

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)**

CIVIL SUIT NO. 358 OF 2009

GOLF VIEW INN (U) LIMITED:.....PLAINTIFF

VERSUS

BARCLAYS BANK (U) LIMITED:.....DEFENDANT

BEFORE: LADY JUSTICE HELLEN OBURA.

JUDGEMENT

Background of the case

The Plaintiff company, Golf View Inn (U) Ltd, commenced this suit seeking Special Damages totaling to **Ushs.319,476,273/= (Uganda Shillings Three Hundred Nineteen Million Four Hundred Seventy Six Thousand Two Hundred Seventy Three)**, **US\$80.00 (United States Dollars Eighty)**, General Damages of **Ushs.2,400,000,000/= (Uganda Shillings Two Billion Four Hundred Million)**, punitive damages and costs of the suit.

The Plaintiff's claim is based on breach of contract by the Defendant and its case is that by a loan agreement dated 14th May 2007, the Plaintiff obtained a loan facility of **Ushs.2,600,000,000/= (Uganda Shillings Two Billion Six Hundred Million Only)** repayable within a period of five(5) years inclusive of a one (1) year grace period at an interest rate of 21% per annum. It is alleged that during the term of the loan, the Defendant improperly charged the Plaintiff with the following;

- i) Interest of **Ushs.26,323,324/=** overcharged on the Plaintiff's account above the agreed 20%,
- ii) **Ushs.19,002,307/=** being default interest at 39% over the interest mentioned in (i) above,
- iii) **Ushs.46,800,000/=** charged as arrangement fee at the rate of 1.8% for the restructure of a facility of **Ushs.2,600,000,000/=**,
- iv) **Ushs.17,867,748/=** charged as compound interest over the sums in (iii) above,
- v) **Ushs.7,875,000/=** charged as legal fees for an additional borrowing of **Ushs.400,000,000/=** which additional sums were not extended to the Plaintiff,
- vi) **Ushs.2,105,813/=** as compound interest at default rate over the charged legal fees in (v) above,

- vii) **Ushs.196,693,961/=** charged as legal fees in a transaction where the Defendant was not a party and where the Plaintiff pursued the sale and obtained a purchaser for its securities.

The Plaintiff claims that the Defendant acted with bad faith, breach of trust and fraud in the management of the Plaintiff's loan and as a result caused financial loss to the Plaintiff.

The Defendant in its written statement of defence denied liability for the Plaintiff's claim and contended that the Plaintiff obtained a loan and overdraft facility totaling to **Ushs.2,660,000,000/=** from the Defendant which was secured with a mortgage over various properties comprised in LRV 3333 Folio 16 Plot 8 Lugard Avenue, Land at Entebbe, LRV 2776 Folio 6 Plot 10 Lugard Avenue Land at Entebbe, LRV 2880 Folio 21 Plot 12, Lugard Avenue Entebbe, LRV 3147 Folio 11 Plot 3 Station Road, Land at Entebbe, LRV 2422 Folio 12 Plot 7 Station Road, Land at Entebbe, all registered in the names of Mr. David Buye. The loan facility was also secured by a debenture and personal guarantees of the directors of the Plaintiff.

The Defendant further contended that the Plaintiff defaulted on servicing the loan thereby attracting default interest on the loan which by 13th November 2008 stood at **Ushs.2,707,717,420/=** and on 24th March 2009, the Defendant demanded for payment of the entire loan outstanding which at the time stood at **Ushs.2,716,824,818/=**. The Plaintiff requested for more time within which to pay but did not comply and the Defendant demanded settlement of the debt in May 2009 which at the time stood at **Ushs. 2,778,163,314/=**.

The Defendant alleged further that subsequently, the Plaintiff, David Buye and the Defendant entered into a Security Realization Agreement (hereinafter abbreviated as SRA) in which the outstanding sum of **Ushs.2,778,163,314/=** was acknowledged as due and owing and the Plaintiff was given four(4) months within which it was to dispose of the mortgaged property or else the Defendant would conduct the sale. The Plaintiff disposed of the mortgaged property on 23rd May 2009 and the sale proceeds were credited onto the Plaintiff's account with the Defendant where upon the outstanding debt was debited therefrom together with Ushs.196,693,961/= as costs incidental to the recovery pursuant to the SRA and the mortgage deed. The Defendant prayed that the suit be dismissed with costs.

Before the hearing of this matter commenced, an evaluative mediation was conducted before senior learned judge Hon. Justice Geoffrey Kiryabwire (as he then was) during which the parties agreed to refer the issue of overcharged interest under relief (a) in the plaint to an independent auditor whose report would be binding on them. The Plaintiff agreed to abandon reliefs (c) & (f) in the plaint. The parties further agreed that the remaining claims under reliefs (b), (d), (e), (g), (h), (i) & (j) would be adjudicated upon by this court.

Representations

At the scheduling and hearing of the case, the Plaintiff was represented by **Mr. David Kaggwa** who appeared together with **Mr. David Mayinja** and the Defendant was represented by **Mr. Masembe Kanyerezi**.

The agreed facts as stated in the joint scheduling memorandum and confirmed at the scheduling conference that;

1. The Plaintiff was a customer at the Defendant Bank operating both a current account and a loan account.
2. The Plaintiff was availed a facility of **Ushs.2,600,000,000/=** by the Defendant in respect of which a facility letter dated 14th May 2007 was signed by both parties.
3. Various securities were executed to secure the loan facility including a mortgage, Further Charge and 2nd Further Charge over properties comprised in (i) LRV 2427 Folio 12 Plot 7 Station Road, ii) LRV 2776 Folio Plot 10 Lugard Avenue, iii) LRV 2880 Folio 21 Plot 12 Lugard Road, iv) LRV 3333 Folio 16 Plot 8 Lugard Avenue and LRV 3147 Folio 11 Plot 3 Station Road, all registered in the name of David Bbuye and together comprising the Golf View Hotel.
4. A further facility letter dated 2nd June 2008 was subsequently signed between the parties.
5. On 18th May 2009, the Plaintiff and the Defendant entered into a SRA to provide for the repayment of the outstanding debt.
6. On 23rd May 2009, the Plaintiff with the consent of the Defendant as Mortgagee sold by private treaty the properties referred to above as Golf View Inn and settled the loan sum.
7. There is a dispute on the various interest sums and collection charges debited by the Defendant on the Plaintiff's account.

The parties agreed to the following issues for determination;

1. Whether there was an interest overcharge by the Defendant in respect of the Plaintiff's account in the sum of **Ushs.26,323,234/=**.
2. Whether the re-mortgaging expense of **Ushs.8,207,000/=** charged by the Defendant on the Plaintiff's account was contractually due.
3. Whether the debit by the Defendant of **Ushs.196,693,961/=** on the Plaintiff's account as legal costs of recovery was lawful.
4. Whether the Plaintiff is entitled to recovery of **US\$ 80** and **Ushs.967,451/=** as interest accrued through alleged delayed credits.
5. Remedies available to the parties.

In the middle of hearing of the Plaintiff's case, counsel for the Defendant applied to add another issue and upon hearing the submissions of both counsels regarding the matter, I allowed the application. The additional issue was framed as follows;

6. Whether the Plaintiff is estopped and or barred by the parole evidence rule from raising issues 1 and 2.

I now proceed to consider the above agreed issues but I will consider the additional 6th issue as soon as I deal with issues number one and two because it has a bearing on their final outcome.

Issue 1:-Whether there was an interest overcharge by the Defendant in respect of the Plaintiff's account in the sum of Ushs.26,323,234/=?

As already mentioned in the background, during evaluative mediation, the parties agreed to refer this issue to an Auditor as an expert and they signed a Consent Order where they agreed to be bound by the Auditor's final report. The parties subsequently appointed Mr. Twaha Kawaase of M/s Ssejaaka, Kawaase & Co.

