THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 802 OF 2015

1. **WILLS INTERNATIONAL ENGINEERS & CONTRACTORS LTD}**

2.GEORGE WILLIAM KIYEGA}.....PLAINTIFFS

VERSUS

DFCU BANK LTD}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiffs action against the defendant bank is for declaratory orders that the defendant is illegally holding the plaintiffs title in respect of Bunamwaya Kyadondo block 260 Plot 7347 and has illegally, encumbered it with a mortgage. The suit is also for a permanent injunction to restrain the defendant or any of their servants/agents from interfering with the plaintiff's ownership and peaceful use of the land, general damages and orders to stop an illegal sale of property in block 260 Plot 7346 and for costs of the suit.

The defendant denied the claims in the plaint and admitted that it erroneously registered a mortgage on Plot 7347. Apart from that the defendant’s defence is that the plaintiff owes money secured by a mortgage on Plot 7346 and it is entitled after due process to proceed to realise the outstanding amount. The Defendant accordingly counterclaimed for the amount of Uganda Shillings 416,764,552 together with the interest accruing at the rate of 23% per annum as well as costs of the suit.

At the hearing, the Plaintiff was represented by Counsel MacDosman W. Kabega of Messrs Tumusiime, Kabega & Co. Advocates while the Defendant was represented by Counsel Richard Obonyo of Messrs Kigozi, Sempala, Mukasa Obonyo (KSMO) Advocates.

On the 22nd of February 2017 both parties agreed to facts numbers 1, 2, 3 and 4 of the draft scheduling notes of the defendant. The points of disagreement were the issues for determination. The agreed points of agreement/facts are as follows:

- Between June and November 2014, the first plaintiff obtained loan facilities from the defendant comprised of: a contract finance facility of Uganda shillings 220,000,000/=; a performance bond facility of Uganda shillings 73,449,366/=, a medium term loan facility of Uganda shillings 200,000,000/=.
- The monies were secured by land comprised in Bunamwaya block 265 plot 7346.
- The defendant registered mortgages on land comprised in Bunamwaya block 265 plot 7346 and Bunamwaya block 265 plot 7347.
- The defendant issued a notice of sale of mortgaged property to the plaintiffs.

The issues raised for trial are:

1. Whether the plaintiffs are entitled to general damages for mortgages registered illegally on land comprised in Block 265 Plot 7347 and Plot 7346.
2. Whether the plaintiff is indebted to the defendant in the amounts claimed in the counterclaim of Uganda Shillings 416,764,552/=
3. Whether the defendant can sell the mortgaged land comprised in Bunamwaya Block 265 Plot 7346 to recover the outstanding loan balance.
4. Remedies

The court was addressed in written submissions and the material facts are sufficient covered in the written submissions and are not controversial other than there being a controversy about whether the plaintiffs owe the money claimed in the counterclaim.

Written Submissions:

Issue 1

Whether the plaintiffs are entitled to general damages for mortgages registered illegally on land comprised in Block 265 Plot 7347 and Plot 7346?

The plaintiff's Counsel relied on the testimony of the 2nd Plaintiff (PW2) that he simply deposited the title for Block 265 Plot 7347 with the Defendant for safe custody and not for use as collateral for any loan which fact was not denied by the Defendant. DW1 confirmed in cross examination that the Defendant had a mortgage registered on the titles yet the 2nd Plaintiff had not given it for any facility. He also confirmed that the court ordered them to return the title deeds of Plot 7347 to the Plaintiffs unencumbered but they returned it with the mortgages not removed and though with a release of mortgage letter. In further cross-examination DW1 testified that their release letter was for only one mortgage on the title and yet there were three mortgages entered as such there were no release letters for the rest of the mortgages. In exhibit P 23 it is shown that one of the mortgages was cancelled and yet the search letter exhibit P9 clearly shows that there are still three other mortgages registered on the title. The Plaintiff's counsel submitted that this was an act of fraud on the part of the defendant. PW2 testified that as a result of the illegal mortgages on his land, he was unable as a businessman to use it to get funding for his business. The defendant's action embarrassed the 2nd Plaintiff and caused him to suffer loss and stress for which he is entitled to general damages. Before a Mortgage can be registered on a title deed, a claim to an interest in the property must exist. In this case, the Defendant had no interest whatsoever in the 2nd Plaintiff's property but went ahead and illegally encumbered it to date. Counsel cited the case of **Makula International Ltd vs. His Eminence Cardinal Nsubuga & Another (1982) HCB 11** where the Supreme Court of Uganda held that a Court of law cannot sanction what is illegal and illegality once brought to the attention of court, over rides all questions of pleadings including any admissions therein. The Defendant illegally encumbered Block 265 Plot 7347 registered in the names of the second plaintiff which he had handed over for safe custody. PW2 testified that he received a facility of Uganda Shillings 318,000,000/- secured by Block 265 Plot 7346 as security and fully paid the loan but to date the mortgage encumbrance still appears on the title illegally. DW1 confirmed that this money was paid by the Plaintiff. PW2 further testified that the Defendant illegally transferred a mortgage to Block 265 Plot 7346 from Plot 7347 which does not/or is not reflected in the Land

Registry under search letter exhibit P8 and which position was confirmed by PW1 the Land Registrar from Wakiso and DW1. Counsel submitted that this was a case of outright forgery.

Lastly, the Defendant executed a mortgage and pledged Block 265 Plot 7346 as security and charged the Plaintiffs Uganda Shillings 1,100,000/= as fees under a Loan Agreement but this money was not even remitted to Uganda Revenue Authority (See exhibits P37 and P 38). The Plaintiffs counsel submitted that the defendant should not be permitted to take a benefit from these illegalities. Any claims against the Plaintiffs arising from the fraudulent documentation in the Counter-Claim should therefore be rejected. It would be absurd for court to allow a litigant who has engaged in fraudulent documentation like the Defendant has to be allowed to claim a benefit out of them. The Court made an Order on the 10th of June, 2016 directing the Defendant to release the 2nd Plaintiff's Title in Block 265 Plot 7347. DW1 further accepted in cross examination that while they gave back the title, they never removed the mortgages encumbrances on the title deed to date. He contended that this was in contempt of court and punitive damages ought to be awarded against the Defendant.

