THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

CS No. 78 of 2016

(Consolidated with HCCS No. 743 of 2015)

MIAO HUA XIAN ::PLAINTIFF

VERSUS

1. **DFCU BANK LIMITED**
2. **NAMAGANDA LIMITED::::::::::::::::::::::::::::::::::::DEFENDANTS**

BEFORE HON. JUSTICE RICHARD WEJULI WABWIRE

JUDGEMENT

7th APRIL, 2022

A. Introduction

1. The Plaintiff commenced civil suits no 743 of 2015 and 078 of 2016 against the Defendants. The suits were consolidated.
   She seeks declarations that the mortgages loans extended by the 1st Defendant were unlawful, null and void and unenforceable and cancellation of a Sale of land Agreement by which the 2nd Defendant acquired the suit /mortgaged property, rectification of the land title, a permanent injunction, declarations and relief against sale by mortgage, damages and costs of the suit.

B. Background of the case

2. The undisputed facts of this case as presented in the parties' Joint Scheduling Memorandum are that the Plaintiff was a customer to the 1st Defendant. The Plaintiff applied for and obtained a loan facility of US$ 500,000 from the 1st Defendants. She defaulted on her loan obligations.
3. That on 24th December 2015, Fit Auctioneers & Court Bailiffs acting on behalf of the 1st Defendant advertised for sale, the Plaintiff's two properties at Plot 47 LRV 2744 Folio 25 Nabugabo road Kampala and Plot 53 LRV 2339 Folio 19 Mackenzie Vale Kololo. The 2nd Defendant bought the suit property from the 1st Defendant. The Plaintiff filed CS 078 of 2015 to annul the sale and recover the property. In that Suit no. 078 of 2016, she seeks to reverse the sale and transfer of the suit property Plot 47LRV2744 Folio 25 Nabugabo Road to the 2nd Defendant

4. The Plaintiff contests the sale and all the activities involving her mortgages with the 1st Defendant.

   On 9th November 2015 the Plaintiff filed CS No. 743/2015 challenging the legality of the mortgages and sought several other declarations, damages and costs of the suit. Arising from the said CS No. 743/2015 the Plaintiff filed MA No. 935/2015 which was disposed of in the Plaintiff's favor on 21st December, 2015. Court issued orders restraining the 1st Defendant from selling off the Plaintiff's property until 14th January 2016 and ordered her to deposit with the 1st Defendant a sum of Ugx. 4,000,000,000/.

C. Representation

5. At the hearing the Plaintiff was represented by M/s Ingura & Company Advocates while the 1st Defendant was represented by M/s MMAKS Advocates and the 2nd Defendant was represented by M/s Marlin Advocates.

   The Plaintiff filed two witness statements deponed by the Plaintiff (PW1) and Elias Kabenge (PW2). On the other hand, the 1st Defendant filed one witness statement deponed by Isaac Mpanga the 1st Defendant's lawyer while the 2nd Defendant also filed one witness statement deponed by Vincent Mawanda a director in the 2nd Defendant.

   The parties also addressed the Court in written submissions.

D. Issues

6. Six issues, as follows, were raised for determination;

   1. **Whether the Plaintiff was at the time of sale of the suit property indebted to the 1st Defendant and if so, to what extent**

2. **Whether the interest and penal charges under the said Mortgage facilities was excessive, extortionate and or unconscionable**
3. **Whether the Plaintiff breached the loan agreement between her and the 1st Defendant**
4. **Whether the foreclosure, advertisement and sale of the Plaintiff's property comprised in LRV 2744 Folio 25 Plot 47 Nabugabo Road Kampala was lawful**
5. **Whether the 1st and 2nd Defendants are liable in fraud**
6. **What remedies are available to the Parties**

7. I have carefully considered the pleadings, the testimonies of witnesses, the written submissions of the parties and the authorities relied upon, to arrive at the determination of the respective issues.

   I will start with the preliminary objection as raised by the 2nd Defendant's Counsel.

E. Preliminary Objection.

Competence of the suit.

8. In their submissions, the 2nd Defendant raised a preliminary objection to the effect that the Plaintiff's suit is incompetent for non-payment of the requisite filing fees.

   Both the 2nd Defendant and Counsel for the Plaintiff made submissions in respect to the same which I have considered.

   As rightly submitted by the 2nd Defendant's Counsel, the Plaintiff filed an amended plaint in this Court on 29th April, 2021 where they were seeking declaratory orders over four new properties that had not been initially included in the preceding plaints. The 2nd Defendant submitted that the total value of the four properties was Ugx. 3,800,000,000/ in which case the Plaintiff ought to have paid

an additional Ugx. 3,900,000/ as filing fees. That his failure to pay as such was a contravention of Rule 6 of the Court fees Rules. He contended that the Plaintiff must pay the requisite filing fees, failure of which the amended plaint is rendered incompetent.

8. **R.4 of the Judicature (Court Fees, fines & deposits) Rules, SI 13-3** provides that every document in respect of which any fee has been paid shall bear an endorsement initialled by the judge, magistrate or other officer as showing the amount of the fee so paid and the number of the receipt recording the payment. The record shows an amended plaint with an endorsement showing that Ugx. 6,000/ has been paid and the receipt number and signature of officer and date in compliance with Rule 4. By virtue of addition of properties in the amended plaint, there ought to have been an increment in filing fees. **R. 6 of the Judicature (Court Fees, fines & deposits) Rules, SI 13-3** however, gives a remedy when it states that if a document is through mistake or inadvertence received, filed or used in any Court without the proper fees for it having been paid, Court may order that such fees be paid on that document and upon such payment, the document and every proceeding relative to it shall be as valid as if the proper fees had been paid in the first instance. This was also emphasised in the case of **Betuco (U) LTD and Another V. Barclays Bank of Uganda Ltd and others, MA No. 243/2009**, where Justice Lameck cited the case of Lawrence Muwonge vs. Stephen Kyeyune SCCA No. 12/2001 where Court held that;

> *"...a complaint against non-payment of Court fees is a minor procedural and technical objection which does not and should not affect the adjudication of substantive justice as envisaged in Article 126 (2) (e) of the 1995 Constitution of Uganda. The*

remedy for non-payment of Court fees would have been the invocation of Rule 6 of the Court Fees and Deposits Rules (Cap 41) to order the defaulting party to pay the necessary fees to the Court…"

9. I am in agreement with Justice Lameck that it does not serve Justice for a judgment reached to be nullified merely for non-payment of Court fees, a procedural and technical anomaly which can be remedied by ordering the requisite fees to be paid. It therefore suffices, for the Plaintiff to conduct a fresh assessment of fees based on the increment reflected in the Amended Plaint, by inclusion of added properties and accordingly pay the corresponding increment in the Court fees, in line with R.6 of the Court fees Rules.

10. The preliminary objection is accordingly dismissed.

However, before I delve into the merits, I would like to first deal with the question of the Plaintiff's alleged illiteracy and inability to understand English as raised by the parties.

Plaintiff's Illiteracy

11. The Plaintiff in her testimony stated that she was never at any time advised by the 1st Defendant. All she did was make an application for a loan as seen in PEX3 the purpose of which she rightly stated therein. That she, being a Chinese, was not even familiar with the English Language, was unable to read and write in the said language, without assistance as per S.3 of the Illiteracy Protection Act Cap 78.

The 1st Defendant's Counsel submitted that all the documents tendered by the Plaintiff including letters written by herself were all in the English language. That PW1 confirmed that during her three (3) years as a customer of Crane Bank, prior to this dispute, she had never interacted with any Chinese speaking employee/officer of Crane Bank.

12. Still during her cross examination PW1 stated that when going to the 1st Defendant, sometimes she would go with Duan the interpreter or Ms Yuping whom she stated did not know English too. Considering that all business was conducted in the English language as testified by DW1, in the absence of evidence to the contrary, it is a reasonable conclusion to make that the Plaintiff's engagements with the Crane Bank Limited were at all times conducted in the English language. It is the Plaintiff' evidence that she had a loan agreement PEX5 with Madame Yuping Zhang, acting on behalf of Zebu Emporium Ltd, and that they both do not speak English. However, the said loan agreement did not have a certificate of translation as required under Section 3 of the Illiterates Protection Act. PW1 also testified that Ram, an Indian employee of Crane bank, who did not know Chinese, called her on the phone and threatened her. She later stated that Mr Ram used not to call her but rather called Duan.

In the case of **Kenya Airways Limited vs. Ronald Katumba, Court of Appeal Civil Appeal No. 43 of 2005**, Hon. Lady Justice AEN Mpagi Bahigeine held that;

> *"Another issue taken was that the Respondent could not read the ticket and was therefore protected under the Illiterates*

Protection Act (Cap. 78). the learned Judge agreed with the Respondent which I would take to be a misdirection. The air ticket was not the Respondent's document. It was never prepared for him for use as evidence of any fact or thing as stipulated under the Act. Most importantly, the Respondent could read though with difficulty as do most people. He could therefore not categorize himself as an illiterate even if the law stated otherwise.

Furthermore, it is well settled that the fact that the Respondent could not read would not exonerate him from his obligation under the contract. Once he is handed the ticket and has accepted it, he is bound by it. Thompson vs. London Midland and Scottish Railway Company, (1930) 1 KB 41. Kenya Airways (KQ) made the offer by tendering the ticket to the Respondent which he duly accepted fully, thus undertaking to be bound by its terms. Also see McCutheon Vs David Mac Bravne Ltd (1964) 1 ALL ER 437. (1964) 1 WLR 134. Where it is stated;

"...when a party assents to a document forming the whole or part of his contract, he is bound by the terms of the document, read or unread, signed or unsigned, simply because they are in the contract…"

13. This was reiterated in the case of **Guma Paulino Vs Bank Of Africa (U) Limited and others, CS No. 0013/ 2008,** where Justice Stephen Mubiru held that it is trite law that when a document containing contractual terms is signed, then, in the absence of fraud, or misrepresentation, the party signing it is bound, and it is wholly

immaterial whether he has read the document or not (see L'Estrange v. F Graucob Ltd [1934] 2 KB 394 and Steel Makers Ltd v. AB Steel Products (U) Ltd, H. C. Civil Suit No. 824 of 2003)…The Plaintiff has neither pleaded nor proved any of these.

