

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 465 OF 2014**

GANAFA PETER KISAWUZI}.....PLAINTIFF

VS

DFCU BANK LTD}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff initially filed this suit against three Defendants namely the first Defendant DFCU bank Ltd, the second Defendant Mr Lujuza Joseph and third Defendant Mr Kiwanuka Ponny. On 9 March 2015 the registrar of this court endorsed a notice of withdrawal of the suit against the second and third Defendants embodied in a notice of withdrawal of suit filed on 6 March 2015. The suit thereafter proceeded against the first Defendant only.

This suit against the surviving Defendant is for a declaration that the Plaintiff is not liable for the loan sum the first Defendant fraudulently advanced to the former second and third Defendants (hereinafter referred to as the Borrowers) in excess and after the Contract Financing Facility without his knowledge and consent purportedly secured by his title described as LRV 3808 Folio 20 Plot 665 Kyadondo Block 187 at Kasangati. Particularly in the prayers the Plaintiff seeks the following declarations against the Defendant namely:

- a) A declaration that the Plaintiff is not liable for the loan sum and interest accrued that the Defendant advanced the Borrowers without his knowledge and consent.

- b) A declaration that the Plaintiff is not liable for the loan sum and interest accrued, the Defendant advanced to the Borrowers in excess and after the contract financing facility.
- c) A declaration that the Defendant advertising his property without giving him notice of default was illegal and wrongful.
- d) A declaration that the loan-sum the Defendant advanced the Borrowers without the knowledge and consent of the Plaintiff was fraudulent.
- e) A claim for the payment of general damages.
- f) An order that the Plaintiff's property be released.
- g) Costs of the suit; and
- h) Any other remedy that the court may deem fit to grant.

The gist of the facts in support of the claim averred in the plaint is that in the Month of April 2012 the Borrowers obtained a contract financing facility to the tune of Uganda shillings 100,000,000/= from the Defendant and the Plaintiff guaranteed the payment by the first Defendant creating a legal mortgage on the Plaintiff's land described above. The loan was payable within a period of six months. It was agreed between the parties that the first Defendant was to debit and withhold any money in coming on the account of the second and third Defendants for recovery of a loan of Uganda shillings 70,473,963/= which was paid into the account of the first Defendant to offset the loan. However without the consent and knowledge of the Plaintiff, the first Defendant advanced to the second and third Defendant's another sum of money purporting to be a loan secured by the Plaintiff's title. Subsequently the Borrowers defaulted on repayment of the loan. The property was first advertised without relating to the Plaintiff. In the premises the Plaintiff's case is that he is not liable for the additional loan advanced by the first Defendant to the Borrowers without his knowledge or consent. He contends that the facility involved in the loan was only restricted to the advance of the facility of Uganda shillings 100,000,000/= only. Consequently the second facility advanced to the Borrowers by the Defendant was fraudulent and in bad faith.

In the amended written statement of defence the Defendant denies the contents of the plaint. The Defendant admits that on the 28th of May 2012 the Defendant advanced to the Borrowers a facility amounting to Uganda shillings 100,000,000/= which was available for a period of 180 days for purposes of execution of contracts awarded to them. The facility was secured by the Plaintiff's property described above, a chattels mortgage over motor vehicle UAD 193 E, and a lien on the Borrower's bank account. The Plaintiff and the Borrowers on the 30th of May 2012 executed a mortgage in relation to the Plaintiff's property described above. The Defendant's case is that the mortgage constituted a continuing security for monies outstanding from the Borrowers account or any sums by loan, overdraft, or otherwise as may be advanced to the Borrowers.

Furthermore the mortgage contained several terms and conditions which were all agreed to by the Plaintiff and the Borrowers. Pursuant to the mortgage deed, the Defendant registered a charge on the property on 14 June 2012. Upon the Borrowers defaulting on the facility the Defendant issued a notice of default on them dated 7th of May 2013 which notice was copied to the Plaintiff but ignored. Thereafter a notice of sale of the property was issued and copied to the Plaintiff and the Plaintiff failed to settle the outstanding amount by paying Uganda shillings 29,600,000/= to secure his title. This offer was refused by the Defendant. In the premises the Defendant seeks to have the Plaintiff's suit dismissed with costs.

The Plaintiff is represented by Counsel Katabalwa Hebert of Messrs Katabalwa Hebert and Co. Advocates while the Defendant is represented by Counsel Isaac Bakayana of Messrs Arcadia Advocates.

The Plaintiff testified as PW1 while one of the Borrowers who were formally the second Defendant Mr Joseph Lujuzza testified as PW2. The Defendant called Lillian Namusisi a special assets management executive with the Defendant as DW1. Thereafter Counsels addressed the court in written submissions.

The evidence as is relevant in this matter is sufficiently contained in the written submissions.

