THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

CIVIL SUIT No. 662 OF 2015

MUBENDE PARENTS SCHOOL LIMITED:.....PLAINTIFF

VERSUS

1. UGANDA DEVELOPMENT BANK LTD
2. JOSHUA OGWAL
3. KABIITO KARAMAGI ..... DEFENDANTS

31ST MARCH, 2022

JUDGMENT OF THE COURT

A. INTRODUCTION

1. The Plaintiff filed this suit against the defendants jointly and severally seeking for declarations that;

   a) the 1st Defendant's appointment of the 2nd and 3rd Defendants as joint Receivers/Managers of the Plaintiff company is unlawful and that the advertisement of the Plaintiff's business as being under Receivership is unlawful,

   b) the Plaintiff is not indebted to the 1st Defendant and that all the money held on the Plaintiff's Bank accounts in equity Bank Limited *vide* account No. 103020044187 and Centenary Bank Ltd *vide* account No. 901600785 belongs to the Plaintiff;

   c) a permanent injunction against the Defendants to restrain them from taking over the Plaintiff's Bank accounts and business assets,

   d) General, special, punitive and aggravated damages,

   e) Interest and Costs.

B. BACKGROUND

2. In an application dated 28th March 2011, the Plaintiff applied for a loan facility of UGX. 620,000,000/= from the 1st Defendant and offered as security, land and buildings comprised in leasehold Register 3071, Folio 12 Plot M46; Leasehold Register 3071, Folio 13 Plot M47 and Leasehold Register 3071, Folio 14 Plot M48 at Mubende. A legal mortgage was executed and a collateral debenture was also signed and executed in favor of the 1st defendant, in respect of all the undertakings, property and assets of the Plaintiff.

3. The Plaintiff filed a suit CS No. 59/2015 at Nakawa against the 1st Defendant and the suit was resolved *vide* a Consent Judgment

dated 15th May 2015 wherein the Plaintiff agreed to pay to the 1st Defendant a sum of UGX. 766,384,349/= within four months. The Plaintiff paid UGX. 50,000,000/ *vide* cheques dated 14th May 2015, leaving an outstanding balance of UGX. 716,384,349/=.

4. On the 26th day of August 2015, the 1st Defendant sold the Plaintiff's land and buildings to Muramira Alexander for a sum of UGX. 610,000,000/. On the 25th day of September 2015, a Notice of Appointment of the 2nd and 3rd Defendants was signed by the 1st Defendant's Bank secretary, Dorothy Ochola and registered with the Registrar of Companies on the 5th October 2015. On the 28th day of September 2015, the 1st Defendant appointed the 2nd and 3rd Defendants as Receivers/Managers of the Plaintiff under a Deed of appointment signed by Patrick Oketta alone on behalf of the 1st Defendant.

D. REPRESENTATION

The Plaintiffs were represented by Kaggwa & Kaggwa Advocates while the Defendants were represented by Kalenge, Bwanika, Kisubi & Co. Advocates.

E. ISSUES

5. At Scheduling, the following issues were framed for determination and the parties' Joint Scheduling Memorandum was adopted by Court: -

    1. Whether the sale of the Plaintiff's mortgaged property by the 1st Defendant was lawful.
    2. Whether the Debenture created on the Plaintiff's property was legal.

3. Whether the Plaintiff is indebted to the 1st Defendant and if so, by how much.
4. Whether the appointment of the 2nd and 3rd Defendants as Receivers was lawful.
5. Whether the actions of the Receivers/Managers were lawful.
6. Whether the Plaintiff is entitled to the remedies prayed for.

6. The Plaintiff filed two witness statements deponed by Edward Kasole Bwerere Lwanga, a director of the Plaintiff and Adam Kakande, the Plaintiff's auditor. The defendants also filed two witness statements deponed by Emmanuel Kwihangana, the Senior Monitoring and Recoveries Officer with the 1st defendant and Joshua Ogwal, the 2nd defendant. All the witness statements were admitted on Court record. The defendants called a third witness whose evidence was admitted orally. All the witnesses were accordingly cross examined.

7. The Parties filed written submissions. Counsel also graciously provided copies of the authorities upon which they relied on to brace their respective arguments in their submissions.

F. PRELIMINARY OBJECTIONS.

8. Counsel for the Defendants raised preliminary objections to the effect that the Plaintiff's suit is totally misconceived, frivolous, and vexatious and an abuse of Court process aimed at stifling the 1st defendant's recovery measures. Counsel relied on the principles of *Issue Estoppel* and *Approbation and Reprobation* to submit that the Plaintiff is estopped from bringing this suit.

9. Counsel for the Defendants submitted that *Issue Estoppel* is a "sub-species" of the *res judicata* doctrine. That the principle of *Issue Estoppel* extends to Consent Judgments, as a Consent Judgment can give rise to *Issue Estoppel* just as does any other judgment. That *Issue Estoppel* applies whether or not the Court in the first proceedings addressed the merits of the issue. He cited the case of **Srivatsa v Secretary of State for Health & Another (2016) EWHC 2916 (QB) at Para [49])** to support his argument.

10. That the instant Plaintiff, who was also the Plaintiff in HCCS No. 59 of 2015, filed the said Suit against the present 1st Defendant, challenging the legality of the loan transaction which formed the basis of the Plaintiff's indebtedness for which the defendant sought to foreclose and recover the unpaid loan amount. That the contest in both cases derives from the Defendant's efforts to recover the unpaid loan by realization of the security. That by opting to resolve and settle the said legal issues by way of a Consent Judgment rather than proceed to a trial, and by conceding that upon default a sale would be conducted with no further recourse to Court, the Plaintiff led the Defendant to believe that the dispute and the legal issues pertaining thereto had been settled fully and finally. That the Plaintiff therefore lost the right to re-litigate on issues relating to the legality of the Mortgage and Debenture and whether or not the Plaintiff is indebted to the Defendant. That the current suit is an abuse of Court process in as far as it raises the same issues previously raised in Civil Suit No. 59 of 2015 and settled by way of Consent between the parties and should be dismissed.

11. In reply Counsel for the Plaintiff submitted that they entered into a Consent Judgment *vide* HCCS No. 59 of 2015 with the 1st Defendant

for the payment of a sum of Ugx. Shs. 766,384,349/= to be paid within 90 days and that the Plaintiff paid Ugx. Shs. 50,000,000/=, leaving a balance of Ugx. Shs. 716,384,349/=. That it is to the extent of this balance that the Plaintiff was indebted to the 1st Defendant before the sale of their properties and it is not in dispute and is not what is being litigated before in the current suit.

12. That what is being litigated on is what happened 90 days after the date of signing the Consent Judgment, to wit, the illegal sale, the illegal appointment of Receivers and the Receivers' sale of the Plaintiffs' assets at a mere 10,000,000/=. All of which were never in issue in HCCS No. 59 of 2015 and are being brought for adjudication for the first time.

13. That Clause 4 of the Consent Judgment did not mean "*without compliance with the Law*", because the 1st Defendant was duty bound to follow the procedure stipulated under the **Mortgage Act and the Mortgage Regulations,** which they flouted and acted illegally. That the Court's duty is to investigate whether the sale was conducted in accordance with the Laws of Uganda.

G. DETERMINATION OF ISSUES BY COURT

14. I will deal with the objection to the Plaintiff's Suit, that it is allegedly an abuse of Court process for seeking to litigate over matters that should have been litigated upon in HCCS No. 59 of 2015, that the matter is *res judicata.* I will also then deal with argument of *Issue Estoppel.*

Section 7 of the Civil Procedure Act pro*vide*s that:

> **No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and**

substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that Court.

15. This common law doctrine bars re-litigation of cases between the same parties over the same issues already determined by a competent Court. The rationale is to prevent multiplicity of suits and to bring finality to litigation.

16. **Halsbury's Laws of England, 4th Edition Volume 16 (Reissue) Para. 977** which lays out the conditions for applying the principle of *Issue Estoppel* states as follows;

"An estoppel which has come to be known as 'Issue Estoppel' may arise where a plea of res judicata could not be established because the causes of action are not the same. A party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue has been solemnly and with certainty determined against him. The conditions for the application of the doctrine have been stated as being that;

(1) The same question was decided in both proceedings

(2) The judicial decision said to create the estoppel was final and

(3) The parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies."

17. Clause 4 of the Consent Judgment pro*vide*s that in case of failure of the Plaintiff to pay the Decretal sum, the 1st Defendant shall be entitled to sell the mortgaged property without any further recourse to Court.

It is common ground that the Consent Judgment (PEX14) CS No. 59 of 2015 from which the estoppel is said to arise was final regarding recovery without recourse to Court. However, *"without recourse to Court"* does not mean without compliance with the law. "*Without recourse to Court*" means that no further suit is to be commenced in respect to the issues that were addressed in the Consent Judgment. These issues are the fact of indebtedness, the commitment to pay, the right to recovery by sell of the mortgaged property and the undertaking by the parties not to revert to Court in lawful enforcement of the things agreed upon under the Consent Judgment.

18. In his submissions, Counsel for the Plaintiff stated that the Plaintiff does not dispute anything in the Consent Judgment but rather their dispute is in respect of what happened 90 days after the date of signing the Consent Judgment.

19. According to the testimony of PW1, the 1st defendant had a right to sale in line with clause 4 of the Consent Judgment however the sale was not done in line with the laws of Uganda.

The question in this suit is therefore in respect of the illegality at sale. This question was raised in the Consent Judgment. The inference of illegalities qualifies the terms of the Consent in Clause 4. Sale without further recourse to Court, as pro*vide*d for in Clause 4, without having explicitly stated so, envisages compliance with all

the lawful requirements and steps expected in a sale of mortgaged property.

20. In the Consent Judgment, the only issue was in respect of the amount owed and the mode of recovery without recourse to Court. This is not in contention. The Plaintiff Counsel submitted that the Plaintiff's litigation in this case is in respect of the illegal sale, illegal appointment of Receivers and the Receivers' sale of the Plaintiffs' assets at a mere 10,000,000/=.

21. Once there is a question as to whether the required steps were taken or not, and if they were taken, whether it was done in the right and lawful way, then Clause 4 can be set aside for purposes of giving the parties an opportunity to be heard on their questions in order to meet the ends of justice. The Plaintiff cannot therefore be said to be re-opening the case, afresh.

22. These, in my view, are absolutely new issues because by the time of the Consent Judgment, the sale had not yet been conducted and the Receivers had not yet been appointed.

23. Since the Plaintiff are raising illegalities in the current suit, justice can only be served if the Court gives them an opportunity to prove their allegations, and the defendants accorded opportunity to absolve themselves as well.

24. To establish whether *Issue Estoppel* arises, the parties to the proceedings in which the estoppel is raised must be the same. An interpretation of this condition leads to the inference that all the parties in the different suits must be the same.

25. In this instance, the Plaintiff in the Consent Judgment is similar with the Plaintiff in the instant case. The defendant in the Consent Judgment is also the same as the 1st defendant in the instant case. However, in the instant case, two more defendants are introduced as the 2nd and 3rd defendants. The Plaintiff submitted that most of the issues in the instant case are in respect of the new defendants Kabiito Karamagi and Joshua Ogwal, who Receivers were appointed after the sale of the properties. The new parties were introduced as the 2nd and 3rd defendants and all the issues raised against them are novo in this suit.

