

UGANDA / JUDGMENT

Megha Industries Uganda Limited v Atul (Civil Suit 959 of 2023) [2024] UGCommC 367 (7 November 2024) [2024] UGCommC 367

COURT

Commercial Court of Uganda

BEFORE

Tumusiime Rubagumya, J

CASE / FILE NUMBER

Civil Suit 959 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION) (CIVIL SUIT NO. 0959 OF 2023) 5 MEGHA INDUSTRIES
UGANDA LIMITED..... PLAINTIFF VERSUS

ATUL SHAH..... DEFENDANT

BEFORE: HON. LADY JUSTICE PATIENCE T. E. RUBAGUMYA

JUDGMENT

10 Introduction

The Plaintiff instituted this suit against the Defendant for breach of the Lease Agreement and an Addendum to the Lease Agreement, all dated 29th May, 2017 and recovery of a sum of USD 358,431.25 (United States Dollars Three Hundred Fifty-Eight Thousand Four Hundred Thirty-One

- 15 and Twenty-Five Cents Only) and UGX 24,312,350.90/= (Uganda Shillings Twenty-Four Million Three Hundred Twelve Thousand Three Hundred Fifty and Ninety Cents Only) due and owing from the Defendant as a coprincipal debtor and surety; an order that the Defendant cannot, at equity, approbate and reprobate by taking benefit under the Lease Agreement and
- 20 the Addendum to the Lease Agreement and at the same omit to meet his obligations thereunder; a declaration that the Defendant was unjustly enriched and that he should accordingly repay the sums being claimed; general damages, interest and costs of the suit.

Background of the suit

The Plaintiff's case is that sometime in 2011, the Plaintiff, who is the registered proprietor of Victoria Mall located in Entebbe, through its affiliate Company Consumer Distributors Africa Limited executed a Lease Agreement with Nakumatt Uganda Limited (now dissolved) and as a result, 5 Nakumatt Uganda Limited became a tenant in Victoria Mall. When the Plaintiff appointed Knight Frank Uganda as its property agent to manage Victoria Mall on its behalf instead of its affiliate Company, the Plaintiff and Nakumatt Uganda Limited executed a new Lease (Tenancy) Agreement on 29th May, 2017, wherein Nakumatt Uganda Limited was leased space in 10 Victoria Mall Entebbe comprised in ground floor; unit G22 and unit LG 09 totalling to an area covering 3,240 square meters. On the same day, the Plaintiff and Nakumatt Uganda Limited executed an Addendum to the Lease (Tenancy) Agreement which included a Deed of Suretyship. According to the Deed of Suretyship, the Defendant and the two Directors 15 of Nakumatt Uganda Limited agreed to be sureties for and co-principal debtors with Nakumatt Uganda Limited under the Lease (Tenancy) Agreement thus making the Defendant liable co-extensively with Nakumatt Uganda Limited as well as the other two Directors. On 14th June, 2017, the Plaintiff informed the Defendant in his capacity as the 20 Managing Director of Nakumatt Uganda Limited and by implication his own indebtedness to the Plaintiff at the time in the amount of USD 225,722.61 for rent, USD 28,284 for service charges and UGX 34,125,224.33/= as electricity charges. The Plaintiff unsuccessfully pursued this amount and its attendant interest and expenses in the 25 amount of USD 358,431.25 and UGX 24,312,350.90/= from the Defendant's co-principal debtor Nakumatt Uganda Limited which was unable to pay its debts and was eventually dissolved. To date, the Plaintiff

has never been paid its monies by the two co-principal debtors of Nakumatt Uganda Limited and the Defendant hence this suit.

