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Francis Xavier Muhoozi t/a Kabale Kobil Station V National Bank of Commerce (U) Ltd -HCT-00-CC-CS-0303-2006 [2007] UGCommC 33 (19 April 2007)

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-0303-2006

Francis Xavier Muhoozi t/a Kabale Kobil Station Plaintiff
Versus
National Bank of Commerce (U) Ltd Defendant

19 April 2007

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The plaintiff's claim against the defendant is for recovery of Shs.403,000,000=, general damages, interest and costs of the suit. The case arises out of an alleged breach of a Guarantee Deed.

From the evidence, the plaintiff was the defendant's customer at its Kabale branch. He operated a fuel station under a dealership arrangement with Kobil Uganda Limited at a place called Rwakaraba in Kabale Town. For a while, the plaintiff obtained over draft facilities from the defendant. He had difficulty paying them back. In February 2006, the plaintiff approached the defendant to negotiate for him a guarantee facility with Kobil Uganda Limited. The defendant agreed. The said guarantee, between the defendant and Kobil Uganda Limited, was for a sum of Shs.100,000,000=, valid effective March 13, 2006 for a year. Under the guarantee, the defendant agreed to honour cheques issued to Kobil Uganda Limited by the plaintiff as long as the amount did not exceed Shs.100,000,000=. When the plaintiff drew a cheque of Shs.43,910,229= under the arrangement, the defendant dishonoured it. Following the dishonour, Kobil Uganda Limited called off the plaintiff's dealership with them. Hence this suit in which the plaintiff contends that the defendant breached the contract of guarantee, between the defendant and Kobil Uganda Limited, without any lawful excuse.

There are two issues for determination:
1. Whether the defendant breached the terms of the guarantee agreement.
2. Whether the plaintiff is entitled to the remedies sought.

Representations:
Mr. Barata and Mr. Birungyi for the plaintiff; Mr. Musisi for the defendant.

I now address myself to the issues. The first one is whether the defendant breached the terms of the guarantee agreement.

It is notable that there are two agreements in this case. The first one is dated 24/2/2006. It is headed:

"Letter of Offer-Application for Bank Guarantee Shs.100million." In this offer letter, the defendant informed the plaintiff as follows:

> "We refer to your recent application seeking for a Bank Guarantee of Ug. Shs.100million...favouring Kobil Uganda Ltd. We are pleased to convey our approval for the same subject to the following terms and conditions."

Those terms and conditions appear therein in black and white. It is unnecessary to reproduce them here. It is enough to state that the plaintiff fulfilled the terms and conditions set by the defendant. This document is on record as D. Exh. V.

The second one is dated 13 March 2006. It is by way of a letter from the defendant to the General Manager, Kobil Uganda Ltd, P. O. Box 27478 Kampala. It reads (in part):

Re: ***Bank Guarantee No. 2006/007 dated 13th March 2006 for Ug. Shs.100,000,000= in your favour and valid up to 13th March 2007***

In consideration of your having agreed to supply Kabale Kobil Service Station Plot 256, Kisoro Road, P O Box 108, Kabale, Uganda ("the Customer") with all Petroleum Products Lubricants and LPG on CREDIT for their business, we National Bank of Commerce (U) Ltd, P O Box 23232 Kampala, Uganda, having our registered office at Plot 13A, Parliament Avenue, Kampala (hereinafter called "the Bank") agree with you the following:-"

The letter then sets out the terms of the agreement. The highlights of it are that the defendants guaranteed to Kobil Uganda Limited payment by the said customer for all the petroleum products the customer would get on credit, subject to the limit on their aggregate liability of Shs.100m; and that the Bank's Liability would include guaranteeing payment of cheques, Promissory Notes and Bills of Exchange drawn in favour of the said Kobil Uganda Limited by the customer. The document is on record a P. Exh. 1. It is not disputed that when the plaintiff issued a cheque of Shs.43,910,229= to Kobil Uganda Ltd, the defendant dishonoured it. What is disputed is the defendant's liability to the plaintiff under the second agreement.

I have addressed my mind to the arguments of counsel on the matter. Mr. Musisi's bone of contention is that the guarantee, P. Exh. 1 was between the defendant bank and Kobil Uganda Ltd. That the plaintiff was not party to it much as he was to derive a benefit out of it. That accordingly, since he was not privy to it, he can not sue on it.
The two learned counsel for the plaintiff do not agree. They argue that the document was initiated by the plaintiff, that he participated in drafting it and that the agreement was to his favour. They see no wisdom in separating the two transactions. Accordingly, they argue that the plaintiff is entitled to sue on it.

