The Republic of Uganda

In The High Court of Uganda at Kampala

(Commercial Division)

Civil Suit No. 063 of 2018

1. Solomon Champlain Lui
2. Hamidah Kobusingye

:::::::::::::::::::::::::::::::::: Plaintiffs

Versus

1. Stanbic Bank Uganda Limited
2. Sekajja Christopher Amooti

:::::::::::::::::::::::: Defendants

Before: Hon. Justice Dr Henry Peter Adonyo

Judgment

1. Background:

On the 3rd February, 2012, Solomon Champlain Lui and Hamidah Kobusingye (the 1st and 2nd plaintiffs) applied for and obtained from the Stanbic Bank Uganda Limited (1st defendant) a loan facility of USD 255,000 (Two Hundred Fifty-Five Thousand United States Dollars) for purchase of land comprised in Kyadondo Block 257 Plots 920-921 Munyonyo repayable within 10 years with interest at 12.5% per annum.

On the 6th of June 2013, the Plaintiffs obtained additional loan facility worth USD 846,029 (Eight Hundred Forty-Six Thousand Twenty-Nine United States Dollars) for the purpose of purchasing land comprised in Kyadondo Block 257 Plot 944 Munyonyo and to complete construction of apartments on the same land. This loan facility was repayable within 10 years with interest at 13.5% per annum.

Both of the two loan facilities were secured by way of mortgage. The Plaintiffs received the funds in installments and utilised them as required but are said to have failed to service the loans as required subsequently defaulting on the loan repayments with the result that the 1st defendant after due notifications decided to foreclose the mortgages and subsequently sold the properties to the 2nd defendant. The Plaintiffs were not happy with the action of the first defendant intimating that they tried to pay up what was due to the 1st defendant in vain. They therefore decided to seek legal redress in this court by suing both the defendants for a number orders details of which are on the second amended plaint but briefly that;

i. The first defendant breached its statutory duty to the plaintiffs not to sell the suit property at the price below both current market value and the forced sale value.
ii. An order that the suit land was sold fraudulently to the 2nd defendant.

iii. An order that the 1st defendant and or its agents did not properly advertise and or give a proper description of the suit property before it was sold.

iv. A declaration that the plaintiffs were not involved in the valuation, inspection and sale of the suit property and therefore no valid sale.

v. A declaration that the 1st and 2nd defendants did not inspect the suit property before sale.

vi. An order for an independent valuation of the suit property by a valuer either agreed upon by both parties' failure of which or appointed by court.

vii. Consequential order that the sale between the 1st and 2nd defendants be set aside or any other remedies that the court deems fit in the circumstances.

viii. General damages.

ix. Costs of the suit.

The defendants denied the plaintiffs' claims and contended that the plaintiffs were not entitled to the reliefs sought and prayed for the dismissal of the plaintiffs' claims.

In addition, the 1st defendant raised a counterclaim against the plaintiffs in which it sought judgment against them jointly and or severally to pay US$ 883,551.14, interest on it at 13% per annum from1st January ,2018 until payment in full, costs of the counterclaim, an order of eviction of both plaintiffs and or their agents from the property comprised in Kyadondo Block 257 Plot 944

and Block 257 Plot 920 and 921 land at Munyonyo and the costs of the counterclaim.

2. Representations:

The dueling parties were represented by various counsels during the trial of this matter notably by counsels David Henry Mukiibi of M/s Katende Serunjogi & Co Advocates for the plaintiffs, Counsel Isaac Bakayana of M/s Arcadia Advocates, Counsel Stanley Omony of Ms Stanley Omony & Co Advocates, Kampala Associated Advocates and Sebalu & Lule Advocates represented the 1st defendant and then Counsel Stewart Kamya of Mbeeta, Kamya and Co. Advocates was for the 2nd defendant.

3. Procedural:

During the course of the trial of this matter, the plaintiffs filed a first plaint, then a first amended plaint and then a second amended plaint which was subsequently filed on 4th October ,2019 indicating the claims above even though the scheduling of the suit was done on the 11th September, 2018. The 1st plaintiff on 19th August, 2019 admitted to owing the 1st defendant about US$ 900,000 though his counsel tried to provide different figures based on a new valuation which was rejected by court. Subsequently the hearing of this matter was set for 27th September, 2019 which action did not materialise due to the transfer of the first trial judge. The file then lost its position until 3rd November, 2020 when the hearing of the matter subsequently started with the last witness being heard on 4th February, 2021.

4. Issues:

The parties and their counsels jointly agreed on the following issues found in the Defendant's Joint Scheduling Memorandum and Trial Bundle filed on the 5th of July 2018 on page 3 for determination of the dispute herein before this court and theses are;

a) Whether the sale of plot 920 and 921 by the 1st defendant to the 2nd defendant was illegal, fraudulent and constituted a breach of duty to obtain the true market value.

b) Whether the 1st defendant breached its duty not to sell the suit property at a value below the forced sale value.

c) Whether the plaintiffs are jointly and or severally indebted to the 1st defendant to the claimed tune of $ 883,551.14 or at all.

d) What are the remedies available to the parties?