The expert upon receiving comments on the draft report he had earlier circulated to both counsel and upon hearing them on those comments in accordance with the agreed Terms of Reference (TOR), submitted his final report in court on 22nd August 2014. Based on the submissions and documents presented to the expert by the parties, he found that the parties agree that there was an overcharge of interest which he calculated and found that the refund the applicant would be entitled to receive is **Ushs.16,031,958/(Uganda Shillings Sixteen Million Thirty One Thousand Nine Hundred Fifty Eight Only)**. In addition, he stated that the effects of the above sum in compounding interest formula used by the Defendant should be computed by the Defendant and this will qualify as an overcharge.

Unfortunately, the effects on the above figure arising from compound interest have not been computed by the defendant as recommended by the expert. Since the plaintiff did not follow up the matter to ensure that the computation is done this Court cannot award what is not determined as it is not an expert in computing compound interest. In the premises, I would adopt the finding of the expert that the computed interest overcharge which this court can allow subject to the findings on issue 6 is the **Ushs.16,031,958/(Uganda Shillings Sixteen Million Thirty One Thousand Nine Hundred Fifty Eight Only)**.

I must however point out at this juncture that the expert noted in his report that while the Defendant admitted that there was an interest overcharge, it was submitted that the overcharge interest was calculated, the undercharge interest was offset from it and the net overcharge interest of **Ushs. 14,277,743/=** was refunded to the Plaintiff on 6th June 2009. The expert did not make a decision on whether indeed a refund was made or not. He stated that he did not consider that submission because the issue of the refund was not part of the subject matter for his expert review and indeed outside the TOR.

This court will also not consider that matter because it was neither pleaded nor canvassed as an issue for determination by this court and no evidence was led on the same. I will now turn to consider the 2nd issue and revert back to this issue for my final pronouncement on the plaintiff's entitlement to the interest overcharge after determining the 6th issue on estoppel and the parole evidence rule.

Issue 2:- Whether the re-mortgaging expense of Ushs.8,207,000/= charged by the Defendant on the Plaintiff's account was contractually due?

According to the evidence of PW1, the Defendant debited the Plaintiff's account with **Ushs.7,875,000/=** and **Ushs.332,000/=** on account of professional fees and stamp duty for remortgaging the suit property. This debit was made in order to pay off an invoice from Kasirye, Byaruhanga & Co. Advocates which clearly indicated that the expense was towards preparation of a mortgage and debenture for additional lending of **Ushs.400,000,000/=** but this money was not disbursed. He testified that the debenture dated 17th July 2008(Ex.P21) purported to provide that a sum of **Ushs.3,000,000,000/=** was advanced whereas not.

During cross-examination, PW1 stated that under the facility letter dated 2nd June 2008 (**Exhibit P.3**) the additional facility was an Overdraft of **Ushs. 60,000,000/=** making a total of **Ushs.2,660,000,000/=** and the bank wanted security cover of **Ushs.3,000,000,000/=** for that amount which he agreed to. He also stated that the difference was **Ushs. 400,000,000/=** since **Ushs. 2,600,000,000/=** had already been covered. He testified that there was an up stamp of the properties given and he was shown proof that stamp duty of 0.5% of **Ushs. 400,000,000/=** was paid. He however contended that stamp duty was only payable on the borrowing but not on the up stamp. According to him only a nominal fee was payable on the up stamp.

DW1 on the other hand, stated that the Plaintiff obtained an overdraft facility of **Ushs.60,000,000/=** over and above the existing loan of **Ushs.2,600,000,000/=** and agreed to up stamp the security held to a security cover of **Ushs.3,000,000,000/=**. He testified that in accordance with the terms of the mortgage, the costs of registration of the mortgaged security were payable by the Plaintiff and therefore the sum of **Ushs.7,875,000/=** being the amount charged to the Defendant by Kasirye, Byaruhanga & Co. Advocates was debited from the Plaintiff's account.

Counsel for the Plaintiff submitted that the debiting of the said amount was unlawful and fraudulent since the Plaintiff was not advanced a loan of **Ushs.3,000,000,000/=**. He contended that whereas the Plaintiff was in dire need of funds for its working capital which the Defendant refused to advance, the Defendant falsely represented to the Plaintiff that it would advance to it a sum of **Ushs.400,000,000/=** and embarked on perfecting securities. He submitted that the Defendant instructed M/s Kasirye, Byaruhanga & Co. Advocates who

prepared and registered a Second Further charge dated 19th July 2008 and in its recital the Defendant misrepresented that it had allowed the Plaintiff further banking facilities of **Ushs.400,000,000/=** over and above the principal sum of **Ushs.2,600,000,000/=**. Furthermore, that the Defendant also drew up a Debenture dated 17th July 2008 and misrepresented that it had agreed to advance a sum of **Ushs.3,000,000,000/=** and based on that, the Defendant's lawyers issued an invoice for the sum of **Ushs.7,875,000/=**. He concluded that the Plaintiff's account was wrongly debited for a transaction where it never received consideration. He relied on the case of *Currie vs Misa (1875) L.R 10 Ex, at 162* for the definition of consideration.

Counsel for the Defendant on the other hand, submitted that the remortgaging expense was contractually agreed upon by the Plaintiff under clause 8.1(D) of the facility letter dated 2nd June 2008 (Exhibit P.3). He contended that under the said facility letter, the Defendant availed the Plaintiff an overdraft facility of **Ushs.60,000,000/=** over and above the **Ushs. 2,600,000,000/=** term loan and it was also agreed that the security would be registered to cover **Ushs.3,000,000,000/=**. He argued that by up stamping the security from **Ushs.2,600,000,000/=** to **Ushs.3,000,000,000/=**, there is a difference of **Ushs.400,000,000/=** and the Plaintiff does not deny executing the facility letter nor do they deny utilizing the **Ushs.60,000,000/=** overdraft granted thereby being the contractual consideration for the up stamping. He explained that the reference to an additional borrowing of **Ushs.400,000,000/=** in the lawyers' invoice and in the Second Further Charge and Debenture was an error which is nevertheless immaterial. He concluded that the debit of the sums in issue was lawfully done.

I have considered the evidence and submissions of both parties and reviewed **Exhibit P.3** which is the facility letter for the additional facility whose purpose as stated in clause 4 thereof was to restructure the existing loan facility. According to clause 2.1 of that exhibit, the principal amount of the facility constituted the existing facility of **Ushs. 2,600,000,000/=** and additional lending of an overdraft of **Ushs.60,000,000/=**. It was further provided in clause 8.1 (D) that the security would be up stamped to cover **Ushs.3,000,000,000/=**. The Plaintiff's directors, Mr. David Buye and Mr. Nathanel Kasozi signed the Form of Acceptance on behalf of the Plaintiff which was couched in the following words:

“We David Buye a director and Nathanel Kasozi another director/company secretary of the Borrower having been duly authorized to witness the affixation of the common seal of the Borrower to the Offer Letter pursuant to a Resolution of the Board of Directors dated 03/06/08 confirm that we have read and understood the contents of the Offer Letter. We confirm that we have also read and understood the Conditions and acknowledge that the conditions form an integral part of and are not divisible from this Offer Letter”.[Emphasis added].

Although PW1 signed the above agreement confirming that he had read and understood the contents of the offer letter and the conditions which form the integral part of the offer letter, it was pleaded in paragraphs 4 (i) & (j) of the plaint that when the offer was made the Plaintiff objected to payment of arrangement fee on the **Ushs. 2,600,000,000/=** because it had already paid the same when that loan was advanced. It was further pleaded that the defendant reacted by threatening to recall the entire loan if the plaintiff did not sign the agreement to restructure the loan under those conditions and the plaintiff in fear that the loan would be recalled and its property sold signed the agreement under those circumstances.

It is the plaintiff's case as pleaded in paragraph 4 (m) of the plaint and stated in paragraphs 16, 17 and 20 of the witness statement that the Defendant went ahead to register a Second Further Charge for additional borrowing of **Ushs. 400,000,000/=** that was never credited on its account. It is contended that instead the Defendant debited the Plaintiff's account with professional fees of **Ushs. 7,875,000/=** and another sum of **Ushs. 332,000/=** for remortgaging the securities which were already mortgaged with the Defendant Bank.

