THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCC-00-CCCS-741 -2004

BACLAYS BANK [U] LTD…………………………………………… PLAINTIFF

VERSUS

1. GLOBAL SUPPLIES LTD
2. PONSIANO KIZITO………………………………………………DEFENDANT
3. CHARLES LWANGA
4. IMELDA KIZITO

BEFORE: THE HON. JUSTICE GEOFRREY KIRYABWIRE

JUDGMENT

The plaintiff, a banking institution incorporated and carrying on business in Uganda, brought this suit against the first defendant company, (a holder of an account with the plaintiff) and the second, third, and fourth (directors and guarantors of the first defendant company) defendants by way of a summary suit for payment of Ug.Shs203,59l,955/= with interest thereon at 26% per annum plus costs.

The case for the Plaintiffs is that on or about the 30th of August 2004 the Plaintiff on purported instructions from its clients M/s Petro Uganda Ltd credited the account of the first Defendant (in the same bank) with the sum of Shs. 350,000,000/=. The second Defendant as the managing director of the first Defendant then on the 1st September, 2004 withdrew Shs. 207,600,000/= from the account of the first Defendant. It is the case for the Plaintiff that the transfer of the said money to the first Defendant's account was fraudulent and was therefore reversed leading to a credit debit on the account for the first Defendant of Shs. 203,591,955/=. The Plaintiffs then demanded a refund of the money from the first Defendant and the rest of the other three Defendants jointly and severally as personal guarantors of the first Defendant Company's indebtedness but the Defendants failed to settle the amount.
The Defendants in their written statement of defence aver that the second Defendant as

Managing Director of the first Defendant was contacted by one Leonard Kamya alias Ben Mutike to allow him use the first defendant's account to receive a payment of Shs. 350,000,000/= due to him from M/s Petro Uganda Ltd because he did not have an account. The money was for the supply of equipment by Mr. Kamya to M/s Petro Uganda Ltd. It was further averred that the first defendant had had helped other people in similar circumstances. The Defendants aver that the Plaintiff Bank was
negligent in failing to detect the defect with the transfer from Petrol Uganda Limited and failing to stop it before withdraw. The Defendants further aver that the personal guarantees of the second to fourth Defendants are defective. Lastly the defendants counter claim for the sum of Shs. 4,0008,045/= which was debited from the first Defendant's account as a result of the credit reversal made by the Plaintiff on its account.

This case proceeded significantly slowly, largely because Counsel Mr. Urban Tibamanya for the Defendant got involved in politics and went on to be appointed a Minister of Government and therefore did not regularly attend Court. He eventually withdrew from the case and the Defendants took time to replace him. The new counsel Mr. Hassan Kamba came on record just before the defence opened their case.

Mr. Kamba in his written submissions raised several points that need to be dealt with right from the onset. First Mr. Kamba submitted that the written statement of defence filed by the original lawyers of the Defendants was a disservice to their clients as they were responding in his words to *'purely imaginary scenarios"* not raised in the Plaint. It is not clear what Learned Counsel meant by this. As it is, if Learned counsel was not happy with the Defence as filed he could have asked for leave to amend at any stage of the proceedings as provided for under Order 6 rule 19 of the Civil Procedure Rules (CPR) which inter alia provides that a party may at any stage of the proceedings with leave of Court amend or alter his or her pleadings for purposes of determining the real questions in controversy. No such application to amend the defence was ever made so the defence on record shall be the one that the court shall rely upon.

Secondly Mr. Kamba also submitted that there was no scheduling conference held and yet this is a mandatory requirement under Order 12 of the CPR. In this regard he relies on the fact that the parties flied separate scheduling memoranda (on the 14th January 2005 by the defendants and 28th February 2005 by the Plaintiffs) and thus there was no consensus on how the case should be managed and no issues framed. Counsel for the Defendant went on