5. <u>Witnesses:</u>

To prove its case, the plaintiff called one witness only, namely Solomon Champlain Lui, the first plaintiff who testified as PW1. The 1st defendant relied on the testimonies of Mr. Joshua Muhama, the Head, Rehabilitation and Recoveries with Stanbic Bank Uganda Limited (DW1), Mr. Isaac Henry Lukanda, a bailiff with a bailiff company known as Armstrong Limited (DW2), Ms. Kusiima Marion Ogwot, the Manager, Rehabilitation and Recoveries at Stanbic Bank Uganda Limited (DW3).

On the other hand, the Second defendant Mr. Sekajja Christopher Amooti presented his own testimony as DW4.

6. <u>Legality of the Two Mortgages:</u>

The major issue which ran throughout the trial of this matter which was raised by the plaintiffs though not pleaded was the issue of the legality of the mortgages. Though procedural rules require parties to a suit to be bound by their pleadings as was pointed out in ***Interfreight Forwards Uganda Ltd. Vs. East African Development Bank, SC CA No. 13 of 1993*** and while this court takes offence with the kind of approach made by the plaintiffs, the justice of this matter required an inquiry and resolution into the issue even if for hypothetical purposes only and for avoidance of the court falling in the trap of subsequently dealing with an illegality.

The main contention of the plaintiffs is that illegalities were committed in the issuance of the two mortgage facilities in respect of the properties comprised in Kyadondo Block 257 plot 920 and 921 at Munyonyo and Kyadondo Block 257 Plot 944 by the mortgagee (1st defendant) in that the mortgagee did not sign and or affix its seals on the mortgage documents contrary to the provisions of *Section 3 of the Mortgages Act, 2009 and Regulation 17 of the Mortgage Regulations 2012* with the result that the said documents ended up being not properly executed given that **Section 3 (1) of the Mortgages Act** that ***"…. A person holding land under any form of land tenure, may, by an instrument in the prescribed form, mortgage his or her interest in the land or a part of it to secure***

the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfilment of a condition..." with **Regulation 17 of the Mortgage Regulations 2012** providing that the mortgage instrument shall be in Form 1 in Schedule 2 as is shown below;

THE REPUBLIC OF UGANDA

THE MORTGAGE ACT, 2009 (ACT No.8 of 2009)

THE MORTGAGE REGULATIONS, 2012

Mortgage Instrument. Freehold Register Vol._____Fol._____ Leasehold Vol. _____ Fol._____ Mailo Block_____Plot_____ Customary _____PIN_____ I, ...being the registered proprietor of the land described above, in consideration of the sum of shs. ..... this day lent to me by....., (in this Instrument called the mortgagee) agree with the mortgagee as follows: (1) to pay to the mortgagee or his or her transferees the principal sum of shs..... on the .....day of....., 20 ..... (2) to pay to the mortgagee or his or her transferees so long as the principal sum or any part of it remains unpaid, interest on the sum or on so much of it as shall for the time being remains unpaid at the rate of ..... per cent per year by equal payments on the ..... day of .....and on the ..... day of ..... in every year. (3) to insure the property in the name of the mortgagee. (4) (here set forth any special covenants relating to the property mortgaged).....

.....

.....

And to secure the payment of the principal sum and interest, I mortgage to the mortgagee all my property and interest in the land described in this Instrument. Dated this _____ day of _____, 20 ____. Signed by Mortgagor In the presence of Name ..... Name..... Address..... Address..... Signature..... Signature ..... Signed by Mortgagee In the presence of Name ..... Name..... Address..... Address..... Signature..... Signature .....

Therefore, according to the plaintiffs, given the requirements of the provisions of the law as indicated above and the fact that the two mortgage documents issued by the 1st defendant to the plaintiffs were at variance with the position of the law for lack of the 1st defendant's signature and seal then the same were invalid with the end result that the purported sale of the suit properties to the 2nd defendant rendered *void ab initio*.

In making this assertion, Counsel for the plaintiffs relied on ***Diana Nansikombi Bbosa vs. Stanbic Bank (U) Ltd., HCCS No. 406 of 2014*** and ***Alice Okiror & Anor vs. Global Capital Save, 2004 Ltd.***

In response to these assertions, the 1st defendant through its counsel asked court to ignore the plaintiffs' submissions arguing that since the issues being raised by the plaintiffs were never pleaded even in

their 2nd amended plaint filed in Court on 4th October 2019 then it meant that the plaintiffs had acknowledged the existence of the mortgages in their pleadings with any diversion from what was pleaded would render such assertions contrary to and in contravention of ***Order 6 rule 1 of the Civil Procedure Rules*** which provides that *"Every pleading shall contain a brief statement of the material facts on which the party pleading relies for a claim or defence, as the case may be"* and ***Order 6 rule 7 of the Civil Procedure Rules*** which provides that *" No pleading shall...except by way of amendment raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party that is pleading"* and thus given that the plaintiffs were raising new grounds which were a complete departure from their previous pleadings then their assertions should not be entertained since it is a legal requirement that parties must stick to their pleadings.

