THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

HIGH COURT CIVIL SUIT NO. 948 OF 2017

MEERA INVESTMENT LIMITED::::::::::::::::::::::PLAINTIFF

VERSUS

1. DFCU BANK LIMITED

2. COMMISSIONER LAND REGISTRATION::::::DEFENDANTS

BEFORE: HON: JUSTICE TADEO ASIIMWE

JUDGMENT

The Plaintiff instituted this suit against the Defendants jointly and severally for illegal and or fraudulent sale and possession of 48 leasehold properties comprised in LRV HQT608 Folio 21, Plot 7 Rujumbura Block, Rukungiri Road land at Bunura, LRV 4478 Folio 25 Plot 31 Margherita Road land at Kasese Municipality, LRV 4478 Folio 24 Plot 33Margherita Road land at Kasese Municipality, LRV HQT228 Folio 6 Plot 105 Busia Municipality, Block customs Road land at Sofia "A" North East Busia Town Council, LRV HQT608 Folio 11 Plot 99 Mamia Bugwe Block, Customs Road Land at Sofia "A"Busia, LRV KCCA104 Folio 2, Plot 1162 Kawempe Division Block

24/10/23

5, Land at Mulago Kampala, LRV 4410 Folio 16, Plot 688 land at Nkumba, LRV 4410 Folio 14, Plot 893, Land at Nkumba, LRV 4412 Folio 12, Plot 22, land at Kampala Road Entebbe, LRV 1083 Folio 11, Plot 106, land at Kireka and Banda, LRV 4410 Folio 19, Plot 60 land at Nabingo, LRV 4410 Folio 20, Plot 61, Land at Nabingo, LRV HQT688 Folio 1 Plot 846 Bulemezi block 652, land at Luwero, LRV 4412 Folio 3, Plot 2A Broadway Road land at Masaka, LRV 4410 Folio 22, plot 18 Jinja Road Land at Gulu and Nasuuti Mukono, LRV 4410 Folio 21, Plot 20A Jinja Road, Land at Gulu and Nasuuti Mukono, LRV 4410 Folio 7, Plot 103 Customs Road, land at Samia Bugwe, Busia, LRV 4411 Folio 101 Customs Road at Busia, LRV 4411 Folio 25, Plot 1B Ntinda Road, land at Kampala, LRV 4410 Folio 15, Plot 93, land at Mengo Kampala, LRV 4410 folio 13 plot 40 Lubas Road, Land at Jinja, LRV 4410 Folio 5, Plot 80 & 82 Main Street Land at Iganga, LRV 4412 Folio 14, Plot 2 Tanga Road Land at Malaba, FRV 1280 Folio 24, LRV 4412 Folio 15 Plot 4, Tanga Road, land at Malaba, LRV HQT608 Folio 23, Plot 4 Soroti Block Kennedy Square, Soroti Senior Quarters, land at Soroti, LRV 4411 Folio 16 Plot 40 Main Street, land at Hoima, LRV 4421 Folio 3, Plots 44 & 46 Kamwenge Road, Land at Bufunda Main Street Ibanda, LRV HQT608 Folio 25, Plot 143 Kabale Municipality Block, Kabale Road, Land at Kabale, LRV HQT608 Folio 24, Plot 145 Kabale Municipality Block Kabale, land at Kabale, LRV 4420 folio 15 Plot 5 Kabula Block 76, land at Masaka, LRV 4410 Folio 6 Plot 55 Main Street Jinja, land at Jinja, LRV 4453 Folio 14, Plot 18 Old Kabale Road, land at Park Ward Eastern Division, Ntungamo, LRV 4409 Folio 19, Plot 54 Nyabushozi

Block 68, land at Rushere Kiruhura, LRV 4410 Folio 9, Plot 52 Nyabushozi Block 68, land at Rushere Kenshunga, LRV 4410 Folio 8, Plot 1 Adumi Road, land at Arua, LRV 4412 Folio 10, Plot 51 High Street Mbarara, land at Mbarara, LRV HQT608 Folio 22, Plot 38 Soroti Block Gweri, land at Soroti Central Ward, LRV 4453 Folio 15, Plot 11 Babiha Road, land at Bazar South Kabarole District, LRV 4456 Folio 15, Plot 4360 Kyadondo Block 208, land at Kawempe Kampala, LRV 4494 Folio 10, Plot 387, Kibuga Block 18, land at Natete, Kampala, LRV 4410 Folio 18, Plot 388, Kibuga Block 18, land at Nateete, Kampala, LRV 44106 Folio 12, Plot 52, Masindi Port Road, land at Masindi, LRV 4411 Folio 18, Plot 1419 Kibuga Block 5, land at Mulago, LRV 4411 Folio 17, Plot 1463 Kibuga Block 5, land at Mulago Kampala, LRV 4410 Folio 17, Plot 817 Kibuga Block 10, land at Nakulabye, Kampala, LRV 4410 Folio 11, Plot 1, Fort Portal road, land at Cell 0, Bushenyi, LRV 4412 Folio 11, Plot7, Luthuli lane, land at Bugolobi, Kampala, LRV 4567 Folio 24, Plot 54, Masindi port Road, land at Masindi, (herein referred to as the "suit properties").

The Plaintiff's cause of action against the Defendants is in illegality and fraud, which the Plaintiff attributes to the Defendants through their actions and or omissions. The Plaintiff is asserting its rights as the registered proprietor and lessor of the 48 Mailo and freehold titles, from which the suit leases emanate and challenges the taking of possession of the suit properties and the subsequent transfer of title and legal possession in favor of 1st Defendant.

The Plaintiff claims that, by virtue of several lease agreements, lease variation of lease agreements and extensions of leases executed between itself and Crane Bank Limited (hereinafter referred to as "CBL"), it leased out its 48 properties to Crane Bank Ltd. Subsequent to the leasing, CBL's interests were registered as encumbrances on the Plaintiff's 48 Mailo and freehold titles, and leasehold certificates of title were processed and registered in the names of CBL, as the lessee. It is these properties that constituted the 48 former Crane Bank Limited branches, situate in various parts of Uganda, currently registered in the names of DFCU and in its possession.

The 1st Defendant denied the Plaintiff's claims and averred that it lawfully acquired its interest in the 48 leasehold properties, having purchased the same from Bank of Uganda as a receiver of CBL. It further asserted that no consent was required from the Plaintiff before the transfer or taking of possession of the suit properties, as the transfer was a statutory transfer under the provisions of the Financial Institutions Act. The 1st Defendant denied committing any illegality or fraud in the acquisition of the suit properties and sought to rely on the pleadings of Crane Bank Limited (in Receivership) that had been filed in another suit vide; **HCCS No.493/2017 Crane Bank Limited (in Receivership) versus Meera Investments Limited and Sudhir Ruparelia, which at the time was pending in the Commercial Division of the High Court** and subsequently on the

pleadings in **HCCS No. 493/2017** maintaining that the 1st Defendant lawfully acquired the suit properties, without any illegality or fraud.

The 2nd Defendant too, denied the allegations of fraud and illegality attributed to it and stating that whereas no consent of the Plaintiff was presented at the time of submission of transfer instruments for registration of the 1st Defendant, it acted lawfully in effecting the transfers and that it was not necessary to ascertain whether the proper stamp duty was paid before effecting a transfer of the suit land. It maintained that if, at all, the duty lay on the 1st Defendant as the transferee to ensure that the requisite consent was obtained and presented and that the office cannot therefore be blamed for the 1st Defendant's failure to obtain the required consent to transfer, from the Plaintiff.

At scheduling conference, issues for Court's determination were framed as follows;

i. Whether the 1st Defendant required prior written consent from the Plaintiff as the registered proprietor of the Freehold/Mailo titles before taking possession of, and causing a transfer of the leasehold interests to itself?

ii. Whether the 1st Defendant acted illegally and fraudulently in taking possession of and transferring the leasehold interests, without the prior

written consent of the Plaintiff, as the registered proprietor of the Freehold/Mailo titles/interests?

iii. Whether the 2nd Defendant acted illegally and fraudulently in effecting a transfer of the leasehold interest in the suit property into the names of the 1st Defendant, without the consent of the Plaintiff?

iv. Whether the said leasehold certificates of title, registered in the names of the 1st Defendant are liable to be cancelled on account of fraud and illegality?

v. What remedies are available to the parties?

