

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

**HCMA NO 49 OF 2016**

**ARISING FROM HCCS NO 302 OF 2014**

**DON MUWANGUZI}.....APPLICANT**

**VS**

**PRIDE MICROFINANCE LTD}.....RESPONDENT**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**RULING**

The Applicant who is the third Defendant to the main suit commenced this application under the provisions of Order 36 of the Civil Procedure Rules for orders that the judgment, orders and decree in HCCS 302 of 2014 be set aside. Secondly he seeks an order to be granted leave to appear and defend the suit. Thirdly the Applicant seeks an order to issue staying execution of the said judgment, orders and decree and for costs of the application to be provided for.

The grounds of the application are that the Applicant was never served with the relevant court process leading to the judgment, decree and orders. Secondly the Applicant avers that he has a constitutional right to be heard. Thirdly the Applicant avers that the case ought to be decided on its merits. Fourthly that the Applicant is desirous of defending himself and lastly that it is in the interest of justice and law if the application is granted.

The application is supported by the affidavit of the third Defendant to the main suit Don Muwanguzi (hereinafter referred to as the Applicant) who deposes therein that he was never served with court process leading to judgment and orders in HCCS 302 of 2014. Secondly he has a non-derogable constitutional right to be heard prior to any adverse decision affecting his rights and obligations. He is desirous of defending himself and attached the proposed written statement

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of defence and asserts that the matter ought to be resolved after hearing the suit on merits. He further repeats the averments in the notice of motion and deposes that it is in the interest of justice to set aside the judgment and orders.

In reply the Respondent relies on the affidavit of Mr Moses Kanyoola, the branch manager of the Respondent. He deposed that on 10 December 2012 Messieurs Qualista Group Ltd, a company where the Applicant is a director and shareholder accessed a credit facility of Uganda shillings 60,000,000/= repayable with interest at a rate of 23% per annum according to a copy of the loan agreement attached. Mr Musisi Ali, the loan officer who was handling the said company was under his supervision and he got to know the Applicant very well. The company failed or neglected to pay the loan instalments according to the loan agreement and consequently the whole loan amount and interest was recalled. Despite several reminders and demands made on the borrower and the Applicant to settle the outstanding amount, they ignored, failed, and neglected or refused to settle the principal amount and interest due. The Respondent sought to enforce the terms of the loan agreement by filing a summary suit namely the main suit HCCS Number 302 of 2014 against the borrower and its Guarantors. The Applicant was sued as the third Defendant in his capacity as a Guarantor. He knows the Applicant as a pastor whose church is located at Najjera. He was requested by the Respondent's clerk Mr Okurut Isaac to help him identify the Applicant and the other Guarantors so that the court papers would be served upon them. He went with the said clerk on the 17<sup>th</sup> of May 2014 together with Mr Musisi Ali, the loans officer to the Applicant's church and identified the Applicant. The process server informed the Applicant that the purpose of the visit was to deliver the court documents which were handed over to him. The Applicant then informed them that he would not acknowledge receipt on the basis of advice of his lawyer. After delivering copies of the court documents which are: the summons in summary suit and the plaint under summary procedure. The affidavit of service was annexed.

The affidavit of service is that of Mr Okurut Isaac deposed on the 20<sup>th</sup> of May 2014. He deposes therein that he is a male adult Ugandan of sound mind and an approved court process server of the High Court and all courts subordinate thereto. He received summons on the 15<sup>th</sup> of May 2014 together with the attached plaint under summary procedure for service upon the Defendants. He

went to the third Defendant/the Applicant's place on the 17<sup>th</sup> of May 2014 around 11 AM with Mr Musisi Ali and Mr Kanyoola Moses. He tendered copies of the summons together with the plaint on the Applicant upon his being identified by the Respondents officials mentioned above. The Applicant perused the document and called a person whom he referred to as his lawyer whereupon he informed the court process server that his lawyer had advised him to retain the documents but not to acknowledge receipt until after the lawyer had perused the documents. They left the summons together with the attached summary plaint with the Applicant.

The court was addressed in written submissions. The Applicant was represented by Counsel Tugumikirize, holding brief for Counsel Aaron Kiiza while the Respondent was represented by Counsel Harriet Sentomero.

