THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

Consolidated Civil Appeals Nos. 146 and 186 of 2013

(Appeal from the Judgment of the High Court of Uganda at Kampala by Hon. Justice Christopher Madrama Izama, J. as he then was, delivered on 13th May, 2013 in the Consolidated High Court civil Suits No. 106, 150 and 788 of 2007)

Mohamed Kalisa :: Appellant

Versus

1. Gladys Nyangire Karumu
2. John Katto
3. Access Reprographic Limited } **:::::::::::: Respondents**

And

1. DFCU Leasing Company Limited
2. Alex Micheal Agaba
3. Moses Kirunda } **:::::::::::: Appellants**

Versus

1.Gladys Nyangire Karumu
2.John Katto
3.Access Reprographic Limited } **:::::::::::: Respondents**

Coram: Hon. Justice Elizabeth Musoke, JA
Hon. Justice Stephen Musota, JA
Hon. Justice Remmy Kasule, Ag. JA

Judgment of Hon. Justice Remmy Kasule, Ag. JA

Parties:

In this Judgment, Mohamed Kalisa shall be referred to as the 1st Appellant, DFCU Leasing Company Limited as the 2nd Appellant, Alex Michael Agaba as the 3rd Appellant and Moses Kirunda as the 4th Appellant.

With respect to Respondents, Gladys Nyangire Karumu will be referred to as the 1st Respondent, John Katto, as the 2nd Respondent and Access Reprographic Limited as the 3rd Respondent.

Background as to the Appeals:

This Judgment is in respect of two consolidated appeals.

Civil Appeal No. 146 of 2013: Mohamed Kalisa (Appellant) vs Gladys Nyangire Karumu, John Katto and Access Reprographic Limited (Respondents), and Civil Appeal No. 186 of 2013: DFCU Leasing Company Limited, Alex Michael Agaba and Moses Kirunda (Appellants) vs Gladys Nyagire Karumu, John Katto and Access Reprographic Limited (Respondents).

The consolidation order of the appeals was made by this Court at commencement of the hearing of the appeals.

The consolidated appeals arose out of a High Court Judgment (Madrama, J.) in three consolidated Civil Suits.

The first suit was lodged in the High Court Land Division as **HCCS No. 741 of 2006: Gladys Nyangire Karumu, John Katto and Access Reprographic Ltd vs DFCU Leasing Company Ltd and Alex Michael Agaba.** This suit was later transferred from the Land Division to the Commercial Court Division where it was re-registered as **HCCS No. 106 of 2007**.

In the suit, the then Plaintiffs now Respondents, challenged the legality of the act of the defendants, now the 2nd and 3rd Appellants, to advertise in the Monitor Newspaper of 17.11.2006 that the 3rd Respondent was under receivership and that its property mortgaged to the 2nd Appellant was to be sold within 30 days by auction/private treaty to recover the money due to the 2nd Appellant.

In this appeal this suit shall, where appropriate, be referred to by its Commercial Court Division Number of **HCCS No. 106 of 2007**.

The second suit was **HCCS No. 150 of 2007** DFCU Leasing (U) Ltd vs Gladys Nyangire Karumu and John Katto.

In this second suit, the 2nd Appellant sued the 1st and 2nd Respondents for the moneys due under the Master Lease Facility Agreement which each one of them had personally guaranteed to pay in case the 3rd Respondent failed to meet repayment of the money borrowed from the 2nd Appellant. This suit lodged in the High Court Land Division was also later transferred to the Commercial Court Division.

The third case was **HCCS No. 788 of 2007: Gladys Nyangire Karumu, John Katto and Access Reprographic Ltd vs DFCU Leasing (U) Ltd, Alex Michael Agaba, Moses Kirunda and Mohamed Kalisa.** In this third suit, the Respondents sued the Appellants challenging the sale and transfer by the 2nd, 3rd and 4th Appellants of the mortgage property to the 1st Appellant, as purchaser. This suit was also placed in the Commercial Court Division of the High Court.

The above three **Civil Suits Numbers 106, 150 and 788 of 2007** were all consolidated by the order of Honourable Justice Madrama, of the High Court Commercial Court Division of 03.05.2011. The parties were ordered to consolidate their pleadings by filing one amended plaint by the Plaintiffs, now Respondents, against the defendants, now the Appellants.

This was done and the Respective defendants filed written statements of defence in answer to the said plaint. At the closure of the pleadings and after conferencing, a full trial was held before His Lordship Madrama, J., as he then was. The learned Judge delivered his Judgment in the consolidated suits on 13.05.2013. Dissatisfied with the Judgment, the respective Appellants lodged these two consolidated appeals against the respective Respondents.

Background Facts Giving Rise to Litigation:

Gladys Nyangire Karumu, the 1st Respondent, was the registered proprietor of the developed land property comprised in LRV 2839 Folio 17 Plot 108 Katalima Road, Naguru/Nakawa, Kampala City.

She stayed on this property together with her family that included John Katto, her husband, the 2nd Respondent.

Both the 1st and 2nd Respondents were the only directors in Access Reprographics Limited, a limited liability company, herein the 3rd Respondent. This company carried on printing business in Uganda.

In 2003, the 3rd Respondent successfully sought for a lease facility from the 2nd Appellant, a limited liability company in the business of providing finances for commercial ventures, including lease facility financing.

On 17.12.2003, the 3rd Respondent through its directors, the 1st and 2nd Respondents, executed with the 2nd Appellant a Master Lease Agreement, Exhibit P2, a Finance Lease Schedule, Exhibit P4, a Sale and Lease Back Agreement also part of Exhibit P2, whereby the 3rd Respondent secured on lease for 5 years a Heidelberg Print Master Four Colour offset Press Model GTO 52-4 Printing Machine.

The lease was to run from 28.01.2004 up to 28.01.2009. The agreed upon capital cost for this lease financing facility was UGX. 479,106,587=. The 3rd Respondent was to repay for the said facility by monthly rentals of UGX. 16,143,975.90= payable to the 2nd Appellant on every 28th day of the month throughout the 5 year lease term, the first instalment payment was to be on 28.08.2004.

By way of security for ensuring repayment of the stated rentals, the 1st Respondent executed a Power of Attorney in favour of the 3rd Respondent to mortgage her stated land property: LRV 2839 Folio 17 Plot 108, Katalima Road, Naguru/Nakawa to the 2nd

Appellant. A Mortgage Deed, Exhibit P5, was executed on 17.12.2003 amongst the 1st Respondent as surety, the 3rd Respondent as Lessee/Mortgagor and the 2nd Appellant as "DFCU Leasing" the Mortgagee.

Further security for the repayment of rentals by the 3rd Respondent was provided by the 1st and 2nd Respondents executing personal guarantees, Exhibits D1 and D2, where each one guaranteed the due and prompt re-payment of each rental as well as the due performance by the 3rd Respondent of all the other terms and conditions of the Master Lease Agreement.

When payment of the rentals became due, the 3rd Respondent defaulted even in meeting its first rental instalment on the due date of 28.02.2004.

On the dates of 01.06.2004, 16.06.2004, 28.07.2004, 04.10.2004 and 18.11.2004, the 2nd Appellant, in writing, called upon the 3rd Respondent to be up to date with the rental payments, but without success. On 15.06.2005, the 3rd Respondent requested and was allowed by the 2nd Appellant to restructure the lease rental payments. The 3rd Respondent, indicated in writing that he was going to effect the restructured rental payments including paying the fee for the restructuring. However, neither the restructuring fee nor the restructured rental payments were paid by the 3rd Respondent, as undertaken.

On 13.10.2006 the 2nd Appellant in writing made a final demand to the 3rd Respondent to pay the principal sum, interest and VAT arrears that were due, within 7 days, otherwise the facility was

going to be terminated and steps taken to enforce recovery in full of all amounts due and outstanding.

The 3rd Respondent did not effect payment and on 24.10.2006, the 2nd Appellant terminated the Master Lease Agreement. The 2nd Appellant was to repossess the leased printing equipment, and the mortgage property, sale the same and the sale proceeds be used to reduce the arrears of rentals. The 3rd Respondent was given up to 31.11.2006 to settle the financial obligations due so as to avoid the threatened sales.

On 13.11.2006, the 2nd Appellant appointed the 3rd Appellant as receiver/manager under **Section 4 of the then Mortgage Act** and Clause 6 of the Mortgage Deed to exercise all powers under the Mortgage Deed, including sale of the properties so as to recover the money outstanding.

On 27.11.2006 E.S. Mungati a qualified valuation surveyor, valued the mortgage property and, at trial, tendered in Court the valuation Report, Exhibit D8. He testified as Dw3.

The above valuation of the mortgage property followed the advertising of the mortgage property for sale by auction/private treaty in the Monitor Newspaper of 17.11.2006. The advertisement was placed by the 3rd Appellant as Receiver/Manager of the 2nd Appellant. The mortgage property was to be sold after 30 days of the advert.

The 2nd and 3rd Appellants had also repossessed and advertised in the East Africa Newspaper of 22-28 May, 2006, the sale of the leased printing machine. The machine was thereafter sold at UGX.

120,000,000=, which amount, reduced but did not settle in full the indebtedness of the Respondents to the 2nd Appellant.

When the 2nd and 3rd Appellants proceeded further to advertise for sale the mortgage property, the Respondents, in order to prevent the said sale, amongst other reliefs, lodged **High Court (Commercial Division) Civil Suit No. 106 of 2007** against the 2nd and 3rd Appellants. When the sale took place, the Respondents lodged **HCCS (Commercial Division) No. 788 of 2007** challenging the sale and transfer of the mortgage property to the 1st Appellant. The 2nd Appellant also lodged in the **High Court Civil Suit (Commercial Division) No. 150 of 2007** to enforce the personal guarantees against the 1st and 2nd Respondents for the balance outstanding. The three suits were later all consolidated and tried together in the High Court Commercial Division Court.

The 3rd Appellant t/a Trust Masters and Court Bailiffs, acted as receiver/manager of the 2nd Appellant from 13.11.2006 when he was appointed up to 10.04.2007 when the appointment was cancelled. The 4th Appellant t/a Pear Link Auctioneers and Court Bailiffs, acted as 2nd Appellant's receiver/manager from 10.04.2007 replacing the 3rd Appellant. Both became parties to the litigation by virtue of their so acting as receiver/manager of the 2nd Appellant.

Legal Representation:

Learned Counsel Alfred Okello Oryem, Joseph Kyazze, John Barungu and Ivan Emoloi represented the 1st, 2nd, 3rd and 4th Appellants. Learned Counsel Kyalimpa Olivia (Ms) represented the 1st, 2nd and 3rd Respondents.

