THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL HOLDEN AT KAMPALA

CIVIL APPEAL NO. 32 OF 2010

(ARISING OUT OF HCCS NO. 179 OF 2004)

SHELL UGANDA LIMITED:: APPELLANT

VERSUS

CAPTAIN NAEEM SHAIR CHAUDRY:::::::::::::::::::::::: RESPONDENT

CORAM: HON. MR. JUSTICE RICHARD BUTEERA, DCJ

HON. MR. JUSTICE BARISHAKI CHEBORION, JA

HON. LADY JUSTICE HELLEN OBURA, JA

JUDGMENT OF RICHARD BUTEERA, DCJ

This is an appeal against part of the decision of Hon. Justice Yorokamu Bamwiine in HCCS No. 179 of 2004 delivered on the 10th day of December, 2008.

BACKGROUND TO THE APPEAL

The appellant appointed the respondent as its dealer to operate three of its petrol stations on 23rd March, 1999. During the course of the dealership, in or about February, 2001, the appellant arranged a banking facility with Citibank to boost the respondent's business. The appellant indeed took up the banking facility which was later renewed on two occasions. Disagreements arose amongst the appellant, respondent and Citibank over failure by the respondent to service the facility. This prompted Citibank to cancel the banking facility that had been issued to the respondent. Upon the cancellation of the Banking Facility, Shell (U) Limited as guarantor paid to Citibank UGX 241,707,213/= (Two hundred forty one million, seven hundred seven thousand, two hundred and thirteen shillings) only in satisfaction of respondent's liability.

The appellant filed HCCS No. 179 of 2004 against the respondent for recovery of UGX 241,707,213/= (Two hundred forty one million, seven hundred seven thousand, two hundred and thirteen shillings only) being the value of the overdraft guaranteed by the appellant.

At the conclusion of the trial, judgment was entered in favour of the appellant for the decretal sum of UGX 241,707,213/=(Two hundred forty one million, seven hundred seven thousand, two hundred and thirteen shillings only) which was to attract interest of 20% per annum from the date of judgment until payment in full together with costs.

After delivery of the said judgment, the appellant filed HCMA No. 694 of 2008 for correction to provide that interest on the decretal sum runs from the date of filing the suit until payment in full. The Learned Trial Judge delivered his ruling on 29th February, 2009 and declined to grant the application.

The appellant was not satisfied with the Learned Trial Judge's decision hence this appeal. The respondent filed a cross appeal.

GROUND OF APPEAL

1. The learned Trial Judge erred in law and fact when he awarded interest on the decretal sum at a rate of 20% to run from the date of Judgment until payment in full.

ORDERS SOUGHT

1. The appeal be allowed.
2. Court substitutes the order with an order that interest runs from the date of filing the suit.

GROUNDS OF THE CROSS-APPEAL

1. The Learned Trial Judge erred in law in failing to find that the guarantee of 13th August, 2002 (PE 14) was uncertain and unenforceable as no credit limit had been set for the period 13th August, 2002 to 31st July, 2003 when the default occurred.

2. The Learned Trial Judge erred in law in failing to hold that the guarantee of 13th April, 2002 (PE 14) only covered monies advanced from its date and not the entire debt owed by the cross-appellant to Citibank.

3. The Learned Trial Judge erred in law in failing to hold that the plaintiff was not under any legal compulsion to pay Citibank the money due to it from the defendant.

ORDERS SOUGHT

a) The Judgment of Hon. Justice Yorokamu Bamwiine be set aside;

b) Costs be provided for.

LEGAL REPRESENTATION

The appellant/cross respondent was represented by Mr. Joseph Luswata from M/s Sebalu & Lule Advocates while the respondent/cross appellant was represented by Mr. Isaac Walukagga from M/s MMAKS Advocates.

PRELIMINARY OBJECTION

Counsel for the respondent raised a preliminary point of objection and contended that the appellant's Notice of Appeal was filed out of time. He relied on Rule 76 (2) of The Judicature (Court of Appeal Rules) Directions and submitted that from the date of delivery of the judgment sought to be appealed against, the appellant should have filed the Notice of Appeal by 24th December, 2008 and not 27th April, 2010 as was the case.

Counsel for the respondent further contended that the Appeal was filed out of time since the Record of Appeal was lodged in court on 5th May, 2010. There was no letter to the Registrar requesting for a record of proceedings. The case of **WANUME DAVID KITAMIRIKE VS UGANDA REVENUE AUTHORITY CACA NO. 138 OF 2010** was cited by Counsel for the respondent to support this proposition.

