

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MUKONO
CIVIL MISC. APPLICATION NO. 7 OF 2020
(ARISING FROM CIVIL SUIT NO. 57 OF 2019)

1. DAVID LUGYA LUTALO

2. KAYE RONALD ::::::::::::::::::::::::::::::::::: APPLICANTS

VERSUS

ADMARK MANAGEMENT

SERVICES LIMITED ::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE HON. LADY JUSTICE FLORENCE NAKACHWA

RULING

Background

1. On 1st August, 2018, the 1st Applicant / 1st Defendant entered into a loan agreement to consolidate his existing loans with the Respondent/Plaintiff into one loan of UGX. 30,000,000/= (Thirty Million Shillings Only) and outstanding interest of UGX. 13,651,740/= (Thirteen Million Six Hundred Fifty-One Thousand Seven Hundred Forty Shillings Only). The said loan was guaranteed by the 2nd Defendant. Under the said loan agreement, the 1st Applicant/1st Defendant was expected to repay the loan in equal installments in a period of six months at an interest rate of 18% per month.
2. The Respondent/Plaintiff claimed in a summary suit that the 1st Applicant/1st Defendant defaulted on his repayment as stipulated in the



loan agreement. And that at the time of filing Civil Suit No 57 of 2019, the outstanding balance was a total of UGX. 99,889,053 (Ninety-Nine Million Eight Hundred Eighty-Nine Thousand Fifty-Three Shillings).

The application

3. The Applicants brought this application under Order 36 rule 3 of the Civil Procedure Rules, SI 71-1. They sought for orders that this court grants unconditional leave for them to appear and defend Civil Suit No. 57 of 2019 and that costs of the application be provided for. The grounds of the application as disclosed in the supporting affidavit are that:

- (a) On diverse dates in the year 2017, the Respondent advanced to the 1st Applicant a finance facility of a total sum of Ten Million Shillings (UGX. 10,000,000/=);
- (b) On the 31st May, 2018, the Respondent advanced to the 1st Applicant further sum of Twenty Million Shillings (UGX. 20,000,000/=) which sum was on the 1st August, 2018 consolidated with the said Ten Million Shillings (UGX. 10,000,000/=) to make it a total sum of Thirty Million Shillings (UGX. 30,000,000/=) with an interest of 18% per month;
- (c) As security for the money advanced to the 1st Applicant, he deposited with the Respondent his open Barclays Bank cheque No. 000874 and the duplicate certificate of title for land comprised in FRV 1397 Folio 10 Plot 96 at Kampala Road - Mukono measuring approximately 0.04 hectares;



(d)As repayment of the thirty million shillings (UGX. 30,000,000/=) advanced to the 1st Applicant by the Respondent, he has since then paid over and above a total sum of forty-nine million four hundred seventy-four thousand shillings (UGX. 49,474,000/=) to the Respondent covering the principal sum of thirty million shillings (UGX. 30,000,000/=) advanced to the 1st Applicant and accruing interest thereon as per annexure "B" attached to the affidavit in support of the Applicant's summary suit;

(e)A sum of ninety-nine million eight hundred eighty-nine thousand fifty-three shillings (UGX. 99,889,053/=) which the Respondent claimed the 1st Applicant owes is not known to him and that the same is aimed at exploiting and enriching the Respondent; and

(f) The Respondent's summary suit raises triable issues and justice requires in the circumstances that unconditional leave is granted to the 1st Applicant to appear and defend the main suit.

4. The Respondent opposed the application through an affidavit in reply sworn by Bernard Ochan, one of the directors of the Respondent. He stated that:

(a)the instant application does not disclose any plausible defence or triable issues to merit the grant of unconditional leave to appear and defend;

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- (b)the Applicants admitted executing the consolidated loan agreement in paragraph 3 of the supporting affidavit and the interest rate was agreed upon;
- (c)the Applicants are neither pleading duress nor coercion or misrepresentation or fraud as acts that may vitiate a contract;
- (d)the facts of the loan repayments are straight forward and the indebtedness does not need a trial by this court;
- (e)the receipts exhibited as annexure "A" to the supporting affidavit do not exhibit that the loan was discharged as their total is only 9,472,000/=;
- (f) if the Applicants do not deny the contract and the facts speak for themselves, this is a matter that the court can dispose of on the evidence available without need for protracted litigation;
- (g)disposing off this matter now will mitigate any loss for both the Applicants and the Respondent since the contract has been admitted and that it continues to accrue interest as agreed; and
- (h)the supporting affidavit to the application emphasizes the importance for settling this dispute in a summary manner.



5. Both parties filed their written submissions and the Applicants' counsel filed a rejoinder. Counsel Ronald Bogezi from M/s Kabega, Bogezi & Bukenya Advocates appeared for the Applicants. The Respondent was represented by Counsel Claire Kahunde from M/s Bluebell Legal Advocates.

