

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

**CIVIL SUIT NO. 464/2013**

5                   **MARIAM NAIGAGA ----- PLAINTIFF**

**VS**

**ORIENT BANK LTD ----- DEFENDANT**

**BEFORE JUSTICE FLAVIA SENOGA ANGLIN**

**JUDGMENT**

10   **Brief Facts:** The Defendant Bank advanced a mortgage facility to one Emmanuel Tamale, who under the terms of the loan provided as security, property comprised in Kyaggwe Block 149, Plot 59 land at Katete, Mukono District (hereinafter referred to as “the Property”) The Mortgagor defaulted in payment of the loan and the Defendant instructed MS Verma Jivram & Associates, to recover from the Mortgagor.

15   On or around 27<sup>th</sup> July, 2011, the Defendant Bank through Expeditious Auctioneers and Court Bailiffs, and MS Verma Jivram & Associates, advertised in the New Vision News Paper, the said property. The Plaintiff emerged the successful bidder and fully paid UG. Shs. 50,000,000/- to the Defendant Bank for the property, and a further Shs. 8,000,000/- was paid directly to the Auctioneers.

20   Upon conclusion of the sale, the Defendant delivered the owner’s duplicate certificate of title and the instruments of release of mortgage to the Plaintiff, who transferred title into her name.

25   Upon failure to obtain vacant possession of the Property, the Plaintiff filed this suit against the Defendant Bank, under the provisions of O. 7 Civil Procedure Rules, seeking the following remedies:

- a) Refund of Shs. 58,000,000/- being the purchase price for the land comprised in Kyaggwe Block 149, Plot 59 Land at Mukono.
- b) Damages of Shs. 30,000,000/- as interest accrued at the rate of 5% per month, for 12 months, incurred by the Plaintiff on borrowing Shs. 50,000,000/- from a money lender, in order to fund the purchase of the suit property.
- c) General damages together with interest on items 1 and 2 at the rate of 25% from the 13<sup>th</sup> day of September, 2013,
- d) Costs of the suit and,
- e) Any other relief court deems fit.

In its defence, the Defendant Bank denied the Plaintiff's claim, contending among other things that, upon the transfer of the Property to the Plaintiff, the Defendant ceased to have any interest in the Property and therefore the Plaintiff has no cause of action against the Bank. The Defendant then prayed for dismissal of the Plaintiff's suit.

5 The following two issues were framed by the parties for determination:

1. Whether the Defendant's failure to grant vacant possession amounted to a breach of contract of sale
2. Whether the parties are entitled to the remedies claimed.

Court proceeds to determine the said issues.

10 **Whether there was breach of contract of sale by the Defendant:**

The Plaintiff testified in this case that before purchasing the property she inspected it and there were occupants in it. She asked the Defendant to hand over vacant possession of the property and the Defendant failed to do so. She asserts that under the sale agreement the Defendant had the obligation inter alia to secure vacant possession of the property through  
15 the Auctioneers who were its agent. And adds that, at the time of the agreement she was not aware that the occupants of the property had refused to vacate. All her efforts to get vacant possession through the auctioneer, the legal officer of the Bank and M/S Verma Jivram came to naught.

Her testimony was supported by that of DW1 Richard Okumu, Auctioneer, who admits that  
20 they were agents of the Bank and as such agreed under clause 3 (iii) of the agreement to assist the Plaintiff to evict the occupants of the premises, so that the Plaintiff could get vacant possession. Further that they were paid as agents of the Bank to facilitate the eviction of the occupants, adding that by the time of the agreement, the Plaintiff was aware that the mortgagor had not vacated the property. The witness insists that the obligation of the  
25 auctioneers was to notify the occupants that the property had been bought and to issue notice of vacant possession which was issued several times.

DW2 Emmanuel Lule also confirmed that the Bank did not give vacant possession to the Plaintiff; but denied being aware that the Auctioneer was paid Shs. 8,000,000/- to assist with the eviction. He contended that under paragraph 3 (iv) it was the Auctioneer to give vacant  
30 possession of the property.

