THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: M.M. KIBEEDI, C. GASHIRABAKE, O.J. KIHIKA, JJA

CIVIL APPEAL NO. 65 OF 2014

(Arising from Consolidated Civil Suits No. 272 of 2008 and 266 of 2009)

(Appeal from Judgment and decision of Honourable Justice Wilson Musaalu Musene dated 24th February 2014)

BARCLAYS BANK OF UGANDA LIMITED :::::::::::: APPELLANT

VERSUS

1. **ETATS LTD**
2. **JAMES BALYEJJUSA**
3. **MARGARET BALYEJJUSA**
4. **MARTIN KAKEMBO :::::::::::::::::::::::::::::::: RESPONDENTS**

JUDGMENT OF CHRISTOPHER GASHIRABAKE, JA

Introduction

This appeal is from the judgment and decree of the High Court in consolidated HCCS No. 272 of 2008 and HCCS No. 266 of 2009.

Background

The 1st respondent obtained several credit facilities from the appellant between May and November 2005 and the facilities were secured by various properties including property comprised in plot 30-34 Eden road Jinja as well as personal guarantees by the 2nd, 3rd and 4th respondents as directors of the 1st respondent. Prior to the advancement of the facilities, the property comprised in Plot 30-34 Jinja Town was valued by Bageine & Co, which returned the market value of UGX. 865,000,000/= and a forced sale value of

UGX. 605,000,000/= as of 21st December 2004. Upon default by the 1st respondent, the appellant purported to sale all the 1st respondent's securities and after the impugned sale, the appellant instituted HCCS No. 272 of 2008 against the 2nd, 3rd and 4th respondents seeking to recover the sum of UGX. 504,998,901/= being the outstanding debt. The 1st respondent was not party to the suit and as the principal debtor, filed a suit against the appellant vide HCCS No. 266 of 2009 challenging the impugned sale of the suit land on grounds that it was conducted fraudulently, negligently and illegally. HCCS No. 272 of 2008 and HCCS No. 266 of 2009 were consolidated and judgment delivered in favour of the respondents.

The appellant was dissatisfied with the decision of the High Court and filed this appeal currently before us on grounds that;

1. The learned trial Judge erred in law and fact when he held that the appellant was fraudulent, negligent and reckless when it sold the suit property at a low price.
2. The learned trial Judge erred in law and fact when he found that the appellant could not enforce the personal guarantees for any outstanding balances because it had fraudulently sold the suit property.
3. The learned trial Judge erred in law and fact when he found that Plot 30-34 Eden Road was 5.3 acres whereas evidence on record confined it to 2.97 acres.
4. The learned trial Judge erred in law and fact when he awarded additional remedies to the respondents which were never pleaded.
5. The learned trial Judge erred in law and fact when he awarded the respondents the difference between the prices obtained from the sale of the property situate at Plot 30-34 Eden Road Jinja and its current market value as determined by a court appointed valuer.
6. The learned trial Judge erred in law and fact when he awarded the respondents general damages.

The respondents were also partly dissatisfied with the decision of the trial court and cross-appealed on the following grounds;

1. The learned trial Judge erred in law and fact when, after finding that the appellant was fraudulent in the sale of the suit property, went ahead to allow the appellant to take benefit of the said fraud.
2. The learned trial Judge erred in law and fact when, after finding that the appellant was not entitled to the payment of the outstanding balance, went ahead to order the appellant to exercise its duty of sale of the remaining acres to recover the outstanding balance.
3. The learned trial Judge erred in law and fact when he did not award costs to the respondents, the successful party in HCCS No. 272 of 2008.

Representation

At the hearing of this appeal, Mr. Allan Waniala appeared for the appellant while Mr. Enos Tumusiime appeared for the respondent. Both parties filed written submissions which I have duly considered.