Section 1 (6) of the illiterate's Protection Act, Cap 78 of the Laws of Uganda defines an illiterate to mean, in relation to any document, a person who is unable to read and understand the script or language in which the document is written or printed. This was elaborated in the case of **Stanbic Bank Uganda Limited Vs Ssenyonjo Moses & Anor. CACA No. 147 of 2015** where the Court of Appeal held that:

> *"the word "illiterate" clearly does not connote or mean "unable to understand the English language as such but means unable to understand the script or language in which the document is written or printed. It has everything to do with understanding the written language...."*

14. **S. 3 of the Illiterate Act** requires a person who writes any document for or at the request, on behalf or in the name of any illiterate to also write on the document his or her own true and full name as the writer of the document which shall imply that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her.

In this particular case, Duan whom the Plaintiff says was her interpreter and the one who wrote her documents, did not verify PEX3 as such which the Plaintiff states was written by her and the Plaintiff only signed. The law on evidence is that he who alleges

must prove. The burden of proof therefore lay on the Plaintiff to prove that Duan was indeed her interpreter and the one who wrote all her documents. This burden was not discharged.

15. The 1st Defendant's Counsel submitted that all the documents tendered by the Plaintiff including letters written by herself were all in the English language. I also took judicial notice of the fact that much as the Plaintiff was testifying through a translator, there were various instances when she seemed to correct the translator. In my view, this indicates that she the Plaintiff cannot be categorised as illiterate as defined under the Act since she understood the language in question. If all the Plaintiff's engagements with the Crane Bank Limited were at all times conducted in the English language it would mean that she was familiar with the English language. Even PW2 Elias Kabenge testified that the Plaintiff's Letter of Instruction to his firm was in English duly signed by the Plaintiff and much as he stated that the Plaintiff did not speak English and was always with an interpreter during their engagements, he testified that he did not know the name of the interpreter.

The inference from this is that the Plaintiff can read and understand English. The Plaintiff having assented to the lending agreements by affixing her signature thereon, (and not a mark which would be required of an illiterate under The Illiterates Protection Act) is bound by the terms of the lending agreements.

I will now deal with the merits of the case.

F. Determination of issues

Issue No. 1: Whether the Plaintiff was at the time of sale of the suit property indebted to the 1st Defendant and if so, to what extent?

16. Now considering the question of whether the Plaintiff was at the time of sale of the suit property indebted to the 1st Defendant and if so, to what extent. PEX11 is a fresh sanction letter dated 23/7/2013 which shows that on 19/7/2013 the Plaintiff had applied for this facility and the same was granted in the sum of US$ 800,000 and UGX 1,500,000,000/.

17. PEX16 is a Restrictive renewal sanction letter dated 30/7/2014 showing that on the 1/7/2014 Plaintiff had applied for this facility for a 12 months period in a sum of US$ 630,000 reduced from US$ 800,000 and Ugx 1,185,000,000/ reduced from Ugx 1,500,000,000/. These facilities were applied for under DEX29 on 1/7/2014 with a temporary overdraft of Ugx. 700,000,000/ as issued in PEX15 on the same date and another, DEX3 on 30/7/2014.

In his cross-examination DW1 stated that the amounts in PEX16 arose because the Plaintiff had serviced the original facility in DEX11 and reduced it from US$ 800,000 and to US$ 630,000 and from Ugx. 1,500,000,000/ to Ugx. 1,185,000,000/=. He further testified that the Plaintiff applied for 3 facilities, which is US$ 630,000, Ugx. 1,185,000,000/= and Ugx. 700,000,000/.

I have taken note of the fact that the temporary overdraft of Ugx. 700,000,000/ was issued twice, that is on 1/7/2014 per PEX15 and on 30/7/2014 as per PEX17.

18. PEX14 is a demand letter dated 14/7/2014 where the 1st Defendant was demanding for arrears of 417,032,492/= and 235,055 US$. This shows that before restructure of the facility to US$ 630,000 and Ugx.

1,185,000,000/= the Plaintiff's debt had reduced as above. I have taken note of the fact that upon restructure the arrears increased from 417,032,492/= to 1,185,000,000/= and from $235,055 to $ 630,000/=.

19. The suit property was sold on 28/1/2016 when Ugx. 4,500,000,000/ was transferred from the 2nd Defendant's Account to MMAKS account. In my view, if there was any restructuring to be done, it ought to have been done in line with PEX14. DW1 never explained the increment from PEX14 to Ugx. 1,185,000,000/= and 630,000 US$.

In her cross-examination, PWI stated that she signed DEX29 and DEX16 but did not know what she was signing. She testified that she did not know how much she owed the Bank at the time of restructure. That she kept depositing money on her account as in PEX6, which were cash deposits, and also made a transfer of US$ 68,888 but never adduced evidence of the transfer.

20. During cross-examination it was confirmed that PEX6 is the summary of all the payments made up to 12/9/2014. A computation of the sums on PEX6 brings the total deposits to UGX 351,164,000/= and US$ 30,671. On the other hand, in his witness statement, DW1 stated that the Plaintiff was indebted to the 1st Defendant in a sum of US$ 1,135,389.94 and Ugx. 2,626,871,564/= which continued to attract interest as seen in DEX13.

21. In her cross-examination, PW1 contradicted herself a lot. She stated that she only borrowed US$ 500,000 and stated that PEX3 requesting for US$ 500,000 was written by the 1st Defendant's credit department and Duan explained it to her then she signed. There

was no dispute in respect to the US$ 500,000/=. In PEX20, a notice of sale dated 17/2/2015, the Plaintiff referred to a notice of sale dated 20/1/2015 issued by the 1st Defendant's lawyers and requested for an extension of 21 working days to arrange for alternative financing to discharge their entire obligation with the 1st Defendant. In PEX21 dated 19/2/2015, 2 days later, the Plaintiff made the same requests. In PEX 22 dated 11/3/2015 the Plaintiff requested for her outstanding loan balances for purposes of clearing the same and admitting on the repayment plan.

In PEX23, dated 11/05/2015, Plaintiff still requested for 2 weeks to conclude with Orient Bank on the possibility of purchase of her loan from the 1st Defendant. In PEX25 dated 10/8/2015 the Plaintiff indicated that they had managed to mobilise 70% of the outstanding amount as advised in the letter of 1st Defendant dated 12/6/2015 and requested to make partial payment so that Nabugabo property is released as they mobilise money for 2nd title to be released.

22. To start with, PW2 who conducted a forensic audit for the Plaintiff testified in cross examination that he did not have any qualifications in forensic auditing. He stated that the Plaintiff had fully discharged her obligations and was not indebted to 1st Defendant at the time of sale of the suit property and confirmed the same in his cross-examination. However, during further cross-examination he testified that he did not consider DEX3, the sanction letter of temporary overdraft of Ugx. 700,000,000/, which PW1 never disputed in her testimony. He further testified that the Plaintiff did not avail him copies of DEX 6, 7, 8, 9 and 12 and in which is noted above in those exhibits Plaintiff was admitting indebtedness to the 1st Defendant. PW2 stated that a debtor contesting indebtedness cannot make

arrangements for alternative financing to discharge the entire debt obligation. He further testified that in DEX30 dated 23/10/2015, a letter from the Plaintiff's former lawyers, no debt was contested. By virtue of the fact that he did not have any qualifications in forensic auditing, his report exhibited as PEX44 is materially discounted.

23. Basing on the foregoing evidence, I am convinced that the Plaintiff was indeed indebted to the 1st Defendant at the time of sale of the suit property on 28/1/2016. As rightly submitted by the 2nd Defendant, there is no reason why one would look for alternative financing to clear a debt that they dispute, the Plaintiff's evidence in para 9, 14, 20, 21 and 22 of her witness are a contradiction to PEX 20 – 23.

According to PEX29, the amount owed to 1st Defendant by Plaintiff at the time of advertisement of the Plaintiff's properties (securities) was US$ 1,072,301 and Ugx. 2,579,919,174/=. When converted to Ugx, this amounted to Ugx. 7,261,504,617/.

PW1 testified that she did not know how much she had paid to the 1st Defendant however, going by the receipts she presented to this Court, she did not fully discharge her obligations to the 1st Defendant. This means that her indebtedness was the difference in the sum stated under PEX40, which is Ugx. 7, 261, 504, 617/= less the total of PEX6, which is UGX 351,164,000/= & US$ 30,671.

24. When the US Dollar to Ugandan Shilling spot Exchange Rates published on the exchange.rates.org.uk on 28/1/2016 when the sale (US$ 1 = UGX 3474.83325) is applied to US$ 30,671 it amounts UGX 106,576,609.0772/=. This amount when added to Ugx. 351,164,000/= amounts to a total of UG. Shs. 457,740,609.0772/=.

The difference between UGX 7,261,504,617/ and UGX 457,740,609.0772/= is the amount the Plaintiff was indebted to the 1st Defendant at time of sale, which according to the evidence presented to this Court which is Ugx Shs. 6,803,764,008/=.

At the time of sale of the suit property, the Plaintiff was therefore indebted to the 1st defendant in the sum of Ugx 6,803,764,008/=.

Issue No. 2: Whether the interest and penal charges under the said Mortgage facilities was excessive, extortionate and or unconscionable.

25. I will first deal with the 1st Defendant's Counsel submission, that the Bank of Uganda Financial Consumer Protection Guidelines 2011 referred to by the Applicant are not Regulations within the context of Section 131(1) of the Financial Institutions Act (FIA) and that accordingly breach of these guidelines cannot form a basis for a cause of action or a defence.

In reply to the defendant's assertion, Counsel for the Plaintiff submitted that the facts within this case are under the ambit of the **Bank of Uganda Act, Cap. 51 of 1993** in addition to other laws such as the **Financial Institutions Act, Act 2 of 2004**. That the Bank of Uganda Consumer Protection Guidelines were originated by the Bank of Uganda as part of its mandate as a supervisor of financial institutions and the same remain in force and are binding on the 1st Defendant. That non-compliance with them is a great nullity and illegality as provided in Section 51 of the Bank of Uganda Act.

