditionally where the material facts on which the defence is based are not disclosed.

- [16] Having perused the affidavit in support of the application and the intended written statement of defence attached to the affidavit in support of the motion, I have formed the view that the requirement of full disclosure of the nature and grounds of the defence and the material facts on which it is based has not been satisfied. The allegations of the applicant in this regard are lacking in particularity. They do not state the material facts upon which they rely other than the bald statement that respondents did shoddy work that is not according to specifications, the construction work was of poor quality and the materials used were low grade.
- [17] The point is that the applicant does not dispute the fact that the plaintiff rendered the services as categorically alleged by the respondent, only that the applicant is dissatisfied with its quality. The applicant does not allege a total failure of consideration and therefore, if successful, appears only to have only a partial defence to the suit. Moreover the Court cannot pay regard to general and vague allegations which do not contain specific facts on which the purported defence is based. The applicant has limited itself to an assertion, unsupported by any material facts, that it has a defence, but has not suggested any basis for holding that this constitutes a legal defence to the respondent's entire claim.
- [18] Under Order 36 rule 8 of *The Civil Procedure Rules*, leave to appear and defend the suit may be given unconditionally, or subject to such terms as to the payment of monies into court, giving security, or time or mode of trial or otherwise, as the court may think fit. The discretion, clearly, is not to be exercised capriciously, so as to deprive a plaintiff of summary judgment when he or she ought to have that relief. Imposing conditions may be justified by the applicant's failure, as demonstrated in the case, to measure up fully to the requirement to disclose fully the nature and grounds of the defence and the material facts on which it is based.

Order :

[19] In the final result, the application is allowed subject to the following condition, failure of which summary judgment is to be entered in favour of the respondent;

- a) Depositing in court within thirty days from the date of this Order, half the sum claimed, being a sum of shs. 3,863,845,405/=
- b) Hearing of the suit is fixed for 17th October, 2019 at 9.00 am in the event of the applicants' compliance with the condition in (a) above. The parties should have filed a joint memorandum of scheduling by then.
- c) The costs of the application shall abide the result of the suit.

Stephen Mubiru
Resident Judge, Gulu

Appearances:

For the applicant : Mr. Brian Watmon.

For the respondent : Mr. Emoru Emmanuel.