

UGANDA / JUDGMENT

Businge v Kirungi (Miscellaneous Application 51 of 2023) [2024]

UGHCCD 45 (28 March 2024)

[2024] UGHCCD 45

COURT

HC: Civil Division (Uganda)

BEFORE

Boniface Wamala, J

CASE / FILE NUMBER

Miscellaneous Application 51 of 2023

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT KAMPALA****(CIVIL DIVISION)****MISCELLANEOUS APPLICATION NO. 051 OF 2023****(ARISING FROM CIVIL SUIT NO. 366 OF 2022)****BUSINGE VICTORIA RUSOKE ::::::::::::::::::::::::::::::::::: APPLICANT****VERSUS****KIRUNGI ANNET PAMELA ::::::::::::::::::::::::::::::::::: RESPONDENT****BEFORE: HON. JUSTICE BONIFACE WAMALA****RULING****Introduction**

[1] This application was brought by Notice of Motion under Order 36 rules 3 and 4 and Order 52 rules 1 and 3 of the Civil Procedure Rules seeking orders that;

- a) The Applicant/ Defendant be granted unconditional leave to appear and defend the main suit.

- b) Costs of the application be provided for.
- [2] The grounds of the application are contained in the Notice of Motion and in the affidavits deposited by **Hon. Businge Victoria Rusoke**, the Applicant and another by **Hon. Alex Ruhunda**. In her affidavit, the Applicant stated that she is not indebted to the Respondent in the sum of UGX 200,000,000/= as alleged in the plaint. She stated that she met with the Respondent on 10th July 2020 and it was proposed that she would sign a document indicating that she was to get a loan from the Respondent. She signed a cheque which she handed over to the Respondent in anticipation of concluding the proposed transaction. But before concluding the actual transaction, she had consultations with her husband and daughter who discouraged her from concluding the transaction and she informed the Respondent and the witness to the document that she was not going to conclude the transaction. On 14th July 2020, she held a meeting with the Respondent in the presence of Hon. Alex Ruhunda (the witness) wherein it was agreed that they would not proceed with the transaction and the Respondent would return the signed cheque. The Applicant and the witness also signed a document cancelling the previous agreement which the Respondent refused to sign on account that she was going to sign after consulting with her husband. The Applicant stated that she waited for the return of her cheque but did not consider it urgent since they had agreed to cancel the transaction. She was later surprised to receive a letter from the Respondent's lawyers claiming that she had defaulted in payment of a friendly loan. The Applicant further stated that she has since established that the Respondent is being investigated for embezzlement of funds from the capitation grant and is acting out of desperacy and for purposes of unjust enrichment. She further stated that there are triable issues of law and fact that require the court's adjudication as is shown in the draft written statement of defence. She concluded that it is in the interest of justice that she is given unconditional leave to appear and defend the suit.
- [3] An additional affidavit in support was sworn by **Hon. Alex Ruhunda**, a Member of Parliament for Central Division, Fort Portal City, who stated that he was privy to the transaction between the Applicant and the Respondent and signed the document as a witness following an expression by the parties to proceed with a transaction indicating a loan from the Respondent to the Applicant but no money was paid by the Respondent to the Applicant. Later on, he was informed by the Applicant that she was no longer willing to go on with the transaction whereupon the parties met in his presence and agreed in good faith to cancel the earlier proposed transaction. A document was signed by the Applicant and witnessed by the deponent cancelling the transaction and the Respondent undertook to sign and return the cheque that she had received. The deponent however later learnt that the Respondent had gone ahead and banked the cheque and never signed the cancellation document. He finally averred that the allegations that the Respondent paid a sum of UGX 200,000,000/= to the Applicant are false since no money was paid before cancellation of the transaction. He concluded that the Applicant has a strong defence to the suit since the allegations in the plaint are false.