Determination on the issue of the legality of the mortgage

I have taken into account the submissions of the parties on this issue. I have also taken into account the provisions of Order 6 rule 1 of the Civil Procedure Rules which provides that, *"Every pleading shall contain a brief statement of the material facts on which the party pleading relies for a claim or defence, as the case may be."* and ***Order 6 rule 7 of the Civil Procedure Rules*** *which provides that "No pleading shall...except by way of amendment raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party that is pleading."* I have also noted the plaintiffs

in their second amended plaint filed in Court on 4th October 2019. In spite of these circumstances, it is my considered assessment that this court ought to consider the validity of the mortgage in the interest of justice so as to determine, once for all the said issue which I am of the opinion is the root cause of the dispute between the parties herein.

The validity or not of a mortgage in Uganda is derived from the provisions of the Mortgage Act, 2009 especially **Section 3 (1) of the Mortgage Act of 2009** which provides thus;

> ***"a person holding land under any form of land tenure, may, by an instrument in the prescribed form, mortgage his or her interest in the land or a part of it to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfilment of a condition."***

The above position is reinforced by the 2nd schedule of ***the Mortgage Regulation 2012*** which provides for the prescribed format of how a mortgage should look like including provisions for parties thereto to sign the same together with witnesses on each side. The said schedule was earlier reproduced above with the court position in ***Diana Nansikombi Bbosa vs Stanbic Bank (U) Ltd HCCS No. 406 of 2014*** as well as in ***Alice Okiror & Another vs Global Capital Save, 2004 Ltd*** noting that where the mortgage deed doubles as a loan agreement then both parties should properly execute the mortgage to assure its validity.

The facts of the matter before me here as shown by **Exhibits P2 and P4** and **Exhibits P3 and P5** *(Loan Facility Agreements and Mortgage Deeds, respectively)* show that one Gloria Kunihira the Manager Home Loans appended her signature on behalf of the 1st defendant bank but did not seal the first mortgage deed and as for the second mortgage deed no one appended their signatures or sealed the same on behalf of the 1st defendant bank which seemingly would fault the view of the courts in in ***Diana Nansikombi Bbosa*** and ***Alice Okiror & Another (above)*** that where the mortgage deed doubles as a loan agreement then both parties should properly execute the mortgage to assure its validity given that a mortgage deed was separate from a loan agreement.

However, as was pointed in by courts in the cases of ***General Parts (U) Limited vs. Non Performing Assets Recovery Trust Supreme Court Civil Appel No. 5 of 1999*** and ***Sarah Bukenya vs DFCU Bank Limited and Another Civil Suit No. 267 of 2015*** a mortgage which arises from contract remains binding is deemed executed and valid so long as the proprietor of a title delivers it to a mortgagee as security for a loan.

Relating the holdings in the two cases of ***General Parts (U) Limited*** and ***Sarah Bukenya*** (above) to the instant matter, it is my finding that the plaintiffs delivered their titles to the 1st defendant to secure the two loan facilities and therefore any failure of the 1st defendant (mortgagee) to sign or seal the mortgage deeds does not render them invalid. I answer the issue that the mortgages were invalid in the

negative and confirm that the two mortgages were issued legally in compliance with the law.

7. **Issue No 1: Whether the sale of plot 920 and 921 by the 1st defendant to the 2nd defendant was illegal, fraudulent and constituted a breach of duty to obtain the true market value.**

It is the plaintiffs case that the 1st and 2nd defendants committed an act of fraud of when they tried to take over the suit land comprised in plot 920 and 921 in addition to plot 944, yet for the latter it was not even part of the disputed suit properties with the act of fraud reflected from the documentary evidence submitted to court as well as the testimony of DW1, DW2, DW3 and DW4 which instances were many including the failure to give a proper description of the suit property upon advertisement, the selling of the suit properties to the 2nd defendant during the subsistence of a suit and the failure to value the suit property as is required under Regulation 12 of the Mortgage Regulations given that the 1st defendant sold the suit property to the 2nd defendant below the current market price thus breaching its equitable duty towards the plaintiffs.

Additionally, the plaintiffs added that the 1st defendant failed to issue a statutory notice to the 1st plaintiff in respect of his default of the loan obligation contrary to **Section 19 of the Mortgage Act 2009** and as was pointed out in the case of ***Epaneti Mubiru vs Uganda Credit and Savings Bank HCCS No. 567 of 1965*** where it held a mortgagee owed a duty of care a mortgagor when dealing with a

mortgaged property with the 1st plaintiff herein pointing out that the sale of his mortgaged property the 1st defendant was carried out by private treaty with no exercise of due diligence and the ensuring that competitive bidding arising from the advertisement of the suit property discounted yet doing so would ensure that the demised property could fetch the best possible price.

