

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**  
**MISC APPLICATION NO. 060 OF 2022**

**[ARISING FROM CIVIL SUIT NO. 034 OF 2022**

**1. BARAAZA DANIEL SAAD**  
**2. KIBENGO IBRAHIM**  
**3. SUNDAY DAVID ::: APPLICANTS**

**VERSUS**

**FINCA UGANDA LIMITED (MDI) ::: RESPONDENT**

**BEFORE HON. MR. JUSTICE VINCENT EMMY MUGABO**

**RULING**

This is an application brought under, Order 36 Rule 4 & Order 52 rule 1 & 3 of the Civil Procedure Rules S.I 71-1 for orders that; leave be granted to the applicants to appear and defend Civil Suit No.034 of 2022 and for costs of the application to be provided for.

The grounds of this application are set out in the respective affidavits of the applicants and are that; the 1<sup>st</sup> applicant is not indebted to the respondent in the amounts claimed and that the 1<sup>st</sup> applicant has not defaulted on his loan obligations with the respondent. The 1<sup>st</sup> applicant also deposes that there is Civil Suit No. 04 of 2022 filed by Birungi Maliza, wife to the 1<sup>st</sup> applicant against the respondent and it has a bearing on the amount and validity of the 1<sup>st</sup> applicant's loan with the respondent. Both the 2<sup>nd</sup> and 3<sup>rd</sup> applicants depose that when the 1<sup>st</sup> applicant and the respondent altered the terms of the original loan agreement, they ceased to be guarantors to the loan and that their obligations were extinguished.

The respondent opposed the application by an affidavit in reply deposed by Deogratiuous Mugenyi, a Branch Operations Supervisor of the respondent.

He stated inter alia; that the 1<sup>st</sup> applicant is indebted to the respondent in the amounts claimed in the suit and that the 1<sup>st</sup> applicant has defaulted on his loan obligations. Further that all the required statutory notices have been served on the 1<sup>st</sup> applicant and that this application is a waste of court's time.

### **Representation and hearing.**

The applicants are represented by Ngamije Law Consultants & Advocates while the respondent's legal department represented the respondent. On the direction of this court, the hearing proceeded by way of written submissions. Both parties filed submissions which have been considered in this ruling.

### **Consideration by court**

Counsel for the applicants has relied on the case of ***Benon Tumusange & anor Vs Exim Bank (U) Ltd HCMA No. 921 of 2016*** to argue 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 the defence to the suit. Relying on the varying demand notices served on the 1<sup>st</sup> applicant by the respondent, counsel argued that even the respondent itself is not certain of the outstanding amounts it claims from the 1<sup>st</sup> applicant.

Counsel for the applicants further argued that while the 1<sup>st</sup> applicant does not dispute his indebtedness to the respondent, the 1<sup>st</sup> applicant's loan is not in a default position to warrant the filing of the suit by the respondent. Further that the 2<sup>nd</sup> and 3<sup>rd</sup> applicants did not participate in the subsequent negotiations of a loan restructure between the 1<sup>st</sup> applicant and the respondent as guarantors to the original arrangement. He notes that their obligations were extinguished by the alterations made to the loan and

that they have been wrongly sued in the main suit. Counsel noted that these are triable issues that would warrant the grant of leave to the applicants to appear and defend the suit.

In response, counsel for the respondent argued that the 1<sup>st</sup> applicant is at liberty to conduct a self-reconciliation of his loan account before seeking for leave to appear and defend and then informing court the balance he thinks is outstanding instead of putting forward a blanket defence. Further that the 1<sup>st</sup> applicant has been in default on the loan since 2020 and as a consequence, the respondent recalled the entire loan and demanded for payment of the same which the 1<sup>st</sup> applicant has not heeded to.

Counsel for the respondent submits that this application is without merit and ought to be dismissed with costs to the respondent, and default judgment entered in the main suit. In the alternative, counsel prays that if the interest on the 1<sup>st</sup> applicant's loan is found to be unconscionable, could should award the interest it thinks fit in line with **Section 27(1) of the Civil Procedure Act**.

The foundation for applications for leave to appear and defend is premised under **Order 36 rules 3 and 4 of the civil Procedure Rules** which provides that upon the filing of an endorsed plaint and consequent service on the defendant, the defendant shall not appear and defend the suit except upon applying for and obtaining leave from court. The defendant (applicant) is required to satisfy the court that "there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial.

Before leave to appear and defend is granted, the defendant must show by affidavit or otherwise that there is a bona fide triable issue of fact or law. The defendant/applicant 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. See the case of ***Bunjo vs KCB (Uganda) Ltd (Misc. Application No. 174 of 2014)***

In the case of ***Corporate Insurance Co. Ltd Vs Nyali Beach Hotel Ltd [1995-1998] EA 7***, the Court of Appeal of Kenya ruled that “*leave to appear and 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. As a result of the investigation even if a single defence is identified, or found to be bonafide, unconditional leave should be granted to the defendant*”.

The court of Appeal in the case of ***Kotecha Vs. Mohammed [2002] 1 EA 112*** stated thus; “*the defendant is granted leave to appear and defend if he is able to show that he has a good defence on the 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 grounds of a bona fide defence.* (Underlining for emphasis)

In the instant case, the respondent submits that the suit does not raise any triable issues of law or fact and it’s just an attempt to waste court’s time. The applicants argue that the 1<sup>st</sup> applicant is not indebted in the amounts claimed by the respondent in the suit, the loan is being managed according to the terms thereof and that there is no default on the part of the 1<sup>st</sup> applicant. They also add that the variation of the terms of the loan between the 1<sup>st</sup> applicant and the respondent relieved the 2<sup>nd</sup> and 3<sup>rd</sup> applicants of their obligations as guarantors to the loan and as such, filing a suit against them would not disclose a cause of action against them.

In my view, the applicants present and demonstrate that they have triable issues for court's determination and therefore a defence to the claim in the main suit. Some of the issues brought out include; the validity of the mandatory arbitration clause in the loan agreement, the validity of the 2<sup>nd</sup> and 3<sup>rd</sup> applicants' guarantorship obligations, the amounts claimed by the respondent, the interest rate in dispute, the 1<sup>st</sup> applicant's default, the effect of the pending civil suit filed by the 1<sup>st</sup> applicant's wife against the respondent and so on. These are all triable issues of law and fact that cannot be settled in a summary suit.

I accordingly allow the application for unconditional leave to appear and defend the suit. The applicants should file a defence to the suit within 15 days of the ruling. Costs of this application shall abide by the outcome of the main suit.

I so order

Dated at Fort Portal this 28<sup>th</sup> day of October 2022



**Vincent Emmy Mugabo**

**Judge.**

Court: The Assistant Registrar shall deliver the Ruling to the parties.



**Vincent Emmy Mugabo**

**Judge**

**28/10/2022**