

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**CIVIL SUIT NO. 468 OF 2013**

5 **STANBIC BANK (U) LTD ..... PLAINTIFF**

**VS**

**TUKA INVESTMENTS LTD AND FOUR OTHERS ..... DEFENDANTS**

**BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN**

10

**JUDGMENT**

**FACTS:** On 30.11.11, the First Defendant applied for and obtained a finance facility of Ug. Shs. 500,000,000/- from the Plaintiff Bank.

15 The security for the facility was a mortgage executed on 08.12.11, over property comprised in Kyadondo Block 214, Plot 3910, Land at Kisaasi, in the names of Kabenge Byuma Titus, the Second Defendant. Personal guarantees were executed by the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants in their capacities as Directors of the First Defendant on assignment of all contract proceeds to the Plaintiff and a cash bond of US Dollars \$ 150,000 only.

20 Prior to the disbursement of the loan amount, the Plaintiff instructed the Fifth Defendant to value and survey the mortgaged property, which the Fifth Defendant did and provided a report to the Plaintiff dated October, 2011.

25 The valuation report of the Fifth Defendant, indicated that the security's fair market value was Shs. 700,000,000/- and that it had improvements thereon. And that the forced sale value was Ug. Shs. 600,000,000/-.

30 Relying on the professional expertise and valuation report of the Fifth Defendant, the Plaintiff proceeded to advance to the First Defendant the sum of money already mentioned herein.

The First Defendant defaulted on the loan repayments, where upon the Plaintiff sought to foreclose on the mortgaged property. The Plaintiff accordingly instructed CMT Realtors, a valuation Company to revalue the security.

35 CMT Realtors duly inspected the property and in their valuation report of March, 2013, indicated that the security is not developed as alleged and has a market value of Ug. Shs. 60,000,000/- only.

40 Further that, the security did not have any structural developments and the forced sale value was Ug. Shs. 45,000,000/-, an amount way below what the Defendants had indicated in the first valuation.

The Plaintiff filed this suit contending that the actions of the First Defendant amounted to breach of contract. The particulars of the alleged breach are set out in paragraph 7 (a) and (b) of the plaint.

5 Further that the Defendants jointly acted fraudulently and misrepresented to the Plaintiff Bank the value of the security. And that the Fifth Defendant exhibited professional negligence in his work and the work of his employees for which he is vicariously liable.

10 The particulars of fraud, misrepresentation and professional negligence are set out in paragraph 8 (a) – (d) of the plaint.

15 It is the Plaintiff's contention that due to the said breach of contract by the First Defendant, fraud and misrepresentation by all the Defendants, it has suffered great economic loss and general damages. Hence this suit against all defendants jointly and severally to recover Shs. 682,311,930/- as special damages, general damages, costs of the suit, and interest on the said sums.

20 In their defence, the 1<sup>st</sup> – 4<sup>th</sup> Defendants contended that the Plaintiff's claim was misconceived, frivolous and vexatious and they denied liability for damages arising out of breach of contract.

25 Further that, the money disbursed to the Second Defendant by the Plaintiff was to be and was specifically applied to contract financing for the construction of call centers at Kirinya, Jinja District, under a contract by Lavit Limited. And that the said Lavit Limited undertook to pay all contracts proceeds to the Second Defendant, through its bank account with the Plaintiff. And that the proceeds were to be applied to settle the facility. And that the Second Defendant is entitled to be indemnified by the said Lavit Limited against the whole of the Plaintiff's claim- Refer to Annexures TK<sub>2</sub>, TK<sub>3</sub>, and TK<sub>4</sub> respectively. And that leave of court would be sought before hearing to issue third party notice to Lavit Limited.

30 It is the assertion of the 1<sup>st</sup> – 4<sup>th</sup> Defendants that, the Fifth Defendant was a pre-approved valuer of the Plaintiff and was jointly instructed by First Defendant and the Plaintiff. – Refer to TK<sub>6</sub>- Valuation report.

