

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
MISC. APPLICATION NO. 2897 OF 2023  
(ARISING OUT OF CIVIL SUIT NO. 1399 OF 2023)**

**FIONA MIGADDE :..... APPLICANT**

**VERSUS**

**GUARANTY TRUST BANK UGANDA LTD :..... RESPONDENT**

**BEFORE: HON. LADY JUSTICE PATIENCE T.E. RUBAGUMYA**

**RULING**

**Introduction**

This application was brought by Notice of Motion under **Section 33 of the Judicature Act, Cap.13, Section 98 of the Civil Procedure Act, Cap.71, Order 36 Rules 3 (1) and 4 and Order 52 Rules 1, 2 and 3 of the Civil Procedure Rules SI 71-1** seeking orders that:

1. The Applicant be granted unconditional leave to appear and defend Civil Suit No.1399 of 2023.
2. Costs of this application be provided for.

**Background**

The background of this application is contained in the affidavit in support by the Applicant, and summarized below;

1. That the loan facility provided by the Respondent was taken out by Dr. Kitaka Francis in the name of MTK Uganda Ltd and secured by property comprised in Kyadondo Block 244 Plot 8199 land at Muyenga.

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2. That the said loan was taken out by Dr. Kitaka Francis in the name of MTK Uganda Limited and he secured it using the above said property registered in his name.

10 3. That the monies were advanced by the Respondent to the 3<sup>rd</sup> Defendant in Civil Suit No. 1399 of 2023 to support his personal activities.

15 4. That the Respondent and 3<sup>rd</sup> Defendant in Civil Suit No. 1399 of 2023 are unlawfully conspiring and colluding to put liability on the Applicant.

20 5. That the Respondent and the 3<sup>rd</sup> Defendant in Civil Suit No. 1399 of 2023 are unlawfully compromising securities for the debt.

6. That the Applicant is not a party to the collusion to compromise securities that have to be realized in the event of the 3<sup>rd</sup> Defendant and 1<sup>st</sup> Defendant failing to pay the debt.

25 7. That it is just and equitable that the application for leave to appear and defend Civil Suit No.1399 of 2023 is granted.

In reply to the application, the Respondent through its Legal Officer Ms.  
30 Mary Ngonzi, opposed the application contending that:

1. The facility was not granted to Dr. Kitaka Francis but to MTK Uganda Ltd as a corporate entity and it was secured by property comprised in Kyadondo Block 244 Plot 8199 land at Muyenga registered in the name of Dr. Francis Kitaka.

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2. The said facility was in two types, a Bond and Guarantee Line and an import finance facility all amounting to UGX 2,250,000,000/=.
3. As evidenced in the offer letter dated 31<sup>st</sup> January, 2019, and the mortgage deed dated 5<sup>th</sup> February, 2019, (annexures A and B respectively), Dr. Kitaka Francis only executed a mortgage deed with the undertaking to unconditionally pay the loan upon default by the principal borrower (MTK Uganda Ltd).
4. The facility was restructured according to the offer letter dated 21<sup>st</sup> July, 2021, and Dr. Kitaka Francis executed a further charge with the undertaking to unconditionally pay the loan upon default by MTK Uganda Ltd.
5. Dr. Kitaka Francis is neither a shareholder nor a director of MTK Uganda Ltd and that on the contrary, the Applicant together with a one Francis X Kitaka are among the shareholders and Directors of MTK Uganda Ltd as seen in annexure 'E'.
6. The Applicant executed personal guarantees assuming liability in the event of default by MTK Uganda Ltd, the basis of which the suit was instituted.
7. The Applicant was sued as a guarantor of the facility following default in making payment by MTK Uganda Ltd as seen in annexures 'F', 'G' and 'H' respectively.
8. The security presented by Dr. Kitaka Francis is subject to a land dispute between the bank, Dr. Kitaka Francis and his spouse which has rendered the foreclosure process futile.

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9. The guarantor's liability arises upon default by the principal borrower who in this case is MTK Uganda Ltd which defaulted in payment and then demand was made upon the Applicant, who is a director of the principal borrower, to remedy the said default but to  
10 no avail.

10. The unpaid sum on this account is UGX 1,083,003,181/= as at the date of filing this suit.

Both parties filed their written submissions for which I am grateful and  
15 the same have been considered by this Court.

#### Representation

The Applicant was represented by M/s Kavuma, Kabenge & Co. Advocates, while the Respondent was represented by M/s Terrain Advocates.  
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#### Issues for determination

This Court rephrased the issues to read as follows:

1. Whether the Applicant raised sufficient grounds to warrant the grant of  
25 leave to appear and defend Civil Suit No. 1399 of 2023?
2. What remedies are available to the parties?

