THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MUKONO

HCCS. NO. 05 OF 2017

1. **ABISHA STEEL INDUSTRIES LTD (IN RECEIVERSHIP)**
2. **KAWALYA MUSA**
3. **ASHRAF MIAN ROHAIL** **PLAINTIFFS**

V

1. **EXIM BANK (U) LTD**
2. **FELIX MUSIIME (RECEIVER)** **DEFENDANTS**

BEFORE: HON. LADY JUSTICE P. BASAZA – WASSWA

J U D G M E N T

Representation:

Mr. Kiggundu Njeru Jason[1] for the Plaintiffs.

Mr. Ssebabi Kenneth and Mr. Brian Kajubi[2] for the 1st Defendant.

None for the 2nd Defendant against whom the suit was heard *ex parte*.

Introduction:

[1] The Plaintiffs; **Abisha Steel Industries Ltd (in Receivership),** together with two (2) of her Directors; **Mr. Kawalya and Mr. Rohail**; (the 2nd & 3rd Plaintiffs), brought this suit by way of an ordinary plaint, against the Defendants; **EXIM Bank (U) Ltd** and **Mr. Musiime**.

[1] Of M/s Kabali – Ssebowa Advocates
[2] Both of M/s Nangwala, Rezida & Co. Advocates.

[2] The 1st Plaintiff; **Abisha Steel Industries Ltd (in Receivership)** carried on business as a manufacturer of steel products at its premises at **Kikati - Kawuku, in Lugazi, Buikwe District,** and enjoyed a customer / Bank relationship with the 1st Defendant; **EXIM Bank (U) Ltd** *(formerly 'Imperial Bank Uganda Ltd)* for a number of years.

[3] The dispute in this case arose from credit financing facilities extended by the 1st Defendant Bank to Abisha Steel Industries Ltd, which culminated into recovery proceedings taken by the Bank. The recovery proceedings included the eventual sell of the assets mortgaged by Abisha to secure the repayment of the said credit facilities.

[4] For ease of reference, the 1st Plaintiff and the 1st Defendant shall be referred to in this judgment as; **'Abisha'**, and as; **'the Bank',** respectively.

The 2nd Defendant; Mr. Musiime, shall be referred to as; **'the Receiver',** while all the Plaintiffs shall be referred to collectively as; **'the Plaintiffs'** and both Defendants shall be referred to jointly as; **'the Defendants'.**

Background:

[5] The undisputed[3] sequence of events that led up to this dispute were;

a) That Abisha obtained three (3) credit facilities from the Bank vide three (3) offer letters dated April 9th 2014, December 23rd 2014 and September 8th 2015. To wit; she obtained; two (2) term loans of **USD$ 200,000 (United States Dollars Two Hundred Thousand only)** and **USD$ 500,000 (United States Dollars Five Hundred**

[3] Refer to the Joint Scheduling Memorundum (JSM), and to the Joint Forensic Audit Report (JFAR).

Thousand only), and an overdraft facility of **USD$ 1,308,000 (United States Dollars One Million, Three Hundred Eight Thousand only.**

b) The Repayment of the said facilities was secured by a mortgage over Abisha's land comprised in **Kyaggwe: Block 205 Plots 20 and 72 at Kikati - Kawuku, in Lugazi**, **Buikwe District, measuring 4.85 Hectares (11.98 Acres),** (hereinafter referred to as '**the Mortgaged property**'), together with further security constituted in floating debentures over all Abisha's assets, including an industrial steel production factory, and the personal guarantees of her erstwhile Directors namely; Ashiraf Mian Rohail and Aqeel Mian Ashiraf.

The Mortgaged property together with all the other pledged assets listed in the debentures shall hereinafter be referred to collectively as **'the Mortgaged assets'**

c) Abisha defaulted on the loan facilities, whereupon the Bank sent a demand and a default notice to her, both dated May 4, 2016. By which notices, the Bank demanded that Abisha pays a sum of **USD$ 136,046.62, (United States Dollars one hundred thirty six thousand, forty six, and sixty two cents only),** within forty – five (45) working days, by July 8, 2016.

d) On November 14, 2016 the Bank appointed Mr. Musiime of M/s Armstrong Auctioneers as the Receiver and Manager over all the mortgaged assets and through him, advertised the mortgaged assets for sale by public auction on November 17, 2016. The Mortgaged assets were subsequently sold vide a sale

agreement marked as **EXB P. 17**, to "Balteck Construction & Trading Company Ltd", on April 2, 2019.

[6] At the hearing of this case, the Plaintiffs had two (2) witnesses; **Mr. Kawalya Musa (PW1)**, who is one of the Directors of Abisha, and is also the 2nd Plaintiff, and **Mr. Aqeel Mian Ashiraf (PW2)**; a former Director of Abisha and a guarantor of the credit facilities obtained by Abisha from the Bank.

The Bank (1st Defendant) had one witness; **Mr. Waidha Joshua** (DW1), who is the Bank's Manager, Monitoring and Recovery.

[7] All the Plaintiffs' Documents contained in their trial bundle were agreed to by the Bank, and equally, all the Bank's documents in their trial bundle were agreed to by the Plaintiffs. These were marked as **EXBs. P. 1 – P. 18,** and **EB. 1 – EB 15**, respectively.

[8] On the directions of this Court, the Plaintiffs and the Bank appointed Joint Forensic Auditors **(JFAs)** to carry out a Joint Forensic investigation into the credit financing facilities disbursed to Abisha by the Bank. The **JFAs; M/s Kalinda & Associates and M/s Mugabi & Mawanda Associates** did their work and submitted to court a Joint Forensic Audit Report **(JFAR).** The representatives of JFAs; **Mr. Kalinda Gonzaga Joseph**[4] **and Mr. Mawanda Lwanga**[5], gave testimony in court as **C 1 and C 2** respectively.