- [4] The Respondent opposed the application through an affidavit in reply deposed by herself in which she stated that the affidavits made in support of the application contain blatant falsehoods and misrepresentation of facts intended to mislead court that she had multiple transactions with the Applicant whereas not. The Respondent stated that on 10th July 2020, Mr. Alex Ruhunda introduced the Applicant to her with a request for a loan of UGX 200,000,000/= because the political campaigns had drained the Applicant and she was on the verge of losing elections. Prior to advancing the money, the Respondent insisted that Alex Ruhunda signs as a witness and that the Applicant issues a cheque to guarantee the payment. In her presence, Alex Ruhunda perused the acknowledgement before witnessing it and that is the only transaction that happened between her and the Applicant. The Applicant personally signed and issued her a postdated cheque as a commitment to repay the money by 30th July 2020.
- [5] The Respondent denied ever meeting the Applicant again to discuss cancellation of the unknown and undisclosed transaction as alleged and the document purportedly signed to cancel the transaction does not bear her signature. She further stated that it is not true that she agreed to return the cheque because it was security for her money and could only return it if the Applicant repaid the money. She also averred that the two years and four months that passed before she demanded for payment does not extinguish the debt and that being investigated by State House or not has no relevancy to the Applicant's indebtedness to her. She concluded that there are no triable issues of law or fact to warrant the Applicant being allowed to defend the main suit and the draft WSD does not disclose any reasonable grounds of defence.
- [6] The Applicant filed an affidavit in rejoinder whose contents have also been considered by the Court.

Representation and Hearing

- [7] At the hearing, the Applicant was represented by **Mr. Esau Isingoma** from M/s K&K Advocates while the Respondent was represented by **Mr. Moses Wacha** from M/s KGN Advocates. It was agreed that the matter proceeds by way of written submissions which were duly filed by Counsel for both parties. I have reviewed the submissions and taken them into consideration in the course of determining the matter before Court.

Preliminary Objection

- [8] Counsel for the Applicant raised a preliminary objection to the effect that the affidavit in reply is defective on account that the deponent never appeared before a commissioner for oaths because the affidavit contains a digital signature. Counsel cited the case of **Mohamed Majyambere v Bhakresa Khalil HCMA No. 727 of 2021** where court stated that the commissioner must satisfy himself that the person named as deponent and the person before him or her are the same and submitted that the affidavit offends the requirements in Sections 6 of the Oaths Act Cap 19 which is in pari materia with Section 5 of the

Commissioner for Oaths (Advocates) Act Cap 5. Counsel prayed that the affidavit is struck out and the application remains unopposed.

- [9] In reply, Counsel for the Respondent submitted that the Respondent's affidavit in reply was duly signed by her in wet ink and that the affidavit in reply served onto the Applicant was scanned out of the original and filed in Court on ECCMIS. Counsel submitted that the affidavit was, therefore, properly commissioned and filed on record.
- [10] Section 6 of the Oaths Act Cap 19, which has similar wording with Section 5 of the Commissioner for Oaths (Advocates) Act Cap 5, provides as follows;

"Place and date of oath.

Every commissioner for oaths or notary public before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

- [11] The courts have taken the view that to comply with the above cited legal provision, the commissioner for oaths must satisfy him/herself that the person named as the deponent and the person that appears before the commissioner are the same and that the person is outwardly in a fit state to understand what he/she is doing. The commissioner for oaths then certifies that the deposition is done before him or her. See: *Mohamed Majyambere v Bhakresa Khalil HCMA No. 727 of 2021*; *Musa Nsime v Joseph Nanjubi & Ors [2015] UGHCED 12* and *Kakooza John Baptist v Electoral Commission and Yiga Anthony [2008] UGSC 8*.
- [12] On the case before me, the contention by the Applicant regarding the affidavit in reply is based on the fact that while the signature of the deponent (Respondent) on the affidavit appears to be an electronic signature, the one for the commissioner for oaths appears to be in wet ink which raises a presumption that the deponent did not personally appear before the commissioner for oaths. The Applicant raised this contention in the affidavit in rejoinder. The Respondent did not reply to the said allegation. What the Applicant's Counsel did was to file another copy of the affidavit in reply which bore a signature of the Respondent apparently in wet ink and explained that it was the copy that was signed before the commissioner only that the same was scanned and uploaded on ECCMIS. Counsel explained that such was the reason as to why the copy first uploaded and served onto the Applicant appeared to have a scanned signature.
- [13] This explanation by the Applicant's Counsel is problematic in the sense that it comes as evidence from the bar which is unacceptable. Nevertheless, the Applicant needed to lead evidence capable of establishing that the deponent of the impugned affidavit did not appear before the commissioner for oaths. The presumption sought to be relied on by the Applicant is rebuttable at several fronts as it remains open to many possible explanations as to what exactly happened. It is only the commissioner for oaths, for example, or any other person that saw what happened that could tell whether the deponent appeared or not. In absence of

