

ROKO CONSTRUCTION LTD ::: APPLICANT
VERSUS
RUHWEZA TRANSPORTATION & CONSTRUCTION (U) LTD :: RESPONDENT

Introduction

1. The Applicant be granted unconditional leave to appear and defend Civil Suit No. 747 of 2020.
2. Costs of the application be provided for.

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The Application

The Applicant therefore brought this application for the above stated orders. The application is supported by an affidavit deposed by **Ashaba Ainea**, the Operations Manager of the Applicant, which also sets out the grounds of the application. Briefly, the grounds are that:

- a) It is not true that the Applicant is indebted to the Respondent to the tune of UGX 426,500,568/= as alleged in the plaint.
- b) Pursuant to an oral contract between the parties for the supply of sand and transportation of stones to different sites, the parties agreed to settle the accrued sums by way of cash payment and some in-kind payments in form of delivery of some construction materials to the Respondent.
- c) The Applicant made cash transfers to the Respondent and numerous deliveries to the Respondent as agreed, which offset the outstanding sum.
- d) The invoices attached by the Respondent to their pleadings total to over one billion Uganda shillings, which amount the Applicant is not aware of. There is, therefore, need to reconcile the accounts of the parties which process will demonstrate that the Applicant is not indebted to the Respondent as alleged.
- e) At no point did the parties agree that the Respondent would be entitled to interest under any circumstances. The suit is intended to unjustly enrich the Respondent at the expense of the Applicant.
- f) The Applicant has a valid defence to the suit and the application raises triable issues of law and fact as shown by a draft written statement of defence.
- g) It is just and equitable that the application is allowed.

The Respondent opposed the application through an affidavit in reply deposed to by **Ruhweza Billy Francis**, a Director of the Respondent company, in which it was stated that it is true that some in-kind deliveries or payments were made

to the Respondent. However, by October 2019, the outstanding amount owed to the Respondent by the Applicant was UGX 575,644,748/=. The Respondent continued to provide its services and materials to the Applicant up to December 2019, which accrued another sum of UGX 81,106,101/=. In November 2019, the Applicant paid the Respondent UGX 100,000,000/= and no further cash advance was made since then to date.

The deponent further stated that on 10th February 2020, the Applicant committed to settle the outstanding balance by making monthly payments of UGX 50,000,000/= every two weeks; which the Applicant did not do. The Applicant only made in-kind payments amounting to UGX 99,615,600/= in the period between February and August 2020. The total outstanding sum was therefore UGX 457,135,268/=.

The deponent also stated that it is apparent from the averments in the affidavit in support of the application that the Applicant is not disputing that it is indebted to the Respondent as all it does is feign half-hearted ignorance of the outstanding amount. The deponent further stated that the invoices attached and said by the Applicant to amount to over a billion Uganda shillings represent the total monetary volume of the work done by the Respondent for the Applicant during the life of the contract and the Applicant is aware of the same. The claim by the Applicant for reconciliation of the amount owing is not a reasonable defence to the suit on the merits that would require a full blown trial of the case. The Applicant has, therefore, not disclosed any reasonable defence on the merits and the application ought to be dismissed.

The Applicant filed an affidavit in joinder whose contents I have also taken into consideration.

Representation and Hearing

At the hearing, the Applicant was represented by Mr. Ogwang Sam while the Respondent was represented by Mr. Kalule Ahmed Mukasa. It was agreed that the hearing proceeds by way of written submissions which were duly filed and have been relied upon in this application.

Issue for determination by the Court

The main issue in an application of this nature is whether the application raises triable issues as to warrant the grant of leave to appear and defend the main suit.

Submissions of Counsel

Applicant's Submissions

Counsel for the Applicant relied on the decisions in ***Benon Tomusange & Another Vs Exim Bank (U) Ltd*** and ***Maluku Interglobal Trade Agency Vs Bank of Uganda [1985] HCB 65*** for the position of the law on an application of this nature. Counsel submitted that it is the case for the Applicant that it is not indebted to the Respondent as claimed or at all. Counsel submitted that the Respondent themselves appear uncertain of the sum being claimed from the Applicant for, while in the plaint in the main suit they claimed for UGX 426,500,568/=, in the affidavit in reply herein, they state the outstanding sum to be UGX 457,135,268/=. Counsel argued that such contradictions require trial of the matter, and thus raises a triable issue.

