

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
CIVIL APPEAL NO: 08 OF 2015

5 **(CORAM: TUMWESIGYE; NSHIMYE; MWANGUSYA; MWONDHA, TIBATEMWA;**
JJ.S.C.)

BETWEEN

POST BANK (U) LTD:..... APPELLANT

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VERSUS

ABDU SSOZI :..... RESPONDENT

[Appeal from the Court of Appeal at Kampala (Kasule, Aweri-Opio and Kakuru, JJA)
dated 1st July, 2015 in Civil Appeal No. 12 of 2010]

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JUDGMENT OF TUMWESIGYE, JSC

Post Bank Uganda Ltd, the appellant, instituted a summary suit in the High Court, HCCS No. 189 of 2008, against Abdul Ssozi, the respondent, and two other defendants under Order 36 rule 2 of the Civil Procedure rules, for the recovery of shs. 82,059,465/= alleging breach of contract and fraud.

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The respondent then filed Miscellaneous Application No. 448 of 2008 for leave to appear and defend the suit. The trial court dismissed the application for having been filed out of the prescribed time. The court then granted a decree to the appellant in the sum of shs. 82,059,000/=, interest on the above sum and costs of the suit as prayed for in the plaint.

Following the issuance of the decree, the respondent filed Miscellaneous Application No.530 of 2008 for unconditional leave to appear and defend the suit under Order 36 rule 11 of the Civil Procedure Rules. The trial judge heard the application and dismissed it as well.

Being dissatisfied with the decision of the court, the respondent appealed to the Court of Appeal
5 which allowed the appeal and set aside the decree on the ground that the appellant's plaint was partly based on fraud which fell outside the ambit of Order 36 rule 2 of the Civil Procedure Rules. The court also struck out the plaint. Being dissatisfied with the Court of Appeal's decision, the appellant brought this appeal.

The appellant lodged its appeal on the following grounds:

10 **(a) The learned Justices of Appeal erred in law and in fact in holding that Civil Suit No. 189 of 2008 did not fall under Order 36 of the Civil Procedure Rules S.1 No. 71-1**

(b) The learned Justices of Appeal erred in law in striking out the appellant's plaint.

15 On 28th June 2016, the respondent in accordance with rule 88(1) of the rules of this court filed a notice of grounds affirming the Court of Appeal's decision on the following grounds:

**(a) The learned trial judge erred in law and in fact in holding that the judgment entered against the defendant respondent herein in a summary suit, after his application for leave to appear and defend the head suit was struck out for
20 having been filed out of time was not a default judgment.**

(b) The learned trial judge erred in law and fact in holding that the respondent whose application for leave to appear and defend the head suit was struck out for competency and judgment entered against him, was not entitled to apply to set aside the decree on ground of good cause and to be allowed to appear and defend the head suit.

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(c) The learned trial judge erred in law and in fact in dismissing the respondent's application to set aside the decree and for leave to appear and defend the suit after she appreciated in the proceedings that the suit was wrongly filed under summary procedure.

10 At the hearing of this appeal Mr. Isaac Bakayana appeared for the appellant while Mr. Eric Muhwezi appeared for the respondent.

Counsel's Submissions

In his submissions, learned counsel for the appellant argued that the learned Justices of Appeal erred when they held that the appellant's claim fell outside the scope of Order 36 rule 2 since the claim included fraud. He argued that while the Order permits anyone who seeks to recover a debt or liquidated demand with or without interest upon a contract to institute a summary suit, the Order does not cover what ought to be pleaded in such a Specially Endorsed Plaintiff.

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He further argued that the use of the word "only" in the wording of rule 2 was merely to emphasize the Scope of the Order and not to provide limitation as to what can be pleaded or not pleaded. He cited the case of **Concorp International Ltd vs. East and Southern African Trade and Development Bank**, Civil Appeal No. 11 of 2009, to support his argument that

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Order 36 if given its plain and ordinary meaning, permits the recovery of a debt or liquidated demand as defined by Black's Law Dictionary.

