THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0131 OF 2021

BANK OF AFRICA UGANDA LIMITED::::::::::::::::::::::::::::APPELLANT

VERSUS

1. SSEMAGANDA MARK
2. KUZUKIRA AGNES LWANGA
(T/A HOLYWAYS HOSTEL)::::::::::::::::::::::::::::::::::::RESPONDENTS

(Appeal from the decision of the High Court of Uganda at Kampala (Commercial Division) before Wangutusi, J. dated the 4th day of July, 2020 in Civil Suit No. 0185 of 2015)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE, JA
HON. MR. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF ELIZABETH MUSOKE, JA

This appeal is from the decision of the High Court (Wangutusi, J.) in a suit filed by the respondents against the appellant and another person not party to this appeal, as well as in a counter – claim filed by the appellant against the respondents. The High Court entered judgment in favour of the respondents in the suit and dismissed the counter – claim, with costs in each matter.

Background

Between 6th January, 2010 and 20th September, 2011, the respondents obtained three separate loan facilities from the appellant bank. On 20th September, 2011, the three loan facilities were consolidated and the combined loan facility at the time stood at a total amount of Ug. Shs. 507,490,364/=. As security for repayment of the combined loan amount, the respondents mortgaged several of their properties including land at Kireka, Wakiso comprised in Kyadondo – Mengo, Block 232 Plot 1074 ("the suit land"). This created a mortgagor – mortgagee relationship with the respondents as mortgagors and the appellant as the mortgagee.

The respondents were required to make 18 monthly payments each of Ug. Shs. 28,193,909/= to pay off the combined loan. However, shortly after the loan had been advanced, the respondents faced financial hardships preventing them from fulfilling their loan obligations, and it became inevitable for the appellant to sell the suit land so as to recover the monies advanced under the loan to the respondents. The respondents would have preferred the loan to be restructured in order to give them more time to pay the loan amount and contacted the appellant about the possibility of doing so, but received no reply. Meanwhile, the appellant proceeded to exercise its powers as mortgagee, and around 25th December, 2013, it sold the suit land.

The respondents disputed the manner of selling the suit land and instituted a suit in the trial Court. They claimed that the appellant contravened several statutory duties placed on it as a mortgagee in the lead up to selling the suit land. The appellant refuted those claims and stated that it sold the suit land in accordance with all applicable statutory duties. The appellant also counter – claimed for balance of the outstanding loan amount – the equivalent of the totality of the loan amount as advanced less the money recovered from sale of the suit land.

In his judgment, the learned trial Judge found that; 1) the appellant sold the suit land without giving the respondents a demand notice creating default in payment of the outstanding loan amounts; 2) the appellant did not give the respondents notice of sale prior to selling the suit land; 3) the appellant sold the suit land via private treaty without consent from the respondents; and 4) the appellant sold the suit land at an undervalued price. The learned trial Judge found that the highlighted acts were in breach of statutory duty and amounted to irregularities that tainted the sale of the suit land and rendered that sale unconscionable.

Because the suit land had already been sold to another person who qualified as a bonafide purchaser for value without notice, the learned trial Judge did not order for reinstatement of the respondents as its owners. Instead, he awarded the respondents compensation, payable by the appellant only, consisting of the true value of the suit land at the time of sale less the

outstanding loan amount, which he set at Ug. Shs. 915,528,445/=. Interest of 18% per annum was ordered to be paid on that sum from 31st December, 2013 till payment in full. The learned trial Judge also awarded aggravated damages of Ug. Shs. 20,000,000/=; punitive/exemplary damages of Ug. Shs. 80,000,000/=; and general damages of Ug. Shs. 80,000,000/=, for a combined award of Ug. Shs. 180,000,000/= as damages, with interest on the combined sum at 6% per annum from date of judgment till payment in full. The learned trial Judge also awarded the costs of the suit to the respondents. The learned trial Judge dismissed the appellant's counterclaim with costs.

Being dissatisfied with the decision of the learned trial Judge, the appellant appealed to this Court on the following grounds:

"1. **The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record to rely on the valuation report of East African Valuers and Surveyors and ignore the valuation report of Mpg Valuers without hearing any evidence to explain the contents of either report thereby arriving at an erroneous value of the suit property upon which he awarded compensation to the respondents.**

2. **The learned trial Judge erred in law and fact when he relied on the uncorroborated evidence of Semaganda Mark that all funds disbursed by the bank were utilized on the suit property and added these funds to the value of the suit property.**

3. **The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record and relied on opinion evidence of handwriting expert without any direct evidence of the 2nd respondent that she was not served a Notice of Default thereby erroneously concluding that the 2nd respondent's signature was a forgery and there was fraud on the part of the appellant.**

4. **The learned trial Judge erred in law and fact when he awarded both general and aggravated damages to the respondents.**

5. **The learned trial Judge erred in law and acted on wrong principles when he awarded inordinately high general and punitive damages to the respondents.**

6. **The learned trial Judge erred in law when he awarded costs to the 2nd defendant against the appellant who did not join the respondents in the appellant's counterclaim and the 2nd defendant did not file a written statement of defence to the respondents' suit or participate in the trial.**

7. **The learned trial Judge erred in law and fact when he dismissed the appellant's counterclaim with costs when the respondents admitted indebtedness to the appellant in the amount of UGX 534,471,555/= which amount ordinarily accrues contractual interest."**

The appellant prays this Court to: 1) Allow the appeal; 2) Set aside the judgment of the High Court; 3) Substitute instead, judgment for the appellant against the respondent for the sum of Ug. Shs. 534,471,555/= with contractual interest thereon from the date of judgment till payment in full; Award the costs of the appeal to the appellant.

The respondents opposed the appeal.

Representation

At the hearing, Mr. Peter Nkurunziza, learned counsel appeared for the appellant. Mr. Jude Byamukama, also learned counsel appeared for the respondent.