[9] The **JFAR** is also **an agreed joint document** based on specific terms of reference **(TORs)** agreed to by the parties. The **TORs** are set out at page 7 thereof.

[4] A Certified Public Accountant and Certified Tax advisor
[5] A Certified Public Accountant

[10] I very carefully considered the oral and documentary evidence on this court's record, together with the written submissions of both learned Counsel, and the authorities they each relied on. For brevity, in this judgment I will refer to only the relevant portions of the said testimonies, the said documents and the arguments of Counsel. The full version of each are on the court record.

The Plaintiffs' case:

[11] The gist of the Plaintiffs' case as contained in their plaint is;

i) That the Bank breached the loan facility contracts and committed acts of misrepresentation.

ii) That Abisha rectified her default when she paid **USD$ 170,000** on June 21, 2016 which amount was over and above the amount demanded by the Bank vide its demand and default notices of May 4, 2016.

iii) That the Bank prematurely recalled the loan and sent a notice of sale, and advertised the suit property for sale, through its agent; Mr. Musiime of M/s Armstrong Auctioneers & Bailiffs, on November 17, 2016.

iv) That on behalf of *Imperial Bank Kenya Ltd*, the Bank prematurely and illegally appointed a Receiver over the assets and property of Abisha, yet Abisha had never received any assignment of the loan it entered with *Imperial Bank Kenya*. That such appointment was without any condition precedent occurring in the loan, in the mortgage or in the debentures.

v) That the actions of the Receiver of taking possession of the Mortgaged assets, and of switching off power amounted to trespass. That the Receiver is liable for illegally closing down the factory and withdrawing HCCS No. 12 of 2016 without the Plaintiffs' authority.

vi) That the acts of the Bank in continuing to charge penal, unsanctioned and unconscionable interest and facility fees, even after recalling the loan, is dishonest, fraudulent and illegal.

vii) That the Bank caused Abisha financial loss of a nature that was reasonably foreseeable.

[12] The Plaintiffs seek *inter alia* a Declaration that the Bank is in breach of the facility contracts, and that the appointment and actions of the Receiver were illegal and premature. They also seek General, punitive and exemplary damages against the Defendants, plus interest thereon and the costs of this suit.

The 1st Defendant's (the Bank's) case:

[13] In answer, in its written statement of defence, the Bank denies the Plaintiffs' allegations and contends (the gist);

i) That Abisha defaulted and neglected all the Bank's demands on each facility, as at December 2016.

ii) That in exercise of its powers under the debentures, on November 14, 2016 the Bank appointed Mr. Musiime; the Receiver, who accepted the appointment and commenced management.

iii) That the Receiver was properly appointed pursuant to Cl. 9 of the Debenture.

iv) That being in default and under Receivership, Abisha has no prima facie case.

v) That the deposit by Abisha of **USD$170,000** as at June 21, 2016 did not rectify her default, as she (Abisha) continued to be in Receivership.

2nd Defendants case:

[14] The Receiver; Mr. Musiime did not file a defence and the suit proceeded *ex parte* against him.

Issues for determination:

[15] The agreed issues for trial are;

1. **Whether the suit by Abisha (the 1st Plaintiff) is maintainable?**
2. **Whether the Bank (1st Defendant) is in breach of contract?**
3. **Whether the appointment of Mr. Musiime (the 2nd Defendant) as a Receiver and manager was lawful?**
4. **Whether the Bank (1st Defendant) is liable for causing the alleged financial loss to the Plaintiffs?**

5. **Whether there are any remedies available to the parties?**

Determination of issues:

Issue No. 1: **Whether the suit by the 1st Plaintiff is maintainable?**

[16] As acknowledged by both Counsel in their respective written submissions, the 1st issue was addressed and determined by my predecessor; Mutonyi, J. in her Ruling vide **Misc. Application No. 1 of 2017; Felix Musiime vs. Kawalya Musa & Ors**.

Issue No. 2: **Whether the Bank (1st Defendant) is in breach of contract?**

[17] Under paragraph 7 of their Plaint, the Plaintiffs listed alleged particulars of breach of contract by the Bank. For brevity, I will not capture those allegations here.

In his written submissions, Mr. Kiggundu; learned Counsel for the Plaintiffs categorized the said allegations, with the Plaintiffs' evidence in support thereof, into two (2) prongs. In like manner, in answer, Mr. Kajubi; learned Counsel for the Bank, made his submissions together with the Bank's evidence in rebuttal under the same categorization. Similarly, I will adopt the same approach in this Judgment.