In his submissions, Counsel for the Plaintiff urged Court to note that that the Defendant did not deal directly with the Plaintiff in this transaction, but through agents. He then contended that the law of agency is well settled and provides that ***“an agent acts on behalf of the principal and that anything done within the scope of the agent’s authority binds the principal”***. – The case of **Direct Domestic Appliances Ltd Vs Nile Breweries Ltd, HCCS No. 471 /2006** was cited in support.

Further that, this means that failure to act by the agent results in liability of the principal for any damage resulting from the same; provided it was within the agent’s authority.

It was asserted that the evidence clearly shows that Expeditious Associates were acting as agents of the Defendants- evidence of PW1 and DW2.

Referring to the definition of breach of contract in Osborn’s Concise Law Dictionary,<sup>10<sup>th</sup></sup> Edition, P.64, and the case of **Kampala General Agency Ltd Vs Mody’s (EA) Ltd [1963] EA 549**, where it was stated that ***“A condition of a contract of sale is an obligation, the performance of which is essential to the contract that if it is not performed the other party may fairly consider that there has been a substantial failure to perform the contract....”***; Counsel argued that the provision of vacant possession was so central a condition; and essential to this contract that breach of the same rendered performance of this contract impossible.

He maintained that the purpose of the sale agreement was for the Plaintiff to acquire the suit property and not merely to transfer documents or certificates of title. And that if the Plaintiff was unable to take possession of the suit premises, this defeated the purpose of the whole contract.

In addition that the handover of the documents pertaining to the suit premises was one of the obligations of the Defendants, but did not in any way amount to actual handover of the property. While clause 3 (iii) of the sale agreement the Auctioneer agreed ***“to assist the purchaser evict the occupants”***; this has to be read together with clause 3 (IV) where the Auctioneer guaranteed that that after the release of the mortgage, the property would be free from any encumbrances of whatever nature legal or equitable that would adversely affect the interest of the purchaser.

And that when the Plaintiff paid Shs. 8,000,000/- for the sole purpose of securing vacant possession of the suit premises; it ceased being an additional service as the Defendants would

want court to believe, and became a cardinal obligation that had to be performed by the Defendants, failure of which amounted to breach of contract.

In response, Counsel for the Defendants submitted that the terms of the sale of the property were reduced into writing as evidenced by the agreement of sale \_ Exhibit DE1. The Plaintiff  
5 admitted that the agreement conferred obligations on all parties thereto. This was confirmed by DW1 and DW2.

It was asserted that it was the obligation of the Auctioneers to evict the occupants and handover vacant possession of the property to the Plaintiff, free of encumbrances; and that the Defendant Bank discharged its obligations by providing the certificate of title and  
10 releasing the mortgage. He referred to Clause 3 (i), 3 (ii) and 3 (iii) of the Contract, and argued that in construing the intention of the parties, ***“the court was obliged to discern the intention of the parties from the words used in the contract”***. The case of **Nile Bank Vs Translink [2005] 2 EALR 237** was relied upon.

Counsel then declared that the un-discharged obligations were of the Auctioneer, and the  
15 question to determine was **whether the Defendant Bank was liable for the breaches of the Auctioneer**.

It was stated that as a general rule, the actions of an agent bind the principal. But in this case, as per DW2’s evidence the Defendant Bank engaged M/S Verma Jivram Associates as their agents, to recover the sums due which included selling the Property. That the Auctioneers,  
20 who were sub-agents, were not engaged by the Defendant Bank.

While acknowledging the above rule, Counsel submitted that there are exceptions to the same, which include the agent/sub-agent undertaking personal liability. And that, under Clause 3 (viii) of the agreement the Auctioneer undertook ***“to indemnify the purchaser against any loss, claim, charge, proceedings or call to answer arising out of the execution  
25 of this agreement and sale of the property”***.

That this is confirmed by the evidence of both the Plaintiff and of DW2; Counsel stated.

