THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

MISC. APPLICATION NO. 020 OF 2024

(ARISING FROM CIVIL SUIT NO. 11 OF 2024)

HABIMANA JOHN :: APPLICANT

VERSUS

ATUHAIRWE SAM ::: RESPONDENT

BEFORE: HON. JUSTICE SSEMOGERERE, KAROLI LWANGA

JUDGEMENT

Brief Facts:

This is an application brought under **Order 36 Rules 3 and 4, and Order 52 Rules 2 and 3 of the Civil Procedure Rules, S.I. 71-1 (the "Civil Procedure Rules")** for unconditional leave to appear and defend **Civil Suit No. 11 of 2024.** The grounds of the application contained in the notice of motion are that the (i) applicant is not indebted to the respondent in the sum alleged; (ii) in the alternative that the amount due to the respondent/plaintiff is in dispute; (iii) that the suit is frivolous; (iv) that there are triable issues, and (v) the applicant has plausible defense that disposes of the claim.

The affidavit in support acknowledges some indebtedness but disputes the total amount, in paragraph 20, thereto. There is no need to reproduce the details for the purposes of this ruling. The indebtedness arose out of a friendly business relationship between applicant and the respondent through which the applicant's company was awarded a road contract by Kanungu District Local Government in 2023, performance of which required a sub-contract which was awarded to a subcontractor, Mugisa Denis in paragraph 8, who failed to perform; and another subcontract to the respondent, which amount the applicant claims to have paid. The affidavit also details a long switch and bait scheme through which applicant alleges he was lured into taking up additional debts to clear the sub-contractor Mugisa John. The applicant in paragraph 23, disputes the total amount outstanding UGX 142,000,000/= claimed by the respondent in the head suit.

The respondent's affidavit in reply admits to certain aversions in the applicant's affidavit in support. In paragraph 5, respondent admits he procured a loan of UGX 30,000,000/= to facilitate acquisition of the business with Kanungu District Local Government. Respondent also admits in paragraph 6, that a sub-contract was awarded to Mugisa Denis in the amount UGX 84,100,000/= but the respondent was not sure whether the subcontractor was ever paid. In paragraphs 12-15, he states there is a MOU under which loans were advanced to the applicant. In paragraph 16, respondent claims that the applicant has only paid UGX 15,00,000/= towards these loans and is mixing up payments under two different obligations.

Representation:

Applicant is represented by M/S Matovu Kateregga & Co Advocates. Respondent is represented by M/S Elgon and Co. Advocates. At a hearing on May 8, 2025, parties were given a submissions schedule which they complied with.

Issues for determination by court:

Applicant framed one issue for determination by court.

(1) Whether the application raised triable issues?

In support of the application, applicant argued that an application under **Order 36 Rule 4 of the Civil Procedure Rules** states that leave may be granted if the applicant shows he or she has a good defence on the merits, or that there is a difficult point of law involved or that there is a real dispute and a reasonable defence.

The applicant repeats the aversions in his affidavit in support that there are triable issues, has a defence to the plaintiff's claim, and therefore fit in the scope of Order 36 Rule 4. Applicant asserts that there is at least one triable issue, entitling him to leave to appear and defend unconditionally. He cited the case of **Begumisa George v East African Development Bank Misc. Application No. 0451 of 2010** which cited with approval the case of **H.D. Hasmani v Banque du Congo Beldge 1938 5 EACA 89.**

The respondent repeats the allegations in his affidavit in reply, summarized in the brief facts. It appears the parties' recollection of events is similar, what is at issue is the amount outstanding, and what amounts were loans, and what amounts have been paid back. Respondent claims an amount outstanding of UGX 137,000,000, plus interest of UGX 220,400,000/= claimed in the main suit.

In the reply, the respondent raises a preliminary point of law to the effect that the application be dismissed under **Order 6 Rule 28 of the Civil Procedure Rules**, on two grounds: First that that the summons was not sealed with the seal of Court in contravention of **Order 5 Rules 1(5) of the Civil Procedure Rules**. Second, that the application was served on the respondent after 21 days had elapsed without seeking leave of court in contravention of **Order 5 Rule 1(2) of the Civil Procedure Rules**. Respondent states that the summons were issued on November 21st, 2024, and only served on the respondent on January 23rd, 2025, two months after the filing of the application, without an extension of time.

In rejoinder, applicant opens up the possibility that the respondent's copy may not have been sealed by court. The applicant submitted that is a mere technicality that should not interfere with the administration of justice under **Article 126(2)(e) of the Constitution**. With respect to the second objection, the applicant admits the application was served out of time, laying the blame on the court process server, who unfortunately was not brought before court as a witness.

Discussion and Analysis:

I start with the preliminary objections. The perusal of the notice of motion on file with court, has the same problem, identified by the respondent. It lacks the seal of court. **Order 5 Rule 1(5)** of the **Civil Procedure Rules** provides as follows:

> "Every such summons shall be signed by the judge or such other officer as he or she appoints, and shall be sealed with the seal of the court." [Emphasis mine].

A seal is an important instrument of authentication of the authority of court. A signature is authenticated by the seal of court, as summons are not issued in the premises of the individual but of court.

