

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISC APPLICATION NO 1052 OF 2016
(ARSING OUT OF CIVIL SUIT NO. 344 OF 2016)**

BYARUHANGA TUMWESIGYE}.....APPLICANT

VERSUS

EQUITY BANK (U) LTD}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant filed this application for leave under the provisions of Order 36 rules 1, 3 & 4 of the Civil Procedure Rules and section 98 of the Civil Procedure Act for unconditional leave to appear and defend Civil Suit Number 344 of 2016 and for costs of the application to be provided for.

The grounds of the application in the Notice of Motion are that the Applicant is not liable to the Respondent/Plaintiff for the sums as claimed by the Respondent in the plaint. Secondly, the Applicant has got a good and plausible defence to the suit against him. Thirdly, the plaint H.C.C.S. No. 344 of 2016 raises triable issues that merit courts consideration and which cannot be disposed of if a defence is not filed. Fourthly, the suit is misconceived, is frivolous and vexatious and amounts to a waste courts' time. Lastly, it is averred that it is just and equitable that the application is allowed.

The affidavit in support is deposed to by Mr Byaruhanga Tumwesigye the Applicant herein and his deposition is as follows:

Sometime back, he obtained a loan facility from the Respondent in the amount of Uganda shillings 80,119,114/=. Arising from his payment obligations, he had so far paid back a sum of Uganda shillings 50,000,000/= out of the total sum granted to him. It followed that he was not indebted to the Respondent in the amount of Uganda shillings 80,119,114/=. He was surprised that the Respondent made what he called baseless claims against him and he therefore had a plausible defence against the Respondent's claims. The claims of the Respondent in the Plaint raise triable issues that merit courts' consideration. The rest of the deposition repeats the grounds in the Notice of Motion.

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The Respondent's reply is made by Mr Joseph Arocha, an advocate of the High Court and a Legal Officer in the Respondent's legal Department conversant with the facts. His deposition is as follows:

He considered the Applicant's application and supporting affidavit. The Applicant applied for and was granted a loan facility of **Uganda shillings 80,000,000/=** at an interest rate of 28% per annum payable in 36 equal monthly instalments of Uganda shillings 3,309,100/= according to a copy of the loan agreement attached. As security for repayment of the loan the Applicant deposited his land title for property comprised in Busiro Block 383 Plot 3887 at Kitende. The Applicants severally defaulted on his loan repayment obligations and the loan was written off on 5th November, 2014 with an outstanding amount of Uganda shillings 80,119,114/= according to a copy of the loan account statement attached. It is not true that the Applicant made payments of up to Uganda shillings 50,000,000/= and he ought to have adduced evidence in support in terms of the deposit slips. He concluded that the Applicant's application does not raise any triable issues because it has no legally valid defence against the Respondents claim apart from some unsubstantiated general denials.

Counsel Edward Mutakirwa represented the Applicant in the proceedings while Counsel Asuman Bamweyana represented the Respondent and the court was addressed in written submissions.

I have carefully considered the written submissions and it all points to the same legal doctrine that an Applicant who files an application for leave to defend a summary suit should show by his application supported by affidavit that he has a plausible defence to the claim in the summary suit and that the action is not frivolous or vexatious. Under Order 36 rule 3 (1) of the Civil Procedure Rules, a Defendant cannot be heard in defence except after applying for and obtaining leave of court. The jurisdiction to refuse leave should be exercised in apparent cases where the Applicant obviously has no plausible defence to the action. The determination of the court is made on the basis of affidavit evidence together with any documentary proof attached. The court also considers the summary plaint and the affidavit in support which informs the background to the application. Order 36 rule 4 of the Civil Procedure Rules provides that the application for leave shall be supported by an affidavit which shall state whether the defence alleged goes to the whole or part only and if so what part of the Plaintiff's claim.

