



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

5 **CIVIL SUIT NO. 260 OF 2015**

**PRICILLA LOPDRUP suing through  
her attorney PEACE SYLVIA LUTAAYA.....PLAINTIFF**

**VS**

**1. MARGARET MIREMBE LUBWAMA**

10 **2. KAJUBI LUBWAMA EDWARD**

**3. WALUSIMBI HERBERT.....DEFENDANTS**

**BEFORE HON. MR. JUSTICE RICHARD WEJULI WABWIRE**

**JUDGEMENT**

15 The Plaintiff filed a summary suit claiming Uganda shillings 80,000,000/= plus costs of the suit from the Defendants. The basis of the claim is that upon the 1<sup>st</sup> Defendant, an employee of Stanbic Bank at the time, promising that she would fix the Plaintiff's money on an account that enables the Plaintiff to get a better interest, the Plaintiff a customer to  
20 Stanbic Bank transferred Ugshs. 100,000,000/= (One hundred million shillings only) from her Stanbic Bank account No. 9030007087240 to the account of the 1<sup>st</sup> Defendant.

25 The 1<sup>st</sup> Defendant did not fix it as promised and also did not pay it back to the Plaintiff.

The Plaintiff registered a Criminal complaint and on 30/1/2015 the 1<sup>st</sup> Defendant was arrested, upon which the Plaintiff entered an undertaking whereby the 1<sup>st</sup> Defendant acknowledged the debt and made part payment of UgShs. 20,000,000/= (Twenty million shillings only) and 30 promised to pay the balance of UgShs. 80,000,000/= (Eighty million shillings only) in three installments.

In making the undertaking, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant guaranteed her payment of the balance. The 1<sup>st</sup> Defendant partly paid a sum of Uganda shillings 20,000,000/= but refused to pay the balance of Uganda shillings 35 80,000,000/= which remained unpaid.

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants claim in defence is that they were coerced and they signed only to secure the release of the 1<sup>st</sup> Defendant from Police cells.

When the case was filed in Court on 27/11/2015, a default judgment was 40 entered against all Defendants but the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants applied under Misc. Application No. 599 of 2015 for the judgment to be set aside. The judgment was set aside against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants only and they filed a defence, hence the instant trial. The judgment against the 1<sup>st</sup> Defendant remains and has never been set aside.

45 The Plaintiff is represented by M/s Pearl Advocates and Solicitors while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are represented by M/s Denis Kakeeto Advocates.

Counsel addressed the court in written submissions.

The issues for resolution as agreed by the parties in the joint scheduling  
50 memorandum are;

1. Whether the undertaking dated 31/1/2015 is legal/valid and enforceable as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

2. Whether the Plaintiff claim against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is sustainable at law.

55 3. What remedies are available to the parties?

The Plaintiff presented three witnesses Peace namely; Sylvia Lutaaya (PW1), Isaac Twikirize (PW2) and Maxim Mutabingwa.

On the other hand, the Defendants presented two witnesses, the 2<sup>nd</sup> Defendant (DW1) and the 3<sup>rd</sup> Defendant (DW2) who filed witness  
60 statements and were cross examined on them.

### **ISSUE 1**

#### **Whether the undertaking dated 31/1/2015 is legal, valid and enforceable as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.**

Counsel for the Plaintiff submitted that both Defendants admitted to  
65 signing the undertaking. That all the Plaintiff's witnesses confirmed to Court that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants brought themselves to Police at Kibuli and none of them was under arrest.

That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants personally first paid Ug. Shs. 15,200,000/= (Fifteen million two hundred thousand shillings only) and  
70 also mobilized an additional Ug. Shs. 4,800,000/= (Four million eight hundred thousand shillings only) making it Ug. Shs. 20,000,000/= (Twenty million shillings only) by the time of signing the agreement. The Plaintiff's witnesses informed court that the undertaking was signed on 31/1/2015.

75 That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are estopped from denying the undertaking dated 31/1/2018 by claiming it was signed on 2/2/2015.

That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants never reported anywhere that they had been forced into signing an agreement whose contents they did not know or whose purpose they did not know but rather only raised the claim  
80 while before Court.

In reply Counsel for the defendants submitted that the undertaking was signed while the 1<sup>st</sup> Defendant was in incarceration in Police custody at Kibuli, at the instance of the Plaintiff trying to enforce the loan agreement between her and the 1<sup>st</sup> Defendant. That the 1<sup>st</sup> Defendant was in Police  
85 Custody and by extension, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant suffered from the distress, intimidation, force and coercion alongside apparent authority of the Police.

That Section 92 of the Evidence Act guards against Oral evidence to the terms of a contract. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant fall within the  
90 exceptions under Section 92(a) of the evidence Act citing intimidation and illegality that was meted out to them in order to have the 1<sup>st</sup> Defendant released on Police Bond.

