THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 173 OF 2019

(Arising from Civil Suit No. 130 of 2019)

NDYAREEBA RONALD :: APPLICANT

VERSUS

JOSEPH ARINAITWE :: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] This application was brought by Notice of Motion under Order 36 Rules 3(1) & (4) of the Civil Procedure Rules and Order 52 Rules 1 & 3 of the Civil Procedure Rules seeking orders that;

a) Unconditional leave to appear and defend Civil Suit No. 130 of 2019 be granted to the Applicant.
b) Costs of the application be provided for.

Brief Background

[2] In the main suit, the Respondent/Plaintiff claims that sometime between the year 2017 and 2018, the Defendant approached him for some cash advances to assist the latter in his businesses. The Plaintiff and Defendant were related as Cousins and business colleagues. The Plaintiff advanced to the Defendant monies at different intervals to the tune of UGX 257,150,000/=. The Defendant issued to the Plaintiff post-dated cheques as security for payment of the borrowed monies. The Defendant was unable to pay within the agreed period. By a memorandum of understanding dated 7th December 2018, the parties agreed to a payment schedule by which the last payment was to be

effected by 19th April 2019. The Defendant only made part payment of UGX 27,000,000/= leaving the balance of UGX 230,150,000/= which the Plaintiff claims in the summary suit. The Applicant/Defendant therefore brought this application seeking leave to defend the summary suit.

Grounds of the Application and Reply by the Respondent

[3] The grounds of the application are laid out in the Notice of Motion and in the affidavit in support of the application deponed to **Ndyareeba Ronald**, the Applicant. Briefly, the grounds are that the alleged sum of UGX 230,150,000/= is not a liquidated sum capable of being recovered under summary procedure. The Applicant does not owe the Respondent the alleged sum of UGX 230,150,000/= or at all. The Respondent was not licensed to advance and/or lend money in his individual capacity. The Applicant has a good defence to the claim set out in the summary suit. It is just, fair and equitable that the Applicant is granted unconditional leave to appear and defend the suit.

[4] The Respondent opposed the application through an affidavit in reply deposed by **Joseph Arinaitwe**, the Respondent, in which he stated that the application by the Applicant was devoid of any merit, is frivolous, vexatious and a mere waste of the court's time. The Respondent stated that he is advised by his lawyers that his claim against the Applicant is a liquidated demand according to the law under which it was brought. He stated that he is neither a money lender nor does he carry on a business of money lending. He only made advances to the Applicant as a business colleague free of any interest unlike what a money lender would have done in the ordinary course of business. The Applicant states that he did not offend any law in making the said advance to the Applicant. He further states that the Applicant willfully and without any coercion issued the post-dated cheques which could not be honoured because the Applicant had no funds on his account at the time. The Applicant has kept on promising to pay the outstanding sums but in vain. The application does

not raise any triable issues and does not fulfill the conditions for grant of leave to appear and defend a summary suit. The Applicant has not attached any draft written statement of defence that would assist the court to assess whether the Applicant has any plausible defence. The Applicant prayed for dismissal of the application.

[5] The Applicant made and filed two affidavits in rejoinder; one filed on 2nd July 2019 and the other filed on 23rd October 2020. Although this matter was not raised by the Respondent, I note that the second affidavit in rejoinder was filed after the date of hearing of the application and after a schedule for filing submissions had been agreed upon by Counsel and set by the Court. The said affidavit in rejoinder was filed without either notice to the other party, their consent or leave of the Court. It therefore offends the rules of pleadings and cannot be accepted on record. Going by the provisions under Order 8 Rule 18 (1) and (2) of the CPR, any such filing had to be with the leave of the court. Accordingly, the affidavit in rejoinder filed by the Applicant on 23rd October 2020 is expunged from the record. I have only taken into consideration the affidavit in rejoinder filed on 2nd July 2019.

Representation and Hearing

[6] At the hearing, the Applicant was represented by Mr. Tumwesigye Wycliffe from M/S TALP Advocates while the Respondent was represented by Mr. Akampurira Jude from M/S MACB Advocates. It was agreed and directed that the matter proceeds by way of written submissions which were duly filed by Counsel for both parties. I have reviewed the submissions and taken them into consideration in the course of determining this matter.

Issue for Determination by the Court

[7] Only one issue is up for determination by the Court, namely; **Whether the application discloses any triable issues as to justify grant of leave to defend the summary suit.**

Determination by the Court

[8] The position of the law is that in accordance with *Order 36 rule 4* of the *Civil Procedure Rules*, unconditional leave to appear and defend a suit will 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 bona fide defence. The applicant should demonstrate to court that there are issues or questions of fact or law in dispute which ought to be tried. The procedure is meant to ensure that a defendant with a triable issue is not shut out. (See ***M.M.K Engineering v. Mantrust Uganda Ltd H. C. Misc. Application No. 128 of 2012; and Bhaker Kotecha v. Adam Muhammed [2002]1 EA 112***).

