

UGANDA / JUDGMENT

Jonel Ltd v Koboko Enterprises Ltd (Miscellaneous Application No. 27 of 2016) [2016] UGCommC 49 (2 June 2016) [2016] UGCommC 49

COURT

Commercial Court of Uganda

CASE / FILE NUMBER

Miscellaneous Application No. 27 of 2016

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THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEUS APPLICATION NO 27 OF 2016

(ARISING FROM CIVIL SUIT NO 840 OF 2015)

JONEL LIMITED}..... APPLICANT

VS

KIBOKO ENTERPRISES LTD}..... RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant commenced this application for unconditional leave to defend HCCS 840 of 2015 and for costs of the application to be provided for. The grounds of the application are that the Applicant has a substantial defence against the Plaintiffs claim. Secondly the Applicants defence raises triable issues. Thirdly the Applicants defence has complex matters of law requiring a hearing into the merits of the Applicants cause. Fourthly a bona fide dispute exists between the Applicant and the Respondent which cannot be determined summary. The Applicant has a counterclaim against the Respondent in the sum of Uganda shillings 1,610,134/=. Finally the Applicant contends that it is in the interest of justice that the application is allowed.

The application is further supported by the affidavit of Chemonges John, the director of the Applicant. He deposes that since the year 2010 the Applicant had been in business with the Respondent as the agents for the supply of assorted products in the Entebbe area. The Respondent would equally send the employees Nimusiima Gerald, Byarugaba Ronald and the

driver Mr Richard to Entebbe area as a support team to the Applicant to expedite its sales. By the arrangement the Applicant received goods which would again be taken back by the employees of the Respondent to sale from dispatched tracks which often failed to account to the Respondent or to the Applicant. At the end of the year 2013 the employees of the Respondent had several outstanding items and the Applicant notified the Plaintiff by e-mail dated 28th of December 2013. On 4 January 2014 one Patrick Semujju acting on behalf of the Respondent by e-mail copied to the business managers promised to follow up matters outstanding in 2013. Again at the end of the year 2014 through e-mail the Applicant informed the Respondent of the close of the year 2014 where one Gerald had crossed to the year 2015 with the big truck with stock worth Uganda shillings 69,454,900/=. A smaller truck under one Sam had stock and balances worth Uganda shillings 12,025,643/=. The employees of the Respondents acknowledged taking the stock from the Applicant worth Uganda shillings 805,702,040/= for Gerald Nimusiima and 197,529,900/= shillings for Byarugaba Ronald. Out of the liabilities of the employees of the Respondent, it would pay the Respondent on behalf of the Applicant company sums for their sales for which they would deliver bank deposits slips to the Applicant for accounting purposes and reduction of liability or dues from stock.

On the 27th of May 2010 the Applicant informed the Respondent of an outstanding sum of Uganda shillings 36,138,350/= which was with the support Van. Another sub – D Captain Sam had an outstanding and unaccounted for the sum of Uganda shillings 6,841,287/=. At the close of business plastic stocks were returned to the Respondent worth Uganda shillings 12,000,000/= and the same was not discounted from the account of the Applicant. The collections previously to be deducted from the Applicants account to the Respondents account amount of Uganda shillings 58,379,637/=. In the premises the Applicant claims from the Respondent a reconciliation of Uganda shillings 58,379,637/=. From the audited accounts of the Respondent the only claim for Uganda shillings 56,769,503/= which leaves the Respondent indebted to the Applicant in the sum of Uganda shillings 1,610,134/= for which the Applicant intends to file a counterclaim if leave is granted.

The cheques forming the Plaintiff's suit were issued to the Respondent in the year 2012 as security for dealings with the Respondent when they would advance the Applicant stock without across the counter cash payments. No consideration arose in support of `issued cheques of 60 million shillings which were irregularly banked. Before the cheques were irregularly banked, the Applicant had informed the Respondent that it had recalled the cheques. In the premises the suit based on the cheques is purely misconceived and untenable. In total the deponent repeats the averments in the notice of motion.

