THE REPUBLIC OF UGANDA

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

HCT - 00 - CC - CS
-254 - 2009

PLAINTIFF

CITIBANK UGANDA LIMITED

VERSUS

1. **UGANDA FISH PACKERS LTD**
2. **ALPHA GROUP LTD**
3. **MASESE FISH PACKERS LTD**
4. **FIAZ SHOKATALI KURJI >** ***DEFENDANTS***
5. **KARIM SHAMSODIN KURJI**
6. **NAWAZ KURJI**
7. **ARZINA KURJI**

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T :

The facts of this case, as can be surmised from the pleadings are thus;

The Plaintiff extended credit facilities to the 1st Defendant comprised of a term loan, an overdraft, post-shipment and pre-shipment facilities which were executed in facility letters spanning the period of 15th May 2007, 6th November 2007 and 8th September 2008. These facilities were guaranteed by the 2nd - 7th Defendant.

One of the terms in the facilities was that in the occurrence of any event which in the opinion of the Plaintiff might have a material adverse effect on

the 1st Defendant's business or their ability to comply with any o
their obligations, then that would amount to an event of default entitling the Plaintiff to terminate the facilities and demand full payment.

In May 2009, the Managing Director of the 1st Defendant died after which the 1st Defendant struggled to meet their repayment obligations to the Plaintiff. The Plaintiff formed the opinion that the death of the Managing Director constituted a "material adverse effect" event for which the facilities were terminated. On 8th June the Plaintiff issued a formal demand to the 1st Defendant for the repayment of the outstanding amounts on the facilities. The Plaintiff also issued written demands to the 2nd - 7th Defendants on 18th June 2009 to repay the outstanding guaranteed amounts.

Contending that the Defendants had failed to honor the formal demands, the Plaintiff brought this suit in which they seek the recovery of US$ 3,706,895.00, Ugx 7,003,733,847/=, interest on the above amounts at the Plaintiffs prevailing US Dollar rate plus 2.5% and Uganda shilling base rate from 8th June 2009 until payment in full, together with costs.

Denying liability, the Defendants contended that the facilities had been advanced with no proper authorization of the directors of the 1st Defendant and that the facilities are also unenforceable because they were not advanced for the proper purpose of the 1st Defendant. They further contended that the facilities had been vitiated by fraud perpetrated by an employee of the Plaintiff and the 1st Defendant's deceased Managing Director.

By way of counterclaim, the Defendants alleged fraud against the Plaintiff and breach of its common law duty of care to its customer, the 1st Defendant. They contended that because of this, the 1st Defendant

had suffered substantial loss and damage for which they claimed, among others, declarations that the guarantees of the 2nd to 7th Defendant were invalid and unenforceable, indemnity in relation to any losses suffered by the guarantors and damages for negligence and/or breach of contract.

The issues for determination by this court are:

1. Whether the five loan facilities were disbursed by the Plaintiff in accordance with the facility agreements or at all?
2. Whether the 1st Defendant is liable to the Plaintiff as principal debtor in relation to the five facilities or any of them?
3. Whether the 2nd to the 7th Defendants or any of them are liable to the Plaintiff as guarantors in relation to the 5 facilities or any of them?
4. Whether the conduct of Mr Kasekende of itself or taken together with other circumstances surrounding the operations of the 1st Defendant's account exonerate the Defendants or any of them from liability to the Plaintiff in whole or in part?
5. Whether the conduct of Mr Kasekende or any other facts related to the operation of the account render the Plaintiff liable to the Defendants or any of them?
6. What remedies are available to the parties?

The Defendants seek discharge from their guarantees contending that the original contract they entered into as guarantors had been altered. That the purpose of the loan was to buy fish based on accurate and confirmed orders payable by those companies that would be supplied the fish. They contended that this idea was dropped along the way when one of the directors Riyaz Kurji diverted from the original idea and failed to remit the money.

They specifically contend that the bank, through its corrupt official, Robert Kasekende, who was the Relations Officer in charge of the 1st Defendant's account in the Plaintiff bank jumped in the same bed with Riyaz Kurji; and together, well knowing that the draw-downs were based on false purchase orders, mismanaged the funds as they were released from the Plaintiff.

