

THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO 228 OF 2012

1. HOUSING FINANCE BANK LTD}

2. LIBERTY LIFE ASSURANCE UGANDA LTD}.....RESPONDENTS

VS

IGEME NATHAN NABETA}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The first Plaintiff commenced this action against the Defendant for recovery of Uganda shillings 209,072,636/= being money due and owing under a credit facility agreement. The Plaintiff operated a swift loan scheme whose beneficiaries are Members of the Parliament of the Republic of Uganda. It is not denied that the Defendant applied for a loan of Uganda shillings 230,000,000/= under the scheme. The terms of payment included deduction and remittance by Parliament from the Defendant's salary and monthly instalments of Uganda shillings 6,518,265/= was agreed upon for the settlement of the principal and interest. However on 14 February 2012 the Plaintiff received notification from Parliament that Parliament was no longer obliged to remit payments on behalf of the Defendant because he had lost his Parliamentary seat pursuant to **Court of Appeal Election Petition Appeal No. 06/2011 between Paul Mwiru versus Electoral Commission and Igeme Nathan Nabeta and the National Council for Higher Education.**

The Defendant's loss of Parliamentary seat was construed as an event of default entitling the Plaintiff to indemnity which the Plaintiff claimed from the insurer for a sum of Uganda shillings 209,072,636/= in accordance with the policy. The Plaintiff was discharged by a discharge

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voucher and the right of recovery from the Defendant of the outstanding amount of the facility was assumed by the insurer.

The Defendant denied liability on the ground that the Plaintiff had received all the sums due to it. The Plaintiff received these sums from the insurance company. Furthermore by the claimant discharge voucher dated 13th of March 2012 the Plaintiff assigned all its rights to the insurance company. In the premises the Defendant seeks to have the suit against him dismissed with costs.

Subsequently the second Plaintiff was added as a co Plaintiff to the suit. The material facts are sufficiently covered in the written address of Counsels.

The Plaintiffs are represented by Counsel Cynthia Harriet Musoke of Messrs A.F. Mpanga Advocates while the Defendant is represented by Isaac Bakayana of Messrs Arcadia Advocates.

The Plaintiff's case is that the first Plaintiff is a licensed financial institution while the second Plaintiff is a licensed private company carrying on insurance business in Uganda. The first Plaintiff obtained insurance cover under police number 10/11/59 from the second Plaintiff in respect of loss of employment by the event of death, accident, sickness or redundancy/retrenchment/job loss. The policy named the first Plaintiff as the assured. The first Plaintiff obtained cover in respect of various loans taken out by members of Parliament. The commencement date of the policy was the 1st of May 2011.

On the 25th of May 2011 the Defendant did apply for and was granted a loan facility of Uganda shillings 230,000,000/=. The application for the loan was followed by a facility letter dated 25th of May 2011 and the facility letter contained the terms of the defence of borrowing. Among the terms of the Defendant undertook to pay a monthly instalment of Uganda shillings 6,518,265/= on the first day of each month with effect from 25 June 2011. The Defendant was required to provide security in the form of a letter of undertaking from the borrower's employer; and assignment of terminal benefits with the employer to the first Plaintiff; a lien and rights of setoff over the Defendant's account; life assurance cover to be taken out in respect of the Defendant. Further the securities had to conform to the form agreed to by the first Plaintiff. The facility was disbursed on account number 011440361100 which is the Defendant's loan account with the first Plaintiff. On 14 February 2012 the first Plaintiff received a letter from Parliament notifying it

that Parliament was no longer obliged to remit any monies on behalf of the Defendant because the Defendant had lost his Parliamentary seat pursuant to **Court of Appeal Election Petition Appeal No. 06/2011 between Paul Mwiru versus Electoral Commission and Igeme Nathan Nabeta and the National Council for Higher Education**. The first Plaintiff treated the loss of Parliamentary seat/loss of job as an event of default entitling him to make a claim for indemnification by the second Plaintiff.

The first Plaintiff claimed the sum of **Uganda shillings 209,072,636/=** in accordance with the policy from the second Plaintiff who paid the first Plaintiff the said sum which includes the principal and interest on the loan taken by the Plaintiff in full discharge of the facility. A discharge voucher dated 13th of March 2012 was executed between the first and second Plaintiffs. By the discharge voucher, the first Plaintiff assigned its rights to recover the amount owed by the Defendant under the facility to the second Plaintiff. On 24 February 2012 the second Plaintiff through its advocates demanded from the Defendant an amount of Uganda shillings 209,072,636/=, being the outstanding debt in respect of the loan from the first Plaintiff. This debt is still owed by the Defendant to the second Plaintiff.

The Plaintiff called PW1 Genevieve Tuhirirwe, the Head of Risk of the first Plaintiff and the head of personal banking Department at the time of the loan application by the Defendant. The Plaintiff also relies on the evidence of Harriet Masembe PW2, an official employed by the second Plaintiff.

1. Whether the first Plaintiff can take out a loan protection insurance policy and if so, whether the second Plaintiff is entitled to recover from the Defendant the monies paid to the first Plaintiff in respect of the first Plaintiffs claim arising out of the Defendant's default to repay his loan?
2. What remedies are available to the parties?

The second Plaintiff's claim is brought under the insurance law and particularly by reason of subrogation having indemnified the first Plaintiff for the loss occasioned by the Defendant's failure or neglect to repay his monthly instalments under the terms of the loan. The Plaintiff's Counsel broke down the issue into sub issues which included whether a creditor can insure a debt? He submitted that the insurance cover was taken by the first Plaintiff in respect of any loss

resulting from the non-payment of the Defendant's loan. The Defendant does not dispute the existence of the insurance cover in respect of the loss but claims that the insurance cover protected him and not the first Plaintiff. The Plaintiff's Counsel maintains that this is a matter of insurance law subject to the interpretation of the contractual document. The Plaintiff's Counsel maintains that under debt insurance, the general legal principle is that wherever a debt exists or is contemplated, the creditor may insure his due payment. This principle was considered in the case of **Seaton versus Burnand [1900] AC 135, 141** where one party in anticipation of lending money to another made it a condition of lending that the loan could not be obtained without an insurance policy in place to cover any resultant loss in the event the protective borrower defaulted. Some of the borrowers under the scheme such as the Defendant lost the Parliamentary seats causing the first Plaintiff to claim indemnity from the second Plaintiff.

The Plaintiff's Counsel submitted that the court should find on this issue affirmatively and find that the Plaintiff could in fact take out loan protection insurance with the second Plaintiff and that the loan was taken out for and on behalf of the first Plaintiff as beneficiary for any resultant loss.

The Plaintiff's Counsel further submitted on the right of subrogation.

Policies insuring against non-payment of a debt are contracts of indemnity and if the debt is not paid on the date when it falls due, the insurer will, on payment of the debt, be subrogated to the rights of the assured against the debtor (see **Meacock versus Bryant and Company (1942) 59 T.L.R 51**). The insured does not have to demand from the debtor payment of the debt before he or she or it can place the claim with the insurer. If the date on which the debtor was supposed to make the payment falls due and the borrower defaults in payment, the insured has a right to make a claim with the insurer. Furthermore the principle of subrogation was considered by the Supreme Court of Uganda in the Case of **Suffish International Food Processors Ltd Versus Egypt Air Corporation SCCA No. 15 of 2001**. In that decision subrogation was defined as: "the right of an insurer who has paid for any loss to receive the benefit of all the rights and remedies for the insured against the third parties which, if satisfied, extinguished or diminish the ultimate loss sustained. The insurer who has paid for the loss may exercise the rights of the

insured to recover from the third-party or if the insured has already exercised that right, the insurer would be entitled to payment from him.”

The Plaintiff's Counsel submitted that from the time the second Plaintiff indemnified the first Plaintiff, the second Plaintiff became entitled to claim from the Defendant the amount paid to the first Plaintiff as compensation for the loss it sustained by paying the first Plaintiff the outstanding amount on the loan facility in question. The basis of the doctrine of subrogation was further discussed by Brett LJ in the case of **Castellan versus Preston [1881 – 85] ALL ER 493 at 495**. The basis is that it is a contract of indemnity and indemnity only. It means that the assured, in case of the loss against which the policy has been made, shall be fully indemnified but shall never be more than fully indemnified. In the premises the Defendant's Counsel submitted that upon payment of the Defendant alone, the first Plaintiff would not make a demand from the Defendant to pay the balance of the loan. The right of the first Plaintiff to demand for the balance of the loan had been assumed by the second Plaintiff upon the execution of the discharge voucher.

The Plaintiff's Counsel further submitted that the Defendant's case is that having remitted premium on the insurance policy to the insurance company; the Plaintiff's are precluded from making any further claims against the Defendant. The Defendant's case is that the first Plaintiff took out the insurance policy for and on behalf of the Defendant. It is however the Plaintiff's assertion that the payment of the premium by the Defendant as claimed did not waive the second Plaintiff's right to indemnification from the Defendant. Under debt insurance, it is not uncommon for a debtor to pay the premium according to Warrington J in **Shaw versus Royce Ltd [1911] 1 Ch. 138, 148** where it was held that where a premium is payable by the debtor, his failure to pay the premium does not put an end to the policy.

What public considerations applied?