It was further emphasized that, the issue of liability in a contract depends on the terms in which the agent contracted. And that ***“in order for an agent to be exonerated from liability, the contract must show when construed as a whole that the agent contracted as agent only,  
30 and did not undertake any personal liability”***- Halsbury’s Laws of England, Vol. 11, P.

512, paragraph 854, **Trietel Law of Contract, P.649**, and **Chitty on Contracts 28<sup>th</sup> Edition, Vol. 2, P. 50**, were cited in support.

In conclusion that since the Auctioneers undertook personal liability to indemnify the Plaintiff; they are liable for any losses that may have been incurred by the Plaintiff under the transaction. And the breaches of the Auctioneer cannot be visited upon the Defendant Bank. The case of **Yeung & Another Vs Shangai Banking Corporation [1980] 2 ALL ER 599**, was relied upon to support this argument.

That the Plaintiff was the highest bidder when the Property in issue was advertised is not in dispute, and she consequently ended up buying the Property from the Defendant Bank on whose behalf the same was advertised by the Auctioneer for sale. A sale agreement was executed between the parties, setting out the duties and obligations of each one of them. – See Exhibit DE1.

It is indicated in paragraph 3 (iii) of the agreement that at the time of signing the same, the mortgagor had failed to vacate the property within the 14 days given in the advertisement. The Auctioneer then undertook to assist the Plaintiff to evict the occupants of the premises. The Plaintiff paid the purchase price and was for that reason entitled to vacant possession without unreasonable delay. Refer to **Cook Vs Taylor [1942] 2 All ER 85 at 87; [1942] CH 349**

The question therefore is who had the duty/obligation to hand over vacant possession of the premises to the Plaintiff? Counsel for the Defendant argues that it was the Auctioneer who undertook to hand over vacant possession and the Auctioneer was a mere sub-agent of the Bank and therefore his actions did not bind the Bank.

However, I am not persuaded by the arguments of Counsel for the Defendant in this respect. The sale of the Property in question was by public auction. The sale was being conducted by the Auctioneer on behalf of the Bank, and Court finds that the Auctioneer was an agent of the Bank. It has long been established that, **“every auction has an auctioneer who is the agent of the seller”**. See Nicholas O’Donnel, Art Law Report quoted in **Kariuki Vs Wang’ombe [2005] 1 EA 107 (CAK)**.

Refer also to **Hirji Vs Alibhai [1974] 1 EA 314** where it was stated that **“...the very concept of broker or auctioneer is an agent who renders some service on commission or some remuneration”**.

It is also an established principle that *“an agent to sell has general authority to do all that is usual and necessary in the course of such employment. The strong presumption is that when a principal authorizes an agent to sell goods for him, he authorizes him to give all such warranties as are usually given in the particular trade or business.”* See Arle CJ in

5 **Dingle Vs Hare [1859] 7 CBNS 145**

The Auctioneer in the present case was a special agent appointed by the Bank for the sale of the property and was authorized to evict the mortgagor/occupants of the property which was necessary to accomplish the task for which he was employed, and hence his undertaking under the sale agreement to ensure vacant possession of the Property.

10 The Defendant Bank placed the Auctioneer in a situation which according to the ordinary rules of law.... or according to the ordinary usages of humankind, the Auctioneer was understood to represent and act for the Bank which so placed him...

The Bank acted in such a way and its conduct led the Plaintiff to believe that it had appointed the Auctioneer to act as its agent, and knew that the Plaintiff acted on that belief; they are  
15 therefore estopped from disputing that agency. By endorsing the agreement where the Auctioneer made the undertaking, they ratified the all the obligations of the Auctioneer; and were obliged to honour them.

For all the above reasons, this Court finds that failure by the Auctioneer to hand over vacant possession of the Property to the Plaintiff, when vacant possession of the same was essential  
20 to the contract amounted to a substantial failure by the Bank as principal to perform that essential obligation.

