

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
COMMERCIAL DIVISION  
MISC. APPLICATION NO. 952 OF 2020  
(Arising from Civil Suit No. 812 of 2020)**

**ASEA GEORGES ASWA ..... APPLICANT**

**VERSUS**

**HOUSING FINANCE BANK LIMITED ..... RESPONDENT**

**BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO**

**RULING**

Introduction

This application was brought by way of Notice of Motion under order 36 rules 3 and 4 and order 52 rules 1, 2, and 3 of the Civil Procedure Rules SI 71-1 and section 98 of the Civil Procedure Act Cap 71 seeking orders that:

- a) The applicant be granted unconditional leave to appear and defend the suit.
- b) The costs of the application be provided for.

Background

The Respondent who is the Plaintiff in the main suit instituted High Court Civil Suit No.821 of 2020 on 13<sup>th</sup> October 2020 seeking the recovery of a total sum of **UGX 207,690,470 (Two Hundred and Seven Million Six Hundred and Ninety Thousand Four Hundred and Seventy Uganda Shillings)** as principal and accrued contractual interest on sums it extended to the Defendant.

On 30<sup>th</sup> August 2018 the Respondent granted the Applicant a loan credit facility of **UGX 199,000,000/= (One Hundred and Ninety Nine Million Uganda Shillings)** repayable over a sixty (60) month period at a fixed rate of 18% per annum. The Respondent's claim in the main suit is that the Applicant was required to repay the loan in equal monthly instalments of **UGX 5,053,292/= (Five Million and Fifty Three Thousand Two Hundred and Ninety Two Uganda Shillings)** and that it was an express condition of the facility that it was repayable on demand; if the Defendant defaulted in payment of any one or more



of the monthly instalments the whole outstanding sum together with interest thereon was to become immediately due and payable on demand. The Respondent thus claims that when the Applicant defaulted, it was justified in demanding the immediate repayment of **UGX 207,690,470/=** which it claims was the outstanding loan amounts and interest that had accrued thereon.

In bringing this application the Applicant claimed firstly that he is not indebted to the Respondent in the amounts sought in the main suit, that the Plaintiff is incompetent insofar as it misstated material facts with respect to the amounts claimed, and that he has a good and plausible defence to the claim.

The Applicant's application is supported by the Affidavit of Mr. Asea Georges Aswa, the Applicant. In **paragraph 4** of his Affidavit, the Applicant avers that following the Respondent's offer, he accepted the loan facility without advice from an independent person about the viability of the offer or the terms and conditions of the loan offer, this argument is reflected in paragraph 8 of the Applicant's Draft Written Statement of Defence where the Applicant argues that the Respondent failed in its statutory duty as a lender to provide the Applicant with independent legal advice on the implications of taking on such a loan, which is a mandatory requirement of the law.

Further, in **paragraph 5** of his Affidavit, the Applicant avers that in February 2019 when he was made redundant at his job which had been his source of income and in paragraph 7 he avers that notwithstanding his redundancy he continued making monthly instalments using his terminal benefits while he was on the lookout for new opportunities. He further avers in **paragraph 8** of his Affidavit that the Respondent nonetheless failed to offer him an opportunity to renegotiate new terms of the loan. He alleges in **paragraph 9** of his Affidavit that the amounts claimed are excessive and that he disputes them and that it is necessary to reconcile the accounts in order to determine the actual outstanding balance on his loan.

The Respondent opposed this application by filing an Affidavit in Reply. The Respondent's Affidavit was deponed by Mr. Africano Bigirwaruhanga, the Respondent's litigation and recoveries manager. In **paragraph 5** of his Affidavit, the Respondent's deponent contended that the Application discloses no genuine triable issue or plausible defence to the Respondent's claim, that the Affidavit in Support of the application is riddled with falsehoods, and that the application is frivolous, vexatious and ought to be dismissed with costs.



In **paragraph 9** of his Affidavit, the Respondent's deponent avers that through the Loan Agreement the Applicant agreed that his loan account would attract a default charge calculated at the Respondent's tariff prevailing at the time, in addition to the applicable interest, in the event that the loan account went into arrears. That the Applicant agreed in the Loan Agreement that the interest would accrue on the outstanding balance on a daily basis. He claims in **paragraph 11** of his Affidavit that he is informed by the Respondent's Credit Department that at the time of filing the Civil Suit, the Applicant's loan account was in arrears of over 277 days.

