THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT HOIMA

MISCELLANEOUS APPLICATION NO. 0002 OF 2023

(Arising from Civil Suit No.001 of 2022)

NDAHURA WILLIAM GAFAYO :::::::::::::::: APPLICANT/RESPONDENT

VERSUS

TWINE STEVEN :::::::::::::::::::::::::::::::::::: RESPONDENT/PLAINTIFF

Before: Hon. Justice Byaruhanga Jesse Rugyema

RULING

[1] This application was brought under **O.36 rr.2 & 4 and O.51 rr.1 & 2 CPR** and **S.98 CPA** seeking orders that;

1. The Applicant be granted unconditional leave by this Honourable court to appear and defend the main suit.
2. Costs of this application be granted.

[2] The grounds in support of the application are outlined in the affidavit sworn by the Applicant **Ndahura William Gafayo** wherein he disputed the alleged plaintiff's claim in the main suit of **Ugx 269,000,000/=** and alleged that the claim is tainted with fraud and contrary to the **Money Lenders Act** of the laws of Uganda. Further, that the alleged claim in the main suit was subject to the Applicant's claim of **Ugx 1,109,009,200/=** from Uganda National Roads Authority (UNRA) which to date, the Applicant has not yet recovered/received. That before the execution of the alleged friendly loan Agreement on the 25/11/2020, both parties agreed that repayment of the foresaid loan money was to be repaid by the Applicant upon receipt of his claim from UNRA. Lastly, that the Applicant has never at all

and ever been served with Notices of intention to sue by the Respondent.

[2] The Applicant prayed that in the circumstances of this case, it is in the interest of justice that therefore, this application be granted unconditionally allowing the Applicant to file a Written Statement of Defence (WSD) and the matter be heard and disposed off on its merits inter parties.

[3] The Respondent, **Twine Steven** opposed the Application in his affidavit in reply wherein he contended that the Applicant admitted to having received the said **Ugx 269,000,000/=** and that the Applicant's claim that repayment of the friendly loan was conditioned on his payment of compensation from UNRA is false. That even if the same was true, from the findings of the Respondent, UNRA paid the Applicant a sum of **Ugx 249,719,700/=** (as per the UNRA internal memo dated 25/2/2022 attached to the affidavit in reply but none of the money was committed to the debt.

[4] The Respondent prayed that in the interest of justice, the application should be dismissed with costs.

[5] It is trite law that for an order of unconditional leave to appear and defend to be granted, the Applicant must show that he has a good defence on merit; or that a difficult point of law is involved; or that there is 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 bonafide defence, see **Children of Africa Vs Sarick Construction Ltd, HCMA No.134 of 2016**. In **Maluku Interglobal Trade Agency Vs B.O.U [1985] HCB 65,** 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 and law. When there is a reasonable ground of defence to the claim, the defendant is not entitled to a summary judgment. The defendant is not bound to show a good defence on merits but should satisfy the court that there was an issue or question to dispute which ought to be tried and the court shall not enter upon the trial of issues disclosed at this stage."

[6] As per the above therefore, the issue for determination, as both counsel agree is;

Issue No.1: Whether the Applicant raises triable issues as to warrant the grant of unconditional leave to appear and defend the suit.

[7] Counsel for the Applicant submitted that the Respondent/plaint instituted in the main/head suit **HCCS No.001 of 2022** against the Applicant claiming repayment of a friendly loan money amounting to **Ugx 269,000,000/=** and that both parties had entered a conditional memorandum of understanding and the alleged loan Agreement was to facilitate the Applicant for his payment of compensation money amounting to **Ugx 1,109,009,200/=** from UNRA on or before the 31/12/2020.

[8] Counsel for the Applicant explained that the alleged loan transaction Agreement dated 25th/11/2020 originates from a memorandum of understanding dated 5th day of Nov.2020 between the Applicant and Respondent wherein the parties agreed that the Respondent advances a loan of **Ugx 228,727,450/=** to the Applicant to facilitate the process of his compensation from UNRA and that the Applicant shall repay the

said loan as soon as UNRA pays his compensation totaling to a sum of **Ugx 978,727,450/=.**

[9] It is the contention of counsel for the Applicant that to date the Applicant has not received the said compensation sum from UNRA and pay the Respondent in accordance with the memorandum of understanding.