On this issue of privity of contract, learned counsel for the plaintiff have submitted that this was not one of the issues framed for determination; that in fact it was never in issue from the time of scheduling through hearing. The implication is that the defendant is estopped from raising the issue now.

With the greatest respect to learned counsel for the plaintiff, their argument on this point cannot be accepted. The issue of privity is key in this case. The Defendants raised it in their Written Statement of Defence. In paragraph 4 (f) of the plaint, the plaintiff avers that the defendant was at all times aware that the dishonour of the plaintiff's cheque was a breach of contract of guarantee and that it would jeopardize the business between the plaintiff and Kobil Uganda Ltd. The defendant specifically denies this in paragraph 6 (d) of its Written Statement of Defence and states that the

defendant shall state that the guarantee contract was between the Bank and Kobil Uganda Ltd. What the parties are talking about here is, in simple terms, the principle of privity of contract. It is a fact pleaded by inference.
A point of law can be raised at any stage of the proceedings. It is in my view never too late to raise it. It can be raised as a preliminary objection to the plaint before evidence is led on it or a party can wait until evidence is presented and the point is determined on merits. The defendant opted for the latter course. I cannot fault it, given that throughout the plaint, the plaintiff makes no mention of the 1st agreement. Indeed as the record shows, the first agreement is the defendant's Exhibit, D. Exh. V. The plaintiff, for reasons best known to him and his lawyers, chose not to base his claim on it. I do not think that the defendant can be prevented from making a submission on it.

The plaintiff's alleged cause of action is expressed in paragraph 4 of the plaint. Paragraph 4 (a) gives background information. In paragraph (b) he states:

> "(b) For purposes of expanding business, the plaintiff applied to the defendant for a credit guarantee facility of Shs.100,000,000= (one million only) in favour of Kobil Uganda Ltd and the facility was granted on 13th March 2006 to run up to 13 March 2007. The terms of the guarantee inter alia that the defendant guarantee payment of cheques drawn in favour of Kobil Uganda Limited by the plaintiff. A copy of the terms of the bank guarantee is hereto attached as Annexture 'A'."

In paragraph (c), he states:

> "(c) Upon the basis of the said bank guarantee Kobil Uganda Limited agreed to supply the plaintiff with a truck load of fuel every seven days and to bank the plaintiff's cheque in payment thereof every seventh day from the date of supply. Then (d) (e) and (f) follow.
> "(d) That without any notice whatsoever, the defendant unilaterally dishonoured the first cheque issued by the plaintiff against the said credit guarantee facility in the sum of Shs.43,910,229= (words) drawn by the plaintiff in favour of Kobil Uganda Limited in fragrant breach of the terms of the credit guarantee facility. A copy of the cheque is attached hereto marked 'B'.
> (e) That as the result of the defendant's breach of the guarantee, particularly the dishonour of the plaintiff's cheque, Kobil Uganda Limited revoked the dealership with the plaintiff. A copy of the letter terminating the dealership is attached hereto marked 'C' together with the hand-over report marked 'D'."

I have already set out above the content of paragraph 4 (f).

It is settled law that in determining whether or not a plaint discloses a cause of action the Court should look at the plaint alone together with anything attached to it so as to form part of it. The Court also proceeds on the presumption that any express or implied allegations of fact in it are true: ***Jeraj Shariff & Co. –Vs- Chotai Fancy Stores[1960] EA 374.***

The plaint has been attacked on one major ground, that is, that the plaintiff was not privy to the Guarantee dated 13th March, 2006.

I have given considerable attention to this matter, that is, the question of privity of contract. The doctrine of privity of contract, according to the learned author of Osborn's Concise Law Dictionary, 9th Edn at p. 302, is to the effect that, a contract cannot usually give rights or impose obligations on any one who is not a party to the contract.

