**THE REPUBLIC OF UGANDA,**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**MISCELLANEOUS APPLICATION NO 224 OF 2015**

**(ARISING FROM HCCS NO. 102 OF 2015)**

1. **SIGMA MEP SERVICES (U) LTD}**
2. **HANUMANT KATKAR SHIVRAM}**
3. **AMIT KUMAR BHATTACHAARJI}**
4. **ANITA KATKAR}.......................................................................APPLICANTS**

**VERSUS**

**ABC CAPITAL BANK LTD}.................................................................RESPONDENT**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**RULING**

The Applicants applied for unconditional leave to appear and defend HCCS 102 of 2015 and for costs of the application to be provided for.

The grounds of the application are that the Applicants are not in any way indebted to the Respondent as alleged in the summary plaint; and that if leave to appear and defend is not granted, it would occasion an injustice to the Applicant and finally that it is just and equitable that the application is granted as prayed.

The Applicant further relies on the affidavit in support of the application deposed by the third Applicant Mr Amit Kumar Bhattachaarji, which gives the facts and grounds of the application in greater detail. He deposes that his disposition is made in his own capacity and on behalf of the other Defendants/Applicants. He is also a director of the first Defendant/Applicant and conversant with all the transactions between the Respondent and the other three Applicants. He deposes that they are not indebted to the Respondent as alleged. His co-director Mr Anita Katkar is currently resident in India while Mr Hanumant Katkar Shivram the second Defendant was not involved in the business. He had met to one Mr Kumar socially and Kumar had introduced himself as a bank manager of ABC Capital Bank. The deponent requested him to arrange a loan to start a new project involving the selling of motorbikes from Ndeeba, Kampala in an area which was a key area for selling motorbikes. He visited the Bank Manager in his office and informed him that their loan requirements was Uganda shillings 50,000,000/= only. Secondly he informed the manager of the bank upon being asked that they had no security to offer for the said loan. Secondly he was asked whether he could find a guarantor who had security whereupon he said he had none. Upon getting in touch with the CEO, the deponent was invited into the office of the CEO who introduced himself as Mr Mahendra Singh. He was informed of a special scheme that would help them in getting the loan but it had to be for a larger amount like Uganda shillings 200,000,000/=. From the Uganda shillings 200,000,000/= the Applicant would deposit 100,000,000/= Uganda shillings which would become security for the loan. The deponent said he would think about it and revert.

He kept getting calls from Mr Kumar and they discussed the matter with his co-directors. They subsequently signed a loan agreement on the 29th of May 2013 which indicated that there was a loan facility of Uganda shillings 200,000,000/=. They opened a fixed deposit account with the account number of 0010030000076 where Uganda shillings 100,000,000/= was deposited. Subsequently Applicants realised that the loan repayments exceeded their business expectations and was not supporting monthly repayments for the loan. They discussed the situation with Mr Kumar several times on the phone and Mr Mahendra Singh, the CEO of the Respondent Bank, did not take their calls. Subsequently they learned that Mr Kumar no longer worked with the bank. A new team of officials treated them as normal clients and the communication between the two parties took a turn for the worse. On 30 December 2014 they received a letter from the bank recalling the loan. During that time they were negotiating with another person Mr Navtam Gosai to take over the management of the company. The deponent is of the conviction that the loan of Uganda shillings 200,000,000/= was offered for a short-term for the gain of the officers in question and to the detriment of the business development because the loan facility had the opposite effect on the business and therefore holds the Respondent bank fully responsible. He deposes that at the trial they would be able to demonstrate the issues in greater detail.

In reply Mr Sanya Francis, the Credit Manager of the Respondent deposes that he knows that on the 15th of May 2013, the Applicant voluntarily applied for a loan of Uganda shillings 200,000,000/= from the Respondent according to a copy of the application attached to the affidavit. Following the application, the Respondent granted a loan to the first Applicant who voluntarily and willingly accepted the terms on the 30th of May 2013 as reflected in the letter of offer a copy of which was also attached. The Respondent disbursed a loan of Uganda shillings 200,000,000/= to the Applicant and the repayment of the loan was among other things secured by personal guarantees of the second, third and fourth Applicants and a lien by the Respondent on the first Applicant’s fixed deposit ‘reserve’ of Uganda shillings 100,000,000/=. Copies of the guarantees were also attached to the affidavit.