Counsel for the Applicant further stated that the other triable issue is whether the Respondent is entitled to interest on the claimed sum since none had been agreed upon between the parties when they entered into the oral contract. Counsel submitted that this was a requirement under Order 36 Rule 2 of the CPR and where such interest is claimed in absence of an agreement to that effect, such amounts to a triable issue that would entitle the defendant to be

granted leave to appear and defend the suit. Counsel relied on the decisions in ***Shipping GL (U) Limited Vs P.N Mashru Limited, HC M.A No. 1099 of 2017*** and ***Begumisa George Vs East African Development Bank, HCMA No. 451 of 2010***.

Counsel concluded that the Applicant has attached an intended written statement of defence as required by the law. Counsel prayed that the application be allowed.

Respondent's Submissions

Counsel for the Respondent submitted that the Applicant has not raised any triable issue that is worthy of a trial. Counsel submitted that while the Respondent has shown by documentary evidence that the in-kind payments amounted to slightly over UGX 99million, the Applicant has merely denied indebtedness without offering any alternative tangible and verifiable set of facts. Counsel submitted that there is no evidence that the sum claimed in the plaint was fully paid; which would have formed the basis for the argument that the Applicant is not indebted to the Respondent. Counsel argued that in absence of material alternative set of facts, the claim by the Applicant for accounts reconciliation is without merit. Counsel argued that even the difference in the figures claimed alone is not reason enough for a full trial.

Counsel argued that the Respondent is clearly entitled to a decree for the sum claimed in the plaint in accordance with Order 36 Rules 3(2) and 5 of the CPR. Counsel relied on the decision in ***Post Bank (U) Limited Vs Adul Kasozi, SCCA No. 08 of 2015*** which set out the rationale of summary procedure, to wit;

“Order 36 was enacted to facilitate the expeditious disposal of cases involving debts and contracts of a commercial nature to prevent defendants from presenting frivolous or vexatious defences in order to unreasonably prolong litigation. Apart from assisting the courts

in disposing of cases expeditiously, Order 36 also helps the economy by removing unnecessary obstructions in financial or commercial dealings.”

Counsel finally submitted that the Respondent was willing to drop the claim for interest in these proceedings; and, that being the case, the Court should find that no triable issue has been disclosed by the Applicant and the application ought to be dismissed and judgment be entered on the summary suit.

Counsel for the Applicant made submissions in rejoinder which I have, as well, taken into consideration.

The Position of the Law

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 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. The applicant should demonstrate to court that there are issues or questions 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. (See ***M.M.K Engineering v. Mantrust Uganda Ltd H. C. Misc Application No. 128 of 2012; and Bhaker Kotecha v. Adam Muhammed [2002]1 EA 112***).

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.”

It is a further requirement under the law that in an application for leave to appear and defend a summary suit, there must be sufficient disclosure by the applicant, of the nature and grounds of his or her defence and the facts upon which it is founded. Secondly, the defence so disclosed must be both bona fide and good in law. A court that is satisfied that this threshold has been crossed is then bound to grant unconditional leave. Where court is in doubt 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. (See ***Children of Africa vs Sarick Construction Ltd H.C Miscellaneous Application No. 134 of 2016***).

Resolution by the Court

From the law as set out above, where an application for leave to appear and defend a summary suit has been filed by the defendant/Applicant, the Court will only enter summary judgment where the application raises no bona fide triable issues of fact or law or where the defence raised is found by the Court to be a sham. On the case before me, the Applicant raises three contentions which, they claim, entitle them to be granted leave to defend the main suit. These are that:

- (i) The payments made by the Applicant in form of cash and in-kind delivery of materials to the Respondent fully settled the Applicant's indebtedness against the Respondent.
- (ii) In case any amount is outstanding, and since the Respondent themselves are uncertain of the exact amount owing, an accounts

reconciliation ought to be conducted to establish whether and how much is outstanding.

- (iii) The claim by the Respondent, under a summary suit, for interest that is not based on any agreement between the parties amounts to a triable issue entitling the Applicant to be granted leave to defend the suit.

