

UGANDA / JUDGMENT

Wasirwa v Jonakee Holdings Ltd (Miscellaneous Application 2410 of 2023) [2023] UGCommC 144 (15 December 2023) [2023] UGCommC 144

COURT

Commercial Court of Uganda

BEFORE

Tumusiime Rubagumya, J

CASE / FILE NUMBER

Miscellaneous Application 2410 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION) MISC. APPLICATION NO. 2410 OF 2023 (ARISING OUT OF
CIVIL SUIT NO.1035 OF 2023)

WASIRWA EMMYAPPLICANT/DEFENDANT

VERSUS

JONAKEE HOLDINGS LTD..... RESPONDENT/PLAINTIFF

BEFORE: HON. LADY JUSTICE PATIENCE T. E. RUBAGUMYA

RULING

Introduction

This application was brought by Notice of Motion under Section 98 of the Civil Procedure Act, Cap. 71, Order 36 Rules 3 and 4 and Order 52 Rules 1 and 3 of the Civil Procedure Rules SI 71-1, seeking the following orders:

- 1. The Applicant be granted unconditional leave to appear and defend Civil Suit No. 1035 of 2023.
- 2. Costs of this application be provided for.

Background

The background of the application is detailed in the affidavit in support by the Applicant and summarized below:

- 1. That the Applicant is not indebted to the Respondent in a sum of UGX 89,929,740/= (Uganda Shillings Eighty-Nine Million Nine Hundred Twenty-Nine Thousand Seven Hundred Forty Only).
- 2. That the Respondent did not justify the accrual of the amount of UGX 89,929,740/= (Uganda Shillings Eighty-Nine Million Nine Hundred Twenty-Nine Thousand Seven Hundred Forty Only).
- 3. That the Applicant fully paid the Respondent the loan of UGX 50,000,000/= (Uganda Shillings Fifty Million Only) and is no longer indebted to the Respondent.
- 4. That the Applicant and the Respondent have never agreed on the interest of 8% per month as alleged by the Respondent.
- 5. That the Applicant has a good and meritorious defence to the suit with a high likelihood of success.
- 6. That the Respondent's case against the Applicant is improperly before this Court.
- 7. That there are triable issues of fact and law for the determination by this Court to wit;
 - i. Whether the Applicant is indebted to the Respondent to the tune of UGX. 89,929,740/= (Uganda Shillings Eighty-Nine Million Nine Hundred Twenty-Nine Thousand Seven Hundred Forty Only).
 - ii. Whether the Respondent is entitled to monthly interest of 8% on the principal sum as claimed in the Plaint.
 - iii. Whether the Respondent's suit is improperly before this Court.
 - iv. Whether the Respondent is entitled to the reliefs claimed in the Plaint.

In reply, the Respondent through Mr. Jonan Kandwanaho, its Director, opposed the application contending that:

- 1. The Applicant borrowed and received a sum of UGX 50,000,000/= (Uganda Shillings Fifty Million Only) from the Respondent for business purposes.
- 2. The Applicant and the Respondent entered into a loan agreement that explicitly stipulated an 8% monthly interest rate and a surcharge of 0.5% on the outstanding loan amount should the loan remain unpaid after its maturity date.

- 3. The loan was secured by the property situated in Block 266, Plot 212 in Seguku. The Applicant and the Respondent executed a mortgage deed pertaining to this loan transaction as evidenced by annexure "R2".
- 4. From the time of the loan disbursement to the present date, the Applicant has only repaid a total of UGX 8,000,000/= (Uganda Shillings Eight Million Only) and the payment is stated in annexure "R3".
- 5. The assertions made in paragraph 7 of the Applicant's affidavit are intentionally false. The Applicant was provided with an acknowledgement/receipt for the deposit he made, as evidenced by annexure "C" to his affidavit. No other deposit was made for which a receipt or acknowledgement was denied.
- 6. All the terms of the loan agreement and mortgage were diligently reviewed, comprehended, and willingly signed by the Applicant.
- 7. The Applicant has always been cognizant of the UGX 50,000,000/= loan amount. The accrued interest on the loan at the time of maturity was UGX 14,894,615.87/= and penalty that had accumulated as of 19th July 2023, was UGX 33,035,124/=. Therefore, the total amount due was UGX 97,929,740.01/= minus UGX 8,000,000/= paid by the Applicant, leaving an outstanding balance of UGX 89,929,740.01/=.
- 8. The Applicant's affidavit supporting the notice of motion, along with the entire application and its attachments, predominantly consist of denials and failure to articulate credible issues for trial or a plausible defence against the claim laid out in the specially endorsed plaint.