such evidence, it has not been proved that the deponent never appeared before the commissioner for oaths.

- [14] I would like to add, for avoidance of doubt, that the purpose of the above cited provisions of the law would be satisfied even where the appearance by the deponent before the commissioner for oaths was virtual and not necessarily physical. In line with *The Constitution (Integration of ICT into the Adjudication Process for Courts of Judicature) (Practice) Directions, Legal Notice No. 6 of 2019*, a party can appear before a court or such other legal authority virtually. Where such virtual appearance is capable of satisfying the purpose of the matter, the fact that it was only virtual and not physical (as previously envisaged under the law) only remains a technicality that ought not be given undue regard in line with the dictate under Article 126(2) of the Constitution.
- [15] As is indicated in the authorities above cited, it is a well stated legal position that the purpose of the requirement for a deponent to appear personally before the commissioner for oaths is so that "the commissioner for oaths satisfies him/herself that the person named as the deponent and the person that appears before the commissioner are the same and that the person is outwardly in a fit state to understand what he/she is doing. The commissioner for oaths then certifies that the deposition is done before him or her". It is clear to me that this purpose can be achieved through a virtual appearance. With the current technology, it is possible for a commissioner for oaths to be satisfied that the person before him/her virtually is the maker of the deposition. The commissioner can then authorize the deponent to place his/her electronic signature before the commissioner appends his signature and seal. In my view, holding otherwise would be a set back to the efforts by the Judiciary and indeed the Government of Uganda towards integration of ICT in business processes.
- [16] It follows, therefore, that in absence of credible evidence that the deponent did not appear before the commissioner for oaths, or in presence of a possibility that the deponent appeared before the commissioner for oaths virtually, the affidavit in reply herein in issue cannot be invalidated. In the circumstances, the preliminary objection raised by Counsel for the Applicant is not made out and is accordingly overruled.

Issue for Determination by the Court

- [17] Only one issue is up for determination by the Court on the merits, namely; **Whether the application raises triable issues as to warrant grant of leave to defend the summary suit?**

Submissions by Counsel for the Applicant

- [18] Counsel for the Applicant relied on the decisions in the cases of *Bhaker Kotecha v Adam Muhammed CACA [2002] EA 122*, cited in the case of *Lucy Katuramu v Virunga Finances Limited HCMA No. 104 of 2016* to the effect that for unconditional leave to appear and defend to be granted, the applicant must show that they have 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

areal dispute as to the amount claimed which requires taking an account to determine or any other circumstances showing reasonable grounds of a bonafide defence. Counsel also relied on the case of **Maria Odido v Barclays Bank of Uganda Ltd HCMA No. 645 of 2008** to the effect that the court at this stage is not required to inquire into the merits of the issues raised but the issues raised should be real and not sham.

- [19] Counsel submitted that paragraphs 16 and 17 of the affidavit in support of the application set out the questions that the Court will be answering in determining the issues as also indicated in the draft written statement of defence attached to the application. Counsel submitted that the Applicant and her witness denied the fact of receipt of the money in issue; there is no evidence of payment in form of a bank statement or any other document; or any evidence showing that money was withdrawn from any account and paid to the Applicant. Counsel argued that such a sum of money cannot be paid without any paper trail which raises an issue on whether or not the money was actually paid as alleged. Counsel prayed that the application be granted by the Court.

