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**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
CIVIL SUIT NO. 577 OF 2016**

10 **ECOBANK UGANDA LIMITED**] **PLAINTIFF**

VERSUS

PRIME I.K LIMITED] **DEFENDANT**

15

Before: Hon. Justice Thomas Ocaya O.R

JUDGMENT

20 **BACKGROUND**

The Plaintiff, a limited liability Company carrying on banking business commenced this action as a summary suit against the Defendant for recovery of UGX 288,217,840/= arising from a loan facility and the interests accrued thereon, interest of 24.5% per annum from the date of default till payment in full and costs of the suit.

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The Defendant applied for leave to appear and defend, which application was subsequently granted. Upon granting of leave to appear and defend this suit the Defendant also filed a counterclaim against the Plaintiff.

30 The facts as set out in the Plaint are that on the 31st day of December 2013, the Defendant applied for and was granted a credit facility of UGX 100,000,000/= by the Plaintiff. The credit facility attracted an interest rate of 24.5% per annum according to the Loan agreement between the parties. The loan was secured by a mortgage over property



5 comprised in Plot 237 Kyadondo Block 189 Mengo, Wakiso district. The Defendant allegedly on several occasions defaulted on payment of its loan obligations, that as a result, as of 29th July, 2016 the sum of UGX 288,217,840/= was due and outstanding.

10 The Defendant on its part averred that it had an arrangement with the Ministry of Water and Environment, whereof the Defendant was contracted by the Ministry to construct Public and institutional toilets for Buwama, Kayabwe and Bukakata towns, which facts were drawn to the attention of the Plaintiff.

15 That the said contract was preconditioned on the Defendant securing Advanced payment security in form of performance and advance payment guarantees from its bankers which the Defendant did and the Ministry released UGX 183,821,246/=.

The agreement between the Plaintiff and the Defendant was that the Defendant would use the sums advanced by the Ministry to commence the constructions and proceeds of the project would be used to clear the outstanding loan sums on the Defendant's account.

20 That the Defendant used UGX 100,000,000/= advanced by the Plaintiff for the project works and a report was made, the basis, whereof was the Plaintiff would advance more money to the Defendant but the Plaintiff refused to do so, hence halting the Defendant's work.

25 The Defendant contended that it was within the Plaintiff's knowledge that the source of money to service the loan was the Ministry proceeds.

30 Defendant further contended that as security for the said loan, the Defendant offered land comprised in Kyadondo Block 189Plot 237 measuring approximately 1.960 Hectares in the names of Dr. William Kaberuka and the Duplicate Certificate of Title whereof was deposited with the Plaintiff.



5 The Defendant contended that the Plaintiff undervalued and illegally sold the mortgaged property and cannot claim any outstanding sums whatsoever from the Defendant.

The Defendant in its counter claim and reiterated the contents of the Written Statement of Defense and contended that the Counter Defendant for breached its duty and statutory provisions, and sought; a declaration that the entire process of the sale of the mortgaged property was tainted with illegalities, the Counter Defendant undervalued the mortgaged property, an order against the Counter Defendant to pay the difference between the value of the land as assessed under court order and the amount due on the loan before the sale, General Damages and Costs of the suit.

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The Counter Claimant's particulars of illegality are that;

The Counter Defendant did not ever issue and serve a demand notice onto the Counterclaimant contrary to the provisions of section 19(1) and statutory notice of default on the claimant contrary to the provisions of section 19(2) of the Mortgage Act, 2009.

20

The Counter Defendant did not issue and serve any notice of sale of the mortgaged property contrary to the provisions of Regulations 26(2) and Counter Defendant did not cause re-valuation of the mortgaged property contrary to the provisions of Regulations 11(1) of Mortgage Regulations 2012.

25

The Counter Defendant did not advertise the property contrary to the provisions of Sections 28(2) of the Mortgage Act, 2009.

30 The Counter Claimant prayed for a declaration that the entire process of sale of the Mortgaged property was tainted with illegalities, a declaration that the Counter Defendant undervalued the mortgaged property, an order against the Counter Defendant to pay the difference between the value of the land as assessed under a court order and

5 the amount due on the loan before the sale, An order for General Damages and Costs of the suit.

In reply to the Counter claim the Counter Defendant denied the allegations of fraud and contended that it had complied with all the requisite notification prior to the sale of the
10 property. The counter defendant stated that the Counterclaimants outstanding balance was UGX 222,321,635/=

The parties filed a joint scheduling memorandum on the 1st of August, 2017, and only agreed on the fact that UGX 100,000,000/= loan facility was granted to Defendant by
15 Plaintiff.

