

- b) A revolving facility with a maximum limit of UGX. 200,000,000/= on 2nd November **ExhP2**, also secured by a further charge on the two properties earlier mentioned.
- c) On 27th December 2011 a further UGX 70,000,000/= which would be drawn whenever need arose, **ExhP3**.
- d) On 12 June 2012 **ExhP6**, the Defendant wrote to the 1st Plaintiff reminding her that she was in arrears of UGX 60,516,800/=. The Defendant stated that there was a balance of UGX.73,573,235/= owing in respect of the revolving facility extended to it on 27 December 2011. Furthermore, that the one extended on 2 November 2011 was in arrears of UGX 14,169,705/=.

This was followed with negotiations in which the parties established that:

- a) There was a balance due on the term loan extended to the 2nd Plaintiff as at 3rd July of UGX. 135,782,000/= comprising principal and interest.
- b) UGX.75,900,000/= still with the 2nd Plaintiff in respect of the revolving facility.
- c) UGX. 61,041,000/= as arrears due on account of 1st Plaintiff as at 3rd July 2012.

The parties then agreed that the Plaintiffs immediately pay the following:

- a) UGX. 135,782,000/= which would fully retire the term loan facility to the 2nd Plaintiff.
- b) UGX. 75,900,000/= to discharge the revolving facility to the 2nd Plaintiff.
- c) UGX. 61,041,000/= to discharge the outstanding arrears on account of 1st Plaintiff.
- d) UGX. 40,640,000/= which would constitute an advance payment of two months instalments in respect to the facility extended to the 1st Plaintiff.

The lot totalled UGX. 312,000,000/=. The payments would in their view fully discharge the 2nd Plaintiff. Whatever debt remained on account of the 1st Plaintiff would be secured by Plot 1250/ Lubowa Gardens. That being the case the Defendant would immediately release to the Plaintiffs the security comprised in Plot 1269/Lubowa Gardens.

The Plaintiffs wrote a number of letters to the Defendant. In a letter dated 17th July 2012, **ExhP10**, they claimed to have written to the Defendant seeking response and clarity on the agreed position regarding payment. The gist of the letter was that they had received no response to their letters. The Plaintiffs wrote in part:

“Please refer to my letters dated 3rd July 2012 and 12th July 2012 regarding our proposal to settle the above loans which to date we have not received any response from you.

As you are aware the interest to the above loans was increased by more than 10% without even communicating to us and even when we have come up with the money to pay, nobody seems to be bothered on this matter.”

In response to the Plaintiffs’ letters the Defendant wrote a letter dated 12th July 2012, **ExhP11** which the Plaintiffs claimed was backdated.

The Defendant wrote in respect of Release of Certificate of Title for Plot 1269, Block 269, Lubowa Estate, Kyadondo Wakiso.

“Reference is made to your letters dated 03 and 12 July 2012 on the above subject matter.

This is to advise that after a series of internal discussions relating to this matter and a thorough evaluation of your request we have agreed to release the above security to you in exchange for immediate deposit of UGX 312 million with us to be utilised as follows:

Settlement of the entire outstanding debt under Mr. T-Shirt.

Settlement of all arrears under Lubowa Gardens.

Pre-payment of two monthly instalments for Lubowa Gardens Ltd.

Please feel free to contact the undersigned for any clarification.”

On 25th July 2012 **ExhP12**, the Plaintiff wrote back to the General Manager Credit of the Defendant alerting him that they had deposited the 312,000,000/= to the 1st Plaintiff’s account and the Defendant should proceed to offset the same towards the agreed settlement.

She wrote:

“Please refer to your letter back dated July 12th 2012 which you handed over to me on 24th July 2012 regarding the release of Certificate of title for the above Plot after payment of UGX 312,000,000/= against my letter dated 3rd July 2012.”

He went on to say:

“I have transferred the UGX 312,000,000/= to my Lubowa Gardens account, please proceed to offset the entire outstanding debt under Mr. T-Shirt (U) Ltd, arrears under Lubowa Gardens and two months prepayment instalment for Lubowa Gardens.”

