THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 35 OF 2009

BARCLAYS BANK OF UGANDA LTD } …….. PLAINTIFF

VERSUS

JING HONG}

GUO DONG} ……DEFENDANTS

BEFORE HONOURABLE MR JUSTICE CHRISTOPHER MADRAMA

RULING

This ruling arises from a preliminary objection raised by counsel for the defendants that the plaintiff's suit is barred by the doctrine of res judicata. The last of the matter was mentioned before me the defendants were represented by Learned Counsel Fred Muwema assisted by Friday Robert Kagoro of Messrs Muwema and Mugerwa Advocates while the plaintiff was represented by Paul Rutisya of Messrs Kasirye Byaruhanga and Company Advocates. Counsels opted to address court in written submissions.

The First and Second Defendants Written Submissions:

Counsel for the first and second defendants submitted that in an earlier suit Messrs **Jinda International Textiles Corporation Ltd** f**iled HCCS No. 156/2008 against Barclays Bank of Uganda Ltd and Andrew Kasirye** challenging the mortgage and debenture in respect of a credit facility transaction in the amounts of **United States dollars 2,450,000**. The Defendants in the above suit filed a counter claim to recover the said **2,450,000 United States dollars** from the plaintiff. The defendant to the counterclaim did not file a defence to the counterclaim as a result of which court entered judgment on the 18th /2/2010 for the claimed some of **2,450,000 United States dollars**. Subsequently, Barclays Bank of Uganda Ltd filed another suit that is **High Court civil suit number 35/2009** against the defendants seeking recovery of the same **United**

States dollars 2,450,000 based on the Defendant's guarantee to the aforementioned Jinda international textiles Corporation Ltd pursuant to the same credit facility transaction.

In the defence to the suit, the defendants stated in paragraph 5 (vi) of the defence that: "the matter in issue in High Court civil suit number 156/2008 is also directly and substantially in issue in the instant case to the extent that the plaintiff is precluded from maintaining this suit at the same time."

Counsel submitted that the suit is barred by the doctrine of res judicata and relied on section 7 of the Civil Procedure Act.

As far as the operation of the doctrine of res judicata is concerned counsel referred to the Supreme Court case of **Karia and another versus Attorney General and others [2005] 1 EA 83 at page 93** which was quoted with approval in the case of **Hon. Piro Santos Eruaga versus General Moses Ali and another Election Petition No. 1 of 2007**.

The ingredients of the doctrine of *res judicata* are: That there has to be a former suit or issue decided by a competent court. The matter in dispute in the former suit between the parties must also be directly and substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. The parties in the former suit should be the same parties or parties under whom they or any of them claim, litigating under the same title.

Counsel contended that High Court civil suit number 156/2008 is a former suit, within the meaning of section 7 of the Civil Procedure Act and the judgment entered in that case upon the counterclaim was done by a competent court. The matter in dispute in the form a suit is a claim for **2,450,000 US$** arising from a credit facility transaction which is directly and substantially the dispute in the new suit namely High Court civil suit number 35/2009 which seeks to enforce a guarantee for the same sum.

The plaintiff/counterclaimant in the former suit is Barclays Bank of Uganda Ltd which party is also the plaintiff in the new suit. On the other hand, the defendants in the new suit claim under the defendants in the old suit as guarantors of its debt and they are therefore litigating under the same title since the relief sought against them is joined in one cause of action.

Accordingly, a judgment against one of them extinguishes the claim against the other because they can only come to court under the same capacity.

In conclusion learned counsel wrote that the judgment in the earlier suit that is High Court civil suit number 156 of 2008 finally resolved the matter touching the plaintiffs claim for **2,450,000 United States dollars**. That judgment can be realised by attachment and sale of the judgment debtor's securities.

Counsel recommended that this court examines the finding of the Court of Appeal in the case of **Boutique Shazim Ltd vs. Norathan Bhatia and another CA No 36 of 2007** in which it was held that:

> "essentially the test to be applied by court to determine the question of res judicata is this: is the plaintiff in the second suit or subsequent action trying to bring before the court, in another way and in the form of a new cause of action which he or she has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If the answer is in the affirmative, the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which belong to the subject matter of litigation and which the parties or their privies exercising reasonable diligence might have brought forward at the time".

