

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO 1072 OF 2016
ARISING FROM MISCELLANEOUS APPLICATION NO 283 OF 2016
ARISING FROM CIVIL SUIT NO 219 OF 2016**

**1. PRADIP ENTERPRISES LTD}
2. BUNJO JONATHAN}.....APPLICANTS**

VERSUS

BUYAGA MULTISERVICES LTD}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This application arises from an order of this court dated 26th October, 2016 dismissing the Applicant’s application for leave to defend Civil Suit No. 219/2016, being a summary suit filed against the Applicant. It was dismissed for want of appearance. Consequently, in this application, the Applicant is seeking to set aside the judgment and decree entered in default of an application for leave to defend the summary suit as prescribed by the law and for reinstatement of the application for leave to defend for it to be determined on the merits as well as for costs of the suit.

The grounds of the application are that the Applicants were not informed of the hearing date by Counsel so as to personally appear in court. Secondly, the Counsel for the Applicant with personal conduct was sick and unable to attend the court. Thirdly, it is just and equitable that an order for stay of execution and setting aside of the judgment is granted and finally that Miscellaneous Application No. 283 of 2016 is reinstated, heard and determined on merits. The application is supported by the affidavit of Nansubuga Robinah, Bunjo Jonathan and Mubiru Bakkidde.

Nansubuga Robinah is a director of the first Applicant Company. The gist of her deposition is that the Applicants did not know about the hearing date because they were not informed by the Counsel Mr Mubiru. Secondly, they were informed by the Counsel that the application was dismissed and judgment entered because of his non-appearance. Thirdly that it is just and equitable that the application for leave to defend the suit be reinstated and heard on the merits.

Furthermore, in the affidavit in support of the application Bunjo Jonathan who is a director of the second Applicant also deposes that his lawyer was sick and he was not aware of the date of hearing the application so as to be personally present in court.

Lastly, Mr Mubiru Amir Bakkidde deposed an affidavit in which he states that on 7th September, 2016 when the matter was first fixed for hearing, he appeared in court but was told by the clerk Mr Okuni Charles that the matter was not cause listed because there was a long hearing and the court wanted to complete it. Subsequently on 9th September, 2016 his firm was served with hearing notice in the application from this court fixing it for hearing on 26th October, 2016. In paragraph 5 of the affidavit he deposed that since Monday 24th October, 2016 he was not in office because he fell sick until 31st October, 2016 according to a copy of the medical forms attached. Because he was not in office, he was unable to check his diary to find out the matters which included Miscellaneous Application No. 283 of 2016. When the application came up on Wednesday 26th October, 2016 he was too sick and reported back to office on Monday 31st October, 2016. Upon reaching the office he discovered that there was a matter on 26th October, 2016 which was Miscellaneous Application No 219 of 2016. The application was dismissed on 26th October, 2016 and judgment entered in the main suit. Thereafter he immediately informed the Applicants who gave instructions to apply to set aside the dismissal and reinstate the application.

In reply, Abasa Denis an official of the Respondent deposed that the application is misconceived and an abuse of court process and without merit. The affidavit was filed on 3rd February, 2017. He deposes that the Applicant's in the main application admitted having obtained a loan facility from the Respondent Company which has never been paid and therefore affirmed the affidavit in opposition. The Applicant's Counsel objected to this affidavit on the ground that it was filed out of time. The contention in the submissions is that the Respondent was served on 1st November, 2016 but only filed a reply on 3rd February, 2017 about three months after service contrary to the rules.

The court was addressed in their written submissions. The Applicant was represented by Asasira Bosco assisted by Tayebwa Geoffrey of Messieurs Bakkidde & Hannan Advocates while the Respondent was represented by Messieurs Katarwa Hebert & Co Advocates.

The gist of the submissions of the Applicant's Counsel is that there is justifiable cause to set aside the dismissal. Notwithstanding, the challenge to the affidavit in reply on the ground that it was filed out of time, the affidavit in reply does not contest the fact that the Applicants Counsel was sick at the time when the application for leave to defend the suit was dismissed for want of appearance.

With reference to the proceedings of 26th October, 2016 Counsel Katarwa Hebert appeared for the Respondent in High Court Miscellaneous Application No. 283 of 2016 arising from H.C.C.S.

