**THE REPUBLIC OF UGANDA,**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**CIVIL SUIT NO 258 OF 2009**

**HUDSON MUSOKE}..... PLAINTIFF**

**VERSUS**

**STANDARD CHARTERED BANK U LTD}..... DEFENDANT**

**BEFORE HON MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**JUDGMENT**

The Plaintiffs action against the defendant is for special, exemplary and general damages for breach of contract, interest thereon and costs of the suit. The plaintiff alleges that on the 27th day of June 2005 he applied for a salary loan from the defendant bank in a sum of Uganda shillings 42,000,000/=. On 30 June 2005 the defendant approved and granted the loan to the plaintiff. It was a condition precedent to the terms of the loan agreement that the defendant would take out an insurance policy cover the repayment of the loan upon the plaintiff suffering death or disability, inter alia, financial disability through loss of employment. The sum of Uganda shillings 1,685,000/= was deducted from the loan sum for the insurance cover. On 20th of July 2005 without any fault of the plaintiff, his employment with Uganda Revenue Authority was terminated. At the time of termination of employment, the loan amount was still outstanding and the defendant demanded for the outstanding sums against the plaintiff personally. The plaintiff tried to make some repayments of the loan but due to lack of any formal or permanent employment failed to service the loan.

Consequently the defendant filed a suit and obtained judgement against the defendant in HCCS number 473 of 2006 whereupon the defendant attached and sold the plaintiffs truck Isuzu Forward Tipper UAG 243 P. Thereafter the defendant obtained a warrant of arrest for the plaintiff was committed to prison from 9 April 2008 after 28 June 2008 when he was released by the court with the consent of the defendant. The plaintiff still faces a threat of being recommitted to prison for the debt. Recently the plaintiff discovered that in breach of the loan agreement, the defendant did not take out an insurance policy in favour of the plaintiff which could have protected the plaintiff from liability to pay the loan balance in case of disability. This was in breach of loan agreement for which the plaintiff holds the defendant liable for general damages and exemplary damages. The committal of the plaintiff to prison made him suffer in his personal capacity and he lost esteem as an advocate. The plaintiff and his family suffered mental anguish.

By reason of failure to take out the insurance policy the plaintiff wrongly paid out Uganda shillings 5,000,000 to clear the loan, 1,685,000/= as arrangement fees for the group insurance premium, costs of defending HCCS number 473 of 2006 of Uganda shillings 10 million and the value of the plaintiffs truck the Uganda shillings 35,000,000/=. Consequently the plaintiff claims special damages of Uganda shillings 51,685,000/=.

The defendant denied the claim and initially raised a preliminary objection to the suit on the ground that it was res judicata. The preliminary objection was overruled. The defendants defence is that the plaintiff had not suffered the disability envisaged in the contract. Consequently the defendant properly filed a suit against the plaintiff for the payment of the loan. Thirdly it acted in good faith in all the proceedings.

At the hearing of the suit the plaintiff was represented by Mr Peter Walubiri of Kwesigabo, Bamwine and Walubiri Advocates while the defendant was represented by William Were.

In the joint conferencing notes signed by both counsels, the following facts were agreed upon.

The plaintiff is a male Ugandan and an Advocate of the courts of judicature why the defendant is a limited liability company registered under the laws of Uganda carry out the business of banking. On 30th of June 2005 the defendant approved and granted a salary loan of Uganda shillings 42,000,000/= upon the application of the plaintiff dated 27th of June 2005. At the time of termination of the plaintiff's employment, the loan with the defendant was still outstanding and the defendant demanded for the loan outstanding from the plaintiff personally. The plaintiff failed to clear the balance of the loan in full and thereafter the defendant filed HCCS number 473 of 2006 against the plaintiff and obtained a judgement against the plaintiff. Thereafter the defendant applied for a warrant of arrest against the plaintiff and the plaintiff was committed to Murchison Bay Prison from 9 April 2008 until 28 June 2008 when the plaintiff was released by court with the consent of the defendant.

Agreed issues for trial:

1. Whether the defendant breached the loan agreement by failing to take out an insurance policy to insure the loan?
2. Whether the risks sought to be insured against occurred?
3. Whether the defendants bailiffs attached and sold the plaintiffs truck registration number UAG 240 P and if so whether the defendant is liable?
4. If so, what remedies are available to the parties?

The plaintiff called one witness and the defendant called one witness. Examination in chief was through written testimony of the witnesses upon which they were cross examined. At the close of each but this case, counsels addressed the court in the written submissions.