In reply, counsel for the 1st defendant contended firstly that there was no law prohibiting the 1st defendant (the mortgagee) from selling a mortgaged property during litigation and secondly that the suit property was advertised and re-advertised following the foreclosure of the mortgages with the plaintiffs being appropriately notified of their failure to service the loan facilities in addition to being given time to deposit due payments to the bank but all ended up in vain in addition to the fact the suit property was properly valued as per the valuation reports exhibited as Exhibits D.10 and D.11 by the 1st defendant in its trial bundle before sale.

In support of the above contentions the 1st defendant through its counsel referred to ***section 20 (e) and section 26 of the Mortgage Act No. 8 of 2009*** which grant a mortgagee the powers of sale upon default by the mortgagor.

As regards the provisions of ***section 27 of the Mortgage Act No. 8 of 2009*** which imposes a duty of care upon the mortgagee to obtain a reasonable price during a sale, it was the 1st defendant's case that this provision of the law was duly complied with given the fact that the plaintiffs did not in any way indicate that they had buyers who

would offer a much higher price than what the 1st defendant secured through bid advertisements as was confirmed by PW1 during cross-examination in addition to the fact that no evidence of bad faith exhibited given that not only four advertisements in widely circulating newspapers (Exhibits)of the properties were carried out but notices of sale were sent to the plaintiffs as proven by Exhibit D5 which is a letter to the plaintiffs dated 15th September, 2014 and Exhibit D6 which is a Statutory Notice dated 27th May 2015 which all notified the plaintiffs of the their default and the intended upcoming sale if the foreclosed mortgages were not serviced with the said notices served through postal service upon the address of the mortgagor that was known to the plaintiff as was agreed to as being proper in the case of ***Co-operative Bank Ltd (In Liquidation) vs Shell Kasese Services Ltd, John Byakwaga and Collins Byakwaga HCCS No. 140 of 2005*** as well as ***Cuckmere Brick Co. Ltd and Another Vs. Mutual Finance Ltd (1971) 2 ALLER 643.***

Additionally, the 2nd defendant added that he carried due diligence on the suit by conducting a search of the title at the Land Registry with the result that no any other statutory diktat was found appended on the suit property at the time of purchase except for the mortgage encumbrance.

Furthermore, the defendants pointed out that the court should not believe the plaintiff's allegations that the 2nd defendant knew of the interest of the plaintiffs and colluded to not value the suit property prior to purchase given that under ***section 29 (1) and (2) of the***

***Mortgage Act*, 2009**, a purchaser in a sale effected by a mortgagee acquires good title except in a case of fraud, misrepresentation or other dishonest conduct on the part of the mortgagee of which the purchaser has actual or constructive notice which in this case was not true for as provided under **section 29 (2) (c) of the Mortgage Act**, a buyer of a mortgaged property is not obliged to inquire whether there has been a default by the mortgagor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular and so he ended up lawfully purchasing the property from the 1st defendant under a mortgage and acquired good title as his purchase was genuine under the law and was protected by section 28 (4) of the Mortgage Act, 2009 as so the allegations of the plaintiffs should not be taken by the court.

Determination of the 1st Issue:

It is settled law that in determining whether or not a plaint discloses a cause of action, a court must look only at the plaint before it and any annextures to it and nowhere else. See: ***Kapeeka Coffee Works Ltd & Another vs. NPART CACA No.3 of 2000***; ***Mulindwa Birimumaso vs. Government Central Purchasing Corporation CACA No.3 of 2002.***

To establish a cause of action, a plaintiff must demonstrate in his or her pleadings that he or she suffered a legal grievance and that the defendant is liable. In the now *locus classicus* case of ***Auto Garage vs. Motokov [1971] EA 514***, it was held, *inter alia*, that if a plaint

shows that the plaintiff enjoyed a right, the right has been violated and the defendant is liable then a cause of action is duly established. The reading of the plaint in the instant case shows that indeed the plaintiffs received mortgages from the 1st defendant. Further, the plaintiffs aver and it is conceded by the 1st defendant that foreclosure of the mortgages were carried out with the 1st defendant then proceeding to sell the suit properties to the second defendant which action the plaintiffs contend prejudiced their rights.

These actions disclose a cause of action premised on the tort of fraud and illegality as duly pleaded and particularized as against the defendants in the plaint.

The plaintiffs unswervingly averred that the 1st defendant was liable for violating the terms of the mortgages and for the resultant transactions which led to the sale of the suit properties thus committed fraud.

