THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLEANOUS APPLICATION NO.188 OF 2017

(ARISING FROM O.S MISCELLEANOUS CAUSE NO.12 OF 2015)

UGANDA DEVELOMENT BANK LTD :::::::::::::::::::::::::::::::::::::: APPLICANT

VS

1. **RINGA ENTERPRISES CO.LTD**
2. **PATRICK ALOYSIOUS OKUMU–RINGA ::::::::::::::::::::::::: RESPONDENTS**

BEFORE: HON. MR. JUSTICE BONIFACE WAMALA

RULING

Introduction

The application was brought under **Sections 82** and **98** of the **Civil Procedure Act**, **Order 46 Rules 1**, **2** and **8**; and **Order 52 Rules 1** and **3** of the **Civil Procedure Rules** seeking orders that:

1. The award of costs to the 2nd Respondent in the judgment/ decree of this Honourable Court entered on the 19th August 2016 be reviewed and set aside upon discovery of new and important matter of evidence.
2. All consequential orders based upon the aforesaid award of costs be reversed and/or vacated.
3. The entire execution process arising out of the said award of costs be declared void ab initio and thus nullified.
4. The costs of the application be borne by the Respondents.

The application was supported by an affidavit sworn by **Susan Amolo**, the Ag. Bank Secretary of the Plaintiff and a supplementary affidavit in support

sworn by one **Christine Nakayiwa**, a Senior Records Officer in the Applicant Bank. Briefly, the grounds upon which the application is based are that:

a) There has been discovery of a new and important matter which would have led the Honourable Court not to make an award of costs to the 2nd Respondent, had it been brought to the attention of the Court at the time of adjudication.
b) The 2nd Respondent as Managing Director of the 1st Respondent did in fact personally execute a personal guarantee to secure the loan applied for and received by the 1st Respondent from the Applicant.
c) As a resultant consequence, this Honourabe Court made an award of costs [which were taxed and allowed at] UGX 25,000,000/= against the Applicant for wrongfully suing the 2nd Respondent which would not have been the case, had the said personal guarantee agreement been brought to the attention of the Court.
d) The Applicant's advocates had inquired from the then Bank Secretary as to the existence of a personal guarantee by the 2nd Respondent who advised that it could not be immediately traced on the file.
e) The 2nd Respondent is ruthlessly and maliciously pursuing the Applicant Company in execution to recover the said costs whereas in fact both respondents are jointly indebted to the Applicant to a tune of UGX 1,200,000,000/=.
f) The suit against the 2nd Respondent was in fact proper and this Honourable Court would have ruled so had this material evidence been discovered before judgment.
g) The Applicant has sufficient cause for this Honourable Court to review its decision and there is sufficient ground for the Court to reverse all the consequential orders thereupon and to set aside the said award of costs against the Applicant.

The Respondents filed an affidavit in reply, through the 2nd Respondent, opposing the application. The Applicant filed an affidavit in rejoinder and the Respondents filed an affidavit in Sur Rejoinder.

Background

Sometime in January 2012, the 1st Respondent through its Managing Director (the 2nd Respondent) applied for and obtained a loan from the Applicant Bank of UGX 700,000,000/=. According to the Applicant, the 1st Respondent was the principal borrower while the 2nd Respondent was the guarantor. Consequently, the Respondents defaulted on the loan agreement upon which the Applicant sued for recovery by way of taking possession of the mortgaged property vide Originating Summons (O.S) Misc. Cause No. 12 of 2015. The Court passed judgment in favour of the Applicant ordering the Respondent to obtain a Government Guarantee for the amount claimed in the suit within a period of three months, failure of which a notice to give vacant possession under the Mortgage Act would be served upon the Respondents. The Court took the view that the suit against the 2nd Respondent was redundant and dismissed it with costs. The Applicant brought this application for review of the order awarding costs to the 2nd Respondent upon the grounds already set out above.

Submissions of Counsel

Both Counsel made and filed written submissions. I will refer to the submissions in the course of consideration of the grounds of the application.

