THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO 461 OF 2009

1. **PETER C. KATWEBAZE}**
2. **SUSAN M. KATWEBAZE}.....PLAINTIFFS**

VS

1. **GROFIN EAST AFRICA FUND LLC}**
2. **DFCU LIMITED}**
3. **HELLEN KANYO}.....DEFENDANTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff's suit against the first and second Defendants jointly or severally is for a declaration that the intended advertised sale of Kyadondo Block 185 plot numbers 2746 and 2747 is unlawful or wrongful, for an order stopping it, for a permanent injunction and for general damages, interest and costs.

Initially the first and second Defendants filed a joint defence denying the claim and counterclaimed against the Plaintiffs jointly and severally for payment of the Plaintiff's bid sum for the property at Uganda shillings 290,000,000/=, general damages for lost opportunity, bad faith and inconvenience caused to the Defendants by the Plaintiffs and costs of the suit. It is admitted that the Plaintiff's tendered in a bid for the suit property on 16 November 2009 in response to an advertisement by the Defendants on the 7th and 13th of November 2009. The Defendants also received other bids for the property. The Defendant accepted the Plaintiffs bid on 3 December 2009. Subsequently the Plaintiffs sued the Defendants.

On the 28th of May 2010 the court entered partial consent judgment pursuant to an agreement of the parties dated 27th of May 2010. The terms of the written consent and judgment of the court are as follows:

1. That the Plaintiffs admit liability to the Defendants to the extent of Uganda shillings 110,000,000/= only and hereby agree to pay the said sum in the following manner.
2. That the Plaintiffs shall settle the above sum in the following instalments:
    a. The first instalment of Uganda shillings 50,000,000/= shall be paid on or before the 31st of May 2010.
    b. The second instalment of Uganda shillings 30,000,000/= shall be paid on or before the 30th of June 2010.
    c. The third instalment of Uganda shillings 30,000,000/= shall be paid on or before 30 July 2010.
3. The parties reserve the following issues for determination in the suit;
    a. Whether the intended sale by the Defendant is lawful?
    b. Whether the Plaintiffs are entitled to a permanent injunction?
    c. Whether the Plaintiff is entitled to pay only the balance on the purchase price?
    d. Whether the purported purchase by the Plaintiffs of the suit property is lawful?
    e. Whether the Defendants are entitled to the prayers in the counterclaim?

Subsequently the second Defendant obtained leave to file a separate written statement of defence peculiar to itself and coupled it with a separate instruction to another Counsel to represent it in the suit. Initially the first and second Defendants were represented by Messieurs Sebalu and Lule advocates. Subsequently the second Defendant instructed Messieurs Kalenge Bwanika, Ssawa and Co. Advocates as its Counsel. The Plaintiff is represented by Messrs Barya, Byamugisha and Co. Advocates.

Both Defendants filed separate and amended written statements of defence and counterclaim. The first Defendant counterclaimed against the third Defendant claiming the deposit made by the Plaintiffs on the purchase of the suit property on or about 2 June 2008 of about shillings 170,000,000/=; general damages for breach of contract; costs of defending the suit and costs of the cross-claim. The amended written statement of defence and counterclaim/cross-claim was filed on 5 July 2011 after partial judgment was entered on the 28th of May 2010. On the other

hand the second Defendant’s amended written statement of defence was filed on 5 November 2013. The defence does not include any counterclaim against the Plaintiff.

At the hearing of the suit Counsel Nestor Byamugisha represented the Plaintiff, Counsel Nicholas Ecimu represented the first Defendant, and Counsel Diana Namulondo represented the second Defendant while Counsel Naboth Muhirwe represented the third Defendant. Subsequently the third Defendant's Counsel withdrew from the conduct of the third Defendant's defence. The third Defendant never appeared at the hearing despite being served with court process and the suit proceeded ex parte against her.

Documents were tendered in evidence by consent of the parties and the agreed issues are as follows:

1. Whether the purported purchased by the Plaintiffs of the suit property was lawful?
2. Whether the intended sale by the Defendants is lawful?
3. Whether the second Defendant is estopped from or waived its right to exercise its statutory power of sale?
4. Whether payment by the Plaintiffs of shillings 110,000,000/=, the balance on the purchase price extinguished their liability?
5. Whether the Plaintiffs are entitled to the reliefs sought?
6. Whether the Defendants are entitled to the prayers in the counterclaim?
7. Whether the first Defendant is entitled to the reliefs sought in the cross-claim?

The Plaintiff's Counsel applied for judgment on admission under Order 13 rules 6 of the Civil Procedure Rules and the application was not allowed inter alia on the ground that the partial settlement of this suit also agrees on the issues reserved for determination of the suit. This include whether the intended sale by the Defendants was lawful? Whether the Plaintiffs are entitled to a permanent injunction? And whether the Plaintiff is entitled to pay only the balance on the purchase price? Whether the purported purchased by the Plaintiffs of the suit property was lawful? And lastly whether the Defendants are entitled to the prayers in the counterclaim? The decision of the court was delivered on 20 January 2014 and this suit was subsequently fixed for hearing.

After adducing evidence the court was addressed in written submissions by consent of Counsel.

Whether the purported purchase by the Plaintiffs of the suit property is lawful?

The Plaintiff's Counsel answered issues numbers 1 and 3 together. Issue number 3 is **whether the 2nd Defendant is estopped from or waived its rights to exercise its statutory power of sale**?

The Plaintiff's case as embodied in the written submissions is that they bought the suit property from its registered proprietor who is the third Defendant with the notice of the second Defendant and constructive notice of the first Defendant. At the time of the sale/purchase transaction on 2 June 2008, the suit property was already mortgaged to the second Defendant apparently as a result of a loan jointly extended by the first and second Defendants and guaranteed by the third Defendant. Although the second Defendant had a registered mortgage on the suit property by the time of the transaction, the first Defendant had not placed any encumbrance on the suit property itself. The first Plaintiff ascertained the status of the suit property before purchase. He also ascertained the balance of the mortgage loan on the third Defendant's account with the second Defendant from the second Defendant and officials of the second Defendant as Uganda shillings 35,000,000/= before he paid the first instalment of Uganda shillings 170,000,000/= out of the Uganda shillings 280,000,000/= purchase price of the suit to the account of the third Defendant.

The first Plaintiff disclosed his intention to obtain a loan to repay the balance of Uganda shillings 110,000,000/= from Housing Finance Bank and retrieve the duplicate certificate of title from the second Defendant wherein a similar offer as Housing Finance Ltd would be given. The Plaintiffs then applied to the second Defendant for a loan of Uganda shillings 110,000,000/= on a standard form provided by the said Defendant and procedures of processing the loan commenced. The second Defendant also provided amortization schedule for the loan. The second Defendant caused the suit property to be valued on the basis of the information given to the valuation surveyors and at the cost of the first Plaintiff. Instructions by the second Defendant to the valuation surveyor acknowledged that the suit property was already secured by the second Defendant for a loan. However the second Defendant finally declined to grant the facility, purportedly because the first Plaintiff failed to present to the second Defendant's officials the third Defendant to answer undisclosed questions.

The suit property was advertised for sale under the Registration of Titles Act and the Mortgage Act in the Monitor Newspaper of the 7th of November, 2009 exhibit P31 and following which the Plaintiffs were served with an eviction order by court auctioneers on the 9th of November, 2009 exhibit P11. The Plaintiffs forestalled the eviction by delaying tactics while they sought legal advice. On the 16th of November, 2009 the Plaintiffs made an offer to purchase the suit property at Uganda shillings 290,000,000/= while negotiations were still going on, they filed the current suit.

In the amended written statement of defence filed on the 8th of July, 2011, the first Defendant denied liability and pleaded for a counterclaim against the Plaintiffs for a sum of Uganda shillings 180,000,000/=. It claimed that the balance of Uganda shillings 110,000,000/= which was the balance then still due and owing from the Plaintiffs to it after the Plaintiffs paid Uganda shillings 110,000,000/= and a partial settlement sealed by court on the 4th of May, 2010. The Uganda shillings 290,000,000 representing the bid price of the advertised suit property offered by the Plaintiffs.

HCCS number 268 of 2008 filed by the first and second Defendants against Joan Traders Ltd and the third Defendant has the amount claimed by the Plaintiffs therein against the Defendants and represents the total outstanding indebtedness of the Plaintiffs to the Defendants under the mortgage of the suit property. It was settled at Uganda shillings 308,140,360/= on 11th of July 2012.

The Plaintiff's Counsel considered issues number one and three together. These are whether the purported purchased by the Plaintiffs of the suit property was lawful? The third issue is whether the second Defendant is estopped from or waived its right to exercise its statutory power of sale?

The Plaintiff's Counsel submitted that at the time of the sale of the suit property by the third Defendant to the Plaintiff, the second Defendant was already registered as a Mortgagee on 19 September 2005. The first Plaintiff established the state of affairs from the land registry before the purchase. He went to the second Defendant's premises and its officials confirmed the state of affairs. The outstanding amount on the mortgage loan account number 0103530089100 of the third Defendant with the second Defendant in respect of which the suit properties were securities in the range of Uganda shillings 35,000,000/=. He was informed of this by the third Defendant.

Having established the outstanding loan amount, it was agreed in the sale agreement that the outstanding amount would be remitted to the second Defendant and the second Defendant would release the suit property. The second Defendant's officials gave the first Plaintiff a standard form to apply for a loan to repay which he filled and returned to the officials. The officials also giving an amortisation schedule for the loan he intended to apply for. The Plaintiffs paid for the valuation of the suit property commissioned by the second Defendant in relation to the Plaintiff's application for the loan to pay the balance of the purchase price, a fact which is not denied.

From the review of the evidence the Plaintiff's Counsel concluded that the dealings between the third Defendant and the Plaintiffs and the second Defendant led to the irresistible conclusion that the sale by the third Defendant of the suit property to the Plaintiff was with the knowledge and consent of the second Defendant. The second Defendant acknowledged the Plaintiff as a new customer of the suit property who had bought it from the third Defendant, the guarantor of the loan in respect of which the property had been mortgaged. The Plaintiff was expected to pay the outstanding loan amount confirmed by the second Defendant.

The evidence is that the Plaintiff's lodged a caveat on the suit property on 20 November 2008. There is no evidence that the Plaintiffs were called upon by the first and second Defendants to remove the caveat. The white pages and the application for the caveat showed that the Plaintiff's lodged a caveat claiming an equitable interest by purchase. The Plaintiff's Counsel submitted that although on the evidence there were no dealings between the Plaintiffs and the first Defendant, the first Defendant had constructive notice of such dealings from the second Defendant who jointly had advanced a loan to Joan Traders Ltd (guaranteed by the third Defendant) in equal amounts which loan was being administered by the second Defendant. The loan was secured by a mortgage on the suit property by the second Defendant. In those circumstances the Plaintiff's purchase of the suit property was lawful and the first issue ought to be answered in the affirmative.

Furthermore Counsel contended that both Defendants are estopped from invoking the Mortgage Act and the Registration of the Titles Act or the mortgage deed to exercise their statutory power of sale. Counsel submitted that the actions of the Defendants are inconsistent with the exercise of a statutory power of sale. He relies on section 114 of the Evidence Act and **Chamute Agencies Co Ltd versus Mbale District Administration [1998] KALR 586, 594**. Additionally the

Plaintiff's Counsel submitted that the second Defendant in the circumstances waived its right to assert and invoke clause 1.15 and 4.1.2 and 4.2.2 of the mortgage agreement between itself and the third Defendant executed on 2 August 2005. In the alternative it had acquiesced in the sale by the third Defendant and the Plaintiffs and is estopped from exercising such a right. It had by conduct waived its right to exercise such powers of sale.

By the same token of the principles of constructive notice, waiver and acquiescence, the first Defendant could not exercise such a power over plot 1247 on which it evident registered a mortgage well after the purchase and physical occupation and utilisation of the property by the Plaintiffs. He submitted that this **answered issue number three in the affirmative.**

In reply on issue numbers 1 and 3 the first Defendants Counsel submitted as follows: The **first Defendants Counsel** relies on the facts set out in the joint scheduling memorandum filed on 4 September 2014.

Whether the purported purchase by the Plaintiffs of the suit property was lawful?

The first Defendants Counsel prayed that this issue should be answered in the negative on the ground that no evidence was led to the effect that prior written consent of the first Defendant in accordance with clause 1 of exhibit 17 was sought and obtained. The purported sale by the mortgagor without the prior written consent of the mortgagee is voidable at the instance of the mortgagee. The submission that the mortgagee was aware of the dealings between the Plaintiffs and the third Defendant does not amount to prior written consent as stipulated in the deed.

The first formal correspondence is exhibited and informs the second Defendant that the Plaintiffs had purchased the mortgaged property but no details of the contents of the purchase were disclosed to the second Defendant nor were the Plaintiffs seeking consent of the second Defendant. There is no evidence to suggest that by November 2009 when the suit property was advertised, they had completed payment in accordance with Exhibit 1. In those circumstances the purported purchase without written consent of the mortgagee is unlawful. In the case of **Katarikawe versus Katwiremu [1977] HCB 187**, it was held that a contract of sale of land is not perfected until an effective transfer of title has been made and this has not been done this case.

