

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

HCT - 00 - CC - CS - 171 - 2008

UGANDA DEVELOPMENT BANK LTD:.....PLAINTIFF

VERSUS

- 1. GEORGE BEGUMISA**
- 2. SAM MUHEBWA**
- 3. JOSEPH BARIYO**
- 4. FRED TUKIRE:.....DEFENDANTS**

BEFORE: HON. JUSTICE GEOFFREY KIRYABWIRE

J U D G M E N T

Brief Facts

The Plaintiff Uganda Development Bank Ltd (UDBL) filed this suit against the Defendants George Begumisa, Sam Muhebwa, Joseph Bariyo and Fred Tukire for recovery of the sums of US \$ 60,872.00 and USHS. 952,894,486/= being the money owing under a deed of guarantee, interest and costs.

The case for the Plaintiff is that by loan agreements dated 4th July 2005 and 18th September 2006 it extended loan facilities of US \$ 200,000.00 and USHS. 920,000,000/= respectively to Begumisa Enterprises Ltd. As security for repayment of the loans the Principal borrower mortgaged different properties and also obtained Guarantees from the Defendants who were shareholders and directors of the Principal borrower. The guarantee deeds are dated 4th July 2005 and 18th September 2006.

The Plaintiff avers that the Borrower defaulted on repayment of all the said monies, subsequent to which it made demands to it and later to the Defendants who were guarantors, to no avail.

In their defence the second third and fourth defendants deny the Plaintiff's claim and plead that they signed the said guarantee deeds without understanding their contents, without any legal advice, independent or otherwise and under undue influence from the first Defendant. The first

Defendant on the other hand denied having ever executed any of the above guarantee instruments and that the advances for which guarantees were given were duly paid back.

At the hearing, the Plaintiff was represented by Ms. Olivia Kyalimpa Matovu of M/S Ligomarc Advocates while the first Defendant on record was represented by Mr. Guma Davis of M/S Guma & Co Advocates; the second third and fourth Defendants were not represented

Background of the case

This is a backlog case that has been scheduled for a backlog session.

The matter was fixed for hearing on 17th April 2013. On that day, Counsel for the Plaintiff prayed that the matter proceeds *ex parte* since the second third and fourth defendants had previously been notified by way of substituted service in the New Vision newspaper leave to proceed against them *ex parte* was granted on the 16th August 2011. Furthermore the first defendant too was served by substituted notice in the New Vision newspaper dated 9th March 2013 and an affidavit of service to that effect was on Court record. Since none of the Defendants or their Counsel had showed up in court on the date of hearing the Court also ordered that the case to proceed *ex parte* against the first defendant as well. The plaintiff provided two witnesses namely Mr Innocent Wanambugo and Mr. Joshua Makayi both employed by the plaintiff bank. The both provided witness statements.

Issues

The following issues were framed by the Plaintiff in the filed Scheduling memorandum;

1. Whether the Plaintiff is entitled to recover the sums due and owing from Begumisa Enterprises Ltd (Principal Borrower) from the Defendants jointly and severally
2. Whether the Plaintiff is entitled to remedies sought

Issue one: Whether the Plaintiff is entitled to recover the sums due and owing from Begumisa Enterprises Ltd (Principal Borrower) from the Defendants jointly and severally

The Plaintiff's case is that that the Defendants refused to honor their obligations under guarantee deeds dated 4th July 2005 and 18th September 2006.

Innocent Wanambugo (PW1) the acting legal officer of the Plaintiff Company, stated in his witness statement that in 2010 he was allocated the account of the Principal Borrower (M/s Begumisa Enterprises Ltd) for purposes of recovering the sums due and owing from its account. He established that the Principal Borrower had borrowed USD \$ 200,000 in July 2005 and Another Ushs. 920,000,000/= on 18th September 2006 from the plaintiff bank. In proof of this the Plaintiff attached two Loan agreements as exhibits P1 and P2 respectively.

Mr Wanambugo further testified that to secure repayment of the said loans the Principal Borrower mortgaged different properties with the Plaintiff and in addition the Defendants gave

personal guarantees also to secure the repayment of the said loans (Two guarantee deeds were exhibited namely exhibits P3 & P4 in support of his statement).

The Principal Borrower defaulted on payments upon which demands were made to no avail. The Company was later placed under receivership, which amounted to an event of default under the terms of the loan agreement.

Subsequently (as reflected in Exhibit 7) the plaintiff bank placed a demand on the Principal Borrower to pay the outstanding loan but no payments were made to date. Then the Defendants as guarantors were sent demand letters (Exhibit 8) to honor their obligations to repay the sums that were due and owing from the Principal Debtor, but this too never yielded any results.