The affidavit in reply is that of Mr Praveen Kumar, the Chief Executive Officer of the Respondent deposes that the application is not supported by any cogent evidence because the affidavit in support deposed by Chemonges on 15th January, 2016 does not conform to the rules governing affidavit evidence and should be rejected and that the application and its supportive affidavit do not raise a probable defence to the suit or triable issues to warrant the grant of orders sought. The Respondent Company's claim in respect to goods supplied to the Applicant in 2015 remains

unpaid and that the documents attached to the affidavit in support of the application are not in any way connected to the Respondent's present claim. That the payment deposits attached as 'E' were clearly made by the Applicant to the Respondent for previous supplies of 2013 and 2014 and not by the Respondent's employees for the present claim as alleged in paragraph 9. That the letters from Applicant to the Respondent are alien to the Respondent and are not in any way connected to the present claim as alleged in paragraph 10. That the alleged outstanding sums alluded to in paragraphs 12 and 15 of the affidavit in support of the application are preposterous, baseless, unfounded and not supported by any cogent evidence but only aimed at duping the court. The cheques on which the Respondent's claim is based are dated 28th September, 2015 not 2012 as alleged by the Applicant that the cheques were duly issued to the Respondent to settle the outstanding amounts and were payable on demand. That the communication attached to the affidavit in support as Annexure 'I' allegedly recalling the said cheques was served on the Respondent's attorneys on 6th October, 2015 after they had been banked and rejected on 5th October, 2015. That the application is devoid of merit and should fail because the Applicant has not shown that it paid the outstanding sums due and owing to the Respondent.

The Applicant was represented by Ilukor Advocates and Solicitors while the Respondent was represented by M/s Kinobe, Mutyaba, and Turinawe Advocates. The court was addressed in written submissions.

In the written submissions the Applicant's Counsel submitted that the Respondent filed an action claiming a net value of 60,000,000/= Uganda shillings which hinges on 3 cheques which the Applicant had issued to the Respondent. The Applicant was a business partner of the Respondent in charge of supply, sales and distribution of the Respondent's products at Entebbe territory and the parties have been in business since 2011.

The Applicant's Counsel submitted that Rule 4 of Order 36 guides the Applicant to show by evidence of affidavit that he or she has a defence which goes to the whole of the Respondent's claim in the suit or to part only and if so, to what part of the Plaintiff's claim.

Counsel reiterated the grounds of the application in the affidavit in support of the application and submitted that the Respondent does not dispute payments referred to in the affidavit in support but instead the Respondent in paragraph 4(b) of the affidavit in reply only claims that the payments are not connected to the deposits were made in 2014 and 2013. The Applicant states that on 27th May, 2015 they informed the Respondent that their employees had not accounted for 36,138,350/= while Sam had an outstanding 6,841,287/=. That in paragraph 12, the Applicant summarized that the sum of 58,379,637/= should have been put into consideration by the Respondent before the Applicant could be held for any default.

Counsel submitted that according to the audit of the Respondent as per the summary suit and paragraph 14 of the Applicant's affidavit, the Respondent's audit makes the Applicant liable to it in a sum of Uganda shillings 56,769,503/=. This claim is different from the Respondent's suit for Ugandan shillings 60,000,000/= and the same shall prejudice the Applicant if a decree for that amount is issued without a hearing. He submitted that triable issues relating to reconciliation of

accounts and cheques can adequately be resolved by hearing the Applicant in their defence. Furthermore the managing director of the Applicant deposed in the supplementary affidavit that talks had been ongoing between the parties to the suit and the Respondent acknowledged that the claim is now about 36,138,350/= and not 60,000,000/= as claimed in the suit. Mr. Mohan of Tirumala Enterprises Ltd was given the task of auditing the aspect of the claim on would ultimately be held liable for the 36,138,350/=. The Applicant contends this amount is held by the employees of the Respondent and not the Applicant according to paragraph 20 and 21 of the Applicant's affidavit in support.

Counsel further submitted that the Applicant has satisfied the requirements for leave to file a defence against the Respondent's suit under rule 4 of Order 36 of the Civil Procedure Rules. The Applicant's Counsel relied on the Court of Appeal case of **Kotecha vs. Mohammed (2002)1 EA 112** where it was held: '...the Respondent had been able to establish the existence of enough triable issues to establish the special circumstances entitling him to be granted leave to appear and defend...'