No. 0219 of 2016. He represented to court that the application was fixed by the Respondent and they duly served the Applicants on 9th September, 2016 according to the affidavit of Namanya Ambrose. The application to dismiss the application for nonappearance was granted under Order 9 rule 22 of the Civil Procedure Rules.

Order 9 rule 23 of the Civil Procedure Rules provides as follows:

"23. Decree against Plaintiff by default bars fresh suit.

(1) Where a suit is wholly or partly dismissed under Rule 22 of this Order, the Plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action; but he or she may apply for an order to set the dismissal aside, and, if he or she satisfies the court that there was sufficient cause for nonappearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal, upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit."

The basis for setting aside a dismissal under Order 9 Rule 22 of the Civil Procedure Rules is sufficient cause for nonappearance when the suit was called for hearing.

The Respondent has not opposed or contested the matter of fact that the Applicant's Counsel did not inform the Applicants of the hearing date. In fact the record shows that it is the Respondent's Counsel who served the Applicant's Counsel with a hearing date. Secondly, the Applicant's Counsel did not inform his clients who are the Applicants about the due date because by the time the hearing was coming on, he fell sick, a few days before. Lastly, the Applicants Counsel was sick on the hearing date and did not appear. In the premises there was sufficient cause for nonappearance of the Applicants when the application was called for hearing on 26th October, 2016. In the premises the dismissal order made on 26th October, 2016 is hereby set aside.

Where a dismissal is set aside, the application or the suit is automatically reinstated by the act of dismissal being set aside. The pleadings in the application are those which were filed in the original application for leave and not in this application. It follows that the affidavit in reply which was filed out of time in this application in so far as it deals with the question of whether the Applicants have a plausible defence in Miscellaneous Application No. 283 of 2016 is of no consequence. Miscellaneous Application No. 283 of 2016 has been reinstated by the order setting aside the dismissal and will be considered on the merits. However, the default decree cannot be set aside until after considering the reinstated application on the merits. I will therefore deal with the application for leave to defend the main suit on the merits.

Whether the Applicant has a good defence against the Respondent?

As far as the main application is concerned, the Applicant's Counsel submitted that the Applicant has a good defence against the Respondent. He submitted that when the Applicant was served with a copy of the plaint in Civil Suit No 219 of 2016 they filed a response and attached the proposed defence to justify that they were willing that the matter be determined on merit inter partes and strongly believed that the defence holds merit. The court ought to note that the first Applicant's loan was secured and the second Applicant was wrongfully sued. He relied on the case of **Label EA Ltd versus EF Lutwama [1986] HCB** for the holding that the purpose of a trial is to enable the parties to put their case properly and broadly so that the court may hopefully come up with a fair decision on crucial issues of the case.

Whether it is in the interest of justice to grant the application?

The Applicants Counsel submitted that section 98 of the Civil Procedure Act provides that nothing shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court. He relied on the affidavit in support for the proposition that there are triable issues of law and fact raised in the application which necessitates hearing of the application on the merits. It was unfair to condemn the Applicant unheard as justice demands that a party willing to defend himself in the court must be given the opportunity to do so. This principle guides the court in the administration of justice when adjudicating on any dispute and where possible disputes should be heard on merits according to the case of **Trust Bank Ltd versus Amalco Co. Ltd [2003] 1 EA 350**.

In reply the Respondents Counsel submitted that none of the grounds in the application provides that the Applicants have a defence to the Respondent's claim. The loan was admitted by the affidavit in rejoinder by Nansubuga Robinah and the admission should not be ignored. On the other hand in the affidavit in reply by Denis Abasa, a director of the Respondent it clearly deposes that the Respondent failed to realise the security because of squatters and threatened legal action against the first Applicant and second Applicant as director of the first Applicant. This is because the director issued his personal cheques and requested for a halt of legal action against the first Applicant. The second Applicant has remained tight-lipped about his cheques meaning that he has no defence. The second Applicant was therefore rightly sued for the cheques. Counsel relied on the cases of **General Industries (U) Ltd versus Non-Performing Assets Recovery Trust SCCA Number 5 of 1998** for the proposition that a third-party is liable for the debt if the creditor forbears from enforcing measures for recovery of the debt. The forbearance is sufficient consideration. As far as the liability for cheques are concerned he relied on the case of **Masersk Uganda Ltd vs. First Merchant International Ltd Civil Suit No. 143 of 2009**.