35 Denying any breach of contract, the 1<sup>st</sup> – 4<sup>th</sup> Defendants contended that on 19.01.12, the First Defendant issued Lavit Limited with an interim payment certificate for US Dollars \$407,786.66- which has not been paid- Annexure TK<sub>7</sub>.

40 The 1<sup>st</sup> – 4<sup>th</sup> Defendants also denied knowledge of any professional negligence on the part of the Fifth Defendant.

They prayed for dismissal of the suit against them and that the court should instead order Lavit Limited to indemnify them against any liability due to the Plaintiff.

45 The defence of the Fifth Defendant is not on record.

In the joint scheduling filed for all parties, the following were the proposed issues.

50 **I) Whether the Defendants are liable for breach of contract, fraud and misrepresentation.**

**II) Whether the Fifth Defendant is liable to the Plaintiff for professional negligence,**

### III) What remedies are available to the parties.

5 Before hearing could proceed, the First Defendant applied to court to issue third party notice to Lavit Limited, which was allowed. The notice was served on Lavit Limited, and the company entered appearance and denied liability to indemnify and or contribute to any liability of the 1<sup>st</sup> – 4<sup>th</sup> Defendants.

10 When hearing commenced on 19<sup>th</sup> February, 2015, Counsel for the 1<sup>st</sup> – 4<sup>th</sup> Defendants told court that Counsel for the third party wanted the issues of liability of the third party to be tried first. However, Counsel for the 1<sup>st</sup> - 4<sup>th</sup> Defendants was of the view that the proper procedure was for all the issues to be tried at once. He prayed court to discharge Counsel for the third party.

15 Counsel for the third party informed court that he would return later after issues of the rest of the Defendants had been determined. Court thereby discharged the third party and the record indicates that the third party was never called to testify.

20 The issues will be dealt with in the order that they were set out.

#### **Whether the 1<sup>st</sup> – 4<sup>th</sup> Defendants are liable for breach of contract, fraud and misrepresentation.**

25 PW<sub>1</sub> Dennis Kiiza testified to the facts as already set out in this judgment. That is the loan agreement Exhibit P<sub>1</sub> of Shs. 500,000,000/- which was secured by the property comprised in Kyadondo Block 214, Plot 3910 and guaranteed by the 2<sup>nd</sup> -4<sup>th</sup> Defendants – see Exhibit P<sub>7</sub>, P<sub>8</sub> and P<sub>9</sub>. The First Defendant defaulted on the loan payment despite the demands made by the Plaintiff – Exhibits D<sub>3</sub>. As a result of the default to repay the loan, the unpaid balance rose from Shs. 682,000,000 to Shs. 782,620,343/- at the time of filing the suit. Of the said amount, Shs. 499,927,738 is the principal sum and Shs. 279,070,195 the interest accruing therefrom.

35 DW<sub>2</sub> Tukacungurwa Enock admitted the facts of the case. But his evidence concentrated on the third party liability, which will be dealt with later in this judgment.

40 It was the submission of Counsel for the Plaintiffs that there is no serious contention between the parties as to whether the debt exists between the Plaintiff and the 1<sup>st</sup> – 4<sup>th</sup> Defendant and therefore the only issue left for determination was the amount of debt. And that since the amount claimed at that time of the suit was not contested by the Defendants, it ought to be accepted as the truth. Counsel relied upon the case of **Samwiri Massa vs. Rose Achieng [1978] HCB 297**. Which is to the effect that **“a story of the Plaintiff given in absence of a defence to contradict it, ought to be accepted as the truth”**. He prayed court to find that the sum of Shs. 682,000,000/- is owing and payable by the 1<sup>st</sup> – 4<sup>th</sup> Defendants jointly and severally.

45 Counsel for the Defendants conceded to the fact of borrowing and default in repayment of the loan by the Defendants, but raised the issue of third party liability.

