

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

MISCELLANEOUS APPLICATION NOS. 656 & 657 OF 2019

(Arising from Civil Suit No. 381 of 2019)

(Arising from Taxation Case No. 48 Of 2019)

1. HAROLD WEJULI

(Administrator of the Estate of the late George Alex Wejuli)

2. BUMERO ESTATES:.....APPLICANTS

VERSUS

AGGREY BWIRE:.....RESPONDENT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING.

These applications were brought under **Order 36 rules 3 & 4, Order 52 rules 1 & 3 of the Civil Procedure Rules SI 71-1** for orders that this court grants unconditional leave to appear and defend Civil Suit No. 381 of 2019 (Arising from application from Taxation Case No. 48 of 2019), and costs of the application be provided for.

The 1st Respondent sued the applicants by way of summary suit for the recovery of a decreed sum of UGX 123, 000, 000/= being awarded in Taxation Case No. 48 of 2019, awarded by this Honorable Court by order dated 4th September, 2019. The applicant filed this application for unconditional leave to appear and defend the suit.

Miscellaneous Application No. 656 of 2019 was supported by the affidavit of the 1st applicant whose grounds briefly stated:

1. That the Applicant shall raise preliminary points of law that this suit is vexatious and frivolous and should be dismissed with costs.
2. That the Applicant is not indebted to the 1st Respondent to a tune of 123, 000, 000/= (one hundred and twenty three million shillings).
3. That the Applicant has a very strong defence to the 1st Respondent's claim as the same is res judicata and a serious abuse of court process.
4. That there is a valid court judgment in Taxation Case No. 48 of 2019 involving the same parties and the same subject matter and thus fact is within the applicant's knowledge.
5. That there is a pending appeal arising from Taxation Case No. 48 of 2019 filed in this Honorable Court and the 1st Respondent is much aware of the same.
6. That the 1st Respondent's claim is misconceived and only intended to waste courts time and create Case backlog.
7. That the application has a very sound defense/response to the suit against him by the 1st Respondent as the latter has no any cause of action against the applicant.
8. That it is the interest of justice, equity and fairness that this court grants the application.

Miscellaneous Application No. 657 of 2019 was supported by the affidavit of Bob Nagemisi whose grounds were briefly;

1. That the applicant states that they have not given any instruction to the respondent or ratify and that the respondent was not entitled to taxation award of UGX 123,000,000/=
2. That the applicant states that they have lodged an appeal against the taxation award in the Taxation application No. 48 of 2019 and therefore the said suit is an abuse of court process.
3. That the defendant insists that the applicant secured a court order to reconstitute the applicant company and rectification of the register of members which order was eventually set aside, and all activities undertaken by him were expunged from the court record.
4. That the defendant has a valid and tenable defense to the suit which defense discloses triable issues.
5. That in the interest of justice leave should be granted.

The 1st respondent filed affidavits in reply deponed by Aggrey Bwire opposing both applications. Together, they briefly stated;

1. That it is true that the Advocate-Client Bill of Costs between me on the one hand and the 1st Applicant and 2nd Respondent on the other hand, was taxed and allowed at 123, 000, 000/= against the Applicant and the 2nd Respondent.
2. That the said taxation of the Advocate-Client Bill of Costs only dealt with the quantum to be paid to me as the advocate and the liability to pay the taxed costs of the Applicant and the 2nd applicant, but the said application for Taxation did not deal with the recovery of the taxed costs.

3. That Civil Suit No. 381 of 2019 from which this application arises deals with the recovery of that taxed cost from the Applicant and the 2nd Respondent.
4. That therefore the issue that the taxation dealt with in Taxation No. 48 of 2019 are clearly different and distinct from the main suit from which the application arises; and therefore the said main suit is not res judicata to that extent, are contended by the applicant.
5. That the applicants' contention that they are not liable or indebted to me in the sum of 123, 000, 000/= was clearly dealt with and finally disposed of in Taxation No. 48 of 2019; and to that extent, that contention/issue is resolved judicata.
6. Therefore the applicants have no defense and this application for leave to appear and defend the suit does not disclose any triable issue.
7. That these applications for leave to appear and defend the suit should therefore be dismissed with Costs.
8. That what is stated herein above is true and correct to the best of my knowledge.

The 1st applicant raised four preliminary points of law in regards to raising the aspect of a triable issue which were adopted by the respondent and they are that:

1. The suit filed by the respondent vide Civil Suit No. 381 of 2019 is res judicata.
2. The summary suit under Order 36 Rule 2 is not a mode of execution and that the suit is misconceived, frivolous and vexatious and a blatant abuse of court process.

3. That the suit was filed by and against a wrong party.
4. The orders sought by the 1st Respondent are not enforceable against the Applicant.

Representation.

