

THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEAL NO 03 OF 2016

KARANGWA JOSEPH}.....APPELLANT

VERSUS

KULANJU WILLY}.....RESPONDENT

(APPEAL FROM THE JUDGMENT AND DECREE OF HIS WORSHIP KAGODA MOSES NTENDE DELIVERED AT MENGO CHIEF MAGISTRATES COURT ON THE 9TH DAY OF FEBRUARY 2016 IN CIVIL SUIT NO. 109 OF 2015)

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

This judgment arises from an appeal by the Appellant, appealing against the decision of his worship Kagoda Moses Samuel Ntende delivered on 5th February, 2016 against the whole of the decision and orders therein. The grounds of the appeal are as follows:

1. The learned trial magistrate erred in law and in fact when he held that the Respondent's case disclosed a cause of action against the Appellant.
2. The learned trial magistrate erred in law and in fact in holding that the contract of guarantee existed between the Appellant and the Respondent in the absence of such a contract in writing.
3. The learned trial magistrate erred in law and in fact in holding that an oral contract whose subject matter exceeds 25 currency points is valid and enforceable.
4. The learned trial magistrate erred in law and in fact in holding that the Respondent is entitled to recovery of US\$5000 from the Appellant.

The Appellant proposes in the memorandum of appeal that the appeal be allowed and the judgment and orders of the trial court to be set aside with costs in the High Court and in the court below.

The Appellant was represented in the proceedings by Counsel Wilfred Nuwagaba of Messieurs Niwagaba advocates & solicitors. The Respondent was represented in the proceedings by Counsel Patrick Bugembe of Messieurs Lutaakome & company advocates. The court was addressed in written submissions.

Submissions of Counsel for the Appellant

The Appellants Counsel addressed grounds 1, 2 and 3 of the memorandum of appeal together. He submitted that the grounds 1, 2 and 3 relate to the finding of the trial magistrate that there was a contract of guarantee and that section 10 of the Contracts Act, Act 7 of 2010 does not apply to indemnity and guarantee which according to the trial magistrate is only provided for under Part VII of the Act and section 68 in particular. The Appellants Counsel submitted that the finding of the trial magistrate that there was an oral contract of guarantee was wrong for there can be no such contract if it does not comply with the legal requirements.

The Appellant's Counsel submitted that section 10 (5) and (6) of the Contracts Act are applicable to contracts of guarantee which guarantee under section 10 (7) is defined under Part VIII of the Act and specifically section 68. The trial magistrate erred to find that there was a contract of guarantee when there was none in writing and more so whose value exceeded 25 currency points as it is a mandatory requirement under section 10 (6) and section 10 (5) read together with the schedule under section 2 of the Contracts Act 2012.

The Appellant's Counsel contended that there are three parties to a contract of guarantee namely, the creditor, the principal debtor and the guarantor. Throughout the trial the existence of the creditor and the relationship between the alleged creditor and the principal debtor was not proved. No evidence was tendered to prove that the alleged Aizhou Peng Sheng Agriculture and Forestry Machinery Company had sued the Respondent or the Appellant and nowhere did it appear that the Respondent had become liable to the creditor in any way whatsoever. The

absence of the alleged creditor in the entire trial renders the existence of the alleged guarantee not proven.

Furthermore, the Appellant's Counsel submitted that under the provisions of section 71 (1) of the Contracts Act, a guarantor is only liable to the extent to which the principal debtor is liable and yet the Appellant's alleged liability as an alleged principal debtor to the said Aizhou Peng Sheng Agriculture and Forestry Machinery Company was never proved on the balance of probabilities by the alleged creditor which Creditor never gave any evidence in court nor authorised by way of power of attorney the Respondent to sue on its behalf. There was no evidence to prove the simplest debt. Counsel further submitted that a claim based on an international transaction would require the alleged creditor to prove the existence of the dealing between it and the Appellant by production of at least international trade documents such as document proving orders, shipment, delivery etc but none was tendered at the trial. Moreover section 71 (2) of the Contracts Act 2010 provides that the liability of the guarantor takes effect upon default by the principal debtor.

The existence of a contract in clear terms as to payments, mode and time must be ascertained but in this particular case there was none. Consequently the Respondents claim did not meet the statutory requirements under section 10 (5) and (6) as well as section 71 (1) and (2) of the Contracts Act and a claim based on an alleged contract of guarantee that is in contravention of the Contracts Act is illegal null and void (see **Bostel Bros Ltd vs. Hurlock (1948) 2 All ER 312 and HCCS 503 of 2012 MTN (U) Ltd vs. Three Ways Shipping Group**).

The Appellant's Counsel further submitted that the order to pay US\$5000 for onward transmission to the Chinese company when there was not a claim for indemnity by them is clearly outside the scope of the principles of guarantees and cannot be upheld by this court. The Respondent had never been sued by the alleged creditor. He never paid the alleged creditor and the provisions of section 69 of the Contracts Act are not applicable to him and therefore he could not sue as an indemnity holder and entitled to the decree passed by the trial court.

