THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL AT KAMPALA

CIVIL APPEAL NO.0076 OF 2016

(Arising from judgment of the High Court (Commercial Division) Civil Suit no. 289 of 2014 dated 10th of February 2016 delivered by the Honorable Justice Mr. David K Wangutusi)

1. FORMULA FEEDS &
2. GICHOHI NGARI
3. ANNE WANGUI GICHOHI
4. SAMSON GICHOHI NGARI

} ::APPELLANTS

VS

KCB BANK UGANDA LIMITED::: RESPONDENT

CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR.JUSTICE GEOFFREY KIRYABWIRE, JA

HON.MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT

BACKGROUND

This is a first Appeal against the judgment of the High Court of Uganda (Commercial Division) delivered by the Hon Mr. Justice David K Wangutusi on the 10th day of February 2018. A partial judgment was entered on admission for the sum of UGX 2,159,000,000/= (two billion, one hundred and fifty nine million shillings) against the plaintiffs (now appellants) on the 24th day of July 2015. The trial judge also found that the respondent was entitled to recover

UGX 4,272,740.118/= (four billion, two hundred seventy two million, seven hundred forty shillings) being the outstanding credit facility with interest. The Appellants being dissatisfied with the judgment lodged this appeal.

INTRODUCTION

On 30th June 2011, the Appellants were offered a credit facility by Respondent which was worth **UGX 3,700,000,000/=** (three billion seven hundred million shilling). The facility included overdrafts to finance the working of the Appellant's business, two term loans one to facilitate a buyout of bank of Baroda, and the other to construct a hatchery. There was also an asset based finance sale and leaseback to finance the purchase of a feed mill to be co-financed by Bank of Baroda and Bank of Uganda under The Agriculture Finance Credit Scheme.

The Appellants had secured these credit facilities with a mortgage over land comprised in Kyadondo Block 101, Plots 190,259-265,266-270 and Kyadondo Block 101 Plot 258 and 275, Land at Watuba. This land was registered under mailo land tenure even though the majority shareholders of the first Appellant are Kenyan nationals. The first Appellant passed a Special Resolution allowing the Respondent to sell the said property by treaty if need be. The second Appellant further executed an irrevocable Power of Attorney to the first Appellant to pledge property comprised in Kyadondo Block 101 Plots 258 and 275 as further securities.

The credit facilities were further secured by personal guarantees executed by the third and fourth Appellants.

The said credit facility of **UGX 3,700,000,000/=** (three billion seven hundred million shilling) was then disbursed.

On 27th October 2011, the first Appellant requested an increase in the facility by a further UGX 831,000,000/= to bring the total sum to **UGX 4,531,000,000/=** (Four billion five hundred thirty one million Shillings only).

It is the case for the Appellants that during the course of the credit facility, the Respondent carried out several illegal acts against them which were not contractual in regard to these facilities which included among others; illegally charging interest on money which was never disbursed to them opened and sustained a loan account two years before the appellants were customers. Consequently it is the further case of the Appellants that the Respondents by reason of the said breaches are not entitled to recover the credit facility and enforce the personal guarantees.

The Appellants sought the following declarations, that the mortgage deed registered over land comprised in Kyadondo Block 101 Plots 190,259-265,266-270 Plot258 and 275, land at Watuba was illegal null and void, that the statutory notice dated 18th October 2013, was illegal null and void and further declaration that the respondent was not entitled to realize the appellants securities. This is because the Appellants as Kenyan citizens could not legally hold Mailo Land in Uganda.

The appellants also sought the following orders for cancellation of the mortgages registered by the respondent on their land, an order of return of the certificate of title free of encumbrance, permanent injunction, general, punitive and aggravated damages, interest and cost of the suit.

In his judgment delivered on the 10th day of February, 2016, the trial Judge found for the Respondents and ordered that the Appellants pay the Respondents the sum of **UGX 4,272,720,118/= (**four billion two hundred seventy two million seven hundred forty thousand one hundred and eighteen shillings) being the outstanding on the credit facility plus interest. He however found and declared the mortgage deed between Appellant and the Respondent null and void and so could not order foreclosure. The trial Judge further, found and declared that the personal guarantees executed by the second, third and fourth Appellants were legal and enforceable and that the Appellants were still liable to pay the respondents the sum of 4,272,720,118/=(four billion two hundred seventy two million seven hundred forty thousand one hundred and eighteen shillings). The costs were also awarded to the Respondent.