At trial the Plaintiff was represented by Counsel Kyazze Joseph and Counsel Natukunda Jackline while the 1st Defendant by Counsel Fredrick Ssempebwa, Arther Kunsa Ssempebwa and Edwin Mugumya. The 2nd Defendant by Moses Ssekito and Moses Ssekabira. All Counsel filled written submissions which I will consider in this judgement.

THE LAW

The general rule is that he or she who asserts must prove and the burden of proof therefore rests on the person who must fail if no evidence at all is given on either side. The standard of proof required to be met by either party seeking to discharge the legal burden of proof is on a balance of probabilities.

In Miller V Minister of Pensions [1947]2 ALL E R 372 Lord Denning stated:

"That the degree is well settled. It must carry a reasonable degree of probability but not too high as is required in a criminal case. If the evidence is such that the tribunal can say, we think it more probable than not, the burden of proof is discharged but if the probabilities are equal, it is not."

It is also the position of the Law that the evidential burden does not shift to the Defendant unless there is cogent and credible evidence produced on the issue for determination.

In a bid to proof its case, the Plaintiff led evidence of 1 witness and closed its case while the Defendants also called 1 witness. The 2nd Defendant never called any witness.

Evidence

PW1, Dr. Sudhir Ruparelia testified though a witness statement of 29 paragraphs dated 27th May 2022 which was admitted as his evidence in chief. Three hundred and nine (309) exhibits were admitted on record for the plaintiff. PW1 was cross examined in court and made clarifications on his evidence as per the proceedings.

DW1, Angelina Namakula through a witness statement of 26 paragraphs dated 25th April 2023. Seventy-nine (79) exhibit were admitted for the 1st defendant. DW1 was equally cross-examined and she clarified on her evidence as per court proceedings.

RESOLUTION

Both Counsel filed detailed written submissions with the relevant authorities. No submissions were filed for the 2nd Defendant. I commend learned Counsel for the well-researched submissions, which I will consider in the determination of the issues herein.

Before I delve into resolution of the framed issues, I will first determine the 1st Defendant's point of law touching the legality of the manner of acquisition of the Mailo and Freehold titles by the Plaintiff. The 1st Defendant's Counsel in their written submissions asserted that the titles acquisition was tainted with illegality and as such the Plaintiff cannot legally enforce its rights as the registered proprietor and lessor of the suit properties. He prayed for a declaration that the transfer of the 48 Mailo and Freehold properties in the names of the Plaintiff as proprietor and registered owner was illegal and void. In Counsel's view, the Plaintiff cannot maintain the claims in the suit and reliefs sought therein against the 1st Defendant.

The gist of the 1st Defendant's contention is that the suit properties were first registered in the names of Crane Bank Limited and later transferred into the names of the Plaintiff, which thereafter leased them to Crane Bank Limited. That by time the properties were transferred into the names of Crane Bank Limited and subsequently to the Plaintiff, the said Crane Bank Limited was a non-citizen, as majority shareholders being Rasik Kantaria, Jyotsna Ruparelia & White Saphire were non-citizens as per the evidence of DW1 and

photocopies of Annual Returns of Crane Bank Limited, attached to the witness statement of DW1. Learned Counsel further submitted that the status of Crane Bank Limited as a non-citizen company which could not hold or own an interest in form of Mailo or Freehold land in Uganda was the subject of determination in the ruling of the Hon. Justice David Wangutusi in HCMA No. 320 of 2019 Sudhir Ruparelia & Meera Investments Limited versus Crane Bank Ltd (in Receivership) arising from HCCS No. 493 of 2017 that had been filed by Crane Bank Limited (In Receivership) against Meera Investments Limited and Dr. Sudhir Ruparelia.

Counsel cited the provisions of section 40 of the Land Act as amended arguing that CBL was incapable, in law, of transferring good title to the Plaintiff.

In response to the objection, learned Counsel for the Plaintiff opposed the preliminary point of law arguing that the 1st Defendant's prayer need not be considered by Court. Counsel submitted that this point raised by the 1st Defendant's Counsel is not a pure point of law that can be determined without a detailed analysis of evidence. That it is not the type of pure point of law envisaged in **Makula International Versus Cardinal Nsubuga** that could be raised at any time whether pleaded or not. Counsel contended that where in appropriate cases, a Court whose attention is drawn to an illegality should consider and determine the illegality, this is not a rule of general application which any party in default of pleadings may ask the Court to invoke. In his view, Counsel for the Plaintiff submitted that the alleged illegality is

one that is premised on material facts and therefore, requires evidence to be adduced by either party, and that the ends of justice would only be met if the alleged illegality is pleaded and evidence in support thereof adduced by the party alleging the illegality. This would then enable the adversary party to plead and adduce evidence in rebuttal. Counsel relied on **SCCA No. 06 of 2013 Fang Min Versus Belex Tours and Travel Ltd pages 27-30** to support his position.

He further submitted that Courts have laid down a threshold that must be satisfied by the party seeking to rely on an alleged point of law, that was not pleaded to wit; i) the Court must satisfied that the alleged illegality is sufficiently proved and that there are no matters of suspicion in the case, which would warrant that an opportunity is given for an explanation and defence to the adversary party, lest there is derogation from the right to a fair hearing ii) the Court must be assured that full justice can be done to the parties by permitting new points of controversy to be discussed; and, iii) that if there are further matters of fact that could possibly and properly influence the judgment to be formed and one party has omitted to take steps to place such matters before the Court because the defined issues did not render it material, the new point ought not to be considered. Counsel cited the cases of **Fang Min Versus Belex Tours and Travel Ltd pages 27-30 and Civil Appeal No. 4 of 2000 Christine Bitarabeho versus Edward Kakonge Civil Appeal** and invited Court

to find that the nature of alleged illegality raised in the submissions of the 1st Defendant is one that was required to be pleaded, particulars set out in the 1st Defendant's written statement of defence or counter claim, and evidence led, which would give an opportunity to the Plaintiff to rebut the allegation by way of pleadings and evidence.

Counsel further relied on Order 6 Rule 2 of the Civil Procedure Rules, which requires the parties to plead material facts of their claim or defence, Order 6 rule 3 which requires parties whose claim or defence is premised on illegality to specifically plead and particularize the alleged illegality, Order 8 Rule (3) that requires a Defendant to specifically plead its defence and set out facts in support thereof, order 8rules (2), (7) & (8) that require a Defendant who is desirous of setting out a counter claim to do so by way of filing a written statement of defence with a counter claim and Order 7 Rule 9 which requires a party who is desirous of obtaining a remedy from Court to specifically plead the remedy and the facts that support such a remedy.

Consideration.

I have carefully considered the submissions of both Counsel on this point and the authorities cited in support of their respective legal arguments. In my view, it is clear the Plaintiff filed this suit asserting its statutory right to enforce covenants in the leases, in its capacity as the registered proprietor of the Mailo and Freehold interest and therefore, the lessor of all the 48 leasehold properties.

The 1st Defendant did not specifically plead that, it would challenge the legality of the manner of acquisition of the impugned Mailo and Freehold titles to the Plaintiff from CBL and no counter claim was filed seeking any declaration or order that the transfer of each of the impugned properties into the names of CBL and the subsequent transfer thereof into the names of the Plaintiff were illegal and void. The issue of acquisition of the Freehold and Mailo titles/interests by CBL and the subsequent transfer of the same to the Plaintiff wasn't a fact issue in either of the parties' pleadings, which explains why no issue was framed for determination by this Court. Instead it was an agreed fact at scheduling that the Plaintiff is the registered proprietor and owner of the 48 Mailo and Freehold interests from which the subject leases emanate.