On cross examination, PW1, conceded that the plaintiff had agreed to give security up to **Ushs. 3,000,000,000/=** and confirmed that the up stamping of security was done to effect what the parties had agreed upon. However, according to the evidence of PW1 in cross examination, the quarrel of the Plaintiff is that stamp duty is not payable on an up stamp. From that evidence the Plaintiff appears to have relaxed its position from challenging the entire re-mortgaging transaction to only questioning payment of the stamp duty. The Plaintiff raised the issue of remortgaging and debiting of the attendant fees to its account in several of its correspondences to the Defendant which were responded to. In its last letter dated 2nd April 2009 (Exhibit D5) the Plaintiff appeared to have been satisfied with the explanations given by the Defendant except for the fact that the tax invoice, receipt by the service providers plus the general receipt for the stamp duty was not attached.

It is also clear from the said correspondences that the Plaintiff never complained that the **Ushs. 400,000,000/=** indicated in the Second Further Charge and Debenture as additional borrowing was never given credited to its account. This means that the Plaintiff understood that the two documents were for purposes of up stamping the security as testified by PW1 and their execution and registration was pursuant to the agreement between the parties. The argument of counsel for the plaintiff that his client expected to receive **Ushs.400,000,000/=** is therefore baseless as it is not backed by any evidence save for what is stated in the Second Further Charge and the Debenture. It is my considered view that the only consideration expected under those deeds was the **Ushs. 60,000,000/=** the parties agreed to in Exhibit P3.

The evidence shows that the remortgaging expense comprised of stamp duty of **Ushs. 2,025,000/=** which is 0.5% of the additional amount. Stamp duty is a statutory tax payable to Government through Uganda Revenue Authority on various instruments. According to section

2 of the Stamps Act, read together with rule 34 of the schedule thereto, stamp duty of 0.5% of the value in an instrument is payable on a further charge. Therefore the further charge having been up stamped to cover an additional security cover/value of **Ushs.400,000,000/=**, stamp duty was payable on it. Other charges included professional fees for the preparation and registration of the securities, other disbursements and Value Added Tax. It is clear from the documents that the Defendant engaged Kasirye, Baruhanga and Company Advocates to prepare the security documents to be up stamped to the agreed security cover which was registered. The law firm invoiced the Defendant for their professional fees and disbursements incurred in the preparation of the security documents and registration.

Under the Mortgage Deed the Plaintiff agreed that all costs, charges and expenses incurred in relation to the mortgage would be debited to its account. The Plaintiff conceded that it agreed to up stamp the security. The up stamp required some legal processes as well as payment of the requisite stamp duty as stated above. I do not therefore see how the Plaintiff can turn around and fault the Defendant for debiting its account with the costs reasonably and properly incurred in executing the up stamp. In the premises, I find that the debiting of the said amount to the Plaintiff's account was lawful.

Before I take leave of this issue, I must observe at this juncture that it was careless of the defendant to have given instructions to its lawyers to draft the second further charge and the debenture as if additional facilities were being given to the principal debtor whereas not. The bank ought to know better how costly such mistake can be and so it should not casually handle its instructions.

Issue 6:- Whether the Plaintiff is estopped and or barred by the parole evidence rule from raising issues 1 and 2?

As stated earlier, this issue was raised by counsel for the Defendant during the hearing of the case. Counsel for the Plaintiff submitted that the Plaintiff is not estopped from claiming the overcharged interest claimed in the sum of **Ushs.26,323,234/=** and the remortgaging expense of **Ushs.8,207,000/=** because the Plaintiff had consistently complained about the same to the Defendant but the Defendant ignored his plea. Counsel referred to Exhibits D3, D5 & D7 to show the Plaintiff's complaints regarding the matter and submitted that instead, the Defendant was at the verge of selling the Plaintiff's property at an undervalue of **Ushs.2,000,000,000/=** yet the property was sold by the Plaintiff at **Ushs.5,350,000,000/=**.

He further submitted that the Plaintiff was under economic duress when they signed the security realization agreement in which they acknowledged being indebted to the tune of **Ushs.2,778,163,314/=** which included the interest and remortgaging expense. He relied on section 92 (a) of the Evidence Act for the exceptions to the parole evidence rule. He submitted that the Plaintiff did not receive consideration after the debit of the remortgaging expense and

that PW1 was intimidated into signing the SRA with the threat of selling his property. He relied on the cases of ***Liberty Construction Co. Ltd vs Lamba Enterprises Ltd HCCS No.215 of 2008, Pai On vs Lau Yiu Long [1980] AC 614 at 635 and Universe Tankships Inc. of Monrovia vs International Transport Workers Federation & Ors [1983] AC 383, North Ocean Shipping Co. Ltd vs Hyundai Construction Co. Ltd*** in support of his argument that there was economic duress which vitiated the Plaintiff's agreement to the remortgaging expense and overcharged interest which formed part of the total sum under the SRA.

Counsel for the Defendant on the other hand submitted that by the evidence of PW1, he stated that he was not aware that the overcharged interest claimed and the remortgaging fee were included in the sum of **Ushs.2,778,163,314/=**. He argued that by the said admission, he could not have consented to the contested **Ushs.34,530,234/=** (being the total of the overcharged interest and remortgaging expense) and signed the SRA under duress. He submitted that at best, the plaintiff could have been under a mistake of fact while signing and since this was not pleaded by the Plaintiff as the reason for their accepting the total amount part of which they now contest, then they cannot rely on it now.

Counsel for the Defendant further submitted that the Plaintiff's claim that the Defendants' lawyers' letter (Exhibit D9) in which they advised that if the agreement was not signed, the Defendant would proceed to recover, gave them no option is untenable. He submitted that the Defendant's advocates were merely restating the Defendant's recourse in law for non-payment of an outstanding mortgage sum. Counsel submitted that the Plaintiff having admitted to defaulting on the payment of the mortgage debt, which debt was secured by the suit property, the Defendant was within its legal rights to advise that it would realize its security to recover the debt. He argued that a threat to exercise a legal right does not amount to economic duress. He buttressed this arguments with a passage from ***Chitty on Contracts, 29th Edition Paragraph 7- 036, Hassanali Issa & Co. vs. Jeraj Produce Store [1967] EA page 555 at 560 and Pao On & Others vs Lau Yiu and Another [1979] 3 ALL ER 65 at p.67.***

Counsel for the Defendant also submitted that the Plaintiff was independently advised by its lawyers during the conclusion of the SRA. He further submitted that the Plaintiff by its own evidence through PW1 relied on the agreement and effected it therefore it cannot approbate and reprobate. He relied on ***Halsbury's Laws of England 4th Edition Vol.16 (2) paragraph 962*** which explains the principle on approbation and reprobation. Regarding the parole evidence rule, he relied on ***sections 91 & 92 of the Evidence Act.***

I have considered the evidence on record and the elaborate submissions of both counsels on this matter and will resolve the issue as follows:-

The Parole Evidence Rule

The Parole evidence rule is provided for under section 92 of the Evidence Act which provides as follows;

“92. *Exclusion of evidence of oral agreement.*

When the terms of any such contract, grant or other disposition of property or any other matter required by law to be reduced to the form of a document have been proved in accordance with section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms but;

(a) Any fact may be proved which would invalidate any document, or which would entitle any person to any decree, or order relating thereto such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure in consideration or mistake in fact or law.....”

The Parole evidence rule has been applied in various cases some of which are ***L’Strange vs Gracoub Ltd [1934]2 KB 394*** where **Scrutton LJ** in his lead judgment underscored the principle that once an agreement is reduced into writing and executed by the parties, the parties are bound and it is wholly immaterial whether the parties read the Document or were not aware of the contents of the same. **Scrutton LJ** also noted the exceptions to the rule which would include Fraud and misrepresentation. In ***Jacobs vs Batavia & General Plantations Ltd [1924] 1 Ch. 287*** P.O Lawrence stated that, “*It is firmly established as a rule of law that parole evidence cannot be admitted to add to, vary or contradict a deed or other written instrument*”.