Grounds of Appeal:

In **Civil Appeal No. 146 of 2013** the Grounds are:

1. ***The learned trial Judge erred in law and fact when he failed to evaluate evidence on record and found that the sale of the mortgaged property (LRV 2839 Folio 17 Plot No. 108 Katalima Road, Nakawa) to the Appellant was conducted in secret, without following the due process and was in bad faith and suspicious.***
2. ***The learned trial Judge erred in law and fact when he failed to evaluate the evidence on record and found that the Appellant was not a bona fide purchaser for value without notice.***
3. ***The learned trial Judge erred in law and fact in awarding the Respondents general damages.***
4. ***The learned trial Judge erred in law and fact in awarding the Respondents mesne profits when the same had not been pleaded.***
5. ***The learned trial Judge erred in law and fact in awarding the Respondents interest at 21% per annum on the general damages and mesne profits from the date of Judgment until payment in full.***
6. ***The learned trial Judge erred in law and fact when he found that the 1st Respondent was indebted to DFCU Bank Limited to the tune of UGX. 581,631,114= (five hundred eighty one million, six hundred thirty one thousand, one hundred fourteen shillings only) but denied them interest thereon and costs of the counter-claim.***

7. ***The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record generally.***

In **Civil Appeal No. 186 of 2013** the grounds of Appeal are:

1. ***The leaned trial Judge erred in law and fact by holding that the 1st, 2nd and 3rd Appellants had not followed the proper procedure in the sale and realisation of the security comprised in LRV 2839 Folio 17 Plot 108 Katalima Road.***
2. ***The learned trial Judge erred in law when he held that the 1st Appellant had to follow the procedure of Section 7(1) of the Mortgage Act, Cap. 229 to give 60 days notice before taking possession.***
3. ***The learned trial Judge erred in law when he came to the conclusion that "receivership deals with management of the suit property as well as possession by the mortgagee".***
4. ***The learned trial Judge misdirected himself when he declared that the power of the receiver/manager in possession puts him in the same shoes as a mortgagee in possession.***
5. ***The learned trial Judge contradicted himself when he recognized that the first Appellant had absolute unfettered powers to sell by private treaty but then declared that the first Appellant had to give 60 days' notice before taking possession when the first Appellant had taken the option of appointing the receiver.***

6. ***The learned trial Judge erred in law when he delued into the issue of the need to advertise the suit property when he had found that there was express consent to sell by private treaty.***

7. ***The learned trial Judge misdirected himself and erred in law and facts when he found that clause 13 of the Mortgage Deed deals only with powers of a receiver in possession but does not envisage the sale of the mortgaged property per se.***

8. ***The learned trial Judge erred in law when he found that the pendency of HCCS No. 106 of 2007 prevented the 1st 2nd and 3rd Appellants from passing on an unimpeachable title to, Mohamed Kalisa, the 4th Defendant in the suits.***

9. ***The learned trial Judge misdirected himself as to the proper role of a receiver appointed by a mortgagee with power to sale by private treaty when he compared such a receiver to a mortgagee in possession.***

10. ***The learned trial Judge erred in law and fact when he found that the 1st and 3rd Respondents were indebted to the 1st Appellant to the tune of UGX. 581,631,114= but denied it interest and costs of the counter-claim.***

11. ***The learned trial Judge erred in law and fact when he awarded the Respondents general damages of UGX. 50,000,000= against the 1st and 2nd Appellants for going into possession without prior 60 days notice and a further UGX. 50,000,000= against the 3rd Appellant and Mohamed Kalisa, the 4th Defendant in the suit.***

12. ***The learned trial Judge erred in law and fact when he awarded the Respondent mesne profits against the 3rd and 4th Appellants at a monthly rate of rent from June, 2007 till handing over vacant possession, which were not pleaded.***

13. ***The learned trial Judge erred in law and fact when he awarded the Respondents 21% interest p.a. on the general damages and mesne profits, from the date of Judgment until payment in full.***

An examination of the grounds in both appeals shows that grounds 1 to 6 of **Civil Appeal No. 146 of 2013** cover and provide for all the grounds in **Civil Appeal No. 186 of 2013**. Tobe specific Grounds 1 and 2 of Civil Appeal No. 146 of 2013 cover and provide for grounds (i)(ii)(iii)(iv)(v)(vi)(vii)(viii) and (ix) of **Civil Appeal No. 186 of 2013.** Grounds 3 and 4 of **Civil Appeal No.146 of 2013** are similar to and provide for the same issues as grounds (xi) and (xii) in **Civil Appeal No. 186 of 2013**. Grounds 5 and 6 in **Civil Appeal No. 146 of 2013** question the same issue as grounds (x) and (xiii) in **Civil Appeal No. 186 of 2013.**

As regards ground 7 of **Civil Appeal No. 146 of 2013**, this ground is too vague and too broad to be a proper ground of appeal. It is contrary to Rule 66(2) of the Court of Appeal Rules. The Rule requires that a ground of objection to the Court decision being appealed against, shall be concise, without argument or narrative, specifying the points of law or fact or mixed law and fact, which are alleged to have been wrongly decided. Ground 7 in Civil Appeal

No. 146 of 2013 is contrary to this Rule. I strike out the same as being wrong in law.

Since the remaining grounds 1 to 6 in **Civil Appeal No. 146 of 2013** all cover and are similar to all the grounds of appeal in **Civil Appeal No. 186 of 2013**, this Judgment shall proceed on the basis that grounds 1 to 6 of **Civil Appeal No. 146 of 2013** are also the grounds of appeal concerning **Civil Appeal No. 186 of 2013.**

I will therefore proceed to resolve grounds 1 to 6 on the basis that they cover all the grounds in both consolidated appeals.

Duty of Court:

As the appellate Court of first instance this Court has to re-appraise the evidence adduced at trial, draw inferences therefrom pursuant to Rule 30(1) of the Court of Appeal Rules. The Court may thus arrive at its own conclusions, different from those of the learned trial Judge, where this Court finds it is necessary to do so. The Supreme Court has elaborated in **Supreme Court Criminal Appeal No. 10 of 1997: Kifamunte vs Uganda**, that it is the duty of the first appellate Court to re-hear the case on appeal by reconsidering all the evidence and materials that were placed before the trial Court and make up its own mind upon the same. Failure to do so by the appellate Court of first instance amounts to an error of law.

The above principles as to the duty of this Court will be strictly observed and complied with in resolving the grounds in this appeal.

Submissions of the Appellants:

Ground 1:

It was submitted for the Appellants that the learned trial Judge ought to have taken as proved the fact that the 3rd Respondent had defaulted in the repayment of the monthly rentals to the 2nd Appellant thus breaching the terms of the Master Lease Agreement and the Mortgage Deed.

It was also not in contention, Appellants' Counsel argued, that on defaulting in making payment on the due dates as agreed, the Master Lease Agreement and the Mortgage Deed entitled the 2nd Appellant to repossess and sale by auction or private treaty the mortgage property.

The 2nd Appellant had acted transparently, properly and in good faith in all that he did in enforcing his rights. He appointed a Receiver, the 3rd Appellant and later, the 4th Appellant, the sale of the properties was advertised in the newspapers, the printing machine in the East African Newspaper and the mortgage property in the Monitor Newspaper of 17.11.2001.

The advertisement in the newspapers for the sale of the properties was after the 2nd Appellant had openly and in writing called upon the 3rd Respondent as well as the 1st and 2nd Respondents to meet their obligations of meeting payment of the agreed upon monthly lease rentals. The Respondents had failed to meet their obligations, defaulting even in respect of the first rental payment.

Learned Counsel relied on the decision of **Court of Appeal Civil Appeal No. 85 of 2011: Takiya Kaswahiri vs Kajungu Dennis**

where this Court held that one challenging the power of a mortgagee to sell the security under the mortgage has a duty to prove that the mortgagee did so under a procedure that was flawed in law. In this case, the 2nd, 3rd and 4th Appellants had properly and strictly followed the procedure under the law and under the Master Lease Agreement and the Mortgage Deed that had been agreed upon with the Respondents.

Counsel further submitted that the Respondents were bound by **Section 92(1) of the Evidence Act** to follow and abide by what was agreed upon with the Appellants in the Master Lease and Mortgage Deed documents, and not what they had orally testified to at trial, which was contrary to those Agreements.

Learned Counsel maintained that the Appellants had acted properly, transparently, in good faith and without any suspicion at all, when the 2nd, 3rd and 4th Appellants sold and transferred the mortgaged property to the 1st Appellant. Accordingly ground 1 had to succeed.

Ground 2:

Learned Counsel for Appellants, with respect to the learned trial Judge, found His Lordship to have erred in his finding that the 1st Appellant had not been a bona fide purchaser for value without notice when he bought and had the mortgage property transferred into his names by the 2nd, 3rd and 4th Appellants. Counsel argued that no proper grounds of fraud had been pleaded and proved against any of the Appellants. Yet the burden to strictly plead and prove such grounds lay upon the Respondents. The Court of

Appeal had so restated this legal principle in **Court of Appeal Civil Appeal No. 17 of 2014: Senkungu and 4 Others vs Mukasa**.

Learned Counsel also contended that at the time the mortgage property was sold and transferred to the 1st Appellant, the Court interim order to stay the sale, had expired and the interlocutory Judgment that had been entered in HCCS No. 106 of 2007 (Commercial Court Division), had been set aside. Since the caveat on the mortgage property had been lodged by the 1st Respondent on the basis of these two Court orders, the said caveat had accordingly been vacated and was inoperative to prevent the sale and transfer of the mortgage property to the 1st Appellant.

Further, the mere fact of the pendency of HCCS No. 106 of 2007 was itself, per se, not a valid ground in law to stop such a sale and transfer according to **Supreme Court Civil Appeal No. 13 of 1992: J.W. Kazzora vs M.L.S. Rukuba**, decision.

At any rate, the presence of a caveat on the tittle of the mortgage property had ceased to be of any consequence since by failing to meet the due payments, the Respondents had lost the right to redeem the mortgaged property. As such they could not validly sustain a caveat on the mortgage property. Learned Counsel thus invited this Court to be persuaded by the High Court decision of **Afrikano Bakaihahwenki v Samuel Patrick Nganda: HCCS No. 86 of 2011.** Counsel prayed that ground 2 be allowed.

Ground 3:

It was the contention of Counsel for the Appellants that as a matter of law, general damages are compensatory in nature to restore some satisfaction to the victim of a loss or some injury. In this

case it is the Respondents' conduct of not carrying out what they contracted to carry out that had brought about whatever had happened. The Respondents therefore had not suffered any loss or injury. They had not proved any. Counsel relied on **Takiya Kaswahiri vs Kajungu Dennis (Supra)** in support of this submission and prayed Court to allow this ground 3.

Ground 4:

Learned Counsel contended that the Respondents never pleaded in **HCCS (Commercial Division) No. 106 of 2007** praying for mesne profits. The learned trial Judge was thus in error to consider and award mesne profits to the Respondents when not pleaded and when not testified to, by any witness; let alone submitted to by any Counsel of any party to the suit. The award was thus in contravention of **Order 7 Rule 1(9) of the Civil Procedure Rules**. Reliance was also put on: **Supreme Court Civil Appeal No. 08 of 2003: Goustar Enterprises Ltd v John Kokas Oumo**. By acting as he did, the learned trial Judge, with respect had condemned the Appellants affected without being heard at all in the cause of mesne profits, learned Counsel so argued. Such a holding of the learned trial Judge ought to be vacated pursuant to the Supreme Court decision of **Supreme Court Criminal Appeal No. 27 of 2002: Charles Harry Twagira v Uganda**.

Ground 4 has also to be allowed, according to Appellants' Counsel.

Ground 5:

Learned Appellants' Counsel contended that though the award of interest is within the exercise of discretion of the Court, that

exercise has to be exercised by awarding interest where it is equitable to do so and the interest must be reasonable.

The learned trial Judge had not stated the basis upon which he awarded interest at 21% p.a., more so, as the same had not been pleaded, not testified about and not submitted to.

