THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO. 637 OF 2013

IMPERIAL BANK (U) LIMITED ----------PLAINTIFF

VS

1) T- BRUCKS EAST AFRICA LIMITED

2) GHULAM RAZA

3) MUHAMMAD OVASI SIDDIQUI ---------- DEFENDANTS

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

BRIEF FACTS:

By agreement dated 06.07.12, the Plaintiff and the First Defendant entered into a loan agreement of Shs. 250,000,000/- with interest at the rate of 27% per annum. The loan was repayable in 24 months in 24 monthly installments. The loan was taken by the Defendants for acquiring two Mack Tracks. It was secured by motor vehicles Registration Nos. UAQ 267Z, UAQ 129T, UAB 622M, 192 Doll Semi Trailer and two Mack Tracks.

On 09.08.12, the 2nd and 3rd Defendants executed unlimited personal guarantees in favor of the Plaintiff, agreeing to pay the principal sum and accrued interest in event of default by the 1st Defendant.

The First Defendant defaulted on the loan repayment and the Defendants were served with notice to remedy the default, which they failed to do; hence this suit.

The Plaintiff seeks general damages for breach of contract, recovery of the unpaid loan balance of Shs. 272,225,225/- together with accrued interest and costs of the suit, interalia.

In their defence, the Defendants denied some of the claims in the plaint, contending that the Plaintiff would be put to strict proof thereof.

Further that, they would adduce evidence to show that the Plaintiff is not entitled to the remedies sought.

It was also the claim of the Defendants that the Plaintiff had no cause of action against the 2nd and 3rd Defendants as the loan was duly secured before it was advanced. They prayed for the dismissal of the suit with costs.

At the scheduling conference, it was agreed that the First Defendant applied for the loan facility of Shs. 250,000,000/- at the interest rate of 27% per annum; the 2nd and 3rd Defendants guaranteed repayment of the principal sum and accrued interest in the event of default by 1st Defendant; that the 1st Defendant defaulted on the loan repayment and that the 2nd and 3rd Defendants are both Directors of the 1st Defendant.

The following were the agreed issues:-

1) Whether the Defendants breached the terms of the loan agreement.

2) Whether the 2nd and 3rd Defendants are liable to repay the loan as guarantors;

3) What remedies are available to the parties.

The case was fixed for hearing but after a number of adjournments, Counsel for the Plaintiff informed court on 24.08.15 that, he had agreed with Counsel for the Defendants that Court should be moved to enter judgment on admission, to bring on an early closure to the suit; which he did. Counsel for the Defendants confirmed to court that, that was the agreed position.

Judgment on admission was entered against all Defendants, and parties were directed to file written submissions.

It was the submission of Counsel for the Plaintiff that judgment on admission was entered under S.98 CPA and 0.13 r 6 C.P.R that the Defendants breached the terms of the loan agreement the 2nd and 3rd Defendants are liable for the repayment of the loan and that Plaintiff is entitled to the reliefs sought.

Counsel went through the facts of the case already referred to and the provisions of 0.13r6 C.P.R. He also cited S.16 of the Evidence Act which defines admission.

He then emphasized that the facts admitted in the joint written statement of defence and the scheduling memorandum insisting that, the Defendants guaranteed repayment of the loan. He cited paragraph 1.1 of the loan agreement Annexture “B” and “C” to the plaint and paragraph 21.

Contending that there is no doubt that the 2nd and 3rd Defendants took full liability to repay the loan, Counsel stated that the court is enjoined to enter judgment on admission under S.57 of CPA and 0.13 r 6 C,P.R.

Counsel relied on **Mulla Code of Civil Procedure 6th Edition Vol.2, P.2177** and the case of **Natha vs. Jodha (1884) 6 ALL 406** to define actual and constructive admissions.

And the case of **Godfrey Lule vs. Attorney General CACA No.2/2000** and the case of **Kamugisha Lennard vs. Uganda Revenue Authority HCCS No. 311/2012** for the holding that 0.13 r 6 C.P.R entitles a party to judgment on the facts of the case admitted by the opposite party.

The application may be made at any stage of the suit and without prejudice to the determination of any other question between the parties and the rule gives court discretionary power to enter judgment as the court may think just. It is now trite law that ***"an admission has to be unequivocal and must admit a claim in the suit".***

It was the further contention of Counsel that the glaring admission in the joint scheduling memorandum conclusively determines and answers all the issues raised in this case.