Representation:

The Plaintiff was represented by the law firm of M/S Kigozi, Ssempala, Mukasa Obonyo (KSMO) Advocates and the Defendant was represented by the law firm of
20 M/s MAGNA Advocates.

Issues:

The following issues were arrived at for determination.

1. Whether the Defendant breached the loan agreement between itself and the
25 Plaintiff?
2. Whether the sale of the Mortgaged property was legal?
3. What are the remedies available to the parties?

Evidence:

The Plaintiff adduced one witness, Mr. Okello Alex Paul, the Head Early Warning Remedial and Recovery in the Plaintiff Bank, who led his evidence in chief by witness statement which was admitted on record as PW1. Plaintiff filed a trial bundle on the 2nd July, 2021 and exhibited ten documents, namely the Loan Agreement (PEX1), the

Application for credit facilities(PEX 2), Demand notice dated 22nd/09/2014(PEX 3), Reply to the Demand notice dated 13th /01/2015 (PEX 4), Notice of Default dated 22nd /09/2014 (PEX 5), Notice of sale of Mortgaged Property dated 27th/11/2014 (PEX 6), Copy of the Advert in the Daily Monitor Newspaper dated 9th /02/2015 (PEX 7), Copies of Bids received to purchase the Mortgaged Property(PEX 8), Copy of the Valuation Report for the Mortgaged Property(PEX 9) and Copy of the Defendant's Loan statement (PEX 10).

The Defendants did not file witness statements or adduced witnesses as directed by the court on the 8th /07/2022 and neither did they file a trial bundle. The only supporting documents in court are the attachments to the Written Statement of Defense and Counterclaim, which they did not appear in court to adduce on record.

5 **Order 17 r.4 of the Civil Procedure Rules** gives guidance in this regard. It provides that;

10 *“Where any party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any other necessary act to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding the default, proceed to decide the suit immediately.”*

15 On the 18th October 2022 Counsel for the Plaintiff submitted in court that the Defendant was served with a hearing notice and several others before that as evidenced by the affidavit of service dated 17th October 2022 sworn and filed by Mr. Baleygisa Charles, who served Counsel for the Defendant on the 12th August 2022 and still neither the Defendant nor its Counsel entered an appearance.

20 The court was inclined to enter a default judgment in favor of the Plaintiff and the matter was set down for hearing of formal proof on the 6th December 2022 at 9:30 am. The Plaintiff led her evidence in support of its claim through its witness *PW 1 Alex Paul Okello*.

5 Court shall rely on the averments in the Defendant's Written statement of Defense as filed in court.

Analysis:

10 **Issue 1: Whether the Defendant breached the loan agreement between itself and the Plaintiff?**

In civil proceedings, the burden of proof lies upon the party who alleges and must prove his or her case on a balance of probabilities if he or she is to obtain the remedies sought. see Lord Denning in Miller versus Minister of Pensions (1947)2 ALL ER 372 at page 373. See Section 101 and Section 103 of the Evidence Act.

When a Plaintiff has led evidence establishing his or her claim, he/she is said to have executed the legal burden. The evidential burden thus shifts to the defendant to rebut the plaintiff's claims.

Black's Law Dictionary 11th Edition at page 232 defines breach of contract as "violation of a contractual obligation by failing to perform one's own promise, by repudiating it or
15 by interfering with another party's performance". In the case of **Stanbic Bank Uganda Limited Versus Haji Yahaya Sekalega T/A Sekalega Enterprises High Court Civil Suit No. 185 of 2009 at page 6** court observed that;

20 "A breach of contract is the breaking of the obligation which a contract imposes which confers a right of action in damages to the injured party. It entitles him to treat the contract as discharged if the other party renounces the contract or makes performance impossible or substantially fails to perform his promise."

There is no dispute between the parties as to the existence of a contract and the duties obligated of each party as drawn out in the loan agreement.



PW 1 Okello Alex Paul, the Head Early Warning Remedial and Recovery of the Plaintiff Bank testified in paragraphs 2, 3, 4, and 5 of his evidence in chief stating that on the 31st of December, 2013, Defendant applied and obtained a credit facility of UGX 100,000,000/= from the Plaintiff and the loan attracted interest at a floating rate of 24.5% per annum as evidenced by PEX 1 and PEX 2.