The Plaintiff had been assured of acquiring the property without any form of encumbrance and had fulfilled her side of the bargain under the agreement. Though the mortgage was released and title was handed over to the Plaintiff and the Property was transferred into her  
25 names, that alone without vacant possession was not sufficient to divest the Defendant of its other responsibilities to the Plaintiff.

Granted, when the property was advertised the occupants thereof were given notice to move and the Plaintiff paid for the Property knowing it was still occupied, she relied on the assurances of the Defendant that actual possession of the property would be handed over to  
30 her. In those circumstances, vacant possession ought to have been given within a reasonable time.

The purchase price was paid on 13<sup>th</sup> September, 2011, by the time the suit was filed on 20<sup>th</sup> August, 2013; the Plaintiff had not been given vacant possession. The Defendants were in a position to have ejected the mortgagor/occupants but failed to do so. Court accordingly finds that the mortgagor's/occupants continued unlawful possession on the Property constituted a  
5 breach of obligation to give vacant possession on completion of the sale pursuant to the contractual terms. Refer to **Ingel Vs Finch [1869] LR 4 QB 659**

It would appear from the circumstances that the contract was frustrated by the refusal of the occupants to vacate the Property. But the Defendants having bound themselves to give vacant possession, and failing to take action against the Occupants when they could have done so,  
10 cannot be excused by the law. "***Mere hardship or inconvenience would not justify discharge of the Ban from its contractual obligations***".

**Whether the parties are entitled to the remedies claimed:**

As earlier stated at the beginning of this judgment, the Plaintiff's claim is for refund of the  
15 purchase price, special and general damages, costs, interest; and any other relief. The Defendant sought dismissal of the suit.

**Refund of Purchase Price:** It was submitted by Counsel for the Plaintiff in this respect that, it is trite law that, where a party suffers damage due to the wrongful act of the Defendant, he/she must be put by the Defendant in the position they would have been had they not  
20 suffered the wrong. He cited the case of **Dr. Dennis Rwamafa Vs Attorney General [1992] KALR 21** in support. Adding that, in this case as a result of the Defendant's breach of contract the Plaintiff has been deprived of the benefit of UG. Shs. 58,000,000/- in addition to other losses and for which she was entitled to a refund.

Counsel for the Defendant pointed out in response that, the Plaintiff conceded in her evidence  
25 that, she deposited UG. Shs.50, 000,000/- with the Defendant Bank, as consideration for the property. This is confirmed by the sale agreement Exhibit DE1. Also that, the Plaintiff confirmed that she deposited Shs. 8,000,000/- with the Auctioneers for purposes of evicting the occupants of the Property. And that since this sum was not part of the purchase price; it should not be included in the refund of the purchase price. That this claim must instead, be  
30 directed to the Auctioneers.

It is perceptible from the pleadings, and the evidence of the parties that the Plaintiff as highest bidder for the Property paid Shs. 58,000,000/-. The Shs. 50,000,000/- was paid to the Defendant to clear the mortgage debt; and the Shs. 8,000,000/- was paid directly to the Auctioneers.

5 Section 31 (1) of the Mortgage Act provides for the application of the proceeds of sale of a mortgaged land. Under the section, the purchase money received by a mortgagee who has exercised the power of sale must be applied in the following order of priority:

(a) ---

(b) In the discharge of any prior mortgage or other encumbrances subject to which the sale  
10 was made;

**(c) In payment of all costs and reasonable expenses properly incurred and incidental to the sale or any attempted sale;**

(d) In discharge of the sum advanced under the mortgage or so much as remains outstanding, interest, costs and all the monies due under the mortgage including any money advanced to a  
15 receiver in respect of mortgaged land under S.2.