Counsel for the Plaintiff relied on **Paget's Law of Banking 13th Edition Chapter 33 Page 825** to define a guarantee as a promise to be liable for the debt, or failure to perform some other legal obligation, of another. Counsel further referred to the case of **Bank of Uganda vs. Bano Arabe Espanol-Civil Appeal No. 23 of 2003** she submitted that the liability of a guarantor arises upon default of the principal debtor.

Counsel for the Plaintiff went on to submit that the Defendants committed themselves and undertook to pay as primary obligors and not merely as sureties. That being the case, the Plaintiff having failed to recover its monies by way of realizing the securities under the mortgage deed, the Defendants are deemed to be liable severally and jointly in their capacity as Guarantors, to pay the money owed to the Plaintiff by M/s Begumisa Enterprises Ltd.

Counsel for the Plaintiff submitted that the Plaintiff therefore entitled to recover the sums claimed from the Defendants as Guarantors.

In their Written Statement of defence the second third and fourth defendants deny the Plaintiff's claim and plead that they signed the said guarantee deeds without understanding their contents, without any legal advice, independent or otherwise and under undue influence from the first Defendant. The first Defendant on the other hand denied having ever executed any of the above guarantee instruments and that the advances for which guarantees were given were duly paid back. The defendants however having failed to respond to hearing notices did not adduce any evidence in support of their pleaded defence.

It is the case for plaintiff bank that the Defendants guaranteed the loans taken by the Begumisa Enterprises Ltd from the Plaintiff bank, and that they as guarantors are jointly and severally liable as a result.

Exhibits P3 and P4 are guarantee deeds dated 4th July 2005 and 18th September 2008 respectively, between the Plaintiff and the defendants. In the said guarantee deeds the Defendants guaranteed repayment of monies taken by M/s Begumisa Enterprises Ltd. This is evidence on record that is not challenged.

In their Written Statements of Defence, the first Defendant denied ever having executed the Guarantee deeds and while the second third and fourth Defendants ever disputed having signed these guarantee deeds, although they averred that the guarantees were signed without understanding the contents, without any legal advise and under undue influence. All these averments however were not proved in evidence. As it is the evidence on record shows that the defendants signed the said guarantees.

In the premises, I find that the Defendants willfully executed the guarantee deeds (marked Exhibits P3 and P4), and as such they guaranteed repayment of the loans that were taken by Begumisa Enterprises Ltd.

The loan statements on record of the Principal borrower (Exhibits P5i and P5ii) show that it is indebted to the Plaintiff bank.

There is also evidence on the record (Exhibit 8) that shows that the Plaintiff bank as far back as 2008 demanded that the Defendants honor their obligations to repay monies borrowed by M/s Begumisa Enterprises Ltd but they have not.

Under the guarantee deeds signed by the Defendants it is provided under section 2.01(a) that;

“The Guarantors hereby irrevocably, absolutely and unconditionally guarantee, as primary obligors and not as sureties merely, the due and punctual payment of the principal of, interest, commitment fee, and all other amounts payable on and in respect of the loan and any and all sums payable by the company under the loan agreement all set forth in the loan agreement.”

Counsel for the Plaintiff rightly defined the term Guarantee with reference to **Paget’s Law of Banking 13th Edition Chapter 33 Page 825** to mean a promise to be liable for the debt, or failure to perform some other legal obligation, of another.

In 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.”

Article 3.01 of the Guarantee deeds provided that the obligations of the Guarantors to the Plaintiff are joint and several.

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.”

I therefore find that the Plaintiff is entitled to recover all the sums due and owing from the Defendants jointly and severally.

Issue two: Whether the Plaintiff is entitled to remedies sought

The Plaintiff brought the suit against the Defendants, seeking judgment against the Defendants jointly and severally for US \$ 60,872.00 and Ushs. 952,894,486/=, interest thereon of 24% p.a from the date of filing the suit and costs of the suit. These are special damages that I find that the plaintiff bank has specifically proved and I accordingly award them against the defendants jointly and severally.

These pieces of evidence are not disputed and/or challenged by the Defendants.

The plaintiffs also prayed for interest of 24% per annum from the date of filing this suit as is claimed.

This was a commercial transaction and therefore the Defendants ought to pay interest to compensate the Plaintiff and the public at large for the loss incurred especially since such money would have been lent to other institutions or persons.

The 24% interest p.a on the Uganda shilling component of the loan as from the date of filing the suit as prayed. I will however grant interest at 11% p.a. on the United States component of the loan from the date of filing the suit until payment in full.

The Plaintiff is also awarded the costs of this suit.

.....
Geoffrey Kiryabwire

JUDGE

Date: 13/05/2013

13/05/13

10: 53 a.m.

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

- Mrs. Kyalimpa – Matovu for Plaintiff

In Court

- None of the parties
- Rose Emeru – Court Clerk

.....

Geoffrey Kiryabwire
JUDGE

Date: 13/05/2013