

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0112-2009

(ARISING FROM HCT-00-CC-CS-0051 – 2008)

PAUL KASAGGA
ANDREW KASAGGA ... } APPLICANT

VERSUS

BARCLAYS BANK (U) LTD RESPONDENT

BEFORE: HON MR. JUSTICE LAMECK N. MUKASA

RULING:

THAT is an application brought by Notice of Motion under Order 46 rules 1 and 8 of the Civil Procedure Rules and Section 82, 98 and 99 of the Civil Procedure Act for orders that:

- (a) The Order/Ruling of the Honourable Court made on 22/08/08 be reviewed by the Court to the effect that the applicant’s liability as guarantors is subject to the outcome of HCCS No 51 of 2008.
- (b) That this is a proper case for review.
- (c) That the applicants be granted unconditional leave to appear and defend the main suit.
- (d) Costs of this application be born by the respondent

The grounds for the application are particularly that:-

1. From the court record/pleadings that the issues for determination raised triable issues and therefore could not properly fall under a summary suit for a liquidated demand.
2. That the court record shows that the applicants were sued as guarantors whose liability only arises upon ascertaining of the true and or actual amount payable between the plaintiff and the Defendant Company which was being contested.
3. That the procedure adopted required issuance of a decree upon refusal of leave to defend which could not be as there were no amount established to be due.
4. That the applicants could not file a defence because the court did not allow them to do so.
5. The order of court determining liability of the applicants as guarantors for an undetermined sum of money is an error apparent on the face of the record.
6. That the applicants have been denied audience before court yet the matters in contention are set to determine their liability or right, thereto.
7. That it is just and equitable that a review be granted in the circumstances.
8. That the applicants be permitted to file a decree.

Order 46 rule 1 of the Civil Procedure Rules allows any person aggrieved by a decree or order to apply for a review of judgment to the court which passed the decree or made the order on account of discovery of new or important matter or evidence which after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. The factors to be considered in an application for review were considered by the Court of Appeal of Kenya in Nyamongo and Nyamongo Advocates Vs Kogo (2001) EA 173 wherein their Lordships the Justices of Appeal held:-

“An error apparent on the face of the record cannot be defined precisely or exhaustively there being an element of indefiniteness inherent in its very nature and it must be left to be determined judiciously on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the

face of the record. Where an error or a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.

As was said in the AIR Commentaries on the Code of Civil Procedure by Chitaly and Rao (4 ed) Volume 3 at 3227: ‘A point which may be a good ground of appeal may not be a ground for an application for review. Thus an erroneous view of evidence or of law is no ground for review though it may be good ground for an appeal.’”

Applying the above principles to the present case the Respondent, Barclays Bank of Uganda Ltd, by summary procedure under Order 36 of the Civil Procedure Rules, filed Civil Suit No 51 of 2008 seeking to recover shs2,211,653,283/05 jointly and severally from M/s Zzimwe Hardware and Construction Enterprises Ltd and the Applicants. The Respondent’s claim was against the Applicants as guarantors to an overdraft facility granted to Zzimwe Hardware and Construction Enterprises Ltd.

Ms Zzimwe Hardware & Construction Enterprises Ltd., vide Miscellaneous Application No. 0114 of 2008, applied for leave to defend the above suit. It disputed the sum of shs2,211,653,282/05 contending that the amount due is only Shs663,182,701/=. Leave to defend was granted for court to determine the amount actually due to the Respondent.

The applicants also, vide Miscellaneous Application 0113 of 2008, applied for leave to defend the above suit on the grounds, inter alia, that:-

- (a) The Applicant's do not owe the Respondent any money.
- (b) The guarantee documents attached to the plaint are not related to the Respondents claim of Ugs2,211,653,287/05 and are not enforceable against the applicants.
- (c) There has been no demand by the Respondent in respect of any guarantees.

This court found that the attached guarantee documents related to the claim and that there had been appropriate demand. It accordingly dismissed the application.

I have carefully considered the able submissions of both Counsel and I find that the Applicant's case is that by rejecting their application for leave to defend their liability was prejudged. The applicants contend that the order of court determining their liability as guarantors for an undetermined sum of money is an error apparent on the face of the record.

I have reviewed the main application and have discovered that the issue of the Applicant's liability which they were contesting in that application was not considered. As observed in the Ruling in the main application a guarantee obligation is secondary and accessory to the obligation the performance of which is guaranteed. The Applicant's liability as guarantors is co-existence with Ms Zzimwe Hardware and Construction Enterprises Ltd's obligation as the principle debtor. If its obligation turns out not to exist or is void or dismissed or discharged so is the Applicant's obligation in respect thereof. The liability of the guarantor arises only upon the default of the principle debtor and limited to the extent of the default. The extent of default and liability of the principle debtor and thus that of the guarantors is in issue. In light of that I find that it was an error apparent on the record not to allow the applicants to defend and ascertain the extent of their liability to the Respondent.

In the premises the application for review succeeds. The order is accordingly reviewed and the Applicants are allowed to appear and defend Civil Suit No 51 of 2008. They must file a Written

Statement of Defence within fourteen days from the date of this ruling. Costs shall be in the course of the main suit.

I so order.

Hon. Mr. Justice Lameck N. Mukasa

JUDGE

16th June 2009