THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

MISCELLANEOUS APPLICATION NO. 1049 OF 2019

(ARISING FROM CIVIL SUIT NO. 573 OF 2012)

1. KALSON AGROVET CONCERN LIMITED

2. HENRY KALIISA :: APPLICANTS

VERSUS

ECOBANK UGANDA LIMITED :::::::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] This application was brought by Notice of Motion under Sections 82 and 98 of the Civil Procedure Act, Order 46 Rules1, 2 and 8, and Order 52 Rules 1 and 3 of the Civil Procedure Rules seeking orders that;

a) The ruling of this Honorable Court dated 2nd November 2017 striking out the Written Statement of Defence and entering judgement for the liquidated sum of UGX 517,648,784.35/= (Five Hundred Seventeen Million Six Hundred Forty-Eight Thousand Seven Hundred Eighty-Four Shillings and Thirty-Five Cents) be reviewed and set aside.
b) The Applicants be granted extension of time within which to file a Written Statement of Defence to the claim.
c) The Applicants/defendants be granted leave to file the Written Statement of Defence.
d) The costs of this application be provided for.

[2] The grounds of the application are summarized in the Notice of Motion and also set out in an affidavit sworn in support of the application by **Henry Kaliisa**, the 2nd Applicant and Director of the 1st Applicant. Briefly, the grounds are that the Respondent filed Civil Suit No. 573 of 2012 claiming for a liquidated sum of UGX 517,648,784.35/= arising from an alleged loan obtained by the 1st Applicant and guaranteed by the 2nd Applicant and his late father who was the 2nd defendant in the suit. It is stated by the deponent that the alleged loan facility was alien to them as they had never applied for a Uganda shillings loan facility from the Respondent as they had always transacted in US dollars. The deponent further stated that the Applicants had tried to obtain the bank account statements and all documents pertaining the alleged loan facility from the Respondent in vain. In the interest of time, the Applicants had instructed their former lawyers to file a defence but also inform the court of the attempt to obtain the required documents. The Applicants' former lawyers of M/s Madibo Mafabi Advocates and Solicitors filed the defence but inadvertently never made material and specific answers to the plaint which error should not be visited on the Applicants. The Respondent availed the Applicants the required documents in 2018 after being contacted by Bank of Uganda by which time the judgement had already been entered by the court. The 2nd Applicant came to learn of the judgment when he was called by a bailiff concerning execution of the said judgement. He tried to contact their former advocates who were unreachable. The 2nd Applicant also discovered that their former advocate had consented with the Respondent's counsel on a sum in costs payable by the Applicants without consulting the Applicants. The deponent averred that the Applicants are not indebted to the Respondent, the documents relied upon by the Respondent in the plaint have never been signed by the Applicants and they were forged; and that the failure by the Applicants to file a proper defence was due to an honest mistake of counsel and lack of vital evidence which should not be visited on the Applicants.

[3] The application was opposed by the Respondent through an affidavit in reply deponed to by **Africano Bigirwaruhanga**, a Senior Legal Officer of the Respondent Bank, who stated that the instant application was brought in bad faith and was intended to frustrate the Respondent's effort to recover the liquidated sum of UGX 528,125,958.35/=. He stated that the mistake or failure by the Applicants' lawyers to file a proper defence is not sufficient reason to order a review of the court's ruling. He further stated that the documents sought by the Applicants do not constitute new evidence that was not within the Applicants' knowledge at the time of passing the decree. The deponent also averred that the application is barred in law since the remedy of review is not available to the Applicants. He concluded that the application does not raise any sufficient reason for court to review its orders.

[4] The Applicants filed an affidavit in rejoinder whose contents I have also taken into consideration.