#### Applicant's submissions

In his submissions, Counsel for the Applicant contended that the Respondent's affidavit in reply was filed out of time. Relying on the case of  
***H. G. Gandesha and Kampala Estates Ltd Vs G. J. Lutaaya SC Civil Application No.14 of 1989***, he submitted that it is settled law that if the  
35 Respondent does not file an affidavit in reply and the evidence in the

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5 affidavit in support is credible in itself, then the facts stand unchallenged. Counsel for the Applicant prayed that the Court finds all the averments in the affidavit in support strong and uncontroverted and allow this application.

Counsel further submitted that should the Court consider the merits of  
10 this application, the principles governing the grant of unconditional leave to appear and defend were laid down in the case of **Maluku Interglobal Trade Agency Ltd Vs Bank of Uganda [1985] HCB 65**, in which Court held that:

15 *“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 plaintiff is not entitled to summary judgment. The defendant is not bound to show a good defence on the merits but should satisfy Court that there was an issue or question in dispute*  
20 *which ought to be tried and the Court should not enter upon the trial of the issue disclosed at this stage.”*

Counsel for the Applicant submitted that **Hon. Justice Lameck Mukasa** guided in the case of **Zzimwe Hardware and Construction Enterprises Ltd Vs Barclays Bank (U) Ltd HCT-CC-MA-0114-2008** while citing the  
25 case of **Abubaker Kato Kasule Vs Tomson Muhwezi (1992-1993) HCB 212**, that at this stage Court is not entitled to inquire into the merits of the issue raised. Counsel also referred this Court to the case of **Maria Odido Vs Barclays Bank (U) Ltd HCT-CC-MA-645 of 2008**.

Counsel submitted that it is the Applicant’s contention that the dealings  
30 between the Respondent, Dr. Kitaka Francis and MTK Uganda Ltd were done in concert and conspiracy without the involvement of the Applicant

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5 in any way which this Court ought to consider by granting the Applicant unconditional leave to appear and defend the Respondent's suit. Counsel for the Applicant further contended that the Respondent's claim of UGX 1,083,003,181/= against the Applicant has no basis and is a mere desire for unjust enrichment.

10 In conclusion, Counsel for the Applicant submitted that the Applicant has established facts that there is a plausible defence to the amount claimed in the main suit and it would be contrary to Article 28 (1) of the Constitution of the Republic of Uganda if the Applicant is not heard.

Counsel for the Applicant filed additional submissions and briefly  
15 contended that according to the affidavit in reply deposed by the Respondent's Legal Officer, there was an admission that the loan facility was taken out by Dr. Kitaka Francis and not the Applicant. Counsel contended that the Respondent has no cause of action against the Applicant but should instead proceed against Dr. Kitaka Francis.

20 Respondent's submissions

In reply, Counsel for the Respondent submitted that the Applicant was sued in her capacity as a guarantor of the loan facility taken out by MTK Uganda Ltd and that the liability arose upon the undisputed default by the principal borrower with an outstanding sum of UGX 1,083,003,181/= inclusive of the accrued interest. Counsel referred this Court to annexure  
25 'H' to the affidavit in reply.

Counsel further referred Court to **Sections 68 and 71 (2) of the Contracts Act, 2010** and the case of **MTK Uganda Ltd Vs Housing Finance Bank Ltd H.C.M.A No. 62 of 2021** wherein the Court quoted  
30 the decision in the case of **Alice Norah Mukasa Vs Centenary Bank Ltd**

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5 **and Bonny Nuwagaba High Court Civil Suit No.77 of 2010** that discusses the liability of a guarantor in case of default.

Counsel for the Respondent further urged Court to take cognizance of the fact that the Applicant did not deny the liability of the Company as a director and neither did she deny signing personal guarantees in favour of  
10 the Respondent wherein she committed to discharge the liability of the borrower. Counsel quoted the case of **Mwebeiha Amatos Vs AG MA No. 822 of 2015** wherein it was held that:

15 *“It is trite law that when facts are sworn to in an affidavit and they are not denied or rebutted by the opposite party, the presumption is that such facts are accepted as the truth.”*

Owing to the above, Counsel for the Respondent prayed for the dismissal of the application with costs contending that the Applicant admitted liability.

As for the claim that the Respondent is colluding with Dr. Kitaka Francis  
20 to impose personal liability on the Applicant and unlawfully compromising the security, Counsel for the Respondent submitted that the security presented by Dr. Kitaka Francis is subject to a land dispute between the Respondent, Dr. Kitaka Francis and his spouse which rendered the foreclosure process futile as there is an injunction prohibiting any dealings  
25 with the property.

