THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT-00-CC- MA -0058-2012

SIMON YIGA……APPLICANT

VERSUS

M/S FINA BANK (U) LTD.....RESPONDENT

BEFORE HON. LADY JUSTICE HELLEN OBURA

RULING

This application was brought under section 98 of the Civil Procedure Act (CPA), Order 36 rule 4 and Order 52 rules 1 & 2 of the Civil Procedure Rules (CPR) for orders that the applicant be granted unconditional leave to appear and defend civil suit No. 8 of 2012 and that costs of the application be provided for.

The grounds of the application are contained in the affidavit of Simon Yiga, the applicant in which he states among other averments that:- in December 2008 while the applicant was an employee of Housing Finance Bank, the respondent extended an interest free benefit of Shs. 150,800,000/= to him as an enticement and/or inducement for him to leave his employment and join the respondent bank. He gave the certificate of title to his land comprised in Kyaddondo Plot 1823 Block 215 situate at Kulambiro as security for the benefit. After working with the respondent bank for a period of three months and in a surprise turn of events, he was presented with a FINA Personal Loan Application Form to fill and sign for purposes of transforming the benefit into a loan facility. Although he objected to filling and signing the form, he was forced to do so when the respondent threatened to sell his land to recover the money at the earliest opportunity.

The applicant further deposed that he was later presented with a loan agreement in which it was indicated that the benefit had been converted into a loan facility payable in 18 months at an interest rate of 9% per annum. The monthly installment was Shs. 1,412,379/= which was deducted from his account without his consent. He was also presented with a Form of Acceptance and a mortgage deed but he declined to sign all those documents as they changed the agreed position. The applicant states that he has been servicing the loan and he has so far paid Shs. 119,088,270/= leaving an outstanding sum of Shs. 31,711,730/= on the interest free benefit.

The grounds stated in the notice of motion are that the applicant has a good and valid defense to the respondent's claim which was brought in bad faith and driven by mala fide and as such it is just and equitable that the application be granted.

Ms. Namale Shamim for the applicant based her submission on the averments in the affidavit in support of the application. She contended that interest was not agreed upon in this case. She buttressed that contention with the decision in ***Jimmy Kisule v Steel Rolling Mills [1995] II KALR 126*** where Kato, J. (as he then was) held that there was a triable issue requiring evidence in court as the claim for interest was not properly brought before court because it had not been agreed upon. She submitted that it was also held in the same case that it is trite law that summary procedure should only be resorted to in clear and straight forward cases where the demand is liquidated and where there are no points for the court to try.

She explained that the applicant had a loan of Shs. 150,800,000/= with Housing Finance Bank where he was working before he joined FINA Bank. When the applicant accepted to join respondent bank upon its request, his loan with Housing Finance Bank was paid by the respondent as an enticement or inducement to him. She contended that the loan was interest free and that is why the applicant considered it a benefit. She further contended that it was the applicant's case that after joining the respondent bank for a period of about three months, in a surprise turn of events, an application form was presented to him to fill for purposes of transforming the benefit into a loan facility.

Counsel for the applicant submitted that the benefit of Shs. 150,800,000/= was purportedly converted into a loan facility payable in 18 years at a rate of 9% per annum with a monthly installment of Shs. 1,412,379/= which were deducted from the applicant's salary account without his consent. She argued that this was shown in the bank statement attached to the affidavit in support as annexture "A".

It was her submission that the applicant did not protest the deduction because he knew he had to pay the benefit but minus the interest. She argued that the applicant declined to sign the loan agreement which he found to be ridiculous and unfair because it changed the entire agreed position where he had received an interest free benefit.

She submitted that the applicant has been servicing the loan ever since it was created and has so far paid Shs. 119,088,270 as reflected in the bank statements attached as annexture "A" to the application. She contended that the applicant never executed the loan facility agreement, the Form of Acceptance and the Mortgage Deed and so the signatures that appear on them are not his. She argued that the suit is based on documents the applicant did not sign.