Likewise, under S.151 (1) of the Contracts Act, an agent may retain out of any sums received on account of the principal in the business of agency, all sums due to the agent in respect of advances made or expenses incurred by the agent in conducting the business **and any remuneration as may be payable to the agent for acting as agent.**

20 In the Present case, the pleadings of the parties, the evidence of Plaintiff, DW1, and DW2, plus the submissions of Counsel all indicate that the Plaintiff paid the total sum indicated in the letter of acceptance of the bid and the amount was split in two. The Shs.50,000,000/- was paid directly to the Defendant bank in settlement of the mortgage debt; while the Shs.8,000,000/- was paid directly to the Auctioneers in settlement of the of the Defendant's  
25 fees/commission to the Auctioneers. The Auctioneer described the terms under which the total bid purchase price was to be paid, and it was actually paid and acknowledged.

In the circumstances, the Plaintiff was entitled to assume that the Auctioneer as agent of the Defendant Bank had authority to receive the Shs. 8,000,000/- . The Plaintiff was dealing with the Auctioneer who was an agent of a named Principal, the Defendant. The Auctioneer was  
30 held out as having unfettered discretion to conclude a binding contract and was prepared to



handover vacant possession against payment of a deposit. I am fortified in my decision by the case of **Edmund Schulster & Co. (U) Ltd Vs Patel [1969] EA 239**

For those reasons, this Court finds that the Plaintiff is entitled to also recover the entire sum of the bid sum paid for the purchase of the mortgaged property that settled the mortgage debt and the Defendant's obligations to the Auctioneer in effecting the sale. Contrary to the submissions of Counsel for the Defendant the Defendant Bank is liable to refund this sum of money as well.

I wish to observe that, even if Court had found the defence of frustration was sustainable, the money paid by the Plaintiff would still have been recovered. This is because ***"a party who has done something or incurred expenses in performance of the contract prior to the frustrating event may claim compensation for such expenses or any benefits conferred upon the other party"***. – See **Principles of Commercial Law 2<sup>nd</sup> Edition, by KI Laibuta, Pg.113.**

**Claim for special damages of Shs. 30,000,000/-:** It was the submission of Counsel for the Plaintiff that, the Plaintiff also incurred a loss of Shs. 30,000,000/- being the interest of 5% per month on the amount borrowed from a money lender to finance the purchase of the Property. And that, it was in the interests of justice that the Plaintiff be put back in the position she was before entering into the onerous transaction from which the Defendant Bank has comfortably benefited.

Counsel for the Defendant contended in reply that, special damages must not only be pleaded but also proved. The claim in this case is based on an alleged loan that was taken to purchase the property. The Plaintiff availed exhibit PE1 an agreement signed on 1<sup>st</sup> September, 2011, as evidence for the alleged loan; but there was no evidence led to prove that, the lender is/was a money lender. The Plaintiff only alleged in her pleadings and confirmed in her submissions that the lending company were money lenders.

It was the argument of Defendant's Counsel that the Plaintiff could not be telling the truth, when she claims that the money was borrowed for the purpose of purchasing the Property. The reason for this being the sequence of events. DW2 testified that the Property was sold through a bidding process. The Plaintiff who was the successful bidder only received communication that her bid had been successful on the 7<sup>th</sup> day of September. Prior to that date, neither the Plaintiff nor anyone else knew what the value of the Property was.

For the Plaintiff to claim to have borrowed money 7 days before her bid was considered and communication being made to her that her bid had been accepted, and therefore without knowing how much she needed to buy the Property; was incredible.

Without prejudice to the foregoing, Counsel for the Defendant further submitted that, the  
5 Plaintiff confirmed in her evidence that the money was borrowed at an interest rate of 5% per month, making it an annual interest of 60% per annum. Counsel then contended that such interest rate is illegal, unconscionable and unenforceable in courts of law.

It was pointed out by Counsel that, transactions between money lenders and borrowers are governed by the Money lenders Act, Cap. 273. That S.12 of the Act provides that ***“interest charged in excess of 24% per annum is unconscionable and excessive”***. That therefore, if  
10 this court enforces the 60% interest rate it would amount to sanctioning an illegality.

