

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 422 OF 2012**

MAURICE SSEBOWA}.....PLAINTIFF

VS

DFCU BANK LIMITED}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff filed this action seeking orders and declarations against the Defendant. It is for a declaration to issue that the Plaintiff was only a guarantor of Uganda shillings 50 million advanced by the Defendant to Messieurs HIMA Cement Ltd in favour of Mikwano Investments Ltd and no more; a declaration issues that the Plaintiff is therefore indebted to the Defendant as a guarantor under the said loan in the sum of Uganda shillings 50,000,000/= and interest less the amount already paid by him and by the other co-guarantor; a declaration issues that the Defendant is estopped from claiming interest on the said sum after 10 January 2011 when it violated the loan agreement terms; a declaration issues that the Defendant has acted and is continuing to act in violation of the loan agreement of 3 December 2009 between it and the Plaintiff; an order issues that the Defendant discloses the amount so far paid by Geoffrey Serunjogi, the Plaintiffs co -guarantor under the loan; an order issues that the Defendant accepts to receive from the Plaintiff a sum under the guarantee of Uganda shillings 50,000,000/= plus interest as at 3 December 2011 minus the amount already paid by the Plaintiff and other co - guarantor; an order issues of a permanent injunction restraining the Defendant, its agents/or servants from disposing of the Plaintiffs land comprised in Kibuga block 5 plot 306 at Mulago and finally an order for costs of the suit.

The Plaintiff's case as disclosed in the plaint is that it guaranteed a loan agreement between the Defendant and the Mikwano Investments Ltd together with one Serunjogi Geoffrey. The Plaintiff guaranteed up to a maximum of Uganda shillings 50,000,000/= and under the agreement the Defendant deposited his certificate of title for land comprised in block 5 plot 306 at Mulago, Kampala.

Briefly the facts disclosed in the plaint are that the Defendant executed a mortgage agreement with Messieurs Mikwano Investments Ltd and the guaranteed a loan. The Defendant issued a guarantee of Uganda shillings 50,000,000/= to Messieurs HIMA Cement Ltd in favour of

Messieurs Mikwano Investments Ltd. The Plaintiff deposited his certificate of title comprising block 5 plot 305 at Mulago, Kampala with the Defendant and Geoffrey Serunjogi deposited with the Defendant his certificate of title for land comprised in LRV 3807 folio 19 (Kyadondo block 268 plot 255). On 28th of September 2010 the Defendant communicated to the Plaintiff to the effect that Messieurs Mikwano Investments Ltd had defaulted in a repayment of the loan. Consequently on 28 September 2010 the Defendant demanded in writing from the Plaintiff the outstanding guarantee amount of Uganda shillings 49,825,068/=. The Plaintiff responded to the Defendants request and proposed payment in instalments. After two months the Defendant did not respond to the Plaintiff's request for instalment payment and the Plaintiff additionally proposed payment of Uganda shillings 2,000,000/= per month. The Plaintiff further notified the Defendant that he had deposited 8,000,000/= as an initial payment. Subsequently the Plaintiff alleges that he was surprised to receive from the Defendant a demand letter for Uganda shillings 206,434,764/=. The Plaintiff insists that his liability is limited to the guarantee of Uganda shillings 50,000,000/= but the Defendant refused to accept the same and demands Uganda shillings 206,434,764/= plus accruing interest. The Defendant additionally lost the Plaintiffs certificate of title deposited as security and the Defendant threatens or is threatening to dispose of the Plaintiff's house. The Plaintiff further alleges that he is directly liable for the guaranteed amount with Mr Geoffrey Serunjogi. He alleges that the demand for over Uganda shillings 206 million was in breach of the agreement between him and the Defendant.

On the other hand the case in the written statement of defence is that the Plaintiff and one Geoffrey Serunjogi had always guaranteed loans, mortgage or overdraft facilities advanced by the Defendant to Messieurs Mikwano Investments Ltd and have always pledged their aforementioned titles as security therefore. On 23 May 2008 Messieurs Mikwano Investments Ltd wrote to the Defendant acknowledging a debt of Uganda shillings 250,000,000/=. On 29 September 2008 the Defendant granted a guarantee facility of Uganda shillings 50,000,000/= to Mikwano Investments Ltd in favour of Hima Cement Ltd and the Plaintiffs land act Mulago was used as security for the facility. On 5 November 2009 the Defendant restructured Mikwano Investments Limited overdraft facility. In the tripartite date mortgage agreement made on 3 December 2009 between the Defendant, Mikwano Investments Ltd, the Plaintiff and Serunjogi Geoffrey, a mortgage agreement for a total sum of Uganda shillings 147,041,507/= was executed. The Plaintiff and Geoffrey Serunjogi deposited their certificates of title as security for the facility. As part of the agreement the Defendant made a guarantee of Uganda shillings 50,000,000/= to Messieurs Hima Cement Ltd. Messrs Mikwano Investments Ltd defaulted in payment of the credit advanced and the default was communicated to the Plaintiff with a demand for Uganda shillings 49,825,086/=. The Plaintiff failed to meet its obligations and proposed instalment payments. By 13 September 2010 Mikwano Investments Ltd was indebted to the tune of Uganda shillings 201,427,460/= which sum was communicated to the managing director of Mikwano Investments Ltd. On 20 December 2010, Geoffrey Serunjogi wrote to the Defendant accepting his liability as a guarantor and his debt obligation was discounted to Uganda shillings 70,000,000/=. Even after final demands were made by letter dated 10th of January 2011, the

Plaintiff failed to meet his obligations and his proposals to pay 50,000,000/= only covered one transaction out of many transactions he had guaranteed. In the circumstances the Defendant maintains that the Plaintiff should pay the entire sum of Uganda shillings 206,434,068/= with continuing interest for a series of loans, overdraft and guarantee facilities to Messieurs Mikwano Investments Ltd guaranteed either expressly or impliedly by the Plaintiff.

In reply the Plaintiff maintained that he only guaranteed the particular loan in the sum of Uganda shillings 50,000,000/= and gave details of the transactions between the parties. The Plaintiff is represented by Messieurs Wameli and Company Advocates while Messieurs Karuhanga, Tabaro and Associates, Advocates and Solicitors represented the Defendant. Counsel for both parties filed a joint scheduling memorandum setting out the points of agreement and disagreement under Order 12 of the Civil Procedure Rules.

The agreed facts in the joint scheduling memorandum are that on or about 3 December 2009; the Defendant entered a mortgage agreement with Messieurs Mikwano Investments Ltd where the Plaintiff and one Mr. Serunjogi Geoffrey were joint guarantors. Under the agreement, the Defendant issued a guarantee for Uganda shillings 50,000,000/= to Messieurs Hima Cement Ltd in favour of Mikwano Investments Ltd. The Plaintiff deposited his certificate of title for land comprised in block five plot 306 at Mulago with the Defendant and the said Serunjogi Geoffrey deposited with the Defendant his certificate of title for land comprised in LRV 387 folio 19 (Kyadondo block 268 plot 255 at Lubowa). On 28th of September 2010, the Defendant communicated to the Plaintiff and informed him that the said Mikwano Investments Ltd in whose favour the guarantee had been given had defaulted. The Defendant in a letter of 28 September 2010 demanded that the Plaintiff pays the outstanding guarantee of Uganda shillings 49,825,068/=.

It is in dispute whether the Plaintiff guaranteed a loan of only of Uganda shillings 50,000,000/= in favour of Messieurs Mikwano Investments Ltd according to the agreement of 3 December 2009. Secondly it is in dispute whether the Plaintiff is indebted to the Defendant only in the sum of Uganda shillings 50,000,000/= that was guaranteed, minus all amounts already paid by him and the other co-guarantor Mr Geoffrey Serunjogi. It is further in dispute whether the Plaintiff already paid Uganda shillings 8,000,000/= and that the other guarantor Mr Geoffrey Serunjogi had already paid Uganda shillings 70,000,000/= on the said loan of Uganda shillings 50,000,000/=. It is further in dispute whether the Plaintiff and Geoffrey Serunjogi had always guaranteed loans, mortgages and overdraft facilities advanced by the Defendant to Messieurs Mikwano Investments Ltd and always used their above described property as security either expressly or impliedly. It is further disputed that on 5 November 2009 the Defendant restructured Mikwano Investments Limited overdraft facilities according to a letter of offer giving an overdraft facility limit of Uganda shillings 50 million, loan facility of Uganda shillings 47,041,507/= and a bank guarantee of Uganda shillings 50,000,000/=. It is further disputed that the Plaintiff and Geoffrey Serunjogi pledged their usual security for the facility. It is also

disputed that as part of the restructuring agreement the Defendant guaranteed Uganda shillings 50,000,000/= to Messieurs Hima cement Ltd which sum would become payable on default by Mikwano Investments Ltd the Plaintiff denies failure to meet his obligations under the alleged transactions. It is in dispute whether the Defendant wrote on 28 September 2010 to the Managing Director of Mikwano Investments Limited informing them of their total debt amounting to Uganda shillings 205,493,949/=. Lastly it is a factual controversy as to whether on 20 December 2010, Geoffrey Serunjogi the Plaintiffs co-guarantor wrote to the Defendant and accepted his liability as a guarantor to Mikwano Investments Limited and executed an agreement with the Defendant and his debt obligation was discounted to Uganda shillings 70,000,000/=.