Appellant's submissions

Counsel argued grounds 1 and 3 concurrently and submitted that the trial court in finding the appellant liable in fraud, negligence and recklessness in selling the suit property, the learned trial Judge did not analyze the appellant's evidence that showed the peculiarity of the suit land. The Judge based his decision of fraud and negligence on the misdirection that DW2 had conceded that the suit property was actually 5.3 acres instead of 2.97 acres and that there were several industrial developments surrounding the suit property that made it more valuable than was reported in DW2's valuation report. Counsel argued that DW2 qualified his evidence on acreage by stating that the size of the property in his report was based on the certificate of title.

DW2 conceded not to have opened any boundaries and therefore could not confirm that the land was 5.32 acres.

Counsel relied on Section 91(1), (5) and (6) of the Land Act (as amended) which provides that for an alteration on acreage to be made on a certificate of title, the registrar shall affix the date on which the correction or amendment was made and initial it. Likewise under Section 59 of the Registration of Titles Act, a certificate of title is conclusive evidence of the particulars set forth in the title and evidence to the contrary should be strictly proved. In essence, the trial court should have relied on the unadulterated acreage originally cited on the certificate of title. Counsel argued that the respondent did not tender in any evidence demonstrating that the suit property was in fact 5.3 acres. The respondent should have adduced independent evidence from the office of the Commissioner of Lands to not only contradict the acreage on the certificate of title but also rectify the purported error on the acreage on the certificate of title as provided for under sections 156, 158 and 159 of the Registration of Titles Act.

Counsel relied on the evidence of DW2 on the developments in Jinja and argued that at the time DW2 conducted the valuation, the premises were dilapidated and there was little economic activity in Jinja and the number of industries between Namanve and Jinja came about after the date of valuation. DW2 justified the reason for offering a market value of Ugx 300.000.000/= that the property was dilapidated and would attract a high replacement cost and the rent for the property would be low.

Counsel relied on the decision in **Cuckmere Brick Co Ltd & another Vs Mutual Finance Ltd [1971] 2 ALL ER 633** in which Salmon LJ observed that a mortgagee is entitled to exercise the right of sale for his own purpose whenever he chooses to do so notwithstanding that the moment may not be favourable and that by waiting, a higher price may be found. That exhibit

DID2 gives reasons why the suit property would not fetch the respondent's preferred price which include the cost of replacing the dilapidated structures.

Counsel submitted that the trial court found that the appellant could not enforce its guarantees having not accounted to the respondents and ignored the fact that the appellant had given a proper account of the return following the sale of the suit property. DW1 also gave testimony to the effect that the appellant provided accountability for the sale of the suit property and this evidence was unchallenged.

Counsel argued that fraud is a serious matter and a party against whom it is alleged should be afforded sufficient notice to enable him answer the allegation. Counsel submitted further that the learned trial Judge erred in relying on the submissions of the respondents as opposed to evaluating evidence on the record and arriving at his own decision. Counsel relied on the decision in **Shokatali Abdulla Dhalla vs Sadrudin Merrali, SCCA No. 32 of 1994** for the notion that relying on submissions rather than evidence is a misdirection.

Respondent's submissions

Counsel submitted that ground one, as framed is misconceived and misleading for reasons that the learned trial Judge based the finding of fraud on a number of issues of which the low price was only, but one. There were several other omissions which constituted fraud to wit the appellant's withdrawal of its earlier consent to the respondents to find a buyer, the appellant's secrecy during the sale which was done by private treaty and the appellant's failure to call Vincent Kawunde, the bailiff who sold the property, as a witness. In this regard, counsel relied on the decision in **Bukenya and others Vs Uganda (1972)1 EA 549** in which the Court of Appeal of East Africa held that the prosecution must make available all witnesses and documents necessary to establish the truth.

Counsel argued that the suit property was grossly undervalued and subsequently sold through a process that was fraudulent, illegal, null and void. PW1 and PW2 testified that the suit property as well as the properties comprised in Plots 3 and 5 Masese Rise had on several occasions been mortgaged to different financial institutions prior to 2005 when the facilities were advanced by the appellant. The properties had been valued by professional Valuers and several facilities advanced to the respondents on the basis of the said valuations. The suit property exhibited a continuous rise from UGX 224,000,000/= in 1993 to UGX 865,000,000/= in 2004. The valuation of December 2004 was done by Bageine & Co. on behalf of the appellant and the facilities, the subject of this appeal, advanced on the basis of the said valuation. The appellant did not raise any kind of concern or complaint against Bageine & Co on grounds of misrepresentation in valuing the suit property. That the report by DW2 was a desktop valuation done presumptively to justify the fraudulent sale of the respondent's property by the appellant. Furthermore, during cross examination, DW2 conceded that he did not measure the suit property and therefore could not confirm its size. He relied on a photocopy of a title from Oscar associates and therefore did not have a deed plan inside.

