THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
CIVIL SUIT NO. 776 OF 2021

ECOBANK UGANDA LIMITED ::PLAINTIFF
VERSUS

1. **FONE PLUS LIMITED**
2. **MIDLAND GROUP OF COMPANIES LIMITED**
3. **BHASKER KOTECHA::DEFENDANTS**

BEFORE: HON. LADY JUSTICE ANNA B. MUGENYI

JUDGMENT

PLAINTIFF'S CASE

The plaintiff brought this suit against the defendant seeking to recover USD 3,403,046 owed to it by the 1st defendant arising from unpaid credit facilities. The 2nd and 3rd defendants are sued in their capacity as corporate and individual guarantors.

The plaintiff contends that by an application for facilities letter dated 2nd November 2015, the plaintiff approved a request for credit by the 1st defendant and offered a Stand/ Usance letter of credit facility to the tune of USD 2,800,000. On 17th May 2016, a letter of credit of USD 2,000,910 was issued under the limit and on 16th November 2016, this letter of credit matured but because the 1st defendant's account was not funded, the account was debited on 17th November 2016 with the sum of USD 2,014,772 on account of the letter of credit amount and interest of 1.75% p.a. negotiation commitment commission for 145 days thereby overdrawing the 1st defendant's account by the same figure.

Subsequently, a sum of USD 200,067 initially held as cash collateral for the issued letter of credit of USD 2,000,910 was liquidated and credited onto the 1st defendant's account reducing the overdrawn position to USD 1,814,708.

Pursuant to the 1st defendant's request in a letter dated 4th November 2016, the plaintiff agreed to refinance the above-mentioned letter of credit and on 2nd December 2016, a sum of USD 1,834,565 was disbursed to the 1st defendant as a

90-day facility expiring on 19th February 2017. In addition, on 12th July 2016, a letter of credit of USD 690,777 was issued still under the same limit availed to the 1st defendant in the letter of offer dated 2nd November 2015. This letter of credit matured on 28th March 2017 and because the account had insufficient funds, the 1st defendant's account was overdrawn by the same amount. On 28th March 2016, a sum of USD 102,980 which was held as cash collateral at the time of opening the letter of credit was liquidated from the cash collateral account reducing the overdrawn position on the 1st defendant's account from USD 690,777 to USD 587,798.

Further, on 19th May 2017, the refinanced letter of credit of USD 1, 834,565 matured but due to the 1st defendant's account not being funded, the account was overdrawn to a tune of USD 2,588,012. In consideration of the plaintiff granting the said facilities to the 1st defendant, among other securities as indicated in clause 1 of the letter of offer dated 2nd November 2015, the 2nd and 3rd defendants issued a corporate and personal guarantee and indemnity respectively in favour of the plaintiff and further undertook to pay on demand the liabilities of the 1st defendant to the plaintiff.

Following an annual review of the 1st defendant's facility on 26th May 2017, the outstanding balance of USD 2,600,000 was structured as a standby/ Usance letter of credit facility with a limit of USD 1,500,000 and a short-term loan limit of USD 1,100,000 which was further secured by the 2nd defendant and an individual guarantee from the 3rd defendant and each letter of credit issued under the letter of credit limit was to be secured by 20% cash margin. Under the short-term loan limit of USD 1,100,000, several short term loans of USD 300,000, 310,000, 200,000 and 290,000 were disbursed on 22/8/2017, 5/9/2017 and 13/9/2017 respectively. The said short term loans were all not paid as contracted and on 26th June 2018 the facility having matured and the 1st defendant having failed to make payments, the 1st defendant's account was debited and overdrawn to the tune of USD 3,212,667 on 29th June 2018.

Pursuant to the 1st defendant's request to restructure their outstanding obligations dated 9th August 2018, and by the letter dated 16th August 2018, the plaintiff agreed to restructure the outstanding balance then amounting to USD 3,280,882. The 1st defendant undertook to repay the restructured amount as set out in the restructure letter but grossly defaulted on the undertaking and as at the time of filing this suit, the outstanding debt was USD 3,403,046 comprising of USD 2,885,112 (principle and interest) written off on 30th June 2020 and interest of USD 517,934 previously

waived on 25th September 2018 on the understanding that the 1st defendant would promptly repay its obligations thereafter. The 2nd and 3rd defendants have failed, neglected or refused to settle the debt despite repeated demands by the plaintiff for payment and remain in default of their undertakings as provided under the respective guarantees hence this suit.

