**THE REPUBLIC OF UGANDA**

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

**(COMMERCIAL COURT DIVISION)**

**MISCELLENEOUS APPLICATION NO. 103 OF 2012**

**(*HCT-00-CC-NO.69 OF 2012*)**

**PETER BIBANGAMBA:::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::APLICANT**

**VERSUS**

**FULGENCE MUNGEREZA**

**(RECIEVER/MANAGER,**

**NILE MINING LTD-**

**IN RECEIVERSHIP::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::RESPONDENT**

**BEFORE HON. LADY JUSTICE HELLEN OBURA**

**RULING**

This is a ruling in an application brought under Order 36 rule 4 and Order 52 rules 1 & 3 of the Civil Procedure Rules (CPR) for orders that the applicant be granted unconditional leave to appear and defend the suit and the costs of this application be granted to the applicant.

The grounds of the application are stated in the notice of motion and the affidavit in support sworn by the applicant. The gist of it are; first, that the applicant has a good defence to the whole of the plaintiff’s claim which raise issues that need to be tried on the merits. Secondly, that the agreement relied upon is unenforceable in law for failure/lack of consideration. Thirdly, that he did not pay the initial installment of the purchase price because the respondent never availed him with the logbooks of the company equipment at the time of signing the agreement contrary to clause 5.3. Lastly, that there was no justification or basis for the claim of liquidated damages as the agreement terminated automatically immediately after execution.

An affidavit in reply and opposition to the application was sworn by the respondent. He deposed, inter-alia that the applicant was raising the issue of failure by the respondent to give him the logbooks at this stage yet he never complained about it earlier and in any case, copies of the logbooks were to be given after payment of the initial installment which the applicant failed to do.

Furthermore, that the claim for liquidated damages was justified because the applicant wasted a lot of receivership time by engaging the secured lenders and him in endless negotiation from March-August 2011 and convinced them of his seriousness when he agreed to pay US $ 150,000 as liquidated damages upon his breach of the agreement. Lastly, that the applicant does not have a defence to the suit.

At the hearing of this application, the applicant was represented by Mr. Steven Beyanga and the respondent by Ms. Ruth Sebatindira. Counsel for the applicant submitted that the liquidated damages clause in the agreement which gave rise to the suit is in contention as to whether it amounts to a penalty or not. He contended that the amount stated in that clause amounts to a penalty and the applicant is not liable to pay it. He argued that it is not reasonable compensation in the circumstances.

He relied on ***Dunlop Pneumatic Tyre Co. Ltd v New Garage & Motor Co. Ltd [1915] AC 79*** to buttress his argument that where certain amount is excessive/extravagant or unconscionable, it would amount to a penalty and not be enforceable. He argued, basing on that case, that for such an amount to be liquidated damages, it should be genuine and reasonable pre-estimate of any damages that would have arisen in case of breach.

On the issue of lack of consideration, counsel for the applicant referred to section 20 of the Contracts Act , 2010 which provides that an agreement without consideration is void unless it falls under the exceptions stated in that section. He submitted that clause 1.0 of the agreement specified that the consideration was payment of the purchase price. He argued that since there was no payment there was therefore no consideration thus making the agreement void and unenforceable.

On breach, counsel submitted that both parties breached the contract. He contended that clause 5.3 put an obligation on the vendor to avail copies of the logbooks to the purchaser upon signing the agreement but this was not done. He argued that payment of the initial contract sum and availing copies of the logbooks were to be contemporaneous, that is, take place at the same time upon signing the agreement.

In conclusion, counsel for the applicant submitted that the applicant had met the conditions for grant of application for leave to appear and defend the suit by showing that there are triable issues. He prayed that the application be granted and costs be awarded to the applicant.

Counsel for the respondent opposed the application. She submitted basing on the contents of the affidavit in reply that clause 9.1 of the agreement stated that if the buyer failed to pay the purchase price, he would pay liquidated damages of US$ 150,000. She relied on the observation of Lord Radcliffe in ***Bridge v Campbell Discount Co. Ltd [1962] All E.R 385 at 397*** to support her argument that *“unconscionable” must not be taken to be a panacea for adjusting any contract between competent persons when it shows a rough edge to one side or the other*.

It was also argued for the respondent that the applicant’s contention that there was no consideration could not apply because the applicant should have paid the initial payment as per the terms of the agreement. As for the issue on breach of the contract, counsel for the respondent referred to the completion events under clause 8 and argued that the event in clause 9.2 had not yet kicked in because the applicant had to first set the ball rolling by paying the first installment.

The law governing application for leave to appear and defend a summary suit is now settled. The applicant/defendant must show by affidavit or otherwise that there is a bona fide triable issue of fact or law. The applicant is not bound to show a good defence on the merits of the case but should satisfy court that there is an issue or question in dispute which the court ought to determine between the parties. This position of the law was stated in ***Maluku Interglobal Trade Agency Ltd v Bank of Uganda [1985] HCB 65*** and ***Kasule v Muhwezi [1992-1993] HCB 212***.

Order 36 rule 7 of the CPR provides that:

*“If it appears to the court that any defendant* ***has a good defence to*** *or ought to be permitted to appear and defend the suit, and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to appear and defend. And the plaintiff shall be entitled to issue a decree against the latter…”* (Emphasis added).

