THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CIVIL SUIT No. 0013 OF 2008

GUMA PAULINO …….……..……..……..……..…… PLAINTIFF

VERSUS

1. BANK OF AFRICA (U) LIMITED }
2. ALIOCIRI MISAELI } ……..…..……..…...… DEFENDANTS
3. REGISTRAR OF LAND TITLES }

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The plaintiff sued the defendants jointly and severally for an order directing them to return to him his certificate of title to land comprised in NLP/2214 LHR Volume 3210 Folio 16 Plot 05 Samuel Baba Road in Koboko Town, an order vacating the mortgage thereon, general damages, interest and costs. The plaintiff's claim is that on 25th March, 2008 he executed powers of attorney in favour of the second defendant, in order to enable the second defendant secure a loan from the first defendant, using the above mentioned title deed as security. In breach of its fiduciary duty owed to the plaintiff, the first defendant instead deposited the loan amount into the second defendant's account, who proceeded to put it to his personal use, to the detriment of the plaintiff.

In its written statement of defence, the second defendant contended that the suit is misconceived in so far as the plaintiff and the second defendant applied for the loan together, the plaintiff executed both a powers of attorney and the mortgage deed and agreed that the amount borrowed was to be deposited on the second defendant's account. The second defendant instead counterclaimed for shs. 13,333,336/= being the amount outstanding on the mortgage. In his written statement of defence, the second defendant contended that he was by way of powers of attorney granted to him by the plaintiff, authorised to borrow money from the first defendant upon security of the plaintiff's certificate of title. He has since then been dutifully re-paying the loan in accordance with the agreed instalments but the plaintiff has to his surprise been harassing

him. He denied having breached the authority granted to him by the powers of attorney. He too counterclaims shs. 4,000,000/= from the plaintiff being money borrowed by the plaintiff on 23rd June, 2008 out of the loan the second defendant obtained from the first defendant.

In his reply to both written statements of defence and by way of a defence against both counterclaims, the plaintiff contended that he does not owe any of the defendants the money claimed by them respectively.

In his testimony, the plaintiff who testified as P.W.1 stated that during January, 2008 he approached the first defendant seeking a loan of shs. 20,000,000/= He was advised by the second defendant's Credit Officer that he would not be given the loan directly but that he should instead use the second defendant's account with the bank. It is on that basis that he executed powers of attorney in favour of the second defendant on 20th March, 2008. He later on 4th April, 2008 executed another document (the mortgage deed) whose terms he did not fully comprehend. The first defendant instead credited the money borrowed to the second defendant's account without informing him and the second defendant put the money to his personal use. As a result, the plaintiff suffered financial hardship, his business collapsed, he is heavily indebted and at one time was imprisoned as a civil debtor. He had intended to use the loan to convert his residence into a lodge. Under cross-examination he admitted that he had his own account with the bank which he opened in December, 2007. When he executed the powers of attorney, his understanding was that the second defendant was to obtain the money and pass it over to him. He however acknowledged having received shs. 4,000,000/= from the second defendant, but is respect of a different transaction. That was the close of the plaintiff's case.

D.W.1 Dramadri Jimmy, the then Branch Manager of the first defendant's Arua Branch testified that after the plaintiff opened an account with the second defendant in January, 2008 he applied for a loan of shs. 15,000,000/= which application was rejected because his business was not viable. Then in March, 2008 the plaintiff went to the bank with the second defendant whom he introduced as a brother. The two suggested that the loan be advanced to the second defendant. He advised the plaintiff to first grant powers of attorney to the second defendant for the loan to be processed. A letter offering the second defendant a loan of shs. 20,000,000/= was then issued. By

the time this witness testified, the outstanding sum was shs. 6,31,953/= payable by 30th April, 2010. Under cross-examination, he stated that although it is the plaintiff who executed the mortgage deed, the money was disbursed to the second defendant because it is the second defendant who had applied for the loans. The plaintiff only provided security fort that loan.

