

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

HCT -00 - CC - CS - 193 - 2000

DFCU BANK (FORMERLY GOLD TRUST BANK LIMITED) PLAINTIFF

Versus

1. MANJIT KENT 1st DEFENDANT
2. RAJESH KENT 2nd DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

J U D G M E N T

The Plaintiff GOLD TRUST BANK LIMITED (now DFCU BANK LTD) filed this suit against the Defendants MANJIT KENT and RAJESH KENT for recovery of the sum of Ushs. 23,616,698/= being the money owing under a deed of guarantee, interest and costs.

The case for the Plaintiff is that by a deed of guarantee and indemnity, the Defendant guaranteed to indemnify the Plaintiff on demand the debt owed by K-Pac Ltd (herein after referred to as the principal debtor), a customer of the Plaintiff, in the sum limited to Ushs. 100,000,000/=, plus charges and interest accruing after demand.

The Plaintiff avers that as at the 8th February, 2000 the debt owed by the said K-Pac Ltd to the Plaintiff Bank was Ushs. 23,616,698/=. Furthermore, that a demand had been made on the Defendants by the Plaintiff, but the Defendants have failed to comply with the demand.

On the other hand, the Defendants in their written statement of defence denied the averments in the plaint and contended that the Plaintiff has no cause of action against them for the sum of Ushs. 23,616,698/=. In the alternative, the Defendant contended that no demand was served on them or on the principal debtor. In the further alternative, that the Defendants plead that they have never signed a guarantee or deed of indemnity and that if they ever guaranteed any loan to any company, it was for an amount not exceeding Ushs. 20,000,000/=. In the further alternative, the Defendants contended that they are discharged from the guarantee because the Plaintiff unilaterally altered the terms of the guarantee.

At the hearing, the Plaintiff was represented by Mr. Mubiru Kalenge, while the Defendant was represented by Mr. Andrew Kahuma. The Plaintiff called one witness; Ms Anna Opio. The Defendant neither called witnesses nor appeared before court.

History of the case

This is an old case that stated before the Hon Justice James Ogoola but was not concluded before he left the bench. The file was then allocated to me. When the case came up for hearing on 10th January, 2011 at the instance of the court, Counsel for the Plaintiff prayed that the suit be determined under the provisions of O. 18 r11 and O. 17 r 4 of the Civil Procedure Rules.

Order 18 r 11 allows a successor Judge to rely on the evidence taken by a previous Judge to conclude a case as if the successor Judge had taken the said evidence. Order 17 r 4 of the Civil Procedure Rules on the other hand provides for the power of the court to decide the suit notwithstanding any default by any party, to perform an act necessary to further the progress of the suit. According to O.17 r 4,

“Court may proceed notwithstanding either party fails to produce evidence.

Where any party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding that default, proceed to decide the suit immediately.”

Given the age of the case I accepted to proceed with the case as prayed by counsel for the Plaintiff. Since the Defendants did not show up in Court on the trial date, I will proceed to decide the suit.

Resolution of the dispute

The issues agreed by the parties at the scheduling conference were as follows;

1. Whether the Defendants guaranteed the over-draft facility.
2. If so, whether the Defendants are liable to pay the amounts and other reliefs sought.

Issue one: Whether the Defendant guaranteed the over-draft facility.

In her testimony, Ms. Anna Opio testified that the Defendants who were the directors of the company guaranteed the loan to a sum not exceeding Ushs. 20,000,000/= with interest and that the loan has never been repaid. Ms Opio further testified that the loan is outstanding was Ushs. 23,616,698/= and it still attracts interest. She further testified that the Defendants as directors of the principal debtor company issued the Plaintiff a guarantee to secure the said advance made to the principal debtor. Furthermore, on default by the principal debtor the Plaintiff’s lawyers made a demand for the sum of Ushs. 25,401,126/=, but the Defendants paid a sum of Ushs. 3,000,000/=, on 1st December 1999, out of the sum demanded. At the trial two forms of guarantee instruments were

exhibited namely Exhibit P2 and P7. Ms Opio conceded that the names of the Defendants do not appear on the guarantee marked Exhibit P2, but she testified that the Defendants none the less signed the said guarantee as directors of the principal debtor. She also testified that the said guarantee was not witnessed. Furthermore, she also testified that the form of guarantee marked P7 which only had the names of the Defendants was not a fabrication.

Counsel for the Plaintiff submitted that to constitute a guarantee, there must be an agreement in writing, there must be failure by the principal debtor to pay the sum guaranteed and a demand in writing to the guarantor by the creditor, and that all the said requirements of a guarantee were fulfilled in this case. That being the case Counsel prayed for Judgment to be entered against the Defendants as prayed.

I have considered the evidence and the submissions in respect of this issue.

I shall begin with the law relating to guarantees. According to “CROSWELL ENCYCLOPAEDIA OF BANKING LAW, E-SECURITIES AT PAR. 2001” guarantee is defined as a contract by which the guarantor undertakes responsibility to the creditor for the liability of the principal debtor to the creditor.

It is an agreed fact that K-Pac Limited, the principal debtor borrowed the sum of Ushs. 20,000,000/=. In determination of the question, whether the said sum advanced was secured by a guarantee, I have considered the exhibits relied on by the parties.

Exhibit P2 is guarantee dated 23rd February, 1998. It provides that the loan is guaranteed as follows;

“... Provided always that the total liability ultimately enforceable against the undersigned under this agreement shall not exceed the sum of Ushs. 20,000,000/=-, together with interest thereon at your current rate from the date of your demand until payment and discount and charges as aforesaid but so that although the ultimate liability of the undersigned hereunder can not exceed the said sum yet this present guarantee shall be construed and take effect as a guarantee of the whole and every part of the said sums of money and liabilities hereby guaranteed.”

