

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISCELLENOUS APPLICATION NO. 441 OF 2006
(ARISING OUT OF CIVIL SUIT NO. 329 OF 2006)

STELLA BANYU ::::::::::::::::::::::::::::::::::::::: RESPONDENT/PLAINTIFF

VERSUS

HAJI ABDUL MIGADDE ::::::::::::::::::::::::::::::::::::::: APPLICANT/DEFENDANT

BEFORE: HON. AG. JUDGE REMMY K. KASULE

RULING:

The applicant seeks unconditional leave to appeal and defend Civil Suit Number 330 of 2006.

In the suit the Respondent claims from the Applicant Ug. Shs.25,700,000/= being money she paid to applicant for purchase of land that the applicant never delivered to the Respondent.

In the Plaint, and in her affidavit in support of the claim as well as in the affidavit in reply to that of the applicant, Plaintiff asserts that in June 2004, Respondent offered to sell to her a piece of land: Plot 33 Naguru Drive, Kampala, at shs.20,000,000/=. After she had paid more than half of the purchase price, she discovered that the Respondent, without informing her, had sold the very plot to someone else. When she confronted Respondent, the latter offered an alternative Plot situate on Magonga Close, Naguru at shs.30,000,000/=. Respondent accepted the alternative offer and paid Applicant Ug. Shs.25,700,000/= only to discover later on that the plot did not belong to Applicant, and that the same had been sold to someone else by Applicant's mother.

Respondent decided to report the matter to police, whereupon, after the report had been made, Applicant prayed upon Respondent to have the matter mutually settled.

On 29.03.06 Applicant undertook in writing to refund the Respondent's money in two installments of Ug. Shs.13,000,000/= and Ug. Shs.12,700,000/= payable on 12.04.06 and 12.05.06 respectively.

The Applicant failed to honour the undertaking, and Respondent sued him by summary suit Under Order 33 Rules 1 and 2 (old version); order 36 Rules 1 and 2, (new version) of the Civil Procedure Rules.

The Applicant, on basis of several grounds in the Notice of Motion and his affidavit in reply, contends he be given unconditional leave to appear and defend the suit as there are triable issues. The grounds are that Respondent breached the sale agreements, yet the knew time was of essence in the agreements. The agreements breaches caused financial loss to Applicant, which Respondent agreed to reimburse, only to renege later. The written acknowledgement to pay the debt was obtained by coercion at the police CID Headquarters.

The applicant who seeks leave to appear and defend has the burden to show and convince Court, by affidavit or otherwise that prima facie, there is also an afide triable issue of fact or law in dispute which the Court ought to determine between the parties to the suit.

At this stage, the applicant is not bound to show and convince Court that there is a good defence on the merits of the case and the Court is not entitled to enquire into the merits or demerits of the Applicant's defence to the suit.

However, the applicant, inspite of the above legal position has the burden to prove, and the Court must study the grounds raised and ascertain whether they raise real triable issues and not sham over. Court must be satisfied that if the facts alleged by the applicant were established, there would be a plausible defence : See: **Abubaker Kato Kasule Vs. Tomson Muhwezi [1992-1993] HCB 212.**

It is also incumbent upon the applicant, as a matter of practice, to annex the proposed defence to the application. This is to enable Court to be able to tell whether the arguments put forward by

Applicant amount to a meritable defence raising triable issues: See **Mukoome Agencies Vs. UCB [1982] HCB 22**, and also **High Court Miscellaneous Application No. 611 of 2001: G.K.O. Trading Co. Ltd. Vs. Sun Trade and Consulting International (U) Ltd.** (Okumu Wengi. J.) unreported.

The Applicant did not attach the proposed defence to the application.

In the Notice of Motion and in the affidavit sub-headed “Affidavit In Reply”, but in actual fact is affidavit in support of his application, the applicant does not deny that the Respondent paid him Shs.25,700,000/= also denied that the money was paid as price for purchase of land, the applicant purported to sell to the Respondent, and that the land has never been delivered to the Respondent.

In Paragraph 3 of his affidavit, Applicant does not explain how the Respondent refused or failed to pay the agreed purchase price in a manner agreed upon, and what the agreed upon mode of payment was.

There is no disclosure in paragraph 5 of his affidavit of what the amounts to be offset as “the outstanding balance due to me, and losses incurred” as a result of the transaction are, let alone the balance to be passed over to Respondent.

Similarly in para 6 of the affidavit, there are no details of the “accountability” applicant exhibited.

There is nothing in paragraph 7 of the Applicant’s affidavit that takes away liability from him from refunding to the Respondent the sum paid for the land.

In paragraphs 8 and 9, Applicant asserts that he was coarsed at and by, the police to sign the document undertaking to refund the money to the Respondent by the 12th May 2006.

Assuming that what the applicant asserts as coercion is true, the respondent is not basing her claim solely on this document. The claim is founded on the premise that between June 2004 and February 2006, the Applicant received the sum claimed from the Respondent as purchase price for land in Naguru offered by applicant. The applicant took the money but failed to deliver the land.

The applicant has not, in the considered view of Court, presented any facts or points of law as to bring out any triable issues with regard to the essence of the Respondent's claim. The Court holds the grounds and facts thereof advanced by the applicant for unconditional leave to appear and defend the suit to be a sham.

Accordingly this application is dismissed with costs.

Judgment is entered for the Plaintiff in Civil Suit Number 329 of 2006 for the liquidated sum of Shs.25,700,000/=. It is also ordered that the Defendant pays costs of the suit to the Plaintiff.

Remmy K. Kasule

Ag. Judge

9th March 2007