Counsel reasoned that, while it is a legitimate consideration that interest should be awarded to one who has been kept out of use of his/her money for some time by the opposite party, this was not the case of the Respondents in this case. Referring to **Supreme Court Civil Appeal No. 02 of 2014: Crane Bank Ltd v Nipun Narrotam Bhatia** and **Supreme Court Civil Appeal No. 20 of 2007: Attorney General v Vichand Mithalal and Sons**, Counsel prayed that ground 5 be allowed.

Ground 6:

Learned Counsel relied on **Section 27 of the Civil Procedure Act** and submitted that a Court determining a cause must properly and judiciously use its discretion in determining costs. The principle that a successful party in a cause should not be denied costs except where it is shown that the litigation was unnecessary and could have been avoided, ought to be applied by the Court. Learned Counsel relied on **Kiska Ltd v Dengelis [1969] EA 6** to support his submission.

The learned trial Judge, learned Counsel submitted, was in error, when he did not award costs and interest on the Appellants' counter-claim based on the Master Lease Agreement, the Mortgage Deed and the Instruments of Guarantee as against the Respondents. Counsel thus prayed that ground 6 to be allowed.

All the above grounds of the appeal being successful, Appellants' Counsel prayed for the whole appeal to be allowed.

Submissions for the Respondents:

Ground 1:

Respondents' counsel found no merit at all in ground 1. Counsel contended that the learned trial Judge properly analysed all the evidence and properly concluded that the sale of the mortgage property to the 1st Appellant by the rest of the Appellants was conducted in secret, in bad faith, was done in suspicious circumstances and the due process was not followed.

The Appellants did not give the mortgagor the requisite notice under **Section 7(1) of the Mortgage Act** before executing the sale and transfer. Yet the Appellants were on notice of the interest of the Respondents in the mortgage property as was exemplified by the presence of the caveat on the mortgage property title.

It was further submitted by learned Counsel for the Respondents, that the mere fact that the Court interim order to stay the sale had lapsed after 45 days and the same had not been renewed and the interlocutory Judgment in **HCCS (Commercial Division) No. 106 of 2007** had been vacated, did not result in rendering the caveat to be inoperative. The same therefore was notice to the 1st Appellants as to the interest of the 1st Respondent in the mortgage property. Further, **HCCS (Commercial Division) No. 106 of 2007** remained pending determination by the High Court, and as such, was notice to the Appellants of the interests of the Respondents in the mortgage property. Learned Respondents' counsel prayed that ground 1 of the appeal be disallowed.

Ground 2:

Learned Respondents' Counsel maintained that the 1st Appellant bought and became registered proprietor of the mortgage property when there was a caveat on the title to the property; and while **HCCS (Commercial Division) No. 106 of 2007** that provided the basis for the caveat, and challenged the Appellants' decision to advertise in the Monitor Newspaper the mortgage property for sale, was still pending determination. This was notice to the 4th Appellant of the interest of the Respondents in the suit property. The existence of the caveat and the said Civil Suit had also been acknowledged in the sale agreement of 10.05.2007 whereby the 1st Appellant documented his buying of the mortgage property from the 2nd, 3rd and 4th Appellants.

Relying on **Supreme Court Civil Appeal No. 12 of 1985: David Ssejjaka Nalika v Rebecca Musoke**, Counsel maintained that the learned trial Judge was correct when he held that the 1st Appellant was not a bona fide purchaser for value without notice. Counsel prayed for the dismissal of ground 2.

Ground 3:

Counsel for the Respondents argued that the learned trial Judge rightly awarded general damages to the Respondents against the Appellants.

The Respondents had specifically pleaded for special and general damages to be awarded against the Appellants by reason of having carried out a fraudulent sale and transfer of the mortgage property to the 1st Appellant by the rest of the Appellants. The resultant deprivation, suffering, embarrassment, inconvenience and

financial loss suffered by the Respondents also entitled them to such damages. The learned trial Judge had, in awarding general damages, acted pursuant to the principle that whenever an injury or loss is done to a right, the law will presume damages. Learned counsel submitted that ground 3 ought therefore to be disallowed.

Ground 4:

Learned Respondents' Counsel argued that the pleadings in the Civil Suits in the High Court provided for a claim for mesne profits.

The Respondents pleaded and led evidence of their being wrongly evicted from the mortgage property by the Appellants without first having served a statutory notice of 60 days to the Respondents pursuant to **Section 7(1) of the then Mortgage Act.**

The Respondents' Counsel maintained, that the learned trial Judge rightly awarded the mesne profits to the Respondents, basing on the principle of law that wrongful possession of property is the very essence of a claim for mesne profits. Counsel invited this Court to consider the persuasive authority of **George Kasedde Mukasa v Emmanuel Wambedde & 4 Others: HCCS No. 45 of 1998.** Counsel prayed that ground 4 be also dismissed.

Ground 5:

Counsel for the Respondents found no merit in this ground. Counsel reasoned that **Section 26(1) of the Civil Procedure Act** vested in the learned trial Judge powers to award interest that is just and reasonable depending on the circumstances of the case. A trial Court is entitled to determine a just and reasonable rate of interest taking into account relevant factors such as inflation and

depreciation of currency that may be obtaining at the time. This is what the learned trial Judge had done. Counsel invited this Court to be persuaded by the decision of **Waiglobe (U) Ltd v Sai Beverage Ltd, HCCS No. 0016 of 2017** and to find this ground 5 to be without merit and dismiss the same.

Ground 6:

Learned Respondents Counsel reiterated that under **Sections 26(2) and 27(1) of the Civil Procedure Act,** the award of costs and interest was within the discretion of the Court.

Though the learned trial Judge found that the Respondents were indebted to the 2nd Appellant in the sum of moneys of the due rentals under the Master Lease Agreement, the Mortgage Deed and personal guarantees, the learned Judge, in the exercise of the discretion vested in him, did not award interest and costs to the 2nd Appellant because of the unbecoming conduct of the Appellants.

Such conduct was constituted by the unlawful sale and transfer of title of the mortgage property to the 1st Appellant by the rest of the Appellants.

The 1st and 3rd Respondents had also been unlawfully and unfairly been denied the right to redeem the mortgage property by being not given the due notice under **Section 7(1) of the Mortgage Act.** Relying on the authorities of **Wambugu v Public Service Commission [1972] 1 EA 296** and **Laxmiba v Radhabai [1971] 42 BOM 327**, learned Counsel urged this Court to find this ground 6 to be without merit and to disallow the same.

Learned Counsel for the Respondents finally prayed for the dismissal of the consolidated appeals since all the appeal grounds had failed.

Resolution of the Grounds of Appeal:

Ground 1:

In this ground the learned trial Judge is stated to have erred in law and in fact in that he failed to properly evaluate the evidence that was on record, and by reason of that failure, he found that the sale of the mortgage property by the 2nd, 3rd and 4th Appellants to the 1st Appellant was conducted in secret, without following the due process, was suspicious and was done in bad faith.

Having analysed of the evidence adduced at trial, I find that it was proved, on a balance of probabilities, that the 3rd Respondent committed breach of the Master Lease Agreement and the Mortgage Deed by failing to pay the agreed upon monthly rental payments on the agreed upon date and in the agreed upon amount to the 2nd Appellant every month, starting 28.02.2004 when the first instalment was due to be paid.

It was also established that in case of the breach of the terms as to payment of the monthly rentals, amongst others, agreed upon by the Respondents and the 2nd Appellant in the Master Lease Agreement and in the Mortgage Deed, that the 2nd Appellant was vested with power to exercise his right as a mortgagee under **Section 10 of the then Mortgage Act**. The Section provided:

"10. Sale Otherwise than by Foreclosure:

Where the mortgage gives power expressly to the mortgagee to sell without applying to Court, the sale shall be by public auction unless the mortgagor and encumbrancers subsequent to the mortgagee, if any, consent to a sale by private treaty".

Clause 5(a) of the Mortgage Deed provided:

"5(a) that the Mortgaged Debt hereby secured shall immediately became payable without demand and this statutory power of sale of DFCU Leasing shall forth with become exercisable without any further or other notice:

i) .....

ii) .....

iii) ***If the Lessee/Surety shall commict a breach of any terms and conditions of the Master Lease Agreement (including any covenants and agreements for the payment of the Mortgaged Debt);***

.....

.....

14. It is hereby agreed that if any of the moneys for the time being owed to DFCU Leasing are not forthwith paid on demand or having become payable without demand, the statutory powers of sale conferred on the mortgage by the Registration of Titles Act and the Mortgage Decree 1974 including powers to sell by

private treaty without reference to Court shall immediately become exercisable.

15. It is further Agreed that notwithstanding anything contained in the Mortgage Decree to the contrary DFCU or the Receiver(s) appointed shall have absolute and unfettered power to exercise power of sale by private treaty and the Mortgagor hereby irrevocably gives his unconditional consent thereto including but not limited to the choice of the purchaser and price".

The Mortgagee Decree, 1974 stated in the Mortgage Deed, was replaced by the Mortgage Act, Cap. 229, which was the operating law by the time of trial.

Clause 3 A and D of the Master Lease Agreement between the 3rd Respondent and the 2nd Appellant provided that the 3rd Respondent as Lessee shall pay to the 2nd Appellant as Lessor, in respect of the lease of the equipment, the rental and other payments specified in the Finance Lease Schedule. All rental payments were to be made by the Lessee to the Lessor on the due dates. Time was to be of the essence in relation to all obligations of the Lessee under the agreement.

In Clause 8(i) (iv) and (xi) of the Master Lease Agreement, the parties agreed that if at anytime during the lease term, the Lessee shall fail to pay any rental on the due date; or if 14 business days of written demand made by the Lessor upon the Lessee; or the Lessee is or is deemed for purposes of any law to be unable to pay its debts as they fall due; or to be insolvent; or

admits its inability to pay its debts as they fall due, then, in the event of such occurrence as stated in clause 8(i)(iv) and (xi), without prejudice to any other right or remedy which the Lessor may have, the Lessor may with or without notice, terminate the leasing of the equipment under the Master Lease Agreement and take possession of the equipment. Notwithstanding such repossession, the Lessee would remain liable to perform all obligations under the Master Lease Agreement.

Section 3 of the then Mortgage Act, availed the mortgagee three options under which to realise his/her security under the mortgage. These were by appointing a receiver, by taking possession of the mortgaged land or by foreclosure. The mortgagee was free to choose one or to have a combination of the three or any two of them.

The evidence at trial, established that the 3rd Respondent failed to meet the obligation of paying its rentals to the 2nd Appellant starting in respect of the first instalment payment and by October, 2006, the rental arrears due were UGX. 216,215,451=. The 2nd Appellant, after calling upon the 3rd Respondent to pay and the 3rd Respondent having failed to pay, terminated the lease facility and recalled all the monies due.

With the consent of the 3rd Respondent, the printing machine, was sold at UGX. 120,000,000= that was credited to the 3rd Respondent's account with the 2nd Appellant.

The 2nd Appellant enforced its security in the mortgage by appointing a Receiver/manager. The same was advertised for sale in the Monitor Newspaper on 17.11.2006. The mortgage

property was ultimately sold to the 1st Appellant at UGX. 220,000,000= on 10.05.2007. The 1st Appellant thereafter took ownership, possession and occupation of the mortgage property.

The 2nd Appellant after the sale of the Printing Machine and the Mortgage property remained claiming UGX. 392,432,369= as still due from the 3rd Respondent.

The learned trial Judge so held that the sale of the mortgage property to the 1st Appellant, was conducted in secret, without following the due process and was in bad faith and suspicious.

