THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

(CIVIL DIVISION)

CIVIL SUIT NO. 338 OF 2017

1. EXCELLENT ASSORTED MANUFACTURERS LTD

2. EPHRAIM NTAGANDA :: PLAINTIFFS

VERSUS

1. DFCU BANK LIMITED :::::::::::::: 1ST DEFENDANT/ COUNTERCLAIMANT

2. THE COMMISSIONER LAND REGISTRATION :::::::::::::: 2ND DEFENDANT

VERSUS

1. EXCELLENT ASSORTED MANUFACTURERS LTD

2. EPHRAIM NTAGANDA

3. MONICA UWANTEGE :::::::::::::::::::::::::::::::::: COUNTER DEFENDANTS

BEFORE: HON. JUSTICE BONIFACE WAMALA

JUDGMENT

Introduction

[1] This suit was brought by the Plaintiffs/1st and 2nd Counter Defendants against the 1st Defendant/Counter Claimant and the 2nd Defendant jointly and severally seeking various declarations and orders, general and punitive damages, interest and costs of the suit. Against the 1st Defendant, the Plaintiffs seek to protect their proprietary interest in the suit properties that form part of the collateral security; seek reliefs for breach of contract through irregular charges on their accounts, unclear/illegal and improper removal of money from their accounts, over charge of interest, illegal and unapplied sums; for a declaration that the intended sale of the suit properties is illegal, an order releasing the suit properties from any claims over the credit facilities, an order

directing the 1st Defendant to surrender the duplicate certificates of title for the suit properties to the Plaintiffs, general damages, interest and costs of the suit.

[2] As against the 2nd Defendant, the Plaintiffs seek for a declaration that the 1st Plaintiff has proprietary interest in the land comprised in **FRV 1352 Folio 5 Plot 302 Block 21 Land at Busega**, a declaration that the decision by the 2nd Defendant that the certificate of title to the above mentioned land was illegally issued and ought to be cancelled is null and void, for an order of a permanent injunction against cancellation of the said certificate of title, general and punitive damages, interest and costs of the suit.

Background and Brief Facts of the Plaintiffs' Case

[3] Sometime during the years 2011-2016, the Plaintiffs were customers of Crane Bank Ltd. At the time material to this suit, the 1st Defendant was a successor in title to Crane Bank Ltd (hereinafter to be referred to as the **"predecessor in title or the Bank"**). In Crane Bank Ltd, the Plaintiffs had operated various bank accounts and obtained different loan facilities using various properties as securities in addition to personal guarantees. In around January 2017, the assets and liabilities (including the Plaintiffs' loan portfolio) of Crane Bank were taken over by the 1st Defendant (DFCU Bank Limited). The 1st Defendant is being sued for its actions and omissions plus the actions and omissions of its predecessor and agents thereof in relation to the credit facilities and the suit property. The Plaintiffs aver that for facilities advanced and renewed by the 1st Defendant's predecessor between 2010 and 2016, the Plaintiffs provided joint collateral in properties described as **FRV 1352 Folio 5 Plot 302 Block 21, Busiro Block 333 Plot 978, Busiro Block 333 Plot 1506, Plot 75 Kampala Road (together with that plot of land situate between Plot 75 Kampala Road and Plot 20 Buganda Road) and Plot 81 Kampala Road (FRV 1279 Folio 19)** [hereinafter referred to as the **"suit properties"**].

[4] It is averred by the Plaintiffs that the 1st Defendant's predecessor on an annual basis drafted and asked the Plaintiffs to sign facility letters marked "Renewal" which the Plaintiffs signed believing that the Bank was acting in good faith. In the said facility letters, the Bank imposed various charges and debits which included, a charge of 1% as utilization fees; a discretional early repayment fee not exceeding 5%; utilization fees of between 0.50% and 1%; extortionate and irregular arrangement fees; overcharge of interest; unexplained legal fees; unaccounted for stamp duty charges. As a result of the above illegal and/or irregular charges, the Plaintiffs encountered numerous financial hardships which made the Plaintiffs to default on monthly instalments. The Plaintiffs sold the property comprised in Plot 81 Kampala Road (FRV 1279 Folio 19) and remitted the proceeds to the 1st Defendant's predecessor. Upon threats by the Bank of selling the rest of the collateral, the Plaintiffs sought to sell the collateral comprised in Plot 75 Kampala Road (FRV 1276 Folio 18), Busiro Block 333 Plots 1506 and 978 and FRV 1352 Folio 5 Plot 302 Block 21 for purpose of settling the loan obligations but was frustrated by the Bank and the 1st Defendant's statutory manager.

[5] On 19th April 2017, the 1st Defendant served upon the Plaintiffs default notices as a commencement of the security realization process. The Plaintiffs sought professional advice and established that the 1st Defendant's predecessor had at all times acted fraudulently, in bad faith, illegally and had occasioned financial hardship to the Plaintiffs. The Plaintiffs set out the various particulars of fraud and illegality.

[6] As against the 2nd Defendant, the Plaintiffs' claims were based on the property comprised in FRV 1352 Folio 5 Kibuga Block 21 Plot 302 at Busega; which was one of the mortgaged properties. Part of the said property was compulsorily acquired by the Government of Uganda through the Uganda National Roads Authority (UNRA) for road construction purposes. The 1st Plaintiff opted to settle the loan obligations to the 1st Defendant with part of the

compensatory monies assessed by UNRA totaling to UGX 18,128,977,441/= but owing to the delay by UNRA to effect the compensation, a dispute arose between the 1st Plaintiff and UNRA which was taken to court whereupon the 1st Plaintiff obtained judgement against UNRA. In a bid to avoid the consequences of the judgment, UNRA initiated a process with the 2nd Defendant herein to cancel the certificate of title to the property in issue. The 2nd Defendant by letter dated 13th February 2017 declared that the said certificate of title was issued illegally and ought to be cancelled. Despite protests by the 1st Plaintiff, the 2nd Defendant issued a Notice of Cancellation of the said certificate of title. It is maintained by the 1st Plaintiff that the conduct by the 2nd Defendant was illegal, particulars of which are set out in the plaint.

The Brief Facts of the Defence Case

[7] The 1st Defendant/Counter Claimant filed a Written Statement of Defence (WSD) together with a counterclaim on 26th May 2017 and an amended WSD with a counterclaim filed on 26th July 2017. In the amended WSD, the 1st Defendant denied the Plaintiffs' claims and stated that although it is admitted that the named suit properties constituted security for the credit facilities extended to the Plaintiffs by the 1st Defendant's predecessor, and that the 1st Defendant took over the assets and liabilities of Crane Bank Ltd, the rest of the claims by the Plaintiffs are denied. It is averred for the 1st Defendant that; the Plaintiffs are still indebted to the 1st Defendant in the sums stated in the certificates of balance annexed to the WSD and counterclaim; the facilities in the letters were temporary for 12 months and were renewable annually which term was agreed to by the Plaintiffs; each of the facility letter was independent with its own terms that were agreed to by the Plaintiffs; the amounts charged to the Plaintiffs were not irregular, extortionate, illegal or excessive as claimed and were charged in accordance with the Sanction Letters as per the agreement with the Plaintiffs.

[8] The 1st Defendant further stated that in breach of their contractual undertakings with Crane Bank Ltd, the Plaintiffs defaulted in repayment of the credit facilities prompting the 1st Defendant to take steps to recover the sums owed. It is averred that as at 18th May 2017, the Plaintiffs were still indebted to the 1st Defendant in the sums set out in the counterclaim. The 1st Defendant denied any conduct on its part or on part of the Statutory Manager intended to frustrate the attempts by the Plaintiffs to sell any of the collateral in order to pay back the outstanding monies. The 1st Defendant prayed for dismissal of the suit with costs.

[9] In the counterclaim, the 1st Defendant/ Counter Claimant claimed against the 1st Counter Defendant as principal and, jointly and severally, against the 2nd and 3rd Counter Defendants as guarantors, for the sum of USD 3,032,498.32 and UGX 19,891,947/= together with accrued interest, being sums due and owing under the various credit facilities granted by the Counter Claimant to the 1st Counter Defendant. The Counter Claimant also sought for a declaration that it is entitled to enforce the securities comprised in Busiro Block 333 Plots 978 and 1506 Land at Nabingo; and Plot 75 Kampala Road (together with that plot of land situate between Plot 75 Kampala Road and Plot 20 Buganda Road – FRV 1276 Folio 18); and costs of the counterclaim. As against the 2nd Counter Defendant as principal, and the 1st Counter Defendant as guarantor, the Counter Claimant sought for a sum of USD 1,146,390.15, USD 193.72 and UGX 12,437/= together with accrued interest, being sums due and owing under various facilities advanced by the Counter Claimant to the 2nd Counter Defendant; and for a declaration in the same terms as above stated.

[10] It is averred by the Counter Claimant that the Counter Defendants failed to make good on their loan obligations either as principals or guarantors despite notices and demands made by the Counter Claimant to that effect. As of 18th May 2017, the Counter Defendants' liability stood at the amounts stated

in the foregoing paragraph which the Counter Claimant seeks to recover as claimed in the counterclaim.

[11] The 2nd Defendant filed a WSD in which they denied the Plaintiffs' facts and particularly stated that the 2nd Defendant, in course of its duties, received communication concerning legality of the Plaintiffs' certificate of title in issue to which communication it was bound to act. It was stated that the reply made by the 2nd Defendant to the Uganda National Roads Authority (UNRA) did not amount to a declaration or decision that the title was cancelled but was an opinion about legality of the title. The 2nd Defendant issued the notice of cancellation and all communications in issue only after recognizing that an error was apparent on the register and ought to be corrected. The 2nd Defendant, therefore, acted in good faith when it issued the notice of cancellation. The notice was intended to give the 1st Plaintiff the forum to be heard as required by the relevant statute. It was prayed that the suit against the 2nd Defendant be dismissed with costs.

Reply to the Defence and the Counterclaim

[12] The Plaintiffs/ Counter Defendants filed a reply to the amended WSD and counterclaim; filed on 15th August 2017. I have taken the contents of the reply and the defence to the counterclaim into consideration.

Representation and Hearing

[13] At the hearing, the Plaintiffs/Counter Defendants were represented by **Mr. Joseph Kyazze, Ms. Jackline Natukunda,** and **Mr. William Were** while the 1st Defendant/Counter Claimant was represented by **Mr. William Kasozi** and the 2nd Defendant by **Mr. Moses Sekitto**.

[14] The parties' Counsel filed a joint scheduling memorandum (JSM) on 11th July 2017 which was adopted by the Court. In the JSM, the following facts were listed as agreed by all parties to the case;

a) The 1st Plaintiff was a customer of Crane Bank Ltd operating account numbers **02985031000010** (Loan EIB), **01983501001875** (Current Account Uganda Shillings) and **02983501000579** (Current Account USD).
b) The 2nd Plaintiff was a customer of Crane Bank Ltd operating account numbers **02984111000022** (Loan USD), **01983001002751** (Current Account Uganda Shillings) and **02983001002709** (Current Account USD).
c) The 1st Defendant took over the assets and liabilities of Crane Bank Ltd.
d) The 2nd Plaintiff obtained the following facilities from Crane Bank Ltd;
    i. Sanction Letter dated 14.04.2010 facility of UGX 1,500,000,000/= as a temporary overdraft for one month.
    ii. Sanction Letter dated 03.12.2010 facility of UGX 6,000,000,000/= (demand loan fresh) for 12 months.
    iii. Sanction Letter dated 08.09.2011 facility of UGX 1,000,000,000/= (demand loan fresh) for 12 months.
    iv. Sanction Letter dated 03.04.2012 facility of UGX 7,500,000,000/= (demand loan fresh) and UGX 1,500,000,000/= (demand overdraft renewal) for 12 months.
    v. Sanction Letter dated 29.03.2014 facilities of USD 2,800,000 (demand loan renewal) and USD 2,000,000 (demand loan fresh) for 12 months.
    vi. Sanction Letter dated 21.04.2015 facilities of USD 2,630,000 (demand loan renewal) and USD 1,692,000 (demand loan renewal) for 12 months.
    vii. Sanction Letter dated 21.04.2016 facility of USD 1,104,000 (demand loan renewal) for 12 months.
e) The 1st Plaintiff obtained the following facilities from Crane Bank Ltd;
    i. Sanction Letter dated 12.07.2013 facility of USD 3,895,200.
    ii. Sanction Letter dated 07.04.2014 facility of USD 1,300,000 (demand loan) for 12 months.

f) As security for the loans, the 1st Plaintiff mortgaged to Crane Bank Ltd the properties comprised in Plot 302 Kibuga Block 21 FRV 1352 Folio 5 at Busega Kampala; Busiro Plot 978 Block 333 Land at Nabingo; Plot 1506 Busiro Block 333 Land at Nabingo; Plot 75 Kampala Road (together with that plot of land situate between Plot 75 Kampala Road and Plot 20 Buganda Road Kampala FRV 1276 Folio 18); and Plot 81 Kampala Road FRV 1276 Folio 19.

g) As security for the loans, the 2nd Plaintiff mortgaged to Crane Bank Ltd the properties comprised in Plot 302 Kibuga Block 21 FRV 1352 Folio 5 at Busega Kampala; Busiro Plot 978 Block 333 Land at Nabingo; Plot 1506 Busiro Block 333 Land at Nabingo; Plot 75 Kampala Road (together with that plot of land situate between Plot 75 Kampala Road and Plot 20 Buganda Road Kampala FRV 1276 Folio 18); Plot 81 Kampala Road FRV 1276 Folio 19; and Plot 772 Kibuga Block 3 Kampala (LRV4232 Folio 4).

h) The Plaintiffs executed mortgages and further charges in favour of the 1st Defendant on the above secured properties.

i) In consideration of Crane Bank Ltd giving the credit facilities to the 1st Plaintiff/ 1st Counter Defendant, the 2nd and 3rd Counter Defendants executed guarantees for repayment of the borrowed sums.

j) In consideration of Crane Bank Ltd giving the credit facilities to the 2nd Plaintiff/ 2nd Counter Defendant, the 1st Plaintiff/ 1st Counter Defendant executed guarantees for repayment of the borrowed sums.

k) The 2nd Defendant issued a notice of intention to effect changes in the register by cancelling the Plaintiff's title for having been issued in a wet land.

[15] At the trial, the Plaintiffs/Counter Defendants led evidence through two witnesses; Mr. Stephen Kasenge (PW1) who testified from 23rd March 2018 to 8th January 2019 and Mr. Ephraim Ntaganda (PW2) who testified from 15th February 2019 to 17th April 2019. The 1st Defendant/Counter Claimant led evidence through three witnesses; Mr. Edward Katimbo Mugwanya (DW1) on

the 5th of August 2019, Ms. Agnes Mayanja (DW2) who testified from 2nd October 2019 to 23rd October 2019 and Mr. Leonard Byambara (DW3) who testified from 18th February 2020 to 24th September 2021. The 2nd Defendant led evidence of one witness Mr. Joseph Kibande (DW4) who testified on 24th September 2021. At the conclusion of the hearing, all the parties' Counsel filed written submissions, that were quite elaborate and studious, which have been adopted and relied upon by the Court in the determination of the issues before the Court.

Issues for Determination by the Court

[16] Ten issues were agreed upon for determination by the Court, namely;

1) Whether the 4 Audit/ investigation reports issued by the 1st Defendant's Head of Internal Audit are competent and whether DW3 was competent to render professional audit reports and professional opinions?
2) Whether the 1st Defendant is liable for the acts and omissions of Crane Bank Limited in relation to the queried transactions, the subject matter of this suit?
3) Whether the following sums of money were deducted from the 1st Plaintiff's accounts and, if so, whether the said deductions were lawfully made?
    a) UGX 77,240,000/= as legal fees
    b) 487,600/= as search fees
    c) 68,383,256/= as stamp duty
    d) 2,860,000/= as registration fees
    e) 10,000,000/= as survey fees debited on 25th of May 2013
    f) USD 103,904.00 as utilization fees
    g) USD 5,472.92 as re-computation of interest on overdraft.
4) Whether the following sums of money were deducted from the 2nd Plaintiff's accounts and, if so, whether the said deductions were lawfully made?

(a) UGX 37,500,000/= as stamp duty

(b) UGX 24,260,000/= as valuation /survey fees
(c) UGX 6,520,000/= as transfer/registration fees
(d) USD 3,430,745/= and UGX 2,716,127,410/= being unclear transactions
(e) UGX 221,492,200/= and USD 138,632 as utilization fees
(f) USD 29,832 and UGX 108,992,200/= as irregular arrangement fees
(g) USD 246,508 as unexplained removals

5) Whether the Plaintiffs/ Counter Defendants are indebted to the 1st Defendant/ Counter Claimant as claimed in the counterclaim and, if so, by how much?
6) Whether the Counter Defendants are liable to the Counter Claimant as guarantors for the amounts due and owing under the respective facilities guaranteed?
7) Whether the actions of the Statutory Manager of Crane Bank Ltd were lawful and, if so, whether they adversely affected the Plaintiffs?
8) Whether the 1st Defendant is entitled to enforce the securities over the property comprised in Busiro Plot 978 Block 333 land at Nabbingo, Plot 1506 Busiro Block 33 Land at Nabbingo and Plot 75 Kampala Road (together with the plot of land situate between Plot 75 Kampala Road and Plot 20 Buganda Road Kampala FRV 1276 Folio 18) to recover the amounts outstanding under the respective loans?
9) Whether the title comprised in FRV 1352 Folio 5 Plot 302 Block 21 is valid and, if so, whether the actions taken or proposed to be taken by the 2nd Defendant to cancel the said title are lawful?
10) What remedies are available to the parties?

Burden and Standard of Proof

[17] In civil proceedings, the burden of proof lies upon he who alleges. **Section 101 of the Evidence Act, Cap 6** provides that;

(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.
(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[18] **Section 103 of the Evidence Act** provides that "*the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person"*. Accordingly, the burden of proof in civil proceedings normally lies upon the plaintiff or claimant. The standard of proof is on a balance of probabilities. The law however goes on to classify between a legal burden and an evidential burden. When a plaintiff has led evidence establishing his or her claim, he/she is said to have executed the legal burden. The evidential burden thus shifts to the defendant to rebut the plaintiff's claims.

Resolution of the Issues

Issue 1: Whether the 4 Audit/ investigation reports issued by the 1st Defendant's Head of Internal Audit are competent and whether DW3 was competent to render professional audit reports and professional opinions?

Submissions by Counsel for the Plaintiffs

[19] Counsel for the Plaintiffs challenged the competence of the 4 audit reports authored by Leonard Byambara (DW3), who described and represented himself as the Head of Internal Audit of the 1st Defendant on the basis that he was not qualified to undertake a professional audit, certify any financial statements and express any professional opinion. Counsel relied on the provisions of Section 34 of the Accountants Act and the Accountants Regulations No. 23 of 2016 which require all heads of accounts, finance and internal audit in public and private sector entities with public interest to be members of the Institute of

Certified Public Accountants. Counsel submitted that DW3 is/was not a member of the Institute of Certified Public Accountants of Uganda (ICPAU); he had no practicing certificate authorizing him to render audit and accountancy services; DFCU Bank where he was the head of internal audit is a subsidiary of DFCU limited, a public company listed on the stock exchange; and that the preparation of reports extended to verification and certification of financial statements which constitutes practicing accountancy.

[20] Counsel contended that DW3 was not qualified to render any professional opinion or views whether in the impugned reports or witness statements in the matter. Counsel relied on the case of ***Sheema Co-operative Society & 31 Others v AG HCCS No. 103 of 2010*** and prayed that the Court finds that the reports and witness statement by DW3 are evidentially worthless and cannot form a basis for any decision of the Court.

Submissions by Counsel for the 1st Defendant

[21] It was submitted by Counsel for the 1st Defendant that there is no legal requirement for DW3 to hold a practicing certificate or be a registered member of the Institute in order to carry out investigations and issue an investigations report detailing his findings. Counsel stated that DFCU Ltd which is registered as a public company is distinct from its subsidiary DFCU Bank Ltd which is registered as a private company and that DFCU Bank Ltd not being a public company or a private company with public interest, the provisions of Section 34 (2) of the Accountants Act do not apply to it. Counsel further argued that DW3 did not testify as an expert but rather as an investigator and his opinions and findings are the opinions of an investigator.

Submissions in Rejoinder

[22] Counsel for the Plaintiffs submitted in rejoinder that the 1st Defendant did not specifically respond to the issue of the competency to make audit reports but rather created his own objection and replied to it by attempting to baptize

the reports as investigation rather than audit reports in the submissions. Counsel cited the case of ***Aliganyira Betty v Uganda, Criminal Appeal No. 001 of 2021*** where the High Court found as meritorious, the contention that the trial court should not have relied on an audit report conducted where the lead auditor was not registered as a practicing accountant. Counsel submitted that the law relating to the practice of accountants is couched in mandatory terms and the Court will be sanctioning an illegality if it relies on the impugned reports or testimony in chief where DW3 purports to testify as an accountant.

Determination by the Court

[23] The 1st Defendant/ Counter Claimant sought to rely on four reports said to have been prepared by one Leonard Byambara (DW3) who was the Head Internal Audit of the 1st Defendant. The reports are on record as **Annexture "O"** attached to the 1st Defendant's amended Written Statement of Defence; the 2nd Report with its annextures appears in the 1st Defendant's Supplementary **Trial Bundle Vol. I** filed on **11th December 2017**; the 3rd report appears in **Exh. Vol. 1** filed on **30th of January 2018;** and the 4th Report appears in **Exh. Vol. 3** filed in court on **28th of February 2018**.

[24] The competence of DW3 to render professional audit reports and opinions was challenged by the Plaintiffs' Counsel on the ground that he was neither a qualified nor a practicing accountant in accordance with the provisions of the Accountants Act, No. 19 of 2013. It was prayed by the Plaintiffs' Counsel that the four audit reports be expunged by the Court from the record. For the 1st Defendant, Counsel made two preliminary arguments; first that the Plaintiffs' Counsel were estopped from objecting to the reports at this stage, they having consented to their admission as exhibits; and secondly, that the reports were not audit reports as termed by the Plaintiffs but were rather investigation reports.

[25] On the question of estoppel, I believe that Counsel for the 1st Defendant misconceived the Plaintiffs' contention against the reports. Counsel for the Plaintiffs do not challenge the authenticity of the reports since it is agreed that they were made by DW3 who properly authenticated them. Such was sufficient to determine their admissibility and the same were properly admitted in evidence. It is, however, wrong for 1st Defendant's Counsel to think that once a document passes the admissibility test, its contents is deemed admitted by the opposite party. The opposite party reserves all the rights to challenge the report and/or its contents on grounds of competence, veracity, reliability, probative value, among others. In the present case, Counsel for the Plaintiffs are challenging the reports on grounds of competence and reliability. Such grounds were not and could not have been resolved at the point of admission since they are matters that require evaluation and consideration of evidence before they are resolved. The principle of estoppel as raised by the 1st Defendant's Counsel is wholly inapplicable to the facts and circumstances of the present case.

[26] As to whether, the reports were audit reports as asserted by the Plaintiffs or investigation reports as asserted by the 1st Defendant is a question that revolves around the evidence before the Court. The Court will also determine whether the name given to the reports matters at all. In his testimony, contained in his witness statement filed on 12th July 2019, DW3 omitted to state expressly his profession, that is, whether he was an accountant. He just stated his qualifications under paragraph 2 of the statement. In paragraph 3, he stated that he was "currently employed as Head Internal Audit at DFCU Bank …" In paragraph 18 of the statement, DW3 states that "In my professional work and according to my training as an accountant/Auditor, I am conversant with this standard …" (while speaking in reference to the International Standard on Related Services 4400). This thus indicates that DW3 was testifying as a professional accountant/ auditor.

[27] In cross examination, however, DW3 conceded that he is not a member of the Institute of the Certified Public Accounts of Uganda (ICPAU); he had no practicing certificate authorizing him to render audit or accountancy services and had not even enrolled as a student of the ICPAU in 2017 & 2018 when he authored the reports. He further conceded that the preparation of the reports extended to verification and certification of financial statements which constitutes practicing accountancy. He signed the reports in his capacity as the 1st Defendant's head of internal audit and as an auditor. In effect, DW3 conceded that he did not have the requisite qualifications for an accountant and was thus not a registered member of the Institute of Certified Public Accountants of Uganda (ICPAU) which made him ineligible to practice the accounting profession in Uganda.

[28] Under Section 1 of the Accountants Act No. 19 of 2013, "accountant" means a person who is enrolled as a member of the Institute of Certified Public Accountants in accordance with the Act. On the other hand, a "practising accountant" means an accountant registered in accordance with section 27 and issued with a practicing certificate under section 28 of the Act. As such, there are two layers involved. A person can be an accountant by profession (in accordance with sections 5 and 25 of the Act) but not a practicing accountant. To be a practicing accountant, one must comply with the provisions under sections 27 and 28 of the Act. The relevant part of section 27 provides as follows;

> ***"Registration as practising accountants.***
>
> *(1) A person who is enrolled as a full member of the Institute under section 25, who wishes to practise accountancy, shall apply to the Council to be registered as a practising accountant.*
>
> *(2) Where the Council is satisfied that a member who applies for registration under subsection (1) fulfills the conditions for registration specified in subsection (3), the Council shall direct the secretary to register the member and to issue him or her with a certificate of practice for the year.*

(3) A member shall only be registered as a practising accountant, where that member has obtained the relevant practical experience as prescribed by the Council and pays the registration fee.

(4) The name of a member who is registered under this section, shall be entered in the register of practising accountants."

[29] Under section 28(1) of the Act, a person registered as a practicing accountant under section 27 shall be granted a certificate of practice by the registrar. Under section 35(1) of the Act, a person shall not practice accountancy in Uganda without a certificate of practice issued under section 28 or 29 of the Act. Section 29 is in respect of renewal of an earlier issued certificate. Under section 35(2), a person who contravenes subsection (1) commits an offence and is, on conviction, liable to a fine not exceeding five hundred currency points or imprisonment not exceeding two years and ten months or both. It is therefore illegal and indeed an offence to practice accountancy without a practicing certificate. Section 34 of the Act provides for what amounts to practicing accountancy. It provides as follows;

"Practicing accountancy.

(1) A person shall be deemed to practise accountancy if he or she, whether by himself or herself or in partnership with another person, for payment—

(a) offers to perform or performs services involving auditing, verification and certification of financial statements or related reports; or

(b) renders any service which, under accounting practices or regulations made by the Council, is a service that amounts to practicing accountancy.

(2) All heads of accounts, finance and internal audit in public and private sector entities, with public interest, shall be members of the institute in accordance with the regulations made under this Act.

(3) A public officer or a person referred to in subsection (2) and is employed by another person to perform or render services that would otherwise amount to practising accountancy, shall not be considered as practising accountancy under this section."

[30] Let me first say something about the provision of *Section 34(3)* above which provides that "*A public officer or a person referred to in subsection (2) and is employed by another person to perform or render services that would otherwise amount to practising accountancy, shall not be considered as practising accountancy under this section"*. The import of this provision is that if an accountant by profession is employed as a public officer or in a private sector entity with public interest, such a person does not require a practicing certificate in order to perform or render services that would otherwise amount to practising accountancy. With or without a practicing certificate, his/her work would be valid. However, as a bottom line, the person has to be an accountant and a member of the Institute (ICPAU). If such a person is not an accountant, they can neither practice accountancy nor qualify to work as head of accounts, finance and internal audit in public and private sector entities, with public interest.

[31] In the present case, DW3 acted in his capacity as head of internal audit of the 1st Defendant. The question is whether the 1st Defendant (DFCU Bank Limited) is a public entity or a private sector entity with public interest. It was argued by Learned Counsel for the 1st Defendant that DFCU Bank Limited and DFCU Ltd are distinct entities with DFCU Bank Ltd being a private company/entity without public interest, with the effect that section 34(2) is inapplicable to it; and DFCU Ltd being a public company listed on the Uganda securities Exchange. Counsel relied on the definition of public interest in the **Stroud's Judicial Dictionary of Words and Phrases, 4th Edition** as cited in the case of ***Muwanga Kivumbi v Attorney General SCCA No.6 of 2001*** for his submission. On the other hand, Counsel for the Plaintiffs submitted that DW3 had no capacity or qualifications to head the internal audit department of the 1st Defendant, a public listed entity or a private sector entity with public interest under the law; and as such, he had no capacity to render professional opinions as an auditor, and to issue or sign the impugned professional reports.

[32] It appears to me that Counsel for the 1st Defendant misconceived the context in which public interest is used under section 34(2) of the Accountants Act. In respect to the ***Muwanga Kivumbi v Attorney General case (supra)***, the term public interest was used in the sense of public interest litigation. In the present case and in the context of section 34(2) of the Act, the "private sector entities with public interest" envisaged by the Accountants Act are what are termed as Public Interest Entities (PIEs). For purposes of audit and accounting regulation, both ordinarily public entities and private entities may be classified as PIEs. A public interest entity is a business that is of significant public focus because of the nature of the business, its size or the number of employees. In the United Kingdom, the definition of a PIE includes entities with transferable securities listed on a UK regulated market, credit institutions and insurance undertakings. In Uganda, neither the Accountants Act nor the Regulations define PIEs. However, under the Institute of Certified Public Accountants of Uganda (IFRS for SMEs) Implementation Guidelines 2009, certain entities are designated as publically accountable. Guideline 2.2 provides a list of publically accountable entities to include, but not limited to;

a. *Entities whose debt or equity instruments are traded in a public market/ domestic or foreign stock exchange or an over the counter market, including local and regional markets; or are in the process of issuing such instruments for trading in a public market.*
b. *Entities that hold assets in a fiduciary capacity for a broad group of outsiders as its primary businesses to include but not limited to;*

i. *Banks, Credit institutions, Micro finance deposit taking institutions and similar/related financial institutions. These include commercial banks, mortgage banks, building societies, acceptance houses, discount houses and finance houses.*
ii. *Non-Regulated micro fiancé institutions and SACCOs (Savings and Credit Cooperative Organizations).*
iii. *Insurance and Re-insurance companies.*

iv. *Mutual Funds and collective investment schemes (including unit trusts)*
v. *Security brokers/dealers.*

c. *Public organizations, in which the state owns the whole or part of the proprietary interest or which is otherwise controlled directly or indirectly by the state, including parastatals, state enterprises, commissions and authorities.*
d. *Private Organizations in which the state has a non-controlling equity interest.*

[33] In light of the foregoing, a bank such as the 1st Defendant, even when a private entity, falls in the category of a public interest entity (PIE) and is thus captured by the provision under section 34(2) of the Accountants Act. As such, its head of internal audit had to be an accountant and member of the Institute (ICPAU). In view of evidence that DW3 was not, the conclusion is that he practiced accountancy illegally. His reports, whether called audit reports or investigation reports, are a product of illegality which cannot be relied upon by the Court.

[34] In this regard, I am persuaded by the finding of the Learned Judge in the case of ***Aliganyira Betty v Uganda, HC Criminal Appeal No. 001 of 2021*** which came to the same conclusion over a report with somewhat similar traits. As a matter of fact, in the ***Aliganyira case***, the person in issue was an accountant but was not in possession of a practicing certificate. His report was found illegal and incapable of being relied upon by the Court. In this case, DW3 was not only lacking a practicing certificate but was as well not an accountant. His reports are a product of gross illegality which makes him incompetent to offer any useful evidence before the Court. The four reports are accordingly expunged from the record. Since DW3's evidence was based on his findings in the said reports and consisted of his interpretation of documents that he neither authored nor was party to, and he acted in his capacity as head of

internal audit of the 1st Defendant, DW3's competence to testify is equally affected by the illegality. His evidence is equally expunged from the record.

[35] Accordingly, in answer to Issue 1, the reports issued by DW3 as the 1st Defendant's Head of Internal Audit were illegally procured and are incompetent before the Court. Equally, DW3 was incompetent to render any professional audit reports or professional opinions, by whatever name called, or to render evidence of such a manner on the matter before the Court.

Issue 2: Whether the 1st Defendant is liable for the acts and omissions of Crane Bank Limited in relation to the queried transactions, the subject matter of this suit?

Submissions by Counsel for the Plaintiffs

[36] Counsel for the Plaintiffs submitted that it was agreed by the 1st Defendant that it took over the assets and liabilities of Crane Bank Ltd including the loan portfolio of the Plaintiffs. Relying on the case of ***Shakil Pathan vs DFCU Bank Ltd, HCCS No. 236 of 2017***, Counsel submitted that the relationship between the Plaintiffs and Crane Bank Limited simply shifted to the 1st Defendant by operation of the law and that the 1st Defendant Bank, having taken over the entire loan portfolio of Crane Bank Limited, cannot claim benefit under the same loan portfolio and at the same time disclaim its attendant claims and liabilities as this would offend the law of approbation and reprobation. Counsel cited ***Republic vs Institute of Certified Public Secretaries of Kenya, HCMA No. 322 of 2008.***

Submissions by Counsel for the 1st Defendant

[37] Counsel for the 1st Defendant stated that the 1st Defendant assumed some liabilities and took over some assets of Crane Bank Ltd. It also became a successor mortgagee in respect of the loans assigned. Counsel submitted that, however, the specific liabilities arising from the claims in relation to the queried transactions in Appendix 1-10 of Doc. 54 were not assumed by the 1st

Defendant. Counsel argued that the basis of the above submission is that at all material times, Crane Bank Ltd and the 1st Defendant remained separate legal entities. Crane Bank Ltd remained a legal entity in receivership but under the management of the Bank of Uganda. Counsel contended that the Plaintiffs have no cause of action against the 1st Defendant Bank on account that it did not assume responsibility for the liabilities of Crane Bank Ltd that were unknown to the parties as at the completion date. He stated that the Plaintiffs' claims came to light on 10th May 2017 upon filing of the plaint and were not subject of the contractual negotiations and fell in the category of unknown liabilities. Counsel submitted that by virtue of the exclusion clause in the *Purchase of Assets and Assumption of Liabilities Agreement* (hereinafter called the ***"P&A Agreement"***), the 1st Defendant did not assume liability for the unknown claims.

[38] Counsel for the 1st Defendant further submitted that all residual liabilities that were not transferred by Bank of Uganda to the 1st Defendant under the P&A Agreement remained as liabilities of Crane Bank Ltd (in receivership) and under the management of Bank of Uganda. Counsel concluded that all unknown liabilities under the general banking contract and the specific contracts such as loan agreements like the ones claimed by the Plaintiffs for wrongful debits of their accounts were not assumed by the 1st Defendant; and the Plaintiffs ought to have pursued the same against Crane Bank Ltd which has since been discharged from receivership.

Submissions in Rejoinder

[39] Counsel for the Plaintiffs submitted in rejoinder that in the 1st Defendant's amended WSD, it was expressly admitted that the 1st Defendant took over the assets and liabilities of Crane Bank Ltd. It was not pleaded that the 1st Defendant took over some assets and assumed some of the liabilities. Counsel pointed out that even in the joint scheduling memorandum, it was stated as an agreed fact that the 1st Defendant took over the assets and liabilities of Crane

Bank Ltd. Counsel therefore submitted that the matter of excluded liabilities is a new theory being introduced by Counsel for the 1st Defendant in their submissions without it having any basis in the 1st Defendant's pleadings. Counsel submitted that such is unacceptable under the law and offends the rule against departure from a party's pleadings under Order 6 rule 7 of the CPR. Counsel further relied on the case of ***Luyimbazi Sulaiman v Stanbic Bank SCCA No.02/2019*** to the effect that a party is bound by their pleadings and it is not open to court to base its decision on an unpleaded issue. Counsel opined that such amounts to denial of justice to the Plaintiffs who did not expect to encounter such a defence at the level of submissions.

[40] Counsel further submitted that as proof that the allusion to the clauses of the P&A Agreement was an afterthought on the part of the 1st Defendant's Counsel, when the said agreement was introduced into the proceedings by the Plaintiffs' Counsel, Counsel for the 1st Defendant vehemently opposed its admission. Counsel also submitted that no witnesses were cross examined on the new defence which is prejudicial to the Plaintiffs' case. Counsel argued that the submissions by Counsel for the 1st Defendant on the new defence were a testimony from the bar which should not be acceptable to the Court. Counsel also reiterated their submission that even if the defence was to be considered by the Court, it would offend the principle against approbation and reprobation seeing that the 1st Defendant intended to take benefit of the Plaintiffs' loan portfolio as part of the assets taken over but disclaimed the attendant liabilities over the same portfolio.

Determination by the Court

[41] It is trite law that parties are bound by their pleadings and a departure from the pleadings is barred by law except by way of amendment of pleadings. *Order 6 Rule 7 of the CPR* is instructive on the point. In ***Attorney General vs Paul Ssemogerere & Another, SC Constitutional Appeal No. 3 of 2004,*** **Mulenga JSC** held that;

"It is a cardinal principle of our judicial process that in adjudicating a suit, the trial court must base its decision and orders from pleadings and issues contested before it. Founding a court decision or relief on unpleaded matter or issue not properly placed before it is an error of the law".

[42] The same position was reiterated in ***Luyimbazi Sulaiman vs Stanbic Bank (U) Ltd, SCCA No. 02 of 2019***, where **Prof. Tibatemwa-Ekirikubinza, JSC** held that;

"It is a cardinal rule that a party is bound by their pleadings and it is not open to the court to base its decision on an unpleaded issue. Even where there is discordance between what is pleaded and the evidence or submissions, such that either the submissions or evidence cover up for a defect in the pleadings, the cardinal rule still applies. This is because the defence would otherwise be denied an opportunity to make a reply to the new allegations raised and hence the ends of justice will not be served."

[43] On the case before me, the 1st Defendant in paragraph 8 of its amended WSD admitted that it took over the assets and liabilities of Crane Bank Ltd. In paragraph 12 of the WSD, the 1st Defendant averred that "all mounts that were charged on the accounts of the Plaintiffs were charged in accordance with the Sanction Letters agreed to by the Plaintiffs". The 1st Defendant annexed a report that detailed the basis of the deductions, marked annexure "O". In paragraph 15(vii) of the WSD, the 1st Defendant denied having made any illegal deductions as alleged in the plaint and contended that at all material times, it acted lawfully and within the confines of the credit facility contracts willfully executed with the Plaintiffs. In all the averments in the WSD and the counterclaim, there was no mention or any kind of reference to the *Purchase of Assets and Assumption of Liabilities Agreement* (the ***"P&A Agreement"***) or its particular provisions. There was no dispute at all as to whether the assets and

liabilities relevant to this case had not been taken over and assumed respectively. Indeed, in the joint scheduling memorandum filed on 11th July 2017, agreed to and signed by Counsel for all the parties, it was categorically agreed as a fact that the "1st Defendant took over the assets and liabilities of Crane Bank Ltd". Indeed, in evidence, DW2 (Agnes Mayanja) stated that the assets and liabilities taken over by the 1st Defendant included the Plaintiffs' loan portfolio.

[44] It follows, therefore, that the present trial never rotated upon the contents of the P&A Agreement as its relevance to the proceedings was deemed to be an agreed fact. Indeed, when Counsel for the Plaintiffs sought to introduce it in evidence, Counsel for the 1st Defendant vehemently objected raising issues of privity and confidentiality, among others. As such, no trial of facts rotated around the said agreement. Since its admission, the first time the provisions of the said agreement became a subject of contention was during submissions by Counsel for the 1st Defendant in reply to the Plaintiffs' submissions. Whatever construction that Counsel for the 1st Defendant has chosen to give to the provisions of the said agreement has not been part of the trial and was not tested in evidence. This is despite the fact the Plaintiffs were not privy to the said agreement and, as such, would not be in position to speak as to the context and purpose of its provisions.

[45] It is obvious that, had the agreement been part of the trial, the Plaintiffs would have had an opportunity to call a witness who could speak to it. They would equally have had an opportunity to cross examine the defence witnesses over the same. In view of the above situation, I am fully in agreement with Learned Counsel for the Plaintiffs that Counsel for the 1st Defendant has, in the course of submissions, introduced a matter that ought to have been part of their pleadings, or at least part of evidence before the Court; which course of action constitutes a departure from their pleadings and is grossly offensive to the law. I, indeed, find this a substantial departure as it breaks all the rules of

the game of pleadings and trial in a civil matter. It would be highly prejudicial to the Plaintiffs if the Court was to allow this case to be decided on a matter that was neither pleaded nor subjected to evidence and trial.

[46] In the further submissions in rejoinder by Counsel for the 1st Defendant/ Counter Claimant, Counsel argued that a court may allow evidence to be called and may base its decision on an unpleaded issue if it appears from the course followed at trial that the unpleaded issue has been left to Court for decision. Counsel relied on decisions in ***Odd Jobbs v Mubia [1970] 1 EA 476*** and ***Sinba (K) Ltd & 4 Others v Uganda Broadcasting Corporation, Supreme Court Civil Appeal No. 003 of 2014***.

[47] To my finding, although the above cited decisions state a correct principle of the law, the principle is not applicable to the present case. As already highlighted herein above, apart from there being no pleading regarding the defence of excluded liabilities, there was no evidence that was led on the said defence, and neither was there any agreement or understanding as alleged by Counsel that such a matter would be left to the court for determination. Indeed, in the present case, the record indicates that it is the Plaintiffs' Counsel who introduced the P&A Agreement into evidence, amidst protest by the defence, and cross examined on it. Such definitely cannot be construed as serving the purpose of litigating an unpleaded and undisclosed defence. It was not the duty of the Plaintiffs' Counsel to plead for and prove lines of defence for the 1st Defendant/Counter Claimant. Further, such approach cannot disclose or constitute agreement that there was an issue that was left for the court to decide. Those conditions must be in place before the narrow space provided by the above principle, which is in the context of an exception to the rule against departure, can be utilized. In absence of such circumstances, the above stated principle is wholly inapplicable to the present case and has been cited by Learned Counsel for the 1st Defendant out of context.

[48] I therefore agree that the defence of excluded liabilities raised by the 1st Defendant's Counsel during his submissions constitutes a departure from pleadings and is offensive to the law. The same will not be explored by the Court. On the evidence before the Court, this issue is answered in the affirmative; to the effect that the 1st Defendant assumed liability for the alleged acts and omissions of Crane Bank Ltd in relation to the queried transactions in Appendix 1-10 of DOC 54.

Other General/ Alternative Defences raised for the 1st Defendant

[49] Counsel for the 1st Defendant raised three other alternative defences to the Plaintiffs' claim, namely; the verification clause argument, the estoppel by silence argument and the time limitation argument. It should be noted that, like the defence of excluded liabilities, the three above listed defences were alternative to the specific defence of lawful mandate and authorization argument that is reflected in the 1st Defendant's amended WSD. It is not in dispute that the said alternative defences are not raised in the WSD either expressly or by clear implication. Under the law, the 1st Defendant was bound to state facts that point to these defences so that the Plaintiffs could reply to them, that issues could be raised concerning them, that the parties could lead and test evidence over them, before any legal arguments could be made over them and before the court can proceed to base a decision on them. The scenario before the court is that the said defences and arguments over them have featured for the first time in the proceedings in the submissions in reply by the 1st Defendant's Counsel.

[50] As submitted by Counsel for the Plaintiffs, this course of action is not acceptable under the law. The manner of pleading in a written statement of defence is well set out under Order 8 of the CPR. The position of the law on departure from a party's pleadings has already been canvassed herein. Order 8 rule 3 of the CPR requires denial in a WSD to be specific. It provides that every *"allegation of fact in the plaint, if not denied specifically or by necessary*

implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against a person under disability; but the court may in its discretion require any facts so admitted to be proved otherwise than by that admission". Order 8 rule 16 of the CPR further requires that where *"the defendant relies upon several distinct grounds of defence or setoff founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly"*. The 1st Defendant, clearly, did not adhere to the required manner of pleading.

[51] The consequence of the above default on the part of the 1st Defendant was that during the scheduling conference, the said matters were not alluded to and did not form part of the issues for determination by the Court. As a further consequence, no evidence was led for the deliberate purpose of proving or disproving any of the said defences. Counsel for the 1st Defendant attempted to make reference to instances where the Plaintiffs' Counsel cross examined on matters related to these defences. I do not agree that such references are capable of covering up for the default by the 1st Defendant. Clearly, that is not how civil trials are conducted. Issues for trial are not imputed, more so from cross examination which under the law is known to be at free range. I am not prepared to accept an argument that simply because opposite counsel cross examined on a matter, then such a matter constituted part of the issues for trial. Such an argument runs counter to the clear rules of pleading and trial of civil cases.

[52] I am convinced that this default on the part of the 1st Defendant produced, not simply a technical but, a substantial effect in that it would have been necessary to adduce facts relating to the impugned defences and to have the same tested through cross examination. For instance, regarding the verification clause, it had to be proved whether the clause was communicated to the Plaintiffs; whether the Plaintiffs kept a copy to ascertain whether they were alive to the provisions of that part of the rules; how the statements were

supposed to be provided or obtained and whether they were actually provided as a matter of fact; among others. The same issues of fact would arise regarding the defence of estoppel by silence. Without the said questions of facts being traversed by the parties, it would be wrong for a decision of the court to rotate on the same. As I stated, this is notwithstanding that matters concerning those defences found their way into the proceedings; which clearly was for different purposes and not to prove the undisclosed defences.

[53] The same is true regarding the defence of time limitation. In law, a defendant who intends to raise the defence of limitation under the Limitation Act or under any other law providing for time limitation must specifically plead the defence to enable the opposite party divulge facts answering to such a claim. In ***Yaya Farajallah v Obur Ronald & Others, HCCS No. 081 of 2018***, it was stated that a limitations defence is an affirmative defence and must be pleaded. Once it is not pleaded, the defendant will ordinarily not be granted the protection of that law since the court cannot grant a defendant the benefit of the limitation law contrary to the rules of pleading and the principle of avoidance of surprise. This is because failure to raise substantive responses to a plaintiff's claims until trial or, worse, until the close of trial, is contrary to the spirit and requirements of *The Civil Procedure Rules* and the goal of fair contest that underlies the Rules. Such a failure also undermines the important principle that the parties to a civil suit are entitled to have their differences resolved on the basis of the issues joined in the pleadings. In this case, the defence of limitation was never raised by the 1st defendant either in the pleadings or throughout the proceedings. It has only been raised by Counsel for the 1st Defendant in their submissions. It would be highly prejudicial to the Plaintiffs if the same is taken into consideration and made a basis of any decision in this matter. In all, therefore, all the arguments by Counsel for the 1st Defendant based on the newly introduced defences must fail as they accordingly do.

Issue 3: Whether the following sums of money were deducted from the 1st Plaintiff's accounts and, if so, whether the said deductions were lawfully made?

a) **UGX 77,240,000/= as legal fees**
b) **487,600/= as search fees**
c) **68,383,256/= as stamp duty**
d) **2,860,000/= as registration fees**
e) **10,000,000/= as survey fees debited on 25th of May 2013**
f) **USD 103,904.00 as utilization fees**
g) **USD 5,472.92 as re-computation of interest on overdraft**

[54] This issue relates to the queried transactions on the 1st Plaintiff's account(s). The 1st Plaintiff challenged the removal of sums totaling to **UGX 158,975,856/=** as loan processing fees. These fees are broken down into legal fees, search fees, stamp duty, registration fees and survey fees, as particularized at page 9 of Exhibit Doc. 54. It is not disputed that these items were debited from the accounts of the 1st Plaintiff. What is disputed is whether they were authorized and lawfully debited in accordance with the account mandate of the 1st Plaintiff.

A) Legal Fees

[55] The first category under this appendix is Legal fees amounting to **UGX 77,240,000/=** which is broken down as UGX 50,000,000/= deducted on 21st August 2013; UGX 25,000,000/= returned on 16th November 2013; UGX 5,000,000/= debited and later credited on 24th April 2014; UGX 2,240,000/= deducted on 9th December 2013 and UGX 50,000,000/= deducted on 24th April 2014. The figures are considered below.

(i)The sums of UGX 50,000,000/= deducted on 21st of August 2013 and UGX 25,000,000/= returned on 16th November 2013.

Submission by Counsel for the Plaintiffs

[56] Counsel for the Plaintiffs submitted that the sum of UGX 50,000,000/= was deducted from the 1st Plaintiff's account under a narration, "legal fees/charges", without notification or negotiation, explanation or supporting documents like invoices issued in the names of the 1st Plaintiff, showing the services offered, and how the fee accumulated to 50,000,000/=. Counsel also submitted that there is no proof that this sum was ever paid by the bank and to whom it was paid as a legal fee/charge, or proof of any recipient of this money for any such services. Counsel thus submitted that the 1st Plaintiff is entitled to a refund of the said sum with interest at a commercial rate from 21st August 2013.

[57] Counsel further submitted that having debited the UGX 50,000,000/= in such a manner, four months later, the 1st Defendant's predecessor credited the 1st Plaintiff's account with UGX 25,000,000/=, which the 1st Defendant claimed to be a reversal. Counsel submitted that the bank breached its legal and fiduciary duty to the customer by removing money from the 1st Plaintiff's account i.e. UGX. 50,000,000/= without any explanation and crediting back half of the money without interest, after using the customer's money. Counsel argued that the 1st Plaintiff is entitled to interest at the then prevailing lending rate on the UGX 25,000,000/= for the period of 21st August 2013 to 16th November 2013.

Submission by Counsel for the 1st Defendant

[58] In reply, Counsel for the 1st Defendant submitted that the debit of UGX 50,000,000/= was lawful and related to documentation charges provided for under clause 8 of the sanction letter dated 12th July 2013 found at page 191 of

Doc. 54 which provided for a one-time charge of 2% (subject to a maximum of UGX. 50,000,000/=). Counsel stated that clause 8 of the sanction letter was explicit in providing for the amount of the documentation charge and the authority to debit the account and argued that no further explanation or breakdown was required under the loan agreement. Counsel submitted that the argument that the 1st Plaintiff was not informed of the charges, the service providers, and not asked to choose amongst them as per the BOU Consumer Protection Guidelines is equally without merit. Counsel argued that it would be unfair to order for a refund of sums lawfully paid under a contractual obligation as that would amount to relieving the 1st Plaintiff of its contractual obligations. Counsel further argued that the BOU Consumer Protection Guidelines relied on by the Plaintiffs have no force of law but are merely directory and a mere code of conduct recommended to banks by Bank of Uganda as a regulator.

[59] Regarding the UGX 25,000,000/=, Counsel submitted that the sum represented a credit that was put back on the 1st Plaintiff's account as a discount for the documentation charge fees charged on 21st August 2013. Counsel argued that while the contract provided for a documentation charge of UGX 50,000,000/=, the bank gratuitously granted the 1st Plaintiff a 50% discount on the fee; which discount resulted in Crane Bank giving back UGX 25,000,000/= to the 1st Plaintiff and having received a discount, the 1st Plaintiff is not entitled to interest on the said sum.

Submissions in Rejoinder

[60] In rejoinder, Counsel for the Plaintiffs submitted that it was pertinent to note that the 1st Plaintiff obtained only 2 loans from the 1st Defendant's predecessor in title as per the facility letters dated 7th April 2014 at page 185 of Doc. 54 and that of 12th July 2013 at page 191 of Doc. 54. Counsel pointed out that in both facility letters, the 1st Plaintiff was charged with; arrangement fees of 1% of the loan sums, utilization fees of 1% of the loan sums,

documentation charge of 2% (up to a maximum of UGX. 50,000,000/=), legal fees, search fees, stamp duty, registration fees, survey fees and valuation fees. Counsel argued that the facility/sanction letters did not define what "documentation charge" is, neither does it explain whether it was payable to a third party or to whom it was payable. Counsel submitted that the 1st Defendant had failed to define what the documentation charge meant and argued that despite presence of a signed facility agreement by the parties, the parole evidence rule gives room to exceptions where a party to a contract can be allowed to adduce extrinsic evidence to court to clarify the intention of the parties where the terms of the contract, though written down, are found to be ambiguous, illegal (for lack of consideration) and that in such circumstances, courts will interpret the words, or construe them in a manner that gives effect to the intention of the parties. Counsel referred the Court to the decision in ***General Industries Ltd Vs. NPART, SC Civil Appeal No. 5 of 1998***.

