

THE REPUBLIC OF UGANDA

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

HIGH COURT CIVIL SUIT NO. 1492 OF 1999

REHEMA NAKIBUUKA..... PLAINTIFF

VERSUS

BANK OF BARODA DEFENDANT

Before: The Hon. Mr. Justice E. S. Lugayizi

JUDGMENT

The plaintiff sued the defendant in respect of a mortgage on land under Leasehold Register Volume 2231 Folio 15 Kyadondo, Block 273, Plot No. 1083, Namasuba (hereinafter to be called "*the suit premises*") and guarantee she gave to support an overdraft and prayed Court for the following orders:

1. An order discharging the plaintiff in respect of the mortgage and the guarantee.
2. A declaration that the plaintiff is not liable to the defendant under the mortgage and the guarantee.

3. An order that the defendant must return to the plaintiff the certificate of title for the suit premises fully discharged of the mortgage.
4. General damages.
5. Costs of the suit.

In its amended written statement of defence and counter-claim the defendant denied the plaintiff's claim and counter-claimed for a sum of shillings 93,785,375 with interest thereon at 24% p.a. from 1st September 1999 till payment in full and costs.

In reply, the plaintiff denied the counter-claim and prayed for its dismissal and insisted on the orders she sought in the plaint.

At the time of hearing the suit and the counter-claim Dr. Byamugisha represented the plaintiff and Mr. John Magezi represented the defendant.

The plaintiff called one witness (namely, Rehema Nakibuuka-PW1-) in support of her case. Briefly, Nakibuuka testified as follows:

In 1998 she was engaged in the business of selling school uniforms. As a result she came to know Kristan Kumar who ran Kumar Sports Ltd. Subsequently when Nakibuuka wished to open an account with the defendant, Kumar offered to help her in that respect. Therefore, Nakibuuka and Kumar visited the defendant with a view to opening a bank account. They talked to Patil who was the defendant's Chief Manager and Kumar's friend. All went well and Nakibuuka opened up a bank account with the defendant in her name. In turn, Patil requested her to help Kumar Sports Ltd to get an overdraft of shillings 40m/= by mortgaging the suit premises and personally guaranteeing the overdraft. Patil pointed out that Kumar Sports Ltd would pay the overdraft in one year. Nakibuuka readily agreed to help Kumar Sports Ltd as

Patil had requested her to do.

By 27th April 1998 all the parties concerned had completed the necessary formalities and Nakibuuka had signed the mortgage, the guarantee, etc, which were meant to facilitate the release of the overdraft. She had also released to the defendant the title deeds for the suit premises. Thereafter, she expected the defendant to release the overdraft to Kumar Sports Ltd and Kumar Sports Ltd to pay back as it was supposed to do. However, later on the defendant notified her that the borrower had defaulted in paying back and that it was now her responsibility to make good the overdraft. Thereafter, she visited the defendant and obtained the vital documents relating to the overdraft. On carefully going through them she discovered a number of irregular things. For example, although she had guaranteed an overdraft of shillings 40m/=, the defendant had given out an overdraft of over shillings 70m/= and it finally required her to pay back a sum of over shillings 93m/=. Secondly, the guarantee she gave was in favour of Kumar Sports Ltd. However, it appeared that Kumar Sports was not the beneficiary of the overdraft the defendant wanted her to pay back. In view of the above irregularities Nakibuuka thought that the mortgage and the guarantee she gave could not be lawfully enforced against her. Therefore, she filed the suit that is the subject of this judgment hoping that Court would release her from the whole arrangement.

