THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 50 OF 2010

STANBIC BANK UGANDA LTD}.....PLAINTIFF

VERSUS

1. **CELLULAR GALORE LTD}**
2. **STEPHEN KAVUMA}**
3. **JOHN KAGGWA}.....DEFENDANTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff bank originally brought a summary suit against the Defendants jointly and severally for a sum of **Uganda shillings 232,643,030/=** by 11 February 2010 arising out of a term loan extended by the Plaintiff to the first Defendant in April 2009, interest thereon and costs of the suit.

The Plaintiff relies on a facility letter dated 9th of April 2009 where it agreed to extend a loan of Uganda shillings 200,000,000/= to the first Defendant at an interest rate of 23.5% per annum repayable in 24 equal monthly instalments of Uganda shillings 10,524,374/= inclusive of interest. Furthermore the second and third Defendants on 16 April 2009 guaranteed the loan. The Plaintiff recalled the loan and demanded the first Defendant to settle it but the first Defendant did not do so. Consequently the Plaintiff demanded payment from the second and third Defendants as Guarantors and asserts that the second and third Defendants in breach of the guarantee agreement refused or neglected to pay the Plaintiff.

Leave was granted for the Defendants to defend the suit whereupon the first and second Defendants in their written statement of defence asserted that they were not liable because the Plaintiff recovered the money by disposal of motor vehicle registration number UAJ 800 F Porsche Cayenne which the Plaintiff held as security. Secondly the first Defendant asserts that

the Plaintiff was at all material times in possession and control of the motor vehicle with authority to deal with the same according to the terms of the term loan agreement. Alternatively the Plaintiffs had a further charge of the second Defendant's prime property comprised in Kyadondo Block 237 Plot 326 at Mutungo where the Plaintiff has custody of the title deeds. Consequently the liability of the second Defendant could not arise because the principal debtor has not failed to pay.

In reply the Plaintiff denied having sold the Porsche Cayenne described above or ever recovering money from the vehicle. The Plaintiff asserts that the first Defendant pledged the registration book of the vehicle as security for an overdraft of Uganda shillings 100,000,000/= granted to the first Defendant in 2007 and the same security was offered by the first Defendant to the Plaintiff in 2009 as part of the securities for a term loan of Uganda shillings 200,000,000/=. The Plaintiff admitted being in possession of the logbook and having executed a chattel mortgage with the first Defendant in favour of the Plaintiff on 22 August 2007. However upon default of the Plaintiff asserts that it failed to trace the vehicle to realise its security. As far as the property in Kyadondo Block 237 Plot 326 at Mutungo is concerned, the Plaintiff sold it and partially recovered the home loan facility granted to the second Defendant and no recovery of the term loan was made at all.

The third Defendant admits that he is a Director/Company Secretary in the first Defendant company with only one nominal share and the company had at all material times been managed by the second Defendant. The third Defendant is not part of the day-to-day management of the company and all bank accounts have the second Defendant as the sole signatory. The second Defendant as managing director applied for a business loan of Uganda shillings 200,000,000/= from the Plaintiff for purposes of selling Orange Telecom airtime. Accordingly on 9 April 2009 the Plaintiff issued a term loan letter to the first and second Defendants confirming availability of the loan and also the money would be used to offset the existing overdraft facility of Uganda shillings 121,006,933/= and the balance used as working capital in the first Defendant’s business.

The Plaintiff paid a chattel mortgage for the Porsche Cayenne 2004 model registered in the first Defendant's name as well as additional security for the loan being Kyadondo block 237 plot 326 land at Mutungo valued at Uganda shillings 1,100,000,000/=. On 9 April 2009, the Plaintiff and

the second Defendant requested the third Defendant to guarantee the loan as a Director/Secretary of the first Defendant. Following the request, the third Defendant went to the Plaintiff's bank and was informed that the Defendant had collateral namely the Porsche Cayenne and land at Mutungo which was sufficient security for the loan and the guarantee was only required as bank policy. The Porsche Cayenne was valued at Uganda shillings 200,000,000/= and the real estate at Uganda shillings 1,100,000,000/=. On the strength of the value of the collateral he guaranteed the loan. On 10 December 2009 the third Defendant received a letter from the Plaintiff requesting for payment under the guarantee whereupon the third Defendant inquired about the loan transaction. He established that the first Defendant without a valid resolution of the board assumed powers of the board through the second Defendant who purported to sign a board resolution dated 9th of April 2009. Secondly the Plaintiff fraudulently sold off the security held by it of the Porsche Cayenne without accounting for the proceeds of the sale and without an initial board resolution of the company sanctioning the initial pledge of the said company property. In October 2009, the Plaintiff by virtue of the mortgage advertised and sold the second Defendant's property at Mutungo.

In the premises the third Defendant avers that the Plaintiff acted fraudulently and breached its duty to obtain the highest bid price for the property and did not account for the proceeds. At the time of the sale the Plaintiff did not carry out a presale valuation of the property and breached its duty to act in good faith. The Plaintiff sold the property without accounting to the third Defendant as a Guarantor. The Plaintiff placed an advertisement in the New Vision of 20th of August 2009 for the sale of residential property but instead purportedly credited the second Defendant's account with the intention of unjustly recovering money from the third Defendant.

The forced sale value of the property was Uganda shillings 800,000,000/=. There were several bids for the property and the Plaintiff accepted a lower bid of Uganda shillings 600,000,000/=. The Plaintiff neglected to respond to the other bids which were higher. The Plaintiff fraudulently accepted an offer from Dr Narcis Kabatareine of Uganda shillings 700,000,000/= and ignored a bid by Concrete Works and Construction Ltd for Uganda shillings 701,000,000/=

The third Defendant further counterclaimed for a declaration that he is entitled to be exonerated or discharged by the Plaintiff as a result of the fraudulent sale of the property. He further sought general damages and costs of the counterclaim.

In a detailed reply, the Plaintiff denied the counterclaim.

The Plaintiff is represented by John Fisher Kanyemibwa while the first and second Defendants are represented by Counsel Felix Kintu of Messrs Kintu Nanteza and Co. Advocates while the 3rd Defendant is represented by Counsel David Kaggwa of Messrs Kaggwa and Kaggwa Advocates.

At the conclusion of the trial several proceedings had taken place in the absence of Counsel for the first and second Defendants while the first and second Defendants were also absent at the proceedings. In a joint scheduling memorandum filed between the Plaintiff and the third Defendant pursuant to the provisions of Order 12 rule 1 of the Civil Procedure Rules, some facts are agreed as between the two parties.

Agreed facts:

It is agreed that the first Defendant was a customer of the Plaintiff and the second Defendant was also a customer of the Plaintiff. Secondly by a term loan agreement constituted in a term loan letter dated 9th of April 2009 the Plaintiff granted a loan of Uganda shillings 200,000,000/= to the first Defendant. The loan was to attract an interest at the rate of 23.5% per annum and was repayable in 24 instalments of Uganda shillings 10,524,374/= per month.