therefore to frame his own six issues for determination and address Court on them. I agree with Counsel for the Defendant, that in the early stages of the case, the parties failed to file a joint scheduling memorandum inter alia showing Court matters of agreement and disagreement as envisaged under Order 12 Rule 1 of the CPR. Whereas the use of a memorandum is not specifically provided for under order 12 of the CPR, Courts throughout the Commonwealth following the *"The Lord Woolf Reforms of 1995" (after* which our Order 12 of the CPR is fashioned) have adopted the use of a memorandum in one form or another as a useful technique in case management. Unfortunately in Uganda there has still been some resistance at the Bar in adopting these new techniques in case management because in our adversarial legal system opposite counsel simply do not want to cooperate with one another. That notwithstanding, if, Counsel for the Defendant had carefully perused the transcribed record which was made available to him he would have noted that on the 28th February 2005, a scheduling conference was held before me without the assistance of a joint memorandum signed by Counsel. At that pre trial conference Mr. Masembe appeared for the Plaintiff while Mr. Tibamanya appeared for the Defendants. At that pre trial conference the parties agreed to the following facts:-

1) The first Defendant holds a current account with the Plaintiff No. 11436883.

2) The second and third Defendants put their signatures on a document entitled *"guarantee"* and dated 5th November 1997 annexed to the Plaint. So did the third defendant but on a different document dated 1st December 1994.

3) There was a transfer from Petro (U) to the first Defendant's account with the Plaintiff worth Shs 350,000,000/=

4) Subsequent to the deposit of Shs. 350,000,000/= the first Defendant issued a cheque worth Shs. 207,600,000/=

The agreed issues were the following

1) Whether there is any cause of action disclosed against the defendants

2) Whether the First Defendant is indebted to the Plaintiff and if so in what sum?

3) Whether the plaintiff owed a duty of care to the first Defendant in ensuring that the transfer to its account was valid?

4) Whether the first and second defendants owed a duty of care to the Plaintiff to ensure that forged instructions for payment were not presented to the first Defendants account?

5) Whether the indebtedness in issue no 2 above is covered by the documents entitled the *"guarantee'*

6) Whether the Plaintiff is indebted to the first defendant in the sum claimed in the counterclaim?

7) Remedies

Mr. Masembe Kanyerezi appeared for the Plaintiff while Mr. Hassan Kamba appeared for the Defendants after Mr. Tibamanya withdrew from the case.
The Plaintiff called 3 witnesses namely Mr. Ahmed Ladha PW1 the General Manager Petro Uganda Ltd, Mr. Edward Kinyutu PW2 The Marketing Manager Petro Uganda Ltd and Mr. Stephen Magimbi PW3 the Relationship Manager of Barclays Bank. For the Defendants the Second Defendant and Director of the first Defendant Mr. Pasiano kizito testified.

Issue No. 1: **<u>Whether there is any cause of action disclosed against the defendants?</u>**

This is an issue on **a** point of law. Counsel for the Defendant submitted that **a** close look at para 3, 4 and 5 of the plaint shows that the Plaintiff avers that first Defendant has **a** debit balance of Shs. 203,591,9955/= according to the ledger of this account and that the rest of the Defendants had executed personal guarantees to secure the indebtedness of the first defendant from time to time. Counsel for the Defendants submitted that pleadings did not in fact show a cause of action. He pointed out that the pleadings did not show how the said liability arose. He pointed out that according to Order 7 rule 1 (e) of the Civil Procedure Rules (CPR) it was a mandatory requirement that the plaint contain particulars of the facts constituting the cause of action. In this case the plaint is said not to have contained these necessary particulars. Counsel for the Defendant submitted that the Plaint missed material facts of how the debit came to be. Counsel for the Defendant referred me to the cases of

> **<u>Auto Garage</u> V <u>Motokov</u> [No. 3] [1971] E.A. 514 and**
>
> **<u>Swan Air Travel & Safari FK1 & another</u> V <u>Sabrina EL-Hail</u> HCCS 377 of 2004** (unreported)

for the proposition that a claimant must disclose the material facts to be proved to succeed in a claim and every fact which the defendant would have a right to traverse. He further submitted that failure to do this would render the plaint a nullity and illegal.
Counsel for the Defendant however concedes that there are what he calls *"some scanty facts"* pleaded in the reply by the Plaintiffs' to the Defendants written statement of Defence (WSD). However Counsel for the defendant submitted that since the Plaint was a nullity/illegal then that situation in itself overrode the WSD, the reply to the WSD and any such admissions made on the Plaint. In this regard he referred me to the cases of

> **<u>Makula international</u> V <u>Cardinal Wamala Nsubuga</u> [1982] HCB 11**.
> and