26. In submitting that the guidelines do not apply to them, the 1st Defendant's Counsel cited the case of **National Drug Authority vs**

Park View Pharmacy DC Ltd Civil Appeal No. 65 of 2002, where the Court of Appeal held that the guidelines do not originate from either the National Drug Policy or Authority Statute or Statutory Instrument made under it. That they are therefore of no legal consequence as their origin, author and time of making is not disclosed.

27. Guideline 1 of the Bank of Uganda Financial Consumer Protection Guidelines, 2011 does not show its origin, author and time of making but rather just states June 1, 2011 as the time when they would take effect. Based on the authority of National Drug Authority (supra), the Guidelines do not therefore have the force of law and consequently their breach is not a basis for a cause of action or a defence.

Interest rate

28. I will now address the question of interest rates: whether the interest and penal charges under the said Mortgage facilities was excessive, extortionate and or unconscionable.

Counsel for the Plaintiff submitted that in this case, the Plaintiff was offered loan facilities at an interest of 12% p.a with a penal interest rate of 36%, of which, the 36% rate was what was mainly used by the 1st Defendant when it came to the Plaintiff's loans. That the rate was very unconscionable, harsh and extortionate. He prayed that it should therefore be revised at the discretion of Court if Court finds that the facilities were lawfully advanced to the Plaintiff. Counsel cited the cases of **Setrepham Uganda Limited V Noble Health Limited & 2 others HCCS No. 595 of 2003**; **Alpha International Investments Ltd V Nathan Kizito HCCS No. 131 of 2001; Guideline 6(1)(b)(iv) of the Bank of Uganda Consumer**

Protection Guidelines 2011 and Section 26 of the CPA, Cap. 71 to brace his submission.

29. In reply the 1st Defendant's Counsel submitted that the interest rates applicable to the Plaintiff's borrowings were all set out in the various lending agreements. That they were normal interest rates of 12% p.a on the dollar borrowings and 24% on the shillings borrowings and penal interest of 36% p.a on both shilling and dollar borrowings. That by its very nature, penal interest only applies when a borrower is in default and is never charged when a loan is performing. That interest rates (whether normal interest or penal interest) are contractual, and if the Plaintiff found these rates excessive, exorbitant or unconscionable, she was at liberty not to take up the loans. That no evidence was led to show that Crane Bank charged interest contrary to what was agreed upon in the lending agreements, or that interest did other than those set out were applied. That the Plaintiff as mortgagor was therefore at liberty to apply to the Court for review if she was in any way aggrieved by the interest rates. That the Plaintiff did not adduce any evidence to prove that interest was charged contrary to what was agreed upon in the lending agreements. Counsel relied on the case of **Campbell Discount Co. vs. Bridge (1961) 2. ALLER. 97; Stockloser vs. Johnson (1954) 1 ALLER 630** and **Sections 34** and **35 of the Mortgage Act.**

In further reply the 2nd Defendant's Counsel cited **Section 29(2) (c) of the Mortgage Act** and submitted that that allegation is inconsequential when dealing with the interests of the 2nd Defendant.

30. In rejoinder to the 1st Defendant, Counsel for the Plaintiff submitted that she did apply for a loan and it is this loan that was subjected to excessive, extortionate and unconscionable interest rates. That the interest on the loan taken out by the Plaintiff in 2012 was at 12% p.a with a penal interest of 36% which is very harsh and unconscionable. That according to **Halsbury's Laws of England,** by the universal custom of bankers, a banker has the right to charge simple interest at a reasonable rate on all overdrafts. That to hold the Plaintiff liable under those rates alleging that they are contractual is unlawful and unmerited considering that the said Plaintiff was illiterate, was never advised on these loan terms (as per Guideline 6(2) of the Consumer Protection Guidelines 2011) and she was not even given documentation relating to any of these agreements or loans until 2018. That the Plaintiff neither read nor understood any of the documents as she was just made to sign documents and not given copies of the same. That the Bank took advantage of the Plaintiffs situation and used it to its benefit.

He prayed that Court exercise its unfettered discretion to direct the 1st Defendant to reconcile their accounts and debt obligations with a simple interest rate imposed to achieve an amicable settlement of the dispute.

Faced with a requirement to address a similar question, in the case of **Setrepham Uganda Limited V Noble Health Limited & 2 others, CS No. 595/2003,** Justice Yorokamu Bamwine held that;

> *"It is stipulated in the said Form, P.Exh.1 that overdue accounts will incur interest of 3% per month which translates into 36% per annum. While this penalty may have been*

intended to discourage wilful defaults, it is the view of this Court that the interest at 36% p.a. was excessive. This Court has a discretion to award interest at less than the contractual rate when that rate is manifestly excessive and unconscionable".

32. In the case of **R.L. Jain v Komugisha & 2 Ors, CS No. 98/2013,** Hon. Mr Justice Christopher Madrama Izama ordered the parties to enter a reconciliation and used the Courts discretionary power to reduce the imposed compounded interest and penal interest rates that were levied on the Defendants from 24% to 15%.

Similarly in the case of **Alpha International Investments Ltd V Nathan Kizito, CS No. 131/2001,** Justice Arach Amoko as she then was re-entered the transaction and charged a new fair interest rate.

I have considered the Common Law cases of **Campbell Discount Co. vs. Bridge (1961) 2. ALL ER. 97** and that of **Stockloser Vs. Johnson (1954) 1 ALL ER 630** where Court held that people who freely negotiate and conclude a contract should be held to their bargain rather than judges intervening by substituting each according to his individual sense of fairness which are contrary to those which the parties have agreed upon for themselves.

I am however alive to **Section 26 of the** Civil Procedures Act, Cap 71 **Cap. 71** which grants Courts unfettered discretion to declare an agreement unfair, null and void *ab initio* where the interest is harsh and unconscionable. I have also taken into account the relevance, albeit with caution, of **Section 34 (b) of the Mortgage Act which** gives Court power to review the mortgage in the interest of justice where it contains a provision which is unlawful.

Black's Law Dictionary, Seventh Edition at page 1526 defines the term unconscionable as "*having no conscience, unscrupulous, affronting the sense of justice, decency or reasonableness".*

Whereas I do not consider the circumstances of this case to wholly satisfy the definition proffered by Black's Law dictionary nor do I regard the interest rate levied to be unlawful, I am however convinced that the rate is excessive and warrants the invocation of this Courts discretionary mandate.

33. Premised on the forgoing, and in the interest of justice, I order that the penal rate be reviewed from 36% to 24%, which I find reasonable in the circumstances. The parties shall adjust and reconcile the accounts accordingly.

Issue No. 3: Whether the loan facilities advanced to the Plaintiff were lawful and if so, whether there was breach of those facilities.

34. In dealing with this issue, we will start with establishing whether a banker-customer relationship existed between the Plaintiff and the 1st Defendant and whether the same was breached by any of the parties.

The general relationship between a bank and the customer is a contractual one which begins when an account is opened (see **Byaruhanga Byabasajja Serwano vs Barclays Bank of Uganda Ltd (1978) HCB 150)** and subsequently introduces a number of obligations between the parties. In the instant case, it is not in dispute that the Plaintiff was a customer of the 1st Defendant.

Counsel for the Plaintiff submitted that the 1st Defendant owed her a duty to explain to her the general terms of opening up an account

which the customer consents to, to have loan service accounts opened.

The 1st Defendant's Counsel contended that the duties of a banker relate to carrying out the customer's payment instructions, dealing with securities deposited with the bank and banker/customer confidentiality. That it is upon breach of these duties that a customer can bring an action for breach of duty by a bank.

35. In **Guma Paulino Vs Bank Of Africa (U) Limited and others, CS No. 0013/ 2008,** Justice Stephen Mubiru held that;

> *"… the mere existence of a lender-borrower relationship does not impose fiduciary obligations on the lender…In a mortgage, the relationship is generally that of a creditor to debtor and the bank owes no fiduciary responsibilities. As an exception to this general rule, a mortgagor must allege some degree of dependency on one side and some degree of undertaking on the Bank to advise, counsel, and protect him or her as a weaker party. Such relationships exist where the Bank knows or has reason to know that the mortgagor is placing trust and confidence in the Bank and is relying on the Bank to counsel and inform him or her… There must be evidence of a relation of trust and confidence between the parties (that is to say, where confidence is reposed by one party and a trust accepted by the other) and that it was abused. Once a fiduciary relationship is established, a fiduciary has a legal duty to disclose all essential or material facts pertinent or material to the transaction in hand. Only then would the duty of the type claimed by the Plaintiff arise. However, is not*

sufficient to impose liability on a bank for breach of fiduciary duty. The borrower must also demonstrate that the bank inequitably abused that confidence by wrongfully using its position of superiority in order to obtain an unconscionable advantage over the borrower."

41. Where the Bank knows or had reason to know that the mortgagor was relying on the Bank's counsel to comprehend the terms of a loan agreement, a fiduciary obligation by which the mortgagor places trust and confidence in the Bank is created. In the instant case, the mortgagor relied on the defendant Bank when processing the loan application and no evidence was adduced that she accessed independent legal advice or that she was given opportunity to do so.

42. In her testimony, the Plaintiff stated that she had opened only one account with the 1st defendant- *vide* account number 02440385200. This was confirmed by DW1 during his cross examination when he confirmed that DEX28 was an account opening form by which the Plaintiff opened account number 02440385200

It however transpired that several accounts had been opened by the 1st Defendant for and on her behalf without her express application or authorisation for the same. It is the Plaintiff's submission that it was after being availed PEX40 that the Plaintiff realised that there were a number of accounts in her name, unknown to her, that were being credited and debited randomly by the 1st Defendant.

That the Plaintiff also testified that she only applied for one loan, which was of US$ 500,000 as per PEX3 but over the next two years, the 1st Defendant allegedly extended a number of loan facilities to the said Plaintiff without her having applied for them.