It was underscored that ***“once an illegality is brought to the attention of court, it overrides all questions of pleadings. Courts of law cannot enforce what is illegal”***. The case of **Active Automobile Spare Limited Vs Crane Bank Ltd & Another SCCA 21/2012**, where the  
15 Supreme Court held that ***“Courts will not condone or enforce an illegality”*** was cited in Support.

It was also pointed out that, although the Plaintiff in the present case claims interest for 1 year, the agreement Exhibit PE1 relied upon provided that the money was to be lent for a period of 6 months, and this is confirmed by the Plaintiff in her evidence. Counsel argued  
20 that this means that the interest that would claimable is UG. Shs. 15,000,000/- and not UG. Shs. 30,000,000/-.

That in the circumstances, the evidence of the Plaintiff to the contrary cannot be sustained as it is contrary to the provisions of S. 91 Evidence Act Cap. 6. The section provides that ***“no evidence save with the exceptions given under S.79 can be admitted in contradiction of the contract”***.  
25

In the present case, Counsel stated, the Plaintiff led no evidence to show any exception or to show that the contract was amended to the alleged 12 months and therefore can only claim for 6 months.

This Court is agrees with the submissions of Counsel for the Defendant. The Plaintiff did not  
30 adduce any evidence that the company where she allegedly borrowed the money was a

money lending company duly licensed. Indeed it is implausible as submitted by Defendant's Counsel, that the Plaintiff could have borrowed the exact amount of money paid to the Defendant Bank and the Auctioneer 7 days before her bid was considered and before being informed that she was the successful bidder; and therefore not knowing how much the property would cost.

However, I wish to observe that, even if court had found otherwise, the rate of interest claimed by the Plaintiff would not have been allowed. As pointed out by Counsel for the Defendant and rightly so, the interest rate of 5% per month that translates into interest of 60% per year is excessively high and therefore harsh and unconscionable. The rate violates S. 12 (1) of the Money Lenders Act, and is accordingly illegal.

The principle established by decided cases is that ***"court will not enforce a contract which is expressly or impliedly forbidden by statute or that is entered into with the intention of committing an illegal act"***. See **Stone & Rolls Vs B. Moore Stephens [2008] EWCA CIV 713, [2009] 2 WLR 351**. And as already stated herein ***"court cannot condone an illegal transaction or even be used as an instrument for such illegality"***. –Refer to **Active Automobile Spare Ltd Vs Crane Bank Ltd & Another (Supra)**

The court cannot for those reasons order the Defendant to pay the illegal interest of Shs. 30,000,000/-.

I also wish to observe that even if the interest rate had not been found illegal, the Plaintiff would only have been entitled to recover for the agreed lending period of 6 months, more so without any proof that the failure of the Defendant to give her vacant possession made it impossible to repay the loan in the agreed six months.

**General damages:** Counsel for the Plaintiff did not make specific submissions in this respect. He urged Court to be pleased to grant the prayers in the Plaint, and also grant order for costs of the proceedings. The prayers in the plaint included general damages. No reasons were advanced for the claim of these damages.

However, it was the submission of Counsel for the Defendant that any losses suffered by the Plaintiff cannot be attributed to the Defendant but to the Auctioneer. And besides, no evidence was led by the Plaintiff to show that she suffered any such damage and she is therefore not entitled to any.

Relying on the case of **Frost Vs Knight**, Counsel for the Defendant also argued that the Plaintiff failed in her duty to mitigate damages. He asserted that the Plaintiff being the registered proprietor of the Property she has every right to evict the occupants of the Property as trespassers. Yet, the Plaintiff confirmed in her evidence that she has never made any effort  
5 or taken any action to evict the occupants. That a court of law cannot assist a person who  
seats on her rights and twiddles her fingers. Adding that, the Plaintiff only brought this matter  
to the attention of the Bank through a letter from her Advocate, dated 6<sup>th</sup> May, 2013- Exhibit  
DE2. And although the Defendant refers to a meeting with one Nicholas in the Defendant  
Bank; there has never been a one Nicholas employed in the Defendant Bank dealing with  
10 matters of this nature.

