

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO 214 OF 2016
(ARISING FROM CIVIL SUIT NO 6 OF 2016)

EVAS BABIGUMIRA}.....APPLICANT/DEFENDANT

VS

HUADAR GUANDONG CHINESE COMPANY LTD}.....RESPONDENT/PLAINTIFF

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant filed this application for unconditional leave be granted to defend the Respondent's summary suit against her. It is also for costs of this application to be provided for. The grounds of the application set out in the Notice of Motion are as follows:

1. The Applicant/Defendant has a good defence to the Respondents claim.
2. The Applicant/Defendant is not indebted to the Respondent/Plaintiff in the sum claimed in the plaint.
3. The Applicant/Defendant has been effecting payments of outstanding debts and is not indebted to the tune of the alleged amount by the Respondent/Plaintiff.
4. The Defendant seeks to contest the loan agreement which the Plaintiff is relying on following manipulations on it by the Plaintiff to reflect a different sum of money borrowed.
5. The application raises triable issues necessitating the grant of leave to the Applicant to defend.
6. It is just and equitable that the application is granted.

The application is supported by the affidavit of the Applicant Evas Babigumira who deposes that she is the Defendant to the summary suit and the Plaintiff filed a claim against her in HCCS No. 6 of 2016. She deposes that she was approached by one Joseph Ssali, a Senior Pastor and Head of Fresh Fire Ministries, Namirembe, where she used to go to pray. He requested her for assistance to guarantee the repayment of the loan he wanted from the Plaintiff/Respondent. On the 9th of May 2012 she guaranteed the loan repayment to the Respondent/Defendant. The Respondent/Plaintiff is a money lending company and she guaranteed Uganda shillings 20,000,000/= at an interest rate of 10%. The managing director of the Plaintiff company one Cheng, a Chinese national and one James Balintuma demanded that she deposits her certificate of title as security for the loan which she did in the presence of one Eric Kairungi and Pastor David Mugumya. Mr Cheng availed signature pages and also blank pages which are now reflected as the 1st, 2nd and 3rd pages and requested her to sign it. However the agreement referred to by the Respondent contains manipulated and conjured information attributed to the Applicant.

The Applicant deposes that on the same day of signing, she was given a copy of the one-page brief typed agreement indicating the money borrowed and 10% interest which agreement was witnessed by one Eric Kairungi and Pastor David Mugumya. At all material times the Applicant asserts that she believed she was executing a guarantee for a loan of Uganda shillings 20,000,000/= that was to be paid within two months. Pursuant to the meeting and the agreed monthly interest of 10% per month, she paid the first monthly instalment of Uganda shillings 2,000,000/= reflecting the interest for the month of June according to a photocopy of the receipt attached. On 14 August 2012 she paid the second instalment amounting to Uganda shillings 2,000,000/= and was also issued a receipt a copy of which was attached. She made several attempts to meet the Respondent/Plaintiff to agree on the actual amount outstanding but the Respondent kept dodging her. Upon realising that the principal borrower had failed to pay the borrowed sum of Uganda shillings 20,000,000/=, the Plaintiff banked the cheque issued by one Ssali Joseph, which cheque bounced. As a result the Plaintiff commenced recovery proceedings against the Applicant. In a bid to ensure that Joseph Ssali met his obligations, she requested for a copy of the bounced cheque in the presence of her lawyers with a view to commencing recovery proceedings against Ssali Joseph and subsequently she commenced the recovery proceedings against him. On the basis of information of her lawyers, she asserts that the interest charged was

unconscionable and illegal. In the premises it is just and equitable that she is given an opportunity to prove that the Respondent manipulated/forged the loan agreement and his charging interest that was unconscionable. On the basis of advice of her lawyers the Applicant contends that the above facts disclose triable issues and leave ought to be granted for her to defend the summary suit.

The Respondent opposed the application and the affidavit in reply is that of Mr Edward Mutebi an employee of the Respondent. He prayed that the Applicant's application and affidavit thereto that the allegations contained in the application and affidavit evidence are irrelevant to the summary suit which is based on a loan agreement executed on the 9th of May 2012. The loan facility was taken out by the Applicant in her capacity as the borrower and not as a guarantor and is therefore binding on the Applicant and the allegations to the contrary are blatant falsehoods concocted to defeat her obligations under the contract. He was personally present when the Applicant was signing the loan agreement and the content therein was clearly explained to her before she could sign the agreement. The affidavit in support of the Applicant's application is bad in law for containing material falsehoods and cannot competently support the Applicant's application and it ought to be struck out or dismissed with costs. Furthermore on the basis of advice of his lawyers he asserts that the application is an abuse of process of court, a waste of courts time and should be dismissed with costs. The Applicant/Defendant has no good defence on the merits and the application ought to be denied.

