

UGANDA / JUDGMENT

I.K Enterprises Limited & 2 Others v Absa Bank Uganda Limited (Miscellaneous Application 404 of 2024) [2024] UGCommC 177 (24 June 2024)
[2024] UGCommC 177

COURT
Commercial Court of Uganda

BEFORE
Ocaya, J

CASE / FILE NUMBER
Miscellaneous Application 404 of 2024

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| 5 | THE REPUBLIC OF UGANDA | | |

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| | IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL
DIVISION]
MISCELLANEOUS APPLICATION NO. 404 OF 2024
[ARISING FROM CIVIL
SUIT NO. 86 OF 2024] | | |

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| | 1.
LK ENTERPRISES LIMITED | | |

| | 2.
KAMUKAGO KENNETH KAARI | | APPLICANTS |

| | 3.
KALANZI MICHELLE LUCY | | |

| 15 | VERSUS | | |

| | ABSA BANK UGANDA LIMITED | | RESPONDENT |

Before: Hon. Justice Thomas Ocaya O. R

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RULING

Introduction

The Respondent filed HCCS 86 of 2024 ["The Main Suit"] filed a suit against the Applicant by 25 specially endorsed plaint. The Applicants brought this Application for the following reliefs:

- (a) The Applicant be given unconditional leave to appear and defend HCCS 86 of 2024.
- (b) Costs of this application be provided for.

The Applicant's story is essentially this; the 1st Applicant on 30 September 2021 signed 30 multi-option facility commercial terms with the Respondent which formed the basis for the disbursement of UGX 321,307,550 to the 1st Applicant. The purpose of the facility was to facilitate the importation of supplies from China required by the company under Lot 1 and Lot 2 of a supply contract with the Ministry of Defence. The Applicant contends that it was agreed that the contract sums would be paid directly by the Respondent to the suppliers, 35 which the Respondent did not do. Owing to these actions, there were delays in performing the commercial terms of the agreement as the supplier demands had not been met which in

5 turn has affect payments by the Ministry of Defence. The Applicants contend that the interest of 18.5% sought by the Respondent in the main suit has no contractual basis. The 2nd Applicant denies that it guaranteed repayment of the 1st Applicant's debt.

The Respondent rejected this application. The Respondent contended that in September 10 2021, the 1st Applicant applied for a multi option loan facility of UGX 321,307,550 to facilitate the supply of local purchases as part of the execution of a contract awarded to the 1st Applicant by the Ministry of Defence. The application was accepted on 29 September 2021. The parties executed the facility which was repayable in 120 days at an interest rate of 18.5% per annum. As security, the 2nd and 3rd Respondents executed personal guarantees.

In breach of the terms of the facility, the Applicants defaulted, failed, refused and/or neglected to pay their loan arrears prompting the Respondent to issue a notice of default to the Applicants for the outstanding sum of UGX 325,312,475. According to the Respondent, despite receipt of the notice, the Applicants failed/refused to clear the outstanding sum 20 prompting the Respondent to issue a final notice of demand. On 28 September 2023, after several engagements, the 1st Applicant, through the 2nd and 3rd Applicants as directors, signed a settlement agreement with the bank. The 1st Applicant acknowledged indebtedness to the bank as at the date amounting to UGX 302,577,054. In the agreement, the Respondent and the first Applicant agreed that the above-mentioned outstanding amount would be paid 25 by the 1st Applicant in three equal installments of UGX 100,859,018 on every 25th day of the

month effective 25 October 2023 until 25 December 2023. It was also agreed that interest on the outstanding amount would be frozen, but in the event of default, interest would be reinstated on the outstanding loan balance from the date of default. The 1st Applicant failed to make payment of the installment amounts in the settlement agreement.

In rejoinder, the Applicants contended that the interest rate was 2% and not 18.5% as claimed. The Applicants contend that the guarantees executed by the 2nd Applicant were in respect of amendment and variation of the terms of the agreement and creation of charges or mortgages where necessary but not to settle the 1st Applicant's debt to the Respondent.

5 The Applicants contend that the Respondent failed to make payments to the suppliers in time which caused payment delays.

Representation

The Applicant was represented by M/s Maldas Advocates while the Respondent was 10 represented by M/s ENS Advocates.

