

THE REPUBLIC OF UGANDA
THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL COURT]
M.A.No. 62 of 2021
(Arising from Civil Suit No. 15 of 2021)

MTK UGANDA LIMITED:::APPLICANTS

VERSUS

HOUSING FINANCE BANK

LIMITED:::RESPONDENT

BEFORE: HON. JUSTICE DUNCAN GASWAGA

RULING

- [1] This is an application brought under, Section 98 CPA, Order 36 r 3 & 4 & Order 52 rr 1 & 3 of the CPR SI 71-1 for orders that; *leave be granted to the applicant to appear and defend Civil Suit No. 15 of 2021 and for costs of the application to be provided for.*
- [2] The grounds of this application are set out in the affidavit of **Fiona Nakazzi Migadde** and are that; *there is no failure by the debtor to pay the debt to enable the respondent claim from the applicant; that the relationship between the applicant and the debtor ceased upon his death; there is a good defense to the suit worth of court investigation to establish the indebtedness of the principal debtor and that there is a good defense to the suit and matters worth of court investigation.*
- [3] This application raises one issue;

(i) Whether the application raises triable issues for which the applicant should be granted leave to appear and defend Civil Suit No. 15 of 2021

[4] It was submitted for the applicant that there is no failure by the debtor to pay the debt to enable the respondent claim from the applicant since the debtor died on 12/09/2020 and his estate is yet to be administered by law. Further that the relationship between the debtor and the applicant had ceased upon his death and that as per Section 286 of the Succession Act, the affairs of the deceased were suspended pending court's appointment of an administrator.

[5] Counsel for the respondent submitted that the debtor was already in default of the loan payment by the time of his demise as per the loan statement. Further that the guarantor became liable as and when the debtor became liable for breach of the loan agreement. In the case of **Moschi Vs. Lep Air Services and Ors [1972] 2 All ER 392** at Page 397 it was held that;

"...if at any time and for any reason the principal debtor acts or fails to act as required by his contract he not only breaks his own contract but he also puts the guarantor in breach of his contract of guarantee. Then the creditor can sue the guarantor, not for the unpaid installment but for damages. His contract being the principal debtor would carry out the principle contract, the damages payable by the guarantor must then be the loss suffered by the creditor due to the principle debtor having failed to do what the guarantor undertook that he would do."

[6] Counsel also submitted that the death of the debtor was specifically provided for in **Clause 1.3 of the Corporate guarantee** which is to effect that; *"....the Guarantor hereby agrees to pay interest, as*

covenanted.....as may from time to time be payable by the customer or would have been payable but for the death, bankruptcy, insanity or other incapacity of the customer.....” The same provision is reiterated in Clause 2.1 of the Corporate guarantee. This argument was buttressed by the decision of court in **Alice Norah Mukasa Vs Centenary Bank Limited and Bonny Nuwagaba Civil Suit No.77 of 2010**. In addition, that the applicant is further held liable on the deed of undertaking considering that therein they undertook to remit the debtor’s terminal benefits upon termination of employment. According to Section 87 of the Employment Act, death is one of the ways through which a contract of employment is terminated. That the applicant has not denied this submission which in turn is an admission that entitles the respondent to a judgment on admission under Order 6 rule 13 CPR. Counsel concluded by stating that the suggested defence offends Order 8 rule 3 and Order 6 rule 1 and 3 CPR since it does not answer the claim of the debt at all and prayed for the application to be dismissed with costs.

- [7] **Order 36 rule 8 of the Civil Procedure Rules** provides for leave to appear and defend the suit which may be given conditionally or unconditionally, or subject to such terms as to the payment of money into court, giving security, or time or mode of trial or otherwise, as the court may think fit. In the case of **Miter Investments Ltd Vs. East African Portland Cement Co. Ltd, M.A No. 0336 of 2012** it was held that;

“in order to avoid judgment being entered for the plaintiff, the defendant must show that there is a triable issue or that for some other reason, there ought to be a trial. Where the defendant

raises a triable issue on his affidavit, he must not at this stage be shut out, and must have leave to defend, although his case may appear to be a weak one. On the other hand mere denials of the plaintiff's are insufficient. The defendant must clearly disclose the nature and extent of his defense in a clear language."