The Respondent discounted the above lines of defence arguing that they are not based on any material alternative facts presented by the Applicant and are intended to cause obstruction in financial and commercial dealings which run contrary to the objective for which Order 36 of the CPR was enacted.

On the facts as they appear on record, there is no clear and conclusive evidence regarding how much the total contract sum was; how much was paid in total; how much was paid by cash; how much was paid in form of in-kind deliveries; and how much is outstanding. As pointed out by the Applicant, the figure claimed by the Respondent in the plaint is different from that stated in affidavit in reply. In absence of such clear and conclusive evidence on the aspects pointed out above, the Court cannot make a conclusion as to whether the Applicant is indeed indebted to the Respondent and to what extent. This can only be established through evidence which has to be adduced and tested at a full trial. I also find merit in the Applicant's call for an accounts reconciliation to establish the total sums paid as against the sum outstanding, if any. In my view, without a reconciliation or clear documentary evidence, a finding cannot be made as to how much materials were delivered by the Respondent, how much was paid for and how much is outstanding.

In the circumstances therefore, the first two contentions set out above raise bona fide triable issues of fact that require investigation through a trial. The said issues present reasonable grounds of defence and do suffice to entitle the Applicant to unconditional leave to defend the main suit.

Regarding the claim for interest, the law is that under a summary suit, a liquidated claim within the meaning of Order 36 Rule 2 of the CPR can only be accompanied with interest where interest was part of the parties' agreement upon which the liquidated claim is based. When interest is claimed in a suit brought by way of a summary suit where none was agreed upon by the parties, such would put the claim outside the ambit of Order 36 of the CPR. This is a conclusion based on a reading of Order 36 Rule 2 of the CPR.

However, in ***Begumisa George Vs East African Development Bank, HCMA No. 451 of 2010, Justice Irene Mulyagonja*** (as she then was) pointed out that the ratio that a claim including interest cannot be brought under summary procedure is not applicable to every suit. In ***Uganda Transport Co. Ltd v. Count de la Pasture (3) (1954) 21 EACA 163***, it was held:

“... where a plaint endorsed for summary procedure contains claims correctly endorsed and other claims, the court may, by O.33 (now O.36) rule 3 to rule 7 and 10, deal with the claims correctly specially endorsed as if no other claim had been included therein and allow the action to proceed as respects the residue of the claim, the court having no power under O.33 (now O.36) to strike out any part of the claim but being unable to give summary judgment for any relief not within the scope of O.33 (O.36) rule 2 aforesaid.”

Also See: ***Arjabu Kasule v. F. T. Kawesa [1957] EA 611 and E. M. Cornwell & Co. Ltd. v. Shantaguari Dahyabhai Desai (1941) 6 ULR 103.***

The position of the law, therefore, is that where a claim including interest is brought under summary procedure in a situation where the document sued upon includes no agreement on interest, such claim of interest constitutes a triable issue. However, if the liquidated claim is properly brought and proved

under summary procedure, the court may go ahead to give judgment upon the liquidated claim and allow the action to proceed in respect of the residue of the claim, which may be a claim for interest. Unless the plaintiff agrees to forfeit the claim for interest, the court cannot strike out the claim for interest so as to bring the claim within the ambit of Order 36 of the CPR.

In the instant case, if it had been proved that the liquidated claim by the Plaintiff was due and owing, the mere addition of a claim for interest would not have defeated recovery of the liquidated claim. It would have been possible for judgment to be granted for the liquidated demand and to proceed with the issue of interest for trial. On the other hand, the Plaintiff/Respondent would have been at liberty to drop the claim for interest and opt to only recover the liquidated demand. In such a situation, judgment and decree would be finally entered on the summary suit in accordance with Order 36 Rules 3(2) and 5 of the CPR.

However, since the Applicant has established other bona fide triable issues of fact beyond the issue of interest, this application wholly succeeds and is allowed with the following orders:

1. The Applicant is granted unconditional leave to defend the main suit.
2. The Applicant shall file a Written Statement of Defence within 15 days from the date of this Ruling.
3. The costs of the application shall abide the result of the main suit.

It is so ordered.



Boniface Wamala

JUDGE

19/03/2021