Representation

The Applicant was represented by M/S MBS Advocates and the Respondent was represented by Counsel Blair Atwebembeire of M/S Blair & Co. Advocates.

Both parties were directed to file their written submissions by 7th December 2023. Counsel for the Respondent filed the submissions on 4th December 2023 while Counsel for the Applicant filed submissions on 14th December 2023 which was after the timelines given by Court. I would like to urge Counsel for the Applicant to always comply with directives of Court going forward because they affect the timelines set by Court to facilitate quick disposal of matters and Court directives should not be issued in vain. However, in the interest of justice I will proceed to consider the late submissions.

Issues for Determination

In accordance with **Order 15 Rule 3 of the Civil Procedure Rules SI**

71-1, this Court rephrased the issues to read as below:

- 1. Whether the Applicant raised sufficient grounds to warrant the grant of leave to appear and defend the suit?
- 2. What remedies are available to the parties?

Applicant's submissions

As already noted above, the submissions were filed late. I will however consider the same since the issue that was canvassed in the submissions is mainly on the interest rate component and the gist of the same was raised in the Affidavit in support of the application. Therefore, it does not prejudice the case of the Respondent who had filed their submissions earlier.

Counsel for the Applicant submitted that the said interest of 8% per month as claimed by the Respondent who is a money lender is illegal.

Counsel stated that money lending contracts are governed by the Tier 4 Microfinance Institutions and Money Lenders Act 2016 wherein Section 85 (2) (c) provides for the interest rate of a money lending contract to be stated at a given percentage per year and Section 90 of the Act provides for the offence of charging excessive interest. He submitted that in the instant case, the money lender/Respondent claims an interest rate of 8% per month as per his impugned loan agreement.

Counsel further stated that an application of Section 85 (2) (c) of the aforementioned Act proves that the Respondent wants to charge the Applicant an exorbitant rate of 96% per annum, an interest rate that is excessive and/or illegal. Counsel submitted that Court cannot sanction any/such an illegality once it has been brought to the Court's attention and such illegality overrides any questions and admission as seen in the case of **Makula International Ltd Vs. His Eminence Cardinal Nsubuga and Another [1982] HCB II.**

Counsel further relied on the case of **Roko Construction Co. Ltd Vs Ruhweza Transportation & Construction Ltd HCMA 831 of 2021** where Court cited with approval the cases of **Arjabu Kasule Vs F. T Kawesa [1957] EA* and *E. M Cornwell & Co. Ltd V Shantaguari Dahyabhai Desai (1941) 6 ULR 103** where it was held that;

*"the position of the law therefore is that where a claim including interest is brought under summary procedure, in a situation where the document sued upon includes interest, such claim of interest constitutes a triable issue".**

Respondent's submissions

Counsel contended that under **Order 36 Rule 4 of the Civil Procedure Rules**, unconditional leave to appear and defend a suit will be granted only when the Applicant demonstrates a good defence or reasonable grounds for a bonafide defence. That such a defence is not a mere façade or a dilatory tactic.

Counsel argued that the application before this Court fails to disclose any substantive triable issues and does not present a credible defence against the Respondent's claim and that mere denials without accompanying evidence, do not constitute a valid defence and the Applicant's primary reliance on denials without attaching compelling evidence is insufficient to meet the legal standard.

Counsel relied on the case of **Begumisa George Vs East African Development Bank Misc. Application No.451 of 2010**, where Court held that;

> *"... the position of the law in Uganda is that an applicant who comes to Court seeking for leave to defend a suit under Order 36 CPR must show that he/she has a good defence on the merits or that there are circumstances showing reasonable grounds or bonafide defence. The defence raised must not be a sham"*.