**Whether the defendant breached the loan agreement by failing to take out an insurance policy to insure the loan?**

The plaintiff's argument on the first issue is that the defendant breached the loan agreement by not insuring the plaintiff against financial disability of dismissal from his job. The terms of the loan agreement between the plaintiff and the defendant were never reduced into a formal loan agreement. These terms were orally negotiated between the plaintiff and officers of the defendant before the plaintiff made a formal application for the loan. The negotiated terms of the loan agreement were confirmed in exhibit P1. The agreed term of the loan agreement was that the defendant would insure the plaintiff's loan against death and disability. The critical question was therefore whether the "disability" contracted included financial disability due to dismissal from the plaintiff's employment. The issue was whether the term "disability" which is not defined was restricted to physical disability as argued by the defendant. The plaintiff was not cross examined on the oral discussions between him and the defendant's officers before he signed the loan application form. Is evidenced is that the insurance would cover financial disability owing to dismissal from employment. DW1 Mr Julius Butufu and SME collections manager and Head of Collections of the defendant bank were not involved in negotiations with potential clients. Consequently he did not know the representations and assurances about the loan terms made by the officers of the defendant which convinced the plaintiff to obtain the loan. The people who negotiated with the plaintiff were not called to contradict what the plaintiff said in paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 and consequently the court should believe the plaintiff's testimony that disability covered financial disability owing to dismissal from employment.

The defendant never produced the policy that covers the specific situation of rose of income due to dismissal from employment. In cross examination DW1 relied on exhibit D6 dated 17th of August 2006 which was a policy taken over a year after the loan agreement was concluded between the defendant and the plaintiff on 30 June 2005 and over a year after dismissal of the plaintiff from employment on 20 July 2005. DW1 claimed that it was a renewed policy but there was no clause showing that it was the renewal of an earlier policy. The policy document relied upon by the defendant was for a different period running from 1 August 2006 to 31 July 2007. This was long after the plaintiff adopted in the loan from the defendant and long after he had lost his job with Uganda Revenue Authority.

In any case the policy relied on by the defendant did not cover loss of jobs through dismissal but covered loss of jobs through retrenchment. Clause 3 of the policy exhibit D6 is not the policy envisaged in exhibit P1 that was to cover death and disability. Clause 3 of exhibit D6 covers death, permanent disablement, total temporary disablement, involuntary retrenchment, and abscondance. It was not the policy the plaintiff which had been negotiated with officers of the defendant. However the rationale for the policy and the attention of the parties was to ensure that when an employee is unable to earn a salary, it would be covered by the policy. The defendant did not insure the plaintiff against financial disability owing to dismissal from employment.

Consequently the defendant was in breach of the term of the contract. The defendant received consideration for a specific insurance policy and did not obtain such a policy.

In reply on issue number one the defendants counsel submitted that the contention that the loan agreement was not reduced into a formal agreement was both misleading and a deviation from the pleadings. The plaintiff applied for a loan by filling out the loan application for exhibit D4 containing the terms and conditions therein. The defendant agreed to disburse the loan sum by the acceptance letter marked exhibit D4. The loan agreement was obtained in the offer and acceptance documents exhibits D4 and D5. The parties all alone knew that the documents formed the loan contract and this can be discerned from the plaint and written statement of defence. At the trial conference, it was agreed that the only question of fact be tried was the question of attachment of the truck. The plaintiff attached annexure "A" which is to exhibit D5 is the basis of the insurance requirement the subject of this suit. Whatever is annexed to the plaint is deemed to be incorporated in the plaintiffs pleading and to assert another thing was a deviation from the pleadings.

Alternatively and without prejudice the defendant's counsel submitted that the parties could not have entered into any contract prior to the application for the loan. Any statements if at all made by the defendant employees or agents were mere invitations to treat and not intended to bind the parties. Where oral statements are followed up by written statements, the parties reduce the oral negotiations into writing. According to Cheshire Fifoot and Furmston’s Law of Contract 14th edition at page 141 after a deduction of the oral negotiations into a written contract, the oral statements are excluded. Consequently the loan agreement comprised entirely of exhibits D4 and D5 and the intention of the parties can be discerned from the documents. Exhibit D5 provides that the plaintiff should read through the information regarding the loan before signing. The loan agreement is exhibit D5.

The defendant insured the loan against disability and death as was agreed between the parties in exhibit D5 and reiterated by PW1 in cross examination. Upon admission of the policy at the scheduling conference, the defendant could not be reasonably expected to call further evidence to prove the existence of the policy or the contents at the trial rather than to indulge in interpretation thereof. Furthermore the plaintiffs pleading does not disclose or imply any oral negotiations as the foundation of the suit bag relies on annexure "A" which at the terms alleged to have been breached. Although DW1 did not participate in the negotiations for the loan, he pointed out what the law negotiations resulted into. Consequently it was not important for the defendant call any witnesses to state what was negotiated during the oral discussions if any. The evidence of the plaintiff was a deviation from the pleadings and evidence amounted to deviation from pleadings should be disregarded according to the Supreme Court authority of Dirisa vs. Sietco [1993] IV KALR at page 108. Additionally the oral testimony is intended to vary the terms of the loan agreement between the parties against the spirit of section 91 of the Evidence Act.

Finally counsel submitted that in the event that the court finds that the policy did not cover the plaintiff, any alleged breach should be remedied only by a refund of the insurance premium being 2% of the loan amount. The rationale being that none of the risks sought to be insured occurred and the failure to insure was not prejudicial to the plaintiff in the circumstances.

