THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT - 00 - CC - MA - 267 – 2008
(arising out of H.C.C.S 111 of 2008)

GEORGE WILLIAM SEMIVULE :: APPLICANT

VERSUS

BARCLAYS BANK OF UGANDA LIMITED :::::::::::::::::::::::::: RESPONDENT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

Ruling:

This is an application for unconditional leave to defend High Court Civil Suit No. 111 of 2008 by the Applicant under orders 36 rule 4 and Order 52 rule 2 of the Civil Procedural Rules.

High Court Civil Suit No. 111 of 2008 is a suit under summary procedure brought by Barclays Bank of Uganda Limited (herein with referred to as *"the Respondent"* the present Respondent) against three defendants namely;

1) Berkerley Educational Enterprises Ltd (the first Defendant) and the second Applicant a company which owns a Senior Secondary School.
2) William Sebuliba Kayongo (the second Defendant) and Director/Shareholder in the first Defendant company.
3) George William Semivule (the third Defendant) the present Applicant and Director/Shareholder in the first Defendant.

Under the main suit Barclays Bank seeks to recover from the Defendants jointly and severally the sum of Shs.1,743,864,285/= on the strength of personal guarantees executed by the second and third Defendants.

Mr. Semivule the Applicant decided to file an application for leave to defend the main suit separate from Mr. Kayongo and Berkerley Education Enterprises Ltd which filed Miscellaneous Application No. 263 of 2008.
Mr. Semivule grounds for leave to defend are slightly different from those of Mr. Kayongo in the other application and he has instructed different counsel in the matter. I accordingly agreed to hear the applications separately thought the cause action by the bank against the Applicant and Mr. Kayongo is the same.

Mr. Tumusiime appeared for the Applicant while Mr. K. Masembe appeared for the Respondent.

Before the motion was argued, both counsel informed court that the parties had attempted to jointly sell the school the subject of the credit facility under a mortgage and failed and so the Respondent was now resorting to the personal guarantees to realize the amount due.

It is the case for the Applicant that the Respondent bank had not exhausted recovery measures against the Applicant and that the entire transaction between the parties is tainted with illegality and therefore is null, void and unenforceable. Counsel for the Applicant submitted that these were triable issues of both fact and law that required unconditional leave to defend to be granted by court. He submitted that the Respondents had applied the wrong interest rate of 21% p.a yet the loan in question was an Apex Loan which attracted an interest rate which was much lower namely 7.68%. Furthermore the money in question was to have been lent to the school but the money was not disbursed to the school which constituted an illegality. He submitted that illegality over rides all questions of pleadings and admissions. In this regard I was referred to the case of

Makulu International Ltd V Cardinal Nsubuga & Anor CA 4 of 1981 (reported in [1992] HCB).

Lastly Counsel for the Applicant submitted that the assets of the school were sufficient to cover the debt but the Respondent Bank chose to enforce the guarantee instead.

In reply Counsel for the Respondent opposed the application. He disagree the Applicant could simply aver that the school had sufficient assets to cover the loan. Counsel for the Respondent submitted that the Applicant had personally signed what he termed to be a classic on demand guarantee; payable on written demand by the bank. Such written demand had already been made by the Respondent Bank. It was not therefore open to the Applicant to try and circumvent the clear wording of the guarantee he had signed.

Counsel for the Respondent submitted that by law on demand guarantees were autonomous from any underlying contractual obligation and that if the Applicant had any issue on the contract itself he had to bring that by way of separate suit. He further disputed that the loan was tainted with illegality. Counsel for the Respondent submitted that illegality is both a term of art and law and great care should be exercised when making such an allegation. In this particular case Mr. Magimbi from the Respondent Bank had sworn an affidavit to the effect that the said Applicants themselves had authorized the transfer of the funds to another company known as M/s Katembe Stores Ltd in which they had shares and called co-business. He also disputed that it was a defense to the case in the head suit to simply state that the assets were sufficient to cover the loan. Counsel for the Respondent denied that the wrong interest rate had been applied by the bank as alleged. He submitted that the two alleged differing interest rates belonged to two separate facilities taken out by the Defendants including the present Applicants and therefore there was no contradiction in the figures.