Counsel for the appellant in reply cited Rule 100 (2) of the Rules of Court and submitted that the Respondents objection to the competency of the appeal was misplaced and should be over ruled as it was raised at the hearing of the appeal without the leave of Court. Counsel cited **HUQ VS ISLAMIC UNIVERSITY IN UGANDA [1995-1998] 2 EA 117** which according to him interpreted Rule 100 (2) of the Rules of Court to be mandatory.

Counsel for the appellant further argued that the Notice of Appeal and Memorandum of Appeal had been filed in time pursuant to Rule 84(b) of the Court of Appeal Rules since the respondent did not file his intended appeal and therefore the appellant's documents were filed with in time taking into account the letter informing the respondent that the record of proceedings was ready for collection from the High Court.

In sur-rejoinder to the appellant's submissions in rejoinder, counsel for the respondent opined that although a formal application could have been made against the competency of the appellant's appeal, the appellant was not prejudiced since the same preliminary objection was raised at the time when the appeal was called for hearing and an opportunity was availed to the appellant to respond to the objection.

Counsel for the respondent further cited Rule 2 (2) of the Rules of this court which empowers court to make any order so as to prevent abuse of court process. Counsel went on to distinguish the authority of **HUQ *(SUPRA)*** for being made per incurium and contended that Rule 100(2) does not limit court from investigating any preliminary point of law that seeks to prevent the abuse of court process.

Counsel for the respondent maintained that the appellant was not protected by Rule 84 (b) of the Court of Appeal Rules and contended that relying on it was an afterthought. He argued that if indeed it was to be relied upon, the letter requesting for a typed record of proceedings written by the respondent's advocates should have been included in the Record of Appeal or counsel for the appellant should have applied to file a supplementary record of appeal. The rest of the contents in sur-rejoinder were a reiteration of the earlier submissions of counsel for the respondent.

Rule 76 (2) of the Judicature (Court of Appeal Rules) Directions provides;

(2) "Every notice under subrule (1) of this rule shall, subject to rules 83 and 95 of these Rules, be lodged within fourteen days after the date of the decision against which it is desired to appeal"

In the instant case the trial Court delivered Judgement on the 10th December, 2008. The appellant lodged a notice of appeal in the Commercial Division of the High Court on the 27th April, 2010. This notice of appeal was served unto counsel for the respondent on the 3rd May, 2010.

Under Rule 83 (1) of the Rules of this Court, an appeal is instituted in the court by lodging in the registry within sixty (60) days after the date when the notice of appeal was lodged a memorandum of appeal, the record of appeal, the prescribed fees and security for costs of the appeal.

Counsel for the appellant submitted in rejoinder relying on a letter dated, 10th December, 2008 in which counsel for the respondent requested for a typed record of proceedings from the Registrar of the High Court. This letter was served onto the appellant's counsel on 11th December, 2008.

At page 470 of the record of appeal is a letter from the Registrar of the High Court informing the respondent that the record of appeal is ready for collection. That letter is dated 12th February, 2010. It was received by the respondent on 19th February, 2010. The sixty (60) days with in which to file the record of appeal by the appellant therefore commenced on the 19th February, 2010 when the Registrar of the High Court informed the respondent that the record of appeal was ready for collection and lapsed on the 19th April, 2010.

Rule 84 (a) of the Rules of this Court provides that if a party who has lodged a notice of appeal fails to institute an appeal within the prescribed time (60 days); he or she shall be taken to have withdrawn his or her notice of appeal.

The respondent failed to initiate an appeal between the 19th February, 2010 to the 19th April, 2010 as required by law. He was therefore considered to have withdrawn his appeal.

Rule 84 (b) of the Rules of this Court stipulates that any person on whom the notice of appeal was served shall be entitled to give notice of appeal not

withstanding that the prescribed time has expired, if he or she does so within fourteen days, after the date by which the party who lodged the previous notice of appeal should have instituted his or her appeal.

When the appellant filed a notice of appeal on the 27th April, 2010; the appellant was well with in time for filing the notice of appeal. The appellant had 14 days within which to file the notice of appeal. The appellant filed the notice of appeal eight (8) days up on receipt of the letter notifying the appellant of the readiness of the record of appeal .The appellant's appeal as instituted by the memorandum of appeal lodged in court on 5th May, 2010 is competent since it was lodged within sixty (60) days of the record of proceedings being availed to the appellant.