First Prong:

[18] **Mr. Kiggundu submitted that the Bank wrongly commenced recovery of the principal installments on the term loan of USD$500,000 and made two principal liquidations before the moratorium period ended. He referred court to page 10 of the JFAR and to the testimony of C. 1.**

He argued that there existed only two term loans with specific due dates of payment, and no call loan was applied for, or granted to Abisha. That the bank wrongly created a call loan on January 18, 2016 without any addendum, and overdrew Abisha's account on October 29, 2015 by a further sum of **USD$ 20,000** in an attempt to conceal the two principal liquidations that had been collected and not accounted for in **EB 14**. That as of December 29, 2015 when the Bank was to commence recovery of the principal, the recovery should have factored in three (3) principal liquidations amounting to **USD$ 77,000.**

[19] **In rebuttal, Mr. Kajubi submitted that it is not true that the Bank commenced recovery of the principal installments on the loan of USD$ 500,000 before the end of the grace period.**

He argued that the grace period on the loan of USD$ 500,000 expired on December 29, 2015 as per call loan schedule No. 002CLFX152510001[6]. That on which date, upon the expiry of the grace period, Abisha was meant to pay interest of **USD$ 3, 611.11** which was duly paid. That however, on December 30, 2015 the Bank's system liquidated in error part of the principal amount equivalent of **USD$ 20,000,** an erroneous auto debit, and that the error was rectified by the Bank on January 18, 2016 by crediting Abisha's **A/C No. 8200000719 (EB. 10)** with the same amount of **USD$ 20,000**. That the debit balance in **A/C No. 8200000719** after the said transaction automatically reduced by **USD$20,000** from **USD$ 1,773,951.32** to **USD$ 1,753,951.32**. He referred court to pages

[6] He referred court to MM05 and MM 10-1 of the JFAR.

9 & 10 of the JFAR and to Annexture MMO3 thereto, and to Abisha's statement of **A/C No. 8200000719** (**EB 10**).

[20] Counsel further argued that it was upon the expiry of the call loan No. 002CLFX152510001, that subsequently the principal loan of **USD $500,000** was liquidated in two tranches of **USD$ 37,158.52** and **USD$ 462,841.48** on December 29, 2015 and January 18, 2016 respectively. That Abisha was thus required to start paying both the principal and interest as per the loan schedule **No. 002TMFX160180001**

[21] Referring to the testimony of Mr. Waidha (DW1), Mr. Kajubi also argued that the Bank could only book the loan as a call loan during the grace periods in the term loans, which period was included in the offer letters. That upon expiry of the grace period on December 29, 2015 the call loan No. 002CLFX152510001 was eventually liquidated by the Bank where Abisha was paying interest only. That subsequently **loan No. 002TMFX160180001** of **USD$500,000** was booked (credited) in **A/C No. 8200000719** on January 18, 2016 to accommodate and support the payment of both interest and principal monthly installments. That there is no record of any call loans booked in **A/C No. 8200000719** after the lapse of the grace period granted by the Bank. That the Bank did not book any call loan in **A/C No. 8200000719** on January 18, 2016 and that therefore the argument of the Plaintiffs' Counsel that Abisha did not apply for call loans, is untenable.

[22] In rejoinder, Mr. Kiggundu submitted that Abisha did not apply for a call loan, and that the two term loans had maturity dates payable within an agreed period, with the

interest and principal payable on a monthly basis as per **EXBs. P. 1, P. 5, P. 6 & P. 7.** That there is no clause on the offer letter / agreements where it was expressly agreed that interest would be repaid during the period of the moratorium. It implies that the interest collected during the period between September 8, 2015 and December 23, 2015 was illegal and in breach of contract. That the Bank had liquidated a sum of **USD$ 16,250.00** as interest, yet according to **EXB. P. 7**, the principal and interest would be repayable with effect from December 23, 2015. That the Bank breached the terms of the offer letter and addendum in the term loan of **USD$ 900,000.00** which was reduced to **USD$ 500,000.00,** by commencing recovery of interest and principal before the due date agreed under the agreement.

[23] Learned Counsel concluded that a total of **USD$ 57,158.52** was liquidated to repay the principal, and a sum of **USD$ 16,250.00** was liquidated to repay interest, contrary to the terms of the offer letter and addendum. That the Bank overdrew Abisha's account by **USD$ 462,841.48** and a further **USD$ 20,000** to pay principal on the same loan of USD$ 500,000.00, which increased the overdraft limit and attracted interest which was also a further breach of the overdraft offer letter and term loan offer letter and addendum.

Analysis by Court on the 1st Prong:

[24] This prong revolves around the term loan of **USD$ 500,000** that was originally a term loan of **USD$ 900,000**. The original loan amount was reduced by the Bank upon a request by Abisha in her letter dated July 7, 2015 **(EB. 7)**.

[25] To determine whether the Bank wrongly made the deductions complained about, one has got to look at Abisha's statement of **A/C No. 8200000719 (EB. 10)** for the period of the moratorium for that term loan, and also at the period covering the month of January 2016.

[26] It is not in contention that the Bank gave Abisha an initial grace period of six (6) months, as per clause 4 (a) of its offer letter to Abisha dated December 23, 2014 **(P. 5)**. To wit; Abisha was to start repaying both the principal and interest after six (6) months from the date of disbursement of the facility. It is also common ground that upon the request by Abisha in her said letter of July 7, 2015 **(EB. 7),** the Bank not only agreed to reduce the term loan of **USD$ 900,000** to a new loan of **USD$ 500,000**, but it also agreed to extend the moratorium by an additional six (6) months. See the Bank's subsequent offer letter to Abisha dated September 8, 2015 **(P. 7)**.

[27] My reading of all three documents; **(P. 5 & P. 7) and (EB. 7),** shows that **the full period of the moratorium was twelve months from December 2014 –December 2015.** The first six (6) months run from December 2014 when the initial term loan of USD$ 900,000 was disbursed, to June 2015. And the next six (6) months run up to December 29, 2015, following the request by Abisha in her letter to the Bank (**EB. 7**). See page 2[7] of the offer letter of September 8, 2015 (**P. 7**[8]).

[28] Three (3) questions therefore emerge for my determination;

[7] Paras. 1 & 2

[8] EXB P. 7 is at page 111 of the trial bundle.

