THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA
HCT-05-CV-CS-0106-2020

CENTENARY RURAL
DEVELOPMENT BANK LTD :::::::::::::::::::::::: PLAINTIFF

VERSUS

1. TEJAS TANNA DHIRAJLAL
2. BAINOMUGISHA SARAH
3. OWEMBABAZI PEREPETWA :::::::::::::: DEFENDANTS

BEFORE: HON LADY JUSTICE JOYCE KAVUMA

JUDGMENT

Background

[1] This suit was commenced by way of Specially Endorsed Plaint under Order 36 rule 2 of the Civil Procedure Rules. The Plaintiff was seeking for recovery of an outstanding loan balance of UGX 46,701,794/= arising from breach of contract, interest of 25% per annum on the instalments in arrears, penal interest of 0.5% per day and costs of the suit.

[2] It was the Plaintiff's case that the 1st Defendant obtained a loan of UGX 54,000,000/= to be repaid in twelve monthly instalments for which he offered security of a Toyota HiAce Minibus, three Mitsubishi Canter trucks and all stock of his business. That the two parties executed a chattels mortgage thereafter on 27th November 2019.

That the 1st Defendant further presented the 2nd and 3rd Defendants as guarantors to his loan who duly executed a guarantee agreement having duly received independent legal advice.
That the 1st Defendant ignored all default notices sent to him by the Plaintiff hence the suit.

[3] The court record indicates that on **22nd January 2021**, in a joint application to this court vide **Misc. Application No. 13 of 2021**, applied for unconditional leave to appear and defend this suit. On **22nd October 2021**, this court delivered a ruling in **Misc. Application No. 13 of 2021** wherein unconditional leave to appear and defend was granted to them.

When the matter came up for hearing the first time, Counsel who was representing the Defendants informed court that the 1st Defendant was now deceased and did not know the whereabouts of the 2nd and 3rd Defendants. Owing to that fact, he withdrew from the matter. This court ordered the Plaintiff to personal effect service upon the 2nd and 3rd Defendants.
According to an affidavit of service deposed by **Mr. Alikonyera Joseph** dated **6th March 2023**, the 2nd and 3rd Defendants were served electronically through WhatsApp.
This court found the service effective and subsequently on **9th March 2023** ordered that the matter proceeds ex-parte.

I note that no efforts were taken by the Plaintiff to have the estate of the 1st Defendant served with court process so that they could be part of the suit since he was the principal debtor in the instant suit.

Be that as it may, I will proceed to determine the suit as against the 2nd and 3rd Defendants.

Representation.

[4] The Plaintiff was represented by *M/s Muhumuza-Kiiza Advocates & Legal Consultants*.

When counsel closed their case on **25th April 2023**, this court gave a schedule to allow counsel file written submissions in the matter by **3rd May 2023**. Counsel did not file written submissions in the matter.

The discretion is with the court on how to proceed where a party has not made submissions as and when ordered to do so.

Order 17 rule 4 of the Civil Procedure Rules gives guidance in this regard. It provides that,

> *"Where any party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any other necessary act to the further progress of the suit, for which time has been allowed, the court may, notwithstanding the default, proceed to decide the suit immediately."*

Having found no submissions from counsel and being guided by **Order 17 rule 4**, I will decide this suit on its merits considering the evidence before me.

The Plaintiff's evidence at trial.

[5] At trial, the Plaintiff led their evidence through one witness, **Mr. Christopher Ngangeyo** who filed a witness statement as his evidence in chief.

He testified that he was currently working in the position of Assistant Manager Business Banking at the Plaintiff's branch in Mbarara. That on **10th June 2019**, the 1st Defendant obtained a loan facility of UGX 24,000,000/= from the Plaintiff's branch in Mbarara payable in twelve monthly instalments of UGX 2,281,061/=. That on **27th November 2019**, the 1st Defendant obtained a further loan from the Plaintiff of UGX 30,000,000/= payable in twelve monthly instalments of UGX 2,851,326/=.

Copies of the above loan agreements were tendered into court and this court admitted them as **PEXh 1 and PEXh 2**.

That the 1st Defendant pledged as security four motor vehicles and all stock of his business for which a chattels mortgage agreement was entered. A copy of the chattels mortgage was tendered into court and it was admitted as **PEXh 3**.

That the 1st Defendant presented the 2nd and 3rd Defendants as guarantors to his loan for which guarantee agreements were executed. Two guarantee undertaking agreements and statutory declarations of

independent advice to guarantors were tendered into court and admitted collectively as **PEXh 4**.