Ground 4

The Appellant's Counsel submitted that the trial magistrate not only failed to correctly interpret the law vis-à-vis the pleadings on record and evidence adduced but also wrongfully reviewed the evidence on record.

The trial magistrate considered documents only tendered for identification purposes but not admitted as exhibits as if they had any evidential value. The learned trial magistrate heavily relied on PID 13, PID14, PID 15 and PID16 in finding for the Respondent. The Appellant's Counsel submitted that the documents tendered for identification cannot be considered as having any evidential value and the trial magistrate erred in law in considering them and relying on them. Articles for identification are clearly distinguishable from exhibits and do not in law pass as evidence and cannot be relied upon by the court (see judgment of Justice Bashaija K Andrew in **Civil Appeal Number 23 of 2014 between Kiyimba Noor vs. John Nagenda Mulinde** at page 11 thereof).

The trial magistrate's review of the evidence was in total disregard of the pleadings on record and one such instance is the finding that the Appellant paid Uganda shillings 14,000,000/= to the Respondent and that the claim by the Appellant that it was for purchase of herbicides was an afterthought since it had not been pleaded. Yet paragraphs 2, 3 and 4 of the written statement of defence denied anything to do with the alleged contract of supply of spray pumps between the Appellant and the said Aizhou Peng Sheng Agriculture and Forestry Machine Company. The trial magistrate seems to imply that pleadings must capture the evidence a party wants to give during the trial which is not the case.

The Appellant's Counsel further submitted that the trial magistrate erred in law when he relied on the evidence of PW2 and PW3 which was clearly hearsay evidence and therefore inadmissible since none of the two witnesses knew anything about the creditor and whether it ever transacted with the Appellant and if so the terms thereof.

He submitted that the trial magistrate further erred in law in awarding interest when the creditor was not shown to be claiming it under any contract and when there was no evidence of a claim by the alleged beneficiary creditor against the Appellant. There was even no evidence of a claim against the Respondent by the alleged creditor. He contended that the damages of Uganda

shillings 4,000,000/= and interest were excessive and the trial magistrate acted injudiciously to make such awards.

In conclusion, the Appellant's Counsel submitted that this was a case where the Respondent alleged that there was a contract of guarantee that is non-existent in law and which even if it existed has not been acted upon by the creditor who should be the beneficiary wants to get rich personally by abuse of court process. He invited the court to set aside the judgment of the trial magistrate and allow the appeal with costs in this court and in the lower court.

Reply by the Respondent's Counsel

In reply the Respondent's Counsel submitted that in light of the evidence adduced by the Appellant and his witnesses, there is a contract between the Respondent and the Appellant in the form of a contract of guarantee. According to section 68 of the Contracts Act, a contract of guarantee means a contract to perform a promise or to discharge the liability of a third-party in the case of default of the third-party, which contract may be oral or written.

A contract of guarantee among other things means a contract to perform a promise. According to **Black's Law Dictionary**, a promise is a manifestation of an intention to act or refrain from acting in a specified manner, conveyed in such a way that another is justified in understanding that a commitment has been made, or a person's assurance that the person will or will not do something.

Section 68 of the Contracts Act 2010 is essentially an interpretation section for Part VIII thereof and it specifically defines what amounts to a contract of guarantee. The section is purely an autonomous provision and is not subject to the provisions of section 10 of the Contracts Act. He submitted that the intention of legislature was to have such a contract either in oral or written form. In light of the provisions of section 68, a contract by guarantee can either be oral or written and evidence adduced by the Respondent and Appellant reveals that there was an oral contract of guarantee between the Respondent and the Appellant. The Appellant adduced evidence to the effect that he overwhelmingly assisted the Respondent who is his friend in obtaining his goods which were bound to be sold to another buyer after the Appellant failed to clear the balance of US\$15,928 and after his tremendous efforts as illustrated in his witness statement. The Appellant

managed to get the said goods moreover at a reduced price of US\$10,000 and remained with the balance of US\$5000 which promised to pay having obtained the container for the said goods and assessed their condition based on the Appellant's promise. The Respondent guaranteed the Chinese company which sent the goods and agreed that the balance of US\$5000 would be cleared after the Appellant had obtained the goods. The Respondent also adduced evidence to the effect that he gave the Appellant his bank account so that he deposits a sum of US\$5000 for onward remittance to the Chinese company and the Appellant deposited Uganda shillings 14,000,000/= equivalent of US\$5000 on his account number 2520096358 in Centenary Bank and the Appellant gave him a copy of the deposit slip for purposes of confirming that he deposited the said sum of money on his account.

In his cross examination, the Appellant accepted having deposited the said money on the Respondent's account and even accepted that he is the one who signed on the deposit slip marked PID3. The Appellant also admitted during cross examination that he knows the commercial invoice which was attached to the Respondent statement and marked as P ID1. The Respondent adduced evidence to the effect that the Appellant operated a business under the name of Masaka Farm Stores. During cross examination, the Appellant stated that the telephone number reflected on the said invoice is his and that his box number is P. O. box 28689 Kampala which is the exact box number reflected on the said invoice. Therefore there is cogent evidence on record to prove that it is the Appellant who ordered for the goods reflected in the said invoice and that he cannot turn around and contend that he has never ordered for the spray pumps reflected in the said invoice.

