

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
MISCELLANEOUS APPLICATION NO.0777 OF 2023
(Arising from Civil Suit No.0418 of 2023)

- 1. FARM UGANDA FARMERS' GROUP LTD]**
- 2. SOSIMU TWESIGA]**
- 3. KALIHANYA KALOUDIAN] ::::::::::::::::::::::::::::::::::: APPLICANTS**

Versus

STANBIC BANK UGANDA LTD:::::::::::::::::::::::::::::::::RESPONDENT

Before Hon. Lady Justice Patricia Kahigi Asimwe

Ruling

Brief background:

1. The Respondent filed Civil Suit No. 0418 of 2023 under Order 36 of the Civil Procedure Rules seeking an order that the Applicants be directed to pay UGX 263,072,329 and interest.
2. The Applicants then filed this Application by Notice of Motion under Order 36 Rules 3 & 4 of the Civil Procedure Rules seeking an order for unconditional leave to appear and defend the suit.
3. The Application was supported by an Affidavit in Support deponed by Sosimu Twesiga, the 2nd Applicant and the Managing Director of the 1st Applicant who stated as follows:
 - a) On 21st December 2021, the Respondent advanced a loan facility in sum of UGX 500,000,000 as working capital for buying barley produce from contracted farmers under the SACCO/VSLA Preposition programme to the 1st Applicant.

- b) That him and the 3rd Applicant executed personal guarantees guaranteeing to pay on demand the money owed by the 1st Applicant to the Respondent.
- c) The Applicants proceeded to service the loan to the tune of UGX 263,072,329 and were left with a balance of UGX 236,072,329.
- d) The Applicant's ability to pay was constrained by delayed payments from a third party M/S Blue Cup Company Ltd and this was duly communicated to the Respondent's officials.
- e) By June 2019, M/s Blue Cup Company Ltd was indebted to the 1st Applicant to the tune of UGX 650,000,000.
- f) The directors of the 1st Applicant and M/s Blue Cup Company Ltd decided to enter into a joint venture and made a resolution to open a joint account in the Respondent Bank in the names of Opio Patrick and Mr. Bamutaze Julius who were the directors of M/s Blue Cup Company Ltd.
- g) The Respondent was aware that the facility was supposed to be funded by monies which were to be deposited on the joint account.
- h) The Respondent neglected its duty of deducting the said monies from the Joint Bank account by failing to effect the bank transfer of funds from the bank account of M/s Blue Cup Company Ltd to the joint Account of Opio Patrick and Batamuze Julius as had been agreed in the Memorandum of Understanding dated 9th August 2022 which affected the loan repayment schedule.
- i) The Respondent was aware that the monies to repay the said loan obligations were to be paid from the monies on the joint bank account and of the 1st Applicant Company and the 3rd party.
- j) Failure to make the transfers frustrated the loan repayment obligations.

4. The Respondent opposed this Application by way of an Affidavit in Reply deposed by Joshua Kitamirike the Manager Business Support and Resolution, who deposed as follows:

- a) The Applicant has admitted to being indebted to the Respondent.
- b) By April 2023 the outstanding balance was UGX 263,072,329 and the amount continues to accrue interest until payment in full.
- c) M/s Blue Cup Company Ltd, Opio Patrick, and Bamutaze Julius were never a part of the loan and neither were the 1st Applicant's dealings with M/s Blue Cup Company Ltd the purpose for which the loan was obtained.
- d) The Respondent was neither privy nor party to the discussions and agreements between the Applicants and M/s Blue Cup Company Ltd as they were entered into before the facility in December 2021.
- e) Mr. Opio Patrick and Bamutaze Julius have never authorized the Respondent to utilize the funds being paid on their account for purposes of settling obligations owed by the Applicants.
- f) The partial consent judgment between the 1st Applicant and M/s Blue Cup Company Ltd shows that the money is to be made on the 1st Applicant's account at Centenary Bank Bwaise Branch not an account with the Respondent.
- g) The Applicants are not interested in paying the money as they have resorted to ensuring that all payments due to it are paid on accounts beyond the reach of the Respondent.
- h) The Applicants' conduct of changing accounts is evidence that the Applicants are deliberately diverting funds to avoid paying the Respondent.

5. The Applicant in Rejoinder stated that:

- a) The 1st Applicant is only indebted to the tune of UGX. 236,072,329, there is a disputed difference of UGX 27,000,000.
- b) The Respondent has been aware of the relationship between the 1st Applicant and M/s Blue Cup Company Ltd, Opio Patrick and Bamutaze Julius, and all was made known to the Respondent at the time of granting the loan facility.
- c) That while under the Consent Judgment, the payments are to be made on an account in Centenary Bank, the 1st Applicant is willing to have the said account changed to indicate the one the 1st Applicant holds with the Respondent Bank or execute a standing order (EFT) in favour of the 1st Applicant's account held in the Respondent bank from which it will be able to deduct money in fulfilment of the loan obligations.
- d) It was M/s Blue Cup Company Ltd which suggested money be paid through Centenary Bank due to the company's indebtedness to the Respondent.

Representation:

6. The Applicants were represented by M/S Twikirize & Co Advocates and the Respondent was represented by S&L Advocates. Both counsels filed written submissions which I have taken into consideration in resolving this matter.

7. Issues

- I. Whether the Applicant should be granted unconditional leave to appear and defend
- II. What remedies are available to the parties?