D.W.2 Maseli Aliociri, the second defendant, testified that he operates an account with the first defendant and that he secured a loan from the second defendant to boost his bar business. After the bank had undertaken a feasibility study of his business, he was advised to provide security for the loan he had applied for. He knew the plaintiff as one of his customers and on that basis requested him to avail him his certificate of title to serve as security. He went together with the plaintiff to the bank. They were advised that the plaintiff had to execute powers of attorney if the title were to serve as security. The powers of attorney were duly executed before a magistrate and taken back to the bank together with the title deed. When his application was approved, he was issued with a loan approval / offer letter dated 3rd April, 2008. Having accepted the terms of the loan, he executed a mortgage deed dated 6th May, 2008. The money was deposited on his account and he began servicing the loan after a month.

Months later, the plaintiff approached him asking for financial assistance and he lent him shs. 4,000,000/= which he promised to pay back in a month but has not paid back to-date. By the time he testified, he had repaid the loan in full and the letter to that effect is dated 26th June, 2010 but the plaintiff was yet to pay back the shs. 4,000,0000/= He received the title back and returned it to the plaintiff.

D.W.3 Dudu John Ongetho testified that he witnessed the transaction by which the plaintiff sold the property comprised in NLP/2214 LHR Volume 3210 Folio 16 Plot 05 Samuel Baba Road in Koboko Town to a one Mr. Michael Oluma on 7th November, 2008 at the price of shs. 50,000,000/= The certificate of title was handed over to the purchaser during October, 2010. Mr. Michael Oluma has since sold it off to another person. That was the close of the defence case.

In their joint memorandum of scheduling, the parties and their counsel agreed on the following issues for the determination of court;

1. Whether the first defendant breached its fiduciary duty owed to the plaintiff.
2. Whether the first defendant gave notice to the plaintiff before paying the loan amount of shs. 20,000,000/= to the second defendant.
3. Whether the second defendant was entitled to receive shs. 20,000,000/= from the first defendant for the first defendant's sole benefit.
4. Whether the plaintiff received shs. 20,000,000/= or at all as part of the loan amount from the second defendant.
5. What remedies are available to the parties?

In his final submissions, counsel for the plaintiff Mr. Paul Manzi contended that the second defendant breached a fiduciary duty it owed the plaintiff when it disbursed money to the second defendant without notifying the plaintiff. The second defendant consequently exceeded the scope of the powers of attorney granted to him when he applied that money to his own use. As a result the plaintiff was denied use of his certificate of title for the duration of that transaction. He conceded that the orders sought against the third defendant had been overtaken by events. Citing the case of *Fredrick J. K. Zaabwe v. Orient Bank Limited and five others, S.C. Civil Appeal No. 4 of 2006*, he argued that the powers of attorney put the first defendant on notice that the security offered belonged to a third party, giving rise to a duty of disclosure. Moreover, the powers of attorney was never registered and should not have been acted upon. The second defendant used the money for his own benefit contrary to the essence of powers of attorney which only constituted him as an agent of the plaintiff.

In response, counsel for the first defendant Mr. Samuel Ondoma, submitted that the plaintiff having signed the mortgage deed (exhibit P. Ex. 2) clearly indicating that the second defendant was the borrower, there was no duty imposed on the first defendant to notify the plaintiff when the loan amount was eventually disbursed, although notice of the disbursement was indeed given. The powers of attorney given to the second defendant by the plaintiff were intended for the former's benefit and not the latter's. The borrower repaid the loan and the title deed was

returned to the plaintiff on or about 27th July, 2010 rendering most of his claim redundant. The plaintiff had long before that, on 7th November, 2008, disposed of the property by sale to a one Oluma Michael Alitre even before filing the suit (exhibit. D. Ex.5). The case of *Fredrick J. K. Zaabwe v. Orient Bank Limited and five others, S.C. Civil Appeal No. 4 of 2006*, is distinguishable in that unlike in the case cited, in the instant case the plaintiff was fully involved in the transaction and was not in any way defrauded. The plaintiff knew the amount that was to be borrowed the purpose of the borrowing and the identity of the borrower. The evidence adduced further shows that out of the proceeds, the plaintiff borrowed shs. 4,000,000/= which he has not re-paid to-date justifying a judgment in favour of the second plaintiff in that sum. The suit therefore should be dismissed with costs as against the first defendant.

