

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

MISCELLANEOUS APPLICATION NO. 0004 OF 2019

(Arising from Civil Suit No. 0049 of 2019)

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**UGANDA ELECTRICITY TRANSMISSION COMPANY
LIMITED.....APPLICANT**

VERSUS

KAISO JACK, ADMINISTRATOR OF THE

10 **ESTATE OF THE LATE LAMECK MUKASA.....RESPONDENT**

BEFORE: HIS LORDSHIP HON. MR. WILSON MASALU MUSENE

Ruling

15 The Applicant Uganda Electricity Transmission Company Limited brought this application under **Section 98** of the Civil Procedure Act, and **Order 36 Rules 3(1)** and **4** of the Civil Procedure Rules against the Respondent Kaiso Jack, Administrator of the Estate of the late Lameck Mukasa for orders that;

- a. The Applicant/Defendant be granted unconditional leave to appear and defend Civil Suit No. 0049 of 2018.
- 20 b. The costs of the application be provided for.

Brief Background:

25 The Respondent lodged a suit for the recovery of a liquidated demand against the Applicant for the payment of a liquidated sum of UGX 365,229,434/= (Three Hundred Sixty five million, two hundred twenty nine hundred thousand, four hundred thirty four shillings only), interest at 25% from the date the cause of action arose until payment in full and costs of the suit. The summons under summary suit were extracted and duly served on the Applicant

requiring it to apply for leave to appear and defend within 10 days from the 14th day of December 2018. The Applicant applied for the said leave on the 22nd January 2019. The Application was fixed and came up for hearing on the 30th April 2019.

The Application was supported by an affidavit sworn by Catherine Wamukota, the Principal
5 Legal Officer of the Applicant and the grounds briefly are as follows;

- a. The suit against the Applicant is premature and as such misconceived.
- b. The sum claimed by the Respondent is not due from the Applicant. The Applicant is not indebted to the Respondent in the sums claimed.
- c. The contract which the Respondent bases his claim is still subsisting and the time of
10 payment is not of the essence.
- d. There was no agreement on payment time and/or schedule between the Applicant and the Respondent. The sums were payable as and when the Applicant received the money from the Government and upon compliance with the Applicant's allowable procedures.
- 15 e. That the Application rises triable issues to wit, whether time is of the essence and whether there is any amount owing from the Applicant as claimed.
- f. That the Applicants have a good and plausible defence to the claim.

The Respondent filed an affidavit in reply to the Application opposing the same and asserting that the Applicant admitted to being responsible for paying the sums claimed by the
20 Respondent, that the Applicant is indebted to the Respondent and that there are no triable issues that go to the core of the main suit that have been raised by the Applicant.

M/s AF Mpanga Advocates who represented the Applicant in their submissions cited **Order 36 Rules 3(1) and 4** of the Civil Procedure Rules which provide that a Defendant in a Suit under **Order 36** may apply for leave to appear and defend the suit. And the case of
25 **Marsenne (U) Ltd & 2 Others versus Stanbic Bank Ltd, HCCA No. 482 of 2014** which laid out the principles for grant of leave to appear and defend as follows;

- i. Unconditional leave to appear and defend will be granted if the Applicant shows that they have a good defence on merits, or that a difficult point of law was involved, or that there is a dispute which ought to be tried, or a real dispute exists
30 as to the amount claimed which require taking an account to determine, or any other circumstances showing reasonable grounds of a bona fide defence.

- ii. Even if it is a single defence identified or found to be bonafide, the principle is that unconditional leave should be granted.
- iii. The Court is not required at this stage (of the Application) to determine the merits of the defence or the suit. The purpose of the application is not to prove the Applicant's defence, but to ask for an opportunity to prove it through a trial. What Court has to determine is whether the Defendant has shown a case to be given leave to defend. What Courts have consistently held to amount to a good case is evidence that the Defendant has triable issues to the suit.

Counsel for the Applicant went on to submit that the Applicant's suit does not seek to recover a liquidated demand and there was no written contract or agreement between the Applicant and the Respondent with express terms and conditions of how the Applicant and the Respondent were to manage their relationship. That the relationship between the two parties has always been informal and in October 2017 the two parties informally agreed that the Applicant will pay the Respondent UGX 1,103,527,973/= as compensation for land to affected by the Respondent's Nkenda-Hoima Transmission Line Project. It was agreed between the Applicant and the Respondent that the payments would be made in instalments and the Applicant was not to use the land in any way until the entire sum was paid and this has been complied with.

Further that the Applicant did not agree to a payment plan/schedule since the Applicant would pay as and when the Government availed money and never was time made of the essence for payment to be made and only two payments have been made since and the amount sought by the Respondent is thus not due and owing to the Applicant since no money has been received from Government. That the arrangement between the Applicant and the Respondent is still subsisting and ongoing and the Respondent cannot now turn around and purport to compel the Applicant to pay the sums claimed at ago, yet the parties did not agree to any such payment and the Applicant has not yet received the money from Government. The Applicant denies breaching its arrangement with the Respondent. Thus, there are triable issues disclosed by the Applicant and therefore the Applicant should be granted unconditional leave to appear and defend the suit.

