THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

HCT-00-CC-MA-225-2008

JAYANTH AMRATLAL BHIMJI & ANOR::::::::::::::::::::::::::APPLICANTS

VERSUS

PRIME FINANCE CO. LIMITED::::::::::::::::::::::::::::::::::::RESPONDENTS

BEFORE: HON. MR. JUSTICE LAMECK N. MUKASA

Representation:

Mr. Andrew Kibaya of Counsel for the Applicants

Mr. Alex Rexida of Counsel for the Respondent

Court Clerk:

Mr. Makoka Ojiambo

RULING (2):

THIS is an application brought by Notice of Motion under section 33 of the Judicature Act, Section 98 of the Civil Procedure Act, Order 36 Rule 11 and Order 52 Rules 1, 2 and 3 of the Civil Procedure Rules. The applicants, Jayantlal Amratlal Bhimji and Amratlal P. Bhimji, are seeking orders that;

1. The judgment and decree in Civil Suit No. 307 of 2007 delivered on 18th April, 2008, be set aside.

2. Execution of the decree in (a) above be stayed.
3. The Applicant be granted leave to appear and defend the suit.
4. Costs of this application be in the cause

The grounds for the application are briefly that:

1. The Applicants were misled by counsel on how to proceed with applying for leave to appear and defend Civil Suit No. 307 of 2007.
2. As a result of being misadvised, Miscellaneous Application No. 467 of 2007 that had been filed for leave to appear and defend was dismissed.
3. The Respondent is a money lender who lent money to the Applicants at an interest rate of over 52% per annum beyond what is permitted by the Money Lenders' Act.
4. The applicants are desirous of proceeding with the matter so that it can be heard and decided on the merits.
5. There are triable issues in the main suit and the applicants have a good defence thereto.
6. It is just and equitable that the orders sought be granted.

The brief background of this application is that the Respondent, Prime Finance Company Ltd, in its ordinary course of business as a licensed money lender was approached by the Applicants for loan facilities that were provided in 2006 and stood at an aggregate of US$ 380,000. The Applicants, jointly and severally undertook to repay the sum of US$ 380,000 with 10 installments coupled with an agreed interest at 1% per week within 5 months. It was further agreed that on default to repay the loan within the stipulated time

the Applicants would continue to pay interest at the agreed rate of 1% per week on the outstanding balance until the liquidation of the of the loan .

As at 6th February, 2007, the Applicants had an outstanding amount of US$ 366,625. The Respondent on 7th May, 2007 by Summary Procedure under Order 36 filed the main Suit claiming:

(a) US $ 366,625

(b) Interest at 1% per week from 6/02/2007 until payment in full of the above amount.

(c) Costs.

The Applicants on 6th July, 2007 filed Miscellaneous Application No. 0467 of 2007 for leave to appear and defend the above suit. On 18th December, 2007, a consent judgment was recorded by Hon. Justice Geoffrey Kiryabwire by which the Applicants were to pay US$ 150,000 and indulging court to try the case in respect of the balance of US$230,000= as the sum claimed in Civil Suit No. 307 of 2007.

On 20th December, 2007, the applicants filed Misc. Application No. 868 of 2007 seeking orders that the court judgment entered and subsequent orders in Miscellaneous Application No., 24th January 2008be set aside. On 24th January, 2008 Hon. Justice Kiryabwqire allowed the Application, set aside the consent judgment and re-instated Miscellaneous Appl. No. 467 of 2007 for hearing. In my ruling dated 18th April, 2008, I dismissed the application on the grounds that the affidavit in support of the application

was incurably defective, the supplementary affidavit unreliable and filed when there was no application to support.