Resolution

Issue I: Whether the Applicant should be granted unconditional leave to appear and defend

8. In the case of **Makula Interglobal Trade Agency V Bank Of Uganda [1985] HCB 65** it was stated:

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. Where 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.

9. In the case **Geoffrey Gatete & Anor V William Kyobe SCCA NO 7 of 2005** Mulenga JSC explained 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 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. what courts have consistently held to amount to good cause is evidence that the defendant has a triable defence to the suit.

10. In the case of **Corporate Insurance Co. Ltd Vs Nyali Beach Hotel Ltd [1995-1998], EA 7** the Court of Appeal of Kenya held that "leave to defend will not be given merely because there are several allegations of fact or law made in the defendant's affidavit. The allegations are investigated in order to decide whether leave should be given."

11. The Applicant raises the following defences:

There is a dispute as to the amount owed

12. According to the Applicant, the amount owed is UGX 236,072,329 and not UGX 263,072,329 and there is disputed difference of UGX 27,000,000.
13. In the case of **UMEME Ltd V Justice Anup Singh Choudry M. A NO 736 OF 2021** Court held 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/ her defence and the facts upon which it is founded.”
14. In the present case, the Applicants did not submit any evidence to prove that they paid the said UGX 27,000,000. It is trite that he who alleges must prove (see Section 101 of the Evidence Act). I therefore do not find that this is a triable issue.

The Applicant has a claim against a third party and the suit is therefore premature.

15. Counsel for the Applicants submitted that the third-party M/s Blue Cup Company Ltd contributed to the default of the Applicants and that Annexures 1 to D2 confirm the dealings with the third party which the Respondent was aware of. Counsel for the Applicants further submitted that they expected money from the third party which has not yet been paid and this has led them to default on their loan obligations. It was further submitted that the suit is premature since the Applicants' took steps to recover from the 3rd party by instituting a suit and subsequently entering into a consent judgment.
16. The Respondent's counsel submitted that the third party was never part of the loan facility agreements. It was further submitted that the loan facility was for the supply of maize and not barley as alleged by the Applicants. And that at the time of granting the loan facility, the Respondent was not aware of any transactions between the Applicants and the third party. It was

further submitted that the consent does not mention that the money is intended to be paid to the Respondent. Furthermore, under the agreement with the 3rd party, the money was supposed to be paid in an account in Centenary Bank and not in the Respondent Bank.

17. I have looked at the documents submitted in evidence by the Applicants and I note that the Respondent does not feature in any of the agreements entered into between the 1st Applicant with the 3rd party. There is no mention of the loan with the Respondent and neither is there any provision to the effect that the money owed by the 3rd party to the 1st Applicant should be paid to the Respondent. In addition, under the loan agreement, there is no reference to the 3rd party. It is clear that the loan agreement was between the 1st Applicant and the Respondent and the Applicants undertook to pay the said loan. The Applicants have not submitted any evidence to prove that the Respondent was aware of the transaction between the 1st Applicant and the 3rd party. Furthermore, there is no evidence that the Applicants instructed the Respondent to deduct the money for the loan repayment from the joint account between the 1st Applicant and the 3rd party.
18. In the case **Makau Nairuba Mabel V Crane Bank Ltd CIVIL Suit No 380 OF 2009**, Justice Hellen Obura held that:
“the general legal principles which govern the relationship between a bank and its customers are well settled that a bank has a duty to act in accordance with the lawful request of its customers in normal operation of its customers account.”
19. Therefore, without proof of instructions from the Applicants to the Respondent instructing the Respondent to deduct money from the joint account, the Respondent cannot be faulted for not deducting the money in question.

20. I have also reviewed the consent judgement between the 1st Applicant and the 3rd party and noted that the Respondent is not a party to the consent and therefore is not bound by it. Furthermore, the consent does not mention that the money to be paid by the 3rd party is for the purpose of paying the outstanding money under the loan agreement. In addition, the said money is to be paid in account held by the 1st Applicant in Centenary Bank.
21. In the case of **George Fredrick Wekesa V Caltex Kenya Ltd HCCS NO 1674 of 1997 (G V ODUNGA PAGE 8184 VOLUME 10)** it was held that:
“in law the fact that a defendant might have a claim for contribution or indemnity against another person does not entitle him to leave to defend as he can obtain such indemnity by a separate suit and the same applies to counterclaim.”
22. Therefore, while the Applicants proved that they have a claim against a 3rd party as was held in the case of **George Fredrick Wekesa V Caltex Kenya Ltd** (supra) that alone does not entitle the Applicants to leave to appear and defend the suit.
23. I therefore find that the Applicants do not have a genuine defence to the main suit. This issue is therefore answered in the negative.

Issue 2: What remedies are available to the parties

24. Following the finding under issue 1 above the Applicants' are denied leave to appear and defend civil suit No. 0418 of 2023.
25. Under Order 36 Rule 5 of *The Civil Procedure Rules*, it is provided that where, after hearing an application by a defendant for leave to appear and defend the suit, the court refuses to

grant such leave, the plaintiff shall be entitled as against the defendant to a decree for the amount stated in the plaint.

26. Therefore, judgment is hereby entered against the Applicants jointly and severally for:
- a) The sum of UGX. 263,072,329;
 - b) Interest on a) above at a rate of interest at the rate of 12.5% per annum from the date of judgment until payment in full.
 - c) Costs of this Application and the main suit.

Dated this 20th day of September 2023



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Patricia Kahigi Asimwe

Judge

Delivered on ECCMIS