The Applicants Counsel submitted that these special circumstances have been established in the application and are:

1. Whether the Respondent is justified to claim for Uganda shillings 60,000,000/= whereas their own previous audit had revealed about 56,000,000/=
2. Whether the cheques were regularly presented to the bank yet no amounts were due from the Applicant to the Respondent
3. Whether the Respondent could claim for the money on 1st October and before 7 days have elapsed and also justifiably present the cheques for payment on the said 1st October, 2015
4. Whether the amount in deficit is now 36,138,350/=
5. Who is to be held liable to pay the amounts if found due between the employees of the Respondent, the Respondent or Applicant
6. Whether there is a need to amend the Plaintiff's suit to reflect the correct amount held by her employees.

Counsel for the Applicant further submitted that in it is in the interest of justice that the application is allowed. The principles of fundamental justice enshrined in Article 28(1) of the Constitution of Uganda provides that in the determination of civil rights, the Applicant has the right to a fair hearing which includes being heard on her alleged defence to the suit.

The Applicant's Counsel further submitted that all matters in controversy ought to be resolved once and a multiplicity of proceedings avoided in terms of section 33 of the Judicature Act by hearing all matters in controversy pertaining to the suit placed before court and finally determined it and this is achieved by allowing the Applicant leave to file a defence unconditionally.

In reply the Respondent's Counsel relied on the affidavit in reply for the facts. Firstly the Respondent's Counsel submitted that the Applicant's application is incompetent and improper and ought to fail on 2 grounds.

Firstly it is fatally defective and secondly it is devoid of merit.

The Respondent's Counsel submitted that the application is fatally defective because it is not supported by any valid affidavit. The affidavits in support of the application contravene the mandatory rules relating to identification of exhibits/attachments to affidavits under Rule 8 and 9 of the Commissioner for Oaths (Advocates), Cap 5 Laws of Uganda in that the annexure to the Applicant's affidavit contrive the rules by not being in the prescribed form. The commissioner for oath did not mark the attachments to the affidavit as prescribed.

The effect for non-compliance with the mandatory requirements was considered in **Solomon Software (EA) LTD and Another vs. Microsoft Corporation (2003)**, EA at page 300, where court was faced with a similar situation where the Commissioner for oaths only stamped the exhibits attached on the affidavit but did not identify them in accordance with the rules. The court held that the exhibits did not conform to the requirements for identification and were a breach of the Oaths and Statutory Declaration Act and as such were not properly before the court. An affidavit that does not comply with the provisions of statute as to form cannot be admitted under the Civil Procedure Rules.'

The Respondent's Counsel concluded in the premises that all annexure to the Applicant's affidavits should be rejected for failure to conform to the provisions of statute. He prayed that the court finds that the application is not supported by any evidence and should be dismissed with costs and judgment entered for the Respondent in the main suit.

Without prejudice, Counsel for the Respondent submitted that the Applicant's application is devoid of merit according to paragraphs (3) and (4) of the affidavit in reply. The gist of the deposition in the paragraphs is that the application does not raise a plausible defence to the suit. The Respondent's claim is in respect of goods supplied to the Applicant in the year 2015 which remain unpaid.

That according to the Respondent, the annexure 'A', 'B', 'C', 'D' and 'E' to the application do not relate to the present claim but to the years 2013 and 2014 and yet the cheques, the subject of the claim as they relate to the years 2013 and 2014 yet the cheques the subject of the claim were issued and dishonoured in the year 2015. Secondly annexure 'F1 and 'F2' are alien to the application and do not show whether the Respondent company ever received them. Contrary to the Applicant's allegations that the suit cheques were issued in 2012, the cheques were issued and indeed bear a date in 2015 and the communication allegedly recalling those cheques was served on the Respondent on 6th October, 2015, after the same had already been banked and dishonoured on 5th October, 2015.

The above evidence has not been challenged by the Applicant as no affidavit in rejoinder was filed to rebut this evidence. In the premises the Respondents Counsel submitted that the Applicant having failed to rebut this evidence, the application has no merit and should be dismissed.