Finally the Plaintiff is a right to bring an action against the Defendant where the Plaintiff failed to realise security because of squatters according to the case of **Barclays Bank of Uganda vs.**

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$# xtra+ maximum735securityx 2017 style*

Bakojja Civil Suit No. 53 of 2011. Counsel further relied on section 21 (1) of the Mortgage Act 2009 and particularly annexure "B1" to the plaint which is evidence that the Plaintiff complied with the requirements of section 21 (2) of the Mortgage Act 2009. He submitted that the court should be pleased to enter judgment for the Plaintiff on admission in the Applicants affidavit under the provisions of Order 13 rules 6 of the Civil Procedure Rules because the Applicants admit that the loan facility was obtained and cheques were issued and dishonoured.

The argument that the application is unchallenged because Dennis Abasa in the affidavit in reply said that he is the Respondent is unsustainable because this was a clerical error that does not affect the merits of the Applicant's application. Even if the application is opposed or proceeded ex parte, the Applicants must prove and satisfy the court that there is a defence to the claim. Lastly, the Plaintiff's Counsel contended that no triable issues whether legal or factual exist and the court cannot try an admission.

In rejoinder to the issue of whether no defence is disclosed, the Applicants Counsel relies on the deposition in the affidavits in support that there are triable issues which have been raised and the second Applicant was never a party to the original agreement and has never been a guarantor in the true sense of the word. Even if the second Respondent was a guarantor, his guarantee was discharged when the second Applicant made it known to the Respondent that it never guaranteed the loan for the first Applicant.

In the relation to the admissions of being indebted to the first Applicant, the Applicant avers further that the loan was secured with a title but denies the amount as well. In the case of **UCB vs. Mukoome Agencies Ltd [HCB] 22** it was held that denial of indebtedness in the amount claimed by the plaint is a proper defence which raises triable issues. On the issue of failure to realise security, the Applicants aver that the Respondent realised the security when it wrote a letter on 12th December, 2014 evicting the first Applicant from land and or security and the first Applicant abided with the letter. If there are squatters on the land, then the Respondent is responsible because the land now belongs to the Respondent as a mortgagee neither has it ever surrendered the same to the first Applicant otherwise the Respondent wants to benefit twice.

Whether the Applicant's application discloses a triable issue or a plausible defence?

The Respondent filed Civil Suit No. 219 of 2016 against the Applicant's on 7th April, 2016 seeking to make the Applicants jointly and severally liable for recovery of **Uganda shillings 134,160,000/=**, interest and costs of the suit.

The Applicant in Miscellaneous Application No 283/2016 applied for unconditional leave to defend the suit.

In the main suit the Respondent averred that it advanced to the Applicant's a secured loan in the sum of **Uganda shillings 78,000,000/=** at an interest of 2% payable within a period of three

months from the date of the advance. The Plaintiff subsequently registered a legal mortgage on the first Defendant's property described as a block 178 plot 3805 land at Munyangwa. The Defendants/Applicants to this application defaulted on the entire loan and interest. The Plaintiff/Respondent embarked on the process of realising the security and served statutory notices and had advertised the property for sale in an auction. In the course of selling the Defendants mobilised other people who started claiming that they had interest in the land and literally scared away potential buyers who responded to the advertisement and frustrated the attempted inspection of the land by interested buyers. The Defendant averred that the applicants practically made it impossible for the Plaintiff to realise the security and recover its money. In the premises the Plaintiff sought payment of **Uganda shillings 134,160,000/=** together with interest at 24% per month from the date of filing the suit till payment in full and costs of the suit.

In the affidavit in support of the suit Mr Denis Abasa confirmed the facts in the plaint on oath and adduced a photocopy of the mortgage deed, photocopies of the demand notice and advertisement for sale of the property. He confirmed that the second Defendant mobilised other people who started claiming interest in the mortgaged land that made it impossible for the buyers to respect and buy the mortgaged property. It is further averred in the plaint that the second Defendant who is also the second Applicant to this application issued cheques which were presented for payment and were dishonoured according to photocopies of the cheques. Finally that the Applicants have no defence.

The mortgage agreement is between the first Applicant and the Respondent and is dated 15th November, 2013. Secondly, the cheques in question are in the names of the second Applicant. 4 cheques were issued for October 2015. Three of the cheques all have an amount of **Uganda shillings 20,000,000/=** each. The fourth cheque is for an amount of **Uganda shillings 18,000,000/=**, giving a total of **Uganda shillings 78,000,000/=** which is the amount claimed in the plaint. All the cheques were drawn in the names of the Plaintiff/Respondent to this application. All the cheques were returned when they were dishonoured on the ground that it was stopped. Some were referred to drawer. What is material is that all the cheques were dishonoured and no payment was effected.

