THE REPUBLIC OF UGANDA

THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

MISCELLANEOUS APPLICATION NO 88 OF 2011

PIUS KASSAJJA

ANNE MARY MURUNGU]..... APPLICANTS/DEFENDANTS

VS.

BARCLAYS BANK OF UGANDA LTD]..... RESPONDENT/PLAINTIFF

BEFORE HONOURABLE MR. JUSTICE CHRISTOPHER MADRAMA

RULING

The applicants application is brought under order 39 rules 2, order 52 rules 1 and 3 of the civil procedure rules and section 98 of the civil procedure act for orders that:

1. The main suit be stayed until the final disposal of HCCS NO 170 of 2008 which is pending before this court
2. The costs of the application be provided for

The grounds of the application are that:

1. That Emerald hotel LTD, crystal way LTD, Juliana Nakityo and Abbey Mutebi instituted HCCS number 170 of 2008 against the respondent and for other defendants.
2. That the respondent filed its written statement of defence and counterclaim against Emerald hotel LTD, crystal way LTD, Juliana Nakityo and Abbey Mutebi, where in it sought recovery of Uganda shillings 5, 160, 372, 301/= on the basis of an allegedly breach of contract

3. That the applicants are directors and shareholders in Emerald hotel LTD
4. That on the 18 of March, 2010, the respondent filed the main suit seeking inter alia enforcement of personal guarantees against the applicants under one Rita Bahemuka recover Uganda shillings 5, 160, 372, 301/=.
5. That the said personal guarantees were issued on 7 November, 2005 by the applicants to secure Emerald hotel LTD indebtedness to the respondent.
6. That both HCCS number 170 of 2008 and the said head suit of vide HCCS number 95 of 2010 raise similar issues on enforceability of the impugned personal guarantees issued by the applicants and also both suits seek to recover the same amount of money to wait; Uganda shillings 5, 160, 372, 301/=
7. That it is just and equitable that this application be allowed and an order of stay of high court civil suit number 95 of 2010 be issued pending the final disposal of high court civil suit number 170 of 2010.

The applicant's application is supported by the affidavit of John Kaggwa sworn on the 7th of February, 2011 which principally repeats the grounds above. The Respondent filed an affidavit in reply sworn by one Eric Kenneth Lokolong the legal counsel of the Respondent and dated 7 March 2011. The affidavit principally contains the following averments.

The relevant part of the respondents affidavits that have liked to refer to commence from paragraphs 5 up to paragraph 13 as follows:

5. That the applicants unconditionally undertook to pay the respondent the ultimate balance owing from the principal debtor, Messrs Emerald hotel LTD under the guarantee.
6. That paragraph 5 of the guarantee stipulates that the guarantee is in addition to and not to be prejudiced by other securities held on account of the principal debtor.
7. The issues to be determined in civil suit number 170 of 2008 and in civil suit number 95 of 2010 to not bear precise similarity.
8. That the only issue to be determined in civil suit number 95 of 2010 is whether the

principal debtor defaulted on its obligations under the loan to made the applicants personally liable for the debt.

9. That the contents of paragraph nine are false because the issues of breach of contract and enforceability of the mortgage and debenture are not issues to be determined in civil suit number 95 of 2010

10. That the guarantee provides for the right of the respondent to refuse to grant further credit to the principal debtor without affecting its rights.

11. That in my skill and experience, I know that an allegedly illegal, void or unenforceable principle obligation does not release guarantors from liability under a guarantee.

12. That I also know that the issues in civil suit number 170 of 2008 are of no bearing in civil suit number 95 of 2010 because the guarantee stipulates that all monies which may not be recoverable by reason of inter alia any legal limitation of fact or circumstances are nevertheless recoverable from the guarantors.

13. That HCCS number 95 of 2010 in which the applicants our co - obligors, is partly determined because the respondent obtained judgement against the second defendant on 26 May, 2010.

At the hearing David Kaggwa appeared for the defendants while Ms Alice

Nalwoga appeared for the Respondents.