50 Right from the time of filing the joint scheduling memorandum, the parties agreed that the loan facility advanced to the First Defendant was not paid as agreed. The same is admitted in the written statement of defence of the 1<sup>st</sup> – 4<sup>th</sup> Defendants, the evidence of DW<sub>1</sub> ad the submissions of the Defendants.

The Plaintiffs evidence that the 1<sup>st</sup> – 4<sup>th</sup> Defendants presented an empty plot of land as developed whereas not, and thereby fraudulently acquired the loan; and what the bank based its decision to grant on this misrepresentation and fraud, was also not contested by the 1<sup>st</sup> to 4<sup>th</sup> Defendants, meaning it was admitted.

It is an established principle of law that ***“once facts are agreed and or admitted, they are no longer in dispute and are put out of the scope of the parties litigation”***. See S.57 of the Evidence Act and the Supreme Court case of **Kampala District Land Board and Another vs. National Housing & Corporation Co. Ltd SCCA 02/2004**.

For all those reasons, court finds that by presenting an undeveloped plot as developed, the 1<sup>st</sup> – 4<sup>th</sup> Defendant through misrepresentation and fraud acquired the loan from the Plaintiff. And by failing to repay the sum agreed in Exhibit P<sub>1</sub>- the loan facility agreement and the mortgage deed Exhibit D<sub>6</sub>, the 1<sup>st</sup> – 4<sup>th</sup> Defendants were in breach of the contract.

The next issue to determine is **whether the Fifth Defendant is liable to the Plaintiff in professional negligence**.

The evidence of the Plaintiff against the Fifth Defendant is that, the Fifth Defendant valued and opened boundaries for property put in as security for the loan by the 1<sup>st</sup> – 4<sup>th</sup> Defendants. He issued a report Exhibit P<sub>3</sub> where he indicated that the security was developed as shown by the photograph of the house and its market value was Shs. 700,000,000/-. Yet, the subsequent valuation and boundary opening report – Exhibit P<sub>4</sub> shows that the security is undeveloped and the market value is Shs. 60,000,000/-.

The Fifth Defendant on the other hand maintained the contents of Exhibit P<sub>3</sub> and insisted that he visited the security and found it to be developed. When questioned about the valuation report Exhibit P<sub>4</sub>, which has contrary findings, he denied ever having seen it, although it is attached to the plaint and was referred to in his witness statement paragraph 21.

Counsel for the Plaintiff submitted that the Plaintiff in advancing the loan relied on the skill and knowledge of the Fifth Defendant, and therefore that the Fifth Defendant was liable to the Plaintiff for professional negligence. The case of **KCB Ltd vs. Eddie Nsamba Gayiya t/a Consult Surveyors & Planners HCCS 642/2012** where the case of **Hedley Byrne & Co Ltd vs. Heller & Partners Ltd [1964] AC 465** was cited in support for the holding that ***“where a plaintiff relies on the skill and knowledge of the defendant in a report to disburse the loan facility, then the defendant is liable for whatever misrepresentation as was in such report which was relied upon by the plaintiff to disburse the loan facility”***.

Counsel also asserted that, the Fifth Defendant was generally untruthful and evasive when he insisted that the security had no access. Yet claimed to have entered it for the purpose of valuing it.

That the Fifth Defendant knew that the Plaintiff would rely upon his skill to disburse the money to the Defendants. However that, the report of the Fifth Defendant contained serious misrepresentation as far as the state of the security was concerned. That this was confirmed by the evidence of Obalum Michael- Exhibit P<sub>4</sub> - which shows the property is undeveloped and has a lower market value.

It was contended that, the premise on which the Fifth Defendant estimated the fair market value was wrong and therefore the purported worth of Shs. 700,000,000/- was wrong, careless, negligent exaggerated and misleading. Court was urged to find that a case of professional negligence had been made out against the Fifth Defendant and that he was liable to pay damages for the negligence.