The said loan was secured by a mortgage over land comprised in Kyandondo Block 189 Plot 237 at Mengo, Wakiso District, and Defendant defaulted on his loan obligation and as a result Plaintiff issued and posted demands for the full payment of the amount due as evidenced by PEX 3.

Counsel for the Plaintiff submitted that the principal law is that a breach of contract occurs where that which is complained of is a breach of duty arising out of the obligation undertaken under the contract. Counsel cited Hon. Justice Flavia Senoga Anglin as she relied on **Tarius vs. Moy, Dacius Smith, Vanderrell & Co. [1936] 1KB** in the case of **Barclays Bank of Uganda V Bakojja [2016] UGCommC 11**.

Counsel further submitted that Defendant acknowledged his application for the loan facility and that under paragraph 5(5.1) of the loan agreement, it stated that the borrower agrees to pay to the Bank interest on the loan at the interest rate on the interest payment date, such interest to be paid as well after as before judgment, winding up or liquidation of the borrower.

Defendant on the other hand acknowledged the application for and receipt of the loan facility from Plaintiff under 4(g) of the Written Statement of Defense and attached the Loan agreement thereto although the same was not adduced in court under the rules of evidence.

Defendant further in paragraphs 4 (h) and (i) stated that Plaintiff was notified and was at all material times aware that any other payment from the ministry was pre-conditioned on completion of the works and that a report was shared with Plaintiff so as to show progress of the work and the Plaintiff would advance more money which the



Plaintiff did not thus the work could not be completed and the ministry did not further any payments hence the Defendants default in payment of the loan.

The crux of issue one and what forms the Defendants contend is that it is the Plaintiff who breached its duty thus leading to the Defendant defaulting, however, to resolve this recourse has to be made to the loan agreement dated 31st day of December, 2013 which both parties acknowledge to be the guiding document on their engagement as it ought to be.

Clause 6 of the Loan Agreement under the heading REPAYMENT provides that, "In consideration of the Loan (receipt of which the Borrower hereby acknowledges), the Borrower undertakes to repay the Loan in a single installment monthly/quarterly/semi-annual principal installments.....each".

Neither the repayment clause nor any clause in the loan agreement makes mention of how Defendant was supposed to raise the money to repay the loan. It certainly does not mention that the Loan shall be repaid by the Defendant when they receive their payment from the Ministry.

The burden of repaying the loan solely lies with the Defendant whichever way he gets access to the money; his obligation still remains complete repayment of the full amounts owed at the times agreed.

In my view, the Plaintiff has performed its obligation; the Defendant was in breach of the agreement entered into.

I accordingly find issue 1 for the Plaintiff.

Issue 2: Whether the Sale of the Mortgaged property was legal?

As earlier noted, this matter proceeded exparte the Defendant/Counter Claimant having elected to exclude himself from the proceedings. On that ground alone this issue would



be answered in favour of the Counter defendant who had denied the counterclaim. That notwithstanding, for completeness I have consider the pleadings filed in this matter.

The Defendant by Counterclaim contended that the sale of the property comprised in Kyadondo Block 189 Plot 237 registered in the names of Dr. William Kaberuka was illegal having not followed the provisions in Section 19(1), Section 19(2), and Section 28(2) of the Mortgage Act 2009.

Also, failure to follow the regulations 26(2), regulations 11(1), of the Mortgage Regulations 2012.

5

Section 19 (1) of the Mortgage Act provides that where money secured by a mortgage is made payable on demand, a demand in writing shall create a default in payment.

Section 19 (2) provides that where the Mortgagor is in default of any obligation to pay the principal sum on demand or any interest or other relief payment or part of it under a mortgage, or in the fulfilment of any common condition, express or implied in the mortgage, the Mortgagee may serve to the Mortgagor notice in writing of the default and require the Mortgagor to rectify the default within 45 working days. For emphasis, *the notice shall be in the prescribed form under section 19 (3) of the Mortgage Act.*

15 Section 26 of the Mortgage Act provides that where the Mortgagor is in default of his or her obligations under the mortgage and remains in default after the expiry of the time provided for the rectification of the default stipulated in the notice served on him or her under section 19, a Mortgagee may exercise his or her power of sale of the mortgaged land.

20 Regulation 12 of the Mortgage Regulations provides that before taking possession of the mortgaged land under section 24 of the Act, the mortgagee shall give notice to the mortgagor in Form 10 in Schedule 2.



5 Regulation 11(1) of the Mortgage Regulations provides that the mortgagee shall before selling the property, value the property to ascertain the current market value and the forced sale value of the property.

