

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT LIRA**  
**CIVIL APPEAL NO.004 OF 20017**  
**(ARISING FROM CIVIL SUIT NO. 132/10)**

**EQUITY BANK UGANDA LTD.....APPELLANT**

**VERSUS**

**ACHOLA LYDIA.....RESPONDENT**

**JUDGMENT**

This Appeal arises from the decision of the chief magistrate court of sitting at Lira, in civil Suit No. 132 of 2010 by his worship Kaggwa John Francis, which was delivered on the 15<sup>th</sup> April 2015 in which the trial court held that the Appellant/defendant is liable for the negligence of the 2 Defendant who was their agent whom they employed to recover the loan whether or not he followed their instructions.

**The brief facts**

The Appellant Bank on the 26<sup>th</sup> June 2009 granted a loan of UGX 4,000,000/= to the Respondent to be paid in 12 equal installments of UGX 426,300/= commencing on the 26<sup>th</sup> July 2009. The security was unregistered interest (Kibanja) on the land situate at Ober Entebbe Village, Ober Parish, Ojwina Division, Lira District. The sale agreement was deposited with the appellant Bank as security. These terms were reduced into a written agreement.

The Respondent defaulted and interest accumulated such that on 24<sup>th</sup> March 2010, the Appellant demanded for the payment of **UGX. 900,000/=** from the Respondent. The Appellant demanded instructed an auctioneer, majimoto Auctioneers to recover its loan in a letter dated 15<sup>th</sup> April 2010. The Respondent made the first repayment of the outstanding balance of **UGX. 500,000/=** with Equity Bank dated 30<sup>th</sup> June 2010. The installment of **UGX 400,000/=** was made with the Appellant Bank on the 22<sup>nd</sup> July 2010, and all these payment are not in contention. The

Auctioneer went ahead with the recovery process and the Respondent property was sold off when she had already cleared the loan. The Respondent sued in Civil Suit No. 132/2010 and was awarded **UGX.15.058.335/=** as compensation and **UGX. 5.000.000/=** for damages in addition to costs hence this appeal.

**The grounds of appeal were set out as follows:**

1. The learned Chief magistrate erred in law and fact when he held that M/s Majimoto Gov. Auctioneers and bailiffs was the agent employed by the Appellant Bank and not an independent contractor thereby breaching a wrong decision.
2. The learned chief magistrate erred in law and in fact when he held the Appellant Bank liable for the negligence acts of M/S Majimotto Gov. Auctioneers and Bailiffs who he states was an agent employed by the Appellant Bank.
3. The learned chief magistrate erred in law and in fact in awarding compensation to the respondent of **UGX 15. 058.335/=** as value of the land without a proper legal and assessment of the same.
4. The learned chief magistrate erred in law when he failed to adequately evaluate the evidence on record as a whole thereby reaching a wrong decision.
5. The learned magistrate Grade one erred in law and in fact when he awarded general damages of **UGX 5.000.000/=** without a proper legal and factual assessment of the same.

The appellant prayed that appeal be allowed, the judgment and Decree be set aside, and the Respondent suit be dismissed against the Appellant with cost.

**Representation:**

M/S Namboyo Rehema represented the Appellant. The respondent was represented by Mr. Omara Innocent. Both parties filed written submissions and there was a rejoinder on court record.

After a careful perusal of the pleadings and the grounds of appeal, I decided to deal with this appeal by first deciding on the law governing the transaction in issue. I

will later deal with the matters of compensation and damages. In answering the above, all the grounds of appeal will be dealt with.

### **The law governing the transaction in issue.**

The appellant is a limited liability company trading under the name of Equity Bank Uganda. It is into the business of taking deposits and giving out credits.

Equity Bank Uganda Limited a lender and Achola Lydia a borrower entered into an arrangement whereby the appellant advanced a loan of **UGX 4.000.000/=** to the Respondent on the 26<sup>th</sup> June, 2009 as in Exh. 1<sup>st</sup> Def B. the term of the loan agreement were reduced in writing, and a chattel mortgage deed was executed dated 26<sup>th</sup> June, 2009 as Exh. 1<sup>st</sup> Def. A.

The appellant submitted that when the Respondent/Plaintiff failed to heed to the demand, the 1<sup>st</sup> defendant/Appellant bank contracted the 2<sup>nd</sup> Defendant to collect or recover money from various defaulting customers, the plaintiff/Respondent inclusive as per Exh 1<sup>st</sup> Def 1. The appellant also obtained spousal consent of a one Juk George dated 24<sup>th</sup> June, 2009 as per Exh. 1<sup>st</sup> Def. E and F. the sale agreement was deposited in with the appellant Bank as security as required by the mortgage Act for the creation of an equitable mortgage.

Next is the default of per day of default and **UGX 70.000/=** for any cheque by the borrower that is stopped from payment. The loan period of a maximum of 12 equal installments of **UGX 426,300/=** commencing on the 26<sup>th</sup> July 2009. The security was unregistered interest (kibanja) on the land situate at Ober Entebbe village, Ober Parish, Ojwina Division, Lira District. An agreement of sale by the original owner was deposited in with the appellant Bank as security. A 'spousal consent' was attached thereto, signed by Nelson Ojok Ojara as required Mortgage Act was also attached.

There are receipts of payment attached of **UGX 500.000/=** and **400.000/=** with the appellant bank by the respondent dated 30<sup>th</sup> June 2010 and the last installment of **UGX 400.000/=** was made with the appellant Bank on the 22<sup>nd</sup> July 2010. From the reading of the above the transaction is an informal mortgage and the Act will not apply to it on account of non-registration. The contracts Act, common law and the law Equity are applicable.

## Submission of counsel

Counsel for the appellant chose to argue grounds 1 and 2 together & grounds 3 and 5 together. Ground 4 was argued alone in the manner in which it is framed.