The Plaintiff's Counsel submitted that the Defendant's contention in the written defence is that the Plaintiff is barred by the doctrine of estoppels from making any further claim in respect of the loan monies from the Defendant which have since been paid. The Plaintiff's Counsel relies on **Birds Modern Insurance Law, John Birds and Norma J Bird, 5th Edition, at page 300 - 301** where it is written that a wrongdoing Defendant cannot claim in defence sought in reality, the

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claimant is actually an insurer and that the nominal claimant has already been fully compensated for the Defendant's wrong. The Defendant had sufficient notice that he had lost his Parliamentary seat and that by reason of the judgement dated 16th of December 2011, Parliament was no longer obliged to make any remittances to the first Plaintiff. Despite that knowledge, the Defendant did not make alternative arrangements to make monthly repayments. It is also not stated in his defence that the Defendant was without means or incapable of paying his debts, except a claim that the first Plaintiff had already been fully compensated by the second Plaintiff. In the premises Counsel submitted that it is no defence for the Defendant to aver that the true claimant has already been fully compensated and therefore having been compensated, there exists no further claim in respect of the borrowed money from the Defendant (See **Suffish International Food Processors Ltd versus Egypt Air Corporation** (supra)).

In the premises the Plaintiff's Counsel submits that the court should find in favour of the second Plaintiff on the second issue. Secondly as a former member of Parliament, the Defendant should leave an exemplary life by meeting his debt obligations. Needless to say, the Defendant applied without coercion for the facility from the first Plaintiff and the facility was availed to him for his personal development on condition that he would pay the principal and interest over 48 calendar months by making monthly repayment of Uganda shillings 6,518,265/=. To this date the facility has not been fully paid by the Defendant. In the premises judgement ought to be entered against the Defendant for the repayment of Uganda shillings 209,072,636/=:, interest at the rate of 16% per annum from the date of default until payment in full, general damages for breach of contract and costs of the suit.

In reply the Defendant's Counsel agreed with the Plaintiff's summary of facts. The only additional facts which is not controversial is that the Defendant further paid premium amounting to 1.65% of the loan amount. The Defendant subsequently lost his Parliamentary seat and the second Plaintiff paid Uganda shillings 230,000,000/= to the first Plaintiff. The second Plaintiff then proceeded to make the same claim against the Defendant.

The Defendant's Counsel disagrees with the issue framed by the Plaintiff's Counsel. The issues at the scheduling were as follows:

- a. Whether the Defendant is indebted to the second Plaintiff to the tune of Uganda shillings 230,000,000/=as claimed or at all?
- b. If so what are the remedies available?

The Defendant's Counsel proceeded to submit on the first issue as to whether the Defendant is indebted to the second Plaintiff to the tune of Uganda shillings 230,000,000/=. The Defendant's Counsel submitted that the issue is answered in the negative because the Defendant is not indebted to the Plaintiffs. This is because by contract the first Plaintiff agreed with the Defendant that one of the securities for the facility was the insurance cover. It was agreed that a life insurance cover would be taken out in respect of the borrower according to clause 10 of the letter of offer/loan agreement dated 25th of May 2011. The Plaintiff took out an insurance cover in respect of the borrower whose premium was fully paid for by the Defendant, which fact is admitted by the parties in the joint scheduling memorandum. The Defendant's Counsel relies on the dictionary definition in Black's Law Dictionary for the word "security" as the collateral given or pledged to guarantee the fulfilment of an obligation, the assurance that a creditor will be repaid. The facts are that the first Plaintiff agreed with the Defendant that the insurance policy was the collateral pledged to guarantee that the creditor will be repaid. The Defendant relies on the claimant discharge voucher at page 34 of the trial bundle as proof that the first Plaintiff was paid. He submitted that parties are bound by the terms of the contracts that they execute according to the case of **Behange versus School Outfitters (U) Ltd (2000) 1 EA 20**. As such the first Plaintiff has no claim whatsoever against the Defendant and no basis on which to assign its rights to the second Plaintiff.

The premium to validate the insurance policy was paid by the Defendant, such he was the insured under the insurance policy. It is further admitted that the Defendant paid the premium which was channelled through the first Plaintiff and received by the second Plaintiff. In the loan protection insurance policy paragraph 2 of the validity of the policy was premised on the payment of the premium. Clause 9 of the policy makes provision for determination of the policy on the ground of non-payment of premium and no benefit would accrue there from. In the schedule 6 of the loan policy, the second Defendant on its own letterhead communicated in clause 3.3 that the borrower shall be required to execute the loan agreement with the bank which shall constitute a valid contract. Clause 3.4 directs the first Plaintiff to charge the Defendant a

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loan insurance fee of 1.65%, payment on disability, death and loss of employment. Consequently the second Plaintiff knew that the premium was from the Defendant. **Hardy** defined premium as the consideration which insurers received from the assured in exchange for the undertaking to pay the sum assured in the event insured against. In the premises the only person who can pay a premium and the policy is the insured and in this case it is the Defendant.

The Defendant's Counsel further submitted that the basis for which the second Plaintiff issued the policy was dependant on consideration was paid by the Defendant. He goes on to define consideration and submitted that from the facts demonstrated it is admitted by the second Plaintiff that consideration for the policy was paid for by the Defendant. In those circumstances, it is difficult to appreciate how the Plaintiff can classify the Defendant as a third party and seek to share benefits arising from his payment of the consideration/premium and also repay the loan for which he supplied security by way of a life insurance policy.

Counsel contends that the Plaintiff wrongly relied on the decision of **Seaton versus Barnard [1900] A.C1 35, at 141** for the argument that a creditor can generally take out a policy to insure their due payment. The Plaintiff's have certainly misapplied the principle and also failed to apply it to the facts before the court. In the circumstances of this case the first Plaintiff and the Defendant agreed as part of the securities for the security, an insurance policy would be taken out in respect of the borrower. Furthermore, it is an admitted fact that the policy was paid for by the Defendant. Thirdly in the Seaton's case, the appellant advanced £15,000 to Barmwell. The lending was guaranteed by Seager Hunt. The respondent, an underwriter then guaranteed the solvency of Seager Hunt. The case does not deal with the Plaintiff's proposition that a creditor can insure a debt. Far from that proposition the insurance policy in that case was to guarantee the solvency of the guarantor. Consequently the authority is inapplicable to the case before the court.

On the principle of subrogation, the Defendants Counsel contends that it does not apply to the facts before the court. The Plaintiffs rightly referred to **Suffish International Food Processors** (supra) on the meaning of subrogation but completely made no effort to apply it to the facts before the court. By the contract the first Plaintiff and Defendant agreed that the policy was part of the securities for the borrowing. Furthermore, the Defendant availed the underlying consideration/premium to validate the policy. The second Plaintiff knew and indeed dictated to

the first Plaintiff to collect the premium from the Defendant. Lastly the first Plaintiff had no right at all to make any claim against the Defendant on the basis of the contract making the provision for the security for the borrowing. The Defendant is not and cannot be classified as a third-party and as such the principle of subrogation cannot and does not apply to the facts of this case.

The Defendant's Counsel further contends that the Plaintiff misapplied the authority of **Meacock and Another vs. Bryant and Co** in support of the assertion that subrogation applied to the facts of this case. In that case the Defendants claimed and received payment of the insured sum from the insurance company which was the Plaintiff. However, when part of the sum was later paid to the Defendant, it refused to remit the same to the Plaintiff. From the facts alone, the authority does not apply to the facts of this case. No claim was ever made by the first Plaintiff against the Defendant. The Defendant in this case has further never received any monies from any party to the suit at all. On the principles of law, the authority is still not applicable. It was held in that case that the controlling principle in insurance is indemnity, except for life assurance, accident and sickness policies. Clearly the policy in issue in the suit is a life assurance i.e. payment on the same policy was upon satisfactory proof of death, sickness, injury or redundancy/job loss. By the Plaintiffs own authority, not only is the authority in applicable to the facts before the court, it is also inapplicable on the principle of subrogation.

The Defendant's Counsel also sought to distinguish the authority of **Suffish International Food Processors and Another versus Egypt Air Corporation SCCA Number 15 of 2001**. In that case the first appellant entered into a contract with the respondent to air freight a consignment of chilled fresh fish to Brussels from Uganda. On arrival, the consignment was found to be unfit for its purpose and was destroyed. The second respondent indemnified the first appellant and the suit was commenced by the first appellant against the respondent to recover the monies paid on the insurance policy. The Defendant's Counsel contends that the **Suffish case** is still distinguishable on the ground that in this case the Defendant is the principal in all dealings between the insurance company and the bank. Premium was paid by the Defendant and 6th schedule of the insurance policy provides and the insurance company knew that the premium which validated the policy was paid by the Defendant. He contends that it is illogical to propose that the Defendant was a third-party to this arrangement. The Defendant was the principal in the

arrangement on whose behalf the bank acted. In those circumstances the principle of subrogation is inapplicable.

The Suffish case further suggests that subrogation would apply where the insured would be entitled to recover from the third-party. The Defendant submits that this will not apply as the bank had taken out an insurance policy in respect of the borrower under clause 10 of the agreement and further debited the Defendant's account with the premium on the policy and could not proceed against the Defendant and did not have any claim against him. Furthermore the authority would not apply on the basis that the Supreme Court held that a contract of insurance by which an insurer agrees to pay the sums of money to the insurance on the happening of a certain event regardless of the actual loss suffered by the insured has no basis for the operation of the doctrine of subrogation. This distinguishes the Plaintiff's claim. In the case before the court, the second Plaintiff agreed to pay monies under the policy in the event of death, sickness, injury or redundancy/job loss. When there was loss of employment on 13 March 2012, the second Plaintiff paid the sums to the first Plaintiff without demonstrating that the Defendant was incapable of paying the sums and without showing any loss suffered. In those circumstances the authority is inapplicable.