The Respondent's Counsel submitted that the promise in the instant case was made by the Appellant to the Respondent such that he can be in a position to assist him in obtaining his spray pumps from the Chinese company. The Respondent fulfilled his obligation by ensuring that the Appellant obtained his goods. This was at a reduced price but the Appellant refused to fulfil his promise of paying the balance of US\$5000. As a result of the Appellant's refusal to fulfil his obligations, liability falls on the Respondent in his capacity as the person who guaranteed the Chinese company the payment of the balance immediately upon the buyer having obtained the goods and assessed the condition of the spray pumps. It is therefore the Respondent's obligation

and duty under such circumstances to ensure that he obtains the sum of US\$5000 from the Appellant and remit it to the Chinese company. The Respondent as a prudent businessman and who usually transact business with the said Chinese company cannot wait to be sued by the company in order for him to demand from the Appellant the payment of the balance and on the same point he invited the court to consider the evidence of the Respondent to the effect that Nancy (the manager of the Chinese company in charge of Africa) is now demanding from him the balance of US\$5000 and he is bound to lose his business relations with the Chinese company as a result of the Appellant's refusal to pay the balance of US\$5000. He is the person who guaranteed and assured the manager of the said Chinese company that the balance would be paid immediately upon the container having been sent to the buyer.

Basing on the evidence adduced by the Respondent, there is a contract in the form of a contract of guarantee between the Appellant and the Respondent which is permissible under section 68 of the Contracts Act 2010. He invited the court to disregard the submissions of the Appellant's Counsel to the effect that the contract of guarantee is illegal, null and void.

Furthermore, the Respondent's Counsel submitted that the evidence adduced by the Respondent clearly reveals that there is a creditor which is the Chinese company; a principal debtor who is the Appellant and a guarantor who is the Respondent. The document which proves the existence of any dealing between it and the Appellant can among other things be derived from the commercial invoice attached to the Respondent's statement as P ID1. This document was admitted by the Appellant during cross examination. Pursuant to the Appellant's own admission of the invoice coupled with the Appellant's submission of the deposit slip PID 3, he is barred by estoppels from denying the documents under the doctrine of estoppels under section 114 of the Evidence Act. Since Masaka Farm Stores is a business name of the Appellant, he is barred by estoppels from denying the fact that he knows the Chinese company, from whom he ordered the spray pumps reflected in the said invoice and that he deposited a sum of 14,000,000/- Uganda shillings on the Respondent's account as part payment for the spray pumps. The Appellant's allegation to the effect that he was praying for herbicides which he had purchased from the Respondent is a hoax, a mere fabrication and is not in any way pleaded in the Appellant's written statement of defence and in his witness statement. He invited the court to disregard the

Respondent's submissions to the contrary. The submissions by the Respondent's Counsel in respect of section 71 of the Contract Act in so far as it contends that the Respondent's default on the part of the debtor are false because the evidence on record clearly reveals that the Appellant defaulted in the fulfilment of his obligations.

In reply to ground four, the Respondent's Counsel submitted that having perused the judgment of the trial magistrate, there is no document marked PID 13, PID14 and PID 15 referred to. With regard to the documents marked PID 1 and PID 3, the trial magistrate did not err in relying on the said documents because they were admitted by the Appellant during cross-examination and the doctrine of estoppels applies.

He further submitted that the trial magistrate did not err in finding that the Appellant paid Uganda shillings 14,000,000/= to the Respondent and that the claim by the Appellant that the payment was for herbicides was an afterthought. The pleadings of the Respondent clearly revealed that he based his claim on the Appellant's deposit of a sum of 14,000,000/= to the Respondent's account for onward remittance to the Chinese company. The deposit slip was marked PID 3 which implies that he was at all material times aware of the fact that the Respondent hinges his claim on the said fact among others and therefore if it was true that his deposit of the said money was for a purpose different from that suggested by the Respondent, he ought to have specifically pleaded the same in his written statement of defence and also included it in his written evidence in chief so as to give the Respondent an opportunity to reply to the same. Moreover, the Appellant also stated during cross examination that he did not even inform his lawyer about the said allegation. By the Appellant bringing up the said allegation in cross examination without pleading the same, it amounts to a departure from pleadings contrary to Order 6 rule 7 of the Civil Procedure Rules.

Finally Counsel submitted that the evidence of PW2 and PW3 is not hearsay evidence and the trial magistrate did not err in law in awarding interest and damages of Uganda shillings 4,000,000/=. The sum of money awarded as general damages is reasonable in the circumstances and the Appellant's submission is contrary to the law and false. He prayed that the appeal is dismissed with costs.

Submissions in rejoinder by the Appellant's Counsel

In rejoinder the Appellant's Counsel reiterated submissions that there is no evidence of the contract of guarantee.

Secondly reliance on documents by the trial magistrate which were never tendered in evidence was erroneous and as such the documents including PID 1 and PID 3 were relied on contrary to the law.