The Credit Manager deposes that the first Applicant defaulted on the loan repayment and following the default on 30 August 2014 the first Applicant requested the Respondent to realise its lien on the fixed deposit account to settle part of the outstanding loan amount according to a copy of the request dated 30th of August 2014 attached to the affidavit in reply. On 30 August and 14 the Respondent realised its lien and settled part of the outstanding loan amount to the extent of Uganda shillings 106,385,261/= only leaving a balance of Uganda shillings 81,025,570/= unpaid.

Subsequently regardless of the Respondent several demands, the Applicants refused or failed to settle the outstanding balance. In the circumstances, the Respondent is entitled to recover the outstanding debt from the Applicants according to the loan agreement and on account of the terms of the personal guarantees set out in the summary suit. In the premises and based on the advice of his lawyers the Credit Manager deposes that the application is legally misconceived, frivolous, vexatious and an abuse of court process and was brought by the Applicants in bad faith and to further frustrate the Respondent's efforts to recover its monies. Secondly the application does not raise any triable issue and the Applicants have no plausible defence to the Respondent’s claim in the summary suit and the application ought to be dismissed with costs.

In rejoinder Mr Amit Kumar Bhattachaarji affirmed an affidavit in which he deposes that the loan application was made for a business loan facility and availed working capital to the Applicant’s import business with the projected budget of Uganda shillings 250,000,000/= later revised upward. The project was mainly financed by a loan facility and all business plans of the Applicants were made based on the facility, which fact was known to the Respondent. The Respondents officials irregularly, and against banking procedures and by taking advantage of the ignorance of the Applicants created a fixed deposit account of Uganda shillings 100,000,000/= to which the Applicants were denied access. The Respondent only disbursed Uganda shillings 100,000,000/= and not Uganda shillings 200,000,000/= and the loan is unenforceable to that extent.

Furthermore he deposes that the irregular/illegal creation of a fixed deposit to act as security and the refusal of the Respondent to allow the Applicant access the same had a negative impact on the business of the Applicants causing damage and losses. On 30 August and 15 they wrote to the Respondent requesting access to the funds and explained their plight in the business but were ignored by the Respondent. Consequently the Company of the Applicants could not sustain the business and suffered damages and losses for which the Respondent is liable. The Respondent was charging interest on the Uganda shillings 100,000,000/= in the fixed deposit account yet the Applicant was not utilising it for the intended purpose and the Respondent was also earning interest from it. It was due to the Respondent’s actions that the Applicants have suffered loss of projected profits of over Uganda shillings 400,000,000/= which the Applicant intends to counterclaim against the Respondent.

As far as the question of a lien on the fixed deposit account is concerned, this was not at the disposal of the Applicants and was never realised by the Applicants. He further deposes that there are triable issues which will not only do justice to the Applicants but the whole unsuspecting public against loan sharks. The whole process of granting the loan was not done with a good intention and the Respondent did not come to the court with clean hands. The refusal to release Uganda shillings 100,000,000/= was unfair, done in bad faith, fraudulent, intended to gain advantage of the Applicants and cheat them.

The Applicant is represented by Counsel Nionzima Vienne while the Respondent is represented by Counsel Carol Luwagga. Both Counsels addressed the court in written submissions.

In the written submissions the Applicant’s Counsel submitted that the Respondent filed an action claiming 81,025,570/= Uganda shillings which was outstanding by 31 December 2014, from a loan facility of Uganda shillings 200,000,000/= granted by the Respondent to the first Applicant. The Applicant’s initially applied for a loan of Uganda shillings 50,000,000/= but were then convinced by the Respondent’s officials to take a loan of Uganda shillings 200,000,000/= and were only given access to Uganda shillings 100,000,000/=. The balance of Uganda shillings 100,000,000/= was held in a fixed deposit account as security for the loan.

