THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLENEOUS APPLICATION NO.964 OF 2019

(ARISNG OUT OF CIVIL SUIT NO. 835 OF 2019)

AFRICA ONE LOGISTICS LIMITED :: APPLICANT

VERSUS

KAZI FOOD LOGISITCS (U) LIMITED :: RESPONDENT

BEFORE: HON. MR. JUSTICE BONIFACE WAMALA

RULING

Introduction

This application was brought by Notice of Motion under Order 36 Rules 1, 3 & 4 and Order 52 Rules 1, 2 & 3 of the Civil Procedure Rules(CPR) for orders that:

1. The Applicant be granted leave to appear and defend Civil Suit No. 835 of 2019.
2. Costs of the application be provided for.

The application was supported by an affidavit deposed by **Nahamya Paula**, a Director in the Applicant Company, which also sets out the grounds of the application. Briefly, the grounds are that:

a) Whereas it is true that the Applicant entered into a tenancy agreement with the Respondent, the agreed amount payable per month was USD 1,800 and not USD 1,950 as alleged in the plaint.

b) The tenancy had automatically terminated after the Applicant went into breach of payment 7 days after the Respondent demanding the same immediately after a period of 2 months which had already been paid for. As such, the rent due and owing to the Respondent should not exceed USD 1,800 equivalent to one month.

c) Any dispute as to the amount or duration of such cessation of rent as per the Tenancy Agreement had to be referred to arbitration under the Arbitration and Conciliation Act.

d) As such the Applicant is not indebted to the Respondent as claimed in the plaint or at all.

e) The Applicant has a good defense and the application raises triable issues.

f) It is in the interest of justice that the Applicant be granted leave to appear and defend the suit.

The Respondent opposed the application through an affidavit in reply deponed to by **Ashif Karmali**, the Managing Director of the Respondent Company, in which he stated as follows:

a) The deponent knows that the agreed rental amounts payable per month were USD 1,800 for Frozen Storage and USD 150 per month for office space totaling to USD 1,950 per month.

b) The deponent was advised by the Respondent's advocates that the Applicant had in his pleadings made an admission that the agreed amount payable per month was USD 1,800 for an initial fixed rental period of one year.

c) In an effort to clear the outstanding rental arrears, the Applicant issued to the Respondent a cheque from Bank of Africa for the sum of USD 5000 which was returned unpaid due to insufficient funds.

d) The Applicant paid USD 3,908 only and defaulted on the agreed terms of payment and to date is indebted in the sum of USD 20,752.38 which is inclusive of additional rental income and interest. The termination of the Tenancy Agreement was not a waiver of obligations to pay rent that accrued before the termination.

e) The deponent has been advised by the Respondent's advocates that referral of the dispute for Arbitration under the Arbitration and

Conciliation Act was optional under the Tenancy Agreement and the Applicant had consistently failed, neglected or refused to honour the terms of the earlier mediation and negotiations.

f) The application is an abuse of the court process, a waste of the court's time and intended to delay the Respondent from obtaining a quick judicial remedy. The deponent is advised by the Respondent's advocates that the proposed draft defence is a sham, elusive, vague and does not offer any triable issues for determination by the court.

The Applicant filed an affidavit in rejoinder still deposed by **Nahamya Pauline** in which she stated as follows:

a) The discrepancy in the outstanding amounts occasioned by the claim that the monthly rent was USD 1,950 when according to the tenancy agreement it was USD 1,800 discloses a triable issue.
b) The Applicant never issued any cheque to settle the outstanding amounts. The only cheque by the Applicant was issued at the start of the tenancy which was blank and the parties had agreed that the same would not be banked.
c) The claim if interest is alien to the agreement and therefore constitutes a triable issue.
d) The Applicant has a plausible defence to the Respondent's claim and also intend to raise a counter claim against the Respondent as disclosed in an amended draft written statement of defence attached to the affidavit in rejoinder.