The Applicant then filed this application on 6th May 2008 seeking the orders indicated above. The application is brought under Order 36 Rule 11 of the Civil Procedure Rules which provides:

> *" After the decree, the court may if satisfied that the service of the summons was not effective or for any other good cause, which shall be recorded, set aside the decree, and if necessary stay or set aside the execution and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do and on such terms as the court thinks fit"*

Under the rule, a decree under Summary Procedure may be set aside for either lack of effective service of summons or any other good cause. Mr. Kibaya, for the applicants, submitted that this application was brought under the second leg of the rule – "for any other good cause". He cited Caltex Oil (U) Ltd vs Kyobe [1988-1990] HCB 141, where Justice Byamugisha held that Court was endowed with wide and discretionary powers to set aside a decree obtained under Order 33 rule 3 (now Order 36 rule 3). That, however, the applicant has to satisfy court either that there was no effective service or he has to show any other good cause. That sufficient cause had to relate to the failure by the applicant to take the necessary step at the right time. There was no hard and fast rule as to what constituted any other good cause. Each case had to be considered on its own peculiar circumstances.

The Application is also brought under Section 33 of the Judicature Act. The High Court is thereby empowered to grant all such remedies in respect of any claim brought before it so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplication of legal proceedings concerning any of those matters avoided. The application was further brought under section 98 of the Civil Procedure Act which provides Court with inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

The Application is supported by an affidavit deponed to by the 1st Applicant, Jayantlal Amratlal Bhimji, wherein he states;

> *"2. That in July 2007, I instructed lawyers at MWM Advocates & Solicitors (Mwandha, Wabwire & Muwanga) to file an application for leave to appear and defend Civil Suit No. 307 of 2007:*
>
> *3. That the above mentioned firm of lawyers assured me that an application would be filed but that since I was outside of the Country at the time, an affidavit in support of the application would be sworn by Steven Mwandha one of the partners in the above mentioned firm of advocates (based on information provided by myself and the said applicant), and that I would later swear a supplementary affidavit which would be filed in further support of the application.*
>
> *4. That going by the erroneous advice given by the said lawyers, I agreed to proceed as stated in paragraph 3 above.*

5. That on the 18th day of April, 2008, I was informed by the lawyers at MWM Advocates & Solicitors that the application for leave to appear and defendant Civil Suit 307 of 2007 was dismissed because the said application was supported by an affidavit sworn by Steven Mwandha Esq, an advocate who is barred by the Advocates Professional Conduct Regulations from deponing affidavits on contentious matters which he as an advocate cannot prove.

6. That prior to filing the application, the lawyers at MWM Advocates and Solicitor did not inform me that advocates cannot depone affidavits in matters on behalf of clients relating to matters which they cannot prove.

7. That I am advised by my present lawyer Mr. Bogere that I have suffered great misfortune by having Miscellaneous Application 407 of 2007 for leave to appear and defend High Court Civil Suit 307 of 2007 dismissed because I was misinformed and misadvised by my then lawyers at MWM Advocates and Solicitors.

8. My present lawyer Mr. Bogere has advised me that the said mistake and or misadvise by MWM Advocates and Solicitors is an error by counsel which should not be visited on the applicants, as the applicants are in court to seek justice, and have a good case which should be heard and decided on the merits.

9. That my lawyer Mr. Bogere has advised me that this is a proper case where mistake of counsel should not be visited on a litigant".

Mr. Kibaya argued that the Applicants were lay people, who were at the material time out of the Country and who instructed lawyers to defend the matter. He submitted that the Applicants exhibited the intention to defend the matter but for the lawyers mistake and or misadvise, their application was dismissed. He argued that such mistake of counsel should not be visited on the Applicant. He relied on the authorities below;

Godfrey Magezi & Anor vs Sudhir Ruparelia SCC Appeal No. 10 of 2002

Where Karokora JSC stated:

> *"It is now settled that omission or mistake or inadvertence of counsel ought not to be visited on the litigant, leading to striking out of his appeal thereby denying him justice. There are many decisions from this court and other jurisdictions in which it has been held that an application for extension of time, such as this are where mistake or error or misunderstand of the applicants legal advisor even through negligence have been accepted as a proper ground for granting relief under rules equivalent to rule 4 of the Rules of this court……..".*