Summons to file a defence were first issued on 11th October, 2023 but these could not be served since the Plaintiff was unable to find the

- 5 Defendant. On 10th June, 2024, the Plaintiff obtained an order to serve the summons by way of substituted service. On 24th June, 2024, this Court renewed the summons to file a defence and as per the affidavit of service deposed by Mr. Kenneth Ntambazi an authorized process server, these together with the plaint were published in the Daily Monitor Newspaper of
- 10 25th June, 2024. However, the Defendant did not file a defence as required by the law. Consequently on 4th September, 2024, this Court entered an interlocutory judgment upon the Plaintiff's application and the matter was fixed for formal proof.

Representation

- 15 The Plaintiff was represented by **Learned Counsel Patrick Mugalula of M/s Katende, Ssempebwa & Co. Advocates**. At the hearing, the Plaintiff brought one witness, Mr. Amin Meghani, a Director of the Plaintiff Company (PW1) and his witness statement was admitted as his evidence in chief.
- 20 Counsel for the Plaintiff was directed to file his written submissions which he did and the same have been considered by this Court.

Issues for Determination

- 1. Whether the Defendant is indebted to the Plaintiff?
- 2. Whether the parties are entitled to any remedies?

Issue No.1: Whether the Defendant is indebted to the Plaintiff?

Plaintiff's submissions

Counsel for the Plaintiff proposed two sub-issues that is; whether there is a contract of suretyship/guarantee between the Plaintiff and the 5 Defendant and whether the Defendant is indebted under his suretyship/guarantee to the Plaintiff?

Regarding whether there is a contract of suretyship/guarantee between the Plaintiff and the Defendant; Counsel relied on **clause 8 of PE 4**, the Addendum to the Lease Agreement, annexure "B", the Deed of Suretyship

- 10 that was signed by the Defendant, wherein the Defendant agreed to be a surety and co-principal debtor with Nakumatt Uganda Limited in respect of all the debts raising from the Lease (Tenancy) Agreement. To that, Counsel contended that by executing the Suretyship Deed, the Defendant personally entered into a suretyship/guarantee contract with the Plaintiff
- 15 and also became a co-debtor with Nakumatt Uganda Limited.

Counsel submitted that as a general rule, contracts confer rights and impose obligations to the parties thereto as was held in the case of **ZTE Corporation Vs Uganda Telecom HCCS No. 169 of 2013** and that as was held by **Hon. Justice Christopher Madrama** (as he then was) in the

20 case of **Barclays Bank of Uganda Limited Vs Jing Hong Guo Dong HCCS No. 35 of 2009**, a guarantee is a secondary agreement in which a person is liable for the debt on default of another (the principal debtor) who is the party primarily liable for the debt.

In conclusion, Counsel submitted that there was a valid suretyship 25 contract/guarantee contract enjoining the Defendant as co-debtor with Nakumatt Uganda Limited.

Regarding whether the Defendant is indebted under his suretyship/guarantee to the Plaintiff; Counsel for the Plaintiff referred Court to the case of **Kabagambe Mathias Vs Kahire Nobert Civil Suit No. 389 of 2016**, in which the Court cited with approval the case of

- 5 **William Kasozi Vs DFCU Bank Ltd High Court Civil Suit No. 1326 of 2000**, where it was stated that it is now settled law that once a contract is valid, it automatically creates reciprocal rights and obligations between the parties thereto and when a document containing contractual terms is signed, then in the absence of fraud or misrepresentation the party signing
- 10 it is bound by its terms. Counsel submitted that the Lease Agreement, its Addendum and the Deed Suretyship imposed obligations on Nakumatt Uganda Limited and the Defendant as a surety to the Plaintiff which obligations, both parties failed to meet. That in the case of **Ronald Kasibante Vs Shell Uganda Limited**
- 15 **HCCS No. 542 of 2006**, breach of contract was defined as a situation where one party to a contract fails to carry out a term of the said contract and that it occurs when a party neglects, refuses or fails to perform any part of its bargain or any term of the contract, written or oral, without a legitimate legal excuse.
- 20 Counsel further submitted that in the case of **Uganda Electricity Transmission Company Limited Vs Citi Bank Uganda Limited and Others HCMA No. 1397 of 2022**, Court defined a surety guarantee as an undertaking to be answerable for another's debt or default and that it is only triggered by proof of actual default and is not independent of the 25 underlying contract. Court further held that it is limited to the amount of loss suffered from the default within the maximum amount stipulated in the guarantee.

