THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

[CORAM: ODOKI, CJ, ODER, TSEKOOKO, KAROKORA AND KANYEIHAMBA,JJ.S.C.]

CIVIL APPEAL No.2 OF 2005

BETWEEN

STANBIC BANK (U) LTD. ::::::::: APPELLANT

AND

ATABYA AGENCIES :::::::::: RESPONDENT

[Appeal from a decision of the Court of Appeal at Kampala (Mpagi-Bahigeine, Engwau and Twinomujuni, JJ.A.) dated 7th December, 2004 in Civil Appeal No.59 of 2004]

JUDGMENT OF TSEKOOKO, JSC.

This appeal is against the decision of the Court of Appeal which upheld the ruling of the High Court ordering the appellant as a guarantor to pay over Shs. One billion to the respondent on behalf of **Uganda Commercial Bank**

(UCB).

The facts leading to this appeal can be summarised as follows. The respondent **Atabya Agencies Ltd**., instituted civil suit No.1197 of 1999 against UCB in the High Court claiming a certain sum of money. The High Court, **(Okumu-Wengi,J)** decided the suit in favour of the respondent. UCB filed a notice of appeal showing an intention to appeal against the decision of the High Court and also sought for and obtained a stay of execution of the judgment and the decree of the High Court, pending institution and disposal of the intended appeal. The stay was granted after the appellant made a guarantee dated 24th June, 2003 in favour of the respondent agreeing to pay the decretal amount on behalf of the UCB if the intended appeal was decided in favour of the respondent. Subsequently a Court of Appeal Civil Appeal No.69 of 2003 was in fact instituted. However Counsel who prepared and instituted the appeal apparently entitled the appeal as under:

"STANBIC BANK UGANDA LIMITED"

(Now merged with Uganda Commercial Bank Limited-Appellant

Versus

Atabya Agencies Limited

…… Respondent"

In law the UCB and the appellant had not merged. Therefore the title of the appeal rendered the appeal defective.

So the respondent moved the Court of Appeal to strike out the appeal on the grounds that -

- The appeal was instituted in the name of a wrong party who was not a party to the proceedings at the trial.
- There was no merger between UCB and the appellant.
- There was no valid appeal against the decree of the High Court in Civil Suit No.1197 of 1999.

When the motion came up for hearing in the Court of Appeal, apparently counsel for the appellant conceded that there had never legally been a merger between UCB and the appellant. As a consequence of that concession, the Court of Appeal ruled that there was no valid appeal and so the Court struck out the appeal. That order prompted the respondent to request the appellant by letter dated 20th January, 2004 that the appellant honours its undertaking to pay the judgmentdebt. The appellant ignored the request. Consequently the respondent presented an application in the High Court seeking for an order to compel the appellant to fulfil its undertaking to pay

the said judgmentdebt which the appellant had guaranteed to pay to the appellant. The High Court **(Kiryabwire Ag.J)** granted the order on 17/5/2004 to the effect that the appellant, had **"become liable as surety for the performance of the decree in HCCS No.1197 of 1999"** and further ordered that the decree be executed to recover the amount the respondent had demanded in the aforementioned letter of 20th January, 2004. On the same day the appellant informally asked for and the learned Judge reluctantly granted leave for the appellant to appeal against his ruling to the Court of Appeal. Meantime the learned judge stayed execution of the decree of the High Court.

The appellant lodged in the Court of Appeal an appeal against the said ruling. The appeal was based on four grounds. That appeal was dismissed. The present appeal arises from that dismissal and the appeal is based on six grounds.

Dr. Byamugisha who prosecuted the present appeal argued all the six grounds together. The original numbering of the grounds was confusing.
I corrected the numbering. The grounds read as follows:

1. **The learned Justices of Appeal erred in law and in fact in holdings that all the four holdings and orders challenged in the four grounds of appeal**

were justified by the evidence on record and the law relating to the matter in dispute.

2. **The learned Justices of Appeal erred in law and in fact in holding that the appeal, which was filed by the Stanbic Bank Ltd and Struck out as incompetent, was an appeal filed by the Uganda Commercial Bank Limited and the one envisaged in paragraph one of the guarantee.**

3. **The learned Justices of Appeal erred in Law and in fact in holding that "the appeal which was made by Uganda Commercial Bank Ltd in this Court was determined as envisaged in paragraph one of the Bank guarantee."**

4. **The learned Justices of Appeal erred in law and in fact in coming to the conclusion that "the appeal was filed but was abandoned under rule 82(1) of the rules of this Court."**
5. **The learned Justices of Appeal erred in law and in fact in holding that the appeal was determined in favour of the respondent in the Court of Appeal.**

6. **The learned Justices of Appeal erred in law and in fact in holding that "the decree/ order of this Court was duly presented to the appellant as envisaged in paragraph one of the Bank guarantee."**

When arguing these grounds together, Dr. Byamugisha for the appellant criticised the Court of Appeal for holding that the appeal which that Court struck out was an appeal filed by the UCB. He stressed that the guarantee made by the appellant concerns an appeal but not a notice of appeal. Learned counsel referred to Rules 82 and 83 (a) of the **Court of Appeal Rules** which regulate the mode of instituting an appeal in that Court and the consequences of any default to institute an appeal. He then contended that the Court of Appeal erred when it held that appeal No.69 of 2003 had been determined by that Court.

