REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT-00-CC-0379-2005

(Arising from HCT-00-CC-CS-0186-2005)

READY AGRO SUPPLIERS LTD
WILSON OGOLA OLENDO APPLICANTS
EDDY OLOO OGOLA

VERSUS

UGAND DEVELOPMENT BANK LTD RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. This is an application seeking leave to defend the main suit. It is brought by the Notice of Motion supported by an affidavit sworn by Wilson Ogola Olendo, Applicant No.2. And a further affidavit filed on 15th June sworn by Eddy Oloo Ogola, Applicant No.3. It is opposed by the respondent, Uganda Development Bank Ltd, which filed an affidavit in reply, sworn by Steven Opeitum.
2. The grounds of this application are set out in the notice of motion and I shall reproduce them below. (a) That the applicant /Defendant is not liable or indebted to the Plaintiff/Respondent in the sums stated in the plaint. (b) That the Plaint raises triable issues of fact and law. (c) That the applicant/Defendant has a plausible defence to the suit.

(d) That it is in the interests of substantive justice that the prayers sought herein be granted.

3. Mr. Alex Rezida, learned counsel for the applicant raised a preliminary matter, in his address to the court, which I will consider before considering the main application. He submitted that applicants no.1 and 3 had not filed applications for leave to appear and defend and judgment ought to be entered against them. In particular in respect of applicant no. 3 he submitted that the affidavit filed by him on 15th June 2005 was out of time, as it was filed beyond the time allowed for instituting applications for leave to appear and defend after service of the plaint.
4. In reply Mr. Stephen Mwandha, learned counsel for the applicants submitted that it was possible to gather from the affidavit of Mr. Wilson Ogola Olendo that it was sworn on behalf of three applicants. Therefore the application of all the three applicants, including applicant no.1 and no.3, were properly supported by evidence on oath.
5. The intitulement of the application and supporting affidavit indicates that the applicants are three in number. That is the three defendants were applying for leave to appear and defend. The application in its body refers only to 'applicant/defendant' where it refers to the applicants. The affidavit of Mr. Wilson Ogola Olendo which was attached to the application reads in part, in paragraph1,

> "That I am an adult male Kenyan of sound mind, and a director in 1st Applicant herein, and I depone this affidavit in that capacity as hereafter."

6. No where in the body of that affidavit is there any indication that it is sworn on behalf of applicant no.3. I find that the above paragraph in the affidavit of Mr. Olendo Ogola, Applicant No.2 is sufficient authority for the applicant no.1, which is a body corporate, and can only act through its natural officers. However, clearly at the time of filing and presenting this application, on 16th May 2005, there was no authority claimed by applicant no.2 to act for applicant no.3. Neither is there any such authority claimed subsequently.
7. The affidavit of applicant no.3 filed on 15th June 2005, a month after the application for leave to appear and defend was filed, was clearly out of time for applicant no.3, to be the supporting affidavit to his application for leave to appear and defend. Perhaps this

explains paragraph 1 thereof which claims that it is being sworn on behalf of applicants no.1 and no.2, and makes no reference to himself, or his application. It states,

> "That I am an adult male Kenyan of sound mind, and a director in the 1st Applicant/Defendant Company and I depone this affidavit on behalf of 1st and 2nd Respondents."