DEFENDANT'S CASE

The 1st defendant approached the plaintiff for facilities with consideration which was supposed to be furnished by the 1st defendant duly spelt out. The 1st defendant duly furnished the said consideration but did not authorise the debiting of its accounts by the plaintiff and accordingly, the defendants are not liable for the debiting. The 1st defendant discharged all its obligations to the plaintiff by payment thus the restructure was imposed on it under a mistake. Without prejudice to its above contention, the 1st defendant further contends that the demand for payment id premature as it falls due in July 2023.

The 1st defendant contends that the restructure was done under a mistake; and the 2nd and 3rd defendants contend that the debiting of the 1st defendant's account, yet it met its obligations under the letters of credit was unauthorised and never brought to their attention thus discharged them from their obligations under the guarantee. The 2nd and 3rd defendants were not privy to the restructure arrangement and are accordingly not liable for any obligations under the said restructure.

During the hearing the plaintiff presented two witnesses to wit; Alex Okello (PW1) and Monica Acirocan (PW2) while the defendants presented Akash Kumar (DW1) as their witness. Counsel for the parties agreed to file written submissions which have been considered in this Judgment.

REPRESENTATION

The plaintiff was represented by M/s Byenkya, Kihika & Co. Advocates while the defendants were represented by M/S Nangwala, Rezida & Co. Advocates.

JUDGMENT

I have carefully read the pleadings and record of proceedings in this matter and listened to the testimonies of the witnesses of the parties herein. The agreed Issues for determination by this Court are:

1. **Whether the 1st defendant is indebted to the plaintiff to the tune of USD 3,403,046 or at all**

2. **Whether the 2nd and 3rd defendants are liable to pay USD 3,403,046 to the plaintiff**
3. **What remedies are available to the parties?**

Issue 1: Whether the 1st defendant is indebted to the plaintiff to the tune of USD 3,403,046 or at all

Before we can delve into the substance of the case, it is important to understand the different concepts used by the parties. The plaintiff issued letters of credit on behalf of the 1st defendant to its suppliers. **Black's Law Dictionary** 10th Edition p.1043 defines 'letters of credit' as:

> *"An instrument under which the issuer (usu. A bank), at a customer's request, agrees to honor a draft or other demand for payment made by a third party (the beneficiary) as long as the draft or demand complies with specified conditions, and regardless of whether any underlying agreement between the customer and the beneficiary is satisfied."*

A commercial letter of credit is defined at p. 1044 as:

> *"A letter of credit used as a method of payment in a sale of goods (esp. in an international transaction), with the buyer being the issuer's customer and the seller being the beneficiary, so that the seller can obtain payment directly from the issuer instead of from the buyer."*

The 2nd and 3rd defendants guaranteed the credit facilities given to the 1st defendant. A guarantee is defined by **Black's Law Dictionary** (supra) at p. 820 as.

> *"1. To assume a suretyship obligation; to agree to answer for a debt or default. 2. To promise that a contract or legal act will be duly carried out. 3. To give security to."*

In **Ac Yafeng Construction Limited v The Registered Trustees of Living World Assembly and another MA 0001 of 2001** Justice Stephen Mubiru stated.

> *"On demand performance guarantees constitute primary independent obligations placed on a guarantor to make payment of a guaranteed amount."*

He further stated that:

"In other words, the 2nd respondent was assuming a primary and independent obligation to pay under the guarantee rather than to guarantee the due performance by the applicant of its contractual obligations."

The plaintiff argued that by issuing letters of credit it guaranteed the 1st defendant's suppliers would be paid. **Black's Law Dictionary** (supra) at p. 1043 states:

"... Often, there is confusion between letters of credit and guarantees, and occasionally between letters of credit and lines of credit. In the credit transactions itself, it is important to distinguish the credit from other contracts and from the acceptance. Generally, the broad credit transaction consists of three separate relationships. These include those that are (1) between the issuer and the beneficiary; (2) between the beneficiary and the account party; and (3) between the account party and the issuer. The first is the letter of credit engagement. The second is usually called the underlying contract, and the third is called the application agreement." Johan F. Dolan, The Law of letters of credit 2.01, at 2-2 (1984).

"A seller hesitates to give up possession of its goods before it is paid. But a buyer wishes to have control of its goods before parting with its money. To relive this simple tension, merchants developed the device known as the 'letter of credit' or simply the 'credit' or the 'letter.' Today, letters of credit come in two broad varieties. The 'commercial' letter dates back at least 700 years. It is a mode of payment in the purchase of goods, mostly in international sales. The 'standby' letter of credit is a much more recent mutant. It 'backs up' obligations in a myriad of settings. In the most common standby a bank promises to pay a creditor upon documentary certification of the applicant's default."