Written submissions filed for the parties in accordance with a schedule set by this Court are on record and have been considered in this judgment.

Appellant's submissions

Counsel for the appellant communicated that he would be abandoning ground 7 and would argue the rest of the grounds as follows; grounds 1 and 2 jointly, grounds 4 and 5 jointly and then each of grounds 3 and 6 independently.

Grounds 1 and 2

Counsel submitted that the learned trial Judge erred in finding that the appellant did not sale the suit land at its true market value and that the true market value of the suit land was that reflected in the East African Surveyors

report (Exhibit P.9). He contended that in finding as he did, the learned trial judge erroneous relied on Exhibit P.9, which was only one of three exhibited valuation reports. He pointed out that during the subsistence of the mortgagor – mortgagee relationship, the appellant had commissioned all the three different reports, namely; 1) a report by East African Valuers and Surveyors dated 21st July, 2011 (Exhibit P9); 2) a report by MPG Associated Ltd (Exhibit D6); and 3) a report by Ideal Surveyors dated 11th December, 2013 (Exhibit D1). The respective reports set different amounts as the true market value of the suit land; Exhibit P.9 at Ug. Shs. 925,000,000/=; Exhibit D6 at Ug. Shs. 460,000,000/= and Exhibit D1 at Ug. Shs. 354,000,000/=. Each report indicated the suit land as having structures as follows; 1) Exhibit P.9 as having 5 hostel buildings, a residential tenement and an ablution block; 2) Exhibit D6 as having a complex of 2 bungalow styled buildings, an incomplete multi-storied buildings and 2 ablution blocks; and 3) Exhibit D1 indicated the suit land as being developed with a storeyed incomplete building, a front hostel building, side hostel building, back hostel building and latrine/bathroom block.

Counsel submitted that the learned trial judge ought to have been persuaded by Exhibit D6 which was quite detailed and set out the methodology relied on for arriving at the true market value of the suit land. The learned trial Judge ought to have found that the structures on the suit land were as indicated in Exhibit D6 which was supported by Exhibit D1.

Further, it was submitted that it was unfair for the learned trial Judge to criticize the evidence of Lucy Kabege DW1 who tendered Exhibit D1 on grounds that the said report did not set out the appropriate survey method applied, and yet on the other hand he accepted Exhibit P9 which also did not set out the survey method used to value the suit land. Counsel contended that Exhibit D1 was based on international standards, a fact not challenged by the respondents and therefore it should have been believed. Moreover, Exhibit D1 was commissioned at a subsequent time than the East African Valuers report and ought to have been considered as representing the true market value. There was evidence that following advancement of the loan,

the respondents had not carried out any substantial development of the suit and this could have led to depreciation in the true market value of the suit land.

Counsel further submitted that the learned trial judge erred in taking into account the total loan amount of Ug. Shs. 507,490,364/= that was advanced to the respondents as evidence that the true market value of the suit land was higher than suggested in Exibit D1 and Exhibit D6. He pointed out that that total loan amount was advanced on security of two properties, that is the suit land and another property.

It was further submitted that Exhibit P9 which was relied on by the learned trial Judge referred to Plot 1024 and not the suit land which was Plot 1074, and this cast doubt on its veracity. Moreover, the author of the said report was not brought as a witness so as to clarify on the mentioned disparities.

Counsel submitted that the more judicious approach should have been for the learned trial Judge to evaluate the value of the suit land as estimated by the Chief Government Valuer against the valuation reports on record as was commended in the authority of **Jeanne Frances Nakamya vs. DFCU Bank and Another, Court of Appeal Civil Appeal No. 105 of 2013 (unreported)**.

Counsel further submitted that pursuant to **Sections 101 and 103** of the **Evidence Act, Cap. 6,** the onus lay on the respondents as the plaintiffs to adduce evidence showing that the suit land was sold at less than its true market value. The onus on the appellant as the mortgagee was only to show on a balance of probabilities that the sale of the suit land was bonafide and that steps were taken to obtain the best price reasonably obtainable. Counsel cited the authority of **Bank of Nova Scotia vs. Rosegreeen and Others, Claim No. CL 1998/B240**.

Counsel prayed this Court to allow grounds 1 and 2.

Ground 3

Counsel submitted that the learned trial Judge erred in believing the evidence that the 2nd respondent's signature on a default notice

acknowledging service of the demand notice on the respondents was a forgery. He contended that it was an error for the learned trial Judge to rely solely on expert handwriting evidence proving that forgery when the 2nd respondent was not brought as a witness in order to be subjected to cross examination. In addition, the advocate who allegedly collected the 2nd respondent's specimen signatures for examination by the expert was not brought as a witness hence breaking the chain of evidence. Further, it was submitted that the handwriting expert stated that she had never met the 2nd respondent and had collected her sample signatures from a law firm that represented her, but the person who handed the expert those signatures was not called as a witness.

Counsel submitted that expert evidence should not be treated as necessarily conclusive and its evidential worth must be scrutinized before a Court can rely on it. He cited the legal text book **Cross & Tupper on Evidence Butterworths, 1995 8th Edition at p. 557** for that proposition. He also relied on the authority of **Kimani vs. Republic [2000] 1 EA 417** for the principle that if a Court is satisfied on good and cogent ground that the opinion though it be of an expert is not soundly based, the Court is not only entitled but would be under a duty to reject it. He contended that in the present case, the expert evidence ought to have been rejected for failure by the 2nd respondent to testify and deny her signature on the demand notice. He prayed this Court to allow ground 3 as well.