The Applicant relies on order 36 rule 11 which allows a default decree obtained under Order 36 to be set aside if the court is satisfied that the service of the summons was not effective or for any other good cause. The court may set aside the decree or if necessary set aside and stay execution and may also give leave for the Applicant/Defendant to appear to the summons and to defend the suit if it seems reasonable to the court to do so and on such terms as the court thinks fit. Counsel relied on the case of **Geoffrey Gatete and Angela Maria Nakigonya versus William Kyobe Supreme Court Civil Appeal Number 7 of 2005**. In that appeal Mulenga JSC inter alia held that the issue is whether service on the Defendant was effective service. The surest way of effective service is to serve the Defendant in person though there are other diverse methods or modes of serving summons and there was a possibility of the service failing to produce the intended result which is to make the Defendant aware of the suit.

On the issue of whether service was effective or not, the Applicant's Counsel submitted that this could be gathered from annexure "C" and annexure "D" which are affidavits of service sworn by process servers from the Respondent and attached to the affidavit in reply in this application.

The Applicant's Counsel relied on paragraphs 3, 6 and 10 of the affidavit in support of the application for the assertion that there was contradiction between Annexure "C" and Annexure "D". In Annexure "C" it is written that the work place of the Applicant is Najeera Busibante Zone Wakiso, where the Applicant was in a church. In paragraph 10 they went to the second

Defendant's residence which was located at Najeera Kungu Zone Wakiso. In Annexure "D" it is written that on the 24<sup>th</sup> of February, 2015 they proceeded from the Plaintiff's offices together with one Moses Isingoma an employee of the Plaintiffs to the third Defendant's workplace in Kungu. He submitted that there are two affidavits on record which purport to serve the Applicant at the Applicant's place of work but located in different zones. Counsel submitted that because of the inconsistency in the two affidavits, the service of the court process on the Applicant cannot be good and effective service. He further submitted that the inconsistencies in affidavits cannot be ignored however minor and where an affidavit contains an obvious falsehood then it naturally becomes suspect. He relied on the case of **BITAITANA versus KANANURA (1977) HCB 34**.

Furthermore the Applicant's Counsel submitted that the application can be granted for any other good cause. For good cause Counsel relied on a copy of the guarantee attached as annexure "B" and clause 1 thereof. He submitted that the clause required the Respondent to make a demand in writing as required by the guarantee but the Respondent breached this term. The Respondent instead sought to enforce the terms of the loan agreement and the guarantees by filing a summary suit against the borrower and the Guarantors. The Applicant was not issued with a demand for the amount of money he guaranteed according to the guarantee instruments. The matter to be considered is whether the suit is defective and premature for failure by the Respondent to serve the Applicants with a written demand?

Secondly the Applicant's Counsel submitted that the claim against the Applicant exceeded the amount guaranteed because the plaint is for recovery of Uganda shillings 101,592,003/= and the Applicant only guaranteed an amount not exceeding Uganda shillings 87,600,000/=. He submitted that the extent of the liability of a Guarantor is dependent on the contract according to the case of **DFCU Bank (formerly Gold Trust Bank Ltd) versus Manjit Kent and Rajesh Kent HCCS 193 of 2000** and a passage from **Halsbury's laws of England fourth edition volume 20 paragraph 183** that a Guarantor cannot be made liable for more than what he has undertaken. Thirdly the Respondent holds the Applicant certificate of title as security for the amount guaranteed and there is a mortgage on the said land. The Respondent has all the right to exercise the right to foreclose and realise the money guaranteed, the guarantee is just and

obligations collateral to the mortgage which in no way stands on its own and can therefore be greater than the obligation of the mortgagor. He relied on the case of **William Sebuliba Kayongo and Berkeley Educational Enterprises Ltd versus Barclays Bank of Uganda**. It was held that a guarantee signed is an obligation collateral to a mortgage within the meaning of section 16 of the Mortgage Act. He submitted that the question for consideration is whether the Respondent can realise both the mortgage and the guarantees at the same time.