The Deputy Registrar's letter dated 12th February, 2010 notifying counsel for the respondent that the record of proceedings was ready for collection clearly shows that the respondent applied for the proceedings and they were prepared and availed. It is not denied by the respondent's counsel that the letter requesting for proceedings and the notification letter indicating readiness of proceedings for collection from the Registrar exist. In any case, the non-inclusion of the letter requesting for the record of proceedings by the respondent is not fatal in view of the evidence of a response to a request for the proceedings and the response was served on the opposite party. This objection is therefore overruled.

APPEAL

GROUND OF APPEAL: THE LEARNED TRIAL JUDGE ERRED IN LAW AND FACT WHEN HE AWARDED INTEREST ON THE DECRETAL SUM AT A RATE OF 20% TO RUN FROM THE DATE OF JUDGMENT UNTIL PAYMENT IN FULL.

Counsel for the appellant adopted his oral submissions made on 9th January, 2018. He argued that where the amount claimed is liquidated, then the interest awarded should be from the date of filing the suit until payment in full and therefore the learned trial judge erred when he awarded interest on

an amount that was liquidated from the date of delivery of the judgment rather than 23rd March, 2004 which was prayed for in the submissions made in the lower court. Counsel relied on the cases of **KANABOLIC GROUP OF COMPANIES (U) LTD VS SUGAR CORPORATION OF UGANDA LIMITED (SCOUL SCCA NO. 15 OF 1994)** as well as **BEGUMISA FINANCIAL SERVICES LTD VS GENERAL MOULDINGS LTD & ANOR [2007]1 EA 28** to buttress this argument relying on Section 26 (2) of the Civil Procedure Act.

Counsel for the respondent in response submitted that the trial Judge studied the pleadings and in exercise of his discretion awarded the appellant interest from the date of Judgment till payment in full. He contended that the award by the trial Judge was in exercise of his discretion and that can only be challenged, if it is demonstrated that the trial Judge relied on a wrong principle of law or the interest awarded was manifestly low or excessive. This according to counsel has not been demonstrated. There was no justification therefore for this Court to attack or revisit the manner in which the trial Judge exercised his discretion in the award of interest from the date of Judgment till payment in full. The cases of **SHAH VS MBOGO & ANOR [1968] EA 93** and **WARD VS JAMES [1965] 1 ALL ER 563** were cited by counsel for court to consider in regard to the basis upon which the discretion of a judge can be interfered with by a higher court while **PREM LATA VS PETER MUSA MBIYU [1965] EA 592** was cited for the distinction of the interest to be awarded for general and special damages. It was the contention of counsel for the respondent that interest antecedent to the suit was not applicable in this case as it did not fall within the categories of ALL INDIA REPORTER 7th Edition (1963) which was cited in **HIGHWAY FURNITURE MART LIMITED VS THE PERMANENT SECRETARY & ANOR [2006] 2 EA 94.**

Counsel for the appellant in his submissions in rejoinder reiterated the earlier submissions made on the merits of the appeal relying on the **KANABOLIC GROUP LTD** Case (supra) and the circumstances to be relied upon in considering at what date interest should begin to run. Counsel submitted that the amount the appellant claimed was in the plaint and was therefore ascertainable when a claim for the same was made upon filing of the suit in

2004. Counsel also submitted that the trial judge exercised his discretion wrongly in awarding interest from the date the judgment was delivered.

In sur-rejoinder to the appellant's submissions in rejoinder, it was submitted by counsel for the respondent that a party is bound by its pleadings and that the appellant prayed for interest from 22nd November, 2002 and not from the date of filing the suit which is being relied on to fault the learned trial judge. It was further submitted for the respondent that the learned trial judge cannot be blamed for not awarding a claim which was not brought to his attention at trial.

Counsel for the respondent relied on **CODE OF CIVIL PROCEDURE 7TH EDITION BY D.V CHITALEY & RAO**, and argued that discretion to award interest must be exercised on sound judicial principles and when so exercised, it will not be interfered with on appeal. Counsel for the respondent contended that the trial judge had exercised his discretion properly after reviewing the evidence on record and awarded the interest as he did and this should not be interfered with.

RESOLUTION OF THE GROUND OF APPEAL

I have perused the record of the Lower Court and considered the submissions of counsel for both parties plus authorities they cited together with others that I find relevant on this ground of appeal.