The appellants being dissatisfied with the judgment of the trial judge filed this Appeal and set out four grounds of appeal namely;

1. **The learned trial judge erred in law and fact when he held the respondent was not liable for breach of the loan agreement.**
2. **The learned trial judge erred in law and fact when he held that it was the appellants who were in breach of the credit facility agreement.**
3. **The learned trial judge erred in law and in fact when he held that the personal guarantees executed by the directors of the 1st Appellant were legal and enforceable.**

4. **The learned trial judge erred in law and fact when he awarded the respondent a sum of UGX 4,272,740,118/= interest and costs without any evidence to support the counterclaim.**

REPRESENTATIONS

The appellant was represented by Mr. Joseph Kyazze, Ambrose Tebyasa and Mr. Odokel Opolot while the respondent was represented by Mr. Terence Kavuma.

Duty of the court

This is a first Appeal and this court is charged with the duty of reappraising the evidence and drawing inferences of fact as provided for under rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions SI 13-10.This court also has the duty to caution itself that it has not seen the witnesses who gave testimony first hand. On the basis of its evaluation this court must decide whether to support the decision of the High Court or not as illustrated in **Pandya vs. R** [1957] EA 336 and **Kifamunte Henry vs. Uganda** Supreme Court Criminal Appeal No.10 of 1997.

LEGAL ARGUMENTS

Preliminary arguments

The Respondent raised a preliminary objection to which we shall first address our minds. The objection arises under Sections 67 (2) and 68 of the Civil Procedure Act to the effect that no appeal can lie from a decree passed by the court with the consent of the parties.

Submissions for the Respondents.

It is case for the Respondents that the supplementary record of appeal filed by the Appellants on the 19th May 2017 contains the proceedings in relation to a partial Judgment in the sum of UGX 2,159,000,000/= entered in favour of the Respondent in the presence of all the parties to the suit.

Counsel for the Respondent submitted that this Judgment had been entered by Court with the consent of both parties and therefore cannot be the subject of this appeal under Section 67 (2) of the Civil Procedure Act. In this regard he referred us to the decision of **Incafex Ltd V James Kabatereine** CA No 16 of 1997 (CA).

He further submitted that Section 68 of the Civil Procedure Act provides;

"...Where any party aggrieved by a preliminary decree does not appeal from that decree, he or she shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.."

He then argued that the partial Judgment of the 1st April 2015 is a preliminary decree for purposes of Section 2 of the Civil Procedure Act and as such is incapable of appeal to this Court now as the Appellants did not appeal it at the time. He also argued that in the case of **Juliet Kalema V William Kalema** CACA No 95 of 2003 this Court allowed an appeal from a partial judgment on admission.

Counsel further submitted that even that Judgment on admission could no longer stand as it was based on a mortgage that was illegal. He referred us to the decision of **Makula International V His Eminence Cardinal Nsubuga & anor** [1982] HCB 11 where it was held:

"...a court of law cannot sanction what is illegal and an illegality once brought to the attention of court overrides all questions of pleadings including any admissions made thereon..."

He further argued that the trial Judge had (page 402 ROA) made a finding that the mortgage was a nullity and therefore should have proceeded to strike out the partial judgment which he did not and therefore erred in law.

Courts' findings and decision concerning the Preliminary Objection

We have considered the submissions of all counsel to this appeal and authorities provided for which we are grateful.

The objection as it appears to us is whether partial judgment entered was a consent judgment or a judgment on admission.

The facts as we understand them are that the respondents filed a supplementary Record of Appeal where on the 19th March 2015, the parties had prayed Court to be given time to reconcile figures. Mr Kaggwa for the Appellants then submitted:

"... We shall file a consent by the 1st April 2015 at 02:30p.m..."

Mr Kaggwa then on the 1st April 2015 then reported to Court that:

"... My lord we agreed on a figure for partial judgment of shs. 2,159,000,000/=..."

The trial court then fixed the case for hearing and entered partial judgment in favour of the respondent stating:

"... Partial Judgment is in the premises is entered in favour of the Counter-claimant in the sum of (U) Shs 2,159,000,000/=..."

A re-evaluation of these facts to us only leads to one clear conclusion that the partial Judgment in the sum of UGX 2,159,000,000/= was arrived at by the consent of the parties. A consent judgment was described in the case of **Broke Bond Liebig (T) Ltd vs Mallya** [1975] I EA 266 AT 269 as follows;

"... prima facie, any order made in the presence and with the consent of counsel is binding on and parties to the proceedings or action." [Quoting Hirani vs. Kassim (1952) EACA 131]..."