He further argued that under Article 126(1) of the Constitution, courts are required to exercise judicial power in conformity with the law and that Order 36 rule 2 relates to the kind of claims a
5 plaint can seek and not the content of the pleading.

Learned counsel for the respondent in response supported the decision of the Court of Appeal. He contended that in reaching its decision, the Court of Appeal relied on its earlier decision in **Haji Numani Mubi-akulamusa vs. Friends Estate Ltd**, Civil Appeal No. 1092 of 2013, in which the Court of Appeal held that the claim had to be struck out because it was based on a
10 number of grounds that included fraud.

Learned counsel cited international law jurisprudence on “fraud exception” which precludes the application of summary procedure in actions where the plaintiff’s claim is based on fraud. The cases he cited in this respect were **Zimmer Sweden AB vs. KPN Hong Kong Limited & Anor**, CACV 172/2015 and **Bruno Appliance and Furniture, Inc vs. Hryniak**, [2014] I.S.C.R. 126.

15 He further argued that the appellant’s claim can only be maintained by resolving the allegation of fraud in the plaint and that, therefore, bringing the plaint under Order 36 amounted to an illegality which the court should not sanction.

Consideration of the appeal

I will consider the appellant’s grounds of appeal and the respondent’s grounds affirming the
20 Court of Appeal’s decision all together since I consider them to be closely interlinked.

Order 36 rule 2 under which the appellant brought its suit provides:

“2. Special endorsement on plaint

All suits _

5 **(a) Where the plaintiff seeks to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising –**

(i) **upon a contract, expressed or implied (as, for instance, on a bill of exchange, hundi, promissory note or cheque, or other simple contract debt);**

10 (ii) **on a bond or contract written for payment of a liquidated amount of money;**

(iii) **On a guaranty where the claim against the principal is in respect of a debt or liquidated amount only;**

(iv) **On a trust; or**

15 (v) **Upon a debt to the Government for income tax; or**

(b) Being actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for nonpayment of rent, or against persons claiming under the tenant,

may, at the option of the plaintiff, be instituted by presenting a plaint in the form prescribed endorsed “Summary Procedure Order XXXVI” and accompanied by an affidavit made by the plaintiff, or by any other person who can swear positively to the facts, verifying the cause of action, and the amount claimed, if any, and stating that in his
5 or her belief there is no defence to the suit.”

There is no doubt that Order 36 rule 2 restricts suits to claims based only on contract or land as spelt out in rule 2. Therefore, any claim based on a different cause of action would have to be brought by way of an ordinary suit and not under Order 36.

The learned Justices of Appeal in allowing the respondent’s appeal stated:

10 **Before a court can entertain a suit brought by way of summary Procedure it must first be satisfied that the claim falls under the ambit of order 36 rule 2. A suit that does not fall under the provisions of that Order is not maintainable as a summary suit...**

15 **In the case before us, the plaintiff’s claim ...sets out a number of allegations including fraud which is particularized therein...**

With all due respect to the learned trial judge, we find that she erred when she entertained the claim and entered judgment in favour of the respondent under Order 36 to which the claim was not applicable.

20 It is not necessary to reproduce the appellant’s plaint word for word here. Suffice to say that it sets out the following facts constituting the cause of action:

The appellant advanced the 1st and 2nd defendants a loan of shs 58,000,000/= at an interest rate of 25% p.a. to be paid within 12 months. The loan was secured by the property comprised in Plot No. 774 Block 11 Kabowa and supported by a Power of Attorney executed by the respondent in favour of the 1st and 2nd defendants. It was agreed that the 1st and 2nd defendants would pay 5 monthly installments of shs. 5,700,000=.

The two defendants defaulted in paying the installments. Consequently the appellant recalled the whole loan amount together with its interest.

The appellant attempted to sell the mortgaged property but was prevented from doing so by a one Sarah Namuleme Ssozi, the respondent's wife, who applied for an injunction restraining the 10 appellant from selling the property.

The plaint goes on to show how the three defendants (including the respondent) allegedly acted fraudulently with the intention of avoiding paying the appellant the money borrowed. Particulars of the alleged fraud by the three defendants together with one Sarah Namuleme Ssozi are set out in the plaint.