Counsel argued that in his intended Written Statement of Defence, the Applicant asserts that proof of loan repayment will be presented during the trial. The absence of this evidence at the current stage prompts questions regarding its credibility and whether it is being fabricated. Counsel stated that the Court should at this stage be satisfied that the

defence is genuine and not a sham. Furthermore, that the Applicant appears to request the Court to grant him leave without a legitimate basis. Counsel stated that while it is true that the Court does not delve into the merits of the case at this stage, it must be satisfied that a plausible defence exists. To establish this, the Court needs to assess the available evidence and ensure that the defence is not a sham. The defence must be articulated with sufficient specificity to appear genuine.

Counsel argued that several inconsistencies in the application cast doubt on the legitimacy of the defence. Notably, the Applicant's denial of the 8% and 0.5% penalty fees is contradicted by their signature on the agreement and acceptance letter containing these terms as evidenced by the Respondent's annexure "R1" and the Applicant's own attachment annexure "B" and that this deliberate falsehood suggests an attempt to gain more time through an untruthful defence. Counsel further submitted that the current application lacks good faith and appears to be an effort to unduly prolong the proceedings to the detriment of the Respondent. The Applicant's acknowledgement of obtaining a loan, coupled with the admission of partial payment, is inconsistent with the unsubstantiated claim of being denied receipts for other deposits. Notably, the receipts attached by the Applicant indicate that repayment was made through online transfers, which implies, funds were transferred from the Applicant's account to the Respondent's account, yet no single proof of these transfers has been provided.

Order 36 of the Civil Procedure Rules as stated in the case of **Adina Zola and Another, NNO Vs Ralli Brothers Limited and Anor [1969] EACA 4** has been re-echoed by many Judges in Uganda that;

" *...Order 35 (an equivalent of our Order 36 of the CPR) is intended to enable a Plaintiff with a liquidated claim, to which there is clearly no good defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the defendants. If the Judge to whom the application is made considers that there is any reasonable ground of defence to the claim, the Plaintiff is not entitled to summary judgment... Normally a Defendant who wishes to resist the entry of summary judgment should place evidence by way of affidavit before the Judge showing some reasonable grounds of evidence*".

Counsel submitted that the evidence as presented by the Applicant does not show existence of a good defence. Counsel stated that Courts have held that leave to appear and defend will not be given merely because there are several allegations of fact or law made in the Defendant's affidavit.

Counsel prayed that in the event that Court is inclined to grant the application, conditional leave be granted, requiring the Applicant to deposit into Court an amount equivalent to the claim as security in accordance with Order 36 rule 8 of the Civil Procedure Rules. Counsel reiterated that there is no valid defence against the claim and prayed for the dismissal of the application.

Analysis and Determination

Issue 1: Whether the Applicant has raised sufficient grounds to warrant the grant of leave to appear and defend the suit?

I have considered the evidence of the parties adduced in their affidavits, the submissions and the legal authorities cited to find as hereunder:

Order 36 rule 3 (1) of the Civil Procedure Rules, provides that a Defendant served with summons, issued upon the filing of an endorsed plaint and affidavit under **Rule 2** of this Order endorsed "Summary procedure", shall not appear and defend the suit except upon applying for, and obtaining leave from Court.

This law is to the effect that an Applicant/Defendant must show by affidavit or otherwise that there is a bona fide triable issue of fact or law.

The said defence should not be stated in a manner that appears to be needlessly bald, vague or sketchy. If the defence is based upon facts, in the sense that the material facts alleged by the Plaintiff in the Plaint are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of one party or the other.

On the other hand, a triable issue is one capable of being resolved through a legal trial i.e., a matter that is subject or liable to judicial examination in Court. It has also been defined as an issue that only arises when a material proposition of law or fact is affirmed by one party and denied by the other (*see Jamil Ssenyonjo Vs Jonathan Bunjo, H. C. Civil Suit No. 180 of 2012*).

Therefore, where the Applicant raises a good defence, the Plaintiff is barred from obtaining summary judgment. To that end, **Order 36 rule 7 of the Civil Procedure Rules** provides as follows;

"If it appears to the court that any Defendant has a good defence to or ought to be permitted to appear and defend the* *suit, and that any other Defendant has not such defence and ought to be permitted to defend, the former may be permitted to appear and defend and the Plaintiff shall be entitled to issue a decree against the latter..."*

In the case of *Kotecha Vs Adam Mohammed [2002]1 EA 112* it was held that where a suit was brought under summary procedure on a specially endorsed plaint, the Defendant shall be granted leave to appear and defend if he is able to show that he has a good defence on 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 bona fide defence.

