

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(LAND DIVISION)  
CIVIL SUIT NO. HCT-00-LD-CS-0469-2017**

**POTTERS HAND LIMITED:..... PLAINTIFF**

***VERSUS***

**1. TIRUPATI DEVELOPMENT (U) LTD  
2. KENYA COMMERCIAL BANK LTD:..... DEFENDANTS**

**BEFORE: HON. JUSTICE BERNARD NAMANYA**

**JUDGMENT**

**Introduction:**

1. The plaintiff (Potters Hand Ltd) sued the 1<sup>st</sup> defendant (Tirupati Development (U) Ltd) and the 2<sup>nd</sup> defendant (Kenya Commercial Bank Ltd) jointly and severally for: a declaration that the suit properties belong to the plaintiff; an order of specific performance compelling the 1<sup>st</sup> defendant to hand over land titles to the plaintiff; permanent injunction; general damages; interest; costs of the suit; and alternatively, an order compelling the 1<sup>st</sup> defendant to refund to the plaintiff, a sum of USD 540,000 being money had and received by the 1<sup>st</sup> defendant as consideration for the sale of the suit properties.

**Background:**

2. The background to the suit is that sometime in 2011, the plaintiff purchased six warehouses from the 1<sup>st</sup> defendant at USD 617,350. The plaintiff paid the purchase price in instalments, and later took possession of the six warehouses in 2013, pending subdivision and creation of separate titles for each warehouse. As of March 2014, the plaintiff had paid a total sum of USD 540,000 to the 1<sup>st</sup>



defendant leaving an outstanding balance of USD 77,350. The 1<sup>st</sup> defendant subsequently obtained separate titles for the six warehouses with the following particulars: LRV 4401 Folio 17 Plot 1222 Kyadondo Block 211 Land at Kikaya, Wakiso District; LRV 4401 Folio 18 Plot 1223 Kyadondo Block 211 Land at Kikaya, Wakiso District; LRV 4401 Folio 19 Plot 1224 Kyadondo Block 211 Land at Kikaya, Wakiso District; LRV 4401 Folio 20 Plot 1225 Kyadondo Block 211 Land at Kikaya, Wakiso District; LRV 4401 Folio 21 Plot 1226 Kyadondo Block 211 Land at Kikaya, Wakiso District; and LRV 4401 Folio 22 Plot 1227 Kyadondo Block 211 Land at Kikaya, Wakiso District. The title deeds were all registered in the name of the 1<sup>st</sup> defendant.

3. It is the plaintiff's case that the 1<sup>st</sup> defendant failed to hand over the title deeds for the warehouses despite several demands from the plaintiff, and instead fraudulently mortgaged the warehouses to the 2<sup>nd</sup> defendant who later fraudulently advertised them for sale, following default on loan repayment by the 1<sup>st</sup> defendant.
  
4. The 1<sup>st</sup> defendant, in its written statement of defence acknowledged entering into a sale agreement with the plaintiff, and giving it possession of the suit property. The 1<sup>st</sup> defendant also acknowledged receipt of USD 540,000 paid by the plaintiff as part payment. The 1<sup>st</sup> defendant denies any wrong doing, and contends that the process of handing over the titles to the plaintiff has been frustrated by the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant further contends that the advertisement of the suit properties was illegal, and was challenged in Civil Suit No. 516 of 2017 in the Commercial Court: Tirupati Development (U) Ltd v. KCB Bank Uganda Ltd & Kenya Commercial Bank Ltd.



5. The 2<sup>nd</sup> defendant contends that it advanced the 1<sup>st</sup> defendant a loan facility of USD 7,000,000 in respect of which a mortgage was created over the suit property. That the 1<sup>st</sup> defendant did not comply with the terms of the mortgage deed, and eventually defaulted on repayment of the facility which led the 2<sup>nd</sup> defendant to advertise the properties for sale. The 2<sup>nd</sup> defendant denied acting fraudulently, and stated that their mortgage was registered earlier on the suit property, and that the plaintiff's purported purchase is subject to the terms of the 2<sup>nd</sup> defendant's mortgage on the suit properties.