Sepinja Kyamulesire of Justine Bikandulila Bagambe SCC Appeal No. 20 of 1995, where earlier on Karokora JSC had said:

> *"……in all fairness……it is my considered view that the errors and omissions by applicants lawyer should not be visited on to the applicant who is a lay man and who had instructed the lawyer within the stipulated period……"*

He however observed that:

> *"… it is now settled that errors or omission by counsel is no longer considered to be fatal unless there is evidence that the applicant was guilty of delatory conduct in the instruction of his lawyer"*

Counsel further argued that such mistake and/or misadvise was sufficient good cause for setting aside the judgment under the rule. He cited, S. Kyobe Seruyange vs Naks Ltd[1980] HCB 30 where Odoki , Ag. J.(as he then was) held that a mistake or oversight on the part of an advocate though negligent is a sufficient cause for setting aside an exparte decree.

Mr. Rexida, counsel for the Respondent, argued that chronological events of the conduct of the Applicants and their counsel show that the Applicant were guilty of dilatory conduct.

Civil Suit 307 of 2007 was filed on 7th May 2007. It is not disputed that the Applicants were not then in Uganda. Infact service of summons was by way of substituted service.

On 6th July, 2007, through M/S MWM Advocates & Solicitors, the applicants filed Miscellaneous Application No. 467 of 2007. The Application was supported by an affidavit deponed to by Mr. Steven Mwandha, one of the advocates in M/s MWM Advocates and solicitors. Later a supplementary affidavit deponed to by Jayanttlila Amraltal Bhimji was filed in further support of the application.

This court found that Mr. Mwondha's affidavit in support to the application contravened the provisions of regulation 9 of the Advocates (Professional Conduct) Regulations 1979

and thus incurably defective. Further that in the circumstances Jayantlilal Amiraltal Bhimji's supplementary affidavit had nothing to supplementary thereby rendering the Application unsupported by any affidavit. It was accordingly dismissed and judgment and decree entered. Thus this application.

I have carefully studied the circumstance of this application and I find that the Applicant had acted diligently and instructed M/S MWM Advocates and Solicitors to apply for them to defend this suit. The said advocates had a legal duty to professionally represent the Applicants which they failed to. This they failed to do resulting into the dismissal of the Applicants Misc. Appl. No. 467 of 2007 for leave to defend Civil Suit No. 307 of 2007 and consequently to judgment in favour of the Respondent. I have carefully perused paragraphs 4 to 22 of the Respondents affidavit in reply deponed to by Mohamed Ali. I have found the event outlined therein subsequent to the filing of Misc. app No. 467 of 2007 thus of no effect to the said lawyers conduct in the filing thereof. In the premises I find that the Applicants' said lawyers' shortcomings should not be visited on the Applicants. It is the said Advocates, as professionals, who are responsible for the dismissal of the Applicants' application. Otherwise the Applicants were interested to defend the respondents claim against them.

The Applicants further contend that the Respondent is a money lender who lent money to the Applicants at an interest rate over 52% per annum beyond what is permitted by the Money Lender's Act. It is the Respondents' case that it is a licensed money lender. It claims that it provided loan facilities to the Applicant in 2006 which stood at an aggregate

of US$ 380,000 repayable within 10 installments coupled with an agreed interest of 1% per week within 5 months, with further interest of 1% per week on the outstanding balance until the liquidation of the loan.

Section 12 of the Money Lenders Act provides:

> *"Where in any proceedings in respect of any money lent by a money lender, after the commencement of this Act, or in respect of any agreement or security made or taken after the commencement of this Act in respect of money that either before or after the commencement of this Act, it is found that the interest charged exceeds the rate to 24 percent per year, on the corresponding rate in respect of any other period, the Court shall presume for the purposes of section 11 that the interest charged is excessive and that that the transaction is harsh and unconscionable, but this provision shall be without prejudice to the powers of the court under that section where the Court is satisfied that the interest charged, although not exceeding 24 percent per year is excessive"*

The above is to the effect that a money lender should not charge interest exceeding 24% per annum.