On his part, counsel for the second defendant Mr. Ronald Munyani submitted that the loan offer was made to the second defendant, and the plaintiff was not party to the loan agreement but only provided security for the second defendant's borrowing. It is the second defendant who received the loan amount, repaid it and redeemed the security which was then returned to the plaintiff. The plaintiff has since disposed of the property and thus his claim is misconceived. The evidence adduced before court (exhibit D. Ex.3) and the testimony of the second defendant shows that out of the loan, the plaintiff borrowed shs. 4,000,000/= which he has not re-paid to-date justifying a judgment in favour of the second plaintiff in that sum. The suit therefore should be dismissed with costs as against the second defendant and judgement be entered on the counterclaim in favour of the second defendant against the plaintiff, with costs.

In rejoinder, counsel for the plaintiff submitted that the first defendant owed the plaintiff a fiduciary duty arising from the fact that he provided security for the loan. The plaintiff suffered a loss when the amount borrowed was not advanced to him but to the second defendant. He therefore reiterated his prayers.

A mortgage is redeemed by the mortgagor repaying the sum advanced. Once the mortgagee acknowledges receipt of the money the mortgage automatically terminates (see section 14 of *The Mortgage Act, 2009*). As rightly conceded by counsel for the plaintiff, the claim relating to cancellation of the mortgage, return of the title deed and an order vacating the mortgage thereon

have since been overtaken by events. I find that what remains to be decided in the first four issues raised by the parties are interrelated and will be considered concurrently.

First to fourth issues: Whether the second defendant owed the plaintiff any fiduciary duties and if so, whether it breached any of those duties in its dealings with the second defendant.

The general relationship between a bank and the customer is a contractual one which begins when an account is opened (*Byaruhanga Byabasajja Serwano v. Barclays Bank of Uganda Ltd. [1978] HCB 150*). In the instant case, the first defendant's obligations were primarily toward the second defendant as its customer and not the plaintiff who was not an account holder with it. However, in the transaction between the first and second defendants, a third party mortgage was created. A third party mortgage arises when security for the borrowing is given by an individual or entity (a third party) for the liability of the borrower. The issue then is whether that relationship gives rise to a fiduciary relationship as between the third party mortgagor and the bank as contended by the plaintiff and refuted by the first two defendants.

A third party mortgage is not an indemnity. An indemnity is a contractual promise to accept liability for another's loss. An indemnity creates a primary obligation because it is independent of the obligation of a third party (the principal debtor) to the beneficiary of the indemnity (the Bank) under which the loss arose. To the contrary, a third party mortgage is a secondary obligation in the form of a guarantee. In a third party mortgage, the mortgagor makes a contractual promise to ensure that a borrower fulfils his or her obligations and / or pay an amount owed by a the borrower if he or she fails to do so himself or herself. Unlike an indemnity, it creates a secondary obligation because it is contingent on the obligation of the borrower (the principal debtor) to the beneficiary of the security (the Bank). Ordinarily, a third party mortgage arrangement does not impose a personal or primary obligation to pay on the part of the mortgagor and it is for that reason that it technically is a limited recourse guarantee so that the liability of the mortgagor is limited to the amount which can be realised upon disposal of the security. In a third party mortgage, the mortgagor secures credit advanced to another. Providers

of security in this type of arrangement are sometimes referred to as “third party mortgagors” because they are not a party to the loan contract between the borrower and the Bank.

A third party mortgage differs from a direct mortgage between a mortgagor and a bank where the mortgagor secures his or her own credit because in the former, there is no direct or primary liability for the debt imposed on the mortgagor. The duties owed by a bank to a mortgagor in a third party mortgage are not those it owes to its customers but are rather akin to those that apply to guarantees and indemnities (see *Bolton v. Salmon [1891] 2 Ch 48* and *Perry v. National Provincial Bank of England [1910] 1 Ch 464*). A third party mortgage thus secures a third party's obligations to the Bank and not the mortgagor's direct obligations, because none are created by the arrangement. The arrangement ordinarily contains guarantee type provisions to avoid the possibility that the mortgagor may be inadvertently discharged by the acts or omissions of the Bank e.g. by the Bank granting time or indulgence to the principal debtor (the borrower) or varying the terms of the guaranteed liabilities.