The Applicant’s Counsel contended that the creation of a fixed deposit account with **Uganda shillings 100,000,000/=** which formed part of the loan was unprecedented and illegal and wholly defeated the purpose of the loan. The Respondent’s affidavit in reply admits that the loan was granted for the purpose of the Applicant’s trade in motorbikes and was to act as the working capital of the Applicants. The Respondent’s refusal to allow the Applicant access to Uganda shillings 100,000,000/= and the creation of a fixed deposit account was illegal out of the loan was fraudulent and an embarrassment. It raises certain questions namely:

Can a loan facility act as security for the same loan? Counsel submitted that the answer was no. In the premises he contended that the acts of the Respondent were not only illegal but fraudulent and gives them an advantage over the Applicants and led to the failure of the contract which contract is null and void. He relied on **Osborn's Concise Law Dictionary 11th edition at page 192** for the definition of fraud as obtaining of a material advantage by unfair or wrongful means which involves obliquity. Fraud also means actual dishonesty on the part of the person alleged to have acted fraudulently, which dishonesty deprives or is calculated to deprive the victim of something according to the case of **Long Way Suitcase Manufacturing Company Ltd versus UAP Insurance (U) Ltd.** In the case of **H Singh vs. Sadhu Singh Dhiman (1951) 18 EACA 75**, the Court of Appeal for East and Africa held that if the illegality of the transaction is brought to the notice of the court, whether the contract on the face of it shows illegality in the course of the proceedings and the person invoking the aid of the court is implicated in the illegality, the court will not assist him even if the Defendant has not pleaded the illegality and does not raise the objection. The court should not aid the Respondent to defraud the Applicants. The Applicants were lured to sign a loan agreement with an unreasonable interest.

Counsel further submitted that the affidavit in rejoinder in paragraph 13 avers that the alleged lien was not at the disposal of the Applicants. Secondly the Respondent was charging interest of 22% per on Uganda shillings 200,000,000/= yet the Applicant only accessed Uganda shillings 100,000,000/=. The interest charged on the Uganda shillings 100,000,000/= in the fixed deposit account was illegal and Respondent should not be allowed to benefit from such an illegality.

Counsel submitted that the Applicant’s business project wholly relied on the funds from the Respondent and this was clearly indicated in the loan application. Refusal to advance the loan facility led to loss of projected profits and Applicants ought to be granted an opportunity to counterclaim the same from the Respondent and not allow the Respondent to benefit from illegal and fraudulent transactions in an unenforceable loan agreement. In the premises Counsel contended that the Defendants have an arguable defence and ought to be given an opportunity to present it in court.

He further submitted that the suit of the Respondent against the second, third and fourth Defendants are premature since no demand was formally made on them. The guarantee agreement required notice of demand for payment by the bank to be made on the Applicants in writing and this was never done. Counsel relied on the case of **Muhwezi Aston vs. Irene Number One and Another HCCA No. 066 of 2009** for the holding that where there was a prima facie triable issue which required judicial consideration, and in such cases there was need for court to investigate the issue and come up with the determination after both parties have adduced evidence. He further contended that a single issue is sufficient for the court to grant the application for leave to defend the summary suit. The Applicant does not have to show a good defence on the merits and all the court needs to be satisfied about is that there are triable issues. In conclusion the Applicant’s Counsel submitted that the manner in which the loan was granted was unprecedented, illegal and fraudulent and it would be in the public interest that the matter is heard to prevent the Respondent from setting bad banking precedents.

In reply the Respondent’s Counsel relied on the affidavit in reply for the facts. Firstly the Respondent’s Counsel submitted that judgment should be entered against the second and fourth Applicants because the third Applicant has no authority to act for them. There was no attempt by the third Applicant to disclose the legal capacity in which he purported to act for the said Applicants and therefore the court should hold that the application for leave was only filed by the third Applicant in his personal capacity and on behalf of the first Applicant as its director.

Alternatively the Applicants applied for a loan of Uganda shillings 200,000,000/= pursuant to which the parties executed an agreement dated 29th of May 2013. Under the agreement, the loan had to be secured by a fixed deposit of Uganda shillings 100,000,000/= and personal guarantees of the Applicant’s directors. The loan was duly disbursed accordingly and a fixed deposit account of Uganda shillings 100,000,000/= was offered as security for the loan. On 30 August 2014 the first Applicant instructed the Respondent to apply the fixed deposit to reduce its loan exposure and the Respondent duly applied the fixed deposit and interest thereon in the total sum of Uganda shillings 106,385,261/= to offset some of the outstanding amounts. The Applicant’s continued to default and the Respondent filed the main suit to recover the outstanding amounts.