15 The plaint ends by praying for judgment to be entered against the defendants for recovery of shs 82,059,465=, interest on the decretal sum, and costs of the suit.

Reading the plaint, it is crystal clear that the appellant's claim is based on a contract which the appellant executed with the 1st and 2nd defendant who were agents (attorney) of the respondent. The claim is not based on fraud. It seems to me that the plaint fulfilled all the requirements of 20 Order 36 rule 2. It sought to recover a liquidated demand in money payable by the defendants,

(shs 82,059,465=) and it was properly endorsed and accompanied by an affidavit sworn by the appellant's servant on its behalf.

While it is true that the plaint contains allegations of fraud against the respondent and 1st and 2nd defendant, this allegation is not essential to prove the claim. It is only incidental to it. It is clear
5 that the appellant included it in its plaint to show that the defendants were trying, allegedly through fraudulent means, to prevent the appellant from selling the property which they used as the loan after they defaulted to pay in accordance with the terms of the contract.

In entering judgment against the respondent jointly and severally with the 1st and 2nd defendant in the sum of shs 82,059,465=, interest at 25% p.a. from the date of judgment till payment in full
10 and costs of the application, the learned trial judge did not base her decision on the alleged fraud but on the appellant's claim of a liquidated sum of money arising from the defendants' breach of contract.

In my view, if the appellant wishes to pursue the action of fraud, it can only do so under Order 4, 5, 6, 7, 8, and 9 of the Civil Procedure Rules as an ordinary suit.

15 In his submissions, learned counsel for the respondent cited a case from Hong Kong **Zimmer Sweden AB v. KPN Hong Kong Ltd & Anor** (supra) on "fraud exception" in which the court stated:

**...the question to be asked by the court is does this action include a claim for which an allegation of fraud would have to be made by the plaintiff in order to establish or
20 maintain the claim? If the answer is in the affirmative, the "fraud exception" is**

engaged and the court has no jurisdiction to hear the summary judgment application, even if the plaintiff seeks to hive off that claim from another claim..

This case is from a foreign jurisdiction but I believe its reasoning is of persuasive authority to the application of Order 36 rule 2 of our Civil Procedure Rules. If fraud is alleged in the plaint in
5 order for the plaintiff to establish or maintain a claim, then the plaint cannot be brought under Order 36 rule 2, and it would be wrong for a court to entertain it. Even where the defendant fails to lodge an application for leave to appear and defend the claim, it is important for a court to satisfy itself that the plaint complies with the requirements of Order 36 rule 2. It would have been wrongly entertained, in my view, if the court proceeded to entertain the plaint if it was
10 based on fraud.

In this case, the learned trial judge was right to entertain the plaint under summary procedure because the pleading of fraud in the plaint was not essential to the claim. The claim is based on contract executed between the appellant and the 1st and 2nd respondent as agents of the respondent. It is for liquidated demand in money (shs 82,059,465=).

15 Reading the cases of **Zimmer Sweden AB vs. KPN Hong Kong Ltd & Another** (supra) and **Bruno Appliance and Furniture, Inc. v. Hryniak** which were both cited by counsel for the respondent in his submissions, I find that in both cases the pleading of fraud was central to the claim whereas in the case under consideration fraud is not central but incidental to the claim. I, therefore, agree with the counsel for the appellant that the cases cited by the respondent's
20 counsel are distinguishable from the instant case.

Order 36 was enacted to facilitate the expeditious disposal of cases involving debts and contracts of a commercial nature to prevent defendants from presenting frivolous or vexatious defences in order to unreasonably prolong litigation. Apart from assisting the courts in disposing of cases expeditiously, Order 36 also helps the economy by removing unnecessary obstructions in
5 financial or commercial dealings.

Defendants in cases which fall under Order 36 are protected by being given the right to apply to court for leave to appear and defend the suit. When the court receives their application and is satisfied by the defendant's affidavit that the defendant has raised a genuine triable and not a sham or frivolous issue, it will grant the defendant leave to appear and defend the suit. (Order 36
10 rule 4).

