

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 663 OF 2014**

NAKASERO MARKET SITTING VENDORS & TRADERS LTD}.. PLAINTIFF

VERSUS

CENTENARY RURAL DEVELOPMENT BANK LTD}DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The plaintiff, a limited liability company commenced this action against the defendant, a financial institution, for breach of contract and for declaration that the defendant breached its contract with the plaintiff when it unlawfully refused to disburse a sum of Uganda shillings 580,000,000/=. Secondly, the suit is for an order of specific performance in respect of the defendant's contractual obligation to disburse the funds. In the alternative, the plaintiff prays for an order for return of certificates of title deposited by the plaintiff's directors to secure the loan. It is also for consequential orders for cancellation of the defendant's mortgage registered on the certificates of title, general damages, aggravated damages, interests and costs of the suit.

The defendant opposed the suit and sought its dismissal. The facts in support and defence of the suit are sufficiently set out in the final address of counsel as reproduced below. The Plaintiff was represented by Counsel David Kaggwa of Messrs Kaggwa & Kaggwa Advocates and the Defendant by Counsel Joseph Luswata of Messrs Sebalue and Lule Advocates.

In support of the suit the Plaintiff relied on the following facts. The Plaintiff applied for a loan facility of Uganda Shillings **580,000,000/-** from the Defendant. The loan facility was approved by the Defendant and the Plaintiff accepted the terms on 4th June, 2013. The loan was subject to some conditions such as securitization, payment of acceptance fee and issuance of Powers of Attorney from the Plaintiff's directors authorizing the creation of securities on their personal property. The Plaintiff's Directors deposited their Certificates of Title for land comprised in Plot' 2431 Kyadondo Block 243 land at Luzira registered in the names of Cissy Namatovu, Plot 331, Block 273 Vol. 143 Folio 3 at Konge registered in the names of Sam Bivanju and Plot 3186 & 3187 block 208 at Kawempe registered in the names of Dr. Kagoda Robert all who granted Powers of Attorney to the Plaintiff. On 4th

September, 2014 the Defendant cancelled the loan offer and did not disburse the sums due to what they termed "governance issues", hence this suit.

In support of the Defendants defence the facts are that the defendant conditionally approved the loan facility to the Plaintiff for Uganda Shillings **580,000,000/-** for payment of premium for the Plaintiff's lease at Nakasero Market. In the course of processing the loan, the Plaintiff made several misrepresentations regarding the status of its securities and its corporate status; These are purporting to have more Directors than the maximum provided for in the Articles of Association; the Members of the plaintiff holding out as Directors of the Plaintiff by signing the resolution to borrow: Failure to disclose to the defendant that one of the securities for the loan Plot 331 was at the time it was offered registered in the names of a deceased person and had developments extending beyond its size or area. Upon the Defendant discovering the said misrepresentations, it declined to disburse the loan and apologized to the Plaintiff for any inconveniences caused. The court was addressed in written submissions on two issues namely:

- 1. Whether the defendant was justified to cancel the loan agreement?**
- 2. Whether the Plaintiff is entitled to the remedies sought?**

Plaintiff's submissions

On whether the defendant was justified in cancelling the loan agreement, the plaintiff's Counsel submitted that the defendant was not justified on the following grounds. The Plaintiff embarked on a project to re-develop its land comprised in Plots 4B and 7B Market Street [Nakasero Market] and they were awarded a sub-lease from the then City Council of Kampala as shown in Exhibit P1. They had an obligation to pay a premium of Uganda Shillings 1,800,000,000/= and ground rent of Uganda Shillings 45,000,000/=. At that time, the Plaintiff opened up a project account with DFCU Bank Limited with the intention of obtaining a loan facility to pay the above sums before they could commence the re-development of their market. Pursuant to a board resolution dated 7th March, 2013, Ex. P8, the Plaintiff under clause 1 thereof, transferred its project development account from DFCU Bank Limited to Centenary Bank, the defendant herein. The Defendant, issued an offer letter dated 4th June, 2013 and it was accepted by the Defendants on the same day. Subsequently, on the 5th June, 2013, by a banking facility agreement, the Defendant agreed to lend the Plaintiff a sum of Uganda Shillings 580,000,000/= to enable them pay their premium and ground rent to KCCA. The Plaintiff was required to furnish collateral securities which they did. The Plaintiff executed mortgage deeds and Powers of Attorney which were handed over to the Defendant who at the Plaintiff's expense, duly registered all as mortgages in the months of July and August 2013 and kept the said Certificates of Title. Initially there were anomalies with regard to the security offered by Kasirivu Yolam on behalf of the Plaintiff however, the Defendant through one of its officials called Kampire

Jackie recommended a law firm (Crested Law Advocates) to rectify this anomaly. The said anomaly was rectified and the Defendant's mortgage was properly registered. The Defendant on the 09/12/2013 debited the Plaintiff's account with Uganda shillings 1, 720,000/= (Uganda Shillings One million seven hundred twenty thousand) which money it directly paid to Crested Law Advocates as consideration for their services according to Exhibit P7. On 9th December, 2013 the Defendant wrote a letter Exhibit P16 to Kampala Capital City Authority seeking some clarifications from it. In spite of the Plaintiff complying with all the required terms, conditions and signing the facility documents as per the offer letter, for over one year, the Defendant remained silent and as an afterthought, woke up from its slumber and wrote a letter on 4th September, 2014 refusing to disburse the funds due to alleged "governance issues surrounding the company." A copy of the letter terminating the credit facilities was admitted as Exhibit P6. Counsel submitted that it should be noted that whereas on previous occasions, the Defendant engaged the Plaintiff to rectify some issues, this time round, no notice was sent to the Plaintiff to explain any governance issues and in case they needed clarity, the Plaintiffs would do so as before. This shows that the decision not to disburse funds to the Plaintiff was unfair and unlawful. This is because even the Defendant's witness, Mr. Innocent Kyakuha, failed to show what the governance issues were. The witness testified that the anomaly of registering one of the titles in the name of Kasirivu Yolamu was rectified. Secondly, he claimed that one of the Plots held as security, Plot 331, encroached on neighboring plots by 0.014 Acres. In cross examination however, he confirmed that the boundaries covered the developments on the kibanja which was covered by an agreement that has been submitted to the bank, hence the issue was also rectified. On governance issues, he admitted that he did not produce in court the full list of directors of the Plaintiff, the bank never obtained search results from the registry of companies, he had never seen a resolution dated 7th March, 2013 wherein it was resolved that all those persons who handed in their securities would be Directors. The only logical conclusion is that had the Defendant searched the registry of companies, they would have found that all the persons who signed the bank documents were authorized; hence there would be no need to cancel the loan agreement. DW1 confirmed that the bank debited a sum of Uganda Shillings 3,830,000/= as mortgage fees and he claimed the figure included stamp duty but no receipt from Uganda Revenue Authority was adduced as evidence to prove that these sums were paid to URA. He further confirmed that a sum of Uganda Shillings 1,720,000/= was paid to their lawyers Crest Law Advocates and that all these sums debited from the Plaintiff's account were never refunded to the Plaintiff. From the above facts, therefore, the Defendant was estopped from reengaging on its promise to disburse the funds once their promise and conduct was relied upon by the Plaintiff to adjust its state of affairs by transferring its project account from DFCU to the Defendant, paying the necessary fees, rectifying all issues raised by the Defendant. The doctrine of promissory estoppel was

discussed in the case of **Century Automobiles Limited vs. Hutchings Biemer Limited [1965] EA 304**, where it was held that for the doctrine to apply, three conditions must be satisfied. First, that there must be a clean and unequivocal representation. Secondly, that the representation must have been made with the intention that it should be acted upon. Thirdly, the representee must have actually acted upon the representation, to adjust his affairs. When that happens, the representor is bound by his promise. In the instant case, counsel submitted that the Defendant bank did make an unequivocal representation by its agreement that they would disburse a sum of 580,000,000/= upon perfection of securities which was done. Secondly, the bank expected the Plaintiff to act on their representation and indeed the bank wrote to KCCA the eventual recipient of the premium and ground rent. Thirdly, the Plaintiff acted on that representation by spending its money to pay legal fees and other expenses.