The learned trial Judge so held, because the mortgage property was taken possession of and sold without first giving to the Respondents, as mortgagor/guarantors, the notice of sixty days under **Section 7(1) of the Mortgage Act**.

His Lordship the trial Judge also took it as a reason that because the sale of the mortgage property was effected when the mortgagor had not been made aware that Moses Kirunda, the 4th Appellant, had become at the time of the sale, the Receiver/manager of the Mortgagee, replacing the earlier Receiver/Manager, Alex Michael Agaba, the 3rd Appellant, therefore the sale was not proper in law. The sale was also effected when **Civil Suits No. 106, 150 and 788 of 2007** were still pending determination in the High Court Commercial Division. The 1st Respondent had also caveated the said mortgage property.

The learned trial Judge rejected the Appellants' case that because the 3rd Respondent failed to meet payments of the

rentals under the Master Lease Agreement and the 1st and 2nd Respondents failed to meet their respective obligations as guarantors, this entitled the Appellants to dispose of the mortgage property in the manner they did.

I have carefully subjected to review the evidence that was adduced by all parties before the learned trial Judge. I have also carefully considered both the statutory and case law authorities applicable to the facts and issues in this case on this particular issue.

It is not in dispute that the 3rd Respondent, a limited liability company, in which the 2nd and 3rd Respondents, were directors, executed a lease facility agreement and a mortgage Deed on 17.12.03 whereby the 3rd Respondent secured a leasing facility of a printing machine with rental funds being provided by the 2nd Appellant. The lease was for 5 years and the rental funds were to be repaid within that period. The 1st Respondent, through a Power of Attorney, surrendered her developed land property comprised in LRV 2839 Folio 17 Plot 108 Katalima Road, Naguru/Nakawa, to the 3rd Respondent to mortgage the same with the 2nd Appellant. The 1st and 2nd Respondents, also executed personal guarantees to be personally liable to the 2nd Appellant in case the 3rd Respondent failed to effect the due and prompt payment of rentals.

The Master Lease Agreement, the Finance Lease schedule, the Power of Attorney (by 1st Respondent), the mortgage, the personal guarantees of the 1st and 2nd Respondents, all executed between the 2nd Appellant and the Respondents are the

documents whereby all the parties freely and voluntarily, agreed upon the terms and condition to govern their relationships in the transaction.

This Court in **Behangane v School Outfitters (U) Ltd, [2002] 1 EA 20 at p. 23,** Berko, JA, with the concurrence of the rest of the Court held:

"One of the basic principles in the law of contract is that the parties have freedom to fix the terms of their own bargain. The Courts do not concern themselves with the question whether adequate value had been given or whether the agreement is harsh or one sided. The fact that one person pays too much or too little for a thing may be evidence of fraud or mistake or it may induce the Court to imply or to hold that the contract has been frustrated. But it does not in itself affect the validity of the contract. Thus in the absence of fraud, duress, undue influence, mistake and misrepresentation, the Courts will enforce a promise so long as some value for it has been given".

I respectfully agree with the above holding as representing the correct position of the law. Accordingly, Courts of law do not interfere with the contractual rights of the parties that are freely and voluntarily agreed upon and expressed in a written agreement.

The evidence in this case is that the Respondents agreed with the 2nd Appellant in Clause 5(a) of the Mortgage Deed that the Mortgage debt was to become immediately payable without demand and the statutory power to sale the mortgage property would become exercisable by the 2nd Appellant, as the

mortgagee, without further or other notice, if the mortgagor or the surety committed breach of any term or condition of the Master Lease Agreement.

Under Clauses 14 and 15 of the Mortgage Deed the mortgagee, the mortgagor, and the sureties/guarantors further agreed that, in case of failure to pay the rentals, the 2nd Appellant would be entitled to exercise the power to sale the mortgage property by private treaty without reference to Court. The Respondents thus gave their Respective unconditional consent to the 2nd Appellant to exercise those powers.

At trial, the Respondents admitted having defaulted in their rental payment obligations. The learned trial Judge himself held so when he so determined the 2nd Appellant's counter-claim. This therefore entitled the 2nd Appellant, as mortgagee, to take possession and to sell the mortgage property by private treaty under **Section 3 of the then Mortgage Act**, and Clauses 5, 14 and 15 of the Mortgage Deed and 3A and D of the Master Lease Agreement.

Through those respective Clauses of those agreements, the 3rd Respondent as Mortgagor and the 1st and 3rd Respondents as sureties/guarantors, expressly consented to a sale by private treaty by the mortgagee in case of failure to meet due payment of the rentals by the Mortgagor. Accordingly **Section 10 of the then Mortgage Act** became applicable.

The 2nd Appellant, as Mortgagee, thus acted in compliance with the law and the Master Lease Agreement and the Mortgage Deed, when, with the stated express consent of the

Respondents, as Mortgagor, sureties and/or guarantors, he proceeded to sale by private treaty the mortgage property. It was also within the 2nd Appellant's powers to appoint a Receiver/Manager as and when he chose to do so. He was also under no obligation to first notify the Respondents of the person he was appointing.

Section 4 of the Mortgage Act and Clause 6 of the Mortgage Deed provided the powers to the 2nd Appellant to appoint a Receiver/Manager.

The letter appointing the Receiver/Manager dated 13.11.2006 specifically stated:

> *".....We hereby appoint you Receiver/Manager of the above mentioned property and assets comprised in the mortgaged property so that you exercise all the powers therein conferred, including sale of the mortgaged property necessary to recover all the outstanding sums of money owed by Access Reprographics Limited ....."*

It was thus clear that the Receiver/Manager was appointed to, among other responsibilities, to sell the properties the subject of the mortgage and the Master Lease agreement.

The Respondents as Mortgagor/Sureties and/or guarantors, having expressly agreed and consented to the Mortgagee, to exercise power to sell the mortgage property through private treaty, the Mortgagee was entitled to act as he did under **Section 10 of the Mortgagee Act.** Accordingly **Section 7(1) of the Mortgage Act** that required the Mortgagee, for the purpose of realisation of the security in the Mortgage, to first give to the Respondents as

Mortgagor sixty days notice of the Mortgagee's intention to enter into possession of the mortgage land security, was not applicable to the 2nd Appellant, as Mortgagee, in the circumstances of this case.

Where the power to appoint a Receiver/Manager is also derived from the Mortgage Deed, the Receiver/Manager's powers are determinable by what the parties to the Mortgage Deed agree upon.

The learned author WAYNE CLARK in FISHER AND LIGHTWOOD'S LAW OF MORTGAGES, *11th Edition page 457* expounds that:

> *"Where a Receiver is appointed under an express, rather than statutory powers, the extent of his powers will be determined by the terms of the instrument under which he was appointed. A Receiver appointed with the power to do something also has an incidental power to do what is necessary to effect that object".*

The above position has been applied by the Courts in Uganda in **Supreme Court Civil Appeal No. 22 of 1993: Barclays Bank (Uganda) Ltd v Livingstone Katende Luutu.**

In that case the Respondent guaranteed a debt by mortgaging his land to the Appellant bank. The principal debtor defaulted on payment to the bank.

The bank advertised the Respondent's property for sale after demand to pay had been made to him. The Respondent sued for an injunction against the sale. The trial Court granted the injunction because, according to that Court, the Respondent stood

to suffer irreparable loss since his property had value of UGX. 120 million, yet the debt due, was only UGX. 4.5 million. Further, the bank had not sought power of Court to realise its security. The bank appealed.

The Supreme Court allowed the appeal holding that, the bank as mortgagee did not require leave of Court to realise its security since by the terms of the mortgage, the mortgagor irrevocably expressly consented to the sale without recourse to Court in the event of the failure to pay the loan. This power conformed to **Section 9 of the Mortgage Decree (later Section 10 of the Mortgage Act, Cap. 229).** The sale without recourse to Court having been agreed upon by the parties, it was sanctioned by **Section 9 of the Mortgage Decree.**

Further, in the persuasive decision of **Jane Francis Nakamya vs DFCU Bank Ltd and Another, HCCS No. 813 of 2007**, the trial Judge F.M.S. Egonda-Ntende, J. (as he then was) relying on the above decision of **Barclays Bank of Uganda Ltd vs Livingstone Katende Luutu (Supra)** held that, where a mortgage expressly gave the mortgagee or the receiver express power to sell the mortgage property by private treaty, the sale of the property by invoking such express powers was lawful.

Therefore with the greatest respect to the learned trial Judge, I find that His Lordship was not justified in law and in fact, when he held that the 2nd Appellant, as Mortgagee, as well as the Receiver(s)/Manager(s) of the mortgagee, were bound under **Section 7(1) of the Mortgage Act** to first give to the Respondents sixty days prior notice of the intention to take over possession of

the mortgage property for purpose of selling the said property to recover the moneys due. I find that the 2nd Appellant and the appointed Receiver(s)/Manager(s) of the 2nd Appellant, complied with the law by giving to the Respondents the requisite due notice pursuant to **Section 117 of the Registration of Titles Act, Cap. 230.**

As to demands for payment of the sums due, the evidence adduced proved that from January, 2006 throughout up to March, 2008, the 2nd Appellant was, in writing, communicating demands for payment of the sums due to the Respondents, in their respective capacities as mortgagor, sureties and/or guarantors under the Master Lease agreement, Finance Lease Schedule and/or the Mortgage Deed. These notices amounted to almost giving the Respondents a period of more than three (3) years within which to pay the sums that were due. The written notice were given on 14.01.2006, 13.10.2006, 24.10.2006, 13.11.2006, 14.02.2007, 15.02.2007, 10.04.2007 and 19.03.2008.

As already held, **Section 7(1) of the Mortgage Act** did not appropriately apply to the facts of this case, but at any rate, even if the said **Section 7(1) of the Mortgage Act**, was to be applied, the Respondents were duly served with demand notices for them to meet payment and also informing them of the intention of the 2nd Appellant to take possession for the purpose of selling, of the Lease Printing Machinery and/or the mortgage property so as to recover the moneys due.

It is my finding that appropriate due notices, beyond even the statutory 60 days, were served upon the Respondents before the

Lease Equipment and mortgage property were disposed of in realisation of the sums that were due.

It is contended for the Respondents that the mortgage property LRV 2839 Folio 17 Plot 108 Katalima Road, Naguru/Nakawa, registered in the names of the 1st Respondent, who had also caveated the same, was transferred and registered in the names of the 1st Appellant without issuing at all any notice to do so to the 1st Respondent, as caveator, which was contrary to **Section 141 of the Registration of Titles Act.** The failure to do so rendered the registration of the mortgage property into the names of the 1st Appellant to be contrary to law and thus null and void. This was the more so since the 1st Appellant acquired the mortgage property while aware of the existence of such caveats as he acknowledged in Clause 5 of the Sale Agreement dated 10.05.2007: Exhibit P12.

The evidence on record established that at the time of the execution of the Sale agreement, Exhibit P.12, there were two caveats lodged on the mortgage property. The 2nd Appellant had lodged a caveat to protect its interest in the property as mortgagee. Since it was the 2nd Appellant, through its Receiver/Manager, the 2nd and the 3rd Appellants, who were selling the mortgage property to the 1st Appellant, the existence of this caveat at the time of the sale of the mortgage property to the 1st Appellant was a matter of no concern.

The 2nd Appellant through the appointed Receiver/Manager removed this caveat so as to enable the 1st Appellant get registered of the mortgage property.