In its defence the defendant called one witness, namely Alyson Mutakirwa (DW1). Briefly, Mutakirwa testified as follows:

He is a banking officer and has been working in the credit department of the defendant for the last 17 years. He knows the plaintiff who has an account with the defendant. The defendant presently holds the plaintiff's title deeds for the suit premises because in April 1998 she mortgaged the suit premises in favour of the defendant with a view to enabling Kumar Sports Ltd to obtain an overdraft of shillings 40m/=. Nakibuuka further guaranteed to pay back the overdraft in case the borrower defaulted. Subsequently, the defendant fully observed the terms of the mortgage and the guarantee by giving the borrower an overdraft of over shillings 70m/=. However, the borrower defaulted in paying back the overdraft. This, in turn, meant that the plaintiff as the guarantor of the overdraft was under obligation to pay back all the money due under the overdraft. For those reasons, Mutakirwa urged Court to dismiss the

plaintiff's suit with costs and to allow the counterclaim.

The parties herein agreed that Court should dispose of the suit that is the subject of this judgment on the basis of three issues. However, for the sake of clarity and perhaps ease of handling Court has slightly changed the wording and the order of the agreed issues. They will now take the form below and Court will dispose of them in that order, that is to say:

1. Whether the plaintiff is discharged from the obligations created under the mortgage and the guarantee and ought not to pay the overdraft in question by reason of the defendant's conduct as set out in the plaint.
2. Whether the plaintiff is liable to the defendant in the sum claimed in the counter-claim.
3. The available remedies.

With regard to the first issue (i.e. whether the plaintiff is discharged from **the obligations created under the mortgage and the guarantee and ought not to pay the overdraft by reason of the defendant's conduct as set out in the plaint**). Court has this to say. All depends on the answers to the two questions below, that is to say,

- (a) whether the defendant breached the contract or arrangement in question;
- (b) in case it did, whether the breach was fundamental.

The plaintiff laid out the alleged acts of breach in paragraphs 5, 6, 7 and 8 of the plaint. Those acts may be summarised as follows:

- (i) that the defendant did not release the overdraft as was agreed, but craftily used the mortgage and the guarantee to secure an existing overdraft or old overdraft that

was standing on the borrower's account;

- (ii) that the overdraft was beyond the agreed limit;
- (iii) that when the overdraft facility expired on 22nd April 1999, the defendant did not recall it, but allowed it to continue until it became a sum of shillings 94,377,775/=;
- (iv) that the defendant prejudiced the plaintiff's rights by dealing with strangers to the contract or the arrangement, that is to say Kumar Sports and Kumar Sports (U) Ltd.

Be that as it may, it is now Court's duty to consider the above four acts of alleged breach with a view to answering the two questions raised above. Court will answer those questions in turn.

Failure to release the overdraft as agreed, but craftily using the mortgage and guarantee to secure an existing overdraft or old overdraft:

The gist of the plaintiff's evidence under this head is that Nakibuuka (PW1) gave the mortgage and guarantee on the understanding that they were to secure an overdraft the defendant intended to give to the borrower. However, contrary to what the parties agreed, the defendant used the said mortgage and guarantee to secure an existing or old overdraft. In the plaintiff's opinion the defendant's failure to comply with the terms of the arrangement in that respect amounted to a breach of contract.

In its defence the defendant denied that it breached the terms of the arrangement. Its witness Mutakirwa (DW1) insisted that the defendant adhered to all the terms of the mortgage and the

guarantee.

Be that as it may, according to the mortgage (Exh. P1), and the guarantee (Exh. P2) it is clear that the plaintiff mortgaged the suit premises and gave the guarantee with a view to enabling the borrower to get an overdraft in the future. The application form for the overdraft (Exh. P9) and the debenture (Exh. D4) also confirm that fact; and there is no evidence to show or to suggest the contrary.

Despite the above state of affairs the defendant deviated from what was agreed upon. For, at the end of April 1998 it manipulated an existing account that was in debit (i.e. in red) by crediting it with a fictitious sum of shillings 72,095,787/= and seemingly bringing it out of debit. Simultaneously, the defendant created a new overdraft account and debited it with the sum of shillings 72,095,787/=. It is under this new account that the defendant purported to hold the plaintiff liable to pay the overdraft on the strength of the mortgage and guarantee. In short, the defendant having advanced money to a borrower in the past, without security, cleverly tried to correct that impropriety by using the mortgage and the guarantee in question. Clearly, that is not what the parties had agreed upon under the mortgage and guarantee in question. For that reason, Court fully agrees with the plaintiff that the defendant breached the contract or arrangement.