Furthermore the Respondents Counsel submitted that the Applicant has not demonstrated the existence of any triable issues in accordance with the decisions in **Begumisa George vs. East African Development Bank, Misc. Application No. 451 of 2010**, which defines a triable issue to mean a bona fide triable issue that merits determination of the Court at a later stage.

Counsel further contended that the application is devoid of any triable issues for the following reasons:

1. It is generally rambling as the Applicant has not shown or towed a specific direction in answering the claim as against it. Irrelevant documents were attached and concern periods outside the time when the suit cheques were issued.
2. The Applicant has not provided any cogent evidence that the suit cheques were issued as security for dealings with the Respondent for advancing it stocks or that no consideration arose to support/back up the said issued cheques of Uganda shillings. 60,000,000/=.
3. The Applicant's alleged evidence in the form correspondences and emails is clearly in respect of previously concluded dealings and therefore has no nexus with the issued suit cheques.

In rejoinder, Counsel for the Applicant addressed the preliminary objections as raised in the Respondent's submissions that the application is defective and devoid of merit and submitted that the said objections are brought very late at the conclusion of the Applicant's case. He submitted that the Respondent explained non compliance with rules 8 and 9 of the Commissioner for Oaths Rules SI 5-1 is not fatal as argued by the Respondent. When the deponent took oath before the Commissioner for Oaths, he cannot be blamed for the manager in which the commissioner for oath commissioned the affidavit.

Secondly the attack on the application on the basis of how the annexure is endorsed by the Commissioner for Oath is not an attack on the affidavit itself which remains clean and without defects. Secondly non compliance with ruled 8 and 9 of the schedule to the Commissioner for Oaths (Advocates) Act can be cured by Article 126(2) (e) of the Constitution of Uganda, 1995 which guides in the achievement of justice as the primary obligation of court. Furthermore the Applicants Counsel submitted that the affidavit clearly names the deponent as Chemonges John and no other person can be associated to the said annexure attached. The date, name or place of deposing the affidavit and the annexure can also b established. All the annexure are serialized in alphabetic letters, are titled and bear the original signature of the commissioner for oaths.

The Applicants Counsel relied on the case of **Kakooza John Baptist vs. Electoral Commission and Another, SC Election Petition Appeal NO 11 of 2011** (also at 2008 HCB 40). In that case the Supreme Court held that affidavit evidence does not necessarily apply to the annexure thereof. This is because affidavit contains the facts which the deponent swears to be true because he has personal knowledge of them but this is not always true of annexure to affidavits.

Furthermore the affidavit is compliant with section 5 of the Commissioner for Oaths (Advocates) Act Cap.6 which prescribes the particulars to be stated in the jurat.

That the case of **Municipal Council of Mombasa (supra) and Solomon Software (EA) LTD (supra)** are Kenyan cases which deal with form and not substance of the law and are distinguishable from the Ugandan position in light of Article 126 (2) (e) of the Constitution of the Republic of Uganda on matters of form and substantive law. He relied on the Court of Appeal case of **Saggu vs. Road master Cycles 2002 E. A 258 at 261** where it was held that an affidavit which was not dated is curable under article 126 (2) (e) of the Constitution

In further rejoinder, the Applicant's Counsel reiterated earlier submissions and tried to demonstrate from the evidence controversies or triable issues of facts as to who owes money to the other. He prayed that the Applicant is allowed unconditionally to appear and defend High Court Civil Suit No 840 of 2015.

Ruling

I have carefully considered the Applicant's application as well as the evidence adduced by way of affidavits in support and opposition to the application. I have also read through the written submissions of Counsel and considered the laws cited.

The Respondent's Counsel objected to the Applicant's application on the ground that the affidavit in support thereof and attached exhibits do not conform to rule 8 of the schedule to the Commissioner for oaths (Advocates) Act. The rule prescribes that all exhibits to affidavits shall be securely sealed to the affidavits under the seal of the Commissioner and shall be marked with serial letters of identification. Secondly the forms of jurat and of identification of exhibits shall be those set out in the Third Schedule to the rules.