In a nutshell, the Defendant is bound by that promise. Failure to disburse funds amounted to a breach of the contract.

Whether the Plaintiff is entitled to the remedies sought?

The Plaintiffs counsel submitted that the Plaintiff is entitled to the remedies prayed for as appear in the Plaintiff's Plaint. The plaintiff prayed for a declaration that the Defendant breached its contract with the Plaintiff by its refusal to disburse the agreed sum of **Uganda Shillings 580, 000, 000/=**.

It is not in dispute that the Plaintiff and Defendant entered into a contract exhibit D4. Breach of contract was defined in **Nakana Trading Co. Ltd vs. Coffee Marketing Board Civil Suit No. 137 of 1991** as where one or both parties fail to fulfill the obligations imposed by the terms of the contract. In the present case when the Plaintiff and Defendant entered into a contract, the Defendant had an obligation to disburse the loan sum of UGX.580, 000,000/= to the Plaintiff. The Defendant without any justifiable reason refused to disburse this money and cancelled the loan agreement. From the above authorities, this amounted to breach of contract. The Plaintiff submitted that this court should in the premises declare that the defendant breached its contract with the Plaintiff by refusal to disburse the agreed sum of **Uganda Shillings 580,000,000/=**. Counsel submitted that the Plaintiff is entitled to a refund of all the expenses involved in the process of acquiring the loan from the Defendant. The Plaintiff's account according to exhibit P7 which is the bank statement was debited with a sum of **Uganda Shillings 3,830,000/=** being a mortgage fee. In cross examination, DW1 testified that it was a debit for registering a mortgage on securities that had been presented by the Plaintiff for a loan. A sum of **Uganda Shillings 1,720,000/=** was paid by the bank's lawyers. Given the fact that money was never disbursed to the Plaintiff in total breach of the contract, the Plaintiff is entitled to a refund of this money. The Plaintiff

seeks general damages of **Uganda Shillings 580,000,000/-** for grave loss, damage and loss of profit suffered as a result of the breach of contract by the Defendant. Counsel argued that it is trite law that *"measurement of the quantum of damages is a matter for the discretion of the individual Judge which of course has to be exercised judicially with the general conditions prevailing in the country and prior decisions that are relevant to the case in question"* as was held in the case of **Southern Engineering Company vs. Mutia [1985] KLR 730** *"In assessment of the quantum of damages, courts are mainly guided by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered"* per **Uganda Commercial bank vs. Kigozi [2002] 1 EA 305**.

Counsel submitted that "a plaintiff who suffers damage due to the wrongful act of the Defendant must be put in the position he or she would have been if she or he had not suffered the wrong" as was held in **Charles Acire vs. Myaana Engola, HCCS 143/1993**. Counsel relied on **section 61 (1) of the Contracts Act** which empowers court to award compensation for any loss or damage caused to one party due to another's breach of contract". He submitted that in estimating the loss *"court has to consider the means of remedying the inconvenience caused by the non-performance of the contract that exist at the time"* per **S.61 (4) Contracts Act**.

Because the Plaintiff had to go back to its members to get the premium it needed and wasted a lot of time, it is only just that the Plaintiff be awarded the general damages as prayed for.

The Plaintiff seeks interest on the general damages from the date of judgment until payment in full. In awarding interest on general damages this Court takes into account the principle that *"interest on general damages is compensatory in nature against the person in breach of the contract"* as held by Berko JA in **Star Supermarket (U) Ltd Vs Attorney General, CACA No. 34/2000**.

Courts have over time established that the Court rate is 6% per annum. He prayed that this interest is awarded from the date of judgment until payment in full.

In regard to costs of the suit, Counsel submitted that it is the established principle of law that *"costs of any action, cause or matter shall follow the event unless Court for good cause orders otherwise"* **per S. 27 (2) of the Civil Procedure Act**. Decided cases have confirmed this principle. In the present case there is no good cause to deny the Plaintiff costs and the same ought to be awarded to the Plaintiff.

Defendant's submissions in reply

On the question of whether in the circumstances, the defendant lawfully declined to continue with the loan to the Plaintiff. The defendant's Counsel based its reply on clause 15 (a) (iv) of the exhibit D4 which provides for what constitutes as *events of default among which include misrepresentation*. Counsel submitted that the Plaintiff conceded that some of the anomalies were rectified at the request of the defendant but not all as there remained the anomaly relating to the fact that developments on that Plot extended beyond its boundaries. In cross examination by Plaintiff Advocates, it was put to DW1 that under Exhibit P12 being a letter by Defendant's Counsel to Plaintiffs advocates, and paragraph 5, the land into which developments on plot 331 encroached was also held under Kibanja by an associate of the Plaintiff. Paragraph 5 of Exhibit P12 reads as follows:

"The original copy of the Kibanja agreement between Sepiriya Mukasa and Kasirivu Yolamiradas Matovu"

However, the Plaintiff led no evidence to show that Kasirivu Yolamiradas Matovu was its associate or had given it authority to mortgage the Kibanja interest for its loan. Far from that, this was another case of misrepresentation because the loan had been approved on the security of registered land and yet the Plaintiff was now submitting as security unregistered land. In any case, DWI stated in cross examination that the Kibanja agreement referred to in Exhibit P12 was submitted after the encroachment had been discovered through exhibit D7 being the Boundary opening survey report for Plot 331. The Plaintiff had submitted that the Defendant failed to prove the allegation that non directors of the Company signed the resolution to borrow. However, the burden of proof was discharged and it shifted to the plaintiff to prove that everybody who signed on the resolution to borrow was a Director. This submission is based on the sufficiency of evidence led by the defendant on the point (which in effect shifted the burden) and the nature of the plaintiff's defence on this aspect of the case. The Defendant pleaded in paragraph 6 (c) (ii) of the WSD that:

"Some of the people who signed the resolution to borrow do not appear in the Annual Returns of 2013 as Directors of the Plaintiff".

In answer to this averment, paragraph 3(d) of its Reply to the WSD the plaintiff averred that:

"All the individuals who signed the resolution to borrow are Directors of the Plaintiff Company. See copies of documents attached collectively as Annexure "B"."