Counsel submitted that the appellant's arguments that the property was in a dilapidated state at the time of the valuation were not backed by evidence. The valuation reports exhibits P3A and P3E categorically confirmed a steady surge in the market value of the suit property from 1993 to 2004. The said reports were never challenged by the appellant and did not cross examine the respondents on the reports. Further, that the appellant advertised the suit property allegedly with a reserve price in June 2007 whereas the valuation was done in September 2007 and no evidence was led to prove what the price was. It cannot therefore be said that the appellant acted in good faith in

exercising the right to sell the property. The appellant acted negligently, recklessly and illegally in disposing off the suit property.

Counsel contended that the mortgages between the appellant and the 1st respondent in respect of the suit property was governed by the Mortgage Act Cap 229 and Section 2 of the Act, stipulated the manner in which such mortgage can be realized. In the instant case, the appellant never sued the 1st respondent but rather instituted HCCS No. 272 of 2008 against the 2nd, 3rd and 4th respondents as guarantors of the 1st respondent. Except for the notice to vacate from Oscar Associates to the 1st respondent, the appellant never took possession of the suit property prior to its alleged sale.

While arguing ground 2, counsel submitted that the personal guarantees of the 2nd, 3rd and 4th respondents were the crux of HCCS No. 272 of 2008 in which the appellant sought to recover UGX 504,998,901/= as the outstanding sum as of 12th August 2008. Counsel argued that the liability of a guarantor crystalizes upon default by the principal debtor and the liability of a guarantor cannot exceed that of the principal debtor. In this case, the appellant prematurely issued demand notices to the 2nd, 3rd and 4th respondents prior to the default of the 1st respondent. The individual guarantees of the guarantors were fixed to the sum of UGX 360,000,000/= and therefore the appellant could not purport to make demands on the said guarantees for UGX 504.998.901/=. In addition, the appellant ought to have realized the 1st respondent's securities first so as to establish the liability of the guarantors. Counsel relied on the decision in **Michael Muhuyi Kiveu vs IG SACCO Ltd, Tribunal Case No. 035 of 2021** on the notion that guarantors are persons under a secondary obligation and their role sets in once the principal debtor has been pursued, and all possible avenues of compelling the principal debtor have been exhausted. The appellant, uncertain of how much was due from the guarantors, still made several inconsistent demands for payment.

Counsel argued that the guarantors are not liable to the appellant at all because the principal debtors' liability was itself extinguished through the sums recovered from the sale of the respondent's properties. ExD.IDO supports the argument that the appellant's claims against the guarantors are exaggerated, untenable and fundamentally flawed.

Counsel submitted that there is credible evidence on the record to show that the suit property was 4.5 acres and not 2.97 acres as alleged by DW2 and the appellant in their submissions. The figure of 5.3 acres was an error adopted by the trial Judge from DW2's evidence in cross-examination while converting the hectares on the Deed Print into acres. At page 5 of the supplementary record, the Deed Print explicitly shows that Plot 30 was 0.677 Hectares while Plot 34 was 0.516 Hectares, all totaling to 1.8 Hectares which is equivalent to 4.5 acres. Furthermore, the respondent's advert in the New Vision Newspaper dated 22nd December 2006 stated that the suit property was 4.5 acres. In addition, the appellant advanced credit facilities on the basis of the 2.97 acreage and therefore, neither the appellant nor the buyer has any legal or equitable claim over the excess.

With regard to the remedies sought, counsel submitted that courts of law are enjoined to make necessary consequential orders on a case by case basis so as to fully settle the dispute presented by the parties. In this case, the sale was done secretly by the appellant and the respondents were never aware of what was sold or when it was sold.