That the content of the undertaking was not brought to their attention. That they were told to sign in order to secure the release of the 1<sup>st</sup>  
95 Defendant from Police custody. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant were not represented. That the Police was used to enforce a debt in a Civil Agreement pursuant to an alleged commission of an offence of obtaining money by false pretense whilst the parties had a loan agreement leading to the undertaking that is subject to litigation now. That the undertaking

100 procured by force, intimidation and undue influence be vacated as  
against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

In rejoinder Counsel for the Plaintiff submitted that the 2<sup>nd</sup> and 3<sup>rd</sup>  
Defendants admitted while giving evidence before Court under cross  
examination that the undertaking dated 31/1/2015 was signed by them  
105 and that at the time of signing none of them was under detention.

That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants admitted before Court that they stood  
surety for the 1<sup>st</sup> Defendant and that she jumped bond and they never  
returned to Police to report. That it is PW3 Maxim Mutabingwa who told  
Court that it is the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants that brought Ug. Shs.  
110 15,260,000/= (Fifteen million two hundred sixty thousand shillings only)  
that was acknowledged before the lawyers went to draft the undertaking  
and they also mobilized more money.

That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants sought through their answers in cross  
examination to distance themselves in the act of payment, yet they  
115 testified that the 1<sup>st</sup> Defendant was in detention at the time of signing.

That there was no distress, intimidation or force as none of the 2<sup>nd</sup> or 3<sup>rd</sup>  
Defendants was ever in Police custody. Counsel prayed that Court be  
pleased to enter judgment in favor of the Plaintiff against the 2<sup>nd</sup> and 3<sup>rd</sup>  
Defendants.

120 I have carefully considered the parties' submissions, evidence and the  
authorities.

The undertaking in question dated 31/1/2015 which is Exhibit P3 is one  
in which the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants signed as guarantors for the 1<sup>st</sup>  
Defendant. It's that undertaking that is subject of contention in this  
125 particular case. It's the Plaintiff's submission that this undertaking was a

valid contract of guarantee whereas the Defendants argue that it is unenforceable because it was procured under duress.

In the case of **Barclays Bank Of Uganda Ltd Vs Jing Hong And Another,**

**Cs No. 35/2009,** Justice Christopher Madrama relied on Oxford

130 Dictionary of law at page 246 to define a guarantee as a secondary agreement in which a person, (the guarantor) is liable for the debt on default of another, (the principal debtor) who is the party primarily liable for the debt. The contract of the guarantor in the strict sense (surety ship) is a secondary or ancillary to the contract of the principal debtor.

135 The last paragraph of the undertaking states as follows;

*"I have also presented two guarantors viz; Kajubi Lubwama Edward and Walusimbi Herbert who hereby unequivocally guarantee and undertake to personally pay the debt or any part/balance thereof to Priscilla Lopdrup in the event of my defaulting in payment of the debt or any part thereof."*

140 The above paragraph shows that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants agreed to personally pay the debt to the Plaintiff in the event that the 1<sup>st</sup> Defendant defaulted in payment of the same. This paragraph was confirmed by the signatures of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants which they never denied in their testimonies.

145 This in my view is a promise to be liable for the debt of the 1<sup>st</sup> Defendant which makes the undertaking in question a contract of guarantee.

The liability of a guarantor arises only upon the default of the principal debtor in his or her obligations as per **Halsbury's Laws of England 4th edition Vol. 20 at Para 193.** In this particular case, a default judgment

150 was entered against the 1st Defendant in MA No. 599/2015 and the same has never been set aside. This means that the 1st Defendant as the

principal debtor is liable for the debt in question which would make the guarantors liable.

The guarantor's liability crystallizes upon default of the principal debtor.

155 Now the other question to be resolved is whether that contract of guarantee is legal and enforceable against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

This can be resolved by establishing whether the contract of guarantee was properly executed.

160 Once the guarantee agreement is properly executed, the guarantor is bound to pay in case the principal debtor defaults. In the case of **Stanbic Bank vs. Atyaba Agencies SCCA No. 2/2005**, it was held that the contract of Guarantee has to be construed strictly.

165 The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants argue that the contract of guarantee was procured under duress. Duress is defined to include a threat of harm made to compel a person to do something against their will or judgment; **Black's Law Dictionary 8th Edition Page 542**. In the case of **Pao On Vs Lau [1979] 3 ALL ER 65 at 78**; Lord Scarman held as follows;

170 *"Duress, whatever form it takes, is a coercion of the will so as to vitiate consent.... There must be present some factor 'which could in law be regarded as a coercion of this will so as to vitiate consent.'*

*In determining whether there was a coercion of will to negate true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised; whether after entering he took steps to avoid it. All these matters*

are, as was recognized in *Maskell Vs Home [1915] 3KB 106*, relevant in determining whether he acted voluntarily or not.” *Burton Vs Armstrong [1976] AC 104 at 121*”.