Brief Background

[5] The Respondent (plaintiff in the main suit) filed Civil Suit No. 573 of 2012 for payment of UGX 517,648,748.35/= against the Applicants (defendants in the main suit) arising out of failure to repay sums under a loan facility agreement entered into between the 1st Applicant and Respondent on 25th November 2009 which facility was guaranteed by the 2nd Applicant. The Applicants' defence was struck out after a preliminary objection was raised by the Respondent/ plaintiff to the effect that the defence contained general denials. Consequently, judgement for a liquidated sum of UGX 517,648,748.35/= was entered. The Applicants then brought this application for review of the said decision of the court and seeking extension of time within which to file a defence in the suit.

Representation and Hearing

[6] At the hearing, the Applicants were represented by Mr. Allan James Mwigo while the Respondent was represented by Mr. Allan Waniala. It was agreed that the hearing proceeds by way of written submissions which were duly filed and have been considered in the determination of this application.

Preliminary Objection

[7] Counsel for the Respondent raised a preliminary point of law to the effect that the remedy of review was not available to the Applicants given the provision under Order 6 Rule 30(1) and (2) of the CPR to the effect that where any pleading is struck out on ground that it discloses no reasonable answer, a judgement subsequently entered will be appealable as of right. Counsel argued that in view of the above provision, the only remedy to the Applicants would be to appeal the decision of the court striking out the defence. Counsel further argued that this court is not vested with jurisdiction to entertain this application since the only available remedy would be to appeal the decision of court.

[8] In reply, Counsel for the Applicant relied on Section 82(a) of the Civil Procedure Act to the effect that a party who opted not to prefer an appeal is allowed to apply for review under the law. Counsel submitted that the instant application is not misconceived and the Applicants have raised substantial grounds for review.

Court Determination

[9] Order 6 rule 30 of the CPR provides as follows;

Striking out pleading.

(1)The court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and,

in any such case, or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed or judgment to be entered accordingly, as may be just.

(2) All orders made in pursuance of this rule shall be appealable as of right".

[10] The written statement of defence (WSD) in the main suit in issue was struck out by the court because it did not raise a reasonable answer to the claim in the plaint. The argument of Counsel for the Respondent is that since according to sub-rule (2) above, such an order is appealable as of right, the provision denied the Applicants a right to seek for a review of the said order. With due respect to learned Counsel for the Respondent, that argument is totally misconceived. This is because, under the law, an appeal is a creature of statute and is either as of right or with the leave of the court. When the law provides for an appeal as of right, while it bestows upon a party an automatic right to appeal, it does not mean that it is mandatory for such a party to appeal. The law is thereby creating a right to the party and not an obligation on the part of such a party. It is for that reason that both Section 82 of the CPA and Order 46 rule 1 of the CPR make it clear that a decree or order that is subject to review may be one in respect of which an appeal is allowed but from which no appeal has been preferred. See: *Section 82(a) of the CPA and Order 46 rule 1(1)(a) of the CPR*. This simply means that while such a party has a right to appeal, because of existence of alleged grounds for review, they have opted to pursue a review instead of an appeal. This is a normal course of action envisaged under the above cited provision.

[11] In light of the foregoing, the preliminary objection raised by Counsel for the Respondent is devoid of any merit and is accordingly over ruled. I will proceed to consider the application on its merits.

Issues for Determination by Court

[12] Two issues are up for determination by the Court namely;

(a) Whether this is a fit and proper case for review under the law?

(b) Whether the Applicants are entitled to the reliefs sought?

Issue 1: Whether this is a fit and proper case for review under the law?

Submissions by Counsel for the Applicant

[13] Counsel for the Applicant submitted that the application was premised on the grounds of discovery of new and important matter of evidence and sufficient reason. On the ground of discovery of new and important mater of evidence, Counsel submitted that at the time of filing the Written Statement of Defence (WSD), the Applicants did not have the requisite documents to enable them specifically answer the averments in the plaint. Counsel stated that the said documents were in custody of the Respondent who declined to avail them on several occasions. Counsel stated that it took the intervention of the Director Commercial Banking in the Bank of Uganda for the Respondent to avail the documents which was done on 21st June 2018 after the Applicants' WSD had been struck out. Counsel further stated that the Applicants are now in possession of the necessary new evidence which is attached to the plausible defence as Annexure G which evidence is capable of establishing their defence to the Respondent's claim in the main suit. Counsel relied on the case of ***Uganda Development Bank Ltd v Ringa Enterprises & Anor MA NO. 188 of 2017*** on what constitutes a new matter of evidence.