**Representation:**

6. At the hearing of the suit, the plaintiff was represented by Mr. Andrew Kahuma of M/s. Kahuma & Co. Advocates. The 1<sup>st</sup> defendant was represented by Mr. Pamba Egan of M/s. Trust Law Advocates. The 2<sup>nd</sup> defendant was represented by Mr. Terence Kavuma of M/s. Kabayiza, Kavuma, Mugerwa and Ali Advocates.

**The plaintiff's witnesses and exhibits:**

7. The plaintiff produced one witness, Andrew Sebutenga (PW1), its managing director. The plaintiff adduced evidence of the following documents that were exhibited:
- i). P1 to P6 – Copies of the land titles for the 6 warehouses.
  - ii). P7 to P9 – Letters by the plaintiff to the 1<sup>st</sup> defendant dated 1 April 2014 12 May 2015 and 28 February 2017.
  - iii). P10 – Sale agreement between the plaintiff and the 1<sup>st</sup> defendant.
  - iv). P11 – Newspaper advert for the intended sale by the 2<sup>nd</sup> defendant dated 23 June 2017.
  - v). P12 – Consent Judgment between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant

in Commercial Court Civil Suit No. 516 of 2017 Tirupati Development (U) Ltd v. KCB Bank Uganda Ltd dated 28 July 2017.

- vi). P13 – Letter from the 2<sup>nd</sup> defendant’s lawyers to the plaintiff’s lawyers dated 8 August 2017.
- vii). P14 – Letter by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant dated 7 August 2017.
- viii). P15 – Title deed for Folio 19 Plot 1224.
- ix). P16 – A copy of the release of mortgage.
- x). P17 – Transfer deed for Folio 19 Plot 1224.

**The 1<sup>st</sup> defendant’s witnesses and exhibits:**

- 8. The 1<sup>st</sup> defendant led evidence from two witnesses, DW2 (Kruti Barot) and DW3 (Rogers Mayanja). The 1<sup>st</sup> defendant adduced evidence of the following documents that were exhibited:
  - i). D19 – Work Identity Card for DW3.
  - ii). D20 – License to transact credit reference bureau business.
  - iii). D21 – Business Standard Credit Report.
  - iv). D22 – Credit Card Request Form.

**The 2<sup>nd</sup> defendant’s witnesses and exhibits:**

- 9. The 2<sup>nd</sup> defendant relied on the evidence of Timothy Nabaala (DW1). The 2<sup>nd</sup> defendant adduced evidence of the following documents that were exhibited:
  - i). D1 – The facility agreement.
  - ii). D2 – The mortgage deed.
  - iii). D3 – Lease agreement between Harshad Barot and the 1<sup>st</sup> defendant.
  - iv). D4 – Notice of default.
  - v). D5 – Notice of sale of mortgaged property.

- vi). D6 – Letter by the 1<sup>st</sup> defendant on release of titles dated 4 August 2017.
- vii). D7 – Letter by the 1<sup>st</sup> defendant on release of titles dated 25 August 2017.
- viii). D8(a) to D8(f) – Interim Certificates
- ix). D9 – Acknowledgment of receipt of titles.
- x). D10 – Letter by the 2<sup>nd</sup> defendant dated 26 November 2020.
- xi). D11 – Letter by the 2<sup>nd</sup> defendant dated 3 July 2020.
- xii). D12 – Letter by the 1<sup>st</sup> defendant dated 3 December 2020.
- xiii). D13 – Letter by the 1<sup>st</sup> defendant dated 16 November 2020.
- xiv). D14 – Letter by the 1<sup>st</sup> defendant dated 27 November 2020.
- xv). D15 – Letter by the 1<sup>st</sup> defendant dated 13 January 2023.
- xvi). D16 – Complaint in Civil Suit No.15 of 2022.
- xvii). D17 – Ruling in Misc. Application No.97 of 2022.
- xviii). D18 – Memorandum of Appeal against the Ruling of Justice David Wangututsi.