[9] In ***Maluku Interglobal Trade Agency v. 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 defendant 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 shall not enter upon the trial of issues disclosed at this stage."***

[10] It is a further requirement under the law that in an application for leave to appear and defend a summary suit, there must be sufficient disclosure by the applicant, of the nature and grounds of his or her defence and the facts upon which it is founded. Secondly, the defence so disclosed must be both bona fide and good in law. A court that is satisfied that this threshold has been crossed is then bound to grant unconditional leave. Where court is in doubt whether the proposed defence is being made in good faith, the court may grant conditional leave, say by ordering the defendant to deposit money in court before leave is granted. (See ***Children of Africa vs Sarick Construction Ltd H.C Miscellaneous Application No. 134 of 2016***).

[11] In the present case, I have not seen an unequivocal denial from the Applicant that he did not receive the sum of money claimed by the Respondent or any sum of money at all. I have also not seen a denial of the allegation that, of the sum of money allegedly borrowed, the Applicant made a part payment of UGX 27,000,000/=. The matters raised by the Applicant appear to be based on technical denials; one that the Respondent had no legal authority to lend any money to the Applicant; two, that the agreement (Memorandum of Understanding) concluded on 7th December 2018 was procured by coercion; and three, that the cheques allegedly issued by the Applicant were irregularly issued.

[12] On the question of legal authority to lend, Counsel for the Applicant appears to give the impression that any money lending transaction has to be governed by the provisions of the *Tier 4 Microfinance Institutions and Money Lenders Act 2016* and that any lending outside the said Act is illegal. This argument is misleading. According to the said law, for a transaction to be governed by the provisions of the Act, the lender has to be a registered company, licensed to lend money as a business. Lending as a business is

conducted in accordance with the rules of commerce. The most predominant of the rules is that the lender charges interest on the money. This in no way means that a person cannot lend outside the framework of the said law. There is nothing illegal either within the said framework or under any other law for a person to lend money to another person under agreement. What is illegal is for a person to do so as a business without a license or without compliance with existing provisions of the law.

[13] On the facts before me, there is no evidence that the Respondent was engaged in the business of money lending without a licence. There is evidence that the transaction in issue was a private arrangement between persons known to each other. There is nothing illegal about such arrangement. More importantly, where there is evidence that the money was actually advanced by the Respondent and received by the Applicant, questions on the Respondent's capacity to lend cannot constitute a reasonable or bona fide ground of defence to an action seeking recovery of such borrowed funds. As such, this claim by the Applicant discloses no triable issue of fact or law.

[14] On the claim that the Memorandum of Understanding dated 7th December 2018 was procured by coercion; the Applicant gives no particulars pointing to such coercion. As indicated herein above, the position of the law is that to disclose a plausible ground of defence, there must be sufficient disclosure by the applicant, of the nature and grounds of his or her defence and the facts upon which it is founded. Further, the defence so disclosed must be both bona fide and good in law. It is for that reason that it is a requirement under the law that the Applicant attaches to the application a draft of the intended defence to enable the court assess whether any allegation so raised constitutes a reasonable ground of defence.

[15] In the instant case, the Applicant attached no draft of any intended statement of defence. In the affidavit in support of the application, the only claim is that the signing of the said agreement followed a threat by the Respondent to commence criminal proceedings against the Applicant. Certainly, a threat to commence legal proceedings against another party cannot amount to coercion within the law. For it to amount to coercion, the exertion of force must be based on the taking of actions outside the law. As such, in absence of any particulars of coercion exerted upon the Applicant before making the agreement, there is nothing worthy of investigation by the Court. The Applicant has, therefore, not established any triable issue of fact or law on account of this allegation.

[16] Regarding the cheques allegedly issued by the Applicant, the claim in the summary suit was not founded on the cheques. The cheques were only pleaded as part of evidence to prove the Plaintiff's claims. Where there is evidence that the monies claimed were indeed advanced to and received by the Applicant, such a claim cannot be defeated by any irregularity in the said cheques. In other words, such alleged irregularity in the way the cheques were issued creates no doubt as to whether the money was actually borrowed.

[17] In all therefore, my finding is that the Applicant has not raised any bona fide triable issue of fact or law that would entitle him to being granted leave to appear and defend the suit. I have therefore found no merit in the application by the Applicant and the same ought to be dismissed. Consequently, judgment and decree are entered in the main suit under Order 36 Rule 5 of the CPR. In the premises, I make the following orders:

1. The application for leave to appear and defend the summary suit has no merit and is accordingly dismissed.
2. Judgment and decree are entered in the main suit under Order 36 Rule 5 of the CPR for:

a) Payment of UGX 230,150,000/= by the Applicant to the Respondent.
b) The costs of the application and of the main suit.

It is so ordered.

Dated, signed and delivered by email this 5th day of January, 2022.

Boniface Wamala
JUDGE