[61] Counsel also relied on the Philippines Supreme Court (Second Division) decision of ***Philippine National Bank vs. Norman Y Pie, G.R. No. 157845 September 20, 2005*** to further submit that just because the 1st Plaintiff signed a facility letter, it was not a blank cheque for the bank to debit monies from its accounts irrespective of whether the debits were legal, understood, authorized or not. Counsel argued that the Bank had a duty to explain and justify the withdrawals and to show that the same were made for the benefit of the 1st Plaintiff. Counsel also relied on ***Stanbic Bank (U) Ltd Vs. Uganda Crocs Ltd, SCCA No. 04 of 2004***.

[62] Regarding the UGX 25,000,000/=, Counsel for the Plaintiffs submitted that whereas Counsel for the 1st Defendant submitted that this was a 50% discount on documentation charge, there was no proof that this was a discount. Counsel maintained that the 1st Plaintiff is entitled to interest on the sums reversed.

Determination by the Court;

[63] Let me begin by setting out the general legal position regarding the bank-customer relationship that will guide my determination on the various figures under contention throughout the entire case. The relationship between a bank and customer is both contractual and fiduciary in nature. The term fiduciary refers to a duty of utmost good faith, trust, confidence and condor owed by a fiduciary to the beneficiary. The bank is the fiduciary and the customer is the beneficiary. It is a duty to act with the highest degree of honesty and loyalty toward another person and in the best interest of the other person. See: **The Black's Law Dictionary 7th Edition at page 523** and ***Eric Butime Katabarwa Vs. Standard Chartered Bank HCCS No. 963 of 2020***. In that regard, the bank is under an obligation to treat the accounts of its depositors with meticulous care, always having in mind, the fiduciary nature of their relationship. In ***Philippine National Bank vs. Norman Y Pie, Philippines Supreme Court (Second Division) G.R. No. 157845 September 20, 2005,*** it was stated that the fiduciary relationship imputes the bank's obligation to observe the highest standards of integrity and performance; the relationship requires the bank to assume a degree of diligence higher than that of a good father of a family. In that regard, therefore, the customer expects the bank to treat his/her account with the utmost fidelity, whether such account consists only a few hundred or millions of monies.

[64] The duty bestowed on the bank extends to and requires the bank to keep proper records of account. It is on the basis of such records that a claim for or against a bank can be determined. Since between a bank and a borrower the former is the one obligated to keep a more dependable record and to avail statements of account, a bank that cannot keep and avail accountable records will be hard-pressed in making any claims against a borrower and would be hard put to discharge any such claims by a borrower. See: ***Ezekiel Osugo Angwenyi & Another v National Industrial Credit Bank Limited [2017]***

eKLR and ***Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & another [2019] eKLR***.

[65] Turning to the present facts, it is not in dispute that the sum of UGX 50,000,000/= was deducted from the 1st Plaintiff's account under a narration; "legal fees/charges", as per the 1st Plaintiff's account statement. The 1st Plaintiff challenged the deduction on ground that it was unclear, there was no record of what legal fees or charges it related to, what it catered for and to whom it was payable or paid. The 1st Defendant justified the deduction by invoking Clause 8 of the Facility Letters, which provides that the 1st Plaintiff would be charged with a "*one-time documentation charge of 2% (subject to a maximum of Ushs. 50,000,000/=".* It is not in dispute that whereas the relevant sanction/facility letters provided for this charge, the term "documentation charge" was not defined in any of the facility letters. There was also no other indication as to what the charge was meant for, which documentation it related to, to whom it was payable and what it would entail. Counsel for the 1st Defendant himself conceded that the facility letter did not define what "*documentation charge"* is and to whom it was payable; whether to the 1st Defendant or a third party. As such, the further submission by 1st Defendant's Counsel that clause 8 of the sanction letter dated 12th July 2013 was explicit in providing for the amount of the documentation charge and that no further explanation or breakdown was required under the loan facility agreement, is not made out.

[66] Consequently, in the absence of a definition of the documentation charge, the clause in the facility letter was rendered ambiguous and open to various interpretations and questions. It ought to be noted that in interpretation of contracts, the general rule is that when two parties have made a contract and have expressed it in writing, to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the

purpose of varying or contradicting the writing. This is in substance what is called the *"parol evidence rule"*. See: **Marvin A. Chirelstein, in Concepts and Case Analysis in the Law of Contracts (7th ed. 2006) at p 116.** The rule applies only to written agreements which are intended by the parties to be "a complete integration of the terms of the contract" and was intended to be "final". In such cases, a court will refuse to use evidence of the parties' prior negotiations in order to interpret a written contract unless the writing is (a) incomplete, (b) ambiguous, or (c) the product of fraud, mistake, or a similar bargaining defect. See: ***Andrew Akol Jacha vs Noah Doka Onzivua, HCCA No. 0001 of 2014 [2016] UGHCLD 64***.

[67] It is also a general rule of construction of instruments that extrinsic evidence is not admissible for the construction of a written contract, and the parties' intentions must be ascertained, on legal principles of construction, from the words they have used. See: ***F.L Schuler AG v Wickman Machine Tools Sales Limited [1973] 2 All ER 39***. The court, therefore, must resort to the relevant cardinal canons in the interpretation of contracts since it would be pertinent to ascertain the intention of the parties. One such principle is that the words used by the parties should be given their ordinary meaning in their contractual context. See: ***Multi-Link Leisure Developments Ltd v Lanarkshire Council [2011] 1 All ER 175***. The other principle is that the court should construe the contract with a businesslike intention or a commercial sense. In ***Mitsui Construction Co Ltd v Attorney General of Hong Kong (1986) 33 BLR 14*** cited in ***Andrew Akol Jacha vs Noah Doka Onzivua (supra)***, **Lord Bridge** stated that *"the poorer the quality of the drafting, the less willing the court should be to be driven by semantic niceties to attribute to the parties an improbable and un-businesslike intention, if the language used, whatever it may lack in precision, is reasonably capable of an interpretation which attributes to the parties an intention to make provision for contingencies inherent in the work contracted for on a sensible and businesslike basis."*

[68] On the case before me, it is conceded that despite the inclusion of the clause on documentation charge in the facility agreement by the 1st Defendant, there was no inclusion of a definition or explanation of what it entailed. Consequently, the enforcement of the said clause was affected by ambiguities manifested by the fact that the sums deducted were variously referred to as legal fees/charges, stamp duty, search fees, valuation fees, registration fees, and survey fees. It is simply not clear to either party or to the Court as to what 'documentation fees' was meant to encompass.

[69] In the circumstances, and in view of the said latent ambiguity, the matter calls for application of the *contra proferentem rule.* The said rule requires construing or interpreting a contract or instrument against the drafter when ambiguities arise. The courts expect that the party who drafts the agreement shall take due care and caution and shall not insert ambiguous provisions in the agreement. The doctrine seeks to encourage clear, explicit and unambiguous drafting of the agreement and to avoid latent and hidden meanings of its clauses. The *contra proferentem* rule places the cost of losses on the party who was in the best position to avoid the harm. See: ***Andrew Akol Jacha vs Noah Doka Onzivua (supra)***.

[70] Applying the above principles, it does not make sound business sense for the Bank to charge the 1st Plaintiff with a block sum of UGX 50,000,000/= in the form of 'documentation fees' and then again separately charge them with other mortgage processing fees, including legal fees, search fees, valuation fees, stamp duty, registration fees, and survey fees. In my view, such would be an unconscionable bargain which makes sufficient ground for application of the *contra proferentem rule*. The bank owes a fiduciary duty of care to its customers to ensure that all actions affecting their accounts are authorized, lawful, made in good faith and made for purpose discharging the customer's liabilities or for his/her benefit. See: ***Stanbic Bank (U) Limited versus Uganda Cross Limited SCCA No.04/2004***.

[71] In the circumstances, there is credible evidence that the removal of the **UGX 50,000,000/=** from the 1st Plaintiff's account as documentation fees/ legal fees or charges was unexplained, unauthorized, unjustified, irregular and unlawful. It ought to be refunded subject to my finding on the next disputed sum of UGX 25,000,000/=.

[72] Regarding the sum of **UGX 25,000,000/=**, it is indicated that on 16th November 2013, the bank credited the 1st Plaintiff's account with a sum of UGX 25,000,000/=. It was claimed for the 1st Defendant that this was a 50% discount on the "documentation charge" but this claim is not supported by any evidence. It is, therefore, safe to assume that the UGX 25,000,000/= was a return of part of the sum of UGX 50,000,000/= that had been irregularly deducted as a documentation charge. It is therefore ordered that the remaining sum **UGX 25,000,000/=** shall be refunded to the 1st Plaintiff by the 1st Defendant.

[73] Regarding interest, it has been established that the said monies were deducted irregularly and/or unlawfully. The 1st Plaintiff was, therefore, denied use of its money and the 1st Defendant had it for itself, and for commercial purposes at that. Such entitles the 1st Plaintiff to interest on the said sums. On the applicable rate, there is evidence on record that is undisputed that the prime lending rate at the time was an average of 12% per annum for the USD and 24% per annum for the UGX. I will therefore allow interest at the rate of 24% per annum on the sum of **UGX 25,000,000/=** that is due to be refunded, which shall run from 21st August 2013 (when it was deducted) until the date of full payment. I will not award interest on the sum of UGX 25,000,000/= that was credited back to the 1st Plaintiff's account.

[74] Given the circumstances of this case, let me at this point take a general position on the aspect of interest that shall run through and be applicable to

all sums that are, in this judgment, to be found refundable. The discretion of the court on award of interest is provided for under Section 26(2) of the Civil Procedure Act. The basis for an award of interest is that the defendant has kept the plaintiff out of his money and the defendant has had the use of it himself and ought to compensate the plaintiff accordingly. See***: Premchandra Shenoi and Anor Vs Maximov Oleg Petrovich SCCA No. 9 of 2003; Harbutt's 'placticine' Ltd V Wayne tank & pump Co. Ltd [1970] QB 447*** and ***Shakil Pathan Ismail vs DFCU Bank Ltd, HCCS No. 236 of 2017***. In determining a just and reasonable rate of interest, court takes 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 currency in the event that the money awarded is not promptly paid when it falls due. See ***Kinyera v the Management Committee of Laroo Building Primary School HCCS 099 of 2013***. In the circumstances, and seeing that the rates of 12% per annum and 24% per annum for the USD and UGX respectively are the average of the rates at which the Plaintiffs were accessing credit, I have found it reasonable to award interest at those rates respectively. Accordingly, all sums ordered in this judgment to be refunded shall attract interest at the flat rate of 12% per annum for the USD amounts and 24% per annum for the UGX amounts, from the date of the debit until payment in full.

(ii) The sum of UGX 2,240,000/= debited on the 9th of December 2013

[75] This sum was said to have been deducted in respect of mortgage registration charges paid to Oundo & Co. Advocates for Plots 978 and 1506 Busiro Block 333.

Submission by Counsel for the Plaintiffs

[76] It was submitted by Counsel for the Plaintiffs that this debit was unlawful on the basis that the invoice related to this sum from Oundo & Co. Advocates

had arithmetic errors; the TIN Number on the said invoice was invalid since it had 9 instead of the usual 10 digits, that the invoice was addressed to Crane Bank instead of the 1st Plaintiff, that the 1st Plaintiff did not take the tax benefit from the expenditure and that the invoice was not proof of payment of the sums and was thus insufficient to answer the query regarding the said sum. Counsel concluded that there was no genuine documentation to justify this debit and the 1st Defendant did not lead any evidence to account for the said sum. Counsel, therefore, prayed to Court to find that the sum was unlawfully deducted from the 1st Plaintiff's account and the same should be refunded with interest from the date of debit.

Submission by Counsel for the 1st Defendant

[77] In reply, Counsel for the 1st Defendant submitted that the 1st Defendant's investigations found that this sum was paid to Oundo & Co. Advocates as mortgage registration charges for Plots 978 & 1506 Busiro Block 333 as per the invoice dated 5/12/2013. Counsel indicated that the credit is shown on the bank account of Oundo & Co. Advocates at Page 340 of Volume 4 and submitted that this sum was lawfully debited by Crane Bank in accordance with the terms of the sanction letters as mortgage registration fees which the 1st Plaintiff had agreed to pay.

Submission in Rejoinder

[78] In rejoinder, Counsel for the Plaintiffs submitted that the 1st Defendant did not lead any evidence concerning this particular sum and the explanation by the 1st Defendant's Counsel is evidence from the bar. Counsel for the Plaintiffs stated that specifically, it is not indicated for which loan the registration fees were being charged since the 1st Plaintiff had obtained two loans. Counsel concluded that in any case, upon imposing a documentation charge, a further charge of mortgage registration fees was unauthorized, unlawful and irregular. The Court ought to order a refund of the same.

Determination by the Court

[79] According to the evidence before the Court, this sum was debited from the 1st Plaintiff's account on 9th December 2013. At page 84 of Doc. 54, the narration on the debit reads, *"Legal chgs/Excellent*". The 1st Defendant, however, in Annexture "O" attached to its WSD responded that this was mortgage registration charges paid for Plots 978 & 1506, Busiro Block 333 and paid as per tax invoice dated 5.12.2013 to Oundo & Co. Advocates. At page 208 of the 1st Defendant's Supplementary trial bundle filed on 11th December 2017, there is an invoice from Oundo & Co. Advocates dated 5th December 2013. The invoice indicates that this was mortgage registration charges for Plot 978 & 1506 Busiro Block 333. At page 341 of Vol. 4 of the 1st Defendant's Supplementary Trial Bundle, there is a credit entry of UGX. 2,240,000/= to Oundo & Co. Advocates on the 9th of December 2013 with a narration, *"Legal Chgs/ Excellent Ass"*.

[80] Counsel for the Plaintiffs submitted that there was no indication as to which facility the said sum was related to since the 1st Plaintiff had obtained two mortgages from Crane Bank Ltd; one as per the facility letter of 12th July 2013 and another of 7th April 2014. On record, however, there is evidence that an activity for registration of a mortgage on Plots 978 & 1506, Busiro Block 333 took place. The 1st Defendant also adduced evidence of an invoice dated 5.12.2013 from Oundo & Co. Advocates and there is proof that this exact sum was credited to the account of Oundo & Co. Advocates on the same day it was debited from the 1st Plaintiff's account. Unlike the documentation fee that was found irregular by the Court, the mortgage registration charge is clearly traced; the payee is known and the purpose for its payment was clearly explained by the 1st Defendant. Given that the block sum termed as documentation charge was rejected, there is no doubt that a specific sum was paid in respect of mortgage registration fees seeing that it is not in dispute that such a mortgage was registered. In the circumstances, I find that the sum of UGX 2,240,000/=

was lawfully and regularly deducted and is not liable to be refunded by the 1st Defendant.

(iii) The sum of UGX 5,000,000/= debited on 24th April 2014 and credited on the same day

[81] According to the record, at page 84 of Exhibit Doc. 54, the 1st Plaintiff's account was debited with a sum of UGX 5,000,000/= as *"Legal Chgs/Excellent"*. On the same day, a similar credit was made back to the same account with the same narration. The 1st Plaintiff challenged both transactions. The 1st Defendant in its defence and in Annexture "O" responded that this was an erroneous entry that was debited by the system but was reversed and cleared. It was argued for the 1st Defendant that the net effect of the debit and credit was zero and no loss was occasioned to the 1st Plaintiff.

[82] I have looked at page 84 of Doc. 54 and noted that whereas the account was debited with UGX 5,000,000/= on the 24th of April 2014, the sum was reversed and credited back to the 1st Plaintiff's account on the same day. Although it is correct as submitted by the Plaintiffs' Counsel that the bank is under an obligation to treat the accounts of its depositors with meticulous care and utmost fidelity, there is no evidence that the error on the part of the bank was reckless or negligent. The wrong is also mitigated by the fact that the error was corrected immediately. Given that the Plaintiff suffered no loss from this erroneous transaction, this claim by the Plaintiff is superfluous and is rejected.

(iv) The sum of UGX 50,000,000/= debited on 24th of April 2014.

[83] The 1st Plaintiff's account was debited with a sum of UGX 50,000,000/=. At page 84 of Doc. 54, the sum was debited on the 24th April 2014 as *"Legal Chgs/Excellent"*.

Submission by Counsel for the Plaintiffs

[84] It was submitted by Counsel for the Plaintiffs that the 1st Defendant did not adduce proof of an invoice for the legal service for which legal fees were charged and no document was produced by the 1st Defendant either by way of an instruction from the 1st Plaintiff, invoice from any law firm or legal services provider for the said legal charge or at least a receipt by a third-party service provider to whom the said sum of UGX. 50,000,000/= could have been paid. Counsel stated that the 1st Defendant did not produce any bank statement and could not point to any bank statement showing the account to which the money was transferred and for which service. When the deduction was queried, the 1st Defendant conveniently termed it as 'documentation charge' in respect of the facility of 7th April 2014 which raised questions as to what it was exactly. Counsel further argued that even if it was a documentation charge as alleged, there was no justification for the Bank to charge the maximum sum provided for (UGX 50,000,000/=) on a lesser loan of USD 1,300,000 while for the bigger earlier loan of USD 3,895,200, the Bank purportedly charged UGX 25,000,000/=. Counsel prayed that the deduction be found by the Court to have been made illegally or irregularly.

Submission by Counsel for the 1st Defendant

[85] In reply, Counsel for the 1st Defendant submitted that Clause 8 of the facility letter at page 187 of Doc. 54 provided for documentation charge of 2% (subject to a maximum of UGX 50,000,000/=). Counsel submitted that the UGX 50,000,000/= was lawfully debited in accordance with clauses 5 & 8 of the sanction letter. Counsel further stated that the terms of clause 8 are clear and do not provide for explanation or approval by PW2. Counsel relied on Section 92 of the Evidence Act to submit that since there was a contract, no evidence of any oral agreement would be admitted and that since several documents such as the sanction letter, the mortgage deed, a collateral further charge, debenture, were prepared and registered, the 1st Plaintiff thereby took

benefit of them. Counsel further submitted that as per the Advocates Remuneration and Taxation of costs regulations at the time, the fees payable for the loan of USD 1,300,000 would have been UGX 163,659,600/= as legal fees but he was charged UGX 50,000,000/=.

Submission in Rejoinder

[86] In rejoinder, Counsel for the Plaintiffs submitted that none of the witnesses presented by the 1st Defendant was able to define what "documentation charge" was and enforcing such a payment would not be the intention of the parole evidence rule. Counsel stated that throughout the hearing, no evidence was adduced to prove to whom this money was paid and what service was rendered. Counsel concluded that a court of a law cannot determine issues of accounts basing on guess work.

Determination by the Court

[87] It is not certain from the position taken by the 1st Defendant as to whether the impugned sum of UGX 50,000,000/= was a documentation charge or legal fees. I have already pronounced myself on the position of the court regarding the ambiguity surrounding the matter of 'documentation fee/charge' as sought to be enforced by the 1st Defendant. In as far as this sum is claimed to have been deducted as a documentation charge, the same finding still holds as the facts and circumstances are similar in both instances. Regarding the claim by the 1st Defendant that the sum was in respect of legal fees, no evidence was led before the Court to prove any legal work that was done, by which law firm, any invoice by the law firm, any payment made to such a service provider.

[88] I also agree with the submission by Counsel for the Plaintiffs that if the impugned sum was claimed to be legal fees, it being a third party charge, it was incumbent upon the Bank to notify the Plaintiffs over the same, to have the service provider clearly known to the Plaintiffs, and to give an opportunity to the Plaintiffs to negotiate the charge or choose a service from available options.

This is upon reliance to the Bank of Uganda Consumer Protection Guidelines. It was argued by Counsel for the 1st Defendant that the Guidelines have no force of law and were wrongly relied upon by the Plaintiffs' Counsel. I do not agree. The correct position is that in absence of a superior legal instrument, Guidelines issued by a regulatory body have persuasive authority and the Court is able to derive useful guidance from them. I agree that the Bank was duty bound to follow the Guidelines and not to openly flout them especially where doing so led to an overt injustice.

[89] All in all on this point, my finding is that the sum of **UGX 50,000,000/=** debited on 24th April 2014 as legal fees but at the same time claimed by the 1st Defendant to have been a 'documentation charge' was illegally and irregularly debited from the 1st Plaintiff's account. The 1st Plaintiff is entitled to a refund of the said sum. As I have already indicated herein above, the same principle on interest applies. The sum shall be refunded with interest at the rate of 24% per annum from 24th April 2014 until the date of full payment.

B) Search Fees

[90] In paragraph 10(r) of the amended plaint, the 1st Plaintiff challenged the debits of UGX 487,000/= as search fees. The particulars of these debits are set out at page 9 of Exhibit Doc. 54. This category, also set out under Appendix 1, contains 3 debits of **UGX 60,000/=** on 11th March 2013 and 2 similar debits of **UGX 213,800/=** on 21st March 2013.

(i)The sum of UGX 60,000/= debited on 11th March 2013

Submission by Counsel for the Plaintiffs

[91] Counsel for the Plaintiffs submitted that whereas the 1st Defendant indicated this to have been company search fees, which was paid to Kiwanuka & Karugire Advocates as per their invoice dated 15th February 2013, what was produced as an invoice was a pro-forma invoice which is not proof of payment. Further, that no search statements were produced in evidence as proof that the

search was indeed made, and for the benefit of the 1st Plaintiff. Counsel further submitted that even if the searches were done, the Bank was bound by the principles under the *Bank of Uganda Financial Consumer Protection Guidelines 2011* which obliges the Bank to act with fairness, reliability and transparency in its dealings with the 1st Plaintiff. Failure to do that, Counsel submitted, the Bank breached its banker-customer relationship for which the customer is entitled to a refund of the debited funds with interest. Counsel concluded that there was no satisfactory answer to this queried sum and the same ought to be refunded with interest.

Submission by Counsel for the 1st Defendant

[92] Counsel for the 1st Defendant submitted that the account was lawfully debited under clause 8 of the sanction letter dated 12th July 2013. Counsel stated that the authority and or mandate to debit the account was in the sanction letter which allowed the bank to debit search fees. He further stated that the debit was lawful without any need to submit a search certificate. Counsel argued that the burden of proof on the balance of probabilities was duly discharged by the 1st Defendant. Counsel also reiterated his submission that the BOU Consumer Protection guidelines relied on by PW1 have no force of law but are merely directory. He also submitted further that there was no complaint by the Plaintiff about this amount and failure by the customer to examine the bank statements and report any errors absolved the bank of any liability or loss arising therefrom. Counsel concluded that the claim for a refund of UGX 60,000/= is fictitious and unjustified.

Submissions in Rejoinder

[93] In rejoinder, Counsel for the Plaintiffs submitted that just because the 1st Plaintiff signed a facility letter, it did not mean that the account would be debited with any amount, without the 1st Plaintiff's approval. Counsel submitted that in this case, the facility letter did not indicate the amounts which would be debited as search fees and that the bank, customer or court

reading the facility letter would not know how much the customer would be charged or what the bank was authorized to debit for search fees. Counsel stated that as per clause 8 of the facility letter, the bank had a duty to inform the customer of its obligations and the clause did not give the bank the mandate to debit the 1st Plaintiff's account without its knowledge, authorization and consent. Counsel concluded that the actions of debiting the customer's account without its knowledge, consent and authorization was illegal and contrary to the law and the BOU Financial Consumer Protection Guidelines 2011.

Determination by the Court

[94] It is a settled position of the law that where the claimant shows that the withdrawals from its accounts were made by the bank in breach of mandate, the burden shifts to the bank to prove its claim that the withdrawals were for discharging the claimant's liabilities or otherwise for the claimant's benefit, and did not occasion loss to the claimant. See: ***Stanbic Bank (U) Limited versus Uganda Cross Limited SCCA No. 04 of 2004.*** On the case before me, the 1st Plaintiff queried the deducted sum of UGX 60,000/= which the 1st Defendant claimed to have been paid as search fees to M/s Kiwanuka & Karugire Advocates. It is common ground that where a search is carried out in relation to particulars of a company at the Companies' Registry or land at the Land Registry, proof thereof is by way of adducing a search statement issued by the Companies Registry or the Land Registry respectively. Such records must be on the customer's file kept by the bank and such would put to rest any question as to whether a search for which the customer was charged was ever carried out or not. I have found useful guidance in the persuasive decision of ***Ezekiel Osugo Angwenyi & Another v National Industrial Credit Bank Limited [2017] eKLR*** cited by the Plaintiff's Counsel, where it was noted that;

> *"Banks must keep proper records of account. It is on the basis of such record that a claim for or against a bank can be determined. Since between a bank and a borrower the former is the one obligated to keep a more dependable*

record and to avail statements of account, a bank, like in this case, which cannot keep and avail accountable record will be disqualified from making any claims against a borrower, and would be hard put to discharge any such claims by a borrower".

[95] In the present case, the 1st Defendant produced no search statement issued by the company registry confirming that a search was carried out for the benefit of the 1st Plaintiff. Even if a search was, indeed, done, it leaves a doubt as to whether it was for the benefit of the 1st Plaintiff and was so authorized. In evidence, the 1st Defendant adduced a proforma invoice, at page 190 of the 1st Defendant's Supplementary Trial Bundle filed on 11th December 2017, issued by Kiwanuka & Karugire Advocates. The invoice indicates *Legal fees*, broken down as *search fees (at companies for M/s Excellent Assorted Manufacturers Assorted Ltd) of 30,000/= and transport of 30,000/=*. At page 312 of the 1st Defendant's Supplementary Trial Bundle Vol. 4 is a credit on the 11th of March 2013 to Kiwanuka & Karugire Advocates' account of UGX 60,000/= with a narration *"Search Fees/Excellent As"*. However, in absence of a search statement or certificate, it remains contested as to whether the search was indeed carried out, and if so, whether it was for the benefit of the 1st Plaintiff.

[96] It was submitted by Counsel for the 1st Defendant that, by signing the sanction letter, the 1st Plaintiff had given mandate to the bank to debit the account with any sums including search fees and that upon signing the sanction letter, there was no need to adduce a search certificate. To begin with, while the alleged search fees was deducted on 11th March 2013, the sanction letter pointed to by the 1st Defendant was issued on 12th July 2013. It is not logical that the 1st Plaintiff gave implied consent to a deduction that had been made way back in March 2013, and without notice. Secondly, under cross examination, DW2 conceded that an entry on a customer's bank statement must be evidenced by a document speaking to the transaction, for which a customer's account is being debited. DW2 testified that where an entry on the

customer's account is queried, the only way the query can be answered is by production of the document speaking to the transaction against which the entry was effected. I would, therefore, agree with the argument by Counsel for the Plaintiffs that production of proforma invoice, or proof of payment to a law firm, without a search statement to confirm that indeed a company search was done for the benefit of the 1st Plaintiff is insufficient proof to answer the query raised against the sum in issue.

[97] Under the law, the bank owes a customer a fiduciary duty of care to, inter alia, inform the customer of all transactions affecting their account. I have not found any evidence of such communication or notification to the 1st Plaintiff or any solicitation of such authorization from the 1st Plaintiff. Given that the sanction letter did not particularize the amounts to be deducted, the bank had a duty to inform the client of what fees were deductible, for which purpose and when. No evidence of execution of such a duty by the Bank in this case was presented by the 1st Defendant. I have, therefore, found no evidence to rebut the claim that the sum of **UGX 60,000/=** was unlawfully deducted by the Bank. Accordingly, the same shall be refunded by the 1st Defendant with interest at 24% per annum from 11th March 2013 until payment in full.

(ii) The sum of UGX 427,600/= deducted on the 21st of March 2014

[98] The 1st Plaintiff queried the sum of UGX 427,600/= deducted in two parts of UGX 213,800/= on 21st March 2014. The 1st Plaintiff's contention was that this sum was never negotiated and there was never proof of payment for the service. In its WSD, the 1st Defendant in Annexture "O" represented that these were mortgage registration charges paid for Plots 978 and 1506 respectively of Block 333 land at Nabingo that was paid as per tax invoice dated 19.03.2014 to Oundo & Company Advocates.

Submission by Counsel for the Plaintiffs

[99] Counsel for the Plaintiffs submitted that the 1st Defendant had initially explained that these sums were mortgage registration charges and that it was expected that the 1st Defendant would adduce proof to that effect. Counsel stated that upon failing to prove the sum as a mortgage registration charges, it was claimed that the sum was deducted as search fees. No search statements were, however, adduced in evidence to confirm that any searches were indeed carried out.

Submission by Counsel for the 1st Defendant

[100] Counsel for the 1st Defendant in reply submitted that according to page 209 of the 1st Defendant's trial bundle filed on 11th December 2017, the said sums were debited from the 1st Plaintiff's account and paid to Oundo and Co. Advocates as shown at page 345 of Vol. 4 of the 1st Defendant's Trial Bundle. Counsel stated that the narrative at page 345 of Vol. 4 shows that these were search fees for the 1st Plaintiff. Counsel submitted that the contradiction presented by the explanation in Annexture "O" was explained by presence of documents showing to whom the sums were paid to as search fees. Counsel further submitted that the invoices in the 1st Defendant's trial bundle at pages 209 to 210 show that they related to the property of the 1st Plaintiff. Counsel concluded that the prayer for a refund is fictitious, unjustified and only intended to avoid repayment of the loan.

Determination by the Court

[101] In as far as the sum of UGX 427,600/= has been claimed to have been part of search fees debited by the Bank and paid to a firm of advocates, the findings that have been made by the Court in regard to the sum of UGX 60,000/= herein above apply to this claim. The facts and circumstances regarding the two figures are similar and, as such, I do not need to pronounce myself on the same any further. For the same reasons, the 1st Plaintiff is

entitled to a refund of the sum of **UGX 427,600/=** with interest at 24% per annum from 21st March 2014 till payment in full.

C) Stamp Duty

[102] The 1st Plaintiff, under paragraph 10(r) of the amended plaint challenged debits totaling to a sum of UGX 68,388,256/= as stamp duty. These are in the 3rd column of Appendix 1 at page 9 of Doc. 54. In its amended WSD, under Annexure O, the 1st Defendant explained that these were stamp duty charges. The sums are UGX 50,985,471/= debited on 21st August 2013 and UGX 17,402,785/= debited on the 24th April 2014.

(i)The sum of UGX 50,985,471/= debited on 21st August 2013.

Submission by Counsel for the Plaintiffs

[103] Counsel for the Plaintiffs submitted that when the URA portal was displayed in court, there was no proof of payment of stamp duty apart from the payment slip at page 212-213 of Vol.1, which is not proof of payment and that there was a variance between the figure that was debited from the 1st Plaintiff's account and the one in the registration slip. Counsel submitted that at the time of debiting the account, there must have been a document with the exact sum of UGX 50,985,471/= yet the amount in the purported invoice at pages 209 to 211 of the 1st Defendant's supplementary Trial Bundle was different from the queried sum. Counsel submitted that the said amount was unlawfully debited from the 1st Plaintiff's account and the same ought to be refunded with interest.

Submission by Counsel for the 1st Defendant

[104] In reply, Counsel for the 1st Defendant indicated that the relevant figures appear in the various stamp certificates in the 1st Defendant's supplementary trial bundle Vol. 4. He further stated that an extra UGX 547,000/= was paid to MMAKS Advocates as disbursements and showed that the stamp duty, disbursements and banking fees all totaled to UGX 50,985,471/=. Counsel

submitted that under the sanction letter of 12th July 2013 upon which the 1st Plaintiff obtained a loan of USD 3,895,200, the 1st Plaintiff agreed to provide security to the bank and clauses 6 and 8 gave the bank the right/mandate to debit the account in satisfaction of those charges. Counsel argued that the account was lawfully debited to pay stamp duty and disbursements as evidenced by the fact that the mortgages were duly registered subsequent to payment of stamp duty.

Determination by the Court

[105] The sum of UGX 50,985,471/= was debited from the 1st Plaintiff's account as *"Stamp Duty/Disbursement"* as per the narration at page 82 of Exhibit Doc. 54. At pages 209 to 211 of the 1st Defendant's Supplementary Trial Bundle Vol. 1, the invoice from MMAKS Advocates indicates stamp duty for debenture deeds, and other documents totaling to UGX 50,437,471.4/=. It also shows disbursements of UGX 547,000/=. The 1st Defendant adduced stamp duty certificates and a statement of the account of MMAKS advocates where the disbursements of UGX 547,000/= were paid.

[106] It is indicated on record as per the 1st Defendant's counterclaim and by way of a table particularizing the mortgages secured by the 1st Plaintiff that the loan of USD 3,985,200 was secured by mortgages over Plot 302 Kibuga Block 21 at Busega (FRV 1352 Folio 5), Busiro Block 333 Plots 978 and 1506 at Nabingo, Plot 75 Kampala Road and Plot 81 Kampala Road. Further documentation comprises of mortgage documents for Plot 302 (2nd collateral legal mortgage) which bears a lodgment stamp of 6/9/2013; a mortgage document for Busiro Block 333 Plot 978 which bears a revenue stamp of 19th November 2013; a mortgage document for Plot 81 Kampala Road with a lodgment stamp of 6/9/2013; a mortgage document for Plot 75 Kampala Road with a lodgment stamp of 6/9/2013; and a debenture dated 3rd August 2013. The above security registrations were all executed in respect of the facility of USD 3,895,000. The encumbrance pages of the relevant certificates of title

appearing at pages 52-63 of the Joint Trial Bundle indicate that the mentioned mortgages were registered. It is, indeed, not disputed by the 1st Plaintiff that the said mortgages were registered. No evidence was adduced by the 1st Plaintiff to indicate that no stamp duty was paid for the registration of the said mortgages or that it was paid differently.

[107] It follows from the above facts, therefore, that the mortgages were indeed registered and stamp duty was paid prior to their registration. Whereas the 1st Plaintiff's query included the claim that it did not authorize this transaction, that claim is not made out for two reasons. One is that there is proof that the said sum was paid for the benefit of the 1st Plaintiff to register the mortgages and proof of such registration is on record. Secondly, following the clauses 6 and 8 in the facility letter of 12th July 2013, it was obvious and by clear implication that the stamp duty had to be paid for purpose of registration of the mortgages and that the same had to be paid by the 1st Plaintiff. As such, provided there is proof that the said sums were indeed paid, for the stated purpose and to the benefit of the 1st Plaintiff, any other contestation by the 1st Plaintiff remains simply a technicality. I am, therefore, satisfied on a balance of probabilities that the sum of UGX 50,985,471/= was lawfully debited. The Plaintiff is, therefore, not entitled to a refund of the same.

(ii) The sum of UGX 17,402,785/= debited on 24th April 2014.

[108] The facts and circumstances of this deduction are similar to the immediately foregoing claim. The 1st Defendant adduced evidence of a stamp duty certificate at page 26 of Vol. 4 of the 1st Defendant's Trial Bundle for payment of stamp duty in the sum of UGX 16,786,785/= and payment of UGX 616,000/= to MMAKS Advocates; which totaled to UGX 17,402,785/= that was debited from the 1st Plaintiff's account. The copies of the certificates of titles in the Joint Trial Bundle at pages 52 – 63 indicate that mortgages were registered in respect of USD 1,300,000 in May and July 2014 respectively. It is, equally, not disputed that these mortgages were registered. In view of my finding that

the debit was done for the benefit of the 1st Plaintiff for purpose of stamp duty payment and registration of the relevant mortgages, any further claim by the 1st Plaintiff over the matter remains without substance. This part of the 1st Plaintiff's claim equally fails.

D) Registration Fees

[109] Under paragraph 10(r) of the plaint, the 1st Plaintiff also queried debits totaling to a sum of UGX 2,860,000/= as registration fees. These sums are particularized in the 4th column of Appendix 1 at page 9 of Doc. 54; as UGX 820,000/= debited on 20/9/2013, UGX 1,220,000/= on 14/10/2013 and UGX 820,000/= on 14/10/2013.

Submission by Counsel for the Plaintiffs

[110] Counsel for the Plaintiffs submitted that according to evidence by PW1, mortgage registration fees are paid in the names of the mortgagor to the Local Government where the mortgaged property is situate and a receipt is issued in the names of the mortgagor. Counsel stated that no such supporting documents had been provided to the 1st Plaintiff for that purpose. Counsel further submitted that the 1st Plaintiff only had 2 loans i.e. one of USD 3,895,200 by the facility letter of 12th July 2013 and that of USD 1,300,000 by facility letter of 7th April 2014. Counsel stated that a documentation charge of UGX 50,000,000/= had already been charged by the bank and therefore the 1st Plaintiff could not be charged again for mortgage registration fees. Counsel further submitted that the Plaintiffs were not provided with the schedule of all the charges and were never informed of the applicable fees.

Submission by Counsel for the 1st Defendant

[111] Regarding the first sum of UGX 820,000/= debited on 20th September 2013, Counsel for the 1st Defendant submitted that at page 54 of the joint trial bundle, there is evidence that on 6th September 2013, a second further charge to Crane Bank was registered on property at Plot 302 Kibuga Block 21 Busega.

Counsel stated that this money was paid to Oundo & Co. Advocates as per the bank statement at page 336 of Vol. 4 of the 1st Defendant's trial bundle. Counsel argued that the 1st Plaintiff took benefit of this payment in order to have its securities registered. Regarding the sum of UGX 1,220,000/= debited on 14th October 2013, Counsel for the 1st Defendant submitted that the mandate to debit the account is set out under clauses 5 and 8 of the relevant sanction letter. Counsel argued that upon proof that the deduction was lawfully made by the Bank, the burden lies on the 1st Plaintiff to prove that the debit was unlawful. Counsel stated that the sum was paid to Oundo & Co. Advocates as per the statement at page 337 of Vol. 4 of the 1st Defendant's trial bundle. Counsel also stated that there was evidence that the mortgage was registered and the 1st Plaintiff took benefit of it in order to have its securities registered. Counsel made the same arguments in respect of the sum of UGX 820,000/= debited on 14th of October 2013.

Submission in Rejoinder

[112] In rejoinder, Counsel for the Plaintiffs submitted that once the 1st Plaintiff shows that the withdrawals from its accounts were made by the bank in breach of mandate, the burden shifts to the bank to prove that the withdrawals were lawful and did not occasion loss to the 1st Plaintiff. Counsel relied on ***Stanbic Bank (U) Ltd vs Uganda Crocs Ltd (supra)***. Counsel argued that the 1st Defendant did not prove which further charges were being registered by Oundo & Co. Advocates. Counsel asserted that no further charge was registered at the time. Counsel further submitted that the charges were not communicated by the bank to the 1st Plaintiff and it was not enough to argue that by signing the sanction letter, the 1st Plaintiff mandated the bank to debit its account with all charges whether known, unknown, accepted or unaccepted by the 1st Plaintiff. Counsel concluded that there was no fairness or transparency and the debits were unfair, illegal and irregular.

Determination by the Court

[113] According to the evidence on record, at pages 243, 247 and 249 of Vol. 1 of the 1st Defendant's trial bundle, the 1st Defendant adduced 3 invoices all speaking to the registration of a mortgage charge on Plot 302 dated 10th September 2013 for a sum of UGX 820,000/=, registration of a mortgage charge on Plot 81 Kampala Road, dated 7th October 2013 for a sum of UGX 1,220,000/= and registration of a mortgage charge on Plot 75 dated 2nd October 2013 for a sum of UGX 820,000/=. None of the above entries make reference to registration of a second further charge as alluded to by Counsel for the 1st Defendant. As already stated above, I have looked at the mortgage documents for the loan sum of USD 3,895,200, dated 3rd August 2013 in Vol. 2 of the 1st Defendant's supplementary trial bundle; and they all refer to "second legal mortgage".

[114] I have further looked at the invoice of MMAKS Advocates dated 19th August 2013. I have found that these collateral second legal mortgages were registered by MMAKS Advocates which also charged for the same *(as seen on pages 209 and 211 of Vol. 1 of the 1st Defendant's supplementary trial bundle)*. It is for registration of these collateral second legal mortgages that MMAKS Advocates issued an invoice and was paid for the service. It is therefore not clear as to why the bank went ahead to debit the 1st Plaintiff's account and purport to pay more money to Oundo & Co Advocates to register a second further charge when the same had been charged by MMAKS Advocates by its invoice of 19th August 2013.

[115] I have also not seen any other mortgage documents for registration of further charges produced by the bank apart from those drafted by and registered by MMAKS Advocates. This is also in view of the fact that the mortgages on Plots 302, 81 and 75, for securing the loan of USD 3,985,200 had been registered by MMAKS which firm charged registration fees as already

shown above. Upon indication by the 1st Plaintiff that the sum of UGX 2,860,000/= was irregularly and unlawfully debited, the burden shifted to the 1st Defendant to prove that the sum was lawfully debited from the 1st Plaintiff's account, was used for its benefit and did not occasion loss to the 1st Plaintiff. This burden has not been executed by the 1st Defendant. The 1st Plaintiff is therefore entitled to a refund of the said sum of **UGX 2,860,000/=** with interest at 24% per annum from 20th September 2013 for the sum of UGX 820,000/= and from 14th October 2013 for the sum of UGX 2,040,000/= until full payment.

E) Survey Fees

The Sum of UGX 10,000,000/= debited on 25th May 2013

[116] In the amended plaint under para. 10(r), the 1st Plaintiff also challenged the sum of UGX 10,000,000/= charged on its account as survey fees. This is also particularized in the 5th column of Appendix 1 at page 9 of Doc. 54. Under Annexture O to the amended WSD, the 1st Defendant averred that this was survey fees paid for Plot 302 Block 21 Kyadondo at Busega and that the same was paid as per tax invoice issued on 23rd May 2013 for UGX 10,000,000/= by Oundo and Company Advocates.

Submission by Counsel for the Plaintiffs

[117] Counsel for the Plaintiffs referred the Court to the evidence of PW1 and submitted that the survey fees/costs were never agreed upon with the 1st Plaintiff and the 1st Plaintiff was never given an opportunity to negotiate the charges. Counsel submitted that whereas the 1st Plaintiff agreed to pay survey fees in the facility letter of 12th July 2013, it did not agree to pay the figure of UGX 10,000,000/= as survey fees. Counsel further submitted that the invoice for the impugned fees was addressed to Crane Bank Ltd and not the 1st Plaintiff; that no survey report was attached to the invoice or adduced in court yet the invoice particulars referred to "to survey report" despite the fact that Oundo & Co. Advocates do not provide survey services. Counsel also submitted

that the purported invoice from Oundo & Co. Advocates adduced by the 1st Defendant as the basis for the debit was not signed and had inconsistent amounts of UGX 1,000,000/= (One Million Uganda Shillings) and UGX 10,000,000/= (Ten Million Uganda Shillings). Without any basis whatsoever, the bank decided to pay 10,000,000/= for a purported invoice of UGX 1,000,000/= which was unlawful and irregular. Counsel prayed for a refund of the amount of UGX 10,000,000/= with interest from the date the account was illegally debited with the said sum.

Submission by Counsel for the 1st Defendant

[118] Counsel for the 1st Defendant submitted that the mandate to debit the account is to be found in clauses 6 & 8 of the sanction letter dated 12th July 2013 and that specifically under clause 8, the 1st Plaintiff agreed to pay survey fees. Counsel submitted that the sum of UGX 10,000,000/= was paid to Oundo & Co. Advocates as per invoice dated 23rd May 2013 and the bank statement of Oundo & Co. Advocates at page 329 of Vol. 4 of the 1st Defendant's supplementary trial bundle shows the credit of UGX 10,000,000/=. Counsel argued that the minute details such as an incomplete TIN and the invoice not being signed are irrelevant to the issue of whether the debit was lawful. Counsel further submitted that there was no variance between the invoice at page 191 of the 1st Defendant's supplementary trial bundle of 11th December 2017 and that at page 207 of the 1st Defendant's supplementary trial bundle Vol. 1. Counsel argued that the submission on the variance has no basis and is erroneous as the invoice that appears on both pages is for UGX 10,000,000/=. On the issue of the survey report not having been adduced in evidence, Counsel responded that this is not the issue that was before court; the real issue being whether the account was lawfully debited for survey fees as agreed in the mandate given by the customer and paid to Oundo & Co. Advocates.

Determination by the Court

[119] I have already agreed with the position that where the debit on a customer's account is queried, the burden lies on the bank to adduce evidence of the lawfulness of the deduction for a beneficial service rendered to the customer and that the deduction did not occasion any loss to the customer. As such, where a sum of money was deducted from the customer's account apparently as survey fees, it was incumbent upon the 1st Defendant to adduce evidence showing that, indeed, a survey was duly carried out on account of the mortgage in favour of the 1st Plaintiff and for its benefit. It is such that would justify the action of the bank paying out the said sums. It is not enough to assert that the sanction letter placed an obligation on the customer to maintain sufficient balance on its account that would facilitate payment of such expenses. It is important that actual evidence is adduced to establish that such an expense was lawfully incurred. The argument by the 1st Defendant is that since there was an agreement that the 1st Plaintiff would meet the cost of survey fees, such amounted to a mandate to the bank to debit the 1st Plaintiff's account with any amount; without any need for notice, negotiation or information.

[120] I do not agree with the above argument by the 1st Defendant. In my view, signing the sanction letter by a customer did not per se constitute a mandate to the bank to unilaterally debit the customer's account with any kind of charges, more so without proof that a particular service was rendered for the customer's benefit. For instance, as stated for the 1st Plaintiff, the sanction letter did not specify the sums chargeable. Neither was there any schedule attached to the sanction letter of fees chargeable on the respective loans. In my view, it was imperative that the customer had to be notified of the service required, the cost or charges involved and the customer's knowledge or consent was necessary in such circumstances. See: ***Stanbic Bank (U) Limited versus Uganda Cross Limited***. The circumstances of this particular debit leave room

for doubt as to whether any service was rendered to the customer and whether the payment made to the firm of advocates was for a service rendered for the customer's benefit. In such circumstances, it is not enough to prove that the impugned sum was credited to the account of a particular firm; more so, a firm that does not offer that kind of services. The above combination of factors leads me to the conclusion that the bank acted in breach of its duty of care towards its customer.

[121] I have considered the aspect of variation in the figures appearing on the relevant invoices and I am in position to tell that the same was a clerical mistake that led to the writing of the sum as 'UGX 10,00,000/=' instead of 'UGX 10,000,000/='. Owing to the presence of commas between the sums, I am in position to infer that the writer intended to write 'UGX 10,000,000/=' but instead wrote 'UGX 10,00,000/='. Such a clerical error cannot form the basis of any substantial conclusion on the matter. I have, therefore, ignored the same. However, the absence of an audit report concerning the relevant transaction is a matter of great substance since in its absence, it cannot be established whether any survey was done in these particular circumstances, and if so, whether it was for the 1st Plaintiff's benefit and done under a lawful mandate. I have, therefore, found no evidence to justify the deduction of **UGX 10,000,000/=** from the 1st Plaintiff's account for purpose of payment for survey fees. The 1st Plaintiff is, therefore, entitled to a refund of the said sum with interest at 24% per annum from 25th May 2013, the date of the debit, until payment in full.

F) Utilization Fees

[122] In paragraphs 10(m) and 11(h) of the amended plaint, the 1st Plaintiff challenged a total sum of USD 103,904.00 which was charged on its account as utilization fees. The 1st Plaintiff avers that these charges were fraudulent, excessive, illegal and irregular. These are also particularized at page 27 of Doc. 54. The 1st Defendant in paragraph 12 of the amended WSD denied the

allegations and stated that the amounts were charged in accordance with the sanction letters, voluntarily agreed to by the Plaintiffs. The 1st Defendant attached Annexture O to the amended WSD as a report detailing the specific charges and basis of deduction. The sum of USD 103,904 is a total for 2 amounts namely; **USD 77,904** debited on 3/8/2013 and **USD 26,000** debited on 8/4/2014. The figures are listed under Appendix 10 of Doc. 54.

Submissions by Counsel for the Plaintiffs

[123] Counsel for the Plaintiffs referred the Court to the testimonies of PW1 and PW2 to the effect that utilization fees were charged contrary to normal banking practice on the basis that the interest rates and charges of the banking industry published by the Central Bank at the time did not indicate utilization fees. Counsel submitted that whereas the facility letter refers to utilization fees of 1%, it does not indicate what the 1% constituted of, making it ambiguous. Counsel argued that the 1st Plaintiff having drawn down the two loans fully and the sums having been disbursed at once, utilization fees should not have been charged and that since these charges were not published by the Central Bank, it was illegal for the bank to charge this sum and the same offended the provisions of Regulation 8(a) of the BOU Financial Consumer Protection Guidelines of 2011. The effect is that the 1st Plaintiff is entitled to a refund of the monies. Counsel also cited the case of ***General Industries Ltd Vs Non-Performing Assets Recovery Trust SCCA No. 5 of 1988*** to the effect that even when written down, where the words of a contract are ambiguous or illegal, the courts will interpret or construe them in a manner that gives effect to the intention of the parties. Counsel submitted that the words utilization fees and arrangement fees were not explained in the contract. Counsel prayed that court applies the exception to the parole evidence rule and finds that the arrangement and utilization fees were illegal, irregular and unlawful and the sums be refunded to the 1st Plaintiff.

Submissions by Counsel for the 1st Defendant

[124] In reply, Counsel for the 1st Defendant referred to the sanction letters and submitted that the bank lawfully debited the sum of USD 103,904 as arrangement and utilization fees. Counsel stated that the authority to charge this sum is contained in the sanction letters dated 12th July 2013 at pages 17-26 and 7th April 2014 at pages 34 – 38, both of the joint trial bundle. Counsel stated that the 1st Plaintiff agreed to pay Arrangement fees of 1% and Utilization fees of 1% amounting to USD 77,904 and USD 26,000 respectively for the two facilities and such were the exact amounts that were debited from the account. Counsel for the 1st Defendant further stated that the entry "A/U Fees" on the statement meant "Arrangement and Utilization fees"; meaning that the 1% utilization fees in respect of the queried sums was USD 38,952 of the USD 77,904 and USD 13,000 of the USD 26,000; but not the entire sums.

[125] Counsel further submitted that there is no legal provision under which Bank of Uganda regulates the type and amount of charges that a bank can charge a customer on transactions. Counsel argued that there is also no law which expressly states that the charges of arrangement and utilization fees by a bank are illegal. Counsel further argued that the publication of fees by Bank of Uganda is intended to promote transparency and enhance competition in the financial sector and not to regulate fees charged by each bank. Counsel submitted that Utilization and Arrangement fees were expressly agreed upon by contract between the 1st Defendant and the 1st Plaintiff. Counsel submitted that the contract was valid and enforceable and having signed the sanction letter, the 1st Plaintiff cannot walk away from its contractual obligations. Citing the cases of **Behange Vs. School Outfitters (U) Ltd (2000) 1 EA 20**; **C & A Tours Travel Operators Ltd Vs. TPS (U) Ltd t/a Serena Hotels, HCMA No. 195 of 2012; and Vantage Mezzanine Fund II Partnership Vs. Simba Properties Investments CP. Ltd, HCMA No. 201 of 2020;** Counsel for the 1st Defendant submitted that the 1st Plaintiff is bound by the doctrine of freedom

of contract and it is bound by the terms of the contract. Parties have the utmost liberty in contracting and once they enter into contracts, such contracts shall be enforced by the courts which have the duty to uphold and enforce them.

Determination by the Court

[126] As I have highlighted above, it is trite law that once parties have executed an agreement, they are bound by its terms and evidence of the terms of the agreement should be obtained from the agreement itself and no extrinsic evidence shall be admitted or if admitted shall be relied upon to contradict, add, vary, subtract from the terms of a contract except where there is fraud, duress, illegality, lack of consideration, lack of capacity to execute a contract or mistake. This is commonly known as the *parole evidence* rule. See ***Golf View Inn (U) Ltd vs Barclays Bank (U) Ltd HCCCS No. 358 of 2009 [2015] UGCOMC 23***. Section 91 of the Evidence Act Cap 6 provides as follows;

> ***"Evidence of terms of contracts, grants and other dispositions of property reduced to form of a document.***
>
> *When the terms of a contract or of a grant, or of any other disposition of property have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence, except as mentioned in section 79, shall be given in proof of the terms of that contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained".*

[127] In ***DSS Motors Ltd vs Afri Tours and Travels, HCCS No. 12 of 2003 [2006] UGCOMC 27,*** court held that in terms of the parole evidence rule and in relation to a contract that has been reduced to writing, neither party can rely on evidence on terms alleged to have been agreed which is extrinsic to the contents of the agreement. However, section 92 of the evidence Act provides

exceptions to the parole evidence rule. One such exception is set out under paragraph (a) thereof, where any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law. In case any of the above mentioned circumstances are proved by a party, the rule may not apply in its strict sense.