The overdraft exceeded the agreed limit:

Nakibuuka (PW 1) testified that she mortgaged the suit premises and gave the guarantee in question to enable the defendant to grant the borrower an overdraft of not more than shillings 40m/=. She insisted that she did not at any time authorise the defendant to increase the overdraft beyond the agreed limit.

The defendant did not agree with Nakibuuka's testimony. Its witness Mutakirwa (DW1) testified that clauses 1, 5, and 10 of the guarantee were very clear. They permitted the defendant to release to the borrower a sum of more than shillings 40m/= as an overdraft and

also bound the plaintiff to pay the whole amount released.

For the sake of clarity Court will outline, below, the contentious areas of the guarantee that is to say, clauses 1, 5, and 10). Clause 1 reads as follows,

“...I, REHEMA NAKIBUKA

...

hereby

AGREE to pay and satisfy the bank on demand all and every., sum

of money which are now or at any time shall be owing to the bank

...from the Customer... . Occasioned by or incident to this or any other

security held by...the Bank for the same indebtedness...

...

...

...

PROVIDED that the total amount recoverable from me hereunder is limited to the

sum of UG. Shs. 40,000,000/= Forty million only with interest thereon...”

Clause 5 of the guarantee reads as follows:

“I agree that the bank’s statement of the Customer’s account with the Bank for the Bank’s last accounting period shall be good and sufficient evidence in Court and elsewhere of my liability hereunder.”

Clause 10 of the guarantee reads as follows:

“10. The Bank may at any time without prejudice to this Guarantee and without discharging or in any way affecting my liability hereunder:

(a). . . vary or increase any credit to the Customer.”

From the foregoing, it is clear that clause 1 of the guarantee limited the plaintiff's liability (for the overdraft) to a sum of shillings 40m/=.

Consequently, the rest of the clauses including clauses 5 and 10 of the guarantee ought not to be read in isolation, but together with clause 1. When that is done, it becomes plain that clauses 5 and 10, do not contradict the contents of clause 1 (as Mr. Magezi seemingly suggested) but, among other things, reaffirm its contents. In other words, one may say that under the guarantee, the plaintiff strictly bound herself to pay not more than shillings 40m/= in respect of the overdraft. However, this does not mean that the defendant was limited to giving the borrower an overdraft of shillings 40m/= only. It could give the borrower more money than the plaintiff bound herself to pay, but in that event the plaintiff would not be liable for the excess. The excess would, exclusively, be the defendant and borrower's business alone. That view is not only the most logical interpretation of the above three clauses it is also consistent with the contents of most of the documents that both parties introduced in evidence as exhibits. For example, the mortgage (Exh. P1), the guarantee (Exh. P2), the application for the overdraft (Exh. P9), the bank statements (Exhs. P3, P7 and D7) and the debenture (Exh. D5).

In Court's opinion, the sum total of the foregoing is this. Granting the borrower an overdraft of more than a sum of shillings 40m/= per Se, was not a breach of the contract or the arrangement in question. For under the contract or arrangement it was clear that the defendant could grant the borrower an overdraft in excess of shillings 40m/=. However, if the borrower defaulted the plaintiff was only liable to pay a sum of shillings 40m/=. Any money the defendant gave in excess of shillings 40m/= was the defendant's business alone.

Failure to recall the overdraft after 22nd April 1999:

According to Nakibuuka (PW1) the defendant's Managing Director Patil had assured her before she mortgaged the suit premises and gave the guarantee in question that the borrower would repay the overdraft in one year. That meant that the overdraft arrangement was

supposed to be effective from the end of April 1998 to 22nd April 1999.

