

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT FORT PORTAL

CIVIL SUIT NO. DR. MFP 16/90

CLOVIS KARATUNGA:.....PLAINTIFF

VERSUS

EDRISA NYAKAIRU:.....DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE I. MUKANZA

RULING

This is an application by notice of motion filed by the applicant/defendant under order 33 r 3 and Order 48 rule 1 of the Civil procedure rules seeking for leave to appear and defend the suit. The grounds for the application are found in the notice of motion. And there was an affidavit in support of the application deponed to by Edirisa Nyakairu the said applicant/defendant.

According to the plaint under an agreement made on 9th January 1990 the applicant undertook to sell to the respondent/plaintiff motor vehicle registration No. UWQ 890 whose registration book was in the names of one Tom Rwomushana. The agreed price was Shs. 1,150,000/=.

On the date of the agreement the plaintiff/respondent paid Shs. 610,000/= CASH to the Defendant/Applicant and on 2nd February 1990 the former respondent paid to the defendant/applicant Shillings 100,000/= on a subsequent occasion on 22th March 1990 the plaintiff/Respondent paid the applicant Shillings 100,000/=. The total sum paid was Shillings 810,000/=. After the respondent had paid over one half of the purchase price to the Applicant/Defendant he refused to pay any further money until the applicant showed evidence of ownership of the vehicle the subject of the agreement. When the applicant failed to show such evidence the Respondent wrote to the applicant demanding for his shillings 810,000/= already

paid. The respondent then filed an action under summary procedure order 33 of the CPR suing for a liquidated sum of Shillings 810,000/=.

The applicant applied for an unconditional leave to appear and defend the suit and filed an affidavit in support. He averred

“That by the agreement the respondent was to pay up the balance of the purchase price by 20th February 1990.

That despite several warnings the respondent had only paid Shillings 810,000/= by July, 1990.

That because of his persistent failure or refusal to pay the balance, He seized the car from him on the 14th June 1990 and on 5th July 1990 he resold the car to one Paulo Asaba to recover his balance as was agreed between the applicant and the respondent in clause 4(b) of the agreement. The sale was done with the consent, of the respondent.

That he had never failed to have the registration book transferred in his names and that that was to be done after full payment of the purchase price.”

Mr Nyakabwa who appeared for the applicant submitted that once a triable issue was raised under an application of that nature then the defendant/applicant was automatically allowed by the court to defend. He referred me to Spry on Civil Procedure East Africa under order 33 of the Civil Procedures unfortunately the said text book was never availed to me for perusal. It was not even available in the library here. Mr. Mugamba for the respondent submitted that on the question raised in both grounds 1 and 2 of the application that the plaintiff/respondent, did not pay fully because after he had paid part of the price it became clear to him that the defendant was not in a position to have the registration book of the motor vehicle transferred into his names despite several requests for him to do so and despite payment by the respondent over half of the agreed cost price of the motor vehicle; and having realized that the applicant/defendant had no title even at that late stage, lacked title to the motor vehicle. He could not envisage how the defendant could pass the same vehicle to him when he had no title to pass *nemodati quod non habet*. It was then that the respondent/plaintiff elected to sue for the money that the defendant had received on no consideration at all. The contract failed when it lacked consideration and it

was on that standing that the, plaint was brought under order 33 of the Civil Procedure Rules. He concluded that the applicant had no defence to the instant suit.

In reply Mr. Nyakabwa submitted that the affidavit in support of the application was good and it raised issues that were of considerable conflict between the, two parties. The agreement was already on the records of the court. It contained other issues paragraph 7 suffice to say that the issue of the registration book was a non issue. He submitted that there were triable issues. The court had to determine whether there was no subject matter or whether the plaintiff/respondent failed to pay. That the learned counsel for the respondent/plaintiff raised some points of law and equity. Does it mean the defendant/applicant did not have title over the vehicle? That issue could be determined when evidence was led.

I have considered carefully the submissions by the learned counsels representing the parties as to whether the applicant could be granted leave to defend the suit or not. The general rule is that leave to defend should be given unconditionally unless there is good ground for thinking that the defenses put forward are no more than a sham and it must be more than mere suspicion **See Kundanlal Restuarant v Devish & Co [1952] 19EACA 77. Souza Figuerido &Co. Ltd v Moorings Hotel Ltd (1959) EA 425 (CA). And in Camille vs Merali and another EA (1966) at P. 414 CE**. Sir Charles Newbold P. as he then was said,

“Before a defendant is entitled (as opposed to the exercise of the discretion of judge in any particular case to give leave to defend) to unconditional leave to defend a plaint, the defendant must show a triable issue which would or might result in the judgment on the plaintiff being affected.”

In the instant case there was a sale agreement entered in to between the parties in connection with the vehicle in question. It was averred by the applicant that it was a term of the agreement that the respondent had to pay the balance of the purchase price at a certain date and that because of the failure to pay the balance as agreed the vehicle was seized and sold in order to realize the balance as per clause 4 (b) of the agreement and that the sale was done with the consent of the respondent. I am of the view that the affidavit raised a triable issue as to whether the respondent was entitled to recover Shillings 810,000/= as money received by the applicant as part payment

for the purchase of the vehicle. Unless the matter came to court and tried it was not easy to say whether the plaintiff was entitled to that money or not. The applicant deponed that he sold the vehicle according to the provisions of the agreement entered into by the parties which agreement this court has not had the opportunity to see and study and make a finding on the same. I am of the view that the defenses put forward are genuine ones and are no more than a sham and they are beyond mere suspicion. The car involved is a subject of a contract between the parties and of which the respondent is accused of having breached and it was as a result of the breach that the applicant seized the vehicle and sold it in order to recover the balance of the purchase price. I am of the view that those were issues which require full hearing of the suit by the court.

From what has been explained above it is the considered opinion of this court that the applicant had shown that there were clearly triable issues raised in the affidavit and the court was not prepared to say that all the defence put up by the applicant were sham. Consequently the applicant is granted unconditional leave to appear and defend the suit. He must file in his papers W.S.D. within 21 days from the date of the delivery of this ruling. The Costs of this application is provided for.

I. MUKANZA

JUDGE

6/1/91