If the court is not satisfied that the defendant has raised a triable issue, it will refuse to grant leave to appear and defend the suit, and the plaintiff will be entitled to a decree in the amount claimed in the plaint with interest, if any. (Order 36 rule 5)

If the defendant fails to apply for leave to appear and defend in the time prescribed (which is 10
15 days), the plaintiff is entitled to a decree for an amount claimed in the plaint with interest, if any. (Order 36 rule 3(2)).

In the instant case, the defendants failed to apply for leave to appear and defend the suit (HCC No. 189 of 2008), therefore, the appellant was entitled to a default judgment and a decree for the amount claimed in the plaint with interest claimed. Therefore, the question raised by the
20 respondent's counsel as to whether it was a default judgment or not is answered in the affirmative.

Order 36 rule 11 is on setting aside the decree. It provides as follows:

5 **After the decree the court may, if satisfied that the service of the summons was not effective, or for any other good cause, which shall be recorded, set aside the decree, and if necessary stay or set aside the execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable so to do, and on such terms as the court thinks fit.**

The respondent applied to the trial court to set aside the decree under Order 36 rule 11. The court dismissed it on the ground that the respondent had applied in the first application for leave to appear and defend the summary suit which application was dismissed, and that, therefore, 10 applying again under rule 11 was tantamount to obtaining the order for leave through the back door. With respect to the learned trial judge, this was a wrong reason for rejecting the respondent's application.

In the case of Geoffrey Gatete & Another vs. William Kyobe, SCCA No. 7 of 2005, this court explained reasons for setting aside the decree under Order 36 rule 11 by stating that "...Apart 15 from ineffective Service of summons, what the courts have consistently held to amount to good cause is evidence that the defendant has a triable defence to the suit".

Ordinary under ordinary suits, once the court has passed a judgment, the only course of action for losing party is to lodge an appeal against the judgment in a court of appeal. However, under summary procedure Order 36 rule 11 gives the court discretionary power to set aside its own 20 decree and stay execution or set it aside altogether, and grant leave to the defendant to appear and defend the suit, if the court is satisfied that the service of the summons was not effective "or

for any other good cause". As has already been shown above, "**good cause**" has been defined to be some evidence that the defendant has a triable issue.

However, the fact that the trial court dismissed the appellant's application under Order 36 rule 11 for a wrong reason does not mean that the appellant had shown that he had a triable issue for the
5 court to grant him leave to appear and defend the suit. What the respondent had raised in his affidavit accompanying the application was that he had filed the first application for leave to appear and defend the suit out of time because his former lawyers had advised him that court vacation days are excluded in the computation of time. The trial court considered this point and rightly dismissed it for lack of merit.

10 The second point which the respondent advanced was that the 1st and 2nd defendants had applied the loan money to their own use and benefit and therefore, the respondent was not liable to repay the loan obtained from the appellant. The court considered this argument after distinguishing it from the case of **Frederick Zaabwe vs. Orient Bank Ltd**, SCCA No. 04 of 2006 and rightly dismissed it.

15 The third point the respondent advanced in his affidavit was that the decree having been passed, was due for execution any time and that this may lead to his imprisonment as a civil debtor which may cause irreparable damage to his life as he was a chronic heart patient. Obviously this point does not raise a triable issue either.

In my view, though the learned trial judge gave a wrong reason for her dismissal of the
20 application, she considered the application and rightly dismissed it. For perusal of the application

it is clear that it does not raise a triable issue to warrant the court giving the respondent leave to appear and defend the suit.

In conclusion, for the reasons given above, it is my respectful view that the learned Justices of Appeal erred to hold that the learned trial judge was wrong to entertain the appellant's claim and
5 enter judgment in his favour under summary procedure.

Accordingly, I would allow the appellant's appeal and order that the trial court's judgment and decree be reinstated. I would also order that the respondent meets the costs of this appeal and of the courts below.

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Since all other members of the court agree, it is ordered accordingly.

Dated this.....19th day ofJanuary..... 2017

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Hon. Justice Jotham Tumwesigye
JUSTICE OF THE SUPREME COURT