As stated by Counsel for the Defendant, it is an established principle of law that ***“general damages are such damages as the law presumes to be the direct natural or probable consequence of the act complained of”***. – Refer to the case of **Stroms Vs Hutchinson [1905] AC 515**

15 It is true that neither the Plaintiff nor his Counsel suggested any figure as to how much  
general damages should be awarded; totally ignoring the fact that it was their duty to provide  
the court with proper guidance relating to the inquiry of Damages generally. In so doing, they  
left this Court with nothing to depend on except judicial discretion. – Refer to the case of  
**Bhadelia Habib Ltd Vs Commissioner General of URA [1997-2001] UCL 202**, by Justice  
20 J. Ogoola

However, taking into account the circumstances of this particular case, and mindful of the  
established principle that ;***“in cases of breach of contract the aggrieved party is only entitled  
to recover such part of the loss as was at the time of the contract reasonably foreseeable as  
liable to result from the breach.*** And that ***Damages may, however, be awarded from  
25 disappointment arising out of the breach”***- **Bank of Uganda Masaba & Others [1999]  
1EA**, where the case of **Chande and others v East African Airways Corporation [1964]  
EA 78** was considered; Court overrules the submission of Counsel for the Defendant that the  
Plaintiff is not entitled to any damages.

The Defendant failed to hand over vacant possession of the property to the Plaintiff thereby  
30 occasioning her inconvenience and loss. The Plaintiff is awarded the sum of Shs.  
10,000,000/- as general damages.

In awarding the said figure, court has also taken into account the principle laid down in  
decided cases that ***“where the Plaintiff claims general damages, while he does not have to  
prove the specific amount lost, nevertheless if he does not lead some evidence which would  
35 assist the court, he has no-one but himself to blame if the amount actually awarded by the***

***court is not sufficient to compensate him for any loss which he actually suffered***". – Refer to the case of **Haria Industries Vs JP Products Ltd [1970] 1 EA 367 (CAN)**

As regards the mitigation of loss, Counsel for the Defendant insists that the Defendant as registered owner of the Property ought to have taken action against the occupants to mitigate her loss. While court is mindful of the fact that the basic reasoning behind the rule is that a claimant should not be compensated by the other for a loss that is not really caused by the breach itself, but is in fact caused by the claimant's own failure to act in a reasonable way after the breach; it is on record that the Plaintiff in this case paid the agent of the Defendant for the eviction of the occupants. And if the Defendant expected her to be the one to evict the occupants thereafter, they ought to have refunded the money she paid for obtaining that service.

Courts have also established that "***the so called duty to mitigate does not go so far as to oblige the injured party, even under an indemnity, to embark on a complicated and difficult piece of litigation against a third party***". - Refer to **Pilkington Vs Wood [1953] CH 770**

It was the duty of the Defendant as Mortgagee to evict the occupants of the Property, and thereafter seek indemnity from them for any losses the Bank would have incurred.

**Costs:** The Plaintiff applied for costs of the suit and Counsel for Defendant argued that Plaintiff was not entitled to any. Nonetheless, under S. 27 (1) of the Civil Procedure Act, costs are in the discretion of the court and the Court has full power to determine by whom and out of what property and to what extent those costs are to be paid. And courts have stressed that "***costs follow the event and a successful party should not be deprived of them unless for good cause***". - See **Jennifer Rwanyindo Aurelia & Another Vs School Outfitters (U) Ltd CACA 53/1999**

The Plaintiff is accordingly granted three quarters of the taxed costs of the suit, since she lost on the issue of special damages.

**Interest:** The Plaintiff prayed for interest on the purchase price and the Shs. 30,000,000/- at the rate of 25% from 13<sup>th</sup> of September, 2011, I believe until the date of judgment. While interest was sought on general damages and costs, from the date of judgment, the Plaintiff did not mention at what rate the interest should be given. Counsel for the Defendant stated that the Plaintiff was not entitled to any interest.

