

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 736 OF 2021

(ARISING FROM MISC. APPLICATION NO. 707 OF 2021)

(FURTHER ARISING FROM CIVIL SUIT NO. 272 OF 2021)

UMEME LIMITED ::: APPLICANT

VERSUS

JUSTICE ANUP SINGH CHOUDRY ::::::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

This is an application brought by way of Notice of Motion under Section 33 Judicature Act Cap. 13, Section 98 Civil Procedure Act Cap. 71, Order 36 Rules 8 and 11 and Order 52 Rules 1 and 3 of the Civil Procedure Rules S.I 71-1.

The prayers sought in the application are, that;

1. *The default judgment entered by court on 19th October 2021 is set aside.*
2. *The applicant be granted an extension of time within which to file its application for leave to appear and defend the main suit vide CS No. 272 of 2021.*
3. *The application for grant of unconditional leave to appear and defend the main suit filed on 12th October 2021 be validated.*

The background and grounds to this application are in the supporting affidavit of Lubang Vincent, briefly, they are;

1. The Respondent instituted a suit by way of a summary plaint for recovery of Ug. Shs. 117,700,000 (Uganda shillings One hundred Seventeen Million Seven Hundred Thousand only).
2. The Applicant was served with summons on 30th September 2021 and were forwarded to the Applicant's external lawyers M/s Shonubi, Musoke & Co. Advocates, via email with attention to the applicant's desk officer (Lubang Vincent) in the said firm on 5th October, 2021.
3. The last day for the applicant to file an application for unconditional leave to appear and defend the main suit fell on Sunday, 10th October, 2021. By the rules, the same automatically got extended to Monday, 11th October, 2021.
4. The applicant's said desk officer inadvertently failed to file the application before expiry of the statutory period on Monday 11th October, 2021 for indisposition (attending a burial upcountry – Adjumani District)
5. The applicant hastily filed the application on 12th October, 2021 a day after the expiry of the statutory period.
6. The application for unconditional leave is meritorious with higher chances of success.
7. The applicant has a plausible defence to the main suit with a very high likelihood of success.
8. It is in the interest of justice that this application be granted to enable the application for grant of an unconditional leave to appear and defend be heard and determined.

The respondent opposed the application and contended that the application is incompetent, meritless, misconceived and intended to waste court's time

and resources. That the applicant's lawyers were negligent in not filing a defense within the timelines set by law. That the applicant should instead make a negligence claim against their lawyers and not use the court as a forum to avoid liability. The applicant should have first applied for extension of time before filing an application for leave to appear and defend as if they were within time.

ANALYSIS

The powers of this court to exercise its discretion to set aside, grant the applicant an extension of time and validating the belatedly filed application for leave to appear and defend are not in dispute. What is important to demonstrate to court is whether the Applicant has sufficient cause to warrant the prayers asked for.

Order 36 r.11 CPR gives this court the discretion to set aside a decree entered under O.36 r.3 (2) and to grant leave to a defendant to appear and defend the main suit. Court however, must be *satisfied* that the service of the summons was not effective or that the defendant did not appear to the summons for other sufficient cause.

In Paragraphs 6 and 7 of the affidavit in support, it is stated that;

6. That, the statutory time for the applicant to file an application for unconditional leave to appear and defend the main suit fell on Sunday, 10th October, 2021. By virtue of the rules, the last filing date automatically got extended to Monday, 11th October, 2021.

7. That from Friday 8th October 2021 until Monday 11th October 2021, I was indisposed (attending a burial – Adjumani District). As such, failed to file the application for the grant of unconditional leave to appear and defend before the expiry of the statutory period.

In response to these averments, the respondent averred;

7. That in response to paragraph 6, 7 and 8 of Lubang Vincent's affidavit in support, it is quite flabbergasting for the summons that were served on the applicant on the 30th day of September 2021 and forwarded to the applicant's lawyers on the 5th of October 2021 for the applicant's lawyers to proceed and reply outside the timeline provided for by law.

8. That in further response thereto, it is quite annoying and legally unjustifiable for a law firm which has over 20 practicing advocates to use such a lame excuse that the lawyer who was in personal conduct of the matter had gone for burial in Adjumani. Any other lawyer in the firm could have handled the task of replying within the timeline set by law. The applicant stayed with the summons for 5 days before having (sic) them transmitting to their lawyers for action and their lawyers stayed with the summons for 6 days before prematurely responding out of time on the 12th day of November 2021.

9. That in further response thereto, the deponent had both 6th and 7th of October 2021 to file an application for leave before he took to the road to go for burial in Adjumani. The actions of the applicant and its lawyers are a clear proof of abuse of court process and they should be taught a lesson that court timelines are supposed to be respected.

The case of *Nicholas Roussos –vs- Ghulam Hussein Habib Virani and Another*, SCCA No. 9 of 1993 cited by counsel for the applicant is good authority for the principle that a mistake of an advocate though negligent may be accepted as a sufficient cause.

The Supreme Court in *Banco Arabe Espanol –V- Bank of Uganda* SCCA No. 8 of 1998, court held that;

“A mistake, negligence, oversight or error on the part of counsel should not be visited on the litigant. Such mistake, or as the case may be, constitutes just cause entitling the trial judge to use his discretion so that the matter is considered on its merits.”