He then prayed court to find that the Defendants breached the terms of the loan agreement and that the 2nd and 3rd Defendants are liable for repayment of the loan, thus entitling the Plaintiff to the reliefs prayed for.

In reply, Counsel for the Defendants submitted that for judgment to be entered on admission, the admission must be unequivocal – **Kamugisha vs. Uganda Revenue Authority (Supra).**

That in this case, the alleged admitted facts do not amount to an admission since they are denied under the Defendants facts in the same

scheduling memorandum, thus making the matter eligible for trial. That the admission is not unequivocal as provided for under the law.

He pointed out that the 2nd and 3rd Defendants are contesting their trial as Directors of the 1st Defendant before disposing off the securities mortgaged to the Bank in case of default by the 1st Defendant.

That without an unequivocal admission of liability, the 2nd and 3rd Defendants cannot be held liable at this stage before the Plaintiff has extinguished all possible efforts to recover from the 1st Defendant.

He prayed that the application be dismissed with costs to the Defendants.

Under S.57 of the Evidence Act, once facts are agreed or admitted, they are no longer in dispute and are put out of the scope of the parties litigation. The section provides that ***"no fact need be proved in any proceedings which the parties to the proceedings or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleadings in force at the time they are deemed to have admitted by their pleadings; except that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions".***

Refer also to the case of **Kampala District Land Board and Another vs. National Housing and Construction Co. Ltd SCCA No. 02/2004** where it was held interalia that ***"Under S.56 (now 57) of the Evidence Act, facts once admitted need no further proof and are no longer in issue".***

In the present case, the Defendants under paragraphs 1 and 3 of the written statement of defence made general demands without traversing the allegations leveled against them by the Plaintiff.

During the scheduling conference, the parties through their Counsel in the joint scheduling memorandum filed in court on 31.1.14, the parties under the sub heading "Agreed facts" agreed that:-

1) The 1st Defendant applied for a loan facility of Shs. 250,000,000/- at an interest rate of 27% per annum.

2) The 2nd and 3rd Defendants guaranteed the repayment of the principal sum and accrued interest in the event the 1st Defendant defaulted.

3) The 1st Defendant defaulted on the loan; and that

4) The 2nd and 3rd Defendants are both directors of the 1st Defendant Company.

The following were agreed issues:-

1) Whether the Defendants breached the terms of the loan agreement;

2) Whether the 2nd and 3rd Defendants are liable for the loan as guarantors; and

3) What remedies are available to the parties.

Under 0.12 r (1) (1) C.P.R and as established by the holding in the case of *Tororo Cement Co. Ltd vs. Frokina International Ltd SCCA No.02/2001 "the purpose of a scheduling conference is to sort out issues of agreement and disagreement by the parties, so that those that are not disputed need not be litigated over".*

It is apparent from the joint scheduling memorandum of the parties there were no disagreed facts.. The issues were framed from the agreed facts; there was therefore no need to litigate over the issues.

The Defendants cannot be heard to claim that they made admission without knowledge of the facts, so as to contend that the facts had little evidential value as per the case of **Comptroller of Customs vs. Western Electric Co. Ltd [1966] AC 367.**

This is because Counsel for the Defendants who prepared the joint scheduling memorandum had full instructions to represent the Defendants as the Defendants' Advocates and had full knowledge of the facts admitted – 0.3 r 1 C.P.R.

The admissions made were of facts and not of law- See the case of **Ashmore vs. Corporation of Llyods [1992] IWLR 446.**

Admissions of fact, as already indicated herein, are admissible. Further ***"the admission has to be clear and unambiguous and must state precisely what is being admitted"*** – Refer to the case of **John Peter Nazareth vs. Barclays Bank International Ltd [1976] EA 39** - which is to the effect that ***"for a judgment to be entered on admission, such an admission must be explicit and not open to doubt".***

In the present case a look at the Defendant's written statement of defence shows that the grounds alleged in the plaint were only generally denied by the Defendants. Yet 0.6r8 C.P.R requires that ***"each party must deal specifically with each allegation of fact of which he or she does not admit the truth except damages".***

In such circumstances, *"the Defendant cannot be given leave to call evidence since in the written statement of defence there was no specific denial"* – See **Joshua vs. Uganda Sugar Factory [1968] EA 570 AT 572 Spry J.A.**

Also 0.6 r 10 C.P.R provides that *"when a party in any pleading denies an allegation of fact in the previous pleadings of the opposite party, the denial must not be done evasively, but must answer the point of substance. For example, it is alleged that a certain sum of money was received, it shall not be sufficient to deny receiving that particular or any part thereof, how much was received should be indicated. And if the allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances".*

In the present case, the Defendants in paragraphs 5-7 of the written statement of defence made evasive denials when they stated that : (5) in further reply to the whole claim of the Plaintiff, the Defendant shall contend and adduce evidence to the effect that the Plaintiff is not entitled to any of the remedies sought.

