THE REPUBLIC OF UGANDA

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

HCT - 00 - CC - MA - 325 - 2008
(arising out of H.C.C.S 111 of 2008)

1. WILLIAM SEBULIBA KAYONGO
2. BERKERLY EDUCATIONAL ENTERPRISES LTD. :::::::::::: APPLICANTS

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 Applicants 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 Barclays Bank"* 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) the present Applicant and Director/Shareholder in the first Defendant company.

3) George William Semivule (the third Defendant) 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. Kayongo and Berkerley Educational Enterprises Ltd. decided to file an application for leave to defend the main suit separate from Mr. Semivule who filed Miscellaneous Application No. 267 of 2008.
Though the cause of action against all the Defendants is the same, Mr. Semivule's grounds for leave to defend are slightly different from those of the present Applicants and he has instructed different counsel in the matter. After reviewing the motions, I have decided to handle them separately as filed as it also appears that Mr. Semivule may have other grounds directed against the present Applicants.

Mr. Rwaganika appeared for the Applicants 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.

Counsel for the Applicants submitted that there were triable issues of both fact and law that required unconditional leave to defend to be granted by court. He submitted that the Respondents were in the process of realizing both the mortgage and the guarantees at the same time while was wrong. Counsel for the Applicant submitted that Mr. Kayongo was just a guarantor and not primary obligor and therefore Barclays Bank should first sell the school which was mortgaged before seeking to enforce the guarantee. Secondly, Counsel for the Applicants submitted that there was a triable issue as to what the correct interest rate should be. He submitted that the correct rate of interest was 7% p.a. under the apex line of credit but the Respondent bank had applied 21% p.a. which was incorrect.

Lastly, Counsel for the Applicants submitted that the Respondent Bank had wrongly disbursed some of the money due to the school to another company known as M/s Kalembe Trading Stores without the authority of Mr. Kayongo.

In reply Counsel for the Respondent submitted that the application for leave was misconceived. He submitted that Mr. Kayongo had not signed any ordinary type of guarantee but rather an on demand guarantee which is autonomous from any other underlying contract or obligation.
In this regard he referred me to the learned author Mark Hapgood QC, in "Paget's Law of Banking" 12 Edition Butterworths at para 34.2 where he writes

> *"…The principle which underlies demand guarantees is that each contract is autonomous. In particular, the obligation of the guarantor are not affected by disputes under 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*
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> *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 be a party…"*

The learned author in this regard relied on the judgment of **Potter L.J** in Comdel Commodities Ltd V Siporesc Trade SA [1997] 1 Lloyds Rep 424, CA 431.

Counsel for the Respondent submitted that based on the wording of the guarantee that Mr. Kayongo signed and the legal authorities cited it was not open to him to contest the indebtness in the underlying contract and if he wanted to do so this had to be by way of another suit.

Counsel for the Respondent submitted that the above arguments also equally applied to the allegation of the wrong interest being applied and money being disbursed to M/s Katembe Stores. That being the case the Applicants had failed to disclose any triable issues under the on demand guarantee and therefore the motion should be dismissed.

I have perused the motion and the affidavits for and against it. I have also considered the submission of both counsel.

The legal tests for the grant of leave to appear and defend are now fairly settled.
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 of 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 is 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.

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.

I have decided to review these authorities for guidance because counsel for the Respondent has submitted in effect that because of the *"on demand guarantee"* signed by the first Applicant by

its very nature, it is not open to the first Applicant to raise any defence at all. I will therefore have to consider the arguments of Counsels in the reverse order because of this assertion.

Counsel for the Respondent submitted that the on demand guarantee is so to speak autonomous and therefore insulted from any dispute between the parties.
Therefore as long as beneficiary of the guarantee (i.e. the Respondent bank here) makes an honest demand on it then it must be paid without question. Indeed Paget's Law of Banking makes the point that any such underlying dispute must be resolved in a separate proceeding. Indeed 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 become the locus classicus on the law of 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.

A review of the amended plaint in the head suit H.C.C.S 11 of 2008 and in particular para 5 thereof shows that the cause of action is that a demand under the on demand guarantee was made but not honoured and therefore the amount is due and owing.

That in effect puts a very thin line between the cause of action in the head suit and the reply to the motion herein. In other words how can one address the motion without subsistantly going into the merits of the head suit? This is a point of law and the arguments in my considered

view in the motion and head suit are the same and in so addressing them in the motion, I ipso facto may unavoidably also deal with the head suit. In so doing, I shall evoke my inherent Section 98 of the Civil Procedure Act (Cap 71) to make such orders as be necessary for the ends of justice and avoid replication of legal arguments. For the Applicants it has been submitted that the Respondent bank was trying to realize the mortgage and yet enforce the guarantee at the same time which was wrong. Counsel for the Applicant submitted that the first Applicant was just a guarantor and not a primary obligor so the mortgage should be realized first before resorting to the guarantee.

He also raised an issue of fact that the wrong rate of interest had been applied i.e. 21% p.a. instead of 7% p.a.

