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**THE REPUBLIC OF UGANDA**  
**IN THE HIGHCOURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**MISC. APPLICATION NO. 522 OF 2020**  
**(Arising from Civil Suit 416 of 2020)**

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**IMPERIAL GAS SUPPLY (U) LIMITED .....APPLICANT**  
**VERSUS**  
**GONDARIYA HITESH KANJI .....RESPONDENT**

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**BEFORE: HON. LADY JUSTICE SUSAN ABINYO**

**RULING**

This is an application brought by notice of motion under the provisions of section 98 of the Civil Procedure Act, Order 36 Rules 3 & 4 and Order 52 Rules 1& 2 of the Civil Procedure Rules, where the Applicant seeks for orders that:

- 20        1. Leave be granted to the Applicant to appear and defend the suit on merit;  
          2. Provision be made for costs of this Application.

**Facts:**

25        This Application is supported by an affidavit of Chirag Goswami, the Managing Director of the Applicant deposed in paragraphs 1-14, summarized as follows: -

That the Applicant is not indebted to the Respondent in the sums claimed.

That the Applicant requested for a friendly loan from the Respondent of Uganda shillings One Hundred and Fifty million (UGX.150, 000,000/-).

30        That the Respondent informed the Applicant that in order to be advanced a loan, they had to make an agreement of Uganda shillings Two Hundred and Twenty million UGX. 220,000,000/-and that on top of that the Applicant had to secure the loan with postdated cheques of an equivalent of the agreed amount.

5 That the Applicant agreed on the terms of the loan and fulfilled its part of the agreement by signing on the agreement and giving the Respondent the agreed postdated cheques as security for the whole contractual amount (the said agreement and postdated cheques are attached as Annextures 'A' & B respectively).

10 That however after signing the agreement, the Respondent only advanced Uganda shillings Fifty million (Ugx. 50,000,000/-) and remained silent on the balance yet the agreement was to run for a period of five months.

That the Applicant has diligently paid back to the Respondent the money that was advanced to it (copies of pay slips are attached as Annexure 'C').

15 That the case presents triable issues of Law and fact, which can only be determined by the deliberation of this honorable Court.

That the Applicant has a plausible and meritorious defense to the Respondent's claim in Civil Suit 416 of 2020.

20 That it is in the interest of justice that the Applicant be granted leave to appear and defend.

This Application is opposed by an affidavit in reply of Mr. Gondariya Hitesh Kanji the Respondent in paragraphs 1-9 briefly summarized as follows: -

25 That the Applicant Company is indebted to the Respondent to a tune of Ugx. 220,000,000/- (Uganda shillings Two Hundred Twenty million) as per Annexure "A" of the affidavit in support of the Application.

That the Applicant drew cheques in the Respondent's favor as a guarantee for payment and neither the same cheques nor the agreement were used as security for the alleged loan of Ugx. 150,000,000/- (Uganda shillings One Hundred and Fifty million).

30 That the Respondent has never advanced a loan of Ugx. 50,000,000/- (Fifty million shillings) to the Applicant but he instead advanced a loan of 220,000,000/- (Uganda shillings Two Hundred Twenty million shillings) which remains unpaid to date.

35 That Annexure "C" only represents Ugx. 36,050,000 (Uganda shillings Thirty-Six Million Fifty thousand) which he received in respect of other transactions other than the loan transaction of Ugx. 220,000,000/- (Uganda shillings Two Hundred and Twenty million).

5 Mr. Chirang Goswami deponed an affidavit in rejoinder in paragraphs 1-8 summarized as follows;

That the agreement made between the Applicant and the Respondent was for an advance of a loan to a tune of Ugx. 150,000,000/- (One Hundred and Fifty million) to be secured by an agreement worth Ugx. 220,000,000/- (Two Hundred  
10 and Twenty million shillings).

That the Respondent never advanced the sum of Ugx. 220,000,000/- as claimed in the affidavit, and the same was just an amount agreed upon as security agreement but advanced only Ugx. 50,000,000/-.

15 That the amount of monies advanced was paid by the Applicant as stated in the affidavit in support and the attached receipts. That the Applicant has no other dealings with the Respondent that he is aware of.

That the Applicant has triable issues of Law which can be decided upon at a trial in this honorable Court.