I am aware of our mandate as a second appellate Court under **Rule 32(2) of the Rules** of this Court. The Principles the Court has to follow in the discharge of its mandate as a second appellate Court were stated by the Supreme Court in **Father Nasensio Begumisa and 3 others Versus Eric Begumisa SCCA 17/2002.** Where the Court held:-

> **"It is a well – settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."**

The main issue in contention for this appeal is on whether interest in the present case should have been awarded from the date of filing the suit or from the date of Judgment.

Section 26 (2) of the Civil Procedure Act sets out the circumstances for award of interest by Court. It provides:-

> ***"Where in so far as a decree is for payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit from the date of the decree, in addition from any interest on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit"***

The Supreme Court and this Court have had occasion to interprete the provisions of **Section 26(2) of the Civil Procedure Act** in numerous cases including;

Supreme Court **Civil Appeal No. 15 of 1994 Kanabolic Group of Companies (U) Ltd Versus Sugar Corporation of Uganda Ltd** where the Court held:-

> ***"It is clear from this provision that a court exercises discretion when ordering for payment of interest. In practice where interest have been properly asked for by a litigant deprivation of interest should be supported by reasons.***
>
> ***As we understand the provisions of section 26 (2), the rate at which such interest is payable is of three types, namely:-***
>
> ***(i) Before the institution of a suit interest may be payable on the principal sum. This normally arises in cases of claims for special damages such as where the claim is for expenses actually incurred before the suit is filed or***

for dispossession of an article before filing the suit: See Hirji Vs Modessa (1967) EA 724 at 727; Kimani Vs Attorney General (1969) MA 502 at page 50 and J.K Patel Vs Spear Motors Ltd. (Supreme Court Civil Appeal No.4 of 1991 (Supra).

(ii) From the date of filing suit till judgment. This is applicable where a debt is due at the time of filing the suit. (See Supreme Court Civil Appeal No. 7 of 1993 (C. Kigundu & Another Vs Uganda Transport Company (unreported).

(iii) From date of Judgment or decree till full payment or earlier. This type of applicant is awarded on general damages arising, for insurance, from personal injuries Hirji Vs Modessa (1967) E.A 724 and Lata Vs Mbiyu (1965) E.A. 592."

When interpreting the provisions of the same Section in **Supreme Court Civil Appeal No. 31 of 1995 Sietco Versus Noble Builders Ltd** Wambuzi CJ held:-

"An award of interest is discretionary. The basis of an award of interest is that the defendant has kept the plaintiff out of his money and the defendant has had the use of it himself and therefore he ought to compensate the plaintiff accordingly. (Harbutt's Plasticine Ltd v Wayne Tank and Pump Company Limited [1970] 1 QB 447 applied).

Where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and their interest is only given from date of judgment. (Mukisa Biscuit Manufacturing Company Limited v

West End Distributors Limited number 2 [1970] EA 469 followed)

The time when the amount claimed was due is the date from which interest should be awarded. As a matter of law, unless the rate of interest is agreed in the contract, the rate must be reasonable. (JK Patel v Spear Motors Limited Supreme Court Civil Appeal Number 4 of 1991 (UR) followed)."

This Court had occasion to state the law on interpretation of the provisions of the Section in **Begumisa Financial Services Ltd v Mouldings Limited and another [200]** 1 EA 28 and it held:-

"**The principle laid down by Lord Denning in Harbutt's "Plasticine" Ltd vs. Wayne Tanks and Pump Co. Ltd** (1970) IQB 447 seems to be,

"An award of interest is discretionary. It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly".

This principle appears to have been accepted in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (No.2) 1970 EA 469. Spry,** VP Held:-

"The principle appears clearly, I think, in the judgment of this Court in Prem Lata vs. Mbivu, [1965] EA 592. That was a case concerning damages for personal injuries. The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and there interest is only given from the date of judgment".

I will now proceed to assess whether the legal principles quoted in the authorities above with which I agree were applied in the Lower Court in the award of interest in the present appeal.

In the present case the appellant filed a suit to recover from the respondent the sum of Uganda Shillings 241,707,213/= that it had paid to Citibank with interest at 20% per annum from the 22nd November 2002 to the date of full payment.

The trial Court awarded the appellant the sum claimed with interest at 20% to run from the date of Judgment till payment in full. The appellant was aggrieved by the decision. He contends that the Court in this case should have ordered that interest should start to run from the date of filing the suit rather than the date of Judgment.