The Certificate was not released, so on the 30th July 2012, **ExhP13** the Plaintiff again wrote demanding its release:

“Please refer to your letter back dated 12th July 2012 which I received on 24th July 2012 regarding payment and release of the above title. As per your letter, UGX 312,000,000/= was paid immediately on receipt of your letter. Could you kindly release the above not later than 1st August, 2012.”

It was not released and the Plaintiff made a similar demand on the 6th August 2012.

“Could you kindly release the title not later than 8th August 2012. Please note that your silence on all my correspondences is causing considerable inconvenience on our side.”

The Plaintiff wrote.

The demand received a response on 8th August 2012, **ExhP17** from the Defendants. In this letter headed Breach of Covenant under the Mortgage Deed with Equity Bank cum Default Notice the Defendant alleged that the Plaintiffs had attempted to subdivide Plot 1250 which would reduce its value. Proceeding to revoke the earlier arrangement of releasing the title 1269, the Defendant wrote;

“It has come to our knowledge that in the course of the said discussion, you knowingly and with intent to mislead us, omitted, concealed and/or chose not to inform us that you had, by that time already applied to Ministry of Lands to have the other security of land comprised in Kyadondo Block 269, Plot 1250 to be subdivided into smaller plots. The effect of such subdivision would be to directly compromise our interest thereon and indeed render it a bad security for the remaining loan amount.”

Then the action;

“WHEREFORE, we are constrained to inform you that because of your intentional concealment of such material fact concerning the second security, we have revoked our promise to release to you the Certificate of Title comprised in Kyadondo Block 269, Plot 1269, and we hereby further notify you that your action of subdividing our security without our consent is tantamount to breach our covenant as a mortgagor under the Mortgage Act 2009, and in total breach of your obligation under the mortgage deed which you executed with the Bank.”

On 24th August 2012 Counsel for the Plaintiffs wrote a long letter pointing out what he called the bank’s mishandling of the matter. He threatened to sue, **ExhP19**.

On 7th March 2013 the Plaintiff sued seeking declarations that the Defendant breached its contractual undertaking when it failed to release the title to land comprised in FRV 413 Folio 8 Plot 1269. They also sought the freezing of interest on unpaid balance injunctions against foreclosure and demands for payments, special damages of UGX.6,971,754,000/=, general damages, punitive aggravated exemplary damages, interest and costs.

In its defence, the Defendant denied liability. That although the Plaintiffs failed to meet their obligations many times, she did not move to foreclose.

The Defendant further stated that she revoked the promise to release the certificate of title for Plot 1269 after she was informed by a firm of valuers (Survesis) that Plot 1250 was under subdivision into smaller plots. That she concluded that this was an ill intent by the Plaintiffs to defeat her interests. Further that the proposal to clear the arrears did not in any way affect the terms of the initial contracts between the parties.

Furthermore, that the Defendant was not privy to the arrangement between the Plaintiffs and the said Agnes Tugume who allegedly lent the Plaintiffs the money they used under the new arrangement. That Agnes Tugume as the source of the money was merely mentioned, and did not make the Defendant privy to the arrangement between the Plaintiff and Tugume.

By way of counter claim the Defendant sought declarations that:

- a) The 1st Plaintiff breached the contract.

- b) That the Defendant/Counter claimant was entitled to UGX 693,423,542,96/= plus any interest that has accrued at date of payment.

The parties agreed to the following issues for resolution.

1. **Whether the Defendant was justified in refusing to release the said certificate of title.**
2. **Whether the Defendant suffered any losses as a result of the Defendant refusing to release the certificate of title and if so, whether the Defendant is liable for the losses.**
3. **Whether the Plaintiffs breached their loan agreements with the Defendant.**
4. **Remedies available to the respective parties.**

On the first issue of whether the Defendant was justified in refusing to release the said certificate of title, it is clear that the Plaintiff had been extended loan facilities and there was difficulty in keeping to the time spans agreed upon by the parties. It is clear that the Defendant did not opt to foreclose but on the request of the Plaintiff entered into an agreement to receive a sum of UGX .312,272,472/= with the result that UGX .135,782,000/= of it would retire the term loan facility to the 2nd Plaintiff, UGX 75,900,000/= of it would discharge the 2nd Plaintiff of the revolving facility known as contract finance, UGX 61,041,000/= would clear arrears on account of the 1st Plaintiff and UGX.40,640,000/= would be advance payments for two instalments.