The plaintiff's action in the instant suit is premised on an assumed fiduciary or alternatively a contractual relationship between him and the first defendant. Fiduciary relationships may be implied in law when premised upon the specific factual situation surrounding the transaction and the relationship of the parties. However, the mere existence of a lender-borrower relationship does not impose fiduciary obligations on the lender (see *London General Omnibus Co. Ltd v Holloway [1912] 2 KB 72, Cooper v. National Provincial Bank Ltd [1946] KB 1; Woods v. Martins Bank Ltd, [1958] 3 All ER 166, [1958] 1 WLR 1018, [1959] 1 QB 55*; *HM Customs and Excise v. Barclays Bank Plc, [2007] 1 AC 181, [2006] 4 All ER 256, [2006] 3 WLR 1, [2006] 2 Lloyd’s Rep 327* and *Tai Hing Cotton Mill v. Liu Chong Hing Bank Ltd, [1986] AC 80*). In a mortgage, the relationship is generally that of a creditor to debtor and the bank owes no fiduciary responsibilities.

As an exception to this general rule, a mortgagor must allege some degree of dependency on one side and some degree of undertaking on the Bank to advise, counsel, and protect him or her as a weaker party. Such relationships exist where the Bank knows or has reason to know that the mortgagor is placing trust and confidence in the Bank and is relying on the Bank to counsel and

inform him or her. In addition, special circumstances may impose a fiduciary duty where the Bank takes on extra services for a mortgagor, receives any greater economic benefit than from a typical transaction, or exercises extensive control (see *Silven Properties Limited, Chart Enterprises Incorporated v. Royal Bank of Scotland Plc, Vooght, Harris [2004] 1 WLR 997, [2004] 4 All ER 484*). It may also arise where the mortgagor has been induced to enter into the transaction by the borrower's misrepresentation, whereupon his or her equity to set aside the transaction will be enforceable against the Bank if either the borrower was acting as the Bank's agent or the Bank had actual or constructive notice of such undue influence or misrepresentation (see *Turnbull & Co. v. Duval [1902] A.C. 429* and *Barclays Bank Plc v. O'Brien and another, [1993] 3 WLR 786*).

In order to establish a fiduciary relationship, there must be an allegation of dependency by one party and a voluntary assumption of a duty by the other party to advise, counsel, and protect the weaker party. There must be evidence of a relation of trust and confidence between the parties (that is to say, where confidence is reposed by one party and a trust accepted by the other) and that it was abused. Once a fiduciary relationship is established, a fiduciary has a legal duty to disclose all essential or material facts pertinent or material to the transaction in hand. Only then would the duty of the type claimed by the plaintiff arise. However, is not sufficient to impose liability on a bank for breach of fiduciary duty. The borrower must also demonstrate that the bank inequitably abused that confidence by wrongfully using its position of superiority in order to obtain an unconscionable advantage over the borrower.

The pleadings in the instant suit contain no allegation of a relationship of dependency, undue influence or misrepresentation by the first defendant. The plaintiff did not in evidence allege actual or presumptive undue influence or misrepresentation on the part of the first defendant. His claim instead is that the bank had notice of that fact that the borrower, the second defendant, was acting on his behalf in taking out the loan since he granted him powers of attorney. There is no evidence to show that the bank’s role exceeded that of a lender in a traditional lender-borrower relationship when the first defendant's officer handled the transaction. The available evidence does not show that the first defendant invited the plaintiff’s reliance by urging him to trust it and by reassuring him of the feasibility of the transaction. There is no evidence to show that the first

defendant knew or had reason to know of the plaintiff's trust and confidence under the circumstances, exceeding an ordinary commercial transaction of the nature of a third party mortgage. The plaintiff therefore has failed to prove breach of any fiduciary duty, let alone the fact that such a fiduciary duty existed at all, a breach thereof, and resulting damages.

On the other hand, the rights accruing to the mortgagor in a third party mortgage are similar to those which accrue to a guarantor, i.e. the right to indemnity (once the mortgagor pays the bank under the terms of the mortgage, he or she has a right to claim indemnity from the borrower provided that the security was given at the borrower's request). The right of set-off (where the borrower satisfies his or her obligations by way of set-off against the Bank's liabilities to the borrower, the mortgagor is also entitled to that right of set-off and will be discharged from his or her obligations under the mortgage. The right of subrogation (a mortgagor who fulfils the debtor's obligations under the terms of the mortgage is entitled to all the rights of the Bank against the borrower under the mortgage, including any rights of set-off and any security that the Bank had taken from the borrower. the right of marshalling (the equitable doctrine of marshalling applies to such mortgages so that a mortgagor may be able to obtain the benefit of another Bank's security over the borrower's assets that it would otherwise not have security over). In general terms the duties are embodied in the overriding principle that the Bank must not prejudice the rights (of subrogation) of the mortgagor against the borrower. Broadly speaking, the right of subrogation is the right of the mortgagor to "stand in the shoes of" the Bank once it has been repaid by the mortgagor to the extent that the mortgagor has borne his proportion of the liability to the Bank.