Submissions of Counsel

For the applicant Counsel David Kaggwa submitted that the application is brought under order 39 rule 2 and 52 rules 1 and 3 of the Civil procedure Rules and section 98 CPA for an order that HCCS 85 of 2010 be stayed pending the final disposal of HCCS 170 of 2008 and for costs. His view is that under order 39 rules 2 where a plaintiff has instituted 2 or more suits and under the provisions of order 1 rule 3, the several defendants could properly have been joined as co defendants in one suit. If the court if satisfied upon application of defendant and the issues in both suits are similar the court can order for a stay until the earlier suit is heard.

Referring to the affidavit of John Kaggwa paragraphs 3, 4, 5, and 6 he asserts that the plaintiff in HCCS 95 of 2010 also has a counterclaim under paragraphs 26 - 27 of Written Statement of Defence. He referred court to paragraph 26 after the word counterclaim where the respondent seeks 5,136,000,000/= against Emerald Hotel, Crystal Way Ltd and Juliana Nakityo and Abbey Mutebi.

In the current suit of 2010, under the reliefs the respondent is seeking recovery of 5,160,372,301 against Pius Kasajja, Rita Bahemuka and Anne Mary Murungu of who are the first and 3 Defendants to the suit of 2010 and directors and shareholders of Emerald Hotel Ltd the first plaintiff in the suit of 2008.

The guarantees sought to be enforced in the suit of 2010 were issued to the respondent as additional security for the loan that was advanced to Emerald Hotel Ltd. In High Court Civil Suit 170 of 2008 Emerald Hotel is seeking recovery from the Respondent of a sum of 7,587,174,958/- in the same suit. Juliana Nakityo are challenging the validity of the mortgage deeds, in respect of land known as plot 3 Semiliki walk on which the hotel is sitting. The respondents counterclaim on the other hand is also seeking enforcement of the mortgage deeds against the registered proprietors namely Juliana Nakityo and Abbey Mutebi. He submitted that the respondent's suit on the mortgages has a bearing on the enforcement of personal guarantees issued by the applicants in this suit of 2010. According to section 16 of the Mortgage Act cap 229 obligations of any a guarantor shall not be greater than the obligations of the mortgagor under the mortgage. The mortgagors are Juliana Nakityo and Abbey Mutebi. Who are defendants in the Respondents counterclaim in Civil Suit 178 of 2008? Since the obligations of the applicant are no greater than those of the mortgagor, then they ought to have been added as defendants to the Respondents counterclaim.

Referring to annexure "A" to the affidavit in reply which is the guarantee instrument paragraph 5 thereof reads that the "guarantee is to be in addition to and not prejudice other securities held by the respondent on account of the principal". The applicant's counsel submitted that it is not in dispute that the respondent held a mortgage and further charge as security on top of the applicants personal guarantee to secure its loan advances to Emerald Hotel Ltd. Counsel referred me to the case of William Sebuliba Kayongo and another vs. Barclays bank U Limited, MA 325

of 2008, arising from HCC 111 of 2008 where Justice Kiryabwire defined a collateral security as one that is given in addition to the principal security. He asserted that collateral securities are the collateral guarantees given in addition to the mortgage. Consequently the personal guarantees issued by the applicants in favour of the respondents are obligations collateral to the mortgage deed within the meaning of section 16 of the Mortgage Act cap 229. He contended that consequently the respondent ought to have added the applicants to Civil Suit 170 of 2008 as co defendants under order 1 rule 3 Civil Procedure Rules.

The applicant's counsel further pointed out that the applicants pleaded under paragraph 5 (G) of the Written Statement of Defence in the suit of 2010 that the respondent sold the assets of Emerald Hotel Ltd to Shumuk Properties Ltd for a consideration of 2.2 billion. By the Respondent filing this suit, it is seeking to unjustly enrich itself by claiming an additional 5.1 billion from the applicants without disclosing to this court the benefit it had obtained from Shumuk Properties in the said sale. He contended that equity would demand that a guarantor is only liable to the creditor for the amounts due less what the creditor received from liquidating the principal debtor's assets. The issue of sale of Emerald Hotel assets would be pivotal to this suit and yet the same issue is being adjudicated in HCC 170 of 2008. He prayed that I allow the applicant's application with costs.