That the 1st Defendant defaulted on his loan repayment obligations which prompted the Plaintiff to issue notices to him which were ignored by him. Copies of notices dated **5/1/2020, 10/2/2020** and **13/3/2020** were tendered into court and admitted collectively as **PEXh 5**.

That as of **7th December 2020**, the outstanding amount owing against the Defendants was UGX 46,701,794/=. A copy of the bank statement and loan account statements were submitted in court and admitted as **PEXh 6**.

Analysis and decision of court.

[6] It is a settled principle of evidence that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. (**See Section 101 of the Evidence Act**). It is said that this person has the burden of proof. This is the person whose suit or proceeding would fail if no evidence at all were given on either side. (**See Section 102 of the Evidence Act**).

The standard of proof in cases like the instant one is on a balance of probabilities. **(See Miller vs Minister of Pensions [1972] 2 All ER 372).**

Where a court decides to proceed ex-parte pursuant to a default on the parties, as it did in the instant case, the court sets down the suit for formal proof.

Where the court sets down a suit for formal proof after a default order has been made, the Plaintiff is under a duty to place before the court

evidence to sustain the averments in his or her plaint. The pleadings and written submissions are not evidence. Thus even where there is no rebuttal because of the Defendant's failure to file a written statement of defence or proceeding with the case, hence in a matter that requires formal proof, **sections 101 – 104 and 106** of The Evidence Act apply. The Plaintiff being desirous of this court giving judgment as to legal rights or liability dependent on the existence of facts which they assert, must prove that those facts exist.

As a matter of law, despite the absence of cross-examination, it was held in **Kirugi and another vs Kabiya and three others [1987] KLR 347**, that:

> *"The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof."*

It therefore follows that the Plaintiff having not taken any efforts to have the estate of the 1st Defendant served so that they could be party to the instant suit since he was the principal debtor, equally liable to them, had the duty to prove to this court that the 2nd and 3rd Defendants owed them UGX 46,701,794/= arising from breach of contract.

I will be guided by the above legal positions.

[7] A guarantee is a promise to be liable for the debt or other legal obligation of another. (**See Moschi vs Lep Air Services Ltd [1973] AC 331, 347H–348A, HL** and generally **John Odgers QC - Paget's Law of Banking-LexisNexis Butterworths (2018) at 18.2**). The person to whom the promise is made is called the 'creditor', the person who makes the promise is called the 'guarantor' or the 'surety', and the person whose

obligation is guaranteed is the called the 'principal debtor' or simply the 'principal'. In the bank lending context as the instant one, the Plaintiff bank is the creditor, the principal debtor was the 1st Defendant, and the guarantors were the 2nd and 3rd Defendants.

According to **Section 71** of the Contracts Act No. 7 of 2010, the liability of a guarantor shall be to the extent to which a principal debtor is liable unless otherwise provided by a contract. The liability of a guarantor takes effect upon default by the principal debtor. In this regard, the guarantor undertakes that the principal debtor will perform his or her obligation to the creditor and that the guarantor will be liable to the creditor if the principal debtor does not perform.

[8] The above provision of the law codifies the age-old legal position that a guarantor's liability depends upon the terms of his or her indemnity contract.
The guarantee contracts governing the 2nd and 3rd Defendants' liability were collectively admitted as **PEXh 4**. The guarantee document which was signed on **27th November 2019** by the 2nd and 3rd Defendants reads in part as follows;

> *"1. HEREBY AGREE to pay and satisfy the Bank on demand all sums of money which are now or shall at any time be owing to the Bank anywhere on any account whatsoever whether from any firm in which the customer may be a partner including the amount of notes or bills discounted or*

paid and other loans, credits or advances made to or for the accommodation or at the request of the customer as aforesaid including legal and bank charges occasioned by or incidental to this or any other security held by or offered to the Bank for some indebtedness.

2.*PROVIDED ALWAYS that the total liability ultimately enforceable against me under this guarantee shall not exceed the sum Shs 30,000,000 together with interest thereon at the rate of 25% plus a monitoring fee of 2-1 % p.m. from the date of demand by the Bank upon me for payment.*

3. *ALTERNATIVELY IN CONSIDERATION of the Bank granting at the request the customer a loan/overdraft/cash credit limit of shs 30,000,000 (shs Thirty Million only). I/We guarantee to the Bank repayment of the said loan/overdraft/cash credit with all the interest due thereon plus all costs, charges and expenses for recovery thereof."*

[9] From the above, the following are the key aspects of the guarantee agreement;

(a) The 2nd and 3rd Defendants agreed to satisfy the Plaintiff on demand all sums of money which were then or were at any time owing to the Bank by the 1st Defendant.