The amount claimed in the instant case was clearly liquidated. It was a specific sum of 241,707,213/=. Counsel for the respondent contended that the learned trial Judge was justified in not awarding interest from the date of filing because the appellant had claimed general damages the basis on which the breach that triggered the claim for special damages. According to counsel the claim for special damages coupled with that of general damages required assessment and, on that basis, interest should not run from the date of filing the suit but from the date of Judgment. He relied on **Prem Lata v Peter Musa Mbiyu [1965] EA 592.**

I have perused the Prema Lata (Supra) Case.

I do not find that the authority supports the contention of counsel for the respondent.

In the Prema Lata Case the appellant, sued for damages for personal injuries. The Court awarded shs. 24,000/= as general damages and shs. 1,742, 180 as special damages but the Judge refused an application to award interest on these two sums from the date of filing the suit until Judgment.

On appeal the Court of Appeal for Eastern Africa, the Court held;

> ***"The award of interest on a decree for the payment of money for the period from the date of the suit to the date of the decree***

is a matter entirely within the courts discretion, by s.26 of the Civil Procedure Act. Such a discretion must of course be judicially exercised, and where as in this case no reasons are given for the exercise of a judicial discretion in a particular manner, it will be assumed that the discretion has been correctly exercised, unless the contrary be shown (Toprani v. Patel (1) [1958] E.A. at p. 349). In an attempt to satisfy us that the normal practice is to award interest on the amount of a money judgment from the date of filing suit counsel for the appellants referred us to Eastern Radio Service v. R.J. Patel (2) and Y.F. Gulamhusein v. French Somaliland Shipping Co. Ltd. (3). In both these cases the successful party was deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest. But suits for damages for personal injuries are in a different category. It cannot be said that, at the date of filing suit, the plaintiff is entitled to any particular amount.

the Chief Justice was right in refusing to award interest on general damages from the date of filing the suit, but it is conceded, and rightly so in our opinion, that interest on should have been given on the amount of shs. 1,742,180 awarded to the next friend in respect of special damages".

The Court in the Perma Case was handling a claim for a liquidated sum of 1,742,180/=. There was a claim for special damages as well as a claim for general damages.

The Court held that in respect of the claim for special damages it was correct to award interest on that claim from the date of filing.

The Court clarified that an award for interest in respect of special damages should normally be made if the amount claimed has been actually expended or incurred at the date of filing the suit.

In respect of the claim on general damages the Court held that the award of interest should be from the date of Judgment as the general damages have

to be assessed and the plaintiff would not be said to be deprived of the general damages before they are assessed.

In the instant appeal the trial Judge found that the appellant was "entitled to indemnification from the defendant in the sum of Ugs 241,707,213 being the outstanding debit balance on his account with Citibank by November 2002". The claim of Uganda Shillings 241,707,213/= was a liquidated claim. The trial Judge ought to have awarded interest on the liquidated claim from the date of filing the suit which is 23rd March 2004 to the date of payment in full.

In addition to the liquidated sum the appellant had also claimed for general damages. According to counsel for the respondent this claim for general damages was the ground for the trial Judge not to award interest from the date of filing the suit to the date of Judgment.

I am not persuaded by the argument of counsel for the respondent on in point in view of the holding in the **Prem Lata (*supra*)** Case.

Where there is a claim for a liquidated sum and a claim for general damages in the same suit the award of interest should be granted to commence running at different times. The interest on the liquidated sum should run from the time of filing while interest on the general damages should run from the date of Judgment.

Counsel for the respondent argued that the award of interest is on the discretion of the trial Judge and this cannot be interfered with on appeal.

The Court of appeal for Eastern African stated the law on when an appellant Court will interfere with the exercise of discretion by a trial Judge in **Mbogo and another versus Shah [1968] EA 93**. The Court held:-

> **"A Court of appeal should not interfere with the exercise of the discretion of a trial Judge unless it is satisfied that the Judge is exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice."**

I find that in the instant case the trial Judge misdirected himself on the law in respect of the award of interest and a result there was injustice when he failed to award interest from the date of filing in respect of the liquidated sum.

The trial Judge did not award the claim for general damages which decision was in exercise of his discretion.

The appellant has not demonstrated that the trial Judge acted wrongly or acted on any wrong principle of law on the decision in respect of general damages. I would therefore not interfere with that decision.