Grounds 1 & 2:

1. **The learned chief magistrate erred in law and fact when he held that M/S majimoto Gov. Auctioneers and bailiffs was the agent employment was the employed by the Appellant bank and not an independent contractor thereby reaching a wrong decision.**
2. **The learned chief magistrate erred in law and in fact when he held the Appellant Bank liable for the negligence acts of M?S MajimotoGov. Auctioneers and Bailiffs who he states was an agent employed by the Appellant bank.**

The appellant submitted that when the plaintiff failed to heed to the demand, the 1<sup>st</sup> defendant Bank contracted the 2<sup>nd</sup> Defendant to collect/ recover money from the various customers, the plaintiff inclusive. Those instructions were to be executed within 45 days. Counsel added that the 2<sup>nd</sup> defendant failed to recover the money within the stipulated time. He confirmed that the Respondent subsequently paid the demanded sum in 2 installments; **UGX 500,000/=** on the 30<sup>th</sup> June, 2010 and **UGX 400.000/=** on the 22<sup>nd</sup> July, 2010 as attached Exh. 1<sup>st</sup> Def D & E.

Counsel for the applicant further submitted that on the 22<sup>nd</sup> July 2010, the same day the last installment was paid by the plaintiff in discharging her obligations, the 2<sup>nd</sup> Defendant without initiating the requisite steps before sale; such as demand, valuation and advertising, and without further instructions sold the respondent's land to the 3<sup>rd</sup> defendant and subsequently evicted her. The respondent then filed the Suit challenging the sale of her land and eviction and trial chief magistrate ruled in favour of the plaintiff /Respondent hence this appeal.

Counsel stated the duty of the first appellate court and invited court to re-evaluate the evidence on record as a whole and come with its own findings and facts. **See: PETERS VERSUS POST LIMITED [1958]1 EA 424.**

Counsel decided to argued ground 1 & 2 together and 3 & 5 together while ground 4 was argued alone in the order in which they appear;

## **Grounds 1&2:**

- 1. The learned chief magistrate erred in law and fact when he held that M/S Majimoto Gov. Auctioneers and Bailiffs was the agent employed by the Appellant Bank and not an independent contractor thereby reaching a wrong decision .**
- 2. The learned chief magistrate erred in law and and in fact when he held the appellant Bank liable for negligence act of acts of M/S Majimoto Gov. Auctioneers and Bailiffs who he states was an agent employed by the appellant bank.**

Counsel referred to the judgment of lower court in page 37-40 of the record of appeal where the trial Chief Magistrate stated that-

***“I don’t believe in the argument advanced by counsel for the 1<sup>st</sup> defendant that the 2<sup>nd</sup> defendant was not an agent or servant of the 1<sup>st</sup> defendant but an independent contractor for whose act they had no control. The 2<sup>nd</sup> defendant was contracted to perform and integral part of their 1<sup>st</sup> defendant’s core function of loan recovery and on the contrary an independent contractor would be a person or firm employed to render works and services like constructions and maintenance of buildings... upon whose action the 1<sup>st</sup> defendant would have no control .hence if a debris fell on passersby from the banks building, the bank will not be held liable. I do hold that the two scenarios are defiant and different and maintain that the 2<sup>nd</sup> defendant was an agent of the 1<sup>st</sup> defendant and not an independent contractor.....I find that the 1<sup>st</sup> defendant is liable for the negligence of the 2<sup>nd</sup> defendant who was their agent whom they employed to recover the loan whether or not he followed their instructions.”***

He submitted that the learned Chief magistrate found negligence on the part of the 2<sup>nd</sup> defendant, which he visited onto the Appellant. The negligence was neither pleaded nor proved as required by law. He cited Justice Tsekooko JSC as he then was in the case of Tororo Cement Company Limited versus Frokina Interernational Limited that:-

***“...Parties of negligence are an important aspect of any party’s case, and therefore, it is important that particulars of negligence should be pleaded aerly so as to assist in framing issues as well as in avoiding surprises which are bound***

***to happen if particulars of negligence are merely introduced as an intrusion during trial at the time evidence is adduced. A party must know the species of negligence which the opposite party seeks to rely on.”***

He submitted that he learned magistrate was bound by the above authority. He wrongly introduced the aspect of negligence in the case without any of the parties pleading and proving it, and wrongly found the 2<sup>nd</sup> Defendant liable in negligence and visited the same onto the 1<sup>st</sup> defendant. Counsel concluded that the decision therefore ought to be set aside as it is not consonant with the law.

With regard to the 2<sup>nd</sup> defendant being an independent contractor, counsel submitted that the sole test applied by learned Chief Magistrate is that the work performed by the 2<sup>nd</sup> defendant formed an integral part of the appellant’s core function of loan recovery is inclusive. He argued that other tests have to be looked at in union in order to establish the nature of the relationship between the appellant and the 2<sup>nd</sup> Defendant.

Counsel went on to define an independent contractor using the Black’s Law Dictionary, 2<sup>nd</sup> Edn. To mean a person who is doing an independent trade, business or profession in which they offer services to the public. The person who hires an independent contractor for his services can only direct the result of work, but not the ways and methods of getting the results.

Counsel submitted that the traditional tests of determining whether a person is an independent contractor or not is the control test. Counsel added that S. 145 of the contracts act states that “an agent shall conduct the business of the principal according to the directions given by the principal. Therefore, if the principal does not tell the employee how to do the work, the employee is an independent contractor and not an agent.

Counsel cited case of ***GARRARD V SOUTHELY & CO.AND ANOTHER DAVEY ESTATES LTD (1952) 1 ALL ER 597 at 599***, Where Lord Parker quoted the statement of lord porter in the case ***MERSEY DOCKS & HARBOUR BOARD V COGGINS & GRIFFITH (LIVERPOOL), Ltd*** as follows;

“...but among the many tests suggested, the most satisfactory by which to ascertain who is the employer at any particular time is to ask who is entitled to tell the

employee the way in which he is to do the work upon which he is engaged. If some other than the general employee's negligence. But it is not enough that the task to be performed should be under his control but he must control the method of performing it". (Emphasis added).

Counsel added that in the instant appeal before court, Exhibit "1<sup>st</sup> Defendant I" on page 72 record of appeal is a letter upon which the 2<sup>nd</sup> defendant received instructions to recover money from various debtors, the respondent inclusive. He argued that the document does not in any way set out the method of doing the work.

He submitted that recovery of a debt takes various forms; including formal demands, law Suits, and foreclosure of the right of redemption among others. He added that none of these was dictated by the Appellant. He concludes that the 2<sup>nd</sup> defendant therefore had the liberty to choose the method of executing the instructions and deliver results to the appellant.

