THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HIGH COURT CIVIL SUITS NOS 106, 150 AND 788 OF 2007

1. **GLADYS NYANGIRE KARUMU }**
2. **JOHN KATTO }..... PLAINTIFFS**
3. **ACCESS REPROGRAPHICS LIMITED }**

VERSUS

1. **DFCU LEASING COMPANY LIMITED }**
2. **ALEX MICHAEL AGABA }**
3. **MOSES MICHAEL AGABA }..... DEFENDANTS**
4. **MOHAMED KALIISA }**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The first and second plaintiffs are directors of the third plaintiff and the first plaintiff is the registered proprietor of LRV 2839 folio 17 plot 108 Katalima Rd Naguru in Kampala, (hereinafter also referred to as the suit property) the subject matter of the suit. The plaintiff's suit is for declarations and order that the sale and subsequent transfer of the first plaintiff's property by the 1st, 2nd and 3rd defendants to the 4th defendant was fraudulent, null and void and an order for the Registrar of Titles to cancel the registration and restore the first plaintiff on the title deed. It is also for orders that a permanent injunction is issued restraining all defendants from selling, registering or interfering with the ownership of the suit property or evicting the plaintiff there from, general damages, interest and costs of the suit.

The plaintiff's case is that the first plaintiff donated a power of attorney to the third plaintiff for a lease facility from the first defendant bank of a printing machine and a legal mortgage was executed in respect of the property. The third plaintiff on 17 December 2003 executed with the first defendant a master lease agreement, the financial lease schedule and the sale and lease back agreement for the printing machine worth Uganda shillings 479,106,578/= for a lease term of five years with effect from 28th of January 2004. The monthly rental was Uganda shillings 16,143,975/=. The third plaintiff paid Uganda shillings 190,787, 951/= but due to business setbacks affecting cash flows, the third plaintiff requested the first defendant to reschedule payments of rentals which the first defendant refused to and unilaterally terminated the lease agreement and repossessed the machines. The plaintiffs case as averred in the plaint is that the first defendant on or before October 2006 took away or repossessed the printing machine before

ascertaining the actual amount due and owing to it and totally refused to give the plaintiffs an opportunity to redeem the mortgaged property thereby crippling the third defendant and brought its business operations to an abrupt end. On 13 November 2006 and without statutory notice the first defendant evicted the first and second plaintiffs from the mortgaged property. The first defendant used the services of the second and third defendants to carry out the eviction of the first and second plaintiffs. The first defendant gave notice in the daily monitor of 17th of November 2006 page 3 thereof by the third plaintiff was under receivership of its property mortgaged to the first defendant which would be sold within 30 days by auction/private treaty. The advertisement caused a serious financial crisis and business loss to the plaintiffs because banks, customers, dealers and suppliers believed that the third plaintiff was insolvent and about to close up. After the plaintiffs obtained an interlocutory judgement in High Court civil suit number 106 of 2007 restraining the first and second defendants from selling the mortgaged property, the first defendant subsequently and in defiance of the court order appointed the third defendant as a new receiver to sell the same property before the issue of the outstanding balance could be resolved. Subsequently the first, second and third defendants fraudulently sold the mortgaged property. The plaintiffs value the property at Uganda shillings 1,500,000,000/=. The plaintiff contends that because the first defendant terminated the lease agreement of the printing machines prematurely, it should be liable to pay the full market value of the first plaintiff's property. Secondly, the mortgage did not empower the first defendant to appoint receivers and managers and sell off the mortgaged property without the requisite statutory notice to the plaintiff to redeem the mortgaged property. Thirdly the plaintiffs contended that they are entitled in law and equity to redeem the property and the court should declare the sale of the suit property by the first, second and third defendants to the fourth defendant as null and void ab initio.

The joint defence of the first, second and third defendants admit the lease facility of the third defendant dated 17th of December 2003 and the mortgage of the first plaintiffs land. Additionally the defendant maintained that the first and second plaintiffs as directors in the third plaintiff executed personal guarantee instruments dated 17th of December 2003 wherein they undertook to pay all the monies/liability of the third plaintiff to the first defendant in the event of default by the third plaintiff. It is the case of the first second and third defendants that upon commencement of the lease, the third plaintiff started defaulting on its rental repayment schedules and accumulated arrears despite the first defendant's persistent request for payment. In June 2005 the first defendant upon request of the third plaintiff agreed to restructure the lease facility by capitalisation of all outstanding arrears to further enable the third plaintiff regularise its account. The plaintiff failed to comply with its reschedule rental payments and issued false cheques leading to accumulation of arrears on its account. By October 2006 the arrears had accumulated to **Uganda shillings 216,125,451/=**. The entire outstanding sum on the facility stood at **Uganda shillings 713,003,508/=** which included arrears, capitalised arrears following the scheduling of the facility and VAT and the first defendant issued a final demand notice. The first defendant further maintains that termination of the lease was proposed by the plaintiff and the first defendant exercised its rights under the lease agreement when it terminated the lease. At

the time of the termination the outstanding balance on the third plaintiffs account was ascertained and the figures were notified to the plaintiff through demanded notices. Even after demands, the third plaintiff did not settle its outstanding indebtedness. Furthermore at the time of the sale of the mortgaged property, the court order/interim order of injunction in High Court civil suit number 106 of 2007 had lapsed and there was no subsisting order restraining the sale of the property. The appointment of the third defendant as a new receiver was lawful. The first and second plaintiffs vacated the suit premises on 30th of November 2006 and handed possession thereof to the second defendant upon notification of his appointment as a receiver/manager. However on the evening of 17th of December 2006 the plaintiffs regained possession with the assistance of rogue policemen and security agents. The third defendant subsequently sold the premises to the fourth defendant for a sum of Uganda shillings 220,000,000/= on 10th of May 2007 upon which the fourth defendant evicted the plaintiffs from the premises.

The defendants deny the claims and allegations in the plaint and filed a counterclaim against the plaintiffs jointly and severally for recovery of Uganda shillings 392,432,369/= being the balance due and owing to the lease facility, interest at 24% per annum from May 2007 till payment in full, general damages financial inconvenience and embarrassment plus costs of the suit.

The first defendants claim is that upon sale of the mortgaged property and in the attempt to realise the outstanding sum of Uganda shillings 713,003,508/=, less money was realised and Uganda shillings 392,432,369/= remained outstanding. During the exercise and upon obtaining of vacant possession of the mortgaged property, the plaintiffs forcefully repossessed the property with the assistance of rogue security agents before commencement of the suit. The first and second plaintiffs are liable on the basis of their personal guarantees of the loan. The third plaintiff is liable to pay the balance of the lease facility as the principal debtor and beneficiary under the facility.

The fourth defendant's defence is that the plaintiffs have no cause of action against him and are not entitled to any of the remedies sought against him. He purchased the suit property following advertisement of the intended sale in the monitor newspaper and is a bona fides purchaser for value without notice of any defect in title. He purchased the property in May 2007 at the prevailing and fair market value thereof.

Finally the plaintiffs maintain that the at all times given the first, second and third defendants written explanations on the economic causes of the delays in rental payment by the first defendant used high-handed methods without due regard to the commercial nature of the transaction which was a lease facility. The first defendant unfairly terminated the lease agreement and repossessed the printing press before expiry of the lease term and caused financial loss to the plaintiffs. Furthermore the first and second plaintiffs were forcefully evicted from the suit property by the first, second and third defendants at all times the first and second plaintiffs were in occupation of the premises on 30th of November 2006. The suit property was sold below the market rates causing serious financial loss to the plaintiffs.

The plaintiff denied the counterclaim and contend that the printing machine was valued at Uganda shillings 479,106,478/= and the plaintiffs had already paid monthly instalments of over 190 million inclusive of interest and later the defendant sold the mortgaged house valued at Uganda shillings 1,500,000,000/= which was unjust and unfair and caused financial loss to the plaintiffs. Repossession of the lease the machines by the first defendant effectively terminated the lease agreement and the plaintiffs do not owe do first defendant any future rentals and such a claim is false.

At the hearing of the suit Richard Mugenyi appeared for the plaintiffs. Kabiito Karamagi appeared for the first, second and third defendants while Isaac Bakayana represented the fourth defendant.

The following facts were agreed upon in the joint scheduling memorandum jointly endorsed by all counsels representing the parties:

1. The First and Second plaintiffs are directors in the third defendant company engaged in the printing business. The second defendant is also the secretary in the company.
2. On 17 December 2003 the third plaintiff took out a lease facility for printing equipment from the first defendant at a capital cost of Uganda shillings 479,106,587/=.
3. The third plaintiff undertook to pay monthly rentals on the equipment of Uganda shillings 16,143,975.90/= (exclusive of VAT which was then charged at 17%) for a period of five years commencing 28th of January 2004.
4. The first and third plaintiff mortgaged the property comprised in LRV 2839 folio 17 plot 108 Katalima Road, Naguru in favour of the first defendant as security for the payment of the facility. The first plaintiff executed the mortgage as surety for the facility while the third plaintiff as the holder of powers of attorney executed by the first plaintiff as registered proprietor.
5. The first and second plaintiffs and as directors in the third plaintiff executed personal guarantee instruments dated 17th of December 2003 wherein they undertook to pay all the monies due from the third plaintiff to the first defendant in the event of the company's failure to honour its obligations under the lease.
6. On several occasions after commencement of the facility, the third plaintiff defaulted on repayment obligations and upon its application, the first defendant agreed to reschedule the lease repayments by capitalising all the outstanding lease arrears in June 2005.
7. The third plaintiff still defaulted on its lease repayment obligations and by October 2006 had accumulated arrears to the tune of shillings 216,125,451/=.
8. Owing to the accumulated arrears, the first defendant terminated the lease facility and issued a final demand on 24th of October 2006 and repossessed its equipment from the third plaintiff company.
9. The second defendant was appointed a receiver/manager in respect of the property on 13 November 2006. However his appointment was terminated on 10th of April 2007 upon which the third defendant was appointed in his place.

10. The first plaintiff then commenced HCCS 106 of 2006 (formerly HCLD 721 of 2006) and obtained an interim injunction against the sale pending the determination of a substantive application for an injunction. The plaintiff also subsequently obtained an interlocutory judgement against the defendant in the same matter.
11. The plaintiff called on the personal guarantees of the first and second defendants on 15 February 2007 but the call was never honoured.
12. The suit premises were sold by the third defendant to the fourth defendant for the sum of Uganda shillings 220,000,000/=.
13. The fourth defendant was subsequently registered as proprietor of the land on 14th of May 2007.
14. By the time of the sale and transfer of the land, the plaintiff's interlocutory judgement obtained in HCLD 106 of 2006 had been set aside.
15. Following the sale of the lease equipment and the mortgaged property, the plaintiffs are indebted to the first defendant in the sum of Uganda shillings 392,432,396/=

The various witnesses filed witness statements and were cross examined on the same whereupon the court was addressed in written submissions.

Plaintiff's submissions:

The agreed issues submitted on by the plaintiff's counsel were:

1. Whether or not the first defendant was entitled to charge, demand and recover future rentals after repossession of the leased equipment.
2. Whether or not the bank legally and properly realised its security in the suit property.
3. Whether the second and third plaintiffs are liable to pay the sums due under the guarantee instruments after the realisation of their securities.
4. Whether or not the sale and transfer of the suit property was valid.
5. Remedies available to the parties.

1. Whether or not the first defendant was entitled to charge, demand and recover future rentals after repossession of the leased equipment?

The plaintiff submission on this point is that the master lease agreement executed between the third plaintiff and the first defendant on 17 December 2003 exhibit P2 and the sale and lease back agreement exhibit P3 executed on the same day at clear manifestations of the first defendants attempted circumvent the provisions of the Chattels Transfer Act cap 70 and the Sale of Goods Act cap 80. The plaintiffs case is that under section 1 (a) of the Chattels Transfer Act cap 77 laws of Uganda the printing machine and the master releasing agreement where chattels under the definition thereof. The first defendant contravened the Sale of Goods Act cap 82 by entering into a sale agreement with the third plaintiff on 17 December 2003 way of the

equipment was described as "goods" in paragraph 1 of the agreement. Counsel argued that if indeed this was a sale agreement under the Sale of Goods Act, then the provisions of the Act apply to the agreement under section 2 (i) which provides that a contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration called the price. Counsel further submitted that under section 2 (3) a contract of sale is either absolute or conditional and it was obvious that the first defendant intended to make the sale and Lease Bank Agreement conditional to the master lease agreement and also to avoid some of the provisions of the Sale of Goods Act namely sections 40 and section 53.

Both agreements are attempts by the first defendant to circumvent the law for pecuniary gain which is unfair and unjust enrichment by the first defendant. They were intended to achieve what an ordinary hire purchase agreement would have achieved under the principles of common law. The whole relationship between the plaintiff and the first defendant was a hire purchase relationship, of the hirer and the lender. Counsel relied on Halsbury's Laws of England 3rd Edition Volume 19 pages 512 – 535 for the principles of hire purchase under common law. Counsel relied on statutory provisions in England namely the Hire Purchase Acts of England 1938 and 1954 to the effect that upon determination of the hire purchase agreement, any provision subjecting the customer to additional liability would be void. The hirer is liable for any liability agreement before determination to pay the hire purchase price and sums due immediately before determination. Counsel further submitted that upon termination and resuming possession of the chattel, the remedy of the owner is to sue for breach of contract in the absence of express stipulation.

Counsel contended that the agreements executed between the parties were hire purchase agreements but cleverly drafted to read as master lease agreement and sale and lease agreement. The first defendant cannot and was not entitled to charge any demand and recover further rent after repossession of the leased equipment. The first defendant violated the VAT act by chatting VAT on future rentals and yet the machines had been repossessed.

The first defendant allegedly sold the repossessed equipment at Uganda shillings 120,000,000/= by the sale agreement tendered in court was not signed by the buyer which was further to suggest that the sale was an in-house sale to staff of the first defendant and neither was the amount realised from the sale credited on the account of the third plaintiff. Counsel further relied on the testimony of DW1 who admitted in court that the sale agreement for the machines was not signed by the buyer and the amount realised was not offset from the arrears demanded from the plaintiffs. Upon repossession of the printing machines and selling them the first defendant cannot demand further rent and the price of the machines and all the agreements pertaining thereto are illegal.

In reply it was submitted on behalf of the first, second and third defendants that the facts were not in dispute. The third plaintiff by way of a facility offer letter exhibit P1 was extended a lease

facility. The third plaintiff and the first defendant executed a master lease agreement exhibit P2. They further executed a financial lease schedule agreement exhibit P4, a lease and lease back agreement exhibit P3 and a mortgage agreement exhibit P5. The master lease agreement laid down the general terms and conditions of the lease by the financial lease schedule stated specific terms to govern this relationship. Counsel submitted that the documents provide the basis for resolution of the issue. Counsel further contended that hire purchase transactions may be confused with financial lease agreements.