Counsel Alice Nalwoga opposed the application based on grounds enumerated in the affidavit in reply of Mr. Erick Kenneth Lokolong. As far as the application is brought under order 39 rule 2 of the Civil Procedure Rules she submitted that rule clearly stipulates that court should be satisfied that the issues to be tried are precisely similar. The rule does not refer to similarity in the amounts sought but the issues in the suit. The issues in this suit and HCCS 170 of 2008 are stated in paragraph 7 of the affidavit in reply and have no precise similarity. Paragraph 4 of the affidavit in reply read in tandem with paragraph 35 of annexure "A" to the notice of motion affidavit of Kaggwa John. Together with paragraph 8 of annexure "A" thereof and the prayers sought in the plaint show that the issue in that suit relate to the mortgage, debenture and receivership.

The Respondents counsel further submitted that the issues in that suit are clearly stipulated in

paragraph 5 of annexure "F" to the affidavit in support of the motion. As stated in paragraph 8 of the affidavit in reply the only issue in this suit is whether the principal debtor defaulted on its obligations. This is supported by the law of Guarantees 2 Edition by Geraldine Andrews and Richard Millet at page 191 and 195. They write that all that the creditor needs to establish to complete his cause of action against a guarantor is that the principal borrower has defaulted. Counsel contended that her colleague had mentioned that the first and third applicants/defendants are directors and shareholders of Emerald Hotels Ltd. However based on the principle of corporate personality the liability of the company in HCCS 170 of 2008 will have no bearing on the guarantors since they are separate individuals and the provided the guarantees in their individual capacities.

Counsel submitted the second ground of objection to the application is premised on the provisions of the guarantee document which clearly indicates that the guarantee as a security is not to be prejudiced by other securities and can stand alone as a continuing security. She referred to the specific provisions in paragraphs 12 and 6 of the affidavit in reply. Cited law of Guarantees at page 70 (cited above) where it is written that the terms of a guarantee contract is derived from the contents of the document itself. Referring to paragraphs 5, 10, and 12 of the guarantee which is annexed to the affidavit in reply as "A' and to the notice of motion as "E" the documents referred to are indicative of the following:

- Under paragraph 5, the guarantee is held on its own account, and cannot be prejudiced by other securities

- Paragraph 10, provides that there is a right to refuse the grant of further credit without affecting rights under the guarantee.
- Paragraph 12, provides that all monies are recoverable from the guarantors despite any legal limitation, fact or circumstances.

Counsel contended that the terms of the guarantee contract is position supported by the text on the law of guarantees at page 158 where it is stated that the precise extent of the liability of a surety will always be governed by the provisions of the guarantee on their true construction. At page 175 it is further written that principal's obligation which is in some way effective does not

necessarily release the surety from liability under the guarantee. Counsel concluded that the issues claimed in HCC 170 of 2008 have no bearing in this suit given that the guarantee is self sustaining and can be sued upon its own.

The third ground of objection to the application is based on paragraph 5 of the affidavit in reply which stipulates that the guarantee was an unconditional undertaking by the guarantors. Therefore any stay of this suit based on the issues in the other suit will in effect contravene the unconditional undertaking by the applicants.

The 4 ground of objection by counsel for the respondent is that under the Law of Guarantees on page 194 and 195 it is written that there is no obligation on the creditor to commence proceedings against the principal and may proceed directly against the guarantor. Therefore showing that the suit against the guarantors can exist independently from the suit against the company.

Lastly as contained in paragraph 13 of the affidavit in reply the suit sought to be stayed in which the applicants have a joint obligation is partly determined by virtue of judgment entered against the second defendant on the 26 May 2010. She contended that a stay of execution would operate to sever the defendant's obligations under the guarantee. Quoting from page 75 of the Law on Guarantees cited above she submitted that if two persons covenant without any words of severance a joint obligation ensues. One of the parties to the joint obligation has already been found liable and as such a stay would defeat the practice and interest of justice. Since they are jointly liable we would have to proceed against a third of the amount.

Counsel submitted that the applicants pleaded under paragraph 5 of WSD that there was a sale of the assets of Emerald Hotel. She pointed out that the said sale was stopped by an order of this court Hon. Mr. Justice Lameck Mukasa. The money was ordered to be returned and it has been returned. Under paragraph 23 of the WSD and paragraph 24 it is pleaded that no sale has taken place. She invited the court to ignore the issue that the purported sale is an issue pivotal to this suit and in any case these are matters to be handled in the main hearing and not at this stage. She prayed that I dismiss the applicant's application with costs.

