

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**[COMMERCIAL DIVISION]**  
**MISCELLANEOUS APPLICATION NO.0479 OF 2023**  
**(ARISING FROM CIVIL SUIT NO. 1052 OF 2022)**

**1.WATUJO AGRO PRODUCE LTD]**

**2. TUSUBIRA WAISWA JOSEPH]=====APPLICANTS**

**VERSUS**

**CENTENARY RURAL**

**DEVELOPMENT BANK LTD=====RESPONDENT**

**Before Lady Justice Patricia Kahigi Asiimwe**

**Ruling**

Background:

1. The Respondent sued the Applicant under summary procedure for recovery of a liquidated sum of UGX 627,554,460. This Application was brought under Order 36 Rule 3 and 4 of the Civil Procedure Rules and Order 52 Rules 1, 2 and 3. This application seeks order that:
  - a) The Applicants be granted unconditional leave to appear and defend Civil Suit No.1052 of 2022
  - b) Costs of the Application.
  
2. The grounds of the application are laid out in the Notice of Motion and elaborated in the Affidavit in Support deponed by Tusubira Waisswa Joseph (the 2<sup>nd</sup> Applicant), who is the Director of the 1<sup>st</sup> Applicant. He stated that:

- a) He is not indebted to the Respondent; he is only a director of the 1<sup>st</sup> Applicant who obtained a credit facility from the Respondent.
- b) The 1<sup>st</sup> Applicant has been repaying the loan, the suit has been brought prematurely.
- c) He met with the Respondent's Loans Officer and mutually agreed that due to the Covid 19 pandemic, the amount due be repaid in installments which the Company has been repaying.
- d) They further agreed that the amount in arrears including interest and penalties be paid on 30<sup>th</sup> June 2023 and then parties revert to the ordinary monthly repayment schedule.
- e) The suit is filed in concealment of the mutual understanding which was reached between the parties.
- f) The Applicant is not indebted to the Respondent to the tune of UGX 627,554,460 and therefore there is need to reconcile the accounts. The amount stated was based on wrongly calculated interest and penalties thus making the claim exorbitant and unconscionable.

3. The Respondent opposed the Application through an Affidavit in Reply sworn by Bonnie Kolokolo Ntanda a legal assistant working with the Respondent's lawyers KAA. He stated that:

- a) The Application was filed 29 days from the date of service.
- b) The Applicants were served with summons in summary plaint on 12<sup>th</sup> December 2022. The Applicant was required to file his application within 10 days which 10 days expired on 22<sup>nd</sup> December 2022.
- c) This Application was filed on 10<sup>th</sup> January 2023, which was out of time, therefore Court entered a default judgment on 15<sup>th</sup> February 2023.

- d) The Applicants have neither sought to set aside the judgement of this Court nor have they sought leave to file this application out of time.
4. The Applicants filed an Affidavit in Rejoinder in which the 2<sup>nd</sup> Applicant stated that:
- a) On 19<sup>th</sup> December, he found summons and a specially endorsed plaint pushed under the door of his office.
  - b) The Application was filed within time since they were served on 19<sup>th</sup> December 2022 and application filed on 10<sup>th</sup> January 2023.
  - c) Default judgment was entered in error since the Application was filed on 10<sup>th</sup> January 2023.

#### Representation

5. The Applicants were represented by M/s Karamagi, Magezi & Co. Advocates and the Respondent was represented by M/s Kampala Associated Advocates.

#### Issue

6. Whether the Applicants raise triable issues to warrant the granting of unconditional leave to appear and defend

#### Submissions

##### *Applicants' Submissions*

7. The 2<sup>nd</sup> Applicant raised a preliminary objection that he was wrongly enjoined in the suit. The 1<sup>st</sup> Applicant has not defaulted or failed to pay the loan so as to warrant the Creditor to sue the 2<sup>nd</sup> Applicant.
8. Counsel cited Section 68 of the Contract Act to support the submission that under a guarantee agreement, a guarantor undertakes that he will be personally liable for the debt of the principal if the principal fails to pay the debt. Counsel also cited

the case of Paul Kasagga and Another v Barclays Bank (U) Ltd HCT-00-CC-MA- 0113-2008 for the definition of a guarantee agreement. Counsel submitted that the principal has not defaulted and therefore the 2<sup>nd</sup> Applicant be granted leave to appear and defend for being wrongly sued together with the 1<sup>st</sup> Applicant as their liability is different and therefore a similar cause of action cannot lie against both of them at same time.

9. Counsel further submitted that the suit is premature because the 1<sup>st</sup> Applicant and the Loans Officer of the Respondent agreed that the money be repaid in installments due to Covid 19 pandemic. It was further agreed that if there is any sum due it should be paid on 30<sup>th</sup> June 2023. The decision by the Respondent to sue the Applicants in concealment of these material facts raises triable issues.
10. Counsel submitted that default judgment was entered erroneously, since there was already a valid application for leave to appear and defend filed on 10<sup>th</sup> January 2023. The purported default judgement was overtaken by events when Court endorsed the Application and the parties appeared before this Honorable Court for hearing and they were given directions on when to file the Affidavit in Reply and Written Submissions. The default judgement is therefore of no legal consequence.

#### Respondent's Submissions

11. The Respondent submitted that the Application is overtaken by events since a default judgement was entered under Order 36 Rule 3 (2) of the Civil Procedure Rules.
12. Counsel for the Respondent cited the case of **China Railway No3 Engineering Group Ltd V Segken Services Ltd HCMA 161 of 2020** in which the Respondent raised a point of law that the Application was filed out of the stipulated time, the Court

upheld the point of law and held that the Application is time barred.

13. Counsel for the Respondent submitted that the Applicants were served on 12<sup>th</sup> December 2022 and the 10 days in which to file the Application elapsed on 22<sup>nd</sup> December 2022. The Applicant filed this Application on 10<sup>th</sup> January, 2023 which was 29 days after service, therefore, this Application was filed out of time. Due to this, there is a default judgment.

#### Submissions in Rejoinder

14. The Applicant submitted that this Application is not overtaken by events and the default judgment was erroneously entered on 15<sup>th</sup> February, 2023 since there was a pending application for leave to appear and defend. The Respondent never brought the default judgement to the attention of court when the matter was called for hearing.

#### Resolution

15. The Applicants seek leave to appear and defend Civil Suit No. 1052 of 2022 under which they were sued by the Respondent for the recovery of UGX 627,554,460. On 15<sup>th</sup> February 2023, the Registrar entered default judgement against the Applicants. **The Black's Law Dictionary 8<sup>th</sup> Edition** at page 2463 defines judgement as "A court's final determination of the rights and obligations of the parties in a case."
16. Therefore, judgement in default having been entered the Applicants no longer have an opportunity to defend the suit. The only opportunity to appear and defend can only arise when the default judgment has been set aside. In the circumstances, the Application has been overtaken by events and is therefore hereby dismissed with costs to the Respondent.

Dated this 1<sup>st</sup> day of September 2023.



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Patricia Kahigi Asimwe

Judge

**Delivered on ECCMIS**