Counsel for the Fifth Defendant argued that for the Plaintiff to succeed in his claim against the Fifth Defendant, he had to prove proximate cause and damages. Otherwise that **“a professional who undertakes to exercise a reasonable degree of care and skill does not undertake ..... to use the urgent possible degree of skill”**. – He relied upon the case of **Lanphier vs. Phipos (1838) 8 CeP. 475**.

Referring to proof on the balance of probabilities, Counsel stated that the standard requires that a dispute be decided in favour of the party whose claims are more likely to be true, which applies in cases of professional negligence.

He then pointed out that in the present case, the Fifth Defendant conducted the valuation of the suit property and produced the report Exhibit P3, which the Bank claims to have relied upon to give the loan. Yet, in paragraph 12.0 of the report, the Fifth Defendant stated **“.... This property will require a resurvey ... to make it a good security for lending in its current state; it will not do for a mortgage”**.

That since the Fifth Defendant provided **“any other information that would help in the assessment of whether the property is good as bank security”** as was required by the Bank – Exhibit D<sub>4</sub> pp 681-86B, then as alleged by the Fifth Defendant, the loss suffered by the Bank was due to its own fault.

Further that mere allegation of professional negligence is not sufficient. The Plaintiff must plead and prove causation of loss and that the valuation was relied upon, and that the breach of duty on the part of the Surveyor was the cause of the loss complained. That is, the particular loss or damage sustained was in consequence of reliance upon the Surveyor’s advice.

Counsel insisted that, courts have emphasized that **“even where there could be found a failure to exercise proper diligence and care in making a survey, there must be evidence to prove that the Plaintiff was influenced by the report – that but for the valuation they would not have given the loan”**. - **Rona vs. Peace (1953) 162 ES 380** and **Banque Braxelles Lambert S.A vs. Eagle Star Insurance Co. Ltd (1994) IEGLR 108**.

Counsel then argued that the evidence in the present case shows that there was no reliance at all on the valuation report of the Fifth Defendant. This is confirmed by the Bank’s own forensic investigation report Exhibit P<sub>7</sub>, which contradicts the pleadings of the Bank and the evidence of PW<sub>1</sub>.

The report indicates that **“the Surveyor recommended a resurvey of the property, but the Bank went ahead to disburse the loan without the resurvey being done”**.

It is further indicated that the Account Executive of the Bank, and the Credit Evaluation Manager **“either ignored or failed to notice that the valuers included a clause indicating that the property was not good security for a mortgage, and then Mr. Subaash waived the pre-condition of a cash bond of US Dollars \$150,000 and approved the loan”**.

Counsel pointed out that the valuation report was prepared and passed over to the Bank in October, 2011, the loan facility letter was issued on 30.11.2011, and the mortgage was signed and registered on 08.12.11. That these facts show that there was ample time to evaluate the valuation report made by the Fifth Defendant and act on any issues raised in paragraph 12 thereof. Failure by the Bank to act should not be blamed on the Fifth Defendant. The Bank ignored the advice of the valuer that the property was not suitable for a mortgage.

He argued that the case of **KCB vs. Eddie Nsamba (Supra)** does not apply to the facts of the present case. In that case, it was proved that a valuation report was produced and the bank relied on it. But in the present case, the Fifth Defendant pointed out in the report that the property valued was not good for a mortgage.

Counsel wondered how the Bank could have relied on the valuation report to lend the money when it had been clearly pointed out that the property was not good for a mortgage. That the Bank did not rely on the report is further evidenced by the fact that other securities were required of the Defendants as a condition precedent.

It was the further submission of Counsel that decided cases have established that **“....a defendant valuer is not liable for all the consequences which flow from the lender entering a transaction. He is not even liable for all the foreseeable consequences or for consequences which would have arisen even if the advice had been correct.... Because they are the consequence of risk the lender would have taken if the valuation advice had been good. As such, they are not within the scope of the duty owed to the lender by the valuer”**. – **Nyekredit Mortgage Bank vs. Edward Erdmen Grano (1997) ULHL 53 [1998], ALL ER 305**. And the case of **South Australia Asset Management Corporation vs. Yorke Montague (1996) UK HL10 [1997] AC 191 [1998] IAU EA 305** where the court observed that **“damages for negligent valuations are limited to the foreseeable consequences of the advice, and the correct approach is to ascertain what element of loss was suffered as a result of the transaction was attributable to the inaccuracy of the information supplied”**.