It was agreed between them that if the terms above mentioned were fulfilled by the Plaintiffs, the Defendant would immediately release one of the titles namely plot 1269/Lubowa Cottages.

The Plaintiffs deposited the sum of money on their Lubowa Gardens Account on the 24th July 2012 and alerted the Defendant by letter **ExhP12**.

The arrangement had the following effects.

1. The payment of UGX 312,000,000/= discarded all earlier defaults occasioned by delayed instalment payments.
2. Removed and did away with any arrears that were existing.
3. Created two advance instalments thus freeing the Plaintiff for the next two months.

4. Immediately entitled the Plaintiffs to possession of Title for Plot 1269 Block 269 Lubowa Estates.

The Defendants did not release the land title. The reason they gave for not releasing the title is found in **ExhP17**. In that letter dated 8th August 2012 the Defendants alleged that while the Plaintiffs were negotiating for the release of the title 1269, they were at the same time secretly subdividing the other title 1250 and therefore reducing its value. The Defendants then revoked the agreement to release the Certificate Title 1269.

I have gone through the documents and the evidence of DW1 both of which suggest that at the time the Defendant wrote to the Plaintiffs branding them everything negative, she did not even know that it was them who were subdividing the plot or that it was being subdivided at all.

The above position is witnessed by the following.

Firstly, that the Defendant in uncertain words wrote to the Commissioner of Land Registration and The Commissioner Surveys and Mapping **ExhP18** which in part reads:

*“It has come to our knowledge that **someone unknown** to us has lodged an application in your office seeking to subdivide the subject land.
.....In the premises we shall be obliged if you forthwith stayed any such processes and also shared with us information concerning the people orchestrating this fraud for further investigation and action.”*

Secondly, the Defendant at the time they were considering whether to take the property as security, they did due diligence and found the title unencumbered. The title was now in their custody and so no one could legally cause transfers or subdivide the same without her involvement.

Thirdly for the Defendant to proceed to revoke the agreement to release the title when it at the same time did not know who was responsible for the subdivision creates a lot of suspicion. It permits a picture of a party who all along did not want to release the title but had now got a chance to renege on her promise yet the other parties had fulfilled their part to the point of advance payment of instalments not yet due.

Court would have understood a suspension, for the Defendant to get time to investigate, but to revoke was beyond the expected.

Furthermore, at the time the loan was given out the Defendants in the course of ascertaining whether the titles were clean, must have come across the intended subdivision by the person the Directors of the Plaintiffs bought from. They did not find that as a threat. They had no reason to find it a threat after they had received the UGX.312,000,000/=.

The sum total is that the Defendants simply used it as a reason to withhold the title of the Plaintiffs' directors. It is therefore this Court's finding that the Defendant was not justified in refusing to release the Certificate of title.

On whether the Plaintiffs suffered any losses as a result of the Defendant not releasing title, PW1 testified that because of the delay in releasing the title the land was taken by one Tugume who had lent them the UGX. 312,000,000/= they paid to the Defendant.

PW1 told Court that to raise the money, he agreed with Tugume Agnes to give them UGX. 312,000,000/= million upon the understanding that as soon as the title to Lubowa Cottages was obtained, the Plaintiffs would use the same to raise and repay Ms. Agnes Tugume. That this was made known to the Defendants.

It was further made known to the Defendants that the terms between them and Ms. Tugume were that if the funds were not promptly paid to her, she would be entitled to take over ownership of Plot 1269 Lubowa Cottages.

In this he relied on **ExhP7** a letter to the Credit Manager of the Defendant. It read in part;

"We have arranged the above money from Mrs. Agnes Tugume Kabatereine and have agreed to handover our title on plot number 1269 Lubowa Estate Volume 413 folio 8 which is in your custody as security.