The Respondent’s Counsel submitted that the only issue is whether the Applicant's application discloses a bona fide triable issue that cannot be disposed off at this stage of the proceedings. It is averred in the application that the Applicants are not indebted to the Respondent. However in the application and the affidavit in support thereof there are contradictory contentions in which the Applicants concede that the first Applicant willingly secured a loan of Uganda shillings 200,000,000/= following consultations between its directors. It is further conceded that the first Applicant applied for a loan of Uganda shillings 200,000,000/=. It followed that the first Applicant freely applied for the said loan. The loan was disbursed and it was contradictory to allege that only Uganda shillings 100,000,000/= was disbursed. The first Applicant’s loan statement discloses the amount that was disbursed.

There is a further deliberate attempt by the Applicants to vary their pleadings at every stage and therefore the come up with triable issues. But the question that cannot be answered in the affirmative is whether the alleged issues, if any at all, are genuine and cannot be disposed off in this application.

Under the terms of the parties agreement, the Applicant was granted a loan of Uganda shillings 200,000,000/= which was inter alia secured by a fixed deposit of Uganda shillings 100,000,000/= and guarantees. It was never agreed that part of the disbursed amount would be applied to secure the loan. It was the first Applicant’s obligation to come up with the sum to secure the loan. The loan statement shows a loan disbursement of 200,000,000/= on the 31st of May 2013. Nowhere in the pleadings do the Applicants allege that the loan statement was falsified. The loan statement shows that subsequent to the disbursement of the loan, the first Applicant proceeded to make payments.

The contention that the Applicants are not indebted to the Respondent attempts to impute undue influence or duress in the acquisition of the loan and is unfounded. The first Applicant continuously serviced its loan. Prior to the institution of the main suit, the first Applicant does not state that it did raise any complaint with the Respondent or the court to the effect that the Respondent was in breach of the terms of the agreement or that a lesser sum was disbursed against the loan. The parties carried out the transaction in accordance with law as agreed in the loan agreement. The averments of the Applicants are an afterthought and can be disposed of in this application. Counsel emphasised that it was never agreed anywhere that part of the loan would act as security. It was up to the first Applicant to come up with the security, which it did.

Moreover the first Applicant directed the Respondent to apply the fixed deposit account to reduce its loan exposure. Having taken the benefit of the fixed deposit account and obtained pursuant to the loan agreement, it was irrational to state that the fixed deposit should have been opened or agreed upon by the parties.

Counsel invited the court in considering whether there are bona fide triable issues for granting of the application to consider the case of **Begumisa George versus East African Development Bank HCCS 258 of 2005** which also made reference to 2 earlier cases of **Hasmani vs. Banque du Congo Belge (1938) EACA 89** and **Charanjilal vs. A.H. Adam (1950) 17 E.A.C.A 92**.

In the case of **Hasmani vs. Banque du Congo Belge (1938) EACA 89** justice Sheridan held that if there is one triable issue contained in the affidavit supporting the application, the Applicant is entitled to unconditional leave to appear and defend. On the other hand in the case of **Charanjilal vs. A.H. Adam (1950) 17 E.A.C.A 92**, the honourable court held that for an Applicant who succeeded in securing leave to appear and defend, they must show by affidavit or otherwise that there is a bona fide triable issue of law or fact.

Furthermore in the case of **Begumisa George versus East African Development Bank** (supra) honourable justice Irene Mulyagonja held that where there is a reasonable ground of defence of the claim, the Plaintiff is not entitled to summary judgement. However though a Defendant is not bound to show a good defence on the merits, it should satisfy the court that there is an issue or question in dispute which ought to be tried and which cannot be disposed of by the court at that stage of the application. It was further held that the Applicant’s defence must be stated with sufficient particularity to appear genuine and general or vague statements denying liability will not suffice.

The Respondent’s Counsel maintains that the application before the court falls short of the criteria in the authorities cited above and ought to be dismissed with costs and judgment entered for the Respondent. Furthermore since the second and fourth Applicants failed to apply for leave to appear and defend within the time stated in the summons, judgement should be entered against them under Order 36 rule 3 (2) of the Civil Procedure Rules.