I have accordingly considered the affidavits and it is true that they do not conform to the format in the Third Schedule to the Commissioner for Oaths (Advocates) Act though they are variously endorsed by the Commissioner for oath.

The question is whether this is defective and renders the documents inadmissible. The Commissioner for Oaths (Advocates) Act Cap 5 Laws of Uganda deals with the duties and powers of commissioners for oath. It imposes duties on commissioners for oaths and I agree with the Applicant's Counsel that they cannot impose duties on the deponent. The Respondent's Counsel relied on the case of **Solomon Software (EA) Ltd and another versus Microsoft Corp [2003] 1 EA page 300**. In that case each of the affidavits had been stamped by the Commissioner for oath. The High Court sitting at Mombasa held that if the affidavit was to be accepted the exhibits would be

thrown out. He relied on an earlier case in which the affidavits attachments were stamped without any signature. The court held that an affidavit which does not conform to the provisions of statute as to form cannot be admitted under the Civil Procedure Rules and upheld the objection.

The present affidavit has evidence which describes each attachment and is also marked in Latin characters serially which match both in the affidavit and in the attachment. Secondly they are endorsed by the Commissioner for oaths though his stamp is not in the format prescribed under the Third Schedule to the Commissioner for Oath (Advocates) Act. The Commissioner is supposed to identify an exhibit by indicating that this is the exhibit marked with the Latin characters referred to in the affidavit.

The requirement is prescribed by regulation 9 of the schedule to the Commissioner for Oaths (Advocates) Act known as the Commissioner for Oaths Rules. I have carefully considered the facts and there is no doubt as to which document or documents the deponent relies upon. Each of the documents are clearly identified in the body of the affidavit itself and attached. They are endorsed by the Commissioner for oath albeit not in the statutory format. Failure to identify the affidavits by the Commissioner for oath is a problem of form and not substance because the documents referred to are clearly identifiable and for that reason it is an irregularity which will not render the affidavit defective. It is also not a sound basis for striking out the Applicant's exhibits or affidavit. Moreover in paragraph 4 of the affidavit in reply Mr Praveen Kumar also makes reference to the attachments in the affidavit in support of the application and particularly makes specific reply to the documents attached. In those circumstances no prejudice has been occasioned to the Respondent and therefore there would be no miscarriage of justice if the status quo is maintained. Moreover the objection was made belatedly after written submissions were directed. Such an objection has to be made before the hearing of the merits of the application and in the very least it ought to have been intimated to the court and to the Applicant that there would be an objection to the application on the ground of competence. For the above reasons the Respondent's objection is overruled.

The second question is whether the Applicant's application discloses triable issues of fact or law. The Plaintiff's claim is for a sum of Uganda shillings 60,000,000/= for goods supplied to the Defendant. The Plaintiff relies on certain Orient Bank Ltd the company cheques drawn by the Defendant/Applicant all dated 28th of September 2015. The cheques are attached to the plaint as annexure "B". The cheques were presented on 1 October 2015 and sent to the honouring bank on 5 October 2015. According to the affidavit in support of the application, the cheques forming the crux of the Plaintiff's suit were issued in 2012 as security for dealings. Before the cheques which bounced were deposited by the Respondent, they notified the Respondent in a letter recalling the cheques and the letter attached is annexure "H" and also annexure I".

I have carefully considered this to letters dated 1 October 2015 the Plaintiff's Counsels wrote demanding payment within seven days of Uganda shillings 56,769,503/= and 10% more for their professional fees. Secondly on 5 October 2015 the Applicant's Counsel wrote to the Plaintiff's lawyers on the same subject. In the letter they wrote that the books revealed that it was the

Respondent who owed the Applicant Uganda shillings 58,200,000/=. They also wrote that there was no mention of the consignment of goods which was returned by the Applicant which information was well-known.

I have carefully considered the basis of the claim which is a cheque that was issued as security. A cheque that was issued as security is not supposed to be banked except as agreed. Secondly before a claim can be made there has to be a notice of dishonour of the cheque and none has been attached. Thirdly the parties are business partners trading in the goods and the Applicant has raised several questions relating to reconciliation of accounts and has on that basis contested as a matter of fact that it is indebted.