The Applicant is represented by Counsel Alfred Ntwali of Messieurs Ntwali & Company Advocates while the Respondent is represented by Counsel Nsubuga Ssempebwa of Messieurs Katende, Ssempebwa and Company Advocates.

The Applicant's Counsel submitted that the application requires the Applicant to demonstrate that triable issues are disclosed in the evidence and in the law. The net effect of the affidavit in support of the application is that annexure A1 and A2 show payments inconsistent with the loan agreement which is the principal evidence of the Respondent. Furthermore the loan agreement is a subject of contest and in the defence attached, the Applicant pleads that the agreement is not true and alleges manipulation. The third triable issue relates to the claim of the Applicant that the subject loan was 20 million and not 40 as claimed by Respondent.

The Applicant's Counsel further submitted that the affidavit in reply brings out a triable issue in paragraph 5 and alleges falsehood of the Applicant to defeat her obligations. He contended that the court has to determine what is false and establish what the truth is. Finally he submitted that the most important point is a matter of law. He contended that the suit is time barred and brought outside the limitation period under the Money Lenders Act and particularly section 19 (1) thereof.

In reply the Respondent's Counsel submitted that the Respondent filed a summary suit for breach of contract amounting to Uganda shillings 60,800,000/=, interest and costs of the suit. The amount arises from a loan agreement in which the Applicant borrowed Uganda shillings 40,000,000/= at an interest rate of 2% per month for a duration of 36 months secured by a certificate of title of land Kyadondo Block 184 plot 524 in the Applicant's names. The Defendant only paid Uganda shillings 8,000,000/= and failed to service the loan and by the 8th of May 2015 and her indebtedness was Uganda shillings 60,800,000/=. This amount continues to attract contractual interest of 2% per month.

On the facts the Respondents Counsel submitted that the Applicant's application is irrelevant as the summary suit was based on a loan agreement executed on the 9th of May 2012 taken out by the Applicant herself and not the case in which she was a guarantor for another person. The Applicant signed the loan agreement after thorough explanation to her satisfaction.

The Respondent's Counsel relies on the guiding principles in considering an application for leave to defend a summary suit as has been set out in the case of **Begumisa George versus East African Development Bank HCMA Number 0451 of 2010**. It was held that the Applicant should show and persuade court by way of affidavit or otherwise that there is a triable issue or arguable point of law or fact which the court ought to determine between the parties to the suit. Secondly leave to appear and defend will not be given merely because there are several allegations of fact or law made in the Applicant's affidavit. The Applicant must satisfy the court that the allegations raised amount to a plausible defence.

On whether there are any triable issues of law or fact which the court ought to determine between the parties to the suit, the Respondent submitted that the Applicant did not disclose any

principal triable issues of fact or law. Firstly she admitted in the affidavit in support of the application that she owes some money to the Respondent and the only dispute would be the amount outstanding. The contention that the amount owed is disputed is not sufficient and does not amount to a triable issue according to the case of **Escon Ltd versus Cable Corporation Ltd HCMA 756 of 2013**. Thirdly the Applicant's reference to falsehoods in the loan agreement are irrelevant to the application as the dispute arises out of a different loan agreement by the same parties executed on the 9th of May 2012 which was taken out by the Applicant/Defendant as borrower and not guarantor. This deals with the Applicant's allegations of unconscionable interest as the agreement clearly stipulates that the interest is 2% per month. On the issue of whether the suit is time barred, the Applicant admits there were various attempts by the parties to come to a settlement of the outstanding debt and the suit is not barred under section 19 (2) of the Money Lenders Act. He prayed that the application is dismissed with costs.

In rejoinder the Applicant's Counsel submitted that the Annexure show inconsistent payments by the Applicant to the Respondent. The inconsistency is with the alleged loan agreement. The receipt issued by the Respondent to the Applicant reflected interest of June 2012 of Uganda shillings 2,000,000/=. But the loan agreement signed on the 9th of May 2012 anticipated payment of Uganda shillings 800,000 per month and not Uganda shillings 2,000,000/=.