[128] In the instant suit, the Plaintiffs have raised an aspect of illegality of charging utilization fees in breach of the banking practice and of ambiguity in the meaning of the terms utilization fees and arrangement fees in the relevant sanction letters. It is therefore important to begin by examining whether the sanction letters in issue are affected by any illegality. It was averred by the Plaintiffs that the utilization fees were illegal because they were charged contrary to the banking practice and that the said terms in the sanction letters were ambiguous. On its part, the 1st Defendant relied on the concept of freedom of contract and averred that the Plaintiffs are bound by the contracts that they signed. The pertinent question, therefore, is whether the impugned charges as contained in the sanction letters were made in accordance with the law and practice in the banking industry.

[129] In their testimonies, PW1 and PW2 stated that the utilization fees were charged contrary to the banking practice. The defence witnesses who testified did not explain exactly what utilization fees entailed. DW2 testified that they meant administration fees. This explanation did not add any meaning to the term. Additionally, the charges were not amongst those published by Bank of Uganda to be charged by the 1st Defendant's predecessor, Crane Bank Ltd, during the period in issue. The explanation by Counsel for the 1st Defendant that the publication by Bank of Uganda did not exclude other fees chargeable by a commercial bank is neither supported by any law or evidence. Once a regulator issues and publishes official charges and leaves no room by way of a

general clause for imposing charges outside the circular, the understanding is that an entity that is subject to such regulation cannot act outside such regulation. Indeed, I find the practice of banks charging fees contrary to what has been endorsed by the regulator, Bank of Uganda, illegal and dangerous to the economy. In this case, the bank itself could not define what utilization fees were which is a recipe for abuse of the bank's fiduciary duty to its customer. In view of such illegality, the 1st Plaintiff cannot be said to be bound by the strict terms of the loan facility agreement. That part of the agreement would be accordingly vitiated.

[130] In the circumstances, it is clear to me that the sum of **USD 51,952** that was debited as 1% utilization fees (being part of the sum USD 103,904) was illegally charged in that regard. That is the total of **USD 38,952** debited on 3rd August 2013 and **USD 13,000** debited on 8th April 2014. The amounts shall be refunded with interest at 12% per annum from 3rd August 2013 in respect of the sum of USD 38,952 and from 8th April 2014 in respect of the sum of USD 13,000; until full payment.

G) Interest Overcharge

[131] In paragraph 10(n) and 11(i) of the amended plaint, the 1st Plaintiff averred that the 1st Defendant overcharged the interest payable by a sum of **USD 5,472.92**. The 1st Defendant denied this allegation in paragraph 12 of the amended WSD and averred that all amounts were charged in accordance with the sanction letters. At page 19 of Doc. 54, PW1 recomputed the interest payable by the 1st Plaintiff and indicated an overcharge of **USD 5,472.92**. At pages 11-13 of Annexture O to the amended WSD, the 1st Defendant recomputed the interest and concluded that the computation of interest was based on the value dates.

[132] Counsel for the Plaintiffs referred the Court to the testimony of PW1 to the effect that the interest overcharge on the 1st Plaintiff over the period from

8th August 2014 to 30th June 2016 was USD 5,472.92. It was shown that the interest rates agreed were 8.69% and 11% and, taking the higher rate, the interest chargeable for the period was meant to be USD 6,569.21 yet the bank charged USD 12,042.13, resulting into an interest overcharge of USD 5,472.92. This evidence was corroborated by PW2 at paragraph 28 of his witness statement. Counsel submitted that the 1st Defendant led no evidence to rebut the above evidence by the Plaintiffs and prayed for refund of the overcharged interest amount. Counsel for the 1st Defendant referred the Court to an explanation made by DW3 which, however, cannot be relied upon by the Court since the evidence was expunged and is not part of the record.

[133] From the evidence on record, it appears undisputed that the maximum amount that the bank could have charged in interest was USD 6,569.21 and yet the bank charged USD 12,042.13 and the excess of USD 5,472.92 remains unexplained. The overcharged sum, therefore, ought to be refunded. Accordingly, the sum of **USD 5,472.92** shall be refunded to the 1st Plaintiff with interest at 12% per annum from 30th June 2016 until full payment.

Issue 4: Whether the following sums of money were deducted from the 2nd Plaintiff's accounts; and if so, whether the said deductions were lawfully made?

a) UGX 518,252,500/= as legal fees

b) UGX. 37,500,000/= as stamp duty

c) UGX 24,260,000/= as valuation/survey fees.

d) UGX 6,520,000/= as transfer/registration fees.

e) USD 3,430,745= and UGX. 2,716,127,410= being unclear transactions

f) UGX 221,492,200= and USD 138,632 as utilization fees

g) USD 29,832 and UGX 108,992,200= as irregular arrangement fees

h) USD 246,508 as unexplained removals.

Items (A) – (D); UGX 518,252,500/= as legal fees, UGX 37,500,000/= as stamp duty, UGX 24,260,000/= as valuation/survey fees, and UGX 6,520,000/= as transfer/ registration fees.

[134] As per the averments in paragraphs 10(o) and (p) and 11(j) and (k) of the amended plaint, the 2nd Plaintiff challenged the deduction of a total sum of **UGX 586,532,500/=** as having been illegally charged on his account without notice. The sums are particularized in 4 columns in Appendix 2 at page 11 of Doc. 54. The 1st Defendant in paragraph 12 and 13 of the amended WSD denied the Plaintiffs' allegations and averred that all charges on the 2nd Plaintiff's accounts were properly and regularly debited/credited and the same were charged in accordance with the sanction letters. The sums under paragraphs (a) – (d) have been considered together.

Submission by Counsel for the Plaintiffs

[135] It was submitted by Counsel for the Plaintiffs that these charges/debits were never agreed to or negotiated and they were made without according the 2nd Plaintiff an opportunity to agree or negotiate them. Counsel submitted that there was no proof that such payments were made on his behalf or that they were indeed paid to the lawyers as alleged. Counsel stated that there were no supporting documents to explain and justify the debits and that had the 2nd Plaintiff been notified; he would not have accepted such exorbitant charges that rendered borrowing very expensive. Counsel further argued that in banking transactions, an advocate does not act for the bank but is hired by the customer indirectly.

[136] Counsel submitted that in line with the law and banking practice, DW2 agreed in evidence that before a customer is charged with any sum as legal fees, the customer must have been informed of such service and the service provider. The customer must be given a chance to negotiate or even choose the service provider from a number presented to him. The customer must know the

fees payable and must authorize payment of the same. Counsel submitted that reference by the 1st Defendant to clause 7 in the sanction letter of 3rd December 2010 did not satisfy the above requirement. Counsel prayed to the Court to find that the impugned sums were unlawfully debited from the 2nd Plaintiff's account and the same should be refunded with interest.

Submission by Counsel for the 1st Defendant

[137] In reply, Counsel for the 1st Defendant stated that it was not disputed by the 1st Defendant that the mentioned sums were debited from the 2nd Plaintiff's accounts. Counsel relied on the sanction letters and submitted that the deductions were lawfully made on the basis that the 2nd Plaintiff authorized the bank to debit its accounts and in light of the fact that the 2nd Plaintiff obtained the relevant loan facility and taxes plus charges were duly paid to register the respective mortgages. Counsel argued that according to clause 7 of the relevant sanction letter, Crane Bank had authority to debit the 2nd Plaintiff's account for fees, costs and taxes, among others. Counsel submitted that the submission by the Plaintiffs' Counsel that the customer had to be notified before the debits were made is untenable given the clear terms of the agreement. Counsel prayed to the Court to reject the claims by the 2nd Plaintiff.

Submissions in Rejoinder

[138] In rejoinder, Counsel for the Plaintiffs submitted that whereas the 2nd Plaintiff signed the sanction letters, he did not concede to unilateral, illegal, irregular, and wrongful debits from his accounts by the 1st Defendant and the filing of the suit is manifest evidence that the 2nd Plaintiff did not authorize these transactions. Counsel stated that from the sanction letters, no specific sums of fees or charges were agreed upon. Neither was any schedule of fees or charges attached to the sanction letters, which would have constituted notice to the customer of the nature of charges and amounts to be paid for the third party charges.

Determination by the Court

[139] It is not in dispute that there was a bank-customer relationship between the Plaintiffs and the 1st Defendant's predecessor. As already stated, this relationship is both contractual fiduciary. Part II of the Bank of Uganda Consumer Protection Guidelines echoes three principles that guide the bank-customer relationship namely; Fairness, Reliability and Transparency. When a customer opens up an account with the bank, the bank is under duty to apply its skill, expertise and all manner of safeguards to ensure that the customers' money is safe from actions by third parties and other unauthorized persons. See: ***Fidelity Commercial Bank Limited v Italian Market Kenya Limited [2017] eKLR.***

[140] On the case before me, the relevant sanction letters were executed with clauses to the effect that the Plaintiffs would incur various costs connected to the mortgage transaction. Such clauses have been construed by the 1st Defendant as a mandate to debit the Plaintiff's account with the queried sums. However, the said sanction letters merely provided a general mandate with no specific provision on sums payable and at which instance. In my view, the existence of a clause requiring a customer to incur costs on non-standardized services like legal fees does not in any way grant the bank permission to debit the customer's account in payment for such services without notice or information to the customer. The customer must be clearly informed of the nature of service, the service provider and must be given an opportunity to negotiate or be involved in the negotiations with the service providers. It is with the above principles in mind that the deductions made in items (a) – (d) shall be considered for their lawfulness or regularity.

(i) The Sums of UGX 101,016,500/= and UGX 30,000,000/= debited on the 14th of January 2011

Submissions by Counsel for the Plaintiffs

[141] It was submitted by Counsel for the Plaintiffs that it was conceded by DW2 that by signing the sanction letters, the customer would not know the exact amount payable for the relevant services. Counsel submitted that the clause relied upon by the 1st Defendant did not specify the service providers or the amount of fees that were payable to them. There was no mention in the sanction letter that the sum of UGX 131,016,500/= would be paid to MMAKS Advocates. There was, therefore, no mandate to debit the 2nd Plaintiff's account with the stated sum. Counsel further submitted that the 1st Defendant failed to produce any document authorizing the bank to debit the 2nd Plaintiff's account with these contested sums. There was also no proof that the queried sums ever left the bank and were paid to MMAKS Advocates. Counsel concluded that in absence of such evidence, the debits amounting to UGX 131,016,500/= were unlawful and ought to be refunded with interest from the date of the debit.

Submissions by Counsel for the 1st Defendant

[142] For the 1st Defendant, Counsel submitted that the payment of UGX 85,386,500/= went to discharge the 2nd Plaintiff's obligations to pay stamp duty, registration fees, legal fees as per the invoice from MMAKS Advocates at pages 303-305 of Vol.1 of the 1st Defendant's supplementary trial bundle. Counsel argued that the 1st Defendant's failure to get the documents to explain the variance of UGX 15,630,000/= was because these were transactions of 2010 and having made no complaint to the bank since then, the 2nd Plaintiff is estopped from asserting that the debit was unlawful. Counsel also invited the Court to apply the parole evidence rule and hold the 2nd Plaintiff to be bound by the terms of the contract signed by him.

Determination by the Court

[143] Clause 7 of the relevant sanction letter states that *"... all legal documentation and registration expenses ... surveyors' charges for surveying land, advocates' fees for verifying the land titles and the valuers' fees for valuing the property offered for mortgage shall be debited to [the 2nd Plaintiff's) current account. Please maintain sufficient funds in your current account to cover the charges."* In agreement with the submission of Counsel for the Plaintiffs, I find that this clause merely informs the 2nd Plaintiff that the charges or fees were payable by him. The provision does not set out any specific sums, of which the 2nd Plaintiff was aware, that could be deducted as legal fees, stamp duty, valuation fees, survey fees, transfer fees and or registration fees. As already stated herein above, the bank had an obligation to inform the customer of the nature of service and its cost.

[144] Paragraph 8(5) of the BOU Financial Consumer Protection Guidelines 2011 requires that for third party charges, a customer must be informed of the charges in advance so that they are able to negotiate with the 3rd party service providers and that the bank has no mandate to negotiate on behalf of a customer and to debit his account with any sums. I have already pronounced myself herein above on the binding nature of these guidelines over a commercial bank. Further, the principles of transparency, fairness and reliability set out under paragraph 5 of the Guidelines also form the core and key principles that govern the banker-customer relationship. See: ***Mugobi Traders Ltd Vs Standard Chartered Bank Limited, HCMA No. 269 of 2016***.

[145] It follows, therefore, that the debits made without the customer's knowledge, consent and or authority were done without mandate and were thus irregular. The irregularity can only be mitigated if it is ascertained that the sums were debited to cover an ascertainable service and there is evidence

that the same was actually paid for the benefit of the customer. In such a case, the court would be in position to ignore the technical breach and dwell on the substance of the matter. The question, in the instant case therefore, is whether the amounts herein in issue were actually paid and or used for the benefit of the 2nd Plaintiff. I have examined the documents referred to by Counsel for the 1st Defendant in regard to these sums and I have noted a few things. First, the fee note/pro forma/Tax invoice dated 12th January 2011 at page 303 to 305 of Vol.1 of the 1st Defendant's supplementary trial bundle indicates professional fees, stamp duty for transfer and mortgage and disbursements. This is supported by the **RTGS of UGX 30,015,000/=** dated 14/01/2011 and its supporting receipt which shows a payment of the same sum as stamp duty in favour of Ephraim Ntaganda on the 15/01/2011. Secondly, the sum of **UGX 52,005,000/=** is also supported by the RTGS at page 309 of Vol. 1 of the 1st Defendant's supplementary trial bundle dated 14/01/2011. This amount is also supported by a receipt at page 108 of the 1st Defendant's supplementary trial bundle Vol. 4 in favour of the 2nd Plaintiff for the payment of the said sum on 15/01/2011. Thirdly, the same invoice of 12th January 2011 shows that UGX 2,360,000/= was to be paid to MMAKS Advocates as professional fees and UGX 976,500/= as disbursements totaling to **UGX 3,336,500/=**. This figure is also seen on the account of MMAKS Advocates as having been credited on the 14/01/2011 with a narration "Ephraim Ntaganda/Legal CH" as seen at page 151 of the 1st Defendant's supplementary trial bundle Vol. 4.

[146] In the present circumstances, although the 2nd Plaintiff was not consulted over or notified of the said sums or the services allegedly rendered, there is evidence showing that the activities mentioned in the Fee Note/Proforma/Tax Invoice dated 12th January 2011 (pages 303 – 305 of Vol. 1) were carried out to the benefit of the 2nd Plaintiff in regard to the loan sum of UGX 6,000,000,000/=. There is evidence that the sum of UGX 85,356,500/= was paid in respect of professional fees, stamp duty and disbursements. Since there is no doubt that the said mortgage was secured and registered in favour

of the 2nd Plaintiff, I find the said sum of UGX 85,356,500/= accounted for as having been utilized for the 2nd Plaintiff's benefit. As such, out of the total sum of UGX 101,016,500/= debited from the 2nd Plaintiff's account on the 14th of January 2011, the sum of UGX 85,356,500/= has been accounted for leaving a balance of **UGX 15,660,000/=** that is not proved to have been used for the benefit of the 2nd Plaintiff. There is no evidence as to why it was debited and to what it was applied. The same applies to sum of **UGX 30,000,000/=** also debited on 14th January 2011 whose application has not been explained. Therefore, the debit of the sums of **UGX 15,660,000/=** and **UGX 30,000,000/=** was illegally made and the same shall be refunded to the 2nd Plaintiff with interest at the rate of 24% per annum from 14th January 2011 to the date of full payment respectively.

(ii) The Sum of UGX 24,372,000/= and UGX 7,500,000/= debited on the 26th of March 2011.

Submission by Counsel for the Plaintiffs

[147] These sums were challenged by the Plaintiffs in paragraph 10(o) & (p) of the amended plaint. The 1st Defendant denied the allegation in paragraphs 12 and 13 of the amended WSD. It was submitted by Counsel for the Plaintiffs that among the documents adduced by the 1st Defendants to explain this deduction are a fee note from MMAKS Advocates, RTGS statement, Account Statement for MMAKS Advocates and stamp duty receipt for 7,525,000/=. Counsel showed that the fee-note from MMAKS Advocates by which this sum was allegedly debited bears a sum of UGX 33,727,000/= which is different from the sum of UGX 31,872,000/= (the latter being the total of the two amounts debited). Counsel also pointed out that the RTGS alluded to which is dated 28th March 2011 and not 26th March 2011 relates to a sum of UGX 23,005,000/= and not any of the two queried sums or their total. Counsel further stated that the account statement of MMAKS Advocates does not indicate that this sum was received by the firm. The purported stamp duty receipt at page 1 of Vol. 4 is for a sum of UGX 7,525,000/= and is dated 29th of March 2011 which is a

different amount and date from that of the debit. Counsel concluded that the documents adduced by the 1st Defendant relate to different transactions and refer to different amounts and different dates and cannot to be used to prove or justify the debit in question. Counsel concluded that the sums were therefore illegally debited.

Submission by Counsel for the 1st Defendant

[148] For the 1st Defendant, Counsel submitted that there was evidence showing that a sum of UGX 7,525,000/= was paid to URA as stamp duty as per a receipt at page 1 of Vol. 4 of the 1st Defendant's supplementary trial bundle. Counsel also indicated that a sum of UGX 2,360,000/= as professional fees and UGX 837,000/= as disbursements, totaling to UGX 3,197,000/= was paid to MMAKS Advocates; as seen at page 154 of Vol. 4. Counsel submitted that the total of the sums deducted for stamp duty, professional fees and disbursements was UGX 10,722,000/= which was the amount the 1st Defendant was able to trace from the queried amounts. Counsel stated that the balance of UGX 13,650,000/= could not be traced by the 1st Defendant and its responsibility lay on Crane Bank Ltd. Counsel concluded that the 2nd Plaintiff had the obligation to pay stamp duty and legal fees and the money was paid on his behalf and, as such, the sum of UGX 10,722,000/= should not be refunded to the 2nd Plaintiff.

Determination by the Court

[149] It is not disputed that the 2nd Plaintiff took out the loan of UGX 1,500,000,000/= and a mortgage was executed and registered thereto. Consequently, legal fees in form of professional fees and disbursements were payable for purpose of effecting the registration of the mortgage. For that purpose, I find that the sum of UGX 2,360,000 being professional fees and UGX 837,000/= being disbursements, totaling to UGX 3,197,000/= has been accounted for. This sum is reflected as having been paid to MMAKS Advocates as per page 154 of Vol. 4 of the 1st Defendant's supplementary trial bundle.

Since this sum is proved to have been paid for a benefit enjoyed by the 2nd Plaintiff, the other queries raised in respect thereof only remain technical and ignorable. The 1st Defendant is not liable to refund the sum that has been proved to have been disbursed.

[150] Regarding the sum of UGX 7,500,000/= allegedly paid as stamp duty, the evidence by the 1st Defendant indicates that the sum actually paid for stamp duty was UGX 7,525,000/= which included items listed at page 323 of Vol. 1 of the 1st Defendant's supplementary trial bundle. There is evidence by way of a receipt that the said sum was received by URA as per page 1 of Vol.4. However, what was debited on the account was UGX 7,500,000/=. In view of this evidence, I find that the queried sum of UGX 7,500,000/= has been accounted for as having been debited for purpose of payment of stamp duty for a facility that has been proved to have been obtained by the 2nd Plaintiff. This sum too is not subject to refund by the 1st Defendant.

[151] As such, the sum of UGX 7,500,000/= has been accounted for. But out of the sum of UGX 24,372,000/=, only the sum of UGX 3,197,000/= has been accounted for; leaving the balance of UGX 21,175,000/= unexplained. In absence of any explanation to the contrary, I find that the said sum of **UGX 21,175,000/=** was debited illegally and or irregularly and the same shall be refunded to the 2nd Plaintiff with interest at 24% per annum from the 26th March 2011 till payment in full.

(iii) The Sum of UGX 23,015,000/= debited on 28th March 2011

Submission by Counsel for the Plaintiffs

[152] Counsel for the Plaintiffs submitted that the 2nd Plaintiff's bank account was debited with this sum with a narration "RTGS PLUS COM" which was not explained by the 1st Defendant; yet the sum was said to have been debited for payment of stamp duty. The 1st Defendant relied on the same fee note/proforma/tax invoice from MMAKS Advocates of 21st March 2011 to

explain this queried sum. The said fee note indicates a sum of UGX 23,005,000/= which is different from the queried sum. Counsel stated that the RTGS at page 327 of Vol. 1 is the same that was used to explain the sums of UGX 24,372,000/= and UGX 7,500,000/= debited on the 26th of March 2011 that have been dealt with above. Counsel for the Plaintiffs concluded that there was no evidence adduced by the 1st Defendant to justify the debit of this sum.

Submission by Counsel for the 1st Defendant

[153] For the 1st Defendant, Counsel submitted that this amount was paid to URA on behalf of Ephraim Ntaganda for stamp duty as evidenced by a copy of the RTGS form at page 327 of Vol. 1. Counsel submitted that the 2nd Plaintiff never disputed payment of stamp duty for the relevant transaction. Counsel stated that the narration "RTGS PLUS COM" meant "RTGS Plus Commission" which sufficiently explains that the extra UGX 10,000/= that led to the deduction of UGX 23,015,000/= instead of UGX 23,005,000/= (stated in the invoice) was commission and, as such, the debit was lawful.

Determination by the Court

[154] It is clear from the invoice at page 323 of Vol. 1 that the sum of UGX 23,005,000/= was not dealt with when considering the sums of UGX 24,372,000/= and UGX 7,500,000/= debited on the 26th of March 2011. The sum of UGX 23,005,000/= was debited on 28th March 2011. I have believed the explanation by the 1st Defendant that the additional sum of UGX 10,000/= was towards commission charges which led to a deduction of UGX 23,015,000/=. The relevant invoice (at page 323 Vol.1) clearly indicates that the stamp duty of UGX 7,525,000/= that has already been considered above was for items listed in part B under the head "Stamp Duty". On the other hand, the sum of UGX 23,005,000/= was listed in part A under the same head "Stamp Duty" and was the stamp duty paid for the actual transfer of the relevant title. The RTGS form at page 327 dated 28th March 2011 is proof that the sum of UGX 23,015,000/= was paid to URA. In view of evidence that the sum of UGX 23,015,000/= was

actually incurred and was used for the benefit of the 2nd Plaintiff, the same was lawfully deducted and is not subject to refund.

(iv) The Sum of UGX 31,288,000/= debited on 13th May 2011

Submission by Counsel for the Plaintiffs

[155] It was submitted by Counsel for the Plaintiffs that the documents relied upon by the 1st Defendant, that is, the invoice from MMAKS Advocates at page 329 and the RTGS form at page 333 of Vol. 1; do not relate to the queried sum. Counsel stated that the purported invoice is for a sum of UGX 10,138,000/= while the RTGS is for a sum of UGX 7,515,000/= which are not the queried sums. Counsel argued that since no document was adduced by the 1st Defendant to justify the debit, the 2nd Plaintiff's account was illegally and unlawfully debited.

Submission by Counsel for the 1st Defendant

[156] In response, Counsel for the 1st Defendant submitted that the invoice at page 329 of Vol. 1 shows that stamp duty for mortgage registration was billed on behalf of the 2nd Plaintiff in the sum of UGX 7,515,000/= and paid as per RTGS form at page 333 of Vol. 1 and the receipt from Diamond Trust Bank at page 4 of Vol. 4. Counsel also stated that a sum of UGX 2,623,000/= was paid to MMAKS Advocates as legal fees as per the account statement at page 156 of Vol. 4. The 1st Defendant was therefore able to explain the total sum of UGX 10,138,000/= and was not able to trace the balance of UGX 21,150,000/=. Counsel submitted that Crane Bank is entitled to take advantage of the UGX 10,138,000/= and the 2nd Plaintiff is not entitled to a refund of the same.

Determination by the Court

[157] Upon examination of the fee note at page 329 from MMAKS Advocates dated 9th May 2011 bearing the sum of UGX 10,138,000/=, I am persuaded to agree with Counsel for the Plaintiffs that there is nothing to connect the transaction in this invoice to the debit of **UGX 31,288,000/=** effected on 13th

May 2011 from the 2nd Plaintiff's account. There is nothing on record to make me believe that the UGX 10,138,000/= forms part of the queried sum. Whereas the RTGS form is dated 13th May 2011, the same date the debit was made, there is also no proof on record that the sum of UGX 7,515,000/= contained therein forms part of the queried amount. The narration for the debit at page 33 of Doc. 54 is "LEGAL CHGS/NTAGANDA E". There is no explanation as to how the bank could debit a sum of UGX 31,288,000/= against an invoice of 10,138,000/=. There is simply no nexus between the two sums in this regard. It was DW2's evidence that before an entry is made on the customer's account, there must be a document supporting the transaction and the exact sum in the document is what would be debited. This leads me to the conclusion that the queried sum of **UGX 31,288,000/=** was illegally deducted and the same shall be refunded to the 2nd Plaintiff with interest at the rate of 24% per annum from 13th May 2011 until payment in full.

(v) The Sum of UGX 5,680,000/= debited on 20th May 2011.

Submission by Counsel for the Plaintiffs

[158] Counsel for the Plaintiffs submitted that the invoice dated 15th February 2011 (See page 355 of the 1st Defendant's supplementary trial bundle Vol.1) referred to by the 1st Defendant in respect of this sum is for a sum of **UGX 2,776,000/=** and not **UGX 5,680,000/=** that was queried by the 2nd Plaintiff. Counsel further stated that the valuation report at page 164 of the 1st Defendant's trial bundle Vol. 5 referred to by the 1st Defendant for which the money was allegedly paid is dated 27th March 2012, over one year from the date of the debit. Counsel submitted that the 1st Defendant had not produced any evidence that authorized the queried debit from the 2nd Plaintiff's account and there is no proof that the UGX 2,776,000/= was part of the queried sum of UGX 5,680,000/=. Counsel concluded that the debit was thus illegal.

Submission by Counsel for the 1st Defendant

[159] In reply, Counsel for the 1st Defendant submitted that the 2nd Plaintiff agreed to pay valuation fees under the sanction letter and that valuation fees of UGX 2,776,000/= were paid. Counsel argued that apart from the date of the valuation report being March 2012, the authenticity of the valuation report was not in issue and that since the 2nd Plaintiff did not adduce any evidence that he paid the valuation fees personally, Counsel prayed that the claim for this sum should be dismissed. Citing the case of **Ligget (Liverpool) Ltd Vs. Barclays Bank Ltd [1928]1 KB 48**, Counsel submitted that Crane Bank is entitled to benefit from those payments and the 2nd Plaintiff should not receive a refund of these amounts.

Determination by the Court

[160] It is true that the invoice from Bageine & Company Ltd at page 355 of the 1st Defendant's supplementary trial bundle Vol. 1 is dated 15th February 2011 and relates to a sum of UGX 2,776,000/=. There is nothing in this document that correlates it to the debit of the queried sum of UGX 5,680,000/= effected on 20th May 2011. While it may be logically possible that an invoice may be issued in February and payment is effected in May of the same year, it is not logical that payment effected in May 2011 was for an activity that took place a year later on 26th March 2012. Equally unique to this transaction is that no evidence was adduced to prove that this payment was effected on the account of Bageine & Co. Ltd and that it was effected for the stated purpose of property valuation. There is no nexus between the valuation report dated 27th March 2012 and the queried deduction. In the circumstances, I find the impugned deduction unexplained and unaccounted for leading to the inevitable conclusion that it was illegally debited. The said sum of **UGX 5,680,000/=** shall, therefore, be refunded to the 2nd Plaintiff with interest at the rate of 24% per annum from 20th May 2011 till payment in full.

(vi) The Sums of UGX 20,314,000/= and UGX 2,035,000/= debited on 28th September 2011

Submission by Counsel for the Plaintiffs

[161] Counsel for the Plaintiffs submitted that according to the narration tagged to the deduction effected on 28th September 2011, the 2nd Plaintiff did not understand the two debit transactions and queried them. Counsel stated that the 2 documents relied upon by the 1st Defendant to explain the two figures do not provide any sufficient evidence. Counsel submitted that the stamp duty receipt of UGX 5,005,000/= dated 5th October 2011 and a fee note from Kiwanuka & Karugire Advocates dated 21st of September 2011 (page 357 of Vol. 1) total to UGX 9,109,000/= and not the UGX 22,349,000/= which is the total of the two queried amounts. Counsel concluded that the documents produced by the 1st Defendant have no bearing to the two queried sums.

Submission by Counsel for the 1st Defendant

[162] In reply, Counsel for the 1st Defendant stated that the sum of UGX 2,035,000/= was paid to Kiwanuka & Karugire Advocates for the transfer of property on LRV Folio 4 Plot 772 at Makerere according to the fee note dated 21st September 2011, which payment was made to the Advocates' account as shown on their bank statement at page 299 of Vol. 4. Regarding the sum of UGX 20,314,000/=, Counsel stated that these were legal fees and stamp duty paid for the loan of UGX 1,000,000,000/= as per clause 7 of the sanction letter at page 359 of Vol. 1. Counsel pointed to the Court the fee note dated 21st September 2011 for a sum of UGX 2,069,000/= which was effected on the account of the Advocates on 28th September 2011. Counsel also pointed to a stamp duty receipt for UGX 5,005,000/= paid on 5th October 2011 at page 33 of Vol. 4. Counsel conceded that the 1st Defendant was only able to disaggregate the sums of UGX 2,069,000/= and UGX 5,005,000/= totaling to UGX 7,074,000/= and could not trace documentation for the balance of UGX 13,240,000/=. Counsel submitted that Crane Bank is entitled to benefit from

those payments and the 2nd Plaintiff should not receive a refund of these amounts.

Determination by the Court

[163] A perusal of the 2nd Plaintiff's account at page 34 of Doc. 54 reveals that the sums of **UGX 20,314,000/=** and **UGX 2,035,000/=** were debited on 28th September 2011 with the narrations, "Legal Fees/Ntaganda E" and "TFR of property/Ntaganda" respectively. As submitted by Counsel for the Plaintiffs, the invoice of Kiwanuka & Karugire Advocates dated 21st September 2011 does not make reference to any of the two figures queried by the 2nd Plaintiff. The invoice, however, refers to a sum of UGX 2,069,000/= which was explained by the 1st Defendant to be in reference to legal fees for registration of the relevant mortgage, pursuant to the sanction letter of 8th September 2011 (page 359 of Vol. 1). At page 299 of Vol. 4 which is the Account statement for Kiwanuka & Karugire Advocates, two sums of UGX 2,069,000/= and UGX 2,035,000/= were credited to the Advocates' account on 28th September 2011 under narrations "LEGAL FEES/K&K" and "TRF OF PROPERTY/NTAGANDA" respectively.

[164] It is noteworthy that only one invoice of UGX 2,069,000/= of Kiwanuka & Karugire Advocates was adduced in evidence dated 21st September 2011. The sum of UGX 2,035,000/= is not backed by any fee note or invoice. The basis upon which the sum of UGX 2,035,000/= was debited from the 2nd Plaintiff's account and credited on the said advocates' account remains questionable. On the other hand, since it is not disputed that the facility of 8th September 2011 was obtained, in presence of the fee note dated 21st September 2011 and of evidence that the sum of UGX 2,069,000/= was credited onto the advocates' account, I am satisfied that the sum of UGX 2,069,000/= has been explained and accounted for by the 1st Defendant.

[165] Regarding the sum of UGX 5,005,000/= claimed to have been paid as stamp duty, beyond the URA receipt of 3rd October 2011, I have not seen any

other document or other evidence speaking to this transaction. The said URA receipt (at page 33 of Vol. 4) makes no reference to the mortgage related to the sanction letter of 8th September 2011. It appears to me that the use of the URA receipt to explain this transaction is an attempt by the 1st Defendant to use any available documents that appear to be proximate in time to explain certain transactions even when there is no nexus between the documents. I find this trend unacceptable. Simply because a payment was done around the time the queried transaction was effected cannot be used as evidence to explain the query. Relying on a decision to which this Court was referred by Counsel for the Plaintiffs, I agree that a court of law cannot determine issues of accounts based on guesswork, and any bank which fails to keep proper records of accounts cannot sustain an ascertainable claim against a customer. **See *Ezekiel Osugo Angwenyi & another v National Industrial Credit Bank Limited [2017] eKLR***.

[166] In the circumstances, only the sum of UGX 2,069,000/= has been accounted for, which I have believed forms part of the sum of UGX 20,314,000/= that was debited on 28th September 2011. This leaves the balance of UGX 18,245,000/= unaccounted for. The sum of UGX 2,035,000/= that was separately debited from the 2nd Plaintiff's account on the same date under narration "TRF OF PROPERTY/NTAGANDA" has also not been accounted for, as per reasons stated above. It follows therefore that the total sum of **UGX 20,280,000/=** was illegally debited and the same shall be refunded to the 2nd Plaintiff with interest at 24% per annum from 28th September 2011 until full payment.

(vii) The Sum of UGX 5,780,000/= debited on the 4th April 2012

Submission by Counsel for the Plaintiffs

[167] Counsel submitted that the 1st Defendant led no evidence to justify this debit. Counsel stated that the fee note from Bageine & Co. Ltd at page 377 of Vol. 1 is only for a sum of UGX 1,478,000/= and has no bearing to the queried

amount of **UGX 5,780,000/=**. Counsel also submitted that there is no proof that the sum of UGX 1,478,000/= was actually paid to Bageine & Co. Ltd and that the valuation report at page 164 of Vol. 4 alluded to by the 1st Defendant is the same valuation report that was referenced over the payment of UGX 5,680,000/= that has been dealt with above. Counsel concluded that in the absence of documents justifying this debit, the 2nd Plaintiff's account was unlawfully debited and the queried sum should be refunded with interest.

Submission by Counsel for the 1st Defendant

[168] In reply, Counsel for the 1st Defendant submitted that the debit was part payment for the valuation of the property at Plot 75 Kampala Road as per valuation report at page 164 of Vol. 5. Counsel referred the Court to a fee note from Bageine & Company for UGX 1,478,000/= at page 377 of Vol. 1 and stated that the 1st Defendant was able to explain the sum of UGX 1,478,000/= out of the queried amount of UGX 5,780,000/= and was unable to find documents for the balance of UGX 4,78,000/=. Counsel concluded that Crane Bank is entitled to benefit from those payments amounting to UGX 1,478,000/= which should not be refunded to the 2nd Plaintiff.

Determination by the Court

[169] The bank statement at page 35 of Doc. 54 shows that a sum of **UGX 5,780,000/=** was debited from the 2nd Plaintiff's account on 04/04/2012 with the narration "Valuation Fees". The invoice at page 377 of the 1st Defendant's trial bundle Vol. 1 alluded to by the 1st Defendant as being proof of payment is for a sum of UGX 1,478,000/= with no indication anywhere that it was part of the queried amount. I have not found any nexus between the invoice dated 2nd April 2012 and the debit of the 2nd Plaintiff's account with the queried sum. The 1st Defendant has established no such nexus. Further, there is also no proof that the invoiced sum of UGX 1,478,000/= was actually paid to and received by Bageine & Co. Limited. The valuation report alluded to at page 164 of Vol.5 is the same that was fronted by the 1st Defendant when explaining the

figure of UGX 5,680,000/= that has been dealt with above. Fronting it again in this regard borders on a gamble on the part of the 1st Defendant. Consequently, the 1st Defendant has not led any evidence to rebut the claim that the debit of **UGX 5,780,000/=** was unlawfully effected. It is ordered that the same shall be refunded with interest at the rate of 24% per annum from 4th April 2012 till payment in full.

(viii) The Sum of UGX 93,302,000/= debited on 23rd April 2012

Submission by Counsel for the Plaintiffs

[170] Counsel for the Plaintiffs submitted that the fee note dated 18th April 2012 at page 379 of Vol.1 from Kiwanuka & Karugire Advocates is for a sum of UGX 2,057,000/= and not the queried sum of UGX 93,302,000/= which was deducted with a narration "Legal Fees". Counsel further argued that there is no evidence adduced by the 1st Defendant to justify this debit or to whom the money was paid and that in the absence of such evidence, the 2nd Plaintiff's account was illegally and unlawfully debited, and the 2nd Plaintiff is entitled to a refund. Counsel also submitted that a bank's fiduciary duty extends to and requires the bank to keep proper records of account and that between a bank and a borrower, the former is the one obligated to keep a more dependable record and to avail statements of account. Counsel argued that it is not enough when asked to explain a deduction for a bank to merely state that it could not find documents explaining a particular transaction.

Submission by Counsel for the 1st Defendant

[171] In reply, Counsel for the 1st Defendant stated that this was part of legal charges including stamp duty paid for the loan of UGX 7,500,000,000/= as per clause 9 of the sanction letter of 3rd April 2012. Counsel referred the Court to a fee note of Kiwanuka & Karugire Advocates dated 18th April 2012 for UGX 2,057,000/=, the credit of this sum to the account of Kiwanuka & Karugire Advocates at page 303 of Vol. 4, the RTGS of UGX 37,505,000/= dated 23rd April 2012 at pages 379-381 of Vol. 1 and a URA payment receipt for stamp

duty for the same sum. Counsel stated that the 1st Defendant was only able to get documents explaining up to a total of UGX 39,562,000/= and was unable to get documents relating to the sum of UGX 53,740,000/=. Counsel submitted that Crane Bank is entitled to benefit from these payments amounting to UGX 39,562,000/= paid on behalf of the 2nd Plaintiff to discharge his liabilities of legal fees and stamp duty as agreed under the sanction letter and the 2nd Plaintiff is not entitled to refund of the same.

Determination by the Court

[172] The evidence on record as per Doc. 54 at page 35 shows that a sum of UGX 93,302,000/= was debited from the 2nd Plaintiff's account on the 23rd April 2012 as legal fees. The invoice from Kiwanuka & Karugire Advocates at page 379 of Vol. 1 dated 18th April 2012 is for a sum of UGX 2,057,000/= for legal fees to prepare and register a mortgage for UGX 7,500,000,000/= in favour of Ntaganda Ephraim. The account statement of Kiwanuka & Karugire Advocates at page 304 of Vol. 4 shows a credit of UGX 2,057,000/= on 23rd April 2012 under the narration "LEGAL CHGS/NTAGANDA EPHR". The 1st Defendant also referred Court to the RTGS Form dated 23rd April 2012 for a sum of UGX 37,505,000/= at page 381 of Vol.1 which indicates URA as the beneficiary and a URA payment receipt at page 91 dated 24th April 2012 acknowledging receipt of the same sum as stamp duty.

[173] I have considered the fact that the credit facility for UGX 7,500,000,000/= was extended to the 2nd Plaintiff as per the sanction letter dated 3rd April 2012 at page 139 of Doc. 54. I am able to establish that the two sums of UGX 2,057,000/= and UGX 37,505,000/= were actually paid to the Advocates and to URA respectively for services connected to the mortgage registered in favour of the 2nd Plaintiff. This totals to a sum of UGX 39,562,000/= leaving the balance of **UGX 53,740,000/=** unexplained and unaccounted for by the 1st Defendant. I therefore find that the sum of **UGX 53,740,000/=** was illegally debited and occasioned loss to the 2nd Plaintiff for

which he is entitled to a refund. The same sum shall be refunded to the 2nd Plaintiff with interest at 24% per annum from the 23rd April 2012 until full payment.

(ix) The Sum of UGX 850,000/= debited on 8th June 2012

Submission by Counsel for the Plaintiffs

[174] Counsel for the Plaintiffs submitted that the 1st Defendant did not provide any documentation or evidence justifying the debit or proving that it was authorized by the 2nd Plaintiff. Counsel stated that the fee note from Bageine & Co. Ltd dated 5th June 2012 is for a sum of UGX 622,000/= which bears no correlation with the queried sum, and there is no evidence that it forms part of the queried sum. Counsel argued that apart from the 1st Defendant alluding to the sum as having been paid for valuation fees for Plots 705 & 706 Namagoma, there is nothing to prove this claim. Counsel further stated that the debit and the service providers were unknown to the 2nd Plaintiff, they were never discussed with him, and he was never given chance to choose the service provider or negotiate these fees, and he did not authorize this transaction. Counsel concluded that in the absence of proof that the debit was lawful, the 2nd Plaintiff is entitled to a refund of the sum with interest from the date of debit to payment in full.

Submission by Counsel for the 1st Defendant

[175] In reply, Counsel for the 1st Defendant submitted that this sum was debited in regard to valuation fees for Plots 705 and 706 Namagoma, and the fee note, the basis of this charge from Bageine & Co. Ltd is at page 383 of Vol. 1. Counsel stated that the valuation report for which this fee was charged is at page 149 of Vol. 5. Counsel conceded that the 1st Defendant was only able to find an invoice for the sum of UGX 622,000/= and did not find documents for the balance of UGX 228,000/=. Counsel concluded that Crane Bank is entitled to benefit from the payment of UGX 622,000/= made on behalf of the 2nd Plaintiff who should not receive a refund of the same.

Determination by the Court

[176] From the record, the account statement of the 2nd Plaintiff at page 36 of Doc. 54 indicates that a sum of UGX 850,000/= was debited from his account by the bank on 8th June 2012 with the narration "valuation fees". It was the duty of the 1st Defendant to adduce evidence showing that it not only had the mandate authorizing the debit from the 2nd Plaintiff's account, but also that the debit was in respect of an ascertained service that is connected to a mortgage taken out by the 2nd Plaintiff. Additionally, the 1st Defendant also had to show that the queried sum or part of it was actually paid to the alleged service provider. In this case, there is no evidence of any specific mandate authorizing the debit, there is no evidence of notice to the customer of provision of that service and debiting of the account to pay for it, and there is no evidence that the queried sum or part of it was paid to Bageine & Co. Ltd, the alleged service provider. Through a fee note from Bageine & Co. Ltd at page 383 of Vol. 1 dated 5th June 2012, it is alleged that a sum of UGX 622,000/= was invoiced for this purpose. However, I have seen neither a nexus between this invoiced sum and the queried sum, nor evidence that the invoiced sum was indeed paid to the alleged service provider. I have therefore arrived to the conclusion that the queried sum of **UGX 850,000/=** has not been explained or accounted for by the 1st Defendant and the same shall be refunded to the 2nd Plaintiff with interest at 24% per annum from the 8th June 2012 until full payment.

(x) The Sum of UGX 4,050,000/= debited on 13th September 2012

Submission by Counsel for the Plaintiffs

[177] It was submitted by Counsel for the Plaintiffs that when this sum was queried, the 1st Defendant explained that the debit was to cover valuation fees for Plots 26-29 and 30-35 Mukabya Close. The 1st Defendant referred the Court to a fee note dated 12th September 2012 of Bageine & Co. Ltd for UGX 1,920,000/= (at page 385 of Vol. 1), the valuation report at page 116 of Vol. 5, and survey report at page 126 of Vol. 5. Counsel for the Plaintiffs stated that

the figure in the said fee note had no bearing with the queried sum of UGX 4,050,000/= in addition to the fact that there was no evidence that the said debit was authorized. Counsel argued that it is inconceivable that an invoice of UGX 1,920,000/= could be used to debit a sum of UGX 4,050,000/=. There was also no proof that this money was ever paid to Bageine & Co. Ltd. Counsel Concluded that the debit was unlawful and the 2nd Plaintiff is entitled to refund of the same with interest.

Submission by Counsel for the 1st Defendant

[178] For the 1st Defendant, it was submitted by Counsel that the invoice provided was for part payment of the valuation fees in the sum of UGX 1,920,000/= and that their investigations did not find the other documents explaining the difference of UGX 2,130,000/=. Counsel submitted that the bank is entitled to benefit from the UGX 1,920,000/= paid on behalf of the 2nd Plaintiff. Counsel prayed to Court to find that the sum is not refundable and that the 1st Defendant is not liable to pay the difference of UGX 2,130,000/=.

Determination by the Court

[179] It is indicated as per Doc. 54 at page 37 that the sum of UGX 4,050,000/= was debited on 13th September 2012 under the narration, "Valuation Fees/Ntaga". For the same reason given for the previous sum of UGX 850,000/= above, this queried sum also stands unexplained for reasons of absence of express mandate or notification, absence of a nexus between the invoice and the queried sum and absence of evidence proving actual payment of the sum or part of it to the alleged service provider. I agree with the 2nd Plaintiff that the sum of **UGX 4,050,000/=** was unlawfully debited from the account and the same shall be refunded with interest at 24% per annum from 13th September 2012 until full payment.

(xi) The Sum of UGX 56,546,700/= debited on 1st October 2012

Submission by Counsel for the Plaintiffs

[180] Counsel submitted that this sum was debited from the 2nd Plaintiff's account under narration "Legal Fees/Ntaganda". Counsel refuted the explanation by the 1st Defendant that the legal charges included stamp duty paid for the loans of USD 1,000,000 and UGX 1,250,000,000/= as per sanction letter dated 31st August 2012. Counsel also refuted the connection of the fee note dated 18th September 2012 for UGX 2,159,000/= from Kiwanuka & Karugire Advocates and the stamp duty receipt for UGX 18,778,350/= to the queried sum. Counsel argued that no supporting documentation has been brought to prove the lawfulness of the debit. Counsel insisted that the narration in the bank statement indicates that the sum debited was towards legal fees and not stamp duty or legal fees with stamp duty. Counsel prayed to Court to find that the sum was unlawfully debited from the 2nd Plaintiff's account and the same ought to be refunded with interest.

Submission by Counsel for the 1st Defendant

[181] Counsel for the 1st Defendant stated that the queried amount was paid as legal charges including stamp duty for loans of USD 1,000,000 and UGX 125,000,000/= as per facility letter dated 31st August 2012. Counsel referred the Court to a fee note dated 18th September 2012 for UGX 2,159,000/= issued by Kiwanuka & Karugire Advocates, a URA receipt of UGX 18,778,550 at pages 389 & 390 of Vol. 1 and the account statement of Kiwanuka & Karugire Advocates on which the money was credited, at page 309 of Vol. 4. Counsel submitted that the 1st Defendant was only able to find documents relating to a total sum of UGX 20,937,550/= and could not get documents relating to the difference of UGX 35,609,150/= out of the disputed sum. Counsel reiterated that Crane Bank is entitled to benefit from the sum of UGX 20,937,550/= paid on the 2nd Plaintiff's behalf and that the balance of UGX 35,609,150/= for which the 1st Defendant was unable to find documents did not constitute

liability on the part of the 1st Defendant pursuant to Rule 16 of the Corporate Current Accounting Rules. Counsel prayed that the claim for this queried sum be dismissed.

Determination by the Court

[182] I have already pronounced myself on the question of liability of the 1st Defendant for acts committed by Crane Bank under issue 2 in this judgment. For that reason, where I have arrived at a conclusion that a particular sum is refundable to the 2nd Plaintiff, I have not dwelt any further on the question of liability although it has kept featuring in the submissions of Counsel for the 1st Defendant. Regarding the present queried sum of UGX 56,546,700/=, the sum was debited from the 2nd Plaintiff's account on 1st October 2012. The 1st Defendant adduced an invoice at page 387 of Vol. 1 from Kiwanuka & Karugire Advocates dated 18th September 2012 for a total sum of UGX 2,159,000/= which was for payment of Legal fees, Bank charges, commissioning fees, stamp duty for named items, registration fees, disbursements, transport costs and VAT. The 1st Defendant also adduced evidence of a bank statement of Kiwanuka & Karugire Advocates at page 309 of Vol. 4 showing a credit of UGX 2,159,000/= with a narration "Legal Fees/Ntaganda E" dated 1st October 2012.

[183] Given that the cited loan facility and the mortgage transaction is not disputed by the 2nd Plaintiff, and in view of proof of invoicing and actual credit of the sum of UGX 2,159,000/= to the account of the advocates on the same date as the queried debit, I find that the sum of UGX 2,159,000/= has a nexus with the queried sum and I find it credible that it forms part of the queried sum. Regarding the sum of UGX 18,778,350/= allegedly paid to URA, I have looked at the URA payment receipt with a payment registration number 113000499472 at page 96 of Vol. 4. I find that although there is evidence that the sum of UGX 18,778,350/= was paid to URA, it has no nexus with the queried sum of UGX 56,546,700/= that was debited with a narrative "Legal Fees/Ntaganda". In my view, if stamp duty for mortgage registration was to be

charged together with the advocates' legal fees, the same should have appeared in the fee note/proforma invoice. This is what has been witnessed herein before in cases where I have allowed to consider stamp duty as forming part of legal fees. In such other instances that I have considered before, the proforma invoice included the stamp duty alleged to have been paid and upon proof that the sum was actually paid to URA, I have allowed such as a lawful debit.

[184] In the present situation, however, the fee note by the advocates does not include the stamp duty sum of UGX 18,778,350/=. Critically though, it includes several sums payable in stamp duty on items listed therein. These sums on stamp duty are part of the total sum of UGX 2,159,000/= that was invoiced by and paid to Kiwanuka & Karugire Advocates. As such, if the stamp duty amount of UGX 18,778,350/= was to be paid by the advocates, it would have been included in their tax invoice. Now that it was not, it has no nexus with the queried sum which was debited under a claim that it was legal fees. There is no evidence that the sum of UGX 18,778,350/= forms part of the queried sum. In the circumstances, out of the queried sum of UGX 56,546,700/=, only UGX 2,159,000/= has been explained and accounted for as having been paid as legal fees to ascertained service providers for the benefit of the 2nd Plaintiff. As such, the balance of **UGX 54,387,700/=** was unlawfully debited and shall be refunded to the 2nd Plaintiff with interest at 24% per annum from 1st October 2012 until payment in full.

(xii) The Sum of UGX 240,000/= debited on 13th November 2012

Submission by Counsel for the Plaintiffs

[185] It was submitted by Counsel for the Plaintiffs that while it was stated by the 1st Defendant that the queried sum was a search report fee for Plot 772 Kibuga Block 3 as per invoice from MMAKS Advocates dated 31st August 2011, the invoice at page 393 of Vol. 1 is dated 31st August 2011, yet the queried debit was made on 13th November 2012, more than a year later. Counsel also pointed out that the said invoice is addressed to Head of Credit, Crane Bank,

and relates to the account of Logic Real Estates and Developers Ltd which is not the Plaintiff. Counsel further submitted that no evidence of a search statement was adduced in evidence to prove that a search was ever conducted as alleged. Counsel further stated that the explanation by the 1st Defendant in evidence that the search fees was paid on account of Logic Real Estate & Developers Ltd because the 2nd Plaintiff was purchasing property from the company, is also not supported by any evidence. Counsel concluded that the invoice adduced by the 1st Defendant related to a different transaction but was adduced just because it had a similar amount and there is nothing to prove that this debit was lawful, for which the 2nd Plaintiff is entitled to a refund with interest from the date of debit.

Submission by Counsel for the 1st Defendant

[186] In reply, Counsel for the 1st Defendant reiterated that the sum was for a search report for Plot 772, Kibuga Block 3 and referred the Court to a fee note from MMAKS Advocates dated 31st August 2011 for UGX 240,000 at page 393 of Vol. 1. Counsel stated that there was evidence of purchase of property from Logic Real Estate by the 2nd Plaintiff using the loan by facility letter dated 8th September 2011. Counsel stated that the fee note was to recover an amount that was used to conduct a search over the said property. Counsel further stated that PW2 did not deny purchasing this property from Logic Real Estate Ltd as he testified that he knew the company and had transacted with it. Counsel stated that the discrepancy in dates was explained by the fact that the debit was a recovery which was done after the transaction. Counsel invited court to find that the account was lawfully debited and the 2nd Plaintiff took benefit thereof.