Submissions of the Plaintiff's Counsel

The Plaintiff's case is that the main evidence in this suit is mainly documentary evidence. Exhibit P1 contains the terms and conditions of the facility and is dated the 28th of May 2012 addressed to the partners and entitled contract financing facility limit of Uganda shillings 100,000,000/=. In exhibit P2 there is a mortgage deed and at page 2 of the mortgage deed the partners Kiwanuka Ponny and Joseph Lujuzi are Borrowers while the Plaintiff is a surety and the Defendant is the lender. Exhibit P1 which is signed by all the parties discloses that the facility was limited to Uganda shillings 100,000,000/= for a period of 180 days from the date of advance. Secondly according to exhibit P4 which is the bank statement of the Partners/Borrowers, money was withdrawn on the 31st of May 2012, 18th of June 2012, 20th of June 2012 and 21st of June 2012. The testimony of PW1 who is the Plaintiff is that his role in the transaction was to guarantee repayment of Uganda shillings 100,000,000/= owed by the partners/Borrowers. PW2 Mr Joseph Lujuzi confirmed this testimony. The testimony was also admitted by DW1 Lillian Namusisi who informed court that the Plaintiff also give a power of attorney to the partners to use his title as security for the facility. Counsel submitted that from the facts, there are two contracts. The first contract is the contract of borrowing between the partners and the Defendant. The second contract is the contract of guarantee between the Plaintiff and the Defendant.

Two issues were agreed to at the scheduling conference namely:

1. Whether the Plaintiff's property is liable for sale as security under the mortgage to the Defendant?
2. Remedies available?

Counsel submitted that the guarantee contracts are governed by the Contracts Act 2010. Under section 74 thereof any variance made to the terms of the contract between the principal debtor and the creditor without the consent of the guarantor discharges the guarantor from any transaction which is subsequent to the variance. Under section 76 a contract between a creditor and the principal

debtor where the creditor makes a compromise, or promise to give time, this discharges the guarantor unless the guarantor assents to the contract. Counsel relied on the discussion of a guaranteed loan by the Supreme Court of Canada in the case of **Manulife Bank of Canada vs. John Joseph Conlin (1996) 3 S.C.R 415** where they held as follows:

- a. It has long been held that a guarantor would be released from liability on the guarantee in circumstances where the creditor and the principal debtor agree to a material alteration of the terms of the contract of debt without the consent of the guarantor.
- b. A surety can contract out of the protection provided to a guarantor by the common law or equity, but any contracting out of the equitable principle must be clear.
- c. The issue as to whether a surety remains liable will be determined by interpreting the contract between the parties and determining the intention of the parties as demonstrated by the words of the contract and events and circumstances surrounding the transaction as a whole.
- d. If there is any ambiguity in the terms used in the guarantee, the words of the document should be construed against the party which drew it by applying the contra proferentem rule.
- e. A surety is a favoured creditor in the eyes of the law whose obligation should be strictly examined and strictly enforced.
- f. The guarantor in this case comes within the class of accommodation sureties, or those who enter into the guarantee in the expectation of little or no remuneration.
- g. The law has protected such guarantors by strictly construing in their obligations and limiting them to precise terms of the contract of surety.

As far as the facts are concerned clause 8.2 of the contract financing facility prohibited the Defendant from re-lending the Borrowers any sums prepaid. According to exhibit P4 on 22 June 2012 Uganda shillings 51,473,967/= was paid on the account. Under item 4 clause 4.2 the bank had a lien on the said account.

When the money was deposited it was used to offset the debt from Uganda shillings 99,974,920/= to Uganda shillings 48,500,953/=.

On 14 August 2012 the Defendant bank allowed the Borrowers shillings 38,400,000/= and shillings 10,000,000/= which money the principal debtor did not have on the account. This was a new borrowing without the knowledge or consent of the Plaintiff. This borrowing was a material alteration of the terms and conditions by increasing the debt from Uganda shillings 51,360,757/= to Uganda shillings 99,934,908/=. This increased the risk of default and the amount defaulted on. On the basis of this breach alone, the Plaintiff was discharged from the contract of guarantee.

The facility was for 180 days and was expiring in December 2012. The principal debtors applied for extension of the period granted by the bank and the Plaintiff was not consulted. Under the provisions of section 76 of the Contracts Act 2010, this was another instance under the law where the Plaintiff was discharged. PW2 testified that the Defendant bank granted to him another loan facility of Uganda shillings 121,000,000/= which he used to clear all the loan arrears. On the other hand DW1 testified that no new loan was given to the principal Borrowers. That the figure of Uganda shillings 121,000,000/= was a result of adding Uganda shillings 119,117,992/= as loan arrears and accrued interest which interest figure is not known. The two added together amount to Uganda shillings 121,000,000/= which became a loan sum under an extended loan period. Secondly interest was computed every month and added on the loan sum therefore there was no accrued interest over time to be calculated at once.

DW1 testified that the bank opened a new account for the principal Borrowers when a loan sum was transferred. This was also a material alteration in the guarantee agreement made without consent of the guarantor and which entitled him to a release. Furthermore there was an extension of the loan period from 180 days by an additional five months. When the facility expired in December 2012, it could not be extended in January 2013 and again in August 2013. It could only be renewed or revived. The Plaintiff was never consulted to ascertain whether it was

an agreeable to having his property continue as security and therefore ought to be discharged.

Furthermore the Plaintiff's Counsel submitted that in the absence of evidence of the particulars of the new account and signatories thereto are as well as when it was opened, the court can only look at the loan account and come to the conclusion that on 2 August 2013 the loan was settled. Consequently there were no pending loan arrears. The Plaintiff's Counsel relies on the case of **Reid versus National Bank of Commerce (1971) EA 524 at page 528**. On the Defendant's contention that the liability of the Plaintiff depends on the power of attorney, the importance and effect of a power of attorney was considered by the Supreme Court in **Frederick JK Zaabwe verses Orient bank Ltd and others SCCA number 04 of 2006**. Its existence is notes that the donor of the power is the owner of the property. In the premises the bank ought to desist from engaging in acts which are prejudicial to the property rights of the donor without seeking his consent. The court noted that a fiduciary relationship existed between the bank and the owner of the property.