A third party mortgagor thus undertakes huge risks without necessarily obtaining any tangible financial benefit from the loan taken out by the borrower. It is apparent, therefore, that the legal system needs to protect third party mortgagors as far as it reasonably can, especially from unfair conduct of lenders and borrowers. An issue which is of importance to a Bank is whether it owes a duty to a prospective third party mortgagor to explain the meaning and effect of the mortgage. The weight of authority in the common law seems traditionally to be against the existence of such a duty in arrangements of guarantee. However, if the bank proffers to explain the nature, effect and security of the guarantee, then it may come under a duty to exercise

reasonable care in doing so (see *Cornish v. Midland Bank plc [1985] 3 All ER 513*). Thus, where're or not a duty exists for the a bank to advise mortgagors and borrowers depends on an analysis of the facts and circumstances of the individual case.

In *Barclay's Bank v. Khaira [1992] 1 WLR 623*, Mrs Khaira, the surety, raised the defence of undue influence and alleged that the bank treated her negligently in that it failed to properly explain to her the nature and effect of the legal charge over the property before she signed. She also contended that the bank owed a duty to advise her to seek independent legal advice. The court held that the bank did not owe Mrs Khaira the alleged duties, although it did say that if the bank took upon itself to explain the effect of the guarantee, it was under a duty to properly explain its nature and the effect of its terms. The court concluded that unless there were special factors which might affect the surety's liability, the bank was not under a duty to proffer any explanations. It also reinforced the proposition that it would be fallacious to suggest that because banks routinely do offer explanations they are under a legal duty to do so.

In a third party mortgage arrangement, a bank's duties owed to the mortgagor are in the circumstances ordinarily limited to; (i) disclosing to a prospective third party mortgagor any matters which are peculiar to the transaction or different from what the latter might naturally or ordinarily expect in a transaction of that nature, facts which the third party mortgagor cannot be reasonably expected to know and which are unusual; (ii) where the bank proffers to explain the nature, effect of the mortgage, a duty to exercise reasonable care in doing so; (iii) a duty to carry out adequate credit checks on the ability of the borrower to repay; (iv) explaining to third party mortgagor the liabilities which the borrower has to the bank under the loan agreement for the avoidance of involving the mortgagor in securing a contingent liability which he or she may be unaware of; and under Regulation of 4 (3) of *The Mortgage Regulations, 2012,* to disclose information about the borrower in respect of the mortgage to a surety of the mortgagor and a donor of a powers of attorney.

It emerges that for the plaintiff to succeed in an action against the first defendant, he had to show that there was a breach of a common law obligation or a violation, whether intentional or inadvertent, of a statutory obligation on the part of the first defendant, such as engagement in

inequitable or fraudulent conduct or conduct proscribed by the applicable laws and Regulations. At common law, it is clear that the only duties owed by the bank to a third party mortgagor are analogous to those owed to a guarantor. None of those duties was breached by the first defendant. Neither is there evidence to show that the first defendant breached its statutory duty to disclose information about the borrower in respect of the mortgage to the plaintiff in his capacity a surety of the borrower and a donor of a powers of attorney to him.

The loan facility offer letter, exhibit D. Ex. 1 dated 18th March, 2008 indicates that the second defendant was the borrower and the plaintiff the third party mortgagor. According to clause (ii) of the mortgage deed, the first defendant agreed "to give or otherwise extend financial credit or advances to the above-mentioned Principal Debtor(s) against the above said property as security and has explained the purpose thereof to the Mortgagor." Then in clause (iii) it is explicitly stated that "The Mortgagor is agreeable to have the said property pledged to the Bank as security against the Principal debtor's loan, advance or credit till payment in full." The agreement describes the second defendant as "the Principal Debtor" and the plaintiff as "the Mortgagor." The plaintiff's contention that he was the intended beneficiary of the loan therefore is inconsistent with the clear and unambiguous express terms of the mortgage deed. The beneficiary of the loan was the second defendant and not the plaintiff.