It is agreed that the plaintiff issued letters of credit to the 1st defendant's suppliers. Once a letter of credit is issued, the bank is obliged to pay the beneficiary if all the conditions are fulfilled. It is not in dispute that on presentation of the letters of credit to the plaintiff by the suppliers, the former paid the latter. A dispute arose when the supplier presented the letters of credit and was paid, but the 1st defendant did not have monies on its account to cover the payments. Two sub issues arose in respect of the obligations of the 1st defendant to the plaintiff. The first one arose because the 1st defendant alleges in its pleading that it is not indebted to the plaint as it settled all the payments by the plaintiff to the supplier. Secondly, the 1st defendant was aggrieved by the plaintiff over debiting its accounts. As a result, thereof, the 1st defendant was charged interest which it feels should not be due. The plaintiff alleges

that it is not a charitable institution. It is in the business of banking to make money. There is no way it can make money without collecting interest when it gives credit to its customers. It is important to see whether the plaintiff is entitled to interest for any credit given to the 1st defendant before we can address the other issues because it affects them.

The application for credit facilities, exhibit P1, provide for the 1st defendant paying interest. Clause 6 on pricing states that:

> *"Interest will accrue on daily outstanding balances and will be applied on the last working day of each month in arrears; however, the bank reserves the right to apply interest at periods shorter than one month. The bank further reserves the right to charge interest applicable at its sole discretion, depending on the changes in the market conditions and the risk rating of the facility.*

Clause 7 on penalty interest provides that,

> *"Penalty interest (in addition to the interest charge mentioned above) will be charged on all past due principle and interest and all other charges not paid when due at the rate of 13% above the banks USD Prime Lending Rate (currently 12%), that is totalling to 25% per annum. Penalty interest is subject to change in line with market forces at the sole discretion of the bank and without prior notice to the Borrower.*

In the letter of extension of credit facilities dated 28th November 2016, exhibit P10, interest is provided for in clause 5 dealing with pricing and clause 6 dealing with penalty interest, which I shall not repeat because the said clauses are similar to the above ones. The application for credit facilities dated 26th May 2017, Exhibit P11, provides for interest on similar terms to the above mentioned. The 1st defendant does not deny that its accounts did not have the amounts stated in the letters of credit. Where the said amounts were not on account, the plaintiff provided credit to the 1st defendant. If the plaintiff had not honoured the obligations in the letters of credit, its reputation would have been at stake, and it would have exposed itself to litigation. The relationship between the 1st defendant and supplier would have been affected.

In **Uganda Finance Trust Limited v Eseri Services Limited and others, Civil Suit 245 of 2011,** the plaintiff sued the defendants for recovery of Ugx 72,157,200 being money mistakenly credited on the 1st defendant's current account and unlawfully withdrawn by the defendants. Justice Flavia Senoga cited **Black's Law Dictionary** 9th Edition p. 887 where it was stated that *"Interest is allowed by law in*

the absence of a promise to pay it, as compensation for delay in paying a fixed sum or delay in assessing and paying damages." The Court found that the plaintiff was entitled to interest at a reasonable commercial rate of 21% from 20.04.11 to 21.03.14 when the money was fully recovered. Likewise, in this case, the plaintiff is entitled to interest as compensation for the delay by the 1st defendant in making available the monies the former remitted to the latter's suppliers which was not on its account. In this case the interest rates were agreed on by the plaintiff and the 1st defendant. The plaintiff is in the business of lending money or offering credit at interest. It is not a charitable institution but a commercial bank.

Having found that the plaintiff was entitled to interest, the Court will discuss whether the 1st defendant is indebted to the plaintiff. PW1 and PW2, in their witness statements, went to great lengths to explain the alleged debt due and owing from the 1st defendant amounting to 3,403,046 USD and referred to several documents in the plaintiff's trial bundle to support the plaintiff's case.

The 1st defendant, through DW1 and despite his averments in his witness statement, did not dispute the fact that the 1st defendant owed monies to the plaintiff and testified, inter alia, that the 1st defendant was willing to pay the sums due to the plaintiff in the sum of USD 2,422,362.7 only if a sum of USD 1,800,000 that was deposited on the 1st defendant's account and later withdrawn is deducted from the said monies.