Counsel referred to the evidence of the Appellant's witness in paragraph 11 of the witness statement on page 26 of record of appeal that the 2<sup>nd</sup> Defendant could employ its own methods in executing the appellant's instructions, without any control from the appellant, and which evidence was never challenged and there taken as truthful. He observed that with the mentioned facts, the control test is not passed.

Counsel's submission was that the 2<sup>nd</sup> test is the integration test. The integration test is done to find out whether, if a person who is doing the work and he does is integral or component to the business or the organization, then he is an independent contractor.

Counsel argued recovery money is not an integral component to the business of banking but it is just an accessory to that business. He submitted that banking business involves taking deposits and giving out credits. Giving out credit is integral to the Appellant's business and it cannot be outsourced or assigned. A bank cannot contract a party to give out loans on its behalf. Counsel further argued that this is explained by the stringent conditions set forth in the financial Institutions Act, 2004. However a bank can contract a party to recover debts on its

behalf. This clearly illustrates that recovering of money is an accessory to the Appellants business and that is why it was out sourced.

Counsel relied on the case of **SWEENEY V BOYLAND NOMINEES PTY (2006) 227 ALR 46** where **S** was injured when a refrigerator door at the service station fell off and hit his head. Earlier on **B** had sent **C** to repair the door and it was not disputed that **C** was negligent, which resulted into injury to **S**. the nature of **B**'s engagement of **C** was the central issue in the case. **B** had other employees to do the same work as **C** would do but **C** would only be engaged when the other employees were fully occupied. In the reports of **B**, **C** would be referred to as "our mechanic" and authorized him to collect the amount due when the repairs were complete.

The new South Wales of Appeal held that **C** was an independent contractor because: **B** did not exercise control over **C**; there was no mutuality of obligations to provide and accept work; the work was carried out under **C**'s own name; **C** provided his own equipment and tools and sometimes bought his spare parts; unlike **B**'s employees, **C** never used to wear **B**'s uniform, **B** paid **C** on a piece work basis; and **C** provided his own insurance and superannuation.

Counsel submitted that Kirby J tried to refer to **C** as a "preventative agent" and reasoned that although **C** was an independent contractor, he carried out his activities representing **B**, rendering him vicariously liable for his wrong-doing. This was rejected by the majority of his colleagues, and it does not aid the plaintiff in this case.

He submitted that when the fact and holding of the case are put in the perspective of the instant case, we can only conclude that the 2<sup>nd</sup> defendant was an independent contractor and the first defendant cannot be liable for his wrong-doing. Counsel invited court to uphold the submission and allow grounds 1&2 of this appeal.

It was counsel submission that in the event that court holds that the 2<sup>nd</sup> defendant was not an independent contractor, their submission that the 2<sup>nd</sup> defendant was on a frolic at the material time of the course of action. He added that the 2<sup>nd</sup> Defendant's actions were done long after the period stipulated in Exh. 1<sup>st</sup> Def. 1, term and condition (v1) of that documents provided that the instructions given were to be executed within 45 days. The instructions were issued on the 15<sup>th</sup> April, 2010 while



on 30<sup>th</sup> July, 2010, the 2<sup>nd</sup> defendant evicted the respondent. He added that the actions of the 2<sup>nd</sup> respondent were clearly done outside the 45 days set in the letter of instructions. Further that any relationship between the 1<sup>st</sup> and 2<sup>nd</sup> defendant and the Appellant ceased after the expiration of 45 days. To this extend, the 2<sup>nd</sup> defendant therefore was on a frolic.

Counsel finally emphasized that it is trite law that a principal cannot be held liable for actions of agent when he was on a frolic of his own.

### **Respondent's Reply:**

In reply counsel for the Respondent submitted that the issue of negligence of the auctioneer of bailiffs not arises for many reasons. Counsel Omara submitted that the bailiff opted not to file an answer to the charge and the judgment was entered against them ex parte. He added that the Respondent's complaint was clear to them.

He submitted further that the Appellant in its written statement of defence itself at paragraph 4 (a)-(g), 5 all admit that its agent was wrong to sell the property. The way it was sold was clearly negligent as a fact.

Counsel added that, the Appellants only witness, one Opolot Emmanuel testified in his sworn statement and at paragraphs 5, 8, 9, 10, 11, 12 and 13 clearly shows that the auctioneer appointed by the Appellants was negligent selling the property of the Respondent when clearly she has paid off her dues.

Counsel Omara added that there is no indication that the bank informed the 2<sup>nd</sup> defendant, the bailiff he had appointed to recover money from the respondent that the money loan had been cleared by the Respondent.

In counsel opinion, no ground exists to fault the magistrate for holding that the bailiff was negligent. It is a correct finding of fact and from the Appellellant's own evidence.

In regard to submission that the trial magistrate was wrong to hold that the 2<sup>nd</sup> defendant, the bailiff or auctioneer firm was an agent of the Appellant, counsel submitted that the decision was a true evaluation of what transpired in regard to the sale of the respondent's land.

Counsel cited the contracts Act 2010 in support of this and added that while the Act makes no reference to or defines what is known in common law as independent contractors which the appellant counsel is laboring to claim the 2<sup>nd</sup> defendant was, the Act makes an emphatic and clear definition of who an agent is and how it is created.

Counsel submitted that **Section 118 of the contracts Act, 2010** to the effect that an agent is defined to mean a person employed by a principal to do any act for that principal or to represent a principal in dealing with a third party. That the section further goes ahead to define a principal to mean a person who employs an agent to do any act for him or her to represent him or her in dealing with a third person.

