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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO. 446 OF 2020
(ARISING OUT OF CIVIL SUIT NO. 201 OF 2020)

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1. BYANYIMA EDITH PEACE
2. AOPHIA KEZA PEACE..... APPLICANTS

VERSUS

OPPORTUNITY BANK (U) LIMITED..... RESPONDENT

15

BEFORE: HON. LADY JUSTICE SUSAN ABINYO

RULING

20 This is an application brought by notice of motion under the provisions of Section 98 of the Civil Procedure Act, Order 36 Rules 1 and 4 and Order 52 Rules 1 and 2 of the Civil Procedure Rules where the Applicants seek for orders that:

1. The Applicants be granted unconditional leave to appear and defend the suit.
2. Costs of this Application be provided for.

Facts:

25 This Application is supported by the affidavits of the two Applicants Byanyima Edith Chuchu and Apophia Keza Peace deponed and summarized as follows: -

30 In March 2018, the 1st Applicant applied for and was granted an agricultural loan facility of Ugx. 217,000,000/- (Uganda Shillings Two Hundred Seventeen Million) from the Respondent bank, the nature of an Agricultural Credit Facility (ACF). That the loan facility was secured by the 2nd Applicant's land comprised in Block 88 plots 708, 709, 726 and 727 Kyaggwe East Buganda land at Bukerere, Mukono District.

5 The Applicants contend that the payments of the said loan to the Respondent were affected by serious challenges met in the agricultural sector including foot and mouth disease outbreak suffered at the onset and in 2019, which was brought to attention of the Respondent.

10 That the Respondent/Plaintiff filed a specifically endorsed plaint for the recovery of a liquidated sum of Ugx. 186,227,211/- (One Hundred and Eighty Six Million; Two Hundred and Twenty Seven Thousand, Two Hundred and Eleven shillings), the claim is misconceived, frivolous, an abuse of Court process, and brought in error.

15 The Respondent in an affidavit in reply deponed by Tugume Grace the Legal Manager of the Respondent, is summarized as follows: -

That the contents of the affidavits in support deponed by the Applicants are misconceived, tainted with deliberate falsehoods and have no merit.

20 That the 1st Applicant has willfully neglected to fulfill her obligation arising out of a loan agreement dated 15th March, 2018 and the 2nd Applicant executed a loan guarantee agreement in favor of the 1st Applicant thereby making her liable for the 1st Applicant's default.

That the loan agreement dated 5th March, 2018 was not restructured and, or amended on the account of the alleged challenges and that the Applicants were still bound by the terms and conditions as stated in the agreement.

25 The Respondent contends that the Applicants are jointly and severally indebted to the Respondent to the tune of Ugx. 186,277,211.46/-. That this application does not disclose any bonafide issue or plausible defense to the main suit that merits adjudication by this Court.

Representation

30 The Applicants were represented by Kal Advocates while the Respondent was represented by M/s Okalang Advocates and Legal Consultants. Both Counsel filed written submissions.

Issues for determination:

35 Counsel for the Applicants in their submissions raised two issues which Counsel for the Respondent adopted, namely;

5 1. Whether the Application raises triable issues for which the Applicants can be granted unconditional leave to appear and defend?

2. Whether the Applicants have a valid defense against the Respondent's suit?

Issue 1: Whether the Application raises triable issues for which the Applicants can be granted unconditional leave to appear and defend?

10 Counsel for the Applicants submitted that the application raises triable issues which justify grant of unconditional leave to appear and defend the suit and relied on the case of **Maluku Inter Global Trade Agency LTD Vs Bank of Uganda HCCS No. 950 of 1985**, where it was held that in a summary suit, before leave to appear and defend is granted, the defendant must show that there is a
15 bonafide triable issue of fact or law.

Counsel for the Applicants further submitted and raised the following circumstances to show that there are bonafide triable issues according to the affidavits of the Applicants, namely ; that the Respondent had admitted in its
20 affidavit that the Applicants had informed them that indeed there was an outbreak of foot and mouth disease which affected the 1st Applicant's Agricultural project although the Respondent did not act; that the Applicants contend that there is a pending counterclaim which the Respondent avers was withdrawn but the Applicants in rejoinder contend that they were not aware of the withdrawal of the counterclaim and therefore an afterthought by the
25 Respondent to try and justify the improper filing of the instant summary suit; that the Applicants further contend that they are not indebted to the Respondent in the sum claimed in the plaint having paid up a total sum of Ugx .92,000,000/- (Uganda shillings Ninety Two Million); that the Applicants challenge the amount presented by the Respondent which calls for court to investigate and establish
30 the amount owed if any and whether the Respondent fairly and legally arrived at the amount claimed in the summary plaint.

