

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

MISC. APPLICATION NO. 0169 OF 2023

(ARISING FROM CIVIL SUIT NO. 0034 OF 2023)

KOLLO AUTO AGENCIES LIMITED ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

STANBIC BANK (U) LIMITED ::::::::::::::::::::::::::::::::::: RESPONDENT

(Before: Hon. Justice Patricia Mutesi)

RULING

Background

The Respondent filed Civil Suit No. 34 of 2023 ('the main suit') by way of summary procedure seeking to recover the liquidated sum of UGX 392,481,685/= (Uganda Shillings Three Hundred Ninety-Two Million Four Hundred Eighty-One Thousand Six Hundred Eighty-Five) from the Applicant.

The Application

The Applicant brought this application by way of a Notice of Motion under Order 36 rule 4 of the Civil Procedure Rules seeking unconditional leave to appear and defend the main suit, on grounds that it has a defense to the suit and it is just and equitable that it is given an opportunity to be heard in the suit. The application is supported by the affidavit of its Director Mr. Hamid Wazir Ballo. The application was opposed through an affidavit in reply sworn by Mr. Mutahunga Norris, the Respondent's Legal, Rehabilitation and Recoveries Officer. The Applicant filed an affidavit in rejoinder also sworn by Mr. Hamid Wazir Ballo.

In the supporting affidavit, Mr. Ballo acknowledged that the Applicant obtained 2 (two) facilities from the Respondent, to wit, a Bank Guarantee of UGX 200,000,000 and an Overdraft of UGX 150,000,000. He stated that these facilities were both secured by property comprised in Kyadondo Block 178 Plot 2330 situate at Manyangwa which the Respondent ought to have had recourse to prior to filing the main suit. Mr. Ballo disputed the Applicant's consent to the Facility Renewal Letter and contested the existence and accuracy of the claimed outstanding amount, maintaining that the overdraft was at all times 'well-serviced' and that the Respondent prematurely cashed the guarantee. He also stated that the Respondent had taken some money from his personal bank account to service the facilities and that this was unsanctioned and illegal.

For the Respondent, Mr. Mutahunga stated in the affidavit in reply that the Respondent provided two facilities to the Applicant, to wit, a Bank Guarantee of UGX 200,000,000 and an Overdraft of UGX 150,000,000. He stated that the Applicant's indebtedness has now accumulated to the tune of UGX 392,481,685 being the principal sum, interest and charges. He further stated that the Respondent could not have had recourse to the alleged security because the same was never perfected through formal registration since the Applicant had failed to clear its earlier indebtedness to KCB Bank Uganda Limited which would have enabled the latter to transfer the security property to the Respondent. Further that the Respondent cashed the guarantee following a claim from Vivo Energy Uganda Limited in respect of the latter's credit facilities advanced to the Applicant for the purchase of petroleum products. Finally, Mr. Mutahunga clarified that the Respondent applied some of the monies on Mr. Ballo's personal account towards the settlement of part of the Applicant's arrears pursuant to a Letter of set-off signed by Mr. Ballo expressly authorizing such action.

The Affidavit in rejoinder reiterated the contents of the Affidavit in support.

Representation and hearing

At the hearing of the Application, the Applicant was represented by Mr. Emmanuel Wamimbi from M/S E. Wamimbi & Co. Advocates while the Respondent was represented by Ms. Nakazibwe Geraldine from M/s

Kalikumutima & Co. Advocates. The parties filed written submissions which I have duly considered.

Preliminary objection

In its submissions, the Respondent raised a preliminary objection contesting the propriety of attaching Applicant's intended written statement of defence to the affidavit in rejoinder instead of attaching it to the affidavit in support of the motion. The Applicant did not file any submissions in rejoinder to respond to this objection but I am inclined to overrule the objection for two reasons.

First, the rule requiring attachment of intended written statements of defence to an application of this nature is only a means to an end, that is to say, it helps the Court make up its mind whether there is a bonafide defence or triable issue of fact or law. Second, in this case, the Applicant had already stated the grounds or basis of its intended defence to the Court in the supporting affidavit which the Respondent had opportunity to respond to through its affidavit in reply. I find that the Respondent has not suffered any miscarriage of justice, especially since the draft written statement of defence does not depart from the grounds of defence earlier pleaded in the supporting affidavit, but merely expounds on the same. Therefore in the spirit of **Article 126(2)(e) of the Constitution of the Republic of Uganda, 1995** which requires this Court to foster substantive justice without undue regard to technicalities, I overrule the objection.

