

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA
AT KAMPALA
(COMMERCIAL DIVISION)**

CIVIL SUIT NO 406 OF 2010

MUTUNGO WOMEN'S CO-OPERATIVE

SAVINGS AND CREDIT SOCIETY LTD}.....PLAINTIFF

VS

EQUITY BANK (U) LTD}DEFENDANT

BEFORE HON. MR. JUSTICE CHRISITOPHER MADRAMA IZAMA

JUDGMENT

The plaintiff is a limited liability company incorporated under the laws of Uganda and filed the action against the defendant bank for breach of contract, fraud, declarations, a permanent injunction, exemplary damages, general damages and costs of the suit. Specifically the action is for a permanent injunction to restrain the defendant, its servants/agents and those acting under its authority from evicting and selling the plaintiffs security deposited with the defendant comprising in block 243 plot 1778 Luzira. It is for declaration that the defendant is in breach of the loan and mortgage agreement; a declaration that the defendant is in breach of the banker customer relationship; a declaration that the amount in arrears claimed by the defendant is unjustifiable and unlawful; a declaration that the mortgage is illegal; a declaration that the impending and or threatened sale an eviction of the mortgage security under the loan agreement and the mortgage agreement is illegal; for the mortgage to be set aside and the security released; exemplary damages of Uganda shillings 100,000,000/= for breach of contract, breach of

customers right under the banker customer relationship, general damages for breach of loan agreement, banker customer relationship, loss of business and psychological distress and costs of the suit.

The defendant is a body corporate and a successor company to Uganda Micro Finance Ltd.

The defendant denied liability and counterclaimed for payment of Uganda shillings 58,900,000/=, general damages for loss of business profits, and costs of the counterclaim together with interest on the general damages and special damages at the rate of 24% per annum from the date of the cause of action till payment in full.

At the hearing of the suit the plaintiff was represented by Counsel Candia Emmanuel assisted by Counsel Mindraru Sarah while the defendant was represented by Counsel Charles Nsubuga. The plaintiff called two witnesses while the defendant called one witness. Subsequently both parties' counsels addressed the court in written submissions.

The following issues were framed for trial of the action namely:

1. Whether any of the parties breached the mortgage agreement?
2. Whether failure of the defendant to give an up-to-date statement to the plaintiff amounted to breach of banker customer relationship?
3. Remedies.

The facts of the suit are set out in the written submissions of counsel. Before the hearing started, judgement on admission was entered against the plaintiffs for Uganda shillings 13,885,000/= which the plaintiffs undertook to pay within two months and which was duly paid. Secondly during the examination of DW1 Mr Frederick Luyimbazi, it became apparent to the court that the controversy between the parties revolves on the question of whether the entire loan of 50,000,000/= was disbursed to the plaintiffs. The basic facts are that the plaintiff applied for a loan of Uganda shillings 100,000,000/= but the defendant offered only shillings 50,000,000/=. A loan agreement with personal guarantees from the directors of the plaintiff was executed and one Kaweesa Muhammad gave powers of attorney to the plaintiff to use his title comprised in block 234 plot 1778 referenced above as security for the mortgage. It is the plaintiffs contention that

the bank only advanced Uganda shillings 26,885,000/= and failed to advance a balance of Uganda shillings 23,115,000/=. The plaintiff paid back Uganda shillings 13,000,000/=.

The plaintiffs case is that the defendant disbursed Uganda shillings 28,000,000/= to the plaintiff and requested the plaintiff to pay back Uganda shillings 1,280,000/= consequently the remainder of the loan disbursed was Uganda shillings 26,000,000/=. The defendant on the other hand maintained that the plaintiff disbursed Uganda shillings 50,000,000/= from the bank in the year 2008 and Uganda shillings 50,000,000/= was withdrawn by the plaintiff in two instalments. Since then the plaintiffs did not fully service the loan.

During the proceedings, there was controversy about the bank statements of the defendant. Particularly the plaintiff's complaint is that the defendant refused to furnish it with the bank statements reflecting the status of the account. On the 7th of May 2012 Counsel Ngobi Tony represented the defendant and during examination in chief of DW1, it was apparent that the whole testimony was about whether the money was disbursed and how much was disbursed and how much the plaintiffs had paid back. It was apparent from the proceedings that the court was dealing substantially with a question of accounts. Section 26 of the Judicature Act provides that the High Court may in accordance with the rules of court, refer to an official or special referee for inquiry and report any question arising in any cause or matter, other than in a criminal proceeding. Secondly the report of the official or special referee may be adopted wholly or partly by the High Court and if so adopted may be enforced as a judgment or order of the court. Secondly section 27 provides that where in any cause or matter other than in a criminal proceeding the question in dispute consists wholly or partly of accounts, the High Court may, at any time, order the whole cause or matter or any question of fact arising in it to be tried before a special referee or arbitrator agreed to by the parties or before an official referee or an officer of the High Court. The court advised the parties that the matter proceeding before the court seem to deal primarily with questions of accounts. Counsels were advised to agree to an auditor who would consider the question of whether the monies were disbursed wholly to the plaintiffs or partially as such contended by the plaintiffs.

The defendants counsel represented to court that the defendant had an internal auditor. The court further advised that it would be fair for there to be an independent auditor. The plaintiff was supposed to appoint an auditor to work with the banks auditor's that is Messrs Earnest and

Young and come up with a joint report. After protracted negotiations and on the 4th of July 2012 the court was informed by Counsel Nsubuga Charles appearing for the defendant and counsels Candia Emmanuel for the plaintiff that the parties further agreed to an auditor to carry out the audit exercise. They agreed that Price and King Accountants and Auditors should be authorised to undertake the audit of the plaintiffs account with the defendant. The proceedings and decision of the court on the matter is reproduced herein below:

“Candia: The last time court ordered that we avail a list of auditors. We agreed that Price and King whose particulars were earlier furnished to court be authorised to audit the plaintiff’s account.

Nsubuga: We have no objection to the above position only if the above stated auditors meet the qualifications.

Court: They are auditors and they meet the qualifications. What they cannot say they will state. Another issue is the terms of reference of the auditors. These would be auditors appointed by court.

Ruling:

It is the order of this court that M/S Price and King Accountants and auditors whose particulars were previously furnished on the court record are hereby appointed under S. 27 (c) of the Judicature Act to audit the account of the plaintiff with the defendant’s bank to establish the state of accounts from the date the loan account was opened up to date and furnish their findings on the state of accounts to the court. The parties will assist the auditors with all the necessary documents including answering all the queries raised by the auditors in the audit exercise. Learned Counsels will follow up this court order with a letter explaining the scope of the court’s directive. Both parties will meet the costs of the auditors on 50% and 50% basis and at the end of the trial; the costs will be included in the taxed costs of the party entitled to costs. The matter will be heard at the next hearing date.”

From the record therefore, it was the ruling of the court that the question of what happened in the plaintiffs loan account was to be established by an audit of the account. The parties were

required to assist the auditors with all the necessary documents and answer all queries raised by the auditors in the audit exercise. Finally the court quoted section 27 (c) of the Judicature Act in making the appointment. The auditors indeed and in accordance with the provisions of the law tried the issue of what actually occurred in the loan account of the plaintiffs with the defendant bank.

Messieurs Price and King, Certified Public Accountants produced an auditor's report which was filed on court record on 19 February 2013. It was forwarded with a covering letter dated 18th of February 2013. It indicated that the first report was issued on 23 November 2012 and was copied to the High Court commercial division and to counsels of the parties. One of the parties to the suit provided some additional information which was subsequently incorporated in the report. So the final the investigation report on the account was forwarded to court. The terms of reference of the auditors was to establish how much money was disbursed by the defendant as a loan pursuant to a loan application by the plaintiff. Secondly how much money was withdrawn by the plaintiff and thirdly what were the operative accounts?

In accordance with section 27 (c) of the Judicature Act, I will set forth the findings of the auditors as part of the court's finding. Paragraph 3.4 of the report at page 5 thereof is as follows:

Equity Bank Uganda Limited

From the bank statement (savings account number 1001140299387), Equity bank (U) Ltd asserted that it disbursed the law of Uganda shillings 50 million in two instalments to the plaintiff. On 10 October 2008 that it disbursed Uganda shillings 28,147,000/=. Secondly on 11 October 2008 that it disbursed Uganda shillings 21,852,300/=. The total amount disbursed according to the defendant is Uganda shillings 49,999,300/=. The auditors found that the Defendant/Equity Bank (U) Ltd did not produce the necessary information that was asked for purposes of establishing the facts of the matter in the transactions that took place between the two parties from the time the plaintiffs opened savings account with Uganda Micro Finance Ltd and then from the time Equity Bank (U) Ltd of Uganda Micro Finance Ltd up to the date of the audit report. The auditors never brought any staff from the bar to clarify on the issues raised according to the list of information forwarded to Equity Bank (Uganda) Ltd through their lawyers and despite several reminders from their lawyers to provide the requisite information for

investigation. Finally additional information was provided by Equity Bank through their lawyers Messieurs Muwema and Mugerwa Advocates and Solicitors on 28 November 2012 and on 29 January 2012 respectively. In the letter of 29 January 2013 the lawyers informed the auditors that they were still looking for the withdrawal slips for Uganda shillings 21,852,300/= and would be able to forward as soon as it is found.

Mutungo Women's Savings and Credit Society Ltd

The Auditors findings on the plaintiffs case is that based on documents provided by Mutungo Women's Savings and Credit Society Ltd and the bank statement from Equity bank (U) Ltd, Mutungo Women's Savings and Credit Society Ltd withdrew render shillings 28,147,000/= on 1 October 2008 and refunded back Uganda shillings 1,262,000/= on the request of the cashier of the defendant but no deposit slip was made. The refunded amount appears on the bank statement on 10th of October 2008 and confirm that only Uganda shillings 26,885,000/= was received by Mutungo Women's Savings and Credit Society Ltd as the first instalment on the loan of Uganda shillings 50,000,000/= according to the loan agreements signed by both parties.

Out of the Uganda shillings 26,885,000/= received as the first and only instalment, only Uganda shillings 24,124,000/= was confirmed to have been paid back by Mutungo Women's Savings and Credit Society Ltd exclusive of interest that is supposed to be paid, the loan principal amount of Uganda shillings 26,885,000/=. During interviews with representatives of the plaintiff company, the auditors were informed that at the time Uganda Micro Finance Ltd was taken over by Equity Bank, they were not informed of the outstanding balances, that is, the savings and loans transferred from Uganda Micro Finance Ltd to Equity Bank.

The auditors recommended that Equity Bank (U) Ltd should be put to task produce evidence of who withdrew the Uganda shillings 21,852,300 as posted to the since account number 1001140299387 that was withdrawn on 11 October 2008. The recommended that the withdrawal slip showing Uganda shillings 21,852,300/= should be produced and fully signed by the bank officer and the signatories to the account. Secondly information subsequently provided by Equity bank through their lawyers Messieurs Muwema and Mugerwa advocates and solicitors on 28 November 2012 and 29th of January 2013 is not support the withdrawal of Uganda shillings 21,852,300/= as clearly stated in the second last sentence of their letter dated 29th of January

2013 from Equity bank to their lawyers. Namely that they are still looking for the withdrawal slip for Uganda shillings 21,842,300/= which was to be forwarded as soon as it was found. Consequently Equity bank should be put to task to provide the withdrawal slip in support of the withdrawal.

As far as Mutungo Women's Savings and Credit Society Ltd is concerned, the auditors recommended that they should pay the interest accrued on the loan amount of Uganda shillings 26,885,000/= which was fully recognised by both parties to the case according to the loan agreement and which is estimated at Uganda shillings 9,191,659/=. Furthermore Mutungo Women's Savings and Credit Society Ltd should continue and clear the balance of Uganda shillings 2,761,000/= that is outstanding out of the Uganda shillings 26,885,000/= that was advanced to them by the bank according to the findings of the auditors. As far as the loan instalment received is concerned, the plaintiff received Uganda shillings 26,885,000/=. The loan repayments made amounting to Uganda shillings 24,124,000/= leaving a balance on the loan repayments of Uganda shillings 2,761,000/=.

The auditors concluded that from the information available to them during the audit exercise, they were able to file that Equity Bank gave Mutungo Women's Credit Society Uganda shillings 26,885,000/= by the payment of 28,147,000/= minus what was refunded back to the bank of Uganda shillings 1,262,222/= on 10 October 2008. The defendants have not proved that the plaintiff withdrew another Uganda shillings 21,852,300/= as indicated in the bank statement. The plaintiff should be made to pay interest accrued on the loan amount of Uganda shillings 26,885,000/= which was fully recognised by both parties and according to the loan agreement which was estimated at Uganda shillings 9,191,659/=. Lastly the plaintiff should continue and clear the balance of Uganda shillings 2,761,000/= which remained outstanding out of the Uganda shillings 26,885,000/= advanced to them by the bank according to the findings of the auditors.

The findings of the auditors are fully endorsed by the court as far as relate to questions of fact and not interpretation. This is in accordance with section 27 (c) of the Judicature Act. A reference by the court under section 27 of the Judicature Act is a reference for trial by a referee or arbitrator. Particularly subsection (c) thereof provides as follows:

"The question in dispute consists wholly or partly of accounts, the High Court may, at any time, order the whole cause or matter or any question of fact arising in it to be tried before a special referee or arbitrator agreed to by the parties or before an official referee or an officer of the High Court."

Trial of questions of fact concerning what happened on the loan account of the plaintiff was in the circumstances a matter determined by the audit exercise. The court would therefore consider the remainder of questions of fact and matters of interpretation as submitted by Counsels.

On the first issue as to whether any of the parties breached the loan agreement, counsel for the plaintiff effectively relied on the auditor's report and submitted that though a loan amount of Uganda shillings 50,000,000/= was offered by the defendants predecessor in title, actually the bank only disbursed Uganda shillings 26,885,000/= and failed to advance the balance of Uganda shillings 23,115,000/=. Counsel further relied on the testimony of PW1 Amal Kinene Namakula, a treasurer of the plaintiff. The testimony is that the plaintiff applied for a loan of Uganda shillings 100,000,000/= but the defendant offered only Uganda shillings 50,000,000/= whereupon a loan agreement with personal guarantees from directors was executed. Security for the loan was given comprising in block 234 plots 1778 referred to above. The plaintiffs made several follow-ups to get the balance of the loan in vain. The plaintiffs then began servicing the loan and paid up to Uganda shillings 30,000,000/=. They requested for a bank statement from the defendant but the defendant refused or neglected to avail the bank statement/s. Subsequently the defendant sent court brokers to demolish the houses comprised in block plot 1778 and the business of the plaintiff collapsed. It was not true that the bank paid the balance of the money to the personal accounts of the directors since she had her own personal account at the bank and had cleared her loan obligations to the bank. The witness further testified that the plaintiff withdrew Uganda shillings 28,000,000/= and paid back about Uganda shillings 1,280,000/.

The loan was obtained while the bank was Uganda Micro Finance Ltd and the plaintiffs dealt with directly with one Tebukozza Nelson, Serwanga and Mr Charles Nalyali who was the CEO of the bank. The plaintiff never authorised the bank to remove money from the plaintiffs account and put it on the personal accounts. The plaintiff intended to increase the plaintiff company into a commercial bank. The loan was at 2.5% at the time of borrowing. Furthermore the plaintiffs stopped paying the loan because the bank brought bailiffs to evict Mr Mohammed Kawesa from

block 243 plot 1778 at Luzira which had been pledged as security. Payments of the loan were previously made through the bank's lawyers.

Counsel further referred to the testimony of PW2 Yudaya Kawesa, a businesswoman and director of the plaintiff. The plaintiff company started in 2007 and were promised a loan of Uganda shillings 100,000,000/= and shown how to use the same for business. It was pegged to a security which has not provided for. He gave a power of attorney for use of the security. Only Uganda shillings 50,000,000/= was approved and the plaintiffs were given Uganda shillings 28,000,000/= out of which they were requested by the defendants officials to return Uganda shillings 1,200,000/= which they did. They had an account number: 2010002224 where they transacted all their businesses. They lent money to members but got summoned to court for failure to pay the loan in civil suit number 268 of 2009 in the High Court, Commercial Division. The suit was subsequently withdrawn and the plaintiffs kept on servicing the loan through the bank's lawyers. One day she was called by an OC that they wanted to demolish their houses. He did not know the status of the card because the bank had never given the plaintiff a bank statement. She had a personal account with the bank and was arrested for her personal loan. The plaintiffs followed up with the bank for the balance but found that the loan officer who had transacted with them had been fired and there was no one to help them. They tried to pay back up to Uganda shillings 13,000,000/= and it is not true that they refused to pay stubbornly. The plaintiffs were unable to continue with their business because members lost trust in the business.

The plaintiff's counsel further referred to the witness testimony of DW1 Mr Frederick Luyimbazi. DW one confirmed that the plaintiff borrowed up to Uganda shillings 50,000,000/= from the bank in 2008. The Uganda shillings 50,000,000/= was withdrawn in two instalments. DW1 attempted to tender in a document as ID1. The defendant's case through the witness is that the loan was not fully serviced and that the bank was demanding Uganda shillings 58,900,000/= from the plaintiffs inclusive of the principal and interest. He was not aware that the plaintiff complained about not receiving Uganda shillings 50,000,000/=. That he admitted in cross examination that the document he was plaintiff tender was not a document used by the bank to issue statements. Furthermore that the bank retains withdrawal slips. The status of the plaintiffs loan was that it was a written of land.

Finally the plaintiff's counsel relied on the audit report of Price and King Certified Public Accountants.

The plaintiff's counsel after referring to the audit report which the court has reproduced above submitted that the crux of the plaintiffs case in resolving the first issue on whether any of the parties breached the loan agreement is pegged on the availability of the withdrawal slip for the alleged Uganda shillings 21,852,300/=. DW1 assured the court of the existence of the withdrawal slip for the same amount but failed to bring it to court. The key question in the controversy according to counsel is whether the bank had disbursed the entire amount of Uganda shillings 50,000,000/=. Counsel submitted that from the facts available, the court should answer the question in the negative. Furthermore counsel submitted that in the case of **Ronald Kasibante versus Shell Uganda Limited [2008] HCB 162** at 163 it was held that breach of contract is the breaking of an obligation which the contract imposes and which confers a right of action for damages on the injured party. It entitles the injured party to treat the contract as discharged if the other party renounces the contract, and make its performance impossible or substantially fails to perform his promise. Counsel further relied on section 33 (1) of the Contract Act 2010 which the court does not have to take into account because the transaction complained about occurred before the enactment of the Contract Act 2010.

Counsel further submitted that the plaintiffs officials severally went to the bankers to inquire and seek for the balance of the loan amount disbursed but to no avail. As to the filing of the case, the plaintiff never received the balance of the loan amount from the defendant. Counsel submitted that it was incumbent on the defendant to ensure that besides disbursing the loan amount to the plaintiff's account, that the plaintiff indeed received the full loan amount as a basis on which to claim for repayment of the said loan. In those circumstances counsel submitted that the defendant was in breach of the loan/mortgage agreement.

On the other hand counsel for the defendant summarised the facts. The plaintiffs applied for a loan facility of Uganda shillings 50,000,000/= from the defendant bank and mortgaged a piece of land comprised in block 243 plot 1778 at Luzira. The plaintiff defaulted on the loan repayments according to the mortgage agreement by failing to pay the outstanding loan amount and the defendant sought to exercise its rights of foreclosure for recovery of the outstanding loan amount. The defendant filed a counterclaim in which it sought orders for the payment of Uganda

shillings 58,900,000/= being the outstanding principal of the loan taken by the plaintiffs which was specifically for a period of 24 months and which the undertaking to pay in monthly instalments that they failed to do together with interest in respect of the loan facility advanced to the defendants in the counterclaim, general damages and costs of the suit.

On the first issue counsel relied on the definition of an agreement in Black's Law Dictionary 9th Edition at page 78 which defines an agreement as a mutual understanding between two or more persons about their relative rights and duties regarding past and future performances. He submitted on the other hand that a contract has been defined as an agreement between two or more parties creating obligations that are enforceable. He further relied on the definition of a contract under section 10 of the Contract Act 2010 as an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object with the intention to be legally bound.

Counsel relied on the loan agreement executed by the parties dated 29th of September 2008 in which the defendant undertook to lend the plaintiff a sum of Uganda shillings 50,000,000/=. The parties further executed a mortgage deed in which the plaintiff plate the suit land as security for the loan advanced to it by the defendant. The mortgage deed was also adduced in evidence and marked P2 and also D1. The fact of signing the loan agreement was not disputed by the plaintiffs. The controversy relates to the withdrawal of the loan amount. The plaintiffs evidence is that the first withdrew Uganda shillings 28,127,000/=. On the other hand DW1 Mr Frederick Luyimbazi, a credit administrator with the defendant bank, testified that the plaintiff borrowed 50,000,000/= but defaulted in paying back the loan amount. The amount was disbursed to the plaintiff in two instalments. In the first instalment, the plaintiff withdrew Uganda shillings 28,147,000/= on 10 October 2008. The second instalment was for a sum of Uganda shillings 21,852,300/= withdrawn on 11 October 2008. Counsel relied on the plaintiffs bank statement executed and marked as ID 1.

Of course the court cannot rely on a document that has not been tendered in evidence. It is in the written submissions of the defendants counsel that exhibit D1 is the contract between the parties. On the 7th of May 2012 when Mr Frederick Luyimbazi testified in chief, the defendants counsel applied to tender in the document marked as IDI for identification and it was marked accordingly. It was subsequently never tendered in evidence and cannot be relied upon.

Furthermore, the auditors Price and King Certified Public Accountants never established evidence of that nature in the audit exercise and section 27 of the Judicature Act. Additionally during cross-examination of the witness, the plaintiff's counsel applied to court for an order for the witness to produce the withdrawal slips on the representation of the witness that they were available. The court ordered that the witness produces the relevant withdrawal slips and specifically for the withdrawal of Uganda shillings 21,852,300/= on 11 October 2008. Cross-examination was adjourned for production of the withdrawal slips. Subsequently, after several adjournments, the witness never came back and the defence was closed. Additionally the parties were required to make the submissions to the auditors under section 27 of the Judicature Act. The finding of the auditors is binding. I would therefore ignore reference to ID1 which is not a court exhibit.

Counsel for the defendant submitted that the plaintiffs defaulted on repayment of the loan. The plaintiffs were obliged to pay the loan in monthly instalments of Uganda shillings 2,795,600/=. Counsel submitted that a contract is enforceable as between the parties to it and particularly against the party which fails to carry out its obligations. The plaintiff defaulted in payment of the loan amount as far as monthly instalments of Uganda shillings 2,705,600/= is concerned. By the time the defendant bank sought to exercise its rights of foreclosure, the plaintiff had defaulted in the repayments of the loan. Counsel submitted that clearly there was breach of contract arising from the breach of the duty or obligations undertaken under the contract. The plaintiff failed to honour the loan repayment schedules agreed to both in the loan agreement and the mortgage deed. The defendant never breached the terms of the loan agreement. It duly disbursed the loan amount agreed upon and it is the plaintiffs who breached the terms of the contract when they defaulted on the repayment of the loan amounts agreed upon. If you read the words of Lord Diplock in the case of Photo Production Ltd versus Securicor Transport Ltd (1980) AC 827 that every failure to perform a primary obligation is a breach of contract. Repayment of the loan was a primary obligation of the plaintiff after the amount had been advanced to it by the defendant company.

I have carefully considered the first issue. The first issue is whether any of the parties breached the loan agreement. I have also considered the record. On 3 November 2011, this honourable

court conducted a scheduling conference in which the documents were admitted by consent and the issues were determined. The issues were as follows:

1. Whether any of the parties breached, the mortgage agreement?
2. Whether failure of the defendant to give an up to date statement to the plaintiff amounted to a breach of banker customer relationship?
3. Remedies

Subsequently on 30 January 2012 the defendants counsel prayed for judgement on admission by the plaintiff. He submitted that it was admitted by the plaintiff's that they had not paid Uganda shillings 13,885,000/= out of a sum of Uganda shillings 26,885,000/=. Subsequently the court gave the parties 10 min within which to consult on the issue of admissions. Both parties came up with a consent agreement which was entered as a judgement of the court in the following terms:

“By consent of the parties it is hereby agreed as follows:

1. Judgment on admissions be entered and is hereby entered against the plaintiff for a sum of Uganda shillings 13,885,000/=.
2. The said sum will be paid to the defendants within a period of two months from the 30th of January 2012.
3. An audit of the plaintiffs account with the defendant will be carried out to establish the state of indebtedness if any,
4. Both parties will agree on an independent auditor and the terms of the audit.
5. The issue of interest will abide the decision of the court after the audit exercise.

Dated at Kampala this 30th day of January 2012.”

The hearing of the suit was then adjourned to 5 March 2012. On 5 March 2012 the plaintiff produced its witnesses. The agreed issues at the commencement of the suit ought to have been refined pursuant to the consent judgement. However I will come to this point after considering the submissions of counsel on the issues as initially framed before the consent judgement.

The mortgage agreement was tendered in evidence as exhibit P2 it was also marked exhibit D1 and is not in dispute. The mortgage agreement admitted in evidence does not have a clear date as to when it was executed. It also does not clearly indicate the amounts because of the poor

photocopy that was tendered in for the examination of the court. It is however agreed by both sides that the defendant bank approved a loan facility of Uganda shillings 50,000,000/=. The repayment schedule was not attached to the mortgage deed. However exhibit P5 which is a power of attorney granted by Kaweesa Mohammed dated 19th of September 2008 grants powers of authority to the plaintiff Mutungo Women's Co-Operative and Savings Society Ltd to use the suit property as security for a loan of up to Uganda shillings 50,000,000/= from Uganda Micro Finance Ltd (Corporate Branch). Consequently it is clear that the plaintiffs were granted the loan facility of Uganda shillings 50,000,000/=. This is reflected in the loan agreement dated 29th of September 2008 which provides that the defendant had agreed to grant the borrower a loan facility of Uganda shillings 50,000,000/=. The loan attracted the monthly interest of Uganda shillings 2.5%.

The first controversy is therefore whether all the Uganda shillings 50,000,000/= approved was disbursed. The audit exercise revealed that there was no evidence that the defendant bank disbursed Uganda shillings 21,852,300/= on 11 October 2008 as alleged. They established that on 10 October 2008, Uganda shillings 28,147,000/= was disbursed and the plaintiff withdrew the same. However on the same day Uganda shillings 1,262,222/= was refunded to the bank by the defendants out of the amount withdrawn. The refund of the money appears from the bank statement according to the auditors. Consequently it is the finding of the auditors that the defendant could not produce any evidence that it disbursed to the plaintiffs Uganda shillings 50,000,000/= as agreed in the loan agreement. What is of crucial relevance is that the instalment payments to be made by the plaintiffs is calculated on the basis of the defendant's having advanced to the plaintiffs Uganda shillings 50,000,000/= as agreed in the loan agreement. The instalment payment is calculated at 2.5% per month out of Uganda shillings 50,000,000/= and amounts to Uganda shillings 2,795,600/=. I will however do a recalculation of this amount agreed in the loan agreement. The instalment payments could be paid weekly or monthly or otherwise under the loan agreement dated 29th of September 2008. 2.5% amounts to Uganda shillings 1,250,000/=. The loan agreement therefore contains a contradiction in terms. The loan is either for instalment payment of 2.5% per month or more. It cannot be 2.5% of Uganda shillings 50,000,000/= and at the same time state that the monthly instalment payment was Uganda shillings 2,795,600/=. It would suggest that payment was going to be made at more than one monthly instalment per month or that there was a mistake in the rate of 2.5% per month. For

the avoidance of doubt, 2.5% of Uganda shillings 28,147,000/= amounts to Uganda shillings 703,675/=. Secondly 2.5% of Uganda shillings 26,885,000/= amount to Uganda shillings 672,125/=.

On the other hand Uganda shillings 2,795,600/= represents 5.59% of Uganda shillings 50,000,000/=. Secondly the sum of Uganda shillings 2,795,600/= represents 10.39% of Uganda shillings 26,885,000/=. Thirdly Uganda shillings 2,795,600/= represents approximately 10% or 9.93% of Uganda shillings 28,147,000/=. All the above percentages are seriously at variance with the contractual percentage of 2.5% per month.

I have further considered the fact that there are two accounts or account numbers relating to the same loan transaction. There was a transition from Uganda Micro Finance Ltd to Equity Bank Ltd. The acquisition of Uganda Micro Finance Ltd by Equity Bank Ltd required the records of Uganda Micro Finance Ltd relating to the loan to be synchronised with that of Equity Bank Ltd. I have also noted the evidence of the plaintiffs to the effect that the loan officer they dealt with had been relieved of his duties. The defendant has been unable to trace any records. I therefore agree with the auditors. I must add that failure of the defendant bank to clearly establish through its own records it inherited from Uganda Micro Finance Ltd what actually transpired in the loan transaction and particularly the second instalment payment cannot be visited on the plaintiffs. The plaintiffs have asserted very strongly and I believe the plaintiff's witnesses that the second instalment purported to have been disbursed by the predecessor in title of the defendant bank on 11 November 2008 was never disbursed to the plaintiffs. Last but not least even though the loan agreement was for a sum of Uganda shillings 50,000,000/=: the personal guarantees of the directors of the plaintiff, guaranteed amounts of up to Uganda shillings 100,000,000/=. One of the directors of the plaintiff PW2 Yudaya Kaweesa testified that she had been arrested for her own personal loan with the bank. It is apparent from the testimony that she experienced difficulties to establish her new account with the defendant bank after the account had been transferred from Uganda Micro Finance Ltd. In those circumstances therefore, I find on the balance of probabilities that the plaintiffs were disbursed an amount of Uganda shillings 28,147,000/= on 10 October 2008 out of a loan facility approved of Uganda shillings 50,000,000/=. Subsequently the plaintiffs were requested by officials of Uganda Micro Finance Ltd to refund a sum of Uganda shillings 1,262,222/=. The plaintiffs therefore effectively received

only Uganda shillings 26,885,000/=. Out of the 50,000,000/= loan approved, the plaintiff was not paid a total sum of Uganda shillings 21,852,300/=. Interest had to be calculated on the basis of the money disbursed. Failure to do so would be in breach of the contract to advance the plaintiffs Uganda shillings 50,000,000/=. Furthermore the defendant's claims in the demand on default were over and above that liability generated by the disbursed amount. The defendant's claim is reflected in the counterclaim and is premised on the disbursement of UGS 50,000,000/= to the plaintiffs. The first issue is answered in favour of the plaintiff. Secondly it is also established that the plaintiffs admitted being indebted and judgment was entered against the plaintiffs and that part cannot be revisited in the remainder of the issues. On the remainder of the issues the plaintiffs are still in default of payments though not to the extent claimed by the defendant and are also in breach of the loan agreement.

Issue number two

Whether the failure by the defendant to give an up to date bank statement to the plaintiff amounted to breach of the banker customer relationship?

On the second issue counsel for the plaintiff again relied on the case of **Ronald Kasibante versus Shell Uganda Limited** (supra) that the breach of contract is the breaking of an obligation imposed by contract. He submitted that PW1 and PW2 testified that they requested the bank for bank statements for the account number 2010002224 with the bank. They were never informed about changes in the account number. DW1 on the other hand was not aware of whether the plaintiffs had requested for bank statements. PW1 and PW2 dealt directly with officers of the bank who have since left the bank. Furthermore during the hearing, the plaintiff's counsel consistently asked for the bank statements in vain. Secondly counsel submitted that the document IDI was not one of the books or entry provided for by section 3 (1) of the Evidence (Banker's Book) Act.

He further submitted that the refusal of the defendant to avail the bank statements deprive the plaintiffs of the right to peruse the information with the view of detecting errors or shortfalls therein leading to loss of business. Counsel relied on the case of **Pertamina Energy Trading Ltd versus Credit Suisse [2007] 3 LRC 253 at 278**. The plaintiff's counsel further argued that the relationship between a customer and the banker was that of implied contract. Among the

services a banker is habitually required to provide include issuing bank statements as and when required by a customer. There existed a fiduciary relationship between the customer and a banker and the customer had a right of access to information about its accounts. Counsel relied on the case of **Banbury versus Bank of Montréal [1980] AC 626** that the nature of such a relationship is a matter of fact and cannot be treated as a matter of pure law. Finally the plaintiff's counsel submitted that the defendant breached the customer banker relationship by failing to avail bank statements to the accounts of the plaintiff.

In reply thereof the defendants counsel agreed that the relationship between a banker/customer is based on contract law and the terms are implied by banking practice. In **Paget's Law of Banking** 13th edition at page 146, the banking code said therein set standards of good banking practice for financial institutions to follow in dealing with personal customers. Therein was a commitment to provide clear information about the banker's products and services and the customer's account and how it works, the terms and conditions that apply to the account and to treat all personal information as private and confidential. The defendants counsel maintains that PW1 and PW2 did not discharge the burden of proof that the defendant refused to avail their account statements. Under section 102 of the Evidence Act, the burden of proof lies in the person who would fail if no evidence at all were given on either side. He further submitted quoting various authorities that the burden of proof was on the person who alleges. Counsel concluded that the plaintiff failed to discharge its burden of proving its assertions.

I have carefully considered this issue. As far as the law is concerned, it was agreed that there is an implied contract between the customer and the banker. The terms of the contract are implied. The underlying issue is clearly whether the defendant bank owed a duty to the plaintiffs to furnish them with the bank statements of their account. It is a matter taken for granted by both counsels, that a bank owes such a duty to a customer. The only question for determination is whether the defendant was in breach of such a duty.

It is alleged by the plaintiffs and it is the testimony of PW1 and PW2 that pursuant to numerous requests for bank statements, the defendant's officials still refused to avail the said statements. The defendants counsel submitted that there was no proof that there was such a refusal. On the other hand DW1 never dealt with the plaintiffs and could not testify about what transpired

between the plaintiff and the defendant bank. In fact DW1 was not aware whether there was such a request for information or statements.

PW1 Amal Namakula Kinene, a lecturer at Kampala University and the Dean School of Business and Management Studies is the treasurer of the plaintiff. Her evidence is that the plaintiff applied for a loan of Uganda shillings 100,000,000/= in September 2008. However Uganda shillings 50,000,000/= was approved. They withdrew UGX 28,000,000/= and when they reached home the cashier called them informing them that he had made a mistake and they should refund some of the money. They never got a schedule for payment of the loan. The defendant never disbursed the balance of the money. The plaintiff never got the balance of the loan which had been approved by the defendant. Later on the defendant claimed Uganda shillings 50,000,000/= together with interest. During cross-examination PW1 confirmed that the plaintiff received only Uganda shillings 26,000,000/=. They withdrew 28 million and were requested to pay back 1.6 2 million. They kept visiting the bank credit manager and even contacted the manager of equity bank about the discrepancies. The bank took PW1 to court over her own personal loans. She obtained her own loan and paid back promptly. PW2 confirmed that the plaintiffs never got a payment schedule. The plaintiff only had one account. Later when they were summoned to court and told to pay Uganda shillings 50,000,000/= by the defendants. They paid some money through the lawyers of the bank. She testified that she did not know the status of the account and had been requesting for statements which was never given to them. The loan officer one Mr Stephen Serwanja was chased away about a week after they obtained the loan. The purpose of the loan was to loan it out to members of the plaintiff.

My conclusion is that the plaintiff's officials kept on going to the defendant bank to establish the state of the account. However, due to migration, information was not forthcoming because Equity Bank Limited took over from Uganda Micro Finance Ltd. The intermediate position has got two elements. The first factor is the want of records concerning the transaction. The second factor concerns the banking officials of Uganda Micro Finance Ltd who are no longer in the picture. This appears strongly in the testimony of PW1 and PW2. The want of records is further demonstrated below.

Exhibit D2 is the bank statement showing that on 29 September 2008 50,000,000/= was disbursed to the plaintiffs. It shows that on 10 October 2008 there was withdrawal of Uganda

shillings 28,147,000/= subsequently on 11 October 2008 there was a cash withdrawal of Uganda shillings 21,852,300/=. Exhibit D2 reflects that the plaintiff's account number was missing at migration. In the very least it shows that some information was missing at migration. It reflects an account number "1001500204283 SME loan". There is no explanation for this number and the several transactions reflected in the statement. Subsequently DW1 was cross examined about a screenshot view of the loan account of the plaintiffs. The screenshot view was not admitted in evidence and was put in for identification purposes as DID1. Inasmuch as the document was not admitted in evidence, he was cross examined on it and it demonstrates the want of documentation or records concerning the plaintiffs account. It demonstrates that on 29 September 2008 there was withdrawal for loan funds of Uganda shillings 21,852,300/=. Secondly it shows that a loan of Uganda shillings 50,000,000/= was disbursed on 29 September 2008. Finally it shows that an amount of Uganda shillings 28,127,000/= was withdrawn on 1 October 2008. The document was not admitted and does not help the plaintiff's or the defendants. In any case it contradicts exhibit D2 as far as dates are concerned. Last but not least if money was paid out at all, there is no evidence of the recipient. The only evidence is available is that of PW1 and PW2 which shows that about Uganda shillings 21,000,000/= was never disbursed to the plaintiffs.

The conclusion is that there was no breach of a client/customer relationship as far as bank accounts are concerned. It is evident that the defendant was labouring from insufficiency of information and was even unable to furnish the most basic information. The plaintiffs cannot be faulted for failure of the defendant to furnish the requisite information. This is against the background that the plaintiff as a savings group which lends money to its members ought to keep a record of its transactions as well. The defendant however took over Uganda Micro Finance Ltd and has to bear some responsibility for the failure to provide the information. Though it is my finding that the defendant failed to provide the requisite information, the defendant cannot be faulted because it cannot be concluded that it was deliberately hiding information from the plaintiffs. The situation is that the defendant could not provide information and because there is no strict liability, it had a justification for failure to provide the information. Moreover the plaintiffs were truly indebted to the defendant bank for monies had and received. Issue number two is therefore answered in the negative.

Remedies

As far as the prayer for a permanent injunction is concerned, the plaintiff's counsel relies on Halsbury's laws of England 4th edition volume 24 paragraphs 803 for the principle that a perpetual or permanent injunction is granted after the final determination of the rights of the parties. The plaintiff earlier on obtained a temporary injunction restraining the defendant's, its agents or persons acting under its authority from evicting the family from the suit property and foreclosing the plaintiff's right to redeem the property. He prayed that a permanent injunction is granted as prayed.

The plaintiff further seeks declaratory orders that the defendant is in breach of the loan/mortgage agreement; that the defendant is in breach of the banker/customer relationship. He submitted that having established that there was no proof that the loan amount was advanced the plaintiff, and that the defendant failed to give the plaintiff its bank statement to enable the plaintiff know the status of its account, the declarations ought to be granted. Secondly the plaintiff seeks declaration that the amount claimed by the defendant is unjustifiable and unlawful. Finally the court be pleased to order the release of the mortgage and return to the plaintiff a clean certificate of title.

The plaintiff's counsel further prayed for exemplary damages. He submitted that according to the case of **Rookes versus Barnard [1964] 1 All ER 367 at 407**, the object of damages is usually to compensate. The object of exemplary damages is to punish and deter. One of the categories for the award of exemplary damages is where the defendant's conduct was calculated to make him or her profit which may well exceed the compensation payable. Counsel submitted that the defendant failed to disburse and the whole amount to the plaintiff and attempted to foreclose without notice to the plaintiff. Failure to disburse the loan amount led to loss of the plaintiff's business as a financial institution. Counsel further relied on the case of **Obongo versus Municipal Council of Kisumu [1971] EA 91** which followed with approval the decision in *Rookes versus Barnard* (supra). The plaintiff's counsel therefore contends that the defendant was intent on profiteering from its conduct at the expense of the plaintiff and a profit would well exceed the compensation payable.

As far as general damages is concerned, the plaintiff's counsel submitted that the plaintiff's suffered inconvenience, loss of business and which entirely depended on lending and charging

interest. In the circumstances there was breach of contract, Breach of customer/bank relationship both the fiduciary and contractual to warrant an award of general damages.

On the other hand the defendant's counsel submitted that the defendant duly executed its obligations and was not in breach of any obligations according to the loan agreement and the mortgage deed. On the other hand it is the defendant's submission that it advanced loan facility to the plaintiff who defaulted on its repayment and whereupon the defendant sought to exercise its right of foreclosure of the plaintiff's right to redeem the suit property. The defendant was not in breach of contract or the banker/customer relationship. In the circumstances the plaintiff is not entitled to any remedies and the suit be dismissed with costs.

On the other hand, the counterclaimant prayed for payment of the outstanding loan amount by way of foreclosure on the security, general damages and costs of the counterclaim.

Counsel submitted that it is the right of the defendant upon failure by the plaintiff to the outstanding loan amounts foreclose the plaintiff's right to redeem the property and sell the same. According to DW 1, the defendant sent several reminders to the plaintiff to pay the loan but the plaintiff continued to default on the repayment schedules. A mortgagor has no right to insist that the mortgagee pursues one form of remedy and not another. Counsel relied on clause 12th of the mortgage deed which gives a right to the mortgagee with or without any formal demand or recourse to the Registration of Titles Act or the Mortgage Act, sale by private treaty or without reference to court immediately the mortgagor defaults in the loan repayment. The defendant invoked its powers upon default of the plaintiffs.

As far as damages are concerned, it is the defendant's submission that the plaintiffs cause a lot of inconvenience the actions of loss of business for failure to pay the loan facility advanced. The actions warrant an award of general damages to the defendant. Damages have been defined as the pecuniary compensation obtainable by success in an action for the wrong, whether in tort or breach of contract according to McGregor on Damages, 18th edition at page 3. Counsel submitted that the plaintiff breached the loan agreement by failing to pay the loan amount it expressly agreed upon in the agreement and the defendant is entitled to damages for breach of the agreement. The defendant's counsel prayed for dismissal of the plaintiff's suit and for the remedies prayed for on behalf of the defendant in the counterclaim.

I have duly taken into account the written submissions of Counsels together with the evidence and the resolution of the above two issues. The following factors as relevant to the question of remedies:

Firstly it has been established that not all the loan approved of Uganda shillings 50,000,000/= was disbursed to the plaintiffs. Secondly the plaintiff is a women's co-operative savings and credit society whose business comprised of lending money to women customers and getting back payment with interests. Thirdly the loan as earlier stated was not all disbursed to the plaintiff but seems to have been disbursed to somebody else. Fourthly the plaintiffs were being demanded upon default a higher amount based on interest on the entire loan amount of Uganda shillings 50,000,000/= which they had not received in full in the claim of the defendant reflected in the counterclaim but this money was not all paid by the plaintiffs. There was only an act of demand of a higher figure. Fifthly the plaintiffs failed to disburse loans to its members and suffered loss of reputation. Particularly PW1 and PW2 who are officers of the plaintiff company suffered a lot of inconvenience and abuse. Sixthly the defendant moved to foreclose the plaintiffs business and the business indeed collapsed with allegations that the directors had misappropriated the funds of the society/savings co-operative. In fact one of the directors was imprisoned and attributed her imprisonment to the fact that Uganda Micro Finance Ltd transferred its records to the defendant Messieurs Equity Bank Ltd. Furthermore the staff of Uganda Micro Finance Ltd who dealt with the plaintiff's officials left the employment of the defendant's predecessor in title. Seventhly the plaintiff admitted indebtedness and judgement on admission was entered as will be summarised here in below. In other words the plaintiffs were in default after all. The audit exercise carried out under section 27 of the Judicature Act which is binding made some findings relevant to the question of remedies. The audit exercise revealed that the plaintiff was indebted to the defendant even after payment of the admitted amount.