To appreciate what the parties to the suit are saying, it is necessary to know who Robert Kasekende was. Kasekende was a public relations officer in the Plaintiff bank and supervised the 1st Defendant's account on a daily basis. He generated and signed most of the documents concerning the 1st Defendant's account. This he did from the start; for example when the 1st Defendant transferred its operations from Crane Bank to the Plaintiff's bank, it was Kasekende who generated the memorandum to the Plaintiffs operations department on 3rd July 2007 which he signed together with Anthony Ndegwa and Shivish Bhide, the Managing Director. This was to settle the 1st Defendant's initial indebtedness with Crane Bank.

Kasekende signed and was, as PW1 stated, *"the owner of the relationship and so the individual responsible for the account or for the relationship of Uganda Fish Packers."* PW1 further stated that the *"day to day activities of any relationship is managed by the relationship manager, in this case by Robert Kasekende who was the Relationship Manager"*

So when the 1st Defendant wanted a second facility, it was originated by the Relationship manager, Kasekende Robert. PW1 said the facility was performing well. He said;

We were receiving regular inflows into the account in foreign currency

- *We were able to convert this foreign currency into shillings and also make money for the bank*
- *We were able to recover our interest on a monthly basis with no problem at all*
- *We were able to also make payments on behalf of Uganda Fish Packers at a fee"*

So in a profitability perspective, this account was profitable for the bank. Because of the foregoing, when the 1st Defendant wanted a second facility, it was granted. Three months down the road there was a query as to why money was being withdrawn in big sums over the counter. But this query was explained away by Robert Kasekende saying what was going on was within the *"customer's profile"* and that the 1st Defendant needed cash because they were buying fish on a daily basis.

Kasekende also generated memorandums for short term loans; In fact all instructions were ideally signed by him. Then the behavior of Kasekende seems to have changed. He began behaving as if he represented the Defendants instead of the Plaintiff. He shared bank confidential information with them; in some instances he advised the Defendants how to word their letters so as to be more appealing to the bank administration. He also begun receiving bribes and kickbacks from Riyaz Kurji, he defended the failings of the 1st Defendant and helped Riyaz falsify figures so as to *"improvd'* the financial position of the 1st Defendant.

His adverse conduct received illustration from the various communications between himself, Sujal, Riyaz and in some instances the 7th Defendant was copied in. The Defendants contended that Kasekende

received a total of Ugx 131,318,940/= and USD$ 39,000 by way of bribes and kickbacks. Some of the money was spent towards purchase of kitchen floor tiles, aluminium sliding windows and a diesel tipper truck. Riyaz is also believed to have paid for the reception of Kasekende's daughter's wedding at Speke Resort and Conference Centre Munyonyo and bought an HP Compaq laptop for Kasekende. Voucher of payment to Future Group Co. Ltd, a car dealer for the tipper lorry and its logbook were exhibited. The various communications showing inappropriate conduct of both Kasekende and Riyaz were exhibited. None of the foregoing has been disputed by the Plaintiff.

During the prosecution of the Plaintiffs case, the learned Counsel himself went to great lengths to show what sort of character Kasekende was. He used the same brush to paint Riyaz Kurji, the deceased Managing Director of the 1st Defendant. When he asked PW1 to describe Kasekende's behavior, the answer was; *"He was identifying himself more with Uganda Fish Packers than with the Plaintiff "*

When asked by Counsel for the Plaintiff whether Kasekende was manipulating accounts so as to give Uganda Fish Packers a good appearance to the bank, PW1 replied that Kasekende was telling lies; that he told false stories to deceive the bank by denying that new loans were being used to settle old loans yet that was what was happening. He admitted in one of the emails that he had *"no more stories to tell,"* indicating that he had been misinforming his superiors at the bank in regard to the financial position of the 1st Defendant.

Asked whether he had heard any contention that Kasekende was fraudulent, PW1 said it was correct and he had investigated and found as follows;

That Kasekende was sending bank internal information to Uganda Fish Packers, he was giving false information to his superiors in the bank as to the credit worthiness of the company and the operations of its accounts.

He had also found that Kasekende was involved in the falsification of the Uganda Fish Packers management accounts, that he had demanded for a laptop, payment of his wedding reception and had in fact communicated the reception quotation to Riyaz Kurji on 17th March 2009.

