

The respondent opposed the application by an affidavit in reply deposed by Kasoba Arnold Kafufu, a director of the respondent. He stated inter alia; that the respondent's claim is well supported by documentary evidence, the applicant has not presented any triable issues for the court to consider, the application lacks merit and is a complete waste of court's time.

In its affidavit in reply, the respondent raised three objections to the application.

- i. That the affidavit in support of the application is defective for want of authenticity
- ii. The affidavit in support of the application is filed without valid authorization from the applicant
- iii. That Jason & Co. Advocates have no instructions to represent the applicant in this application and Civil Suit No.043 of 2022.

Representation and hearing.

The applicant is represented by Jason & Co. Advocates while the respondent is represented by the Bagyenda & Co. Advocates. On the direction of this court, the hearing proceeded by way of written submissions. Both parties filed submissions which have been considered in this ruling.

Preliminary matters

The respondent has brought forward three objections to the application. It is convenient that they are handled first. I will handle them in the order presented.

That the affidavit in support of the application is defective for want of authenticity.

Counsel for the respondent argues that the affidavit in support has a scanned signature yet the law requires that the deponent of an affidavit appears before the Commissioner for Oaths. He notes that where the signature of the deponent is scanned, the test for appearance before the commissioner for oaths is not met and the affidavit would be incurably defective. Counsel relied on the case of ***Mohammed Majyambere Vs Bhakresa HCMA No. 727 of 2011*** to support this argument.

Counsel for the applicant addressed all the objections in one argument in his submissions in rejoinder. He relied on the case of ***Mrs. Shifa Lovewood Vs Luyima Godfrey & Anor CACA No. 229 of 2021*** which cited with approval the case of ***Bankone Ltd Vs Simbamanyo Estates Ltd HCMA No. 646 of 2020***. He argued that the validity of an affidavit is subject to the same rules that govern oral evidence under **Section 117 of the Evidence Act**. All persons are competent to swear an affidavit unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions.

I agree with the submission of counsel for the respondent that a deponent of an affidavit is required to appear before the commissioner for oaths. To succeed in an objection like this one, the respondent ought to prove that the deponent of the affidavit in support of this application did not appear before the commissioner for oaths who commissioned the said affidavit. In this regard, counsel for the respondent has argued that the deponent's signature was scanned and that it was merely spread with some ink thereafter. Counsel has not adduced any other evidence to prove that the deponent did not appear before the commissioner for oaths. Counsel did not apply to cross examine the deponent to confirm the allegations brought forward in this objection.

I have looked at the signature of Owitigala Didsanayakage Dilan Chathura Dissanayake, the deponent of the affidavit in support of the application. While the same appears appended in thick ink, I wouldn't conclusively say that it was scanned. But even if this was the case, in a digitally advancing world, upholding laws that do away with electronic signatures and virtual meetings is self-defeating.

I find no merit in this objection and do hereby overrule it.

The affidavit in support of the application is filed without valid authorization from the applicant.

It is the contention of counsel for the respondent that a corporation like the applicant can only be represented by a director, secretary, principal officer of the company or a holder of a power of attorney. He argues that the deponent of the affidavit in support of the application is merely an accountant who is not a principal officer that could legally depose the affidavit on behalf of the company in line with **Order 29 Rule 1**, and **Order 3 rule 2(a) of the Civil Procedure rules**.

In the affidavit in rejoinder, the applicant attached an email purportedly sent by Prabodha Sumanasekera, Managing director of the applicant authorizing Owitigala Didsanayakage Dilan Chathura Dissanayake to sign affidavits and related documents on behalf of the applicant. Counsel for the applicant argued that the deponent was duly authorised to depose the affidavit on behalf of the applicant.

I would agree with the submission of counsel for the applicant that the test for admitting evidence in a suit of this nature is whether the witness is able to understand the nature of the evidence he or she is giving, is alluding to facts that are within his or her knowledge and is able to reasonably respond

to questions that may be put to him or her. (See **Order 19 rule 3(1) of the Civil Procedure Rules.**)

Objections as to express authority to swear affidavits have been discussed in several decisions including Madrama J.A in ***Mrs. Lovewood Shifa Vs Luyima and Another (Civil Appeal 229 of 2021) [2022] UGCA*** and Mubiru J. in ***HCMA No 645 of 2020 Bankone Ltd v Simbamanyo Estates Ltd.*** They are to the effect that what is required in affidavits is the knowledge or belief of the deponent, rather than authorisation by a party to the litigation. Their content is dictated by substantive rules of evidence and their form by the rules of procedure. Competency to swear an affidavit is pegged to ability “to depose to the facts of the case,” which in turn is circumscribed by the deponent’s ability to “swear positively to the facts,” on account of personal knowledge or disclosure of the source, where that is permitted.

It is my considered opinion that the authorities cited by counsel for the respondent are determinant on the authority of a person to represent another as an agent in litigation rather than the ability of a person to give evidence in favour of or on behalf of another. This objection would accordingly be overruled as well.

That Jason & Co. Advocates have no instructions to represent the applicant in this application and Civil Suit No.043 of 2022.

Counsel for the respondent argues that instructions to represent a corporation must be by presentation of a registered resolution as stated in the case of ***City African Textiles Shop (U) Ltd Vs Jan Mohammed Ltd HCMA No. 437 of 2002*** and confirmed by the Supreme Court in ***Kabale Housing Estates Tenants Association Ltd Vs Kabale Municipal***

Council SC Civil Application No. 15 of 2013 to the effect that an application filed by Counsel without instructions is incompetent in law.