In rejoinder the plaintiff's counsel submitted that the submissions of the plaintiff and not misleading and they were not a deviation from the pleadings. The application for a loan exhibit D4 and exhibit D5 which is the loan information letter, cannot be properly said to be the loan agreement. Counsel reiterated submissions that the terms of the loan agreement between the plaintiff and the defendant were never reduced into a formal loan agreement. These terms were orally negotiated between the plaintiff and officers of the defendant before the plaintiff made a formal application for the loan in exhibit D4. The negotiated terms of the loan were only confirmed in exhibit P1 which is merely a confirmation of the existence of the loan but was not the loan agreement itself.

Exhibit P1 clearly indicates that it is an auto generated letter and does not require a signature. It is headed "Loan Account Information". It was not a written agreement but refers to the orally negotiated terms. In order to understand whether the loan is insured against death or disability, one has to read exhibit P1 in conjunction with the oral evidence of the plaintiff.

The plaintiff's counsel further submitted that assurances made by officers of the defendant according to the testimony of the plaintiff were not mere invitations to treat. The terms of the loan agreement were orally negotiated between the plaintiff and officers of the defendant before the plaintiff made a formal application for the loan according to exhibit D4. The negotiated terms of the loan were confirmed in exhibit P1/D5. In the absence of the written loan agreement it would be proper to refer to the oral terms negotiated between the parties. Counsel relied on section 92 (b), (c) and (f) of the Evidence Act. The provisions of the Evidence Act quoted above permitted reference to the oral terms negotiated between the parties should existence of a separate oral agreement where the award "disability" would cover "financial disability" to repay the loan as a result of dismissal. To show that there was a separate oral agreement for insurance against financial disability which was a condition precedent to the loan agreement. To prove the manner in which the language of exhibit P1 related to existing facts. Because the plaintiff was not cross examined on paragraphs 2, 3, 4, 5, 6, 7, 8, and 9 of his witness statement, the evidence remained unchallenged. Finally there was not ambush or departure from pleadings on the issue of breach of contract in terms of failure to insure against financial disability due to dismissal. The authority quoted by the defendant was cited out of context namely the case of **Dirisa vs. Sietco** and **Interfreight forwarders Uganda Ltd versus East African Development Bank** (supra). Finally the defendant never produced the policy that covers the specific situations of loss of income due to dismissal from employment.

The first issue is whether the defendant breached the loan agreement by failing to take out an insurance policy to insure the loan. The question of whether the defendant failed to take out or did not take out an insurance policy in respect of the loan of the plaintiff is a question of fact.

The primary submission of the defendant is that the basis of the plaintiff's suit is contained in the plaint and evidence of the loan referred to in the plaint is annexure "A" which forms part of the plaintiffs pleading and which the defendant admits. It is the submission that annexure "A" is evidence of the terms of the loan agreement and therefore the question of insurance of the loan. Annexure "A" was admitted as exhibit P1.

It is an agreed fact that on 27 June 2005 the plaintiff applied for a salary loan from the defendant in the sum of Uganda shillings 42,000,000/= and on 30 June 2005 the defendant approved and granted the loan. Annexure "A" to the plaint was admitted under paragraph 4.1 of the joint scheduling memorandum of the parties as exhibit P1.

I have carefully considered this evidence. Without much ado it leads to the conclusion that the parties are in agreement that the defendant was obliged to take out an insurance policy. The defendant in fact concedes this point and argues that it did take out an insurance policy but the situation of the plaintiff was not within what had been insured against. The insurance company was not involved in this action. None of the parties produced the policy of insurance if any. Even if the policy of insurance, if any, was not produced in evidence, it is an agreed fact that the defendant was obliged to take out an insurance policy. Had such an insurance policy been taken out, it would be the insurance company to pay for the insured risk. Therefore, it will be crucial to consider the question of whether the risk insured, if at all there was any insurance taken out, was the risk envisaged in the agreed document annexure "A" or exhibit P1. The defendant should not be arguing the case of the insurance company. What is even more crucial is that the plaintiff relies on exhibit P1. Exhibit P1 communicates to the plaintiff that his loan is insured against death and disability. In other words the communication is to the effect that there was an insurance policy cover death and disability. However it would be necessary to resolve the first issue conclusively after resolving the second issue which is whether the risks sought to be insured against occurred. This is because if the risks sought to be insured has not occurred, the consequences of failure to take out any insurance policy as contracted would be minimal. Consequently the first issue should not be resolved without a resolution of the second issue.

The second issue is **whether the risks sought to be insured against occurred?**

On this issue the plaintiff's counsel submitted that the risk which the parties negotiated about and agreed before the plaintiff obtained the loan from the defendant is financial disability owing to dismissal from employment. This risk had occurred. The plaintiff's counsel contended that in paragraph 16 of the plaintiffs witness statement, the plaintiff clearly states that his services were terminated on 20 July 2005. In cross examination the plaintiff stated that when he was dismissed, he had no income and had a family to take care of but was faced with challenges to do so. His

terminal benefits were collected by the defendant and his truck registration number UAG 240 P was equally attached. Clearly the risk occurred and since the defendant did not take out an insurance policy to ensure this risk, the defendant is liable for breach of this term of the contract.