In the premises Counsel reiterated submissions that the Plaintiff is discharged owing to the contract of the Defendant.

Reply by the Defendant's Counsel

In reply the Defendants Counsel agreed with the basic facts that the Defendant loaned money to the Borrowers amounting to Uganda shillings 100,000,000/= secured by the Plaintiffs property. Later on the Plaintiff and the Borrowers executed a mortgage deed.

Whether the Plaintiffs property comprised in LRV 3808 Folio 20 Plot Number 665 Kyadondo Block 187 is liable for sale as security under the mortgage to the Defendant?

The Defendant's Counsel submitted that the Plaintiff has admitted what the mortgage deed as well as being a guarantor has underplayed these facts. He contended that the Plaintiff is a mortgagor and not a surety/guarantor and relied

on the Mortgage Act 2009 section 2 thereof which defines a mortgage. From the evidence on record the Defendant's Counsel contended that the Plaintiff was a mortgagor and not a surety/guarantor. This is also pleaded in paragraph 5 (a) where the Plaintiff admits the existence of a legal mortgage over his property. The Plaintiff cannot turn round and claim to be merely a guarantor. In **Uganda Breweries Ltd versus Uganda Railways Corporation Civil Appeal Number 6 of 2001** the Supreme Court held that the pleadings operate to define and delineate with clarity and precision the real matters in controversy between the parties which can enable them to present their respective cases. The fact that the Plaintiff is a mortgagor is also established by the mortgage deed. The Defendant's Counsel submitted that the collective effect of exhibit P1, P2, P3 and P6 only lead to the conclusion that the Plaintiff is nothing else but a mortgagor and not a surety/guarantor as he has attempted to mislead the court to believe.

Under section 68 of the Contracts Act, a guarantor is defined as a person who gives a guarantee. The Defendant's Counsel further submitted that there is no evidence showing that the Plaintiff was indeed a guarantor. There is no other document of guarantee/surety signed by any of the parties to this suit. The word surety on the mortgage deed is also not useful as it is used interchangeably with the word "mortgagor". From the evidence on record the Plaintiff is a mortgagor and not otherwise. The Defendant's Counsel relied on section 8 of the Evidence Act as to be relevance of the facts necessary to explain or introduce a fact showing the relation of parties by whom any such fact was transacted. Alternatively he submitted that should the court find that the Plaintiff was a guarantor, then the provisions of section 74 and 76 of the Contracts Act 2010 would only permit the discharge of the Plaintiff from the purported guarantee. This would not in any way affect the property which is governed by the provisions of the Mortgage Act 2009 and which property would still be available for sale under the provisions submitted below.

The Defendant's Counsel further contended that the mortgaged property is liable for sale under the mortgage because the Plaintiff was the mortgagor and it follows that the property is liable for sale. It is admitted in the least in the plaint

that the Borrowers defaulted in the repayment of the loan. This fact was further confirmed by the evidence of PW1 and PW2 during cross-examination. Counsel relied on section 57 of the Evidence Act for the proposition that facts once admitted need not be proved. The fact of default within the meaning of clause 15.1 of exhibit P1 is therefore proved.

Upon default the Defendant demanded immediate payment of the total facility. This was contractual under the mortgage deed. Furthermore under clause 5.1 of the contract financing facility, the facility was repayable on demand. Demands were made in the form of notice of demand dated 7th of May 2013 in the notice of sale of the mortgaged property dated 11 February 2014. The Supreme Court accepted the doctrine stated in **Payne versus Cardiff Rural Council (1932) KB 254 in the case of Housing Finance Bank Ltd and another versus Edward Musisi (SCCA 22 of 2010)** that where mortgage money is payable by instalments, the power of sale is exercisable when an instalment of the mortgage has become due and payable but has not been paid. In the premises the suit property is liable for sale under the mortgage.

Regarding the assertion that the Defendant advanced the following to Mr Lujuzo Joseph and Kiwanuka, the assertion is false. The erroneous assertion is premised on Uganda shillings 121,000,000/= apparently credited on to the Borrowers account on 2 August 2013.

The assertion is erroneous because the only person alleged to have granted the facility one Ivan Ssekimpi was never called as a witness to testify about the loan. There was not a single document supporting the assertion that there was a further loan of Uganda shillings 121,000,000/=. DW1 testified that the bank has never granted any other loan to the principal Borrowers. The Plaintiff has not discharged the burden of proof for the granting of a second loan.

For the submission that one of the Borrowers applied for extension of the facility, in a letter dated 16th of January 2013, it was with reference to the existing facility with the Defendant. The letter writes that if the extension was granted, he would make sure the outstanding balance is cleared. On the basis of that application the

bank created another account to allow the borrower continue using their existing facilities. DW1 testified that the bank could not use the existing account which was an overdraft account.

She further testified that the Borrowers need to continue using the account. Consequently the outstanding amount was moved to a new account which act would allow the client to freely continue using the operative account. This is confirmed by the bank statement exhibit P4 at pages 55 and 56 and there is no other evidence to contradict this evidence.

The Defendant's Counsel further submitted that the Plaintiff and his witnesses admitted that the Borrowers were in default. The facility expired in November 2012 while there were still some unpaid sums. PW2 testified that the partnership was unable to pay as promised and the bank issued a notice of default. There is no evidence from the Borrowers that the partnership, settled the entire loan sum. No evidence was adduced to challenge the bank/loan account statement adduced in court.