With respect to the submissions on estoppels under section 114 of the Evidence Act and in particular the doctrine of estoppels, does not apply and there are no proven facts to establish the doctrine of estoppels. The submission that the Appellant admitted the transaction in cross examination does not hold water since no alleged admitted document was tendered in evidence. He invited the court to find no merit in the Respondent's submissions and to allow the appeal with costs to the Appellant in this court and in the lower court.

Judgment

I have carefully considered the Appellant's appeal as disclosed in the memorandum of appeal and the submissions of Counsel. I have duly considered the evidence from the record and the pleadings which gave rise to the hearing and subsequently to the appeal. To give a proper background to this suit in the lower court, I will set out the pleadings in terms of the plaint and a written statement of defence.

The record of proceedings indicates that the Respondent filed this suit on 4th February, 2015 at the Chief Magistrate's Court of Mengo and claimed as against the Defendant for recovery of US\$5000 equivalent to Uganda shillings 14,000,000/=, general damages, interests and costs. The crux of the pleading is that the Plaintiff helped to buy goods for the Defendant in that the Defendant had failed to pay for the goods. The Plaintiff negotiated with the supplier who had alerted him that there were goods lying somewhere unpaid. The Plaintiff promised to get a buyer for the goods and thereafter notified the Defendant. The Defendant had only paid US\$8000 and he failed to clear the balance of US\$15,928 when the supplier contacted the Plaintiff. The Plaintiff negotiated the price down for the balance of US\$ 15,928 and the supplier agreed to

receive US\$ 10,000 instead of US\$ 15,929 which had remained unpaid. The supplier further agreed to release the goods from Mombasa upon being paid US\$ 5,000 on the strength of a guarantee from the Plaintiff that the balance would be paid upon the buyer accessing and inspecting the goods (for fitness of purpose). The goods were released and given to the Defendant. However the Defendant refused to pay the guaranteed amount of US\$ 5,000 being the balance out of the US\$ 10,000. The Plaintiff further averred that the Defendant had paid him Uganda shillings 14,000,000/= which is the equivalent of US\$ 5,000 that he remitted to the supplier for the release of the goods.

I have also perused the Defendant's written statement of defence in which the Defendant averred that the Plaintiff's pleadings do not disclose a cause of action against the Defendant and that the suit is frivolous and vexatious and an abuse of court process. Thirdly, he averred that the court had no jurisdiction to hear the suit. Without prejudice and in the alternative the Defendant averred that he had never ordered goods and failed to pay the price thereof from Aizhou Peng Sheng Agriculture and Forestry Machinery Company. The Defendant denied knowledge of the said Nancy and having any transactions or communications between her and himself or the Plaintiff.

In the further alternative the Defendant/Appellant averred that he never had any contract of sale of goods with the Plaintiff or the Chinese company and that he has never dealt with the said Nancy. Thirdly, he never had any contract of guarantee with the Plaintiff nor ever contemplated one more so in favour of one Nancy or the Chinese company. No contract in law exists between the Defendant and the Plaintiff in respect of the unspecified and un-described spray pumps allegedly supplied by a Chinese company.

The first three grounds of appeal deal with point of laws and for ease of reference the grounds are:

1. The learned trial magistrate erred in law and in fact when he held that the Respondent's case disclosed a cause of action against the Appellant.

2. The learned trial magistrate erred in law and in fact in holding that a contract of guarantee existed between the Appellant and the Respondent in the absence of such a contract in writing.
3. The learned trial magistrate erred in law and in fact in holding that an oral contract whose subject matter exceeds 25 currency points is valid and enforceable.

The first ground is whether the learned trial magistrate erred in law and fact in holding that the Respondent's suit disclosed a cause of action against the Defendant/Appellant. I have carefully considered the second and third grounds and indeed they are intertwined with the first ground which has to do with whether the plaint disclosed a cause of action. Ground number two simply holds that there was no contract of guarantee between the parties which is the same as saying that there is no cause of action or that the action cannot be maintained on a point of law. Ground number 1 may be necessary to argue from the pleadings alone. Ground number three is of the same import except that it holds that because the alleged contract was an oral contract, it was unenforceable as it does not comply with the acceptable ingredients of a contract under section 10 of the Contracts Act. Ground two and three are based on the interpretation of sections 10 and 68 of the Contracts Act 2010.

I have carefully perused the judgment of the trial court and the three grounds arise from or are based on the judgment of the learned trial magistrate at pages 3 to 5 of the judgment. The learned trial magistrate held that he had considered the provisions of section 10 of the Contracts Act and held that section 68 of the Contracts Act relates to interpretation for part VIII which deals with indemnity and guarantee and which specifically defines what amounts to a contract of guarantee and was therefore in line with the submissions of the Plaintiff's Counsel. He held that section 68 of the Contracts Act was an autonomous provision which should be read in isolation of section 10 which generally defines what amounts to a contract. He therefore found that there was a contract by guarantee which can be oral or written. He further found that the Defendant/Appellant had made a promise to the Plaintiff/Respondent in order to be assisted in obtaining spray pumps from the Chinese company.