The agreed issues for trial are as follows:

1. *How much did the Plaintiff and his co-guarantor, Serunjogi Geoffrey, guarantee under the mortgage agreement?*
2. *How much is the Plaintiff indebted to the Defendant in the circumstances?*
3. *What remedies are available to the parties?*

The Plaintiff testified as PW1 and closed his case. The Defendant likewise called one witness Philip Miuro Kwagala, the relationship manager of the Defendant and the defence case was closed. Counsels addressed the court in written submissions. The evidence of the Plaintiff and the Defendant are sufficiently disclosed in the written submissions and I will resolve any factual controversies referred to from the evidence adduced on record.

The Plaintiff's submissions

The Plaintiff's case is that he only guaranteed an overdraft of Uganda shillings 50,000,000/= whereupon Messieurs Mikwano Investments Ltd acquired cement from Messieurs Hima Cement Ltd and the Defendant guaranteed to pay the money and claim it from the Plaintiff in case Messieurs Mikwano Investments Ltd defaulted. The Plaintiff executed a mortgage agreement to this effect where he surrendered his property comprised in Kibuga block 5 Plot 306 at Mulago as security, together with his co-guarantor Geoffrey Serunjogi who also surrendered his property comprised in LRV 3807 folio 19 Kyadondo block 268 plot 255 at Lubowa. On the other hand the Defendant's case is that the Plaintiff and Geoffrey Serunjogi were always guarantors of loans, mortgages or overdraft facilities advanced by the Defendant to Messieurs Mikwano Investments Ltd and had always allowed with their lands mentioned above to be used as security either expressly or by implication since 2008. On 5 November 2009 the Defendant restructured the overdraft facility. Under that arrangement the same property of the Plaintiff was used as security. Messieurs Mikwano Investments defaulted and hence the Defendant demanded its money from the guarantors. Lastly Mr Serunjogi Geoffrey admitted liability and this loan was discounted to Uganda shillings 70,000,000/= by the Defendant.

On issue number one as to how much the Plaintiff and his co-guarantor Mr Serunjogi Geoffrey guaranteed under the mortgage agreement, the Plaintiff's Counsel submitted that it was Uganda shillings 50,000,000/= and nothing more. PW1 the Plaintiff testified that he was approached by the owners of Messieurs Mikwano Investments Ltd when they wanted to get cement worth Uganda shillings 50,000,000/= from Messieurs Hima Cement Ltd in 2009. By this time the Plaintiff's title deeds were with the Defendant bank for an earlier but already cleared loan of Uganda shillings 50,000,000/= of the year 2005. He permitted Messrs Mikwano Investments Ltd to use his certificate of title as security for Uganda shillings 50,000,000/= for the cement from Messieurs Hima Cement Ltd.

A mortgage agreement was executed between the Plaintiff and Geoffrey Serunjogi on the one part as guarantors and the Defendant bank on the other and is exhibit P1. At the time the Plaintiff signed the mortgage agreement, the amount indicated in the document was Uganda shillings 50,000,000/= only. He was later surprised when he learnt that other figures like Uganda shillings 47,041,507/= and Uganda shillings 50,000,000/= appeared on the same agreement later. His unchallenged evidence is that he was never availed a copy of the mortgage agreement after signing it. The Plaintiff saw the additions later on.

The Defendants demand exhibit P2 indicates that the Plaintiff guaranteed only Uganda shillings 50,000,000/=. The letter reads that the bank issued a guarantee of Uganda shillings 50,000,000/= to Messieurs Hima Cement in favour of Messieurs Mikwano Investments Limited. No mention was made by the Defendant of any other loan/guarantee. When the Defendant made a demand of Uganda shillings 49,825,068/= from the Plaintiff on 28th of September 2010, it had just demanded Uganda shillings 201,427,460/= from Messieurs Mikwano Investments Limited on 13th of September 2010, about 15 days earlier. Upon the demand being made on the Plaintiff, the Plaintiff admitted the debt by his letter dated 2nd of October 2010. This further proves that the Plaintiff only knew of the loan the Plaintiff guaranteed of Uganda shillings 50,000,000/= and admitted that the outstanding balance was Uganda shillings 49,825,069/=. Furthermore both parties agree and the Plaintiff is willing to fulfil his promises. The Plaintiff's submission is that the Defendant bank received exhibited D3 dated 2nd of October 2010 but did not respond to it for unknown reasons. After over two months without a response, the Plaintiff again wrote on 10 December 2010 and also made part payment of Uganda shillings 8,000,000/= on the outstanding debt of 49,826,069/=. The Defendant still did not respond until after one month when on 10 January 2011 it wrote back claiming an amount of Uganda shillings 206,434,764/= which amount is unknown to the Plaintiff. The demand was referred to as a final demand by the Defendant implying that an earlier demand had been made. However the only demand that the Plaintiff received was for Uganda shillings 49,805,069/= by letter of 28th of January 2010. Another significant factor is that according to the Plaintiff's Counsel by the time the demand of Uganda shillings 49,825,069/= was made on the Plaintiff by the Defendant, Messieurs Mikwano Investments Limited had already defaulted on the entire loans with the Defendant and the Defendant had accordingly demanded for Uganda shillings 201,427,460/=. The Plaintiff's

Counsel contends that it is because the Defendant failed to realise all its monies from Messieurs Mikwano Investments Limited and upon having the Plaintiff's title in its custody that it decided to plant the entire outstanding loan obligations on the Plaintiff.

In relation to the Defendant's evidence, the Plaintiff's Counsel contends that there is nothing to show that there had been any earlier and outstanding loan upon which the Plaintiff had allowed his certificate of title to be security. The evidence of the Plaintiff is that the first time he put in his certificate of title with the Defendant was when he guaranteed cement worth Uganda shillings 50,000,000/= in the year 2005 in favour of Mikwano Investments Limited. On 23rd of May 2008, Messrs Mikwano Investments Limited wrote to the Defendant informing it that the Plaintiff was no longer willing to allow his certificate of title to be used as security for any further loans according to exhibit D1. Therefore in the absence of an existing and outstanding loan guaranteed by the Plaintiff with a corresponding mortgage agreement, there was no way the Defendant would have created a further charge on the Plaintiff's certificate of title as it is purported in exhibit P1. This further confirms the Plaintiff's testimony that the mortgage agreement of 3 December 2009 was altered. The additions made to the mortgage agreement were made after the Plaintiff signed it. There is a cancellation of the word 'mortgage' to leave the word "further charge" and addition of the figure of Uganda shillings 47,041,407/= and 50,000,000/=.

The mortgage agreement that the Plaintiff signed had the amount of Uganda shillings 50,000,000/=. This explains why in exhibit D6 the Defendant demanded from Messieurs Mikwano Investments Limited a total of Uganda shillings 201, 427,460/=. The basis of the claim for the sum of money are overdraft (expired) of Uganda shillings 84,628,649/=: commercial loan No. 1 of Uganda shillings 20,385,826/=. Commercial No. 2 of Uganda shillings 17,678,464/=: Hima Cement of Uganda shillings 49,825,069/= and finally a lease of Uganda shillings 3,633,054/=.

Counsel further wondered if the loan of Messieurs Mikwano Investments Limited was restructured at the time the Plaintiff signed the mortgage agreement, why all these items were not listed? Furthermore in the final demand exhibit P6 the Defendant claims that the Plaintiff had stood surety and guaranteed all loan obligations of the Defendant but in the particular agreement the items listed above forming the total claim against **Messieurs** Mikwano Investments Limited were not indicated. Counsel invited the court to find that the Plaintiff only stood surety for Uganda shillings 50,000,000/= in relation to the cement from Hima Cement Ltd Mikwano Investments Limited had several loan obligations with the Defendant including commercial loans and loses which were never brought to the attention of the Plaintiff and in any case he never guaranteed the repayment.