Further that under **Section 112 of the Act**, the appointment of an agent may be express appointment in writing or oral statement or it may be inferred from the circumstances of each case. Counsel observed that it is admitted by the Appellant that he instructed the second defendant, a bailiff or auctioneer to recover its money from the respondent (see: paragraph 7 & 8 of the Emmanuel Opolot witness Statement). The reality of the instructions to the bailiff from the Appellant strongly indicates the appointment of bailiff. There is clear evidence that he was working for the bank make him an agent of the bank as opposed to working for the bank which could suggest him being an independent contractor. He relied on exhibit def. 1. Counsel submitted that there is no other document brought on court record to indicate any other relationship or special relationship between the appellant and the 2<sup>nd</sup> appellant except the single document dated 15/04/2010

Counsel Omara submitted that the letter construed in its ordinary and plain meaning can only mean the appointment of the 2<sup>nd</sup> defendant was an agent of the Appellant for which the Appellant is liable. He added there is great wealth of authority on liability of the principal for acts of his agent. Further that there is nothing to indicate that the Appellant ought to be excused. He observed that at the time the property was sold the respondent had paid her dues. Mr. Omara wondered whether there was communication between the bailiff and the Appellant who held the security of the respondent and had placed it in the possession of the bailiff for purposes of sale for recovery. Counsel submitted that the Appellants submission that 2<sup>nd</sup> defendant was an independent contractor is empty and unsubstantiated.

What is clear is that the constituted the 2<sup>nd</sup> defendant as its 2<sup>nd</sup> defendant as its agent to recover money due from the respondent and others on its behalf.

With regards to argument of the control or supervision test submitted, counsel submitted that there is clear evidence from the instructions that it was to be executed under strict terms of the bank including the issuing of guidelines on how the firm would access the defaulting client as in DE1. Counsel observed that clearly the bank was in close control and supervision of the whole recovery process so much so that even the money recovery could only be directed onto the bank account. Essentially, though it was a recovery instruction, the bailiff was authorized to receive any of the recovery. He concluded that there was nothing to support the suggestion of independent contractor.

### **Determination of grounds 1 & 2.**

I agree with the submission of counsel for the Respondent that an agent means a person employed by the principal to do any act for the principal or to represent the principal in dealing with the 3<sup>rd</sup> party. Section 118 of the contracts Act defines a principal to mean a person who employs an agent to do any act for him or her or to represent him or her in dealing with 3<sup>rd</sup> party.

Practically, an agent has two main functions; first to make contracts on behalf of the principal and second to dispose of the principal's property. It is important to distinguish the legal conception of agency from its commercial understanding. Legally, an agent is a person who acts on behalf of another in his dealings with third parties. Commercially, a 'sole agent' may simply be a person who is given the sole selling rights by a particular manufacturer. When such a person contracts, he does so as a principal.

There is also need to distinguish an agent from other relationships in a fiduciary relationship. The distinction between an agent on one hand and an independent contractor on the other hand is one of function. Agents are employed to make contracts to dispose of property but independent contractors are employed for other tasks.

An independent contractor renders services to his employer in the course of an independent occupation or calling. He contracts with his employer only as to

results to be achieved not to the means and skill and is entirely independent of control and supervision of his employer. **See: Haji Khamisha juma Essak V high commissioner for transport, 20 K.L.R. 1 (Kenya) where it was held that-**

***“The court dismissed the plaintiff’s claim and took into account of facts that they were put into the funds by the plaintiff to pay the wharfage charges, they were not the owner of the goods; they were under a duty for which remuneration was payable to clear the plaintiffs goods and to hand them over to the plaintiff. Further that, the fact that they did similar work for others at the same time did not make them an independent contractor.”***

It is also important to know the capacity to appoint agents. Note that companies can be appointed as agents of individuals or of other companies. No formal formalities are required to achieve this end. **See: in Lwajali Coffee growers Ltd. V Leslie and Anderson (E.A) Ltd, Makenzie and O’ Neil 1965 (1) A.L.R Comm. 323.** Where the plaintiff company had appointed the first defendant company as an agent for selling coffee.

The next item to consider is the agent’s authority. The authority of agent may arise in many instances: by express authority; through implied authority; through usual authority and by apparent or ostensible authority among others.

I will particularly address the expression usual authority. First, it may mean implied or incidental authority. Second it may refer to cases where an agent has apparent authority because he has been placed by his principal in a situation in which he would have had incidental authority if this has not been expressly negative by instructions given to him by the principal and not communicated to the third party. Third it may refer to a situation where the principal is bound by the agent’s contracts even though there is no express, implied or apparent authority.

Let me now examine particular instances in which an auctioneer agent is regarded as having usual authority of his principal to do an Act. An auctioneer is usually given instructions to sell certain items. As a result, by the application of the doctrine of usual authority of has authority to sign a memorandum of the contract of sale. Secondly, an auctioneer is deemed to be an agent of the purchaser and the vender and for the purpose of signing the memorandum of contract of sale.

Thirdly, the power to sign extends to a licensed auctioneer employed by the auctioneer in question. **See: Wilson V Pike [1948] 2 ALLE.R.265.**

Determining the nature of the work relationship between parties is normally said to be a question of mixed fact and law, although where the discovery of the correct status depends on the construction of document, it may be a question of law. **See. Davis v presbyterian church (1986) 1 WLR 323** where it was said that the evaluation of the factual circumstances in which the work is performed is a question of fact to be determine by the trial court. I agree with the submission of counsel for the Appellant that where the contract is for service, this is an employer-independent contractor relationship and the employer is not vicariously liable for the torts of the other.

I should also point out that no single test may establish this relationship but rather a combination of them. The traditional method of distinguishing an agent from independent contractor is the degree and right of control. It should be noted that if the employer only determine “what” was to be done rather than “how” it was to be done, then the person working for him would be an independent contractor. **In the case of Honey will and stein Ltd vs Larkin Brothers Ltd (1934) KL 191 Slesser J** expressed this idea as follows:

***“The determination whether the actual wrong doer is a servant or agent on one hand or an independent contractor on the other depends on whether or not employer not only determines what is to be done, but retains the control of the actual performance, in which case the doer is a servant or agent; but if the employer while prescribing the work to be done, leaves the manner of doing it to the control of the doer, the latter is an independent contractor.”***

Looking at the agreement which was signed by Equity bank and the auctioneer, in my humble opinion, it is an agreement which made the 2<sup>nd</sup> defendant an agent of the 1<sup>st</sup> Defendant. The agreement marked 1<sup>st</sup> D 1, dated 15<sup>th</sup> April 2010 provides the terms and conditions which the 2<sup>nd</sup> defendant were to recover the outstanding debts to include; the execution was to be done in accordance to acceptable standards and the retainer agreement between the 2<sup>nd</sup> defendant and the 1<sup>st</sup> defendant; it uses the words “contact the branch manager who will give you guidelines as to how to access the defaulting clients.” It mention “you will recover

your professional fees in accordance with the retainer agreement.” It provides that the 2<sup>nd</sup> defendant shall indemnify Equity Bank Uganda Limited against any liability arising from your improper execution of these instructions. Furthermore, that all payments by the defaulting client must be deposited with equity bank Uganda limited. Finally, it provides for 45 days of execution. In my opinion, this is not a case of an independent contractor agreement with some features of service agreement several peculiar features appropriate to the employment of the 2<sup>nd</sup> defendant as an agent.