In the case of ***Fredrick Zaabwe vs Orient Bank SCCA No.04 of 2006*** the act of "Fraud" was defined as "... ***the intentional perversion of truth for purpose of inducing another in reliance upon it to part with some valuable thing belonging him or to surrender a legal right...".***

In ***Nanteza Nabeta vs Konde Civil Suit No. 391 of 2010*** the court added that the act of fraud must be attributed to the party accused of committing it and the party alleging it must prove that such an act of fraud was attributed either directly or by necessary implication to the transferee with the fraudulent act known by somebody else and that somebody took advantage of the same.

I will now proceed to consider the whether the various acts referred to amount to fraud or illegality.

a. ***Failure to give a proper description of the suit property upon advertisement***

The plaintiff through the evidence of Solomon Champlain (PW1) insisted that the 1st defendant deliberately failed to advertise the suit property properly before its alleged sale to the 2nd defendant with the newspaper advertisement in ***The Daily Monitor*** of 5th October 2017 containing a different description from the actual structures in noncompliance with ***Regulation 8 of the Mortgage Regulations, 2012***, which specifies that the advert of a mortgaged property for sale ought to include a coloured picture of the mortgaged property, the time and place of sale and the time at which the property may be viewed by the public.

I have had the opportunity to examine the copy of newspaper advertisement (the original which the court saw) which is exhibited at page 152 of the defendants' Joint Trial Bundle and in my consideration of it I note that it properly describes the mortgaged property in compliance with the requirements of ***regulation 8 of the Mortgage Regulations, 2012.***

Given this finding, I would hold that the plaintiffs failed to prove that the 1st defendant not comply with the law and therefore, I would find so.

b. <u>Failure to issue a statutory notice to the 1st plaintiff contrary to Section 19 of the Mortgage Act 2009.</u>

According to ***section 19 (1) of the Mortgage Act, 2009*** where money lent is secured by a mortgage under the Act such monies are payable on demand with a demand in writing forming a default in payment.

In the present case, the plaintiffs deny having ever received notices in default, however, during cross-examination, Muhama Joshua, (DW1) informed court that more than six demand notices were served on the plaintiffs through their postal address. The said notices were shown to the court with one document marked as Exhibits P. 6 dated 26th June ,2014 proving that indeed the plaintiffs were served with notices of loan default USD 974,607 together with interests and which document required the plaintiffs to repay the stated amount sum amounting within forty-five working days the failure of which the 1st defendant bank would move to recover the outstanding amounts due to it.

From the drafting and the serving of the said documents, I am satisfied that the demand notices met the requirements of section 19 (1) of the Mortgage Act for they were in writing and indicated a default in payment in an unequivocal and unconditional demand for all the moneys due and owing. The notices were duly posted to the plaintiffs' known postal address and were even duly received as is shown by the correspondences received by the 1st defendant bank from the plaintiffs including Exhibit D9 which was from the First International Bank (Maldives) Pte. Limited on behalf of the plaintiffs requesting the

1st defendant bank to provide sufficient information in regards to the debt owed by the plaintiffs such that the later bank could pay in full. Given all these documentary evidence, I am satisfied that appropriate demand notices within the meaning of section 19 (1) of the Mortgage Act were issued but still the plaintiffs defaulted and thus are blameworthy.

c. ***Selling of the suit properties to the 2nd defendant during the subsistence of a suit:***

Section 19 (1) and (2) of the Mortgage Act, 2009 provides that a mortgagee may make a demand in writing, which shall create a default in payment. **Section 19 (2) of the Mortgage Act, 2009** requires that such a default must be remedied within 45 days with ***Section 20 of the Act*** allowing a mortgagee to sell the mortgaged property upon failure to remedy the default as demanded. In ***Andrew Babigumira and Another Vs. Global Trust Bank and 3 Others HCCS No. 344 of 2013*** this honourable court noted that caveat by a mortgagor who is in default under a mortgage deed is not a legal encumbrance meaning that even the 1st plaintiff's evidence that the court had granted an order stopping the sale and transfer of the suit property by the 1st defendant in ***HCCS No. 083 of 2016 Solomon Champlain Lui & Anor V Stanbic Bank Uganda Limited*** could not stop the sale of the property as such an order was not an encumbrance as was held in ***Andrew Babigumira and Another*** (above).

In any case, it was the testimony of the 2nd counsel defendant's that a search of the demised property title at the Lands Registry was

carried out with the only encumbrance found on the title being the mortgage itself only with no any other encumbrance registered on the property and no proof that there was a court order issued by this honourable court at the time of the sale of the property.

Given that the mortgagee had duly issued notices of default and advertised the property for sale after exercising its option of sale, then I would find that the plaintiffs (mortgagors) could not impute fraud on the part of the mortgagee and the 2nd defendant and as such selling of the suit properties to the 2nd defendant during the subsistence of a suit is not verifiable and thus was proper.

d. Failure to value the suit property as is required under regulation 12 of the Mortgage Regulations:

According to ***Regulation 11 (1) the mortgagee Regulations, 2012,*** a mortgagee is required to before selling the property to value the mortgage property to ascertain its current market value and the forced sale value with Regulation 12 stipulating that a mortgagor ought to give access to persons who are required to access the mortgaged property opportunity to do so for the purposes of inspection and valuation of the property for the purposes of a purchase.

