IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO. 123 OF 2015

(CORAM: MUSSA, J.A., MKUYE, J.A., And WAMBALI, J.A.)

EVARIST JOHN KAWISHE ..... APPELLANT
VERSUS
CRDB BANK LTD ..... RESPONDENT
[Appeal against the judgment and decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam]

(Nchimbi, J.)

dated the 2nd day of July, 2014
in
Commercial Case No. 69 of 2011

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JUDGMENT OF THE COURT

25th September, 2018 & 8th March, 2019
WAMBALI, J.A.:

The appellant is a customer of the respondent where he holds two current accounts one registered in the name of Mkwa General Traders Ltd and another as Mount Evarist School Limited. The appellant also holds a Fixed Deposit Account in the name of Evarist John Kawishe.

It is not in dispute that on 30th June, 2004 the appellant after being persuaded by his friend one Exaud Kwayu who had bought shares in Simon Agency Limited in order to buy cotton, offered his Fixed Deposit Account (FDR) number 01J0007242101 bearing fixed deposit receipt No. C 039330 as an additional security to guarantee the loan of Tshs. 500,000,000/= which was granted by the respondent to Simon Agency Limited in a form of an overdraft.

To facilitate the guarantee, the appellant signed a letter of lien in the sum of Tshs. 104,110,585/85 as additional security for the loan. The appellant believed that the guarantee was to expire after one year. However, as at 31st March, 2005 the loan was not fully paid on the reason that Simon Agency Limited's business did not go well. This necessitated the respondent to grant additional loan of Tshs. 1, 500,000,000/= to Simon Agency Limited which was valid for one year and based on the same securities offered by the principal borrower earlier and the appellant's FDR. Despite the second loan, Simon Agency Limited did not manage to settle the outstanding loan by the end of the agreed period. Nevertheless, the respondent again granted Simon Agency Limited during the period of 2007/2008 a further loan of Tshs. 3,000,000,000/= on the same securities. However, up to 3rd September, 2010 Simon Agency Limited had not managed to settle the outstanding balance of Tshs. 6,814,158,448/47 which included the principal sum and interests. The respondent was thus compelled to sell some of the buildings which were offered as securities by Simon Agency Limited. The respondent also uplifted all the outstanding amount, that is, Tshs. 129,584,209/38 which were in the Fixed Deposit Account No. 01J0007242109 belonging to the appellant.

That action prompted the appellant to lodge Commercial Case No. 69 of 2011 before the High Court (Commercial Division) in which he contended that the respondent acted unprofessionally and as a result he suffered damages. He contended that the respondent had no justification of taking his money for the outstanding debt of the principal borrower

because there was no binding agreement between them after the guarantee expired on 31st March, 2005.

To be specific, the appellant (plaintiff) prayed for the judgment and decree against the respondent (defendant) as hereunder:-

(a) *Court be pleased to declare that the defendant was in breach of the guarantee agreement and that the plaintiff was as at 31st day of March, 2005 discharged as a guarantor and his account number 01J0007242101 committed by the signed lien was equally discharged.*

(b) *Court be pleased to declare that the plaintiff's liability as a result of the guarantee was not co-extensive to other borrowing by the principal debtor from the defendant without his consent.*

(c) *Court be pleased to condemn the defendant for paying itself from separate accounts of the plaintiff contrary to the letter of lien.*

(d) *Court be pleased to order the defendant to refund all sums of money with interest taken by the defendant from the plaintiff's fixed deposit account number 01J0007242109 being Tshs. 129,584,209/38.*

(e) Court be pleased to order the defendant to open plaintiff's new fixed deposit receipt unconditionally in his name.

(i) Court to order the defendant to pay the plaintiff general damages to be assessed.

(j) Court be pleased to order the defendants to pay interests on all pecuniary claims from the date of cause of action till judgment at the commercial rate pertaining at the time of cause of action and at 12% from the date of judgment till final settlement.

(k) Costs of this suit to be met by the defendants

(l) Any other and further relief the court deems fit and just be ordered."

On her part, the respondent denied the claims and contended that the appellant did not withdraw his FDR from being used as security and therefore she continued to issue additional loans to Simon Agency Limited. The respondent argued further that there was no need to give notice to the appellant as the modality of the action to be taken was stipulated in the letter of lien.