Counsel then contended that the Defendant as a surety guarantee to the Plaintiff is obliged as evident by the Addendum and the Deed of Suretyship, to pay the Plaintiff the money in arrears for rent and utilities. That as per PW1's testimony, a letter was sent to the Defendant by the 5 Plaintiff wherein Nakumatt Uganda Limited was informed of its indebtedness to the Plaintiff for the rent and utilities of USD 223,870 and UGX 161,417,566/= and that on 14th June, 2017 another letter was sent to the Defendant informing him of his own indebtedness of USD 225,722.61 for rent, USD 28,284 for service charges and UGX 10 34,125,224.33/= as electricity charges. That however, the Defendant and Nakumatt Uganda Limited defaulted and never paid the outstanding sum

to the Plaintiff.

In conclusion, Counsel invited Court to find that the Defendant as surety and personally in his capacity as co-principal debtor with Nakumatt 15 Uganda Limited is indebted to the Plaintiff with no justification for the non-

payment of the indebted amount.

Analysis and Determination

The Plaintiff's case is that the Defendant is indebted to the Plaintiff in the amount of USD 358,431.25 and UGX 24,312,350.90/= as a surety and 20 co-principal debtor, in addition to the other reliefs sought.

According to PW1's evidence, sometime in 2011, the Plaintiff through its affiliate company, Consumer Distributors Africa Limited, entered into an Agreement to lease part of its premises, Victoria Mall, to Nakumatt Uganda Limited in which the Defendant, Atul Shah, was a shareholder and

25 Director. PW1 further testified that when Knight Frank Uganda Limited came on board as a property manager of Victoria Mall, a new Tenancy

Agreement was executed between the Plaintiff and Nakumatt Uganda Limited. That in addition to that, an Addendum was also executed which included a Deed of Suretyship wherein the Defendant agreed to become a surety and co-principal debtor with Nakumatt Uganda Limited in respect 5 of the Tenancy Agreement. Further, that at the time of dissolution of Nakumatt Uganda Limited, the outstanding debt amounted to USD 358,431.25 and UGX 24,312,350.90/= and that to date the said debt remains unsatisfied despite informing the Defendant about the same, and that therefore, the Defendant is liable under the said Deed of Suretyship.

10 According to **Black's Law Dictionary Eleventh Edition** at **page 402**, a contract is defined as:

> **"An agreement between two or more parties creating legal obligations that are enforceable or otherwise recognisable at law."**

Suretyship is defined by **Bryan A. Garner** in **Black's Law Dictionary 15 Eleventh Edition** at, **page 1743**, as:

> **"The legal relation that arises when one party assumes liability for a debt, default, or other failing of a second party. The liability of both parties begins simultaneously. In other words, under a contract of suretyship, a surety becomes a party to the principal obligation."**

20 I have carefully examined exhibit **PE 4** and perused **clause 8** of the same, which is to the effect that:

"8. Suretyship"

"The tenant undertakes, as a material term of this Tenancy Agreement, to furnish to the landlord a deed of suretyship signed by* *the person/s that are sureties in a form acceptable to the landlord as recorded in the attached Annexure B."