Counsel contended that the plaintiff is abusing court process by re – litigating the same matter so as to obtain a parallel decision to the first one. Such a suit is barred by res judicata and prayed that it is dismissed with costs.

The Plaintiff's Written Submissions in opposition

Counsel for the plaintiff opposed the preliminary objection and contended that it lacks merit, is misconceived and ought to be dismissed with costs. He submitted that Jinda Textiles Corporation Ltd (hereinafter called the company), covenanted to repay to the plaintiff herein a sum of **US $ 2,450,000** together with interest thereon. Jinda defaulted on repayment of the loan and the bank appointed a receiver in order to recover the monies owed.

By guarantees in writing dated 22nd of September 2004 and 12th November 2004, the defendants guaranteed repayment of all liabilities of the company to

the plaintiff. The plaintiff made a demand on the company but the company failed/neglected to make payment to the plaintiff wherein the plaintiff filed a suit to recover the monies owed from the defendants herein.

The preliminary objection arises out of the judgment on the counterclaim in HCCS No. 156 of 2008 between Jinda Textiles Corporation Ltd vs. Barclays Bank of Uganda Ltd and Mr Andrew Kasirye.

The counterclaim was to the effect that the company had obtained a credit facility from the defendant bank to the tune of US$ 2,450,000 and had defaulted and thus failed to make payment of the same when it fell due. The company failed/neglected to file a defence to the plaintiffs counterclaim and judgment was entered against the company for payment of the said sum of money. Following the judgment, the defendant herein claim that the issues in the current suit is substantially the same as the ones that gave rise to the judgment and pursuing the said case would amount *res judicata*.

Counsel submitted that the issue in this preliminary objection is "whether civil suit number 35 of 2009 against the defendants therein as guarantors is *res judicata* in light of the judgment entered against the company for the claimed sum of US$ 2,450,000 in HCCS No 146 of 2008 between Jinda International Textiles Corporation Ltd vs. Barclays Bank of Uganda Ltd and Mr Andrew Kasirye.

Paget's Law of Banking 11th edition chapter 35 page 617 defines a guarantee as "*a promise to be liable for the debt, or failure to perform some other legal obligation of another*". Counsel for the plaintiff concluded that it is a guaranteed obligation on the guarantor to pay the debt in the event of default by the principal debtor (per Lord **Diplock in Moschi vs. Lep Air Services [1973] AC 331 at 348**). He argued that in the present case, the defendant's deed executed guarantees and promised to be liable for the debts of the principal debtor, a condition which was precedent before the lending bank would advance any monies. The guarantees were executed as additional securities to secure the repayment of the credit facilities and as the principal debtor.

Counsel contended that once the guarantee agreement is properly executed, the guarantor is bound to pay in the case the principle debtor defaults. In the case of **Stanbic Bank vs. Atyaba Agencies SCCA No. 2/2005**, it was held that

the contract of Guarantee has to be construed strictly. In this case Stanbic Bank executed a guarantee in favour of UCB to pay the decretal sum if the latter were to lose an appeal against the respondent. Indeed the said appeal was thrown out and the Supreme Court ruled in favour of the respondent based on the terms of the guarantee.

Furthermore counsel referred to the case of **Bank of Uganda vs. Banco Arabe Espanol SCCA No. 8 of 1998** where the government of Uganda executed a loan agreement with the respondent in 1987 for US$ 1,000,000. The Bank of Uganda was a guarantor to the government and agreed to pay the sums. There was a condition precedent that the Attorney General had to give a legal opinion o the enforceability of the agreement which he duly gave. Court accepted the Attorney General's opinion and held that the guarantor was liable to pay the loan amounts plus interest.

Learned counsel for the plaintiff submitted that it was a requirement for advancing money to the company that the banks required a personal guarantee, which personal guarantees were executed. The company defaulted and guarantors became liable for the monies owing. In order for the respondent/plaintiff herein to recover their money it filed a suit against the guarantors, a remedy which they were entitled to.

Counsel submitted that section 7 of the Civil Procedure Act which spells out the doctrine of res judicata and referred to the case of **Boutique Shazim Ltd vs. Norattam Bhatia and Hemantini CA No. 36 of 2007** Where Bahigeine JA who wrote the lead judgment of the court stated:

> "To give effect to a plea of res judicata, the matter directly and substantially in issue in the suit must have been heard and finally decided in the former suit. It simply means nothing more than that a person shall not be heard to say the same thing twice, in the successive litigations".