The loan was secured by a chattel mortgage over the logbook for Porsche Cayenne 2004 model registration number UAJ 800 F registered in the names of the first Defendant and also accompanied by transfer forms. Secondly it was secured by a legal mortgage dated 22nd of April 2009 stamped by Uganda shillings 200,000,000/= for the second Defendant's property comprised in Kyadondo Block 237 Plot 326 land at Mutungo in addition to an existing charge dated 7th of April 2008 of the said property securing a home loan of Uganda shillings 700,000,000/= in favour of the second Defendant.

The loans were also secured by personal guarantees for Uganda shillings 200,000,000/= each of the second and third Defendants dated 16th of April 2009. The property comprised in Kyadondo block 237 plot 326 land at Mutungo was a security for a home loan taken by the second

Defendant and the subsequent term loan taken by the first Defendant. The Plaintiff disbursed the term loan to the first Defendant. The second and third Defendants are directors of the first Defendant. The third Defendant was also a company secretary of the first Defendant. The first Defendant did not repay the said loan. The second Defendant also did not repay the home loan.

As of 25 February 2009 the open market value of the mortgaged property was Uganda shillings 1,100,000,000/= while the forced sale value of the land was Uganda shillings 800,000,000/=. The highest bid received in respect of the property was for a sum of Uganda shillings 701,000,000/= submitted by Concrete Works and Construction Ltd.

The Plaintiff realised its mortgage security in respect of Kyadondo Block 237 Plot 326 land at Mutungo Luzira and sold the same to Dr Narcis Kabatereine at Uganda shillings 700,000,000/=. The Plaintiff filed this action to recover the term loan.

Agreed issues for trial:

1. Whether the Plaintiff realised the security constituted in the chattel mortgage in respect of the vehicle registration number UAJ 800 F Porsche Cayenne?
2. Whether the first Defendant is indebted to the Plaintiff in respect of the term loan?
3. Whether the Plaintiff was negligent and fraudulent in realising the mortgaged property?
4. Whether the second and third Defendants are liable to the Plaintiff on their respective personal guarantees of the term loan to the first Defendant?
5. What remedies are available to the parties?

The Plaintiff called three witnesses while the first and second Defendants did not call any witnesses and were absent at the proceedings. The third Defendant Mr John Kizito Kaggwa testified as DW1 and even though he was admittedly a director of the first Defendant, testified on his own behalf. The court was subsequently addressed in written submissions and the facts of the dispute and the controversies for determination will be considered sufficiently from the submissions included in this judgment.

The 1st, 2nd and 4th Issues are interrelated and concern the question of whether the first and second Defendants are liable under the contract of guarantee to pay the guaranteed sum to the Plaintiff. Parties started with a submission of whether the chattel, the subject of the chattels mortgage was

in fact sold by the Plaintiff. I will consider the 1st, 2nd and 4th issues together as they substantially resolve the suit and counterclaim.

Whether the Plaintiff realised that the security constituted in the chattel mortgage in respect of the vehicle registration number UAJ 800 F?

On this issue the Plaintiff's Counsel submitted that the term loan letter exhibit P1 provides that the security in the term loan letter was a first registered mortgage over the logbook for Porsche Cayenne with the particulars given above which was deposited with the Plaintiff pursuant to the chattels mortgage. He submitted that the burden of proving that the Plaintiff realised the said security in respect of the said vehicle lay on the Defendants. The first and second Defendants did not adduce any evidence to prove the pleading that the said vehicle was in the possession and control of the Plaintiff. The third Defendant on the other hand did not discharge the burden of proof on the averment that the Plaintiff fraudulently sold the vehicle. The third Defendant made a bare assertion that the Plaintiff fraudulently sold the vehicle prior to the first Defendant default on the term loan. The written witness statement assertion is however silent on the date of the alleged sale and the person to whom the Plaintiff allegedly sold the vehicle. No sale agreement was exhibited. Counsel contended that the Defendant’s assertion is patently untrue because none of the Defendant’s responded to the Plaintiff’s demand letters in respect of the term loan claimed that the Plaintiff sold the said vehicle or to demand for accountability in respect of the alleged sale. The Defendant agrees that the Plaintiff’s security was held over the logbook for the said vehicle. He did not adduce any evidence as to when the Plaintiff recovered the said vehicle from the first Defendant and did not provide the date of sale. Lastly the Defendants did not adduce the evidence of any person who allegedly purchased the motor vehicle from the Plaintiff.

The testimony of Mr Henry Katokye, the Plaintiff’s former head of collections who testified as PW1 is that the Plaintiff never conducted any sale of the property and this assertion was not challenged in cross examination. He testified that in March 2010 when the Plaintiff was in the process of having the vehicle impounded, the Plaintiff learnt of the disposal of the vehicle by Cairo International Bank. Unknown to the Plaintiff the first Defendant had contrary to the provisions of clause 5 of the chattel mortgage pledged the same vehicle to Cairo International Bank. The first Defendant had obtained two separate logbooks for the vehicle being an original

and a duplicate copy thereof. The first Defendant lodged the duplicate logbook with the Plaintiff as security for a loan of Uganda shillings 100,000,000/= and subsequently lodged the original logbook with Cairo International Bank.

Counsel relied on court Exhibit 1, a report dated October 26, 2010 by Uganda Revenue Authority giving details of alleged fraudulent conduct by the first and second Defendants. The first Defendant falsely reported to Uganda Revenue Authority loss of the original logbook and acquired a duplicate logbook. Subsequently on 20th of September 2007 the first Defendant deposited the original logbook with Cairo International Bank to secure a loan of Uganda shillings 250,000,000/=. Victoria Kawooya the Assistant General Manager of Cairo International Bank Testified as PW3. She testified that in 2008 the second Defendant requested Cairo bank for the release of the vehicle and an agreement was reached with regard to a part of the secured money to be deposited for the release of the vehicle. Subsequently one Peter Sajjabi deposited the agreed money with Cairo International Bank. The bank released the registration book to the first Defendant whereupon the lawyers of Peter Sajjabi demanded for release of the logbook. The first Defendant sold the vehicle to Peter Sajjabi.

The Plaintiff's Counsel further submitted that it is the contention of all the Defendants in their written statement of defence that the Plaintiff sold the vehicle. Both the pleadings and evidence is false and a common strategy to avoid obligations to the Plaintiff. The third Defendant took the matter further by alleging fraud against the Plaintiff. He had no basis for the assertion. As Company Secretary and co-director in the first Defendant Company knew the truth that it is the first Defendant which sold the vehicle. Consequently Counsel prayed on the basis of the evidence of PW1 and PW3 for the court to hold that the Plaintiff never conducted any sale in respect of the vehicle and issue number one is answered in the negative.