Representation and Hearing

At the hearing, the Applicant was represented by Mr. Mwigo Allan while the Respondent was represented by Mr. Bafirawala Elisha. It was agreed that the matter proceeds by way of written submissions, which were duly filed by both

Counsel. I have considered the submissions of Counsel in the course of resolution of the issue before the Court.

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**.

Resolution by the Court

On the case before me, let me first deal with the preliminary matters of law that were raised by each Counsel in their submissions.

Counsel for the Applicant submitted that the suit was wrongly filed under summary procedure on the ground that the Respondent's claim was not a liquidated demand in accordance with Order 36 Rule 2 of the CPR. Counsel submitted that the claim of USD 20,752.38 was not ascertained and had no proper justification.

In reply, Counsel for the Respondent submitted that the entire claim is based on the terms of the tenancy agreement between the parties. The Respondent had attached on the affidavit in support a full computation and invoices issued to the Applicant totalling to USD 20,752.38 inclusive of the charges agreed upon in the tenancy agreement. Counsel prayed that the objection be dismissed as being misconceived.

A liquidated demand can be defined as a figure readily computed, based on terms of an agreement or is fixed by operation of the law. It is in the nature of a debt, a specific sum of money due and payable under or by virtue of a contract which is either already ascertained or capable of being ascertained as a mere matter of arithmetic. Where ascertainment of a sum of money, even though it

be specified or named as a definite figure, requires investigation beyond mere calculations, then the sum is not a debt or liquidated demand but constitutes damages. See: The **Black's Law Dictionary, 5th Edition, pg. 839** and the decision in ***Simon Yiga Vs Fina Bank Ltd, HC M.A No. 058 of 2012 (Commercial Court)***.

In the instant case, like it was submitted by Counsel for the Respondent, the claim by the Respondent in the main suit is based on the terms of the tenancy agreement between the parties. Counsel pointed out to the Court the key clauses relevant to this claim. The Respondent also attached onto the affidavit in support the computation and the various invoices issued to the Applicant which establish the sum claimed. In light of the position of the law set out above, I do not see how the Respondent's claim does not qualify as a liquidated claim. It does not require any further investigation beyond mere calculation. It is based on clear terms of an agreement; which agreement is agreed to by both parties as binding upon them. The sum is ascertained or ascertainable by merely looking at the agreement and doing the necessary calculations. I therefore agree that this objection by Counsel for the Applicant is misconceived and the same is dismissed as bearing no merit.

On their part, Counsel for the Respondent applied for judgment on admission under Order 13 Rule 6 of the CPR for the sum of USD 1,800 admitted as rent per month. Counsel submitted that in the affidavit in support of the application, the Applicant admitted in paragraph 2 (c) that the rent is USD 1,800; which admission is unequivocal and positive. Counsel prayed that judgment on admission be entered against the Applicant for the immediate payment of USD 1,800 without waiting for the determination of the application for leave to appear and defend the main suit.

In their reply contained in the submissions in rejoinder, Counsel for the Applicant submitted that the alleged USD 1,800 is the source of the dispute as to the proper amount charged. Looking at the invoices annexed to the plaint, the amount charged each month kept varying which matter the Applicant kept questioning. The amount claimed by Counsel for the Respondent does not meet the criteria set for a judgement on admission to be entered. Counsel relied on the decision in ***The Board of Governors Nebbi Town S.S.S Vs Jaker Food Stores Limited HC M.A No. 0062 of 2016 (Arua HC)*** and prayed that the prayer for a judgment on admission be rejected.

It is a settled principle of the law that a judgment on admission is not a matter of right but rather one of discretion of the court. The admission must be unambiguous, clear, unequivocal and positive. Where the alleged admission is not clear and specific, it may not be appropriate to take recourse under the provision. **See: *Future Stars Investment (U) Ltd Vs Nasuru Yusuf, HCCS No. 0012 of 2017***. The judge's discretion to grant judgment on admission of fact under the law is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to judgment. **See: *Cassam v. Sachania [1982] KLR 191*** and ***The Board of Governors Nebbi Town S.S.S Vs Jaker Food Stores Limited HC M.A No. 0062 of 2016 (Arua HC)***.