In rejoinder Counsel David Kaggwa submitted that the wording highlighted in the book of

Geraldine Andrews relied on by the respondents counsel only brings out a general rule of liability of guarantors. However there are exceptions which the applicants pleaded in their WSD and they are the same exceptions being handled in HCCS 170 of 2008. The exceptions include cases of fundamental breach on the part of the creditor, illegality, bad faith, and the sale of the principal debtor's asset. He submitted that if the court answers the issues in favour of Emerald Hotel in the 2008 suit, the applicant will be entitled to be discharged of their obligations under the guarantee hence the need to stay the suit in this court.

Referring to annexure "F" which is a joint scheduling memo at page 4 issue NO. 9 in HCCS 170 of 2008 is whether the sale of the suit property to Shumuk Properties Ltd was lawful and effectual. Shumuk properties is claiming that they are bona fide purchasers without notice of fraud. It cannot arise that the money was refunded. He submitted that counsel for the respondent had a duty to disclose the issue of sale of property before judgment was entered by the defendant. In any case the judgment does not bind the applicants before this court. This court is enjoined under section 98 of the CPA to prevent an abuse of court process. In the instant case judgment is entered against one party in default. We reiterate our earlier prayer and pray that the application be granted.

Ruling of Court

I have carefully listened to the submissions of counsel and perused the pleadings of the parties. This application is made under order 39 rules 2 of the civil procedure rules. Order 39 of the civil procedure rules has rarely been interpreted if at all. I have searched around the east African law reports but it seems there is no case that seeks to interpret the rule. Recourse to Spry's Digest of Civil Procedure Cases has also yielded no fruit. In Mulla on CivilPprocedure the order is excluded. Doing the best I can, I have reproduced the entire order. Order 39 has only two rules and the head note thereof reads: "selection of test suit." I shall therefore attempt to interpret the whole order. The first rule deals with staying of suits against the same defendant for purposes of proceeding with one as a test case having the effect of resolving precisely similar issues and therefore the judgment on precisely similar issues may have a bearing on the remainder of the suits. Rules 2 on the other hand deals with the stay of suit where the plaintiff sues several

defendants and the issues in the suits are precisely the same. Order 39 rule 1 provides as follows:

> "1. Staying several suits against the same defendant
>
> Where two or more persons have instituted suits against the same defendant and those persons under the provisions of rule 1 of Order I of these Rules could have been joined as co-plaintiffs in one suit, upon the application of any of the parties the court may, if satisfied that the issues to be tried in each suit are precisely similar, make an order directing that one of the suits be tried as a test case, and staying all steps in the other suits until the selected suit shall have been determined, or shall have failed to be a real trial of the issues."

The first part of rule one defines a situation where two or more persons have instituted a suit against the same defendant and they could have been joined as co-plaintiffs under order 1 rule 1 of the Civil Procedure Rules. For an application to be made under rule 1, there have to be two or more plaintiffs suing the same defendant in different suits. Secondly the rule caters for an application by any of the parties to the suit, that is; the plaintiff or the defendant. Thirdly, the court has to be satisfied that the issues to be tried in each suit are *"precisely similar"*. Fourthly, if the court is satisfied that the issues that are to be tried, are *precisely similar* it may make an order that one of the suits should be tried as a test case and stay all steps in the other suits until the selected suit has been determined. This gives court a discretionary power whether to stay the suits or not. The underlying rationale for staying proceedings in the other suits is to get a judgment on the issues which are *precisely the similar* in the test case. The decision in the issues which are "precisely the same" as in the other suits will have a bearing on the suits which have been stayed. The intention of legislature in enacting rule one is clearly to avoid the expense of trying several suits when the issues in each suit is "precisely similar" to the other suits. In addition, there would be no need to try the other suits on precisely similar issues. I must add that issues are normally issues of fact or law.

