

UGANDA / JUDGMENT

Miao v Karuhanga & 10 Others T/A
Kampala Associated Advocates
(Miscellaneous Application 2097 of 2023)
[2024] UGCommC 364 (3 December 2024)
[2024] UGCommC 364

COURT

Commercial Court of Uganda

BEFORE

Ocaya, J

CASE / FILE NUMBER

Miscellaneous Application 2097 of 2023

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5 THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION] MISCELLANEOUS APPLICATION NO. 2097 OF 2023
[ARISING FROM CIVIL SUIT NO. 739 OF 2023]

MIAO HUA XIAN] APPLICANT

VERSUS

| 15 | 1.
DR. ELLY KARUHANGA |] | |

| --- | ----- | --- | ----- |

| | 2.
OSCAR KAMBONA |] | |

| | 3.
SAMUEL MAYANJA |] | |

| | 4.
PETER CR KABATSI |] | |

| | 5.
DR. KALLU C. KALUMIYA |] | |

| 20 | 6.
JOSEPH MATSIKO |] | RESPONDENTS |

| | 7.
BRUCE MUSINGUZI |] | |

| | 8.
JET J TUMWEBAZE |] | |

| | 9.
AUGUSTINE OBILIL IDOOT |] | |

| | 10. ELISON KARUHANGA |] | |

| 25 | 11. ZULAIKA M. KASAJJA |] | |

| | T/A KAMPALA ASSOCIATED
ADVOCATES |] | |

| | | |

Before: Hon. Justice Ocaya Thomas O. R

30 RULING

Introduction

This is an application under Order 36 Rules 3(1) and 4 of the Civil Procedure Rules ["CPR"] seeking orders that the Applicant be given unconditional leave to appear and defend HCCS

35 739 of 2023 ["The Main Suit"] and for orders as to costs of this application. The facts leading to this application as advanced by the Applicant are summarized as below.

- 5 The Applicant instructed Mr. John Musiime previously working with the Respondents trading as Kampala Associated Advocates to act for her in a dispute against the now defunct Crane Bank, whereupon the parties agreed to legal fees of UGX 60,000,000 being the sum payable by the Applicant to the Respondent as their legal fees which was payable in installments. The Applicant contends that she was issued an invoice of UGX 60,000,000 which she paid.
- 10

According to the Applicant, the Respondents did not disclose that they were also lawyers for Crane Bank and its proprietor Sudhir Ruparelia. The Applicant contends that during the proceedings, she was advised by court to get another lawyer as the Respondents were conflicted.

The Applicant contends that the Respondents instead served her with an advocate-client bill of costs of UGX 447,753,500. The Respondents had the same bill taxed exparte without her knowledge vide Taxation Application No. 424 of 2021 and consequently filed the main suit by specially endorsed plaint to recover UGX 349,181,550 being the sum awarded in the said

20 taxation proceedings.

The Applicant contends that she was neither served with a taxation hearing notice nor served with a taxation ruling notice. The Applicant contends that she paid the Respondents all the legal fees they were entitled to. The Applicant further contends that she only became aware

25 of the taxation award on 29 August 2023 when she was served with the summary suit via the WhatsApp platform.

The Applicant further asserts that there is a pending dispute between the parties in the Law Council arising from HCCS 78 of 2016 in which the taxation award arises. The Applicant contends that she instituted proceedings at Law Council against the Respondents vide LCD/50/2018 and LCD/105/2019 in which the Applicant seeks a remedy against the Respondents for failing to disclose their conflict of interest and gross professional misconduct.

35 The Applicant contends that she has a good defense against the whole of the Respondents claim and also has a counterclaim for negligence arising from professional misconduct

5 against the Respondents. The Applicant contends that she has paid the Respondents over UGX 100,000,000 personally and occasionally through her companies to wit Zebu Emporium, Kangli Limited and China Palace Limited.