The defendant did not challenge or contradict the above evidence. In fact, one of the defendant's documents Court received in evidence as exhibit D5 confirms Nakibuuka's version above.

In view of the foregoing, it is clear that the evidence on record shows that the defendant was supposed to recall the overdraft on 22nd April 1999. However, the bank statement Court received in evidence as Exh. D7 tells a different story. It reveals that the defendant allowed the overdraft facility to go beyond the agreed time limit. Obviously, the failure on the part of the defendant to honour what it had agreed upon concerning the life span of the overdraft was another breach of contract or arrangement in question.

Prejudicing the plaintiff's rights by dealing with strangers to the contract or arrangement, that is to say Kumar Sports and Kumar Sports (U) Ltd.:

According to Nakibuuka (PW1), Patil (the defendant's principal agent) requested her to mortgage the suit premises and to give the guarantee in question with a view to enabling Kumar Sports Ltd to get an overdraft from the defendant. The plaintiff obliged. However, subsequently, when the borrower defaulted and the defendant turned to the plaintiff to pay the overdraft the plaintiff discovered this. That although the defendant had fronted Kumar Sports Ltd as the borrower finally the actual beneficiary of the overdraft was Kumar Sports. Nakibuuka pointed out that the above state of affairs prejudiced her rights under the contract or the arrangement for she never consented to giving a mortgage or guarantee for an overdraft in favour of Kumar Sports, which is a stranger to the contract or arrangement.

The defendant did not dispute the fact that it dealt with strangers to the contract or arrangement that is to say, Kumar Sports and Kumar Sports (U) Ltd. However, it insisted that the above occurrence was an insignificant factor because it was a mere variation of the name of the borrower that did not prejudice the plaintiff's interests under the contract or the

arrangement.

Be that as it may, the bone of contention is whether the above occurrence prejudiced the plaintiff's rights under the contract or arrangement and amounted to a breach thereof.

Court thinks that it did and it amounted to a breach of contract or arrangement. These are Court's reasons for holding that view. It is common knowledge that in law each of the three names that the defendant used in the contract or arrangement represents something different. In essence, that means that Kumar Sports (i.e. a firm name) is different from Kumar Sports Ltd and Kumar Sports (U) Ltd, which are ostensibly limited liability companies.

Equally so, the fact that Kumar Sports Ltd and Kumar Sports (U) Ltd are ostensibly limited liability entities does not make the two entities one and the same. The two are totally different entities. Therefore, the defendant acted unfairly when it sought to force the plaintiff to pay back an overdraft that Kumar Sports took when it knew too well that under the contract or arrangement the plaintiff gave the mortgage and the guarantee to enable Kumar Sports Ltd to obtain the overdraft. In that respect, the defendant's conduct prejudiced the plaintiff's rights under the contract or arrangement and amounted to a breach thereof.

All in all, Court is satisfied that out of the four acts of alleged breach of contract or arrangement the plaintiff succeeded in proving three of them, that is to say the first act, the third act and the fourth act. That takes care of the first question Court raised above.

Court will now go to the second question (**i.e. whether the above breaches are fundamental**). In law a fundamental breach of the contract entitles the plaintiff to disregard or to avoid the contract. (See **Karsales (Harrow) Ltd v Wallis (1956) 2A11 E.R 866.**) Therefore, the important question to answer now is whether the breaches pointed out above (i.e. under heads (1), (iii) and (iv) are fundamental. Without wasting time, Court must straight away point out that the breach under head (iii) above, i.e. the defendant's failure to recall the overdraft on 22nd April 1999, was not a

fundamental breach for it did not destroy the very basis of the contract or arrangement. Indeed, if all other things had remained equal, the plaintiff's liability under the contract or arrangement would have not been affected by the defendant failure to recall the overdraft on 22nd April 1999. The defendant's failure to recall the overdraft in time would have only meant that the defendant which allowed that situation to rise would, in law, have taken the responsibility for the extra money that fell due after the agreed time limit for the overdraft. That takes care of the breach under head (iii) above.