Respondent's submissions on the cross appeal

Counsel submitted that the learned trial Judge's order to sale the residue of the suit property so as to recover the outstanding balance is a contradiction and is legally untenable on the basis of the doctrine of *ex turpi causa non oritur actio*. Counsel relied on the decision in **Active Automobile Spares Ltd vs Crane Bank & another, S.C.C.A No. 21 of 2001** wherein the Supreme

Court, citing with approval, the decision in **Scott Vs Brown, Doering, McNAB &CO(3) (1892) 2 QD 724 at p,728** held that **"No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court ,and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence by the plaintiff proves the illegality the court ought not to assist him"**. That the appellant's submission that the sale was by private treaty is contrary to Section 10 of the Mortgage Act and in addition, the respondents never agreed to a sale by private treaty.

Counsel relied on Section 27(1) of the Civil Procedure Act and submitted that the learned trial Judge erred in failing to award costs to the respondent, being the successful party.

Consideration of the appeal

I have carefully read the submissions of both Counsel and the authorities cited. I have also carefully perused the record of appeal. It is the duty of the 1st appellate court to reappraise all evidence that was adduced before the trial court and come to its own conclusions of fact and law while making allowance for the fact that the court neither saw nor heard the witnesses.

See ***Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions*, S.I 13-10, *Pandya Vs R [1957] EA 336, The Executive Director of National Environmental Management Authority (NEMA) Vs Solid State Limited, Supreme Court Civil Appeal No.15 of 2015 (unreported)*.**

It is with the above principles in mind that I now proceed to consider the grounds of appeal as set out in the Memorandum of Appeal.

Grounds 1 and 3

The appellant faults the learned trial Judge for finding that the appellant was fraudulent, negligent and reckless when it sold the suit property at a low price. The appellant, also faults the trial Judge for having found that the land was 5.3 acres whereas the evidence showed 2.97 acres.

The appellant's argument is that the Judge based the decision on the evidence of DW2, having conceded that the suit land was 5.3 acres and valued it at UGX 300,000,000/= as at 25th September 2007. DW2 however admitted and conceded that he did not measure the suit property and could therefore not confirm the size, having not opened the boundaries. DW1 testified that the appellant sold the mortgaged property comprised in Plot 30-34 Eden Road Jinja at UGX 265,000,000/= following a valuation of the property at UGX 300,000,000/= by DW2. DW2 admitted to court that when he visited the property, he relied on a copy of the Title Deed for the property without the deed plans. DW2 did not measure the property but simply relied on the photocopy of the title from Oscar Associates, the appellant's bailiff, which title had no Deed plan.

In addition, DW2's evidence that the suit property was dilapidated or that property prices in Jinja had taken a down turn for over 20 years was not backed by evidence. DW2 also did not state the alleged net market rental value in his report.

PW1 testified on the other hand, that in all antecedent borrowings, the properties were valued by professional Valuers and several facilities advanced to the respondents on the basis of the said valuations. The valuation of 21st December 2004 was done by Bageine & Co. and the facilities, the subject of this appeal, were advanced on the basis of the said valuation and the property was valued at UGX 865,000,000/=. From ExDID2, the valuation report by

DW2, he stated that Jinja lost its attractiveness nearly 20 years ago and that the property was in a dilapidated state and lost value.

PW1 and PW2 testified that the appellant failed to inform them of the second valuation and when they suffered financial constraints, they requested the appellant to allow them advertise and sell their properties in order to settle their indebtedness, which was granted but withdrawn four days after. The respondents learnt through a third party that its property had been sold.

I note that the respondents in this case did not challenge the loan, the complaint was that the property was sold at a give away price. The learned trial Judge relied on a number of actions of the appellant as argued by the respondent's counsel to impute fraud, negligence and recklessness on the appellant in selling the respondent's property. First, the withdrawal of consent to the respondents to sell the property, the secrecy in sale of the property by private treaty and the undervaluation of the property. Second, the appellant's failure to call the bailiff as a witness and failure to tender into court the alleged sale agreements of the mortgaged properties imputed fraud on the appellant.