The Applicant contends that Mr. Musiime, working with/for the Respondents represented her in HCCS 743 of 2015 and HCCS 78 of 2016 which were actions challenging the sale of her mortgaged property to wit LRV 2744 Folio 25 Plot 47 land at Nabugabo, Kampala, the two said suits being later consolidated.

The Applicant asserts that the said Respondent's firm only represented her up to pre-trial 15 where after the learned Judge presiding over the proceedings objected to the Respondents representing the Applicant and informed the Applicant that the Respondents were the lawyers of Crane Bank and its proprietor Sudhir Ruparelia where after the Applicant asserts that she was instructed to find another lawyer.

- 20 The Applicant asserts she was shocked to learn of the above and thereafter lodged a complaint against Mr. John Musiime and the Respondents in vide the above-mentioned cause numbers. The Applicant contends that she seeks to recover damages in the above proceedings and the said proceedings are still ongoing at Law Council.
- 25 The Applicant asserts that the above taxed amount is exorbitant and intends to appeal the same award. The Applicant asserts that to this end, she has filed an application for extension of time within which to appeal vide HCMA 291/2023.

For the Respondents, this application was opposed. In summary, the Respondents contended 30 that:

- (a) There was never any agreement for payment of UGX 60,000,000 as alleged by the Applicant.
- (b) The matters raised by the Applicant were raised and fully and finally determined in. HCMA 615/2018 by Hon. Justice Richard Wejuli.
- 35 (c) It was rightly determined in HCMA 615/2018 that all monies paid by the Applicant to the Respondents' law firm was properly applied and accounted for.

- 5 (d) The Respondents did not represent Crane Bank Limited but only represented Sudhir Ruparelia and even then only subsequently in 2017, way after HCCS 78/2016 and HCCS 743 of 2015 had been commenced.
- (e) The Applicant on her own volition chose to withdraw instructions from the Respondents' firm.
- 10 (f) Upon withdrawal of instructions, the Respondents served the upon the Applicant a demand for payment of legal fees which demand was neglected hence the filing of HCMA 615 of 2018 seeking leave to tax an advocate-client bill of costs.
- (g) The court in HCMA 615 of 2018 ordered that the Respondent's advocate-client bill of costs be taxed and the same has never been appealed against by the Applicant.
- 15 (h) The actions before Law Council are non-starters aimed at frustrating recovery of the legal fees due to the Applicant. These actions have not been prosecuted for over 6 years and have not resulted in any order that varies, stays or sets aside the ruling in HCMA 615 of 2018.
- (i) Taxation Application No. 424 of 2021 was done interparty and the Applicant was 20 represented by the law firm Ingura & Company Advocates who opposed the bill of costs by appearing and filing written submissions.
- (j) There has been no appeal against the taxation decision of the taxing master and the 30 day time frame for making such an appeal has lapsed.
- (k) Whereas the Applicant seeks extension of time to appeal vide HCMA 291/2023 the
- 25 Applicant has not taken steps to fix the same application for over nine (9) months and are guilty of dilatory conduct.
- (l) The Registrar properly exercised her discretion when he awarded the sum of UGX 349,181,500.
- (m) The Application raises no triable issues for determination of this Honourable Court as
- 30 this application is only intended to frustrate the Respondents in the realization of their taxed costs in total abuse of court process.

Representation

The Applicant was represented by M/s Silicon Advocates while the Respondents was 35 represented by M/s Kampala Associated Advocates.

5 Evidence and Submissions

The Applicant led evidence by way of an affidavit in support of the notice of motion deponed by herself. The Respondent led evidence by way of an affidavit in rejoinder deponed by Augustine Obilil Idoot, the 9th Respondent herein and a partner in M/s Kampala Associated Advocates.

Both parties filed submissions in support of their respective cases which the court has considered before arriving at its decision. I have, however, for the purposes of brevity, not felt the need to reiterate the same herein.