In reply the defendant reiterated submissions that the loan agreement was exhibit D5 with reference to the instructions for the borrower to take a minute to read through the information regarding the loan. The plaintiff accepted the loan according to the terms of the offer. Secondly it was a deviation from the pleadings for the plaintiff to adduce oral testimony about the terms of a loan. The plaintiff seeks to vary the loan agreement between the parties through the oral testimony. The agreement specifies the risks insured namely disability and death. The plaintiff's submissions on the scope of disability to include the dismissal from employment were not tenable. Counsel contended that disability is an adjunct to life. Thirdly the defendant could not be requested to pursue policy terms different from what is stated in exhibit D5.

The defendant's obligation obviously was to take out a group policy and should be read together with the loan acceptance letter exhibit D5. Disability is defined at page 2 of exhibit D6. The defendants counsel further reiterated submissions that the plaintiffs attempted oral evidence of the terms of the loan agreement were a deviation from the pleadings which are the only foundation upon which evidence can be led in proof thereof. The court cannot adjudicate upon a different case that is reflected in the pleadings. Counsel relied on the case of Interfreight Forwarders Uganda Ltd versus East African Development Bank Civil Appeal number 33 of 1992.

On the submission that the plaintiff was dismissed and that means of income and the only source of income which was his truck was attached, the argument was not tenable. This is because the plaintiff did not service his loan while practising law and earning from the truck. On the question of whether the policy relied upon by the defendant was a wrong policy, the inclusion of other risks in the policy did not in any way affect the agreement between the parties and could not prejudice the plaintiff. Alternatively the defendants counsel submitted without prejudice that if the court where to define dismissal as a risk (disability), the plaintiff in exhibit D4 undertook to notify the defendant of any changes in his employment status, which the plaintiff was in breach of under the provisions of his loan application. The plaintiff did not notify the defendant of any changes in his employment status according to the testimony of DW1 which remained unchallenged. Consequently the defendant could not have known that the risk had occurred.

In rejoinder the plaintiff's counsel reiterated submissions that the plaintiff's services were terminated on 20 July 2005 and this assertion was not a deviation from the pleadings. The defendant got to know about the plaintiff's loss of employment when it collected his terminal benefits from Uganda Revenue Authority further compounding the plaintiff's disability to service the loan. The risk occurred and because the defendant did not take out an insurance policy to insure this risk, the defendant is liable for breach of the term of the contract.

The question of whether the risks sought to be insured against occurred as earlier discussed above is a question of fact. The question of fact depends upon the existence of terms of a contract whether written or oral.

It is an agreed fact that the plaintiff obtained the loan which was approved and granted on 30 June 2005. It is also agreed that on 27 June 2005 the plaintiff applied for a salary loan from the defendant in the sum of Uganda shillings 42,000,000/=. At the time of termination of the plaintiff's employment with Uganda Revenue Authority, the loan was outstanding.

Exhibit P 1 is a letter addressed to the plaintiff by the defendant with the subject "Loan Account Information". The letter is dated 10th of June 2005. The letter reads as follows:

> "*Please take a minute to read through the information below regarding your loan. The total amount borrowed is Uganda shillings 42,000,000/=. The prevailing interest rate is 21.5%. Your loan agreement (loan account) number is 2010090057985. Please remember to quote the above number when making enquiries about your loan.*
>
> *Standard Chartered bank paid Uganda shillings 40,315,000/= (which is made of arrangement fees and insurance amount) into your transactional account number on 30th of June 2005.*
>
> *The bank will recover in monthly instalments of Uganda shillings 1,493,155/= from your transactional account number. The first monthly instalment is due on 30th of July 2005. Subsequent repayments would follow the same monthly cycle for a period of 36 months, or until the outstanding loan principal and interest due are cleared.*
>
> *Your loan is also insured against death and disability. The insurance premium and arrangement fees (5% of the total amount borrowed or a minimum of Uganda shillings 250,000) have been recovered from your transactional account as advised below:*
>
> *Arrangement Fee + Group Insurance Premium = UGS 1,685,000/=.*
>
> *BROKEN PERIOD INTEREST: UGS 25,083 (this amount is the interest charged between the drawdown date and your first payment date. This would be collected or debited from your account upon drawdown).*
>
> *Please contact us on the under listed numbers:…"*

The plaintiff's services were terminated in a letter dated 20th of July 2005 hardly a month after exhibit P1. The termination letter is exhibit P2. In the termination letter the plaintiff's services with Uganda Revenue Authority were terminated with effect from 22nd of July 2005 under clause 14.2 of the Human Resource Management Manual. In accordance with the clause of termination the plaintiff was entitled to 2 months salary in lieu of the notice plus any accumulated leave less any staff indebtedness upon proof of hand over. It should be noted that

the first instalment payment under exhibit P1 was the 30th of July 2005. Subsequently by a demand letter dated 23rd of January 2006 exhibit P3, the defendant bank wrote to the plaintiff a demand note for an amount of Uganda shillings 30,554,204/= inclusive of interest by 23 January 2006. The plaintiff was given 14 days within which to clear the outstanding loan. Subsequently the defendant filed HCCS number 473 of 2006 and a consent judgement was entered into following terms:

1. *The Defendant shall pay to the plaintiff the outstanding loan and costs of Uganda shillings 28,673,074/=.*
2. *The said sum shall be paid in monthly instalments of shillings 1,000,000/= with effect from 30th of July 2007.*
3. *In the case of default on any instalment the outstanding balance shall be due and payable in one lump sum.*

A decree was issued on 4 July 2007 in the above terms and was exhibited as exhibit D1. As far as exhibit P1 is concerned the defendant notified the plaintiff that his loan was insured against death and disability. As a question of fact, the plaintiff was notified that his loan was insured. As earlier on held by the court, whether the plaintiff's loan was insured or not is a question of fact. The second point that can be established was that an arrangement fee for a group insurance premium of Uganda shillings 1,685,000/= was levied on the plaintiff by the defendant. Again a question of fact comes out strongly that there was a group insurance scheme.

The defendant adduced in evidence exhibit D4, the loan form which gives the terms of the loan. The loan form has a place for the Employer's consent and recommendations. The plaintiff in the form duly filled authorised the bank/defendant to deduct any premiums payable towards an insurance cover from the amount approved. He further agreed to inform the defendant about any change in his employment status. It is the defendant's evidence through DW1 that there was a group policy exhibit D6. However exhibit D6 was signed on 17 August 2006 after termination of the plaintiffs services with Uganda Revenue Authority.

The plaintiff asserted that the defendant did not take out any insurance policy according to the terms of his loan agreement with the defendant. The defendant on the other hand claimed that there was an insurance policy which had been taken out. It is a finding of fact that the insurance policy referred to in exhibit P1 relied upon by the plaintiff is a group insurance scheme. However, no policy document was adduced in defence. The plaintiff's assertion that there was no insurance policy is not based on his knowledge of the defendant's operations but is pure conjecture. A review of the plaintiff’s witness statement and testimony in cross examination do not prove that no insurance policy was ever taken out by the defendant. That assertion remains an assertion of fact not proved by evidence. The plaintiff's testimony is that he was approached by three employees of the defendant with an offer for the salary loan. The salary loan was payable within a period of three years. He was assured by the defendant’s employee that if his employment was terminated, he should not worry because the loan was insured against such an

eventuality. He was informed that the loan was insured against loss of employment. He understood it to mean that he would be insured against any form of disability whether physical or financial. He further testified that the two months' pay he was entitled to upon termination was not paid to him because it was passed over to the defendant by his employers. In January 2006 he visited the defendant and was given a demand letter to pay the outstanding loan amount. The letter is dated 23rd of January 2006, exhibit P3. He had no alternative other than to look for the money and paid a total of Uganda shillings 5,000,000/=. Subsequently he was sued by the defendant who claimed Uganda shillings 30,397,188/=. Judgment was consequently entered against him. One morning he was served with a warrant of arrest exhibit P7. Exhibit P7 is dated 28th of March 2008 and is for payment of Uganda shillings 27,673,074/=. On 9 April 2008 he was confronted by the court bailiffs who had a warrant of arrest against him whereupon he was committed to civil prison on 9 April 2008.

The group insurance policy exhibit D6 was issued by the Lion Assurance Company Ltd and is an agreement between Standard Chartered Bank and Uganda Revenue Authority and the insurer. The document is entitled "Personal Loan and Overdraft Protection Insurance Policy."

Exhibit D6, though relating to a different period, is a good example of the defendant's group insurance scheme. This is because the main controversy relates to the definition or scope of the word "disability" as contained in exhibit P1. Such a definition is necessary irrespective of the finding of the court on whether the policy of insurance was actually taken out. Exhibit P1 reflects the intention of the parties. Exhibit D6 defines temporary total disability and total permanent disability. Temporary total disability is defined as a situation where the client debtor is prevented from earning his own income from his own occupation as a result of sickness or bodily injury, and is under the care of a duly qualified medical practitioner. The definition contains three ingredients namely: the debtor is prevented from earning income as a result of sickness or secondly as a result of bodily injury and thirdly is under the care of a duly qualified medical practitioner. In other words the debtor is not working and is under medical care though for a temporary period of time. On the other hand total permanent disability has five categories namely:

- Incapacity which prevents the client debtor from practising his own occupation, or any other occupation, for which he is qualified by training, education and experience.
- Total or permanent loss of both hands of both feet or one hand or one foot.
- Loss of sight in one or both eyes.
- Permanent confinement to a wheelchair or sickbed.
- Any other disability which, at the sole discretion of the company, is of a similar nature.