It is contended on the behalf of the said defendants that finance leases are not dependent on any legal requirements but are designed on the doctrines of common law and freedom of contract. The lessee selects the equipment to be supplied by the manufacturer or dealer and the lesser (a finance company) provides the funds and acquires title to the equipment. It allows the lessee to use it for all of its expected useful life. During the period of the lease, the usual risk and rewards of ownership are transferred to the lessee who bears the risks of loss, destruction and depreciation of the leased equipment. (See Nassolo Farida and Another versus DFCU Leasing Company Ltd HCC is 536 of 2006) counsel further submitted on the nature of leasing finance. The first is the doctrine of non-cancellability. The obligations to make rental payments in accordance with the terms of the contract are irrevocable. The obligation ends upon full payment under the lease arrangement. Upon termination of the lease, the lessor is entitled to receive all future rentals being the outstanding capital investment and contribution overheads and profit due under the lease. The lessee cannot rescind the contract and opt out according to the master lease agreement exhibit P2. Secondly the equipment and the supplier are selected by the lessee who is liable for the state of the equipment and its suitability. Thirdly the lessor retains legal ownership of the equipment during the lease term as a form of security for receipt of the full rental payable. This gives the right of repossession of the equipment upon default by the lessee. Fourthly the risk in the equipment for the duration of the lease rests with the lessee. Fifthly the option to purchase is exercised by the lessee only after the lessee has completed payment of all its lease rentals. Furthermore the principle of bailment is incorporated in the contract to prevent the lessee from being able to make a valid disposition of the property and also prevent the lesser from being held vicariously liable for any injury or damage caused to third parties by the equipment under the possession and control of the lessee. The rentals agreed-upon must be paid regardless of the termination of the lease. The rentals are structured to recover the full capital cost of the equipment, plus a return for the lesser over the term of the lease.

The defendants counsel further sought to make a distinction between a finance lease and hire purchase agreement. He contended that the underlying transaction in the hire purchase relationship is always purchase. Instalment payments reduce the amount of consideration and the agreement is normally between and intending purchaser of goods and the supplier of that good. On the other hand a financial lease deals with credit and intention of the parties is not for one party to pass title to another at the end of the lease term. The transfer of ownership of the asset is referred to as "an option to purchase" exercisable by the lessee. Payments are lease rentals

applied towards a deduction of monies paid by the lessor in acquiring the equipment for the lessee's use. Consequently legal doctrine based on the Hire Purchase Act of England 1938 is inapplicable.

Whereas there was no particular statutory framework for finance leasing, section 3 of the Financial Institutions Act 2004 recognise it. Section 4 of the VAT Act provides for taxation of rent earned from finance leases. Section 59 of the Income Tax Act imposes tax on income derived from finance leases. Consequently the leasing transactions are guided by principles of common law under section 14 (2) of the Judicature Act. In practice they are internationally recognised principles and practices for equipment leasing.

As far as future rentals are concerned, it is not disputed that the third plaintiff performed miserably on its rent payment obligations under the lease according to the ledger postings exhibit D3 leading to termination of the lease by the bank. The first defendant possessed the equipment and realised its securities in the mortgage to recover future rentals. The initial amount upon termination was Uganda shillings 817,322,228/= which was reduced to Uganda shillings 708,634,000/= and acknowledged by the plaintiffs. The very nature of the transaction was that future rentals could be demanded. It was a contractual obligation under clauses 8 and 10 (ii) of the Master Lease Agreement exhibit P2 for future rentals after termination of the lease agreement. Even upon termination of the lease agreement, the plaintiff was obliged to perform its obligations until the lessor has recovered its investment in full. Counsel relied on the case of **Deluxe Enterprises Ltd versus Uganda Leasing Company**, honourable Lady Justice Constance Byamugisha as she then was held on the question of future payments that the court would enforce the contractual terms of the master lease agreement which entitled the leasing company to demand future rentals. Furthermore in **Nassolo Farida versus DFCU Leasing Company Ltd** honourable Justice Lamech Mukasa ordered payment of future rentals under similar conditions. The justification for future rentals is that the bank as the financial institution does not deal in the equipment. Its business is to finance the purchase of the equipment and it is the lessee who is expected to know about the equipment he or she needs for his/her business. Upon ascertaining the creditworthiness of the applicant to repay the credit facility, the bank's role is to finance the purchase of equipment. The holding of the legal title to the property is for purposes of security and entitlement of repossession of the equipment in the event of the lessee's default. Counsel further submitted on the right of the first defendant to terminate the lease upon fundamental breach of the term of payment of monthly rent. Counsel relied on the case of **Lombard North-Central Plc versus Butterworth (1987) 1 All ER** 267 where upon default of the defendant the leased equipment was repossessed and sold to recover future rent. The sale was unable to recover the entire sum. The defendant contended that the demand for future payments amounted to a penalty. The court found that the plaintiff was entitled to terminate the lease agreement for default in punctual payments of instalments and recover damages for the loss of the whole transaction.

In the case of **Deluxe Enterprises Ltd** (supra) the argument that future rentals were a penalty was rejected. Counsel further submitted that the plaintiffs actually repudiated the contract on 20th of February 2006 when the second and third plaintiff's wrote to the bank in the letter exhibit D4 requesting to terminate the lease and they were willing to deliver the machine to the bank. They informed the bank that they learnt that the machine had been excessively overpriced. Where a breach amounts to repudiation of the lease agreement or breach of the condition, the lessor would be able to treat the contract as discharged and recover damages for loss of his bargain.

On the question of the VAT payments on future rentals after repossession of equipment, counsel submitted that the second schedule of the VAT Act which provides for exempt supplies includes the supply of financial services. However under clause 2 (b) (iv) provision of credit facilities under leasing are specifically excluded from exemption and are liable to attract VAT. VAT was properly levied and paid on the future rentals. The tax is payable to the credit of the plaintiffs account and the plaintiff is free to claim for a refund against their own expenditures from Uganda Revenue Authority.

On the contention that the sale and lease back circumvents the Chattels Transfer Act and the Sale of Goods Act counsel contended that the leased equipment under the sale and lease back agreement was never repossessed. It is not indicated anywhere on record that this equipment was returned to the defendant.

Counsel further sought to distinguish the case of this court in **Otaok Charles versus Equity Bank** HCCS 335 of 2010. In that case it was held that the lessor was not entitled to recover future rentals on the lease and the court interpreted the clause permitting termination with or without notice to amount to an election in that case. In the case of **Lombard North-Central verses Butterworth (1987) 1 All ER** 267 the court found that punctual payments of instalments was of essence in the agreement and breach of which went to the root of the contract and entitled the plaintiffs to terminate the contract and recover damages for loss of future rentals. The court found that in the absence of repudiated a breach clause 6 thereof would become a penalty. Counsel submitted that in this case there was repudiatory breach as evidenced from the conduct of the parties and the letters expressly requesting to return the machine to the bank. In the case of **Financings Ltd versus Baldock** (**1963) 1 All ER** 443 it was held that where the owner determines a hire purchase agreement in exercise of the right to do so given him by the agreement, in the absence of repudiation he can recover damages for any breaches up to the date of termination but not thereafter and a minimum payment clause which purports to oblige the hirer to pay larger sums than this is unenforceable as a penalty. Counsel contended that the key distinction with the present case is that the transaction in the former was a hire purchase transaction whereas the present case dealt with a finance lease and the decision of Lord Denning would not apply to the current circumstances. Consequently he contended that my decision in **Otaok Charles versus Equity Bank Uganda Limited HCCS 335 of 2010** determined the matter as if it were a hire purchase which was not the case. Counsel submitted that my decision

would be redefining a financial lease as a hire purchase and yet the operation of the two transactions is different in principle. Counsel went on to explain the characteristics of a finance lease and its importance in the finance industry.

I do not need to go into the details of the submissions. Counsel examined the rationale for recovery of future rentals which include depreciation in the machinery/equipment, the fact that the bank utilises depositor's money to finance the lease equipment and the fact that additional security had been taken where foreclosure upon default was contemplated by the parties among other points.

I will start with the last point of contention about the effect of my judgment and alleged erroneous reliance on the ratio decidendi in **Financings Ltd vs. Baldock (1963) 1 All ER 443.**The defendant's Counsel sought to distinguish **Financings Ltd** (supra) on the ground that it dealt with a hire purchase transaction as opposed to a finance lease. In the case of **Otaok Charles versus Equity Bank Uganda Limited HCCS 335 of 2010** I was persuaded by the judgement of Lord Denning in Financings Ltd (supra) where he held at page 455 that:

> ***"It seems to me that, when an agreement of hiring is terminated by virtue of a power contained in it and the owner retakes the vehicle, he can recover damages for any breach up to the date of termination, but not for any breach thereafter, I see no difference in this respect between the letting of the vehicle on hire and the letting of land on a lease. If a lessor, under a proviso for entry, re-enters on the ground of non-payment of rent or of disrepair, he gets the arrears of rent up to the date of re-entry and damages for want of repair at the date, but he does not get damages for loss of rent thereafter or for breaches of repair thereafter. In this and many hire purchase agreements, the owners have sought to avoid the general principle by inserting a "minimum payment" clause such as we see in clause (11) (a) here,… The owners by such a clause are really seeking, on an early termination of the hiring, to recover damages for loss of future rentals, when they have not lost any. They have no right to future rentals after they have terminated the agreement and got the vehicle back. …"***

I agree with the defendant's counsel that that case dealt with hire purchase of a vehicle. However in my decision I referred to the case of **Lombard North-Central Plc versus Butterworth [1987] 1 All ER 667 and** judgment of Lord Mustill at page 271 where his Lordship held that where a breach goes to the root of the contract, the injured party may elect to put an end to the contract and thereupon both sides are relieved from those obligations which remain unperformed. The general law was that a contract which prescribes what damages are payable upon termination for breach of a condition is open to being struck down as a penalty if it is not a genuine pre-estimate of the damage. The summary of earlier decisions referred to was that:

> ***"A term of the contract prescribing what damages are to be recoverable when the contract is terminated for a breach of condition is open to being struck down as a penalty, if it is not a genuine covenanted pre-estimate of the damage".***

A genuine pre-estimate of damages may include future rentals in its assessment. Secondly, the court enforces the contract of the parties and every case must be based upon an interpretation of the contract. The court preserved the principle of *restitutio in integrum* which should be the basic guiding principle in all cases. In the case of **Otaok Charles versus Equity Bank** (supra) the court did not strike out any clause as a penalty. Secondly the case had peculiar facts and was decided on a different basis. In that case the bank advanced the plaintiff Uganda shillings 23,000,000/= and the plaintiff bought the vehicle for Uganda shillings 25,000,000/=. At the time of repossession the entire outstanding amount on the loan was Uganda shillings 13, 766,366/=. The bank issued a notice for the plaintiff to pay arrears of rent and what was outstanding of Uganda shillings 7,148,565/=. The defendant bank sold the vehicle at Uganda shillings 9,000,000/=. What remained outstanding and owing to the bank was Uganda shillings 4,766,366/=. The defendant bank counterclaimed against the plaintiff for recovery of this sum together with interest. It was the case of the defendant bank that interest continued to accumulate even after the possession of the machine/equipment/vehicle. The primary issue was whether the defendant unlawfully repossessed the leased equipment/vehicle. The facts were peculiar in that the defendant bank gave the plaintiff seven days notice but impounded the vehicle the same day as the date of the written notice and sold it the next day. Secondly the notice was not for future rentals but for the outstanding arrears. Under the contract the defendant bank had the option to repossess the vehicle with or without notice. The court found that the defendant bank had opted to repossess the leased vehicle upon giving written notice of seven days and could not impound/repossess the vehicle on the same day as the notice. That the defendant bank was bound by the terms of the notice it had issued and consequently the court awarded damages for breach of the terms of the notice. This was because the plaintiff was not given opportunity to redeem the property by clearing the outstanding amount. However the court found that the plaintiff had consistently been in default. The plaintiff was a taxi operator and the vehicle stopped making money. The court did not make a finding as to whether there was repudiatory breach by the lessee entitling the lessor to claim the whole amount due in future rentals. That decision cannot be of general application on the operation of financial leases. The court construed the contract of the parties as should be the case in all financial leases. I therefore do not agree with the defendants counsel that the decision endangered the business of finance leasing. For emphasis, I will take this opportunity to address the concerns of the defendants counsel.

The real controversy between the parties is whether after repossession of the equipment, it was lawful to keep on charging future rentals. In the case of **Financings Ltd versus Baldock [1963] 1 All ER 443** Lord Denning compared a hire purchase agreement to a lease agreement. The question is whether such an analogy applies to financial leases. In the case of land leases, re-entry puts the landlord into possession. The rationale that the landlord can recover damages for

any breach up to the date of termination was that there could be no further breaches after re-entry. I agree that to a limited extend the principle in the above decision was erroneously applied to a finance lease. I further agree that the case of **Lombard North Central plc versus Butterworth [1987] 1 All ER 267** is the most relevant decision on the question of finance leases generally and subject to the wording of the contract and interpretation thereof. The general application of the doctrine in the case of **Otoak Charles versus Equity Bank** does not redefine a financing lease. What should be noted from the outset is the fact that future rentals if paid for promptly are an identifiable pre-estimate of instalment payment under the lease before the exercise of the option to purchase the equipment. In other words they are in the nature of a liquidated demand based on calculations in the contract. Calling them rentals, can lead to an erroneous conception that they are the fees or charges for hiring the equipment. It is however an ingenious scheme where the owner remains the financier but the financier is not responsible for buying the equipment in terms of identifying it and taking certain risks about the suitability of the equipment. It is ingenious because the rent in another context accrues from possession and use of property. It is also technically not a hire purchase arrangement because instalment payments are technically not payments towers purchase. The financier remains the owner until after all rentals have been paid. Lastly the hirer only has the option to pay a nominal sum to obtain ownership of the equipment. In the case of **Lombard North Central plc versus Butterworth** (supra) the lessee is also referred to as the hirer. Not much distinction can be made in substance from hire purchase agreement in finance leases though in legal terms the distinction is important because of the consequences of each type of transaction.

The case of **Lombard North Central plc versus Butterworth** (supra) dealt with a lease of a computer. Secondly the court looked at the payment of future rentals on the ground of whether it was a fair pre-estimate of the compensation due to breach. I do not think that in the previous decision of **Otaok Charles vs. Equity Bank** (supra) the court detracted from the principle that restitutio in integrum is the underlying principle in dealing with the question of the appropriate remedies available to an injured party. In the case of **Lombard North-Central Plc** (supra) the specific provision which was of concern was clause 6 of the lease agreement which provided that in the event of termination of the lease for non-payment of rent, the lessee shall forthwith pay to the lessor all arrears of rentals. Secondly the further rentals which would, but for determination of the lessor's consent to the lessee's possession of the goods, have fallen due to the end of the fixed term of the lease less a discount for accelerated payment of 5% per annum. It was specifically provided that the determination of the lessor's consent to the lessee's possession of the goods shall not affect or prejudice the rights of the lessor and remedies provided for. The Creditor/Financier filed an action for recovery of damages plus the outstanding arrears. The trial judge gave judgment for damages recoverable in respect of the future instalments subject to credit allowed in the statement of claim. The question was whether clause 6 of the agreement was a penalty and, if so, whether the conduct of the hirer (the defendant) amounted to a repudiation of the agreement that was accepted by the owner (the plaintiffs).