Similarly the second instalment payment is consistent with the Applicant's averments that the loan amount was Uganda shillings 20,000,000/= at an interest rate of 10%. Counsel wondered why the Respondent would have received a monthly deposit which is in conflict with the loan agreement. The Respondent has not explained the monthly deposit payments. On that basis there is a triable issue to be considered by the court in the main trial.

The Respondent also did not respond to the contention that the loan agreement was subjected to manipulations by the Respondent.

Thirdly the Applicant's Counsel submitted that the allegations of falsehoods and concoction in the affidavit in reply by itself raise a triable issue. It does not only provoke a triable issue but also a need by the court to investigate the falsehoods to establish who is telling the truth.

The Applicant further agrees with the decision in **Begumisa George versus East African Development Bank** (supra) and added that even one triable issue contained in the affidavit supporting the application for leave to defend is sufficient for leave to be granted unconditionally.

On the question of whether the application is time barred, the Respondent's assertion is that various attempts were made by both parties to settle the outstanding debt and it followed that the suit was not time barred under section 19 (2) of the Money Lenders Act. The Respondent however did not state when the settlement attempts took place and has not availed any written admission/acknowledgement of indebtedness and in the premises the quoted provisions of the loan is not apply. Furthermore the contention on limitation of proceedings raises a triable issue.

Ruling

I have carefully considered the Applicant's application as well as the affidavit in opposition together with the submissions of learned Counsel and the law.

The Applicants claim is that she is not indebted to the Respondent in the sum claimed in the plaint. She does not however disclose what she owes. The averment that she is not indebted to the Defendant is in breach of Order 36 rule 4 of the Civil Procedure Rules which requires the Applicant to indicate whether the defence alleged goes to whole or part only and if so to what part of the Plaintiff's claim. Under Order 36 rule 2 of the claim is ordinarily a claim for a liquidated demand. Reading Order 36 rule 4 in context, the Applicant was required to indicate which part or how much she owed under what is claimed in the plaint.

The above notwithstanding there are serious inconsistencies in the Applicant's application regarding the basis of the claim of the Respondent. While in paragraph 4 the Applicant alleges that she was introduced by one Joseph Ssali to the managing director of the Plaintiff/Respondent who availed to the Plaintiff a cheque in the amount of Uganda shillings 20,000,000/= as security for repayment of the loan, she alleges in paragraph 3 of the affidavit that she was approached to be a guarantor for repayment of the loan by Mr Joseph Ssali. Therefore on the 9th of May 2012 on behalf of one Joseph Ssali she guaranteed the loan repayment from the Respondent/Defendant of Uganda shillings 20,000,000/= at an agreed interest rate of 10%. Paragraph 5 does not indicate

whether the interest rate is 10% per month. In paragraph 6 she alleges that she deposited the certificate of title as security for the loan. Thereafter she signed signature pages only and was availed blank pages and requested to sign it. Annexure "A" indicates that the loan agreement was signed at every page and the borrower is the Applicant. In the last page where the Applicant agrees that she signed, it clearly indicates that the borrower acknowledges receipt of the loan amount by appending her signatures. The loan agreement is dated 9th of May 2012. On 27 November 2015 an equitable mortgage was notified and registered on the Applicant's certificate of title Kyadondo block 184 plot 524. On 18 November 2015 the Applicant's lawyers Messieurs Masembe, Makubuya, Adriko, Karugaba and Ssekatawa Advocates wrote to the Applicant in a letter dated 18th of November 2012 claiming Uganda shillings 60,800,000/= on the basis of an agreement dated 9th of May 2012.

The inconsistencies in the Applicant's application relate to averments that she is a guarantor of the loan. Annexure A1 and A2 indicate that she was paying for a loan. The receipt is dated 18th of June 2012 and 14 August 2012.

The Applicant further averred that annexure "A" which is the loan agreement relied on by the Plaintiff contains manipulated information.

In a surprising twist the Respondent alleges that the averments of the Applicant relates to a totally different loan agreement where the interest rate is 2% per month.