Lastly the Defendant's Counsel submitted that the extension of the facility does not affect the mortgagee's rights to sell the property. He relied on the mortgage deed paragraph 3 thereof which provides that the total principal monies for which the mortgage constitutes as a security shall be security for all monies including but not limited to the facilities in issue. Secondly the security created it was a continuing security for the payment of all monies which may from time to time become outstanding.

Submissions of the Plaintiff's Counsel in rejoinder

The Plaintiff's Counsel submitted on the issue of whether the Plaintiff was a mortgagor and not a surety. He contended that the fundamental question is whether the bank can alter or vary the terms of the mortgage without the knowledge and consent of the mortgagor? The Plaintiff's Counsel submitted that the answer to the question is that the bank cannot do so. He relied on the case of **Canadian Imperial bank of commerce versus Patel (1990) 72 OR (2 nd) 109** where it was held that if the guarantor is to be treated as the principal debtor and

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not as a guarantor, then the failure of the bank to notify the respondent of the renewal agreement and the new terms of the contract must release him from his obligations since he is not a party to the renewal.

The Plaintiff's Counsel submitted that even if the Plaintiff was the mortgagor, he still had to be consulted on all the variations/alterations or other arrangements/negotiations that were going on between the partners as well as mortgagors and the Defendant. Short of this, the Plaintiff has to be discharged in the eyes of the law as he was not a party to the variations.

In the original defence in paragraph 6 thereof the bank had unequivocally admitted that the Plaintiff's consent and knowledge was not necessary for the second facility to which he was not a party and as such cannot be liable for. The subsequent amendment of the pleadings was an afterthought. From the evidence available the Plaintiff's Counsel submitted that the Plaintiff was a guarantor. This court defined a guarantee in the case of **Barclays Bank of Uganda versus Jing Hong HCCS Number 35 of 2009** as a secondary agreement in which a person (Guarantor) is liable for the debt on default of another (the principal debtor) who is the party primarily liable for the debt.

The submission that the Plaintiff is either a surety or a mortgagor is ambiguous. The ambiguity should be construed in favour of the Plaintiff and against the party who drew the contract. The mortgage deed was drawn by the bank. The mortgage deed was secondary to the contract financing facility and therefore constitutes a guarantee agreement.

The pertinent questions were whether the bank demanded for its money on time and from whom? Secondly whether there was a waiver of the money for the money?

In December 2012 when the loan became due, the bank did not demand for payment. The bank waived the right when it accepted the extension by the principal Borrowers in January 2013 and again a further extension in August 2013. On both occasions DW1 admitted in court that the Plaintiff was not consulted. To

that extent the authority of the case of **Housing Finance Bank Ltd versus Edward Musisi** (supra) is distinguishable.

PW2 testified that he dealt with the Credit Manager of the Defendant to obtain another facility of Uganda shillings 121,000,000/=. Whether there is any documentation or not his evidence remained unchallenged and the figure of Uganda shillings 121,000,000/= is reflected in the account statement as a disbursement and he was charged Uganda shillings 2,000,000/= as an extension fee. In the premises the explanation of DW1 about the facility of Uganda shillings 121,000,000/= being the old facility does not add up.

The Plaintiff testified that he offered to pay Uganda shillings 29,000,000/= because he thought that was the debt owing as a guarantor. It is clear from the fact that the law releases the Plaintiff as a guarantor does not extinguish the indebtedness of the principal Borrowers. The principal Borrowers accepted indebtedness owing to the loan arising from the transaction of 2 August 2013. The Defendant bank has all the powers to recover its money from the principal borrower as if it so wishes to do so. Consequently whether as a mortgagor or a guarantor, the Plaintiff ought to be released because he was entitled to be consulted before any alterations or variations to the mortgage could be made.

Remedies available to the Parties:

The Plaintiff's Counsel submitted that the Plaintiff's evidence is that he was denied the opportunity to access financial facilities from banks for his business. Secondly he has been advertised in the newspapers as a defaulter and he has been living under the threat of losing his property. The activities of the Defendant's officials caused him inconvenience and mental anguish and stagnated his business as a contractor in water engineering. In the premises the Plaintiff's Counsel submitted that the Plaintiff is entitled to an award of general damages. Relying on the authorities of **Stroms vs. Hutchinson (1905) AC 515 at page 525** and the definition that general damages are such as the law will presume to be the direct and natural or probable consequence of the act complained of, the Plaintiff's Counsel submitted that the Plaintiff be awarded

general damages. Secondly general damages are at the discretion of the court (See **Senyonjo vs. Bunjo HCCS 180/2012**).

Reply of the Defendant's Counsel

On the other hand the Defendant's Counsel submitted that the Plaintiffs claim is without merit and prays that it is dismissed with costs.

Judgment

I have carefully considered the Plaintiff's pleadings, the Defendant's pleadings, the evidence adduced, the submissions of Counsels of the parties as well as the authorities cited. The primary question that was agreed upon by the parties is whether the Plaintiff's property which was mortgaged to the Defendant for a facility availed to the principal Borrowers who were partners and initially the second and third Defendants, could be sold on the basis of the outstanding monies owing to the Defendant bank.