The Fifth Defendant, Counsel concluded, could not be found liable in negligence when he warned the Bank that the property was not suitable for a mortgage, but the Bank ignored the comments of the valuer. Adding that professional responsibility should be limited to the taking of reasonable care, which the Fifth Defendant did by warning the Bank.

Negligence is **“the omission to do something, which a reasonable man, guided upon those considerations, which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The standard demanded is not of perfection but of reasonableness”**- **Blyth vs. Birmingham Water Works (1856) EXch, Exch 781; 156 Eng. Rep.1047**.

It is the Plaintiff’s contention in its case that the Fifth Defendant was professionally negligent in stating that the property was well developed whereas not and then over valuing it, well knowing that it was to be used to secure a loan facility.

To prove the alleged negligence, the Plaintiff had to prove that the Defendant owed a duty of care; the duty of care was breached resulting into damage to the Plaintiff.

To determine whether the ingredients of negligence were proved by the Plaintiff, court will take into account the relationship between the parties and the principles established by cases to be taken into consideration to determine whether a duty of care existed. The **“relationship**

***between a valuer and the person who appoints him is of a professional person and a client***". – Halsbury's Laws of England 4<sup>th</sup> Edition. Vol. 49(1) P. 407 par 412.

5 The principles to determine whether a duty of care exists include foreseeability of harm proximity of relationship and reasonableness of imposing such a duty **Capara Industries PLC vs. Dickman [1990] AC 605 [1990] UKHL 2 [1990] IAUER 568.**

10 To determine whether the valuer exercised the required standard of care and skill is a question of fact on which an expert witness may be called to give evidence. This question is to be answered in light of the knowledge which is current in the profession at the time of valuation or survey.

15 A person who holds out himself as a Surveyor or Valuer as having the skill and knowledge which a reasonably competent member of his profession or calling would have, and it is his duty to take reasonable care to give a reliable and informed opinion on the open market value of the property in question at the date of valuation. *Valuation is a matter of opinion on which competent valuers may reach different conclusions. A valuer is accordingly not guilty of negligence merely because another valuer produces a different answer nor because his valuation turns out to be wrong*". – **Baxter vs. FW Gapp & Co. Ltd [1938] 4 ALL ER 457 at 459.** However, **"a valuation which fails outside the permissible margin of error brings into question the Valuer's competence and the care with which he carried out his task"**.

25 **"A Valuer is not negligent merely because he adopts a method of valuation which is not the best, provided it is one which is acceptable by a responsible body of opinion among valuers. A valuer will, however, be negligent if he gives an open market valuation without considering implications of a recent sale of property, unless he has been specifically instructed to disregard it"**. – **Banque Bruxelles Lambert SA vs. Eagle Stay Insurance Co. Ltd [1995] 2AU ER 769 at 789-791.**

30 In the present case, the fact that the Fifth Defendant is a professional Surveyor and Valuer is not disputed. He has the necessary qualifications and is duly registered. The instructions given to him were to inspect, survey and value the property in order to ascertain the fair market value, forced sale value and insurance value of the property. He carried out the given task by valuing the property described as Kyadondo Block 214, Plot 3910, Kisaasi. He described it as developed property with a built residential house, a wall fence and a big compound. *The property, he insists, was shown to him by one of the First Defendant's officials. He valued it at Shs. 700,000,000/- fair market value.* However, he clearly spelt out in the report that **"this property will require a resurvey.. to make it a good security for lending. In its current state, it will not do for a mortgage."**

40 This warning given by the Fifth Defendant was in line with the required minimum contents of valuation reports that were listed by the Plaintiff Bank – Exhibit D<sub>4</sub> at Pp 68A and 68B- Joint trial bundle – It was certainly **"any other information that would help in the assessment of which the property is good as Bank Security"**.