[8] Under **Section 68 of the Contracts Act**, a guarantor is defined as a person who gives a guarantee. **Section 70** of the same Act further speaks to the liability of a guarantor in the following terms;

(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 purposes of this section the liability of a guarantor takes effect upon default by the principal debtor".

[9] In the case of **Paul Kasagga and Anor Vs Barclays Bank (U) Ltd M.A No. 0113 of 2008** it was held that;

"A guarantee is a contract whereby a person contracts with another to pay a debt of a third party who notwithstanding remains primarily liable for such payment. See Encyclopedia of Form and Precedents 4th Ed page 761. The guarantor's liability for the nonperformance of the principle debtors' obligation is co-extensive with that obligation. A guarantee obligation is secondary and accessory to the obligation the performance of which is guaranteed. The guarantor undertakes that the principal debtor will perform his obligation to the creditor and that the guarantor will be liable to the creditor if the principal debtor does not perform."

[10] From the foregoing discourse therefore, I find that the applicant has an obligation to clear the outstanding monies borrowed by the principal debtor. The death of the principal debtor does not take away the

applicant's liability considering that the same was agreed to in the Corporate Guarantee, clauses 1.3 and 2.1 way before the breach occurred. I therefore disagree with the applicant's submissions that there is no failure by the principle debtor to pay the debt to enable the respondent bank claim from the corporate guarantee. Besides, that is not the issue herein. For it is not the deceased or his successor that is being sued here but the company. The dead man is not a party to the case. This case has nothing to do with the succession or management of a deceased person's affairs or estate as the applicant would want the court to believe. Of course it is trite that the rights of a dead man cannot be established without letters of administration. But the case at hand does not require letters of administration (see Section 268 of the Succession Act) because this was an assignment clearly made by the deceased man while he was still alive of his emoluments to the respondent bank.

- [11] The deed of undertaking of 29/01/2019 is instructive. In addition, the applicant company went ahead to issue a corporate guarantee dated 04/03/2019 for the loan in favour of the respondent bank. This further confirms a lack of connection between the claim herein and the estate of the deceased man. Thus the claim is not against his estate but the applicant company which stood as guarantor for the loan. It should once again be emphasized that obtainance of letters of administration in this situation is unnecessary. In the same vein, I reject the submissions of counsel for the applicant along these lines together with the authorities he cited to support this position as being inapplicable to the facts at hand i.e **Juliet Kalema Vs William Kalema and anor HCCS No. 1474 of 2000** and **Ignatius Kajubi Vs Canan Wanyama Civil Appeal No.26**

of 2002. So, in my view, since the applicant company doesn't need letters of administration in respect of the deceased in order for it to pay off his said loan, it also means that they have no defense at all to the claim worth of court investigation. As guarantors, they should discharge their duties and obligations as covenanted under the corporate guarantee.

[12] This conclusion is fortified by the decision of court in Alice Norah Mukasa vs. Centenary Bank Limited and Bonny Nuwagaba (supra) where it was further held that;

"The purpose of a guarantor to a loan is to render assurance to the lender that in the event the borrower dies or fails to pay back the loan sums, the guarantor would pay the money. This is why the mortgage agreement makes the borrower and the guarantor jointly and severally liable."

[13] **In the circumstances therefore, I find that the applicants have not disclosed any triable issues or reasonable grounds of defense that warrant being granted leave to appear and defend the summary suit. This application is hereby dismissed with costs.**

I so order

Dated, signed and delivered at Kampala this 30th day of April 2021



Duncan Gaswaga

JUDGE