

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
COMMERCIAL DIVISION  
MISC. APPLICATION NO. 383/2018  
[ARISING OUT OF CIVIL SUIT NO.91/2018]**

**HN DEVELOPERS LTD ::: APPLICANT**

**VERSUS**

**PRAYOSHA ENTERPRISES LTD ::: RESPONDENT**

**BEFORE: HON. JUSTICE DR HENRY PETER ADONYO**

**RULING**

**1: Background:**

This is application brought by notice of motion under Order 36 rule 3 and Order 52 rules 1 and 3 of the Civil Procedure Rules for orders that the Applicant be granted unconditional leave to appear and defend High Court (Commercial Division) Civil Suit No. 91 of 2018; and for the costs of the application to be provided.

## **2: Grounds of the Application:**

The grounds of the application are that:

- a) The Applicant/ Defendant is not indebted to the Respondent in the sum claimed or at all
- b) The Applicant has never contracted the Respondent for the supply of or received white powder coated Aluminum sliding windows as alleged or at all
- c) The Applicant has a good and complete defence to the whole of the claim by the Respondent
- d) There are triable issues of law and fact that can only be determined after the Court hearing both parties to the suit
- e) It is in the interests of substantive justice.

## **3: Representation:**

The Applicant was represented by Mr. Henry Nyegenye of Arcadia Advocates while Mr. Suleiman Ajungule of Ajungule & Co. Advocates appeared for the Respondent.

## **4: Brief facts:**

The brief facts of the case are that the Applicant previously contracted the Respondent to supply and fix white powder coated aluminum sliding windows of tinted glass with louvers and mosquito net together with their necessary hardware and fittings at a Bukoto site for a consideration of United States Dollars Twenty

Seven Thousand Four Hundred Ninety Eight and Ten Cents only (USD 27.298.10).

The Respondent is said to have fulfilled its part of the transaction but that the Applicant has to date refused and/ or neglected to settle the said USD 27, 498.10. The Respondent then brought a summary suit against the Applicant claiming this sum.

In an affidavit in support of the application dated 16<sup>th</sup> May 2018, Mr. Hitesh Prajapati, the Director of the Applicant deposes that the Respondent has never written to the Applicant or even reconciled its statement of account with the Applicant. A Mr. Bakanga Onesimus, for the Respondent swore an affidavit in reply dated 18<sup>th</sup> June 2018. According to paragraph 3 and 4 of the affidavit confirming that the Applicant contracted the Respondent to supply and fix powder coated aluminum windows in tinted glass with louvers and mosquito nets at a consideration of USD 27,498.10 which the Respondent executed.

Mr. Bakanga says that despite repeated reminders the Applicant has ignored and/ or refused to settle the outstanding USD 27,498.10 and but states that the in March 2015 the Applicant committed to settle the outstanding sum before the 16<sup>th</sup> June 2015 but has to date not done so.

In the affidavit in rejoinder dated 2<sup>nd</sup> October 2019, Mr. Prajapati states that whereas the Applicant wrote a commitment to pay the Respondent in March 2015 the same did not relate to the sums claimed in the suit and that what was in contention had been extinguished when the parties conducted a reconciliation and found that all the money had been paid.

### **5: Submissions:**

Upon this matter coming up for hearing either party made written submissions which are on record.

Briefly, the Applicant's counsel submitted that this application this application should be granted on the basis that the application raises triable issues of fact or law *to wit* that the applicant was not indebted to the Respondent in the sum claimed as no evidence has been adduced in form of any orders delivery notes or acknowledgment of receipt of the impugned subject matter.

That the burden of proof in civil cases lies on the party that asserts while the other party can only called upon to controvert what has been alleged but that in this case the Respondent had not lead any evidence to prove that it delivered the said items which raises

triable issues of whether the Respondent ever supplied materials to the Defendant.

In addition to the above, counsel for the applicant submitted that even the amount claimed by the Respondent was disputable for as per Annexure 'B' to the affidavit in reply of the date of 18<sup>th</sup> March 2015 the amount which the Applicant committed to pay USD 24,700 exclusive of VAT which was outstanding yet the account statement attached to the plaint as Annexure 'A' reveals that by 10<sup>th</sup> June a sum of USD 31, 985 was due creating doubt as to indeed which amount was due to the Respondent.

Furthermore, the applicant through its counsel argued that another triable issue related to the fact that the Respondent charged exorbitant interest as from 30<sup>th</sup> September 2016 to 30<sup>th</sup> June 2017, amounting to USD 4,523 which was harsh and unconscionable.

On the other hand, the respondent through its counsel submitted that the applicant had not raised bonafide triable issues of fact or law to warrant the grant of unconditional leave to appear and defend the suit since its application was devoid of merit and was brought in bad faith and meant only to frustrate the court process.

That the attempt by the applicant to deny the existence of the contract between the disputing parties was clearly deceitful and fraudulent.

The respondent further denied ever charging exorbitant interest rates on the sums due stating that an interest rate of 1.85% per month was low and reasonable and in fact was never disputed by the Applicant in the first place concluding that an applicant could only contest an application for a summary judgment by way of providing concrete and good defence as was held in the case of ***Sembule Investments Ltd vs Uganda Baati Ltd Misc. Application No. 664 of 2009*** and ***Bunjo vs KCB Bank Uganda Ltd Misc. Application No. 174 of 2014.***

## **6: Decision:**

From the application with its supporting affidavit , the rebuttal thereto and the submissions presented before this court , I find that the triable issue raised for consideration and the determination of the matter before this court is whether the instant application raises triable issues of fact and law and whether the applicant has a plausible defence.