Whereas in cross examination, DW1 stated that for one to open an account in the 1st Defendant bank, they had to first complete an account opening form, when DW1 was asked for the supporting Application forms for the alleged bank accounts, he admitted that they did not have any. When he was asked whether it was irregular to open several current accounts on behalf of the client without any supporting documents he stated that it was normal.

Despite DW1 stating that for one to open an account in the 1st Defendant, they had to first complete an account opening form, the 1st Defendant did not present any account opening form for the above accounts. When asked about the account opening form of 0230020385202 (US$), DW1 stated that there was no account opening form for it and explained that the Plaintiff's account numbers changed when the bank moved from "*bank master system*" to "*T24*". This therefore means that the above accounts were opened without the Plaintiff's consent since she did not apply for them. In explaining the reason for this, during his cross examination DW1 stated that in the general terms of opening up an account, the customer consents to have loan service accounts opened and that it was normal to open several current accounts on behalf of the client without any supporting documents. Much as this might be normal practice for the 1st defendant, the Plaintiff would appear to never have been made properly aware of the peculiar practices.

The 1st defendant was under a fiduciary duty to explain to her the general terms of opening up an account. Even if by signing the loan agreements, the Plaintiff had consented to have the said loan service accounts opened on her behalf, no evidence was adduced

to prove that the document was explained to the Plaintiff. The 1st defendant failed in this duty.

In paragraph 26 of her statement, the Plaintiff states that she was never at any time availed with copies of her financial statements to appraise herself on the status of her finances. She re-echoed this during cross examination when she testified that on several occasions she requested to be availed with the said details but the 1st Defendant was adamant, until later in 2018, when she was availed with some of the information. She also testified that further attempts to obtain the financial status in 2015 as indicated in PEX21 and PEX22 yielded only plain loan balances with some information still missing as stated in PW2's report PEX44. She however did not adduce any evidence of having asked for the same.

On the other hand, in his testimony, DW1 stated that if a customer wants a bank statement, it is requested for and availed. The 1st Defendant submitted that the allegation of failing to avail her with information was wholly untrue. That the Plaintiff was quite vigilant in writing letters to Crane Bank, some of which were tendered as "DEX6", "DEX7", "DEX8", "DEX9" and "DEX10 but in none of these letters does she request for any documents. That in cross examination of both the Plaintiff and PW2, they were asked whether they ever wrote any letters to Crane Bank requesting for any documents, in response to which they both unequivocally stated that they never wrote to the Bank. That as such Crane Bank did not fail, neglect or refuse to avail her with relevant information as alleged.

37. When dealing with the question of the duties of a banker-customer relationship in the case of **Kaaya L. Enterprises Limited Vs KCB Bank (U) Limited, CS No. 531/2013,** Justice Billy Kainamura, citing

The Law Relating to Domestic Banking Volume 1 by G.A. Penn, A.M. Shea and A. Arora at page 65-66 , held that;

> *"It is not the case that a banker has a duty to honour all his customer's instructions. Rather, there is a duty to honour all instructions which the banker has, at the time of the original contract, or subsequently, undertaken to honour, and this depends on any specific undertakings in a particular case, and on the general "holding out" of those things which the banker will do, which arises from the nature of the bankers business…The duty is to obey the mandate, and in obeying it to do so with reasonable care so as not to cause loss to the customer".*

39. The Plaintiff-cum-Customer instructions in the instant case, as exhibited in PEX22 dated 11th March 2015, were a request to her banker (the 1st Defendant) for updates of her loan balances. The only bank statements availed to her were availed in PEX40, which is the response to additional information request by Miao Huaxian, a report availed after sale of the suit property on 14th February 2018.

The 1st Defendant was not able to prove that they availed the information requested when the Plaintiff requested yet in his cross examination DW1 stated that if a bank statement is requested, it is availed but that the Plaintiff never requested for it. This is not true, as in PEX21 and PEX22 dated 19/02/2015 and 11/03/2015 respectively, the Plaintiff was requesting for information and an update about her account. Information about an account not only entails the loan balances but the whole statement of account as a whole. PEX40 which is a response from the 1st Defendant to the

Plaintiff about the Plaintiff's request for additional information shows that it was on 18th December that the 1st Defendant resolved to provide loan statements to the Plaintiff's accountant in respect of facilities granted to the Plaintiff during 2012. It should be noted that by this time the Plaintiff's suit property had already been disposed of. DW1 made it clear in his testimony that the bank statements were not availed because the Plaintiff had not requested for them. On this basis therefore, the 1st Defendant's failure to avail a bank statement to the Plaintiff when she requested was a breach of the banker-customer relationship by the 1st Defendant.

Loan application and Loan payment schedules

47. In her testimony PW1 stated that she only borrowed US$ 500,000 as indicated in PEX3. There was no contention regarding the discharge of this facility.

However, PEX8, PEX9, PEX10, PEX11, PEX15, PEX16 and PEX17 show that the Plaintiff acquired more facilities in the amounts of US$ 110,000 on 30/04/2012 as a temporary overdraft, Ugx. 1,000,000,000/ on 08/06/2012 as a fresh facility, US$ 500,000 on 10/11/2012 as a fresh facility, US$ 800,000 and Ugx. 1,500,000,000/ on 23/7/2013 as a fresh facility, Ugx. 700,000,000/ dated 01/07/2014 as a temporary overdraft, US$ 630,000 and Ugx. 1,185,000,000/ dated 30/07/2014 as a renewal, Ugx. 700,000,000/ dated 30/07/2014 as a temporary overdraft respectively.

DEX29 is a loan application form for accounts number 01440203852/02440203852 dated 01/07/2014 by which the Plaintiff was applying for a renewal of US$ 630,000 and Ugx. 1,185,000,000/and a temporary overdraft of Ugx. 700,000,000/.

48. During her cross examination PW1 stated that she had never seen the sanction letter requesting for a temporary overdraft of US$ 110,000 (PEX8) but was told to sign it and she did. She further testified that every 3 months she would be called to sign for purposes of internal audit and was told that she was signing loan assessment reports after being told by Ram, the head of credit section, that if she did not sign she would return the money and get blacklisted. She testified that in respect of PEX17, the 1st Defendant told her that when she gets the 700,000,000/, "*all the previous issues would be settled".*

49. In his cross examination DW1 stated that it is normal for a bank to add a defaulting client additional facilities where a loan is being restructured and the additional facility is to pay off the arrears so that the restructured amount runs without arrears.

It is evident from the Plaintiffs testimony that she steadily became deeply indebted but that that notwithstanding, the 1st defendant continued lending to her such huge amounts within such short intervals with no restraint.

The only loan applications herein are PEX3 where the Plaintiff applied for a loan of US$ 500,000 and DEX29 where she applied for renewal of US$ 630,000/ and Ugx.1,185,000,000/ and the temporary overdraft of Ugx.500, 000,000/. No loan application forms were availed in respect of the facility of US$ 110,000/-, the facility of Ugx.1,000,000,000/, the facility of US$ 500,000, the facility of US$ 800,000 and Ugx.1,500,000,000/-. However, according to the testimony of DW1, DEX29 was an application for renewal of the facility of US$ 800,000/- and Ugx.1,500,000,000/- to US$ 630,000

and Ugx. 1,185,000,000/. He further stated that in DEX29 the only new facility applied for was Ugx. 700,000,000/-.

51. In the Plaintiff's statement under paragraph 9 and 11, the Plaintiff stated that she would be made to sign various documents by the 1st Defendant under the pretext that they were making internal reports to Bank of Uganda yet in actual sense they were alleged Sanction letters for loan facilities she had neither applied for nor had an idea about as she was never availed copies. The 1st Defendant did not make any effort to present copies of the internal reports made to Bank of Uganda that were signed by the Plaintiff.

52. The availability of two sanction letters, PEX15 dated 1st July 2014 and PEX17 dated 30th July 2014, disbursing the same facility of Ugx 700,000,000 which had been applied for on 1st July 2014 was irregular.

During cross-examination of DW1, he clarified that the Plaintiff was granted just one overdraft facility of UGX 700,000,000/ on 30th July 2014. Interestingly both sanction letters were signed by the Plaintiff which implies that she was possibly misled into signing sanction letters under in honest belief that she was signing internal reports.

53. Furthermore, the 1st Defendant's actions of extending unsolicited loans without supporting Bank opening forms and loan application forms was a breach of the banker – customer relationship because it would appear that the Plaintiff was not properly appraised of the implications of the borrowing. Evidently, the 1st Defendant was not working on proper instructions from the Plaintiff, as would have been envisaged in customer-banker relationship.

It would appear that the Plaintiff was willingly lured into an inordinately onerous debt burden by the 1st defendant. She found herself in a debt spiral from which she, unfortunately seems to have imagined, could redeem herself by further borrowing but this only condemned her to the current predicament. As alluded to earlier, in his cross examination DW1 stated that it is normal for a bank to add a defaulting client additional facilities where a loan is being restructured and the additional facility is to pay off the arrears so that the restructured amount runs without arrears. In PEX20, PEX21, PEX22 and PEX23 the Plaintiff admitted indebtedness because she had actually taken out some of the facilities alluded to above.

54. The Plaintiff's consumption of the loan facilities notwithstanding, I am inclined to conclude that the sanction letters in respect of the facility of US$ 110,000, the facility of Ugx. 1,000,000,000/, the facility of US$ 500,000, the facility of US$ 800,000 and that of Ugx. 1,500,000,000/ were irregularly procured and hence unlawful.

It is however evinced in Issue No.1 that the Plaintiff was at the time of filing the suit, indebted to the 1st Defendant and was therefore in breach of her repayment obligations in respect of the legitimate facilities, when her property was sold.

According to PEX40, a report from the 1st Defendant; by 28th January 2016 when the suit property was sold, all outstanding facilities when converted to Uganda shillings amounted to Ugx. 7,261,504,617/=. However, in Issue No.1, this Court established that indeed the Plaintiff was indebted to the 1st defendant in the sum of Ugx. 6,803,764,008/= at the time of sale of the mortgaged property. Needless to say, following the Court's resolution of Issues

No. 2 and now, Issue No.3 as I did, the above amount is subject to reconciliation.