In reply, the defendant's Counsel submitted that it was not in dispute that mortgages were registered on the title for the land comprised in Kyadondo Block 265 Plot 7347 under the instruments cited in evidence when this should not have been done. DW1 Mr. Mustafa Kasaga testified that the mortgages were registered in error by the Registrar of Titles to whom the Defendant presented the land title in issue. Both the Registrar of Titles and the Defendant did not notice the error until later when the present suit was instituted. The Registrar of Titles conceded that there was an error on their part. The Defendant did not receive a formal request from the Plaintiffs for release of the mortgage. As soon as the error relating to the mortgage registration came to the Defendant's attention, it issued a release of mortgage instrument to the Plaintiffs and evidenced in letter dated 4th August, 2016, Exhibit D4. The Defendant had a good Bank/Client relationship with the Plaintiff with whom it has acted in good faith and mutual respect in all dealings including transactions giving rise to this suit. In view of the good and well established relationship between the parties, the Defendant did not hesitate to release the erroneously entered mortgages on Plot 7347 and

returned the title deeds to the Plaintiff. The Defendant's counsel submitted that the award of general damages is at the discretion of the court which should always be exercised having in mind, the circumstances of each case. The Plaintiffs did not suffer any loss on account of the encumbrances erroneously registered whose release it has not objected to and no concrete evidence has been presented to Court to augment the claim for general damages allegedly suffered by the Plaintiffs. Counsel invited court to find that in the circumstances there is no merit for an award of general damages to the Plaintiffs.

Issue 2

Whether the plaintiff is indebted to the defendant in the amounts claimed in the counterclaim of Uganda Shillings 416,764,552/=?

The plaintiff's Counsel submitted that the Plaintiff was not indebted to the defendant to the extent of an amount of Uganda shillings 416,764,552/= at the time of the issuance of the notice of sale of the mortgaged property against the Plaintiffs on 9th November, 2015. The Defendant did not know the exact amount that was owed by the Plaintiffs if any because DW1 in his letter Exhibit P13 of 11th March, 2015 to the Plaintiff claimed Uganda Shillings 234,247,582/= as outstanding yet in exhibit D6 the balance shown is Uganda Shillings 214,163,588/=. On 15th June, 2015 DW1 wrote to the Plaintiff in exhibit P14 indicating the loan amount due as Uganda Shillings 581,000,000/= and which he admitted in cross examination as being false. Both the outstanding loan of Uganda Shillings 391,383,768/= and the arrears amount of Uganda Shillings 391,383,768/= were false. On the 13th August, 2015 DW1 wrote to the Plaintiff in exhibit P16 indicating the loans limit amount of Uganda Shillings 581,000,000/= and that the outstanding balances as of 12th August, 2015 in total was Uganda Shillings 391,383,768/=. He confirmed in cross examination that these totals were all false. On the 2nd November, 2015 DW1 wrote to the Plaintiffs in exhibit P17 indicating the loan limit amount of Uganda Shillings 581,000,000/= and that the outstanding balances as of 29th October, 2015 in total was Uganda Shillings 391,383,768/=. He also confirmed in cross examination that these totals were all false. The Defendant's counter - claim is for a sum of Uganda Shillings 416,764,552/-. The law on special damages is well settled that they must be proved specifically. DW1 admitted in cross examination that their figures are false and that the additions are wrong yet this formed the basis

of their claim against the Plaintiff. Even the Bank statement filed by the Defendant exhibits D5 and D6 do not reflect this amount as due from the Plaintiffs. In his evidence PW2 stated that he never took the performance bond facility of Uganda Shillings 73,449,366/= which position was confirmed by DW1. But DW1 testified that this amount was included in the totals that appear in exhibit P12 where a total sum of Uganda Shillings 416,764,552/= was demanded from the Plaintiffs. DW1 denied in re-examination that this figure is not being demanded from the Plaintiffs. In view of this admission by the defendant that their figures were false and yet it formed the basis of thee Notice of Sale, Counsel submitted that the defendant did not know the amount that the Plaintiff owed by 9th November, 2015. The Plaintiff's were not therefore indebted in the sums as claimed in the counter claim and the counter claim ought to fail for failure to prove it specifically.

In reply the defendant's Counsel submitted that DW1 testified that the loan facilities obtained by the 1st Plaintiff have not been fully repaid and this is the foundation of the counterclaim. By Facility Letter dated 30th June, 2014 Exhibit P5, the 1st Plaintiff obtained a Contract Finance Facility of Uganda Shillings 220,000,000/= (Uganda Shillings Two Hundred Twenty Million) from the Defendant. The facility was to facilitate execution of contracts awarded to the 1st Plaintiff and was secured by a continuing charge over land comprised on Block 265 Plot 7346 in the names of the 2nd Plaintiff and the 2nd Plaintiff's personal guarantee. By a further facility letter dated 21st November, 2014 (Exhibit P4), the 1st Plaintiff obtained a medium term loan of Uganda Shillings 200,000,000/= (Uganda Shillings Two Hundred Million) from the Defendant. The facility was sanctioned for purposes of equity release and working capital and was to be secured by a further charge over property comprised in Block 265 Plot 7346 in the names of the 2nd Plaintiff and the 2nd Plaintiff's personal guarantee and rental assignment. DW1 testified that the 1st Plaintiff as principal debtor did not service the above loan facilities as agreed and he also did not deny its indebtedness to the Defendant in the several engagements that the parties had prior to and after the institution of the suit to the tune of Uganda Shillings 416,764,552/= at the time of issuance of notice of sale of mortgaged property against the Plaintiffs on 9th November, 2015. This debt was not settled in full and the 1st Plaintiff remains indebted to the Defendant to a tune of Uganda Shillings 354,232,440/= (Uganda shillings three hundred fifty four million two hundred thirty two thousand four hundred forty

only) after taking into account Uganda Shillings 210,000,000/= (Uganda shillings two hundred ten million only) deposited by the Plaintiffs after institution of this suit. The Plaintiffs outstanding loan exposure and repayments are reflected in the statements of account exhibits D2, D3, D5 and D6. DW1 testified that under the regulations, the Defendant is entitled to demand for interest hitherto suspended which should be taken into account in computing the outstanding sums payable by the Plaintiff. This is the position stated in regulation 9 (2) of the Financial Institutions (Credit Classifications and Provisioning) Regulations, 2015. The Plaintiffs admit that the 1st Plaintiff received the loan funds from the Defendant. The Plaintiffs witness testified that they have been servicing the loans and are not indebted to the Defendant in the sum of Uganda Shillings 416,764,552/= but did not provide any evidence to show what they have paid and what is outstanding as would contradict the evidence of the Defendant in Exhibits D2, D3, D5 & D6. In stating that the Plaintiffs are not indebted to the Defendant in the sum of Uganda Shillings 416,764,552/=, the Plaintiff's admitted indebtedness to the Defendant to a certain amount. The letter dated 27th July, 2015 Exhibit P29 attached to the Plaintiffs trial bundle at page 112 is even more instructive as it indicates the Plaintiffs total admission of indebtedness to the tune claimed by the Defendant. The Plaintiffs proposed a payment plan which they have not honoured. Counsel invited court to find that the evidence presented confirms that the Plaintiffs are indebted to the Defendant as pleaded in the counterclaim.