Preliminary Points of Law

Counsel for the Applicant raised two preliminary points of law in regard to the affidavits of the Respondents in reply and the one in sur rejoinder. The fist point of objection was that the affidavit in reply was filed out of time. The second point of objection was that the affidavit in reply and the one in sur rejoinder were filed by a different law firm from the law firm which was on record as representing the Respondents.

On the first point of objection, it was argued by Counsel for the Applicant that the application was filed on 7th March 2017 and was signed by the

Court Registrar on 10th April 2017. The same was served upon the Respondents' Counsel on 21st April 2017. The 2nd Respondent's affidavit in reply was filed on 2nd June 2017, after a lapse of 41 days. Counsel for the Applicant submitted that this was contrary to Order 12 Rule 3(2) of the CPR which provides that service of an interlocutory application to the opposite party shall be made within 15 days from the filing of the application and a reply to the application by the opposite party shall be filed within 15 days from the date of service of the application. Counsel relied on the case of ***Stop and See (U) Ltd vs Tropical Bank Ltd HC Misc. Application No. 333 of 2020 (Madrama J. as he then was)*** in which the above rule was interpreted strictly. Counsel prayed that the preliminary objection be upheld and the Respondent's affidavit in reply be struck off the record.

In reply, Counsel for the Respondents submitted that it was true that the application was served upon the Respondents on the 21st April 2017 and the Respondents filed the affidavit in reply on the 2nd June 2017. Counsel stated that while filing the affidavit in reply, it was accompanied by a letter dated 1st June 2017 seeking the Registrar's indulgence to allow the Respondents file the affidavit out of time on grounds that the deponent of the affidavit was out of jurisdiction and was thus unable to peruse and sign the affidavit on time. Counsel submitted that it was presumed upon receipt of the letter in court, that leave of court to file the affidavit out of time was dispensed with. Counsel further submitted that no injustice was occasioned to the Applicant since there was three weeks before the set hearing date within which the Applicant could file the affidavit in rejoinder which they indeed filed and served upon the Respondents. Counsel prayed that the preliminary objection be dismissed and the case be decided on its merits.

It is true that the affidavit in reply by the Respondents was filed 41 days from the date of service of the application upon the Respondents. The first question to be resolved by the Court is whether the provisions of Order 12 Rule 3 of the CPR apply to the present facts and circumstances as

submitted by the Applicant's Counsel. **Madrama J.** [as he then was] in ***Stop and See (U) Ltd vs Tropical Bank Ltd (supra)*** dealt with this question in detail. The learned Judge held that Order 12 Rule 3 (2) of the CPR should not be read in isolation as it flows from sub-rule (1) of Rule 3 thereof. The said sub-rule (1) deals with all remaining interlocutory applications from the date of completion of the alternative dispute resolution (ADR), or where there has been no alternative dispute resolution, from the completion of the scheduling conference. Where the application before the Court is not dependent on the occurrence of either of the two matters (completion of ADR or the scheduling conference), the logical interpretation is that such an application does not fall within the provisions of Order 12 Rule 3 of the CPR. The learned Judge went ahead to give the view that it was possible, on the other hand, to find that Order 12 Rule 3(2) is of general application and does not apply only to applications in the above mentioned category. As such even if an application was filed before the completion of ADR or the scheduling conference, sub-rule 2 which prescribes 15 days for the filing and reply would apply.

It is clear to me in the instant case that the present application does not fall within either of the scenarios **Justice Maldrama** dealt with in the above cited authority i.e. after the ADR or the scheduling conference on the one hand; and before the ADR or the scheduling conference on the other. The present application arose after disposal of the suit. It cannot therefore be subjected to the timelines that govern applications that are envisaged before the suit is set down for hearing and, most importantly, which timelines were meant to achieve effective case management at that level of the suit. **Justice Maldrama** however made a further opinion that I find instructive; to the effect that ***"pleadings in applications follow the same pattern as that of a plaint and a written statement of defence. It therefore follows that the same timelines would apply to interlocutory applications. A reply or defence to an application has to be filed within 15 days. Failure to file within 15 days would put a defence or affidavit in reply***

out of the time prescribed by the rules. Once a party is out of time, he or she needs to seek the leave of court to file the defence or affidavit in reply outside the prescribed time. The practice of legal practitioners is to file an affidavit in reply at pleasure. This has to be discouraged ...”