Without prejudice the first Defendants Counsel submitted in the alternative that should the court determine that the purported sale is lawful, the Plaintiff's bought the property subject to existing interests. The first Defendants Counsel relies on section 64 of the Registration of Titles Act (RTA) cap 230 to the effect that a registered proprietor of land holds the land subject to all encumbrances. The Plaintiffs cannot and could not purchase a better title than what the third Defendant was holding.

The Plaintiffs would therefore purchase the land subjective to the rights in the encumbrances. Such rights cannot be waived by conduct. For that reason specific instruments such as the release of mortgage, withdrawal of caveat ar required if the encumbrances are to be removed. The caveator can therefore exercise his or her rights irrespective of the sale by a registered proprietor. The first Defendants Counsel contended that the Plaintiffs took a risk and were responsible for the consequences.

On the question of two conflicting equitable interest, the law is that when two equities are equal the first in time takes priority. Exhibit 15 and 16 indicates that the interests of the first and second Defendants were registered before the interest of the Plaintiff. Section 48 (1) of the RTA gives priority to the interest registered first in time. Under the Act, priority of competing interests is determined in accordance with the date of registration and not the date of the transaction. In **Goode on Legal Problems of Credit and Security, 5th Edition, Sweet and Maxwell** at page 177 the principle of priority at common law of competing interests is that as between competing interests, the first in time prevail. The rule applies where the competing interests are both legal interests and also where they are both equitable interests.

As far as facts are concerned the first Defendants Counsel submitted that there is admission by the Plaintiffs that he purchased the suit property from the third Defendant on 2 June 2008. Secondly the first Defendant to the security with the consent of DFCU bank as part of the loan conditions when the loan was made on the 19th of May 2006 and which the loan was clearly secured by a mortgage on both pieces of land. The mortgage Exhibit 17 speaks for itself and therefore the first Defendant's equitable right supersedes the Plaintiff's equitable right which was acquired later in time. The first Defendant's interest on the loan was protected by a caveat registered on 26 August 2008 before that of the Plaintiffs. In exhibit P 15 the first Defendant's

caveat was registered on 26 August 2008 while the Plaintiffs caveat was registered in November 2008.

The Plaintiff failed to carry out due diligence. The first Defendants Counsel relies on the case of **Mudima and 5 others versus Kayanja and 5 others HCCS 0232 of 2009** following the Court of Appeal case of **Sir John Bageire versus Ausi Matovu CACA 07 of 1996** were Okello JA held that lands are not vegetables that are bought from unknown sellers. Buyers are expected to make thorough investigations not only of the land but of the sellers before purchase.

The Plaintiffs ought to have known that the mortgage, for which the property he was buying was pledged, was in respect of Joan Traders Ltd and not the third Defendant. They ought to have formally written to the second Defendant asking for the balance due on the loan to Joan Traders Ltd. He ought to have known that because they are not signatories to the account of Joan Traders Ltd no bank would divulge customer information to them as third parties. The reliance of the Plaintiffs on Exhibit 9 which is "a yellow sticker" is inconsequential because it is not a letter from the bank and was not signed by anybody. In the premises the issue of whether the purported purchase by the Plaintiffs of the suit property was lawful ought to be answered in the negative. In case the court finds otherwise, the first Defendants Counsel prays that the court also finds that the purchase was subject to the interests of the first Defendant who by the Plaintiffs own admission was never informed, requested or consulted.

On whether the second Defendant is estopped or waived its right to exercise its statutory power of sale? The first Defendants Counsel submitted that the law on waiver or promissory estoppels is fairly well settled. In the case of **Agri-Industrial Management Agency Ltd versus Kayonza Growers Tea Factory Ltd and Another HCCS 0819 of 2004** honourable justice Geoffrey Kiryabwire quoting from **Halsbury's laws of England** agreed with the law that waiver in a contract is most commonly used to describe the process whereby one-party unequivocally, but without consideration grant a concession or forbearance with the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of a term waived.

The Plaintiffs have not adduced evidence of the exact concession or forbearance that the second Defendant is said to have granted them. In Exhibit 21 and 22 of the trial bundle respectively, the

correspondences between Counsel for the Plaintiffs and Counsel for the first and second Defendants Messieurs Sebalu and Lule were at that time acting for both Defendants clearly shows that the first and second Defendants did not recognise the interests of the Plaintiffs because any purported sale was done without their prior written consent. Silence cannot be interpreted as a waiver of rights. On the contrary the Plaintiffs would only have purchased subject of those rights of the Defendants. In the premises issue number three ought to be answered in the negative.

In further reply the second Defendants Counsel submitted that on the first issue:

The Second Defendant's case is that in the year 2006 the second and first Defendant co – financed in equal proportions a loan to Joan Traders Ltd in the sum of Uganda shillings 740,000,000/=. The third Defendant is the director of the borrower and executed a power of attorney in favour of Joan Traders to use her property comprised in Kyadondo, block 185, plots 2747 and 2746 at Namugongo. The third Defendant executed a deed of suretyship undertaking to fully repay the loan amounts in the event that Joan Traders fails to pay. A mortgage deed was executed and the second Defendant registered is charged on the certificates of title on 19 September 2005 under Instrument Number KLA 280 7304 both plots described above. Subsequently Joan Traders Ltd failed to repay the loans which prompted several warning notices and final demands being issued. The first and second Defendants jointly instituted **HCCS 268 of 2008 against Joan Traders Ltd and Helen Kakyo** (the third Defendant). There was a partial settlement of the suit where it was agreed to by the first and second Defendant that the property is advertised and sold to realise the security and the third Defendant would settled any indebtedness. The consent judgment was executed on 11 June 2012 and endorsed by the court on 20 June 2012.

Following advertisements of November 7th and 13th 2009, several bids were received which included the Plaintiffs bid for the property at Uganda shillings 290,000,000/= as the highest bid. The Plaintiff undertook to pay Uganda shillings 110,000,000/= by 15 December 2009 and Uganda shillings 180,000,000/= by the 31st of February 2010. The Plaintiffs bid was accepted on 3 December 2009 and thereafter the first Plaintiff requested for time to consult his wife and bankers on the modalities of obtaining a big loan to finance the purchase. They bid acceptance date was extended after 14 December 2009. Instead the Plaintiff filed the instant suit on 11

December 2009. On 11th of May 2010 the suit was settled by partial compromise executed on the 27th of May 2010 and endorsed by court on the 28th of May 2010. In the partial settlement the Plaintiff agreed to and paid Uganda shillings 110,000,000/= to the first and second Defendants. On 10 July 2008 the Plaintiff applied for a loan facility with the second Defendant retail services Department. The Defendants Counsel submitted that this was a separate and distinct transaction and the second Defendant required a valuation report as part of the loan appraisal process but this process could not lead to a binding relationship with the Plaintiffs before its contractual relations with the third Defendant.

Whether the purported purchase by the Plaintiffs of this property was lawful?

The first Plaintiff testified that before the purchase he was aware that the property was encumbered by a mortgage registered in favour of the second Defendant. Whereas the first Plaintiff alleges that he was told by the third Defendant that the outstanding monies where only Uganda shillings 35,000,000/= on bank account number 0103530089100, he did not adduce any evidence that he made any formal enquiry from the second Defendant to verify this information. The Plaintiff purports to use a paper sticker as the basis on which he executed a purchase agreement with the third Defendant. The Defendant's Counsel contended that the paper sticker is the Plaintiffs own fabrication and it is not the second Defendant's bank official mode of communication and cannot be used in evidence.

The Plaintiff engaged the third Defendant and purchased the property from her and paid her huge sums of money without first crosschecking and confirming the information he had gotten from the third Defendant with the second Defendant and most importantly without obtaining formal communication, commitment and assurance of the second Defendant that once the third Defendant's loan obligations were fully extinguished, the second Defendant would release the registered encumbrances and handover the certificates of title to the Plaintiffs. The Plaintiffs failed to exercise due diligence prior to the purchase and payment of money to the third Defendant and is therefore not a bona fide purchaser for value without notice. Counsel relied on the case of **Edward Gatsinzi & Mukasanga Ritah vs. Lwanga Steven HCCS No. 690 of 2004** where Hon Justice Bashaija with the reference to other authorities held that a bona fide purchaser is one who buys property for value without notice of another's claim over the same property and without actual or constructive notice of any defect in, or infirmities, claims, or equities against

the seller's title. He is one who has in good faith paid valuable consideration for the property without notice of prior adverse claims. Furthermore to qualify as a bona fide purchaser one must have done proper due diligence and exercised reasonable question before entering into any transaction that would ultimately be binding upon him or her. With further reference to the judgment of the Court of Appeal in **Hajji Nasser Katende versus Vithaldas Halidas & Co. Ltd C.A.C.A. No. 84 of 2003** for the proposition that lands are not vegetables that are bought from unknown sellers. Buyers are expected to make thorough investigations not only of the land but of the sellers before purchase.

The Plaintiff alleged that he made a loan application to the second Defendant Retail Sales Manager who instructed the valuation of the properties to be done on his behalf and that the surveyors/values were referred to the first Plaintiff as the contact person thereby acknowledging that he was in effective occupation. The Defendant’s Counsel submitted that the second Defendant deferred with the submission. The second Defendant's letter of instructions to carry out a valuation is a separate and distinct transaction that comprised a loan appraisal process that was initiated and paid for by the Plaintiff. The Plaintiff had to be the point of contact. This had no bearing and no relationship with the registered mortgage and/or Joan Traders Ltd loan facility. The second Defendants witness testified that whereas the first Plaintiff dealt with the second Defendant’s retail sales Department, it never at all dealt with the Credit Recovery Department. This was the only department that would have rendered a true and appropriate information regarding the registered mortgages, had the Plaintiff carried out due diligence prior to the purported purchase of the property from the third Defendant.

The second Defendant bank is made up of several departments and the repeal and sales Department is one that handles loan applications. The second Defendants witness testified that when the first Plaintiff came to the bank, he's departments or a prospective business deal and went for it but its conclusion is subject to a number of confirmations and procedural requirements that must be met before the customer can obtain a loan. The retail sales Department commissioned valuation surveyors and the Plaintiff’s application are to go through all demanded to the procedural steps of loan appraisal before his file could be forwarded to another department for approval or consideration. When the file was forwarded to the credit recovery Department, the Plaintiff was required to bring the third Defendant to the bank for reasons that the collateral

that the first Plaintiff purported to use for his loan application was already mortgaged to the second Defendant by the third Defendant. The second Defendant could not use the third Defendant's title as collateral for a third party loan before it got qualified confirmation from the third Defendant.

It is the Plaintiffs case that they executed the purchase agreement on 2 June 2008 when he paid Uganda shillings 170,000,000/= the third Defendant on 4 June 2008 and to which later on 17 June 2008, they wrote to the second Defendant. There is no evidence to show that this letter was delivered to and received by the second Defendant. In any case by this time PW1 had already paid money to the third Defendant thereby committing himself to risk and there is nothing in the letter of 17 June 2008 to suggest that PW1 was seeking the second Defendant's consent prior to the purchase and there is no mention of the Uganda shillings 170,000,000/= in the letter. The second Defendant's Counsel submitted that the Plaintiff had no dealings whatsoever with the second Defendant prior to or after the purported purchase of the suit property from the third Defendant and they have not adduced any evidence to this effect.

It is apparent that the third Defendant selectively give the Plaintiff wrong information and the Plaintiff did not independently write to the second Defendant to inquire into the details of the mortgage registered on the titles. This was expressed in a letter dated 25th of November 2009 Exhibit 22 wherein the first and second Defendant’s lawyers noted that the Plaintiff had no right to make any demands on them since the Plaintiff did not first obtain their written consent to the purported purchase from the third Defendant in accordance with clause 3 (i) of the mortgage deed. Furthermore section 18 (g) of the Mortgage Act 2009 provides that the mortgagor shall not transfer or assign a tenancy by occupation or part of it without the previous consent in writing of the mortgagee.

The first Plaintiff’s omissions enabled the third Defendant to defraud him and allowed the third Defendant to withdraw all the monies amounting to Uganda shillings 170,000,000/= that they had paid on her account of the next day after its payment as seen in the bank statements.

The Plaintiff submitted that they covenanted with the third Defendant that the ascertained balance would be remitted to the second Defendant to defray the balance so as to release the securities for the suit property. The additional submission that the second Defendant was in

agreement with this position and most importantly the Plaintiffs have not adduced any evidence that the second Defendant was notified that such monies have been paid by the Plaintiffs on the third Defendant's account for purposes of extinguishing the loan. Apparently the Plaintiff independently dealt with the third Defendant and thereafter purported to contact the second Defendant if at all he did.