Prof Huq V IUIU SCCA No. 47 of 1995

Counsel for the Plaintiff disagrees that a cause of action has not been disclosed. He submits that it is pleaded that the Defendants inspite of demands to settle the amounts owed to the bank have failed to settle them. Counsel for the Plaintiff submitted that that is all that is required for the cause of action to be made out in a case between a bank, its customer and the guarantors of that customer. He further submits that the defendants in their defence to the alleged debit to the bank actually negate their liability to the bank and even file a counter claim against the bank. It is to this rebuttal and counter claim that the plaintiff's filed a reply to the WSD/counter claim. Counsel submitted that all that the law requires is a statement in a concise form of the material facts on which the party pleading relies upon. Counsel for the Plaintiff submitted that the bank sued on a debt which was disclosed on the customer's ledger (or bank statement) as a debit to which the customer had the right to query.

I have had perused the legal submissions of both counsel on this point of law. The objection that the Plaint does not disclose a cause of action in this case is largely grounded on order 7 rule 1 (e) of the CPR that a Plaint shall contain

"…the facts constituting the cause of action and when it arose..."

I agree with much of the authorities cited by Counsel for the Defendant as to what constitutes a cause of action. The reference to the term "facts" in Order 7 rule 1 (e) on the authorities has a common purpose. The term *"facts"* can mean material facts that entitle the claimant to succeed in his/her claim and every fact which the defendant will have a right to traverse. It can also mean *"every necessary fact" (see)*

Sullivan V Allimohamed Osman [1959] EA 239 (CA-T)

The purpose of the facts is to put the defendant on notice of the case against him/her and avoid embarrassment and ambush/surprise. The facts therefore help the defendant to know

the foundation of the right alleged to have been violated (see)

Cottar V Attorney General (1938) 5 EACA 18 (CA-K)

In this case the Defendants object that the original plaint as Ned from what I can deduce is too scanty on the facts and therefore is an entire nullity. It is also the case of the Defendants that this nullity cannot be cured by their pleadings by way of reply to the WSD/counterclaim. The reply in brief of the Plaintiffs is that only material facts in a concise form were pleaded. It is important to remember that originally the suit filed by the Plaintiff was one on a specially endorsed Plaint under Order 36 of the CPR where a defence can only be filed with leave of court. Such Plaints under order 36 tend to be less detailed and more precise than in ordinary suits because it is anticipated that the Defendant has no Defence to the suit. Such a suit is to be support by affidavit that the defendant has no defence. In this case the Plaintiffs argue that the debit in question is reflected in the bank statement of the first defendant in annexure "A". The statement shows that the first Defendant had an opening balance of Shs. 354,008,045/= and that on the 2nd September 2004 by cheque No 100425 the sum of Shs. 207,600,000/= was debited on that account, leaving a credit balance of Shs. 146,408,045/=. On the same day 2nd September 2004, there is a further debit of Shs. 350,000,000/ leaving in this instance a debit balance of Shs. 203,591,955/= which is the subject of this suit. The Defendants then filed an application for leave to appear and defend. In that application the defendants deponed that there were triable issues in the case for which leave to defend should be granted. The main defence put forward at that time was that the Defendants had not taken overdraft facilities to lead to the debit balance alleged in the Plaint. In a further affidavit the second defendant raises the same issues (including the possible perpetuation of a fraud) as put forth in the WSD. It was on that basis that Court granted unconditional leave to defend the case. How could the Defendants say there be triable issues if there was no cause of action in the first place?

It would appear to me therefore that on the basis of the pleadings the facts raised by the plaint are not unknown to the Defendants and that is why they put up a spirited application for leave to defend and went On to file a defence as they did. As to the argument by Counsel for the Defendant that the Reply to the WSD can not cure or be read together with the Plaint with

great respect I must disagree. An argument such as this was handled in the case of

Moses Katuramu V Attorney General and anor [1986] HCB 39 (CA)

In that case the Court of Appeal held

> *"…although a plaint does not include a reply by the Plaintiff nevertheless a reply forms part of the Plaintiff's pleadings and is therefore part and parcel of his case. Where a reply is fl/ed in answer to a defence, it must be considered together with the plaint with the result that it may supplement or cure any deficiency in the plaint..."*

Given the proceedings right from the application for leave to defend the case I am satisfied that a cause of action has been made out against the Defendants to which they must and indeed have filed a defence. Any deficiency in the specially endorsed Plaint if at all was supplemented by the reply the defence.

