THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEAL NO. 38 OF 2021

(ARISING FROM THE CHIEF MAGISTRATE'S COURT OF KAMPALA AT LAW DEVELOPMENT CENTRE IN CIVIL SUIT N0. 54 OF 2018)

ORIENT BANK LIMITED :: APPELLANT

VERSUS

SSEMBATYA CHARLES :: RESPONDENT

BEFORE: HON. LADY JUSTICE PATIENCE T.E. RUBAGUMYA

JUDGMENT

Introduction

The Appellant, Orient Bank Limited, aggrieved by the decision and orders of **His Worship Alule Augustine Koma**, Magistrate Grade One, in Civil Suit No. 54 of 2018 at the Chief Magistrate's Court of Kampala at Law Development Centre, delivered on 21st May 2021, filed this appeal on the grounds that: -

1. The Learned trial Magistrate erred in law and fact when he misapplied the principles on parole evidence rule and dismissed the oral agreement between the Appellant and the Respondent.

2. The Learned trial Magistrate erred in law and fact in holding that the valuation of the mortgaged property was done on the sole instruction of the Appellant.

3. The Learned trial Magistrate erred in law and fact in holding that the Appellant breached its banker-customer relationship when it debited the Respondent's account.

4. The Learned trial Magistrate erred in law and fact when he solely relied on **DExh.1** to hold that the Appellant was liable to pay the valuation fees of the mortgaged property.

5. The Learned trial Magistrate erred in law and fact in holding that the Appellant refunds the valuation fees of the mortgaged property to the Respondent.

6. The Learned trial Magistrate erred in law and fact in disregarding DW1's evidence and submissions hence failing to evaluate the evidence on record thereby arriving at the wrong conclusion that the Appellant illegally debited the Respondent's account.

7. The Learned trial Magistrate erred in law in awarding the Respondent general damages of UGX 8,000,000/= which are manifestly high and excessive.

8. The Learned trial Magistrate erred in law and fact in awarding interest at 24% per annum from the date of filing the suit until payment in full.

The Appellant seeks orders of this Court that the appeal be allowed, the orders of the lower Court be set aside and costs of the appeal be provided for.

Background

The brief background to this appeal is that the Respondent sued the Appellant for breach of the customer-banker relationship, recovery of UGX 1,652,000/= (Uganda Shilling One Million Six Hundred Fifty-Two Thousand Only), general damages, punitive damages, costs of the suit and interest at 28% on the above sums from the date of accrual until payment in full. The Respondent holds an account with the Appellant vide Account No. 16021733010108. The Respondent applied for a loan from the Appellant pledging his land comprised in Block 68 Plot 289 at Mabanga and Block 68 Plot 141 land at Ssabawali Wakiso District as security. The said land was valued and a sum of UGX 1,652,000/= was debited from the Respondent's account. Judgment was delivered in favour of the Respondent. Aggrieved by the said decision, the Appellant filed this appeal.

Representation

Counsel Eva Nabadda Sevume and Counsel Allan Mark Lutaaya of Shonubi, Musoke & Co. Advocates represented the Appellant while Counsel Emmanuel Kigenyi of M/s Alma Associated Advocates represented the Respondent.

The parties were directed to file their written submissions to which they complied and I am grateful. The submissions have been considered by this Court.

Duty of this Court

It is trite that as a first appellate Court, I am duty bound to re-appraise the evidence on record and come up with my own decision, not disregarding the judgment appealed from and the fact that the trial Court had the opportunity to look at the demeanour of the witnesses which this

Court does not have. (See: ***Fr. Narsensio Begumisa & 3 Others Vs Eric Tibebaga SCCA No.17 of 2002, Pandya V R (1957) EA 336).***

As stated in the case of ***Fr. Narsensio Begumisa & 3 Ors Vs Eric Tibebaga SCCA No. 17 of 2002***:

> *"It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inferences and conclusions."*

For the record, this Court has corrected the spelling of the word *'parole'* as indicated in the grounds of appeal of the Appellant and the submissions of both Counsel to read as *'parol'* in reference to the '*parol evidence rule'.*

Submissions of the Parties

Counsel for the Appellant argued grounds 1 and 2 together and 3, 4,5 and 6 together and 7 and 8 independently while Counsel for the Respondent argued grounds 1,3,6,7 and 8 independently and 2,4 and 5 together.