In addition, the fact that the appellant invited bids prior to valuation and subsequently procuring an incompetent valuation without measuring the suit property, to match the already received bids would only result into an undervaluation of the property. The appellant was duty bound to obtain the true market value of the property prior to the sale. See **Cuckmere Brick Co. Ltd and another Vs Mutual Finance Ltd [1971] 2 ALL ER 633.**

I reiterate that the appellant's failure to call the bailiff as a witness and tender into court the alleged sale agreements of the mortgaged properties imputed fraud on the appellant.

The Court of Appeal of East Africa held in the case of **Bukenya and others Vs Uganda (1972) 1 EA 549** that;

"where the evidence called is barely adequate, the Court may infer that the evidence of the uncalled witnesses or untendered document would have been adverse to the prosecution..."

In my view, the trend of property value in Uganda is ascending and there were no peculiar circumstances given in this case to explain the tragic fall in the property that warranted it to be sold at less than half the valuation upon which the facilities were given. The suit property was grossly undervalued and subsequently sold through a fraudulent process.

There were also procedural irregularities in the sale itself that were relied on by the learned trial Judge to find illegality and fraud on the side of the appellant. The mortgage between both parties was governed by the Mortgage Act Cap 229 and so was the sale of the mortgaged property. Section 2 of the Mortgage Act provides that;

"2. Remedies upon breach of covenant.

(1) Upon failure of performance of any covenant in a mortgage under

the Registration of Titles Act, the mortgagee may—

(a) sue the mortgagor, obligor, if any, or both as the case may be, on the covenant; or

(b) realise his or her security under the mortgage in any manner hereafter provided in this Act.

In the instant case, the appellant never sued the 1st Respondent but rather instituted HCCS No. 272 of 2008 against the 2nd, 3rd and 4th Respondents as guarantors of the 1st respondent. The appellant did not apply to court to foreclose under Section 8 or appoint a receiver under Section 4 of the Act. There was also no public auction under Section 10 of the Act and the parties

did not consent to sale by private treaty. The sale was conducted in contravention of the **Mortgage Act** and was therefore *void ab initio.*

I therefore find no reason to disagree with the finding of the learned trial Judge. In that respect, ground 1 of the appeal fails.

Regarding the acreage of the land, the Deed Print shows that was converting the hectares on the Deed Print into acres Plot 30 was 0.677 Hectares, Plot 32 was 0.607 Hectares while Plot 34 was 0.516 Hectares, totaling to 1.8 Hectares equivalent to approximately 4.448 acres (on the basis of one hectare being equivalent to approximately 2.471 acres). Likewise, the advert in the New Vision Newspaper marked ExP.2 described the property to be 4.5 acres not 5.3 acres as was stated by the learned trial Judge. 5.3 acres was an error adopted by the learned trial Judge from the evidence of DW2 in cross examination while DW2 was converting hectares on the Deed Print to acres. Similarly, Ex P.3D, the Valuation Report by Ideal Surveyors dated 2nd November 2004 also confirmed that Plot 30-43 Eden Road was 1.8 Hectares and not 1.2 Hectares. However, the appellant advanced credit to the respondents on basis of 2.97 acres and was not entitled to the entire 4.448 acres. The respondents are thus lawfully entitled to the residue in excess of 2.97 acres.

Ground 2

The appellant faults the learned trial Judge for declining to enforce personal guarantees for the outstanding balance. The learned trial Judge held that the Appellant could not enforce personal guarantees without accounting to the Respondents on the outstanding loan balance after the sale of the property had been concluded. The appellant issued demand notices to the 2nd, 3rd and 4th respondents marked ExD.2B, ExD. 2C and ExD.2D on 17th September 2007 to pay UGX. 575,433,749/=. However, the individual guarantees in this case were fixed at UGX 360,000,000/= and yet the appellant's demand was

for the sum of UGX 504,998,901/=. The personal guarantees of the 2nd, 3rd and 4th respondents were the subject of H.C.C.S No. 272 of 2008 and in that suit, the appellant sought to recover Ugx 504,998,901/= as the outstanding sum as of 12th August 2008. According to the respondents, the demand notices were only served upon the guarantors after the alleged sale of the property yet the appellant recovered UGX 265,000,000/= from the suit property and UGX 95,000,000/= from Plots 3 and 5 Masese Rise. The letters marked ExD.2B, ExD.2C & ExD.2D were never served on the guarantors until 7th December 2007 and yet they were made prior to the sale and maintained the same outstanding balance even after the appellant had recovered Ug. Shs. 265,000,000/= from the suit property and Shs. 95,000,000/= from Plots 3 and 5 Masese Rise.