First; '*Did the Bank wrongfully make two (2) principal liquidations of USD$ 37,158.52 and of USD$20,000 on 29/12/2015 & 30/12/2015 respectively, on Abisha's A/C No. 8200000719 (EB.10), during the last half of the said moratorium period?*

Second; '*Did the Bank wrongfully make interest liquidations totaling to USD$16,250.00 on Abisha's A/C No. 8200000719 (EB.10), during the last half of the said moratorium period?*

Third; '*Did the Bank wrongfully make a principal liquidation of USD$462,841.48 on January 18, 2016 on Abisha's A/C No. 8200000719 (EB.10)?*

[29] I will deal with the first and third questions jointly, and then with the second singularly.

[30] I find as sound, the explanation of Mr. Waidha (DW1) and of the Bank's Counsel; Mr. Kajubi, in respect of the two deductions of *USD$ 37,158.52 and of USD$462,841.48*.

Their explanation, to which I agree, is that;

'It was upon the expiry of the call loan No. 002CLFX152510001, that subsequently the principal loan of **USD $500,000** was liquidated in two tranches of **USD$ 37,158.52** and **USD$ 462,841.48** on December 29, 2015 and January 18, 2016 respectively'.

[31] The basis for my finding is that indeed on the same date; January 18, 2016 there was an equivalent credit entry of **USD$500,000.00** for the new loan, which supported their explanation.

[32] I further find that the Bank's explanation about the call loans, is also sound. I agree with Mr. Kajubi's argument below, and with Mr Waidha's (DW1) detailed explanation further below, that;

'...the Bank could only book the loan as a call loan during the grace periods in the term loans, which period was included in the offer letters'.

Mr. Waidha (DW1) explained the difference between a call loan and a term loan, that;

'A call loan can be liquidated anytime by the Bank and it is normally for a short period of time, usually six (6) months. That it is basically to allow the client pay only interest to accommodate the moratorium. While a term loan is for payment of principal and interest on a monthly basis for a given period of time stated in the offer letter. The 1st Plaintiff signed for a term loan which had a holiday (a moratorium) on the payment of the principal, that is why the call loans came in the picture to accommodate the moratoriums where the client was only paying interest, before the term loan could be booked'.

[33] I found these explanations well in harmony with the findings of the **JFAs** in the **JFAR,** and with the entries in Abisha's statement of **A/C No. 8200000719 (EB.10).** And also with a similar oral explanation on call loans by C. 1; Mr. Kalinda Gonzaga.

[34] In regard to the deduction of *USD$20,000 made on 30/12/2015*, Mr. Kajubi owned up, and acknowledged that there had been an auto erroneous deduction which was however reversed on January 18, 2016. Abisha's statement of **A/C No. 8200000719 (EB.10)** clearly shows the stated reversal on that given date. The testimony of C. 2; Mr. Mawanda Lwanga, on that aspect, is also to the same effect.

[35] **All in all, my findings above are largely based on the conclusions of the JFAs at pages 10, 12 & 13 of their JFAR. See paragraph 33 and tables 4.2 & 4.4 respectively. These show that only USD$ 25,690.19 was debited as principal in respect to the loan and period under review, and no other principal amount was debited as alleged.**

[36] I will now address the second question on *interest liquidations totaling to USD$16,250.00.*

I find that Mr. Kiggundu's argument on this is misplaced. As it has already been acknowledged, it is correct that during the grace periods, only interest is charged. That

figure of *USD$16,250.00* represents the interest charged on the loan of **USD$ 500,000.00** for the period under review. **See Annextures MM04 and MM09 of the JFAR.**

[37] Before I take leave of this prong, it is pertinent that I state my observation here. In his testimony Mr. Aqeel Mian (PW2) listed so many other alleged wrongful deductions made by the Bank. He asserted that in total, the Bank collected **USD$ 972,935.00** over and above the amount due to it. As it were, it is apparent that the Plaintiffs and their Counsel abandoned all the other numerous alleged deductions that could not be sustained. Clearly those alleged deductions were all alien to the **JFAR.**

[38] **By reason of my findings above, the 1st prong is answered in the negative. The Bank did not make any wrong deductions as alleged.**

I will now turn to analyze the 2nd prong.

Second prong:

[39] **Mr. Kiggundu submitted that the sale notice of October 14, 2016 and the advertisement (P.11) were all done in breach of contract.**

He argued that the Bank wrote the demand notices of May 4, 2016 **(P.9 & P.10)** and that the same were complied with. That the bank also wrote **EXB. P.16** to indicate that the two term loans were regular and that the overdraft was within limit. That in case of further default, the Bank had to commence the recovery process in accordance with **sec. 19 of the Mortgage Act, 2009**.

27/2

[40] In rebuttal, Mr. Kajubi argued in respect of **section 19 of the Mortgage Act**, that **P. 16** referred to by the Plaintiffs did not create any express waiver of breach as far as the default on arrears was concerned. That the loan facilities were already non-performing loans, and that once there was an initial default, this constituted breach of the facility contracts. That the Bank issued notices by invoking clauses 3, 4, 6 and 10 of the letter of Offer **(EB. 1)** and clauses 6, 8, 11 (c) and 13.5 (a) (iv) of the Mortgage Deed, in compliance with **sec. 19 of the Mortgage Act**. That the default was never rectified. That as of May 4, 2016 when the notices were issued, a sum of **USD$ 82,587.62** was outstanding on the first credit facility and a sum of **USD$ 516,508** was outstanding on the second facility, and a sum of **USD$1,383,310.43** was outstanding on the overdraft facility. And that interest continued to accrue on the outstanding amount daily.