The Applicant filed an Affidavit in Rejoinder, in **paragraph 6** of the said Affidavit the Applicant specifically responded to **paragraph 9** of the Affidavit in Reply above. The Applicant avers that the Respondent did not demonstrate how the default charge would be calculated and how it was to be applied on the amount being demanded and that as a result, the Respondent has not shown how the total amount being claimed arose.

In **paragraph 10** of his Affidavit in Reply, the Respondent's deponent stated that the Applicant agreed further in the Loan Agreement that interest would accrue on the outstanding balance on a daily basis, and that the interest would be applied in arrears on the scheduled instalment date. The Applicant respondent to this averment in **paragraph 7** of the Affidavit in Rejoinder contending that **clause 11** of the Loan Agreement says otherwise, that interest would accrue monthly on the outstanding balance of the loan.

In **paragraph 18** of the Affidavit in Reply, the Respondent's Deponent specifically addressed **paragraph 4** of the Applicant's Affidavit in Support and contended firstly that the Applicant understood all the terms of the loan and secondly that, to this effect, the Applicant signed a waiver of the right to advice from an independent third party when he signed the Loan Agreement.

In **paragraph 22** of the Affidavit in Reply, the Respondent's deponent argued that the Applicant is an experienced banker because he was employed as the Head of Risk at a commercial bank in Uganda and that therefore he understood the risk on the loan and is estopped from denying his indebtedness. In specific response to this, the Applicant argued in paragraph 9 of his Affidavit in Rejoinder that being an experienced banker does not dispense with the requirement to obtain advice from the Respondent's financial adviser about the viability of the loan as it is a legal requirement specifically provided for under **Guideline 6(2)** and **(3)** of the **Bank of Uganda Financial Consumer Protection Guidelines, 2011** and cannot be dispensed with, notwithstanding his profession.



On this basis, the Applicant prayed that his application succeeds and he be granted leave to defend himself in the main suit.

### Representation

At the hearing on 30<sup>th</sup> March 2022, the Applicant was represented by Benson Tusasirwe and Fabian Omara appeared for the Respondent.

The parties were given directions on the filing of pleadings and submissions in this matter which were duly filed and I have taken them into consideration in making this Ruling.

### Issue for Determination:

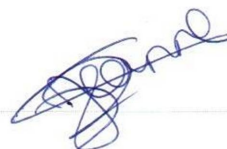
The main issue for determination is whether this application raises triable issues that warrant the grant of unconditional leave to appear and defend the main suit.

### Resolution

Under **Order 36** of the **Civil Procedure Rules SI 71-1**, 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 defence (**Africa One Logistics Ltd v Kazi Food Logistics (U) Ltd Misc. Application No.964 of 2019**).

Unconditional leave to appear and defend a suit may further be applied for and granted to a defendant who shows that his/ her defence raises a triable issue or questions of fact or law which ought to be determined at trial. To the extent that the defendant raises a triable issue in his Affidavit, he must not be shut out and should be granted leave to formulate his defence and adduce evidence of the triable issue raised. (See **MM.K Engineering v Mantrust Uganda Ltd H.C.M.A No.128 of 2021** and **Bhaker Kotecha v Adum Muhammed [2002] 1 EA**)

Raising a triable issue is to be distinguished from mere denial and the defence raised must not be a sham defence intended to delay the Plaintiff from recovering money due (see **Begumiha George v East African Development Bank Misc. Application No.451 of 2010**).