15 DECISION

PART I: DECISION ON PRELIMINARY POINT OF LAW

In their submissions, the Respondents raised a preliminary point of law that the affidavit in support of this application is incurably defective. The Respondents contended that the 20 Applicant has always held herself out as illiterate in English. They contended that Section 3 of the Illiterates Protection Act requires that a person writing a document for an illiterate person to write down their own name and address. The Respondents contended that the certificate of translation in the affidavit in support does not bear the name and address of the person who undertook the translation and accordingly, the affidavit in support is fatally

25 defective. Counsel relied on **Ayub Bujingo v Abubakali Kikoba & Ors CACA 234/2023**

Counsel for the Applicant contended that the Applicant duly attached a certificate of translation and duly signed the same. Failure to indicate a full name and address is a mere technicality

The decision of **Ayub Bujingo (Supra)** dealt with the absence of a certificate of translation rather than a failure to include the name of the person who undertook the translation. I take note of the position of the law that courts should ordinarily take a liberal approach in dealing with defective affidavits. See **Kasaala Growers Cooperative Society v Kakooza Jonathan**

35 & Anor SCCA 19/2020, **Banco Arabe Espanyol v Bank of Uganda SCCA 8/1998**, **George Lubega v Nampinga Theresa CACA 235/2023**.

- 5 However, an affidavit of an illiterate person without a certificate of translation as required by law is in non-compliance with a clear and mandatory statutory requirement which is not only that there should be a certificate of translation, but that that certificate should bear the name and address of the person who undertook the translation. Both requirements go hand in hand and an affidavit that meets only one of these requirements is still fatally defective. See
- 10 sections 3 of the Illiterates' Protection Act.

Applicant.

In my considered view, the name and address of the person who undertook the translation is important as it is information that assists in establishing whether the person who undertook the translation had the necessary command of the languages relevant to the 15 translation.

Accordingly, non-compliance with this requirement is not a thing that can be lightly ignored or wished away as a mere technicality as submitted by counsel for the

In the premises, I find that the affidavit in support of the Application is incurably defective, 20 and is accordingly struck out. The Application not being supported with any other evidence means that the same is defective and equally stands struck out. see **George Lubega** *(Supra)*

PART II: DECISION ON THE MERITS

25 However, for purposes of completeness, I have felt it necessary to render what would have been the decision of the court on the merits of the Application.

As noted above, the main suit was commenced by way of specially endorsed plaint under the provisions of **Order 36 Rule 2** of the Civil Procedure Rules["CPR"]. This procedure is used to 30 originate liquidated or certain claims for which it is believed that the Defendant does not have a defence to the claim.

In this procedure, there is no automatic right to defend. The right to defend is only conferred by the leave of court, upon an application by the Defendant in the summary suit.

5 Under the provisions of **Order 36 Rule 3** of the CPR, a defendant to a summary suit, who is served with summons, ought to file an application for leave to appear and defend within the timelines indicated in the summons. Failure to do so will entitle the plaintiff to a judgment in default for the sums claimed. Equally so, when an application for leave to appear and defend fails, the plaintiff is entitled to judgment without further proof of the claim. [See **Order 36** 10 **Rule 5** of the CPR]

The rationale for summary procedure has been summarised in the long standing decision of **Post Bank (U) Ltd v Abdul Ssozi SCCA 8/2015** where the Supreme Court held thus:

"Order 36 was enacted to facilitate the expeditious disposal of cases involving debts and

15 contracts of a commercial nature to prevent defendants from presenting frivolous or vexatious defences in order to unreasonably prolong litigation. Apart from assisting the courts in disposing of cases expeditiously, Order 36 also helps the economy by removing unnecessary obstructions in financial or commercial dealings."

See also **Zola & Another v. Ralli Brothers Ltd. & Another** [1969] EA 691, 694.

The Applicant brought this application for unconditional leave to appear and defend the main suit. **Order 36 Rule 4** of the CPR provides thus:

"An application by a defendant served with a summons in Form 4 of Appendix A for leave to appear and defend the suit shall be supported by affidavit, which shall state whether

25 the defence alleged goes to the whole or to part only, and if so, to what part of the plaintiff's claim, and the court also may allow the defendant making the application to be examined on oath. For this purpose, the court may order the defendant, or, in the case of a corporation, any officer of the corporation, to attend and be examined upon oath, or to produce any lease, deeds, books or documents, or copies of or extracts from them. The 30 plaintiff shall be served with notice of the application and with a copy of the affidavit filed by a defendant."