2. Whether the first Defendant is indebted to the Plaintiff in respect of the term loan?

On this issue the Plaintiff's Counsel in summary submitted from the documentary evidence of the term loan and the statement on the account that the first Defendant received Uganda shillings 200,000,000/= from the Plaintiff and in breach of the requirement to ensure that the first Defendant had sufficient funds on its current account to meet the monthly instalments of Uganda shillings 10,524,374/=, it failed to provide sufficient funds. The loan statement proves that

Uganda shillings 326,071/= was recovered on the 30th of May 2009 and Uganda shillings 34,697/= was recovered on 21 July 2009 from the first Defendant account. As a consequence of the failure to deposit money in its current account, the loan became non-performing and the statement shows a constant balance of Uganda shillings 199,639,232/= from 30th of July 2009 to 22nd of November 2010 when the accumulated debit balance was reversed from the loan account in accordance with the Regulations (Regulation 9 and 10 (9) (a) (i) of the Financial Institutions (Credit Classification and Provisioning) Regulations, 2005). The Plaintiff never recovered the term loan through the sale of the vehicle as falsely pleaded. Consequently issue number two should be answered in the negative.

4. Whether the second and third Defendants are indebted to the Plaintiff on the respective guarantees for the term loan?

The Plaintiff's Counsel contended that the second and third Defendants are sureties for the term loan according to their respective personal guarantees exhibits P3 and before. On the premises of the above submissions in issue number three, the third Defendant is liable on his personal guarantee.

As far as the second Defendant is concerned, paragraph 6 (b) of the written statement of defence is that the liability could not arise where the principal debtor has not failed to pay. On the basis of the submissions in issues number two and three, the principal debtor the first Defendant failed to settle the term loan. Upon the first Defendant defaulting on the term loan repayment the Plaintiff demanded from the first Defendant for the repayment. The Plaintiff also demanded from the second Defendant to honour his guarantee according to exhibit PE 8. The second Defendant upon the demand became liable to settle the loan. The defence that this suit against the second Defendant is premature should be disregarded. In the premises the second Defendant ought to be found liable to the Plaintiff on his personal guarantee of the term loan.

The first and second Defendants Counsel did not participate in the last part of the proceedings and no submissions in reply to the Plaintiffs submissions were received from him.

Submissions of the third Defendant's Counsel in reply

The third Defendant's Counsel relies on the brief background that the resolution dated 29th of October 2007 of the first Defendant's board appointed the third Defendant as a director according to exhibit D39. Secondly the third Defendant was allotted one nominal share in the company in the Memorandum and Articles of Association exhibit D1. Prior to the execution of the loan agreement dated 9th of April 2009, the Plaintiff advanced a loan of Uganda shillings 100,000,000/= to the first Defendant. The loan was secured by a chattel mortgage dated 22nd of August 2007 registered on a logbook for Porsche Cayenne 2004 model registered in the names of the first Defendant. The chattel mortgage was strangely accompanied by signed blank transfer forms exhibit P 35 which bears the signature of the second Defendant and is dated 15th of August 2007 about two months before the third Defendant became a director/secretary and shareholder. The third Defendant signed a personal guarantee of Uganda shillings 200,000,000/=. On the 10th of December 2009 the Plaintiff demanded the sum from the third Defendant after it had already sold the mortgaged property at Uganda shillings 700,000,000/= on 17 November 2009. After 7 April 2010 the Plaintiff's legal adviser Mr Elijah maintained in paragraphs 28 and 29 of his affidavit in reply exhibit D10 that the Plaintiff had not yet sold the mortgaged property due to a caveat and instead it was seeking to enforce the guarantee. The affidavit in reply was filed on court record on 12 April 2010 although the offer and acceptance of the sale of the mortgaged property was concluded on 4 November 2009. The actual sale agreement is dated 8th of April 2010. The significance is that the offer, acceptance, first deposit of Uganda shillings 300,000,000/= and the sale agreement were all concluded before 12 April 2010 when the Plaintiff filed its affidavit in reply. In the affidavit in reply, the whole fraudulent conduct of the Plaintiff is summarised. It manoeuvred its internal advocates for purposes of confirming the misrepresentation that began with the term loan. Consequently the deposition of Mr Elijah is a false affidavit sworn by the Plaintiff legal adviser in a desperate attempt to enrich the Plaintiff by misleading the court. Counsel prayed that this act is strongly condemned by the court especially when it comes from an advocate of the High Court.

On the first issue:

Whether the Plaintiff realise the security constituted in the chattel mortgage in respect of vehicle registration number UAJ 800F Porsche Cayenne?

The third Defendant's Counsel conceded that the Plaintiff did not sell the vehicle Porsche Cayenne. The only argument is that the third Defendant challenges the manner in which the Plaintiff dealt with the securities it held. In his evidence, the third Defendant testified that there was a material nondisclosure by the Plaintiff. He testified that at the time of execution of the loan agreement on 9 April 2010, the Plaintiff misrepresented to him that it held an existing security namely a Porsche Cayenne.

According to the term loan letter dated 9th of April 2009 exhibit P1 and paragraph 7.1.1 thereof, the Plaintiff misrepresented to the third Defendant that it held a first ranking register chattel mortgage of a Porsche Cayenne 2004. This was false and entitles the third Defendant to be discharged as prayed for in the counterclaim. The vehicle was valued at Uganda shillings 203,000,000/= according to an insurance policy by Lion Assurance Company marked as exhibit P 59. The value of the vehicle was more than what the third Defendant had guaranteed. There was therefore misrepresentation which was substantially prejudicial to the third Defendant on his personal guarantee.

The Plaintiff dealt with the first and second Defendant's way back on 22 August 2007, the Plaintiff took the said car as security and the third Defendant was neither a director nor a shareholder in the first Defendant. This explains why the third Defendant did not sign on the blank transfer form for the vehicle which transfer form bears the date of 15th of August 2007. The third Defendant was therefore not party to any dealings prior to the term loan dated 9th of April 2009. Furthermore by that time the first and second Defendants pledged the same car to Cairo International Bank according to a facility letter dated 20th of September 2007 exhibit P 58. The third Defendant was not a director or a shareholder in the first Defendant at that time. In summary the third Defendant was not a party to pledging of the company car to either the Plaintiff or Cairo International Bank.

The evidence of PW3 Messieurs Victoria Kawooya, a banker at Cairo International Bank is that the acceptance letter of the offer letter was made by the second Defendant and the third Defendant did not sign it. The car was sold by the second Defendant according to the letter written by Web Advocates exhibit P 63. There is no evidence that the third Defendant Mr John Kaggwa participated in the pledge and subsequent sale of the motor vehicle. Instead the Plaintiff

ought to have known that the car had already been sold before and misrepresenting the third Defendant in its term loan letter dated 9th of April 2009 that they held it as security whereas not.

The fraudulent pledging and disposal of the Porsche Cayenne was unknown to the third Defendant. At the time of disposal of the vehicle, he was not a director and never knew of what had transpired. In **Halsbury's laws of England fourth edition paragraph 103**, it is written that a contract of guarantee, like any other contract, can be avoided where there has been a material misrepresentation of fact including entry into the contract, even if the misrepresentation is innocent. It was also held in the case of **Barton versus County NatWest Ltd [1999] Lloyds Report Bank 408,** CA that where a misrepresentation is made fraudulently and it is of a kind that would be likely to induce the person to enter into the contract, there is a presumption of reliance in favour of the victim of the misrepresentation. The creditor then has the burden of proving that there was no reliance by the victim on the misrepresentation.