Grounds 4 and 5

Counsel submitted that the learned trial Judge erred to award damages in the manner he did. The learned trial Judge awarded both aggravated and general damages contrary to the authority of this Court in **Mufumba vs. Uganda Development Bank, Civil Appeal No. 241 of 2015 (unreported)** where it was held that it is erroneous to award both general and aggravated damages in the same case. It was also submitted that it was not appropriate for the learned trial Judge to award punitive damages. He relied on the authority of **Zaabwe vs. Orient Bank Ltd, Supreme Court Civil Appeal No. 4 of 2006 (unreported)** for the principles on award of

punitive damages where it was stated interalia, that punitive damages should not be awarded in a case involving private persons where the impugned acts were unlikely to be repeated, as it was in the present case.

Counsel also referred to the authority of **Crown Beverages Ltd vs. Sendu Edward, Supreme Court Criminal Appeal No. 1 of 2005 (unreported)** which sets out the principles on circumstances that would justify an appellate Court to interfere with an award of damages made by the trial Court. An appellate Court will interfere if the trial Court acted on wrong principle of law or if the amount of damages that was awarded is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled. For his earlier submissions counsel urged this Court to find that the award of aggravated and exemplary damages by the learned trial Jude was based upon wrong principles of law and to set those awards aside.

Ground 6

It was submitted that the learned trial Judge erred in ordering the 2nd defendant to pay costs to the respondents yet he was an innocent party throughout the proceedings. The 2nd defendant neither filed a defence nor participated in the prosecution of the relevant suit and counter claim. The learned trial Judge found that the 2nd defendant was protected under **Section 29 (4) of the Mortgage Act, 2009**. Therefore, it was strange for the learned trial Judge to order for him to pay costs without giving reasons to justify that course. Counsel cited the authority of **Kiska Ltd vs. Vittorio De Angelis [1969] EA 6** for the principle that an appellate Court may interfere if it is satisfied that the order on costs was wrong and urged this Court to interfere with the costs order affecting the 2nd defendant.

Respondents' submissions

Counsel for the respondents made his submissions basing on issues framed during conferencing and did not address the grounds of appeal as counsel for the appellant had done. Those issues were as follows:

> "(i) **Whether the learned trial Judge wrongly evaluated the evidence in relation to the three valuation reports to base his order for compensation of the respondents on the value in Exhibit P9**

(ii) **Whether the learned trial judge wrongly evaluated the evidence on record to hold that the second respondent's signature was forged and arrived at the conclusion that the second respondent was never served with a notice of default.**

(iii) **Whether the learned trial judge acted upon wrong principles to award aggravated and exemplary damages against the appellant.**

(iv) **Whether the learned trial judge wrongly ordered the appellant to pay the second defendant's costs of the suit."**

Counsel for the respondents argued the above issues as points under the grounds as set out in the appellant's memorandum of appeal; issue (i) – ground 1; issue (ii) – ground 3; issue (iii) – grounds 4 and 5; and issue (iv) – ground 6. In the interest of consistency, the submissions of counsel for the respondents shall be set out as points under the relevant grounds.

Grounds 1 and 2

Counsel for the respondents supported the learned trial Judge's decision to rely on Exhibit P9 in preference to Exhibit D6. He contended that the Exhibit D6 was neither pleaded nor exhibited in evidence in the lower Court. Further that counsel for the appellant who also represented the appellant in the lower Court never made reference to Exhibit D6 in the written submissions in the lower Court, and in making reference to that report on appeal, counsel for the appellant was attempting to irregularly smuggle evidence before this Court. Counsel made reference to the authority of **Interfreight Forwarders (U) Ltd vs. East African Development Bank, Supreme Court Civil Appeal No. 33 of 1992 (unreported)** and submitted that a party is bound by its pleadings and thus the appellant is precluded from raising issues surrounding Exhibit D6 on this appeal. Counsel further submitted that it is not open for the appellant to rely on new evidence on appeal without following the proper procedure by seeking additional adduce as directed under **Rule 30 (1) (b)** of the **Judicature (Court of Appeals) Rules, 13 – 10**. It is equally inappropriate for counsel to seek to influence a decision of the trial Court basing on matters that were not raised in the trial Court. He relied on **General Parts (U) Ltd vs. Non-Performing**

Assets and Recovery Trust, Supreme Court Civil Appeal No. 5 of 1998 (unreported) for these submissions.

Counsel submitted that inclusion of Exhibit D6 in the appellant's supplementary record of appeal was not sufficient to show that the said document was admitted as an exhibit in the trial Court. The only exhibit tendered on behalf of the appellants at trial was the Ideal Surveyors report that was marked as Exhibit D1 which was tendered in by DW1 Lucy Kabega. Counsel urged this Court to have Exhibit D6 expunged from the record of appeal and reject any arguments based on it.

Counsel for the respondents further submitted that, in any case, under **Regulation 11 (2) of the Mortgage Regulations,** a valuation report of mortgaged property is only deemed to be valid if made within 6 months from the date of valuation, and that after 6 months, valuation is deemed to have expired and fresh valuation has to be conducted before the mortgaged property can be sold. Exhibit D6 was made on 28th August, 2012 yet the suit property was sold on 31st December, 2013, at a time when the valuation was deemed to have expired. Further, it was the contention of counsel that the Exhibit D6 did not subject all the developments on the suit property to valuation and therefore rendered a false account of the mortgaged property making it irrelevant to the present case.

Without prejudice to the above submissions, counsel submitted that the learned trial Judge properly evaluated the evidence and came to the right conclusions as to the true market value of the suit property. He was justified to rely on Exhibit P9 because it had been used to ascertain the value of the suit land when the respondents took the initial loan facility from the appellant in 2011. The learned trial Judge also properly considered Exhibit D1 which was made at the time of sale of the suit land in 2013. Counsel further submitted that the respondents failed to challenge Exhibit P9 which was why the learned trial Judge based on it to found his decision. It was therefore surprising that the respondents are, now on appeal, seeking to challenge Exhibit P9.