From the above legal principles, it is clear that once parties have executed agreements, they are bound by them and evidence of the terms of the agreement should be obtained from the agreement itself and no extrinsic evidence shall be admitted or if admitted, shall be relied on to contradict, add to, vary, subtract from the terms of a contract except where there is fraud, duress, illegality, lack of consideration, lack of capacity to execute the contract or mistake.

The Plaintiff’s case is that the remortgaging expense and overcharged interest should be refunded to it despite the execution of the SRA where it acknowledged the total indebtedness of Ushs.2,778,163,314/=. PW1 stated that he was not aware that the disputed amounts constituted part of the total indebtedness acknowledged. He also stated that he signed the Security Realization Agreement as he had no option since the Defendant had threatened to dispose of the same and he was in fear of losing his property at a low value.

What I discern from the Plaintiff's case is that they are raising two(2) grounds under which they seek to invoke the exceptions to the parole evidence rule and these are i) Unilateral Mistake and ii) Economic Duress. However, the Plaintiff cannot rely on both grounds at the same time. PW1 was either mistaken that the disputed sum was not part of the debt indicated in the agreement or he was aware that it was but had no option but to sign.

Regarding **unilateral mistake**, I have reviewed the correspondences between the Plaintiff and the Defendant and between the Plaintiff's lawyers and the Defendant's lawyers (**Exhibits D(2(iii)), D3, D4, D5, D6, D7, D8 and D9**) and it is clear that the amounts claimed as overcharged interest and remortgaging expense were always part of the total debt due from the Plaintiff and that is why the Plaintiff continuously sought explanations for those charges which the Defendant provided in the various correspondences. Particularly, in Exhibit D7, the Plaintiff's lawyers upon receipt of the draft security realization agreement wrote to the Defendant's lawyers stating, among others, that;

"In addition, there are some important issues which our Client had raised with the Bank on several occasions which the Bank has not addressed to date. These include;

- i) Interest overcharge of 27,470,980/ on your account*
- ii) 8,207,000/ for remortgaging securities*
- iii) Arrangement fee of 1.8%*
- iv) Delay to credit your account on time, besides money under default has been attracting punitive interest of 39.8%*

These issues greatly affect the balances and the interest on the loan. For that reason, we deem it necessary to have another meeting in order to iron out these issues before we advise our Client to sign the security realization agreement". [Emphasis added].

From this correspondence, it is clear that the Plaintiff and his lawyers were very much aware that the amounts referred to formed part of the outstanding debt and they needed a meeting to have the issues resolved so that the position of the balances on the loan and interest is confirmed. **Exhibits D9 and D10** were the subsequent correspondences and finally the SRA was executed. I therefore find that the PW1, the representative of the Plaintiff who executed the SRA on behalf of the Plaintiff was aware that the monies being claimed as overcharged interest and remortgaging expense were part of the total exposure reflected therein. As such, the ground of mistake as an exception to the parole evidence rule does not apply to the facts of this case.

Economic Duress

The Plaintiff also seeks to rely on economic duress as an exception to the parole evidence rule to justify his claim for the remortgaging expenses and overcharged interest.

In the case of *Pao On & Others vs LauYiu & Another* [1979] 3 ALL ER 65, Lord Scarman while relying on the judgments of Lord Wilberforce and Lord Simon of Glaisdale in *Balton vs Armstrong* [1976] AC 104 held that there is criteria that is relevant in considering whether a Plaintiff acted voluntarily or not in signing an instrument or entering into a contract. Furthermore, that in determining whether there was coercion of the will such that there was no consent, it is material whether the person alleged to have been coerced did or did not protest at the time, that at the time he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised and finally whether after entering the contract, he took steps to avoid it.

I have already stated herein above that correspondences were exchanged between the Plaintiff's lawyers and the Defendant's lawyers regarding the SRA. Indeed, the Plaintiff's lawyers raised some issues about the same and responses were made thereto by the Defendant's lawyers. Finally, in **Exhibit D9** dated 5th May 2009, the Defendant's lawyers forwarded the agreement and stated that it captured all matters that were agreed upon. There is no evidence to show that a protest was forwarded to the Defendant or its lawyers that the terms in the agreement were not agreed to. Instead, by **Exhibit 10** dated 14th May 2009, the Plaintiff's lawyers forwarded copies of the Agreement signed by the Plaintiff. I have noted that the discussions pertaining to the contents of the SRA commenced on 18th April 2009. This is gleaned from **Exhibit D6** which forwarded the SRA to the Plaintiff's lawyers. The SRA was finally executed and forwarded by the Plaintiff on 14th May 2009. This means that from the time the draft SRA was forwarded to the Plaintiff for signature to the time it was actually signed it took a period of almost one (1) month. While the Plaintiff states that they were under pressure lest they lose their property, I believe the Plaintiff could have had recourse to a legal remedy by seeking intervention from court within that time if indeed it was not satisfied with the terms of the SRA, particularly the sums owing. Moreover, the Plaintiff was represented by legal counsel who provided independent advice.

Another consideration that was highlighted in the **Pao On case** (supra) was whether the Plaintiff had thereafter taken steps to avoid the contract. In the circumstances of this case, the evidence shows that the Plaintiff proceeded to effectuate the SRA by selling the suit property on 23rd May 2009 as shown by **Exhibit D16** and realized a benefit from it because it had the opportunity to negotiate a good price which left a balance of the proceeds after the outstanding debt, costs, charges and expenses were paid.

The Plaintiff having enjoyed a benefit from the SRA cannot at the same time seek to vitiate it on grounds of duress and mistake. Suffice it to note that the grounds raised by the Plaintiff, if upheld, would vitiate the whole agreement and not merely open up a few clauses for review. Opening up a few clauses for review and setting them aside while leaving others under which the Plaintiff derived authority to conduct the sale to its benefit would amount to approbation and reprobation which is barred by law. In *Verschures Creameries Ltd vs Hull &*

Netherlands Steamship Co. Ltd(1921) 2 KB 608 at p.612, Scrutton LJ emphasized the equitable principle that one cannot approbate and reprobate at the same time. He stated that the principle is based on the doctrine of election and he stated that “*a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn around and say it is void for the purpose of securing some other advantage.*”

In the premises, I find that under the normal circumstances, the Plaintiff would be precluded from claiming the remortgaging expenses and the interest claimed as overcharged interest based on the principles discussed above since it agreed to and acknowledged that it was indebted to the Defendant in the sum of **Ushs.2,778,163,314/=** which amount was inclusive of the sums claimed. However, there are subsequent developments as relate to the overcharged interest which this court cannot simply ignore since it has a bearing on this aspect of the claim.

As clearly elaborated upon under issue one, by the consent of both parties this matter went for evaluative mediation which resulted into them signing a Consent Order by which they agreed to, inter-alia; appoint an expert to determine the issue of overcharged interest and to be bound by the final report. In accordance with the TOR a copy of which was filed in court on 29th April 2014, the expert was expected to verify whether the plaintiff’s claim against the defendant for over charged interest of **UShs. 23,323,234/=** under relief (a) in the plaint is valid. The parties did submit their respective submissions to the expert and were heard on those submissions where upon a draft report was issued to them for comments and the expert upon considering the comments after hearing the parties again, filed a final report in which he found that there was overcharged interest of **Ushs.16,031,958/=(Uganda Shillings Sixteen Million Thirty One Thousand Nine Hundred Fifty Eight Only)** which the Defendant conceded to.

