THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-0739-2005

CAPITAL FINANCE CORPORATION LTD

:::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

SHAMSHERAL M. ZAVER :::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

R U L I N G:

The plaintiff's claim against the defendant is for Shs.7, 500,000= accruing from a loan facility to one Adam Vassiliadis. From the evidence, the plaintiff extended a loan facility to the said Adam who failed to pay it back. The loan facility was allegedly secured by the defendant's personal guarantee. The suit is for the enforcement of the said guarantee.

By his written statement of defence, the defendant has raised 2 distinct issues, namely;

(i) that the suit is res judicata.

(ii) that the suit is time barred.

The defendant's contention that the suit is resjudicata is based on the fact that the plaintiff company filed a civil suit against the principal debtor, one Adam Vassiliadis, and obtained a decree in its favour. From the records, the plaintiff filed HCCS No. 1021 of 1999 against the said Adam Vassiliadis following his default in retiring the loan. Vassiliadis did not defend the suit and therefore a default judgment was entered against him on 4/10/1999. He was ordered to pay Shs.6, 000,000=

which to date he has not paid. The issue herein is whether having obtained a decree against the principal debtor, the subsequent suit against the guarantor is barred by the doctrine of res judicata.

Res judicata is Latin short for **res judicata pro veritate accipitur**, meaning that a thing adjudicated is received as the truth. What this means is that a judicial decision is conclusive until reversed, and its verity cannot be contradicted. Res judicata presupposes that there are two opposing parties, that there is a definite issue between them, that there is a tribunal competent to decide the issue, and that within its competence, the tribunal has done so. Once a matter or issue between parties has been litigated and decided, it cannot be raised again between the same parties, but other parties are not so bound.

In the case of **Semakula –Vs- Magala & others [1979] HCB 90,** a case cited to me by learned counsel for the defendant, the Court of Appeal for Uganda (as it then was) held that in determining whether or not a suit is barred by res judicata, the test is whether the plaintiff in the second suit is trying to bring before the Court in another way in the form of a new cause of action a transaction which had already been presented before a Court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If this is answered affirmatively, the plea of res judicata will then apply not only to all issues upon which the first Court was called upon to adjudicate but also to every issue which properly belonged to the subject of litigation and which might have been raised at the time through the exercise of due diligence by the parties.

I harbour no any amount of doubt in my mind that the test laid down in the above case is still good law. The doubt is on whether the authority applies with full force to the case now before Court as learned counsel for the defendant contends. I think it doesn't. In **HCCS No. 1021 of 1999**, the principal debtor alone was impleaded as the defendant. The principles which apply to the principal debtor as regards liability are different from those which apply to the guarantor in that the person primarily liable to the creditor for the obligation guaranteed is the principal debtor. Although sometimes bound by the same instrument as his guarantor, the principal debtor is not a party to the guarantor's contract to be answerable to the creditor: there is not necessarily any privity between the guarantor and the principal debtor; they don't constitute one person in law, and are not as such jointly liable to the creditor, with whom alone the guarantor contracts. See: **Francis X. Muhoozi t/a Kabale Kobil Station –Vs- National Bank of Commerce (U) Ltd, HCT-00-CC-CS-0303-2006** (unreported). Therefore, it cannot be true that a decision against the principal debtor is as good as a decision against the guarantor. Liability in respect of each can only be determined on evidence.

Accordingly, it is immaterial in my view that the guarantor was not joined as a co-defendant in HCCS No. 1021/1999. Whether or not he is liable to pay in the instant case would depend on whether or not the guarantee is enforceable against him. This question did not arise in **HCCS No. 1021 of 1999.** The issue of the claim being res judicata does not therefore arise. And let me state this for the record, that in order for a second suit to be dismissed on a motion such as this (that is, of res judicata), the trial must be identical to the first trial in the following manner:

(i) identical parties.

(ii) identical theories of recovery.

(iii) identical demands.

From the pleadings, the parties in the two suits are different, and so are the theories of recovery and demands to the parties. In all these circumstances, the plea of res judicata must fail and it fails.

As to whether the suit is time barred, the law is that an action founded on contract must be brought within a period of six years from the date on which the cause of action arose. In a case where recovery is based on a guarantee, time starts to run from the date the demand for payment is made.

From the pleadings, the personal guarantee executed by the defendant was invoked on 19/03/2004 as per Annexture 'C' to the plaint. Whether or not the demand was indeed made is a matter that can only be resolved on evidence. The law is settled that the question whether or not a plaint discloses a cause of action must be determined upon perusal of the plaint alone, together with anything attached so as to form part of it, and upon assumption that any express or implied allegations of fact in it are true. See: **Jeraj Shariff & Co. –Vs- Chotai Fancy Stores [1960] EA 374** at p. 375.

Assuming, therefore, that the guarantee was properly, effectively and timely invoked, time started running from 19/3/2004. This renders the argument that the suit is time barred baseless.

For the reasons stated above, I would overrule the two objections and order that the suit be set down for hearing on its merits. Costs shall abide the outcome of the main suit. I so order.

Yorokamu Bamwine

J U D G E

12/12/2007