Issue 3

Whether the defendant can sell the mortgaged land comprised in Bunamwaya Block 265 Plot 7346 to recover the outstanding loan balance?

The plaintiffs' Counsel submitted that the Defendant cannot sell the Plaintiffs property because one mortgage on it under Instrument No. WAK00038391 is fraudulent. Court should not allow a party to make a benefit based on illegal/fraudulent documents. In cross examination DW1 confirmed that Instrument No. WAK00038391 for Uganda Shillings 200 million does not appear on exhibit P8 being the search letter and yet it is reflected on exhibit P 24 which is the title in possession of the Defendant. He did further confirm that this encumbrance on the title was fake. Counsel submitted that on another mortgage WAK00058796 for Uganda Shillings 220 million he demonstrated to Court that the Bank did not pay stamp duty and went ahead to come up with

a forged URA payment receipt. This court cannot condone a fraud which has been cited and admitted by a defence witness. Based on the illegality brought to the attention of court, the court should not allow the Defendant to sell the Plaintiff's mortgaged property comprised in Block 265 Plot 7346.

In reply to the plaintiffs' submissions on this issue, the defendant's Counsel submitted that if court finds that the 1st Plaintiff is indeed indebted to the Defendant in the sum claimed or at all, the debt is secured by the land comprised in Block 265 Plot 7346 which was offered as mortgage security in the facility letters for the outstanding loan (Exhibits P4 and P5). The Defendant followed due process under the Mortgage Act to realize the security and as such the Defendant is entitled to sell the mortgaged property to recover the outstanding loan balance. Paragraphs 4, 6 & 9 of Mustafa Kasaga's Witness Statement show that the 1st Plaintiff obtained a Contract Finance Facility and Medium Term Loan Facility of Uganda Shillings 220,000,000/= and 200,000,000/= respectively which have not been fully repaid and Uganda Shillings 354,232,440/= remains outstanding. The outstanding sum to the Defendant is reflected in the statements of account marked Exhibit D2, Exhibit D3, Exhibit D5 & Exhibit D6 and confirmed by the testimony of DW1. The 2nd Plaintiff in his testimony to Court admitted indebtedness and did not provide evidence of full repayment of the loan to contradict the Defendant's evidence. As to the existence of a mortgage to secure the debt, DW1 testified that the Defendant has a valid mortgage registered over the land comprised on Kyadondo Block 265 Plot 7346 to secure the 1st Plaintiffs borrowings. The defendant is either entitled to repayment by the Plaintiffs in accordance with loan facility agreement or to realize the mortgages securing the facilities after due process of law to recover the loan sum outstanding as indicated in the counterclaim. The Plaintiffs do not dispute the existence and validity of the legal mortgage registered on land comprised in Kyadondo Block 265 Plot 7346 land at Bunamwaya. The DW1 testified that the Defendant issued relevant demands for payment against the Plaintiffs including a Notice of Sale of security for the land comprised in Kyadondo Block 265 Plot 7346 and also advertised sale of security, but the Plaintiffs did not honour the demand and notices. The Defendant admitted the notice of sale notices in the testimony of PW2 and paragraph 24 thereof.

Under section 20 (e) of the Mortgage Act No. 8 of 2009 where the mortgagor is in default and does not comply with the notice served on him or her under section 19, the mortgagee may sell

the mortgaged property. Further Section 26 (1) of the Mortgage Act, a mortgagor who is in default of his or her obligations under a mortgage and who remains in default at the expiry of the time provided for the rectification of that default in the notice served on him or her under section 19 (3) gives the Mortgagee a right to exercise his or her power to sell the mortgaged land. In the case of **Savers International (U) Ltd V DFCU Misc, Application No. 283 of 2002**, Hon. Justice Okumu Wengi cited with approval the holding of Justice Richard Kwach in **Bharmal Kanji Shah and another v Shah Depar Devji [1965] 1 EA 91** that: "As I understand the law, a dispute as to the exact amount owed under a mortgage is not a ground upon which a mortgagee who has served a valid statutory notice can be restrained from exercising its statutory power of sale."

He further submitted that since the Plaintiff is indebted to the Defendant and the Defendant served the Plaintiffs with a Notice of Sale as well as advertised the property for sale as prescribed in the Mortgage Act, the Court should find that the Defendant is entitled to sell the mortgaged property to recover the outstanding loan balance.

Issue 4 Remedies

The Plaintiff's Counsel submitted that the Plaintiffs prayed for general damages for the illegal encumbrance on their two titles deeds having shown court that the mortgages that appear on Block 265 Plot 7347 were illegally entered at the instance of the Defendant. Furthermore, the Defendant illegally transferred a mortgage to Block 265 Plot 7346 on 28th January, 2015 from Block 7347 which does not appear anywhere in the Lands Registry at Wakiso as was indicated in ExP8. These facts were admitted by the Defendant's witness DW1. The Defendant had no claim of interest at all in the suit property. The illegal acts caused the plaintiffs loss, stress, anxiety, embarrassment and inconvenience as they could not use the title deed for getting funding for their business. In Ferdinand Mugisha vs. Steven Barya & Registrar of titles, HCCS. No. 833 of 2007 Lady Justice Tuhaise awarded Uganda shillings 15,000,000/- for the defendant's act of caveating the plaintiff's title unlawfully. In the present case court should take into account the depreciation of the shilling. Counsel prayed that the plaintiff be awarded general damages of UGX. 100 million taking into account all the circumstances of the case. He further submitted that on 10th June, 2016 the Court ordered the Defendant to return to the 2nd Plaintiff his title deeds for