In the circumstances the Plaintiffs cannot say that they sought and/or obtained the consent and had knowledge of the second Defendant prior to the purchase of the property. Without prejudice knowledge was not a condition precedent in the mortgage deed, it was the prior written consent of the second Defendant before the third Defendant could sell which is what was covenanted. The Defendants Counsel further referred to authorities defining the term "notice" including in **Dr Mwesigwa versus EADB HCM 863/2013** and **Jowett's Dictionary of English law and first edition volume 2 at page 1253**. He contended that there is no evidence to prove that the Plaintiff personally communicated at all with the second Defendant prior to 2 June and 4 June 2008.

The only possible conclusion is that the Plaintiff's never engaged, notified or sought the consent of the second Defendant prior to the alleged purchase of the suit properties from the third Defendant. They never wrote and demanded from the second Defendant information pertaining to the registered mortgages and the Plaintiff voluntarily assumed all risks. In the premises the second Defendant's submission is that the purported purchase of the suit property by the Plaintiffs was unlawful and issue number one ought to be answered in the negative.

On the third issue of whether the 2nd Defendant is estopped from or waived its rights to exercise its statutory power of sale? The second Defendants Counsel submitted that clause 5 of the mortgage deed conferred on the second Defendant and absolute right invoke it statutory power of sale of the mortgaged property to realise its security. Sections 26, 27 of 28 of the Mortgage Act 2009 provided for the mortgagees power of sale. The Plaintiff seems to submit that the second Defendant is barred by the doctrine of estoppels to exercise its statutory right of sale on the basis of allegation that the second Defendant had notice of the purchase of the mortgaged property by the Plaintiff. According to Halsbury's laws of England volume 9 (g) fourth edition paragraph 1025 the expression "waiver" in contract is most commonly used to describe the process whereby one party unequivocally but without consideration grants a concession for forbearance

to the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of a term waived.

The second Defendant had no notice, actual or constructive relating to the Plaintiff's purported purchase of the land and the second Defendant granted no concession to the Plaintiffs and furthermore it was on the strength of the consent judgment that the Defendant exercised their statutory power of sale. Furthermore there was no contractual relationship between the Plaintiffs and the second Defendant and there was no representation made by the second Defendant to the Plaintiffs at all and the second Defendant could never have waived its statutory right of sale. There must be an act or omission by which the inference that the second Defendant is barred by the doctrine of estoppels or waived its statutory right of sale can be made. The Plaintiffs did not adduce evidence to support the claim of estoppels, waiver or acquiescence and therefore the issue must be answered in the negative.

In rejoinder on issues 1 and 3, the Plaintiff's Counsel made a detailed submission. He submitted that the sale agreement between the Plaintiffs and the third Defendant dated 2nd of June 2008 did not require the Plaintiffs to seek the consent of the second and first Defendant's. The requirement for consent was between the first and third Defendants and the Plaintiff was not privy to the agreement.

Before execution of the sale agreement dated 2nd of June 2008 the first Defendant's interest did not appear as an encumbrance on the suit property. The first Defendant lodged a caveat with effect from 26 August 2008 on plot 2746 and a mortgage on plot 2747 with effect from 21 July 2008. Both the dates were after the execution of the sale agreement between the Plaintiff and the third Defendant. Secondly the first Plaintiff had notice of these encumbrances from the first Defendant in August 2008. Lastly the Plaintiffs occupied this suit premises upon execution of the sale agreement dated 2nd of June 2008.

The Plaintiffs had notice of the second Defendant encumbrance and the second Defendant's official confirmed to the first Plaintiff that the third Defendant had an outstanding loan on the account. The second Defendant had registered mortgage on the suit property and knew of its joint interest with the first Defendant. The second Defendant dealt with the third Defendant and

the Plaintiff in a manner inconsistent with the requirement of consent of the Mortgagee in a mortgage deed leading to the Plaintiffs to purchase the property from the third Defendant.

The Plaintiffs paid Uganda shillings 110,000,000/= in return for the certificate of title but the second Defendant knew that they had purchased and were in occupation of the suit property. Generally the second Defendant conducted itself inconsistent with the purported the rights asserted by the Defendants in their submissions in reply. On the other hand the Plaintiffs exercised due diligence.

In rejoinder to the submissions of the second Defendant's Counsel, the Plaintiff exercised due diligence and adduced evidence which stood up to cross examination. The Plaintiff agreed to pay the ascertained balance of the loan of Uganda shillings 35,650,000/= direct to the second Defendant which they did. The purpose of the payment was to retrieve the certificates of title from the second Defendant. The paper sticker the Plaintiff relied on was pleaded in the amended plaint and there was no contrary evidence adduced. It was tendered by consent of the parties in evidence. It confirmed the balance on the third Defendant's account.

With reference to the application for a loan from the second Defendant, the Plaintiff was advised to apply for the loan in the second Defendant bank instead of Housing Finance Bank Ltd. It was at that time that they indicated the outstanding balance on the account of the third Defendant according to exhibit P 30. The second Defendant's official also wrote to the valuation surveyors for valuation of the property. This is the evidence that the Plaintiff actually bought the suit property.

Issue number two is whether the intended sale by the Defendant was lawful?

The Plaintiff's Counsel submitted that the Monitor Newspaper of 7 November 2009 advertised the sale of Plot number 2747 only under the Registration of Titles Act and the Mortgage Act. This by implication meant that the mortgagees were invoking their statutory power of sale under the two Acts. To that extent the intended sale of plot 2746 which was not a subject of the advocates said in exhibit P 31 was unlawful. It would also appear that exhibit 31 which had been in respect of only plot 2747 could never have been a valid sale of plot 2746. The first Defendant had not registered the mortgage on the said plot and could not exercise a valid power of sale in respect thereto. Furthermore as had already been submitted the first and second Defendants could

not as a result of estoppels and waiver sell the property under their powers of sale under the Mortgage Act and the Registration of Titles Act or even under the mortgage deed. Their attempt to do so in the circumstances of the Plaintiffs case was unlawful and therefore issue number two should be answered in the negative.

In reply the first Defendants Counsel submitted on issue number two:

Whether the sale by the first and second Defendants followed an agreement by the parties in mediation proceedings in High Court civil suit 268 of 2008? Advertisement for sale was made twice. The first advertisement inadvertently omitted the full description of both properties. The second advertisement carried a picture of the property which was being sold as well as the full particulars of both plots. Secondly while the sale was inappropriately described as a sale under the Mortgage Act and an order of court, it was a mere misnomer which should not impute any ill motive on the part of the first Defendant who was a mortgagee anyway. The first Defendant was a mortgagee by the registration of the mortgage on plot 2747 and registration of an equitable mortgage in plot 2746.

To the extent that the Plaintiff submitted that the advertisement was in respect of plot 2747 only, this was an error on the part of the party who drew the advertisement. DW1 clearly testified that the plots advertised were both plots and the advertisements had to be read together. They were just five days apart from the advertisement in Exhibit 12 refers to the advertisement in Exhibit 31. At the mediation proceedings the parties agreed to meet and agree on the outstanding amounts following the sale of the security. In as far as the Plaintiff submitted that the Defendant adduced no evidence to show that the amounts as agreed between the parties had not been cleared, the record will show that the third Defendant has filed bankruptcy proceedings against herself. It was aimed at frustrating any execution process by the first Defendant. The first Defendant is pursuing a counterclaim because there are outstanding loan obligations.

The intended sale which the Plaintiffs participated in and took benefit from and even paid the portion of the bid price was pursuant to a court order in mediation proceedings and therefore lawful. The second issue ought to be answered in the affirmative.

In reply by the second Defendants Counsel on whether the intended sale by the Defendants is lawful?

The second Defendants Counsel submitted that the first and second Defendants jointly financed a mortgage facility in favour of Joan Traders Ltd. The loan was guaranteed by the third Defendant and a mortgage deed was executed and registered under instrument number KLA 280730. Section 20 (e), 26, 27, and 28 of the Mortgage Act of 2009 provides for the power of sale of the mortgaged land. Section 21 entitled the first and second Defendant to sue for money secured by the mortgage. Having failed to service the loan, the first and second Defendants filed a suit against Joan traders and Helen Kakyo. On 29 October 2009 and during mediation proceedings both Defendants in HCCS 268 of 2008, agreed with the first and second Defendants to sell the property to realise the security. At this time the third Defendant and Joan Traders Ltd did not mention that the third Defendant had sold the land to the Plaintiffs or any other third-party. They actually undertook to remove encumbrances on the title to make it easier for the first and second Defendants to sell the property. The first and second Defendants advertised the property for sale on the strength of the consent judgment and therefore have a right to sale and the sale was lawful.

The Plaintiff submitted that there was no valid sale of plot 2746 because it was not included in the advertisement of November 7, 2009 and the intended sale of the plot was unlawful, they do agree that there was a valid sale of plot 2747 since it was advertised.

In the premises the second Defendant's Counsel submitted that the issue is whether there was a valid intended sale of plot 2746?

The advertisement of 7 November 2009 was an inadvertent mistake because the letter of instructions to the auctioneers dated fourth of November 2009 required that they advertise and sell properties comprised in block 185 plots 2746 and 2747. This mistake was rectified by the advertising the properties on Friday, November 30, 2009 in the Daily Monitor Newspaper. The submission of the Plaintiff's Counsel that the sale was unlawful on account of failure to advertise the two plots therefore should fail. Additionally when the Plaintiff sent in their bid offer, dated 16th of November 2009, the first Plaintiff referred to the advertisement dated seventh and 13th of November 2009 acknowledging that the first and second Defendants had a statutory right of sale. They cannot therefore turn around and say that the sale of plot 2746 was unlawful for failure to advertise the property. In the premises the second Defendants Counsel submitted that the sale of the mortgaged property by the second Defendant was lawful and the Plaintiffs bid was

acquiescence to the first and second Defendant's right to sell and issue number 2 ought to be answered in the affirmative.

Issue number 4 is whether the payments by the Plaintiffs of Uganda shillings 110,000,000/= balance of the purchase price extinguished their liability?

On this issue the Plaintiff Counsel referred to Exhibit 19 which is the consent partial settlement of the suit. He submitted that pursuant to the payment made by the Plaintiff to the first and second Defendants of Uganda shillings 110,000,000/=, this was the outstanding amount owing to the third Defendant on the purchase price of the suit property and it is the reason why the Plaintiff willingly paid it. The sum was paid in full on 16 February 2011. In the premises the Plaintiffs owed nothing to the first and second Defendants as they were not privy to the mortgage agreement with the third Defendant and Joan Traders Ltd. Secondly the second Defendant did not make any claim against the Plaintiffs over and above Uganda shillings 110,000,000/= in its written statement of defence filed on court record on 5 December 2013. Consequently the witness of the second Defendant Juliet Okoth supports a non-existent counterclaim in her testimony.

The first Defendant however counterclaimed against the Plaintiffs for Uganda shillings 180,000,000/= said to be the difference between Uganda shillings 290,000,000/= the Plaintiffs bid for the suit property in exhibit P13 and Uganda shillings 110,000,000/= the Plaintiffs paid under Exhibit 19. The Plaintiff's Counsel contends that the intended sale having been illegal according to the submissions on issue number two, cannot be a basis for a valid contract. Secondly there was no valid contract at all between the Plaintiffs and the first Defendant on the basis of the bid.

For a valid contract to exist there has to be offer and acceptance. The acceptance must be obligated to the offeror failure for which no contract comes into existence according to Lord Denning in **Entores versus Miles Far East Corporation [1955] 2 All ER 493**. In Exhibit 13 the first Plaintiff reacted to Exhibit 31 and offered to purchase the suit property for Uganda shillings 290 million as a sitting tenant payable in two instalments within three months. The terms could only be accepted if the timelines of 31 January 2010 for paying the second instalment of Uganda shillings 180,000,000/= were strictly adhered to. The Plaintiffs would forfeit any first instalment

paid pursuant thereto if this condition was breached. They were required to accept the terms within seven days from the receipt of Exhibit 14 dated 3rd of December 2009. Exhibit 14 is the bank form for the acceptance of the terms of the offer which was to be filled by the Plaintiffs signifying their acceptance of the offer. In the premises the Plaintiff's Counsel submitted that the acceptance was conditional. The Plaintiff did not sign and return the acceptance form at all and instead on 9 December 2009 according to Exhibit 20 wrote requesting for more time to consult. The first Plaintiff also wrote that he was still consulting with his bankers on the modalities of extending a big loan in a short time. This amounted to a counter offer. In response thereto in Exhibit 20 the first Plaintiff received Exhibit 24 which inter alia extended his responsibility to 14 December 2009. They included automatic revocation of the acceptance of the bid and requiring the first Plaintiff to vacate the suit premises. By their conduct, it was a conditional acceptance of the counter offer in Exhibit 20. The Plaintiffs never responded and opted to file a suit to prevent the intended sale and eviction. This amounted to a total rejection of the conditional acceptance in Exhibit 24.

