

**Itungo Joram v Cohen Ferreira Carlos
Patricio (Misc. Application No. 1175 of 2024)
[2024] UGCommC 392 (29 October 2024)**
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This application was brought by way of Notice of Motion under **Section 98 of the Civil Procedure Act, Cap.71 (now Cap. 282), Orders 36 rules 3 and 4 and 52 rules 1 and 3 of the Civil Procedure Rules SI 71-1**, for orders that:

- 1. The Applicant be granted unconditional leave to appear and defend Civil Suit No.611 of 2024.
- 2. Costs of this application be provided.

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Background

The background of this application is contained in the affidavit in support deposed by **Mr. Itungo Joram**, the Applicant herein, but briefly

- 35 summarized below:
- 1. That the Applicant is not indebted to the Respondent to the claimed sum in the plaint or at all and the Respondent's claim is erroneous,
- 5 unreasonable, alien to him, and is bedevilled with illegalities and smirks of personal witch-hunt.
- 2. That the Applicant never at any one moment approached the Respondent and requested for the sum claimed and no money was 10 ever put on his account as alleged by the Respondent.
- 3. That the Applicant has never asked for any additional USD 20,000 as claimed and the same is hogwash.
- 15 4. That the Respondent and his lawyers are on a trajectory of witchhunting the Applicant so that he can surrender his shares in Feldstein Trading Company.
- 5. That the Applicant owns 10% shares in Feldstein Trading Company 20 with the Respondent owning 90% and that the Applicant knows that the instant suit is aimed at intimidating and calculated to cause a surrender of his shares in the Company.
- 25 6. That the Respondent has further maliciously alleged and caused the arrest and prosecution of the Applicant in order to hound him out of the Company.
- 7. That it is in the interest of justice that this application is granted.

In reply to the application, the Respondent **Mr. Cohen Ferreira Carlos Patricio**, opposed the application contending that:

- 1. In June or July, 2023, the Applicant approached the Respondent 35 and informed him that State House had granted his son a scholarship to study in the United Kingdom.
- 40 2. The Applicant further informed him that the University where the son was admitted requested that the Applicant being the child's

- 5 parent should furnish the school with a bank statement showing that it has substantial money as proof that the parent was capable of sponsorship of his child.
- 10 3. On those grounds, the Applicant requested him for a sum of USD 30,000 as a friendly loan for the purpose of depositing it on the account.
- 4. He proceeded to give the Applicant a sum of USD 30,000 in cash 15 whereupon the Applicant promised to pay back the money within a period of 30 days from the date he gave him the money.
- 5. The Applicant has to date deliberately refused to pay the said money 20 despite several reminders.
- 6. During one of the several reminders, rather than pay back the money owed, the Applicant further asked him for an additional USD 20,000, a request he turned down.
- 7. The Respondent's allegations contained in paragraphs 3 and 4 of the affidavit in support are full of speculation and false excuses since the Applicant does not own any share in Feldstein Trading Company anymore.
- 8. The transfer of shares was voluntarily done by the Applicant who personally signed the transfer form as well as the Board resolution authorizing the transfer of shares.
- 9. He reported to Police an incident believing that his life was in danger according to the information that was given to him by witnesses in the case for conspiracy.
- 40 10. The Applicant has never been threatened by anyone on the subject matter.
- 5 In rejoinder, Mr. Itungo Joram disputed the Respondent's affidavit in reply contending that:
 - 1. He is not indebted to the Respondent at all and the WhatsApp conversations attached thereto, are unknown to him and are just a creation by the Respondent through photoshop in furtherance of his 10 witch hunt against him and they do not have any evidential value.
 - 2. He was forced by the Respondent and his allies to surrender his shares in Feldstein Trading Company so that the Respondent and his team stop the witch hunt and fabrication of criminal charges 15 against him.
 - 3. He should be granted leave to appear and defend Civil Suit No.0611 of 2024 against the malicious false accusations of the Respondent in connivance with others.

20 Representation

The Applicant was represented by **M/s Arcadia Advocates** while the Respondent was represented by **M/s Apricus Advocates**.

Issues for determination

- 25 1. Whether the Applicant has raised sufficient grounds to warrant the grant of leave to appear and defend Civil Suit No. 611 of 2024?
- 2. What remedies are available to the parties?
- 30 Both parties were directed to file their written submissions but only the Respondent did and this Court has considered the same.

35 Respondent's submissions

- 5 In his submissions, Counsel for the Respondent submitted that **Hon. Justice Billy Kainamura** in the case of **Benon Tumusage & Timothy Justine Robert Mathew Vs Exim Bank Uganda Ltd High Court Misc. Application No.1213 of 2016**, while relying on the case of **Maluku Interglobal Trade Agency Vs Bank of Uganda [1985] HCB 65 at Pg**
- 10 **66**, stated that before leave to appear and defend is granted, the Defendant must show by affidavit or otherwise that; there is a bona fide triable issue of fact or law and that there is a reasonable ground of defence to the claim, and proof that the Plaintiff is not entitled to a summary judgment.
- 15 That it was further held that the Defendant is not bound to show a good defence on the merits but should satisfy the Court that there is an issue or question in dispute that ought to be tried.

