

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 481 OF 2018
(ARISING FROM CIVIL SUIT NO. 078 OF 2016)

JACKSON JEMBA KIMBUGWE----- APPLICANT

VERSUS

BATTE GERALD..... RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

This is an application for leave to appear and defend a defence in HCCS No. 78 of 2016 brought under Order 36 rule 3(1) of the Civil Procedure Rules. Section 101 of the Civil Procedure Act.

The respondent filed a summary suit on 8th day of April 2016 and Summons in Summary Suit on plaint were issued on the same day for recovery of 154,000,000/=.

The applicant filed an application for leave to appear and defend the suit on the 2nd day of May 2016 vide Miscellaneous Application No. 481 of 2016 and the same was fixed for hearing on 29th November 2016.

The court dismissed the application for want of prosecution and summary judgment was accordingly entered on the summary suit as prayed for in the specially endorsed plaint.

The court set aside the earlier order and allowed the application to be reinstated and heard on merits.

The applicant was represented by *Rukundo Seth* and the respondent was represented by *Kyeyune Albert Collins*. In the interest of time court directed the counsel for both parties to file written submissions.

The main grounds upon which this application is based are set out briefly;

1. The defendant/applicant has never breached the agreement of sale with the plaintiff and has done whatever is in his powers to have the agreement executed but to no avail
2. That it is the plaintiff who has failed the performance of the agreement by just failing to pay the purchase price as agreed.
3. That the defendant has instead tried to assist the plaintiff in the performance of the agreement by handing over the certificate of title to the land sold and by agreeing to extension of the payment schedules.
4. The plaintiff has further without the consent of the Defendant assigned part of the performance to a company by the names of NJOVU Estates Nansana without seeking and securing consent of the defendant.

The applicant in his affidavit states;

- (3) That it is not true that I owe the plaintiff/respondent shs 154,000,000/= or any part thereof
- (4) That the allegation that I failed to transfer the suit land to the plaintiff/respondent is false that the none transfer to the plaintiff resulted from his failure to comply with the payment of the purchase price in accordance with schedule agreed upon by the parties.
- (5) That having failed to conform to the schedules of payment the plaintiff/respondent agreed to the refund of the purchase price to the plaintiff/respondent.
- (6) That the allegation that the plaintiff/respondent's failure to conform to the schedule of payment was caused by claims of third parties is

false and not tenable considering that no particular of the same have been pleaded.

The respondent filed an affidavit in reply to this application and contended that;

(4) The applicant owes me 154,000,000/= which he undertook to refund me for having sold to me the suit land yet it had third party claims

(5) On the 30th day of October, 2015 I reached an understanding with the applicant whereupon he to refund me UGX 154,000,000/= and that he would pay me 80,000,000/= within a period of 14 days from the date of execution of the understanding whereas the balance of UGX. 74,000,000/= would be paid within a period of two months and in any case, not later than the 15th day of January, 2016.

(6) I gave the applicant a benefit of doubt that he would refund the said money until I decided through my lawyers of M/s Mukiibi & Kyeyune Advocates vide a letter dated 27th January 2016 to demand for the same but to date, the applicant has not honoured his obligation to pay.

According to the plaintiff's cause of action under the specially endorsed plaint is for recovery of 154,000,000/= being a refund of the principal sum arising out of a failed sale of land comprised in Busiro Block 222 plots 70 & 146.

The applicant and the respondent agreed or entered into a memorandum of understanding, agreeing to refund 154,000,000/=

The submissions of counsel for the applicant together with the evidence adduced in his affidavit in support does not make any explanation about the refund of 154,000,000/=.

In his affidavit, he confirms to having agreed to refund the said money (purchase price). The applicant does not set out any plausible defence to the claim and neither does he raise any triable issues in his defence.

It is clear he made an agreement/memorandum of understanding to refund the money by January 2016 and since that time he has never honoured his obligations and no explanation has been availed as to whether the said memorandum of

understanding was ever varied or revoked. I do not think the application of the applicant raises any defence to the respondent's claim.

In the case of ***Maluku Interglobal Trade Agency vs Bank Of Uganda [1985] HCB 65,66*** the court held 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 plaintiff 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.”

The applicant does not show any defence in his affidavit but rather he introduces the reasons why the earlier transaction failed and how he could not consent to issues of tax evasion.

But it is clear, the parties agreed that the transaction failed and indeed the applicant confirmed that *“That having failed to conform to the schedules of payment the plaintiff/respondent agreed to the refund of the purchase price to the plaintiff/respondent.”*

I find the applicant's counsel's submission full of evidence from the bar. Most of the allegations he is referring to are not mentioned anywhere in the applicant's affidavit in support of the application for leave to appear and defend. Facts to the defence are entirely evidence from the bar.

In the case of ***Corporate Insurance Co. Ltd vs Nyali Beach Hotel [1995-1998] 1 EA 7***, the Court of Appeal of Kenya held that leave to appear and defend will not be given merely because there are several allegations of fact or law made in the defendant's affidavit. The allegations are investigated in order to decide whether leave should be given.

The rest of the submissions are misleading and misplaced and this court shall not waste time to address them since they are not derived from the application and were never pleaded.

The court is satisfied that the applicant has failed to set forth any ground for defence in his affidavit.

In the case of ***Sembule Investments Ltd vs Uganda baati Ltd High Court Miscellaneous Application No. 664 of 2009***, Hon Lady Justice Irene Mulyagonja stated that the defendant who wishes to resist the entry of a summary judgment should disclose through evidence that there are some reasonable grounds of defence.

I'm in total agreement with the above decision and the applicant's application fails to satisfy the test.

The application is dismissed with costs. Judgement is entered in the sum of 154,000,000/= with interest at court rate from the date of filing this suit.

It is so ordered.

SSEKAANA MUSA
JUDGE
13th /07/2018