

retrenchment, and that the loan facility he obtained with the Respondent was insured against retrenchment. The Applicant's claim is therefore that the Respondent ought to have recovered the money from the insurance company and not the Applicant himself.

The Applicant brings the current application on grounds that the suit raises a triable issue, which issue is whether or not the loan was insured against retrenchment.

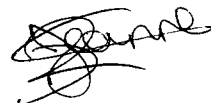
The Application:

The Applicant's application is supported by an affidavit deposed by **Ariho Trevor**, the Applicant, which sets out the grounds for the application. Briefly, the grounds are that;

- a) That the loan facility was granted to him on the basis of being gainfully employed, and at the time he was employed by AAR Health Services (U) Ltd.
- b) That he later resigned from AAR health services in June 2017 and changed employment to UMC Victoria Hospital in December 2017.
- c) That he complied with the terms of the loan agreement until April 2018 when there was a retrenchment exercise at UMC Victoria Hospital leading to him being relieved of his duties.
- d) That he has not been engaged in gainful employment since then.
- e) That the loan facility was insured against retrenchment.
- f) That as a result of the retrenchment being the cause of his employment termination, the Respondent should have recovered the money from the insurance company.
- g) That the facts of the suit raise a triable issue as to whether the loan was insured against retrenchment.
- h) And that consequently the Applicant should be granted unconditional leave to appear and defend the suit which raises a triable issue for determination.

The Respondent opposed the application through an Affidavit in Reply deposed to by **Nagasha Jackline**, a Recoveries Manager in the Respondent bank. In her Affidavit, she contended that the application does not raise any triable issue for determination by the court.

Whilst accepting that the loan facility was insured against retrenchment, the deponent has asserted that the Applicant has not provided proof that he was indeed retrenched. The deponent also denied that the loan facility was advanced to the Applicant on the basis of his being gainfully employed, rather employment was merely a source of income but not the only condition upon which the respondent advanced the loan to the Applicant.



Issues:

1. Whether the application raises triable issues such as to warrant the grant of unconditional legal to appear and defend the main suit.

Representation and Hearing:

At the hearing, the Applicant was represented by Justus Amanyire and the Respondent was represented by James Zere.

It was agreed that the hearing proceeds by way of written submissions which were duly filed and have been relied upon in resolution of this application.

Submissions


Both parties filed written submissions. In the Respondent's Submissions, it is asserted that there is no proof that the Applicant was retrenched because no retrenchment letter has ever been adduced to prove that fact.

The Respondent's counsel argued that he who comes to court seeking leave to defend a suit under Or 36 must show that he/ she has a good defence on the merits or that there are circumstances showing reasonable grounds or a bona fide defence and that the defence raised must not a sham (**Begumisa George v East African Development Bank (Miscellaneous Application No.451 of 2010) [2011] UG CommC 62**).

The Respondent's counsel argued that the duty of the court is not merely to accept the defence alleged by the Applicant relying on **Bunjo v KCB Bank Uganda Ltd (Misc. Application No.174 of 2014)** and **Corporate Insurance Co. Ltd v Nyali Beach Hotel Ltd [1995-1998] EA**. The Respondent argued that the court has a duty to investigate the defence to establish whether it raises a bonafide issue on the merits or is just a sham defence.

In the Applicant's Rejoinder to the Respondent's Submissions, the Applicant's counsel submitted that the terms of the insurance policy and whether or not the retrenchment actually happened are triable issues that ought to be investigated by the court.

The Applicant also averred that retrenchment need not only be proven through a retrenchment letter but that oral evidence can suffice in the absence of documentary proof. The Applicant relied on **section 58 of the Evidence Act** which provides that "All facts, except the contents of documents, may be proved by oral evidence." The Applicant's counsel averred that the case of **Bunjo v KCB Bank Uganda Ltd (Misc. Application No.174 of 2014)** relied upon by the Respondent does not limit the investigation the court may undertake to only documentary evidence.



The Applicant maintained that in these circumstances, the court can only investigate the claim thoroughly by looking at all forms of relevant evidence, including oral evidence and submitted that leave ought to be granted to enable the Applicant to present all the evidence they have in their possession (including oral evidence) to enable the court to reach a fair and just conclusion.

The Position of the Law

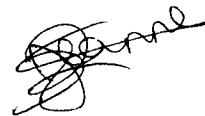
Under Order 36, rule 3, 4, and 8 of the Civil Procedure Rules SI 71-1, unconditional leave to appear and defend a suit may be applied for and granted to a defendant who shows that his/ her defence raises a triable issue or questions of fact or law with which ought to be determined at trial. To the extent that the defendant raises a triable issue in his affidavit, he must not be shut out and should be granted leave to formulate his defence and adduce evidence of the triable issue raised. (See **MM.K Engineering v Mantrust Uganda Ltd H.C.M.A No.128 of 2021** and **Bhaker Kotecha v Adum Muhammed [2002] 1 EA 112**)

Raising a triable issue is to be distinguished from mere denial and the defence raised must not be a sham defence intended to delay the Plaintiff from recovering money due. (See **Begumiha George v East African Development Bank Misc. Application No.451 of 2010**)

In **Makulu Interglobal Trade Agency v Bank of Uganda [1985] HCB 65**, the court stated that:

"Before leave to appear and defend is granted, the defendant must show by affidavit or otherwise that there is a bonafide triable issue of fact or law. When there is a reasonable ground of defence to the claim, the defendant is not entitled 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."

It is a further requirement under the law that in an application for leave to appear and defend a summary suit, there must be sufficient disclosure by the applicant, of the nature and grounds of his or her defence and the facts upon which it is founded. Secondly, the defence so disclosed must be both bonafide and good in law. A court that is satisfied that this threshold has been crossed is then bound to grant unconditional leave. Where the court is in doubt whether the proposed defence is being made in good faith, the court may grant conditional leave, say by ordering the defendant to deposit money in court before leave is granted. (See **Children of Africa vs Sarick Construction Ltd H.C Miscellaneous Application No. 134 of 2016**).



Resolution by the Court

From the law set out above, where an application for leave to appear and defend a summary suit has been filed by the defendant/ Applicant, the court will only enter judgement where the application raises no bona fide triable issues of fact or law or where the defence raised is found by the Court to be a sham.

It ought to be emphasised that the court is not obligated at this stage to carry out investigations as to the triable issues raised, rather what is to be determined is whether or not an issue is raised which is, by its nature, triable and therefore warrants consideration and determination through the trial process.

In the present case, the Applicant raises one contention which, he claims, entitles him to be granted leave to defend the main suit, namely that his employment was discontinued because it was retrenched. The loan which is the subject of this suit was insured against retrenchment – something both parties agree on – therefore the issue of whether or not the retrenchment actually occurred goes to the root of the main suit and ought to be fully investigated and determined at trial. The Respondent denies that this retrenchment actually occurred on grounds that the Applicant has not provided any proof by way of a retrenchment letter that he was retrenched. Whilst it is true that the burden of proof rests on the Applicant to show that indeed he was retrenched, in these circumstances the question of proof is one to be conclusively determined at trial after this court considers and evaluates all the relevant evidence.

Conclusion and Order:

In these premises, the Applicant's application succeeds and I hereby order as follows;

1. The Applicant is hereby granted unconditional leave to defend the main suit.
2. The Applicant is hereby ordered to file and serve his written statement of defence within ten (10) days from delivery of this Ruling.
3. The costs of the application shall abide the outcome of the main suit.

I so order.



Jeanne Rwakakooko

JUDGE

12/11/2021

This Ruling was delivered on the 30th day of November, 2021