Nicholls LJ considered the ratio decidendi in **Financings Ltd versus Baldock** as stating the principle that in the absence of a repudiatory breach, clause 6 was a penalty in so far as it purported to oblige the defendant, regardless of the seriousness or triviality of the breach which led to the plaintiff terminating the agreement by taking possession of the computer, to make a payment, in respect of rental instalments which had not accrued prior to repossession. To distinguish the case his Lordship examined the characteristics of a financial lease in terms of the express agreement between the parties in the particular case. It was a case for the construction of the agreement between the parties.

The characteristics of such agreements were considered. It was the business of the plaintiff to finance customers to acquire goods whether by hire purchase or lease. The financiers themselves do not supply the goods. They purchase the goods chosen by the customer from the supplier and let them to the customer on hire purchase or hire as the case may be. The lease agreement was meant to generate for the duration of hire/lease a rate of return to make a commercial profit on the money paid out on the acquisition of the property. It remained open for the defendant to buy the goods at the end of the hire period for 5% of the initial value. The interest of the financier upon repossession of the goods was confined to reselling them at prevailing market rates and possibly at a time when the goods had undergone some depreciation. It was crucial that agreed instalments are paid promptly. Interest is calculated on the basis of instalment dates in order to have them paid regularly and promptly. Failure to pay promptly would make the arrangements unattractive and unprofitable and was likely to cause substantial loss to the financier. The defendants objective was to use the goods while making instalment payments and at the end of the hire period upon paying all the instalments to acquire ownership to the goods on the payment of a nominal sum. Nicholls LJ on the basis of the intention of the parties found that failure to pay promptly amounted to a repudiatory breach of the agreement thereby distinguishing the case of **Financings Ltd versus Baldock** (supra). He found that failure to pay triggers the right of the plaintiff/the financier to terminate the agreement and take possession of the goods. In the context of financial leases, a breach in the payment of instalments goes to the root of the contract. Consequently the legal consequence of the contract was that the plaintiff would be entitled to claim damages for loss of the whole transaction. The parties agreed that breach of such a condition would go to the root of the contract and would entitle the innocent party to accept the breach as repudiation and to be paid damages according to the contract.

The decision rested on the construction of the lease agreement to the effect that failure to pay promptly was repudiation of the lease. Finally his Lordship found that in the case of **Financings Ltd versus Baldock** there had been no repudiation of the agreement. In **Financings Ltd versus Baldock** (supra) Lord Denning MR extensively reviewed authorities on the point. The authorities dealt with whether failure to pay past rentals amounted to repudiation by the hirer of his obligation to pay future rentals. The question is whether the hirer repudiated his liability for future rentals and whether the owners were entitled thereby to treat the repudiation as going to root of the contract. In case the repudiation did not go to the root of the contract, the remedy of

the owner was to claim damages up to the time of the breach with interest. It could not claim for future instalments since they had not arisen and that could not be any breach. The question of whether failure to pay amounted to repudiatory breach should be determined on a case-by-case basis and based on construction of the contract. There should be room for the court to assess whether repossession of the equipment and the sale thereof would be sufficient to cover the future rentals. As mentioned above the underlying principle is that of *restitutio in integrum*.

The resolution of issue number one would therefore turn on the construction of the contract and the question would only be whether failure to pay instalment payments was a repudiatory breach of the obligations of the third plaintiff to pay future rentals.

It is an agreed fact that the third plaintiff had failed to pay and its directors had expressed difficulty in meeting obligations to the first defendant bank.

A master lease agreement was executed between the parties on 17 December 2003 namely between the third plaintiff and DFCU Leasing Company Ltd. Clause 2 of the master lease agreement paragraph A thereof provided that the lessor shall lease and the lessee shall take on lease the equipment under a lease term, subject to the terms and conditions of the agreement. In paragraph "B" of clause 2 of the agreement it is provided that "the lease confirms and acknowledges that each financial lease schedule is a full pay out non – cancellable agreement and the lessee has no right to surrender the equipment during the lease term. Furthermore the agreement provided that ownership of the equipment shall at all times during the lease term remain with the lessor. Clause 5 of the master lease agreement provides that the lessee has by itself or through its agent selected the equipment. Clause 8 provides for termination events which include failure to pay any rental or any other sum provided for in the agreement on the due date. Upon the occurrence of a termination event described in clause 8, the lessor may with or without notice terminate the leasing of the equipment and take possession of it. It further provides that notwithstanding repossession the lessee will remain liable to perform all obligations under the agreement. Clause 10 of the master lease agreement provides inter alia that upon termination of the agreement by reason of a fundamental breach or repudiation of the agreement by the lessee or by reason of any agreed terminating event provided for under clause 8, the lessee shall pay to the lessor on the date of termination of the leasing of the equipment a termination payment amount which include arrears of rental including the termination payment amount under the agreement. Any amount equal to the aggregate of all payments of rental which would provide for such termination are payable under the agreement after the termination together with costs in connection with the repossession storage, insurance or sale of the equipment. The finance lease schedule shows that the leased equipment is printing equipment. The capital costs of the equipment is Uganda shillings 479,106,587/= and the lease term shall be for a period of five years with effect from 28 January 2004 up to 28th of January 2009. The schedule further provides that the rent in respect of the lease term is Uganda shillings 16,143,975.90 only. The first instalment of the rental in respect for the lease term was supposed to be payable after the commencement of the lease term followed by 59 rentals at monthly intervals subject to

adjustments in accordance with the master lease agreement. Clause 6 of the finance lease schedule is of special mention because it provided that the lessee was to deliver to the lessor 60 cheques in respect of payment rentals plus value added tax at the applicable rate. The option to purchase was exercisable upon payment of all instalments at the purchase fee of 5% of the capital costs. The first day of the lease was the date the lessor notifies the lessee that the supplier has confirmed to the lessor delivery of the equipment.

Written evidence shows that the third plaintiff started experiencing difficulties in the payment of the lease rentals. Exhibit P6 is a letter dated 20th of February 2006 in which the third plaintiff's directors write to the Head of Credit of the first defendant that they had been very committed but had struggled with the lease from the very beginning. The conclusion was that they did not understand the lease fully. With the assistance of some Danish consultants they came to the conclusion that the reason for the struggling was that the printing press was excessively priced. It was sold at a higher price than a brand-new one. In other words it was a second-hand printing press. Consequently the rentals were placed above production levels of the machine. Thirdly the machine was not properly adapted to the kind of work that the third plaintiff mostly dealt with. They go on to say that they were of the opinion that the best way was to terminate the lease. Part of the letter reads as follows:

> ***"We are therefore ready and willing to deliver the machine to you at the place of your choice. On the other hand, since we know that it is always easier to sell the machine while it is operational, we are willing to show case it for you for a limited period and perform a live demonstration of it to whoever you wish. Of course, we will not use it for any other purpose than that in that time.***
>
> ***This has been our first lease experience and, though it has not been a total success, we take a positive view of the many lessons we have learnt from it. We kindly request to negotiate a soft exit with you, in the full knowledge that we will be back with better business soon.***
>
> ***We thank you for the patience you have had with us and for all the instructions given us. We will, of course, continue to cooperate with you until the end of this issue and intend to maintain a good working relationship with you always."***

Again in a letter dated 19th of October 2006 admitted in evidence as exhibit P7, the third plaintiff wrote to the first defendant expressing difficulties with the contract. Therefore the third plaintiff proposed a way out as follows:

- "***We mutually agree to terminate the lease as soon as possible and the rentals plus interest are frozen.***
- ***A final figure is agreed on as the last outstanding owing to DFCU that is agreeable to both parties.***

- ***The machine be put up for sale. The time limit of two months be given to offloading the said machine and the proceeds to go to reducing the outstanding balance.***
- ***A payment schedule been drawn up for the balance that would be manageable. We proposed the equivalent of the rent that the security would collect, i.e. US$1000 per month. We would, of course try to reduce the outstanding as fast as we could nonetheless.***
- ***The facility to be converted to a direct mortgage and the property to remain as security. We hope that you will find the above proposal agreeable and that we may finalise the transaction as soon as possible. We thank you once again for your kind consideration."***

The defendant rejected the proposal for conversion of the master lease agreement into a direct mortgage in a letter dated 24th of October 2006. Instead the first defendant wrote a letter for termination of the master lease agreement on the ground of the repayment history and insufficient cash flow. The first defendant further notified the third plaintiff that it will take immediate possession of the leased equipment and proceeds from the sale shall be used to reduce the exposure of the third plaintiff. The outstanding balance on the lease would further be reduced by proceeds from the sale of the residential property and the plaintiffs were given not later than 31st of November 2006 to settle any outstanding balance.

In a letter dated November 3, 2006 the third plaintiff further proposed payment for the terminated lease admitted as exhibit P8. The third plaintiff proposed payment of a grand total of Uganda shillings 558,000,000/= through a seven-year period. The plaintiff proposed that payments were to begin in January 2007 and no interest should be paid. Exhibit P9 which is a statement of account shows that by 28th of October 2006 the outstanding amount due and owing to the first defendant was Uganda shillings 713,003,508/=.

In the joint scheduling memorandum signed by the parties it is an agreed fact that on several occasions after commencement of the facility, the third plaintiff company defaulted on repayment obligations and upon its application, the first defendant agreed to reschedule the lease repayments by capitalising all the outstanding lease arrears in June 2005. Thereafter the third plaintiff still defaulted on its lease repayment obligations and by October 2006 and accumulated arrears to the tune of Uganda shillings 216,105,451/=. Owing to the accumulated arrears, the first defendant terminated the lease facility and issued a final demand on 24th of October 2006 and repossessed its equipment. The second defendant was appointed a receiver/manager on 13 November 2006 and his appointment terminated on 10th of April 2007 whereupon the third defendant was appointed in his place.

As far as the question of repudiatory breach is concerned, the terminating offence under clause 8 of the master lease agreement had occurred. Clause 8 (i) of the master lease agreement provided that should the lessee fail to pay any rent or other sum due on the due date or fail to perform or observe any of the undertakings, agreements or obligations in the agreement, and any other act,

matter or thing occurs which in the opinion of the lesser might have a material adverse effect upon the ability of the lessee to perform its obligations under the agreement, the lesser may with or without notice terminate the leasing of the equipment under the agreement and take possession thereof. It admitted in the letters of the defendant exhibits P6 that the third plaintiff was unable to meet its obligations under the lease. I am persuaded by the holding in **Lombard North Central plc versus Butterworth (supra)** that failure to pay promptly instalment payments or rentals under the specific contractual terms went to the root of the contract and was a fundamental breach. The third plaintiff and even offered termination of the lease upon acceptable terms. The offer was rejected by the first plaintiff who opted to terminate the lease under clause 8 of the master lease agreement. Termination could be with or without notice. Upon termination future rentals became due. The future rentals are first of all a contractual obligation calculated if regularly paid to run for a particular duration upon completion of which the third plaintiff would have been entitled to exercise the option to purchase at 5% of the initial value of the equipment.

Secondly the third plaintiff clearly expressed the opinion that it could not cope with the instalment payments because the machine had been overpriced. It was a second-hand machine which had been purchased at a higher price than a new one. Secondly it did not meet the business requirements of the third plaintiff because it did a different kind of job rather than what the plaintiff had a good market for. The repossession of the equipment is therefore not controversial. What is controversial is the consequence of termination of the lease. It is the contractual provision under clause 10 of the master lease agreement that upon termination of the lease or arrears of rent due including a termination payment date and any other monies due would be payable with interest on any overdue sum. Secondly clause 10 (ii) provided that "an amount equal to the aggregate of all payments of rental which would but for such termination have been payable under this agreement during the period from and including the day following the termination payment date of the end of the lease term;" would also be payable. In other words all the future rental payments became due. The rationale for payment of future rentals, include considerations that the equipment is brought at the request and requirement of the borrower/lessee. The financier has to recover its money together with profit upon financing the purchase of the equipment. The financier retains legal title to the property without the risks associated with the ownership.

I have further considered the arguments of the plaintiff's counsel relating to whether the first defendant/lesser was trying to circumvent the law namely the Sale of Goods Act particularly sections 40 and 53 thereof. Section 40 of the Sale of Goods Act deals with the seller's lien where the sale of goods has been unpaid. It deals with the right to retain possession until payment. Section 53 of the Sale of Goods Act provides for the remedies of a buyer or seller. It is apparent that the relationship between the plaintiffs and the first defendant is not that of a buyer or seller. Neither is the contract, a contract for the sale of goods. The third plaintiff in that relationship is not a buyer who bought goods from the seller/first defendant. The seller in the relationship is the person who supplied the lease equipment. Because the transaction is question is not a contract of

sale under Part 2 the Sale of Goods Act, and particularly section 2 (3) thereof, the submission that it was conditional sale is inapplicable. Furthermore the Chattels Transfer Act cap 70 is inapplicable to the transaction because it deals with the pledging of property by the owner in the return for credit. In the master lease agreement, the third plaintiff is not the owner of the goods.

Consequently it is my finding that the agreement between the parties is not an agreement for the sale of goods and the provisions of the Sale of Goods Act are inapplicable to the transaction. Secondly the Chattels Transfer Act is likewise inapplicable. The master lease agreement is not an ingenious circumvention of the law and there is no nothing to suggest that it is an illegal contract under the laws of Uganda. Because there is no statutory framework, the contract is governed by the common law and authorities such as **Lombard North Central plc versus Butterworth** (supra) are of persuasive force.

In those circumstances issue number one on whether or not the first defendant was entitled to charge, demand and recover future rentals after the possession of the leased equipment is answered in the affirmative. Under the master lease agreement and the common law, particularly the clause making it repudiatory breach for the lessee not to promptly pay rental instalments, the lesser is entitled to claim the whole of the rental instalments which is calculated exactly and is a liquidated demand under the contract.