Block 265 Plot 7347 unencumbered. DW1 admitted that the title was returned but that the encumbrances had not been removed. Counsel submitted that this act of not removing the encumbrances was an act of defiance and contempt of a lawful court order by the defendant. In the case of **Hadkinson vs. Hadkinson [1952] 2 All ER 567** the Court of Appeal of England observed that a party who knows of an order of court, whether null or valid, regular or irregular cannot be permitted to disobey it. In the American case of **Michael Lynn Kirkbridge and Dolores Avoline Kirkbridge**, an award of US$ 63,000 was made against the Bank of America for contempt of court for having wilfully violated a court order they were aware of. In Stanbic Bank (U) ltd vs. Commissioner General URA HC Misc. App No. 0042/2010 the applicants brought an action against the Commissioner General for violating an interim order that had been issued against it and sought for exemplary and punitive damages for contempt of court and the court in 2011 awarded Uganda Shillings 100 million. Counsel prayed that taking into account the depreciation of the shilling an award of Uganda Shillings 150 million would be appropriate in the circumstances for the contemptuous behaviour of the defendant. The Defendant entered a mortgage on Block 265 Plot 7346 and debited the Plaintiffs Account with Uganda Shillings 1,100,000/= as stamp duty as shown in exhibit P 32 entered on 1st July, 2014. From the evidence of PW3 this money was never paid to URA as the Defendant filed forged documents exhibit P 38. Counsel prayed that the defendant refunds this money to the Plaintiff's account. The Plaintiff had applied for a performance bond guarantee of Uganda Shillings 73,449,366/= which the defendant issued late and well after the Plaintiff had notified it that it was no longer required which position was confirmed by DW1. He also prayed that the charges that the Defendant took from the Plaintiffs Account of Uganda Shillings 2,948,479/= be refunded to his account as reflected in ExP32 as debited on 31st October, 2014. The actions of the Defendant in encumbering a title Plot 7347 with a mortgage that was simply handed to it for safe custody and with some mortgages on it not reflected in the land registry was not only an illegality but bordered on criminality. Further in entering a mortgage on title Plot 7346 and purport to have paid stamp duty but reflect payment with a forged receipt exhibit P 38 is criminal. In the case of URA vs. Wanume David Kitamirike C. A. No. 43/2010 on the principle of punitive damages, it was held that court should not condone criminality on the part of a financial institution charged with taking care of clients' money. He prayed that the Defendant's conduct be punished and that the defendant is penalised by way of an award of punitive damages. He proposed a sum of

Uganda Shillings 150 million in the circumstances. He prayed that Court be pleased to find for the Plaintiffs as prayed with the reliefs sought and the Defendant's counter-claim be dismissed as it had not proved specific damages. The dismissal should be with costs and interest as prayed for in the Plaint.

In reply to the plaintiffs' submissions, the defendant's Counsel submitted that the Plaintiffs instituted this suit for declaratory orders that the Defendant is illegally holding the Plaintiffs title for Kyadondo Block 265 Plot 7347 and illegally encumbered it with a mortgage, a permanent injunction restraining the Defendant from interfering with the Plaintiff's ownership of this land and general damages and orders stopping an alleged illegal sale of property comprised on Block 265 Plot 7346 and costs of the suit. The defendant's Counsel submitted that the Defendant handed back the land title for Plot 7347 along with its mortgage release instrument to rectify the erroneously entered memorial on the land title deed. As such the Order for a declaration that the Defendant is illegally holding the title for Plot 7347 and an injunction restraining the Defendant from interfering with the Plaintiff's ownership of this land is overtaken by events and untenable. Court should not grant the prayers in light of the actions already taken by the Defendant to return the title deeds and release of mortgage. The defendant has demonstrated willingness to release the title free of encumbrances. If the court finds that the Plaintiffs are indebted to the Defendant in the sum counterclaimed or at all, the property which secures the debt should after due process be sold to recover the outstanding amount. As such the defendant's counsel submitted that the plaintiff is not entitled to the orders sought. On the other hand, the Defendant counterclaimed for recovery of 416,764,552/= which was partly paid leaving a balance of Uganda Shillings 354,232,440/= (Uganda Shillings Three Fifty Four Million Two Hundred Thirty Two Thousand Four Hundred Forty) which sum ought to be awarded together with interest on this sum at the rate of 23% per annum and with costs of the suit. Counsel prayed that the court considers the resolution on issues numbers 2 and 3 and finds that the 1st Plaintiff is indebted to the Defendant as stated above. The sum attracts interest at the rate of 23% per annum.

Counsel cited Section 26 of the Civil Procedure Act for the submission that courts will not interfere with the interest rate agreed by parties in a contract unless the agreed rate is

unconscionable or excessively high. This principle was applied in the Kenyan case of **Pelican Investment Ltd & Another vs. National Bank of Kenya Ltd [2000] 2 EA 488** where court held that parties are bound by their contracts and court will not interfere with the interest rate agreed upon unless the same is harsh and unconscionable. Accordingly Counsel submitted that since the 1st Plaintiff agreed to borrow at an interest rate of 23% per annum, the court should find that they are liable to pay interest at this rate on the outstanding loan of Uganda Shillings 354,232,440/= (Uganda shillings three fifty four million two hundred thirty two thousand four hundred forty) to the Defendant/Counterclaimant. Regarding costs of the suit, under section 27 (2) of the Civil Procedure Act, costs follow the event (See **Banco Arabe Espanol vs. Bank of Uganda S.C.C.A No. 8 of 1998**). He invited Court to find that the defendant/counterclaimant is entitled to costs of the suit together with all the other remedies sought by the defendant.

Judgment

I have carefully considered the plaintiffs suit as disclosed in the plaint, the written submissions of counsel as well as the evidence and the law. The facts in this dispute are not in controversy. If there are any factual controversies, they do not relate to the material facts upon which the plaintiff relies in support of the suit.

The facts disclosed in the plaint are that the plaintiff is a customer of the defendant and the second plaintiff is the first plaintiffs managing director and owner of the land described as Bunamwaya Block 265 Plots 7346 and 7347. In June 2014, the first plaintiff company sought for a bank guarantee from the defendant for execution of a contract Number UDC/WRKS/2013 – 2014/00089, using the security of Block 265 Plot 7346 in the names of the second plaintiff and personally guaranteed by the second plaintiff. The contract was for a duration of four months commencing on the 14th May, 2015 and ending 30th August, 2014. The first plaintiff applied for a performance bond facility secured by the said security. The performance guarantee was however released by the defendant to the first plaintiff on 3rd November, 2014 long after the head contract had expired and even after the second plaintiff had notified the defendant that it was no longer required.

The defendant despite the plaintiff's letter notifying it illegally registered a mortgage on land comprised in plot 7347 which was never offered to the defendant as security and without the plaintiffs consent. The plaintiff alleged that it suffered stress and financial loss forcing the plaintiff to apply for another loan of Uganda Shillings 350,000,000/= using the security in block 260 Plot 7346. The defendant only released Uganda Shillings 200,000,000/= to the first plaintiff of which the defendant illegally and erroneously encumbered land comprised in block 265 plot 7347 which was never offered by the plaintiff to the defendant. The plaintiffs alleged that the conduct of the defendant ensured and further frustrated the plaintiff's efforts to sell off his land block 265 plot 7347 to offset the first plaintiff's outstanding loan obligations with the defendant for which the plaintiff claims general damages.

On 17th of November 2015 the plaintiffs were served with a notice of intention to sell property comprised in block 265 plot 7346 at Bunamwaya valued at Uganda Shillings 2,000,000,000/= to recover Uganda Shillings 416,764,552/= which is the outstanding balance owing.