Ground 1: **The Learned trial Magistrate erred in law and fact when he misapplied the principles on parol evidence rule and dismissed the oral agreement between the Appellant and the Respondent.**

Appellant's submissions

Counsel for the Appellant addressed the duty of this Court in re-evaluating the evidence while considering the decisions in the cases of ***Peters Vs***

Sunday Post Ltd (1958) EA 424, Selle & Anor Vs Associated Motor Boat Co. Ltd and Others (1968) EA 123, Banco Arabe Espanol Vs Bank of Uganda SCCA No. 8 of 1998 and Fr. Narsensio Begumisa and 3 Others Vs Eric Tibebaga (supra).

Counsel for the Appellant referred to His Worship's judgment at pages 8, 9,10 and DW1's evidence and argued that the evidence adduced before the trial Court is clear that prior engagement between the Appellant and the Respondent regarding the valuation of the Respondent's property was performed orally. Counsel submitted that all the elements of the contract were present hence there was no basis for finding that the valuation was performed on the sole instruction of the Appellant.

Counsel submitted that there was no written agreement between the Appellant and the Respondent for Court to invoke the application of the parol evidence rule.

Counsel for the Appellant relied on the case of ***Andrew Akol Jacha Vs Noah Doka Onzivua High Court Civil Appeal No.0001 of 2014,*** in which **Hon. Justice Stephen Mubiru** stated that:

> *"(Parol evidence) rule applies only to written agreements which are intended by the parties to be "a complete integration of the terms of the contract" and was intended to be 'final' [emphasis]. In such cases, a court will refuse to use evidence of the parties' prior negotiations in order to interpret a written contract unless the writing is (a) incomplete, (b) ambiguous, or (c) the product of fraud, mistake, or a similar bargaining defect. The party presenting the writing will testify to its execution and to its accuracy and completeness. The form and substance of the document may strongly corroborate the party's testimony; or it may not."*

Counsel for the Appellant also argued that though the trial Magistrate rightly cited the decisions in ***L'Estrange Vs Graucob Limited [1934] 2 KB 394, Jacobs Vs Batavia and General Plantations Trust Limited [1924]1 Ch.287 and Golf View Inn (U) Limited Vs Barclays Bank (U) Limited HCCS No.358 of 2009***, which point to the existence of an agreement reduced into writing and executed by the parties; **DExh.2** was not an agreement but a letter instructing Stanfield Property Partners to value the Respondent's land comprised in Plot 289 Block 68 at Mabanga and Plot 141 Block 68 at Ssabawali Wakiso District. Counsel contended that the parol evidence rule did not apply to the transaction at hand. In conclusion, Counsel prayed that this Court finds that since there was an oral agreement between the parties, then the valuation of the mortgaged property was not performed on the sole instruction of the Appellant.

Respondent's submissions

In his submissions, Counsel for the Respondent argued ground 1 independently contending that, the trial Magistrate properly applied the principles of the parol evidence rule and dismissed the oral agreement between the Appellant and the Respondent. He also referred to the trial Magistrate's judgment at pages 9 and 10 wherein he was not persuaded by the oral agreement but by the written agreement, vide which the valuation firm was engaged.

Counsel also relied on **Section 92 of the Evidence Act, Cap.6** stating that its wording is directive and provides that when the terms of any such contract, grant or other disposition of property or any matter required by law to be reduced to the form of a document, have been proved according to Section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any instrument or their representatives

in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms.

Counsel for the Respondent argued that there is no agreement between the parties from which the Appellant could have premised its oral evidence and that in its pleadings, it never alluded to any oral agreement with the Respondent hence it cannot change pleadings as it is bound by **Order 6 Rule 7 of the Civil Procedure Rules SI 71-1.**

Quoting the case of ***DSS Motors Ltd Vs Afri Tours and Travels Ltd and Anor HCCS No.12 of 2003*** in which the Court held that, concerning a contract, the rule means that where a contract has been reduced to writing, neither party can rely on evidence of the terms alleged to have been agreed which are extrinsic to the contents of the agreement. Counsel for the Respondent prayed that Court agrees with the trial Magistrate's findings.

Appellant's submissions in rejoinder

In rejoinder, Counsel for the Appellant contended that **DExh.2** was not a written agreement but a letter instructing Stanfield Property Partners to value the Respondent's property. Furthermore, that at page 4 of its written statement of defence, the Appellant pleaded to the existence of an agreement between itself and the Respondent and maintained that the said agreement regarding the valuation of the property and DW1's evidence was never controverted in cross-examination.