There is no dispute about the question of fact as to whether money is owing to the Defendant bank from the principal Borrowers. However the Plaintiff advanced the argument that by a new facility granted to the Borrowers, the outstanding sum was settled by the Borrowers. There is therefore a controversy about whether there is any outstanding sum under a facility secured by the Plaintiff's property.

The issue is whether the Plaintiff should be discharged or considered discharged on the basis of the alleged further facility taken by the principal Borrowers. There is a question of fact involved in resolving this controversy as to whether a new facility was advanced by the Defendant to the Borrower. Secondly the question is whether the Plaintiff should be categorised as a mortgagor or as a guarantor or both and the effect of each case scenario on his liability if any.

Counsels filed a joint scheduling memorandum admitting certain basic facts. The agreed facts are that on the 28th of May 2012 the Defendant agreed to advance the Borrowers (who were formally the second and third Defendants namely Lujuzo Joseph and Kiwanuka Ponny respectively) a facility of Uganda shillings

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100,000,000/=. The facility was secured by the land and property comprised in LRV 3808 folio 20 Plot Number 665 Kyadondo Block 187 at Kasangati, Wakiso district registered in the Plaintiff's name, a chattels mortgage over motor vehicle UAD 193 E and a lien on the borrower's account.

The issues agreed in the joint scheduling memorandum were:

1. Whether the Plaintiff and the Borrowers are jointly or severally indebted to the first Defendant?
2. Whether the Borrowers obtained in new loan facility without the knowledge and consent of the Plaintiff?
3. Whether the Plaintiff was a mortgagor or surety?
4. Remedies available to the parties.

Issues numbers 1, 2 and 3 were merged into one issue as to whether the Plaintiff's property is liable for sale as security under the mortgage to the Defendant. The question of whether the plaintiff and the Borrowers are jointly or severally indebted depends on the resolution of issues 2 and 3. Issue 3 tackles whether the Borrowers obtained a new facility without consent of the Plaintiff enabling the Plaintiff to avoid liability for whatever is outstanding on the new facility. The other issue of whether the Plaintiff is characterised as a Surety or Mortgagor is about which law determines his rights and obligations in the circumstances so as to answer the issue of whether the property mortgaged to the defendant is liable and whether the Plaintiff is discharged on account of the new facility being taken without his consent.

To answer this first crystallised issue of whether the Plaintiffs property is liable for sale as security under the mortgage to the defendant, I have considered the admitted documents namely the loan facility letter exhibit P1, the mortgage deed exhibit P2, power of Attorney exhibit P4 as well as other admitted documents.

The loan facility agreement exhibit P1 is dated 28th of May 2012 and offers to the Partners Messrs Kiwanuka Ponny and Lujuzza Joseph t/a EMCO Works (referred to as the borrower) a contract facility of Uganda shillings 100,000,000/=. The subject caption of the letter is "A Contract Financing Facility Limit of Uganda Shillings 100

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million". The parties are defined as the borrower and the bank/Defendant. The Defendant advised the Borrowers that it was prepared to make available to the partners/Borrowers pursuant to the application of 26 April 2012 and subject to the terms and conditions set out in the facility letter and the bank standard terms and conditions to permit the Borrowers a drawdown on a secured basis an aggregate principal amount not exceeding the contract financing limit of Uganda shillings 100,000,000/=. The purpose of the facility was solely to enable the borrower's execution of the contracts awarded to them. The Defendant undertook to honour instructions drawn on the borrower's current account up to the facility limit of Uganda shillings 100,000,000/= in the aggregate of overdrafts taken for a given period of time. The facility was to be repaid within 180 days which translates to about six months. The Borrowers were required to maintain daily banking on their current account.

The security for the facility is a legal mortgage over land and property comprised in Leasehold Register Volume 3808 Folio 20 Plot 665 Kyadondo Block 187 at Kasangati, Wakiso district in the names of the Plaintiff. Secondly a chattels mortgage over a motor vehicle Mitsubishi FUSO UAD 193 E. Clause 7.1 provided that the contract financing limit will run for a period of 180 days from the date of disbursement. At the end of the period, the facilities we agreed to expire unless it is renewed prior to its expiry date. Clause 7.2 provided that the bank may at its sole discretion consider the request by the borrower for renewal of the facility and if deemed appropriate, grant a renewal for such period and on such terms as it may in its sole discretion determine. The facility letter agreement was executed by the Borrowers and the Defendant on the 29th of May 2012.

On 30 May 2012 in exhibit P2 there is a mortgage deed executed by the partners/borrower's on the first part, the Plaintiff Mr Peter Ganafa Kisawuzi who is referred to as the "Surety (ies) Mortgagor (s)" of the second part. Immediately thereafter it is written as follows:

"The Borrower (s) and the Surety (ies) are herein collectively referred to as the mortgagors"

Finally the Defendant is the third-party referred to as "DFCU". In other words the document expressly stipulates that the Plaintiff and the Borrowers were collectively referred to as Mortgagors.