PW1 concluded that Kasekende was soliciting kickbacks and that all this conduct was improper conduct of a relationship officer. Because of these fraudulent inducements Kasekende who had the dual responsibility of safe guarding the Plaintiff and 1st Defendant's interests bent all rules expected of a banker and caused the release of money based on fictitious purchase orders and all sorts of procedures that had not been agreed upon.

In their defense, the guarantors said they could not be held by the guarantees executed by them because when the money was drawn down, it was not used for the purpose for which it had been applied for. Furthermore, that the procedure of obtaining the money was also altered and varied which had the effect of discharging the guarantors from their obligations.

The purposes for the loans are clearly set out in the various facility letters. The facility letter dated 15th May 2007 of US$5,000,000 was intended to finance the borrower's working capital requirements; Trial Bundle A1 Page 19.

The 2nd facility letter dated November 16th 2007, which revised the earlier facility to US$ 6,500,000 was for the refinancing of the CAPEX facility with Crane Bank; Trial Bundle A1 Page 29. In the same facility letter, other

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facilities 2,3 and 4 were spelt out. The Facility letter showed that the purpose for Facility 2, equivalent to US$400,000 but paid out in Ugandan shillings, was for the Borrower's working capital requirements and cash management while Facility 3, equivalent to US$ 1,000,000 to be utilized in only Uganda shillings, had a detailed purpose describing how it would be drawn down. It was a *"bills discounting facility with a maximum tenor of 60 days, the post shipment facility would be evidenced through the documentary collection pack, containing a bill of exchange which cites the usance period from the bill of lading date, as well as a transport document (bill of lading), and a request for a post shipment trade loan in Uganda shillings only backed by the evidenced export. "*

The 4th facility of USD$ 100,000 was purposed to enable the company take on aggregate sport and for or forward foreign exchange contracts.

On the 19th September 2008, the Plaintiff, through a Facility letter agreed to extend an additional loan of US$1,900,000 which would only be utilized in Uganda shillings. Its purpose was *"working capital in form of pre- shipment financing. It will be a seasonal pre-shipment facility running from September to April against confirmed customer purchase orders from eligible participating buyers with a haircut of 10%"*

The Defendants contend that the purposes that I have enumerated above were things they were aware of at the execution of their guarantees, that in the course of utilization of these facilities, the Plaintiff and the 1st Defendant's chairman and director Riyaz Kurji disregarded the purposes as provided for in the facility letters, diverting the money to activities

other than those envisaged by the facility letter and furthermore, the Plaintiff and the 1st Defendant's chairman and director Riyaz Kurji completely disregarded the procedures of utilizing the collection pack namely, the bills of exchange and the bill of lading that were clearly provided for in the facility letters. The Defendants therefore sought discharge from the guarantees they had executed.

Under what circumstances can a guarantor be discharged? There are important equitable principles that apply to the conduct of the bank which might lead to the discharge of the guarantor. These defences are based upon the fact that the guarantor is not a party to the contract between the creditor and the debtor and may not have any control over the conduct of the bank but would be affected by the bank's conduct and the operation of the facility agreement. This situation may arise where the guarantor has the benefit of certain rights such as the right to indemnity from the debtor. Under those circumstances, any conduct by the bank that actually or potentially prejudices these rights can operate to discharge a guarantor from liability.

Discharge may occur where the bank releases the debtor or gives him more time to pay. The discharge is based on the fact that the guarantors right at any time to pay the debt and sue the principle in the name of the creditor is interfered with. The discharge may also occur when there is an increase in the underlying loan without approval from the guarantor.

The reason here is because such increase or waiver may change what was agreed upon so unless there are clear words in the guarantee which show that the guarantor agreed to be bound by future changes, he would be discharged; **Triodos Bank NV V Ashley Charles Dobbs [2005] EWCA CIV 630**

He would also be discharged if there is material change in risk being guaranteed. In this case, conduct by the lender or creditor can have the effect of materially changing the balance of the risk that the guarantor had agreed to cover. It should be known that any factual matter that is likely to increase the risk of default by the principle represents a material alteration of risk.

Where also the principle is released from its obligation by operation of law, or release of a co-personal guarantor from its liability will also lead to a discharge. Lastly, where the lender and a co-personal guarantor have the effect of varying the liabilities of the personal guarantor or of prejudicing the exercise of his or her rights could lead to a discharge.