Determination by the Court

[187] The queried sum of UGX 240,000/= was debited on 13th November 2012 according to the evidence at page 37 of Doc. 54 with a narration “Search and Survey Fees”. I note that the invoice at page 393 of Vol. 1 dated 31st August

2011 is addressed to Head of Credit, Crane Bank Ltd. It is indicated that the invoice was issued to Crane Bank Limited as the client, on account of Logic Real Estate & Developers Ltd. I do not find any nexus between this invoice and the 2nd Plaintiff or the queried sum that was debited more than a year later from the date of issue of the fee note. The explanation by the 1st Defendant regarding the discrepancy in time is not any helpful. Even if it were true that the debit was for recovery of a transaction that had already taken place, there is no way the 2nd Plaintiff's account could be lawfully or regularly debited using an invoice for a different client and drawn over a different account number.

[188] Further, even if it were believed that the 2nd Plaintiff purchased the property in issue from Logic Real Estate & Developers Ltd, there is no evidence that the 2nd Plaintiff was the only client who had expressed interest in the purchase such that whatever search was conducted, was done for his benefit. In absence of evidence that payment for the search was, by agreement, supposed to be made by the 2nd Plaintiff, the same cannot be assumed. It is also important to note that the 1st Defendant adduced no evidence of a search report and, like it has already been found herein above, a search report or statement is the main evidence to prove that a search has been conducted in respect of any property. In the circumstances, I find that the documents adduced by the 1st Defendant have no connection with the debit of **UGX 240,000/=**. The same was unlawfully effected and shall be refunded to the 2nd Plaintiff with interest at the rate of 24% per annum from 13th November 2012 until full payment.

(xiii) The Sum of UGX 2,000,000/= debited on 13th November 2012

Submission by Counsel for the Plaintiffs

[189] It was submitted by Counsel for the Plaintiffs that this sum was debited from the 2nd Plaintiff's account on 13th November 2012 as Valuation fees and when queried, the 1st Defendant explained that this was survey fees and referred to a copy of the survey report for Plots 978 and 1506 Block 333

Kyengera from Prime Surveys and Digital Mapping. Counsel submitted that there was no indication that the survey report had a bearing with the debit of the UGX 2,000,000/=. Counsel also submitted that the letter from Oundo & Co. Advocates dated 10th December 2012 at page 106 of Vol. 5 did not indicate any figure claimed and, indeed, the account statement of Oundo & Co. Advocates at page 325 of Vol. 4 has no credit in the sum of UGX 2,000,000/= on or around 13th November 2012. There was also no evidence of a fee note containing the queried sum and it was also not clear which survey or valuation report was related to this claim; whether the one from Associated Consulting Surveyors or from Prime Surveys and Digital Mapping. Counsel concluded that since the 1st Defendant did not adduce any evidence to justify this debit or that the sum was debited to pay for valuation, the account was unlawfully debited and the 2nd Plaintiff is entitled to a refund of the same.

Submission by Counsel for the 1st Defendant

[190] In reply, Counsel for the 1st Defendant stated that according to available evidence, this sum was paid for valuation and survey fees for Plots 978 and 1506 Block 333 Kyengera. Counsel referred the Court to the valuation report from Associated Consulting Surveyors on page 90 of Vol. 5 and an instruction to conduct a valuation. Counsel submitted that it is not disputed that the 2nd Plaintiff owns the property known as Plot 978 and 1506 Block 333 Kyengera, or that the valuation was made for his benefit to access credit facilities. Counsel argued that the 2nd Plaintiff never adduced any evidence to prove that he paid for the valuation report. Counsel concluded that the bank is entitled to benefit from this payment and the 2nd Plaintiff should not receive a refund.

Determination by the Court

[191] According to the record, a debit of UGX 2,000,000/= was made on the 2nd Plaintiff's account on 13th November 2012 with a narration "Valuation fees/Ntaga". The explanation by the 1st Defendant is that the sum was in respect of survey/valuation fees for Plot 978 and 1506 Block 333 Kyengera and

referred to a report from Prime Surveys and Digital Mapping Consultants Ltd at page 107 to 115 of Vol. 5. The report is dated 30th November 2012. It was forwarded to Crane Bank by a letter from Oundo & Co. Advocates dated 10th December 2012 (at page 106 of Vol.5). The letter also claimed to forward an invoice for the survey report. However, no such invoice was attached. I note that although the letter purporting to forward the invoice is dated 10th December 2012, the queried payment was said to have been made on 13th November 2012. It is inconceivable that money was paid before it was invoiced and before the subject for the payment was in place. There is also no evidence that the queried sum of UGX 2,000,000/= was ever paid either to Oundo & Co. Advocates or to the Surveyors who are said to have carried out the survey. As rightly pointed out by Counsel for the Plaintiffs, the account statement of Oundo & Co. Advocates at page 325 of Vol. 1 does not contain a transaction of the sum of UGX 2,000,000/=on or around 13th November 2012. I am unable to believe that the documents referred to Court by the 1st Defendant have any relationship with the queried sum. The logical conclusion is that the debit of **UGX 2,000,000/=** being unexplained by the 1st Defendant, the same was unlawfully debited and the 2nd Plaintiff is entitled to refund of the same with interest at 24% per annum from 13th November 2012 until payment in full.

(xiv) The Sum of UGX 2,400,000/= debited on 13th December 2012

Submission by Counsel for the Plaintiffs

[192] Counsel for the Plaintiffs submitted that the explanation of the 1st Defendant over this queried sum lacks merit. Counsel argued that the impugned invoice from Oundo & Company Advocates referred to a Survey report for Plot 978 & 1506 Block 33 at Kyengera in Wakiso District which, according to evidence, was not one of the properties in any of the facility letters. Counsel submitted that Block 333 Plot 978 Mengo Busiro at Nabingo and Plot 978 & 1506 Block 33 are totally different properties; seeing that the two blocks 333 and 33 are different and fall in different areas. Counsel also submitted that the debit was not known to the 2nd Plaintiff, he was never given

chance to choose the service provider or even negotiate the fees; which was all in breach of the BOU Consumer Protection Guidelines. Counsel prayed that the queried sum ought to be refunded to the 2nd Plaintiff with interest from the date of debit until payment in full.

Submission by Counsel for the 1st Defendant

[193] In reply, Counsel for the 1st Defendant stated that this sum was debited for survey fees on Plot 978 & 1506 Kyengera, paid to Oundo & Co. Advocates as per fee note dated 5th December 2012 as per pages 395 and 397 of Vol. 1 and the account statement of Oundo & Co. Advocates at page 324 of Vol. 4. Regarding the discrepancy in the description of land, Counsel submitted that the title deeds at pages 55-56 and 58-59 of the Joint Trial Bundle show that the 2nd Plaintiff owns Plots 978 & 1506 Block 333 Nabingo. Counsel submitted that the description of the property as "Kyengera" in the invoice was an error. Counsel submitted that there was evidence that the survey was done, the 2nd Plaintiff took benefit of it, and cannot therefore contest payment on grounds that the location of the land was mis-described. Counsel concluded that there is evidence that the queried sum was paid for the valuation report and the same is not liable to be refunded.

Determination by the Court

[194] Taking into account the arguments on behalf of both parties, I find that it is undisputed that the 2nd Plaintiff owns land at Busiro Block 333 Plots 978 and 1506 at Nabingo. The description of the property either as "Plot 978 & 1506 Block 33 at Kyengera" or as "Plot 978 & 1506 Block 333 at Kyengera" could be ignorable if it was proved that there was a facility that was extended to the 2nd Plaintiff for which a mortgage was registered on property at Busiro Block 333 Plots 978 & 1506 at Nabingo at the same time as the debit of the queried transaction. The 1st Defendant, however, adduced no evidence of such a relevant facility letter or a mortgage in that regard. There is also no evidence of a valuation report from Prime Surveys and Digital Mapping Consultants Ltd

which would be proof that the survey/valuation was indeed undertaken. What was adduced by the 1st Defendant is a letter from the surveyors addressed to Oundo & Co. Advocates dated 11th December 2012 titled "requirements for boundary opening of Plot 978 and Plot 1506 on Block 333 at Kyengera" and an invoice by Oundo & Co. Advocates dated 5th December 2012 claiming the sum of UGX 2,400,000/= as survey fees. There is also evidence that the said sum of UGX 2,400,000/= was credited on the account of the advocates on 13th December 2012 as per page 325 of Vol.4.

[195] Nevertheless, in absence of evidence of a valuation report, a facility letter and a mortgage registered as result of that valuation, the lawfulness of this debit has not been established. The explanation by the 1st Defendant leaves a huge possibility that either the money was credited to the advocates' account for no work done or that the money was never disbursed to the alleged surveyors yet the firm of advocates was not a survey firm as to charge survey or valuation fees. Lastly, it is also inconceivable that the invoice from the advocates that states the sum of UGX 2,400,000/= is dated 5th December 2012 and the letter from the Surveyors communicating the fees chargeable is dated 11th December 2012. The question that arises is, how did the advocates know the fees that were to be invoiced for the service before they obtained instructions from the surveyors? This leaves the explanation of this queried sum hollow and unacceptable to the Court. I agree with the 2nd Plaintiff that the sum of **UGX 2,400,000/=** was unlawfully debited and the same shall be refunded with interest at 24% per annum from 13th December 2012 until full payment.

(xv) The Sum of UGX 3,260,000/= debited on 8th February 2013

Submission by Counsel for the Plaintiffs

[196] It was submitted by Counsel for the Plaintiffs that the queried sum is said to have been paid as survey/valuation fees which was a third party charge and, under Regulation 8(5) of the BOU Consumer Protection Guidelines, the

bank had an obligation to inform the customer of the charge, the service provider, and enable the customer to negotiate with the service provider.

Submission by Counsel for the 1st Defendant

[197] In reply, Counsel for the 1st Defendant stated that this amount was paid as a charge for surveying Plots 30-35 and 26-29 Mukabya Close according to the fee note dated 5th February 2013 from Oundo & Co. Advocates for the sum of UGX 3,260,000/=. Counsel also referred to the bank statement of Oundo & Co. Advocates on page 326 of Vol.4, and a copy of the survey report at page 75 of Vol. 5 and submitted that the account was lawfully debited for survey fees. Counsel further submitted that the 2nd Plaintiff took benefit of the payment as it went to discharge his lawful obligations towards survey fees and he should therefore not receive a refund of this sum.

Determination by the Court

[198] The evidence on record shows that the sum of UGX 3,260,000/= was debited from the account of the 2nd Plaintiff on 8th February 2013 with the narration, "Survey Fees/Ntaganda". I have also looked at the invoice from Oundo and Co. Advocates at page 399 of Vo. 1 dated 5th February 2013, which indicates that these were disbursements towards survey report on Plot 30-35 and 36-29 Mukabya Close in the names of Ephraim Ntaganda. There is also a letter from Prime Surveys and Digital Mapping Consultants Ltd to Oundo & Co. Advocates dated 1st February 2013 over the same sum. At page 327 of Vol. 4 is an accounts statement of Oundo & Co. Advocates which indicates that same sum was credited thereon on the 8th February 2013 under the narration, "Survey Fees/Ntaganda E". At page 75 of Vol. 5 is a survey report from Prime and Digital Mapping Consultants Ltd and on page 74 of Vol. 5 is a letter from Oundo & Co. Advocates forwarding the survey report.

[199] In regard to this queried sum, I find consistency in the particulars of the properties, the subject of the survey, and also find that there is proof of a

survey report by surveyors who wrote to Oundo & Co. Advocates giving instructions over the survey and communicating the costs involved. In turn, Oundo & Co. Advocates wrote to Crane Bank forwarding an invoice for the service provided. There is also further evidence that the invoiced sum was credited on the account of the advocates on 8th February 2013, the same day it was debited off the 2nd Plaintiff's account. There is no claim by the surveyors that they never received the money. There is also no dispute by the 2nd Plaintiff that this survey was related to a transaction that was known to him. As I have held herein before, in presence of such proof, the other claims by the Plaintiffs remain only technical. There is evidence before the Court that the queried sum of UGX 3,260,000/= was paid for an ascertained service, to an ascertained service provider and for the benefit of the 2nd Plaintiff. This claim by the 2nd Plaintiff, therefore, fails and the said sum is not refundable.

(xvi) The Sum of UGX 97,235,700/= debited on 2nd April 2013

Submission by Counsel for the Plaintiffs

[200] Counsel for the Plaintiffs submitted that this debit which is alleged to have been made as legal fees on 2nd April 2013 was not explained by the 1st Defendant. Counsel submitted that even if the sums shown in the documents produced by the 1st Defendant were added up, they total to a sum of UGX 41,401,850/= which is not the queried sum and cannot constitute an explanation for the debit of UGX 97,235,700/=. Counsel argued that it is not enough for the bank to gather documents for different sums and connect them to the queried sum. Counsel further submitted that there is no correlation between the queried sum debited as legal fees and the sums allegedly invoiced as legal fees and stamp duty for URA. Counsel concluded that no evidence has been adduced to justify the debit or prove that the debit was lawful and the 2nd Plaintiff is entitled to a refund of the sum debited with interest from the date of debit until payment in full.

Submission by Counsel for the 1st Defendant

[201] Counsel stated that this amount was debited to cover legal charges including stamp duty paid for the loan of USD 3,000,000 as per clause 8 of the duly sanction letter dated 18th March 2013. Counsel also referred to a fee note from Kiwanuka & Karugire Advocates for a sum of UGX 2,381,000/= and the corresponding bank account at page 312 of Vol. 4 as well as a URA stamp duty receipt for UGX 39,020,850/= dated 2nd April 2013 at pages 403-409 of Vol. 1, stamp duty certificates at pages 49, 50 & 51 of Vol. 4. Counsel submitted that the 1st Defendant was only able to disaggregate the sum UGX 2,381,000/= as legal fees and UGX 39,020,850/= plus the commission charges which total to UGX 41,402,850/= leaving a balance of UGX 55,850,850/= for which they did not find the relevant evidence. Counsel submitted that Crane Bank is entitled to benefit from the payments amounting to UGX 41,402,850/= paid on the 2nd Plaintiff's behalf to discharge his liabilities for stamp duty and legal fees and the same should therefore not be refunded.

Determination by the Court

[202] According to the record, it is not disputed by the 2nd Plaintiff that pursuant to the sanction letter of 18th March 2013, he obtained a loan facility of USD 3,000,000/= and a mortgage was thereby registered on properties listed at page 413 of Vol. 1. That being the case, it is believable that the sum of UGX 2,381,000/= that is reflected on the invoice issued by Kiwanuka & Karugire Advocates of 28th March 2013 and credited on the advocates account on 2nd April 2013 under the narration "Legal Fees/Ntaganda E" was paid as legal fees for work done towards the said loan facility.

[203] Similarly, it is believable that stamp duty had to be paid for such a transaction. There is evidence that a sum of UGX 39,020,850/= was paid to URA as stamp duty inclusive of relevant commissions. Proof of payment of this sum is reflected at pages 403 – 409 of Vol. 1. It is clear that these payments were made to the benefit of the 2nd Plaintiff. The two sums total to UGX

41,401,850/= which when subtracted from the queried sum leaves a balance of UGX 55,851,850/= that is unaccounted for. My finding, therefore, is that out of the queried sum of UGX 97,253,700/=, the sum of UGX 41,401,850/= was lawfully paid to the 2nd Plaintiff's benefit while the sum of **UGX 55,851,850/=** has not been accounted for and was therefore unlawfully debited. The same shall be refunded to the 2nd Plaintiff with interest at 24% per annum from 2nd April 2013 until full payment.

(xvii) The Sum of UGX 71,144,600/= debited on 27th June 2013

Submission by Counsel for the Plaintiffs

[204] It was submitted by Counsel for the Plaintiffs that whereas the queried debit was for a sum of UGX 71,144,600/= as legal fees, the 1st Defendant did not adduce evidence to justify the debit and the only invoice alluded to from Kiwanuka & Karugire Advocates is for a sum of UGX 2,229,000/= which is not the queried sum and could not have been the invoice that was used to debit the sum of UGX 71,144,600/=. Counsel also submitted that there is no proof that the alleged stamp duty has any correlation with the debit of legal fees. Counsel further submitted that in the sanction letter alluded to, there is no provision that the 2nd Plaintiff would pay stamp duty of the sum of UGX 71,144,600/= and even though the 2nd Plaintiff signed the sanction letter, he did not necessarily authorize the bank to debit this sum from his account. Counsel stated that even if the alleged stamp duty of UGX 26,017,300/= was to be taken as being part of the legal fees, if added to the sum of UGX 2,229,000/=, they total to UGX 28,272,300/= which is different from the queried sum. Counsel concluded that in absence of documents justifying the debit of the queried sum, the transaction was illegal and the 2nd Plaintiff is entitled to a refund with interest from the date of debit until payment in full.

Submission by Counsel for the 1st Defendant

[205] In reply, it was submitted by Counsel for the 1st Defendant that from the available evidence, the sum of UGX 28,271,300/= was supported by

documentary evidence leaving a difference of UGX 42,873,300/= for which supporting documents could not be found. Counsel submitted that the payment of stamp duty was not disputed as the mortgage was duly registered. Counsel argued that Crane Bank is entitled to benefit from these payments of UGX 28,271,300/= paid on behalf of the 2nd Plaintiff to discharge his liabilities for stamp duty paid to URA and legal fees paid to Kiwanuka & Karugire Advocates and therefore, the 2nd Plaintiff is not entitled to a refund.

Determination by the Court

[206] The sum of UGX 71,144,600/= was debited on 27th June 2013 under the narration "Legal Chgs/Ntaganda". It was explained by the 1st Defendant that out of the queried sum, a sum of UGX 2,229,000/= was paid to Kiwanuka & Karugire Advocates as legal fees as per invoice dated 26th June-2013 at page 423 of Vol. 1 and credited on their account on 27th June 2013 as per page 314 of Vol. 4. The 1st Defendant also showed that UGX 26,042,300/= was paid to URA as stamp duty as per the stamp duty receipt at page 425 and 426 of Vol. 1, all totaling to a sum of UGX 28,271,300/=. Counsel for the 1st Defendant submitted that the said sum of UGX 28,271,300/= was paid out on behalf of the 2nd Plaintiff and for his benefit, pursuant to clause 6 of the sanction letter dated 24th April 2013. I find that there is no dispute that the 2nd Plaintiff obtained the loan facilities as per the sanction letter dated 24th April 2013. It is also not disputed that legal fees and stamp duty were payable in execution of the relevant mortgage. There is evidence that the sum of UGX 2,229,000/= was paid to Kiwanuka & Karugire Advocates as legal fees and UGX 26,042,300/= was paid to URA as stamp duty. As such, the total sum of UGX 28,271,300/= has been explained and accounted for by the 1st Defendant as having been debited lawfully and for the benefit of the 2nd Plaintiff. This leaves a sum of **UGX 42,873,300/=** unaccounted for. In absence of evidence to the contrary, the sum of **UGX 42,873,300/=** was unlawfully debited ad the same shall be refunded with interest at 24% per annum from 27th June 2013 until full payment.

(xviii) The Sums of UGX 1,625,000/= and 1,630,000/= debited on 20th September 2013

Submission by Counsel for the Plaintiffs

[207] Counsel for the Plaintiffs submitted that when the two sums were queried, the 1st Defendant offered the same explanation for both figures; as having been debited as mortgage registration charge for Plot 302 Busega, Plot 978 and 1506 Nabingo although the 1st Defendant adduced two different invoices of the same date with a difference of UGX 5,000/= in the amount stated in the two invoices. Counsel submitted that the bank charged the 2nd Plaintiff twice on the same day, for the same service. Counsel concluded that the debits were illegal and prayed for a refund of the same with interest from the date of debit.

Submission by Counsel for the 1st Defendant

[208] In reply, Counsel for the 1st Defendant submitted that the sum of UGX 1,625,000/= was mortgage registration fees as per fee note from Oundo & Co. Advocates dated 10th September 2013 at page 429 of Vol. 1 for registration of a mortgage charge on Plot 302 Kibuga Block 21 Busega, Plot 978 Busiro Block 333 Nabingo, Plot 1506 Busiro Block 333 Nabingo. Counsel stated that this amount was credited to Oundo & Co. Advocates on 20th September 2013 as per page 336 of Vol. 4. Counsel submitted that the sum of UGX 1,630,000/= was different and was charged under a different invoice for an agreed charge under the sanction letter. Counsel submitted that the submission by the Plaintiffs' Counsel that there was a double charge is unfounded and unsupported by evidence.

Determination by the Court

[209] The evidence on record shows that on 20th September 2013, the 2nd Plaintiff's account was debited with two sums of UGX 1,625,000/= and UGX 1,630,000/= with the same narration, as "Reg. Fees/Ntaganda". According to

the explanation by the 1st Defendant, both amounts were in respect of mortgage registration charges for Plot 302 Busega, Plot 978 and 1506 Nabingo as per two fee notes dated 10th September 2013 of Oundo & Co. Advocates for UGX 1,625,000/= and UGX 1,630,000/= respectively. It is clear to me that although the sums are different by UGX 5,000/= and were charged under different invoices, they were charged for the same service. It is inconceivable that the same mortgage was registered twice or registration of the same mortgage was charged twice by the same firm of advocates! In the circumstances, although the first charge of UGX 1,625,000/= was lawfully debited for an ascertained service for the benefit of the 2nd Plaintiff, the second charge of **UGX 1,630,000/=** was unexplained and unlawfully debited. The sum of **UGX 1,630,000/=** shall therefore be refunded to the 2nd Plaintiff with interest at 24% per annum from 20th September 2013 until full payment.

(xix) The Sum of UGX 1,230,000/= debited on 20th September 2013

[210] The evidence on record concerning this sum is that the sum was debited to cover mortgage registration charge for Plots 26-29, 30-35 & Plot 75 as per fee note dated 5th June 2013 for Oundo & Co. Advocates for UGX 1,230,000/= as per page 433 of Vol. 1. The said sum was credited to the advocates' account as per the account statement of Oundo & Co. Advocates at page 337 of Vol. 4. It is not disputed that the relevant transaction concerning the above named properties took place and that mortgage registration charges were payable. Since there is evidence that the said sum was invoiced and paid to the advocates, I find that the queried sum has been explained as having been lawfully debited. The claim based on this queried sum therefore fails.

Paragraph (E) under Issue 4: The Sums of USD 3,430,745.00 and UGX 2,716,127,410 under Appendices 3 and 4 of DOC. 54.

[211] In paragraph 10(a) and 10(r) of the amended plaint, the 2nd Plaintiff queried a total sum of **USD 3,430,745.00** and **UGX 2,716,127,410/=** allegedly debited from his account without his knowledge and mandate, and

claiming that the same were not applied towards reduction of his loan obligations. The 1st Defendant, in paragraphs 12 and 13 of the amended WSD, denied the 2nd Plaintiff's allegations and stated that the amounts were charged in accordance with the relevant sanction letters. I will deal with the queried sums under Appendices 3 and 4 respectively.

Appendix 3: The Sum of USD 3,430,745.00

[212] This sum is particularized under Appendix 3 at page 13 of Doc. 54. It comprises of 30 transactions that were made on the 2nd Plaintiff's account between 2012 and 2016. I will follow the sequence in which they appear. I need to point out that I have already pronounced myself on the general defences and will not dwell on the arguments introducing them any further. I will only dwell on specific arguments and findings concerning the respective figures.

(i) The Sum of USD 748,000

Submission by Counsel for the Plaintiffs

(213) The evidence by the 2nd Plaintiff by way of a bank statement in Exhibit Doc. 54 is that the above sum was debited from the 2nd Plaintiff's account on 16th June 2012. Counsel for the Plaintiffs submitted that there was no instrument adduced by the 1st Defendant which was used to debit the 2nd Plaintiff's account with the queried sum and the explanation that it was used for repayment of the 2nd Plaintiff's loan and interest was unsupported by any evidence. Counsel for the Plaintiffs referred the Court to the narration "CHW" in the bank statement against which the debit was made; which is said to mean "cheque withdrawal" and to the statement at page 1018 of Vol. 3 where it was stated that the sum was withdrawn using Cheque No. 001980; which is the same number that appears against the debit in Doc. 54 at page 61. Counsel, however, pointed out that no such cheque was produced in evidence. Counsel also stated that this evidence is inconsistent with the explanation in the pleadings that the sum was debited towards payment of the 2nd Plaintiff's

loan and interest. Counsel concluded that the said debit was illegally and irregularly effected and the sum should be refunded to the 2nd Plaintiff.

Submission by Counsel for the 1st Defendant

[214] In reply, Counsel for the 1st Defendant raised arguments over which the Court has already pronounced itself. In the further alternative, Counsel submitted that the debit of the sum of USD 748,000 was known and authorized by the 2nd Plaintiff. Counsel further submitted that the 2nd Plaintiff was close to Dr. Sudhir Ruparelia and thus an insider to Crane Bank and related companies and this transaction was, in all likelihood, an insider transaction between the 2nd Plaintiff and his close friend Dr. Sudhir Ruparelia. Counsel prayed to the Court to reject this claim by the 2nd Plaintiff.

Determination by the Court

[215] It is settled under the law of banking that a customer's account can only be debited by the bank in presence of a proper instrument authorizing the transaction. On the case before me, evidence indicates that the 2nd Plaintiff's account was debited with a sum of USD 748,000 and no instrument has been adduced as having authorized such a debit. There is also contradictory evidence as to what the said sum was applied towards. In one breath, the sum was applied towards settlement of the 2nd Plaintiff's loan and interest while in the other, the sum was allegedly picked by the 2nd Plaintiff. Neither claim has been verified by any evidence. The claim on behalf of the 1st Defendant that if the 2nd Plaintiff had not authorized the said debit, he ought to have complained since the sum was big, is itself not made out. It is not an excuse in the face of an illegal or irregular debit that the customer did not notice and or complaint against the same. In principle, when a customer maintains an account with the bank, he/she is not obligated to be checking the account every other day to confirm that the account is safe. See: ***Fidelity Commercial Bank Limited v Italian Market Kenya Limited [2017] Eklr.***

[216] Regarding the submission by the Counsel for the 1s Defendant that this was an insider transaction on account that the 2nd Plaintiff was a close associate of Dr. Sudhir Ruparelia, I have found no evidence to establish this assertion beyond the allegation raised during cross examination. But even if there was such evidence, the position of the law is that the standard operating procedures of the bank ought not to be relaxed or completely disregarded even where a customer is well known to the bank staff. See: ***Makua Nairuba Mabel vs Crane Bank Ltd, HCCS No. 380 of 2009***. As submitted by Counsel for the Plaintiffs, there is no evidence that the said Dr. Sudhir Ruparelia was personally involved in the cashing of the cheque relevant to the queried sum, if any. For that matter, even if the relationship existed, it would be inconsequential. On the other hand, if the staff of the bank chose to relax the standard operating procedures because of their knowledge of the 2nd Plaintiff or his closeness with one of the Directors of the Bank, such would amount to negligence which itself is not excusable under the law.

[217] In the circumstances, I am able to reach a conclusion that the debit of the queried sum of **USD 748,000** is not backed by any evidence or law. It was neither authorized by the 2nd Plaintiff nor is its purpose sufficiently explained. The debit was therefore illegally and or irregularly effected and the said sum shall be refunded to the 2nd Plaintiff with interest at 12% per annum from 16th June 2012 till payment in full.

(ii) The Sum of USD 1,000,000 debited on 27th August 2012

Submissions by Counsel for the Plaintiffs

[218] Counsel for the Plaintiffs referred the Court to the testimony of PW2 who testified that he did not authorize the withdrawal of this queried sum from his account. Counsel submitted that the 1st Defendant, in Annexture O attached to its WSD, stated that this sum was for *"repayment of loan and interest"* evidence of which the 1st Defendant was expected to adduce at trial. However, the 1st Defendant departed from its pleading in Vol. 1 at page 435 when it changed its

plea and instead stated that this sum was transferred from the 2nd Plaintiff's USD personal current account 0244070512000/1005021010000006 on 27th August 2012 at the rate of 2517, which was equivalent to UGX 2,517,000,000/= and credited it to his personal current account. Relying on **Order 6 Rule 7 of the CPR** and the case of **Painento Semalulu Vs. Nakito Eva Kasule (supra),** Counsel submitted that this was a departure from pleadings which should not be permitted.

[219] Counsel further stated that during trial, PW2 referred the Court to an alleged withdrawal slip presented by the 1st Defendant which clearly showed that he is not the one who withdrew or took the money. PW2 also denied that the money was ever transferred to his UGX Account. PW2 further stated that as a requirement of the Bank, he used to sign and leave blank cheques with the Bank. Counsel submitted that there was evidence that the money was never transferred to the 2nd Plaintiff's loan account or applied to the repayment of his loans and interest as alleged by the 1st Defendant. Counsel further submitted that the 1st Defendant had not adduced any evidence of any transfer or withdrawal documents of the money or mandate by the 2nd Plaintiff to withdraw the money or transfer it to his Shillings Account as alleged by the 1st Defendant.

[220] Relying on the case of ***Stanbic Bank (U) Ltd Vs. Uganda Crocs Ltd (supra)***, Counsel submitted that all documents concerning the customer's accounts are in possession of the bank which is responsible for entries that are made on the customer's account and it was incumbent on the 1st Defendant to adduce evidence showing that this sum had been either applied towards repayment of the 2nd Plaintiff's loans and interest, or was withdrawn by the 2nd Plaintiff, and/or transferred to his Shillings Account as alleged by the 1st Defendant. Counsel concluded that in absence of such proof, the debit was unlawfully effected and the queried sum should be refunded with interest from the date of debit until payment in full.

Counsel for the 1st Defendant's Submissions

[221] It was submitted by Counsel for the 1st Defendant that Crane Bank Ltd had the authority to debit the account which authority was derived from the bank's contractual right to combine accounts and set off. Counsel referred the Court to clauses 11 and 7 of the sanction letter of 3rd April 2012. Counsel stated that there was evidence that an overdraft of USD 1,000,000 was granted to the 2nd Plaintiff by Crane Bank and deposited on his USD account on 27th August 2012 upon his application for the same. Counsel further stated that at the time, the 2nd Plaintiff had an outstanding overdraft on the UGX Account No. 0144070512000 of UGX -1,541,068,521/= and in the bank's right of set off and combination, his USD and UGX accounts were combined; thereby debiting the USD account with USD 1,000,000 which was converted to UGX 2,517,000,000/=, which sum was credited to his Shillings' account on 27th August 2012 to clear the overdraft of UGX -1,541,068,521. This left a balance of UGX 975,931,479/= which was used by the 2nd Plaintiff. Counsel submitted that the debit was, therefore, lawful as per the mandate from the bank's contractual right to combine the accounts and set off. Counsel referred the Court to pages 534 and 477 of Vo1. 1 and argued that even if there was no such authority to debit the USD Account, the sums debited were converted to UGX and used to discharge the overdraft on the UGX Account which was a debt to the bank.

Submissions in Rejoinder

[222] In rejoinder, Counsel for the Plaintiffs submitted that the 1st Defendant departed from its pleading that this sum was used for repayment of loan and interest. Counsel reiterated that no evidence of an instrument signed by the 2nd Plaintiff, withdrawing the money or transferring it to his UGX Account was adduced by the 1st Defendant. On the right of set off and combination of accounts under the alleged sanction letter of 3rd April 2012, Counsel submitted that the alleged bank's right to combine and set off was not only a deviation

from pleadings, but that even if it were considered by court for arguments' sake, there is no reason why the bank would need to convert and transfer USD 1,000,000 equivalent to UGX 2,517,000,000/= from one account, only to set off UGX 1,541,068,521/= as the right to set off is only limited to the debt owed if any. Counsel also stated that the 2nd Plaintiff did not sign any instrument for transfer of the sum of USD 1,000,000.

Determination by the Court

[223] Having considered the extensive submissions by both Counsel on this present matter, I will begin by deriving guidance from the decision in ***Ezekiel Osugo Angwenyi & Another v National Industrial Credit Bank Limited (supra)*** wherein a principle was laid down to the effect that in determining issues of accounts, a court of law cannot base on guesswork. The Bank must keep proper and dependable records of accounts and produce them when asked or when such transactions are queried.

[224] It is not disputed that a sum of USD 1,000,000 was debited from the 2nd Plaintiff's account on 27th August 2012. The explanation by the 1st Defendant in its amended WSD was that this was applied to the repayment of the 2nd Plaintiff's loan and interest. In evidence, however, the explanation by the 1st Defendant was that the sum was an overdraft granted by the bank upon the application of the 2nd Plaintiff. The 2nd Plaintiff, in his witness statement at para 30(b), testified that he did not authorize the withdrawal of the USD 1,000,000 and that he had no recollection of this transaction which was unclear to him. I have carefully examined the debit of this sum from the 2nd Plaintiff's USD account at page 61 of Doc. 54 with a narration "27/8/2012 1,000,000 @ 2517" and I am of the view that whereas it is submitted by Counsel for the 1st Defendant that this sum was an overdraft granted by the bank upon the application of the 2nd Plaintiff, I have not found such proof. From the documents on record, I have seen an application for a credit facility at page 846 of the 1st Defendant's trial bundle Vol. 2 dated 27th August 2012

for loans of USD 1,000,000 and UGX 1,250,000,000/=, which I believe have a bearing to the one referred to by Counsel for the 1st Defendant as the application for an overdraft of the queried USD 1,000,000. However, this specific application has a corresponding sanction letter at page 144 of Doc. 54 dated 31st August 2012 for the loans applied for. Indeed, there is a loan disbursement of USD 1,000,000 at page 61 of Doc. 54 on 5th September 2012 pursuant to the facility letter, which clearly, is the loan that had been applied for and granted to the 2nd Plaintiff. I have not seen any other application for an overdraft facility of USD 1,000,000, or a corresponding overdraft sanction letter to that effect.

[225] On further perusal of the record, I have found several sanction letters for overdrafts such as at pages 115, 127, 149, all of Doc. 54 but I have not found any document allowing the 2nd Plaintiff to overdraw his USD account with the sum of USD 1,000,000 around the same time. There is evidence on record of previous conduct of the parties whereby overdraft sanction letters were signed before disbursement of a particular facility. To my mind, had this been an overdraft facility as the 1st Defendant wishes this Court to believe, a similar overdraft sanction letter would have been signed by the parties and adduced in evidence. It is also clear that no instrument was adduced by the 1st Defendant, signed by the 2nd Plaintiff, instructing the bank to transfer the sum of USD 1,000,000 from his USD Account to the UGX Account. Counsel for the 1st Defendant argued that the bank had authority to debit the account, derived from the bank's contractual right to combine accounts and set off as provided for by clauses 11 and 7 of the sanction letter of 3rd April 2012. I agree with Counsel for the Plaintiffs that this line of argument constitutes a departure from the 1st Defendant's pleadings and earlier evidence and, more importantly, it contradicts the averments in the 1st Defendant's pleadings and earlier explanation. In any case, the sanction letter alluded to of 3rd April 2012 does not relate to the queried transaction of USD 1,000,000. This argument,

therefore, does not assist the 1st Defendant in proving existence of any lawful mandate to make the impugned debit.

[226] In ***Stanbic Bank (U) Ltd Vs. Uganda Crocs Ltd (supra)***, **Mulenga JSC** held that upon the customer showing that the withdrawals from its accounts were made in breach of mandate, the burden shifted to the bank to prove its claim that the withdrawals were for discharging the customer's liabilities or otherwise for the customer's benefit, and did not occasion loss to the customer. The 1st Defendant has, clearly, not executed this burden. I am satisfied, on a balance of probabilities, that the queried debit of **USD 1,000,000** from the 2nd Plaintiff's account was unlawfully effected and the same shall be refunded to the 2nd Plaintiff with interest at 12% per annum from 27th August 2012 until full payment.

(iii) The Sum of USD 249,000 debited on 25th March 2013

Submissions by Counsel for the Plaintiffs

[227] Counsel for the Plaintiff submitted that when the debit of the said sum was contested as having been removed without any authorization from the 2nd Plaintiff, the 1st Defendant averred in Annexture O to the WSD that the queried sum was debited using counter cheque leaf No. 567404 dated 25/3/2012 which sum was converted at a rate of UGX 2618 into UGX 653,976,400/= which was credited to a transitory account of the bank, then credited to the 2nd Plaintiff's UGX Account, and then withdrawn by the 2nd Plaintiff. In evidence, however, another cheque, No. 004933, was introduced by the 1st Defendant. Counsel referred to the testimony of PW2 to the effect that the sum of UGX 653,967,200/= on his UGX account was from a different source and not transferred from his USD account as alleged by the 1st Defendant and that he had never seen cheque No. 567404 by which he is alleged to have transferred the money.

[228] As regards the cheque adduced in court at page 439 of Vol. 1 of the 1st Defendant's trial bundle, by which the account was apparently debited, Counsel submitted that the cheque had Crane Bank as payee and not the 2nd Plaintiff which means that the 2nd Plaintiff was not the beneficiary of the money debited from his account. Counsel stated that according to PW2's evidence, UGX 653,967,400/= on the UGX account was a deposit and not a transfer of the impugned USD 249,000 from the USD account. Counsel argued that it is inconceivable that the 2nd Plaintiff could use a USD account cheque to pay to Crane Bank and then withdraw the money in UGX using the same cheque. Counsel emphasized that no evidence of a cheque that purportedly withdrew the disputed amount in UGX was adduced by the 1st Defendant. Counsel concluded that the 1st Defendant having failed to adduce evidence proving that the queried sum was lawfully debited from the 2nd Plaintiff's account for the settlement of his loans and interest, or that he authorized a transfer of the money from the USD to UGX Accounts, or that he withdrew the said sum as alleged, the sum was unlawfully debited and the same ought to be refunded by the 1st Defendant with interest from the date of debit.

Submissions by Counsel for the 1st Defendant

[229] In reply, Counsel for the 1st Defendant submitted that the debit of USD 249,800 was lawful as it was authorized by the 2nd Plaintiff through cheque number 004833 dated 25/03/2013 at page 439 of Vol.1. Relying on Section 58(1) of the Bills of Exchange Act, Counsel submitted that the said cheque once signed by the 2nd Plaintiff, constituted his authorization to the bank to debit the account and that this mandate by cheque was sufficient evidence that the payment was lawful and therefore the bank discharged its burden of proving that the debit was lawful. Counsel further stated that according to evidence on record, the queried sum was exchanged into Ugandan Shillings at a rate of UGX 2618 into UGX 653,976,400/= which was credited to a Crane Bank Ltd internal account, **BP transitory account No. 01A609999202**, and then credited to the 2nd Plaintiff's UGX Account No. 0144070512000. Counsel

stated that when showed the cheque for USD 249,800, the 2nd Plaintiff (PW2) admitted that the signatures thereon were his and that there was a credit of UGX 653,976,400/= on his UGX account. Counsel submitted that although PW2 testified that this was another deposit and not the debited USD 249,800, he did not adduce evidence of a deposit slip for the said sum. Counsel also submitted that the instrument permitting the withdrawal of UGX 653,976,400/= was a sanction letter at page 11 of the joint trial bundle which conferred a right on the bank to debit the account with interest and charges as agreed upon and set off any amount due. Counsel concluded that having authorized the debit, by a cheque which was honoured by the bank, it would be wrong for the 2nd Plaintiff to be refunded the money that he took.

Submissions in Rejoinder

[230] In rejoinder, Counsel for the Plaintiffs submitted that having testified that the UGX 653,976,400/= on his UGX account was a different sum and not the one debited from his USD account, the 2nd Plaintiff had no evidential burden to prove deposits on his UGX account as that was not part of his claim. Counsel argued that the burden of proof lay on the 1st Defendant to prove that UGX 654,796,400/= was the same queried sum debited from the 2nd Plaintiff's account but the 1st Defendant's theory that it is the money which was debited from the dollar account that was credited on the 2nd Plaintiff's UGX account as UGX 653,796,400/= remained unsupported by evidence.

Determination by the Court

[231] The undisputed evidence is that the queried sum was debited from the 2nd Plaintiff's account on 25th March 2012. There is on record a bank statement with a narrative that the sum was withdrawn using counter cheque leaf No. 567404 dated 25/3/2012. The 2nd Plaintiff contested the transaction as being unclear and having been unauthorized. The 1st Defendant in answer relied on Annexture O to the WSD stating that UGX 653,976,400/= was withdrawn on 25th March 2013 from A/c No. 014407512000 using counter cheque leaf

567404 by the 2nd Plaintiff, equivalent to USD 249,800 @ UGX 2618. The same narration appears at page 435 of Vol. 1. In the 1st Defendant's supplementary trial bundle Vol. 3 at page 1018, it was further explained that the queried sum of USD 249, 800 @ 2618 was withdrawn on 25.03.2013 using counter cheque leaf No. 567404 by the 2nd Plaintiff to UGX 653,976,400/= which was transferred on the same day to his UGX current account. The 2nd Plaintiff denied ever withdrawing the sum using counter cheque leaf No. 56704. I will therefore first examine whether the sum was lawfully debited by way of withdrawal by the 2nd Plaintiff.

[232] The account statement at page 62 of exhibit Doc. 54 shows that on the 25/03/2013, a sum of USD 249,800 was debited from the 2nd Plaintiff's account. Whereas the 1st Defendant referred to cheque No. 567404 by which the money was withdrawn by the 2nd Plaintiff, that cheque was not adduced in evidence by the 1st Defendant; which, if adduced, would have provided a perfect answer to the query. Rather, the Court was referred to another cheque at page 439 of Vol. 1, cheque No. 004933, dated 25/3/2013, paying Crane Bank a sum of USD 249,800 signed by the 2nd Plaintiff. It should be noted that if the Court is to believe that this is the cheque by which the queried sum was debited, the cheque was not withdrawing the money but was rather paying Crane Bank. As such, the argument that this sum was withdrawn by the 2nd Plaintiff whether using cheque No. 567404 or cheque No. 004933 is unsupported by any evidence and therefore collapses.

[233] The other explanation by the 1st Defendant is that counter cheque leaf No. 004933 dated 25th March 2012 at page 439 of Vol. 1 had been signed by the 2nd Plaintiff authorizing the debit of his account, which sum was converted into UGX at an exchange rate of UGX 2618 into UGX 653,976,800/= which was credited to the Account OIA60999999202 BP Transitory Account of Crane Bank from which it was credited to the 2nd Plaintiff's UGX Account No. 0144070512000, from which the money was withdrawn by the 2nd Plaintiff. It

is clear that Crane Bank was the named payee of the said cheque and not the 2nd Plaintiff. The 1st Defendant, however, did not adduce evidence of a statement from the OIA60999999202 BP Transitory Account alluded to, where the USD 249,800 was first deposited as alleged. It was not explained as to why it was necessary for the bank to take that course of action when it was possible for the money to be transferred directly to the 2nd Plaintiff's UGX account or to be withdrawn by him from his own USD account. The nagging question is why would a customer not withdraw the money directly, or if not, have the money transferred directly to the account on which he wanted it? There is uncontroverted evidence by PW2 that he was required by the bank to leave with them signed cheques. I would be inclined to believe the 2nd Plaintiff's testimony that the bank could have used one such cheques to effect such a transaction, but not for the benefit of the 2nd Plaintiff.

[234] Counsel for the 1st Defendant in his submissions introduced another explanation that when the queried sum was sent on the UGX account, the latter account had an overdraft and the sum of UGX 653,976,800/= was applied towards reducing that overdraft. This line of argument is faced with two challenges. One is that it was introduced by Counsel in his submissions and it is therefore evidence from the bar that is unacceptable. Secondly, even if it had been introduced in evidence, a statement from the account that had the overdraft and which was affected by the credit of UGX 653,976,800/= was not adduced in evidence. Indeed, even in Counsel's submissions, the reference to the account number remained blank. In all, therefore, there is no evidence proving that the queried sum of **USD 249,800** was lawfully debited. The 2nd Plaintiff's claim that it was illegally debited is made out. The said sum shall be refunded to the 2nd Plaintiff with interest at 12% per annum from 25th March 2013 until full payment.

(iv) The Sum of USD 299,000 debited on 28th March 2013

Submissions by Counsel for the Plaintiffs

[235] It was submitted for the 2nd Plaintiff that the said sum was illegally debited from the account as it was not authorized by any instrument duly executed by the 2nd Plaintiff. Counsel stated that the explanation by the 1st Defendant that the said sum was withdrawn by the 2nd Plaintiff on 28th March 2013 using counter cheque leaf No. 0004956 and on the same day, credited to his USD Account No. 0245032023400 was not backed by evidence. Counsel submitted that the 2nd Plaintiff denied ever withdrawing the said sum and had testified in evidence that the USD Account No. 0245032023400 where the sum was purportedly credited was not his account number. PW2 also stated that he was not the payee of the said cheque but rather it was payable to Crane Forex Bureau, in which company he had no interest. Counsel also submitted that, indeed, in evidence, it was revealed that Account No. 0245032023400 where the sums were credited belonged to Crane Forex Bureau, the indicated payee in the cheque. Counsel concluded that there was sufficient evidence to prove that the said sum was unlawfully debited from the 2nd Plaintiff's account as it was neither withdrawn by him nor was it used to settle his loans and interest and or used for his benefit.

Submission by Counsel for the 1st Defendant

[236] In reply, Counsel for the 1st Defendant submitted that counter cheque No. 004956 dated 28th March 2012 at page 439 of Vol. 1 paying Crane Forex Bureau a sum of USD 299,000 was duly signed by the 2nd Plaintiff which signature was confirmed by him. Counsel argued that the allegation that the 2nd Plaintiff left blank cheques in the bank was a lie because those left in the bank were security cheques drawn on the 2nd Plaintiff's account No. 014470512000 and they were not counter cheques like this one. Counsel stated that all the security cheques were not blank but were filled and signed except for the date and that the allegation that he left cheques in the bank was

fictional and a concoction that should be dismissed by court. Counsel also submitted that having confirmed that he signed cheque No. 004956 by which this sum was debited, the cheque constituted a valid mandate authorizing Crane Bank Ltd to debit the account. Counsel cited the case of **Barclays Banks Vs. Sims [1980] QB 677** and submitted that once a bank produces the cheque and proves that a customer signed it, the bank is authorized to debit the account of the customer and such debit is lawful.

Determination by the Court

[237] According to the account statement at page 62 of Doc. 54, the queried sum was debited from the 2nd Plaintiff's account on 28th March 2013 with the narration *"CHQ#4956 Ntaganda"*. The reasonable inference is that this was a withdrawal by Ntaganda (the 2nd Plaintiff) using Cheque No. 4956, the same cheque adduced in evidence by the 1st Defendant at page 441 of Vo. 1. It is, however, clear to me that for the principle in ***Barclays Banks Vs. Sims [1980] QB 677*** (cited by Counsel for the 1st Defendant) to apply, a cheque that is said to have been used by the 2nd Plaintiff to withdraw a stated sum from his account must be a cheque that was signed by the 2nd Plaintiff in his favour as the payee. If it is a cheque issued to another person (a third party), the withdrawal cannot be said to have been made by the issuer of the cheque. In presence of such a contradiction, the production of such a cheque even when signed by the 2nd Plaintiff cannot constitute prima facie evidence of authorization to debit a person's account. In that regard, the decision in ***Barclays Banks Vs. Sims (supra)*** was cited by Counsel out of context and is not applicable to the present facts and circumstances.

[238] In the present case, whereas the 2nd Plaintiff is said to have withdrawn the queried sum using cheque No. 4956, the payee in the cheque is Crane Forex Bureau. No evidence was adduced of any transaction between the 2nd Plaintiff and Crane Forex Bureau warranting the debiting of the 2nd Plaintiff's account, and without disclosure of the payee on the account statement. In my

view, the mere fact that the signature of a customer exists on a cheque is not conclusive to explain mandate; and factors like illegality or absence of consideration can discount such mandate. In presence of an explanation by the 2nd Plaintiff that he was required and indeed used to leave signed cheques with the bank, such may constitute a reasonable explanation of how such a cheque came to be signed and used in the circumstances it was. This is irrespective of whether the cheques left signed but unfilled were security cheques or counter leaf cheques. In either case, the motive of requiring a customer to leave signed but uncompleted cheque leaves is not legitimate and smacks of fraud. In the circumstances, none of the explanations made by the 1st Defendant in regard to this debit is credible. The conclusion is that the sum of **USD 299,000** was unlawfully debited off the 2nd Plaintiff's account and the same shall be refunded with interest at 12% per annum from 28th March 2013 until full payment.

(v) The Sum of USD 313,436 debited on 28th March 2014

Submissions by Counsel for the Plaintiffs

[239] Counsel for the Plaintiffs submitted that there were 2 transactions of USD 313,436 debited from the 2nd Plaintiff's account on the 28th of March 2014, one with the narration, "TRT to Arrears" and the other, "$407780 @2550". It is the latter that was queried by the 2nd Plaintiff but the 1st Defendant furnished an explanation in regard to the former (which was not queried). Counsel pointed out that, however, when the 1st Defendant reproduced the same statement at page 480 of Vol. 1, strangely, one of the transactions and in particular, the queried one, was missing. Counsel invited the court to compare the two statements; at page 64 of Doc. 54 & 480 of Vol. 1. Counsel Concluded that the queried sum was not explained and was unlawfully debited and should be refunded by the 1st Defendant with interest.

Counsel for the 1st Defendant's Submissions

[240] Counsel submitted that the bank had the mandate to debit the account with USD 313,436 which it did, pursuant to the relevant sanction letter. Counsel stated that pursuant to the mandate the bank debited the 2nd Plaintiff's account No. 0244070512000 and credited it to his account No. 02301705120001 to clear his loan facilities and that therefore, the account was lawfully debited for repayment of the 2nd Plaintiff's loans. Regarding the second debit which was queried by the 2nd Plaintiff, Counsel submitted that the 22nd entry on the statement with the annotation "$407780@2550 SMP 28/03/14 313,436.00" was an erroneous debit which was cleared when the two erroneous entries were removed as per page 480 of Vol.1. Counsel submitted that this transaction was an error which did not result into any loss of funds to the 2nd Plaintiff.

Determination by the Court

[241] Two bank statements were adduced in evidence; one by the Plaintiffs at page 64 of Doc. 54 issued by Crane Bank Limited and the other by the 1st Defendant at page 480 of Vol. 1 issued by the 1st Defendant. The transactions on 28th March 2014 as per the bank statement at page 64 of Doc. 54 are reflected as follows; a credit of USD 313,436.00 and three debits of USD 313,436.00 with the narration "$40778@2550", USD 313,436.00 with the narration "TFR TO ARREAS", and USD 94,294 with the narration "TFR TO ARREAS". On the same day, a credit of USD 407,780 was made on the account. On the other hand, the statement at page 480 of Vol. 1 shows two debits of USD 313,436.00 and USD 94,294 both with similar narrations, "TRF TO ARREARS". The credit of USD 313,436 and the debit of the same amount with the narration "$40778@2550" which appear on the earlier bank statement are conspicuously missing from the latter statement. There is no credible explanation of this occurrence beyond the claim by the 1st Defendant that the second entry was an error that was corrected and did not occasion any loss on

the part of the 2nd Plaintiff. In my view, even if it was an error, that was not reason for its disappearance from one of the statements. Secondly, there was neither pleading nor evidence to rebut the claim that the second entry occasioned loss to the 2nd Plaintiff. The 2nd Plaintiff has therefore satisfied the Court on a balance of probabilities that the queried sum of **USD 313,436** was debited from his account unlawfully. The same shall be refunded to him with interest at 12% per annum from 28th March 2014 until full payment.