I have also perused the Deed of Suretyship annexed as **"B"** attached to **PE 4**, and it partly reads as follows:

5 *I/We, the undersigned ATUL SHAH, hereby bind myself/ourselves jointly and severally to [Landlord] and its successors in title and assigns ('the Creditor') as surety for and co-principal debtor with NAKUMATT UGANDA LIMITED ('the debtor') for the due and punctual payment and performance by the debtor of all debts and obligations* 10 *which may now be owing and which may hereafter be owing or which may arise, in terms of or in respect of a Tenancy Agreement entered into or about to be entered into between the creditor and the debtor..."*

I have also carefully noted that Annexure "B" was duly signed. Even though the Defendant is said to be Kenyan, **clause 13** of the Deed of 15 Suretyship provides that he is domiciled in Uganda, and no contrary evidence has been adduced of any change thereof. I am also persuaded by **clause 12** of the Deed of Suretyship where the parties consented that the creditor shall be entitled to institute legal proceedings in respect of the Deed of Suretyship.

20 This Court is also persuaded that the Defendant indeed executed a valid Suretyship Deed annexed and arising out of the Addendum to the Lease Agreement that was executed between the Plaintiff and Nakumatt Uganda Limited. According to Annexure "B", the Defendant is a surety for and coprincipal debtor with Nakumatt Uganda Limited under the Tenancy 25 Agreement to which the Defendant bound himself by his signature.

Regarding whether the Defendant is indebted under his suretyship/guarantee to the Plaintiff; Counsel for the Plaintiff referred Court to the case of *Kabagambe Mathias Vs Kahire Nobert (supra)*, in which the Court cited with approval the case of *William Kasozi Vs DFCU*

- 5 *Bank Ltd (supra)*, where it was stated that it is now settled law that once a contract is valid, it automatically creates reciprocal rights and obligations between the parties thereto and when a document containing contractual terms is signed, then in the absence of fraud or misrepresentation the party signing it is bound by its terms.
- 10 Having resolved above that the Lease Agreement, Addendum and the Suretyship Deed all dated 29th May, 2017 were valid agreements, I am persuaded that the Lease Agreement, Addendum and Deed of Suretyship imposed different obligations on Nakumatt Uganda Limited and the Defendant as a surety and co-principal debtor. As testified by PW1, the
- 15 Plaintiff unsuccessfully demanded for the payment of the debt in the amount of USD 358,431.25 and UGX 24,312,350.90/= by Nakumatt Uganda Limited but was unable to recover the same and that to date the said debt remains unsatisfied. In the absence of any contrary evidence, this Court finds that the Defendant is liable for the aforementioned 20 outstanding debt under the said Suretyship Deed.

It is also a principle that where payments were indeed delayed, and the figure pleaded has not been challenged by the Defendant, the Plaintiff is taken to have proved the claim to the satisfaction of the Court (*See: Roko Construction Co. Limited Vs Attorney General HCCS No. 517 of 2008*).*

25 Accordingly, this Court finds that the Plaintiff is entitled to recover the sum of USD 358,431.25 and UGX 24,312,350.90/= due and owing from

the Defendant as a surety and co-principal debtor of Nakumatt Uganda Limited.

In the premises, as a result of Nakumatt Uganda Limited's failure to meet its obligations to the Plaintiff under the Lease Agreement and its 5 Addendum dated 29th May, 2017 and also the Defendant's failure to settle

Nakumatt Uganda Limited's liability, I find that there was a breach of the Lease Agreement, its Addendum, and the Deed of Suretyship.

Issues No. 2: Whether the parties are entitled to any remedies?

The Plaintiff prayed for the following orders;

10 a) An order that the Defendant should pay the Plaintiff a sum of USD 358,431.25 and UGX 24,312,350.90/=

It is evident, according to PE 2, that the Plaintiff wrote to the Defendant in his capacity as Managing Director of Nakumatt Uganda Limited informing him of Nakumatt Uganda Limited's indebtedness at the time of 15 USD 225,722.61 for rent, USD 28,284 for service charges and UGX 34,125,224.33/= as the outstanding electricity bill, which PW1 testified that they demanded for but were not successful. It is also evident from PE 6 that Nakumatt Uganda Limited was unable to pay its debts and was dissolved as a consequence of its insolvency.