At the hearing the 1st applicant was represented by Ms. Deborah Brendah and Ms. Flavia Nakato Wejuli, the 2nd applicant by Yesse Mugenyi the respondent was represented by Mr. Aggrey Bwire. It was agreed that the matter proceeds by way of written submissions, which were duly filed by both counsel.

Preliminary Objections.

The 1st Applicant raised four preliminary objections or preliminary points of law.

The first preliminary objection that was raised by the 1st Applicant is to the effect that the suit filed by the respondent vide Civil Suit No. 381 of 2019 is res judicata.

The 1st Applicant submitted that the suit filed was res judicata where as the 1st Respondent stated that it could not be res judicata because it would then mean that the 1st Applicant and 2nd Respondent had paid the 1st Respondent the decreed sum due to him which was not the case.

The second point of law was to the effect that the summary suit under Order 36 Rule 2 is not a mode of execution and that the suit is misconceived, frivolous and vexatious and a blatant abuse of court process.

Counsel for the 1st Applicant submitted that a summary suit is not a mode of execution and is not provided for under **Order 22 of the Civil Procedure Rules SI 71-1** and **Section 38 of the Civil Procedure Act Cap. 71**. Counsel for the 1st

Respondent claimed that the sum claimed is a liquidated sum within the meaning of **Order 36 of the CPR** and relied on the provision of **the Advocates Act and the Advocates (Remuneration and Taxation of Costs) Regulations section 57 and Regulation 10** respectively together with the case of **Fides Legal Advocates v Kampala Capital City Authority Taxation Appeal No. 40 of 2015** where Madrama J (as he then was) held that a matter for recovery of costs one would have to be brought by plaintiff, therefore counsel for the 1st Applicants submission is flawed and misconceived.

The third point of law was to the effect that the suit was filed by and against a wrong party. Counsel for the 1st Applicant stated that he was wrongly attached as a party to the main suit from which this application is arising from and should have been sued as a director of the 2nd Respondent and not as an Administrator. He relied on **Order 1 rule 1 and Order 30 rule 1 of the Civil Procedure Rules** together with **section 180 of the Succession Act**. The counsel for the 1st Respondent submitted that the parties to the suit were the same parties sued from the deputy registrars order dated 4th/09/2019 for the taxed bill of Costs and are therefore the right parties before court and have not been substituted.

The fourth point of law was to the effect that the orders sought by the 1st Respondent are not enforceable against the Applicant.

I have carefully considered the submissions of both counsel together with the evidence provided for on file and it is therefore my considered view that all the four preliminary points of law raised by the 1st Applicant fail and are devoid of merit.

Determination.

In that regard I will go ahead to look at the main issue for determination in an application of this nature which is **whether the application raises triable issues as to warrant the grant of unconditional leave to appear and defend the main suit.**

Under **Order 36 Rule 4 of the Civil Procedure Rules**, a defendant served with a summons filed under **Order 36 Rule 2 of the Civil Procedure Rules** may seek leave to appear and defend the suit.

The settled law is that for an application for leave to defend to be granted, the applicants have to show that there is a bonafide triable issue of fact or law that they will advance in defence of the suit. In ***Makula 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 an application for leave to appear and defend a summary suit, 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. Secondly, the defence so disclosed must be both bona fide and good in law. 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 grant conditional leave, say by ordering the defendant to deposit money in court before leave is granted. (See ***Children of Africa vs Sarick Construction Ltd H.C Miscellaneous Application No. 134 of 2016***).

In the instant case, the 1st respondent argues that the suit does not raise any triable issues of law or fact and it's just an attempt to waste court's time and cause case backlog. However, the 1st and 2nd Applicants submit that there are serious questions of fact and law that ought to be answered as laid out in the affidavits of the 1st and 2nd Applicants. In the affidavit of Harold Wejuli (Administrator of the Estate of the late George Alex Wejuli) wherein the 1st Applicant states that he is not in any way indebted to the Respondent in the sum claimed and also goes ahead to adduce substantial evidence to that effect in the annexures attached to the Affidavit in Support of the Applicant's application.

The 1st Applicant also adds that there is a Taxation Appeal that is pending and has not yet been concluded which would not allow for Civil Suit No. 381 of 2019 to continue without its determination and it is pertinent to the case at hand.

The second affidavit was made by Bob Nagemisi on behalf of the 2nd Applicant wherein the 2nd Applicant states that they did not give the 1st Respondent instructions to ratify and is therefore not entitled to the liquidated sum sought. He also goes on to state the fact that there is a pending appeal against the taxation award in Taxation application No. 48 of 2019.

Therefore, in my opinion, both applicants have ably demonstrated that they have a defence to the claim that is brought under summary procedure. And the triable issues raised are issues of law and fact that cannot be amicably settled under a summary suit.

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

The 1st and 2nd Applicants shall 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

30th November 2022