A discharge of the guarantor may also occur where the employees of the creditor bank exhibit carelessness or recklessness by failing to seek approval of the guarantor. This may even occur where seemingly comprehensive standard terms are in place; **Journal of International Banking Law and Regulations Volume 20 issue 12; National Westminster Bank pla V Philip Joseph Bowls [2005] EWHC 182 (QB)** following a principle set out clearly in **Bank of India V Patel (1982) 1 Lloyds Rep 507.**

In the National Westminster Bank case (supra), an employee of the Bank was said to have lied to the court in administration proceedings. The court relied on this information and brought about the downfall of the debtor company. The gurantee was called upon but the guarantor did not pay and a default judgment was obtained by the creditor bank. The guarantor applied to have it set aside and the judge was of the view that the guarantor had a good case for discharge.

From the facts of this case, it is also clear that the unfair conduct of the employee of the creditor bank need not be toward the guarantor for the principle to apply. In the case I have cited above, the guarantor was discharged by conduct towards the principle

The simple lesson one derives from the foregoing is that conduct on the part of the creditor bank which approached to dishonesty would lead to discharge of guarantee. Where a creditor materially alters the terms of a guarantee after signature, the guarantee will be completely discharged. In fact once that happens, you cannot even revert to the original terms. The reason for this is clearly stated in **Master V Miller (1791) 4 T.R.320** that;

"No man shall be permitted to take the chance of committing a fraud, without running the risk of losing by the event when it is detected."

The guarantor must however show potential for prejudice as a result of the alteration if he is to benefit from the protection of the rule. The common law principle therefore is that a guarantee of performance of a specific contract is released if the contract is varied, and the variation is not insubstantial and is not consented to by the guarantor. The best practice therefore is to obtain the guarantor's written consent to any variation to the underlying contract between the principle debtor and the bank.

The question therefore that must be asked and answered is, *does the variation or alteration go beyond the general purview of the original guarantee?* If there is a good arguable case that amendments to the principle contract after the giving of the guarantee have altered the nature of the obligation guaranteed to such an extent as to have changed

the nature of the obligation beyond the reasonable contemplation of the parties at the time the guarantee was given, then a discharge might be sustained; **CIMC Raffles (Singapore Limited) & Anor V Schahin Holdings S.A [2013] EWCA Civ 644**

The issue of purview of the guarantee can only be considered as a whole, case by case in a trial. Giving the guarantor notice of variation may suffice if it can be said that the guarantor has allowed the creditor to think that he has consented; **Holyer V Eyre (1840) 9 C&F 52**

Finally, the effect of **Triodos Bank NV V Ashley Charles Dobbs (supra)** is that assent, whether previous or subsequent to a variation, only renders the guarantor liable for the contract as varied where it remained a contract within the general purview of the original guarantee and if a new contract was to be secured, there had to be a new guarantee.

The resolution that gave the corporate guarantees of Alpha Group and Masese Fish Packers Ltd as well as personal guarantees of directors of Aplha Group Ltd was dated 22nd May 2007 signed by the chairman Riyaz Kurji and Nawaz Kurji Page 44 Trial Bundle Al.

The board resolution of Alpha Group Ltd which sanctioned Alpha Group Ltd to give security to the Plaintiff to guarantee the credit facility provided by the Plaintiff to the 1st Defendant to the tune of US$5,000,000 or the Uganda shilling equivalent. This resolution was signed by the director, Karim Kurji and the secretary dated 12th June 2007

Another resolution in respect of 1.5 m US$ was given by Alpha group ltd on 8/10/2007. On the strength of these resolutions, Alpha group signed corporate guarantee in which it undertook to pay at anytime all money that the 1st Defendant failed^o pay the Plaintiff. This guarantee was in

respect of money extended to the 1st Defendant whose purpose was to buy fish, export the fish and sell to outside countries. From the evidence on record, the purpose of the loan worked for a short time when the Managing Director of the 1st Defendant diverted from the purpose for which the loan had been given and used to money for his own gain and bribery and gifts to Kasekende. At no time when this guarantee was being entered into did the 2nd Defendant guarantee to pay back money other than that obtained towards the purchase of fish.

