

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**HCCS NO 710 OF 2012**

**KABAGENYI TEDDY ONYANGO}.....APPLICANT/DEFENDANT**

**VERSUS**

**MESSRS FINA BANK (U) LTD}.....RESPONDENT/PLAINTIFF**

**BEFORE HON MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**RULING**

The Applicant/Defendant commenced this application under the provisions of section 98 of the Civil Procedure Act, Order 36 rules 3 (1) and (4) of the Civil Procedure Rules for unconditional leave to appear and defend the main suit and for costs of the application.

The grounds of the application as detailed in the notice of motion are firstly that the Applicant has a good defence and a counterclaim to the Plaintiffs claim in HCCS number 395 of 2012. Secondly the mortgage upon which the main suit is grounded is a nullity and unenforceable at law. Thirdly if the orders sought by the Respondent/Plaintiff are granted, the Applicant would suffer double jeopardy. Lastly the Applicant avers that it is just and equitable that leave is granted for the Applicant to defend the suit. The affidavit in support of the grounds is disposed to by the Applicant herself. She deposes that the main suit is grounded on the mortgage deed dated 3<sup>rd</sup> of May 2012 allegedly between her and the Respondent bank. The Respondent bank illegally created a mortgage as an encumbrance on her property comprised in Plot 104 Block 447 at Kitinda, Abaita Ababiri, and Busiro Wakiso district hereinafter referred to as the suit property. The Respondent bank has not sought to foreclose her right to redeem the property and she has not released the property as security from the alleged loan. On the basis of information from her lawyers she deposes that the mortgage executed between her and the Defendant bank does not comply with the law and was unenforceable. She had made many payment to the Respondent

bank totalling to **Uganda shillings 129,354,800/=**. She claims that she is illiterate in terms of banking terminologies and the Respondent bank never explained to her the import of the terms of the loan facility as required by law. The Applicant further claims that the Respondents claim is fraudulent because of the claim of the principal sum plus accrued interest yet the Respondent bank still holds her security by way of a mortgage. The Respondent bank abandoned her primary remedy of sale or foreclosure of the mortgaged property and instead sought for other remedies not envisaged under the mortgage deed/loan facility. The Applicant claims to have a valid counterclaim against the Respondent bank for declaratory orders that the mortgage deeds entered into between her and the Respondent bank was invalid and unenforceable and that the mortgage registered on the certificate of title as an encumbrance should be removed. Furthermore on the basis of advice from her lawyers she deposes that the Plaintiff's suit is not a proper suit for trial by way of summary procedure. Her suit raises triable issues of fact and law necessitating the adducing of evidence according to an attached draft written statement of defence. The Applicant reiterates the grounds in the notice of motion.

The affidavit in opposition is deposed to by Charles Nalyali, the Chief Executive Officer of the Respondent bank. The deposition gives that facts and that the Applicant applied for and was granted a loan of Uganda shillings 300,000,000/= and she accepted the loan offer letter on the 5th of May 2011 by signing it. The loan was to enable her pay off an existing loan she had with Barclays bank and for working capital. The loan was granted with an interest rate of 23% per annum and was repayable in 36 monthly instalments of Uganda shillings 11,612,916/= each. The Applicants signed a demand promissory note and mortgagor's approval and consent. The loan amount was disbursed to the Applicant on the 26th of May 2011 less the processing fee of Uganda shillings 6,000,000/= which was 2% agreed upon. All the payments made by the Applicant were correctly noted in the statement of account and she is truly indebted to the bank in the sum of Uganda shillings 250,319,930/= by 14 August 2011. The Applicant previously acknowledged the debt in Bankruptcy Petition number 6 of 2012. Copies of the title of the suit property comprising block 333 of 1293 are attached to the affidavit in opposition. Furthermore appropriate stamp duty was paid before the mortgages were released and the properties have not been sold by the bank.

The application for leave to appear and defend was dismissed on 3 July 2013 for want of appearance and judgment entered against the Applicant for a sum of Uganda shillings 250,319,930/= with interest. The order of dismissal was subsequently set aside by consent of Counsels and the application was argued on merits.

Counsel Aggrey Bwire represented the Applicant while Counsel Musisi Stephen represented the Respondent.

Counsel Aggrey Bwire for the Applicant in his address made reference to the facts and grounds in the notice of motion and submitted that the test as to whether the Applicant should be given unconditional leave to defend the suit is whether the application discloses triable issues. Counsel relied on the case of **Kyobe Senyange versus Naks Ltd (1980) HCB** at page 30. In that case the Applicant pleaded that the alleged contract upon which the Applicant was sued was illegal, void and harsh and it was held that the Applicant had shown triable issues. In averment of the Applicant in grounds 2 of application that the mortgage upon which the main suit is grounded is a nullity and unenforceable supported by paragraph 6 of affidavit in support that the mortgage did not comply with the law is a triable issue. The issue is reflected in the proposed Written Statement of Defence.