The Defendant's Counsel submitted that from the facts the Plaintiff misrepresented to the third Defendant that they held the Porsche Cayenne as security whereas not. The third Defendant relied on the fraudulent misrepresentation and signed a personal guarantee of Uganda shillings 200,000,000/=, and indeed based on the understanding that he had a fallback position and that the value of the car was Uganda shillings 203,000,000/= as shown in the insurance policy marked exhibit P 59. In the premises the third Defendant ought to be discharged from the guarantee as prayed for in the counterclaim.

Whether the first Defendant is indebted to the Plaintiff in respect of the term loan?

On this issue the third Defendant's Counsel submitted that it is up to the first Defendant to answer. The actions and omissions of the Plaintiff in disposing of the mortgaged property satisfied the first Defendant's debt and therefore the third Defendant stands discharged of its guarantee. **He relied on Halsbury's laws of England fourth edition volume 20 paragraph 184** that the extent of the liability undertaking by the Guarantor would depend upon the terms of the contract of guarantee. The amount and nature of the principal debtor's debt to the creditor has to be ascertained. In **Skipton Building Society versus Stott and Another [2000] 1 All ER 257 Evans LJ** agreed with the principle stated in **Watts versus Shuttle Worth (1860) 5 H and N 235, 157 ER 1171** that in equity upon a contract of suretyship, if the personal guarantee does any

act injurious to the surety, or inconsistent with his rights, or if he omitted to do any act which his duty enjoins him to do, and this omission proves injurious to the surety, the surety will be discharged.

The first Defendant obtained a credit facilities from the Plaintiff in the sum of Uganda shillings 200,000,000/=. This sum was fully recovered by the Plaintiff when it sold the mortgaged property to recover the debt due from "Cellular Galore Ltd was what as advertised in the press exhibit P4. The act of the Plaintiff crediting a different account from that advertised, injured and was inconsistent with the third Defendant's right as a Guarantor. Therefore as at the time of filing the suit in 2010, the first Defendant was not indebted to the Plaintiff. As a consequence thereof, the third Defendant's liability had been long discharged on 17 November 2009 when the Plaintiff received Uganda shillings 300,000,000/= as the deposit on the purchase price.

On the first issue as to whether the second and third Defendants are indebted to the Plaintiff on the respective guarantees for the term loan, the third Defendants Counsel relies on the submission that the third Defendant is not liable under his personal guarantee on the rest of the issues.

In rejoinder on the issue of whether the Plaintiff realise the security in the chattel mortgage, the Plaintiff's Counsel submitted that contrary to the third Defendant's pleadings and testimony in chief, Counsel for the third Defendant concedes that the Plaintiff never sold the vehicle. As a director and company secretary of the first Defendant, the third Defendant was aware that the Plaintiff never disposed of the vehicle but pleaded and took an oath to testify otherwise.

Secondly it is not true as submitted for the third Defendant that the Plaintiff misrepresented to the third Defendant that it held a first ranking registered chattel mortgage of the Porsche Cayenne Model 2004. According to court Exhibit 1, the caveat which was placed by the Plaintiff on the vehicle on 22 August 2007 was still in place as of 8th of September 2009. The caveat was in place long after the signing of the term loan letter. How could the Plaintiff have knowledge of the sale of the vehicle without any notice and removal of its caveat? If it is correct as submitted for the third Defendant that by the time exhibit P1 was signed, the vehicle had already been disposed of this is a matter that was guarded as a secret between the second and third Defendants and is excluded by the term loan letter exhibit P1 and the respective guarantees. In as far as the

Plaintiff's caveat on the vehicle had not been removed, the statement under paragraph 7.1.1 of the term letter exhibit P1 that the Plaintiff held that the security was factual and not a misrepresentation as submitted for the third Defendant.

The Plaintiff was not privy to the motor vehicle insurance policy exhibit P 59 where the value of the said vehicle was said to be Uganda shillings 203,000,000/=. The policy was adduced by PW3, an officer of Cairo International Bank. There is no evidence on record that it is the Plaintiff which published exhibit P 59 of the third Defendant.

I have considered the rest of the submissions in rejoinder as well as that of the plaintiff and defendant's Counsel on the issue of fraud and negligence and I have found it unnecessary to repeat the lengthy submissions in light of my judgment.

Judgment

I have duly considered the pleadings, the evidence and submissions of both Counsels. The 3rd Defendant claims to have been discharged. It is a fact which has been established that the Chattels Mortgage was not enforced to realise the Plaintiffs security so as to recovery the term loan. The vehicle was said to have been sold by Cairo International Bank and the Plaintiff has not taken steps to recover it. There was no misrepresentation about the Porsche Cayenne because the Plaintiff obtained facts of what happened after filing the suit. Secondly the second Defendant was responsible for the sale of the vehicle.

The Plaintiff also foreclosed on the mortgaged property registered in the names of the second Defendant and realised about Uganda shillings 700,000,000/=. The forced sale value of the mortgaged property was Uganda shillings 800,000,000/= while the market value before the loan was Uganda shillings 1,100,000,000/=. The Plaintiff now seeks to recover from the Guarantors of the term loan as far as the suit against the 3rd Defendant is concerned.

What are the principles of law for the discharge of a Guarantor or of holding a Guarantor liable in the circumstances of this case? According to **Halsbury's laws of England Fourth Edition Reissue volume 20,** and paragraph 304, equity intervenes to protect a Guarantor. The principles for the protection of a Guarantor are also extracted from a decision of the Privy Council in **China and South Sea Bank Ltd v Tan [1989] 3 All ER 839**, in the judgment of Lord

Templeman in a review of several precedents on the principles of equity for the discharge of a surety. The review of all the facts of the case is not important to reach a conclusion of the suit and reference will be made to the principles extracted from the precedents on holding a Guarantor liable or the circumstances of his or her discharge.

With reference to the case of **Watts v Shuttleworth (1860) 5 H & N 235, 157 ER 1171** quoted with approval in the case of **China and South Sea Bank Ltd v Tan [1989]** (Supra) the creditor had agreed to insure mortgaged goods but failed to do so and the question was whether the omission to do so discharged the surety. The rule of equity in the case was that if the person guaranteed (the creditor) does anything injurious to the surety or inconsistent with his rights or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the surety will be discharged in equity (and not in contract as such). In Wulff v Jay (1872) LR 7 QB 756 where the creditor failed to register a mortgage as a bill of sale and failed to take possession of the mortgaged chattels which were as a consequence seized by a trustee in bankruptcy, the surety was held to be discharged to the extent of the value of the mortgaged chattels. Where a debt is secured by a surety, and the debt is also secured by security available for the payment of the debt, it is the duty of the creditor to make the security available. For instance where the surety voluntarily pays the debt the property will be made available to the surety to help him recover what he paid. It was held that the omission to register the mortgage led to loss which was detrimental to the surety.