The **HIGHWAY FURNITURE MART LTD CASE (SUPRA)** is distinguishable in that it dealt with interest accruing before institution of the suit whereas the appellants claim is for interest from the date of filing the suit. The **PREM LATA CASE (SUPRA)** is even more instructive in that interest can be claimed if the sums in issue have actually been expended or incurred at the date of filing the suit. The decretal sum that was awarded to the appellant had already been expended at the time the suit was filed and therefore interest should have been awarded to run from the time the suit was filed.

The Learned Trial Judge erred in law and fact when he awarded interest on the decretal sum to run from the date of judgment until payment in full.

I would therefore substitute this order with an order that interest runs from the date of filing the suit in the lower court and specifically 23rd January, 2006 until payment in full. The appellant is also awarded the costs of the appeal.

CROSS-APPEAL

GROUND 1: THE LEARNED TRIAL JUDGE ERRED IN LAW IN FAILING TO FIND THAT THE GUARANTEE OF 13TH AUGUST, 2002 (PE 14) WAS UNCERTAIN AND UNENFORCEABLE AS NO CREDIT LIMIT HAD BEEN SET FOR THE FOR THE PERIOD 13TH AUGUST, 2002 TO 31ST JULY, 2003 WHEN THE DEFAULT OCCURRED.

GROUND 2: THE LEARNED TRIAL JUDGE ERRED IN LAW IN FAILING TO HOLD THAT THE GUARANTEE OF 13TH APRIL, 2002 (PE 14) ONLY COVERED MONIES ADVANCED FROM ITS DATE AND NOT THE ENTIRE DEBT OWED BY THE CROSS-APPELLANT TO CITIBANK.

GROUND 3: THE LEARNED TRIAL JUDGE ERRED IN LAW IN FAILING TO HOLD THAT THE PLAINTIFF WAS NOT UNDER ANY LEGAL COMPULSION TO PAY CITIBANK THE MONEY DUE TO IT FROM THE DEFENDANT.

Counsel for the respondent/cross appellant argued all the three grounds of the cross appeal jointly. It was submitted that PE 14 (the guarantee) was unenforceable since it had no credit cap from 13th August, 2002 up to 31st July, 2003. It was submitted for the respondent that this guarantee was uncertain on the sums guaranteed by the appellant and was to this extent vague. Counsel for the appellant cited Chitty on Contracts for the opinion that a guarantor cannot be indemnified by the principal borrower if he pays before the principal debt becomes due.

That there was no scintilla of evidence from the appellant to prove that a demand had been made by the creditor thus making the debt due in effect requiring payment of the same by the appellant.

Counsel for the appellant submitted that the cross appeal is devoid of merit and should be dismissed. Counsel for the appellant submitted that the cross appellant was trying to argue a guarantee that he was not party to and further the cross appellant's admission that indeed he received a credit facility estops him from arguing that it was unenforceable.

Counsel for the appellant charged that the absence of credit limits on the sums that were to be guaranteed and that the liability that accrued was the actual amount of money received by the respective dealer.

Counsel for the appellant further discounted the respondent's argument that the appellant paid voluntarily because the respondent was in default, the bank had terminated the facility and the person to pay for that default had to be the appellant. **AS FOLKES & CO VS KASANDAS PURSHOTTAM & ANOR [1959] EA 36**, was referred to for the argument that from the terms of the

guarantee, the appellant was liable to pay for the default of a guarantor under the scheme.

In sur-rejoinder, it was submitted for the respondent that the trial judge erred in enforcing the guarantee that had been executed by the appellant when it was clear that the said guarantee was equivocal in as far as the sums guaranteed were not mentioned, there were no events of default by the cross-appellant and had no time limit as well. Counsel went on to submit that this was the reason of the cross-respondent's letter dated 12th April, 2002 (DE 29 at page 277 of the record of appeal).

Counsel for the respondent submitted that the authority relied upon by the cross-respondent of **AS FOLKES & CO (SUPRA)** was distinguishable in as far as it did not address an equivocal guarantee. It was concluded that the manner in which the guarantee was couched as well as DE 29, it was equivocal and unenforceable against the cross-appellant therefore the cross appeal should be allowed with costs in this court and in the court below.

