

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT-00-CC-MA-177-2005

(Arising from HCT-00-CC-CS-76-2005)

ELIZABETH MUGAZA
KISOMA MUZAMIRU
KABANDA STEVEN
JANE BAFUKAWA
AGNES KASAIJI
PROSSY MULALYA
ALL T/A MAKABU WOMEN'S ASSOCIATION

APPLICANTS

VERSUS

ECUMENICAL CHURCH LOAN FUND LTD

RESPONDENT

BEFORE: THE HON. MR. JUSTICE F.M.S EGONDA-NTENDE

RULING

1. The applicants are the defendants in the head suit. In this application the applicants are seeking unconditional leave to appear and defend the suit against them. There are two grounds in support of this application, as set out in the notice of motion. Firstly it is contended that the applicants were never advanced a loan to the tune of Shs.21,000,000.00. Secondly that the total amount claimed does not add up to Shs.5,117,600.00.
2. The affidavit in support of this application was sworn by Jane Bafukawa, the secretary to Makabu Women's Association. It states, in part,
 4. *That in June 2000, we were loaned money by M/s Ecumenical Church Loan Fund to be used in our businesses.*
 5. *That the said money did not amount to 21,000,000/= (Twenty one million shillings only) as alleged in their plaint.*

6. That the agreement did not contain the clause of payable in 6 instalments but for a period to be agreed after one year. 7. That the outstanding amount does not total up to 5,117,600/= (Five million one hundred seventeen thousand, six hundred shillings only).

8. That by virtue of an agreement and memorandum of understanding drawn up between the member and attested to by the plaintiff, it was agreed between the parties that each member pays a portion of the outstanding amount so as to retire the whole loan.

9. That some members paid their portion while others have failed and thus those that paid their portion are not liable.'

3. There was a further affidavit sworn by a Mr. Ronald Bafukawa that was subsequently filed in support of this application. This Ronald Bafukawa was not a party to the suit but claimed that as a guarantor to the loan, the outcome in the head suit, and this application was likely to affect him, and accordingly had sworn this affidavit in support of this application. The affidavit does not show that he was authorised by the parties/applicants to swear this affidavit in support of this application. Mr. Bafukawa Ronald is a stranger to the current proceedings. For those reasons I decline to take this affidavit in account as I consider the merits of the application before me.
4. At the hearing of this application, the respondent was not present, in spite of proof of service on record. The hearing proceeded in their absence. Mr. Urban Tibemanya, learned counsel for the applicant, in his very brief submissions to the court, stated that a mere denial of the claim by the applicant was sufficient for this court to allow the applicant leave to appear and defend. He referred to the case of Photo Focus (u) Ltd v Group Tour Security Ltd Court of Appeal Civil Appeal No. 30 of 2000 as authority for that proposition. He therefore submitted that the applicants should be granted leave to appear and defend.
5. The applicants' factual position is that they accept that they received a loan from the respondent but deny that it was in the sum of Shs.21,000,000.00. The applicants do not state what they claim to have received. The applicants' claim that the outstanding amount is not the sum claimed in the plaint, but do not disclose the sum due and owing to their

knowledge. The applicants claim that the agreement did not contain a clause requiring them to repay the loan in six equal instalments but that the period would be agreed after one year. This agreement is not attached, and I presume they refer to the agreement attached to the plaint. That agreement is clear. It provides for repayment to be made in six instalments. The applicants' position in this regard is clearly false.

6. The applicants' affidavit alleges a new agreement as to the liquidation of the outstanding sums of money to the respondent, but the same is not attached. The applicants further assert that some members have paid their portion and others have not paid. It does not disclose who has paid, and who has not paid.
7. The applicants' evidence is evasive and vague without providing sufficient particulars that would allow a court to evaluate whether or not what appears a good defence to the respondent's claim has been raised or whether a triable issue has been raised with regards to the facts that would be in issue. Neither does it specify the specific sums of money that is due from the members who have not paid their 'portion' of the loan or the sums paid by the members who have paid their 'portions.' The applicants admit taking a loan but fail to disclose the sum they received. They deny that the sum claimed is not the actual sum owing but do not disclose what they have either paid or is otherwise outstanding. They deny a term of the agreement. The denial is false as the term exists in the agreement. I am satisfied that the applicants have failed to raise a triable issue on their application.
8. In taking this position, I take comfort in the case of *Zola and Another v Ralli Brothers Limited and Another* [1969] E A 691 which considered what is a triable issue. The Court of Appeal for East Africa considered the Kenyan provisions of Order 35 Rule 2 which are somewhat worded differently from our own rules with regard to summary judgment. The court considered what would amount to a triable issue in the following words of Newbold, P.,

'... the mere denial in the defence that the sums were lent would not suffice to raise a triable issue. Similarly, the mere statement in the defence of a new agreement with, be it noted, no particulars as to the parties, the date, the circumstances and the reason for the new agreement, which statement by Mr. Sirley did not see fit to substantiate by affidavit on which he could have been cross

examined, would not suffice to raise a triable issue. Equally, the bare statement in the defence of a failure of duty on the part of the receiver and manager does not suffice to raise a triable issue.'

9. These remarks, of weighty and persuasive authority, would equally apply in the case before me. No particulars have been provided to support the alleged defence that the sum claimed by the respondent is not what is outstanding. Admission is made to some money being outstanding but it omits to declare what is outstanding and what has been paid. This offends Order 33 Rule 4 of the Civil Procedure Rules, which require an applicant to state clearly to which part of the plaintiff's claim that the alleged defence is directed to. The exact part of the plaintiff's claim which the applicants wish to defend is not disclosed.
10. I shall now turn to consider Photo Focus (U) Ltd v Group Four Security Ltd (Supra), the decision referred to by learned counsel for the applicant, Mr. Urban Tibemanya. Even if I were to accept the reading of this decision, which Mr. Urban Tibemanya, pressed upon this court, I find that the facts before me are distinguishable from the facts upon which that decision is based. In the case now before the court, there is actually an admission that money is owing while at the same time vaguely denying that what is claimed in the plaint is the sum due from the applicants to the respondents. This is not a 'clear and unequivocal denial' as was the case in Photo Focus (U) Ltd v Group Four Security Ltd (supra). This decision is therefore not applicable to this case, given the facts of this case.
11. I am satisfied that this application is without merit. It has failed to show that the applicants have what appears to be a good defence. The application has also failed to raise a triable issue that needs to go to trial. It is dismissed, without costs, as it proceeded *ex parte*.
12. Judgment is entered for the respondent in the sum claimed in the plaint with costs and interest at court rate from the date of filing this suit till payment in full.

Dated at Kampala this 28th day of September 2005

FMS Egonda-Ntende
Judge