As far as rule 2 is concerned, the head note of the rule is very instructive. It provides: "staying similar suits upon application by the defendant". Rule 2 of order 39 is quoted hereunder:

> "2. Staying similar suits upon application by defendant
>
> Where a plaintiff has instituted two or more suits, and under the provisions of rule 3 of

Order I of these Rules the several defendants could properly have been joined as co-defendants in one suit, the court, if satisfied upon the application of a defendant that the issues to be tried in the suit to which he or she is a party are precisely similar to the issues to be determined in another of the suits, may order that the suit to which the defendant is a party be stayed until the other suit shall have been determined or shall have failed to be a real trial of the issues."

Rule 2 deals with a situation where a plaintiff has instituted two or more suits against several or different defendants and under the provisions of order 1 rule 3 of the Civil Procedure Rules the several defendants could have been joined as codefendants in one suit. The court has to be satisfied that the issues to be tried in the suit to which he or she is a party are "precisely similar" to the issues to be determined in another of the suits. Secondly, the application has to be made by a defendant in one of the suits. Upon such an application, the suit to which the defendant is the party and upon satisfaction of the court that the issues are "precisely similar" the court may stay the said suit, until the other suit shall have been determined or failed to be determined on the real trial of the issues. The word *issues* must be taken to have the meaning under order 15 rules 1. As I had noted above issues of fact or law are generated from the pleadings of the parties only. Order 15 rule 1 provides as follows:

1. Framing of issues.

(1) Issues arise when a material proposition of law or fact is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute a defense.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds: issues of law and issues of fact.

(5) At the hearing of the suit the court shall, after reading the pleadings, if any, and after such examination of the parties or their advocates as may appear necessary, ascertain upon what material propositions of law or fact the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case

appears to depend.

(6) Nothing in this rule requires the court to frame and record issues where the defendant at the hearing of the suit makes no defense, or where issue has been joined upon the pleadings."

The issues of fact or law are framed from the material propositions of fact or law averred in the pleadings of the parties generally and documents attached to the pleadings. This is consistent with the fact that a plaintiff can only prove a case pleaded in the plaint and not another case not pleaded. Order 15 rule 3 makes this very clear. It provides:

"3. Materials from which issues may be framed.

The court may frame the issues from all or any of the following materials—

(a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of the parties;
(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit; and

(c) the contents of documents produced by either party."

Sub issues such as on the admission of documents must be for either proving the issues in the case or establishing a defence to the plaintiff's case.

In this application the applicants seek to stay proceedings in civil suit number 95 of 2010 and between the applicants as defendants and Barclays Bank of Uganda as plaintiff, pending the determination of High Court Civil Suit No 170 of 2008.

In HCCS N0.170 of 2008, Emerald Hotel LTD, Crystal Way LTD, Juliana Nakityo, and Abbey Mutebi are the plaintiffs while the Barclays Bank Uganda Limited is the first defendant. There are 4 other co-defendants in the suit namely KABIITO KARAMAGI, HEBERT WAMALA T/A DEBT MASTERS, SHUMUK PROPERTIES LIMITED and SHUKLA MUKESH. None of the applicants are defendants in that suit nor are they plaintiffs. They are not defendants to the

counter claim filed by the first defendant namely the respondent in this application. Secondly, the court has to determine whether there could have been properly joined to the counter claim of the first defendant in high court civil suit No. 170 of 2008, under the provisions of order 1 rule 3 of the Civil Procedure Rules. Before we look at order 1 rule 3 of the Civil Procedure rules, we need to note that the counterclaim filed in H.C.C.S. No. 170 of 2008 is made in a defence filed by Barclays Bank of Uganda, Kabiito Karamagi, and Hebert Wamala T/A Debt Masters. The Counterclaim is filed by Barclays Bank or the first defendant to the suit for a claim of loan sums amounting to U. Shs. 5,136,000,000/- against the first plaintiff. In paragraph 29 thereof it is averred that upon Emerald Hotel Ltd having defaulted in its repayment of the loan, the first defendant would be entitled to additional interest. In that suit the second defendant is the receiver to the first plaintiff

having been appointed by the first defendant to recover the loan. The second defendant is averred to have engaged the services of the 4 defendant to mitigate loses in the management of the Hotel Business. The counterclaimant seeks order to be declared a secured creditor. Having a right to the security under the mortgage deed and to foreclose. Order 1 rule 3 of the Civil Procedure Rules is reproduced herein under:

> "3. Who may be joined as defendants.
>
> All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against those persons, any common question of law or fact would arise."