26. I am in agreement that the parties in the different suits are also different. The causes of action in the different cases are not the same. The instant case is therefore not *res judicata* nor is it barred by *Issue Estoppel*. It is therefore not an abuse of Court process.

27. Counsel for the Defendants also raised an objection to the effect that the Suit is barred by the principle of *Approbation and Reprobation*. He submitted that the Plaintiff's contention that the Mortgage and Debenture are invalid amounts to approbating and reprobating because, the loan on which they defaulted was secured by the said Mortgage and Debenture and this argument has only arisen at the time of default.

28. That the Plaintiff filed CS No. 59 of 2015 which he on his own volition decided to settle by a Consent Judgment where it was agreed that the defendant would be entitled to sell the mortgaged property without any further recourse to Court. That however, on defaulting to pay the Sums agreed in the Consent Judgment and obtaining a stay of realization, by the Defendants, of its security the Plaintiff filed

the present Suit. That the present suit amounts to an unlawful reprobation of the Plaintiff's actions and conduct and the same ought to be dismissed.

29. That the Plaintiff granted a Power of Attorney dated 31st August 2015 (DEX26) to one Tushabe Ausi-Ali, a co-director of Alexander Muramira in *All Parents School*. That Alexander Muramira is the party that purchased the property previously mortgaged to the 1st Defendant as security for the loan extended to the Plaintiff. That for the same donor of the Power of Attorney to bring this suit amounts to approbating and reprobating.

30. In reply Counsel for the Plaintiff contended that the defendants' submission, that the Plaintiff cannot challenge the Mortgage and Debenture Deeds because the Plaintiff borrowed and took money from the 1st Defendant, is false. That whereas the Plaintiff maintains that they were indebted to the 1st Defendant at the time of signing the Consent Judgment, they never admitted to the validity of the security documents of the Mortgage and Debenture deeds and Oketta's Power of Attorney. That the defendants' submission that because the Plaintiff signed a Consent Judgment in CS No. 59 of 2015, they cannot therefore bring these proceedings is false, because no sale or appointment of Receivers had happened by the signing of the Consent Judgment.

31. Counsel for the Plaintiff further contended that the right to property is Constitutional and the Plaintiff is entitled to challenge the sale of its property. That the principle of *Approbation and Reprobation* is not applicable to the instant case because the Plaintiff is exercising their right under the law to challenge the Defendants' illegal actions.

That the Plaintiff was within their right to redeem their property under the Mortgagees' equity of redemption because they paid 50,000,000/= upon signing the Consent Judgment. Counsel argued that the Power of Attorney issued by the Plaintiff was for purposes of running the school on behalf of the Plaintiff and not on behalf of All- Parents School Limited which was incorporated to perpetuate a fraud. That there is no relationship amongst Tushabe Ausi-Ali, Alexander Muramira and All - Parents School Limited. That witnessing a document does not make a person a Co-Director. That the Power of Attorney does not amount to approbating and reprobating. That the points of law be dismissed with costs.

32. The principle of *Approbation and Reprobation* is a common law principle which, according to **Halsbury's Laws of England, 4th Edition, Reissue, Volume 16, Para 957** states that;

> *"The principle that a person may not approbate and reprobate expresses two propositions:*
>
> *(1) That the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile; and*
>
> *(2) That he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.*
>
> *Thus, a Plaintiff, having two inconsistent claims, who elects to abandon one and pursue the other may not, in general, afterwards choose to return to the former claim and sue on it; but this rule of election does not apply where the two claims*

are not inconsistent and the circumstances do not show an intention to abandon one of them."

33. The doctrine is further amplified by the Case of **Evans v Bartlam (1937) AC 473**, where Lord Russell stated, at page 483, that: -

> *"The doctrine of Approbation and Reprobation requires for its foundation inconsistency of conduct; as where a man having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit."*

The parties cited various cases that I have taken into consideration.

34. Counsel for the Defendants cited the case of **Amamu Ltd v Barclays Bank of Uganda Ltd & Anor HCCS No. 21 of 2010**, where Justice Kiryabwire agreed with Counsel for first defendant that the Plaintiff approbated the sale of the suit property to the 2nd Defendant and is therefore estopped from bringing a fresh suit challenging the same.

35. To distinguish the case of **Amamu Ltd v Barclays Bank of Uganda Ltd & Anor** (supra) from the instant case, in the Amamu case property was also sold through an agreement by a Consent Judgment and upon sale the Plaintiff was given a percentage of the proceeds of the sale. He then sought to challenge that same Consent Judgment. However, in the instant case, the Plaintiff does not challenge the Consent Judgment but rather, how the sale was conducted. Unlike in **Amamu case (supra)** where the Plaintiff benefitted from the sale of his property, the Plaintiff in the instate case has not derived any benefit from the sale of his property, to warrant invocation of the maxim of approbation and reprobating.

36. In my view, the principle of *Approbation and Reprobation* is cited out of context and is therefore not available to be invoked against the Plaintiff in the circumstances.

37. I find no merit in the preliminary objections raised by the Defendant and they are accordingly dismissed.

H. DETERMINATION OF ISSUES

ISSUE NO.1: WHETHER THE SALE OF THE PLAINTIFF'S MORTGAGED PROPERTY BY THE 1st DEFENDANT WAS LAWFUL.

38. Counsel for the Plaintiff submitted that the sale of the Plaintiff's mortgaged property by the 1st Defendant was unlawful for reasons of omission to re-advertise after the initial intended sale had been stayed, sale by private treaty, sale at an undervalued price and want of execution of the Sale Agreement. Counsel further submitted that the fact that the Plaintiff paid to the 1st Defendant a sum of Ugx. Shs. 50,000,000/= as partial repayment of the loan, the default had been rectified and the initial Notice of Sale and advertisement lapsed. In which case therefore, the 1st Defendant, having decided to sale was under obligation to repeat the whole process (afresh) by issuing a new Notice of Sale and only sought to recover the reduced amount of UGX. 716,384,349/=.

39. In reply, Counsel for the Defendants submitted that the Plaintiff's submissions on non-re-advertisement are flawed and unsustainable because the Sale was not under the Mortgage and merger in judgment. Counsel submitted that the Consent Judgment gave the 1st Defendant a right to sale on default, which they exercised. That the Plaintiff still defaulted on the terms of the Consent Judgment by

failing to pay the decretal instalments on time, upon which the Mortgagee sold.

40. Counsel for the Defendants further contended that the rights of the Plaintiff under the Mortgage and the Debenture merged into the Judgment in CS No. 59 of 2015, when that Judgment was issued or pronounced by the Court. That the Consent Judgment was not appealed by the Plaintiff/Mortgagor, and it has never been reviewed. That the Consent Judgment did not put any limitations on the manner of sale, even though the 1st Defendant still took steps to obtain the best price realizable, in the circumstances, from the sale of the property. That it is not a breach of duty to sell by private contract without advertising, as long as the sale is in good faith and for a fair price. That the Plaintiff consented to a sale by private treaty under Clause 3 (iii) A of the Deed of Legal Mortgage (Exhibit P3).

41. In rejoinder Counsel for the Plaintiff submitted that the 1st defendant's Sale Agreement indicates that it was executed under the Mortgage Act No.8/2009.

DETERMINATION BY COURT

Non-re-advertisement after initial intended sale and sale by private treaty

42. It is the Plaintiff's argument that a sale which has been stayed cannot be carried on without re-advertisement.

According to Clause 4 of the Consent Agreement between the parties in CS 59 of 2015 (PEX14), it was agreed that the defendant, who is now also the 1st defendant in the instant suit, would stay any recovery proceedings against the Plaintiff until the lapse of 90 days.

Within that period, it was agreed, that the Plaintiff would clear all the outstanding balance. In the same Clause, it was also agreed that in the event the Plaintiff failed to honor its obligations, the defendant was entitled to sell the mortgaged property *"without any further recourse to Court".*

43. Counsel for the Defendants relied on that clause and submitted that the Consent Judgment gave the 1st Defendant a right to sale on default without putting any limitations on the manner of sale and that it is this right that the 1st Defendant exercised.

44. In his cross examination, PW1, one of the directors in the Plaintiff stated that according to the Consent Judgment the Bank had a right to sell the mortgaged property upon default and that the Plaintiff had defaulted on the terms of the Consent Judgment.

45. The Plaintiff cited three Ugandan cases, regarding applicability of S.19 of the Mortgage Act, where a sale had been stayed, while the defendants cited various common law authorities in respect of the doctrine of merger in judgment.

46. Counsel for the Defendants submitted that when the Mortgagee (who is now the Judgment Creditor) proceeds to enforce the Judgment, the Mortgagor (now Judgment Debtor) cannot fall back to the rights under the Mortgage Act and Regulations. That the rights of the Plaintiff under the Mortgage and the Debenture merged into the Judgment in CS No. 59 of 2015. That basing on the merger principle, the Plaintiff who litigated the Mortgage in the previous suit cannot revert back to the Mortgage rights. That the Consent Judgment was not appealed by the Plaintiff and it has never been reviewed.

47. I will look at the doctrine of merger *Vis a Vis* S.19 of the Mortgage Act.

Both principles relate to prohibition of adjudication of a matter that has already been decided to finality. However, the doctrine of merger differs from the doctrine of *res judicata.*

48. The doctrine of merger was explained by Arden LJ in the Case of **Clark and another v In Focus Asset Management & Tax Solutions Ltd (2014)3 All ER 313** at Para 5, when he stated that: -

> *"[5] Merger explains what happens to a cause of action when a Court or tribunal gives judgment. If a Court or tribunal gives judgment on a cause of action, it is extinguished. The claimant, if successful, is then able to enforce the judgment, but only the judgment. The effect of merger is that a claimant cannot bring a second set of proceedings to enforce his cause of action even if the first tribunal awarded him less than he was entitled to..."*

49. The doctrine of merger treats a cause of action as extinguished once judgment has been given on it so that the claimant's sole right is a right on the judgment.

50. On the other hand, the principle of *res judicata* as provided for in S. 7 of the CPA Cap.71 is a principle that prohibits Court from adjudicating a matter which has already been adjudicated upon and finally decided by a competent Court.

Counsel for the Defendants cited various authorities which I have looked at but established that they all relate to the principle of *res judicata* not the doctrine of merger as alleged.

51. The principle in the Case of **Cambefort v Chapman (1887) 19 QBD** as cited by the defendants is no different from the principle of *res judicata* as it also relates to prohibition of a person from suing twice on the same contract. The difference between this case and the doctrine of merger is that merger relates to a cause of action whereas this particularly relates to a contract.

52. As has already been determined, when addressing the preliminary points of law raised by the defendants, there is no question of *res judicata* in the instant case, as there is no suit that has been brought with similar facts or issues.

53. The principle of merger is also, to my understanding, inapplicable in this case.

54. It therefore begs to be determined whether the sale was transacted solely on a contractual or a statutory basis.

To brace his submissions, Counsel for the Defendants cited the case of **Majid Akuze V Centenary Rural Development Bank, Civil Suit No. 87 of 2015**. In that case, Justice Flavia Senoga Anglin stated that it is trite law that the power of sale of mortgaged property is either statutory under the Mortgage Act or contractual under the Mortgagee agreement.

