

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO 852 OF 2016
(ARISING FROM CIVIL SUIT NO 577 OF 2016)**

PRIME I.K UGANDA LIMITED}.....APPLICANT/DEFENDANT

VERSUS

ECO BANK UGANDA LIMITED}.....RESPONDENT/PLAINTIFF

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant applied to court for unconditional leave to appear and defend Civil Suit No 577 of 2016 and for costs. The grounds of the application are as follows:

The Applicant/Defendant is not indebted to the Respondent/Plaintiff in the amounts claimed in the plaint. Secondly, the Applicant has a plausible defence to the claims in the head suit which raises triable issues of law and fact warranting adjudication on the merits. Thirdly, the Applicant secured a loan from the Respondent by creating a mortgage on land comprised in Kyadondo Block 189 Plot 237 at Seta, Wakiso district measuring 1.96 Hectares. Consequently the said land was sold off by the Respondent and transferred into the names of Muwanga Kivumbi Mohammed and Zahara Nampewo who are the current registered proprietors thereof. Fourthly, the Respondents did not even follow the known legal procedure of foreclosure as neither the Applicant nor the former registered proprietor of the land Dr. Kaberuka William received any demand notice before the sale was conducted. Fifthly, the Respondent has not disclosed the sale of the said land and the proceeds thereof yet the certificate of title that was left in its possession as security is now transferred into the names of 3rd parties. Sixthly, the Respondent's suit is an abuse of the process of the court as the reliefs sought cannot be recovered under Order 36 of the Civil Procedure Rules. On the seventh ground, the Applicant's grounds in opposition of Civil Suit No. 577 of 2016 disclose triable issues meriting consideration and adjudication by this court. Finally, it is in the interest of justice that the Applicant be allowed to appear and defend Civil Suit No. 577 of 2016.

The application is supported by the affidavit of **Keijuka Edward** a director of the Applicant. The facts deposed to in addition to the grounds are that the Respondent's claims are baseless and malicious as it is clear that it is aimed at unjustly enriching itself at the cost of the Applicant. The

Respondent's suit was commenced in bad faith as the Respondent by the head suit is seeking to recover an amount of money that is not known to the Applicant, the Respondent having sold off the mortgaged property and got money to sort its claims against the Applicant. The Applicant is aware that he is not indebted to the Respondent/plaintiff in any way considering the circumstances. In view of substantiated and factually unsupported claims in the sum sought to be recovered, the Applicant intends to challenge the same in its defence to the suit which constitutes a triable question of fact. Consequently this is a case where the court can exercise its inherent power and grant the application.

In reply **Okello Alex Paul** the Head Early Warning Remedial and Recovery in the Respondent Bank deposed to an affidavit in reply on 11th January, 2017 in which he denied the contents of paragraphs 5 – 14 of the affidavit in support of the application. He stated the facts as follows;

On the 31st day of December, 2013 the Applicant applied and obtained a credit facility of Uganda Shillings 100,000,000/= (Uganda Shillings One Millions only) which attracted interest at a floating rate of 24.5% per annum as per Annexure "A". The said loan was secured by a mortgage over land comprised in Kyadondo Plot 237 Block 189 Land at Mengo, Wakiso District. He averred that the Applicant defaulted on his loan obligations as a result of which the Respondent issued and posted demands for the full payment of the amount due from the Applicant. Consequently the Respondent maintained that the said security was disposed off by the Respondent through lawful processes with a view of clearing the loan. However, the Applicant still had an outstanding sum of Uganda Shillings 288,217,840/= (Uganda Shillings Two Hundred Eighty Eight Million Two Hundred Seventeen Thousand and Eighty Four Only) owing to the Respondent despite the disposal of the security. As at 29th July, 2016, the loan amount plus interest had accumulated to Uganda Shillings 288,217,840/= (Uganda Shillings Two Hundred Eighty Eight Million Hundred Seventeen Thousand and Eighty Four Only). To-date the Applicant has never paid the above outstanding sum. The Respondent was then constrained to file a summary suit as the only available option to recover her money lent out to the Applicant. The Applicant has no defence whatsoever to the Respondent's claims in the main suit. He was informed by the Respondent Bank's lawyers M/s KSMO Advocates that contents of this application clearly show that the Applicant are not being truthful and has no intention of honouring his loan obligation to the Respondent Bank yet they have no valid defence. He was further informed that this application lacks merit and should be dismissed with costs to the Respondent. The Applicant filed this application as a delaying tactic, an abuse of court process and waste of court's time. It is in the best interest of substantive justice that the Applicant's application for leave to appear and defend Civil Suit No. 577 of 2016 be dismissed with costs to the Respondent.