As I said, summary procedure presupposes that the defendant does not have a defence and that there is no matter to try. It follows that if the defendant shows that it has a defence or

5 that there is a matter to try, summary procedure is untenable. In **Kotecha v. Mohammed** [2002] 1 EA 112, the threshold for grant of leave to appear and defend was laid out:

"Therefore English authorities on that rule are of persuasive authority and provide (a) useful guide. Under the English Rule the Defendant is granted leave to appear and defend if he is able to show that he has a good defence on the merit(s); or that a difficult point of

10 law is involved; or a dispute as to the facts 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. See *Saw v Hakim* 5 TLR 72; *Ray v Barker* 4 Ex DI 279."

[See also **Churanjilal & Co. v. A. H. Adam** (1950) 17 EACA, 92, **Hasmani v. Banque du 15 Congo Belge** (1938) 5 EACA 89 at 89]

It follows that it is not sufficient to simply deny indebtedness. Some older decisions such as the decision of the majority in **Photo Focus (U) Ltd. v. Group Four Security Ltd** CACA 30/2000 suggest that a mere denial of indebtedness, without more, is a good defence. I do 20 not think this to be the case. This is because, first a general denial of indebtedness is not itself a valid defence under the CPR. [See **Order 6 Rule 8 of the CPR, Ecobank Uganda Limited v Kalson's Agrovvet Concern Ltd & Anor** HCCS 573/2016, **Pamela Anyoti v Root Capital Inc** HCMA 844/2023

- 25 If the reasoning in the Photo Focus decision was to be applied, it would mean that summary procedure would never work since the defendant could easily bring an application for leave to appear and defend with three paragraphs; one introducing himself, a second indicating he or she or it denies indebtedness and a third indicating that he believes all the averments are true and the application would have to succeed.
- 30

Second, the purpose of an application for leave to appear and defend is to show that there is something to try, such that granting of a summary judgment is not in the interests of justice.

Third, and as observed by Justice Irene Mulyagonja *(as she then was)* in **George Begumisa v 35 East African Development Bank** HCMA 451/2010, the decision in Foto Focus has been

5 departed from by the Court of Appeal which issued it, as evidence in the Kotecha Decision. See also **Emoru & Co. Advocates v ISS Globa Frieght Forwarding Company Uganda SMC Limited HCMA 1843/2022**

The sum total of the above is that an Applicant must show one of two things; either that they 10 have a defence to the claim, or that there is a there is a matter to try. This can be summarised by saying that an Applicant for leave to appear and defend must show that there is a triable issue whether this is a contestation caused by their defence to the claim or some other issue of fact or law affecting the matter.

15 Having established the threshold for determination of applications of this nature, I must now turn to the Applicant's defence/grounds for the application for leave to appear and defend.

The Applicant's defence

The Applicant did not attach a draft defence. In applications of this nature, it is good practice

20 for a party claiming to have a good defence to attach the draft defence to the affidavit in support in order to establish the same. When this is not done, the Applicant should show in their affidavit the grounds of defence they intended to rely on and provide other materials that can speak to the competence of their defence. See **Hon. Sebamala Richard v Equity Bank (Uganda) Limited HCMA 1722/2022, Dr. Francis Kitaka v Intracin 25 Pharmaceuticals Pvt Ltd HCMA 2136/2023**

The gist of the Applicant's defence is that

- (a) She is not indebted to the Respondents as she paid UGX 60,000,000 being the legal fees agreed by the parties.
- 30 (b) The Applicant paid the Respondents over UGX 100,000,000 beyond the sum of UGX 60,000,000 agreed by the parties.
- (c) The taxation of the sums sought to be recovered by the Respondents' summary suit happened without the Applicant's knowledge and participation.