The consent was entered by court on representation of counsel.

That is what the parties undertook to court to do on the 19th March 2015 and that is indeed what they eventually reported to Court on the 1st April 2015. It was not a judgment on admission.

We accordingly are unable to fault the preliminary objection and accordingly uphold it under Section 68 of the Civil Procedure Act.

We shall proceed to deal with the Grounds of appeal. Grounds one and two in relation to breach of the credit facility were argued jointly

Grounds one and two

Learned counsel proposed to argue ground one and two jointly

The Learned Trial Judge erred in law and fact when he held that the Respondent was not liable for breach of the loan agreement.

And

The Learned Trial Judge erred in law and fact when he held that it was the appellants who were in breach of the credit facility.

Arguments for the Appellant

It is the case for the Appellants that the trial Judge erred in law and fact when he found that it was the Respondents were liable for breach of the loan agreements but rather it was the Appellants who breached the credit facility agreements.

Counsel for the Appellant submitted that the Respondents had breached the credit facility agreements in four ways namely:

a) Failing to open fresh letters of credit
b) Creation of illegal loan accounts
c) Charging illegal interest and
d) Failing to give notice and negotiate the exchange rates when converting US $ 549,000 to Uganda Shillings.

He argued that the parties had a banker and customer relationship which was contractual breach of which could lead to an award in damages. In this regard he referred us to the decision in **Esso Petroleum Co. V Uganda Commercial Bank** CA 14 of 1992.

We shall highlight these allegations one by one as submitted.

Failing to open fresh letters of credit

Counsel for the Appellant submitted that the credit facilities were to finance the Appellants business and also buy a feed mill. He argued that this contract was not in dispute.

However it is the case for the Appellants that the Respondent Bank refused and or neglected to open fresh letters of credit inspite of reminders from Bank of Bank of Baroda who were also involved in the said financing and as a result the suppliers terminated their contracts.

Counsel submitted that the Respondent only disbursed a total of UGX 2,904,325,227/= of which

a) (date 10 /08 /11) UGX 1,825,000,000/= was to buy out a loan from the Bank of Baroda
b) (date 19/09 /11) UGX 148,520,940/= was for part shipment of the mill equipment
c) (date 23/09 /11) UGX was part shipment of the mill equipment
d) (date 24 /11 /11) UGX 831,000,000/= was a loan on the amendment arranged
e) UGX 25,942,151was an additional overdraft.

Counsel further argued that because of the failure to open the said letters of credit the Appellant lost USD 350,000 (UGX 790,000,000/=) and US $ 52,567/= (UGX 222,383,076/=) which had earlier been deposited to the supplier M/S Buhler SA (PTY) Ltd on the purchase; which fact was not in dispute.

Counsel further faulted the trial Judge for relying on a letter dated 19th April 2012 by the Appellants to the Respondents not to open the letters of credit without taking into account the circumstances under which the said letter was written; that is delay of six months by the Respondents to open the letters of credit.

He further submitted that the trial Judge erred when he held that US $ 549,000 was also disbursed or held in trust for the Appellant to open letters of credit. Counsel argued that this was a mere commitment on money which was never disbursed and against which interest was erroneously applied. It was therefore wrong for the trial Judge to find that the said money was held in trust by the Respondent for the Appellant.

In the alternative counsel for the Appellant submitted that if this Court found that if the illegal Mortgage did not affect the Appellant's liability then the Appellant can only be liable for the actual sums disbursed as the rest of the claim arises from creative accounting.

Undertaking/letter of guarantee pursuant to expired letters of credit.

