

5 **THE REPUBLIC OF UGANDA**

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

Misc. Appl No. 1213 of 2016

(Arising from C.S No. 921 of 2016)

10 **1. BENON TAMUSANGE**

2. TIMOTHY JUSTIN ROBERT MATHEW ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

EXIM BANK (UGANDA) LTD ::::::::::::::::::::::::::::::::::: RESPONENT

15 **BEFORE: HON.MR. JUSTICE B. KAINAMURA**

RULING

This application was brought under S.98 C.P.A, 0.36 rr 3 and 4 and 0.52 rr 1 and 2 C.P.R seeking orders that the applicants be granted leave to appear and defend the suit. Costs of the application were also applied for.

20 **The brief facts of the case are;**

African Minerals Limited, a company limited by shares (the company) borrowed money to the tune of UGX 403,546,430/= from the respondent. Before paying off the debt, the company was placed under receivership and is now under liquidation. The respondent lodged their claim with the Receiver and the Liquidator of the company and the Receiver released to the respondent trucks Crane Reg No. UAS 602S and Merceded Benz Tipper Reg No. UAS 222D, which were security for the facility, in final settlement of the monies by the debtor African Minerals Limited to the respondent. The motor vehicles were sold at UGX 172,000,000/= leaving an outstanding sum of UGX 358,005,135/=.

The respondent brought a summary suit against the applicants as guarantors of the company claiming that proceeds from the vehicles released to them during receivership were not sufficient to settle the debt and as such they are still owed by the company UGX 358,005,135/=.

The applicants then brought this application seeking to be granted unconditional leave to appear and defend the suit. The grounds in support of the application are contained in the affidavits of the applicants Benon Tamusange and Timothy Mathew but briefly are that:-

- i. The applicants are not indebted to the respondent in the sum claimed in the plaint.
- ii. African Minerals Limited, the company which borrowed money from the respondent was placed under receivership and is now under liquidation and the respondent did lodge their claim with the receiver and the liquidator and the claim was settled.
- iii. At the time African Minerals Limited went into liquidation, the money owed by African Minerals Limited to the respondent was UGX 403,546,430/= which was settled by the receiver by releasing to the respondent trucks Crane Reg No.UAS 602S and Merceded Benz Tipper Reg No. UAS 222D which were security for the facility, in final settlement of the monies then owed by the debtor African Minerals Limited to the respondent, although the respondent has evaded giving a final accountability to the Receiver and the Liquidator and there is need to investigate and ascertain whether the said securities were sold by the respondent in accordance with the law.
- iv. The plaint is false and the suit filed by the respondent is incompetent and filed in concealment of material facts.
- v. The applicants have a good and plausible defence to the claim filed by the respondent.
- vi. The suit is an embarrassment and cannot be determined in a summary manner.
- vii. There are triable issues as to whether the applicants are indebted to the respondent given that the Receiver settled the debt on behalf of the principal debtor and as to whether the securities released by the Receiver to the respondent were lawfully sold and the matters warrant the filling of a defence as the issues raised cannot be determined in a summary manner.

viii. It is only just, fair, and equitable that the applicants be granted leave to defend the suit.

An affidavit in reply was sworn by one Leila N. Nalule a Legal Manager in the respondent company. She deponed that the vehicles given to the respondent company were not sufficient and there is still balance of UGX 385,005,135/= as at 16th November 2016 on which interest continues to accrue.

The parties agreed on two issues.

4. Whether the application raises triable issues to warrant the grant of leave to appear and defend the main suit

5. What remedies are available.

Counsel for the applicants submitted that the legal issue that arises for determination is whether or not the application raises any triable issues for which the applicant can be granted leave to appear and defend. According to him, the company settled the entire debt with the vehicles the receiver gave the respondent bank. They are therefore not liable to pay any money to the respondent.

In reply, Counsel for the respondent submitted that the application does not disclose any plausible defence or triable issues. According to him, the fact that the applicants say that they settled all the amount is not a defence at all. He relied on the case of *Kabagenyi Teddy Onyango Vs Fina Bank (U) Ltd H.C.C.S NO. 70 of 2012* where it was held that the defence must be shown positively by affidavit evidence. If there is a denial of indebtedness, but there is positive evidence to show indebtedness, then the denial becomes a sham. Counsel argued that the applicants' contention that they settled the debt is a pure assertion backed by no evidence. The affidavit should have shown such evidence.

Ruling

I have carefully considered the applicant's application, the affidavit evidence for and in opposition to it, the written submissions of counsel and the law.

Under Order 36 Rule 4 of the Civil Procedure Rules, a defendant served with a summons filed under O 36 r 2 CPR (summary procedure) may seek leave to appear and defend the suit.

- 5 The settled law is that for an application for leave to defend to be granted, the applicants has to show that there is a bonafide triable issue of fact or law that he will advance in defence of the suit. In the case of ***Makula Interglobal Trade Agency Vs Bank of Uganda [1985] HCB 65, at 66*** while considering the above rule court held that;

10 *“Before leave to appear and defend is granted, the defendant must show by affidavit or otherwise that there is a bonafide triable issue of fact or law. When there is a reasonable ground of defence to the claim, the defendant is not entitled to summary judgment. 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 shall not enter upon the trial of issues*
15 *disclosed at this stage.”*

In the case of ***Bunjo Vs KCB (Uganda) Ltd (Misc. Appl No. 174 of 2014)*** while considering the same principle court held that;

20 *“It is generally accepted that the court should not enter upon a trial on any of the issues raised. However, in the case of **Corporate Insurance Co. Ltd Vs Nyali Beach Hotel Ltd [1995-1998]**, EA7 the Court of Appeal of Kenya ruled that leave to appear and 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 bonafide,*
25 *unconditional leave should be granted to the defendant”.*

Further still, in the case of *Uganda Commercial Bank Vs Mukoome Agencies [1982] HCB 22*, the then Court of Appeal unanimously held that in applications for leave to appear and defend in summary suits, the defence and triable issues must not only be disclosed, but that the intended written statement of defence should be annexed to the Application. Their Lordships then
5 emphasized that it would serve a good purpose if the intended written statement is annexed to the Notice of Motion as it would help the Judge make up his mind whether to refuse or grant the application.

In the instant case, the applicants first of all assert that the claim was settled when the Receiver released to the respondent company two vehicles. They adduced evidence of both the bank
10 statement and the copy of a letter written by the Receiver to the respondent advising them where to get the motor vehicles that they had asked the Receiver to release to them. In my view, the applicant has already demonstrated that he has a defence to the claim that is brought under summary procedure.

Further, the applicant annexed a copy of the intended written statement of defence on to the
15 application. The applicants have demonstrated that they settled the debt, the respondent in response say that the vehicles did not satisfy the debt and there is more money that the applicant still owes. The applicants are unsatisfied with the way the vehicles were sold and even call upon court to order an accountability of the money. These are all triable issues of law that cannot be settled in a summary suit. I accordingly find that that the applicant indeed raises a triable issue of
20 law.

In the result, I find that the applicants have raised plausible triable issues. I accordingly allow the application.

The applicants should file a defence to the suit within 10 days of the ruling.

Costs will be in cause

B. Kainamura

Judge

14.08.2017