55. In his cross examination, whereas PW1 stated that the Sale Agreement was executed out of the Consent Judgment, line 2 of the said Sale Agreement (DEX21) bears the caption '*In the matter of the Mortgage Act No. 8 of 2009*'. In his re-examination, DW2's testified that the property was sold pursuant to both the Mortgage Act and the Consent Judgment.

56. It is therefore common ground that the mandate of sale of the mortgaged property in issue was governed by the Mortgage Act. Since the transaction was subject to the application of the Mortgage Act, when conducting the sale, the 1st defendant was obliged to comply with the procedure in the Mortgage Act.

57. **S.19 of the Mortgage Act** lays out the procedure of what is to be done in the event that a mortgagor has defaulted on their loan obligations. It pro*vide*s that a Demand Notice be served on the mortgagor, then if the mortgagor continues to default, a Notice to rectify the default within 45 working days is served on the mortgagor, if the default continues, then a final default is served on the mortgagor requiring him or her to clear the default within 30 days.

58. If the mortgagor has not complied with the said notices, then S.20 of the Mortgage Act mandates the Mortgagee to appoint a Receiver of the income of the mortgaged land/lease, the mortgaged land or where the mortgage is of a lease, sublease the land/enter into possession of the mortgaged land or sell the mortgaged land.

59. Upon the Plaintiff's default, the Bank appointed a Receiver in line with clause 3(D) of the Mortgage Deed. It was upon the defendant's exercise of this remedy that the Plaintiff sought an injunction and eventually entered into a Consent Judgment which they breached.

60. As noted earlier, the Consent Judgment stayed the defendant's recovery process. It is the plaintiff's case that the sale having been stopped on this occasion, the subsequent sale ought to have been preceded by a re-advertisement.

61. The Plaintiff cited the case of **Grindlays Bank (U) Ltd vs Edward Boaz SCCA NO. 23/1992,** in which the Supreme Court set aside a

sale of the suit property and held that it was an irregularity for a sale which was meant to be by public auction to be done by private treaty as it was not re-advertised following stay of the first auction.

62. The Plaintiff also cited the case of **Solomon Chaplain Lui and Another —vs- Stanbic Bank Uganda Limited, MA No. 766 of 2016**, where Justice Madrama held that where the default has been rectified, fresh notices in terms of **section 19 of the Mortgage Act** have to be served afresh and the entire process has to begin afresh.

63. Counsel for the Defendants submitted that the default by the Plaintiff was never rectified but was instead compounded or multiplied.

64. In **Solomon Chaplain Lui and Another vs Stanbic Bank Uganda Limited (supra),** whose circumstances are very similar to the instant case, the Applicants in that case had been served with a Notice of sale which was also advertised in the New Vision. But before the sale could take place, they requested for rescheduling of the debt whereupon the Applicants, after a discussion with the Respondents, paid a sum of US$106,563 and undertook to make monthly payments but which they again defaulted on. When the property was due for sale in March 2016, the Applicants applied for a temporary injunction. In granting that injunction, Justice Madrama (as he then was) held that;

> *"I have carefully considered the facts and come to the conclusion that there is no clear evidence as to whether at the first instance the Respondent had not rectified the default. Where default has been rectified, fresh notices in terms of section 19 of the Mortgage Act have to be served afresh. These include notice of default under section 19 (1) and also*

a notice to rectify after the new default. Can the Respondent just rush to sell? The entire process has to begin afresh and this is also an issue for trial."

65. In that case, the Applicant's payment of US$106,563 upon reschedule amounted to rectification of the default which was the reason why the entire process had to begin afresh.

66. **Solomon Chaplain Lui (supra)** is on all fours with the instant case. In the instant case, before the sale could take place, the Plaintiff filed a suit CS No. 59/2015 against the 1st Defendant and the suit was resolved by a Consent Judgment in which the Plaintiff agreed to pay to the 1st Defendant a sum of UGX. 766,384,349/= within four months. Pursuant to paragraph 2 of that Consent, the Plaintiff was to pay UGX. 50,000,000/= leaving an outstanding balance of UGX. 716,384,349/=. In his re-examination, PW1 confirmed that the paragraph was fulfilled through payments by cheques (PEX16) amounting to Ugx. 50,000,000/=, leaving a balance of UGX. 716,384,349/=.

67. The Plaintiff's payment of Ugx. 50,000,000/=, amounted to rectification of the default and following the principle in Solomon Chaplain Lui (supra), where default has been rectified fresh notices in terms of section 19 of the Mortgage Act ought to have to been served.

68. During cross examination, PW1 testified that the Bank sold after the expiry of the grace period of 90 days as agreed in the Consent Judgment. However, it did not serve the requisite Notices as required by the law.

69. It is not in contention that the Consent Judgment of 15th May 2015 stayed the sale that was supposed to be conducted on 3rd March 2015 as indicated in DEX16. As established earlier, once the Plaintiff defaulted on the Consent Judgment, before any sale was conducted, the defendants had to go through the whole procedure as indicated in S.19 of the Mortgage Act.

70. **Section 28(1)d) of the Mortgage Act, 2009**, pro*vides* that where a Mortgagee becomes entitled to exercise the power of sale, that sale may be by public auction, unless the mortgagor consents to a sale by private treaty. This was clarified by Justice Madrama (as he then was) in the case of **Ecumenical Church Loan Fund Uganda Ltd v Ways KM Uganda Ltd (CS (OS) 11 of 2014)** when he held that: -

> *"A sale by a Mortgagee for example shall be by Public Auction unless sale by private treaty is agreed to by the Mortgagor ..."*

71. The defendants' argument was that under Clause 3 (iii) A of the Deed of Legal Mortgage (PEX3) dated 22nd September 2011, the Plaintiff consented to a sale by private treaty.

72. Clause 3 (iii) A of the Deed of Legal Mortgage states as follows;

> **THE MORTGAGOR HEREBY AGREES AND DECLARES that the following provisions shall apply to this Mortgage...At any time after the whole of the moneys hereby secured shall have become payable under the provisions of clause 1 (3) hereof or on becoming entitled to enter into possession of the mortgaged property and without previous notice to or concurrence on the part of the Mortgagor:**

The Bank may without applying to Court sell or concur with any other person in selling the mortgaged property or any part or parts thereof in one or more lots by public auction or private contract and either at one or at several times subject to such terms and conditions as the Bank shall think fit; and resell in manner aforesaid without being liable for loss occasioned thereby with power to make and sign transfers and to do such acts and things as are necessary for the carrying out of any such sales or resale by private treaty; ... and the Mortgagor hereby irrevocably CONSENTS to the selling of the whole or part of the mortgaged property by private contract.

73. A similar issue was dealt with in the case of **Twase & 3 Ors v Attorney General & Anor, Civil Suit No. 421 of 2002,** where Justice Hellen Obura in interpreting Section 10 of the repealed Mortgage Act Cap. 229 followed the case of **Barclays Bank v Katende, Civil Appeal No. 22/93** and held that;

> *"...the Bank does not require leave of Court to realize its security once by the terms of the mortgage the mortgagor irrevocably expressly consented to the sale without recourse to Court in event of failure to repay the loan."*

74. This was emphasized by Justice Yorokamu Bamwine in the case of **Katusiime Elias v Arncy Holdings Limited, MA No. 272 of 2005** where he held that;

> *"It is trite that the right to sell can be exercised without recourse to Court where such a right is expressly reserved in the mortgage agreement."*

75. Clause 3 (iii) A of PEX3 above clearly indicates that the Plaintiff as the mortgagor authorised the 1st defendant to either sell by public auction or private treaty. In exercise of their rights in the first instance, the 1st defendant opted to advertise by public auction as seen in DEX16. However, this time round they opted to sell by private treaty which was still in exercise of their rights under the deed.

76. Taking into account the provisions of Clause 3 (iii) A of PEX3, I do not find the contextual relevance of the case of **Grindlays Bank (U) Ltd vs Edward Boaz (supra)** cited by the Plaintiffs. That case is not applicable in the instant case.

77. In his cross examination DW2 confirmed that the 1st defendant did not re-advertise after the initial but rather proceeded by calling the bidders in the initial advert. The sale was based on the initial advert.

78. In his re-examination he stated that it was because of the clause in the Consent Judgment which stated that "without further recourse to Court".

In my view, the ordinary interpretation of the clause would imply; *"no further suits, applications, proceedings etc to be brought to Court thereafter"*, but would not exclude or waive the requirement for recourse to the Mortgage Act, which is the governing law.

79. It is this Court's finding and conclusion that the omission by the 1st defendant to comply with the procedural requirements stipulated under S.19 of the Mortgage Act, after a stay of the initial sale had been granted, invalidated the purported sale.

SALE AT AN UNDER VALUE PRICE

80. Counsel for the Plaintiff submitted that the 1st Defendant sold the Plaintiff's mortgaged property at an under-stated value thus making the sale unlawful.

81. Counsel further submitted that at the time of the Plaintiff applying for a loan from the 1st Defendant in 2011, the Plaintiff's property was valued by CBRE CB RICHARD ELLIS for and on behalf of the 1st Defendant. That the Valuation Report had an Open Market Value of UGX. 1,270,000,000/= (One Billion, Two Hundred Seventy Million) and a Forced Sale Value at UGX. 740,000,000/= (Seven Hundred Forty Million).

82. He drew Courts attention to the fact that DW2 testified that a reserve price of UGX.740, 000,000/= is what was stated in a letter to Armstrong auctioneers (EXH. P18), which would therefore mean that at the time of the initial sale which had been slated for 3rd March 2015, there was no pre-sale valuation of the property. That the said letter confirmed that the property was sold below the reserve price which was a breach of their duty to take reasonable precaution to obtain a true market value of the property. That PW1 was not cross examined on his testimony that the 1st defendant's Valuation Report which established the forced sale value of Ugx Shs 605,000,000/= and was done after the expiry of the stay granted by Court in the Consent Judgment was a mere sham. That the Plaintiff's suit property cannot have depreciated in value yet new buildings had been set up using the loan borrowed from the 1st Defendant.

83. In reply Counsel for the Defendants submitted that at the trial, the Plaintiff did not seek to put in issue the Valuation Report that the 1st Defendant relied on for the sale of the property. That the reserve

Price of Shs. 740,000,000/= is derived from a valuation done by CB Richard Ellis (U) Ltd a Valuer who was subsequently blacklisted, which was never controverted and that the bona fides of their Valuation cannot be trusted by a Court of Law. Counsel submitted that the Valuation in DEX18 was carried out by a reputable Valuer who returned a Forced Sale Value of Shs. 605,000,000/=, on the basis of which the property was sold by the 1st Defendant at Shs. 610,000,000/ =. Counsel further submitted that the Valuation commissioned by the Plaintiff and carried out by East African Consulting Surveyors & Valuers (PEX19) is full of contradictions and inconsistencies and should be rejected by the Court. That it is a usual scenario that Valuations can differ. That the burden of proof is on the mortgagor to show that the Mortgagee failed to take reasonable care to obtain the best price reasonably obtainable. That if there was an error at all, a Forced Sale Value of Shs. 605,000,000/= would be within an acceptable margin of error. That the law is that a Mortgagee's exercise of its power of sale will not be faulted if the Mortgagee's selling decision is within an acceptable margin of error.