The contract agreement makes mention of the word “retainer” my understanding is that retainers only apply to contractors not to employees or agents. If one is an employee, the employer cannot simply put him/her on a retainer without first legally terminating the employment. In such a case, a contractor typically enters into a contract for service, working to a pre-agreed timeline. Generally speaking, a contractor has fewer obligation and restrictions in workplace compared to an agent and employee.

However, in the instant case, the 2<sup>nd</sup> defendant’s contract with the 1<sup>st</sup> defendant on record does not qualify the 2<sup>nd</sup> defendant literary to be an independent contractor in as much as the employer had control over the recovery process, and in my opinion it explains why the 1<sup>st</sup> defendant was reluctant in giving / finding any report from / to the 2<sup>nd</sup> defendant about the recovery process for the obvious reason that they had control over the money being recovered and were fully updated by themselves since all payments from the defaulting clients were to be made to the bank. In my view that was nothing else than a check and balance on the work of the 2<sup>nd</sup> defendant.

In page 5, line 5 of the judgment, on page 29 records of appeal, the trial magistrate observed “he acted negligently by advertising another customer’s property.” This is not disputed by the 1<sup>st</sup> defendant elsewhere and automatically the 1<sup>st</sup> defendant remedy is to invoke paragraph (iv) of the terms and conditions given to the 2<sup>nd</sup> defendant. The paragraph reads “you shall indemnify equity bank Uganda limited against any liability arising from your improper execution. This term of employment with that of the contract of independent contractor. My understanding is that independent contractors are liable to 3<sup>rd</sup> parties for any tort on their part and not the employer.

In the instant case, parties own characterization is in issue. In a situation where several features point to self-employed status or otherwise, account will be taken of how the parties themselves decided to characterize their relationship. Thus in **Massey v Crown life Insurance Company Ltd [1978] 1676** on the question of whether he was an employee or not, it was held that, in the circumstances, the parties own classification of their relationship was determinative. According to Lord Denning, “provided that their relationship is ambiguous and is capable of being one or the other, then the parties can remove the ambiguity by the very agreement itself which they make with one another. The agreement then becomes the most important material from which to gather the true legal relationship between them. Court must look at the realities of the situation to determine the proper relationship between the parties.”

In the instant case, the Appellant in its written statement of defence itself at paragraph 4 (a)-(g), 5 all admit that its agent was wrong to sell the property. The way it was sold was clearly negligent as a fact. I am aware that such self-classification is only decisive in relatively evenly balanced situation. The law is that parties on their own cannot alter the truth of that relationship by putting a different label upon them. **See: Massey case (1978) 1 WLR 679. As Carril J** put it in the *Re Sunday Tribune Ltd*, the court must look at realities of the situation to determine the true relationship.

I have applied a number of tests to arrive at my decision that the proper construction of the contractual document between 1<sup>st</sup> and 2<sup>nd</sup> defendant clearly points to the fact that the disputed relationship by the Appellant is as correctly determine by the trial magistrate.

Even the argument by the Respondent that the 2<sup>nd</sup> defendant’s work although done for the business is one not integrated into it but is only accessory to it, in my opinion does not stand. In my understanding, the banks’ major duty to its customer is to lend money and which money must be paid back through a process in order to enhance continuous lending to its customer. The recovery process begins gently on the date of the 1<sup>st</sup> installment till the completion of the principal sum and its interest. It is only when the client defaults in payments that the recovery process takes another dynamic trend. It would therefore be wrong to conclude that recovery is not an integral part of the banking system. I agree with the respondents

submission to the effect that courts have not spelt out in general terms what is meant by integration. More so the usefulness of this test is debatable and one judge has marked that “it raises more questions than I know how to answer.”

I therefore agree with the judgment of the lower court that the 2<sup>nd</sup> defendant was not an independent contractor basing on the close interpretation of the terms and conditions of instructions by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant in this particular case acted as an agent of the 1<sup>st</sup> defendant.

Counsel for the Respondent submitted that in the event that court holds that the 2<sup>nd</sup> defendant was not an independent contractor, their submission that the 2<sup>nd</sup> defendant was on a frolic at the material time of the course of action. He added that the 2<sup>nd</sup> defendant’s actions were long after the period stipulated in Exh. 1<sup>st</sup> Def. 1, term and condition (vi) of that documents provided that the instructions given were to be executed within 45 days.

My view on the issue of time is that the principle is liable for all acts of the agent which were within the authority usually codified to an agent of that character, notwithstanding limitations as between the principal and his agent put upon such authority. The 2<sup>nd</sup> defendant was acting within its authority. A secret limitation of such authority was useless where the agent was sued by a third party. Further still, the 1<sup>st</sup> defendant had given the 2<sup>nd</sup> defendant all document to act on his behalf. The essence of time was impliedly extended when the 1<sup>st</sup> defendant allowed the plaintiff to pay part of her outstanding balance after the expiry of the date stipulated in the agreement. This should have put the bank on notice to notify the 2<sup>nd</sup> defendant of the current position of its client which the bank did not do to the demise of its client property. For the above reasons, I therefore hold that the 2<sup>nd</sup> defendant was an agent of the 1<sup>st</sup> defendant as correctly found by the trial court and the act done by the 2<sup>nd</sup> defendant was within its authority.

### **In grounds 3, 4 & 5**

- 3. That the learned magistrate Grade one erred in law and in fact when he awarded compensation to the respondent of UGX 15,058,335/= as value of the land without a proper legal and factual assessment of the same;**



4. That the learned Chief Magistrate erred in law and fact when he failed to evaluate the evidence on record as a whole thereby reaching a wrong decision.
5. That the learned Magistrate grade one erred in law and in fact when he awarded general damages of UGX 5 Millions without a proper legal and factual assessment of the same.