In the premises Counsel for the Plaintiff contends that there was no valid contract between the Plaintiff and the Defendants. That being the case, there is nothing additional to Uganda shillings 110,000,000/= to be paid by the Plaintiffs to the Defendants.

On 11th of June 2012 in Exhibit 28 and in HCCS 268 of 2008, the amount owing an outstanding the first and second Defendants by Joan Traders Ltd and the third Defendant was settled at Uganda shillings 190,701,803.5/= for each of the Defendants. No evidence has been adduced to prove that the third Defendant did not satisfy the decree.

An order awarding one than Uganda shillings 110,000,000/= to the Defendants would have no basis as earlier submitted and would unjustly enrich the first and second Defendants in case the third Defendant satisfied the decree. In the premises Counsel prayed that issue number 4 is resolved in the affirmative.

In reply on issue 4 the first Defendant’s Counsel submitted on **whether the payment by the Plaintiffs of Uganda shillings 110,000,000/= balance on the purchase price extinguished their liability?** He prayed that the issue is answered in the negative on the following grounds:

a) The payment of Uganda shillings 110,000,000/= was made pursuant to a partial consent judgment Exhibit 19 on page 58, the trial bundle.
b) In the case of Katarikawe (supra) the court held that a purchaser acquires an equitable interest in the nature of the right in persona enforceable only against the vendor. Therefore the rights of the Plaintiffs are enforceable only against the third Defendant. Their remedy could be against misrepresentation by the third Defendant to the Plaintiffs.
c) No evidence was adduced to show that the third Defendant was or is an agent of the first and second Defendants instructed to receive payment on their behalf sought any payment made to how would be presumed to have been made by the Defendant's. Instead evidence is that payment was made to the third Defendant and was for her benefit.
d) Financial institutions for security to enable them recover in the event of default. This right is protected by the law. The contract between the parties cannot take away such a right which is in rem.
e) The evidence adduced further shows that the first Defendant's counterclaim is premised on a bid by the Plaintiffs, which was after the purported purchase by the Plaintiffs from the third Defendant. The Plaintiff's liability to the first and second Defendants is premised on the partial consent judgment. These are two separate transactions. If the court finds this issue in the affirmative, it would mean that the first and second Defendants are barred by the contract they did not consent to nor were parties to. The first and second Defendants cannot be bound by an agreement between the Plaintiff and the third Defendant which is a right in persona.

In conclusion issue number four ought to be answered in the negative because the third Defendant is not an agent of the first Defendant. Secondly the agreement between the Plaintiffs and the third Defendant is an agreement in persona that can only be enforced against the vendor. The first Defendant was not the vendor in Exhibit 1. The issue seeks to enforce the agreement as an agreement in rem and it is bad in law.

In reply on issue 4 whether the payment by the Plaintiff of Uganda shillings 110,000,000/=, the balance on the purchase price extinguished their liability?

The second Defendant's Counsel submitted that on 29 October 2009 all the Defendants agreed that the properties comprised in block 185 plots 2746 and 2747 is advertised and sold to realise

the security. Following advertisement dated 7th and 13th of November 2009, the Plaintiffs on 16 November 2009 sent in their bid offer and undertook to pay in two instalments of Uganda shillings 110,000,000/= and 180,000,000/= respectively. On 3 December 2009 the Plaintiffs offer was accepted by the second and first Defendant's lawyers. From the evidence on record, there was an offer by the Plaintiffs to enter into a legal relationship on definite terms and the offer was accepted. The issue should therefore be answered in the affirmative.

The Plaintiff contended that the second Defendant did not make any claim against the Plaintiff over and above Uganda shillings 110,000,000/=. It however suffices to note that the first and second Defendants jointly financed the mortgage facility that was given to Joan Traders Ltd and guaranteed by the third Defendant. The first and second Defendants were represented by the same lawyers and their rights and interest in the mortgaged property is not severable and monies recovered by either are shared accordingly.

Furthermore it is not true that the Plaintiff's evidence was not challenged. The evidence was challenged. The Plaintiff claimed to have paid Uganda shillings 110,000,000/= pursuant to the sale agreement between themselves and the third Defendant and the question is if that was the case why they paid the money the first and second Defendants are not directly to the third Defendant according to clause 5 of the sale agreement? At the time of the sale by the third Defendant she did not have an absolute right in the property to vest in the Plaintiffs. Clause 3 (i) of the mortgage deed required prior written consent from the first and second Defendants before any sale of the third Defendant. The third Defendant could not have sold to the Plaintiff a better title than the one she had. The Plaintiffs voluntarily took the risk. Furthermore they paid Uganda shillings 110,000,000/= and the first and second Defendants thereby admitting their liability to the Defendants in the consent judgment of the 27th of May 2010.

It did not mean that the first and second Defendants rights were absolutely extinguished. The consent judgment stipulates that the third Defendant and Joan Traders Ltd agreed with the Defendants to sell the mortgaged property is to recover a total amount of Uganda shillings 381,403,606/=. The first and second Defendants only received Uganda shillings 110,000,000/= and therefore have a right in the mortgaged properties to recover their money. The rights of the first and second Defendants are enforceable against the whole world as opposed to the Plaintiff's

rights which are only enforceable against the third Defendant. In the premises issue number four ought to fail.

Counterclaim of the first Defendant.

On this issue the Plaintiff's Counsel prayed that the counterclaim for Uganda shillings 180,000,000/= and damages be dismissed. He relied on the submissions on issue number 4 for the effect that the first Defendant and the second Defendant are not entitled to any money from the Plaintiffs for the same reason the first Defendant is not entitled to general damages for lost opportunity, bad faith and inconveniences claimed. As far as the claim for declaration that the first Defendant is not indebted to the Plaintiffs and is not obliged to waive receipt of its balance of the bid price is concerned, Counsel submitted that the Plaintiffs in the amended plaint did not claim that the first Defendant was indebted to them in anyway. Consequently the prayer does not arise from the first Defendant's pleadings or of its amended written statement of defence and counterclaim/cross claim.

The question of dismissal of the suit with costs and costs of the suit or any other relief claimed in the counterclaim does not arise. In the premises the Plaintiff's Counsel prayed that this suit is allowed with costs and the first Defendant's counterclaim be dismissed with costs to the Plaintiff.

In reply the first Defendants Counsel submitted on whether the Plaintiffs are entitled to the reliefs claimed? And whether the first Defendant is entitled to the counterclaim?

The first Defendants Counsel submitted that the Plaintiffs are not entitled to the remedies claimed in the plaint for several reasons. Firstly the purported purchase was unlawful because it lacked the necessary consent of the mortgagees as required. In the alternative should the sale be declared lawful, it should be subject to all other interests which are enforceable against the Plaintiffs. In other words the purchase of the property did not extinguish the rights of the first Defendant to foreclose on the security. There was no need for an application for foreclosure because the foreclosure was by consent of the parties the court annexed mediation proceedings.

Secondly the Plaintiff’s right is a right in persona which can only be enforced against the third Defendant as a vendor. This was anticipated in exhibit P1 where the parties to the contract indicated that in the event of any misrepresentation, the vendor would fully indemnify the

purchasers for any loss. The agreement further states that if the vendor could not pass any title, the purchase price would be refunded by the vendor. Counsel submitted that this was such a case where no claimed title could be passed to the Plaintiffs and their remedy delay in seeking compensation from the third Defendant after settling particularly the first Defendant.

Thirdly the Plaintiffs indirectly seek an order for specific performance. However the first Defendants Counsel submitted that this was not the case where specific performance can be ordered. The contract between the Plaintiffs and the third Defendant is in persona. The remedy of the Plaintiffs is to sue the third Defendant for a refund of their money and for damages. The court cannot order specific performance against a party who is not a party to the contract.

Fourthly on the claim for general damages, the Plaintiffs bought the land subject to all interests. This was a risk they willingly took. The argument that they would be evicted is misplaced, premature or misconceived. The Plaintiffs have been given an opportunity to purchase the security from the mortgagees. The counterclaim shows that the first Defendant is seeking for orders that the Plaintiffs pay the balance of their bid price of Uganda shillings 180,000,000/=. All the need to do is to pay the money and sue the third Defendant for monies paid to her and which were withdrawn by her.

In the premises the Plaintiffs are not entitled to costs of the suit.

Whether the first Defendant is entitled to reliefs claimed in the counterclaim?

The first Defendants Counsel prayed that the counterclaim is allowed on the following grounds.

The conduct of the Plaintiffs has greatly affected the first Defendant expected income from the anticipated sale. The first Plaintiff conducted himself in a manner showing that he was ready to pay but instead instituted a suit and got an injunction stopping the sale of the property pending disposal of the suit. The Plaintiffs admitted in paragraph 3 of the submissions that they applied by delaying tactics to avoid eviction. They are the kind of people with such disposition that are coming to justice and seeking to be shielded after such blatant admissions. They took advantage of the situation and have taken full benefit of the property which the continued to leave in to date happily and hope to avoid paying the first Defendant what they bid and promised to pay. This is unconscionable conduct that a court of justice should not condone. All other bidders were turned

off and not contacted to make payment for the property because the first Defendant took pity on the Plaintiffs and agreed to offer the property to them and after all this accommodation, the Plaintiffs turned around and sued the first Defendant with the hope of getting away without paying the balance. The first Defendant lost other opportunities and the only compensation that the first and second Defendant can have is the granting of the counterclaim. In the premises the first Defendant prays for an order for the Plaintiffs to pay the balance of Uganda shillings 180,000,000/= and interest on the sums from 2009 till payment in full at the rate of 22% per annum.

Secondly the Plaintiff's contract with the third Defendant cannot be enforced against the whole world. It is a right in persona and therefore it is just and equitable that the rights of a financial institution to foreclose on the security should be protected by the court.

Counsel further prayed for an order of general damages because when the Plaintiffs bid for the property, they duped the first and second Defendants to believe that they were interested and willing to purchase the property only to get a court injunction stopping the sale pending determination of the suit. This conduct caused the first Defendant to lose the opportunity to dispose of the property in 2009 and it has therefore lost time and value of money. Secondly the court should be guided by the factors in **Annette Zimbiha vs. Attorney General HCCS No 0109 of 2011** wherein the court also relied on the case of **Uganda Commercial Bank vs. Kigozi [2002] 1 EA 305** to determine the quantum of damages. They held that in the assessment of the quantum of damages, courts have mainly been guided by the value of the subject matter, economic inconvenience that a party may have been put through and the nature and extent of the breach. In the premises the first Defendant's Counsel proposed an award of general damages to the first Defendant of Uganda shillings 50,000,000/=. Secondly he prayed that interest be awarded on the sum prayed for at the commercial rate of 30% per annum from the date of judgment till payment in full. Lastly the first Defendant's Counsel submitted that in the premises the first Defendant is entitled to costs of the suit.

In further reply the second Defendants Counsel submitted on whether the Plaintiffs are entitled to the reliefs sought? And whether the first Defendant is entitled to the counterclaim?

On the premises that the Plaintiffs negligently purported to purchase the suit property and willingly and flagrantly flouted the requirements of dealing with the mortgaged property, they did so at their own risk and therefore cannot be seen to benefit from their own wrong.

The Plaintiffs only remedy is to pay the balance of the bid price if they are seriously interested in the mortgaged property and to sue the third Defendant for monies received from them in accordance with clause 8 (v) of the sale agreement. They have a cause of action for money had and received either by mistake, or upon a consideration which failed. In the premises they are not entitled to the remedies claimed.

Whether the first Defendant is entitled to the prayers in the counterclaim?

The second Defendant's Counsel supported the first Defendant's counterclaim on the ground that the Plaintiffs unlawfully purchased the property without the requisite written consent of the first and second Defendants. Secondly the Plaintiffs paid money to the third Defendant who is not an agent of the first and second Defendants and therefore cannot enforce their contract against the first and second Defendants. Thirdly the first and second Defendants were legally registered on the property prior to the Plaintiff’s purported parties. In any case the sale to a third party would not stand because it will create conflicting equities and it is trite law that where there are conflicting interests the first in time is the first right according to the case of **Rice vs. Rice (1854) 6 1 ER 646.** The consent judgment between the third Defendant and the Messieurs Joan Traders Ltd as well as the first and second Defendants is binding entitling the first and second Defendants to recover their money. Furthermore following the consent judgment, the first and second Defendants advertised the property and the Plaintiffs bid for the property which bid was accepted by the first and second Defendants thereby creating a contractual relationship. The Plaintiff took advantage of the first and second Defendant’s good faith and stalled the recovery of money.

In the premises the first Defendant ought to be compensated with the recovery from the Plaintiff of Uganda shillings 180,000,000/=, general damages and costs for the loss suffered due to the Plaintiffs act and omissions.

Counsel further supported the claim for an award of interest of the first Defendant.

Finally on the issue of costs, the second Defendant's Counsel submitted that costs should follow the event unless the court for good cause directs otherwise. In the premises the Plaintiff's suit ought to be dismissed with costs.