That the Bank issued a notice of sale dated September 14, 2016 by exercising its right of sale under **section 26 (1) of the Mortgage Act**. That by Abisha merely making payment by installment did not rectify the default. That by that date (September 14, 2016) when the notice of sale was issued, the outstanding amount on both the term loans and the overdraft was **USD$ 1,886,806.94** together with interest. That when the default notice was issued, the Plaintiffs did not comply because the money stated in **P.9; of USD$ 136, 046.62** was supposed to be paid fully within 45 days.

[41] He (Kajubi) further argued, in the alternative, that Abisha defaulted on each of the three credit facilities and that each facility was non-performing[9]. That Abisha wrote to the

[9] Counsel cited Regulation 6 (1) of the Financial Institutions (Credit Classifications and Provisioning) Regulations, SI No. 43 of 2005 on when a credit facility with a pre-established repayment schedule is considered to be non-performing.

Bank, in a letter dated July 2015 **(EB. 7)** admitting to defaulting in its contractual obligations and requested for an extension period to start making payments. That by the time the Bank commenced recovery proceedings, Abisha was already in default and breach of the mortgage facility clauses.

That the Bank lawfully exercised the right of enforcement and recovery as per the duly executed credit facility documents.

For his propositions, learned Counsel relied on **Housing Finance Bank Ltd & Anor v Edward Musisi**[10].

[42] Mr. Kiggundu rejoined for the Plaintiffs, that the default was rectified in compliance with **P. 9 & P. 10,** and that the term loans and overdraft were not non-performing.

He argued that if Abisha's accounts were in arrears again, the Bank was under obligation to send a new demand and default notice to rectify the default. That if there was any failure by Abisha to rectify a default within 45 working days, the sale notice would be sent, and the recovery process would commence. That the sale notice was issued illegally and the recovery process commenced in breach of clause **19 of the Mortgage Act, 2009,** as well as the terms in the offer letters and the addendum. That the **Housing Finance Bank Ltd case (supra)** cited by Mr. Kajubi does not apply to this case as it dealt with a mortgage under the repealed Mortgage Act.

[10] SCCA No. 22 of 2010

Analysis by Court on the 2nd Prong:

[43] For wholeness and clarity, I will begin by laying out, verbatim, the provisions of **Section 19 (2) of the Mortgage Act, 2009**. That section stipulates that;

> 'Where the mortgagor is in default of an obligation to pay the principal sum on demand or interest or any other periodic payment or any part of it 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 default and require the mortgagor to rectify the default within forty -five working days'
>
> (Underlining added)

[44] It is not in dispute that by the time the Bank wrote the demand and Default notices to Abisha, both dated May 4, 2016 (**P. 9 & P. 10**), Abisha was in arrears on all three (3) credit facilities to the tune of **USD$ 23,017.53** on the 1st loan, **USD$ 37,205.72** on the 2nd loan and **USD$ 75,310.43** on the overdraft facility. **(Refer to table 4.5 at page 13 of the JFAR).**

[45] According to the loan amortization schedules[11], and to the term loan(s) and overdraft offer letters of April 9, 2014 and of December 23, 2014[12] and of September 8, 2015[13], Abisha was to pay a monthly installment of **USD$ 7,672.51** on the 1st loan, and of **USD$ 9,301.43** on the 2nd loan. As it were, as at that date (May 4, 2016) for the 1st loan of **USD$ 200,000**, Abisha was in arrears of three (3) months; February, March and April 2016, to the tune of **USD$ 23,017.53**[14]

[11] See Annextures MMO2 and MMO5 of the JFAR
[12] EXB. P.5 (also EXB EB 1)
[13] EXB. P.6
[14] Refer to table 4.5.1 at page 13 of the JFAR

For the 2nd loan of **USD$ 500,000**, Abisha was in arrears of four (4) months from January to April 2016, both inclusive, amounting to **USD$ 37,205.72**[15]. And for the overdraft facility, Abisha was in arears of **USD$ 75,310.43**[16]

[46] The said Bank demand and default notices (**P. 9 & P. 10**) both gave Abisha time lines to the effect that if she (Abisha) failed to clear the arrears of **USD$ 136, 046.62** by July 8, 2016, the Bank would be entitled to proceed with recovery steps including appointing a receiver and selling the mortgaged assets. The relevant parts of the wording in each notice was as follows;

The Notice of default (P.9) reads:

'...TAKE FURTHER NOTICE that in accordance with the Mortgage you are required to pay the sum of **USD$ 136,046.62 (United States Dollars one hundred and thirty six thousand forty six and sixty two cents only)** within 45 working days from the date of this notice in order to rectify the default.

TAKE FURTHER NOTICE that if the default is not remedied within the time stated in this notice, the mortgagee shall be entitled and will proceed to exercise any of the following remedies;

(a) Appointing a receiver of the mortgaged land;
(b) Leasing / subleasing the mortgaged land;
(c) Entering into possession of the mortgaged land; or
(d) Selling the mortgaged land.

Dated this 04th day of May 2016'

The Demand Notice (P.10) reads;

'...We have however noted that your repayment is irregular and that you are 72 days in arrears on the first loan by **USD 23,710.19 (United States Dollars twenty three thousand, seven hundred and ten and**

[15] Refer to table 4.5.2 at page 13 of the JFAR
[16] Refer to table 4.5 of the JFAR

nineteen cents only) and 96 days in arears by **USD 37,026 (United States Dollars thirty seven thousand, twenty six only)** on the second term loan facility.

Please note the overdraft facility is in excess by **USD 75,310.43 (United States Dollars seventy five thousand three hundred and ten and forty three cents only)** ...