In reply the Defendant submitted that one Geoffrey Serunjogi and the Plaintiff had always been guarantors for loans, mortgage or overdraft facilities in favour of Messieurs Mikwano Investments Limited and always allowed their property described above to be used as security

either expressly or impliedly in previous transactions since 23rd of May 2008. On 29 September 2008 the Defendant granted a guarantee facility of Uganda shillings 50,000,000/= to Mikwano Investments Ltd in favour of Hima Cement Ltd and the Plaintiffs land comprised in Kibuga block 5 plot 306 at Mulago was charged as security for the facility.

Subsequently on 5 November 2009 the Defendant restructured Mikwano Investments Limited overdraft facility through a letter of offer with the following details: overdraft limit of Uganda shillings 50,000,000/=; loan facility of Uganda shillings 47,041,507/=; and a bank guarantee of Uganda shillings 50,000,000/= and the security facility of the Plaintiff and Geoffrey Serunjogi remained the security for the restructured loan facilities. As part of the agreement the Defendant made a guarantee of Uganda shillings 50,000,000/= in favour of Messieurs Hima Cement Ltd which sum would become payable on default by Mikwano Investments Limited. Mikwano Investments defaulted and Hima Cement wrote to the Defendant demanding for payment of the guaranteed sum. The Plaintiff failed to meet his obligations under the transaction and instead wrote to the Defendant suggesting payments in instalments which was unacceptable and the Defendant demanded for payment on 10 January 2011 of the amount due under the mortgage agreement. On 28 September 2010 the Defendant wrote to the managing director of Mikwano Investments Limited informing them of their total debt amounting to Uganda shillings 205,493,949/=. On 20 December 2010, George Serunjogi the Plaintiffs fellow co-guarantor wrote to the Defendant accepting his liability and entered into an agreement with the Defendant and his debt obligation was discounted to Uganda shillings 70,000,000/=.

The Defendants Counsel invited the court to find that the Plaintiff is trying to avoid financial liability by trying to arrange facts in a dramatic avoidance ploy. Finding himself in the deep pit of financial liability, the Plaintiff is attempting to put himself out. There is glaring documentary proof of his financial liability. All that the Plaintiff could answer when cross examined was that he had only guaranteed Uganda shillings 50,000,000/= and therefore from his own testimony it is obvious that the Plaintiff guaranteed Mikwano Investments Limited its credit facilities on the strength of his relationship with one of the directors James Kavuma who happens to be his nephew. This could explain his casual and aloof attitude towards the bank documents he had appended his signature to. On the issue of how much the Plaintiff guaranteed, only two documents need to be considered namely the letter of offer exhibit D3 and the credit facility exhibit P1. According to the testimony of DW1, for a facility to be extended to the borrower, the two documents ought to be originated by the bank and given to the client in a chronological order. The documents speak for themselves and were written in English and signed by all the parties thereto and witnessed by DW1.

Exhibit D3 is the letter of offer to Mikwano Investments Limited and was written on 5 November 2009 addressed to the directors. It is entitled "Overdraft Loan Facilities – Letter of Offer". It clearly indicates that the current overdraft facility of Messieurs Mikwano Investments Limited was Uganda shillings 100,000,000/= and there was an outstanding amount of Uganda

shillings 97,041,507/=. Mikwano Investments Limited and the running overdraft facility which was being restructured to include a new guarantee facility of Uganda shillings 50,000,000/=. DW1 further testified that Mikwano Investments Limited always enjoyed credit facilities from the Defendant guaranteed by the Plaintiff. The restructured facility was an overdraft facility of Uganda shillings 50,000,000/=: a loan facility of Uganda shillings 47,041,507/= and a bank guarantee of Uganda shillings 50,000,000/=. It provided for a further legal mortgage on the Plaintiffs property. The testimony of DW1 is that the Plaintiff's loan had always been pledged as security and in the restructured loan the term "a further legal charge" was used.

The mortgage which is exhibit P1 is a tripartite agreement between Mikwano Investments Limited, the Plaintiff and Geoffrey Serunjogi on the one hand and the Defendant on the other hand. The figures of Uganda shillings 50,000,000/=: 47,041,407/= and Uganda shillings 50,000,000/= were inserted in handwriting. Counsel further submitted that the Plaintiff's attack on the mortgage/further charge on the basis of alleged insertions and alterations had not been proved to the required standard. Insertions would be fraud and requires a higher standard of proof according to the Supreme Court Civil Appeal No. 13 of 1992 in the case of **JWR Kazzora vs. M.L.S. Rukuba reported in [1992] KALR 377 at 385**. The crossings on some of the clauses such as clause C were meant to cross out certain words where alternatives are provided. For instance the words "personal loan/landlord" were crossed out and the words "overdraft" and "guarantee" were left because that is what the parties intended.

On the basis that exhibit P1 was signed by the Plaintiff, and they are listed as guarantors, they are liable upon default of the principal borrower according to the case of **Barclays Bank of Uganda versus Jing Hong and Guo Dong HCCS No. 35 of 2009** applying the case of **Moschi versus Lep Air services Ltd [1973] AC 331**. Having appended his signature to the tripartite agreement and in the absence of fraud or undue influence the Plaintiff cannot claim not to have read the contents of exhibit P1. Counsel further relied on the testimony of PW1/the Plaintiff on his qualifications and career as an internal auditor. In the premises Counsel prayed that the court finds that the Plaintiffs guaranteed Uganda shillings 50,000,000/=: 47,041,407/= and an additional Uganda shillings 50,000,000/= amounting to Uganda shillings 147,041,507/=:

In rejoinder the Plaintiff reiterated earlier submissions and added that the record indicates that the Plaintiff first received a formal demand from the Defendant for Uganda shillings 49,825,068/= on 28th of September 2010 and on 2 October 2010, after five days he wrote to the Defendant bank and expressed willingness to pay. He reiterated submissions on the chronology of events.

On the question of insertions, the Plaintiff's Counsel insisted that DW1 admitted that the Plaintiff was never given a copy of exhibit P1 after execution. Secondly the document was signed by different people at different times. The Plaintiff signed first and the document was retained by the Defendant and other people came and signed afterwards. It was therefore not too remote to

see that the Plaintiff did not witness the insertions or that the insertions or additions were added later on.

As far as the letter of offer is concerned, the Plaintiff had nothing to do with this document because it was written by the Defendant to Messieurs Mikwano Investments Limited. Mentioning the Plaintiffs land in the document does not mean that the Plaintiff permitted his property to be used as security for the figures mentioned in that document. By 23rd of May 2008 the Defendant had made an offer to Messieurs Mikwano Investments Limited stating that the Plaintiff was not agreeable to using his certificate of title as security. Finally the Plaintiff did not dispute printed material in exhibit P1 but rather handwritten insertions.

Issue number two

How much is the Plaintiff indebted to the Defendant under the circumstances?

On the question of how much the Plaintiff owes the Defendant, the Plaintiff and another guaranteed a loan of Uganda shillings 50,000,000/= for purchase of cement from Hima Cement Ltd by mortgage agreement of 3 December 2009. By 28th of September 2010, the outstanding loan obligation was Uganda shillings 49,825,069/=. Upon the demand being made on the Plaintiff on 10 December 2010 the Defendant made a part payment of Uganda shillings 8,000,000/= leaving a balance of Uganda shillings 41,825,069. The Plaintiff has been willing to pay this amount but has been held back by the Defendants outrageous claim for Uganda shillings 206,434,764/= which was not known to the Plaintiff and for which he was not liable.

The Defendant cannot even continue claiming interest from the Plaintiff because the delay in payment was caused by the acts or omissions of the Defendant. The evidence is very clear that the Plaintiff owes the Defendant Uganda shillings 49,825,069/= and the claim that the Plaintiff owes 206,424,764/= as at 10 January 2011 cannot be sustained. Counsel reiterated submissions that the mortgage agreement of 3 December 2009 was altered by inserting the figures of Uganda shillings 50,000,000/=: Uganda shillings 47,041,507/= and Uganda shillings 50,000,000/= totalling to Uganda shillings 147,041,507/=. On the same page there are figures of interest at 22% and 23% suggesting that the amounts do not have an interest rate. If the interest rates are applied to the amounts of Uganda shillings 50,000,000/= and 47,041,507/= for one year period from 3 December 2009, up to 10 January 2011 when the demand for Uganda shillings 206,434,306 was made, one gets a total interest of Uganda shillings 21,819,547/=. If that interest is added to the principal amounts one gets a total figure of Uganda shillings 168,861,054/=. The Plaintiff's Counsel opined that the figure of Uganda shillings 206,434,764/= cannot be justified in anyway. The Defendant did not lead any evidence to prove the sources of the amount neither can it be deduced from the evidence on record.