[14] On the ground of sufficient reason, Counsel for the Applicants argued that the mistakes of the Applicants' former lawyers should not be visited upon the Applicants who are interested in defending the suit on its merits. Counsel cited the case of ***Banco Arabe Espanol v Bank of Uganda SCCA No. 8 of 1998*** to

the effect that mistake of counsel would amount to sufficient cause and submitted that the failure to file a proper defence and inform court of the discovery they were doing was purely a mistake of counsel that should not bar the Applicants from defending the suit on its merits. Counsel also cited the decisions in ***Captain Philip Ongom vs Catherine Nyero Owota, SCCA No. 14 of 2001*** and ***Mugisha Abraham & Ors v G4 Security services (U) Ltd MA No. 282 of 2010***. Counsel prayed that the Court finds that the Respondent was in possession of the necessary documents and the Applicants' WSD ought not to have been struck out by the Court.

Submissions by Counsel for the Respondent

[15] For the Respondent in reply, it was argued that the grounds of the application are outside the scope of review and do not provide sufficient grounds to warrant a review. Counsel cited Section 82 of the Civil Procedure Act and Order 46 of the Civil Procedure Rules and the case of ***FX Mubuke v UEB HCMA NO. 98/2005*** on the grounds that warrant a review. Counsel submitted that the loan facility referred to was within the Applicants' knowledge and possession before the judgement was made and could not be regarded as new and important matter of evidence. Counsel submitted that the defendants' trial bundle lists their UGX bank statements as DE6 and DE7 which same documents have been annexed to the affidavit in support as Annexure A to the Applicants' proposed Written Statement of Defence. Counsel also submitted that the Respondent had responded to the Applicants' request for evidence and had availed the same in good faith so that the Applicants could make appropriate responses.

[16] Counsel for the Respondent further submitted that Annexure D to the affidavit in reply demonstrates that that the Applicants had already received a response to their request on 26th June 2015. Counsel also argued that the claim that the Applicants had never applied for a Uganda shillings loan facility

was a new cause of action that was not pleaded in the main suit. Counsel cited the case of ***Apollo Wasswa & Others v Nsabwa Ham CA NO. 288 of 2016*** to the effect that parties are bound by their pleadings. Counsel further submitted that the alleged honest mistake of counsel is not a ground for review as it is not analogous to an error apparent on the face of the record. Counsel concluded that the Applicants have not sufficiently established grounds to warrant a review of the ruling of this court.

[17] The Applicants made submissions in rejoinder which I have also taken into consideration.

Determination by the Court

[18] The position of the law regarding an application for review is set out under *Section 82 of the Civil Procedure Act* which provides as follows;

> *"Any person considering himself or herself aggrieved –*
>
> *(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*
>
> *(b) by decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit".*

[19] The considerations for grant of an application for review of a judgement, decree or order are set out under Order 46 Rule 1(1) of the Civil Procedure Rules to wit;

> *"Any person considering himself or herself aggrieved –*
>
> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
>
> *(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter of evidence which, after the*

exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order was made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her, may apply for a review of judgment to the court which passed the decree or made the order". [Emphasis added]