As to whether the application raises bona fide triable issues that need to be fully determined by the Court, Counsel first defined a triable issue as

20 per the case of **Jamil Senyonjo Vs Jonathan Bunjo HCCS No.180 of 2012**, as an issue that only arises when a material proposition of law or fact is affirmed by one party and denied by the other.

Referring to **paragraphs 3, 4, 5, 6 and 7** of the Respondent's affidavit in reply, Counsel submitted that the Applicant approached the Respondent

- 25 and informed him that State House had granted his son a scholarship to study in the United Kingdom and that the University which admitted him requested the Applicant to furnish the University with a bank statement to show that he has substantial money as proof that he was capable of sponsoring his child.
- 30 For that purpose, the Applicant requested the Respondent for a friendly loan of USD 30,000 which was granted in cash, and the Applicant

5 promised to pay back the sum within 30 days from the date of receipt. However, that to date, the Applicant has never paid the said money despite several reminders as stated in **annexure "A"** to the affidavit in reply.

That whereas the Applicant in **paragraph 2** of his affidavit in support disputes the debt, he only makes general denials, falsehood speculations

10 and excuses that do not respond to the gist of **Civil Suit No.611 of 2024**. That the Applicant does not dispute the WhatsApp conversations contained in **annexure "A"**.

In submission on the evidential value of **annexure "A"**, Counsel relied on **Section 8 of the Electronic Transactions Act, Cap. 99** which provides 15 for the admissibility of electronic/data messages.

He also defined a data message as per **Section 2 of the Electronic Transactions Act** as data generated, sent, received or stored by computer means and includes voice, where the voice is used in an automated transaction; and stored record.

20 Counsel further relied on the case of **Wen Jie Vs Nabimanya Isaac & Bregah International Limited, HCCS No.605 of 2014**, wherein **Hon. Justice B. Kainamura**, while overruling the Defendant's dispute of admissibility of the Plaintiff's WhatsApp messages held that:

**"...Counsel for Bregah International tried to dispute the* 25 *admissibility of the WhatsApp messages. However, Section 8 of the Electronic Transactions Act provides for the admissibility of the electronic data messages and in my view PE 13 was properly admitted in evidence*."*

5 Premised on the above, Counsel for the Respondent submitted that the Applicant's attempt to dispute the evidential value of the WhatsApp messages is baseless and not founded on any known principles.

That the Applicant's allegations that the Respondent is maliciously prosecuting him and that he was forced to surrender his shares in 10 Feldstein Trading Company are extraneous facts which are false,

diversionary and baseless.

That the criminal case against the Applicant is for conspiracy to murder and is currently being heard at the Chief Magistrate's Court at Buganda Road with plausible evidence being adduced.

- 15 That the Applicant voluntarily agreed to transfer the shares he held in the above Company and as such duly executed the documents in support of that transaction on the guidance of his lawyers. To that he referred to the case of **Rahbot Chic (U) Ltd and Another Vs Stanbic Bank (U) Limited HCMA 782 of 2023**.
- 20 Based on the above, Counsel concluded that the facts constituting this matter raise no bona fide triable issues that need to be fully determined by this Court.

Regarding the second ground that the Applicant must show that there is a reasonable ground of defence to the claim, and proof that the Plaintiff is

25 not entitled to a summary judgment, Counsel relied on the case of **Maluku Interglobal Trade Agency Vs Bank of Uganda (supra)**, which stipulates that before leave to appear and defend is granted, the Defendant must show by affidavit or otherwise that there is a reasonable ground of defence to the claim, and proof that the Plaintiff is not entitled to a summary 30 judgment.

- 5 Counsel for the Respondent submitted that the Applicant herein has no plausible defence to the claim in its entirety and the attached defence does not raise any such reasonable defence. That the only logical conclusion is that it is intended to mislead the Court and enrich the Applicant to the detriment of the Respondent.
- 10 That as envisaged by **Section 101 of the Evidence Act, Cap. 8**, he who alleges bears the burden of proof. That the Applicant has not discharged that burden and hence has no plausible defence. That the Applicant has not fulfilled any requirement for the grant of this application therefore, it is in the interest of justice that the application is dismissed.
- 15 Analysis and Determination

Issue No. 1

Whether the Applicant has raised sufficient grounds to warrant the grant of leave to appear and defend Civil Suit No. 611 of 2024?