Judgment

I have duly considered the pleadings, evidence adduced, submissions of Counsel and the authorities cited by Counsels.

As far as the evidence is concerned the basic agreed facts in this dispute are contained in the joint case scheduling conference memorandum endorsed by all Counsels for all the parties except the third Defendant and filed on court record on 4 September 2014. In the scheduling memorandum the following are the agreed facts.

The Plaintiff's bought the suit properties from the third Defendant Helen Kakyo and executed an agreement of sale on 2 June 2008 when the said property had been mortgaged to the second Defendant. The suit property is plot 2747 and Plot 2746 and the mortgage was registered on 19 September 2005 under Instrument No. 280730. Plot 2746 only was encumbered by a caveat lodged by the first Defendant on 26 August 2008. The third Defendant’s Account number with the second Defendant is 0103530089100.

The Plaintiffs paid Uganda shillings 170,000,000/= as a first instalment to the third Defendant promptly on her account with the second Defendant at Pinnacle Branch in account number OIL 6006309100 and took immediate possession and occupation of the suit property. At the time of the proceedings in this suit they were still in possession and occupation of the suit property.

The first Plaintiff notified the second Defendant of the purchase of the suit property and applied for a loan of the balance of purchase price of Uganda shillings 110,000,000/= against the suit land as security.

For purposes of the loan from the second Defendant and the first Plaintiff opened account number O1L 6095196900 (Old), 01103000264222 (New) at the second Defendant's Nsambya branch. The second Defendant commissioned MS Certified Properties Surveyors and Valuers and Real Estate Agents ("the valuers") to value the suit lands following the application for a loan

by the first Plaintiff. The valuers rendered the report in August 2008. The Plaintiffs paid for the services of the valuers and costs related to valuation.

The first Defendant declined to grant the loan applied for by the first Plaintiff. The Plaintiff lodged a caveat on Plot 2746 on 20 November 2008. On 9 November 2009 MS Ruhega Auctioneers and Court Bailiffs served a notice to vacate on the Plaintiff's pursuant to a notice of sale of the suit property in the Saturday Monitor of 7 November 2009 scheduled to take place on 20 November 2009. The Plaintiffs bid for the purchase of the suit property in writing on 16 November 2009.

The first Defendant registered a mortgage on only Plot No. 2747 on 21 July 2008. On the 19th of May 2006 Joan Traders Ltd executed a mortgage with the first Defendant in respect of both plots. On 26 August 2008 the first Defendant lodged a caveat on plot 2746.

The first and second Defendants filed HCCS No. 268 of 2008 against Joan Traders and Helen Kakyo. HCCS No. 268 of 2008 was settled by consent of the parties. The Plaintiffs partially settled this suit by payment of Uganda shillings 110,000,000/=.

The first Defendant's peculiar facts which it asserts for its defence are that the first Defendant granted a loan to Helen Kakyo for a business under the business name of Joan Traders Ltd. Joan Traders Ltd and the third Defendant gave the two certificates of title for the loan (the suit property). They executed a mortgage deed dated 19th of May 2006 for the loan against block 185 plots 2747 and 2746. Joan Traders Ltd failed to pay and the first Defendant filed HCCS 268 of 2008 to recover the sums due. In the course of mediating that suit, Helen Kakyo and Joan Traders Ltd expressly agreed that the suit property should be sold to reduce on the indebtedness of Joan Traders Ltd. Pursuant to the mediated partial settlement of the suit, the first Defendant advertised the property for sale in the Monitor Newspaper of 7 November 2009. Pursuant to the advertisement, five people bid to buy the property including the first Plaintiff. The first Plaintiff's bid was accepted and the property was supposed to have been sold to him. The first Plaintiff however wrote a letter stating that he had instead already bought the property from Helen Kakyo separately without the knowledge or consent of the first Defendant as a legal and equitable mortgagor. The first Defendant considered this unacceptable and it is the situation that led to the current suit.

As far as the second Defendant's peculiar facts are concerned, the second Defendant's case is that it gave a loan to Helen Kakyo for the same business of Messrs Joan Traders Ltd. A mortgage deed was executed with the third Defendant and a charge was registered on the certificate of title on 19 September 2005 under instrument number KLA 280730 in respect of block 185, plot 2747 and 2746. Helen Kakyo kept an account number OIL 6006309100; and Joan traders Account number 0103530089100.

The third Defendant defaulted on the loan and the first and second Defendant's jointly instituted HCCS 268 of 2008 against Joan Traders Ltd and the third Defendant. During mediation of HCCS No. 268 of 2006 it was agreed by the first and second Defendant, the third Defendant and Joan Traders Ltd that the property is advertised and sold to realise the security whereupon the third Defendant would settle any indebtedness. Prior to the first and second Defendant's decision to realise the security, the Plaintiff had separately engaged and executed a sale agreement with the third Defendant without notice, consent or involvement of the second Defendant and the second Defendant was never a party to the dealings between the Plaintiffs and the third Defendant. By the time the Plaintiff purported to purchase the property from the third Defendant, the certificate of title was already encumbered by the second Defendant's mortgage reflected under Instrument No. KLA280730. The Uganda shillings 170,000,000/= that the Plaintiff paid to the third Defendant was deposited on her personal account number OIL 600630100 on 4 June 2008 and it was withdrawn by the third Defendant on 5 June 2008. The Plaintiff nevertheless bid for the property on 16 November 2009 at Uganda shillings 290,000,000/= with an undertaking to pay Uganda shillings 110,000,000/= by 15th of December 2009 and Uganda shillings 180,000,000/= and by 31st of January 2010.

The Plaintiff instituted the current suit which was partially settled wherein he paid 110,000,000/= to the first and second Defendants. The second Defendant asserts that the Plaintiff's application for a loan facility constitutes a separate and distinct transaction and the second Defendant had before the requisite mandatory loan appraisal before the loan could be approved and money disbursed to the Plaintiffs. The Plaintiffs were fully aware that a valuation report is part of the appraisal process at its production was no guarantee that the applicant would get the loan. The second Defendant solely dealt with the third Defendant to whom it disbursed loan monies and

she pledged the collateral and duplicate certificate of title for the land comprised in the suit property described above.

Agreed issues:

1. Whether the purported purchased by the Plaintiffs of the suit property was lawful?
2. Whether the intended sale by the Defendants is lawful?
3. Whether the second Defendant is estopped from or waived its right to exercise its statutory power of sale?
4. Whether payment by the Plaintiffs of shillings 110,000,000/=, the balance on the purchase price extinguished their liability?
5. Whether the Plaintiffs are entitled to the reliefs sought?
6. Whether the Defendants are entitled to the prayers in the counterclaim?
7. Whether the first Defendant is entitled to the reliefs sought in the cross-claim?

I have carefully considered the facts and the issues and would summarise them for ease of reference before dealing with the issues.

This controversy arises primarily by the Plaintiffs claim to have bought the suit property comprising of plots 2747 and plot 2746 from the third Defendant. The basis of the assertion is the sale agreement dated 2 June 2008. It is agreed that by the time of the sale agreement on 2 June 2008, the property had been mortgaged to the second Defendant. It is also an agreed fact that plot 2746 was only encumbered by a caveat lodged by the first Defendant on 26 August 2008. The first matters of fact to be ascertained are the rights of the parties at the date of the sale agreement between the Plaintiff's and third Defendant. However before matter can be considered in the relation to the rights of the parties at the time of the sale of the property by the third Defendant to the Plaintiffs, it is important to establish the relationship between the third Defendant and the second and first Defendants.

It is not in controversy that Joan Traders Ltd obtained a loan from the first and second Defendants who are financial institutions licensed to loan money. Secondly it is an agreed fact that the loan was secured by a mortgage or mortgages on plots 2747 and 2746 at the time of the sale transaction between the third Defendant and the Plaintiffs. The third Defendant Helen Kakyo is the registered proprietor of plots 2747 and 2746. Secondly she is a director of Joan

Traders Ltd. Thirdly she personally guaranteed the loan as well as having the title deeds used as security for the loan. Last but not least there was a suit between the first and second Defendants against Joan Traders Ltd and Helen Kakyo with regard to the loan agreement/transaction between the Plaintiffs who were at the first and second Defendants and Joan Traders Ltd. The suit was completed however the timing of the sale agreement between the third Defendant and the Plaintiff's has to be considered to give a chronological account of the facts leading to the controversies in this suit and to resolve the controversy with the context and chronology of facts in perspective.

A sale agreement was executed on 2 June 2008 between the Plaintiffs and Helen Kakyo for the residential property situated at Namugongo and described as Kyadondo block 185 plots 2746 and 2747 measuring approximately 0.46 acres. It was agreed that the property would be sold for Uganda shillings 280,000,000/= payable in two instalments. The first instalment of Uganda shillings 170,000,000/= was payable before the execution of the agreement to the personal account of the third Defendant with the second Defendant account number OIL 6006309100 DFCU bank Ltd William Street branch. The balance of Uganda shillings 110,000,000/= was to be arranged for by the purchasers through Messieurs Housing Finance Bank Ltd through a mortgage over the property and remitted to the third Defendant within 90 days. This was by direct remittance of Uganda shillings 35,650,000/= by Housing Finance Limited to DFCU bank/the second Defendant for purposes of paying of an outstanding balance on the personal account of the third Defendant/vendor so as to release the mortgaged property namely plots 2746 and 2747 and retrieve the respective certificates of title. The balance of Uganda shillings 74,350,000/= would be promptly remitted to the account of the third Defendant. It was also agreed that the Plaintiffs would be entitled to possession of the demised premises. The vendor was required upon completion of payment of the purchase price to execute transfer documents in favour of the Plaintiffs. The certificates of title were supposed to be handed over to the Plaintiffs. The second Defendant/DFCU bank Ltd was not privy to the agreement between the Plaintiffs and the third Defendant.

A mortgage agreement had been executed between DFCU bank and Helen Kakyo (the third Defendant to this suit) by a mortgage deed dated 2nd of August 2005. The third Defendant borrowed Uganda shillings 80,000,000/= and the security provided block 185 plots 2746 and

2747. Subsequently the mortgage agreement was executed by which Joan Traders Ltd obtained a loan from the first Defendant. Under the mortgage agreement executed on the 19th of May 2006 the first Defendant agreed to lend to the said Joan Traders Ltd Uganda shillings 740,000,000/=. The third Defendant signed on behalf of the borrower. Strangely Joan Traders Ltd is referred to as the registered proprietor of plots 2746 and 2747 and not an attorney as such of the third Defendant; the same plots are the subject matter of a mortgage deed executed between the second Defendant and the third Defendant. By a power of attorney dated 8th of May 2006 the third Defendant Helen Kakyo delivered the security and granted all powers necessary to Joan Traders Ltd to use the title for purposes of raising a loan of Uganda shillings 740,000,000/= and to execute mortgages, agreements and contracts etc on her behalf. Additionally Helen Kakyo bound herself to be a surety by deed of Suretyship dated 22nd of May 2006.

Subsequently Joan Traders Ltd was found to be in arrears of the loan repayment by several months and the matter became the subject of the civil suit between the first Defendant and the second Defendant as Plaintiffs and Joan Traders Ltd and Helen Kakyo as Defendants. Before considering the civil suit referred to above and the particulars therefore, it is also a matter to be considered that certain encumbrances were registered on plot 2747 and 2746.

The property was registered in the names of the third Defendant Helen Kakyo under instrument number KLA 72025 on 31 March 2005. Subsequently there is an encumbrance by way of the mortgage by DFCU bank under instrument number KLA 280730 on 19 September 2005 on plot 2746. The first Defendant Grofin East Africa Fund LLC registered a caveat on the property on 26 August 2008 under instrument KLA 387855.

As far as plot 2747 is concerned it is registered in the names of the third Defendant Mrs Helen Kakyo on 31 March 2005 under instrument number KLA 272025. Secondly it has a mortgage encumbrance registered by DFCU bank Ltd on 19 September 2005 under instrument number KLA 280730. It also has a mortgage registered by Grofin East Africa Fund LLC on 21 July 2008 under instrument number KLA 383153.

It is a fact that is accepted by all parties that the sale agreement between the Plaintiff and the third Defendant is dated 2nd of June 2008.

On the face of it the encumbrances of DFCU bank on plots 2747 and 2746 were registered on 19 September 2005 on both plots. On plot 2746 the first Defendant lodged a caveat on 26 August 2008 after the sale agreement between the Plaintiffs and the third Defendant. Secondly as far as plot 2747 is concerned, the first Defendant Grofin East Africa Fund LLC registered a mortgage on 21 July 2008 in addition to that of DFCU bank Ltd which was registered on 19 September 2005.