It is general principle that where the surety pays off the debt the security held by the creditor for repayment of the debt should be made available for the surety to recoup his losses. According to a quote in that case from Hannen J:

> " ... if the creditor who has had, or ought to have had, them in his full possession or power, loses them or permits them to get into the possession of the debtor or does not make them effectual by giving proper notice, the surety to the extent of such security will be discharged. A surety, moreover, will be released if the creditor, by reason of what he has done, cannot, on payment by the surety, give him the securities in exactly the same condition as they formerly stood in his hands."

According to **Halsbury's laws of England Fourth Edition Reissue volume 20,** and paragraph 304:

> "a Guarantor is discharged if the creditor, without his consent, either releases the principal debtor or enters into a binding arrangement with him to give him time without reserving his rights against the Guarantor. Since, by virtue of the guarantee, the Guarantor is as much concerned in every transaction with the principal debtor affecting the guaranteed liability as the creditor, any variation of the principal contract made without his consent discharges him from his guarantee, unless the variation is clearly unsubstantial or obviously cannot prejudice him."

In assessing whether the Guarantor is discharged the contract of guarantee has to be perused to consider the nature of the guarantee. Thereafter there are two matters to be considered in this relationship. The first matter is the fact that the Plaintiff/creditor in this case executed a chattels mortgage which was not realised on account of factors which I will consider. The second factor is the fact that the creditor sold the mortgaged property which was security for a loan. On this latter part both parties dwelt at length on the allegation that the property was fraudulently or negligently dealt with by the creditor. On issues 1, 3 and 4 I propose to confine my analysis to the equitable doctrine for discharge before dealing with the counterclaim. Firstly it is further established that the mortgaged property had been sold. So the question shall be confined to whether the Uganda shillings 700,000,000/= ought to have been partly used to offset the term loan as well. The sale money according to the evidence of the Plaintiff's witnesses was used to offset the Home loan only. The home loan was not guaranteed by the 3rd Defendant.

The term loan letter agreement exhibit P1 is for a loan of Uganda shillings 200,000,000/= which was advanced to the first Defendant. Under paragraph 7.1.1 the security for the loan included a first ranking registered chattel mortgage over the log book for Porsche Cayenne 2004 model registered in the names of the first Defendant. Secondly under paragraph 7.1.2 it included personal guarantees for Uganda shillings 100,000,000/= each by the second Defendant and the 3rd Defendant. Clause 7.2 provides for the securities required for the term loan. In clause 7.2.1 it provides as follows:

"7.2.1 a registered legal mortgage Stamped by Uganda shillings 200,000,000/= over land and property is comprised in Kyadondo block 237 plot 326 land at Mutungo and Luzira registered in the names of Steven Kavuma of PO Box 12635, Kampala in addition to the existing charge of Uganda shillings 700,000,000/= in respect of Steven Kavuma's home loan bringing the total charge to Uganda shillings 900,000,000/= the above."

Furthermore clause 7.2.2 provides for personal guarantees of Uganda shillings 200,000,000/= it is signed by the second Defendant and the third Defendant supported by valid identity documents and statements of assets and liabilities.

An additional document exhibit P2 is a further charge and mortgage on Kyadondo Block 237 Plot 326 (supra). It is provided that the charge was supplementary to a mortgage registered on 16 April 2008 under instrument KLA 372784 securing a home loan facility of Uganda shillings 700,000,000/=. In clause 2 it is provided that the home loan is still owed on the security of the said mortgage. In clause 3 it is written that at the request of the surety (the second Defendant) the bank agreed to grant a fresh facility to the first Defendant by way of a term loan of Uganda shillings 200,000,000/= which was sanctioned to offset the borrowers existing overdraft and the balance to be used as working capital over and above the existing loan. For securing the payment of the loan the surety mortgaged to the bank all his estate and interest in the land comprised in the title with all buildings.

A further charge and mortgage is dated 22nd of April 2009 exhibit P3. The third Defendant executed exhibit P4, a guarantee instrument between himself, the Plaintiff and the first Defendant. The guarantee is expressly written as being in addition and without prejudice to any other securities of guarantees on account of the debtor and is a continuing security notwithstanding any settlement of the account.

A Guarantor is ordinarily liable for the debt or default of another (the principal debtor) who is the party primarily liable for the debt according to the **Oxford Dictionary of Law, 6th Edition at page 246.** (See also Justice Lameck Mukasa in the case of **Pan African Insurance Company Ltd vs. International Air Transfer Association HCCS NO.0667/2003; Holroyd Pearce L.J**. in the case of **Yeoman Credit Ltd vs. Latter And Another (C.A.) (1961) 2 ALLER 294 at 296).**

The obligation of the Guarantor to the Creditor in the words of Lord Diplock in **Moschi vs. Lep Air Service Ltd And Others, (1973) AC 331 348/ [1972] 2 ALL ER 393,** is**:**

> "to guarantee the performance by a debtor of his obligations to a creditor arising out of a contract gives rise to an obligation on the part of the Guarantor to see to it that the debtor performs his obligations to the creditor".

This obligation includes that of seeing to it that the debtor performs his part of the bargain to the Creditor.

In this case the Plaintiff bank has already moved to enforce the security through exercise of a right of sale of the security. However the security in the chattels mortgage was not enforced for reason that it was sold by another creditor.

I will first consider the Legal Mortgage and further charge securing the term loan.

The Legal Mortgage

According to Edward F Cousins (assisted by Sidney Ross) in The Law of Mortgages, Sweet and Maxwell 1989 © F Cousins at page 344, a Mortgagor is able to obtain advances on the same property and circumstances may arise in which the property is insufficient to satisfy all securities and there is a need for rules to regulate priorities among the various Mortgagees. He goes on to discuss the order of priorities between legal and legal mortgages as well as between legal and equitable mortgages. The general principle is that a mortgage registered first in time takes precedence over a subsequent mortgage. However in the Plaintiff's case, there are no competing Mortgagees with different mortgages over the same property. The Plaintiff is the sole Mortgagee and the second Defendant is the sole Mortgagor while the principal borrower is the first Defendant Company in whom the second and third Defendants are directors. When the agreement exhibit P2 and exhibit P3 being a further charge and further mortgage were executed between the second Defendant and the Plaintiff with the first Defendant being the borrower and the second Defendant being the surety and the Mortgagor as the registered proprietor of Kyadondo block 237 plot 326 (supra), it was expressly stipulated that the Uganda shillings 200 million under the term loan was in addition to another home loan of Uganda shillings 700,000,000/=. Consequently the total liability secured by the property was Uganda shillings

900,000,000/= covering the home loan and term loan. There was no discrimination between the home loan and the term loan as far as being security is concerned. As far as the security is concerned, the two facilities were amalgamated and a default in the repayment of the term loan was sufficient to make the entire facility liable to recall and the mortgaged property sold or any other remedies available to the Mortgagee exercised to realise the security.

Under the Ugandan Mortgage Act cap 229 which was the applicable law at the time of sale of the mortgaged property, the proceeds of sale of the mortgaged property is provided for under section 11 of the Act which provides as follows:

> "11. Application of proceeds from a sale.
>
> (1) The proceeds from any sale under this Act shall be applied as follows, and in the following order—
>
> (a) in payment of all expenses properly incurred or incidental to the sale or any prior attempted sale;
>
> (b) in payment of all sums due to the Mortgagee and to any other encumbrancer with the same order of priority;
>
> (c) in payment in the order of priority of any encumbrancers subsequent to the Mortgagee; and
>
> (d) the residue, if any, in payment to the Mortgagor."