According to the Judicature (Court of Appeal Rules) Directions, Rule 91 (1) a respondent may lodge a notice of cross appeal against the decision of the High Court or any part thereof that the party desires to be varied or reversed. Rule 91 (2) provides as follows;

"(2) A notice given by a respondent under this rule shall state the names and the addresses of any persons intended to be served with copies of the notice and shall be lodged in four copies in the registry not more than thirty days after the service on the respondent of the memorandum of the appeal and the record of the appeal."

Once an appeal has been lodged, the respondent can lodge a notice of cross-appeal in order to obtain any remedy available to him or her in law. It follows therefore that a cross-appeal arises from an appeal that is competent and legally sound having been instituted in accordance with all the relevant laws both procedural and substantive.

Counsel for the cross respondent submitted that the cross appellant withdrew the cross appeal on the 19th January 2018 and for that reason had no right to argue the cross appeal.

Counsel for the cross appellant denied having withdrawn the cross appeal.

Rule 94 of the Rules of this court allows formal withdrawal of an appeal. The cross appellant did not formally withdraw the cross appeal and counsel for the cross appellant denied such withdrawal. The cross appeal was therefore not withdrawn.

When the cross appellant and cross respondent held a scheduling conference on 18th April, 2006; it was agreed that the cross appellant was a dealer at 3 stations of the cross respondent and was advanced credit facilities from Citibank up on recommendation of the cross respondent. The repayment of the credit facility was guaranteed by the cross respondent. The cross appellant did not honour his obligations to Citibank. The cross respondent paid to Citibank Ug. Shs.241.707.213/=.

The above agreed facts show that the Ug.Shs.241.707.213/= was paid on behalf and for the benefit of the cross appellant.

The deed of guarantee executed on the 16th of March, 2001 was for Ug. Shs. 150.000.000/=.

Term 2 of the deed of guarantee provides as follows;

"The guarantor hereby binds itself to pay and satisfy Citibank for all sums due and owing up on one month's notice being given, PROVIDED that the claim does not exceed the advance".

The second guarantee as set by the letter dated 11th September, 2001 was even clearer in a sense that the first guarantee was increased from Ug. Shs. 150.000.000/= to Ug. Shs. 250.000.000/=. The amounts guaranteed were the amounts borrowed. The credit limits in both guarantees had clear credit limits. The arguments that the guarantees had no credit limit; that payment by the cross respondent were made voluntarily can therefore not be sustained and are rejected.

Therefore, the cross-appeal is hereby struck out and the cross appellant shall bear the costs of the cross appeal.

In the result, since my Lords Cheborion Barishaki and Hellen Obura JJA both agree we give the following orders:-

a) The appellant's appeal, Civil Appeal No. 32 of 2010 is allowed.

b) The learned trial Judge's order as regards interest is set aside and is substituted with an order that interest of 20% on the decretal sum is to run from 23rd January, 2006 the date of filing the suit.

c) The respondent is ordered to bear the costs of the appeal.

d) The respondent's cross-appeal is struck out.

e) The cross appellant is to bear the cross respondent's costs of the cross appeal.

Dated at Kampala this ....23rd.... day of ....Aug..... 2021.

RICHARD BUTEERA
DEPUTY CHIEF JUSTICE

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 32 OF 2010

CORAM: Richard Buteera, DCJ, Cheborion Barishaki, Hellen Obura, JJA.

SHELL UGANDA LTD::APPELLANT

VERSUS

CAPTAIN NAEEM SHAIR CHAUDRY::RESPONDENT

JUDGMENT OF CHEBORION BARISHAKI, JA

I have had the benefit of reading in draft the judgment prepared by Hon. Justice Richard Buteera, DCJ in this appeal. I concur with his conclusion and the orders proposed in both the appeal and the cross appeal.

Dated at Kampala this.........23rd.........day of.....Aug.............2021

Cheborion Barishaki

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Richard Buteera, DCJ, Cheborion Barishaki & Hellen Obura, JJA)

CIVIL APPEAL N0. 32 OF 2010

(Arising from High Court Civil Suit No.179 of 2004)

SHELL UGANDA LIMITED::APPELLANT

VERSUS

CAPTAIN NAEEM SHAIR CHAUDRY:::::::::::::::::::::::::::::::::::::: :::::::::::::RESPONDENT

JUDGMENT OF HELLEN OBURA, JA

I have read in draft the judgment of my Lord Hon. Justice Richard Buteera, DCJ. I concur with his conclusion and the order proposed in both the appeal and the cross appeal.

Dated at Kampala this..23rd......day of....Aug..................2021.

....

Hellen Obura

JUSTICE OF APPEAL