

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00-CC-MA- 0113-2008
(Arising from HCT-00-CC-CS-051-2008)

Paul Kasagga } APPLICANTS
Andrew Kasagga }

VERSUS

BARCLAYS BANK (U) LTD RESPONDENT

BEFORE HON. MR. JUSTICE LAMECK N. MUKASA

RULING:

This is an application by Notice of Motion under order 36 rule 4, Order 52 rule 1 of the Civil Procedure Rules and section 98 of the Civil Procedure Act for orders that:

- (i) Unconditional leave to appear and defend the main suit be granted to the applicants
- (ii) Costs for the application be provided for.

The grounds for this application are briefly that:-

- (a) The applicants do not owe the respondent any money

- (b) The guarantee documents attached to the plaint are not related to the Respondents claim of Ugshs2,211,653/05 and are not enforceable against the applicants.
- (c) There has been no demand by the Respondent in respect of any guarantees.
- (d) It is just, fair and equitable that unconditional leave to appear and defend be granted to the defendants/applicants.

The application is supported by two affidavits by the applicants, Paul Kasagga and Andrew Kasagga, respectively, wherein they echo the above grounds.

The main suit was brought by summary procedure. The Respondent, Barclays Bank of Uganda Ltd, therein seeks to recover from M/s Zzimwe Enterprises Hardware & Construction Ltd and the Applicants a sum of Ugshs2,211,653,283/05.

In the plaint, the Respondent claims against Applicants as guarantors. The pleadings state:-

“6. By Guarantees made in writing and duly executed by the second and third defendant (the Guarantors) in favour of Nile Bank Ltd, the said Guarantors guaranteed the repayment of all and every sum(s) of money owing from the first Defendant/Principal Debtor to Nile Bank Limited (copies of the Guarantees are attached as “B1” and “B2).

7. To-date the first Defendant has neglected/failed/refused to discharge its indebtedness arising from the overdraft facility it

enjoyed from Nile Bank Limited, which is tantamount to breach of contract, for which the plaintiff, holds the first Defendant liable. Further, the plaintiff contends that the second and third Defendants as Guarantors of the first Defendant have similarly not honoured their obligation under the Guarantees to settle the indebtedness of the first Defendant and are thus also in breach.”

Representation was Mr. Kavuma Kabenge for the Applicants. The Respondent was represented by Mr. Andrew Kasirye jointly with Mr. Okua.

In applications for leave to defend the law is that the applicant must show by affidavit or otherwise that there is a bonafide triable issue of fact or law. Any defence raised should be stated with sufficient particulars as to appear genuine and not generally vague statements denying liability. See Muluku Interglobal Trade Agencies Vs Bank of Uganda (1985) HCB 65, Tororo District Administration Vs Andalap Industries (1997) IV KALR 126.

The Respondent’s claim, in the main suit, against the Applicants is based on the Guarantee Deeds, annexures “B1” and “B2” to the plaint. In their respective affidavits the Applicants argue that the said guarantee documents do not relate to the Respondent’s claims of Shs2,211,653,283/05 and contend that they are not enforceable against them. Further that there had not been demand by the Respondent in respect of the guarantees.

The Respondent filed an affidavit in reply deposed to by its Manager Corporate Recoveries, Ms Esther Masazi Birungi. She therein states:-

“3That between May 2005 and May 2006 , the Applicants’ Company M/s Zzimwe Enterprises Hardware & Construction Ltd obtained overdraft facilities from the then Nile Bank Ltd totalling Ugshs1,600,000,000/= (Uganda Shillings one billion six hundred million only)

4. THAT under the overdraft facilities’ letters, the borrower M/s Zzimwe Enterprises Hardware & Construction Ltd undertook to furnish security for the said facilities including Guarantees from its directors.

5. THAT the overdraft facilities’ letters were signed for and on behalf of M/s Zzimwe Enterprises Hardware & Construction Limited by the Applicants herein, Paul Kasagga and Andrew Kasagga, as Director and Managing Director respectively.