In *Maluku Inter Global 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.”***

In *Bbumba Abbey v Tropical Bank Limited Misc. Application No.157 of 2013* Hon. Justice Christopher Madrama summarised the principles applicable to applications for leave to defend a summary suit as follows:

***(a) In considering an application for leave to defend a summary suit, where there is plainly or on the face of it no defence, the Plaintiff is entitled to summary judgement. The flip side of the argument is that where there is plainly an arguable case or a plausible defence to the action, the Plaintiff is not entitled to a summary judgement.***

***(b) Secondly, where the Defendant raises a point of law and the court can clearly see that it is misconceived the Plaintiff is entitled to summary judgement. The flipside again is where the point of law is plainly arguable or plausible as a defence, it should be considered and the Plaintiff is not entitled to summary judgement.***

***(c) Thirdly, in applications for leave to defend a summary suit, the court should not involve itself in lengthy arguments involving points of law which would take hours or days before it can make up its mind or arrive at a decision. Obviously, in such cases, the issue of whether the Plaintiff is entitled to a summary judgement is not plain and such a case is not appropriate for the entry of a summary judgement.***

From the above, and particularly point (c) it is clear that the summary procedure under **Order 36** should be reserved for straightforward matters where there is no real, viable defence and there is no real, grounded, contention as to the facts. Anything to the contrary gives rise to a triable issue that should be resolved through the presentation of evidence, consideration of arguments on both sides, and deliberation of the court.



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 bonafide and good in law. A court that is satisfied that this threshold has been crossed is then bound to grant unconditional leave. Where the 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***).

However, it ought to be emphasized that the court is not obligated at this stage to carry out investigations as to the triable issues raised; rather what is to be determined is whether or not one or more issues are raised which warrant consideration and determination through the trial process.

In ***Geoffrey Gatete and Anor v William Kyobe Supreme Court Civil Appeal No. 7 of 2005*** Mulenga JSC explained the above principle by stating as follows at pg. 10 and 11;

*"I should stress that in an application for leave to appear and defend a summary suit, the court is not required to determine the merits of the suit. The purpose of the application is not to prove the applicant's defence to the suit but to ask for the opportunity to prove it through a trial. What the court has to determine is whether the defendant has shown good cause to be given leave to defend. Apart from ineffective service of summons, what the courts have consistently held to amount to good cause is evidence that the defendant has a triable defence to the suit."*

From the law set out above, where an application for leave to appear and defend a summary suit has been filed by the Defendant/ Applicant, the court will only enter judgement where the application raises no bona fide triable issues of fact or law or where the defence raised is found by the court to be a sham.

It ought to be emphasized that the court is not obliged at this stage to carry out investigations as to the triable issues raised, rather what is to be determined is whether or not an issue is raised which is, by its nature, triable and therefore warrant consideration and determination through the trial process.

In the present case, the Applicant raises the following contentions which he claims entitle him to be granted leave to defend the main suit; firstly he disputes that he is indebted to the Respondent in the amounts claimed (**UGX 207,690,470**), secondly, he is challenging the processes which were undertaken

by the Respondent a) in not granting him the opportunity to get legal advice from an independent third party before taking on the loan and b) in not offering him the opportunity to renegotiate new terms to his loan in light of his redundancy before the Applicant claim they rushed to institute the present suit.

The Applicant's argument about his entitlement to independent advice before taking on the loan is premised in **guidelines 6(2) and (3) of the Bank of Uganda Financial Consumer Protection Guidelines, 2011** which provide as follows;

***“(2) Provision of Information and Advice to a Consumer***

*(a) Prior to a consumer choosing a product or service, a financial services provider shall:*

- (i) explain clearly in plain language the key features of the range of products and services that the consumer is interested in so as to enable the consumer to arrive at an informed decision about these products and services, including any charges and fees which would be incurred; and*
- (ii) request the consumer to provide all the information needed to verify whether or not the consumer is eligible for a product or service in which the consumer is interested.*

*(b) Where a consumer has chosen a product or service, a financial services provider shall before the consumer buys the product or service:*

- (i) provide the consumer with a key facts document for the product or service;*
- (ii) give the consumer a copy of the terms and conditions for the consumer's agreement or consent; and*
- (iii) inform the consumer of the applicable charges, fees or additional interest the consumer will bear should the consumer decide on an early termination of any contract.*

***(3) Suitability of Advice***

*(a) Where a financial services provider gives advice to a consumer, the financial services provider shall ensure that:*

- (i) the advice is suitable, taking into account the circumstances and needs of the consumer;*
- (ii) any product or service which the provider recommends a consumer to buy is suitable for the consumer;*
- (iii) there is no other product or service available to the financial services provider that would be more suitable for the consumer;*

