

Last Updated: 19 March 2007

Florance Atto-V- Remode Enterprises Ltd-HCT-00-CC-MA-0501-2006 [2007] UGCommC 7 (25<sup>th</sup> January 2007)

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

HCT-00-CC-MA-0501 - 2006  
ARISING OUT HCT-00-CC-CS-0301-2006

FLORANCE ATTO..... APPLICANT

VERSUS

REMODE ENTERPRISES LTD..... RESPONDENT

**25<sup>th</sup> January 2007**

**BEFORE: HON. JUSTICE LAMECK N. MUKASA**

**RULING**

This is an application by Notice of Motion brought under order 36 rules 3 and 4, order 52 rules 1 and 3 of the Civil Procedure Rules and section 98 of the Civil Procedure Act for order that the applicant be granted an unconditional leave to appeared and defend the main suit and that costs be provided for.

The grounds for the application are that:-

- 1- The applicant is not indebted to the respondent in the sum of money as claimed in the plaint.
- 2- Even if the applicant was indebted to the Respondent (through derived) the interest charged on the interest charged on the principle amount is harshly excessive and unconscionable.
- 3- The purported plaint under summary procedure is bad in law and ought to be struck out with costs, in case the applicant is granted leave to defend the suit.

In the main suit the Respondent's claim against the applicant Florence Atto is that on 17<sup>th</sup> August 2005 by a loan agreement executed between the parties the Respondent agreed to lend the Applicant Shs. 3,000,000/= attracting a total interest of Shs. 180,000/= making a total of Shs. 3,180,000/= payable in two equal monthly instalments by 17<sup>th</sup> October 2005. The loan agreement provided for a fine on late payments of 5% of the instalments due every after 7days, that is 20% per month on the due amount. The Respondent disused the loan of Shs. 3,000,000/= to the Applicant on 17<sup>th</sup> August 2005.

For leave under order 33 rules 3 and 4 of the Civil Procedure Rules to be granted the applicant must show that there is a bona fide triable issue of fact or law. The court must be certain that if the facts alleged by the Applicant were established there would be a plausible defence in which case the

applicant should be allowed to defend the suit. The defence raised should be stated with sufficient particularity as to appear genuine and not merely general vague statements denying liability See **Muluku Interglobal trade Agencies Ltd vs. Bank of Uganda [1985] HCB 65, Tororo District Administration vs. Andalamp Industries Ltd [197] N KALR 126.**

In her affidavit in support dated 14<sup>th</sup> July 2006 the Applicant indebtedness to the tune of Shs. 8,868,000/= as claimed or at all. She also claims that the interest charged on the principal sum was too harsh, excessive and unconscionable. She further contends that the plaint was improperly brought under summary procedure. The applicant also filed a supplementary affidavit dated 6<sup>th</sup> December 2006 wherein she avers that at the time of the purported loan the Respondent was not licensed to carry on the business of money lending.

In his submission Mr. Patrick Katende pointed out, and rightly so, that the main suit was brought by "*Summary procedure under 0.33 SI 65-1*". Counsel argued that the main suit was filed on 22<sup>nd</sup> May 2006 and submitted that by then S.I 65-1 was not applicable. In his reply Mr. Mukwatainse for the Respondent conceded that the relevant law had by then changed but contended that the mistake was of counsel which should not be visited on the Respondent. He invited court to treat the error as a technicality and disregard it under Article 126 (2) (e) of the constitution.

The Revised Edition, 2000 of the Laws of the republic of Uganda came into force on 31<sup>st</sup> December 2000. However the Blue volumes (subsidiary Volumes) which affect the subsidiary legislations came into circulation some time in 2006 I am not aware of the actual date. This suit was filed on 22<sup>nd</sup> May 2006. the plaint in the main suit was properly drafted under summary procedure but wrongly brought under Order 33 instead of the current order 36. In **Col (Rtd) Dr. Besigye Kiiza vs. Museveni Yoweri Kaguta and Electoral Petition No. 1 2001** Benjamin Odoki C5 observed that a liberal approach is in enactment in Article 126 of the constitution that courts should administer substantive justice without undue regard to technicalities. That rules of procedure should be used as hand maids of justice but not to defeat it. In **Akon International vs. Kasirye Byamukunga & Co. Advocates [1995] 111 KALR 91** Justice Musoke Kibuuka held that procedure defects can be cured by the invocation of Article 126 (2) (e) of the constitution. The test applicable is for the court to consider whether the irregularity is serious enough to prevent the court from hearing the application and deterring it on its own merit. The answer would depend on whether observance of the procedural rules in issue would lead to injustice. If it would not, then the court should be willing to over-look it otherwise it should not. See **Intraship (U) Ltd vs. GN. Combine (U) Ltd [1994] V1 KALR 42.**

In the instant case I find that save for a wrong order quoted in the plaint the plaint was properly endorsed "under summary procedure" and is accompanied by an affidavit sworn by Momo Masiko a director of the Respondent Company.

In light of the charges in law which are just recent and in the promotion of substantive justice I find that the above irregularity can be disregarded. Therefore for reason of only quoting order 33 instead of the right order 36 I would not grant leave to defend unless I find that the applicant has satisfied the conditions upon which court would otherwise allow the application, which conditions I have already set out hereinabove.

With regard to the amount claimed the Respondent in its affidavit in support of the summary suit attached the loan agreement. The loan agreement provides that the loan was of a principal sum of 3,000,000/= payable in two months at an agreed interest of 3% per month making a total of interest. Also provided in the agreement paragraph 10 is a late payments fine of 5% of the instalments due every after seven days. It is payment of the above sums that the Respondent seeks in the main suit.

The applicant in her affidavit denies indebtedness in the sum claimed or at all. Mere general denial of liability is not sufficient. The defence raised should be stated with sufficient particularity. The applicant does not deny the loan advanced, she does not deny the loan agreement, she does not deny the fact that she defaulted in payment and does not adduce any evidence of payment.

However the Applicant contends that the interest charged was h..., excessive and unconscionable. Interest under the agreement was 3% per month and a fine of 5% of the instalments due every after seven months. In the summary plaint the Respondent claimed total monthly interest for two months of Shs. 180,000/= and Shs. 5, 148,000/= in respect of fine for late payment. Mr. Katende argued that interest above was shs. 5,688,000/= which he computed at 178% per annum. Counsel submitted that his contravenes section 11 and 12 of the money he ...Act. Section 11 of the Act empowers court where it finds the interest charged to be harsh and unconscionable to after the interest payable and under section 12 where interest charged is found to be exceed the rate of 24 percent per year court is entitled to presume that the interest charged is excessive. In his submission Mr. Mukwatawse did concede that there are statutory restrictions on the interest chargeable by a moneylender. In the circumstances I find that the applicant has raised a prima facie triable issue with regard to the interest charged.

Further the applicant in paragraph 3 of her supplementary affidavit contends that the Respondent was not licensed to carry on the business of money lending at the time of the purported loan. In paragraph 1 of the summary plaint the Respondent describes itself as licensed to carry on the money lending business in Uganda. However the averment tht it was not so. Licensed in August 2005 was neither denied nor rebutted. Therefore presumed to be true unless evidence is adduced by the Respondent to contrary. See **Massa vs. Acehn [1978] HCB 279**. Thus raising another triable issue.

In the final result I find that the applicant has raised bona fide triable issues. The application is accordingly allowed. The Applicant is to file a written statement of defence with 14 days. The Applicant is awarded costs of this application.

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Lameck. N. Mukasa  
**JUDGE**  
25/01/07