### **Submissions of the Respondent in the reply:**

Counsel referred court to the evidence set out at the beginning of this ruling. With regard to the affidavit of service in the main suit annexure "C" to the affidavit in reply, paragraph 2 of 9 of Mr Okurut Isaac narrates in detail how the Applicant was served with summons in the main suit. The Applicant was first identified by his loan officer Mr Musisi Ali after which summons was served on him. Consequently the Respondent's submission is that there was effective service as interpreted by the Supreme Court in the case of **Geoffrey Gatete and Angela Maria Nakigonya versus William Kyobe SCCA 7 of 2005** where Mulenga JSC held that effective service means making the Defendant aware of the summons.

The Respondent's Counsel further submitted that irrespective of the fact that the Applicant refused to acknowledge receipt of the summons, the process is narrated in the affidavit of service. The Applicant was made aware of the claim though he refused to acknowledge receipt of the documents and deliberately chose not to file his defence. Since the contents of the affidavit proving service has not been denied in the affidavit in support of the Applicant's application, it proves that the Applicant was made aware of the claim but refused to acknowledge receipt of the documents and deliberately chose not to file his defence. The Applicant was further made aware of the taxation proceedings but also did not defend the same. Annexure "C" and annexure "D" clearly indicates that summons of the main suit were served first to the Applicant in his church and later to an agent at his church respectively.

The affidavit of Isaac Okurut has no inconsistencies at all but clearly narrates the whole exercise including how he identified the Applicant and it leaves no doubt as to whether personal service was effected in line with Order 5 rule 10 of the Civil Procedure Rules. With regard to references

to different locations in Najjera, the Respondent submits that the Applicant does not outright deny receipt of the court documents and does not deny the fact that he is the person who owns the church in Najjera. Counsel further submitted that the facts in **Bitaitana versus Kananura (1977) HCB 34** are distinguishable from the Respondent's case. In that case reference was made to inconsistencies in one affidavit made by the same deponent. On the other hand the affidavit of Mr Isaac Okurut which this honourable court relied upon to enter the ex parte judgment did not have any falsehoods and in fact its content has been augmented by the affidavit in reply deposed to by Mr Kanyoola who was part of the team that identified the Applicant when the plaint was served on him. Secondly the different zones referred to in respect of the different deponents concerned different court processes. The similarity in both the affidavits is the description of the Applicant who owns a church in Najjera. The Applicant does not deny having knowledge of the personalities mentioned especially in the affidavit of service of the taxation proceedings. In the case of **Shah versus Mbogo and another (1967) 1 EA 116** it was held that in applying the principle of courts discretion to set aside a judgment/decree it is intended to avoid injustice or hardship resulting from accidental inadvertence or excusable error but not to assist a person who would deliberately sought to obstruct or delay justice.

With regard to the Applicant submission on whether the Applicant has any other good cause, the Respondent's Counsel submitted that from the pleadings filed in court and the grounds stated therein, the issue should be answered in the negative because the Applicant did not prove by affidavit or otherwise that he had a bona fide triable issue. Furthermore it is not true that the Respondent was not served with notice of default. In the affidavit in reply Mr Kanyoola deposes that despite several reminders and demands made on the borrower and the Applicant to settle the outstanding amount, they ignored, failed and neglected or refused to settle the claim. Furthermore in the case of **DFCU bank versus Manjit Kent and the Rajesh Kent HCCS 193 of 2000 Kiryabwire J** on the issue of whether the bank will recover from the Guarantors held that they were liable for as long as the demands for payment were served upon them. Mr Moses Kanyoola further deposes that the decree in the main suit had already been issued and the Applicant made part payment of Uganda shillings 5,000,000/= on 7 October 2015 when the warrant of arrest was returned to the High Court, execution division and Applicant consented to paying the Respondent Uganda shillings 10,000,000/=.

The Respondent's Counsel submitted that the Applicant was not only a shareholder but also a director in the Defendant Company which accessed credit facilities and he had a lot to say in the decision-making process of the company. In the premises the principle of a Guarantor being a favoured debtor is not applicable to the facts of this case. Furthermore the case of **William Sebuliba Kayongo and Berkeley Educational Enterprises Ltd versus Barclays bank of Uganda HCMA 325 of 2008 arising from HCCS 111 of 2008** are distinguishable from the facts of this case. In that case the Guarantors therein were not shareholders in the defaulting company. In the instant case the Applicant is not only a shareholder and a director but also is the donor of powers of attorney in respect of the security which has been pledged. The principal debtor was a creature of the Applicant and the master who the Applicant is holding before his face to avoid the recognition by the eyes of equity when he does not deny the claim at all. From the submission, the Applicant has impliedly admitted liability for the sum of 87,600,000/= which amounts are the maximum he guaranteed. Counsel further prayed that if the court is inclined to consider that the Applicant is a favoured debtor, he prayed that an order for the said amount is made by this honourable court.