Analysis and Determination

It is trite that in civil matters, the person who alleges must prove his or her contentions to the satisfaction of the Court on the balance of

probabilities so as to obtain the remedies sought. (See: **Sections 101-103 of the Evidence Act).**

Oral contracts are legally provided for under **Section 10 (2) of the Contracts Act, 2010.**

In the case of ***Hon. Justice Anup Singh Choudry Vs Mohinder Singh and Anor Civil Suit No. 335 of 2014,*** **Hon. Justice Ssekaana Musa** quoted the case of ***Greenboat Entertainment Ltd Vs City Council of Kampala Civil Suit No.580 of 2003***, in which the Court held that:

> *"In general, oral contracts are just as valid as written ones. An oral contract is a contract, the terms of which have been agreed by spoken communication, in contrast with a written one, where the contract is a written document. In my view whether a contract is oral or written, it must have the essentials of a valid contract."*

The same case discussed the essentials of a valid contract wherein the Court stated that:

> "*For a contract to be valid and legally enforceable, there must be; capacity to contract, intention to contract, consensus ad idem, valuable consideration, legality of purpose; and sufficient certainty of terms. If in a given transaction any of them is missing, it could as well be called something other than a contract."*

As was held in the case of ***Hon. Justice Anup Singh Choudry Vs Mohinder Singh and Anor (supra),*** enforcing an oral contract depends on the circumstances of each case and as stated by **Hon. Justice**

Ssekaana Musa, some of the guidelines in the establishment of such a contract are; the conduct of the parties after the alleged contract was created, any prior conduct between the parties, how similar transactions are normally conducted, testimony of the parties to the contract, testimony by witnesses to the alleged agreement and each party's credibility.

I have considered the law cited above, evidence, submissions, authorities and the judgment of the Learned trial Magistrate. The Appellant contends that the engagement between the Appellant and the Respondent regarding the valuation of the Respondent's property was orally performed.

On the other hand, the Respondent disputes the said oral agreement which prompted the Learned trial Magistrate to determine which evidence was true. In his determination, the trial Magistrate took into account the allegations of the oral evidence and **DExh.2,** a letter from the Appellant instructing Stanfield Property Partners to value the land on Plot 289 Block 68 at Mabanga and Plot 141 Block 68 at Ssabawali Wakiso District.

Having found that the letter was written by the Appellant and the instruction on payment for the valuation was silent, he interpreted that he/she who gives instructions for a service pays for the same and relied on **Section 92 of the Evidence Act, Cap. 6** to invoke the parol evidence rule to invalidate the allegations of the oral agreement and upheld the letter **(DExh.2)** as a written agreement between the Appellant and Stanfield Property Partners over the oral agreement and that the Appellant could not divert from it.

Section 92 of the Evidence Act, Cap.6 together with the cases of ***DSS Motors Ltd Vs Afri Tours and Travels Ltd and Anor (supra) and***

Obwana Peter Vs Malaba Town Council & Others, HC Civil Appeal No.139 of 2013, which discuss the parol evidence rule are inter alia to the effect that oral evidence cannot be admitted or if it is admitted, it cannot be used to contradict, vary or add to a written agreement. Therefore, where a contract has been reduced into writing, neither party can allege to have agreed on other terms extrinsic to the provisions of the written agreement except for reasons of fraud, coercion, illegality or any fact that would be proved to invalidate the agreement. (See: ***Cross and Tapper on Evidence, 8th Edition (1995) pages 769-771)***.

In the instant case, **DExh.2,** was an instruction to the valuers to assess the Respondent's property to which the valuers accepted and carried out the valuation. The letter requesting for the valuation clearly spelt out the terms of engagement between the valuers and the Appellant and therefore it cannot be used to imply that there was a written contract between the Appellant and the Respondent.

I agree with the submission of Counsel for the Appellant that the principles of the parol evidence rule were not applicable in the circumstances. The letter in issue was simply an instruction letter to the valuers and not an executed agreement between the Appellant and the Respondent. The next issue is whether or not there was any oral agreement between the Appellant and Respondent at any stage? PW1 according to the record of appeal on page 103 stated that:

> *"I don't have it here, they told me that they would first do a survey before responding to my application of which I accepted."*

My understanding of the above statement is that the Respondent agreed to a survey and thus there was an agreement to that extent and it is the basis upon which the Respondent paid the sum of UGX 350,000/= which he was told was for valuation. There was no discussion between the Appellant and the Respondent about contracting a firm for valuation of the property or the fees payable for valuation of the property, in addition to the sum of UGX 350,000/= which he had paid.

