

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

M.A.No. 714 of 2020

(Arising from Civil Suit No. 669 of 2020)

1. HARAMBE STORES AND CONSTRUCTION LTD  
2. JOSEPH ODOI OCHIENG:::APPLICANTS

VERSUS

TWINOMURIISA JORDAN :::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 that the applicants be granted leave to appear and defend HCCS No. 669 of 2020 and costs of the application be provided for.
- [2] The grounds of the application contained in the affidavit of **Joseph Odoi Ochieng** are that; the applicant/ defendant company is not a party to the said annexure” **A**” to the respondent’s affidavit in support of his claim; that Harambe Stores and Construction, the predecessor in title vide annexure “**F**”, has never executed any form of guarantee for the loan obtained by him to warrant attachment of the 1<sup>st</sup> applicant’s title; that the applicant is not personally indebted to the respondent in the sum claimed in HCCS No. 669 of 2020;That the applicant doesn’t

acknowledge indebtedness in Ush. 18,000,000/= as claimed by the respondent and that the respondent's claim has no definite sum.

[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 669 of 2020***

[4] Counsel submitted by way of written submissions. Counsel for the applicant stated that the law on granting leave to appear and defend has evolved as in the case of **Maluku Interglobal Trade Agency Ltd Vs Bank [1985] HCB 65 at 66** where court held that,

*"Before leave to appear and defend is granted, the defendant must show by affidavit or otherwise that there is a bonafide triable issue of fact or law. When there is a reasonable ground of defence to the claim, the plaintiff is not entitled to summary judgment. The defendant is not bound to show a good defence on the merits but should satisfy the court that there was an issue or question in dispute which ought to be tried and the court should not enter upon the trial of the issue disclosed at this stage."*

[5] Counsel further stated that the respondent's claim is false in some material respects for misrepresentation of some material facts, the said friendly loan agreement was never advanced to the defendants/applicants jointly and severally as claimed by the respondent, that the 1<sup>st</sup> applicant/defendant company is/was not a party to the said annexure "A" attached to the plaint and that Harambe Stores and Construction, has never executed any form of guarantee for the loan solely obtained by the 2<sup>nd</sup> applicant to warrant attachment of its

title.(see annexure “F”). The 2<sup>nd</sup> applicant further disputes being indebted to the respondent in the sum claimed and the respondent’s claim is merely speculative, baseless and not definite.

- [6] It was also Counsel’s submission that the principles of grant of unconditional leave to appear and defend have been laid down in **Broadband Company Ltd vs Joram Mugume HCMA No. 363 of 2013** as follows;

*“An applicant for leave to defend a summary suit must demonstrate to court that there is or are issues or questions of fact or law which are in dispute and which ought to be tried; Where the applicant shows a state of facts which leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff’s claim, he ought not to be debarred of all power to defend the demand made upon him; Where the court is doubtful whether the proposed defence is being made in good faith, the court may order the defendant to deposit money in court before leave is granted; Whether there is a genuine defence either in fact or in law, the defendant is entitled to unconditional leave to defend; General allegations however strong may be the words in which they are stated are insufficient to amount to an averment of fraud of which any court ought to take notice; that the only question for determination is whether this is a matter that merits the grant of unconditional leave to defend the suit.”*

- [7] That the conduct of the respondent of transferring the land into his name was therefore an illegality since it’s a clog on the equity of redemption as the position of the law is that “once a mortgage always a mortgage; **Stanley vs Wilde [1899] 2 Ch 474**; Lord Lindley MR said, “a clog or fetter is something which inconsistent with the idea of security, a clog or fetter is in the native of a repugnant condition.”

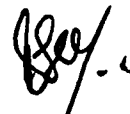
- [8] Counsel quoted the case of **Kotecha vs Mohammed [2002] EA 112** in which it was stated that “*where a suit is brought under summary procedure on a specially endorsed plaint, the defendant is granted leave to appear and defend if he was able to show that he had a good defence on merit, or that 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 claimed which required taking into account to determine; or any other circumstances showing reasonable grounds of bonafide defence.*”
- [9] As a general rule, leave to defend should be given unconditionally unless there is good ground of thinking that the defences put forward are no more than a sham as according to **Souza Figuerido & Co. Ltd vs Moorings Hotel Co. Ltd [1959] EA 425**. The respondents cited the case of **Sembule Investments Ltd Vs Uganda Baati Ltd Misc. Application No. 664 of 2009** in which it was held that summary procedure is intended to enable the plaintiff with a liquidated claim to which there is no clear defence to obtain a quick and summary judgment without being delayed. The defendant who wishes to resist the entry of a summary judgment should disclose through evidence that there are some reasonable grounds of defence. The defendant must show a good defence to the suit.
- [10] However, as per the case of **Uganda Commercial Bank vs Mukoome Agencies [1982] HCB 21** as noted by the applicants, the Court of Appeal held inter alia where fraud is alleged the party alleging must be given an opportunity to prove it and it is trite law that a substantial allegation of fraud in an affidavit in opposition raises a triable issue entitling the defendant to leave to defend the suit. The conduct of the

respondent of transferring the land into his name was therefore an illegality since it's a clog on the equity of redemption as the position of the law is that; "*once a mortgage, always a mortgage*". The above was premised on the honest belief by the 2<sup>nd</sup> applicant and was clearly indicated in the applicant's affidavit in support of the motion.

**[11] In the premises therefore, the court finds bonafide triable issues of fact, discussed earlier on, upon which the application to appear and defend can be granted. The applicants raise a plausible defence to the respondent's claim and it is just to grant the applicants unconditional leave to appear and defend the head suit.**

**I do order**

**Dated, signed and delivered this 19<sup>th</sup> day of March 2021**



**Duncan Gaswaga**

**JUDGE**