Secondly the Applicant alleges fraud in paragraph 9 of the affidavit in support and the proposed written statement of defence. The Applicants Counsel submits that fraud is a serious allegation which ought to be subjected to thorough judicial examination and trial. He relied on the case of **UCB vs. Mukoome Agencies [1982] HCB 22**; it was held that where fraud is alleged, the party alleging must be given an opportunity to prove it. Counsel contends that it is trite law that a substantive allegation of fraud in an affidavit in opposition raises triable issue which entitles the Defendant to appear and defend the suit. Thirdly the Applicant's case is that where a counterclaim is proposed, courts are inclined to grant unconditional leave to appear and defend the suit. Counsel relied on **Maluku Interglobal Trade Agency Ltd vs. Bank of Uganda [1985] HCB at 65**. He submitted that there is a proposed counterclaim included in the draft WSD. The Applicant's Counsel concluded that the application raises triable issues of law and fact which should be subjected to thorough judicial examination. He prayed that the application is allowed with costs in the cause.

In reply Counsel Musisi Stephen submitted that the Applicant's Counsel claims that the suit is founded on a mortgage which is a nullity. To counteract that submission, the suit is not founded on a nullity. The loan is based on the letter of offer which was duly signed by the Applicant. The mortgages created were to secure the loan facility only. The Applicant's Counsel has not demonstrated how the mortgages are a nullity. Even if the mortgage was proved to be a nullity, the loan agreement would be unaffected and can only become unsecured. As far as the allegation of fraud is concerned, the Applicant paid Uganda shillings 139,000,000/=, yet the Plaintiff is seeking over Uganda shillings 250,319,930/=. The Applicant has not furnished proof that she paid the sums alleged. On the other hand the Respondents claim is based on statement of account which shows the amounts disbursed, what the Applicant paid and the balance of Uganda shillings 250,319,930/=. The Applicant claims that the Defendant was only granted 260,000,000/= when she applied for Uganda shillings 300,000,000/=. However annexure "A" to affidavit in reply proves that the Applicant was disbursed two sums namely Uganda shillings 294,000,000/= as loan proceeds and Uganda shillings 6,000,000/= as processing fees. These two sums add up to Uganda shillings 300,000,000/=. Uganda shillings 6,000,000/= was retained. The Applicant has not proved that she was not disbursed Uganda shillings 260,000,000/.

On the assertion that the Applicant is an illiterate person the Respondent Counsel submitted that the Applicant has sworn many affidavits disproving the allegation of illiteracy. Furthermore the loan the Respondent granted was to buy out an earlier loan from Barclays bank. The letter of offer paragraph 2 thereof gives the purpose of the loan. The authorities cited by the Applicant's Counsel is the law but inapplicable. Finally the application has not shown triable issues and the purported defence is a sham and the application ought to be dismissed with costs.

In rejoinder the Applicant's Counsel maintains that the Respondent's Counsel delved into the merits of the main suit which should not be the preoccupation of court. All that the Applicant needed was to show triable issues. Pleadings are to be proved in the substantial trial of the main suit. In conclusion the Respondent's Counsel has not rebutted the fact that there are triable issues raised in the application.

## **Ruling**

I have carefully considered the Applicants application together with the affidavit evidence for and in opposition to the application as well as the submissions of Counsel and authorities cited.

Several authorities were cited by the Applicants Counsel for the principles upon which the court should consider the Applicants application and the Respondents Counsel agreed with the state of law but submitted that they were inapplicable to the Applicant's case. Nonetheless I will briefly mention some of these principles as reflected in the authorities cited by the Applicants Counsel.

Reference was made to the case of **Senyange vs. Naks Limited [1980] HCB at page 30**. In that case the Applicants application for leave to appear and file a defence under Order 33 rule 11 (revised Order 36 rule 11) of the Civil Procedure Rules was dismissed for want of appearance and judgment entered. Upon an application being filed under rule 11 (supra) it was held that before setting aside an ex parte judgement, the court has to be satisfied not only that the Defendant had some reasonable excuse for failing to appear, but also that there is merit in the defence to the case. Secondly it was held that where the Applicant has shown a triable issue, he is entitled to be granted unconditional leave to enter appearance and defend the suit. Secondly learned Counsel for the Applicant cited the case of **Maluku Interglobal Trade Agency Ltd versus Bank of Uganda [1985] HCB at page 65**. In that case it was held that before leave to appear and defend is granted, the Defendant must show by affidavit or otherwise that there is a bona fide triable issue of fact or law. Where there is a bona fide triable issue of fact or law, the Plaintiff is not entitled to summary judgement. The Defendant is not bound to show a good defence on the merits but should satisfy the court that there was an issue or question in dispute which ought to be tried and the court should not enter upon the trial of the issues disclosed at this stage. The defence must be stated with sufficient particularity to appear genuine and general or vague statements denying liability will not suffice. Lastly learned Counsel for the Applicant relied on the case of **Uganda Commercial Bank versus Mukoome Agencies [1982] HCB at page 22**, a decision of the Court of Appeal. Counsel particularly relied on the holding that where fraud is alleged, the party alleging it must be given an opportunity to prove it and it is trite law that a substantive allegation of fraud in an affidavit in opposition raises a triable issue entitling the Defendant to leave to defend the summary suit.

