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**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
CIVIL SUIT NO.475 OF 2013**

**STANBIC BANK UGANDA LIMITED :::::::::::::::::::::::::::::: PLAINTIFF**

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**VERSUS**

**1. REHEMA KIRYOWA SANYU**

**2. LUKUNGU MUSA :::::::::::::::::::::::::::::: DEFENDANT**

**BEFORE: HON. MR. JUSTICE B. KAINAMURA**

**JUDGMENT**

15 By letter dated 14<sup>th</sup> December, 2011, the plaintiff granted and advanced to the defendants a business term loan of UGX 250,000,000/= on terms and conditions that were set out in the letter. The loan was secured by a mortgage on land comprised in Kyadondo Block 249, Plot 1118 at Kalungu, Makindye. The defendants utilized the loan but neglected / failed to pay as had been agreed and as a result, the loan was recalled by the plaintiff. The plaintiff proceeded to realize  
20 the security under the mortgage and later sold the mortgaged land but did not recover the entire sum loaned to the defendant from the sale.

The plaintiff subsequently sued the defendants for the recovery of UGX 357,385,041/= being the amount still owing on the loan, interest and costs of the suit. It was the plaintiff’s contention that the land mortgaged was not the actual land belonging to the 1<sup>st</sup> defendant, the land had no access  
25 road and that it was part of the NEMA gazetted wetland.

The 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant filed separate written statements of defence. The 1<sup>st</sup> defendant contended that the agents of the plaintiff visited the mortgaged land and accordingly valued the same before extending the loan to the defendants. Further, that the acts of the plaintiff’s agents of selling/disposing of the mortgaged land below the forced sale value was an  
30 act inconsistent with the law and in that regard the plaintiff did not have any further claim against her. The 2<sup>nd</sup> defendant also contended that the mortgaged land did not comprise a wetland and that the plaintiff did not have a further claim against him as the proceeds from the sale of the mortgaged land ought to have extinguished the entire loan as per the valuation report.

At the scheduling conference, the following issues were agreed upon for determination by the Court:

1. Whether the land which had been valued for the loan was the 1<sup>st</sup> defendant's land comprised in Kyadondo, Block 249, Plot 1118.
- 5 2. Whether the 2<sup>nd</sup> defendant is indebted to the plaintiff to any tune.
3. If so, whether the defendants are jointly and severally liable to pay the amount claimed by the plaintiff.
4. Remedies, if any.

In determining the issues above, I shall rephrase and join issues 2 and 3 into one, as follows:

- 10 Whether the defendants are indebted to the plaintiff to any tune and, if so, whether they are jointly and severally liable to pay the amount claimed.

At the hearing, the plaintiff was represented by Mr. Albert Byamugisha (counsel for the plaintiff), and the 2<sup>nd</sup> defendant was represented by Mr. Moses Sekito (counsel for the defendant). The 1<sup>st</sup> defendant did not adduce any evidence at trial, she was not represented and  
15 no submissions were made on her behalf. I shall, therefore, consider her pleadings and make findings based on the evidence adduced by the plaintiff in determining the case brought against her.

***ISSUE 1:                    Whether the land which had been valued for the loan was the 1<sup>st</sup> defendant's land comprised in Kyadondo, Block 249, Plot 1118.***

20 The plaintiff led the evidence of 3 witnesses in support of its case. PW1, Caroline J. Byokusheka, was the Valuer that carried out an inspection and survey of the mortgaged land in 2013, on the instructions of the plaintiff. PW2, Mugume Stevens, was the Auctioneer that carried out the sale of the mortgaged land. PW3, Denis Kiiza was the Manager Specialized Recoveries with the plaintiff Bank.

25 PW1 testified that upon her Firm being instructed by the plaintiff to carry out an inspection and survey of the land comprised in Kyadondo Block 249 Plot 1118, land at Bunga, registered in the names of the 1<sup>st</sup> defendant, the survey was carried out and a report was made in that regard. It was her testimony that the mortgaged land was measuring approximately 0.239 hectares and was enclosed in a boundary wall with the neighboring Plot 1072. She made reference to the Valuation

report where it was indicated that the residential structure on the neighboring Plot 1072 extended into the subject land and that they got information that the structures were being developed by the registered proprietor of the neighboring Plot No.1072 and not the Registered Proprietor who was the 1<sup>st</sup> plaintiff.