In another supplementary affidavit in reply dated 6th March, 2017 he deposed as follows: The Bank records he scrutinised show that the balance due before the sale of the Overdraft is Uganda Shillings 353,975,058.52 (Uganda Shillings Three Hundred and Fifty Three Million Hundred Seventy Five Thousand Fifty Eight and Fifty Two Cents); the Contract Loan Uganda Shillings 168,346,575.34 (Uganda Shillings One Hundred Sixty Eight Million Three Hundred and Forty Six Five Hundred Seventy Five and Thirty Four Cents) which makes the total Exposure Uganda Shillings 522,321,633.86 (Uganda Shillings Five Hundred Twenty Two Million Three Hundred Twenty One Thousand Six Hundred and Thirty Three and Eighty Six Cents). Thirdly, the Defendant's property was valued at Uganda Shillings 300, 000,000.00 (Uganda Shillings Three Hundred Million). Finally, the total exposure less the property results into an outstanding sum of Uganda Shillings 222,321,633.86/= (Uganda Shillings Two Hundred and Twenty Two Million Three Hundred Twenty One Six 'Hundred Thirty Three and Eighty Six Cents).

At the hearing of the Application, **Counsel Veronica Namuswe** represented the Applicant while **Counsel David Sempala** represented the Respondent.

The Applicant's Counsel objected to the 2nd affidavit in reply of the Respondent on the ground that it was irregular and unknown in law and should be struck out. She relied on the case of **Kasajja Robert versus Nasser Iga and another HCT-04-CV-MC-004-2014** for the principle that in cases where a supplementary affidavit is misplaced as an affidavit in reply, the affidavit in reply is struck out. She prayed that the 2nd affidavit in reply filed by the Respondent be struck out for being improper and irregular. Without prejudice however, Learned Counsel for the Applicant submitted that the grounds upon which the Application is founded are laid down in the Notice of Motion, the affidavit in support of the same sworn by Mr. Keijuka Edward, a Director in the Applicant dated 25th August, 2016, and the affidavit in rejoinder also sworn by the said Keijuka Edward dated 27th January, 2016, which the Applicant reiterates for purposes of these submissions. Relying on the facts in the affidavit in support of the application Learned Counsel submitted that the crux of the application is that the Applicant is not indebted to the Respondent in any way. The sum claimed in the plaint is unknown to the Applicant as the Respondent undervalued, illegally and unlawfully sold the mortgaged property, which property if was properly sold would fully satisfy the Respondent's claims. The Respondent can therefore not turn around to claim any sums from the Applicant.

The Applicant relied on among others **Order 36 Rule (3) of the CPR** to bring this application which expressly provides that that the defendant cannot defend the suit without leave being applied for and granted. She submitted that the main issue to be determined by this honorable court is **whether the Applicant should be granted unconditional leave to appear and defend the main suit**. The test applied by courts

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before leave to appear and defend is granted is that the Applicant must show that he or she has a good defence on the merits. Secondly the applicant may show that there is a difficult point of law involved; or a dispute as to the facts which ought to be tried; or a real dispute as to the amount or any other circumstances showing reasonable grounds of a bona fide defence.

In the case of **Marsenne (Uganda) Limited and 2 others versus Stanbic Bank (U) Limited (supra)** it was held that unconditional leave can be granted to try a single bona fide defence. In this application the Applicant has demonstrated grounds and circumstances warranting grant of the application as written below:

1. A good defence on the merits

The Respondent did not follow the legal procedure for demanding the outstanding sums and selling off the mortgaged land comprised in Kyadondo Block 189 Plot 237 at Seta, Wakiso district measuring 1.96 Hectares (4.84 Acres). No demand notice or notice of default was ever served upon the Applicant before the sale of the mortgaged property yet it is a legal requirement under **S.19 of the Mortgage Act**. Moreover, the Respondent was not authorized in any way to sell the mortgaged property, as there is no legal mortgage executed and or attached to the Respondent's affidavit authorizing the sale. The loan agreement which forms the basis of the Respondent's claim does not authorize any sale. In the premises, a court order was necessary in to effect the sale of the mortgaged property in a manner provided for in the order.

