

The Appellant's application for leave to appear and defend was dismissed on grounds that it did not raise triable issues to support the grant of unconditional leave to appear and defend. Judgment was entered for the Respondent in accordance with Order 36 Rule 5 of the Civil Procedure Rules.

Being dissatisfied with the ruling and judgment of the trial Magistrate, the Appellant filed this appeal on the following grounds;

1. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby reaching a wrong decision;
2. The learned trial Magistrate erred in law and fact when he held that the Appellant had not disclosed any triable issues to warrant the grant of unconditional leave to appear and defend;
3. The learned trial Magistrate erred in law and fact when he refused to grant the Appellant unconditional leave to appear and defend;

Both Parties filed written submissions.

Counsel for the Appellant argued that the trial Magistrate erred when he failed to consider the Appellant's plausible defence as was stated in the Written Statement of Defence annexed to his affidavit in support of the application for leave to appear and defend. Counsel faulted the trial magistrate for failing to consider the defence and simply relying on the affidavit to reach his conclusion that the application did not raise any triable issues. To support this argument, Counsel cited and relied on the case of *Uganda Commercial Bank Vs Mukoome Agencies [1982] HCB 225* and invited court to reevaluate the evidence.

Counsel for the Respondent raised a preliminary objection and argued that the Appellant did not adduce a record of proceedings from the lower court which is a basic document and the basis of the appeal, and that as such this court's duty of evaluation evidence will be impossible. Counsel prayed for the objection to be upheld and the appeal dismissed.

Determination of the appeal;

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (*see in Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236*). In a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

I will first resolve the preliminary objection raised by Counsel for the Respondent.

Counsel for the Respondent prayed for the appeal to be dismissed on the ground that the Appellant did not adduce in this court, the record of proceedings from the lower court.

Appeals to the High Court are preferred by memorandum of appeal as per *Order 43 Rule 1 of the Civil Procedure Rules SI 71-1*. In the instant case, the Appellant indeed preferred this appeal by memorandum of appeal.

It is the duty of this Court to issue notice to the lower court requiring the lower court to furnish the file of the matter subject to appeal including the record of proceedings, certified judgment and any other papers involved in the case. This is in accordance with *Order 43 Rule 10 (1 &2) of the Civil Procedure Rules*.

According to *Order 43 Rule 10(3)*, either Party may apply in writing to the court from whose decree is preferred specifying the papers needed from the lower court which papers include the certified record of proceedings which they might need for the appeal process.

From the foregoing, the Appellant is not under duty to furnish the appellate court with the certified record of proceedings. The effect of the above provisions is that either party who needs any documents to rely on for the appeal may apply to the trial court for such documents. This is because the documents and in this case the record of proceedings is

meant to guide parties in preparation of their documents like formulating their grounds of appeal or preparation of their arguments.

I therefore find that the Appellant's failure to furnish this court with a record of proceedings does not render the appeal incompetent. Nevertheless, **Order 43 Rule 10(3)** does not bar the Respondent from applying for the record of proceedings since it stipulates that either party may apply for any papers needed for the appeal.

The preliminary objection is therefore disallowed.

I will now consider the merits of appeal and the ground will be resolved concurrently since they all relate to re-evaluation and the decision of not granting leave to appear and defend.

The Appellant faults the trial Magistrate for failing to consider the evidence on the record and holding that the Appellant did not raise triable issues in his application for leave to appear and defend.

The law on summary suits is contained in **Order 36 of the Civil Procedure Rules** and the whole purpose of summary suits is to resolve matters when the Plaintiff claims a liquidated demand for which the defendant has no defence. **Order 36 Rule 3** establishes the requirement for filing an application for leave to appear and defend where the defendant has a defence to the claim.

In the instant case, the Respondent's claim was for Ugx. 7,000,000/= being money arising from a contract.

The Appellant filed an application for leave to appear and defend and not only denied the claim but also raised a defence that there was no such agreement between the Parties but rather a loan which was secured by the agreements and was repaid.

An agreement dated 20/04/2018 is on the record showing that indeed the monies were advanced to the Appellant and in his written statement of defence, he acknowledged that he

received the loan from the Respondent but claimed to have repaid the money. He stated that the Respondent refused to acknowledge receipt of the loan payments.

In his Ruling, the trial Magistrate dismissed the application on grounds that the Appellant did not dispute the loan.

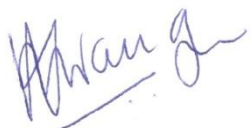
I have carefully perused the record and established that the Appellant did not dispute the loan in his written statement of defence and further he did not adduce any evidence to show that he paid the debt owed. He simply stated that the Respondent refused to acknowledge receipt but did not adduce his own evidence to show that he had made the payments. This defence was therefore insufficient and as such the trial Magistrate was right in finding that the Appellant had no defence to the claim.

In the result, this appeal bears no merits and is hereby dismissed.

No order as to costs since the Respondents preliminary objection was disallowed and no arguments on the merits of the case were made.

I so order.

Dated at Masaka this 17th day of January, 2022

Signed;  _____

Victoria Nakintu Nkwanga Katamba

Judge