I have duly considered the affidavit evidence referred to at the commencement of this ruling. I have also considered the submissions of Counsel in relation to the affidavit evidence. The first

triable issue alleged to have arisen is the averment of the Applicant that the mortgage was null and void and unenforceable in law. I have some difficulty in appreciating the Applicant submission for the simple reason that the Applicant's affidavit is inherently contradictory on that issue. On the one hand she avers that the mortgage is an illegality because it was executed not in compliance with the law. She avers that the Respondent illegally created a mortgage as an encumbrance on her title comprised in Plot 104 Block 447 at Kitinda in Wakiso district (see paragraph 4 and 5 of the affidavit in support). On the other hand in paragraph 5 of her affidavit in support of the application, she deposes that the Respondent bank has not sought to foreclose her right to redeem the mortgaged property nor has she released the mortgaged property as security for the alleged loan. Implicit in paragraph 5 of her affidavit is an acknowledgement that she mortgaged the property to the Respondent. In paragraph 10 she avers that the Respondent bank has abandoned its primary remedy of sale or foreclosure of the mortgaged property and is instead seeking for other remedies not envisaged under the mortgage deed/loan facility. Lastly I have duly considered the Respondents submission to the effect that the basis of the summary suit is the loan and not the security. That if the mortgage was done away with, the only effect that it would have is that the loan would be unsecured. I agree with the Respondents Counsel that the issue of whether the mortgage was a nullity or not does not affect the issue of indebtedness of the Applicant for money had and received from the Respondent. Secondly a perusal of annexure "A" to the affidavit in reply (supra) clearly indicates that in a letter dated 4<sup>th</sup> of May 2011 the Applicant was offered a loan facility of Uganda shillings 300,000,000/= and she accepted the transaction with her own signature. Secondly the Applicant endorsed a demand promissory note indicating that on demand she promised to pay the Respondent a sum of Uganda shillings 300,000,000/= with interest at 3% over and above the banks prevailing Uganda shillings base rate which was currently at 20% and the effective rate being 23% per annum. Consequently the indebtedness of the Applicant can be founded on the loan agreement and the demand promissory note without reference to any mortgage.

Secondly in Bankruptcy Petition Cause No 6 of 2012 which was a petition by the Applicant, paragraph 5 of the petition indicates that the petitioner is indebted to the Respondent to the tune of Uganda shillings 250,319,930/=. In the affidavit verifying the petition and paragraph 4 thereof, her indebtedness to the Respondent is confirmed on oath. Last but not least the mortgage referred to by the Respondent attached to the affidavit in opposition is block 333 plot 1293.

*Decision of Hon. Mr. Justice Christopher Madrama*

However, the Applicant refers to another plot namely plot 104 Block 447. The record of the court shows that on 28 November 2012, Counsels informed the court that there was a discussion on the effect of a bankruptcy petition acknowledging the debt. However the petition was subsequently withdrawn. Withdrawal of the petition cannot withdraw the admission of indebtedness. In ordinary suits, Order 13 rule 6 of the Civil Procedure Rules provides that a Plaintiff or any party may at any stage of the suit where an admission of facts has been made either on pleadings or otherwise apply to court for judgement. Section 57 of the Evidence Act provides that admitted facts need not be proved. It will be hard to escape the admission of indebtedness contained in the petitioners own petition albeit withdrawn. In those circumstances the issue of the alleged illegality and nullity of any mortgage executed between the parties is not a relevant issue to the question of the Applicant's indebtedness and therefore does not give rise to a triable issue as to the indebtedness of the Applicant.