(vi) The Sum of USD 45,000 debited on 19th June 2014

Counsel for the Plaintiffs' Submissions

[242] It was submitted for the 2nd Plaintiff that this debit at page 64 of Doc. 54 was not clear to the 2nd Plaintiff and he was not aware of the transaction or instrument by which the debit was made. It was also stated that the money was not applied for the benefit of the 2nd Plaintiff. Counsel stated that the document relied on by the 1st Defendant (DID 27) was apparently created to coincide with the deposit of a similar sum on the 1st Plaintiff's account. Counsel further submitted that the averment that the queried sum had been applied to the repayment of the 2nd Plaintiff's loan and interest was not supported by any evidence as no loan that was being paid was pointed out. No cheque/instrument signed by the 2nd Plaintiff, authorizing the debit of USD 45,000 or its transfer to the 1st Plaintiff's account was adduced in evidence. Counsel submitted that resemblance of transactions without proof of a transfer instrument executed by the 2nd Plaintiff authorizing the transfer does not mean that the sums are the same. Counsel concluded that the sum was unlawfully removed from the 2nd Plaintiff's account and prayed for a refund with interest from 19th June 2014.

Counsel for the 1st Defendant's Submissions

[243] Counsel for the 1st Defendant stated that according to evidence, this queried sum was debited from the 2nd Plaintiff's account No. 0244070512000 on 19th June 2014 and credited to account No. 0245034003900 of Excellent

Assorted Manufacturer's Ltd (the 1st Plaintiff), which company is owned by the 2nd Plaintiff who is the sole signatory on the bank account. Counsel argued that whereas PW2 testified that this document was created to coincide with the deposit on the account of the 1st Plaintiff on the same day, and therefore a forgery, the 2nd Plaintiff did not prove the forgery against the bank. Counsel submitted that DID 27 was evidence of a necessary connection between the debit of USD 45,000 from the 2nd Plaintiff's account and the credit of USD 45,000 to the 1st Plaintiff's account and that PW2's testimony that the document was created to coincide with the credit on the 1st Plaintiff's account was untrue and not proved by the 2nd Plaintiff. Counsel stated that the 2nd Plaintiff did not tender any proof by way of deposit slip for the USD 45,000 to the 1st Plaintiff's account or an alternative explanation as to where the credit came from.

Submissions in Rejoinder

[244] In rejoinder, Counsel for the Plaintiffs submitted that having pleaded that this sum was applied to repayment of loan and interest, the other explanation advanced that the money was transferred to the 1st Plaintiff's account was a departure from pleadings. Counsel submitted that because the 2nd Plaintiff did not bring proof of a deposit of USD 45,000, is not reason for the transaction to be treated as a transfer to the 1st Plaintiff. Counsel submitted that it is the duty of the bank to adduce evidence of an instruction by way of a cheque or instrument to prove lawfulness of the transfer as it is the duty of the bank to keep proper records and present them when asked. Counsel relied on ***Ezekiel Osugo Agwenyi (supra)***.

Determination by the Court

[245] The record indicates at page 64 of Doc. 54 that on 19th June 2014, a debit of USD 45,000 was made on the 2nd Plaintiff's account with the narration "EXE ASS MAN". Perusal of the record and examination of the entire evidence has revealed no instrument either by way of a cheque or any instruction by the

2nd Plaintiff requesting and or instructing the bank to transfer the impugned sum of money to the 1st Plaintiff's account. I have considered the document that is on record as DID 27 adduced by the 1st Defendant as evidence of a voucher transferring the sum from the 2nd Plaintiff to the 1st Plaintiff's account. This document has two issues. One is that it was never tendered and admitted in evidence as an exhibit; it was simply identified. Under the law, a document that is simply identified is not considered an exhibit before the court and cannot be relied upon or subjected to evaluation by the court. As such, no evidential weight can be placed upon such a document. Secondly, even if the document had been admitted as an exhibit, it is not an instrument by which a client can authorize a transaction on a bank account. It is an internal bank document which is not signed by the 2nd Plaintiff or to which the 2nd Plaintiff was not privy. It would be difficult for a court to take such a document as evidence of an instruction by a client to debit his account or to transfer money from his account.

[246] In line with the essential principles already cited herein above, and in absence of proof of a transfer instrument related to the queried debit, the mere fact that two different accounts were affected on the same day; one by debit and another by credit; cannot constitute credible evidence that the sum debited from one was the very sum that was credited on the other. It is a settled position that the court cannot determine issues of bank accounts by relying on guess work and that a bank is duty bound to maintain proper records of a customer's accounts. See: ***Stanbic Bank (U) Ltd Vs. Uganda Crocs Ltd (supra)*** and ***Ezekiel Osugo Anwenyi (supra)***. In absence of evidence by the 1st Defendant to establish its defence that the queried sum was applied to repayment of the loan and interest, or, that it was transferred from the 2nd Plaintiff's account to the 1st Plaintiff's account, the claim by the 2nd Plaintiff that the sum of **USD 45,000** was unlawfully debited has been made out. The sum shall be refunded to the 2nd Plaintiff with interest at 12% per annum from 19th June 2014 until full payment.

(vii) The Sum of USD 49,000 debited on 27th January 2015

Submissions by Counsel for the Plaintiffs

[247] Counsel submitted that this transaction was unclear to the 2nd Plaintiff and the 2nd Plaintiff did not recall withdrawing the sum and neither was it applied to his loans. Counsel submitted that in Annexture O attached to the WSD, the 1st Defendant averred that this sum was withdrawn by the 2nd Plaintiff using counter cheque leaf No. 009929 which appears at page 449 of Vol. 1. The 2nd Plaintiff denied having withdrawn the money using the alleged cheque and testified that the counter cheque was paying Crane Bank. Counsel stated that whereas the 2nd Plaintiff admitted the signature on the cheque, he testified that he did not fill it and that it was one of those cheques that he signed blank and left with the bank which was used to debit the account. Counsel submitted that the bank statement at page 482 of Vol. 1 indicates a narration "DBU209849/CENTRAL MOTORS" to which PW2 denied issuing any instrument for payment. Counsel also pointed out that whereas the bank indicated that this sum was withdrawn by the 2nd Plaintiff, the cheque was paying Crane Bank and the voucher accompanying the cheque indicated that the money was credited to Account No. 0200700007902 in the names of Douche Bank, which had no relationship with the 2nd Plaintiff. Counsel concluded that the money was illegally debited from the 2nd Plaintiff's account and he is entitled to a refund with interest.

Submissions by Counsel for the 1st Defendant

[248] In reply, Counsel submitted that there was evidence of counter cheque leaf No. 009929 drawn in favour of Crane Bank for a sum of USD 49,000 signed by the 2nd Plaintiff which was to be debited on the 2nd Plaintiff's Account No. 0244070512000 which was a valid instrument to prove that the bank was authorized to debit the 2nd Plaintiff's account and that the debit was therefore lawful as per the mandate of the account holder, who is the 2nd Plaintiff. Counsel refused PW2's explanation that he used to leave many blank cheques

in the bank as being fanciful and illogical intended to avoid paying his debts. Counsel also submitted that if a duly signed cheque is produced in evidence, that is sufficient to answer the question of whether the debit was lawful and that the testimony of PW1 and PW2 that the 2nd Plaintiff did not take the money is irrelevant as it is not the duty of the bank to investigate who the payee was and why the customer was paying a certain customer or how the customer spends his money. What matters is that there is a valid instrument and the bank's job is to honour the customer's instruction.

[249] Counsel further submitted that the Deutshe Bank account where the money was credited was a nostro account of Crane Bank Ltd which dealt with all transfers of money abroad and so, it was logical for a cheque paying Crane Bank Ltd to be credited to a nostro account belonging to Crane Bank Ltd. Counsel submitted that once the bank adduced evidence of a signed cheque, it discharged the burden of proving that the debit was lawful and does not have to prove anything further. Counsel argued that the payment can only be challenged on grounds that; the signature is forged, that the cheque was countermanded or such similar grounds. Counsel prayed to court to find that this sum was lawfully debited and the 2nd Plaintiff is not entitled to refund of the same.

Determination by the Court

[250] In Annexture O to the 1st Defendant's amended WSD, it was pleaded that this queried sum was withdrawn on 27th January 2015 from a/c 1005021010000006/024407051200 using counter cheque leaf 009929 by Ephraim Ntaganda. A similar explanation was provided at page 435 of Vol. 1, and similarly, at page 1018 of Vol. 3. In evidence, however, it was shown that the debit of USD 49,000 was made from the 2nd Plaintiff's account No. 0244070512000 and credited to Account No. 0200700007902 in the name of Deutsche Bank which is a nostro account for Crane Bank in the Deutsche Bank. Counsel for the 1st Defendant stated that the 2nd Plaintiff authorized a

payment to Crane Bank of USD 49,000 to be debited from his account which the bank transferred to Deutsche Bank. As submitted by Counsel for the Plaintiffs, the evidence adduced for the 1st Defendant constitutes a material departure from its pleadings. I have already dealt with the position of the law on the subject of departure from a party's pleadings and its consequences.

[251] However, for completeness, I will proceed to examine on merit as to whether the queried debit was lawfully made. From the record, at page 65 of Doc. 54, the sum of USD 49,000 was debited from the 2nd Plaintiff's account on 27th January 2015 with the narration, "DBU209849/CENTRAL MOT". The 2nd Plaintiff denied knowledge of the transaction. The 1st Defendant adduced evidence of a cheque at page 449 which was signed by the 2nd Plaintiff as proof that the debit was authorized by the 2nd Plaintiff and therefore lawful. The cheque at page 449 for the sum of USD 49,000 was paying Crane Bank. The narration according to another bank statement at page 482 of Vol. 1 is "DBU209849/CENTRAL MOTORS". There was no explanation in evidence of the position of Central Motors in these proceedings or of the meaning of the figures appearing before the description "Central Motors".

[252] Secondly, whereas the cheque was paying Crane Bank, it is indicated at the back of the cheque that the recipient of the money was Account No. 0200700007902 in the name of Deutsche Bank, which the 1st Defendant avers is a nostro account of Crane Bank. There was no explanation made of the relationship between the nostro account and the 2nd Plaintiff and what benefit he was getting from the credit or transfer of the said sum. Lastly, the claim that the account to which the money was credited was for Crane Bank Ltd remained an allegation with no proof at all. No evidence of that account was adduced or to whom the money was paid after leaving the alleged nostro account, if at all it did. In light of absence of any evidence to rebut the query by the 2nd Plaintiff, the conclusion is that the sum of **USD 49,000** was unlawfully

debited and the same shall be refunded to the 2nd Plaintiff with interest at 12% per annum from 27th January 2015 until full payment.

(viii) The Sum of USD 43,293.41 debited on 16th October 2015

Submissions by Counsel for the Plaintiffs

[253] Counsel for the Plaintiffs submitted that the 2nd Plaintiff could not understand why the sum was debited from his account. The 2nd Plaintiff disputed the explanation by the 1st Defendant that the sum was transferred to the 2nd Plaintiff's account in three deductions ($28,000, $15,097.79 and $195.62) on account No. 10050230210000003 for payment of loan and interest. Counsel submitted that the evidence that one of the transactions (of $195.62) was reversed or sent to the internal commission account of the bank was contradictory and unsubstantiated.

Submissions by Counsel for the 1st Defendant

[254] In reply, Counsel for the 1st Defendant submitted that account No. 100502101000006 was debited with the total sum of USD 43,293.41 which was transferred to the 2nd Plaintiff's loan account at page 569 of Vol.1. Counsel stated that according to the statement, USD 28,000 was applied to the principal, USD 15,097.79 to interest and USD 195.62 to penalty interest. Counsel stated that it is the penalty interest that went to the internal commission account. Counsel submitted that the sanction letters authorized the bank to debit the customer's account for the repayment of principal and interest. That on 30th September 2015, the loan account had a balance of -1,567,097.79 which reduced to -1,523,804.38 upon applying the sum of 43,293.41. Counsel concluded that the bank lawfully debited the account for repayment of principal, interest and penalty interest.

Determination by the Court

[255] The bank statement at page 497 of Vol. 1 shows that a sum of USD 43,293.41 was debited from the 2nd Plaintiff's account on 16th October 2015.

On the same day, as per statement at page 569 of Vol. 1, three sums of USD 28,000, USD 15,097.79 and USD 195.62 were credited to the 2nd Plaintiff's loan account which reduced his loan. On the same day, there is a reversal of the sum of USD 195.62 with the narration, "interest repayment". Below that narration, there is another narration "Penalty interest/Apply Repayment". In absence of contrary evidence, I am inclined to believe that the last transaction of USD 195.62 was not a reversal but was an allocation of the said sum to where the penalty interest was supposed to go. According to the evidence by the 1st Defendant, the penalty interest was supposed to go to the internal commission account. I find no reason to disbelieve this evidence. I therefore find that the amounts of USD 28,000, USD 15,097.79 and USD 195.62 were lawfully applied towards payment of the 2nd Plaintiff's loan on account of the principal, interest and penalty interest. The sum was therefore lawfully debited and applied to the benefit of the 2nd Plaintiff and the same cannot be refunded.

(ix) The Sum of USD 62,145.75 debited on 16th October 2015

[256] Both Counsel referred the Court to page 587 of Vol. 1 where this sum was said to have been applied to the reduction of the 2nd Plaintiff's loan and interest in the denominations of USD 40,000 for the loan, USD 21,866.30 for interest and USD 279.45 for penalty interest. According to the evidence on record, a total sum of USD 62,145.75 was debited from the 2nd Plaintiff's account on 16th October 2015 as per page 497 of Vol. 1. At page 587 of Vol. 1, on loan account No. 10050230020000003, three sums were credited in denominations of USD 40,000 for the loan, USD 21,866.30 for interest and USD 279.45 for penalty interest. In a similar manner, the credit of the sum of USD 279.45 was apparently reversed. For the same reasons, I have believed the explanation by the 1st Defendant that the said sum of USD 279.45 was applied towards payment of penalty interest and was allocated to the relevant account. I am satisfied, therefore, that the sum of USD 62,145.75 was lawfully debited and no refund is ordered.

(x) The Sum of USD 106,000 debited on 20th October 2015

Submissions by Counsel for the Plaintiffs

[257] Counsel for the Plaintiffs submitted that when the sum was queried, the 1st Defendant responded in Annexture O that this was for "repayment of loan and interest". Counsel stated that, however, according to the bank statement, the 2nd Plaintiff had, at the time of debit of this sum, already fully paid the loan in a sum of USD 2,120,000/= on 20th October 2015 (page 587 of Vol. 1); leaving a positive balance of USD 1,164.62, which fact was undisputed. Counsel argued that since there was no outstanding loan balance, there was no reason for further debiting of the account for "*repayment of loan and interest"* which had already been cleared to zero balance.

Submissions by Counsel for the 1st Defendant

[258] In reply, Counsel for the 1st Defendant submitted that, on evidence, the payment of USD 106,000 related to prepayment charges which were due upon the loan being prepaid. Counsel referred to the entries at page 587 of Vol. 1 which shows that on 20th October 2015, after the prepayment, the loan account was debited with USD 106,000 which was recovered from the 2nd Plaintiff's current account and credited to the loan account. Counsel submitted that the prepayment was a charge payable by the 2nd Plaintiff pursuant to clauses 6 and 11 of the sanction letter dated 29.03.2014 at pages 27-33 of the Joint Trial Bundle which authorized the bank to charge 5% of the amount of the loan prepaid i.e. USD 2,120,000 which comes to a sum of USD 106,000.

Determination by the Court

[259] When this sum was queried by the 2nd Plaintiff, it was explained by the 1st Defendant in Annexture O that this was repayment of loan and interest for loan account No. 10050230210000003 of Ephraim Ntaganda. The 2nd Plaintiff disputed this explanation and stated that at the time the deduction was made, there was no accrued outstanding loan obligation on the part of the 2nd Plaintiff. In evidence, it was claimed for the 1st Defendant that the 2nd Plaintiff

had to pay prepayment charges as per the terms of the loan agreement and this sum went towards that. It is clear that the issue of a prepayment charge was introduced later in the proceedings and the Plaintiffs had no opportunity to lead evidence or any material to contest it. As submitted by Counsel for the Plaintiffs, it constitutes departure from the 1st Defendant's pleadings and is unacceptable under the law. I do not agree with the argument by the 1st Defendant's Counsel that such a defective approach can be cured by the application of Article 126(2)(e) of the Constitution as such is not a question of undue regard to technicalities but rather a substantive matter concerning the right to fair hearing.

[260] In the circumstances, there is no evidence that the sum of USD 106,000 was debited from the 2nd Plaintiff's account for repayment of his loan and interest as alleged in the defence. Available evidence indicates that when the queried sum was debited on 20th October 2015, the 2nd Plaintiff's outstanding loan of USD -2,1118,835.38 had been cleared upon a deposit of USD 2,120,000/= leaving a credit balance of USD 1,164.62. The indication is that the entire loan had been cleared and there was no outstanding loan or interest. The further deduction of USD 106,000 on the same day, therefore, remains unexplained. Even looking at the statements themselves, they tell no story of the reason for such deduction. My finding, therefore, is that the sum of **USD 106,000** was unlawfully debited from the 2nd Plaintiff's account and the same shall be refunded with interest at 12% per annum from 20th October 2015 until payment in full.

(xi)The Sum of USD 21,000 debited on 20th October 2015

Submissions by Counsel for the Plaintiffs

[261] Counsel submitted that the 2nd Plaintiff could not understand why this sum was removed from his account and the basis thereof. Counsel stated that when this sum was queried, the 1st Defendant responded, in Annexture O, that this was for repayment of loan and interest to loan Account No.

1005230210000003 of Ephraim Ntaganda. At page 436 of Vol. 1, it was stated that the money was removed towards "interest repayment". In evidence, it was stated that this money was debited and credited to the 2nd Plaintiff's loan account for interest repayment. Counsel submitted that similar to the queried figure of USD 106,000, this money had been debited from the 2nd Plaintiff's account after the loan had been cleared. Counsel refuted the explanation that the debit was a prepayment charge as a deviation from pleadings which ought to be rejected. Counsel stated that in October 2015, particularly on 16th, the bank had already levied interest for that month and levying another interest charge of USD 21,000 was exorbitant. Counsel concluded that this money was unlawfully charged.

Submissions by Counsel for the 1st Defendant

[262] It was submitted for the 1st Defendant that this sum was debited from the 2nd Plaintiff's current account No. 1005021010000006 on 20th October 2015 and credited to his loan account No. 10005023020000003 as shown at page 571 under the narrative, "*charge-repayment, payoff fee, apply repayment*". Counsel invited the Court to look at clause 11 of the sanction letter at page 27-33 of the joint trial bundle. Counsel submitted that on 16th October 2015, the loan had a balance of USD (-1,524,000). On 20th October 2015, a sum of USD 420,000 was prepaid which reduced the loan and that USD 21,000 which was debited from the current account and credited to the loan account to clear this charge is 5% of the prepaid sum of USD 420,000. Counsel submitted that it was not true as stated by Counsel for the Plaintiffs that the loan was fully cleared as of 20th October 2015 since it had an outstanding loan balance of USD (-1,104,000). Counsel invited the Court to find that the 2nd Plaintiff's current account was lawfully debited with USD 21,000. Counsel also referred to clause 6 of the sanction letter which permitted the bank to debit the customer's account and settle his indebtedness. Counsel concluded that the account was lawfully debited with the queried sum.

Determination by the Court

[263] The findings I made when dealing with the queried sum of USD 106,000 apply to this query mutatis mutandis. I only wish to add that in particular reference to the relevant loan (facility II), the debit appears a bit odd. From the account statement, starting at page 559 to 571 of Vol.1, it appears that the 2nd Plaintiff had settled his liability on his loan installments. I have studied the loan statement from page 559 of Vol. 1 and found that the loan installment of USD 28,000 and interest amounts for the months of February, March, April, May, and June 2015 were paid. At page 561, it is shown that in July, the 2nd Plaintiff was charged again for three installments of the principal and interest for May 2015 and the payment for August 2015. At page 565-567, again May, June, July and August were charged for principal and interest. In September, 6 installments of principal and 3 of interest were paid during that month. Indeed, there was no clear evidence as to how much interest was charged per month. In October, loan and interest were paid, and in addition USD 420,000 was paid by the 2nd Plaintiff reducing the loan from USD -1,524,000 to USD -1,104,000. Therefore, going by the statement exhibited in court, there was no outstanding interest or principal installment payable at the time when the 2nd Plaintiff's account was charged another USD 21,000 without a clear explanation. In the circumstances, I find that the queried sum was not used for the benefit of the 2nd Plaintiff and was unlawfully or irregularly debited. The sum of **USD 21,000** shall be refunded to the 2nd Plaintiff with interest at 12% per annum from 20th October 2015 until full payment.

(xii) The Sum of USD 14,070.41 debited on 20th October 2015

Submissions by Counsel for the Plaintiffs

[264] Counsel submitted that the 2nd Plaintiff could not understand why this sum was deducted from his account and the basis thereof. When it was queried, the 1st Defendant responded that the sum was transferred from the 2nd Plaintiff's current account to his loan account for repayment of loan and

interest. In evidence, it was reiterated that the sum was used to set off interest due. This was despite the evidence that upon payment of USD 2,120,000, the 2nd Plaintiff's loan had been settled and therefore it was not clear why the bank was still charging interest on a loan which had been fully settled. Counsel invited the court to look at page 581 of Vol. 1 where this money was credited and immediately debited without an explanation of where it was taken.

Submissions by Counsel for the 1st Defendant

[265] Counsel submitted that this sum was debited from the 2nd Plaintiff's current A/c No. 1005021010000006 on 20th October 2015 (page 499 of Vol. 1) and credited to his loan account 1000502302000000 and used to settle his interest due for that day. Counsel stated that according to the facility letter at page 28 of the joint trial bundle, interest was calculated monthly in arrears, on a closing balance and that from the statement at page 587 of Vol. 1, the last monthly interest charge was on 30th of September which was USD 21,866 that was recovered on 16th of October 2015, and that the next interest payment should have been 30th October 2015 but for the prepayment. That interest for 20 days from 1st to 20th October accrued to USD 14,070.41 and the debit sum went to clear the outstanding balance and therefore the debit was lawful.

Determination by the Court

[266] According to the record, when this sum was queried, the 1st Defendant in Annexture O answered that this was for repayment of loan and interest to loan account No. 1005023210000001 of Ephraim Ntaganda. In evidence, it was claimed by the 1st Defendant that the sum was credited to the 2nd Plaintiff's loan account and used to settle interest repayment on that account which was allowed by the facility agreements signed by the 2nd Plaintiff. Upon examination of both the current and loan bank statements of the 2nd Plaintiff at page 499 and 589 respectively, it is revealed that the sum of USD 14,070.41 was debited from the 2nd Plaintiff's current account on 20th October 2015 and credited to his loan account as per page 589 of Vol. 1. However, I find this transaction

awfully odd. It is evident from the bank statement that when the 2nd Plaintiff paid a sum of USD 2,120,000 as per statement at page 587 of Vol. 1, his loan and interest had been fully paid. The bank went ahead to even charge an alleged prepayment charge of USD 106,000 on the same date which took the loan balance to a positive USD 1,164.42 which was also debited on the same date, leaving the account at 0.0 as per page 589 of Vol. 1. The 1st Defendant's explanation that the queried sum was to pay for interest cannot therefore stand because the "0.0 balance" meant that the loan had been cleared to Zero balance and there was nothing outstanding. It is inconceivable that after a loan is paid to zero balance a person is still charged interest. I also agree that the submission by Counsel for the 1st Defendant to the effect that the charge was interest for 20 days from 1st October 2015 to 20th October 2015 constitutes evidence from the bar as it never arose from the evidence on record. In my finding, therefore, there was no interest outstanding to pay and the queried sum of **USD 14,070.41** was illegally debited and the same shall be refunded to the 2nd Plaintiff with interest at 12% per annum from 20th October 2015 until full payment.

(xiii) The Sum of USD 49,008.04 debited on 5th February 2016

[267] Counsel broke down this figure into 4 sub-figures namely; USD 13,528.80, USD 11,569.32, USD 11,954.96 and USD 11,954.96, all debited on 5/02/2016. The four figures were tackled differently but having read both counsel's submissions, I find that the sums having been debited on the same day for alleged interest repayment, it is appropriate to consider them all at once.

Submissions by Counsel for the Plaintiffs

[268] Counsel submitted that the debits of USD 13,528.80, USD 11,569.32, USD 11,954.96 and USD 11,954.96 from the 2nd Plaintiff's account on 5th February 2016 were all unknown to the Plaintiff and when queried, the 1st Defendant in Annexture O pleaded that all these sums were applied to

repayment of loan and interest to the loan account No. 10050230210000003 of Ephraim Ntaganda. Counsel submitted that there was no explanation by the 1st Defendant as to how much interest was chargeable on that day and, whereas there were 4 entries of interest repayment, there was no explanation as to the specific dates when the amounts fell due and for what months the interest was being charged. Referring to PW1's testimony, Counsel submitted that there were no reversals because when you have a debit and credit of the same amount, you cannot say the loan was reduced by that amount but it rather gives a nil effect. Counsel, therefore, submitted that the 2nd Plaintiff did not take benefit of the queried sums. Counsel concluded that the sums were illegally debited and ought to be recovered with interest.

Submissions by Counsel for the 1st Defendant

[269] In reply, Counsel for the 1st Defendant stated that the sum of USD 13,529.80 was debited from the 2nd Plaintiff's account (as per page 503 of Vol 1) and credited to his loan account on the same day (as per page 571 of Vol.1) and was used for interest repayment which reduced the loan from USD (-1,141,053.08) to USD (-1,127,524.28). Counsel submitted that whereas the 2nd Plaintiff questioned why there were many transactions on 5th February 2016, there were 2 credits of USD 13,528.80 and USD 11,954.96 and that USD 11,569.32 was reversed on the same day. Counsel stated that the 2nd Plaintiff had taken time without being charged interest and upon application of the interest repayments, the loan balance was reduced by USD 13,529.80 and therefore the account was lawfully debited.

[270] For the sum of USD 11,569.32, Counsel stated that this sum was debited from the 2nd Plaintiff's current account to his loan account to cater for overdue interest. Counsel stated that it was explained in evidence that the entry "interest make due" on the statement meant that when the system would attempt to recover an installment and there was no money on the account, the system would automatically reverse the entry until the money became available

and that all entries with "interest make due" meant that the system had failed to recover the money and reversed it because there was insufficient balance on account. Counsel stated that the record at page 499 to 503 of Vol. 1 shows that the 2nd Plaintiff's current account had no money for the months of 7th November 2015 to 6th February 2016 and that interest fell due for those months until the current account was credited with USD 83,550 on 5/02/2016 when the system recovered all the unpaid interest for the previous months. For the sum of USD 11,954.96, Counsel stated that this sum is part of the interest amounts that were debited to recover interest from previous months when there were no funds in the current account to settle the loan obligations.

Determination by the Court

[271] The record indicates that on 5th February 2016, sums of USD 13, 528.80, USD 11,569.32, USD 11,954.96 and USD 11,954.96 totaling to **USD 49,008.04** were all debited from the 2nd Plaintiff's current account. An examination of the 2nd Plaintiffs current account as against the loan account at pages 503, 571 and 573 of Vol.1 respectively reveals that the sums were debited from the 2nd Plaintiff's current account and credited to the loan account with a sum of USD 11,954.96 being interest for November 2015; USD 11,569.32 being interest for November and December having been paid on 31st December 2015. It is further indicated that a sum of USD 11,954.96 as the interest for January and February was paid on 5th February. However, the statement shows that interest was paid twice for the month of February 2016. Counsel for the 1st Defendant explained that this was because the interest had not been paid for long and referred to the period between 7th November 2015 to 5th February 2016. However, the bank statement on record indicates that the interest for November and December had already been paid and, therefore, any further charge of the same was unlawful. In my view, even if the Court was to believe that the 2nd Plaintiff had taken long without paying interest, the absence of a standard specific monthly charge on interest, and the failure in the narration to indicate the particular month upon which interest was being

charged negatives the 1st Defendant's claim that the interest was lawfully charged. Simply charging multiple interest for the same month without explanation cannot be believed to be regular or lawful. The effect of the alleged reversals has also not been explained to the satisfaction of the Court. I have not been able to see that they did not occasion loss to the 2nd Plaintiff. I am, therefore, not convinced by the explanation by the 1st Defendant and I find that the sums of USD 13, 528.80, USD 11,569.32, USD 11,954.96 and USD 11,954.96 totaling to **USD 49,008.04** were unlawfully debited from the 2nd Plaintiff's account and the same shall be refunded with interest at 12% per annum from 5th February 2016 until full payment.

(xiv) The Sum of USD 34,400 debited on 6th February 2016

Submissions by Counsel for the Plaintiffs

[272] Counsel submitted that the 2nd Plaintiff never withdrew this sum; neither was it applied to settle his loan obligations. Counsel referred the Court to the testimony of PW1 to the effect that he had not seen a cheque withdrawing that money and that no particulars of the cheque had been indicated in the bank statement. Counsel also pointed out that PW2 denied withdrawal of the said amount and stated that the withdraw slip, DID 25, adduced by the 1st Defendant as confirmation of the withdrawal of the sum by the 2nd Plaintiff was not signed by him even though there was a provision for the customer to sign to certify the transaction. Counsel submitted that whereas the debit was done using a cheque signed by the 2nd Plaintiff, he did not withdraw and or pick the money. Counsel referred to the testimony of PW2 that he used to sign many blank cheques and leave them in the bank which were later used to remove money from his accounts without any instruction and that the bank was relying on coincidences to debit the 2nd Plaintiff's account. Counsel stated that as an example, for this queried transaction, the 1st Plaintiff made a deposit on its account of USD 34,400 and on the same day, a signed cheque by the 2nd Plaintiff was cashed by the bank and money taken by someone else as per the

withdrawal slip referred to above. Counsel submitted that the debit was unlawful and prayed for a refund of the money.

Submissions by Counsel for the 1st Defendant

[273] In reply, Counsel for the 1st Defendant submitted that there is on record a counter cheque No. 567404 dated 6th February 2016 signed by the 2nd Plaintiff for USD 34,400 at page 451 of Vol. 1, paying Ephraim Ntaganda. Counsel submitted that the bank complied with the account mandate of the 2nd Plaintiff who had signed the cheque. Counsel submitted that PW2 confirmed that the signatures and the handwriting in the cheque were his. He also stated that there was an alteration on the figures in the cheque which was also countersigned by the 2nd Plaintiff and, as such, the claim that the 2nd Plaintiff left blank cheques in the bank was a mere fabrication and false testimony. Citing **Barclays Bank Vs. Sims (supra)**, Counsel submitted that once the bank produces a cheque duly signed as per the mandate, as it did for this transaction, the bank is authorized to debit the account of that customer and that this debit was lawful.

[274] On whether the 2nd Plaintiff took the money, Counsel submitted that once it is proved that the account was lawfully debited with a cheque signed by the account holder, the question of the mandate must be answered in the affirmative and it does not matter who took the money. The 2nd Plaintiff signed the cheque for USD 34,400 where he was payee and this is corroborated by the deposit of the same amount on the 1st Plaintiff's account. Counsel invited the Court to find that this debit was lawful.

Submissions in Rejoinder

[275] Counsel for the Plaintiffs submitted that as per page 74 of Doc 54, the narration in the bank statement indicated that this was a cash withdrawal but it did not reflect any cheque or particulars of the cheque at page 451; and that the deposit slip for the 1st Plaintiff at page 453 of Vol. 1 and the withdrawal

voucher were not signed by Mr. Ephraim Ntaganda which is confirmation that the money was taken by someone else but not the 2nd Plaintiff.

Determination by the Court

[276] According to the record, at page 74 of Doc. 54, the sum of USD 34,400 was debited as a cash withdrawal on 6th February 2016. The 2nd Plaintiff denied ever withdrawing cash in the sum of USD 34,400 and argued that the bank never presented an instrument by him authorizing the bank to withdraw this sum. On the other hand, in Annexture O, the 1st Defendant explained that this was withdrawn by Counter Cheque leaf 567404 by the 2nd Plaintiff and, adduced three documents to prove that the debit of this sum was lawful, namely; a photocopy of a cheque at page 451 of Vol. 1, DID 21- a withdrawal voucher, and a cash deposit slip at page 453 of Vol. 1. The original cheque was produced during evidence and is on record. It is not disputed that the cheque was signed by the 2nd Plaintiff who also countersigned a 'write over' on the sum in figures. The 2nd Plaintiff also signed against the crossing for purpose of opening the cheque which is consistent with the act of withdrawing cash using a cheque. Lastly, the 2nd Plaintiff also signed twice at the back of the cheque, also evidence of a withdrawal by cheque. I am able to take judicial notice of the fact that this is consistent with the existing practice in the banking industry.

[277] I am not convinced by the explanation of the 2nd Plaintiff that this is one of the cheques that he left in the bank signed but unfilled. Unlike the other cheques that were believed by the Court to fall in the category of the blank signed cheques left with the bank, this present cheque is in the name of the 2nd Plaintiff as payee, is signed in a manner signifying cash withdrawal and is filled in the 2nd Plaintiff's own handwriting. I am, therefore, in agreement with Counsel for the 1st Defendant that the position of the law espoused in ***Barclays Bank Vs. Sims (supra)*** applies to this queried sum. It is true that once the bank produces a cheque duly and regularly signed as per the mandate of the customer, the bank would have proved that it was authorized

to debit the account of that customer. In this case, I am satisfied that the cheque was regularly and duly signed by the 2nd Plaintiff and the presumption is that, in absence of evidence to the contrary, the 2nd Plaintiff withdrew and took the money, his protestations notwithstanding. My finding, therefore, is that the debit of USD 34,400 was regular and lawful and no refund of the same can be ordered.

(xv) The Sum of USD 11,101.95 debited on 7th March 2016

Submissions by Counsel for the Plaintiffs

[278] It was submitted for the 2nd Plaintiff that he was not aware of this sum that was debited as an internal transfer. PW1 testified during cross examination that he was able to see the transaction although the narration in the bank statement was different. According to the evidence, in March 2016, the 2nd Plaintiff's loan account was charged with USD 11,101.95 and USD 381.80 on 31st March 2016, both as interest for the month of March 2016. Counsel concluded that interest was charged more than once a month, yet it was supposed to be monthly; which was illegal or irregular.

Submissions by Counsel for the 1st Defendant

[279] In reply, Counsel stated that this sum was debited from the 2nd Plaintiff's current account as per statement at page 503 of Vol. 1 and credited to his loan account as per page 573 of Vol. 1 to cover interest payments for his loans. The bank statement shows that this credit was applied to the loan account and it reduced the loan balance from USD (-1,115,101.95) to USD (-1,104,000). Counsel submitted that the debits and credits on these accounts were authorized under the terms of the sanction letters and that the debit was therefore lawful. Counsel argued that the debit of USD 381.80 was not queried by the 2nd Plaintiff.

Determination by the Court

[280] I have examined the current and loan account bank statements at page 503 and 573 of Vol. 1 respectively. There is evidence that the queried sum was debited from the 2nd Plaintiff's account on 7th March 2016 and it was debited to the loan account on the same day. However, like the figures totaling to **USD 49,008.04** that have been considered above, there is no evidence showing as to which month this interest was being charged. There is evidence from the 1st Defendant that the proper practice was that the account was charged interest every end of month and the bank statement would constitute the evidence. In this case, the bank charged interest on 7th March 2016 and on 31st March 2016; and no credible explanation appears on record. I am inclined to believe the 2nd Plaintiff's assertion that there was a double charge of interest for the month of March 2016 and the 2nd Plaintiff is entitled to a refund of the sum of **USD 11,101.95** which was irregularly debited. The same shall be refunded with interest at 12% per annum from 7th March 2016 until full payment.

(xvi) The Sum of USD 196,500 debited on 9th March 2016

Submissions by Counsel for the Plaintiffs

[281] Counsel submitted that although this sum was debited with the narration, *"internal transfer"*, the 2nd Plaintiff was not aware of the debit and the instrument used and the 1st Defendant did not adduce evidence of any instrument used to transfer this sum. Counsel submitted that when this sum was queried, the 1st Defendant in Annexture O explained that this sum was transferred to the 1st Plaintiff's account for repayment of its loan and interest. Counsel submitted that at the trial, the 1st Defendant relied on the bank statement at pages 635-637 of Vol. 1 and the document at page 457 of Vol. 1 and gave an explanation that the sum was debited as a whole from the 2nd Plaintiff's account and was split before crediting it to the 1st Plaintiff's account. Counsel submitted that, however, when the alleged split figures are added, they total to USD 189,352.79 and not the queried sum of USD 196,500.

Counsel submitted that the debited sum was not a direct match of the purported split figures on the 1st Plaintiff's account where the queried sum was purportedly credited. Counsel also stated that the document at page 457 had handwritten words *"no confirmation for this transaction*". Counsel, therefore, concluded that this sum was not traced on the 1st Plaintiff's account to which it was allegedly transferred and its debit was illegal.

Submissions by Counsel for the 1st Defendant

[282] Counsel for the 1st Defendant stated that this sum was transferred from the 2nd Plaintiff's account No. 1005021010000006 to the 1st Plaintiff's account No. 1002021020000849 as per statement at page 607 of Vol. 1. Counsel stated that the 1st Plaintiff company is owned by the 2nd Plaintiff and his wife and that this transaction was between two related parties. Counsel referred the Court to an "account to account transfer" document at page 457 of Vol. 1 and the bank statement of the 1st Plaintiff at page 607 of Vol. 1 where the queried sum of USD 196,500 was traced to have been credited. Counsel submitted that this sum was credited to the 1st Plaintiff's current account and not to the loan account and that the correct account to which the money was credited is USD Account No. 1002021020000848 on 9th March 2016 and on the same day, several debits were made from this account to the 1st Plaintiff's loan account to pay principal and interest of the 1st Plaintiff. Counsel submitted that under the guarantee dated 3rd August 2013, at page 88-92 of the Joint trial bundle, the 2nd Plaintiff was a guarantor for the 1st Plaintiff and that the guarantee allowed the bank to debit the 2nd Plaintiff's account at any time and without notice for any sum which would become due under the guarantee and set off any sum that would become due. Counsel concluded that this sum was lawfully transferred from the 2nd Plaintiff's account to the 1st Plaintiff's account and was used by the 1st Plaintiff to pay off its loan and interest and that if court finds otherwise, then it should find that the 1st Plaintiff received the money and is liable to refund it to the bank.

Submissions in Rejoinder

[283] In rejoinder, Counsel for the Plaintiffs submitted that the 1st Defendant did not prove, with documentary proof, that there was authority by the bank to debit the 2nd Plaintiff's account and that the document at page 457 of Vol. 1 which was adduced by the 1st Defendant has a writing *"no confirmation for this transaction".* Counsel further submitted that the guarantee relied on by Counsel for the 1st Defendant as the mandate to debit the account limits the guarantor's liability to the amount due at the date of such a debit and the 1st Defendant did not lead evidence to show how much was due and payable on the date of the debit. Counsel reiterated that the sum was unlawfully debited from the 2nd Plaintiff's account and ought to be refunded.

Determination by the Court

[284] The evidence on record at page 75 of Doc. 54 shows that the sum of USD 196,500 was debited from the 2nd Plaintiff's account on 9th March 2016 with the narration, "internal transfer to 1002021020000849". It was the 1st Defendant's defence that this sum was transferred to that account of the 1st Plaintiff for repayment of loan and interest. The loan account statement is on record and indicates that the queried sum was credited to that account on 9th March 2016, with the narration "Transfer Credit 1005021010000006" as per page 607 of Vol. 1. I have examined the documents referred to by the parties and I have not found any instrument or instruction duly executed by the 2nd Plaintiff, authorizing the bank to debit his account with a sum of USD 196,500 or instructing the bank to transfer the queried sum to the 1st Plaintiff's account. I am unable to agree with Counsel for the 1st Defendant that the instrument of transfer was the relevant guarantee which authorized this debit because, firstly, the cited guarantee reads; "*The guarantors … hereby jointly and severally agree to pay and satisfy to the bank on demand and every sum or sums of money which are now or at any time shall be owing to the bank anywhere…*" In my view, this can only mean, as it should, that the mandate

under guarantee would only be invoked by the bank upon issuance of a demand for payment of the sums outstanding as at that point when the debit is made. There is no proof that there was a demand or that the 1st Plaintiff had sums owing and unpaid by it for which the bank invoked its alleged mandate to debit the 2nd Plaintiff's account without authority, permission or instrument executed by the 2nd Plaintiff.

[285] Nevertheless, it appears to me that the fact that the money was transferred to the 1st Plaintiff's account is not controverted. I am aware that the 1st Plaintiff, a private limited liability company, is a distinct legal personality under the law. However, I agree with the 1st Defendant's Counsel that the relationship between the company and the 2nd Plaintiff is well disclosed in these proceedings. As such, in presence of evidence that money was irregularly debited on the 2nd Plaintiff's account and credited on the 1st Plaintiff's account, it would be unacceptable that the 1st Defendant is ordered to refund such money to the 2nd Plaintiff. The correct thing would be for the two Plaintiffs to balance their accounts and settle each other accordingly. Doing otherwise would be to facilitate the 1st Plaintiff to benefit unlawfully by way of unjust enrichment which course of action the court cannot facilitate. In the circumstances, although I would agree that the queried sum was irregularly debited from the 2nd Plaintiff's account and credited on the 1st Plaintiff's account, I do not agree that the 1st Defendant is liable to refund the same. This claim by the 2nd Plaintiff fails.

(xvii) The Sum of USD 42,000 debited on 9th March 2016

Submissions by Counsel for the Plaintiffs

[286] Counsel submitted that this sum was debited from the 2nd Plaintiff's account as a cash withdrawal which the 2nd Plaintiff was not aware of. When the sum was queried, the 1st Defendant in Annexture O explained that the sum was withdrawn on 14th March 2016 using counter cheque leaf No. 56766 by the 2nd Plaintiff as per page 463 of Vol. 1, DID 26, withdrawal slip at page 465

and a receipt of Exchange of USD 42,000 at page 461 of Vol. 1. Counsel referred to the testimony of PW2 to the effect that the cheque at page 463 of Vol. 1 was not paying the 2nd Plaintiff but *"CASH"* as the payee. Counsel pointed out that the withdrawal voucher at page 465 of Vol. 1 which required the customer withdrawing the money to sign and confirm receipt, was not signed by the 2nd Plaintiff and it does not bear the 2nd Plaintiff's signature anywhere. The receipt for exchange of USD 42,000 at page 467 of Vol. 1, was not dated or signed by the 2nd Plaintiff and whereas the 2nd Plaintiff signed the cheque, he did not sign the withdrawal voucher which would indicate who took the money. Counsel argued that this was another example of the many blank cheques which were left with the bank as required of the 2nd Plaintiff.

Submissions by Counsel for the 1st Defendant

[287] In reply, Counsel for the 1st Defendant stated that the counter cheque No. 567566 dated 14th March 2016 (at page 463 of Vol. 1) was shown to the 2nd Plaintiff who confirmed the signatures on the cheque both at the front and the back. Counsel submitted that once the bank produces a cheque duly signed as per the mandate and is able to prove on balance of probabilities that the customer signed, the bank is authorized to debit the account of the customer and the debit is lawful. Counsel stated that whereas the 2nd Plaintiff testified that he signed the cheque but did not fill it, he did not adduce proof of who did. Regarding the payee in the cheque being "*CASH"*, Counsel submitted that where a cheque is drawn payable to *"Cash",* the drawer intends that the bank pays the person presenting the document and the bank, by paying the presenter of the cheque, has properly interpreted the intention of the drawer and the customer cannot question the transaction. Counsel cited the case of ***North and South Insurance Corporation Ltd Vs. National Provincial Bank Ltd [1936] 1 K.B 328*** to support his submission and further submitted that the cheque was therefore presentable for payment by any bearer whether the 2nd Plaintiff himself or any other person. Counsel prayed that the claim for this queried sum be dismissed.

Determination by the Court

[288] The facts and circumstances of this queried sum have much similarity with the sum of USD 34,400 already considered above under item (xiv) of this head of queried sums. I reiterate my reasoning regarding the fact that the cheque under present consideration is distinguishable from those that the Court believed to have been left signed but unfilled in the bank. Like the cheque under item (xiv) above, the present cheque was apparently issued by the 2nd Plaintiff and was regular on the face of it. The only major difference is that the payee in the present cheque is indicated as "Cash". The interpretation by the 1st Defendant's Counsel that such endorsement refers to a payment to the bearer of the cheque was not controverted. Under the law of banking, once a customer regularly signs the instrument, in line with the mandate, the duty shifts to him/her to prove that they did not cash the cheque. If the cheque, for instance was stolen, and the bank pays on it, the bank is not liable to compensate the customer. The customer is duty bound to notify the bank and where possible countermand the cheque. Where the customer does not, the bank is duty bound to honour the customer's instruction.

[289] In the present case, like in the item referred to above, the duty lay upon the 2nd Plaintiff to prove that despite his issuance of a regular instrument, he did not actually pick the money. The 2nd Plaintiff did not execute this burden. Secondly, the claim that the 2nd Plaintiff did not sign the voucher as evidence of taking the money is no such evidence capable of discharging that burden. Like i did before, I am in position to take judicial notice that the current practice in the banks is that where a person is withdrawing cash using a cheque, they are required to sign twice at the back of the cheque. Where a system was developed by a particular bank to issue vouchers that should be signed by the customer, the absence of a customer signature on such a voucher only remains a technicality with no real substance. This is especially so since such is not standard practice and certainly not a legal requirement. In the circumstances,

therefore, I find that this queried sum was regularly and lawfully debited and is not subject to refund. The claim by the 2nd Plaintiff regarding this sum fails.

(xviii) The Sum of USD 56,602.76 debited on 13th August 2016

Submissions by Counsel for the Plaintiffs

[290] It was submitted for the 2nd Plaintiff that this transfer of money from his account on 13th August 2016 as an internal transfer was unknown to him. When it was queried, the 1st Defendant responded in Annexture O that this was repayment of loan and interest to loan account No. 1005023020000003. Counsel pointed out that at page 436 of Vol. 1, the 1st Defendant provided a different explanation to the effect that the sum was transferred from the 2nd Plaintiff's current account to his loan account broken down into USD 11,573.16, 11,569.32, 11,319.78, 11,251.73 and 10,888.77 for interest repayment, which was a departure from pleadings. Counsel submitted that the bank statement reflecting the debit indicated in the narration that it was an internal transfer and not interest repayment and did not indicate to which account the money was being transferred. There was no explanation as to which loan this interest was applied or how much interest was chargeable for the month of August 2016. Counsel referred to the testimony of PW1 that the first five entries at page 575 of Vol. 1 have the same narration and are interest charged on the same day. Counsel concluded that the authority in the sanction letter to debit the account to pay interest was limited to the monies due at the time of the debit, and not as the bank from time to time unilaterally deemed fit.

Submissions by Counsel for the 1st Defendant

[291] Counsel for the 1st Defendant stated that this sum was debited from the 2nd Plaintiff's current account on 13th August 2016 and credited to his loan account in 5 different amounts which were applied to settle interest repayments due on the 2nd Plaintiff's loan accounts as seen at page 575 of Vol.1; which reduced the loan from USD (-1,160,602.76) to (-1,104,000) as permitted under the terms of the facility letters. Counsel submitted that the

explanation at page 436 of Vol. 1 did not depart from Annexture O but provided clarification and precision to the answer and is therefore not a departure from pleadings. On why there were many debits of interest effected on the same day, Counsel submitted that this was interest payment for the months of March, April, May, June and July 2016 as it had become due but the 2nd Plaintiff did not have money on account to meet the interest repayments until 13th August 2016 when a transfer was made to pay off the unpaid interest for the previous months. Counsel prayed that the court finds that this debit was lawful and was used to cover interest payments for the 2nd Plaintiff.

Determination by the Court

[292] It is agreed that the sum of USD 56,602.76 was debited from the 2nd Plaintiff's current account on 13th August 2016 with a narration, "*internal transfer".* The contention by the 2nd Plaintiff is that reading the narration "internal transfer", one would not understand what transaction gave rise to the debit on the account and to where the money was transferred, without a clear explanation from the bank, supported by relevant documents. According to the Plaintiffs' Counsel, the explanation by the 1st Defendant that the said sum was transferred to the 2nd Plaintiff's account as per page 575 of Vol.1 was not satisfactory since there is no credit entry of the sum of USD 56,602.76 on the said account. What is apparent, however, is that on the same date, several smaller sums were credited on the loan account; being 5 instalments of USD 11,573.16, 11,569.32, 11,319.78, 11,251.73 and 10,888.77. These instalments total to USD 56,602.76 which is the same queried amount.

[293] I am inclined to believe the 1st Defendant's explanation that the deductions constitute interest for the months of March, April, May, June and July 2016 as they appear on the loan account at pages 573 to 575 of Vol.1. Unlike the previous interest payments at pages 571 to 572 of Vol. 1, these make clear reference to interest charged for the 31st March 2016, 30th April 2016, 31st May 2016, 30th June 2016 and 31st July 2016 which was charged

but not paid until 13th August 2016. I am therefore satisfied that the sum of USD 56,602.76 was debited and credited to the 2nd Plaintiff's loan account as interest in instalments of USD 11,573.16, 11,569.32, 11,319.78, 11,251.73 and 10,888.77 for the months of March to July 2016, which reduced the 2nd Plaintiff's loan to his benefit. The queried sum has therefore been explained as having been lawfully debited and no order of refund is available.

(xix) The Sum of USD 5,353.51 debited on 28th October 2016

Submissions by Counsel for the Plaintiffs

[294] It was submitted for the 2nd Plaintiff that this sum was debited as an internal transfer which the 2nd Plaintiff had no knowledge of. When it was queried, the 1st Defendant in Annexture O responded that this was repayment of loan and interest. Counsel submitted that in evidence, however, a different explanation was given by the 1st Defendant at page 437 of Vol. 1 to the effect that the sum was broken down into USD 5,019.81 and USD 333.70 and transferred to the 2nd Plaintiff's loan account. Counsel referred to the testimony of PW1 that the sum of 333.70 was reversed without an explanation as to where it was credited when reversed. Counsel stated that there was no explanation by the 1st Defendant as to which month this interest was paid and how the reversal was handled. The amount was therefore unlawfully debited.

Submissions by Counsel for the 1st Defendant

[295] In response, Counsel for the 1st Defendant stated that this sum was debited from the 2nd Plaintiff's account on 28th October 2016 and transferred to his loan account in two installments of USD 5,019.81 and 333.70 for interest payments. Counsel argued that the Court has the duty to analyze all the evidence on record and, looking at page 575 of Vol. 1, it is clear that when these sums were applied, the loan reduced from USD (-1,126,137.77) to (-1,120,784.26) and that the reversal of USD 333.70 which was penalty interest on the loan was income to the bank and was not supposed to reduce the

indebtedness of the customer. Counsel concluded that the debit was lawful and the 2nd Plaintiff is not entitled to a refund of the same.

Determination by the Court

[296] It is agreed that the sum of USD 5,353,51 was debited from the 2nd Plaintiff's account on 28th October 2016 with a narration, "internal transfer". It was not clear from the statement as to where the sums were transferred. However, the sum was credited to the 2nd Plaintiff's loan account as per page 575 of Vol. 1 in two installments of USD 5,019.81 and USD 333.70. The sums were applied as interest repayment which reduced the 2nd Plaintiff's loan from (-1,126,137.77) to (-1,120,784.26). According to the narration on the loan statement, the sum of USD 5,019.81 is indicated as principal interest while the sum of USD 333.70 is indicated as penalty interest. Indeed, on the same date, the figure of USD 333.70 was reversed, still under the narration "Penalty Interest". It is true that looking at the 2nd Plaintiff's current account, this sum was not reversed to the current account. The argument for the 1st Defendant is that this reversal constituted penalty interest and because it was income of the bank, it was not supposed to reduce the indebtedness of the customer. Owing to the narration on the statement, I accept this explanation by the 1st Defendant. I have not seen any evidence capable of negating the claim that the 2nd Plaintiff was charged penalty interest. I am therefore satisfied that the sums of USD 5,019.81 and USD 333.70 were lawfully debited and applied to the payment of the 2nd Plaintiff's interest, inclusive of penalty interest.