Moreover it is trite law that when a document containing contractual terms is signed, then, in the absence of fraud, or misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not (see *L'Estrange v. F Graucob Ltd [1934] 2 KB 394* and *Steel Makers Ltd v. AB Steel Products (U) Ltd, H. C. Civil Suit No. 824 of 2003*). It seems to be generally accepted that a person who signs a lawful contractual document may not dispute his or her agreement to the terms which it contains, unless he or she can establish one of five defences; fraud, misrepresentation, duress, undue influence or *non est factum*. The plaintiff has neither pleaded nor proved any of these.

In addition, the argument raised by the plaintiff is contrary to the common law parol evidence rule to the effect that once the terms of a contract are reduced to writing, any extrinsic evidence meant to contradict, vary, alter, or add to the express terms of the agreement, is generally

inadmissible (see *Halsbury's Laws of England* (4th edn.) vol. 9 (1) para 622; *Chitty on Contracts* 24th Edition Vol I page 338; *Jacob v. Batavia and General Plantations Trust, (1924)1 Ch. 287*; *Muthuuri v. National Industrial Credit Bank Ltd [2003] KLR 145*; and *Robin v. Gervon Berger Association Limited And Others [1986] WLR 526 at 530*). A contract without ambiguity is to be applied, not interpreted. In absence of fraud, illegality, want of due execution, want of capacity, the need to clarify an ambiguity, or to prove a condition precedent, oral evidence of the nature relied upon by the plaintiff that contradicts the express provisions of the mortgage deed is inadmissible. The parol evidence rule prevents the admission of oral evidence to prove that some particular term was verbally agreed upon, but had been omitted from the contract.

The plaintiff instead relies on the content of the powers of attorney and the decision in the case of *Fredrick J. K. Zaabwe v. Orient Bank Limited and five others, S.C. Civil Appeal No. 4 of 2006*, to support the argument that the loan was intended for his benefit and not that of the second defendant such that the first defendant erred in disbursing it to the second defendant and not to him. I have considered the case cited by counsel for the plaintiff and found it distinguishable from the facts of this case. In that case, the grantor of the powers of attorney did not follow it up with execution of a third party mortgage as in the case at hand. In that case, the bank dealt with the donee exclusively and did not involve the donor. The court construed the effect of the powers of attorney relying only upon non-extrinsic evidence since it was the only document explaining the bi-partisan relationship created between the donor and the donee. In the instant case, the court must consider, not one but two documents in a tri-partite and not a bi-partisan arrangement. The decision is clearly inapplicable.

When multiple documents of a contractual nature are executed within a single commercial transaction, courts are reluctant to hold that such contract documents are inconsistent, but will rather seek to give effect to an interpretation which avoids or reconciles the conflict. In essence, the court will attempt to make sense of the contract by reading all of the contractual documents in context as complementing each other in expressing the parties' commercial intentions. It is only where there is a clear and irreconcilable discrepancy that a hierarchy clause, if it exists in one of them, should be resorted to or otherwise the court may need to determine which of the documents takes precedence.

I find that the power of attorney having been executed after the parties had been advised by the first defendant that it was necessary before the third party mortgage could be executed, it was intended to be complementary to the intent and purpose of the mortgage deed, i.e. to secure borrowing by the second defendant in his own right and not on behalf of the plaintiff. In light of that relevant factual background, the two documents can be read together in a sensible and commercial way. That being so, resort to the "hierarchy" clause may not be necessary because there is, in reality, no conflict or inconsistency between the mortgage deed and the powers of attorney. In any event if determination of precedence be required, clause 13 of the mortgage deed in a way meets the essence of a hierarchy clause by stating that the deed "comprises the whole of the mortgage," from which clause it can be inferred that mortgage deed takes precedence.

In conclusion, I find that the second defendant did not owe the plaintiff any fiduciary duties the consequence of which is that the suit by the plaintiff for alleged breach of such duties is misconceived. In all their dealings with one another, neither the first nor the second defendants breached any obligations owed to the plaintiff. There is no merit in the suit and it is consequently dismissed with costs to the first and second defendants.

