

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

CIVIL APPEAL NO. 110 OF 2018

(Arising from Misc. Application No. 240 of 2018)

(Arising from Civil Suit No. 616 of 2017)

DAVID PIKER t/a MM MASTERCHEF

SNACKS & TAKEAWAY LTD ===== APPELLANT

VERSUS

JOY KARUHANGA LUBOGO ===== RESPONDENT

**BEFORE: HON. JUSTICE EMMANUEL BAGUMA**

**JUDGMENT.**

**Background.**

This is an appeal against the judgment and orders of Her Worship Angura Shiela Fionah a Magistrate Grade One at Nakawa Chief Magistrates Court.

The Respondent (**formerly Plaintiff**) filed summary Suit No. 616 of 2017, against the Appellant (**formerly Defendant**) for recovery of UGX 4,000,000/= (Four million shillings) being rent arrears.

The Appellant filed Misc. Application No.240 of 2018 for leave to appear and defend the summary suit but was conditionally granted upon deposit of UGX 4,000,000/= (Four Million Shillings) within 10 days and the terms of the tenancy agreement were to continue running until the determination of the main suit.

The Appellant being dissatisfied with the ruling and orders of the trial Magistrate appealed to this Court.

**Grounds of Appeal.**

The memorandum of appeal had 2 grounds of appeal;

1. *That the learned trial Magistrate erred in law and fact when she granted leave to defend the suit on condition of furnishing security of UGX 4,000,000/= (Four Million Shillings).*
2. *That the learned trial Magistrate erred in law and fact when she granted leave to file a defence subject to enforcement of the terms and conditions of the tenancy agreement.*

### **Legal representation.**

Mr. Robert Ojambo together with Mr. Benard Mugeni represented the Appellant while Mr. Kazibwe Achilles represented the Respondent.

### **Duty of first Appellant Court.**

The duty of the first appellate court was stated in the case of **Kifamunte Henry Vs Uganda SC, (Cr) Appeal No. 10 of 2007**, where it was held that;

*“...the first appellate court has a duty to review the evidence of the case, to reconsider the materials before the trial judge and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it...”*

This Court therefore has a duty to re-evaluate the evidence to avoid a miscarriage of justice as it mindfully arrives at its own conclusion. I will therefore bear these principles in mind as I resolve the grounds of appeal in this case.

When this case came up for hearing both Counsel agreed to file written submissions. However, the Respondent filed his submissions beyond the agreed schedule and counsel for the Appellant wrote a letter asking this court to disregard the Respondent's submissions. It is my view let filing of written submissions did not cause any miscarriage of justice and the request to disregard the written submissions is rejected.

### **Submissions by Counsel for the Appellant on ground 1 and 2.**

Counsel submitted that by the trial Magistrate granting leave with such conditions of security for costs and continuance of the tenancy agreement which was in

contested, she in effect condemned the Appellant on a tenancy that was being challenged which was erroneous.

Counsel for the Appellant referred to the case of **Begumisa George Vs East African Development Bank Misc. Application No. 0451 of 2010** and the case of **Corporative Insurance Co. Ltd Vs Nyali Beach Hotel Ltd [1995-1998] EA 7** where it was held that;

*“Leave to defend will not be given merely because there are several allegations of fact or of law made in the defendant’s affidavit. The allegations are investigated even a single defence identified or found bonafide, unconditional leave should be granted to the defendant”.*

Counsel concluded that the trial Magistrate having found there was a triable issue relating to the materials spent by the Appellant ought to have given unconditional leave to appear and defend.

### **Submissions by Counsel for the Respondent on ground 1 and 2.**

Counsel for the Respondent submitted that the trial court had wide discretion under section 98 of the Civil Procedure Act to issue the orders issued for the ends of justice to be met.

Counsel referred to Order 36 r 8 of the CPR which provides that;

*“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”.*

Counsel referred to the case of **Africa One Logistics Vs Kazi Food Logistics (U) Ltd, Misc. Application No. 964 of 2019** where court held that;

Where court is in doubt of 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.