5 PW2, testified that upon advertising the mortgaged property and issuing eviction notices to the occupants of the land, he received a letter from Roger Nkamwesiga who indicated that he was a bonafide occupant of the land having been in possession of the same since November 2010. Further, that the said Roger Nkamwesiga confirmed to him that Plot 1118 had no access road and was within the NEMA gazetted line as a wetland on which no permanent structure could be  
10 constructed.

PW3, testified that upon the defendants offering land comprised in Kyadondo Block 249, Plot 1118, land at Bunga as security for the loan, the plaintiff directed the defendants to choose a Firm from a list of approved valuers that were provided by the plaintiff to obtain a valuation of the land at the defendants own cost. Further, that the defendants delivered a valuation report  
15 dated 21<sup>st</sup> November, 2011, prepared by Katuramu & Co. Consulting Surveyors and it stated that the land was vacant, free from any developments, flat and ripe for development and with a residential house.

It was PW3's testimony that the land which was valued for the loan as stated above was not the 1<sup>st</sup> defendant's land and it was different from her actual land because the initial report did not  
20 indicate that the land was in a wetland, it did not have an access road as it was enclosed in a boundary wall together with an adjacent Plot 1072 and that Roger Nkamwesiga was in occupation of the land.

On the other hand, the 2<sup>nd</sup> defendant testified that before the loan was extended to the defendants, the plaintiff's agents (Valuers / surveyors) visited the land belonging to the 1<sup>st</sup> defendant to value  
25 the same and ascertain its location with a search report from Ministry of Lands. Further, that the valuation made by the said Valuers /Surveyors was done without the intervention of the defendants.

Counsel for plaintiff and the 2<sup>nd</sup> defendant filed written submissions in support of and against the claim respectively.

Counsel for the plaintiff submitted that the valuation report dated 21<sup>st</sup> November, 2011, which was delivered to the plaintiff by the defendants indicated that the land was vacant, free from any developments, flat and ripe for development and with a residential house. However, that from the valuation made after the defendants had defaulted in repaying the loan, it was showed that the  
5 subject land was not vacant, free from developments or ripe for developments. In view of the above, counsel submitted that the land valued of which the report dated 21<sup>st</sup> November, 2011 was made, and upon which the plaintiff based to issue a loan to the defendants did not belong to the 1<sup>st</sup> defendant.

Counsel submitted that the above was confirmed by the letter written by Roger Nkamwesiga  
10 which showed that the land valued was not the 1<sup>st</sup> defendant's land because it did not have an access road and that the location of the 1<sup>st</sup> defendant's land was part of the NEMA gazetted wetland on which construction of permanent structures was prohibited.

It was counsel's contention that the land which was valued for the loan was not the 1<sup>st</sup> defendant's land comprised in Kyadondo Block 249 Plot 1118.

15 In reply, counsel for the 2<sup>nd</sup> defendant submitted that the 1<sup>st</sup> defendant was the owner of the land comprised in Kyadondo Block 249 Plot 1118 as evidenced by the Certificate of Title that was availed to the plaintiff. Counsel cited **Section 59** of the **Registration of Titles Act, Cap 230**, where it is stated that possession of a Certificate of Title by a registered proprietor is conclusive evidence of ownership of the land described therein.

20 Counsel further submitted that the land in issue was inspected by the plaintiff's agent M/S Katuramu & Co who were registered surveyors, and boundaries were opened thereof. Counsel contended that considering that the surveyors were agents of the plaintiff, their actions were in essence the actions of the plaintiff and that the plaintiff was estopped from stating that the land in issue did not belong to the 1<sup>st</sup> defendant. Counsel relied on **Section 114** of the **Evidence Act** to  
25 support the above submission.

It was counsel's submission that the plaintiff had not adduced evidence to prove that the defendants colluded or connived with the surveyors to fleece the bank.

I have considered the evidence on record and submissions of counsel in support of and against the claim herein.

It is not in dispute that the 1<sup>st</sup> plaintiff was the registered proprietor of the land comprised in Kyadondo Block 249 Plot 1118, which was apparently the land that was mortgaged to the plaintiff by the defendants as security for the loan advanced to them. **Section 59** of the **Registration of Titles Act** stipulates that a certificate of title is conclusive evidence that the person named in the certificate as proprietor is possessed of that estate.

