

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
MISC APPLICATION NO. 1845 OF 2022
(ARISING FROM CIVIL SUIT NO. 717 OF 2022)

1. TAD TECHNICAL SERVICES LIMITED]
2. TWINOMUJUNI MOSES]
3. TWINAMASIKO CHRISTINE]=====APPLICANTS

VERSUS

EQUITY BANK UGANDA LIMITED=====RESPONDENT

Before Hon. Lady Justice Patricia Kahigi Asimwe

Ruling

Introduction

1. This Application was brought under Section 98 of the Civil Procedure Act Cap 71, Order 36 Rule 4 and Order 52 Rules 1 & 3 of the Civil Procedure Rules SI 71-1 seeking orders that the Applicant be granted unconditional leave to appear and defend Civil Suit No. 717 of 2022 and costs of the Application.
2. The grounds of the Application are laid down in the Notice of Motion and are further elaborated in the Affidavit in Support deposed by Twinomujuni Moses, the 2nd Applicant and Director of the 1st Applicant. He stated that:
 - a) The 3rd Applicant is also a director of the 1st Applicant.
 - b) On 1st April 2021 the 1st Applicant applied for a credit facility of UGX 400,000,000 to execute and complete its project with the Ministry of Health, and on 28th April

2021, the Respondent offered UGX 360,000,000 to the Applicant.

- c) Contrary to the agreement, the Applicant was to receive UGX 360,000,000 but instead received UGX 290,000,000. The Respondent informed him that UGX 70,000,000 had been deducted from the said sum and paid to Charlotte Tumuhairwe Komuhangi in order to release the security which was land comprised in FVR 473 Folio 19 Plot 31, Bukonjo Road Kasese Town.
- d) The loan was guaranteed by the 3rd Applicant and him.
- e) The Applicants have never been served with a default notice by the Respondent.
- f) The Respondent is in the process of realizing the mortgage and the guarantees which is wrong. The Respondent ought to commence recovery against the borrower before resorting to the guarantors.
- g) The Applicant is not indebted to the sum claimed in the Complaint.

3. The Respondent opposed this application by way of an Affidavit in Reply deposed by Isiko Charles, the Legal Officer of the Respondent. He stated that:

- a) The 1st Applicant was duly represented by its Directors who were advised to seek independent advice, and they accepted the terms and conditions of the loan facility.
- b) The Respondent disbursed UGX 360,000,000 through the 1st Applicant's account on the 2nd August 2021.

- c) The Applicants were duly served with default notice by the Respondent as a step of commencement of the recovery and foreclosure process.
- d) The 2nd and 3rd Applicant gave primary personal guarantees where they undertook to repay all the monies owing from the Company.

4. In Rejoinder, the Applicant through an Affidavit deponed by Twinomujuni Moses, the 2nd Applicant stated that:

- a) The Directors of the Applicant are not lawyers hence they could not advise on the viability of the loan facility.
- b) The offer of the credit facility was made on 28th April 2021 and the acceptance was made on 30th April 2021, therefore there was little to no time to seek independent advice.
- c) The statement attached is fabricated since it doesn't reflect the UGX 70,000,000 which was deducted on the disbursement of UGX 360,000,000. Charlotte Tumuhairwe Komuhangi is ready to appear before this Honorable Court and testify.

Representation

- 5. The Applicants were represented by M/S Wetaka, Bukenya & Kizito Advocates and the Respondent was represented by M/S Simul Advocates. Both parties filed written submissions.

Issue

6. Whether the Application meets the requirements for the grant of leave to appear and defend Civil Suit No. 717 of 2022

Resolution

7. In the case of **Makula Interglobal Trade Agency V Bank of Uganda [1985] HCB 65** where it was held that:

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.

8. In the case **Geoffrey Gatete & Anor V William Kyobe SCCA NO 7 of 2005** Mulenga JSC held 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."

9. The Applicants raised the defence that they are not indebted to the Respondent for the amount claimed. The deponent of the affidavit in support stated that only UGX 290,000,000 was received and that he was informed that UGX. 70,000,000 had been deducted and paid to a one Charlotte Tumuhairwe Komuhangi in order for her to release the duplicate title of the security for the loan. The deponent also stated in the affidavit in rejoinder that "the UGX. 360,000,000 had a lien of UGX. 70,000,000 which I first withdrew as a condition in the presence of bank officials and gave it to one Charlotte Tumuhairwe who was in possession of the security of land title comprised in FRV 473 Folio 19 Plot 31, Bukonjo Road Kasese Town."
10. The Respondent attached to the affidavit in reply a bank statement which indicates that it disbursed UGX 360,000.000. The Applicants questioned the authenticity of the statement since it does not indicate the deduction of UGX. 70,000,000.
11. In the case **Agony Swaibu Versus Swalesco Motor Spare and Decoration Dealers High Court Civil Appeal No.0048 of 2014** Mubiru J held as follows:

Despite the fact that at the hearing of an application for unconditional leave to appear and defend the court is not required to determine the merits of the proposed defence, it is incumbent upon the applicant to present a plausible defence. Leave is declined where the court is of the opinion that the grant of leave would merely enable the applicant to prolong the litigation by raising untenable and frivolous defences. The test is whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the applicant are established there would be a good or even a plausible defence on those facts.

12. 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. Secondly the defence so disclosed must be both bonafide and good in law. A court that is satisfied that this threshold has been crossed is then bound to grant unconditional leave. Where the Court is in doubt whether the proposed defence is being made in good faith, the Court may grant conditional leave, say by ordering the Defendant to deposit money in Court before leave is granted."

13. In the present case, court is in doubt as to whether the defence raised by the Applicants that the amount claimed is not what is due is plausible. The Applicants did not adduce any evidence to prove that UGX. 70,000,000 was withdrawn and paid to a one Charlotte Tumuhairwe Komuhangi. The deponent of the affidavit in support and the affidavit in rejoinder states that he was forced to withdraw the money and pay Charlotte Tumuhairwe Komuhangi. However, no withdrawal slip or any other evidence as proof of withdrawal of the money was adduced. There is no evidence of receipt of the money by Charlotte Tumuhairwe Komuhangi either. This therefore raises doubt as to whether the defence has been made in good faith.
14. Court however notes from the affidavit in rejoinder that Charlotte Tumuhairwe Komuhangi is willing to testify in court regarding the UGX. 70,000,000. Court further notes that it is not in dispute that UGX. 290,000,000 was disbursed to the Applicants and has not been paid back. The only issue of

contention is in regard to the UGX. 70,000,000 allegedly paid to Charlotte Tumuhairwe Komuhangi.

15. In light of the above, the Applicants are hereby granted conditional leave to appear and defend Civil Suit No 717 of 2022.
16. In light of the above, the Applicants are granted conditional leave to appear and defend Civil Suit No. 717 of 2022 on the following terms:
 - a) The Applicants deposit UGX 380,000,000 within 90 days from the date of this ruling.
 - b) The Applicants file their Written Statement of Defence within 15 days from the date of making the deposit.
 - c) If the Applicants fail to make the deposit, default judgment will be entered against the Applicants for the sum of UGX. 482,627,328.
 - d) Costs of the Application be in the main cause.

Dated this 8th day of January 2024


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Patricia Kahigi Asiimwe

Judge

Delivered on ECCMIS