I have carefully considered the pleadings as well as the written submissions of Counsel. Before delving into the definition of a contract under section 10 of the Contracts Act as well as section 68 thereof, the Plaintiff averred in paragraphs 4 (i) and (o) that they devised a strategy in which they represented to one Nancy of Aizhou Peng Sheng Agriculture and Forest Machine Company that there was another buyer of the consignment, the subject matter of the suit rather than the Appellant/Defendant in the lower court.

In other words it is abundantly clear that the Respondent represented or misrepresented to the alleged company in China that there was another buyer of the goods other than the Appellant/Defendant who had failed to pay for the same. So by misrepresentation, the alleged contract could not be between the Appellant/Defendant as the buyer and the Chinese company with the Respondent as a guarantor. The misrepresentation was against a party on whose behalf the suit has been filed in the sense that the Plaintiff/Respondent is seeking to be paid a sum of US\$5000 which is averred in the plaint as due and owing to Aizhou Peng Sheng Agriculture and Forest Machine Company according to the plaint and which was the balance to be paid upon the buyer inspecting the contents of the container containing the spray machines. In other words the seller of the machines was and is supposed to be kept ignorant of the fact that the spray machines were coming to the Defendant/Appellant who had failed to pay for the same. It is specifically averred as follows and I will later make comments about the amount of money involved.

The Plaintiff averred that he and the Defendant are businessmen dealing in agricultural inputs and products and had been friends for a long period of time. The Plaintiff and the Defendant transacted business at Container Village. It is averred that the Plaintiff and the Defendant usually buy their inputs from China from a company called Aizhou Peng Sheng Agriculture & Forestry Machinery Company. In November 2014 the Plaintiff received an SMS from one Nancy, a manager in the said company in charge of Africa requesting him to buy spray pumps which the Defendant while trading as Masaka Farm Store had ordered for and failed to fully clear payments for the same. The manager informed the Plaintiff that the Defendant had only paid a sum of US\$8000 and he failed to clear the balance of US\$15,928 and the company decided to sell the spray pumps to another person who would be in a position to pay the balance. The said Nancy sent to the Plaintiff/Respondent a copy of the invoice to the same effect. A copy of the invoice

was attached to the plaint as annexure "A". The invoice concerns 792 pieces of agricultural sprayers with the CIF Price to Mombasa at US\$ 23,923.40. In paragraph 4 (3) of the plaint it is averred that the Plaintiff informed Nancy that he had just imported goods from the same company and it still had enough stock and informed him that they could assist the supplier by him getting another prospective buyer. Thereafter he informed the Appellant/Defendant about what transpired. The Defendant informed him that he was still interested in buying the goods and they had indeed paid a sum of US\$8000 and remained with a balance of US\$15,928 which he could not pay due to financial constraints. It is averred that the Defendant/Appellant informed him that he only had US\$5000 and he had requested Nancy to accept it and release the goods. However Nancy refused and insisted that the Defendant/Appellant first clears all the outstanding balance. In paragraph 4 (h) it is averred that the Defendant informed the Plaintiff/Respondent that he had US\$5000 which he was willing to pay and he requested the Plaintiff/Respondent to devise all possible means to see to it that he does not lose the said goods. In paragraph 4 (i) it is averred as follows:

"that the logical solution which the Plaintiff and the Defendant devised for purposes of preventing the Defendant from losing the said goods was that the Plaintiff would inform Nancy that he had got a buyer who was willing to buy the said goods and that for him (the Plaintiff) would act as a middleman in the said process and that the Plaintiff does inform Nancy that the buyer whom he got had requested for a reduction in the balance of US\$15,928 to at least US\$10,000 since the container for the said goods had overstayed at Mombasa Port and it had accumulated a lot of demurrage charges."

It is averred that Nancy after negotiations and various discussions agreed to forfeit the rest of the money and settled for the balance of US\$10,000. It is further averred that the parties agreed that the buyer would first assess the condition of the sprays which had overstayed in the container and that the buyer was willing to pay US\$5000 and the balance within a very short period after the buyer had seen the container and after the Plaintiff had guaranteed to pay the balance of US\$5000 which was the balance to be paid. It is averred that Nancy accepted the proposal and the Plaintiff informed the Defendant accordingly and the Defendant deposited a sum of 14,000,000/= equivalent to US\$5000 on the Plaintiff's account as reflected in the bank statement

and a deposit slip attached and marked B and C respectively. The deposit is dated 24th November 2014 and is for 14,000,000/= Uganda shillings.

It is averred that the Plaintiff remitted the money to Nancy who released the container. The Defendant received the container in the presence of the Plaintiff and all the spray pumps therein were offloaded in his presence and none of the spray pumps was found to be in a bad condition. In paragraph 4 (o) of the plaint it is averred as follows:

"The reason why it was not revealed to Nancy that it was the Defendant still interested in purchasing the goods is that if Nancy got to know the said fact, she would have cancelled the whole deal since the business relations between Nancy and the Defendant was not good and Nancy could no longer deal with him."