Sometime in July 2012, the plaintiff obtained a loan of Uganda Shillings 380,000,000/= secured by a mortgage on the block 265 plot 7346. The plaintiff paid up the loan fully but the defendant continued to illegally and unlawfully encumber the plaintiff's title. As a result of the illegal encumbrance, the defendant illegally recovered bank charges from the plaintiffs amounting to a sum of Uganda Shillings 50,000,000/=. The plaintiff alleged that the continued holding onto the title for block 265 plot 7247 is illegal and continues to be oppressive and a great inconvenience and hardship to the plaintiff's occupation and enjoyment of the suit property for which the plaintiff claims general damages. The plaintiff alleges that there was no justification in holding onto the land comprised in block 265 plot 7347. The entry of a mortgage on the suit property is illegal. The entry of a mortgage facility for Uganda Shillings 73,449,366/= on the said plot 7347 was unknown to the plaintiff and illegal.

Among other things the plaintiff seeks a declaration that they are entitled to the release of the mortgage on the land comprised in block 265 plot 7347 and a return of the title to the plaintiff. A declaration that the defendant has no legal right to sell the property comprised in block 265 plot 7346. An order directing the defendant to release the mortgage on the suit property namely plot 7347. A permanent injunction, general damages and punitive damages as well as interest at 26%

per annum from the date of recovery till payment in full. Interest on the general damages, costs and punitive damages from the date of judgment till payment in full and costs of the suit.

The defendant denied the claim and in the written statement of defence admitted that between July and November 2014, the first plaintiff obtained loan facilities from the defendant being a contract finance facility of Uganda Shillings 220,000,000/=, a performance bond facility of Uganda Shillings 73,449,366/= and the medium term loan facility of Uganda Shillings 200,000,000/=. The parties agreed that payment for the loan facilities were to be secured by mortgage on the Kyadondo block 265 plot 7346 at Bunamwaya in the names of the second plaintiff as well as a personal guarantee of the second plaintiff. However, the defendant erroneously presented mortgage deeds relating to the plaintiff's borrowing to the registrar of titles for registration but the registrar in error registered a mortgage on the certificate of title for land comprised in Kyadondo block 265 plot 7347 at Bunamwaya instead of plot 7346 and both parties did not notice the error before the suit was instituted by the plaintiff. In any case prior to the institution of the suit the defendant had not received a request for release of the title for plot 7347.

In further response the defendant averred that the plaintiffs did not service the loan facilities as agreed and have not denied their indebtedness to the defendant to the tune of Uganda Shillings 416,764,552/= secured by the land comprised in Kyadondo block 265 plot 7346 against which the defendant instituted recovery measures which prompted the filing of the suit. In any case the defendant has a valid mortgage registered on plot 7346 to secure the first plaintiffs borrowing and is entitled to realise the mortgage after the due process of law to recover Uganda Shillings 416,764,552/=.

The defendant averred that it has failed to identify charges amounting to Uganda Shillings 50,000,000/= as alleged by the plaintiff.

Accordingly the defendant counterclaimed for the amount of Uganda Shillings 416,764,552 together with the interest accruing at the rate of 23% per annum as well as costs of the suit. While reiterating the averments in the written statement of defence the defendant alleged that the plaintiff did not service the loan facilities as agreed. The counterclaimant issued the relevant demands for payment against the defendants to counterclaim including a notice of sale of the

security namely plot 7346 and also advertised the sale of the security by the defendants who have not rectified the default through payment. In addition to claiming a liquidated amount of Uganda Shillings 416,764,552/=, the counterclaimant claims interest at the rate of 23% per annum from 9th November, 2015 until payment in full as well as costs of the suit.

In reply, the plaintiffs denied ever receiving the performance bond facility of Uganda Shillings 73,449,366/=. Secondly, the plaintiffs never authorised the use of the plot 7347 as collateral but only plot 7346. The plaintiff further maintained that they have been servicing the loans and not deny the facility for Uganda Shillings 200,000,000/= as well as 220,000,000/=.

At the scheduling conference the following facts are agreed facts.

Between June and November 2014, the first plaintiff obtained loan facilities from the defendant comprised of a contract finance facility of Uganda shillings 220,000,000/=, a performance bond facility of Uganda shillings 73,449,366/=, a medium term loan facility of Uganda shillings 200,000,000/=. The monies were secured by land comprised in Bunamwaya block 265 plot 7346. The defendant registered mortgages on land comprised in Bunamwaya block 265 plot 7346 and Bunamwaya block 265 plot 7347. The defendant issued a notice of sale of mortgaged property to the plaintiffs.

It was later proved that the defendant advertised the property for sale and the plaintiff also filed this suit for injunction and other remedies. On 22nd February, 2017 the agreed issue number one was modified to read as follows:

Whether the second plaintiff is entitled to general damages for mortgages registered on land comprised in Bunamwaya Block 265 Plot 7347 by Instrument Number WAK 0003 8391 on 28th of January 2015 as well as Instrument Number WAK 0004 1022 registered on 27th of February 2015?

I have carefully considered the question of whether general damages should be awarded for registration of a mortgage on plot 7347. The fact that a mortgage was registered is not in dispute. Having reviewed the evidence and the documentary exhibits, the following facts are material.

Summons to file a defence was issued on 3rd December, 2015. On 10th June, 2016 in High Court Miscellaneous Application No. 1000 of 2015, the plaintiff was granted a conditional temporary

injunction wherein the court ordered for return of the title deeds for Kyadondo block 265 plot 7347 to the plaintiff free of all encumbrances. In the written statement of defence the defendant admitted that the plot was wrongly encumbered by the registration of a caveat. It has also been established that the property of the second plaintiff used for security by the first plaintiff was advertised for sale on 4th December, 2015 in exhibit P2. Exhibit P2 however concerns the encumbered plot 7346 which encumbrance is not controversial and is based on the contract between the parties. It was also established by exhibit P9 which is the letter of the Commissioner for Land Registration that plot 7347 had an encumbrance registered on 5th February, 2015 under Instrument Number KLA 565080. A mortgage was also registered on 28th January, 2015 under Instrument Number WAK00038391. Another mortgage was registered under Instrument Number WAK – 00041022 on 27th February, 2015. According to the certificate of title Exhibit P 23, Instrument Number WAK 00038391 was cancelled on the ground that it was "entered in error". It shows that it was a further charge to secure the repayment of Uganda shillings 200,000,000/=. Instrument number WAK 00041022 is the further charge to secure the repayment of Uganda shillings 73,449,366/=.

Exhibit P 24 is the certificate of title for plot 7346 and the encumbrance page shows the registration of the mortgage under instrument number KLA 552933 on 19th July, 2012. Under instrument number WAK 0003 8391 registered on 28th of January 2015 there is a further charge to secure the repayment of Uganda shillings 200,000,000/=. By another instrument number WAK 0005 8796 there is a further charge to secure the repayment of Uganda shillings 220,000,000/= dated 19th August, 2015.