I have perused the Motion and the affidavits for and against it. I have also considered the submissions of both Counsels for which I am grateful.

I have always had the view that the tests to grant leave to defend are not onerous. The rationale for this was best put by **Justice Sir Charles Newbold (P)** in the Kenyan case of

Zola & Another V Ralli Brothers Ltd & Anor [1969] EA 691 (CA)

where he observed that summary procedure under the civil procedure rules is intended to enable a plaintiff with a liquidated claim, to which there is clearly no good defence, to obtain a quick and summary judgment without being unnecessary kept from what is due to him by delaying tactics of the Defendant.

As to the tests themselves, in the case of **Maluku Interglobal V Bank of Uganda** [1985] HCB 65. **Odoki (J)** as he then was, set out the tests to be applied. He held that before leave to appear and defend is granted the Defendant must show by affidavit or otherwise that there is a bona fide triable issue of fact or law. When there is a reasonable ground of defence to the claim, the Plaintiff is not entitled to summary judgment. The Defendant is not bound to show a good defence on the merits but should satisfy the court that there was an issue or question in dispute which ought to be tried and the court should not enter upon the trial of the issues disclosed at this stage.
However, the defence must be stated with sufficient particularity to appear genuine. General and vague statements denying liability will not suffice.

As to whether leave to defend a case should be granted unconditionally, it was held in the case of

Kundalal Resturant V Deushi & Co. [1952] EACA 77

That leave will normally be given unconditionally and only be given subject to payment in court where there is ground for believing that the defence is a sham.

Counsel for the Respondent has submitted in this application, as he did in **William Kayongo & Anor V Barclays Bank** M.A. 263 of 2008, that because of the nature of the *"on demand guarantee"* signed by the Applicant, it is not open to the Applicant to raise any defence at all. Indeed Paget's Law of Banking (12 Ed Butterworth para 34.2) makes the point that any such underlying dispute must be resolved in a separate proceeding. The learned authors in their notes on that page refer to the decision of **Lord Denning M. R**. in the case of

Edward Owen Engineering Ltd V Barclays Bank International Ltd [1978] 1 Q.B 159 or 1978] 1 Lloyds Rep 166

which has became the locus classicus on the law of on demand performance bonds which in substance are the same as guarantees. In that case **Lord Denning** referring to *"on demand bonds"* held that the issuer must pay according to its guarantee on demand if so stipulated, without proof or conditions. The only exception is when there is clear fraud of which the

issuer has notice. He further observed that such guarantees were virtually promissory notes that are payable on demand.

It would appear therefore that under the tests of **Maluku Interglobal** (supra) save for a fraudulent demand by Respondent bank against the on demand guarantee there be no other reasonable ground for a defence to the claim. The motion by the Applicant on the other hand does not raise a ground of fraud but rather illegality which in my view is different.

In the application of **Kayongo** (supra) I have already held that whereas as general rule the arguments raised by Counsel for the Respondent with regard to on demand guarantees/bonds are correct, the position changes when such gurantees are given together with a mortgage. Section 16 of The Mortgage Act (Cap 229 of the Laws of Uganda Rev 2000) 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…"*

There is no doubt in this case that a mortgage was created over the property comprising the school and therefore the test in Section 16 of the Mortgage Act is applicable to this case. My findings in the **Kayongo application** (supra) will therefore be no different from my findings in this particular application, that is, in the absence of the mortgage deed (which has not been annexed in these applications) it is not possible to determine the extent of the obligations there under by way of summary suit. This in my view is sufficient to allow the application the other arguments of Counsel for the Applicant notwithstanding; which may now be treated as issues for trial.

The Applicants may file their defence within 14 days of this ruling costs in the cause.

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Geoffrey Kiryabwire

JUDGE

Date: 10/03/2010

10/03/2010

11:28

Ruling read and signed in open Court in the presence of:

- E. Tumusiime for Applicant
- T. Kavuma h/b for Masembe for Respondent
- Rose Emeru - Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 10/03/2010