Plaintiff adduced PEX 5 a copy of the notice of default dated 22nd September 2014, which was received by the Defendant as evidenced in the reply letter by M/s Muhimbura and
10 Company Advocates on behalf of Defendant PEX 4 and PEX 6 a copy of the notice of sale of the Mortgaged Property dated 27th November 2014. A period of 49 days between them is more than the 45 days prescribed in section 19(2) of the Mortgage Act which is more than sufficient for Defendant to rectify the default in the loan payment partly or in full.

And further 21 days were given to the Defendant in the notice of sale to rectify the default.

15 The Plaintiff adduced a copy of the Valuation Report in PEX 9 where the property was valued by Stanfield Property Partners and valued at the market price of UGX 700,000,000/= and a forced sale value of UGX 310,000,000/=. This is pursuant to Regulation 11(1) of the Mortgage Regulations 2012.

Advertisement for the bid of sale was placed in the Daily Monitor News Paper of 9th
20 February 2015 by the Expeditious Associates and the mode of sale was by Public Auction/Private treaty which is in line with section 28(2) of the Mortgage Act 2009.

Noteworthy, is that the exercise of the power of sale by a Mortgagee under the Mortgage Act sections 19, 20, and 26 is not preceded by an order of the court but is a statutory power of sale based on compliance with the prescribed procedure.

25 PW 1 on questioning by Court testified that the Mortgaged Property was disposed of on the 28th August, 2015 at UGX 300,000,000/= as evidenced by PEX 10 at page 36. There is a period of about a year from the time the demand notice was served on the 22nd September, 2014 and the final sale on the 28th August, 2015.

30 The prescribed procedure has inbuilt statutory safeguards that ensure sufficient notice to interested parties and fairness, it also gives the interested parties or their agents under



5 section 26 (3) recourse to come to court if the mortgagee fails to follow the procedures under the Act. Further recourse is provided for under Regulation 13(1) and (4) of the Mortgage Act Regulations to salvage the disposing of the Mortgage property and it still did not exercise the rights therein. Equity can only help the vigilant

10 Having considered the evidence adduced and the failure of Defendant to enter an appearance to prosecute its counterclaim and defend the case, it is my finding that Plaintiff legally exercised its rights as a mortgagee to sell the mortgaged property comprised in Kyadondo Block 189 Plot 237 Mengo, Wakiso District.

My above finding equally disposes off of the counterclaim in this matter. It is therefore my finding that the counterclaim stands dismissed.

15 **Issue 3: What remedies are available to the Parties?**

Plaintiff in its written submissions prayed for among others that Defendant settle the outstanding sum of UGX 288, 271, 840/= and General damages.

Having found in issue 1 that Defendant breached the contract between it and Plaintiff and Plaintiff having exercised its rights as a mortgagee to dispose of the mortgaged property albeit it could not settle off the amount in question, it is sufficed to say that the Plaintiff would have been entitled to the outstanding amount claimed of UGX 288,271,840. However, during the testimony of PW 1 Alex Paul Okello, on examination by Court; he testified that the Mortgaged property was disposed of on the 28th August, 2015 at sum of UGX 300,000,000/= was applied to the Defendants outstanding balance. The amount outstanding as shown in the and it was applied on the Defendant's Copy of the Defendant's Loan statement (PEX 10) indicated the outstanding of UGX 222,321,633/=. Furthermore Par. 7 (e) of the Reply to counterclaim reiterates this amount as the outstanding balance.

Whereas the Plaintiff contended that the amount due was UGX 288, 271, 840/=The Plaintiff did not lead any evidence of how the amount claimed in the plaint now reached



5 From the evidence adduced Plaintiff is therefore only entitled to the outstanding balance of UGX 222,321,633/=, which I accordingly award the Plaintiff.

General Damages.

The Plaintiff prayed for General Damages of UGX 50,000,000/= having spent over 7 years in getting the Defendant to fully comply with its loan obligations.

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It is trite law that damages in general damages are awarded at the discretion of the Court and the purpose is to restore the aggrieved person to the position they would have been in had the breach or wrong not occurred. *See Hadley v. Baxendale (1894) 9 Exch 341; and Kibimba Rice Ltd v. Umar Salim, S. C. Civil Appeal No. 17 of 1992.*

15 **See Section 46 Contracts Act, 2010.**

In the assessment of general damages, the court should be guided by the value of the subject matter, the economic inconvenience that the Plaintiff may have been put through, and the nature and extent of the injury suffered. *See: Uganda Commercial Bank v. Kigozi [2002] 1 EA 305).* The damages available for breach of contract are measured in
20 a similar way as loss due to personal injury.