On the terms of rules 3 of order 1 is the supposition or finding that common questions of law or fact would arise in the suit. Do common questions of fact or law arise between the two suits referred to in this application? Secondly, are the issues to be tried "precisely similar"? I must add that in deciding this question, I am not entitled to look at the plaint of Emerald Hotel in HCCS No 170 of 2008 because it is not a suit by the plaintiff in HCCS No 95 of 2010. In fact the plaintiff in the HCCS No 95 of 2010 is Barclays Bank (U) Limited, the respondent herein. In HCCS 170 of 2008 Barclays Bank (U) Ltd is the first defendant in HCCS 170 of 2008. Issues in a suit where the respondent is also a defendant do not fall under the ambit or purview of order 39

rule 2 of the Civil Procedure Rules under which the applicants have proceeded in this application. It is only the counterclaim of the first defendant in HCCS NO 170 of 2008 and a defence thereof which generate issues for comparison with HCCS No 95 of 2010 so as to establish whether such issues are precisely similar. The first point of course is that it can be said that the respondent to this application filed a suit against the plaintiffs in HCCS 170 of 2008 by way of counterclaim. Therefore the respondent has filed two separate suits and that order 39 rule 2 can be applied to stay one of the suits in which the applicant is a defendant.

A further and deeper analysis of order 39 rules 2 is called for. Order 39 rules 2 specifically has a head or side note that states that it deals with "staying similar suits upon application of a defendant. The first crucial test is that the applicant needs to have proved by affidavit that the plaintiff has instituted two or more similar suits to which the applicant is a defendant in one. Secondly that the issues to be tried are precisely similar to the suit in which the applicant/defendant is a party and which he or she seeks to have stayed.

Ground 2 of the notice of motion is that the counterclaimed against Emerald Hotel, Crystal Way Ltd, Juliana Nakityo and Abbey Mukasa. It is my finding that this is not true. The counterclaim is only against the first plaintiff Messrs Emerald Hotel Ltd as can be read from paragraphs 26 - 35 of the counterclaim (though wrongly numbered and is supposed to be paragraphs 28 - 37). The counterclaimant claims on the basis of mortgage deeds and debenture deeds. The applicant's application and the affidavit in support of it sworn by Counsel John Kaggwa do have the plaint and the written statement of defence of Barclays Bank. However they have not attached an answer to the counterclaim of the first defendant in HCCS 170 of 2008. If we are to use order 15 rule 1 quoted above, no issues arise from HCCS NO. 170 of 2008 because the counterclaim has not been defended or there is no evidence that it has been answered or defended.

As I have noted above issues of law or fact only arise when a material proposition of law or fact is asserted by one party and denied by the other. It is trite law that a counterclaim is a suit and has to be replied to. Order 15 rule 1 (1) provides that "(1) Issues arise when a material proposition of law or fact is affirmed by the one party and denied by the other." Where there is no denial of the material proposition of law or fact affirmed in the counterclaim of the

Respondent in HCCS No. 170 of 2008 by Emerald Hotel Ltd, no issues arise which may be compared to the suit in HCCS NO. 95 of 2010 to which the applicants are defendants.

Where a counterclaim has been included in a written statement of defense the same rules applicable to the filing of defense under Order 8 apply. Therefore a defense or reply to the counter claim has to be filed within 15 days from the service of the defense and counterclaim. Specifically order 8 rule 11 (1) provides that: "(1) Any person named in a defense as a party to a counterclaim thereby made may, unless some other or further order is made by the court, deliver a reply within fifteen days after service upon him or her of the counterclaim." Further order 8 rule 3 provides that every allegation of fact in a plaint if not denied specifically shall be taken to be admitted. The points made are as follows:

- There is no evidence in the application and attachments that the counterclaim was denied. These pleading are necessary to determine whether precisely similar issues arise as in HCCS No. 95 of 201o to which the applicants are a party.

- Where an allegation is not denied, it is taken to be admitted and there is no controversy for trial.