In the circumstances, I find the Learned trial Magistrate to have misapplied the parol evidence rule in his evaluation of the evidence and further, when he dismissed the argument that there was an oral agreement between the Appellant and the Respondent regarding valuation. Therefore, ground 1 succeeds.

Ground 2: **The Learned trial Magistrate erred in law and fact in holding that the valuation of the mortgaged property was done on the sole instruction of the Appellant.**

Counsel for the Appellant submitted that by the conduct of the Respondent's admissions, he made a deposit of UGX 400,000/= on the valuation fees. Counsel contended that the Appellant acted upon the conduct of the Respondent by going forward with the valuation instruction.

Counsel for the Respondent submitted that no evidence was adduced to show that the Respondent hired the services of the surveyor and that during cross examination, the Respondent informed Court that he did not know the said surveyor. Counsel for the Respondent contended that since

the Appellant is the one who knew the surveyor, they were duty bound to bring him as a witness which they did not do.

Analysis and Determination

At the trial, DW1 (Mr. Shafic Kazibwe) testified that the Respondent consented to the payment of the valuation fees and the instruction to Stanfield Property Partners to conduct the same. In evidence, he presented **DExh.1**, an application letter for the overdraft facility dated 9th August 2017, **DExh.2**, a letter from the Appellant to Stanfield Property Partners requesting for valuation of the Respondent's property, **DExh.3** the valuation report addressed to the Appellant, received on 7th August 2017 and **DExh.4**, the tax invoice addressed to the Respondent and was received by the Appellant on 7th August 2017. During cross-examination, DW1 stated that the Appellant instructed Stanfield Property Partners to carry out the valuation and that the invoice was given to the Bank. Consequently, the money was deducted from the Respondent's account. In the examination in chief, he testified that he had participated in the valuation exercise together with the Respondent who deposited UGX 400,000/= as part payment. DW1 further stated that the Respondent declined to take the loan because it was little money compared to what he had applied for. DW1 testified in re-examination that it is the customers that meet the valuation fees.

I have keenly looked at the exhibits above and observed the following; **DExh.1** which is the application letter for the overdraft facility, is dated 9th August 2017 while **DExh.2** the letter to Stanfield Property Partners does not have a clear date. **DExh.3** the valuation report has a 'received' stamp of the Appellant bearing the date of 7th August 2017 while **DExh.4,** the tax

invoice is dated 7th August 2017. I also noted that the search statement signed for the Commissioner Land Registration is dated 1st August 2017.

Since **DExh.1** is dated 9th August 2017, I find the inconsistencies in the above mentioned documents questionable as they bear dates before the Respondent applied for the overdraft facility.

Counsel for the Appellant further erred in referring to the property as 'mortgaged property'. For the record, the mortgage transaction was never concluded and therefore there was no mortgage.

Furthermore, no evidence was adduced to show that the instruction for valuation of the property which was given to Stanfield Property Partners was brought to the Respondent's attention nor was the letter in issue copied to him. In light of this, my analysis of the facts is that as per **DExh.2**, the Appellant solely instructed the valuers to value the Respondent's property. The Appellant further instructed the valuer vide the aforementioned letter to submit copies of the valuation report and the tax invoice to it so that payment is arranged. Although **DExh.4** (tax invoice) is addressed to the Respondent with a date of 7th August 2017, the tax invoice was received by the Appellant on 7th August 2017 as per the copy on the Court record.

It is not clear why the valuer addressed the tax invoice to the Respondent when the instructions from the Appellant were to the effect that the invoice and valuation report should be addressed to it. Furthermore, the valuation report indicates that the physical inspection was undertaken on 28th July 2017 and yet the application for the overdraft facility was made on 9th August 2017. The question that arises is; why was the inspection of the property which was to be the security for the overdraft facility done before

the application for the loan was made by the Respondent? Given the unexplained dates on the above exhibits, this Court is unable to rely on the truthfulness of the said documents.

Based on the above, it is my finding that the Learned trial Magistrate did not error in law and fact in holding that the valuation of the property was done on the sole instruction of the Appellant hence ground 2 fails.