Evidence and Submissions

The Applicant led evidence by way of an affidavit in support and an affidavit in rejoinder deponed by the 2nd Applicant. The Respondent led evidence by way of an affidavit in reply

15 deponed by Eric Kibedi Magoola, the business support manager of the Respondent.

Both the Applicants and the Respondent filed submissions in support of their respective cases which I have considered and I thank Counsel for the same. As submissions are not evidence, I have not felt the need to reiterate them below.

Decision

As noted above, the main suit was commenced by way of specially endorsed plaint under the provisions of **Order 36 Rule 2** of the Civil Procedure Rules["CPR"]. This procedure is used to originate liquidated or certain claims for which it is believed that the Defendant does not

25 have a defence to the claim.

In this procedure, there is no automatic right to defend. The right to defend is only conferred by the leave of court, upon an application by the Defendant in the summary suit.

- 30 Under the provisions of **Order 36 Rule 3** of the CPR, a defendant to a summary suit, who is served with summons, ought to file an application for leave to appear and defend within the timelines indicated in the summons. Failure to do so will entitle the plaintiff to a judgment in default for the sums claimed. Equally so, when an application for leave to appear and defend fails, the plaintiff is entitled to judgment without further proof of the claim. [See **Order 36**

- 35 Rule 5 of the CPR]
- 5 The rationale for summary procedure has been summarised in the long standing decision of **Post Bank (U) Ltd v Abdul Ssozi SCCA 8/2015** where the Supreme Court held thus: "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
- 10 courts in disposing of cases expeditiously, Order 36 also helps the economy by removing unnecessary obstructions in financial or commercial dealings." See also **Zola & Another v. Ralli Brothers Ltd. & Another [1969] EA 691, 694.**

The Applicant brought this application for unconditional leave to appear and defend the main 15 suit. **Order 36 Rule 4** of the CPR provides thus:

- "An application by a defendant served with a summons in Form 4 of Appendix A for leave to appear and defend the suit shall be supported by affidavit, which shall state whether the defence alleged goes to the whole or to part only, and if so, to what part of the plaintiff's claim, and the court also may allow the defendant making the application to be examined on oath.
- 20 For this purpose, the court may order the defendant, or, in the case of a corporation, any officer of the corporation, to attend and be examined upon oath, or to produce any lease, deeds, books or documents, or copies of or extracts from them. The plaintiff shall be served with notice of the application and with a copy of the affidavit filed by a defendant."
- 25 As I said, summary procedure presupposes that the defendant does not have a defence and that there is no matter to try. It follows that if the defendant shows that it has a defence or that there is a matter to try, summary procedure is untenable. In **Kotecha v. Mohammed [2002] 1 EA 112**, the threshold for grant of leave to appear and defend was laid out:
- 30 "Therefore English authorities on that rule are of persuasive authority and provide a useful guide. Under the English Rule the Defendant is granted leave to appear and defend if he is able to show that he has a good defence on the merit(s); 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

5 reasonable grounds of a bona fide defence. See *Saw v Hakim* 5 TLR 72; *Ray v Barker* 4 Ex DI 279."

See also **Churanjilal & Co. v. A. H. Adam (1950) 17 EACA, 92**, **Hasmani v. Banque du Congo Belge (1938) 5 EACA 89 at 89**, **Pamela Anyoti v Root Capital Inc HCMA 844/2023**

10 It follows that it is not sufficient to simply deny indebtedness. Some older decisions such as the decision of the majority in **Photo Focus (U) Ltd. v. Group Four Security Ltd CACA 30/2000** suggest that a mere denial of indebtedness, without more, is a good defence. I do not think this to be the case. This is because, first a general denial of indebtedness is not itself a valid defence under the CPR. [See **Order 6 Rule 8 of the CPR, Ecobank Uganda Limited**

15 v Kalson's Agrovet Concern Ltd & Anor HCCS 573/2016]

If the reasoning in the Photo Focus decision was to be applied, it would mean that summary procedure would never work since the defendant could easily bring an application for leave to appear and defend with three paragraphs; one introducing himself, a second indicating he

20 or she or it denies indebtedness and a third indicating that he believes all the averments are true and the application would have to succeed.

Second, the purpose of an application for leave to appear and defend is to show that there is something to try, such that granting of a summary judgment is not in the interests of justice.