I am in agreement with the above conclusion by the learned Judge [as he then was]. Where an application does not fall within the strict timelines provided for under Order 12 Rule 3 of the CPR, the same timelines that govern the filing of a plaint and the WSD ought to and do apply to such an application. An affidavit in reply, just like a WSD, should be filed within 15 days. But I also hasten to add that with such applications, the circumstances of each particular case should be taken into consideration.

In the instant case, as I have pointed out above, this application arose after the disposal of the suit. When it was filed, it was not issued out or served until after over 30 days from the date of filing. When it was served, the affidavit in reply was not filed until after 41 days. If we are to go with Order 12 Rule 3(2) of the CPR, service of the application had to be done within 15 days from the date of filing. This was not done. Equally upon service, the Respondents had to file the affidavit of service within 15 days. This too was not done. The explanation on behalf of the Applicant is that the Registrar took long to sign and issue out the Notice of Motion. That explanation is borne out by the record. I am prepared to overlook the delay since it was occasioned by the Court. I however reiterate the caution sounded by **Madrama J.** in ***Stop and See (U) Ltd (supra)*** to the Court Registrars to ensure that court papers are signed and issued on the day of filing or as soon as possible to avoid distorting statutory timelines which may result into the parties putting down their guard in regard to adhering to such timelines.

For the Respondents, it is explained that the deponent of the affidavit in reply was out of jurisdiction and was thus unable to peruse and sign the affidavit on time. This averment was not rebutted by the Applicant. I have therefore believed that the Respondents were disabled from filing the affidavit in reply in time owing to the absence of the 2nd Respondent who had to depone to the affidavit. In such circumstances, since the affidavit was accepted on record, replied to by the Applicant and relied on in the hearing of the matter, I would find no reason to strike it out. That, in my considered view, would be an undue regard to technicalities against the provision and spirit of Article 126 (2) (e) of the Constitution.

I have therefore found that the late filing of the affidavit in reply by the Respondents was excusable and this point of objection by the Applicant is overruled.

On the second point of objection, it was argued by Counsel for the Applicant that the affidavits of the Respondents were filed by a different law firm from the one that had represented the Respondents in the main suit yet there was no notice of change of advocates on record and neither was any served upon the Applicant. Counsel stated that on record, the Respondents were represented by M/S Nyadoi & Co. Advocates yet the Respondent's affidavits were filed by M/S Patricia Okumu Ringa & Co. Advocates. Counsel argued that the latter firm had no locus to file the affidavits without being on record officially and the conduct violated Regulation 2(1) of the Advocates (Professional Conduct) Regulations which provides that no advocate shall act for any person unless he/she has received instructions from that person or his/her duly authorized agent. Counsel prayed that the Respondents' affidavits be disregarded and the court finds that the application stands unopposed.

In reply, Counsel for the Respondents submitted that it was the same firm that changed name from Nyadoi Advocates to Patricia Okumu Ringa & Co.

Advocates with approval from Law Council and registration of change of name was effected at the Uganda Registration Services Bureau (URSB). Counsel submitted that at the point of change of name, the trial in the main suit had been completed. The change was however communicated to the Execution Division when the matter went for execution. Counsel prayed that the Court disallows this point of objection.

I find that the provision quoted by Counsel for the Applicant in Regulation 2(1) of the Advocates (Professional Conduct) Regulations does not apply to the present case. That provision is about proof of receipt of instructions before an advocate represents a party. The point raised herein by Counsel for the Applicant was appearance of a firm of lawyers on record without a notice of change of advocates from an earlier firm that was on record. These are two different things. The provision in Regulation 2(1) does not therefore apply to the present case.

Regarding the notice of change of advocates or lack of it, the explanation by Counsel for the Respondents is credible and in absence of evidence to the contrary, I believe the same. It is true that the change of the firm name ought to have been communicated to the Court. I however find that the absence of such notice did not prejudice the opposite party or the Court and had no adverse effect on the pleadings and subsequent proceedings. I have therefore found no merit in the second point of objection and the same is overruled.