Ground 3:

The Learned trial Magistrate erred in law and fact in holding that the Appellant breached its banker-customer relationship when it debited the Respondent's account.

Appellant's submissions

Counsel for the Appellant submitted on grounds 3,4,5 and 6 jointly.

Counsel referred to the case of ***Esso Petroleum Company Vs Uganda Commercial Bank SCCA No.14 of 1992*** in which the Supreme Court found the relationship between the bank and customer to be contract-based. Counsel submitted that the bank must act by lawful requests of its customer in the normal operation of its customer's account. Counsel further referred the Court to the case of ***Stanbic Bank Uganda Limited Vs Uganda Crocs Limited SCCA No.4 of 2004*** which cited with approval the authorities in ***Banex Ltd Vs Gold Trust Bank Civil Appeal No.29 of 1995 (SCU) (Unreported), Halsbury's Laws of England, 4th Edition, Volume 3 (1) paragraph 175***; and submitted that the Bank had to value the property before advancing the loan which formed part of the transaction.

Counsel for the Appellant referred to banking practices as reflected in the case of ***AZK Services Limited Vs Crane Bank Limited High Court Civil Suit No.334 of 2016*** and submitted that in the event that this Court cannot discern the intention of the parties at the time of contracting, then let it be pleased to look into the customs and usages in the banking practice. Counsel for the Appellant also referred this Court to the case of ***Hon. Justice Anup Sing Choudry Vs Mohinder Singh Channa and Anor (supra)*** in which the Court stated that Courts may determine the intention of parties in a contract by considering the circumstances of the contract's formation, as well as the course of dealing between the parties.

Counsel for the Appellant further defined a custom and by extension a usage of trade as the way things are done and uniformly followed by industry as stated in the case of ***Gulf Cross Limited and Derricks Cargo Logistics Vs Shree Hari Tiles Limited and Jimi Rahimali Hajiyani HCCS No.753 of 2018***, in which Court noted that the existence of a custom and usage is a question of fact, which may be established by an argument based upon case law, law journals, treatises, and other non-evidentiary information, or by anecdote, or through the presentation of fact.

Counsel submitted that in **Essays in African Banking Law and Practice 2nd Edition (2009)** at page **62, Grace Patrick Tumwine Mukubwa**, states that the contract between a banker and customer is an implied one with unwritten terms dependent on the custom of bankers, which contract entails superadded obligations being the duties and obligations that arise in the ordinary course of business.

Referring to the facts of this case, Counsel for the Appellant contended that the Respondent applied for a bank loan, offering his land comprised

in Plot 289 Block 68 at Mabanga and Plot 141 Block 68 at Ssabawali Wakiso District as security and was informed about valuation of the property. Counsel for the Appellant contended that the Respondent agreed to the valuation and that the same was conducted in his presence.

Counsel for the Appellant further submitted that the expectation of the Respondent to pay valuation fees is a general banking custom and practice and DW1 testified to the same and that no evidence was adduced in contradiction and further that the rejection of the loan does not exonerate him from payment of the same.

Counsel further contended that PW1 was not truthful in his testimony when he stated that the Appellant told him not to worry about the valuation but later deposited UGX 350,000/= for the service. Counsel stated that the Respondent testified that he had a valuation report from Centenary Bank but no evidence to that effect was adduced and also participated in another valuation exercise which questions his credibility as per the case of ***Andrew Akol Jacha Vs Noah Doka Onzivua (supra).***

Counsel prayed that the Court finds that it is a known custom and banking practice that the valuation fees are met by the customer and that the Appellant did not breach the banker-customer relationship.

Respondent's submissions

In reply, it was contended by Counsel for the Respondent that the Appellant does not dispute debiting the Respondent's account to the tune of UGX 1,652,000/=. He referred to paragraph 15 of DW1's witness statement wherein he stated that:

"*It was on these grounds that the Plaintiff's account was debited with UGX 1,400,000/= leaving a balance of UGX. 252,000/=*

(Uganda shillings two hundred fifty-two thousand only) which balance was debited in November."

Counsel submitted that during cross-examination, the Respondent stated that it is true that the Respondent's account was debited without his consent, and that he did not know the gist of debiting his account. He stated that it was the Bank that instructed the valuers to value the Respondent's two plots of land. Counsel submitted that the above shows the high magnitude of the breach by the Appellant of its banker-customer relationship and that there is no doubt that the Learned trial Magistrate found so.

