

money from the Applicant but this did not happen. The Respondent used her own funds to finance the 2nd phase of the Project to the tune of Ugx. 50,328,190/=, submitted proof of the said expenses to the Applicant and asked for a reimbursement. The Applicant declined to honour the request on the ground that the funds advanced during the 1st phase were not properly accounted for in accordance with the terms of the Agreement. This resulted in the Respondent filing civil suit number 0027 of 2023.

The affidavit in support of the application was deposed by Xavier Ejoyi, the Country Director of the Applicant. The affidavit in reply opposing the application was deposed by John Patrick Ndira, the Deputy Director of the Applicant.

(b) Representation and Appearance

The Applicant was represented by M/s Okecha Baranyanga & Co. Advocates while the Respondent was represented by M/s Aju, Baleese, Bazireke Advocates.

When the matter came up for mention on the 21st March 2023, parties were encouraged to resolve their dispute amicably. However, without prejudice to same, court gave parties schedules to file their written submissions. Court has relied on the Parties' pleadings and written submissions to decide the matter.

(c) Issues

1. Whether the Application raises triable issues
2. What other remedies are available to the Parties?

(d) Law Applicable and general considerations

An application made under Order 36 rule 4 of the Civil Procedure Rules as amended for leave to appear and defend a suit may 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 *bonafide* defense (see the case of **Africa One Logistics Ltd –vs – Kazi Food Logistics (U) Ltd. Misc. Application No. 964 of 2019**).

As to whether the Defendant/Applicant raises a triable issue and must not be shut out and should be granted leave to formulate their defence and adduce evidence of the triable issue(s) raised was settled in the cases of **MMK Engineering –vs- Mantrust Uganda Limited H.C.M.A No. 128 of 2021** and **Bhaker Kotecha –vs – Adum Muhammed [2002] 1 EA 112**. In the case of **MMK Engineering (supra)**, Hon. Mr. Justice Christopher Madrama (as he then was) cited **Odgers’ Principles of Pleading and Practice in Civil Actions in the High Court of Justice Twenty-Second Edition pages 71 – 78** the principles for leave to defend to include the following:

- a) *The Applicant must show the court that there is an issue or question of fact or law in dispute which ought to be tried.*
- b) *Where the Defendant shows that there was such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the Plaintiffs claim, he ought not to be debarred of all power to defeat the demand made upon him.*
- c) *Where the defence that is proposed is doubtful as to its good faith, the Defendant may be ordered to deposit money in court before leave is granted.*
- d) *Whenever there is a genuine defence either in fact or in law, the Defendant is entitled to unconditional leave to defend.*
- e) *General allegations however strongly may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice.*
- f) *The Defendant may in answer to the Plaintiffs claim rely upon a set off or counterclaim. A set off is a defence to the action. Where it is a counterclaim, and there is no connection with the Plaintiff’s cause of action, the Plaintiff may be given leave to obtain judgement on the claim provided that it is clearly entitled to succeed upon it and will be put to unnecessary expense in having to prove it. It is within the courts discretion to stay execution up to the anticipated amount of the counterclaim pending the trial of the counterclaim or further order.*

Raising a triable issue must be distinguished from mere denial and the defence raised must not be a sham defence that is intended to delay the Plaintiff from recovering money due. In the case of **Maluku Interglobal Trade Agency Ltd versus Bank of Uganda [1985] HCB 65**, the Court stated 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 plaintiff is not entitled to summary judgement. The defendant is not bound to show a good defence on the merits but should satisfy 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 the same case, the court further stated that:

“...the defence must be stated with sufficient particularity to appear genuine. General or vague statements denying liability, will not suffice” (emphasis is mine).

(e) Submissions

Learned Counsel for the Applicant submitted that the Respondent’s demand for the payment of Ugx. 50,328,190/= could not be honored because the Respondent had not accounted for the first disbursement of Ugx. 83,035,000/= in accordance with clauses 4,12-24 and 29 of the Grant Agreement and annexes. It was the contention of the Applicant that the financial reports or accountability availed by the Respondent did not conform to the provisions of the Agreement. That is, that they were not audited by an independent qualified auditor.