Counsel submitted that the decision in **Jeanne Frances Nakamya (supra)** that was relied on to support the appellant's case is distinguishable and inapplicable in this case. In that case, it was necessary to make a comparison between a land valuation by the Chief Government Valuer and that by a private valuer. In the present case, all the relevant valuation reports were issued by private valuers and the appellants failed to convince the trial Judge to believe their reports. The evidence of DW1 Lucy Kabege, who tendered the Ideal report in evidence was found unsatisfactory by the learned trial Judge for reasons clearly pointed out in his judgment and was therefore rightly rejected.

It was further submitted that under **Section 27 (1) of the Mortgage Act, 2009**, a mortgagee has a statutory responsibility to take all reasonable steps to obtain the best price for mortgaged property. Counsel cited the authority of **Jeanne Frances Nakamya (supra)** in support of his submissions. The appellant as mortgagee acted recklessly and negligently and failed to prove that it obtained the best price for the suit property. Instead, the price at which the suit property was a giveaway price. The appellant also violated the key principles of fairness, reliability and transparency under the Bank of Uganda Consumer Protection Guidelines, 2011. The circumstances and the evidence showed that the respondents exhaustively discharged their burden and proved that they were unlawfully denied their right to own property guaranteed under **Article 26 (1) of the 1995 Constitution**.

Counsel urged this Court to disallow grounds 1 and 2.

Ground 3

Counsel submitted that the handwriting expert evidence adduced for the respondent showed that the signature purported to be of the 2nd respondent on the relevant demand notice was a forgery. He pointed out that it was mandatory under **Section 19** of the **Mortgage Act** for the said demand notice to be served on the respondents as mortgagors before the mortgage amount could become due. PW2 Chelangat Alice, a handwriting expert, after comparing the signature on the demand notice to sample signatures of the 2nd respondent on her Passport, a credit facility letter letter issued by the

appellant and on her I.D card, concluded that the signature on the demand notice was a forgery. The appellant did not call the person who served the demand notice on the 2nd respondent as a witness. Additionally, the expert evidence was not challenged by the bank through subjecting it to a different handwriting expert, which left that expert evidence unchallenged.

The expert evidence was therefore sufficient to prove the respondent's case of non-service of the demand notice. There was no requirement to call a particular number of witnesses to prove a fact as stipulated under **Section 133** of the **Evidence Act, Cap. 6**. Moreover, considering that in the submissions in the trial Court, the appellant conceded that it sent a notice of sale of the suit land at a wrong address for the respondents but argued that it was an honest mistake, it was surprising that the appellant was turning around to fault the learned trial Judge for finding that there was non-service of the notice. Counsel urged this Court to find that the learned trial Judge properly handled the relevant handwriting expert evidence and to disallow ground 3 of the appeal.

Grounds 4 and 5

Counsel submitted that the respective quanta of general, aggravated and punitive damages awarded by the learned trial Judge were justified in this case and ought to be maintained. He made reference to the principle that awarding damages is at the discretion of the trial Judge and an appellate Court will only interfere if the trial Court acted on wrong principles or if the amount awarded was too high or so low as to make it an entirely erroneous estimate of damage. For that principle, counsel relied on the following authorities; **Ahmed Ibrahim Bholm vs. Car and General Ltd, Court of Appeal Civil Appeal No. 12 of 2002; and Uganda Revenue Authority vs. Wanume David Kitamirike, Court of Appeal Civil Appeal No. 43 of 2010 (both unreported)**.

In the present case, the learned trial Judge considered evidence that the appellant bank failed to operate within established code of conduct and took advantage of its customers (the respondents) prevailing financial hardships by selling the suit land in total disregard of established principles for

protection of vulnerable mortgagors. Counsel further submitted that in the **Fredrick Zaabwe case (supra),** the Supreme Court awarded enhanced compensatory damages against a bank that had mistreated its customer by acting with arrogance towards him. He urged this Court to maintain the damages awarded to the respondents.

As for the appellant's reference to this Court's decision in **Florence Mufumba (supra)**, counsel for the respondent conceded that that decision establishes a principle that it is erroneous to award general and aggravated damages separately, in the same case since the two heads of damages are of the same species. Counsel contended that, however, the learned trial Judge intended to award Ug. Shs. 100,000,000/= as aggravated damages only but mistakenly made two awards. Counsel implored this Court to consider **Article 126 (2) (c) of the 1995 Constitution** which enjoins Courts to award adequate compensation to victims of wrongs which was the guiding factor for the learned trial Judge's award of damages.

On the award of punitive damages, counsel submitted that that the same were justifiably awarded to punish the appellant bank and deter other financial institutions from similar predatory behavior of taking advantage of vulnerable clients and customers like the respondents.

All in all, he prayed this Court to maintain the respective awards of damages and to disallow grounds 4 and 5 as well.

Ground 6

Counsel submitted that the submissions of his counterpart for the appellant on this ground are redundant as they concern Ssebuwufu Mohammed, the 2nd defendant who is not a party to the present appeal. He urged this Court not to entertain this ground.

Appellant's submissions in rejoinder

On ground 6, counsel for the appellants submitted that notwithstanding that Ssebuwufu is not a party to this appeal, this Court can in the interests of justice order for reversal of the unlawful costs order made against him by the trial Judge.

As for the submission that Exhibit D6 is new evidence being smuggled before this Court, counsel for the appellant submitted that the said report was duly exhibited in the lower Court and marked as Exhibit D6. This document was admitted in evidence before hearing commenced and was even relied on by the respondent's counsel at trial. It is that document that is set out in the appellant's supplementary record. Counsel submitted that the respondent's allegations about smuggling Exhibit D6 in evidence are false and embarrassing and he urged this Court to maintain that evidence and refer to it, as it re-evaluates of evidence.