For the avoidance of doubt, the record of proceedings at page 49, DW1 during cross-examination stated thus:

"Mr. Byenkya: *What amount do you know that you owe?*

DW1: ***Okay so one of the biggest discrepancies in this case is that amount of USD 1.8 million which we have never applied but is removed from our account. So for me 2.4 million minus 1.8 is approximate amount which we can agree to pay to Eco Bank. But if I am not sure about that entry I cannot accept.***

Mr. Byenkya: *So you are saying that you know that you are indebted to Eco Bank, you just think you don't know how much because somehow by magic 1.8 million was paid into your account. My question to you is, did you ever pay it yourselves into the account that 1.8 million you are talking about?*

DW1: *We did not.*

Mr. Byenkya: *So do you have any right to that payment?*

DW1: *Into our bank account not always...(inaudible). We don't know if our customers paid that amount. If somebody claims tomorrow or if not how are we sure that no body escaped the debt.*

Mr. Byenkya: *Fortunately, Mr. Kumar you are in court today. Did you hear the bank officer explain where that money came from?*

DW1: *Eco Bank South Sudan?*

Mr. Byenkya: *Exactly.*

DW1: *On whose instructions? How can you be sure that one of our customers did not go to Eco Bank South Sudan and told to send that money in to an account in Uganda?*

Mr. Byenkya: *Are you aware of any person who was your customer who owed you money, who paid money on your behalf into the account?*

DW1: *I have 1000 plus customers, so I cannot answer that. I don't know that. There are Sudanese customers, yes.*

Mr. Byenkya: *My question is simple. Are you aware of any particular customer who made that payment on your behalf into your account instead of Eco Bank Southern Sudan?*

DW1: *No but I don't rule out the possibility that one day somebody will come and claim.*

Mr. Byenkya: *So Mr. Kumar at the end of the day after the restructuring these are payments you agreed to in exhibit P20 which you signed up for did you make those payments?*

DW1: *I don't remember but I don't think we made any payment because we were not yet sure of the amount and that's why we want to resolve this amicably also. We have requested several mediation requests. They are not interested to talk because...*

Mr. Byenkya: *This Fone Plus think could it be that one of the reasons why you don't think you need to pay is because it has gone out of business and you think that there is nothing to be pursued?*

DW1: *If there was no intent to pay Fone Plus would have declared bankruptcy. Fone Plus did not have any assets. The directors and the owners even shareholders have committed to clear off the debts provided we have amicably provided the right figures. We don't want to be robed (sorry to use that word).*

Mr. Byenkya: *But Mr. Kumar don't you think if you don't like being robbed that maybe it is also good to pay from whom you have taken money?*

DW1: *Let us agree to the amounts and we will pay. I can testify this statement here and if we agree...*

Mr. Byenkya: *So are you ready to pay any amount that the court finds due having assessed the evidence? Fortunately, now we have an impartial arbiter, are you ready to pay?*

DW1: *2,422,363 minus 1.8 is the amount I will pay. You see we are in the court. Each of us are proving our point. So you have explained your point and I am explaining my point that yes we are ready to pay. There is no lack of intent. The only thing is that we don't want to pay what is not due.*

Mr. Byenkya: *But the 1.8 is not your money; you said you didn't pay it; you don't know any customer who paid it so it is not your money. Why do you want to deduct it?*

DW1: *That is the dispute which is not addressed...*"

From the above testimony by DW1, the 1st defendant does not deny that it is indebted to the plaintiff. However, the plaintiff wishes to take advantage of a payment of USD 1,800,000 which was removed from its account. Though the 1st defendant admits liability it is oblivious to the extent of the liability.

A close look at the bank statement of the 1st defendant (page 29 of the defendant's trial bundle) reveals that USD 1,800,000 in issue was transferred to the 1st defendant's account on 1st November 2017 by Ecobank South Sudan putting the 1st defendant in a credit position of USD 52,429 and later a sum of USD 1,815,079 was transferred in favour of South Sudan on 29th December 2017 leaving the 1st defendant in a negative position of USD 15,079.

PW2 testified in Court that the USD 1,800,000 in issue was indeed deposited on the 1st defendant's account but it did not belong to the 1st defendant which fact was also

confirmed by DW1 in cross-examination. How the said monies came to be deposited on the 1st defendant's account was not very clear, however, what is clear is that not only did the said monies not belong to the 1st defendant but also were not deposited or withdrawn by it and the defendants did not operate an account with Ecobank in South Sudan as testified by DW1. The 1st defendant did not tender in evidence any deposit/ payment slip or transfer instrument (such as Electronic Fund Transfer -EFT) showing that the money was deposited by its customer.