In the instant case, the claim by the Respondent for a judgment on admission is differently put in the affidavit in reply as compared to the submissions of Counsel for the Respondent. In the affidavit in reply, paragraph 4 thereof, the deponent stated:

> *"I have been advised by my lawyers … which advice I verily believe to be true that the Applicant makes an admission that the agreed amount payable per month was USD 1,800 <u>for an initial fixed rental period of one year</u>".* [Emphasis added]

Paragraph 2 (c) of the affidavit in support, said to contain the alleged admission, reads:

> *"That as such, the rent due and owing to the Respondent should in the circumstances not exceed USD 1,800 equivalent of one month".*

The averment in paragraph 4 of the affidavit in reply, when compared to paragraph 2(c) of the affidavit in support, is inaccurate in the way it captured the Applicant's averment. The part of paragraph 4 underlined for emphasis herein above does not appear in the Applicant's averment; yet it fundamentally changes the meaning of the Applicant's averment. The Applicant's averment is restricted to USD 1,800 for a period of one month.

It is not very clear from the submissions of Counsel for the Respondent whether the judgment on admission sought is for USD 1,800 for one month or USD 1,800 per month for the initial period of one year. It is also not very clear that, by the averment in paragraph 2(c), the Applicant was admitting to the sum of USD 1,800 as being outstanding or was simply building an argument disputing the claimed sum of USD 20,752.38. The statement by the Applicant, therefore, cannot be categorized as clear, unambiguous, unequivocal and positive as to invoke the discretion of the Court to enter a judgement on admission in that regard. I am therefore unable to enter a judgement on admission as prayed for by the Respondent. This claim is accordingly rejected.

The merits of the Application

I now turn to the merits of the application. The position of the law is 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 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***).

On the case before me, the Applicant raises four contentions which, they claim, entitle them to be granted leave to defend the main suit. These are that:

(i) There is a dispute on the actual monthly rent payable – USD 1,950 as against USD 1,800;
(ii) The Respondent claims for interest that is not based on agreement;
(iii) The matter ought to have been first referred to arbitration; and
(iv) The Defendant has a plausible defence with a counter claim.

There is a dispute on the actual monthly rent payable – USD 1,950 as against USD 1,800

It was claimed by the Applicant that while the Respondent claimed that the rent payable was USD 1,950 per month, the rent payable according to the tenancy agreement was USD 1,800 per month. According to the Applicant, this dispute constitutes a triable issue that entitles the Applicant to be granted leave to defend the suit.

For the Respondent, it was pointed out that according to paragraph 1 of the tenancy agreement, the rent payable for frozen storage was USD 1,800 per month and the rent payable for office space was USD 150 per month, making a total sum of USD 1,950 per month.

I have looked at the copy of the tenancy agreement and it is in the terms stated above by the Respondent. I am unable to appreciate the basis of the Applicant's insistence that the monthly rent was USD 1,800 and not 1,950. This claim by the Applicant is therefore baseless and cannot constitute any triable issue of fact or law. It is accordingly rejected.

The Respondent claims for interest that is not based on agreement

It was submitted by Counsel for the Applicant that while the tenancy agreement made no provision for interest, the Respondent made a claim for

interest in the summary suit which is contrary to the law. Counsel relied on the decision in ***James Kataza & Another Vs Sylvia Namusisi & Another, HC M.A No. 244 of 2011***.

In response, Counsel for the Respondent relied on paragraph 16.3 of the tenancy agreement which provides that the Respondent would charge a rate of 15% on each invoice issued but not settled within 7 days. The Applicant was therefore acting in bad faith in feigning ignorance of interest being charged as part of the agreement.