Counsel argued that the suit was not a fresh suit but rather an ongoing case it was filed in court as a result of default in payment of the monies owing by the principal debtor. At the time of filling the suit the company had denied liability and had challenged the appointment of a receiver by the plaintiff. It is against this background that the plaintiffs sought to recover the money from the

guarantor, a remedy that they are entitled to. Counsel further submitted that the liability of a guarantor and principal debtor are co-extensive and not in the alternative. Counsel cited Bank of Bihar Ltd Damador Prasad and Another (1969) 1 SCR for the principle quoted therein that:

> "The court is of that a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety and when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt".

The liability of a principal debtor and the liability of a surety which is coextensive with that of the former are really separate liabilities, although arising out of the same transaction. Notwithstanding the fact that they may stem from the same transaction, the two liabilities are distinct.

He submitted that if the said liabilities were to be taken to be the same as counsel for the defendants' purports to argue then there would be no room for guarantors in commercial transactions, a situation that would no doubt create a legal absurdity. In fact lending banks would not as for the added security of guarantors since they would never be able to enforce their rights under the guarantee agreements on the ground that they contracted with the principal debtor and thus cannot claim against the guarantors.

Counsel argued that the guarantor's liability crystallises upon default of the principal debtor as in this case. Unless Jinda (the company) can prove to this court that the monies owing to the bank have been paid in full, the current suit is not *res judicata*.

The mere fact that the judgment was entered in favour of the bank does not mean that the issues in contention were adjudicated upon. The plaintiff should be allowed to use all means at its disposal to recover its money, more so in cases where a bank guarantee is offered.

The doctrine of *res judicata* would not make any sense and in essence would be denying the plaintiff its right to pursue its remedies under the law to recover the money.

Counsel further argued that the parties to the first suit are Jinda international Textiles Corp Ltd and the defendants in the current suit are not the same. The said parties are in fact liable for the monies owing in different capacities.

Further the current suit is not a fresh suit but one that has been ongoing since 2009 and therefore the plaintiff does not seek to reopen the case where the issues in contention have already been decided but rather following the judgment in High Court civil suit number 16 of 2008, the plaintiff seeks to enforce their remedy under the guarantees given by the defendants.

In the case of **UCB Corporate Services Ltd vs. Clyde and Co. [2002] 2 ALL ER (Comm) 257**; the court held that so long as there was a duty executed guarantee, the guarantor is bound by its undertaking and as long as the guarantee is not fully satisfied, this matter cannot be said to be *res judicata*. Counsel prayed that the preliminary objection be dismissed with costs and the court orders the suit to proceed on its merits.

Submissions of the First and Second Defendants in rejoinder

Counsel for the first and second defendants reiterated his earlier submissions and contended that having perused the plaintiffs written submission two issues require emphasis. The first is "whether the liability of the guarantors would be dispensed with upon realisation of the principal sum from the principal debtor." Secondly "whether HCCS No 35 is a fresh suit in light of HCCS No 156 of 2008.

As far as the first issue is concerned learned counsel contended that in the guarantee contract unless otherwise expressly provided, parties are mainly bound by the provisions of the contract. Clause 9 of the contract of guarantee in the instant case expressly provides that a court judgment against the principal is binding and conclusive on the guarantor. It has been construed that "the secondary nature of the contract of guarantee means that the guarantor is not liable unless the principal debtor is liable". Referring to Halsbury's Laws of England 4th edition at page 177. Counsel submitted that in the instant case the liability of the principal debtor was discharged at the point when judgment was entered in favour of the creditor in HCCS No. 16 of 2008 and consequently the liability of the guarantor ceased.

Counsel further contended that equity intervenes to protect the guarantor if the creditor "without his consent, either releases the principal debtor or enters into a binding arrangement with him to give him time without reserving his rights against the guarantor" (See Halsbury's Laws of England 5th Edition page 193". The plaintiff by virtue of judgment in High Court civil suit number 156 of 2008 without the guarantor's consent and without reserving his rights against him released and entered into a binding arrangement with the principal debtor consequently discharging the guarantor of liability.

