

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO. 688 OF 2018
(ARISING FROM CIVIL SUIT NO. 653 OF 2018)**

5 **KAMAGERO ERIA ISABIRYE.....APPLICANT**

VS

BARCLAYS BANK UGANDA LTD.....RESPONDENT

BEFORE HON. MR. JUSTICE RICHARD WABWIRE WEJULI

RULING

10 The Applicant filed this Application under Order 36 rule 4 and Order 52 rule 1 and 2 of the Civil Procedure Rules S.I 71-1 seeking unconditional leave to appear and defend in Civil Suit No. 653 of 2018 and for costs of the Application to be provided for.

15 The Application is supported by the affidavit of Kamagero Eria Isabirye the Applicant in which the grounds of the Application are spelt out, but briefly are;

- i. The Applicant acquired from the Respondents, a salary insured loan of UGX. 80,000,000/ for which he says he has always made payments as stipulated under the loan agreement.
- 20 ii. That the insurance company is supposed to pay the alleged outstanding balance if any.
- iii. That the Applicant is not indebted at all to the Respondent as alleged.

iv. That the Applicant has a valid defence to the Plaintiff's claim and that it is just and equitable that the Applicant be granted unconditional leave to appear and defend the suit.

In the Affidavit in Reply, Mugoya Sylvia the Respondent's Agency Manager for collection and Risk Management of the Respondent deposes that the Applicant applied and was granted a personal loan of Ugshs. 80,000,000/ by the Respondent through an offer letter dated 19th May, 2016. The loan was to be repaid in 60 monthly installments of Ugshs. 2,490,000/ from the date of disbursement at an interest rate of 28% per annum. However, the Applicant defaulted on the loan repayments and the outstanding sum as at 7th July, 2018 was Ugshs. 70,198,058/. She further deponed that efforts to obtain repayment have been futile.

The Applicant is represented by Counsel Muhumuza Rogers while the Respondent is represented by Counsel Owomugisha Immaculate. Both Counsel addressed the court by written submissions.

Submissions of the Applicant's Counsel

Applicants Counsel drew the courts attention to the principles governing the grant of leave to appear and defend. He cited the case of **Maluku Interglobal Trade Agency Ltd versus Bank Of Uganda [1985] HCB 65** in which Justice Odoki, as he then was, held that before leave to appear and defend is granted the defendant must show by affidavit or otherwise that there is a bona fide triable issue of fact or law. That when there is a reasonable ground of defense to the claim, the plaintiff is not entitled to summary judgment. The Defendant is not bound to show a good defense on the merits but should satisfy court that there was an issue or question

in dispute which ought to be tried and the court should not enter upon a trial of the issues disclosed at this stage.

That the Applicant is not bound at this stage to show that he had a good defence on the merits of the case, but ought to satisfy court that there
50 was, prima facie, a triable issue in dispute which the court ought to determine between the parties (**Abubakar Kato Kasule Versus Tomson Muhwezi [1992-93] HCB 212**). That in all Applications for leave to appear and defend under Order 36 rules 3 & 4, the court must study the grounds raised and ascertain whether they raise a real issue and not a sham one.

55 Counsel submitted that in the instant case the Applicant has raised a number of grounds in his Affidavit in Support of his Application for leave to appear and defend. That specifically paragraphs 6 and 7 raise a triable issue between the Plaintiff and Defendant which requires to be adjudicated upon by the court in order for justice to prevail. In those paragraphs 6 and 7, the Applicant does not deny that a contract
60 was executed between the parties for a salary loan of UGX 80,000,000 (Uganda Shillings Eighty Million Only) which the Applicant duly insured as well, the Applicant lost his job and that all efforts to secure another job have been futile, and that since he obtained an insured salary loan with the policy covering the loan in the event of loss of employment, it is the insurance company that should clear any outstanding
65 balance on the loan.

He cited the case of **Lucy Katuramu Vs Virunga Finances Limited Miscellaneous Application No. 104 of 2016** to articulate the principle that mere denial of liability is enough to secure grant of leave to appear and defend by the Applicant.

He prayed that court judiciously exercises its discretion and grants the Applicant
70 unconditional leave to appear and defend himself against the Respondent's claim
in the interest of justice and for the reasons stated in his submissions.

Submissions of the Respondent's Counsel

Respondents Counsel also cited Order 36 r 3 of the Civil Procedure Rules and the
case of **Maluku Interglobal Trade Agency Ltd Versus Bank of Uganda [1985] HCB**
75 **65** to draw the courts attention to the principles governing the grant of leave to
appear and defend. He contended that the established law is that before leave to
appear and defend can be granted the Applicant must prove to court that there is
a question in dispute which ought to be tried. This was upheld in the case of
Jonathan Bunjo Vs KCB (U) Ltd Misc. Application No.174 of 2014 by Justice Wilson
80 Masalu Musene.

*"Before leave to appear and defend is granted the defendant must show by affidavit
or otherwise that there is a bona fide triable issue of fact or law.... The defendant is
not bound to show a good defence on the merits but should satisfy the court that
there was an issue or question in dispute which ought to be tried and the court
85 should not enter upon the trial of the issues disclosed at this stage."*

He argued that in the matter at hand the Applicant does not in any way raise a bona
fide triable issue of law or fact.

He also cited Justice Flavia Anglin's decision **Marsenne (U) Ltd and Ors V Stanbic
Bank (U) Ltd Miscellaneous Application No. 482 of 2014**, where she stated that;
90 *"the Applicant must show that they have a good defence on the merits; 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 bona fide defence.”

