

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

MISCELLANEOUS APPLICATION No. 929 of 2015

10 *[Arising Out Of Civil Suit No. 687 of 2015]*

1. WALUJJO UGANDA LIMITED

2. NASSER KIBIRIGE TAKUBA ::::::::::::::: APPLICANTS/ DEFENDANTS

3. KIBIRIGE ZULAIKA

VERSUS

15 **TROPICAL BANK LIMITED ::::::::::::::: RESPONDENT/PLAINTIFF**

BEFORE: HON. MR. JUSTICE B. KAINAMURA

RULING

The applicant brought this application by Notice of Motion Under O 36 rule 3 & 4 & O 52 of the CPR for unconditional leave to appear and defend Civil Suit No. 687 of 2015 and for costs.

20 The grounds for the application as set out in the affidavit in support deposed by Mr. Nasser Kibirige Takuba a Director of the 1st applicant are briefly that; the respondent advanced loan facilities to the 1st applicant by way of overdraft facility but the sums/ amounts claimed are inflated and wrongly stated in the affidavit by Joweria Mukalazi, the 1st applicant in November 2012 with the consent of the respondent sold his land comprised in Kyadondo Block 82 Plot 25 1832 at a sum of UGX 190,000,000/= which was used to clear indebttness of UGX 150,000,000/= and UGX 40,000,000/= left in excess before advancement of any further loan to the 1st applicant, after the sale of the property in Kiryowa the respondent declined to advance the loan of UGX 350,000,000/= before the applicants deposited another property as security and the 1st applicant deposited duplicate certificate of title in respect of land comprised in Kibuga Block 30 8 Plot 669 to secure the loan of UGX 350,000,000/=: the agreement in respect of the loan facility was drafted in November 2012 but executed on 8th February 2013 without altering clauses in

regard to the property to comprise security and the purpose of the loan, the respondent only advanced UGX 100,000,000/= after registering a mortgage on its property which jeopardised the business plan of importing oil products, the property mortgaged has no substantive challenges, the failure or refusal to return the property will form among others a counterclaim should the court allow this application, the applicants have a good defence in the main suit if leave to appear and defend is granted and it is in the interest of justice that the court grants this application.

In the affidavit in reply, Ms Joweria Mukalazi deposed that; the 1st applicant applied for an overdraft facility of UGX 100,000,000/= from the respondent which was granted pending perfection of the securities, in absence of the agreed security, the respondent was unable to disburse the balance as agreed in the Credit Facility Agreement, the 1st applicant is currently indebted to the respondent in the sum of UGX 448,647,619 as at 22nd April 2015, as guarantors the 2nd and 3rd applicants are liable for the said indebtedness.

In an affidavit in rejoinder, Mr. Nasser Kibirige Takuba deposed that; the affidavit in reply was filed and served upon the applicants' lawyers out of time and contrary to the law and their lawyers shall raise an objection at the earliest opportunity, it is not true that it owed the respondent a sum of UGX 73,244,370/= on the contrary it had a balance of approximately UGX 40,000,000/=, by the time the respondent advanced UGX 100,000,000/= to the 1st applicant, the 1st applicant was not indebted to the respondent at all, and it is in the interest of justice that the court grants this application.

Applicants' Submissions

Counsel for the applicant adopted one issue for resolution of the application which is; whether there are triable issues warranting the grant of the application for unconditional leave to appear and defend the suit. Counsel relied on the case of ***Peter Bibagamba Vs Florence Mungereza and Nile Mining Ltd (Misc Application No. 103 of 2012)*** where court observed that the defendant must show that there is a triable issue of fact or law and is not bound to show a good defence on the merits of the case but rather satisfy court that there is an issue or question in dispute which court ought to determine between the parties. Counsel submitted that there are issues in regard to money advanced and the certificates of title which the respondent refused to return yet they are not part of the security and are held illegally which can only be resolved at a full hearing. Counsel submitted that the applicants will suffer injustice if the application is not granted and prayed for costs.

Respondent's Submissions

Counsel for the respondent first challenged the application for being incompetent and for not disclosing triable issues. Counsel on the issue of competence of the application submitted that the applicants violated Order 1 rule 12 of the CPR which requires authority in writing where an
5 action is representative in nature. Counsel added that this was not done in this application as the 2nd applicant's affidavit in support of the application is sworn on behalf of the 1st and 3rd applicants without showing any authority to do so. Counsel prayed that the application be dismissed with costs and judgment entered as prayed for in the plaint.

Discussing the merits of the application, Counsel submitted that the respondent's affidavit
10 reveals that the said UGX 100,000,000/= was withdrawn by the applicant on 13th Feb 2013 bringing the liability to UGX 250,000,000/=. Counsel invited court to dismiss this application for not disclosing any triable issue. Counsel added that if court is not inclined to dismiss the application, they pray that the applicants pays UGX 250,000,000/= that is admitted to have been taken before the leave to appear and defend can be granted.

RULING

I have carefully considered the application, the affidavits and written submissions made herein by both Counsel. The applicant filed this application for leave to appear and defend Civil Suit No. 687 of 2015. However, Counsel for the respondent raised an objection in regard to the affidavits deposed by the 2nd applicant on behalf of the 1st and 3rd respondent without any proof
20 of authorisation to do so which he argued is contrary to ***Order 1 rule 12 of the CPR***.

Counsel for the applicants made no response to the above objection as there was no rejoinder on court record.

Order 1 rule 12 of the CPR provides;

(1) *Where there are more plaintiffs than one, any one or more of them may be
25 authorised by any other of them to appear, plead or act for that other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorised by any other of them to appear, plead or act for that other in any proceeding.*

(2) *The authority shall be in writing signed by the party giving it and shall be filed in the case.*

In the first paragraph of the affidavit in support of the application, **Mr Nasser Kibirige Takuba** deposes that;

5 *“THAT I am an adult male of sound mind, the director of the 1st applicant and the 2nd applicant/ defendant in the application and make this affidavit in that regard and on behalf of the 1st and 3rd applicants/ defendants.”*

There is no proof on record that shows that he was authorised to do so as required in the Civil Procedure rules which in **rule 12(2) of Order 1** requires authorisation to be in writing. In the case
10 of **Scorpion Holding Ltd & 2 Ors Vs Bank of Baroda Uganda Ltd Misc Appl. No. 286 of 2013** which had similar facts with the facts in this case in regard to the preliminary objection regarding representation of other parties. Court ruled that;

15 *“Upon perusing and reviewing the authorities relied upon and in the absence of proof of authority, this court is inclined to agree with the submission of Counsel for the respondent that the affidavit in support of the application and that in rejoinder are both incurably defective for non-compliance with the requirements of the law and they cannot therefore support the application. I would therefore uphold the preliminary objection and dismiss the application for being incompetent due to lack of a supporting affidavit. That would dispose of this application and there would be no need to consider the merits.”*

20 I agree with the ruling above and accordingly uphold the preliminary objection. In the result the application incompetent. It is therefore not necessary to consider the merits of the application. The application is accordingly dismissed with costs and judgment entered for the respondent in C.S No. 687 of 2015 as prayed.

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B. Kainamura

Judge

14.10.2016