#### **Representation**

20 The Applicant was represented by Counsel Kazibwe Achilles from Barenzi & Co. Advocates while the Respondent was represented by Counsel Mugabi Edward from M/s Mbeeta, Kamya & Co. Advocates. Both Counsel filed written submissions.

#### **Issues for determination:**

25 Both counsel did not raise any issue in their submissions.

This court deemed it fit to phrase the issue for determination as below:

Whether the applicant has grounds for unconditional leave to appear and defend to be granted.

30 **Issue: Whether the applicant has grounds for unconditional leave to appear and defend to be granted.**

Counsel for the Applicant submitted that before leave to appear and defend is granted, the Defendant must show by affidavit that there is a bonafide triable issue of fact or Law.

35 Counsel relied on **G.F Harwood: "Odgers on Pleadings and Practice" 12<sup>th</sup> edition**, at pg. 66 and the decisions of **China National Aero -Technology International Engineering Corporation Vs Kenam Construction Services Limited Misc.**

5     **Application No. 478 of 2014; Maluku Inter global Agency Ltd Vs Bank of Uganda**  
[1985]HCB 65 and **Kasule Vs Muhwezi [1992-93]HCB 212**, to state the position of  
the Law that the Defendant in proceedings of this nature is not bound to show a  
good defense on merits, he must show that there is an issue or question in  
dispute which ought to be tried or that there ought for some other reason to be  
10    a trial of the claim.

Counsel further cited the decision of **Hasmani Vs Banque du Congo Belge**  
**(1938)5 EACA 89 at 89** as cited in the case of **Begumisa George Versus East**  
**African Development Bank, Misc. Application No. 0451 of 2010**, where Sheridan,  
CJ held that, if there is one triable issue contained in the affidavit supporting the  
15    application for leave to appear and defend then the defendant is entitled to  
have leave to appear and defend unconditionally, to support his contention.

Counsel averred that the Applicant has stated that it is not indebted to the  
Respondent at all as alleged in the summary suit because the Applicant paid  
back all the money that was advanced by the Respondent and that the  
20    Applicant has no any other contractual relationship that has ever existed  
between it and the Respondent in a manner pleaded in the summary suit and  
affidavit in reply.

Counsel in addition contended that Annexure 'C' of the affidavit in support of  
the notice of motion shows that the Applicant made several payments in favor  
25    of the Respondent to clear the sum of Ugx. 50,000,000/- (Uganda shillings Fifty  
million). That the Applicant under paragraph 8 of the affidavit in support of the  
application has adduced cogent evidence to support its defense that it is not  
indebted to the Respondent at all since the amount so advanced to the  
Applicant was paid back diligently to the Respondent and that it has no  
30    contract or other dealings with the Respondent.

Counsel for the Applicant further submitted that the agreement that was signed  
between the parties of Ugx. 220,000,000/- was a security agreement to secure  
the amount of Ugx. 150,000,000/- and that the same was never executed as the  
Respondent states in the summary suit and that the Respondent's claim squarely  
35    falls within what cannot merely be ascertained by mere calculations because  
there is an issue as to whether the Applicant advanced more than the amount  
ascertained by the Applicant and that this requires proof by adducing more  
evidence.

5 Counsel thus averred that this is a proper case in which the Applicant should be granted unconditional leave to appear and defend the suit and prayed that this Court invokes its inherent powers and grants the prayers sought herein.

In reply, counsel for the Respondent submitted that the Applicant's affidavit in support is riddled with material falsehoods as the averments by the Applicant  
10 are not supported by any evidence and cited the case of **Bitaitana Vs Kananura [1977] HCB 34**, to support his contention that affidavits are very serious documents, and once it contains some falsehood in one part, the whole document becomes suspect and the application supported by such affidavit should fail.

15 Counsel averred that the agreement and the cheques does not indicate that they are security and that there is no other document from which an inference can be made to that effect. That there are independent documents which manifestly indicate the Applicant's liability in the sum of Ugx. 220,000,000/-

Counsel further submitted that there is no document or evidence by affidavit  
20 adduced by the Applicant to show that money was secured and paid. That the receipts do not total to 50,000,000/-and that the same were in respect to other transactions as per paragraph 6 of the Respondent's affidavit in reply of the application.

Counsel further submitted that once an agreement is reduced in writing,  
25 extraneous facts cannot be used to prove its contents and relied on the case of **URA Vs Stephen Mabosi Supreme Court Civil Appeal No. 26 of 1995**, to support this contention.

