

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**

**CIVIL SUIT NO. 126 OF 2009**

**BONEY MWEBESA KATATUMBA**  
**& 3**  
**OTHERS:.....:PLAINTIF**  
**FS**

**VERSUS**

**SHUMUK SPRINGS DEV'T LTD**  
**& 3**  
**OTHERS:.....:DEFENDA**  
**NTS**

**BEFORE THE HON. MR. JUSTICE HENRY PETER ADONYO**

**JUDGMENT**

**1. Background:**

The Plaintiffs sued the Defendants, seeking various declarations and orders, damages, interest and costs arising from a series of transaction and dealings between the parties in relation to land and property comprised in plot 2 Colville Street, Kampala, Plot

970 and 971 at Kisugu-Muyenga, and Block 135, plot 1 and 2 at Banda – Kalangala.

The original plaint and defenses in this matter were allowed by court to be amended to include additional parties and counterclaims.

The decision of this court will therefore be based on the amended pleadings filed in this court and these are on record.

## **2. The Plaintiffs' Case:**

The Plaintiffs' case as per their pleadings is that the First Plaintiff, DR. Boney Mwebesa Katatumba was all times the registered proprietor of the land and property comprised in LRV 131 Folio 1; plot 2 Colville Street, Kampala, known as Black lines House with the suit property said to have by then been transformed into and was comprised of 92 condominium units which units were already duly registered with each having own respective certificate of title.

The Second Plaintiff, Hotel Diplomate Ltd is said to have been at the time when the dispute arose the registered proprietor of mailo interests in the land and property comprised in Kyadondo Block 244 plots 970 and 971 at Kisugu in which the First Plaintiff Boney

Mwebesa Katatumba held leases, to wit LRV No. 3831 Folio 22, plot 970 and LRV 3835 Folio 25, plot 971 respectively, with the Plaintiffs jointly having constructed and operated thereon an hotel of that name of Hotel Diplomate Ltd.

The Third Plaintiff Katatumba Properties Ltd is stated to have been and still is the registered proprietor of an island in the Kalangala archipelago in Lake Victoria known as Block 135 plot 1 and 2 LRV 2462 Folio 13 being land at Banda Island.

The 4<sup>th</sup> Plaintiff Mrs. Gertrude Namutebi Katatumba is stated together with her family members to be residents in the property comprised in private Mailo Block 244 plot 970 Block 244 plot 971 LRV 3831 Folio 22 and LRV 3835 Folio 25 Kisugu Kampala with this said property being her matrimonial home as well as where she and her family derived their livelihood and sustenance.

Boney Mwebesa Katatumba, the First Plaintiff, by mid 2008 was a man heavily indebted to various banks, individuals, and or other entities and was as such under a lot of pressure to settle his indebtedness. To alleviate the pressures which were being exerted on him, Dr. Katatumba decided to sell some his assets so

that he could settle his debts. In that respect and on the 16<sup>th</sup> August 2008 he entered into an agreement with the First Defendant, Shumuk Springs Development Ltd for the sale of his interest in LRV 131 folio 1 plot 2 Colville Street, Kampala also known as Black Lines House for the sum of US\$ 5,000,000. Upon the signing of the said agreement a US\$ 101,000 deposit was paid to him as down payment with the rest of the balance to be paid within 60 days that is from the 16<sup>th</sup> August, 2008 up to and including the 15<sup>th</sup> October 2008. On the agreement was attached a schedule of the Dr. Boney Katatumba's creditors were among others to be paid directly by the First Defendant Shumuk Springs Development Ltd from the balance of the purchase of the property purchase price.

By the 15<sup>th</sup> October, 2008, to the dismay of the Plaintiffs neither the balance of the money nor the creditors had been paid as was agreed yet pressure continued to mount on the First Plaintiff to pay of his debts.