5 (d) The Applicant has filed HCMA 291/2023 seeking extension of time to appeal the decision of the taxing master, and accordingly, the sums sought to be recovered are disputed.

The starting point is that the Respondents adduced clear, cogent and unchallenged evidence 10 that not only did the Applicant participate in Taxation Application No. 424 of 2021 from which the sum sought to be recovered by the summary suit was awarded (See Annexure "B" to the affidavit in reply) the Applicant also participated in HCMA 615 of 2018 which was an application by the Respondents for leave to tax an advocate client bill of costs (See Annexure "A" to the affidavit in reply).

What's more, the Applicant attached the taxation ruling of the Learned Registrar in HCMA 424 of 2021 (Annexure "C" of the affidavit in support) and the decision of the Learned Judge in HCMA 615 of 2018 (also marked Annexure "C") which all evidence the participation in those proceedings by the Applicant. This is at variance with her averments that she didn't 20 participate in the taxation proceedings.

In HCMA 615 of 2018 and Taxation Application No. 424 of 2021, the question as to whether the Applicant was liable to pay legal fees to the Respondents, and if so, how much was thoroughly investigated and determined.

For instance, in HCMA 615 of 2018, at Pages 5-9 of the ruling of Hon. Justice Wejuli, His Lordship considered the assertion that the parties to this matter agreed a sum of UGX 60,000,000 as legal fees and that there were payments in excess of the sums agreed. His Lordship held thus;

30 "Clearly, all the money disbursed to the Applicants including the Shs 43 Million advanced to the Applicants was properly applied and accounted for and even after that was done, a part of the Applicants (now respondents) fees remained outstanding."

It is common ground that the above finding has not been appealed, although I am aware that 35 there is an existing application for extension of time.

5 As a general rule, an appeal will not prevent enforcement of a right to payment or a money judgment. See **UMEME Limited v Jane Nankabirwa HCMC 154/2021, Luwa Luwa Investment v URA HCMC 1336/2022** *(unreported)*

Accordingly, it follows that the entirety of the defence of the Applicant to the summary suit 10 has already been considered and adjudicated vide HCMA 615 of 2019 and Taxation Application 424 of 2021 and resolved in favour of the Respondents. Even if there is an intended appeal against the decision in HCMA 615 of 2019, the same cannot prevent enforcement of decreed/taxed amounts. This application for whatever it is worth seeks to have this court re litigate and/or sit in Appeal these earlier decisions.

Accordingly, I find no merit in the Applicant's application for leave to appear and defend as their intended grounds of defence against the Respondents' specially endorsed plaint do not disclose any triable issue.

20 Once an application for leave to appear and defend is dismissed, the Respondent is entitled to judgment on the sums claimed. See **Order 36 Rule 5, Pamela Anyoti v Root Capital Inc HCMA 844/2023**

Accordingly, the Respondents are entitled to and are hereby awarded a decree for the sums 25 claimed in the specially endorsed plaint and costs therein.

Costs

As a rule of law, costs ordinarily follow the event and a successful litigant receives his or her costs in the absence of special circumstances justifying some other order. Where the

- 30 successful party has been guilty of some misconduct, an order of costs may not be granted. See **Section 27(2) Civil Procedure Act, Harry Sempa v Kambagambire David HCCS 408/2014, Iyamuleme David vs. AG SCCA NO.4 of 2013, Kinyera George v Victoria Seeds Limited HCCS 604/2015.**
- 35 The Applicant has not demonstrated any meritorious grounds for grant of leave to appear and defend and should therefore bear the costs of this application.

5 Conclusion

In sum, this court makes the following orders:

- (a) The Applicant's application is fatally defective and the same is struck out with costs.
- (b) Irrespective of my decision in (a) above, the decision of the court on the merits is that the Applicant's application does not disclose a triable issue and the same is
- 10 incompetent and ought to be dismissed with costs.
- (c) Judgment is hereby entered for the Respondents in HCCS 739 of 2023 for the sums claimed therein and costs of the suit.

I so Order.

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[illegible]

Judge 3rd December, 2024

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