- A counterclaim is a separate suit and not an answer to a plaint and issues cannot be generated or established between a plaint and a counterclaim under order 15 rules 1 of the Civil Procedure Rules.

Even if there is an answer to the counterclaim in HCCS No. 170 of 2008, which counterclaim was filed on the 2 of March 2010 there is unfortunately no pleadings attached to the notice of motion or affidavit from which issues of fact and law can be established. The intention of order 39 rule 2 is to show that the issues are precisely similar so that one suit is stayed pending the outcome of the other suit, which outcome will affect the proceedings in the suit stayed either on matters of law or fact.

I attempted to establish whether issues which are precisely similar arise using the traditional method of establishing issues by reading the pleadings and attachments are required by order 15 rules 1 and 3 of the Civil Procedure Rules. This has simply not been possible. Even if we went by grounds 4 and 6 of the notice of motion, it does not solve the problem. Ground 4 of the notice of motion simply states that a suit for enforcement of personal guarantees against the applicant

and one RITA BAHEMUKA had been filed. Ground 6 of the motion avers that similar issues of enforceability of the impugned personal guarantee arise. If you ask the question between which persons or parties do these issues arise? The question of whether an issue of affirmation and denial arise. For authorities on the point that a counterclaim is a separate suit we have the case of Karshe vs. Uganda Transport Company Limited [1967] EA 774 where it was held that the defendant has the option either to file a separate suit or include a counterclaim. In James Katuku vs Kalimbagiza [1987] HCB 75 at page 76 it was held that a reply to a counterclaim filed outside the statutory period without the order of court extending time for filing it would be ignored and the plain tiff would be deemed to have admitted the statement of facts in the counterclaim. In Patel vs Madhvani International Limited [1992] 1 KALR, the plaintiff did not file a reply to the counterclaim and an ex parte judgment was passed. In an application to set aside the ex parte judgment, the court held that in order to set aside the ex parte judgment the applicant had to show that it had a prima facie defense and satisfied courts that there is a reasonable explanation why there was no reply to the counterclaim within time. The fact that these materials may be available elsewhere does not help. Without a reply to the counterclaim issues for determination do not arise. As a matter of evidence the reply to the counterclaim is available is necessary for a proper determination of this application.
HCCS No. 170 of 2008 is founded on a challenge or breach of the relevant mortgage and debenture deeds. The Respondents counsel asked me to find that HCCS No. 95 of 2010 to which the applicants are defendants is founded on a guarantee to the loan which is a separate and severable contract under the law. For me to establish whether a guarantee is a separate and severable contract independent of the mortgage, I have to imply that issues arising from the suit founded on the mortgage contract and debenture involve the same loan guaranteed by the applicants. However, the rules of pleading do not imply issues. The counterclaim did not join issues. It was a separate action and as I have noted, every claim in a plaint or counterclaim or every proposition of fact or law have to be specifically denied in terms of order 15 rule 1 and 3 and order 8 rule 3 and 11 of the Civil Procedure Rules for the formulation of issues for trial.

Where issues are established my duty is to further establish whether the issues in the two suits are precisely similar. In the process of doing this can I establish whether the issues relating to the guarantee contracts in HCCS No. 95 of 2010 are precisely similar to the issues arising from the mortgage and dentures in HCCS 170 of 2008. Being unable to formulate issues from the counterclaim suit in HCCS 170 of 2008, I cannot decide on the separateness, severability or independence of the guarantee contracts.

For the above reasons, I do not need to go into the merits of the applicant's application as to whether issues which are precisely similar arise in HCCS 95 of 2010 and HCCS No 170 of 2008 which part of the suit considered is the counterclaim only. An effort to establish precise similarity of issues is futile as issues cannot arise without affirmation and denials by the pleadings of the

parties. The applicant's application is therefore incompetent and stands dismissed with costs.

Ruling delivered in open court on the 8th of April 2011.

Hon. Mr. Justice Christopher Madrama

Ruling delivered in the presence of

David Kaggwa for Applicant

2nd Applicant in Court

Alice Nalwoga for Respondent

Ojambo Court Clerk

Hon. Mr. Justice Christopher Madrama