On the question of the subsistence of the mortgage on the Applicants title, the Respondent submitted that the Applicant under the section 16 of the Mortgage Act which provides for recovery of the mortgage moneys in circumstances where the mortgagee were absent are misconceived and cannot be applicable to the circumstances of this case. The guarantee was meant to materialise upon default of the principal debtor and is in addition to and without prejudice to any other security offered by the debtor. If the Applicant paid up debt he would be entitled to the securities held by the Respondent in respect thereof (see **Law and Practice of Banking by J Milnes Holden volume 2 and 8<sup>th</sup> Edition page 264**). In the case of **Maria Odido versus Barclays bank Ltd HCMA 0645 of 2008** Honourable Justice Lamech Mukasa held that a Guarantor is liable if the principal debtor fails to pay. The authority is misconceived because in that case the liability of the principal debtor was not in contention. In the instant case the default of the principal debtor which is a company owned by the Applicant is not in dispute and demands were on several occasions issued to the Applicant and for that reason his application must fail. The Applicant has not shown any defence to the claim.

Furthermore whereas the Applicant has a constitutional right to be heard, he waived the same when he failed to file an application for leave to appear and defend the suit. In the premises the application should be dismissed with costs.

### **Applicant's submissions in rejoinder**

On the issue of whether the Defendant ever became aware of the summons as required by law Counsel reiterated earlier submissions. Furthermore he reiterated submissions that the contradictions with regard to the location of the Applicant's offices in the two affidavits annexure "C" and annexure "D" shows that the information therein cannot be true. It is logical that the deponents were served the Applicant should identify the same location or address where court process was delivered. Court process was delivered in two different places. The discrepancy is material and exposes the lies in the affidavit of service on which the court relied to enter judgment in default. The Applicant is not raising the issue of service to obstruct justice by drawing the attention of the court to the inconsistency to achieve justice. Justice should not be obtained on the basis of lies. Furthermore Counsel submitted that annexure "D" begs belief because agents concerned were not empowered under the law to accept service and as such it cannot be conclusively said to have served the Applicant.

With regard to whether any other good cause has been disclosed, the Applicant's Counsel submitted that clause 1 of the contract of guarantee required the Respondent to give a written demand. A summary plaint duly filed in court is not a written demand envisaged under the contract. The demand ought to have been attached to the summary plaint if at all it had been issued. In the absence of the demand the suit was prematurely brought to court and ought to be dismissed. Failure to issue such a notice in writing is in breach of the contract of guarantee between the Applicant and the Respondent.

Counsel further submitted that he wished to contest the consent agreement entered into by the Applicant when he was arrested and was due for committal to a civil prison. The circumstance under which the written consent was signed leaves a lot to be desired. A warrant of arrest was returned to the court at the time when Uganda shillings 5,000,000/= was extracted from the

Applicant. That payment does not bar the Applicant from challenging the decree and it did not amount to a waiver of his rights.

With regard to the submission asking the court to recognise that the Applicant was not only a shareholder but a director of the company which accessed the credit facility, such an argument is only speculative and is oblivious of the fact that company decisions are reached through unanimous resolutions. The Respondent knows that the Applicant is a shareholder and director and also guaranteed the loan. It would be foolhardy to sue the Applicant who has been running the Defendant Company which has defaulted when you have the security. Money is primarily lent against security or ability to recover the money on default. The fallback position upon default by the Defendant Company which was under management of the Applicant can only be the mortgage not the Guarantor. Furthermore the Respondent seems to have conceded that the current claim exceeded the amount claimable under the guarantee contract. Counsel prayed that the suit should be dismissed.

### **Ruling**

I have carefully considered the Applicant's Application, the affidavit for and against as well as the submissions and the law cited by both Counsel.

