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**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)**

CIVIL SUIT NO. 152 OF 2019

(FORMERLY CIVIL SUITS NO's 418 OF 2010 & 400 OF 2012)

10

1.HERBERT LUBEGA WASSWA

2.OKECHA MICHEAL PLAINTIFFS

VS

HOUSING FINANCE COMPANY (U) LTD

15

(Now known as Housing Finance Bank Ltd)DEFENDANT

BEFORE: HON. LADY JUSTICE SUSAN ABINYO

JUDGMENT

20 **Introduction**

The 1st Plaintiff instituted this suit against the Defendant vide Civil Suit No. 418 of 2010 while the 2nd Plaintiff instituted a suit against the Defendant vide Civil Suit No. 400 of 2012 in the High Court Land Division that were all transferred to Commercial Court Division and given another number of Civil Suit No.152 of 2019 upon
25 consolidation of the two suits on registration.

Facts

The 1st Plaintiff averred in the plaint that he obtained a loan of UGX 15,000,000(Uganda Shillings Fifteen Million only) from the Defendant in December, 2005 and secured with his property comprised in Kyadondo Block 210 Plot 1353.
30 later in March, 2006, the Defendant extended to the Plaintiff a further loan of UGX 10,000,000(Uganda Shillings Ten Million only). That on 21st April, 2010, the Defendant issued the 1st Plaintiff a statutory notice of foreclosure on the mortgaged property in respect of a loan balance of UGX 26,022,474(Uganda

- 5 Shillings Twenty Six Million, Twenty Two Thousand Four Hundred Seventy Four only) if it was not paid within a month.

10 That on 7th September 2010, the Defendant through its appointed Auctioneers of M/S Bemug Strict Auctioneers & Court Bailiffs advertised the mortgaged property for sale by Public Auction and, or Private Treaty in the New Vision Newspaper which stated the date, time and place of sale of the mortgaged property to be 8th October, 2010, 10:00am at Plot 47/49 Nkrumah Road UCA Building, Mezzanine floor, suite 105 and that the successful bidder was to pay a non-refundable fee of 10% at the fall of the hammer and the 90% balance was to be paid within 30 days.

- 15 That on 3rd December, 2010, 1st Plaintiff was contacted by the Defendant's officer called okumu to inquire about the outstanding balance and the 1st Plaintiff deposited UGX 4,500,000 (Uganda Shillings Four Million Five Hundred Thousand only) with the Defendant on his loan account and when he had the balance of UGX 26,000,000 (Uganda Shillings Twenty Six Million Shillings to pay on 6th December, 2020, he was advised from the main branch that the mortgaged property had been sold and his loan account had been blocked.

That the conduct of selling the 1st Plaintiff's property while at the same time accepting the money well aware that he wanted to redeem the mortgaged property was unfair, dishonest and done in bad faith.

- 25 That the Defendant sold the Plaintiff's property long after the date on which the public auction was to be done had lapsed and that the property was sold by private treaty without his consent as a mortgagor and after accepting a deposit from the 1st Plaintiff to clear all the outstanding monies in a short time.

30 The 1st Plaintiff seeks for a declaration that the sale of property comprised in Kyebando Block 210 Plot 1353 was unlawful and orders be made for a permanent injunction restraining the Defendant, its agents, servants, workmen, employees and any person working under its direction or authority from trespassing on the suit land or dealing with the suit land or title in any way, general damages, interest and costs of this suit.

- 35 The 2nd Plaintiff averred in the plaint that on 7th September, 2020, while he was reading the New Vision Newspaper of the said date, he saw an advert by Bemug Strict Auctioneers & Court Bailiffs that they had been instructed by the registered mortgagee (the Defendant) to sale by public auction or private treaty property comprised in Block 210 Plot 1353 at Kyadondo unless the 1st Plaintiff paid all the

5 monies owing to the Defendant before 8th October, 2010 which was the date for sale.

That the 2nd Plaintiff arranged his finances and on November, 2010, made an offer to the managing partner of Bemug Strict Auctioneers & Court Bailiffs who was acting on behalf of the Defendant.