The wording of the section is unequivocal about the principle that the Mortgagee is to be paid first before any other encumbrancer would be paid in the same order of priority. In this case the Mortgagee is the same person and there is no subsequent encumbrancer. There is only an additional charge and the parties expressly agreed that the outstanding loan was Uganda shillings 900,000,000/=. The question then becomes whether there is a priority of payments between charges. It is difficult to separate one loan facility namely the home loan from the term loan for purposes of security.

I have considered the submissions that the advertisement for the sale of the mortgaged property in exhibit P 14 to the extent that it mentions the debtor as the first Defendant is superfluous. I do

not agree. Under the Mortgage Act cap 229 (repealed) section 10 thereof, a sale by a Mortgagee under a power of sale in the mortgage agreement shall be by public auction unless the Mortgagor and encumbrancers subsequent to the Mortgagee, if any, consent to a sale by private treaty. It is imperative that the debtor is given an opportunity to pay the debt before the property is sold. In fact exhibit P 14, which is the advertisement notice clearly stipulates that there would be a sale by public auction/private treaty owner said MD and specifically provides as follows:

> "duly instructed by our client a financial institution we shall proceed to sell the under mentioned property and developments thereon as appears in photograph, unless the Mortgagor/debtor pays to us within 30 days all monies owed, our fees and costs incidental thereto before the date of sale."

No other argument is more powerful than the notice to the debtor to pay. The debtor named in the notice is the first Defendant Company. It cannot be said that the debtor is the second Defendant personally because the second Defendant undertook to pay anyway. In the premises the Plaintiff could not purport to apply the monies to only offset the home loan. This is because the 3rd Defendant when he signed the term loan letter of agreement was aware and it is expressly stipulated that the term loan was to be secured by a registered legal mortgage of Uganda shillings 200,000,000/= in addition to an existing home loan of Uganda shillings 700,000,000/=. The Plaintiff also held a first ranking legal mortgage over the Porsche Cayenne registered in the names of Cellular Galore.

The difficult question therefore is how to apportion the sale monies between the two facilities. One facility at the time of the term loan had an outstanding amount of Uganda shillings 700,000,000/=. The subsequent facility was for Uganda shillings 200,000,000/= together with interest. The two facilities for purposes of the security were amalgamated and the term loan clearly indicates that the mortgaged property secured a loan of Uganda shillings 900,000,000/=.

The sum of Uganda shillings 200,000,000/= is 18% of the sum of Uganda shillings 900,000,000/=. If the two facilities are to be considered rateably, the amount of money realised from the sale should have been applied in proportion to both facilities. The home loan would be entitled to 82% out of the Uganda shillings 700 million realised from the property or thereabouts after subtracting the costs occasioned by the sale. Approximately and by way of example if

Uganda shillings 700,000,000/= is taken to be the net value due to the creditor, the term loan facility would have received by way of an offset Uganda shillings 126,000,000/=. The home loan facility would have received Uganda shillings 574,000,000/= (this illustration is without prejudice to the principles for offsetting the costs of the sale of the mortgaged property). From these premises I do not agree with the submissions of the 3rd Defendant's counsel that the term loan had been paid by the time of the demand on the 3rd Defendant. If that formulae is used there would still be outstanding some money on the term loan.

Without going into the question of whether there was any negligence on the part of the Plaintiff in the sale of the mortgaged property, the term loan facility would have been reduced by a significant amount. After all the Plaintiff had decided to liquidate the security to offset what was outstanding which was an amount of Uganda shillings 900,000,000/= or thereabouts. Before concluding the matter I would further consider the chattels mortgage.

Chattel mortgage

The chattels mortgage is registered over the log book for the Porsche Cayenne referred to above registered in the names of the first Defendant Company. In exhibit P37 the first Defendant executed a chattels mortgage dated 22nd of August 2007 which mortgage was signed by Steven Kavuma, the second Defendant.

It was subsequently discovered that the vehicle had been sold and transferred to one Ssajjabbi Peter by Cairo International Bank. These facts are in the testimony of PW3 Mrs Victoria Kawooya. She testified that the first Defendant was a customer in Cairo International Bank. In 2007 the first Defendant had a facility comprising of the loan of Uganda shillings 250,000,000/= which was secured by the same Porsche Cayenne. They had obtained an original copy of the logbook. The vehicle was sold by the first Defendant to Mr Peter Sajjabi. In May 2008 the second Defendant Mr Steven Kavuma requested the bank to release the logbook. That is when the purchaser came and deposited money on the bank account and the sale took place outside the bank. Secondly there was an insurance policy in favour of Cairo International Bank from Lion Assurance Company Limited for the period 19th of May 2007 up to 11th of January 2008 in respect of the insured. Cairo international bank had lodged a caveat on the logbook. The witness

had not met the third Defendant. She was not sure whether the third Defendant was part of the sale transaction.

The documents tendered in court exhibit P 58 prove that the first Defendant on 20 September 2008 applied for a loan facility of Uganda shillings 250,000,000/=. The application was made on behalf of the first Defendant by the second Defendant. The vehicle was valued at Uganda shillings 203,000,000/= according to the insurance policy in favour of the insured the first Defendant by Lion Assurance Company Ltd. On the 13th of May 2008 the second Defendant requested for release of the logbook according to exhibit P 62. On 26 August 2009 in exhibit P 63 Messieurs Web Advocates and Solicitors requested for release of the logbook. The letter was addressed to the managing director Cairo Bank (U) Ltd.

An investigative report of Uganda Revenue Authority was admitted as court Exhibit 1. In the report it was established that motor vehicle registration number UAJ 800 F was registered in the names of the first Defendant and within one month the owners of the vehicle processed a duplicate registration book. They used both the original and duplicate logbooks to process loans with Cairo International Bank and Stanbic **Banks** respectively. Placed caveats on the motor vehicle. Cairo International Bank released the caveat and the motor vehicle was transferred when it still had another caveat of Stanbic bank.