In regard to the submission by counsel for the respondents that the learned trial judge intended to make one award of general and aggravated damages, counsel submitted that this submission was incorrect. The judgment of the trial Court clearly shows that the learned trial Judge deliberately made two separate awards which awards were wrong in principle.

Resolution of the Appeal

I have carefully studied the Court record, considered the submissions of counsel for both sides and the authorities cited in support of those submissions. Other relevant authorities not cited have also been considered.

This is a first appeal and on such appeals, this Court has a duty to review the materials on record and come up with its own conclusions on all issues of law and fact. For the duty of this Court on first appeals see: **Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10** and the authority of **Kifamunte Henry vs. Uganda, Criminal Appeal No. 10 of 1997 (unreported).** I will remain mindful of the said duty as I resolve the grounds of appeal.

I will consider the grounds of appeal in the order as argued by counsel for the appellant.

Grounds 1 and 2

Counsel for the appellants made three points in the submissions on grounds 2 and 4. First, he submitted that the learned trial Judge should have preferred the valuation of the suit land contained in the Exhibit D6 to that in

Exhibit P9 because the former was more cogent. Second, it was submitted that in any case, there was need to call for evidence of the Chief Government valuer as to the valuation of the suit land in order to assess the accuracy of the two private reports. Third, it was submitted that the learned trial Judge should not have considered the total loan amount of Ug. Shs. 507,490,364/= advanced to the respondents in 2011 in assessment of the true market value. as evidence that the true market value of the suit land was higher than suggested in the Ideal and MPG reports. He pointed out that the total loan amount was advanced on security of two properties, that is the suit land and another property.

The respondent supported the learned trial Judge's handling of the evidence and submitted that he reached the correct conclusions as to the true market value of the suit land at the time of its sale.

I note that the learned trial Judge found that the appellant as mortgagee seeking to realize money owing under a mortgage to the respondents sold the suit property in violation of several statutory duties imposed on a mortgagee exercising his rights and as a result, the sale of the suit land was tainted with irregularities that rendered the sale unconscionable. The learned trial Judge therefore went ahead to determine what he considered adequate compensation payable to the respondents who had been wrongfully deprived of the suit land through the irregular sale.

In arriving at the adequate amount of compensation awarded, the learned trial Judge observed at page 325 of the record that the parties had not guided Court on the precise quantum of the compensation payable, but he felt it appropriate in the interests of justice to rely on the material on record to reach a fair and just award. After noting that the respondents' and appellant's representations on this matter were not useful in guiding on the matter of compensation, the learned trial Judge stated at pages 325 to 326 of the record as follows:

> **"This Court cannot however just sit by and fold its hands and say it does not know what to do. The nearest this Court can go is to rely on the**

Valuation Report, Exh. P9 which was given by valuers that were nominated by the 1st defendant and which report was never disputed."

Exhibit P9 is a valuation report setting the value of the suit land as at 21st July, 2011 at Ug. Shs. 925,000,000/= and was made by a firm of surveyors called East African Consulting Surveyors and valuers upon being commissioned by the appellant bank. Counsel for the appellant faults the learned trial Judge for preferring Exhibit P9 to other valuation reports that were tendered in evidence, namely, relied on the East African Valuers valuation report (Exhibit P9).

In my view, in arriving at the adequate compensation payable to the respondents, the learned trial Judge conducted a value judgment which necessitated him to apply his discretion to determine which of the relevant valuation reports (Exhibits P9 or Exhibit D1) he would prefer in the interests of justice.

I pause here to note that the learned trial Judge never considered another valuation report Exhibit D6 and this omission has been strongly criticized by counsel for the appellant. Exhibit D6 which is set out between pages 280 to 298 of the record of appeal is a document which was contained in an additional trial bundle filed for the appellant in the trial Court. It was a report commissioned by the appellant bank on 26th August, 2012, over a year earlier than the sale of the suit land. Exhibit D6 was labelled as an exhibit before commencement of hearing in the trial Court, and during the trial, no witness was called for the appellant for purposes of explaining its contents. This explains why the learned trial Judge disregarded Exhibit D6, which in my view had between none to very low probative value considering that there neither examination in chief nor cross examination had been conducted with regards to that document.

I therefore accept the submissions of counsel for the respondents that Exhibit D6 was not sufficiently canvassed in the trial Court, which was why it did not form the basis of the decision of the learned trial Judge. In the circumstances, it would be unfair for this Court to criticize the learned trial Judge for not considering that document.

Nonetheless, as stated earlier, in preferring the valuation set out in Exhibit P9, the learned trial Judge was conducting a discretionary exercise, and there is authority for the principle that an appellate Court will not interfere with such exercise of discretion unless there is compelling reason to do so. This point was made by Mason, J. in the High Court of Australia decision in **Federal Commissioner of Taxation v. St. Helens Farm (A.C.T.) Pty. Ltd [1981] HCA 4**, as follows:

> **"...on a question of valuation an appellate tribunal is not justified in substituting its own opinion for that of the court below unless it is satisfied that the court below acted on a wrong principle of law or that its valuation was entirely erroneous ... As with the assessment of damages, especially in personal injury cases, the valuation of property by a court has many of the characteristics of a discretionary judgment. Valuation is a matter of estimation, not of precise mathematical calculation. It certainly involves the making of a value judgment in the metaphorical as well as the literal sense." (Emphasis added)**

In the present case, the learned trial Judge considered the two valuation reports that were properly canvassed before him, namely Exhibits P9 and D1. It has to be borne in mind that the learned trial Judge was determining how much compensation an errant bank had to pay to two individuals it had irregularly deprived of their property. It appears that the evidence of PW1 Lucy Kabege, who tendered Exhibit D1 in evidence did not inspire much confidence in the learned trial Judge. He was not convinced by the contents of her report and was doubtful that the value of the suit land could plummet from Ug. Shs. 925,000,000/= to 354,000,000/= as suggested in Exhibit D1.