...This therefore is to inform you that if you do not clear the arears by 08th July 2016 for all the credit facilities, we shall proceed with recovery steps including realization of securities held by the Bank.

We trust that you will accord this notice the attention it merits...'.

[47] It is not in contention that in the following month, on June 21, 2016 Abisha paid **USD$ 170,000.00** as shown in her statement of account **No. 8200000719 (EB. 10).** It is also apparent that, her said payment of **USD$ 170,000** covered all the arrears demanded by the Bank as per its demand and default notices.

[48] It is however, also apparent that after that date (June 21, 2016) Abisha did not make any of the scheduled loan installments (principal and interest) on the due dates[17] in each loan facility contract. The Bank then opted to appoint Mr. Musiime as Receiver and Manager over all the mortgaged assets on November 14, 2016 and later sold them off.

[49] The question therefore that emerges for my determination, is; **'whether the Bank was right to take the recovery steps it took, at the time it did, or at all, including the sale notice of October 14, 2016 and the advertisement (P. 11)?**

[50] **I am in agreement with the argument by learned Counsel; Mr. Kiggundu,** that under **section 19 of the Mortgage Act**, the options taken by the Bank, to wit; *of appointing a Receiver and Manager, and through the Receiver, of selling the mortgaged assets,* required that upon Abisha's payment of **USD$170,000.00**, which was a payment in compliance with the 45-

[17] Refer to Abisha's statement of account No. 8200000719 (EXB EB. 10).

day timeline stipulated in **P. 9 & P. 10**, and upon Abisha's further default, **the Bank ought to have given Abisha fresh notices.**

[51] **Section 19 (3) (d) of the Mortgage Act** stipulates that if the default is not rectified within the time specified in the notice under subsection (2), the mortgagee will proceed to exercise any of the remedies referred to in **section 20** in accordance with the procedures provided for in this part.

[52] **Section 20** itself provides that where the mortgagor is in default, and does not comply with the notice served on him or her under section 19, the mortgagor may take the remedies listed thereunder, that require the mortgagor to pay all the monies owing on the mortgage, to appoint a receiver, to enter into possession of the mortgaged land, or to sell the mortgaged land.

Section 26 (1) of the Act is of similar effect. It provides; *as a condition for the exercise of the right of sale by the Mortgagee*, that there must be non-compliance by the Mortgagor of the notice served on him or her under section 19.

[53] Similarly, **Section 22 (2) of the Mortgage Act** stipulates that **before the appointment of a receiver under that section, the mortgagee shall serve a notice on the Mortgagor,** and shall not proceed until fifteen (15) working days have elapsed from the date of service of the notice of appointment of the Receiver.

[54] A reading of all **sections 19, 20, 22 & 26 of the Mortgage Act** clearly require that after Abisha complied with the first set of notices **(P. 9 & 10),** the Bank was legally obliged to issue to Abisha fresh notices after she relapsed into subsequent default. It would only

have been upon Abisha's failure to comply with such subsequent notices, that the Bank would have been entitled to take the remedies listed under **section 20, 22 and or 26 (1) of the Act.**

[55] I looked at the **Housing Finance Bank Ltd case (supra)** cited by Mr. Kajubi and in my view, in that case, unlike in this present case, the Respondent therein did not comply with the demands for payment that the 1st Appellant Bank made. On the contrary, in this present case, Abisha complied with the Bank's demand / default notices.

[56] As stated in paras. [53] & [54] above, section 22 of the Mortgage Act requires that before and not upon appointment of a Receiver, the mortgagee should give notice to the Mortgagor. No such notice was shown by the Bank as to have been served upon Abisha.

[57] In addition, under **section 22 (1) – (9) of the Act,** the appointment of a Receiver is *'of the income of the mortgaged land',* with power to demand and recover all the income from 3rd parties in respect to which she or he is appointed, and to give such 3rd parties valid receipts. **(See sec. 22 (7) of the Act)**.

Such appointment of the Receiver under that section appears to me, to be for purposes of servicing the loan repayments of principal and interest **(see sec. 22 (9) (f) & (g) of the Act),** and not for the purpose *'of realizing all the monies owing on the mortgage, by way of sale of the mortgaged property',* as was the scenario in the present case. Compare this with the wording of the letter of appointment of the Receiver **(EB. 3).**

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[58] The implication is that for the proper appointment of the Receiver under section 22 of the Mortgage Act with powers of realizing all the monies owing under the mortgage by way of sale of the mortgaged property, the Bank was under legal obligation to re-serve the notice required under section 19 (2) of the Mortgage Act. In these circumstances, I thus Rule out propriety of the appointment of the Receiver by the Bank under section 22 of the Mortgage Act.

[59] I am fortified in the above position by a similar position taken by Madrama, J. (as he then was), in his decision in **GT Bank (U) Ltd (formerly Fina Bank (U) Ltd v Richline International Ltd & Anor case[18],** that was cited by Mr. Kiggundu. The Judge stated that;

> 'Where a mortgagee chooses to exercise the option of selling the mortgaged land, he has to prove that the mortgagor is in default of his or her obligations, and that the mortgagor remained in default at the expiry of the time provided for the rectification of the default in the notice served on him or her under section 19 (3) of the Mortgage Act'.

[60] I will now turn to examine the Bank's / Mr. Kajubi's assertion that the appointment of the Receiver was made under **Clause 9 (e) of the Debenture, in addition to section 22 of the Mortgage Act.** They argue that the letter of appointment **(EB. 3)** was duly issued, and the notice of the Receiver was advertised.