As far as the authority of **Shaw vs. Royce Ltd [1911] 1 Ch 138** for the proposition that payment by the Defendant of the premium did not waive the second Plaintiff's right to indemnity, the facts are different from the case before the court. This is because in that case it was the company that issued the debentures which was responsible for paying the premium to the building society. In the case before the court it was the Defendant in the knowledge and participation of the Plaintiffs who was to pay the premium. The holding that where premium is payable by the debtor and failure to pay the premium does not put an end to the policy was quoted out of context. In that case the company took out debentures secured by a guarantee of the society. The guarantor agreed that it would pay premiums to the society. After the first transaction was completed, the Plaintiff took out the debentures on the strength of an undertaking by the society that it would pay him interest and principal if the company defaulted on its premiums to that society. In the case before the court, the transaction cannot be split. The Defendant agreed to a loan with the first Plaintiff, who agreed as security to an insurance policy, whose terms were dictated by the second Plaintiff. The entire transaction in the case before the court was linked. The document

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that communicated the terms of the Defendant's loan agreement with the first Plaintiff was communicated by the second Plaintiff.

The Defendant's Counsel further submitted that the Defendant is not a wrongdoer within the meaning of insurance law. It was further factually incorrect to assert as the Plaintiff's that the Defendant has claimed to be the insured. The Plaintiffs have not referred the court to any paragraph in the Defendant's defence that makes that assertion. Evidence further shows that the Defendant never defaulted on a single repayment term. The Defendant's account statement confirms that this assertion. The Defendant could not make any payments to the first Plaintiff because the event for which the second Plaintiff had taken money from him had occurred and this was a simple and straightforward matter. The second Plaintiff had to make good on the premium it had been receiving.

The Defendant further submitted that the first Plaintiff was his agent and could not and did not pay the consideration to the second Plaintiff. Counsel submitted that the first Plaintiff as an agent had a fiduciary relationship with the principal. The parties agreed that one of the securities was a life insurance cover to be taken in respect of the borrower. They did not require the borrower to take out the policy himself. It was under this clause that the first Plaintiff took out an insurance policy in respect of the borrower by requiring him to pay the premium which he did.

The second Plaintiff knowingly took a premium from the Defendant, the first Plaintiff and is estopped in law from making any demand from the Defendant for the payment of any loan amounts which had been duly settled. The Defendants Counsel relies on section 114 of the Evidence Act for the doctrine of estoppels. He submitted that under clause 10 of the letter of offer, an insurance policy was to be taken out in respect of the borrower and the premium was payable and indeed paid by the Defendant. The first Plaintiff represented to the Defendant that in the event of the loss of his seat, insurance would pay in an attempt to justify the Defendant's payment of premium. The second Plaintiff knew of the Defendant and both parties made a representation to the Defendant that they would pay if he paid the premium for the policy. Notwithstanding they have not turned around having taken the benefit of the premium and demanding for settlement of the loan amount. In the premises they are barred by the doctrine of estoppels from making any further demand against the Defendant.

Counsel further submitted that the second Plaintiff should not be permitted to unjustly enrich itself. The basis of the doctrine of subrogation is the prevention of parties from unjustly enriching themselves according to **Nipun Norattam vs. Crane Bank Ltd Civil Appeal No. 75 of 2006 of the Court of Appeal of Uganda**. The second Plaintiff not only continue holding onto the Defendants premium but also wants to compel him to pay the borrowed sums upon the occurrence of the event that the Defendant paid his premium for.

Alternatively the Defendant's Counsel submitted that if the court were to find that the Defendant is indebted to the Plaintiffs, then it would be the Defendant's prayer that the court finds that the indebtedness is much less than that claimed. According to the account statement, it is not indicated anywhere that the Defendant was ever in default of any instalment to the first Plaintiff. On 21 March 2012 there was a credit of Uganda shillings 196,477,982/=. By 21st of June 2012 the Defendants account had a debit of only Uganda shillings 2,778,530/=. During the trial the Plaintiffs applied to the court for and were granted leave to use an account statement different from the statement which includes the above facts but they never adduced the said statement. In the premises based on the first Plaintiff's own document, the indebtedness of the Defendant does not exceed Uganda shillings 2,770,530/=. In the premises the Defendants Counsel prays that the suit is dismissed with costs.

In rejoinder the Plaintiff's Counsel submitted that the issues which were agreed upon in the joint scheduling memorandum are: whether the doctrine of subrogation is applicable? Secondly whether the Plaintiff is entitled to indemnity from the Defendant? If so, to what extent? Furthermore whether the Plaintiff has a claim against the Defendant as regards the outstanding loan amount? Further whether the settlement of the outstanding loan amount by Liberty Life Assurance Company Ltd extinguished the Defendant's liability? Lastly what other remedies are available to the parties.

The court guided the parties on the issues and advised that the trial should be conducted with a view to interpreting the contract of insurance and the underlying transaction. To that end, it was thought that the only issue for consideration would be two namely whether the Defendant was discharged of his obligations to the bank upon payment of **Uganda shillings 209,072,626/=** to Housing Finance Company Ltd and secondly what remedies are available according to the

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proceedings of 17 March 2014. The first issue submitted upon by the Defendant as to whether the Defendant is indebted to the second Plaintiff to Uganda shillings 230,000,000/= defers from the issue according to the court record. It also represents that the second Plaintiffs claim is for Uganda shillings 230,000,000/= which is not true. The claim in the suit is for the amount of compensation paid to the first Plaintiff and indicated in the discharge voucher dated 13th of March 2012.

The Plaintiff's Counsel therefore submitted on a rephrased issue on whether the Defendant was discharged of his obligation to pay the loan after the second Plaintiff indemnified the first Plaintiff. In answering the issue several sub issues were raised which were whether a creditor can insure a debt; whether subrogation is applicable; who has the duty to pay premium; and whether there was any public policy consideration to be taken into account.

In rejoinder he submitted that the insurance policy was a security for the borrowing. The Defendant rightly relied on black's law dictionary for the definition of security as collateral given or pledged to guarantee the fulfilment of an obligation. In the premises the Lion Assurance policy was a guarantee against any loss to the first Plaintiff as a result of non-payment by any member included in the policy.

To this submission the first Plaintiff was paid by the second Plaintiff for and on behalf of the Defendant who is the insured, and that the Plaintiff has no claim or basis upon which to assign its rights to the second Plaintiff, the policy was a security guaranteeing the repayment of the loan. The Defendant's Counsel did not mention the fact that the facility letter dated 25th of May 2011 stipulates that all securities shall be in a form agreed by the Housing Finance Bank Ltd. The format of the policy was devised by the first Plaintiff and the first Plaintiff is named as the assured and therefore the beneficiary of the loss resulting from the loss of seat/employment by the Defendant. Evidence established that the policy was a Lion Assurance Policy included in the trial bundle. Under the policy the beneficiary is the first Plaintiff and having been paid by the second Plaintiff, the second Plaintiff by reason of the discharge voucher is entitled to take on the rights and obligations of the first Plaintiff to claim the payment of the balance of the debt/loan from the Defendant. The Defendant's obligation to repay the loan is therefore not extinguished by the second Plaintiff's payment to the first Plaintiff.

To the submission that the Defendant is the assured/insured, the Defendant relies on schedule 2 which defines members of the policy and in the definition stipulates that a member is the customer of the assured who has completed an application form and has been granted a personal loan by the assured and continues to comply with the terms and conditions of such a loan facility. For as long as the Defendant's application for the loan was granted by the first Plaintiff and the Defendant complied with the loan facility, he continued to be a member under the policy. However the Defendant's membership under the policy was short lived as he defaulted on repayment of the instalments which were supposed to be monthly over a 48 months period. The Defendant default disqualified him from being a member in the policy. The only assured the claim upon that default from the second Plaintiff. The first Plaintiff upon indemnification assigned its rights to the second Plaintiff to claim for the unpaid balance of the loan facility.

To the submission on the phrase "in respect of the borrower" used on the loan facility to mean that the first Plaintiff was obliged to pay the policy for the benefit of the Defendant, the Defendant's Counsel misconstrued the meaning of the phrase. It simply meant concerning, regarding or about or in the matter of. The first Plaintiff took out a policy in which it was the assured or named beneficiary in the matter of the Defendant's borrowing. Payment of the premium alone would not make the Defendant the beneficiary of the policy without him complying with other general terms and conditions incorporated in the sixth schedule of the policy. For instance clause 3.4.7 which stipulated a maximum loan repayment period of 50 months.

On the applicability of the principle of subrogation, the Plaintiff's Counsel submitted that policies insuring against non-payment of a debt are contracts of indemnity. If the debt is not paid on the date when it falls due, the insurers would be subrogated to the assured the rights against the debtor.

Insurance can be taken out at any point of the transaction either in anticipation of the lending or when the lending is done for instance when there has been an application for a loan and the bank or creditor has granted the loan. The insurance policy between the two Plaintiffs was concluded at the onset before some members of Parliament actually applied or were granted personal loans. Whereas the insurance policy commenced on the 1st of May 2011, the loan facility is dated 25th

of May 2011 meaning that the policy was taken out in anticipation of the borrowing by the Defendant.