Clause 16.3 of the Tenancy Agreement (at page 11) states –

> *"Accordingly, if any instalment of Lease Rate shall not be paid within seven (7) days after issuance of the invoice to the Tenant, the Tenant will pay the Landlord on demand a rate charge equal to 15% of the invoiced amount due and payable, daily, until payment is effected in full."*

The first question is whether the above clause is a provision for interest. The clause does not say the 15% is interest; it could be a penalty or a surcharge. But that aside, the charge of 15% is payable "daily until payment is effected in full". This raises a question as to legality of such a clause. Then, in the plaint, the Respondent claims for interest at 20% per annum from the date of filing till payment in full. This is, definitely, not the interest or charge referred in in paragraph 16.3 of the tenancy agreement. If the rate envisaged in the tenancy agreement was claimed and computed, it would be at 15%, per day and from the date of default on each invoice. Clearly, this is not what the Respondent is seeking for in the suit. The Respondent preferred to include a modified claim for interest that is capable of passing the test of legality and reasonableness. It is therefore true as claimed by the Applicant that the interest claimed in the summary suit is not based on the tenancy agreement or any other agreement between the parties.

The position of 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.***

Therefore, 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. In the instant case, if the Court were to reach a conclusion that the liquidated claim is made out, the court would take this course of action. This will however depend on my finding on the two next contentions raised by the Applicant.

The matter ought to have been first referred to arbitration

It was claimed by the Applicant that the tenancy agreement provided for an arbitration clause which was not enforced by the parties and, as such, the summary suit was filed prematurely. Counsel for the Applicant referred the Court to Clause 13.2 which he said contains a mandatory arbitration clause.

On the other hand, Counsel for the Respondent submitted that the applicable clause on arbitration was Paragraph 18.1.4 of the Tenancy Agreement which was not couched in mandatory terms and was not the only agreed way in which the parties would resolve a dispute arising from the tenancy agreement.

Clause 13 relied upon by Counsel for the Applicant as the relevant arbitration clause stipulates as follows:

> *"13. Abatement of Rent*
>
> *13.1 If the whole or any part of the demised premises (or the common parts necessary for access to it) is destroyed or damaged by fire or any other … the rent or a fair proportion of it according to the nature and extent of the damage shall be suspended until the demised premises (with the common parts necessary for access to it) is again fit for use.*
>
> *13.2 A dispute as to the amount or duration of such cessation of rent and service charge shall be referred to arbitration under the Arbitration and Conciliation Act (Cap 4) …"*

Clause 18 of the Tenancy Agreement upon which Counsel for the Respondent relied upon provides as follows:

> *"18. Law Applicable, Dispute Resolution and Jurisdiction*
>
> *18.1.1 The Lease shall be governed by and construed in accordance with the Laws of Uganda.*
>
> *18.1.2 The parties shall make every effort to resolve any disagreement or dispute arising between them under or in connection with this Lease amicably by direct informal negotiation.*
>
> *18.1.3 If any disputes cannot be resolved amicably by the parties, the parties and their legal representatives will promptly meet to consider whether there is a possibility of reconciliation by mediation or conciliation.*
>
> *18.1.4 if both parties do not agree to refer the dispute to mediation or conciliation, the parties will promptly consider whether to refer the dispute to arbitration. If the parties agree to refer the dispute to arbitration, the Arbitration and Conciliation Act … shall apply. If the parties do not agree to refer the dispute to arbitration, they will proceed to litigation in the Uganda courts of judicature."*

It is clear from the plain reading of the two clauses set out above that Clause 13 is not about the dispute resolution mechanism for enforcement of the Tenancy Agreement. It is a specific provision on what happens if there is abatement or cessation in payment of rent owing to the named occurrences. The dispute herein is not about abatement or cessation of rent payment envisaged under the said provision of the agreement.