84. In rejoinder, Counsel for the Plaintiff submitted that the allegation that CBRE Richard Ellis was blacklisted was not adduced in evidence. That he may have made some mistakes with other Banks but not with the 1st Defendant. That no evidence was led to show that he over-valued Mubende Parents School, no suit or complaint was filed by the 1st Defendant against the said Valuer in respect of the suit property. That at the time he made that Valuation Report, he was properly registered. That the submissions that valuations before the loan is disbursed are optimistic and merely speculative

conjecture by the Defendants because no expert Valuer was brought to Court to explain the science of valuations.

DETERMINATION BY COURT

85. **R.11 of the Mortgage Rules** pro*vide*s as follows;

> **1. The Mortgagee shall before selling the property, value the property to ascertain the current market value and the forced sale value of the property.**
>
> **2. For the purposes of sub regulation (1), the Valuation Report shall not be made more than six months before the date of sale.**
>
> **3. The Valuation Report shall contain the current pictures of the property, including—**
>
> **a. the front view of the property;**
>
> **b. the side view of the property; and**
>
> **c. the detailed description of the property.**

86. The contention however is not whether the property was valued but rather that it was undervalued. Whereas the Regulations do not prescribe details on how valuation is to be conducted, the issue has been dealt with in various cases including **Cuckmere Brick Co. Ltd vs Mutual finance Ltd [1971] CH 949** in which it was held that,

> *"..... a Mortgagee exercising his power of sale does owe a duty to take reasonable precaution to obtain the true market value of the property at the date on which he decides to sell it."*

87. At the time when the Plaintiff was applying for the loan, the 1st defendant conducted a valuation of the suit land by CBRE Richard

Ellis who presented a Valuation Report dated 12th May 2011 (DEX23). In that Valuation Report the market value was Ugx. 1,270,000,000/ while the forced sale value was Ugx. 740,000,000/. The Plaintiff defaulted on their loan obligations and the 1st defendant instructed Armstrong auctioneers to recover the loan in question through a letter dated 5th November 2014 (PEX18). In that letter, the 1st defendant stated the reserve price as UGX.740, 000,000/. Thereafter the parties entered into a Consent Judgment on 15th May 2015 which led to the stay of the recovery proceedings.

88. On a balance of probability, I am convinced by the Plaintiff's argument that at the time of the initial sale which had been slated for 3rd March 2015, there was no pre-sale valuation of the property because according to PEX18 the reserve price had been set at UGX.740,000,000/ which was the forced sale value of the mortgaged property at the time of applying for the loan. Furthermore, no Valuation Report had been presented at that point.

89. Upon the Plaintiff's default on the Consent Judgment, the 1st defendant through SM Cathan Ltd conducted a valuation and a Valuation Report dated 18th August 2015 (DEX22) was issued in respect to Plots M46, M47 & M48 Mubende. In the Report, the market value was stated to be Ugx. 930,000,000/ while the forced sale value was Ugx. 605,000,000/.

90. This rectified the pre-stay anomaly which had sought to rely on the CBRE Richard Ellis forced sale value which was more than four years old. In this way, the 1st defendant complied with Regulation11 of the Mortgage Regulations and it is the SM Cathan Ltd Valuation Report that the sale was based upon.

91. The Plaintiff contends that the sale of the suit property at a sum of Ugx. 610,000,000/= was a gross undervaluation committed by the 1st Defendant company. While the Report by SM Cathan Ltd showed the market value as Ugx. 930,000,000/ and the forced sale value as Ugx. 605,000,000/, the valuation conducted by East African consulting surveyors & Valuers showed that the market value was Ugx. 1,110,000,000/ but does not indicate the forced sale value.

92. The Plaintiff's question is why the Valuation Report of 2011 had a forced sale value of UGX.740,000,000, while that of 2015 had a forced sale value of UGX.605,000,000/. It is important to note the fact that the plaintiffs had used the money borrowed to construct additional structures on the property after the initial valuation had been done by CBRE CB Richard Ellis in 2011 and that the valuation by East African consulting surveyors & Valuers which showed that the market value was Ugx. 1,110,000,000/ was conducted after the property had been sold on 26th August 2015.

93. Counsel for the Defendants submitted that there was need to quickly complete the sale before re-opening of the new school term. According to the school calendar of 2015 as presented by the Uganda National Examinations Board, third term was scheduled to run from 16th September to 29th November.

94. In **The Glossary of Terms of International Valuation Standards, 6th Edition,** *forced sale* is defined to mean circumstances where a seller is under compulsion to sell and that, as a consequence, a proper marketing period is not possible, and buyers may not be able to undertake adequate due diligence, while Market Value is the

estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.

95. The import of the definition is that in case there was proper marketing, the property is likely to fetch the market value and the forced sale value is the limit at which the property can be sold where the seller is under compulsion to sell and a long marketing period is not possible. It means that depending on the circumstances surrounding the sale, the property is expected to attract a sum between the market value and the forced sale value but not less than the forced sale value.

96. These definitions are underpinned by the long established position of practice and law that the lenders obligation is to take reasonable care to obtain a proper price, which should be a reflection of the true market value of the property mortgaged. This would require, among others, that the property is properly and conspicuously advertised and that the sale is done within a period not so distant from the date when the property was advertised so as to render the price offer, in a way, obsolete.

97. The position that a Mortgagee owes the debtor a duty of care to take all steps to realize the security at the best price reasonably possible was also upheld by this Court in **Margherita Millers Ltd & Another vs. HFBU & Comm. Land Registration, HCCS No. 390 of 2018** in which this Court adopted with approval the position in Gosling V Gaskell (1897) AC 575.

98. The argument by the defendants that there was need to quickly complete the sale before re-opening of the new school term notwithstanding, it is inconceivable that the property value could have so significantly depreciated even after additional developments had been added between 2011 when the first valuation which returned a forced sale value of Ugx 740 million was conducted and 2015 when the property was sold and soon after which a valuation conducted by East African Valuers placed the property at a value of Ugx 1,100,000,000/=.

99. In the case of **Cuckmere Brick Co. Mutual Finance Ltd [1971] EWCA Civ 9,** where when handling the sale of the Mortgaged property on behalf of the lenders, the Auctioneers were negligent, with the result that the property was sold at an under value, Court held the lenders liable to the borrowers and that a mortgagee was under a duty to take reasonable care to obtain the true market value of land.

100. Counsel for the Defendants also sought to discredit the Valuation Report by CB Richard Ellis (U) Ltd by stating that he had been blacklisted. He based this on the finding in CS No. 195 of 2012 where Justice Anna Mugenyi, found him negligent in issuing a Valuation Report that was marred with falsehoods. As rightly submitted by Counsel for the Plaintiff, the allegations that CBRE Richard Ellis was blacklisted were not substantiated by adducing any form of evidence.

101. From the evidence and submissions on record for the Plaintiff, I am convinced that the value of the plaintiff's property was understated. The shortfall of Shs 129m/= between the 2011 forced sale value and

the price at which the property was sold is significantly out of an acceptable margin of error.

102. The possibility of getting a better price was not adequately explored.

The sale at Ugx. 610,000,000/ was indeed an understatement of the prevailing market and forced sale value of the property.

WANT OF EXECUTION OF THE SALE AGREEMENT

103. Counsel for the Plaintiff submitted that Patrick Oketta, who signed the Sale Agreement (DEX21) which concluded the purported sale, did not have the power to sign the Sale Agreement alone without another signatory, Millie Kasozi, named in the Power of Attorney. That Article 89 of the 1st defendant's Articles of Association (PEX12) shows that at all times, instruments with seals shall be signed by two individuals on behalf of the Bank. That as such, the Sale Agreement was not properly executed by those mandated to do so, which makes the sale unlawful.

104. In reply Counsel for the Defendants submitted that the delegation under PEX12 does not derive from Article 89 of PEX12 but rather from Article 64 of PEX12. That Article 64 is the specific provision authorizing the Directors to delegate their powers to an attorney or to attorneys. That Article 64 of PEX12 is the same as Article 81 in the Second Schedule of the present Companies Act No.1 of 2012. That the said Article 64 of the 1st Defendant's Articles of Association does not state that the attorneys appointed by the 1st Defendant Bank were to sign jointly on documents. That Article 89 only regulates the use of the Seal by the Directors, not by a person or body of persons appointed to be the Attorney or Attorneys of the company. That the Authorities cited by the Plaintiff in relation to

Powers of Attorney are misconstrued or quoted out of context. That the question of the signature of the Agreement by only one of two Attorneys is a matter of internal management which the 1st Defendant as donor of the Power of Attorney has not questioned. That the Sale Agreement was properly executed by Oketta on behalf of the 1st Defendant Bank, which also received the proceeds of sale as further confirmation of the 1st Defendant Bank's ratification and validation of the transaction and that the sale of the Plaintiff's mortgaged property was lawful and cannot be challenged on those purported grounds.

105. In rejoinder, Counsel for the Plaintiff submitted that the Defendants admit that Patrick Oketta and Millie Kasozi were to sign jointly on documents on behalf of the 1st Defendant. That it is possible that Millie Kasozi was kept in the dark in regard to this sale to allow Oketta and his co-conspirators to sell the Plaintiff's property for personal gain. That ratification is a question of fact and no deed of ratification was adduced in evidence. That Oketta was not called as a witness to prove that his illegal actions were ratified and if so, how? That the burden to prove ratification lies with the Defendants who failed to prove it. That there was no evidence that the 1st Defendant ever received the money in the Sale Agreement as no proof of transfer of funds or receipt from Uganda Development Bank was adduced in evidence.

DETERMINATION BY COURT.

106. I have looked at Article 89 of the 1st defendant's Articles of Association, it provides as follows;

"The directors shall provide for the safe custody of the seal, which shall only be used by the authority of the directors or of a committee of the directors authorised by the directors in that behalf; and every instrument to which the seal shall be affixed shall be signed by a director and shall be countersigned by the secretary or by a second director or by some other person appointed for that purpose."

107. Counsel for the Plaintiff submitted that in line with Article 89, the board of directors of the 1st defendant on 20th December 2013 made a Power of Attorney marked PEX20 authorizing Patrick Oketta (Director Development Finance) and Millie Kasozi (Director HR & Administration) to be their true and lawful Attorneys and agents.

108. Powers of Attorney were defined in the case of **Gold Trust Bank (U) Ltd (Now DFCU Bank Ltd) vs Josephine Zalwango Nsimbe, the Executrix of the Estate of Sam Nsimbe, Civil Suit No. 2226 of 1992,** where Justice Remmy Kasule (as he then was) held that;

"A Power of Attorney is an Instrument conferring authority of the principal to the agent where such authority is required to be conferred by a deed, or where, in any other circumstances, it is desired formally to appoint an agent to act for the principal in one transaction or a series of transactions, or to manage the affairs of the principal generally. The person conferring the authority is the donor of the power, and the recipient of the authority, the Donee. A Power of Attorney is construed strictly by the Courts according to well recognized rules of construction: See: Halsbury's Laws of England, Fourth

Edition: Re issue: Volume 1(2) Butterworth's, paragraph 46. In applying the strict construction regard is first had to the recitals in the Power of Attorney which show the general object, and control the general terms in the operative part of the deed. General words are construed as limited by reference to the special powers conferred."