Without prejudice if the court is inclined to grant the Applicant’s application for leave to appear and defend, Counsel prayed that the order should be conditional upon the Applicants depositing in court the sum of Uganda shillings 81,025,568.8/=. The Applicants failed to show that they did not take the benefit of a loan of Uganda shillings 200,000,000/= secured and granted by the Respondent. In the premises it would be unjust that the Applicants be allowed to continue to benefit and be in default on the loan terms.

**Ruling**

I have carefully considered the application of the Applicants as contained in the notice of motion together with the affidavit evidence for and against the application as well as the submissions of Counsel and the laws cited.

The Respondent filed a summary suit under Order 36 of the Civil Procedure Rules against the first Applicant which is a company and the principal borrower and the second, third and fourth Applicants who are guarantors of the loan advanced to the first Applicant. The affidavit in support of the application is deposed to by the third Applicant who is also a director of the first Applicant. The main suit is for recovery of **Uganda shillings 81,025,570/=** together with interest as agreed in a loan facility agreement granted by the Respondent to the first Applicant/Defendant in the main suit.

The basis of this suit is a loan agreement for a facility of **Uganda shillings 200,000,000/=** said to be disbursed on the 29th of May 2013 and repayable within 36 months in quarterly instalments of Uganda shillings 3,205,847/= commencing three months after the date of the drawdown. The loan facility was repayable with interest at the rate of 22% per annum. In this application the Applicants allege that they are not indebted to the Respondent.

The Respondents Counsel raised a preliminary matter to the effect that the application is supported by the affidavit of the third Respondent and there is no evidence that the third Respondent has authority from the second and fourth Respondents to represent them in the main suit or application for leave to defend the suit. He prayed for an order in default of an application for leave to defend under Order 36 rule 3 of the Civil Procedure Rules. The Respondents Counsel rightly did not object to the affidavit of the third Applicant being in support of the application of the first Applicant which is a limited liability company in which Mr Amit Kumar Bhattachaarji is a director.

The application is also brought on behalf of the second and fourth Defendants/Applicants. In the first order sought in the application, the application is filed on behalf of all the Applicants for unconditional leave to appear and defend Civil Suit Number 102 of 2015. In the affidavit in support of the application deposed to by Mr Amit Kumar Bhattachaarji paragraph 1 thereof only deposes that he is the Applicant in the matter and swore the affidavit in that capacity on his own behalf and on behalf of the other Defendants. In paragraph 2 he deposes that he is a director of the first Defendant/Applicant. I agree with the Respondent’s submission to the extent that the application does not show that the deponent has authority of the second and fourth Defendants who are natural persons. The second and fourth Applicants are sued in their capacity as guarantors of the loan obtained by the first Applicant. Personal guarantees were executed according to the documentation submitted by the Plaintiff by the second, third and fourth Applicants to this application.

Order 3 rule 1 of the Civil Procedure Rules provides that every application to or appearance or act in any court required or authorised by the law to be made or done by the party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person or by his or her recognised agent. Order 3 rule 2 of the Civil Procedure Rules provides for recognised agents and includes persons holding powers of attorney authorising them to make such appearances and applications and to do such acts on behalf of parties or persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done.

There is no evidence that the third Applicant is an agent of the second or fourth Applicants. It is a rule of pleading under Order 7 rule 4 of the Civil Procedure Rules that where a Plaintiff sues in a representative character, the plaint shall show not only that he or she has an actual existing interest in the subject matter but that he or she has taken the steps, if any, necessary to enable him or her to Institute proceedings concerning it. An application is a suit under section 2 of the Civil Procedure Act. Section 2 of the Civil Procedure Act defines a "suit" to include all civil proceedings commenced in any manner prescribed. An application for leave to defend is a suit and the Applicants may be for purposes of that application, be described as the Plaintiff though the word "Applicant" is used. The Respondent becomes the Defendant to the proceeding and generally the rules of pleading are the same.