Order 36 rule 2 (i) of the Civil Procedure Rules provides that a summary plaint may be filed in all suits where-;

*Where the plaintiff seeks to only recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising-  
Upon a contract, expressed or implied...*

Under rules 3 and 4, an applicant and or defendant may upon receipt of service of an endorsed plaint and an affidavit appear to defend the suit only after obtaining leave from court to appear and defend the suit. This position was clarified in ***Bunjo vs KCB Bank Ltd Misc. Application No. 174 of 2014*** where the learned trial judge while considering the principles for the grant of leave to defend a suit court referred to the holding in ***Makula Interglobal Trade Agency vs Bank of Uganda [1985] HCB 65 at 66*** 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 bonafide triable issue of fact or law. When there is a reasonable ground of defence to the claim, the defendant is not entitled to summary judgment. 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 dispute which ought to be tried and the court shall not enter upon the trial of issues disclosed at this stage.*

Furthermore in the cases of ***Bunjo vs KCB Bank (cited supra)*** and ***Tamusange and Another vs Exim Bank Ltd Misc Application***

**No. 1213 of 2016** it was noted by court that the allegations made by an applicant must be seriously proved with the Court not granting any to leave appear and defend a clear case on the basis of mere allegations of fact or law. Moreover an applicant was required to present a defence which discloses triable issues contained in an attached intended written statement of defence to the application.

Relating the above to the instant matter, it can be seen from the Applicant's documents that indeed it has attached its intended written statement of defence to its application which reiterates what is contained in its affidavit in reply and its application.

The reading of all these documents show that the Applicant raises several defence by denying its being indebted to the Respondent in the sum claimed in addition to stating that it has ever contracted with the Respondent for the supply white powder coated aluminum windows for any of the respondent's sites in Bukoto as alleged by the Respondent. Furthermore the applicant denies ever writing to the respondent or even reconciled any statement of account with it.

The duty of this court is simple. It has to satisfy itself that triable issues have been raised by the applicant to warrant the grant of the orders sought and that the matter raised in the application are not trivial and raised to defeat the cause of justice.



In resolving this application therefore, I have had the occasion to study all the documents filed in support or against this application and I note that a letter written by the Applicant attached to the affidavit of one Bakanga Onesimus as Annexure B dated 18<sup>th</sup> March 2015 referenced *Re: Irrevocable Commitment to settle outstanding amount of USD 24,700/- (Ex. VAT), states in no uncertain terms as follows;*

*“ ...*

*First, we sincerely apologise for our failure to honour our financial commitments and/or obligation for the services provided by your company. The delay was due to reasons beyond our control.*

*We appreciate your patience and understanding and once again kindly request you to accept our below mentioned proposal. The said proposal signifies our willingness and commitment to settle your account at the earliest.*

*We propose and irrevocably commit ourselves to pay you full and final payments on 16<sup>th</sup> June 2015.*

*Further, in the event of default, we commit ourselves to pay interest @ 5% per month (compounded) on the reducing basis payable from 17<sup>th</sup> June 2015 till full and final payments which period should not exceed 2015. Thereafter, interest of 10% per month shall be applicable until the time of full and final payments.”*

The reading of this document indicate clearly that there is an admission of indebtedness by the party who wrote it.

A demand note (Annexure 'A' written by the respondent) dated 13<sup>th</sup> November 2017 shows that an outstanding debt of USD 27, 498.10 Enterprises Ltd was due and was sent to the Applicant. Also statement of accounts attached to the same letter shows that the Respondent alleges that it supplied and fixed aluminum doors, windows and curtain walling on various dates between 2013 and 2014 to the sites belong to the applicant with a rubber stamp impression though slightly faded, showing that the letter was received by the Applicant company on the same date with no protest at all.

This fact reinforces the fact of a claim as against the applicant including the issue of the interest charged and the total amount demanded before the suit filed with a letter dated 18<sup>th</sup> March 2015 from the Applicant in which is an offer to pay an interest of 10% per month on the outstanding amounts till payment in full further providing proof that indeed there was an agreement between the two parties before me.

I am, therefore, based on the various documents attached in support of this application by the two parties before me, satisfied that triable issues have been raised by the Applicant to warrant the grant of this application for there is indeed differences of opinion as to whether there existed any contract between the two parties and how the same played out it is implementation.

Subsequently considering the principles laid out in **Makula Interglobal Trade Agency vs Bank of Uganda [1985] HCB 65** deems it that the applicant ought to be given an opportunity to explain itself since it has raised concrete and triable issues and in order to avoid multiplicity of suits..

**7. Orders:**

- a) This application is allowed.
- b) The Applicant be granted unconditional leave to appear and defend High Court (Commercial Division) Civil Suit No. 91 of 2018.
- c) The Applicant to file and serve its written statement of defence within fifteen days from the date of this ruling.
- d) b. The costs of the application, I order that this application .with costs to be in the cause.

I do so order accordingly.

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**HON. JUSTICE DR. HENRY PETER ADONYO**

**JUDGE**

**20<sup>TH</sup> MARCH 2020**