**Locus in quo visit:**

10. Locus in quo visit to the suit property was conducted by this court on the 24 November 2023. The following persons attended: Mr. Andrew Kahuma – counsel for the plaintiff; Ms. Stella Nakato – counsel for the 2<sup>nd</sup> defendant; Mr. Pamba Egan – counsel for the 1<sup>st</sup> defendant; Ms. Kruti Baroti – Managing Director, 1<sup>st</sup> defendant; Mr. Nabaale Timothy – Head of Recoveries & Collections, 2<sup>nd</sup> defendant; Mr. Andrew Sebutenga – Managing Director, plaintiff; and Ms. Masitula Nakisozi – Local Council Chairman of the area. Mr. Andrew Sebutenga and Ms. Kruti Baroti gave evidence on oath and were cross examined and re-examined by either counsel. The court observed that the suit property is in possession of the plaintiff.



**Issues:**

11. The following four issues were framed for determination:
- i). Whether the plaintiff's interest in the suit property is subject to the 2<sup>nd</sup> defendant's mortgage.
  - ii). Whether the 1<sup>st</sup> defendant fraudulently mortgaged the suit property to the 2<sup>nd</sup> defendant.
  - iii). If so, whether the 2<sup>nd</sup> defendant's mortgage is vitiated by fraud.
  - iv). What remedies are available to the parties?

**The plaintiff's evidence:**

12. Andrew Sebutenga (PW1), managing director of the plaintiff testified and stated that sometime in 2011, he agreed to purchase six warehouses on land comprised in LRV 4183 Folio 16 Plot 1072 Block 211 at Kikaya in Wakiso District from the 1<sup>st</sup> defendant at USD 617,350. It was agreed that the 1<sup>st</sup> defendant would pay the purchase price in instalments, and as of March 2014, a total sum of USD 540,000 had been paid to the 1<sup>st</sup> defendant by the plaintiff leaving an outstanding balance of USD 77,350. That in 2013, the 1<sup>st</sup> defendant allowed the plaintiff to take possession of the six warehouses, numbered 82,83,84,85,86&87. That the 1<sup>st</sup> defendant was supposed to process separate titles for each warehouse, and hand them over to the plaintiff but the 1<sup>st</sup> defendant failed to deliver the title deeds. That initially, the parties had no formal agreement of sale for the warehouses but on the 1 July 2016, a formal sale agreement for the warehouses was executed, stating the terms already agreed upon by the parties. That sometime in 2017, the suit property was advertised for sale by the 2<sup>nd</sup> defendant following default by the 1<sup>st</sup> defendant on its loan obligations. Later on, the 1<sup>st</sup> defendant handed over one title deed

for Folio 19 Plot 1224. That to date the plaintiff is in possession, use, and occupation of the 6 warehouses but without the title deeds for five warehouses.

**The 2<sup>nd</sup> defendant's evidence:**

13. DW1 (Timothy Nabaala) testified that on 17 July 2012, the defendants executed a facility agreement wherein the 2<sup>nd</sup> defendant and Kenya Commercial Bank Ltd agreed to advance the 1<sup>st</sup> defendant a sum of USD 7,000,000 payable in 36 months to finance the construction of 135 warehouses, with each of one of them having a title. That the said facility was secured by *inter alia* the suit property. That on 9 November 2012, 135 leasehold titles in the name of the 1<sup>st</sup> defendant were created and on 16 November 2012, the 2<sup>nd</sup> defendant's mortgages were registered. That the 1<sup>st</sup> defendant did not comply with the terms of the mortgage deed, prompting the 2<sup>nd</sup> defendant to serve a notice of default on the 1<sup>st</sup> defendant, and eventual advertisement of the properties for sale on 23 June 2017. That following the advertisement for sale, on 3 August 2017, the 1<sup>st</sup> defendant filed Civil Suit No. 516 of 2017 against the 2<sup>nd</sup> defendant which suit was settled by consent. That the 1<sup>st</sup> defendant paid USD 342,000, and on 7 August 2017, pursuant to the consent, the 2<sup>nd</sup> defendant released the mortgage on Kyadondo Block 211 LRV 4401 Folio 19 Plot 1224, one of the properties claimed by the plaintiff.

**The 1<sup>st</sup> defendant's evidence:**

14. DW2 (Kruti Baroti) testified that the plaintiff took possession of the warehouses after the signing of the sale agreement, and has remained in possession to date. That the 2<sup>nd</sup> defendant has unfairly refused to release title deeds of the warehouses to the detriment of the plaintiff and the 1<sup>st</sup> defendant. She prayed for an order compelling the 2<sup>nd</sup> defendant to surrender the title deeds for the

plaintiff. DW3 (Rogers Mayanja), an official of Metropol Uganda Ltd, testified that the credit reference bureau report adduced by the 1<sup>st</sup> defendant is authentic.