Second issue: What remedies are available to the parties ?

The second defendant counterclaimed for shs. 4,000,000/= from the plaintiff being money borrowed by the plaintiff on 23rd June, 2008 out of the loan the second defendant obtained from the first defendant. The plaintiff while under cross-examination admitted having received shs. 4,000,000/= from the second defendant, but is respect of a different transaction. I have read the contents of exhibit D. Ex. 3 a letter addressed to the first defendant's branch manager by which the plaintiff sought to revoke the powers of attorney. In that letter, the plaintiff communicated as follows;

> ..... you prevailed over me and convinced [me] that I give power of attorney of my property above to the said Mr. Aliociri Misaeli to secure a loan of 20,000,000/= which we could share equally thereafter. Following the meeting I then proceeded to prepare the power of attorney on 20/03/2008 and the loan was secured.....It then transpired that Mr. Aliociri Misaeli failed to make good this agreement forcing me to take action against him.....He forcefully did give me shs. 4,000,000/= (four million shillings) through the court.....

By that letter, the plaintiff made an admission of having received the sum claimed by the second defendant, not as part of a separate transaction, but as a portion of the money lent by the first defendant to the second defendant. Under Order 13 rule 6 of *The Civil Procedure Rules,* the court is empowered to enter judgment on admission at any stage of a suit, where an admission of facts has been made, either on the pleadings or otherwise.

It is a settled principle that a judgment on admission is not a matter of right but rather a matter of discretion of a Court. To justify a judgment of this nature, the admission should be unambiguous, clear, unequivocal and positive. Where the alleged admission is not clear and specific, it may not be appropriate to take recourse under the provision. In *Cassam v. Sachania [1982] KLR 191,* it was held that; "the judge's discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the Plaintiff to judgment." Furthermore, in *Industrial and Commercial Development Corporation v. Daber Enterprises Ltd, [2000] 1 EA 75* and *Continental Butchery Ltd v. Ndhiwa, [1989] KLR 573*, the Court of Appeal of Kenya stated that the purpose of a judgment on admission is to enable a plaintiff to obtain a quick judgement where there is plainly no defence to the claims.

To justify such a judgment, the matter must be plain and obvious. Therefore unless the admission is clear, unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable right of a defendant to contest the claim. In the instant case, I find the plaintiff's admission clear, unambiguous and unconditional justifying a judgment in favour of the second defendant against the plaintiff on the counterclaim in the sum of shs. 4,000,000/= and it is accordingly entered.

The normal measure of damages in cases of belated repayments of money is by way of interest which the money would attract during the period of breach, taking the rates of interest and inflation into account (see *Sowah v. Bank for Housing & Construction [1982-83] 2 GLR, 1324*). I have therefore applied a rate of interest of 15% per annum, as the measure of profit which the money would have attracted during the period of breach, i.e. from 23rd June, 2008 to-date (nearly

ten years), as general damages to be awarded to the plaintiff. I therefore find this to be shs 600,000/= per annum. When multiplied by the rounded off ten years of default, the result is shs. 6,00,000/= which is herby awarded as general damages**.**

Under section 26 (1) of *The Civil Procedure Act* where interest was not agreed upon by the parties, Court should award interest that is just and reasonable. In determining a just and reasonable rate, courts take into account "the ever rising inflation and drastic depreciation of the currency. A Plaintiff is entitled to such rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any further economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due (see *Mohanlal Kakubhai Radia v. Warid Telecom Ltd, H. C. Civil Suit No. 234 of 2011* and *Kinyera v. The Management Committee of Laroo Boarding Primary School, H. C. Civil Suit No. 099 of 2013*). Consequently, the award of general and special damages shall carry interest at the rate of 8% per annum from the date of judgment until payment in full.

In the final result the suit is dismissed with costs to the first and second defendants and Judgment is entered on the counterclaim in favour of the second defendant against the plaintiff in the following terms;-

a) shs. 4,000,000/= as the principal sum owed.
b) shs. 6,00,000**/=** general damages.
c) Interest on the award in (a) and (b) above at the rate of 8% per annum from the date of judgment until payment in full.
d) The costs of the counterclaim.

Dated at Arua this 9th day of April, 2018

……..
Stephen Mubiru
Judge,
9th April, 2018.