**THE REPUBLIC OF UGANDA,**

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

**(COMMERCIAL DIVISION)**

**MISCELLANEOUS APPLICATION NO 1152 OF 2014**

**(ARISING FROM HCCS NO 870 OF 2014)**

**MUGOYA MUWAZI}...........................................................................APPLICANT**

**VS**

**BUYINZA JOHN}..............................................................................RESPONDENT**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**RULING**

The Applicant filed this application under the provisions of Order 6 rule 4 and Order 52 rules 1 and 3 of the Civil Procedure Rules as well as section 98 of the Civil Procedure Act for unconditional leave to appear and defend HCCS No 870 of 2014 and for costs of the application to be provided for.

The grounds in the application are that the Applicant was served with summons in a summary suit on plaint on Friday, 19 December 2014. Secondly he alleges that there is no cause of action maintainable by the Respondent/Plaintiff against the Applicant/Defendant. Thirdly cheque No. 0005624 and account number 0102060217000 does not belong to the Applicant/Defendant and was not issued by him and the Applicant/Defendant is wrongly sued. Fourthly the sum of Uganda shillings 107,000,000/= upon which this suit is founded has never been advanced to the Applicant/Defendant and therefore it is not due and owing and recoverable under summary procedure or any other law.

Fifthly the terms of the agreement upon which the summary suit is brought are mere allegations since they are not written anywhere and therefore unenforceable in law. Sixthly the suit is premature as the Applicant has never been served with a written demand or notice of intention to sue. Furthermore the Applicant asserts that there are triable issues upon which this honourable court may grant unconditional leave to the Applicant to appear and defend the suit. Lastly that it is in the interest of justice and equity that the application is allowed and the suit heard on the merits.

The application is supported by the affidavit of the Applicant Mr Mugoya Mawazi who deposes that he was served with summons in a summary suit on 19 December 2014.

He deposes that around the end of July 2014 the Donee Company Ltd tried to obtain financial assistance from the Respondent by way of a provision of various construction materials including windows and doors which the Respondent promised to provide within three weeks after his consignments from China arrived. As the managing director of the company, he negotiated terms of the transaction. In consideration for the promise and on behalf of the said company he signed one post-dated cheque number 00562 for Uganda shillings 107,000,000/= payable on 5 August 2014. The cheque was supposed to be supported by the invoices and delivery notes which were all supposed to be signed on the date of delivery of the goods. The Respondent never delivered the goods as promised because he failed to obtain the same from his suppliers.

The Respondent retained the cheques with the promise that he will deliver the goods at any time when he obtains the same but he never delivered them at all. The company had no obligation whatsoever to make funds available only to confirm clearance of the cheque because the goods were never delivered by the Respondent and therefore the money was never payable. The presentation of the cheque for payment by the Respondent well knowing that there is no debt payable was an act of deceit, dishonesty and theft.

Furthermore on the ground of advice of his lawyers the Applicant deposes that the cheque belongs to a separate entity which is different from the Applicant. Secondly there is no evidence of a written contract or loan agreement and its details were not presented to court. Thirdly there is no evidence of an offer from the Respondent and acceptance from the Applicant and consideration or receipt of funds by the Applicant. Fourthly the terms of the contract and how it was breached by the Applicant have not been proved. Fifthly there are no witnesses presented to court to prove the allegations and existence of the contract. Lastly there is no intention to create a legally binding relationship.

The deponent further deposes that he had never received any demand, written or otherwise from the Respondent demanding for payment of the money as alleged in the plaint. That it is an injustice to make him pay such a huge amount of money which he had never borrowed as claimed by the Respondent.

In the premises the Applicant prays that he is granted unconditional leave to appear and defend the main suit so that the matter can be heard on merit. Secondly that it is in the interest of justice and equity that the court is pleased to grant the application and issue the orders sought in the application.

When the application came for hearing on 11 March 2015, the Applicant was represented by Counsel Mpima Jamil Senoga but the Respondent was not represented.

The application of the Applicant was filed on 31 December 2014 and issued by the registrar on 30 January 2015. It was fixed for hearing on 11 March 2013 at 11:50 AM. According to the affidavit of service of Kawagga Norman on 30 January 2015 he obtained a notice of motion for service on Messrs Ayigihugu and Company Advocates. He proceeded to the offices of the lawyers and the notice of motion was received according to the acknowledgement of service which was attached. The acknowledgement has the stamp of Messrs Ayigihugu and Company Advocates.

The application proceeded for hearing ex parte under the provisions of Order 9 rule 20 of the Civil Procedure Rules.