**Consideration and determination of the issues by the court:**

**Issue No.1: Whether the plaintiff's interest in the suit property is subject to the 2<sup>nd</sup> defendant's mortgage.**

15. The plaintiff submitted that its interest in the suit property is not subject to the 2<sup>nd</sup> defendant's mortgage. The 2<sup>nd</sup> defendant submitted that the plaintiff's purported interest in the suit property is subject to its mortgage interest.
16. I have perused the certificates of title for the suit property (Exh.P1 to P6), and they reveal the following particulars of ownership and incumbrances:

<b><i>Property details</i></b>	<b><i>Ownership</i></b>	<b><i>Incumbrances</i></b>
LRV 4401 Folio 17 Plot 1222 Kyadondo Block 211 Land at Kikaya, Wakiso District	Tirupati Development (U) Ltd entered as owner on the 9/11/2012	Mortgage to KCB Bank Uganda Ltd entered on the 16/11/2012
LRV 4401 Folio 18 Plot 1223 Kyadondo Block 211 Land at Kikaya, Wakiso District	Tirupati Development (U) Ltd entered as owner on the 9/11/2012	Mortgage to KCB Bank Uganda Ltd entered on the 16/11/2012
LRV 4401 Folio 19 Plot 1224 Kyadondo Block 211 Land at Kikaya, Wakiso District	Tirupati Development (U) Ltd entered as owner on the -/11/2012	Mortgage to KCB Bank Uganda Ltd entered on the 16/11/2012
LRV 4401 Folio 20 Plot 1225 Kyadondo Block 211 Land at Kikaya, Wakiso District	Tirupati Development (U) Ltd entered as owner on the 9/11/2012	Mortgage to KCB Bank Uganda Ltd entered on the 16/11/2012
LRV 4401 Folio 21 Plot 1226 Kyadondo Block 211	Tirupati Development (U) Ltd entered as owner on the 9/11/2012	Mortgage to KCB Bank Uganda Ltd





Land at Kikaya, Wakiso District		entered on the 16/11/2012
LRV 4401 Folio 22 Plot 1227 Kyadondo Block 211 Land at Kikaya, Wakiso District	Tirupati Development (U) Ltd entered as owner on the -/11/2012	Mortgage to KCB Bank Uganda Ltd entered on the 16/11/2012

17. Having regard to evidence before this court, mortgages on the suit property in favour of the 2<sup>nd</sup> defendant were created on the 16 November 2012 with the 1<sup>st</sup> defendant having been entered as registered owner of the suit property on the 9 November 2012. Upon perusal of the certificates of title of the suit property, there is nothing to indicate the interest of the plaintiff. If it is true that the plaintiff had acquired an equitable interest in the suit property way back in the year 2011, why didn't the plaintiff lodge a caveat on the title deeds to protect its interest? Accordingly, it is my decision that any purported equitable interest of the plaintiff in the suit property is subject to the 2<sup>nd</sup> defendant's mortgage over the suit property.

**Issues No.2 & 3: Whether the 1<sup>st</sup> defendant fraudulently mortgaged the suit property to the 2<sup>nd</sup> defendant; If so, whether the 2<sup>nd</sup> defendant's mortgage is vitiated by fraud.**

18. Issues No.1 and 2 shall be handled concurrently. In paragraph 10 of the plaint, the plaintiff averred that the mortgage of the suit property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was fraudulent. The plaintiff alleged several particulars of fraud against the two defendants. The plaintiff bears the burden to prove fraudulent conduct against the two defendants. The standard of proof in fraud cases is heavier than a mere balance of probabilities. See the case of Kampala

*Bottlers Ltd v. Damanico (U) Ltd, Supreme Court Civil Appeal No.22 of 1992*  
*(coram: S.W.W. Wambuzi, C.J., A. Oder, J.S.C., H. Platt, J.S.C).*