6. THAT by virtue of the undertaking mentioned in paragraph 5 above, the Applicants executed individual unlimited Guarantees in favour of Nile Bank Ltd.

7. --- that the Demand upon the Applicants was served upon them in November 2007; the said demand being signed in acknowledgment of receipt by the first Applicant at the direction of the 2nd Applicant. (A copy of the Demand is attached and marked “A”).

In paragraph 10 she avers that sometime in the year 2007 the Respondent acquired Nile Bank Limited and thereby took over and became entitled to all the assets, liabilities, title and interest of Nile Bank Ltd. Annexure B to the affidavit is the letter of notification of transfer of the business of Nile

Bank Ltd to Barclays Bank of Uganda Ltd., pursuant to section 112 of the Financial Institutions Act, dated 18th August 2007. In paragraph 11 she avers that Zzimwe Enterprises Hardware & Construction Ltd is and remains indebted to the Respondent in the sum of Ugshs2,211,653,283/05.

The applicants did not file any affidavit in rejoinder. The above averments in Birungis affidavit are neither denied nor contradicted. The law is that where facts are sworn to in an affidavit and they are not denied or rebutted by the opposite party, the presumption is that such facts are accepted. See Massa Vs Achieng (1978) HCB 297. The applicants' only contention is that the guarantee documents do not relate to the Respondent's claim of Ugshs 2,211,653,283/05 and that they are not enforceable against them. In his submission Mr. Kavuma Kabenge argued that the guarantee documents were executed by the Applicants in relation to other borrowings from the Respondent which he contended had been retired. The Applicants did not in their respective affidavits show the borrowings to which their guarantees related. It is trite that an applicant has a duty to put up a credible case. I am aware that at this stage court is not entitled to inquire into the merits of the issues raised. However, the court has a duty to study the grounds raised and ascertain whether they raise a real issue and not a sham one. See Abubakar Kato Kasule Vs Tomson Muhwezi (1992-1997) HCB 212.

Mr. Kavuma Kabenge argued that the Respondent's claim for Shs2,211,653,283/05 is based on a loan Agreement dated 15th January 2007 yet the Guarantee deeds appear to have been executed sometime in 2005. His contention is that guarantees executed in 2005 could not be security for a loan facility granted in 2007. He made reference to loan

agreement annexure A to the affidavit in reply filed by the Respondent in Miscellaneous Application 114 of 2008 also arising from the same suit. Documents filed in the said application are documents on record in the same main suit so I cannot keep a blind eye to them. In fact both counsel referred to them in their respective submissions. In the affidavit filed in reply by the Respondent in application No. 114 the deponent explains the connection between the overdrafts secured by the Guarantees executed by the applicants and the loan agreement executed in 2007. Ms Birungi therein states:-

“3. THAT between May 2005 and May 2006, the Applicant obtained three (3) separate overdraft facilities from the then Nile Bank Ltd totalling Ugshs1,600,000,000/= (Uganda shillings one billion six hundred million only).

4. ---

6. THAT the Applicant defaulted in repayment of the facilities with the result that the said facilities were terminated.
7. THAT at the time of termination of the facilities the amounts due on the Applicant's overdraft account was Ugshs1,300,000,000/= as principal and Ugshs300,000,000/= in interest.
9. THAT at the special request of the Applicant, the then Nile Bank Limited restructured the facilities by converting the amounts into a loan of Ugshs1,600,000,000/= (A copy of the Loan Agreement is attached and marked “A”) . Also attached hereto as “B” is a letter from the Applicants' counsel dated.

January 25, 2008 acknowledging the conversion of the facilities from the overdraft account into a loan)."

It is these same overdraft facilities in paragraph 3 above which Birungi also avers to in paragraph 3 of her affidavit in reply of the instant application and for which she avers that the Applicants individually executed the unlimited Guarantees in favour of Nile Bank Limited. I have already found that her above averment on oath are neither denied nor rebutted on oath by the Applicants. The loan agreement in paragraph 1 (b) states:-

" This agreement is to be in addition to and not to be derogation from other agreements between the Borrower and the Bank in connection with this loan and other advances."