Counsel for the Appellants also submitted that the no liability should have been attributed to the Appellants by virtue of the Respondent's purported guarantee undertaking. This is because the letters of credit had expired. The Respondents had wrongly opted to issue a guarantee in favour of Bank of Baroda in these circumstances and yet what was required for this asset based financing were letters of credit. Counsel referred us to Section 75 of the Contracts Act which provides;

> *"... A guarantor is discharged by any contract between a creditor and principal debtor where the principal is released or where an act or omission of the creditor discharges the principal debtor..."*

He argued that since the obligation of Bank of Baroda to the Appellant had ceased it followed therefore that at the same time the Respondent Bank was discharged form its obligation to disburse any money in respect of those

letters of credit. In this regard he referred us to the case of **Mwaniki Wa Ndegwa V National Bank of Kenya Ltd & Anor** HCCS No. 86 of 2000. In that case it was held:

> "... A guarantee's obligation is secondary and accessory to the obligation the performance of which is guaranteed; the guarantor undertakes that the principal debtor will perform his (the principal debtor's) obligation to the creditor and that the (the guarantor) will be liable to the creditor if the principal debtor does not perform. Therefore, the guarantor's liability for the non-performance of the principal's debtor's obligation is co-extensive with that of the principal debtor's. If the principal debtor's obligation turns out not to exist, or is void, diminished or discharged, so is the guarantor's obligation..."

Counsel therefore concluded that there was no basis for the trial Judge's findings that money was held in trust for the Appellant when there were no valid letters of credit.

Creation of illegal loan accounts

It is the case for the Appellant that the Respondent opened up to 8 accounts (MG 1122000022; LD 1125000308; MG 12500006; MG 1250000121; PDMG 00000; PDLD 125000309; PDLD 1125000308; LD 1125000305 PDLD 112500030 and MG 1214300005 between 18th October 2008 and 29th August 2011) and for the Appellants wrongfully and illegally. Counsel for the Appellant argued that the Appellant only got to know of these unauthorised accounts when his current account was overdrawn to pay these loan accounts. He in particular referred to account No MG 121300005 created on the 18th October 2008 yet the Appellants became customers of the Respondent in

2011. He further argued that the trial judge erred in law when he did not refer to these accounts which occasioned the Appellant great loses especially in administrative costs amounting to UGX 21,000,000/=; exclusive of interest.

Charging interest on illegal loans.

It is the case of the Appellant that the Respondent charged non contractual interest on an illegal mortgage. Counsel for the Appellant submitted that the contractual interest on for the first three facilities was 18% while the fourth was 10%. However the Respondent applied interest as high as 28% without giving notice to the Respondent contrary to Para 5.5 of the loan agreements.

Counsel faulted the trial judge for finding that no notice had been given to the Appellants by the Respondent (page 409 ROA) and yet concluding that this was not prejudicial to

> *"...the right of the bank to recover interest charged subsequent to any such charge..."*

Counsel further argued that it was also wrong for the trial Judge to declare the mortgage facility a nullity and then go on to grant interest on such an illegal transaction. In this regard he referred us to the cases of **Active Automobiles Spares Ltd V Crane Bank SCCA No 21 of 2001 and the Makula International case (supra)** for the authority that illegal contracts cannot be enforced.

Breach when converting USD 549,800

It is the case for the Appellants that the Respondent could not have converted US $ 549,080 to Uganda Shillings on behalf of the Appellants because they did

not have a US Dollar account with the Respondent Bank. In this regard Counsel for the Appellant raised two arguments.

First, there was bank advisory note or documentary proof of the said transaction and on which account this took place.

Secondly, if there was such a conversion then it was unfair and contrary to Para 6 (1) of the Bank of Uganda Financial Guidelines which provide that:

"...A financial services provider shall act fairly and reasonably in all its dealings with a consumer..."

Counsel for the Appellant submitted that it would have been prudent for the Respondent to have advised the Appellant that it would have lost UGX 300,000,000/= through currency loss of this transaction. However the Respondent bank did not do so to the Appellant's detriment. Counsel submitted that the bank should have invited the Appellants to negotiate the exchange rate for this transaction instead of acting unilaterally which they did not. In this regard the Respondent failed in excising a banker's duty of care when conducting the activities of their customer. In this regard we were referred to the case of **Woods V Martins Bank** (1959) 1 QB 55. Consequently the counsel for the Appellant's submitted that the Respondents stood to gain unjustly the sum of UGX 280,000,000/= as a result of this transaction.

Arguments for the Respondent

Counsel for the Respondent supported the findings of the trial Judge.

Letters of credit

Counsel submitted that it was not for the Respondent bank to open letters of credit but rather it issued Bank of Baroda a Letter of Undertaking/Guarantee for USD 601,625.16 (page 292 ROA) to support Bank of Baroda in opening the said letters of credit. Indeed, Bank of Baroda called upon the said Letter of Undertaking/Guarantee to settle a bill of USD 52,667 pursuant to the letters of credit. The Appellants do not deny having received equipment for that amount form the suppliers. The balance disbursable was USD 549,000. Counsel further submitted that it was the Appellants who instructed the Respondent by letter not to complete the purchase of the feed mill (page 297 ROA). Consequently the Respondent wrote to Bank of Baroda to cancel the Letter of Undertaking/Guarantee (pages 298-299 ROA).