Merits of the Application

Turning now to the merits of the application, let me first lay down the provisions of the law invoked by Counsel for the Applicant which are specifically relevant to this application.

Section 82 of the Civil Procedure Act (CPA) provides:

Any person considering himself or herself aggrieved —

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit.

Order 46 Rule 1(1) of the Civil Procedure Rules (CPR) provides:

Any person considering himself or herself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her, may apply for a review of judgment to the court which passed the decree or made the order. [Emphasis added]

Issues for determination by the Court

Two issues arise from the pleadings and the arguments of both Counsel, namely:

1. Whether this is a fit and proper case for review under the law.
2. Whether the Applicant is entitled to the reliefs prayed for.

Issue 1: Whether this is a fit and proper case for review under the law.

It was shown in the affidavit in support of the application sworn by Susan Amolo, the Ag. Bank Secretary of the Applicant, that when the main suit was filed, the then Bank Secretary, Ms Dorothy Ochola, provided documents to the Bank's Lawyers without the personal guarantee agreement which had been misfiled and could not immediately be traced at the time of filing the suit. The evidence further stated that upon the lawyers requesting for the same, all efforts to trace the said guarantee agreement were futile until around 28th February 2017 when it was discovered and retrieved from a different file. It was further averred for the Applicant that at the time of hearing of the suit, the said personal guarantee was therefore not before the court. As a result, the court made an award for costs against the Applicant for wrongfully suing the 2nd Respondent. The deponent further averred that the main suit against the 2nd Respondent was in fact proper and the court would have ruled so had this material evidence been discovered and presented to court at the time of hearing.

In the supplementary affidavit in support of the application, one Christine Nakayiwa, a Senior Records Officer of the Applicant, stated that all documents pertaining to the transaction herein in issue were duly filed on the Respondents' file. However, in the process of filing, one of the Bank's filing clerks who the deponent supervised, misfiled the personal guarantee agreement that had been executed by the 2nd Respondent in favour of the 1st Respondent when obtaining a loan facility from the Applicant. The deponent stated that all the other documents on the Respondents' file were copied and forwarded to the Bank's Lawyers apart from the said guarantee agreement which was misplaced. The deponent continued to search for the agreement until the 28th February 2017 when the said agreement was found having been misfiled.

It was submitted by Counsel for the Applicant that the evidence adduced was sufficient to show that the discovery of the personal guarantee agreement by the Applicant after the court had made the order of costs puts

the application within the ambit of Order 46 of the CPR. Counsel further argued that had this evidence been presented before the Court at the time of hearing, the Court would have come to a different finding on the matter. Counsel argued that the grant of the remedy of review in the circumstances will guard against injustice upon the Applicant and abuse of court process especially so since the 2nd Respondent himself admits having signed the Guarantee. Counsel invited the Court to find that the Applicant was prevented by a non-culpable reason from producing the said evidence at the trial. Counsel relied on the case of ***Tanitalia Ltd vs Mawa Handels Anstal (1957) EA 215***.

In reply, evidence was given by the 2nd Respondent who was the Managing Director of the 1st Respondent. The 2nd Respondent did not deny signing the personal guarantee but stated that he was never served with any notice of the 1st Respondent's default in his capacity as the guarantor before the Applicant filed the main suit. The 2nd Respondent further stated that according to the advice of his lawyers, the Applicant never ensured that independent advice was given to the Respondents before the loan was given. It was further averred by the 2nd Respondent that it was held in the judgment in the main suit that the suit against the 2nd Respondent was redundant because the remedies sought were for realization of security of the mortgaged property for which the suit against the 2nd Respondent was dismissed with costs. The 2nd Respondent further averred that it was not the Respondents' fault that the Applicant failed to locate documents relating to the guarantee during the entire trial in the main suit. The 2nd Respondent concluded that the Applicant had invoked the personal guarantee as an afterthought in order to deny the 2nd Respondent the costs awarded by the Court.