Further, DW1 confirmed that the 1st defendant never complained about the said transfer and re-transfer of the said monies to the plaintiff to date which could only mean that the 1st defendant was not prejudiced nor injured in any way by the said transaction.

This Court finds the explanations of the 1st defendant in respect of USD 1,800,000 above mentioned an afterthought and an attempt to avoid liability to repay sums of monies due and owing from it to the plaintiff because not only did the defendants fail to prove any ownership of the said sums, but also the 1st defendant benefitted from the said deposit which did not belong to him and only sought to dispute the same during the hearing.

Further, the 1st defendant has not hitherto filed any legal proceedings to recover the said monies nor reported loss of the same to any authorities. In **Uganda Finance Trust Limited v Eseri Services Limited and others** (supra) where money was mistakenly credited on a defendant's account and unlawfully withdrawn by it, the Court ordered that it pay interest. Taking the said decision into consideration, the 1st defendant is not entitled to the USD 1,800,000 as claimed. The Court notes that plaintiff remitted back USD 1,815,079 from the 1st defendant's account leaving it in a negative of USD 15,079 which it will address later. The said USD 15,079 most probably was interest accrued from use of the funds.

Having found that the plaintiff was justified to remove the USD 1,800,000 that was credited on the 1st defendant's account in error, the Court will proceed to address the issue of the indebtedness of the latter to the former. The 1st defendant, in its defence, does not deny that it requested the plaintiff to open a letter of credit of USD 2,800,000 in favour of its suppliers for a period of 12 months and to grant it a short-term loan of USD 1,100,000, each letter of credit issued having a tenor not exceeding 150 days and each short-term loan drawn down having a tenor of 120 days. Neither does it deny two other letters of credit in the sums of USD 2,000,910 and USD 690,777 were issued by the plaintiff in favour of its suppliers and that the credit facilities were restructured. On 13th May 2016, the 1st defendant requested for a 30-

day temporary facility. On 4th November 2016 the defendant requested the plaintiff to restructure and extend the letters of credit by 90 days. On 14th February 2017 the 1st defendant requested for a renewal of for an additional 12 months with a restructure of USD 1,500,000. The 1st defendant asked for USD 1,100,000 as a short-term loan payable in 150 days. On 1st August 2018, the plaintiff requested for restructure of the outstanding obligations. The loan statements of the 1st defendant's loan account 7255000869 statement of 14th October 2021 exhibit P30, shows that its liability was USD 2,647,763. Loan account 0121016103353201 statement of 14th October 2021 also in exhibit P30, has a liability of USD 1,951,750. The total comes to USD 4,599,513. The above suit was filed on 16th March 2021. The loan statements included liability after the suit was filed. The plaintiff prayed for USD 3,403,406 comprising of USD 2,885,112 and interest of USD 517,934 as at the time of filing the suit. The defendant has not challenged the computation in the loan statements or in the plaint. There is no reconciliation from an audited firm disputing the computation in the loan statements. The 1st defendant' witness stated that it was not aware of its indebtedness which it would have obtained from the plaintiff. This is different from what is pleaded and argued by the 1st defendant.

The gist of the defendants' defence is that it did not authorise the plaintiff to debit its accounts in any manner, that all the facilities availed by the plaintiff to the 1st defendant were duly discharged by payment and that that the plaintiff having debited its account with funds to meet its undertaking under the letters of credit to the beneficiary without authorisation, the restructure arrangement was imposed on the 1st defendant under a mistake.

With regard to alleged unauthorised debiting of the 1st defendant's account, I have had the opportunity to look at the letter dated 2nd November 2015 (application for credit facilities – PE1) and the Lien and Set-Off agreement dated 5th November 2015 (PE3) with particular focus on **Part B under 'witnesseth' section, clause 12 (1)** and **clause 2** of the said documents respectively.

Part B under the' witnesseth' section states that the 1st defendant, who it refers to as the entity, "is involved in construction contracts and has applied to the bank for Guarantee limit and overdraft limit ('the facilities') in the total sum of USD 2,800,000". The 1st defendant cannot deny that it applied for an overdraft when it is in the agreement dated 5th November 2015 which it signed. **Black's Law Dictionary** 10th Edition p.1278 defines an overdraft as:

> *"1. A withdrawal of money from a bank in excess of the balance on deposit.*
> *2. The amount of money so withdrawn: ... the amount of money a bank*

customer owes to the bank after spending more money than the customer has in the account on which payment is drawn... 3. A line of credit extended by a bank to a customer (esp. an established or institutional customer) who may overdraw an account."