He also referred to **Grace Patrick Tumwine's Essays in African Banking Law and Practices** wherein he stated that:

"*The relationship of a banker customer is a contractual one with the bank having a duty to carry out the customer's payment instructions, dealings with securities deposited with the bank and the way the banker handles information concerning the affairs of the customer.*"

Counsel for the Respondent also referred the Court to the case of ***Joachimson Vs Swiss Bank Corp (1921) 3 KB 110*** *at* ***127***. In conclusion, he prayed for this ground to be resolved in the negative.

Appellant's submissions in rejoinder

In rejoinder, Counsel for the Appellant disputed the Respondent's submission that his account was debited without his knowledge and consent on grounds that the Respondent's knowledge of the loan application and oral agreement negated the denial about the debit. Counsel reiterated the submission on the banking policy. Counsel also

stated that the Appellant met the provision of paragraph 8 of the Bank of Uganda Financial Consumer Protection Guidelines 2011, which enjoins the Appellant to ensure that any information given to a consumer whether in writing, electronically or orally is fair, clear and transparent.

Analysis and Determination

As was held in the case of ***Joachimson Vs Swiss Bank Corp (supra)***, the cardinal duty of the bank is to honour the instructions of the customer. (See: ***Great Western Railway Vs London and County Banking Co. [1901] AC 414*** and ***Ladbroke Vs Todd [1914] Com. Case 256)***.

In the case of ***Foley Vs Hill (1848) 2 HLC 28, 9 E.R 1002***, it was argued that the relationship between a banker and customer consists of a general contract which is basic to all transactions together with special contracts which arise in a relationship to the specific transactions or service. (See: ***Banex Limited Vs Gold Trust Bank Ltd (supra)*** which held that a bank must act under the lawful requests of the customer in the normal operation of the customer's account.

Further, in the case of ***Joachimson Vs Swiss Bank Corporation (supra)***, it was stated that it is the duty of the bank to repay the customer's funds upon demand and also obey the mandate of a customer and that the relationship between the bank and the customer is contractual and no bank has the unilateral right to vary such contracts without prior notice and express consent by the customer to debit the account.

In light of the above authorities, this Court has to determine whether or not the Appellant notified or sought the consent of the Respondent before debiting his account? In the instant case, the Respondent as evidenced by **PExh.1/DExh.1** (the Respondent's application letter dated 9th August

2017), sought an overdraft facility of UGX 135,000,000/= (Uganda Shillings One Hundred Thirty-Five Million Only) from the Appellant. As security, the Respondent pledged his land comprised in Block 68 Plot 289 at Mabanga and Block 68 Plot 141 at Ssabawali Wakiso District. Consequently, the Respondent's account was debited by the Appellant to meet the valuation fees.

The Respondent on the other hand disputed the debiting of his account by the Appellant contending that he did not consent and that he never entered into any contract with Stanfield Property Partners. In their defence, the Appellant argued that it is a banking policy that in cases of loan applications, the customer meets the valuation expenses; and that this is why the Respondent deposited part of the valuation fees.

It was DW1's evidence that the Bank did not obtain consent from the Respondent to debit his account. Further, as stated above, the evidence adduced regarding the oral contract did not provide for the party responsible for payment of the valuation fees and mode of payment. **DExh.2** was an instruction to the valuers to value the Respondent's property. No evidence was adduced by the Appellant to show that it had directives from the Respondent to debit his account in the sum of UGX 1,652,000/= so as to effect payment to the valuers. Therefore, given the facts in this case, the Appellant's action of debiting the Respondent's account without his knowledge and consent was illegal and in breach of the banker-customer relationship. As opposed to the payment of UGX 350,000/= where the Respondent was asked for a specific amount for valuation fees, it is not stated anywhere that the Respondent authorized the debit of the sum of UGX 1,652,000/=. In fact, DW1 testified as per the record of appeal on page 112 that:

"I did not get authorization from the client."

I am cognisant of the fact that the banking industry has customs and business practices. However, no witness was brought to Court to explain the practices that the Appellant alluded to. This notwithstanding, the practices and customs must be considered alongside the facts of each particular case. In this instant case, PW1 stated that he was asked for UGX 350,000/= for valuation and this is confirmed by DW1 though he states a figure of UGX. 400,000/=. It is not stated anywhere in the testimony of DW1 that he informed the Respondent/PW1 that there was a balance to be paid on the valuation fees after receipt of UGX 350,000/= or that there was a possibility that an additional amount would be charged for the valuation upon receipt of the valuation report, to justify the Appellant's action of debiting the Respondent's account. Therefore, the Appellant breached its banker-customer relationship when it illegally debited the Respondent's account.