As to the second caveat, the same was lodged on the suit property on 23.01.2007 by the 1st Respondent, as registered proprietor of the mortgage property. The 1st Respondent deponed to an affidavit stating the reasons for the caveat to be:

"7. That I together with Access Reprographics Limited filed HCCS No. 741 of 2006, to, inter alia, seek a permanent injunction to restrain DFCU Leasing Company Limited from selling my said property and whereof I obtained an interim order to that effect and served it upon DFCU Leasing Company Limited.

8. That I have also obtained an interlocutory Judgment in the said suit and the same is still pending formal proof and final determination in the High Court.

9. That in the meantime DFCU Leasing Company Limited is trying to employ extra Judicial means to dispose of my said land and house despite the existence of an interim order and an interlocutory Judgment to restrain the said mortgagee from disposing my property".

This caveat was lodged basing on the fact that the caveator had lodged in Court **HCCS No. 741 of 2006 (HCCS No. 106 of 2007** in Commercial Division), had obtained an interim order restraining the 2nd Appellant from selling the mortgage property and she had also obtained an interlocutory Judgment in the suit.

The contention of the Appellants was that by the 10.05.2007 when the 4th Appellant as Receiver/Manager sold the mortgage property to the 1st Appellant, the 1st Respondent no longer had any caveatable interest in the mortgage property. This is because, amongst other reasons, the interim order issued in HCCS No. 741 of 2006

had expired after 45 days from the date it was issued. Also the interlocutory Judgment in the said suit had been vacated. Since this caveat had been based upon those two, then the caveat was also taken as having been vacated.

I have carried out an analysis of the law applicable and the evidence that was before the trial Court as regards the status of this caveat.

It was an admitted fact by the Respondents that by October, 2006 the Respondents as borrower/Mortgagor (3rd Respondent) and as sureties and guarantors (1st and 2nd Respondents) had defaulted on the Leasing facility monthly rental payments to arrears of UGX. 216,125,451=.

Under Clause 3(d) of the Master Lease Agreement, the Respondents and Appellants bound themselves that in the re-payment of the lease rentals time was to be of the essence.

They also further mutually agreed that the consequences of failure to pay rentals in time were termination of the lease, repossession of the lease equipment and/or mortgage property and enforcement of the rights of the 2nd Appellant, including the right to sell under the Master Lease Agreement and also under the Mortgage Deed respectively, pursuant to Clauses 8 and 10 of the Master Lease Agreement and Clauses A,B,C, 5(a)(iii), 11 and 12 of the Mortgage Deed.

Clause 5(a)(iii) of the Mortgage Deed provided that the Mortgaged debt shall immediately become payable without demand and the statutory power of sale by the 2nd Appellant shall become exercisable without any further or other notice, if the 3rd

Respondent and 1st Respondent as surety shall commit breach of any terms and condition of the Master Lease Agreement, including those for the payment of the Mortgage debt.

It follows therefore, that the 1st Respondent, one who granted the Power of Attorney to mortgage the land property, no longer had any valid interest in the mortgage land property to rely upon to lodge a caveat forbidding the 2nd Appellant from carrying out any dealings on the said mortgage land. Punctual payment of the rental instalments was a fundamental condition, commission, default of, went to the root of the whole financial lease contract transaction.

It must have been in bad faith for the 1st Respondent to lodge the caveat on the mortgage property in respect of which she had vested powers in the 2nd Appellant, to dispose of the same by private treaty, in case of breach to pay the monthly rentals. She was aware of that breach by the time she lodged the caveat. She was being untruthful for not disclosing in the affidavit supporting the caveat, that there was default of payment of the lease rentals. See: **Lourbard North Central PLC vs Butterworth (1987) 1 ALLER 267.**

The 1st Respondent, on failure by all the Respondents to meet prompt and regular payments of the financial rentals, could not claim to have legitimate interest in the mortgage land, as a basis for lodging a caveat upon the same, against the interests of the 2nd Appellant.

It was submitted for the 1st Respondent that she lodged the caveat on the mortgaged property because of the pendency in Court, pending determination, of **Civil Suit No. 741 of 2006: Gladys**

Nyangire Karumu and Access Reprographic Limited vs DFCU Leasing and Alex Michael Agaba, later transferred to the Commercial Court Division as **HCCS No. 106 of 2007.**

In the suit the Plaintiffs sought reliefs from both Defendants for having wrongfully evicted the Plaintiffs from the mortgage property because they were not given the statutory sixty (60) days notice under **Section 7(1) of the then Mortgage Act**. The Plaintiffs thus sought against the Defendants a permanent injunction against the realization of the mortgage security.

On 04.12.2006, through **High Court Miscellaneous Application No. 992 of 2006** arising from the said main suit, the Registrar, High Court Land Division, issued an interim order staying the sale of the mortgage property for 45 days.

Earlier before 04.12.2006, an interlocutory Judgment had been entered against the defendants to the said suit by reason of their having failed to file a defence in the suit when duly served with the Court summons of the suit.

In the affidavit in support of the caveat she lodged on 23.01.2007, the 1st Respondent (1st Plaintiff in the suit) in paragraphs 7,8,9 and 10 of the affidavit in support of the caveat, relied upon the fact that the Court had issued in the suit an interim order staying the sale of the mortgage property and the interlocutory Judgment entered in the main suit, as the basis for lodging the caveat so as to restrain the 2nd Appellant from using extra judicial means to dispose of the mortgage property.

The Court interim order to stay the sale of the mortgage property lapsed on 17.01.2007 after the expiry of 45 days from the date of

its issue of 04.12.2006. The issuing Court had so ordered. No steps were taken by the 1st Respondent to extend it.

The interlocutory Judgment entered in the said main Civil Suit was also set aside on 04.04.2007 by His Lordship Egonda-Ntende, J. (as he then was) in **Miscellaneous Application No. 109 of 2007.**

It followed therefore that the expiry of the Court Interim Order to stay sale of the mortgage property and the setting aside of the interlocutory Judgment in the main suit deprived of the 1st Respondent basis for maintaining a caveat on the mortgage property.

A Court of law does not act in vain. The High Court had ordered in its Interim Order that the stay of the sale of the mortgage property was to last for 45 days, and thereafter, unless extended by the Court, the sale was to be effected, regardless of whether or not the mortgage property was caveated by the 1st Respondnt. Accordingly the lapse of the Court Order to stay sale of the mortgage property after 45 days also automatically lapsed the 1st Respondent's caveat on the said mortgage property.

This is because the maintenance of the caveat on the mortgage property would render the Court to have acted in vain, when it ordered that after expiry of 45 days, unless there was an extension by Court, the sale of the mortgage property was free to go on. Equally the setting aside of the interlocutory judgement in the main suit also automatically lapsed the 1st Respondent's basis for lodging a caveat on the mortgage property.

The mere fact that the main suit **HCCS No. 741 of 2006 (Land Division) HCCS No. 106 of 2007 (Commercial Court)** was

pending when the sale of the mortgage property proceeded on, was no bar to that sale. The Supreme Court in **J.W.R. Kazzora vs M.L.S. Rukuba: Civil Appeal No. 13 of 1992,** Oder (RIP) held:

> *"As regards the contention that the second caveat was different because it mentioned the suit, I am not aware of any* ***lis pendens*** *rule in our jurisdiction which forbids dealings in land which is the subject matter of a pending suit"*

Platt, JSC, emphasized:

> *"There is no lis pendens rule in Uganda. A purchaser either protects himself by a caveat or a Court injunction. Unfortunately the Appellant did not seek an injunction. In these circumstances, despite the various errors which the Registry committed the registration of the Respondent's title on 6th May, 1988, cannot be assailed".*

Likewise in this case, the caveat of the 1st Respondent collapsed with the lapse of the interim Court order staying the sale when the expired and was not extended after 45 days.

The mere pending in Court of the main **Civil Suit No. 741 of 2006, later HCCS No. 106 of 2007** was also no bar in law to prevent the 1st Appellant from purchasing and being registered as proprietor of the mortgage property.

The submission that the Commissioner Land Registration, ought to have served notice of 45 days upon the 1st Respondent as caveator, under **Sections 139 and 140 of the Registration of Titles Act** before registering the 1st Appellant as proprietor of the

mortgage property, has no validity for the same reasons that have been stated.

The 1st Respondent's caveat was, from the very beginning based on a falsehood that it was based on the existence of a Court interim order to stay sale of the mortgage property, when in fact that Court order had already expired on 17.01.2007 by the time the 1st Respondent lodged the caveat on 23.01.2007. The same caveat also lost its basis when the interlocutory Judgment entered in the main **Civil Suit No. 741 of 2006 (later 106 of 2007)** was also set aside.

The Commissioner, Land Registration, therefore had the powers under **Section 145 of the Registration of Titles Act** to vacate the said invalid caveat from the mortgage property and register the 1st Appellant as proprietor of the same. The Commissioner did so after diligently carrying out due inquiry from the High Court. The Registrar of the said Court had in writing on 18.05.2007 confirmed that there was no Court order preventing the sale of the mortgage property.

The Respondents were bound by Clauses 10,11,14 and 15 of the Mortgage Deed where they agreed with the 2nd Appellant that, in the exercise of the powers of sale of the mortgage property, the purchaser of the mortgage property was not to be concerned or inquire about the right of the 2nd Appellant, Receiver/Manager, as to their exercise of the power of sale or issues of notice of sale being given to the mortgagor. (Clause 10). The 2nd Appellant was to exercise such powers as he saw fit. (Clause 11).

Once the monthly rentals were not paid in the amount and on the dates agreed upon, the 2nd Appellant was empowered to immediately exercise the powers of sale of the security by private treaty or otherwise without resorting to Court and with or without notice to the Respondents. (Clauses 14 and 15). The Respondents unconditionally agreed and consented to the 2nd Appellant/Receiver/Manager to exercise those powers, as they many deem fit, including the power to choose the purchaser and the price to be paid for the mortgage property.

Having so agreed and consented as above, the Respondents were asserting, falsely and in bad faith, that the mortgage property was sold and transferred to the 1st Appellant without their being given any notice. Such an assertion could not in law defeat the title of the 1st Appellant of being registered proprietor of the mortgage property.

The requirement to act in good faith, honestly, diligently and without any fraud applied equally to all the parties to the transaction, Respondents and Appellants inclusive, and not only upon the 1st Appellant as purchaser.

The onus of proving that any party to the transaction acted dishonestly, not in good faith, not diligently and or with intent to defraud is on the one so alleging. The fact that the subsequent purchaser has had notice of a prior conveyance or dealing in the property being purchased do not per se invariably result in making the purchase defective. Such a purchaser may, on availing valid grounds defeat such effect of a prior conveyance or dealing in the mortgage land. See: **National Bank v Behan [1913] 11 R. 512**

and **Halsbury's Laws of England, Vol. 17, 3rd Edition Para 1287 page 665-666.**

Before the learned trial Judge, it was proved, through exhibit P.12 that the 1st Appellant bought the mortgage property aware of caveats thereon, one by the 1st Respondent and the other by the 2nd Appellant and that the property was the subject of litigation in **HCCS No. 741 of 2006** later **HCCS (Commercial Division) No. 106 of 2007**.

The 1st Appellant was also aware that the property had the 1st and 2nd Respondents as occupants. He was to evict them at his cost.