It is pertinent to note that right from the outset of this suit the defendant maintained that the plaintiff’s claim for overcharged interest and remortgaging costs is barred by estoppel and the parole evidence rule. This is seen right from the pleading where the defendant in reference to the SRA alleged in paragraph 3 (l) of the written statement of defence (WSD) that;

“In clause A of the citation to the said agreement, the plaintiff clearly and unequivocally acknowledged being indebted to the defendant in the sum of Ushs. 2,778,163,314/= (Uganda Shillings Two Billion Seven Hundred Seventy Eight Million, One Hundred Sixty Three Thousand Three Hundred Fourteen only). The execution of the agreement was witnessed by the plaintiff’s attorneys and accordingly the plaintiff is estopped from alleging false interest calculations, charges and postings

after acknowledging being indebted in the said amount inclusive of interest and the charges now complained of.”

The above position notwithstanding, the defendant by a Consent Order dated 23rd May 2013, signed by both parties and sealed by this court agreed to submit the issue to an expert for determination and unequivocally committed itself to be bound by the final report issued by the expert. Clause 2 of that Consent Order states thus:

*“2.That the experts shall hear the parties and consider their submissions and thereafter shall make a determination of the validity of the claim initially by a draft report to both parties who will make comments addressed to him and copied to each other and thereafter by **a final report which shall be binding on the parties**”.* [Emphasis added].

Based on the Consent Order, the parties drew the TOR for the expert whom they jointly appointed and agreed to pay in equal proportion his professional fees of **Ushs. 5,000,000/= (Uganda Shillings Five million only)** plus VAT of 18%.

However, on a surprised turn of events, in the middle of hearing the plaintiff’s evidence on the other issues, counsel for the defendant applied to add an additional issue on a question of law. He contended that reference of the issue of overcharged interest and remortgaging fees to an expert and agreeing to be bound by the final report does not bar court from determining a question of law arising from the same issue.

As expected, counsel for the plaintiff vehemently opposed that application arguing firstly, that this would be prejudicial to the plaintiff because the parties had already agreed on the issues on whose basis witness statements had already been filed and hearing had commenced. Secondly, that following the agreement of the parties to refer the issue to an expert under sections 26 & 27 of the Judicature Act, and the appointment of the expert whose TOR was signed by both parties, the defendant was estopped from avoiding the terms of the Consent Order without first setting it aside. He therefore prayed that the application to introduce a new issue be rejected. I considered those arguments and found that the plaintiff would not be prejudiced by allowing the additional issue on the points of law to be framed so that all matters relating to the dispute could be conclusively determined.

While the above developments were taking place in court, the expert commenced work and both counsels faithfully followed the steps prescribed in the TOR. This facilitated the expert to execute the assignment in accordance with the TOR and his final report which under the Consent Order is binding on the parties was submitted to court on 22nd August 2014.

Now, with the above chronology of events in mind, can the defendant again revert back to its earlier contention as regards estoppel and parole evidence rule after signing a Consent Order by which it agreed to refer the issue of overcharged interest to an expert for determination and to be bound by his final report? To my mind the answer is a clear NO for the same reason of estoppel relied upon to bar the plaintiff's claim and I would add waiver as well.

I will start by looking at waiver and how it applies to this case. **Words and Phrases Legally Defined Volume 4 at P. 404** defines waiver as:

“the abandonment of a right in such a way that the other is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct”.

Black's Law Dictionary 8th Ed at page 1611 defines waiver as; *“the voluntary relinquishment or abandonment express or implied of a legal right or advantage.”* It states further that ; *“an implied waiver may arise where a person has pursued a course of conduct as to evidence an intention to waive a right or where his conduct was inconsistent with any other intention than to waive it.”*

For there to be waiver, **Black's Law Dictionary, 7th Edition at page 1574** states that the party alleged to have waived a right must have had both knowledge of the existing right and the intention of foregoing it. In the instant case, upon looking at the position the defendant maintained up to the time the Consent Order was signed, it is clear that the defendant was well aware of its rights to raise the issue of estoppel and parole evidence rule. However, its subsequent conduct of signing the Consent Order in the terms stated above and the steps its counsel took to comply with the Order show that it intended to waive that right. I do not think the defendant thought that this was merely an academic exercise where monies could be spent to engage an expert with no resultant benefit to either of the party. The Judicature Act and the Civil Procedure Rules provide for trial by referee or arbitrator of matters that, among others, consists wholly or partly of accounts, like in the instant case. Section 26 (2) of the Judicature Act provides that the report of an official or special referee may be adopted wholly or partly by the High Court and if so adopted may be enforced as a judgment or order of the High Court.

It is also common practice that the parties can agree to be bound by a report of a referee like it was done in this case and if so agreed court merely adopts it unless the parties for some genuine reason challenge the credibility or veracity of the report. The firm view of this court is that in the instant case the defendant waived its rights by accepting to submit the issue to an expert for determination and agreeing to be bound by the final report. It is therefore my finding that the defendant cannot now assert that right having waived it.

As regards estoppel, I find section 114 of the Evidence Act which counsel for the defendant relied on to support his argument against the Plaintiff's claim very instructive on this matter. It provides thus:

“When one person has, by his or her declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she nor his or her representative shall be allowed, in any suit or proceeding between himself or herself and that person or his or her representative, to deny the truth of that thing.”

Black's Law Dictionary, 8th Edition at page 590 defines estoppel by election as; *“the intentional exercise of a choice between inconsistent alternatives that bars the person making the choice from the benefits of the one not selected”*.

The defendant in the instant case agreed to be bound by the report of the expert and caused the plaintiff to act upon that belief by submitting to that process and even paying half of the expert's professional fees which possibly it would not have agreed to pay if it knew that the report was not going to be binding.

In conclusion of this issue, I am convinced that the defendant having waived its right to contest the plaintiff's claim for overcharged interest on the grounds stated above, it is now estopped from raising the same matter by the doctrine of estoppel by election. For the above reasons, it is the finding and conclusion of this court that the plaintiff is entitled to a refund of the overcharged interest of **Ushs.16,031,958/=(Uganda Shillings Sixteen Million Thirty One Thousand Nine Hundred Fifty Eight Only)** determined by the expert and adopted by this court.

Issue 3:-Whether the debit by the Defendant of Ushs.196,693,961/= on the Plaintiff's account as legal costs of recovery was lawful?

PW1 testified that after the Plaintiff sold off the securities and the proceeds were credited to the Plaintiff's account with the Defendant, they were surprised that the Defendant recovered **Ushs.196,693,961/=** from the Plaintiff's account as legal fees to MMAKS Advocates. He stated that this was contrary to paragraph 7 of **Exhibit P3** being the facility offer letter and paragraph 2.1 of the SRA (**Exhibit P4**).

During cross-examination, PW1 was referred to clause 4.1 of Exhibit P.4 and he confirmed that under that clause, the Plaintiff Company was to meet the bank's legal costs of recovery as

stipulated under the mortgage deed. He however stated that clause 4.1 of Exhibit P 4 should be read together with clause 2.3 of that same exhibit because clause 4.1 referred to recovery when the Plaintiff failed to sell and the Defendant conducts the sale. He contended that since the sale was conducted by the Plaintiff the recovery fees were not applicable. PW1 was also referred to Exhibit D2 (iii) which is a formal demand dated 24th March 2009 and he confirmed that he received it. He also confirmed that the demand sought payment of the loan principal of **Ushs.2,420,977,891/=** and money outstanding on the current account in the sum of **Ushs.295,846,927/=**. He then stated that the last paragraph to the said letter stated that the company would meet the legal costs once legal action commenced after 15th April 2009. He, however, maintained that he thought the issue of costs would arise upon the company failing to sell and the Bank formally informs them that they were commencing the recovery process.

On the other hand, DW1 testified that the lawyers' fees of Ushs.196,693,961/= debited to the Plaintiff's account were collection charges incurred by the Defendant and that by Exhibits D2 (iii), the Defendant demanded payment of the entire outstanding loan by 15th April 2009 failing which the matter would be passed on to MMAKS Advocates. He stated that following the Plaintiff's response to the demand (Exhibit D3) wherein they requested for more time and raised queries regarding overcharged interest and re-mortgaging expenses, the Defendant vide Exhibit D4 advised that no further extensions would be given since the Plaintiff had since November 2008 been making requests for extensions to enable it clear the arrears but the arrears would not be cleared. Furthermore, that the Defendant maintained the deadline of 15th April 2009 and further explained the position regarding claim of interest overcharge and remortgaging expenses.