In the instant case, the Respondent instituted Civil Suit No.1035 of 2023 against the Applicant for recovery of UGX 89,929,740/= (Uganda Shillings Eighty-Nine Million Nine Hundred Twenty-Nine Thousand Seven Hundred Forty Only), resulting from a credit facility advanced to the Applicant of UGX 50,000, 000/= (Uganda Shillings Fifty Million Only) on 5th October 2022. The Applicant does not dispute the credit facility but the amount sought by the Respondent.

He disputes the said amount contending that he serviced the credit facility per the agreement and that he is not indebted to the Respondent and that he never agreed to the interest of 8% per month as alleged by the Respondent. The Applicant annexed a copy of a deposit slip as "C". It is dated 19th March 2023, for an amount of UGX 8,000,000/=.

On the other hand, Respondent contends that from the time of the loan disbursement, the Applicant has only paid UGX 8,000,000/= as

evidenced by annexure "C". The Applicant entered into a loan agreement that explicitly stipulated an 8% monthly interest rate and a surcharge of 0.5 % on the outstanding loan amount should the loan remain unpaid after its maturity date. In evidence, he presented a copy of the loan agreement marked as annexure "R1" to the affidavit in support.

As provided for under **Order 36 Rule 2 (a) of the Civil Procedure Rules**, and echoed in the case of *Sterling Travel and Tour Services Ltd Vs Millennium Travel Tours Services Ltd HCMA No.116 of 2013,* a claim can only be brought by summary suit only if it is a liquidated demand founded on a written contract or acknowledgement between the parties or at least by the Applicant/Defendant. A liquidated amount is defined by **Black's Law Dictionary 8th Edition** as a figure readily computed, based on an agreement's term.

The major principle espoused above and as laid out in the case of *Twentsche Overseas Trading Co. Ltd Vs Bombay Garage [1958] EA 741*, is that summary procedure is to be resorted to in clear and straightforward cases where the demand is liquidated and there are no issues for determination by Court except for the grant of the claim.

I am mindful that in such an application, Court is not to delve into the merits of the suit. The Applicant disputes the consent of 8% interest rate per month however in the absence of any evidence to the contrary, the presence of the signatures on the agreement would point to consent and this is not a triable issue. However, the Applicant under paragraph 8 of the affidavit in support of the application states that the interest charged of 8% percent per month was exorbitant. **Section 26 (1) of the Civil Procedure Act** stipulates that;

"Where an agreement for the payment of interest is sought to be enforced, and the Court is of opinion that the rate agreed to be paid is harsh and unconscionable and ought not to be enforced by legal process, the Court may give Judgment for the payment of interest at such rate as it may think just".

The issue of interest in my view raises a triable issue that would require Court to examine the circumstances, the relevant laws like the Civil Procedure Act and the Tier 4 Microfinance Institutions and Money Lenders Act 2016 and determine whether or not the interest rate of 8% per month is harsh and unconscionable.

Issue No. 1 is answered in affirmative.

Issue No.2: What remedies are available to the parties?

According to the case of *Churajilal & Co. Vs A. H Adam (1950) 17 EACA 92*, the East African Court of Appeal held that a Defendant who has a stable and arguable defence must be allowed to state and argue before Court.

In the premises, I find that the Applicant has raised a triable issue in relation to the interest which merits the grant of this application. As such he is entitled to unconditional leave to appear and defend the suit and it is accordingly granted with the following orders:

- 1. The Applicant is hereby granted unconditional leave to appear and defend **Civil Suit No.1035 of 2023**.
- 2. The Applicant is ordered to file his Written Statement of Defence within 14 days from the date of this order.
- 3. Costs of this application shall be in the cause.

I so order.

Dated, signed and delivered electronically via ECCMIS this **15th day of December, 2023**.

Patience T. E. Rubagumya **JUDGE** 15/12/2023

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