The Defendant through DWI repeated the averment in paragraph 6 (c) (ii) of the written statement of defence and this time also supplied the names of the individuals who signed the Resolution to borrow when they were not Directors of the Plaintiff Company. In cross examination on this point, the Plaintiff's Advocate referred to exhibit D2, to prove that there were more Directors than those specifically mentioned in the Exhibit. The Plaintiff's Advocate

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$#\$ xtra+ maximum735securityx 2017 style*

accordingly submitted that this aspect of the case has not been proved. Counsel submitted that once the Defendant stated in evidence that Yolam Kasirivu, Nabisubi Margaret Semakula, Mbaziira Edward and Dr Kagoda Robert were not Directors of the Plaintiff, the burden of proof that they were shifted to the Plaintiff. This is more so given the nature of the defence which affirmatively states that the above were Directors. **Adrian Keane, in his book, the Modern Law of Evidence**, states at **page 77**, that;

‘The legal burden of proving a defence which goes beyond a simple denial of the plaintiff’s assertion such as *volenti non fit injuria* or contributory negligence lies on the defendant”

Counsel submitted that notwithstanding the plaintiff’s submission that the individuals named were not Directors of the plaintiff, the burden of proof lay on the plaintiff who asserted affirmatively and beyond a mere denial that those individuals were Directors. He submitted that the plaintiff failed to discharge this burden because, what it relied upon in proof, exhibit P13 being annual returns was unreliable. When the issue is who the current directors of a company are, the evidence from the current Annual returns is preferable to that from a previous annual return. The Plaintiff also relied on Exhibit P8 being a special resolution and particularly clause 3, as evidence of appointment of Directors who may not necessarily be included in exhibit D3 being the annual returns of 2013. However, exhibit P8 which is the special resolution falls short of that proof because it was a Board resolution and there is nothing in exhibit D1 which is the Articles of Association that empowers the Board of the Plaintiff to appoint Directors. On the issue of **whether the defendant was justified to cancel the loan Agreement**, Counsel submitted that the defendant was indeed justified and that the first misrepresentations relating to plot 331 even though some were rectified at some stage of the relationship were so grave, intertwined and quite inseparable from the subsequent misrepresentations that any reasonable bank which finds itself in the circumstances in which the defendant found itself would decline to proceed with the loan. The declaration that in declining or refusing to disburse the loan of Uganda shillings 580,000,000/= to the Plaintiff, the defendant was in breach of the contract with the Plaintiff should be denied.

On the issue of remedies: In the unlikely event that the Plaintiff’s action is to succeed, the law is fairly summarized at **Page 306** of the leading text Book on **Banking law by Ross Cranston, Second Edition** that:

"Specific performance, the authorities say, is not generally available to a borrower to compel the Bank to lend. Damages are an adequate remedy...Specific performance would create a position of inequality since the borrower would get the money but the lender would have only the hope of repayment. The rules for damages are easy enough to state- The general rule is that only nominal damages are available since it is assumed that a borrower can always obtain money in another quarter. If money is

obtained at less advantageous rates, damages can be awarded to cover the difference. Clearly the administrative expenses in obtaining the money elsewhere can be recovered as consequential losses ...”

The Plaintiff has prayed for Uganda Shillings 580,000,000/= as general damages, the exact amount that would have been given under the loan agreement if the parties had proceeded with it and submitted that this is a disguised or backdoor attempt at obtaining the remedy of specific performance, which according to the authority of **South African Territories Limited vs. Wallington (1898) AC 309**, is not available in lending transactions. The law as quoted above is that nominal damages can be awarded because loans can be obtained elsewhere. Indeed, PW1 stated that the Plaintiff has since borrowed the funds for lease the premium elsewhere. In assessing the nominal damages, the Court should consider that the plaintiff committed misrepresentations and find that the Bank was not unreasonable in its decision. In the premises the Defendant’s Counsel submitted that an amount of Uganda Shillings 3,800,000/= which was the mortgage fee covering stamp duty and legal fees and expenses the Plaintiff agreed to meet under the Facility Agreement was sufficient. The stamp duty payable can be worked out because the amount of the loan is known and the rate is stated in the law (Stamps Duty Act). For the same reason that the declaration of breach is denied, this claim should be denied too. The lending transaction was lawfully cancelled and there is no basis on which the Plaintiff can recover incurred expenses. He prayed that the suit be dismissed with costs to the Defendant.

Submissions in rejoinder

The Defendant's submissions are to the effect that the Plaintiff committed several misrepresentations regarding the status of their securities and its corporate status and in their main submissions explained how the Plaintiff dealt with each query as and when it was presented by the Defendant and PW1 confirmed that position. The Plaintiff was led on by the Defendant that the queries once corrected would be sufficient for the Defendant to disburse the loan funds. In essence, by the Defendant's actions, it was represented to the Plaintiff that despite the anomalies that arose out of the securities, they would nevertheless disburse the loan sums once the securities are put in order. To that extent the Defendant, hired its own law firm, valuers and surveyors to correct those anomalies at the Plaintiffs expense. Unlike the anomalies on the securities, the governance issues were never brought to the attention of the Plaintiff until this suit was filed. It therefore cannot be the reason why the loan funds were not disbursed. Also, since the Defendant's letter dated 4th September, 2014 alluded to governance issues only, it means that the securities had been perfected to the Defendant's satisfaction and cannot be raised at this juncture.

The Plaintiff’s cause of action and submissions are premised on breach of contract, it however has elements of promissory estoppel on the basis of the Defendant's conduct after it raised issues regarding to perfection of securities. The conduct of the Defendant was

exhibited at the hearing when the Defendant bank at various times debited the Plaintiff's account to pay to its professionals to rectify the anomalies on the securities. This was not in vain; it was a promise that they would disburse the funds once the securities are perfected. The securities were perfected and the Defendant breached the contract by failure to disburse the funds. Counsel submitted that it is not correct to allege that the plaintiff departed from its pleadings that the Defendant's conduct brought into play the doctrine of promissory estoppel which is synonymous with breach of contract. The case of **Interfreight Forwarders Limited vs. East Africa Development Bank [1990 - 1994] EA 117**, as relied on by Counsel for the Defendant was recently watered down by the Supreme Court decision of **Kabu Auctioneers and Court Bailiffs & Another vs. F.K Motors Ltd S.C.C.A No. 19 of 2009** as per **Tsekooko, JSC** where the Court held that;

"The matter of Shs. 2,300,000,000/= was addressed upon in the trial court. It therefore became an issue and it was left to the trial court for decision. *Odd Jobs v Mubia* [1970] EA 476 and *Nkalubo v Kibirige* [1973] EA 102 are authorities for the view that a court may base a decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision ..."

The above decision was applied with approval by Hon. Justice Hellen Obura (as she then was) in the case of **Arch. Joel Kateregga & Anor vs Uganda Post Limited HCCS No. 20 of 2010**, where the Learned Judge held that,

"In my humble view, that subsequent Supreme Court decision seems to suggest that even though a matter was never pleaded, if the parties make it an issue for trial and leaves it to the court for decision it should be decided upon."

On the basis of the Defendant's conduct, it waived the strict compliance with the representations made in the contract when it agreed to rectify the anomalies in the Plaintiffs securities. The Defendant is therefore barred by estoppels from relying on the strict compliance of its conditions which it waived.

In the case of **Arch. Kateregga vs. Uganda Post Ltd (supra)** the Learned Judge relied on the decision of Kiryabwire, J in **Agri-Industrial Management Agency Ltd v. Kayonza Growers Tea Factory Ltd & Anor HCCS NO. 819 of 2004** where he held that;

"Waiver' in contract is most commonly used to describe the process whereby one party unequivocally, but without consideration grants a concession or forbearance to the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of a term waived."

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$\$# xtra+ maximum735securityx 2017 style*

According to **Chitty on Contracts, 28th Edition, Vol. 1, 1999 page 1158 paragraph 23-039**, the Learned Authors state that;

"where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has waived his right to require that the contract be performed in this respect according to its tenor...'