45 While it is not disputed that the Fifth Defendant owed the Plaintiff a duty, the Plaintiff owed a corresponding duty to take note of the warning of the Fifth Defendant before disbursing the loan.

50 Indeed the forensic investigation report carried by the Bank – Exhibit D<sub>7</sub> confirms that the Bank ignored the recommendation of the Fifth Defendant and proceeded to issue a loan on this property without a resurvey. Further that the Accounts Executive who originated the

loan and forwarded it to the Credit Evaluation Manager either ignored or failed to notice the warning of the Fifth Defendant. And that the Bank official waived the pre-condition of a cash bond of US Dollars \$150,000 and approved the loan.

5 With a clear warning in the valuation report that was brought to the attention of the Plaintiff, but was ignored or overlooked for reasons only well known to the Bank Officials, the Fifth Defendant cannot be found to have been professionally negligent. The Bank Officials had sufficient time from the date the report was passed on to the Bank in October, 2011, when the loan facility letter was issued on 30.11.11 and by the time the mortgage was signed and  
10 registered on 08.12.11, to internalize the report and effect the suggested recommendation of the Fifth Defendant. That is, the resurvey.

As it turns out, the resurvey was done after the loan had been disbursed- Exhibit P<sub>4</sub> and it revealed that the property was not developed and had a fair market value of Shs. 60,000,000/-  
15 and forced sale value of Shs. 45,000,000/- and that the property was best suited for redevelopment.

Certainly there was variance of opinion as to the value of the property. But the principle established by case law is that ***“variance of opinion as to the value of a property does not mean that the valuer has been in breach of his duty”***. – Halsbury Laws of England  
20 (Supra).

This position was upheld in the case of **Baxter vs. FW Gapp & Co. Ltd [1938] 4 ALL ER at 457** where Goddard LJ observed as follows: ***“we are liable to make mistakes and a valuer is certainly not to be found guilty of negligence merely because his valuation turns out to be wrong. He may have taken too optimistic or too pessimistic a view of a particular property. One has to bear in mind that, in matters of valuation, matters of opinion must come very largely into account”***.  
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30 While the Fifth Defendant may have given the property a high market value, which the Plaintiff considers to be outside the tolerable limb of the valuation figure and therefore negligent, it remains his uncontroverted evidence that he issued the warning already referred to in this judgment. If he had meant to be out rightly deceitful, he would never have issued the warning. This is coupled with the fact that it is the officers of the Plaintiff Bank who  
35 showed him the property that he valued.

For all those reasons, I find that the Plaintiff has failed to prove that the Fifth Defendant was professionally negligent and caused to Plaintiff a loss as a result. The issue is accordingly  
40 answered in the negative.

#### **What remedies are available to the parties.**

The Plaintiff in this case sought the following remedies:-  
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- 1) A declaration that the Defendants jointly perpetrated fraud against the Plaintiff.
- 2) Recovery of Special damages of Shs. 682,311,930/-.
- 50 3) General damages.



- 4) Interest on special damages at the rate of 25% per annum from the date of filing the suit till payment in full.
- 5) Interest on general damages from the date of judgment until payment in full.
- 6) Costs of the suit
- 7) Any other remedy the court deems fit.

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**Declaration:** I have already found in this judgment that the 1<sup>st</sup> – 4<sup>th</sup> Defendants through misrepresentation and fraud acquired the loan from the Plaintiff Bank. The findings are hereby affirmed and the declaration granted.

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**Special Damages:** In paragraphs 5 and 6 (1) and (vi) of the plaint, the plaintiff pleaded that the loan facility granted to the 2<sup>nd</sup> – 4<sup>th</sup> Defendants was Shs. 500,000,000/-. It attracted interest from the time of filing the suit.

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The claim was not challenged by the 1<sup>st</sup> – 4<sup>th</sup> Defendants.