10 That the 2nd Plaintiff offered to purchase the suit property at UGX 73,000,000 free from any incumbrance and that he would pay 10% of the offered purchase price upon acceptance of the offer and pay the balance in two weeks which terms were accepted by the Defendant through Bemug Strict Auctioneers & Court Bailiffs who received the 10% of the offered purchase price on 6th December,
15 2010, and urged him to pay the balance as proposed.

That the 2nd Plaintiff paid the entire purchase price of UGX 73,000,000 (Uganda Shillings Seven Three Million only) as per the acceptance of the offer whereupon, the Defendant handed over the certificate of title and signed transfer forms for the property but to date the 1st Plaintiff has failed, neglected or ignored to
20 handover vacant possession of the said property and lodged a caveat.

The 2nd Plaintiff further contends that he purchased the said property to use as his dwelling place and that denying him possession of the suit property has occasioned him undue expenses in paying rent for the current dwelling place hence this suit where he seeks for orders for delivery of vacant possession, eviction
25 of the 1st Plaintiff from the suit property, special damages, general damages for the inconvenience caused since December, 2010 to date, interest and costs of the suit.

The Defendant in its written statement of defence in respect of the 2nd Plaintiff admitted the contents of paragraph 1,2, 4(a) and (b) of the plaint and averred
30 that this suit is misconceived, frivolous, an abuse of court process and bad in law as it does not disclose any cause of action against the Defendant.

That the Defendant denies the contents of paragraphs 4(c), 4(d), 5, 6, 7 and 8 of the plaint and shall put the 2nd Plaintiff to strict proof thereof.

The Defendant in specific reply to paragraphs 4(c) and 4(d) averred that the
35 property comprised in Block 210 Plot 1353, Kyadondo, was sold by the Defendant as a mortgagee exercising his rights not as a registered owner in possession, a fact within the knowledge of the 2nd Plaintiff.

5 That in reply to paragraphs 6, 7 and 8 of the plaint, the Defendant shall aver that failure to handover was a result of a 3rd party who was neither an agent nor principal of the Defendant.

That the Defendant denies the said loss or liability for such loss and avers that the 2nd Plaintiff's claim is misconceived to a wrong party and the suit be dismissed
10 with costs.

Issues for determination:

The following issues were agreed upon during scheduling;

1. Whether the sale of property comprised in Block 210 Plot 1353 Kyadondo by the Defendant to the 2nd Plaintiff was lawful.
- 15 2. Whether the 2nd Plaintiff is entitled to vacant possession of the property comprised in Block 210 Plot 1353 Kyadondo.
3. What remedies are available to the parties?

Representation

The 1st Plaintiff was represented by Mr. Mwebesa Raymond of Kampala
20 Associated Advocates; Mr. Seninde Saad of Okecha, Baranyanga & Co. Advocates appeared for the 2nd Plaintiff while Mr. Bwayo Richard of M/S Nangwala, Rezida & Co. Advocates appeared for the Defendant.

Issue No. 1: Whether the sale of property comprised in Block 210 Plot 1353 Kyadondo by the Defendant to the 2nd Plaintiff was lawful.

25 The evidence of the 1st Plaintiff (PW1) was that in December, 2005, he applied for a loan facility of UGX 15,000,000(Uganda Shillings Fifteen Million only) with the Defendant which was granted and secured by a mortgage over property comprised in Kyadondo Block 210 Plot 1353 measuring approximately 0.099 acres; that he diligently serviced the aforementioned loan facility whereupon the
30 Defendant was pleased to offer him another facility of UGX 10,000,000(Uganda Shillings Ten Million only) in March, 2006 still secured with the property stated above as seen in the copies of the Mortgage Deeds attached and marked Annexures "A" and "B" respectively.

35 That he subsequently lost his employment and had financial difficulties between 2005 and 2010 which resulted into default in payment of the above facility and by July 2010, the mortgage account was in arrears and that in September, 2010, the Defendant through Bemug Strict Auctioneers and Court Bailiffs wrote to him a notice of eviction and consequently advertised the property for sale on the same

5 date as seen in the eviction notice and advert attached and marked as Annexures "C" and "D" respectively and that the notice stated that the mortgaged property was to be sold on 8th October, 2010 by public auction.