Issus numbers 2 and 4 are intertwined and will be considered together. There are (2) **whether or not the bank legally and properly realised its security in the suit property?** and; (4) **whether or not the sale and transfer of the suit property was valid.**

The plaintiffs case is that the manner in which the first defendant bank realised its security was not only illegal but improperly carried out. According to the testimony of PW1 and PW2 the first defendant did not give the plaintiffs an opportunity to redeem the mortgaged property and did not issue notices to the plaintiff as required by law. The first and second plaintiffs were forcefully evicted from the suit property by the third defendant acting on instructions of the first and fourth defendants. The eviction of the plaintiffs took place after the first defendant had already sold the property. They had not informed the plaintiff's that even the printing machines which the first defendant had repossessed from the third plaintiff were also sold by the first defendant and the amount was not offset against the loan facility PW1 and PW2 were not satisfied by the computations of the first defendant on the outstanding balances on account. They were not told or reminded to redeem the property. The mortgaged property was hurriedly sold when plaintiff had filed a civil suit number 106 of 2006 to save the property. Under section 7 (1) of the Mortgage Act cap 229 a mortgagee is required to give at least 60 days' notice of intention to realise security under the mortgage. Notice as required by the law was not given. A mortgagee never took possession of the property but merely sold the house even when the first and second plaintiffs were still in occupation thereof. DW1 failed to produce in court copy of the pre-– loan valuation of the mortgaged property. Furthermore DW5 denied knowledge of the pre-– loan valuation. Counsel submitted that it was standard bank procedure to give loans at 75% of the

value of the property. Counsel wondered how the bank could give a loan of Uganda shillings 450,000,000/= to purchase a machine worth Uganda shillings 75,000,000/= according to the sale and lease back agreement dated 17th of December 2003 exhibit P3 and schedule 1 thereof. The question was also why the security for the loan facility was six times greater in value than the cost of the printing machine. Counsel further asked the question as to how the mortgaged property whose estimated value at the time of securing the loan/lease facility in December 2003 was Uganda shillings 450,000,000/= could have depreciated in value to Uganda shillings 200 million at the time it was sold in May 2007. Counsel contended that it is conventional wisdom that real estate appreciates in value and does not depreciate. Consequently the plaintiff's counsel concluded that the realisation of the security by the first defendant was illegal and improperly done and the court should be pleased to order that the actions of the first defendant were illegal and fraudulent.

The 4th issue is whether or not the sale and transfer of the suit property was valid.

The plaintiff's case is that the sale and transfer of the mortgaged property was illegal, fraudulent null and void ab initio. It was done in complete disregard of the Mortgage Act and the Registration of Titles Act cap 230. Counsel reiterated arguments that the first and second plaintiffs were never issued with any notice as required under section 7 (1) of the Mortgage Act. Secondly the property was sold when the first defendant was fully aware that there was a pending civil suit HCCS number 106 of 2007 between the first plaintiff and the third plaintiff against the first defendant and another. Exhibit P4 shows that the bank had been issued with a court order on several occasions. The property was also sold with the existence of two caveats on the title. Finally exhibit P 12 which is the sale agreement discloses that at the time of the sale of the second, third and fourth defendants were aware of the encumbrances on the property and the court case. Counsel relied on the case of National Bank of Commerce Ltd versus Saad Trading HCCS 496 of 2003 where the High Court held that the mortgagee had a duty to act in good faith and take all reasonable steps to sell the land at the true market value or prevailing prices at the time of the sale.

The advertisement for sale of the plaintiff's house appeared only once in the Monitor Newspaper of 17th of November 2006 exhibit P10 with no accompanying pictures of the property indicating lack of good faith on the part of the defendants. Counsel submitted that for the court to find that the purchaser was a bona fides purchaser for value he had to fulfil 4 guidelines laid out in the case of Hannington Njuki vs. William Nyanzi HCCS number 434 of 1998. Firstly that he holds a certificate of title issued under the Registration of Titles Act; secondly that he purchased the title/land when he had no knowledge of the fraud; thirdly that he purchased it for valuable consideration and lastly that the vendor from whom he bought or derived title was formerly the registered proprietor. The fourth defendant admitted that he bought the property with all its encumbrances according to exhibit P12. The fourth defendant was therefore not a bona fide purchaser for value without notice of any defect in title of the vendor. In the case of **Frederick JK Zaabwe versus Orient Bank Ltd and 5 others SCCA 04** of 2004 that the purchaser who

buys property subject to a caveat cannot claim not to have notice whatever the merits or demerits of the caveat. The conduct of the defendants was clearly fraudulent because they intended to dispose of the plaintiff's property with intent to defraud the plaintiffs. According to Black's Law Dictionary 6th edition at page 660, fraud is an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. And to act with intent to defraud means to act wilfully and with the specific intention to deceive or cheat for the purpose of either causing some financial loss to another or bring about some financial gain to one's self. Counsel concluded that the sale of the plaintiff's property was illegal, null and void and the fourth defendant was not a bona fide purchaser for value. The sale was done in bad faith and the first defendant cannot pass a good title to the fourth defendant. Moreover the sale was in violation of the Mortgage Act cap 229.

In reply the first defendants counsel submitted that the bank realised its security in the suit property in a proper and legal manner. Under clause "A" of the mortgage deed, the first and that the plaintiffs in their respective capacities as sureties and lessees agreed to mortgage the suit property to secure the due and prompt payment of each and every sum which became due and payable to the lessor. Under clause 6 (a), 7, 8 and 9 a receiver was appointed to sell the mortgaged property as an agent of the mortgagor. The receiver sold the property under powers vested in him by the mortgage deed. In the case of **Housing Finance Bank and Another versus Edward Musisi SCCA 22 of 2010** it was held that in cases where mortgage money is payable by instalments the part of sale is exercisable when an instalment has become due and payable and has not been paid. Counsel submitted that under the Mortgage Act cap 229 a mortgagee has options in which to realise the security and that the mortgage by appointing a receiver, taking possession of the mortgaged property or foreclosure. Enforcement was by way of an appointment of a receiver/manager within the terms of clause 6 of the mortgage deed.

As far as failure to notify the mortgage as well concerned, counsel contended that all the notices issued were given to the plaintiffs to redeem their property. Reference to the recovery under the lease agreement also meant the recovery under the mortgage deed which provided the master lease agreement and the finance lease agreement would be deemed integral to and construed as one and the same with the mortgage. Exhibits D5 – (iii) – (v). Furthermore the first defendant issued the plaintiffs with a lease termination and final demand notice dated 30th of October 2006 exhibits D6 (ii). It was indicated to the plaintiffs that the first defendant would terminate the facility and enforce recovery in full of all amounts due if the arrears of Uganda shillings 216,125,451/= was not paid within seven days. On 19th of October 2006 the plaintiffs wrote to the bank in exhibit P6 (ii) and requested for a consensus on the final determination and proposed to settle partly the proceeds of the sale of equipment and balance by making monthly instalments of US$1000. The first defendant gave the plaintiffs up to 13th of November 2006 within which to settle outstanding monies. On 24th of October 2006 the bank wrote to the plaintiffs in exhibit D6 (iii) rejecting the proposal to convert the lease facility into a mortgage facility secured by residential property. The plaintiffs failed to pay the monies as demanded and on the 3rd of

November 2006 the plaintiffs wrote exhibit P6 acknowledging indebtedness to the bank of 708,634,000/= with a proposal to pay within seven years after the sale of the equipment which the plaintiff estimated at Uganda shillings 150,000,000/=. The proposal was rejected by the bank and because of the failure to pay; the first defendant enforced its rights under the mortgage by appointing a receiver/manager on 13th of November 2006. The first defendant additionally advertised the property for sale both in the New Vision and the Monitor newspaper's giving sufficient notice to the plaintiffs. The notices were by way of demand notices in terms of clause 5 (a) (iii) and 6 of the mortgage deed.

Under section 117 of the Registration of Titles Act a demand in writing upon default by a mortgagor for the period provided for in the mortgage is sufficient and no other notice is required. Demand notices had been issued since June 2004 and the plaintiffs did not satisfactorily settle their indebtedness according to the notice.

Concerning enforcement through possession by the mortgagee counsel reiterated submissions that the realisation of the security was by appointment of a receiver under the provisions of sections 4 and 5 of the Mortgage Act and was not in breach of section 7 thereof. As far as the evidence of alleged eviction is concerned, the position of the plaintiffs is that they never left the property until May 2007 when they were evicted by the fourth defendant after his purchase of the property. The assertion is contradicted by the affidavits in support of the caveat exhibit P9 paragraph 6 thereof where it is averred that they were evicted from the property and the house advertised for sale. It is alleged in paragraph 4 (f) and (j) of the plaint in High Court civil suit number 741 of 2006 that the plaintiffs had been evicted from the property and rendered homeless. The testimony of the plaintiffs is contradicted by DW3 Mr Seth Mungati to the effect that when he went visited the property on 27th of November 2006 he found it vacant. The second eviction took place after the property had been sold to the fourth defendant. The testimonies of the second and third defendants are that the plaintiffs had made it clear that they were not going to meet the obligations under the mortgage deed. There was no chance for a negotiated exit and the only way was to forcefully evict the plaintiff's. Eviction was done by the third defendant on the strength of a court order issued in favour of the fourth defendant. Counsel also submitted that the sale of the property was preceded by a valuation report by DW 3 Seth Mungati. Sale by private treaty is specifically authorised by clause 14 of the mortgage deed. The first defendant's case is also that the fact that there being a suit pending is no bar to the sale by private treaty as held in the case of **J.W R Kakooza vs. Rukuba SCCA 13 of 1992** where the Supreme Court held that that the rule (the lis pendens rule) does not apply in the Ugandan jurisdiction.

On the question of the pendency of the civil suit, the first defendants counsel submitted that the third defendant sold the property to the fourth defendant while HCCS 107 of 2006 was pending. The plaintiffs had also obtained an interim order on 4 December 2006 staying the sale of the property. The order lapsed after 45 days and was not renewed because the plaintiffs secured an interlocutory judgment against the defendant. The introductory judgment was set aside on 4 April 2007. Consequently the sale was conducted when there was no order in force restraining

the first defendant or agents. Secondly the existence of a suit is not an automatic injunction. As far as the caveats are concerned, there were two caveats on the property. The first caveat was by DFCU bank Ltd while the second was by the second plaintiff. The caveat was removed upon an application by the first and third defendants to the Commissioner of lands. It was removed because the interim order and introductory judgement which formed the basis of the caveat on the property had lapsed and had been set aside. It was up to the Commissioner for land registration refuse or grants the application for removal of the caveat. The plaintiff ought to have sued the Commissioner for land registration to answer for his actions. In any case the Commissioner acted upon the request of the plaintiff's and issued a notice to effect changes in the register in the belief that he had been misled. The Registrar of the High Court advised him about the status of the case. It was made clear that the interim order of injunction lapsed on 19th of January 2007 and interlocutory judgement was set aside in April 2007. Not every sale and transfer of property the subject of the caveat amounts to a fraud. The purpose of the caveat is to warn potential buyers of an existing interest in the property. The fourth defendant could choose to investigate the merits of the caveat before taking a risk. The fourth defendant had satisfied himself of the nature of the interest in the land and like any good businessman took the risk of loss. The third defendant undertook to indemnify the fourth defendant in the event of a successful challenge to any sale and conveyance of the property.

On the allegations of poor advertisement and undervaluation of the property advertisements were run in both the new vision and the monitor newspapers on 17th of November 2006. The property was described as a developed property with a double storied house. Counsel further submitted that it was the practice that advertisement is only run once. In any case the interim order prohibited any further advertisements.

The fourth defendant had offered a fair market value of Uganda shillings 220,000,000/= and other interested bidders were unable to commit themselves to it because of the plaintiffs disruption of the process. In a letter dated 19 March 2008, the plaintiffs offered to redeem the property at Uganda shillings 220,000,000/=. In the case of **Kampala Bottlers Ltd versus Damanico (U) Ltd** it was held that fraud had to be attributed to the transferee in title either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act. Fraud has to be strictly proved. The plaintiffs failed to establish any fraud that can be directly attributed to any of the defendants in the suit. It was not fraudulent to apply to the Commissioner to remove a caveat. The court confirmed the contents of the application of the first and third defendants for removal of the plaintiffs caveat. The fourth defendant cannot be condemned for being a businessman who took the risk on the basis of the facts after doing a due diligence and investigating the property.

The fourth defendant’s Counsel further submitted that the 4th defendant purchased the property from the third defendant, a receiver appointed by the first defendant. There was a leasing facility agreement between the third plaintiff and the first defendant. The first and third plaintiff's mortgaged the suit property as security for repayment of the facility. The plaintiff defaulted by

October 2006 by Uganda shillings 216,125,451/=. Following the sale of the lease equipment and the mortgaged property the plaintiffs are still indebted to the first defendant for Uganda shillings 392,432,396/=. Counsel relied on the case of **Housing Finance Bank versus Edward Musisi Supreme Court civil appeal number 22 of 2010** where it was here that the power of sale under a mortgage is exercisable where an instalment under the mortgage becomes due and there is a default in payment. Failure to pay the whole sum meant that the mortgagor loses the right to redeem the mortgaged property. Counsel reiterated submissions of the first defendants counsel that there was notice to the plaintiffs.

On whether the transfer to the fourth defendant was lawful counsel reiterated submissions on the lapsing of the interim order, the setting aside of the interlocutory judgement and the fact that there was no court order in force stopping the sale of the suit property.

As far as the caveat by DFCU is concerned, the fourth defendant had no reason not to purchase the property on the basis of that caveat. The first plaintiff having failed to pay the instalments under the mortgage had no further right to caveat the suit property. She lost the right to redeem the property when she and her co-plaintiffs failed to redeem the mortgaged property by payment of the sums owing to the first defendant. In the affidavit in support she concealed material information such as that she was in default in the loan repayments. She lied when she said that the first defendant had unlawfully appointed receivers and evicted her from the suit property. The caveat is dated 23rd of January 2007 but the affidavit in support is dated 23rd of January 2006 and is false.

Finally counsel submitted that the fourth defendant was a bona fide purchaser for value without notice of any defect in title. The plaintiffs admitted being indebted to the first defendant and therefore cannot challenge the sale. The fourth defendant purchased the land at a fair market value as evidenced by the valuation report exhibit D8 which indicated the value of the property to be Uganda shillings 220,000,000/= and the forced market value of Uganda shillings 180,000,000/=.

I have tried to analyse the legal framework on the remedies of the mortgagee upon default of the mortgagor. The first defendants counsel relied on section 117 of the Registration of Titles Act cap 230 for the submission that a written demand is equivalent to notice and consequently that notice had been given to the plaintiffs before the process of sale. The defendant also contends that it relied on the provisions for the appointment of a receiver under the Mortgage Act. Section 117 of the RTA provides that where money secured by mortgage is made payable on demand, a demand in writing under the mortgage shall be equivalent to a notice in writing to pay the money owing and no other notice shall be required to create the default in payment. The gist of the provision is that a demand in writing shall create a default in payment for non-compliance with the notice. Consequently the various demands in writing by the first defendant are deemed to be notices under the mortgage deed. Exhibit D5 is a batch of documents giving notice to the managing director of the third plaintiff about default on lease agreement. There is a notice of 1

June 2004 about accumulated arrears of Uganda shillings 35,334,622/=. The first defendant wrote on 16th of June 2004 about the same arrears and requesting the third plaintiff to hand over the lease equipment. On 20 July 2004 the first defendant wrote to the third plaintiff's managing director about default on lease agreement with arrears having accumulated to 62,337,000/= and the issuing of bouncing cheques. Again the third plaintiff was reminded on 4 October 2004 about arrears totalling Uganda shillings 78,689,007/=. On 18th of November 2004 the first defendants business support manager wrote to the managing director of the third defendant that it was still in arrears of Uganda shillings 69,832,983/=.