[10] Counsel concluded that this court has inherent discretionary powers to grant the orders sought by the Applicant in the application of this nature for it raises bonafide triable issues of fact and the law that are very contentious in nature which are as follows;

a) That both parties entered a conditional memorandum of understanding dated 25/11/2020 and the loan Agreement dated 5/11/2020 to facilitate a 3rd party to process the Applicant's recovery of his compensation money amounting to **Ugx 1,109,009,200/=** from UNRA on or before the 31/12/2020 on condition that the Respondent repays the loaned sum as soon as UNRA pays his compensation. That to date, the Applicant has not yet received the said compensation from UNRA and pay the Respondent in accordance with the memorandum of understanding.

b) That the Applicant has never personally signed and received the alleged **Ugx 269,000,000/=** from the Respondent/plaintiff as there are no delivery payment receipts and acknowledgement before this court.

c) That the Applicant has since instituted recovery legal proceedings against UNRA vide **HCCS No.03/2022,** Hoima upon which UNRA made a minimum partial compensation

payment to the Applicant out of which he has also partly paid it to the Respondent/plaintiff.

d) That the Respondent is not a licensed money lender as prescribed in accordance with the laws of Uganda as he charged future interest on the alleged loan money yet he has never disclosed and attached any money lenders certificate and license authorizing him to lend money.

e) That the Respondent/plaintiff brings the instant suit prematurely and in bad faith.

[11] Counsel concluded that the Respondent/plaintiff is carrying on a business of money lending fraudulently and illegally and therefore, this court should find that this application raises very bonafide triable issues of fact and law as envisaged under **O.36 r.4 CPR** that can only be ably and successfully investigated by this court during a full trial of the main suit on merit inter parties. He prayed that this application be granted unconditionally with costs to the Applicant.

[12] Counsel for the Applicant on the other hand submitted that the Applicant clearly alleges that the Respondent's advancement of the friendly loan was subject to the Applicant's claim against UNRA and that the same loan would only be advanced upon receipt of compensation which he claims not to have received and therefore contests the Respondent's claim which is inclusive of the undisclosed interest charged on the principal and agreed conditions of repayment period in the main suit. That however, the Applicant provided evidence that indeed the said UNRA paid the Applicant and that the allegations are not in any way connected with the Respondent/plaintiff's claim before this court.

Consideration of the Application

[13] As to whether the application raises triable issues as to warrant the grant of leave to appear and defend the main suit, the test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established, there would be a good or even a plausible defence on those facts; **Mrs Raj Duggal Vs Ramesh Kumar Bansal, AIR 1990 Supreme Court of India 2018**. In **UCB Vs Mukoome Agencies [1982] HCB 22,** the then court of Appeal held that in applications for leave to appear and defend in summary suits, the defence and triable issues must not only be disclosed, but that the intended Written statement of defence should be annexed to the application to help the judge make up his mind whether to refuse or grant the application.

[14] In the instant application, I have carefully scrutinized the Friendly Loan Agreement dated the 25th of November 2020 upon which the Respondent/plaintiff's claim for summary recovery of **shs.269,000,000/=** is based. I have also carefully scrutinized the intended or proposed WSD of the Applicant which is attached and therefore forms part of the Applicant's application for leave to defend the main/head suit.

[15] In the first instance, the Applicant disputes the Respondent's claim of **Ugx 269,000,000/=** in the main suit on the grounds that he has never received the said sum as, first of all, there are no delivery payment receipts and acknowledgements before this court, and 2ndly, that he has partly paid the loan as evidenced by 3 receipts dated 22/01/2020, 08/2/2020 and

24/09/2020 (dates not clear because of the faint photocopies) attached to the affidavit in rejoinder.

[16] The Friendly Loan Agreement however, clearly show that the Applicant duly received and acknowledged so, the sum of **Ugx 269,000,000/=** from the Respondent, **paragraph 1** states thus;

> *"The lender by this agreement advances a friendly loan of Uganda Shillings two hundred sixty nine million only (269,000,000/=) to the borrower and the borrower acknowledges receipt of the money by signing this agreement."*

[17] The Applicant has neither denied signing the said agreement nor claim that he was either coerced or misrepresented. In the premises therefore, in my view, there was no need for the parties to issue additional documentation in form of delivery payment receipts or any other form of acknowledgement of the said sum of money as counsel for the Applicant submitted. The 3 receipts indicated by the Applicant as proof of part payment of the loan are pre the Friendly loan agreement which is dated 25th November 2020 and it cannot therefore be said that the sums of money indicated thereon was part payment to Friendly loan that was yet to exist. Besides, indeed, the Applicant does not plead any part payment of the loan in his intended/proposed WSD.

[18] Secondly, the claim by the Applicant that the Friendly loan agreement between the parties was conditional on the memorandum of understanding dated 5/11/2020 which is allegedly to the effect that the monies in question were to facilitate a 3rd party to process the Applicant's recovery of his compensation money from UNRA and that the repayment was as soon as UNRA pays him his compensation sum, in my view,

is a mere afterthought. This is so because firstly, the alleged memorandum of understanding dated 5/11/2020 attached to the affidavit in rejoinder has no endorsement of the Respondent **Steven Tumwine** and therefore, it does not bind him. He is not bound by it and it is not even true that it was endorsed or witnessed by his lawyer as counsel for the Applicant claims in his submissions. There is no evidence to that effect. 2ndly, the Friendly loan Agreement in question never alluded to this memorandum of understanding and therefore, it cannot be imported in the interpretation of the loan agreement. The alleged memorandum of understanding dated 5/11/2020 is a separate transaction whose contents in any case also do not bind the Respondent/plaintiff and therefore, it is not in any way connected with the Respondent/plaintiff's claim before this court. Lastly, I would state that it is also a mere afterthought as it is also not pleaded in the intended/proposed WSD.