That on 3rd December, 2010, he was contacted by Mr. Okumu an officer of the Bank to inquire about the outstanding monies and he assured him that he was going to clear the entire debt within 48 hours but he had carried with him UGX 4,500,000(Uganda Shillings Four Million Five Hundred Thousand only) to show his commitment and he deposited the money and the account was credited by the Defendant on the same day as seen in the copies of the Banking slip and statement attached and marked as Annexures "F" and "G" respectively.

15 That he later mobilized UGX 26,000,000(Uganda Shillings Twenty Six Million only) from friends and on 6th December, 2010, he reported to the Defendant's premises at Kikuubo but was advised to go to the main branch in Kololo which he did and he was informed that the property had been sold and his account was subsequently blocked, that the conduct of the Defendant in selling his property while at the same time accepting money from him well aware that he intended to redeem the mortgaged property was unfair, done with dishonesty and in bad faith considering that he was an old customer; the property was sold long after the date on which the public auction was to be done had lapsed without re advertising and that the sale by private treaty was without his consent as a mortgagor.

The 2nd Plaintiff's evidence (PW2) was that on 7th September, 2010, while he was reading the New Vision Newspaper of the said date, he saw an advert by Bemug Strict Auctioneers and Court Bailiffs that they were instructed by the Defendant as the registered mortgagee to sale by public auction or private treaty property comprised in Block 210 Plot 1353 at Kyadondo unless the Plaintiff paid all the monies owing to the Defendant before 8th October, 2010 which was the date of sale.

That he arranged finances and on 12th November, 2010, he made an offer to the Managing partner of Bemug Strict Auctioneers and Court Bailiffs who was acting on behalf of the Defendant and that on 6th December, the Defendant through the said Auctioneers accepted his offer and received payment of 10% of the offered purchase price and urged him to pay the balance of UGX 65,700,000(Uganda Shillings Sixty Five Million Seven Hundred Thousand only) as had been proposed.

5 That upon completion of payment of the purchase price, the Defendant handed over to him the certificate of title and executed transfer instruments for the suit property which the 2nd Plaintiff lodged for transfer but was informed that a caveat had been lodged by the 1st Plaintiff and that the Defendant had to deliver vacant possession of suit property to him for occupation but the same has never been
10 executed for ten years now since he purchased the said property and yet he purchased the said property for his home and family; this has subjected him to renting another place at a monthly rental fee of UGX 2,000,000 (Uganda Shillings Two Million only) for which the Defendant should be held liable in damages, interest and costs.

15 The evidence of Mr. Alex Kiyimba (DW1) for the Defendant was that he had worked in the Defendant's legal Department as a Principal Legal Officer in 2010 when the transaction involving the Plaintiffs took place and left in March, 2014 and is currently in private practice.

20 That the 1st Plaintiff applied for and was granted two loan advances by the Defendant in September 2005 and early 2006 respectively secured by a mortgage over the 1st Plaintiff's property comprised in Block 210 Plot 1353 land at Kyadondo and that the terms of both mortgages were at all material times duly made known and in the knowledge of the 1st plaintiff and required strict compliance thereof.

25 That for the four years during which the loan subsisted, the 1st Plaintiff defaulted on his obligations under the mortgage Deeds as evidenced by the issuance of several statutory notices attached in the Defendant's trial bundle at pgs. 44,46,48 and 50 and demand notices at pgs. 38 – 43 all of which required the 1st Plaintiff to properly service the mortgage as a result of the persistent default.

30 That a statutory notice of foreclosure dated 8th August, 2008 was issued and the Defendant advertised the property for sale on 20th November, 2008 but was called off after the 1st Plaintiff undertook to stop defaulting but he did not take any steps to remedy the default and that upon advertising the property, the highest bidder offered UGX 60,000,000 (Uganda Shillings Sixty Million only) which
35 made the Defendant to conduct another valuation of the property for purposes of ascertaining the reserve price for the property as seen in the valuation report on pg 58 of the trial bundle which returned the reserve price to UGX 70,00,000 (Uganda Shillings Seventy Million only).