Counsel for the Respondent submitted that the learned trial Magistrate was right in granting leave to the Appellant to file a defence subject to enforcement of the terms and conditions of the tenancy which are in contention.

Counsel submitted that the terms of the contract ought to have continued since the Appellant stayed in occupation and utilization of the Respondent's premises yet in default rent.

Counsel concluded that the Appellant is just buying time to frustrate the interest of the Respondent while he continues to occupy her premises.

### **Analysis of Court.**

Under **Order 36 rule 8 of the CPR** provides that;

*“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”.*

In the case of **Katuramu v Jain HCT Civil Revision No.008 OF 2013** court while faced with the same situation held that;

*“.....the learned Chief Magistrate having allowed the applicant to appear and defend himself against the respondent's claim, it was irregular and unjust for him to order the applicant to deposit the contested shs 45,037,445= which was contained in “consent settlement order” executed before the acting Registrar High Court Execution Division. By allowing the applicant to defend himself, it meant that the judgment and decree in CS 2882 of 2010 were set aside otherwise there would be nothing the applicant would defend himself against”.*

*Therefore the order directing the applicant to deposit shs 45.037.445= was irregular and unjust and would defeat the purpose for defence which raises triable issues”.*

Leave to defend may be conditional or unconditional. The conditionality envisaged does not include the equivalent of the disputed claim which had been contained in a tenancy agreement.

The decision to grant leave or not has to be made judicially. The court has to exercise discretion keeping in view the basic dictates of justice when determining the question whether or not to permit the defendant to contest the suit and if so whether unconditionally or on terms and what terms.

Unconditional leave should be granted where a defendant satisfies court that he has a good defence to the claim on its merits and/or if facts disclosed by the defendant indicate that he has a substantial defence to raise with a good chance of success or has good potentiality to dislodge the plaintiff. The defence should raise such question of law or facts which require thorough judicial scrutiny.

While conditional leave is granted if the defendant discloses such facts as may be deemed sufficient to entitle him to defend.

In the instant case, it is not in dispute that the Respondent/Plaintiff in paragraph 3 of the plaint claimed for recovery of UGX 4,000,000/= (Four Million Shillings) and enforcement of the terms of the tenancy agreement dated 30<sup>th</sup> May 2017. At the same time the trial court while granting leave to appear and defend ordered the Appellant/Defendant to deposit UGX 4,000,000/= (Four Million Shillings) as security for costs within 10 days.

As if that was not enough, the trial Magistrate also ordered for the enforcement of the terms and conditions of the tenancy agreement dated 30<sup>th</sup> My 2017 when the same were contested.

It is my considered view that parties should not be blocked from accessing justice by setting stringent terms and conditions which are unreasonable.

It was not fair for a defendant to be ordered to deposit what the plaintiff claimed in the plaint yet the same was contested by the defendant as this amounts to breach of the principles of natural justice. I am alive to the fact that court has discretion to set conditions to file a defence but the discretion should be exercised judiciously.

Article 28 of the Constitution provides for a right to be heard. The fact that the Appellant/Defendant had raised triable issues and was allowed to file a defence. The condition to furnish security for costs and enforcement of the terms and conditions of the tenancy agreement were not justified as this would amount to giving with one hand and taking away with another.

Accordingly, the orders of the trial court were not proper.

### **Conclusion.**

In the final result, the appeal succeeds with the following orders that;

1. The order for furnishing security of UGX 4,000,000/= (Four Million Shillings) is set aside.

2. The order for fulfilling the terms and conditions of the tenancy agreement is set aside.
3. The applicant is allowed to file a defence un conditionally.
4. Let the main suit be place before a different judicial officer for hearing on its own merit.
5. Costs shall be in the cause.

Dated, signed, sealed and delivered at Kampala this **13<sup>th</sup>** day of July **2022**

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**Emmanuel Baguma**

**Judge**