Further, under section 20 (e), 28 (1) (a) and (d) of the Mortgage Act and 8 (1) of the Mortgage Regulations, a mortgagee can exercise the power of sale the mortgaged property at a reasonable price obtainable in the market. However, such sale can be exercised in good faith as was noted in the case of ***Sendagire Stephen and Nanyombi Gladys v DFCU Limited, Kabiito Karamagi and Kirumira Godfrey***

***Kalule* HCCS No. 26 of 2008** where the court pointed that the relationship between a bank and customer is based on trust and confidence and premised on a duty of care and mutual benefit with the rights of the mortgagee limited by duty of care and a mortgagee was not allowed to sell a suit property below the forced sale value or at an undervalued price and if it did so would amount to an act of negligence for a mortgagor would be awarded the difference between the market price and the purchase price of the suit property.

In the present case, the plaintiffs emphasized that the 1st defendant failed to properly value the property in addition to selling the suit property at below the forced sale value after failing to exercise due diligence and ensuring that there was competitive bidding after an advertisement in order to fetch the best possible price for the suit property.

Joshua Muhama (DW1) testified in court that the suit property was valued before its eventual sale at UGX 2.5 billion as market value with UGX 1.5 billion as forced sale value with previous valuation placing the same property market value at US $ 2,900,000 US Dollars and a forced sale value of 1, 980,000 US Dollars.

This fact is corroborated by the two valuation reports, which was exhibited in the as **Exhibit D.10.** The suit properties were subsequently sold at a price of USD 240,000 to the 2nd defendant, which amounts to about UGX 878,400,000/= yet the forced sale value as per the second valuation report was UGX 1,500,000,000/=

billion meaning that the property was sold by the 1st defendant at half of the forced sale value.

Taking into account the requirement of the law and the circumstances of sale given that there was a clear forced sale value to guide the eventual sale of the property arising from the second valuation report which preceded the sale of the suit property, I would find that the 1st Defendant as mortgagee did not act in good faith, and acted negligently as was pointed out in ***Cuckmere Brick Co. Ltd and Another Vs. Mutual Finance Ltd (1971) 2 ALLER 643***.

Thus from my findings above I would the issue of whether the sale of plots 920 and 921 by the 1st defendant to the 2nd defendant was illegal, fraudulent and constituted a breach of duty to obtain the true market value not illegal and fraudulent but partly in the favour of the plaintiff on the basis that the 1st defendant breached its duty of care to obtain by sale of the suit properties the true market value given that it sold the suit properties below the second valuation report forced sale value.

Therefore, while I do confirm the sale of the suit properties as legal, I am inclined to award the plaintiffs the difference between the force sale value sale value as informed by the second valuation report amounting to UGX 1,500,000,000/= billion and the subsequent under force sale value of UGX 878,400,000/= which would amount to **UGX 621,600,000/=** which is ordered to be paid within a period of One (1) month from the date of this judgment with any failure to

do so attracting an interest thereafter at the rate of 18% per annum till payment in full.

8. **Issue 2: Whether the plaintiffs are jointly/severally indebted to the 1st Defendant/ Counterclaimant to the tune of USD 883,551.14**

According to the plaintiffs' there were two separate facilities that were granted to them by the 1st defendant with each of the facility having separate terms and conditions, rendering the amounts reflected in the account statements submitted by the 1st defendant not correct and inconsistent with each of the facility given that the 1st defendant pooled the two accounts which were in respect of different loan amounts and granted on different terms and conditions and in respect of different securities without giving notice to the plaintiffs, therefore they could not be found liable for the claims by the 1st defendant in its counterclaim.

On this particular point, the 1st defendant averred that the since the plaintiffs admitted to the borrowings and do not show that they have ever paid back any of the borrowed sum which was an indication of acknowledgement of the fact that the bank extended two facilities even though they were lumped together then its act of lumping together the two loan facilities should not be used to vitiate the fact that loans were extended to the plaintiffs and were never serviced when demanded which fact the court should find so.

Determination of the 2nd issue:

I have carefully perused the witness statements of Solomon Chaplain (PW1) and Joshua Muhama (DW1) as well as the bank statements of the 1st and 2nd plaintiffs and letters exhibited collectively as **Exh. P.10** variously dated, I note that in addition to the documentary exhibits, Solomon Chaplain (PW1) himself in Paragraphs 10, 11, 18 of own witness statement and also during cross examination confirms the fact that he together with the 2nd plaintiff obtained the two loan facilities from the 1st defendant and were indeed indebted to the 1st defendant in the sum of US$ 1.2 Million as of 30th May 2017.

This fact is also confirmed by Joshua Muhama (DW1), Head Rehabilitation and Recovery at the first defendant bank in his testimony at paragraphs 4, 5, 6 and 7.