In civil suit No.493/2017 the claim by which CBL (in Receivership) had sought to challenge the Plaintiff's ownership of the impugned Mailo and Freehold titles by CBL (in Receivership) was dismissed by my brother Judge, Hon. Justice David Wangutusi, vide his ruling in HCMA No. 320 of 2019 Sudhir Ruparelia & Meera Investments Limited versus Crane Bank Ltd (in Receivership) arising out of HCCS No.493/2017. The appeal therefrom by CBL (in Receivership) to the Court of Appeal, vide; Civil Appeal No 252 of 2019 was equally dismissed by the Court of Appeal, which upheld the findings and orders of the High Court, namely; that by 2017, when HCCS No.493/2017 was filed in the High Court Commercial Division,

seeking to recover the 48 Mailo and Freehold titles from Meera Investments Limited, the Plaintiff herein and one of the Defendants in that suit, CBL was a non-citizen, that could not, in law, hold nor own an interest in Mailo and freehold land and secondly, that CBL (in Receivership) lacked legal capacity to sue or be sued as such under the applicable law.

It is also not in dispute that a further appeal preferred by CBL (in Receivership) to the Supreme Vide SCCA No. 07/2020 was subsequently withdrawn by it, implying that the decision of the Court of Appeal and the High Court, declining to grant CBL (in Receivership), any reliefs that would deprive the Plaintiff of its proprietorship and ownership of the impugned Mailo and Freehold titles remained intact.

Therefore, it is clear the challenge of the Plaintiff's proprietorship and ownership of the Mailo and Freehold titles interests was settled in that case and no longer an issue for consideration in this court.

Indeed, at scheduling one of the agreed facts was that the Plaintiff is the registered proprietor and owner of the Mailo and Freehold properties and the lessor thereof and no issue was framed by the parties touching the legality of or manner of acquisition of registration of the suit properties into the names of CBL and into the names of the Plaintiff company.

During trial, DW1 in her evidence challenged the manner of acquisition of the Mailo and Freehold titles were also objected to by Plaintiff's Counsel, on ground that they were not premised on the 1st Defendant's pleadings and sought to adduce evidence on the very claims that had been set out in the intended amended written statement of Defence, which amendment had been rejected by Court.

It should be noted that at all material times in this suit, the 1st Defendant was aware of how the Plaintiff company obtained proprietorship and ownership of the Mailo and Freehold titles. The original owners of the suit land are not complaining and the current registered proprietor is a citizen of Uganda.

In my considered view, the invitation by the 1st Defendant for this Court to adjudicate the un pleaded issue regarding the legality of the Plaintiff's proprietorship and ownership of the said Mailo and Freehold titles on account of the alleged status of CBL as a non-citizen at the time the titles were registered in its names or transferred into the names of the Plaintiff, on ground that the Court has a mandate to determine a claim of illegality whether pleaded or not is not legally and tenable in this matter. It offends the rules of pleadings and would amount to compromising the right to a fair hearing as per the case of **Fang Min Versus Belex Tours and Travel Ltd (Supra).** In finding as such, I am further fortified by the decision of the Supreme Court in **Civil Appeal No. 4 of 2000 Christine Bitarabeho versus Edward Kakonge**, where it was held thus;

"The issue upon which the Court is being asked to decide the point of law must be that which establishes beyond doubt that the facts, if fully investigated supports new pleadings. The Court must be assured that full justice can be done to the parties by permitting new points of controversy to be discussed. If there are further matters of fact that could possibly and properly influence the judgment to be formed and one party has omitted to take steps to place such matters before the Court because the defined issues did not render it material, the new point ought not to be considered.

In the instant case, the suit properties were defined as the 48 leasehold properties, whose particulars were set out in the plaint. The Plaintiff premised its claim on enforcement of its rights as the registered proprietor and lessor of the suit property. It pleaded that the suit leases emanated from its Mailo or Freehold titles and were registered thereon as encumbrances. The 1st Defendant was at liberty to file a defence and or counter claim where it would plead that material facts and challenge the manner of registration of the Mailo and Freehold properties into the names of CBL and subsequently into the names of the Plaintiff. This is what Order 8 (2) (3), (7) & 8 of the Civil Procedure Rules requires. Having failed to comply with the above requirements under the said rules, the interests of justice will not be served if the 1st Defendant is allowed to change its case and set up a case inconsistent with what it alleged in its pleadings.

Besides there is evidence on record that in some of the Freehold titles the Plaintiff company is indicated as the first registered proprietor of the freehold titles and CBL is not reflected as a predecessor in title. It would have helped Court if the 1st Defendant had pleaded those facts to separate the two scenarios. It is also evident that the titles were transferred into the names of CBL and subsequently into the names of the Plaintiff at different periods of time. The status of the shareholding of CBL and citizenship of the majority shareholders at each of the times when it acquired and transferred the properties, had to be pleaded and proved for Court's consideration which was not done. Introducing such claims at submissions level offends the rules and Court is unable to discern the allegations of 1st Defendant's allegations from the said submissions. In the circumstances, I am not convinced that the 1st Defendant has met the conditions for an exception to the rule against departure from pleadings and in such circumstances The principle in **Makula International** relied on by Counsel for the 1st Defendant is wholly inapplicable to the present case where all factual and legal points were available to the 1st defendant at pleadings following previous court pronouncements in matters involving CBL.

The position of the law was summarized by the Supreme Court in **Luyimbazi Sulaiman Vs. Stanbic Bank (U) Ltd SCCA No. 02 of 2019** where it was held that;

"A party is bound by their pleadings and it is not open to Court to base its decision on an un-pleaded issue. That 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".

I have also carefully considered the evidence on record and I am satisfied that, save for the allegations made in the submissions, no material evidence was led to prove the alleged illegality. I have not found any legal or factual basis that could lead to a conclusion that the acquisition by and or registration of the said Mailo and Freehold titles/properties into CBL's names and the subsequent acquisition and transfer of the same to the Plaintiff was null and void.

I have noted that there are several titles registered in the names of the Plaintiff where the predecessors in title thereof are not CBL. There are also freehold titles where the Plaintiff is the 1st registered proprietor and were never registered in the names of CBL and as such those would not be affected by the citizenship status of CBL.

What is clear is that as of 2017 when CBL was established to have been a non- citizen, it had long transferred the titles to the Plaintiff and had even created leases to the Plaintiff. There is nothing on record to suggest that the non-citizenship status of CBL was the same all through from the time of its incorporation as there is no cogent evidence from the 1st Defendant.

The 1st Defendant's claim/allegations lack merit and the prayer sought to cancel the Plaintiff's titles and proprietorship on that basis

is equally declined. CBL is not a party to this case and any order would be improper. The argument that the lease covenants about consent do not bind the 1st defendant on account of privity of contract is not sustainable because due diligence should have revealed the said covenants before purchase.

In Summary, the 1st Defendant's point of law seeks to impeach the Plaintiff's title yet it is in possession of the suit properties and the lease titles which arise from the very titles it is seeking to impeach. In simple terms the 1st Defendant is trying to cut down a tree while clinging on its branches to avoid falling which I find to be selfish, illogical and against the interest of justice. In my view it is an attempt in bad faith.

Therefore, the point of law raised is hereby overruled. I will proceed to resolve the issues as framed.

1. **Whether the 1st Defendant required prior written consent from the Plaintiff as the registered Proprietor of the Freehold/Mailo titles, before taking possession of, and causing a transfer of the leasehold interests to itself.**

The contention between the parties is whether the transfer of both physical and legal possession from CBL (in Receivership) through Bank of Uganda as the receiver to the 1st Defendant required the prior written consent of the Plaintiff. First of all, it is not in dispute that possession as a matter of law includes both legal and physical possession of the demised properties. In **Babigumira v Magezi HCMA No. 538 of 2013,** the Court noted that; the word 'possession'

may mean effective, physical or manual control, or occupation, evidenced by some outward act, sometimes called de facto possession. The Court further noted that possession' may mean legal possession: that possession which is recognized and protected as such by law. I agree with the submission by learned Counsel for the Plaintiff that a proper construction of the phrase "not to part with possession" covers both legal and physical possession and that extends to transfer.