The first controversy for consideration is whether the Applicant was served with summons and Plaintiff in summary civil suit 302 of 2014. The controversy arises from the deposition of Okurut Isaac who is described as an approved court process server of the High Court and upon whose affidavit of service a default judgment was entered against the Applicant. The affidavit was sworn to on the 20<sup>th</sup> of May 2014 at Kampala and is marked as annexure "C" to the affidavit in reply to the Applicant's application. Paragraph 3 of annexure "C" is to the effect that on the 17<sup>th</sup> of May 2014 at around 11 AM Mr Okurut Isaac went together with the Plaintiff's employees one Musisi Ali and Mr Kanyoola Moses who knew the Defendants. He also went together with the Plaintiff's driver one Moses at the workplace of the third Defendant who is the Applicant to this application located at Najeera, Busibante Zone, and Wakiso. The second affidavit is that of one Mr Mugezi Amon an advocate of the High Court of Uganda who deposed an affidavit about 10 months later sworn to on 25 February 2015 at Kampala. His affidavit is annexure "D" to the

affidavit of Mr. Kanyoola in reply to the Applicant's application. He deposed in paragraphs 3 - 14 thereof that on 24 February 2015 he went from the Plaintiff's offices together with one Moses Isingoma, an employee of the Plaintiff who knew the third Defendant's workplace in Kkungu. He found a small gate that was unmanned but opened and let himself into the premises. He also found some two men carrying out some construction inside the church building and inquired from them whether the third Defendant was around. The men informed him that the third Defendant was not around and referred him to a certain lady. The lady introduced herself as Nakyusibwa Ritah Nanteza when he informed her about the purpose of his presence. She informed him that the third Defendant was not around and she did not expect him to come back that day. She accepted a sealed copy of the taxation hearing notice on behalf of the third Defendant but declined to acknowledge receipt thereof by signing on the photocopy he had.

I have duly considered the evidence about whether the second deponent knew the premises of the Applicant or whether the first court process server actually knew the premises of the Applicant. In both instances there was no acknowledgement of service of court process by endorsing on the return documents. On matters of fact I agree with the Respondent's Counsel that the first affidavit of service of Mr Isaac Okurut speaks for itself. It is the affidavit of service of summons with a copy of the plaint attached. The second affidavit was deposed to by a lawyer and concerns a taxation hearing notice and was sworn to about 10 months later. The second deponent who is an advocate of this court was supposedly taken to the premises by one Moses Isingoma. I cannot conclude that the second deponent Mr Amon Mugezi actually went to the same place. This does not mean that the first deponent did not go to the first Applicant's premises. The averment has been made by two different persons on two different occasions and dealt with two different court processes. One was service of a copy of the plaint together with summons. The second one concerned the taxation hearing notice. Furthermore the difference in description does not conclusively mean that they went to two different places. The place Kkungu is also mentioned in paragraph 10 of the affidavit of Isaac Okurut (annexure "C") where he avers that:

“That thereafter, we inquired for the whereabouts of the 2<sup>nd</sup> and 4<sup>th</sup> Defendants, and the 3<sup>rd</sup> Defendant informed us that he totally lost contact with the said Defendants. However, upon leaving the 3<sup>rd</sup> Defendant's office, Musisi Ali insisted that the 3<sup>rd</sup> Defendant was not

telling the truth and proposed that we go to the second Defendants residence located at Najeera, Kungu Zone, Wakiso.”

As a matter of fact the name Kungu refers to a zone in Najeera, Wakiso according to both affidavits. Isaac Okurut refers to it as the second Defendant’s residence. By that time he had been to the Applicant’s place at Najeera, Busibante Zone, Wakiso. While the affidavits seem to have contradictions as to the office place of the Applicant, they can only be considered as contradictory for purposes of the default judgment. There is only one affidavit relating to the default judgment confirmed by two deponents namely Mr Moses Kanyoola and secondly Mr Isaac Okurut. Mr Moses Kanyoola is the branch manager of the Respondent and made the deposition in reply to the Applicant’s application. He only attached the affidavits of Isaac Okurut as proof that the Applicant was served with summons together with a copy of the plaint attached. This was annexure "C". Secondly he attached annexure "D" which is the affidavit of service of Mr Amon Mugezi, an advocate of this court relating to a taxation hearing notice in which a seemingly different place was described as the place of service of the first Applicant. The advocate could have been taken to a different place. Secondly the people the second deponent met at the supposed office of the Applicant were not demonstrated in the affidavit as having introduced themselves as agents of the Applicant.