It is lastly averred that sometime later Nancy started demanding the balance of US\$5000 from the Plaintiff and the Plaintiff informed the Defendant accordingly. It is averred that despite numerous interventions from various businessmen and from KACITA, the Defendant still refused to pay the said sum of money and to date has never paid the balance of US\$5000. It is averred that Nancy is still demanding from the Plaintiff the balance of US\$5000. The Plaintiff's grievance as averred in the plaint is that he is bound to lose his good business relationships with the Chinese company. It is averred that the Plaintiff guaranteed and assured the manager that the buyer would pay the balance.

Ordinarily a person who "guarantees" is also known as a guarantor.

I have duly considered the definition of a contract under section 10 of the Contracts Act 2010 and that of a guarantee under section 68 which provisions are reproduced below for ease of reference. Under section 10 an agreement that amounts to a contract is defined as follows:

"10. Agreement that amounts to a contract.

(1) A contract is an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound.

(2) A contract may be oral or written or partly oral and partly written or may be implied from the conduct of the parties.

(3) A contract is in writing where it is—

(a) in the form of a data message;

(b) accessible in a manner usable for subsequent reference; and

(c) otherwise in words.

(4) Nothing in this Act shall affect any law in Uganda relating to contracts by corporations or generally.

(5) A contract the subject matter of which exceeds twenty five currency points shall be in writing.

(6) A contract of guarantee or indemnity shall be in writing.

(7) In this section, “guarantee” and “indemnity” have the meaning assigned to them in Part VIII of this Act.”

Section 10 is a general provision which provides for an agreement that amounts to a contract. In other words it deals with agreements which are enforceable as contracts. The Appellant particularly relies on subsections 5 and 6 of section 68. In subsection 5 it is provided that a contract the subject matter of which exceeds twenty five currency points shall be in writing. On this ground alone the Appellant’s contention is that the learned trial magistrate erred in law to find that there was a contract when the sum of US\$ 5,000 exceeded twenty five currency points and is the subject matter of the alleged contract. From those premises a contract which is oral and exceeds twenty five currency points does not amount to a contract. The Respondent on the other hand relied on section 68 which also defines a contract of guarantee. This brings in the second controversy as to what amounts to a contract of guarantee. Subsection 6 of section 68 of the Contracts Act provides that “a contract of guarantee or indemnity shall be in writing.”

The Plaintiff/Respondent's Counsel submitted and the trial Magistrate agreed with him and held that section 68 of the Contracts Act is an autonomous provision and allows a contract of guarantee or indemnity to be either in writing or oral. The Appellant's Counsel contended that the learned trial magistrate erred in law so to find.

Section 68 of the Contracts Act defines the following terms as follow:

“contract of guarantee” means a contract to perform a promise or to discharge the liability of a third party in case of default of that third party, which may be oral or written;

“contract of indemnity” means a contract by which one party promises to save the other party from loss caused to that other party by the conduct of the person making the promise or by the conduct of any other person;

“guarantor” means a person who gives a guarantee;

“indemnity” means an undertaking by which a person agrees to reimburse another upon the occurrence of an anticipated loss;

“principal debtor” means a person in respect of whose default a guarantee is given.

The definition of a contract of guarantee under section 68 of the Contracts Act is contradictory to section 10 (6) which expressly provides that a contract of guarantee shall be in writing and uses the expression “shall be in writing” which is mandatory language. Yet section 68 provides that a contract of guarantee may be oral or written and uses a permissive language. Nevertheless, section 10 (6) provides for a contract of guarantee but under section 10 (7) provides that a contract of “guarantee” and “indemnity” have the meaning assigned to them in Part VIII of this Act.” Under Part VIII a specific and detailed definition is given of a contract of guarantee or indemnity in the sense that it is written that: “a contract of guarantee” means a contract to perform a promise or to discharge the liability of a third party in case of default of that third party, which may be oral or written;” The major question is whether the promise has to be to a third party. Can there be a guarantee without there being a third party in the picture?

Without harmonizing what is an apparent conflict between section 10 (6) which prescribes that the contract shall be in writing and section 68 of the Contracts Act which permits an oral contract, the definition itself and not the form of the contract itself should first be considered. A contract of guarantee is a contract to perform a promise or to discharge the liability of a third party in case of default of that third party. For the provision to be harmonized with section 10 of the Contracts Act it means that any contract of guarantee which exceeds 25 currency points shall be in writing but a contract “of guarantee” which is less than 25 currency points may be oral. This may be taken from the provision of section 10 itself. Section 10 permits a contract to be either oral or in writing as a general rule. It provides under section 10 (2) that “A contract may be oral or written or partly oral and partly written or may be implied from the conduct of the parties.” It therefore does not exclude an oral contract. Sections 5 and 6 prescribe that a contract that exceeds twenty five currency points shall be in writing. Moreover it specifically prescribes that a contract of guarantee shall be in writing by stating that: “a contract of guarantee or indemnity shall be in writing.” Because section 68 permits a contract of guarantee or indemnity to be made orally, it has to apply to contracts whose value do not exceed twenty five currency points. The Appellant’s submissions have merit in that regard. Generally a contract which exceeds twenty five currency points shall be in writing. The requirement under section 10 (5) of the Contracts Act for the contract to be in writing is mandatory. On the other hand the requirement under section 68 as to whether a contract of guarantee may be in writing or oral is couched in discretionary language and is therefore permissive. Imperative language for instance by use of the word “shall” makes what is prescribed mandatory. On the other hand by using the word “may”, the provision is permissive and may or may not be followed. The question should therefore be whether the contract is void or unenforceable.