Issue 4: Whether the foreclosure, advertisement and sale of the Plaintiff's Suit property comprised in LRV 2744 Folio 25 Plot 47 Nabugabo Road Kampala was lawful?

a) Demand Notices

55. Before foreclosure, advertisement and sale of the mortgaged property are conducted, it is important to verify that indeed the mortgagor is in default of payment and there exists a debt to be recovered. This has been affirmatively resolved in the Court's determination of the preceding Issues No.1, 2 and 3.

The law on demand notices is laid down in the Mortgage Act as follows;

Section 19 of the Mortgage Act states that;

> **"(1) Where money secured by a mortgage under this Act is made payable on demand, a demand in writing shall create a default in payment.**
>
> **(2) Where the mortgagor is in default of any obligation to pay the principal sum on demand or interest or any other periodic payment or any part of it due under any mortgage or in the fulfilment of any covenant or condition, express or implied in any mortgage, the mortgagee may serve on the mortgagor a notice in writing of the default and require the mortgagor to rectify the default within forty five working days**.

Section 20 states that;

> **"Where the mortgagor is in default and does not comply with the notice served on him or her under section 19, the mortgagee may—**
>
> **(a) require the mortgagor to pay all monies owing on the mortgage;**
>
> **(b) appoint a receiver of the income of the mortgaged land;**
>
> **(c) lease the mortgaged land or where the mortgage is of a lease, sublease the land;**
>
> **(d) enter into possession of the mortgaged land; or**
>
> **(e) sell the mortgaged land.**

Section 26 states that;

> **(1) Where a mortgagor is in default of his or her obligations under a mortgage and remains in default at the expiry of the time provided for the rectification of that default in the notice served on him or her under section 19 (3), a mortgagee may exercise his or her power to sell the mortgaged land.**
>
> **(2) Before exercising the power to sell the mortgaged land, the mortgagee shall serve a notice to sell in the prescribed form on the mortgagor and shall not proceed to complete any contract for the sale of the mortgaged land until twenty one working days have lapsed from the date of the service of the notice to sell.**

56. As noted in the authorities cited above, in matters to do with mortgages, where there is a default, there are three important notices to be served on the mortgagor before the mortgagee goes ahead to exercise their rights under the mortgage upon default. The first notice is a demand in writing which creates a default in payment. The second notice is a notice in writing requiring the mortgagor to rectify the default within forty five working days. The third is a notice to sell giving the mortgagor twenty one working days before a sale can be effected. The fourth is the public advertisement of the sale in a newspaper which has wide circulation in the area concerned, specifying the place of the auction, and the date of the auction, being no earlier than thirty days from the date of the first advert. Once all these notices have been duly served on the mortgagor, then the right to sell the mortgaged property can be duly exercised.

57. Counsel for the Plaintiff submitted that given the evidence on record, the Plaintiff was never served with a Notice of Default stating the true sums being demanded. That the amounts claimed in DEX4 (1) are over 3 times higher than the amounts claimed in the Final Demand Notice that had been issued just three months earlier in PEX14. That as such the Notice of default marked DEX4 (1) should be impugned. That the sums stated in all Demand notices issued by the 1st Defendant were riddled with grave inconsistencies and contradictions which cannot even be justified as Interest. Counsel for the Plaintiff submitted that, a copy of the Notice of sale was duly served on the Plaintiff in February 2015, as indicated in PEX19 and to it, the Plaintiff responded by informing the Bank that she was in advanced stages of obtaining alternative financing, with the aim of rescuing her property from being sold as seen in PEX20.

58. In reply the 1st Defendant's Counsel submitted that the Plaintiff was served with a Notice of Default in compliance with Section 19 of the Mortgage Act exhibited as DEX4(1) and its proof of postage by registered post also exhibited as DEX4(2). Counsel further submitted that the Plaintiff was also served with a Notice of sale in compliance with Section 26(2) of The Mortgage Act, exhibited as DEX5(1) and its proof of postage by registered post exhibited as DEX5(2). That furthermore by the Plaintiff's letter of 17th February 2015 to Crane Bank Limited exhibited as DEX6, she made reference to this Notice of Sale. That the 1st Defendant's sole witness was not cross examined on both Notices of Default and Notice of Sale.

59. PEX14 dated 14/07/2014 was the demand in writing which created a default in payment.

PEX18 dated 16/10/2014 is a notice of default requiring the Plaintiff to pay the mortgagee within 45 working days. DEX4 (2) is proof of postage which shows that it was sent to the Plaintiff on 17/10/2014.

PEX19 dated 20/01/2015 is a notice of sale of mortgaged property requiring the Plaintiff to pay the mortgagee within 21 working days and received by a one Peter on 21/04/2015. DEX5 (2) is proof of postage which shows that it was sent to the Plaintiff on 03/02/2015.

In PEX20 which is the Plaintiff's letter dated 17th February 2015 to Crane Bank Limited she made reference to the Notice of Sale dated 20/01/2015. In my view, the fact that the Plaintiff made reference to PEX19 in PEX20 is sufficient acknowledgement that the said notice was duly served upon her. I am also in agreement with the 1st Defendant's submission that the 1st Defendant's witness, DW1, was not cross examined on issuance and service of Notices of Default

and Notice of Sale which in effect means that the Plaintiff had no contention in that regard. That she had therefore been duly served with all the requisite notices.

60. I find that the three important notices were duly served on the Plaintiff.

b) Redemption

61. Counsel for the Plaintiff submitted that the 1st Defendant denied the Plaintiff an opportunity to redeem her property with the aim of selling it off. That under the concept of redemption the Plaintiff is allowed to retain ownership and full rights over the property if he/she reimburses the outstanding loan amount and expenses before the sale as per **Section 32 of the Mortgage Act and Regulation 13 of the Mortgage Regulations**. Counsel relied on the Court of Appeal case of **Francis Kiyaga vs Josephine Segujja & Another, CA No. 76/2010** and the case of **Knights Bridge Estates Trust Ltd Vs Byrne (1939) 1 CH 441** to brace his submission**.**

62. In reply the 1st Defendant's Counsel submitted that the Plaintiff's contention that she was not permitted to exercise her right to equity of redemption is wholly without basis. That the Plaintiff was at all times at liberty to redeem the Suit Property and this could only be done upon full payment of the monies owed. He cited the case of **Knights Bridge Estates Trust Ltd vs Byrne (1939) 1 CH 441** in which it was held, inter alia, that this is the idea of a mortgage and the security is redeemable on payment of or discharge of such debt obligation. He further submitted that by her letters of 17th February 2015, 19th February 2015, 11th March 2015, 11th May 2015 and 10th August 2015, the Plaintiff informed the Bank that she was in

advanced stages of obtaining alternative financing but never presented any evidence of her application to any financier for this alternative financing. That she was accorded opportunity to redeem is evinced through the opportunity given to the Plaintiff in the case of **Miao Huia Xian vs Crane Bank Limited & Anor, MA No. 935/2015**, where Justice Madrama (as he then was) granted a temporary injunction to the Plaintiff on condition that she pays a sum of Ugx. Shs. 4,000,000,000/= (Uganda Shillings Four Billion) to the Bank by 14th January 2016 which condition the Plaintiff did not fulfil.

63. In rejoinder Counsel for the Plaintiff submitted that by letters from the Plaintiff to the 1st Defendant the Plaintiff informed the Bank of her intention to seek alternative financing and requested for her outstanding balances to enable her plan her repayment schedule. That this proves the willingness and intention of Plaintiff to redeem her property even when she disputes the amount due. That the Plaintiff informed the 1st Defendant of the willingness of Orient Bank to take on the loan and wished to deposit money to seek release of only the suit property. That the Plaintiff was willing to leave all other titles for security so that the 1st Defendant at all times remained secured but they did not adhere to the Plaintiff's pleas. That Orient Bank gave up making it harder for the Plaintiff to redeem her property.

64. In the case of **Francis Kiyaga vs Josephine Segujja & Another, CA No. 76/2010 and CA No.37/2010** as relied on by the parties, the Court of Appeal re-emphasized that, it is an established rule that if money is lent on the security of land, the lender will get security and nothing more. Therefore, if the borrower wishes to redeem the land within a reasonable time, he will be allowed to do so, even though

the due date is past. This rule is so strict that not even an express agreement will be allowed to exclude the borrower's right to redeem. However, that case is distinguishable from the instant case because in the Francis Kiyaga case, the loan agreements contained a clause to the effect that in case the borrower fails/refuses to pay the lender, the lender would instead turn to be the owner of the mortgaged property.

65. In that case, that clause clogged the borrower's right of redemption contrary to the law. In the instant case however, there is no such clause.

S.32 (1) of the Mortgage Act 2009 as relied on by the Plaintiff provides that at any time before an agreement is reached between the mortgagee and any purchaser for the sale to that purchaser of the mortgaged land the mortgagor or any other person who is entitled to discharge the mortgage may discharge the mortgage in whole or in part by paying to the mortgagee all monies secured by the mortgage at the time of discharge.

The Plaintiff also relied on **R.13 (5) of Mortgage Regulations** which provides that where the sale is stopped or adjourned at the request of the mortgagor for the purposes of redemption, the mortgagor shall at the time of stopping or adjourning the sale pay a security deposit of 50% of the outstanding amount.

66. Both provisions of the law require the mortgagor to make some payment to the mortgagee for the redemption or adjournment to be effected. In this particular case, a Notice of sale of mortgaged property was issued to the Plaintiff on 20/01/2015. On 17th February 2015 the Plaintiff wrote a letter to Crane Bank Limited requesting for

21 days for purposes of arranging for alternative financing to discharge their entire obligation. PEX27 shows that the suit property was advertised for sale on 15th October 2015, which is almost 8 months later.

Following the said advert, the Plaintiff applied for a temporary injunction against the 1st Defendant which was granted on 21/12/2015 on condition that the Plaintiff would deposit a sum of Ugx. Shs. 4,000,000,000/= (Uganda Shillings Four Billion) to the Bank by 14th January 2016 which they failed to do and the property was sold on 28/01/2016.