A lessee will ordinarily be deemed to have parted with possession if it completely grants its rights in the lease and demised premises to another, to the extent that such a grant has the effect of wholly ousting him or her from the legal possession of the property. I also agree that transfer of title confers both legal and constructive possession in favor of the transferee thereof. I find the decision of Lam **Kee Ying Sdn V Lam Shes Tong and Another ALLER (1974)3** very persuasive on this point.

Therefore, in the instant case, regarding the question of whether there was parting with possession of the suit properties, both the testimony of PW1 and DW1 confirm that indeed, the act (s) of Bank of Uganda as the Receiver of CBL of executing the P & A agreement under which it sold, assigned and conveyed the legal estate in the leasehold properties to the 1st Defendant, followed by the subsequent acts of ceding possession of the properties and causing their transfer into the names of the 1st Defendant constituted parting with possession. PW1 testified that the 1st Defendant took both physical

and legal possession of the suit properties. This was not disputed by the 1st Defendant. Indeed, under cross examination, DW1 testified that the 1st Defendant's claim of a bonafide purchaser for value without notice is based on the fact that the DFCU purchased the leases, paid valuable consideration and that the seller had good title to pass on. She further testified that the seller being bank of Uganda as receiver of CBL passed on both legal and physical possession of the leases and that the 1st Defendant is currently in occupation of all the 53 properties previously leased to CBL including the 48 lease properties which are the subject of this suit. It is therefore the finding of the Court that indeed Bank of Uganda, as the receiver of CBL, parted with both legal and physical possession of the suit properties to the 1st Defendant.

I will now consider the contentious issue of whether consent of the lessor was a condition precedent to CBL (in Receivership) albeit through Bank of Uganda as the Receiver parting with possession to the 1st Defendant. First of all, I find the provisions of the Registration of Titles Act relevant to this case. Section 2 (1) of the RTA provides that; "except so far as is expressly enacted to the contrary, no Act or rule so far as inconsistent with this Act shall apply or be deemed to apply to land whether freehold or leasehold which is under the operation of this Act".

It would therefore follow, that, in the absence of an express enactment prescribing to the contrary, the provisions of the RTA prevail in all titled properties. This position was settled by the

Supreme Court in Silver Byaruhanga v Ruvugwaho & Anor (Civil Appeal No. 9 of 2014) [2020] UGCA 2088. Therefore, the dispute at hand which concerns determination of the rights of a proprietor of Mailo and Freehold interests as a lessor of the leasehold properties, the Court has considered Section 36 (2) of the said Act. The section provides that;

"Every certificate of title to leasehold land shall be subject to the rights and powers of the lessor or other proprietor of the reversion immediately expectant upon the term".

My understanding of the said provision is that the rights and powers of the lessor are not merely contractual, as may be reserved under the covenants in a lease, but are expressly reserved and protected by Statute as well. The law applicable to transactions in respect of leasehold properties is therefore both the law of contract and the Registration of titles Act. I find the decision of my learned brother, Kaweesa J in **Magode Ikuya v Londa Mbarak (HCT-04-CV-CA 87 of 2012) [2015] UGHC** very instructive on this point. In that case, the lease clauses as contained paragraph 2 (f) (i) and (ii) it states that: "***the lessee shall not without the consent of the lessor in writing deal in any way with his/her interest in the land before the lease is extended to the full term of 49 years." Paragraph 3 of the said lease provided for the need for "consent to transfer".***

The lease concluded a sale and transfer of the leasehold land without seeking and obtaining the requisite consent.

The Court held that the leases were governed by the law of contract and the provisions of the RTA.

In my view, any dealing or transaction in the property under a leasehold certificate of title must be concluded in a manner that is consistent with the rights and powers of the Lessor. Where the lessor has reserved the right and power to consent to any transfer of physical and legal possession or parting with possession by the lessee as is the instant case, any transaction concluded having the effect of transferring legal and physical possession of the leasehold properties would be illegal and in breach of the statutory protection conferred upon the lessor by section 36 of the RTA, unless that transaction is concluded pursuant to express provisions of the law to the contrary in any other enactment. In my view the provisions of section 36 (2) of the RTA bind both the transferor and the transferee of the leasehold properties. Any transaction between the lessee and transferee which avoids the reserved rights and powers of the lessor would in my view amount to breach of Statute and would be illegal.

The consequences of a transaction concluded without obtaining consent required under contract or statute was also considered in the case of **Deo & Sons Properties Limited versus UBC and Others, HCCS No. 326 of 2011.** Where Court held that the sale and transfer of the suit land was a nullity for lack of consent. Further in **Broadways Construction Co. Versus Kasule and Others (1972) 1**

EA 76, the Court further held that a contract of entering into possession of the land before the required consent was given was prohibited by law and the contract was thus void and that, nothing done subsequently could legalize and render such contract enforceable.

In the instant case, evidence was led through PW1 who clearly indicated that clause 3 (f) common to all lease agreements for the subject leases reserved the right of the lessor to consent to any parting with possession of the suit properties by the lessee. I have already found that the act (s) of Bank of Uganda as a receiver of CBL of selling, assigning and conveying the suit properties to the 1st Defendant and handing over physical and legal possession amounted to parting with possession of the demised premises within the meaning of clause 3 (f) of the lease agreements for the suit properties.

I have carefully reviewed the submissions of the parties. The Plaintiff's contention is that the 1st Defendant purchased the suit properties subject to the lease covenants without obtaining prior written consent of the Plaintiff, bound itself to comply with the covenants at the time of execution of the P & A agreement, took the same lease agreements in the leasehold titles, whereof it was registered as lessee. The Plaintiff further contends that the 1st Defendant acquired legal and physical possession through a sale and ordinary transfer regulated under the Registration of Titles Act and not a statutory transfer, as none is provided for under the Financial

Institutions Act. The gist of the 1st Defendant's contention on the other hand is that, it was not bound by the lease covenants for the suit properties as it was not party thereto. It further contends that it obtained legal and physical possession of the suit properties by virtue of a statutory transfer from Bank of Uganda as a receiver under the Financial Institutions Act and not an ordinary transfer of property and that as such, there was no need to obtain any such consent from the Plaintiff.

It is quite clear clause 3(f), all lease agreements for the suit properties, CBL as the then lessee covenanted not to part with possession of the suit properties without the prior written consent of the Plaintiff, the then lessor. I am not persuaded by the submission of learned Counsel for the 1st Defendant that clause 3 (f) was ambiguous and apparently unclear as from whom the consent would be obtained. The covenant was between the lessee and the lessor and obviously the consent would only meaningfully be obtainable from the Lessor, the Plaintiff and no one else.

From the evidence on record, at the time the 1st Defendant purchased the suit properties, the leases in respect of the suit properties were subsisting. It is clear to me that at the time of execution of the P & A, Bank of Uganda as the Receiver of CBL, the vendor and the 1st Defendant as a purchaser had knowledge of the subsisting and binding covenants in the lease agreements for the suit properties. In clause 8 (2) of the P & A, it was provided that;

"The properties are sold and assigned herein subject to the rents reserved by and the covenants and all other provisions contained in the relevant leases"

By this clause, the vendor and the 1st Defendant were alive to the statutory rights and powers of the lessor under the provisions of section 36 (2) of the Land Act as reserved in the lease agreements. They were equally aware of the need to observe and comply with the lease covenants, especially given the fact that the Lessor, the Plaintiff herein, was not a party to the P & A Agreement, was not a financial institution regulated under the Financial Institutions Act and its rights as the registered proprietor and lessor of the suit properties could not be compromised. The evidence on record shows that the suit properties were initially leased to CBL by the Plaintiff. This was pursuant to lease agreements, lease variation agreements and lease extension agreements executed between the Plaintiff as the Lessor and CBL as the lessee. These agreements formed the basis upon which the leasehold certificates of title were created and registered in the names of CBL, the lessee at the time. Indeed, in the copies of the leasehold titles adduced in evidence by the Plaintiff, the said agreements appear therein.