The second affidavit cannot be used to cast doubt on the affidavit of service of Mr Isaac Okurut. I also agree with the Respondent’s Counsel that the Applicant in this affidavit in support of the application only makes a flat statement that he was never served with court process leading to judgment and orders. He does not anywhere challenge the affidavit of service of summons and plaint. In the premises it is the Applicant's word against that of Mr Moses Kanyoola and Mr Isaac Okurut. None of the deponents were cross examined. Most importantly the affidavit of Isaac Okurut was not challenged by the affidavit in support of the application neither are the facts therein denied. The affidavit of Isaac Okurut was never contradicted by Mr Amon Mugezi as such. The second deponent only seemed to have referred to a different office. The affidavit of Mr Isaac Okurut can stand on its own. The only problem it has is that the Applicant never acknowledged service of summons. I cannot therefore conclude that the Applicant was never served and the only credible and consistent evidence is that he was served personally and an

affidavit of service was filed on court record. It is my humble conclusion on the basis of the affidavit evidence of the two deponents that the Applicant was served with a copy of the plaint and summons. Ground one of the application fails.

The second arm of the Applicant's application deals with the issue of whether there is any other good cause in terms of Order 36 rule 11 of the Civil Procedure Rules as to why the application to set aside the default judgment should be allowed.

Three main arguments have been advanced to the effect that there was no demand on the Applicant and therefore the Respondent could not enforce the guarantee. Secondly that the amount claimed in the plaint exceeded the amount guaranteed. Thirdly the loan was secured by property among others of the Applicant which ought to be realised before moving against the Guarantor i.e. the Applicant.

I have carefully considered the arguments and as far as good cause is concerned I would first deal with the other issues other than that of whether there was a demand made on the Applicant prior to the filing of the action. The other two matters are whether the suit was not prematurely brought against the Applicant on the ground first of all of the notice which does not have to be considered immediately and secondly the levying of other recovery measures against the principal borrower was not exhausted before proceeding against the Applicant. Interestingly the Respondent's Counsel argued to the effect that if the Applicant is a mortgagor, then he may as well be considered as the principal borrower who has defaulted. This is because he is said to be the donor of a power of attorney though this is not in the affidavit evidence and cannot be considered.

Good cause should be a cause that raises a plausible defence and which would have entitled the Applicant to unconditional leave to defend the summary suit had he applied for leave in time. Good cause under rule 11 of order 36 of the Civil Procedure Rules has not been defined though the same principles for the grant of leave to defend should apply as well without limiting the generality of the provision for other good causes.

Order 36 rule 4 of the Civil Procedure Rules prescribes that an application for leave to appear and defend the suit shall be supported by affidavit which shall state whether the defence alleged

goes to the whole or part only and if so to what part of the Plaintiff's claim. Is there a triable issue as to a part or whole of the claim? A triable issue should not only arise from a bare averment but must include some evidence to enable the court assess whether the defence advanced is plausible.

In **Abu Baker Kato Kasule vs. Tomson Muhwezi [1992-93] HCB 212**, it was held that "In all applications for leave to appear and defend the court must be certain that if the facts alleged by the Applicant/Defendant were established, there would be a plausible defence in which case the Defendant should be allowed to defend the suit unconditionally". In other words the facts disclosing the cause of action should be alleged. More specifically to the issue in the case of **Corporate Insurance Co. Ltd. v. Nyali Beach Hotel Ltd [1995-1998] EA 7** the Court of Appeal of Kenya held that it was not sufficient deny the claim or make an averment of a defence. The merits of the issues have to be investigated to decide whether leave to defend should be given. The court has power to reject some prima facie issues as being unfit for trial because they are incapable of constituting a defence.