He submitted that the effect of waiver is that the Defendant cannot later claim that the Plaintiff misrepresented contrary to its conditions which it waived when it went into the arena of perfecting securities using its own private consultants at the expense of the Plaintiff. The Defendant has also argued that the Plaintiff did not lead evidence to show that they had increased their membership from 26. In reply the allegation that the Plaintiff purported to have more Directors than the maximum provided for in the articles of association was raised by the Defendant in their Written Statement of Defence. The Defendant therefore, had the burden of proof to adduce evidence in support of its defence and not vice versa. Counsel replied on the case of **J.K Patel vs. Spear Motors SCCA No. 04 of 1991** where Justice Seaton J.S.C held on the principal of burden of proof that;

‘...it rests, before evidence is gone into upon the party asserting the affirmative of the issue; and it rests after evidence gone into, upon the party against whom the tribunal at the question arises, would give judgment if no further evidence were adduced ... ”

The plaintiff had at closure of their case discharged their burden by demonstrating that it signed a loan agreement with the Defendant for the disbursement of Uganda shillings 580,000,000/=, that it provided securities which were perfected by the Defendant itself. The Plaintiff closed its case by seeking remedies for breach of contract. At that juncture, the burden of proof shifted to the Defendant to prove that its termination of the contract based on "governance issues" was justified. The Defendant had the burden to adduce before the court the latest annual returns and resolutions to prove that the Plaintiff's Directors were not increased. Counsel submitted that DW1 conceded that the bank never obtained the complete records of the Plaintiff from the registry of Companies which implies that there was no due diligence and as such the Defendant failed to prove that its termination of the contract was lawful and in the premises judgment ought to be granted as prayed for in the Plaint.

Judgment

I have carefully considered the plaintiffs action as well as the defence as disclosed by the pleadings of the parties, the evidence both by way of written witness evidence and cross examination and re-examination as well as documentary evidence. I have duly taken into

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$\$# xtra+ maximum735securityx 2017 style*

consideration the written submissions of counsel which have been set out above and taken into account the laws cited. I have accordingly considered the documentary evidence chronologically in relation to the reason given by the defendant for not disbursing the loan.

The first agreed issue is **whether the defendant was justified in cancelling the loan agreement?**

In arguing this issue the parties actually argued whether the defendant was in breach of the loan facility agreement that was executed by both parties as well as the arrangement in which the plaintiff deposited some securities and executed a mortgage deed and the defendant registering the mortgage on the title deed. The arrangement for the securities were executed on 5th June, 2013 but subsequently in September 2014 the defendant declined to disburse the Uganda shillings 580,000,000/= specified in the facility agreement. The way I understand the issue as framed is whether the defendant can be excused for refusing to disburse the loan on any legal grounds. I will accordingly set out the chronological account of events and the salient points on which this issue rests. Did the plaintiff meet the preconditions for disbursement of the loan? Did the Defendant waive some of these preconditions? The procedural question is whether there was a departure from the pleadings because the issues or controversies for trial under the rules arise from pleadings.

According to the pleadings and particularly the plaint paragraph 4 (d) on 4th June, 2013 the defendant approved a credit facility to the plaintiff of Uganda shillings 580,000,000/= and the plaintiff accepted the same. Subsequently the plaintiff executed mortgage deeds and powers of attorney which were handed over to the defendant pursuant to the offer letter.

I have accordingly considered the trial bundle and exhibit P1 is a copy of the lease offer. The lease over to the plaintiff is made by the City Council of Kampala in a letter dated 2nd June, 2010. What is material for purposes of resolving factual controversies is that the lease offer required the plaintiff to produce a register of all individuals operating in Nakasero Market and ensure that they were all incorporated in the plaintiff company and the register should be endorsed by the representatives of the groups. Secondly, in exhibit P2 in a letter dated 4th June, 2013 addressed to the directors of Nakasero Market Sitting Vendors Traders Limited (the plaintiff) the defendant offered a corporate loan in the amount of Uganda shillings 580,000,000/= for a period of 36 calendar months with a repayment in a period of 36 monthly instalments. Certain securities were agreed upon to secure the borrowing. Among the properties is one which became controversial namely plot 331 Block 273 volume 143 folio 3 at Konge , Kyadondo Kampala district registered in the names of Sam Bivanju.

The banking facility agreement is dated 5th June, 2013 and was exhibited as exhibit D4. The principal amount agreed in the facility agreement is a sum of Uganda shillings 580,000,000/= and the facility type is a corporate loan. The facility is indicated as having been sanctioned for payment of the lease premium to KCCA for land at Plot 4B Volume 2808 Folio 24 & Plot 7B Volume 2808 Folio 22 at Market Street. In clause 11 the security included the controversial Plot 331 Block 273 Volume 1435 folio 3 Kyadondo, Kampala district indicated as registered in the names of Kasirivu Yolamu.

In the facility agreement paragraph B there are preconditions set out for facility utilisation where it is agreed by the parties to the facility agreement as follows:

"Unless otherwise waived by the bank, the obligation of the bank to permit utilisation of the facility shall be subject to the following preconditions:-

1. Delivery to the bank of duly registered copies of the powers of attorney (if any) authorising the borrower to pledge the securities;
2. The execution of this agreement by the bank and the borrower and its registration with the relevant Government Department (s);
3. The execution and registration of the mortgage (s), debenture (s) lien (s) and charges in favour of the bank of its security referred to in this agreement;
4. Land search confirmation that there are no higher ranking mortgages, charges against, liens or other third-party interests and encumbrances registered in respect of any of the loan security referred to in this agreement;
5. The reimbursement or payment by the borrower of stamp duty, fees, government and other charges required for registration, searches and filing of the securities referred to in this agreement;
6. To ensure pledged collaterals against the fire naming Cerudeb as loss payee;
7. All requirements regarding collateral with POA to be fulfilled before the disbursement
8. Land title for plot 24312 be corrected to read 0.139 ha before the disbursement;
9. Perfection of security documents before the disbursement,
10. Undertaking from KCCA indicating that NMSVTL will be fully in charge of collecting market dues upon full payment of the lease premium.
11. Undertaking from KCCA to deliver land titles for plots 4B & 7B upon receipt of full payment of the lease premium."

The plaintiff deposited three land titles inclusive of the plot 331, block 273 and also included powers of attorney from the registered proprietors authorising the property to be pledged as security for the loan. A mortgage deed was also executed by directors of the plaintiff and registered with the Commissioner land registration. Admitted in evidence is exhibit D6 which is a mortgage deed in respect of plot 331 block 273 that turned out to be

controversial. The mortgage deed is dated 5th of June 2012 according to the first page of the mortgage but was signed on 17th June, 2013 according to the last page of the mortgage deed. Letters of administration to the estate of Sam Bivanju the registered proprietor were granted to Kasirivu Yolamu by the High Court in the Family Division Administration Cause No. 709 of 2013 on 16th October, 2013.

In a letter dated 4th of September 2014 admitted in evidence as exhibit P6 the defendant wrote to the directors Nakasero Market Sitting Vendors & Traders Limited advising that after review by the bank's senior management, the bank is unable to go ahead with the facility due to governance issues surrounding the company. The plaintiff is aggrieved by this turn of events and filed this action alleging breach of contract.

