

1. The Respondent's suit is frivolous, none starter clothed with untruthfulness and the applicant's lawyer will raise a preliminary point of law at the earliest opportunity.
2. The Respondent's claim for USD 71,608 (Seventy One Thousand six Hundred Eight dollars) in a period of 5 years is unfounded.
3. I agreed with the Respondent's representatives to set off the computed rent of USD 6,000/= be offset by one of the applicants assets to wit a Superior Printer and the rest of the equipment be handed over to me to relocate.
4. The premises have remained closed since the period of the pandemic lock down thereby occasioning loss to me.
5. The claim for rent arrears is inaccurate in light of the aforesaid facts, and the claim for 18,130,000/= is a farce as I have never enjoyed any services from the Respondent. There are no toilets, water and electricity paid by the Respondent.
6. The Respondent's claim and actions amount to unjust enrichment and I intend to file a counter claim of 300,000,000/= (Three Hundred Million Shillings) for loss of business.

In reply, in an affidavit sworn by **Vaidya Pankajkumar** a director and Chief Accountant of the Respondent/Plaintiff opposed the application and stated that;

1. The Respondent through his lawyers will raise a preliminary objection to effect that the application was served outside the 21 days after the signing and sealing of summons.
2. The respondent objects to the preliminary objection intended to be raised by the Applicant because the same is not disclosed.
3. The Applicants have always enjoyed peaceful working environment throughout and there were closures of premises and the Applicants refused to discharge their obligation of paying rent.
4. The Applicants were in peaceful occupation all through the lockdown save for 2021 when they were closed by the Respondent on justifiable claim of lien for unpaid rent after demanding for the same in vain.
5. The applicants premises have enough toilets, enough water points and electricity paid by the applicant as per the agreement.

In rejoinder, the Applicant reiterated his averments in chief.

Legal representation.

The Applicants were represented by Mr. Mutyaba Joseph Geoffrey and Mr. Joel P Olweny of Ssekaana Associated Advocates while the Respondent was represented by John Mary Mugisha of M/S Mugisha and Co. Advocates.

When the matter came up for hearing, Counsel for the Respondent indicated that he has a preliminary point of law to raise. Both counsel agreed to handle the PO in the written submission of the main application.

Before I analyze the merits of this application, I found it prudent to consider to first consider the preliminary objection raised by counsel for the respondent to the effect that;-

The application was served out of time and therefore incompetent.

Submissions by counsel for the Respondent on the P.O

Counsel for the Respondent submitted that the application was received by court on 10th September 2021 and the application signed and sealed by the Registrar on 17th November 2021. It was then served on 17th May 2022 after a period of approximately 6 months from the date of issue. No steps were taken by the applicants to apply for extension of time as required under the law.

Counsel referred to Order 5 rule 1 which requires summons to be served within 21 days and order 5 rule 1 (3) which provides for an application for enlargement of time.

Counsel referred to the case of **Fredrick James Jjunju and ANOR Vs Madhivani Group ltd MA No. 688 of 2015.**

Submissions by counsel for the applicant in reply to the P.O

Counsel for the Applicant submitted that the Respondents were duly served and the record of proceedings reveals that they were present at all times that the matter came up for hearing, how then did they know about the hearing dates of 13th January 2022, 3rd February 2022 and 5th April 2022 if they were not served?

Counsel referred to the case of **Rashida Abdul Karim Hanali and Anor Vs Suleiman Adrisi HCCS No. 1 of 2017** where court held that;

“If the defendant appears before the court after the filing of the suit against him or her, and he or she is informed about the nature of the claim and the date fixed

for reply thereto, it must be deemed that the defendant has waived the right to have summons served on him.

..... a waiver can be determined from the record and also from the subsequent conduct of that party”.

Counsel submitted that the Respondent’s counsel picked a copy of the application from record when he was submitting his application for default judgment. The Respondent also appeared in court which is proof that they were aware of the suit and hence waived service.

In rejoinder, the Respondent reiterated his submissions in chief and contended that the Applicant’s submission that they served the respondent is untruthful since they did not adduce any evidence to that effect.

Ruling on preliminary objection.

Order 5 rule 2 and 3 of the CPR provides that;

“(2) Service of summons issued under sub rule (1) of this rule shall be effected within twenty-one days from the date of issue; except that the time may be extended on application to the court, made within fifteen days after the expiration of the twenty-one days, showing sufficient reasons for the extension.