I have further carefully considered the facts relating to the two suits concerning the property. The first and second Defendants filed HCCS 268 of 2008 against the Joan Traders Ltd on 20 October 2008. Again this was after the sale agreement between the third Defendant and the Plaintiffs concerning plot 2746 and 2747. Subsequently the other relevant fact is that the civil suit was settled partly by consent of the parties namely by an agreement between Grofin East Africa Fund LLC, DFCU bank Ltd (namely the first and second Defendants to this suit) who were Plaintiffs in HCCS 268 of 2008 on the one hand and Joan Traders Ltd and Helen Kakyo who were Defendants on the other hand. The most material matter of parties is that Helen Kakyo made the agreement as a director of Joan Traders Ltd and also in her capacity as a surety and party. The consent agreement was executed before the Assistant Registrar on 29 October 2009. The terms of the consent agreement are as follows: That Messieurs Sebalu and Lule would advertise the property which was given as security to the Plaintiff comprised in block 185 plots 2746 and 2747 within one week from 29 October 2009. Secondly the property would be marketed for 15 days. Thirdly the two caveats registered on plot 2746 by the spouse of the second Defendant (Helen Kakyo) Mr Ali Ahmed Salim and other persons named therein would be vacated to facilitate the sale. Fourthly the parties would meet and agree on the outstanding amount due to the Plaintiffs by the Defendants. Lastly the second Defendant (Helen Kakyo) would take three weeks to travel to South Africa and settle with her suppliers any monies due to her so as to make good her indebtedness to the Plaintiff.

Pursuant to the consent agreement endorsed by the assistant registrar, the property was advertised in the daily monitor of 7 November 2009. It is an agreed fact that the Plaintiffs bid for the property. Prior to bidding for the property on 9 November 2009 Messieurs Ruhega Auctioneers and Court Bailiffs issued a notice to vacate the property to the Plaintiffs pursuant to a notice of sale of the suit property in the Saturday monitor of 7 November 2009 scheduled the

place on 20 November 2009. The Plaintiffs thereafter bid for the purchase of the suit property in writing on 16 November 2009 according to the agreed facts.

It is now a fact in this current suit namely HCCS 461 of 2009 was filed by the Plaintiffs on 11 December 2009 barely a month after bidding for the property. It is specifically for a declaration that the intended advertised sale of the property is unlawful or wrongful and for an order stopping it and for a permanent injunction, general damages interests and costs.

Last but not least this suit was partially settled by consent of the parties according to the settlement order dated 11th of May 2010. The question that arose is whether this settlement between the parties compromised the rights of the parties reflected in the various transactions. In fact the Plaintiff's applied for judgment on admission but before delving into that it is material to further refer to the terms of the settlement between the parties.

The first point of agreement/partial settlement is that the Plaintiffs admitted liability to the Defendants to the extent of Uganda shillings 110,000,000/= and agreed to pay the money in a particular manner. I need to emphasise that at the time of the partial settlement of HCCS 461 of 2009, the suit was between the Plaintiffs and the first and second Defendants. The third Defendant Helen Kakyo was not yet joined as the 3rd Defendant to the suit. The Defendants instituted a joint claim/cross action against the third Defendant in November 2013 and therefore the consent partial settlement of HCCS 461 of 2009 is only between the Plaintiffs and the first and second Defendants. That notwithstanding the amount of Uganda shillings 110,000,000/= was the amount of money that is equivalent to the balance left for the purchase price of Uganda shillings 280,000,000/=. It is an agreed fact as to the agreement between the Plaintiffs and the third Defendant that the Plaintiffs paid Uganda shillings 170,000,000/= to the third Defendant. The balance to be paid was Uganda shillings 110,000,000/=. This is the amount that constitutes the partial settlement of HCCS 461 of 2009. In other words the first and second Defendants still claim Uganda shillings 180,000,000/= from the Plaintiffs. On the other hand the Plaintiffs claim to have paid this money to the third Defendant already. In theory the money in controversy is Uganda shillings 170,000,000/= (more by 10,000,000/= shillings by using the bid price of Uganda shillings 290,000,000/-).

That notwithstanding it is an agreed fact that the Plaintiffs have already paid to the first and second Defendants Uganda shillings 110,000,000/=. At the beginning of this judgment I had already set out the consent partial settlement to HCCS 461 of 2009. However certain questions were reserved for trial of the suit and that constituted the main reason why the Plaintiff's application for judgment on admission was rejected. The following issues were reserved for trial of the suit by consent of the parties namely: Whether the intended sale by the Defendants is lawful? Whether the Plaintiffs are entitled to a permanent injunction? Whether the Plaintiff is entitled to pay only the balance on the purchase price? Whether the purported purchase by the Plaintiffs of the suit property was lawful? Whether the Defendants are entitled to the prayers in the counterclaim?

I have carefully considered the issues which were reserved by the parties for trial of this suit after the consent partial settlement of the suit on the 27th of May 2010. The first glaring question is why the first and second Defendants would accept money from the Plaintiffs with whom they had no prior dealings? Of course to this question there arose a question of the Plaintiffs bid for the suit property. The second glaring question is why the Plaintiffs would pay the first and second Defendants. Were they compelled by circumstances or do they now agree that the first and second Defendants are mortgagees who are owed money by the 3rd Defendant who sold them the suit property? The only controversy in the relation to that matter of fact is whether the Plaintiffs purported to pay the balance of the purchase price in the agreement between the Plaintiffs and the third Defendant or in relation to the mortgage. However the third Defendant was not yet a party to HCCS 461 of 2009 and was not privy to the partial consent settlement of the suit. She has also not participated in the trial of the agreed issues. In any case she was joined after the partial consent judgment. There are only two options. Either the payment was pursuant to the bid of the Plaintiffs for the property after the advertisement of the property by the first and second Defendants or the payment was pursuant to the sale agreement with the 3rd Defendant. One thing that is evident and which can be concluded is that both parties agreed that the Plaintiffs would have the property. What are not agreed is whether the sale of the property by the Defendants would go ahead and whether an injunction should be granted against the Defendants. It was also not agreed whether the Plaintiff's would only pay the balance on the bid price because the question of whether the Defendants are entitled to realise the security by getting the balance on the bid price remained outstanding.

There were several adjournments by agreement of the parties in the course of proceedings in this suit to enable the parties try to resolve the impasse. It became evident in the course of the proceedings that the third Defendant had to be part of this suit because she had been paid Uganda shillings 170,000,000/= pursuant to the sale agreement between the Plaintiffs and the third Defendant on 2 June 2009. This fact was concealed by the third Defendant when a consent settlement was reached between the first Defendant and the second Defendant who were Plaintiffs and Joan Traders Ltd and Helen Kakyo (The 3rd Defendant in this suit) who were the Defendants in HCCS 268 of 2008. HCCS 268 of 2008 was filed after the transaction between the Plaintiff's and Helen Kakyo. Yet there were prior interests.

What remained as far as notice to the Plaintiffs of the mortgage arrangement between Joan Traders Ltd as well as Helen Kakyo and Messrs DFCU bank Ltd as well as Grofin East Africa Fund LLC is concerned are the encumbrances on plots 2746 and 2747, the subject matter of this suit. The resolution of the reserved issues for trial would depend on the resolution of whether the interest of the first and second Defendants to the suit property could be realised notwithstanding the sale transaction on 2 June 2008. To put it in another way whether the Plaintiffs are bona fide purchasers for value without notice of the third Defendant’s defect in title by the time of the sale transaction of the 2nd of June 2008.

Resolution of the above issues would resolve this suit in its entirety. It will resolve the issue of whether the intended sale by the Defendants is lawful? Whether the Plaintiffs are entitled to a permanent injunction? Whether the Plaintiff is entitled to pay only the balance on the purchase price? Whether the purported purchase by the Plaintiffs of the suit property was lawful? And whether the Defendants are entitled to the prayers in the counterclaim? In the premises the issues shall all be resolved at once by considering the evidence and the law as hereunder.

The issues are resolved by determining whether the Plaintiffs are bona fide purchasers for value without notice of the mortgage interest of the first and second Defendants entitled to protection under section 181 of the Registration of Titles Act.

The chronology of the material facts are as follows. There is an admitted sale agreement dated second of June 2008 executed between the Plaintiffs and the third Defendant. The timing of the sale agreement is not in controversy though it a material proposition of fact. It proves that the

controversial sale took place in June 2008. At the time of execution of the sale agreement the second Defendant had a mortgage registered on the title deeds for Kyadondo block 185 plots 2746 and 2747, the subject matter of the suit. As far as encumbrances on the title deeds are concerned, the property was mortgaged to the second Defendant on 2 August 2005 by the third Defendant. Subsequently the third Defendant gave a power of attorney to Joan Traders Ltd and mortgaged the property on the 19th of May 2006. The encumbrance by DFCU bank was registered on 19 September 2005 with regard to plot 2747 under instrument number KLA 280730. The second encumbrance was registered on the same day on plot 2747 under instrument number KLA 280730. The said mortgage registrations were not discharged at all times relevant to the controversy in relation to the purchase by the Plaintiffs.

I have carefully considered the written testimony of the first Plaintiff and the evidence in cross examination. It confirms that he executed an agreement for the sale of property on 2 June 2008. He established the encumbrances on the property from the third Defendant. The third Defendant presented to him a mortgage loan statement on account number 0103530089100 with the second Defendant. He obtained the bank loan statement of the third Defendant which revealed that she had a balance of Uganda shillings 33,894,620/=. However he was not aware of the other mortgages on the same property. Indeed by June 2008 the said mortgage arrangements with Joan Traders Ltd were not registered on the title deeds of the suit property. The Plaintiffs paid to the third Defendant Uganda shillings 170,000,000/= and were left with a balance of Uganda shillings 110,000,000/= which the Plaintiffs expected to finance with a loan from Housing Finance using the property as security for a loan. His application for a loan to DFCU bank Ltd was received but later declined on account of reported serious problems the third Defendant had with the bank. The Plaintiffs have been in quiet possession of the suit property until it was advertised for sale by the first and second Defendants around November 2009. From the documents and agreed facts above after 2 June 2008, further encumbrances were registered on the title deeds of the property by the first Defendant Messrs Grofin East Africa Fund LLC.

It is an admitted fact that the Plaintiffs dealt with the third Defendant and tried to obtain some information from the second Defendant about the mortgage of the third Defendant.

The loan obligations of Joan Traders Ltd as well as that of the third Defendant had not been discharged. This was the subject matter of the suit in the High Court between the third Defendant

and Joan Traders Ltd as Defendants and the first and second Defendants to this suit as Plaintiffs. This suit was filed subsequent to the purchase agreement between the Plaintiffs and the third Defendant.

I have carefully considered the law relating to the discharge of mortgages. It is a matter of fact that plot 2747 and 2746 had a mortgage registered on 19 September 2005 only. There is no evidence that a further charge was registered to reflect the loan transaction between Joan Traders Ltd and DFCU bank as well as Grofin East Africa Fund LLC (the first Defendant) at the time of the deal between the Plaintiffs and the third Defendant. Consequently the factual situation is that at the time of the sale transaction between the Plaintiffs and the third Defendant the only registered encumbrance is that of a mortgage executed between the third Defendant and DFCU bank and registered as instrument number KLA 280730 on 19 September 2005. The subsequent encumbrance to the property was that of Ali Ahmed Salim who lodged a caveat on the property on 22 February 2008 as a spouse to the third Defendant. In all other respects there was no other legal interest registered on the title deed.

It is true that the first Defendant Grofin East Africa Fund LLC executed a mortgage deed with Joan Traders Ltd on the 19th of May 2006. However no mortgage was registered on the title deed of plots 2747 and 2748 until after the sale agreement between the Plaintiffs and the third Defendant. At the time of the sale transaction the further mortgage on the property remained an equitable mortgage until it was registered after the date of the purchase agreement between the Plaintiffs and the third Defendant.

There are two matters which are relevant here. A subsequent instrument is also to be registered for it to enjoy the protection afforded by the Registration of Titles Act on legal interests as contradistinguished from equitable interests. Joan Traders Ltd executed an additional mortgage deed instrument. This instrument was not registered by the Defendants with the Registrar of Titles. Secondly an equitable mortgage is to be noticed on the title deed by way of a caveat and there was no caveat by the first Defendant until after the sale agreement. The requirement to register a mortgage or instrument is important in setting out the priority of interests as far as mortgages are concerned. Last but not least equitable interests only hold good as against persons who have notice of the equitable interest. So long as there is no caveat lodged by an equitable mortgagee as prescribed by the RTA, any dealing in the property may be bona fide and without

notice of the mortgage interest. The issue of notice or registration of a charge was considered in the case of Re White Rose Cottage [1964] 1 All ER 169 where Wilberforce J at pages 174 – 174 considered the effect of statutory provisions to register the instrument or give notice of a charge. He held:

> "It appears to me that these respective sections and rules are dealing with separate cases. Where an equitable charge is created by means of a document, then (unless, as can be done but was not done here, registration as a charge is made under s 26) notice of the charge may be given and the notice entered in the charges register under s 49. Where, on the other hand, there is a mere deposit of documents giving rise to what the Act calls a lien, then a notice may be given under r 239, which notice is also entered in the charges register but which operates as a caution. In fact the form used in this case for giving the notice was one designed to be used for a notice under r 239. The charge was effected by a memorandum under seal accompanied by deposit, and notice of the deposit, not of the memorandum, was entered on the charges register.
>
> What was the effect of this? In the first place, it seems to me that the charge, and the only charge, is effected by the memorandum and that no second or additional charge was brought about by the deposit. This is in accordance with the principle that where parties have put their arrangements in writing, the terms of the charge are defined by the writing and it would not be admissible to invoke evidence of an intention to create a charge outside the writing—ie, by the fact of deposit or by any agreement to be implied from the fact."