The Applicant's Counsel submitted that on top of the illegal sale, the mortgaged property was undervalued; no valuation or re-evaluation report was attached to establish the values to base on to conduct the sale. The Respondent chose to sell the mortgaged property but did not consider the best price as required under S.27 (1) of the Mortgage Act. A court order is necessary to establish the market value at the time of sale of the subject property, which order can only be secured if the Applicant is granted an opportunity to prove his case.

Counsel further submitted that the Respondent was able to recover any and or all the claimed sums from the property if the sale was properly and legally conducted and issues of undervaluation necessitate investigation by court as was held in **Kakooza Abdallah versus Stanbic Bank (u) Limited HCMA NO.614 OF 2012, paragraphs 6,8,9,10,11 and 17.**

2. A dispute as to the facts which ought to be tried.

The Applicant's counsel submitted that it is a statutory requirement that before any mortgaged property is sold by the mortgagee; a notice of default has to be served on the mortgagor under Section **19 of the Mortgage Act**. The Applicant denied service of the notice

of default alleged by the Respondent in its affidavit in reply. In **Zebra Telecom Limited & 2 others vs. Stanbic Bank (U) Limited**, the dispute as to whether service of a notice of default was effectual was considered a ground for grant of leave to appear and defend. It raises a factual controversy (See **Kakooza Abdallah vs. Stanbic Bank (U) Limited HCMA No. 614 of 2012**) which requires proof that is possible only when leave to defendant is granted.

3. A real dispute as to the amount claimed which requires taking an account to determine

The Applicant's Counsel submitted that following the objection raised herein above in respect to the competence of the 2nd affidavit in reply filed by the Respondent. Striking out of the said affidavit leaves the Respondent with no evidence adduced proving how the claimed sum was arrived at. Without prejudice to the above, a dispute in the amount claimed is clearly indicated in the Applicant's supplementary affidavit in support of the application in Paragraph (5) of the same. It is to the effect that the known outstanding sum by the Applicant was **Uganda Shillings 108,166,667/=** and according to the Respondent, the outstanding sum is **Uganda Shillings 222,321,633.861/=** as per paragraph (5) of its affidavit in reply dated 6th March, 2017. The Respondent did not attach any valuation or re-evaluation report or sale agreement to confirm the proceeds of the sale. This renders the Respondent's evidence insufficient to establish whether it is entitled to the claimed sum or not hence an issue that has to be determined upon hearing of the matter on its merits. The dispute relating to the amount is a ground for grant of unconditional leave to appear and defend (See **Marsenne (Uganda) Limited and 2 others versus Stanbic Bank (U) Limited (supra)**).

4. Any other circumstances showing reasonable grounds or a bonafide defence.

Failure to service the loan by the Applicant was caused by the Respondent's failure to avail funds so as to facilitate the Applicant execute the Ministry work as agreed. *See Paragraphs 13-17 of the Affidavit in Rejoinder*. This is reflected on *Annexure "A"* of Applicant's supplementary affidavit in support of the Application from 12th December 2013. She invited the court to constitute that failure on the part of the Respondent as a reasonable ground of a bonafide defence hence base on the same to grant the Applicant leave to appear and defend the main suit. Counsel further submitted that in the circumstances, the Applicant has a plausible defence to the Respondent's suit as such the application be granted.

The Respondent's Reply

The Respondents Counsel relied on the facts in the affidavit of Okello Alex Paul.

The issue for consideration is whether the Applicant raises any plausible defence in the

above matter. Secondly, whether the Parties are entitled to any remedies?

On **whether the Applicant raises any plausible defence in the above matter**, the Respondent's Counsel submitted that the Applicant in its application for leave to appear and defend does not raise a plausible defence to merit a full trial as such the matter before this Honourable Court is one that does not raise any plausible issues that merit a full trial. The matter is simple and straightforward involving the Applicant's getting a loan and failing to pay it back. This does not merit a full trial due to the fact that the amount is known and the Applicant does not deny the facts in its Application.