Additionally the defendant adduced a batch of documents exhibited D6. The first one dated 15th of June 2005 and is addressed to the managing director of the third plaintiff restructuring the account of the third plaintiff. In another letter dated Friday, October 13, 2006 and addressed to the Executive Director of the third plaintiff the first defendants head of credit jointly with the executive director wrote a lease termination/final demand indicating that the third plaintiff had accumulated principal, interest and VAT arrears due amounting to Uganda shillings 216,105,451/= and if the third plaintiff failed to pay the same the first defendant would enforce recovery in full of all amounts due and outstanding of a total of Uganda shillings 817,322,228/= inclusive of the arrears. Again on 24th of October 2006 they wrote to the third plaintiff on the subject of termination of master lease agreement. Indicating that the first defendant shall take immediate possession of the leased equipment and proceeds from the sale shall be used to reduce the exposure of the plaintiff. They further indicate that the lease obligation would be reduced by proceeds from the sale of the residential property and the directors would have an obligation of settling the outstanding balance not later than 31stNovember 2006.

On 13thof November 2006 the first defendants Corporation Secretary wrote appointing one Agaba Michael of Trust Masters and Court Bailiffs a receiver and manager of assets of the third plaintiff under section 4 of the Mortgage Act. They gave notice therein that they were registered under instrument number 347057 constituting a first ranking legal interest on the land comprised in folio 17 plot 108 Katalima road. With reference to clause 6 of the mortgage deed and upon breach of the third plaintiff they appointed him receiver/manager of the property and assets mortgaged to recover all the outstanding sums owed by the third plaintiff. On the same day and in a letter dated 13th of November 2006 they wrote to the Executive Director of the third plaintiff acknowledging the repayment proposal dated 3rd of November 2006 for settling the outstanding on the terminated lease facility. In that they did not accept the proposal of the third plaintiff and indicate that the earlier demand still stands and they would have no option but to proceed with recovery action as earlier communicated.

In terms of section 117 of the Registration of Titles Act I am satisfied that there is overwhelming evidence that several demands were given in writing to the third plaintiff to pay the outstanding arrears due on the lease facility. The demands created a default position under the mortgage deed. The issue therefore is what should happen next after a default position is established. It is a question of whether the first defendant complied with the legal requirements for sale of the

security/mortgaged property. It must be emphasised that the creation of a default position under section 117 of the Registration of Titles Act only entitles the mortgagee to exercise its options under the Mortgage Act to realise the security or to take such measures as are necessary to recover its money. This cannot be mixed with whether the proper steps were taken under the Mortgage Act. The question of whether 60 days notice was given before possession remains to be determined.

The next consideration is whether there was compliance with the provisions of the Mortgage Act cap 229. Section 2 of the Mortgage Act provides for remedies upon breach of covenant. It provides that upon failure to perform any covenant in a mortgage deed under the Registration of Titles Act a mortgagee may sue the mortgagor, or realise his or her security under the mortgage in any manner provided for in the Mortgage Act.

Section 3 of the Mortgage Act provides for realisation of the security. It specifically provides that the mortgagee may realise his or her security by appointing a receiver; taking possession of the mortgage land; and by foreclosure. The three options are alternatives. The submission of the first defendant is that it exercised the option of appointing a receiver. As quoted in the letter referred to above namely letter dated 13th of November 2006 and addressed to Trust Masters and Court Bailiffs appointing Mr Michael Agaba under section 4 of the Mortgage Act cap 229. Additionally the notice dated 24th of October 2006 addressed to the Executive Director of the third plaintiff indicating that the first defendant would reduce the exposure of the plaintiff by sale of the leased equipment and further reduce the outstanding amounts by sale of the residential property.

Before considering in detail what actually transpired after the appointment of Trust Masters and Court Bailiffs, Mr Michael Agaba, it will be necessary to further consider the provisions for appointment of receivers. Section 4 is very explicit that the receiver may be appointed in writing either by the mortgagee himself or herself under a power expressly provided for in the mortgage in that behalf or by the court upon application for the appointment by the mortgagee. The position of the receiver is further provided for by section 5 of the Mortgage Act. Section 5 provides as follows:

> 5. Position of the receiver.
>
> (1) ***A receiver appointed by a mortgagee shall be the agent of the mortgagor notwithstanding anything in the mortgage to the contrary; but the receiver shall, in addition to the mortgagor, be accountable to the mortgagee as well, to the extent of the mortgagee's interest in the mortgaged land.***
>
> ***(2) A receiver appointed by the court shall be liable to account at anytime directed by the court."***

Whereas section 5 provides that the receiver shall be an agent of the mortgagor notwithstanding anything in the mortgage to the contrary, in addition the receiver shall be accountable to the mortgagee to the extent of the mortgages interest in the property. Section 5 of the Mortgage Act does not expressly indicate how the receiver shall manage the property under receivership. The first defendant's letter of appointment dated 13th of November 2006 clearly provides and I quote:

> ***"We hereby appoint you receiver/manager of the above mentioned property and assets comprised in the mortgaged property so that you may exercise all the powers therein conferred, including sale of the mortgaged property necessary to recover all the outstanding sums of money owed by Access Reprographics Ltd to DFCU Ltd and those necessary to vest any properties sold as receiver/manager in the purchasers thereof. The terms of your appointment are contained in the appendix to this instrument."***

The powers and duties of a receiver are provided for by section 6 of the Mortgage Act. The receiver is entitled to a commission or remuneration as provided for at the rate to be determined under the Act as far as section 6 (1) is concerned. Secondly the receiver shall have power to enter into possession of the mortgaged land, to collect by demand or by an action in the name either of the mortgagor or the mortgagee all the income, including arrears, accruing to the mortgaged land. Section 6 (3) deals with how the receiver is supposed to apply all the income received by him or her from the mortgage land. Section 6 (4) provides that in the appointment of a receiver not in writing and which is not consistent with the provisions of the section shall be void and of no effect.

Section 7 deals with possession by a mortgagee. A mortgagee may enter possession of the mortgaged land after giving at least 60 days' notice of his or her intention to do so to the mortgagor. In case of foreclosure, a mortgagee may apply to the court to foreclose the right of the mortgagor to redeem the mortgaged land any time after the breach of covenant to pay. In any application by the mortgagee to the court the court shall determine the amount due to the mortgagee and may fix a date not exceeding six months from the date of the failure to pay within which the mortgagor shall pay the amount due. Upon failure to pay as directed by the court within the period fixed, the court shall order that the mortgagor be foreclosed of his right to redeem the mortgaged land and the land shall be offered for sale according to the provisions of section 9 of the Mortgage Act. Furthermore under section 10 of the Mortgage Act where the mortgage gives a power expressly to the mortgagee to sell without applying to court, the sale shall be by public auction unless the mortgagor and encumbrancers subsequent to the mortgagee consent to a sale by private treaty.

Analysis of the above sections, generate some conclusions. The first conclusion is that the receiver is an agent of the mortgagor as well as the mortgagee. The role of a receiver in possession in relation to the mortgaged property is clearly to collect the income such as rent from the mortgaged land. To collect whatever income is earned from the mortgaged land or generated on the mortgaged land. A receiver is appointed to manage the property. For the same reason

section 7 of the Mortgage Act gives the mortgagee power to gain possession of the mortgaged property. A mortgagee in possession under section 7 is governed by the provisions of section 7 (4) of the Mortgage Act which gives the conditions for the possession. Section 7 (5) provides that a mortgagee in possession shall have power from the date of his or her possession to collect by court action or otherwise any income from the mortgaged land including arrears to which he or she would have been entitled if he or she had been in possession from the date of the mortgage.

Foreclosure on the other hand is governed by specific provisions namely sections 8 and 9 of the Mortgage Act. Lastly the power of sale by deed or under the mortgage deed is expressly provided for by section 10 of the Act. Section 11 deals with the application of proceeds of sale. The conclusion is that receivership deals with management of the suit property as well as possession by the mortgagee. Sale on the other hand does not require receivership though a receiver may sell property to realise the security. The provisions for foreclosure and sale by foreclosure deal with foreclosing the right to redeem the property. Sale has nothing to do with management of the property but with realising the security and specific provision is made as to how the sale shall be conducted and the application of the proceeds. Edward F Cousins in his book on THE LAW OF MORTGAGES, London, Sweet and Maxwell 1989 discusses this and states at page 220 that:

> ***"A mortgagee places a receiver in control of the mortgaged property for the same reasons as he goes into possession himself; either the security is in danger of been squandered by the mortgagor, or else he is anxious to intercept the profits and apply them to the discharge of the mortgage debt. Appointing a receiver has great advantage over going into possession, since by this means the property can be taken out of the mortgagor's control without the mortgagee having to assume any responsibility towards the mortgagor and there is only one minor disadvantage, which is that lapse of time does not confer a title to the land in the case of the receiver."… If the receiver is not expressed to be the agent of the mortgagor, he will be the agent of the mortgagee."***

As far as the evidence is concerned, there are some agreed facts of the dispute contained in the joint scheduling memorandum signed by counsels dated 27th of August 2012. As far as is relevant to the issue of appointment of a receiver and the sale of the mortgaged property, it is agreed that the second defendant was appointed a receiver/manager in respect of the property on 13th of November 2006 and his appointment was terminated on 10th of April 2007 upon which the third defendant was appointed in his place. The first plaintiff commenced High Court civil suit number 106 of 2006 formerly land division suit 741 of 2006 and obtained an interim injunction against sale of the mortgaged property pending the determination of the substantive application for an injunction. The plaintiff also obtained an interlocutory judgement against the defendant in the same matter. The first defendant called on the personal guarantees of the first and second plaintiffs on 15th of February 2007 but the call was not honoured. The suit premises were sold by the third defendant to the fourth defendant for a sum of Uganda shillings

220,000,000/= on 10th of May 2007. By the time of the sale and transfer of the land, the plaintiff's interlocutory judgement in High Court civil suit number 176 of 2006 had been set aside.

During the cross-examination of PW1 what came out strongly was whether there were matters in court when the property was sold. The power of sale of the first defendant seems not to be in dispute. The mortgage document is exhibit P5. I will first start with clause 6 of the mortgage deed. It provides that if at any time the money secured or any part thereof becomes payable, DFCU leasing may by writing under the hand of the managing director or other officer or under the seal appoint any person whether an employee of DFCU or not to be a receiver and manager of the property mortgaged or any part thereof upon such terms as to remuneration and otherwise as it shall think fit and may have the power from time to time to remove any receiver and manager so appointed and appoint another person instead. Generally the powers of the receiver/manager in possession of the property are to collect any property mortgaged for purposes of taking proceedings in the name of the lessee or otherwise. To carry on the business of the lessee for the purposes of raising money and to manage the property generally. Under clause 7 the receiver/manager shall apply all the income received by him from the mortgaged property in accordance with the provisions of the Mortgage Act. For that purpose the mortgage provided that the Surety irrevocably appointed the first defendant and any receiver/manager to be its attorney. Paragraph 13 of the mortgage deed is particularly important and would be quoted in full. It provides as follows:

> ***"DFCU leasing will not nor shall any receiver and manager appointed as aforesaid by reason of DFCU leasing or any receiver and manager entering into possession of the mortgaged property or any part thereof be liable to account as mortgagee or mortgagee in possession for anything except actual receipts be liable for any loss upon realisation or for any default or commission for which a mortgagee in possession might be liable."***

It is abundantly clear that clause 13 of the mortgage deed deals with the powers of the receiver/manager in possession as if he or she were in the shoes of the mortgagee. It does not envisage the sale of the mortgaged property per se. This is made clearer by the subsequent provision namely clause 14 of the mortgage deed which provides as follows:

> ***"It is hereby agreed that if any of the monies for the time being owing to DFCU leasing are not forthwith paid on demand or having become payable without demand the statutory powers of sale conferred on the mortgage by the Registration of Titles Act and the Mortgage Act including powers to sale by private treaty without reference to court shall immediately become exercisable."***

Clause 14 particularly deals with the power of DFCU leasing to sell by private treaty without reference to court upon demand having been made or without a demand under the statutory powers of sale conferred by the law. In other words it does not deal with going into possession of

the mortgaged property but with the right to foreclose the right of the mortgagor to redeem the property or power of sale which extinguishes the right of redemption of the mortgagor. Last but not least clause 15 of the mortgage deed specifically gives the power of sale by DFCU or the receivers/managers so appointed without foreclosure proceedings. It provides as follows:

> ***"IT IS FURTHER AGREED that notwithstanding anything contained in the mortgage decree to the contrary DFCU or the Receiver/s appointed shall have absolute and unfettered power to exercise power of sale by private treaty, and the mortgagor hereby irrevocably gives his unconditional consent thereto including but not limited to the choice of the purchaser and price."***

The exercise of the power of sale is a separate and different remedy of the mortgagee from that of going into possession of the mortgaged property for management purposes though it may arise while the mortgagee or receiver is managing the property. The mortgage deed is consistent with the provisions of the Mortgage Act. The appointment of receivers therefore can be for purposes of foreclosure or for purposes of management of the property or for sale. The previous receiver appointed namely the second defendant was appointed inter alia to gain possession of the suit property. It is the case of the first defendant that subsequently the appointment of the second defendant was revoked and another receiver/manager was appointed instead.

The case of PW1 the managing director of the third plaintiff is that the sale took place irregularly in that there were court orders and a suit pending. Secondly, that the property was undervalued. A review of the exhibits as far as the court orders are concerned is as follows: the first exhibit to be reviewed it is an interim order in miscellaneous application number 992 of 2006 arising from HCCS number 741 of 2006 between the first plaintiff and the third defendant on the one hand as applicants and DFCU leasing company Ltd and Mr Alex Michael Agaba the first receiver appointed by the first defendant as the respondents on the other hand. The interim order was issued ex parte on 4 December 2006 and was to restrain the respondents, their legal representatives, agents/employees/servants from selling or further advertise for the sale or entering into any arrangement with any person to sell by private treaty or public auction the first applicant's property (the suit property). It was further ordered that the interim order would remain in force for 45 days from the date of the order unless extended by the court. Consequently the interim order forbade the sale of the property of the third plaintiff/mortgagor in the current suit. The mortgaged property was assigned to the third plaintiff by the first plaintiff through a power of attorney. It is further a question of fact that in miscellaneous application number 109 of 2007 (formerly land division miscellaneous application number 2 of 2007) arising out of high court civil suit number 106 of 2007 (formerly land division High Court civil suit number 741 of 2006), the first defendant and the second defendant as applicants/defendants in the main suit got an order against the first plaintiff and the third plaintiff in this suit before his Lordship Honourable Justice Egonda-Ntende. The order is dated 4th of April 2007 in which they interlocutory judgement entered by the registrar was set aside. Secondly the applicants/defendants were permitted to file their written statement of defence within 10 days.