Mr. Kibaya argued that there are 52 weeks in a year and submitted that interest at the rate of 1% per week if translated into a year would be 52% per annum which exceeds 24% per annum. That with further penalty interest of 1% on the outstanding balance would translate to 104% per annum. He accordingly submitted that the interest charged by the Respondent was illegal and should not be sanctioned by court.

In Makula International Ltd vs His Eminence Cardinal Nsubuga and Anor [1982]HCB 11 the Court of Appeal held that a Court of law cannot sanction what is illegal and illegality once brought to the attention of the Court, overrides all questions of pleadings, including any admissions made thereon. Miscellaneous Application No. 467 of 2007 was dismissed and judgment in Civil Suit No. 307 of 2007 entered on a technicality. Where the issue of legality of the interest is brought to the attention of Court should a judgment on such interest be sustained without being investigated!! To do so court would be promoting such illegality. However, Mr. Rexida for the Respondent argued that the clear intention of the Money Lenders Act is to guard against un cautionable interest. He gave an example of 13th May, 2006 where the Applicants borrow a sum of US$50,000 for three weeks at the agreed interest of 1% per which would attract interest of only U$1515. He submitted that such interest would not be uncautionable but fair and reasonable. Section 12(1) above states:

> *"…….it is found that interest charged exceeds the rate of 24 percent per year, or the corresponding rate in respect of any other period,……."*

This calls for Courts determination as to whether, in light of the above provisions the agreed interest of 1% per week should be translated into a year.

In light of my findings above, I find that the interest of justice command that judgment and decree in the above suit be set aside and the Applicant be granted leave to defend the suit and the same be determined on merits.

Counsel for the Respondent prayed that if Court is inclined to grant the application then it should be conditioned upon the Applicants depositing in Court the amount claimed in the pliant. In the event Court finds in the main suit that the interest charged was excessive that does not discharge the Applicants from liability on the principle sum. Section 11 of the Act provides:

> "*(1) Where proceedings are taken in any court by a money lender for the recovery of any money lent after the commencement of this Act, or the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals or any other charges, are excessive, and that in either case, the transaction is harsh and unconscionable or is otherwise such that a Court of equity would give relief, Court may re open the transaction and take an account between the money lender and the person sued and may notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken between them and relieve the person sued from payment of any sum in excess of the adjudged by the Court to be fairly due in respect of the principal interest, and charges as the Court, having*

regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid or allowed in a court by the debtor, may advise the creditor to repay it, and may set aside, either wholly or in part or revise or alter any security given or agreement made in respect of money lent by the money lender and if the money lender has parted with the security may advise him or her to indemnify the borrower or other persons sued".

In the instant case, the Applicants in their affidavit in support of the application admit having borrowed various sums of money from the Respondent. They only contest the interest charged as being harsh and unconscionable. They in their intended defence, intend to seek for reopening of the money lending transaction and account between them and the Respondent and a refund of excess interest paid.

In such circumstances it is only fair that the Applicants deposit in Court the principle amount claimed by the Respondent of US$ 366,625.

In the final result, subject to the conditions set out below;

It is hereby ordered as follows;

1. The judgment and decree in Civil Suit No. 307 of 2007 delivered on 18th April 2008 is set aside.
2. Execution of the said decree is set aside.

3. The Applicants are to file a defence within 28 (twenty eight) days for the date hereof.

PROVIDED that the Applicant deposit in Court the Principal sum claimed in the plaint of US$ 366,625 on or before the filing of their Written Statement of Defence.

I so order.

LAMECK N. MUKASA

JUDGE

18/04/2011