8. This may make sense as the affidavit is an affidavit in reply to the affidavit for the respondent filed in court, and it is so headed. It is not intended to be an affidavit supporting the application of applicant no.3 for leave to appear and defend. If it was, it was clearly out of time, coming a month after the filing of the application for leave to defend, and without leave of court.
9. It would follow from the foregoing that application for applicant no.3 is not supported by an affidavit. The only affidavit filed in time in support of the application is the affidavit of applicant no. 2 sworn on behalf of applicant no.1 and no.2 only. I have been unable to gather from the contents of this affidavit that it was sworn on behalf of the applicant no.3. There is no express statement to that effect. Nor have I been able to find any implicit authority that it is sworn on behalf of applicant no.3.
10. Applicant No.3 has been sued in his personal capacity. In order to be granted leave to appear and defend he must file an application supported by an affidavit for leave to appear and defend, if he claims to have a defence to the claim, showing whether the defence alleged goes to the whole or part of the claim only, under Order 33 Rule 4 of the Civil Procedure Rules. As he has not done so, nor authorised anyone to do so on his behalf, the application by applicant no.3 is unsupported by evidence, as it ought to be, and is dismissed forthwith.
11. Mr. Stephen Mwandha, learned counsel for the applicants argued three grounds. Firstly that the applicant was not indebted to the respondent in the amount claimed in the plaint, relying on the affidavit sworn by the applicants' no. 2 and 3. Secondly that the respondent had breached the agreement between the respondent and the applicants leading to a loss of US$16,500.00. Details of the breach are in the affidavits in support. Thirdly that there are discrepancies in the calculation and computation of the principal amount and interest which comprise the plaintiff's claim.
12. Mr. Alex Rezida, submitted that the first ground was abandoned given the fact both counsel went over the figures, and all receipts of the applicants were accounted for on the

statement attached to the claim. The applicants wre provided with time to verify, using their own accountant, interest claimed, and they did not do so.

13. With regard to the second ground of claim which was that the respondent were in breach of contract, Mr. Rezida opposed this ground. Relying on the affidavit in reply by Mr. Opeitum, he submitted that the principal amount of US$250,000.00 had been fully disbursed, and the respondents could not provide funds beyond what was agreed. At the same time Mr. Rezida submitted that no counter claim was actually included in the proposed written statement of defence by the applicants which accompanied the application.
14. Mr. Rezida attacked the third ground that alleged there were discrepancies arising from computation of the principal sum and interest, as no single discrepancy was pointed out by the applicants.
15. I now turn to consider the merits of the application. I will start with ground no.3 and that is that there are discrepancies in the calculation and computation of the principal amount and interest which comprise the plaintiffs claim. This ground has no support in the affidavits filed for the applicant. It is unsupported by any evidence. It is without merit. No single discrepancy is pointed out by the applicants.
16. The affidavit of applicant no.2 basically raises two issues. In paragraph 4 it denies the plaintiff's claim in the following words,

> "That to the best of my knowledge the applicants are not indebted
> to the Respondent in the sums as alleged in the Plaint.
> (Photocopies of receipts of payments are attached hereto and
> marked Annexture A1 to A)"

17. The second issue raised by the rest of the affidavit is the allegation of a breach of contract by the respondent leading to incurring of an expense of US$ 16,500.00 which the applicants claim from the respondent. The respondent's response to this alleged breach of contract, is that they disbursed the agreed sum of US$250,000.00 beyond which they could not disburse more funds as the ceiling had been reached.
18. The plaintiff's claim is for US$140,752.19 together with agreed interest at 12% per annum from 31st January 2005 till payment in full. In response to this claim the applicant No. 2 merely alleged that to the best of his knowledge the applicants are not indebted to the respondent in the sums claimed in the plaint. And he attached copies of receipts of

payments. The applicants do not tie up the receipts attached to the affidavit of applicant no.2 with the statement of their account with the respondent attached to the plaint. The affidavit of Applicant no.2 is not clear whether the receipts so attached go to the whole of the claim or only to part. And if only part, which part of the plaintiff's claim, as is required by Order 33 Rule 4 of the Civil Procedure Rules.

19. In the affidavit in reply of Steven Opeitum it is averred that those receipts are reflected on the statement attached to the plaint, leaving the balance claimed due and owing.

20. Save for the possible counter claim, the applicant no.2 does not articulate, in his affidavit what defence is alleged as to the plaintiff's claim which is supported by a particularised statement of account. Is it that Applicant no.1 paid off the whole amount as evidenced by the attached receipts? Is the agreed interest claimed in the plaint disputed? No reference is made at all to the statement of account attached to the plaint that details the account of applicant no.1 with the respondent.