Consequently if court where to adjudicate in favour of the plaintiff in High Court civil suit number 35 of 2009 disregarding the judgment in High Court civil suit number 156 of 2008, the plaintiff would have been awarded a sum of US$ 4,900,000, twice the principal sum and thus being unjustly enriched. The fact that the plaintiff has a claim against the guarantors gives it no right to an award from both the principal debtor where the claim has been satisfied against the principal debtor.

Learned counsel argued that the two cases cited by the plaintiff namely the cases of Stanbic Bank vs. Atyaba Agencies SCCA No. 2/2005 and Bank of Uganda vs. Banco Arabe Espanol SCCA No. 8 of 1998 do not apply to the extent that they set out to determine the rights of the creditor against the guarantor yet the case before court is concerned with the rights of the guarantor where the principal debt has been realised by the creditor. In the same manner, the case of Bank of Bihar Ltd Damodar Prasad and Another (1969) 1 SCR cannot be construed to apply to the principal sum. Counsel contended therefore that the liability of the directors would be dispensed with upon realisation of the principal sum from the principal debtor.

As far as issue No. 2 is concerned, a suit is defined under section 2 of the Civil Procedure Act to mean all civil proceedings commenced in any manner prescribed. In compliance with the above rule, the plaintiff on the 11th day of February 2005 filled a plaint HCCS No. 35 of 2009; the argument therefore that the current suit is not a fresh suit but one that has been ongoing since 2009 following judgment in HCCS No. 156 of 2008 is legally unsound.

Counsel contended that furthermore the matter in HCCS No. 156 of 2008 is between parties under whom the plaintiffs claim litigating under the same title

and ought to have sued. The argument that the parties are different in both suits cannot stand.

In conclusion counsel contended that it is the common law position that "so long as the judgment stands and the record of the act of the court is forthcoming, no one who was a party thereto can reopen that litigation".

The only reason why guarantees are executed in commercial transactions is to insure payment of the principal sum. It would defeat legal and equitable reason to insist on executing a guarantee where the principal sum has been realised.

Counsel reiterated his earlier position that litigation should come to an end and the suit is barred by the doctrine of res judicata so the suit should be dismissed with costs.

Ruling

I have carefully considered the submissions of the counsels for the parties, the pleadings and the records of proceedings in the previous suit. The plaintiff Barclays Bank of Uganda Ltd filed HCCS No. 35 of 2009 on 11 February 2009 against the defendants. Paragraph 3 of the plaint avers that the plaintiff's claim against the defendants jointly and severally arises from a guarantee in writing and is for the recovery of a sum of US$2,450,000 plus the accrued interest thereon, general damages and costs of the suit.

In paragraph 4 (a) of the plaint, the plaintiff refers to a third legal mortgage deed in writing dated 28th of October 2004 between the plaintiff and Jinda International Textiles Corporation Ltd. The defendants by guarantees in writing dated 22nd of September 2004 and 12th of November 2004 respectively guaranteed repayment of all liabilities of Jinda International Textiles Limited.

The plaintiff made a demand on Jinda International Textiles Ltd but it failed/neglected and/or refused to make payment to the plaintiff under the terms of the mortgages and debenture. The plaint avers in paragraph 4 (d) that by letters dated December 18, 2008 the plaintiff made a demand on the first and second defendants under the terms of the guarantee for a sum of United States dollars 2,450,000. But the first and second defendants as guarantors of

Jinda International Textiles Ltd have similarly not honoured their obligation under the guarantees to settle the indebtedness of Jinda International Textiles Ltd to the plaintiff.

In their joint written statement of defence the first and second defendants denied liability. The defendants averred in their written statement of defence that the suit lacks merit and is an abuse of court process and bad in law and the defendants would at the trial raise a preliminary objection that it be dismissed on the grounds that:

(i) Jinda International Textiles Corporation's limited who is the principal debtor was purportedly put under receivership by the plaintiff to receive and sell its assets to recover the debt due, which process is continuing.

(ii) It is premature to make a claim against the guarantee when recovery process of the debt, which is in dispute hasn't been done and concluded against the principal debtor.