The learned trial Judge generally found Exhibit D1 unsatisfactory. He found that while it was stated in D1 that the value of the suit land was arrived at by comparing values of other similar land, there was no evidence citing the price of any such similar buildings at the time of making the report. The learned trial Judge also considered that the date of making Exhibit D1 was on 11th December, 2013, one day earlier than 12th December, 2013 when PW1 is said to have received instructions for making that report. The learned

trial Judge concluded that Exhibit D1 was unreliable and could not be relied on.

Another point that was raised by counsel for the appellant is that the veracity of Exhibit P9 was doubtful as it was stated to have been made in respect to Plot 1024 yet the suit land was Plot 1074. Further that the author of the said report was not brought as a witness so as to clarify on the mentioned disparities. At the trial, it was not contested that Exhibit P9 related to the suit land, and therefore, the submissions of counsel on this point, are an afterthought being raised for the first time on this appeal. I would reject them.

Counsel for the appellant then submitted that the more judicious approach should have been for the learned trial Judge to obtain valuation of the suit land by a governmentas was commended in the authority of **Jeanne Frances Nakamya vs. DFCU Bank and Another, Court of Appeal Civil Appeal No. 105 of 2013 (unreported)**. However, I note that the present case revolved around a dispute as to valuation of the suit land. In resolving the dispute, each party adduced in evidence valuation made by private valuers. There is no law requiring that a government valuer must give evidence in each case before a Court can make up its mind on the proper valuation of land. I do not think the **Jeanne Francis Nakamya case (supra)** can be authority for such a proposition.

Ground 2 of the appeal alleged that the learned trial Judge erroneously relied on the uncorroborated evidence of Semaganda Mark the 1st appellant, in deciding the amount of work undertaken by the respondents on the suit land for purposes of deciding how much the value of the suit land had appreciated. In support of this ground, it was submitted that the learned trial Judge failed to consider relevant factors and in other instances took into account some extraneous matters in assessing the true market value of the suit land. First, it was contended that the learned trial Judge failed to consider that no substantial development of the suit land had been undertaken by the respondents after receiving the loan which could have led to depreciation in the true market value of the suit land. This matter is

evidence from the bar, and we reject it. At the trial only one witness was called for the appellant, and that witness never testified as to the nature of developments on the suit land.

I observe that considering the manner in which ground 2 was framed, the expectation would have been that the submissions in its support would be concerned with challenging the alleged reliance the learned trial Judge placed on the evidence of the 1st respondent. The submissions touched on several other points and I was almost inclined to consider ground 2 as having been abandoned. However, in the interests of justice, I will consider the relevant material on record relating to ground 2.

In addition to their contention that the true market value of the suit land should have been as set out in Exhibit P9, the respondents also contended that some developments had been carried out on the suit land which had increased the market value of the suit land. In para 28 of the 1st respondent's witness statement at page 83 of the record, it was stated that there had been further developments made on the suit land subsequent to the valuation in Exhibit P9, including tarmacking of the access road connecting to the suit land from Jinja road.

In cross examination of the 1st respondent testifying as PW1, at page 177 of the record, counsel for the appellant pointed out that the 1st respondent was claiming Ug. Shs. 1,325,000,000/= as compensation. He was also asked whether he was claiming that specific figure and if so, as to how he had arrived at that figure, to which the 1st respondent stated as follows:

> **"I arrived at the figure, by the time they gave me the loan, the property I pledged to the bank was valued at Shs. 925m/= by the Bank's valuers. The Bank advanced 300m which it fully acknowledged I topped up on 925m, making the property to have a value of about 2,225bn/=. During that process we added on our funds in order to develop the property further. From 2011, up to the time the property was sold, a lot of changes occurred within the vicinity, roads were tarmacked, prices of land went up. So according to us, by the time they sold in 2013, the value of the property had gone up to Shs. 1.6bn, that is why we come and claim for Shs. 1.3bn/=."**

In arriving at the relevant compensation, the learned trial Judge took into account the value of Ug. Shs. 925,000,000/= assigned to the suit land in Exhibit P9 which was made in 2011, and found that that value had appreciated at the time of sale by the appellant in 2013. The learned trial Judge found that the loan advanced to the respondent between 2011 – 2013, by appellant of Ug. Shs. 525,000,000/= represented the minimum level of appreciation of the suit land. He based his finding on evidence given by the 1st respondent that the totality of the advanced loan amount was invested in developing the suit land. This evidence was not challenged as the appellant called no witness to do so. It is only now on appeal that counsel for the appellant is seeking to challenge it by suggesting that the respondents did not invest the totality of the loan amount in developing the suit land. This amounts to evidence from the bar and cannot be sustained.

All in all, because the appellant bank was the errant mortgagee, and the learned trial Judge deemed it liable to pay compensation representing the true market value of the suit land, the appellant ought to have done a better job by adducing evidence to prove that lesser compensation should have been awarded in the circumstances. The appellant fell short, calling just one witness whose evidence was unreliable and unconvincing. The learned trial Judge, on the other hand did an excellent job in the circumstances and arrived at a value of compensation which I am not persuaded to interfere with. Grounds 1 and 2 must fail.

Ground 3

The contention in ground 3 is that the learned trial Judge should not have believed the expert handwriting evidence that a signature of the 2nd respondent on the relevant default notice was a forgery. I observe that evidence of a person who qualifies as an expert may be relied on by the trial Court in proving any fact. In the present case, the respondents relied on the evidence of PW2 Chelangat Sylivia, an expert to prove that a signature on a default notice purporting to be of the 2nd respondent was a forgery. Once that had been proven, it would reveal fraud and would mean that an agent

of the appellant fraudulently forged the 2nd respondent's signature, so as to get out of properly serving the default notice as required under the law.