The plaintiffs claimed that the act of 1st defendant of combining the two loan facilities in their names without notice invalidated the loan facilities given that the said loans were for different loan amounts, granted on different terms and conditions with different securities as substantiated by the documentary evidence adduced in court such as Exhibits P2, P3, P4, P5, D1, D2 and D14 (Loan facility documents and bank statement).

A careful perusal of all these documents together with others found in both the trial bundles of the plaintiffs and the defendants confirms the grant of the loan facilities and default thereto.

In my view, therefore, I would find that the act of combining the loan facilities into one would not negate the fact that loans facilities were granted to and received by the plaintiffs and there was default thereof of the whole amount as was even acknowledged by M/s First Bank (Maldives) Pte Ltd. in a letter dated 30th May, 2017 (Exh. D9) in which First Bank undertook (on behalf of Solomon Chaplain (PW1), upon being provided by the 1st defendant additional information in regards to the loan facilities amounts, to remit the whole amount due to the 1st defendant's recovery suspense account directly by telegraphic transfer so as to settle the loan facilities owed by the plaintiffs as a block thus validating the 1st defendant's action of lumping the said loan facilities together.

Taking into account these facts I would find that the 1st and 2nd plaintiffs are still liable to pay to the 1st defendant an amount of USD 883,551.14 interest inclusive which was due to it as a result of the combined loan facilities less what had been repaid through the sale of the suit properties and the balance owed to them by the 1st defendant.

9. Issue 3: <u>The Remedies are available to the parties</u>

The plaintiff sought a number of remedies as against the defendants including;

1. Setting aside the sale of the suit property between the 1st Defendant and the 2nd Defendant specifically that;

a. The sale between the 1st and 2nd defendant be set aside

b. A consequential order of cancellation of the 2nd defendant's title as registered proprietor of land comprised in Kyadondo Block 257 Plots 920 & 921 at Munyonyo.

c. An order for unconditional release of the plaintiffs' land comprised in Plots 920 & 921, 944 from the illegal mortgages created by the 1st defendant

d. An order that the plaintiffs' names be reinstated as proprietors

e. An order that the 2nd defendant surrenders the duplicate certificate of title back to the plaintiffs

f. An order of cancellation of all the encumbrances registered by the defendants on the suit land.

2. General Damages

3. Costs

4. Interest on general damages and costs

The 1st defendant prayed that the suit be dismissed and that judgment be entered on the counterclaim in the amount of USD 883,551 at an interest of 13% per annum from 1st January, 2018 till payment in full with costs and that the plaintiffs be evicted from the suit property.

Determination of Issue 3: Remedies available to parties:

Both the plaintiffs' claims and the 1st defendant claims are grounded on the loan facility agreements entered into between the two parties and stated to have been defaulted by plaintiffs which the plaintiffs with the resultant sale of the suit properties to the 2nd defendant.

In the case of ***Lloyds Bank Ltd vs. Bundy [1974] 3 ER 737*** Lord Denning MR pointed out that;

"English Law gives relief to one, who without independent advice into a contract upon terms that are unfair, or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired because of his needs or desires or his ignorance or infirmity, coupled with undue influence or pressures brought to bear on him or for the benefit of the other".

As applicable to facts of the instant case, the 1st defendant offered to the plaintiffs' loan facilities and the plaintiffs defaulted on payment with the plaintiff subsequently selling of the suit properties to the 2nd defendant through processes which I have found to have been legal. With what I have already found above, I would hold that the plaintiffs are the sole cause of their problems for it is clear to me they borrowed huge sums of money speculatively much above their weight perhaps with the hope that eventually such monies could be wished away by the 1st defendant and then they would enjoy the windfall in the form of the suit properties. In my considered opinion, this would amount to illicit enrichment which in the laws of equity, occurs when one person is enriched at the expense of another in circumstances that the law sees as unjust with the law imposing an obligation upon the such recipient to the obligation to make restitution with liability for an unjust (or unjustified) enrichment arising irrespective of any wrongdoing on the part of a recipient. The concept of unjust enrichment can be traced to Roman law and the maxim of ***nemo locupletari potest aliena iactura or nemo locupletari debet cum***

aliena iactura, that is "no one should be benefited at another's expense".

The law of unjust enrichment is closely related to, but not co-extensive with, the law of restitution. The law of restitution is the law of gain-based recovery. It is wider than the law of unjust enrichment. Restitution for unjust enrichment is a subset of the law of restitution in the same way that compensation for breach of contract is a subset of the law relating to compensation.