In view of the dispute between the parties, the High Court, (Commercial Division) (Nchimbi, J) heard evidence and arguments that were laid before that court and in the end the suit was dismissed with costs.

This appeal therefore, araises from the dissatisfaction of the appellant with the decision of the High Court (Commercial Division) dated 2nd July, 2014 in Commercial Case No. 69 of 2011.

The appellant has approached this Court with four grounds of complaints:-

"1. *That the trial judge erred both in law and facts*

and misdirected himself on the law and practice of banking involving the appellant's letter of lien involving the appellant's FDR that has never featured in any of the loan agreements merely because the appellant never pleaded non-use of the same.

2. *That the trial judge erred in banking law and practice and facts when he held that the appellant's letter of lien involving the FDR was co-extensive and that the respondent was at liberty to utilize all monies held thereunder by the respondent without giving notice to the appellant on due dates.*

3. *The trial judge erred in law and fact and*

misdirected himself on the law and practice of banking when he applied the general principle of the law of contract involving a continuing guarantee that it is the appellant to have revoked the

guarantee when in this case the extended loan agreements after the guaranteed loan automatically discharged the guarantee.

4. *The trial judge erred in law, facts and practice of banking in not considering DW1's evidence in favour of the appellant that the FDR in issue expired with the period of guarantee as per the letter of lien hence the FDR the respondent utilized was a new creature not known to any loan agreement."*

At the hearing of the appeal, the appellant was represented by Mr. Godfrey Ukwong'a, learned advocate, while the respondent was represented by Mr. Thadei Hyera, learned advocate. We think, it is also not out of place to state that both learned advocates represented the parties in their respective positions at the trial court.

In his submission in support of the appeal, Mr. Ukwong'a adopted the written submission which was lodged before the Court and explained briefly on the grounds of appeal in general.

On his part, Mr. Hyera did not lodge written submission but was allowed by the Court to respond to the written submission of the appellant and he responded briefly to Mr. Ukwong'a's oral submission.

With regard to ground one, the thrust of the argument of Mr. Ukwong'a is that the appellant did not consent through a letter of lien for his FDR being used to settle the overdrafts that were advanced to Simon Agency Limited after the agreed period, expired on 31st March,

2005. He submitted further that a letter of lien alone was not sufficient to show that the appellant undertook to pay the respondent in case the principal borrower (Simon Agency Limited) failed to pay the overdraft that was extended to her. In his view, as the letter of lien did not feature in any loan agreement entered between the respondent and Simon Agency Limited, the appellant was required to sign a mortgage deed indicating his willingness to guarantee the loan. He argued that since the letter of lien has not featured anywhere in the agreement between the respondent and Simon Agency Limited, the trial judge wrongly construed it as a deed of guarantee. He therefore implored us to allow this ground of appeal on contention that after the appellant signed a letter of lien there was no any action that was taken by the respondent to cause him to sign any other document to signify that he was bound to be responsible for future overdrafts. The learned counsel for the appellant further contended that the letter of lien was misapplied by the respondent as it was intended to cover and offset a loan that was granted for a period of one year (2004/2005) and was for a specific FDR. He argued thus that the appraisal of the appellant's FDR was not in the interest of covering the outstanding loans above the overdraft of Tshs. 500,000,000/= advanced to Simon Agency Limited by the respondent.

In reply, Mr. Hyera argued that in view of the nature of the letter of lien, the appellant undertook to be responsible and liable to pay in case of default by Simon Agency Limited. He submitted that there was no need for the appellant to execute any other instrument like where landed property is offered as security. He emphasized that the appellant promised through a letter of lien he signed to allow the bank to utilize the monies in the FDR which

was in possession of the respondent with or without notice if Simon Agency Limited failed to pay the loan. It was further argued by Mr. Hyera that the appellant duly signed the letter of lien in the presence of the commissioner for oath. He therefore contended that the fact that the letter of lien did not feature in any loan agreement between the respondent and Simon Agency Limited is not an important issue in the circumstances of the case as the same expressed the willingness of the appellant to guarantee the loan granted to Simon Agency Limited by the respondent. Mr. Hyera urged us therefore to hold that this ground lacks merit and dismiss it accordingly.