Using, specialized scientific analytical methods, PW2 examined the default notice against four specimen signatures of the 2nd respondent contained on four different documents, namely; 1) a credit facility letter signed with the appellant; 2) a plain paper where the 2nd respondent wrote her signature; 3) a passport copy; and 4) a National ID Card copy. She concluded that there was strong evidence showing that the signature on the default notice was not written by the 2nd respondent, thus, making it a forgery.

In cross examination at page 181 of the record, it was put to PW2 that the credit facility letter she relied was a photocopy, but she stated that it was not necessary to rely on the original of that document. The possibility that some of the signatures on the specimen documents were not for the 2nd respondent was put to her, but she maintained that her signatures on the passport and National ID Card probably belonged to her.

PW2 was also asked whether there are factors that may cause a person's signature to change, to which she responded at page 182 of the record that factors such as signing in a hurry or sickness or old age could affect a person's signature. PW2 was also asked about the 2nd respondent's age, or health status but she answered that she was unaware of the same. However, PW2 stated that she didn't establish any features of old age or sickness on the disputed signature and accordingly she had not found it necessary to pursue any further inquiries.

In further cross examination at page 182 of the record, PW2 was asked whether it would have been prudent to get the specimen signatures from the 2nd respondent in person, but she responded that the fact of a document being a photocopy has no bearing on examining a questioned signature.

In re-examination at page 183 of the record, PW2 was asked to elaborate on the features that would indicate old age or sickness on a document and she gave some of these as tremor in writing, loss of coordination, alignment of words. She maintained that these features could not have caused the

variations between the signature on the default notice and other questioned documents.

In my view, PW2's evidence was not seriously shaken in cross examination and could have only been rebutted by similar evidence but the appellant did not adduce any such evidence. PW2 explained that it was not necessary to meet an author of a specimen signature to authenticate specimen signatures provided. Therefore, counsel for the appellant's contentions otherwise must be rejected. Further, failure to call the advocate who collected the 2nd respondent's specimen signatures was also not fatal considering that PW2's evidence was cogent and believable. The learned trial Judge saw the witness testify and was convinced that she was a truthful witness, and therefore, this Court cannot now on appeal second guess the learned trial Judge's view of PW2's evidence.

It is true as counsel for the appellant submitted that expert evidence should be thoroughly scrutinized, but in the present case, it is my view that the learned trial Judge handled this evidence well. In his judgment, at page 312 to 314 of the record, the learned trial Judge thoroughly scrutinized PW2's evidence. He found that the documents that PW2 based her examination on were clear and thus were capable of supporting her conclusions. I have no reason to depart from the learned trial Judge's conclusions.

Moreover, the appellant did not bother to call a similar witness to give another account to try and persuade the learned trial Judge against relying on the evidence of PW2. At page 314 of the record, the learned trial Judge remarked that because the appellant did not call any witnesses to counter PW2's findings, he had no reason to disbelieve her. I agree. I only add that submissions of counsel, however persuasive, cannot stand in the place of evidence when it comes to proving or disproving a fact, and in hindsight, I believe counsel for the appellant can appreciate this fact.

Ground 3 must fail.

Grounds 4 and 5

In their pleadings, the respondents contended that they suffered loss owing to the acts of the appellant that led to their being irregularly deprived of the suit land, and that consequently, the appellant was liable to pay general, aggravated and punitive or exemplary damages. The learned trial Judge agreed with the respondents and assessed damages as follows; general damages – Ug. Shs. 80,000,000/=; aggravated damages – Ug. Shs. 20,000,000/=; and exemplary damages – Ug. Shs. 80,000,000/=.

On this appeal, the appellant contests the above awards on several grounds which will be considered below. It is worth remembering, however, that the awarding of damages is done at the discretion of the trial Judge, and an appellate Court will usually not interfere unless exceptional circumstances exist justifying that course. In **Crown Beverages Ltd vs. Sendu, Civil Appeal No. 01 of 2005 (unreported),** it was stated:

> **"...an appellate court will not interfere with the award of damages by a trial court unless the trial court acted upon wrong principle of law or the amount awarded is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff was entitled."**

The appellant argued that the damages awarded to the respondents were based on wrong principles for two reasons. First, the learned trial Judge could not in law award both aggravated and general damages, as he did. Secondly, that in law, punitive damages could not be awarded in a case involving private persons like the present case.

It must be stated that the applicable principles on general, aggravated and exemplary damages are a product of the common law, at which damages were as initially intended to compensate a plaintiff for injury caused by a defendant. In settling the sum of money to be given as damages, the court would be expected to arrive at an amount which would put the injured party in the same position that party would have been if the injury had not been caused. **See: Livingstone vs. The Rawyards Coal Company (1880) 5 App Cas 25.** The class of damages envisaged in that case is what is now referred to as general damages.

The common law also recognized a sum of damaged referred to as aggravated damages which constituted a sum based on the amount of compensation awarded, and in principle aggravated damages were an addition to that compensation and were expected to take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. **See: Rookes vs Barnard [1964] 1 ALLER 367.**

It is my considered opinion, therefore, that in practice, a court should first assess the appropriate amount of general damages, take into account any factors that should lead to aggravation of that amount and arrive at a figure of aggravated damages. In the present case, although the learned trial Judge assessed two separate amounts as general and aggravated damages, it is clear from his reasoning that he felt that the amount he assessed as general damages needed to be aggravated due to the appellant's conduct. In his judgment at page 329 of the record, the learned trial Judge took into account the appellant's conduct in unilaterally selling the suit land which was a source of income for the plaintiffs thereby depriving them of their earnings since 2013 when the property was sold. The learned trial Judge considered a sum of Ug. Shs. 80,000,000/= as general damages. The learned trial Judge had earlier found a sum of Ug. Shs. 20,000,000/= appropriate as aggravated damages reasoning that the conduct of the appellant while selling the suit land amounted to malice and persistent falsehood as understood in the Rookes case (supra). Therefore, the practical implication of the learned trial Judge's decision was that he considered as appropriate a sum of Ug. Shs. 100,000,000/= as aggravated damages.