The second objection is self-resolving as the applicant admits, service was out of time. **Order 5 Rule (2)** of the **Civil Procedure Rules** provides as follows:

> "Service of summons issued under subrule (1) of this rule shall be effected within twenty-one days from the date of issue, except that time may be extended on application to the court, made within the fifteen days after the expiration of the twenty-one days, showing sufficient reasons for the extension." [Emphasis mine].

These defects, while procedural in nature, are in-built safeguards to protect litigants from forgeries and stale claims. The Civil Procedure Rules are part of the laws of Uganda and were not passed in vain. Upholding these two glaring deficiencies would create an obvious error on the face of the record. When glaring deficiencies like these are raised, the proper recourse for counsel would be to invoke **Section 98 of the Civil Procedure Act, Cap 282, (the "Civil Procedure Act")** and apply formally to court to withdraw the impugned application and file and serve a sealed application. Then with respect to service out of time, the provisions of Order 5 Rule (2) are self-contained, the remedy is within the rule itself, by way of application to court.

With respect to the second objection, it appears applicant was aware, time had elapsed but went ahead to serve the application, advancing the defect, instead of curing it. This rendered in itself the application incurably defective.

Article 126(2)(e) of the Constitution and Section 98 cannot be of avail, when a party attempts to steamroll the rules that govern court practice as is the case here. The submissions cited by the applicant are of no assistance in light of the clear mechanisms in the law to cure the defect, and advance the remedy.

The entire episode of this application creates fundamental questions as to when the application was filed; received a hearing date, and was ready for service on the respondent. This information is extraneous to the adjudication of application.

The preliminary objections are upheld with costs to the respondent. I accordingly proceed to determine the main action.

As the application for leave to defend cannot proceed, Judgment is granted to the plaintiff (respondent) under **Order 36 Rule 5, of the Civil Procedure Rules** which provides as follows:

> "Where after application by a defendant for leave to appear and defend the suit, the court refuses to grant such leave, the plaintiff shall be entitled to the decree such as described in rule 3 of this order."

Having made such a finding, I also make an additional finding that the interest rate of 30% per month is unconscionable. I hereby find that the interest rate of 30% per month payable in paragraph 3 of the MOU is illegal and unenforceable. **Section 26(1) of the Civil Procedure Act** permits court to interfere with interest agreed to by the parties if in the opinion of court, the interest is unconscionable. **Section 26(1) (op cit.)** provides as follows:

> "Where an agreement for the payment of interest is sought to be enforced, and the court is of the 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." [Emphasis mine].

This power is in the discretionary power of court. This is the correct position of the law in Uganda. **In Attorney General v Dr. Maj. (Rtd) Jallon Okello, Civil Appeal No. 207 of 2016**, Egonda Ntende, JA., held at page 8, that this power is a "specific power". He said:

> "…..it is not for court to write a new contract for the parties. However, under **Section 26(1) of the Civil Procedure Act**, court has the power to deal with the issue of interest being sought to be enforced, if it is of the opinion that the rate agreed is harsh and unconscionable, to give judgment at the such rate as it will think just."

In **Rajnish Jain (Administrator of the Estate of the late R.J. Jain v Lokii Peter Abraham, Civil Suit No. 277 of 2013**, my brother, Wejuli Richard Wabwire J., held that:

> "the interest rate of 10% per month is unconscionable and excessive."

In the instant case, the rate is 30% per month or three times higher than the interest rate found harsh and unconscionable by the Trial Judge in the above decision. Under the provisions of **Section 26(1) of the Civil Procedure Act**, I substitute the rate of 30% per month with 1.5% per month from the date of the agreement till the date of the filing of the suit.

Comment:

First, The legal and regulatory regime in Uganda has evolved to govern the business of money-lending, but has not gone as far as to protect this as a franchise of regulated businesses. In the time of rapid development of our country and expansion of credit to facilitate business of the kind the subject of this matter, this is necessary. The business of money lending should be the preserve of regulated institutions. So should the receipt, transmission and processing of financial instruments.

Second, parties and their counsel must respect the rules of procedure, as justice is dispensed not just in the names of the parties seeking redress, but the people of Uganda. Ignoring the rules exposes the courts to accusations of bias, impartiality and favoritism which are not warranted in the courts of justice.

Findings and conclusions:

In accordance with **Order 36 Rule 3, of the Civil Procedure Rules, I enter judgment for the respondent** and make the following orders:

1. Judgment to the plaintiff for the "reconciled sum of indebtedness" between the applicant and the respondent offset by the amounts paid by the defendant (applicant) to the plaintiff (respondent).
2. Interest on the reconciled amount in paragraph 1, above at 1.5% per month, from the date of the agreement to date to the filing of the suit, Civil Suit No. 11 of 2024.
3. Costs of the application to the respondent.
4. Costs of the suit, Civil Suit No. 11 of 2024 to the plaintiff.
5. Learned Registrar to extract the decree after the reconciliation in (1) above.

I SO ORDER

DATED AT KABALE THIS 17th DAY OF JUNE 2025

SSEMOGERERE, KAROLI LWANGA,
JUDGE.