67. Basing on the above, it is my view that the Plaintiff had a lot of time within which to redeem her property but she never exercised the opportunity.

Valuation of the mortgaged property and sale by public auction

68. The Plaintiff stated that the property was intentionally undervalued to the detriment of the Plaintiff as it was subsequently sold at a giveaway price.

69. S.27 (1) of the Mortgage Act provides that a mortgagee who exercises a power to sell the mortgaged land owes a duty of care to the mortgagor to take all reasonable steps to obtain the best price as prescribed in the regulations.

70. R.11 of the Mortgage Regulations provides as follows;

'Valuation of mortgaged property

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.'

71. DEX27 dated 21st October 2015 is a valuation report by Bageine & Company. In the report, the mortgaged property was valued at Ugx. 4,030,000,000/ as the market value and Ugx. 2,820,000,000/ as the forced sale value.

72. Section 28(2) of the Mortgage Act and Regulations 8(2) and (4) of the Mortgage Regulations also require that the mortgagee publicly advertise the sale in advance of the sale by public auction for at least thirty days. The advert should be placed in a Newspaper of wide circulation in the area concerned and should portray the exact property to be sold clearly, in a colour.

73. DEX11 was the first advertisement dated 15th October 2015 and DEX21 dated 24th December 2015 was the 2nd advertisement. All the adverts run in the Daily Monitor newspaper, which has wide circulation in Uganda.

74. The 1st Defendant complied with R.11(1) of the Mortgage Regulations by engaging Bageine & Company to value the property to ascertain the current market value and the forced sale value of the property as indicated in DEX27. The Plaintiff submitted that the value of the property should have been over UGX 11,000,000,000/ as expressed by a third party. She however, did not indicate who the third party was that gave that opinion nor did she present a valuation report to support her assertion.

75. Therefore, the Plaintiff's submission that the property was undervalued has no legal basis because the property was sold off at Ugx. 8,500,000,000/, a value way higher than the market value of 4,030,000,000/ as established in the Valuer's report (DEX27).

76. The Plaintiff stated that the sale process was rushed to cut out other potential purchasers who could have offered a better price because the advert duration lapsed on or about 25th January 2016 and the notification of the best bidder and sale happened on 28th January 2016 and subsequent transfer of Title happened on 1st February 2016. However, whereas PW1 stated that a one Katongole had expressed interest to buy the suit property at US$ 3,300,000, the said Katongole Alex who is the alleged author of PEX35 was not called to testify about that document to indeed prove that there was an offer of the said sum.

77. Except for the foregoing un-substantiated allegations, no evidence of ill motive is discerned from what transpired. The re-advertisement having been done on 24th December 2015, the bid accepted on the 28th January 2016 and the sale entered on the 28th January 2016 did not contravene any law.

78. The Defendants complied with the statutory timelines under the Mortgage Act and Regulations and save for that, they were under no other obligation to pace the transaction in any other way as insinuated by the Plaintiff.

The only other primary obligation that the 1st Defendants had was to sell at the most optimum price possible in the circumstances. - See **Mbuthia vs. Jimba Credit Finance Corporation & Another, EALR (1986-1989) EA.340,** in which the Court of Appeal held that the only obligation incumbent on a mortgagee selling under a power of sale is that it should act in good faith for the purpose of realizing the security and take reasonable precautions to secure not the best price, but a proper price.

79. The Plaintiff has not been able to prove that the price for which the suit property was sold was not the proper price in the circumstances.

80. The fact that the Title transfer was allegedly done on 1st February 2016 a few days after sale is in the circumstances, of no consequence and in any case, the rules pertaining to transfer militate against procrastination or delayed transfer of property once a change of ownership has taken place.

81. R.11 (2) of the Mortgage Regulations also provides that the valuation report shall not be made more than six months before the date of sale. In the instant case, the valuation report was done on 21st October 2015 and the sale on 28th January 2016, which is within the stipulated 6 months.

82. R.11 (3) of the Mortgage Regulations provides that the valuation report shall contain the current pictures of the property including the front view of the property; the side view of the property; and the detailed

description of the property. DEX27 has all the said pictures and description of the property.

83. The Plaintiff submitted that the 1st Defendant's advert showed 2 different properties and did not show a clear picture of the properties to be auctioned so as to bring it to the attention of suitable purchasers and also put the mortgagor on notice.

The pictures of the properties in DEX21 showed the front view and the side view of the mortgaged property. Similar pictures were used in DEX27 and when the same were showed to the Plaintiff during her re-examination she identified them as 888 hotel which she said she could recognise. These pictures were the same ones that appeared in the advert and in the valuation report. It is therefore follows that the pictures as they appeared in the advert were sufficiently clear for potential purchasers to see and appreciate the properties.

84. Court is convinced that the 1st Defendant duly valued the mortgaged property before sale.

85. Counsel for the Plaintiff contended that the mortgagor was never served with a new notice of sale as required under Regulation 13(7) of the mortgage regulations since the first intended sale had been adjourned for more than 14 days. Regulation 13(7) provides that where a sale is adjourned for a period longer than fourteen days, a fresh public notice shall be given in accordance with Regulation 8 unless the mortgagor consents to waive it.

I am convinced by the evidence on record which indicates that the 2nd advertisement, DEX21 which was put out in the Daily Monitor newspaper on the 24th December 2015 fully satisified the requirements of Regulations 8 & 13(7) of the Mortgage Regulations.

d) Auctioning and Bidding

86. The Plaintiff submitted that no evidence was adduced to prove that the sale was conducted through a competitive bidding process and how the best bidder was arrived at.

87. That during the cross examination of DW1 on evidence of bids offered for the purchase of the property, he stated that the 2nd Defendant was the successful bidder because it was the only company that had actually made a bid offer. That to the contrary, DW2, during his cross examination, admitted that it was not the only bidder but there were many others. That the selection of the suitable purchaser was secretly done privately by the two Defendants. That there was no sale by public auction as required by law.

88. That the said suit property was used as security for the 2nd Defendant to obtain a loan to purchase the same, which proves that the 1st Defendant needed the 2nd Defendant to be the ultimate buyer. That all the evidence establishes that it was a sale by private treaty.

89. That the 2nd Defendant was not the successful bidder because she had no money to purchase the property. That public advertisement of an intended sale of mortgaged property by public auction is mandatory under the provisions of **Section 28(2) of the Mortgage Act, 2009 and Regulations 8(2)** and **(4) of the Mortgage Regulations SI No.2 of 2012**. That it is standard practice that the party conducting the bidding process ought to prepare a report on a list of bidders and how the bidding process was done. That the contradictions in the testimonies of the Defendants on existence of the bidding process are grave and material and ought to be rejected, leaving one conclusion that there was no bidding process that took

place and neither was there any public auction conducted. That if the 2nd Defendant was the only bidder then they should have re-advertised the property to ensure competitiveness.

90. In reply, the Defendants submitted that according to the two advertisements published in the Daily Monitor on diverse dates, the general public was invited to compete. That in re- examination DW1 clarified that he had not seen the list of bidders. That the evidence on record does not show that there were any irregularities in the process of the sale in which the 2nd Defendant's bid was accepted.

91. Section 28(1) d) of the Mortgage Act and Regulation 8(1) of the Mortgage Regulations are to the effect that sale of mortgaged property should be by public auction unless, otherwise the other party consents to a sale by a private treaty.

The Plaintiffs sought to rely on the case **Sendagire Stephen and Nanyombi Gladys v DFCU Bank & 2 others, CS No. 26/2008** when she stated that;

> *"…public auction is competitive and more transparent and if private treaty is used, the best price and involvement of the mortgagor is preferable especially access to information…A receiver entrusted with sale of mortgaged property should have all processes documented since there is an underlying duty of care…The only way to guard against liability is to adduce proof of correct processes. Word of mouth or reputation is not enough. As pointed out in the beginning of my decision, documentary evidence is a golden egg in commercial disputes…There was only one bid that was accepted. It is not clear why the 2nd Defendant did not*

advertise again the sale until he got a buyer offering the best price…A public auction is a public event where interested parties attend and present bids. While a sale by private treaty is determined privately between the parties to the exclusion of all others. This form of sale required the consent of the 1st Defendant…I note that although the sale of the suit property was conducted in the most part in a lawful manner in terms of notice and advert. The property was sold under value and lacks a high degree of transparency."

92. The instant case is distinguished from the case of **Sendagire Stephen (supra)** in that whereas in Sendagire (supra), the 2nd Defendants did not re-advertise the sale, in the instant case, the Defendants re-advertised the sale in the Daily Monitor newspaper of 24th December 2015.

Whereas the mortgagee is under the obligation to re-advertise and to optimise the search for the best possible price in order to substantially resolve the mortgagor's indebtedness, the mortgagee has no control of the response from the market place. The law does not provide for a threshold of a minimum number of responses nor does it prescribe a precise procedure for bid processing. In the absence of impropriety or prior agreement on a minimum number of bids to be received therefore, the process cannot be impeached on grounds that there was one or fewer bidders than the mortgagor would desire to have responded to the advert.

93. During his cross examination DW1 testified that the property was advertised and bids received but could not adduce evidence of a record of bidders. He also stated that the 2nd Defendant is the only

one who responded to the advert. However, in his cross examination, DW2 also testified that there were other people who competed for the bid but they were not given the list.

As rightly submitted by Counsel for the Plaintiff, there were contradictions in the testimonies of the Defendants regarding the bidding process, since DW1 stated that only the 2nd Defendant responded to the advert while DW2 testified that there were other people who competed for the bid.

94. I have addressed myself to the inconsistence in the testimonies of DW1 and DW2 and they do not, in my opinion, warrant a finding that the bid process was fraudulently flawed. The position proffered in **Sendagire (supra**), in which court opined that a receiver entrusted with the sale of mortgaged property should have documented the sale, made documentary proof of all the bids received and how the whole process was conducted is best practice and not the law. Acts of impropriety that would amount to fraudulent conduct must be proved and evinced by more cogent evidence than inferences deduced from the inconsistences in witness testimonies of DW1 and DW2.