In the present case however, it appears to me that the point of argument is not whether the plaintiff was the proprietor of land described above, but that the land that was valued by M/S Katuramu & Co before the loan being advanced to the defendants was not the same land described above. It was the plaintiff's argument that while the valuation by M/S Katuramu indicated that the land was vacant, free from any developments, flat and ripe for development with a residential house, the subsequent valuation carried out by M/S Byokusheka and Co revealed that the 1<sup>st</sup> plaintiff's land was enclosed in a boundary wall together with the adjacent Plot no.1072 and was being developed with a multi story structure at first floor level, the residential structure extended onto the subject land, the subject land was low lying and appeared to have been in filled and compacted to enable development and that it was adjacent to an existing wetland.

First, I find that there is no evidence on record to prove that the defendant's colluded or connived with M/S Katuramu & Co to prepare and submit a false report which was submitted to the plaintiff for the loan. The plaintiff did not dispute that they availed a list of Valuers to the defendants which included M/S Katuramu & Co. In view of that, it can be presumed that the plaintiff trusted that the said Firm of Valuers could be reliable in conducting the valuation upon which the plaintiff could base to advance the loan. If the said Valuers were not acting for and in the best interest of the plaintiff, the Plaintiff would have done the due diligence of visiting the land and confirming that what was stated in the valuation report was true before advancing the loan to the defendants.

While the plaintiff contends that the defendants connived with M/S Katuramu & Co, the said Firm of Valuers was not part of this suit. I find that it would be unfair to implicate them as

having connived with the defendants in order to enable the defendants to obtain the loan without giving them a chance to be heard on the allegations.

Further, as stated above, a certificate of title is conclusive evidence of title to the land by the registered proprietor thereof. In that regard, I find that the latter from Roger Nkamwesiga dated  
5 17<sup>th</sup> February, 2013, indicating that the land described in the title did not belong to the 1<sup>st</sup> defendant and that the certificate of title was a forgery cannot be the basis to say that the land pledged as security and valued by M/S Katuramu & Co did not belong to the 1<sup>st</sup> defendant. Besides, it is questionable why Roger Nkamwesiga would go ahead and buy the same land after it had been advertised for sale by the plaintiff yet he claimed that the title to the land was a  
10 forgery and that he was the actual owner of the land.

In view of the above, I am not satisfied that the land valued and pledged as security was not the 1<sup>st</sup> defendant's land comprised in Kyadondo Block 249 Plot 1118.

This issue is therefore answered in the affirmative.

**ISSUE 2:**                    ***Whether the defendants are indebted to the plaintiff to any tune, and if  
15 so, whether they are jointly and severally liable to pay the amount claimed.***

Denis Kiiza (PW3), testified that the defendants applied for a loan and offered the land comprised in Kyadondo Block 249 Plot 1118, land at Bunga as security. Further, that the  
20 defendants delivered a valuation report dated 21<sup>st</sup> November, 2011, to the plaintiff and that the report stated that the land was vacant, free from any developments, flat and ripe for development with a residential house. On the basis of the above, that the plaintiff granted the defendants a loan of UGX 250,000,000/= and the defendants executed a mortgage dated 20<sup>th</sup> December, 2011, in which the 1<sup>st</sup> defendant was mortgagor/principal debtor and the 2<sup>nd</sup> defendant was principal  
25 debtor.

It was his further testimony that the defendants utilized the loan but neglected / failed to pay as had been agreed with the result that the loan was recalled. Further, that the bank proceeded to realize its security under the mortgage and it is then that it was discovered that the land which had been valued for the loan was not the land that belonged to the defendants; it had no access

road and was part of the NEMA gazetted wetland. It was his testimony that the land was later sold at only UGX 22,000,000/=, and the same was credited to the defendants account less expenses. Further, that the principle loan was reduced to UGX 231,590,267/= while the interest remained UGX 125,797,774/= making the total sum claimed by the plaintiff against the defendant jointly and severally the sum of UGX 357,385,041/=.