The 1st defendant could not have applied for an overdraft limit and not have expected the plaintiff not to debit its account. In **Greenland Bank Limited v Richard Ssekiziyivu t/a Global General Auctioneers, Civil Suit 0501 of 2001** the Court stated that *"The law as I understand it is that drawing a cheque or accepting a bill payable at the banker's where there are no funds sufficient to meet its amounts to a request for an overdraft."* It is still debatable whether a bank customer who does not have funds to meet monies paid on a letter of credit issued on his behalf accepts the bill is payable by the bank.

Clause 12 (1) of the application for credit facilities dated 2nd November 2015 states that the Bank shall have a right of lien and set-off on any of the Borrower's accounts held with the Bank for as long as this facility remains outstanding in the Bank's books; while **clause 2** of the Lien and Set-Off agreement provides that the Entity shall and hereby irrevocably and unconditionally mandate the Bank without right of notice to the Entity to set off any amounts payable out of the Facilities from the above account.

In **Black's Law Dictionary** (supra) at p. 1063 a 'lien' is defined as *"A legal right or interest that a creditor has in another's property, lasting, usus. until a debt or duty that it secures is satisfied."* At p.1063 'banker's lien' is defined as *"The right of a bank to satisfy a customer's matured debt by seizing the customer's money or property in the bank's possession."* At p. 1258 it defines offset as *"Something (such as an amount or claim) that balances or compensates for something else; setoff."*

In **Co-operative Bank in Liquidation v Christopher Kisembo and Another HCCS 392 of 2002** Justice Kiryabwire stated that *"It is trite law that where a customer deposits securities with a banker, a banker's lien is created on the customer's securities deposited with that bank, unless there is an express contract or circumstances that show an implied contract or circumstances inconsistent with such a lien – see the case of **Re London and Globe Finance Corporation (1902) 2 Ch 416.**"*

Mr. Alex Okello testified that on 17th November 2018, USD 200,067 held as cash collateral for the issue of the letter of credit of USD 2,000,910 was liquidated and credited onto the 1st defendant's account reducing the overdrawn position to USD 1,814,708.

To this Court, the clauses above allowed the plaintiff to setoff, debit or overdraw the 1st defendant's account for as long as the sums in respect of the letters of credit remained due and owing from the 1st defendant.

Counsel for the defendants' definition of lien/ set-off in favour his clients does not apply to the circumstances of this case because the set-off/ lien herein as provided in the fore-mentioned documentation relates to the issuance of letters of credit and overdraft facilities by the plaintiff to the 1st defendant and the repayment of the same especially if the 1st defendant failed to fund its accounts to meet its known obligations.

In any case, in all the correspondence between the parties seen by this Court, nowhere does the 1st defendant complain about unauthorised debiting of its account but they rather clearly acknowledge its indebtedness to the plaintiff. The 1st defendant was availed bank statements. At no time did the 1st defendant object to its accounts being over debited or challenge the accuracy of the statements. In **Greenland Bank Limited v Richard Ssekiziyivu t/a Global General Auctioneers** (supra) Justice Yorokamu Bamwine quoted the learned author of Essays in African Banking, Grace P.T. Mukubwa, commenting on a related issue and stated (at p. 126):

> *"A bank is only entitled to fair and reasonable interest on an overdraft where the parties have not expressly or impliedly agreed to the rate of interest payable. However, where a person receives periodic statements on which it is shown that compound interest was charged on the amount of his overdraft and he does not dispute the accuracy of those statements he is deemed to have accepted that interest should be charged at the rate."*

Relying on the statements, the 1st defendant requested for its credit liabilities to be restructured in the letters of 4th November 2016, 14th February 2017, and 1st August 2018. By requesting for restructure of the outstanding obligations, which were in the bank statements, the 1st defendant was admitting that they were correct and acceptable to it. The said statements included the amounts that had allegedly been over debited or overdrawn. In **Greenland Bank (in liquidation) v Dr. Apuuli Kihumuro and another** HCCS 0790 of 2003 Justice Yokoramu Bamwine stated that *"Under that law, where any right of action has accrued to recover a debt or other liquidated pecuniary claim and the person liable or accountable thereafter acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of acknowledgement or the last payment."* The letters requesting the liabilities to be restructured were

acknowledgement of the liabilities. By not challenging the accuracy of the bank statements, the 1st defendant accepted that bill arising from the letters of credit issued at its request were payable by the bank. One cannot request for restructuring of a credit liability it is disputing.