20 In light of the Deed of Suretyship, it is therefore my considered view that the Defendant is indebted to the Plaintiff to the extent of Nakumatt Uganda Limited's indebtedness to the Plaintiff as a surety and co-principal debtor for USD 358,431.25 and UGX 24,312,350.90/= and I hereby order that the Defendant pays the Plaintiff a sum of USD 358,431.25 and UGX 25 24,312,350.90/=.

- b) An order that the Defendant cannot, at equity, approbate and reprobate by taking benefit under the Lease Agreement and the Addendum to the Lease Agreement, both dated 29th May, 2017 and at the same time omit to meet his obligations thereunder.
- 5 Generally, the doctrine of approbation and reprobation reflects the principle that a party cannot elect to approve of or benefit from an action in one instance and then disapprove of it in another. In light of the facts of this case, the Defendant cannot take benefit under the Lease Agreement and the Addendum to the Lease Agreement, all dated 29th May, 2017, and 10 at the same time, omit to meet his obligations thereunder.

According to PW1's evidence, the Plaintiff entered into the Lease Agreement and its Addendum with Nakumatt Uganda Limited and the Defendant as a surety and co-principal debtor, to rent out space in Victoria Mall, Entebbe the Plaintiff's property, but the Defendant has since failed

15 to meet its obligations.

In light of the above, I therefore, hold that the Defendant as a surety and co-principal debtor with Nakumatt Uganda Limited cannot, at equity, approbate and reprobate by taking benefit under the Lease Agreement and its Addendum and at the same time fail to meet his obligations thereunder.

20 c) A declaration that the Defendant was unjustly enriched and that he should accordingly repay the amount of USD 358,431.25 and UGX 24,312,350.90/=.

In the case of *Moses Vs Macferlan [1760] 2 Burr. 1005 at 10*, the Court held that:

"*The principle of unjust enrichment requires; first, that the Defendant has been enriched by the receipt of a benefit; secondly, that this enrichment is at the expense of the Plaintiff and thirdly, that the retention of the enrichment is unjust. This qualifies restitution.*"

5 In my view and concerning the facts at hand, by the Lease Agreement and its Addendum, all dated 29th May, 2017, Nakumatt Uganda Limited enjoyed a lease over the Plaintiff's property, but up to date, a sum of USD 358,431.25 and UGX 24,312,350.90/= arising out of the Agreement is still due and owing with no justifiable cause for its non-payment yet the 10 Defendant signed a Deed of Suretyship. By virtue of signing the Deed of Suretyship, the Defendant agreed to be liable to pay all the outstanding

debts arising from the Lease (Tenancy) Agreement and its Addendum that were executed between the Plaintiff and Nakumatt Uganda Limited.

- In the premises, It is hereby declared that the Defendant was unjustly 15 enriched and that he should accordingly repay the amount of USD 358,431.25 and UGX 24,312,350.90/= to the Plaintiff.
- d) A declaration that the Defendant is in breach of the Lease Agreement and the Addendum to the Lease Agreement, all dated 29th May, 2017 that he executed with the Plaintiff on behalf of Nakumatt Uganda 20 Limited and, in particular, to the Suretyship Deed therein.

PW1 testified that Nakumatt Uganda Limited was, at the time of its dissolution, indebted to the Plaintiff. As a result of Nakumatt Uganda Limited's failure to meet its obligations to the Plaintiff under the Lease Agreement and its Addendum dated 29th May, 2017 and also the 25 Defendant's failure to assume Nakumatt Uganda Limited's liability, I find

that there was a breach of the Lease Agreement, its Addendum, and the Deed of Suretyship.

e) General damages.

Counsel for the Plaintiff submitted that it is trite law that general damages 5 are awarded at the discretion of the Court to compensate the aggrieved party for the inconveniences accrued as a result of the Defendant's actions.