I have also considered the facilities under which the above properties were encumbered. According to exhibit P3 which concerns the Performance bond, it is dated 14th October, 2014 and was executed by the first plaintiff's directors on 15th October, 2014. Clause 4.1 thereof provides that the security for the facility is Kyadondo block 265 plot 7346.

It is therefore proven from the documentation agreed that plot 7347 was wrongfully or erroneously encumbered by the defendant by registering thereon a charge in respect of the performance bond exhibit P3.

In exhibit P4 which is the facility dated 21st November, 2014 concerning a medium term loan facility for Uganda shillings 200,000,000/=, clause 4.1 of the agreement provides that the security for the borrowing would be plot 7346. The document was signed by the directors of the plaintiff on 24th of November 2014.

In exhibit P5 which is dated 30th June, 2014, there is a contract finance facility with the facility amount being Uganda shillings 220,000,000/=. Under clause 4.1 of the agreement the security for the borrowing is plot 7346. The contract was signed by the directors on 30th of June, 2014.

In exhibit P6 that is a letter dated 29th September, 2014 written by the second plaintiff as a director of the first plaintiff concerning the performance bond. In the letter the director wrote that the performance bond was not needed by the plaintiff anymore. They informed the defendant that he had executed the contract 85% and what they needed was another loan. The letter was received by the defendant.

In exhibit P7, there is a performance guarantee or a performance bond dated 3rd November, 2014 which was received by Uganda Development Corporation on 5th November, 2014. This was more than a month after the plaintiffs letter exhibit P6 informing the defendant that the performance bond was no longer required.

I have accordingly also considered the plaint and in paragraph 5 (a) it is averred that in June 2014, the plaintiff sought the facility for execution of works. The contract is described as UDC/WRKS/2013 first 2014/00089 and the security for the facility sought is plot 7346. In paragraph 5 (c) the contract was for four months ending 30th August, 2014. The plaintiff had applied for a performance bond security but the same was issued late on 3rd November, 2014. It is averred that after the contract had expired, the plaintiff notified the defendant by letter of 29th September, 2014. All the above averments have been proven by the documentary exhibits. The fact that the title plot 7347 was encumbered by the defendant has been admitted. According to the search letter exhibit P9 dated 5th September 2016, Instrument Number W8K00041022 was registered on 27th February, 2015. The court ordered the defendant to remove the encumbrance on the title and the order was issued on 10th June, 2016. By the time the witness PW1 testified in April 2017, the encumbrance had not been removed.

General damages are compensatory according to the case of **Johnson and another vs. Agnew [1979] 1 All ER 883.** In the above case, it was held by Lord Wilberforce that the award of general damages is compensatory and meant to place the innocent party so far as money can do so, in the same position as if the contract had been performed. According to **Halsbury's Laws of England 4th Edition Reissue volume 12** (1) and paragraph 812 thereof general damages are those losses which are presumed to be the natural or probable consequence of the wrong complained of. The compensation principle is known as *restitutio in integrum* and its rationale was discussed by the East African Court of Appeal in **Dharamshi vs. Karsan [1974] 1 EA 41.** They held that general damages are awarded to fulfil the common law remedy of *restitutio in integrum.* This means that the Plaintiff has to be restored as nearly as possible to a position he or she would have been in had the injury complained of not occurred.

The question is therefore whether the second plaintiff who is a director in the first plaintiff as well as the first plaintiff suffered damages on account of the encumbrance on the title deed.

The suit came for hearing on 24th of April 2017 when PW1 Mr Emmanuel Bamwite, a Senior Registrar of Titles, Ministry of Lands, Housing & Urban Development testified about the encumbrances on Bunamwaya Kyadondo block 265 plot number 7347. He had examined the search letter dated 5th October, 2016 exhibit P9 and also conducted a search of the register. He confirmed the documentary evidence and most importantly was able to establish that the particulars in the search letter exhibit P9 admitted in evidence was true and correct at the time of his testimony on 24th April, 2017 in that it reflected the status quo two weeks before he testified. He established that instrument number KLA 565080 dated 5th February, 2013, instrument number WAK00038391 dated 28th January, 2015 and instrument number WAK – 0004 1022 dated 27th February, 2015 were still on the register at the time of the testimony (24th of April 2017).

Additionally PW1 testified about exhibit P 23 which is a copy of the certificate of title for plot 7347 and exhibit P 24 which is a copy of the certificate of title for plot 7346. According to him exhibit P 24 and instrument numbers KLA552933 dated 19th July 2012 and WAK – 0058796 dated 19th August 2015 are still on the register as compared to the search letter exhibit P8. On the other hand instrument number WAK 0003 8391 dated 28th of January 2015 appearing on exhibit

P24 concerning plot 7347 has never been entered on the register as is confirmed in the search letter dated 5th of September 2016 exhibit P8. I note that instrument number WAK – 00038391 concerns a loan facility of 200,000,000/=. It was also entered on plot 7347 under the same instrument number with the words entered in error inserted though not dated.

PW1 confirmed that instruments KLA565080 dated 5th Feb 2013 and WAK – 00038391 dated 28th January 2015 and instrument WAK – 00041022 dated 27th Feb 2015 are registered on exhibit P23 which is a copy of the certificate of title of plot 7347.

While it is indicated that the encumbrance was entered in error, this is very unlikely in light of the fact that the same encumbrance was entered on both titles on 28th January 2015. The error is allegedly on the part of the Registrar of Titles. No further evidence was adduced concerning the error.

According to PW2 Mr William George Kiyega and paragraph 7 of his written testimony, as a consequence of the defendant's failure to provide the performance guarantee in time, the first plaintiff lost business and suffered loss as a result of the defendant's breach. As far as loss is concerned, he testified in paragraph 8 of his written testimony that the defendant charged the plaintiffs a sum of Uganda shillings 2,948,479/=, an arrangement fee of Uganda shillings 734,493/=. Additional fees for "PBGCom" Uganda shillings 1,101,740/= and the professional fees of Uganda shillings 1,112,246/= thereby leading to loss on the part of the plaintiff. Furthermore he testified that sometime in May 2014, the performance bond facility for Uganda shillings 73,449,366 was required by the first plaintiff from the defendant which the defendant provided. In the agreement of 14th October, 2014, it was one of the conditions that should the guarantee crystallise into an effective payment to be paid by the bank, the plaintiffs account shall be debited to effect such payment. However, the plaintiff's loan account was never debited and the amount was not disbursed but the defendant went ahead and lodged a mortgage on the plaintiff's property plot 7347. In paragraph 14 he testified that the defendant illegally continued to encumber his title for block 265 plot 7346 and illegally transferred the mortgage on 28th January, 2015. His testimony is that he deposited the title deed on 3rd November, 2009 for safe custody. However the defendant without his knowledge and approval illegally entered mortgages

on the title deed. The plaintiffs never gave the said title for plot 7347 to the defendant as collateral for any facility.