109. Interpretation of Powers of Attorney was dealt with in the case of **Fredrick Zzaabwe vs Orient Bank Ltd & 5 others SCCA No. 04 of 2006,** where Katureebe JSC, as he then was, held that;

'In short the authority conferred by a Power of Attorney is that which is within the four corners of the instrument either in express terms or by necessary implication."

110. The import of these decisions is that Powers of Attorney are to be interpreted strictly with nothing added therein or removed.

111. The Power of Attorney referred to in this case is marked PEX20 dated 20th December 2013. In that Power of Attorney, the 1st defendant's directors authorised Patrick Oketta and Millie Kasozi to be their lawful attorneys and agents to sign and execute documents, deeds and instruments on behalf of the Bank, pro*vided* that the signing or the execution of such documents, deeds, instruments shall first have been authorised by the Board of the Bank. In his cross examination, DW2 confirmed that Millie Kasozi never signed on the Sale Agreement. In his re-examination DW2 also further clarified this by stating that only Patrick Oketta signed the Sale Agreement.

112. Counsel for the defendants' argument was that the Powers of Attorney were derived under Article 64 of the Articles of Association which states as follows;

> **The directors may from time to time and at any time by Power of Attorney appoint any company, firm or person or body of persons, whether nominated directly or indirectly by the directors, to be the attorney or attorneys of the company for such purposes and with such powers, authorizes and discretions not exceeding those vested in or exercisable by the directors under these regulations and for such period and subject to such conditions as they may think fit, and any such Powers of Attorney may contain such provisions for the protection and convenience of persons dealing with any such attorney as the directors may think fit.**

113. The defendants contend that it is from this Article 64, which is in pari materia with Article 81 of 2nd Schedule of the Companies Act 2012 that PEX20 was made.

114. I have considered the defendants' submissions and in my opinion, whereas indeed there is no bar to having a single individual sign on behalf of the company, in the instance, there is a Power of Attorney whose mandate is explicit. To therefore invoke the provisions of Article 64 in the manner that the defendants propose would amount to an attempt to import meaning into the Power of Attorney. I do not agree with the notion that the interpretation of the Power of Attorney should in this case be based on Article 64 or Article 81 of 2nd Schedule of the Companies act 2012 which is in pari materia. This,

in my view, would lead to the absurdity of re-characterizing the mandate of the power of attorney, contrary to the intention of the donor.

115. Relating the findings in the cases of **Zzaabwe (supra)** and **Gold Trust Bank (supra)** on interpretation of Powers of Attorney: that Powers of Attorney are to be interpreted strictly with nothing added or removed, to the facts of the instant case, then in the instant case there was a deviation from the mandate of the Power of Attorney when Oketta executed the Sale Agreement alone without Millie Kasozi the second donee. This was a fatal irregularity which renders his actions null, void and ineffectual and the Agreement unlawful.

Premised on all the foregoing findings, this Court finds that the sale of the Plaintiff's mortgaged property by the 1st defendant was unlawful.

Issue No.1 is answered in the affirmative.

ISSUE 2: WHETHER THE DEBENTURE CREATED ON THE PLAINTIFF'S PROPERTY WAS LEGAL.

116. Counsel for the Plaintiff submitted that the debenture (PEX4) created on the Plaintiff's property was illegal because it was not properly executed, was not sealed and was only signed by one person on behalf of the 1st Defendant. He further submitted that the debenture at hand does not bear the seal of the 1st Defendant, thus making it illegal and unlawful because it is contrary to Article 89 of the Articles of Association (PEX12) which gives authority to two individuals to sign instruments, that is either two directors or a director and the secretary. That only one person (Gabriel 0. Etou) signed the debenture yet the legal requirement was for two people

to sign for and on behalf of the 1st Defendant. That there is no way the directors of the 1st Defendant would nominate an individual to sign instruments on their behalf because this would be in total violation of Article 89 of Exhibit P12.

117. In reply, Counsel for the Defendants submitted that the Plaintiff erroneously focuses on Article 89, instead of Article 64 of the 1st Defendant's Articles of Association which authorizes the Directors to delegate their powers to an attorney or to attorneys. That on the basis of the provisions of Article 64, the signing of the debenture by Gabriel 0. Etou alone was therefore not illegal, null and void. That all the cases cited by the Plaintiff are inapplicable because they deal with a mortgage executed by a company under the Registration of Titles Act. That there is no need for the Debenture to 'double as' a Loan Agreement because in this Case, there was a Loan Agreement between the Plaintiff and the 1st Defendant (DEX1). That the Plaintiff is estopped by the doctrine of *Approbation and Reprobation* from denying the validity of the debenture under which it borrowed and acknowledged the debt.

DETERMINATION BY COURT.

118. In **Broad v Stamp Duties Comr. (1980] 2 NSWLR 40 at 52-54**, Lee J. established that the root meaning of debenture is indebtedness, and to constitute a debenture, the written acknowledgment of debt must be executed by or on behalf of the debtor.

119. **Halsbury's Laws of England/Companies (Vol 14 (2009) 5th Edition**, Paras 1299 defines debenture as;

> *"…. a document which either creates or acknowledges a debt. The debt secured may be all moneys due from the company*

on any account whatsoever, and is then known as an 'all moneys debenture'.

A debenture also contains terms of the loan advanced.

120. A Mortgage deed on the other hand is a document in which the mortgagor transfers an interest in real estate to a Mortgagee for the purpose of providing a Mortgage loan.

121. Both documents serve a common purpose of acknowledgement of debt and setting out the terms of a loan advanced. The only difference between the two lies in the fact that the debenture is usually in respect to creating a charge over the stock of a borrowing company while the Mortgage deed is in respect to land. All the above definitions connote an acknowledgement of debt.

122. In **General Parts Uganda limited —versus- NPART SCCA No. 5 of 1999** , a case cited by both parties, Court showed that a company can only duly execute the mortgage document by either affixing its common seal to the document or by acting through its Attorneys appointed for the purpose of signing the document. Mulenga JSC, as he then was, - RIP, held that;

> *"For the Appellant Company to duly execute the mortgage document as Mortgager whether in the capacity of the registered proprietor or Donee of Powers of Attorney, it had to either affix its common seal to the document or to act by its Attorneys appointed for the purpose of signing the document".*

123. In the instant case, the 1st defendant's directors, through a Power of Attorney dated 2nd July 2009 and registered with the Registrar of documents under instrument No.10019 of 2009, had appointed

Gabriel 0. Etou as the 1st defendant's attorney and he signed it by virtue of that Power of Attorney. It is the Plaintiff's contention that in making the Power of Attorney in question, the 1st defendant's directors did not take Article 89 of their Articles of Association into consideration. The said Article requires that at all times, when any instrument is signed for and on behalf of the 1st Defendant, it had to be countersigned by another person.

124. In their reply the defendants submitted that the Power of Attorney in question was derived from Article 64 of the 1st defendant's Articles of Association.

125. As already stated by this Court in Issue No. 1 above, Powers of Attorney are to be interpreted strictly with nothing added therein or removed.

126. The provisions of Article 89 of the 1st defendant's Articles of Association notwithstanding pro*vide*s the Power of Attorney dated 2nd July 2009 appointed Gabriel O. Etou as the 1st defendant's Attorney and he executed the deed by virtue of that Power of Attorney. The directors who made the Power of Attorney in question were duly mandated to do so. According to that provision of the Companies Act, they can appoint whoever they choose to sign alone or jointly. In the instance, unlike under Issue No. 1, they chose to only appoint Gabriel O. Etou and so there was no illegality about the Power of Attorney in question or the mandate and actions arising from the lawful exercise of any mandate derived therefrom.

127. In conclusion, Court finds that the debenture created on the Plaintiff's property was legal. Issue No.2 is answered in the affirmative.

ISSUE 3: WHETHER THE PLAINTIFF IS INDEBTED TO THE 1ST DEFENDANT & IF SO, BY HOW MUCH.

128. Counsel for the Plaintiff submitted that the Plaintiff is not indebted to the 1st Defendant at all.

That it was agreed upon in the Consent Judgment (PEX14) that the Plaintiff was indebted to the tune of UGX. 766,384,349/=. That pursuant to the Consent Judgment, the Plaintiff paid UGX.50, 000,000/= leaving a balance of UGX.716, 384,349/. That during cross examination DW1 confirmed that there was no clause in the Consent Judgment allowing for further interest. That in a letter to Armstrong Auctioneers (PEX18), the 1st defendant indicated that the reserve price for the mortgaged property was UGX.740, 000,000/= but instead sold the Plaintiff's property at an under value of UGX. 610,000,000/= for which reason they are not entitled to any difference if any. That the 1st Defendant is actually the one indebted to the Plaintiff.

129. In reply Counsel for the Defendants submitted that the Defendant conceded that there was no provision for post-judgment Interest in the Consent Judgment. That it is the Plaintiff's breach of the Consent Judgment that occasioned grievous loss and expense to the 1st Defendant, including the cost of defending legal proceedings, for which the 1st Defendant needs to be compensated. That the Letter of 5th November 2014 (PEX18) written by the 1st Defendant to M/S Armstrong Auctioneers which mentions a reserve price of Ugx. 740,000,000/ predates the sale under the Consent Judgment in August 2015 and the Valuation by Mugisha Turyahikayo Allan dated 14th August 2015 Annexture (DEX18) on

whose basis the property was sold by the 1st Defendant at Shs. 610,000,000/ =. That the Forced Sale Value mentioned in that letter was by CB Richard Ellis Valuation which is inconsequential and the value was appraised by a reputable Valuer before the sale in August 2015.

130. Counsel submitted that the Plaintiff is still indebted to the 1st Defendant, as per Counterclaim, to the tune of Ugx. Shs. 225,093,907/=.

131. In rejoinder Counsel for the Plaintiff submitted that the 1st Defendant illegally received another Ugx.10, 000,000/= from the Plaintiff's assets which they never bothered to value. That the Plaintiff's assets were valued at Ugx.188, 541,500/= and by selling them at Ugx.10, 000,000/= the 1st Defendant occasioned a loss to the Plaintiff of Ugx.178, 541,500/= arising from loss of the assets.

132. That the Plaintiff's land and buildings were valued at UGX. 1,110,000,000/= as per PEX19 but the 1st Defendant sold the Plaintiff's mortgaged property at UGX. 610,000,000/= and occasioned a loss to the Plaintiff in the sum of UGX. 500,000,000/=. That the sum total of the loss on the land and the company assets adds up to 678,541,500/= after deducting the money that the property was sold for. That the Defendants are jointly and severally liable to the Plaintiff.

DETERMINATION BY COURT.

