THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC - MA - 0093 - 2013
(Arising from Civil Suit No. 79 of 2011)

SAM ENGOLA :::::::::::::::::::::::: APPLICANT/2ND DEFENDANT

VERSUS

KAMLESH PATEL :::::::::::::::::::::::::::::::::::: RESPONDENT/DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

This application brought by Sam Engola who is referred to as the Applicant in these proceedings, against Kamlesh Patel hereinafter referred to as the Respondent seeks to set aside the judgment and decree in Civil Suit No. 79 of 2011.

The Applicant also seeks for leave to appear and defend the suit on the merits. It is brought under S. 98 of the Civil Procedure Act, O. 36 r 11 and O. 52 r 1 and 3 of the Civil Procedure Rules.

The background to this application emanates from Civil Suit No. 79 of 2011. Briefly, the background is that the Applicant and the

Respondent were known to each other. The Applicant was also a friend to one Edward Luyinda.

In 2009, Luyinda who wanted to borrow some money, asked the Applicant to introduce him to the Respondent. He did and the Respondent advanced Edward Luyinda 218 million. Edward Luyinda issued post dated cheques to the Respondent.

This transaction was reduced into writing in the following manner;

> *'I, Mr. Edward Luyinda, have agreed with Kamlesh Patel of Raju Raj Enterprises (U) Ltd P. O. Box 22647 Kampala to pay back a loan of 218 million (two hundred eighteen million Uganda Shillings only) on or before 23/10/2009. Which I received as a loan from Mr. Kamlesh Patel and gave him a cheque of DFCU Bank as a security each of 20 million."*

Mr. Sam Engola had given a guarantee and as a witness.

This document was signed by Edward Luyinda, Kamlesh Patel and Sam Engola. Edward Luyinda failed to pay as the cheques he had issued to the Respondent bounced

The Respondent sued both Mr. Edward Luyinda and the Applicant. He subsequently obtained judgment against both. When execution issued, the Applicant here in applied for stay, on the grounds that he had never been served with summons in Civil Suit No. 79 of 2011. He obtained an interim stay.

The present application is grounded on the following;

That the Applicant was never served with summons in Civil Suit No. 79 of 2011, that the Applicant has never had any transaction with the Respondent, that the Applicant has never guaranteed the 1st Defendant to get a loan of 218 million from the Respondent, that the Applicant has a good defence to the suit.

In support of his application, the Applicant deponed that he only witnessed a money lending agreement between the 1st Defendant and the Respondent. It was a loan, he said of 60 million and not 218 million as alleged by the Respondent. He claimed that since he was only a witness, he could not be found liable and he insisted that he had never had any transaction with the Respondent. He prayed for the judgment to be set aside.

In reply, the Respondent contended that the Applicant was actually served from Serena Hotel as he emerged from the gym, that in fact after he had been served, he gave the Respondent a treat in the mini bar of the hotel. That when he (Respondent) was served with the application of Luyinda to appear and defend, he talked to the Applicant and the Applicant even swore an affidavit rebutting the claim of Luyinda.

The issues now for settlement are whether the Applicant was aware of the suit against him.

The Applicant has denied ever being served with the document. He has also denied ever knowing of the suit against him. This presupposes that he never saw the court documents.

The Respondent deponed that when he sued both Defendants, the 1st Defendant Luyinda filed a Notice of Motion seeking leave to appear and defend. He has also told court that he met the Applicant with whom they discussed the matter and in fact the Applicant swore an affidavit in aid of the Respondent's rebuttal of Luyinda's affidavit.

In paragraph 2 of the supplementary affidavit in reply which he deponed, the Applicant said the following;

> *"That I have read and understood the affidavit in support of the Notice of Motion dated 25/3/2011 deponed by Edward Luyinda and swore this one in rebuttal thereto."*

In paragraph 3 he swore;

> *"That I am personally known to the Applicant whom I recommended to the Respondent for a loan facility."*

In paragraph 8, the Applicant swore;

> *"That I swear the affidavit in reply to rebut the deponement of Edward Luyinda and his affidavit in support and accordingly pray that the court dismisses the application with costs."*

These deponements clearly indicate that the Applicant was aware of what was going on and that he must have seen the pleadings that had brought risk to the situation that demanded for his affidavit.

This position is buttressed by paragraph 4 of the Respondent's affidavit in rebuttal in which he deponed that he was present when the said summons were served on the Applicant who was served at Serena Hotel.

In my view, the Applicant was not only aware of the existence of this suit but even participated in pinning down Luyinda by swearing a supplementary affidavit in reply as a response of Luyinda's Miscellaneous Application No. 166 of 2011. The first ground therefore fails.

The second ground is that the Applicant has never had any transaction with the Respondent.

In the affidavit supporting his application, the Applicant said he witnessed the loan transaction. He said;

> *"That I witnessed a loan of Ushs. 60 million of which payment was of 100 million and cheques of 100 million were issued in that respect but not 218 million."*

That he witnessed this transaction is strengthened by Annexture 'D' which he signed. Not only as a witness but a person guaranteeing the loan.

The Applicant has denied that he had any transaction in this matter but this same Applicant's affidavit is tainted with falsehoods. While in paragraph 6 of his affidavit in support of the application he says he witnessed a loan of only 60 million, this same Applicant on the 9th May

2010 in a supplementary affidavit in reply deponed in paragraph 4 as follows;

> *"That sometime in 2009, the Respondent advanced the Applicant the sum of 218 million ..."*

Even the Annexture 'D' to which he is a signatory clearly indicates that he witnessed a loan transaction of 218 million.

Such a person as the Applicant who gives a different figure at one point on oath and then gives a completely different figure also on oath in respect of the same matter is difficult to believe.

Furthermore, while he denies that he did not guarantee the loan, Annexture 'D' referred to herein above clearly states in the last paragraph as follows:-

> *"Which I received as a loan from Mr. Kamlesh Patel and gave him a cheque of DFCU Bank as a security each of 20 million. And Mr. Sam Engola had given a guarantee <u>and</u> as a witness."*

The fact that the word 'guarantee' was followed with the words 'and as a witness' leaves no doubt that they were two separate things that the Applicant did when he signed that document. It meant he was a guarantor as well as a witness.

Osborn's Concise Law Dictionary at page 186 defines a guarantee as a secondary agreement in which one person (the guarantor) will become liable for the debt of the principal debtor if the principal debtor defaults.

It meant that on signing that document the Applicant had made himself answerable for the loan on behalf of Luyinda who was primarily responsible. A promise made by a guarantor to a creditor is that if the debtor does not pay, the guarantor will pay (Francis Xavier Muhoozi t/a Kabale Kobil Station V National Bank of Commerce) HCCS 303/2006.

It means that the Respondent could sue both defendants jointly or could sue the Applicant alone.

Barclays Bank of Uganda Ltd V Jing Hung and Guo Dong HCCS 35/2009 Law of Guarantees by Geraldine Mary Andrews and Richard Millet.

He opted to sue both. The sum total is that there was not only a transaction between the 3 parties but the Applicant indeed also guaranteed the loan transaction. For those reasons, I find no merit on grounds 2 and 3.

Having dismissed the first 3 grounds, there remains nothing that would amount to a good defence to the Applicant. This ground also therefore fails.

As for the fifth ground, substantive justice in a situation such as this dictates that it would be a promotion of injustice to grant leave to the Applicant to appear and defend.

In all therefore this application is dismissed with costs.

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David K. Wangutusi

JUDGE

Date: 18 – 12 – 2013