- In relation to the prayers sought by the plaintiffs, I have also taken into consideration, section 29 (1) of the Mortgage Act, 2009 which offers protection to a purchaser as follows;

Section 29 (1) of the Mortgage Act, 2009:

> ***"A purchaser in a sale effected by a mortgagee acquires good title except in a case of fraud, misrepresentation or other dishonest conduct on the part of the mortgagee of which the purchaser has actual or constructive notice.***
>
> ***(2) A purchaser is not— (a) answerable for the loss, misapplication or non-application of the purchase money paid for the mortgaged land;***
>
> ***(b) obliged to see to the application of the purchase price; or***
>
> ***(c) obliged to inquire whether there has been a default by the mortgagor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular."***

The evidence presented by the plaintiffs was insufficient to establish fraud by the 1st and 2nd defendants.

Additionally, the 2nd defendant as purchaser was not obliged to inquire into the conditions of the sale or the manner in which the sale was conducted by the 1st defendant.

The plaintiffs must bear the sole responsibility for their act of the failed mortgages and must be held responsible, though in their attempt to negate responsibilities, prayed for a declaration that the mortgage deeds be found null and void.

But having found as above that indeed the mortgages were valid, I would pronounce that the plaintiffs after having secured the mortgages in relations to their properties through loan facilities from the 2nd defendant, they had the legal obligation to service the mortgages in accordance with the terms of those mortgages and since they failed to do so then the 1st defendant had the legal powers to foreclose and subsequently sell the same as they did with the only consequential obligation to remit to the plaintiffs residual amounts above the endorsed sale prices and has been found above the plaintiffs ceased to have any further legal rights over the mortgaged properties the moment the sale to the 2nd defendant was carried out following the provisions of the law as has been found above.

The only legal relief they remained with is being granted the difference between the sale value and the actual value of the suit properties.

Therefore, it is my finding and holding that the sale by the 1st defendant to the 2nd defendant was legal with the 2nd defendant

acquiring good title to the suit properties and is declared the legal owner of the suit property which the plaintiffs ordered to freely vacate forthwith within a period of fourteen (14) days with any failure to do so giving the 2nd defendant the right to use all available legal means to forcibly evict them.

- The plaintiffs also prayed for general damages. The position of the law is that general damages are in the discretion of the court but are always as the law will presume to be the natural and probable consequences of the loss or injury occasioned.

The Court of Appeal in ***Takiya Kashwahiri & A'nor vs. Kajungu Denis, CACA No. 85 of 2011*** held that general damages should be compensatory in nature in that they should restore some satisfaction, as far as money can do it, to the injured plaintiff. The plaintiff should, however, lead evidence as to what damage he or she suffered at the instance of the defendant.

In the instant case, however, little or no evidence have been provided by the plaintiffs or the defendants for this court to base upon to grant general damages.

I am thus reluctant to award any to any of the parties herein.

- The plaintiffs and the defendant also prayed for the award of costs. **Section 27(2) Civil Procedure Act** provides that costs are in the discretion of the court but shall follow the event unless for good reasons court directs otherwise.

Having found that the defendants are overall the successful parties herein, I would award them the costs of this suit to them in equal amounts as against the plaintiffs.

10. Orders:

Having found as above, I do issue the following orders;

i. The two mortgages issued to the plaintiffs were legally issued in compliance with the Mortgage laws of Uganda.

ii. The sale of the suit properties to the 2nd Defendant, that is, Kyadondo Block 257 Plots 920 and 921 at Munyonyo is hereby declared legal and is upheld as the 2nd defendant did acquire good title to the suit properties.

iii. I do is issue a consequential order directing the 1st defendant to pay to the plaintiffs the difference between the forced sale value as per the second valuation report of UGX 1,500,000,000/= billion and the subsequent sale price of the suit properties amounting to UGX 878,400,000/= which an amount of **UGX 621,600,000/=** within a period of One (1) month with any failure to do thereafter so attracting an interest at the rate of 18% per annum till payment in full.

iv. I do find that the act of combining the loan facilities into one would not negate the fact that loans facilities were granted to and received by the plaintiffs and there was default thereof of the whole amount with the 1st and 2nd plaintiffs still liable to pay to the 1st defendant an amount of USD 883,551.14 interest inclusive unpaid on the two loan facilities due as of as of 24th May, 2017 to it as a result of the combined loan facilities **LESS** what is repayable to them by the 1st defendant in iii (above) with the 1st defendant granted the right to evict the plaintiffs from Kyadondo Block 257 Plot 944 Munyonyo

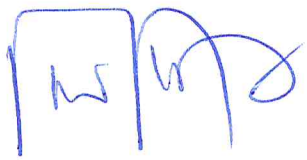
and sell it to recovery the due balance within one (1) from the date of this judgment.

v. I do issue an order of cancelling any or all the encumbrances registered by any person prior to this judgment on Kyadondo Block 257 Plots 920 and 921 at Munyonyo and Kyadondo Block 257 Plot 944 Munyonyo.

vi. I award no General Damages to any of the parties as none is proved.

vii. The costs of this suit is awarded to the defendants in equal amounts as against the plaintiffs.

I so order.



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Dr. Henry Peter Adonyo

Judge

16th April 2021