On our part, we wish to state that according to the record of appeal and the finding of the trial High Court, we have no doubt that through the letter of lien, the appellant offered his FDR to provide additional guarantee for Simon Agency Limited to secure a loan. This fact is also reflected in paragraphs 4 and 5 of the plaint that was placed before the trial court by the appellant. According to the letter of lien which was directed to the respondent and signed by the appellant on 30th June, 2004 and admitted as exhibit P1, although there is indication that the appellant intended to execute such other deed and instruments, that discretion was left on the respondent to decide depending on the circumstances that prevailed with regard to the letter of lien. We further observe that the appellant explained in his testimony how he was approached by his friend Exaud Kwayu to offer his FDR as an additional guarantee to Simon Agency Limited and that he was fully enlightened on the letter of lien which he signed at the respondent's Lumumba Branch while with his friend. What is more interesting is that this complaint of the letter of lien not featuring in any loan agreement entered between the

respondent and Simon Agency Limited was never vividly raised in the plaint which was laid before the trial court. Indeed, despite the fact that the appellant attached a copy of loan agreement that was marked as annexture 'B' as evidenced by paragraph 5 of the plaint, the same was not tendered and admitted as exhibit at the trial. It is clear that the major issue at the trial court was whether the letter of lien was intended to cover only the loan of Tshs. 500,000,000/= for a period of one year and no more. However, the appellant did not show sufficiently that the letter of lien contained the said amount that was guaranteed by him.

In the circumstance, we do not think that the issue of the letter of lien not being reflected in any loan agreement, can be raised at this stage of appeal as it did not also feature in the issues which were framed, agreed by the parties and recorded by the court and decided upon. Moreover, as stated above although the loan agreements between the respondent and Simon Agency Limited were attached to the plaint as annextures B and C, they were not tendered and admitted as evidence at the trial. We, therefore agree with Mr. Hyera that this ground lacks merit and we dismiss it.

In ground two, Mr. Ukwong'a main argument is that according to the agreement between the appellant and the respondent, the FDR was intended to guarantee an overdraft loan of Tshs. 500,000,000/= for one year and nothing more. He argued further that as the money in the FDR were not utilized after the expiry of one year, it means the guarantee was discharged and that it was not co-extensive to be applied to other loans that followed in favour of Simon Agency Limited. In his opinion, the action of the respondent to continue appraising the FDR after one year and used it to guarantee further overdrafts to Simon Agency

Limited was wrong as there was no authority from the appellant. Mr. Ukwong'a thus argued that the trial court should not have found that the respondent was at liberty to apply the balance that existed in the FDR to recover the principal borrower's outstanding loans because it was co-extensive. He therefore urged us to reverse the finding of the trial court on this issue.

On his part, Mr. Hyera strongly defended the finding of the trial judge as he believed that the same is backed by the terms stipulated in the letter of lien which was admitted as exhibit P1 and relied upon in the judgment. He further explained that the letter of lien did not show that the guarantee was for a specific period but rather that it was continuos and therefore co-extensive. In his view, this ground has been preferred against the actual position which was agreed between the appellant and the respondent and therefore the same should be rejected.

In this regard, it is noted that the finding of the trial judge on this point is that the appellant through a letter of lien (exhibit P1) authorized the respondent to use his FDR to offset the outstanding loans of Simon Agency Limited without giving notice. The trial judge went further and quoted the relevant part of the letter of lien which we do not wish to reproduce herein. It suffices to state that we fully agree with the finding of the trial judge on the co-extensive nature of the guarantee which was executed by the appellant through a letter of lien. We have no doubt that the quoted paragraph of exhibit P1 authorised the respondent at any time to offset the advanced loan upon default whether before or after the due date, without giving notice to the appellant or receiving notice from him as found by trial

judge. We wish to emphasize that one of the principle governing the guarantor's liability is that it is co-extensive with that of the principal debtor. The term co-extensive with the principal debtor implies the maximum extent of the guarantor's liability in case of the principal debtors' default. It follows thus that where the payment of loan which is guaranteed is not made, the guarantor becomes liable not only for the amount of the loan that is guaranteed, but also for any interest and charges which may have become due on it.