DW1 further stated that when the 15th April 2009 deadline passed without the Plaintiff clearing its arrears, the whole loan fell due and MMAKS advocates commenced the recovery proceedings. To that end, on 16th April 2009, a recovery meeting was held between the Defendant, MMAKS Advocates and the Plaintiff in which it was agreed that the Plaintiff would be permitted to participate in the recovery proceedings and pursuant thereto, the SRA was prepared. DW1 then stated that while the Plaintiff had raised issue with payment of costs vide its lawyers' letter dated 21st April 2009 (**Exhibit D1**), the issue was finally resolved at a meeting held on 5th May 2009 between the Defendant's lawyers, the Defendant, the Plaintiff and the Plaintiff's lawyers. Consequently, the SRA maintained the clause that the Plaintiff would pay the recovery costs pursuant to clause 2(iv) of the mortgage deed.

Counsel for the Plaintiff submitted that there was no recovery to justify the legal fees charged. He further submitted that the Service Level Agreement (hereinafter abbreviated as SLA) from which the Defendant claims a right is illegal, null and void because it contravenes sections 48, 50 and 51 of the Advocates Act. He submitted that Barclays Bank of Uganda Limited (Defendant), who was the Client for MMAKS Advocates, neither signed nor sealed the Agreement which does not even disclose which law firm contracted with the Defendant and

who signed on behalf of the firm. He further argued that Section 51 of the Advocates Act requires the person to be bound by the agreement to sign and it has to contain a certificate signed by a notary public to the effect that the nature of the agreement had been explained to the person to be bound by it and he /she appeared to understand it but this was not done. He relied on the cases of *Njogu & Company Advocates vs National Bank of Kenya (2007) 1 EA 296*, *S.V Pandit vs Willy Mukasa Sekatawa & Others [1964] EA 490*, *Kituuma Magala & Co. Advocates vs Celtel Uganda Ltd SCCA No.9 of 2010* and *Marles vs Phillip Trant & Sons Ltd Mackinon, Third Party 1 QB 29*.

He also submitted that the Plaintiff was never made aware of the legal fees which would be 6% of the sum involved.

Counsel for the Defendant on the other hand submitted that the Defendant did incur legal costs in obtaining payment of the monies secured by the mortgage and was entitled under the mortgage to pass on these costs to the Plaintiff. He referred to clause 2(iv) of the Mortgage Deed (**Exhibit P1**) as the clause that entitled the Bank to make the debit. Counsel also submitted that the Bank did instruct lawyers to pursue recovery of the debt following the Plaintiff's default. It was counsel's submission that during the negotiations leading to signing of the SRA, all parties were aware that MMAKS Advocates was instructed by the Defendant to handle the transaction.

Regarding the issue of the legality of the SLA, counsel for the Defendant submitted that the Advocates Act governs agreements by which advocates seek to bind their clients to stated remuneration terms and the Act imposes restrictive conditions which include explaining to the person intended to be bound by it on the nature of the remuneration and a confirmation by a notary public with a notarial certificate that the person intended to be bound appeared to have understood.

It is the argument of Counsel for the Defendant that sections 48 and 51 of the Advocates Act do not apply where the agreement is by the client imposing on the advocate remunerative terms as the mischief of the provisions is the protection of clients and the public and not protection of advocates who are free to accept remuneration offers by clients subject to rule 4 of the Advocates Remuneration and Taxation of Costs Rules. Counsel submitted that a reading of the SLA in issue shows that it is the Defendant Bank that imposes terms on its panel of law firms and not the other way round and that is why the agreement was only signed by the law firm accepting terms issued by the Defendant Bank. He quoted the case of *Kituuma Magala & Co. Advocates vs Celtel (U) Ltd* (supra) in support of his argument that the policy of the aforesaid provisions of the Advocates Act was to protect the general public or a class of persons who are clients of the advocates.

Finally, counsel for the Defendant submitted that under clause 4.1 of the SRA the Plaintiff was to meet the Defendant's legal cost of the recovery as stipulated in clause 2 (iv) of the mortgage and this entitled the Defendant to debit his account.

I have reviewed the evidence and considered the submissions of both counsel on this issue. Both counsels adopted different approaches in dealing with this issue. Counsel for the plaintiff submitted on two lines of arguments, namely; that there was no recovery to justify the legal fees and secondly that the SLA and the mortgage deed from which the claim for fees are based are illegal, null and void. Counsel for the defendant on the other hand submitted under five sub-issues. I will adopt the approach used by the plaintiff and consider the matter under two sub-issues;

(i) **Whether the Service Level Agreement (Exhibit P.8), which was the basis for the Advocates' charges, is valid and enforceable.**

I have reviewed **Exhibit P.8** and noted that the document did not state which advocate or law firm the Defendant was entering the agreement on terms of engagement with. On the execution page, there is just a scribbled signature and the full name of the signatory is not indicated. The Defendant did not sign the same as a contracting party.

Regulation 2 of the Advocates (Remuneration and Taxation of Costs) Regulations SI 267-4 provides that;

“The remuneration of an advocate of the High Court by his or her client in contentious and non-contentious matters, the taxation of that remuneration and the taxation of costs as between party and party in contentious matters in the High Court and in magistrates courts shall be in accordance with these Regulations.”

Sections 48 and 50 of the Advocates Act provide for remuneration by agreement. Under those provisions an advocate and his or her client can make an agreement as to the remuneration of the advocate in respect of non-contentious and contentious transactions. Section 51 of the same Act provides the special requirements of agreements under sections 48 and 50 which the parties must comply with for the agreement to be unenforceable. It provides as follows;

- 1) *“An agreement under section 48 and 50 shall;*
 - a) *be in writing*
 - b) *be signed by the person to be bound by it and*
 - c) *contain a certificate by a notary public (other than a notary public who is a party to the agreement) to the effect that the person bound by the agreement had explained to him or her the nature of the agreement and he appeared to understand the*

Agreement. A copy of the Certificate shall be sent to the Secretary to the Law Council by prepaid registered post.

- 2) *An Agreement under section 48 or 50 shall not be enforceable if any of the requirements in subsection(1) above have not been satisfied in respect of the Agreement, and any Advocate who obtains or seeks to obtain any benefit under any agreement which is unenforceable by virtue of the provisions of this section shall be guilty of professional misconduct.”*

The Supreme Court of Uganda has interpreted the provisions of sections 48, 50 and 51 of the Advocates Act in ***Kituuma Magala & Company Advocates vs Celtel Uganda Ltd SCCA No.9 of 2010*** and held that the provisions of section 51(2) of the Advocates Act are clear and any remuneration agreement which is not in compliance with the same is illegal and unenforceable.

Counsel for the Defendant submitted that the said provisions do not apply to the agreement in this case since the terms of the agreement were imposed by the Defendant on the Defendant’s panel of lawyers’ firms. Unfortunately, he did not tell this court the law under which that agreement was made. In the absence of an explanation of where the power to make that agreement was derived from I am unable to agree with the argument that it was not made under the above law because then it would have no legal basis. I have also not found any justification for counsel for the defendant’s interpretation of section 51 of the Advocates Act, save for his own convenience. The provisions of the law are clear from their literal meaning that they regulate remuneration of agreements between advocates and their clients. My understanding of the provisions is that it does not matter who proposes the terms of the agreement since after execution by the parties it becomes binding on them. The contention that one party imposed terms on the other is not sustainable where the other party has agreed to the same.

In the premises, this court is bound by the established principle stated by the Supreme Court in the case ***Kituuma Magala & Company Advocates (supra)*** that any remuneration agreement which is not in compliance with section 51 of the Advocates Act is illegal and unenforceable. Any other form of agreement that purports to provide for remuneration of an advocate outside the above law, in my view, is not recognized under our law and therefore the argument of counsel for the defendant that the SLA did not have to comply with the above law as it was imposed on them by the defendant is misconceived. In the circumstances, I find that **Exhibit P.8** being an agreement for remuneration of advocates is governed by the Advocates Act and since it does not meet the mandatory special requirements of section 51 of the Advocates Act, it is illegal and unenforceable.

