

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
MISCELLANEOUS APPLICATION NO. 0717 OF 2022
ARISING OUT OF CIVIL SUIT NO. 0380 OF 2022

HAJI MUSOKE ELIAS ::: APPLICANT

VERSUS

KABANDA FAIZO

(Suing through his lawful

Attorney Ssemakade Luqman) ::: RESPONDENT

Before Hon. Lady Justice Harriet Grace Magala

RULING

Background

This is an application for leave to appear and defend HCCS 0380 of 2022. The Respondent/Plaintiff's claim against the Applicant/Defendant in the said suit is for a recovery of Ug.Shs. 77,000,000/= being a loan outstanding for the breach of a guarantee agreement. The facts constituting the cause of action in HCCS 0380 of 2022 are that:

- a) On or about 2nd February 2020 while at Mayirikiti Buwambo, Wakiso District, the Defendant entered into an agreement with the Plaintiff guaranteeing the payment of money owed by his son- Musoke Twaha to the Plaintiff to the tune of Ugx. 77,000,000/=. The Defendant/Applicant signed an agreement on 8th February 2020 giving his land measuring 129ft x 142ft and 141ft x 130ft as security for the payment of money owed by his son. The said parcels of land had a farm and a residential house on it that belonged to Musoke Twaha, the son of the Defendant/Applicant. The agreement was to the effect that Musoke Twaha had six months from 8th February 2020 within which to pay the said debt and failing which, the Plaintiff /Respondent was free to take the said parcel of land. The



Defendant /Applicant executed instruments of transfer but only gave the Plaintiff/Respondent copies of the same. He stated that he signed the said agreement without duress or coercion.

- b) That upon default of the loan repayment by Twaha Musoke, the Defendant/Applicant failed to perform his part of the agreement as agreed by the parties.
- c) That the Defendant /Applicant has refused/ failed/neglected to deliver the said property to the Plaintiff/Respondent.

The Affidavit in support of the Application was deposed by the Applicant who stated that the agreement dated 8th February 2020 was the subject of HCCS 0405 of 2020 which seeks to set aside the agreement. The Applicant avers that he was forced and coerced into signing the said agreement.

The Affidavit in Reply opposing the application was deposed by lawful attorney of the Respondent. It gave a detailed background or genesis of the events that led to the signing of the agreement dated 8th February 2020. It is to the effect that the Applicant was never coerced into signing the said agreement and that HCCS 0405 of 2020 was filed and never prosecuted. It was intended to delay the ends of justice and the application for leave to appear and defend should be dismissed and judgement entered for the Respondent/Plaintiff.

Appearance and Representation

The Applicant was represented by M/s M/ Mugoya & Co. Advocates and the Respondent was represented by M/s Bbaale & Partners Advocates and Legal Consultants. Parties were given schedule to file their pleadings and written submissions.

Issues

1. Whether the Applicant should be granted leave to appear and defend
2. What other remedies are available to the parties?

Determination

Law Applicable

An application made under Order 36 rule 4 of the Civil Procedure Rules as amended for leave to appear and defend a suit may be granted where the

applicant shows that he or she has a good defence on the merits, or that a difficult point of law is involved, or that there is a dispute 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 *bonafide* defense (see the case of **Africa One Logistics Ltd –vs – Kazi Food Logistics (U) Ltd. Misc. Application No. 964 of 2019**).

As to whether the Defendant/Applicant raises a triable issue and must not be shut out and should be granted leave to formulate their defence and adduce evidence of the triable issue(s) raised was settled in the cases of **MMK Engineering –vs- Mantrust Uganda Limited H.C.M.A No. 128 of 2021** and **Bhaker Kotecha –vs – Adum Muhammed [2002] 1 EA 112**. In the case of **MMK Engineering (supra)**, Hon. Mr. Justice Christopher Madrama (as he then was) cited **Odgers’ Principles of Pleading and Practice in Civil Actions in the High Court of Justice Twenty-Second Edition pages 71 – 78 the principles for leave to defend to include the following:**

- a) *The Applicant must show the court that there is an issue or question of fact or law in dispute which ought to be tried.*
- b) *Where the Defendant shows that there was such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the Plaintiffs claim, he ought not to be debarred of all power to defeat the demand made upon him.*
- c) *Where the defence that is proposed is doubtful as to its good faith, the Defendant may be ordered to deposit money in court before leave is granted.*
- d) *Whenever there is a genuine defence either in fact or in law, the Defendant is entitled to unconditional leave to defend.*
- e) *General allegations however strongly 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.*
- f) *The Defendant may in answer to the Plaintiffs claim rely upon a set off or counterclaim. A set off is a defence to the action. Where it is a counterclaim, and there is no connection with the Plaintiff’s cause of action, the Plaintiff may be given leave to obtain judgement on the claim provided that it is clearly entitled to succeed upon it and will be put to unnecessary expense in having to prove it. It is within the courts discretion to stay execution up to the anticipated amount of the counterclaim pending the trial of the counterclaim or further order.*

Raising a triable issue must be distinguished from mere denial and the defence raised must not be a sham defence that is intended to delay the Plaintiff from recovering money due. In the case of **Maluku Interglobal Trade Agency Ltd versus Bank of Uganda [1985] HCB 65**, the Court stated 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 judgement. The defendant is not bound to show a good defence on the merits but should satisfy court that there was an issue or question in dispute which ought to be tried and the court shall not enter upon the trial of issues disclosed at this stage”

In the same case, the court further stated that:

“...the defence must be stated with sufficient particularity to appear genuine. General or vague statements denying liability, will not suffice” (emphasis is mine).

Before court can apply the law to the facts before it, it was brought to the attention of court that the Applicant filed **HCCS No. 0405 of 2020: Musoke Twaha & Haji Musoke Erias – vs – Sebi Mohammed and Kabanda Fazio** seeking to set aside the agreement dated 8th February 2020 on the grounds that the said agreement was signed by the Applicant under coercion. The said suit according to the court records as at the time of preparing this ruling was filed on the 9th July 2020, it is pending hearing and is allocated to Hon. Lady Justice Susan Abinyo.

It is important to note that the contested agreement is the same agreement which forms the claim of the Respondent /Plaintiff in HCCS 0380 of 2022 out of which this application arises. The said suit was filed in this honorable court on 19th May 2022 and registered on the 25th May 2022. It is only proper that this court pronounces itself on any matters relating to and arising out of HCCS 0380 of 2022 after HCCS 0405 of 2020 has been heard and disposed of.

Under normal circumstances and according to the practice adopted by this Division, HCCS No. 0380 of 2022 and MA 0717 of 2022 should have been allocated to the Hon. Lady Justice Susan Abinyo. However, in the interest of justice and without causing further delay; I hereby make the following orders:

- a) This application shall not be determined until HCCS 0405 of 2020 is heard and disposed of;
- b) The prosecution of HCCS 0380 of 2022 should be stayed pending the hearing and final determination of HCCS 0405 of 2020;
- c) HCCS 0380 of 2022 and MA 0717 of 2022 should be reallocated to the Hon. Lady Justice Susan Abinyo;
- d) The Parties should take all the necessary steps to prosecute HCCS 0405 of 2020 without any further delays; and
- e) No order shall be made as to costs.

Delivered electronically this 25 day of JULY 2023 and uploaded on ECCMIS.



Harriet Grace MAGALA

Judge

25th July 2023