40 That the eventual sale of the property by private treaty was done in strict compliance with the terms of the mortgage which included the issuance of the

5 requisite notices and advertisement in a newspaper of wide circulation as seen
at pg. 31 of the 1st Plaintiff's trial bundle and that the highest offer was UGX
73,000,000 by the 2nd Plaintiff who made the first 10% deposit of the purchase price
on 6th December, 2010 as per the Bank statement at pg 68 of the Defendant's
10 trial bundle and upon making the second deposit, the Defendant Bank signed for
the 2nd Plaintiff the requisite transfer instrument and also handed over the
certificate of title and that the money realized from the sale was used to set off
the 1st Plaintiff's outstanding obligations of UGX 44,053,088.52 deposited on the 1st
Plaintiff's bank account as showed in the certificate of final mortgage settlement
at pg 54 of the Defendant's trial bundle.

15 That the 2nd Plaintiff's failure to take vacant possession of the suit property was
due to the court order obtained by the 1st Plaintiff and the discussions or pleas of
the 1st Plaintiff if any, were therefore inconsequential and of no legal effect as it
was indeed a term of the mortgage that any grant of time indulgence or any
variation or waiver or release of the terms would not prejudice any subsequent
20 strict enforcement of all or any of such terms by the Defendant against the 1st
Plaintiff.

Submissions

Counsel for the 1st Plaintiff submitted that the sale of the mortgaged property was
unlawful and irregular because the said sale infringed on the 1st Plaintiff's right to
25 redemption as provided under section 10 of the Mortgage Act Cap 229 which is
the applicable law since the Mortgage Act, 2009 had not yet come into force;
that it only came into force on the 2nd day of September, 2011 in accordance
with the Mortgage Act, 2009 (Commencement Instrument), 2011.

Counsel further submitted that section 10 of the Mortgage Act Cap 229 provides
30 that any sale otherwise than foreclosure shall be by public auction unless the
mortgagor consents to a sale by private treaty and relied on the authority of
***Amratlal Purshottam Bhimji & Anor VS Gian Singh Bhambra & 3 others H.C.C.S No.
239 Of 2009 consolidated with H.C.C.S No. 298 of 2010 [2014] UGHCLD 11*** where it
was held that its trite law that the terms of an agreement could not act as a fetter
35 or clog on the borrower's right of equity of redemption.

Counsel argued that according to PE15 a land sale agreement dated 21st
December, 2010, the mortgaged property was allegedly sold on 21st December,
2010 which was close to three (3) months after the date of the purported sale by
public auction however, the description of the said document marked as PE15 by

5 Counsel is not correct as the record indicates that it is a copy of the transfer agreement for the property in question dated 21st December, 2010.

Counsel further argued that the purported sale of the mortgaged property by the Defendant to the 2nd Plaintiff was neither a public auction nor a private treaty and that it was intended to clog or fetter the 1st Plaintiff's right to redeem the mortgage and was thus unlawful as seen in the only survey and valuation report
10 marked DE13 made after 8th October, 2010 and a letter written by the Auctioneer to the Defendant dated 1st November, 2010 presenting another offer for purchase of the mortgaged property marked as DE10.

Counsel for the 2nd Plaintiff submitted that it is not in dispute that the 1st Plaintiff mortgaged the suit property with the Defendant Bank as seen in the Mortgage Deeds marked PE1 and PE2 and that the 1st Plaintiff defaulted on repayment of the loan he secured from the Defendant as seen under paragraph 6 of the witness statement of Herbert Lubega the 1st Plaintiff; thus in accordance with clause 4.1.4 of the Mortgage Deeds that were executed by both the 1st Plaintiff and
15 Defendant and 2nd Plaintiff's exhibits marked PE12, PE13, & PE15, the Defendant was at liberty and indeed lawfully sold the suit property to the 2nd Plaintiff.

Counsel further submitted that considering the provision of section 10 of the Mortgage Act Cap 229, that was operational at the time of sale of the suit property, the Defendant on the 7th day of September, 2010, through its appointed
25 Auctioneers of M/S Bemug Strict Auctioneers & Bailiffs advertised the sale of the suit property in the New Vision Newspaper(PE4); the 2nd Plaintiff offered to purchase the said property at UGX 73,000,000 (Uganda Shillings Seventy Three Million only) which offer was accepted as seen in PE10 & PE11 and upon payment of the entire purchase price of UGX 73,000,000 by the 2nd Plaintiff, the Defendant
30 handed over the certificate of title and signed transfer forms for the property to the 2nd Plaintiff.(See PE13,PE15 & PE7 of the 1st Plaintiff's trial bundle)

Counsel argued that as per paragraph 22 of the witness statement of Kiyimba Alex for the Defendant and DE11, the Defendant recovered the monies due to it and deposited the balance of UGX 44,053,088.82 on the 1st Plaintiff's Account, and all monies that the 1st Plaintiff was entitled to was received by the 1st Plaintiff
35 thus the sale of property comprised in Block 210 Plot 1353 Kyadondo by the Defendant to the 2nd Plaintiff was lawful.