Similarly, in *Philip Ongom vs Catherine Owata 2003 KALR 53* Mulenga JSC (as then was) had this to say:-

“A litigant ought not to bear the consequences of the advocate’s default unless the litigant is privy to the default or the default results from failure, on the part of the litigant to give to the advocates due instruction

According to O.36 r.11 CPR, the question of whether or not there is good cause to set aside the decree is strictly a matter of court’s satisfaction. This court is satisfied that the failure of the applicant’s lawyer to file the application for leave to appear and defend because he had gone to attend a burial in Adjumani, though negligent, is sufficient cause for this court to set aside the judgment in *HCCS No. 272 of 2021* however negligent it may have been.

I find no merit in the respondent’s submission that the applicant, just like its lawyer, was equally negligent about the issue of filing the application for leave to appear and defend within time; and that for this reason, there is no sufficient cause to set aside the judgment. I find the argument self-defeating for a number of reasons.

The respondent faults the applicant for keeping the summons for five (5) days before transmitting the same to its lawyers for action. However, the respondent avers in paragraph 9 of his affidavit that Counsel Lubang Vincent “.....had both 6th and 7th of October 2021 to file an application for leave before he took to the road to go for burial in Adjumani...”.

This implies that at the time the applicant forwarded the summons to its lawyers for action, the applicant was still within time. I hardly see how this imputes negligence on the part of the applicant.

Secondly, the respondent argues that the applicant’s remedy lies in a claim for professional negligence and not in the instant application. In light of the authorities highlighted above and the provisions of O.36 r.11, it is

superfluous for the applicant to sue its lawyer in circumstances such as this one.

Extension of time and validation of application for grant of unconditional leave to appear and defend

This court has powers under **Section 98** of the **Civil Procedure Act Cap. 71** to make such orders as may be necessary to achieve the ends of justice.

I find the authority of *Re Christine Namatovu Tebajjukira [1992-93] HCB 85, (SCU)* cited by counsel for the applicant instructive in this regard. Court, in that case stated that; *“The administration of justice should normally require that the substance of disputes should be investigated and decided on their merits and that lapses should not necessarily bar a litigant from the pursuit of his rights.”*

This court is satisfied that the scales of justice should tilt in favour of the applicant being granted an extension of time within which to file its application for leave to appear and defend the main suit.

Counsel for the applicant opposed the grant of extension of time saying that missing a statutory deadline by going to a burial can hardly fall within the purview of any justice under **section 98 CPA**. To support this submission, counsel relied on the case of *Okiria Ben –vs- Zomu Yusuf and Electoral Commission EP No. 033/2021* where court dismissed the petition even when the petitioner filed the petition late by just one day.

In my opinion, the case of *Okiria Ben (supra)* is distinguishable from the present case. The case dealt with a peculiar area of the law (Local Council Chairperson Elections) regulated by a specific Act of Parliament i.e. **The Local Government Act**. I find support of this view in the holding of Justice Bashaija K. Andrew in the same case when he says;

“Clearly, the extension or abridgment of time is the function of the statute and/or the rules. Court is not vested with the discretion to extend or abridge time set by the statute or rules where no provision exists in the statute or rule stating so.”

In arriving at that decision, my learned brother relied on the case of *Makula International Ltd –vs- His Eminence Cardinal Nsubuga and Anor [1982] HCB 11 (SC)* where court held that a court has no inherent or residual power to extend time set by a statute unless the statute provides so.

In the instant case, **Section 98** CPA preserves the court's power to extend time if the justice of the case demands it.

This court is satisfied that this is a proper case for the grant of extension of time within which to file an application for leave to appear and defend the main suit and validate the belatedly filed application.

Leave to appear and defend

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."

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*).

In the present case, the respondent's claim against the applicant is for a sum of *Ug. Shs. 117,700,000 (Uganda shillings One hundred Seventeen Million Seven Hundred Thousand only)* arising from unpaid invoices in respect of license fees for installation of an electric pole on the respondent's residential premises.

The applicant denies installing electricity pole with 3-phase electric voltage at the respondent's premises. It further alleges that at the time the respondent acquired the suit property, the electricity pole was in existence. The applicant also denies existence of any agreement with the respondent for the payment of rent/license fees.

I note that there is no evidence of such contract before this court.

On the face of it, there is need to establish whether the applicant is liable for the actions of its predecessors. Similarly, given the nature of the claim, court will reasonably have to inquire into the existence of a contract between the applicant and respondent the basis of which the respondent purports to claim the liquidated sum.

The Judgment under this order can only be properly made in cases in which there are no substantial disputes as to the facts or law. Leave to defend will be given, if the defendant shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim. The defence must be sufficient in particularity and prima facie genuine.

In light of the foregoing, therefore, my finding is that the Applicant has disclosed plausible grounds of defence and/or bona fide triable issues of either law or fact which can sufficiently justify the grant of leave to appear and defend the main suit. In the circumstances, the application by the Applicant has merit and therefore succeeds.

Consequently, this application is allowed. I make the following orders;

- a) The judgment and decree in the main suit entered for the respondent is set aside.
- b) The applicant is granted unconditional leave to appear and defend HCCS No. 272 of 2021
- c) The costs of this application shall abide the outcome in the main suit.

I so order.

Ssekaana Musa

JUDGE

8th August 2022