The Applicant further submitted that the Respondent’s claim was for Ugx. 50,328,190/= whereas according to the Agreement, funds due for disbursement in the 2nd Phase were to the tune of Ugx. 87,576,000/=. This discrepancy appeared suspicious and of concern to the Applicant. The Applicant feared that this would occasion financial loss to the Donor.

It was therefore the submission of the Applicant that there are prima facie triable issues and as such she ought to be granted unconditional leave to appear and defend the suit. The Applicant cited and relied on the case of **Roko Construction Ltd. – vs – Ruhweza Transportation Construction Co. Ltd. HCMA No. 0831 of 2020** where court stated that:

“Under Order 36 rule 4 of the Civil Procedure Rules, unconditional leave to appear and defend a suit will be granted where the Applicant shows that he/she has a good defence on the merits; or that a difficult point of law is involved; 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 into account to determine or any other circumstances showing reasonable grounds of a bona fide defence. The Applicant should demonstrate to court that there are issues 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”

The Applicant further cited and relied on the case of **Begumisa George – vs – East African Development Bank, Misc. Application No. 0451 of 2010** which cited with approval the case of **H.D Hasmani – vs – Banque Du Congo Belge [1938] 5 EACA 89** where Sheridan, CJ ruled that:

“if there is one triable issue contained in the affidavit supporting the application for leave to appear and defend, then the defendant is entitled to have leave to appear and defend unconditionally”.

The Respondent in reply submitted that the Application did not raise any triable issues. The Applicant was merely interested in delaying the payment to the Respondent. Learned Counsel for the Respondent drew court’s attention to the various e-mail correspondences between her accounts officer and the Respondent’s Finance and Administration Manager contained in annexures MF 2, MF 3 to MF 14. The said annexures referred to accountability and financial reports that were forwarded to the Applicant by the Respondent whereupon the Applicant reviewed the same and cleared/ approved them.

Learned Counsel for the Respondent further submitted that the email correspondences showed that the Respondent met and fulfilled the terms of the Agreement in as far as spending and accounting for funds disbursed was concerned. Therefore, the Respondent found no reason as to why the Applicant could not disburse the funds demanded for. Lastly, the Respondent submitted that she found no reason to ask for a reimbursement of funds beyond what was spent. The argument by the Applicant that the discrepancy between the budgeted funds for the 2nd Phase and what the Respondent was seeking to be reimbursed would occasion financial loss to the donor was not tenable.

The Respondent therefore prayed that the Application be dismissed with costs and court be pleased to enter a summary judgment against the Respondent in the main suit.

(f) Determination

According to the law as set out above, where an application for leave to appear and defend a summary suit has been filed by the Applicant, the court will only enter a summary judgement where the application raises no bona fide triable issues of fact or law; or where the defence raised is found by court to be a sham.

In the case before me, the Applicant only raised one triable issue; that is, that the accountability for funds disbursed in the 1st Phase by the Respondent did not conform to the provisions of the Grant Agreement and Annexes.

Whereas it was the contention of the Respondent that the accountability was submitted to the Applicant several times and the same was done in accordance with the provisions of the agreement, Court was at a loss to ascertain what form the accountability took given that the Respondent attached email communications between the Parties but the important documents which were attached to the emails such as the financial reports were never attached to the Respondent's affidavit in reply. The Respondent also attached various invoices and corresponding payments made through Stanbic Bank but this in my view did

not give court a clear picture as to how the same were presented to the Applicant.

From the pleadings and submissions of the Parties, it can clearly be inferred that there is a divergence of opinion regarding the interpretation and enforcement of the Grant Agreement as to what amounts to accountability or what form of accountability was acceptable.

In the circumstances, this raises a bona fide triable issue of both fact and law that can only be investigated through a trial and this thereby entitles the Applicant to unconditional leave to appear and defend the main suit.

This application succeeds and is allowed with the following orders:

- a) The Applicant is granted unconditional leave to appear and defend civil suit number 0027 of 2023;
- b) The Applicant should file her written statement of defence within fifteen (15) days from the date of delivery of this ruling; and
- c) The costs of the application shall abide the outcome of main suit.

I so order.

Delivered electronically this 07 day of September 2023 and uploaded on ECCMIS.



Harriet Grace MAGALA

Judge

25th August 2023