Moreover it is an admitted fact that Geoffrey Serunjogi admitted liability for the sum of Uganda shillings 70,000,000/= which was a discounted amount and it is a wonder why the Defendant did

not reflect this amount and also further discount it. According to the Plaintiff's Counsel this was clear evidence that the Defendant is bent on defrauding the Plaintiff in this transaction. Consequently Counsel prayed that the court finds that the Plaintiff is indebted to the Defendant in the sum of Uganda shillings 41,825,068/= only.

In reply the defence case is that the Plaintiff is indebted in the amount of Uganda shillings 206,434,764/=. This arose from the restructured facility including three items referred to above amounting to Uganda shillings 147,041,507/=. Upon default by Mikwano Investments Limited, the outstanding amount is Uganda shillings 206,434,764/=.

The Defendants Counsel reiterated submissions that the guarantee of Uganda shillings 50,000,000/= to Hima Cement Ltd was just one of the two facilities made available to Mikwano Investments Limited the principal borrower. Counsel relied on the restructured facility of 3 December 2009. The demand made on the Plaintiff of Uganda shillings 49,805,600/= was not the only amount owing.

The Plaintiff was at all material times aware of the total sums due. On 13 September 2010, the Defendant wrote to the directors of Mikwano Investments Limited on their indebtedness to the Defendant to the tune of Uganda shillings 201,427,460/= and it was copied to the two Sureties. This letter is exhibit D6. The Plaintiff acknowledged receipt of the letter by signing at the bottom corner on 13 September 2010. The Plaintiff never raised the matter as when they received the letter. The letter advised the recipients to clear the arrears within 14 days failure upon which the total amount due would become outstanding.

On the question of interest rates applied amounting to Uganda shillings 21,819,527/=: Counsel got the total wrong because the outstanding amount on the overdraft facility of Uganda shillings 100,000,000/= was Uganda shillings 77,041,507/= and the figure was broken down or restructured into an overdraft limit of Uganda shillings 50,000,000/= and a loan facility of Uganda shillings 47,041,407/= respectively. If interest of 22% is applied to 97,041,574/= one gets Uganda shillings 21,329,131/=. Furthermore if interest of 23% is applied to Uganda shillings 50,000,000/= one gets Uganda shillings 11,500,000/= when added to the principal amount gives the figure of Uganda shillings 201,710,185/=:

The Defendants Counsel further submitted that the documents namely exhibit D6 and D9 show that the Plaintiff owes Uganda shillings 206,434,054/= and show how the figures were arrived at. Had the Plaintiff been in doubt about the figures; he ought to have contested them as far back as 2010 when the contested figures were made available to him. On the question of the other surety paying Uganda shillings 70,000,000/=: the Defendants Counsel submitted that the Plaintiff cannot look to Geoffrey Serunjogi to arrive at what is due and outstanding.

In rejoinder the Plaintiff's Counsel reiterated earlier submissions. He reiterated submissions that the Plaintiff only guaranteed Uganda shillings 50,000,000/= which could be traced to the

agreement of 3 December 2009. Furthermore the Defendant demanded on 28 September 2010 Uganda shillings 49,825,068/= as the outstanding balance on this figure. On the other hand the amount of Uganda shillings 206,434,764/= which the Defendant demanded from the Plaintiff by letter of 10th of February 2011 has nothing to support it. It is not even supported by the mortgage agreement of 3 December 2009. The Defendant's submissions are misleading with on this point. Counsel upon computing the same figure arrived at a total of Uganda shillings 179,890,638/= and not Uganda shillings 206,434,764/= as claimed. It is therefore evident that even if the mortgage agreement of 3 December 2009 was anything to go by, all the Defendant was trying to do was to defraud the Plaintiff by planting unknown figures on him.

As far as the demand exhibit D6 dated 13th of September 2010 and copied to the Plaintiff but addressed to Mikwano Investments Limited by the Defendant is concerned, it dealt with another person's debt and not the Plaintiff's debt. This letter was only copied to the Plaintiff because the total claim contained Uganda shillings 49,825,069/= for Hima Cement Ltd which the Plaintiff knew about and did not deny. It tallies with the fact that it in exhibit P2 the figure of Uganda shillings 49,825,069/= was specifically demanded from the Plaintiff on 28 September 2010 15 days after the demand on Mikwano Investments Limited.

Judgment

I have duly considered the pleadings, the evidence adduced by PW1 and PW2 together with exhibits and the written submissions of Counsel.

The first issue is intertwined with the second issue. The first issue is how much the Plaintiff and co-guarantor, Mr Serunjogi Geoffrey guaranteed under the mortgage agreement? The second issue is how much the Plaintiff is indebted to the Defendant in the circumstances. If the first issue is answered, then the second issue revolves on a matter of calculations. Consequently the first issue will determine the answer to the second issue.

The evidence of PW1 Mr Sebowa Maurice is that he knows the Defendant because he guaranteed an overdraft of **Uganda shillings 50,000,000/=** in favour of Messieurs Mikwano Investments Limited when it obtained cement from Hima Cement Ltd. In the year 2005 Mr James Kavuma trading as Messieurs Mikwano Investments Limited, approached him and requested that he guarantees payment of an overdraft of **Uganda shillings 50,000,000/=** to enable him obtain cement worth the amount from Messrs Hima Cement Ltd. He guaranteed the overdraft and handed over his certificate of title comprised in Kibuga block 5 Plot 306 at Mulago and the loan was eventually fully settled.

In 2009 Mr James Kavuma again requested the Plaintiff to guarantee another loan for **Uganda shillings 50,000,000/=** from the Defendant. Initially he declined to solely guarantee the loan because he wanted his certificate of title freed from the Defendant. Earlier in 2008, the Defendant bank wanted to use his certificate of title for Messieurs Mikwano Investments Limited

outstanding loans and he declined to do so and this was duly communicated by Messieurs Mikwano Investments Limited in a letter dated 23rd of May 2008 exhibit D1.

Thereafter Geoffrey Serunjogi was called upon to jointly guarantee the loan after the Plaintiff declined to have his certificate of title for Kyadondo block 268 plot 255 used as security. They jointly guaranteed a loan of **Uganda shillings 50,000,000/=** from the Defendant to Messieurs Mikwano Investments Limited for the purchase of cement from Hima Cement Ltd. Upon default the Defendant wrote to him claiming **Uganda shillings 49,825,068/=** exhibit P2 which letter disclosed the outstanding amount. Thereafter PW1 wrote to the Defendant requesting to be allowed to pay in instalments and the letter is exhibit P3. Subsequently when he did not get a reply he paid **Uganda shillings 8,000,000/=**. He was therefore surprised and shocked when he received a letter from the Defendant on 10 January 2011 demanding for **Uganda shillings 206,434,764/=**. He testified that he was not a party to the restructuring of the loan agreement relied on by the Defendant and he never guaranteed the sums indicated therein. He testified that he was not a party to exhibit D1, D2 and D3 which the Defendants relied upon. Furthermore some additions had been inserted in the mortgage agreement that he had signed.

The witness insisted that he had guaranteed only **Uganda shillings 50,000,000/=** when he was cross examined and that he was not aware of the figures inserted in the mortgage agreement neither was he aware that he was a guarantor of **Uganda shillings 147,000,000/=**.

DW1 Mr Philip Miiro Kwagala is the Defendant's relationship manager. He obtained the information about the matter from the file of the loan. His testimony was that the Plaintiff and Geoffrey Serunjogi always guaranteed loans, mortgage or overdraft facilities advanced by the Defendant to Messieurs Mikwano Investments Limited and secured by the various properties described above. On 29 September 2008 the Defendant offered a guarantee facility of **Uganda shillings 50,000,000/=** to Mikwano Investments Limited in favour of Hima Cement Ltd and the Plaintiff's land comprised in Kibuga block 5 plot 306 at Mulago. On 5 November 2009 the Defendant restructured the facility through a letter of offer as follows: overdraft limit of **Uganda shillings 50,000,000/=**; loan facility of **Uganda shillings 47,041,507/=** and a bank guarantee of **Uganda shillings 50,000,000/=** using the security of the Plaintiff and Mr Geoffrey Serunjogi. Subsequently a tripartite mortgage/further charge agreement was signed between the Defendant, Messieurs Mikwano Investments Limited, the Plaintiff and one Serunjogi Geoffrey on 3 December 2009 exhibit P1. As part of the agreement the Defendant guaranteed **50,000,000/=** to Messieurs Hima cement Ltd which sum would become payable on default by Mikwano Investments Limited. He was a witness to the tripartite agreement. On cross examination he was not aware of any other document surrendering the title of the Plaintiff other than exhibit P1. When the document was executed, not everybody who signed was present at the same time. The Plaintiff signed alone and Mr Geoffrey Serunjogi also signed alone. Mr Serunjogi came first and the Plaintiff later. The Plaintiff never got a copy when he signed. This is because the document requires registration first. Crossings made on the document were done by one Doris Nahabwe

who filled in the details and gave him a completed set of documents. He expected Mikwano Investments Limited to have explained to the Plaintiff the documents. He further testified that the Plaintiff did not sign the document under duress.

I have carefully examined the documentary evidence. Exhibit P1 is a mortgage/further charge document dated 3rd of December 2009. It is indicated that the mortgage deed is by Messieurs Mikwano Investments Limited called the borrower and the Plaintiff and Mr Geoffrey Serunjogi are referred to as the mortgagors and sureties/borrower's collectively referred to as the mortgagors. The other party is DFCU bank Ltd referred to as DFCU. In paragraph 1 of the mortgage/further charge agreement, three sums of money are revealed. The first sum of money as the consideration is **Uganda shillings 50,000,000/=**. Secondly **Uganda shillings 47,041,407/=** and thirdly **Uganda shillings 50,000,000/=**. The interest rates are indicated as 22% and 23%.

The mortgagors mortgaged the property to secure the repayment to DFCU by the borrowers. The property is described in the heading of the mortgage agreement. The mortgagors signed at page 11 of the mortgage agreement and it is witnessed at page 12 where the mortgagee also signs. Attached to the mortgage deed is consent by a spouse to a land transaction under the Land Regulations 2004 and is signed by one Namuli Eve Kiggundu and is dated 17th of November 2009. It is for block 268 plot 255 and the transaction is indicated as a further charge and the land is situated at Lubowa in Wakiso district. There is no similar consent of a spouse to a land transaction with regard to the land of the Plaintiff at Mulago. At least none is attached to the mortgage deed. Secondly the transaction consented to by the spouse of Geoffrey Serunjogi is a further charge.

Exhibit P2 is dated 28th of September 2010 and addressed to the Plaintiff on the subject "CALL ON THE GUARANTEE" by the Defendant. In that letter the Head of Legal of DFCU Bank wrote to the Plaintiff as follows:

"As you are already aware, on 16 December 2009, the bank issued a guarantee of Uganda shillings 50,000,000/= (in words) to Messieurs Hima Cement in favour of Mikwano Investments Limited.

The bank accepted to issue this guarantee after you, together with one Mr Geoffrey Serunjogi stood as sureties for the full performance of the guarantee.

*We regret to inform you that Messieurs Mikwano Investments subsequently defaulted on the terms and conditions of the guarantee and the bank has thus be called upon to pay and has accordingly paid to Messieurs Hima cement the outstanding sum on the guarantee, being **Uganda shillings 49,825, 068 and 31 cents**. See evidence of payment attached.*

Note further that the above sum continues to accrue interest on a daily basis till payment is made in full.

This is to no demand that you immediately pay to the bank the above-mentioned sums of money and in any case not later than seven (07) days from the date of this letter.

If you fail or ignore the demands of this letter, we shall proceed to dispose of the security created in our favour against your property comprised in Kibuga block 5 plot 306 land at Mulago without any further notice to you...."

The letter is also signed by the Head of Credit of Messieurs DFCU bank.

Exhibit P3 is the response of the Plaintiff on the subject of "CALL ON THE GUARANTEE" and is dated 2nd of October 2010. In that letter the Plaintiff acknowledged the call on the guarantee letter of the Defendant bank and the sum of **Uganda shillings 49,825,068.31** as the outstanding sum on the guarantee. He recognised his financial obligations towards the bank and proposed to pay in instalments of **1,500,000/=** per month if the bank could convert the guarantee into a long-term loan. He further indicated that he was capable of repaying the loan given the fact that he owns property at Block 5 Plot 306 at Mulago. He further requested for an additional loan of **Uganda shillings 20,000,000/=**. The document indicates that it was received by the DFCU bank. The date of receipt of the letter unfortunately was not written on the "received" acknowledgement stamp. Specifically where the date stamp is supposed to appear is blank. On the other documents such as exhibit P4 the date is part of the stamp.

Exhibit P4 is yet another letter of the Plaintiff dated 10th of December 2010 on the same subject matter of "CALL ON THE GUARANTEE" addressed to the Head of Legal, and Head of Credit, DFCU Bank Ltd. In that letter the Plaintiff proposes that the amount outstanding on the loan of **Uganda shillings 49,825,068.31/=** is converted into a long-term loan. Secondly that he was ready to deposit **Uganda shillings 8,000,000/=** as initial payment. The received stamp acknowledging receipt of the letter is dated 10th of December 2010 and is the stamp of DFCU bank. The Plaintiff proposed in the letter that he would repay it in instalments of **2,000,000/=** on a monthly basis. The Plaintiff further produced exhibit P5 which is the deposit slip having the stamp of DFCU bank dated 10th of December 2010 indicating a cash deposit of **Uganda shillings 8,000,000/=**.

On 10 January 2011 just about a month later the Defendant bank Messieurs DFCU bank wrote to the Defendant on the subject of "FINAL DEMAND NOTICE". In that letter the Defendant's managing director referred to the letter of 10th of December 2010 in the response to the earlier letter calling upon the Plaintiff to satisfy the guarantee issued to Hima Cement Ltd in favour of Messieurs Mikwano Investments Limited. In the letter the Plaintiff was advised that upon default of Mikwano Investments Ltd, and the fact that the Plaintiff stood surety and guaranteed the borrowing of the customer, the property comprised in Kibuga block 5 plot 305 at Mulago was charged as security for the repayment of the commercial loans, a guarantee and overdraft facilities. Part of the letter reads as follows:

"The total amount currently outstanding on the indebtedness of Mikwano is Uganda shillings 206,434,764/= (in words), with interest continuing to accrue.

Given the position above, your offer/settlement proposal of Uganda shillings 49,825,068.31/= (also the amount in words), is not acceptable to us. We therefore advise that if no acceptable plan of repayment of the above amount is received by us within a period of seven (07) days from the date of this letter, we shall proceed to dispose of the property to recover the full indebtedness of yourself and Messieurs Mikwano Investments Limited.

We advise that you promptly act to salvage your property from attachment and the Defendant further related costs to you...."

The letter makes reference to the proposal to settle the outstanding indebtedness and then strangely writes that the Plaintiff had offered to settle **Uganda shillings 49,825,068.31**. This is false or misleading because the Plaintiff never offered to settle anything in the letter dated 10th of December 2012 other than the sum of **Uganda shillings 49,825,068.31** which was the amount indicated in the "CALL ON GUARANTEE" letter of the Defendant exhibit P2 and dated 28th of September 2010. The Plaintiff has proved two letters in evidence. The first letter is dated 2nd of October 2010 proposing instalment payments to satisfy the outstanding loan of **Uganda shillings 49,825,068.31**. That the letter directly responded to the "CALL ON GUARANTEE" letter of the Defendant exhibit P2 dated 28th of September 2010 written by the Head of Legal and Head of Credit. In the second letter addressed to the head of legal and head of credit dated 10th of December 2010 the Plaintiff improved on his proposal. In the first proposal he proposed a monthly instalment payment of **1,500,000/=** and also sought a further loan of **Uganda shillings 20,000,000/=**. He wanted the guarantee converted into a long – term loan. In the second proposal dated 10th of December 2010 exhibit P4, the Plaintiff proposed a monthly instalment payment of **Uganda shillings 2,000,000/=**. He indicated that he was ready to deposit **Uganda shillings 8,000,000/=** as initial payment.

Exhibit P6 which is the final demand notice dated 10th of January 2011 refers to the Plaintiff's letter of 10 December 2010. Specifically I would like to quote the first paragraph which is very revealing:

"We refer to your letter dated 10th of December 2010, in response to ours calling upon you to satisfy a guarantee which was issued to Hima Cement Ltd in favour of Messieurs Mikwano Investments Limited."

It is apparent that the Defendant's Managing Director who wrote the letter of 10th of January 2011 made reference to the letter referred to as "CALL ON GUARANTEE". That letter is dated 28th of September 2010 and is written by Head of Legal and Head of Credit. The final demand letter is written by the Managing Director of the Defendant. So by making reference to the letter

of the Head of Credit and Head of Legal of the Defendant bank the Managing Director in exhibit P6 on the subject of "FINAL DEMAND NOTICE" acknowledges that they wrote a letter calling the guarantee of the Plaintiff. However in that letter written by the Head of Legal and Head of Credit the outstanding amount notified to the Plaintiff was **Uganda shillings 49,825,068.31**. Secondly the Plaintiff was notified that it was to satisfy a guarantee issued to Hima Cement Ltd in favour of Messieurs Mikwano Investments Limited. It is exactly the amount paid by the Defendant bank to Messieurs Hima Cement Ltd. This was pursuant to a default in payment of Hima Cement Ltd.

The final demand notice written by the Managing Director of DFCU Bank exhibit P6 dated 10th of January 2011 introduces another outstanding amount based on three underlined particulars namely commercial loans, the guarantee and overdraft facilities. Secondly it is apparent that the Managing Director of DFCU Bank in exhibit P6 introduces the fact that the property of the Plaintiff was the security. Secondly that he stood surety and guaranteed the borrowing of the customer and pledged his property. Thirdly the outstanding amount was of the indebtedness of Mikwano Investments Limited. There is apparently no controversy about the fact that the bank guaranteed to Messieurs Hima cement Ltd up to **Uganda shillings 50,000,000/=** in favour of Messieurs Mikwano Investments Limited. One might speculate that the Defendant's Head of Credit and Head of Legal made the mistake. Before I conclude on that point, it is clear that there is consistency in the fact that the Plaintiff guaranteed **Uganda shillings 50,000,000/=** in favour of the bank which in turn guaranteed **50,000,000/=** in favour of Hima Cement Ltd. The managing director in exhibit P6 introduces another obligation not earlier on communicated to the Plaintiff. I have further established that attached to exhibit P1 which is the mortgage document is consent by spouses to transaction in land dated 17th of November 2009; it is the spouse of Serunjogi Geoffrey who consented to a further charge and not a mortgage with regard to exhibit P1. There is no evidence of the consent of the Plaintiff's spouse.

I have additionally considered the Defendants exhibits on the matter. Exhibit D1 is a letter dated 23rd of May 2008 and addressed to the Bank Manager of DFCU Bank. It is written by a director of Mikwano General Hardware. Strangely the address indicated on the letterhead of Mikwano General Hardware is that of Mikwano Investments Limited. In that letter the director wrote responding to a letter of offer dated 23rd of May 2008 making available an overdraft facility of **Uganda shillings 100,000,000/=** and a full loan amount of **Uganda shillings 150,000,000/=**. Part of the letter indicates that the Plaintiff did not want his property to be charged in respect of that loan. The letter further indicates that it is the major reason why the company contacted Geoffrey Serunjogi to allow his title to be used for the loan. In this regard exhibit D7 is a letter dated 28th of September 2010 by DFCU bank and addressed to Dr Ruth Kavuma Managing Director of Messieurs Mikwano Investments (U) Ltd in which they acknowledge receipt of the letter of the company dated 21st of September 2010 on the subject of: REQUEST FOR EXTENSION OF TIME TO REPAY THE LOAN AND TO CONVERT THE OVERDRAFT INTO A LOAN. In that letter the Defendant informed Messieurs Mikwano Investments (U) Ltd

that Hima cement had called on the bank guarantee and the bank had accordingly paid **Uganda shillings 49,825,069/=**. The Defendant advised the company to take immediate action to regularise their account by paying to the bank the sum of **Uganda shillings 205,493,949/=** on which interest was continuing to accrue. Mikwano Investments (U) Ltd was given 14 days from the delivery of the demand notice in which to regularise the company account or else recovery measures would be taken against the company. The letter was written by the Head of Legal and Head of Credit of DFCU Bank.

Exhibit D2 is a letter dated 29th of September 2008 addressed to the directors of Mikwano Investments Limited offering a bank guarantee of **Uganda shillings 50,000,000/=** in addition to an existing loan of **Uganda shillings 129,047,883/=** and an overdraft facility of **Uganda shillings 100,000,000/=** together with a lease of **Uganda shillings 23,791,446/=** making a total exposure of **Uganda shillings 302,839,329/=**. The purpose of the loan was for submission to Hima Cement Ltd to obtain cement on credit to the tune of **Uganda shillings 50,000,000/=** and the bank would issue a guarantee in favour of Hima Cement Ltd. It indicated that the security would be a further charge on Kibuga block 5 Plot 306 at Mulago. This letter of offer is endorsed by Messieurs Mikwano Investments Limited and DFCU Bank officials. It is not endorsed by the Plaintiff. It is apparent that the offer was to Messieurs Mikwano Investments Limited and was in addition to other facilities. Specifically the offer was of **Uganda shillings 50,000,000/=** but it incorporated other existing loans.

Exhibit D3 is another letter written by DFCU bank addressed to the directors of Mikwano Investments Limited trading as Mikwano General Hardware. It is dated 5th of November 2009. It was noticeably written after the guarantee facility of **Uganda shillings 50,000,000/=** letter of offer of 29 September 2008. I specifically need to point out that the second letter of offer concerning overdraft loan facility letter of offer was written over one year later. Again it is endorsed by officials of Mikwano Investments Limited and the officials of DFCU bank. It is not endorsed by the Plaintiff. In that letter there is an offer of an overdraft limit of **Uganda shillings 50,000,000/=**; loan facility of **Uganda shillings 47,041,507/=** and a bank guarantee of **Uganda shillings 50,000,000/=**.

Exhibit D4 is the guarantee document issued by the bank to Messieurs Hima Cement Ltd dated 16th of December 2009. It guarantees payment of **Uganda shillings 50,000,000/=** for goods supplied on credit to Messieurs Mikwano Investments Limited. Furthermore exhibit D5 is a letter dated 21st of September 2010 from Messieurs Hima Cement Ltd informing the Executive Director of DFCU bank Ltd about the default of Mikwano Investments Limited and demanding payment of **Uganda shillings 49,825,068.31**. The letter "CALL ON GUARANTEE" written by the Head of Legal and Head of Credit to the Plaintiff and received by the Plaintiff on 30 September 2010 is dated 28th of September 2010 after Messieurs Hima Cement Ltd called on the guarantee of the bank.

In exhibit D6 the Defendant bank wrote to Messieurs Mikwano Investments (U) Ltd in a letter dated 13th of September 2010 indicating that the outstanding amount on the account had a total of **Uganda shillings 201,427,460/=** which was supposed to be paid within 14 days from the date of the letter. Subsequently the Defendant also wrote to the Plaintiff exhibit P2 dated 28th of September 2010 just about 15 days later. In that letter they demand payment of **Uganda shillings 49,825,068.31** which is the amount guaranteed and paid to Hima Cement Ltd. The conclusion on the basis of the exhibits is inevitable. DFCU bank only demanded **Uganda shillings 49,825,068.31** from the Plaintiff after it had made another demand on Messieurs Mikwano Investments Limited for the outstanding amount which included the amount in default of payment of Hima Cement Ltd. The question is why they did not write about or demand the entire outstanding amount from the plaintiff at once? The evidence is consistent with the Plaintiffs belief that he only guaranteed **Uganda shillings 50,000,000/=** and it was for the business of obtaining cement on credit by Messieurs Mikwano Investments Limited. Secondly in exhibit D8 dated 20th of December 2010 Mr Geoffrey Serunjogi wrote to the managing director of DFCU bank Ltd on the question of the call on guarantee for Mikwano Investments Limited. The letter was received by DFCU bank on 22 December 2010. He proposed that the amount demanded as outstanding and due on his account to be discounted to **Uganda shillings 70,000,000/=** and converted into a loan payable within four years at an interest rate of 14% per annum. The actual amount of money that was outstanding on the account of Mr Geoffrey Serunjogi is however not in evidence.

The documentary evidence clearly indicates that all the offer letters concerning the so-called restructured facility did not have the Plaintiff as a party. The only document that the Plaintiff admitted as having signed is exhibit P1 which is the further charge document. I have carefully considered this evidence. First of all it appears prima facie to be a mortgage. On the first page are the words "Mortgage/Further Charge". However the word "mortgage" was crossed out. The evidence of DW1 is that the Plaintiff did not sign the document at the same time as the other parties. The Plaintiff's signature appears at page 11 of the exhibit. It is on the same line as that of Geoffrey Serunjogi. However DW1 indicated that the Plaintiff signed first. PW1 who is the Plaintiff testified that he was not aware of certain insertions in paragraph 1. He was only aware of the guarantee amount of **Uganda shillings 50,000,000/=**. That is what he signed. The truth of the plaintiff's testimony lies in the fact that the loan was for a sum of **Uganda shillings 50,000,000/=** which was the actual potential amount that could be used by Messieurs Mikwano Investments Limited. The other amounts were already outstanding amounts from previous transactions. In other words the plaintiff guaranteed a new liability and not a past liability.

DW1 was not responsible for filling in the details. The details were filled in by yet another person namely Doris Nahabwe. There is no credible evidence as to when she filled in the details. DW1 testified that she filled in the details and gave him a completed set of documents for signature. He expected Messieurs Mikwano Investments Limited to have explained the document to the Plaintiff. However evidence shows that the other loans had something to do with the

previous loans of Messieurs Mikwano Investments Limited and under the guarantee. This is consistent with the actions of the Defendant in demanding only amounts relating to **50,000,000** guarantees for the Hima Cement guarantee. The implication of the defendants defence is that the plaintiff guaranteed previous obligations of over **Uganda shillings 97 million**.

Furthermore the Defendants own document expressly indicated that Messieurs Mikwano Investments Limited communicated in respect of the previous loans that the Plaintiff was not a desirous of having his title deed used as security. This fact was the primary reason why they got another person namely Mr Geoffrey Serunjogi was to have an alternative to the Plaintiff's title as security. Exhibit P1 is only the consent of a wife of Mr Geoffrey Serunjogi supporting the inference that it was only his title which had been pledged as security for any previous loans. The crux of the issue is that no guarantee instrument has been produced in evidence. It is very unlikely that the Plaintiff was involved in a further charge. A further charge in any case ought to be based on previous security which had already been pledged. And the evidence is that the previous security was that of Mr Geoffrey Serunjogi. The Plaintiff's evidence is that there were additions to exhibit P1. I am inclined to accept this testimony because he has proved its case on the balance of probabilities. His testimony is supported by the Defendants own document exhibit D1 dated 23rd of May 2008. It is further supported by the actions of the Defendants officials by making a demand for an outstanding amount of only **Uganda shillings 49,825,068.31**. This supports the testimony of the Plaintiff that he was not privy to other loan undertakings of Mikwano Investments Limited. It is inconsistent of the Defendant's officials to demand for the guaranteed amount for Hima cement only after having demanded the full outstanding amount from Messieurs Mikwano Investments Limited. When Messieurs Mikwano Investments Limited in the previous demand failed to make good payments on the outstanding amounts, DFCU officials decided to proceed against the guarantors namely Geoffrey Serunjogi and the Plaintiff. The proceeded against Geoffrey Serunjogi but there is no evidence of what kind of demand they made in terms of amounts and whether it incorporated the other loans referred to in exhibit D1. The evidence is that the demand was "discounted" to **Uganda Shillings 70,000,000/=**. They also proceeded against the Plaintiff with regard to the Hima Cement guarantee which had a maximum of **Uganda shillings 50,000,000/=**. Specifically Hima cement was owed a sum of **Uganda shillings 49,825,068.31** which is what the Defendants officials demanded from the guarantor thereof Mr Sebowa Maurice, the Plaintiff.

The evidence of the document exhibit P1 itself is not sufficient because the Plaintiff was unaware of the other loans. Specifically the other loans concerning the overdraft facility and the loan facility had nothing to do with the guarantee for Hima Cement Ltd. The question however of how much the Plaintiff and Mr Serunjogi Geoffrey guaranteed under the mortgage agreement cannot be conclusively answered. What can be answered is what the Plaintiff guaranteed was **Uganda shillings 50,000,000/=** a fact which is consistent with the evidence of the Defendant and the Defendant own documents and the action of its officials. Moreover exhibit P1 demonstrates that it was possible on the face of it meant to be a further charge document. A further charge

presupposes an existing charge on property. As noted above the entitlement of the document shows that the word "mortgage" was crossed out. What was left was "further charge". This is supported by the consent of the spouses to transactions in land annexed to the "further charge" document which specifically stipulates on 17 November 2009 that the spouse of Geoffrey Serunjogi consented to a further charge in paragraph 6 of the document under the Land Regulations 2004. Secondly the property described in the consent is block 268 plot 255 land at Lubowa and not the land at Mulago. Additionally exhibits D1 which is the Defendant's document dated 23rd of May 2008 just over a year before the further charge document was executed is a request of Mikwano Investments Limited trading as Mikwano General Hardware requested in writing to the bank manager DFCU bank not to charge the property comprised in Kibuga block 5 plot 306 at Mulago, which property belongs to the plaintiff. Notwithstanding the total amount mentioned in exhibit P1 as being the consideration or the loan under the "Mortgage/Further Charge" document is **Uganda shillings 147,041,507/=**. This is because the document speaks for itself. However the conclusion is simplistic because further evidence is that some figures had been inserted without the knowledge of the Plaintiff. As mentioned above the Plaintiff believed that he was guaranteeing a sum of **Uganda shillings 50,000,000/=**. However they are mentioned in the document as Mortgagors. There is absolutely no evidence to suggest that the Plaintiff and Geoffrey Serunjogi acted in concert. The signed on different occasions and the possibility exists that each of them signed on the basis of different amounts inserted for their benefit. There is however no evidence other than the evidence of PW1, the Plaintiff that those other figures had been inserted. I am inclined to believe the testimony of the Plaintiff who has proved his case on the balance of probabilities. In fact only **Uganda shillings 50,000,000/=** was guaranteed because other amounts were previous indebtedness of Messieurs Mikwano Investments Limited. Whereas no deed of guarantee deed was proved, both parties refer to the plaintiff and Geoffrey Serungoji as guarantors and not mortgagors. In the absence of documentary proof of the deed of guarantee, the conclusion is that the plaintiff is referred to as a guarantor and not mortgagor because the bank never loaned him any money. In other words both parties do not rely on exhibit P1 which is the Mortgage or Further Charge deed to assert that the Plaintiff is a guarantor. Exhibit P1 is not a deed of guarantee and does not purport to be an instrument of guarantee. In the premises issue number one is resolved in favour of the Plaintiff and the conclusion is that as far as the plaintiff is concerned he guaranteed **Uganda shillings 50,000,000/=** only. There is no evidence as to how much Serunjogi Geoffrey guaranteed.

Issue number 2 is how much the Plaintiff is indebted to the Defendant under the circumstances.

Issue number two has been resolved under issue number one. The evidence is consistent with the truth that the Plaintiff guaranteed **Uganda shillings 50,000,000/=** against failure of Mikwano Investments Limited to pay the bank that amount which the bank had guaranteed for the supply of Mikwano Investments Limited on credit by Hima Cement Ltd. This is further proved on the balance of probabilities and to the satisfaction of court by the Defendant on demand and representation of the outstanding sum owed by the Plaintiff to the Defendant. I specifically refer

to exhibit P2 which is the document dated 28th of September 2010 on the subject of "CALL ON THE GUARANTEE" written to the Plaintiff by the Head of Legal and Head of Credit of the Defendant. They demanded from the Plaintiff a sum of **Uganda shillings 49,825,068.31** which is the exact amount the bank owed to Hima Cement Ltd and is reflected in several documents namely exhibit D6 comprising the breakdown of the outstanding indebtedness of Mikwano Investments Limited which characterised that amount as concerning money owed to Hima Cement Ltd. Exhibit D7 also indicates that the amount was **Uganda shillings 49,825,068.31** in a letter dated 28th of September 2010 and addressed to the managing director of Messieurs Mikwano Investments (U) Ltd by the Head Legal and Head of Credit DFCU bank. Hima Cement Ltd in exhibit D5 demanded for the said amount. In exhibit D4 DFCU bank executed a guarantee document guaranteeing **Uganda shillings 50,000,000/=**. In exhibit D2 dated 29th of September 2008 DFCU bank offered to Mikwano Investments Limited a guarantee facility of Uganda shillings 50,000,000/=. Again in exhibit D3 dated 9th of November 2009 DFCU bank offer to Mikwano Investments Limited overdraft loan facilities. In that letter of offer it was indicated that the current outstanding amount was Uganda shillings 97,041,507/=. This is the amount which is additionally reflected in exhibit P1 broken down into **Uganda shillings 50 million** and **Uganda shillings 47,041,507/=** additional to the guarantee amount of **Uganda shillings 50,000,000/=** owed by the Plaintiff. In other words when the mortgage/further charge document dated third of December 2009 exhibit P1 was purportedly executed, Mikwano Investments Limited had an outstanding amount of **Uganda shillings 97,041,507/=** owing to DFCU bank and under previous arrangements. For emphasis the credit facility offered by the defendant bank was only worth **Uganda shillings 50,000,000/=**.

The only evidence of the previous arrangements is exhibited D1 on the point that the Plaintiff did not want his property to be pledged as security for an overdraft facility of **Uganda shillings 100,000,000/=** and the full loan amount of Uganda shillings 150,000,000/=. In that letter written by Mikwano General Hardware also described as Mikwano Investments Limited in the address thereof, the director informed the DFCU bank that the Plaintiff had made the request not to charge the property comprised in Kibuga block 5 plot 306 Mulago with the loan overdraft facility and full loan amount. They specifically mentioned that that it was the main reason why they had brought another guarantor who had a separate property Kyadondo Block 268 Plot 255 at Lubowa. That other guarantor is Geoffrey Serunjogi.

The conclusion is that the Plaintiff has proved that he only guaranteed Uganda shillings 50,000,000/= for payment of the Defendant upon default of Mikwano Investments Limited to pay for the credit supply of cement by Hima Cement Ltd and which had been guaranteed by DFCU bank. Finally DFCU bank in an attempt to include the Plaintiff's property as security upon default of Mikwano Investments Limited executed what they called a restructuring offer. I do not accept the so-called restructuring offer in the face of the overwhelming evidence that the Plaintiff guaranteed **Uganda shillings 50,000,000/=** and did not want his property to be charged

for that loan involving over **97,000,000/= Uganda shillings** taken by Mikwano Investments Limited in previous transactions to which he did not want his property used as security.

I have further considered the provisions of the exclusion of oral evidence by documentary evidence. Under section 91 of the Evidence Act, no oral evidence may be admitted in proof of the terms of a written agreement except the document itself. Secondly under section 92 a written document cannot be contradicted or varied through oral testimony so as to contradict, varied, add or subtract from its terms that any fact may be proved which would invalidate any document such as mistake in fact or law. The plaintiff claimed to have been unaware about questions of fact. The document was not executed at the same time with other parties to it. DW1 was noncommittal about the insertions in handwriting as he was not the one who wrote to them and the person who wrote them was never called. In those circumstances the evidence of PW1 is admissible to the extent that he testified that he was unaware of other additions to the document. I do not agree that the plaintiff had to prove fraud of the defendant. Exhibit P1 is not a guarantee deed and both parties unequivocally refer to the plaintiff as a guarantor. He was called upon by the defendant to make good the amount guaranteed. He is not a "Mortgagor" as mentioned in exhibit P1 and he is entitled to insist that he was only a guarantor under an arrangement known to both parties and as reflected in the correspondence admitted in evidence. Particularly the demand was to him as a guarantor of a loan to Messrs Mikwano Investments Ltd. The question was; what was his guarantee worth? It was sufficient for him to prove mistake of fact or being unaware of certain insertions in exhibit P1. That notwithstanding, a guarantee and a mortgage are not the same thing and the plaintiff's evidence of the amount of the guarantee is accepted. In the premises issue number two is also resolved in favour of the Plaintiff.

Issue number three is on remedies available.

The Plaintiff having succeeded in having issues number one and two resolved in his favour is entitled to certain remedies claimed in the plaint. The Plaintiff claims several declarations and an order that the Defendant discloses the amount so far paid by Geoffrey Serunjogi, and an order that the Defendant accepts to receive from the Plaintiff under the guarantee Uganda shillings 50,000,000/= plus interest as at 3 December 2011 less the amount already paid by the Plaintiff.

I will start with the prayers regarding Geoffrey Serunjogi. Those prayers cannot be granted because Geoffrey Serunjogi has not been given a hearing and no order ought to be made which directly affects his interests. He is not a party to the proceedings.

Concerning prayers for declarations, the law is under Order 2 rule 9 of the Civil Procedure Rules which provides that:

"Declaratory judgment

No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought by the suit, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not."

A rule in *pari materia* with Order 2 rule 9 of the Civil Procedure Rules has been interpreted by the English courts. In **Halsbury's laws of England 3rd edition volume 22 paragraph 1610 pages 746 – 747**, it is written that the rule gives a right to declaration without reference to the enforcement of those rights:

"It is however sometimes convenient to obtain a judicial decision upon a state of facts which has not yet arisen, or a declaration of the rights of a party without reference to their enforcement. Such merely declaratory judgments may now be given and the court is authorised to make binding declarations of right whether any consequential relief is or could be claimed or not ..."

In the case of **Guaranty Trust Company of New York versus Hannay and Company Limited [1915] 2 KB 536** it was held by Pickford LJ that a declaration of right could be made even where no consequential relief can be given. It was further held by Bankes LJ at page 568 that the rule:

"enables the court to make the declaration irrespective of whether consequential relief could be claimed or not..."

In this case the Plaintiff wants a declaration about what his obligations to the Defendant are. In ordinary cases it is the Defendant to sue for its entitlements and for the Plaintiff to defend or admit the part of the claim that he agrees with and defend those he is not in agreement with. The rule however enables the Plaintiff's rights as against that of the Defendant to be declared by the court and in the premises the following declarations will issue namely:

1. A declaration issues that the Plaintiff only guaranteed **Uganda shillings 50,000,000/=** advanced by the Defendant to Messieurs Hima Cement Ltd in favour of Mikwano Investments Limited and no more.
2. A declaration issues that the Plaintiff is accordingly indebted to the Defendant as a guarantor of the said amount of **Uganda shillings 50,000,000/=** together with interest, minus any amounts already paid by him towards settlement of his obligations.
3. The other declarations sought by the Plaintiff will not be granted for the reasons that they involve matters which are not appropriate for declaration for instance it cannot be declared that the Defendant is estopped from claiming interest on the ground of violating loan terms when the very document which forms the basis of the Defendant's claim

against the Plaintiff has been successfully contested as having some alterations or insertions which the Plaintiff was not aware of and it is not a deed of guarantee.

4. Regarding the declaration that the Defendant discloses the amount so far paid by Geoffrey Serunjogi, the court has already held that he is not a party to the proceedings and no order will be made affecting his interests. The court has also established that there is no evidence that the Plaintiff and Geoffrey Serunjogi acted in concert. The evidence is that they executed exhibit P1 on different dates.
5. In the premises the Defendant is entitled to receive from the Plaintiff monies arising from a guarantee of Uganda shillings 50,000,000/= plus interest calculated up to the date of filing the suit on 21 September 2012. There is no evidence that the Defendant violated the terms of any loan. The Defendant only gave a final demand which involved other amounts owed by Messieurs Mikwano Investments Limited. Secondly the Defendant attempted to include the Plaintiff's property as security. That security was originally pledged for a guarantee of up to a limit of **Uganda shillings 50,000,000/=**. Since the Plaintiff is willing to pay the sums together with interest, he should be given a chance by the Defendant to settle his obligations.
6. Finally as far as the outstanding sums owed by the Plaintiff to the Defendant is concerned, a declaration issues that the Defendant is bound by its demand for the outstanding amount on a guarantee of the Plaintiff dated 28th of September 2010 addressed to the Plaintiff and signed by the Head of Legal and Head of Credit of the Defendant which discloses a sum of **Uganda shillings 49,825,068.31** and that the Defendant had paid to Hima Cement Ltd. The document was admitted as exhibit P2 and is on the subject "CALL ON THE GUARANTEE".
7. Because the Defendant attempted to apply recovery measures for **Uganda shillings 206,434,764/=** against the Plaintiff in its final demand dated 10th of January 2011 and admitted as exhibit P6, the Plaintiff has succeeded in defending his case of owing less money and therefore the costs of this suit are awarded to the Plaintiff.

Judgment delivered in open court the 13th day of May 2014

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Decision of Hon. Mr. Justice Christopher Madrama

Karuhanga Justus for the defendant

Legal Manager of the defendant Pius Olaki in court

Wameli Anthony for the plaintiff

Plaintiff in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

13 May 2014