Under Order 36 rule 3 (2) of the Civil Procedure Rules, where there is a default by any Defendant, the Plaintiff shall be entitled to a decree for an amount not exceeding the sum claimed in the plaint. The wording of the rule is important in a suit against several Defendants. It envisages an application by each of the Defendants for leave to appear and defend a summary suit. It provides as follows:

*"In default of the application by the Defendant or by any of the Defendants (if more than one) within the period fixed by the summons served upon him or her, the Plaintiff shall be entitled to a decree for an amount not exceeding the sum claimed in the plaint, together with interest, if any, or for the recovery of the land (with or without mesne profits), as the case may be, and costs against the Defendant or such of the Defendants as have failed to apply for leave to appear and defend the suit."*

From the wording of the rule, the Plaintiff is entitled to a decree in the amount claimed or fixed in the summons against the second and fourth Defendants. I however reserve any order for further consideration of whether there are any triable issues since the court cannot act like a robot. A default judgment is not on the merits. For instance if the first defendant is not liable as the principal borrower, how can the guarantors be held liable? The court cannot bury its head in the sand if any of the Applicants can prove that they are not indebted. The rule on liability upon default to apply to file a defendant is not on the merits but a rule dealing with default. Where one of the Defendants defends the whole of the suit on liability for the loan, the court cannot be blind to any grounds which would absolve all the Defendants. Moreover the third and first Applicants have raised the issue of whether the remedy against the first Applicant who is the principal borrower should first be exercised by the Respondent before proceeding against the guarantors. Where this is found in this application to be a triable issue, then it would affect the suit against the Applicants who have not brought an application within 10 days as prescribed. In the premises I will deal with the main application on the merits before concluding the question of whether the Plaintiff is entitled to default judgment as against the second and fourth Defendants/Applicants.

The apparent controversy is whether the Applicants are indebted to the Respondent at all. On the other hand the Plaintiff’s claim in this suit is that the Defendants who are the Applicants in this application have no defence to the claim for Uganda shillings 81,025,570/= together with interest as agreed in the loan agreement.

The Applicants namely the first and third Applicants have presented a technical arguments premised on the fact that what the Respondent disbursed was not Uganda shillings 200,000,000/= as agreed in the loan agreement. It is an allegation by the Applicants that Uganda shillings 100,000,000/= was never disbursed but instead was put on a fixed deposit account which became security for the loan of Uganda shillings 100,000,000/= that the Applicants actually look for their business.

Mr Amit Kumar Bhattachaarji deposed in the affidavit paragraph 25 thereof that they were made to understand when applying for the loan that the loan would be Uganda shillings 100,000,000/= and the other Uganda shillings 100,000,000/= would be put on behalf of the 1st Applicant on a fixed deposit account and would form security for the loan of Uganda shillings 100,000,000/=.

There is no information as to what the rate of interest on the fixed deposit account was. In practical terms the first Applicant received Uganda shillings 100,000,000/= as a take away. However it also received Uganda shillings 100,000,000/= which under the arrangement was put on a fixed deposit account and not on the business of the first Applicant which was to deal in motor bikes.

The third Applicant in the affidavit in support of the application admits in paragraph 36 of the opening of a fixed deposit account. In the affidavit in reply Mr Sanya Francis, the Credit Manager of the Respondent attached an application dated 30th of August 2014 to liquidate the fixed deposit account of the first Applicant with the Respondent to offset the outstanding amount and thereafter to reschedule the balance of the loan. This was against the background that the Applicant was struggling to service the loan which was disbursed and which loan was reflected as Uganda shillings 200,000,000/= according to the loan agreement. The Respondent indeed attached a statement of account showing that Uganda shillings 200,000,000/= was disbursed to the first Applicant. This was on the 31st of May 2013. The loan agreement itself was for a loan of Uganda shillings 200,000,000/=. In paragraph 6 of the loan facility letter dated 29th of May 2013 duly endorsed by the directors of the Applicant at every page, it is provided in paragraph 6.1 that part of the security is a lien on the fixed deposit amounting to Uganda shillings 100,000,000/=.

In paragraph 7.2 of that facility, it is provided that the securities were to be perfected prior to the disbursement of the facility.

The only matter that is raised is that the very money which was disbursed amounting to Uganda shillings 200,000,000/= was also partly used and invested in a fixed deposit account. The Applicant’s contention is that the opening of the fixed deposit account was an illegality.

