

UGANDA / JUDGMENT

Roko Construction Ltd v Babirye Construction Services (H.C.Miscellaneous Application No. 1244 of 2020) [2021] UGCommC 82 (30 April 2021)

[2021] UGCommC 82

COURT

Commercial Court of Uganda

BEFORE

Gaswaga, J

CASE / FILE NUMBER

H.C.Miscellaneous Application No. 1244 of 2020

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPLA

[COMMERCIAL DIVISION]

M. A No. 1244 of 2020

[ARISING OUT OF CIVIL SUIT No. 1046 of 2020]

ROKO CONSTRUCTION LIMITED :::::::::::::::::::::::::::::::::::APPLICANT

VERSUS

BABIRYE DOREEN T/A BABIRYE CONSTRUCTION
SERVICES:::RESPONDENT

BEFORE: HON. JUSTICE DUNCAN GASWAGA RULING

- [1] This is a ruling on an application for leave to appear and defend brought under Order 36 rules 3 & 4 of the CPR and S.98 of the CPA for orders that the applicant be granted leave to appear to the summons and defend Civil Suit No. 1046 of 2020 and costs of the application be provided for.
- [2] The grounds of the application contained in the affidavit of Mark Koehler are that; the applicant is not indebted to the respondent to the tune of UGX 123,475,000 (One hundred twenty three million four hundred seventy five thousand Uganda Shillings only) as claimed

in Civil Suit No. 1046 of 2020 and thus denies liability for the claim as alleged in the plaint; that the applicant orally contracted the respondent to hire to it machinery at different times in which basing on the advice of the lawyers believes that the oral contract exceeded the statutory

amount and is therefore unenforceable. That CS No. 1046 of 2020 raises bonafide triable issues of both fact and law and that the respondent is intended to unjustly enrich itself at the expense of the applicant.

- [3] That in light of the poor mechanical condition of the equipment, it affected the applicant's performance on sites to which they shall demand for damages from the respondent which shall exceed any purported claims and that there is therefore need to reconcile the accounts which process will demonstrate that the applicant is not liable to the respondent as alleged. That money put in the invoices is exaggerated and does not reflect the work done and the applicant was put to untold inconvenience.
- [4] That at no point did the applicant agree with the respondent that the respondent would be entitled to interest in any circumstance.
- [5] That the plaint is supported by a defective and incompetent affidavit having been commissioned by a one Obiro Ekirapa Isaac who is not a duly commissioned person as required by the law.
- [6] This application raises one issue;

1) Whether the applicant satisfies the conditions for grant of leave to appear and defend.

- [7] Counsel submitted by way of written submissions. Counsel for the applicant stated that the application satisfies the grounds for grant of unconditional leave to appear and defend. That the grounds for the grant of unconditional leave to appear and defend have been enunciated under case law and that in **Benon Tamusanqe & Timothy Justin Rover Mathew Vs Exim Bank (U) Ltd Misc. Application No. 1213 of 2016**. Justice Billy Kainamura stated that, 'the settled law is

that for an application for leave to defend to be granted, the applicants have to show that there is bonafide triable issues of fact or law that they will advance in defense of the suit. He went further to cite **Makula Interqlobal Trade Agency v. Bank of Uganda HCCS No, 950 of 1985** where it was held that; "before leave to appear and defend is granted, the defendant must show by affidavit or otherwise that there is a triable issue of fact or law. When there is a reasonable ground of defense to the claim, the defendant is not entitled to judgment. The defendant is not bound to show a good defense on the merit but should satisfy 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 the issues disclosed at this stage." The* applicant averred that it is not indebted to the respondent to the tune of UGX 123,475,000 (One hundred twenty three million four hundred seventy five thousand Uganda

Shillings only) as claimed in Civil Suit No. 1046 of 2020 and thus denies liability for the claim as alleged in the plaint as per paragraph 3 of the affidavit of Mark Koehler.

- [8] That the pleadings in Civil Suit No. 1046 of 2020 are defective and cannot be a basis for the grant of a summary judgement if any. That a reading of the whole Order 36 rule 2 shows that the plaint filed therein shall be accompanied by an affidavit. Further, that the affidavit of the application is untenable and defective because it was commissioned by a one Obiro Ekipara Isaac who is not a duly commissioned person as required by the law under Section 2 of the Oath's Act, Cap 19 which is to the effect that "in as far as affidavits are concerned, the person to tender oath under the second schedule is a Commissioner for Oaths or a Chief Registrar of the High court authorized in that behalf by the"

Chief Justice. Section 1(3) of the Commissioner for Oaths (Advocates) Act Cap 5 provides that "after the commission shall be dully signed and stamped as provided in subsection (1) and (2), the appointment of the person named in it as a Commissioner for Oaths shall be immediately published in the gazette. " As per the letter from the Chief Registrar Ref. A/267 dated 17th August 2020 *(Annexure 'A' where Obiro Ekipara Isaac was appointed as a commissioner for oaths on 29th May 2010, he has since not gazetted his certificate of appointment hence making him unable to lawfully carry out the duties of a commissioner for oaths. Further that the contract is unenforceable basing on the case of **Karangwa Joseph Vs Kulaniu Willy, Civil Appeal No. 03 of 2016** where Justice Christopher Madrama Izama held at page 17 of the judgement that the requirement under section 10(5) of the Contracts Act for the contract to be in writing is mandatory.