I note that the said guarantee is signed by the Defendants, but is not witnessed. In addition to this, there is a stamp of K-Pac Limited the principal debtor. There is another guarantee, marked Exhibit P7, which is also signed by the Defendants, but is not witnessed, and there is a stamp of K-Pac Limited the principal debtor. There is however no limit as to the sum guaranteed on the said guarantee.

Ms Anna Opio testified that the difference between these two guarantees was not a fabrication by the bank. A close scrutiny of both exhibits to me reveals that they are identical though not filled in the same detail. Furthermore, I note that the Defendant did not plead any fraud or forgery in respect of the guarantee and therefore, I cannot impute the same. In addition to this, the documents were agreed to by the parties.

In the written statement of defence, the Defendants pleaded that no demand was served on them or on the principal debtor. Furthermore, the Defendants pleaded that if they ever guaranteed any loan to any company, it was for an amount not exceeding Ushs. 20,000,000/=. In the further alternative, the Defendants contended that they are discharged from the guarantee because the Plaintiff unilaterally altered the terms of the guarantee.

This defence, when considered in its entirety seems to raise a multitude of ingenious arguments in the alternative. There is no specific detailed defence. Furthermore, the evidence of Ms. Opio, that the Defendants as directors of the principal debtor executed a guarantee in the sum not exceeding Ushs. 20,000,000/= and interest is not challenged by the Defendant in cross examination. In the premises and based on the evidence on record, I find that a guarantee in the form shown in exhibit P2 was executed by the Defendants, for the money borrowed by K-Pac Ltd. from the Plaintiff bank.

Issue two: Whether the Defendants are liable to pay the amounts and other reliefs sought.

It is the unchallenged testimony of Ms. Opio, that the Defendants as directors of the principal debtor executed a guarantee in the sum not exceeding Ushs. 20,000,000/= together with interest.

The question therefore to be determined by this court is whether the Defendants are liable to pay the amount of Ushs. 23,616,698/= which the Plaintiff alleges to be the sum owing under the said guarantee.

Ms. Opio, on behalf of the Plaintiff, during cross examination testified as follows;

“... The customer accepted only Ushs. 20,000,000/=. At 30% average penalty rate from February 1999 to March the Ushs. 20,000,000/= loan would have become Ushs. 33,075,554/=. From this you subtract the credit on that account for that period, of shs 8,500,000/=: leaving a balance of Ushs. 23,575,555/=. The difference between this Ushs. 20,000,000/= and the statement Ushs. 23,000,000/= in Exhibit P9 is due to netting (i.e. factoring in the credit). I am aware that M/S Kirenga & Co. Advocates once acted for the bank in this matter. Exhibit P5 is the letter from M/S Kirenga & Co. Advocates to Mr. and Mrs Kent. The bank received its copy. The lawyers were demanding Ushs. 25,401,126/=. After 01/12/1999, the Defendants paid Ushs 3,000,000/= only on 01/01/2000. But at the time they had incurred interest of Ushs. 614,024/= hence total loan of Ushs. 26,437,193/=. After the Ushs. 3,000,000/= repayment the balance was Ushs. 23,434,193/=.”

The extent of liability of a guarantor is dependent on the contract. According to HALSBURY'S LAWS OF ENGLAND 4th Ed. Vol. 20 Par 183,

“It has been said that a guarantor is a favored debtor. He is entitled to insist upon rigid adherence to the terms of his obligation by the creditor and cannot be made liable for more than he has undertaken.”

Furthermore at Par 184,

“The extent of the liability undertaken by the guarantor will depend upon the terms of the contract of guarantee. It need not be co-extensive with that of the principal debtor; but, in so far as it exceeds it, it is not a guarantee liability. In order to ascertain the extent of the guarantor’s liability, if any, to the creditor, it is first necessary to determine the amount and the nature of the principal debtor’s debt to the creditor and the circumstances in which it has arisen. This having been done, the contract of guarantee should then be construed strictly to see whether it covers the nature, extent and circumstances of the principal debt sought to be recovered from the guarantor.”

In this case, the guarantee provided as follows;

*“...shall not exceed the sum of Ushs. 20,000,000/=, **together with** interest thereon (emphasis mine)...”*

The operative words there are together with and not inclusive of interest as pleaded in the written statement of defence. From the testimony of Ms. Opio above, the sum of Ushs. 23,434,193/=, includes the principal debt and the interest, which I find, are provided for under the guarantee. In the premises, I am satisfied that the Defendants are liable to pay the sum of Ushs. 23,434,193/=.

As to the defence that the Plaintiff bank did not serve a demand on them, there can be nothing further from the truth.

Clearly, the guarantee was instructive as to the form of the demand. There are letters of formal demand dated 9th November, 1999, [marked Exhibit P3 (a), P3 (b), P3 (c)] addressed to the Defendants and the principal debtor. In the premises I am satisfied that a demand was served on the Defendants jointly and severally and is valid.

The Plaintiff is entitled to and I hereby so grant the sum of Ushs. 23,434,193/=, being the sum guaranteed, together with interest and charges, as stated in the guarantee. The said sum shall attract interest at 21%p.a. from the 9th September, 1999 until payment in full.

The Plaintiff is also awarded the costs of this suit.

Justice Geoffrey Kiryabwire

JUDGE

Date: 21/05/2012

21/05/12
10:37 a.m.

Judgment read and signed in open court in the presence of:

- Tumwebaze c/c for C. Bwanika for Plaintiff

In Court

- None for the parties
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire
JUDGE

Date: 21/05/2012