Counsel for the Respondent therefore argued that there was no breach in issuing the letters of credit as the trial Judge found.

Illegal Bank Accounts

Counsel for the Respondents submitted that the issue of illegal bank accounts was not raised at the trial Court so it would be unfair to fault the trial Judge in this regard. This notwithstanding, he submitted that all the accounts referred to were loan accounts opened to facilitate disbursement of monies for the Appellants. In particular it was not true that account MG 1214300005 was created in 2008 before the Appellants became customers of the Respondent but rather on the 22nd May 2012.

Counsel submitted therefore that there were no illegal accounts that were created.

Illegal interest

Counsel for the Respondents rejected the argument by the Appellants that the non-notification of interest charges render the interest illegal.

He referred this Court to clause 5.4 of the facility agreement (page 406 of the ROA) where it is was provided that the interest rate could change without notification and it is the same contractual provision that the trial Judge used to make the same finding; for which he should not be faulted.

Counsel further disagreed that once a mortgage was found to be illegal it followed that the loan facility became illegal as well. This is because a mortgage was just a security to a debt but not the debt itself. He argued that even here the trial Judge could not be faulted on his findings.

Conversion of USD 549,085 into Uganda shilling and incurring an exchange loss of UGX 280,000,000/=.

Counsel for the Respondent submitted that the conversion of the said money was done at the express instruction of the Appellants (page 301 para 4) where they said the conversion should be made *"... as soon as possible and at the prevailing exchange rates".* He challenged the Appellants to prove the banking practice that when a bank is exchanging a large sum of money a customer has to be invited to negotiate the said rate. In any event this was not in issue at the trial and was also not pleaded.

Court's findings and decision

We have considered the submissions of all counsel to this appeal and authorities provided for which we are grateful.

It is the broad case for the Appellants that it was the Respondent bank that was in breach of the credit facility and not them. The Respondents go on to particularize the said breaches.

The relationship between a banker and its customer is one of contract. In this regard we agree with the authority of **Esso Petroleum Co** (supra) cited by counsel for the Appellants. In this regard therefore, the governing documents include the credit facility agreement dated 27th October 2011 (page 181 ROA).

The facility agreement was for a total of UGX 4,531,000,000/= broken up as follows:

1. An overdraft for UGX 400,000,000/= for Working Capital;
2. A Term Loan (1) for UGX 400,000,000/= for buy out for Bank of Baroda Facilities;
3. A Term Loan (2) for UGX 900,000,000/= for construction and acquisition of capital assets;
4. Asset based financing (ABF) for UGX 2,831,000,000/= for buy out of Bank of Baroda facilities for purchase of a feed mill.

We shall now turn to the grounds which cover the failure by the Respondent bank opening of fresh letters of credit in favour of the Appellants.

Here a time line of events that needs to be carefully evaluated. In August 2011 (12th August 2011 to be precise page 32 ROA) well before the signing of the facility agreement, the Respondents on instructions of the Appellants wrote to Bank of Baroda providing a Letter of Undertaking/Guarantee [worth USD 601,662.16] to release all documents of title to the machinery imported from M/s Buhler SA (Pty) on behalf of the Appellant under the letter of credit.It

would appear that there was already a subsisting letter of credit in favour of the Appellants with Bank of Baroda. It is under this Letter of Undertaking/Guarantee that a part payment of USD 52,652 for the feed mill under the said letter of credit form the Bank of Baroda (LC No. 95011MPLC0012710 for the Appellants) was paid on the 12th September 2011.We find that it was after this transaction that the credit facility agreement of October 2011 replacing Bank of Baroda would have kicked. However on the 24th February 2012, in a letter from the Appellants to the Respondents (page 36 ROA) the Appellants because of a turn down in their business fortunes, decided not to proceed with the concluding the purchase of the feed mill. The Respondents then decided to retire their Letter of Undertaking/Guarantee to the Bank of Baroda by letter dated 8th April 2012 (page 38 ROA). It is therefore to clear to us that notwithstanding the credit facility agreement being signed the only letter of credit still operational was that of Bank of Baroda and no other had been authorized by the Appellants. How then can the Appellants claim that the Respondents had failed to open fresh letters of credit when they had not specifically instructed the Respondents to do so? Even then the likelihood of opening fresh letters of credit by the Appellants had diminished by February 2012 when the Appellants informed the Respondents that they were reluctant to continue to buy the feed mill when they had a business down turn. Even though the trial Judge did not pick up this sequence of events, he captured the well the down turn of the Appellant's business when he found (page 406 ROA):

"...this clearly indicates that the plaintiffs limping business had nothing to do with the failure of opening fresh letters of credit and that they would even have been in a worse financial position had the mill been imported..."