The second triable issue raised concerns an allegation of fraud. The allegation of fraud is contained in the draft written statement of defence. The particulars of fraud in paragraph 6 indicates that the Plaintiff claims the principal sum including accruing interest from the Defendant yet the Plaintiff bank still holds security of the Defendant by way of mortgages. This ground does not disclose fraud for the simple reason that the basis of the Applicant's indebtedness as has been discussed above is not necessarily related to the mortgage. The second particular is that the Plaintiff has already received a sum of Uganda shillings 139,354,800/= from the Applicant yet it is claiming an additional Uganda shillings 250,319,930/=. Again the facts are at variance with the admissions of the Applicant. The third particular of fraud is that the Plaintiff seeks to enforce the terms of an invalid/impugned mortgage. Perusal of the summary plaint makes no reference to the mortgage for purposes of foreclosure. It is purely a claim for a liquidated sum of money. Consequently no triable issue has been disclosed by the particular of fraud in relation to the liquidated demand. In paragraph 6 (d) of the draft written statement of defence, the Applicant claims that the Plaintiff has abandoned the primary remedy of sale or foreclosure of the mortgaged property and is instead seeking for other remedies not envisaged under the mortgage deed/loan facility. The method of enforcement of the liquidated demand is not a triable issue for purposes of establishing indebtedness and may be a matter in execution. Finally the last particular of fraud is that the Plaintiff obtained a sum of Uganda shillings 139,354,800/= from the Defendant as the payment of an enforceable mortgage by exploiting the

Defendants illiteracy and ignorance. I will consider this last particular of fraud as to whether it raises a triable issue together with the allegation that the Applicant is an illiterate in bank matters and the Respondent/Plaintiff took advantage of her.

The Applicants application is supported by an affidavit deposed to on 12 November 2012 before the Commissioner for oaths. The affidavit is in the English language. The loan agreement is in the English language. There was no attempt by the Applicants Counsel to comply with the provisions of the Illiterates Protection Act. Section 1 (b) of the Illiterates Protection Act Cap 78 defines the word "illiterate" to mean, as follows:

"in relation to any document, a person who is unable to read and understand the script or language in which the document is written or printed."

In other words if the Applicant was unable to read the script or language of her own affidavit in support of the application, it would be concluded that she is unable to read and understand the affidavit or the English language. Wherever a person cannot read and understand the script or language in which a document is written or printed, it is a mandatory requirement that the signature of illiterates is verified by the person who read back the script to the illiterate on the very document in which the illiterate appended his or her signature. The affidavit in support of the application never complied with the mandatory requirements of the Illiterates Protection Act (supra). I therefore believe that the Applicant is not illiterate having duly endorsed both the loan offer and her own affidavit in support of the application in total disregard of the Illiterates Protection Act (supra).

According to the case of **Uganda Commercial Bank versus Mukoome Agencies [1982] HCB 24**, there has to be a substantive allegation of fraud in an affidavit to raise a triable issue entitling the Defendant to leave to appear and defend the suit. Secondly in the case of **Maluku Interglobal Trade Agency Ltd versus Bank of Uganda [1985] HCB at page 65**, the Applicant/Defendant has to show by affidavit or otherwise that there is a bona fide triable issue of fact or law. I agree with the Respondents Counsel that the Applicants defence is a sham and does not raise bona fide issues of fact or law for trial. The Applicant clearly acknowledged in her own bankruptcy petition albeit withdrawn that she is indebted to the Respondent bank to the tune of Uganda shillings 250,319,930/=. The petition was filed on court record on 27 August 2012.



The Plaintiff's suit however was filed subsequently on 12 September 2012. A statement on oath filed on the court record even if withdrawn should not be taken lightly. The Plaintiffs claim in the summary suit is for Uganda shillings 250,319,930/=. It is based on the copy of the Defendant's statement of account as of 14th of August 2012.

The conclusion is that the Defendant/Applicant is heavily indebted. Secondly the purpose of the loan was to offset another loan with Barclays bank of Uganda. Paragraph 2 of the loan offer letter which was endorsed by the Applicant indicates that the facility shall be used to pay off the existing loan obligations with Barclays bank and the balance for working capital purposes.

In those circumstances the Applicant has not raised bona fide triable issues which merit investigation by the court as far as her indebtedness to the Respondent is concerned. In the Plaintiff's suit, the only order that can be made is an order awarding the liquidated sum together with interest as claimed. The court in the summary suit cannot purport to foreclose the Applicant's right to any mortgaged property. So if there are any issues relating to the mortgage or the legality of the mortgage, they do not belong to the summary suit. The summary suit is merely to establish the indebtedness of the Applicant to the Respondent bank. Foreclosure proceedings are however specific proceedings and may proceed upon establishing liability of the mortgagor by an order of the court. The allegations of the legality of the mortgage are matters to be raised either in execution or in foreclosure proceedings. In the premises, the Applicant's application for leave to defend the summary suit has no merit and is accordingly dismissed with costs.

Ruling delivered in open court on 6 December 2013

**Christopher Madrama Izama**

**Judge**

Ruling/Judgment delivered in the presence of:

Leku Doreen for the Respondent bank

Respondent no in attendance

*Decision of Hon. Mr. Justice Christopher Madrama*

Applicant in attendance

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

6<sup>th</sup> December 2013