THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 1820 OF 2021
(ARISING FROM CIVIL SUIT NO. 0866 OF 2021)

OLET CHARLES DICKENS :: APPLICANT

VERSUS

CENTENARY RURAL DEVELOPMENT BANK LIMITED :::::::::::::::::: RESPONDENT

(Before: Hon. Justice Patricia Mutesi)

RULING

Background

The respondent filed Civil Suit No. 866 of 2021 ('the main suit') in this Court by way of summary procedure seeking recovery of UGX 171,419,138/=, interest thereon and costs of the suit from the applicant. The dispute arose from a salary loan which the applicant took out while he was still working in the respondent but which he had not fully repaid by the time his employment was terminated.

The Application

This application was brought by notice of motion under Section 98 of the Civil Procedure Act Cap 71, Order 36 rules 1, 2 and 3 and Order 52 rules 1, 2 and 3 of the Civil Procedure Rules S.I. 71-1 seeking unconditional leave to appear and defend the main suit along with costs of the application.

The application is supported by the affidavit of the applicant, who stated that in 2016, he applied to the respondent for a salary loan of UGX 160,000,000. The loan was subsequently advanced and disbursed upon the security of a legal mortgage over the applicant's land. He claimed that for the following 6 years, he diligently paid the loan installments without any default but that he encountered financial challenges after he lost his job in the respondent on 30th September 2020. The applicant further asserted that he applied for a grace period but that the same was

not granted. He also stated that he was able to pay UGX 10,000,000 after he lost the job.

The respondent opposed the application through an affidavit in reply sworn by Ronald Sekidde, its Legal Manager, Litigation. He recounted the history of the applicant's loan and clarified that the loan was advanced and disbursed in 2018 and not in 2016. He also clarified that the facility letter anticipated that the applicant could lose his job and still continue repaying the loan. He stated that when the applicant was terminated from work, he asked for a grace period of 2 months which was granted with effect from December 2020. Mr. Sekidde further told the Court that the respondent has made attempts to enforce its rights as an unpaid mortgagee but that it has faced resistance from the applicant, which is what led to the filing of the main suit.

The applicant filed an affidavit in rejoinder in which he conceded that the respondent gave him a grace period but claimed that the same was dishonoured by the respondent who started demanding for payment before the period ended. He stated that the respondent did not serve the requisite notices under the mortgage laws to enforce its rights and that he has never resisted the respondent's agents. He also challenged the respondent's decision to pursue the foreclosure while at the same time prosecuting the main suit.

Representation

At the hearing of the application, the applicant was self-represented while the respondent was represented by Mr. Brian Kajubi and Mr. Daniel Muyambi from MMAKS Advocates. I have carefully considered all the materials on record, the submissions of the parties and the laws and authorities cited.

Issue arising

1. Whether there is a bonafide defence to, or any triable issues in, the main suit.

Determination

1. Whether there is a bonafide defence to, or any triable issues in, the main suit.

Order 36 rules 3 and 4 of the Civil Procedure Rules S.I. 71-1 allow a defendant in a summary suit to apply for leave to appear and defend the suit. In **Maluku Integlobal Trade Agency v Bank of Uganda [1985] HCB 65,** 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. Where there is a reasonable ground of defence to the claim, the plaintiff 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 is 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 …"* Emphasis mine.

Additionally, in **Agony Swaibu v Swalesco Motor Spare and Decoration Dealers, HCCA No. 48 of 2014**, this Court had this to say:

> *"… Despite the fact that at the hearing of an application for unconditional leave to appear and defend the Court is not required to determine the merits of the proposed defence, it is incumbent upon the applicant to present a plausible defence. **Leave is declined where the court is of the opinion that the grant of leave would merely enable the applicant to prolong the litigation by raising untenable and frivolous defences. The test is whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the applicant are established, there would be a good or even a plausible defence on those facts** …"* Emphasis mine.

The applicant raised a number of concerns which he considers to be triable issues in the main suit. First, he contended that despite commencing the process of foreclosing on the mortgaged property to recover the outstanding loan balance, the respondent also filed the main suit to recover the same money. The Court is unconvinced that this is a real triable issue in the main suit.

The law allows an unpaid mortgagee, like the respondent, several options to recover a loan debt. Although the Mortgage Act, 2012 creates self-help remedies for an unpaid mortgage which can be pursued without recourse to court, there is nothing in the law that forbids such a mortgagee from recovering the debt through court action. In any case, a mortgagee who pursues one option and is unable to

recover the full loan debt can always pursue another option to recover the balance of that debt. What would be unjust is for a mortgagee to pursue an option after successfully recovering all his or her money through another option.

In this case, although the respondent had commenced the foreclosure process in early to mid-2021, it appears that that process was abandoned in favour of court action when the main suit which was filed in December 2021. It is also undisputed that the foreclosure process was never completed and that the debt is still outstanding. I do not find anything wrong with the respondent pursuing recovery through court action as long as it is yet to recover the full loan debt.

Second, the applicant contested the accuracy of the claimed outstanding loan balance. He submitted that he took out the loan in 2016 and that he had been faithfully repaying the same until 2020 when he lost his job in the respondent. He submitted that UGX 171419,138/= was "too much" yet he had been servicing the loan for 6 years. He also pointed out that there were some inconsistencies in the outstanding balances claimed by the respondent over time.

I am unable to find any merit in the above claim. By its very nature, a loan debt keeps increasing as long as it is not paid in time. It is normal, and even expected, that the outstanding loan balance increases over time upon default. In this case, the parties even expressly agreed to the accrual of daily default interest once any due installment, or any part thereof, remains unpaid. It should, therefore, not shock the applicant that since he became inconsistent in repaying his loan after leaving the respondent, the loan debt has kept increasing.