Secondly, that there is a contention as to the actual amounts owing to the Respondent which are not accurate because the Applicant has paid more than is reflected and this too is a triable issue and there was never an agreement between the parties to pay interest. Therefore, it is the

Applicant's submission that the question of whether the Plaintiff/Respondent is entitled to charge interest, whether 10% or 25% raises a question of law and is a bonafide triable issue for consideration at trial as per the case of **George William Sikibwabu Kyeyune versus R.L. Jain, HCMA No. 421/2014.**

5 M/s Bahenzire, Kwikiriza & Co. Advocates and M/s Rwabogo & Co. Advocates who represented the Respondent on the other hand submitted that the instant Application does not go to the root of the claim because the Applicant has not disclosed a good defense on the merits of the main suit and there are no reasonable grounds of a bona fide defense. That the Respondent's claim is well premised on a clear breach of a contract by the Applicant who is
10 indebted to the Respondent and has neglected or refused to pay the sums due within the stipulated time. That the breach occurred when the Applicant did not pay the whole amount of UGX 1,103,527,973/= (One Billion, one hundred three million, five hundred twenty seven thousand, nine hundred seventy three shillings only) as per the commitment to do so in the letter dated 6th December 2017, within three weeks from 1st December 2017. That the
15 Application does not raise any triable issues of law or fact and is intended to waste Court's time.

Further, that the main suit is intended to achieve a particular purpose envisioned by the Legislature and the Courts of Judicature thus this suit is neither premature, nor misconceived. That in paragraph 5 of the affidavit in support of the Application deponed by Catherine
20 Wamukota, was categorical that the reasons why the Applicant has not been paid the sums due include; that the Applicant has not yet concluded with the verification of title, acquisition of the necessary clearances and approvals, among others and that the Applicant has not yet received the money from the Government; that the contract upon which the Respondent bases his claim is still subsisting and therefore the sums claimed by the Respondent are not yet due.

25 Furthermore, that it is trite law that land affected by a development project cannot be expropriated without prior prompt payment of compensation as per the case of **Uganda National Roads Authority versus Irumba Asumani & Peter Magelah, Supreme Court Constitutional Appeal No. 2 of 2014.** That in the instant case the Respondent is being deprived of his right to own property without compensation as per **Article 26(2)(b)(i)** of the
30 Constitution of the Republic of Uganda, 1995 which makes time of payment essential. That the two parties had an agreement of payment time between them and the Applicant was to pay UGX 1,103,527,973/= (One Billion, one hundred three million, five hundred twenty

seven thousand, nine hundred and seventy three shillings only). That by letter dated 6th December 2017 the Applicant made a commitment to compensate the balance of the compensation in 3 weeks from 1st December 2017 to which the Respondent consented. However, the Applicant has never paid the said balance to date.

5 Counsel for the Respondent concluded that the Applicant's allowable procedures were duly complied with thus extinguishing all the possible disputes as to facts in this application for which he prays that the Applicant should be compelled to pay the amount claimed as compensation for the Respondent's land. And that in the circumstances the Applicant has no good defence, there is no good cause for the Application to be granted because it was not
10 made in good faith.

I have considered the submissions on record by both sides in this application for unconditional leave to appear and defend. I have also studied the pleadings on record, including the plaint under summary procedure and the supporting affidavits. There are numerous decided cases on claims under summary procedure and applications for leave to
15 appear and defend.

In **Kotecha versus Mohammed [2002] E.A 112** where Court held that where a suit is brought under summary procedure on a specially endorsed plaint, the Defendant is granted leave to appear and defend if he was able to show that he had a good defense on merit, or that there was a difficult point of law involved; or a dispute as to the facts which ought to be tried
20 or a real dispute as to the amount claimed which requires taking into account to determine; or any other circumstances showing reasonable grounds of a bonafide defense.

In the present case, the Respondent's claim was that there was breach of contract by the Applicant who did not pay the Respondent UGX 1,103,527,973/= at ago as per the commitment to do so in a letter dated 6/12/2017. The Applicant kept on paying part of the
25 UGX 1,103,527,973/= to the Respondent in instalments including a sum of UGX 202,414,287/= deposited on the Respondents individual account on 13/2/2018. So, having committed to pay and indeed the Applicant kept on paying till there remained an outstanding balance of UGX 365,229,343/= then this Court is satisfied that the Applicant does not have a good and plausible defense, and therefore no good cause for the application for leave to
30 appear and defend.

The submissions by Counsel for the Applicant, that the cause was prematurely filed or that time of payment was of essence does not arise. The other argument by the Applicant that payment was conditional on the Applicant getting money from Government is not reflected in the communications between the Applicant and the Respondent. In fact the Applicant in one
5 of the communications stated that they would fast truck the payments.

In my view, fast trucking cannot go on forever particularly since the outstanding balance of UGX 365,229,434/= is not denied by the Applicant. Furthermore, since the Applicant has already taken over the Respondent's land and is developing the same, and since **Article 26(2)(b)(i) of the Constitution of the Republic of Uganda, 1995** is to the effect that no person
10 shall be compulsorily deprived of property or any interest therein without compensation, then this Court cannot deny the Respondent of their payments under the pretext that there are triable issues. And furthermore, this Court cannot allow the Applicant's submissions that the Applicant and Respondent have always managed their relationship informally.

All in all, since the Applicant has paid a substantial sum of the original amount of UGX
15 1,103,527,973/= to the Respondent, and since the balance of UGX 365,229,434/= is not disputed, then the Application for leave to appear and defend is uncalled for. The same is hereby dismissed with costs.

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20 **WILSON MASALU MUSENE**

JUDGE

12/09/2019