On the other hand, it is equally plain and clear that clause 18 is the relevant clause on dispute resolution during the enforcement of the Tenancy Agreement. As submitted by Counsel for the Respondent, it is clear that under Clause 18.1.4, arbitration was not a mandatory course of action. The agreement

exhaustively makes provision for a range of alternatives. The Respondent indicated in evidence that they made effort to explore those alternatives in vain. The Respondent attached to the plaint a document dated 5th June 2019 (Annexture B) which refers to a meeting held between the parties and the compromise the parties had reached. In the affidavit in reply (paragraph 7), the Respondent states that the Applicant consistently failed, neglected and/or refused to honour the terms of earlier mediations and negotiations.

Therefore, in agreement with Counsel for the Respondent, it is my finding that the relevant arbitration clause herein was not mandatory and that before the Respondent filed the summary suit, they attempted to explore the alternatives provided for under the agreement but they were unable to secure the cooperation of the Applicant. The summary suit was therefore not premature and was properly filed. The claim by the Applicant in this regard does not raise any triable issue of fact or law and is rejected.

The Defendant has a plausible defence with a counter claim

On the application by Notice of Motion, the Applicant attached a draft written statement of defence. In the affidavit in rejoinder, the Applicant introduced an amended draft written statement of defence with a counter claim. Counsel for the Applicant submitted that the counter claim ought to be investigated and the same constitutes a valid triable issue. Counsel further submitted that the counter claim was necessitated by the fact that after the filing of the application, the facts of the case have changed greatly with the Applicant's various rights being infringed by the Respondent. To avoid a multiplicity of suits, the Applicant deemed it necessary to bring their claims in that regard by way of a counter claim to be considered and determined at once.

For the Respondent, it was submitted by Counsel that the counter claim, not having been part of the original application, was simply being smuggled into

the court proceedings after the Applicant realizing that their defence is a sham. Counsel prayed that the proposed amended defence be struck out and expunged from the court record.

I notice that the claims in the counter claim, though related, are independent of the original cause of action of the Respondent in the summary suit. The claims in the counter claim do not occasion a dispute over the liquidated demand. Although the Applicant may be able to establish a cause of action against the Respondent on the counter claim, it in no way negatives the Applicant's liability on the liquidated demand. This is because by the time the matters alleged in the counter claim arose, the claimed rental dues had already accrued. The presence of the counter claim cannot, therefore, constitute a triable issue in as far as the liquidated demand is concerned.

However, in line with my finding above, since there is a triable issue over the claim for interest, which can be heard independently of the liquidated claim, I find that it is possible for the court to entertain the counter claim together with the trial of the question on interest. The Applicant therefore has the liberty to either bring the counter claim in his defence on the question of interest or to institute a different suit.

Decision of the Court

In all therefore, regarding the liquidated claim by the Respondent, the Applicant has not established any triable issue of fact or law that would entitle him to being granted leave to appear and defend the summary suit. The Respondent is therefore entitled to judgment and decree on the summary suit under Order 36 Rule 5 of the CPR. I however find that on the issue of interest claimed by the Respondent, the Applicant has established a bona fide triable issue of fact and law that entitles the Applicant to be granted leave to appear and defend the suit on that claim only. In line with the position of the law set

out herein above, I grant the Applicant unconditional leave to defend the suit on the issue of interest only. The Applicant will be at liberty to introduce his counter claim or to bring a separate suit against the Respondent. The Respondent/Plaintiff will have half of the costs of the suit and of this application. The orders of the Court are therefore summarized as follows:

1. The application is partly dismissed with an order that the Applicant is not entitled to be granted leave to defend the summary suit on the liquidated claim.
2. Judgment and decree are accordingly entered for the Respondent/Plaintiff against the Applicant/Defendant for the liquidated claim of USD 20,752.38.
3. The application is partly allowed with an order that the Applicant is granted leave to defend the suit on the question of interest only.
4. The Applicant shall file the written statement of defence in that regard within 15 days from the date of this order and is at liberty either to include the counter claim into the proceedings or to bring a separate suit.
5. The Respondent/Plaintiff is granted half of the costs of the suit and half of the costs of this application.

It is so ordered.

Dated, Signed and Delivered by email this 19th day of April, 2021.

Boniface Wamala

JUDGE