I have duly considered the submission that the Plaintiff is a surety/guarantor. In the mortgage deed exhibit P2 the above parties executed a mortgage deed. In the recitals it is expressly written that the Borrowers have applied for a credit facility from DFCU. Secondly it is written that the Borrowers/surety is the registered proprietors of the land which is described in the title of the mortgage deed. In the title/caption of the mortgage deed it is clearly written that the property in question is registered in the names of Peter Ganafa Kisawuzi. Regarding the controversy as to whether the Plaintiff is a mortgagor or a guarantor, the agreement defines the Plaintiff as a mortgagor together with the partners/Borrowers. The agreement is sufficiently defines the Plaintiff as a mortgagor and ordinarily there would have been no need to consider the law under the Mortgage Act 2009. However due to the Plaintiffs submissions relying on the characterisation of the Plaintiff as a Surety or Guarantor, I will refer to the definition of a "Mortgagor" under the Mortgage Act, Act 8 of 2009. Section 2 of the Mortgage Act 2009 defines who a mortgagor is and what a mortgage is. It defines a mortgage as including:

"... any charge or lien over land or any estate or interest in land in Uganda for securing the payment of an existing or future or a contingent debt or other money or money's worth or the performance of an obligation and includes a second or subsequent mortgage, a third party mortgage and a sub mortgage;

From a simple and plain reading of the above definition, the Plaintiff had a charge or lien over his land or interest in land for securing the payment of a loan taken or to be taken by the Borrowers.

Secondly a "mortgagor" is defined as:

"... a person who has mortgaged land or an interest in land and includes any person from time to time deriving title under the original mortgagor or

entitled to redeem the mortgage according to his or her estate, interest or right in the mortgaged property;"

Because the Plaintiff's property was mortgaged according to the definition of a mortgage, the mortgagor is a person who has mortgaged land or interest in land and includes a person who is entitled to redeem the mortgage. The definition is wide enough to include the Borrowers who derived title from the original mortgagor. The question is how they derived such a title? According to exhibit P6 on 25 November 2008 the Plaintiff authorised PW2 Mr Joseph Lujuzza of EMCO Works to be his true lawful attorney and on his behalf to do any of the following acts:

"To take possession of his certificate of title in respect of land comprised in LRV 308 folio 20 in block 187 plot 665 land at Kasangati, Wakiso district.

To pledge or mortgage the above stated certificate of title as collateral for a credit facility from DFCU bank Masaka Branch, for the benefit of, use and purpose of the Attorney and to execute all documents necessary for that purpose.

To exercise all rights and privileges and perform all duties which ordinarily fall upon an Attorney for the above described purpose,

To be bound by any act, thing or things done by the attorney with regard to the said facility."

The power of attorney did not have any limit and is addressed to the manager DFCU bank Masaka Branch. It is therefore apparent that the Plaintiff had granted the power of attorney to the Borrowers and in the facility agreement exhibit P1 Mr. Joseph Lujuzi prior to the execution of the mortgage deed exhibit P2 agreed with the defendant to have the property of the plaintiff as security for the loan. Exhibit P1 is dated 28th of May 2012 while exhibit P2 is dated 30th of May 2012. An attorney only acts on behalf of the principal. The principle is the Plaintiff as far as the law is concerned is the mortgagor whichever way one looks at it. This is because it is his property which was pledged as security for the loan facility. In

any other arrangement where the where Joseph Lujuzza mortgages the property the Plaintiff is still the principal and hence the Mortgagor.

The Plaintiff withdrew the suit against Mr Joseph Lujuzza who is his attorney for purposes of any mortgage arrangement with the Defendant. In other words the plaintiff has not exercised a right to sue the Attorney for any breach of trust or duty yet Lujuzza claims to have obtained an additional facility.

I agree with the submissions of the Defendant's Counsel that there is no evidence whatsoever of a guarantee document by which the Plaintiff became a guarantor. The document relied upon is a mortgage deed pledging the Plaintiff's property as security and duly signed by the Plaintiff as mortgagor/Surety. The characterisation of the Plaintiff is Surety is in the alternative to "Mortgagor" but the document itself mortgages the Plaintiffs property. In other words the Defendant concedes that the Plaintiff is not a guarantor and I do not need to consider whether the Plaintiff can be held liable for any outstanding loans as a guarantor. The Plaintiff is not being sought or held liable as a Guarantor and the issue of his discharge from the role of guarantor does not arise. In any case the discharge of the plaintiff as guarantor does not and would not release the mortgage over the property. The bank would discharge the mortgage upon being paid. I see no prejudice to anybody if the plaintiff is discharged from any obligations real or fanciful as a guarantor. The Plaintiff is accordingly discharged to the extent that he may be held personally liable for any loans taken by the Borrowers on the footing that he is a guarantor.

I also agree with the submissions of the Plaintiff's Counsel that it would not matter whether the Plaintiff is a mortgagor or a surety in considering whether the consent of the plaintiff was got for any additional facility. It is a matter of evidence that the only document by which the Plaintiff is bound is the mortgage deed exhibit P2. What needs to be read is the mortgage deed whose terms are binding on the Plaintiff and the Defendant. Paragraph D of the recitals under the mortgage deed provides as follows:

"at the request of the Borrowers, DFCU has under the terms of the facility letter dated 28th of May 2012 executed between the borrower and DFCU agreed to advance to the Borrowers the said facility upon having the repayment thereof with interests thereon secured in the manner herein after appearing;

It is an express term of the mortgage deed and the very purpose thereof that it was securing repayment of the facility dated 28th of May 2012 executed between the borrower and DFCU bank. The question therefore is what the facility is or was at the time of creation and thereafter. There is no controversy about the fact that there was an overdraft facility advanced to the Partners/Borrowers trading as EMCO Works. The only controversy that emerged from the evidence is whether an additional facility was extended to the Borrowers without the consent of the Plaintiff and whether if so, this discharged the mortgage and mortgagor.