### Analysis and Determination

Before delving into the merits of the application, let me first address the issue raised by Counsel for the Applicant in his submissions. The  
30 Applicant’s Counsel raised an objection contesting the affidavit in reply that it was filed out of time. Counsel for the Applicant stated that the

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5 Respondent had not filed an affidavit in reply but later stated that the same was filed out of time.

The Respondent on the other hand perceived that the Applicant disputed the existence of an affidavit in reply and accordingly submitted that an affidavit in reply dated 18<sup>th</sup> January, 2024 was filed.

10 In that regard, since there is an affidavit in reply on record, I shall proceed to establish whether or not the same was filed on time.

In the case of ***Stop and See (U) Limited Vs Tropical Africa Bank HCMA No.333 of 2010***, Hon. Justice Christopher Madrama (as he then was) held that rules of procedure are meant to give parties timelines within  
15 which to file and complete their pleadings.

In the instant case, the said affidavit in reply was filed on 18<sup>th</sup> January, 2024, whereas the Notice of Motion was signed by the Registrar on 29<sup>th</sup> December, 2023. During the hearing of the application on 10<sup>th</sup> January, 2024, Counsel for the Applicant informed Court that the Respondent was  
20 served with the application on Monday, 8<sup>th</sup> January, 2024. Consequently, Counsel for the Respondent requested for two days within which to file the affidavit in reply.

Court accordingly gave timelines to Counsel for the parties, within which to file the affidavit in reply, affidavit in rejoinder and the parties' written  
25 submissions. The affidavit in reply was to be filed by the Respondent by 12<sup>th</sup> January, 2024. Accordingly, the Respondent did not comply with Court directives in respect to the timelines given for filing the affidavit in reply.

I further note that Counsel for the Applicant filed the written submissions  
30 on 17<sup>th</sup> January, 2024 and indeed by then the Respondent had not filed

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5 an affidavit in reply by that date. This formed the basis of the submission of Counsel for the Applicant that since the Respondent did not reply by affidavit or otherwise, then the facts as stated in the Applicant's affidavit stood unchallenged.

Considering the above, since an affidavit in reply and submissions were  
10 filed by the Respondent; I am inclined to consider the same. It is in the interest of justice to the parties herein, and to avoid multiplicity of proceedings, that this Court hereby exercises its inherent powers under **Section 98 of the Civil Procedure Act** to consider the merits of this application as hereunder.

15 Resolution

Issue 1

Whether the Applicant raised sufficient grounds to warrant the grant of leave to appear and defend Civil Suit No. 1399 of 2023?

**Order 36 Rule 3 (1) of the Civil Procedure Rules**, stipulates that a  
20 defendant served with summons, issued upon the filing of an endorsed plaint and affidavit under **Rule 2** of this Order, shall not appear and defend the suit except upon applying for, and obtaining leave from Court.

It is therefore trite that for leave to appear and defend a summary suit to  
25 be granted, an Applicant/Defendant must show by affidavit or otherwise that there is a bona fide triable issue of fact or law.

A triable issue is one capable of being resolved through a legal trial that is, a matter that is subject or liable to judicial examination in Court. It has  
30 also been defined as an issue that only arises when a material proposition of law or fact is affirmed by one party and denied by the other (**See: Jamil Ssenyonjo Vs Jonathan Bunjo, H.C. Civil Suit No. 180 of 2012**).

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A defence raised by the Applicant should not be averred in a manner that appears to be needlessly bald, vague or sketchy. If the defence is based upon facts, in the sense that material facts alleged by the plaintiff in the  
10 Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.

In essence, where the Applicant raises a good defence, the plaintiff is  
15 barred from obtaining summary judgment.

**Order 36 of the Civil Procedure Rules** as stated in the case of **Adina Zola and Another, NNO Vs Ralli Brothers Limited and Anor [1969] EACA 4** has been re-echoed by many Judges in Uganda that:

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*“ ...Order 35 (an equivalent of our Order 36 of the CPR) is intended to enable a plaintiff with a liquidated claim, to which there is clearly no good defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the  
25 delaying tactics of the defendants. If the judge to whom the application is made considers that there is any reasonable ground of defence to the claim, the plaintiff is not entitled to summary judgment... Normally a defendant who wishes to resist the entry of summary judgment should place evidence by way of affidavit  
30 before the judge showing some reasonable grounds of evidence.”*

In the case of **Kotecha Vs Adam Mohammed [2002] 1 EA 112** it was held that where a suit is brought under summary procedure on a specially

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5 endorsed plaintiff, the defendant shall be granted leave to appear if he/she  
is able to show that he/she has a good defence on merit, or that a difficult  
point of law is involved; or a dispute as to the facts 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  
10 grounds of a bona fide defence.