We therefore request for your confirmation that upon payment of the above money, the above title will be released so that payment to the bank can be effected immediately."

The confirmation was given by the Defendant in her letter dated 12th July 2012 which in part reads;

“Reference is made to your letters dated 03 and 12 July 2012 on the above subject matter.

This is to advise that after a series of internal discussions relating to this matter and a thorough evaluation of your request, we have agreed to release the above security to you in exchange for immediate deposit of UGX 312,000,000/= with us.

The wording of **ExhP7** in the 2nd last paragraph;

“We therefore request for your confirmation that upon payment of the above money, the above title will be released so that payment to the Bank can be effected immediately.”

Clearly shows that the Plaintiffs were going to use that very title to get the money which would settle the balance on account of Lubowa Gardens. This was not done because the Defendant did not release the title as agreed between the parties. That it was not until 20th December 2013 that the Plaintiffs picked the land title.

The Plaintiffs contend that they agreed with their financier Agnes Tugume , that if they did not produce the title within a week of deposit of the UGX 312,000,000/=, she would take over the land. They further contended that because of the failure of the Defendant to hand over the land, Agnes Tugume took the land and they have suffered damage.

Furthermore, they claim that they had also agreed with Agnes that she would charge interest of 15% on the UGX 312,000,000/= every month that passed by and that in fulfilment of this agreement, they paid her UGX 46,800,000/= per month from August 2012 until May 2013 which totalled UGX 468,000,000/= a sum they now claimed from the Defendant. As for the land, the Plaintiffs claimed UGX 800,000,000/= being the value given by the valuer.

For the Plaintiffs to succeed in such a situation they are required to show the following;

- 1) That the Defendants were privy to the Plaintiff and Tugume’s agreement in such an explicit way that left no doubt that the Defendant was aware that if the certificate was not released such consequences as those claimed by the Plaintiffs would occur.
- 2) That the Plaintiffs were the owners of the land in question and that they have lost it.

- 3) That in fact the Plaintiffs and Tugume entered into the agreement as alleged.
- 4) That the arrangement between the Plaintiffs and the Defendant was not an outright sale.

The Plaintiffs relied on **ExhP7** to show that the Defendant was aware of the consequences of not releasing the title. I have carefully analysed the wording of **ExhP7**. Apart from stating that the UGX 312,272,472 would be provided by Tugume, it does not state under what terms she was to give the money. Tugume was not availed to court to support the position that she would take the land if there was a delay. The letter does not even mention interest at all. What the Plaintiff was to suffer is not told to court.

The Defendant contend that the transaction between the Plaintiffs and Tugume was a sale and not money lending. They relied on the Transfer Forms, **ExhD4** whose wording indicate that there was a sale. The Transfer Form showed that PW1 and Nancy Byaruhanga had received UGX 800,000,000/=.

PW1 however told court that although the Transfer Form indicates a sale, they did not receive any money but simply put the figure that the valuer had come up with. In my view, this is a situation that called for Tugume's testimony to explain why she said she had paid out money whereas not.

That this land was sold and not treated as security to Tugume's money, is further buttresses by PW1's evidence. At a point in his evidence during cross examination, PW1, told court that it was a sale in these words;

“My Lord originally it was actually a sale to her, we intended to sell it to her but we agreed that she gives us UGX 312,000,000/= so that the Equity Bank releases the title and when we get the title, we transfer it to her.”

When court asked PW1 what the UGX 312,000,000/= constituted, he replied;

“It was supposed to be part payment.”

He further stated;

“My Lord when we got the money from her, the agreement was that we give her the title. We had given extra two months to the Bank hoping that within the two months the Bank would give us the title and we finish the transfer process.”

Asked whether the issue of interest with Agnes came later, PW1 answered in the affirmative.

From the foregoing, the Plaintiffs cannot sustain the version that the Defendant at the time they agreed to receive the UGX 312,000,000/=, knew that the Plaintiffs and Ms Tugume had entered into an agreement of forfeiture in event of delay or of accrual interest because at the time the money was paid, no such deal had been entered between the Plaintiffs and Ms Agnes Tugume.

There is even no evidence on record that interest was ever paid or even agreed upon.