At trial, it was confirmed by DW1 under cross examination that the leases envisaged under clause 8 (2) were the subsisting leases hitherto executed between the Plaintiff and CBL. She further conceded the said leases agreements, lease extensions and variations

and the exact terms therein were the one in the leasehold titles, adduced in evidence by the 1st Defendant and registered in its names. All the leases included; a covenant on the lessee not to part with possession of the property without prior written consent of the lessor, the covenant to pay rent reserved, the covenant on restoration of the premises and that clause 5 prescribed the consequences of any non-compliance with the covenants in the leases including termination or forfeiture of the leases.

The evidence on record further shows that the taking of physical possession by the 1st Defendant and the eventual transfer of the leasehold certificates of title into the names of the 1st Defendant were subsequent to execution of the P & A Agreement. At the execution of the P & A Agreement, the 1st Defendant must have been aware that CBL (in Receivership) was selling, assigning and conveying all the leases and covenants therein to the 1st Defendant subject to the binding covenants therein. Therefore, the reasonable inference drawn from the wording of clause 8 (2) of the P & A Agreement is that upon execution of the said agreement, there would be compliance with the lessee's covenants including the covenant to seek and obtain consent of the lessor, which in any case, as was provided in clause 3 (f) of the lease agreements was not to be unreasonably withheld. The 1st Defendant, by the said clause, bound itself to ensure that the lease covenants are complied with.

Further, the 1st Defendant contended that it was not party to any of these agreements and was not bound by them. This argument is defeated by the import of clause 8 (2) of the purchase agreement. It is clear to me CBL covenanted not to part with possession of the properties without prior consent of the Lessor. The inference made by the 1st Defendant that the transfer of the properties was a "statutory transfer" by BOU under the Financial Institutions Act is not cannot be right because BOU was not a lessee of the properties. If the consent wasn't provided by CBL (in receivership), the obligation therefore lay on the 1st Defendant to ask and acquire the same pursuant to clause 8(2) of the P &A Agreement which was not done.

I therefore find that that the requirement to obtain prior written consent of the Plaintiff was a condition precedent to lawfully taking over of legal and physical possession, a condition well known to the 1st Defendant. I also find that as a purchaser and transferee of the leasehold properties, the 1st Defendant was obliged to comply with that lease terms and covenants. The 1st Defendant therefore required prior written consent of the Plaintiff as the registered Proprietor of the Freehold/Mailo titles, before taking possession of, and causing a transfer of the leasehold interests to itself. The 1st issue is therefore answered in the positive.

Whether the 1st Defendant acted illegally and fraudulently in taking possession of and transferring the leasehold interests,

without the prior written consent of the Plaintiff, as the registered proprietor of the Freehold/Mailo titles/interests.

The resolution of issue one herein above partly resolves this issue. I have already found that the transaction leading to the parting with legal and physical possession from CBL (in Receivership) to the 1st Defendant, as purchaser, assignee and transferee thereof was subject to the statutory rights and powers of the Plaintiff as the lessor, and subject to lease covenants in the leasehold titles to the suit properties. I have also found that the 1st Defendant was bound by the covenant requiring the lessor's prior written consent. I have also found that pursuant to clause 8 (2) of the P & A agreement, the legal estate of CBL (in Receivership) in the suit properties was sold, assigned and conveyed to the 1st Defendant subject to the covenants in the leases. It was also an agreed fact in the parties' joint scheduling memorandum that the leasehold interests constituting the suit properties emanate from the Plaintiff's Freehold and Mailo Titles.

It is also not in dispute that both Bank of Uganda as the Receiver of CBL (in Receivership), the vendor and the 1st Defendant, the purchaser and transferee of the suit properties, having agreed in clause 8 (2) of the P & A Agreement, that the sale, assignment and conveyance of the suit properties. I have found the properties sale was subject to the lease covenants.

PW1 testified that neither BOU acting as a receiver of CBL nor the 1st Defendant applied to it and or requested for consent to part with possession to the 1st Defendant. He also testified that to this date, the 1st Defendant has never introduced itself to the Plaintiff as the lessee and no consent was subsequently obtained for the 1st Defendant to remain in the suit properties. DW1 also conceded that in all documents she had come across there was neither a request for consent from the vendor nor the 1st Defendant as the purchaser. She further admitted that the 1st Defendant has never sought any consent from the Plaintiff whether before or after taking possession. It is therefore clear that at the time of transfer of the suit properties into the names of the 1st Defendant, no consent from the Plaintiff was presented to the 2nd Defendant. This is clear from the pleadings of the 2nd Defendant.

It has been submitted by the 1st Defendant that the taking of possession of the suit properties without seeking and obtaining the prior written consent of the Plaintiff is not illegal because this was a statutory transfer by Bank of Uganda, in exercise of its authority under the Financial Institutional Act. I am not persuaded by this argument. My understanding of a statutory transfer is that, it is by operation of law and not by ordinary sale and transfer as it was in the instant case. **In Kampala District Land Board and Anor v National Housing and Construction Corporation (Civil Appeal No. 2 of 2004) [2005]** it was held among others that;

"It seems to me, therefore, that the District Land Boards became successors in title to controlling authorities or urban authorities in respect of public land which had not been granted or alienated to any person or authority. The District Land Boards became successors by operation of law because land was vested in them by law, not by grant, transfer or registration, under Section 59(8) of Land Act".

Therefore, the submissions of learned Counsel for the 1st Defendant are inconsistent with the evidence on record. The record shows that the acquisition of the suit properties by the 1st Defendant was pursuant to a purchase agreement and ordinary transfer instruments were used to transfer the properties into its name. As I have already found, the 1st Defendant agreed under clause 8 (2) of the P & A that the properties were being sold, assigned and conveyed subject to the covenants in the leases for the suit properties. There would be no need for such a clause if indeed this were to be a statutory transfer. If indeed, Bank of Uganda, the Receiver of CBL (in Receivership) had powers to transfer physical and legal possession of the suit properties, without any need to comply with the lease covenants, there would be no need to include such a clause.

I have carefully reviewed the powers of a receiver under 94 and 95 of the Financial Institutions Act, under which Bank of Uganda as the Receiver of CBL (in Receivership) sold the suit properties. All that Section 95 (1) (b) of the section provides, as one of the options that a receiver may take is to arrange for the purchase of assets and

assumption of all or some of the liabilities by other financial institution. There is not mention of a statutory transfer of assets by a Receiver. It is not expressly provided therein that in the sale and transfer of leasehold properties of a financial institution in receivership or transfer of legal and physical possession of such properties, the lease covenants, the subject of the leasehold properties shall not apply. It is also not provided anywhere that any such sale and transfer of such properties or parting with legal and physical possession thereof shall be in total disregard of the rights of the lessor reserved under the lease covenants. It is also not provided expressly that the provisions of the Registration of Titles Act governing the rights of the lessor and lessee shall not apply to such transaction. If that had been the intention of the framers of the said Act, they should have stated so in explicit terms. I am unable to impute an intention which is not apparent from the provisions of the Act(FIA).

It is the finding of this Court that the acquisition of both physical and legal possession of the suit properties by the 1st Defendant was not pursuant to a statutory transfer but a sale subject to the lease covenants. The 1st Defendant was bound to ensure that the covenant is complied with before it could take physical and legal possession thereof. The 1st Defendant, aware of the legal requirement opted to depend on assurances by the Receiver to recover the reversionary interests and sell them. It ought to have been clear to the 1st

Defendant that its contractual arrangements with the Receiver purporting to contract the Plaintiff out of its properties were not binding on the Plaintiff as the lessor and could not override the rights of the Plaintiff as a lessor, reserved under the lease covenants and protected under the provisions of the RTA.