It is a fundamental principle of our law, and therefore not merely a matter of technicality, that only a person who is party to a contract can sue upon it. A stranger to a contract cannot take advantage of the provisions of the contract even where it is clear from the contract that some provision in it was intended to benefit him. It was so held in ***Midland Silicones Ltd -Vs- Scruttons [1962] A.C 446*** and the principle has been applied in numerous other cases in this country. I would hasten to add that in the country of origin of this doctrine, England, the same has recently been modified by an Act of Parliament. The Contracts (Rights of Third Parties) Act 1999 (CRTP Act) has changed fundamentally the position in England on privity of contract since May 11, 2000. Previously, the only persons who were legally bound by or who could enforce a contract were the parties to that contract. The said Act of 1999 now allows third parties to enforce a contract governed by English law, if the contract gives them an express right to do so or if the contract identifies the third party and purports to confer a benefit on them. In the instant case, in the absence of any provision in it to the contrary, the presumption is that the Guarantee in issue is governed by and must be construed in accordance with the law of Uganda regarding contracts. The law in England was specifically enacted to address issues akin to the instant one. Until our Uganda Parliament considers moving in the same direction by enacting a similar law, this Court is bound to administer the law of contract as it stands today. In my view, the doctrine of privity of contract seals the plaintiff's fate in this case.

In the same Dictionary, Osborn's Concise Law Dictionary, at p. 186, guarantee is defined as:

> "A secondary agreement in which one person (the guarantor) will become liable for the debt of the principal debtor if the principal debtor defaults ...It also requires independent consideration."

It is, so to say, a promise made by a guarantor to a creditor that if the debtor does not pay a debt, the guarantor will pay it. Clearly, the promise is by the guarantor to the creditor. It is not to the principal debtor, much as it is being made in his favour. Needless to say, the debtor would have agreed with the guarantor on terms of such guarantee, as happened in this case. But that does not in any way confer privity to the creditor on the guarantee.

The learned authors of Halsbury's Laws of England, 4th Edn, (Re issue) Vol. 20 at page 56 define it thus:

> "101. Guarantee. A Guarantee is an accessory contract by which the promisor under takes to be answerable to the promisee for the debt, default or miscarriage of another person, whose primary liability to the promisee must exist or be contemplated."

They state further that as in the case of any other contract, its validity depends upon the mutual assent of the parties to it; their capacity to contract; and consideration, actual or implied. As regards the principal debtor, they state:

> "103. The principal debtor. The person primarily liable to the creditor for the obligation guaranteed is usually referred to as 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 do not constitute one person in law, and are not as such jointly liable to the creditor, with whom alone the guarantor contracts."

In short, the common law position, with which I agree entirely, is that even though a principal debtor may sometimes be bound by the same instrument as a guarantor, the principal debtor is not a

party to the guarantor's contract with the creditor. There is therefore not necessarily privity of contract between the guarantor and the principal debtor, and they are not generally jointly liable to the creditor.

Learned Counsel for the plaintiff have argued that the guarantee agreement is contained in a set of three documents: the guarantee itself, P. Exh. 1; the letter of offer, D. Exh. V; and the Mortgage Deed, P. Exh. X1. With the greatest respect to them, I do not agree with them on this point. In my view, the guarantee contract constitutes a contract between the defendant herein and Kobil Uganda Ltd, while the offer letter and the mortgage deed constitute another contract in its own right between the plaintiff and the defendant. The plaintiff in his plaint makes no reference to the offer letter and the mortgage deed as constituting the contract on which his claim is based. However, the offer letter, D. Exh. V, sets out terms upon which the defendant would issue the guarantee and how the plaintiff would relate to the defendant. The terms were subject to his acceptance and he accepted them. It is a contract in its own right, the breach of which would entitle the innocent party to remedies under it. As I understand the plaintiff's claim, it is not based on that contract, D. Exh. V and P. Exh. X1, the Mortgage Deed, considered together. His claim is based on P. Exh. 1, the guarantee agreement between the defendant and Kobil Uganda Ltd, to which he furnished no consideration. He could only be privy to it upon furnishing independent consideration to it. The only consideration he is on record to have furnished was for the contract between himself and the defendant Bank. He is clearly a stranger to the Guarantee Deed, P. Exh. 1. As a stranger to it, he cannot take advantage of it.

I would accept Mr. Musisi's argument on this point.

