

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0645-2008
(ARISING FROM HCT-00-CC-CS-0282-2008)

MARIA ODIDO APPLICANT

VERSUS

BARCLAYS BANK OF UGANDA LTD.RESPONDENT

BEFORE: HON MR. JUSTICE LAMECK N. MUKASA

RULING:

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

1. Unconditional leave be granted to the Applicant to file a defence in the above suit.
2. Cost of the application be provided for.

The grounds for the application are that:-

1. The Applicant is a director in the principal debtor Company, to wit, Bee Natural Products Limited (BNP) and is conversant with the way the Respondent handled the loan facility applied for by BNP.
2. From inception the Respondent, by its conduct through its mandated officers agreed to finance the project run by BNP well knowing that the source of repayment of the loan with agreed interest was the project when completed.
3. The Project which the Respondent agreed to finance was completion of a hostel but the Respondent knowingly frustrated the project by disbursement of funds in a manner inconsistent with the Commercial presentation made by the Applicant and the said BNP and by withholding a substantial sum of the contracted amount.
4. The Respondent in breach of a lender's implied obligation refused to fully disburse the loan thereby frustrating the project.
5. The Respondent arbitrarily charged interest on the facility amount at a rate not agreed upon and on amounts not disbursed.
6. The Respondent has sold all assets of BNP but has not accounted for the proceeds of the sale.
7. The Respondent deliberately sold the assets of BNP at an under value with interest to perpetually keep BNP indebted and to unjustifiably invoke the personal guarantees.
8. The suit against the Applicant is misconceived in so far as the purported default by BNP was caused by a breach by the Respondent. The Applicant cannot be held liable under the guarantee when the Respondent breached the facility agreement with BNP on which the guarantee was founded.

In the main suit, brought by summary procedure Ms Barclays Bank of Uganda Ltd (the Respondent) claims against Maria Odido (the Applicant) and Antonio Difonzo, jointly and severally as guarantors for the payment of Ugshs2,972,238,392/= being monies owed to the Respondent by BNP, interest thereon at bank rate and costs.

In an application of this nature the law is that the Applicant must show by affidavit or otherwise that there is a bonafide triable issue of fact or law. At this stage the Applicant is not bound to show that he has a good defence on the merits of the case but ought to satisfy court that there is prima facie a triable issue in dispute which the court ought to determine between the parties. The

Court is not at this stage required to inquire into the merits of the issue raised. However the issues so raised should be real and not a sham. Court must be certain that if the fact alleged by the Applicant were established there would be a plausible defence and if the Applicant has a plausible defence he should be allowed to defend the suit unconditionally. See Abubakar Kato Kasule Vs Tomson Muhwezi (1992-93) HCB 212, Muluku Interglobal Trade Agency Vs Bank of Uganda (1985) HCB 65.

In Kotechcha Vs Mohamed (2002) IEA 112 Berko JA at page 118 stated:

“The summary procedure on specifically endorsed plaint under Order 33 (now 36) Civil Procedure Rules is similar to a writ specially endorsed under Order 3 rule 6 (Order 14 rule 1) of the English Rules of the Supreme Court. Therefore English authorities on that rule are of persuasive authority and provide useful guide. Under the English Rule the Defendant is granted leave to appear and defend if he is able to show that he has a good defence on the merit, or a difficult point of law is involved, or a dispute as to the facts which ought to be tried, or a real dispute as to the amount claimed which requires taking an account to determine or any other circumstances showing reasonable grounds of a bonafide defence.
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In Provincial Insurance Co of East Africa Ltd Vs Kivutu (1995 – 1998) IEA 283 the Court of Appeal of Kenya held that in an application for summary judgment even one triable issue, if bonafide would entitle the defendant to have unconditional leave to defend.