PW2, Mugume Stevens, was the auctioneer in the present matter and he testified that the highest bidder was Rogers Nkamwesiga to whom the property was sold and that it was purchased at UGX 22,000,000/=.

On the other hand, the 2<sup>nd</sup> defendant testified that considering that him and the 1<sup>st</sup> defendant held a joint account with the plaintiff Bank, the plaintiff agreed to extend a loan of UGX 250,000,000/= to the defendants. Further, that a legal mortgage was executed on land comprised in Kyadondo Block 249 Plot 1118, land at Bunga. It was his further testimony that the plaintiff's agents valued the said land.

It was the 2<sup>nd</sup> defendant's further testimony that due to a financial crisis and a drop in his business, he could not effectively facilitate the loan. Upon the defendants' failure to fulfill the terms of the loan, the plaintiff went ahead to realize its security with no objection from the defendants. It was his testimony that the proceeds from the sale ought to have extinguished the entire loan as per the valuation report made before the drawdown of the loan. DW1 contended that the plaintiff undervalued the property far below the loan drawdown and the actual market value. In that regard, it was his contention that the plaintiff did not have any further claim against him. In his view, the plaintiff's claim was based on misrepresentation since the bank was concealing material facts.

Counsel for the plaintiff submitted that it was an agreed fact that the defendants utilized the loan of UGX 250,000,000/= but neglected / failed to repay the same as had been agreed. Counsel relied on **Section 38 and 39(1)** of the **Contracts Act, 2010**, and submitted that the defendants were jointly liable to pay the balance on the amount owing to the plaintiff.

In reply, counsel for the 2<sup>nd</sup> defendant submitted that the plaintiff while exercising its right to realize the security under the mortgage, it did not dispose of the property at its market value or forced sale value; an act that was illegal. It was counsel's further submission that if the property

had been disposed of at its market value, the monies from the sale of the security ought to have extinguished the debt. Counsel further submitted that the plaintiff had a duty to take reasonable precautions in the conduct of the sale so as to obtain the true market value of the property. Counsel relied on *Espaineti Mubiru Versus Uganda Credit and Savings Bank, High Court Civil Suit No.567 of 1965, African Textile Mill Limited (in liquidation) Versus Co-operative Bank Limited High Court Civil Suit No.20 of 2005* and *Cuckmere Brick Co. Ltd Versus Mutual Finance Ltd [1971] 2 ALL ER 633* to support the above submission.

Counsel also cited *Standard Chartered Bank Ltd Versus Walker & anor [1982] 3 ALL ER 938*, where it was held that if it should appear that a mortgagee or the receiver had not used reasonable care to realize the assets to the best advantage, then the mortgagor should be given credit for the amount which the sale would have realized if reasonable care had been used.

Counsel contended that the plaintiff instructed its auctioneers to sell off the mortgaged land at UGX 22,000,000/= to a person who from the onset was interested in the land. It was his contention that the true market value stated in the initial valuation report was UGX 200,000,000/=. In view of the above, counsel contended that the whole transaction was questionable and smelt of insider dealing between the plaintiff, its auctioneer and the buyer of the land.

It is apparent that the plaintiff advanced to the defendants a loan of UGX 250,000,000/=: and the defendants pledged land comprised in Kyadondo Block 249 Plot 1118 as security for the loan. It was also conceded by the defendants in their written statements of defence and from the evidence of the 2<sup>nd</sup> plaintiff that the loan was utilized but the defendants failed in their obligation to repay the same. Consequently, the plaintiff recalled the loan and subsequently realized the security by exercising its power of sale. However, the plaintiff sold the mortgaged property at UGX 22,000,000/= yet the initial valuation of the property by M/S Katuramu & Co had apparently placed the market value at UGX 200,000,000/=. The said valuation though cited and relied upon by the plaintiff and the defendants was not produced in evidence.

It was the plaintiff's case that it was entitled to be paid the balance of the loan which was not realized from the sale of the mortgaged property. On the other hand, the defendants contended that the plaintiff allowed the sale of the mortgaged property below the market value contained in



the initial valuation report and therefore was not entitled to any further payments from the defendants.