Counsel for the Defendant submitted that they agree with the Plaintiffs that the now repealed Mortgage Act Cap 229 was the law applicable and that the court
40 must consider and assess what the 1st Plaintiff as mortgagor agreed with the

5 Defendant as to how any eventual sale would be conducted to determine whether the sale by the Defendant was lawful.

Counsel further submitted that under clause 4.2.3 identical in both deeds for the two loans, the 1st Plaintiff as Mortgagor, gave the Defendant *express power to "sell any part of the mortgaged property upon such terms as it thinks fit"* as one
10 of the consequences of default and that under clause 4.1.1, also identical in both Deeds, indicated as an event of default where the 1st Plaintiff "*makes default in the payment of any or more of the instalments hereby covenanted to be made at the times and in the manner aforesaid*", the above undertaking was supported by section 10 of the Mortgage Act Cap 229 which was the law in force at the
15 time.

Counsel argued that a clear interpretation of clause 4.2.3 of the respective Mortgage Deeds as highlighted above gave the Defendant power to sell the mortgaged property upon default in a manner it deemed fit and reference to court was not stipulated as a condition before sale; that as for the consent of sale
20 by private treaty, the 1st Plaintiff had given the requisite consent vide exhibit DE3.

Counsel contended that section 10 and clauses couched in terms similar to clause 4.2.3 were previously interpreted by the courts and cited the case of ***Jeane Frances Nakamya Vs DFCU Bank Ltd & Anor H.C.C.S No. 813 of 2007.***

Counsel further contended that the mortgagee's right to sell, particularly upon
25 default on any single instalment by a mortgagor was held to be lawful and relied on the case of ***Housing Finance Bank Ltd and Anor Vs Edward Musisi Supreme Court Civil Appeal No.22 of 2010*** which cited with approval the case of ***Payne Vs Cardiff Rural Urban Council [1932] K.B 254.***

Counsel further argued that in light of the facts in the instant case as above and
30 the law as well interpreted above, it is the Defendant's submission that the sale of the 1st Plaintiff's mortgaged property was lawful particularly in regard to the admitted default in payment of his loan and no evidence to show that he fully repaid the loan.

Resolution of issue No.1

35 I have considered the evidence adduced by the parties herein, submissions of their Counsel, the law applicable and cases cited and find as follows: -

The facts in ***Jeane Frances Nakamya Vs DFCU Bank Ltd & Anor(supra)*** are slightly distinguishable from the instant matter, in that case, the contention was that the

5 Plaintiff was not served with the statutory notice before sale as required by law and that it rendered the sale wrongful and in the instant case, the contention is that the suit property was sold to the 2nd Plaintiff without regard to the 1st Plaintiff's right of redemption which rendered the sale to the 2nd Plaintiff unlawful.

10 In **Housing Finance Bank Ltd and Anor Vs Edward Musisi(supra)** the facts are in all fours with the instant matter, in that case, the Respondent borrowed a sum of UGX 40,000,000 (Uganda Shillings Forty Million only) from the Appellant(then known as Housing Finance Company (U) Ltd) and that the Respondent was given several reminders by the 1st Appellant as to the arrears due on the loan but the Respondent did not pay, statutory notice was served on the Respondent who
15 denied that service was effected on him; the property was advertised and sold but before the sale, the Respondent made a deposit of UGX 3,300,000(Uganda Shillings Three Million Three Hundred Thousand only) into the Bank account held with the 1st Appellant early morning on the day of sale and the payments were
20 duly accepted and acknowledged by the officials of the 1st Appellant which according to the Respondent, constituted waiver of the sale and the subsequent sale by the Appellants was wrongful. The Supreme Court held in that case that since the Respondent had failed to pay the instalments in time and the 1st Appellant wrote to him several reminders to meet his 20 obligation, that did not constitute a waiver of their right to foreclose.