The allegation is that the refusal to disburse a sum of Uganda shillings 580,000,000/= is in breach of contract and the plaintiff seeks a declaration to the effect that the defendant breached its contract with the plaintiff when it unlawfully refused to disburse the said amount. Alternatively the plaintiff sought an order for return of certificate of title deposited by the plaintiff's directors to secure the loan and an order for cancellation of the defendant's mortgage registered on the certificates of title deposited with the defendant as well as a claim for general damages, aggravated damages, interests and costs of the suit. It is therefore clearly alleged that there was breach of contract by the defendant's refusal to disburse the loan. The facts in support of the alleged cause of action give the chronology of events culminating in the refusal of the defendant to disburse the loan. On the other hand the defendant averred in the written statement of defence that the offer of the loan to the plaintiff was a conditional offer and the plaintiff discovered serious anomalies. Firstly that the plaintiff in breach of contract offered as part of the security to the defendant land registered in the names of the deceased person Sam Bivanju associated with the plaintiff and also father of the deceased. One Kasirivu Yolamu is alleged to have unlawfully with the knowledge of the plaintiff acted in the name of the deceased person in the transaction. Having discovered the anomaly, the defendant bank undertook to carry out additional due diligence on the plaintiff and established that the plaintiff purported to have more directors than its articles of Association provided for according to a copy of the articles of Association attached. Secondly, some of the people who signed the resolution to borrow do not appear in the annual returns 2013 as directors of the plaintiff. Thirdly the defendant established that the developments on one of the securities namely block 273 volume 1435 folio 3, plot 331 extended beyond the boundaries of the plot, and the fact that had not been disclosed to the bank by the plaintiff and not earlier on picked up by the valuation process but which the plaintiff's associates knew but did not disclose. In the premises the defendant alleged that the omissions by the plaintiff amounted to misrepresentations and were intended to mislead the defendant bank, enticing the defendant to enter into the commitment with the plaintiff.

The rules of pleading expressly provide that issues arise from the pleadings of the parties. Order 15 rule 1 of the Civil Procedure Rules provides for the framing of issues and that they arise when a material proposition of law or fact is affirmed by one party and denied by the other. This may be material propositions of law or fact which the plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute a defence. Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. Most importantly Order 15 rule 1 (5) of the Civil Procedure Rules stipulates that the court shall after reading the pleadings if any and after examination of the parties or their advocates ascertain the material propositions of law or fact the parties are at variance and proceed to frame and record the issues on which the right decision of the case appears to depend. This approach is further reinforced by Order 21 Rule 5 of the Civil Procedure Rules which requires the court to reach a decision on each separate issue where they have been framed upon one or more of the issues sufficient for the decision of the suit.

From the pleadings, the question of justification requires the trial of the grounds for refusal to disburse the loan amount. These grounds are pleaded in paragraph 6 (a)-(c) of the defendant's written statement of defence. The question arises as to the burden of proof. This question is determined by the rules of evidence and I refer to the relevant provisions of the Evidence Act Cap 6 Laws of Uganda.

“101. Burden of proof.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

102. On whom burden of proof lies.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

Under section 101 of the Evidence Act, the burden is on the plaintiff to prove the existence of facts in support of the cause of action. The real question is whether it is sufficient for the plaintiff to have proven that there was an agreement executed between the parties for the disbursement of loans and there was compliance on the part of the plaintiff with the requirements of the agreement. If that question is answered in the affirmative, then the burden shifts on the defence to prove that the grounds for refusal to disburse the loan are justifiable. This arises from section 102 which provides that the burden of proof in a civil

suit or proceeding lies on the person who would fail if no evidence at all were given on either side. The burden shifts to the defendant only if the plaintiff has a prima facie case and evidence on the balance of probabilities in terms of having established a breach by failure to disburse according to the terms of the agreement. When is the burden of proof satisfied? The burden of proof is satisfied when the plaintiff proves the contract to disburse. The question is whether the burden is on the plaintiff to prove that it was entitled to the disbursement against the plaintiff's allegation that the refusal to disburse the loan was a breach of contract. The fact that the defendant refused to disburse the loan is not in contention and the question to be determined is whether the refusal was in breach of contract or justifiable in the facts and circumstances of this case. In coming up with the resolution of this issue, the court will be guided by the two corresponding questions of fact and law as to whether there was a breach of contract or justification for the refusal to disburse the loan. The determination requires an interpretation of the instruments executed by the parties. It requires principles of law such as estoppels on which the court was addressed. Yet it cannot be taken in isolation of the grounds for refusal advanced by the defendant. The question can be resolved by looking at the grounds advanced by the defendant for refusal of the disbursement of the loan. In other words if those grounds were justifiable then there was no breach of contract and the defendant acted within its rights.

It is an agreed fact in the joint scheduling memorandum executed on behalf of the parties to the suit by their lawyers that the plaintiff is a customer of the defendant and pursuant to that relationship, the plaintiff applied for a loan facility of Uganda shillings 580,000,000/=. On 4th June, 2013, the defendant approved the credit facility of Uganda shillings 580,000,000/= in favour of the plaintiff with conditions as to security or authorisation, acceptance and the issuance of powers of attorney from the plaintiffs directors authorising the creating of securities on their personal property. The plaintiff accepted the terms of the facility offer by signing and also deposited certificates of title for land comprised in plot 2434 Kyadondo block 243 land at Luzira registered in the names of Cissy Namatovu as a director of the plaintiff and the Donors of powers of Attorney. Secondly plot 331 Block 273 volume 143 folio 3 at Konge registered in the names of Sam Bivanju as director of the plaintiff and a donor of powers of attorney. The last property is plot 3186 & 3187 of 208 at Kawempe registered in the names of Dr Robert Kagoda as director and donor of powers of attorney. The last agreed fact is that on 4th September, 2013 the defendant cancelled the loan offer due to governance issues.

What are the governance issues raised by the Defendant?

The preconditions to the disbursement of the loan are specifically set out in the banking facility agreement exhibit D4 and paragraph B thereof and particularly clause 3 for the execution and registration of mortgages in favour of the bank of its security referred to in

the agreement and in clause 7 to give powers of attorney for the fulfilment before the disbursement.

It is not in dispute that there was a problem with the security known as Plot 331 Block 273 volume 1425 folio 3 at Konge, Kyadondo Kampala district registered in the names of Kasirivu Yolamu. The banking facility agreement is on the letterhead of the defendant bank and is dated 5th of June 2013. It is written in the last page thereof that the directors of the plaintiff would signify acceptance of the agreement by signing and returning a copy of the agreement and attached documents duly executed by 5th July, 2013. The people who signed as directors are:

1. Dr. Kagoda Robert
2. Sam Bivanju
3. Namatovu Cissy
4. Kakooza Godfrey
5. Atedu Florence
6. Pius Oyugi

The relevant title is exhibit P4 and it shows that a mortgage was registered on 12th July, 2013. Before further analysis of the certificate of title it is material to consider the mortgage deed itself. The mortgage deed is exhibit D6 and shows that it was executed on 5th June, 2016 and includes plot 331 Block 276 volume 1435 folio 3 as described above. The deed was executed by the signature of the directors of the plaintiff. It is indicated that it was executed by Sam Bivanju the second surety. Apparently the registered proprietor named above had passed away. The letters of administration to the estate of Sam Bivanju were granted to Kasirivu Yolamu (as father) on 16th of October 2013 by the High Court in exhibited D8. The first striking anomaly is contained in the banking facility agreement which would require that the title to be in the names of Kasirivu Yolamu. The property was however in the names of Sam Bivanju. Subsequently the intended registered proprietor obtained letters of administration about three months later. So the intended security was required to be in the names of Kasirivu Yolamu. In exhibit D9 he duly applied for registration on the title deed. The signature on the mortgage deed was therefore fraudulent and there is no evidence as to who signed as Mr Sam Bivanju. This also goes for the powers of attorney dated 5th of June 2013 in which one Kasirivu Yolamu represented that he was the registered proprietor of the relevant plot 331 block 273 volume 1435 folio 3 described above whereas he was not. At the time of execution of the power of attorney, he was not the administrator of the estate of Sam Bivanju (deceased). He subsequently obtained letters of administration. The testimony of PW1 Mr Kakooza Godfrey in paragraph 10 of the written testimony is that there were anomalies with regard to the security offered by Kasirivu Yolamu on behalf of the plaintiff however the defendant through one of its officials recommended a law firm to rectify this anomaly. The

Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$#\$ xtra+
maximum735securityx 2017 style

anomaly was rectified and the defendant's mortgage was properly registered. In fact the plaintiffs account was debited with Uganda shillings 1,720,000/= to be paid to Crested Law advocates as consideration for their services in this regard. In the premises the question is whether this violated the precondition for disbursement of the loan amount. My simple conclusion based on the evidence is that the plaintiff represented that the property to be given as security would be in the names of Kasirivu Yolamu. They never said it would be in the names of Sam Bivanju (deceased). The plaintiff therefore never offered as part of the security property registered in the names of a deceased person though indeed as a matter of fact the property which was intended as security was at the material time in the names of a deceased person. The plaintiff offered the names of Kasirivu Yolamu. It is therefore apparent that Mr Kasirivu Yolamu had in the meantime applied for letters of administration which were granted the three months later. The only logical conclusion based on the fact that the name Sam Bivanju is different from the name Kasirivu Yolamu, is that the Plaintiff expected the security to be in the names of Kasirivu Yolamu and hence it was put in the intended security. Most importantly the defendant was aware of the anomaly and subsequently and took steps to have it rectified. This was a case in which both parties worked together to implement one of the preconditions of the banking facility agreement by having the property registered in the names presented by the plaintiff after knowing that the property was in the names of a deceased person. I agree that the defendant is barred by estoppels from denying the transaction only on the ground that it was presented with a certificate in the names of a deceased person when steps were taken jointly by the parties to rectify the anomaly by having it in the names of the person in whose name it was supposed to be according to the bank facility agreement. In any case no prejudice was occasioned and a precondition of the mortgage agreement was for fulfilment prior to any disbursement and thereafter the defendant took further steps to implement the bank facility agreement. I also agree with the authorities on waiver and estoppels submitted by the Plaintiff's Counsel and would add two other authorities on election and waiver on the same issue that bars the defendant from raising the issue of the name on the certificate.

According to **Words and Phrases Legally Defined, 3rd edition 1 volume 2 D – J page 147**, the term "election" or the doctrine of election is defined in the case of **Scarf versus Jardine (1882) 7 App Cas 361** per Lord Blackburn:

"Where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon and as he had not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he had made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an

unequivocal act – I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way – the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election."

The defendant chose to have the anomaly rectified rather than avoid the banking facility agreement on that ground and cannot later on rely on the anomaly as a ground to refuse disbursement of the loan.

Furthermore, in the case of **Kamins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1970] 2 All ER 871** at 894 per Lord Diplock:

"The second type of waiver which debars a person from raising a particular defence to a claim against him, arises when he either agrees with the claimant not to raise the particular defence or so conducts himself as to be stopped from raising it" (see **Words and Phrases Legally Defined** third edition R – Z page 405)

The Defendant conducted itself in such a way as to lead the Plaintiffs to believe that the anomaly was rectified and was not a bar to the loan disbursement. The parties kept on engagement on other issues. This is reinforced by the evidence of the defendants witness Mr Innocent Kyakuha in paragraph 8 of the written testimony when he testified that the anomaly was rectified when the title was eventually registered in the agreed names. The defendant cannot go back to complain about the registration of the title deed in the names of the deceased.

The other reasons given by the defendant for avoiding disbursement relates to 2 issues namely after discovery of the anomaly the bank decided to do or conduct an additional due diligence on all properties proposed to be tendered as security and discovered that plot 331 had two tenement blocks built on the plot which extended or encroached on neighbouring plots by 0.014 acres. Secondly, the bank sought clarification on the status of the plaintiff company and established that the annual returns for 2013 exhibit D3 had 47 directors in excess of what the memorandum and articles of the company exhibit D2 provided. Thirdly, the bank discovered that some of the people who had signed on the resolution to borrow exhibit D5 do not appear in the annual returns exhibit D3 as directors and the signatories included Kasirivu Yolamu, Dr. Kagoda Robert, Nabisubi Margaret Semakula and Mbazira Edward.

In general a loan is assessed for good health by the responsible persons in a financial institution. The conditions for the disbursements in the loan agreement need to first be considered. In exhibit D4 and the first page thereof it is written that the bank confirmed subject to the conditions precedent and upon presentation and warranties as set out in the agreement its willingness to make available the banking facility. Again I will make reference to paragraph B of the banking facility agreement which gives conditions

Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$\$# xtra+
maximum735securityx 2017 style

precedent. It is provided that the obligation of the bank to permit utilisation of the facility was subject to the preconditions. This includes clause 10 of paragraph B which is an undertaking from KCCA indicating that the plaintiff would be fully in charge of collecting market dues upon full payment of the lease premium. Secondly an undertaking from KCCA to deliver the land titles to be developed upon receipt of full payment of the lease premium.

I have as a necessary step to bill the context of the loan issue referred back to exhibit P1 which was the award of the lease for the development of plots 4B and 7B by Kampala Capital City Authority dated 2nd of June 2010 to the plaintiff. The plaintiff was required to produce a register of all individuals operating in Nakasero Market to show that they were all incorporated in the plaintiff company and the register should be endorsed by representatives of all their groups. In exhibit P 16 in a letter dated 9th of December 2013 and addressed to Kampala Capital City Authority the defendant wrote to the Directorate of Legal Affairs on the issue of the credit facility in favour of Nakasero Market Sitting Vendors and Traders Limited (the plaintiff) with a copy to the plaintiffs seeking confirmation on the following:

"To: The Directorate of Legal Affairs,

Kampala capital city authority (KCCA),

...

1. The balance due for completion of payment for premium ground rent of the aforementioned the properties.
2. Confirmation that the aforementioned land titles would be handed over to Nakasero Market Sitting Vendors and Traders Limited upon full payment of the lease premium and ground rent fees.
3. Confirmation that the (plaintiff) will be fully in charge of collecting market dues upon full payment of the lease premium.
4. The account number, account name, the bank and the branch where you would like us to remit payment.
5. The BANK commits itself to channel the funds as advised and upon receipt of the confirmation by yourselves.

Your earliest response shall be of mutual advantage ..."

The letter of the Defendant is evidence that by the 9th of December, 2013, the defendant was to try to have fulfilled the conditions for disbursement of the loan. These include preconditions number 10 and 11 in paragraph B of exhibit D4 which is the banking facility agreement. For emphasis preconditions number 10 provided that there would be an undertaking from KCCA indicating that the plaintiff will be fully in charge of collecting

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$\$# xtra+ maximum735securityx 2017 style*

market dues upon full payment of the lease premium. This is number 3 in the above letter written by the defendant to KCCA. Secondly preconditions number 11 was to obtain an undertaking from KCCA to deliver land titles for plots 4B and 7B upon receipt of full payment of the lease premium. The defendant sought in number 2 the confirmation from KCCA. The bank committed itself to channel defines as advised upon receipt of the confirmation from KCCA.