According to **Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22nd Edition** at pages 75 – 76 whenever a genuine defence, either in fact or law, sufficiently appears, the Defendant is entitled to unconditional leave to defend. The learned author also wrote that the Defendant is not bound to show a good defence on the merits. "The court should be satisfied that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial". The defence should be made in good faith. The defence must be stated with sufficient particularity, as appear to be genuine. These principles are captured in **Maluku Interglobal Trade Agencies Ltd versus Bank of Uganda**

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[1985] HCB 65 and Souza Figuerido & Co Ltd versus Moorings Hotel Co Ltd (1959) EA 426 .

I have accordingly perused the plaint and it is for Uganda shillings 80,119,114/=. It is averred therein that the Applicant applied for a banking facility and on 15th October, 2011 the Plaintiff offered a loan of Uganda shillings 80,000,000/= according to the offer letter. Interest was calculated at the rate of 28% per annum and the Applicant did not pay the loan in full and what is outstanding is what is claimed in the plaint. A copy of the loan account statement was attached. The loan account statement runs from the period 30th of April 2012 up 1st November, 2013. The statement ends with advertisement fees calculated at **Uganda shillings 106,289** charged on the Applicant's account. The debiting balance is **Uganda shillings 66,819,409/=**. A similar statement is attached to the affidavit in reply of Counsel Joseph Arocha and marked as annexure "C". No evidence is attached other than the bank account statement as to why the Plaintiff is claiming **Uganda shillings 80,119,114/=** and not the outstanding amount at the end of the statement of **Uganda shillings 66,819,409/=**.

When the application first came for hearing on 18th January, 2017, the Applicant prayed for time to be afforded an opportunity to have the matter mediated. The Applicant was given time with the Respondent to negotiate an amicable out of court settlement. On 10th February, 2017 the Applicant's Counsel was absent but on record is a letter written without prejudice by the Applicant's Counsel dated 17th January, 2017 offering the Respondent bank **Uganda shillings 40,000,000/=** in full and final settlement of the suit. It was represented to the court that the Respondent was still considering this offer and a further adjournment was granted. Lastly, when the matter was mentioned again on 21st February, 2017 directions were given for the parties to file written submissions and the suit was fixed for mention on 14th March, 2017 to get a feedback on the settlement negotiations or to give a date for ruling. On 14th March, 2017, the Respondent's Counsel had not received any written submissions and decided to file his own submissions. The Applicant without prejudice and through his Counsel wrote a letter dated 14th March, 2017 and proposed that the Applicant pays **Uganda shillings 60,000,000/=** in final settlement of the suit. The Applicant's submissions were received on 15th March, 2017 after the Respondent had filed submissions on 7th March, 2017.

I have duly considered all the circumstances and particularly Order 36 Rule 2 of the Civil Procedure Rules. A specially endorsed plaint under this rule is for recovery of a liquidated demand in money payable by the Defendant with or without interest arising upon a contract, express or implied, on a bill of exchange, promissory note or cheque or other simple contract debt. It may arise on a bond or contract written for payment of a liquidated amount of money. It can arise on a guarantee where the claim against the principal is in respect of the debt or liquidated amount. The affidavit in support of the plaint should be made by the Plaintiff or any other person who can swear positively to the facts, verifying the cause of action, and the amount claimed, if any and stating that in his or her belief there is no defence to the suit.

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The Plaintiff relied on the bank statement as evidence of the indebtedness of the Applicant/Defendant but the bank statement shows a lesser amount than what is claimed in the plaint. Coupled with the offer of the Applicant which has been made without prejudice, I see no prejudice if conditional leave is granted for the Applicant to defend the remainder of the suit not proved by the Bank Account Statement.

In the premises the Applicant has leave to file a defence to the suit. The Applicant shall deposit with the Court a sum of Uganda shillings 50,000,000/= within a period of 30 days from the date of this order as security for payment of the Respondent.

The Applicant shall file a written statement of defence within 14 days from the date of this order.

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

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

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

7th April 2017