I accept the submission of counsel for the 2<sup>nd</sup> defendant that a mortgagor has a duty to take reasonable precautions in the conduct of the sale so as to obtain the true market value from the property. (See *Cuckmere Brick Co. Ltd Versus Mutual Finance Ltd [1971]2 ALL ER 633*). In  
5 the present case, it is agreed by both parties that the initial valuation conducted by M/S Katuramu & Co indicated that the market value of the property in issue was much higher than the price at which the property was subsequently sold.

First, the plaintiff led evidence to show that upon the defendants defaulting in servicing the loan,  
10 with the intention of selling the property, the plaintiff instructed another Firm of valuers to further survey and value the land. The said valuation was apparently carried out and a valuation report was tendered in evidence in that regard. However, the said valuation report did not return a market value for reasons that it was adjacent to an existing wetland, was susceptible to flooding and appeared to fall under NEMA restrictions. In view of that, it was the plaintiff's case that the  
15 land was sold to the highest bidder.

The 2<sup>nd</sup> defendant indicated that they did not object to the sale. There is no evidence on record to indicate that the said sale was challenged or set aside by the defendants. I am of the view that on the face of it, the sale is still valid as it is because it is still subsisting.

It is apparent that the plaintiff did not realize the entire amount of the loan from the sale of the  
20 mortgaged property. In that regard, the plaintiff is still entitled to the balance on the loan which remained unpaid from the sale of the property.

With regard to whether the defendants are jointly and severally liable to pay the balance that remained unpaid on the loan, it is apparent from the reading of the loan agreement that the loan was advanced to both the 1<sup>st</sup> and 2<sup>nd</sup> defendants. They were both indicated as being principal  
25 debtors in the loan agreement. The 2<sup>nd</sup> defendant also admitted in cross examination that the loan was advanced to both him and the 2<sup>nd</sup> defendant for purposes of financing a business which they jointly operated. While taking into consideration **Section 38(1) of the Contracts Act**, I find that the defendants are jointly and severally liable to pay the amount that remained unpaid to the plaintiff.

I, therefore, find that the defendants were still indebted to the plaintiff and are jointly and severally liable to pay the amount owing to the plaintiff.

**ISSUE 3: Remedies available to the parties.**

DW3 testified that upon the sum of UGX 16,942,366/= of the UGX 22,000,000/= being credited  
5 to the defendants account from the sale of the mortgaged property, the principal loan was reduced to UGX 231,590,267/= while the interest remained at UGX 125,794,774/=, making a total sum still owed UGX 357,385,041/=. In that regard, it was indicated for the plaintiff that the defendants ought to pay the above amount of money. A Bank statement was tendered in evidence to prove the above.

10 In his submissions, and in reference to the Bank statements which were admitted during the scheduling conference as being part of the agreed documents, counsel for the plaintiff relied on *Administrator General Versus Bwanika James & 9 ors, [2005] 1 ULSR 184*, where it was held that the contents of an agreed document can be treated as truth unless those contents intrinsically point to the contrary. Counsel further submitted that the Bank Statement which was an agreed  
15 document indicated that the sale of the mortgaged property was used to reduce the defendants' liability but the entire amount owing to the plaintiff was never realized.

Counsel submitted that the defendants were liable to pay UGX 357,385,041/= to the plaintiff.

In reply, counsel for the 2<sup>nd</sup> defendant submitted that had the plaintiff followed the proper laws and procedures in disposing of the mortgaged property, it would have realized the monies to  
20 extinguish the loan. It was his view that in the circumstances of the case, the plaintiff was not entitled to any remedies.

I have already made a finding above that considering that the sale had never been set aside or challenged, it is still valid and the plaintiff is entitled to the balance of the loan amount that was not realized from the sale.

25 The contents of the Bank statements which were tendered in evidence by the plaintiff and indicating the amount still owing was never challenged by the defendants. They were part of the agreed documents. The Statements indicate that the principal amount owing to the plaintiff was

UGX 231,590,267/= while the interest had accumulated to UGX 125,794,774/=. I find that the defendants are jointly and severally liable to pay the above amount of money to the plaintiff.

In conclusion, the suit against the defendant succeeds and awards to the plaintiff are made as follows:

- 5        1. Special damages UGX 357,385,041/=
2. 10% Interest on the award (1) above from the date of filing the suit till payment in full.
3. Costs of the suit.

It is so ordered.

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**B. Kainamura**  
**Judge**  
**10.10.2016**

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