In the present case, the Plaintiff is a financial institution whose business objective among others is to lend money to members of the Public at an interest payable within the
25 periods agreed upon. Defendant in its Written statement of Defense admitted having defaulted in paying its loan obligations.

Plaintiff has illustrated the level of inconvenience it has gone through inclusive of this court process to ensure Defendant fulfills its loan obligation and prayed for General
30 Damages of UGX 50,000,000/= which is on the high end considering it has already implemented actions intended to recover the amount owed by the sale of the Mortgaged



5 Property, therefore the damage has been substantially mitigated and as such, I award the Plaintiff General Damages of UGX 35,000,000/=.

I therefore award General Damages of UGX 35,000,000/= which I find is fair to make good the inconveniences the Plaintiff has gone through.

10

Interest:

The Plaintiff in its pleading also prayed for interest at the rate of 24.5% per annum from the date of default till payment in full.

15 Counsel for the Plaintiff submitted, relying on the decision of the Supreme Court in **Milly Masembe v Sugarcane Co-operation of Uganda, Lugazi, and Another S.C.C.A No.1 of 2000**. which provides that for commercial ventures as in the instant case, the offending party should always pay interest at a commercial rate.

20 **Section 26(2)** of the Civil Procedure Act provides for the court's discretion in granting interests.

Oder, JSC in **Premchandra Shenoï & Anor v. Maximov Oleg Petrovich**, SCCA No. 09 of 2003 opined on award of interest as follows;

25 "In considering what rate of interest the respondent should have been awarded in the instant case, I agree that the principle applied by this Court in **SIETCO v. NOBLE BULDERS (U) Ltd Supreme Court Civil Appeal No. 31 of 1995** to the effect that it is a matter of the Court's discretion is applicable. The basis of awards of interest is that the defendant has taken and used the Plaintiff's money and benefited. Consequently, the Defendant ought to compensate the Plaintiff for the money.

30

From the foregoing, it is likely that Defendant benefitted from the retention of the money, and accordingly, I award an interest of 24.5% on the outstanding sum that is, UGX 222,321,633/= per annum from the date of filing the suit until payment in full.

5

I find the General Damages sufficient enough and in exercising the court's discretion under Section 26(2), Section 98 of the Civil Procedure Act, and Section 33 of the Judicature Act, I find no need to award interest on the General Damages awarded.

10 Costs:

As a rule of law, costs ordinarily follow the event and a successful litigant receives his or her costs in the absence of special circumstances justifying some other order. Where the successful party has been guilty of some misconduct, an order of costs may not be granted. See **Section 27(2) Civil Procedure Act, Harry Ssempe v Kambagambire David HCCS 408/2014, Iyamuleme David vs. AG SCCA NO.4 of 2013, Anglo-Cyprian Trade Agencies Ltd v. Paphos Wine Industries Ltd, [1951] 1 All ER 873.**

Given the findings above, the Plaintiff is entitled to the Costs of the suit, and the same is awarded to them.

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Having found no merit in the Counterclaim, the Plaintiff/ Counter Defendant is entitled to the Costs of the counterclaim, which I accordingly award her.

In Conclusion:

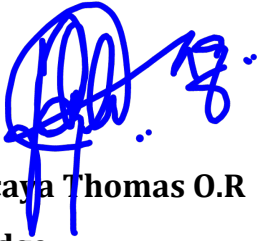
25 I accordingly make the following orders,

- a) The Defendant breached the loan agreement agreed between itself and the Plaintiff.
- b) The Sale of the Mortgaged Property was Legal.
- c) The Plaintiff is entitled to recover the outstanding balance of UGX 222,321,633/=
- 30 d) The Plaintiff is awarded General Damages of UGX 35,000,000/=
- e) The Plaintiff is awarded interest of 24.5% per annum on (c) from the date of filing the suit until payment in full.

5 f) The Plaintiff/Counter Defendant is awarded the costs of the suit and costs of the counterclaim.

I so order.

10 Delivered electronically this 22nd day of November 2023 and uploaded on ECCMIS.

A handwritten signature in blue ink, appearing to be 'Ocaya Thomas O.R.', written over a printed name.

15 **Ocaya Thomas O.R**
Judge,
22nd November, 2023