133. According the Consent Judgment dated 15th May 2015 (PEX14), the Plaintiff was indebted to the 1st defendant to a tune of UGX. 766,384,349/. This was confirmed by DW1 in his cross examination. The Consent Judgment also provided that the Plaintiff was to pay to

the 1st defendant a sum of UGX.50,000,000/ at the time of entering the Consent Judgment, leaving a balance of UGX.716,384,349/. According to PEX16, the Plaintiff through its lawyer paid the agreed sum of UGX 50,000,000/ on the date of signing the Consent Judgment which was also confirmed by PW1 in his cross examination. It was never controverted by the defendants.

134. The Plaintiff's argument is that under a letter (PEX18) dated 5th November 2014 from the 1st defendant to Armstrong Auctioneers, the 1st defendant had indicated the reserve price for the mortgaged property as UGX.740,000,000/=. The Plaintiff further argues that having set the reserve price at UGX 740, 000,000/, to later sell the Plaintiff's property at UGX. 610,000,000/= was an under value of the property, for which they are entitled to the difference from the 1st Defendant.

135. In reply Counsel for the Defendants submitted that it is the Plaintiff's breach of the Consent Judgment that occasioned grievous loss and expense to the 1st Defendant, including the cost of defending legal proceedings for which the 1st Defendant needs to be compensated.

136. The question of undervaluation was dealt with under Issue 1. In addition to what was discussed, Regulation11 of the Mortgage Rules requires the Mortgagee to value the Mortgaged property before selling it and present a Valuation Report within six months before the date of sale.

137. DEX23 is the Valuation Report prepared by CBRE Richard Ellis arising from the valuation conducted at the application for the loan while DEX22 is the Valuation Report by S.M Cathan Limited in respect of the valuation conducted upon default on the Consent

Judgment. The Plaintiff's objection to the value was based on the valuation conducted by East African Consulting Surveyors & Valuers, marked PEX19, made on 22nd October 2015 which showed that the market value was Ugx. 1,110,000,000/.

138. In Issue No.1, this Court noted that it was inconceivable for the property value to have possibly so significantly depreciated even after additional developments had been added after the pre-financing valuation. Court found that a sale at Ugx. 610,000,000/ was an understatement of both the possible prevailing market value and the forced sale value of the property and concluded that the sale was undervalued.

139. I will now consider the defendant's claim that the sum increased because it included the cost of defending legal proceedings and that the Plaintiff, except the claim for post-Judgment Interest, is still indebted to the 1st Defendant as per Counterclaim to the tune of Ugx. Shs. 225,093,907/=.

140. According to the counterclaim, the defendants averred that upon sale of the Plaintiff's mortgaged property to the highest bidder at Ugx. 610,000,000/, the proceeds were applied to partly settle the Plaintiff's indebtedness with the 1st defendant leaving an outstanding balance of Ugx. 116,384,349/.

141. In reply the Plaintiff stated that the sale was never concluded with the highest bidder since there was no re-advertisement after the stay of the initial sale. That it is the 1st defendant's deliberate actions that resulted in the lapse of time, interest and costs of security, for which the Plaintiff cannot be held liable.

142. This Court is in agreement with the Plaintiff's averment. Since there was no re-advertisement after the stay of the initial recovery process, the possibility of getting better value propositions was lost. This was extensively dealt with in Issue No.1

143. According to the Consent Judgment, the outstanding sum after the Plaintiff paying Ugx. 50,000,000/ which the 1st defendant does not dispute was Ugx. 716,384,349/. So, if the property was sold at Ugx. 610,000,000/ as alleged by the 1st defendant and the same applied to partly settle the Plaintiff's indebtedness with the 1st defendant that would leave an outstanding balance of Ugx. 106,384,349/ not Ugx.116, 384,349/ as alleged by the 1st defendant. The 1st defendant was not able to explain how the additional Ugx. 10,000,000/ came about.

144. During his cross examination DW1 also stated that upon sale of the mortgaged property the outstanding balance was Ugx. 156,384,349/. DW1 also never explained how the additional Ugx. 50,000,000/ came about.

145. In their submissions, the defendants conceded that there was no provision for post-judgment Interest in the Consent Judgment which implies that the addition of Ugx. 10,000,000/ or 50,000,000/ to the outstanding amount could not have been interest and therefore had no basis.

146. Upon sale of the Plaintiff's mortgaged property at Ugx. 610,000,000/ which was then applied to partly settle the Plaintiff's indebtedness with the 1st defendant, the outstanding balance was Ugx. 106,384,349/.

147. According to Clause 4 of DEX27, the Plaintiff had cash in Bank amounting to Ugx. 150,000,000/. In his cross examination DW1 confirmed this and stated that there was a further Report which shows how the said money was disbursed. He however did not tender in that Report for this Court to ascertain how it was utilized. Had the cash in the Bank been applied to the outstanding balance of 106,384,349/ therefore, the whole debt would have been cleared and the Plaintiff would even be entitled to a balance of Ugx. 43,615,651/ from the 1st defendant.

148. As per the Counterclaim, the defendant stated that the Plaintiff is still indebted to them to the tune of Ugx. Shs. 225,093,907/=, being the balance on the loan, Auctioneer's fees and security charges. In paragraph 31 of DW2's witness statement, he confirmed that the outstanding balance at sale of the Plaintiff's property was in Clause 3 of the Consent Judgment and that after the sale, a balance of Ugx. 106,384,349/ remained. That it increased due to further interest charges, auctioneer's fees, legal expenses and other incidental charges.

149. If the sum of Ugx. Shs. 225,093,907/as claimed in the counterclaim is subtracted from the sum of Ugx. 106,384,349/, it leaves a balance of Ugx.118,709,558/. According to the defendants' averments, this would mean that the sum of Ugx.118,709,558/ catered for Auctioneer's fees and security charges. The defendants never adduced any e*vide*nce to show how much fees were paid to the auctioneers.

150. In respect of the money spent on security charges, in his testimony, DW1 testified that they did not need security to take possession of

the Plaintiff's property but surprisingly testified that they pro*vide*d fuel for police cars and "facilitated" the Regional Police Commander (RPC) with a sum of Ugx. 700,000/.

151. There is no legal basis for the Receivers to pro*vide* fuel to police cars and to "facilitate" the Regional Police Commander with Ugx. 700,000/ using the Plaintiff's money yet, according to DW1, they did not even need the security.

152. In any case, had the cash in Bank, amounting to Ugx. 150,000,000/ referred to above, been utilized to clear the outstanding balance of Ugx. 106,384,349/, there would have been no need for auctioneers.

153. Premised on the forgoing, all effort by the defendants to prove a claim against the Plaintiffs come to naught. The Defendants have not been able to prove that they were entitled to the sum claimed in their counterclaim.

154. Counsel for the Plaintiff submitted that the 1st Defendant illegally received another Ugx. 10,000,000/ from the Plaintiff's assets which they sold off without having ever bothered to value. That the Plaintiff's assets had a value of Ugx. 188,541,500/ and by selling them at Ugx. 10,000,000/ the 1st Defendant occasioned a loss to the Plaintiff of Ugx. 178,541,500/ arising from loss of the assets. In paragraph 2.1 of his Report, PW2 who was the Valuer of the business listed 9 items as omitted items in his preliminary Business loss Report. The listed items included furniture and fittings such as tables and chairs, computers and accessories, machinery and equipment, textbooks, food supplies, cash at Bank, intangible assets, other improvements and the land at Manyangwa, all adding up to an estimated value of Ugx. 438,159,869/.

155. In his Report, DW3 stated that the only things that qualified as assets in omitted assets were furniture and fittings such as tables and chairs, computers and accessories, machinery and equipment and textbooks.

156. In his cross examination PW2 stated that wooden tables and other tangible assets were not new and they depreciate, that the depreciation value is different from the replacement value, which is the current cost. However, whereas he confirmed to this Court that the said wooden tables were valued at replacement cost, he also contradicted himself by stating that he considered the net book value, which is the cost of an item after depreciation. The inconsistencies in his testimonies were too evident for this Court to rely on the values that he came up with regarding the wooden tables.

157. In his Report, DW3, while reviewing PW2's Report, stated that the replacement cost ignores wear and tear. He contended that because the wooden tables are subject to wear and tear, relying on the replacement cost which ignores the same could not lead to a correct value.

158. PW2 further stated that in the process of the audit he did not enter the school compound but arrived at a value of Ugx. 106,618,369/ for intangible assets by adopting the Projection Agreement in PEX6, It does not make sense for PW2 to rely on estimates yet he was aware about the valuation method for intangible assets, yet he was aware, as can be discerned from his testimony when he stated that the valuation method for intangible assets is to take the total assets of

the school and remove liabilities of the school and equity of the school.

159. Regarding what amounts to intangible assets, in his Report, DW3 stated that a school license as listed under intangible assets is not an asset. That the brand name is an intangible asset but according to International Accounting Standard 38 it cannot be recognized in a balance sheet of an entity because it cannot be measured reliably. DW3 further stated in his Report that the pupils, teachers and promoters indicated as intangible assets are not assets. He also stated that the value for omitted assets is overstated as a result of inclusion of items misclassified as assets.

160. DW3's testimony was not challenged. I am therefore convinced that some of the items categorized as intangible assets of the Plaintiff are not assets at all, others were not properly valued and others do not fall under omitted assets as stated by PW2 in his report. The import of this is that the value of Ugx. 438,159,869/ for omitted assets is therefore not wholly accurate.

161. In his report PW2 had included the land at Manyangwa in the omitted assets and valued it at Ugx. 40,000,000/. However, during his cross examination, he stated that he was not aware that that land was still in the names of Edward Kasole, one of the Plaintiff's directors who also still occupied it. He stated that he never checked on its certificate of title when conducting his audit and value of assets. This was a patently negligent omission which culminated into inclusion of this item as an omitted asset whereas it was not.

162. When asked to point out what was audited or not in his own report, PW2 was not able to do that. In paragraph 3.1.2 of his report PW2

stated that the valuation was performed under the premise of value in continued use as a going concern business enterprise. Noteworthy however, by the time he conducted his valuation, the Plaintiff had failed to pay their debts. It is therefore questionable as to whether they were indeed a going concern.

163. The law relating to contradictions and inconsistencies was discussed by Justice Stephen Mubiru in the case of **Odur v Ocaya & 3 Ors Civil Appeal No. 34 of 2018,** citing with approval **Alfred Tajar v. Uganda, EACA Cr. Appeal No.167 of 1969; Twinomugisha Alex & two others v Uganda, S. C. Criminal Appeal No. 35 of 2002** where it was held that;

> *"It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored."*

164. The testimony and Report of PW2 contained several contradictions and inconsistencies which were not properly explained and the Court cannot rely on it.

165. The Plaintiff's submission that their assets were valued at 188,541,500/= and that by selling them at 10,000,000/= the 1st Defendant occasioned a loss to the Plaintiff of 178,541,500/= arising from the loss of the assets is therefore not acceptable owing to the inconsistencies and inaccuracies in the Report in which the values were.

ILLEGAL RECEIPT OF UGX 10,000,000 BY THE DEFENDANT

166. I will now look at the Plaintiff's submission that the 1st Defendant illegally received another Ugx. 10,000,000/ from the Plaintiff's assets, which they never bothered to value.