The chronology of events was that on 8 June 2007 the vehicle was registered in Uganda in the names of the first Defendant. On 11th of July 2007 which is a month later the first Defendant reported misplacement of the original logbook and applied for a duplicate which was issued on 25 July 2007. The Uganda Revenue Authority official who did the issuance of the logbook did not update the duplicate logbook in the system to cancel the original logbook reported missing. On 22 August 2007 after one month, Messieurs Stanbic bank used the duplicate logbook to place a caveat on the motor vehicle. On 29 November 2007 the motor vehicle file was placed under safe custody. The transaction was captured in the Safe Custody Electronic Data Systems of Uganda Revenue Authority. On 13 March 2008 Cairo International Bank placed a caveat on the same motor vehicle using the original logbook. There was no evidence that this was captured in the Safe Custody Electronic Data System. On 4 September 2009 Cairo International Bank applied to Uganda Revenue Authority to lift a caveat and the motor vehicle file was then released

from safe custody yet it still had the caveat of Stanbic bank. On 8 September 2009 the motor vehicle ownership was transferred when it still had the caveat of Stanbic bank in force. The report notes that the officer who processed the duplicate logbook acted negligently by failing to cancel the original logbook in the system and updated with the duplicate book. By October 2010, over three years, details of the duplicate logbook were not on the system. Secondly the officer responsible for safe custody acted negligently when she released the file for transfer when it still had another caveat of standard bank. She had been instructed to check if there was any other encumbrance which she did not. The officer who handled the transfer also acted negligently when she failed to study other documents on the file which included an application letter for duplicate logbook and caveat of Stanbic Bank. The three officers of Uganda Revenue Authority acted negligently according to the URA report. It was recommended that they are invited to the Disciplinary Committee to account for their negligence. According to the guidance documents Stanbic Bank charge had precedence over Cairo International Bank. Secondly no transfer should have been made when another caveat was still subsisting.

On the other hand details in exhibit P1 show that the loan transaction namely the term loan is dated 9th of April 2009. This was after the transactions using the alleged logbook. What is material is that there was a previous loan and chattel mortgage on the duplicate logbook before the term loan between the first defendant and the Plaintiff to which the 3rd Defendant is not privy. There is no evidence whatsoever that the third Defendant knew about the original logbook which had been reported missing. The evidence is that it is the second Defendant Mr Steven Kavuma who carried out the representations and questionable transactions.

The third Defendant was sued in his own individual capacity. Attempts were made according to the testimony of PW1 by the Plaintiff to realise the security in the chattel mortgage to offset the term loan. According to PW1 Mr Henry Katookye, in the year 2009 the first Defendant applied to the Plaintiff for a term loan of Uganda shillings 200 million as working capital. The Plaintiff extended the loan part of which was used to offset an overdraft of Uganda shillings 100,000,000/= which had accumulated interest. Consequently Uganda shillings 121,006,933/= was offset on 31 March 2009 and the balance was to be used by the first Defendant as working capital. The loan was repayable in 24 equal monthly instalments with an interest rate of 23.5% per annum. The loan was secured by a first registered mortgage over the first Defendants

logbook for the Porsche Cayenne 2004 model and personal guarantees for Uganda shillings 100,000,000/= each by the second and third Defendants. The loan was disbursed on the 6th of May 2009. There was default of the first Defendant to settle the monthly instalments and by 30th of September 2009 the term loan had accumulated arrears of Uganda shillings 217,083,391/=. On 10 December 2009 the Plaintiff demanded from the third Defendant payment for settlement of the loan which had accumulated to Uganda shillings 224,956,018/=.

As far as is relevant to the issue of the chattel mortgage, PW1 testified that in March 2010 the Plaintiff decided to engage auctioneers to impound the Porsche Cayenne from the first Defendant for the purpose of realising the chattel mortgage. He however learned from Cairo International Bank that it had already disposed of the vehicle. The vehicle was transferred without the Plaintiff's consent and without the knowledge of the Plaintiff. The Plaintiff is still in possession of the logbook and original transfer forms signed by the first Defendant (the second Defendant director) on 15 August 2007.

It was conceded by the third Defendant's Counsel that the Plaintiff did not sell the motor vehicle. The Plaintiff made enquiries of Uganda Revenue Authority and by 23rd of March 2012 was informed by Uganda Revenue Authority that investigations had been concluded. The Plaintiff never got the report. The report of Uganda Revenue Authority was subsequently availed to the court after an order was issued for the production of the investigation report and it was received in the court on 18 June 2014. By the time the Plaintiff filed this action on 18 February 2010, it was not aware of what had transpired.

That notwithstanding the third Defendant was not aware of the transaction. PW3 was unable to associate the third Defendant with the loan issued by Cairo International Bank. I have carefully considered the testimony of DW1 Mr John Kaggwa. It was the second Defendant who requested him to guarantee the loan as a Director/Secretary of the first Defendant. He confirmed that the term loan was secured by the Porsche Cayenne as well as a legal mortgage. He received the letter on 10 December 2009 requesting for payment of the loan under the guarantee and in made enquiries from the second Defendant about the whole transaction. He was unaware about the sale of the house and how the proceeds were applied as well as the sale of the Porsche Cayenne which he said was valued at about Uganda shillings 200,000,000/=.

It is my finding that the Plaintiff has not been exhausted its remedies of realising the security in the Porsche Cayenne. It is even apparent from the report of Uganda Revenue Authority that the Plaintiff had priority over Cairo International Bank in realising its money. The vehicle had been secretly disposed off from the perspective of having obtained another loan from Cairo International Bank. Secondly the process of transfer was fraudulent because the caveat of Stanbic bank was concealed when the vehicle was allegedly sold. Uganda Revenue Authority is however not a party to this suit. Having tried to obtain or realised its security in the Porsche Cayenne, the Plaintiff cannot turn round and claim that it would only realise its security from the Guarantors. Its options to recover money from the chattel mortgage remained open.

I have carefully considered the principles summarised above for the discharge of a Guarantor. Though the Plaintiff had a right to move against the Guarantor, it also had a corresponding duty to ensure that the securities were available for the Guarantor to recover any money. The Plaintiff opted to realise the security but omitted first of all to notify or even offset part of the sale money from the mortgaged house. The Plaintiff has even argued that the sale was to offset the home loan which had not been settled fully. Yet the mortgage was security for both the home loan and the term loan and was a total amalgamated security for a loan of 900,000,000/= Uganda shillings. It could not be apportioned only to offset the home loan as it was used as security by the same Mortgagee. The priority of registration cannot apply. The Plaintiff ought to have known the value of the mortgaged property and whether it could act as security for the additional term loan of Uganda shillings 200,000,000/=. The Plaintiff charged the property as security for a loan of Uganda shillings 900,000,000/= without specifying any rank or priority. I have already held that because two loans and borrowers were involved, the sale proceeds of the property had to be applied in proportion to the loan burden with the term loan sharing 18% of the process and the home loan getting 82% of the sale proceeds. The Plaintiff acted in the circumstances to the detriment of the 3rd Defendant by not applying the proceeds of sale to partly offset the term loan.

As far as the chattel mortgage is concerned, it did not exhaust its remedies as a first ranking Mortgagee to recover its security. The report of Revenue Authority demonstrates that the caveat of the Plaintiff was wrongfully or negligently not taken into account in the sale of the chattel the subject matter of the chattel mortgage in issue. Failure not to take further action so as to realise its first ranking rights in the chattel mortgage was to the detriment of the 3rd Defendant.

In the circumstances of this case, I agree with and will apply the equitable principles echoed in the privy council decision in the case of **China and South Sea Bank Ltd v Tan [1989] 3 All ER 839**, and particularly the summary of principles from the quoted case of Watts v Shuttleworth (1860) 5 H & N 235, 157 ER 1171 that if the person guaranteed (the creditor) does anything injurious to the surety or inconsistent with his rights or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the surety will be discharged in equity.