In her submissions, Counsel for the Respondents argued that at the time of hearing of the main suit, the then Bank Secretary who gave evidence on behalf of the Applicant was aware of the existence of the guarantee and had

every opportunity to inform the court that the applicant intended to recover the loaned money from the 1st and the 2nd Respondents as principal and guarantor respectively even though the necessary documents were missing. Counsel submitted that since she did not do so, she caused the Applicant to sit on its rights and the negative effects of the oversight should not be visited on the 2nd Respondent. Counsel further submitted that misfiling or misplacement of the personal guarantee agreement does not amount to discovery of a new fact that had been previously overlooked by excusable misfortune. Counsel submitted that the Applicant knew about the existence of the personal guarantee agreement and as such these documents cannot be said to be novel to the Applicant.

It is clear from the above evidence and submissions of Counsel that there was existence of a personal guarantee agreement executed between the 2nd Respondent and the Applicant in favour of the 1st Respondent. As such, the 1st and 2nd Respondents were in the positions of the principal borrower and guarantor respectively. Unless otherwise expressly stated, a party placed in that position under an express guarantee agreement is as obliged as the principal debtor to ensure satisfaction of the obligations under the contract. There is no stipulation to the contrary in the instant case. It therefore appears to me that the only reason the suit against the 2nd Respondent was found redundant was because there was no evidence before the court of existence of a personal guarantee agreement. Had the agreement been before the court, I have no doubt the Court would have come to a different finding and decision over the liability of the 2nd Respondent.

The next question therefore is: Does the retrieval of the personal guarantee agreement which had been allegedly misfiled amount to discovery of a new and important matter of evidence within the meaning of O.46 r. 1 of the CPR? The answer is to be found in rule 1(1) of Order 46. The relevant part, which I highlighted above when I set down the said provision is that any person "… *who from the discovery of new and important matter of evidence*

which, after the exercise of due diligence, … could not be produced by him or her at the time when the decree was passed or the order made, … may apply for a review of judgment to the court which passed the decree or made the order".

Counsel for the Respondents queried whether this piece of evidence can be called new when the Applicants knew about its existence although they could not allegedly find it. By the definition provided by Counsel for the Respondent, the word "new" is defined as *"not existing before; introduced, or discovered recently or now for the first time or already existing but seen, experienced or acquired recently or now for the first time"* [**from the Merriam Webster online dictionary**]. According to the **Blacks Law Dictionary 5th Edition at page 954**, the word "new" "*ordinarily … is a purely relative term and is employed in contrasting the date, origin, or character of one thing with the corresponding attributes of another thing of the same kind or class".*

It appears to me that by contrasting the date of when the document herein was discovered or retrieved with the date that the case materials were compiled for filing and prosecution of the main suit in the court, the retrieval of the personal guarantee agreement constitutes a "new" matter of evidence. I have already shown above how important this matter of evidence was to the main suit. The Applicant has also shown in evidence that they exercised due diligence but they were unable to produce that evidence before the Court.

I therefore find that the Applicant has satisfied the Court that the retrieval of the personal guarantee agreement way after the disposal of the main suit constituted a discovery of a new and important matter of evidence which, after the exercise of due diligence, could not be produced by them at the time when the decree was passed or the order made. The Applicant has therefore satisfied the court that this is a fit and proper case for granting of an order for review of the court's earlier judgment and decree.

It is my considered view that with the above finding, the other matters raised by Counsel for the Respondents become immaterial, to wit; that the Applicant never expressed any intention to recover the borrowed money from the 2nd Respondent as a guarantor of the 1st Respondent; that the 2nd Respondent was never served with a notice of default in his personal capacity as a personal guarantor; and that the 2nd Respondent was never furnished with independent advice as the personal guarantor. These contentions by the Respondents cannot disentitle the Applicant to the order of review once the latter has satisfied the condition under Order 46 Rule 1(1) of the CPR. These contentions may only have a bearing on the reliefs sought by the Applicant herein.

In all therefore on the first issue, the Applicant has satisfied the Court that this is a fit and proper case for review of the judgment and decree of the Court issued in O.S Miscellaneous Cause No. 12 of 2015. The first issue is therefore answered in the affirmative.

Issue 2: Whether the Applicant is entitled to the reliefs claimed?