I accordingly dismiss the preliminary objection on a point of law.

Issue No. 2: **Whether the First Defendant is indebted to** the **plaintiff and if so in what sum?**

Mr. Magimbi (PW 3) testified that on the 31st august 2004 a transfer of Shs. 350,000,000/= was made from M/s Petro Uganda Ltd's to the account No. 162223 of the first Defendant account No. 1143682 both being held in Barclays Bank pursuant to Exh. P1. On the 2 September 2004 Mr. Kizito (DW1) withdrew Shs. 207,600,000/= from the first Defendant's account No. 1143683 as evidenced in ledger account Exh. P3. Mr. Magimbi then testified that they got an immediate query of the transfer of the money from Petro Uganda Ltd prompting the Bank to reverse the said entry on the first Defendant's account and thus creating a debit of Shs. 203,591,955/= which the Bank now seeks to recover. Mr. Magimbi testified that when he

contacted the second Defendant about the transaction, the second Defendant told him that he had sold land to M/s Petro Uganda Ltd.

Mr. Kizito (DW1) on the other hand testified that he had indeed withdrawn money from the first defendant's account amounting to the Shs. 207,600,000/. He however testified that he was only facilitating two people namely; Kamya and one Fred to collect payments due to them from M/s Petro Uganda Ltd through the first Defendant's bank (for a commission) as the said two people did not have a bank account of their own. Mr. Kizito testified that these two people had told him that they were staying in Lira but had won a local purchase order (LPO) from Petro Uganda Ltd but did not have a bank account. He however further testified that the two people did not tell him what equipment had been supplied and they did not show him the LPO. All they promised him was a 10% commission for assisting them. Mr. Kizito testified that he was to draw two cheques for the benefit of these two people. The first in the sum of about Shs. 207,000,000/= for which he was to purchase US $120,000 and give to the two which he did. The second was to draw the balance of the money less his commission in Uganda Shillings. He was not able to draw and present the second cheque because Mr. Magimbi called him and told him the M/s Petro Uganda Ltd had called the bank to query the whole transfer. By this time the two people had disappeared never to be seen again.

As for Mr. Ladha and Mr. Kinyutu from Petro Uganda they testified that the instruction letter (Exh. P1) to Barclays Bank that caused the money to be transferred to the first Defendant's account was a forgery.

Counsel for the Defendant's submits that the defendants cannot be held to be liable for the alleged forged instruction letter to Barclays Bank. He further submits that in any event forgery was not sufficiently pleaded by the Plaintiff. Counsel for the Defendant goes on to further submit that even the act of forgery itself was not proved as neither Mr. Ladha nor Mr. Kinyutu lead evidence to show what their true signatures looked liked in comparison to that in the instruction letter.

From the evidence before Court it is not in dispute that the first defendant's account was credited by the bank with Shs. 350,000,000/= of which Shs. 207,600,000/= was withdrawn by the second Defendant but was later reversed by the bank leaving a debit of Shs. 203,591,555/=. The value of that figure is not disputed. It is also not in dispute that the money was transferred from the account of the Plaintiff but after a query that figure was reversed. The Defendants and in particular the second Defendant do not deny that the money in question did not belong to them but rather some two people whose identities are not clear. These two people otherwise known as Kamya and Fred did not provide the Defendants with

documentary evidence of the transaction they had with M/s Petro Uganda Ltd to warrant the transfer of money nor did they come to testify on the matter. Instead they have disappeared. This makes their transaction suspicious. All the two wanted was to clear their alleged payment through the account of the first Defendant and disappear. This to my mind is a form of money laundering a vice that is growing within our financial institutions. Surely it would have been more realistic for the two men to open a bank account for themselves than to use another's bank account. That notwithstanding in the absence of these two people the first defendant cannot lay claim to the money as the second Defendant made it clear that he does not know the M/s Petro Uganda Ltd and its officers so the Defendants cannot properly be described as indicated in the instruction letter (Exh.P1) as one of the *"customers"* of M/s Petro Uganda.