- (iv) *the provider keeps sufficient records of each piece of advice it has given to a consumer to enable it to demonstrate that it has complied with paragraph 6(3)(a)(i), (ii) and (iii); and*
- (v) *it clearly informs the consumer of any actual or potential conflict of interest.*

*A conflict of interest would arise where, for example, a member of staff dealing with the consumer would earn a fee or commission if the consumer buys a product which has been recommended by that member of staff.*

*(b) A financial services provider shall obtain from the consumer such information as is necessary for the provider to comply with paragraph 6(3)(a)(i), (ii) and (iii).*

*For the purposes of paragraph 6(3) of the guidelines, a financial services provider gives advice when it makes a personal recommendation to a consumer about the purchase of a product or service.*

*If a provider is not giving advice to a consumer, it should not give the consumer the impression that it has checked whether a product or service is suitable; and it would not be appropriate to answer questions such as “what should I do” or “which one would you choose”. If the consumer is confused or unsure, it is good practice to suggest that the consumer obtains advice.”*

Ultimately, the Applicant does not deny that he is indebted to the Respondent in some amount but the crux of the Applicant’s claim is that it is necessary to audit and reconcile the accounts and records in order to determine the actual amount of what he owes to the Respondent, which reconciliation process can only be undertaken through the trial process and not through issuing a summary judgement as was sought by the Respondent in instituting the suit.

To support his claim that the amounts sought by the Respondent in the main suit are more than what he actually owes, the Respondent attached a number of bank statements to his draft WSD (**annexures ‘A’**). In the Applicant’s Affidavit, he does not clearly state the complete amounts he paid but looking at the bank statements the instalment of **UGX 5,053,292.06** was made a total of 12 times until 18<sup>th</sup> September 2019, a few months after his job was discontinued in February 2019. The total amount which was paid by the Applicant is indicated at the bottom of the statement as **UGX 60,708,189.77 (Sixty Million Seven Hundred and Eight Thousand One Hundred and Eighty Nine Ugandan**





**Shillings and Seventy Seven) with UGX 206,303,149.84 (Two Hundred and Six Million Three Hundred and Three Thousand One Hundred and Forty Nine Uganda Shillings and Eighty Four)** indicated as still outstanding as at the date of the bank statement (18<sup>th</sup> September 2020). The Respondent's claim in the main suit is for **UGX 207,690,470**, but the basis for this is unclear to me looking at the bank statements, it is unclear to me, reading the Respondent's pleadings whether the amount the Applicant already paid on the loan has been taken into account in the amounts being claimed and to this extent I agree with the Applicant that the basis of the amounts being claimed in the Plaintiff is unclear.

For this reason, and also because the Applicant is challenging the propriety of the processes that were undertaken by the Respondent in giving him the loan, I am inclined to find that judgement cannot be issued at this stage and that the matter ought to proceed to trial to determine the issue of the amounts due and owed to the Respondent and the propriety of the transaction in light of the **Bank of Uganda Financial Consumer Protection Guidelines, 2011**.

I thus resolve this issue in the affirmative with a finding that triable issues have been raised which warrant the grant of unconditional leave to appear and defend to the Applicant.

### **Orders**

On these premises, the Applicant's application succeeds and I hereby order as follows;

1. The Applicant is granted unconditional leave to defend Civil Suit No.821 of 2020.
2. The Applicant files a Witten Statement of Defence within fifteen (15) days from the date of this Ruling.
3. The costs of this application shall abide the outcome of the main suit.

It is so ordered.

  
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**Jeanne Rwakakooko**  
**JUDGE**  
**22/06/2022**

This Ruling was delivered on the 29<sup>th</sup> day of June, 2022

**MISCELLANEOUS APPLICATION NO. 952 OF 2020**  
**(ARISING FROM CS NO. 812 OF 2020)**

**PROCEEDINGS - JUNE 29, 2022 (DELIVERY OF RULING)**

Court: This matter was cause listed for delivery of the Ruling, today at 2pm. However, when the matter was called on for delivery of the Ruling at that time and up to 4pm, neither the parties nor their legal representatives was present.

In order not to keep case files open because of non-appearance of the parties and their legal representatives, I will deem this Ruling delivered.



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**Jeanne Rwakakooko**

**JUDGE**

**29/06/2022**