ExD.IDO is a statement of account purportedly showing the extent of the 1st Respondent's indebtedness to the appellant as at 31st July 2008 as Ugx. 505,998,901/=. However, the mortgaged properties had been sold on 8th August 2007 and the sale fetched Ugx. 360,000,000/= yet the appellant did not deduct the same from the outstanding balance. Exh. P.6 shows that by 25th February 2008, the Respondent was only indebted to the appellant in the sum of Ugx. 245,558,753/=. The demand letter dated 22nd April 2008 also showed an accrued interest of Ugx. 38,874,813.72/=, which did not total to UGX 504,998,901/= as stated by the appellant. This in essence means that between 20th March 2008 and 31st July 2008, the 1st respondent's liability more than doubled from Ugx. 245,558,753/= to UGX 504,998,901/=. Thus, the appellant's claim against the respondents as guarantors were untenable.

I must note that the liability of a guarantor arises only upon the default of the principal debtor in his or her obligations as per **Halsbury's Laws of England 4th edition Vol. 20 at Para 193**. In this case, the appellant ought to have realized the 1st respondent's securities first before proceeding to the liability of the guarantor. The appellant wrote demands to the 2nd and 3rd respondents

and served the same after the sale was completed and as such, the personal guarantees were affected by the fraud and negligence in the sale of the property. Had the appellant sold the property for the proper value, more proceeds would have been realized from the sale and there would be no need for the personal guarantees. This was an illegality that cannot be ignored by the court. In **Makula International Vs Cardinal Emmanuel Nsubuga, Civil Appeal No. 4 of 1981**, it was held that once an illegality is brought to the attention of court, it overrides all questions of pleading including any admissions made thereon.

All in all, ground 2 fails.

Ground 4 and 5

Grounds 4 and 5 fault the learned trial Judge for having awarded the respondents remedies to wit the difference between the price obtained from the sale of the property and the then current market value as determined by a court appointed Valuer.

I have already found in resolving grounds 1, 2 and 3 that the sale of the mortgaged property was fraudulently done by the appellant and sold at a give away price. Plots 3 and 5 were stated not to have been valued by DW2 and the bailiff that carried out the sale was never called as a witness to inform court whether Plots 3 and 5 were actually sold and at what price. Infact, there was almost no evidence at all regarding the status of Plots 3 and 5. The respondent' counsel cited **Sinba K Ltd & 4 others vs Uganda Broadcasting Corporation, S.C.C.A No. 003 of 2014** in which the Supreme Court held that a court can decide an unpleaded matter if the parties have led evidence and addressed court on a matter in order to arrive at a correct decision in the case. The sale of the suit property was done secretly by the appellant and no accountability was filed on whether Plots 3 and 5 were sold. In addition, I have already found that Plot 30-34 Eden Road Jinja was undervalued and

should it have been properly valued, the appellant would not have sold Plots 3 and 5 Masese Rise, if infact they were sold. It is my considered view that an order that Plots 3 and 5 Masese Rise transfers be cancelled and given back to the respondents, would meet the ends of justice. I find no reason to interfere with this order.

The glaring fraudulent actions of the appellant in the sale of the suit property warranted the learned trial Judge to grant an award of general damages. General damages are awarded at the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the appellant. The actions of the appellant were illegal, reckless and fraudulent and in my view, warranted an award of general damages to the respondents.

Respondent's cross appeal

Having resolved grounds 1, 2 and 3 the way I have, I find that the appellant cannot benefit from an illegality.