The **first** order sought for by the Applicant was that the award of costs to the 2nd Respondent in the judgment and decree of the Court dated 19th August 2016 be reviewed or set aside upon discovery of a new and important matter of evidence or for a sufficient cause.

From my findings above, the Applicant has satisfied the Court that they are entitled to an order of review owing to a discovery of a new and important matter of evidence which, after the exercise of due diligence, could not be produced by them at the time when the judgment and decree were passed. As such, the 2nd Respondent was not entitled to the costs that were awarded to him for, had the Court been aware that he had executed a personal

guarantee in favour of the 1st Respondent, it would have come to a different finding and decision as to his liability.

It was argued by Counsel for the Respondents that the 2nd Respondent as a personal guarantor to the 1st Respondent required a notice of default to be served upon him personally for purpose of fair treatment on the one hand and in order to show that the Applicant intended to recover the money from the guarantor as well, on the other hand. Counsel relied on Guideline 6 (1) (a) of the Bank of Uganda Financial Consumer Protection Guidelines which states that it is the obligation of a financial services provider to act fairly and reasonably in all its dealings with the consumer. Counsel submitted that the Applicant was bound by the Guidelines as far as the Bank of Uganda exercises its supervisory role over all banks under **Section 4 (2)(j) of the Bank of Uganda Act**. Counsel submitted that under Clause 2.01 (b) of the personal guarantee agreement, the guarantee was a demand guarantee by nature; as it provided that upon default, the personal guarantor was required to pay on demand as if he was the principal obligor.

Counsel contended that upon default, the personal guarantor just like the principal debtor were entitled to be notified about the default in their personal capacity. Counsel submitted that in the instant case, the applicant breached its duty of care towards the personal guarantor when it did not serve the 2nd Respondent with a notice of default in his personal capacity as the guarantor.

In rejoinder, Counsel for the Applicant submitted that the 2nd Respondent was at all material times aware of his obligations and the terms of his guarantee. Counsel submitted that not only did the 2nd Respondent execute all the documentation pertaining to the loan transaction but also received all the correspondences and notices pertaining to the same and there was evidence of acknowledgement of receipt by him. Counsel for the Applicant further submitted that according to Clause 2.02 of the guarantee agreement,

the agreement was a continuing guarantee whose obligations as undertaken by the 2nd Respondent could only be discharged by performance.

Counsel submitted that the 2nd Respondent did not need personal notice of default in order to become liable under his obligations. Counsel relied on the case of ***MOSCHI vs Lep Air Services Ltd [1973] AC 33*** cited with approval in ***Barclays Bank of Uganda Ltd vs Sing Hong Guo Dong Civil Suit No. 35 of 2009*** where it was held that:

"On default of the principal promisor causing damage to the promise, the surety/ guarantor is, apart from special stipulation, immediately liable to the full extent of his obligation without being entitled to inquire about either a notice or a default or previous recourse against co-sureties".

I agree with the submission of Counsel for the Applicant as it is in line with the established law governing contracts of guarantee. According to **Section 71(1) of the Contracts Act 2010**, the liability of the guarantor shall be to the extent to which a principal debtor is liable unless otherwise provided by the contract. Under **Section 71(2) thereof**, the liability of a guarantor takes effect upon default of the principal debtor. In the case of ***Bank of Uganda vs Banco Arabe Espanol C.A Civil Appeal No. 23 of 2000***, it was held that once a principal debtor defaults, the guarantor has the duty to repay the loan. The case of ***Moschi v Lep Air Services Ltd (supra)*** further adequately drives the point home.

It was pointed out by Counsel for the Applicant that under Clause 2.02 of the guarantee agreement, the agreement was a continuing guarantee whose obligations as undertaken by the 2nd Respondent could only be discharged by performance. Under the law therefore and in accordance with the agreement between the parties, there was no requirement for service of a personal notice against the 2nd Respondent. In his evidence, the 2nd Respondent does not deny either knowledge of the guarantee or the fact of

default. Through his Counsel, he only raises a technical point that he was entitled to personal notice in his capacity as a personal guarantor. Unfortunately, this requirement is not backed by the law.