(b) The total sum owed was not to exceed the sum of UGX 30,000,000/= (together with interest thereon at the rate of 25% plus a monitoring dee of 2-1% p.m.)

From the Plaintiff's evidence in chief, in **paragraph 5**, **PW1** stated that;

> *"On 10th June 2019, the 1st Defendant obtained a loan facility of UGX 24,000,000/=…"*

Under **paragraph 6** thereof, **PW1** stated that;

> *"On 27th November 2019, the Plaintiff further obtained from the Plaintiff a loan facility of UGX 30,000,000/=…"*

The above excerpts of **PW1's** evidence is indicative of the fact that the 1st Defendant obtained two loans totaling to a sum of UGX 54,000,000/=.

One of the loans, that is, that obtained on **10th June 2019**, it would seem was obtained before the 2nd and 3rd Defendants signed the guarantee document which I have already pointed out was signed on **27th November 2019**.

This poses two questions;

1. *For which of the two loans did the 2nd and 3rd Defendants, guarantee?*
2. *How much money if any are the 2nd and 3rd Defendants liable to pay to the Plaintiff?*

[10] The answer to the first question will automatically impact the second question.

For the first question to be answered, I have looked at the joint guarantee agreement signed on **27th November 2019** marked as **PEXh 4** and arrived at the conclusion that the loan that was guaranteed by the

2nd and 3rd Defendants was that given to the 1st Defendant after **27th November 2019**. This was that which **PW1** referred to under **paragraph 6** of his evidence in chief. The amount of this loan was UGX 30,000,000/=. The 2nd and 3rd Defendants cannot be said to have guaranteed a past loan as this was not covered within the wording of **PEXh 4**(the guarantee agreement).

[11] According to **PW1's** evidence in chief at **paragraph 12**, he stated that;

> *"As of 7th December 2020, the outstanding amount owing against the Defendant was UGX 46,701,794/=."*

It is not possible for this court, in answering the second question, from the evidence provided by the Plaintiff, to ascertain how much of the UGX 46,701,794/= forms the first loan obtained on **10th June 2019** before the guarantee agreement was signed and the second loan obtained by the 1st Defendant on **27th November 2019** after the guarantee agreement was signed.

The Plaintiff in bringing this suit, referred to one lumpsum figure as being owed. It would have been proper, for the Plaintiff to specify to this court whether the first loan referred to by **PW1** in **paragraph 5** was fully paid or not; or how much of it was due. And also, specifically state how much of the second loan was due on the figure that they sought to recover from court. This is so because the issue came up when the Defendants sought for leave to appear and defend.

The 2nd and 3rd Defendants would ordinarily be liable for the sum owed only on the second loan since this was what the evidence shows they guaranteed.

[12] In the circumstances, the Plaintiff has failed on a balance of probabilities to prove to this court that the 2nd and 3rd Defendants owe them the whole sum of UGX 46,701,794/=.

The implication of this means that this left the sum sought to be recovered on only the principal debtor who according to the court record is now deceased. As already noted, no steps were taken by the Plaintiff to effect service on the estate of the 1st Defendant when service was ordered by this court. The Plaintiff opted to only pursue the case against the 2nd and 3rd Defendants. They were legally entitled to do so.

It is trite that the death of the principal debtor will not usually discharge his or her estate from liability for debts contracted prior to his or her death, and so will not usually discharge a guarantor for those debts. (See Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (208) 5TH EDITION, PARAS 1620-2586)4. GUARANTEE AND INDEMNITY (7) DISCHARGE OF THE GUARANTEE (iii) Death of Parties/1202. Death of principal debtor).

In the instant case, having found that the Plaintiff has failed to distinctively lay before this court evidence to show how much of the sum owed fell within the guarantee contract signed by the 2nd and 3rd

Defendants on **27th November 2019**, have the option of pursuing the debt against the estate of the 1st Defendant or even the 2nd and 3rd Defendants subject to the law of limitation.

[13] In conclusion this suit stands dismissed. The matter having proceeded ex parte, the Plaintiff shall bear their own costs.

I so order.

Dated, delivered and signed at Mbarara this 31st day of August 2023.

Joyce Kavuma

Judge