That the contents of the agreement executed by the parties are very clear and that a cheque is a mode of payment but not a security.

30 Counsel for the Respondent thus submitted that the Applicant has not demonstrated that it has a plausible defense and that this Court should dismiss this application with costs.

Counsel also averred in the alternative but without prejudice to the above prayer and submissions, that if Court is inclined to allow the application, that the  
35 grant of leave be on condition that the Applicant deposits 50% of the sum claimed by the Respondent/Plaintiff.

5     **Resolution:**

I have carefully perused this application together with the supporting affidavits of the parties and taken into consideration the submissions of both Counsel.

It's trite law that an application for leave to appear and defend can only be granted when the Applicant has showed by way of an affidavit, that there are  
10     bonafide triable issues of fact or law and that there is a plausible defense; general or vague statements denying liability will not suffice. (*see Maluku Interglobal Trade Agency Ltd Vs Bank of Uganda [1985] HCB 65*).

It is also settled law that summary procedure provides a quick way for the Plaintiff who demands a liquidated sum to obtain judgment where there is no  
15     evident defense (*see Post Bank (U) Ltd Vs Abdu Ssozi Civil Appeal No. 08/2015*).

In the case of *Sembule Investments Ltd Vs Uganda Baati Ltd Misc. Application No.664 of 2009 arising out of Civil Suit No.410 of 2009* Mulyagonja. J (as she then was) stated that the Defendant who wishes to resist the entry of a summary judgment should disclose through evidence that there are some reasonable  
20     grounds of defense.

From the above decision, it is clear that a summary judgment should not be based on mere assertions of probable defenses available to the defendant but rather the defendant should take a step further and show court the evidence he or she intends to rely on to prove his or her defense.

25     In the instant case, the Applicant asserts that it is not indebted to the Respondent in the sum claimed. The Applicant further states that the loan amount being claimed by the Respondent is unreasonable and unjustified as the same was never advanced to the Applicant. That the Applicant requested for a friendly loan from the Respondent of Uganda shillings 150,000,000/-but that  
30     the Respondent informed the Applicant that in order to advance the loan, they had to make an agreement of Ugx. 220,000,000/-whereupon the Applicant had to advance security of postdated cheques equivalent to the said sum. That after signing the agreement, the Respondent advanced only 50,000,000/- and has since remained silent.

35     The agreement attached as Annexure 'A' by the Applicant in paragraph 1 thereof is very clear on the sum of the loan that was to be advanced as 220,000,000/- (Uganda shillings Two Hundred Twenty million) and in paragraph 3 of the loan agreement, it is explicit that the postdated cheques were deposited as security.

5 Following the decision of **URA Vs Stephen Mabosi Civil Appeal No. 26 of 1995**, the Supreme Court while relying on the decision of the Court of Appeal for Eastern Africa in **Sheikh Binti Ali's case (1958) E.A 623** cited with approval in **Sheikh Muhammad Ibrahim Vs Bibi Biriam (1929)8 Pat at pg. 489** where it was held that:

10 *"It is true that a valid contract can be created without a document, but when the terms of disposition of property have been reduced to the form of a document, under section 91 of the Evidence Act, no evidence can be admitted in proof of the terms of such disposition except that document itself or secondary evidence thereof".*

15 In this case, I find that the terms of the agreement were clearly reduced to the form of a document attached as Annexure 'A' to the Notice of Motion. The terms of the agreement were duly signed by the Applicant's representative although the Applicant adduced receipts to indicate that a sum of Ugx 50,000,000/- was advanced to him and not the sum of 220,000,000/- which is in  
20 this claim.

The extraneous facts that the Applicant wishes to rely on as to the actual amount which he was granted in form of a loan of Ugx 50,000,000/- and the averment that he paid back is secondary evidence which is admissible.

25 In conclusion, I find that the Applicant has raised triable issues of fact and a plausible defence whereupon, this merits the grant of unconditional leave to the Applicant to appear and defend the suit.

This Application is therefore allowed with the following Orders;

1. The Applicant is hereby granted unconditional leave to appear and defend in Civil Suit No.416 of 2020.
- 30 2. The Applicant shall file a written statement of defence within 10 days from the date hereof.
- 35 3. Costs of the application will abide in the main suit.

5 Ruling is signed, dated, and delivered by email on the 28<sup>th</sup> day of October, 2020.

10 .....  
SUSAN ABINYO  
JUDGE

28/10/2020

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