In the premises, I am inclined to re-iterate my earlier finding on issue number one that, a contract for entering into possession of the land before the required consent was given, was prohibited by law and such contract was thus void and as such, nothing done subsequently could legalize and render such contract enforceable. The requirement for obtaining the prior written consent of the Plaintiff as the lessor was a condition expressly known by both the 1st Defendant, the transferee of the suit properties and its Transferor CBL (in Receivership). The parties knew that the transfer of possession whether physical or legal required the prior consent of the lessor.

From the evidence on record, the 1st Defendant having obtained the leasehold titles/interests which emanate from the same lease agreements executed between CBL and the Plaintiff, which lease agreements also form part of the lease titles, the 1st Defendant was or ought to have been aware of the requirement to obtain the consent prior to taking both legal and physical possession of the properties.

All the acts and conduct of the 1st Defendant right from the execution of the P & A Agreement point to fraud. These as already highlighted included; denying the title of the Plaintiff as the lessor, taking possession without securing the consent of the lessor, occupying and

utilizing the suit properties without paying any ground rent to the lessor, and purporting to enter into illegal arrangements with Bank of Uganda towards rescission of the purchase with BOU allegedly acting as a receiver, despite knowledge by both the Bank of Uganda and the 1st Defendant of the pronouncements of the High Court and the Court of Appeal that the receivership of CBL had ended in January 2018. These cannot be said to be acts and conduct of an innocent and bonafide purchaser. The 1st Defendant was privy and actively participated in the highlighted illegal and fraudulent acts.

This 2nd issue is answered in the positive.

Issue 3. Whether the 2nd Defendant acted illegally and fraudulently in effecting a transfer of the leasehold interest in the suit property into the names of the 1st Defendant, without the consent of the Plaintiff?

As already noted, the Plaintiff's case is that the 2nd Defendant as the custodian of the Mailo and Freehold titles and the leasehold titles for the suit property was or ought to have been aware of the requirement for any transferee of the subject leasehold properties to present the written consent of the lessor at the time of effecting the transfer and that the acts of effecting the transfer of the leasehold properties to the 1st Defendant without the consent of the Plaintiff was illegal and fraudulent. In the written statement of defence filed on behalf of the 2nd Defendant, and in the summary of the 2nd Defendant's case in the joint scheduling memorandum, the 2nd Defendant did not deny

knowledge of the requirement for the prior written consent of the Plaintiff as the lessor and conceded that the prior written consent of the Plaintiff as the lessor of the suit properties was required and that no such consent was presented by the 1st Defendant, as the transferee of the suit properties at the time of submission of the transfer instruments to the 2nd Defendant or even thereafter. The 2nd Defendant did not call any witness and did not lead any evidence to controvert the Plaintiff's claims. The 2nd Defendant did not equally file any submissions to controvert the Plaintiff's contentions.

From the evidence on record, it is also not in dispute that leasehold certificates of title for the suit properties had been processed and issued by the office of the 2nd Defendant based on the lease agreements, which now form part of the lease titles. The 2nd Defendant had a statutory duty to enforce provisions of the Registration of Titles Act, even at the time of effecting transfers. It must be expected to have been alive to the provisions of section 36 (2) of the RTA prescribing that every certificate of title to leasehold land shall be subject to the rights and powers of the lessor or other proprietor of the reversion immediately expectant upon the term. Section 36 (2) of the RTA in essence mandated the 2nd Defendant not to effect a transfer of a leasehold certificate of title without the transferor and transferee complying with the statutory rights and powers of the Lessor/ reversion owner including the need for the mandatory prior written consent.

As was held by the Supreme Court in **Commissioner Land Registration & Anor v Lukwajju (Civil Application No. 12 of 2016) [2017],** the 2nd Defendant is the authority on matters of ownership and transfer of ownership of land in Uganda including leasehold properties. It was thus incumbent on the 2nd Defendant and registrars therein, to insist on the transferor or transferee presenting the written consent of the lessor before effecting a transfer of the suit properties into the names of the 1st Defendant. I have seen evidence on record showing that, when the 1st Defendant moved to the 2nd Defendant to vacate the Plaintiff's caveats, the 2nd Defendant issued and served notices on the Plaintiff informing it of the intention to vacate the caveats. This is one of the duties of the 2nd Defendant under the provisions of the RTA. It would be expected that, similarly, at the time transfers were presented for transfer of the suit properties into the names of the 1st Defendant, without the accompanying written consent of the Lessor, the 2nd Defendant would have notified the Plaintiff of the intended transfer and inquired, if the Plaintiff had consented to the same pursuant to the terms of the lease agreements or had no objection to the same. There is no evidence that this was ever done by the 2nd Defendant.

It is clear from the evidence on record is that the 2nd Defendant and all the registrars at the various land offices where the transfers were effected "rubber stamped" the transfers presented by the 1st

Defendant and proceeded to effect the transfer oblivious of the need for the lessor's consent and therefore sanctioning the apparent illegality. In my view, the averments by the 2nd Defendant in its pleadings and in the scheduling memorandum that prior written consent of the lessor i.e., the Plaintiff was a condition precedent to the transfer of the 48 leasehold titles constituting the suit property herein, clearly confirm that the 2nd Defendant acted illegally in effecting a transfer of the leasehold interest in the suit property into the names of the 1st Defendant, without the consent of the Plaintiff. I have already held in this judgment, that in absence of the required written consent of the lessor, the entire sale and transfer of a leasehold land or property void ab initio and illegal.

As to whether the 2nd Defendant can be said to have acted fraudulently in effecting the transfer of the properties into the names of the 1st Defendant without the requisite consent, I am unable to make a finding of fraud against the 2nd Defendant. It is apparent that the 2nd Defendant and the registrars who effected the titles acted illegally. It is also clear that they were negligent in ignoring the rather glaring requirement for the Lessor's consent which was clear in the lease agreements forming part of the lease titles which the 2nd Defendant is a custodian of. However, such negligence of executing their mandate in a manner that was tainted with illegality does not necessarily lead to conclusion that the 2nd Defendant acted fraudulently. It also inconceivable that all registrars in the various Land offices where the titles transfers were effected from across the country could have acted in concert and in connivance with the 1st

Defendant as alleged by the Plaintiff. I have herein before highlighted the various acts and omissions that rendered the transaction acquisition of the suit properties by the 1st Defendant fraudulent and these were not attributed to the 2nd Defendant.

No evidence was adduced by the Plaintiff to prove any participation of the 2nd Defendant in the highlighted scheme, acts and or omissions of or between BOU as the receiver of CBL and the 1st Defendant. It is trite law that fraud must be attributed to the party against whom it is alleged. I have found that the registration of the 1st Defendant by the 2nd Defendant as proprietor of the suit leases was in in violation of the law. That finding does not in any way lead to a conclusion that the 2nd Defendant was fraudulent, especially in view of the fact that there was no proof of the 2nd Defendant's participation in the fraudulent scheme. In fact, the 2nd Defendant having lodged a commissioner's caveat on the suit titles to stop any further transfers/transaction pending the determination of this suit is further proof that whereas it illegally transferred the properties without the consent of the lessor, it was not party to any acts intended to defeat the Plaintiff's reversionary interests.

I am also unable to fault the 2nd Defendant for the alleged failure to scrutinize the transfer form and consent forms presented for registration by the 1st Defendant to ascertain whether the 1st Defendant had properly declared therein, the proper consideration or

purchase price paid and whether it had paid the correct stamp duty as asserted by the Plaintiff. In my view assessment and determination of the value of the land is the duty of the Chief Government Valuer and assessment of the stamp duty payable is the mandate of the Uganda Revenue authority. In my view, the 2nd Defendant's duty is inter-alia restricted to verifying the propriety of the transfer instrument on the face of it, proper execution and attestation, thereof, ascertainment of whether the transferor is the registered proprietor and in the event of a lease verification of whether prior written consent of the lessor is required and whether it has been presented. The obligation to state the correct consideration paid in the transfer instrument and the consent to transfer instrument and the further duty to pay the requisite stamp duty for the prcperty, the subject of transfer is on the transferee any fraud committed during that process cannot be attributed to the 2nd Defendant. It is therefore my finding that the Plaintiff's allegations that the 2nd Defendant have not been proved. I so find. Issue 3 is answered in the negative as well.