All in all we cannot fault the trial Judge in his findings and find there was no breach in not opening fresh letters of credit.

It therefore also follows regarding the alleged breach of opening a Letter of Undertaking/Guarantee pursuant to expired letters of credit that nothing can be further from the truth. The instruction to provide the said Letter of Undertaking/Guarantee was given to the Respondent bank three months before the credit facility was concluded. At that time the letters of credit with Bank of Baroda were still valid and it was the Appellants who gave up the purchase of the mill in February 2012. This was well captured by the trial Judge in his Judgment (page 407 ROA). We find no breach here as well.

As to the alleged breach of opening illegal and unauthorised accounts in favour of the Appellant by the Respondent, we find this assertion to be greatly misconceived. These were all loan accounts created under the facility agreement to manage funds disbursement and drawdowns by the Appellants. There was no evidence that even account number MD 1214300005 was opened in 2008 before the facility as alleged. The Appellants actually do not deny the drawdown of funds so how can they call the disbursement accounts illegal? We accordingly find no breach here too.

The Appellants further argued that it was wrong to charge interest on illegal accounts. The first reason given is that the interest was varied without notification to them. Whereas the trial Judge cited Clause 5.5 of the facility agreement in his Judgment (page 405 ROA), the correct clause is 5.4 which inter alia provides:

"...failure by the bank to advise the borrower shall not prejudice the right of the bank to recover interest charged subsequent to any such change..."

We agree with the trial Judge none the less that this issue was a matter of contract which the Appellants agreed to by signing the credit facility and cannot now say it is illegal.

Secondly, it was argued that the bank could not charge interest because the mortgage was illegal. We have already dealt with this matter in a little earlier in our judgment; and found this not to be the case. First we agree with the finding of the trial Judge that the mortgage deed was illegal. However a mortgage deed which is a security should be distinguished from a loan or credit facility. If the security is defective then it simply means that the credit facility is not capable of being reimbursed from that source. This is because the mortgage is simply collateral to and independent from the credit facility. Here too we find that the Respondent was not in breach.

The last breach relates to the converting of USD 549,085 into Uganda shillings without consulting the Appellants or failure to exercise due diligence can to avoid a big foreign exchange loss.

It the case for the Appellant that there is no evidence that this transaction took place and even it did, it was handled unfairly because up to UGX 280,000,000/= was lost in the in currency exchange. Furthermore if the transaction was necessary then a prudent banker would have allowed the client to participate in the negotiation of the exchange rate.

We are at a loss as to this line of argument. In the Appellant's letter to the Respondent bank dated 19th April 2012 the Appellants (page 301 ROA) specifically acknowledged that the USD 549,000 was held *"... as a margin for the LC but not disbursed. We are paying interest on this money..."* The Appellants then wrote that it was imprudent to maintain this money due to

declining sales and the cancellation of the purchase of the feed mill. They then continued to write:

"... We therefore request the bank to cancel this margin and realize the UGX equivalent of the USD 549,000 as soon as possible and at the prevailing exchange rates..."

We find that it was the express instruction of the Appellant to the Respondent to convert this money into Uganda Shillings at the prevailing exchange rates and as soon as possible. The Trial Judge ably (pages 407-8 ROA) addresses this in his Judgment and does not fault the Respondent for using their prevailing bank rate. In any event this is fairly standard banking practice. Here too we find that the Respondent did not cause any breach as alleged.

All in all the factual basis of these grounds as put by the Appellant grossly misleading. Much of what the Appellants now complain about, they in fact authorized the Respondent bank to do. We are unable to interpret that to amount to a breach of a banker/client relationship. Grounds one and two are therefore without any merit and we dismiss them.

Ground No. 3: Whether the learned trial judge erred in law and fact when he held that the personal guarantees executed by the directors of the 1st appellant were legal and enforceable.