Accordingly, ground 3 fails.

Ground 4:

The Learned trial Magistrate erred in law and fact when he solely relied on DExh.1 to hold that the Appellant was liable to pay the valuation fees of the mortgaged property.

Counsel for the Appellant submitted that DW1 testified that valuation was a banking policy and that it is the obligation of any person who has applied for a credit facility to meet the cost of valuing the property that has been pledged as security. Counsel for the Respondent contended that the grounds of appeal are tainted with lies since the trial Magistrate never referred to any property as mortgaged property and that the Appellant was never ordered to refund the valuation fees of the mortgaged property.

Counsel contended that the Appellant was only ordered to refund UGX 1,652,000/= that it illegally debited from the Respondent's account.

I agree with Counsel for the Respondent that there was no reference to mortgaged property in the judgment of the Learned trial Magistrate. In any case, there was no mortgage created since the overdraft transaction did not materialize. The Respondent did not accept the loan amount which the Appellant was offering. I find that Counsel for the Appellant misinterpreted the reasoning of the Learned trial Magistrate.

Furthermore, **DExh.1** is the application letter for the overdraft facility. The Learned trial Magistrate in his judgment did not not rely on **DExh. 1** to hold that the Appellant was liable to pay the valuation fees. The Magistrate was of the considered view that since the instruction for valuation was given by the Appellant, then the person who gives the instructions pays for the services and he relied on **DExh.2** when he stated that the valuation firm was engaged through a written agreement and that the terms must be executed based on the contents. In addition, the arguments in this ground hereof have been considered under ground 2. In the premises, ground 4 fails.

Ground 5:

The Learned trial Magistrate erred in law and fact in holding that the Appellant refunds the valuation fees of the mortgaged property to the Respondent.

Ground 5 has been dealt with under the determination of ground 3. Nevertheless, briefly, the Learned trial Magistrate ordered that the Appellant refunds UGX 1,652,000/= that it illegally debited from the

Respondent's account. There was no mention of refunding the valuation fees of the mortgaged property in the judgment of the Learned trial Magistrate.

The discussion on the valuation fees was in respect of payment of UGX 350,000/=. Upon the Respondent being asked whether DW1 told him that the valuation process was free, PW1 according to page 103 of the record of appeal stated that:

"No, they asked me for 350,000/= they did not give me a receipt."

In respect of the valuation fees, the Respondent as stated above was asked for UGX 350,000/= for valuation which he paid. The action of debiting the account to recover UGX 1,652,000/= as stated above was unjustified. Therefore, I do not fault the Learned trial Magistrate for holding that the Appellant refunds the money which it illegally debited from the Respondent's account. The Learned trial Magistrate did not hold that the Appellant refunds the valuation fees of the mortgaged property. Accordingly, ground 5 fails.

Ground 6:

> **The Learned trial Magistrate erred in law and fact in disregarding DW1's evidence and submissions hence failing to evaluate the evidence on record thereby arriving at the wrong conclusion that the Appellant illegally debited the Respondent's account**.

Ground 6 relates to the debiting of the Respondent's account and the order made by the Learned trial Magistrate for the refund of the money so debited. I have resolved this under ground 3 hereinabove to the effect that

the Appellant illegally debited the Respondent's account. I shall therefore not delve into the same as this would be a repetition.

Accordingly, ground 6 too fails.

Ground 7:

The Learned trial Magistrate erred in law in awarding the Respondent general damages of UGX 8,000,000/= which are manifestly high and excessive.

In their submissions, both Counsel for the Appellant and the Respondent agreed to the principles regarding the award of general damages as stated in different cases.

Counsel for the Appellant submitted that the trial Magistrate misdirected himself on the law on the award of damages. Counsel contended that basing on the principle that general damages are not to punish the wrong party but to restore the innocent one, the award of UGX 8,000,000/= was manifestly high and excessive in the circumstances. Counsel stated that the general damages awarded for the Respondent should have been balanced with the fact that the sums claimed and debited from his account are to be refunded as was indicated in the judgment of the trial Magistrate.

Counsel for the Appellant further submitted that the Respondent's account was rightfully debited and that there was no mental anguish or torture nor unjust financial loss suffered by the same.