What is clear from the evidence of PW1 was that there was a sale of land by the Directors of the Plaintiffs to Ms Agnes Tugume which evidence is supported by the Transfer Forms **ExhD4**.

That being the case, the claim of UGX 800,000,000/= in respect of land allegedly forfeited must fail and is denied.

Having found that there was a sale, the Plaintiffs had no reason to pay the UGX 468,000,000/= as interest. The reason being that the only solution that Tugume had was to sue for the land or refund of her money. Furthermore, if that took place, the Plaintiffs had the option of taking out third party notice against the Defendants or joining them in such a suit as Defendants.

The payment of interest was not proved. There is no acknowledgment and the Plaintiff did not even bother to call Tugume to throw light on the issue of interest. This interest was unjustified and it would be imprudent of the Plaintiffs to pay it especially after the sale.

The sum total is that the claim for interest fails.

It is also inconceivable that while the instalments sought by the Defendant was just above UGX 20,000,000/=, the Plaintiffs could go ahead and pay UGX 46,800,000/= for 10 months a sum that would have cleared their indebtedness.

Furthermore the Plaintiffs in this case sued for compensation in respect of land they did not own and there is nothing on record to show that they were empowered to do so.

They had no title or right of claim in the land. They were therefore not the rightful Plaintiffs. If anyone was to sue under these circumstances, it was bound to be Robert and Nancy Byaruhanga.

That being the case the Plaintiffs could not sustain the claims based on interest and or forfeiture of land.

The Plaintiffs also claimed UGX 1,902,443,000/= for loss of profits following closure of the 2nd Plaintiff and UGX 1,902,443,000/= as lost profit following closure of Lubowa Gardens.

The Plaintiffs alleged that the Defendants spread word that they were about to carve in and would be sold. That they also sent unknown persons to inspect the property with a view to purchasing the same. That such acts undermined the Plaintiffs' business and scared away potential bookings. The Plaintiffs by letter dated 7.08.12 complained to the Defendants that estate agents had brought people to inspect the property to buy it.

Further that the refusal to handover the certificate after the UGX 312 million was paid prevented the Plaintiffs from either selling the property to raise money that would pay off the loan and recapitalise their businesses.

That because of that foregoing, the businesses were starved of credit and they closed.

A furthermore that because the Defendant's refusal to release the certificate prevented them from discharging their indebtedness, the Plaintiffs continued to be reflected as loan defaulters and were blacklisted by the Credit Reference Bureau which renders them incapable of borrowing. They said one such instance was when Barclays Bank denied them money after writing to the Defendant on the 15.11.13 enquiring about their indebtedness.

The complaint that the Defendant sent people to inspect the premises was communicated to the Defendants as a letter of 17th July 2012 **Exh P10**. It is clear and agreed by the Plaintiffs that at the time inspection and revaluation took place the Plaintiffs were in arrears. The Defendant was also considering the proposals of a new payment structure and whether to release one of the Titles.

The effect of the new structure would be the discharge of the 2nd Plaintiff and release the title 1269. The only way the Defendants would be sure of finding out whether the title being released and the one they were retaining satisfied their needs was to revalue the property to know its current value. And also in a situation where sale is likely to take place, prospective buyers even without being sent by the lender do on own volition visit sites like the one in question. I do not think that the Defendant wanted the whole world to know of the indebtedness of the Plaintiffs because if that had been the case, they would have recalled the loan and advertised for all to see.

On whether the refusal to release the title prevented the Plaintiff from clearing their indebtedness, I find insufficient evidence to hold so, because even after the transfer of the

land 1269 the Plaintiffs did not make any payments. They instead claim they made payments on interest to Ms Agnes Tugume, which interest is not even reflected anywhere. What instead seems to be clear from the evidence of PW.1 and **Exhibit D4** is that they sold the land and got UGX 800,000,000/=. That in my view is what should have cleared the debt and recapitalised the Plaintiffs. I do not therefore agree that the refusal to handover the title caused the closure of the Plaintiffs. That being the case, the claims for loss of profit from the 1st and 2nd Plaintiffs cannot be sustained.