This evidence was never contested and in fact the defendant's witness Mr Mustafa Kasaga, the special assets manager in the special assets Department of the defendant testified that pursuant to the facility terms, duly executed by the parties, the defendant presented title deeds to the registrar for registration. The Registrar of titles erroneously registered the mortgage on the certificate of title comprised in Kyadondo block 265 plot 7347. Prior to the suit, the defendant did not receive a formal request from the plaintiffs for the defendant to release the mortgage erroneously registered on the title. However the defendant issued the release of mortgage on the property and also handed over the land title of the property to the plaintiff by letter dated 4th of August 2016.

The conclusion is that the defendant presented titles of both Plots to the registrar of titles when it should only have presented title for Plot 7346 and not 7347. Furthermore Plot 7347 was wrongly encumbered with a charge as security for a performance bond facility which was not required because the contract it was required for had expired. The plaintiff is entitled to recover all charges and fees charged in respect of the performance bond facility.

However the plaintiff testified that it had tried to sell the suit property namely Plot 7347 but it was encumbered but there is no credible evidence to support this assertion. There is no evidence that the plaintiff requested the defendant to hand over the title. The plaintiff obtaining further loans is not related to the encumbrance as plot 7346 was the security agreed to.

I agree that the encumbrance of plot 7347 was wrongful and seemed deliberate. However did it lead to loss?

For the above reason the plaintiff will be awarded nominal damages in adition to the order to recover all charges and fees paid in respect of the performance bond.
Nominal damages are defined by Maule J, in the case of Beutmont vs Greathead (1846) 2 CB 494 AT 499 as, a sum of money that may be spoken of but that has no existence in point of quantity or 'a mere peg on which to hang costs'. According to Halsbury's Laws of England, 4th Edition, Volume 12 (1) Para 813 a plaintiff is entitled to nominal damages where (i), his or her rights have been infringed, but he has not in fact sustained any actual damage from the infringement or he fails to prove that he or she has (ii) although he or she has suffered actual

damage, the damage arises not from the defendant's wrongful act but from the conduct of the plaintiff himself or (iii), the plaintiff is not concerned to raise a question of actual loss but brings his action simply with a view of establishing his right. Furthermore, nominal damages may be awarded in respect of breach of contract or in respect of torts for which they are actionable per se. Lord Halsbury C in **The Owners of the Steamship Mediana vs. The Owners, Master and Crew of the Lightship Comet; "the Mediana" [1900] AC 113** held that:

> "nominal damages is a technical phrase, which means that you have negatived anything like real damage, but that you are affirming by your real damage that there is an infraction of a legal right, which, though it gives you no right to any real damages at all, yet gives you a right to the verdict on a judgment because your legal right has been infringed. But the term nominal damages does not mean small damages."

In the premises, the plaintiff is entitled to nominal damages in addition to recovery of all charges in respect of the performance bond facility.

Issue 2: **Whether the Plaintiffs are indebted to the defendant in the amount counterclaimed?**

The question of whether the plaintiffs are indebted to the defendant is a question of fact. The defendant counterclaimed for Uganda shillings 416,764,552/=.Subsequently the defendant's counsel submitted that what is now outstanding is Uganda shillings 354,232,440/-. The plaintiff on the other hand submitted that the defendant did not know the exact amount owed by the first plaintiff. There were inconsistencies in demand letters written by the defendant which include exhibit P14 dated 15th June 2015 where the defendant claimed Uganda shillings 581,000,000/=. ON 13th August 2015 in exhibit P16, the defendants official wrote claiming Uganda shillings 581,000,000/=. On the 2nd of November 2015 DW1 wrote on behalf of the defendant claiming Uganda shillings 581,000,000/= as outstanding. On the other hand DW1 disowned the correspondence which he acknowledged as having written to be false. Instead the outstanding balance by 29th October, 2015 was Uganda shillings 391,383,768/=. However, the counterclaim is for Uganda shillings 416,764,552/=. Counsel further submitted that the bank statements exhibits D5 and D6 do not show the amount due as being that demanded by the defendant. He submitted that special damages have to be specifically proved and the defendant failed to prove

it. On the other hand the performance bond of Uganda shillings 73 million was included in the amount claimed by the defendant.

I have carefully considered the evidence. Starting with the court order in the temporary injunction application, the plaintiffs were required under Rule 13 of the Mortgage Regulations 2012 to deposit money with the defendant. The Court Order was that the plaintiff would deposit 30% of the forced sale value of Plot 7246 or 30% of the outstanding amount. The 30% of the outstanding amount was not to take into account charges in respect of the performance bond facility of Uganda shillings 73,449,366/=. The court also ordered that if the first plaintiff wished to redeem the property it would pay 50% of the outstanding amount.

I have accordingly perused the record and in a letter dated 12th July 2016 copied to the registrar, the first plaintiff's lawyers wrote to the defendant on a proposed settlement in which they found Uganda shillings 400,198,470/= as the outstanding sum agreeable and proposed monthly instalments to effect payment. DFCU bank did not accept the proposal and on 14th July, 2016 the Plaintiffs lawyers wrote indicating that they paid 50% on the loan value as ordered by the court to stop sale of the property.

In exhibit D4 dated 4th August 2016 the defendants lawyers Messrs KSMO wrote to the Plaintiffs Lawyers Messrs Tumusiime Kabega & Co. Advocates on the subject of HCCS NO. 802 of 2015 and acknowledged receipt of Uganda shillings 210,000,000/= on 15th July 2016 out of which the bank applied Uganda shillings 121,762,487/= on the outstanding loan leaving a balance of Uganda shillings 88,484,256/= which would be treated as pre payment of the loan. They wrote that the outstanding loan would reduce to Uganda shillings 403,484,256/= which would continue to accumulate interest at 27% per annum. They claimed that the outstanding amount was Uganda shillings 613,484,256/= by the time they received the amount of Uganda shillings 210 million.

I have accordingly compared this to the demand letter dated 9th November 2015 and is exhibit P12 claiming that the outstanding amount was Uganda shillings 416,764,552/=.

I have re-considered the agreed facts which disclose two categories of loans apart from the performance bond which is a third facility. These loans were obtained between June and November 2014. It is an agreed fact that the first plaintiff obtained loan facilities from the

defendant comprised of a contract finance facility of Uganda shillings 220,000,000/=, a performance bond facility of Uganda shillings 73,449,366/=, a medium term loan facility of Uganda shillings 200,000,000/=. Upon examination of the contract finance facility in comparison to the account statement the following can be deduced.