(iii) The aforesaid principal debtor filed civil suit No. 156 of 2008 Jinda International Textiles Corporation Ltd versus Barclays Bank of Uganda Ltd and Andrew Kasirye seeking inter alia declaratory orders for an account of monies paid by the debtor to the plaintiff bank which suit is yet to be heard and disposed of.

(iv) In the same suit the plaintiff counterclaimed against the principal debtor for the same amount of United States dollars 2,450,000 now claimed in this suit.

(v) That the plaintiff cannot legally maintain recovery proceedings against the principal debtor and the guarantor at the same time for the same debt.

(vi) The matter in issue in High Court civil suit number 156 of 2008 is also directly and substantially in issue in the instant case to the extent that the plaintiff is precluded from maintaining this suit at the same time.

(vii) Alternatively that the defendants are not liable under the guarantee for the sums claimed or at all.

(viii) Additionally the guarantee is not enforceable against the defendants but that notwithstanding, the defendants haven't received any formal demand there under.

As noted above High court civil suit number 156 of 2008 is between Jinda International Textiles Corporation Ltd as plaintiff against Barclays Bank of Uganda Ltd and Mr Andrew Kasirye as defendants.

In a letter dated 10th of October 2007 the defendant's lawyers wrote to the plaintiffs advocates indicating the documents that they intended to rely on to make the objection on the ground of res judicata. These documents are:

1. Written statement of defence in High Court civil suit number 156 of 2008 Jinda International versus Barclays Bank and Another
2. Demand notice to first defendant dated 18th of December 2008.
3. Demand notice to second defendant dated 18th of December 2008.
4. Statement of account showing the current loan position.

The records relied on by the defendants are of High Court civil suit number 156 of 2008 between Jinda International textiles Corporation Ltd as plaintiff and Barclays Bank of Uganda Ltd and another as defendants attached to the written submissions of the defendant's counsel. On 18th of February 2010 when the suit came for hearing before honourable Justice Lamech Mukasa, the court delivered judgment against the plaintiff in the sum of **Uganda shillings 1,017,266,000/=** plus interest at 25% with costs. On 24 August 2011 the matter came before my learned sister Judge Hon. Lady Justice Helen Obura when she dismissed the suit under order 9 rule 22 of the Civil Procedure Rules. The words of her ruling are follows:

> "When this matter last came up on 16 June 2011, the plaintiff was represented by Mr Fred Robert Kagoro who informed court that the parties wished to settle this matter amicably. Court then adjourned this matter to today to give parties a chance to explore an amicable settlement. The records show that this matter was adjourned to today for scheduling in the event that settlement failed. Counsels for both defendants have reported that the settlement attempts have failed. However, neither the plaintiff nor its counsel has appeared. No explanation has been furnished to court for their non-appearance. In the

circumstances, this matter is dismissed with costs to both defendants under O. 9 r. 22 of the CPR. I so order"

This record has not been disputed by counsel for Messrs Barclays Bank Uganda Limited.

The doctrine of res judicata is founded under section 7 of the Civil Procedure Act cap 71 which provides that:

7. Res judicata.

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.

Explanation 1.—The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior to it.

Explanation 2.—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation 3.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation 4.—Any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit.

Explanation 5.—Any relief claimed in a suit, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation 6.—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in that right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

There are certain key expressions which must be considered under this provision. The first is that the court is barred from trying a suit in which the subject matter was directly in issue in the former suit. The question of whether the subject matter was directly in issue in the formal suit is a question of fact. In this case, the question would be whether the liability of the defendants for the sum of United States dollars 2,450,000 was directly or substantially in issue in a former suit. The second contention is whether the matter if found to be directly in issue in a former suit was between the same parties. Corollary to this issue is whether the parties are claiming under the same parties in the former suit or litigating under the same title. Lastly, the matter in issue must have been finally adjudicated upon by a court of competent jurisdiction.