21. The affidavit of applicant no.2 is silent on the claim against applicant no.2 and no.3 as guarantors, except by possible implication from the allegation that applicant no.1 does not owe the respondent the sums claimed in the plaint. No defence is set up with regard to the claim against applicant no.2 or for that matter applicant no.3 as well other than that no money is owed by applicant no.1 to the respondent. In this regard the applicants fail to satisfy the requirements of Order 33 Rule 4 of the Civil Procedure Rules.

22. I must bring in view Order 33 Rule 4 of the Civil Procedure Rules which sets out what applicants must do, if they seek leave to appear and defend. It provides in part,

> "An application by a defendant served with a summons in Form 4 of Appendix A for leave to appear and defend the suit shall be supported by affidavit, *which shall state whether the defence alleged goes to the whole or to part only, and if so, to what part of the plaintiff's claim*, and the court also may allow the defendant making the application to be examined on oath……."

23. The foregoing provisions are clear in what is demanded of the defendant. He/She must state by way of affidavit whether the defence alleged goes to the whole or to part only of the plaintiff's claim, and if only part, which part of the plaintiff's claim. The response must specific and not general or evasive, so as to leave no one in doubt, as to the extent of the plaintiff's claim that the defendant genuinely disputes.

24. In effect what the applicants have done in this first ground is simply to deny that the money claimed is owing from the applicant no.1 to the respondent without specifically

articulating whether or not the sum claimed in the plaint was repaid wholly or in part, especially as they acknowledge receipt of a loan of US$250,000.00. The applicants have failed to show that there is a triable issue in the defence alleged with regard to the sum claimed in the plaint. Ground No.1 fails.

25. Ground No.2 is to the effect that the respondent breached the agreement between the parties to pay for the port charges at Mombasa and cost of transportation of the merchandise financed by the loan agreement, from Mombasa to Kampala and to the various buyers in Uganda, compelling the applicant no.1 to meet those costs totalling to US$16,500.00 which the applicants wish to claim from the respondent. As a result of the refusal by the respondent to meet this agreed expense, the applicant no.1 received its merchandise late.

26. The respondent denies that it was obliged to meet the expense of US$16,500.00 as the applicant no.1 had reached the agreed ceiling of the facility at US$250,000.00. The facility was to be utilized for “importation of fertilizers and internal transportation costs.” Both the letter of offer of the loan and the loan agreement refer to importation of fertilizers and internal transportation costs”. Internal is not defined. Is it internal to Uganda? Internal to Uganda is the meaning put on this clause by applicant no.2 in paragraph 7 of his affidavit. It states,

> “That specific purpose/utilization of the loan was intended to “finance importation of fertilizers and internal transportation costs” (i.e. from Kampala ware house(Ntinda industrial area) to customers Mapanga Growers Tea Factory, Mabale Growers Tea Factory Ltd in Fort Portal, Igara Growers Tea Factory in Bushenyi, Kayonza Growers Tea Factory Ltd in Kanunga, Leaf Tobacco Ltd in Arua. (A copy of the loan agreement is attached hereto and marked annexture B2.)”

27. The breaches alleged against the respondent are detailed in paragraphs 9, 10, 11,12, 13 & 14 which in substance aver that there was an express agreement that the respondent would pay for the port handling charges at Mombasa, railage costs for wagons from Mombasa to Kampala, clearing charges at Malaba Border, at Kampala railway station and other incidental costs to clear the shipment of fertilizers but that the respondent departed from this term and refused to pay for these charges. The applicants do not show whether this alleged term was verbal or not. They point to no document where it is contained. They do not show when this term was agreed.