[61] On that point, Mr. Kiggundu submitted for the Plaintiffs that the appointment of the Receiver / Manager was illegal and invalid as the same was done without authorization, and on non-registered debentures and or non-existent debenture certificates and without notice of breach under clause 2 of the Debenture. He referred court to **P4 at**

[18] HC (OS) No. 10 of 2014

pages 63-75 of the Plaintiff's trial bundle, and to **EB. 5 pages 40-53 of the Bank's trial Bundle)**.

[62] He argued that the debenture **(EB. 5)** at page 15 of the Bank's trial Bundle, between Abisha and Imperial Bank Uganda Ltd was not registered, and that the certificate of registration of a debenture **(EB. 2)** relied on by the Bank was in respect of a debenture in favor of *Imperial Bank Ltd, Kenya (in receivership),* and not the debenture in favor of the Bank in this case. That no evidence was adduced to prove that the Bank had been authorized to appoint a Receiver on behalf of the Receiver in Kenya. That such appointment was therefore illegal.

[63] He (Kiggundu) argued further that the subject matter of the debenture marked **EB. 5** cannot be differentiated from the other two non – registered debentures and the provisions of each had to be validly exercised to effect the properties and the assets of Abisha, and failure to do so, rendered the appointment invalid.

For his propositions, learned Counsel relied on the **GT Bank Ltd v Rich line case (supra), and sec. 33 of the Contracts Act.**

[64] In rebuttal, Mr. Kajubi argued that the issue of non-registration of a debenture was not pleaded at the trial and cannot now be raised in submissions. That, as to do so would be a departure of pleadings. And that in the alternative, even if the debenture was not registered, it is the duty of the borrower to lodge the debenture deed for registration under **sec. 105 of the Companies Act, 2012**. He referred to the case; **Margherita Millers**

Ltd & Anor v Housing Finance Bank Ltd & Anor[19]. In that case Wejuli Wabwire, J. reiterated that the duty to register a charge fell on the borrower, and that the lender did not have an obligation to register a charge.

[65] I have looked at the appointment letter of the Receiver **(EB. 3).** While it is true that it is stated therein that the Receiver's appointment was made pursuant to three (3) debentures dated **September 7, 2015** & **April 28, 2015** & **July 3, 2013,** registered on **September 10, 2015** & **May 21, 2014** & **July 8 2013** respectively, the Bank only produced two (2) of the stated debenture deeds and one certificate of registration in its trial bundle.

[66] The two debenture deeds (**EB. 5)** that the Bank produced are the deeds dated **July 3, 2013** in favor of *Imperial Bank Uganda Ltd,* and **September 7, 2015** in favor of *Imperial Bank Ltd, Kenya.* While the only certificate of Registration that the Bank produced is the certificate dated **September 11, 2015 (EB. 2),** that certificate matched the debenture deed of **September 7, 2015** in favor of *Imperial Bank Ltd, Kenya.*

As it were, the debenture deed dated **April 28, 2015** was not attached, nor were the two certificates of registration **dated July 8, 2013** and **May 21, 2014.**

[67] Mr. Kiggundu was therefore correct when he pointed out that the certificate of registration of a debenture **(EB. 2)** that the Bank relied on, was in respect of the

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[19] HCCS No. 390 of 2018 (Comm. Div.)

debenture **(EB. 5)** in favor of *Imperial Bank Ltd, Kenya (in receivership)*, and not the one in favor of the Bank that is a party to this case.

[68] I noted however, that attached and collectively marked as annexture **'EB. 2'** to the Bank's written statement of Defence, are two (2) certificates of registration; the one stated above, *dated September 11, 2015* in respect of the Debenture in favor of *Imperial Bank Ltd, Kenya (in receivership)*, and another *dated April 28, 2014, registered on May 21, 2014* in favor of *Imperial Bank Uganda Ltd*. Refer to paragraph 8 of the written statement of defence. Both certificates were referred to in that paragraph as **'(EB. 2)'** and are both physically attached.

[69] **Being alive to the dangers of not subjecting this certificate of registration** *(dated April 28, 2014, registered on May 21, 2014* **in favor of** *Imperial Bank Uganda Ltd)*, **at the trial, to the test of admissibility of evidence, I have pondered at length; as to whether or not to take cognizance of that certificate.**

[70] **This scenario, seems to me, to be one of either a mix up of documents by Counsel, or a mistake or error of Counsel, and or, of sheer failure and or negligence on their part. Little wonder that Mr. Kajubi** *cried foul* **when he argued in rebuttal that** *'the issue of non-registration of a debenture was not pleaded at the trial'*. **In my view, that was an argument in futility! The contents of paragraphs 5 (a), and 6 (o), (p) & (q) of the plaint raised the question of the propriety / impropriety of the appointment of the Receiver. Those paragraphs ought to have readied the Bank's lawyers to correctly attach and produce all the requisite documents touching the questioned appointment. They did not.**

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[71] In these circumstances, I am constrained to take a liberal approach. I will, and have, against the said odds, taken cognizance of the said *certificate of registration dated April 28, 2014 registered on May 21, 2014* in favor of *Imperial Bank Uganda Ltd.*

[72] As stated earlier, that certificate is attached to the Bank's written statement of defence and cannot be overlooked or washed away. The absence of that document in the Bank's trial bundle should not be a ground to discard it, especially since the document was cited in the 1st paragraph of the appointment letter of the Receiver (EB. 3), which is itself, an agreed document. As courts are enjoined to administer substantive justice without undue regard to technicalities, the omission to include this certificate in the Bank's trial Bundle, will not be given undue regard. (Art. 126 (2) (e) of the 1995 Constitution, applied).