According to learned counsel, the Notice of Appeal preceding Civil Appeal No.69 of 2003 was not what was contemplated by the guarantee. He contended that an appeal had to be heard on merits and determined in favour of the respondent to entitle the respondent to present to the appellant a decree therefrom for satisfaction. In counsel's view, the decree presented to the appellant was not the one envisaged under the guarantee.

Messrs. Walubiri and Bamwine appeared for the

respondent but it was the latter (Mr. Bamwine) who opposed the appeal on behalf of the respondent. He opined that the guarantee was a commercial document setting out obligations of each party. He contended that the crux of this appeal depends on the interpretation of clause one of the guarantee given by the appellant. The respondent's requirement was to withhold executing the decree. The responsibility of UCB was to institute an appeal and prosecute it. If UCB chose not to institute an appeal, the appellant had to pay the decretal amount. Mr. Bamwine further argued in effect that if the appeal was defective because a wrong party was named as the appellant, an application should have been made seeking substitution of a proper party or name.

Since UCB chose not to appeal at all the appellant had to pay because the effect of abandoning the defective appeal was that the appeal was determined. This is the effect of the order of the Court of Appeal issued on the 19th January, 2004 stating that Civil Appeal No.69 of 2003 was struck out. Finally Mr. Bamwine submitted that the Court of Appeal justifiably upheld the ruling of the High Court. In support of these arguments Counsel cited a number of decided cases including- **Investors compensation Scheme Ltd Vs West Bromwich Building Society** (1998) All ER. 98 (on principles of interpretation) **Hilbers Vs Parkinson** (1883) 25 ChD 200 at pages 2003/4; **Maunai Investment Co.Vs Eagle Star Life Assurance Co. Ltd.** (1997) 3 All E.R.352 at pages 376 (on objective intentions of the parties) and **L.Schuler A.G.Vs. Wickman**

Machine Tool Sales. Ltd (1973) 2 ALL.ER.39 at page 45 A-B (giving reasonable construction to a contract). Counsel urged us to dismiss the appeal. In rejoinder, Dr. Byamugisha submitted that the cases cited to us by the respondent do not detract from the principle that clear words have to be interpreted as they are. He appeared to blame the respondent for what he termed as **"confusion in this matter."**

I agree with Mr. Bamwine and the two courts below that, the crux of the matter in this appeal is the interpretation of the contents of the first clause of the guarantee entered into on 24/7/2003 between the present appellant and the respondent. A copy of this guarantee is on the record of appeal. Clause 1 reads as follows:

> ***"In consideration of Messrs. Atabya Agencies Limited as Judgment Creditor entitled to immediate payment of its decretal sum, interest and taxed costs consenting to the High Court making an order staying execution of the decree in HCCS. No.1197/1999, ATABYA AGENCIES LTD VS UGANDA COMMERCIAL BANK LTD, till the hearing and determination of the appeal to be filed by UGANDA COMMERCIAL BANK LTD in the Court of Appeal of Uganda, we STANBIC BANK OF UGANDA LTD, a limited***

liability company incorporated and carrying on banking business in Uganda with our registered office at Plot No.45 Kampala Road, P.O Box 7131, Kampala do hereby undertake and guarantee to you that we shall, on presentation of a Court of Appeal <u>Order Or Decree</u> duly sealed and signed as by law required and indicating that the appeal has been decided and determined in favour of M/S ATABYA AGENCIES LTD, without further assurance or demand within ten (10) days pay M/S KWESIGABO, BAMWINE AND WALUBIRI ADVOCATES on behalf of M/S ATABYA AGENCIES LTD the sum of UG. SHS.904,025,816/= or such other lesser or higher sum as shall have been allowed or determined by the Court of Appeal plus further accrued interest at the rate set out in the High Court Decree or such rate as shall have been determined by the Court of Appeal."

To my understanding this clause sets out four important points:

One: Parties to the guarantee knew that the respondent

had won HCCS No.1197/1999 and was entitled to immediate payment from UCB of a sum of Shs 904,025,816/= as a judgmentdebt.