The Respondent's claim, in the main suit, is against the Applicant as a guarantor for the a sum of shs2,972,238,392/= As a guarantor the Applicant's liability for the non performance of BNP's obligations is co-existensive with BNP's obligation. So if BNP's obligation turns out not to exist or is void or diminished or discharged so is the Applicant's obligation in respect thereof. See Paul Kasagga & Anor Vs Barclays Bank (U) Ltd HCT-00-CC-MA-0113-2008

In his submission Mr. James Nangwala, for the Applicant, argued that the Applicant had signed the Guarantee upon which she is being sued on the implied understanding that the Respondent would meet its obligations to the principle borrower, BNP. He contends that the Respondent is in breach of its obligations towards the principle borrower.

In paragraph 3 of the Applicant's affidavit she avers that the Respondent agreed to extend three credit facilities to BNP as follows:

- Apex Loan of Shs850,000,000/=
- Apex Loan of Shs475,000000/=
- Apex Loan of Shs1,200,000,000/=

That is a total facility of Shs 2,525,000,000/=. In paragraphs 5 and 6 she contends that she signed the guarantee on the understanding that the Respondent would meet its obligations to BNP and disburse the entire facility funds. In paragraphs 8 and 9 Applicant avers that in breach of its undertaking and banking practice the Respondent refused and failed to disburse to BNP the entire loan facility and purported to disburse only shs1,321,000,000/= The Applicant claims that the Respondent owed her, as a guarantor, a duty to ensure that it would not be in breach, a duty which the Applicant contends the Respondent breached.

Further the Applicant contends that she has noticed that the Respondent has been fraudulent in the way it handled its financing to BNP in that the Respondent:

- (i) did not invite the Applicant or any other director of BNP to discuss on the interest chargeable on the loan but charged arbitrary interest.
- (ii) claims amounts under the facility which it did not disburse to BNP as being due from BNP and accordingly due from her.
- (iii) sold the hostel project at an under value and failed to account to BNP for the proceeds of the sale.
- (iv) sold machinery and equipment belonging to BNP for a total sum of shs70,460,000= but the said sum is not reflected on the statement.

- (v) credits are reflected on the statement furnished but they are unexplained and are inconsistent with payments made.

In the premise the Applicant contends that the Respondent's claim against her is fictitious and cannot be proved.

Mr. Masembe-Kanyerezi referred to the Guarantee Deed, annexure B to the plaint, and argued that it was a Demand Guarantee. He submitted that in a demand guarantee the liability of the guarantor arises upon demand as opposed to the default guarantee. Counsel distinguished a demand guarantee from a classic guarantee of suretyship. He distinguished the guarantee in this case from that in *Kassaga Vs Barclays Bank (U) Ltd* (Supra) which he argued was a contract of suretyship where the Guarantor's liability is co-extensive with the principal debtor's liability. He referred to Paget's Law of Banking 12th Ed page 730 para 34.2 where it is stated:

“The essential deference between a guarantee in the strict sense (i.e. a contract of suretyship) and a demand guarantee is that the liability of a surety is secondary, whereas the liability of the issuer of a demand guarantee is primary. A suretyship liability is co-extensive with that of the principle debtor and if default by the principle debtor is disputed by the surety; it must be proved by the creditor. Neither proposition applies to a demand guarantee. The principle which underlies demand guarantees is that each contract is autonomous. In particular, the obligations of the guarantor are not affected by disputes under the underlying contract between the beneficiary and the principal. If the beneficiary makes an honest demand, it matters not whether as between himself and the principal he is entitled to payment. The guarantor must honour the demand, the principal must reimburse the guarantor (or counter – guarantor), and any disputes between the principal and the beneficiary, including any claim by the principal that the drawing was a breach of the contract between them, must be resolved in separate proceedings to which the bank will not be a party.”

The guarantee Deed provides:-

“ In consideration of your giving time credit and/or Banking facilities and accommodation to BEE NATURAL PRODUCTS LTD of P. O. Box 5318 Kampala (hereinafter referred to as “the Principal)” I/we the undersigned hereby guarantee to you the payment of and undertake on demand in writing made on the undersigned by your or any of your Directors, General Managers, Manager or Acting Manager to pay to you all sums of money which may now be or which hereafter may from time to time become due or owing to you anywhere from or by the Principal either as principal or surety, or jointly with any other person upon current banking account bills of exchange of promissory notes or upon loan or any other account whatsoever or for actual or contingent liability including all usual banking charges.”