In exhibit P18 the Directorate of Legal Affairs of KCCA in a letter dated 7th of April 2014 wrote to the plaintiff on the subject of Nakasero market with a copy to the Manager Credit Services, Centenary Rural Development Bank. The plaintiff was reminded in that letter that on 2nd June, 2010 the town clerk City Council of Kampala communicated a decision of the Kampala District Contracts Committee awarding a sublease to the plaintiff. Some of the salient conditions attached to the sublease were for the plaintiff to produce and submit a register of all individuals operating in Nakasero market to prove that they had all been incorporated in the plaintiff company. It was written that by consent in High Court Miscellaneous Cause Number 32 of 2012 KCCA as the successor of KCCA bound itself to execute a sublease agreement upon the plaintiff honouring and abiding by the terms and conditions of the sublease offer. In the second last paragraph of the letter they write that upon full compliance with the terms of the sublease offer, a sublease agreement would be executed between KCCA and the plaintiff.

The question of registration of all members of Nakasero Market is obviously a touchy question because in exhibit D1 the defendant attached the Memorandum and Articles of Association indicating in the articles of Association that the plaintiff company is a public company. It had subscription page of the Memorandum and Articles of Association names and signatures of 187 subscribers. In exhibit D2 which is an annual return of the company having a share capital there are 14 directors but not all documents were attached. The annual return is dated 12th of February 2013. On the other hand the resolution of the plaintiff to borrow from the defendant is dated 22nd of March 2013 exhibit D5. It shows that it is a resolution in a special meeting for the Board of Directors held on the company premises on 2nd March 2013. The resolution is stamped for bank purposes. Exhibit D2 is an incomplete document because it does not have a list of all the directors because the other least of directors is indicated as attached as "B" but is not part of exhibit D2. I note that the only common name therein is that of Kakooza Godfrey, Oyugi Pius and Atedu Florence who signed as a director on the special resolution of the board of directors. The directors who signed on the resolution are named as Kakooza Godfrey, Kasirivu Yolamu, Atedu Florence, Dr. Kagoda Robert, Namatovu Cissy, Pius Oyugi, Mugenyi Fred, Mbazira Edward and Kintu Emma.

A careful scrutiny of the annual return exhibit D2 shows that it was received in June 2014. In fact it was filed on 23 June 2014. The resolution to borrow was filed on 3 December
Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$\$# xtra+
maximum735securityx 2017 style

2013 exhibit D5 and can only be based on an earlier list of directors which can be verified from the registry. Exhibit P13 is a form notifying the registry of the particulars of Directors and Secretaries of the Plaintiff. It has 26 directors whose names are listed. It includes Oyugu Pius, Etedu Florence, Kakooza Godfrey, Kintu Emma as common names also included in the resolution. The names of Kasirivu Yolamu, Dr. Kagoda Robert, Namatovu Cissy, Mugenyi Fred, Mbazira Edward are not included.

According to DW1 in paragraph 10 of the written testimony, there was lack of clarity on how the current directors were appointed, discrepancies in the management, and membership of the plaintiff which presented serious challenges and the bank deemed the governing issues of the company were not suited to the commitment it was being led into and therefore wrote to the plaintiff declining to disburse the loan.

The conclusion of the bank was communicated to the plaintiff in exhibit P6 on 4 September 2014 in the following words:

"Reference is made to our letter for a loan facility of Uganda shillings 580,000,000/= (Ugx. Five hundred eighty million only). We regret to advise that after review by the bank's senior management, the bank is unable to go ahead with the facility due to governance issues surrounding the company."

The plaintiff's counsel submitted that Mr Innocent Kyakuha the Defendant's witness, failed to demonstrate the governance issues and did not produce in court the full list of directors of the plaintiff. There were no search results from the Registrar of Companies (Uganda National Registration Services Bureau). Secondly that he had never seen the resolution dated 7th of March 2013 wherein it was resolved that all those persons or handed in the securities would be directors. He contended that had the Defendant searched the registry, they would have found that the persons who signed the bank documents were authorised and hence there was no need to cancel the loan agreement. On the other hand, the defendants counsel submitted that upon the defendant adducing evidence that Yolam Kasirivu, Nabisubi Margaret Semakula, Mbazira Edward and Dr, Kagoda Robert were not directors of the plaintiff, the burden of proof shifted to the plaintiff to show that they were. The defendant indeed produced exhibit D2 which does not have the names of the above persons as directors. The only issue is that the exhibit shows that there was an additional list which was not included. I have duly noted that by resolution made on 1st October 2007 by an extraordinary general meeting of shareholders, Namatovu Cissy, Mujenyi Edward and Kasirivu Matata Yokana among other were appointed new directors. However this was not notified in the subsequent returns of the plaintiff company.

I have carefully considered the issue and it is my holding that it need not be resolved on the question of the burden of proof but that of the rights and obligations of the borrower

and lender under the banking facility agreement. In paragraph B of exhibit D4 the plaintiff was required to deliver to the bank duly registered copies of powers of attorney authorising the borrower to pledge the securities. In paragraph A clause 11(iv) the security to be provided by the plaintiff included personal guarantees by company directors; Kakooza Godfrey, Atedu Florence, Oyugi Pius, Ndugga Richard, Cissy Namatovu, Kasirivu Yolamu and Robert Kagoda. It was the obligation of the plaintiff to provide the personal guarantees of the said directors. However upon perusal of exhibit D2 being the annual return of the plaintiff after 12 February 2013 and filed on 23 June 2014 the only names that are replicated in the annual return of directors are those of Kakooza Godfrey, Atedu Florence, Oyugi Pius and Nduga Richard. Furthermore, exhibit P13 has 26 names of directors as by 27 February 2007 and gives the particulars of directors and secretaries. The 26 names replicated in the annual return of directors by the names in exhibit D2 remains the same. Exhibit P13 where there are 26 names is the plaintiffs own document and also part of the testimony of PW1 in paragraph 4 of the written testimony. The plaintiff wrote that pursuant to the plaintiff's condition of payment of premiums and ground rent to Kampala Capital City Authority where the market is situated, the plaintiff through its directors agreed to borrow from the defendant bank. The relevant documents included exhibits P8, P13, P 14 & P 15. Exhibit P13 was presented as part of the documents required for the borrowing.

These are the names known to the defendant. It is a question of prudence whether the defendant which is a financial institution was satisfied with this arrangement. The defendant had the right to terminate the facility agreement because of governance issues that arise from the facts and circumstances above. The question really for determination cannot be whether there was breach of contract because it is the banks prudence whether to disburse the loan or not. Obviously there are aggravating circumstances such as the demands of KCCA of the plaintiff which introduces more management issues for consideration by the defendant in the disbursement of the loan. The defendant opted out in the circumstances and this in my opinion is a question of prudence. Moreover the mortgage registration was a prerequisite to borrowing among other conditions. The registration of the mortgages did not conclude the preconditions required for borrowing.

The question is whether the plaintiff is entitled to compensation and not whether the bank had justification to pullout of the deal because the bank from the findings on issue two which I have taken into account cannot be compelled to lend in most circumstances. The bank as a business entity did not accept the risk of lending to the Plaintiff in the circumstances and pulled out. Furthermore a declaration of breach of contract also has to be considered in the context of the second issue as to whether the plaintiff is entitled to the remedies prayed for.