Because the loan insurance policy is similarly a contract of indemnity, it entitles an insurer to claim compensation from the person from whom the insured was entitled to recover any damages or repayment. The principle of subrogation applies only to the case because the second Plaintiff as an insurer is entitled to receive all the benefits of all the rights and remedies of the first Plaintiff against the Defendant.

On the authority of **Suffish** (supra) that the contract by which an insurer agrees to pay a certain sum of money to the insured on the happening of something event regardless of actual loss suffered by the insured has no basis for the operation of the doctrine of subrogation, the Defendant's case is that the second Plaintiff agreed to pay monies under the policy in the event of loss of job. Parliament notified the first Plaintiff of the loss of employment without demonstrating that the Defendant was incapable of paying sums or without showing any loss suffered. The point is that the Defendant defaulted on payments in November 2011 and the payment of the compensation by the second Plaintiff was made in March 2012 without the Defendant having any alternative arrangement to pay the instalments that were outstanding at the time of the second Plaintiff making the payment. It cannot be the case that the Defendant was not aware that Parliament had ceased remitting money on his behalf.

The Defendant misapplied both the law and facts of the case. When the court in the Suffish case stated that the contract by which an insurer agrees to pay a set sum of money to the insured on the happening of a certain event regardless of actual loss suffered by the insured has no basis for the operation of the doctrine of subrogation, it was of the mind that subrogation is premised on the principle of indemnity and not the failure to prove whether there was a loss or default. The court went further to state that it appears to be clear that in order for the doctrine to operate, it is essential for a valid and operative contract of indemnity to exist between the insurer and the insured. In the other authorities the contract of indemnity and a contract of insurance appear to be used interchangeably. Payment of indemnity by the insurer to the insured alone is not enough. There must be a valid and operative contract of insurance as the basis of payment by the insurer upon a loss by the insured. The policy sets out the details of the event which is insured against

and also the list of exceptions specifying the circumstances in which the insurance would not be liable.

The facts indicate that there is an operative contract of indemnity between the second and first Plaintiff that gives rise to the operation of the doctrine of subrogation.

On the question of the doctrine of estoppels: The submission under the doctrine of estoppels is baseless because the Defendant has not produced any evidence to show any misrepresentation whether verbal or written. The only available evidence is the letter of offer/loan agreement that provides that a life assurance policy cover was to be taken out in respect of the borrower.

On the question of unjust enrichment: The Plaintiff's Counsel disagreed with the submission that payment of premium by the Defendant amounts to unjust enrichment. He submitted that unjust enrichment arises in circumstances where there is an unjust benefit that would lead to a man retaining or some benefit derived from another which is against conscience that he should keep. It is absurd that the Defendant's Counsel claims that the second Plaintiff wants to unjustly enrich himself by claiming repayment from the Defendant. It is indeed the case that the Defendant took loan of Uganda shillings 230,000,000/= which was supposed to be paid back over a period of 48 months. It is the Defendant who has unjustly enriched himself with proceeds from the first Plaintiff.

If it were true that upon payment of the premium the Defendant was absolved of all indebtedness to the Plaintiff, it would be the case that all the instalment payments remitted by Parliament were made in error. The Defendant's Counsel's argument cannot hold on that ground because the life assurance policies are by nature policies of indemnity and entitled an insurer who has paid off the creditor to claim compensation from the debtor.

On the question of the amount claimed, the Plaintiff's Counsel submits that the outstanding amount by 25th of November 2011 was **Uganda shillings 208,587,697.18/=**. This amount was paid on 30 March 2012 according to the discharge voucher. It is this amount which is now due to the second Plaintiff who claims the same from the Defendant. The discharge voucher attests to the amount received by the first Plaintiff from the second Plaintiff and which is still owed by the

Defendant exclusive of any interest. In the premises the court ought to grant the remedy set out in the plaint.

Judgment

I have carefully considered the Plaintiff's claim, the testimony of the witnesses as well as the documentary evidence. The documentary evidence was admitted by consent of the parties in the scheduling memorandum of the parties setting out points of agreement and disagreement. I have also considered the authorities cited on the controversies.

The factual matters in this suit are not controversial and as I noted before in the trial, the suit can be resolved through interpretation of the documents and the law. The gist of the claim after amendment to the claim and addition of the second Plaintiff arises from the fact that the second Plaintiff indemnified the first Plaintiff upon the Defendant's loss of Parliamentary seat pursuant to a petition to court of a loser after the election and which loss was determined by a judicial officer as envisaged in the insurance policy document. The Defendant had obtained a salary loan from the first Plaintiff on the strength of being an elected Member of Parliament and the monthly instalments were to be paid from remittances from the Parliament of the Republic of Uganda. Unfortunately and pursuant to an election petition and an appeal from the original decision in that petition, the Defendant lost his Parliamentary seat and hence was not entitled to any remittances from the Parliament of the Republic of Uganda which remittances were made on the ground that he was an honourable Member of Parliament. It is an agreed fact that Parliament, upon the loss of seat of the Defendant, stopped remittances to the first Plaintiff thereby rendering the Defendant in default of monthly instalments under his loan agreement with the first Plaintiff. It is also not a controversial fact that the first Plaintiff sought to be indemnified by the second Plaintiff on the basis of a life/employment assurance policy. Furthermore the Plaintiff had a contractual relationship with the Defendant which needs to be interpreted on its own terms. On the other hand the first Plaintiff had a relationship with the second Plaintiff which also has to be interpreted in context.

In the submissions both Counsels addressed the court under different subheadings. I do not see any prejudice in the way the issues were framed because the primary question to be considered is whether the Defendant is liable to pay the second Plaintiff on the ground that the first Plaintiff

had been indemnified for the loss of monthly instalment payments by the second Plaintiff under the arrangement to be considered in this controversy. It is also a question of whether the right of subrogation applied. The primary question for resolution is whether in the circumstances the Defendant is not liable for the claim in the plaint. It is not in dispute that the claim arose from a loan transaction between the first Plaintiff and the Defendant. Finally corollary to the issue argued in the alternative by the Defendant is whether any outstanding amount is as claimed in the plaint or much less. This question of fact will be resolved last and if the action succeeds.

I will start with the joint scheduling memorandum in which the parties through their Counsels set out points of agreement and disagreement in terms of Order 12 rule 1 of the Civil Procedure Rules. The joint scheduling memorandum was executed on 14 August 2013 and sets out the undisputed facts disclosed by the pleadings of both parties and any additional agreed relevant facts. Facts which are agreed need not be proved according to Section 57 of the Evidence Act unless the court orders that the facts be proved otherwise than by the admission of the parties.

It is agreed that the Plaintiff is a limited liability company incorporated in Uganda and licensed to carry out the business of a financial institution. Secondly it is agreed that the Defendant is a former Member of Parliament of Jinja Municipality East. Thirdly it is agreed that the Plaintiff operated a swift loan scheme whose beneficiaries are the members of the Parliament of Uganda. Fourthly it is agreed that under the scheme the members of Parliament would apply for loans from the Plaintiff upon an undertaking from the office of the Clerk to Parliament to directly remit to the Plaintiff the agreed monthly instalment between the Plaintiff and the Member of Parliament. Fifthly it is agreed that the Defendant executed the loan agreement with the Plaintiff on the 25th of May 2011 of Uganda shillings 230,000,000/= and the amount advanced to the Defendant was secured under a loan protection insurance policy number 10/11/59 dated 18th of May 2011 which commenced on the 1st of May 2011 issued by the Liberty Life Assurance (U) Ltd. Additional facts are that the Defendant was required to pay and he paid the requisite premium of 1.65% out of Uganda shillings 230,000,000/= in respect of the insurance policy to the insurance company. The terms of repayment contained in the facility letter included the deduction of remittance by Parliament from the Defendant's salary in a monthly instalment of Uganda shillings 6,519,265/=. Thirdly by a letter dated 14th of February 2012 the Clerk to Parliament informed the Plaintiff that Parliament was no longer obliged to remit any payments

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on behalf of the Defendant because the Defendant had lost his Parliamentary seat by the **Court of Appeal Election Petition Appeal Number 06/2011: Paul Mwiru v Electoral Commission, Igeme Nathan Nabeta and National Council for Higher Education**. The loss of Parliamentary seat was among others risks for which the cover under the policy was taken. A claim for payment of Uganda shillings 209,072,636/= was made by the Plaintiff and upon payment the insured was issued with a discharge voucher dated 13th of March 2012. On 13 April 2012, the insurer through its advocates A.F. Mpanga Advocates demanded from the Defendant the outstanding sum on the facility.

Whereas the proposed issues were as follows:

1. Whether the doctrine of subrogation is applicable?
2. Whether the Plaintiff is entitled to indemnity from the Defendant? If so what extent?
3. Whether the Plaintiff has a claim against the Defendant as regards the outstanding loan amount?
4. Whether the settlement of the outstanding loan amount by Liberty Life Assurance Company Ltd extinguished the Defendant's liability therein?
5. What remedies are available to the parties?