The fraud that the employee of the Bank, Kasekende, which conduct bound the bank, dealt with the facilities by causing the release of monies in consort with Riyaz for purposes different from which they had given their guarantee; created a complete variation or alteration which went beyond the purview of the original guarantee. The change in purpose of the facility between Robert Kasekende and Riyaz Kurji created an amendment to the principle contract after the guarantee which altered the nature of the obligation guaranteed to such an extent going beyond the reasonable contemplation of the parties at the time the guarantee was given; **CIMC Raffles (Singapore Limited) & Anor V Schahin Holdings S.A (supra)**

These changes were made in complete co-operation and connivance of the Bank's relation's officer who was supposed to monitor and supervise the 1st Defendant's account, who also owed the 2nd Defendant guarantor a duty to ensure that his rights were not prejudiced. The behavior of Kasekende and Riyaz made the guarantee more onerous. There was a complete material change in the risk that had been guaranteed. This change in risk, having been occasioned by the change of purpose of the loan materially increased the risk of default by the principle and

therefore the second defendant could only have remained bound by the guarantee with its approval. This approval having not been obtained and their fraudulent conduct having altered their nature of obligation under which the guarantee was given, it would be unjust to hold the 2nd Defendant to the guarantee. They are therefore accordingly discharged from the guarantee.

The 3rd Defendant also gave a guarantee under similar circumstances as the 2nd Defendant. The purpose for the loan that they guaranteed was for the purchase and sale of fish. This purpose was diverted from by the Relations officer and Riyaz, Managing Director of the 1st Defendant. Money meant for fish was diverted for the personal gain and bribing of Kasekende.

At no time did the 3rd Defendant guarantee the repayment of money which was expended on such activities. The nature of the obligation under which the guarantee was given was therefore altered with the cooperation and full participation of the Relationship Manager of the Plaintiffs bank. That conduct materially changed and increased the balance of the risk that the guarantor had agreed to cover because it greatly increased the risk of default by the principal.

It would therefore be unjust to hold the 2nd Defendant to the guarantee whose nature of obligation was altered. In the circumstances the 3rd Defendant is also discharged from the guarantee.

The 4th, 5th and 6th Defendants, Fiaz Shokatali Kurji, Karim Shamsodin Kurji and Nawaz Kurji respectively also gave personal guarantees, being directors in the 1st, 2nd and 3rd Defendant companies. They gave their guarantees based on the purpose of the facilities. These facilities, as

already said above were totally altered and varied by not only Riyaz Kurji, the Managing Director of the 1st Defendant, but also with the complete support, participation and shrouded in fraud for personal gain of the Relations Manager of the Plaintiff bank. The Plaintiff owed the guarantors a duty to ensure that the money was given out for the purpose assigned to it in the facilities and to check on Riyaz or any of the other co-guarantors whose misconduct came within the knowledge of the Plaintiff.

Instead of such protection, the Relationship manager himself orchestrated a risk which he executed together with the Managing Director of the 1st Defendant in such a manner that it increased the risk and indeed caused the default of the 1st Defendant. This material alteration of risk changed the nature of obligation under which the 4th,5th, and 6th Defendant had given the guarantees. They were not active participants in the day to day running of the 1st Defendant. Therefore, to hold them onto the guarantees which had stood for a different purpose would be unjust and it is this court's finding that they be discharged from the guarantees.

In respect of the 7th Defendant, it was her defense that she did not sign willingly because as an Indian woman she could not say no to her husband who placed the personal guarantee before her for signature. In other words, she intimated that she signed out of undue influence. Submitting on this point, Counsel for the 7th Defendant relied on **Barlcays Bank Pic V O'brien [1991] 1 AC 180** and quoted Lord Browning Wilkinson in these words:

> *"In my judgment, a creditor is put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors;*

a) *The transaction is on the face of not to the financial advantage of the wife*

b) *There is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction. "*

I do agree that husbands may under certain circumstances have influence over their wives and may make them to support a thing that is dear to their husbands. That, in my view is what Lord Brown Wilkinson was thinking of in the Barclays Bank case (supra).