The sale agreement exhibit P 13 is dated 10th of May 2007 and was executed between Kirunda Moses the second Receiver/Manager appointed by DFCU leasing company Ltd on the one hand and the fourth defendant on the other hand. The citations in the sale agreement provide that the Receiver/Manager agreed to sell the property to the purchaser by private treaty upon the terms indicated in the agreement. The property was sold for a sum of **Uganda shillings 220,000,000/=** exclusive of any taxes, duties, rights and/or other levies that may be payable in relation to the property by the purchaser. Paragraph 5.1 provides that the purchaser was fully aware of the existence of a caveat placed on the property by the first plaintiff was the registered owner of the property. Secondly the purchaser was also aware of the existence of a caveat placed in the property by the first defendant. Thirdly the purchaser was fully aware that the property was the subject of HCCS 106 of 2007 between the first plaintiff and the third plaintiff and the first defendant and the former receiver/manager Alex Michael.

The testimony of Mr Moses Kirunda the receiver/manager appointed by the first defendant is that he was appointed a receiver/manager on 10 April 2007 and obtained the file from the former receiver Mr Michael Alex, the second defendant. He approached several persons and was eventually referred to the 4th defendant on the information of Mr Michael Alex the second defendant. He subsequently concluded a deal and signed the sale agreement exhibit P12. He got a copy of an interim order and an order setting aside the interlocutory judgement from lawyers of DFCU Leasing Company Ltd before conducting the sale of the property. He signed transfer forms and wrote a letter to the Commissioner of Lands to process the transfer into the names of the fourth defendant. The letter is exhibit P11. The letter is addressed to the Commissioner Ministry of Lands and Housing and Urban Development and is dated 11th of May 2007. The last paragraph reads as follows:

> ***"I also move you to remove the registered proprietors caveat on the property as the interlocutory judgement on which it is based was removed by the court on 4th of April 2007. Furthermore the interim order staying the sale of the property has long expired and no attempts have been made to renew it. Attached hereto are the two orders referred to."***

Subsequently the third defendant/Moses Kirunda received a letter from the Commissioner of lands indicating that the Commissioner had been misled to effect the transfer in the property when there was a pending suit. The notice to effect the changes was issued to the fourth defendant under section 91 of the Land Act chapter 227. It was a notice to cancel registration of the fourth defendant from the registrar because it was made in error and because the registrar acted under the honest but the mistaken belief that proceedings of the property had been fully concluded whereas not. The Commissioner noted that HCCS No. 106 of 2007 were still pending between the same parties. The notice was issued on the 15th of May 2007. It would be prudent to pause at this stage to point out that the sale agreement is dated 10th of May 2007. Mr Moses Kirunda objected to the notice in a letter dated 16th of May 2007 and addressed to the Acting Commissioner Land Registration Kampala. In the objection, the receiver/manager made three

points to the Commissioner. The first point was that the sale was made under clause 6 (a), 8 and 9 of the mortgage deed which empowered him to sell the property as the former registered Proprietor's agent and attorney. Secondly the receiver/manager was not a party to the proceedings pending in court and was not bound by any orders or the outcome of the suit. Finally the pendency of a suit did not serve as an automatic injunction to stay a sale of property. In a letter dated 18th of May 2007 the Acting Commissioner for Land Registration wrote to the Acting registrar of the commercial court division enquiring about the pending suit and whether there was a court order restraining the mortgagee at the time of the sale and transfer of the property from doing so. The letter of the Acting registrar commercial court division is also dated 18th of May 2007 and the reply was that civil suit number 106 of 2007 was still pending before court and a default judgement having been set aside. Secondly that the interim order that was granted restraining the respondents namely DFCU leasing company Ltd and Mr Alex Agaba from selling the property lapsed on 19 January 2007 and was never extended. The registrar of the commercial court division confirmed this position to the Acting Commissioner of Land Registration in another letter dated 23rd of May 2007. On the 21st of May 2007 Mr Kirunda Moses was informed that he had been issued with a warrant to execute in respect of the property sold to the fourth defendant. The warrant to execute had been issued on the application of counsel for the fourth defendant. The court issued a warrant of the 21st of May exhibit P13. This was in miscellaneous application number 70 of 2007 between the fourth defendant as applicant and the first and third plaintiff's as the respondents. The warrant was to remove any person in occupation of the mortgaged property and to put the fourth defendant in possession. Subsequently on 19 July 2007 Hon. Justice Rubby Opio-Aweri in miscellaneous application number 552 of 2007 arising out of miscellaneous cause number 70 of 2007 ruled that the warrant/orders issued by the Acting assistant registrar of the civil division of the High Court of Uganda at Kampala on the 21st of May 2007 to Moses Kirunda in miscellaneous cause number 70 of 2007 for the eviction/removal of the applicant and for putting into possession the respondent in the suit house/land at plot 108 situated at Katalima road was illegal, null and void ab initio for want of jurisdiction and set it aside. The order was obtained upon the application of the first plaintiff as the applicant and the fourth defendant as the respondent. This order was admitted in evidence as exhibit P 14. It is the testimony of the third defendant that upon obtaining a warrant on the 21st of May 2007 he proceeded to enforce the warrant and handover possession to the fourth defendant. The witness statement of PW1 who is also the second plaintiff was that they registered a caveat on the property on January 23, 2007. This was to await disposal of High Court civil suit number 741 of 2006 where they intended the court to determine how much they owed the first defendant. Secondly they were unable to deposit any money on the account because they were informed by the first defendant bank that the account had been barred. On the 15th of May 2007 on information that the property had been transferred by the first defendant to the 4th defendant they instructed their lawyers to write to the Commissioner for Land Registration informing him that the property had a caveat and was the subject of a High Court case. The Genesis of this matter is that in November 2006 the second defendant Mr Michael Agaba acting on instructions of the first defendant evicted the first and second plaintiffs.

He also advertised the house for sale. The first and second plaintiffs repossessed the property in December 2006. On 21st of May 2007 they were evicted. The plaintiff's lawyers filed miscellaneous application number 552 of 2007 arising out of miscellaneous cause number 70 of 2007 in the land division of the High Court. The honourable judge who heard the application ordered that the warrants/orders issued by the Acting registrar of the civil division of the High Court in miscellaneous application number 70 of 2007 for the eviction/removal of the applicant and for putting into possession the respondent was illegal, null and void ab initio for want of jurisdiction and set it aside. He further ordered that civil suit number 335 of 2007 is transferred to the commercial division of the High Court for determination.

The facts on record are that High Court civil suit number 741 of 2006 was filed by the first and third plaintiffs on 27th of November 2006 in the Land Division of the High Court. It was subsequently transferred to the commercial court division and numbered as HCCS 106 of 2007. The suit was against DFCU leasing company Ltd and Mr Alex Michael Agaba. The suit was for declaration that the outstanding sum of rent arrears and other charges was unrealistic and excessive and for an order that the appointment of the second defendant as the receiver and manager of the mortgaged property was unlawful and that the eviction of the first plaintiff and taking possession of the mortgaged property by the second defendant was unlawful. This suit was also for a permanent injunction to restrain the defendants from the sale of the mortgaged property and for a declaration that the second plaintiff was not under receivership. On 21 December 2006 and in a letter written on 20 December 2006 by the plaintiffs advocates, the plaintiffs sought and obtained an interlocutory judgement under order 9 rules 6, 8 and or 10 of the Civil Procedure Rules with an order that the suit should be fixed for formal proof before a trial judge. On 4 December 2006 the plaintiff's obtained an interim order in miscellaneous application number 992 of 2006 against the first and second defendants. The interim order was to restrain the respondents, their legal representatives, agents and employees from selling or further advertising for sale or to enter into any arrangement with any person to sell by private treaty or public auction the first applicant's property on plot 108 Katalima road. The interim order was for a period of 45 days unless otherwise extended by the court.

One the other hand on 2 March 2007 DFCU leasing company Ltd in HCCS number 150 of 2007 sued the second plaintiff and the first plaintiff respectively for recovery of 713,003,408/=, with interest at court rate and costs of the suit. In the suit they plead that efforts to recover the loan had been frustrated by the defendants who are plaintiffs in the current suit. The suit was subsequently consolidated with the current suit. This was pursuant to an application by the plaintiffs in miscellaneous application number 798 of 2007 filed in November 2007. The application was allowed on 9 January 2008.

In miscellaneous application number 109 of 2007 arising out of HCCS 106 of 2007 DFCU leasing company Ltd and Mr Alex Michael Agaba trading as Trust Auctioneers and Bailiffs applied against the first plaintiff and the third plaintiff to set aside the judgement against the applicants/defendants in the suit and for extension of time within which to file their written

statement of defence. The application was filed on 3 January 2007. On 4 April 2007 his Lordship Justice Egonda-Ntende allowed the application and set aside the interlocutory judgement entered by the registrar. He also allowed at the defendants/applicants to file their written statement of defence within 10 days.

This suit property was advertised for sale on 17th of November 2006 and was not re-advertised by the time it was sold on 10th May 2007. The Advertisement was a notice of sale by private/public auction under the Registration of Titles Act, The Mortgage Act and The Companies Act. It was to be sold after 30 days from the date of the advertisement. The property was advertised for sale by one Agaba Alex Michael (receiver) and second defendant. The appointment of the receiver was subsequently terminated by the first defendant. From all the facts gleaned from the documentary records, it is clear that the sale was conducted by the second receiver/manager after 10th of April 2007. The arguments of the defendants centre on the fact that there was no court order restraining the first defendant from selling the property. Secondly the power of sale was permitted by the mortgage deed. The plaintiff's case on the other hand is that the suit property was sold when there was a pendency of the suit concerning the property. Thirdly, the first plaintiff caveated the suit property pending final determination of HCCS 106 of 2007. Exhibit P12 which is the sale of the mortgaged property by Kirunda Moses/the receiver/manager appointed by DFCU Leasing Company Ltd expressly acknowledges that there was a caveat lodged by the first plaintiff, the registered proprietor of the house and the purchaser was fully aware that the property was the subject of HCCS 106 of 2007 against DFCU Ltd and Alex Michael Agaba. The agreement exhibit P12 speaks for itself in that it was executed on the 10th of May 2007. A batch of documents admitted as exhibits include a letter dated the 11th of May 2007 written by Lawyers of the first defendant and addressed to the Registrar of Titles in which they indicate that the first defendant was a mortgagee registered in the title deed on 27 September 2004. Secondly the first defendant was the defendant to HCCS 106 of 2007 formerly HCCS 741 of 2006. And that the registered proprietor of the land is also the plaintiff in that suit or at best a caveat following obtaining an interlocutory judgement and an interim order staying the sale and transfer of the suit property. They further informed the registrar of titles that the interlocutory judgement was set aside on 4thof April 2007 and the interim order expired and no renewal had been obtained. They prayed that the caveat placed on the property should be removed.

It is therefore proven that at the time of the sale there was a caveat on the suit property and all the relevant parties were aware of the pendency of HCCS 106 of 2007 (Commercial Division) formerly HCCS 741 of 2006 (Land Division). Additionally in a letter dated 10th of April 2007 DFCU leasing company Ltd revoked the appointment of Mr Agaba Michael trading as Trust Masters and Court Bailiffs as the receivers/managers of the assets of the third plaintiff. They appointed Mr Moses Kirunda of Spear Link Auctioneers and Court Bailiffs to replace Mr Michael Agaba. This must have been after 10 April 2007 or subsequent to the letter. The property was not re-advertised for sale by the time it was sold by private treaty.

The testimony of DW 3 Mr Moses Kirunda is that he was not a party to HCCS 106 of 2007. However he admitted to being an agent of the first defendant duly appointed under the mortgage deed. He obtained a warrant for vacant possession to put the 4thdefendant into possession of LRV 2839 417 plot 108 land at Katalima road in Naguru, Kampala. Furthermore the order for vacant possession was set aside by justice Rubby Opio Aweri 19th of July 2007 for want of jurisdiction.

As far as the caveat is concerned the first plaintiff signed the caveat on 23 January 2007. She was cross examined about the date of the affidavit in support as being signed on 23 January 2006. The year 2006 was in typescript and was obviously an error by the plaintiff's counsel in drafting the affidavit in support of the caveat. Dates in affidavits are inserted by Commissioners for Oath. The caveat was lodged in 2007 and it is apparent that it was lodged soon after 23 January 2007 after it was endorsed by the first plaintiff. The affidavit is truthful because it testifies to the facts of filing HCCS number 741 of 2006 and obtaining an interim order which was served upon DFCU leasing company Ltd. The facts revealed that the interim order was obtained in December 2006 and consequently the affidavit in support of the caveat could not have been written or signed in January 2006 but after December 2006. I am satisfied that there was a caveat which had been lodged on the suit property. As to whether the registration of the caveat had been endorsed on the title deed is another matter. The fourth defendant was registered on 14th of May 2007 at 3:30 PM after the Commissioner for Land Registration deemed the caveat inoperative against the purchaser by virtue of the mortgage deed.

It is against this background that we should analyse the correspondence from the Commissioner Land Registration. On the 15th of May 2007 the Acting Commissioner for Land Registration gave notice to the fourth defendant under section 91 of the Land Act as to whether he had any objection for the Commissioner to cancel the registration from the registrar because it was made in error. The letter was that they were labouring under an honest and mistaken belief that proceedings in court in respect of the property had been concluded. However it had come to their notice that HCCS number 106 of 2007 was still pending before the court and between the same parties. The response of Mr Moses Kirunda, the third defendant is that he was not a party to the proceedings pending in court and was not bound by the outcome of the suit. Secondly there was no court order stopping the sale of the property and thirdly the pendency of the suit does not serve as an automatic injunction or stay the sale of the suit property. The Commissioner for land registration also wrote to the Acting registrar of the commercial court seeking clarification on the matter. The clarification was that HCCS 106 of 2007 were still pending in court but the default judgement had been set aside. Secondly the interim order which had been granted restraining the respondents i.e. DFCU leasing company Ltd and Mr Alex Agaba from selling the property lapsed on 19th of January 2007 and had never been extended.

The conclusions are that the first defendant give notice to the plaintiffs in a letter dated 24th of October 2006 and give the plaintiffs 31st November 2006. The notice was to run up to 31st November 2006 and was less than 60 days prescribed by section 7 of the Mortgage Act. The fact that there was an express notice under the Mortgage Act bars the first defendant though the

doctrine of estoppels from asserting earlier demands to pay as amounting to notice under section 7 (1) of the Mortgage Act. The earlier demands to pay only gave rise to a default position that entitled the first defendant to remedies under the mortgage deed pursuant to default in payment. On the other hand the formal notice to go into possession of the mortgaged property is specific and is the exercise of a remedy under the mortgage Act. The formal notice of the 24th of October 2006 was not compliant with section 7 (1) of the Mortgage Act which provides that the mortgagee may for the purposes of realisation of his or her security in the mortgage, enter into possession of the mortgaged land after giving at least 60 days notice of his or her intention to do so to the mortgagor. Mr Alex Michael Karugaba was appointed on 13 November 2006 and advertised the property for sale 4 days later on 17 November 2006. This was before the 60 days had run. Secondly, he went ahead and evicted the first and second plaintiffs from the suit property. All this was done before 60 days notice had expired. DW3 Mr Seth Mungati court found when he went valued the property that the plaintiffs had been evicted in November 2006. Furthermore, the first defendants counsel has admitted and submitted that the first defendant exercised its rights under the mortgage deed to appoint a receiver. Appointment of a receiver is provided for under clause 6 of the mortgage deed and clearly indicates that it is for purposes of management of the mortgaged property. It should also be emphasised that the third plaintiff is a company and there is no evidence whatsoever that it had been put under receivership by taking over the management of the company. It was an attempt to take over the property of the company namely the mortgaged land without giving 60 days' notice. I have already indicated that the right of possession granted by section 7 of the Mortgage Act is a method of realising the security through management of the property. Section 6 (2) of the mortgage act provides that a receiver shall have power to enter into possession of the mortgage loan, to collect my demand or action in the name either of the mortgagor what the mortgagee, all the income, including arrears, accruing to the mortgaged land. Consequently Mr Alex Michael Agaba went into possession of the suit property without prior 60 days' notice. The realisation of going into possession was frustrated when the first and second plaintiffs re-entered the suit premises.