Regarding a term loan of Uganda shillings 200,000,000/= by 25th November 2014, Uganda shillings -185,494,626/= was in debit by 25th November, 2015.

Exhibit D5 is an admitted Credit Finance Facility statement commencing 1st July 2014 with a credit of 220,000,000/= by 14th April 2015 it is in debit by -220,330,184/=.

Trade Finance facility had 220,330,184/- by 30th April, 2015 and is account number 01015112491914. By 31st March 2016 it was in debit by Uganda shillings -130,721,349/-. This account statement was made after the demand letter exhibit P12 which a notice of sale dated 9th November 2015 demanding a total outstanding amount of Uganda shillings 416,764,552/=. The letter reads in part as follows:

> "**TAKE NOTICE** that in accordance with Section 26 of the Mortgage Act, 2009, dfcu Bank Limited shall after 21 working days from the date of receipt of this notice proceed to sell the mortgaged property comprised in Kyadondo Block 265 Plot 7346 at Bunamwaya, unless the total sum of **UGX 416,764,552/- (Uganda shillings Four Hundred Sixteen Million, Seven Hundred and Sixty Four Thousand, Five Hundred Fifty Two only)**, being the total sum outstanding on your contract Finance and Term Loan Facilities respectively, is paid in full to the mortgagee within that time, Note that this sum continues to accrue interest and excludes recovery costs."

According to exhibit D6, which is a statement of account, by 30th July, 2015 the term loan on account number 01015032759988 had a debit of Uganda shillings -168,579.975/=. By 25th November 2015 the term loan account had a debit balance of Uganda shillings -185,494,626/=. On 15th July 2016 Uganda shillings 110,673,086/= was paid to account number 01015032759988 leaving a debit balance of -120,884,235/=. On 26th July 2016 another amount was paid leaving a balance of Uganda shillings 115,693,916/=. Again on 5th August 2016 another amount of 88,237,513/- was paid to account number 01015032759988 leaving a debit balance of Uganda shillings -27,456,403/= and by March 2017 this had grown to a debit balance of Uganda shillings

-33,673,841/= by 24th March 2017. The payments are confirmed by the statement admitted as exhibit P25 being from the corporate current account of the plaintiff account number 01013500020862 which account statement was printed on 12th August, 2016.

By 24th of March 2017 the term loan had a debit balance outstanding of -33,673,841/=. On the other hand the figures for the trade finance loan are for the period ending 31st of March 2016 giving a debit balance by that date of Uganda shillings -130,721,349/-. Without taking into account any further accrued interest for the period August 2016 up to 31st March 2017 this gives a total of both credit finance facility and term loan of Uganda shillings -164,395,190/= being the debit balance owing. This demonstrates a clearance of the loan through payment by the first plaintiff of more than 50% of the amount reflected in the notice of sale of Uganda shillings 416,764,552/- (Uganda shillings Four Hundred Sixteen Million, Seven Hundred and Sixty Four Thousand, Five Hundred Fifty Two only). The plaintiff under rule 13 (5) of the Mortgage Regulations 2012 is entitled to redeem the suit property namely plot 7246.

In the premises issue number 2 is answered as follows: the plaintiffs are not indebted to the defendant in the amount of Uganda shillings 416,764,552/= as contained in the counterclaim by the time of this judgment.

Issue Number 3:

Whether the Defendant can sell the mortgaged land Comprised in Block 265 Plot 7346 to recover the outstanding loan balance?

Following the court order in Miscellaneous Application Number 1000 of 2015 the plaintiff has paid over 50% of the outstanding amount and is entitled to a stay of the sale of Plot 7346, the subject matter of the intended sale. Secondly, the actual outstanding amount owed by the plaintiff has not been established. Thirdly, following resolution of issue number 2 above the defendant is not entitled to sell the mortgaged property in the circumstances though the plaintiff is obliged to pay what is owed. What is owed, if any, was not established in the counterclaim.

Whether the parties are entitled to the reliefs claimed?

Following the resolution of issues numbers 1, 2, and 3 above the remedies if any should flow from the resolution of the issues.

Regarding the declarations sought that the defendant illegally and wrongfully caveated plot 7347, it is an admitted fact that the said title deed was wrongly caveated. The declaration to that effect would be of no value to the plaintiff especially in light of the return of title deeds to the plaintiff. The court already ordered in High Court Miscellaneous Application No. 1000 of 2015 pursuant to admissions of the defendant that the title deed of plot 7347 should be returned to the plaintiff free of encumbrances. This order is enforceable and confirmed as the judgment of this court. What remained was an issue of execution. Instead what the court considered is whether general damages should be awarded to the plaintiffs.

I have already held that the plaintiff did not prove that it requested for the title deed or sought it for purpose of sale of the suit property. The plaintiff sought damages for unlawful acts of encumbering the title. In the premises the court would award the plaintiff the amounts charged on the performance bond facility being an amount of Uganda shillings 2,948,479/= which is hereby awarded to the plaintiff.

Secondly, the second plaintiff is awarded nominal damages of Uganda shillings 20,000,000/=. The prayer for general damages by the first plaintiff on the ground of illegal encumbrance of plot 7347 is disallowed.

On the second issue the defendant did not prove the amount claimed or what lesser amount owed and instead the court established that pursuant to the order in Miscellaneous Application No. 1000 of 2015, the plaintiff paid over 50% of what owed pursuant to the notice of sale of suit property. This also resolves the third issue as to whether the defendant is entitled to sell Kyadondo Block 265 plot 7346 at Bunamwaya. The defendant is not entitled to sell the property and the notice of sale of the suit property is hereby revoked. Because the court cannot leave the issue of what amount is actually owed pending, the court established that the plaintiffs owe some money to the defendant. The actual amount outstanding was not conclusively determined. However these are the findings of the court namely:

By 24th of March 2017 the term loan had a debit balance outstanding of -33,673,841/=. For the trade finance loan and up to the period ending 31st of March 2016 there was a debit balance of Uganda shillings -130,721,349/-. Without taking into account any further accrued interest for the period August 2016 up to 31st March 2017 or further payments made by the plaintiff if any, this

gives a total for both credit facilities of Uganda shillings -164,395,190/= being the debit balance. There shall be a reconciliation of accounts pursuant to which the plaintiff will continue servicing the loan. In the premises the counterclaim is dismissed with no order as to costs and without prejudice to payment by the plaintiff of the remaining outstanding amount after reconciliation of accounts.

The third issue was resolved and the defendant is in the circumstances not entitled to sell the plaintiffs property.

Finally the plaintiff's suit succeeds with costs.

Judgment delivered in open court on 28th August, 2017

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Ivan Kyateka holding brief for Counsel M Kabega

Jacob Kalabi holding brief for Counsel Richard Obonyo for the Defendant

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge

28th August, 2017