Clearly, an *"on demand guarantee"* is designed as security instrument to enable the beneficially quickly gets its money without resorting prolonged litigation. Annexture 'A' to the affidavit of Mr. Samuel Maitum (Manager Corporate Recoveries of the Respondent) attaches the said guarantee. The wording under para 1 are

> *"…In consideration of your giving time credit and or banking facilities and accommodation to Berkerley Educational Enterprises Ltd of P. O. Box 15060 Kampala (hereinafter referred to as "the principal"), I/We the undersigned hereby guarantee to you the payment of and undertake an demand in writing made on the undersigned by you… to pay to you all sums of money which may now be or which hereafter may from time to time became due or owing to you…"* (emphasis mine).

This guarantee is signed by the first Applicant Mr. Kayongo.

The first Applicant Mr. Kayongo in his affidavit in rejoinder (actually it was an affidavit in reply) does not deny the facility. He however gives some more detail as to the facility in paragraph 3 of the affidavit when he depones

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3. *That the loan in issue was given by the Respondent to Berkerley Educational Enterprises Ltd. Berkerley Educational Enterprises Ltd mortgaged its properties at Kyadondo Block 265 Plots 517, 1918, 3826, 3828 and 3825…"*

So the facility was a mortgage on property.

I have not found local authorities on the subject of an on demand guarantees or bonds. I do not see however, how the case of **Edward Owens Engineering Ltd** (supra) would not be a persuasive authority in Uganda for on demand bonds/guarantees. I must nonetheless observe that the bulk of the authorities on the subject of on demand guarantees from the United Kingdom (which have also been cited herein) relate to disputes between merchants where the on guarantees or bonds were given by banks. This can also be seen from the speech of **Kerr J**. in the case of

> **Habottle (R.D) (Mercantile) Ltd V National West Minster Bank** [1978] 1 Q. B 146

when he alluded at page 155 to the practice that courts will not interfere with the machinery of irrevocable obligations assumed by banks and that except for fraud the courts will leave merchants to resolve their underlying disputes by litigation or arbitration as available to them or stipulated in the contracts.
Even the case of **Edward Owen Engineering Ltd** (supra) involved merchants relying on a bond undertaken by a bank.

Here the facts are slightly different in that the guarantees are issued by individuals to a bank in addition to 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…"*

Annexture 'W' to the affidavit of Mr. Kayongo then first Applicant is a facility letter dated 11th October 2004 from the bank to the director of the second Respondent. Therein is an overdraft of Ug.Shs.411,141,555/=. The court file also has another similar facility letter from the bank dated 20th January 2006 for an apex loan Ug.Shs.328,913,244/=. Paragraph 4 entitled "security" states that all indebtness and liabilities will be secured in favour of the bank legal

mortgage and further charges over certificates of titles. Plots 185 Kyadondo Block 273, Plots 517, 3824, 3826, 3827, 1918 and 3828 land at Bunamwaya Rsc Shs. 400,000,000/= million and Block 265 plot 3825 land at Bunamwaya to the registered collaterally to the mortgage above to be RSC Shs.1,200bn/.

- Unlimited guarantees by Directors William Semivule and William Kayongo.
- Insurance policy over the above properties with interest noted thereon. The bank will renew the policy on expiry at your cost.

The case for the Respondent has been argued as though the guarantee was a stand alone and yet in my view and indeed by the practice of banks in Uganda, it is given in addition to the mortgage and or mortgage deed. Actually paragraph 5 of the guarantee reads in part

> *"… This guarantee is to be in addition to and is not to prejudice or be prejudiced by other securities… which you may now or here matter hold on account of the principal…"*

How then does this on demand guarantee relate to Section 16 of the Mortgage Act? Both counsel did not address court on this important point of law. The words *"collateral to"* in Section 16 of the Mortgage Act can be interpreted to mean

> *"…A collateral security is one given in addition to the principal security. Thus a person who borrows money on the security of a mortgage may deposit shares with the lender as collateral security…"*
> *(See Obsorn's Concise Law Dictionary 6th Edition Sweet and Maxwell P. 79 "collateral")*

It is therefore my finding that the guarantee signed by the first Applicant is an obligation collateral to a mortgage within the meaning Section 16 of The Mortgage Act. That being the case the guarantee notwithstanding its being an on demand guarantee can not be greater than the obligation of the mortgagor under the mortgage as provided for under the said law.

In this suit the mortgage deed has not been annexed and so it is possible for court to know the extent of the obligations under it. This in my view is sufficient to create a triable issue for which I grant the Applicants leave to defend.

As stated earlier, I am conscious that this ruling may answer many of the issues that may arise in the head suit but there was some degree of inevitability in this given the way the motion was argued. That notwithstanding the Applicants may file their defence within 14 days of this ruling costs in the cause.

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Geoffrey Kiryabwire

JUDGE

Date: 11/03/2010

11/03/2010

1:01 p.m.

Ruling read and signed in open court in the presence of;

- T. Kavuma for Bwogi Kalibala for Respondent
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 11/03/2010