Issues

- (1) Whether the Applicants have a *bona fide* triable issue of fact or law and reasonable grounds of defence to the claim.**
- (2) Whether there are remedies available to the parties.**

Issue 1: Whether the Applicants have a *bona fide* triable issue of fact or law and reasonable grounds of defence to the claim.

6. It was submitted for the Applicants that under Order 36 rule 4 of the Civil Procedure Rules, as amended, unconditional leave to appear and defend a suit will be granted where the 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. That the procedure is meant to ensure that a defendant with a triable issue is not shut out. Counsel cited the case of **Makula Interglobal Trade Agency v. Bank of Uganda [1985] HCB 65** where court stated that before leave to appear and defend is granted, the Defendant must show by affidavit or otherwise that there is a *bona fide* issue of fact or law. That when there is a reasonable ground of defence to the claim, the Respondent is not entitled to a summary judgment. That the Applicant / 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.

7. Counsel further argued that it is a requirement under the law 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 or her defence and the facts upon which it is founded. That secondly, the defence so disclosed must be both *bona fide* and good in law. That a court that is satisfied that this threshold has been crossed is then bound to grant unconditional leave.
8. Learned counsel contended that in the instant application, the 1st Applicant deponed that the Respondent advanced a sum of Thirty Million Shillings (UGX. 30,000,000/=) and that he has since then paid over and above a sum of Forty-Nine Million Shillings (49,000,000/=). That some of the deposit slips are collectively attached as annexure "A" and that the Respondent's claim of UGX. 99,889,053/= is intended to defraud him. That the Respondent did not attach the 1st Applicant's reconciled financial statement to show how much it advanced the 1st Applicant vis-a-vis how much money the 1st Applicant paid and how much is still owing though it admits the deposits made by the 1st Applicant.
9. Furthermore, that in the absence of such clear and conclusive evidence by the Respondent as pointed out, it raises a triable issue which court ought to investigate and conclusively determine to ascertain whether the Applicant is indebted to the Respondent and if

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so to what extent and that this can be established through evidence which has to be adduced at a full trial. Counsel prayed that the 1st issue is answered in the affirmative.

10. The Respondent's counsel contended that the Applicants have admitted executing the consolidated loan agreement and the interest rate agreed upon. That section 33 (1) of the Contracts Act, 2010 states that parties of a contract shall perform or offer to perform their respective promises unless the performance is dispensed with or executed under the Act or any other law. That under Section 35 of the Contracts Act, where a party to a contract refuses or disables himself from performing a promise in its entirety, the promisee may put an end to the contract unless he or she signifies by words or conduct of its continuance.
11. That in the case at hand, the 1st Applicant failed to perform obligations under the loan agreements with the Respondents by failing to make payments as per the agreed payment plan. So the Respondent reminded the Applicants of the breach in a bid to have the matter settled as per their agreement in vain; hence its election to exercise its rights under the agreements and section 35 of the Contracts Act by demanding the whole contractual sum hence the suit before this court. That the Applicants do not have a plausible defence and their intended written statement of defence does not raise any triable issues and should be struck out.

12. It was further averred for the Respondent that the essence of summary procedure under Order 36 rules 3 and 4 of the Civil Procedure Rules, SI 71-1 is to enable the Plaintiff with a liquidated claim to which there is no clear defence to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the Defendant. That in the case of **Sembule Investments v. Uganda Baati**, it was held that a Defendant who wishes to resist the entry of summary judgment should disclose through evidence that there are reasonable grounds for defence. That the Applicant must show a good defence to the suit.
13. Learned counsel asserted that this application is merely a delaying tactic by the Applicant aimed at denying the Respondent what is due to it under the agreement. Counsel prays that court finds this application unsustainable and that it discloses no genuine or plausible triable issues for grant of unconditional leave to appear and defend.
14. The Applicants rejoin that on the diverse dates the 1st Applicant paid in instalments part of the money advanced to him which the Respondent does not admit notwithstanding the deposit slips attached as Annexure "A" to the application which raises a triable issue which in the circumstances warrants leave to the Applicants to appear and defend the main suit. That the Respondent's submissions are misdirected, misconceived and thus the same should be disregarded and leave to appear and defend the main suit be granted to the Applicants.

Court's consideration.

15. The law entitles the Plaintiff in a summary suit to a summary judgment on liquidated liability if it is proved that there is no issue in dispute in respect of the claims in the suit and there are no other reasons why there should be a trial. The legal enhancement for leave to appear and defend is found under Order 36 rule 4 of the Civil Procedure Rules, SI 71-1 which provides thus:

"An application by a defendant served with a summons in Form 4 of Appendix A for leave to appear and defend the suit shall be supported by affidavit, which shall state whether the defence alleged goes to the whole or to part only, and if so, to what part of the plaintiff's claim, and the court also may allow the defendant making the application to be examined on oath. For this purpose, the court may order the defendant, or, in the case of a corporation, any officer of the corporation, to attend and be examined upon oath, or to produce any lease, deeds, books or documents, or copies of or extracts from them. The plaintiff shall be served with notice of the application and with a copy of the affidavit filed by a defendant."