Finally the court found for the plaintiff on the first issue. Pursuant to the finding on the first issue, the declarations may issue may issue. Order 2 rule 9 of the Civil Procedure Rules is entitled in its head note as "Declaratory judgement". It provides that the court may make binding declarations of right whether any consequential relief is or could be claimed or not. In other words declarations are not necessarily followed by an award of consequential damages. Consequently the following declaration flows from the first issue namely:

A declaration issues that the defendant is in breach of the loan and mortgage agreement in so far as it did not disburse the entire loan amount of Uganda shillings 50,000,000/= to the plaintiff. On the other hand, the plaintiff is indebted to the defendant.

The plaintiff's prayer for a declaration that the defendant is in breach of the banker/customer relationship is based on the second issue which was not resolved in the plaintiffs favour and the prayer cannot therefore be granted.

The second issue to be considered is whether the plaintiff is entitled to exemplary damages. I have carefully considered the question of whether the plaintiff is entitled to exemplary damages. Exemplary damages are defined by Osborn's Concise Law Dictionary as damages awarded in relation to certain tortuous acts (such as defamation, intimidation and trespass) but not for breach of contract. The definition and scope of an award of exemplary damages was considered by the Court of Appeal in **Obongo and another v Municipal Council of Kisumu [1971] 1 EA 91**. The court approved the decision in *Rookes vs. Barnard [1964] A.C. 1129* that:

Exemplary damages for tort may only be awarded in two classes of case (apart from any case where it is authorized by statute): these are, first, where there is oppressive, arbitrary or unconstitutional action by the servants of the government and, secondly, where the defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff."

The first category of oppressive, arbitrary or unconstitutional action by servants of the government does not apply to the plaintiff's case or claim against the defendant. The second category also does not apply because exemplary damages are awarded for torts and not breach of contract. The plaintiff's action for exemplary damages cannot be sustained.

Thirdly the plaintiff's prayer for a permanent injunction cannot be granted because the plaintiff is admittedly and pursuant to the audit of the account under section 27 of the Judicature Act still indebted to the defendant.

As far as the plaintiffs claim for general damages is concerned, an assessment for general damages is based on the principle of *restitutio in integrum*. In the case of **Dharamshi vs. Karsan [1974] 1 EA 41** the East African Court of Appeal held that principle of *restitutio in integrum* is a

fundamental principle for the guidance of court in the award of damages. It is a broad enough principle that means that the plaintiff is to be restored as nearly as possible and as much as money can do as if the injury complained about had not occurred. It is quite difficult in the plaintiffs case where there was an admitted liability to assess the kind of profit that the plaintiff would have earned had the entire loan amount been disbursed. On the other hand the plaintiff suffered inconvenience due to the transition of Uganda Micro Finance Ltd to Equity Bank Ltd. Due to the transition and possibly loss of the previous staff of Uganda Micro finance Ltd, there was a fluid situation in which the plaintiff was not disbursed all the loan approved and this was not reflected in the records. Secondly the plaintiff in fact took from the defendant only Uganda shillings 26,885,000/=. Out of this amount Uganda shillings 24,124,000/= was paid back by the plaintiff exclusive of interest that is to be paid over the loan principal amount of Uganda shillings 26,885,000/= according to the audit report. The plaintiff did not receive Uganda shillings 21,852,300/= out of the Uganda shillings 50,000,000/= and approved.

The auditors have already omitted in the calculations interest on the amount of Uganda shillings 50,000,000/=. They have recommended that the plaintiff pays interest only on Uganda shillings 26,885,000/= which amounts to Uganda shillings 9,191,659/=. After careful analysis of the facts of the loan repayments of the plaintiff, it is a question of accounting language to suggest that the plaintiff was being charged interest on Uganda shillings 50,000,000/=. The audit report clearly establishes that the plaintiff only paid back Uganda shillings 24,124,000/= less the amount received from the defendant bank which is Uganda shillings 26,885,000/=. The auditors classified this as payment of the principal amount. Out of this amount Uganda shillings 2,761,000/= is still outstanding.

Because the plaintiff was indebted to the defendant bank, the defendant bank was entitled to commence proceedings for recovery of the loan amount against the plaintiffs. It is true that the plaintiffs suffered inconveniences and were unable to establish the exact status of the account. Secondly the assertion that they were being charged interest on 50,000,000/= does not have any sustainable evidence in figures. Damages cannot be awarded for that. Finally the only inconvenience suffered is loss of reputation and loss of business due to failure to access the full loan amount. The directors were imprisoned for their own personal loans. It was contractual to disburse the full loan amount. However, the plaintiff has not paid any money over and above the

money had and received. The plaintiff has not demonstrated that it made a profit out of the loans disbursed. In those circumstances the plaintiff is awarded Uganda shillings 7,000,000/= as general damages for breach of contract to disburse the full amount and the inconveniences suffered.

As far as the counterclaim is concerned, the defendant is entitled to Uganda shillings 9,191,659/= being interest on the amount of Uganda shillings 26,885,000/=. Additionally the defendant is entitled to payment of Uganda shillings 2,761,000/=. Consequently the defendant is entitled to Uganda shillings 11,952,659/= established by the audit report which amount is awarded to the defendant.

In the circumstances of this case, interest is chargeable on the amounts awarded from the date of judgment at the rate of 14% per annum till payment in full.

Given the history and circumstances of this case, each party will bear its own costs.

Judgment delivered in open court on 27 September 2013.

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Emmanuel Candia for the plaintiff

Director of Plaintiff Yudayah Kawesa in court.

Charles Nsubuga

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

27th of September 2013