Total disability is related to the health and physical fitness of the client debtor. Clause 3 of exhibit D6 gives the benefits and cover of the insurance policy. It provides that in the event of a client debtor losing his capacity to maintain his monthly instalments or servicing his loan or overdraft as a result of death; permanent disablement; total temporary disablement; involuntary

retrenchment; or abscondance, the insurance company will pay to the bank the outstanding amount of the loan or overdraft, less all finance charges and any monthly instalment arrears. It is therefore crucial to the plaintiff's case to prove that no insurance policy was taken out by the defendant as contracted. Even then it must additionally be shown that had the insurance policy notified in exhibit P1 been issued, it would have entitled the defendant to claim from the insurance company the outstanding loan amount which otherwise was recoverable from the plaintiff's salary. From the proposition it would follow that the debt recovery measures taken by the defendant would not be applied on the plaintiff. It is necessary to observe that the insurance policy as contained in exhibit D6 ensures that the bank recovers the outstanding amount of the loan or overdraft from the insurance company. Secondly it insulates the client debtor from paying the outstanding amount of the loan or overdraft personally. In any case what is insured is the inability of the client debtor or borrower from meeting his or her obligations under the loan by making the monthly instalment payments due to disability or death.

The plaintiff's counsel disagreed with the definition of temporary or permanent disability contained in exhibit D6 on the ground that it dealt with a period after termination of the plaintiff's services with Uganda Revenue Authority. Of course the burden is on the plaintiff to prove that the defendant had not taken out an insurance policy. What would be the rationale for the defendant not to claim for the outstanding amount on the loan from the insurance company? The argument of the defendant is that the risk insured had not occurred. In other words termination of the defendant’s employment was not the disability envisaged by the parties in the loan agreement and the defendant bank was unable to recover the outstanding amount from the insurance company. The task of the court is not made easier by failure of the defendant to produce the contract of insurance or the policy document. Exhibit D4 which is the loan agreement is not evidence of the policy document as far as insurance coverage is concerned. Consequently the only evidence is exhibit P1 and exhibit D5 which is the letter informing the plaintiff about the loan and indicating that the loan is also insured against death and disability.

After careful thought, the letter of offer or the loan agreement considered above do not specify the kind of policy which would be negotiated or which was negotiated between the defendant, the employer of the plaintiff and insurance company. Without considering whether in actual fact such a policy was taken, if indeed the policy was to be taken out, it will involve the employer of the plaintiff, the defendant and the insurance company. The relevant negotiations for terms of the policy including what kind of disability which would be covered would be with the insurance company. What is further crucial is that it would be Uganda Revenue Authority to negotiate on the behalf of the staff or the members of staff would have to negotiate as a group or through representatives. Exhibit P1 notifies the plaintiff of a premium for a group policy. Consequently, the available evidence is that the group policy insures the defendant from loss of loan instalments due to disability or death. If the plaintiff’s argument is taken to its logical conclusion, it would mean that termination of his employment would entitle the bank to claim from the insurance company. However, if he got employment immediately thereafter, the defendant would not claim

from the insurance company because he would not be labouring under a disability. Such a proposition is absurd because it would involve the insurance company investigating what happened to the debtor client after termination of services. The insurance company will rely on a question of fact as to whether the client debtor was gainfully employed after termination of his or her services by Uganda Revenue Authority. In exhibit D6 abscondance is a ground for the bank to claim from the insurance company. In such a case the bank would have lost their monthly salary payable by the employer to the employee/client debtor. Abscondance and retrenchment are by their nature loss of employment in that the employer would not be paying the monthly salary of the client debtor to the defendant bank anymore.

If the court went by the defendants submission that the policy taken out which covered the plaintiff was similar to that exhibited as D6 and which covered the subsequent period after termination of the plaintiffs employment, certain conclusions can be reached. Clause 4 of exhibit D6 gives specific restrictions on liability of the insurance company. The restrictions on liability are very instructive. Clause 4.2 restricts obligations to pay the outstanding amounts where death, disability, or sickness is caused directly or indirectly by certain factors spelt out there under. Clause 4.2 does not apply to the plaintiff's case because the plaintiff does not claim any of the factors excluded by clause 4.2.

Clause 4.3 restricts liability of the insurance company caused directly or indirectly related to the client debtor is ill health or incapacity as a result of pregnancy, miscarriage, childbirth, and abortion. It also includes incapacity due to mental disorder. Last but not least clause 4.4 provides as follows:

> *"The Company's liability in terms of this policy will cease upon payment to the Financial Institution/Bank of the outstanding balance or if the Client Debtor has voluntarily opted to be retrenched and has been given a retrenchment package from which they can easily pay off his loan or outstanding debts."*

The first observation to be made is that in the entire clause 4 of the contract, the contracting parties did not deem it fit to exclude termination due to employee's fault. Voluntary retrenchment is specifically excluded from the insured risks. To explore the matter further, if the employer decides to terminate the employment of its employees, the bank stands to lose. If the employer is at fault, it would be involuntary termination of employment on the part of the employee as contrasted to voluntary retrenchment. Whatever the case may be, clause 4.4 makes it clear that the client debtor is obliged upon voluntary retrenchment to pay his or her retrenchment package to the bank and the insurance company would not be liable to pay the outstanding balance on the loan to the bank.

The plaintiff testified during cross-examination that his disability was financial disability. He had sued Uganda Revenue Authority for unlawful termination of his employment contract and was successful in the case for unlawful termination of his employment. The plaintiff further testified

that he was awarded 37,000,000/= Uganda shillings. However, he did not use the money to settle his indebtedness to the bank. Secondly the evidence does not indicate when the plaintiff was paid Uganda shillings 37,000,000/= as testified.