Counsel submitted that the learned Magistrate in his judgment on page 26 line 39-40, of the record of appeal held that:

*“The plaintiff can only be compensated for the value of the property. I do order that the 1<sup>st</sup> defendant pays 15,053,335/= being value of the land with developments.....about general damages, its compensation for the damages, loss or injury he or she suffered. It is given discretion of court and intended to place the injured party in the same position in monetary terms as he would have been had the act not taken place. In my opinion believe general damages of 5,000,000/= shillings is appropriate considering the suffering and inconvenience caused to the plaintiff. The first defendant is ordered to pay general damages of 5,000,000/= to the plaintiff.”*

Counsel submitted in regard to special damages that the respondent pleaded various items of special damages in paragraph 8 of the plaint, including the sum UGX 15,948,338/=being the value of the damages property and premise.

Counsel submitted that the respondent never proved the said special damages at all. The respondent called three witnesses including her, and their testimonies were recorded on page 53-59 of the record of appeal. None of the witnesses attempted to adduce any evidence relating to the value of the damaged property and premises as pleaded in the plaint. In absence of such evidence, the learned magistrate nevertheless awarded special damages of UGX 15,948,338/=.

Counsel submitted that it was held by an order of Justice Oder JSC as he then was in the case of **Uganda Telecom Limited vs Tanzanite Corporation Civil Appeal No. 17 of 2004** that:-

**“According to Aiyar’s sale of good Act, “special damages” is that damage in fact caused by wrong. It is trite law that this form of damages cannot be recovered unless it has been specifically claimed and proved or unless the best suitable available particulars or details have for loss of profits, the normal measure of damages thus special damages must be specifically pleaded and proved.” This was not adhered to by the learned trial Magistrate and the thus reached a wrong decision.**

With regard to general damages, counsel argued that there was no basis upon which general damages of UGX 5,000,000/= was awarded to the respondent. Counsel submitted that the respondent in her testimony just attempted to refer to general damages at the end of her testimony in chief at page 54 of the record of appeal, last paragraph when she stated that;-

**“The manager then promised to give my land and compensate me for the damage, and pay me general damages and costs.”**

Counsel urged that statement does not in any way amount to evidence of damage suffered by the respondent. He cited the case of Bonham-Carter V Hyde Park Ltd 1948 64 T.L.R 177 where Sheridan J said that:

**“On the question of damages, I am left in an extremely unsatisfactory position. Plaintiff must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, through them at the head of court, saying, ‘this is what I have lost; I ask you to give me these damages.’ They have to prove it. The evidence in this case with regard to damages is extremely unsatisfactory.” (Emphasis added).**

Counsel finally submitted that there was no evidence in the instant appeal upon which the learned Magistrate based his decision to award damages of **UGX. 500,000/=**, and this was wrong. He added the trial court failed to evaluate the evidence and reached a decision. Further that such a decision ought to be set aside. Counsel prayed that court should allow grounds 3, 4 &5 of the appeal with costs.

**RESPONDENTS REPLY:**

In reply to ground 3, 4 & 5 on damages, counsel submitted that the court awarded fifteen million as compensation and five million as general damages. The facts of the case are that the respondent's property was sold off by an agent of the Appellant in the year 2010. Since then the respondent has not had enjoyment use or benefit of her property as a consequence of the appellant's wrong. He submitted that the Appellant's agent threw her out of the house in such a humiliating circumstance. The neighbor witnessed it and to date she has not been able to recover her losses.

In the case of **Karim Hirji vs Kakira Sugar Works Civil Appeal No. 84/2002**, The court of appeal in a unanimous decision held that the award of general damages shall not be interfered with on an appeal in the absence of guidance provided by the event of loss of property is the current market value of the compensation in the event of loss of property is the current market value of the property at the time of judgment.

Counsel urged that from the records and submissions of the appellant, there is no suggestion or indication of what would constitute a fair and adequate value of property to warrant court to interfere with the award made. The appellant has not been helpful to court to give guidance on the amount which can be said to be reasonable or just and fair. Counsel observed that in the circumstances there is no ground upon which to interfere with the trial court's decision as being an erroneous estimate.

Counsel submitted that the submitted that the subject matter is land within the municipality of Lira. He added that judgment in this case was delivered five years after it was sold as the respondent wallows in poverty. There is no justification for interfering with any of the awards.

Counsel submitted further in the case of **Fredrick Zaabwe v Orient Bank SCCA 4/2006**, the supreme court held that aggravated/compensatory damages are awarded to where the plaintiff suffered malice or arrogance and the damages is purely punitive. It went on to add that though in the case did not qualify for the award of exemplary damages, the appellant was in deed entitled to the award of enhanced aggravated or compensatory damages for the unwarranted damages for the unwarranted and wrongful conduct and apparent arrogant of the bank. Counsel

added that in the case of Fredrick Zaabwe, the bank had sold the property of the plaintiff wrongfully too to the detriment of the Appellant and the bank was ordered to pay for the purpose.

Counsel submitted that in the instant case, it is well over seven years since the property of the Appellant was wrongfully sold. He added that the court has power under **section 80 (1) of the CPA Cap 71 to-**

- a. Determine the case finally
- b. Remand the case
- c. Frame issues and refer them for trial
- d. Take additional evidences or require additional evidences or to order a new trial
- e. Or to be taken.

And for the avoidance of doubt, the court has all the powers of original jurisdiction. It can therefore act by confirming or varying the orders of the trial court. If the court is in doubt, it has power to remit the case back for determination of the appellant property wrongfully sold by appointing or directing the appointment of a valuer approved by it to determine the value of the property sold at the current market value at the time of judgment.

Counsel urged that the respondent has sought justice for the last seven years for a wrong visited upon her by the bank and its agent. She has incurred costs and peril of living without property. He prayed that the appeal be dismissed with costs under **section 27 of the civil procedure Act Cap. 71**. He emphasized that the appeal has been filed simply to defeat the end of justice.

In rejoinder, counsel for the appellant submitted that learned counsel for the respondent did not respond to the pertinent issues raised in the appellant counsel's submissions.