In response, in the affidavit in rejoinder, the applicant has attached a letter purportedly written by Prabodha Sumanasekera, Managing director of the applicant on 16th May 2022 to Jason & Co. Advocates authorizing the firm to take over conduct of all matters involving the applicant in courts of law. Counsel for the applicant argues that counsel for the respondent himself has not shown that he has instructions to represent the respondent.

I have taken the time to read the authorities cited by counsel for the respondent on the objection. I find that they are distinguishable from the circumstances of the present application. In the case of **City African Textiles Shop (supra)** for instance, the advocates entered into a compromise with the opposite party without a company resolution agreeing to a settlement of a lesser sum. The person who purported to give them instructions was found not to be an officer of the company. The letter purporting to issue the instruction was not signed by the managing director of the company. The court further referred to the case of **Bugerere Coffee Growers LTD v Sebaduka and Anor [1970] EA 147** where the advocate did not have instructions to act for the applicant to compromise the decree and court noted that where an advocate consents to an order without authority of the company the resultant judgment is a nullity. This is different from the present application where there is no compromise involved and there is a letter signed by the managing director of the applicant authorizing Jason & Co. Advocates to take over the applicant's matters in court of law.

Secondly, matters that concern the management of the affairs of the company including the management of its legal or other risk are those that

are by law assigned to directors of a company. This of course should be in line with the Articles of Association that govern the modus operandi of how this obligation is executed from company to company. In the absence of the applicant's Memorandum and Articles of Association to indicate that a resolution is always required in the procedures of the applicant to instruct a law firm to represent the applicant, I am unable to find merit in the submissions made by the respondent's counsel.

This objection would accordingly be overruled.

I will now delve into the merits of the application.

Consideration by court

Counsel for the applicant relies on the case of ***Football Association Vs Mandela National Stadium Ltd HCMA No. 570 of 2020*** to argue that for an application for leave to appear and defend to be granted, the applicant has to show that there is a bona fide triable issue of fact or law that he or she will advance in the defence to the suit. Counsel reiterated the grounds of the application and submitted inter alia that; There exists no EPC Contract number 2014-10-03 dated 31st March 2017 between the applicant and the respondent and a non-existent contract may not form the basis of a summary suit; The suit is based on a contract and invoice to Rwenzori Hydro (PVT) Ltd which is separate from the applicant and not a party to the suit; The applicant has a good and plausible defence to the summary suit and that The applicant is not indebted to the respondent in the sums claimed or at all.

Counsel noted that the above are triable issues, offer the applicant a plausible defence that would warrant the grant of leave to the applicant to appear and defend the suit.

In response, counsel for the respondent argued that the claim against the applicant is well supported by documentary evidence clearly written on the applicant's letter heads and that the applicant has not raised any allegation of forgery against the same. Counsel submits that the applicant has not brought forward any triable issues for consideration by this court and that the present application is merely intended to delay justice.

The foundation for applications for leave to appear and defend is premised under **Order 36 rules 3 and 4 of the civil Procedure Rules** which provides that upon the filing of an endorsed plaint and consequent service on the defendant, the defendant shall not appear and defend the suit except upon applying for and obtaining leave from court. The defendant (applicant) is required to satisfy the court 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. (Emphasis added)

Before leave to appear and defend is granted, the defendant must show by affidavit or otherwise that there is a bona fide triable issue of fact or law. The defendant/applicant 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. See the case of ***Bunjo Vs KCB (Uganda) Ltd (Misc. Application No. 174 of 2014)***

In the case of ***Corporate Insurance Co. Ltd Vs Nyali Beach Hotel Ltd [1995-1998] EA 7***, the Court of Appeal of Kenya ruled that *“leave to appear and defend will not be given merely because there are several allegations of fact or law made in the defendant's affidavit. The allegations are investigated in order to decide whether leave should be given. As a result of the investigation even if a single defence is identified, or found to be bonafide, unconditional leave should be granted to the defendant”*.

The court of Appeal in the case of ***Kotecha Vs. Mohammed [2002] 1 EA 112*** stated thus; “*the defendant is granted leave to appear and defend if he is able to show that he has a good defence on the merit: or that a difficult point of law is involved: or a dispute as to the facts 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.* (Underlining for emphasis)

In the instant case, the respondent submits that the suit does not raise any triable issues of law or fact and it’s just an attempt to waste court’s time. The applicants argue that the applicant is not indebted to the respondent in the amounts claimed or at all. They also add that the contract upon which the respondent bases its claim in the summary suit is non-existent.

Indeed, I note that the contract upon which the respondent bases its claim in the summary suit is not annexed to the plaint. The respondent has also not attached evidence that it delivered fuel to the applicant and in what quantities, at what rate. In my view, the applicant presents and demonstrate that they have triable issues for court’s determination and therefore a defence to the present in the main suit.

I accordingly allow the application for unconditional leave to appear and defend Civil Suit No.055 of 2022. The applicant should file a defence to the suit within 15 days of this ruling. Costs of this application shall abide by the outcome of the main suit.

I so order

Dated at Fort Portal this 14th day of November 2022



Vincent Emmy Mugabo

Judge.

Court: The Assistant Registrar shall deliver the Ruling to the parties.



Vincent Emmy Mugabo

Judge

14/11/2022