In the guarantee deed, P. Exh. 1, the Bank promised to Kobil Uganda Ltd that if the plaintiff defaulted on the credit terms, it (the Bank) would pay on his behalf. When his cheque to them bounced and he took the Bank on its undertaking, it paid Shs.100m to Kobil Uganda Ltd, without argument. That was the Bank's responsibility under the guarantee, as between itself and Kobil Uganda Ltd. If the Bank had paid less than Shs.100m to Kobil Uganda Ltd, or nothing at all, it would have been in breach. Even then, that would have been as between the defendant and Kobil Uganda Ltd, and not as between the plaintiff and the defendant. In these circumstances, Court is unable to find that the defendant breached the terms of the guarantee agreement of March 13, 2006. Accordingly, I would answer the first issue in the negative. I do so.

As to whether the plaintiff is entitled to the reliefs sought in the plaint, having held as I have done in issue No. 1 that he cannot take advantage of P. Exh. 1, he is not entitled to the reliefs sought. I would, therefore, order the plaint struck out and dismiss the suit.

In the event of a successful appeal, since the plaintiff had prayed for damages, special and general, I shall try to make an assessment of the same.
Starting with special damages, the rule has long been established that special damages must be pleaded and strictly proved by the party claiming them, if they are to be awarded.

It is submitted by counsel for the defendant that the plaintiff did not plead special damages in the plaint as the law requires. Looking at the plaint as a whole, there is merit in this submission.

The plaintiff seeks recovery of Shs.403,000,000=. The first mention of it is in paragraph 3 of the plaint where he states:

> "3. The plaintiff brings the suit inter alia to recover Ug. Shs.403,000,000= (in words) from the defendants ..."

Then in paragraph 4 (h) he states:

> "(h) That as a result of the said revocation following the defendants breach of the guarantee, the plaintiff has suffered loss of business and earnings in the sum of Shs.403,000,000= (in words) and continues to suffer loss and damage as interest accrues on the plaintiff's overdraft facility."

And in paragraph 8 he states:

> "8. The plaintiff contends that the defendant is liable to him in the sum of Shs.403,000,000= (in words) being loss of business, general damages, interest thereon and costs of the suit."

He then ends with the usual prayer for the amount stated above. He does not give any indication in the plaint as to how he arrived at that figure of Shs.403,000,000=. In fact, from the way he has framed his claim, it is as if the amount claimed, that is, Shs.403m covers loss of business, general damages, interest and costs, all put together.

It would appear to me that the plaintiff must, in a case like this, prove the net income lost as a result of a breach of contract, that is, the gross income less expenses. This must be pleaded and subsequently proved by way of oral evidence or documents. He did no produce any records showing his cash flow at the time. If no accounts were being kept, the plaintiff would be contented with an award of general damages. On careful scrutiny of the plaintiff's pleadings, his claim of Shs.403m is legally unsustainable on account of offending against ordinary rules of pleading. Besides, it is highly speculative. I would disallow it.

As regards general damages, these are at large. The quantum would be within the discretion of Court. Evidence has been led that the plaintiff suffered inconvenience and has been put out of business. Learned counsel for the plaintiff suggested to me a figure of Shs.100m as general damages. I would find that according to their agreement of February 24, 2006 (on which the claim is not based), the plaintiff was under duty to deposit fuel sale proceeds on his account with the defendant. He had sold fuel for a week, so the defendant rightly expected to find money on the account when the cheque came. I would doubt the plaintiff's evidence that he did not discuss with the defendant's officials the fate of the cheque before the defendant finally bounced it. The telephone print out, though it discloses not the nature of their conversation, gives the plaintiff in. They could not have been discussing nothing, for that long, at the time when the cheque was in the process of being bounced.

Be that as it may, given that he had been given guarantee in full appreciation of the financial difficulties he was experiencing at the time, the expectation that there would be the full cheque amount on the account would in my view, be unrealistic. I would of course disregard the plaintiff's argument that the defendant did not have cause to worry about the funds being diverted towards making improvements on the security. This would be contrary to the plaintiff's undertaking to deposit all fuel sale proceeds on the bank account. Doing the best I can, and working on the assumption that the plaintiff would be entitled to general damages, I would have awarded him nominal damages in the sum of Shs.5,000,000= (five million only), if his suit against the defendant had succeeded.

For the reasons I have given above, the suit is dismissed.
As regards costs, the usual result is that the loser pays the winner's costs. This practice is subject to the Court's discretion, so that a winning party may not necessarily be awarded his costs. I have considered the nature of the case and the peculiarity of the issue before me. I'm inclined to order that each party bears its own costs. I do so.