The first Defendant acting through the third defendant Mr Moses Kirunda of Spear Link Auctioneers and Court Bailiffs sold the property to the fourth defendant fully aware that HCCS 106 of 2007 was still pending. Secondly HCCS 150 of 2007 in which the first defendant was the plaintiff was also pending. He was aware that there was a caveat on the property. They chose to rely on the provisions of the mortgage deed. The crucial question therefore is whether the acts of the first and third defendant to sell the property to the fourth defendant in the above circumstances make the sale colourable or objectionable. Was it tainted with the fraud? Last but not least is the fourth defendant a bona fides purchaser for value without notice of any defect in title of the first defendant?

The Mortgage Act section 1 thereof does not define the word "foreclosure". Section 3 of the Mortgage Act provides that the mortgagee may realise his or her security under a mortgage in three ways. The first is by the appointment of a receiver, secondly by taking possession of the

mortgaged land and thirdly by foreclosure. Foreclosure is simply sale of the mortgaged property through the process of court or by an order of the court. It provides under section 8 thereof that the mortgagee may apply to the court to foreclose the right of the mortgagor to redeem the mortgaged land any time after breach of the covenant to pay. The process of foreclosure is through application to court, the hearing of the application and the determination of the amount due to the mortgagee and the fixing of the date within which the mortgagor has to pay the amount due on the mortgage failure for which the court shall order that the mortgagor be foreclosed of his or her right to redeem the mortgaged land. Thereafter the land would be offered for sale in accordance with section 9 of the Mortgage Act. The plaintiff's counsel relied on the right of the mortgagor to receive at least 60 days' notice of intention of the mortgagee to enter into possession of the mortgaged property.

Submissions of the parties centred on whether there was notice to the mortgagor. Such submissions assume that the mortgagee was going into possession of the suit property. I find the arguments untenable or unnecessary in the circumstances of the case. The facts show that the first receiver/manager appointed to manage the third defendant company and receive the property of the company which had been mortgaged did not carry out his duties. The receiver is Alex Michael Agaba and the plaintiffs sued him together with the first defendant. He had advertised the property for sale but never sold the property. The contention of the defendants was that attempts to obtain possession of the suit property/land met with resistance and was not successful. The attempt to obtain possession of the suit property was overtaken by circumstances. In the same way the attempt to advertise the property became inoperative as the sailors been stopped by the court. The sale was a sale pursuant to the advertisement of 17th of November 2006.

Consequently notice prior to possession of the suit property is only relevant to show that the first and 2nd defendant acted illegally (contrary to section 7 (1) of the Mortgage Act.

The realisation of the security in the mortgage proposition flopped. What is material is that the first defendant appointed another receiver/manager who sold the property by private treaty. On the other hand Mr Moses Kirunda, the second receiver/manager made it clear that he sold the property and obtained a warrant for vacant possession of the property whereupon the first and second plaintiffs were evicted. The warrant for vacant possession was subsequently set aside as being a nullity for having been issued by the registrar without jurisdiction. The first defendant therefore acted through Mr Moses Kirunda and sold the property by private treaty. Moses Kirunda sold the property on behalf of the first defendant. The arguments in the correspondence between Moses Kirunda and the Commissioner for land registration that Moses Kirunda was not a party to the civil suit is without basis. It is a highly technical argument to suggest that the receiver/manager acted under a power of receivership of the 3rdplaintiff company. The evidence is that the receiver acted on behalf of the first defendant company as an agent to sell the property. Secondly it may appear as if possession under section 7 of the Mortgage Act was necessary for the sale to take place. I have already observed that section 3 of the Mortgage Act gives three

options to the mortgagee namely by appointment of a receiver; by taking possession of the mortgaged land and by foreclosure. A receiver appointed by a mortgagee shall be the agent of the mortgagor notwithstanding anything in the mortgage deed to the contrary (see section 5 (1) of the Mortgage Act). The right of possession is provided for by section 7 of the Mortgage Act. A receiver may be appointed to sell the property and does not have to be in possession. An intention to get into possession has to be preceded by at least 60 days' notice of intention to do so. Getting into possession is only related to management of the property for purposes of realising the income generated in the property and not for purposes of sale. It may be argued that a receiver needs possession in order to sell. Even if that were so, such possession is specific to obtaining buyers for the property and cannot be argued under section 7 of the Mortgage Act. As far as intention to sell is concerned, the sale can be either by foreclosure or through exercise of the power of sale under the mortgage deed.

Furthermore sale by private treaty cannot be through foreclosure proceedings where public auction is prescribed under the Mortgage Act as the sale procedure. The express power of sale under the mortgage deed is governed by section 10 of the Mortgage Act. It provides that where the mortgage gives power expressly to the mortgagee to sale without applying to court, the sale shall be by public auction unless the mortgagor and encumbrancers subsequent to the mortgagee consent to a sale by private treaty. Section 10 of the Mortgage Act imposes conditions on a mortgagee with express powers of sale to exercise the power of sale through a public auction unless the mortgagor and encumbrancers subsequent to the mortgagee consent to sale by private treaty. The question is therefore whether an express stipulation in the mortgage deed that the sale shall be by private treaty or by public auction amount to consent to a sale by private treaty. Does the Mortgage Act forbid sale by private treaty? According to Halsbury's laws of England 4thedition reissue volume 32 paragraph 640 and at page 307:

> ***"Where the power was to sell by public auction, a sale by private contract was invalid. But under a power to sell by public auction or private contract there was no need to offer the property at a public auction first."***

There is no suggestion anywhere that the mortgage deed executed between the parties namely the third plaintiff, the first plaintiff on the one hand and the first defendant on the other hand was illegal or invalid in as far as it provided for sale by private treaty. The consent to sell by private treaty was under the hand of the parties. Clause 15 of the mortgage deed provides for that consent:

> ***"IT IS FURTHER AGREED that notwithstanding anything contained in the mortgage decree to the contrary DFCU or the Receiver(s) appointed shall have absolute and unfettered power to exercise power of sale by private treaty, and the mortgagor hereby irrevocably gives his unconditional consent thereto including but not limited to the choice of the purchaser and price."***

Clause 15 of exhibit P5 has to be read in conjunction with clause 14 which provides that it is agreed that:

> ***"if any of the monies owing to DFCU leasing and not forthwith paid on demand or having become payable without demand, the statutory powers of sale conferred on the mortgage by the Registration of Titles Act and the Mortgage Decree (Act) including powers to sell by private treaty without reference to court shall immediately become exercisable".***

Furthermore clause 5 (a) provides that where the mortgage debt secured becomes payable under S power of sale of DFCU pleasing shall become exercisable without any further or other notice, no property of the mortgagor shall be redeemed except on payment of the monies secured. Clause 6 of the mortgage deed emphasises the right of possession to be the right of management with the property. The right of sale is governed by clause 14 of the mortgage deed. The question to be determined is therefore what a statutory power of sale is? The only statutory power of sale is that provided for by section 10 of the Mortgage Act. It provides that the sale shall be by public auction unless there is consent the sale by private treaty. This section only distinguishes between a public auction and a private treaty. It makes no reference to advertisement prior to the sale by private treaty. Obviously a sale by public auction has to be notified to the public. Should a sale by private treaty be without notice?

The agreement of sale has already been analysed. Without consent of the mortgagor, the sale has to be by public auction. In this case there was express consent of the mortgagor in the mortgage deed. The evidence is that the sale was without notice to the mortgagor because there was a suit pending in the High Court. Secondly the sale was without notice to the public. The first advertisement/notice had been overtaken by events. The first suit was brought by the plaintiffs. The second suit had been filed by DFCU leasing company Ltd against the plaintiffs. There was no subsequent advertisement of the suit property for sale. The plaintiffs were right to assume that upon DFCU leasing company Ltd filing an action against the plaintiffs to recover over 700 million Uganda shillings owed to the first defendant, the first defendant was unlikely to exercise the power of sale granted in the mortgage deed. The first advertisement had been restrained by the court even though the injunction lapsed after 45 days. Secondly there was a caveat on the suit property.

The principles for sale by a mortgagee were considered by Honourable Justice Egonda-Ntende in the case of the **Co-operative Bank Ltd (in liquidation) versus Shell Kasese HCCS number 140 of 2005.** The honourable judge considered the principle in the case of **Yosiya vs. Musa Umar Amerliwalla and Matia Wamala civil appeal number 72 of 1955 (1956) 23 EACA 71** where an old English rule was approved. The principle is that although a mortgagee in selling is not a trustee for the mortgagor, he must sell in good faith and at a reasonable price that he knows to be obtainable. If the mortgagee acts in secret and conceals what is being done from the mortgagor, he may expose himself to some suspicion of not having acted in good faith. If a sale

yields a surplus, the mortgagee holds a surplus in trust for the mortgagor and if on the other hand there is a deficit, the mortgagor still owes the mortgagee. The mortgagor is therefore vitally affected by the result of the sale though the preparation for the sale and the conduct is left entirely in the hands of the mortgagee. Justice Egonda-Ntende observed that it would be strange if the mortgagee had no legal obligation to take reasonable care to obtain the true market value at the date of the sale. The duty of the mortgagor is to offer the property for sale in an open and transparent manner. Again in the case of **Greenland Bank Ltd (in Liquidation) versus Wasswa Birigwa HCCS number 26 of 2004** honourable justice Egonda-Ntende held that in affecting the sale of the mortgaged property the mortgagee or his agents are under a duty to act with reasonable care. The duty is not to serve the mortgaged property at the best price possible but at a reasonable price. In that case he found that the plaintiff/mortgagee acted negligently in failing to obtain a presale valuation of the property and proceeding to sell the same by private treaty without the benefit of competition that a public auction provides.

I am generally in agreement with the above principles. Even though the first defendant whether by itself or through its agents had a right to sell the mortgaged property, they did not have to do it in secret. They had already sued the guarantors for the whole amount. They had gained possession of the leased property and the possession frustrated and a suit filed against the appointment of the receiver. There was a caveat on the suit property and the argument that it was up to the Commissioner for land registration to decide on the application is not tenable in court. This is because the matter is already in court and the court will decide on the merits of the matter. The court cannot be influenced by the decision of the Commissioner for land registration. In the first place the Commissioner for land registration had already registered the fourth defendant on the 14th of May 2007. By the time he registered the fourth defendant, he laboured under the false impression that there was no suit pending. Consequently he wrote to the court and established that there was a suit pending but there was no order barring the registration which had already been done. There is no evidence of what happened after the Commissioner got the information from the registrar. This is because he had already registered the fourth defendant by the time he issued the notice to show cause why the registration should not be cancelled.

Secondly the argument that there was no court order does not bar the duty owed to the mortgagor to sell the property in a transparent manner. The presale valuation of the property cannot be taken into account in the circumstances of the case. First of all the first possession of the suit property was done without prior notice as envisaged by section 7 (1) of the Mortgage Act. The sale was subsequently stopped by court order. The fact that the interim order stopping the sale lapsed after 45 days does not stop the fact that the attempt had been challenged in the suit which was still pending between the parties. Consequently the court has now decided that the possession by the second defendant was unlawful. The plaintiffs did not know about the appointment of the third defendant Mr Moses Kirunda who sold the property without due process. Mr Kirunda ought to have advertised the property before selling by private treaty in the very least. The fact that the plaintiffs were unaware about the appointment of Mr Moses Kirunda

is demonstrated by the fact that they filed an action against the first and second defendants only specifically dealing with the attempted possession of the mortgaged land. Whatever the merits of that suit from the point of view of the first defendant, the issue was still to be determined. To go ahead and appoint a second receiver and secretly have the property sold through the agent is suspicious and in bad faith. The fact that the pending suit was very much in the mind of the agent of the first defendant is proved by the sale agreement. The sale agreement insulates the agent by giving notice to the buyer that there were two caveats on the suit property and there was a suit pending determination in the court in respect of the suit property.

As far as the fourth defendant is concerned, the arguments that he was a bona fides purchaser for value without notice are untenable. This is because he had notice that there was a suit challenging the acts of the first defendant through its agents of trying to put the property under receivership. Secondly he was purchasing the property from the first plaintiff who was still the registered proprietor of the suit property and he was a first transferee in title from the person alleging that the property was fraudulently transferred. Section 181 of the Registration of Titles Act is inapplicable. Section 181 (supra) applies to cases where a bona fides purchaser purchases from another person who acquired the property fraudulently but where he or she (the bona fide purchaser) had no notice of the fraud. The purchaser/fourth defendant was aware of the encumbrances including the civil suit that was pending with respect to the suit property. The civil suit had the potential of terminating in favour of the plaintiffs. If this were not so, the suit could have been decided on a preliminary point of law for disclosing no cause of action. It is of particular relevance to repeat the relevant contents of the sale agreement exhibit P 12. The second citation in the sale agreement dated 10th of May 2007 is misleading. It provides that the property was duly advertised for sale by the receiver/manager following which the purchaser expressed interest to purchase the property. Mr Kirunda Moses is defined at page 1 of the agreement as the receiver/manager of the mortgaged property. There is no evidence whatsoever that Mr Kirunda Moses advertised the suit property for sale. The agreement does not indicate that the advertisement was made by the former receiver/manager being the second defendant. It is therefore not only misleading but false.

Secondly the sale and purchase was upon certain conditions in paragraph 5.0. It provides that the purchaser is fully aware of the existence of the caveat placed on the property by Ms Gladys Nyangire Karumu, the registered owner of the property. Secondly it provides that the purchaser is aware of the existence of the caveat placed of the property by DFCU leasing company Ltd. Thirdly it provides that the purchaser is fully aware that the property is currently a subject of HCCS 106 of 2007 Gladys Nyangire Karumu and Access Reprographic Ltd versus DFCU Ltd and Alex Michael Agaba. The parties agreed that the receiver/manager shall at the earliest opportunity cause the removal of the two caveats at his expense to enable the purchaser transfer ownership of title into his names. The defendant undertook to fully indemnify the purchaser against any rightful claims arising from the sale for want of legal title or authority on the part of the vendor to convey the property sold to the purchaser. The indemnity was limited in value to

the amount paid as consideration under the agreement which was 220,000,000/= Uganda Shillings.

By acknowledging the pendency of HCCS number 106 of 2007, the fourth defendant knew that the sale was subject to the outcome of the suit. The third defendant and the fourth defendant could not purport to predict the outcome of the suit. It is therefore by operation of the agreement itself that the title of the purchaser can be impeached on the basis of the outcome of the suit.

Last but not least, the third defendant purported not act on his own but as an agent of the first defendant. The first defendant is liable for the manner in which he sold the property to the fourth defendant. He was exercising a power of sale granted by the mortgage deed. I must also emphasise that the court recognises the right of the first defendant to realise its money but not in the manner it did which became the subject of this suit. Moreover the court has jurisdiction to set aside the sale conducted in a manner prejudicial to the interest of the Mortgagor in the circumstances of this case.

In the premises, there are many grounds upon which the sale and transfer of property to the fourth defendant cannot stand. This is because it was evidently meant to defeat the plaintiffs challenge to receivership by the second defendant. The second defendant had been appointed without the prior 60 days' notice. Secondly the sale was by private treaty and does not enjoy the protection of the court normally enjoyed by sale through foreclosure proceedings. In any case a sale through foreclosure proceedings would be by public auction. For emphasis section 9 (7) of the Mortgage Act which deals with improper or irregular sales by an irregular order for sale through a foreclosure procedure provides that such a sale cannot be impeached. The rationale for this is obvious; it is because even if the order for foreclosure is irregularly or improperly obtained or made, it will still be a sale under order of the court. Section 10 of the Mortgage Act which permits sale authorised by the mortgage deed without reference to court does not enjoy a similar protection. Section 176 of the Registration of Titles Act provides that no action for recovery of land shall lie or be sustained against the person registered as proprietor under the Registration of Titles Act except in the case of a mortgagee as against a mortgagor in default. In this particular case, there was a suit by the mortgagee against the mortgagor in default but not for impeachment of title. There was another suit by the mortgagor against the mortgagee challenging the process under the mortgage deed.

I have further noted that the property was registered in the names of the fourth defendant before notice to the caveator was issued. A transfer cannot be made without notice of the caveator. Section 141 of the RTA provides that no entry shall be made without notice to caveator. The Commissioner for land registration wrote that he issued the notice under section 91 of the Land Act on the ground that he had removed the caveat under the mistaken belief that there was no suit pending anymore. The correct procedure is to issue a notice to caveator requiring the caveator to show cause why the caveat should not be removed before effecting the registration of an interest on the suit property. Even if the registrar is not a party, the entry by transfer to the

fourth defendant was made upon the application of the third defendant who was an agent of the first defendant. Notice to caveator is issued under section 140 of the RTA. The evidence shows that no such notice was issued before transfer of the property into the names of the fourth defendant. Paragraph 7 of the affidavit in support of the caveat signed by the first plaintiff clearly indicates that she together with the third plaintiff had filed HCCS number 741 of 2006 to seeking a permanent injunction to restrain DFCU leasing company Ltd from selling the suit property and she had also obtained an interim order and served it upon the first defendant. The lapse of the interim order after 45 days can only lead to the Commissioner for land registration issuing a notice to show cause why the caveat should not be cancelled. This is because the caveat concerns the mortgage deed. It's a procedural requirement that the notice is issued before a transfer is made. The notice to caveator dated 15th of May 2007 is specifically issued to the fourth defendant who had already been registered. How was he registered without notice to caveator? In the absence of any other evidence, the registration was in contravention of the clear provisions of section 140 and 141 of the Registration of Titles Act. It was an illegal and therefore a fraudulent registration. The registration can be attributed to the transferee in title because, he got registered knowing that there was a caveat and a dispute between the mortgagee and registered proprietor pending in court in respect thereto. He did not cause to issue any notice to show cause why the caveat should not be removed. What is even more important is the fact that the mortgagee sells on behalf of the registered proprietor as far as legal title is concerned. He draws his authority from the mortgage deed. In this case the fourth defendant/purchaser was fully aware of the dispute between the registered proprietor/mortgagor and the mortgagee. Because he was fully aware, clause 4 of the agreement being in the matter of a sale by private treaty under the Mortgage Act and exhibit P12 provides that the purchaser takes the property in the condition in which it is without any warranties on the part of the vendor. Secondly it was sold subject to all applicable laws. Apart from citing the Mortgage Act, any breach of law under the clause would be sufficient to render the agreement inoperative. Clause 5.4 provides that the receiver/manager shall at the earliest appropriate time cause the removal of the two caveats at his expense to enable the purchaser transfer ownership of the title into the purchaser's names. The duty to transfer ownership was on the part of the purchaser and therefore it was upon the purchaser to cause notice to caveator to be issued by the Commissioner for land registration. Lastly clause 10 provided that the vendor undertook to fully indemnify the purchaser against any rightful claims arising from the sale for any want of legal title and authority on the part of the defendant to convey the property sold to the purchaser. The entire agreement between the vendor and the purchaser makes the sale subject to the Mortgage Act and any other laws. The sale is also subject to the encumbrances which are described including the caveats and the pending suit. In those circumstances the purchaser did not obtain a perfect title and held the title in trust pending the outcome of the dispute between the mortgagor and mortgagee. Exhibit D16 is a warrant for vacant possession of the suit property under the seal of the commercial court division dated 21st of May 2007 upon the application of the fourth defendant in the miscellaneous cause number 70 of 2007 and between the fourth defendant as applicant and the first and third plaintiffs the suit as respondents. The warrant for vacant possession was issued to the third defendant to execute the

same as the bailiff of the court. The order for vacant possession was set aside for being illegal, null and void ab initio for want of jurisdiction and/or set aside on 19th of July 2007 by the trial judge honourable justice Rubby Opio Aweri.

The fourth defendant gained possession of the suit property through an illegal, null and void warrant of attachment. He was fully aware of the circumstances of the suit property and consequently the sale agreement between the third defendant and the fourth defendant dated 10th of May 2007 is hereby set aside. The sale as having been set aside, and in the circumstances spelt out above, the registration of the fourth defendant is cancelled under the provisions of section 176 (c) of the Registration of Titles Act because the transfer was made to defeat the interest of the mortgagor in the civil suit. It was made in secret without notice to caveator.

6. Whether the first and second plaintiffs are liable to pay the sums due under the guarantee instruments after the realisation of the securities.

The question of whether the first and second plaintiffs are liable to pay the sums due under the guarantee instruments after realisation of the securities cannot be determined at this stage. This is because the first defendant has not exhausted all remedies against the defendant company pursuant to the finding on the previous issue that the transfer of the property and the sale thereof to the fourth defendant cannot stand.

Remedies available to the parties:

The court will next consider the issue of the prayer of the plaintiffs for special and general damages for fraudulent sale, deprivation, inconvenience and financial loss suffered by the plaintiffs.

The first defendant's submission is that he was unaware of the plaintiff's resistance to the sale of the property. Secondly that the plaintiffs admitted their indebtedness to the first defendant namely DFCU Leasing Company Ltd. I have already held that by the sale agreement, the third defendant agreed to indemnify the fourth defendant against any claims against the suit property from third parties. In those circumstances it would appear as if losses suffered by the plaintiffs ought not to be visited on the fourth defendant by an award of general damages. However the fourth defendant was aware that there were third-party claims to registered proprietorship and the mortgage contract was the subject matter of a suit in the High Court. The indemnity clause operates between the fourth defendant and the third defendant and does not affect any claims against the fourth defendant by any third party in the context of the sale agreement exhibit P12. It is only upon such claims being made that the fourth defendant would seek indemnity under the sale agreement. I have further considered the written testimony of the fourth defendant which I will quote for ease of reference. The witness statement of the fourth defendant paragraph 7 thereof provides as follows:

"Upon my payment of the purchase price, I caused the transfer of the property into my name on the 14th day of May 2007. See a copy of the certificate of title – exhibit P8."

In the subsequent paragraph he states that he duly and rightly bought the property from the third defendant. I must emphasise that a notice to caveator must have a minimum of sixty days duration under section 140 (2) of the Registration of titles Act before the caveat can lapse. For the caveat to lapse earlier the caveator has to be summoned to show justification before the court why the caveat should not be removed. The sale agreement is dated 10th May 2007 and the 4th defendant was registered on the 14th of May 2007 barely four days later. This was insufficient time for the first plaintiff who is the caveator to show cause why her caveat should not be removed. Another crucial point is that the 4th defendant claims to have initially expressed an interest in the property after an advert dated 17th of November 2006 whereupon he approached the second defendant to purchase the property. Subsequently he was contacted by Mr Moses Kirunda and he expressed his interest to purchase the suit property which he bought at Uganda shillings 220,000,000/=. The fourth defendant cannot be unaware of the manner in which the property was sold to him. He caused the transfer of the property into his names on the 14th of May 2007. In those circumstances and after eviction of the first and second plaintiffs through the warrant which was subsequently declared illegal, null and void, the fourth defendant is personally liable for causing the suffering of the plaintiffs through an illegal process. In the case of **Greenland Bank Ltd (in Liquidation) versus Wasswa Birigwa HCCS number 26 of 2004** honourable justice Egonda-Ntende J the unsuccessful party is only required to compensate the successful party for the loss suffered only once. If the successful party is allowed to recover the value of the house, he cannot at the same time recover mesne profits for the post sale period. However because the plaintiff did not seek to revoke the sale, he would not be entitled to mesne profits. On the other hand had the plaintiff sought cancellation of title, he would be entitled to claim for mesne profits.

According to PW2 rent for the property is valued at US$2000 per month. However the court cannot establish the rent through this testimony per see and will refer the matter to the government valuation surveyor to establish the prevailing rent for the suit premises.

In the circumstances the plaintiffs are specifically awarded damages by way of mesne profits from the date of eviction of the plaintiffs and with effect from June 2007 until vacant possession is given to the plaintiffs. Mesne profits shall be assessed at the going rate of rent for the suit property as against the 3rd and 4th defendants. Furthermore the action of the 4th defendant to evict the plaintiffs was declared illegal, null and void by the High Court. The 4th and 3rd defendants are liable therefore for the mesne profits so awarded.

Furthermore mesne profits at the going rate of rent for the suit property are awarded as against the 2nd and 1st defendant for one month when the plaintiffs were evicted without prior 60 days' notice under section 7 (1) of the Mortgage Act.

As far as the other defendants are concerned, I will start with the submissions of the first, second and third defendants counsel on the question of general damages. The first consideration is that the third plaintiff is still indebted to the first defendant. Secondly the first defendant's suit as against the first and second plaintiffs cannot be considered at this stage on account of not having exhausted all the remedies against the third plaintiff company under the mortgage deed.

Thirdly the conveyance of the property into the 4th defendant's names has been set aside and an order made for cancellation of title. The suit against the plaintiffs was premised on the balance still owing to the first defendant after offsetting Uganda shillings 220,000,000/= based on the sale of the suit property which is the subject of an order for cancellation of title.

I have further considered the proposals of the plaintiffs to the first defendant proposing sale of the leased equipment at Uganda shillings 150,000,000/=. The leased equipment was repossessed around 26 October 2006 according to the testimony of DW1 Mrs Elizabeth Ssenkaali, who was at the time the Monitoring and Control Manager of the first defendant bank. The equipment was subsequently sold for Uganda shillings 120,000,000/= in August 2007 after the suit had been instituted. Furthermore the final demand notice of the first defendant to the third plaintiff was for Uganda shillings 713,003,508/=. This amount is not far part from the plaintiffs offer of Uganda shillings 708, 634,000/=. I have further considered the fact that the third plaintiff through its directors disputed the suit amount and the manner of calculation by the defendant in arriving at the final figure. However no alternative calculation has been advanced for consideration by the court. At best the matter could have been referred to auditors since it will be based on reconciliation of accounts between the parties. In the circumstances the only evidence is that the third plaintiff owed the first defendant Uganda shillings 713,003,508/=. When the sum for the machines amounting to Uganda shillings 120,000,000/= is offset, the balance owing to the first defendant would become Uganda shillings 593,003,508/=. According to the testimony of DW1 Mrs Elizabeth, the bank realised a further Uganda shillings 6,972,394/= on a further reconciliation of the plaintiffs account. Furthermore a cash guarantee of Uganda shillings 4,400,000/= further reduced the plaintiffs indebtedness to the first defendant. Consequently the third plaintiff owes the first defendant **Uganda shillings 581,631,114/=**. For emphasis the sale of the suit property is not taken into account having being set aside in arriving at this figure.

Last but not least it is fitting to observe that the whole saga arose because the directors of the third plaintiff made a bad investment decision to obtain a lease of equipment which turned out to be uneconomical and was unable to generate sufficient income leading to the ill – fated attempts to the sell the house of the first plaintiff. The first defendant is not liable for the losses suffered on account of the equipment.

On the basis of the above findings of the court, the following remedies would be granted.

(a) A declaration issues that the sale and transfer of the plaintiffs suit property LRV 2839 folio 17 plot 108 Katalima road, Nakawa Kampala by the first, second and third defendants to the fourth defendant was fraudulent, illegal, and void ab initio.

(b) An order issues to the Registrar of Titles for cancellation of the fourth defendant's name from the register book and restoration of the first plaintiffs name as the lawful registered proprietor thereof.

(c) The plaintiffs prayer for a permanent injunction restraining the first defendant from selling, transferring or registering any encumbrances on the title is dismissed.

(d) The third plaintiff remains indebted to the first defendant and the first defendant is entitled to re-advertise the property for sale in a regular and transparent manner under the terms of this decree. The plaintiffs are given a period of 60 days from the date of this judgement and in lieu of notice within which to redeem the property.

(e) Upon any failure to redeem the property within 60 days, the property will be re-advertised for sale.

(f) As far as general damages are concerned, the plaintiffs are awarded an additional Uganda shillings 50,000,000/= as against the first and second defendants for going into possession without prior 60 days' notice and because a demand notice under the mortgage deed which is not fulfilled results into a default to pay instalments but does not amount to notice to go into possession under section 7 (1) of the Mortgage Act.

(g) Uganda shillings 50,000,000/= general damages is specifically awarded as against the third and fourth defendants in addition to being liable to pay mesne profits to the plaintiffs at a monthly rate of rent to be established from June 2007 till handing over vacant possession of the premises to the plaintiffs. Monthly rent shall be established by the Government Valuation Surveyor to whom the issue is hereby referred and whose decision shall be binding on the parties.

(h) The plaintiffs are awarded interest at 21% per annum from the date of judgement till payment in full on the award of general damages and mesne profits.

(i) The plaintiffs are awarded costs of the suit and as against the 1st, 2nd, 3rd and 4th defendants severally.

(j) Each party will bear its/his/her own costs of the counter claim of the first defendant.

Judgement delivered in open court this 13th day of May 2013

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Richard Mugenyi for the plaintiff

Bakayana Isaac for the 4th defendant

Olivia Kyalimpa Matovu holding brief for Kabiito Karamagi counsel for the 1st, 2nd and 3rd defendant

Plaintiffs in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

13th of May 2013