Submissions of the Appellant.

Counsel for the Appellants submitted that the personal guarantees entered into by the 2nd, 3rd and 4th appellants guaranteeing the purported impugned mortgage under page 21, 22, and 23 of the record of appeal were meant to constitute a continuing security.

Counsel argued that since the mortgage was declared null and void and illegal it followed that it is not legally possible to guarantee an illegal mortgage and or contract. He in support of this contention cited the case **of Kisugu Quarries Ltd vs. Administrator General (1999) 1 EA 162 (SC)** where the court held that court cannot sanction an illegality.

Counsel further submitted that the trial Judge erred when he held that the personal guarantees of the illegal mortgage are valid and enforceable in total disregard of the legal principles of this court. He further argued that the Supreme Court have also held that an illegality once brought to the attention of court overrides all matters of pleading including admission. **ALCON INTERNATIONAL VS N.S.S.F CIVIL APPEAL NO.15 OF 2009.**

Counsel also submitted that this Court ought to follow the decision in the case of **General Parts Uganda Limited vs Non-Performing Assets Recovery Trust** SCCA No.5 of 1999 where that court found that the respondent had to file a separate suit for money had and received since the trial Court had already declared the mortgage illegal and no interest and or personal guarantee could stand. Counsel distinguished this case from the authority relied upon by the trial Judge of **INDUSTRIAL INVESTMENT BANK OF INDIA VS BISWANATH JHUNJHUNALA 2009**. He argued that the **Bank of India case** (Supra) is only applicable in an ideal scenario where there is a legal mortgage and cannot be applicable in the circumstances since the mortgages were illegal.

Submissions for the Respondent

Counsel for the Respondent submitted that liability of guarantees takes effect upon the default by the principal debtor in accordance with section 71(2) of the Contracts Act 2010.

Counsel submitted that evidence of the default by the First Appellant was on record (Page 352 ROA) where it was admitted that monthly repayments of the facilities were not made by the First Appellant in accordance with the agreement. He submitted that it was upon the default that the personal guarantees became enforceable.

Counsel further submitted that the that the appellant's submission that the personal guarantees were unenforceable because the mortgage had been declared null and void are not tenantable because the guarantees were premised on the loan facility agreements which formed the basis of the loan transaction and these were never declared illegal by the trial court.

Learned counsel prayed that this court uphold the findings of the trial court.

Court's findings and decision

We have considered the submissions of all counsel to this appeal and authorities provided for which we are grateful.

The first thing to establish under this ground is what the said guarantees actually provided. The guarantees are part of the record (Pages 225 to 230) and all in pari materia having the same wording. We shall pick out the active parts of the said guarantee.

As to the subject matter of the guarantees they all provide (Para a) that:

"...the Bank has agreed to provide the Borrower a loan facility of UGX 831,000,000/=... under the terms and conditions contained in the said Agreement..."

The guarantor then under Para 1 guarantees prompt payment of each and every sum due to the Respondent and observation of all other terms and conditions of the said agreement.

As to default the guarantees then provide:

"....

2. Agree that this guarantee is and constitutes a continuing security and shall not be considered as satisfied by any intermediate payment or satisfaction made by the Guarantor.

3. Agree that if a sum is not recoverable by KCB Bank Uganda Limited under the foregoing guarantee it shall nevertheless be recoverable on the basis that I am the sole or principal debtor.

4. Agree that I shall whenever required by KCB Bank Uganda Ltd execute a proper transfer of such assets as are capable of being transferred together with the power of sale and all necessary powers for securing and enforcing payment for the loan as per the said Agreement.

5. Waiver any right I may have of first requiring KCB Bank Uganda Limited to proceed against the Borrower..."

These are the contractual terms of the guarantee entered into by all the guarantors being the second, third and fourth Appellants. We first need to point out that this is a very inclusive guarantee in that it makes the guarantors

a possible first line of recovery in the event of default by the first Appellant Company.

Guarantees come into effect on default of the subject matter (See **Bank of Uganda vs. Banco Arabe Espanal Civil Appeal No.23 of 2003 [SC]).** In this case the subject matter is the credit facility agreement.