(ii) Whether recovery fees were payable by the Plaintiff in respect of the realization of the suit property.

A review of the mortgage deed (**Exhibit P1**) under clause 2(iv) shows that the Plaintiff as Principal Debtor and Mr. David Buye as Mortgagor undertook to pay the Defendant's costs, charges and expenses incurred under the mortgage. The clause provides as follows;

*“ All costs, charges, and expenses incurred hereunder by the Bank and all other monies paid by the Bank in perfecting or otherwise in connection with this security or in respect of the mortgaged property including(without prejudice to the generality of the foregoing) all monies expended by the Bank under sub-clause (ii) hereof **and all costs of the Bank of all proceedings for enforcement of the security hereby constituted or for obtaining payment of the monies hereby secured or any part thereof(whether or not such costs, charges, expenses and monies or part thereof would be allowable upon a party and party or solicitor and own client taxation by the Court) shall be recoverable** so far as they relate to the liabilities of the Principal Debtor from the Mortgagor and /or from the Principal Debtor or from both as a debt and may be debited to any account of the Principal Debtor or of the Mortgagor as the case may be and shall bear interest accordingly and shall be charged on the mortgaged property and the charge hereby conferred shall be in addition and without prejudice to any and every other remedy or lien or security which the Bank may have or but for the said charge would have for the monies hereby secured or any part thereof.” [Emphasis added]*

Clause 4.1 of the SRA (**Exhibit P4**) provides as follows;

“The Company shall meet the Bank's legal cost of this recovery as stipulated in clause 2(iv) of the Mortgage Deed.”

It is a settled principle of law that all costs, charges and expenses properly and reasonable incurred by the mortgagee in relation to the mortgage is recoverable from the mortgaged property. This position was firmly stated by Scott L.J. in the case of **Gomba Holdings (UK) Ltd & Others v. Minories Finance Ltd & Others 9No.2** [1992] 3 WLR 723 at 733 in the following words:

“The principal that a mortgagee is entitled to add to the secured debt his costs, charges, and expenses properly incurred is, therefore, firmly embedded in the law and is the principle underlying express contractual provisions such as those that must be construed in the present case.”

The dispute rotating around this issue as I understand it is that the Plaintiff, under an arrangement which culminated into signing the SLA sold the mortgaged property and so the debiting of its account with the mortgagee's lawyer's fees for the same transaction is not justified. The Defendant on the other hand maintains that when the dead line it gave for clearing the Plaintiff's arrears passed its lawyers started the realization process. Mr. Masembe relied on a number of correspondences exchanged between their law firm and the Plaintiff's lawyers to argue that the realization process did commence as per the instructions they were given and so they are entitled to the costs in issue.

It is not in dispute that the Plaintiff defaulted on its loan obligations and a Formal Demand was sent to it on 24th March 2009 (Exhibit D2 (iii)). That letter stated among other things the fact that the account was overdrawn with a debit balance as stated therein. A demand was then made in the following words:

"This is to accordingly demand that should you fail to clear the above overdrawn position by 15th April 2009, the total sum of the outstanding sum.....

If no response is received from you in relation to this letter, the bank by copy of instructs MMAKS Advocates whose registered offices are at.....to institute necessary legal action to recovery the outstanding amounts.

You are advised that once legal action starts after the 15th April 2009, you will be responsible for meeting all costs related to the recovery of the outstanding amounts. [Emphasis added].

To my mind, that letter especially in the last paragraph was clear that once legal action was started after 15th April 2009 then the plaintiff would be responsible for costs related to the recovery. I therefore find it pertinent to ask and possibly attempt to answer the difficult question as to whether legal action did commence after that date with a view to enforcing recovery. I call it a difficult question because it may not have a straight forward answer other than what is gleaned from the correspondences and the course of action that was taken after that letter was received by the Plaintiff.

The Plaintiff's reply to the Formal Demand is Exhibit D3. It is dated 26th March 2009 just two days from the date of the Formal Demand. The Plaintiff in that reply regretted the state of affairs, requested for extension of the grace period up to 30th April 2009 and raised some outstanding issues which were said to be of serious concern.

The Defendant responded by a letter dated 30th March 2009 (Exhibit D4). In that letter the Plaintiff was reminded about the previous extensions of time and its failure to make good its overdrawn account. The Plaintiff was then advised that if it failed to clear its overdrawn

position of Ushs. 351,542,214/= as at 30/03/2009 by 15th April 2009, the total sum of the outstanding balances on its loan and current accounts would become due and owing. The Defendant also addressed some of the concerns raised by the Plaintiff in its letter of 30th April 2009. The plaintiff in its response to that letter dated 2nd April 2009, made some observations about the issues it had raised and concluded that the response did not adequately address the concerns.

As the parties were exchanging correspondences on the clearing of the overdrawn account and the outstanding issues raised by the Plaintiff there was also some negotiations going on as regards the mode of repayment of the loan. DW1 testified to the negotiations and it can be gleaned from the next correspondence from the defendant's lawyers to the plaintiff's lawyers dated 17th April 2009 that the parties had indeed to the plaintiff selling the property and that is why the SRA was being forwarded for the plaintiff's signature. I will reproduce most parts of the content of that letter because I consider it very relevant in helping me answer the difficult question posed above. It states:-

“RE: SECURITY REALISATION AGREEMENT

We act for Barclays Bank of Uganda Ltd and have instructed to forward to you the Security Realisation Agreement between our Client, Golf View Inn (U) Ltd as debtor and David Bbuye, Julian Bbuye , Joy Nansubuga, Noah Mubiru and Nathanael Kasozi as guarantors.

We enclose herewith the Security Realisation Agreement in triplicate for execution by the relevant parties. Thereafter, please return the same to us for onward transmission to our client for execution.

Kindly acknowledge receipt of the agreement by signing and returning to us the attached of this letter.

Yours faithfully,

MMAKS ADVOCATES

MKB/ln.....” [Emphasis added]

It is important to note the instructions the lawyers were carrying out as stated by them in the first paragraph of the letter highlighted in bold for emphasis because I will be reverting back to it in due course. That letter sparked off a series of correspondences between the Plaintiff's lawyers and the Defendant's lawyers. The Plaintiff's counsel in its letter of 21st April 2009 alluded to a meeting between the parties held at the Defendant's lawyer's offices and highlighted some of the issues agreed upon in that meeting which in the opinion of their client

had been altered. He also raised the issue of the Plaintiff paying costs and some of the outstanding issues the Defendant had raised in its earlier letters but in their opinion had not been addressed. He concluded that the issues affected the balances and the interest on the loan and suggested another meeting to iron out those issues before their client could be advised to sign the SRA.

The Defendant's counsel responded to those concerns by a letter dated 4th May 2009 in which they explained the Defendant's position and the lawyers concluded in the following words:-

*“We thus request you to call on us on 5th May 2009 at 2.30 p.m **to have the agreement finalized and executed failing which we are instructed to commence on realization by the bank of securities held.**”* [Emphasis added].

I have noted the parts in bold and again I will revert back to it shortly.

It appears the meeting took place on 5th May 2009 as scheduled and a letter was written to the Plaintiff's lawyers the same day forwarding copies of the agreement that incorporated all that the parties agreed on. I will also reproduce the last paragraph of that letter which I consider relevant to this issue. It states thus:-

*“We should however underscore the importance of having this agreement executed promptly **as the bank is desirous of making a recovery albeit fully conducted by your client, and in the event that the agreement is not signed, recovery proceedings by the bank shall commence**”.* [Emphasis added].