This suggests that the test to determine coercion is that a person must show that; he protested to the duress, that he did not have any other alternative course open to him such as an adequate legal remedy and he was not independently advised and whether the person took steps after entering to vacate it.

From the facts before me, DW2 the 2<sup>nd</sup> Defendant in his testimony stated that at the time of signing the undertaking the 1<sup>st</sup> Defendant was in the cells and there were three people besides him. That one was Isaac who also gave him his phone number and instructed him to sign the undertaking if he wanted to take his daughter and that there were other two gentlemen standing by.

That the said Isaac did not sign on the undertaking. That he was not around when the 3<sup>rd</sup> Defendant was signing the undertaking. The undertaking shows that it was signed by five people. If the 1<sup>st</sup> Defendant was in the cells and the 3<sup>rd</sup> Defendant was not around, that would mean that the other two people who were around were the lawyer of the Plaintiff and that of the 1<sup>st</sup> Defendant.

In his testimony, DW2 testified that he signed on the undertaking on 2<sup>nd</sup> February 2015 not 31<sup>st</sup> January 2015 as reflected on the undertaking.

The Defendants’ submission is an introduction of oral evidence to challenge evidence of a written document which is the undertaking dated 31/1/2015. **S. 92 of Evidence Act** provides that where the terms of any



document have been reduced into writing and have been proved, then no oral evidence shall be admitted. Exhibit P3 is an agreed upon document.

205 The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were involved in the agreement leading to the drafting of the terms and were not under arrest at all.

There was no agreement signed by parties on 2/2/2015 as alleged by the Defendants. At signing the undertaking, neither DW2 nor DW3 protested the signing.

210 Both DW1 and DW2 submitted that at the time of signing, the 1<sup>st</sup> Defendant was in Police custody and by extension the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants suffered from the distress, intimidation, force and coercion alongside apparent authority of the Police. No evidence of coercion that was exerted by Isaac or anyone present at the signing of the undertaking  
215 was adduced.

In his testimony PW1 confirmed that when the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were signing on the undertaking for payment of the balance of Ugx 80,000,000/= they were not under detention by Police. That P3, which is the undertaking, was made by both the Plaintiff's and 1<sup>st</sup> Defendant's  
220 lawyers and that all parties involved in it read through before signing.

In my view, DW1 and DW2 were not truthful in their testimonies because they alleged that the 1<sup>st</sup> Defendant who is their daughter and sister respectively introduced her man and even got married legally but only knew one name of the said son in law and husband to their daughter, they  
225 did not know where he comes from, not even his clan yet they claim to have introduced under Baganda culture.

Under paragraph 6 of his witness statement DW2 stated that he was told to stand surety for the release of the 1<sup>st</sup> Defendant who had agreed to pay

the Plaintiff's loan. But when asked about whether 1<sup>st</sup> Defendant had  
230 agreed to pay the debt he stated that he wasn't aware of the loan.

It is evident that the Defendants are hiding the truth. In signing the  
undertaking, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were acting on behalf of the 1<sup>st</sup>  
Defendant. The 1<sup>st</sup> Defendant's lawyer was therefore also the  
representative of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant in this undertaking.

235 Having taken no steps to avoid what they had entered into, leads to the  
conclusion that they regarded the transaction closed and had no  
intention to repudiate the agreements. Therefore, the fact that the 2<sup>nd</sup>  
Defendant was promised that the 1<sup>st</sup> Defendant would be released if he  
signs the undertaking cannot be said to be unlawful pressure and the  
240 Defendants cannot be said to have been coerced into signing the  
undertaking by the promise of having 1<sup>st</sup> Defendant set free. This does  
not constitute duress.

The Defendants therefore failed to prove duress and are in consequence  
bound by the undertaking they signed. As such the exceptions provided  
245 for under **S. 92 (a) of Evidence Act** do not exist in this case.

In the result issue one is answered in the affirmative.

## **ISSUE 2**

**Whether the Plaintiff claim against the 2nd and 3rd Defendants is  
sustainable at law.**

250 Counsel for the Plaintiff submitted that it was not compulsory that the 2<sup>nd</sup>  
and 3<sup>rd</sup> Defendants, being father and brother to the 1<sup>st</sup> Defendant  
respectively, had to guarantee the 1<sup>st</sup> Defendant. That if there was to be  
any allegation of force, duress or undue influence, it ought to have been

255 raised by the 1<sup>st</sup> Defendant who never challenged the judgment against her.

In reply Counsel for the defendants submitted that the Plaintiffs' claim is not sustainable against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. That the charge against the 1<sup>st</sup> Defendant while at Police was obtaining money by false pretense not a loan agreement. That the said security of a plot of land was also part of the initial loan agreement, the Lawyers and the Plaintiff ought to have done due diligence, which they ignored.