Still on the 1st defendant's contention that its account was over debited by the plaintiff, the Court notes that the latter tendered in loan bank statements which showed the former applied for and received short term loans. The liability included that of the loans. The loan statements show the applicant's indebtedness is beyond what was claimed in the plaint. Probably because the statements were adduced after the suit was filed. A bank can only overdraw a current account when there are no monies on it. In this case, the 1st defendant has not adduced evidence to show how the plaintiff's overdrawing monies on its current account affected its indebtedness. It did not file a counterclaim nor show the extent of the overdrawing of its current account. The 1st defendant's allegation that its account were overdrawn are therefore moot.

With regard to the contention by the 1st defendant that the facilities availed by the plaintiff to the 1st defendant were duly discharged by payment, not only did the 1st defendant fail to adduce any evidence to show it had paid up monies paid by the plaintiff in respect of the agreements subject of this case; but also it failed to discredit the testimony of the plaintiff's witnesses who it only sought to explain how letters of credit operate etc. without controverting what they had to say in respect of the outstanding sums due to the plaintiff from the 1st defendant.

In any case, as seen above, the 1st defendant stated that they owed loan monies to the plaintiff on condition USD 1,800,0000 is deducted from the said sums which sum they were not able to show belonged to them and that it had been made towards clearance of their loan obligations. Further, in paragraph 8 of the defendants' written statement of defence, the 1st defendant averred that it is premature of the plaintiff to demand the allegedly restructured amount (which the 1st defendant claimed was imposed on it as a mistake) as the said amount falls due for payment in July 2023 making this suit premature; thereby accepting liability for unpaid sums due to the plaintiff.

With regard to the contention by the 1st defendant that the restructure of the loan was imposed on it by the plaintiff under a mistake, I have had the opportunity to look at a letter dated 9th August 2018 wherein DW1 requested the managing director of the plaintiff for a revised payment schedule that would consider payment of USD 50,000 on or before 30th August 2018 and payment of the balance amount from January

2019 onwards on a monthly basis, inter alia. Further, I have seen the letter dated 16th August 2018 to the 1st defendant from the plaintiff wherein terms of the restructure of outstanding facilities of the 1st defendant was communicated to it and was accepted for and on behalf of the 1st defendant by DW1 himself and a one Bhasker Kotecha, both being directors of the 1st defendant. A repayment programme in respect of the said restructure was duly signed by the same directors as seen on page 80 of the plaintiff's trial bundle.

DW1, in cross examination, testified to the effect that by the letter 9th August 2018 the 1st defendant was agreeing to clear payments that were due and that even as at that date of the hearing they are willing to mediate and settle but no one was listening to them. DW1 confirmed the contents of the letter dated 16th August 2018 and accepting the said offer in cross examination.

Nowhere did the 1st defendant adduce evidence to prove that the said restructure was imposed on them under a mistake. This could only mean that the 1st defendant knew about its obligations and its failure to perform the same as agreed by the parties. I agree with the submissions of counsel for the plaintiff that the fact that the 1st defendant applied to have the loans restructured is sufficient proof that it was aware that the credit facilities had never been repaid and remained due and outstanding.

I find all the 1st defendant's allegations above false and misleading and an attempt to avoid liability to pay monies due and owing to the plaintiff. Further, I do not find any merit in the 1st defendant's claims and, there being no evidence adduced by the 1st defendant to rebut or challenge the plaintiff's evidence in respect of the sums of monies/ debt due and owing from it to the plaintiff, I find that the plaintiff has satisfactorily demonstrated that the 1st defendant is indebted to the plaintiff to the tune of USD 3,403,046.

This Issue is resolved in the affirmative.

Issue 2: Whether the 2nd and 3rd defendants are liable to pay USD 3,403,046 to the plaintiff

From the evidence on record (P5, P6, P12 and P14), the corporate and personal guarantees signed off by the 2nd and 3rd defendants are demand guarantees which means that upon demand being made on them to settle the monies owed by the 1st defendant they were duty bound to settle the monies demanded.