She further argued that the sum claimed in the main suit is not liquidated as stated in the affidavit in support. She referred to the decision in ***Twentsche Overseas Trading Co. Ltd v Bombay Garage [1958] EA 741*** where it was held that it is trite law that summary procedure should only be resorted to in clear and straight forward cases where the demand is liquidated and where there are no points for the court to try. She submitted that the summary suit was irregularly filed since the claim included interests which had not been earlier on agreed upon by the parties.

She referred to the case of ***Toro and Mityana Tea Company Ltd v Ibingira Charles [1995] IV KALR 20*** where Bahigeine, J (as she then was) held that an applicant for leave to appear and defend a suit only needs to show that there is an issue or question in dispute which ought to be tried.

In conclusion, counsel for the applicant submitted that the interest rate of 9% which was not agreed upon coupled with the applicant's case that he never executed the loan facility agreement,

form of acceptance and the mortgage deed raise triable issues. She prayed that the applicant be granted unconditional leave to appear and defend the suit.

While opposing the application, Mr. Musisi Stephen for the respondent contended that the applicant had no defence to the claim in the suit. It was his submission that the alleged defence is premised on a lie. He submitted that the respondent engaged the applicant in January 2009 and the terms of engagement are spelt out in the employment offer letter dated 29th December 2008. The letter is annexture "A" to the affidavit in rejoinder and no benefits or inducement is included.

Counsel for the respondent referred to paragraphs 14 and 15 of the affidavit in rejoinder and submitted that it is not the respondent bank policy to offer inducement or enticement for prospective employees to leave their work. According to him the bank instead offers loans to its staff at preferential rates below what ordinary customers are offered. He argued that the respondent bank took over and paid the applicant's existing loan with Housing Finance Bank his former employer totaling Shs. 150,823,425/=.

He contended that the applicant did not deposit the Certificate of Title to his land with the respondent as alleged but it was passed from Housing Finance Bank to the respondent bank as evidenced by annexture "B" to the affidavit in rejoinder. That annexture is a letter from Housing Finance Bank indicating that the securities shall be released after payment of the sum of Shs. 150,823,425/=.

Counsel for the respondent also contended that the applicant voluntarily signed the loan letter of offer and the mortgage deed as could be seen from his subsequent conduct. He observed that until this case was filed the applicant had never objected to this loan but rather embraced it wholeheartedly and effected payments to reduce it.

He highlighted the fact that the applicant on 16th April 2009 resigned from the employment of the respondent and wrote a notice of resignation which is annexture "F" to the affidavit in rejoinder. In the last paragraph of that letter he stated thus:-

"I am requesting for your dispensation to give me up to twelve months to look around for funds to repay the loan I have with Fina Bank".

Counsel for the respondent submitted further that the applicant wrote another letter dated 27th July 2009 (Annexture "G" to the affidavit in rejoinder) proposing a loan repayment plan. He referred to the 1st and 3rd paragraphs of that letter where the applicant stated as follows:

> ***"I have a staff mortgage with your bank for which I pay up approximately UGX 1,800,000/= each month, the loan balance is approximately148 million. I was given up to 90 days to come up with a repayment plan as I ceased to be a staff. Below is my repayment plan…….. I request the office to adjust my mortgage to the going mortgage rate of 18% for a repayment of approximately UGX 4,000,000/= each month over a five year period."***

He submitted that this letter dispels the claim that the loan was an interest free benefit or an inducement. In counsel's view if the applicant had signed the loan application form under duress, he would have protested since at the time of writing that letter he had left the employment of the bank.

Counsel for the respondent also referred this court to annexure "I" to the affidavit in rejoinder being a letter from the applicant dated 24/02/2010 by which he undertook to clear two installments the following week. Counsel invited this court to take special note of these two letters which were written after the applicant had left the employment of the respondent bank.

As regards the allegation by the applicant that the interest rate of 9% was not agreed upon, counsel for the respondent referred to paragraph 7 at page 2 of annexture "D" to the affidavit in rejoinder which shows the interest rate of 9%.

In reference to the applicant's claim that he has paid most of the loan, counsel for the respondent pointed out that what counsel for the applicant highlighted in yellow in the account statement (annexture "A" to the affidavit in support) were actually debits that would not show if the loan

had been paid off. It was his contention that there are some credits that are reflected on the statements but noted that that account statement could not give the accurate balance since the applicant used the same account to withdraw funds for his personal use.