It has been argued for the Appellant that the fact that the Mortgages were illegal meant that the whole transaction was illegal. That cannot be the correct position of the law. We have been referred to the **Supreme Court case of General Parts** (Supra) for this proposition. In that case the receiver/manager was trying to enforce an invalid mortgage. However it is important to note that there was no personal guarantee in that case like it is in this one. In this case the Respondent wisely executed multiple securities so if one failed then they would have recourse to another. The Respondent bank hedged themselves better than the Defunct Uganda Commercial Bank did in the **General Parts Case** (Supra).

The trial Judge having found the fact of default and further having found that the mortgages were illegal correctly still found that the guarantees remained a separate and valid security to the main credit facility against which the Respondent had the right to recover.

Given our findings above we have no basis to fault the findings of the trial Court on this ground and accordingly dismiss it.

GROUND NO 4: Whether the learned Trial judge erred in law and fact when he awarded the respondent a sum of UGX 4, 272, 740,118 interest and costs without any evidence to support the counterclaim.

Submissions of the Appellants.

This ground is the sum total of all the grounds one to three in this appeal.

Counsel reiterated his earlier submissions that since the mortgage was illegal, therefore the appellants could not be liable in the counterclaim as it sought to enforce an illegal mortgage.

He further submitted that the sum of UGX 4,272,740,118/= awarded to the Respondent by the trial court included UGX 1, 344,000,000/= as interest that was charged illegally on the credit facility and a further sum of UGX 505,000,000/= being interest illegally charged on the agricultural loan with bank of Uganda.

Counsel further argued that the trial judge erred in law and fact when he subjected the appellants to pay illegal interest arising from the illegal /impugned mortgages.

He further submitted that he the learned trial judge erred in law and fact when he was oblivious of the USD350, 000 that the appellants had paid to the supplier.

Counsel for the Appellant further argued held that the trial judge erred in law and fact when he ignored the fact that the respondent illegally and criminally purported to open eight additional illegal loan accounts outside the four legitimately created accounts for loan disbursement.

Submissions for the Respondent

Counsel for the Respondent also reiterated his earlier submission in support of the trial Judges findings that the money in default of the credit facility agreement was due and owing.

He pointed out that the trial Judge properly evaluated the evidence and found that the sum of UGX 4,272,740,118 was due and owing on the evidence before him.

Court's findings and decision.

We have already addressed the issues raised in all the grounds of the Appellant and found them to be without merit. It includes a letter dated 19th April 2012 admitting liability for the sum of UGX 4,446,94,641.74 (Pages 40-41 ROA) against which an adjustment for USD 549,000 was to be made on conversion into Uganda Shillings. We have no basis to disagree with the Trial Judge on this finding and accordingly dismiss this ground as well.

Conclusion.

We agree with the finding of the trial Judge. The only challenge remains the mortgage which was illegal because the underlying Mailo land titles were held in the names of non-Ugandans which is prohibited by law. Such a non-Ugandan can only hold a lease under the said titles. So a lease and not mailo title should have been issued to the first Appellant since it paid valuable consideration for the land. This would avoid an absurdity in this transaction. This was clearly an error/illegality made at the time of registration. It would also have the effect of reviving the said mortgage which was the commercial and legal intention of the transaction. There can therefore be no enforcement under the mortgage as it stands unless rectification is done under Section 91

of the Land Act 1998 to bring the said proprietorship in line with the law. Section 91 of the Land Act gives the Commissioner Land Registration the following powers:

"...

Special powers of commissioner.

(1) Subject to the Registration of Titles Act, the commissioner shall, without referring a matter to a court or a District Land Tribunal, have power to take such steps as are necessary to give effect to this Act, whether by endorsement or alteration or cancellation of certificates of title, the issue a fresh certificates of title or otherwise.

(2) The Commissioner shall, where a certificate of title or instrument—

(a) is issued in error;

(b) contains a wrong description of land or boundaries;

(c) contains an entry or endorsement made in error;

(d) contains an illegal endorsement;

(e) is illegally or wrongfully obtained; or

(f) is illegally or wrongfully retained;

give not less than twenty one day's notice, of the intention to take the appropriate action, in the prescribed form to any party likely to be affected by any decision made under this section..."

However the personal guarantees remain enforceable for the other assets.

Final Result.

These this being our findings, this appeal accordingly is dismissed with costs.

Dated at Kampala this 8th day of July 2019

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HON. MR. JUSTICE KENNETH KAKURU, JA

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HON. MR.JUSTICE GEOFFREY KIRYABWIRE, JA

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HON.MR. JUSTICE CHRISTOPHER MADRAMA, JA