In **Semakula vs. Magala & Others [1979] HCB 90** the Court of Appeal at Kampala defined the test for determining whether a suit was barred by *res judicata* and held that the test is whether the plaintiff in the second suit is trying to bring before the court in another way in the form of a new cause of action a transaction which has already been presented before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. The same ratio is found in **Kamunye and Others vs. The Pioneer General Assurance Society Ltd, [1971] E.A. 263 per** LAW, Ag. V.-P on the tests to be used in determining whether a suit is **res judicata**:

> The test whether or not a suit is barred by res judicata seems to me to be – is the plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which properly

belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. …The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply…"

I was also referred to the cases of **Karia and Another vs. Attorney General and Others [2005] 1 EA 83 and Hon. Piro Santos Eruaga v Gen Moses Ali and another Election Petition No. 001 of 2011**. All these cases advance the same principles that have been set up above and are not in dispute.

I have carefully considered this doctrine and related it to the facts of this case. What must first of all be determined in this matter is whether there was a former suit between the same parties. The conclusion is obvious; the previous suit was between Jinda Textiles International Corporation Ltd as plaintiff against Barclays Bank of Uganda and Andrew Kasirye as defendants. The current suit is between Barclays Bank of Uganda against the guarantors of Jinda Textiles International Corporation Ltd. the second corollary issue is whether the parties are claiming under the same title. This has not been pleaded in the plaint or averred in the written statement of defence. The question of parties is inextricably linked with the question of the subject matter in controversy between the parties. Counsel for Barclays Bank Uganda limited submitted that the subject matter is different in that this suit is based on a contract of guarantee which is an additional security to secure the payment of the principal debt by the guarantors in the event of default of the principal debtor. In this regard, the question is therefore whether a guarantee contract is a separate and severable contract giving rise to a separate cause of action by the creditor for the same loan transaction.

As far as the question of parties is concerned, the parties in the current suit are not the same as the parties in the former suit. Secondly, that is no indication that any of them claims under the same title. However this question has further to be clarified in the subsequent matters and is answered by defining the nature of a guarantee contract. I would therefore go to the second issue which is whether the plaintiff in the suit is bringing before the court a transaction which has already been adjudicated upon by a court of competent jurisdiction and perhaps between the same parties. As far as analysis of what transaction is before the court is concerned, counsel for the defendants emphasized the fact that it was the same loan transaction.

It must be borne in mind that the pleading of the parties which is on court record does not attach the mortgage agreement or the guarantee agreements. This requires evidence. Consequently court had to examine the guarantee instruments found in the plaintiffs trial bundle. Perusal of the written submissions of both parties showed that they have gone into the merits of the suit in that they were answering the issue of whether under the agreement a judgment for the principal amount owed by the principal debtor in the suit between the creditor and the principal debtor terminated the guarantors obligations to pay the creditor any sum owing by the principal debtor to the creditor. This is not a submission on the question of *res judicata* but goes into interpretation of a separate contract of guarantee. It is a question on the merits of the suit.

That notwithstanding, the question for determination of how much money the principal debtor owes the creditor, could not have extinguished the question for trial of whether the guarantor would be liable for the debts proved in another suit against the principal debtor. This is based on a simple analogy that

proof of a debt against the principal debtor only establishes how much is owing but does not conclusively establish against whom the money owing should be enforced. I would like to demonstrate this by looking at the nature of a guarantee contract without losing sight of the principal issue in contention which is whether the suit is *res judicata*. In answering this issue, the court should be alert not go into the merits of the main suit as to whether the guarantors are liable for the debt of the principal debtor. The question of *res judicata* only applies to a small extent in establishing whether a previous judgment dealt with a matter substantially in issue in the current suit. The extent of relevance in relation to the doctrine of *res judicata* only leads to the question of liability of the principal debtor and the amount owing. Only to that extent if the suit is trying to establish the above two ingredients can it be said that the suit is *res judicata*.

The liability of a guarantor arises only upon the default of the principal debtor in his or her obligations as per H**alsbury's Laws of England 4th edition Vol. 20 at Para 193**. It is therefore a triable issue whether there has been a default of the principal debtor. It would be irrelevant whether the default is to pay a decreed amount under the loan agreement issued by a court of competent jurisdiction. The issue of whether the suit is premature is not an issue answering the doctrine of *res judicata*. A **guarantee** is defined by **Oxford Dictionary of law at page 246,** as a secondary agreement in which a person, (the guarantor) is liable for the debt on default of another, (the principal debtor) who is the party primarily liable for the debt. The contract of the guarantor in the strict sense **(surety ship)** and is a secondary or ancillary to the contract of the principal debtor. Liability of a **guarantor** depends on the liability of the principal borrower as held in **BANK OF UGANDA VS BANCO ARABE ESPANOL CIVIL APPEAL NO. 23 OF 2000.** According to **LAW OF**