19. It is evidence of the plaintiff that the 1<sup>st</sup> defendant mortgaged the suit property to the 2<sup>nd</sup> defendant without disclosing that the plaintiff had an equitable interest in it; and that the 2<sup>nd</sup> defendant accepted a mortgage on the suit property without ascertaining its status, and the fact that the suit property was occupied by the plaintiff at the time of creation of the mortgages.
20. I have carefully considered the evidence adduced by the plaintiff in relation to the allegations of fraudulent creation of the mortgage but I am not satisfied with it. I have found nothing to indicate fraudulent conduct on the part of the defendants in the way that the mortgages were created. Notably, the plaintiff failed to lodge a caveat to protect its purported equitable interest in the suit property. Accordingly, it is my decision that the mortgages over the suit property in favour of the 2<sup>nd</sup> defendant were not fraudulent.

***Issue No.4: What remedies are available to the parties?***

21. The plaintiff prayed for several remedies including, an order of specific performance compelling the 1<sup>st</sup> defendant to hand over to the plaintiff the land titles for the suit property; a declaration that the said properties belong to the plaintiff; a permanent injunction against the defendants; general damages for inconvenience; interest on general damages; and costs of the suit.
22. It is my decision that the plaintiff has failed to prove a case for an order compelling the 2<sup>nd</sup> defendant to hand over title deeds of the suit property to the plaintiff. This is because the suit property is encumbered with mortgages in

favour of the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant already admitted to its indebtedness to the 2<sup>nd</sup> defendant in the consent judgment dated 28 July 2017 in Civil Suit No. 516 of 2017. It is not necessary for me to delve into the status of compliance by the parties to this consent judgment. Suffice to note, that as of 28 July 2017, the 1<sup>st</sup> defendant was indebted to the 2<sup>nd</sup> defendant to the tune of USD 5,972,237.

23. Given the failure of the 1<sup>st</sup> defendant to deliver title deeds of the suit property to the plaintiff due to mortgage incumbrances in the 2<sup>nd</sup> defendant's favour, it is necessary for this court to consider the alternative prayer for refund of the purchase price to the plaintiff by the 1<sup>st</sup> defendant for partial failure of consideration.
  
24. It is the law that in a contract for sale of land, the vendor has a primary obligation to convey the land to the purchaser free from any encumbrances. The vendor will be in breach of the obligation to convey the land free from encumbrances, where there remain on the land, persons who are lawfully in possession such as tenants or licensees; or where there are trespassers on the land; or where there are legal impediments to the enjoyment of the property. The only exception to this general rule is where there is an express stipulation in the contract for sale of land to the contrary or if the land was subject to some incumbrance or other impediment to vacant possession which was known to the purchaser. *See Megarry & Wade: The Law of Real Property, 9<sup>th</sup> Edition, Stuart Bridge, Elizabeth Cooke and Martin Dixon, Sweet & Maxwell, London, 2019 at paragraphs 14-088; and 14-089.*

25. In the case of *Cook v. Taylor [1942] 2 ALL ER 85*, the brief facts of the case were that a vendor sold freehold property, and undertook to deliver vacant possession to the purchaser. The vendor subsequently failed to deliver vacant possession of the property to the purchaser. The vendor sued for specific performance, and the purchaser counterclaimed against the vendor seeking to be discharged from the contract, and for refund of the purchase price paid. Simonds, J dismissed the vendor's action, and held that the purchaser was entitled to a declaration that he is discharged from the obligation to perform the contract for sale of land, because of the failure by the vendor to give him vacant possession. He ordered the vendor to refund the purchase price.
26. In the case of *Nsubuga v. Rwomushoro (Court of Appeal of Uganda Civil Appeal No. 102 of 2012) [2019] UGCA 3*, the court considered the issue as to whether there had been a total failure of consideration entitling the respondent to a refund of the entire purchase price. The court agreed with the trial Judge that there had been a total failure of consideration because the respondent never received the land that she paid for, and that she was thus entitled to a refund of the purchase price.
27. The plaintiff has proved to my satisfaction that there is a valid sale agreement dated 1 July 2016 between the plaintiff and the 1<sup>st</sup> defendant. It concerned the sale of the suit property at a consideration of USD 617,350. Unknown to the plaintiff, by this time, the suit property was already mortgaged to the 2<sup>nd</sup> defendant. There is evidence that the plaintiff paid a sum of USD 540,000 leaving a balance of USD 77,350. There is also evidence that out of the six warehouses that were sold to the plaintiff, one title deed was handed over to the



plaintiff (LRV 4401 Folio 19 Plot 1224). The plaintiff was entered as the registered owner of Plot 1224 on the 21 September 2020.