[73] I have also carefully considered that turning a blind eye to the existence of the said certificate would have dire consequences to the Bank. The implication of non-registration of a certificate of a charge is fatal to any creditor or liquidator in whose favor the charge is created. The same would be void and unenforceable under section 105 (1) of the Companies Act, 2012.

Section 105 (1) of the Companies Act, 2012 stipulates that;

> 'Subject to this Part, every charge created by a company registered in Uganda and being a charge to which this section applies is, so far as any security on the company's property or undertaking is conferred by it, is void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced are delivered to or received by the registrar for registration in a manner required by this Act within forty two days after the date of its creation'

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[74] In a wealth of authorities, it has been echoed that a mistake, flaw or negligence of Counsel should not be visited on his / her client. See Banco Arabe Espanol v Bank of Uganda[20] that is one such authority.

[75] In the result, I sustain the assertion by the Bank / Mr. Kajubi that the appointment of the Receiver was made under Clause 9 (e) of the Debenture(s) in favor of the Bank; *(formally Imperial Bank Uganda Ltd).*

[76] Considering that all the amounts drawn and remaining outstanding in respect of the facilities, as at May 4, 2016 (the date of the demand notice (P.10), had fallen due and payable by virtue of clauses 3, 4, 6 and 10 of the letter of offer, cum facility contract of December 23, 2014 (EB. 1), I find that the recovery options chosen by the Bank, to wit; to appoint a Receiver, and through the Receiver, to sell the mortgaged assets, were options exercised within the precincts of the law. The sale notice of October 14, 2016 / advertisement (P. 11) were thus lawful, and the Bank was not in breach of contract.

[77] Issue No. 2 is accordingly answered in the negative.

Issue No. 3:

Whether the appointment of Mr. Musiime (the 2nd Defendant) as a Receiver and manager was lawful?

[78] This issue has been determined under issue No. 2. I hold this issue in the affirmative.

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[20] SCCA No. 8 0f 1998

Issue No. 4:

Whether the Bank (1st Defendant) is liable for causing the Plaintiffs the alleged financial loss?

[79] **By reason of my conclusions under issues 2 & 3 above, this issue follows suit and is therefore answered in the negative. The alleged financial loss has not been proved against the Bank.**

Issue No. 5: **Whether there are any remedies available to the parties?**

[80] **The remedies sought for by the Plaintiffs all stem from their allegations that the Bank was in breach of contract, and that the Receiver was not lawfully appointed. Having determined those questions as I have, it follows that the Plaintiffs are not entitled to any of the remedies they seek in their pleadings.**

[81] Be that as it may, I however find, from the uncontroverted evidence of PW1 and PW2, that upon commencement of the Receivership, the Receiver simply shut down Abisha's business, and has since failed to account to Abisha and the 1st & 2nd Plaintiffs; as persons claiming, through Abisha, for among other things, what came into his hands as Receiver, and how he conducted and concluded the Receivership.

These witnesses (PW1 & PW2) also produced two documents; a valuation report[21] dated June 8, 2016 **(P-14)** and insurance Policy documents[22] **(P-16)**, both of which documents,

[21] Prepared by M/s Bageine & Company Valuation Surveyors.
[22] Authored by Alliance Africa General Insurance Ltd

read together, give indicative figures of the forced sale value of the mortgaged assets, that is put therein, in the region of **USD$ 7,000,000 and USD$ 8,063,722.**

[82] **Under sections 179, 180, 189 & 190 of the Insolvency Act, 2011** a Receiver is legally bound to account, by way of *inter alia,* preliminary and other Reports, for all the amounts and the values of all assets and incomes that come into his hands. In this case, that came into his hands with effect from the date of the his (the Receiver's) appointment on November 14, 2016. He is duty bound to account for all the incomes and proceeds out of the sale of the mortgaged assets, and how he applied them. He is also legally bound to exercise his powers in the best interests of the grantor (in this case Abisha), and the 1st & 2nd Plaintiffs; as persons claiming, through the grantor, among those listed under **section 179 of the Insolvency Act, 2011.**

[83] To this end, I hereunder make Orders in that regard. And by virtue of the indemnity undertaking made by the Bank to the Receiver in the latter's appointment letter **(EB. 3)**[23], the Bank must also take responsibility. I thus hold that *the Plaintiffs are entitled to a detailed account of the receivership over Abisha's assets,* which accountability must be made by the Receiver, and by implication, by the Bank.

Decision of Court:

[84] In the final result, Judgment is largely entered for the Defendants, save as stated under para. 83 above. I accordingly Declare and Order as follows;

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[23] See the indemnity clause in the Terms of Engagement at page 2 of EB. 3.

1. The Plaintiffs' suit is dismissed, save for the Plaintiffs' entitlement as ordered hereunder.
2. A declaration is hereby issued that the Plaintiffs are entitled, pursuant to **sections 179, 180, 189 & 190 of the Insolvency Act, 2011,** to a detailed account of the Receivership over the 1st Plaintiff's assets, which the Receiver, and by implication, the Bank must make available to them.
3. The Defendants shall, within thirty (30) days from the date of this Judgment, avail to the Plaintiffs, and also to this court, by filing with the Registrar of this Court, detailed Account reports of the Receivership over the assets of the 1st Plaintiff.
4. I make no order as to costs. The Defendants' failure to comply with the law as aforesaid, does not warrant any award of costs to them. **(Section 27 of the Civil Procedure Act[24], applied).**

I so Order,

P. BASAZA - WASSWA
JUDGE

February 27, 2023

Judgment delivered digitally via email to the parties.

[24] Cap. 71