The Plaintiffs also sought to be exempted from payment of interest in the period they were denied the title.

By **ExhP7** the Plaintiffs informed the Defendant that as soon as they got the title, they would use it to acquire the balance to clear their indebtedness.

The Defendant did not release the Certificate of Title which prevented the Plaintiffs from accessing money that was readily available from the buyer who had in fact made part payment.

In my view, the Defendant's action prevented the Plaintiffs from paying the debt balance which continued to attract interest.

This interest caused by the conduct of the Defendant cannot be visited on upon the Plaintiffs.

That being the case, the Plaintiffs are absolved from all the interest accrued from 24th July 2012 up to the 23rd December 2013 when the transfer of the land into the names of Ms Agnes Tugume Kabatereine was executed.

In my view, this is the date the Plaintiffs should have paid the outstanding balance of the loan.

The Plaintiffs claimed General damages.

The award of General damages is a discretion of Court and are always as the law will presume to be the natural consequences of the Defendant's act or omission ***Fredrick Nsubuga vs. Attorney General HCCS No. 13 of 1993.***

In assessment of the quantum of damages the Court is guided by among others the value of the subject matter, the economic inconvenience the Plaintiff has been put through and the nature and extent of the breach, ***Uganda Commercial Bank v. Kigozi [2002] 1 EA 305.***

For a Plaintiff to win an award, he or she must have suffered loss or inconvenience, ***Musisi Edward v. Bebihuga Hilda [2007] HCB 1, 84.***

To do justice that party must be put in the position he or she would have been in had she or he not suffered the wrong; ***Kibimba Rice Ltd v. Umar Salim SC Appeal No.17 of 1992.***

Evidence is required to show that the claimant indeed deserves those damages, ***Ongom v. Attorney General [1979] HCB 267.***

In this case the Plaintiff successfully gave evidence of how the Defendants promised that on payment of UGX 312 million they would release the certificate. On the strength of that promise the Plaintiffs offered for sale Plot 1269 and mobilised the money. They must have made a sorts of promises to the buyer. All this was thwarted by the Defendant when she refused to handover the certificate. The Directors of the Plaintiff could not immediately transfer. This uncertainty must have unsettled them in many ways. Writing letters, demanding answers took centre stage.

The sum total is that they suffered damage. This failure of the Defendant to fulfil its promise to customers who had even paid two instalments in advance justifies an award of damages to the claimant. The Court found earlier that the denial of title was unjustified, taking into account all the circumstances of this case, I find General damages of Shs.100,000,000/= appropriate in the circumstances. It is so awarded.

As for the claim for punitive/aggravated and or exemplary damages, the Plaintiffs have shown an oppressive, and high handed Defendants who reneged on their promise and as such sought to get interest on what they shouldn't have. In those circumstances this Court awards punitive damages of UGX 20 million.

In the counterclaim the Defendant claimed for UGX 693,423,542.96 as at 26. March.2013. That sum includes interest which accrued between 24.07.12 to 23. Dec. 2013. This interest has been excluded earlier in the judgment.

The Plaintiffs are however liable for interest that accrued after they signed the transfer forms **Exh 4**. For avoidance of doubt the computation of interest resumed on 23. Dec.2013.

The sum total is that the Defendants is entitled to the sum claimed less interest accrued in the excluded period plus interest accrued after the excluded period.

All in all judgment is entered in the following.

- a) The refusal to handover the title was unjustified.

- b) The claims for loss of profit in respect of both Plaintiffs are dismissed.
- c) The Plaintiff is awarded UG Shs.100,000,000/= as damages for denial of certificate of title.
- d) The Plaintiff is awarded UGX 20 million as punitive damages.
- e) Interest on 'c' and 'd' at Court rate from date of judgment till payment in full.
- f) The Counter Claimant is awarded Shs. 693,423,542 plus interest till payment in full but less interest accrued between 24.07.12 to 23 Dec.2013.
- g) Both parties having made out their cases, costs shall be shared equally.

Dated at Kampala this 26th day of February 2018.

**HON. JUSTICE DAVID WANGUTUSI
JUDGE**