**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**COMMERCIAL DIVISION**

**HIGH COURT MISCELLANEOUS APPLICATION No. 609 OF 2015**

**(FROM HCT-00-CS-CS-No. 0460 OF 2015)**

**KYARIMPA EMILY APPLICANT**

**VERSUS**

**MK CREDITORS LIMITED RESPONDENT**

**BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI**

**RULING**

This is an application by notice of motion under O. 36 rr.3 and 4 of the Civil Procedure Rules (CPR), and S. 98 of the Civil Procedure Act (CPA), for unconditional leave to appear and defend Commercial Division High Court Civil Suit No. 0460 of 2015, and that costs of the application be provided for.

The application was supported by the affidavit of the applicant Kyarimpa Emily dated 7th August 2015.

The brief background to this application is that the respondent brought a suit under summary procedure on a specially endorsed plaint, 0.36 rr. 1 and 4 of the CPR, for recovery of a sum of sh. 54.010.000= arising from breach of contract by the applicant. The applicant filed this notice of motion for leave to defend that civil suit No. 460 of 2015.

Six grounds were set out in the notice of motion as follows,

1. That the applicant is not indebted the respondent.
2. The suit raises triable issues which cannot be determined in a summary manner.
3. The suit is res judicata.
4. The suit is on appeal pending disposal.
5. The applicant has a defence to the respondents claim.
6. It is just and equitable that the application be allowed as presented.

On 5th October 2015, the matter came up before Adonyo J., and he declined to dismiss the same for non appearance of the applicant as had been prayed, but ordered that the applicant appear to substantiate the serious allegations which she raised in her affidavit in support of the motion.

When the matter was set down for hearing before me, I issued timelines for filing submissions. While the respondent did so, the applicant failed to meet the given timelines. One day before I issued the timelines

1. e. on 3rd November 2016, well after the hearing before Adonyo J., the respondent filed an affidavit in reply. •

In the respondent’s affidavit in reply, it was deposed among other things that the applicant failed to serve the notice of motion within the time required under the law. He submitted that the application be dismissed for failure to comply with 0.5 r. (2) of the CPR. It was not clear when and where the respondent ‘saw’ the notice of motion. He appeared before Adonyo J., on 5th October. Nothing was said of lack of service of the notice of motion. The matter proceeded, and an application was made to dismiss the motion, meaning it was otherwise properly before court. A ruling was made declining to uphold the prayer for dismissal. That is when the prayer regarding non service of the motion comes up. I will decline' to grant that prayer.

The respondent further submitted that the applicant failed to file submissions as directed. Therefore the application ought to be dismissed under O. 9.r.22 CPR. Several authorities were cited in support thereof. I do not intend to dismiss the application under that provision as prayed. Proceedings under 0.36 CPR rely essentially on affidavit evidence unless court directs otherwise. There was evidence from the applicant in this matter. The need for submissions was only to elucidate, explain the evidence on record. Submissions are not evidence. If a party fails to file submissions when ordered to do so, court will proceed to deal with the matter as appropriate in the peculiar circumstances of each case. Such a party will have placed itself at a disadvantage, as its evidence, if any will remain unexplained, authorities will not have been availed to court and court will not have been assisted in arriving at the decision.

O. 17. r. 4 CPR provides that court may proceed to decide a matter notwithstanding that a party has failed to perform any necessary act to further the progress of the suit. I therefore decided to decide this matter\_ even though the applicant failed to meet the timeline of submitting submissions.

In an application for leave to appear and defend a suit which has been brought under summary procedure by the provisions of O. 36 CPR it ought to be shown by affidavit or otherwise that there is a bona fide triable issue of fact or law. Where there is a reasonable ground of defence to the claim, the plaintiff is not entitled to summary judgement. In the words of Duffus, P, in the case of Patel V. Carso Handling Services [1974] EA 75, “ a triable issue is an issue which raises a prima facie defence and which should to go to trial for adjudication.”

In the application such as the one before me, the defendant is not required to show a good defence on the merits, but to satisfy court that there is an issue or dispute in question, which ought to be tried. The court is not, at this stage required to engage in the trial of the issues raised. As Akiiki Kizza J, pointed out in Sulaiman Nsambu V. Fred Balinda HCMA No. 289 of 1998 (unreportedj, once triable issues have been shown to exist from the affidavit in support of the application, then in such a case, leave to appear and defend will be granted.

In the present case, the applicant deposed that the matter was res judicata. Annexed to that affidavit were copies of Originating Summons, affidavit of Male H Mabirizi in support of the Originating Summons, proceedings before Katushabe Prossy Magistrate Grade I, a ruling by the same judicial officer, a notice of appeal signed by Male H Mabirizi on behalf of MK Creditors Ltd., and a memo of appeal.

Mr. Male Mabirizi submitted that the Originating Summons proceedings and the resulting appeal did not decide the contractual liability of the applicant, nor could the results therein absolve her of the same. If the OS was dismissed without referring the matter for trialas under ordinary plaint, wouldn’t the issue of' res judicata arise? That is a triable matter.

The applicant deposed that she was not indebted to the respondent. The proceedings in the Originating summons annexed to her affidavit show a loan of sh. 500,000= having been advanced by the respondent. The current suit No. 460 of 2015 mentions sh. 54 million, arising from breach of contract. Surely it would only be just and fair that parties are heard in respect of the astronomical differences in the figures in the suits. That is another triable issue.

In the case of H.D. Hasmani V. Banque Du Congo Belse (1938) 5 EACA 89, the court held that, “ even if there is only one triable issue in the affidavit supporting the application for leave to appear and defend, then the appellant is entitled to leave to appear and defend unconditionally.”

As I stated earlier, court is not at this stage required to go into the merits of the defence, or to decide whether or not the defence will be successful. Suffice that there is on the face a defence which is worth consideration by the court. The applicant has showed this. I would for the above reasons allow the application.

Having decided as I have that there are triable issues in the suit, it is clear that it is just and equitable that the application be granted. I accordingly allow this application. In the event, the following orders are hereby made.

1. The applicant is hereby granted unconditional leave to appear and defend the suit.
2. The applicant shall file his defence within 10 days from date of reading this ruling to the parties.
3. Costs of this application shall abide the results of the suit.

Rugadya Atwooki

Judge

20/09/2017

Court: The Registrar of the Commercial Division shall read this ruling to the parties.

RUGADYA ATWOOKI

20/09/2017