In the short address of the Applicant’s Counsel, the Applicant’s Counsel submitted that the grounds of the application are that the cheque issued does not belong to the Applicant and was not issued by him but a different entity. Secondly the terms of the alleged agreement are not written anywhere and are mere allegations which are not enforceable under the law. Thirdly the sum claimed had never been advanced to the Applicant. Fourthly the Applicant has never been served with a written demand notice of intention to sue. Finally the Applicants Counsel adopted the grounds in the notice of motion as well as the affidavit in support of the application which have been reproduced above. He proposed that the issue is disclosed in the application are as follows:

1. Whether the Applicant is the right party to this suit on the basis of the cheque?
2. Whether the amount claimed was advanced to the Applicant? Counsel submitted that evidence is necessary to establish that.
3. Whether the oral agreement claimed by the Respondent is enforceable under the law?

He prayed that the Applicant’s application for unconditional leave is granted.

I have duly considered the Applicant’s application together with the applicable law and the submissions of Counsel. The application was not defended. Order 36 rule 2 of the Civil Procedure Rules provides that where a Plaintiff seeks only to recover a debt or liquidated demand in money payable by the Defendant, with or without interest arising upon a contract, express or implied, he or she may at the option of the Plaintiff, institute a suit by presenting a plaint in the prescribed form accompanied by an affidavit made by the Plaintiff or by any other person who can swear positively to the facts, verifying the cause of action, the amount claimed and stating that in his or her belief that there is no defence to the suit.

In the case of **Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (In Liquidation) [1989] 3 All ER 74** it was held by Parker LJ at page 77 that the purpose of a summary suit is to enable the Plaintiff obtain a quick judgement where there is plainly no defence to the claim. On that basis, it has to be apparent on the face of the pleadings of the Plaintiff that the Defendant has no defence to the suit.

On the other hand all that the Applicant needs to prove is that there are serious questions to be tried or a plausible defence to the action. According to **Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22nd edition** at pages 75 and 76 whenever a genuine defence, either in fact or law, sufficiently appears, the Defendant is entitled to unconditional leave to defend. **Odgers** (supra) notes that “the Defendant is not bound to show a good defence on the merits.” Secondly that the court: “should be satisfied that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial.” The defence should be made in good faith. The defence must be stated with sufficient particularity, as appear to be genuine. These principles have been applied variously in several Ugandan cases namely in **Maluku Interglobal Trade Agencies Ltd versus Bank of Uganda [1985] HCB 65; Tororo District Administration versus Andalalapo Industries HCM 8/2/1997** and **Souza Figuerido & Co Ltd versus Moorings Hotel Co Ltd (1959) EA 426** **.**

A perusal of the plaint discloses that the Plaintiff’s claim against the Applicant/Defendant is for a liquidated sum of Uganda shillings 107,000,000/=. In paragraph 5 it is alleged that the Applicant issued to the Plaintiff a cheque of his company Mugobi Traders Ltd of Messieurs Standard Chartered Bank. The Plaintiff banked the cheque as agreed but it was returned unpaid with the remark R/D 06/08/14. The Plaintiff demanded payment of the money according to a copy of the demand letter annexure "B".

A perusal of the cheque shows that it was issued by Mugobi Traders Ltd for the sum of Uganda shillings 107,000,000/=. Of course a cheque of Uganda shillings 107,000,000/= cannot be honoured since the Bank of Uganda has limited amounts on a cheque to Uganda shillings 20,000,000/= at a time. Payments beyond Uganda shillings 20,000,000/= are supposed to be effected electronically. That notwithstanding the Applicant is not the company which issued the cheque and a company is separate from its members/directors. The plaint does not aver the capacity in which the cheque was issued.

There is therefore a triable issue as to whether the Applicant is a proper party to the summary suit.

In the affidavit in support of the summary suit, the Plaintiff merely avers that the claim is correctly set out in the plaint. That the Defendant is truly indebted to the plaintiff in the sum of Uganda shillings 107,000,000/=. However the terms of the indebtedness have not been particularised. In the plaint it is alleged that the Plaintiff advanced a friendly interest-free loan of Uganda shillings 107,000,000/= to the Defendant and the Defendant undertook to pay the whole sum on 5 August 2014 and issued a cheque of his company. However the terms of the friendly loan have not been specified. On the other hand the Applicant advances different facts for the money.

The Applicant has argued in the affidavit in support of the application that he negotiated terms of the transaction at the end of July 2014. The Applicant deposed that the company he negotiated for tried to obtain financial assistance from the Respondent by way of provision of various construction materials including windows and doors which the Respondent promised to provide within a week’s time after he received a consignment from China. The consignment never arrived and the goods worth the amount of money were never supplied.

There is therefore a triable issue as to whether the amount of money claimed by the Applicant in the summary suit is due and owing.

In the premises the Plaintiff/Respondent is not entitled to summary judgement. The Defendant/Applicant has plausible defences to the entire claim of the Respondent.

The Applicant is granted unconditional leave to defend the action with costs to be in the cause. The Applicants shall file a defence to the Respondent’s action within 14 days from the date of this ruling.

The costs of this application shall abide the outcome of the main suit.

Ruling delivered in court on 27th of March 2015

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Mpiima Jamil Counsel for the Applicant

Respondent not represented

Both Parties absent

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

**27th of March 2015**