Issue No. 4; Whether the said leasehold certificates of title, registered in the names of the 1st Defendant are liable to be cancelled on account of fraud and illegality?

The resolution and findings of the Court in respect of issues 1, 2 and 3 substantially resolve this issue as well. The Court has already found and held that the transaction leading to the acquisition of the

suit properties, taking of possession thereof and the subsequent registration of the 1st Defendant as proprietor of the suit properties were tainted with fraud and illegality. I have also found that parting with possession including effecting a transfer of the suit properties to the 1st Defendant without the prior written consent of the lessor i.e. the Plaintiff contrary to the express covenants in the lease renders the transfer illegal. I have equally found that the 2nd Defendant acted illegally in effecting a transfer of the suit properties into the names of the 1st Defendant without the mandatory written consent of the Plaintiff as the lessor of the suit property.

I have further found that the transfer of a leasehold titles in total disregard of the statutory rights and powers of the Lessor was illegal. The position of the law is that in order for the title to be cancelled on ground of fraud or illegality, the Plaintiff must prove that transferee and therefore current registered proprietor was a party or was privy to the illegalities or fraud. This is the import of the decision in **Transroad Uganda Limited v Commissioner Land Registration (Civil Suit No. 621 of 2017) [2019].** I have found in issues 1-3 that the 1st Defendant illegally caused itself to be registered as transferee of the leasehold properties without securing the mandatory prior written consent of the Plaintiff as the Lessor. The registration of the 1st Defendant procured illegally is therefore liable to be cancelled.

565. I have also found that, the actions of the 1st Defendant of taking legal and physical possession of the suit properties without the

consent of the Plaintiff as a lessor, the denial by the 1st Defendant of the Plaintiff's title and continued and adamant refusal to recognize the Plaintiff as the lessor, the refusal by the 1st Defendant to mitigate by at least seeking to regularize the leases with the Plaintiff, even after the unsuccessful bid to recover the Mailo and freehold interests and the continued adamant refusal to pay any ground rent hiding under clauses in the P & A Agreement all demonstrate that the 1st Defendant has at all material times, not recognized the title of the Plaintiff as the lessor of the suit properties.

The 1st Defendant cannot purport to be a lessee of the suit properties without a lessor and without being bound by covenants in the lease agreements. The 1st Defendant cannot force itself to be registered as a lessee and continue to challenge or refuse to recognize the title of the Lessor. It cannot be a lessee that had continued to adamantly ignore the lease covenants and denies being bound by such covenant, despite having had the properties sold, assigned and conveyed to it subject to the lease covenants.

The position of the law is that, where a lessee or even a tenant denies the title of the Lessor and or refuses to recognize the lessor of the suit property and the covenants of the lease, such lessee or tenant becomes a trespasser on the suit property and the Lessor would be entitled to an order of vacant possession of the premises.

Accordingly, I find that the 1st Defendant became a trespasser on land in January 2017 and the certificates of titles for the lease properties illegally and fraudulently acquired and or transferred in its names are liable for cancellation on account of fraud and illegality. Therefore, issue 4 is also answered in the affirmative.

Issue No. 5: What remedies are available to the parties?

The Plaintiff prayed for a number of remedies as set out in the plaint. I will analyze each of them to determine whether the Plaintiff is entitled to any.

1. A declaration that the Plaintiff, as the registered proprietor of the freehold/Mailo interests in the suit properties described herein above has the right to consent or otherwise to any taking of possession and transfer of the leasehold interest to any third party. The Court has already found that the right of the Plaintiff, being the registered proprietor of the Mailo and Freehold interests and the Lessor of the suit properties reserved the right to consent under clause 3(f) of the lease Agreements. The said right is equally preserved and protected under section 36 (2) of the Registration of Titles Act. I am satisfied that on the evidence on record, the Plaintiff is entitled to the declaration sought and the same is hereby granted.

2. A declaration that the transfer of the leasehold interests in the suit properties from Crane Bank Limited into the names of the 1st Defendant was tainted with illegality and fraud and is therefore invalid. I have made findings specifically, in issues 1 and 2 herein above that the evidence on record has proved to the satisfaction of Court that the acquisition of the suit properties by the 1st Defendant was tainted with illegality and fraud. I am satisfied that on the evidence on record, the Plaintiff entitled to the declaration sought. The same is hereby granted.

3. A declaration that the transfer of the leasehold interests in the suit properties to the 1st Defendant and taking of possession of the same by the 1st Defendant, without the prior consent of the Plaintiff rendered the leases illegal and invalid. The evidence on record and the authorities cited all lead to the conclusion that the manner of taking legal and physical possession of the suit properties rendered the transfer of the leases illegal and invalid. This was the finding of this Court in issue 2 herein above. The declaration is hereby granted.

4. A declaration that there are no longer any valid leases in respect of the suit properties. I have already found that the 1st Defendant illegally obtained legal and physical possession, adamantly refused to secure the prior written consent of the Lessor and denied or refused to recognize the title of the Plaintiff, as the

reversion owner thereon. The 1st Defendant equally adamantly declined to recognize the lease covenants claiming that it was not bound by the terms of the lease agreements as it wasn't privy to the lease agreements, despite having purchased them same subject to the terms therein. This renders the lease legally ineffectual. In the circumstances, it can hardly be concluded that there are any valid leases. It is inconceivable that a lease can subsist without a lessor, or where the lessee doesn't recognize the lessor, does not recognize the lease covenant and does not pay any ground rent. The Court finds that there are no longer any valid leases in respect of the suit property.

5. A declaration that the occupation and continued utilization of the suit properties by the 1st Defendant constitutes trespass. I have already found that by entering into the suit properties without the prior written consent of the lessor, denying the title of the Lessor and adamantly refusing to recognize the terms of the leases and covenants therein, the 1st Defendant is a trespasser on the suit property. According to the evidence on record, the lease agreements and other documents, there is only one lessor and that is the Plaintiff. However, at all times, despite having knowledge of the lessor, the 1st Defendant has refused to recognize the Plaintiff as such and as such, the 1st Defendant became a trespasser. Since evidence of DW1 confirmed that the 1st Defendant is still in possession of the suit properties, its continued possession and

utilization of the suit properties without the consent or authorization of the lessor constitutes trespass.

6. A declaration that the Plaintiff as the registered proprietor of the freehold/Mailo interest in the suit properties is entitled to vacant possession of the suit properties. In view of the findings, declarations hereinabove that the taking of legal and physical possession of the suit properties by the 1st Defendant was tainted with illegality and fraud, a declaration that the registration of the 1st Defendant as proprietor of the suit properties was illegal and tainted with fraud and that its liable to be cancelled from the register of the suit properties, and that the 1st Defendant is a trespasser on the suit properties, the Plaintiff is entitled to vacant possession of the suit properties.

7. An order directing the 2nd Defendant to cancel the registration of the 1st Defendant as proprietor of the leasehold interests in respect of the suit properties. In view of the earlier findings and declarations herein above and having found that the leases determined and the certificates of titles in the names of the 1st Defendant are liable for cancellation for fraud and illegality, an order issues directing the 2nd Defendant to cancel the registration of the 1st Defendant from the register and titles in respect of all the 48 suit properties.

8. An order directing the 2nd Defendant to cancel the entry on the leasehold interest as an encumbrance on all the Plaintiff's freehold/Mailo titles. The evidence adduced by the Plaintiff and uncontroverted by the Defendants showed that the subject leases, variation lease agreements and lease extensions were registered as encumbrances on the register and white page of Plaintiff's Mailo and Freehold titles. In view of the findings and declarations above and the leases having determined, the 2nd Defendant is hereby directed to cancel the entry of those leases, lease variations and lease extensions registered as encumbrances on the Mailo and freehold titles of the Plaintiff from which the leases derived.