(3) Where summons have been issued under this rule, and—

(a) service has not been effected within twenty-one days from the date of issue; and

(b) there is no application for an extension of time under sub rule (2) of this rule; or

(c) the application for extension of time has been dismissed, the suit shall be dismissed without notice”.

For the interest of justice court has looked at the court record and noted that on 5th April 2022, court directed the applicant to serve the Respondent with notice of motion if at all they were not served. For that reason therefore, I am of the considered view that Respondents were served after court’s directive hence the issue of service out of time was overtaken by event.

This preliminary objection is overruled.

Having overruled the P.O, I will now proceed with the merits of the application.

Submissions by counsel for the Applicants.

Counsel raised two issues for court's determination

- 1. Whether there are triable issues?*
- 2. What remedies are available?*

Issue No.1

Whether there are triable issues?

Counsel submitted that the figures stated as rent arrears for the period of 5 years are contested. That all through this period, the Applicants tenancy was interrupted by the Respondent who occasionally closed their business premises which is illegal. This is not contested by the Respondent since they confirmed closure of premises in paragraph 9 that in late 2021 they closed the premises due to none payment of rent by the Applicants.

Counsel referred to the case of **Nakitende Vs Mabu Commodities HCCS No. 117 of 2016** where court held that;

“The law allows a landlord to recover rent through distress for rent under the Distress for Rent (Bailiffs) Act instead of using irregular and illegal means of recovery. It would be a challenge to court to allow the defendant who claims unpaid rent in circumstances where there is no written tenancy.

The landlord should not be allowed to use all means available to recover rent or obtain vacant possession for non-payment of rent by a tenant. A landlord should not exercise his rights of re-entry or recovery of rent extra-judicially and acts of hooliganism should not be encouraged or allowed by a court of justice. Parties ought to manage their businesses (rental) in an organized or orderly manner in order to avoid self-help measures in a landlord-tenant relationship which may turn out to be very unreasonable and unfair.

Counsel concluded that the illegal closure of the premises by the Respondent, illegal seizure of the Applicant's tools of trade coupled with the inflated figures stated in

the plaintiff provide a plausible defence to warrant grant of unconditional leave to appear and defend the suit.

Submission by counsel for the Respondent

Counsel for the Respondent submitted that for an order for unconditional leave to appear and defend to be granted, the Applicant must show that there are triable issues. He referred to the case of **Miter Investments limited Versus East African Portland and Cement Company Ltd** where court cited with approval the case of **M.M.K Engeneering Vs Man Trust Uganda Ltd MA NO. 128 OF 2012.**

Counsel submitted that the Applicants have refused/and or failed to discharge their obligation to pay the rent arrears, agreed interest thereof and other charges and V.A.T when it fell due and is now outstanding at UGX 18,130,000/= and USD 71608 hence being in total breach of the agreement.

Counsel denied the allegation that after the periodic closures by the Respondent, a meeting was convened with the Respondents representatives and they computed the actual rent due and owing at the time and in addition the applicant proposed that the said debt be offset from one of his superior printers which was more than equivalent of the rent owed and the rest of his tools of trade be handed to him.

Counsel concluded that the Applicant has not established triable issues to warrant grant of unconditional leave to appear and defend.

Analysis of Court.

Order 36 rule 4 of the Civil Procedure Rules provides that;

“unconditional leave to appear and defend a suit will 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 bona fide defence”.

In *Maluku Interglobal Trade Agency v. 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 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 the instant case the applicant contends that the figures stated as rent arrears are inflated, raises issues of illegalities regarding the Respondent’s modes of recovering rent including locking the premises and seizure of the Respondent’s tools of trade.

These facts are confirmed by the Respondent’s affidavit in reply in paragraph 9 where it admitted closing premises in late 2021 because the Applicants had failed to pay rent.

In my view, there is need to investigate such allegations by listening to evidence of both parties which cannot be done in a summary suit.

Accordingly find that there are triable issues in this application.

Issue 2

What remedies are available to the parties.

Having found that the applicant has established a plausible defence, there is need to grant the orders sought from this court.

Conclusion.

In the final analysis, This application is granted with the following orders.

1 The applicant is allowed unconditional leave to appear and defend civil suit No. 237 of 2021.

2 The Applicant is ordered to file and serve her defence within 10 days from the date of this ruling.

3 Costs of this application will abide the outcome of the main suit.

Dated, signed, sealed and delivered by email at Kampala this **30th** day of **March 2023**

Emmanuel Baguma

Judge