

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

HCT-00-CC-MA-0125 OF 2005
(Arising from HCT-00-CC-CS-1007-2004)

- 1. UGANDA MICRO ENTREPRENEURS]**
- ASSOCIATION LIMITED]**
- 2. JENINAH MARY NTABGOBA]**
- 3. KAYONGO NKAJJA GODFREY]**

:.....

APPLICANT/DEFENDANTS

VERSUS

THE MICRO FINANCE SUPPORT
CENTRE LTD :.....
RESPONDENT/PLAINTIFF

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU
BAMWINE

R U L I N G:

This is an application by Notice of Motion under 0.33 r 3 (sic) of the Civil Procedure Rules. It is for orders that the Applicants be granted unconditional leave to appear and defend HCCS No. 1007/2004 and that costs of the application be provided for.

The application is based on the affidavits of Mr. Kayongo Nkajja Godfrey and Mrs Jeninah Mary Ntabgoba. Briefly, the two deponents state:

- a. that 1st Defendant is not indebted to the Respondent as alleged.
- b. that the 2nd and 3rd Applicants/Defendants are not indebted to the Plaintiff in any respect whatsoever.
- c. that in respect of the agreement between the Plaintiff and the 1st Defendant, the outstanding amount is not Ug. Shs.19,423,853- as alleged.
- d. that in the premises, it is fair just and equitable that the orders sought be granted.

One Thomas More Katutsi, Credit Supervisor of the Plaintiff/Respondent swore an affidavit in reply.

Representation:

Mr. Wambuga for the Applicant.

Mr. Karugire for the Respondent.

The case for the Plaintiff in the main suit is that three loans totaling Ug. Shs.35,000,000, Ug. Shs.170,000,000- and Ug. Shs.52,600,000- were advanced to UGANDA MIRCO ENTREPRENEURS ASSOCIATION LTD, UMEA. That the 2nd and 3rd Defendants personally guaranteed the repayment of the loan of Ug. Shs.35,000,000-. That as at 30/11/2004, the total amount due on

the three loans respectively was Ug. Shs.19,423,853-, Ug. Shs.194,195,404- and Ug. Shs.64,106,257-. It is contended that the Defendants have no defence to the suit. Hence the suit under Summary Procedure as opposed to an ordinary suit.

Both counsel made passionate address to Court, for and against the application. Mr. Wambuga did contend, for instance, that Mr. Kayongo and Mrs Ntabgoba did not execute personal guarantees in favour of the Respondent. That it was intended that they do so as Directors of the company but actually did so in other capacities Kayongo as President and Mrs Ntabgoba as Treasurer. That even then, the company had six Directors and yet only two have been sued. It is contended by Mr. Wambuga that the issue of personal guarantees is a triable one.

It is further argued by counsel that upon making the last payment, according to the affidavit of Kayongo, the outstanding amount stood at Ug. Shs.13,611,111- and not Ug.19,423,853- as claimed by the Respondents.

As regards the amount loaned to the 1st Defendant, as per para 6 (j) to (l) of the plaint, it is argued by the Applicants that the money was paid to the 1st Defendant with specific instructions to pay it to selected individuals. The instructions are said to have emanated from State House, implying that the Applicants did not have any free hand in the disbursement of those funds. By implication, the Defendants cannot be held liable for the defaults of such

individuals since they, the Defendants, did not assess their potential to pay it back, the assessment having been done by a third party. If I have understood the Applicant's argument on this point, it is that they acted as a conduit pipe for the funds, to people whose potential to pay it back was assessed by a party other than the Defendants. In support of this, they have attached a letter from the Office of the President undertaking to pay part of the money advanced to the officers stated therein.

Against the above arguments, it is contended by Mr. Karugire that the 2nd and 3rd Applicants did guarantee their individual responsibility to repay the money and must therefore pay. According to him, the Plaintiff chose to sue those directors who signed the agreement. As such, their choice of Defendants should not be questioned.

As to who the beneficiaries of the money were, it is counsel's argument that the GOU did not and could not have dictated to the Defendants as to who should be given what. In effect, the letter said to originate from the office of the President is denied.

The arguments for and against the application are detailed in the proceedings of the day. I need not repeat them here. Suffice it to say that in civil litigation, issues arise when a material proposition of law or fact is affirmed by one party and denied by the other. The law defines material

propositions as those propositions of law or fact which a Plaintiff must allege in order to show a right to sue or a Defendant must allege in order to constitute a defence. See: 0.13 r 1 of the Civil Procedure Rules.

From the arguments of both counsel and the pleadings on record, a number of issues are raised. They include whether the 2nd and 3rd Defendants made personal guarantees to pay the loan; whether the 1st Defendant was loaned the money in question or whether it merely acted as a convenient channel for the conveying of funds from the Plaintiff to people who are not party to this case; and the balance on the loan as at 17/12/2004 when HCCS No. 1007/2004 was filed.

To answer these issues, evidence is, in my view, required. While the Plaintiff's case is based on documentary evidence, interpretation of some clauses requires oral evidence. The possible issues articulated to this Court by counsel for the Applicants cannot be determined in a summary manner, without the other side being given a chance to produce its evidence. In view of the correspondence on record purporting to originate from the Office of the President and the arguments of the Applicants on the said correspondence; and in view of the arguments of the Applicants whereby the terms of the contracts and the accuracy of the Plaintiff's figures are challenged, the Plaintiff/Respondent cannot have reasonable ground for believing that there is no defence to the suit. It should be appreciated 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 Plaintiff is not entitled to summary Judgment. See: **Maluku Interglobal Trade Agency Ltd -Vs- Bank of Uganda [1985] HCB 65.**

In this respect, defence on the merits does not mean a defence that must succeed. It means as Sheridan, J. put it “a triable issue”, that is, an issue which raises a prima facie defence and which should go for trial for adjudication: **Patel -Vs- E.A. Cargo Handling Services Ltd [1974] E.A. 75** at 76.

Relying on the authorities above, I believe and hold that the defence raised by the Applicants is a bonafide one. It raises triable issues basically on the liability of the 2nd and 3rd Defendants as alleged guarantors to the loans and the accuracy of the Plaintiff's figures as to the amount payable by the 1st Defendant. These matters should go for trial and adjudication. I would grant to the Defendants/Applicants unconditional leave to defend the suit and I do so. The intended defence shall be filed and served on the opposite party within 14 days from the date of this order and thereafter the case go for mediation. Costs herein shall abide the outcome of the main suit.

Yorokamu Bamwine

J U D G E

06/06/05