95 Counsel contended that the Applicant doesn't deny receiving the personal loan from the Respondent. He also doesn't dispute the updated financial statement attached to the Affidavit of the Respondent; he however states that due to his job loss, he is unable to clear his loan and yet his loan was not granted premised on his job sustainability. The assumption that since he lost his job then he should be excused from paying a personal loan should not be condoned by Court.

100 He argued that whereas In the case of **Maluku Interglobal Trade Agency Vs. Bank of Uganda [1985] HCB 65 Court held that** where there is a real dispute as to the amount claimed which requires taking an audit to determine, the unconditional leave to appear and defend the suit has to be granted, in this case the Applicant neither denies the outstanding Loan nor admits to payment of any given sum but
105 rather states the he isn't sure of the amount owed. That the Applicant has therefore failed to show that there are bona fide triable issues of fact or law that would warrant granting this Application. He prayed that this Application should fail and be dismissed with costs as it lacks merit.

Submissions in rejoinder

110 In rejoinder, the Applicant's Counsel reiterated his submissions and clarified that the Applicant denies knowledge of how much is outstanding and further that under paragraph 9 of his affidavit in support, he also indicates that all efforts to do a reconciliation have been futile. This alone is a clear case for this Hon. Court to grant leave.

115 Ruling

I have carefully considered the pleadings on the record of this Application and that of the main suit and carefully perused the submissions filed together with the authorities referred to by both counsel.

In my opinion the singular issue whose resolution would determine the matter is;
120 ***whether the Application raises triable issues to warrant the grant of leave to appear and defend the main suit***

Order 36 Rules 3 and 4 of the Civil Procedure Rules, avail an opportunity for a defendant against whom a summary suit has been brought under order 36 rule 2 of the Civil Procedure Rules to apply to court for leave to defend such a suit,
125 provided that they must demonstrate that they have a bona fide triable issue of fact or law or both.

This principle that sets the basis for consideration of an Application for leave to appear and defend in a summary suit has been long established as stated in the leading case of Makula ***Interglobal Trade Agency Vs Bank of Uganda [1985] HCB***
130 ***65*** which both parties in this case have extensively cited and sought to rely on in arguing their respective cases, that;

*“Before leave to appear and defend is granted, the defendant must show by affidavit or otherwise that there is a bona fide triable issue of fact or law. When there is a reasonable ground of defence to the claim, the defendant is not entitled
135 to summary judgment. The defendant is not bound to show a good defence on the merits but should satisfy the court that there was an issue or question in dispute which ought to be tried and the court shall not enter upon the trial of issues disclosed at this stage.”*

140 In the instant case, whereas the Plaintiff in CS 653/2018 from which the Application
arises seeks to recover Shs 70,198,058/= from the defendants as owing and due
following his (defendants) default in payment of the undisputed loan extended to
him, the Applicant/defendant in para 7 of his affidavit in support of the Application
contended that the loan was an insured salary loan and that consequently the
obligation to clear any outstanding amounts following his loss of employment fell
145 on the insurance company.

Although the Respondents/Plaintiffs in their affidavit in reply do not make any
specific rebuttal of this averment by the Applicant, they maintain their claim
against the defendant and hold him liable for the outstanding loan amount.
In **Corporate Insurance Co. Ltd Vs Nyali Beach Hotel Ltd [1995-1998], EA7.**
150 Whenever a genuine defence, either in fact or law, sufficiently appears, the
Defendant is entitled to unconditional leave to defend. The Defendant is not bound
to show a good defence on the merits. The court should be satisfied that there is
an issue or question in dispute which ought to be tried or that there ought for some
other reason to be a trial (**Odgers' Principles of Pleading and Practice in Civil**
155 **Actions in the High Court of Justice 22nd edition at pages 75 and 76).**

The Applicant/defendant has raised a material issue regarding his liability for the
outstanding amount and the Respondent/Plaintiffs have while insisting on their
claim against the Applicant /defendant have not debunked this denial of liability by
the Applicant thus raising an issue which can only be determined by adducing
160 evidence in a trial on the merits of the case to determine whether the
Applicant/Defendant or another entity, the Insurance Company, is liable for the
outstanding amount on the loan.

The Applicant has attached a copy of his intended written statement of defence, the purpose of which as court held in *In Uganda Commercial Bank Vs Mukoome Agencies [1982] HCB 22*, is to help the Judge make up his mind whether to refuse or grant the Application.

I have looked at it and in his WSD he inter alia pleads that the insurance policy taken out at acquiring the loan covers the salary loan in the event of loss of a job and the insured is unable to proceed with the payment of the same loan. He also contends that the outstanding amount is unknown and would need a reconciliation of records. It is a long established principle that ***where there is a real dispute as to the amount claimed which requires taking an audit to determine, the unconditional leave to appear and defend the suit has to be granted*** (Kotecha Vs. Mohammed)

I find that the defendant raises bona fide triable questions and issues of fact.

His intended Written Statement of Defence goes beyond a general denial and discloses sufficient ground to justify further inquiry, on evidence, into the matter.

In the event the Application succeeds and the Applicant is granted unconditional leave to appear and defend in summary suit CS 653/2018.

The Applicant will file a written statement of defence within 14 days from the date of this Ruling.

The costs of this Application shall abide the outcome of the suit.

I so order.

Ruling delivered in open court this 25th Day of January 2019.

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Richard Wejuli Wabwire

JUDGE