In addition, in the case of **Begumisa George Vs East African  
Development Bank Misc. Application No.451 of 2010**, Court held that:

15 *“... the position of the law in Uganda is that an Applicant who  
comes to Court seeking for leave to defend a suit under Order 36  
of the CPR must show that he/she has a good defence on the  
merits or that there are circumstances showing reasonable  
grounds or bonafide defence. The defence raised must not be a  
20 sham.”*

Furthermore, as was held in the case of **Maluku Interglobal Trade  
Agency Ltd Vs Bank of Uganda (Supra)**, the defendant is not bound to  
25 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.

The Courts, as highlighted above have clearly laid down the principles to  
consider in an application for leave to appear and defend a suit. In the  
instant case, the Applicant disputes liability in the mortgage transaction  
30 arguing that the loan facility was taken out by Dr. Kitaka Francis in the  
name of MTK Uganda Limited and secured it with property comprised in  
Kyadondo Block 244 Plot 8199 land at Muyenga registered in his name  
and applied the funds to support his personal activities.

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5 The Applicant contended that the Respondent and the 3<sup>rd</sup> Defendant in Civil Suit No.1399 of 2023 are unlawfully conspiring and colluding to put liability on her by compromising securities that have to be realized in the event of the 3<sup>rd</sup> Defendant failing to pay the debt.

On the other hand, the Respondent contended that the Applicant was sued  
10 as a guarantor of the facility as evidenced by annexures 'F', 'G' and 'H' attached to the affidavit in reply and that the presented security is subject to a land dispute between the Respondent, Dr. Kitaka Francis and his wife and that there is a temporary injunction barring any dealings on it.

I have perused the annexures in issue that present the Applicant as a  
15 guarantor of the loan facility in issue. Though the Applicant did not dispute signing the said documents, her claim is that the Respondent and Dr. Kitaka Francis are unlawfully compromising the securities for the debt thereby placing liability for repayment of the loan on her. This, in my view is a serious triable issue of fact that requires Court to hear both parties  
20 and determine the same as well as the issue of recovery of the outstanding debt given that in the instant case the debt was secured by property and a personal guarantee. Court cannot at this stage attempt to hear evidence regarding the above contentions raised by the Applicant.

25 Taking the above into consideration, I am convinced that the Applicant has raised bonafide triable issues of law and fact that Court needs to determine to their logical conclusion in the interest of justice. It would be unfair to deny the Applicant an opportunity to defend herself in the circumstances.

30 The principle espoused in the authorities discussed above and as laid out in the case of ***Twentsche Overseas Trading Co. Ltd Vs Bombay Garage***

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5 **[1958] EA 741**, is that summary procedure is to be resorted to in clear and straightforward cases where the demand is liquidated and there are no issues for determination by Court except for the grant of the claim.

10 However, in the instant case, the facts and evidence adduced by both parties disclose issues that go to the root of the legality of the transaction and the securities for the debt in issue, which all require determination by Court. I am cognizant of the fact that the Court should not enter upon the trial of the issues disclosed at this stage as was held in the case of **Maluku Interglobal Trade Agency Ltd Vs Bank of Uganda (supra)**.

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It is therefore in the interest of justice that the Applicant is allowed to appear and defend Civil Suit No. 1399 of 2023.

Issue No.2: What remedies are available to the parties?

20 According to the case of **Churanjila & Co. Vs A.H Adam (1) (1950) 17 EACA 92**, the East African Court of Appeal held that a defendant who has a stateable and arguable defence must be given the opportunity to state it and argue it before the Court and that all the defendant has to show is that there is a definite triable issue of fact or law.

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In the premises, I find the Applicant to have raised triable issues that merit the grant of this application. The Applicant is therefore entitled to unconditional leave to appear and defend the main suit and it is accordingly granted with the following orders:

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1. The Applicant is hereby granted unconditional leave to appear and defend **Civil Suit No. 1399 of 2023**.

2. The Applicant is ordered to file her Written Statement of Defence within 14 (fourteen) days from the date of this order.

3. Costs of this application shall be in the cause.

I so order.

Dated, signed and delivered electronically this **14<sup>th</sup>** day of **February, 2024**.

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Patience T. E. Rubagumya

## JUDGE

14/02/2024

8:45am