On the other hand the Respondents contention is that this is a frivolous and illusionary defence because the agreement and the bank statement clearly indicate that a loan of Uganda shillings 200,000,000/= was disbursed. Does this constitute a triable issue? The Respondent’s Counsel submitted strongly that there was no triable issue. The Applicant on the other hand contended that the loan was meant for their business and they never accessed part of the loan amounting to Uganda shillings 100,000,000/=. This amount had been deposited in a fixed deposit account.

Order 36 rule 2 of the Civil Procedure Rules provides that where a Plaintiff seeks only to recover a debt or liquidated demand in money payable by the Defendant, with or without interest arising upon a contract, express or implied, he or she may at the option of the Plaintiff, institute a suit by presenting a plaint in the prescribed form 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, the amount claimed, if any and stating that in his or her belief that there is no defence to the suit. In this case the Plaintiff claims a liquidated amount being the outstanding amount in a loan advanced to the first Defendant. The other Defendants are guarantors. The purpose of a summary suit under the Ugandan Order 36 of the Civil procedure Rules or RSC Order 14 of the UK is discussed by Parker L.J in the case of **Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (In Liquidation) [1989] 3 All ER 74** where Parker LJ held at page 77 that:

“The purpose of Ord. 14 is to enable a Plaintiff to obtain a quick judgment where there is plainly no defence to the claim. If the Defendant’s only suggested defence is a point of law and the court can see at once that the point is misconceived the Plaintiff is entitled to judgment. If at first sight the point appears to be arguable but with a relatively short argument can be shown to be plainly unsustainable the Plaintiff is also entitled to judgment. But Ord. 14 proceedings should not in my view be allowed to become a means for obtaining, in effect, an immediate trial of an action, which will be the case if the court lends itself to determining on Ord. 14 applications points of law which may take hours or even days and the citation of many authorities before the court is in a position to arrive at a final decision.”

The relevant questions to ask under the above criteria are whether there is plainly no defence? Whether the defence is a point of law which is plainly misconceived or arguable? Furthermore a summary suit should not be used to determine an action summarily where arguments would take hours or days and considerations of many authorities for its determination. A Defendant should support the application by affidavit evidence and the grounds of the defence should be disclosed in the affidavit and should be stated with sufficient particularity. I.e. it should disclose whether the defence is to the whole or only part of the claim (See Order 36 rule 4 of the Civil Procedure Rules). According to **Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22nd edition** at pages 75 and 76 whenever a genuine defence, either in fact or law, sufficiently appears, the Defendant is entitled to unconditional leave to defend and 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. The defence should be made in good faith. The defence must be stated with sufficient particularity, as appear to be genuine. In the case of **Souza Figuerido & Co Ltd versus Moorings Hotel Co Ltd (1959) EA 426** Sir Kenneth O’Connor P of the East African Court of Appeal sitting at Kampala held at page 426 that where a Defendant shows by affidavit that there is a bona fide triable issue, he is to be allowed to defend as to that issue without condition. A condition of payment into court ought not to be imposed where a reasonable ground of defence is set up. The condition of payment into court, or giving security, is seldom imposed, and only in cases where the Defendant consents, or there is good ground in the evidence for believing that the defence set up is a sham defence and the master ‘is prepared very nearly to give judgment for the Plaintiff’ in which case only the discretionary power given by this rule may be exercised. It should not be applied where there is a fair probability of a defence nor where the practical result of applying it would be unjustly to deprive the Defendant of his defence.

Coming back to the facts of this application I have carefully considered the loan agreement which had been endorsed by the directors of the first Applicant. The evidence that Uganda shillings 100,000,000/= would be retained in the fixed deposit account in the names of the first Applicant is not part of the agreement and at first glance is it admissible? Even if it was taken to be true, a fixed deposit account is not the account of the Respondent but that of the first Applicant. Money on a fixed deposit account is deemed to be the first Applicant's money and ought to earn interest. The first Applicant’s director alleges that the interest was being earned for the Respondent. A triable question of fact arises which requires an examination of accounts to establish how much interest was earned on the fixed deposit account.