[19] Thirdly, the Applicant has not pleaded before this court any material to support his claim in this application that the Respondent/plaintiff's brings the instant suit prematurely and in bad faith because under **paragraph 3** of the Friendly loan Agreement of the parties, the Applicant borrower undertook to repay the money in full and at once not later than 31/12/2020. It was a further term of the Agreement, that, time as referred to by the parties in this agreement shall be treated as of essence by the parties. This suit was filed on 4/10/2022, long after the deadline for the payment of the debt.

[20] As regards the issue of whether the Respondent was a licensed money lender or nor and therefore authorized to carry on the business of money lending, counsel for the Applicant relied on **Ss.1(h) and 21 of the Money lender's Act** which defines the

money lender to apply to the Respondent yet he is without a license. It provides thus;

> *"(1h) Money lender includes every person whose business is that of money lending who advertises or announces himself or holds out in any way as carrying on that business..."*
>
> *"(21) ...if any person carries on business as a money lender without having in force a proper Money lender's license authorizing him to do so or...he or she contravenes this Act."*

[22] In this case, upon perusal of the pleadings in the main suit and in this application, I have not found any evidence to suggest that the Respondent carried on the business of Money lending in this particular transaction with the Applicant. As observed by my brother Justice Wamala Boniface in **Clessy Barya Vs Jomo Robert Kashaija, HCCS No.894/2019 (Commercial Division),**

> *"It ought to be noted that it is not correct to think that any money lending transaction where the lender possesses no money lender's license is illegal...*
> *There is nothing illegal either within the framework or under any other law for a person to lend money to another person under Agreement."*

Indeed, in the English case of **Litch Field Vs Dreyfus (1906)1KB 584,** court observed that

> *"Not every man who lends money at interest carries on business of money lending."*

[23] In this case, there is no evidence adduced by the Applicant to show that the Respondent advertises or announces himself or holds out in any way as carrying on business of money lending. The illegality would be trading as a money lender without a

money lender's certificate/license which I find does not apply to the Respondent, who in this case, merely advanced **Ugx 269,000.000/=** without interest and security to the Applicant via a Friendly loan Agreement repayable within a specified period of time. In this case, money was had and received by the Applicant in form of a friendly loan and therefore, there is *primafacie* an obligation to pay it back. The friendly loan Agreement is valid and it binds the parties. Besides, points of law are decided on the basis of pleadings and facts not disputed. Further evidence that the loan transaction between the parties was merely a friendly loan advancement as per the agreement itself and not a money lending business, is the fact that the Applicant did not even intend to plead illegality in his WSD (see the proposed WSD).

[24] In conclusion, I find that no illegality has been established concerning the transaction between the parties. The intention of the Applicant in filing this application is to prolong the litigation by raising untenable and frivolous defence to defeat and delay justice. The intended defence does not raise any real issue but is just a sham. The Applicant has not placed before this court any materials to support his case and therefore, no valid defence or triable issue has been established to consider the grant of leave to appear and defend.

Issue No.2: Whether the Applicant is entitled to costs

[25] Counsel for the Applicant submitted relying on **Mbabali Muyanja Vs UCB HCCS No.261/1993** for the notion that where a suit is filed without first serving the defendant/Respondent the necessary statutory Notice of intention to sue under **S.2 (1) (c) of the Civil Procedure Limitations (Misc. provisions) Act 20/69**, ~~(sic)~~ in the head suit is void ab initio.

[26] I think here, with due respect counsel for the Applicant misconceived the law. The Applicant in this case is not in any way a scheduled corporation, Government or local authority to be entitled to a Statutory Notice of intention to sue. In case of **Mbabali Muyanja (above),** relied upon by the Applicant UCB was a scheduled corporation. Even when scheduled corporations, Local Government or Government are involved as defendants, failure to serve the statutory notice under **S.2(1) (c) of the Act** does not vitiate the proceedings. A party who decides to proceed without issuing the statutory notice only risks being denied costs; **Kampala Capital City Authority Vs Kabandize & 10 Ors, SCCA No.13/2014.**

[27] In the instant case, since the Applicant is an ordinary litigant, the general rule that costs shall follow the event and that the successful party should not be deprived of them except for good cause, shall apply; **Francis Butagira Vs Deborah Namukasa (1992-1993) HCB 98.** The Respondent being a successful party in this case, in absence of any good cause to deny him such, he is granted costs of this application.

[28] In conclusion, the Applicant's application for leave to appear and defend **HCCS No.01/2022** is declined and dismissed with costs to the Respondent. The summary judgment for shs.269,000,000/= is accordingly entered in favour of the Respondent/plaintiff with costs.

Dated this .....15th.....of **August, 2023.**

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Byaruhanga Jesse Rugyema
JUDGE