28. It is only internal transportation that is expressly included as one of the purposes for the loan. And this clearly was internal to Uganda. The claims with regard to port charges in Mombasa, rail transportation from Mombasa to Kampala, and incidental expenses thereto are clearly outside internal transportation. Clearly those expenses are not part of internal transportation costs given the explanation by the applicant no.2 in paragraph 7 of his affidavit quoted above.
29. A reading of both the letter of offer for the loan and loan agreement between the parties leaves me in no doubt that the alleged express agreement to pay for the charges alleged by the applicant no.2 is not part of the written agreement between the parties. The applicants have failed to show when it was made, where it was made and in what form it was made. It is not enough for parties just to make allegations with substantiating the same, if they wish court to give credence to the same.
30. A further breach alleged is the claim that the respondent refused to open a letter of credit for 1000 tons of the merchandise in question and ordered the applicant no.1 to order only 750 tons. This breach appears to be a sham claim in so far as it is the applicant no.1 who wrote to the respondent on 20th June 2003 and stated, "We are requesting you to open the letter of credit for the 750 metric tonnages instead of 1000 metric tonnages. Please find a copy of the Proforma invoice." This letter was signed by applicant no.2 and is annexture S2 to the affidavit of Steven Opeitum. The utilisation provision only refers to fertilizers and not 1000 metric tons of fertilizer.
31. The applicants have failed in my view to show that there is a triable issue with regard to the possible counter claim as against the respondent. It appears to me to be a sham counter claim raised only to claim a set off against the plaintiff's claim, and delay meeting its obligations to the plaintiff. Perhaps this explains the reason why it was not even raised in the draft written statement of defence that accompanied this application. Ground No.2 fails.
32. Even if I was wrong, and Ground No.2 succeeds in raising a proper counter claim as against the respondent, two further issues would arise. Firstly it would appear to me that the counter claim would be between applicant no.1 and the respondent only. Applicant No.2 and 3 do not have a counter claim and or set off against the respondent disclosed on the application. If there is a cause of action it would between applicant no.1 and the

respondent for breach of contract as alleged. No counter claim is alleged to have arisen against the respondent on the contract of guarantee between the applicants no.2 and 3 and the respondents. And if, as I have found, that there is no defence by all the applicants to the plaintiffs claim, judgment would still be entered for the respondent against applicant no.2 and no.3 as a result of the failure of ground no.1.

33. Secondly what would be the consequence of finding that there is a triable issue in respect of a counter claim of US$16,500.00 against the respondent with regard to the respondent's claim for US$140,752.19 to which the applicants have no defence? A defendant is entitled in an action to set up a set off or counterclaim in his defence so that the claim and set off or counter claim are tried together. See Order 8 Rule 2 of the Civil Procedure Rules and *Elizabeth Edmea Camille v Amin Mohamed E.A. Merali and Another [1966]E.A.411.* The counter claim would then be regarded for all intents and purposes as a defence to the claim.

34. It would appear Order 33 Rule 6 of the Civil Procedure Rules would then be relevant in case the counter claim was a defence to only part of the claim as in this instance.

> "If it appears that the defence set up by a defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall be entitled to a decree forthwith for such part of his claim as the defence does not apply to or as is admitted, subject to such terms, if any, as to suspending execution or payment of any amount realised by attachment into court, and the taxation of costs or otherwise, as the court may think fit; and the defendant may be allowed to appear and defend the residue of the plaintiff's claim."

35. The respondent in this case would then be entitled to judgment in respect of the sum claimed less US$16,500.00 which is the value of the counter claim disclosed on the affidavit of applicant no.2. in respect of which the applicant no.1 would file a defence/counter claim. However, for this case, this remains moot, as I have found that the applicants have failed to establish that there is a triable issue established with regard to the counter claim.

36. In the result I dismiss this application for leave to appear and defend as without merit, with costs. I enter judgment for the respondent in the sum claimed in the plaint with interest at 12% per annum from 31st January 2005 till 4th May 2005, the date of filing of the plaint, and thereafter at court rate till payment in full, with costs of the suit. In my

view the agreed rate of interest holds good only up to the time the case is filed, and thereafter it is only just that the court rate applies.

Dated at Kampala this21st day of July 2005.

FMS Egonda-Ntende
Judge