The primary and underlying question is whether the Defendant is liable to pay the second Plaintiff who had indemnified the first Plaintiff for the loan upon the loss of the Defendant's employment as a Member of Parliament. All the other issues are meant to answer the main controversy based on the claim in this suit against the Defendant. I agree with the Plaintiff's Counsel that on 17 March 2014 upon discussion with Counsel it was agreed that the main issue is whether the Defendant was discharged of his obligations to the bank upon payment of **Uganda shillings 209,072,636/=** to the Housing Finance Company Ltd? Secondly what remedies available. This was an overarching issue and the word "bank" actually meant the second Plaintiff which had subsequently been joined as a co-Plaintiff. After the scheduling conference an amended plaint was agreed to and filed on 28 March 2014. It was agreed that the Defendant would reply to the amended plaint if he so wished by 16 April 2014. On 17 April 2014 the Defendant's Counsel informed the court that it was unnecessary to respond to the amended plaint. It is therefore by consent that the second Plaintiff was added and no preliminary objection

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was made to the addition of the second Plaintiff. I make this point because in the written submissions of the Plaintiff's Counsel, the Plaintiff submitted presumably on behalf of both Plaintiffs that upon the second Plaintiff giving the first Plaintiff the discharge voucher for the amount of the indemnity paid of **Uganda shillings 209,072,636/=**, the first Plaintiff assigned its rights against the Defendant to the second Plaintiff. In essence the first Plaintiff has no claim against the Defendant having passed over its rights to the second Plaintiff. That notwithstanding I will consider the suit on the merits.

The controversies in the joint scheduling memorandum revolve around the payment of premium of 1.65% in clause 3.4 of the sixth schedule to the policy by the Defendant. The question is whether the policy stipulated that the Plaintiff would be indemnified by the insurer on the occurrence of certain events such as loss of employment. Whether upon the execution of the discharge voucher between the insurer and the first Plaintiff, the Plaintiff's right to recovery of the outstanding amount from the Defendant was assumed by the insurer. Whether the beneficiary of the policy was the first Plaintiff and not the Defendant and whether the Defendant is still obliged to pay the outstanding balance on the facility (whether the outstanding balance was not extinguished by the payment or indemnification of the first Plaintiff). Whether the Defendant is in default of its loan obligations to the tune of **Uganda shillings 209,072,636/=**.

I have critically considered the contractual documents starting with the facility letter dated 25th of May 2011 exhibit P2. Among other relevant terms the letter provides that the loan is available at the discretion of the bank and is payable on first demand by the lending company. It is a condition of the loan that if the borrower defaults in payment of any one or more of the monthly payments, or if the borrower's salary is no longer received direct from his employer on a monthly basis for the credit of his or her account, the whole sum outstanding together with interest thereon shall immediately become due and payable on demand. The second document is a document issued by the second Plaintiff exhibit P3 dated 18th of May 2011. The document is issued by Liberty Life Assurance Uganda Limited. Under schedule 5 the single premium under the loan facility was 1.65% of the loan amount. Clause 5 includes among other insurable risks by loss of employment. Loss of employment is defined as loss of Parliamentary seat as a result of petitioning by the loser and where a judge of a competent court in Uganda issues a written verdict that the loss of the Parliamentary seat is due to the petition by the aggrieved/loser. The

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definition is subject to an outstanding loan balance less any monies that the bank actually recovers from the debtor's employer.

The first paragraph of the loan protection insurance policy provides that in consideration of the payment made to the company of the first premium or first instalment of premium mentioned in the schedule and on the condition that the subsequent payments or instalments of premium are duly paid as provided, the assured shall be entitled to receive from the company the sums assured referred to in the first schedule upon proof inter alia of injury or redundancy/retrenchment/job loss, as the case may be among other risks. Under the first schedule the sums assured is the aggregate of the individual sums assured for all members calculated in accordance with the condition 5 of the Second Schedule.

Under the sixth schedule and the general conditions for the salary loan facility there under and particularly it is provided under clause 3.4.3 provides that a loan insurance fee of 1.65% was payable upon disbursement to cover payment disability, death and loss of employment. The amount was charged upon the borrower by the bank. The maximum loan amount was to be Uganda shillings 230,000,000/=.

In exhibit P4 and by a deed of undertaking Parliament undertook to remit to the first Plaintiff the borrower's monthly loan instalment of Uganda shillings 6,418,265/= to the relevant account number which is mentioned.

On 13 February 2012 the first Plaintiff requested for clarification on an alleged loss of Parliamentary seat of the Defendant in a by-election according to exhibit P5. Indeed in exhibit P6 the Parliament of Uganda through the Clerk to Parliament notified the collections manager of the first Plaintiff about the loss of Parliamentary seat in the ninth Parliament of the Defendant. They also communicated that the Defendant does not have any terminal benefits that can be used to offset the loan obligation.

A perusal of all the documents reviewed above shows that the Defendant applied for a loan which was granted and this is not in dispute. Secondly the Defendant was charged 1.65% of the loan amount as a single premium. Thirdly the first Defendant was under obligation to collect 1.65% from the borrower under a scheme meant for members of Parliament. Fourthly the event

of loss of Parliamentary seat which was the insured event occurred. On the fifth ground the policy document exhibit P3 provides that the memorandum of understanding works to create a working relationship between the bank and the ninth Parliament of Uganda. It also provided by all the parties that the bank shall have priority claim after all statutory deductions upon all or any other payments due to members of Parliament towards settlement or reduction of the outstanding amounts on the borrower's loan facility.

The first paragraph of exhibit P2 which is the policy document provides as follows:

"Whereas this policy has been effected with Liberty Life Assurance Uganda Limited (hereinafter called "the Company") by the assured named in the first schedule hereto, and whereas the insured has delivered to the company as the basis of the contract herein contained a proposal and declarations referred to in the first schedule."

The assured named in the first schedule has the name and address of the assured as Housing Finance Bank, P.O. Box 1539 Kampala.

Under schedule 3 of the policy document and clause 1 thereof it is provided that the policy and the proposal and declarations thereto and its customers application for a loan facility constitute the entire contract between the parties. The customer means a Member of Parliament and a customer of the first Plaintiff who has completed an application for and been granted a personal loan according to the definition of a member under schedule 2 the policy document. Under the definition of a member, a copy of the terms and conditions of the loan facility forms schedule 6 of the policy. Schedule 6 applies the general terms and conditions applicable to all personal loans. It contains undertaking by the clerk to the Parliament, undertaking by the first Plaintiff bank and general conditions for the salary loan facilities.

Last but not least I have carefully considered clause 3.4 which provides that the bank will under the memorandum charge the borrower the following fee structure namely:

"3.4.1 Uganda shillings 15,000/= being the loan application fees.

3.4.2 Facility fee (nil) of the loan amount payable upfront.

3.4.3 Loan insurance fee of 1.65% payable upon disbursement, payment disability, death and loss of employment.

3.4.4 An interest rate of 16% per annum, reducing balance.

3.4.5 In the event of default, penalty fees and the recovery fees.

3.4.6 The maximum loan amount shall be Uganda shillings 230,000,000/=.

3.4.7 Maximum loan period shall be 50 months and in any case the repayment period shall not extend beyond 31 December 2015. In all instances, the loan period shall be negotiated by the borrower, based on the borrower's ability to repay but the bank shall make the ultimate decision.

3.4.8 All personal accounts operated by the borrowers shall attract normal banking charges."

My understanding of clause 3.4.3 is that the loan insurance fee of Uganda shillings 1.65% was payable upon disbursement to cover payment disability due to death and loss of employment. In other words the fee of 1.65% of the loan amount was a charge on the borrower as part of the fee structure for the loan. However the person assured is the first Plaintiff. On the occurrence of the events insured, the first Plaintiff would be entitled to indemnity from the second Plaintiff. This is exactly what happened and is based on the contractual terms.

The Defendant has not produced any life insurance policy he took out to assure the repayment of the loan. The insurance policy was taken to insure any risk in the repayment upon the occurrence of payment disability such as death and loss of employment. In the Defendant's case failure to pay occurred as a result of loss of employment.

Without determining the question of whether the outstanding amount at the time of loss of employment and the stoppage of any remittances to the first Plaintiff bank by the Parliament, amounted to the sum paid by the second Plaintiff to the first Plaintiff, it is a question of fact and it is agreed that the second Plaintiff upon the loss of Parliamentary seat by the Defendant indemnified the first Plaintiff by paying the first Plaintiff **Uganda shillings 209,072,636/=**. The sum is also the sum of money claimed against the Defendant in paragraph 3 of the amended plaint. Paragraph 3 clearly avers that the second Plaintiff's claim against the Defendant is for recovery of **Uganda shillings 209,032,636/=** being money due and owing under a discharge

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voucher dated 13th of March 2012. The discharge voucher is exhibit P9 which document was admitted by agreement of the parties in the joint scheduling memorandum. The sum was paid to the first Plaintiff in repayment of the outstanding sum due under the loan advanced by the first Plaintiff to the Defendant.

What is controversial is the assignment of the interest of the first Plaintiff in the loan advanced to the Defendant under the loan agreement to the second Plaintiff which is the insurance company. The assignment in exhibit P9 provides as follows:

"WE HEREBY ASSIGN to the Company, interest in the loan advanced to SAMSON NATHAN IGEME NABETA and a loan agreement No. SL/0093/11 dated the 25th day of May 2011.

WE FURTHER UNDERTAKE to provide to the Company all documentation and information that the Company shall in its sole discretion deem necessary for purposes of enabling the Company to recover the sums paid as under this claim Discharge Voucher."