16. The above cited provision is premised on the fact that the Plaintiff has failed to establish a prima facie case for summary judgment and thus the summary judgment should not be granted or entered. The Applicant for leave to appear and defend is required to satisfy the court that there is an issue which ought to be tried and determined inter parties. As rightly submitted by the Applicants' counsel in the case of **Maluku Inter-global Trade Agency v. Bank of Uganda (supra)** at **page 66**, it is trite law that for an application for leave to appear and



defend to be granted, the Applicant has to show that there is a *bona fide* triable issue of fact or law that he or she will advance in defense of the suit.

17. In **Uganda Commercial Bank v. Mukoome Agencies [1982] HCB 22**, the then Court of Appeal Justices, Musoke, P, Lubogo V.P and Nyamuchoncho, J.A unanimously held that:

"In applications for leave to appear and defend in summary suits, the defence and triable issues must not only be disclosed, but the intended Written Statement of Defence should be annexed to the application."

Their Lordships then emphasized that:

"It would serve a good purpose if the intended written statement of defence is annexed to the Notice of Motion as it would help the Judge make up his mind whether to refuse or grant the application."

18. The Defendant who seeks leave to appear and defend under summary suit must disclose a good defence. I have carefully analyzed the annexed intended written statement of defence. It is contended that the 1st Defendant paid a sum of UGX. 49,474,000/= to the Respondent covering the principal sum and the accruing interest thereon. The Defendants dispute the sum of UGX. 99,889,053/= claimed by the Plaintiff and contended that such is just aimed at exploiting them to enrich the Plaintiff. The Defendants raise a point of law in their intended defence disputing the jurisdiction of this court on the ground that the said money was advanced to the 1st Defendant




from Kampala and that repayments were also done from Kampala. The Applicants also attached some of the deposit slips to their application as proof of repayment of the said loan which they agree to have been advanced to the 1st Applicant / 1st Defendant by the Respondent.

19. From perusal of the Plaintiff's specially endorsed plaint, this court notes that the Plaintiff / Respondent has not indicated therein how much money was repaid by the 1st Defendant. I completely agree with the Applicants' counsel that the Plaintiff / Respondent ought to have attached in its pleading a reconciled financial statement clearly showing how much money was advanced to the 1st Applicant and how much money was repaid by him to the Respondent and to clearly indicate how much balance, including interest, that was remaining for the 1st Defendant to repay. From the summary suit, the Plaintiff does not acknowledge any repayment of the principal sum made by the 1st Defendant.

20. In **Sembule Investments Ltd v. Uganda Baati Ltd, High Court Misc. Application No. 664 of 2009** Justice Mulyagonja stated that the Defendant who wishes to resist the entry of a summary judgment should disclose through evidence that there are some reasonable grounds of defence.

21. I agree with this holding. Resisting a summary judgment should not be based on mere assertions of probable defence available to the Defendant but rather he or she should take a step further and show

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court the evidence he or she intends to rely on to prove his or her defence. In my judgment, the Applicants have done this in the present case.

22. In conclusion therefore, I find that the Applicants' intended defence is sustainable and valid. It is this court's considered view that genuine or plausible triable issues were raised by this application for leave to appear and defend which cannot, in my judgment, be settled in a summary suit.

23. **Issue 2: Whether there are remedies available to the parties.**

The Applicants' counsel prayed for orders that:

- (a) The Applicants are granted leave to defend the main suit;
- (b) The Applicants file their written statement of defence within fifteen (15) days from the date of this ruling;
- (c) Costs of the application be borne by the Respondent.

24. The Respondent's counsel on the other hand prayed that the application is dismissed with costs to the Respondent and that judgment be entered for the Plaintiff in the sum of UGX. 99,889,053/=. Counsel further prayed that in the alternative, should this honourable court feel inclined to grant the application for leave to appear and defend, such leave should be conditional and the Applicant should be ordered to deposit the sum of UGX. 99,889,053/= in court as security for the due performance.

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25. Having found in the first issue that the Applicants have already demonstrated that they have a defence to the claims brought under Civil Suit No. 57 of 2019, I accordingly allow the application for unconditional leave to appear and defend the suit with the following orders:

(a) The Applicants should file a written statement of defence to Civil Suit No. 57 of 2019 before 16th November, 2022;

(b) Costs of this application shall abide the outcome of the main suit.

I so rule and order accordingly.

This ruling is delivered this 1st day of Nov. 2022 by



FLORENCE NAKACHWA
JUDGE.

In the presence of:

(1) *Counsel Claire Kahunde from M/s Bluebell Legal Advocates for the Respondent;*

(2) *Ms. Pauline Nakavuma, the Court Clerk.*