In answer therefore to the second issue I find that the first Defendant is indebted to the Plaintiff in the sum of Shs. 203,501,955/=.

Issue No. 3 **Whether the plaintiff owed a duty of care to the first Defendant in ensuring that the transfer to its account was valid?**

This was an issue originally framed by the Defendants; whether the Plaintiff's owed the Defendants a duty of care to ensure the transfers to the account of the first defendant were valid. Mr. Kamba the Second Counsel for the Defendants took a slightly different approach and said that the Plaintiff were negligent in making the transfer and so are estopped from making an claim on the Defendants. Whereas I agree that negligence was specifically pleaded, I am not too sure in substance what the distinction is in legal terms is regarding these two issues as for one to prove negligence one must first establish that a duty of care existed. That notwithstanding the Defendant pleaded three particulars of negligence

1. Giving advice to the first Defendant's director that the payment from Petro Uganda Ltd was sound without proper evaluation and ascertainment as to its propriety

2. Failure to discover the defect in the transfer if any from Petrol Uganda Ltd after staying with it for about four days

3. Failure to stop any withdrawal from the first Defendants account even after Petro Uganda Ltd had called the bank before payment of Shs. 207,600,000/= alerting them of an anomaly with the transfer which information was not passed on to the defendant's before drawing the same.

4. Allowing the Defendants to draw the cheque in such a manner as may facilitate a fraud.

Counsel for the Defendant raised some points relating to negligence. He referred me to the case of

<u>Silayo</u> V <u>Centenary Rural Development Bank</u> (1996) Ltd [2001] E.A. 288

Where it was held "*. . a collecting bank is bound to use reasonable ski/I, and diligence in presenting and securing payments of cheques, (or bills) entrusted to it for collection and p/acing the proceeds to the customer's account, as in taking such other steps as may be proper to secure the customer's interests...*"

Furthermore

> "*. .should the banker represent to the customer, either expressly or by conduct, that he might treat the money as his own, or negligently falls to discharge his duty to the customer, as to change his position and act to his detriment, the banker will not be permitted to recover the money paid under a mistake...*"

Counsel for the Defendants pointed that there was evidence that bank had handled many other similar transactions for M/s Petro Uganda and that there was a system between them to confirm transfers of this nature which was not followed in this case. Instead the bank instruction manager gave instant authority to the transaction showing negligence. As proof of this six of the bank's employees were dismissed.

Counsel for the Defendants submitted that the bank was under a duty not to misinform a customer as to the true state of his account and where such a misrepresentation is made to which the customer relies to his detriment the bank is estopped from denying that the representations were made (see)

Byaruhanga V Barclays Bank (U) Ltd [1978] HCB 150

Counsel for the Plaintiffs denies that the bank was negligent. He disputes that the bank held on to the transfer from M/s Petro Uganda Ltd for a period of four days as alleged but rather it was for one day. Counsel for the Plaintiff submitted that the bank could not owe a duty of care to a fraudster to ensure that a fraud is discovered. I was referred to the case of

Barclays Bank of Kenya V Janday [2004] 1 E.A. 8

In that case the customer had facilitated **a** withdrawal of a large amount of money that had been credited to his account from another account (first customer) originating with third party forgery. It was found that the second customer was privy to this unusual transaction. The issue arose whether the bank had failed in its duty of care to the second customer and whether the bank was estopped from recovery due to the changed position by the second customer after receipt of the funds in his account? **Justice Nyamu** in that case held that the bank may have been negligent to its first customer by excising in sufficient care prior to accepting the forged instruction letter. This duty of care was not however owed to the second customer who received the money under a mistake of fact. The learned Judge found that by the bank confirming second customer's account balance did not amount to a positive representation

that the credited funds belonged to the customer since the customer was aware of the true position and that the money was not paid for any consideration and that the balance was unusual and unexpected. He further found that the second customer had received the money under a mistake of fact and the bank was therefore entitled to the equitable remedy of tracing the money.

During cross examination Mr. Magimbi from The bank conceded that there was human error in processing the alleged instruction from M/s Petro Uganda Ltd and as a result two staff members of the bank were dismissed. It is also generally agreed that the sum of Shs. 350,000,000/= posted on the first Defendant's account was reversed as a result of a clear error of posting an amount which in reality had not been instructed. There is therefore on doubt in my mind that by reason of the above, the bank had breached its duty of care to M/s Petro Uganda Ltd by moving money out of their account without authorisation. That is why the transaction had to be reversed and two bank employees dismissed.