In Miscellaneous Application No. 283 of 2016 the Applicant does not deny the indebtedness of the first Applicant but instead avers that the loan was a secured loan. In paragraph 3 of the Notice of Motion it is averred that the first Applicant disputes the amount of money claimed by the Respondent. The affidavit in support of the first Applicant's application is that of Nansubuga Robinah, a director of the first Applicant Company. She deposes that on 14th February, 2013, the Respondent/Plaintiff was paid Uganda shillings 5,000,000/= hence reducing the amount claimed. Secondly, the interest rate claimed in the suit is 24% but the agreement spelt out interest at 2%. Thirdly the Respondent had already started the process to realise the security by giving an eviction notice to the debtors and by advertisement in the newspapers. Consequently, on the

basis of advice of her lawyers, she deposed that it was improper for the Respondent/Plaintiff to file a suit when it was in the process of realising the security securing the loan.

I have carefully considered the above intended defence and in terms of Order 36 rules 4 of the Civil Procedure Rules and it only amounts to saying that the total amount claimed is not admitted because it was reduced by Uganda shillings 5,000,000/=. With regard to the contention that interest rate is at 2%, there was no averment as to whether the 2% was per month or per annum. I have accordingly perused clause 2 (a) of the Mortgage Agreement and it clearly provides that the principal amount shall be charged at the rate of 2% per month from the date of the mortgage agreement. The rate of 2% per month is equivalent to 24% per annum and therefore raises no triable issue.

Thirdly, the question of offsetting 5,000,000/= means that the first Applicant admits being indebted in the sum of Uganda shillings 73,000,000/= as at the date of filing the suit. That admission is governed by Order 36 rule 4 of the Civil Procedure Rules which provides in part as follows:

"Application by a Defendant served with summons in Form 4 of Appendix A for leave to appear and defend the suit shall be supported by affidavit, which shall state whether the defence alleged goes the court or to part only, and if so, to what part of the Plaintiffs claim,..."

Furthermore Order 36 rule 6 of the Civil Procedure Rules provides that:

"If it appears that the defence set up by a Defendant applies only to a part of the Plaintiff's claim, or that any part of his or her claim is admitted, the Plaintiff shall be entitled to a decree immediately for such part of his or her claim as the defence does not apply to or as is admitted, subject to such terms, if any, as to suspending execution or the payment of any amount realised by attachment into court, the taxation of costs or otherwise, as the court may think fit; and the Defendant may be allowed to appear and defend as to the residue of the Plaintiffs claim."

The provisions on the face of it entitles the Plaintiff/Respondent to judgment in the amount of Uganda shillings 73,000,000/= as against the first Applicant. Before taking leave of the matter, the Respondent's Counsel relied on section 21 of the Mortgage Act 2009 for the proposition that a mortgagee can bring an action in a court of law even where the money is secured by a mortgage. Section 21 (supra) allows a mortgagee to sue for the money where the mortgage deed provides that if there is default by the mortgagor, the money secured by the mortgage becomes payable in full. The only question then would be whether the suit is barred. Should that question await the trial of such a defence as to whether such a suit is maintainable?

I have carefully considered the wording of section 21 (1) of the Mortgage Act and it uses permissive language. It provides that the mortgagee may sue for the monies secured by the mortgage only in the instances stipulated there under. One of the grounds is where the mortgagee is deprived of the whole or part of his or her security or the security is rendered insufficient due to or in consequence of the wrongful act or default of the mortgagor. Thirdly, an action shall not be commenced until after complying with the notice served under section 19 of the Mortgage Act. Nonetheless, the court may on the application of the mortgagor or the surety order a stay of any proceedings brought until after the mortgagee has exhausted all his or her other remedies against the mortgaged land unless the mortgagee agrees to discharge the mortgage on payment of the money secured by the mortgage.

I have carefully considered the above provision and the first observation is that the question of whether the agreement permits the entire loan amount to be payable is expressly provided for by clause 4.6 of the mortgage deed which provides as follows:

"The Mortgage Debt and interest hereby secured shall immediately become payable on demand and the Statutory Power of sale by the mortgagee without recourse to the Courts of Law shall forthwith become exercisable;...