This position was buttressed by **Paget's Law of Banking, Twelfth Edition by Mark Hapgood QC** at page 730 where it is stated that:

"*Characteristics of demand guarantees.*

The essential difference between a guarantee in the strict sense (i.e. a contract of suretyship) and a demand guarantee is that the liability of a surety is secondary, whereas the ***liability of the issuer of a demand guarantee is primary. A surety's liability is co-extensive with that of the principal debtor and, if default by the principal debtor is disputed by the surety, it must be proved by the creditor, neither proposition applies to a demand guarantee. The principle which underlies demand guarantees is that each contract is autonomous. In particular, the obligations of the guarantor are not affected by disputes under the underlying contract between the beneficiary and the principal. If the beneficiary makes an honest demand, it matters not whether as between himself and the principal he is entitled to payment. The guarantor must honour the demand, the principal must reimburse the guarantor (or counter-guarantor), and any disputes between the principal and the beneficiary, including any claim by the principal that the drawing was a breach of the contract between them,*** *must be resolved in separate proceedings to which the bank will not be party. As Potter LJ Explained in Comdel Commodities Ltd. Vs Siporex Trade SA*"

Further, section 71 of the Contracts Act, 2010 provides:

"Liability of guarantor

(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 2nd and 3rd defendant did not attend court to challenge the guarantees they made. It means that the evidence of the plaintiff in respect of the guarantees remain uncontroverted. In light of the above provisions of law and in the absence of any evidence to the contrary adduced by the 2nd and 3rd defendants themselves, I find that the 2nd and 3rd defendants who signed the corporate guarantee and indemnity and the personal guarantee and indemnity in issue as guarantors became liable to pay USD 3,403,046 to the plaintiff the moment the 1st defendant failed to pay the monies due and owing to the plaintiff. This Issue is also resolved in the affirmative

Issue 3: What remedies are available to the parties?

The plaintiff prayed for judgement against the defendants jointly and severally for payment of the outstanding debt, interest on the same at the rate of 9% per annum from the date of filing the suit, general damages for breach of contract, interest at the rate of 12% per annum from the date of judgment and costs of the suit.

Having held as I did in Issue 1 and 2 above, I find that the defendants are jointly and severally liable to pay the outstanding debt of USD 3,403,046 as claimed in the plaint and an order for payment of the said sum is granted in favor of the plaintiff.

The plaintiff prayed for interest on the outstanding amount at the rate of 9% per annum from the date of filing the suit and general damages for breach of contract.

Paragraph 17 of the plaint refers to an outstanding debt of USD 3,403,046 comprising of USD 2,885,112 (principle **and interest** written off on 30th June 2020) and **interest of USD 517,934** previously waived on 25th September 2018 on the understanding that the 1st defendant would promptly repay its obligations thereafter. The defendants did not adduce any concrete evidence to rebut the plaintiff's claim above and in fact, as seen above, conceded to a figure of USD 2,422,362.7 payable to the plaintiff less monies deposited on the 1st defendant's account and later removed by Ecobank South Sudan.

I will award interest of 9% per annum as agreed by the parties from the date of filing the suit as prayed by the plaintiff.

Further, in the various facilities letters endorsed by the parties herein including the letter of 2nd November 2015 as well as the letter dated 16th August 2018 wherein outstanding facilities were restructured and all terms and conditions therein remained unchanged, the parties agreed on **penalty interest** to be charged on all past due principle and interest and all other charges not paid when due totaling to 25% per annum. Further still, the parties agreed on **default charges** as the bank may stipulate from time to time (in addition to the penalty interest) to be charged on all overdue instalments of principle and interest on loan and all other charges not paid when due.

This Court is of the considered opinion that the plaintiff and defendants voluntarily agreed on interest charges accruable on unpaid principle and interest sums as seen above and the same should be applied accordingly. The payment by the defendants of penalty interest and default charges as agreed is meant to cater for the inconvenience suffered by the plaintiff by the conduct of the defendants and is sufficient compensation for the plaintiff in this regard. Consequently, the prayer for

general damages is declined and instead penalty interest and default charges shall be charged accordingly on all overdue installments of principle and interest as agreed by the parties.

Having declined to award the prayer for general damages for reasons afore stated, the grant of interest on the same from the date of judgment till payment in full as prayed does not arise.

It is trite law that costs follow the event and having no reason to deprive the plaintiff of costs of the suit, the same are awarded to it accordingly.

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HON. LADY JUSTICE ANNA B. MUGENYI

DATED: 12/5/2023