25 In the instant matter, the 1st Plaintiff contends that the suit property was sold to the 2nd Plaintiff without regard to his right of redemption as required under section 10 of the Mortgage Act Cap 229, when he made a deposit of UGX 4,500,000 on 3rd December, 2010 before the sale of the suit property on 21st December, 2020, which rendered the sale to the 2nd Plaintiff unlawful.

30 The law as provided then under section 10 of the Mortgage Act Cap 229 will be reproduced for emphasis as follows: -

35 "Where the mortgage gives power expressly to the mortgagee to sell without applying to court, the sale shall be by public auction unless the mortgagor and the encumbrancers subsequent to the mortgagee, if any, consent to a sale by private treaty."

40 It must be noted that clause 4.1.1 of the Mortgage Deeds that were executed by both the 1st Plaintiff and Defendant made provision in case of default by the borrower that, provided always that if the borrower; makes default in the payment of any one or more of the instalments hereby covenanted to be made at the times and in the manner aforesaid, the consequences of the default then

5 and in any such case the whole of the monies payable hereunder shall be deemed to become forthwith due and owing and the company may in addition to its statutory powers at any time thereafter without any previous notice to or concurrence on the part of the borrower.

10 Clause 4.2.3 identical in both Deeds indicated one of the consequences of default available to the mortgagee to be, the sell of or part of the mortgaged property upon such terms as it shall think fit.

15 It is very clear from the 1st Plaintiff's evidence under paragraph 6 of the witness statement that he was in default of payment of the above facility and by July, 2010, the mortgage account was in arrears. The statutory notices dated 20th August, 2008 and 21st April, 2010 marked as DE7 and DE 8 respectively issued by the Defendant, brought to the attention of the 1st Plaintiff as mortgagor the outstanding amount in arrears inclusive of the principal and interest and warned the 1st Plaintiff that unless the entire amount was settled within a period of one month from the date thereof, the bank would proceed to advertise and sell the property by public auction or private treaty.

20 Indeed, the Defendant went ahead to advertise the suit property for sale in the New Vision Newspaper dated 19th September, 2010 and the date of sale was indicated as 8th October, 2010 at 10:00am by way of public auction and, or private treaty as one of the options available to it as the mortgagee in the event of default by the mortgagor in accordance with clauses 4.1.1 and 4.2.3 of the mortgage Deeds referred to above.

25 The 1st Plaintiff's evidence was that he was contacted by one Mr. Okumu an official of the Defendant to inquire about the outstanding arrears in early December 2010, and he acted swiftly to deposit a sum of UGX 4,500,000 in the loan account held with the Defendant on 3rd December, 2010 who acknowledged and receipted it.

30 The deposit of UGX 4,500,000 by the 1st Plaintiff as above, still left an outstanding balance of more than UGX 20,000,000 in arrears, this is deduced from the notice marked exhibit DE8 above. No evidence was adduced by the 1st Plaintiff to show that the outstanding arrears were settled or that a commitment was made to do so until the suit property was finally sold on 21st December, 2010 to the 2nd Plaintiff by private treaty after the 1st sale in 2008 was called off by the Defendant allegedly in favour of the 1st Plaintiff to comply with his obligations in the mortgage deed which the 1st Plaintiff subsequently failed to honor as indicated in the notice dated 21st April 2010 marked DE8 above and later exhibit PE5, a copy of the letter

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5 addressed to the Defendant by the Chairman Cheshire Home for Rehabilitation services dated 14th November, 2010.

I am unable to agree with Counsel for the 1st Plaintiff in his further argument that the purported sale of the mortgaged property by the Defendant to the 2nd Plaintiff was neither a public auction nor a private treaty and that it was intended to clog
10 or fetter the 1st Plaintiff's right to redeem the mortgage and was thus unlawful as seen in the only survey and valuation report marked DE13 made after 8th October, 2010 and a letter written by the Auctioneer to the Defendant dated 1st November, 2010 presenting another offer for purchase of the mortgaged property marked as DE10.

15 The Defendant as a mortgagee, had no option but to exercise its right of sell provided in the mortgage Deeds marked PE1 and PE2 respectively in the 1st Plaintiff's trial bundle and exhibit marked DE3, a copy of the mortgagor's approval and consent dated 1st December, 2005 in which the 1st Plaintiff as mortgagor had given his express consent to the Defendant to sell the mortgaged
20 property by private treaty.