It is my finding therefore that there was no legal requirement for the 2nd Respondent to be personally served with a notice of default for his obligations as a guarantor to be triggered into effect. In fact evidence shows, and the 2nd Respondent agrees, that he executed the guarantee and was fully aware of the default as well as being fully involved in efforts to ensure that the 1st Respondent (principal borrower) meets its obligations. No injustice would therefore be committed against the 2nd Respondent by making him to meet his obligations under the contract.

In the circumstances, the order dismissing the suit against the 2nd Respondent and awarding him costs therefore ought to be and is accordingly reviewed and set aside. It is replaced with an order awarding costs to the Plaintiff/Applicant against the 2nd Respondent/Defendant. The judgment had awarded costs to the Plaintiff/Applicant against the 1st Defendant/Respondent. That order is not interfered with. As it is therefore, both the 1st and the 2nd Defendants/Respondents shall pay costs in the main suit to the Plaintiff/Applicant.

The **second** order sought by the Applicant was that all consequential orders based upon the aforesaid award of costs be reviewed and/or vacated. In the affidavit in support of the application, the deponent stated (in paragraph 9) that the 2nd Respondent was ruthlessly and maliciously pursuing the Managing Director of the Applicant Company in execution to recover the said costs whereas in fact both Respondents are indebted to the Applicant to the tune of UGX 1,200,000,000/=. In the affidavit in reply sworn by the 2nd Respondent, it was stated that following the award of costs by the Court, the 2nd Respondent filed a bill of costs which was taxed and allowed at UGX 25,000,000/=. The 2nd Respondent stated that according to the advice given

to him by his lawyers, the awarded costs were in respect of legal representation by their lawyers and not to the 2nd Respondent in his personal capacity. The 2nd Respondent further stated that the Applicant Bank was issued with a demand notice requesting for payment of counsel's costs but all in vain. The 2nd Respondent averred that consequently, an application for execution and a notice to show cause why a warrant of arrest of the Applicant's Managing Director should not be issued were filed. The applications were fixed but Counsel for the Applicant did not attend despite being served with the notice. As a result, a warrant of arrest was issued against the M.D of the Applicant. The 2nd Respondent further averred that instead of honoring the 2nd Respondent's demand, the Applicant chose to file an application for stay of execution and the present application seeking a review of the decree of the Court; which the Respondents opposed.

Given my findings above, the order awarding costs in favour of the 2nd Respondent has been reviewed and set aside. It therefore follows that the taxed bill of costs, the application for execution, the notice to show cause why a warrant of arrest should not issue and the warrant of arrest are accordingly set aside. No execution in enforcement of the impugned bill of costs shall therefore proceed.

The **third** order sought by the Applicant was that the entire execution process arising out of the said award of costs be declared void ab initio and thus nullified. This prayer is both unnecessary and unsustainable. It is unnecessary because the matter has been sufficiently handled under the second relief above. It is unsustainable because the execution process was not void ab initio. It was based upon a lawful order of the Court. The order has not been set aside for reason of illegality or even irregularity. It has been set aside upon proof of deserving grounds for review. As such the idea of the execution being void ab initio cannot arise. This prayer is rejected.

The **fourth** and last prayer is that the costs of the application be provided for. The law is that costs follow the event unless, for good cause, the Court decides otherwise. There is no reason why the successful party herein should not be awarded costs. I therefore award the Applicant the costs of this application against the Respondents.

Final Decision of the Court

In all therefore, this application is allowed with orders that:

1. The order awarding costs to the 2nd Respondent in the judgment and decree of the Court dated 19th August 2016 is accordingly reviewed and set aside and is replaced with an order awarding costs in the main suit to the Plaintiff/Applicant against the 2nd Respondent. As such, both the 1st and the 2nd Defendants/Respondents shall pay costs of the suit to the Plaintiff/Applicant.
2. The taxed bill of costs and the process of execution that had been commenced against the Applicant in respect to the impugned award of costs are set aside.
3. The Applicant is awarded the costs of this application against the Respondents.

It is so ordered.

Signed, dated and delivered by email this 28th day of May, 2020.

BONIFACE WAMALA

JUDGE