It is a cardinal requirement that guarantors enter into an agreement of guarantee out of their own free will. In the absence of this, the guarantee could be put to test. Their intentions must therefore clearly be seen to be free of undue influence or duress. Where undue influence is detected, the conclusion is that the party did not have the intention to contract. There are many types of undue influence or duress which would affect the contractual obligations of the guarantor or the creditor. One of them, as would apply in a situation like that involving the 7th Defendant is that of a husband or a wife of a business owner or Managing director of a corporation. Under such circumstances, the guarantor might sign a guarantee without the requisite intention to form a contract. In fact even in the absence of physical undue influence, the influence of a wife and husband fall under the doctrine of **"presumed undue influence"**

This presumed undue influence is commonly perceived in a relationship where one party has the possibility of exerting influence over the other. Such relationships are those of husband and wife, parent and wife and

others. In the circumstances therefore, where a bank requires a guarantee to be given by a spouse of the borrower and this spouse is not involved in the day to day management of the business, then the signature of that guarantor should be perceived as one obtained through undue influence. The bank must therefore satisfy itself that the spouse has entered into the agreement of her own free will.

Where spousal relationship arises, the bank must typically require the spouse to receive independent legal advice. In the instant case, one wonders whether the 7th Defendant had the opportunity of getting independent legal advice.

The resolution to appoint the 7th Defendant as a director of the 1st Defendant was reached on 9th September 2008. There is nothing on record to indicate that she was advised to seek independent advice. Indeed she herself told court that she had fears and consulted her father about it but her father is not known to be a person of a legal mind. Independent advice was mandatory unless it was shown that she had been involved in the running of the company and handling finance matters of the company for some time. Hardly had two months passed since she was appointed a director when she was required to sign the guarantee.

Under such circumstances it was the bank's duty to advise her to seek independent legal advice and for her to confirm that she had understood and agreed to be bound; **Lloyds Bank Ltd V Bundi (1975) QB 326; Royal Bank of Scotland V Etridge (2002) 2 AC 773.** The bank in this case has not shown that it privately advised the 7th Defendant and encouraged her to obtain independent legal opinion which she actually got.

This requirement is so important that even where she was a director at the time she executed the guarantee and was involved in the administration, which administration could even have included signing of cheques, it was a requirement that she be advised to seek independent advice and confirm that she had received it.

As said above in the judgment, she had hardly settled in as director when she was required to sign a guarantee. Furthermore, what she had guaranteed, just like in the case of the 2nd - 6th Defendants had been altered. She could not have guaranteed the payment of bribes to the Plaintiffs relation manager nor the expenditure of money on anything else other than the trade in fish.

This alteration changed what she had guaranteed. In conclusion, the fact that she was not advised to seek independent legal advice and the purpose of the facility having been changed by Riyaz and Kasekende without her consent being sought, altered the nature of obligation under which she had given the guarantee and she is accordingly discharged thereof.

The 1st Defendant contended that they could not be held liable for the fraudulent activities of their director, Riyaz Kurji, who was supposed to protect the interests of his company but instead conspired with the Plaintiffs employee and committed fraud against the Plaintiff and caused financial loss to the 1st Defendant. Counsel for the 1st Defendant submitted that the company was a victim of the Plaintiff because the relationship manager who was supposed to ensure that the facility was put to the proper use, turned round and through fraud with the managing director of the company, misdirected the money into other things.

He relied on **Jetvia SA & Anor V Bilta (UK) Ltd (In liquidation 2015 UKSA) 23** which held that under what was called the breach of duty exception, the fraud of the directors could not be attributed to be the fraud of the company. That one could not attribute the misconduct of the director or employee of the company upon the company and that since fraud had been orchestrated by the company's managing director and by the relationship manager of the Plaintiff, then the Defendant should be absolved of the debt.

It is not in dispute that in all facilities the money was dispatched by the Plaintiff onto the account of the 1st Defendant. It is also not in doubt that to settle the debt that the 1st Defendant had with Crane Bank, money was paid by the Plaintiff and that that was the only reason why Crane Bank released the securities. That payment to Crane Bank was for purposes of furthering and effectuating the facilities that were granted to the 1st Defendant. It is also not in doubt that the drawdowns were done through the account of the 1st Defendant. As a principal debtor, it had the responsibility to ensure that the facilities were utilized for the purpose that was intended in the facility agreement. From evidence, it is clear that the draw downs were to be made on the strength of purchase orders which was not done in this case. That notwithstanding, the disbursement of funds took place on the strength of the securities of the 1st Defendant.