The question therefore is whether this duty of care extended to the first Defendant with respect to crediting its account with funds from M/s Petro Uganda? Here I can only recall with approval the words of **Justice Nyamu** in the case of **Barclays Bank V Jandy** (supra)

> *"…It defies logic for him (i.e. the second customer) to hide behind his contention that the bank was negligent in paying on the authority of the forged letter…"*

Indeed I follow with approval the holding of **Justice Nyamu** that such a duty of care cannot be owed to a customer who knowingly received those funds on his account under a mistake of fact as it also happened in this case. Clearly the Defendants were not expecting this money from M/s Petro Uganda Ltd as by the admission of their director Mr. Kizito they did not even know them! The only link if at all were these two people called Kamya and Fred and they even did not give the Defendants any evidence that the money in question was genuinely theirs. In these circumstances cases of **Silayo V Centenary Bank** (supra) and **Byaruhanga V Barclays Bank** (supra) are distinguished.

In answer therefore to the third issue the plaintiff bank did not owe a duty of care to the first defendant to ensure that the transfer to its account was valid.

Issue No. 4: <u>Whether the first and second defendants owed a duty of care to the Plaintiff to ensure that forged instructions for Payment were not presented to the first Defendants account?</u>

This issue is the flip side of the last issue number three. The duty of **a** customer in these circumstances was also well covered in the case of **Barclays Bank V Jandy** (supra) to which I approve.

The learned Judge in that case found that the customer has a duty to act in good faith when transacting on his account. Part of this duty includes the duty to notify the bank of unexpected deposits on his account. In using such deposits the customer warrants to the bank that he has the authority to use them. The learned Judge went on to find that the customer in that case had breached his warranty of authority by facilitating, encouraging and assisting in the withdrawal of funds that did not belong to him, from his account. I see no difference in that case with what the first and second Defendants did in this case. The second Defendant a director of the first Defendant used the first defendant's account to assist persons unknown to the bank (and indeed him) to draw funds not belonging to the first Defendant from its account. The first and second Defendants could not warrant that they had the authority so to use those funds and therefore were unable even to contest the reversal of the said credit on the first Defendant's account.

Counsel for the defendant submitted that forgery had not been pleaded, particularised nor proved by the Plaintiff. The question of forgery or fraud is pleaded under the reply to the written statement of defence paragraphs 2 (c), 4 and 5. The particulars are to found in paragraph 4 which inter alia states

> *"... the 1st and 2nd Defendants who caused the fraudulent letter to be delivered to the bank with intent to defraud the bank..."*

I find that the plaintiffs' through the evidence of Mr. Ladha and Mr. Kinyutu, that the instruction letter was not signed by them and the bank agreed with them and reversed the entry. It was not for the Plaintiff's witnesses to challenge their own signatures but rather the Defendants if they truly believed that the signatures on the instruction letter were valid but they did not. That being the case this court finds that there is ample evidence to show that the said instruction letter was a forgery and fraud.

That being the case in answer to the current issue I find that the first and second Defendants owed a duty of care to the Plaintiff to ensure the forged instructions for payment were not presented on the first Defendants account which they did not and therefore breached this duty of care.

Issue No. 5: Whether the indebtedness in issue No. 2 above is covered by the documents entitled the "*guarantee*"?

It is the case for the Plaintiffs that the indebtedness found in issue No. 2 is covered by the guarantees presented to Court.

The guarantees in question are drawn out in the banks standard format and essentially are the same. One was signed by the second and fourth Defendants dated the 1st December 1994. The second was signed by the second and third Defendants dated the 1st December 1997. It is the contention of counsel for the Plaintiff that both guarantees are still valid by reason of their clauses 2 and 3 which are identical. Clause 2 provides that the guarantee is a continuing one even three months after termination. Clause 3 also deals with how the guarantee may be determined namely three months after receipt of notice to determine it. Counsel for the Plaintiff submits that the guarantees are wide enough to cover the indebtedness of the first Defendant in this case. He further submits that there is no evidence that notice of termination has ever been given these guarantees.