The parts in bold is noteworthy and will soon be handy in addressing my difficult question. The last correspondence in this series is a letter dated 14th May 2009 from the Plaintiff's lawyers forwarding the signed copies of the agreement to the defendant's lawyer. The bank also executed the SRA where in clause 2.1 the plaintiff was given four months within which to sell the securities and/or refinance. Clause 2.3 thereof then provided as follows:-

*“**Should the company fail to obtain a sale or refinance and repay the indebtedness inclusive of interest by the end of the fourth (4th) month herefrom then the Bank shall be at liberty to foreclose on and realize the securities held and recover the full debt owing inclusive of interest.**”* [Emphasis added].

Pursuant to that agreement, the Plaintiff did sell the securities as per the sale agreement executed on 23rd May 2009 just five days after the SLA was signed by the bank and the

proceed of sale was deposited on the Plaintiff's account with the Defendant. The debt that had been acknowledged as due and owing under the SRA was debited to the account as well as all costs (inclusive of costs of the defendant's lawyers for realization of the securities being contested here), charges and expenses related to the mortgage and the balance was paid to the Plaintiff.

Now, with the above correspondences and more especially the parts highlighted in bold in mind, would one say that the defendant commenced legal action with a view to enforcing recovery? My answer would be NO. I say so for the following reasons. Firstly, clause 2.3 of the SRA quoted above clearly stated that foreclosure and realization of the security held to recover the full debt would only take place upon the failure of the mortgagor to obtain a sale or refinance to pay the debt by the end of the four months. Of course the sale was done just days after the SRA was executed and the debt was fully paid.

Secondly, the Defendant's lawyers up to the point when they forwarded the final copies of the SRA for signature stated two important points, namely; that, **"the bank is desirous of making a recovery albeit fully conducted by the plaintiff"** and that, **"in the event that the agreement is not signed, recovery proceedings by the bank shall commence."** The simple questions would then be: was the SRA signed and if so, did the Plaintiff sell the securities as agreed in the SRA? The answer is an obvious yes as clearly seen from the above analysis of the events. So, would it be right to assert that there was recovery by the bank that justifies payment of the lawyer's recovery fees? My answer would be a definite NO. The bank lawyer themselves in their letter of 5th May 2009 used the future tense **"shall commence"** clearly showing that the bank had not yet commenced recovery but would do so if the SRA was not signed.

Just to elaborate more on this point, I would like to point out that the Plaintiff responded to the Final Demand and its response sparked off discussions of the outstanding issues. From the correspondences it appears that the Defendant's lawyers came on board at the point of discussing the SRA which in principle had already been agreed upon by the parties and by their letter dated 17th April 2009 whose content is reproduced above they merely forwarded copies of the draft SRA for signature. They themselves stated that that was their instruction. The instruction to commence legal action for recovery would only come to play upon the Plaintiff's failure to sign the SRA and after signing the SRA, upon the Plaintiff's failure to sell the securities within four months as explained above. I am convinced that recovery by the bank did not commence because none of the above stipulated events that would constrain the bank to do so occurred. I therefore find that even the statutory notice purportedly issued by the Defendant's lawyers had no place in the entire arrangement as there was no basis for it.

Upon answering my difficult question as I have done above, it is my firm view that issue number 3 (ii) should be answered in the negative because there was no recovery done by the

defendant's lawyers that would justify paying them fees on that account. It therefore follows that the debiting of the Plaintiff's account with the amount stated in the lawyer's fee note/debit note was illegal and the Plaintiff is entitled to a refund of that amount.

Be that as it may, I wish to note that the Defendant's lawyers provided some conveyance service and corresponded with the Plaintiff's lawyers. Under the mortgage deed the Defendant as mortgagee is entitled to recover those costs from the mortgagor or principal debtor as a debt and may be debited to any account of the principal debtor or mortgagor. It is therefore only just, fair and equitable that the fee for those services is ascertained by the Taxing Master taxing the bill of costs of the Defendant's lawyers in respect of those services so that the amount allowed is offset from the original amount erroneously paid to the lawyers and the balance be refunded to the Plaintiff. I therefore order that the bill of costs of the Defendant's lawyers in respect of those services be filed and taxed accordingly.

Before I take leave of this issue, I wish to make a few general comments arising from what I have observed in this case. First of all, the fact that the law allows all costs, charges and expenses of the mortgagee to be recoverable from the mortgagor so far as they relate to the liabilities of the mortgagor as a general rule is no license to the mortgagee to debit the mortgagor's account even with those costs, charges and expenses improperly or unreasonably incurred. The words of Nourse L.J. in ***Parker Tweedale v. Dunbar Bank Plc. (No. 2) [1991] Ch. 26 at pg 33*** is very instructive on this principle. He stated thus:-

*“A mortgagee is allowed to reimburse himself out of the mortgaged property for all costs, charges and expenses **reasonably** and **properly** incurred in enforcing or preserving his security.” [Emphasis added].*

However, as was held in ***Gomba Holdings (UK) Ltd & Others(Supra)***, “on the taking of an account the plaintiffs are entitled to object to items therein contained on the ground that they have been unreasonably incurred or are of unreasonable amount.” And where a mortgagor questions any debit to its account as being improperly spent or unreasonable in the amount the court has the power to order taxation of that amount by the taxing master as was stated in that same case.

Secondly, the duty of care owed to a mortgagor by a mortgagee should not be presumed to have been compromised by the blanket provision on costs, charges and expenses in the mortgage deed. It must always be exercised to avoid disputes that end in court like this one.

Lastly, it is the firm view of this court that as far as it is ascertainable, the mortgagor should be made to know in advance the major costs, charges and expenses it would be expected to pay so as to avoid surprises and also minimize abuse of the mortgagor's account by the mortgagee under the guise that the mortgage deed provides for such costs, charges and

expenses. I believe if transparency is promoted in the handling of mortgages the courts would be saved from the burden of handling the escalating number of disputes that arise therefrom purely on account of lack of it.

Issue 4: Whether the Plaintiff is entitled to recovery of US\$ 80 and Ushs.967,451/= as interest accrued through alleged delayed credits.

I have reviewed the evidence of both parties on this issue as well as considered the submissions of both counsels and I am inclined to agree with the argument of counsel for the defendant that the plaintiff did not adduce enough evidence to prove its allegations. PW1 conceded that he did not know whether the paying banks were the ones that delayed to remit the monies after debiting the account. I must also point out that no effort was made to show court how the interests accrued as a result of the defendant's delay to credit the account. I therefore find that the plaintiff has not proved its case under this issue on a balance of probabilities and the issue is accordingly answered in the negative.

Issue 5: Whether the Plaintiff is entitled to the remedies sought.

In light of my findings above, I find that the Plaintiff has on a balance of probabilities, proved its case under issues 1, 6 & 3 in the order in which they were considered. Therefore judgment is entered for the plaintiff on those issues with the following orders:-

1. That the defendant pays the plaintiff the sum of **Ushs.16,031,958/= (Uganda Shillings Sixteen Million Thirty One Thousand Nine Hundred Fifty Eight Only)** being the overcharged interest determined by the expert and adopted by this court.
2. That the defendant refunds to the plaintiff the sum of **Ushs.196,693,961/= (One Hundred Ninety Six Million Six Hundred Ninety Three Thousand Nine Hundred Sixty One only)** illegally debited to the Plaintiff's account less its lawyers taxed costs for the conveyance services and correspondences.
3. That the defendant pays interests on (1) & (2) above at the rate of 25% per annum from the date of filing the suit until payment in full.
4. That the defendant pays the plaintiff 80% of its taxed costs for reason that some of the Plaintiff's claims did not succeed.
5. That the defendant pays interest on (4) above at the rate of 10% per annum from the date of judgment until payment in full.

I so Order.

Dated this 23rd day of January, 2015

Hellen Obura

JUDGE

Judgment delivered in chambers at 4.00pm in the presence of Mr. David Kaggwa for the Plaintiff whose Managing Director Mr. David Buye was also present and Mr. Bwogi Kalibala h/b for Mr. Masembe Kanyerezi for the Defendant.

JUDGE

23/01/15