At this juncture, we think it is instructive to go along the important holding of the Supreme Court of India in **Bank of Bihar Ltd v. Daniodar Prased**, IR 1969 SC 279 when interpreting section 128 of the India Contract Act, 1872 which is in *pari materia* with section 80 of the Law of Contract Act Cap. 345 R.E. 2002. In that case it was stated that under the 1872 Act, save as provided in a contract, the liability of the surety is co-extensive with that of the principal debtor. The Supreme Court went further and stated that this means that the surety thus becomes liable to pay the entire amount and that this liability is immediate. The Supreme Court also observed that the liability is not deferred until the creditor exhausts his remedies against the principal debtor. (See also a book on Banking Law by R.N. Chandhary (2009) Pgs. 259-261).

This Court similarly emphasized in **Exim Bank (Tanzania) Limited v. DASCAR Limited and Another,** Civil Appeal No. 92 of 2009 (unreported) that the liability of a guarantor is co-extensive with that of the principal debtor.

In the present case, it is not disputed as per the evidence in the record of appeal that the respondent started with selling the properties of the principal debtor that were pledged

as securities and then dealt with the appellant's FDR for the balance as provided in the letter of lien. In the event, we find that the complaint of the appellant on this ground has no bases. We accordingly dismiss it.

With regard to ground three, the submission of Mr. Ukwong'a is that the appellant offered his FDR as a guarantee for a loan of Tshs. 500,000,000/- to Simon Agency Limited for a period of one year only. It was further argued for the appellant that there was no any intention for the agreement to cover other loans which were issued after the expiry of the first overdraft as decided by the trial judge. Mr. Ukwong'a therefore criticized the trial judge for applying the principle of the law of contract concerning a continuing guarantee as the appellant did not revoke it after it expired. His contention is that the guarantee expired after one year and the same could not be extended automatically. The learned advocate was of the view that the extended loan agreements after the guarantee expired automatically discharged the guarantee. In the event, he implored us to find that the trial judge's finding was wrong in law.

Mr. Hyera did not support the argument of Mr. Ukwong'a on the ground that the letter of lien left no doubt that the guarantee which the appellant executed has all elements of a continuing guarantee and therefore it could not escape from the application of the law of contract. He thus urged us to disregard the complaint in this ground and hold that the trial judge properly found and applied the provisions of section 81 of the Law of Contract Act. Cap 345 R.E. 2002 to support his decision.

On our part, we think that the learned trial judge cannot be faulted in applying the principles of the law of contract in view of the wording of the letter of lien (exhibit P1) and the circumstance of the case that was before him. It is noted that the trial judge found that the letter of lien intended to cover even future renewals of the FDR to cover other loans that followed. We need to note further that the letter of lien provided for a situation in which even renewed receipts for the FDR would be handed over to the respondent. We better quote the relevant part of exhibit P1.:-

> *"... and that I/we will not encumber, assign or deal with it or any renewals thereof, and renewed receipts will be handed over to the bank duly discharged by me/us failing which the bank be entitled to do so on/our behalf".*

According to the evidence and the finding of the trial court, the FDR was renewed soon after one year and the subsequent years that followed. Indeed, there is no indication that the appellant intended to revoke the letter of lien after the expiry of the first FDR on 31/3/2005. It is important to state that for the first time the appellant through Mr. Ukwong'a, his current advocate, wrote a letter to the respondent with the tittle "NOTICE OF DEMAND FOR DISCHARGE OF LETTER OF LIEN OVER A FIXED DEPOSIT RECEIPT NO. C.039330 ACCOUNT NO 01J0007242101 EVARIST JOHN KAWISHE."

This letter with reference No. GSU/Kaw/crdb/1/10 was copied by Mr. Ukwong'a to his client (appellant) and was admitted at the trial as exhibit P4. Although it was not mentioned by the trial judge in his judgment, it was written one day (20/10/2010) after the respondent

uplifted the FDR on 19/10/2010 leaving the same with 00 balance. It is noted that in paragraph 13 of the plaint the appellant simply complained that although he wrote that letter to the respondent she did not reply. However, the appellant did not demonstrate in his evidence that he had earlier on demanded for the discharge of the guarantee.

Another important piece of evidence concerning the status of the appellant's FDR is a letter with ref. No. CRDB/MZA/LETTER/10 dated 7/10/2010 which was written by the respondent to Simon Agency Limited informing her of the rejection to extend time for payment of the outstanding balance of the loan and the action that would have followed. In that letter which was copied to the appellant, who there is no indication whether he replied, indicated clearly that his FDR which was part of the security for the loan, will be uplifted within 7 days. The letter was tendered and admitted as exhibit P2 at the trial.