The letter of termination exhibit P2 was therefore not the end of the matter. The plaintiff sued Uganda Revenue Authority and was paid damages for loss of employment. In other words he was compensated for the salary that he would have earned had he remained in the employment of Uganda Revenue Authority/The Employer. The plaintiff's case is that the defendant obtained his terminal benefits upon termination of his services. The termination letter clearly indicates that the plaintiff was entitled to 2 months pay in lieu of notice.

Whether or not the policy of insurance was taken out would be immaterial in the circumstances of the plaintiff because in either case, he was obliged to remit the damages awarded due to termination of his employment to the defendant bank to the extent of the outstanding amount due. He admitted in court that he won the case of unlawful termination of his services and was awarded damages. In other words all the instalment payments relevant to his employment had been paid. Secondly the evidence is clear that the amount outstanding by 23rd of January 2006 was Uganda shillings 30,554,204/=. First of all the plaintiff under exhibit P2 which is the termination letter of his employment was entitled to 2 months salary in lieu of notice plus any accumulated leave due. Secondly he was admittedly awarded Uganda shillings 37,000,000/= as damages for unlawful termination.

In favour of the plaintiff is the argument that his services were brought to an end through no fault of his. However he was compensated for the loss of employment. He ought to have remitted the damages he received to the defendant bank to clear the outstanding loan amount. In other words, the defendant was entitled to proceed against him personally to recover the fruits of his employment with Uganda Revenue Authority. The basis of the loan was the salary he was earning from the defendant. Terminal benefits ought to be paid to the defendant bank because they represent damages for loss of employment. Last but not least, upon suing Uganda Revenue Authority the plaintiff cannot claim that he was suffering from any financial disability relative to his employment. The plaintiff therefore has no claim against the defendant on the basis of the insurance cover since he was compensated for loss of employment. Secondly the question of whether an insurance policy was taken out is answered by the plaintiffs own document exhibit P1 which provides that the plaintiffs loan had been insured. The first issue is therefore answered in the negative in that the balance of probability shows that the defendant bank had taken out a group policy and also notified of the plaintiff in exhibit P1. Secondly as to whether the risk insured had occurred, the proper party against whom such a risk is to be claimed would have been the insurance company. The insurance company is not a party to this suit and the resolution of the issue would lead to no possible good. Moreover, the plaintiff was paid his terminal benefits and was not under disability due to dismissal from his employment and upon compensated for loss of salary the very basis of the loan. The second issue could not be determined without production of the contract of insurance. In any case it is not important to

determine the question because the plaintiff did not pay damages for unlawful termination of his services to the defendant bank.

The third issue is whether the defendant's plaintiff attached and sold the plaintiffs truck registration number UAG 240 P and if so whether the defendant is liable.

The plaintiff's counsel submitted that the defendant's bailiff attached the plaintiff's truck. The question of whether the plaintiff's truck was attached could not be disproved by the defendant. The plaintiff's counsel further submitted that the court bailiff acted the way he did on the orders of the defendant to recover money from the plaintiff. The truck was sold to satisfy the decreed sum awarded against the plaintiff and therefore the defendant is liable for the sale.

In reply the defendants counsel submitted that the plaint and the evidence in chief of the plaintiff are at variance. In miscellaneous applications arising out of the suit, there are affidavits sworn by the plaintiff of which the court should take judicial notice wherein the plaintiff avers that the truck was attached. The plaintiff is an advocate of the High Court of Uganda and knew that a bailiff is an agent of the registrar of the court who issues the arrest warrant and any illegal acts cannot be visited on the judgment creditor if done without its knowledge. The plaintiff testified in cross examination that there was never any attachment warrant/order presented to him. Consequently the defendants counsel submitted that there was no attachment order obtained by or for the defendant and the sale was a private arrangement of the plaintiff. The third issue should therefore be resolved in favour of the defendant.

Alternatively the defendants counsel submitted that the documentary proof is of the circumstances surrounding the truck are contained in exhibit D3 which was signed for an admitted by the plaintiff. It is proves that the plaintiff received Uganda shillings 19,000,000/= in two instalments. The plaintiff did not call any evidence that he or the bailiff disclosed the proceeds to the defendant. The actions of the plaintiff where without the defendant's knowledge or the court order obtained by the defendant and cannot be visited on the defendant. There is no evidence that Uganda shillings 19,000,000/= was ever received by the defendant and the outstanding sums when the consignment remained the same in exhibit P3, P4, P5 and P6. Should the court fined that the proceeds of the sale or any part thereof were disclosed to the defendant by the plaintiff or the bailiff, the sum should be treated only as payment towards the outstanding loan because there was no attachment warrant or directions by the defendant or the court registrar for the sale of the property.