Counsel for the Applicants submitted that the 1st Applicant's Affidavit in support, states that she had been making periodic payments until the interim Order was issued which shows that the amount claimed in the bank is not certain and the
35 court has to investigate the evidence to ascertain the exact amount owed.

Counsel further relied on the decision of **Uganda Baati Vs Patrick Kalema H.C.C.S No. 126 of 2010** where the Court adopted the definition of a liquidated demand as defined in **Stroud's Judicial Dictionary** to *inter alia* mean the amount

5 on the bill of exchange, definite interest on a contract or under a statute, a sum certain in money, a statutory demand for the payment of a total debt and an amount due on judgment, to contend that the sum is not a liquidated demand as there are points that need to be tried by this Court.

10 Counsel for the Respondent submitted in reply that the Applicants do not deny having executed a loan agreement and a loan guarantee dated 15th March 2018 which was worth Ugx. 217,000,000/- they received and were supposed to pay back within 36 months and that they admit failing to pay the scheduled loan installments thus there is no triable issue.

15 Counsel further submitted that the Applicants aver that they were unable to fulfill the scheduled loan payments due to the foot and mouth disease which is clearly denied by the Respondent in paragraph 7 of the Affidavit in reply and contends that the Applicants have not either attached any evidence of a written communication of the said challenges to the Respondent or any request for restructuring of the scheduled loan payments. That this is an afterthought
20 which cannot be proved by affidavit evidence and therefore does not raise a triable issue.

Counsel relied on the case of **Zolla and Another Vs Ralli Brothers Limited and Another (1969) 1 EA 691 at page 694**, to support his contention, where the Court of Appeal of East Africa held that, " ...Normally a defendant who wishes to resist
25 the entry of summary judgment should place evidence by way of affidavit before the judge showing some reasonable ground of defense,"

In regard to the withdrawal of the counter claim, Counsel for the Respondent submitted that the withdrawal of the counter claim at Mukono High Court was neither made in bad faith nor was it an afterthought as it was withdrawn on the
30 16th of December, 2019 as stated in paragraph 9 of the affidavit in reply, almost four months before this suit was instituted and that no reply had been made to the counter claim by the time it was withdrawn and that it was withdrawn within the provisions of Order 25 of the Civil Procedure Rules hence there is no issue for determination.

35 Counsel further averred that it's not in dispute that the Applicants had made partial payment of the loan as stated in the bank statement attached to the affidavit in support of the application. That the Applicants neglect to address this Court on the fact that it was further contracted by the parties that the loan accrued monthly and default interest and that this amount due is contractual as

5 stated in annexure 'A' of the affidavit in reply and the Applicants do not provide any evidence to the contrary that warrants the grant of unconditional leave.

10 Counsel in addition submitted that Order 36 Rule 2 provides that a plaintiff may bring an action in a summary manner if he/she seeks to recover the money payable by the Defendant; with or without interest arising upon a contract. That it further provides that a summary suit can be commenced on a guaranty where the claim against a principal is in respect of a debt or a liquidated amount only and that the facts in this case match the requirement of the Law in institution of summary suits.

15 In reply to the assertion that the Respondents were restrained from making periodic payments by the interim Order granted by the High Court in Mukono, Counsel contended that the orders of the Court were clear and cannot be construed otherwise. That the interim Order as attached on the affidavit in reply restrained any dealings in the land that would prejudice the Plaintiff's interests and did not bar the Applicants from fulfilling their contractual obligations to the
20 Respondents.

Counsel relied on the case of **Post Bank(U) Ltd Vs Abdu Ssozi Civil Appeal No. 08 of 2015**, where the Supreme Court held that the reason why Order 36 was enacted was to facilitate expeditious disposal of cases involving debts and contracts of a commercial nature to prevent defendants from presenting
25 frivolous and vexatious defenses in order to unreasonably prolong litigation, to support his contention.

Counsel thus submitted that the Applicants in this case do not deny being indebted to the Respondent and therefore, no triable issue has been raised that merits the grant of this application and prayed that this Court finds that the
30 Applicants have failed to raise bonafide triable issues.

Resolution

I have carefully perused this application together with the supporting affidavits of the parties and taken into consideration the submissions of both Counsel. I find as follows: -

35 The Law under **Order 36 Rule 3(1) of the Civil Procedure Rules** enjoins a defendant served with summons under summary procedure to seek leave of court to appear and defend the suit.