The 1st Appellant in cross-examination explained that before executing the sale agreement, his then lawyer (Kwarisiima, RIP) searched and examined everything and concluded that the purchase should be executed. That advice was based on the facts that the 2nd Appellant's caveat was to be vacated when the sale of the mortgage property would be executed.

Then the caveat of the 1st Appellant was based on the Court orders issued in **HCCS No. 741 of 2006** later **HCCS (Commercial Division) No. 106 of 2007** for interim stay of sale and for an interlocutory Judgment being entered in the suit. These orders had lapsed and been vacated and by reason thereof the said caveat had also become inoperative. As to the existence of **HCCS No. 741 of 2006** later **HCCS (Commercial Division) No. 106 of 2007,** its mere existence per se did not as a matter of law prevent further dealings in the mortgage property.

The Appellants on the basis of the above advice acted in good faith, honestly and diligently in executing the transaction of sale and transferring the mortgage property to the 1st Appellant.

The Respondents, through the 1st (Pw2) and 2nd (Pw1) Respondents asserted in evidence that the 2nd, 3rd and 4th Appellants acted without powers to sell the mortgage property to the 1st Appellant; and that the said sale was done without their (Respondents) knowledge and at an under value. All this showed bad faith, dishonesty and lack of diligence on the part of the Appellants. Each one of them claimed that on their part, as Respondents, they had conducted themselves honestly, in good faith and diligently throughout the transaction.

It was, in my considered view, an act that showed honest, good faith, due diligence and transparency on the part of the Appellants to specifically state the existence of the caveats and the civil suit in the Sale Agreement, Exhibit P.12. It was proof that the Appellants were not hiding anything in their transaction.

The evidence as regards the two caveats is that the caveats placed by the 2nd Appellant was vacated after the 1st Appellant had purchased the mortgage property from the 4th Appellant as Receiver of the 2nd Appellant.

The other caveat was lodged by the 1st Respondent on the 23.01.2007. It was supported by an affidavit of the 1st Respondent who in paragraph 6 thereof stated on oath that the 2nd Appellant terminated the financial lease agreement in 2006 before its expiry, repossessed the printing machine, unlawfully appointed receivers,

evicted her and her family from the mortgage property and advertised the same property for sale.

In paragraphs 7 and 8 of the supporting Affidavit the 1st Respondent further asserted that she and the 3rd Respondent had lodged in the **High Court HCCS No. 741 of 2006** and had obtained an interim order restraining the sale of the mortgage property and that she had also obtained an interlocutory Judgment in the same suit and that the same was pending final determination by way of formal proof. It was on the basis of these assertions that she lodged the caveat.

Designedly, and in bad faith, the 1st Respondent did not state in her said Affidavit that the Appellants were taking the steps they were taking because she and the other Respondents had failed to meet payment of the monthly rentals as agreed upon with the 2nd Appellant. The 1st Respondent did not also disclose in the same affidavit that she and her husband, the 2nd Respondent, the only shareholders and directors in the 3rd Respondent, had each personally guaranteed the prompt payment by the 3rd Respondent of each monthly rental and that they were both in breach of that guarantee.

The 1st Respondent did not also disclose that she was surety in the Mortgage Deed under whose terms and conditions, the 2nd and 3rd Appellants were exercising the power of sale.

The acting of the 1st Respondent as above cannot be said, in my considered view, to have been in good faith, honest and with due diligence.

Further, the Court interim order restraining the 2nd and 3rd Appellants from selling the mortgage property was issued by Court on 04.12.2006. It was to expire after 45 days, unless extended by Court. It thus expired on 19.01.2007 and was never extended by Court. The 1st Respondent as Caveator did not take any steps to move Court to extend it. So by the 23.01.2007 when the 1st Respondent deponed to the affidavit in support of the caveat, the said order was no longer in existence. The 1st Respondent who was certainly aware of this fact of the expiry of the interim order of Court to stay the sale thus based the lodgement of this caveat on this falsehood, that the said interim order was still operative, whereas not. This falsehood was on oath by the 1st Respondent in her Affidavit in support of the Caveat deponed to on 23.01.2007 though in her Affidavit the date of deponement is wrongly stated as 23.01.2006 (see page 271 volume 1 of the Record of Appeal). The said Affidavit could not have bee deponed to by the 1st Respondent on a date that was before the lodgement of **HCCS No. 741 of 2006.** The said suit was lodged in Court on 27.11.2006.

As to the interlocutory Judgment in **HCCS NO. 741 of 2006**, the same was set aside on 04.04.2007, so that as from that date the same ceased to be a basis for the existence of the caveat. This was the position on 10.05.2007 when the sale of the mortgage property to the 1st Appellant was executed.

As to the pendency of **HCCS No. 741 of 2006, (Land Division) later HCCS No. 106 of 2007 (Commercial Court)** when the sale was effected, it is the law that the pendency of a suit in a Court of

law is no bar on its own to prevent dealings with the said land. See: **Kazzora v Rukuba (Supra).**

In addition to the above, the evidence available proves that the Respondents only resorted to lodging the said suit **HCCS No. 741 of 2006** in Court as a means to delay and disable the 2nd Appellant from enforcing his rights of sale by private treaty or otherwise of the mortgage property as the mortgagee.

The 2nd Appellant never unilaterally terminated the Lease Agreement on 24.10.2006. Notices, discussions and time to repay had gone on between the Respondents and the 2nd Appellant.

The Respondents themselves offered that the printing machine be sold and the proceeds cover some of the rentals they had failed to pay.

At all material time the 2nd, 3rd and 4th Appellants disclosed to the Respondents the amounts due for re-payment. The Respondents did not dispute the same. At no time was an opportunity to redeem the mortgage property refused. Every time, the Respondents sought for this opportunity and the same was availed, they failed to meet their obligation to repay the moneys due, even when there was re-scheduling of payment.

The Mortgage Deed and the Master Lease agreement allowed the 2nd, 3rd and 4th Appellants to dispose of the mortgage property by private treaty with or without notice being given. The Respondents thus pleaded otherwise dishonestly and in bad faith in **HCCS No. 741 of 2006**. Notices and demands to pay were given to the Respondents by the 2nd Appellant beginning February, 2004, when they failed to meet payment of the first rental instalment. The

Monitor Newspaper advertisement of 17.11.2006 was proof of an opportunity to the Respondents to redeem the mortgage property within the 30 days before the sale.

The learned trial Judge in his Judgment also came to the same conclusion that the Respondents had failed to meet their obligations as Lessor/Mortgagor/Sureties/Guarantors in punctually meeting the monthly rental payments. They were thus found liable to the 2nd Appellant in the adjusted sums claimed in the counter-claim.

The subsequent Civil Suits **HCCS No. 150 of 2007 and 788 of 2007** were lodged after the sale of the mortgage property had been concluded.

Likewise the High Court eviction order: **Miscellaneous Cause No. 70 of 2007** of 21.05.2007 which order was set aside on 19.07.2007 in **Miscellaneous Application No. 552 of 2007**, all happened after the sale of the mortgage property to the 1st Appellant on 10.05.2007. Accordingly they have no bearing on whether or not the 1st Appellant obtained a proper title of ownership to the mortgage property from the Appellants.

It is not in dispute at all, that the 1st, 2nd and 3rd Respondents executed with the 2nd Appellant:

1. **The terms of approved leasing facility on 08.12.2003, Exhibit P.1.**
2. **The sale and Lease Back Agreement on 17.12.2003.**
3. **The Master Lease agreement on 17.12.2003, Exhibit P.2: Clauses 3D, 8(i)(ii), 14 D (1) are of particular relevance.**
4. **The Finance Lease Schedule on 17.12.2003.**

5. **The Mortgage Deed on 17.12.2003, Exhibit P.5 with Clauses 5(a)(iii), (g), 6(a), 8,9, 10,12, 14 and 15 of particular relevance, and**
6. **Personal guarantee by 1st Respondent on 17.12.2003, Exhibit D1**
7. **Personal guarantee by 2nd Respondent on 17.12.2003, Exhibit D2.**

In the above documents the Respondents as mortgagor, Lessee, Sureties and/or guarantors individually and/or collectively agreed and undertook with the 2nd Appellant, that:

(a) Failure to pay monthly rentals under the Master Lease Facility would entitle the 2nd Appellant to take possession and/or sale the mortgage property by public auction or by private treaty with or without prior notice and/or demand being given to the Respondents.

(b) The purchaser of the mortgage property was not to inquire as to the circumstances of the 2nd Appellant as to the exercise of those powers of sale by private treaty or otherwise.

(c) The 1st and 2nd Respondents personally guaranteed the prompt payment of any moneys due as rentals from the 3rd Respondent.

(d) The 2nd Appellant was vested with powers to appoint a Receiver/Manager or replace such a one as and when he chose to do so.

I find therefore that the Respondents having agreed as above, by acting as they did, the Respondents acted in breach of their undertakings in the stated executed documents. This was proof of

bad faith, dishonest and in breach of what had been agreed upon with the 2nd Appellant in the stated executed documents. This such conduct was exemplified by the 1st Respondent lodging a caveat on the mortgage property and also by the Respondents lodging in Court **HCCS No 741 of 2006**, later **HCCS No. 106 of 2007** in the Commercial Court.

It is this conduct of bad faith, dishonesty and lack of transparency and due diligence that the 1st, 2nd and 3rd Respondents are relying upon to defeat the title of the 1st Appellant as purchaser of the mortgage property from the 2nd, 3rd and 4th Appellants.

The learned trial Judge held in support of the Respondents that the 1st Appellant did not get good title to the mortgage property since he bought the same while on notice of the caveat of the 1st Respondent and also of the pendency of **HCCS No. 741 of 2006**, later **HCCS106 of 2007**.

I, with the greatest respect, disagree with the above holding of the learned trial Judge.

For the reasons already elaborated, I have come to the conclusion that the 1st Respondent's caveat on the mortgage property was based on a fundamental falsehood, lacked basis for being lodged and was a manifestation of the 1st Respondent's conduct, and that of the other Respondents, of bad faith, dishonesty and lack of transparency in their dealing with the 2nd, 3rd and 4th Appellants as regards the mortgage property.

The lodgement of the caveat on the mortgage property as well as the lodgement and prosecution of **HCCS No. 741 of 2006**, later **HCCS No. 106 of 2007** in the High Court for the purpose of

preventing the 2nd Appellant from exercising his powers and rights as Lessee/Mortgagee, agreed upon and set out in the already stated agreement documents, amounted to conduct in bad faith, dishonesty and without due diligence and transparency on the part of the Respondents. Such acts and conduct therefore cannot be relied upon, as the responds are purporting to do, to defeat the title of the 1st Appellant when acting bona fide and for value he bought the mortgage property from the 4th Appellant as Receiver/Manager of the 2nd Appellant.

I accordingly allow ground 2 of the appeal, with a rider that the 1st Appellant was a bona fide purchaser for value with notice of matters that were not capable of defeating his title to the acquired mortgage land.

Ground 3:

Whether the learned trial Judge erred in law and fact in awarding the Respondents general damages.

The learned trial Judge awarded to the Respondents general damages of UGX. 50,000,000= as against the 2nd and 3rd Appellants for the said Appellants going into possession of the mortgage property contrary to **Section 7(1) of the Mortgage Act**. Additional general damages of UGX. 50,000,000= were awarded specifically against the 3rd and 4th Appellants. The general damages and the mesne profits were to carry interest of 21% p.a. from the date of Judgment till payment in full.