 Whether they used part of the loan for the fixed deposit or got the amount from another source would be immaterial. What happened is that the arrangement placed the Applicants at a disadvantage because they had to pay interest for a loan of Uganda shillings 200,000,000/= which is the amount of money they signed for. Why they put the loan money specifically into a fixed deposit account is not mentioned in the terms of the agreement. The agreement only provides in clause 6.1 that the bank would have a lien on a fixed deposit account of the first Applicant amounting to Uganda shillings 100,000,000/=. Whatever other arrangements they had were informal and may be between the managers of the bank and the Applicants. This is discerned from the affidavit in support of the application in paragraphs 38 – 42 where Mr. Amit Kumar deposes as follows:

“38. We talked about this situation to Mr. Kumar several times over the phone and the CEO would not take our calls.

39. That we asked for a review of our account but that was not entertained by Mr. Rawat.

40. That later on we were informed that Mr. Kumar is no longer with the bank and also the CEO left.

41. That the new team at the bank treated us as normal clients and there was no client – customer relationship any further and over the period the communication worsened.

42. That we continued to discuss the situation and some offer was made on a ‘without prejudice’ basis that failed to materialise.”

The Applicant alleges that the use of the loan as security for a loan is an illegality but Counsel did not cite any law to support that assertion. Is such a defence a sham? Considering at first glance the Evidence Act, the question I have posed before is whether such evidence can be admitted to contradict the terms of the loan agreement. Section 92 of the Evidence Act provides as follows:

“92. Exclusion of evidence of oral agreement.

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms; but—

(a) any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law;

(b) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this paragraph applies, the court shall have regard to the degree of formality of the document;

(c) the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;

(d) the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property may be proved, except in cases in which that contract, grant or disposition of property is by law required to be in writing or has been registered according to the law in force for the time being as to the registration of documents;

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of the incident would not be repugnant to, or inconsistent with, the express terms of the contract;

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts.”

This section excludes oral testimony for purposes of contradicting, varying, adding to or subtracting from the terms of the contract or other disposition of property unless in the circumstances mentioned in paragraphs (a) – (f). What would be a triable matter would be whether there was any fraud, intimidation, illegality, want of due execution, want of capacity in the execution of the agreement. The third Applicant in his affidavit in support of the application clearly indicated that there was a written agreement between the parties. In paragraph 27 of the affidavit in support, he deposes as follows:

“27. That we failed to understand the logic but as we wanted the loan for the business to be developed, we signed wherever we were asked to sign and placed the company seal where required.”

In the deposition he tries to raises questions of whether the agreement was witnessed at the time he signed it. The Applicant’s Counsel however did not address the court on this matter. The contention is inter alia that they signed an agreement which was not dated and was witnessed later after he signed it.

Particularly he raises the issue of whether the opening of a fixed deposit account for the deposit of Uganda shillings 100,000,000/= is lawful. The Applicant’s directors nonetheless signed the agreement and about a year later the Respondent proved that they wrote a letter requesting for the liquidation of the fixed deposit account to offset part of the outstanding amount on the loan repayment. This suit is about the remainder of the outstanding amount.

As noted earlier the Applicants did not cite any laws specifically under the Financial Institutions Act as would make the loan agreement an illegality. They just assert that the loan was irregularly processed inter alia because of the Applicant’s allegation that part of it went to a fixed deposit account and the Applicant could not access the amount therein when they needed it.

I am inclined to exercise the discretion of the court to allow the Applicant leave to argue the alleged illegality of the fixed deposit account being used as security for a loan when it comprises of a loan from the Respondent. It requires proof of facts as well as arguments on law.

The Applicant has leave to file a defence within 14 days from the date of this order. Secondly the Applicant shall deposit security in court in the sum of Uganda shillings 15,000,000/= or its equivalent in security acceptable to the registrar of the court within a period of 30 days from the date of this order.

Though the Respondent is entitled to a default judgment against the 2nd and 4th Defendants, the default order shall abide the outcome of the main suit, which may or may not absolve the said defendants. Costs of this application are costs in the cause.

Ruling delivered in open court on the 21st of August 2015

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Carol Luwaga for the Respondent

Respondents Credit Recovery Manager Richard Sebikari present

Neither Applicants nor their Counsel is present

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

**21st August 2015**