Third, and as observed by Justice Irene Mulyagonja *(as she then was)* in **George Begumisa v East African Development Bank HCMA 451/2010**, the decision in Foto Focus has been departed from by the Court of Appeal which issued it, as evidence in the Kotecha Decision.

30 The sum total of the above is that an Applicant must show one of two things; either that they have a defence to the claim, or that there is a matter to try. This can be summarized by saying that an Applicant for leave to appear and defend must show that there is a triable issue whether this is a contestation caused by their defence to the claim or some other issue of fact or law affecting the matter.

5 Having established the threshold for determination of applications of this nature, I must now turn to the Applicant's defence/grounds for the application for leave to appear and defend.

The question of default

Counsel for the Respondent contended that only the 1st and 2nd Applicants applied for leave

10 to appear and defend and that accordingly, default judgment should be granted against the 3rd Applicant.

A copy of the notice of motion and affidavit in support show that the 3rd Applicant is one of the Applicants herein. In its responses and submissions, the Respondent also recognized and

15 named the 3rd Applicant as an Applicant herein. A review of the record also shows that Mr. Peter Cheptoyek appeared for the all the Applicants, rather than the 1st and 2nd Applicants only.

Can it be said that the 3rd Applicant did not apply for leave to appear and defend merely 20 because it did not file an affidavit in reply?

Deponing of an affidavit is mode of presentation of evidence. The criteria for determining if a person can depone an affidavit and thereby lead evidence on a certain matter is contained in **Order 19 Rule 3(1)** which provides thus:

25 "Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated."

To test the veracity of the deponent's evidence, a party may cross examine someone making 30 an affidavit. See **Order 19 Rule 2** of the CPR.

Clearly from the above, the law does not confine the adducing of evidence by way of affidavit to a party to litigation, such that the same can be undertaken by a recognized agent or advocate. A party can have another person, not being a party to litigation to testify for that

35 party, including an advocate practicing in a firm retained to represent the litigant, as long as the matters they seek to testify on are within their own knowledge or (for interlocutory 5 applications like the present one) belief. There is no rule that only a party to litigation should testify in support of their case. See **Allan Makula v First Finance Bank Limited HCMA 1407/2022, ATC Uganda Limited v Smile Communications Limited HCMA 621/2023**

This is different from say, the right to commence a suit in a party's name or to compromise a 10 suit by a party. Only a party (or their recognized agent or advocate) can commence a suit in that party's name, and only such a party (or their recognized agent or advocate). Order 3 Rule 2 operates to prevent a different person or party from doing an act which the law provides is the preserve of another person except where their recognized agent or advocate. The effect of this law is to prevent person X from doing an act which is the right or preserve of person 15 Y such as person X commencing a suit in the name of person Y.

In my considered view, the non-filing of an affidavit in reply by the 3rd Applicant is not evidence that they did not apply for leave. The 3rd Applicant was listed as a party in this application which sought leave to appear and defend by all the Applicants, including the 3rd

20 Applicant. Further, the 3rd Applicant was represented by counsel at hearing. It follows that there is no basis for the grant of a default judgment considering that the 3rd Applicant applied for leave to appear and defend.

I will now proceed to assess the Applicant's application.

The Applicant's defence

The Applicants' defence has three major grounds

- (a) The Applicant delayed dispatchment of the loan
- 30 (b) The Applicable interest rate is 2% and not 18.5% as claimed

- (c) The 2nd Applicant did not guarantee the debt of the 1st Applicant

Delay

Where the parties have agreed that loans should be disbursed at a certain date, and in such

35 a manner that such period of disbursement is a central term of the contract, a delay may occasion a breach. However, in contract envisages a delay in disbursements, it is unlikely that

5 such a delay would be considered a breach. See *Habib Oil Limited & Ors v Standard Chartered Bank Uganda Limited HCMA 872/2015*

The Respondent adduced a loan statement indicating a disbursal of UGX 292,359,128 on 4 October 2022. This was a year after the 1st Applicant's loan application was agreed. It must

10 be noted that there is generally no relationship between the loan application acceptance date and the loan disbursement day. Depending on the documents used, and the facts of each specific case, a loan acceptance preceeds due diligence by the bank and, where relevant, securitization of the facility, which may take time. Where a party alleges a late disbursal, they ought to demonstrate that what date was agreed on for the disbursal of the loan and when it 15 was actually disbursement.