The Defendant's argument is that having paid premium, and upon the occurrence of the insurable risk i.e. the loss of employment, he was discharged of his loan obligations upon indemnity of the first Plaintiff by the second Plaintiff. Paragraph 3 of the amended plaint is very revealing. It contains no claim of the first Plaintiff against the Defendant. It only contains the claim by the insurance company namely the second Plaintiff.

Is the second Plaintiff entitled to recover the indemnity money against the Defendant?

The question is deceptively simple. The relationship under the salary loan scheme is not simple but complex and involves more than the first and second Plaintiffs. It involves undertaking by the employer to ensure that money due to the Member of Parliament is paid to the account of the borrower periodically in the first Plaintiffs bank and not elsewhere. The employer is the Parliament of Uganda. Secondly it includes an obligation on the part of the first Plaintiff to ensure that certain terms are incorporated in the loan agreement with the borrower. The loan agreement itself is a contract between the first Plaintiff and the Defendant. What are the terms thereof?

The loan application letter exhibit P1 does not have terms of the loan agreement. It only indicates among other things that the applicant applied for a loan of Uganda shillings 230,000,000/= and the repayment period is a period of five years translating into 50 months. It includes the interest rate payable of 16% per annum translating into a monthly payment of Uganda shillings 6,418,264.59/=. It also shows that there was an employer's undertaking which was verified. The most important document indicating the contractual terms between the first Plaintiff and the Defendant the letter of offer/loan agreement dated 25th of May 2011. It confirms that the applicant took a loan of Uganda shillings 230,000,000/= for personal development and at an interest rate of 16% per annum on the loan amount.

The applicant was required to pay a commitment fee of Uganda shillings 3,450,000/= on the loan amount, application fees of Uganda shillings 10,000/=: stamp duty of Uganda shillings 5000/= and a life insurance premium of Uganda shillings 4,025,000/= to be payable upfront upon establishment of the loan. It was further agreed that the loan would run for a period of 48 calendar months effective from the date of disbursement. It was agreed that a monthly instalment of Uganda shillings 6,518,265/= will be debited on the borrowers account number 0114403611000 before the first day of each month beginning on 25 June 2011.

The security agreed upon includes a letter of undertaking from the borrower's employer. Secondly an assignment of terminal benefits with the employer to Housing Finance Bank Ltd. A lien and rights to set off over the borrower's account. Life insurance covers to be taken out in respect of the borrower. All securities are to be in the form agreed by the Housing Finance Bank Ltd.

The security of life insurance cover to be taken out in respect of the borrower which is a term in the loan agreement does not prima facie indicate who would take out the life insurance cover.

It is only agreed that there was a loan protection assurance policy exhibit P3 whose terms we have already discussed above. The Defendant is not directly privy to the loan protection assurance policy. And there is no evidence that a life insurance policy has been taken out in respect of the individual borrower per se. The life insurance policy is security under the loan agreement. I have considered the lengthy submissions on the fact that a premium was charged on the account of the borrower/Defendant. I find the arguments simplistic on the ground that the life

insurance premium of Uganda shillings 4,025,000/= payable upfront upon establishment of the loan was catered for under fees for the loan. Secondly there is no life insurance policy in evidence taken out in the name of the borrower (for the benefit of the first Plaintiff Bank). There is only a collective life assurance policy for all members of Parliament under a scheme. The life insurance cover is security for each individual loan applied for and granted to an MP under the scheme. The security on the face of it is taken out by the insured which is the First Plaintiff. The clear intention of the loan agreement is that certain securities were to be availed to the bank.

These included a letter of undertaking from the borrower's employer. The letter of undertaking exhibit P4 is from the office of the Clerk to Parliament and is dated 23rd of May 2011, predating the loan agreement. Parliament undertook to remit to the bank the borrower's monthly loan instalment of Uganda shillings 6,518,265/= and to the bank account number 0170200019700 for the entire duration of his employment. It further undertook to advise the bank in the event that the borrower's employment is terminated or if the borrower should cease to be employed by the organisation. The first Plaintiff was therefore assured by the Parliament of Uganda of receiving a monthly loan instalment in the agreed amount so long as the Defendant remained employed by the Parliament and to advise the first Plaintiff in case the Defendant lost his employment.

The second security of the assignment of terminal benefits with the employer to Housing Bank Ltd was not effective because the letter of undertaking by Parliament expressly stipulates that the Parliamentary Commission does not warrant that terminal benefits shall be attached as settlement of the loan advance. This rendered the terminal benefits as security inoperative or uncertain.

As far as the lien and rights to set-off over the borrower's account is concerned, the bank could apply self-help by deducting any amounts on the account of the borrower. Therefore it was security in the hands of the first Plaintiff bank.

As far as life insurance cover to be taken out in respect of the borrower is concerned, none was taken out with the Defendant as the insured. What was taken out is a collective policy under a collective scheme. I carefully considered the Defendant's pleadings in respect to that matter. Paragraph 5 (b) of the Defendant's written statement of defence is as follows:

"By the said loan agreement, the Defendant agreed to avail the Plaintiff with security for the borrowing, which included: a letter of undertaking from the borrower's employer and a life insurance cover to be taken out in respect of the borrower among others. See clause 9 of annexure B1 to the plaint."

The annexure referred to is the loan agreement and it has no clause 9. However the subsequent paragraph of the written statement of defence which is paragraph 5 (c) stipulates that under clause 9 of the loan agreement, the Plaintiff under the Defendant's mandate approached Liberty Life Assurance Uganda Limited and took out a loan protection assurance policy. In other words the written statement of defence contains an error though the Defendant obviously meant exhibit P3 which is the loan assurance policy dated 18th of May 2011. This is supported by the agreement of the parties in the joint scheduling memorandum paragraph (v) of the undisputed facts therein. The undisputed fact is that the Defendants Loan was secured under a Loan Protection Assurance Policy No. 10/11/59 dated 18th May 2011 which commenced on 1st May 2011 issued by Liberty Life Assurance (U) Ltd (The second Plaintiff). The loan assurance policy exhibit P3 is a collective policy issued by the insurance company namely the second Plaintiff. In the case of **Long Way Suitcase Company Ltd vs. UAP Insurance Company (U) Ltd HCCS NO 417 of 2010**, I considered the principles to be applied where premium is paid but no valid insurance policy contract is deemed to be concluded on the ground of lack of consensus ad idem. I relied on **McGillivray on Insurance Law, 10th edition** at page 197 paragraphs 8 – 6 for the proposition of law that where premiums have been paid to the insurer with an application for insurance, but no binding contract of insurance is in fact concluded the money is recoverable as paid for a consideration which has wholly failed. If the Defendant's defence is that no life assurance policy whose premium he paid was taken out, his remedy would be refund of the premium. It is an agreed fact that the insurance policy envisaged was taken out and the duty of the court is to interpret the policy in the context and the circumstances of the case.

In this case the Defendant's Counsel submitted that the first Plaintiff was an agent of the Defendant for purposes of paying premium for a life assurance policy under the loan agreement. While it is true the premium for insurance cover was charged on the Defendant, the part controversy is whether that payment made the Defendant a beneficiary of the policy. Secondly whether it meant that the insurance policy had to have another person other than the first Plaintiff

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as beneficiary. If the first Plaintiff fails to take out that policy it would be breach of contract to take out a life assurance policy. By considering the elementary rule that only parties to a contract can enforce it, who were to be parties to the life assurance contract?

I have carefully considered the evidence and particularly exhibit P3 which is the loan protection assurance policy. The first Plaintiff indeed insured the loan against certain risks which included the debt, sickness, injury or redundancy/retrenchment/job loss, as the case may be or the person on whose life the sum assured is to depend. Whereas the assured is the first Plaintiff, the first Plaintiff indeed took out insurance policy for all the loans taken by members of Parliament from Liberty Life Assurance Uganda Limited. The insurance policy was collective and included risks by loss of life and it is the life assurance policy envisaged by the parties to the loan agreement. Moreover it is meant to be security which secures repayment of the loan. There was no need to take out separate insurance policies for each individual Member of Parliament. As we shall note later this is a collective scheme and the letter of application of each member and loan agreement formed part of the collective insurance scheme.

The first Plaintiff accordingly recovered from the second Plaintiff upon the loss of job of the Defendant who is an individual Member of Parliament and loss of remittances of money from which to recover its loan from the individual member only. The first Plaintiff was the assured or insured. The complex argument is that the Defendant ought to have been the insured because he was the one paying the premium. This is not the intention of the parties under the loan agreement. Under the loan agreement premium was deducted from the Defendant for purposes of obtaining a life assurance cover to secure the loan. This was done by the first Plaintiff and the intention of the parties was fulfilled. The life assurance cover included other risks such as redundancy, retrenchment or job loss. It was the job loss risk which occurred and therefore the first Plaintiff was entitled to recover from the insurance company the sum assured.

Finally the Defendant's argument which needs to be considered on the merits is that the loan was secured by an insurance policy and that he had paid the premium for that policy. Consequently after recovering the outstanding from the security, the second Plaintiff was not entitled to proceed against him upon occurrence of the insured risk by loss of job. The first Plaintiff has assigned all its rights in this suit to recover the loan to the second Plaintiff.

This suit is entirely about the right of the insurance company to proceed against the Defendant for recovery of the loan amount after indemnifying the first Plaintiff. Secondly this is a point of law and there is no need to consider other evidence than that necessary for interpretation of the law. The agreed facts are adequate to consider the law applicable. Last but not least it is a point of law of public importance because where the bank recovers should the insurance on the occurrence of the risk, proceed against the debtor? What would be the situation if the debtor dies? Would the insurance company be entitled to proceed against the debtor's estate?