- **Order 36 rule 3(1) of the Civil Procedure Rules**, stipulates that a 20 Defendant served with summons, issued upon the filing of a specially endorsed plaint and affidavit under **rule 2** of this Order endorsed "summary procedure", shall not appear and defend the suit except upon applying for, and obtaining leave from Court.
- 25 For leave to appear and defend a summary suit to be granted, an Applicant must show by affidavit or otherwise that there is a bona fide triable issue of fact or law. See: **Maluku Interglobal Trade Agency Vs Bank of Uganda (supra)**.
- 30 As defined in **Jamil Senyonjo Vs Jonathan Bunjo HCCS No. 180 of 2012,** a triable issue only arises when a material proposition of law or fact
- 5 is affirmed by one party and denied by the other. Therefore, it is capable of being resolved through a legal trial, which is a matter that is subject or liable to judicial examination in Court.
- A defence raised by the Applicant should not be averred in a manner that 10 appears to be needlessly bald, vague or sketchy. A triable issue must be differentiated from mere denial. Therefore, the defence raised must not be a sham intended to delay the Plaintiff from recovery of his/her money. If the defence is based upon facts, in the sense that material facts alleged by the Plaintiff in the plaint are disputed or new facts are alleged constituting 15 a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of

- the one party or the other. In essence, the Plaintiff is barred from obtaining summary judgment where the Applicant raises a good defence.
- 20 In the case of **Kotecha Vs Mohammed [2002] 1 EA 112,** it was held that where a suit is brought under summary procedure on a specially endorsed plaint, the Defendant is granted leave to appear if he/she can show that he/she has a good defence on merit, or that a difficult point of law is involved; or a dispute as to the facts which ought to be tried; or a real 25 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.
- 30 Furthermore, in the case of **Geoffrey Gatete & Anor Vs William Kyobe Supreme Court Civil Appeal No.7 of 2005**, the Court noted that in such a case;

"*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*

5 *dispute which ought to be tried and the Court shall not enter upon the trial of issues disclosed at this stage.*"

In the instant case, the Applicant disputes indebtedness to the Respondent. The assertions of the Applicant are premised on arguments that he never borrowed any money from the Respondent and that the 10 Respondent's claim is founded on malicious allegations aimed at intimidating him and disgracing his name. The Applicant further contends that he was forced by the Respondent to surrender his shares in Feldstein Trading company.

The principle espoused in the authorities discussed above and as laid out in the case of **Twentsche Overseas Trading Co. Ltd Vs Bombay Garage [1958] EA 741** is that summary procedure is resorted to in clear and straightforward cases where the demand is liquidated and there are no 20 issues for determination by Court except for the grant of the claim.

As analyzed above, the facts and the evidence adduced by both Counsel disclose issues that need to be proved. The only evidence relied upon by the Respondent for the claim is **annexure "A"** to the affidavit in reply, 25 being the WhatsApp messages which the Applicant disputes in **paragraph 5** of the affidavit in rejoinder. I have observed that the extract of the WhatsApp messages attached to the affidavit in reply do not show the telephone numbers nor was proof of ownership of the numbers that exchanged the said messages attached to aid Court in confirming that the 30 attached message was sent by the Applicant. This would in my view require additional evidence and testimony in a trial to enable Court make a determination in respect of the claim made in the interest of justice.

- 5 As stated above, a triable issue was defined in the case of **Jamil Senyonjo Vs Jonathan Bunjo HCCS (supra)** as an issue that only arises when a material proposition of law or fact is affirmed by one party and denied by the other.

- The Applicant vide **paragraph 2** of the affidavit in support and **paragraph 10 4** of the affidavit in rejoinder denied being indebted to the Respondent and further denied the claimed amount. The Respondent did not attach any form of agreement that proves that the sums were lent to the Applicant and the agreed terms thereto. Accordingly, this is a triable issue of fact which requires both the Applicant and Respondent to testify in Court 15 about the sums of money claimed to enable Court determine the matter.

In the circumstances, the Applicant has in my view raised triable issues of fact that need to be proved to ascertain the outstanding amount, if any, hence placing the plaint outside the ambit of **Order 36 of the Civil**

20 Procedure Rules.

Issue No.2: What remedies are available to the parties?

25 The East African Court of Appeal in the case of *Churanjila & Co. Vs A. H Adam (1) [1950] 17 EACA 92*, held that a Defendant who has a stateable and arguable defence must be allowed to state it and argue it before the Court. That all the Defendant has to show is that there is a definite triable issue of fact or law.

In the premises, having found that the Applicant has raised triable issues of fact, it merits the grant of the application. As such, the Applicant is entitled to unconditional leave to appear and defend the suit and it is accordingly granted with the following orders:

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- 5 1. The Applicant is hereby granted unconditional leave to appear and defend Civil Suit No.0611 of 2024.
- 2. The Applicant is ordered to file his Written Statement of Defence within fourteen (14) days from the date of this Ruling.
- 3. Costs of the application shall be in the cause.

I so order.

Dated, signed and delivered electronically via ECCMIS this **29th** day of **October, 2024.**

Patience T. E. Rubagumya **JUDGE** 29/10/2024 6:40am

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