Two: UCB, the judgment debtor, intended to appeal to the Court of Appeal against the judgment awarding the said sum to the respondent.

Three: Meantime, UCB desired to have execution of the decree awarding the said sum stayed pending the institution and prosecution of the intended appeal in the Court of Appeal.

Four: If the Court of Appeal decided the appeal in favour of the respondent, then within ten days after the Court of Appeal decision, the appellant would pay the sum of shs.904,025,816/= or whichever amount the Court of Appeal would determine, including interest.

Clause 6 of the guarantee stipulated that the appellants obligation under the guarantee would end if the Court of Appeal decided the appeal in favour of the UCB.

The contention between the parties really is whether or not there was an appeal and whether if there was an appeal that appeal was or was not determined when the Court of Appeal struck out Civil Appeal No.69 of 2003. Dr. Byamugisha's contention is that the appeal envisaged by the guarantee was an appeal which should have been filed by the UCB, heard on its merits and decided by the Court of Appeal. In his opinion the appeal which was

struck out had been filed by the appellant and not UCB and therefore that is not the appeal contemplated by the guarantee. On his part Mr. Bamwine supports the decisions of the two courts below which came to concurrent conclusions that the appeal which was struck out by the Court of Appeal is the appeal which was contemplated by the guarantee and that in striking out that Civil Appeal the Court of Appeal determined that appeal in favour of the respondent.

I respectfully agree with the concurrent conclusions of the two courts below and the contentions of Mr.Bamwine.

Although a Civil Appeal (unlike a Criminal Appeal) is instituted by lodging in the appropriate registry a memorandum of appeal and the record of appeal, (see Rule 76 of Court of Appeal Rules) a party who desires to appeal in civil cases must first give a Notice of Appeal in writing (see Rule 75). Pursuant to this rule, on 25/3/2003, UCB as the loosing party in HCCS No.1197/1999 lodged in High Court a Notice of Appeal titled as follows:

"Atabya Agencies Ltd ……

Plaintiff

Versus

Uganda Commercial Bank Ltd …….

Defendant

NOTICE OF APPEAL

Take notice that ***Uganda Commercial Bank Ltd*** *being dissatisfied with the decision of the Honourable Mr. Justice Okumu Wengi given at Kampala on the 20th day of March, 2003 but dated 14th /3/2003, intends to appeal to the Court of Appeal of Uganda against the whole of the*

said decision."

UCB followed this by filing a notice of motion (Civil Application No.290 of 2003) on 23/5/2003 seeking stay of execution of the High Court decree in Civil Suit No.1197 of 1999. UCB was the applicant for the stay. The parties agreed to stay execution of the decree. The conditions for staying the execution were spelt out in the guarantee. I have already reproduced clause one of that guarantee.

Thereafter an appeal was instituted, this time with the Stanbic Bank, Uganda, Ltd., rather than UCB being named as the appellant. The memorandum of appeal indicated that the appellant had merged with UCB. This prompted the judgment creditor, the present respondent to file in the Court of Appeal a Notice of Motion (No.11 of 2003) seeking to have the appeal struck out "***on the ground that the appellant therein is not a proper party to the appeal."*** because, inter alia;

- The appeal was instituted in the names of a wrong party who was not party to the proceedings in the trial Court.
- That M/S Stanbic Bank Uganda Ltd has never been merged with Uganda Commercial Bank Ltd.

When the motion came up for hearing Dr. Byamugisha conceded that there was no legal merger between the two banks. In effect he conceded that a wrong party instituted the appeal. I am unable to appreciate why counsel for

the two banks did not at that stage apply for substitution of proper parties. The Court was therefore obliged to strike out the appeal. As a result the respondent considered, justifiably in my opinion, that the appeal had been determined in its favour and so on 20/1/2004, its counsel demanded that the appellant should fulfil its obligations under the guarantee. Upon failure by the appellant to fulfil its obligations, the respondent instituted an application in the High Court seeking to enforce the guarantee. I do not find it necessary to consider the authorities cited by counsel. Considering the facts of this case as set out in this judgment, I have no doubt in my mind that the decisions of both the High Court and the Court of Appeal are correct.

There is no suggestion that fresh efforts were, or have been made subsequent to the striking out order, to institute a proper appeal. The respondent cannot wait forever.

Dr. Byamugisha argued that it is the respondent which is responsible for the **"confusion."** I do not quite appreciate this argument. If counsel means that the respondent caused confusion in having the appeal struck out, I cannot agree. That cannot be a basis for the argument that no appeal has been heard and determined in favour of the respondent. There is no longer any appeal to hear and determine.

Accordingly, I find no merit in all the six grounds of appeal. I would therefore dismiss this appeal with costs to the respondent here and in the courts below.

