

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**HCT - 00 - CC - CS - 185 - 2011**

**LUKULA JOSEPH ::::::::::::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**DFCU BANK LTD & 5 OTHERS::::::::::::::::::::::::::::: DEFENDANT**

**BEFORE: THE HON. JUSTICE DAVID WANGUTUSI**

**J U D G M E N T:**

The Plaintiff, Joseph Lukula sued DFCU Bank Ltd, Prime Contractors Ltd, Wilson Kashaya, Grace Bakeine Kashaya and the Registrar of Titles herein after referred to as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendant respectively.

The Plaintiff sought an order staying or stopping the sale of property comprised in LRV 277 Folio 8 Plot 12 Oboja Road, Jinja Municipality, herein after referred to as the suit property. He further sought a temporary/permanent injunction, release and return of the land title of the suit property, general damages, interest and costs of the suit.

The background to the suit, as it emerged from the pleadings is that sometime in August 2009, the Plaintiff, who is the registered proprietor of the suit property, was invited to the premises of the 1<sup>st</sup> Defendant bank by his late father, Charles Kitamirike. They stood in the parking

yard of the bank and here the Plaintiff was given two sheets of paper by the 3<sup>rd</sup> Defendant and instructed to sign, which he did.

It is based on these documents and others that a mortgage deed was executed on 27<sup>th</sup> August 2009 in which the 1<sup>st</sup> Defendant approved overdraft facilities of Ugx 170,000,000/= to the 2<sup>nd</sup> Defendant company, in which the 3<sup>rd</sup> and 4<sup>th</sup> Defendant are Directors. They also guaranteed the loan.

The suit property was one of the properties submitted as security for the loan and the mortgage was registered as an encumbrance on the certificate of title by the 5<sup>th</sup> Defendant.

The 2<sup>nd</sup> Defendant subsequently defaulted upon the loan obligations, prompting the 1<sup>st</sup> Defendant to enforce the mortgage agreement and the suit property was advertised for sale in the New Vision newspaper of 29<sup>th</sup> April 2011.

On seeing the advert, it is the Plaintiff's case that he made inquiries with the 1<sup>st</sup> Defendant and discovered that his property had been used as security to guarantee the 2<sup>nd</sup> Defendant's loan without his consent. It is based on these circumstances that he filed the current suit.

The 1<sup>st</sup> Defendant's denial of liability was expressed in their Written Statement of Defence in which they contended that they had secured interest in the suit property as the Plaintiff had voluntarily mortgaged it as portrayed by his signature on the Mortgage deed.

The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendant did not file Written Statements of Defence and a default judgment was entered against them on 20<sup>th</sup> July 2011 on application of the Plaintiff and pursuant to Order 9 Rule 8 of the Civil Procedure Rules.

The issues for determination by the Court as agreed by the parties are:

1. Whether it was a fundamental breach when the Bank dealt with the Plaintiff's property when the Plaintiff was not a borrower nor had he given Powers of Attorney under Sections 147 and 148 of the Registration of Titles Act Cap 230, thereby rendering the transaction fundamentally defective, null and void?
2. Whether the Mortgage deed was fundamentally defective, null and void for want of execution/attestation?
3. Whether the 1<sup>st</sup> Defendant bank's failure to swap the Plaintiff's suit title as agreed with the title comprised in Kyadondo Block 208 Plot 2366 at Kawempe was a fundamental breach prejudicial to the Plaintiff's interest?
4. Whether the advert to seek the Plaintiff's property was premature before the Bank first seeking recovery from the guarantors whose company was the borrower?
5. Whether the Plaintiff is entitled to the remedies sought in the plaint?

I will resolve the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> issues together as they all relate to components of the Mortgage deed and transactions arising out of it. The Mortgage deed - Exhibit P6 executed on 27<sup>th</sup> August 2009 reflects the 2<sup>nd</sup> Defendant as the borrower/ mortgagor and the Plaintiff and his father, Kitamirike as the sureties/mortgagors. The 3<sup>rd</sup> and 4<sup>th</sup> Defendant signed the deed in their capacities as Directors on behalf of the 2<sup>nd</sup> Defendant.