This Court, as a first appellate Court, may only interfere with an award of general damages made by the trial Court, if the Appellants succeed in proving that the trial Court in making the

award acted on a wrong principle of law: See: **Supreme Court Civil Appeal No. 06 of 1999: Francis Sembuya v All Port Services (Uganda) Limited**.

General damages are awarded to compensate the claiming party for the damage, loss or injury that party may have suffered. See: **Supreme Court Civil Appeal No. 08 of 1999: Robert Cuossens v Attorney General**.

The evidence that was adduced before the trial Judge clearly proved that the Respondents were the author of their own loss and/or sufferings.

The 3rd Respondent, consistently defaulted on its rental payments, starting with the very first instalment payment that was due on 28.02.2004. The arrears of rental payments resulted into the entire sum due being UGX. 713,103,508= as of 15.02.2007.

Having admitted that they had failed to meet the due payments of the agreed upon monthly rentals on the due dates, thus signalling the 2nd Appellant to take the steps agreed upon in the stated agreements and documents, which steps the 2nd Appellant took, the Respondents cannot be heard claiming any damages from the Appellants.

The learned trial Judge himself, held in his Judgment that the Respondents were indebted to the 2nd Appellant. By so holding the learned trial Judge accepted as proved, that the Respondents had acted in breach of the written agreements they had executed as regards the repayment of the rentals every month. Having acted in breach of those agreements, the Respondents could not claim general and mesne profits from the Appellants.

Specifically with regard to the 1st Appellant, he did what he did, in the transaction as a result of the 2nd Appellant rightly exercising and enforcing his (2nd Appellant) rights against the Respondents. There was therefore no basis at all for the Respondents being awarded general damages or mesne profits against the 1st Appellant.

As against the 3rd and 4th Appellants, these carried out whatever they carried out as Receivers/Managers appointed by the 2nd Plaintiff. To the extent that the 2nd Appellant rightly carried out his obligations under the stated documents, then the Respondents had no basis for claiming and being awarded general damages against the 3rd and 4th Appellants.

It has already been held in this Judgment, that the 2nd Appellant in enforcing his rights against the Respondents was not bound by **Section 7(1) of the Mortgage Act**. It follows therefore that the learned trial Judge erred to award damages to the Respondents against the Appellants on the apparent ground that **Section 7(1) of the Mortgage Act** had been violated by the Appellants to the prejudice of the Respondents.

The correct position of the law is that parties to a contract are bound by the bargains they freely and voluntarily agree upon and set them out in the contract which they so execute so as to be subsequently bound by the same. See: **Behange Jennifer v School outfitters (U) Ltd [2000] 1 EA 20.**

One of the matters agreed upon between the Respondents and the Appellants under Clauses 8 and 9, considered together with Clauses 5(a)(iii), 6(a), 10, 11, 12, 14 and 15 of the Mortgage Deed

was that the Receiver/Manager appointed by the mortgagee pursuant to the Mortgage Deed was to be the agent and attorney of the mortgagor, (3rd Respondent), and the surety, (1st Respondent) while carrying out responsibilities of the Receiver/Manager. It follows therefore that the 1st and 3rd Respondents could not recover damages out of acts carried out by their respective agents/attorneys, the 3rd and 4th Appellants.

In conclusion, for the reasons stated above the learned trial Judge, with respect, erred to award general damages to the Respondents.

Ground 3 of the appeal is accordingly also allowed.

Ground 4:

Whether the learned trial Judge erred in law and fact in awarding the Respondents mesne profits when the same were not pleaded and no evidence was led thereon.

A careful examination of the pleadings, the plaints and written statements of defence that resulted in the High Court (Commercial Division) Civil Suits Nos. 106, 150 and 788 of 2007, shows that none of the parties to those suits pleaded in the pleadings any claim for mesne profits.

Mesne profits was also not raised as an issue at the conferencing of the case. At the hearing, no witness specifically testified and/or was cross-examined on the issue of mesne profits. No Counsel also submitted about it at trial.

The learned trial Judge in his Judgment held that:

"Furthermore mesne profits at the going rate of rent for the suit property are awarded against the 2nd and 1st defendant for one

month when the plaintiffs were evicted without prior 60 days notice under Section 7(1) of the Mortgage Act".

The learned trial Judge further held under remedy (g) of the remedies he granted that:

".....the third and fourth defendants in addition to being liable to pay mesne profits to the plaintiffs at a monthly rate of rent to be established from June 2007 till handing over vacant possession of the premises to the plaintiffs"

The law is that parties to a suit are bound by their pleadings; and lead and present their respective cases at the hearing based on what they have pleaded in their pleadings.

A party cannot present, let alone be allowed to succeed on a case that party did not set out in the pleadings. See: **Supreme Court Electoral Petition Appeal No. 04 of 2009: Bakaluba Mukasa v Namboze.**

The purpose of the above state of the law is to enable the parties, present their respective cases through pleadings, so that each party to the suit knows exactly the case against him/her. That way a party is able to present his/her case in rebuttal. Otherwise one would be taken unaware of the case against him/her with the result that he/she would be condemned unheard by the Court. See: **Supreme Court Civil Appeal No. 55 of 1995: Oriental Insurance Brokers Ltd vs Transocean (Uganda) Limited.**

With respect to the learned trial Judge, he introduced on his own, in his Judgment the issue of mesne profits, when the same had not been pleaded, let alone testified to by any witness, and or

submitted upon by any Counsel on behalf of any party to the consolidated suits. The learned trial Judge, with the greatest respect, was in error to deal with this issue the way he did.

At any rate, it has already been held in this Judgement that **Section 7(1) of the Mortgage Act** was never violated by the 2nd, 3rd and 4th Appellants since they never based their actions upon the same. The Section did not apply to their case.

I accordingly also allow ground 4 of the appeal.

Ground 5:

Whether the learned trial Judge erred in law and fact in awarding the Respondents interest at 21% per annum on the general damages and on the mesne profits from the date of Judgment until payment in full.

The award of interest, unless a statutory law states otherwise, is within the discretion of the Court. Interest is awardable where it is equitable to do so. See: **Supreme Court Civil Appeal No. 20 of 2007: Attorney General v Virchand Mitchalal and Sons**.

A party that keeps another away from the use of that money where the one being kept away is entitled to so use the said money, is entitled, if the discretion of the Court is rightly exercised, to interest.

In the exercise of its discretion, the Court awarding interest, must see to it that the interest awarded is reasonable and is reflective of the circumstances for which the money was to be used. Interest at the obtaining commercial bank rate, will be awarded where the circumstances of the case involve a transaction of a commercial

nature. Another rate of interest may be applied by the Court, where the transaction brought out by the case, is purely a charitable one and not commercial. See: **Supreme Court Civil Appeal No. 29 of 1994: Ecta (U) Ltd v Geraldine Namurimu**.

In this case, it has already been held that the learned trial Judge was in error to award to the Respondents general damages and mesne profits. Accordingly it follows that the award of interest at the rate of 21% p.a. or at all, ought not to have been made.

I allow ground 5 of the appeal.

Ground 6:

Having found that the Respondents were indebted to DFCU Bank Ltd, to the tune of UGX. 581,631,114=, whether the learned trial Judge erred in law and fact when he denied the bank, interest thereon and costs of the counter-claim.

Section 27(2) of the Civil Procedure Act provides that, subject to the exercise of the discretion of the Court, the costs of any action shall follow the event unless the Court shall for good reason otherwise order.

Under Clause 3(e) of the Master Lease agreement, the parties agreed that interest would be paid if any money due under the lease fell due and was not paid "after as well as before Judgment".

Clauses 1 and 3 of the Finance Lease Schedule provided that the monthly rental were to be calculated including an interest pegged on a three month Treasury Bill rate.

By failing to pay the monthly rentals as undertaken, a fact that the trial Judge himself upheld in his Judgment, the Respondents kept the 2nd Appellant out of use of its money.

The 2nd Appellant was accordingly entitled to interest at the commercial rate on that sum of money adjudged by the trial Judge to be due to the 2nd Appellant. See: **Ecta (U) Ltd v Geraldine Namurimu (Supra).**

This would be in compliance with the already stated principle that parties to an agreement are bound by the bargains into which they freely enter. See. **Behange vs School Outfitters (U) Ltd (Supra).**

The learned trial Judge did not award any interest to the 2nd Appellant as against the Respondents and gave no reasons for not doing so. This, with respect, was an error on the part of the learned trial Judge.

As to costs, the Appellant were successful in their counter-claim and as such they were entitled to costs on the counter-claim, unless the Court assigned a reason why, as a successful party, the 2nd Appellant was not being given costs: See: **Sam Kuteesa and 2 Others v Attorney General: Constitutional Court Constitutional Petition No. 46 of 2011.**

The Learned trial Judge, with respect, was in error on the issue of not awarding interest and costs to the 2nd Appellant against the Respondents on the sum in the counter-claim of the Appellants.

All the grounds of the appeal, except ground 7, having been allowed, I allow this appeal by setting aside the Judgment and

orders of the learned trial Judge. I would enter Judgment for the Appellants in the following terms and orders:

1. The sale and transfer of the property comprised in LRV 2839 Folio 17 Plot 108 Kataiima Road, Naguru/Nakawa, by the 2nd, 3rd and 4th Appellants from the names of the 1st Respondent into the names of the 1st Appellant was valid and effective.
2. The 1st Appellant is hereby declared to be the lawful registered proprietor of the said land property in 1 above. The Registrar of Titles is to effect this declaration in the Register book.
3. The prayer of the 1st Respondent for a permanent injunction restraining the 2nd Appellant from selling, transferring or registering any encumbrance on the title of the said land in (1) above stands dismissed.
4. The 3rd Respondent is indebted to the 2nd Appellant to the tune of UGX. 361,631,144= principal sum as from 10.05.2007.
5. The Principal sum in 4 above shall as from 10.05.2007 carry interest at the rate calculated in a manner agreed upon and set out by the Respondents and the 2nd Appellant in the Master Lease Agreement and in the Mortgage Deed and other documents related thereto executed on 17.12.2003, till the whole sum due shall be paid in full by the Respondents to the 2nd Appellant.
6. The orders of the trial Court as to the award and payment of general damages and mesne profits are hereby vacated.

As to costs, this appeal has been determined mainly on issues of legal interpretation of the law and the relevant documents in the case, as arrived at by the learned trial Judge of the High Court. As such the individual ordinary parties to the appeal should not be further punished with costs. Accordingly I order that each party is to bear its costs of the appeal

However, as regards the trial of the suits in the High Court, the Appellants, as Defendants in those High Court Civil Suits, are awarded the costs of those suits, as consolidated including the counter-claim.

Dated at Kampala this ...26th day of .....Aug..... 2021.

Remmy Kasule
Ag. Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CONSOLIDATED CIVIL APPEALS NOS. 146 AND 186 OF 2013

MOHAMMED KALISA::APPELLANT

VERSUS

1. GLADYS NYANGIRE KARUMU
2. JOHN KATTO
3. ACCESS REPROGRAPHICS::::::::::::::::::::::::::::::::::RESPONDENTS

AND

1. DFCU LEASING COMPANY LIMITED
2. ALEX MICHEAL AGABA
3. MOSES KIRUNDA::APPELLANTS

VERSUS

1. GLADYS NYANGIRE KARUMU
2. JOHN KATTO
3. ACCESS REPOGRAPHIC LIMITED::::::::::::::::::::::RESPONDENTS

(Appeal from the decision of the High Court of Uganda at Kampala (Commercial Division) before Madrama, J. (as he then was) dated the 13th day of May, 2013 in Consolidated Civil Suits Nos. 106, 150 and 788 of 2007.)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE STEPHEN MUSOTA, JA
HON. MR. JUSTICE REMMY KASULE, AG. JA

JUDGMENT OF ELIZABETH MUSOKE, JA

I have had the benefit of reading in draft, the judgment of my learned brother Kasule, Ag. JA. In his judgment, Kasule, Ag. JA sets out in detail the background to the appeal, the parties' submissions, all of which I will not reproduce herein. In this judgment, I only set out to give the brief reasons for the conclusions that will follow.