Counsel relied on the decision of Hon. Lady Justice Irene Mulyagonja (as she was then) on the purpose of Order 36, in the case of **Begumisa George Vs. East African Development Bank (Misc. Appl. No. 451 Of 2010) (Misc. Appl. No. 4510f 2010) [2011] UGCOMMC 62 (23rd April, 2011)** citing with approval the Kenyan case of **Zola & Another v. Ralli Brothers Ltd. & Another [1969] EA 691 at 694**: Summary procedure under Order 35 (or 36) is intended to:

“...enable a plaintiff with a liquidated claim to which there is clearly no good defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the defendant. If the judge to whom the application is made considers that there is any reasonable ground of defence to the claim the plaintiff is not entitled to summary judgment...normally a defendant who wishes to resist the entry of summary judgment should place evidence by way of affidavit before the judge showing some reasonable ground of defence”

The Applicant does not deny the claim against it. In addition to that, the Applicant admits that it borrowed the amount of Uganda Shillings. 100, 000,000/= [Uganda Shillings One Million Only] at an interest of 24.5%. The Applicant can therefore simply do the math to arrive at a sum of Uganda Shillings. 288,217,840/= (Uganda Shillings Two Hundred Eighty Eight Million Two Hundred Seventeen Thousand Eight Hundred Forty Only). As such he submitted that the application is a delaying tactic of the Applicant and should be dismissed.

Counsel also relied on **Begumisa George Vs. East African Development Bank (Supra)** where order 36 rule 7 was applied. It provides that “if it appears to the court that any defendant has a good defence to or ought to be permitted to appear and defend the suit, and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to appear and defend and the plaintiff shall be entitled to issue a decree against the latter. In **Hasmani vs. Banque du Congo Belge (1938) 5 EACA 89 at 89**, Sheridan, CJ held that one triable issue is sufficient to grant leave to defend a summary suit. (See also **Maluku Interglobal Trade Agency Ltd vs. Bank of Uganda (1985) HCB 65**).

Whether the Applicant is entitled to any remedies

The authorities are very clear on the implications of being able to raise a reasonable defence in a summary suit. The Application is allowed by the court and the Applicant is granted leave to

appear and defend (See **Begumisa George vs. East African Development Bank (Misc. Appl. No. 451 of 2010) ((Misc. Appl. No. 451 of 2010) [2011] UGCOMMC 62 (23 April 2011),**

The Respondent's Counsel concluded that the Applicant has not shown any reasonable defence and the application ought to be dismissed with costs.

In rejoinder to the issue on **whether the Applicant raises any plausible defence in the above matter**, the Applicant's Counsel submitted that whereas the Applicant admits that it obtained a loan in the sum of **Uganda Shillings 100,000,000/=** from the Respondent, the Applicant denies the Respondent's claim in the main suit. It is misleading for the Respondent to submit that the Applicant does not deny the claim against it. Learned Counsel submitted that Ground 2 of the Notice of Motion and paragraph 3 of the Applicant's affidavit in support of the Application clearly indicate that the Applicant denies the Respondent's claim in the main suit. The Applicant's computation varies with regard to the known outstanding loan sums. Furthermore Counsel contended that the variance in the computations alone is a ground for granting of the orders sought by the Applicant in the application. This is in line with the Respondent quoted authority of **Hasmani versus Banque Du Congo Beige (supra)**.

The application duly discloses triable issues of facts and law as evidenced in the affidavits filed and referred to, in line with the Respondent's quoted case of **Maluku Interglobal Trade Agency Limited vs. Bank of Uganda** a trial can only follow by granting the orders sought for in the Application.

On whether the parties are entitled to any remedies, the Applicant's Counsel submitted that since the application discloses triable issues and a good defence, the Applicant should be granted the orders sought in the application.

Ruling

I have carefully considered the Applicants application together with the affidavit in support and in opposition thereto. The application was filed on 29th August, 2016 and the Respondent filed an affidavit in reply on 11th January, 2017. The application had been issued by the registrar on 6th December, 2016.

I have duly considered the objection of the Applicants counsel to the second affidavit in reply of Mr Okello Alex Paul filed on 6th March, 2017. I have carefully perused the record and noted that the matter came for mention on 15th February, 2017. The court directed in accordance with Order 36 rule 4 of the Civil Procedure Rules for the Applicant to file a further affidavit by 20th February, 2017. That affidavit was to specify how much money owed and how much had been paid before sale of the mortgaged property. Thereafter the Respondent was to give particulars of

the sale of the mortgaged property by 24th February, 2017. Subsequently the parties would address the court in written submissions.