167. During his cross examination DW1, who is the 2nd defendant and one of the Receivers, admitted that the business assets were indeed sold at Ugx. 10,000,000/ and he received the said sum. He further stated that the assets were not valued because it was costly to carry out the valuation but instead, they were put on the market in an advertisement and the price was determined by the bids received. He however failed to explain how the said sum was utilized.

168. DW2, contradicted DW1's testimony by stating that there was valuation of assets but he could not avail the Valuation Report. He also failed to explain how the valuation came to Ugx. 10,000,000/ but stated that it was applied to the Plaintiff's account but could not avail a Bank statement to prove the same. DW2 further contradicted himself by stating that the said sum was given to the Receiver who made his informed decision about it.

169. I agree with Counsel for the Plaintiff that the Plaintiff's business assets were never valued and the Ugx. 10,000,000/ obtained from them could not be accounted for.

170. According to clause 4 of DEX27, the Receiver's Preliminary Report on the state of affairs of the Plaintiff in Receivership, the 2nd defendant stated that the Plaintiff had cash at Bank totaling to Ugx. 150,000,000/. The cash in Bank of Ugx. 150,000,000/ and the sum of Ugx. 10,000,000/ from sale of business assets received by the

Receivers made a total of Ugx. 160,000,000/ which the Receivers never accounted for.

This was enough money to clear the outstanding balance of 106,384,349/.

171. The finding and conclusion of this Court, based on the foregoing, is that the Plaintiff is not indebted to the defendants at all.

Issue No.3 is answered in the negative.

ISSUE 4: WHETHER THE APPOINTMENT OF THE 2ND AND 3RD DEFENDANTS AS RECEIVERS WAS LAWFUL.

172. Counsel for the Plaintiff submitted that the appointment of the 2nd & 3rd Defendants as Receivers was unlawful because it was based on a debenture that was not supposed to be enforced. That the sale of the mortgaged property was the first to happen followed by the 1st Defendant appointing the 2nd & 3rd Defendants as Receivers. That there was no debt to recover hence no default to warrant the appointment of the Receiver.

173. That the Deed of appointment of the 2nd and 3rd Defendants as Receivers was signed by a one Patrick Oketta on behalf of the 1st Defendant, yet Patrick Oketta did not have the power to sign the Deed of appointment alone without his co-signatory Millie Kasozi, according to the Powers of Attorney, which rendered the appointment illegal and void.

174. That without prejudice to the above submission, the 2nd & 3rd Defendants did not send Notice of their appointment to the Company.

174. Counsel submitted that the purported appointment of the 2nd & 3rd Defendants was unlawful since it was in clear contravention of Section 355(1) (a) of the Companies Act.

175. In reply Counsel for the Defendants contended that the Plaintiff misdirected himself to Article 89 of the 1st Defendant's Articles of Association, instead of Article 64 which is the specific provision authorizing the Directors to delegate their powers to an attorney or to attorneys.

176. That PEX11 which is the Notice of appointment as Receiver, which was issued by the 1st Defendant pursuant to S.178 of the Insolvency Act, 2011, although dated 25th September 2015, was effectively filed with the Registrar of Companies on the 5th day of October 2015, which date followed the due execution of the Deed of Appointment. That the said Notice took effect on the date it was filed with the Companies Registry. That the effect of non-compliance with the requirement to give Notice of Receivership states that failure to comply with subsection (4), which also pro*vide*s for giving Notice of Receivership, shall not affect the validity of the document.

DETERMINATION OF ISSUE BY COURT.

177. The question of legality of the Debenture was effectively dealt with in Issue No.2, in which this Court agreed with the defendants' submissions that the debenture created on the Plaintiff's property was legal. In which case actions that were done basing on that debenture are unless proved otherwise deemed to be lawful.

178. The conclusion that the Plaintiff was not indebted to the defendants is a foregone conclusion of this Court. Had the Defendants been diligent in managing the Plaintiff's matters, it would have been

apparent that when they decided to appoint a Receiver, there was actually no debt to recover and hence no justification for their action in appointing the Receiver.

179. Counsel for the Plaintiff submitted that the sale of the mortgaged property was the first to happen followed by the 1st Defendant appointing the 2nd & 3rd Defendants as Receivers. DEX21, the Sale Agreement in respect of the land in question, shows that the sale was conducted on 26th August 2015. PEX9 which is the Deed of Appointment of the Receiver was entered into on 28th September 2015. Whereas, as righty submitted by the defendant's counsel, the omission to give notice is cured by S178 (4) of the insolvency Act, this does not validate an otherwise superfluous and uncalled for action- which was the appointment of Receivers.

180. In consequence, Court finds the appointment of the 2nd and 3rd defendants as Receivers was unlawful since there was no debt to recover given that the money on the Plaintiff's Bank account exceeded what would have been required to clear the outstanding obligation after the sale of his property.

181. Issue No. 4 is answered in the negative.

ISSUE 5: WHETHER THE ACTIONS OF THE RECEIVERS/MANAGERS WERE LAWFUL.

182. Counsel for the Plaintiff submitted that all the actions of the Receivers/ Managers were unlawful because their appointment was also unlawful. He cited the case of **Macfay —vs- United Africa Co. Ltd [196113 ALLER 1169** in which Lord Denning held that;

"If an act is void, then it is a nullity. It is not only bad, but incurably bad. There is no need for an order of Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

183. In reply Counsel for the Defendants submitted that the Case of **MacFay v United Africa Co Ltd (supra)** cited by the Plaintiff is quoted out of context, inapplicable and inappropriate.

184. Having impeached the legality of the Receivers'' appointment, in Issue No. 4 above, premised on the earlier finding that there was after all no debt to recover, it follows that all their actions which ensued from their appointment were a nullity and equally unlawful.

185. Counsel for the Plaintiff submitted that the Receivers did not carry out a valuation of the Plaintiff's assets prior to the purported sale and that the Receivers also used the Plaintiffs funds for unlawful actions.

186. In reply, Counsel for the Defendants submitted that PEX23 in which the Plaintiffs assets were valued at UGX. 188,541,500/= was not credible. That the Receivers in their discretion and given the prevailing circumstances, exercised their powers lawfully in selling the assets and utilizing the funds as they did.

DETERMINATION OF ISSUE BY COURT

187. In the Case of **Centenary Homes vs Victoria Claire Lindell (2020) EWHC 1080 QB,** the Court of Appeal of England and Wales held that;

> *"Whilst the Receiver does owe an equitable duty to the mortgagor, his primary duty is owed to the Mortgagee. His primary duty in exercising his powers is to try and bring about a situation in which the secured debt is repaid."*

188. It is common ground that the Receivers did not carry out a valuation of the Plaintiff's assets prior to the purported sale. This was confirmed by the 2nd defendant under paragraph 20 of his witness statement where he stated that no valuation was done of the assets of the Plaintiff.

189. Counsel for the Plaintiff also submitted that the Receivers used the Plaintiffs funds for unlawful actions. In the Plaintiff's view, the Ugx. 700,000/ given to police was a bribe. Through cross examination DW1 admitted to having used the Plaintiffs funds to "pay facilitation" (sic) to the Regional Police Commander (RPC) Mityana to witness the takeover of the school and fuel police cars all totaling to UGX.700,000/= yet he also testified that there was no need for security. Whereas there is no evidence to prove the allegations of bribery, the expenditure was irregular, for an unjustifiable cause and was therefore an unlawful act by the Receiver.

190. Furthermore, DEX28, a Bank statement of the Plaintiff in Receivership for their account held in Centenary Bank shows that on 28th May 2016, a sum of Ugx. 22,500,000/ was transferred from the said account to Ligomarc Advocates. When asked about this transfer during his cross examination, DW1 stated that the money

was disbursed as indicated in paragraph 24 of his witness statement. In that paragraph, DW1 stated that upon completion of the sale and receipt of the proceeds, there was a total of Ugx. 32,500,000/ which they spent on Receivership expenses, Receiver's fees inclusive of VAT, money transmitted to the Bank and money retained to meet contingent Receivership expenses that could accrue later.

191. According to the e*vide*nce on record, the only sale conducted by the 2nd and 3rd defendant was the sale of business assets that was done on 10th June 2016. The money in question was transferred about a month earlier than that sale.

192. It would appear that the sum of Ugx. 22,500,000/ which was transferred to Ligomarc Advocates on 28th May 2016 could not have been the same sum that the 2nd defendant was referring to under paragraph 24 of his statement, since the sums differ and the timing is different. If indeed the sum of Ugx. 22,500,000/ was applied as alleged, there was inconsistency with the sum of Ugx. 32,500,000/ which they spent on Receivership expenses, Receiver's fees inclusive of VAT, money transmitted to the Bank and money retained to meet contingent Receivership expenses that could accrue later. According to the explanation of DW1 in paragraph 24 of his witness statement, a sum of Ugx. 4,557,000/ was for Receivership expenses, Ugx. 14,160,000/ for Receivership fees inclusive of VAT, a sum of Ugx. 5,392,977/ for contingent Receivership expenses and Ugx. 13,783,000/ was money transmitted to the Bank.

193. Whereas DW1 may have been entitled to receive his payment, as a Receiver, this would entail Receivership expenses, Receivership fees inclusive of VAT and contingent Receivership expenses which make a total of Ugx. 24,109,977/. This total amount still does not equate to the sum of Ugx. 22,500,000/ which was transferred on 28th May 2016. Additionally, in his cross examination, DW1 was not able to explain the money indicated as transmitted to the Bank as he simply stated that it came from Ligomarc Advocates to the Bank but did not adduce any evidence to prove it. DW1 was therefore not able to satisfactorily explain the transfer of Ugx. 22,500,000/ on 28th May 2016.

194. Contrary to the expectations of accountability arising from the long established norm that the Receiver is the agent of the company, not of the debenture holder or the Bank, *in* his cross examination, DW1 admitted that he never sent any accountability to the Plaintiff. This was a patently negligent and unlawful omission on the Receivers' part. The Receiver owed a duty to the Plaintiff.

195. According to clause 4 of DEX27, the Receiver's Preliminary Report on the state of affairs of the Plaintiff in Receivership, the 2nd defendant stated that the Plaintiff had cash at Bank totaling to Ugx. 150,000,000/. This cash in Bank and the sum of Ugx. 10,000,000/from sale of business assets received by the Receivers made a total of Ugx. 160,000,000/.

196. During his cross examination DW1 who is the 2nd defendant and one of the Receivers, admitted that the business assets were indeed sold at Ugx. 10,000,000/ and he received the said sum. He however failed to explain how the Ugx. 10,000,000/ was utilized and at some

point contradicted himself by stating that he did not remember how it was paid yet in paragraph 21 (a) of his Witness Statement he stated that the Receivers had agreed with *All Parents School* that *All Parents School* would pay a cash sum of Ugx. 10,000,000/ for the assets.