(xx) USD 6,229.19 debited on 10th November 2016

[297] From the record, and taking into account the submissions of both Counsel, it is revealed that this sum was debited from the 2nd Plaintiff's current account as a block figure of USD 6,229.19 with the narration of "internal transfer" and debited to his loan account in two installments of USD 5,953.02 and USD 276.17 at page 577 of Vol. 1; which reduced the 2nd Plaintiff's loan from USD (-1,132,084.32) to (-1,125,855.13). However, the sum of USD 276.17

was reversed by the bank putting the 2nd Plaintiff's loan back to (-1,126,131.30), which the 1st Defendant argues was an income to the bank. The reversal of the sum of USD 276.17 is still under the narration "Penalty Interest". As I indicated earlier, there is no evidence before me to indicate that the 2nd Plaintiff was not liable to pay penalty interest at the time. I have, therefore, come to the same conclusion that the sum of the USD 6,229.19 debited from the 2nd Plaintiff's account in two instalments of USD 5,953.02 and USD 276.17 was lawfully debited and applied to the 2nd Plaintiff's loan in interest.

(xxi) The Sums of USD 3,706.96 debited on 10th November 2016, USD 35,515.53 debited on 15th November 2016, USD 3,269.96 debited on 15th November 2016, USD 7,798.56 debited on 29th November 2016, USD 28,161.07 debited on 29th November 2016, USD 339.62 debited on 30th November 2016, and USD 12.10 debited on 30th November 2016.

[298] All the above sums were debited from the 2nd Plaintiff's USD current account to his loan account, within the month of November 2016, under the narration, "internal transfer", save for the USD 12.10 which has a narration, *"Change Make due".* I have considered the respective submissions of Counsel in respect of these sums. I note that whereas most of these sums were debited as lump sums, they were credited/applied to the loan account in breakdowns which most probably led to the query. It was submitted for the 2nd Plaintiff that all these debits, made in November 2016, for loan repayment and interest, did not indicate for which months interest was being paid. It is true that looking at the statement, it is hard to tell how much interest was payable per month, and for which months, interest was being paid for.

[299] In view of the above concerns, I have examined the loan statement at pages 577 to 578 of Vol. 1 and found as follows;

a) The sum of USD 3,706.96 debited from the 2nd Plaintiff's current account on 10th November 2016 was credited to his loan account in installments of USD 3,430.79 and USD 276.17 which was wholly applied to the reduction of the 2nd Plaintiff's loan from USD (-1,126,131.30 to -1,122,424.34). The Plaintiff is therefore not entitled to a refund of the same.

b) The sum of USD 35,515.53 was debited from the 2nd Plaintiff's current USD Account on 15th November 2016, and credited to the loan account in the sums of USD 16,976.12, USD 10,966.36, USD 7,457.98 and USD 115.07. I have found that the sums of USD 16,976.12, USD 10,966.36, and USD 7,457.98 totaling to USD 35,400.46 were applied to reduce the 2nd Plaintiff's loan from USD -1,122,424.34 to -1,087,023.88. The sum of USD 115.07 was debited under the narration "Penalty Interest" and was reversed in a similar manner already explained above. Upon the same principle, I find that the sum of USD 35,515.53 was lawfully debited.

c) The sum of USD 3,269.96 debited from the 2nd Plaintiff's current account on 15th November 2016 was wholly credited to his loan account and it reduced his loan exposure from -1,087,023.88 to -1,083,753.92. It was therefore applied for his benefit and is not subject to refund.

d) The sum of USD 7,798.56 was debited from the 2nd Plaintiff's current account on 29th November 2016 which was credited to his loan account in two installments of USD 7,592.85 and USD 205.71. It was shown that the sum of USD 7,592.85 was applied to the 2nd Plaintiff's loan from -1,083,753.92 to -1,076,161.07. The sum of 205.71 was reversed under the narration "Penalty Interest". My finding above stands and I have found that this queried sum was lawfully debited.

e) The sum of USD 28,161.07 debited from the 2nd Plaintiff's current account on 29th November 2016 was credited to his loan account in instalments of USD 28,000 and USD 161.07, totaling to USD

28,161.07 which is the queried sum. When applied, the instalments reduced the 2nd Plaintiff's loan from USD -1,076,161.07 to -1,048,000 and was therefore wholly applied for his benefit and is not subject to refund.

f) The sum of USD 339.62 was debited on 30th November 2016 from the 2nd Plaintiff's current account and credited to his loan account which reduced the loan from USD -1,058,336.44 to -1,057,996.82 and was therefore wholly applied for his benefit. It is also not subject to refund.

g) The sum of USD 12.10 was debited from the 2nd Plaintiff's current USD account on 30th November 2016 under the narration, "Charge make due". The 1st Defendant explained that these were monthly charges. This, however, is not borne out by the statement. It was contended by Counsel for the Plaintiffs that throughout the bank statement in issue which runs from page 66 to 80 of Doc. 54, there was no such monthly charge, save for this queried one. Indeed, I have not found any other monthly charge of this kind for the period January 2015 to 31st December 2016. I am not satisfied with the explanation by the 1st Defendant and I find that this debit was unlawful or irregular and ought to be refunded. The sum of **USD 12.10** shall be refunded to the 2nd Plaintiff with interest at 12% per annum from 30th November 2016 until full payment.

The Sum of UGX 2,716,127,410/= under Appendix 4 of DOC. 54 (2nd Part of Paragraph (E) under Issue 4)

[300] By way of background, Issue No. 4(E) had two components of queried sums of USD 3,430,745 debited from the 2nd Plaintiff's Current Dollar account, and UGX 2,716,127,410/= debited from his Current Shillings Account. These two components fall under Appendices 3 and 4 respectively. Above, I have dealt with the first component of USD 3,430,745 under Appendix 3 and below is my consideration of the queried sums under Appendix 4 concerning the debited sums of UGX 2,716,127,410/= from the Shillings Account. These debits were

challenged by the 2nd Plaintiff in paragraph 11(a) and (r) as having been unclear transactions that were not applied towards the reduction of the 2nd Plaintiff's loan obligation. The allegation was denied by the 1st Defendant whereby it was averred that all the transactions were lawfully debited/credited to the 2nd Plaintiff's accounts. The sum of UGX 2,716,127,410/= is composed of 17 debits as particularized/itemized in appendix 4 at page 15 of Doc. 54. Following is my consideration of the items respectively.

i. The Sum of UGX 1,215,843/= debited on 1st February 2015

Counsel for the Plaintiffs' Submissions

[301] Counsel submitted that the 2nd Plaintiff did not understand the narration *"principal adjustments account capture bal"* and that the sums were not applied to the 2nd Plaintiff's loan. When the sum was queried, the 1st Defendant in Annexture O explained that the sum was a balance transferred from previous system. Counsel referred to the testimony of PW1 and stated that from the two statements at page 44 of Doc. 54 and at page 721 of Vol. 1, it would be expected that the balance of UGX 1,215,843/= which closed the month of January 2015 would be the opening balance for the new month of February. However, the opening balance for the new month was UGX (-10,000) instead and no explanation was furnished by the 1st Defendant for this debit, which was never used for the 2nd Plaintiff's benefit.

Counsel for the 1st Defendant's Submissions

[302] In reply, it was submitted for the 1st Defendant that this was a system migration of balances on the account and not a debit. Counsel referred to the statement at page 719 of Vol. 1 and stated that the 2nd Plaintiff had a debit balance of -1,215,843 and that on 30th January 2015, Crane Bank changed its systems from Branch Power Bank Master Banking System to a new core banking system called T-24 whereof the debit balance which was on Account No. 1044070512000 was transferred to a new account 1005011010000028, which reflects the previously existing debit balance on the account held on the

bank master system. Counsel stated that the old balance at page 719 of Vol.1 was carried forward onto a new account at page 721 of Vol.1. He concluded that the balance remained and no money was deducted from account.

Determination by the Court

[303] It is clear on record that on 28th January 2015, the 2nd Plaintiff's current account No. 01444070512000 had a closing balance of UGX 1,215,843DR which means a debit balance, as is evident on both pages 43 of Doc. 54 and 719 of Vol. 1. There is on record a statement at page 721 of Vol. 1 which indicates a new format statement that was introduced by the bank starting February 2015, upon migration to a new account No. 1005011010000028. It was explained that the first figure of -10,000/= on the account on 1st February 2015 relates to the end of month charge which was applied to the customer's account when the system was being changed. The debit balance of UGX -1,215,843/= was then brought forward on the same day, making a debit balance of UGX -1,225,843/=. I have examined the two bank statements and I find this to be the true position or status of the account. In other words, UGX 1,225,843DR and UGX -1,225,843 represents the same amount, being a debit balance. It is therefore true that the January closing debit balance of UGX -1,215,843/= was carried forward as is reflected at page 721 of Vol. 1. The 2nd Plaintiff is therefore not entitled to a refund of this queried sum.

ii. The Sum of UGX 44,500,000/= debited on 17th April 2015

Submissions by Counsel for the Plaintiffs

[304] When this sum was queried by the 2nd Plaintiff, the explanation by the 1st Defendant was that this was transferred to the 2nd Plaintiff's credit card payment as per the credit card statement at page 737 of Vol.1. Counsel for the Plaintiffs submitted that the documents adduced by the 1st Defendant in explanation of this debit as per pages 657 and 661 of Vol. 1 were for transactions that happened on 25th February 2016 and 29th March 2016 for the sums of UGX 4,015,559/= and UGX 40,360,014/= respectively, totaling to

UGX 43,360,014/= which is not the sum queried. Counsel argued that these could not have been the documents that were used to debit the 2nd Plaintiff's account in April 2015. Counsel further submitted that the statement at page 737 of Vol. 1 has nothing to show that it is the credit card statement of the 2nd Plaintiff. Counsel pointed out that the purported statement has clear transactions indicating the items which were being paid for that month except those on 17th April 2015 which are indicated as "DD/CASH Payment", without itemizing what the payments for the sums deducted were. Counsel, therefore, concluded that the sum was unlawfully debited from the 2nd Plaintiff's account and ought to be refunded.

Submissions by Counsel for the 1st Defendant

[305] In reply, it was submitted by Counsel for the 1st Defendant that the 2nd Plaintiff applied for and obtained a credit card as per the credit card application marked DID 36 which also appears at page 761 -781 of Vol. 1 and overtime, he used two credit cards No. 4625270000462038 and No. 462257000063515. Counsel stated that according to the evidence at pages 737 and 738 of Vol. 1, it is shown that in April 2015, the 2nd Plaintiff spent about UGX 130,000,000/= which sums were recovered from his current account in 2015. Counsel submitted that the debit entry on page 45 of Doc. 54 can be traced as having been credited on 17th April 2015 to the credit card statement at page 737 under the narration, "DD/Cash Payment" of UGX 44,500,000/= which debit was lawful as it was used to settle the 2nd Plaintiff's credit card dues.

[306] Regarding the contention by the 2nd Plaintiff that this particular transaction on the statement was not clear, Counsel for the 1st Defendant submitted that the payments indicated on the statement only tell one side of the contract. Counsel relied on the case of ***Re Charge Cards Services Ltd [1988] 3 All ER 702***, to submit that the sellers of the goods and services allowed the 2nd Plaintiff to use the card to purchase goods and services on the

understanding that Crane Bank would pay them, and indeed Crane Bank settled them. Counsel added that the 2nd Plaintiff in turn agreed to pay Crane Bank the full amount paid by Crane Bank to the sellers. Counsel concluded that the account was lawfully debited with the sum of UGX 44,500,000/= and the claim for a refund should be dismissed.

Submissions in Rejoinder;

[307] In rejoinder, Counsel for the Plaintiffs submitted that the 2nd Plaintiff's case is that the charge of UGX 44,500,000/= was not applied to his expenditure as such expenditure cannot be found in any credit card statement. Relying on the ***Re Charge Cards Services Ltd case (supra)***, Counsel submitted that the credit card application between the Plaintiff and the Bank gave the Bank authority only to debit the 2nd Plaintiff's account to settle his liabilities which is not the case in regard to the queried sum. Counsel submitted that in his submissions, Counsel for the 1st Defendant could easily point to clear transactions such as payments to Jumeirah Beach Hotel, Selfridges, Russel and Bromerly, and Massimoo Dutti which were not queried by the 2nd Plaintiff because they were clear and the 2nd Plaintiff could understand them, unlike this particular transaction which just indicated "DD/Cash Payment". Counsel concluded that in the absence of evidence as to what liabilities this sum was used to settle, the Court should find that the sum was unlawfully debited and be refunded to the 2nd Plaintiff.

Determination by the Court

[308] It is agreed by the parties that a sum of UGX 44,500,000/= was debited from the 2nd Plaintiff's account on 17th April 2015 with the narration, "Internal transfer 462257000463515" as per the statement at page 45 of Doc. 54. It is the 1st Defendant's contention that this sum was used to settle the 2nd Plaintiff's monthly credit card dues as shown at page 737 of Vol.1 and that the debit was lawful as it was authorized by the 2nd Plaintiff and used to settle his credit card dues. The 2nd Plaintiff's contention is not whether or not he had or

used a credit card to meet his expenses but rather that the queried sum is unclear, unknown to him and was not used to settle his liabilities. It is also contended for the 2nd Plaintiff that whereas the money was transferred to settle the alleged credit card monthly dues, the credit card statement adduced does not elucidate and or show what particular purchases this sum was paying for.

[309] I have examined the statement at page 737 of Vol. 1 and I find that the Credit Card Account Number that appears at the top, is the same as the one in the narration at page 45 of Doc. 54. A cursory glance at the statement shows that routinely, the transaction numbers, the particular transactions paid for and the sums thereof, are set out for each transaction. However, for this particular transaction, it is not explicit and I am unable to tell what it was paying for. Just like it is contended by the 2nd Plaintiff, anyone looking at the statement, without any better explanation, cannot tell as to what transaction this sum was used to pay for. This is unlike the other transactions on the same statement. The burden clearly lay upon the 1st Defendant to explain the missing link. I have not seen that explanation. In absence of a credible explanation, the query by the 2nd Plaintiff remains unanswered and the queried sum unaccounted for. In the circumstances, I am not satisfied that sum of **UGX 44,500,000/=** was debited to settle the 2nd Plaintiff's monthly credit card liabilities and I accordingly find that the said sum was unlawfully debited and the same shall be refunded to the 2nd Plaintiff with interest at 24% per annum from 17th April 2015 until full payment.

iii. The Sum of UGX 13,874,882/= debited on 28th April 2015

Submission by Counsel for the Plaintiffs

[310] It was submitted for the 2nd Plaintiff that he did not recall withdrawing this sum. When it was queried, the 1st Defendant indicated that this sum was applied to Credit Card payment as per page 738 of Vol.1. Counsel submitted that the statement at page 738 clearly defines the transactions which were paid using the credit card throughout the statement period, except for this

particular transaction which indicates DD/Cash Payment without the details of the purchases made and the 1st Defendant did not explain why. Counsel further submitted that this was still unclear and the 1st Defendant had not shown the lawfulness of this debit, for which Counsel prayed for a refund of the same with interest.

Submission by Counsel for the 1st Defendant

[311] In reply, Counsel for the 1st Defendant stated that the 2nd Plaintiff's account was lawfully debited with the sum of UGX 13,874,882/= as authorized under the debit authorization Auto Debit for Payment of Credit Card Dues at page 777 of the 1st Defendant's supplementary trial bundle. Counsel stated that this debit was credited on 28th April 2015 to the credit card statement at page 738 of Vol. 1 to settle the 2nd Plaintiff's credit card dues, and having been authorized, the claim for a refund of the same sum should be dismissed.

Determination by the Court

[312] Like the previous sum, it is not in dispute that this sum was debited from the 2nd Plaintiff's current account as per statement at page 45 of Doc. 54 as "*internal transfer* to 462257000463515" which is the same credit card number at page 738 of Vol. 1. The period in issue on the statement is between 19.04.2015 and 19.05.2015. The statement indicates several purchases which are clear, decipherable and particularized in terms of the dates they were made, the transaction IDs, the particulars of the purchases, the currency and the sums charged on the credit card. However, the disputed sum indicated as "DD/Cash payment" does not show whether it involved a purchase, what purchase it was or for what purpose the payment was made and by who. As I stated above, this is an explanation that was expected from the 1st Defendant. The claim that the payment was for the credit card dues, without more, has been found by the Court to be incredible and insufficient. If the dues referred to were meant to be in the form of "bank charges", it is highly incredible and suspicious that such huge amounts could be deducted as bank charges

without express mandate and a clear formula as to how they were arrived at. The queried sum of **UGX 13,874,882/=** has not been explained and or accounted for by the 1st Defendant. The same was unlawfully debited and shall be refunded with interest at 24% per annum from 28th April 2015 until full payment.

iv. The Sum of UGX 26,492,103 debited on 28th April 2015

Submissions by Counsel for the Plaintiffs

[313] It was submitted by Counsel for the Plaintiffs that when this sum was queried, the 1st Defendant explained that this sum was debited and transferred to the credit card payment of Uwantege Monica, the 2nd Plaintiff's wife. In evidence, it was stated for the 1st Defendant that the arrangement was that the payments for the credit card of the 2nd Plaintiff's wife would be debited from his current account. Counsel however submitted that none of the 1st Defendant's witnesses could point to any joint application by the 2nd Plaintiff and his wife or any instruction by the 2nd Plaintiff allowing the deductions for his wife's dues to be made to his current account. Counsel further submitted that the alleged statement at page 759 of Vol. 1 for the period of 19.04.2015 to 19.05.2015 does not indicate what credit card purchases the debited sum was settling. Counsel submitted that in the absence of a joint application for the credit card or an authority to debit the account, the sum of UGX 26,492,103/= was unlawfully debited and should be refunded to the 2nd Plaintiff.

Submissions by Counsel for the 1st Defendant

[314] In response, it was submitted for the 1st Defendant that Monica Uwantege, the 2nd Plaintiff's wife, applied for and obtained a credit card No. 46225700000463069 which was a secondary card linked to that of the 2nd Plaintiff's primary card and that payments for that card were to be recovered from him who had a primary card, hence the debit of UGX 26,492,103/= to settle the amount owing to her credit card as per page 759 of Vol. 1. Counsel stated that at page 767 of Vol. 1, it was a term of the credit card application

that the 2nd Plaintiff could apply for add-on cards and he would be billed for such expenses incurred with the add-on cards and that by signing the application, the 2nd Plaintiff agreed to pay all the sums incurred on his wife's card. Counsel submitted that the queried debit was lawful and authorized by the 2nd Plaintiff and his claim for refund of this sum should be dismissed.

Submissions in Rejoinder

[315] It was submitted by Counsel for the Plaintiffs in rejoinder that the purported credit card statement at page 759 of Vol. 1 did not bear a printed card number of Uwantege Monica but rather one written by someone in pen which writing did not appear on the same card statement of DID 38. Counsel further submitted that whereas PW2 did not have a problem with settling his wife's bills, the impugned credit card statement did not indicate the transactions that gave rise to the outstanding dues for the month of April 2015 but merely stated a figure of UGX 26,492,103/= without any explanation to the client as to what he was paying for.

Determination by the Court

[316] It is not disputed that this queried sum was debited from the 2nd Plaintiff's account. However, even if the Court is to believe that the alleged credit card for Monica Uwantege was linked to the credit card held by the 2nd Plaintiff (her husband) and that the 2nd Plaintiff had agreed to meet her dues, the real contention by the 2nd Plaintiff is that the alleged credit card statement for Monica Uwantege at page 759 of Vol. 1 does not indicate any purchases for that month or period for which the sum in issue was debited to settle. The narration on the alleged statement (DD/CASH PAYMENT) is similar to the scenario already discussed above. For the same reasons, there is no evidence before the Court to explain and or account for the said debited sum. I am not satisfied that the sum in issue was used to settle accrued liabilities of Monica Uwantege in a lawful and agreed manner. The sum of **UGX 26,492,103/=** was

therefore unlawfully debited and the same shall be refunded with interest at 24% per annum from 28th April 2015 until full payment.

v. The Sums of UGX 412,000,000/= debited on 19th May 2015 and UGX 360,000,000/= debited on 29th May 2015

[317] While Counsel for the Plaintiffs submitted on these two figures separately, Counsel for the 1st Defendant did so jointly and, having read both Counsel's submissions, I have opted to consider the sums at once to avoid unnecessary repetition.

Counsel for the Plaintiffs' Submissions

[318] Regarding the sum of UGX 412,000,000/=, Counsel for the Plaintiffs stated that according to the testimonies of PW1 and PW2, the 2nd Plaintiff did not recall withdrawing this sum and could not understand the transaction; and the sums were not applied towards the settlement of his loans. When this sum was queried, the 1st Defendant in Annexture O stated that the relevant voucher would be provided later. Subsequently, the voucher was not produced and the 1st Defendant only relied on the documents at pages 705 and 707 of Vol.1 to explain this debit. Counsel pointed out that the document at page 707 in Vol. 1 has a narration at the bottom that "*the transaction of this sum was unauthorized"* and the one at page 705 indicated that "*the cheque 401007 was not in the register*". Counsel concluded that the transaction was not authorized by the customer and would be irregular in absence of any evidence to the contrary. Counsel concluded that the 1st Defendant did not adduce any evidence or instrument to prove that this transaction was authorized by the 2nd Plaintiff and the debit was therefore unlawful for which the 2nd Plaintiff is entitled to a refund with interest from the date of debit. Regarding the sum of UGX 360,000,000/=, it was submitted by Counsel for the Plaintiffs that when this sum was queried, the 1st Defendant likewise indicated in Annexture O that

the relevant voucher would be provided later but similarly, the same was not produced. Similar circumstances and a similar argument pertain to this sum.

Submissions by Counsel for the 1st Defendant

[319] In his reply, Counsel for the 1st Defendant reiterated the general arguments of excluded liabilities, the verification clause agreement and the defence of estoppel by silence. The Court has already made a pronouncement on the application of these defences to this case. Counsel further stated that an extensive search for the instruments used to effect the two withdrawals was made but in vain.

Determination by the Court

[320] It is not disputed that the sums of UGX 412,000,000/= and UGX 360,000,000/= were debited from the 2nd Plaintiff's account on 19th May 2015 and 29th May 2015 respectively as per pages 46 and 47 of Doc. 54. The narrations in the bank statement for the said sums are indicated as *"Cash Withdrawal (Local 401007)"* and *"Cash Withdrawal (Local 401051)"* respectively. According to the 2nd Plaintiff, these sums were not withdrawn by him and no documentary proof has been produced by the bank to prove otherwise. There is also no evidence that the sums were applied by the bank for his benefit. It was conceded for the 1st Defendant that the documents relevant to the explanation of these sums could not be retrieved. Indeed, the documents produced as per pages 705 and 707 of Vol.1 were not helpful to the 1st Defendant's case. In the circumstances, the debit of the queried sums of **UGX 412,000,000/=** and **UGX 360,000,000/=** has not been explained. The conclusion is that the sums were debited illegally or irregularly. The same shall be refunded to the 2nd Plaintiff with interest at 24% per annum from 19th May 2015 and 29th May 2015 respectively until full payment.

vi. The Sum of UGX 150,000,000/= debited on 20th May 2015

Submissions by Counsel for the Plaintiffs

[321] It was submitted by Counsel for the Plaintiffs that the 2nd Plaintiff stated that he did not recall withdrawing this sum and could not understand the transaction. When the sum was queried, the 1st Defendant, in Annexture O stated that the voucher in respect of this sum would as well be provided later. At page 651 of Vol. 1 and page 1021 of Vol. 3, the 1st Defendant provided an explanation that Crane Forex Bureau was debited and sent TT for Ntaganda and later, his account was debited with the same amount. The 1st Defendant relied on the documents at pages 697, 699, 701 and 703 of Vol. 1 to explain this sum. In respect to the said documents adduced by the 1st Defendant, Counsel submitted that the voucher at page 697 of Vol. 1 is in respect to Crane Forex Bureau and Meera Investments, and does not relate to the 2nd Plaintiff; that the cheque at page 693 of Vol. 1 belongs to Crane Forex Bureau and the payee is "Cash" and not the 2nd Plaintiff; the document at page 699 of Vol. 1 refers to a TT number, different from the one alluded to by the 1st Defendant. Counsel stated that the 1st Defendant conceded to these facts.

[322] Counsel further submitted that besides these documents which do not relate to the 2nd Plaintiff or the debit on his account, the 1st Defendant did not adduce any documentary proof to prove that the sum of UGX 150,000,000/= was withdrawn by the 2nd Plaintiff and that it is inconceivable that the 2nd Plaintiff used a cheque of Crane Forex Bureau to withdraw money from his account. Counsel argued that all the documents adduced by the 1st Defendant in respect of this transaction relate to different entities and the 1st Defendant was trying to use them simply because they have a similar date and amount as the queried transaction. Counsel concluded that the sum of UGX 150,000,000/= was unlawfully debited from the 2nd Plaintiff's account and should be refunded with interest.

Submissions by Counsel for the 1st Defendant

[323] Counsel for the 1st Defendant stated that this debit was a telegraphic transfer transaction with reference TT151140RFSYR done for Ephraim Ntaganda. Counsel stated that Crane Forex Bureau Limited was debited to send the TT for Ephraim Ntaganda and later, Ephraim Ntaganda's account was debited with the same amount of UGX 150,000,000/= as shown at pages 697, 699, 701 and 703 of Vol. 1.

Determination by the Court

[324] The fact that this queried sum was debited from the 2nd Plaintiff's bank account on 20th May 2015 is not disputed by either party. The sum in issue was debited under the narration, "*Cash Withdrawal (Local 401013*)". The 2nd Plaintiff's case is that he neither authorized this debit, withdrew the money personally nor was it used for the reduction of his loans. The 1st Defendant, on the other hand, states that this debit was a telegraphic transfer transaction with reference TT151140RFSYR done for Ephraim Ntaganda. It was explained that Crane Forex Bureau Limited was debited to send the TT for Ephraim Ntaganda and later, Ephraim Ntaganda's account was debited with the same amount of UGX 150,000,000/=. To prove this, the 1st Defendant adduced documents at pages 693, 697, 699, 701 and 703 of Vol. 1; which documents were queried by the 2nd Plaintiff.

[325] The cheque No. 004309 dated 20th May 2015 for a sum of UGX 150,000,000/= paying "Cash" is a cheque of Crane Forex Bureau Kla Rd Ltd drawn on account No. 1002011020000009. The cheque does not bear the 2nd Plaintiff's signature or any other particulars anywhere. However, the account from which the queried debit was made was the 2nd Plaintiff's personal current account No. 1005011010000028. I do not see any connection at all between this cheque and the debit from the 2nd Plaintiff's account on the date and sum in issue. Like it was submitted by Counsel for the Plaintiffs, it is inconceivable

that a cheque of Crane Forex Bureau Kla Rd Ltd drawn on Account No. 1002011020000009 could be used to lawfully debit the 2nd Plaintiff's current Account No. 1005011010000028.

[326] Further still, at page 697 of Vol. 1 is a withdrawal voucher dated 20/5/2015 for a sum of UGX 150,000,000/=. The voucher indicates the transaction reference as TT/15140/RRBRW. It has a bearing on two entities, Crane Forex Bureau Kla Rd Ltd and Meera Investments Ltd. It also relates to a cash payment debited to account No. 1002011020000009, which is the same account on the cheque for Crane Forex Bureau Kla Road Ltd. There is still no explanation as to the correlation between this voucher and the 2nd Plaintiff or, for that matter, the debit on his account. There is simply no evidence to show that the impugned debit of UGX 150,000,000/= from the 2nd Plaintiff's current account No. 1005011010000028 by the bank was lawfully made. I also note that the TT reference number alluded to by the 1st Defendant is different from the TT reference on this voucher. I am tempted to agree with the argument by the Plaintiffs' Counsel that the 1st Defendant was attempting to take advantage of a coincidence in connection with a transaction bearing the same figure and executed on the same date. In the circumstances, the debit of the queried sum of **UGX 150,000,000/=** was unlawful and the same shall be refunded to the 2nd Plaintiff with interest at 24% per annum from 20th May 2015 until full payment.

vii. The Sum of UGX 773,849,756/= debited on 21st May 2015

Submissions by Counsel for the Plaintiffs

[327] It was submitted that the 2nd Plaintiff did not recall authorizing debit of this sum from his current account. When the debit was queried, the 1st Defendant, in Annexture O, stated that this was a TT for USD 258,122. Subsequently, at page 651 of Vol. 1 and 1021 of Vol. 3, the 1st Defendant gave a different and contradictory explanation that this sum was withdrawn using counter cheque leaf No. 401017 at a rate of 2990, which was a departure from

the 1st Defendant's pleadings. In evidence, it was stated that this sum was debited using counter cheque leaf No. 401017 as per page 673 of Vol.1, converted into USD 258,122 @ 2998 and as per the 2nd Plaintiff's handwritten instruction at page 687 of Vol.1, split into 3 different transactions and transferred to different accounts as per the vouchers at pages 675, 677 and 679 of Vol.1.

[328] Counsel for the Plaintiffs referred to the testimony of PW2 to the effect that his name on the impugned cheque as Payee had been cancelled out and replaced with Crane Bank and that he had no recollection of giving the bank instructions regarding this sum of money as the handwritten document at page 687 of Vol. 1 is not an instruction/mandate. PW2 had also pointed out that the amount in words on the cheque were different from the amount in figures. Counsel therefore submitted that such an invalid cheque could not have been used to debit the 2nd Plaintiff's account in light of Section 8(1) of the Bills of Exchange Act. Counsel further submitted that the vouchers at pages 675-679 were not signed by the 2nd Plaintiff, the figures therein are not equivalent to the queried sum, and the sums reflected on the vouchers were not found on the accounts to where they were purportedly transferred. Counsel concluded that in light of the above, the sum of UGX 773,849,756/= was unlawfully debited from the 2nd Plaintiff's account and he is entitled to a refund of the same with interest.

Submissions by Counsel for the 1st Defendant

[329] It was submitted for the 1st Defendant that the 2nd Plaintiff signed cheque No. 401017 dated 21st May 2015 for the sum of UGX 773,849,756 authorizing Crane Bank to debit his account with the said sum. Counsel submitted that in accordance with ***Barclays Bank Vs. Simms (supra)***, where there is a mandate by cheque or a debit order and the bank acts in accordance with such a mandate, the transaction is authorized. Counsel submitted that the evidence by PW2 that someone else cancelled his name as Payee and put the name of

Crane Bank is inconsistent with his evidence before court as he did not prove who else could have effected the cancellation which the 2nd Plaintiff himself signed against. Counsel argued that it is PW2 who altered the cheque by crossing out his name, replacing it with Crane Bank, and then signing against that alteration thereby approving it in accordance with the account mandate. There was proof, therefore, that the cheque was validly authorized by the 2nd Plaintiff.

[330] Regarding the amount in figures in the cheque being different from the amount in words, Counsel submitted that it is PW2 who wrote the wrong amount in words on the cheque and being his mistake, he is estopped from denying the instructions in the cheque. In reply to the submission concerning Section 8(2) of the Bills of Exchange Act, Counsel submitted that there is no discrepancy between the words and figures because only the figures made sense but the words in the cheque were improperly written, illogical and incapable of making sense and therefore could not constitute a sum payable expressed in words, envisaged under section 8(2) of the Act. Counsel submitted, therefore, that the section is not applicable. Counsel further submitted that by paying the cheque, Crane Bank was acting as the agent of the 2nd Plaintiff and it is the amount in figures which were a true reflection of the 2nd Plaintiff's intention when he signed the cheque; which, Counsel stated, is corroborated by his handwritten note at page 687 of Vol. 1.

[331] Counsel also submitted that the cheque was honoured and a total sum of UGX 773,849,756/= was converted to USD at a rate of 2998 giving a total sum of 258,122 which was paid out according to the 2nd Plaintiff's instructions contained in the handwritten note at page 687 of Vol. 1. Counsel stated that the sum of USD 258,122 was transferred to the T.T Transit Account as shown at page 675 of Vol.1 and out of that amount, **USD 131,293.45** was credited to the 2nd Plaintiff's account No. 1005023020000001, from which, USD 131,563.45 was transferred (in a series of transactions of USD 40,000;

39,967.12; 27,026.85; 22,947.95; 424.03; 32.88; and 1,164.62) to the 2nd Plaintiff's USD loan account at page 583 of Vol. 1 to clear arrears; **USD 1,197.50** was credited to the 2nd Plaintiff's account 1005023020000001; **USD 125,328** was transferred to the 1st Plaintiff's account as per page 681 of Vol.1. The 1st Defendant was, however, unable to explain how the balance of **USD 1,500.38** was applied by the bank. Counsel concluded that the claim for a refund of this queried sum is unfounded and should be dismissed.

Submissions in Rejoinder

[332] It was submitted in rejoinder by Counsel for the Plaintiffs that the impugned cheque is not the instrument that was used to withdraw or debit the sum of UGX 773, 849,756/= because the narration in the bank statement at page 46 of DOC-54 is that this was an Internal Transfer and not a cheque withdrawal and therefore the 1st Defendant's evidence is inconsistent with the narration in the bank statement. Counsel submitted that the argument that the queried sum was converted to USD at the rate of 2998 and transferred to different accounts on the basis of 2nd Plaintiff's handwritten instruction at page 687 of Vol. 1 is flawed to the extent that UGX 773,849,756/= converted to USD at the rate of 2998 would be equivalent to USD 258,122; a sum which the 1st Defendant has failed to account for. Counsel pointed out that USD 131,293.4, USD 1,197.50 and USD 125,328 at pages 677 to 681 of Vol. 1 give a total sum of USD 257,818.9 which is less than USD 258,122 and therefore different from UGX 773, 849,756/= or its equivalent of USD 258,122. Counsel therefore concluded that it is not true that the only sum not accounted for is USD 1500.38. Rather, the entire sum of UGX 773,849,756/= was not accounted for. The sum ought to be refunded.

Determination by the Court

[333] It is not disputed that the sum of UGX 773,849,756/= was debited from the 2nd Plaintiff's account on 21st May 2015. At page 46 of Doc. 54, the sums were debited with the narration, "*Internal Transfer TRF TO USD A/CS*". The 2nd

Plaintiff denied ever transferring or withdrawing the sums. The 1st Defendant claims that the sum was withdrawn by the 2nd Plaintiff using cheque No. 401017 and paid to different accounts as per the 2nd Plaintiff's hand written instruction at page 687 of Vol. 1. I have carefully examined the documents adduced by the 1st Defendant at pages 673-687 of Vol. 1 and I note that, at page 673, there is a cheque No. 401017 dated 21/5/15 for a sum of; in figures, *UGX 773,849,756/=* and in words; *Seven Hundred Seventy Three Thousand Eight Hundred Forty Nine Thousand Seven Fifty Six Shillings Only.* Counsel for the 2nd Plaintiff argued that this was an invalid cheque which could not have been honoured by the bank to debit UGX 773,849,756/=. Counsel cited Section 8(2) of the Bills of Exchange Act to the effect that where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable. Counsel argued that the bank could not pay the amount in figures when there was a discrepancy between the two.

[334] At page 675 of Vol. 1, is an Account to Account Transfer document indicating that UGX 773,849,756.00 was debited and transferred from Ntaganda Ephraim Account No. 1005011010000028 and credited to TT Transit Account No. USD 1530110030002 as USD 258,122.00. The 2nd Plaintiff's case is that he did not transfer this sum and the customer signature space is not signed by him but by someone else. At page 677, there is an Account to Account Transfer document indicating that USD 131,596.33 was debited from USD Account No. 1530110030002 T.T Transitory Account to Ephraim Ntaganda's Account No. 1005011010000028. At page 679, there is an Account to Account Transfer document indicating that USD 1,197.50 was debited from Account No. USD 1530110030002 T.T Transitory Account to Ephraim Ntaganda's Account No. 1005023020000001. The 2nd Plaintiff asserts that this voucher was not signed by him; which is factually correct.

[335] Further, at page 681 is another Account to Account Transfer document indicating that USD 125,328.00 was debited from Account No. USD 1530110030002 T.T Transitory Account to Excellent Assorted Manufacturers Ltd's Account No. 1002021020000849. At page 687 is a handwritten note indicating; *"1005023020000001 131,596.33 and 1,197,50 – Ntaganda and 0245034003900- 125,328.00 - Excellent $ 258,122 x 2998 = 773,849,756/=."* It is the 1st Defendant's argument that this was an instruction by the 2nd Plaintiff to convert the sums of UGX 773,849,756/= into USD and transfer the money in the denominations noted on the piece of paper to the different accounts as instructed by the 2nd Plaintiff. The 2nd Plaintiff's argument on the other hand is that this was not an instruction but a rough paper which was not signed by him and that a bank could not act upon it.

[336] I have examined the 2nd Plaintiff's account statement for Account No. 1005023020000001 where the sums of **USD 131,596.33** and **USD 1,197.50** were allegedly credited as per the 1st Defendant's explanation and the vouchers at pages 677 and 679 of Vol. 1. The Account statement for account number 1005023020000001 where the sums were allegedly credited appears at page 581-589 of Vol. 1. I have also examined the transactions of 21st May 2015 particularly at page 583 of Vol. 1 and found that; for the sum of **USD 131,596.33**, the entries/credits of USD 40,000, USD 39,967.12, USD 27,026.85, USD 22,947.95, USD 424.03, USD 32.88, and USD 1,164.62 do not add up to the sum of USD 131,596.33, which was purportedly transferred to the said account and the evidence that it is the same sum does not add up. For the sum of USD 1,197.50, whereas it is indicated to have been transferred to the 2nd Plaintiff's account No. 1005023020000001 as per the voucher at page 679 of Vol. 1, I am unable to trace the credit of the same on 21st May 2015 on the statement at page 583 of Vol. 1.

[337] For the sum of USD 125,328.00, whereas the sum is indicated to have been transferred to the 1st Plaintiff's account No. 1002021020000849 as per

page 105 of Doc. 54 and the voucher at page 681 of Vol. 1, in the absence of any valid instrument authorizing the transfer, I find that transfer of this sum was done without mandate of the 2nd Plaintiff and was therefore unlawful. For the sum of USD 1500.38, no evidence was adduced by the 1st Defendant as to where it was credited or for which purpose it was applied. It could not be traced any anywhere and no evidence to the contrary was adduced by the 1st Defendant.

[338] Regarding the argument that the hand written document was an authorization to the bank to credit the Plaintiffs' accounts with the various sums, such is factually and legally wrong because such a document is not a recognized instrument that could be relied on by the bank to debit a client's account. It is a hand written note with no instruction or mandate and it is not signed by the 2nd Plaintiff. While I am mindful that some of the transactions are reflected on the 2nd Plaintiffs account, I have not found verifiable evidence of the correlation between those sums and the queried sum. I have also not found ample evidence of authorization or mandate by the 2nd Plaintiff to debit his account in relation to those transactions. There is no evidence that the debit was effected for the benefit of the 2nd Plaintiff or that it did not occasion him any loss. I therefore find that the debit of the sum of **UGX 773,849,756/=** was unlawfully made on the 2nd Plaintiff's account and shall be refunded with interest at 24% per annum from 21st May 2015 until full payment.

viii. UGX 26,262,375/= debited on 26th May 2015

Submissions by Counsel for the Plaintiffs

[339] It was submitted by Counsel for the Plaintiffs that he did not recall having withdrawn this sum and, from the narration in the bank statement, he could not understand the transaction. When it was queried, the 1st Defendant in Annexture O to the WSD indicated that the voucher would be provided later. Subsequently at page 651 of Vol. 1, the 1st Defendant explained that this was a URA payment by the 2nd Plaintiff. Counsel submitted that in evidence, PW2

stated that he was seeing the URA receipts for the first time when they were availed during the trial. Counsel concluded that the debit was unlawful and done in breach of the bank's obligation of transparency as required under BOU Consumer Protection Guidelines.

Submissions by Counsel for the 1st Defendant

[340] It was submitted by Counsel for the 1st Defendant that this sum was debited to cover payment to the URA of tax amounting to UGX 26,262,375/= on behalf of the 2nd Plaintiff as per receipt attached on page 711 of Vol. 1 and the payment registration slip on page 713 of Vol.1. Counsel argued that the sanction letter authorized Crane Bank to debit the 2nd Plaintiff's account for purposes of paying stamp duty and that the account was accordingly debited to pay stamp duty. As such, the claim for a refund of this sum is unfounded.

Determination by the Court

[341] It is an agreed fact that this sum was debited from the 2nd Plaintiff's current account on 26th May 2015 under the narration, "*Outward Cheque Dr. 215000296956100036*6". While the 2nd Plaintiff stated that he neither understood nor authorized the queried debit, the 1st Defendant produced documents as per pages 711 and 713 to prove that this sum was used to pay stamp duty on behalf of the 2nd Plaintiff and that the bank had mandate, under the sanction letters, to debit the 2nd Plaintiff's account with this sum and had therefore lawfully done so. Upon examination of the bank statement at page 47 of Doc. 54, I agree with the 2nd Plaintiff that the narration against the debit, "*Outward Cheque Dr. 215000296956100036*6" is not clear as to indicate that it was a payment to Uganda Revenue Authority. I do not agree with the 1st Defendant's Counsel that any of sanction letters gave a mandate to the bank to debit the 2nd Plaintiff's account with this sum in payment of stamp duty. Clearly, no particular sanction letter allowing the bank to debit the 2nd Plaintiff's account with this particular sum was adduced in Court.

[342] As already pointed out, the principles governing the banker customer relationship demand that, in case of third party payments, a customer is informed of such debits before they are made on his account. According to PW2's unrebutted evidence, he was never notified of this debit or the purpose until he came across the receipts in court. I also notice that whereas the 1st Defendant claims that the payment was for stamp duty, the payment registration slip at page 713 indicates the tax head as Income Tax. I therefore find that the debit of the queried sum of **UGX 26,262,375/=** was not explained and or accounted for by the 1st Defendant. The sum was unlawfully or irregularly debited and the same shall be refunded to the 2nd Plaintiff with interest at 24% per annum from 26th May 2015 until full payment.

ix. The Sum of UGX 119,374,588/= debited on 28th May 2015

Submissions by Counsel for the Plaintiffs

[343] Counsel submitted that this sum was debited from the 2nd Plaintiff's account as an "internal transfer", without any details and that the 2nd Plaintiff neither recalled withdrawing this sum, nor transferring it and he therefore did not understand it. In its defence, the 1st Defendant stated that this was a credit card payment, and relying on the document at page 740 of Vol.1, it was explained that this sum was debited from the 2nd Plaintiff's account to cover his credit card dues. Counsel for the Plaintiffs submitted that the purported account statement at page 740 of Vol.1 for the period of 19/05/2015 to 19/06/2016 did not have account balances and did not indicate details of expenditure or what purchases had been made for which the sum was used to settle the alleged credit card dues apart from the narration "DD/Cash Payment" from which the 2nd Plaintiff cannot tell what the payment was for.

Counsel for the 1st Defendant's Submissions

[344] In reply, Counsel for the 1st Defendant submitted that according to available evidence, the 2nd Plaintiff's account was debited with this sum to cover his credit card dues on 28th May 2015 and the account was lawfully

debited in accordance with the mandate given by the 2nd Plaintiff in his credit card application documents at pages 761 to 763 and the Auto debit for Payment of Credit Card Dues Authorization on page 777 of Vol.1, and then credited to the credit card account at page 740 of Vol.1. Counsel submitted that at page 47 of Doc. 54, there is a clear narrative of this debit of the sum of UGX 119,374,588/= which was credited to the Credit Card Account as per the statement at page 740 of Vol.1. Counsel reasoned that the 2nd Plaintiff executed a contract at pages 761-773 of Vol. 1 which contract binds the 2nd Plaintiff to pay back to Crane Bank such sums as shall be expended by him by use of the credit card and as such, the debit was lawful, authorized and used to settle the credit card dues of the 2nd Plaintiff.

Submissions in Rejoinder

[345] It was submitted by Counsel for the Plaintiffs in rejoinder that whereas the credit card application authorized debits on the 2nd Plaintiff's account, that authority was limited to the dues/liabilities of the 2nd Plaintiff and in the instant case, the 1st Defendant did not adduce evidence of the dues outstanding at the time for which this sum was debited from the 2nd Plaintiff's account. Counsel further submitted that the 1st Defendant did not adduce evidence of the expenses for which this sum was paid and to whom it was paid and therefore did not discharge the burden to prove that the debit was lawful.

Determination by the Court

[346] It is not disputed that this sum was debited from the 2nd Plaintiff's account on 28th May 2015. This transaction is similar to some amounts over which I have already pronounced myself on the legality or regularity of those debits. Concerning this particular amount, I have examined the credit card statement at page 740 of Vol. 1. It indicates one purchase "Pur/TPS Serena" for a sum of USD 963,974, and no other purchases. Contrary to the claim by the 1st Defendant that the queried sum was used to settle the 2nd Plaintiff's dues for the month up to 28th May 2015, I have not seen any purchases on the

account statement for the period of 19/05/2015 to 19/06/2016 to attract payment of credit card dues of up to UGX 119,374,588/=. There is no evidence as to what dues/liabilities this sum was paid. As already stated, where such a debit is challenged, it is the duty of the bank, being the custodian of all documents relating to customer's accounts, to adduce evidence of such documents that were used to debit the customer's account. In absence of such crucial evidence, I find that the claim by the 2nd Plaintiff that the debit of the queried sum of **UGX 119,374,588/=** was unlawful has not been rebutted. The said sum shall, therefore, be refunded to the 2nd Plaintiff with interest at 24% per annum from 28th May 2015 until full payment.

x. UGX 55,000,000/= debited on 8th September 2015

Submissions by Counsel for the Plaintiffs

[347] It was submitted by Counsel for the Plaintiffs that the debit of UGX 55,000,000/= was made on 8th September 2015 with the narration of "Cash withdrawal" and the 2nd Plaintiff did not recall or understand this transaction. The explanation by the 1st Defendant was that this was a cash withdrawal using cheque No. 000317 as per page 653 of Vol. 1 which led to the assumption that the 2nd Plaintiff withdrew the sum by cash. Counsel stated that during cross examination, PW2 testified that whereas this cheque was signed by him, it was not filled by him, and was among the many other blank cheques signed and left in the bank and he had not authorized this debit. Counsel also pointed out that the withdrawal voucher at page 655 of Vol. 1 was as well not signed by the 2nd Plaintiff in the customer signature space, which proves that he is not the one who withdrew this money but the money was taken by the person who signed the withdrawal slip. Counsel concluded that the debit was unlawful and the 2nd Plaintiff is entitled to a refund of this sum with interest.

Submission by Counsel for the 1st Defendant

[348] Counsel submitted that cheque No. 000317 was duly signed by the 2nd Plaintiff authorizing his account to be debited with UGX 55,000,000/= and that the evidence of PW2 that he signed a blank cheque and did not take the money should not be believed by the Court because all the cheques PW2 is denying are counter cheques which are not available to the customer ordinarily. Counsel explained that a customer requests for this cheque from the counter in the absence of his cheque book in order to transact and that it defeats logic that the customer requested for a cheque, signed it and left it with the bank and that it is inconceivable that the cheque was blank because the 2nd Plaintiff signed it both at the front to authorize the payment of the cheque, and to open it for cash payment and at the back twice; to acknowledge that he had been paid cash. Counsel submitted that the voucher at page 655 of Vol.1 is a back office voucher that is printed whenever the transaction is captured on the system and it does not give the bank the right to debit the customer's account. Counsel submitted that where there is mandate of a cheque, then the transaction is authorized and therefore, the claim for UGX 55,000,000/= is unfounded.

Determination by the Court

[349] It is an agreed fact that the sum of UGX 55,000,000/= was debited from the 2nd Plaintiff's account on 8th September 2015 with the narration, "Cash Withdrawal (Local 317)". The 2nd Plaintiff's case is that whereas he signed the cheque that was used by the bank to debit his account, he did not authorize the transaction and that this was one of the many cheques the 2nd Plaintiff left in the bank signed but blank. In order to prove that the transaction was authorized and the money was withdrawn and taken by the 2nd Plaintiff, the 1st Defendant adduced in evidence a cheque and a withdraw slip/voucher at pages 653 and 655 of Vol.1. While it is admitted that the cheque was signed by the 2nd Plaintiff, the withdrawal slip was not signed by him. I have already

hereinbefore pronounced myself on this kind of cheque; signed in the name of the account holder as payee, drawn by himself, crossings opened, and signed twice at the back. In agreement with Counsel for the 1st Defendant, I found that this manner of drawing a negotiable instrument is consistent with withdrawal of cash using a cheque by the named payee. I have also found that there was no evidence that signing of a voucher upon receipt of cash is a legal or standard practice in the banking industry. For those reasons, I have found this to amount to sufficient evidence that this sum was withdrawn by the 2nd Plaintiff. I rejected the assertion that a cheque like the present one is one of those cheques that were believed to have been left in the bank by the 2nd Plaintiff blank but signed. In the circumstances, my finding is that the queried sum of UGX 55,000,000/= was lawfully debited and is not subject to refund as claimed.

xi. The Sum of UGX 18,535,040/= debited on 29th September 2015

Submissions by Counsel for the Plaintiffs

[350] It was submitted by Counsel that the 2nd Plaintiff did not have knowledge of and was never availed documents for the transfer of this sum. The explanation by the 1st Defendant in evidence was that this was payment for insurance premium to Gold Star Insurance Company Ltd as the mortgagor had the obligation to insure property, failure of which, the bank was permitted to take up insurance and charge the customer. Counsel submitted that this was a third party charge which was regulated by the BOU Consumer Protection Guidelines and therefore the customer ought to have been informed in advance of the service and the applicable fees and charges. Counsel submitted that the 2nd Plaintiff was never given an opportunity to negotiate this sum or compare the rates with other service providers, which were all contrary to the said guidelines and therefore, the money was recoverable with interest.

Submissions by Counsel for the 1st Defendant

[351] In reply, Counsel submitted that the 2nd Plaintiff contractually, under the sanction letter of 21st April 2015 at page 174 of Doc. 54, clause 6, agreed to pay for insurance relating to the mortgage and having failed to take out insurance, the bank took it out and debited his account for the charge. Counsel stated that the mortgage was registered and the customer took benefit of the payment. As such, the debit was lawful as it was authorized and the customer took benefit of it. Counsel reasoned that where there is a mandate of a cheque, or a debit order, and the bank acts in accordance with the mandate, then the transaction is authorized and given that the payment went to discharge a legal obligation of the customer to pay insurance, the bank is entitled to take benefit of the payment. Counsel prayed that the claim of this queried sum should be dismissed.

Determination by the Court

[352] It is not disputed that this sum was debited from the 2nd Plaintiff's account on 29th September 2015 as per page 51 of Doc. 54. It is the 1st Defendant's case that the sum was debited from the 2nd Plaintiff's account to pay insurance premium for the 2nd Plaintiff's mortgage and was therefore used for his benefit. On their part, Counsel for the Plaintiffs cited Section 18 of the Mortgage Act No. 8 of 2009 in contention to this debit. The section provides for implied covenants by the mortgagor. Under Section 18 (1) (d) of the Act *"There shall be implied in every mortgage …[a] covenant(s) by the mortgagor with the mortgagee binding the mortgagor … to insure by insurance or any other means as may be prescribed or as are appropriate, that resources will be available to make good any loss or damage caused by fire to all buildings on the land, and where insurance is taken out, it is done in the joint names of the mortgagor and mortgagee with insurers approved by the mortgagee and to the full value of all the buildings"*. Section 18 (1)(j) thereof provides that where the mortgagor fails to comply with any of the covenants implied by paragraph

18(d) above, among others, the mortgagee may spend such money as is reasonably necessary to remedy the breach and may add the amount so spent to the principal money and that amount shall be deemed for all purposes to be a part of the principal money secured by the mortgage. Under section 18(3) of the Act, the *"mortgagee shall not spend any money under subsection (1) (j) without giving notice to the mortgagor of his or her intention to do so"*.