As to the legal consequences of issuing payment by cheques which bounce sections 72, 2, and 26 of the Bills of Exchange Act Cap 68 are relevant. A cheque as defined there under is a bill of exchange payable on demand as an “unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer.” In the case of **Naris Byarugaba vs. Shivam M. K. D Ltd [1997] HCB 71** it was held that a bill of exchange constitute prima facie evidence of the sum of money printed on it and due to the person in whose favour it is drawn. In that case the court further held that in law such a debt is only discharged when the bill of exchange is honoured. A cheque is said to be dishonoured under section 46 of the Bills of Exchange Act when it is duly presented for payment and payment is refused or cannot be obtained. In the case of **Kotecha vs. Mohammad [2002] 1 EA 112** it was held by the Court of Appeal that a bill of exchange is normally treated as cash and the holder is entitled in the ordinary course to judgment except in exceptional cases. The cause of action arises when the cheque is dishonoured (See case of **Red fox Bureau De Change vs. Anke Alemayehu and Another [1997 – 2001] UCLR 359** where the court held that the cause of action arises when the cheques are dishonoured.) It was held in the case of **Sembule Investments Ltd vs. Uganda Baati Ltd MA 0664 of 2009** by Hon. Lady Justice Irene Mulyagonja Kakooza, that it is implied from the definition of a bill of exchange that a cheque is by its nature unconditional. A cheque cannot be issued on any conditions unless those conditions are notified to the banker. The cheques should have been dishonoured and returned with the words “refer to drawer” and upon giving to the drawer notice of dishonour, the only recourse for the Plaintiff was to file a suit. A cheque constitutes a promise to pay and the Defendant becomes liable to make good the amount written on the cheque.

For the Plaintiff/Respondent to rely on the bounced cheque it has to show that it gave the Defendant/Applicant a notice of dishonour of the cheque. Section 47 and 48 of the Bills of Exchange Act Cap 68 laws of Uganda are the relevant provisions. Section 47 provides that where a bill is dishonoured a notice of dishonour must be given to the drawer. Secondly section 48 of the Bills of Exchange Act gives the rules as to dishonour. Under section 48 (e) notice of dishonour must be in writing sufficient to identify the bill and intimate that the bill has been dishonoured by non payment. Under section 48 (l) notice of dishonour is to be given within a reasonable time. I have duly considered the demand letter dated 1st of October 2016 and annexure H to the

affidavit and it contains a demand for Uganda shillings 56,769,503/- but does not contain any information as to a bounced cheque and neither does it give particulars of any cheque as required by the law. In the affidavit in support of the summary Plaintiff no notice of dishonour of the cheque has been attached. Last but not least the affidavit in reply to the application of Praveen Kumar does not attach any notice of dishonour or even depose that a notice of dishonour of cheques has been served on the Defendant/Applicant.

In this case therefore there is no notice of dishonour to qualify for summary judgment. For the reasons stated above that there is a business relationship between the parties consisting of supply and sale of goods supplied by the Plaintiff and where it is alleged that some goods were returned to the Respondent but not accounted for. It is further alleged that some agents of the Respondent have outstanding sums though they trade under the Applicant and attribute this liability on the Applicant. The facts as disclosed require reconciliation of accounts after evidence has been adduced and tested and not tried in a summary suit. Order 36 rule 2 of the Civil Procedure Rules deals with a liquidated demand in money payable by the Defendant with or without interest arising upon the contract express or implied. In this case it is in dispute as to whether there is a liquidated demand in money which is uncontested or to which there is no defence. In fact the Applicant alleges a counterclaim which leaves the Respondent owing it. The averments require trial.

In the premises the Applicant has unconditional leave to file and serve a written statement of defence within 7 days from the date of this order. The costs of this application shall abide the outcome of the main suit.

Ruling delivered in open court on the 2nd of June 2016

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Counsel Chemisto Shuaib for the Applicant

Applicants General Manager Anthony Kuka Cherotich

Respondents are not represented.

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

2nd June 2016

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