The other point is whether there was a contract to discharge the liability of a third party and whether this is the essence of a contract of indemnity or guarantee. As far as the contract or alleged contract is concerned, there is no third party in the picture. The alleged relationship is between the Appellant and the Respondent. In fact the seller of the goods was not supposed to know about the arrangement between the Appellant and the Respondent. The seller or supplier of the goods should therefore be excluded in establishing whether a binding relationship existed between the two parties. The third party had no knowledge of the Defendant/Appellant except as

a misrepresentation of fact that the buyer was not the Appellant/Defendant. In considering the obligations between the parties it is an obligation alleged to be based on the promise to pay the Plaintiff/Respondent a sum of US\$ 5,000 for the benefit of a third party. There was no third party in the alleged agreement because the supplier was not supposed to know of the existence of the Defendant/Appellant.

Was it then a contract to perform a promise to a third party? First of all paragraph 4 (l) of the plaint shows that it is the Plaintiff who is the guarantor of payment to the third party or supplier of the goods. I will quote the paragraph in full. The Plaintiff averred in paragraph 4 (l) of the plaint as follows:

“That the Plaintiff informed the Defendant accordingly and then the Defendant requested the Plaintiff to inform Nancy that since the container for the said spray pumps had overstayed at Mombasa, the buyer was desirous of first assessing the condition of the spray pumps in the container before he can fully pay the said sum of \$10,000 and that the buyer was willing to pay \$5000 and then pay the balance after assessing the condition of the spray pumps. Nancy at first refused the said proposal but after further discussions she heeded to the said proposal after the Plaintiff having assured him that the balance would be sent within a very short period of time after the buyer has seen the container and after the Plaintiff having guaranteed to him that the balance of \$5000 was going to be paid.”

The paragraph shows that the Plaintiff/Respondent acted as a middle man between a fictitious buyer and the supplier when in actual fact the parties to the suit/this appeal agreed to a scheme to have the goods released to the Defendant. It is the Plaintiff who guaranteed the payment before the balance was released through a partial deception. The Plaintiff has now become liable to pay up presumably after collecting the money from the buyer from the perspective of the supplier. It is apparent from the plaint that the Plaintiff purported to act for a fictitious buyer when in fact he was allegedly acting for the Defendant who is alleged to have already paid US\$ 8,000 and failed to pay the balance of the total price for the goods whereupon the supplier informed the Plaintiff about the goods and the Plaintiff agreed to get another buyer to buy the goods. This state of facts also appears in the written testimony of the Plaintiff/Respondent.

The fictitious buyer promised to pay the total consideration agreed at US\$10,000 through payment of a deposit of USD\$ 5,000, whereupon the goods would be released and the balance paid. Where was the contract of guarantee? If it is a contract to perform a promise, to who was the promise made? From the pleadings the promise was made to the Plaintiff by the Appellant. The judgment of the learned trial magistrate is as follows:

“And the promise which Counsel for the Defendant claims not to have ever been made for the promise of the benefit of the Defendant. I find this to have been made by the Defendant to the Plaintiff such that he can be in position to assist him in obtaining his spray pumps from the Aizhou Peny Sheng Agriculture and Forest Machine Company. In where the Plaintiff did hence fulfilling his obligation by ensuring that the Defendant obtained his goods moreover at a reduced price but the Defendant refused to fulfill his promise of paying the balance of US\$5000.

This completed with the evidence of PW2 Musoke Titus and PW3 Mayanja Kato who turned to which ever and on all occasions the Defendant was not refuting the claim of the balance of \$5000 it clearly shows that there existed a contract between the Plaintiff and the Defendant by guarantee.”

In other words the court held in the above quoted many words that there was a contract to perform a promise. Secondly, it was the Defendant who promised to pay the Plaintiff. This contract was an oral contract and implied from the conduct of the parties. Firstly, the learned trial magistrate erred in law to enforce an alleged contract of guarantee which exceeded 25 currency points which was not proved to be in writing under the mandatory provisions of section 10 (5) of the Contracts Act. The holding that section 68 of the Contracts Act was autonomous is erroneous since section 10 (7) refers and applies section 68 of the Contracts Act. The two provisions have to be read in harmony and not in isolation with one another and this is the clear intention of legislature under section 10 (7) of the Contracts Act.

Secondly, the price of the goods negotiated with an alleged third party buyer was only US\$ 10,000 as the total consideration for the goods. Yet the Defendant had allegedly already paid US\$ 8,000 and further released the equivalent of US\$ 5,000 or shillings 14,000,000/= to the

Plaintiff. This is a total of US\$ 13,000. If the supplier went ahead with the sale to another buyer as was its intention, was the Defendant/Appellant going to be refunded his US\$ 8,000? It was very improbable for the supplier to bargain for less than the balance without dealing with the original buyer namely the Defendant. Was the Defendant going to forfeit the US\$ 8,000 or was he going to be refunded or get the equivalent of the money in goods from the 8,000 US\$ from the subsequent buyer?