In this case there is omission to pursue remedies under the Chattel Mortgage as well as omission to consider the mortgaged property as a partial offset of the guaranteed loan. In the premises the 3rd Defendant Mr. John Kizito Kaggwa is discharged as a Guarantor from liability for the term loan. The discharge is from liability in his personal capacity. Let the Plaintiff pursue whatever remedies it has under the chattel mortgage against the people who could have caused loss to it as well as against the other parties to the suit.

The 3rd Defendant having been discharged it is unnecessary to consider the rest of the issues in light of the fact that the 1st and second Defendant have not participated in the proceedings and there is overwhelming evidence that the first Defendant obtained the loan and defaulted in the payment of the loan. Secondly the chattel mortgage vehicle was sold with the knowledge and participation of the second Defendant Mr. Steven Kavuma.

Remedies:

As far as the Plaintiffs remedies are concerned, the Plaintiff's Counsel prayed that judgment is entered for the Plaintiff against the Defendants as prayed in the plaint. He prayed that Uganda shillings 232,643,030/= together with interest at 23.5% per should be awarded against the Defendants from 11th of February 2010 until payment in full and for costs of the suits to be provided for.

Furthermore the Plaintiff’s Counsel prayed that the third Defendant's counterclaim ought to be dismissed with costs to the Plaintiff.

In light of the discharge of the 3rd Defendant and the proof by the Plaintiff through the testimony of PW1, PW2 and PW3 of the liability of the 1st and second Defendant the Plaintiff is hereby

awarded Uganda shillings 232,643,030/= against the first and second Defendants jointly and severally.

Secondly the said amount carries interest at 23.5% per annum from the 11th of February 2010 till the date of judgment.

The said sum shall carry an additional interest at 19% per annum from the date of judgment till payment in full.

Costs are awarded for the Plaintiff as against the first and second Defendants.

The suit against the 3rd Defendant stands dismissed with costs.

Whether the counterclaim of the 3rd Defendant against the Plaintiff should be allowed?

The counterclaim of the 3rd Defendant is based on the premises that the suit against the Guarantors was unjust because of the conduct of the Plaintiff in the sale of the mortgaged property and also in the alleged sale of the Porsche Cayenne. The 3rd Defendant subsequently admitted that the Plaintiff was not responsible for the sale of the Porsche Cayenne. To the extent that he is entitled to be discharged from his liability as a Guarantor is concerned, the counterclaim succeeds in part. To the extent of the allegations of fraud, having being discharged of his obligations under the guarantee, does the 3rd Defendant have a right to proceed against the Plaintiff for damages?

As far as misrepresentations are concerned, I have received the evidence and I have not established any misrepresentation by the plaintiff to the 3rd Defendant. The plaintiff indeed executed a chattel mortgage but the first defendant and its director the second defendant used two log books to obtain another loan.

As far as the allegations of fraud are concerned, it would be erroneous to proceed against the reputation of 3rd parties who are not part of the proceedings. The Applicant alleges fraud against Paul Muhimbura and Dr. Narcis Kabatereine but none of them were joined to the suit. In the case of **Kampala Bottlers Ltd v Damanico (U) Ltd [1990–1994] 1 EA 141 (SCU)** Platt JSC at page 148 The Supreme Court was emphatic that it is unfair to stain the reputation of parties not before the court without giving them a hearing. Platt JSC said:

> “Fraud is very serious allegation to make and it is as always wise to abide by the Civil Procedure Rules, Order VI, rule 2 and plead fraud properly giving particulars of the fraud alleged. ... he should have brought the Land Office officials and Town Council officials before the Court. It is important that before someone’s reputation is besmirched, he has had an opportunity to defend himself. The officials here might have explained the confusion in their action. Even incompetence might not be fraudulent.”

In the absence of the persons alleged to have committed the offence, I decline to consider the lengthy submissions which involved in many respects the said third parties and the evidence led for and against the allegations.

It is my considered ruling that the 3rd Defendant cannot be heard in defence of the 1st and 2nd Defendants who opted not to appear in these proceedings. Having been discharged, the only question is whether he should be awarded general damages. This is because the third Defendant's counterclaim succeeded on the basis of the above judgment on grounds of equity. Further grounds for discharge of the Guarantor from the obligations under the guarantee on the grounds of negligence or fraud are unnecessary.

The third Defendant's Counsel prayed for general damages in the sum of Uganda shillings 200,000,000/= because the third Defendant is an advocate of this court and the managing partner of Messieurs Kaggwa and Kaggwa advocates. He submitted that the third Defendant was unfairly brought to this court for recovery of a debt which had long since been recovered by the Plaintiff. That the third Defendant religiously attended court for all the sessions during the five-year period and that this was the case was pending. He should be given as to how the dispute resolved. Since advocates bill according to time, the court should take judicial notice of this fact. The third Defendant has lost a great deal of billable time at his law firm to attend to this claim. In aggravation, the Plaintiff has exhibited tremendous arrogance, high handedness and fraud. The Plaintiff’s issuance of the demand to the third Defendant concealed fraud and misrepresentation and it occasioned mental torture to the third Defendant. The third Defendant had delivered the threat of being a sum of over Uganda shillings 400,000,000/= with interest and yet the claim is fraudulent another source of stress to the third Defendant. He relied on the case of Alice Okiror

versus Global Capital Save 2004 and another HCCS 149 of 2010 were general damages were granted where a creditor had long been paid but was unlawfully demanding for more money.

I have carefully considered the submissions of the third Defendant's Counsel. I have also carefully perused the Plaintiffs submissions in respect to the counterclaim and a defence to the counterclaim on the grounds of fraud and negligence. I have also read through submissions in rejoinder of the Plaintiff's Counsel.

The submissions and the authorities have not changed my conclusion in the above judgment which to my mind resolves the dispute conclusively.

My conclusion is that the third Defendant as a Guarantor had an obligation to ensure that the first Defendant pays off the debt. This debt was not paid. Upon the failure of the first Defendant to pay off the debt, the Plaintiff was entitled to pursue its remedies which included sale of the mortgaged property. The Plaintiff is faulted for the manner in which it conducted the pursuit of its remedies which was prejudicial to the 3rd Defendant.

The property was sold to the highest available bidder and the third Defendant could not prove that there could have been a higher bidder in the circumstances. The alleged highest bidder offered Uganda shillings 1,000,000/= more than the purchaser of the property. However because the 3rd Defendant proved grounds for discharge above, the suit against him is dismissed on the merits as held above.

As far as this suit against the third Defendant is concerned, he is not entitled to general damages because the suit against the third Defendant is not unlawful. Even though the suit delayed for a period of five years, delays are compensated by an award of costs.

In the premises the order for the discharge of the third Defendant as a Guarantor succeeds with costs.

The claim for general damages against the Plaintiff stands dismissed with no order as to costs.

Judgment delivered in open court the 28th day of August 2015.

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

David Kaggwa for the 3rd defendant

Carol Luwaga holding brief for John Fisher Kanyemibwa for the plaintiff

John Kaggwa 3rd Defendant in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

28th August 2015