GUARANTEES by Geraldine Mary Andrews and Richard Millet; at Pg 193, the fact that the obligations of the guarantor arise only when the principal has defaulted in his obligations to the creditor does not mean that the creditor has to demand payment from the principal or from the surety, or give notice to the surety, before the creditor can proceed against the surety. The learned authors noted that the question of whether demand is necessary is a matter of construction of the relevant contracts. In other words it is a matter on the merits. Simply put the question of the right to sue is determined by the nature or type of the guarantee contract and its construction. I agree with the right to sue discussed in the House of Lords case of **Moschi v. Lep Air Services Ltd [1973] AC 331**, per Lord Simon:

> "On the default of the principal promisor causing damage to the promisee the surety is, apart from special stipulation, immediately liable to the full extent of his obligation, without being entitled to require either notice of the default, or previous recourse against the principal, or simultaneous recourse against co-sureties."

Last but not least according to Halsbury's Laws of England 4th edition Volume 20 paragraph 215 the plaintiff may join as defendants to the action on a guarantee all or any of the persons liable under it, whether their liability is joint, joint and several or several. The principal debtor and the guarantor may, but need not be sued in the same action. There is generally no need to sue or arbitrate against the principal debtor, even if the principal debtor is insolvent.

In the case of several sureties, at pg 209, the authors of **LAW OF GUARANTEES (supra)** note that:

> "Quite apart from the difficulties which may arise when the creditor has a free choice whether or not to sue both the principal and the surety, there may be situations in which he is bound to sue them both, or to sue all the sureties in the same proceedings. As a general rule, if the liability of the surety is several or joint and several, the creditor may sue the surety independently without joining in other parties to the action, or he may sue some or all of them."

In other words, the creditor could have proceeded simultaneously against the principal debtor and the guarantors at the same time. The creditor could have sued them in the same action or in separate suits. As far as the counterclaim in the former suit is concerned, it only established the liability of the principal debtor for an amount of United States dollars 2,450,000. For the moment, the question of how much the principal debtor owed Barclays Bank of Uganda has been adjudicated upon in a former suit that is High Court civil suit number 156 of 2008 between Jinda International Textiles Corporations Ltd and Barclays Bank of Uganda Ltd and Andrew Kasirye. A careful perusal of the plaint in civil suit number 35 of 2009 which is the current suit, is a suit for recovery of United States dollars 2,450,000. The issue that arises in this suit, is not whether the principal debtor is liable for the sum of United States dollars 2,450,000, but whether the guarantors have liable under the deed of guarantee dated 22nd of September 2004 and 12th November 2004 for the liability of the principal debtor. The question of whether the guarantors are liable has never been the subject of any controversy in High Court civil suit number 156 of 2008. As noted above, whether notice was given before the suit was filed, whether there was a demand as stipulated in the contract are matters dealing with the construction of the relevant contracts and do not answer the issue of whether the suit is barred by the doctrine of *res judicata*. Similarly, as to whether some

of the money has not been recovered by the receivership of the principal debtor is a question of fact that can be tried in the present suit. Any winding up action against the principal debtor or receivership per se is not a bar of the suit against the guarantors provided there is some money due and owing. To emphasise the point a liquidator or trustee in Bankruptcy can file an action against the guarantors of the company in trouble or the guarantors of the principal debtor in respect of whose estate a receiving order has been made. Where liability of the guarantors can be barred through construction of the deed of guarantee, this becomes a triable issue on the merits of the suit.

For the reasons stated above, the preliminary objection on the ground that the suit is barred by the doctrine of *res judicata* is overruled with costs and the suit shall proceed to be heard on its merits.

Dated at Kampala this 10th day of February 2012

Hon. Justice Christopher Madrama

Ruling delivered in the presence of:

Stewart Kamya holding brief for Counsel Paul Rutisya,

No representative from the Plaintiff Company,

Friday Robert Kagoro for the Defendant

Ojambo Makoha: Court Clerk

Hon. Justice Christopher Madrama