260 As established under issue 1, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants signed the undertaking when they were not under detention. They willfully chose to guarantee and undertook that they would pay the balance of Ug. Shs. 80,000,000/= (Eighty million shillings only) or any part thereof personally in case of default by the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant defaulted and judgment was entered against her in the sum of Ug. Shs. 80,000,000/= (Eighty million shillings only).

270 In his evidence PW2 (Isaac Twikirize) who is a Court Bailiff testified that in executing the judgment through Exhibit P7, he discovered that the land comprised in Kyadondo, Block 207, Plot 1862 land at Kanyanya which had been given by the 1<sup>st</sup> Defendant as security in the undertaking had a caveat lodged on it by G7 Trading Company Ltd Exhibit P8 claiming that the 1<sup>st</sup> Defendant had sold off the land to them but had refused to transfer the same.

275 According to the evidence of Maxim Mutabingwa when he presented the title given by the 1<sup>st</sup> Defendant on signing the undertaking for caveat registration, it was retained by Lands that it was a forgery. Following PW2's advert for sale of the suit land, Rapid Advisory Services wrote to

280 the Registrar of lands through Exhibit P9 stating that they had the certificate of title for Kyadondo, Block 207, Plot 1862 land at Kanyanya yet the 1<sup>st</sup> Defendant had given a certificate of title over the same property to the Plaintiff's lawyer which title was confiscated as forgery. The above evidence shows that the 1<sup>st</sup> Defendant gave the Plaintiff a  
285 worthless security and had also disappeared since her guarantors claimed not to know her whereabouts. This means that the sum of Ug. Shs. 80,000,000/= (Eighty million shillings only) as decreed in the judgment is still due and unpaid.

**S.71 of the Contracts Act** provides as follows;

290 *“(1) the liability of a guarantor shall be to the extent to which a principal debtor is liable, unless otherwise provided by a contract.*  
*(2) For the purpose of this section the liability of a guarantor takes effect upon default by the principal debtor.”*

The implications of section 71 Contracts Act to the facts and  
295 circumstances in this case, in which the 1st Defendant who is the principal debtor defaulted on her payments, is that the 2nd and 3rd Defendants are liable for her debt.

The Plaintiff's claim against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is sustainable at law. Issue no.2 is answered in the affirmative.

### 300 **ISSUE 3**

#### **REMEDIES**

The Plaintiff prayed for an order for payment of Ug. Shs. 80,000,000/= (Eighty million shillings only) by all Defendants jointly and severally, payment of interest at a rate of 24% per annum from January 2015 until  
305 payment in full and costs of the suit.

Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants prayed that the case be dismissed due to illegalities, undue influence and intimations meted to them.

Premised on the fact that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants guaranteed the sum of Ug. Shs. 80,000,000/= (Eighty million shillings only) in the  
310 undertaking signed on 31/1/2015 and that principal debtor (the 1<sup>st</sup> Defendant) defaulted on her debt obligation of the said Ug. Shs. 80,000,000/= (Eighty million shillings only), the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are jointly and severally liable for her debt.

### **Interest**

315 Counsel for the Plaintiff submitted that the Plaintiff's money has remained unpaid since the month of January 2015 despite the undertaking by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to pay the same. That money depreciates in value and as such court be pleased to order payment of interest as prayed for in the Plaint. Counsel to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants  
320 prayed that no interest be awarded.

Under the provisions of **S. 26 (2) of the Civil Procedure Act, Cap 71**, where Court makes a Decree for payment of money, it has discretion to order for payment of interest. The intention of the transaction was for the money to be fixed on an interest earning account. This was not done and  
325 the money therefore did not grow as had been promised by the Defendant to the Plaintiff. The Defendants are liable for this missed opportunity.

### **Costs.**

Counsel for the Plaintiff submitted that the case has dragged on for years since 2015, all leading into incurring costs yet on an agreement the 2<sup>nd</sup>  
330 and 3<sup>rd</sup> Defendant signed willfully on 31/1/2015. He prayed that court award costs to the Plaintiff. Counsel to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants prayed

that upon dismissal of the Suit, court be pleased to award costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

335 **S. 27 Civil Procedure Act, Cap 71** gives court discretion to award costs to a successful party.

**Final orders.**

- I. The Defendants are jointly and severally ordered to pay to the Plaintiff Ugshs 80,000,000/= (eighty million).
- 340 II. The above amount shall attract interest at the rate of 8% per annum from filing this case until payment in full.
- III. Costs are awarded to the Plaintiff.

Delivered at Kampala by email to Counsel for the respective parties and signed copies for the parties placed on file this 22<sup>nd</sup> 345 day of December, 2020.

.....  
**RICHARD WEJULI WABWIRE**  
**JUDGE**

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