Counsel for the Respondent submitted that the award of UGX 8,000,000/= was fair and that in fact a slightly higher figure should have been awarded. Counsel submitted that Court may increase the award of general damages to any amount it deems fit.

Analysis and Determination

According to the case of ***Kabandize John Baptist & 21 Ors Vs Kampala Capital City Authority Civil Appeal No.36 of 2016 [2019] UGCA 48 (16 April 2019***), the general rule regarding award of general damages is that the award is such a sum that would put the person who had been injured as adjudged by Court in the same position as he/she would have been had he not sustained the wrong for which he/she is getting compensation. I have read the judgment of the Learned trial Magistrate and the reason for awarding the above general damages was for the inconvenience and mental torture caused to the Respondent. Counsel for the Respondent urged the Court to consider the period the Respondent had been restrained from using his money.

Considering His Worship's reasoning in awarding the general damages and the amount that was claimed of UGX 1, 652,000/= (Uganda Shillings One Million Six Hundred Fifty-Two Thousand Only), I find the award of UGX 8,000,000/= to have been high. Though it had taken approximately three years for the recovery at the time of judgment, the Respondent at the trial did not provide any details regarding the possible losses that he suffered due to the deprivation of the above sum and accordingly in my view the amount of UGX 8,000,000/= as general damages is excessive given the fact that the subject matter value in this case is UGX 1,652,000/=, which amount is to be refunded by the Appellant. I accordingly award UGX 2,000,000/= which in my view is a fair amount for general damages given that interest on the decretal sum is being awarded as compensation in addition to the other remedies awarded by Court. In the premises, ground 7 is upheld.

Ground 8:

The Learned trial Magistrate erred in law and fact in awarding interest at 24% per annum from the date of filing the suit until payment in full.

Analysis and Determination

In their submissions, both Counsel for the Appellant and the Respondent relied on **Section 26(1) and (2) of the Civil Procedure Act, Cap. 71**. The Appellant disputes the interest of 24% per annum contending that it is high. The Respondent on the other hand prayed that Court upholds the interest of 24% per annum on the refund of UGX 1,652,000/=. Both Counsel relied on several authorities that I have considered.

Section 26 (2) of the Civil Procedure Act provides that:

> *"Where… a decree is for payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."*

Further, in the case of ***Tate & Lyle Food and Distribution Ltd Vs Greater London Council and Anor [1981] 3 All ER 716*** **Forbes J** at page **722** held that an award of interest is part of an attempt to achieve *restitutio in integrum*.

In the case of ***ECTA (U) Ltd Vs Geraldine and Josephine Namukasa S.C.C.A No.29 of 1994***, as cited by the Respondent, **Odoki Ag. DCJ** (as he then was) held that:

> *"…the Court has discretion to award reasonable interest on the decretal amount. But it appears that a distinction must be made between awards arising out of Commercial or business transactions which would normally attract a higher interest, and awards of general damages which are mainly compensatory*."

Considering the above authorities, and in exercise of the discretion in awarding interest, each case is construed on its facts while considering the nature of the economic activities and the extent of deprivation of the decretal sum in order to arrive at a reasonable award of interest. In the instant case, the award of the rate of interest of 24% per annum was not justified neither did the Learned trial Magistrate give reasons for the award. I therefore find the award of interest of 24% per annum excessive and the same is hereby set aside and an award of interest of 8% per annum on the decretal sum from the date of filing the suit until payment in full is hereby granted. Accordingly, ground 8 is upheld.

Conclusion and orders

1. On the whole, I hold that the appeal partly succeeds on grounds 1, 7 and 8.
2. The Appellant refunds the sum of UGX 1,652,000/= ((Uganda Shillings One Million Six Hundred Fifty-Two Thousand Only) it illegally debited from the Respondent's account.

3. I award general damages of UGX 2,000,000/= (Uganda Shillings Two Million Only) to the Respondent.

4. Interest on the decretal sum of UGX 1,652,000/= (Uganda Shillings One Million Six Hundred Fifty-Two Thousand Only) of 8% per annum from the date of filing the suit until payment in full is awarded to the Respondent.

5. Each party shall meet their own costs of this Appeal.

It is so ordered.

Dated, signed and delivered electronically this **30th** day of **January**, **2024.**

Patience T. E. Rubagumya
JUDGE
30/01/2024