The rationale of summary procedure under Order 36 of the CPR was stated in the case of ***Zola v Ralli Brothers Ltd [1969] EA 691 at 694*** where the Court of Appeal of East Africa was considering the Kenya equivalent of that order. The court stated thus:

*“Order 35 is intended to enable a plaintiff with a liquidated claim, to which there is no good defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the defendant. If the Judge to which application is made considers that there is* ***any reasonable ground of defence*** *to the Claim the plaintiff is not entitled to Summary Judgment.”* (Emphasis added).

In the case of ***Kotecha v Mohammed [2002] 1EA 112*** it was 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 defence on merit*, or that a difficult point of 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.

This court is fortified by the decision in ***Corporate Insurance Co. Ltd v Nyali Beach Hotel Ltd [1995-1998] EA 7*** where the Court of Appeal of Kenya held that leave to defend will not be given merely because there are several allegations of fact or law made in the defendant’s affidavit. The allegations are investigated in order to decide whether leave should be given. As a result of the investigation even if a single defence is identified or found to be bona fide, unconditional leave should be granted.

In view of the above authorities, the applicant in this case should satisfy court that there is an issue or question in dispute which this court ought to determine between the parties. To that end, the applicant has contended that there are triable issues raised by this application which I understand to be; (1) whether clause 9.1 on liquidated damages is a penalty or not; (2) whether there was consideration; and (3) whether both parties breached the contract.

On the other hand it was contended for the respondent that this is a straight forward case where the applicant entered into an agreement and undertook to pay upon signing US $ 500,000 which he failed to pay. Furthermore that clause 9.1 automatically applies since there was breach of the contract by the applicant. The issues of consideration and breach of contract by the respondent were said not arise for reasons already alluded to above.

I have carefully considered the arguments of both parties and looked at the affidavits and the authorities relied upon. I have also looked at the applicant’s intended written statement of defence. On the proposed triable issue on consideration, I am not at all convinced that there was no consideration. There was indeed consideration at the time of executing the agreement. The term consideration is defined under section 2 of the Contract Act, 2010 as; “*consideration means a right, interest, profit or benefit accruing to one party or forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other party*”.

By a sale agreement entered into by the respondent and the applicant on 27th August 2011, the respondent undertook to sell to the applicant the assets that were listed in schedules I & II of the agreement and the applicant undertook to pay the respondent a sum of US$ 1,500,000 in three installments. The agreed purchase price was the consideration for the assets as stated in clause 1.0.

The applicant’s subsequent failure to pay the purchase price which indeed amounts to a breach of contract, in my considered view, cannot negate the consideration that was already agreed upon at the time of executing the contract. I believe if this argument was to be upheld by this court, it would create a very bad precedent where parties to an agreement would deliberately breach its terms and plead lack of consideration. For that reason, I find that the allegation of lack of consideration has no basis and cannot constitute a triable issue in the main suit.

Turning to the proposed triable issue on breach of contract by both parties, I find that in view of clause 5.3, there would be need to try this issue on its merit. This is because as stated in most of the above authorities, the applicant is not bound to show a good defence on the merits of the case but should satisfy court that there is an issue or question in dispute which the court ought to determine between the parties.

Finally on the issue of liquidated damages, I find that the contention of both parties on whether what is stipulated in clause 9.1 is liquidated damages or a penalty, raise an issue that cannot be determined in this application as the respondent appears to suggest. I believe this issue can only be properly investigated in a full hearing where evidence will be led and subjected to cross-examination.

I do not agree with counsel for the respondent that this is a straight forward case where judgment should just be entered for the respondent based on clause 9.1. That would only be the case if the applicant did not contend that it is a penalty. I am of the view that the moment the applicant challenged that clause as being a penalty; this court needs to hear and determine it on its merit.

This court is fortified to come to this conclusion by one of the propositions which Lord Dunedin in ***Dunlop Pneumatic Tyre Co. Ltd*** (supra) stated would rank as authoritative in cases dealing with liquidated damages clause like this one. He stated that:-

*”Though the parties to a contract who use the words “penalty” or “liquidated damages” may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages.”*

In ***Robophone Facilities, Ltd v Blank [1966] 1 W.L.R 1428***, Diplock L.J stated that;

“*The onus of showing that such a stipulation is a “penalty clause” lies on the party who is sued on it. The terms of the clause may themselves be sufficient to give rise to the inference that it is not a genuine estimate of damages likely to be suffered but is a penalty…….but the plaintiff may be able to show that, owing to special circumstances outside “the ordinary course of things”, a breach in those circumstances would be liable to cause him a greater loss of which the stipulated sum does represent a genuine estimate*”.

Lord Dunedin in ***Dunlop Pneumatic Tyre Co. Ltd*** (supra) suggested some four tests that would assist in the task of construction of the terms and inherent circumstances of each particular contract. I will not state those tests in this ruling. However, I believe that in order for the parties to this application to be able to prove each of their allegations as suggested above and for this court to apply those tests, there would be need for a full trial of this issue in the main suit.

In the result, I find that the applicant has raised some triable issues that merit grant of this application. Consequently, he is entitled to unconditional leave to appear and defend the suit and it is accordingly granted. The applicant **shall file a written statement of defence within seven days** from the date of this ruling and costs of this application shall be in the cause.

I so order.

Dated this 28th day of August 2012.

Hellen Obura

**JUDGE**

Ruing delivered in chambers at 3.00 pm in the presence of Mr. Steven Beyanga for the applicant who was also present and Mr. Martin Kakuru who was holding brief for Ms. Ruth Sebatindira for the respondent.

**JUDGE**

28/08/2012