In regard to grounds 1 & 2; counsel submitted that the trial magistrate wrongly found negligence where the same was never pleaded or proved. In response, counsel for the respondent submits that since the 2<sup>nd</sup> defendant never defend the suit, the he admitted to the negligence. Counsel submitted that the respondents submission is no merits.

In trite law that despite the court entering ex-parte judgment in any matter, the plaintiff must still prove his/her claim to the required standards. The plaintiff was enjoined to plead, and more so to prove, the particulars of negligence. According to counsel, negligence is not inferred from the evidence of the parties like counsel for the respondent is trying to do by the statement in his submissions that “It is easy to decipher from the appellants own evidence.”

Counsel further **cited order 6 Rule 3** and argued that the authority of Tororo Cement is binding. He observed that the argument by counsel for the respondent is inconsistent with the law thus untenable and invites court to find that the learned trial magistrate wrongly found negligence on the part of the 2<sup>nd</sup> defendant which he later attributed to the Appellant.

Counsel maintained that the 2<sup>nd</sup> defendant was an independent contractor and argued that **S.118 of the contracts Act** relied on by counsel for the respondent to justify the 2<sup>nd</sup> defendant as an agent to mean a person employed by a principal to do any act for the principal or to represent the principal in dealing with a third person.

Counsel further submitted that the 2<sup>nd</sup> defendant was engaged by the bank to recover money but not to represent the bank in dealing with a third party. Recovery is an independent work that an auctioneer can carry out using his desired method of work and for remuneration. It’s not a mere representation in a transaction

Counsel for the respondent further argued that the appellant using phrase “On behalf” on the letter of instruction (Exhibit Def.1) insinuates an agent relationship. Counsel in his reply disagrees and added that the “phrase” is not conclusive determinant that the person instructed is an agent. It is common knowledge that whoever is instructed to do work, he/she does so, on behalf of the instructor/ employer. He reiterated his earlier prayer.

In reply to grounds 3, 4, & 5, counsel submitted that despite the plaintiff pleading the special damages of **UGX. 15,948,338/=** she never proved such damages. He urged that counsel for respondent failed to show that special damages were proved. Instead he asks court to grant what he refers to as “a fair and adequate value of the property.”

He submitted further that special damages are not discretionary and there is no room for a second thought by court on how much to award. He added that the respondents call for 'a fair value' is misconceived. Further that it is intrinsic for special damages to be specially pleaded and proved. He submitted that a litigant must prove what he pleaded, failure of which the whole claim for special damages collapses.

On that basis, counsel submitted that the award of **UGX 15,948,338** which court awarded as the value of the property in the absence of evidence to support the same ought to be set aside.

It was counsel submission in regard to general damages that no evidence was led to prove general damages. He added that damage suffered cannot be inferred from circumstances. It is counsel contention that if the plaintiff did not say that "I lost this" then where does court have authority to award general damages.

He submitted that counsel for the respondent is conceding defeat and prayed that this court remit the matter back to the lower court for determining the amount ought to be awarded in compensation to which they object. He urged that there was no misdirection in the hearing/trial of the case. The case was properly tried and determined. All the procedures were adhered to and no miscarriage of Justice occurred. He opined that referring the matter to the lower court will be giving the respondent an opportunity to tailor the patches in her case, and will set a bad precedent. Further that this court cannot take new evidence and the application ought to have been made after the respondent cross appealing which she did not do. He prayed for the appeal to be allowed with costs.

### **Determination of grounds 3, 4 & 5**

I have considered the submissions on both sides with regard to the combined grounds and the rejoinder as well. I have also considered the authorities cited by learned counsel. On perusal of the records, I find that the grounds touch on the evaluation of evidence in the lower court and whether the findings and conclusions of the lower court should be upheld or not.

It is trite law that the duty of the first appellate court is to re-appraise or re-evaluate the evidence of the trial court and subject it to close scrutiny. **The cases of D.R**

**Pandya Vs R [1975] E.A and Banco Arabe Espanol V Bank of Uganda SCCA No. 8 of 1998** are in point.

**Section 8 of the Mortgage Regulations 2012** provides for sale by public Auction to the effect that the subject matter is advertised after giving notice as per **S.26 of the Mortgage Act**. My understanding is that sub rule 4 of rule 8 makes it mandatory and gives a proper penalty for non-compliance to a tune of fine not exceeding 72 currency points or imprisonment not exceeding three years or both.

The advertisement in sub regulation 2 shall include a coloured picture of the mortgage property and specify; the time and place for sale, the time at which property may be viewed by the public and to take place only after the expiration of twenty one days.

Regulation 11 provides that before selling the property, the mortgage should value to ascertain the current market value and the forced sale value of the property. The valuation report shall contain the description of the property and the report shall not be made more than six months before the date of sale.

**Paragraph 6(9) (a) of the bank of Financial Consumer Protection Guidelines, 2011 it to effect that-**

- (a) Where a consumer is unable to repay a loan, financial services provider shall have the right take steps to recover the amount owing to it by the consumer.

*For purposes of paragraph 6(9), debt recovery should be transparent and assets to be sold off should have a fair value that is in line with the market rate.[Emphasis added]*

In the instant case, the 1<sup>st</sup> Defendant contracted the 2<sup>nd</sup> defendant to recover money from defaulted clients and the authorized person nevertheless was to comply with the above requirements before selling the property. The facts of the case are that the respondent's property was sold off by an agent of the appellant in the year 2010. The appellants only witness, one Opolot Emmanuel testified in his sworn statement and at paragraphs 5, 8, 9, 10, 11, 12, & 13 of the records of proceedings clearly shows that the auctioneer appointed by the appellants was negligent selling the property of the respondent when clearly she has paid off her dues. Such auction

by the 2<sup>nd</sup> respondent/Auctioneer is not minor and has effect on the right to life enshrined in the 1995 constitution of the Republic of Uganda.

My view of general damages is that it is based on the preposition that damages are only awarded to compensate the plaintiff. Therefore damages are based on loss to the plaintiff and not the gain to the defendant. Loss includes harm to the person or property of the plaintiff or any other injury to his economic position. They are by their nature non-financial losses, and compensation cannot be possibly calculated, it can only be evaluated on some basis. It is very obvious that when the respondent's property was sold; she underwent pain and suffering and there was loss of amenities.