28. Owing to the failure by the 1<sup>st</sup> defendant to hand over certificates of title for the suit property; it is my decision that there is sound basis in law to order the 1<sup>st</sup> defendant to refund the purchase price to the plaintiff.
29. The plaintiff did not adduce any evidence to justify payment of general damages. The evidence presented shows that the plaintiff has been in possession of the suit property since the year 2013. When this court conducted a locus in quo visit to the suit property, it was observed that the plaintiff has rented out some of the warehouses to tenants who are paying rent. For example; Warehouse No.82 is rented to Eurostar who pays rent of USD 750 per month to the plaintiff; Warehouse No.83 is rented to JWH Enterprises Ltd who pays rent of Shs 2,400,000 per month to the plaintiff; Warehouse No.85 is rented to Li Meng who pays rent of Shs 2,000,000 per month to the plaintiff; and Warehouse No.86 is rented to MED Equip Ltd who pays rent of Shs 2,400,000 per month to the plaintiff. Considering the fact that the plaintiff has been in occupation of the suit property since 2013, and to some extent has earned rental income from the suit property, the plaintiff's claim for general damages is not justified.

**Final order of the court:**

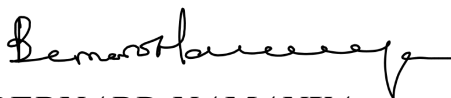
30. Therefore, I enter judgment in favour of the plaintiff with the following orders:
  - i). That the 1<sup>st</sup> defendant (Tirupati Development (U) Ltd) shall refund to the plaintiff (Potters Hand Ltd) the sum of USD 437,108 (United States



Dollars four hundred thirty-seven thousand one hundred and eight) for partial failure of consideration.

- ii). That the 1<sup>st</sup> defendant shall pay interest on the above sum at the rate of 20% per annum from the date of this judgment until payment in full.
- iii). That upon 1<sup>st</sup> defendant's refund of the purchase price and payment of interest (if any) as set out herein, the plaintiff shall vacate property comprised in property comprised in LRV 4401 Folio 17 Plot 1222 Kyadondo Block 211 Land at Kikaya, Wakiso District; LRV 4401 Folio 18 Plot 1223 Kyadondo Block 211 Land at Kikaya, Wakiso District; LRV 4401 Folio 20 Plot 1225 Kyadondo Block 211 Land at Kikaya, Wakiso District; LRV 4401 Folio 21 Plot 1226 Kyadondo Block 211 Land at Kikaya, Wakiso District; and LRV 4401 Folio 22 Plot 1227 Kyadondo Block 211 Land at Kikaya, Wakiso District; and hand over possession of the property to the 1<sup>st</sup> defendant.
- iv). That the 1<sup>st</sup> defendant shall pay costs of the suit only to the plaintiff. The 2<sup>nd</sup> defendant is not entitled to payment of costs owing to the fact that the dispute between 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant was settled in accordance with the consent judgment dated 28 July 2017 in Civil Suit No.516 of 2017.

***IT IS SO ORDERED.***

  
**BERNARD NAMANYA**  
**JUDGE**  
**26 March 2024**

**Attendance:**

26 March 2024 at 2:43pm.


Pamba Egan (holding brief for Andrew Kahuma)	Counsel for the plaintiff
Pamba Egan	Counsel for the 1 <sup>st</sup> defendant
Michael Abili (holding brief)	Counsel for the 2 <sup>nd</sup> defendant
Twagiramungu Joshua (on behalf of the plaintiff)	
Namubiru Josephine, legal officer of the 2 <sup>nd</sup> defendant	
Allena Kanyakire	Court Clerk

**Pamba Egan/Michael Abili:**

We are ready receive the judgment.

**Court:**

Judgment delivered in open chambers.

  
**BERNARD NAMANYA**  
**JUDGE**  
**26 March 2024**