(6) the 2nd and 3rd Defendants shall aver and adduce evidence to the effect that the Plaintiff has no cause of action against them and the suit against them is totally premature; and (7) The Defendants shall further adduce evidence to the effect that the loan was duly secured and the Plaintiff accepted the securities availed to it before the loan was advanced.

This is what was also stated in the scheduling memorandum as the Defendants' brief facts.

According to the principle established by case law, *"for a denial to be effective, it must amount to a denial of liability for all times and all purposes"*- Refer to **Bank of Baroda vs. Mahomed [1999] LLoyds Rep 14.**

As already set out in this judgment, the Defendants denial in the present case was evasive contrary to 0.6 rr8 and 10 C.P.R. This means that, the defence was an implied admission of the material facts as set out by the Plaintiff and this is supported by the joint scheduling memorandum.

"Agreed facts"

It is trite law that, once an admission of facts is made, court may upon application by either party to the case make such order or files such judgment without waiting for the determination of any other question between the parties. – 0.13 r 6 C.P.R.

The rule was discussed in the case of **Luka Matovu & Others vs. Attorney General MA 143/2008 (Arising from HCCS 248/2003)** where Justice Musoke Kibuuka stated that *"in a persuasive judgment of the Court of Appeal of Kenya in Agricultural Finance Corporation vs. Kenya National Insurance Corporation, Civil Appeal No. 271 of 1996, the court took the view that "where admission is not ambiguous, the court ceases to have a discretion whether to enter judgment or not. It must do so".*

See also the case of **Kamugisha Lennard vs. Uganda Revenue Authority HCCS No. 311/2012.**

In the present case, the Defendants agreed to and admitted all material facts in the Plaintiff's claim in the joint scheduling memorandum, therefore, there remaining no triable issues for this court to consider.

Triable issues would only have arisen under 0.15 r 1 (1) (2) and (3) C.P.R if any material propositions of law or fact were affirmed by one party and denied by the other.

"An admission is the best piece of evidence that the opposite party can rely upon, though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous".

Having found that the admission of the Defendants in this case was unambiguous, I agree with the submissions of Counsel for the Plaintiff that it binds the Defendants and cannot be litigated upon by virtue of S.57 Evidence Act, 0.6 rr 8 and 18, 0.12 r 1, 0.13 r 6 and 0.15 r 1 (1), (2) and (3) C.P.R.

The arguments of Counsel for the Defendants that the Defendants did not unequivocally admit liability as alleged by the Plaintiff are accordingly rejected. There was no indication anywhere that the facts agreed to in the joint scheduling memorandum were made under mistaken belief, or were erroneous. And no application to withdraw the admissions was made. *"What a party admits to be true by himself/herself or through the Advocate cannot be construed otherwise by court".*

It was the further submission of the Defendants' Counsel that the 2nd and 3rd Defendants cannot be held liable at this stage before the Plaintiff has extinguished all possible efforts to recover from the 1st Defendant.

However, the 2nd and 3rd Defendants admit that there was a contract of guarantee between them and the Plaintiff.

A **"contract of guarantee"** is defined under S.68 of the Contracts Act, to mean, *"a contract to perform a promise or to discharge*

liability of a third party in case of default of that third party, which may be oral or written".

The 2nd and 3rd Defendants in this case executed unlimited personal guarantees in favor of the Plaintiff.

- Looking at Annextures "B" and "C" to the plaint paragraph 1.1 it states *" in consideration of the Bank granting or continuing to make available banking facilities – to T-Brucks East Africa Ltd (hereinafter referred to as the "The Borrower") the guarantors hereby personally guarantee on demand to pay to the Bank the principal guaranteed amount of up to Ug X 250,000,000/- (Uganda Shillings Two Hundred and Fifty Million only) and all other moneys falling due there under or under any finance document or credit facility availed to the Borrower, and discharge all obligations and liabilities whether actual or contingent now or at any time thereafter due, owing or incurred to the Bank by the Borrower…. Any statement of account of the Borrower signed as correct by any duly authorized Officer of the Bank shall be conclusive evidence against the Guarantors of the indebtedness of the Borrower to the Bank".*

The two guarantees were listed in the scheduling memorandum as No2 for Plaintiffs and No. for Defendants. The 2nd and 3rd Defendants admitted executing the guarantees in favor of the Plaintiff.