I agree with the argument by Counsel for the Defendant that the mortgagee's right to sell, particularly upon default on any single instalment by a mortgagor is lawful as was held in the case of **Housing Finance Bank Ltd and Anor Vs Edward Musisi Supreme Court Civil Appeal No.22 of 2010** which cited with approval the
25 case of **Payne Vs Cardiff Rural Urban Council [1932] K.B 254**.

The 2nd Plaintiff adduced evidence in exhibits marked PE10, a copy of the offer from the 2nd Plaintiff; PE11, a copy of the acceptance from the Defendant's appointed Auctioneers; PE12 a copy of the cheques for payment on the purchase price; PE13, a copy of a letter from the Defendant confirming payment
30 of the entire purchase price; PE14, a copy of the certificate of title for the property and PE15, a copy of the transfer form for the suit property and on record, PE7 a certified copy of the Bank statement in the 1st Plaintiff's trial bundle proves that the 2nd Plaintiff purchased the suit property.

Following the decision in **Housing Finance Bank Ltd and Anor Vs Edward Musisi(supra)** in which the justices held inter alia that ... the 1st Appellant wrote to
35 him several reminders to meet his 20 obligation. That did not constitute a waiver of their right to foreclose.

In the instant matter, the acknowledgment of the money deposited by the 1st Plaintiff on 3rd December, 2010 by the Defendant did not constitute a waiver on

5 the sale, as the outstanding arrears remained unsettled by the 1st Plaintiff. (**see Nurdin Bandali Vs Lombark Tanganyika Ltd [1963] EA 304** cited with approval in **Housing Finance Bank Ltd and Anor Vs Edward Musisi(supra)**).

10 In addition, the Defendant had given the 1st Plaintiff ample time by way of several reminders in notices dating as far as 2007 to the last notice dated in 2010, in which the 1st Plaintiff would have exercised his right of redemption over the suit property but he did not take the necessary steps even after negotiations were made with the Defendant as evaluated above.

15 The term redemption is defined as the payment of a defaulted mortgage debt by a borrower who does not want to lose the property. (**see Black's Law Dictionary Seventh Edition pg. 1282.**)

In my considered view, I find that the sale of the mortgaged property comprised in Block 210 Plot 1353 Kyadondo by the Defendant to the 2nd Plaintiff was justified for failure by the 1st Plaintiff to pay the outstanding arrears. (**see Payne Vs Cardiff Rural Urban Council [1932] K.B 254.**)

20 Accordingly, I find that the sale of the property by the Defendant to the 2nd Plaintiff was in accordance with the provision of section 10 of the Mortgage Act Cap 229 (the applicable law then) in which the 1st Plaintiff had lost his equitable right to redeem the property.

25 For the reasons above, I find that the sale of the suit property by the Defendant to the 2nd Plaintiff was lawful.

Issue No. 2: Whether the 2nd Plaintiff is entitled to vacant possession of the property comprised in Block 210 Plot 1353 Kyadondo.

Resolution

30 Having found the first issue in the affirmative, I agree with the submission of Counsel for the 2nd Plaintiff that the offer by the 2nd Plaintiff in respect of the suit property was on condition that it was free from any incumbrances, which implies that the 2nd Plaintiff wanted vacant possession and the title of the suit property without any claim or adverse interests. (**see section 1(g) of the Registration of Titles Act Cap 230**)

35 The acceptance of the offer by the Defendant as seen in exhibit PE11, placed a duty on the Defendant to deliver vacant possession to the 2nd Plaintiff after he had fully paid the purchase price of the property but this has not been done by the Defendant since 2010 to date and yet the 2nd Plaintiff had purchased the

5 property for it to become his home as per the evidence of the 2nd Plaintiff under paragraph 9 of the witness statement.

Counsel for the Defendant submitted that a finding that the sale of the mortgaged property was lawful, inevitably implies that the 1st Plaintiff immediately vacates the property as he is in possession by virtue of an interlocutory relief
10 obtained under this suit.

Accordingly, I find that the 2nd Plaintiff is entitled to vacant possession of the property comprised in Block 210 Plot 1353 Kyadondo.