[353] It is clear from the above provision that it is the primary duty of the mortgagor to take out insurance in respect of a mortgage. Where the mortgagor does not, the bank may take out the policy and add the expense on the principal. But before the bank does so, it must notify the mortgagor of its intention to do so. In the instant case, there is no evidence as to how the bank came to the decision to take out the insurance policy and bill the 2nd Plaintiff. There is no evidence that the 2nd Plaintiff failed to take out the policy and that he was notified that the bank intended to take over the role. According to Clause 4(b) of the Further Charge and Mortgage dated 21st March 2013 and Clause 2 (b) of the Further Charge of 8th April 2014, alluded to by Counsel for the 1st Defendant, the bank was only permitted to take up insurance and charge the customer, in the event that the mortgagor, and in this case, the 2nd Plaintiff, failed and or neglected to insure the mortgaged property. It was thus incumbent on the 1st Defendant to adduce evidence that it duly notified the 2nd Plaintiff of the obligation to insure the mortgaged property and the 2nd Plaintiff failed to do so, which made the bank to take out the insurance. Consequently, in this case, the customer had no say on the service provider and the cost. There is no evidence as to how the queried sum was arrived at. The 1st Defendant apparently acted unilaterally and without the knowledge, notice and consent of the 2nd Plaintiff. The conclusion, therefore, is that the debit of the queried sum was unauthorized.

[354] Nevertheless, it is important to appreciate that there is evidence that the actual debited sum was received by the Insurance Company as per the

acknowledgement at page 667 of Vol.1. It was not contested by the 2nd Plaintiff that he obtained the mortgage in issue. It is also not contested that the relevant sanction letters obliged the 2nd Plaintiff to take out an insurance as one of the covenants under the mortgage. Clearly, therefore, the 2nd Plaintiff had to take out an insurance policy. It is also clear that although one was taken out without his notice or consent, it was taken out for an ascertained service obtained by him and for his benefit. That being the case, the failure by the bank to issue relevant notices to the 2nd Plaintiff only remain a technicality that ought not obscure the substance of the matter in issue. In my view, what matters is the fact that the cost was actually incurred by the bank, the sum was received by the service provider and the same was for the benefit of the 2nd Plaintiff. Under such circumstances, the 1st Defendant cannot be liable to refund this queried sum and this claim by the 2nd Plaintiff fails.

xii. The Sum of UGX 184,000,000/= debited on 6th February 2016

Submissions by Counsel for the Plaintiffs

[355] Counsel for the Plaintiffs submitted that this sum was debited from the 2nd Plaintiff's account on 6th February 2016 with the narration, "Cash WD Local Curr 408834" as per page 54 of Doc. 54. The Plaintiff queried it because he could neither recall withdrawing the sum nor understand the transaction. The explanation by the 1st Defendant was that the 2nd Plaintiff wrote a counter cheque for this sum and there was also a voucher, both at pages 1023 and 1024 of Vol. 3. Counsel stated that in evidence, PW2 testified that he did not withdraw this sum and that the withdrawal voucher at page 1024 clearly proves that it was signed by someone else in the customer signature space. Counsel submitted that the 2nd Plaintiff did not withdraw this money and that although the cheque was signed by him, it was one of the cheques he signed and left in the bank as testified by him. Counsel concluded that the money was unlawfully debited and the 2nd Plaintiff is entitled to a refund of the same with interest.

Submissions by Counsel for the 1st Defendant

[356] In reply, it was submitted for the 1st Defendant that the 2nd Plaintiff wrote a counter cheque No. 408834 for the amount of UGX 184,000,000/=; which cheque is conclusive evidence that the account was debited in accordance with the instructions of the 2nd Plaintiff and account mandate. Counsel stated that PW2 admitted filling and signing the cheque both at the front and at the bank and in the presence of such mandate by cheque or debit order, the bank acted with the mandate and the transaction was authorized. Counsel submitted that the lawfulness of the debit is premised on the authority in the mandate and relying on **Barclays Bank Vs. Simms case (supra)**, Counsel submitted that once a signed cheque has been adduced in evidence and was honored by the bank, it is proof that the bank acted in within its mandate. Counsel submitted that the withdrawal voucher is not for withdrawal but is evidence that the transaction passed through the system. Counsel disputed the claim that this was one of the signed but blank cheques left by the 2nd Plaintiff with the bank and prayed that the claim for this sum should be dismissed.

Determination by the Court

[357] It is not in dispute that the sum of UGX 184,000,000/= was withdrawn from the 2nd Plaintiff's account on 6th February 2016 with the narration, "*Cash WD (Local Curr 408834"*. There is on record a cheque No. 408834 that was used to withdraw the sum of UGX 184,000,000/=. The cheque is drawn by the 2nd Plaintiff, addressed to himself as the payee, opened by him by signing against the crossing and signed by him at the back twice; all of which are consistent with the act of withdrawal of cash by cheque by the payee. I have already made a pronouncement on this kind of instrument, its regularity and capacity to confer the requisite mandate. Since the cheque herein in issue has the same features, I do not have to belabor the point. I have also indicated why this kind of cheque does not fall in the category of cheques that were alleged to have been left signed but blank. For the same reasons, I find that the debit of

the queried sum of UGX 184,000,000/= has been explained and the same is not subject to refund.

xiii. The Sums of UGX 4,015,559/= debited on 25th February 2016 and UGX 40,360,014/= debited on 29th March 2016

Submissions by Counsel for the Plaintiffs

[358] The two stated sums were each debited with the narration, "Internal transfer 4622570000462038" and "Internal transfer 4622570000463515" respectively. When queried by the 2nd Plaintiff, the 1st Defendant responded that both debits were credit card payments. Counsel for the Plaintiffs pointed out that the document at page 741 where UGX 4,015,559/= was credited does not show what payment was outstanding for that month; and that compared to page 743, Page 742 of Vol. 1 where UGX 40,360,014**/=** was credited does not indicate the details of the transactions or dues for which this sum was used to settle. Counsel argued that, looking at these statements, it is not possible to identify what the outstanding amounts were at a particular given time, or which purchases/dues the sums were used to settle. Counsel submitted that these sums were not applied to settle the 2nd Plaintiff's alleged obligations and he is entitled to a refund with interest from the dates of debit.

Submissions by Counsel for the 1st Defendant

[359] Counsel submitted that according to available evidence, these sums were debited from the 2nd Plaintiff's account and credited to his credit card account to settle his credit dues and the debits were permitted in accordance with the credit card application at pages 761 to 773 and 777 of Vol. 1. Counsel referred the Court to page 741 of Vol.1 for the credit card account statement where the sum of UGX 4,015,559**/=** was credited and page 742 for the credit of UGX 40,360,014**/=** and prayed that the 2nd Plaintiff's claim for these sums should be dismissed.

Determination by the Court

[360] These two transactions are similar to those I have already dealt with bearing the narration of "DD/CASH PAYMENT". Like the previous transactions, the debit of UGX 4,015,559/= was made on 25th February 2016 from the 2nd Plaintiff's current account with the narration "Internal transfer 4622570000462038" and credited to his credit card on the same date with the narration "DD/CASH PAYMENT". Like was the case in the previous transactions of this nature, I am not satisfied with the unsubstantiated explanation that the sum was used to cover the 2nd Plaintiff's credit card dues. More so, the debit and credit of this sum has an additional question. While the narration in the current account bank statement indicates that the internal transfer was to account No. 4622570000462038, the credit was effected on account No. 4622570000463515. The statement for Account No. 4622570000462038 was not adduced in evidence by the 1st Defendant. This is further testimony to the irregularity of this transaction. In the circumstances, I am satisfied that the debit of the sum of **UGX 4,015,559/=** was unlawful and or irregular and the same shall be refunded to the 2nd Plaintiff with interest at 24% per annum from 25th February 2016 until full payment.

[361] For the debit of UGX 40,360,014/=, the sum was debited on 29th March 2016 with the narration, "internal transfer 4622570000463515". Similarly, the sum was purportedly credited to the 2nd Plaintiff's credit card to settle his credit card dues, with the same narration as "DD/CASH PAYMENT". The circumstances of this debit being similar to the previous transactions of the kind, already dealt with herein above, I find that this queried sum of **UGX 40,360,014/=** was also unlawfully and or irregularly debited by the bank. The same shall be refunded to the 2nd Plaintiff with interest at 24% per annum from 29th March 2016 until full payment.

xiv. The Sum of UGX 454,000,000/= debited on 1st April 2016

Submissions by Counsel for the Plaintiffs

[362] It was submitted by Counsel for the Plaintiffs that when this transaction was queried by the 2nd Plaintiff, the 1st Defendant indicated that a voucher would be provided later. In evidence, the 1st Defendant referred to a cheque No. 00380 drawn on account of the 2nd Plaintiff dated 2nd April 2016 for the amount of UGX 454,000,000/= which is at page 1025 Vol. 3 and a withdrawal slip for the same amount stamped on 2/4/2016 at page 1026 of Vol. 3. Counsel referred to the testimonies of PW1 & PW2 to the effect that the purported cheque at page 1025 of Vol. 3 was dated 2nd April 2016 and it was not possible that the 2nd Plaintiff could have withdrawn cash and received it on the 1st April 2016 (as per the statement at page 55 of Doc. 54) using the cheque dated 2nd April 2016 or before the cheque was presented to the bank. Counsel argued that this was one of the signed cheques left in the bank which the bank used as and when it wanted.

Submissions by Counsel for the 1st Defendant

[363] Counsel submitted that it is not disputed that the 2nd Plaintiff's account was debited on 1st April 2016 with the sum of UGX 454,000,000/=. Regarding the money being debited on 1st April 2016 and the cheque being dated 2nd April 2016, Counsel referred to the withdrawal voucher which confirms that although the transaction was done on the 2nd of April 2016, it was value dated 1st April 2016 which was a day earlier. Counsel submitted that this was sufficient explanation about the variation in dates. Counsel invited the Court to ignore the 2nd Plaintiff's claim that he did not take the money because he did not sign the voucher as it is not the voucher that was used to debit the account but the cheque. Counsel submitted that having established that the cheque was duly issued in accordance with the mandate, the 1st Defendant has proved that there was a mandate and that the transaction was authorized. The claim for this sum should therefore be ignored.

Determination by the Court

[364] It is agreed that the sum of UGX 454,000,000/= was debited from the 2nd Plaintiff's account on 1st April 2016 under the narration, "Cash WD Local Curre 000380" as per page 55 of Doc. 54. The difference between this alleged withdrawal by cheque and those earlier considered is that whereas the debit on account was said to have been done on 1st April 2016, the cheque and the withdrawal voucher were dated 2nd April 2016, which according to the 2nd Plaintiff was impossible. Taking into consideration the submissions by both counsel, I have made a number of observations. The cheque No. 000380 at page 1025 of Vol. 3 for the sum of UGX 454,000,000/= dated 02/04/2016 bears two stamps, both with the date of 02 Apr 2016. The 2nd Plaintiff denies ever using this cheque and contends that it is inconceivable that he could withdraw the money before presenting the cheque. Counsel for the 1st Defendant insists that this cheque is the mandate by which the debit was authorized.

[365] Going by the rules of banking, I am unable to accept the argument by Counsel for the 1st Defendant to the effect that this cheque constituted the mandate that authorized the debit. The cheque is dated 2nd April 2016 and going by the stamps thereon, it was received by the bank on 2nd April 2016. I agree with the Plaintiffs that there is no way an account would have been lawfully debited under the mandate of an instrument that was not yet in existence. The statement appearing on the alleged voucher about the "value date" being 1st April 2016 would not change this position. If it was to do that, then there would have to be evidence beyond the cheque proving that that the customer took the money under an agreed arrangement and the instruments were regularized later. In this case, there is no evidence of such arrangement. Indeed, even the improvised payment voucher is not signed by the customer. To my mind, this is not the kind of case where the manner of signature of the cheque is capable of confirming mandate and an act of withdrawal of cash by

cheque. It ought to be noted that the previous view was taken on account of the regularity of the instrument. In this case, the discrepancy in dates makes the instrument irregular and incapable of conferring the requisite mandate. In light of the foregoing, I am satisfied that the 2nd Plaintiff has proved that the withdrawal of the queried sum of **UGX 454,000,000/=** was unlawful and the same shall be refunded to the 2nd Plaintiff with interest at 24% per annum from 1st April 2016 until full payment.

xv. The Sum of UGX 32,647,250/= debited on 29th August 2016

Submissions by Counsel for the Plaintiffs

[366] It was submitted for the 2nd Plaintiff that he did not understand this transaction and when queried, the 1st Defendant responded that this was insurance premium paid to Gold Star Insurance Company Ltd for the registered Mortgage. It is submitted that the 2nd Plaintiff was never given chance to choose a service provider or negotiate the cost of insurance and there is no proof that he was ever given prior notice to pay insurance premium and he failed to do so. Counsel submitted that this being a third party charge, the 2nd Plaintiff ought to have been informed in advance of the service and the charge. Counsel stated that signing a facility letter which had a term requiring him to pay insurance did not amount to authorization of debit of his account to pay insurance with this particular sum.

Submissions by Counsel for the 1st Defendant

[367] For the 1st Defendant, Counsel submitted that the sum was debited from the 2nd Plaintiff's account for insurance premium paid to Gold Star Insurance Company Ltd and that the amount was credited to account No. 1002011020000014 for Gold Insurance Company Ltd on 29th August 2016 as payment for a renewal endorsement of an insurance policy as shown at pages 665 and 663. Counsel pointed out that proof of this payment is at page 2 of Vol. 5 and therefore, the sum was properly debited from the 2nd Plaintiff's account in accordance with the authorization in the sanction letters and

mortgage deeds to settle lawful obligations for insurance payments. Counsel further argued that the 2nd Plaintiff benefited from this debit and this claim should be dismissed.

Determination by the Court

[368] I have dealt with this kind of transaction in detail while dealing with the queried sum of UGX 18,535,040/= debited on 29th September 2015 under item (xi) of this very section of queried items. The facts and circumstances of the two transactions are similar and I accordingly adopt the same reasoning and come to the conclusion that the queried sum of UGX 32,647,250/= has been well explained and accounted for. The same is not subject to refund by the 1st Defendant.

Paragraph (F) under Issue 4: The Sums of UGX 221,492,200/= and USD 138,632 as utilization fees under Appendix 5 of Doc. 54

[369] Both Plaintiffs queried charges debited from their accounts as utilization fees on their Accounts. In paragraph 10(j), (m) & (l) and 11(a), (c), (f) & (g) of the amended plaint, the Plaintiffs contested and or queried utilization and arrangement fees charged on their accounts on grounds that the charges on the loans and renewals were extortionate, exorbitant, fraudulent and illegal. As per Doc. 54, the 1st Plaintiff queried the sums at page 27 charged as utilization fees under Appendix 10, and the 2nd Plaintiff queried utilization fees, both in UGX and USD, appearing under Appendices 5 and 7 at pages 17 and 21 of Doc. 54 respectively.

Appendices 5 and 7 – Utilization Fees charged on the 2nd Plaintiff's Accounts (UGX 221,42,200/= and **USD 138,632.00)**

Submissions by Counsel for the Plaintiffs

[370] It was submitted that the 2nd Plaintiff queried utilization fees charged pursuant to the following facility letters;

i) The sanction letter dated 3rd December 2010 at page 117 of Doc. 54

ii) The sanction letter dated 16th December 2010 at page 122 of Doc. 54

iii) The sanction letter dated 21st April 2011 at page 129 of Doc. 54

iv) The sanction letter dated 8th September 2011 at page 134 of Doc. 54

v) The sanction letter dated 3rd April 2012 at page 139 of Doc. 54

vi) The sanction letter dated 31st August 2012 at page 144 of Doc. 54

vii) The sanction letter of 18th March 2013 at page 151 of Doc. 54

viii) The sanction letter dated 24th April 2013 at page 157 of Doc. 54

ix) The sanction letter dated 29th March 2014 at page 164 of Doc. 54

x) The sanction letter dated 21st April 2015 at page 171 of Doc. 54

xi) The sanction letter dated 21st April 2016 at page 179 of Doc. 54

[371] Counsel submitted that according to the 2nd Plaintiff, the said sums charged as utilization fees were illegally charged. When the sums were queried, the 1st Defendant responded that they were charged as per the provisions of the above listed sanction letters. Counsel for the Plaintiffs submitted that there was no definition or explanation of the meaning of the term utilization fees in the sanction letters; which was necessary in order to answer the question as to whether or not the said fees were lawfully charged. Counsel submitted that according to the evidence of DW2, the term refers to administration fees. She explained that it is a charge for utilizing a credit facility. Counsel submitted that it was unclear from the facility letters as to what utilization fees entailed, what it was charged for, and when the sums were to be charged. Counsel specifically drew the court's attention to the sum of UGX 82,000,000/= debited from the 2nd Plaintiff's account on 24th December 2011 as utilization fees pursuant to a sanction letter signed on 3rd April 2012.

[372] Counsel for the Plaintiffs further submitted that to their understanding, utilization fees refer to a periodic fee assessed by a lender against a borrower based on the amount of credit used by the borrower in a revolving line of credit which, according to Counsel, means that the borrower can borrow up to his limit again and again without going through another loan approval process.

Counsel stated that in that case, the bank has to keep for the borrower some money aside which he can access whenever he wants for as long as it is within his limit and that because the bank is not earning from that sum and keeps it aside for the customer to access it whenever he/she wishes, the bank charges utilization fees as a charge for allowing the borrower to utilize that money. Counsel submitted that where the loan is applied for, disbursed and fully drawn down by the borrower, without a revolving line of credit, as was in this case, utilization fees do not apply. Counsel argued that in the 2nd Plaintiff's case, there was no revolving line of credit as all the 2nd Plaintiff's loans were fully drawn down and taken by the customer; and there was no evidence to the contrary.

[373] Referring to **page 163 of the Joint Trial Bundle**, Counsel for the Plaintiffs also submitted that utilization fees were also challenged on the ground that they were not among the charges published by the Central Bank as being one of the charges for Crane Bank and that whereas the publication indicated all the other charges, utilization fees were not among them. Counsel argued that charging the fees was, therefore, in breach of the BOU Consumer Protection Guidelines, Clause 8(5) which requires banks to provide their customers with standard fees and charges. Counsel further submitted that even if the Court was to find that it was applicable, utilization fees was illegally charged more than once for the same loan. Counsel indicated, for example, that Facility 1 in the sanction letter of 3rd April 2012 was charged utilization fee for the first time, and charged again when it was renewed on 24th April 2013, yet no new loan was disbursed. Similarly, under Appendix 7, utilization fees were charged as per the sanction letter of 29th March 2014 at the time of the initial loan, then charged twice later on renewals of the same loans yet no loan had been disbursed by the bank. Counsel pointed out that, interestingly, the renewed loans were payable in over 72 monthly installments meaning that it was the same loan. Counsel stated that on the loan of USD 2,000,000 initially disbursed in March 2012, utilization fees were charged again upon renewal of

the same loan in March 2013, again in March 2014, again in April 2015, and again in May 2016, all under the guise of a new sanction letter, when in fact it was the same loan. Counsel concluded that utilization fees were not only illegal, but extortionate, exorbitant and charged with no basis whatsoever and that the money deducted as utilization fees ought to be refunded to the Plaintiff with interest from the dates of the debit.

Submissions by Counsel for the 1st Defendant

[374] It was submitted by Counsel for the 1st Defendant that the 2nd Plaintiff signed several sanction letters by which he obtained various loans. In the said letters, there were express terms of utilization and arrangement fees which were contractually agreed upon by the parties and therefore Crane Bank was entitled to charge the 2nd Plaintiff for these charges. Counsel submitted that the facilities were for 12 months, renewable at the discretion of the bank and that at the end of the 12 months, either the customer would repay the facilities or reapply to renew these facilities for another 12 months, and the 2nd Plaintiff chose to renew the facilities. Counsel stated that the facility letters for the loans of 12 months and the subsequent renewals were all independent of each other, and in each instance, the customer entered a new and independent contract for 12 months under which utilization and arrangement fees were charged. Counsel stated that the sanction letters granted Crane Bank Ltd express authority to debit the accounts of the 2nd Plaintiff with all the queried arrangement and utilization fees and the bank did so pursuant to the clause stating that; "*The bank has a right to debit your account with any interest and charges from time to time as agreed upon*".

[375] Counsel further submitted that having signed the facility letters for the loans and their renewals, the 2nd Plaintiff cannot be permitted to resile from his signature on the sanction letters and that under the parole evidence rule, PW1 and PW2 cannot be allowed to add, vary, or contradict the express terms of the sanction letters and the application for credit facilities. Counsel submitted that

whereas the Court was called upon to interpret utilization fees and arrangement fees, the meaning must be obtained from the documents themselves and not from the evidence given by the witnesses as to their understanding of the words. Counsel emphasized that the Court must read the terms of the contract as a whole, giving the words their natural and ordinary meaning in the context of the agreement, the parties' relationship and the relevant facts surrounding the transaction so far known to the parties.

[376] Counsel further submitted that all the facility letters provided for utilization and arrangement fees and that the burden of proving that the bank acted fraudulently or illegally when it charged utilization and arrangement fees is on the Plaintiff. Citing the case of ***Bhagwat Sharan (DEAD THR. LRS Vs. Purushottam and Ors, Civil Appeal No. 6875 of 2008 (SC India)***, Counsel submitted that the 2nd Plaintiff cannot seek to take benefit of the loan sums under the various sanction letters but not want to honour the terms of the same contracts requiring him to pay utilization and arrangement fees, provided for in the contracts, and that having accepted the benefits of the contract, the 2nd Plaintiff is estopped from denying the validity of the binding effect of the sanction letters or their clauses.

[377] In reply to the submission that utilization fees were not among the published charges by BOU, Counsel submitted that the mere fact that the publication by BOU does not show utilization and arrangement fees, is not evidence of illegality of the fees and there is no law that prohibits these charges. Counsel argued that the BOU Consumer Protection Guidelines relied on by the Plaintiffs, which have no force of law and are merely regulatory directives, contain no provision prohibiting the charges of utilization and arrangement fees and that all that the Guidelines require is for the customer to be informed, which was done. On the interpretation of utilization fees by DW2, Counsel submitted that the evidence is not an aid to interpretation and, citing Section 91 of the Evidence Act, Counsel submitted that the sanction letters

provide for payment of utilization fees and arrangement fees and any evidence to contradict these terms cannot be admitted by Court. Counsel submitted that the definition of utilization fees is simple – it is a fee for utilizing the facility. In reply to the submission that utilization was charged more than once for the same loan, Counsel reiterated that all sanction letters expressly provided for the facility period of 12 months and therefore each sanction letter was new clearly setting out an agreement to pay the respective utilization and arrangement fees and as such, the claim by the 2nd Plaintiff was unfounded.

Submissions in Rejoinder

[378] In rejoinder, Counsel for the Plaintiffs submitted that whereas Counsel for the 1st Defendant submitted that the meaning of "arrangement fees" and "utilization fees" should be obtained from the facility letters, there are no definitions at all of these phrases, what the charges meant, or what they are comprised of; which is why the 2nd Plaintiff disputed them. On the parole evidence rule, Counsel submitted that by looking at the terms utilization and arrangement fees, one would not understand what the words and or charges entailed, unless they are given their true meanings. Citing ***General Industries Ltd Vs. NPART, CA No. 5 of 1988***, Counsel submitted that the parole evidence rule gives room to exceptions where a party can be allowed to adduce extrinsic evidence to clarify on the intention of the parties where the terms of the contract are found ambiguous or illegal. Counsel submitted that just because the 2nd Plaintiff signed facility letters did not mean that the bank would charge his accounts with all and any sums as the bank wished and that it would be an absurdity if the parties to a contract are held at ransom to the terms of the contract, even when they are unaware of them or if the terms are ambiguous.

[379] On the argument that the loans were for 12 months only and that charges also applied to the renewals which were treated as new loans, Counsel while giving an example of the sanction letter of 18.03.2013, submitted that

the loan was payable in 75 successive installments and was valid until 29.02.2020. Counsel argued that it could not be a new loan upon renewal for which arrangement fees and utilization fees should have been charged as it had already been arranged and disbursed to the 2nd Plaintiff. Counsel also submitted that whereas Counsel for the 1st Defendant contends that utilization and arrangement fees were contractual, a sum of UGX 82,000,000/= was for example charged on 24th December 2011 pursuant to a facility letter of 3rd April 2014 which did not exist at the time the fee was charged. Counsel maintained that this charge was unlawful, exorbitant and contrary to the law and procedures and therefore the queried sums ought to be refunded with interest.

Determination by the Court

[380] The sums of utilization fees challenged by the 2nd Plaintiff as having been charged illegally or irregularly on his account are particularized in Appendix 5 for the UGX account and Appendix 7 for the USD account. For the UGX charges, the 2nd Plaintiff disputes a total sum of **UGX 221,492,200/**= made up of eight (8) debits of UGX 60,000,000/= charged on 14.12.2010; UGX 15,000,000/= on 20.12.2010; UGX 15,000,000/= on 26.04.2011; UGX 10,000,000/= on 15.09.2011; UGX 82,000,000/= on 24.12.2011; UGX 8,000,000/= on 12.04.2012; UGX 12,500,000/= on 05.09.2012 and UGX 18,992,200/= on 03.05.2013. These are found under Appendix 5 at page 17 of Doc. 54. For the USD charges, the 2nd Plaintiff queried a total sum of **USD 138,632**, made up of 8 debits of USD 10,000 charged on 05.09.2012; USD 30,000 on 23.03.2013; USD 20,000 on 03.05.2013; USD 20,000 on 01.04.2014; USD 28,800 on 01.04.2014; USD 14,160 on 23.04.2015; USD 10,152 on 04.05.2015 and USD 5,520 on 04.05.2016.

[381] From the pleadings and evidence on record, the Plaintiffs disputed these sums for several reasons, namely that; i) the Plaintiffs did not understand the charge as it was not defined in the sanction letters; ii) there was no revolving line of credit and therefore the charge was not applicable; iii) the fee was not

among the fees published by BOU as chargeable by Crane Bank at the time; iv) it was not clear when the fee was chargeable and for what purpose it was charged; and v) even if the Court found that the fee was applicable, it was charged more than once for the same loan under the guise that renewals of already existing facilities were new loans and therefore subject to payment for arrangement or utilization fees. These arguments were opposed by Counsel for the 1st Defendant as indicated in the submissions above.

[382] Upon examination of all the sanction letters, it is agreed that the term 'utilization fees' is not defined in any of the letters. The letters only contain the clause, "Utilization Fee: 1%" variously. I also note that the facility letters do not indicate against what amount, the 1% was charged or chargeable. Throughout the sanction letters, there is no explanation of what the term means or what it entails. Counsel for the 1st Defendant emphatically submitted that the meaning of utilization and arrangement fees should be obtained from the sanction letters and nowhere else. However, a look at all the facility letters, which have almost identical clauses, reveals neither a definition nor any assignment of meaning to the terms.

[383] I am unable to agree with Counsel for the 1st Defendant that the terms are so well provided for in the sanction letters such that any extraneous interpretation or assignment of meaning to the terms would amount to introducing new meaning to words and would be contrary to the parole evidence rule. It is clear to me that interpretation of the terms utilization or arrangement fees cannot be restricted to the document evidencing the contract (the sanction letters) since the document is silent on what the terms meant or entailed. If at the time of making the contract, it was assumed that both parties knew what the terms entailed, evidence had revealed that such is not the case; as there is a huge disagreement on the subject. That being the case, the law is that in case of such ambiguity, the same has to be resolved against the party who was in a better position to eliminate the ambiguity, at the time of making

the contract. See: ***Andrew Akol Jacha vs Noah Doka Onzivua, HCCA No. 0001 of 2014 [2016] UGHCLD 64.***

[384] In terms of the parole evidence rule as already discussed herein, such a situation calls in the exceptions to the rule. In the present circumstances, extrinsic evidence assigning meaning to the terms in issue is acceptable and may be relied upon by the Court. According to the meaning assigned to the term 'utilization fee' by the 1st Defendant (through the evidence of DW2), it means a charge for utilizing the facility. This, however, leaves many questions asked by the Plaintiffs unanswered; when was the fee applicable? To which amounts? When was it chargeable? How lawful was it to charge the fee? Among other questions. I agree with Counsel for the Plaintiffs that it is incomprehensible for a bank to charge a client simply for utilizing a loan facility granted to them except in a circumstance where the facility is a revolving credit. The rationale given by the Plaintiffs' Counsel for charging a utilization fee in the case of a revolving credit is clear and comprehensible. But this was not the case herein according to the 1st Defendant's case. In light of the existing ambiguity, the burden lay upon the 1st Defendant to provide the context in which the impugned fees were charged. The 1st Defendant provided no such material. There is, therefore, nothing to satisfy the court that utilization fees were lawfully or regularly chargeable and/or charged in the present case.

[385] As an example of the ambiguous and illegal nature of the charge, Counsel for the Plaintiffs pointed out the charge of utilization fees in the sum UGX 82,000,000/= debited from the 2nd Plaintiff's account on 24th December 2011. At page 10 of Annexture O to its WSD, the 1st Defendant stated that this was utilization fee @ 1% as per the clause in the duly sanction letter dated 03.04.2012. At pages 11-12 of the joint trial bundle, the facility letter refers to an application made by the 2nd Plaintiff on the 30.03.2012. This application is DE-4 at page 838 of Vol. 2 and is dated 30-03-2012. It appears to be the case

that at the time of charging this sum as utilization fee and debiting it from the 2nd Plaintiff's account on 24th December 2011, there was neither the loan application nor an existing facility letter for the facility in issue. I agree that it is incomprehensible that the 2nd Plaintiff was made to pay for utilizing a loan facility that he had neither applied for nor obtained.

[386] The other question was whether, if the fee was applicable, it could be applied to all the loans as if they were new and independent loans from the initial loans. While Counsel for the Plaintiff queried the fact that the bank charged utilization fees more than once for the same loan, Counsel for the 1st Defendant argued that the loans to the 2nd Plaintiff were 12 months' loans renewable at the discretion of the bank. Counsel submitted that for every 12 months when the sanction letters were renewed, the 2nd Plaintiff signed them and agreed to pay the said charges. In one of the sanction letter dated 18th March 2013, at page 152 of Doc. 54, the relevant clause on the term of the loan or advance reads as follows;
"Period: 12 months, subject to demand nature of the advance and renewable at the discretion of the bank (Demand loan shall be repaid, subject to a demand nature of the advance and annual review at the discretion of the bank, in 75 successive monthly installments of USD. 40,0000 each commencing from 31.12.2013 and concluding on 29.02.2020, interest and charges to be paid in addition as and when charged).

[387] It was the argument of Counsel for the Plaintiffs that the above particular loan, and like many others, was not a 12 months' loan but for 75 months up to 29th February 2020. Counsel argued that the renewals of the loans could not have been new loans for which the bank could have charged arrangement fees and utilization fees. On the other hand, the argument by the 1st Defendant's Counsel was that all loans and renewals were 12 months and that upon expiry, the 2nd Plaintiff having opted to renew and signed other facility letters requiring payment of the charges, he was estopped from denying them. I note that this

issue of the term of the loan kept resurfacing during the hearing of the matter and I am inclined to comment on it. From the example set out above of the term of the loan, which I also note is similar in almost all facility letters, there was confusion of whether the loan term was 12 months or 75 months. During cross examination of DW2 at page 1249-1255 of the Record, she failed to explain what the term of the loan was. Having been referred by Counsel for the Plaintiffs to two facility letters at Pages 7 and 15 of the Joint trial bundle where a similar clause appears, DW2 gave no clear answer and stated that she could not speak to this term. When the Court, at page 1254 of the record, sought clarification over this similar term because it was not clear to the Court, the witness testified that the answer she had given earlier was the best she could do and that this was a Crane Bank document.

[388] I have read the facility letters and terms therein. I am of the view that the term of the loan was ambiguous as evidenced by this particular facility letter at page 152 of Doc. 54, in which the loan was for a sum of USD 3,000,000 payable with interest, in 75 successive monthly installments of USD 40,000 each, commencing from 31.12.2013 and concluding on 29.02.2020. Logically, I do not see how a loan of USD 3,000,000, together with interest at 11% p.a. could have been paid in 12 months, in monthly installments of USD 40,000. Clearly, installments of USD 40,000 per month for 12 months give rise to USD 480,000 only which could not have been the intention of the parties at the time of contracting in as far as the terms of repayment were concerned. There is no plausible explanation as to why the 2nd Plaintiff was subjected to signing new facility letters for renewing a running loan and accompanying it with attendant charges as if he were obtaining a totally new facility.

[389] Another case in point still concerns the loan by the facility letter dated 18.03.2013 at page 151 of Doc. 54 for a sum of USD 3,000,000. The 2nd Plaintiff was charged among others; interest, Arrangement fees of 1%, Utilization fees of 1%, legal and documentation fees, Surveyors' fees, advocates'

fees, valuers' fees and insurance. This loan was apparently renewed (together with the loan of USD 2,000,000 which had initially been granted by facility letter dated 24.04.2013 as per page 157 of Doc. 54) by a sanction letter (renewal) dated 29.03.2014 as per page 164 of Doc. 54. In the renewal, I note that the bank charged, all over again, interest, arrangement fees of 1%, Utilization fees of 1%, documentation, registration, search fees, survey fees, valuation fees, together with the attendant disbursements thereto. It ought to be noted that all these charges had already been charged at the time of the initial loan. These same loans were again renewed by sanction letter (Renewal) dated 21.04.2015 as per page 171 of Doc. 54 and I note again, that all the fees were charged all over again. The loan of USD 2,000,000 was renewed again by sanction letter (renewal) dated 21.04.2016 as per page 179 of Doc. 54 and similarly, all the charges were applied all over again, at the discretion of the bank.

[390] I am not prepared to accept that these could have been different loans; so much to the extent that a fresh mortgage had to be executed with all the attendant costs of survey, valuation, registration, among others. This is something that required a plausible explanation by the 1st Defendant if it were to make sense. This is especially so in view of the fact that according to the initial sanction letters, these two loans were payable in 75 successive monthly installments ending on 29.02.2020 for the loan of USD 3,000,000 and 73 installments for the loan of USD 2,000,000 ending on 30.04.2020. I totally accept the insinuation by the Plaintiffs that the renewals were intended for no other purpose but to charge the customer all over and over again with the same charges under the guise that these were different loans, whereas they were not. The conclusion, therefore, is that the charges of utilization and arrangement fees for the renewed loans against the 2nd Plaintiff were illegally effected and the 2nd Plaintiff is entitled to a refund of the debited sums with interest from the date of the respective debits.

[391] I have already pronounced myself on the contention over the legal weight that can be attached to the BOU Consumer Protection Guidelines. The same position applies to the present matter. In view of absence of evidence that these category of fees were among those that could be charged by Crane Bank, this fact points to another aspect of illegality. In view of all my findings above on this matter, I hold that the utilization fees charged against the 2nd Plaintiff amounting to **UGX 221,492,200/=** under Appendix 5 and **USD 138,632** under Appendix 7 were unlawfully charged and the stated sums shall be refunded to the Plaintiffs with interest at 24% per annum for the UGX amount and 12% per annum for the USD amount; from the respective dates of the debits until payment in full. The sum of **USD 51,952** under appendix 10 debited from the 1st Plaintiff's account was already dealt with and awarded herein above.

Paragraph (G) under Issue 4: The Sums of USD 29,832 and UGX 108,992,200/= as irregular arrangement fees under Appendices 8 and 9 of Doc. 54

[392] In paragraphs 10(h), (l), (m), and 11(b), (c), (f), and (g) of the amended plaint, the Plaintiffs challenged the debit of sums charged on them as arrangement fees. These debits were set out under Appendices 8, 9 and 10 at pages 23, 25 and 27 of Doc. 54. The charges were challenged on grounds that they were extortionate and irregular. The Plaintiffs further averred that the charge of arrangement fees on an annual basis was contrary to banking practices and the charges on renewals of facilities which were already running were exorbitant, illegal and extortionate.

[393] The sums queried by the 2nd Plaintiff are; **USD 29,832** comprised of USD 14,140 debited on 23.04.2015; USD 10,152 debited on 04.05.2015 and USD 5,520 debited on 04.05.2016 as particularized in appendix 8 at page 23 of Doc. 54; and **UGX. 108,992,200** charged on the 2nd Plaintiff's UGX account, particularized in appendix 9 at page 25 of Doc. 54 as UGX 82,000,000/= debited on 24.12.2011; UGX 8,000,000/= debited on 12.04.2012; and UGX

18,992,200/= debited on 03.05.2013. On their part, the 1st Plaintiff queried a total sum of **USD 103,904** particularized in Appendix 10 at page 27 of Doc. 54 charged as A/U Fees. I note from the bank statements and counsel's earlier submissions that the sum of USD 103,904 is a total of both utilization and arrangement charges and, having found that **USD 51,952** being half of the entire sum was illegally charged as utilization fees, it follows that arrangement fees challenged by the 1st Plaintiff is the sum of **USD 51,952** charged on the 1st Plaintiff's account on the 3/8/2013 and 8/4/2014.

[394] It is apparent to me that most of the arguments by both Counsel in respect of utilization fees are largely similar to those for arrangement fees. In principle, a large part of my findings concerning the charge of utilization fees apply to the charge of arrangement fees. I will, therefore, deal only with the arguments that are particular to the query of arrangement fees and will not repeat the general arguments.

Submissions by Counsel for the Plaintiffs

[395] Referring to PW1's testimony, Counsel submitted that the Plaintiffs challenged the queried sums as arrangement fees on the ground that they were charged on facilities that already existed and had already been arranged. Counsel argued that the same facilities could not be arranged again for the bank to charge arrangement fees as they had initially been arranged and were still running. Counsel referred to the facility letter at page 151 of Doc. 54, to which the sums under Appendix 8 relates, and stated that the facility letter was for an initial loan of USD 3,000,000, arrangement fees had been charged on the loan initially, the loan was expiring on 29th February 2020, and there was no evidence of a demand from the bank to the 2nd Plaintiff requiring him to pay the loan in 12 months. In relation to appendix 9, Counsel pointed out that this sum was debited from the 2nd Plaintiff's account on 24th December 2011 pursuant to the facility letter of 03.04.2012, which clearly did not exist at the

time. Counsel also pointed out that the sum of UGX 18,992,00/= was charged as arrangement fees for a loan that was already existing.

[396] Counsel emphasized that the Plaintiffs were not challenging the initial charges for arrangement but those charged on renewals of the same facilities for which arrangement fees had already been paid. Counsel submitted that the subsequent charges on renewals of the same loans were illegal, extortionate, irregular, double charges and therefore ought to be refunded to the 2nd Plaintiff.

Submissions by Counsel for the 1st Defendant.

[397] Counsel submitted that having executed sanction letters under which he agreed to pay arrangement fees, the 2nd Plaintiff was bound by the terms of contract. On the Plaintiffs' argument that the subsequent charges of arrangement fees on renewals was illegal, yet the loans were still running, Counsel submitted that according to the sanction letters, the loans would expire every 12 months unless renewed at the discretion of the bank and that having applied for the renewals, signed the renewal sanction letters, and continued to use the facilities, the 2nd Plaintiff's claim for these sums is just an attempt to avoid liability. Counsel submitted that it is not true, as submitted by the Plaintiffs, that the loans of USD 3,000,000 and USD 2,000,000 were expiring on 29.02.2020 and 30.04.2020 respectively. Counsel submitted that according to the facility letters, the loan period was 12 months renewable and any evidence that contradicts the express terms of the written sanction letter would not be admissible under Section 91 of the Evidence Act. Counsel concluded that the debits were lawfully made and therefore the claims for these sums ought to be dismissed.

Determination by the Court

[398] In the preceding section, I have dealt with the aspect of the loan period and I found that, contrary to the assertion by the 1st Defendant's Counsel, the

loan period was not 12 months but rather 75 or 72 months depending on each particular sanction letter. I have also found that the inclusion of the clause for renewal was ambiguous and possibly ill-intended and the bank, as the entity that included the clause, has to suffer the consequence of the ambiguity. In the circumstances, my finding is that the debits made as charges for arrangement fees on purported renewal of already existing facilities were extortionate and unlawful. This finding applies to the debited sums as follows;

a) The Sum of **USD 14,160** debited on the 23.04.2015, as arrangement fees of 0.60% for renewal of the loan of USD 2,360,000 as per sanction letter of 21.04.2015 at page 171 of Doc. 54. According to the said sanction letter, this was a renewal of the loan from the reduction of the loan of USD 3,000,000/=. From the record, the loan of USD 3,000,000 was first arranged and granted pursuant to the sanction letter dated 18.03.2013 at page 151 of Doc. 54. By that sanction letter, the bank charged against the 2nd Plaintiff, arrangement fees of 1%. The loan was payable in 75 successive monthly installments concluding on 29.03.2020 and therefore at the time of the purported renewal on 21.04.2015, albeit disguised as a new loan, the loan was still valid and therefore the charge of arrangement fees on renewal was a double charge, illegal and extortionate. This debited sum of **USD 14,160** shall be refunded to the 2nd Plaintiff with interest at 12% per annum from 23rd April 2015 until full payment.

b) The sum of **USD 10,152** debited on 04.05.2015, as arrangement fees of 0.60% for renewal of the loan of USD 1,692,000 as per sanction letter of 21.04.2015 at page 171 of Doc. 54. According to the said sanction letter, this was a renewal of the loan from the reduction of the loan of USD 2,000,000. Pursuant to the sanction letter dated 24.04.2013 by which this loan was arranged and granted, the bank had charged arrangement fees of 1%. The loan was payable in 72 successive monthly installments concluding on 30.04.2020 and therefore at the time of the purported renewal on 21.04.2015, albeit disguised as a new loan, the loan was still

valid and therefore the charge on renewal was illegal and extortionate. The debited sum of **USD 10,152** shall, therefore, be refunded to the 2nd Plaintiff with interest at 12% per annum from 4th May 2015 until full payment.

c) The sum of **USD 5,520** debited on the 04.05.2016, as 0.5% arrangement fees on the renewal of a loan of USD 1,104,000 as per sanction letter of 21.04.2016 at page 179 of Doc. 54. According to the said sanction letter, this was a renewal of the loan from the reduction of the loan of USD 2,000,000/=. I note from the record that this was the 3rd time this loan was being renewed and arrangement fees were paid on each purported renewal. Considering that the loan was payable in 72 successive monthly installments concluding on 30.04.2020, at all times when the renewals were made, the loan was still one and valid and as I have already found, these charges in arrangement fees on the same loan were extortionate and illegal. Accordingly, the debited sum of **USD 5,520** shall be refunded to the 2nd Plaintiff with interest at 12% per annum from 4th May 2016 until full payment.

d) The sum of **UGX 82,000,000/=** debited on 24.12.2011. As already pointed out, the 1st Defendant did not adduce any facility letter by which this sum was charged as arrangement fees. The sanction letter alluded to by the 1st Defendant, the basis of which this sum was charged, is dated 03.04.2012, over 3 months after the debit. The sanction letter indicates that the application for that loan was made on the 30.03.2012 which is on record. I have already rejected the possibility that arrangement fees could be charged for a facility that had neither been applied for nor granted to the 2nd Plaintiff. This debit was, therefore, illegal and the sum of **UGX 82,000,000/=** shall be refunded to the 2nd Plaintiff with interest at 24% per annum from 24th December 2011 until full payment.

e) The Sum of **UGX 8,000,000/=** debited on 12.04.2012, charged pursuant to the sanction letter dated 03.04.2012 for the overdraft renewal of UGX 1,500,000,000/=. I have found that when this loan was first granted by

sanction letter dated 21.04.2012 at page 129 of Doc. 54, arrangement fees had been charged. This queried charge was therefore not only a double charge but also illegal and extortionate. The debited sum of **UGX 8,000,000/=** shall be refunded to the 2nd Plaintiff with interest at 24% per annum from 12th April 2012 until full payment.

f) The sum of **UGX 18,922,000/=** debited on 03.05.2013, as arrangement fees of 1% on the renewal of a loan of UGX 1,899,220,000/= (reduced from UGX 7,500,000,000/=) and was charged as per sanction letter dated 24.03.2013. The record shows that when the loan of UGX 7,500,000,000/= was first arranged by sanction letter dated 03.04.2012 at page 139 of Doc. 54 and payable in 79 monthly installments (over 6 years) concluding on the 31.03.2019, the bank charged the client 1% arrangement fees which was paid. The renewal on the 24.04.2013, albeit disguised as a new loan, was during the pendency of the loan and therefore unfair, a double charge, illegal and extortionate. The debited sum of **UGX 18,922,000/=** shall, therefore, be refunded to the 2nd Plaintiff with interest at 24% per annum from 3rd May 2013 until full payment.

g) The sum of UGX 10,000,000/= debited on 19.10.12. Although included in the evidence and submissions, I did not find this as a queried sum in the Plaintiffs' pleadings. I have therefore given it no consideration in line with the settled principle against departure from pleadings.

h) Regarding the sum of USD 51,952 charged on the 1st Plaintiff's account on the 3/8/2013 and 8/4/2014 as arrangement fees, I have studied the sanction letters dated 12.07.2013 and 07.04.2014 at pages 191 and 185 of Doc. 54 respectively. They provided for arrangement fees of 1% which translated into USD 38,952 and USD 13,000 for both loans of USD 3,895,200 and USD 1,300,000 respectively. This was a first time charge of arrangement fees. It is the Plaintiffs' own case that arrangement fees for the first time were applicable and chargeable because they covered the cost of arranging the loan and the charge was published by BOU. In

the circumstances, these being arrangement fees that had been charged for the first time on these two loans, I find that the sums were debited lawfully and regularly and are not subject to refund by the 1st Defendant.

[399] The Sum of USD 246,508 that was queried as **unexplained removals** in Paragraph (H) under Issue 4 was apparently abandoned by both Counsel as no submissions were made in respect thereof. I have, therefore, not given it any consideration and the claim concerning the same is rejected. Issue 4 is accordingly answered as per the foregoing discourse.

Issue 5: Whether the Plaintiffs/ Counter Defendants are indebted to the 1st Defendant/ Counter Claimant as claimed in the Counter Claim and, if so, by how much?

Submissions by Counsel for the 1st Defendant/ Counter Claimant

[400] It was submitted by Counsel for the Counter Claimant that by Clause 2.3 of the Purchase of Assets and Assumption of Liabilities Agreement, the Bank of Uganda as Receiver of Crane Bank Limited assigned and transferred to the 1st Defendant/ Counterclaimant the title benefits and interests of Crane Bank Limited in the Assets. The Assets included the Loans and Advances granted or extended by Crane Bank Limited to customers. Counsel stated that on the agreed Completion Date, the Receiver executed assignments in respect of the loans and advances, the credit files and securities relating to the loans and advances; hence property and title in and to the loans and advances passed to the 1st Defendant/Counterclaimant. The loans and advances granted by Crane Bank to the Plaintiffs/Counter Defendants were part of the assets and liabilities transferred to the 1st Defendant/ Counterclaimant and, as such, the Counterclaimant became the successor in title to the securities as a mortgagee.

[401] Counsel submitted that in breach of their contractual obligations with the Counter Claimant, the Counter Defendants defaulted on repayment of their loans to the tune of USD 3,914,406.51 and UGX 45,049,054/= for the 1st Counter Defendant; and USD 1,560,247.64, UGX 24,461 and USD 272.27 for the 2nd Counter Defendant. The Counter Claimant also claimed from the 2nd and 3rd Counter Defendants payment of the sums claimed against the 1st Counter Defendant on account that they had guaranteed payment of the same on demand which they failed to do when a demand was made. Counsel relied on the case of ***Barclays Bank vs Howard M. Bakojja, HCCS No. 53 of 2011*** to the effect that the only compensation for non-payment of a debt is payment of the debt. Counsel prayed that the sums under the counter claim should be repaid together with interest and penalties.

[402] By way of elaboration on the alleged default in repayment, Counsel pointed out that under the Sanction Letter dated 21st April 2016, a demand loan facility of **USD 1,104,000** was renewed to the 2nd Plaintiff by Crane Bank. It was a term of the sanction letter that the loan would be repaid in 12 months subject to the demand nature of the facility. The 2nd Plaintiff/Counter Defendant was to repay in instalments of USD 28,000 per month commencing on 30.09.2016. It was the testimony of DW2 that by the time the Counter Claimant took over the loan under the P&A Agreement, the 2nd Plaintiff/ Counter Defendant was already in default and that meetings were held with the Counter Defendants which did not yield any results. A default notice dated 27th March 2017 was served on the 2nd Plaintiff/Counter Defendant which he acknowledged receipt thereof, as per page 160 of the Joint Trial Bundle. Under the Default Notice, the Counterclaimant demanded that the 2nd Counter Defendant pays the sum of **UGX 11,113/= (Arrears) and USD 1,077,908** within 45 days, failure of which the mortgaged properties would be advertised for sale. The 2nd Counter Defendant did not pay as required, which constituted a breach of the contract. Counsel submitted that according to the sanction letter, failure to pay the demand loan was subject to a penal interest of 15%

until repayment. The demand loan continued to attract interest at the contractual rate and penal interest at 15% p.a. until payment in full.

[403] Counsel further submitted that the claims for monies which the 2nd Plaintiff/ Counter Defendant alleges were removed from his account cannot be taken into account or set off from the loans owed to the Counterclaimant under the loans primarily because of a number of reasons. One, is that the Counter Claimant (DFCU Bank Ltd) and Crane Bank Ltd are separate legal entities and there has never been a merger of the two entities into one. Two, is that the claims by the 2nd Plaintiff/Counter Defendant against Crane Bank for illegal or unlawful deductions were not assumed by DFCU Bank under the P&A Agreement, and were unknown liabilities which were expressly excluded and for which DFCU Bank is not liable. Three, that the claims by the 2nd Plaintiff/Counter Defendant can only be legally pursued against Crane Bank which is the entity that carried out the transactions and which is still an existing entity and can sue and be sued in its own right. Lastly, that the 2nd Plaintiff/ Counter Defendant's claims, if proven, are liabilities of Crane Bank Ltd which cannot be set off against the loans and advances which are the Assets acquired for value by DFCU Bank from Bank of Uganda in its capacity as receiver of Crane Bank Ltd.

Submissions by Counsel for the Plaintiffs/ Counter Defendants

[404] In reply, Counsel for the Counter Defendants submitted that the Plaintiffs/ 1st and 2nd Counter Defendants operated current accounts with the 1st Defendant and its predecessor Crane Bank Limited. They also obtained loans which are the subject of the suit and the counter claim. It is not in dispute that under the facility letters executed by the parties, the Bank as lender was to recover the loan and accrued interest directly from monies on the accounts of the Plaintiffs. The agreement between the parties, as was the testimony of PW2, was that all monies to be removed from the accounts of the Plaintiffs by the Bank was to be done lawfully and would be applied towards

loan repayment. It would follow that if the said sums are applied to the loan repayment to cover part of the principal and accrued interest, the principal sum and interest would have been paid up. Counsel submitted that the 1st and 2nd Counter Defendants are not indebted to the 1st Defendant/ Counter Claimant on account that if the monies unlawfully deducted from their respective USD and UGX accounts were applied to settle their loans, there would not be any liability.

[405] Counsel further submitted that in view of the conflicting claims by the Plaintiffs and the Counter Claimant, it was necessary for the 1st Defendant to provide an account of the computation that gave rise to the sums in dispute. Counsel submitted that, to the contrary, the Counter Claimant has not provided an account or workings of the monies demanded and how they came about. Counsel argued that with no accounts rendered, the sums owed by the Plaintiffs, if any, are not known and will never be known. Counsel pointed out that the certificates of balance attached to DW2's witness statement bear different sums from those in the pleadings on the counterclaim, and no explanation was given for the variation. Indeed, none of the witnesses for the 1st Defendant/ Counter Claimant owned the certificates of balance as they conceded in evidence that they did not participate in making the said documents. Counsel concluded that any amount allegedly due to the Counter Claimant is a result of guess work and a court of law cannot determine issues concerning accounts based on guesswork; any bank that fails to keep proper records of accounts cannot make an ascertainable claim against a customer. Counsel relied on ***Robert Mugo Wa Karanja vs Ecobank (Kenya) Ltd & Another [2019] eKLR***.