The loan was secured among others by securities indicated in paragraph 2 as "Held" which included:

"(vi)Personal guarantees from the company directors"

I find the "other advances" referred to in the loan Agreement to be the overdraft facilities as per the letter annextures "A1", "A2" and "A3" to the plaint and the "held" personal guarantees to be the guarantees annexture "B1" and "B2" to the plaint.

Therefore I agree with Mr. Kasirye's submission that the Respondent has explained the transformation from the overdrafts facilities secured in 2005 by the personal guarantees of the company directors, who are the

Applicants, into a loan facility secured, inter alia, by the same personal guarantees from the Applicants as per the loan Agreement dated 15th January 2007. Each of the guarantee deeds, in paragraphs 2, provided that the guarantee shall be a continuing security. The Applicants' personal guarantees to the overdraft facilities were kept alive by the Loan Agreement.

As regards demand in respect of the guarantees the Respondent in paragraph 7 of Birungi's affidavit states that demand was served upon the Applicants in November 2007. Annexure A is a letter dated 16th November 2007 addressed to the Managing Director, Zzimwe Enterprises Hardware and Construction Ltd, where in the respondent demands payment. The letter is among others copied to Mr. John Andrew Kasagga and Paul Semugoma Kasagga, who are the Applicants. It states:

“By copy hereof M/s Joka Investments and Mr. John Andrew Kasagga, Mrs Josephine Kasagga Nalubale and Mr Paul Semugoma Kasagga, all being guarantees of Zzimwe Enterprises Hardware and Construction Limited are hereby put on notice of intended enforcement of their respective guarantees”

Receipt of this letter is not denied by any of the Applicants. I therefore find that demand in respect of each of the Applicant's guarantee was made and received.

Considering all the above I find that the Applicants have failed to put up a plausible defence. The issues raised are a sham. It must however be

appreciated that the Applicants were guarantors to a facility advanced by the Respondent to M/s Zzimwe Enterprises Hardware and Construction Ltd, the first defendant in the main suit. In Miscellaneous Application No 114 of 2008 M/s Zzimwe Enterprises Hardware and construction Ltd disputed the sum of Shs2,211,653.283/05 claimed as owing and due by the Respondent in the main suit. Zzimwe Enterprises Hardware and Construction Ltd, who is the principle debtor, has in that application been granted leave to appear and defend so as to enable this court determine inter parties the amount due under the loan.

A guarantee is a contract whereby a person contracts with another to pay a debt of a third party who notwithstanding remains primarily liable for such payment. See Encyclopaedia of Form and Precedents 4th Ed page 761. The guarantor's liability for the non performance of the principle debtors' obligation is co-extensive with that obligation. In the instant case the applicant's individual liability as guarantors is co-extensive with M/s Zzimwe Enterprises Hardware and Construction Ltd's obligation. If the principle debtor's obligation turns out not to exist or is void or diminished or discharged so is the guarantor's obligation in respect of it. Pending court's determination of the extent of M/s Zzimwe Enterprises Hardware and Constructors Ltd's indebtedness to the Respondent, the extent of the Applicants' liability as Guarantors remains undetermined. A guarantee obligation is secondary and accessory to the obligation the performance of which is guaranteed. The guarantor undertakes that the principal debtor will perform his obligation to the creditor and that the guarantor will be liable to the creditor if the principal debtor does not perform.

The circumstances of this application dictate that its practical effect cannot be separated from that of Miscellaneous Application No. 114 of 2008. Under section 98 of the Civil Procedure Act this Honourable Court has unlimited inherent power to make such orders as may be necessary for the ends of Justice or to prevent abuse of the process of Court.

So in the final result I make the following orders:-

1. The Applicants' application to appear and defend Civil Suit No 51 of 2008 is dismissed.
2. The Respondent is not to exercise its rights to recover from the Applicants, as guarantors, until the 1st Defendant's indebtedness is determined in Civil Suit No. 51 of 2008.
3. Each party shall, in the circumstances, bear its own costs.

Hon Mr. Justice Lameck N. Mukasa

JUDGE

22nd August 2008