Finally the court should not indulge in deep consideration of the issues which ought to be reserved for ordinary suits. This was the holding of Parker LJ in **Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (In Liquidation) [1989] 3 All ER 74** at page 77 that:

*"it is to enable a Plaintiff to obtain a quick judgment where there is plainly no defence to the claim. If the Defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived the Plaintiff is entitled to judgment. If at first sight the point appears to be arguable but with a relatively short argument can be shown to be plainly unsustainable the Plaintiff is also entitled to judgment. But Ord 14 proceedings should not in my view be allowed to become a means for obtaining, in effect, an immediate trial of an action, which will be the case if the court lends itself to determining on Ord 14 applications points of law which may take hours or even days and the citation of many authorities before the court is in a position to arrive at a final decision."* (Emphasis added)

I have duly considered the contention that the Plaintiff/Respondent ought to have exhausted all its remedies before moving against the Guarantor. The issue can be considered by examining the guarantee document. It matters not whether the principal borrower is liable. The question is whether the suit can be considered premature for purposes of trial. The nature and kind of guarantee has to be discerned from the words of the contract. Every case depends on the construction of the actual words used. According to Lord Diplock in **Moschi v Lep Air Services Ltd and another [1972] 2 All ER 393** at page 402

“Whether any particular contractual promise is to be classified as a guarantee so as to attract all or any of the legal consequences to which I have referred depends on the words in which the parties have expressed the promise.”

Secondly the obligation of a Guarantor to the creditor according to Lord Diplock in *Moschi vs. Lep Air Service Ltd And Others [1972] 2 ALL ER 393*, is:

“to guarantee the performance by a debtor of his obligations to a creditor arising out of a contract gives rise to an obligation on the part of the Guarantor to see to it that the debtor performs his obligations to the creditor”.

**In *Perrylease Ltd v Imecar AG and others [1987] 2 All ER 373*** Scott J held at page 378 that:

“The general approach to construction of guarantees is set out in 20 Halsbury’s Laws (4th edn) Para 143:

‘The principles of construction governing contracts in general apply equally to contracts of guarantee. Dealing with a guarantee as a mercantile contract, the court does not apply to it merely technical rules, but construes it so as to reflect what may fairly be inferred to have been the parties’ real intention and understanding as expressed by them in writing, and so as to give effect to it rather than not ... ’”

While the Applicant submitted that the remedies against the principal debtor should first be exhausted, the Respondent maintains that the creditor has a right to proceed against the Guarantor and the Guarantor can pursue the securities later. As noted in **Moschi vs. Lep Air**

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**Services Ltd and Others** (supra) this would depend on the wording of the guarantee contract. Paragraph 2 of the guarantee contract provides that it is in addition to and without prejudice to any other security offered by the debtor. The guarantee is to remain in force until all principal monies and interest due from the debtor to the creditor by virtue of the loan agreement are paid. In paragraph 6 the creditor has a lien on all the securities pledged by the Guarantor. The question of whether the Respondent can proceed against the Guarantor first seems to be a triable issue at first blush. However the Applicant is a director clothed with knowledge and power of principal borrower to pay the Respondent. Secondly should the court be made aware as to what happened to the security the subject matter of the guarantee agreement? Clause 11.1 of the loan agreement without further analysis gives the creditor power to exercise its rights under the mortgage deed, debentures, guarantees or any other deed or instrument executed as a security against the borrower. While this gives the Respondent the option to go for the guarantee, the Guarantor has a right to a demand as well and he has the duty to ensure that the money is paid to the Respondent. Strangely the Applicant conceded that the remedies should be pursued against the Company and that he has security to secure it. Any liability against the Guarantor would still be paid through among other things his property. It is his duty to ensure that the Respondent is paid. The only basis which I see is that there are other Guarantors who are equally liable to contribute jointly to the Uganda shillings 87,600,000/= guaranteed amount. These other Guarantors are Nagujja Mariam and Magoma Younus. For that reason there is other good cause and the second main ground of the application succeeds.

The default judgment is hereby set aside and the Applicant has conditional leave to file a defence to the action within 14 days from the date of this ruling.

The condition for leave to defend the suit is that the Applicant shall deposit with the Respondent a sum of 20,000,000/= Uganda shillings as security within a period of thirty days from the date of this order. Evidence of the deposit with the Respondent shall be filed with the registrar of the Commercial Division.

Execution so far levied shall not be set aside but money paid by the Applicant shall be considered as additional deposit to the one ordered by the court made by the Applicant to the Respondent. Costs of the Application are costs in the cause.

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Ruling delivered in open court on the 22<sup>nd</sup> day of March 2016

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Tugumisirize Innocent Counsel for the Applicant

Stella Brenda Nakimuli Counsel for the Respondent

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

**22<sup>nd</sup> March 2016**