[20] The instant application is premised on the grounds of discovery of new and important matter of evidence and existence of sufficient reason. On the ground of discovery of new and important matter of evidence, it was stated by the Applicants that they did not have the requisite documents to enable them specifically answer the averments in the plaint at the time of filing the WSD that was eventually struck out by the Court. The Applicants stated that they tried to obtain the said documents in vain and the same were only availed on 21st June 2018 by which time their WSD had been struck out. It is further stated by the Applicants that they are now in possession of the necessary new evidence which is attached to the plausible defence to the Respondent's claim in the main suit. It is shown by the Applicants that the retrieved evidence shows an identical Reference No. **FT0933008168** issued on the same day for two different accounts which proves that the loan facility of UGX 487,559,000/= issued on 25th November 2009 is the same as the USD 245,000 facility offered to them on 29th January 2010. It is thus argued that such evidence points to the fact that the transaction was one and the same.

[21] On the other hand, it was argued for the Respondent that the Applicants were always aware of the loan facility and had received a response to their request on the 26th of June 2015 and the evidence attached to the proposed WSD was actually referred to by the Applicants in the defendants' trial bundle.

[22] The question, therefore, to be answered is whether the said evidence attached to the proposed WSD constitutes a new and important matter of evidence which, after the exercise of due diligence, was not within the Applicants' knowledge or could not be produced by them at the time when the decree was passed or the order was made. From the record, the new evidence introduced by the proposed defence relates to the letters of credit showing the different transactions and certified bank account statements of the Applicants' USD and UGX bank accounts which show different transactions including loan repayments. The evidence of bank statements according to the defendants' trial bundle that was available at the time of filing the initial WSD was in relation to Account numbers **USD 0021036100264001** (for the period 01/10/2011 – 23/06/2015), **UGX 002026610064001** (for the period 01/10/2011 – 07/05/2015), **1301150720021** (for the period 01/01/2009 – 02/11/2011).

[23] On the other hand, the evidence attached to the proposed WSD includes bank statements of Account numbers; **UGX 1301150720021** (for the period 01/01/2009 – 02/11/2011 marked as Annexure A to the proposed WSD); **USD 1308150720018** (marked as Annexure B to the proposed WSD for the period 01/01/2009 – 02/11/2011); **USD 1301150720013** (marked as Annexure C to the proposed WSD for the period 01/01/2009 – 02/11/2011); **USD 0021036100264001** for a later period of 31/10/2011 – 02/06/2017 (Annexure G to the proposed WSD) which provides information for an additional two years from the previous account statement; **UGX 0010266100756401** (for the period 01/10/2011 – 20/06/2018 part of Annexure G to the proposed WSD); and **UGX 0020266100264001** (for an additional period of up to 02/06/2017 also part of Annexure G to the proposed WSD).

[24] From the foregoing information, it is not true as claimed by the Respondent that at the time of filing the initial WSD, the Applicants had all the

necessary bank accounts statements. I realize that a date is conspicuously missing from the Respondent's certifying stamp that would tell when the said statements were certified by the Respondent. There is no proof that the date the statements are said to have been issued is the same date they were certified. But even then, there is no proof that the same were availed to the Applicants before the 21st June 2018, the date that the Applicants assert to have received them. The Respondent's Counsel referred the Court to a letter dated 26th April 2016 (Annexure D to the affidavit in reply) in which it is purported that the UGX and USD accounts statements had already been availed. The said letter refers to attachment of acknowledgment of such receipt but there is no such attachment on record. As such, there is no proof that such information was delivered before 21st June 2018 when the 2nd Applicant signed for them.

[25] It is also clear from the record that the bank statement for Account Number **USD 1308150720018** (Annexure B to the proposed WSD), which is one of the documents that were not available to the Applicants, is the very account statement that shows the transactional Reference number **FT0933008168** on **26/11/ 2009** relating to the transfer of **USD 245,000** with a description "TRF to Cash Collateral IRO LC". The same is similar to transactional reference **FT0933008168** relating to the withdrawal of **UGX 487,550,000/=** on UGX Account **1301150720021** on **26/11/2009** with a description "Debit – Withdrawal Kalsons' Agrovet Concerns Ltd TRF to Cash Collateral IRO LC". This is the evidence on which the Applicants rely to advance the argument that the facility reflected on both accounts is the same that was issued on 29th January 2010. In the circumstances, I am able to draw an inference that some important evidence was not available to the Applicants at the time of filing the initial WSD. The Applicants have also shown that they exercised due diligence by requesting for the necessary information on various

occasions including having to seek the intervention of the Director Commercial Banking of Bank of Uganda and taking out a notice to produce documents.