5 It's trite law that an application for leave to appear and defend can only be granted when the Applicant has showed by way of an affidavit, that there are bonafide triable issues of fact or law and a plausible defense; general or vague statements denying liability will not suffice.

10 It is also settled law that summary procedure provides a quick way for the Plaintiff who demands a liquidated sum to obtain judgment where there is no evident defense.

15 In the instant case, the Applicants assert that they had informed the Respondent that there was an outbreak of foot and mouth disease which affected the 1st Applicant's Agricultural project although it did not act and that the Applicants are not indebted to the Respondent in the sum claimed in the plaint having paid up a total sum of Ugx. 92,000,000/- (Uganda Shillings Ninety Two Million).

Taking into consideration the assertions by the Applicants, I find that triable issues of fact or law have been raised by the Applicants which requires investigation and this cannot be ascertained in a summary manner.

20 **Issue 2: As to whether the Applicants have a valid defense?**

25 Counsel for the Applicants while referring Court to the proposed written statement of defense attached to the Application as annexure 'G', contends that under paragraphs 8 and 14 of the 1st Applicant's affidavit and paragraph 13 of the 2nd Applicant's affidavit, the Applicants are challenging the amount claimed by the Respondent in the summary suit as the formula applied by the Respondent to arrive at the figure is unjustified and unfair and, that the Respondents seem to be applying interest in the claim which they are presenting to this Court as a liquidated demand.

30 Counsel submitted that the High Court of Uganda at Mukono is handling a pending dispute concerning the mortgaged land and has issued an interim Order preventing all parties, their agents, servants and persons who derive interest from them from selling or changing interest in the land till further orders are made by the court.

35 Counsel further submitted that the pending court case is fused with the instant suit against the Applicants and, the interest of justice demands that the entire matter be subjected to judicial scrutiny in order to arrive at a fair decision.

5 Counsel thus prayed that the Applicants be granted unconditional leave to appear and defend the suit as the Applicants have a bonafide defense and in the interest of justice, the case be heard on merits and all the contentious issues raised by the Applicants be considered.

10 Counsel for the Respondent in reply submitted that the Applicant in this case has no valid defense and that the proposed written statement of defense is based on falsehood that there is still a subsisting counterclaim in the High Court at Mukono which does not merit the grant of this application.

15 Counsel for the Respondent in the alternative but without prejudice to the foregoing submitted that should this court be inclined to grant the leave sought, the Court should require that the Applicant deposits the admitted outstanding balance in this honorable Court. That this is because the application is not premised on a total denial of the debt. That this will prove that the Applicants were genuinely seeking for leave to file their defense and not simply prolonging the litigation process.

20 **Resolution**

I have taken into further consideration the submissions of both Counsel as above and find as follows: -

Following the Court of Appeal decision of **Kotecha v. Mohammed [2002] 1 E.A 112**, where Court held that: -

25 *"The summary procedure on specially endorsed plaint under Order 33 of our Civil Procedure Rules is similar to a writ specially endorsed under Order 3, rule 6 (Order 14, rule 1) of the English Rules of the Supreme Court. Therefore, English authorities on that rule are of persuasive authority and provide (a) useful guide. Under the English Rule the Defendant is granted*
30 *leave to appear and defend if he is able to show that he has a good defence on the merit(s); or that a difficult point of law is involved; or a dispute as to the facts which ought to be tried; or a real dispute as to the amount claimed which requires taking an account to determine; or any other circumstances showing reasonable grounds of a bona fide*
35 *defence."* See *Saw v Hakim* 5 TLR 72; *Ray v Barker* 4 Ex DI 279.)

In the instant case, the Applicants in their proposed written statement of defense attached to the Application as annexure 'G', are challenging the amount claimed by the Respondent in the summary suit and contend that the

5 formula applied by the Respondent to arrive at the figure is unjustified and unfair
as the Respondent seems to be applying interest in the claim to amount to a
liquidated demand.

I therefore find that the Applicants have raised a triable issue of fact and a
plausible defense whereupon, this merits the grant of unconditional leave to the
10 Applicants to appear and defend the suit.

This Application is allowed with the following Orders;

1. The Applicants are hereby granted unconditional leave to appear and
defend in Civil Suit No.201 of 2020.
- 15 2. The Applicants/ Defendants shall file a written statement of defence
within 10 days from the date hereof.
3. Costs of the application will abide in the main suit.

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Ruling is signed, dated and delivered by email on the 30th day of October, 2020.

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SUSAN ABINYO
JUDGE
30/10/2020