It is trite law that special damages and loss of profit must be specifically pleaded and proved. – See **Haji Asuman Mutekanga vs. Equator Growers (U) Ltd SCCA 7/95.**

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The Plaintiff fulfilled the requirement and proved that the 1<sup>st</sup> – 4<sup>th</sup> Defendants failed to repay the loan as agreed. By the time the suit was filed, the loan had attracted interest and therefore risen up to Shs. 682,311,930/-.

The sum is accordingly awarded to the Plaintiff as special damages. This was not disputed by the 1<sup>st</sup> – 4<sup>th</sup> Defendants.

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**General Damages:** Counsel for the Plaintiff prayed court to direct that the 5<sup>th</sup> Defendant to pay general damages on the ground that he caused the Plaintiff loss through professional negligence. Counsel prayed for the sum of Shs. 100,000,000/-.

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40 But Counsel for the Fifth Defendant argued that ***“the Plaintiff cannot recover damages in respect of any loss which he ought reasonably to have avoided”. The nature of the steps which he ought to have taken will depend on the facts of each case.*”**

45 I must state that I am persuaded by the arguments of Counsel for the Fifth Defendant to confirm that the Plaintiff cannot recover damages from the Fifth Defendant, this court having found that he was not professionally negligent having warned the Plaintiff that the property was not suitable for a mortgage and there was need for another survey. The Plaintiff ignored the advice and therefore the attendant loss occasioned by the failure of the 1<sup>st</sup> – 4<sup>th</sup> defendants to repay the loan cannot be attributed to the Fifth Defendant.

50 However, the evidence that the 1<sup>st</sup> – 4<sup>th</sup> Defendant defaulted in repayment of the loan was firmly established as earlier pointed out. This court therefore finds that it ought to be the 1<sup>st</sup> – 4<sup>th</sup> Defendants to pay general damages for the loss occasioned to the Plaintiff.

This court is aware that ***“general damages have no standard measure except the estimation of the trial court. The award of damages by the trial court must be to give the Plaintiff compensation for loss of use, loss of profit and injury suffered. Such damages must be the direct probable consequence of the act complained of.”***- Robert Coussens vs. Attorney General SCCA 08/1999.

The failure by the 1<sup>st</sup> – 4<sup>th</sup> Defendants to repay the money advanced by the Plaintiff has without doubt occasioned the Plaintiff loss of use, loss of profit and has greatly inconvenienced the Plaintiff Bank which has had to wait for its money since 30.11.11 when the loan was advanced. And upon finding that the property offered as mortgage was not worth the value, it had been given and therefore could not be sold to recover the sums.

The Plaintiff is accordingly awarded general damages of Shs. 50,000,000/-.

**Interest:** The Plaintiff sought interest on the special and general damages at the rate of 21% per annum. The 1<sup>st</sup> – 4<sup>th</sup> Defendants’ Counsel did not submit on the issue of interest.

Interest is a sum ***“allowed by law in the absence of a promise to pay it, as compensation for delay in paying a fixed sum...”*** – Blacks Law Dictionary, 9<sup>th</sup> Edith P.887.

Under S. 26 (2) of the CPA, ***“court has powers to award interest on the decretal sum, that is, interest on the principal sum adjudged from the date of a decree. Hence the court decides at its discretion, which must be made judiciously, the rate of interest to be awarded; and, interest on the aggregate sum so adjudged from the date of the decree to the date of payment in full”***. – Refer to Charles Lwanga vs. Centenary Rural Development Bank Ltd [1999] IEA 175, CACA 30/1999 – G. Okello JA.

In the present case, the Plaintiff and First Defendant agreed that the loan amount would carry interest at the rate of 26.5% per annum. It appears that the rate was dispensed with when the Plaintiff sought interest at the rate of 21% per annum on the special damages.

The Plaintiff is accordingly awarded interest on the special damages at the rate of 21% per annum from the date of filing the suit till payment in full.