Under S.71 (2) of the Contracts Act, *"the liability of the guarantor takes effect upon default by the principal debtor".*

The principal debtor in the present case the 1st Defendant defaulted on repayment of the loan.

The guarantee of the 2nd and 3rd Defendant created a primary obligation. *"A primary obligation is imposed on the guarantor to actually pay in the event of default by the guaranteed party under the primary conduct".* If it had been a second obligation created it would have instead imposed an obligation on the guarantor to ensure that the guaranteed party will honor its obligations in the loan family. That is, the guarantor would have been requested **"to see to it"** that the debtor performs.

The primary obligations is for guarantor to pay the money and failure of which entitles the creditor to sue the guarantor for the sum of money. While in the case of the secondary obligation the creditors is only entitled to sue for damages for breach of that obligation by the guarantor". - See **Moschi Vs. Lep Air Services [1973] AC 331 Lord Reid.**

Since as I have already indicated in this judgment that the 2nd and 3rd Defendants created a primary obligation to re-pay the 1st Defendants loan amount plus accrued interest, they became obliged to pay the sums guaranteed immediately after the 1st Defendant defaulted.

It follows therefore that they can be held liable at this stage. All three Defendants were sued jointly and severally after demand for payment was made as per Annexture "E" and they failed to respond to the demand.

It is for all those reasons that the Plaintiff's application for judgment on admission is allowed under 0.13 r 2 C.P.R and judgment is entered as prayed in the plaint.

The issue of general damages and costs of the suit was not addressed by Counsel for the Plaintiff. However, under 0.8r4 C.P.R- *"no denial or defence shall be necessary as to damages claimed or their amount; but they shall be deemed to be put in issue in all cases, unless expressly admitted"*

It is trite law that the intention of law in awarding general damages for breach of contract is that *"the party complaining should, so far as it can be done by money, be placed in the same position as he/she would have been if the contract had been performed".*

And according to the case of **Hajji Asuman Mutekanga vs. Equator Growers (U) Ltd, SCCA No 07/1995 [1996] III KALR 70 at 83** *"general damages in breach of contract are what a court may award when it cannot point out any measure by which they are to be accessed except the opinion and judgment of a reasonable man".*

Although Counsel for the Plaintiff and of the Defendants did not submit on the aspect of general damages as already indicated that are deemed to be put in issue under 0.8r4 C.P.R and thus court will determine the issue relying on the provisions of S.33 of the Judicature Act.

The section empowers the *"High Court to grant absolutely or on such terms and conditions as it thinks fit, all such remedies as any of the parties to a case of mater is entitled to in respect of any legal or equitable claim properly brought before it, so that*

as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matter avoided".

Bearing in mind all circumstances surrounding this case, the court grants to the Plaintiff general damages of Shs. 10,000,000/-, together with interest.

It is trite law that *"interest on general damages is compensatory in nature against the person in breach of eth contract".*

The Plaintiff is accordingly awarded interest on general damages at the rate of 12% per annum from the date of judgment till payment in full.

Similarly, costs of the suit are also awarded to the Plaintiff based on the principle of decided cases that *"costs follow the event unless for good cause court orders otherwise. It is a matter of discretion of court that ought to be exercised judiciously".* - See also S.27 of the Civil Procedure Act.

For all those reasons:-

1) Judgment on admission is entered against the Defendants jointly and severally under 0.13 r 6 C.P.R.

2) It is also hereby declared that the Defendants breached the terms of the loan agreement.

3) The Defendants shall pay to the Plaintiff the sum of Shs. 272,225,225/- due and owing from them to the Plaintiff.

4) General damages of Shs. 10,000,000/- are also awarded to the Plaintiff.

5) Interest at the agreed rate of 27% per annum shall be paid to the Plaintiff from the first day of November, 2013, till payment in full.

6) Interest at the rate of 12% per annum to be paid on general damages from the date of judgment till payment in full.

7) Costs of the suit are also awarded to the Plaintiff.

FLAVIA SENOGA ANGLIN
JUDGE
27.06.18