

THE REPUBLIC OF UGANDA

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

HCT-00-CC-MA-0512-OF 2008
(ARISING OUT OF HCT-00-CC-CS-0243 OF 2008)

NGANDA KAWEEESI APPLICANT

VERSUS

R. L. JAINRESPONDENT

BEFORE: HON JUSTICE LAMECK N. MUKASA

RULING:

THIS is an application brought by Notice of Motion under Order 36 rules 3 and 4, Order 52 Rules 1 and 3 of the Civil Procedure Rules for Orders that:

- (a) The Applicant be granted unconditional leave to appear and defend Civil Suit 243 of 2008.

(b) Costs of this application be provided for.

The grounds for the application are briefly that:-

1. The suit is frivolous and vexatious as against the Applicant herein as he is wrongly joined as a party thereof.
2. The Applicant is prematurely sued in Civil Suit No. 243 of 2008.
3. The Applicant has a good defence to the Respondent's claim.
4. It is just and equitable that the Applicant be granted unconditional leave to appear and defend the suit.

Representation was Mr. Joseph Balikudembe for the Applicant and Ms Esther Katusiime for the respondent. At the hearing Mr. Joseph Balikudembe dropped the first ground of the application. The Respondent, R L Jain, filed HCT-00-CC-CS-0243-2008, by summary procedure, against Ali Ndaula and the Applicant, Nganda Kawesa, seeking to recover Shs121,880,000/=, interest and costs. The sum claimed was arising out of a loan by the Respondent to Ali Ndaula which was guaranteed by the Applicant. The Guarantee, annexure A to the plaint, stated.

“-----

I Nganda Kawesa have agreed to stand as a guarantor for a loan amount totaling Ugshs sixty two million (62,000,000/= only to Mr./Ms/ Mrs -----

Which is due for repayment within five months, beginning 6th October 2006 as per your agreement dated 6/10/06. Should he/she fail to pay your company as per entitlements and then I will be liable myself to pay the loan amount with full interest.----“

The Respondent/plaintiff contends that the 1st Defendant, Ali Ndaula, has since failed, refused and or neglected to settle his indebtedness. Thus the claim in Civil Suit No 243 of 2008 against Ali Ndaula and the Applicant.

In his affidavit in support, the Applicant admits being a guarantor to the transaction and states:

- “4. THAT in guaranteeing Mr. NDAULA ALI the borrower, I acted upon an honest and bonafide belief that he the borrower in the said transaction had presented a land title as requirement needed by the Respondent as collateral security as clearly indicated in the borrowers Application for a loan (see copy of loan Application attached hereto and marked as Annexure “A”)
5. THAT I am also aware the said borrower agreed to assign his money due from the parliamentary car loan scheme to the Respondent herein as further security towards the said loan.
6. THAT on the basis of the foregoing in paragraphs 4 and 5 I agreed to guarantee the borrower for the said loan.
7. ----
8. THAT I have been informed by my lawyers to wit M/s Lukwago & Co Advocates, which information I verily believe to be true that the Respondent can only resort to recovering money directly from me only after the securities put forward by the borrower have been completely failed.
-----.”

In annexure A the borrower, Ndaula Ali, as security assigned

“the whole amount of Car Scheme Payable to me by Parliament and mortgage of my property in Luwero on Plot No 163 Block 57 at Bukumu.

Your can sell the property if I fail to pay your dues in full without recourse to the Courts of law.”

Mr. Balikudembe, for the Applicant, submitted that the Applicant can not be sued for recovery of the money before the Respondent had disposed off the other securities.

Ms Kusiima, for the Respondent, opposed the application. She submitted that there is no law that requires the lender to pursue the borrower first before he can pursue the guarantor. That the Lender can pursue either the guarantor or the borrower for recover of the money due to him.

She cited Law of Guarantees 3rd Edition pages 3 – 4. Counsel argued that as long as the principle borrower has been in default in payment of a loan is enough to make the guarantor liable. That there is no obligation on a lender to sell off the other securities or realises the securities in order to recover the loan once there has been a default.

In an application to appear and defend a suit under the summary procedure the Applicant must show by affidavit or otherwise that there is a bonafide triable issue of fact and law. And any defence raised should be stated with sufficient particulars as to appear genuine and not generally vague statements denying liability. See Mukulu Interglobal Trade Agencies Vs Bank of Uganda, (1985) HCB 65, Tororo District Admin Vs Andalap Industries (1997) IV KALR 126.

I have carefully studied the Applicant's affidavit in support and I find that the Applicant admits that the Respondent advanced a loan to Ndaula Ali, the 1st Defendant. The Applicant admits that he guaranteed the repayment of the said loan. He does not dispute that the said Ndaula Ali had defaulted in the loan repayment and does not dispute the amount claimed. The Applicant's only claim and disclosed defence is that his liability as guarantee can only arise after the Lender, the Respondent, has sold off or realized the securities provided by Ndaula Ali, particularly the land at Block 57 plot 163 Bakimu, Luwero.

A guarantee is a contract whereby the guarantor promises the lender to be responsible, in addition to the principal borrower for the due performance by the principal of his existing or future obligations to the lender, if the principal fails to perform those obligations. Under the guarantee the guarantor promises or undertakes that he will be personally liable for the debt, default or miscarriage of the principal. The guarantor's liability is ancillary or secondary to that

of the principle who remains primarily liable to the creditor. There is no liability on the guarantor unless and until the principal has failed to perform his obligations. In the instant case it is not disputed that the principle debtor, Ndaula Ali, had failed to pay back the money borrowed from the Respondent.

In case of a default of payment the Creditor has choice of which of the securities to realise or liquidate. A guarantee is a form of security. In the instant case the securities were the guarantee, the land at Block Plot 163 Bukim Luwero and the borrower's financial entitlement under the Members of Parliament car scheme. There is no rule that the creditor must avail himself of the other securities which the debtor may have himself given before turning to the guarantor. However any express or implied conditions precedent to the guarantor's liability must be fulfilled before recourse can be had to him. For example where guarantor stipulated that the principal debtor is to execute a particular instrument, this will be regarded as a condition precedent requiring fulfillment. There is no stipulation in the guarantee (Annexure A to the plaint) that the realization or liquidation of the other securities was a condition precedent to the guarantor's (Applicant's) liability. The fact that the taking of other security is intended or contemplated by the creditor does not make the taking of that security a condition precedent to the guarantor's liability, unless the guarantor makes the fact that his guarantee is so conditional clear to the creditor before he gives it. See Halsbury's Laws of England 4th Ed. Vol 20 pages 123 – 128. The applicant has not pleaded nor adduced evidence of existence of any conditions precedent to his liability under the guarantee.

Considering all the above I find that the Applicant has failed to raise any bonafide triable issue. The Application is therefore dismissed with costs.

Hon. Mr. Justice Lameck N. Mukasa

20th March 2009