- [9] Counsel further stated that there is a triable issue relating to whether the respondent is entitled to interest at a commercial rate of 20% per annum from the time of filing of the suit until payment of the decretal sum in full. That the respondent is not entitled to any interest on the principal sum as claimed in their summary suit. That the respondent seeking interest that was not contractual does not fall within the ambit of a summary suit as per Order 36 rule 2(a) (i) CPR. Counsel relied on the case of **Begumisa George Vs East African Development Bank HCMA No. 451 of 2010** where court held that "a claim under Order 36 should not include interest, except where an agreement on interest is included." That court went on to conclude that the issue of interest was a triable issue and gave leave for the defendant to defend the suit in an ordinary trial.

[10] Also, in **Kotecha Vs Mohammedr2002** ¹ EA 112 court held that

"where a suit was brought under summary procedure on a specially endorsed plaint, the defendant is granted leave to appear if he was able to show that he had a good defense on merit, or that a difficult point of law is involved or a dispute as to 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 claim. "

- [11] Counsel for the respondent then submitted that there is no triable issue and that **Order 36 rule 4 CPR** provides that unconditional leave to appear and defend the suit will be granted where the applicant shows that he or she has a good defense 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 on a bonafide defense. That the rationale of summary procedure under Order 36 of the CPR was re-stated in **Post Bank (U) Ltd Vs Abdul Kasozi SCCA No. 08 of 2015** where it was stated that *'Order 36 was enacted to facilitate the expeditious disposal of cases involving debts and contracts of a commercial nature to prevent defendants from presenting frivolous or vexatious defenses 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.'*
- [12] Counsel further submitted that in the case of **Jubilee Insurance Co. Ltd Vs Fifi Transporters Ltd HCMA No. 0211 of 2008** court held that

'in an application for leave to defend a suit under summary procedure the law is that the applicant must show that there is a bonafide triable issue of fact or law.' That also in **Musoke Kitenda Vs Roko Construction Limited, Misc Civil Application No. 1240 of 2020** Justice Stephen Mubiru at pg 3 stated that 'in *an application of this nature, there must be sufficient disclosure by the applicant, of the nature and the grounds of his or her defense and the defense so disclosed must be both bonafide and good in law....*his Lordship went on to comment on the evidence contained in the applicant's affidavit as follows *' the applicant states that his defense and triable issues are based partly on the contract having been oral, the amount stated in the invoices is exaggerated, the respondent claims interest which is not contractually agreed and the machines hired to him were in poor mechanical condition. As regards the claim of exaggeration, it is not stated by what margin. The deficiencies in the machinery supplied are not disclosed. The affidavit has not crossed the threshold that requires pleading the material facts on which the defense is based. It has to determine whether there has been a full disclosure of the defense and the material facts upon which the applicant relies as a defense to the respondents claim.'* That in paragraph 6, it speaks of deficiencies in the machinery supplied but the same are not disclosed.

[13] In regard to the contract, counsel for the respondent submitted that Section 10(5) of the Contracts Act No. 7 of 2010, a contract, the subject matter of which exceeds twenty- five currency points (500,000/=) must be in writing. That in **Britain Vs Rossiter (1879) 11 QBD 123**, the 'writing' envisaged does not require a formal written contract. This requirement is satisfied by any signed writing that;

- i. Reasonably identifies the subject matter of the contract
- ii. Is sufficient to indicate that a contract exists, and

- *Hi.* States with reasonable certainty the material terms of the contract. It can be a receipt or even an informal letter.

Further that part performance of an oral contract makes it enforceable in equity as per in **Stanley Beinababo Vs Abaho Tumushabe Civil Appeal No. 11 of 1997**. In paragraph 6 of the affidavit in support the applicant admitted having taken possession of the machinery.

- [14] That on the issue of interest, the applicant asserted that the interest the respondent seeks for was not contractual and does not fall within the ambit of a summary suit. In **Musoke Kitenda Vs Roko Construction Ltd (supra)**. Justice Stephen Mubiru stated that *'similarly, the argument that the claim is bad for containing a claim for interest is unsustainable. Whereas claiming interest in a suit by summary procedure, except where interest was expressly provided for, is wrong.....paragraph 6.03 of the plaint indicates that an interest is claimed from date of filing of the suit until payment in full. It does not accrue on the contract. Interest from the date of suit or judgement is at the discretion of the court. '*
- [15] That in paragraph 2.3 of the plaint indicates an interest at a commercial rate of 20% per annum from the date of filing or judgement, which is at discretion of this court.
- [16] **In the premises therefore, in the presence of evidence indicating a plausible defense to the claim or that the applicant is not indebted to the respondent in the amount claimed of UGX**

123,475, 000/=, this court finds bonafide triable issues of fact or law upon which the application to appear and defend can be granted. This application has merit. Accordingly, it is granted. The applicant should file its written statement of defence within fifteen days from the date hereof and serve the respondent/plaintiff as prescribed by law.

^I so order.

Dated, signed and delivered this 30th day of April, 2021

Duncan Gaswaga

Judge

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