He submitted that it was difficult to say what has been paid because the interest rate kept on adjusting. He contended that the loan account statement attached to the plaint was a more accurate indicator of the amount paid and it shows the outstanding balance of Shs. 115,024,226/=.

I wish to observe at this point that actually no loan account statement was attached to the plaint although it was stated in paragraph 4 (e) of the plaint that it was annexture "D". My perusal of the annextures to the plaint indicates that annexture "D" is a copy of the Certificate of Title which was stated in paragraph 4 (d) of the plaint to be annexture "C". Clearly, there was a mix up on the annextures as referred to in the plaint and the affidavit is support. It appears in the process the loan account statement was never annexed.

With regard to the interest rate applied to arrive at the outstanding amount claimed, counsel for the respondent submitted that once the applicant left employment of the respondent, the preferential interest rate of 9% ceased to apply. He submitted further that the interest rate keeps changing with the adjustments from Bank of Uganda and once the applicant became an ordinary customer he was faced with the same interest rate like any other customer.

With respect to the authorities relied upon by the applicant, counsel for the respondent submitted generally that they were not applicable in this instance. He specifically referred to the authority of ***Toro and Mityana Tea Company LTD v Ibingira Charles*** (supra) and submitted that it is not applicable because this application does not raise any triable issue. He contended that the applicant's alleged defence is based on lies that he was offered an interest free benefit or an inducement which is not true.

In rejoinder, counsel for the applicant maintained that the applicant signed the FINA personal application form under pressure and for fear of his property being sold but he did not sign the

loan facility agreement, the form of acceptance and the mortgage deed. Counsel conceded that the applicant wrote annextures “F” and “G” but not annexture “I” to the affidavit in rejoinder. She assumed the role of a handwriting expert and pointed out that the signature on annexure “I” was different from the applicant’s signature.

On the amount so far paid by the applicant, she submitted that the bank statement marked annexture “A” to the affidavit in support showed that the money was deducted from the applicant’s salary to facilitate the loan as highlighted. Counsel for the applicant admitted that the bank statement was not for a loan account but a personal account and contended that the applicant was never given statements for his loan account.

As far as payment of the loan was concerned, counsel for the applicant submitted that the applicant has been servicing the loan and had so far paid Shs.119,088,270/=. She then submitted that the sum claimed in the suit was overstated. She contended that the applicant/defendant owes the respondent/ plaintiff a sum of Shs. 31,711,730/= only arising out of the benefit without interest.

Asked by court to reconcile the applicant’s contention that the loan was interest free and annexure “G” where he was requesting the bank to adjust his mortgage to the going mortgage rate of 18%, counsel submitted that the applicant stated that he wrote to the respondent under economic duress requesting for more time to pay. She reiterated her prayer that the applicant be granted unconditional leave to appear and defend the suit.

The law governing applications for leave to appear and defend a summary suit is that an applicant/defendant must show by affidavit or otherwise that there is a bona fide triable issue of fact or law. The applicant is not bound to show a good defence on the merits of the case but should satisfy court that there is an issue or question in dispute which the court ought to determine between the parties. See ***Maluku Interglobal Trade Agency Ltd v Bank of Uganda [1985] HCB 65*** and ***Kasule v Muhwezi [1992-1993] HCB 212***.

The Court of Appeal of East Africa in the case of ***Zola v Ralli Brothers Ltd [1969] EA 691 at 694*** where it was considering the Kenya equivalent of Order 36 of the CPR under which this application is brought (previously Order 33), stated the rationale of that order as follows:

> ***"Order 35 is intended to enable a plaintiff with a liquidated claim, to which there is no good defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the defendant. If the Judge to which application is made considers that there is any reasonable ground of defence to the Claim the plaintiff is not entitled to Summary Judgment."***

In essence, where the applicant raises a good defence the plaintiff is barred from obtaining summary judgment. To that end, Order 36 rule 7 of the CPR provides as follows;

> ***"If it appears to the court that any defendant has a good defence to or ought to be permitted to appear and defend the suit, and that any other defendant has not such defence and ought to be permitted to defend, the former may be permitted to appear and defend. And the plaintiff shall be entitled to issue a decree against the latter…"***

In the case of ***Kotecha v Mohammed [2002] 1EA 112*** it was held that where a suit was brought under summary procedure on a specially endorsed plaint, the defendant is granted leave to appear if he was able to show that he had a good defence on merit, or that a difficult point of law is involved; or a dispute as to the facts which ought to be tried; or a real dispute as to the amount claimed which requires taking an account to determine; or any other circumstances showing reasonable grounds of a bona fide defence.