Interest on general damages is awarded at the court rate of 6% per annum from the date of judgment until payment in full.

**Costs:** Counsel for the Plaintiff prayed that costs of the suit be paid jointly and severally by all the Defendants. Counsel for the 1<sup>st</sup> – 4<sup>th</sup> Defendants submitted that 01r19 C.P.R gives court discretion to decide the question of costs as between a third party and other parties to the suit. He asserted that, the Defendants’ case is that the third party defaulted on undertakings made to both the Defendants and the Plaintiff and therefore the third party should be ordered to pay costs of the suit.

For the Fifth Defendant, it was submitted that no order for costs should be made against the Fifth defendant for no demand for the same was ever made in the suit.

While Counsel for the third party urged court to dismiss the claim of the 1<sup>st</sup> – 4<sup>th</sup> Defendants for indemnity by the third party.

Under S. 27 (2) CPA costs follow the event unless for good cause court determines otherwise. See also the case of **James Mbabazi & Another vs. Matco Stores Ltd & Another CA. Civil Reference No. 15/2004**

5 This court having found that the 1<sup>st</sup> – 4<sup>th</sup> Defendants breached the loan agreement and made false misrepresentation and defrauded the Plaintiff, costs of the suit are awarded against them.

10 No costs are to be paid by the Fifth Defendant since he was absolved of professional negligence and the claim against him dismissed.

However, the Plaintiff should pay the Fifth Defendant the taxed costs of the suit brought against him.

15 **Third Party:** Many issues were raised by the 1<sup>st</sup> – 4<sup>th</sup> Defendants against the third party-Lavit Limited, claiming that the moneys borrowed from the Plaintiff were specifically applied to the construction contract with the third party Company, which undertook to pay all contract proceeds through the First Defendant’s Account held by the Plaintiff.

20 First and Fourth Defendants claim for indemnity from the third party based on the undertakings made.

25 However, it is on record that the third party was never allowed a hearing on the issues, as the Company was discharged from court until the issues between the Plaintiff and the 1<sup>st</sup> – 4<sup>th</sup> Defendants had been determined.

Though Counsel for the third party made submissions in respect of the issues raised by 1<sup>st</sup> – 4<sup>th</sup> Defendants, it would unjust condemn the third party without according it a fair hearing.

30 To do so would be contrary to Article 28 (1) of the Constitution which guarantees the right to a fair hearing. ***“It should always be remembered that to deny a subject a hearing would be the last resort of a court”.*** – **Jammadas Sodha vs. Gadhandas Hemraj (1952) USR7 at P.11.**

35 For those reasons, court will not delve into the issues raised by the 1<sup>st</sup> – 4<sup>th</sup> Defendants in respect of the third party. If the 1<sup>st</sup> – 4<sup>th</sup> Defendants insist on indemnity, they should take out the necessary proceedings against the third party.

40 Judgment is given to the Plaintiff against the 1<sup>st</sup> – 4<sup>th</sup> Defendants jointly and severally in the following terms:-

I) It is hereby declared that the 1<sup>st</sup> – 4<sup>th</sup> Defendants jointly perpetuated fraud and misrepresentation against the Plaintiff.

45 II) The Plaintiff is awarded the sum of Shs. 682,311,930/- as special damages against the 1<sup>st</sup> – 4<sup>th</sup> Defendants.

III) General damages of Shs. 50,000,000/- are awarded to the Plaintiff against the 1<sup>st</sup> – 4<sup>th</sup> Defendants.

50 IV) Interest is awarded on the special damages at the rate of 21% per annum from the date of filing the suit until payment in full.

V) Interest is awarded on the general damages at the rate of 12% per annum from the date of judgment until payment in full.

5 VI) Costs of the suit are awarded to the Plaintiff against the 1<sup>st</sup> – 4<sup>th</sup> Defendants.

VII) The claim against the Fifth Defendant is dismissed and costs awarded to him against the Plaintiff.

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**Flavia Senoga Anglin**

**JUDGE**

**02.10.17**