I have considered the case of **Suffish International Food Processors (U) Ltd and Pan World Insurance Company vs. Egypt Air Corporation T/A Egypt Air Uganda SCCA No. 15 of 2001** and the judgment of Oder JSC with the concurrence of the Odoki JSC CJ, deals with the right of subrogation while Justices Kanyeihamba, Tsekooko JSC and Karokora JSC arrive at the same conclusion on other grounds. The summary of the principles and purpose of subrogation by Oder JSC is relevant.

He considered the essential elements of the doctrine of subrogation and its general application in the law of insurance. In summary if a person suffers any loss for which he can recover against a third party and that person has insured himself against such a loss, the insurer cannot avoid liability on the ground that the insured can claim against a third-party. On the other hand the third party cannot avoid liability on the ground that the insured has been or will be fully compensated by his insurer. The right of subrogation is corollary to these rights. Subrogation is the right of an insurer who has paid for any loss to receive the benefit of all the rights and remedies for the insured against third parties, which if satisfied, extinguish or diminish the ultimate loss sustained. An insurer paid for the loss may exercise the right of the insured to recover from the third-party or if the insured has already exercised that right, the insurer will be entitled to repayment from him. Finally the Defendants Counsel relied on the holding that:

"A contract of insurance by which an insurer agrees to pay a certain sum of money to the insured on the happening of a certain event regardless of actual loss suffered by the insured has no basis for the operation of the doctrine of subrogation."

Justice Oder JSC went on to hold that for the doctrine to operate it is essential for a valid and operative contract of indemnity to exist between the insurer and the insured. Payment of

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indemnity by the insurer to the insured alone is not enough. There must be a valid and operative contract of insurance as the basis of payment by the insurer upon a loss by the insured. The policy sets out the details of what is insured against and exceptions.

In the circumstances of this case, premium was paid by the borrower who is not directly a signatory or privy to the contract of insurance. The borrower was not at fault for the occurrence of the insurable risk which is his loss of employment. He had been declared a winner and his election was challenged by a loser. Secondly I agree with the Defendant's Counsel that the insurance policy was security for the loan. The aspect of the life assurance policy envisaged being security is based specifically on the terms of the loan agreement. The consideration for the insurance policy was paid by the borrowers under the collective scheme.

I have generally considered the authorities relied upon by the Plaintiff's Counsel. The Plaintiff's Counsel in rejoinder relied on an excerpt from **Collinaux's Law of Insurance Seventh Edition** wherein it is written as far as subrogation is concerned:

"Policies insuring against the non-payment of a debt are contracts of indemnity, and if the debt is not paid on the date when it falls due the insurers will, on payment, be subrogated to the assureds' rights against the debtor."

It is my humble holding that this would depend on the policy of insurance and is firstly a matter of contract. It applies where the bank or financial institution takes out a policy of insurance against possible loss due to failure by the borrower to pay the money lent to the borrower. It does not apply to a situation where the borrower and the financial institution or bank agree that there are certain insurable risks which would bring about payment disability which should be covered by a policy of insurance and whereby the mega policy of insurance become security for the loan or loans. In this case the borrower and the financial institution agreed that the loan would be insured against certain specific events are namely against loss of employment, redundancy and death. The purpose for naming the above risks clearly is the effect of those risks in frustrating the ability of the borrower to repay loan as envisaged.

In other words it was a clear intention of the parties that the loan was against salary payments of the borrower. Clause 3.4.3 of the 6th Schedule quoted above of the policy document is specific

about the purpose of the policy. The bank was to insure against *payment disability*. It was further within the contemplation of the parties that the borrower would continue in employment and upon loss of job; the primary source of income would be unavailable. Consequently an insurance policy was taken out as security against possible loss of instalment payment due to injury, death, or loss of job i.e. retrenchment or redundancy etc. This was the *payment disability* contemplated by all the parties concerned with the policy of insurance. On the basis of that understanding, the borrower was supposed to pay a fee by way of premium payment for insurance of the risks provided for in the loan agreement.

According to the Modern Insurance Law Third Edition by John Birds at page 272:

"Subrogation applies to all insurance contracts which are contracts of indemnity, particularly contracts of fire, motor, property and liability insurance. It does not apply to life insurance nor prima facie accident insurance."

In my holding and in the circumstances of this suit the primary reason why subrogation would not apply to contracts of life assurance or accident insurance essentially is the frustrating effect of the insurable risk. In such cases the insured, ensures against the unpredictable which is not the fault of the person whose life is the subject of the policy. The question of the right of the assured or insurance company to proceed against a third party can be considered in other contexts. I.e. in tort if the accident leading to disability or death was caused by a third party. I shall quote from the Modern Insurance Law Third Edition by John Birds at page 272 – 273:

"However, although payments and an accident policy are usually of a fixed stated sum or according to a fixed scale, it is possible to have such policies whereby payments are made on an indemnity basis, in other words are related to specific heads of loss suffered by the insured. This might well also be the case in, for example, a health insurance policy or a medical expenses section of a larger policy. There can be no real doubt that these policies are indemnity policies and therefore should attract the right of subrogation. It has indeed been argued that many forms of life insurance have indemnity intentions... Notable examples are "key man policies effected by employers on the lives of their employees, and policies by creditors on the lives of their debtors. The only real purpose of such insurance is to indemnify against the risk of loss. *However, whatever the attractions of*

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such an argument, it can be safely assumed that the law would not regard any form of life insurance as attracting the right of subrogation." (Emphasis added)

Justice Oder JSC clearly agrees with the above proposition that life insurance does not attract the right of subrogation. I want to emphasise the further ground that it depends on the agreement of the parties. Where the insurance policy is considered security for the borrowing and deemed to be provided by the borrower and where the creditor is the assured, then upon the satisfaction of the creditor, the creditor has no right to proceed against the debtor who would be dead or disabled from paying.

There are some basic principles which may guide the court. Lord Denning held in **Parry v Cleaver [1967] 2 All ER 1168** (Court of Appeal) that a Defendant cannot argue that insurance should be taken into account in computing damages. He held at page 1171 that the reason was that Insurance payments are based on contract “wholly independent of the relation between the Plaintiff and the Defendant which gave the Plaintiff this advantage.”

Obviously a defendant would be a third party who is liable for a known cause of action.

On appeal to the House of Lords the matter was considered at length when in **Parry v Cleaver [1969] 1 All ER 555** Lord Morris of BORTH-Y-GEST at page 573 agreed with the principle that insurance benefits of the Plaintiff should not concern the Defendant. He held that:

“It is not for a Defendant to inquire what use a Plaintiff has in the past made of his own money. If a Defendant who is sued asks the Plaintiff whether or not he had had a gift from a friend or whether or not he had saved money and invested it and whether his investments had prospered and if so to what extent or whether or not he had taken out any insurance policies the reply, firm though courteous, could well be that the Defendant should only concern himself with his own affairs.”

Lord Pearce at pages 575 – 576 the grounds are that the insurance contract was wholly independent of the relation between the Plaintiff and the Defendant (but the Plaintiff was entitled to sue the Defendant on the basis of the cause of action for which he is held liable). Damages recoverable by an injured man cannot be reduced by the fact that he has recovered indemnity

from an accident policy. Quoting from Asquith LJ in *Shearman v Folland* ([1950] 1 All ER at page 978:

“If the wrongdoer were entitled to set-off what the Plaintiff was entitled to recoup or had recouped under his policy, he would, in effect, be depriving the Plaintiff of all benefit from the premiums paid by the latter and appropriating that benefit to himself.”

From the above premises a Plaintiff who has covered himself with an insurance policy can still proceed against a Defendant where there is a cause of action. What is the case where the Plaintiff and the Defendant agreed to insure against a risk which occurred with the Plaintiff as beneficiary? Would the plaintiff have a cause of action against the Defendant? My holding is that where the Defendant is part of the policy arrangement the assured or insurance company can only proceed against a third party and not the Defendant whose loan was secured by security of insurance policy agreed upon by the parties. In other words the insurance company can proceed against the Defendant where there is a cause of action of the insured. In such cases the Defendant is a third party and not part of the contract of insurance. **McGillivray on Insurance Law, 10th edition** page 99 sets out the fundamentals of an insurance contract, which is a contract between the insurers and the assured. The material terms of the contract must include:

"the definition of the risk to be covered, the duration of the insurance cover, the amount and mode of payment of the premium and the amount of the insurance payable in the event of loss. As to all these there must be a *consensus ad idem*, that is to say, there must either be an express agreement or the circumstances must be such as to admit of a reasonable inference that the parties were tacitly agreed. "

The contract is between the insurance company and the insured. In the Plaintiff's case there are several parties involved. There was an undertaking by the Clerk to Parliament to remit his monthly payment for repayment of the loan. Secondly there was an agreement between the first Plaintiff and the Defendant where part of the agreement was to secure a life assurance policy to cover loss due to death, disability and job loss as security for the loan. The Defendant was charged for the premium but the policy on the face of it seems to be between the first Plaintiff and the second Plaintiff though it recognised the requirements of the requisite security and payment of premium by the borrower who is the Defendant. It is essential in subrogation that the

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insured has a cause of action against the third party. My concern in this case is whether the Defendant can be considered a third party to the insurance policy document?