The 1st Defendant is a company incorporated in Uganda. An incorporated company is a legal person in law. Despite a company being a legal person in law, it has no will or mind of its own. The purpose for such will or mind arises because of the civil law intention of knowledge as an

ingredient for the cause of action or defense; **El Ajou V Dollar Land Holdings [1994] 2 All ER 685.**

The doctrine that attributes to the company the will and mind of the natural persons or persons who manage and control its actions was stated by Viscount Haldane LC in **Lennards Carrying Co V Asiatic Petroleum Co Ltd [1915] AC 705 at 713** as:

> *"My Lords, a corporation is an abstraction, it has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody, who for some purposes may be called an agent but who is really the directing mind and will of the corporation, the very ego and center of the personality of the company."*

Management and control however are not things to be considered generally. It is therefore necessary to identify the natural person or persons having management and control in relation to the act in point. This was well enunciated in **R V Andrews Weatherfoil Ltd (1972) WLR 118 at 124** by Eveleigh J who said:

> *"It is necessary to establish whether the natural person or persons in question have the status and authority which in law makes their acts in the matter under consideration the acts of the company so that the natural person is to be treated as the company itself "*

It is not in doubt that Riyaz Kurji was the Managing Director of the company involved in its day to day administration. The applications for draw downs were made by him or in his absence, by the 7th Defendant, Arzina Kurji. These two were the ones responsible for the administration and financial management. They wrote and submitted purchase orders,

sought draw downs and received payment through the company account, all in the names of the 1st Defendant. They were the mind of the 1st Defendant and all that was done they did in their capacity as its directors.

If there is any claim that the 1st Defendant would have, these two directors would not be exempt. It is therefore legally unjust to absolve the 1st Defendant company of liability of money that went through its accounts, operated by its own directors. It is also therefore my finding that the 1st Defendant, notwithstanding the fraudulent behavior of its managers is liable to the Plaintiff as recipient of the facilities agreed upon by the two parties.

Judgment is therefore entered in favour of the Plaintiff against the 1st Defendant in the sum of USD$3,706,895 and Ugx 7,003,733,847/= as claimed by the Plaintiff.

The Plaintiff prayed for interest on the above decretal sums. The 1st Defendant took the Plaintiffs money and deprived the Plaintiff which was a bank from use and multiplying it. The only way that the Plaintiff can recover the losses is through the payment of interest. The Plaintiff has asked for 30% interest on the Uganda shilling claim. The bank interest rates on the Uganda shilling have not been static. They have gone up and come down even as low as 17%. In the circumstances I would find an average figure of 22% per annum appropriate. The decretal sum in Uganda shillings of Ugx 7,003,733,847/= will therefore attract interest of 22% per annum from 8th June 2009 until payment in full.
As for interest on the decretal sum in US dollars, court finds a flat interest rate of 2.5% per annum from 8th June 2009 until payment in full

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appropriate.

As for general damages, the Plaintiff did not plead them and because of this, the Defendants were not given a chance to say anything about them. They are hereby denied.

By way of counterclaim, the 1st Defendant sought damages for breach of contract. They contended that it was the duty of the bank to ensure that the facilities were not operated fraudulently and that the bank continued permitting advances to the 1st Defendant notwithstanding the manipulation of the 1st Defendant's financial figures. Though the Plaintiffs official, Kasekende helped Riyaz in masking the fraud and prevented its discovery, the grand scheme to defraud was hatched in the premises of the 1st Defendant itself. Riyaz being the 1st Defendant's mind, the 1st Defendant cannot turn around now and play the innocent party claiming damages. To do so would be tantamount to having their cake and eating it at the same time. In the premises, their counterclaim is dismissed with costs.

The 2nd - 7th Defendant counterclaimed for indemnity by way of damages in relation to any loss suffered by them as guarantors. No evidence was led to this effect thus it remained unproved. This prayer is accordingly denied. However, the 2nd - 7th Defendants having been discharged from their obligations as guarantors are entitled to costs of the instant suit which shall be paid by the 1st Defendant.

In conclusion, judgment is entered in favor of the Plaintiff against the 1st Defendant in the following terms:

a. Recovery of USD$ 3,706,895

b. Recovery of Ugx 7,003,733,847/=

c. Interest on (a) at 2.5% per annum from 8th June 2009 until payment

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in full

d. Interest on (b) at 22% per annum from 8th June 2009 until payment in full.

e. Costs

David K. Wangutusi

JUDGE

Date: 15 July, 2016

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