This court was referred to the case of ***Toro and Mityana Tea Company Ltd v Ibingira Charles*** (supra) where it was held that an applicant for leave to appear and defend a suit only needs to show that there is an issue or question in dispute which ought to be tried. In the instant case, the applicant does not need to show a good defence on the merits of the case but should satisfy court

that there is an issue or question in dispute which the court ought to determine between the parties.

Before I consider whether this application raise triable issues, I first of all wish to deal with the argument for the applicant that the claim in H.C.C.S. No. 8 of 2012 which gave rise to this application is not liquidated. In effect that would answer the question as to whether the suit was properly brought by summary procedure. As correctly argued by counsel for the applicant based on the case of ***Twentsche Overseas Trading Co. Ltd v Bombay Garage*** (supra), summary procedure should only be resorted to in clear and straight forward cases where the demand is liquidated. That is also the import of Order 36 rule 2 (a).

I have thoroughly looked at the specially endorsed plaint with all its annextures. The plaintiff is claiming Shs. 115,224,226/= which arose from a loan of Shs. 150,800,000/= that was given to the applicant in January 2009. The Fina Personal Loan Application Form by which the applicant applied for the loan was attached as annexture "A" to the plaint. The letter of offer of the loan facility was attached as annexture "B" and the form of acceptance as annexture "C". The letter of offer refers to the amount borrowed.

It was alleged in the plaint and the supporting affidavit that the applicant defaulted in the repayment of the principal and interest which have accumulated to the amount claimed in the suit. The loan account statement which should have indicated how that amount accumulated was never attached to the plaint. In other words there is no document to support the plaintiff's claim of Shs. 115,224,226/=. It therefore remains a mere allegation especially in view of the contention of the applicant that he had so far paid Shs.119,088,270/=. Would it therefore be proper in the circumstances to proceed with this matter by way of a summary procedure when the rules and case law authority state that the amount must be liquidated?

Black's Law Dictionary 8th Edition defines liquidated amount as "*a figure readily computed, based on an agreement's term"*. It is stated in "***The Annual Practice***"[1] that a liquidated demand is in the nature of a debt, a specific sum of money due and payable under or by virtue of a

[1] 1966, SWEET & MAXWELL, LONDON

contract which is either already ascertained or capable of being ascertained as a mere matter of arithmetic.

From the above definitions it is clear that the amount must be ascertained or capable of being ascertained as a mere matter of arithmetic. In the instant case, the plaintiff/respondent did not provide the basis for its claim which would have assisted this court to verify its claim as indeed liquidated. It is stated in "***The Supreme Court Practice***"[2] that;

"…if ascertainment of a sum of money even though it be specified or named as a definite figure, requires investigation beyond mere calculations, then the sum is not a debt or liquidated demand but constitutes damages".

In my view, the applicant's claim squarely falls within what cannot merely be ascertained by mere calculations because there is an issue of interest rate charged after the applicant left the plaintiff/respondent's employment. Counsel for the respondent in his submission did not even tell court the interest rate that was used to arrive at the amount claimed. He only stated that the respondent kept on adjusting the interest rate in accordance with the fluctuating Bank of Uganda prime rate.

He submitted that the interest rate of 9% which was agreed upon by both parties ceased to apply when the applicant resigned from the respondent bank. I must point out that that interest rate was also disputed but as I will allude to it later there is evidence to support the respondent's contention. Nonetheless, from the submission of counsel for the respondent the amount claimed includes a component of interest that was not agreed upon by both parties.