According to the **Oxford Dictionary of Law, 6th Edition at page 246**, a guarantee is a secondary agreement in which a person known as **the Guarantor** is liable for the debt or default of another known as the principal debtor who is the party primarily liable for the debt. According to **Geraldine Mary Andrews and Richard Millet in “Law of Guarantees”** page 3 a contract of guarantee in the true sense, is a contract whereby the surety or Guarantor promises the creditor to be responsible, in addition to the principal for the due performance by the principal debtor of the existing or future obligations to the creditor, if the principal debtor fails to perform those obligations.

In **Yeoman Credit Ltd vs. Latter and Another [1961] 2 All ER 294 at 296** a contract of guarantee was defined as a contract to answer for the debt, default or miscarriage of another who is to be primarily liable to the promise. In the case of **Moschi vs. LEP Air Services Ltd and Others [1972] 2 All ER 393** at 400 Lord Diplock held that:

“The law of guarantee is part of the law of contract. The law of contract is part of the law of obligations. The English law of obligations is about their sources and the remedies which the court can grant to the obligee for a failure by the obligor to perform his obligation voluntarily. Obligations which are performed voluntarily require no intervention by a court of law. They do not give rise to any cause of action.

English law is thus concerned with contracts as a source of obligations. The basic principle which the law of contract seeks to enforce is that a person who makes a promise to another ought to keep his promise. This basic principle is subject to an historical exception that English law does not give the promisee a remedy for the failure by a promisor to perform his promise unless either the promise was made in a particular form,

e.g. under seal, or the promisee in return promises to do something for the promisor which he would not otherwise be obliged to do, i.e. gives consideration for the promise.”

At page 401

“By the beginning of the 19th century it appears to have been taken for granted, without need for any citation of authority, that the contractual promise of a guarantor to guarantee the performance by a debtor of his obligations to a creditor arising out of contract gave rise to an obligation on the part of the guarantor to see to it that the debtor performed his own obligations to the creditor. ...

It is because the obligation of the guarantor is to see to it that the debtor performed his own obligations to the creditor that the guarantor is not entitled to notice from the creditor of the debtor’s failure to perform an obligation which is the subject of the guarantee, and that the creditor’s cause of action against the guarantor arises at the moment of the debtor’s default and the limitation period then starts to run. *It is also why, where the contract of guarantee was entered into by the guarantor at the debtor’s request, the guarantor has a right in equity to compel the debtor to perform his own obligation to the creditor if it is of a kind in which a court of equity is able to compel performance*” (Emphasis added)

In all the above definitions, there is a third party who is owed money and the guarantor agreed to be liable on the failure of the principal debtor. The liability is to a third party. Furthermore the guarantor can bring an action against the debtor to compel the debtor to perform his obligation to the creditor. If we take the creditor to be the supplier company from China, there would be a problem with this as the supplier does not know the buyer and only knows the Plaintiff/Respondent. In other words there is no contract between the principal debtor and the supplier or creditor.

In this case the third party is making a demand on the guarantor but does not know who the principal debtor or buyer is. Secondly the creditor or supplier has not yet collected his US\$ 5,000. From the pleadings that money still owes. The only liability that remains is that to a third

party and not to the Plaintiff/Respondent as far as the supply of goods is concerned. The Respondent only caused the goods to be released by telling a false story about a fictitious buyer paying US\$ 5,000 which is 50% of a negotiated balance consideration. To put it clearly he was a middleman between a fictitious person and the supplier of the goods. Yet he came to court and informed the trial court that he hatched a scheme with the Defendant/Appellant to have the goods released to the Appellant who had failed to pay for the balance of the price because he had no money. The scheme succeeded and the court is supposed to endorse it. The Respondent admittedly has not yet incurred any liability of having lost any money. The overall result is that the contract, if any, between the Appellant and the Respondent is not enforceable through court process as it aids the Respondent in the deception of any innocent supplier. If the Respondent had a cause of action against the Appellant in equity then the maxim “he who comes to equity must come with clean hands” applies. In this case the Respondent’s cause of action cannot proceed on the footing of equity and the learned Magistrate erred in law in not disposing of the suit on a point of law.

The first three grounds of appeal succeed and there is no need to consider the last ground. The decision of the trial Magistrate is set aside and substituted with a decision to dismiss the suit in the lower court with costs of this appeal and at the lower court.

Judgment signed by me on 24th August 2017 for delivery by the Registrar on 24th August, 2017.

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Mr. Patrick Bugembe for the Respondent

Mr. Isaac Okurut Holding brief for Mr. Nuwagaba Wilfred for the Appellant

Both parties present

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$# xtra+ maximum735securityx 2017 style*

Charles Okuni: Court Clerk

Judgment delivered upon request of Hon. Justice Christopher Madrama

Thaddeus Opesen

ASSISTANT REGISTRAR

24th August, 2017