Issues arising from the merits of the Application

1. Whether this Application raises a bonafide defence or any triable issues warranting the grant of leave to appear and defend the main suit.
2. What remedies are available to the parties.

Decision

1. **Whether this Application raises a bonafide defence or any triable issues warranting the grant of leave to appear and defend the main suit.**

In **Maluku Interglobal Trade Agency v Bank of Uganda [1985] HCB 65**, the High Court of Uganda stated the parameters within which unconditional leave to appear and defend a summary suit can be granted. The court held that such leave will be granted where an 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 into account to determine or any other circumstance showing reasonable grounds of a bonafide defence.

At this stage, an Applicant need not convince the court that there is a good defence on the merits and the court should not delve into a detailed analysis of the merits or demerits of the applicant's defence. It is sufficient for an Applicant to simply convince the court that there is a bonafide triable issue of fact or law that merits consideration by the court through a full trial.

After reading and considering the motion and affidavits of both parties and their submissions, it is my finding that this Application raises a bonafide issue of fact which merits the full consideration of this Court through a trial.

The two credit facilities secured by the Applicant from the Respondent are not contested. Indeed, in paragraph 2 of the Affidavit in support of the motion, the Applicant acknowledges securing a bank guarantee worth UGX 200,000,000 and an overdraft worth UGX 150,000,000 from the Respondent. This brought the aggregate principal sum of both facilities to UGX 350,000,000. However, the Respondent's claim in the main suit is for recovery of UGX 392,481,685/= being the principal sum, interest and charges. The Applicant contested the existence and accuracy of this amount in paragraph 9 of the Affidavit in support of the motion. Therein, the Applicant questioned the evidence supporting this accumulated debt and the manner in which it was tabulated. This puts the existence and accuracy of the claimed debt into issue.

Unfortunately, the Respondent only attached the Facility Renewal Letter to its Complaint in the main suit. The initial Facility Letter was not attached. None of the documents adduced by the Respondent, whether in the Complaint in the main suit or

in the Affidavit in reply to this Application, state what interest rates and charges were applicable to the two facilities.

Additionally, while the Respondent conceded in its submissions that the Applicant had made some payments towards repayment, and that some money was taken from Mr. Ballo's personal account and used to service part of the Applicant's outstanding debt, it is not clear to this Court if and how these partial repayments reduced the outstanding principal, interest and charges over the time when the Applicant was compliant with the credit terms.

Furthermore, the Respondent did not attach any of the Applicant's loan account statements to the Plaint in the main suit or to the Affidavit in reply in this Application. These could have assisted this Court to ascertain, at this stage, how interest accumulated over time, how the Applicant's partial repayments reduced the outstanding amount and how the aggregate principle sum of UGX 350,000,000 disbursed by the Respondent accumulated interest and charges to become the UGX 392,481,685/= which is claimed in the Plaint.

The Court does not take as gospel truth every assertion made in an affidavit, especially where the assertion is based on critical documents that could have been annexed to the affidavit. Parties ought to adduce all relevant documents to enable the Court scrutinise their cases. The Respondent's failure to do this through the Plaint and the Affidavit in reply leaves this Court at a loss in conclusively determining whether the claimed debt exists or not.

It is trite law that summary procedure is reserved for clear and straightforward cases, where the demand is liquidated and where there are no points for Court to try. (See **Negalambire Faruku & 2 Ors v Woiria Brian, HCMA No. 1145 of 2020.**) In my mind, this is not a clear and straightforward case for the Respondent since it has not adduced all documents sufficient for the Court to ascertain how the principal sums disbursed accumulated to the current claimed debt. This alone is sufficient for me to grant leave to the Applicant to appear and defend the main suit and it is not necessary for me to descent into the analysis of any other matters raised.

2. What reliefs are available to the parties.

Having found that this application raises a triable issue of fact regarding the existence and accuracy of the claimed debt, I make the following orders:

- i. This application is hereby allowed and the Applicant is granted unconditional leave to appear and defend the main suit.
- ii. The Applicant shall file its defence to the main suit within 15 (fifteen) days from the date of this ruling and duly serve the same upon the Respondent.
- iii. The costs of this Application shall abide by the outcome of the main suit.

A handwritten signature in blue ink, appearing to read 'Patricia Mutesi', is written over a dotted line.

Hon. Justice Patricia Mutesi

JUDGE

(30/08/23)