Alternatively the sale was done by the bailiffs. If it was void or voidable for illegality, the plaintiffs redress was against the bailiff who was an officer of the court and not the defendant. The evidence according to exhibit D3 shows that the sale took place on 25 November 2006 when Uganda shillings 30,000,000/= was paid. The truck remained parked at Mukono Town Council and the sale was concluded on 8 December 2006 when Uganda shillings 6,000,000/= was paid. The vehicle was brought by the plaintiffs own driver at the request of the plaintiff. Neither the

defendant not the bailiffs were aware of the existence of the truck. The plaintiff informed the court bailiff aboard truck whereupon they agreed to sell it without notice to the defendant or the registrar handling the execution process. Counsel for the defendant was not involved at all in the process. Whatever the case the purported sale or attachment if it is deemed illegal, the remedy of the plaintiff is against the court bailiff. In the case of Registered Trustees of Kampala Archdiocese and Another versus Harriet Namakula and others HCMA number 1024/1996 it was held that where execution is unlawful, the bailiff cannot enjoy immunity.

In rejoinder the plaintiff's counsel reiterated submissions that the money obtain from the sale of the truck was received by the defendant in partial payment of the money owed by the plaintiff to the defendant. The defendant had not adduced any evidence to the contrary. The issue of attachment the vehicle in Mukono Town Council after the sale is immaterial. What was important is that the vehicle was sold under a forced sale circumstances because of the warrant of arrest and the defendant and its breach of the loan contract was because of the warrant of arrest and a beneficiary of the proceeds of sale. Clearly the sale by the bailiff was conducted with the knowledge of the defendant who is therefore liable for it.

I have carefully considered the third issue. The issue of whether the defendant’s bailiffs attached and sold the plaintiffs truck and if so whether the defendant is liable may not be lawful for trial in this action. Before concluding whether such an action or issue can be tried, it would be necessary to examine the basis of the issue. The foundation of the attachment/sale of the plaintiff’s vehicle is a warrant of arrest issued to the plaintiff for the outstanding amounts due to the defendant bank. The warrant of arrest exhibit P7 was intended to arrest the plaintiff unless the plaintiff pays to the court bailiff the sum of Uganda shillings 27,673,074/=. In other words, there was no warrant of attachment of the vehicle. What happened is clearly what should happen as directed in the warrant of arrest. The warrant of arrest is dated 28th of March 2008. The agreement of sale of the vehicle was made by the plaintiff and was adduced in evidence as exhibit D3.

The plaintiff’s action is for breach of contract. It is not for cancellation of the sale on account of the vehicle having been sold by him under duress. The duress that had been applied on the plaintiff was a lawful order of arrest by which the plaintiff was threatened. The plaintiff never pleaded duress in the plaint. In paragraph 4 (g) of the plaint, the plaintiff’s case is as follows:

> *"The Plaintiff failed to clear the balance of the loan in full and thereafter, the defendant filed a suit and obtained a judgement against the plaintiff under HCCS number 473 of 2006, where upon the defendant attached and sold the plaintiffs truck, Isuzu forward Tipper registration number UAG 240 P."*

The evidence is quite explicitly clear that the warrant of arrest was issued against the plaintiff. The plaintiff therefore agreed to the sale of the vehicle as a way of redeeming himself which is

the lawful thing to do. The warrant provides that if the plaintiff pays he would not be arrested. This is consistent with order 22 rules 35 of the Civil Procedure Rules which provides as follows:

> *"Every warrant for the arrest of the judgement debtor shall direct the officer entrusted with its execution to bring him or her before the court with all convenient speed, unless the amount which he or she has been ordered to pay, together with the interest on the amount and costs, if any, to which he or she is liable, is sooner paid."*

The warrant of arrest need not to be executed if the judgment debtor pays the amount he or she has been ordered to pay. In other words there was no warrant of attachment of the plaintiff's property. The agreement for sale of the vehicle made under the threat of being arrested was an agreement made by the plaintiff. It is the force of the law and therefore lawful. The vehicle was sold for a sum of Uganda shillings 19,000,000/=. The sale was made pursuant to a warrant of arrest in execution and was meant for the defendant. In other words the amount contained in the sale agreement was supposed to be handed over to the court bailiff who was obliged to hand it over to court on the defendant's behalf. The sale agreement unfortunately does not mention the court bailiff. Part of the money was received by the plaintiff on 8 December 2006. The defendant did not file any counterclaim against the plaintiff. The question of whether the money the subject of this sale was handed over to the court bailiff cannot be determined in this suit. It is a question that arises from execution and under section 34 of the Civil Procedure Act cannot arise in the current suit which dealt with the breach of the contract to insure the loan. Consequently the question of whether the plaintiff paid all the money the subject of the consent decree in HCCS number 473 of 2006 between the defendant bank and the plaintiff cannot be determined in this suit. For emphasis section 34 (1) of the Civil Procedure Act provides that:

> *"All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."*

In the premises, the plaintiff's plaint lacks merit and is dismissed with costs.

Judgment delivered in open court this 21st day of June 2013.

**Christopher Madrama Izama**

**Judge**

Judgment delivered in the presence of:

Kizito Sekitoleko for the plaintiff

Plaintiff in court

William Were for the defendant

No representative of defendant in court.

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

21st June 2013