I have carefully considered the evidence. The evidence of the Plaintiff who testified as PW1 is that he guaranteed the repayment of the facility and the Defendant created a legal mortgage on his property described as LRV 3808 Folio 20 Plot 665 Kyadondo Block 187 at Kasangati, Wakiso district and exhibit P2. On 10 June 2013 he was served with a default notice by the first Defendant. It was the time when he got to know that the partners had defaulted on the facility. He called PW2 Mr Joseph Lujuzza who informed him that there was a default of about Uganda shillings 30,000,000/= which was not the amount indicated in the default notice. He subsequently discovered according to the bank statement produced in the course of proceedings that the outstanding amount was Uganda shillings 121,000,000/= but actually Uganda shillings 119,117,008/= was deducted upon full settlement of the loan amount after the Defendant disbursed a new loan on 2 August 2013 to the Borrowers. He further contended that the disbursement of the loan without his consent was fraudulent.

Without much ado I find this contention as illogical for the simple reason that if a loan was obtained and it offsets the previous loan, the question is how much was the previous loan? Why would the Plaintiff want to benefit from what he calls a fraudulent disbursement of a new loan and at the same time condemn it as

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fraudulent? If it discharged the liability secured by the loan why allege fraud? What prejudice did he suffer? The Plaintiff should either contend that the property was wrongly charged and therefore any disbursements were not secured by his property meaning that even the payment of the money to offset the old loan should not be relied upon. The old loan could only be repaid either by the Borrowers or by selling the property pledged as security to secure the repayment of the loan. The bank cannot offset a loan with another loan from the same bank unless it is done under a different arrangement. That arrangement has to be proved by adducing evidence. That notwithstanding I have further considered the evidence.

PW1 was cross examined on his written testimony and testified that it appears that monies were paid into the Borrowers account but he did not know from where. He admitted that the Borrowers were in default on the principal as well as the interest. He could not however establish whether a new loan had been granted to the Borrowers on the basis of the admitted the bank statement or not. Most importantly the witness admitted in paragraph 3 of his witness statement that Mr Joseph Lujuzi and Kiwanuka Ponny had been his friends since the year 2008 and have been using his title to obtain a facility from the Defendant as and when the need arises. He had granted them a power of attorney to mortgage his land as the need arose.

PW2 Mr Lujuzi Joseph testified that there was indeed a legal mortgage over the Plaintiff's property according to exhibit P2. The facility expired in November 2012 while there were unpaid sums. In January 2013 in a letter dated 16th of January 2013 exhibit P10 he wrote to the Defendant requesting for extension of time within which to pay the loan. The request was accepted up to April 2013. However the partnership was unable to pay as promised and the bank issued a notice of default. Specifically he testified that the bank accepted his request for another loan and disbursed Uganda shillings 121,000,000/= out of which Uganda shillings 119,117,008/= was deducted in full settlement of the loan arrears.

In this cross examination testimony of PW2 admitted that he had paid Uganda shillings 70,000,000/= and what was outstanding was Uganda shillings

29,000,000/=. The interest was also outstanding. The Borrowers were in default on both the interest and principal amount. He had not paid Uganda shillings 121,000,000/=.

DW1 Lillian Namusisi the Special Assets Management Executive of the Defendant testified that the facility advanced to the Borrowers was to run for a period of 180 days from the date of disbursement and was to expire at the end of that period. The facility period expired and the Borrowers requested the bank to allow the more time within which to repay the facility and also permit them to continue using the account. The bank on account of the request created a new account on which it moved the outstanding amount of Uganda shillings 121,000,000/=. This act allowed the client to freely continue using the operative account. On account of defaults on the repayment of the facility, the bank issued a notice of default on the client dated 7th of May 2013 copied to the Plaintiff who received it on 10 June 2013 and the notice was ignored. The bank subsequently issued a notice of sale of the mortgaged property. The bank did not agree that the Plaintiff should pay Uganda shillings 29,600,000/= through instalments of Uganda shillings 1,000,000/=. She was cross examined about how much money owed by 31 December 2012. There was an outstanding amount of about Uganda shillings 98,000,000/=. She admitted that there was an extension of the loan repayment period by the Defendant. Secondly the figure of 121,000,000/= on 2 August 2013 was the outstanding loan amount. The loan was transferred to another account.

I have carefully considered the evidence as well as the pleadings of the parties. The Plaintiff's case is that the Defendant without his consent advanced to the Borrowers another sum of money by way of a loan secured by the Plaintiff's title. I do not believe the testimony of PW2 that he was advanced another loan. PW2 wrote the letter exhibit P10 dated 16th of January 2010 for extension of the period of the facility. He applied for extension of the facility for two months. By 31st of January 2013 the Borrowers account was outstanding to the tune of Uganda shillings 101,954,000/=.

Exhibit P4 is the bank statement of the Borrowers and indicates that on 2 August 2013 the account of the borrower was disbursed Uganda shillings 121,000,000/=.