In other words the position in England at that time was that where a party relies on an instrument which is registered only the terms of the instrument will be considered. What of unregistered interests which are not even given notice of by caveat? In Uganda the registration of an instrument affecting land is entered as a memorial and as defined by section 51 of the Registration of Titles Act Cap 230 which provides that:

> "51. Memorial defined.
>
> Every memorial entered in the Register Book shall state the nature of the instrument to which it relates, the time of the production of that instrument for registration and the

name of the party to whom it is given and shall refer by number or symbol to the instrument, and shall be signed by the registrar."

The memorial of the instrument lodged with the Registrar of Titles is entered on the title deed including the deed in possession of the mortgagee in this case under section 52 of the Registration of Titles Act and the entry on the certificate shall be received in all courts as conclusive evidence that the instrument was duly registered. Furthermore in support of the statutory requirement to inform the world at large through registration of any instrument affecting land, it is provided by section 54 of the Registration of Titles Act that an instrument such as a mortgage deed is not effectual until registered. It provides as follows:

"54. Instruments not effectual until registered.

No instrument until registered in the manner herein provided shall be effectual to pass any estate or interest in any land under the operation of this Act or to render the land liable to any mortgage; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be, the land shall become liable in the manner and subject to the covenants and conditions set forth and specified in the instrument or by this Act declared to be implied in instruments of a like nature; and, if two or more instruments signed by the same proprietor and purporting to affect the same estate or interest are at the same time presented to the registrar for registration, he or she shall register and endorse that instrument which is presented by the person producing the duplicate certificate of title."

Because instruments take priority according to the principle of registration first in time, it is expressly provided for by section 46 of the Registration of Titles Act that an instrument shall be deemed to be registered effective on the date and time of lodgment of the instrument at the office of the registrar and upon entry of the memorial. A person so entered as a mortgagee is deemed to have the interest of a mortgagee described therein and in the memorial. Section 46 (4) is quoted for ease of reference:

"46 (4) The person named in any certificate of title or instrument so registered as the grantee or as the proprietor of or having any estate or interest in or power to appoint or

dispose of the land described in the certificate or instrument shall be deemed and taken to be the duly registered proprietor of the land."

Under section 48 of the Registration of Titles Act every instrument presented for registration except transfers are registered in a chronological order of lodgment and take priority according to the date of registration. It is therefore necessary for purposes of notice for a subsequent mortgage or charge to be registered as notice of such an additional interest to the world. It is further a statutory doctrine that a mortgagor is deemed to have agreed to certain covenants with the mortgagee. The covenants are transferable to a transferee of the title of the mortgagor. This is stipulated by section 118 of the Registration of Titles Act Cap 230 which provides:

"118. Covenants to be implied in every mortgage

In every mortgage made under this Act there shall be implied covenants with the mortgagee and his or her transferees by the mortgagor binding the latter and his or her heirs, executors, administrators and transferees that he or she or they will pay the principal money mentioned in the mortgage on the day appointed in the mortgage, and will so long as the principal money or any part of it remains unpaid pay interest on it or on so much of it as for the time being remains unpaid at the rate and on the days and in the manner specified in the mortgage; also that he or she or they will repair and keep in repair all buildings or other improvements which have been or are erected or made upon the mortgaged land; and that the mortgagee and his or her transferees may at all reasonable times until the mortgage is redeemed enter into and upon that land with or without surveyors or others to view and inspect the state of repair of those buildings or improvements."

The title that the mortgagor has and transfers or purports to transfer is subject to the covenants implied by section 118 of the RTA. It follows that a mortgage (a registered mortgage) can only be discharged by the mortgagee or by the court. Where the mortgage is discharged by the mortgagee, section 125 of the RTA is relevant and gives the mode of discharge of a registered mortgage. It provides that:

"125. Discharge of mortgages.

> Upon the presentation for registration of a release from any registered mortgage or charge in the form set out in the Twelfth Schedule to this Act signed by the mortgagee or his or her transferees and attested by one witness and discharging wholly or in part the lands or any portion of the lands from the registered mortgage or charge, the registrar shall make an entry of the release upon the original and duplicate certificate of title and upon the original mortgage and duplicate, if any, and on the date of such registration as defined in section 46(3) the land affected by the release shall cease to be subject to the registered mortgage or charge to the extent stated in the release."

In other words unless released the registered title of the mortgagor or mortgagors transferee in title is subject to the registered legal mortgage. Conversely where an equitable mortgage is reflected on the title by the lodgment of a caveat to notify of the interest, that title is subject to the equitable mortgage. Section 129 of the RTA stipulates that a mortgagee of a title by deposit shall lodge a caveat on the title to reflect the interest and provides that:

> "129. Equitable mortgage.
>
> (1) Notwithstanding anything in this Act, an equitable mortgage of land may be made by deposit by the registered proprietor of his or her certificate of title with intent to create a security thereon whether accompanied or not by a note or memorandum of deposit subject to the provisions hereinafter contained.
>
> (2) Every equitable mortgage as aforesaid shall be deemed to create an interest in land.
>
> (3) Every equitable mortgagee shall cause a caveat to be entered as provided for by section 139.

Last but not least a caveat lodged under section 129 (3) and by the wording of section 139 of the RTA gives notice to the world that the title is subject to the equitable mortgage and transactions affecting the land would be subject to the equitable interest. The wording of section 139 (1) of the RTA as set out above is unequivocal and provides as follows:

> "139. Caveat may be lodged and withdrawn.

(1) Any beneficiary or other person claiming any estate or interest in land under the operation of this Act or in any lease or *mortgage under any unregistered instrument or by devolution in law or otherwise* may lodge a caveat with the registrar in the form in the Fifteenth Schedule to this Act or as near to that as circumstances permit, forbidding the registration of any person as transferee or proprietor of and of any instrument affecting that estate or interest until after notice of the intended registration or dealing is given to the caveator, or unless the instrument is expressed to be subject to the claim of the caveator as is required in the caveat, or unless the caveator consents in writing to the registration." (Emphasis added).

The conclusion from the facts considered together with the law is that at the time of sale agreement between the Plaintiffs and the 3rd Defendant there was a mortgage which was registered by the 2nd Defendant in respect of a loan granted to the 3rd Defendant. The transaction between the first and second Defendant with Joan Traders Ltd remained unregistered and an equitable mortgage. No caveat was lodged to reflect the equitable mortgage on the register of titles and no further charge or mortgage had yet been registered on the title. As far as knowledge of the transaction is concerned, it was known to Helen Kakyo and cannot be imputed on the Plaintiffs because there could have been no constructive notice of the mortgages in issue. What therefore needs to be considered is the effect of the registered mortgage reflecting the security for the loan taken by the third Defendant in 2005. The caveat by the spouse of the 3rd Defendant Mr. Ahmed Salim seems not to be in issue and I will not comment on its effect. Suffice it to say that there is no issue about consent of a spouse either for the mortgage or the sale to the Plaintiffs by the 3rd Defendant being the subject matter of the dispute.

Having reached the above conclusion the issue of what actually took place when the Plaintiffs purported to purchase the suit property from the 3rd Defendant is material and will be considered to conclude this suit.

Before doing that I have carefully considered the lengthy written submissions of Counsel and authorities cited and supplied on the agreed issues and which I have set out at the beginning of this judgment.

The gist of the Plaintiff’s case is that there was a mortgage executed by the mortgagor who is also the third Defendant. At the time of the sale transaction with the third Defendant, there was a balance of Uganda shillings 35,000,000/=. On the other hand the Plaintiffs had bid for the purchase of the property upon the advertisement of the first and second Defendants in November 2009 to delay the process. The subsequently filed an action and during the proceedings agreed to pay Uganda shillings 110,000,000/=. The Plaintiffs relied on information by the third Defendant about the outstanding amounts on her mortgage. The Plaintiffs also suggested that the valuation commissioned by the second Defendant for purposes of the proposed loan to the Plaintiffs by the second Defendant is evidence of constructive notice of the sale. The Plaintiff's Counsel submitted that the acts of the second Defendant was inconsistent with the statutory power of sale and that the second Defendant is barred by the doctrine of acquiescence, waiver or estoppels from exercising their statutory power of sale.

In reply the first Defendant submitted that there was no prior written consent of the first Defendant before the purported sale. The first Defendants Counsel noted that exhibit 17 required the prior written consent of the first Defendant and secondly the sale was voidable at the instance of the mortgagee. He noted that the transaction of the mortgage between the first Defendant and Messieurs Joan Traders Ltd was prior in time than that of the Plaintiffs and therefore took priority. He also contended that this advertised sale took place in November 2009 by which time there was no completed sale transaction between the Plaintiff's and the third Defendant. He suggested that the Plaintiffs ought to have written to the second Defendant with regard to the registered mortgage before purchasing the suit property from the third Defendant.

In further response to the Plaintiff's submissions the second Defendant's Counsel noted that the Plaintiffs also bid for the suit property after it was advertised in November 2009. Secondly the Plaintiffs did not cross check with the second Defendant prior to purchasing the property from the third Defendant. On the basis of the Plaintiff’s actions in dealing with the third Defendant, there was no due diligence in the face of the registered mortgage interest of the second Defendant. As far as the valuation report is concerned, the second Defendant's Counsel submitted that it was a separate and distinct action which was not related to the mortgage agreement between the second Defendant, the first Defendant and Messieurs Joan Traders Ltd. The second Defendant's Counsel observed that the third Defendant concealed material

information from the Plaintiffs and because the Plaintiff never carried out any due diligence, it enabled the third Defendant to defraud them.

I have carefully assessed the evidence and the law. I agree with the Plaintiffs to the extent that the Plaintiff's established the indebtedness of the third Defendant whose mortgage had been registered. They established that the third Defendant owed about Uganda shillings 35,000,000/= and sought to pay off the loan. To the extent that the Plaintiffs had notice of the registered mortgage, they seem to have acted with diligence in trying to offset the outstanding loan amount. This is further supported by the application of the Plaintiff intending to retrieve the certificates of title and having the property used as security to obtain a loan to pay off the outstanding balance. The question is therefore whether the Plaintiffs acted reasonably having established that there was a loan amount of about Uganda shillings 35,000,000/= owing on the registered mortgage. I have already established that the mortgage agreement was between the third Defendant and the second Defendant. There was no notice on the title deed or registered with the registrar of land titles of the mortgage between the first Defendant as well as the second Defendant and Messieurs Joan Traders Ltd. There was no additional charge of mortgage after the mortgage of the third Defendant had that been registered. In other words there was culpable negligence on the part of the first and second Defendants officials in not lodging a caveat with regard to the equitable mortgage or having it registered as a legal mortgage on the basis of the mortgage deed. At the time of the purported purchase by the Plaintiffs, the only constructive notice which can be imputed on the Plaintiffs is that relating to the third Defendant's loan obligations. Indeed the second Defendant’s witnesses are the only material witness in that regard other than the Plaintiff. The first Defendant was out of the picture because their interest was not the subject of a caveat or a further charge on the title prior to the sale agreement between the Plaintiff and 3rd Defendant.

Juliet Okoth who had been employed as the Special Assets Manager and was previously the Business Support Executive of DFCU bank since 2006 testified on behalf of the second Defendant. She testified that the third Defendant pledged her property as security and executed a power of attorney in favour of Joan Traders Ltd for the loan. Her testimony is that the second Defendant registered charges on the certificate of title for land on 19 September 2005. She in the main testified about the loan granted jointly by the first and second Defendants to Messieurs Joan Traders Ltd and guaranteed by the third Defendant. Additionally she testified that a sum of

Uganda shillings 170,000,000/= was paid to the third Defendant's personal account on 4 June 2008 and the third Defendant withdrew it on 5 June 2008. The bank was never advised by the Plaintiffs or the third Defendant that the money was paid to the third Defendant's account as part payment for the purchase of the suit property by the Plaintiffs. Secondly the second Defendant never got any money from the Plaintiffs or the third Defendant as part payment for the purchase of the suit property and the second Defendant were not informed by the Plaintiffs about making any payment to the third Defendant. Secondly the Defendant never had any dealings with the Plaintiff in respect of the suit property and had no knowledge of the sale transaction between the Plaintiffs and the third Defendant. On the other hand she admitted that the Plaintiffs did apply for a loan which was dealt with by the Retail and Sales Manager Mr. Stephen Serubiri who saw a good opportunity for the bank to get business. The loan application was refused after it was forwarded to the Credit Department of the second Defendant for approval. Furthermore she is of the opinion that the first Plaintiff got the information about the loan balance from the third Defendant who knowingly and selectively gave the first Plaintiff limited information concerning her personal unsecured loan account.