Submissions by Counsel for the Respondent

- [20] Counsel for the Respondent relied on the decisions in **Maluku Interglobal Agency v Bank of Uganda [1985] HCB 65** and **Africa One Logistics Ltd v Kazi* *Food Logistics (u) Ltd [2021] UGHCLD 64** on the principles for determination of whether an applicant should be granted leave to appear and defend a suit. Counsel submitted that the proposed triable issues in paragraph 16 of the affidavit in support of the application do not constitute bona fide triable issues that would warrant the granting of leave to appear and defend the main suit. Counsel also cited the case of **Golf View Inn (U) Ltd v Barclays Bank (U) Ltd HCCS No. 358 of 2009** to the effect that once an agreement is reduced in writing and executed by the parties, the parties are bound by it. Counsel argued that the Applicant is barred by the parole evidence rule from raising questions on validity of an enforceable contract.
- [21] Counsel further submitted that resisting a summary judgement should not be based on mere assertion of probable defences available to the defendant but rather the defendant should take a step further and show court the evidence he/she intends to rely on to prove his or her defence. Counsel cited the case of **Bunjo Jonathan v KCB (U) Ltd HCMA No. 174 of 2014** in support of that submission. Counsel submitted that the Applicant has not shown the court the evidence she intends to rely on to prove her defence other than mere allegations that she never received the money. Counsel concluded that the application lacks merit and prayed that it should be dismissed with costs to the Respondent.

Determination by the Court

- [22] The position of the law is that in accordance with 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 HC Misc. Application No. 128 of 2012* and *Bhaker Kotecha v Adam Muhammed [2002]1 EA 112)*.

[23] 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."*

[24] 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 v Sarick Construction Ltd HC Miscellaneous Application No. 134 of 2016*.

[25] On the case before me, the claim in the summary suit is based on a loan agreement dated 10th July 2020 and a Centenary Bank postdated cheque No. 10700228 that was issued by the Applicant. It is claimed by the Applicant that the loan agreement was cancelled in the presence of Hon. Alex Ruhunda who had witnessed its initial signing. It is further claimed that although the Respondent did not sign the document signifying the cancellation, she had promised to do so after consulting her husband. According to the Applicant and her witness, no money exchanged hands and there is nothing by way of evidence to prove the existence of such a huge sum of money in relation to the transaction. On the other hand, the Respondent asserts that she paid the alleged sum of money to the Applicant as per the document attached to the plaint. The Respondent also disputes the claim by the Applicant and her witness that the agreement was cancelled and that she was meant to return the cheque.

[26] In a situation where one party is alleging payment which the other is denying, such denial if supported by any evidence constitutes a triable issue. The question as to whether the oral evidence adduced by the Applicant intending to impeach the written agreement will be admitted by the court is itself a triable issue since the parole evidence rule has exceptions. It is also the position of the law that where one party asserts the fact of payment and the other

is denying, the burden of proof in such a case lies upon the party alleging payment. See: *J. K. Patel v Spear Motors Ltd SCCA No. 4 of 1991 [1991] UGSC 9 (11 October 1991)*. In this case, it is the Respondent/Plaintiff to prove the allegation that she paid the said sum to the Applicant. Such can only be achieved through a trial.

[27] In the premises, I am satisfied that the application by the Applicant raises bona fide triable issues of fact and law which entitles the Applicant to being granted unconditional leave to appear and defend the main suit. The application is accordingly allowed with orders that;

- a) The Applicant is granted unconditional leave to appear and defend Civil Suit No. 0366 of 2022.
- b) The Applicant shall file her Written Statement of Defence within 15 days from the date of delivery of this ruling.
- c) The costs of the application shall abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered by email this 28th day of March, 2024.

Boniface Wamala JUDGE

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