To my mind, in the circumstance of this case where the agreed interest rate was a much lower rate offered for the staff, once that rate was changed unilaterally by the respondent, the amount due and payable cannot just be ascertained by mere calculation but require more investigation into the interest rate applied. See ***E.M Cornwell & Co. Ltd v Shangtaguari Dahyabhai Desai (1941) 6 ULR 103*** and ***Haji Arjabu Kasule v F.T. Kawesa [1957] EA 611*** where it was held that

[2] 1966, SWEET & MAXWELL, LONDON

interest cannot be claimed in a suit under Order 33 (now 36) unless it is based on an agreement for interest in the document sued on, or on a statute. The document sued on in this case (which is even disputed by the applicant) provides for interest of 9% but what is claimed is based on other interest that was subsequently charged by the respondent without the applicant's consent.

Besides, there is a dispute on the amount claimed. While the applicant contends that he has paid a substantial amount of the loan, the respondent makes its claim without indicating what has so far been paid. It would therefore be fair and in the interest of justice for this court to know the exact amount so far paid by the applicant so as to determine the actual outstanding amount. All those need further investigation by this court hearing evidence from both sides. This, in my considered opinion, would then remove Civil Suit No. 8 of 2012 from the ambit of summary procedure.

In the circumstances, I agree with counsel for the applicant that the suit was irregularly brought by summary procedure when the amount claimed is not a liquidated demand. This finding alone would justify granting the applicant unconditional leave to appear and defend the suit because there are questions in dispute which ought to be tried.

However, the applicant raised another ground of this application that I will comment on before I take leave of this matter. In doing so, I am alive to the decision in ***Corporate Insurance Co. Ltd v Nyali Beach Hotel Ltd [1995-1998] EA 7*** where the Court of Appeal of Kenya held that leave to defend will not be given merely because there are several allegations of fact or law made in the defendant's affidavit. The allegations are investigated in order to decide whether leave should be given. As a result of the investigation even if a single defence is identified or found to be bona fide, unconditional leave should be granted.

It was strongly argued for the applicant that the Shs. 150, 823,425/= in issue was an interest free benefit that was used to pay off his loan with Housing Finance Bank as an inducement for him to join the service of the respondent bank. I have carefully considered this argument by looking at the application with its affidavit in support and the supporting documents as well as the affidavit in reply with all the documents relied on.

I find the applicant's argument at variance with his three letters to the respondent attached to the affidavit in reply as annextures "F", "G" and "I". Even if I were to believe that the applicant did not execute the loan facility agreement, form of acceptance and the mortgage deed and did not write annexture "I" as argued, I would find that the contents of annextures "F" and "G" contradict the applicant's contention that the loan was an interest free benefit. In annexture "G" he did not only clearly acknowledge the loan but even went ahead and proposed "the going mortgage rate of 18%" to be applied on his mortgage by the respondent. He admitted that he wrote annexture "G" but it was contended by his counsel that he wrote it under economic duress.

To my mind, that is evidence from the bar as the applicant did not allude to this in his affidavit in support. The applicant did not state in his affidavit that he at any one time protested against the interest. He instead wrote annexture "G" acknowledging the loan and requested for the going mortgage rate of 18% and even gave a repayment schedule. If at all he felt that he was under duress, in my view, he should have at least indicated that he was writing the letter under protest but he did not.

In the circumstances, I find the applicant's contention that the loan was an interest free benefit unconvincing as his subsequent conduct instead confirmed that the loan attracted interest. That argument does not raise any triable issue as it lacks merit.

However, as already stated above I find that the undisclosed interest rate applied by the respondent after the applicant resigned from its employment and the unclear position on the amount so far paid and what is due and owing raise triable issues. These questions need to be conclusively investigated by this court taking evidence from both sides and deciding on the basis of that evidence.

In the premises, I find that the applicant has raised triable issues that merit grant of this application. As such he is entitled to unconditional leave to appear and defend the suit and it is

accordingly granted. The applicant shall file a written statement of defence within ten days from the date of this ruling. Costs of this application shall be in the cause.

I so order.

Dated this 28th day of June 2012.

Hellen Obura
JUDGE

Ruling delivered in chambers at 3.00 pm in the presence of Ms. Shamim Namale for the applicant and Ms. Doreen Leku who was holding brief for Mr. Stephen Musisi for the respondent. Both parties were absent.

JUDGE
28/06/2012