Before I conclude I have duly reviewed some authorities on subrogation. By way of dictionary definition and according to **Osborn's Concise Law Dictionary 11th Edition** the expression "subrogation" means:

"The substitution of one person or thing for another, so that the same rights and duties which is attached to the original person or thing attaches to the substituted one. If one person is subrogated to another, he is said to "stand in the other's shoes", e.g. creditors are subrogated to the executors right of indemnity against the estate where a business is carried on under the authority of the will; a person paying the premium on the policy of insurance belonging to another may be subrogated to the other; and an insurer is subrogated to the rights of the insured on paying his claim."

The question of the right of the second Plaintiff to sue the Defendant is answered by considering whether upon being paid, the first Plaintiff still had a cause of action against the Defendant.

Subrogation is further considered in the case of **Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd [1961] 2 All ER 487** where Diplock J held that:

"First, "subrogation" is concerned solely with the mutual rights and liabilities of the parties to the contract of insurance. *It confers no rights and imposes no liabilities on third parties who are strangers to that contract. It vests in the insurer who has paid a loss no direct rights or remedies against anyone other than the assured. He cannot sue such parties in his own name (see Simpson v Thomson); he is bound by any release given by the assured to a third party (see West of England Fire Insurance Co v Isaacs). The insurer's rights against the assured cannot be affected by any subsequent contract or dealings between the assured and a third party (Boag v Standard Marine Insurance Co Ltd; West of England Fire Insurance Co v Isaacs).*" (Emphasis added)

The insurer is subrogated to any right of action subsisting when the insurer paid under the policy. In this case what were the rights of the insured at the time the insurer paid the outstanding loan amount? Under the loan agreement exhibit P2 a life assurance cover was to be taken out in

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respect of the borrower as part of the security for securing repayment of the loan. In that regard I agree with the reliance by the Defendant's Counsel on the dictionary definition of the term "security" as something tangible that secures repayment of the loan. According to Black's Law Dictionary "security" means:

"Collateral given or pledged to guarantee the fulfilment of an obligation; esp., the assurance that a creditor will be repaid (usu. With interest) any money or credit extended to a debtor."

Under the Financial Institutions Act 2004 securities are inclusively defined to include:

- "(a) debentures, stocks or bonds issued by or proposed to be issued by a Government;
- (b) debentures, stocks, bonds or notes issued or proposed to be issued by a body corporate;
- (c) any right, warrant, option or futures in respect of any debenture, stocks, shares, bonds, notes or in respect of commodities; or
- (d) any instrument commonly known as securities, but does not include bills of exchange, promissory notes or certificates of deposit issued by a financial institution;"

A policy of insurance wherein an insurance company undertakes to pay indemnity upon the occurrence of certain insurable risks is security because it can be used as security to secure payment. The expression "security" includes an insurance policy because it is an undertaking to pay upon the occurrence of a certain risk. So long as the beneficiary named is the assured the policy is for the benefit of the insured upon the occurrence of the risk. In exhibit P3 the second Plaintiff undertook to pay the sums assured referred to in the First Schedule upon proof of the death, sickness, injury or redundancy/retrenchment/job loss as the case may be of the person whose life the sum assured is to depend. The benefits were assured on the lives of Members of Parliament in respect of whom all due premiums have been paid. The lives upon which the life assurance depends are defined under Schedule 2 and condition 1. A member is defined as a customer of the Assured who has completed an application for and has been granted a personal loan (being a Fixed term Loan) and who continues to comply with the terms and conditions of the loan facility. In this case the Clerk to Parliament continued to remit the instalment payment

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until when the Defendant lost his seat in Parliament. The letter informing the first Plaintiff stipulates that Parliament will not be able to remit money to service the loan obligation and no terminal benefits were due to the Defendant. The letter from the Clerk to Parliament is exhibit P6 dated 14th February 2012.

The amount assured is the aggregate of individual sums assured for all members calculated under the policy. The sum to be paid by each member is described under Schedule 4 which provides that each member would pay 1.65% of the loan amount as a single premium. Secondly the free cover limit is Uganda shillings 230,000,000/=. Furthermore Schedule 4 and clause 5 provides for risk by loss of employment. It is provided that loss of employment means loss of Parliamentary Seat as a result of petitioning by the loser and where a competent judge decides so.

The policy required the Clerk to Parliament to undertake to make remittances to a member's account with the first Plaintiff. The Bank undertook on the recommendation of the 9th Parliament of Uganda to enable members of Parliament to access salary loan facilities and open loan accounts for each member. Under clause 3 of the policy the bank was required to charge the borrower a certain fee structure which included the loan insurance fee of 1.65% of the loan amount.

The contract of insurance was not a two party contract per se. It required undertaking from the Clerk to Parliament and provides that the policy and the proposal and declaration thereto as well as each customer's loan application for a loan facility constitutes the entire contract between the parties (See schedule 3). In Schedule 3 and clause 3 it is provided that certain assignments would not be made in the following words:

“No Member or the Assured may assign a part or the whole of any assurances provided under this policy.”

The policy of insurance purports to bind the MP's who are beneficiaries of the salary loan scheme and the 2nd Plaintiff cannot make the argument that the MP's are not parties but are third parties.

Under schedule 2 clause 5 the sum assured for each member is described in schedule 4 of the policy. In schedule 4 it is provided in paragraph 1 that on the death of a member the Company

will pay the Assured the amount outstanding under the loan facility. In schedule 4 clause 5 the insurer undertook to pay any outstanding amount less monies the bank recovers from the debtor's employer. The clause envisages payment of gratuity or terminal benefits upon loss of employment. All the payments envisaged are payments from the Parliament of Uganda and not from the Defendant outside that source.

In Exhibit P9 being a claim discharge voucher the 2nd Plaintiff under its letter head made the policy holder sign an assignment in the following words:

“WE HEREBY ASSIGN to the Company our interest in the loan advanced to SAMSOM NATHAN IGEME NABETA under the loan agreement No. SL/0093/11 dated 25th day of May 2011.”

After applying the agreed security to offset the loan, the first Plaintiff could not turn around and refuse to consider the life assurance policy taken out as security and purport to proceed against the Defendant who participated in securing the policy under a collective scheme. The Defendant was part of a collective scheme in which certain risks were secured by an insurance policy which covered the loans of all compliant members of Parliament upon the occurrence of certain specified risks.

In those circumstances the doctrine of subrogation does not apply because the first Plaintiff cannot exercise a right to recover the outstanding loan from the Defendant direct after using the agreed security. The only remedy could have been against Parliament to pay any dues to the Defendant to the first Plaintiff.

I further note that the first Plaintiff conceded that it has no case against the Plaintiff. It is just a nominal Plaintiff having purported to assign its right of proceedings against the debtor to the second Plaintiff. The purpose of insurance under the collective scheme involved not only the first and second Plaintiff but also the 9th Parliament of Uganda and Members of Parliament who are beneficiaries under the scheme. The undertaking of Parliament also secured the policy. Furthermore the policy was secured by member's contributions through the first Plaintiff and upon request by the second Plaintiff. Though the first Plaintiff is the assured, it cannot recover the loan from the Defendant after being indemnified for the loss of Parliamentary seat of the

Defendant. There is no evidence that there were more dues owing to the Defendant from Parliament at the time of loss of Parliamentary seat of the Defendant. The principle discussed in the Modern Insurance Law 3rd edition by John Birds applies to this case. Subrogation does not apply to life insurance in the peculiar circumstances of this case.

Subrogation cannot apply in this case because it was a salary loan and the job was lost due to a loser's petition as envisaged. This was a risk that was foreseen by all the parties and the first Plaintiff was insured against the risk. The second Plaintiff understood the extent of the risk and required members to pay 1.65% as premium for the policy to be issued in favour of the first Plaintiff under a collective scheme. In those circumstances the Defendant cannot be considered a third party who may be sued in tort or for breach of contract. There is no evidence that the Clerk to Parliament failed to remit the agreed instalments or any terminal benefits. There were no terminal benefits. Payments stopped only on account of loss of Parliamentary seat. All concerned players in this scheme understood that the arrangement would only work if a beneficiary member of the scheme remained a member of the 9th Parliament of Uganda pursuant to which his monthly remittances would continue flowing as undertaken by the Clerk to Parliament. The undertaking of the Clerk to Parliament was a requirement imposed by the second Plaintiff as well. That undertaking depended on the Defendant retaining his Parliamentary seat. The entire arrangement collapsed and was frustrated upon the occurrence of loss of a job by a loser's petition by which the Defendant lost his Parliamentary seat for Jinja Municipality East. In the words of schedule 6 clause 3.4.3 there was payment disability upon loss of job. In the circumstances the first Plaintiff had no cause of action against the Defendant because the salary loan was frustrated and the source of income dried up. In the facts and circumstances of this case, the loan the Defendant took was a salary loan and it was fully secured by an insurance policy according to the contractual requirements of the policy document. It was also a contractual requirement that the policy was as security for a loan under the loan agreement exhibit P2.

In the premises the Plaintiff's action stands dismissed with costs.

Judgment delivered on the 7th of September 2015

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Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Counsel Kyamanywa Julius holding brief for Counsel Cynthia H Musoke for the plaintiff

Counsel Adams Byarugaba holding brief for Counsel Bakayana Isaac for the Defendant

Defendant represented in court by Patience Igeme wife of the Defendant

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

7th September 2015