The burden of proving the loss suffered is on the plaintiff. I agree with the position of the applicant that the plaintiff had alleged in her plaint but did not prove such loss. In the case of **Kaboli Sempa V Latif's Garage Ltd. HCCS642 of 1965 (Uganda)**, the plaintiff demanded the return of the car and special damages to recover the loss of profits he would have made when using the car. Court ordered the return of the car or its value but refuse the claim for special damages on the basis that the plaintiff had alleged but not proved such loss.

In the instant case, on page 10 of the judgment, paragraph 2 line 14, the trial judge had this to say:-

*“On the issue of remedies the plaintiff had prayed for order of restitution or restoration of the attached property. I am of the opinion that this one has been over taken by events as the property was sold to a third party. The plaintiff can only now be compensated for value of the property which was claimed as special damages. I do order for the 1<sup>st</sup> defendant to pay 15,058,335/= being the value of the land with developments as stated by witnesses PW2 and PW3.”*

My view on this is the award of 15,058,335/= was reasonable compensation for the current value of land within the municipality and the development therein.

I am aware that a court of law is by the constitution enjoined to ensure that adequate compensation are awarded to parties in civil litigation. I am also aware that the transaction being a judicial sale would only be complete if all the procedures were strictly adhered; which was not the case in the instant case.



I have not seen the valuation report of the land which sold by the 2<sup>nd</sup> defendant on behalf of the 1<sup>st</sup> defendant giving a fair assessment of the current market value of the land. The auctioneer should have done this before selling the land. I am equally conscious that such irregularity does not vitiate the agreement but entitled the aggrieved party to compensation. The respondent is therefore entitled to the above compensation for the value of the land at current market price and the value of development that was on the land.

Page 77 of the records of appeal provides for spousal consent toward the mortgage land measuring approximately 20.5 x 27, located in Lira Municipality. Since the transaction occurred on the 26<sup>th</sup> June 2009, and the breach occurred in 2010, and the plaintiff was evicted on 23 July that same year, the value of land within the municipality at that time can easily be ascertained. My view is that it is now five (5) years since the respondent lost her land and the value of land in 2010 is not the same as the value of land today. My opinion is that adequate compensation should be given to the respondent. The basic rule in assessment of the award is that the injured party should be placed in the same position as if the event of breach had not taken place.

Litigation must come to an end and this court is mandated with the inherent power to confirm or vary any award or maintain it except that such discretion should be exercised judiciously. I do order that the first defendant/appellant pay the sum of UGX 15,058,335/= being compensation for the value of the land and development as witnessed by PW2 and PW3. In the case of **Ronald Kasibante V Shell Uganda Ltd HCCS No. 542 of 2006** breach of contract was defined as;

***“The breaking of the obligation which a contract imposes confers a right of action for damages on the injured party.”***

In that case, the plaintiff was compensated for land equivalent to that which it had surrendered. As noted earlier in this judgment this was not met by the 1<sup>st</sup> defendant. It is trite law that damages are the direct probable consequences of the act complained of as noted in the case of **Storrs V. Hutchison (1905) AC 515**.

It was held in the case of **Assist (u) Ltd V Italian Asphalt & Haulage & Anor, HCC No. 1291 of 1999 at 35** that the consequences could be loss of profit, physical inconvenience, mental distress, pain and suffering. In the instant case,

because of the further encroachment by the 1<sup>st</sup> defendant on the plaintiff's land, and its eventual sale to a third party, it caused damage to the plaintiff's social welfare more so considering that she had used most of the money to service the loan. In the case of **Haji Asuman Mutekanya V Equator Growers (U) Ltd, SCCA No. 7 of 1995**, Oder JSC (R.I.P) held that with regard to proof, general damages in a breach of contract are what a court (or Jury) may award when the court cannot point out any measure by which they are to be assessed, except in the opinion and judgment of a reasonable man. This negatives the appellants submission in rejoinder that damage suffered cannot be inferred from circumstances.

Applying the principles to facts and circumstances of this particular case, taking into account the economic value of the properties involved and the time it has taken for the plaintiff to successfully pursue her rights to a logical conclusion, i.e., from 14<sup>th</sup> September, 2010, when it filed this action to 15/04/2015 and general inconvenience occasioned to her, I would maintain the figure of UGX 5,000,000/=, which was awarded by the trial court to be a fair and adequate amount as general damages, and I award the same to the plaintiff/respondent.

Much as the trial magistrate had granted interest at court rate, this was a commercial transaction and so I shall vary the interest and so the plaintiff is awarded an interest at a rate of 20% per annum on the amounts in (a) and (b) above from the date of filling the suit until payment in full as to when the period of judgment will disadvantage the respondent.

**(e) Costs.**

The general principle under **Section 27 (2) of the Civil Procedure Act (supra)** is that costs follow the event and a successful party should not be deprived of costs except for good reasons. In the instant case the plaintiff has succeeded in the entire case and is awarded costs of this suit in summary the plaintiff's claim is allowed in the following terms of the orders;

- (a) The plaintiff is awarded UGX 15,948,338/= as compensation for land surrendered and the development therein.**

**(b) The plaintiff is awarded UGX 5.000.000/= as general damages for the suffering and inconvenience occasioned by the 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant to the respondent/plaintiff's property.**

**(c) The amounts in (a) and (b) above shall attract an interest rate of 20% per annum from the date of filing the suit until payment in full.**

**(d) The plaintiff is awarded costs of this suit.**

I am therefore unable to disturb the findings and judgment of the lower court as it was arrived at after a proper evaluation of the evidence on record. The plaintiff proved their case to the required standard under the law.

However, the intention of the relationship created by the parties can be merely inferred from the documents that formed the terms and condition of the recovery process originated by 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant. This leaves the between the 1<sup>st</sup> and 2<sup>nd</sup> defendants is that of a principal and agent as correctly held by the learned trial magistrate. So, grounds No. 1,2,3,3 & 5 of appeal are hereby rejected.

Having rejected all the grounds of appeal, I hereby dismiss the appeal and uphold the judgment and orders of the lower court. Save for interest as directed.

I also award costs to the respondent.

Dated at Lira this 2<sup>nd</sup> day of April 2019

**HON. JUSTICE AJIJI ALEX MACKAY**