In the case of **Active Automobile Spares Ltd vs Crane Bank & another (supra),** the Supreme Court cited with approval the decision in **Scott Vs Brown (1892) 2 QD 724** held that no court ought to enforce an illegal transaction or allow itself to be made the instrument of enforcing obligations alleged to arise out of a transaction which is illegal.

The outstanding balance arose from the appellants' undervaluation and sale of the suit property at a cheap price. Further, the 2.97 acres on the title that was never offered to the appellant as security for the credit facilities should not be within the realizable assets.

It is trite law that costs follow the event unless court, for good cause, orders otherwise. In deciding the issue of costs, court is guided by the provisions of **Section 27(1)** of the **Civil Procedure Act** which grants court the discretion to

grant costs and to what extent costs incident to suits are to be paid. Despite the wide discretion, the general rule is that a successful party in contested proceedings is entitled to an award of costs. It is the accepted general rule of law that in the absence of special circumstances, costs follow the event.

In the case of considering the exercise of discretion **Anglo-Cyprian Trade Agencies Ltd v. Paphos Wine Industries Ltd, [1951] 1 All ER 873**, Devlin J formulated the relevant principle in exercise of such discretion as follows:

"No doubt, the ordinary rule is that, where a plaintiff has been successful, he ought not to be deprived of his costs, or, at any rate, made to pay the costs of the other side, unless he has been guilty of some sort of misconduct."

In the present case, the learned trial Judge found for the respondents but declined to award costs to the respondents. It is my considered view that the respondents should be awarded costs in H.C.C.S No. 272 of 2008.

This appeal substantially fails. The cross appeal succeeds and I make the following orders;

1. This appeal is dismissed.
2. The 1.53 acres in excess of the 2.97 acres mortgaged to the appellant be returned to the respondents.
3. Costs of H.C.C.S No. 272 of 2008 are awarded to the respondents
4. The respondents are awarded costs of the cross-appeal

I so order

Dated this 11th day of MARCH 2024

Christopher Gashirabake
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Muzamiru M. Kibeedi & Christopher Gashirabake, Oscar John Kihika JJA]

CIVIL APPEAL NO. 65 OF 2014

(Arising from Consolidated Civil Suits No. 272 of 2008 and 266 of 2009)

BARCLAYS BANK OF UGANDA LIMITED :: APPELLANT

VERSUS

1. **ETATS LTD**
2. **JAMES BALYEJJUSA**
3. **MARGARET BALYEJJUSA**
4. **MARTIN KAKEMBO :: RESPONDENTS**

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA

I have had the benefit of reading in draft the judgment prepared by my learned brother, Hon. Justice Christopher Gashirabake, JA.

I agree with the reasoning and the orders proposed.

As Hon. Justice Oscar John Kihika, JA likewise agrees, the unanimous decision of the court is that the appeal and cross-appeal are hereby resolved in the terms proposed in the Lead Judgment of Hon. Justice Christopher Gashirabake, JA.

It is so ordered.

Dated at Kampala this 11TH day of 03 2024

Muzamiru Kibeedi

Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 65 OF 2014

ARISING FROM CONSOLIDATED CIVIL SUITS NO 272 OF 2008 & NO.266 OF 2009

(Appeal from the Judgment of Hon. Justice Wilson Musalu Musene delivered on the 24th of February 2014)

CORUM: MUZAMIRU M.KIBEEDI,JA, CHRISTOPHER GASHIRABAKE,JA, OSCAR JOHN KIHIKA, JA

BARCLAYS BANK OF UGANDA LIMITED.....APPELLANT

VERSUS

1. **ETATS LTD**
2. **JAMES BALYEJUSA**
3. **MARGARET BALYEJUSA**
4. **MARTIN KAKEMBO.....RESPONDENT**

JUDGEMENT OF OSCAR JOHN KIHIKA

I have had the benefit of reading in draft the Judgment of my brother Justice Christopher Gashirabake, JA. I agree with his analysis, conclusions and orders proposed.

Date this ...11TH....day of ....MARCH.....2024

OSCAR JOHN KIHIKA
JUSTICE OF APPEAL