The instances written under the clause apply on breach of any of the terms and conditions of the agreement including, agreement for the payment of the mortgage debt or the interest thereon stated to be paid on the part of the mortgagor.

It follows that the Plaintiff/Respondent could file an action under the instances provided for in section 21 of the Mortgage Act as against the mortgagor who is the first Applicant.

Secondly, it is apparent that the intention of section 21 is to ensure that the mortgagee exhausts all his or her remedies against the mortgaged land unless the mortgagee agrees to discharge the mortgage on payment of the monies secured by the mortgage which is not the case here. In this application, the mortgagee who is the Respondent claims that the security has become impossible to enforce on account of the wrongful act or default of the mortgagor. Again that cannot be tried in a summary suit.

As far as the second Applicant is concerned, I agree with the Respondent's submissions and the authorities relied on that a cheque is payment and is enforceable against the drawer. However, for it to be enforceable against the second Applicant, the mortgagee should agree to discharge the mortgaged property in terms of section 21 (3) of the Mortgage Act 2009.

Last but not least, what is the purpose of a decree against the Applicants/Defendants except for enforcement?

In the premises, I do not find any grounds for setting aside the judgment and decree except to determine the question of whether the mortgagee is willing to discharge the mortgage and proceed against the second Applicant or whether the Applicant agree to have the property sold and provide evidence that the property is available to satisfy the mortgage as agreed. In either case, the judgment and decree would in effect be the right of the mortgagee to proceed against the security or to proceed against the second Applicant. I do not agree that the liability of the Applicant can be a joint liability. Under section 21 of the Mortgage Act, the liability of the second Respondent is alternative to the liability of the first Applicant. Section 21 of the Mortgage Act is hereby reproduced for ease of reference:

“21. Mortgagee’s action for money secured by mortgage.

(1) The mortgagee may sue for the money secured by the mortgage only in the following cases—

(a) where the mortgage deed provides that if there is default by the mortgagor, the money secured by the mortgage becomes payable in full;

(b) where the mortgagor is personally bound to repay the money;

(c) where a surety has agreed to be personally liable to repay the money in circumstances that have arisen;

(d) where the mortgagee is deprived of the whole or a part of his or her security or the security is rendered insufficient through or in consequence of the wrongful act or default of the mortgagor.

(2) An action shall not be commenced under subsection (1) until the time for complying with a notice served under section 19 has expired.

(3) The court may, on the application of the mortgagor or a surety, order a stay of any proceedings brought under this section, until the mortgagee has exhausted all his or her other remedies against the mortgaged land, unless the mortgagee agrees to discharge the mortgage on payment of the money secured by the mortgage.”

In the premises, the judgment and decree in default shall not be set aside and shall be modified as follows:

1. The Plaintiff/Respondent is entitled to the sum of Uganda shillings 73,000,000/= as against the first Applicant.

2. The first Applicant has leave to defend the suit in so far as it is a claim over and above the amount of Uganda shillings 73,000,000/= and specifically as to the amount of Uganda shillings 5,000,000/=.
3. A stay of execution is ordered in the relation to the sum of Uganda shillings 73,000,000/= as against the first Applicant for the mortgagee/Respondent to this application to inform the court as to whether it is willing to discharge the mortgaged property and accept payment instead from the second Applicant.
4. The Respondent shall notify the Registrar of this court in writing within one month from the date of this order as to whether it opts to discharge the mortgaged property or not and upon the expiry of the period of one month, the Respondent shall be entitled to enforce the decree against the mortgaged property.
5. Should the Respondent opt to discharge the mortgaged property within the period of 30 days stipulated above, the decree shall be enforced against the second Applicant only.
6. The Applicant has leave to file a defence as to the claim over and above Uganda shillings 73,000,000/= namely the Uganda shillings 5,000,000/=.
7. The rest of the application stands dismissed with costs save in relation to the sum of Uganda shillings 5,000,000/= which is over and above Uganda shillings 73,000,000/=.

Ruling delivered in open court on 7th April, 2017.

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Counsel Asasira Bosco for the Applicants

Second Applicant is in court

Counsel Katarwa Hebert for the Respondent

Patricia Akanyo: Court Clerk

Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$# xtra+
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Christopher Madrama Izama

Judge

7th April 2017