The Plaintiff testified that he went with his father to the bank premises on Jinja Road where he met the 3<sup>rd</sup> Defendant and that the 3<sup>rd</sup>

Defendant entered the bank and came out with two sheets of paper which the Plaintiff was told to sign. Further that when he inquired about the signatures, his father informed him that the land title for the suit property was being taken to the bank for safe custody and that the signatures were a requirement.

This evidence was not disputed. I have looked at the Mortgage deed - Exhibit P6 which is 15 pages and out of those; the Plaintiff signed only two pages. One was the page with a provision for signature - Exhibit P4 and the other was the declaration as to marital status - Exhibit P5. It is my view that these were the two sheets that the Plaintiff looked at.

What really confirms that the Plaintiff was never presented with the entire Mortgage deed is made clear by the signatures. A look at Exhibit P6 shows that while the 3<sup>rd</sup> and 4<sup>th</sup> Defendant signed on all the pages of the Mortgage deed, the Plaintiff's signature is only on the last page of the deed and the Marital Status Declaration.

Having seen only those pages, he could not have appreciated what he was signing. In any case, his father, Charles Kitamirike, had told him that the procedure he was going through was necessary for depositing his land title for safe custody with the 1<sup>st</sup> Defendant bank.

Furthermore, the Plaintiff told court, which evidence was not disputed, that the deed was taken to him for signing in the parking yard of the 1<sup>st</sup> Defendant. Looking at Exhibit P6, one would think that it was signed in an office and witnessed by the bank official. To sign such an important document in the 1<sup>st</sup> Defendant's parking yard, and away from those who purportedly witnessed it, made Exhibit P6 very suspect and could

not be relied upon as an instrument establishing an enforceable contractual relationship.

In the two sheets he looked at and signed, the Plaintiff was signing away his property without knowing he was doing so. It was a requirement for the Bank officials to explain to him the effect of his signature. This they did not do. As the learned JSC said in **Fredrick Zaabwe V Orient Bank & 5 Ors SCCA 4/06**, the Plaintiff could only be deprived of his property through strict adherence of the law in its entirety.

For the 3<sup>rd</sup> and 4<sup>th</sup> Defendant to use the property as they did, it was necessary for the Plaintiff to have given them or one of them Powers of Attorney which spelt out all the actions that the donee could do. There was no Power of Attorney in the instant case.

Furthermore, it is the contention of the Plaintiff that the use of his property as security was merely temporary and that after 12 months, his property was to be swapped with another.

**Clause 3.1** of the Overdraft and Guarantee Facilities Letter of offer - Exhibit P7 provided:

*“Upon mutual agreement between the parties, the security in 3.0 above will be swapped with land and property comprised in Block 208, Plot 2366 Kyadondo at Kawempe once the missing white copy is obtained from Ministry of Lands.”*

The foregoing in my opinion shows that the Plaintiff's property was not the intended security but the land in Kawempe. Counsel for the 1<sup>st</sup> Defendant submitted that it was the duty of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup>

Defendant to cause the swap and that their failure to do so could not be blamed on the 1<sup>st</sup> Defendant.

Be that as it may, it shows that at the time the Mortgage deed was signed, it was not intended that the Plaintiff's property would be the one to be sold in the event of default.

In other words, the parties were not ad idem, that is, there was no meeting of the minds. For a contract to be valid and legally enforceable there must be: capacity to contract, intention to contract, consensus ad idem, valuable consideration, legality of purpose and sufficient certainty of terms. If in a given transaction any of them is missing, it could as well be called something other than a contract. The intention of the parties to enter into legal relations and thereby bind themselves to carry out the agreement converts an agreement into a legally enforceable contract. I have not seen any such intention in the impugned Mortgage deed. There was a clear lack of consensus ad idem which is quite essential to a valid contract. See **Greenboat Entertainment Ltd V City Council of Kampala HCCS 580/03**

In conclusion, based on the circumstances as have been set out above, it is my finding that the mortgage deed was fundamentally defective and could not constitute a legally enforceable contract.

With regard to the issue of whether the advert to seek the Plaintiff's property was premature before the Bank first seeking recovery from the guarantors whose company was the borrower, Counsel for the Plaintiff submitted that the Plaintiff never received any notice of demand when the 2<sup>nd</sup> Defendant defaulted on the loan repayments.