On the other hand the Applicant attached a plaint in which she sued one Joseph Ssali in the Mengo Chief Magistrate's Court in 2013. In that suit she alleges that Mr Joseph Ssali is a judgment debtor who had requested her to borrow money to secure his release from Luzira prison. She pledged a certificate of title and borrowed Uganda shillings 20,000,000/= at 10% interest per month. She further alleges that it was on the 9th of May 2012 when she borrowed the money. She claimed a total amount of Uganda shillings 38,000,000/= and sought an order for the Defendant to secure the Plaintiff certificate of title. On 30 August 2013 she secured a warrant of arrest in execution for the sum of Uganda shillings 42,666,000/= against one Joseph Ssali. Finally in that suit the Applicant attached annexure "D" in which there is a guarantee/undertaking by one Joseph Ssali in which Mr Joseph Ssali wrote that he would be

responsible for repayment and recovery of sums of money to the Respondent. The document was not executed by the Respondent but executed by Joseph Ssali and the Applicant only. It also alleges that the amount borrowed was Uganda shillings 20,000,000/= on the 9th of May 2012 at an interest rate of 10%.

There is a controversy from the attached documents as to how much the Applicant borrowed. Secondly I have considered the application of the Money Lenders Act and have come to the conclusion that upon the Respondent taking security of the Applicants land, the Money Lenders Act is inapplicable to the transaction. Section 21 (1) of the Money Lenders Act provides that where the transaction is secured by the execution of a legal or equitable mortgage upon immovable property, the Act shall not apply to it.

I have further examined the receipts attached by the Applicant Annexure " A1 and A2 and have come to the conclusion that the said receipts do not specify the balance outstanding. Secondly the receipt dated 14th of August 2012 only indicates that there was part payment of Uganda shillings 2,000,000/=. The first receipt writes about interest of June 2012 and is dated 18th of June 2012 about a month after the loan agreement.

While the agreement between the Applicant and the Respondent dated 9th of May 2012 speaks for itself, it is apparent that the Applicant secured an order for Uganda shillings 38,000,000/= against a purported guarantor in a court of law. The guarantee document signed by Joseph Ssali includes annexure D2 wherein he was guaranteeing a loan in the names of the Applicant at an agreed rate of 10% per month to be paid in four months from 10 October 2012. This seems to refer to a totally different agreement dated 10th of October 2012. Apparently the document supports an agreement between the Applicant and Mr Joseph Ssali. It is not executed by the Respondent Company.

Pursuant to the breach of Order 36 Rule 4 of the Civil Procedure Rules it is established that the Applicant acknowledges her indebtedness to the Respondent for which she filed the suit against the guarantor of the loan. However in this suit she claims that she redeemed the Defendant Mr Joseph Ssali from prison and pledged her certificate of title to a Chinese money lending company namely the Respondent. In paragraph 5 (h) of the plaint filed in the Chief Magistrate's Court, the

Applicant acknowledged that the total amount together with accumulated interest was Uganda shillings 38,000,000/= by 30 April 2013. **She secured** a judgment for that amount on 26 August 2013.

Having considered all the relevant facts, it is my conclusion that the Money Lenders Act does not apply. The Applicant in the premises raises certain questions of fact and allegations of unconscionable interest thought she also secured judgment in the Magistrate's Court against another party on the basis of the seemingly same agreement she had with the Respondent. Is she barred by the doctrine of estoppels from challenging the interest charged by the Respondent? Can she challenge the agreement annexed to the plaint on the basis of alleged manipulation? How can her signature be explained since it is on every page?

I will give the Applicant the benefit of doubt and hereby grant her conditional leave to defend the Respondent's suit.

The Applicant has conditional leave to file her defence within 35 days from the date of this order.

The Applicant is granted leave on condition that she deposits with the court the decreed sum in Civil Suit Number 1258 of 2013 in the Chief Magistrates Court of Mengo in the sum of Uganda shillings 38,000,000/= within a period of 28 days from the date of this order as security against her admitted indebtedness in a court proceeding.

The costs of the application shall abide the outcome of the main suit.

Ruling delivered on 17 June 2016 in open court.

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Counsel Ntwali Alfred for the Applicant

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+: maXimum728securityx 2016 style*

Counsel Nsubuga Ssempebwa for the Respondent

Applicant is present in court

Respondent in court through James Balintuma a Manager in the Respondent

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

17th June 2016