

1. RAHBOT CHICK (U) LIMITED
2. BELAY TEAME ASFAHA ABEL APPLICANTS

STANBIC BANK UGANDA LIMITED ::::::::::::::::::::::::::::::: RESPONDENT

RULING

The respondent filed Civil Suit No. 0422 of 2023 (“the summary suit”) seeking to recover the liquidated sum of UGX 151,289,018/= from the applicants and a one Wolderfuael Ghide Ghabreyesus (“the 3rd defendant”).

This application was then filed by way of a Notice of Motion under **Order 36 rules 4 & 5** and **Order 52 rule 1** of the **Civil Procedure Rules, S.I. 71-1** seeking unconditional leave to appear and defend the summary suit. It is supported by the affidavit of the 2nd applicant who is also the 1st applicant's managing director.

Briefly, the 2nd applicant stated that the 1st applicant carries on poultry business in Kampala. On 31st December 2021, the 1st applicant entered into a contract with Ugachick Poultry Breeders Ltd (“Ugachick”) wherein the latter would supply the 1st applicant with day-old chicks and feeds. The 1st applicant would then grow the chicks and sell them back to Ugachick. Ugachick was to make payments to the 1st applicant under the contract through the latter’s account in the respondent.

The 2nd applicant further stated that due to continued payment delays, Ugachick advised that where such delays occur, the 1st applicant should get credit from the respondent using the contract as security. The respondent accepted this plan on

the understanding that when Ugachick deposits payments into the 1st applicant's account, the respondent would deduct the credit as priority. That subsequently on 27th January 2022, the respondent disbursed a credit facility of UGX 100,000,000 to the 1st applicant which the latter failed to repay due to Ugachick's failure to make payments under the contract into the account.

The respondent opposed the application through an affidavit in reply sworn by Mr. Norris Mutahunga, its Officer Legal, Rehabilitation and Recoveries. He testified that on 1st December 2021 the 1st applicant applied for and was granted a credit facility by the respondent to enable it cover its cash flow shortages in its supplies to Biyinzika Poultry International Limited. On 17th January 2022 the facility was varied by mutual consent of the applicants, the 3rd defendant and the respondent, to include Ugachick as one of the targeted counterparties. He confirmed that the applicants used the facility to trade with Ugachick. Mr. Mutahunga also pointed out that the applicants did not deny the indebtedness claimed in the summary suit. He revealed that they even made some repayment of the loan to the tune of UGX 10,000,000 on 9th November 2023 after the filing of this application. He concluded that this application has no good faith basis and that it is only intended to frustrate and delay the respondent's recovery.

Issue arising

Whether there is a bonafide defence to, or any triable issue arising in the summary suit.

Representation and hearing

At the hearing of this application, the applicants were represented by Mr. Marvin Mvano from M/s Tumusiime Irumba & Co. Advocates while the respondent was represented by Mr. Pius Kitamirike from M/s S&L Advocates. I have considered all the materials on record, the submissions of the counsel and the laws and authorities they cited.

Determination

Whether there is a bonafide defence to, or any triable issue arising in the summary 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.

In any application of this nature, it is incumbent upon the applicant to present a plausible defence. Leave will be denied 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. (See **Agony Swaibu v Swalesco Motor Spare and Decoration Dealers, HCCA No. 48 of 2014**)

After fully considering this application, my impression is that the applicants do not have a bonafide defence to the main suit. There is also no triable issue arising in the main suit. The true sequence of the relevant events leading up to the dispute in the summary suit, as gathered from the Court record, is that on 1st December 2021, the respondent offered a short term loan facility of UGX 100,00,000 to the 1st applicant to support the latter’s supplies to Biyinzika Poultry International Limited. The facility was repayable as a bullet payment with interest thereon at the rate of 21% per annum within 45 days after disbursement. The facility was secured by personal guarantees of the 2nd applicant and the 3rd defendant (also a director in the 1st applicant). On 17th January 2022, the 1st December 2021 facility letter was varied to, among other things, include Ugachick as one of the targeted counterparties. The applicants are now contending that the 3rd defendant’s signature on the variation letter was forged. On 27th January 2022, the respondent disbursed the facility to the 1st applicant who defaulted on repayment.

There is no dispute as to the amount claimed by the respondent in the summary suit. The applicants' main contention is that the respondent cannot recover the loan balance since Ugachick has not yet paid the money it owes to the 1st applicant. However, it is evident that Ugachick was not privy to the credit facility agreement and the applicants have not referred this Court to any provision of the facility letter which conditioned the repayment of the loan on Ugachick's payments to the 1st applicant. In my view, the 1st applicant is legally bound to repay the facility, and the 2nd applicant and the 3rd defendant are also bound to honour their guarantees, irrespective of whether Ugachick pays the 1st applicant or not.

For these reasons, I am unable to find any merit to the applicants' argument that they cannot successfully explain their default in loan repayment in the absence of Ugachick. The applicants did not refer me to any provision of their contract with Ugachick which entitles them to indemnity from Ugachick for any loans they take out to work that contract. Since the performance of the obligations in the credit facility agreement is not legally contingent upon the performance of the obligations in the 1st applicant's contract with Ugachick, Ugachick's presence before this Court in this dispute which relates to breach of the facility agreement is not necessary. I agree with counsel for the respondent that, in these circumstances, it would defeat the interests of commercial justice if the respondent is required to wait for the 1st applicant's debtors to pay up before the loan sum can be recovered.

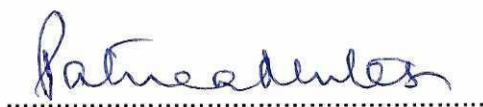
The applicants' other argument that the 3rd defendant's signature on the variation letter was forged appears to me to be a disingenuous afterthought. This letter was duly countersigned by the 2nd applicant who, as a managing director, also had the power to bind the 1st applicant. The applicants did not prove the date when they learnt about the alleged forgery. This Court believes that they should have raised this issue, if it had any merit, before or soon after the disbursement. Instead they kept quiet and utilized the facility without duly repaying the same.

In any case, the main effects of the variation were the inclusion of Ugachick as one of the entities with which the 1st applicant could trade using the facility, the assignment of the 1st applicant's proceeds from its contract with Ugachick to the respondent, and the consensus that all those proceeds would be exclusively paid

through the 1st applicant's account in the respondent. The variation letter did not condition the repayment of the loan on Ugachick's payments to the 1st applicant. This implies that granting the applicants leave to appear and defend the summary suit just so that they can prove that the 3rd defendant did not authorise the variation would be inconsequential since it would not change the fact that the 1st applicant's duty to repay the loan is not contingent on Ugachick's payments.

This application must fail because it is a mere desperate scheme crafted by the applicants to frustrate and, or delay the respondent's bonafide recovery by unnecessarily prolonging the litigation in the summary suit. Consequently, I make the following orders:

- i. This application is hereby dismissed.
- ii. In accordance with Order 36 rule 5 of the Civil Procedure Rules S.I. 71-1, a summary judgment is hereby entered in favour of the respondent in **Civil Suit No. 0422 of 2023**.
- iii. The applicants and Wolderfuael Ghide Ghabreyesus are jointly and severally liable to pay the outstanding loan balance of UGX 151,289,018/= to the respondent, along with interest thereon at the contractually-agreed rate of 21% per annum from 31st March 2023 when the said balance was last tabulated by the respondent, until full payment.
- iv. Costs of this application and those of the summary suit are awarded to the respondent.



Patricia Mutesi

JUDGE

(27/02/2024)