Pleadings ought to be factually clear and elaborate. An Applicant for leave to appear and defend must, in their pleadings, itemize their defence with sufficient particularity and precision, so that the Applicant's answer to the specially endorsed plaint can be clearly be 20 made out. The proposed grounds of defence should be imprecise, general or evasive as the court may deny leave where this is the case. See *Visare Uganda Limited v Muwema & Co.*

Advocates HCMA 827/828 of 2023.

As was held in *Night Nagujja v Namuwonge Agnes & Ors HCMA 1878/2021*, it is not 25 enough for a party to throw unsubstantiated allegations at the court, hoping that the court will fill in the gaps, speculate or use its powers to separate the hay from the chaff. A party should, in its pleadings, clearly spell out what its case is in order to enable the court be able to clearly identify all the issues between the parties and pronounce itself on them. The Applicants in their draft defence and application did not indicate the agreed disbursement

date for any of the options. What is more, Part B of the 2nd 30 Schedule provides utilization conditions for each of the options.

| OPTION | UTILISATION CONDITIONS |

|-----|-----|

| STL Facility | A written request in the bank's standard |

| | form two business days prior to the business |

| | day on which the funds are required, stating |

|-----|-----|

| | the amount of the drawing, the interest |

| | period required and giving instructions for |

| | payment of funds |

| BGI Facility | (a)
Duly completed written application |

| | on the Bank's standard form and any |

| | other document that the bank may |

| | require from time to time |

| | (b)
All information in connection with |

| | the relevant obligation required by |

| | the bank. |

| | (c)
The format of the obligation to be |

| | issued,
in
form
and
substance |

| | satisfactory to the bank. |

| LC Facility | (a)
A duly completed written application |

| | on the Bank's standard form and any |

| | other document that the bank may |

| | require from time to time |

| | (b)
All information in connection with |

| | the relevant obligation required by |

| | the bank |

| | (c)
The format of the obligation to be |

| | issued,
in
form
and
substance |

| | satisfactory to the bank. |

| | (d)
The
MOF
Facility
will
be
used |

| | interchangeably. |

| | (e)
The
bank
will
finance
70%
of |

| | proforma invoices/ call for orders to |

| | purchase supplies for the contracts. |

5 From the foregoing, the disbursement of the funds depended on the Applicants making an application to exercise the option needed which would then be processed by the Respondent.

This is what is usually called a utilization request. It must be noted that there is a difference between what I would call "provision" facilities and "access" facilities. A provision facility is 10 where the facility is disbursed either at once or in tranches as soon as the execution of the agreement/securitization process is complete. Usually in these transactions, the customer does not need to do more before the borrowed sums are credited on their account. This is different from what I call access facilities where the bank makes available a set of resources which the customer must request utilization from over the course of a period of time. While

- 15 the bank makes available these resources, the facility documents usually have a procedure for one to access these funds, often on a rolling basis. In this transaction, the conclusion of the facility transaction gave the 1st Applicant access to a pool of resources which they could tap into for their purposes if they met the procedure indicated above. In such circumstances, the Applicant in their pleadings ought to demonstrate that they complied with the above
- 20 procedure agreed on by the parties and the Respondent did not cause disbursement of the funds and is therefore in breach of the agreement.

The Applicants have neither alleged that they made utilization requests which were not processed or processed in time and neither have they presented such utilization requests.

Moreover, the Applicants having contended that the Respondent was obligated to pay suppliers have not adduced a shred of correspondence on its face showing this delay. In the circumstances, I find that this head of defence does not raise triable issues warranting the grant of leave to appear and defend.

Interest

The Applicants allege that the Respondent's summary suit claims a different interest rate than was contractually agreed. First, page 2 of the facility agreement which was annexed to the affidavit in support clearly provides that the interest rate on the facility is 2% above base

35 rate which was indicated to be 16.5%, which would bring the interest calculation to 18.5%.

5 This document was adduced by the Applicants as the facility letter between the 1st Applicant and the Respondent. This shows that this claim is clearly not true.