9. An order directing the 1st Defendant to forthwith vacate the suit properties. The evidence on record proved that since 26th January 2017 when the 1st Defendant took possession of the suit premises to date, the 1st Defendant has been and continues to be in possession of the premises. In his evidence, PW1 testified that the 1st Defendant took possession of the suit properties, vandalized them, left them unattended to, and unmaintained thereby leaving them in a sorry state. He stated that CBL had maintained and kept the properties in a good state and the suit properties have deteriorated due to lack of maintenance by the 1st Defendant. The Plaintiff through PW1 adduced evidence to prove that the suit properties have since been vandalized while under occupation or possession of agents of the 1st Defendant since January 2017 and

are now in a state of disrepair. The Plaintiff produced in evidence photographs of some of the properties showing the extent of damage cause by the 1st Defendant. The Court conducted a locus visit at one of the suit properties in Ntinda Branch, as a sample to ascertain the general state of the suit properties. I observed at the locus visit that as testified by DW1, the 1st Defendant is still in possession and control of the premises, has some agents/ caretakers in occupation of some of the rooms, though there was no ongoing banking activity.

I also observed the need for general repairs and replacements, particularly, painting of the inner and outer walls, replacement of broken tiles, and some electrical works including replacement of sockets and or repair of the air conditioning, the repair of some of the toilet apparatus in some of the rooms. In view of the earlier finding and declaration that the Plaintiff is entitled to vacant possession of the suit properties, the 1st Defendant is hereby ordered to vacate the suit properties in a period of 3 months from the date of this Judgement after restoring them to a tenantable position at its cost.

10. An order of a permanent injunction restraining the 1st Defendant, its agents and servants from continued trespass on the suit properties. The 1st Defendant is a trespasser which has continued to remain in possession of the suit property from January 2017 to date which is almost 7 years. Upon the Court

ordering the 1st Defendant to vacate the suit premises, it is pertinent to stop the 1st Defendant and its agents from any acts of further trespass. The Plaintiff is therefore entitled to an order of a permanent injunction restraining the 1st Defendant, its agents and servants from continued trespass on the suit properties.

General Damages.

It is trite law that damages are the direct and probable consequence due to loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering. In determining general damages, Court is required to consider factors like the economic/commercial value of the subject matter, the inconvenience the party has been put through and the nature and extent of the injury suffered as per **Civil Suit No. 724 of 2003 The Law Development Centre Versus Dan Wasswa Serufusa** General damages are compensatory in nature. See Civil **Suit No 299 Of 2015 3wm Uganda Limited Versus Loadwell Freight Logistics Ltd & 2 Others Citing Johnson and another v Agnew [1979] 1 All ER 883 wherein Lord Wilberforce held at page 896** that the award of general damages is compensatory and meant to place the innocent party so far as money can do so, in the same position as if the contract had been performed. The Plaintiff prayed for 3,000,000,000 (three Billion) as general damages.

The law on general damages is that damages are awarded at the discretion of curt and the purpose is to restore the aggrieved person to the position that they would have been, had the breach or wrong not occurred. Guidance can be found in 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.

In this case, the Plaintiff has been found to be the owner of the 48 subject properties including the Mailo and freehold interests. The 1st Defendant has been a trespasser thereon and illegally utilizing them since 26th January 2017 without any legal justification and without paying ground rent. This is a period of 6years. The Plaintiff being a real estate company has therefore, due to the actions of the 1st Defendant, been denied and deprived of its properties or taking benefit from them throughout since January 2017.

The subject properties are commercial properties which can generate rent for the Plaintiff and that the Plaintiff has not earned from the property since January 2017 to date. PW1 attached to his witness statement, a computation of rent from 1st July 2017 to the 31st of December 2022 amounting USD. 3,592,448 which was admitted as PE-309. This is the rent the Plaintiff would have earned from the suit premises. As such, the Plaintiff has been deprived of the right to commercially benefit from the suit property. It would have put its money to alternative use for the last 6 years. That is not catered for by an award of mesne profits and ought to be considered for

damages. It is evident therefore that the inconvenience caused to the Plaintiff over the years has been to a large extent, financial. The Plaintiff has not been able to earn from its properties, neither has it been able to apply the rent to use for commercial gain. Being a business entity dealing in real estate, I find the sum of UGX. 50,000,000/= (Fifty million only) per property as appropriate as general damages in the matter totaling to UGX 2,400,000,000/= (Two billion Four hundred million only) which I hereby award to the Plaintiff against the 1st Defendant. The said sum shall carry interest at 8% per annum from the date of this judgement till payment in full

Mesne profits.

Section 2(ii) of the Civil Procedure Act Cap 71 defines mesne profits of property to mean those profits which the person in wrongful possession of the property actually received or might, with ordinary diligence have received from it, together with the interest on those profits. Halsburys Laws of England also defines mesne profits as an action by a land owner against another who is trespassing on the owner's lands and who had deprived the owner of income that otherwise may have been obtained from the use of the land. Although it has been proved by the Plaintiff that the 1st Defendant interfered with the Plaintiff's property, there is no evidence to show that the DFCU Bank has earned income from the suit properties by way of rent or otherwise. Some of the properties are not yet developed. Mesne profits must be strictly proved. The amounts contained in PE

309 is an expected figure as opposed to what was collected from the suit properties. The Plaintiff's claim is based on deprivation of commercial benefit from the suit properties which are commercial in nature and the expected income to be derived naturally is rental income. Although the 1st defendant has been found to be occupying the suit properties since January 2017 without paying any rent, there is no evidence that the properties were rented out so as to benefit the 1st defendant. The claim for ground rent is equally speculative. The wrongful possession has already been remunerated by the award of general damages. Therefore, the plaintiff is not entitled to mesne profits.

Costs of the suit.

The position of the law under section 27 of the Civil Procedure Act is that costs follow the event unless the Court determines otherwise. Given the findings above, the Plaintiff is entitled to the costs against both Defendants and the same are awarded to the Plaintiff.

In conclusion, the Plaintiff's suit succeeds against the Defendants with the following declarations and orders;

a) A declaration that the Plaintiff, as the registered proprietor of the freehold/Mailo interests in the suit properties described herein above had the right to consent or otherwise to any taking of possession and transfer of the leasehold interest to the 1st Defendant.

b) A declaration that the transfer of the leasehold interests in the suit properties from Crane Bank Limited into the names of the 1st Defendant was tainted with illegality and fraud and is therefore invalid.

c) A declaration that the transfer of the leasehold interests in the suit properties to the 1st Defendant and taking of possession of the same by the 1st Defendant, without the prior consent of the Plaintiff rendered the leases illegal and invalid.

d) A declaration that there are no valid leases in respect of the suit properties. The said leases are therefore declared to be invalid and absolutely determined on account of breach and illegality.

e) A declaration that that the occupation and continued utilization of the suit properties by the 1st Defendant constitutes trespass.

f) A declaration that the Plaintiff as the registered proprietor of the freehold/Mailo interest in the suit properties is entitled to vacant possession of the suit properties within 3 months from Judgement date.

g) The 2nd Defendant is hereby ordered to cancel the registration of the 1st Defendant as proprietor of the leasehold interests in respect of all the suit properties.

h) The 2nd Defendant is hereby ordered to cancel the leasehold titles in respect of the suit properties.

i) The 2nd Defendant is hereby ordered to cancel the entry of the suit leases, lease variations and lease extensions registered as encumbrances on the Mailo and freehold titles of the Plaintiff.

j) The 1st Defendant is hereby ordered to vacate all the suit properties and give vacant possession to the Plaintiff within 3 months.

k) An order of a permanent injunction is hereby issued restraining the 1st Defendant, its agents and servants from continued trespass on the suit properties.

l) The Plaintiff is awarded general damages in the sum of UGX 2,4000,000,000/=payable by the 1st Defendant. The said sum shall carry interest at 8% per annum from the date of this judgement till payment in full.

m) Mesne profits not awarded.

n) The Plaintiff is awarded costs of the suit against the Defendants.

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TADEO ASIIMWE.

JUDGE

24/10/2023