In the premises issue number one can only be answered in favour of the defendant bank which declined to take the risk of lending to the Plaintiff.

Whether the plaintiff is entitled to any remedies?

The plaintiff filed this action on 19th of September, 2014 exactly 15 days after the letter of the defendant dated 4th of September 2014. By 7th January, 2015 the defendant's advocates wrote a letter to the plaintiff's advocates in exhibit P12 indicating that they enclosed certificates of title and release of mortgage for all the securities the subject matter of the banking facility.

In the plaint the plaintiff seeks a declaration that the defendant breached its contract with the plaintiff by refusing to disburse the agreed sum of Uganda shillings 580,000,000/=.

Upon resolution of issue number one in favour of the defendant, the declaration prayed for cannot be granted. Secondly the plaintiff seeks a refund of all expenses such as arrangement fees, legal fees, and insurance fees. The plaintiff also seeks general damages in the amount of the loan facility, interest, aggravated damages and an order for return of certificates of title free from any encumbrances.

Some of the orders sought by the plaintiff were overtaken by events because the return of certificates of title is confirmed by exhibit P12 and is no longer an issue.

In support of the remedies the plaintiff's counsel submitted that the plaintiff is entitled to an award of compensation for the loss or damage caused by failure to disburse the loan. He prayed for an award of Uganda shillings 3,830,000/= mortgage fees debited from the Plaintiffs account on 14th of June 2013. Secondly a sum of 1,720,000/= paid to the banks lawyers. The Plaintiffs counsel also prayed for general damages of Uganda shillings 580,000,000/= for grave loss, damages and loss of profit. Secondly he prayed for interest of the amounts claimed at 6% per annum.

In reply the defendants counsel submitted that the prayer for Uganda shillings 580,000,000/= in general damages is the exact amount which would have been disbursed under the loan agreement had the parties proceeded with it. It is a disguised backdoor attempt to obtain a remedy of specific performance which according to **South African Territories Ltd versus Wallington (1898) AC 209** is not available in lending transactions.

I have not had the benefit of reading the case of **South African Territories Ltd versus Wallington** (supra). The defendants counsel attached the **Principles of Banking Law Second Edition by Ross Cranston, Oxford University press** at page 306 where it is written as follows:

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$\$# xtra+ maximum735securityx 2017 style*

"Specific performance, the authorities say, is not generally available to the borrower to compel the bank to lend. Damages are an adequate remedy, especially in the case of unsecured loan; specific performance would create a position of inequality, since the borrower would get the money back to the lender would have only the hope of repayment. The Privy Council has said, without elaboration, that in 'exceptional cases' specific performance might be awarded in the case of an unsecured loan agreement. Possibly this would be if there were necessary difficult questions about the measure and remoteness of damages or obviously great delay and expense in obtaining them.

The rules for damages are easy enough to state. The general rule is that only nominal damages are available, since it is assumed that a borrower can always obtain the money in another quarter. If money is obtainable only at less advantageous rates, damages can be awarded to cover the difference."

I have further considered the remedy of specific performance of a loan or damages in the exact amount applied for in lieu thereof from a passage from **Philip H. Pettit "Equity and the Law of Trust" Fourth Edition Butterworths** page 463 on the remedy of specific performance in contracts to lend or advance money and this is what he writes:

"Such contracts are not enforceable by specific performance, whether or not the loan is to be secured by mortgage. The reason is that the remedy at law is adequate – the borrower can borrow the money elsewhere, and claim at law if he is compelled to pay a higher rate of interest, and likewise the lender has a simple money demand if his money has lain idle or been invested less advantageously. ..." (With reference to *Larios v. Bonany y Gurety* (1873), LR 5 P.C. 346; *Western Wagon and Property Co v. West*, [1892] 1 Ch. 271; *Loan Investment Corporation of Australia vs Bonner*, [1970] N.Z.L.R. 724 P.C.)

I agree with the defendants counsel that the plaintiff cannot be awarded specific performance by ordering the defendant to pay general damages of **Uganda shillings 580,000,000/=**. There is no evidence on record to show that the Plaintiff had to borrow money elsewhere at a higher interest to be able to claim for the difference. Secondly the claim is for loss of profit and damages, yet the loan was intended for a specific item of payment of lease premium and it was expected that the Plaintiff would collect and remit market dues upon full payment of lease premium according to the banking facility agreement paragraph A (5) and B (10) thereof and marked as exhibit D4. There cannot be any business where KCCA had not yet concluded handing over collection of revenue and it was just a deal in the making. There was therefore no loss of profit.

I further agree that an award of general damages of Uganda shillings 580,000,000/= is a disguised order of specific performance of the loan facility agreement exhibit D4. The above authority also partially is an answer to the first issue on the justification for refusal to disburse the loan. The plaintiff could obtain the loan elsewhere and the only question is whether there was delay which inconvenienced the plaintiff from seeking the remedy of obtaining the loan elsewhere within a reasonable period.

I have carefully considered the evidence which comprises of the inconvenience caused to the plaintiffs by the delay before a final decision was made by the defendant and also for the holding of the securities making it difficult for the plaintiff to commence development of the market and to source alternative funding. The Plaintiff was kept on the hook as it were expecting to get a disbursement when suddenly and obviously unexpectedly, in light of the numerous efforts made to comply with the conditions precedent for disbursement, the defendant pulled out of the deal.

The agreement is defeated by the banking facility agreement which give specific preconditions before disbursements to be met by the plaintiff and which were not satisfactorily met. This included undertakings by KCCA. I however agree that the plaintiff was subjected to a lot of inconveniences and expenses only to be told at the end of about a year that the loan would not be disbursed. The plaintiff only got a release of securities in 2015. The release of securities ought to have followed on the heels of the letter informing the plaintiff that the top management of the defendant had declined to disburse the loan. Given the period of time taken on the issue, the plaintiff was greatly inconvenienced and had to source for alternative funding. It is my finding that the defendant had a right to refuse to disburse the loan provided it reimburses the plaintiff reasonable expenses which the plaintiff had to incur to process all the requirements demanded by the defendant bank over a period of over six months. The plaintiff was further inconvenienced from seeking alternative funding immediately when the securities were released in exhibit in January 2015 after the suit was filed.

In the premises, the defendant shall reimburse the plaintiff for all the expenses for registration of mortgage, legal costs for rectification of the names in plot 331 amounting to Uganda shillings 5,550,000/=.

The Plaintiff cannot be awarded more than below because the period taken before termination was to fulfil preconditions of disbursements which were not met to the satisfaction of the Defendant. The preconditions in the facility letter have already been discussed above. In the premises the plaintiff is awarded general damages for inconveniences of delaying the release of securities after refusal to disburse the loan on the 4th of September 2014. The plaintiff is awarded Uganda shillings 10,000,000/= for the

inability to source alternative funding between 4th September 2014 and January 2015 when its securities were released as well as for the inconveniences and expenses suffered.

Interest is awarded on the above amounts at court rate from the date of judgment till payment in full.

In the circumstances of this case where the plaintiff did not succeed substantially on the various claims, but succeeded only on a small portion, each party shall bear its own costs of the suit.

Judgment delivered in open court on the 3rd of March 2017

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Counsel Lukongwa Aubrey holding brief for David Kaggwa Counsel for the Plaintiffs

Plaintiffs are in court

Defendant is absent

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge

3rd March 2017