Clause 13 of the deed gave the 1<sup>st</sup> Defendant unfettered powers to exercise their power of sale by private treaty to which the mortgagor gave irrevocable and unconditional consent. This clause empowered the mortgagee with several options, that is, they could have sold by seeking a court order or they could have sold without resorting to the courts either by public or private auction.

The foregoing provisions apply in a properly executed mortgage. As I have said earlier in this judgment, this mortgage deed was obtained through illegalities and in a most irregular manner that it could not lawfully operate within the confines of the Mortgage Act.

Be that as it may, Section 19 of the Mortgage Act 2009 provides that where money secured by a mortgage is made payable on demand, a demand in writing shall create a default in payment which is to be served on the mortgagor who is required to rectify the default within 45 working days.

Having seen that a demand in writing was not made before the 1<sup>st</sup> Defendant proceeded to advertise the property for sale, it is my view and holding that the move to sale was premature.

Turning to the issue of remedies, the Plaintiff sought an order staying or stopping the sale of the suit property, an order for the release and return of the land title of the suit property and a temporary / permanent injunction. Having found that the Mortgage Deed cannot be legally enforced and that any transactions arising there from are void, it is hereby ordered that the sale of the suit property is stopped and the certificate of title of the said property be returned to the Plaintiff. A

permanent injunction restraining the Defendants, their agents or assignees from dealing in the suit property is also granted

The Plaintiff further sought general damages and interest. The settled position is that the award of general damages is in the discretion of Court and is always as the law will presume to be the natural and probable consequence of the Defendant's act or omission. **James Fredrick Nsubuga V Attorney General HCCS 13/93; Erukana Kuwe V Isaac Patrick Matovu HCCS 177/03**

In the assessment of the quantum of damages, Courts are mainly guided by a number of factors among which is the economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered. **Uganda Commercial Bank V Kigozi [2002] 1 EA 305**

The Plaintiff testified that he had suffered great inconvenience by the Defendant's actions. Counsel for the Plaintiff submitted that the Plaintiff, a student at Coventry University had incurred costs amounting to £610 from flying into the country to testify. He prayed for general damages of Ugx 100,000,000/= since the suit property was a commercial property with its title being kept away from the Plaintiff for 5 years and thereby depriving him of its use.

Despite the fact that the title was in the custody of the bank, the Plaintiff was under the impression that it was being retained for safe custody and was only alerted to something amiss by the advertisement of sale of the same. The Plaintiff has not led any evidence to show that in the time the title was in the custody of the Defendants, he was deprived of any income accruing from the commercial property.



Be that as it may, he has undergone the inconvenience in having to travel to testify and in attempting to safeguard his property which was supposed to be swapped by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant after 12 months of getting their loan but was never swapped and ultimately attached for sale . I would find an award of Ugx 10,000,000/= sufficient. It is so awarded.

Counsel for the Plaintiff prayed for interest on the above figure at a commercial rate of 25% from the date of filing the suit til payment in full. However, no evidence was led as to why the Plaintiff wanted interest at a commercial rate on general damages. That leaves the rate of interest payable to the discretion of the court. In **Crescent Transportation Co. Ltd Vs B.M Technical Services Ltd CACA 25/2000**, it was held that “... where no interest rate is proved, the rate is fixed at the discretion of the court.”

I would find an interest rate at court rate appropriate in these circumstances since an award on general damages is only compensatory: **Star Supermarket (U) Ltd Vs Attorney General CACA 34/2000**

In conclusion, judgment is entered in favour of the Plaintiff against the Defendant’s jointly and severally in the following terms:

1. An order staying or stopping the sale of the suit property is hereby issued
2. An order for the release and return of the land title of the suit property is hereby issued

3. A permanent injunction is granted restraining the Defendants, their agents or assignees from dealing in the suit property
4. General damages of Ugx 10,000,000/=
5. Interest on (4) at court rate from date of judgment til payment in full
6. Costs

.....  
**David K. Wangutusi**  
**JUDGE**

**Date: 27/05/15**