

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
HIGH COURT CIVIL SUIT NO. 619/98

Hima Cement (U) Ltd ::: Plaintiff versus
Uganda Co-operative Insurance Ltd ::: Defendant

Before: The Hon. Principal Judge Mr. Justice J.H. Ntabgoba

RULING

Hima Cement (U) Ltd, the plaintiff in this case brought an action against Uganda Co-operative Insurance Limited, the defendant seeking an order for payment to the plaintiff by the defendant of a sum of Shs. 21,943,200/= termed, in the plaint, the contractual sum. An order is also sought for general damages for breach of contract and interest on the decretal amount at the rate of 49% per cent per annum, together with the costs of the suit.

It is the case for the plaintiff that, upon a guarantee by the defendant for the payment of Shs. 50 million shillings signed by the defendant in favour of the plaintiff, the latter supplied to N.K.Paints Cement worth Shs. 21,943 ,200/=; that when N.K. Paint failed to pay this debt, the plaintiff resorted to the defendant for its payment relying on the guarantee but that N.K. Paint, Ltd defaulted in payment despite demands by the plaintiff. The alleged guarantee was written on the official document of the defendant bearing its logo, the letter head, and it was signed by two persons for the General Manager of the defendant. Their signatures are under the seal of the defendant. Although Mr. Kinyera P'Lodi, learned Counsel for the defendant concedes that the two persons who signed the alleged guarantee were employees of the defendant, he contends that they were too junior to bind the defendant in view of S.48 of the defendants' Bye-Laws (annexture "C" of the W.S.D) 'That section provides that:-

“Documents and contracts shall be signed by two of the following:- Chairman or Secretary and General Manager except documents and contracts relating to the day to-day business of the Society and all cheques which shall be signed by the General Manager and one of the following:- Accountant or Secretary.”

There seems to be no dispute that the two persons who signed the alleged guarantee do not ordinarily qualify to sign a guarantee issued by the defendant. Mr. Kinyera p'Lodi argues that the defendant's bye-laws are a public record since they were registered at the Registry of Documents for everyone to see and be informed of the contents thereof. He argues that the plaintiff is presumed to have been aware of S.48 of the defendant and that it should not have relied on the so called guarantee having been issued by non-authorized persons:

Ms. Nakabuye Charity, on the other hand, argues that the two persons who signed the guarantee were clothed with ostensible authority to so sign in view of the fact that they were allowed access to the company's seal which must be kept by the General Manager of the defendant. S .47 of the defendant's bye laws provides:-

“The Society shall have a seal on which its name registered number shall be engraved in legible characters with the device of a crested crane. It shall be kept by the General Manager and shall be used only by the officers who have authority to sign documents under Bye-Law 48”

Ms. Nakabuye contends that by the General Manager making available the company's seal to the signatories on the guarantee, they were clothed with authority to sign documents such as the guarantee under the defendants' seal.

Mr. Kinyera p'Lodi also contends that the type of guarantee allegedly issued by the defendant is only suitable as a Bank guarantee and not as an insurance guarantee whose technical term he says is “performance guarantee bond.” In paragraph 9 of the W.S.D. the defendant pleads:

“An insurance company by its very nature does not issue credit guarantees but performance guarantee bonds where a contract should have been executed by the insurance company and N.K. Paints assuring the plaintiff that N.K. Paints would

perform.”

In paragraph 5(B) of the W.S.D one of the particulars of fraud pleaded by the defendant is that:-

“(b) The plaintiff through Colombus Kiragga made available to the defendant’s junior officers a Bank Guarantee No. TBUL/97/LG - 006 dated 29th day of May 1997 at Kampala to enable them to copy and produce what they called “Insurance Guarantee” dated the 2nd day of October 1997 at Kampala.”

Mr. Kinyera p’Lodi informed the Court from the Bar, and he was not challenged, that his client, the defendant reported Colombus Kiragga to the Police for the fabrication of the so called guarantee. He was arrested by the Police and as a result, he drew up and signed the memorandum of understanding annexed to the W.S.D. as Annexure ‘I’. Counsel says that the copy of the annexure was obtained by him from the Police, the memorandum was signed by the plaintiff and Colombus Kiragga and therein it is provided that Colombus Kiragga would pay the decretal sum to the plaintiff by installments.

I disqualified the so called memorandum of understanding because it contravenes the provisions of S.66 of the Advocates Act. I struck it out of the pleadings.

In view of the preliminary points raised by Counsel for the defendant challenging the guarantee document I adjourned the hearing of the main suit in order to give my ruling before deciding to proceed with the hearing of the suit. These are therefore my rulings: -

1. I have scrutinised the so called guarantee (Annexure “D” to the W.S.D). I have compared it with Annexure ‘C’ which is Bank Guarantee No. TBUL/97/LG - 0006. I am satisfied that but for the particulars of their respective letter heads and logo, the two documents are similar word for word.

2. I have looked at the so called guarantee annexure “D” to the W.S.D. and at so called guarantee that was signed by the junior officers of the defendant. They are exactly similar.

3. I have read SS.47 and 48 of the Bye-Laws of the defendant. Clearly, no person, employee of the defendant is authorised to sign a document of the Calibre of the “guarantee” being relied on by the defendant. It does not matter whether or not the document bears the Company’s letter head, its logo and was signed under seal. Clearly the bye-law (S.48) excludes any other person of the rank of those who signed the document. They should not have signed it for to do so is illegal. The doctrine and plea of ostensible authority cannot be pleaded by the plaintiff where such authority is feigned and illegally assumed. It does not matter that S.47 of the bye-laws instructs that the seal should be kept by the General Manager and was made available to the two junior officers to use it. Besides, it was up to the plaintiff to prove that the General Manager deliberately made the seal available to those officers to use

it. S.48 is strict. No other person can sign a performance guarantee bond apart from either the General Manager jointly with the Chairman ç the General Manager jointly with the Secretary. To accept Ms. Nakabuye’s argument is to accept that even if the two junior officers had stolen the company’s seal to use it their use would be lawful and justify ostensible authority.

In view of my foregoing decisions, I hold the so called guarantee illegal as I also hold that there was thus no guarantee. And in view of such conclusions, it is clear that no suit can be sustained against the defendant since the guarantee which is the suit’s substratoin is struck out.

In the result, I uphold the defendant’s defence that the plaintiff has no cause of action against the defendant. The suit is accordingly struck out in its entirety with costs to defendant.

J.H. Ntabgoba

Principal Judge

6/4/99