[26] In view of the foregoing, I am in position to reach a finding that the retrieval of the indicated letters of credit and the certified bank statements not previously provided and those with newer dates; constituted new evidence whose importance I have already alluded to. The Applicants have, therefore, established their claim on the ground of discovery of new and important matter of evidence as to warrant review of the decision of the court passed on 2nd November 2017. The application therefore succeeds on this ground.

[27] On the ground of existence of a sufficient reason for review, Counsel for the Applicants argued that the mistakes of the Applicants' former lawyers of failing to inform court of the discovery they were making was purely a mistake of counsel which should not be visited upon the Applicants. Counsel argued that such a mistake amounted to a sufficient reason upon which this court can base on to grant a review of the said decision of the Court.

[28] As pointed out by Counsel for the Respondent, "sufficient reason" as applied under Order 46 rule 1(1) of the CPR must relate to a factor that is analogous to the earlier two grounds, that is, of discovery of new and important matter of evidence on the one hand; and error or mistake apparent on the face of the record on the other. See: ***Chhaju Ram v. Neki (1992), 49 I.A 144*** cited with approval in ***Yusufu v. Nokrach [1971] EA 104***.

[29] In the instant case, the Applicant's argument was that the alleged sufficient cause related to the ground of discovery of new and important matter of evidence. The submissions of the Respondent's Counsel in relation to the ground of error apparent on the face of the record were therefore made out of context. Regarding the Applicants' claim on this ground, it was stated that the

mistake of their previous advocate was his failure to inform the court of the discovery of evidence that the Applicants were undertaking. I have not found this claim verified. This is because there is evidence by way of a notice to produce documents (Annexure A to the affidavit in support of the application) which was filed in the court way back on 02/03/2017 and served on the Respondent on the same date. By this notice, the court was definitely aware of the discovery process that had been undertaken by the Applicants. It therefore cannot be true that the Applicants' advocate did not inform the court of the same so as to constitute sufficient reason for review. This ground of the application is, therefore, not made out and it fails.

Issue 2: Whether the Applicants are entitled to the reliefs sought?

[30] Having succeeded on the ground of discovery of new and important matter of evidence, the Applicants have satisfied the Court that this is a fit and proper case for review of the ruling of this Honorable Court dated 2nd November 2017. The logical conclusion is that if the said evidence had been available to the Applicants, they would have been in position to file a formidable defence to the main suit and, as such, their WSD would not have been struck out on the ground it was; and judgment would not have been entered against the Applicants without their being heard on the merits. Consequently, the decision by the Court ought to be reviewed and set aside. The Applicants/ defendants ought to be granted leave to file a WSD to the claim in the main suit so that the matter is heard and finally determined on its merits.

[31] In the premises, the application succeeds and the same is allowed with the following orders;

a) The ruling of the Court in Civil Suit No. 573 of 2012 dated 2nd November 2017 striking out the Applicants' Written Statement of Defence and entering judgement for a liquidated sum of UGX 517,648,784.35 (Five

Hundred Seventeen Million Six Hundred Forty-Eight Thousand Seven Hundred Eighty-Four Shillings and Thirty-Five Cents) is accordingly reviewed and set aside.

b) The Applicants are granted leave to file a Written Statement of Defence within 15 days from the date of this ruling.

c) The costs of this Application shall abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered by email this 4th day of January 2023.

Boniface Wamala

JUDGE