[406] Counsel also submitted that the 1st Plaintiff/Counter Defendant under Appendices 1, 6 and 10 of Doc 54 at pages 8-9, 18-19 and 26-27 disputes deduction of sums of UGX 158,975,856/= and USD 109,376.92 while the 2nd Plaintiff/Counter Defendant challenges deduction of total sums of USD

3,599,209 and UGX 3,644,144,310/=. Counsel concluded that even if the Court found that there were any monies due to the Bank, the money owed to the Plaintiffs as unlawfully removed from their accounts is sufficient to cover the claims by the 1st Defendant/Counter Claimant, if any. Counsel also reiterated their submissions in reply to the general defences raised by Counsel for the 1st Defendant/ Counter Claimant.

Determination by the Court

[407] Let me begin by reiterating the position of the Court regarding the argument raised by Counsel for the 1st Defendant/ Counter Claimant as to why a set off is not possible in this case even where the Court has found that illegal deductions were made on the accounts of the Plaintiffs/ 1st and 2nd Counter Defendants. Counsel for the Counter Claimant gave four reasons as set out in their submissions. I need to point out, however, that the Court has already pronounced itself on all the stated matters under Issue 2 in this judgment. That position by the Court thus holds and I will not dwell on these arguments any further.

[408] From the evidence and entire material on record, it is not disputed that there was a contract between Crane Bank Ltd and the Counter Defendants. It is also agreed that the 1st Defendant/ Counter Claimant took over particular assets and assumed particular liabilities of Crane Bank Ltd. The Court has found that the assets and liabilities subject of the present claims constitute part of the assets and liabilities taken over by the Counter Claimant. It is also agreed that the 1st and 2nd Counter Defendants took the various loan facilities as per the relevant facility letters; which form part of the assets taken over by the Counter Claimant. The contention by the Counter Defendants is that the sums claimed by the Counter Claimant have been arrived at erroneously, without taking of any accounts and without regard to the monies illegally and irregularly deducted from the accounts of the 1st and 2nd Plaintiffs/Counter Defendants.

[409] The Counter Claimant led evidence through Agnes Mayanja (DW2/ PW2 under counter claim) to the effect that the loans were not fully paid. The Counter Claimant adduced evidence of several loan facilities as per the 1st Defendant's Supplementary trial bundle Volume 2 at pages 830-884; the sanction letters in the Joint Trial Bundle at pages 1-51 and in Doc 54 at pages 122, 129, 144, 151 and 157. The Counter Claimant adduced certificates of balances in evidence indicating the outstanding amounts of USD 3,032,498.32, UGX 19,891,947 and USD 10.50 as against the 1st Counter Defendant; and USD 1,560,247.64, UGX 24,461/= and USD 272.27 as against the 2nd Counter Defendant which reflected some raise from the amounts indicated in the counter claim allegedly owing to the penal interest of 15%. It was indicated that upon failure to pay, the loan kept accumulating.

[410] The certificates of balance were challenged by the Counter Defendants on the grounds that they bear different sums from those in the pleadings on the counterclaim, and no explanation was given for the variation. Counsel argued that, indeed, none of the witnesses for the 1st Defendant/ Counter Claimant owned the certificates of balance as they conceded in evidence that they did not participate in making the said documents. I also notice that the certificates of balance represent a period running up to July 2019 when this case was already in court. The facts that led to this suit ought to be taken into consideration, at this juncture. It is stated that the Plaintiffs realized that numerous debits had been made by the Bank on their accounts without the funds being applied to reduce their loan obligations. The Plaintiffs undertook an audit or taking of accounts which disclosed the amounts set out in Doc. 54 which formed the basis of the present suit. According to the estimation by the Plaintiffs, they were convinced that the sums illegally or irregularly deducted could be sufficient to offset their loan obligations. They could not, therefore, make any further payments. The Plaintiffs demanded that if the 1st Defendant/Counter Claimant was to establish any further payment due from

the Plaintiffs, they had to take accounts and show a computation as to how they arrived at such amounts. No such computation was adduced in evidence by the 1st Defendant/ Counter Claimant beyond the impugned certificates of balance.

[411] In the circumstances, the figures that are ascertainable on the part of the Counter Claimant are those that were ascertained at the time of instituting the counter claim and any findings and orders herein shall be based on those figures. In my view, it was not possible to keep on applying interest and penalties when the outstanding loan amounts were in dispute and before proper accounts were taken or until the determination of the dispute by the Court. As such, according to available evidence, the sums claimed as against the 2nd Plaintiff/ Counter Defendant as reflected in the Notice of Default of 27th March 2017 (DE 53 and Annexture G2 to the plaint) are **UGX 11,113/= (Arrears) and USD 1,077,908**. The sum claimed against the 1st Plaintiff/ Counter Defendant according to the Notice of Default of 27th March 2017 (DE 57 at page 64 of the Joint Trial Bundle) is **USD 3,032,307**. I have not seen any notice of demand against the 1st Plaintiff/ Counter Defendant in regard to the UGX account and none has been drawn to my attention by the 1st Defendant/Counter Claimant.

[412] On the above premises, I am unable to ascertain with evidence the basis of the figures reflected in the counterclaim. The figures I have been able to ascertain are those reflected in the latest demand notices issued by the time of institution of the suit and the counterclaim; which are **USD 3,032,307** against the 1st Plaintiff/ Counter Defendant on the one hand and **UGX 11,113/= (Arrears) and USD 1,077,908** against the 2nd Plaintiff/ Counter Defendant on the other. These are the sums that I have found due and payable to the 1st Defendant/ Counter Claimant by the Plaintiffs/ 1st and 2nd Counter Defendants jointly and severally. I accordingly find that the Plaintiffs/ 1st and 2nd Counter Defendants are liable to pay the above stated sums upon the

counterclaim. Owing to my previous findings herein above, the payment by the 1st and 2nd Counter Defendants shall be effected by way of a set off depending on the mathematics.

[413] It was claimed by the Plaintiffs/ 1st and 2nd Counter Defendants that before arriving at the outstanding loan balances, the Counter Claimant ought to have taken into account the amounts that were unlawfully or irregularly debited as set out in DOC 54 and should have applied the same towards loan repayment to cover the principal sum and interest. Since the 1st Defendant/ Counter Claimant contested the claims by the Plaintiffs/ Counter Defendants, the said queried sums were clearly not taken into account. I have, however, made specific findings on each of the queried sums or a combination thereof. The sums found to have been illegally or irregularly debited from the accounts of either Plaintiff, when summed up, will be subjected to a set off as against the sums indicated above as due and owing under the counter claim. I will use the tabulation below to illustrate the sums that have been ordered to be refunded to the Plaintiffs/ 1st and 2nd Counter Defendants;

1(A). APPENDIX 1

EXCELLENT ASSORTED MANUFACTURERS LIMITED – UGX ACCOUNT

DATE	**QUERIED AMOUNT (UGX)**	**REFUNDABLE AMOUNT (UGX)**	**INTEREST RATE (p.a.)**	**ACCRUED INTEREST UP TO 16.08.2023**
11/03/13	60,000	60,000	24%	150,312
25/05/13	10,000,000	10,000,000	24%	24,558,904
21/08/13	50,000,000	25,000,000	24%	59,950,684

20/09/13	820,000	820,000	24%	1,950,207
14/10/13	1,220,000	1,220,000	24%	2,882,275
14/10/13	820,000	820,000	24%	1,937,267
21/03/14	213,800	213,800	24%	482,895
21/03/14	213,800	213,800	24%	482,895
24/04/14	50,000,000	50,000,000	24%	112,142,466
TOTAL		**88,347,600**		**204,537,906**

1(B). APPENDICES 6 & 10

EXCELLENT ASSORTED MANUFACTURERS LIMITED – USD ACCOUNT

DATE	**QUERIED AMOUNT (USD)**	**REFUNDABLE AMOUNT (USD)**	**INTEREST RATE (p.a.)**	**ACCRUED INTEREST UP TO 16.08.2023**
03/08/13	77,904	38,952	12%	46,934.5
08/04/14	26,000	13,000	12%	14,604.2
30/06/16	5,472.92	5,472.92	12%	4,683.6
TOTAL		**57,424.92**		**66,222.3**

2(A). APPENDICES 3, 7 & 8

EPHRAIM NTAGANDA – USD ACCOUNT

DATE	QUERIED AMOUNT (USD)	REFUNDABLE AMOUNT (USD)	INTEREST RATE (p.a.)	ACCRUED INTEREST UPTO 16.08.2023
16/06/12	748,000	748,000	12%	1,002,852.8
27/08/12	1,000,000	1,000,000	12%	1,317,041.1
25/03/13	249,800	249,800	12%	311,750.4
28/03/13	299,000	299,000	12%	372,857.1
28/03/14	313,436	313,436	12%	353,246.7
19/06/14	45,000	45,000	12%	49,487.7
27/01/15	49,000	49,000	12%	50,310.3
20/10/15	106,000	106,000	12%	99,564.5
20/10/15	21,000	21,000	13%	19,725.1
20/10/15	14,070.41	14,070.41	12%	13,216.2
05/02/16	13,528.80	13,528.80	12%	12,227.1
05/02/16	11,569.32	11,569.32	12%	10,456.1
05/02/16	11,954.96	11,954.96	12%	10,804.7
05/02/16	11,954.96	11,954.96	12%	10,804.7
07/03/16	11,101.95	11,101.95	12%	9,920.6

30/11/16	12.10	12.10	12%	9.7
05/09/12	10,000	10,000	12%	13,140.8
23/03/13	30,000	30,000	12%	37,459.7
03/05/13	20,000	20,000	12%	24,703.6
01/04/14	20,000	20,000	12%	22,514.0
01/04/14	28,800	28,800	12%	32,420.1
23/04/15	14,160	14,160	12%	14,138.3
04/05/15	10,152	10,152	12%	10,099.7
04/05/16	5,520	5,520	12%	4,827.4
23/04/15	14,160	14,160	12%	14,138.3
04/05/15	10,152	10,152	12%	10,099.7
04/05/16	5,520	5,520	12%	4,827.4
TOTAL		**3,073,882.5**		**3,832,643.8**

2(B). APPENDICES 2, 4, 5 & 9

EPHRAIM NTAGANDA – UGX ACCOUNT

DATE	QUERIED AMOUNT (UGX)	REFUNDABLE AMOUNT (UGX)	INTEREST RATE (p.a.)	ACCRUED INTEREST UP TO 16.08.2023
14/01/11	101,016,500	15,660,000	24%	47,335,246
14/01/11	30,000,000	30,000,000	24%	90,680,548
26/03/11	24,372,000	21,175,000	24%	63,016,800
13/05/11	31,288,000	31,288,000	24%	92,125,587
20/05/11	5,680,000	5,680,000	24%	16,698,266
28/09/11	20,314,000	18,245,000	24%	52,065,736
28/09/11	2,035,000	2,035,000	24%	5,807,277
04/04/12	5,780,000	5,780,000	24%	15,776,075
23/04/12	93,302,000	53,740,000	24%	146,007,899
08/06/12	850,000	850,000	24%	2,283,682
13/09/12	4,050,000	4,050,000	24%	10,622,762
01/10/12	56,546,700	54,387,700	24%	142,010,010
13/11/12	240,000	240,000	24%	619,871
13/11/12	2,000,000	2,000,000	24%	5,165,589

13/12/12	2,400,000	2,400,000	24%	6,198,707
02/04/13	97,253,700	55,851,850	24%	139,112,422
27/06/13	71,144,600	42,873,300	24%	104,361,835
20/09/13	1,630,000	1,630,000	24%	3,876,631
17/04/15	44,500,000	44,500,000	24%	89,039,014
28/04/15	13,874,882	13,874,882	24%	27,661,573
28/04/15	26,492,103	26,492,103	24%	52,815,818
19/05/15	412,000,000	412,000,000	24%	815,692,274
20/05/15	150,000,000	150,000,000	24%	296,876,712
21/05/15	773,849,756	773,849,756	24%	1,531,077,643
26/05/15	26,262,375	26,262,375	24%	51,874,307
28/05/15	119,374,588	119,374,588	24%	235,635,625
29/05/15	360,000,000	360,000,000	24%	710,373,699
25/02/16	4,015,559	4,015,559	24%	7,205,563
29/03/16	40,360,014	40,360,014	24%	71,546,694
01/04/16	454,000,000	454,000,000	24%	803,915,836
14/12/10	60,000,000	60,000,000	24%	182,584,110
20/12/10	15,000,000	15,000,000	24%	45,586,849
26/04/11	15,000,000	15,000,000	24%	44,334,247
15/09/11	10,000,000	10,000,000	24%	28,622,466
24/12/11	82,000,000	82,000,000	24%	229,312,438

12/04/12	8,000,000	8,000,000	24%	21,793,315
05/09/12	12,500,000	12,500,000	24%	32,852,055
03/05/13	18,992,200	18,992,200	24%	46,917,498
24/12/11	82,000,000	82,000,000	24%	229,312,438
12/04/12	8,000,000	8,000,000	24%	21,793,315
03/05/13	18,992,200	18,992,200	24%	46,917,498
TOTAL		**3,103,099,527**		**6,567,505,930**

[414] From the above tabulation, the Plaintiffs are entitled to a refund of the sums that have been proved to have been unlawfully or irregularly debited from their accounts together with interest at the rate of 12% per annum on the amounts in USD and 24% per annum on the amounts in UGX. The principal sums recoverable by the 1st Plaintiff/ 1st Counter Defendant are **USD 57,424.92** and **UGX 88,347,600/=**. The principal sums recoverable by the 2nd Plaintiff/ 2nd Counter Defendant are **USD 3,073,882.5** and **UGX 3,103,099,527/=**. The interest period runs from the date of debit of each sum as shown in the tabulation above. I have indicated that the sums that have been found due and payable on the counterclaim shall be paid by way of set off from the amounts awarded to the Plaintiffs/ 1st and 2nd Counter Defendants. For that reason, I have computed the accrued interest from the date of debit of each sum to the date of judgment; which is taken to be 16th August 2023. The sums accrued in interest will be added to the principal sum for purpose of effecting the set off. Any other interest shall run from the date of judgment until full payment.

[415] In that regard, the accrued interest on the sums awarded to the 1st Plaintiff is **USD 66,222.3** and **UGX 204,537,906/=** for the sums in USD and UGX respectively. The accrued interest for the sums awarded to the 2nd Plaintiff is **USD 3,832,643.8** and **UGX 6,567,505,930/=**. When added to the principal sums, the totals are **USD 123,647.22** and **UGX 292,885,506/=** for the 1st Plaintiff; and **USD 6,906,526.3** and **UGX 9,670,605,457/=** for the 2nd Plaintiff respectively.

[416] Going by the result of the counterclaim, the total sum claimed and awarded against the 1st Plaintiff/ Counter Defendant is **USD 3,032,307**. As against the 2nd Plaintiff/ Counter Defendant, the total sum claimed and awarded is **USD 1,077,908** and **UGX 11,113/=**. These sums would, equally, attract interest at the rate of 12% per annum for the sums in USD and 24% per annum for the sum in UGX. The dates of accrual of interest awarded to the Counter Claimant will, however, defer in view of evidence and my finding that there was contention and lack of clarity as to whether any money was owed to the 1st Defendant/ Counter Claimant and, if so, how much was payable by the Plaintiffs/Counter Defendants as outstanding amounts on their loan facilities. In my view, since this confusion was occasioned by the unprofessional conduct on the part of Crane Bank Ltd, whose liability in respect to the subject matter before the Court was assumed by the 1st Defendant, the 1st Defendant has to suffer the consequence of the confusion. In that regard, interest on the sums awarded under the counter claim would have ran from the date of judgment; since it is at this point that the Plaintiffs/Counter Defendants are in position to ascertain their actual liability under the loan facilities. They cannot reasonably be expected to have paid earlier than this point, going by the contestations that have had to be resolved by the Court.

[417] In the premises, since the 1st and 2nd Counter Defendants were sued jointly and severally, I will add up the sums awarded for and against them for purpose of effecting the set off. As I have indicated above, the total amounts for

the Plaintiffs shall include the principal sums and the accrued interest up to the date of judgment (16th August 2023). It follows, therefore, that any interest subsequently computed by the Plaintiffs on the awarded sums shall run from the date of judgment and decree. It should be noted, however, that in the computation of such subsequent interest, the sums herein awarded as accrued interest (the last column in the tabulation) shall not be subjected to further interest. In other words, no award of compound interest should be deemed to have been made by the Court.

[418] Accordingly, the total sum awarded to both Plaintiffs/ 1st and 2nd Counter Defendants are **USD 3,131,307.42** and **UGX 3,191,537,127/=** (without accrued interest). When added with accrued interest from the respective dates of the debits until the date of judgment (16/08/2023), the sums total to **USD 7,030,173.52** and **UGX 9,963,490,963/=**. On the other hand, the total sums awarded upon the counter claim to the 1st Defendant/ Counter Claimant against the Plaintiffs/ 1st and 2nd Counter Defendants are **USD 4,110,215** and **UGX 11,113/=**. If the award to the Counter Claimant of **USD 4,110,215** is offset from the sum of **USD 7,030,173.52** awarded to the Plaintiffs/ 1st and 2nd Counter Defendants, a balance of **USD 2,919,958.52** remains outstanding in favour of the Plaintiffs/ 1st and 2nd Counter Defendants. The Plaintiffs/ 1st and 2nd Counter Defendants have also been awarded a sum of **UGX 9,963,490,963/=**. The sum awarded on the counterclaim in UGX is **UGX 11,113/=**. When the sum of **UGX 11,113/=** is offset from the Plaintiffs' award of **UGX 9,963,490,963/=**, it leaves a balance of **UGX 9,963,479,850/=** in favour of both Plaintiffs/ 1st and 2nd Counter Defendants.

[419] Consequently, after considering the counterclaim and applying a set off, my finding is that the Plaintiffs/ 1st and 2nd Counter Defendants are entitled to payment by the 1st Defendant/ Counter Claimant of the sum of **USD 2,919,958.52** and **UGX 9,963,479,850/=**. It should be noted that the entire outstanding balance on the USD amount arises from accrued interest. As such,

no interest is payable on that sum. On the other hand, out of the sum of **UGX 9,963,479,850/=**, the sum of **UGX 6,772,079,836/=** arises from accrued interest and no further interest is payable on it. This leaves a balance of **UGX 3,191,400,014/=** which shall be paid by the 1st Defendant/ Counter Claimant to the Plaintiffs/ 1st and 2nd Counter Defendants together with interest at 24% per annum from the date of judgment until full payment. Issue 5 is accordingly answered.

Issue 6: Whether the Counter Defendants are liable to the Counter Claimant as Guarantors for the amounts due and owing under the respective facilities guaranteed?

Submissions by Counsel for the Counter Claimant

[420] Counsel submitted that in the amended WSD and counterclaim, the Counter Claimant sought against the 1st Counter Defendant, as guarantor, the sums due under the loan facilities granted to the 2nd Counter Defendant together with interest and penalties. Counsel submitted that the Counter Claimant has adduced evidence to prove that the 2nd Counter Defendant defaulted on payment for the loan facility; for which reason the guarantee became enforceable. Counsel relied on the provisions of section 71 (1) and (2) of the Contracts Act 2010 to the effect that a guarantor shall be liable to the extent to which a principal debtor is liable and liability of a guarantor takes effect upon default by the principal debtor. Counsel submitted that upon default on payment of the installment on the due date, the Counter Claimant was entitled to serve a demand on the 1st Counter Defendant as guarantor and the latter became liable to pay the claimed sums; failure of which amounted to breach of contract. Counsel prayed that the court orders that whichever amount may not be recovered by the Counterclaimant from the 2nd Counter Defendant, shall be ordered to be paid by the 1st Counter Defendant in full under the terms of the indemnity clause 14.

Submissions by Counsel for the Counter Defendants

[421] Counsel for the Counter Defendants submitted that the position of the law is that where the guarantee was given in addition to the mortgage, the law is that such a guarantee, notwithstanding its being an on demand guarantee, cannot be greater than the obligation of the mortgagor as provided under the Mortgage Act. Counsel cited the case of ***William Sebuliba Kayongo versus Barclays Bank (U) Limited, HCMA No. 325 of 2008***. Counsel submitted that as demonstrated from the relevant sanction letters, it is clear that the guarantees provided by the 1st, 2nd and 3rd Counter Defendants were among and or in addition to the securities provided by the Plaintiffs and therefore, their obligation cannot be greater than that of the mortgagors. Counsel cited the case of ***Paul Kasagga & Anor Vs. Barclays Bank (U) Ltd HCMA No. 113 of 2008*** to the effect that the guarantor's liability for the non-performance of the principal debtor's obligation is co-extensive with that obligation. If the principal debtor's obligation turns out not to exist or is void, diminished or discharged, so is the guarantor's obligation in respect thereof. A guarantee obligation is secondary and accessory to the obligation the performance of which is guaranteed. The guarantor undertakes that the principal debtor will perform his obligations to the creditor and that the guarantor will be liable to the creditor if the principal debtor does not perform. Counsel submitted that the 1st, 2nd and 3rd Counter Defendants' individual liability as guarantors is co-extensive with the Plaintiffs' obligation who were the principal borrowers.

[422] Counsel argued that since the Plaintiffs/ 1st and 2nd Counter Defendants challenged the claims by the Counter Claimant, pending court's determination of the extent of the Plaintiffs' indebtedness to the 1st Defendant, the extent of the Counter Defendants' liability as guarantors remains undetermined. Counsel, therefore, prayed that in view of the reasons stated above, the Court should find that the Counter Defendants' liability does not arise in the circumstances; and that the Counterclaimant has no valid and sustainable

cause of action against them in the counterclaim and the counterclaim should be dismissed with costs.

Determination by the Court

[423] It is trite law that where a contract of guarantee is executed and the principal debtor fails to pay, the guarantor is liable to meet the principal obligation. Section 71 (1) of the Contracts Act 2010 provides that the liability of a guarantor shall be to the extent to which a principal debtor is liable, unless otherwise provided by contract. Section 71(2) of the Act provides that liability of a guarantor takes effect upon default by the principal debtor. In law, under a contract of guarantee, the guarantor promises the lender to be responsible, in addition to the principal borrower, for the due performance by the principal of their existing or future obligations. The guarantor thereby promises or undertakes that he/she will be personally liable for the debt, default or miscarriage of the principal. The guarantor's liability is ancillary or secondary to that of the principal who remains primarily liable to the creditor. There is no liability on the guarantor unless and until the principal has failed to perform his obligations. See: ***Moschi v Lep Air Services and Ors [1973] AC 345*** and ***Paul Kasagga & Anor v Barclays Bank HCMA No. 113 of 2008***.

[424] On the case before me, it is not disputed that the Counter Defendants executed a contract of guarantee in respect of monies borrowed by the 1st and 2nd Plaintiffs and that demand notices were issued in respect of the default on payment. As found above, however, by the time the respective demand notices were issued, there was a dispute as to whether the 1st and 2nd Counter Defendants owed any monies to the Counter Claimant. I am therefore in agreement with the submission by Counsel for the Counter Defendants that until the Court resolved that contention, it was not possible to establish a default by the principal debtors and, as such, the liability of the guarantors could not be triggered. Secondly, after establishing the claims by the Counter Claimant as shown above, it has been found by the Court that the claims by

the Counter Claimant are to be settled by a set off. The sums that have been awarded to the Plaintiffs/ 1st and 2nd Counter Defendants have been applied, jointly and severally, to set off the sums awarded under the counterclaim. Once such is done successfully, the claim under the guarantee becomes extinguished. My finding, therefore, is that since the principal debtors have settled their obligations by way of set off, there is no reason to resort to the guarantees. On basis of the contract of guarantee, the 1st, 2nd and 3rd Counter Defendants are discharged under the said guarantees. This issue is accordingly answered in the negative.

Issue 7: Whether the actions of the Statutory Manager of Crane Bank were lawful and, if so, whether they adversely affected the Plaintiffs?

Submissions by Counsel for the Plaintiffs

[425] Counsel submitted that according to the pleadings, when the Plaintiffs were faced with demands for payment of the loans, they sought to sell some of their securities. However, aware of the time constraints in the sale, the 1st Defendant delayed communication with the buyers, thereby frustrating the sale. Further, that the Statutory Manager of Crane Bank Ltd at the time, frustrated the Plaintiffs' efforts to settle the then claimed monies and demanded 10% of the proceeds of the intended sale as a pre-condition for allowing early repayment, yet the sanction letters did not provide for the alleged early repayment charges or penalties. Counsel stated that because of the statutory manager's actions, the sale was frustrated which made the Plaintiffs lose the buyers and the sale of the property abated leaving the Plaintiffs in debt. Counsel stated that this was at the time when the Plaintiffs genuinely believed to have been indebted to the 1st Defendant before they discovered the irregular and unlawful deductions of money from their accounts. Counsel prayed that the Court finds that the Statutory Manager did not act in good faith, was not diligent and acted without due regard to the interests of Crane Bank Ltd at the time and the Plaintiffs as creditors and therefore breached his

duties and the sound banking and financial principles which adversely affected the Plaintiffs.

Submissions by Counsel for the 1st Defendant

[426] In reply, Counsel for the 1st Defendant submitted that the statutory manager acted at all times promptly and lawfully as per his duties under Sections 89(10), 90(4)(b) of the Financial Institutions Act and did everything to salvage the transaction. Counsel stated that the 10% contingency fund proposed by the statutory manager was a work around intended to assist the 1st Plaintiff to overcome the contractual thirty-day notice period and that a balance of it was to be refunded upon satisfaction of the EIB charges and prepayment indemnity which had not yet been determined by EIB. Counsel argued that such did not amount to a clog on the equity of redemption on account of having failed to pay the sums due including the prepayment indemnity. Counsel concluded that the 1st Defendant is not liable for the actions of the statutory manager since, in any event, they were lawful and did not cause any loss or damage to the Plaintiffs.

Determination by the Court

[427] I have taken into consideration the submissions of both Counsel particularly on the process of appointment and duties of a statutory manager which I have found helpful in the determination of this matter. I am of the view that the actions of the statutory manager were within his power and discretion and, although it can be agreed that the delay in communication frustrated the planned sale, the connection of that incident to the default by the Plaintiffs was remote. In my view, whatever the result of the planned sale, it would not have resolved the dispute between the Plaintiffs and the 1st Defendant. In any case, there were no proper accounts indicating the standing of the Plaintiffs' liabilities and shortly later, the Plaintiffs raised the contentions that led to the present suit. I do not find anything to make me think that the conduct of the statutory manger could have made a difference in this set of circumstances. I

also do not find that the said conduct amounted to a clog on the equity of redemption. I have not found evidence that the statutory manager acted unlawfully or that his conduct adversely affected the Plaintiffs in any substantial manner.

Issue 8: Whether the 1st Defendant is entitled to enforce the securities over the property comprised in Busiro Plot 978 Block 333 Land at Nabbingo, Plot 1506 Busiro Block 33 Land at Nabbingo and Plot 75 Kampala Road (together with the plot of land situate between Plot 75 Kampala Road and Plot 20 Buganda Road Kampala FRV 1276 Folio 18) to recover the amounts outstanding under the respective loans?

Submissions by Counsel for the Plaintiffs

[428] Counsel for the Plaintiffs relied on the provisions of Order 7 Rule 7 of the CPR and the case of ***Muhwezi v Irene Number One & Anor HCCA No. 66*** *of* ***2009*** to the effect that a party seeking reliefs in court should make specific averment as to the reliefs sought either simply or in the alternative. Counsel argued that the 1st Defendant having specifically and intentionally excluded the land comprised in **FRV 1352 Folio 5 Plot 302 Block 21 at Busega (now FRV 1352 Folio 5 Plot 1220 Kibuga Block 21 at Busega)** among the properties it sought for enforcement of securities to recover amounts outstanding under the respective loans, cannot turn around and seek to enforce against the same. Counsel stated that the debt sought to be recovered is unknown on the basis that the amounts on the certificates of balance neither show how they accrued nor were the sums erroneously deducted taken into account before the demand was made. Counsel prayed that the 1st Defendant be ordered to surrender the title for the property comprised in FRV 1352 Folio 5 Plot 302 Block 21 at Busega, (now FRV 1352 Folio 5 Plot 1220 Kibuga Block 21 Busega) to the Plaintiffs and that the 1st Defendant's mortgage encumbrance thereon be vacated.

[429] Regarding the properties comprised in Busiro Plot 978 Block 333 Land at Nabbingo, Plot 1506 Busiro Block 333 Land at Nabingo and Plot 75 Kampala Road (together with that Plot of land situate between Plot 75 Kampala Road and Plot 20 Buganda Road Kampala FRV 1276 Folio 18), Counsel argued that the 1st Defendant can only be entitled to an order to enforce against the said securities, upon proof that there was default by the Plaintiffs and that there are outstanding sums under the facilities. Counsel also stated that over and above the securities held by the 1st Defendant, the 1st Defendant holds in escrow account, the 1st Plaintiff's money in the sum of UGX 2,750,000,000/= (Uganda Shillings, Two Billion, Seven Hundred and Fifty Million), in two sets, namely; UGX 2,400,000,000/= received from National Water and Sewerage Corporation (NWSC), on account of the 1st Plaintiff, deposited pursuant to a consent order in HCMA No. 675 of 2017 dated 6th November 2018 and is still in the possession of the 1st Defendant as a lien or security under the impugned facilities; and UGX 350,000,000/= received from the Uganda National Roads Authority (UNRA) as compensation for land taken by UNRA to construct the Entebbe Mpigi Express way. Counsel submitted that there is no justification for the 1st Defendant exercising its statutory power of sale and/or continuing to withhold the Plaintiffs' titles. Counsel prayed to the Court to order the 1st Defendant to release the sum of UGX 2,750,000,000/= held by the 1st Defendant/Counterclaimant to the Plaintiffs.

Submissions by Counsel for the 1st Defendant

[430] Counsel for the 1st Defendant/ Counter Claimant stated that the Plaintiffs' argument that the title should be released to them is misconceived since the right of the counter claimant as mortgagee to enforce security mortgaged to it does not arise from obtaining a court order but rather from the provisions under Section 20(e) of the Mortgage Act. Counsel argued that in terms of the executed mortgage document, its enforcement does not matter whether it was pleaded in the current suit or not. Counsel also submitted that the said property is subject of litigation between the 1st Plaintiff/ Counter

Defendant and the 2nd Defendant in this present suit concerning the legality of issuing the certificate of title for that property. The Counter Claimant, therefore, elected to await a decision on the matter since it has a bearing on the legality of the mortgage executed on the said property. Counsel argued that by doing so, the Counter Claimant cannot be deprived of its rights as mortgagee without receiving the sums secured by the mortgage. Regarding the sum of UGX 2,750,000,000/= held on its account with the Counter Claimant pursuant to the consent order in HCMA No. 675 of 2017, Counsel prayed that the same be applied towards settlement of the obligations of the 1st Counter Defendant both as guarantor and borrower.

Determination by the Court

[431] Given the findings upon determination of the counterclaim, all the sums that were proved as outstanding on the existing mortgages between the Plaintiffs and the 1st Defendant/ Counter Claimant have been settled by way of a set off by applying sums that have been awarded to the Plaintiffs under this judgment. It follows, therefore, that by the said set off, the Plaintiffs/ 1st and 2nd Counter Defendants have satisfied their obligations under the mortgages in issue. The 1st Defendant/ Counter Claimant, therefore, has no further claims on the mortgaged property and upon the principle of equity of redemption, the Plaintiffs are entitled to release of the properties in issue, including the property comprised on FRV 1352 Folio 5 Plot 302 Block 21 at Busega, (now FRV 1352 Folio 5 Plot 1220 Kibuga Block 21 Busega), which is said to have been omitted in the prayers made by the parties. In that regard, therefore, the 1st Defendant is not entitled to enforce the securities over the property comprised in Busiro Plot 978 Block 333 Land at Nabbingo; Plot 1506 Busiro Block 33 Land at Nabbingo; Plot 75 Kampala Road (together with the plot of land situate between Plot 75 Kampala Road and Plot 20 Buganda Road Kampala FRV 1276 Folio 18) and FRV 1352 Folio 5 Plot 302 Block 21 at Busega, (now FRV 1352 Folio 5 Plot 1220 Kibuga Block 21 Busega); since there

are no outstanding amounts recoverable under the respective loan facilities. The said properties are accordingly released from the respective mortgages.

[432] Regarding the sum of UGX 2,750,000,000/=, the sum is confirmed to be held on account by the 1st Defendant. There is no dispute that it belongs to the 1st Plaintiff. Since all the 1st Defendant's claims on the loan facilities have been satisfied, the 1st Plaintiff is entitled to recovery of the sum of **UGX 2,750,000,000/=**. There is mention in evidence that the said sum was kept on an escrow account. As such, it appears that the money was not doing business for the 1st Defendant. I will, therefore, make no order for interest on the said sum.

Issue 9: Whether the title comprised in FRV 1352 Folio 5 Plot 302 Block 21 is valid, and, if so, whether the actions taken or proposed to be taken by the 2nd Defendant to cancel the said title are lawful?

Submissions by Counsel for the Plaintiffs

[433] Counsel for the Plaintiffs submitted that the 1st Plaintiff sued the 2nd Defendant for the act of issuing a notice of intention to effect changes in the register on Kibuga Block 21 Plot 302 Land at Busega, FRV 1352 Folio 5 belonging to the 1st Plaintiff. Counsel stated that as per the notice dated 2nd March 2017, the 2nd Defendant intended to rectify the register by cancelling the 1st Plaintiff's title for the said land. The contention by the 1st Plaintiff is that the conduct of the 2nd Defendant was illegal. Counsel submitted that the allegation upon which the 2nd Defendant's notice was based to the effect that the land in issue is situate in a wetland and that the title issued thereof was invalid and illegal; was an unfounded and wrong allegation. Counsel pointed out that in its WSD, the 2nd Defendant averred that it did not take the decision to cancel the 1st Plaintiff's title when it communicated the intended cancellation of the title and that the impugned notice was issued in good faith and was intended to give the 1st Plaintiff the forum to be heard as required by the relevant statute.

[434] Counsel submitted that under *Section 59 of the RTA*, the production of a certificate of title issued by the office of the 2nd Defendant is conclusive evidence that the title is valid and the title cannot be impeached save on grounds of fraud or illegality attributed to the registered proprietor. Counsel further submitted that under the law, for areas considered as wetlands to be protected, such areas must be gazetted. Counsel argued that the 2nd Defendant cannot wake up and unilaterally declare and determine that certain land is a wetland and proceed to cancel titles previously issued by them. Counsel referred the Court to ***Asuman Irunga & Others versus AG & Others, HCMA No. 258 of 2017***. Counsel also argued that the law does not bar a person from owning a proprietary interest in land said to be a wetland and from acquiring a valid title thereto, unless the land was hitherto gazetted as such. The law only bars a person from using the land in a manner that affects the environment. See: ***Amooti Nyakana versus Attorney General & 2 Others, Constitutional Appeal No. 05 of 2011*** **[Per Katureebe CJ, (as he was then)]**.

[435] Counsel further submitted that according to the evidence by PW2, before taking the land in issue as collateral, the officials of the bank visited and valued the property, and advised the European Investment Bank (EIB) confirming that the property was good collateral which was the basis of the loan. Later on, part of the land was compulsorily acquired by UNRA after which UNRA refused to pay the assessed value of the acquired land, whereof the 1st Plaintiff sued UNRA and obtained a judgment in its favour. It is stated by PW2 that in order to circumvent the implementation of the judgment, UNRA initiated processes with the 2nd Defendant to cancel the 1st Plaintiff's certificate of title for ***FRV 1352 Folio 5 Plot 302 Block 21*** hence issuing the notice to effect changes on the register with the intention to cancel the title. Counsel submitted that if it were not for an injunction issued by the Court restraining the cancellation until the hearing and determination of this suit, the 2nd Defendant was bent on effecting the cancellation.

[436] Counsel finally argued that the title was valid and there was no evidence showing that the suit land falls within a gazetted wetland. Counsel stated that according to the evidence adduced for the 2nd Defendant by DW4, the title was validly issued by the 2nd Defendant and it remains valid unless cancelled. Counsel further argued that the subsequent transactions of subdivision of the land and transferring part of it to NWSC, a government entity, during the pendency of this suit clearly confirms that the suit land is not in any gazetted wetland, the title thereto is valid and was legally issued. Counsel prayed to the Court to find as such and further find that the actions taken or intended to be taken by the 2nd Defendant were unlawful.

Submissions by Counsel for the 2nd Defendant

[437] Counsel for the 2nd Defendant relied on the provisions of Section 91 of the Land Act which confers special powers on the Commissioner Land Registration to cancel or correct a certificate of title or an instrument that was issued in error, illegally or wrongfully obtained and submitted that the 2nd Defendant, acting on a complaint from UNRA that the 1st Plaintiff's land was in a wetland and its title had been illegally issued, commenced the process of cancellation of the title but the same process was stopped by an order of court. Counsel argued that the 2nd Defendant has never cancelled the 1st Plaintiff's title and the same title was later subdivided following a consent of the parties. The residue title, now comprised in FRV 1352 Folio 5 Plot 1220 Kibuga Block 21 Busega, is still registered in the names of the 1st Plaintiff. Counsel further submitted that it would be immature to answer the question of legality of the title since investigations on the matter have never been concluded. Counsel also submitted that the subdivision of the title does not lead to a conclusion that the title is valid and that it was a matter for NEMA to determine. Counsel also pointed out that the 2nd Defendant took the steps envisaged under the law and did not pronounce itself on the legality of the title while complying with the injunctive order issued by the court.

Determination by the Court

[438] Under Section 91(1) and (2) of the Land Act Cap 227, the 2nd Defendant is vested with special powers to call for a duplicate certificate of title or instrument for cancellation or correction where, among others, the certificate of title or instrument is illegally or wrongfully obtained. In the present case, the Plaintiffs challenge the 2nd Defendant's action of calling for the certificate of title to land comprised in **FRV 1352 Folio 5 Plot 302 Block 21** for cancellation on the basis that the title was issued illegally for the land being in a wetland. The position of the law set out by Counsel for the Plaintiffs present the correct position of the law on the matter. It is a requirement under the law that for an area considered as a wetland to be protected, it must be gazetted. The determination cannot be based on an individual's subjective opinion. Certainly, it cannot be open to an authority such as the 2nd Defendant to unilaterally declare and determine that certain land is a wetland and proceed to cancel a certificate of title previously issued over that land. See: *Sections 54 and 179(2)(g) of the National Environment Act No. 5 of 2019 and Regulation 8 of the National Environment (Wetlands, River Banks & Lake Shores Management) Regulations S.I No. 3 of 2000* and the case of ***Asuman Irunga & Others vs Attorney General & Others, HCMA No. 258 of 2017***. It is also the true position that unless a particular piece of land is gazetted as a wetland, the law does not bar a person from owning a proprietary interest in such land or from acquiring a valid title thereto. The law only bars a person from using the land in a manner that negatively affects the environment. See: ***Amooti Nyakana versus Attorney General & 2 Others, Constitutional Appeal No. 05 of 2011*** **[Per Katureebe CJ, (as he was then)]**.

[439] On the case before me, no evidence was led to prove that the land in issue falls under a protected wetland or that it was put to use that is contrary to the law. A certificate of title was already issued to the 1st Defendant and the same has not been impeached. The special power of the 2nd Defendant under

Section 91 of the Land Act is applicable where the matter is not before the Court. Where a dispute over propriety of ownership of land is before the Court, then recourse cannot be taken to the said powers of the 2nd Defendant. Counsel for the 2nd Defendant appears to argue that since the 2nd Defendant had not yet investigated the allegation of illegality of issuance of the said title, it is premature for this mater to be handled by the Court. I find this argument misconceived. Once the Court takes cognizance of a matter concerning land under the RTA, then the Commissioner ceases to have jurisdiction to exercise the power under Section 91 of the Land Act. Whatever material that is in possession of the Commissioner regarding any alleged illegality of the title would have to be produced in the court for consideration.

[440] In the circumstances, although there was, at the time, no bar for the 2nd Defendant to investigate the allegation made over the land in issue, the fact that the matter was brought to the Court and an injunction was issued against any cancellation of the title put the matter outside the realm of the 2nd Defendant's power of cancellation. In view of absence of any evidence capable of impeaching the certificate of title in issue, it is my finding that the certificate of title for land comprised in **FRV 1352 Folio 5 Plot 302 Block 21** is valid and was lawfully issued. Since the 2nd Defendant had not made a decision to cancel the title, no act of illegality was committed by the entity. There was no bar, at the time, to the 2nd Defendant issuing a notice for purpose of investigating the matter. As such, a declaration shall issue to the effect that the said certificate of title was validly issued and the same is not liable to cancellation. A permanent injunction shall also issue against the 2nd Defendant restraining the entity from taking any action directed towards cancellation of the said title. Lastly, since the said title was sub-divided under the authority of the 2nd Defendant with the consent of the parties, to the benefit of two government agencies (NWSC and UNRA), the residue on the title shall be returned to the 1st Plaintiff.

Issue 10: What remedies are available to the parties?

[441] The Plaintiffs sought several declarations and orders against the Defendants in the suit. At the end, I will summarize the reliefs granted. The 1st Defendant/ Counter Claimant also sought several reliefs against the 1st, 2nd and 3rd Counter Defendants. The 3rd Counter Defendant has been discharged since it was unnecessary to invoke any liability on the contract of guarantee given that the 1st and 2nd Counter Defendants were in position to extinguish any existing liabilities in their capacity as principal debtors. Those liabilities have been extinguished by way of a set off as shown herein above. After the set off, the sums awarded under the counterclaim to the 1st Defendant/ Counter Claimant have been applied towards reducing the awards made to the Plaintiffs/ 1st and 2nd Counter Defendants. The outstanding balances shall be paid to the Plaintiffs in the sum of **USD 2,919,958.52** and **UGX 9,963,479,850/=**. Out of the sum of **UGX 9,963,479,850/=**, only **UGX 3,191,400,014/=** shall attract interest at the rate of 24% per annum from the date of judgment till full payment. For reasons already given, the other awards above shall not attract any interest. The Plaintiffs are also entitled to refund of the sum of **UGX 2,750,000,000/=** that is held on account by the 1st Defendant. The same shall carry no interest for reasons already stated. The other declarations and orders sought by the Counter Claimant have not been made out and are accordingly rejected.

General Damages

[442] The Plaintiffs prayed for general damages against the Defendants for loss and inconvenience. Counsel for the Plaintiffs submitted that the evidence adduced by the Plaintiffs has demonstrated the reckless, irresponsible and negligent manner in which the Plaintiffs' accounts were dealt with by the Defendant's predecessor. This includes evidence of the various sums of money removed from the Plaintiffs' accounts without their knowledge and authority;

which exposed the Plaintiffs to default. Counsel pointed out that at the time the default notices were issued, lots of money had been removed from the accounts and, if that money had been used to settle the loans or interest, the Plaintiffs would not be in default. Counsel stated that the Plaintiffs were subjected to enormous inconvenience as they were issued notices of sale of their properties. The Plaintiffs struggled to even look for buyers to salvage their properties and to settle the loans and interest, unaware at the time that enormous sums of money had been removed from their accounts. Counsel argued that the conduct of the bank was extra ordinary as can be seen from the admission by DW2 in evidence that some of the entries made by the bank were not ordinary. Counsel further argued that all these consequences were inherited by the 1st Defendant, which voluntarily assumed the liabilities. The 1st Defendant itself made the position of the Plaintiffs worse when it insisted on foreclosing on their properties. Counsel concluded that in all the above circumstances, the Plaintiffs are entitled to an award of general damages for the inconvenience meted out on them by the 1st Defendant and its officials or those of its predecessor in title. Counsel proposed a sum UGX 1,000,000,000/= (One billion shillings) for each of the Plaintiffs as general damages. There was no response to this submission by Counsel for the 1st Defendant. No submission was made as against the 2nd Defendant and I will make no consideration of award of general damages as against the 2nd Defendant.

[443] The law on general damages is that the damages are awarded at the discretion of the Court and the purpose is to restore the aggrieved person to the position they would have been in had the breach or wrong not occurred. *See**: Hadley v. Baxendale (1894) 9 Exch 341; Charles Acire v. M. Engola, H. C. Civil Suit No. 143 of 1993*** and ***Kibimba Rice Ltd v. Umar Salim, S. C. Civil Appeal No. 17 of 1992.*** In the assessment of general damages, the court should be guided by the value of the subject matter, the economic inconvenience that the plaintiff may have been put through and the nature and extent of the injury suffered. ***See: Uganda Commercial Bank v. Kigozi***

[2002] 1 EA 305). The damages available for breach of contract are measured in a similar way as loss due to personal injury.

[444] In the present case, the Plaintiffs have shown the nature of inconvenience occasioned to them as a result of the conduct of the 1st Defendant and its predecessor in title. The inconvenience was financial, physical and emotional. The issue of liability of the 1st Defendant for the acts of its predecessor in title has already been resolved. I therefore find that the Plaintiffs are entitled to compensation by way of general damages. Given the facts and evidence before me, it is difficult to separate the injury suffered by each of the Plaintiffs distinctly. In my assessment, I will make a joint award of general damages. Taking all circumstances into consideration, I find a sum of **UGX 500,000,00/=** appropriate as general damages in the matter and I award the same to the Plaintiffs.

Punitive Damages

[445] The Plaintiffs made a claim for punitive damages on the ground that the manner in which the Plaintiffs' accounts were mismanaged was high handed. Counsel stated that the officials of the bank could deal with the accounts the way they deemed fit; not in the interest of the customer but of the bank. The bank denied the customer any tax benefit and any vouchers were in the names of the bank. Counsel prayed for punitive damages to the tune of UGX 500,000,000/= (Uganda Shillings, Five Hundred Million) for each Plaintiff.

[446] Under the law, punitive damages are expressed by way of exemplary damages. Exemplary damages represent a sum of money of a penal nature in addition to the compensatory damages given for loss or suffering occasioned to the plaintiff. The rationale behind the award of exemplary/punitive damages is to punish the defendant and deter him from repeating the wrongful act and should not be used as means to enrich the Plaintiff. According to the dictum by **Lord McCardle J**, in ***Butterworth v Butterworth & Engle field [1920] P126***,

"*simply put, the expression exemplary damages means damages for example's sake''*.

[447] According to decided cases, there are only three categories of cases in which exemplary damages are awarded, namely; (a) where there has been oppressive, arbitrary, or unconstitutional action by the servants of the government; (b) where the defendant's conduct has been calculated by him to make a profit which may well exceed the compensation payable to the plaintiff; or (c) where some law for the time being in force authorizes the award of exemplary damages. Three other considerations must also be borne in mind before making an award of exemplary damages, namely; (i) the plaintiff cannot recover exemplary damages unless he or she is the victim of punishable behavior; (ii) the power to award exemplary damages should be used with restraint; and (iii) the means of the parties are material in the assessment of exemplary damages. See: ***Rookes V. Barnard*** ***[1946] ALL ER 367 at 410, 411*** and ***Fredrick J. K. Zaabwe v. Orient Bank & Others, SC Civil Appeal No. 4 of 2006***.

[448] On the case before me, I agree that evidence has disclosed wanton and reckless conduct on part of Crane Bank Ltd in the way the entity dealt with the accounts of the Plaintiffs. In my view, it is necessary to pass a message that no financial institution should reserve the liberty to conduct financial business in such a manner. Indeed, if Crane Bank Ltd was the defendant in this suit, I would have had no hesitation to make an award of exemplary damages against them. Nevertheless, although I have come to the conclusion that the 1st Defendant assumed the liabilities subject of this suit, I do not hold the view that the 1st Defendant should bear the punitive consequences of wanton and reckless conduct of another entity. In my opinion, the compensatory consequences that have been borne by the 1st Defendant are sufficient to meet the ends of justice to both parties and are in better alignment with the

liabilities that could have been in the contemplation of the 1st Defendant. For those reasons, I have not made any award of exemplary/punitive damages.

Interest

[449] I have already made a detailed pronouncement and application of interest in this matter. I will not dwell on it any further except in the case of general damages. Basing on the rationale already set out, I accordingly award interest on general damages at the rate of 8% per annum from the date of judgement till payment in full.

Costs

[450] Under *Section 27 of the Civil Procedure Act,* costs follow the event unless the court upon good cause determines otherwise. Given the findings above, the Plaintiffs are entitled to costs of the suit and the same are awarded to them. Since the counterclaim succeeded in part, the 1st Defendant shall have half of the costs of the counterclaim which shall be assessed and offset from the general costs of the suit. Regarding the suit against the 2nd Defendant, it is ordered that each party shall bear their own costs.

Decision of the Court

[451] In all therefore, the suit by the Plaintiffs substantially succeeds while the counterclaim has succeeded in part. Judgement and decree are accordingly entered for the Plaintiffs against the Defendants severally with the following declarations and orders;

a) A declaration that the 1st Defendant through its predecessor in title breached contractual and fiduciary duties/obligations owed to the Plaintiffs by dealing with the Plaintiffs' accounts in an unlawful, unauthorized and/or irregular manner.

b) A declaration that the 1st Plaintiff's certificate of title for land then comprised in Plot 302 Kibuga Block 21 FRV 1352 Folio 5 at Busega

Kampala (and now comprised in FRV 1352 Folio 5 Plot 1220 Kibuga Block 21 Busega after subdivision) was lawfully issued, is valid and is not liable to cancellation by the 2nd Defendant.

c) A declaration that the 1st Defendant is not entitled to enforce the securities over the properties comprised in Busiro Plot 978 Block 333 Land at Nabbingo; Plot 1506 Busiro Block 33 Land at Nabbingo; Plot 75 Kampala Road (together with the plot of land situate between Plot 75 Kampala Road and Plot 20 Buganda Road Kampala FRV 1276 Folio 18) and FRV 1352 Folio 5 Plot 302 Block 21 at Busega, (now FRV 1352 Folio 5 Plot 1220 Kibuga Block 21 Busega); and the Plaintiffs are entitled to have the said properties released from the respective mortgages.

d) Orders for;
   i) Payment of the sum of **USD 2,919,958.52** and **UGX 9,963,479,850/=** by the 1st Defendant to the Plaintiffs being the outstanding balances after applying a set off.
   ii) Delivery to the Plaintiffs of the sum of **UGX 2,750,000,000/=** that is held on account by the 1st Defendant.
   iii) Payment by the 1st Defendant of a sum of **UGX 500,000,000/=** as general damages to the Plaintiffs.
   iv) Payment of interest on the sum of **UGX 3,191,400,014/=** (being part of the sum of **UGX 9,963,479,850/=** under item (d)(i) above) at the rate of 24% per annum from the date of judgment until full payment.
   v) Payment of interest on general damages under item (d)(iii) at the rate of 8% per annum from the date of judgment until full payment.
   vi) Release of certificates of title for properties comprised in Busiro Plot 978 Block 333 Land at Nabbingo; Plot 1506 Busiro Block 33 Land at Nabbingo; Plot 75 Kampala Road (together with the plot of

land situate between Plot 75 Kampala Road and Plot 20 Buganda Road Kampala FRV 1276 Folio 18) and FRV 1352 Folio 5 Plot 302 Block 21 at Busega, (now FRV 1352 Folio 5 Plot 1220 Kibuga Block 21 Busega); within forty-five (45) days from the date of judgment.

vii) Removal of any mortgage encumbrances on the above stated certificates of titles that had been entered in favour of the 1st Defendant or its predecessor. The 1st Defendant shall issue release letters to the Plaintiffs within thirty (30) days from the date of judgment and the 2nd Defendant shall effect removal of the encumbrances within thirty (30) days from the date of issue of the release letters.

viii) A permanent injunction restraining the 2nd Defendant from taking any action directed towards cancellation of the certificate of title for land then comprised in Plot 302 Kibuga Block 21 FRV 1352 Folio 5 at Busega Kampala (now FRV 1352 Folio 5 Plot 1220 Kibuga Block 21 Busega).

ix) Payment of costs of the suit to the Plaintiffs by the 1st Defendant. Since the counterclaim succeeded in part, the 1st Defendant shall have half of the costs of the counterclaim which shall be assessed and offset from the general costs of the suit. As against the 2nd Defendant, each party shall bear their own costs.

It is so ordered.

Dated, signed and delivered by email this 16th day of August 2023.

Boniface Wamala

JUDGE