The witness was extensively cross examined about the transactions in issue and particularly admitted exhibit P5 which is an amortisation schedule for purposes of the loan application. She also admitted that the first Plaintiff applied for a mortgage loan Exhibit 6. Furthermore exhibit 7 is a valuation report which clearly indicates under item 5.0 that there were encumbrances of the mortgage in favour of DFCU bank. It is therefore not true that the mortgage loan of the third Defendant was not secured. It was a mortgage loan. She further admitted that the Plaintiff was given a figure of Uganda shillings 33,894,622/= as the outstanding loan amount on the3rd Defendants loan but not officially. She was further cross examined about Exhibit 18 which was the mortgage agreement between the third Defendant and DFCU bank. Furthermore she admitted that the third Defendant had two accounts one of which dealt with the mortgage agreement between Joan Traders and the first and second Defendants. She further admitted that both accounts had loan arrears. The money was paid to the personal deposit account of the third Defendant.

The second witness of the second Defendant Agnes Mukupe testified in writing and the Plaintiff's Counsel did not cross examine her. I have further considered her written testimony on

the issue. Her testimony is that she established that DFCU bank had co – financed a loan with the first Defendant to Joan Traders Ltd for the sum of Uganda shillings 740,000,000/= and the facility was secured by block 185 plots 2746 and 2747 situated at Namugongo. The second Defendant registered charges on the certificate of title on 19 September 2005.

I have carefully considered this assertion and I reject the evidence as incorrect. The evidence on record only supports the finding that there was a mortgage loan agreement between Grofin East Africa Fund LLC and Messieurs Joan Traders Ltd on the 19th of May 2006. This agreement could never have been the subject of a mortgage instrument registered on 19 September 2005 about a year earlier. In the premises the evidence is in all respects consistent with the instrument which was registered being in respect of the mortgage loan granted to the third Defendant personally. It is my conclusion that the third Defendant personally dealt with the Plaintiffs and concealed from the Plaintiffs the transaction between the first Defendant and the second Defendant with regard to the loan of Uganda shillings 740,000,000/= which had not been registered with the Registrar of titles.

In the premises the Plaintiff was informed and was aware of the loan obligation of the third Defendant only. It was suggested in the submissions of Counsel that there had to be a prior written consent of the first and second Defendants before the purchase in question could be effectual. I have carefully considered the relevant mortgage agreement which is the subject matter of the registration with the Commissioner for land registration and is dated 2nd of August 2005. The question is whether the third Defendant would not on the face of it without reference to the other mortgage transaction deal with the Plaintiffs even if there was a mortgage agreement. The third Defendant took full advantage of the lack of registration of the interest of the first Defendant and second Defendant in the second mortgage loan advanced to Messieurs Joan Traders Ltd. She was able to convince them to pay off her outstanding loan of about Uganda shillings 35,000,000/= which loan was the subject of registration in September 2005 on the register. The Plaintiffs informally obtained information from the second Defendant's official one Stephen Serubiri about what was outstanding. They went ahead and paid Uganda shillings 170,000,000/= to the third Defendant's account. The loan was owed by the third Defendant. They expected to offset the loan by taking a further loan from Housing Finance Bank Ltd and later DFCU Bank Ltd.

In the premises the Plaintiff's could have acted negligently by paying the money direct to the third Defendant's account. However in my opinion they acted reasonably considering that they took into account the registered mortgage and went ahead to obtain a statement showing what was outstanding on the third Defendant's account. The third Defendant misrepresented to the Plaintiffs the actual state of affairs and concealed the unregistered mortgages relating to the subsequent loan advanced to Messieurs Joan Traders Ltd. The question is whether a mortgagor can deal with the property after having prior a legal mortgage registered on it. Is a purchaser of property from the mortgagor barred? The law is not silent and envisages situations where a mortgagor transfers title. Title of a mortgagor can be inherited or devised in a will. It can in certain circumstances be transferred to another person. The mortgagor can get another loan if an intending mortgagee is satisfied that the security is adequate to cover two loans. The ability to deal in the property is not taken away on account of a mortgage agreement registered prior in time. The mortgage registered prior in time takes priority. In fact section 116 and 118 of the Registration of Titles Act merely suggest that any conveyance is subject to the registered interest of the mortgagee. Section 116 of the RTA provides as follows:

> “116. Mortgage not to operate as transfer
>
> A mortgage under this Act shall, when registered as hereinbefore provided, have effect as a security, but shall not operate as a transfer of the land thereby mortgaged; and in case default is made in payment of the principal sum or interest secured or any part thereof respectively, or in the performance or observance of any covenant expressed in any mortgage or hereby declared to be implied in a mortgage, and the default is continued for one month or for such other period of time as is for that purpose expressly fixed in the mortgage, the mortgagee or his or her transferees may serve on the mortgagor or his or her transferees notice in writing to pay the money owing on the mortgage or to perform and observe the aforesaid covenants, as the case may be.”

Where there is a default in payment, the mortgagor or transferees in title have to continue servicing the loan. Secondly the mortgage deed does not operate as a transfer of the title to the mortgagee. The recognition of a conveyance from the mortgagor subject to the interest of a mortgagee is also recognized by section 118 of the RTA in the following words:

> "In every mortgage made under this Act there shall be implied covenants with the mortgagee and his or her transferees by the mortgagor binding the latter and his or her heirs, executors, administrators and transferees that he or she or they will pay the principal money mentioned in the mortgage on the day appointed in the mortgage, and will so long as the principal money or any part of it remains unpaid pay interest on it or on so much of it as for the time being remains unpaid at the rate and on the days and in the manner specified in the mortgage;…"

In other words a purchaser can purchase property provided it is subject to the registered encumbrance. The Plaintiffs therefore purchased the property subject to the legal mortgage which had been registered only. The Plaintiffs ought to have paid the money to the second Defendant and are liable for the outstanding loan of the third Defendant. They are not liable for the loan advanced to Messieurs Joan Traders Ltd of which they had no notice. The negligence in paying the money resulted in the third Defendant withdrawing all the money from her account without the knowledge of the second Defendant. In the premises the Plaintiffs are indeed bona fide purchasers for value without notice of any other interests other than the legal interest registered on the title deeds for which they are liable. In any case at the time of the sale agreement, the mortgage agreement between Joan Traders and the first and second Defendants was not effectual because it was not registered as held above. Consequently that interest cannot be imputed on the Plaintiffs. The Plaintiffs bought the property subject to the interest of the second Defendant which had been registered in September 2005. I do not agree with the submissions of the first Defendants Counsel that the Plaintiffs bought the property subject to the equitable interest of the first Defendant. In the premises all the authorities cited by the Defendants are distinguishable. The Plaintiffs had notice of the legal mortgage and took steps to offset the loan which was reflected as a legal mortgage interest on the title deed. Though I agree with the first and second Defendant's Counsels that the Plaintiffs acted at their own risk by dealing with the third Defendant, that risk can only be confined to the risk of the disclosed interest which had been registered.

The Plaintiffs attempted to pay off the loan but were negligent in doing so. Had they successfully paid off the loan of the third Defendant, they would have been entitled to a release of the mortgage interest as reflected in the registered title. They are not bound or concerned about the

unregistered interest of the first and second Defendants which came subsequent to the mortgage agreement of the third Defendant and was noted on the register after their purchase agreement.

According to **Edward F Cousins on the Law of Mortgages, London, Sweet & Maxwell 1989** English courts have an equitable and statutory jurisdiction to modify, set aside or avoid executed conveyances in cases of fraud, fraudulent misrepresentation or if given for an illegal consideration, or if opposed to public policy. But because the conveyance is voidable and not void, it passes a good title to an innocent purchaser who has no notice of the circumstances unless and until it is avoided. In this particular case, the Plaintiffs on the basis of what is on the face of the register entered into a sale agreement bona fide with the third Defendant with the genuine desire to pay off the loan of the third Defendant with the second Defendant. Can the contract be avoided?

My conclusion is that the sale agreement having been made with the registered proprietor is valid and only voidable as against the 3rd Defendant. Secondly, the first and second Defendant's officials negligently omitted to register the interest of the two banks in the land register. That negligence cannot be visited on the Plaintiffs who acted on the basis of registered interests. The conclusion is that the remedy of the first and second Defendants would have been to obtain from the Plaintiffs the balance of the loan advanced to the third Defendant from the Plaintiffs and then proceed to recover the rest of the outstanding amounts from the third Defendant. However I have to consider the actions of the parties in partially settling the suit.

Before taking leave of the matter, pursuant to the Plaintiffs having filed an action against the first and second Defendants, there was a partial settlement of this suit. Under the settlement the first and second Defendants received from the Plaintiffs Uganda shillings 110,000,000/= which was the outstanding balance on the sale agreement between the Plaintiff and the third Defendant. The wording of paragraph 1 of the consent agreement is crucial. It provides as follows:

> "The Plaintiffs admit liability to the Defendants to the extent of Ushs. 110,000,000/= (…) and agree to pay the sum in the following manner."

The first and second Defendants received the sum of money without prejudice to the determination of the legality of the intended sale by the Defendants. Secondly they reserved the question of whether the Plaintiffs are entitled only to pay the balance on the purchase price. In

other terms they also agreed on the issue of whether the Defendants are entitled to their prayers in the counterclaim.

It is an inescapable fact that the Defendants received the admitted money from a third-party to the loan transactions which forms the basis of their claim and the money was deemed to be used to offset some of the outstanding loan amounts owed by Joan Traders Ltd and perhaps the third Defendant. It is not my duty at this stage of the proceedings to establish how the first and second Defendants applied the sums of money paid by the Plaintiffs pursuant to the partial settlement of the suit. What is the effect of accepting to receive money from the Plaintiffs?

It is my considered holding that the Defendants accepted to deal with the Plaintiffs and only waited for a resolution of the question of whether the sale transaction between the Plaintiffs and the third Defendant could be enforced. Secondly the Plaintiffs admitted liability to the first and second Defendants and not to the 3rd Defendant. Can they go back on their admission? In other words the first and second Defendants still claim sums which are contained in the counterclaim. The question is therefore whether the Plaintiffs are liable to pay the balance of the sums outstanding and which is claimed in the counterclaim.

Having resolved the first controversy which covers several issues as to whether the Plaintiffs acted bona fide in purchasing the property it is my considered conclusion that they Plaintiffs only bought the property subject to the loan obligations of the 3rd Defendant personally and not that of Joan Traders Ltd. Being innocent of other transactions they bid for the property when advertised by the 1st and 2nd Defendants in a devil's alternative and resolved to have their predicament determined by court.

In the premises the Plaintiffs are entitled to the purchase of the property. They are however not entitled to a permanent injunction for the following reasons.

The Plaintiffs admitted to the outstanding balance on the purchase price and paid it. In the premises the counterclaim of the first and second Defendants succeeds in part and the Plaintiffs are liable to pay Uganda shillings 33, 894,622/= in addition to the Uganda shillings 110,000,000/= they agreed to pay in the partial settlement. The Plaintiff shall pay the sum of Uganda shillings 33, 894,622/= to the first and second Defendants in full settlement of the purchase of the suit property.

The sum awarded against the Plaintiffs shall attract an interest at the rate of 20% per annum from the date the Plaintiffs filed this action till date of judgment. The Plaintiffs shall further pay interest at 20% per annum on the aggregate sum at the rate of 20% per annum from the date of the decree till payment in full.

As far as the cross action of the first and second Defendants against the 3rd Defendant is concerned, the 3rd Defendant is liable to pay to the first and second Defendants the sum of Uganda shillings 156, 105, 378/=.

The 3rd Defendant shall pay interest on the said sum from the date the Plaintiffs filed this suit up to the date of judgment at the rate of 20% per annum.

In addition the 3rd Defendant shall pay interest on the aggregate sum at the rate of 20% per annum from the date of the judgment till payment in full.

I have carefully considered the prayer for general damages against the Plaintiffs. Having held that they acted reasonably the prayer for general damages by the first Defendant in the counterclaim stands dismissed.

Given the fact that the whole dispute was generated by the 3rd Defendant, she shall pay the costs of the Plaintiffs in the main suit as well as that of the first and second Defendants in the counterclaim.

Judgment delivered in open court on the 23rd of November 2015

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Counsel Ayebare Robert holding brief for Counsel Nester Byamugisha Counsel for the plaintiffs,

Peter Katwebaze 1st Plaintiff in court

Second Plaintiff absent

Counsel Andrew Munanura Kamuteera Holding brief for Nicholas Ecimu counsel for the first defendant

First defendant not in court

Sarah Kisubi holding brief for Counsel Diana Namulondo for the second defendant

Second Defendant not in court

Third Defendant is absent

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

23rd November 2015