

UGANDA / JUDGMENT

Nabiteme v Tropical Bank Ltd (Miscellaneous Application No. 1059 of 2019) [2022] UGCommC 53 (29 July 2022) [2022] UGCommC 53

COURT

Commercial Court of Uganda

BEFORE

Rwakakooko, J

CASE / FILE NUMBER

Miscellaneous Application No. 1059 of 2019

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION MISC. APPLICATION NO. 1059 OF 2019 (Arising from Civil
Suit No. 890 of 2019)

NABITEME HABIIBAH LUKYAMUZI APPLICANT

VERSUS

TROPICAL BANK LIMITED RESPONDENT

BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO

RULING

Introduction

This application was brought by Notice of Motion under Section 98 of the Civil Procedure Act, Cap 71, Order 36 Rules 3 & 4, Order 52 Rules 1,2 & 3 of the Civil Procedure Rules, SI 71-1 for orders that:

- a) This Honourable Court be pleased to grant the Applicant unconditional leave to appear and defend Civil Suit No. 890 of 2019.
- b) That costs of this application be provided for.

Background

The Respondent sued the Applicant by summary procedure in Civil Suit No. 890 of 2019 (the main suit) for recovery of a loan outstanding balance of Ugx. 50,054,186/= plus interest of 25% per annum on the outstanding amount from the date default until payment in full, and costs of the suit. Upon being served with the summons, the Applicant filed this application seeking leave to appear and defend the main suit.

The application as supported by the Applicant's affidavit in support is based on the following grounds. That the Applicant has a plausible defense to the main suit. That the main suit raises the following triable issues; that is whether or not the Applicant is liable to pay the sum claimed in the plaint in light of a compromise agreement between the Respondent and the Applicant's employer (Africa Travel Ltd). That the sum claimed in the main suit is premised in illegalities and misrepresentations deliberately designed by the Respondent. And lastly that the amounts of money claimed by the Respondent in the main suit

are based on miscomputation of the original sum and much of the money paid by the Applicant has not been included.

The Respondent's Head of Legal and Acting Company Secretary, Bamweyana Asuman swore an affidavit in reply stating the following. That the Applicant admits to having received the salary loan and defaulting on the same. He stated that the Compromise Agreement relied upon by the Applicant was not executed by any known officer of the Respondent bank, was not sealed or witnessed. Additionally, that the Compromise Agreement makes no reference to the Applicant anyway, and therefore the Applicant cannot make a claim under it. He maintained that the Applicant is indebted to the Respondent to the tune claimed in the main suit.

Representation

At the hearing, the Applicant was represented by Nakiito Fatuma, while Dennis Kyewalabye appeared for the Respondent. Parties were ordered to file written submissions per set timelines, with the last submissions (i.e. submissions in rejoinder, if any) to be filed and served on 24th June, 2022. Neither party has filed submissions per the court order. As such, this application shall be determined based on the pleadings.

Resolution

Issue: Whether the Applicant should be granted unconditional leave to appear and defend Civil Suit No. 890 of 2019

Order 36 Rule 3(1) of the Civil Procedure Rules provides:

- (1) Upon the filing of an endorsed plaint and an affidavit as is provided in rule 2 of this Order, the court shall cause to be served upon the defendant a summons in Form 4 of Appendix A of these Rules, or in such other form as may be prescribed, and the defendant shall not appear and defend the suit except upon applying for and obtaining leave from the court.

Order 36 Rule 4 of the Civil Procedure Rules also states:

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. 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.

The Court of Appeal in **Kotecha -v- Mohammed** [2002] ¹ EA 112 explained the above provisions thus:

"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; 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 reasonable grounds of a bonafide defence." (Underlined for Emphasis.)

The law as reiterated above shows that leave to appear and defend a suit may be granted where the applicant shows that he or she has a good defense on the merits, or that a difficult point of law is involved, or that there is a dispute 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 defense. See also **Africa One Logistics Ltd -v- Kazi Food Logistics (U) Ltd, Mise. Application No.964 of 2019.**

A triable issue raised must not be a mere denial and the defense raised must not be a sham defense intended to delay the Plaintiff from recovering money due to him or her. This is according to **Begumisa George -v- East African Development Bank Mise. Application No.451 of 2010.**

This application raises a number of triable issues of law and fact to be determined by this court. First, the Applicant denied the sums claimed by the Respondent in the main suit. He contended in paragraphs 16,17 & 18 that the sums claimed in the summary suit do not reflect the payments the Applicant made for one and a half years. He stated that there is need for the parties to balance the books to ascertain the exact amount demanded, if any. The Respondent rebutted this in paragraph 9 of the Affidavit in Reply by attaching a bank statement giving the same sums due as indicated in the specially endorsed plaint and annexure B thereto. The Applicant disputes the

sums arrived at from the bank statement marked Annexure B to the specially endorsed plaint. There still exists a question of fact as to the exact sums owed by the Applicant, if any.

There are more triable issues of law and fact concerning the Compromise Agreement dated 18th January, 2019, marked as Annexure A to the affidavit in support of the application. This agreement is purportedly between Tropical Bank Limited and Africa Travel Limited. The Respondent however in paragraph 7 of the affidavit in reply stated that the agreement was not executed by any known

officer of the bank, and was not sealed or witnessed. Therefore, there is a question of law and fact whether the Respondent bank executed the agreement.

The application also raises a question of fact as to whether the Applicant is one of the ten employees of Africa Travel Limited mentioned in the recitals of the agreement. The Respondent contended that the Applicant was not a party to the agreement and therefore cannot benefit from it. See paragraph 8 of the affidavit in reply. However, the Applicant contended in paragraph 6 of his affidavit in support of the application that he is among the ten employees of Africa Travel Limited, and per paragraph 11 of the same affidavit, Africa Travel Limited took over his loan obligation. This question of fact is best satisfied by evidence at a hearing giving insight into the background to the Compromise Agreement.

These triable issues raised give birth to a plausible defense. In the premises, the issue is answered in the positive.

Conclusion

- 1. The Applicant is granted unconditional leave to appear and defend Civil Suit No. 890 of 2019.
- 2. The Applicant is ordered to file a Written Statement of Defence in Civil Suit No. 890 of 2019 within fifteen (15) days from date of this Ruling.
- 3. Costs shall be abide the outcome of the main suit.

^I so order.

ane Rwakakooko JUDGE 29/07/2022

This Ruling was delivered on the

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