What is more, the Applicants did not deny that the 1st Applicant, represented by the rest of the Applicants signed a settlement agreement which recognized the 1st Applicant's indebtedness as to UGX 302,577,054. In the agreement, the Respondent and the first Applicant agreed that the above-mentioned outstanding amount would be paid by the 1st Applicant in three equal installments of UGX 100,859,018 on every 25th day of the month effective 25 October 2023 until 25 December 2023. In my considered view, and having reviewed the pleadings, it appears that the summary suit is aimed at recovering the sums 15 acknowledged as due and owing, together with interest, indicated in this settlement agreement. The question of interest becomes a little moot since the sum due and owing was clearly indicated in the settlement agreement as well as the applicable rate of interest.

Accordingly, as the question of the applicable interest rate has no bearing on the dispute, the 20 sums sought to be recovered having already been ascertained and clearly acknowledged in the settlement agreement, I take the view that this ground of defence does not raise a triable issue.

Even then, the Applicants did not dispute that the settlement agreement executed by the 25 parties is not accurate as to the computation of the indebtedness it reflected therein. In my view, the Applicant is estopped from asserting otherwise. In **Ismail v Polish Ocean Liners (1976) 1 ALL ER 902, 907** the appellant contended that the respondent was estopped from asserting that mode of packing potatoes by the appellant freight company caused them to rot thereby occasioning loss to the respondent hirer. Lord Denning held that where a man has

30 led another to believe that a particular state of affairs is settled and correct, he will not be allowed to depart therefrom and assert that they were erroneous when it would be unjust or unequitable for him to do so. The Applicants having not disputed the indebtedness calculation in the settlement agreement, they cannot be heard to raise those same objections now when they represented that the figure in the agreement mentioned above was due and 5 been pleaded herein. I therefore find that this application does not raise a triable issue on this head of defence.

Guarantee

Section 71 of the Contracts Act, 2010 provides thus

10 "(1) The liability of a guarantor shall be to the extent to which a principal debtor is liable, unless otherwise provided by a contract.

(2) For the purpose of this section the liability of a guarantor takes effect upon default by the principal debtor."

- 15 A guarantee is a contractual agreement to make payment of sums due and owing in the event of default by the principal borrower. The Guarantee is a separate security from any of other securities that may have been provided and is enforceable if there is a default by the principal borrower (in this case, it is common ground that the principal borrower SAPL has defaulted). In the event of a default, unless there is a contrary provision of law, a mortgagee is entitled
- 20 to pursue all securities available simultaneously. The mortgagee does not need to first attempt recovery or fail to recover as against the principal borrower for them to pursue the guarantor(s). See **Barclays Bank of Uganda v Jing Hong & Guo Odong HCCS 35/2009, Moschi V Lep Air Services and Ors [1973] AC 345, Paul Kasagga and Another v Barclays Bank (u) Ltd HCMA 0113/2008, Uganda Finance Trust Limited v Alloys Muhumuza & 25 Anor HCCA 111/2015**

It is not disputed between the parties that there isn't a separate document expressed as a contract of guarantee as distinct from the facility documents on record. For the Respondent, it was contended that the third party acknowledgement and undertaking constitutes an agreement of guarantee. As noted above, the Applicants affixed the facility agreement to their affidavit in support. Page 1 of the agreement names them as guarantors and their signatures

- are affixed thereon. On page 7, the 2nd and 3rd Applicants give an undertaking as guarantors acknowledge that the facility agreement may be modified and agree to create such charge or mortgage as may be required. Further, at the execution page of the facility agreement, the 2nd
- 35 and 3rd Respondent signed the facility agreement as both directors of the 1st Applicant and
- 5 guarantors. The Applicants did not refute receiving the demand letter of 24 April 2023 where the Respondent made a demand on them as guarantors. Still, nowhere in the email correspondences adduced by the Respondent (which were not denied by the Applicants) do the 2nd and 3rd Applicants raise an objection to being classified as guarantors.
- 10 In the present case, the facility agreements are not disputed by the parties. Equally so, no allegations of misrepresentation or mistake are raised in violation of the agreement. The court's task is to ascertain the intention of the parties by examining the words they used and giving them their ordinary meaning in their contractual context. It must start with what it is given by the parties themselves when it is conducting this exercise. Effect is to be given to
- 15 every word, so far as possible, in the order in which they appear in the clause in question. Words should not be added which are not there, and words which are there should not be changed, taken out or moved from the place in the clause where they have been put by the parties. It may be necessary to do some of these things at a later stage to make sense of the language. But this should not be done until it has become clear that the language the parties

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