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Prior to that it was in arrears of Uganda shillings 119,117,008/=. The explanation of DW1 is that the Borrowers were given an extension of time to repay the loan. However because the account was an overdraft account, it could not be overdrawn by more than 100,000,000/=. So the indebtedness of the Borrowers was transferred by crediting the account by Uganda shillings 121,000,000/= and debiting another account. In other words the Borrowers still owed the Defendant outstanding amounts by 2 August 2013 which was not reflected in the statement. Secondly DW1 testified that no further loan was granted to the Borrowers. I believe this testimony because PW2 testified when under cross examination by the Defendants Counsel that he did not pay back what was outstanding because the partnership was experiencing problems. In other words the amount of Uganda shillings 121,000,000/= came for the Defendant and was used to offset the amount of money on the Borrowers account for accounting purposes only. No money was received from the Borrowers to offset the loan. The Borrowers still owed the money and there was no other credit facility granted to them. Another account was created for administrative reasons and debited with the outstanding amount. The debit was credited on the loan amount and on paper seemed to credit it and offset the loan amount.

It seems illogical to say that no further sums were advanced to the Borrowers. If the indebtedness of the Borrowers was transferred to another account, it meant that they could overdraw their active account with more money. However I have carefully considered the bank statement and it demonstrates that the Borrowers account has no other overdraft facility extended to it. What was being charged debited was the accumulating interest on the account. The narratives against the numerous debits indicate that thereafter there were maintenance fees and other charges which continued being charged on the account. PW2 admitted that the partnership did not pay more money. They also did not receive more money. They still owe the Defendant bank. The conclusion is that though the extension of the time of the facility could have been done without the consent of the Plaintiff, the Plaintiff was not prejudiced because the purpose of the extension was to give the Borrowers a breathing space within which to pay otherwise being in default up to a limit of Uganda shillings 100,000,000/= only meant that the bank would move to

have the property sold or apply any other recovery measures enabled by the mortgage deed.

Last but not least PW2 testified that the second facility was unsecured. I do not believe the testimony. The Plaintiff had armed PW2 with a power of attorney and he had powers to mortgage the property as if he was the Plaintiff. In further cross examination he testified that the second loan was wrong because when he was getting this facility there was no consent of the plaintiff. The obvious inference from such an assertion is that he used the Plaintiffs property as security. If not the consent of the plaintiff would be unnecessary as it would be a new facility. As an attorney he could only act on the authority of the Plaintiff. The Plaintiff deemed it fit to drop him as a Defendant to the suit.

However there is no evidence that another loan facility was secured. I agree with the Defendant's counsel that no document was produced to prove the existence of another loan facility either unsecured or secured by another security. The Plaintiff did not discharge the burden of proof to prove that the borrowers obtained another loan facility on the balance of probabilities. Exhibit P4 which is the bank statement only proves an accounting credit made by the Defendant bank. It is upon the bank to discharge the mortgage. The certificate of title only has one encumbrance registered in June 2012. No further charge was registered. For the Plaintiff's property to be discharged he has to prove that the outstanding amount has been paid off by the Borrower. Neither the Borrowers nor the plaintiff offset the loan. No additional money was paid by the Borrowers and the Bank still claims the money as outstanding. The alleged disbursement was a mere administrative and internal accounting mechanism employed by the Defendants officials to limit the amount on the overdraft facility. On the basis of these facts the authorities cited on variation without consent of a guarantor or mortgagor are inapplicable to the facts and circumstances of this case and need not all be referred to in my judgment. It suffices to refer to the holding in the case of **Harilal & Co. v. Standard Bank Ltd [1967] E.A. 512**. In that case the issue was whether the bank by altering without the consent of the guarantor the terms

upon which it extended overdraft facilities to the merchant had discharged the guarantor from liability under her guarantee. Sir Charles Newbold, P Held:

“... the case of *National Bank of Nigeria Ltd. v. Awolesi* (2), the facts of which are remarkably similar to the facts of this case. In that case the Privy Council held that the act of the banker in requiring the second account to be opened without the consent of the guarantor discharged the guarantor from his liability. Reference was made to *Holme v. Brunskill* (3), where Cotton, L.J., said (3 Q.B.D. at p. 505):

“The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, *although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged*; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court will not, in an action against the surety, go into an inquiry as to the effect of the alteration.” (Emphasis mine)

He noted at page 519 that there was a material alteration in that case which was prejudicial to the guarantor:

“Without the knowledge or consent of the guarantor the bank in effect closed that account and prevented the merchant from depositing to the credit of that account sums which would normally have been so deposited. On the face of it that created a material alteration in the course of dealing between the bank and the merchant and on the face of it such a variation would be prejudicial to the surety.”

The crux of the matter is that the Plaintiff is not a guarantor. As a mortgagor he pledged his property as security and has a right to redeem the property. The Plaintiffs property was mortgaged and the monies owing which the property secured have not been cleared by the Plaintiff or EMCO works and remain

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outstanding. I do not see what prejudice the Plaintiff has suffered on account of transferring the figures in the account to another account because the amount remained outstanding and the bank did not give the impression in writing that no money owed.

In the premises I agree with the Defendant's Counsel that the Plaintiff's suit has no merit. The Plaintiff is the mortgagor and had also granted a power of attorney and PW2 who claimed to have wrongly obtained another loan (can only be based on existing securities otherwise he would not be at fault). The evidence however is that no further facility was extended to the Borrowers and the property is available to the bank under exhibit P2. Whereas the Plaintiff is not personally liable, the Defendant is entitled in the absence of repayment of the loan to use the security of the property to realise its money in the absence of efforts to redeem it. In the premises the Plaintiff's suit is dismissed with costs.

Judgment delivered on 7 December 2015

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Katabalwa Hebert for the Plaintiff

Bakayana Isaac for the Defendant

None of the parties present in court.

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

7th December 2015

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