Moreover, a thorough reading of the letter of lien indicates, without doubt, that it was not intended to be used for a single transaction. Indeed, as found by the trial judge, the amount of Tshs. 500,000,000/= which was secured by the first FDR was stated in evidence and accepted by the parties. But there is no any amount of money which was indicated in the letter of lien as the one intended to be guaranteed. The letter of lien only indicated the amount of Tshs. 104,110,585/84 as commitment of the guarantee for guaranteeing the loan.

From the analysis which we have made above, we have to state that the guarantee which the appellant executed was continuous. Indeed, according to the evidence in the record of appeal and the conduct of the appellant, throughout the period when the loans were advanced to Simon Agency Limited there is no doubt that he did not revoke the

guarantee after 31st March, 2005. He is on record when he was cross-examined by the lawyer for the respondent to have agreed that he did not request for the discharge of his FDR. However, he stated that he followed closely to know its status since it was being renewed every year during the period of guarantee. Moreover, the appellant did not offer any evidence at the trial to contradict the evidence by the respondent's witness Martin F. Rajab (DW1) that by 31st March, 2005 the overdraft of Tshs. 500,000,000/= which was granted to Simon Agency Limited had not been paid and that further overdraft were extended by the respondent.

In the circumstances, we think the trial judge was perfectly entitled to invoke the provisions of section 81 of the Law of Contract Cap. 345 R.E 2002 to describe the kind of the appellant's guarantee as a continuing one. We need to emphasise that a person who executes a guarantee need to know that in essence a guarantee is a binding promise of one person to be answerable for the debt or obligation of another if that other defaults. It follows that a contract of guarantee is predicated upon existence of a valid principal obligation owed by the principal debtor. A valid guarantee thus depends upon the existence of a promise made to a person to whom a debtor is answerable or is to become answerable. In the present case, there is no doubt that by executing a letter of lien, the appellant undertook to answer for the debt, default or miscarriage of Simon Agency Limited within the terms of the guarantee. The principal obligation therefore remained unchanged throughout the life of a guarantee. From the above analysis of the evidence in the record of appeal we cannot conclude as Mr. Ukwong'a submitted that the extended loan agreements automatically discharged the guarantee. In the event, we are settled in our mind that the complaint in this point against

the finding of the trial court is not justified. We accordingly dismiss ground three of the appeal.

Lastly, Mr. Ukwong'a lamented in ground four that the trial judge failed to hold that the FDR which the respondent utilized was not the one which the appellant guarantee through a letter of lien. He insisted that the intended FDR expired after one year as stated by DW1. He thus argued that the FDR which was uplifted had different numbers compared to the one indicated in the letter of lien. He therefore requested us to find that the respondent wrongly uplifted the FDR which was not the subject of a letter of lien.

Mr. Hyera, quickly pointed out that the evidence of the respondent indicated that the FDR account was the same although it was renewed and given a new reference number. He stated that despite the fact that a new reference number was given, the guaranteed amount in the FDR remained the same save for the interest which continued to accrue every year during the period of the guarantee. In the circumstance, Mr. Hyera urged us to disallow this ground of appeal as the appellant did not open any new account with new deposits. However, the same was being renewed after one year and the respondent had the mandate to uplift the said FDR which had deposits and accrued interests to satisfy the overdrafts granted to Simon Agency Limited, Mr. Hyera submitted.

On our part, we are settled that taking into consideration that the appellant did not withdraw his FDR until when the same was uplifted and the fact that the guarantee which was executed by the appellant in the terms of the letter of lien was a continuing one, we think the complaint of the appellant lacks merit. We have no doubt that there is ample

evidence that although the Fixed Deposit Account was given another number, it remained the same as there was no any request for its discharge throughout the period the respondent granted the overdrafts to Simon Agency Limited. We therefore support the decision of the trial judge in that the respondent was entitled to uplift the FDR which was intended to guarantee the loans. In the circumstance, we dismiss this ground of appeal.

In the final analysis, we are of the firm view that this appeal has no merits. We dismiss it in its entirety with costs. We so order.

DATED at **DAR ES SALAAM** this 7th day of March, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F.L. K. WAMBALI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL