

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 43 OF 2012

MUGARURA CITEZEN JOTHAM APPELLANT

VERSUS

POSTBANK UGANDA LIMITED RESPONDENT

*(An appeal against the decree and order of the High Court of Uganda at
Kampala (Commercial Division) by Hon. Mr. Justice Geoffrey Kiryabwire dated
22nd June, 2010 in High Court Civil Suit No. 147 of 2009)*

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA

Hon. Mr. Justice Stephen Musota, JA

Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF JUSTICE KENNETH KAKURU, JA

The respondent filed a summary suit against the appellant and others for breach of
contract and recovery of Ug. Shs. 60,757,645 (Sixty Million Seven Hundred Fifty
Seven Thousand Six Hundred Forty Five Uganda Shillings), interest and costs of the
suit. Leave to file written statements of defence was granted and the same were
filed. The parties prepared and filed in Court their first scheduling notes, upon
which the learned trial Judge prepared and delivered a Judgment in favour of the
plaintiff now respondent in the terms of the claim as set out in the plaint.

The appellant, being dissatisfied with and aggrieved by the decree and order of the
High Court filed this appeal on the following grounds;-

- 1. The Learned Trial Judge erred in law and fact when he entered Judgment
against all defendants jointly and/or severally, including the appellant/ 2nd*

defendant, without hearing the suit on its merits, in disregard of the defence raised by the appellant to the effect that the respondent was estopped from enforcing the guarantee executed by the appellant when the respondent had breached the terms of the loan agreement on which the guarantee was founded.

- 5 2. *The Learned Trial Judge erred in law and fact when he disregarded the appellant's plea and claim that he was released from liability under the guarantee when the respondent connived/ colluded with officers/servants of Booma High School Limited, the 1st defendant, to divert the loan funds.*
- 10 3. *The Learned Trial Judge erred in law and fact when he entered judgment in the main suit against all the defendants, including the appellant, without pronouncing himself on the appellant's counterclaim against the respondent.*
- 15 4. *The Learned Trial Judge erred in law and fact when he made the decision aforesaid, without due regard of two(2) suits which had been filed in respect of the same subject matter and were and still are pending in the High Court at Mbarara, to wit HCCS. NO. HCT-05-CV-CS-0071 of 2007; Jotham Mugarura-ss-Post Bank Uganda Limited and Booma High School Limited, and HCCS No. HCT-05-CV-CS-0019; Jackline Nahabwe Mugarura -vs-Mugarura Jotham, Post Bank Uganda Limited and Booma High School Limited.*

Representations

20 At the hearing of this appeal *Mr. Benson Tusasirwe* learned Counsel appeared for the appellant while *Mr. Isaac Bakayana* learned Counsel appeared for the respondent. The parties were allowed to adopt their conferencing notes but were also permitted to make brief oral arguments. It is on the basis of the conferencing notes and the brief oral arguments that this appeal has been determined.

Appellant's submissions

In respect of grounds 1 and 2, Mr. Tusasirwe for the appellant submitted that the respondent had an obligation founded on the loan agreement to ensure that the loan was put to the agreed purpose. It was expressly stipulated that the funds would be disbursed in two installments of Ug. Shs. 25,000,000/= each and the second
5 installment would only be disbursed upon satisfactory report about the utilization and performance of the first disbursement. The appellant was a landlord of the borrower company and his only interest in the loan was to improve the structure being occupied by the 1st defendant (Booma High School Ltd) and used to run a school. Counsel's argument is that the bank did not fulfill this obligation.

10 Counsel relied on the decision of *Fredrick Zaabwe vs Orient Bank and 5 others, Supreme Court Civil Appeal No. 4 of 2006* and argued that the appellant did not benefit from the security used to borrow the said money and the borrower did not bother to discharge its indebtedness to the bank which exposed the securities to the threat of realization.

15 In addition, he submitted that while entering Judgment, the trial Judge stated that the defence did not disclose a sufficient answer to the plaint. However, there was no such application under Order 6 Rule 30 of the Civil Procedure Rules to strike out the defence.

On ground 3, Counsel submitted that a counterclaim is a suit in its own right though
20 founded on the same facts as the main suit. He relied on *Amon vs Bobbett [1889] 22 QBD 543* on the notion that a counter claim is to be treated, for all intents and purposes for which justice requires, as an independent action and submitted that it was an error for the trial Judge not to pronounce himself on the counterclaim.

While arguing ground 4, Counsel submitted that there were two independent suits
25 arising out of the same subject matter which had been filed earlier and should have been disposed of first. The *lispendens* rule is to the effect that a Court of law will not hear a matter where the issues in contention are similar to those in another case

pending hearing between the same parties before another Court of competent jurisdiction. The appellant raised a preliminary objection at the trial Court against the hearing of the suit and it was over ruled. He submitted that, the learned trial Judge would have struck out or dismissed the respondent's suit on the ground that
5 filing the suit when there was a suit in Mbarara of which the respondent was fully aware amounted to vexatious litigation. He argued that the determination of the said suit was erroneous and was in violation of *Section 6* of the Civil Procedure Act.

He asked Court to allow the appeal with costs.

Respondent's reply

10 Counsel submitted that at scheduling there were admitted facts that the loan was borrowed and not paid back and the trial Judge entered Judgment for the respondent. However, the learned trial Judge did not pronounce himself on the counterclaim and as such, it is still pending before the trial Court.

15 The respondent's case is that there was a failure to comply with the provisions of the facility agreement in as far as the bank failed to make sure that the loan was used for the purpose it was released. The loan agreement had various other provisions that the credit institution may neglect or forebear to enforce any of the terms of the banking facility.

Resolution

20 This Court is required under *Rule 30* of the Rules of this Court to re-appraise the evidence of the trial Court and come to its own decision. *Rule 30 (1) (a)* provides as follows:-

"Power to reappraise evidence and to take additional evidence.

25 *(1) on any appeal from a decision of the High Court acting in its original jurisdiction, the court may-*

(a) reappraise the evidence and draw inferences of fact"

In the case of *Fr. Narcensio Begumisa & others vs Eric Tibebaaga*, Supreme Court Civil Appeal No. 17 of 2002, Mulenga JSC in his lead Judgment put this obligation of the first appellate Court in the following words:-

5 *"It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions. This*
10 *principle has been consistently enforced, both before and after the slight change I have just alluded to. In Coghlan vs. Cumberland (1898) 1 Ch. 704, the Court of Appeal (of England) put the matter as follows -*

15 *"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the*
20 *court comes to the conclusion that the judgment is wrong ... When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and*
25 *demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."*

In *Pandya vs. R (1957) EA 336*, the Court of Appeal for Eastern Africa quoted this passage with approval, observing that the principles declared therein are basic and applicable to all first appeals within its jurisdiction. See: *Bogere Moses Vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997* and *Kifamunte Henry Vs Uganda, Supreme Court Criminal No. 10 of 1997*.

We shall keep in our minds the above position of the law in the determination of this appeal.

Ground one of the appeal is set out as follows:-

1. *The Learned Trial Judge erred in law and fact when he entered Judgment against all defendants jointly and/or severally, including the appellant/ 2nd defendant, without hearing the suit on its merits, in disregard of the defence raised by the appellant to the effect that the respondent was estopped from enforcing the guarantee executed by the appellant when the respondent had breached the terms of the loan agreement on which the guarantee was founded.*

The appellant together with others namely Booma High School Ltd, Mwebaze Robert, Bonny Barugahare, Bwotariho Samuel and Mwikirize Cosmas were all defendants in Civil Suit No.147 of 2009 at the Commercial Court. The suit had been instituted by Post Bank (Uganda) Ltd a financial institution by way of summary suit under Order 36 Rule 2 of the Civil Procedure Rules for recovery of Ug. Shs. 60,757,645,/=interest and costs.

The above stated amount arose from a loan obtained by the 1st defendant a school for the stated purpose of renovation and building science laboratories among others.

The bank made an offer to the school for a business of 50 million for the purpose of construction of laboratory and computer rooms with interest at 25 percent per annum for a period 24 months.

It was to be disbursed in two installments of 25 million each. The first execution of the mortgage in favour of the bank and the second upon *“satisfactory report about utilisation and performance of the first disbursement”*.

5 The loan was secured by a legal mortgage over the land and property described as plot 38 and 40 Katate Close Mbarara Municipality valued Shs.106 million.

Apparently the land belonged to the appellant, who was the 2nd defendant at the High Court in the suit from which this appeal arises.

On 16th January 2006 the appellant had issued to Booma High School a Power of Attorney in respect of the said property for the following purposes.

- 10
1. *To mortgage, pledge or use the plot land above mentioned. It being my lawful property as evidence by the Certificate of Title hereto attached.*
 2. *To use it as security for the purposes of securing a loan. Overdraft from a Bank or any other financial assistance from any financial institution(s) or all money lender(s).*

15

 3. *To sign and execute all documents that may be necessary or incidental for the purpose for performing any duties or benefits conferred on it herein.*
 4. *To secure the repayment of the loan by creating legal or equitable mortgage or charge on my said land and also to exercise and execute such powers which are now or shall be vested or conferred upon me under the land Act/*
Registration of Titles Act in respect of the said land for me and in my names

20

to sign and execute all such deeds matters and things as may be necessary or expedient for carrying out these powers HEREBY granted and I hereby justify and confirm all whatever my said Attorney shall lawfully do or cause to be done by virtue of these presents.

5. *This instrument to remain valid and effective for three years from the date of first mortgage unless or until it is revoked in writing.*

The 1st defendant Booma High School Ltd failed to pay the loan, which had been fully disbursed by the respondent herein, resulting into a summary suit against the school mentioned about, which was filed on 30th April 2009, with the appellant herein as the 2nd defendant.

On 15th May 2009 the appellant singularly filed a notice of motion seeking unconditional leave to appear and defend the suit, through Mugarura, Kwarisiima & Co. Advocates. On 27th of May 2009, the other defendants namely Mwebaze Robert, Bonny Barugahare, Byotariho Samuel and Mwikirize Cosmos filed a separate application by way of notice of motion also seeking unconditional leave to appear and defend suit.

In his notice of motion referred to above the appellant set out his grounds as follows:-

1. *The suit by the respondent/plaintiff against the applicant raises triable issue to wit:*
 - a) *Whether or not the applicant is liable to the respondent in view or the fact that the respondent breached fundamental terms of the grant of the loan facility.*
 - b) *Whether or not the loan money was ever disbursed to the borrower or a tall.*
 - c) *Whether or not the respondent has a cause of action against the applicant in view of the fact that the respondent had a first charge on his properly comprised in and known plots 38-40 Katate close Mbarara Municipality which right it feigned to enforce upon realization that it had breached the loan contract.*

2. *The applicant has a good defence to the respondents claim as the alleged personal guarantee also ceased to bind him upon the Bank breaching the loan contract.*

5 3. *It is in the interests of justice and permissible at law that the application be granted.*

The rest of the defendants/applicants set out their own grounds for leave to appear and defend suit in the notice of motion as follows:-

- 10 1. *The 2nd Applicant was not aware of the Suit until the 18th of May 2009 at about 11.00am when he came to the school and the Deputy Headmistress Ms. Ninsiima Alice handed him some documents namely, Five copies of the Complaint and Five summons in the summary suit.*
- 15 2. *She informed him that she had got them from the gate keeper of the school Bamparana Fred who had in turn got them from an unidentified man on Sunday the 17th May 2009 with instructions to give to him.*
- 20 3. *A part from 17th May 2009 being a Sunday, the gate keeper had no instructions whatsoever to receive such documents from anybody on behalf of the school or any of the applicants in this application.*
- 25 4. *The 1st Applicant obtained a loan from the respondent*
5. *The loan was a duly secured by property comprised in Plot No. 38 and 40 Katate Close Mbarara municipality in the names of one Mugarura Citezen Jotham, the 2nd Defendant.*
- 30 6. *The said security is still available.*
7. *The 1st Applicant for the first six months duly honoured its obligation under the loan by remitting the monthly installments.*
- 35 8. *The only source from which the 1st applicant was getting the funds to service the loan was being realized from the operations of the school.*
9. *The school was being run in the Mortgaged property under a Tenancy Agreement with Mr. Jotham Citezen Mugarura which was running up to 2009.*

5 10. Mr. Jotham Citezen Mugarura 2nd Defendant who is the Landlord and a Board Member of the 1st Applicant frustrated the servicing of the loan by unilaterally and forcibly using security operatives taking over the management of the school.

11. Since then the 2nd Defendant Jotham Citezen Mugarura is running the school using all development/facilities that had been made with the loan funds.

10 12. The 2nd Defendant, Jotham Citezen Mugarura as a Professional Lawyer ought have known the consequences of frustrating the servicing of the loan which had been obtained using his Land title as security and should bear them squarely and pay the Bank and/or the property sold.

15 13. The Bank has a remedy against Jotham Citezen Mugarura

14. There are trial issues or fact for the determination of the Court.

15. The Applicants have a good and meritorious defence to the suit.

20 16. It is in the interest of Justice that this Application should be granted.

The motion was filed by M/S Bamwe & Co. Advocates.

25 Apparently both applications were allowed. The parties were all granted unconditional leave to file their respective written statements of defence.

The appellant filed his written statement of defence singly on 3rd July 2009 through Mugarura, Kwansiime & Co. Advocates. He also set out a counter claim therein.

30 On 6th July 2009, the 1st, 3rd, 4th, 5th and 6th defendant filed a joint written statement of defence. The parties in this written statement of defence were set out as follows:-

35 *Post Bank (U) LTD*

..... Plaintiff

VERSUS

1. *Booma High School Limited*
2. *Mugarura Citezen Jotham*

3. *Mwebaze Robert*
4. *Bonny Barugahare ::::::::::::::: Defendants*
5. *Byotariho Samuel*
6. *Mwikirize Cosma*

5

On the other hand the appellant in his written statement of defence set out the parties as follows:-

Post Bank (U) LTD ::::::::::::::: Plaintiff

10

VERSUS

1. *Booma High School Limited*
2. *Mwebaze Robert*
3. *Bonny Barugahare ::::::::::::::: Defendants*
4. *Byotariho Samuel*
5. *Mwikirize Cosma*

15

The heading to the written statement of defence is set out as follows:-

20

WRITTEN STATEMENT OF DEFENCE BY 2ND DEFENDANT.

The counter claim is set out in as paragraph 10 of the written statement and begins as follows:-

25

Counter claim

10. The 2nd defendant /counter-claimant repeats the contents of the defence, joins issue with the plaintiff and counter claims against the plaintiff as follows:-

30

I shall revert to the issues raised by the above pleadings later in this Judgment. Following the filing of the written statements of defence, the parties filed a joint conferencing memorandum a mandatory requirement at the Commercial Division of the High Court.

35

The memorandum was filed in Court on 18th June 2010. Booma High School Limited Mwebaze Robert, Bonny Barugahare, Byotariho Samuel, Mwikirize Cosma were represented by Bamwe Advocates as 1st, 3rd, 4th, 5th and 6th defendants. The

appellant was represented by Mugarura Kwarisiima & Co. Advocates as the 2nd defendant. Whereas the plaintiff Post Bank (U) LTD was represented by M.B Gimara Advocates.

- 5 All the parties named above agreed and admitted to the following facts.
- a) *The particulars of all parties to the suit.*
 - b) *On the 5th day of November 2005, the 1st defendant acting through the 3rd and 4th defendants applied to the plaintiff for a loan of UGX 50,000,000/= (Fifty Million Uganda Shillings).*
 - 10 c) *The Plaintiff allowed the loan to the 1st defendant on the 20th day of February 2006 repayable within 24 (twenty months) at an interest rate of 25% per annum.*
 - d) *The purpose of the said loan was to construct laboratory and computer room*
 - 15 e) *A mortgage over the 2nd defendant's property comprised in Plot No 38 and 40 Katate Close, Mbarara was executed between the plaintiff of the one hand and the 1st and 2nd defendants of the other hand dated 11th March 2006.*
 - 20 f) *The loan funds were to be disbursed in two installments of UGX 25,000,000 (Twenty five Million shillings).*
 - g) *The 2nd defendant executed a power of attorney in favor of the 1st defendant over Plot No 38 and 40 at Katate Close.*
 - h) *The 2nd, 3rd, 4th, and 5th defendants further executed personal guarantees as further security for the repayment of the loan monies to the plaintiff.*
 - 25 i) *The 1st defendant defaulted on its loan undertaking with the plaintiff by failing to remit the monthly repayments of UGX 2,668,575 (Two Million Six Hundred Sixty Eight Thousand Five Hundred Seventy Five Uganda Shillings).*

j) *The second installment was to be disbursed to the 1st defendant upon satisfactory report about the utilization and performance of the 1st disbursement.*

k) *The plaintiff disbursed the loan amount of UGX 50,000,000 (Fifty Million Uganda Shillings) to the 1st defendant.*

l) *The 1st defendant serviced the loan with the agreement on only two occasions and defaulted thereafter.*

m) *The Plaintiff recalled the whole loan due to it and further issued a statutory notice to the 2nd defendant.*

n) *The Plaintiff attempted to sell the mortgaged property but was sued by the 2nd defendant and his purported wife in Civil Suits no 71 of 2007 and 0019 of 2007 in the High Court, Mbarara seeking for orders that the intended sale was unlawful.*

The following documents were agreed to by the parties.

a) *A request for a business loan letter dated 5th December 2005 from the 1st defendant to the Plaintiff*

(b) *Minutes of the board of governors meeting held on the 3rd December 2005*

(c) *Credit application form dated 5th November 2005*

(d) *Loan facility agreement dated 20th February 2006*

(e) *Legal mortgage dated 11th March 2006*

(f) *Certificate of title for the land and developments therein comprised in LRV 3193 Folio 5 Plots 38 and 39 Katate Close Mbarara, Mugarura Citezen Jotham*

(g) *2nd defendant's special powers of attorney to the 1st defendant dated 16th January 2006*

(h) *Guarantee dated 21st February 2006*

(i) *1st defendant's loan account statement*

(j) Letter from M/S MMAKS Advocates dated 2nd January 2007 to the 1st defendant informing it of its indebtedness

(k) Statutory notice to the 2nd defendant dated 9th January 2007

(l) Report of utilization of funds.

5

The suit came up for hearing before Hon. Kiryabwire J (as he then was) on 22nd June 2010 the proceedings are recorded as follows:-

'22/06/2010: 09.51.a.m

10

- I. Bakayana for the Plaintiff
- B. Babigumura for 1st, 3rd, 4th, 5th and 6th Defendant
- H. Kyalimpa for 2nd Defendant
- Legal Manager of Plaintiff Bank present
- Robert Mwebaze Headmaster of the school
- Rose Emeru Court Clerk

15

Bakayana: My Lord we have the memorandum on file.

20

Court: Thank you. Let us proceed with the scheduling.
(Court go s through the memo and reaches issues at paragraph 10)

25

I am unable to see the purpose of these issues. Was the money borrowed and paid back?

Is there a reconciliation problem or what is the problem?

30

Kyalimpa: It is not denied that the money was borrowed.

Babigumira: I agree the money was borrowed. I actually was away in India for treatment. When I returned I wanted to put in a third party notice against the 2nd defendant.

5 Court: It appears to me that at scheduling it is an admitted fact that the loan was borrowed and not paid back. I think the Plaintiffs were right from the very beginning to file a summary suit, but as it is, the Defendants were allowed to file a defence but it does not answer the
10 plaintiff. I therefore give Judgment for the Plaintiff as prayed in the plaint with costs. There is nothing to try in the main suit.'

The agreed facts as set out in the scheduling memorandum appear clearly to me to have answered in affirmative the whole of the plaintiff's claim as set out in the
15 plaintiff. Paragraph 5 of the plaint which sets out the claim states as follows:-

- 15 a. On the 5th November 2005, the 1st defendant through the 3rd and 4th defendants applied for a loan of 50,000,000/= (Fifty Million Uganda Shillings) from the plaintiff to renovate the school's structures. A copy of the 1st defendants request and credit application form is attached hereto and marked "A" and "B" respectively.
- 20 b. On the 20th February 2006, the plaintiff allowed a loan facility of 50,000,000/= (Fifty Million Uganda Shillings) to the 1st defendant at an interest rate of 25% per annum repayable within a period of 24 (Twenty four) months. A mortgage deed was further executed between the plaintiff on the one hand and the 1st and 2nd defendants on the other hand. A copy of the loan facility agreement and mortgage is attached hereto and marked "C" and "D" respectively.
- 25 c. The loan was secured by the property comprised in Plot No. 38 and 40 Katate Close, Mbarara municipality registered in the names of the 2nd defendant, and the personal guarantees of the 2nd, 3rd, 4th, 5th, and 6th defendants. A copy of the certificate of title, power of attorney and guarantee document is attached hereto and marked "E",
30 "F" and II "respectively.
- 35 d. That the 1st defendant defaulted on its loan undertaking with the plaintiff by failing to remit the monthly payments of 2,668,575/ = (Two Million Six Hundred Sixty Eight Thousand Five Hundred Seventy Five Uganda Shillings) to the plaintiff. A copy of the 1st defendant's loan account statement is attached hereto and marked "R".

e. *The whole loan amount consequently fell due and was recalled by the plaintiff. A statutory notice was issued to the 2nd defendant. A copy of the letter of recall and statutory notice is attached hereto and marked 'I' and 'J' respectively.*

5

f. *That when the plaintiff attempted to sell the mortgaged property to realize the outstanding sums, the 2nd defendant and his purported wife, a one Jackline Nahabwe, filed civil suits No. 071 of 2007 and 0019 of 2007 in the High Court at Mbarara seeking declarations that the alleged sale was unlawful.*

10

Although there seems to have been no specific application by the plaintiff for Judgment on admission, I find that the Court may on its own motion enter Judgment on admission based on the pleadings or otherwise. It is trite law that admission may be express or may arise by implication from non-traverse of a material fact in the statement of claim. The admission has to be clear and unambiguous and must state precisely what is being admitted. In *John Peter Nazareth vs Barclays Bank International Ltd., E.A.C.A. 39 of 1976 (UR)* it was held that:-

15

"For judgment to be entered on admission, such an admission must be explicit and not open to doubt. Apart from the foregone, once an admission of facts is made, court may upon application make such order or file such judgment."

20

See: *Mohamed B.M. Dhanji v. Lulu & Co. [1960] E.A. 541.*

In this case Judgment was based both on the pleadings and on the facts agreed to in writing by all parties to the suit. The defendants in that did admit to the whole claim as set out in the plaint. The learned trial Judge was therefore justified when he entered Judgment in favour of the plaintiff in the terms that he did.

25

The 2nd defendant's now appellant's written statement of defence did not answer the claim at all. The whole written statement of defence appears to have misconstrued the claim as set out in the plaint in the result that it did not answer it.

5 The plaintiff's claim premised is on the mortgage agreement and not to the loan offer or loan disbursement agreement. The two are separate and distinct documents. The mortgage agreement is between three parties. The plaintiff bank now respondent is the mortgagee, on one part and the appellant is the mortgagor, on the other part. The school, Booma High School 1st defendant at the High Court is
10 named as "the principal debtor".

The respondent first sought to recover the outstanding money by selling off the mortgaged property under the provisions of the Mortgage Act (CAP 229). This was blocked by a Civil Suit instituted at High Court Mbarara by the appellant and his wife
15 claiming *inter alia* that the mortgage was registered in error and or was unlawful as the land was family property and no prior consent of the mortgagor's spouse and children had been obtained. Since the suit was pending, the respondent Bank then filed a summary suit to recover the money directly from the mortgagor, the principal debtor and the guarantors. This suit is premised on the mortgage
20 agreement and on the loan agreement. It was also premised on the guarantee deed executed by the defendants including the appellant in favour of the respondent.

The fact that the loan could have been disbursed and /or used in contravention of the terms loan agreement is irrelevant to the claim as set out in the plaint. It could
25 probably have been relevant in the assessment of damages but not as defence to a claim of money had and received.

The claim as set out in the plaint was wholly sustainable against the appellant under the mortgage agreement alone. The mortgage agreement sets out the obligation of the appellant as mortgagor in the following terms:-

5 *The Bank at the request of the Mortgagor agreeing to make advances to the Principal Debtor by permitting the Principal Debtor to overdraw its current account with the Bank or granting to the Principal Debtor other financial accommodation from time to time to an amount not exceeding the Principal Sum of Ug. shs. 50,000,000/= (Uganda Shillings Fifty Million Only) (exclusive of interest but inclusive of all sums already advanced or incurred before the*
10 *date of this security) or such lower sum as may from time to time be fixed by the*
Bank.

15 a) *The Principal Debtor HEREBY covenants with the Bank that the Principal Debtor will on demand in writing made to the Principal Debtor pay or discharge to the Bank all monies and liabilities which shall for the time being (and whether on or at any time after such demand) be due owing or incurred to the Bank by the Principal Debtor.*

20 b) *The Mortgagor HEREBY covenants with the Bank, that the Mortgagor will on demand in writing made to the Mortgagor pay or discharge to the Bank all monies and liabilities which shall for the time being (and whether on or at any time after such demand) be due owing or incurred*
25 *to the Bank by the Principal Debtor in each case either as principal or surety and whether solely or jointly with any company, society, Corporation, person, or person in partnership or otherwise or Upon loans or bills of exchange or promissory notes drafts orders for payment or delivery of money bills of lading or exchange or other negotiable or*

5 *mercantile instruments drawn accepted or endorsed by or on behalf of
the Principal Debtor and discounted or paid or held by and at the request
of the Principal Debtor in the course of business and in respect of bills of
exchange accepted by the Bank on the instructions of the Principal
Debtor or its authorized agents or in respect of moneys which the
Principal Debtor has or shall become liable to pay the Bank or for money
or any other facility guaranteed by the Bank for and on behalf of and at
the request of the Principal Debtor or in any other manner whatsoever
and whether any such moneys shall be paid to or incurred on behalf of
10 the Principal Debtor or any society, corporation, person, or persons in
partnership or otherwise at the request of the Principal Debtor for any
other amount whatsoever or howsoever or for any actual or contingent
liability together with interest thereon at the rate of Twenty Five per
centum (25%) per annum such interest to be calculated on daily
15 balances and debited monthly by way of compound interest and together
with commission and other usual Bank charges . . .*

20 The mortgage is a standalone document. It does not refer to, neither is it premised
on the guarantee or loan offer. What the appellant misconceives as a loan agreement
is in fact a loan offer. It is a letter of offer addressed to the Directors of Booma High
School Ltd dated February 2006. The wording of that letter clearly brings out the
fact that it is indeed an offer letter. It reads in part as follows:-

25 *Private & Confidential*

20th February 2006

30 *The Directors:
Booma High School
Limited.
P.O.Box 1725
Mbarara*

RE: LOAN FACILITY FOR UGS. 50,000,000.

5 Post Bank Uganda (the Credit Institution") is pleased to inform you (subject to the conditions precedent and upon your representations and warranties as set out herein) of its willingness to make available to you ("the Borrower") the uncommitted banking facility ("the Facility") outlined below on the terms and conditions set out in this letter of offer, as modified by the Credit Institution from time to time, subject to the covenants set out herein, and subject to the satisfactory completion of any security documentation.

Amount: Loan of UGS. 50,000,000 (Shillings: Fifty million only).

Facility type: Business Loan

15 Purpose: Construction of Laboratory & Computer rooms.

Arrangement Fee: The facility is subject to an arrangement fee of 2% of the loan amount, plus an application fee of UGS 10,000.

20 Pricing: Interest will be charged at 25 % per annum compounded on a monthly basis and is subject to change at the sole discretion of the Credit Institution. The Credit Institution may notify you prior to any variation of the rate of interest or additional interest but failure to notify you of any such change shall not prejudice in any way whatsoever the recovery by the Credit Institution of any interest charged subsequent to any such change.

30 Interest payable on this facility letter will:
be calculated on the basis of a 365 day year be accrued tram day to day be debited on the loan account on a day convenient to the Credit Institution once in each calendar month.

35 Further on the letter states as follows:-

40 Kindly signify your acceptance of the offer contained in this letter by signing and returning to the Credit Institution the copy within seven days from the date of this letter.

The offer states that the loan would be secured by a legal mortgage over the appellant's land already described above and personal guarantees of the Director of the school.

5 The respondent bank in my view was well within its right to proceed with the claim only under the mortgage agreement alone, which itself does not refer to the terms set out in the offer. I find that the defence raised by the appellant did not answer the claim set out in the plaint and I hold so. I also find that the learned trial Judge was justified when he ignored or rejected the defence and entered Judgment in favour of the respondent bank.

10 Grounds one and two of the appeal would therefore fail.

Ground 3 is set out as follows.

3. The Learned Trial Judge erred in law and fact when he entered judgment in the main suit against all the defendants, including the appellant, without pronouncing himself on the appellant's counterclaim against the respondent.

15 It is trite law that a counterclaim is a separate suit. The determination of the suit would not ordinarily dispose of the claim in the counterclaim. Ground three is to that extent misconceived. Judgment my indeed be entered in the suit on admission and the counterclaim would also be set down for hearing separately. Judgment in respect of the suit therefore did not dispose of the counterclaim. I have not been
20 able to see any order made by the trial Judge dismissing the counterclaim. It would ordinarily still be pending hearing at the High Court.

However, a close look at the appellant's written statement of defence reveals that he was not named as a party in the written statement of defence. The parties in his written statement of defence are set out as follows:-

25 *In the High Court of Uganda
(Commercial Division)
Civil Suit No. 147 of 2009*

Post Bank (U) LTD

versus

1. *Booma High School Limited*
2. *Mwebaze Robert*
3. *Bonny Barugahare*
4. *Byotariho Samuel*
5. *Mwikirize Cosma*

WRITTEN STATEMENT OF DEFENCE BY THE 2ND DEFENDANT

The counterclaim states that the 2nd defendant/counter claimant as Mwebaze Robert. It is clear that, the appellant is not Mwebaze Robert named in the written statement of defence as the 2nd defendant. This could be dismissed as typing error and corrected under *Article 126 2(c)* of the Constitution. But no attempt was made to amend this written statement of defence. On that alone I would strike it out as incompetent.

Be that as it may, I have already explained that the 2nd defendant was at all time a principal party to the mortgage agreement as the mortgager and that the respondent's claim was not based on the guarantee. The counterclaim is therefore clearly misconceived in that it is premised on the obligations of parties set out in the loan offer letter/agreement whereas the suit is premised on the mortgage deed. The appellant is at liberty to peruse his claim against the school and its directors if such a claim is sustainable. As a suit the counter claim discloses no cause of action against the respondent bank and I find so. I would accordingly reject it on that account alone. That counterclaim is hereby rejected under order 7 Rule 11 for none disclosure of a cause of action. Ground 3 of appeal therefore fails.

Ground four of appeal is set out as follows:-

4.The Learned Trial Judge erred in law and fact when he made the decision aforesaid, without due regard of two(2) suits which had been filed in respect of

the same subject matter and were and still are pending in the High Court at Mbarara, to wit HCCS. NO. HCT-05-CV-CS-0071 of 2007; Jotham Mugarura-ss-Post Bank Uganda Limited and Booma High School Limited, and HCCS No. HCT-05-CV-CS-0019; Jackline Nahabwe Mugarura -vs-Mugarura Jotham, Post Bank Uganda Limited and Booma High School Limited.

With all due respect to the learned Counsel for the appellant Section 6 of the Civil Procedure Act was irrelevant to the proceedings before the Commercial Court in Civil Suit No. 147 of 2009 from which this appeal arises.

Section 6 of Civil Procedural Act stipulates as follows:-

2. Stay of suit.

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where that suit or proceeding is pending in the same or any other court having jurisdiction in Uganda to grant the relief claimed.

The section applies clearly in instances where a Court is proceeding “with the trial of any suit or proceedings in which the matter is in issue.....”

In this case the Judge found that there were no triable issues for him to determine, the defendants having admitted to all the facts in the plaint in their joint scheduling memorandum. There was nothing remaining for him to try or to proceed with. He only did what the law required him to do, that is to enter Judgment on admission.

In *Tororo Cement Co. Ltd vs Frokina International Ltd*, Supreme Court Civil Appeal No. 2/2001 and *Stanbic Bank (U) Ltd vs Uganda Cros Ltd*, Supreme Court Civil Appeal No. 4/2004, it was held that the purpose of Scheduling Conference is, *inter alia*, to sort out issues of over which parties are agreed so that there is no litigation over them

thereafter. *Section 22 of the Evidence Act* is to the effect that facts which are admitted need not to be proved. Under *Order 15 Rule 1 Civil Procedure Rules* issues only arise when a material proposition of law or fact is affirmed by the one party and denied by the other.

5 Section 6 of the Civil Procedure Act in my view was enacted to avoid simultaneous trials in two different courts. In this case, the suit from which this appeal arises was determined on admission and therefore its determination would in no way effect the proceedings in the pending suits.

10 Be that as it may, it appears clearly to me that, the sole purpose of the appellant filing Civil Suit HCCS NO 71 of 2007 *Mugarura Jotham vs Post Bank & Booma High School and HCCS No 19 of 2007, Jackline Nahabwe Mugarura -vs-Mugarura Jotham, Post Bank Uganda Limited and Booma High School Limited* was solely intended to frustrate the effort of the respondent bank from recovering its money from him. The suits were both brought in bad faith in blatant abuse of Court process. I say so because, the appellant's wife one Jackline Nahabwe deponed an affidavit dated 27th 15 May 2009 the pertinent parts of which state follows:-

- 20 1. *THAT I am a female adult Ugandan of sound mind, the purported Plaintiff in Mbarara Civil Suit No 019 of 20107 case and I swear this Affidavit in that capacity.*
- 25 2. *That I am legally married to one Mugarura Citizen Jotham the 2nd Defendant in Commercial Division Civil Suit NO. 147 of 2009 and the purported 1st Defendant in Mbarara Civil Suit No. 019 of 2007*
- 30 3. *THAT I have been shown a copy of the Plaint in Mbarara Civil Suit No. 019 of 2007 by the above Lawyer, read through it and respond hereto as follows.*
4. *THAT I have never instructed M/s Mugarura, Kwarisirna & Co. Advocates, to file Mbarara Civil No. 019 of 2007 against my Husband Jotham Citizen Mugarura and others as purported in the suit.*

5. That it would be a circus and madness to instruct my husband Jotham Citizen Mugaruu and or his law firm M/s Mugarura, Kwarisirna & Co. Advocates to sue my husband and two others on behalf (photocopy of the Plaintiff attached and marked JNM/A).

6. That this is fraud of the highest order perpetuated by my husband Jotham Citizen Mugarura to defraud the Bank and the School headed by one Mwebaze Robert.

7. That if there are any other papers purportedly signed by me in relation to Mbarara Civil Suit, No. 019 of 2007, they are totally denied and are a fraudulent/forgery as the Civil Suit itself.

8. That I swear this affidavit in proof that I have never instructed my husband Jotham Citizen Mugarura and or his Law firm as purported in Mbarara Civil Suit No. 019 or 2007.

From this affidavit which remained unchallenged, the existence of pending suits alluded to by the appellant's Counsel is moot. They are only pending dismissal. The affidavit of Mr. Jackline Nahabwe Mugarura raises very serious issues that call for both criminal and professional misconduct investigations against the appellant and his advocates. The two suits pending before the High Court are in abuse of Court process and this cannot be condoned. I find that ground 4 of appeal is devoid of any merit and I dismiss it accordingly.

Counsel for the appellant cited to us the Supreme Court decision in *Fredrick Zaabwe versus Orient Bank & 5 Others, Supreme Court Civil Appeal No. 04 of 2006*. With all due respect the decision in that case is inapplicable here. In that case the Supreme Court discusses the law relating to Powers of Attorney and specifically the relationship between the donor and the donee. In the suit from which this appeal arises the law relating to Powers of Attorney was not discussed, rightly so because neither the mortgage agreement nor the guarantee was based on a Power of Attorney. The appellant signed the mortgage as the mortgagor which the 1st defendant in High Court Civil Suit No. 147 of 2009 Booma High School

signed the mortgage as the "principal debtor". All the directors of Booma High School signed a separate guarantee in their personal capacities. The Power of Attorney therefore was neither used nor alluded to.

5 In any event the Power of Attorney was permissive and didnot refer to any conditions in the loan agreement. It couldnever have envisaged the terms ofthe loan agreement which were set out in a letter dated 20th February 2006 as it had already been issued by then.

10 All in all I find no merit whatsoever in this appeal. It was nothing but a futile attempt to perpetuate an abuse of Court process in order to frustrate lawful recovery of a Judgment debt. This kind of behaviour by errant bank debtors and their advocates is not uncommon. Time and again litigants and their advocates have abused court process to perpetuate illegalities. As courts of law we take exception to this practice and we shall not condone it at all.

15 I accordingly direct the Registrar of this Court to forward a copy of this file to both the Director of Public Prosecution and the Secretary to the Law Council for investigation of any breach of law or Advocates professional code of conduct.

For the reasons set out above this appeal stands dismissed with costs at this Court and at the Court below as it has no merit whatsoever.

20 **Dated at Kampala** this 18th day of Oct 2019.


.....
Kenneth Kakuru
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
CIVIL APPEAL NO. 43 OF 2012

5 **MUGARURA CITEZEN JOTHAM :::::::::::::::::::: APPELLANT**

VERSUS

10 **POSTBANK UGANDA LIMITED ::::::::::::::::::::RESPONDENT**

(An appeal against the decree and order of the High Court of Uganda at Kampala (Commercial Division) by Hon. Mr. Justice Geoffrey Kiryabwire dated 22nd June, 2010 in High Court Civil Suit No. 147 of 2009)

15 **CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA**
HON. JUSTICE STEPHEN MUSOTA, JA
HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA

20 I have had the benefit of reading in draft the judgment of my learned brother Hon. Mr. Justice Kenneth Kakuru, JA.

I agree with his reasoning, analysis and conclusions as well as the orders he has proposed. This appeal should be dismissed with costs.

Dated at Kampala this.....18th.....day ofOct.....2019

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Stephen Musota
JUSTICE OF APPEAL

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**THE REPUBLIC OF UGANDA,
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO 43 OF 2012**

(CORAM: KAKURU, MUSOTA, MADRAMA, DCJ, JJA)

MUGARURA CITEZEN JOTHAM}APPELLANT

10

VERSUS

POSTBANK UGANDA LIMITED}RESPONDENT

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA, JA

I have read in draft the judgment of my learned brother Hon. Mr. Justice
Kenneth Kakuru, JA in the above appeal and I agree that the appeal should
15 be dismissed for the reasons expressed in his judgment and I have nothing
useful to add to the judgment.

Dated at Kampala the 18th day of Oct, 2019



Christopher Madrama Izama

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Justice of Appeal