I have taken cognizance of the fact that the 1st Plaintiff framed an issue in respect of fraud by the Defendant and derogated from the issues agreed upon during
15 scheduling.

Despite that step taken by the 1st Plaintiff, I have taken into consideration the evidence, submissions of Counsel for the parties herein and the cases cited which are on record and find that the issue lacks merit having found in issue (1) above that the sale of the suit property by the Defendant to the 2nd Plaintiff was lawful.

20 **Issue No. 3: What remedies are available to the parties?**

Resolution

In view of the findings above, the 1st Plaintiff is not entitled to any of the remedies sought for. This suit instituted by the 1st Plaintiff as against the Defendant is dismissed with costs to the Defendant.

25 With regard to the 2nd Plaintiff, an order for delivery of vacant possession of the property and consequently, an eviction order is hereby granted.

On the aspect of special damages, it's trite that special damages must be specifically pleaded and strictly proved. (**See *Kyambadde Vs Mpigi District Administration [1983] H.C.B 44 & Borham –Carter Vs Hyde Park Hotel [1948] 64 TLR***)

30 I agree with the argument of Counsel for the Defendant that the 2nd Plaintiff has not adduced evidence by way of rent receipts to prove the claim of special damages, this remedy is therefore not available to the 2nd Plaintiff.

It is also settled law that an award of general damages is given at the discretion of court; **See *Crown Beverages Vs Sendi S.C.C.A No. 1 of 2005*** and ***Uganda Commercial Bank Vs Kigozi [2002] 1 EA 305*** on the factors to be considered by
35 the courts when assessing the quantum of general damages.

5 Following the decision in **Uganda Commercial Bank Vs Kigozi(supra)** on the factors to be considered by the courts when assessing the quantum of general damages which are as follows: - the value of the subject matter, the economic inconvenience that the Plaintiff may have been put through and the nature and extent of the injury suffered; given the circumstances of this matter, where the 2nd Plaintiff has not been given vacant possession by the Defendant for a period of over ten years now since 21st December, 2010 when the 2nd Plaintiff purchased the property, it is clear that the 2nd Plaintiff has been put to economic inconvenience despite, the purpose for which he had purchased the suit property as discussed above.

15 In the result, I find that the 2nd Plaintiff is entitled to general damages and the sum of UGX 60,000,000(Uganda Shillings Sixty Million only) is awarded in general damages to the 2nd Plaintiff.

As to the issue of interest on general damages, its trite that interest should be awarded from the date of judgment until payment in full. (**See Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd No.2 [1970] EA 469**)

20 Accordingly, interest is awarded on the sum of UGX 60,000,000(Uganda Shillings Sixty Million only) as general damages to the 2nd Plaintiff at the rate of 6% per annum from the date of judgment till payment in full.

In regard to costs, **Section 27 of the Civil Procedure Act Cap 71** provides as follows:

25 **27(1)** "subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all
30 necessary directions for the purposes aforesaid."

Taking into consideration the above provision on costs and the decision in **Uganda Development Bank Vs Muganga Construction Co. Ltd (1981) HCB 35** where Justice Manyindo (as he then was) held that a successful party can only be denied costs if its proved, that, but for his or her conduct, the action would not have been brought, the costs will follow the event where the party succeeds in
35 the main purpose of the suit.

I find no reason to deny the 2nd Plaintiff costs and accordingly, the 2nd Plaintiff is awarded costs of this suit.

5 On the issue of interest on costs, **Section 27(3) of the Civil Procedure Rules** provides that the court may give interest on costs at any rate not exceeding 6% per year, and the interest shall be added to the costs and shall be recoverable as such.

10 In accordance with the provision of Section 27(3) of the Civil Procedure Rules above, 2nd the Plaintiff is awarded interest on costs at the rate of 3% per annum from the date of filing the suit till payment in full.

The argument by Counsel for the Defendant that the remedies sought for by the 2nd Plaintiff be visited on the 1st Plaintiff is untenable since the Defendant did not have any counterclaim against the 1st Plaintiff.

15 In conclusion, judgment is entered against the 1st Plaintiff as above and, in favour of the 2nd Plaintiff as against the Defendant in the above terms.

Judgment delivered by email this 10th day of August, 2021.

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SUSAN ABINYO

JUDGE

10 /08/2021

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