

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-0156-2005

INTERFREIGHT (U) LTD PLAINTIFF

VERSUS

HAJI AHMEND NSUBUGA DEFENDANT

Guarantee-Suit statutorily barred- Section 3(1) of the Contract Act, Chapter 73, Laws of Uganda 2000 Edition.

Brief facts:

The plaintiff sought to recover from the defendant the sum of US\$16,000.00 based upon an alleged verbal guarantee issued to the plaintiff for outstanding debts owed to the plaintiff by three companies, two of which are limited liability companies, (Kindu Traders Ltd and Kavule Investments Ltd) and the third (Kito Traders) is simply a firm. The defendant is the managing director of the said companies. The defendant denied that he provided a personal guarantee for payment of the said debts.

Issues:

Whether this suit passes the threshold set by Section 3(1) of the Contract Act.

Held:

Suit is barred by Section 3(1) of the Contract Act, dismissed with costs accordingly.

Legislation referred to:

The Contract Act, Chapter 73, Laws of Uganda 2000 Edition

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

JUDGMENT

1. The plaintiff is seeking to recover from the defendant the sum of US\$16,000.00 based upon an alleged verbal guarantee issued to the plaintiff for outstanding debts owed to the plaintiff by three companies, two of which are limited liability companies, (Kindu Traders Ltd and Kavule Investments Ltd) and the third (Kito Traders) is simply a firm. The defendant is the managing director of the said companies. The defendant denies that he provided a personal guarantee for payment of the said debts.
2. It is contended in the plaint that on the 6th November 2002 there was a meeting between the managing director of the plaintiff and the defendant in which it was agreed to discount the group debt to one single sum of US\$ 16,000.00 and the defendant ‘personally and verbally guaranteed payment of the above sum in a short time. Copy of a letter of the same date is attached hereto as annexure “B” for its content and meaning.’ The defendant has since then defaulted on making the said payment.
3. The suit went to trial after a scheduling conference and both parties hereto called witnesses and presented evidence in the case. However, in the course of the trial, it was drawn to the attention of Mr. Fred Muwema, learned counsel for the plaintiff, by the court, that this suit might be barred by statute in light of the provisions of Section 3(1) of the Contract Act, Chapter 73, Laws of Uganda 2000 Edition. Mr. Muwema responded in effect that this action is not based upon a verbal guarantee but that there was a note or memorandum of an agreement dated 6th November 2002 which had been signed by the defendant. He therefore concluded that this suit is not barred by Section 3(1) of the Contract Act.
4. It is important at the outset to clear this matter given the wording of Section 3(1) of the Contract Act. I set it out below.
‘(1) No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person unless the agreement upon

which the suit is brought, or some memorandum or note of the agreement is in writing and signed by the party to be charged with it or some other person lawfully authorised by him or her to sign it.'

5. The above provisions clearly bar the institution of any suit if it is based upon a contract of guarantee unless the said contract is in writing, and signed by the defendant or his authorised representative. If the agreement itself is not in writing, then there must be some memorandum or note of that agreement which must be signed by the defendant or his or her authorised representative. This is a pre condition or condition precedent before a suit based on such an agreement can be entertained in a court of law. The question before this court therefore, before we can consider the evidence is whether this suit passes the threshold set by Section 3(1) of the Contract Act.

6. At the end of the trial no application was made to amend the pleadings in this case, and in particular the plaint. The plaint stands as it was filed. It alleges that the defendant 'personally and verbally guaranteed payment' of the sum demanded. It makes no allegation that such verbal agreement was reduced into writing and signed by the defendant or his representative. It makes no allegation that in lieu of the agreement itself being reduced into writing, a memorandum or note of that agreement was written and signed by the defendant or his representative. On the face of the plaint before the court this suit is based upon the personal and verbal guarantee of the defendant. This suit, in my view, as it stands is barred by Section 3(1) of the Contract Act, if the plain and ordinary meaning of the provisions thereof, are applied. I would dismiss the same accordingly.

7. Mr. Fred Muwema contended that there was a memorandum or note of the agreement of guarantee in the form of the letter of 6th November 2002 which was annexed to the plaint as annexure 'B' and admitted into evidence as plaintiffs exhibit 16. The defendant admitted signing this letter on receipt of the same in his testimony. My response to this is two fold. If it is a memorandum or note of the agreement of guarantee signed by the defendant, it would be inconsistent with the pleadings of the plaintiff, and unless the plaint was amended the plaintiff can hardly take benefit of this, as the case he must put forth must be consistent with his own pleadings. The plaint contains the material facts which the plaintiff hopes to prove at the trial. If the facts in the plaint are inconsistent with the evidence put forth at trial, it can hardly be said that the case as put forth in the plaint has been proved in evidence. The averments in the plaint refer only to a verbal guarantee and for as long as that is the basis of the action, it is barred by statute.

8. Nevertheless, it may be possible that I am wrong. I will therefore examine this document,

and determine if it is a memorandum or note of the agreement between the parties hereto upon which this action can be founded, leaving aside the question of the pleadings. I will set out the said letter in full.

‘6th November 2002 IFU/HM/2002/11 KITO Traders PO Box 1104 Kampala Fax: (041) 344362 Attn: Mr. Ahmed Nsubuga Dear Sir, RE: ACCOUNT SETTLEMENT This refers to our todays meeting between yourself and our Mr. Heinz Mueller. It was resolved that the accounts will be settled in a LUMPSUM compromise, rather than going into the various operational queries you did have with INTERFREIGHT. At the moment we have the following amounts outstanding in our books; 1) KITO TRADERS US\$21,094.40 USHS----- 2)KINDU TRADERS US\$1,947.00 USHS2,117,772.00 3) KAVULE INVESTMENTS US\$600.00 USHS5,970,153.00 We have agreed to accept a payment of USD 16,000.00 in full and final settlement of the above outstandings. The payment terms accepted are four (4) monthly instalments of USD 4,000.00 each, starting in December 2002 and completed in March 2003. We hope this compromise will open the doors for a future business relationship again. With best regards, (signed) Heinz Mueller GROUP MANAGING DIRECTOR’

9. Inscribed on the document is a signature which the defendant admitted he appended to the document on receipt of the same. I have read and re-read this document. I have been unable to gather any suggestion that it purports to be a memorandum or note of the agreement of guarantee allegedly agreed to by the parties hereto. All it says is that the agreement reached was a lump sum of US\$16,000.00 to be paid in 4 monthly instalments from December 2002 to March 2003. It makes no mention that it had been agreed that the defendant would pay the said sum of money personally or that he guaranteed payment of the said sums of money by the 3 companies which had outstanding unsettled accounts with the plaintiff.

10. I am unable to agree with Mr. Muwema that this letter amounts to a memorandum or note of the alleged agreement of guarantee. A plain reading of this letter reveals no agreement of guarantee at all between the plaintiff and the defendant in this case. I therefore come to the conclusion that there is no memorandum or note of agreement of guarantee signed by the defendant upon which an action such as this one must be based.

11. In light of the findings made herein above, it is not necessary to review the evidence of the parties adduced in this case or the issues that had initially been agreed upon. A finding that this suit is barred by Section 3(1) of the Contract Act is sufficient to dispose of this suit. I regret that this issue did not arise earlier or at least during the scheduling conference as it was definitively pivotal in disposing of this matter. In addition the time of this court and the

parties as well as costs of all would have been saved accordingly. I have no alternative other than to dismiss this suit with costs accordingly.

Dated, signed and delivered this 22nd day of December 2005

FMS Egonda-Ntende

Judge