Counsel submitted that PW1 testified that the Plaintiff has, to this date, not been paid by the two co-principal debtors, Nakumatt Uganda Limited (now dissolved) and the Defendant and that as a result, the Plaintiff has 10 suffered untold inconvenience, financial loss, and unnecessary interference as a result of the Defendant's actions, which justify the award of general damages.

Since the Plaintiff informed the Defendant's co-principal debtor (Nakumatt Uganda Limited), vide PE 2 regarding its indebtedness and given that up 15 to date, neither Nakumatt Uganda Limited, which was dissolved, Nakumatt Uganda Limited's other two co-principal debtors nor the Defendant has paid the outstanding sum, I am of the view that the failure to settle the debt has greatly inconvenienced the Plaintiff for which I award the Plaintiff UGX 85,000,000/= (Uganda Shillings Eighty-Five Million 20 Only) as general damages.

f) Interest

Counsel for the Plaintiff prayed for the award of interest on the general damages at the rate of 18% per annum from the date of filing the suit until payment in full and for the award of interest on the outstanding sums at

the rate of 24% per annum from the date of filing the suit until payment in full.

Section 26(2) of the Civil Procedure Act, Cap. 282 enjoins this Court with the discretion to award interest at such rate where the decree is for 5 payment of money. In the case of **Mohanlal Kakubhai Radia Vs Warid Telecom Uganda Ltd HCCS No. 224 of 2011** it was held that in determining a just and reasonable rate, Courts take into account the following:

"*The ever rising inflation and drastic depreciation of the currency. A* 10 *Plaintiff ought to be entitled to such rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due."*

- 15 I, therefore, award the Plaintiff interest at the rate of 20% per annum on the decretal sum from the date of filing the suit until payment in full. Interest is also awarded on the general damages at the rate of 6% per annum from the date of Judgment until payment in full.

- g) Costs

- 20 **Section 27(2) of the Civil Procedure Act** provides that costs of any cause shall follow the event unless otherwise ordered by the Court. Further in the case of **Uganda Development Bank Vs Muganga Construction Co. Ltd [1981] HCB 35,* Hon. Justice Manyindo* (as he then was) held that:

"*A successful party can only be denied costs if it is proved that but for* 25 *his or her conduct, the action would not have been brought. The costs*

will follow the event where the party succeeds in the main purpose of the suit"

The Plaintiff, being the successful party in this case, is therefore entitled to the costs of this suit.

- 5 Consequently, Judgement is hereby entered in favour of the Plaintiff against the Defendant in the following terms:
- 1. It is hereby declared that the Defendant is in breach of the Lease Agreement and its Addendum, all dated 29th May, 2017, that was executed between the Plaintiff and Nakumatt Uganda Limited.
- 2. An order is issued that the Defendant cannot, at equity, approbate and reprobate by taking benefit under the Lease Agreement and its Addendum, all dated 29th May, 2017 and at the same time omit to meet his obligations thereunder.
- 15 3. The Defendant shall pay the Plaintiff a sum of USD 358,431.25 (United States Dollars Three Hundred Fifty-Eight Thousand Four Hundred Thirty-One and Twenty-Five Cents Only) and UGX 24,312,350.90/= [Uganda Shillings Twenty-Four Million Three Hundred Twelve Thousand Three Hundred Fifty and Ninety Cents 20 Only).
- 4. The Plaintiff is awarded general damages of UGX 85,000,000/= (Uganda Shillings Eighty-Five Million Only).
- 5. Interest is awarded on the sums in (3) above at the rate of 20% per annum from the date of filing the suit until payment in full.
- 6. Interest is awarded on the sums in (4) above at the rate of 6% per annum from the date of Judgment until payment in full.
- 7. Costs of the suit are awarded to the Plaintiff.
- 5 I so order.

Dated, signed and delivered electronically via ECCMIS this **7th** day of **November, 2024**.

Patience T. E. Rubagumya

10 JUDGE 7/11/2024

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Prepared on 14 October 2026 · Esheria