The Applicant filed submissions on 13th March, 2017 but never filed an affidavit specifying how much money was owed and how much had been paid before the sale of the mortgaged property. On the other hand the Respondent through Okello Alex Paul filed a further affidavit in reply on 6th March, 2017 specifying how much money was owed as directed by court. The Respondent however never gave particulars of sale of the mortgaged property as directed by the court. In the premises, the objection to the second affidavit in reply by the Applicants counsel has no merit and is overruled. The Respondent was directed by the court to give particulars of the sale of the mortgaged property for purposes of determining the application. The Applicant did not comply with the courts directive to file an affidavit specifying how much money was owed by the time of the sale. In the premises, there are facts which are material that have been concealed from the court.

The facts of the application are not controversial. I have also taken into account the written submissions of counsel and will not regurgitate the principles of law when considering an application for leave to defend a summary suit. All that the Respondent needs to disclose for the moment is whether it has a plausible defence or whether the application raises triable issues of fact or law which merit judicial consideration before a final decision is taken on whether leave should be granted to defend the suit.

The Respondent filed a summary suit to recover Uganda shillings 288,217,840/=. In the summary suit, the plaintiff does not disclose how much was realised from the sale of the mortgaged property.

The Applicant does not deny having obtained credit facilities from the Respondent. However the application does not specify how much money was owed by the time of the sale of the suit property. It therefore cannot be determined how much the Applicant admits. The only figures that have been disclosed are those in the affidavit in reply of the Respondent. It indicates that after the sale of the suit property, what remained outstanding by 29th July, 2016 was Uganda shillings 288,217,840/=.

In the further affidavit in reply Okello Alex Paul deposed that the Applicants property was valued at Uganda shillings 300,000,000/=. He does not however disclose how much the property was sold for. The fact that the property had been sold by the Respondent to offset the outstanding amounts owed by the plaintiff is not denied.

I have carefully considered the application and noted that the credit facility in question indicated that the open market value of the Applicants property at that time and according to a credit facility letter dated 26th September, 2013 was Uganda shillings 350,000,000/= while the forced sale value of the property was Uganda shillings 250,000,000/=. The facility was a performance

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guarantee and an advance payment guarantee. In annexure "D" to the affidavit in reply there is a notice of default indicating that there was an outstanding amount of Uganda shillings 436,013,670.53/= by 22nd September, 2013.

In paragraph 3 (d) of the affidavit in reply of Okello Alex Paul it is written that the Applicant defaulted on his loan obligations as a result the Respondent issued and posted demands for the full payment of the amount. No evidence was attached to show that the demand notice annexure "C" was actually received by the directors of PRIME I K Ltd. Below annexure "C" is a handwritten note indicating that the Bunjo received on behalf of Prime Machinery Ltd. Prime machinery is not the Applicant. There is no signature of acknowledgement.

With regard to the sale amount, the approximate value of the sale can only be arrived at by subtraction of the alleged outstanding amount and what is now due and owing.

The Applicant's case is that the statutory notices were not issued before the sale. The statutory procedure is set out under section 19 of the Mortgage Act, 2009 as well as the Mortgage Regulations 2012.

The Mortgage Regulations require the time of valuation of property not to exceed six months prior to the sale. It prescribes the notices of sale of the suit property and advertisement as well as the public auction. The Applicant has raised a plausible defence on the basis that the manner in which the sale was conducted may not be lawful and the question of whether the proper procedure was followed is aggravated by the Respondent's failure to indicate how much the property was sold for. While the Applicant does not deny indebtedness, he has raised matters of enforcement of the Mortgage Act 2009 which inter alia safeguard the interest of the mortgagor and mortgagee. Courts should ensure compliance with statutory provisions for the realisation of the security in the mortgage or for the equity of redemption. A person who contravenes provisions for sale under Regulation 8 of the Mortgage Regulations 2012 commits an offence. The allegation of breach of law is fundamental to the conduct of mortgage business and ought to be investigated before a final decision is made.

In the premises, the Applicant shall have unconditional leave to defend the suit and the Respondent shall be entitled to file the requisite reply giving details of the sale of the suit property and whether there was compliance with the statutory procedure for the sale of mortgaged property.

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 on the 5th of May 2017 in open court

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Charles Okuni: Court Clerk

Counsel Veronica Namuswe for the Applicant

Counsel Jacob Kalabi for the Respondent

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge

5th May, 2017