

THE REPUBLIC OF UGANDA  
THE HIGH COURT OF UGANDA AT KAMPALA  
[COMMERCIAL COURT]

M.A.No. 1007 of 2019

(Arising from Civil Suit No. 847of 2019)

HOPE DEVELOPMENT INITIATIVE LTD ::::::::::::::::::::APPLICANTS

VERSUS

YUNUS SOCIAL BUSINESS

FOUNDATION (U) LTD ::::::::::::::::::::RESPONDENT

RULING

BEFORE: HON. JUSTICE DUNCAN GASWAGA

- [1] This is a ruling on an application for leave to appear and defend brought under S.98 of the CPA Cap 71, Order 36, rule 3 &4 & Order 52 rule 1,2 &3 of the Civil Procedure Rules for orders that; *the applicants be granted leave to appear and defend HCCS No. 847 of 2019 and costs of the application be provided for.*
- [2] The grounds of the application contained in the affidavit of **Atim Agnes Apea** are that; the respondent's claim is unknown to the applicant, having obtained a credit facility worth USD 212,437 and fully cleared the same; that on several occasions the applicant requested the plaintiff to discuss how much compounded interest would be charged but to no avail; that on several occasions the applicant requested for account statements but the respondent refused to avail the same; that the

respondent is not a registered money lender and as such did not have a right to charge compounded interest in turn making the money lending agreement illegal and void ab initio; that doing a money lending business without the legal capacity and charging compounded interest amounts to fraud; that the plaintiff filed the above suit without exploring the mediation provided for in section 5.8(h) which amounts to abuse of court process; that the applicant has a good defence and it is in the interest of justice that the same application be allowed.

[3] This application raises one issue;

*(i) Whether the application raises triable issues for which the applicant should be granted leave to appear and defend Civil Suit 847 of 2019*

[4] Counsel submitted by way of written submissions. Counsel for the applicant relying on Order 36 rule 3 & 4 CPR, Order 36 (8) and **Makula Interglobal Trade Agency Vs Bnak of Uganda 1985 HCB 65** which was quoted with approval in **Benon Tomusange & Anor Vs Exim Bank (U) Ltd , M.A No. 1213 of 2016** to state that the applicant has bonafide triable issues of fact and law and he is not indebted to the respondent and Civil Suit 847 of 2019 is premature and incompetent for the plaintiff's failure to explore the arbitration option in clause 8.5 of the loan agreement. That the applicant is not indebted to the respondent and the claim for USD 183,688 is for unexplained charges, excessive and compounded interest which is illegal and fraudulent.

[5] Counsel further stated that a money lending agreement is rendered illegal when it provides for compound interest and an increase in interest at every default. See Section 86(1) Tier 4 Microfinance Institutions and Money Lenders Act 2016. That an arbitration clause in

the contract was ignored in contravention of Section 3(4), 5(1) and 9 of the Arbitration and Conciliation Act. That the court be pleased to send the matter back to arbitration as per Section 40 of the Arbitration and Conciliation Act.

- [6] It was counsel for the respondent's submission that the application does not disclose any triable issues or plausible defence. That the applicant's assertion that she paid all her outstanding balance is not backed by any evidence. Further, in reliance on **Sembule Investments Ltd Vs Uganda Baati Ltd M.A No. 664 of 2009**, Counsel stated that the applicant's assertion that she paid the whole loan is not true as is evident from the demand notices attached to the respondent's affidavit in support of the summary suit to which the applicant/defendant made no response. Counsel concluded by praying that the application for leave to appear and defend be dismissed for being unsustainable, baseless, unfounded and lacking a plausible defence.
- [7] Regarding the arbitration, the respondent stated that he has made several requests to the applicant to appoint an arbitrator but the applicant has not been forthcoming. As such the arbitration agreement is incapable of performance due to the un cooperative nature of the applicant. Counsel further stated that if however, the court is pleased, it can stay the proceedings with no orders as to costs and send the matter to arbitration. See **Emmanuel Mugabo Vs Saava Stephen Kikonyogo & Joseph Kigala (administrators of the estates of the late Nkizi Nalinnya) & Anor Misc. Cause No. 65 of 2012.**
- [8] In a brief rejoinder counsel for the applicant stated that the applicant's evidence has proved that the applicant has many triable issues that can only be dealt with and determined in the main suit. The applicant further

denied knowledge of annexures “B”, “F” which were brought to its attention at the stage of filing pleadings and the respondent having ignored her requests for loan restructuring, the applicant got all the money and paid it back and as such she is not indebted to the respondent. The applicant further asserted that annexures “C, D,F,G,H,J and K” had never been brought to the attention of the applicants save for the time they were pleaded in pleadings and so they do not prove the indebtedness of the applicant. Counsel further stated that the respondent has never taken any steps to appoint an arbitrator and that Civil Suit No. 847 of 2019 is in direct violation of Section 11 of the Arbitration and Conciliation Act, Cap 4 whose provisions the respondent never paid heed to. Counsel concluded by reiterating the earlier prayers that there are many triable issues which can only be determined in the main suit which warrants the grant of this application.

[9] The court of Appeal in the case of **Kotecha Vs. Mohammed [2002] 1 EA 112** stated thus; *“the defendant is granted leave to appear and defend if he is able to show that he has a good defence on the merit; 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 defence.”*

[10] The applicant herein intimated to this court that the outstanding sums were cleared to completion as required whereas the respondent denies the same. The applicant further avers that the respondent ought to have first had recourse to the arbitrator before moving this honourable court.

[11] The above constitute triable issues which merit further consideration by this court by way of hearing the main suit. See **Corporate Insurance**

**Co. Ltd Vs Nyali Beach Hotel Ltd [1995-1998], EA** where 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, unconditional leave should be granted to the defendant.”*

[12] Resultantly, this court finds that the above issues merit this court’s consideration and in the circumstances, leave to appear and defend is hereby granted. The applicant is ordered to file its written statement of defence within fifteen days from the date hereof. The respondent shall then file a rejoinder, if he so wishes, according to law.

I so order

Dated, signed and delivered at Kampala this 23<sup>rd</sup> day of March 2021

  
Duncan Gaswaga

JUDGE