The respondents were desirous of purchasing printing equipment to be used in the 3rd respondent's business but could not raise finances to do so. They approached DFCU Leasing Company Ltd (DFCU) to provide the finances. The financing was provided in a mishmash of arrangements. First, it was agreed that DFCU would source for and purchase the printing equipment. After doing so, DFCU would lease it to the 3rd respondent for a term and in consideration of payment of periodic rent fees (Lease Agreement is Exh. P1). The parties also executed a sale and lease back agreement (Exh. P2), by which it was agreed that the 3rd respondent, would, after it obtained the lease of the equipment, sell it back to DFCU. The parties also agreed that the 1st respondent would donate to the 3rd respondent her land comprised in Leasehold Register Volume 2839 Folio 17, Plot 108, Katalima Road, Naguru, Kampala (the suit land), to be mortgaged to DFCU, as part of the security to ensure payment of the agreed upon rent under the lease agreement.

The 3rd respondent defaulted on payment of its obligations under the lease agreement. On 24th October, 2006, DFCU wrote to terminate the lease agreement, and to communicate its intention to appoint a receiver for the suit land, if by 19th October, 2006, the 3rd respondent had not cleared all its outstanding obligations. DFCU went on to exercise several remedies, as a mortgagee of the suit property. The successful remedy was for sale without recourse to Court, carried out, when on 10th May, 2007, Mr. Kirunda, acting as an agent of DFCU sold the suit land to Mr. Kalisa. Subsequently, the 1st and 2nd respondent were evicted from the suit land where they lived with their family.

The respondents instituted a suit in the High Court, in which they prayed, interalia, for the Court to make a declaration that the manner of the sale and transfer of the suit land, was fraudulent, illegal and void ab initio; an order to direct the Registrar of Titles to cancel the registration of the 4th respondent as proprietor of the suit land. The learned trial Judge granted both prayers. The main question on this appeal is whether the learned trial Judge erred to grant the said prayers.

The learned trial Judge considered two related questions, first, whether DFCU legally and properly realized its security in the suit property and second, whether or not the sale and transfer of the suit property was valid.

In his judgment the learned trial Judge gave carefully considered and extensive reasons for concluding that the sale was irregular, illegal and or invalid. He noted at page 516 of the record that DFCU as a mortgagee was obligated to act transparently, with openness and in good faith when dealing with the respondents, as the mortgagors. The learned trial Judge noted the history of dealings between the parties, and had regard to the fact that DFCU had at the time instituted a suit in the High Court for the Court to order for the 1st and 2nd respondents to meet the 3rd respondent's indebtedness, as guarantors under the lease agreement and the mortgage. The learned trial Judge expressed the view to the effect that the institution of the said suit by DFCU amounted to a sort of estoppel by which DFCU communicated that it would resort to Court action and not to sale of the suit land, as a remedy for the respondents' indebtedness.

The learned trial Judge further stated that DFCU, acting through its agent, Mr. Kirunda was under an obligation to advertise the suit land before completing any sale, which it had not done.

As for Mr. Kalisa, the learned trial Judge held that he had obtained possession of the suit land in reliance on a warrant for vacant possession which came to be set aside by the High Court. Therefore, Mr. Kalisa had not acted with clean hands, and was not a bonafide purchaser for value. The learned trial Judge concluded that the manner of sale and transfer of the suit land was fraudulent, illegal and void ab initio.

I observe that the respondents came to be dispossessed of the suit land owing to failure to meet financial obligations owed to DFCU under a mortgage. DFCU proceeded to exercise its rights as a mortgagee, and it accordingly became obligated to comply with the law, when doing so. I note that there is a common law duty imposed on the mortgagee to act in good faith when it exercises its rights under a mortgage. According to the **Halsbury's Laws of England (Volume 77 (2010) 5th Edition)**:

> **"The mortgagee does, however, owe a general duty to exercise his powers in good faith for the purpose of obtaining repayment which flows from the equitable principles for the enforcement of mortgages and the protection of borrowers, that a mortgage is security for the repayment of a debt and that a security for repayment of a debt is only a mortgage. He also owes specific duties once he exercises his powers. It has been said that he owes a duty to act fairly towards the mortgagor."**

In my view, there is evidence on record which indicates that DFCU, as a mortgagee, did not act towards the 3rd respondent the mortgagor, with transparency, openness or fairness when it moved to sale the suit land. This was the essential point made by the learned trial Judge, and I see no reason to fault him for doing so.

Furthermore, the whole nature of the transaction leading to sale of the suit land to Mr. Kalisa, was such that, if he had exercised due care, he would have discovered that the suit land which he was attempting to buy had contentious ownership. After all, the land was registered in the names of Ms. Nyangire at the time it was sold to him. The land was encumbered with a caveat. In my view, Mr. Kalisa could not claim to be a bonafide purchaser.

Accordingly, I would uphold the learned trial Judge's decision to declare that the sale and transfer of the suit land from the respondents to Mr. Kalisa was fraudulent, illegal and void abinitio. I would have dismissed the part of each appeal challenging the said decision of the learned trial Judge.

As to the remedies, I would have upheld the declarations and orders of the learned trial Judge, with slight modification on the amount of interest allowed on the relevant awards to the respondents, of mesne profits and special and general damages against each respective appellant of 21% per annum from date of judgment of the trial Court till payment in full, which I would set at 8% per annum from the date of judgment of the trial Court till payment in full.

I would conclude by setting out the decision of the Court in this matter, as follows. By majority decision (Musota, JA and Kasule, Ag. JA; with Musoke, JA dissenting), the consolidated appeals are allowed on the terms proposed in Kasule, Ag. JA's judgment.

It is so ordered.

Dated at Kampala this ....26th.... day of....Aug....2021.

.....

Elizabeth Musoke

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CONSOLIDATED CIVIL APPEALS NOS. 146 AND 186 OF 2013

(Appeal from the Judgment of the High Court of Uganda at Kampala by Hon. Justice Christopher Madrama Izama, J. as he then was, delivered on 13th May, 2013 in the Consolidated High Court civil Suits No. 106, 150 and 788 of 2007)

Mohamed Kalisa :: Appellant

Versus

1. Gladys Nyangire Karumu
2. John Katto } **:::::::::::::: Respondents**
3. Access Reprographic Limited

And

1. DFCU Leasing Company Limited
2. Alex Micheal Agaba } **:::::::::::::: Appellants**
3. Moses Kirunda

Versus

1. Gladys Nyangire Karumu
2. John Katto } **:::::::::::::: Respondents**
3. Access Reprographic Limited

Coram: HON. JUSTICE ELIZABETH MUSOKE, JA
HON. JUSTICE STEPHEN MUSOTA, JA
HON. JUSTICE REMMY KASULE, AG. JA

JUDGMENT OF HON. STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment by my brother Hon. Mr. Justice Remmy Kasule, Ag. JA.

I agree with his finding that the consolidated appeals be allowed for the reasons he has given. His Lordship set out the background of both appeals, submissions of the parties and I find it unnecessary to repeat the same herein.

From the evidence adduced at the trial court, it is clear that the 3rd Respondent committed breach of the Master Lease Agreement and the Mortgage Deed by failing to pay the agreed upon monthly rental payments. It was agreed upon by the Respondents and the 2nd Appellant in the Master Lease Agreement and in the Mortgage Deed, that the 2nd Appellant was vested with power to exercise his right as a mortgagee under Section 10 of the Mortgage Act which provides for sale otherwise than by foreclosure.

The 3rd Respondent failed to meet the obligation of paying its rentals to the 2nd Appellant right from the first instalment payment and by October, 2006, the rental arrears due were UGX. 216,215,451=. The 2nd Appellant called upon the 3rd Respondent to pay and upon failure, terminated the lease facility and recalled all the monies due. With the consent of the 3rd Respondent, the printing machine, was

sold at UGX. 120,000,000= that was credited to the 3rd Respondent's account with the 2nd Appellant.

The 2nd Appellant appointed a Receiver/manager and the property was advertised for sale in the Monitor Newspaper on 17.11.2006. The mortgage property was ultimately sold to the 1st Appellant at UGX. 220,000,000= on 10.05.2007. The 1st Appellant thereafter took ownership, possession and occupation of the mortgage property. After the sale of the Printing Machine and the Mortgage property, the 2nd Appellant remained claiming UGX. 392,432,369= as still due from the 3rd Respondent.

The learned trial Judge held that the sale of the mortgage property to the 1st Appellant, was conducted in secret, without following the due process and was in bad faith and suspicious, because the sale was conducted when Civil Suit No. 106, 150 and 788 of 2007 were still pending determination in the High Court and the 1st Respondent had caveated the mortgage property. I respectfully do not agree with the finding of the learned trial Judge. The parties had executed a Master Lease Agreement which was breached by the 3rd respondent.

This Court in **Behangane v School Outfitters (U) Ltd, [2002] 1 EA 20 at p. 23,** Berko, JA, with the concurrence of the rest of the Court held:

> *"One of the basic principles in the law of contract is that the parties have freedom to fix the terms of their own bargain. The Courts do not concern themselves with the question whether*

adequate value had been given or whether the agreement is harsh or one sided. The fact that one person pays too much or too little for a thing may be evidence of fraud or mistake or it may induce the Court to imply or to hold that the contract has been frustrated. But it does not in itself affect the validity of the contract. Thus in the absence of fraud, duress, undue influence, mistake and misrepresentation, the Courts will enforce a promise so long as some value for it has been given".

Like Kasule, JA stated in his judgment, Courts of law do not interfere with the contractual rights of the parties that are freely and voluntarily agreed upon and expressed in a written agreement. The Respondents agreed with the 2nd Appellant in Clause 5(a) of the Mortgage Deed that the Mortgage debt was to become immediately payable without demand and the statutory power to sale the mortgage property would become exercisable by the 2nd Appellant, as the mortgagee, without further or other notice, if the mortgagor or the surety committed breach of any term or condition of the Master Lease Agreement.

Whereas **Section 7(1) of the Mortgage Act** requires that the mortgagor b given sixty days' notice of the mortgagee's intention to enter into possession of the mortgage land security, this section was not applicable to the 2nd Appellant, because as already stated above, the parties had agreed otherwise. The Supreme Court in in **Supreme Court Civil Appeal No. 22 of 1993: Barclays Bank (Uganda) Ltd v Livingstone Katende Luutu** held that the bank as

mortgagee did not require leave of Court to realise its security since by the terms of the mortgage, the mortgagor irrevocably expressly consented to the sale without recourse to Court in the event of the failure to pay the loan.

I would allow this appeal and set aside the Judgment and orders of the learned trial Judge and substitute the same with the orders made by His Lordship Remmy Kasule, JA.

Dated this 26th day of Aug 2021

Hon. Stephen Musota
JUSTICE OF APPEAL