On a balance of probability, I find no evidence to justify the claims that the bidding process was a sham. I am convinced that it was a sale by public auction, the fact that there was only one bidder who responded to the advert notwithstanding. A mortgagee does not require the mortgagor's consent or participation in determining who the buyer should be, in order to lawfully conclude a sale of mortgaged property.

95. The foreclosure, advertisement and sale of the Plaintiff's suit property was therefore lawfully done. Issue No.4 is answered in the affirmative.

Issue 5: Whether the 1st and 2nd Defendants are liable in fraud

96. DEX30 which is the 2nd Defendant's Bank statement shows that Diamond Trust Bank (DTB) paid a sum of 4,500,000,000/ towards purchase of property comprised in Plot 47 Nakivubo road Kampala. The same statement shows that on the next day, 29th January 2016, DTB deposited a sum of Ugx. 4,600,000,000/ on to the 2nd Defendant's account. This was confirmed by PEX43 where DTB stated that the 2nd Defendant obtained a loan facility of Ugx. 4,600,000,000/ from DTB whose purpose was to purchase LRV 2744 Folio 25 Plot 47 Nabugabo road from Crane Bank. A Mortgage Deed, exhibited as PEX42 dated 10/02/16, was signed between the 2nd Defendant and DTB. During his cross examination DW2 testified that the 2nd Defendant obtained a loan from DTB before acquiring the suit property and that the whole sum of Ugx. 8,500,000,000/ was paid on 28th January 2016.

The Plaintiff contends that on the basis of the above, the 2nd Defendant did not actually have money to purchase the suit property at the time of the sale, and that this contravenes **Regulation 15 of the Mortgage Regulations**.

97. **Regulation 15 of the Mortgage Regulations** provides that after payment of the full purchase price, the mortgagee shall execute instruments of transfer of the property in the name of the purchaser or the person named by the purchaser.

98. The Plaintiff faults the loan transaction between the 2nd Defendant and DTB. She submitted that it was *highly fraudulent* for the Defendants to use the very property that was being sold, as security to obtain a loan from DTB to purchase it.

Counsel for the Plaintiff cited the cases of **Belex Tours and Travels V Crane Bank Limited and Anor, CACA No. 071/ 2009; Fredrick Zaabwe vs. Orient Bank Ltd & Others, SCCA No. 4/2006** to brace his submission on fraud. His argument is that the **Belex** case was basically on all fours with instant case.

99. In the Belex case (supra), the 2nd Respondent in that case purchased a mortgaged property from the 1st Respondent by obtaining a mortgage from the 1st Respondent. The mortgage was signed before the money had been availed to the 2nd Respondent.

100. It is also the Plaintiff's argument that given the manner in which the 2nd Defendant, allegedly, hurriedly concluded the sale transfer, when aware of Civil Suit 743 of 2015 in which the Plaintiff was challenging the sale, the 2nd Defendant could not claim to be a *bona fide* purchaser for value without notice.

101. In reply, Counsel for the 1st Defendant contended that the sale of the suit property was lawfully done and that all the statutory requirements had been complied with, including the Plaintiff having been accorded unfettered opportunity to exercise her redemptive rights, but which on her own, she failed to exercise.

102. For the 2nd Defendant, Counsel contended that based on the amended Plaint, the Plaintiff had made only one allegation of fraud against the 2nd Defendant; that there was collusion between the 2nd Defendant and its sister company, to orchestrate an illegal bid

process which culminated into the sale, not withstanding the fact that the said sister company did not even participate in the bidding.

103. He pointed out that the Plaintiff could not rely on **Section 30(1) & (2) of the Mortgage Act** as she had not led any evidence to suggest that the Defendants were within the scope of relations stipulated under that provision. He contended that the Plaintiffs attempt to introduce new allegations of fraud, through her Written Statement of Defence, which were not pleaded in the amended Plaint, should be disregarded by Court.

104. Regarding the authenticity of the bank statements, Counsel submitted that the 2nd Defendant had discharged their burden of proof when they tendered in the impugned documents and since the Plaintiff did not challenge the documents in cross examination, they cannot purport to impeach them in submissions.

105. Regarding the transfer of the suit property, the 2nd Defendant clarified that it was transferred on the 1st February, 2016 while payment was done on the 28th January 2016. That the shs 8.5 billion was therefore all paid before the transfer of the suit property and that the Defendants was therefore in full compliance with **Regulation 15 of the Mortgage Regulations**.

106. The particulars of fraud labelled against the 1st Defendant, including alleged omission to serve the Plaintiff with the requisite statutory notices, allegations of refusal to furnish the Plaintiff with information and documents regarding the mortgage and overdraft facilities, omission to carry out a valuation of the property prior to the sale, alleged placement of "stealth" advert for the sale, in disregard of the law, and sale of the suit property at shs 8.5 billion which was below

what the Plaintiff had allegedly been offered by another party were all dealt with and determined by this Court under Issue No. 4, in which it was held that the foreclosure, advertisement and sale of the Plaintiff's suit property was lawful.

107. The case of **Belex Tours & Travel** (supra), which the Plaintiff seeks to rely upon, is cited out of context. Whereas in that case, the Defendants, Crane Bank Ltd, was also the lender, in the instant case the 1st Defendant did not lend to the buyer, who happens to be the 2nd Defendant.

108. The circumstances in Belex Tours (supra) are dissimilar and the decision therefore inapplicable to the instant case. As distinguished by the Defendants, whereas in **Belex**, transfer of title into the purchaser's names was effected before she had paid up for the property, in the instant case, according to DEX30, the 2nd Defendant paid up on the 28th January 2016 and the property was transferred on 1st February 2016. The 2nd Defendant was therefore able to pay up the entire purchase price before the transfer was effected.

109. Whereas logically, it would be unlikely for a borrower to access money before perfecting the necessary securities, the Plaintiff did not adduce evidence of impropriety regarding the manner in which the loan financing was structured between the 2nd defendant and DTB. As rightly submitted by Counsel for the Defendant, pre-perfection drawdown is a not an unlawful practice in the banking business. It is likewise a conventional practice in banking practice to extend asset financing in such a way that the payment is effected directly to the supplier, lessor or owner of the asset being procured. No impropriety is therefore imputed by the mere fact of

disbursement of funds before perfection of loan transaction securities nor is pre-perfection drawdown a fraudulent act at all. I find nothing that would lead me to conclude that the 2nd defendants acted fraudulently in the sale transaction.

110. The Plaintiff's allegations that the 2nd Defendant's sister company had submitted a higher bid offer for the same property were not supported by any evidence nor is the fact that the 2nd Defendant was aware of the Plaintiff's contest to the Defendants disposal of her property vide Civil suit no. 743 of 2015 such knowledge as would disentitle the 2nd defendant to immunity derived from the status of a *bona fide* purchaser for value without notice.

The 2nd Defendant drew this Court's attention to **Miscellaneous Application No. 935 of 2015-** in which the Plaintiff was ordered to pay shs 4 billion but had not complied with the Court Order when the suit property was put up for sale and the 2nd Defendant placed a bid and bought the property. This Court takes judicial notice of the referenced decision in **MA 935 of 2015**.

111. At cross examination, the Plaintiff was not able to demonstrate the nexus between the 2nd Defendant and the company alleged to be associated with the 2nd Defendant and which is said to have been represented by a one Alex Katongole, mentioned in PEX35. Whereas the Plaintiff claimed to have been approached by a one Alex Katongole with a bid offer of US$3,500,000 for the property, in her cross examination, she was elusive when asked about the said Katongole, his visit to her office and presentation of the bid offer to her. She testified that she did not know Katongole and denied "knowing" whether she had ever met him, but acknowledged having

received two documents from him; bid offer documents for property at Nabugabo and Kololo.

112. Whereas the Plaintiff's strong argument was that the Defendants were involved in fraudulent collusion and that the 2nd Defendant was therefore not a bona fide purchaser for value without notice, the 2nd Defendants have gone to great length to exculpate themselves of any fraudulent actions. They contend that the property was rightfully up for purchase after the Plaintiff having failed to comply with the Courts directive in MA 935 of 2015 which this Court takes judicial notice.

113. That they have no relation with Nabukera, the alleged bidder represented by a one Alex Katongole who the Plaintiff controversially denied knowing when cross examined, that their bank statement and the transactions reflected therein are authentic and that they were not in contravention of **Regulation 15 of the Mortgage Regulations**. That all payments for the suit property was completed before the transfer was effected. That the Plaintiff does not successfully attribute any fraud on the 2nd Defendant and the 2nd Defendant's title cannot therefore be impeached.

114. Black's law dictionary defines a bona fide purchaser as one who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title, one who has in good faith paid valuable consideration for property without notice of prior adverse claims.

115. A bona fide purchaser **David Sekajja Nalima vs. Rebecca Musoke (supra)** was described as that person who purchased the land without the notice of any equitable interest or claim therein.

116. In **Katende V Haridas & Company Ltd (2008) 2 EA 173**, the Court of Appeal described a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

117. For a purchaser to successfully rely on the bona fide principle, he must prove "that he holds a certificate of title, he purchased the property in good faith, and he had no knowledge of fraud, he purchased a valuable consideration, the venders had apparent valid title, he purchased without notice of fraud and he was not a party to any fraud"

118. The fraud which should be proved to nullify a registered title must be the fraud of the person whose title it is designed to impeach. In ***Kampala Bottlers Ltd vs. Damanico (U) Ltd (supra)*** Wambuzi CJ (as he then was) held that;

> ***"The party must prove that the fraud was attributed to the transferee. It must be attributable either directly or by necessary implication, that is the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act."***

119. It was also held in ***David Sekajja Nalima vs. Rebecca Musoke C.A No.12 of 1985*** that:

"…It is well settled that fraud means the actual or some act of dishonesty. Where there are a series of subsequent transfers, for the title of the incumbent registered proprietor to be impeachable, the fraud of the previous proprietors must be brought home to him…A fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out the fraud had he been more vigilant and had made further inquiries which he omitted to make does not itself prove fraud on his part. But if it is shown that his suspicions were aroused and that he abstained from making inquiries for fear of learning the truth, the case is very different and fraud may be ascribed to him…"

Section 29(1) of the Mortgage Act provide that a purchaser in a sale effected by a mortgagee acquires good title except in a case of fraud, misrepresentation or other dishonest conduct on the part of the mortgagee of which the purchaser has actual or constructive notice.