Delivered at Mengo this 15th day of March 2006.

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J.W.N.Tsekooko
Justice of the Supreme Court

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, CJ, ODER, TSEKOOKO, KAROKORA AND KANYEIHAMBA, JJ.SC)

CIVIL APPEAL NO. 2 OF 2005

BETWEEN

STANBIC BANK (U) LTD :::::::::::::::::::::::::::::::::: APPELLANT

AND

ATABYA AGENCIES :::::::::::::::::::::::::::::::::: RESPONDENT

{Appeal from a decision of the Court of Appeal at Kampala (Mpagi Bahigeine, Engwau and Twinomujuni, JJA) dated 7th December 2004 in Civil Appeal No. 59 of 2004}

JUDGMENT OF ODOKI, CJ

I have had the benefit of reading in draft the judgment prepared by my learned brother, Tsekooko JSC, and I agree with his reasoning and conclusion that this appeal should be dismissed with costs.

As the other members of the Court also agree, this appeal is dismissed with costs here and in the Courts below.

Dated at Mengo this 15th day of March 2006

B J Odoki
CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, CJ, ODER, TSEKOOKO, KAROKORA AND KANYEIHAMBA, JJ.SC)

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{Appeal from a decision of the Court of Appeal at Kampala (Mpagi Bahigeine, Engwau and Twinomujuni, JJA) dated 7th December 2004 in Civil Appeal No. 59 of 2004}

JUDGMENT OF ODER JSC

I had the benefit of reading in draft the judgment of Tsekooko JSC. I agree with him that the appeal should be dismissed. I also agree with the order for costs proposed by him.

Dated at Mengo this 15th day of March 2006

A.H.O. ODER
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, CJ, ODER, TSEKOOKO, KAROKORA AND KANYEIHAMBA, JJ.SC)

CIVIL APPEAL NO. 2 OF 2005

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STANBIC BANK (U) LTD :::::::::::::::::::::::::::::::::: APPELLANT

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JUDGMENT OF KAROKORA JSC

I have had the benefit of reading in draft the judgment prepared by my learned brother, Hon. Justice Tsekooko JSC, and entirely agree with him that the appeal has no merit and should be dismissed with costs here and in the Courts below.

Dated at Mengo this 15th day of March 2006

A.N. KAROKORA
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, C.J., ODER, TSEKOOKO, KAROKORA, KANYEIHAMBA, JJ.S.C.)

CIVIL APPEAL NO. 2 OF 2005

BETWEEN

STANBIC BANK (U) LTD :::::::::::::::::::::::::::::::: APPELLANT

VERSUS

ATABYA AGENCIES :::::::::::::::::::::::::::::::::::: RESPONDENT

[An Appeal from the decision of the Court of Appeal at Kampala {Mpagi-Bahigeine, S.G. Engwau and Twinomujuni, JJA} dated 7th December, 2004 in Civil Appeal No. 59 of 2004]

JUDGMENT OF KANYEIHAMBA, J.S.C

I have had the benefit of reading in draft the judgment of my learned brother Tsekooko, J.S.C and I agree with him that this appeal ought to be dismissed.

There can be no doubt that in order to stay execution of the judgments of the trial court and the Court of Appeal both in favour of the respondent, the appellant willingly and properly in my opinion, entered into a binding agreement between itself and the respondent. That agreement has been reproduced in the judgment of Tsekooko, J.S.C. Thereafter, the appellant ought to have taken all the necessary steps to file and prosecute the appeal within the time allowed by the rules of this court. It chose not to do so. This left the respondent with no other option but to fall back on the agreement.

For emphasis, I will reproduce the relevant parts of that agreement;

> *"In consideration of Messrs. Atabya Agencies Limited as judgment creditor entitled to immediate payment of its decretal sum, interest and taxed costs, consenting to the High Court making an order staying execution of the decree in HCCS. No. 1197/1999, … we Stanbic Bank of Uganda Ltd … shall, without further assurance or demand within ten days, pay M/S Kwesigabo, Bamwine and Walubiri Advocates, on behalf of M/S Atabya Agencies Ltd, the sum of Shs. 904,025,816 ….*

I agree with the findings of Tsekooko, J.S.C, as to the four important points implied by the agreement. I am not persuaded by Dr. Byamugisha, learned Counsel for the appellant that it was the respondent who caused confusion in

the matter.

Failure to proceed with the appeal could only have meant one thing and that is the implementation of the agreement between the parties which was made to stay execution of judgment.

For those reasons, I agree that this appeal ought to be dismissed. I also agree that the costs in this court and the courts below should be awarded to the respondent.

Dated this 15th day of March 2006

G.W.Kanyeihamba
JUSTICE OF SUPREME COURT