Counsel for the Defendant submits that the guarantees have lapsed by reason of time. He further submits that the guarantees are barred by section 3 of the Statute of Limitations. Counsel for the Defendant submits that Mr. Kizito testified that the guarantees were renewed

at three month intervals which periods have long passed. He also referred me to the authority of Halsburys Laws of England 4th) Ed Vol 20 Para 198 & 199 where they write

> *"... the duration of a guarantor's liability depends upon the terms of the guarantee. Some guarantees are intended to cover a single credit or transaction only while others apply to a series of transactions. In the case of a single credit or transaction, the guarantor's liability extends only to the single credit or transaction agreed upon..."*

Counsel submitted that the suggestion that the guarantees in this case were continuing was vague and tenuous.

I have reviewed the submissions of Counsels on this issue and looked at the evidence adduced. It is quite clear that the guarantees in question are quite old. It is difficult to establish the credit history of the Defendants save for the fact that there is evidence that the first Defendant had benefited from several credit agreements with the Plaintiff. A review of the first Defendant's bank statement Exh. P3 covering the period 10th August to 2nd September 2004 does not reveal that the first Defendant was still servicing any credit from the bank at the time this dispute arose. Indeed Exh. D2 shows that the First Defendant was last extended a credit facility of Shs. 30,000,000,000/= on the 25th August 2003 to expire on the 30th August 2004. The securities for that facility were;

i. Legal mortgage over block 24 plot 1066 at Lugujja Kampala
ii. Insurance over the property with bank interest noted.

It is important to observe that there is no reference to any guarantees subsisting at this stage. One wonders why in 2004 no reference is made to the guarantees of 1994 and 1997 if they were still subsisting. Why is one of the guarantees dated 1994 and the other 1997 if both of which had no notice of termination? It would appear to me that these securities were being renewed when the credit facilities were paid. I therefore agree with counsel for the

Defendants that the two guarantees had lapsed by the time this incident occurred.
In answer to the issue therefore I find that the indebtedness in issue No. 2 is not covered by the guarantees.

Issue No. 6: Whether the Plaintiff is indebted to the first defendant in the sum claimed in the counterclaim?

The case for the first Defendant is quite straight forward. It is that when the Plaintiff reversed the entry of Shs. 350,000,000/= on its account it also offset the sum of shs. 4,008,045/= that was already on the account against the reversed figure thus creating a debit of Shs. 203,591,955/= which was illegal.
The facts and arguments for this issue have already been outlined above. As pointed out before based on the holdings in **Barclays Bank V Jandy** (supra) where a customer has received a deposit on his account under a mistake of fact under these circumstances then the bank is entitled to the equitable remedy of tracing the money. This in my view means that the bank can exercise the right of set off on the account where the deposit was mistakenly made to recover the wrongly deposited money. This is what happened in this case and I need not go further than that.
In answer therefore to this issue I find that the plaintiff is not indebted to the first Defendant in the sum claimed in the counter claim.

Issue No. 7: Remedies.
As to remedies these are in two parts. As to the main suit I find

i. That the first defendant is liable to the Plaintiff in the sum Of Shs. 203,591,955/=. As to the second, third and fourth defendants the evidence is clear that the third and fourth defendants as directors of the first Defendant had no role to play in this matter and I find that they are not jointly and severally liable. However as to the second Defendant as a Director of the first Defendant his role was pivotal in all of this and he cannot be allowed to hide under the veil of incorporation. Indeed in paragraph 4(1) of the written

statement of defence the second Defendant concedes that his actions were done as the Managing Director of the first Defendant. I according find the second Defendant as an individual director jointly and severally liable with the first Defendant.

ii. That sum above is payable with interest at 20% per annum from the 2 September until payment in full.

iii. That costs of the suit are awarded to the Plaintiff against the first and second Defendant.

As to the counterclaim that is dismissed with costs.

Geoffrey Kiryabwire
JUDGE
Date: 17/02/09

17/02/09
9:25am

Judgment read in open court and signed in the presence of

- K. Masembe for Plaintiff
- H. Kamba for Defendant
- Rose Emeru -Court Clerk

Geoffrey Kiryabwire
JUDGE
Date: 17/02/09