120. This was emphasised in the case of **Nazarali Hassanali Sanyani vs. Edward Mperese Nsubuga Civil Suit No. 364/1993** in which it was held that a person who claims to be bona fide purchaser will lose the protection of the Law if there is evidence to show that he did not act in good faith and if there is evidence of fraud on his part.

121. The 2nd defendant holds title to the suit property and according to section 64 of the Registration of Titles Act, the title of a registered proprietor is indefeasible except in cases of fraud. Such fraud should

be as was envisaged in the case of **Kampala Bottlers Ltd Vs Damanico (U) Ltd, SCCA No. 22 of 1992,** in which Wambuzi CJ, as he then was, held that;

> *"the party must prove that the fraud was attributed to the transferee. It must attributable either directly or by necessary implication, that is the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act".*

122. Premised on the evidence on record, the findings in Issues No. 1, 3 and 4 and the authorities referred to above, the Plaintiff has not convinced this court that the Defendants were involved in any acts of impropriety that would impute fraud on the defendants' part in dealing with suit property. The 1st defendant is a bona fide purchaser for value without notice of adverse interests.

123. I find no fraud attributable to the 2nd Defendant to warrant cancellation of the 2nd Defendant's title to the suit property.

Issue No. 6: Whether the 1st defendant is lawfully holding the other certificates of title that the Plaintiff deposited as additional security for the impugned loan.

It was the Plaintiffs case that the 1st defendant had taken and continues to, without lawful justification maintain possession of a number of securities from her. She argued that upon completion of the sale of the suit property, the 1st defendant ought to have wholly released or discharged the plaintiff of their lender-borrower relationship and that the loans should have been deemed dissolved per sections 14 & 15 of the Mortgage Act and Regulation 20 of the

Mortgage Regulations. That continued retention of the securities is unlawful and that they should be returned to her forthwith.

The Defendants did not make specific replies to this issue.

Be that as it may and premised on the Court's finding in Issues No.1, 3, 4 and 5, this Court's conclusion is that all the additional securities which were taken on account of the additional unlawful loan facilities and continue to remain in the 1st defendant's custody, are so held unlawfully by the 1st defendant.

7: Conclusion

1) At the time of sale of the suit property, the Plaintiff was indebted to the 1st defendant in the sum of Ugx 6,803,764,008/=.
2) The penal interest rate of interest at 36% was excessive.
3) The sanction letters in respect to the facility of US$ 110,000, the facility of Ugx. 1,000,000,000/, the facility of US$ 500,000, the facility of US$ 800,000 and that of Ugx. 1,500,000,000/ were irregularly procured and hence unlawful.
4) The Plaintiff was at the time of filing the suit, indebted to the 1st Defendant and was therefore in breach of her repayment obligations in respect of the legitimate facilities.
5) The foreclosure, advertisement and sale of the Plaintiff's suit property was lawful.
6) No fraud is attributable to the 2nd Defendant to warrant cancellation of the 2nd Defendant's title to the suit property.
7) All the additional securities which were taken on account of the additional unlawful loan facilities and continue to remain in the 1st defendant's custody, are so held unlawfully by the 1st defendant.

Issue 7: What remedies are available to the Parties?

124. Counsel for the Plaintiff prayed that based on the evidence submitted in support of her claim against the Defendants, judgment be entered in favor of the Plaintiff against the said defendants.

The plaintiff prayed for the award of general damages of UGX 1,000,000,000/ (Uganda Shillings One Billion Only) for all inconveniences, loss of earning, sufferings, and mental anguish. That in the instant case the plaintiff adduced evidence as to how there have been endless threats to evict her until she was able to obtain an Interim Order against the Defendants. That she has also been subjected to unnecessary remittance of rent collected from her property thus denying her a right to use the said proceeds for possible investments. That the said defendants had all along been bent on taking the suit land, at all costs, including participating in fraudulent dealings to achieve the same.

The Plaintiff also prayed that the 1st Defendant be found in breach of their statutory obligations in relation to handling the banker-customer relationship, following their breach of a number of principles in the Banker-customer relationship among others.

That the said sale of the Plaintiff's property to the 2nd Defendant be declared fraudulent and unlawful for failure to have followed the required procedures in relation to conducting a sale of mortgage property and the two be found liable in fraud during the said process and therefore make a declaration that the sale was illegal, unlawful and therefore, null and void and the Plaintiff's name be registered back on her title, as she is still in possession of the suit property.

That the Plaintiff be refunded all the monies that were unlawfully deducted from her account in the guise of loan recovery by the 1st Defendant and she also be refunded all rent arrears so far remitted.

Counsel also prayed for exemplary and punitive damages of UGX. 500,000,000 (Uganda Shillings Five Hundred Million Only) for the highhanded acts of fraud, negligence and insider dealing.

That an Order for costs be made against the Defendants for this suit and all Applications that arose from hereunder and the Plaintiff be awarded interest on all the above at a commercial rate of 22%.

125. In reply the 1st defendant's Counsel submitted that the Plaintiff has not proved her case to warrant issuance of the remedies sought. That the Plaintiff distanced herself from her Witness Statement during cross-examination and accordingly no basis to warrant the award of general damages was made out.

That it cannot be said that she suffered any loss as she is still in possession of the premises and the rentals collected are pursuant to a Court Order issued in an application she filed and deposited with Court.

126. In further reply the 2nd defendant's Counsel submitted that the remedies sought by the Plaintiff fail as against the Defendants and prayed that;

1) the Plaintiff's suit be dismissed with costs and further, that;
2) that the Plaintiff delivers to the 2nd Defendant vacant possession of or be evicted from the suit property;

3) that the 2nd Defendant is entitled to all the rent collected and due from the suit property from the date of purchase until the date of delivery of vacant possession and that,
4) the 2nd Defendant is entitled to the rent deposited in Court by the Plaintiff.

127. In rejoinder to the 1st and 2nd defendant's submission Counsel for the Plaintiff reiterated their prayers and submitted that;

1) court make an order that the 1st Defendant immediately hands over all the titles given to her during the said loan periods by the Plaintiff, to wit; LRV 2339 Folio 19 Plot 53 Mackenzie Vale, Kololo No. 1-3 Block (road) Kambusu Road at Misoli, Entebbe Municipality, (FRV WAK 201, FOLIO 3) in the name of Urban Tibamanya and Plot 11-13 Block (Road) Misoli Road, Entebbe Municipality (FRV WAK 201, Folio 4) in the name of Tibamanya Urban and Nabulime Rachael respectively.
2) That the said sale of the Plaintiff's property to the 2nd Defendant be declared fraudulent and unlawful for failure to have followed the required procedures in relation to conducting a sale of mortgage property and the two be found liable in fraud during the said process and therefore make a declaration that the sale was illegal, unlawful and therefore null and void and the Plaintiff's name be registered back on her title as proprietor.
3) That the Plaintiff be refunded all the monies that were unlawfully deducted from her account in the guise of loan recovery by the 1st Defendant and she should also be refunded all rent arrears so far remitted to court and be awarded interest on all the above at a commercial rate of 22%.

Determination by Court

128. The plaintiff prayed for the award of general damages of UGX 1,000,000,000/= (Uganda Shillings One Billion Only) for all inconveniences, loss of earning, sufferings, and mental anguish. That she has also been subjected to unnecessary remittance of rent collected from her property thus denying her a right to use the said proceeds for possible investments.

In the case of **Luzinda v. Ssekamatte & 3 Ors, CS No. 366/2017**, Justice Musa Ssekaana held that as far as damages are concerned, it is trite law that general damages be awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the defendant. It is the duty of the claimant to plead and prove that there were damages, losses or injuries suffered as a result of the defendant's actions.

129. 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.

130. 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.

131. It was established that the 1st defendants acted unlawfully when they irregularly issued some of the loan facilities. However, even if the loan facilities were extended unlawfully, the plaintiff does not satisfactorily prove that she did not take and benefit from the money.

132. Court also takes cognizance of the 1st Defendant's breach their obligations in the banker-customer relationship when they did not avail the plaintiff with information when requested, did not exercise reasonable care in their lending when they issued unsolicited for and unlawful loans to the plaintiff, which culminated into loss to the plaintiff.

133. I however find the sum of UGX. 1,000,000,000/= 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 by the 1st defendant.

134. Having established that the 1st defendants continues to hold some of the Plaintiffs properties, as securities, unlawfully, the 1st Defendant is directed to hand over the said titles, to wit;

1) LRV 2339 Folio 19 Plot 53 Mackenzie Vale, Kololo
2) No. 1-3 Block (road) Kambusu Road at Misoli, Entebbe Municipality, (FRV WAK 201, FOLIO 3) in the name of Urban Tibamanya and
3) Plot 11-13 Block (Road) Misoli Road, Entebbe Municipality (FRV WAK 201, Folio 4) in the name of Tibamanya Urban and Nabulime Rachael

135. Save for the general damages awarded above, the order to reduce the interest rate and the directive regarding the unlawfully held securities all premised on the partial success in Issues No.2 and No.3, the Plaintiff has not proved her case to warrant issuance of any of the other remedies sought.

All the other remedies sought by the plaintiff fail.

Final orders

136. The penal rate of interest levied by the 1st defendant on the Plaintiff shall be reviewed and reduced from 36% to 24% and the parties shall adjust and reconcile the accounts accordingly.

137. The Plaintiff is directed to cede vacant possession of the suit property to the 2nd defendant, together with all the rent collected and due from the said suit property from the date of purchase by the 2nd defendant until delivery of vacant possession.

138. The Plaintiff shall pay the 2nd defendant's costs in this suit

139. The Plaintiff and the 1st defendant shall each meet their respective costs in this suit.

Delivered at Kampala this 7th day of March 2022.

……..

Richard Wejuli Wabwire

JUDGE