Accordingly, I accept the submission of counsel for the respondents that the learned trial Judge intended to award an enhanced quantum of damages to reflect both the loss suffered by the respondents and the fact that the appellant's conduct in selling the suit land was unfair, arbitrary and high handed. The enhanced award of damages would constitute the combined sum of the general and aggravated damages that the learned trial Judge

awarded. This explains why the learned trial Judge awarded a smaller amount as aggravated damages and a larger amount as general damages. I am not persuaded to interfere with the award. In my view, it was a question of form and not substance, the fact that the learned trial Judge assessed general and aggravated damages separately. Moreover, the case of **Mufumba vs. Uganda Development Bank, Court of Appeal Civil Appeal No. 241 of 2015 (unreported)** was decided on 3rd July, 2020 after the decision of the trial Court had been rendered, and the guidance in that authority with regards to computation of aggravated damages was at the time not available for the learned trial Judge, and he therefore cannot be criticized for not following that guidance.

In regard to the award of punitive damages, I would reject counsel for the appellant's submission that punitive damages should not be awarded in a case involving private persons where the impugned acts were unlikely to be repeated. On several previous occasions, courts have awarded punitive damages in cases involving private persons, provided the criteria for awarding such damages are met. In **Broome v Cassell & Co Ltd and another [1971] 2 ALL ER 187**, Denning, L.J quoting with from the textbook Mayne and McGregor on Damages, 12th Edition stated:

> **"Such damages (exemplary damages) are variously called punitive damages, vindictive damages, exemplary damages, and even retributory damages. They can apply only when the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as when it discloses fraud, malice, violence, cruelty, insolence, or the like, or as it is sometimes put, when he acts in contumelious disregard of the plaintiff's rights."**

The learned trial Judge was alive to the principles governing award of exemplary damages as can be seen from portions of his judgment at pages 327 to 328 of the record. He took the view that exemplary damages were appropriate to deter the appellant bank from future misconduct and to send a warning to other financial institutions, who might deviate from the rules regarding sale of mortgaged property to the disadvantage of their customers. In my view, there was evidence supporting the learned trial

Judge's exercise of discretion and I would therefore not interfere with it. All in all, the appellant has not demonstrated that the learned trial judge either acted on wrong principles or that he awarded an unreasonably excessive amount of damages in the present case, and therefore, I would uphold the amount of damages awarded.

Grounds 4 and 5 of the appeal must also fail.

Ground 6

Ground 6 challenges the costs order made by the learned trial Judge in so far as it affects Mr. Ssebuwufu Mohammed. He had been jointly sued with the appellant and it was to him that the appellant sold the suit land. However, Mr. Ssebuwufu is, not a party to this appeal. Therefore, it is my view that nothing concerning Mr. Ssebuwufu can be decided on this appeal as it leaves the risk of dragging him into litigation which he does not want to be a part of. I would disallow ground 6.

In conclusion, all grounds of appeal having been disallowed, I find no merit in the appeal and would dismiss it with costs to the respondents.

As Bamugemereire and Musota, JJA both agree, this appeal is dismissed with costs to the respondents.

It is so ordered.

Dated at Kampala this ....10th..... day of....Feb.....2022.

.....

Elizabeth Musoke

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

CIVIL APPEAL NO. 0131 OF 2021

(Arising from the Judgment of Justice Wangutusi, J in High Court Civil Suit No. 0185 of 2015)

BANK OF AFRICA UGANDA LIMITED :::::::::::::::: APPELLANTS

VERSUS

1. **SSEMAGANDA MARK**
2. **KUZUKIRA AGNES LWANGA**
   T/A HOLYWAYS HOSTEL :::::::::::::::::::: RESPONDENTS

CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment by my sister Hon. Justice Elizabeth Musoke, JA.

I agree that the appeal has no merit and ought to be dismissed with costs to the respondents.

Dated this 10th day of Feb 2022

Stephen Musota

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0131 OF 2021

{Coram: Musoke, Bamugemereire, Musota, JJA}

BANK OF AFRICA UGANDA LIMITED :: APPELLANT

VERSUS

1. **SSEMAGANDA MARK**
2. **KUZUKIRA AGNES LWANGA**

(T/A HOLYWAYS HOSTEL) ::RESPONDENTS

(Appeal from the decision of the High Court of Uganda at Kampala (Commercial Division) before Wangutusi, J dated the 4th day of July, 2020 in Civil Suit No. 0185 of 2015)

Judgment of Catherine Bamugemereire, JA

I have had the privilege of reading in draft the Judgment of my Learned Sister Hon. Lady Justice Elizabeth Musoke, JA. I do agree with her reasoning and conclusion and only wish to plug into few issues.

In total, I too find that given the materials and facts available to the Learned Trial Judge, he was justified in finding that the appellant sold the suit land without giving the respondents a demand notice. He was equally justified to find that the appellant did not give the respondents sufficient notice of the sale prior to placing the property on the market and thereafter disposing of it and moreover that the appellant sold the suit property by private treaty and kept this information secret and did not seek the consent of the

respondents and finally that the appellant sold the suit land at an undervalued price.

Consequently I agree with the Learned Trial Judge that the above breaches were major, unlawful and tainted the sale of the suit property.

The Learned Trial Judge correctly exercised his discretion in awarding the damages judiciously and I see no reason to interfere with the awards.

I would not hesitate to dismiss this appeal with costs.

Signed and dated this ..... 10th ..... day of ..... Feb 2021

Catherine Bamugemereire
Justice of Appeal