In Court's opinion, the breaches under heads (i) and (iv) above are fundamental. They destroyed the very basis of the contract or arrangement in question in that they turned the contract or arrangement into a totally different one, which the plaintiff did not subscribe to. (See **Karsales (Harrow) Ltd v Wallis- supra-**). Indeed, as Court earlier on pointed out the plaintiff did not mortgage the suit premises with a view to providing security for an existing or old overdraft. She mortgaged the suit premises to the defendant in order to secure an overdraft, which was supposed to be released in future. Equally so, she did not enter the contract or arrangement in question with a view to enabling Kumar Sports to get an overdraft. Instead, she did so to enable the defendant to grant an overdraft to Kumar Sports Ltd. For those reasons it is clear that the defendant fundamentally breached the contract or arrangement in question.

All in all, Court must order that the plaintiff should be discharged from the obligations created under the mortgage and the guarantee and that she should not pay the overdraft in question by reason of the defendant's conduct as set out in the plaint. That finding takes care of the first issue.

However, before Court goes to the second issue, it thinks it is appropriate to point out that it agrees with the submission of Dr. Byamugisha that the defendant may have committed some criminal offences in respect of its conduct against the plaintiff. This is particularly so, in respect of the acts complained of under heads (i) and (iv) above.

With regard to the second issue (**i.e. whether the plaintiff is liable to the defendant in the sum claimed in the counter-claim**) Court thinks that after resolving the first issue as it has

done above, the question of the plaintiff's liability on the counter-claim does not arise.

With regard to the third issue (i.e. **the available remedies**) Court has this to say. Since Court has resolved the first two issues in favour of the plaintiff it means that the plaintiff's suit has succeeded. Therefore, Court must grant the plaintiff some remedies.

At the beginning of this judgment Court outlined the remedies that the plaintiff wishes to obtain. Therefore, Court will now go through those remedies with a view to determining whether it will grant them to the plaintiff.

(a) An order discharging the plaintiff in respect of the mortgage and the guarantee:

In view of Court's findings above it has no problem with granting the order that the plaintiff seeks under this head.

(b) A declaration that the plaintiff is not liable to the defendant under the mortgage and the guarantee:

Again Court has no problem with granting the order under this head.

(c) An order that the defendant returns to the plaintiff the Certificate of title for the suit premises fully discharged as far as the mortgage is concerned:

Again the success of the plaintiff's suit dictates that **Court** must grant her the order under this head.

(d) General damages:

It is most likely that the plaintiff has, in some way, suffered inconvenience as a result of the fact that the defendant has been illegally holding the title deeds for the suit premises for the last six years or so. She must have also suffered mental anguish because, all along, there was a likelihood of losing the suit premises. Therefore, considering all, Court thinks that a sum of shillings 2m/= would be sufficient to compensate the plaintiff for the inconvenience and the mental anguish she has so far suffered.

Costs:

Since costs follow the event, the plaintiff whose suit has succeeded must recover from the defendant the costs she incurred. **(See section 27(1) of the Civil Procedure Act (Cap.71)).**

In conclusion, Court hereby enters judgment in favour of the plaintiff in the following terms:

1. Court hereby discharges the plaintiff in respect of the mortgage (Exh. P1) and the guarantee (Exh. P2).
2. Court also hereby declares that the plaintiff is not liable to the defendant under the mortgage (i.e. Exh. P1) and the guarantee (Exh. P2).
3. The defendant must return to the plaintiff the certificate of title for the suit premises when the said certificate has been fully discharged in respect of the mortgage (i.e. Exh. P1).

4. The defendant shall also pay the plaintiff the sum of shillings 2m/= as general damages.

5. The defendant shall bear the costs of the suit.

E.S. Lugayizi

16/8/2004

(Judge)