In reply Mr. Nangwala referred to section 16 of the Mortgage Act It provides:

“The obligations of any party to any agreement or arrangement collateral to a mortgage, whether by way of guarantee, indemnity or otherwise, shall be no greater than the obligations of the mortgagor under the mortgage.”

Section 1 (b) defines “mortgage” to mean any mortgage, charge, debenture, loan agreement, or other encumbrance, whether legal or equitable which constitutes a charge over an estate or interest in land in Uganda or partly in Uganda and partly elsewhere and which is registered under the Act.

The facility letter annexure M1 to the Applicant’s affidavit constituted the loan agreement. The facilities were secured by, among others, a legal mortgage over plot No, 63 Block 261, Lukuli

Makindye Hill, first mortgage over Block 9 Plot 371 Kagugube Kibuga, unlimited guarantee by Ms Maria Odido, M/s Difonzo and Ms Achola Odido, and a Debenture over machinery and stocks.

Mr. Nangwala submitted that for a demand guarantee to be invoked there must be money owing by the principal debtor to the lender. That proof of advancing money to the borrower is on the lender. He argued that the Respondent had not shown that it had advanced all the monies to BNP as per the facilities agreement. He argued that for the obligation to pay on demand to arise under clause 1 of the Guarantee there must be money due from the principal which fact must be proved and not any fictitious amount. Further counsel argued that the Respondent had not adduced any evidence to show that the loan amounts were posted to BNP's account. Yet clause 9 of the Guarantee provides:-

“9. Any admission or acknowledgment in writing by the principal or any person on behalf of the Principal of the amount of the indebtedness of the Principal otherwise in relation to the subject matter of this guarantee or any judgment or award obtained by you against the Principal or proof by you in insolvency bankruptcy or liquidation of companies which is admitted or any statement of account furnished by you the correctness of which is certified by any one of your manager or acting managers shall be binding and conclusive on the undersigned.”

I have given due consideration to the affidavits by both parties, the documents attached and the able submissions of both counsel. I find the issues raised -- whether the Respondent charged interest arbitrarily; whether the Respondent breached the loan agreement by failing to disburse all the loan monies; whether the Respondent has demanded from BNP more funds than what it actually advanced to BNP; whether the Respondent has breached its duty to the borrower to account for the proceeds from the sale of the securities deposited and whether the respondent has acted fraudulently in respect to the loan agreement -- are issues privy to the Principal (BNP) and

not to the Applicant as guarantor. A guarantor is only liable if the Principal debtor fails to pay. The guarantors liability arise where the Principal fails to discharge its obligations to pay. In light of the above identified issues BNP's liability is put in issue. If default by the principal debtor is disputed by the Guarantor it must be proved by the Creditor. However, it is the Respondent's case that the Applicant's Guarantee is a demand guarantee whereby it is not affected by the disputes underlying the agreement between the borrower and the lender. In respect of a demand guarantee, if the beneficiary makes an honest demand, it matters not whether between the lender and the borrower the lender is entitled to payment. The guarantor must honour the demand. But the Statutory provisions of section 16 of the Mortgage Act tend to limit the obligations of the guarantor to the obligations of the principal debtor. So an issue arises as to the nature of the guarantee whether it is an on demand guarantee and if so what is the effect of the provisions of section 16 of the Mortgage Act. These are two triable issues which need to be resolved to determine the Applicant's liability to pay.

In the premises I find that the Applicant has established circumstances which entitle her to be granted leave to defend the suit. Leave is accordingly granted and the Applicant is to file a Written Statement of Defence within 14 days from the date hereof. She is awarded costs of the application.

Hon. Mr. Justice Lameck N. Mukasa

JUDGE

19th June, 2009