I note that, as correctly clarified by the respondent, the impugned loan was taken out on 29th January 2018 and not sometime in 2016 as the appellant claims. This implies that before his exit from the respondent, the applicant had actually not serviced the loan for 6 years as he says. Unfortunately, the applicant's affidavit in support and affidavit in rejoinder are laced with many similar falsehoods and contradictions. He claimed that the loan was disbursed in 2016 but this could not have been possible because the loan offer letter (adduced by the respondent adduced as Annexure A to the affidavit in reply) was clearly signed by both parties

on 29th January 2018. It is not plausible that a bank would disburse a loan to a borrower 2 years before it signs the loan agreement with him or her.

Furthermore whereas the applicant had claimed that he was not granted a grace period to repay the loan after his exit from the respondent, he admitted in his affidavit in rejoinder that he got the grace period and claimed that he paid UGX 7,000,000 in further repayment of the loan before the end of that grace period. The grace period was for the months of December 2020 and January 2021. However, the applicant's loan account statement (adduced as Annexure B to the affidavit in reply) clearly shows that he made this payment at the end of February 2021. Meanwhile in his affidavit in rejoinder, the applicant claimed to have repaid UGX 7,000,000 before the lapse of the grace period but in his supporting affidavit and draft written statement of defence, he had stated that he paid UGX 10,000,000 before that period lapsed.

It is settled law that such factual contradictions in affidavits cannot be ignored, however minor, since a sworn affidavit is not a document to be treated lightly. If an affidavit contains an obvious falsehood, then it all mutually becomes suspect. See **Sirasi Bitaitana & 4 Ors v Emmanuel Kananura [1977] HCB 37 at 38**. Due to the said falsehoods and contradictions, the Court has had a real difficulty in believing the contents of the applicant's affidavits.

As far as the claimed inconsistencies in the outstanding balance are concerned, I am in agreement with the respondent that the outstanding amount is so clear that there is no need for a trial for this Court to receive more evidence in proof of how much the appellant owes the respondent. The respondent adduced the relevant extract from applicant's loan account statement covering the period from 2nd February 2018 to 26th November 2021 as Annexure B to its affidavit in reply. This statement shows all the debits and credits on the loan account from the time the first tranche of the loan was disbursed until shortly before the main suit was filed. It shows how the outstanding balances decreased and increased over time. In my view, this system-generated statement conclusively proves that, taking into account all the repayments made by the applicant, the loan balance had accumulated to UGX 171,419,138 by 26th November 2021.

Third, the applicant took issue with the respondent's alleged failure to serve him with a notice of default and a notice to sell as required by the law governing mortgages in Uganda. Although both parties went to great lengths to submit on this issue, I find the same to be misplaced. The main suit is not about whether the respondent can exercise his rights as an unpaid mortgagee over the mortgaged property. It is not about whether the respondent has, so far, exercised its rights to foreclose on the mortgaged property in the right way. The main suit is simply and plainly about whether or not the applicant is indebted to the respondent. As such, whether or not all the due notices preceding foreclosure were served is inconsequential and irrelevant to the issues in the main suit.

I am convinced that the applicant simply wants to prolong the litigation process in the main suit but with no plausible defence thereto. The facility letter expressly anticipated that the applicant would continue to service the loan if and when he lost his job. The applicant agreed to the terms of that facility letter and signed. Although the loan term was 20 years, he serviced it for the better part of 4 years and lost his job. Upon his exit, he wrote to the respondent on 5th November 2020 committing himself to continue servicing the loan as long as the respondent allowed him a grace period of only 2 months to get his wine business on track. The grace period was, shortly thereafter, approved. After the grace period lapsed, the applicant continued to default and the loan was recalled. The applicant has not proved, or even suggested, that he made any payment after February 2021.

It is trite law that in salary loans, salary is only proof of creditworthiness. While loss of employment certainly makes repayment of a salary loan onerous, it does not render that repayment impossible so as to frustrate the loan agreement. See **Standard Chartered Bank (U) Ltd v Bob Ssekamatte Nsereko, HCCS No. 0873 of 2020.** The applicant lost his job in the respondent but this did not extinguish his obligation to fully repay the loan. I am unable to find any merit in his application.

Consequently, this application must fail and, in accordance with Order 36 rule 5 of the Civil Procedure Rules S.I. 71-1, judgment shall be entered in favour of the respondent in the main suit. Unfortunately, the reasons for which the applicant left the respondent's employment were not explained and it is not clear if the applicant

could benefit from the insurance cover for his loan. I am however, mindful of the hardship and pressure on income and resources that has been occasioned by the COVID-19 pandemic on individuals, like the applicant who was a self-represented litigant before me, and on the general economy. For this reason, I award will award the Respondent only one-third of the taxed costs of the application and of the main suit. I make the following orders:

i. This application is hereby dismissed.

ii. Judgment is hereby entered in favour of the respondent against the applicant in **Civil Suit No. 0866 of 2021**.

iii. The applicant shall pay the loan balance of **UGX 171,419,138/=** to the respondent.

iv. The applicant shall pay interest on the amount in (iii) above at the contractually-agreed rate of 8% per annum from 26th November 2021 when the applicant's loan account statement that was adduced in evidence was printed until payment in full.

v. The applicant shall pay one-third of the taxed costs of this application and one-third of the taxed costs of the main suit to the respondent.

Patricia Mutesi

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Patricia Mutesi

JUDGE

(31/01/2024)