197. DW1 contradicted himself by stating that the only money they received from the Plaintiff was a total of Ugx. 160,000,000/ and again stated that it did not get to Ugx. 160,000,000/ but rather was Ugx. 121,710,663/. That out of that, Ugx. 13,783,000/ was sent to the 1st defendant leaving a balance of Ugx. 107,288,663/ which DW1 said was spent as follows;

I. Ugx. 33,765,850/ was spent on back payments for four months,
II. Ugx. 10,000,000/ was used to buy triple decker beds,
III. Ugx. 6,500,000/ was spent in buying metallic doors and windows,
IV. Ugx. 25,000/ was spent on registration fees for the notice of appointment of the Receiver,
V. Ugx. 5,019,000/ was spent on travels to the Plaintiff,
VI. Ugx. 355,000/ was used for certification of Notice,
VII. Ugx. 2,410,000/ was spent on advertisements,
VIII. Ugx. 225,000/ was spent on Bank fees,
IX. Ugx. 1,243,000/ was spent on travel expenses,
X. Ugx. 32,692,836/ was offset by Equity Bank and
XI. Ugx. 14,160,000/ spent on the Receiver's remuneration.

198. In the Case of **Centenary Homes vs Victoria Claire Lindell (2020) EWHC 1080 QB,** the Court of Appeal of England and Wales held that;

> *"Whilst the Receiver does owe an equitable duty to the mortgagor, his primary duty is owed to the Mortgagee. His primary duty in exercising his powers is to try and bring about a situation in which the secured debt is repaid."*

199. The 2nd and 3rd defendants as Receivers had a duty to exercise their powers in the best interests of the Plaintiff for whom they were appointed.

200. As noted earlier, upon sale of the Plaintiff's mortgaged property at a sum of Ugx. 610,000,000/ there was an outstanding balance of Ugx. 106,384,349/. The Receivers' fundamental duty should have been to clear that outstanding balance. No convincing explanation was proffered as to why the Receivers only sent a sum of Ugx. 13,783,000/ to the 1st defendant, leaving a balance of Ugx.107, 288,663/ yet the same amount would have cleared all the Plaintiff's indebtedness to the 1st defendant. The choice to spend the sum of Ugx. 107,288,663/ on the above expenses instead of first clearing the Plaintiff's indebtedness was in total disregard of the Plaintiff's plight and prejudicial to Plaintiffs interest.

The defendants breached this duty, the duty to act in best interests of plaintiff to apply his assets towards resolving the indebtedness.

201. The Receivers' actions transcended mere negligence and were unlawful. Issue No.5 is answered in the affirmative.

ISSUE 6: REMEDIES

202. The Plaintiff prayed for declarations that:

i. the 1st Defendant's appointment of the 2nd and 3rd defendant as Receivers/Managers of the Plaintiff was unlawful.

ii. the advertisement of the Plaintiff's business as being under Receivership was unlawful,

iii. the Plaintiff is not indebted to the 1st Defendant

iv. all the money held on the Plaintiff's Bank accounts in equity Bank Limited *vide* account No. 103020044187 and Centenary Bank Ltd *vide* account No. 901600785 belong to the Plaintiff and that the sums be credited back to the above accounts.

v. Counsel also prayed for Orders that:

a) the 2nd and 3rd Defendants be removed as Receivers/Managers of the Plaintiff's business.

b) the defendants pay compensation equivalent to the current market value of the property comprised in Leasehold Register Volume 3071, Folio 12, Plot M 46, Leasehold Register Volume 3071, Folio 13, Plot M47, Leasehold Register Volume 3071, Folio 14, Plot 48 land at Mubende purportedly illegally sold by the 1st Defendant less the money agreed under the consent.

c) a permanent injunction issue against the Defendants to restrain them from taking over the Plaintiff's Bank accounts and business assets.

d) Damages, interest and costs be awarded to the Plaintiff.

203. In reply Counsel for the Defendants prayed that Court find that the Plaintiff's Suit is bad in law and an abuse of the Court process and that the reliefs prayed for by the Plaintiff be denied.

204. CONCLUSION.

1. The appointment of the 2nd and 3rd defendants as Receivers was unlawful since there was no debt to recover, given that the money on the Plaintiff's Bank account exceeded what would have been required to clear the outstanding obligation after the sale of his property.
2. The advertisement of the Plaintiff's business as under Receivership was unlawful because upon sale of the mortgaged property, the amount from the sale was sufficient to extinguish the whole debt.
3. The 2nd and 3rd defendants as Receivers, the illegality of their appointment notwithstanding, have since completed their tasks and the Receivership is extinguished.
4. The 2nd and 3rd defendants' actions as Receivers/Managers of the Plaintiff's business were laced with illegalities as established in Court's determination of Issue No.5 and were therefore unlawful.
5. The defendants disposed of the Plaintiff's property without following the proper procedure as stipulated under the Mortgage Act and the Regulations. The defendants are in consequence jointly and severally ordered to compensate the Plaintiffs, the equivalent of the current market value of the property comprised in Leasehold Register Volume 3071, Folio 12, Plot M 46, Leasehold Register Volume 3071, Folio 13, Plot M47, Leasehold Register Volume 3071, Folio 14, Plot 48 land at Mubende illegally sold by the 1st Defendant less the money agreed under the consent.
6. The Plaintiff is not indebted to the 1st Defendant at all.

7. The prayer for a permanent injunction against the Defendant to restrain them from taking over the Plaintiff's Bank Accounts and Assets was overtaken by events because the Receivers took over the Plaintiff's Bank accounts and disposed of the assets.

8. Special damages: It is trite law that in all cases where special damages are claimed, they must be pleaded with sufficient specificity and strictly proved: See **Musoke v. Departed Asians Custodian Board (1990-19941 EA 219**.

The Plaintiff was not able to prove any business loss as its preliminary business loss report as presented through Adam Kakande PW2 was discredited by this Court for being inconsistent and contradictory. Special damages must be claimed specially and proved strictly. Accordingly the Plaintiff's claim for special damages of Ugx. 517,828,049/= was not proved.

9. General Damages: The Plaintiff submitted that they suffered inconvenience and loss, loss of good will and business reputation. General damages are awarded at the discretion of Court, and are always as the law will presume, to be the natural consequence of the defendant's act or omission.

In **Musisi Edward v. Babihuga Hilda [2007] HCB Vol. 1 pg. 84** it was held that to be eligible for general damages the party should have suffered loss or inconvenience to justify award of general damages.

In the assessment of the quantum of damages, Courts are guided mainly, inter alia, by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach.

During cross examination PW1, a director in the Plaintiff, admitted that the Plaintiff was indebted to the 1st defendant. This being the

case, I do not see what inconvenience was caused by the 1st defendant trying to recover their money. It is difficult to fathom that a company in default may have a strong goodwill or business reputation to protect.

However, it was established that the Receivers acted unlawfully and misused the Plaintiff's money. Owing to this misuse of his assets, it would therefore be reasonable to place the Plaintiff back in the position he previously was before the misuse happened. I however find the sum of UGX. 200, 000,000/= prayed for by the Plaintiff to be excessive and do grant them Ugx. 50,000,000/=, which in my assessment is appropriate in the circumstances, to be paid jointly and severally by the defendants.

10. The Plaintiff prayed for punitive and aggravated damages because of the Defendants illegalities, arrogant and highhanded conduct. That the Defendants illegally commenced purported recovery proceedings based on illegal instruments, sold the Plaintiffs assets at an under value without first having valued them, used the Plaintiffs money to pay for unlawful purposes. They prayed for a sum of UGX. 200,000,000/=.

Counsel for the Defendants submitted that the Defendants performed their duties in compliance with the Mortgage Deed and the subsequent Consent Judgment.

The objective of punitive damages is to deter and warn the public that similar conduct will always be frowned upon by Court.

Katureebe, JSC, as he then was, in his paper **Principles Governing the Award of Damages in Civil Cases** cited with approval the principles, according to Lord Devlin in **Rookes V. Barnard, 1964] AC 1129,** states that the three matters to be borne in mind include;

(a) that the Plaintiff cannot recover exemplary damages unless he or she is the victim of punishable behavior,

(b) that the power to award exemplary damages should be used with restraint, and

(c) the means of the parties

The facts show that the 1st Defendant was entitled to sell the mortgaged property since the Plaintiff had defaulted. However, in doing so they did not follow the proper procedure. The Defendants also fell short in the way they managed and applied the Plaintiffs money and assets.

These acts of negligent misconduct are reprehensible and make a case for award of exemplary damages. I am inclined to award exemplary damages in the circumstances.

11. The Plaintiff prayed for interest on special damages, general damages, punitive and aggravated damages at 25% per annum from the date the illegal sale of the Plaintiff Company's until payment in full.

Counsel for the Defendants submitted that the Plaintiff is not entitled to damages of any kind, and as such no interest should be awarded.

Section 26 of the CPA, pro*vide*s that interest is to be awarded at Court's discretion. From the foregoing, it has been established that the Plaintiff is entitled to general damages. I award interest on the damages awarded at a rate of 8% per annum from the date of judgment till payment in full.

12. The Plaintiff prayed for costs of the suit. In reply Counsel for the Defendants contended that Court awards and orders Costs of the Suit to be paid by the Plaintiff to the Defendants.

Section 27 of the Civil Procedure Act pro*vide*s that;

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 necessary directions for the purposes aforesaid.

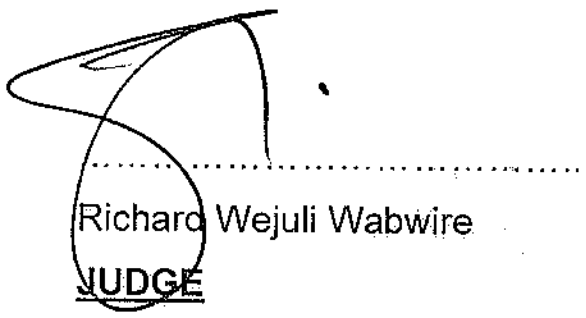
Having found that the sale was unlawful, I find no good reason to deny the Plaintiff costs of the suit and I accordingly award the costs of this suit to the Plaintiff.

I. Final Orders

1. The 1st Defendant's appointment of the 2nd and 3rd Defendants as joint Receivers/Managers of the Plaintiff company was unlawful
2. The advertisement of the Plaintiff's business being as under receivership is unlawful,
3. All the money held on the Plaintiff's Bank accounts in equity Bank Limited *vide* account No. 103020044187 and Centenary Bank Ltd *vide* account No. 901600785 belongs to the Plaintiff.
4. The Plaintiff is not indebted to the 1st Defendant at all.
5. The defendants are in consequence jointly and severally ordered to compensate the Plaintiffs, the equivalent of the current market value of the property comprised in Leasehold Register Volume 3071, Folio 12, Plot M 46, Leasehold Register Volume 3071, Folio 13, Plot M47, Leasehold Register Volume 3071, Folio 14, Plot 48 land at Mubende illegally sold by the 1st Defendant LESS the money agreed under the consent.

6. The Plaintiff's claim for special damages of Ugx. 517,828,049/= was not proved and is therefore denied.
7. The Plaintiff is awarded Ugx. 50,000,000/= in general damages to be paid jointly and severally by the defendants.
8. The Plaintiff is awarded Ugx. 10,000,000/= in exemplary damages to be paid jointly and severally by the defendants
9. The Plaintiff is granted interest on award items 7 & 8 above at the rate of 8% per annum from the date of this Judgment till payment in full.
10. The costs of this suit are awarded to the Plaintiff.

Delivered at Kampala this 31st day of March 2022.



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Richard Wejuli Wabwire

JUDGE