However, no evidence was led as to why the Plaintiff wanted interest at the rate of 25% and neither was evidence led as to what the ruling rate of interest was at the time of hearing. That leaves the rate of interest payable to the discretion of the court. Refer to the case of **Crescent Transportation Co. Ltd Vs B.M Technical Services Ltd CACA 25/2000**, where it was held that "***... where no interest rate is proved, the rate is fixed at the discretion of the court. However, it is recognized that in commercial transactions, the award of interest should***

*reflect the current commercial value of money*". In that case, the court set the interest rate at 22% because the Respondent had held the Applicant's money for too long.

See also the case of **Star Supermarket (U) Ltd Vs Attorney General CACA 34/2000**, where Justice Berko held that *"an award arising out of a commercial transaction normally attracts a higher interest, while on general damages it is only compensatory"*.

In the present case, it is not disputed that the Plaintiff expended the Shs. 58,000,000/- on a commercial transaction. She is entitled to the current interest rate of 22%, and it is accordingly awarded from the 12<sup>th</sup> Day of September, 2011, to the date of judgment.

In respect of General damages court will resort to S. 26 (1) of the Civil Procedure Act and award interest on general damages at the rate of 6% from the date of judgment until payment in full. The same rate is allowed on costs.

**Third Party:** It was submitted by Counsel for the Defendant that the Defendant applied for and was granted a third party notice to serve on the occupants of the Property (Third parties). He contended that, while the Third parties were served, they entered no appearance. Further that according to DW2 the police insisted on a court order if they were to assist in evicting the Third parties. And since the Defendant divested itself of any interest when the property was transferred into the names of the Plaintiff, and have no locus to evict the Third Party, Court should be pleased to issue and order of vacant possession of the property to the Third party; and the same be handed over to the Plaintiff.

Counsel for the Plaintiff did not comment about this issue in his rejoinder to the Defendant's submissions. Perusal of the file indicates that the Defendant applied for and was granted leave to issue a third party notice to the Third parties. However, there is no affidavit of service on record to confirm that the third parties were served. In normal circumstances, court would direct that the Third Party be served again. But at this late stage in the proceedings there is nothing Court can do to assist the Defendant Bank. In not effecting service and not following up to ensure that service was effected, the Bank was negligent. However, they can still take any action they wish against the third party to seek remedy for any inconvenience and or loss occasioned to the Bank. Section 33 of the Judicature Act would have come into play if the Third Party had been effectively made a party to the proceedings.

Court also wishes to note that, even if the Third party had been effectively served and made party to the proceedings, granting the order for vacant possession would not have been for

purposes of handing over the property to the Plaintiff. The Plaintiff is evidently no longer interested in getting possession of the property and brought this suit to recover the money paid for it, plus other remedies as already indicated in this judgment. Some of those remedies have been granted, plus cancellation of title given to the Plaintiff. As already indicated, the Defendants can in those circumstances take whatever action they wish against the Third Party and thereafter deal with the property as they wish.

Judgment is entered in the following terms:

1. Refund of Shs. 58,000,000/- being the purchase price and the sum paid to the Auctioneer to facilitate eviction.
- 10 2. General damages of Shs. 10,000,000/-
3. Interest on item one at the rate of 22% per annum from the 12<sup>th</sup> day of September, 2011 until the date of judgment, and interest on item 2 at the rate of 6% from the date of judgment until payment in full.
- 15 4. The title of the Plaintiff in the Property is hereby cancelled and the Plaintiff is directed to surrender the Title deed to the Defendant Bank.
5. The Bank is at liberty to take the necessary steps to recover the premises and get indemnity from the Third Parties for any inconvenience and losses incurred in this process.
- 20 6. The Plaintiff is granted three quarters of the taxed costs together with interest at the rate of 6% from the date of judgment until payment in full.

**FLAVIA SENOGA ANGLIN**

**JUDGE**

**07.04.15**