On the 10<sup>th</sup> day of November 2008, it is said that long after the deadline for payment had expired, Mr. Mukesh Shukla, (The

Fourth Defendant) who is also the Managing Director of Shumuk Springs Development Limited, (The First Defendant) wrote a letter to the attention of the First Plaintiff indicating that the First Defendant was withdrawing from the purchase of Plot 2 C Colville Street and was demanding immediate refund of the moneys which had thus been advanced to the First Plaintiff for the sale/purchase of the said property. At the same time, however, this Fourth Defendant intimated to the First Plaintiff that if the First Plaintiff was still interested to sell his property there was a possibility that Fourth Defendant's other company known as Springs International Hotel Ltd (the Second Defendant) could step in and purchase the same but at a reduced amount US\$ 4,000,000/= and further that if this proposal was agreeable to the First Plaintiff, then the purchase would still be based on terms similar to the previous contract. The First Plaintiff well knowing the dire situation he was in had no option but to jump into this snare whereby he accepted the new developments and therefore on the same date of 10th November 2008 executed a new agreement with the Second Defendant for the sale of LRV 131 Folio 1 Plot 2

Colville Street, Kampala also known as Black Lines House to the Second Defendant for the reduced sum of US\$4,000,000.

On the 18<sup>th</sup> November 2008, the First Plaintiff released duly signed transfer forms for those condominium units under his control for LRV 131 Folio 1 Plot 2 Colville Street, Kampala to the Fourth Defendant.

However, with the understanding and knowledge that the reduced new purchase price for Plot 2 Colville Street would not be able all his indebtedness, the First Plaintiff signed another agreement the sale of Plots 970 and 971 at Kisugu known as Hotel Diplomate to the Second Defendant for the sum of US\$ 630,000 to enable him complete his total debts.

Upon signing this agreement also on the same date of 10<sup>th</sup> November, 2008, the First Plaintiff surrendered to the Fourth Defendant the certificates of title for Plot 970 and 971. He, however, denies ever signing any transfer forms for these properties and states that if the Defendants had any such including transfer forms, company resolutions and consents of the family members of the First Plaintiff to transfer both leasehold

and mailo interests in Plot 970 and 971 for the transfer of those properties into the names of the Second Defendants then those documents ought to be considered forgeries. The Plaintiffs adds that later the Defendants even tried to forcefully take possession of Plots 970 and 971 but failed.

With the First Plaintiff required more financial assistance and so on the 16<sup>th</sup> January 2009, he signed another loan guarantee agreement with the Third Defendant for which he was to receive a sum of US \$ 100,000 with Plot 2 Block 135 at Banda Island placed as security for the loan. He also signed the required documents to that effect.

All the agreements were drafted by legal counsel for the Defendants, M/s Rubumba & Co. Advocates.

According to the Plaintiffs apart from the agreement for the sale of Plot 2 Colville Street the later agreements were not sales as such but a security or assurance to the Second Defendant that in case further third-party claims exceeded the proceeds from the purchase of Plot 2 Colville Street, then these later properties

guarantees would be converted into sales to meet the extra financial requirements.

The Plaintiff's contends that while the First plaintiff met all the contractual requirements by signing and giving all the required documents to the Defendants, the Defendants never met their obligations of either completing payments for Plot 2 Colville Street and even that whatever was paid in that regard was done way outside the agreed payment period yet the Defendants took possession of the entire property and even transferred its mother title and the condominium titles for 65 units into the names of the Second Defendant with even rebranding the property which was titled "Black Lines House" to "Shumuk House".

The Plaintiffs contends that inspite of failure to meet their obligations, the Defendants since made full use of the entire property and have even collected rentals including the driving out from the suit property the third party owners of the remaining 27 condominium units.

The Plaintiffs then instituted this suit to recover its properties upon the failure of the Defendants to meet their obligations with



several requests to this court which are contained in their pleadings which are on record.

The Plaintiffs insists that the agreement between the First Plaintiff and the First Defendant dated 16<sup>th</sup> August 2008 being valid though fundamentally breached by the First Defendant with those made on

10<sup>th</sup> November 2008 as being invalid and unenforceable as they were illegal and void.

In 2009, a High Court Miscellaneous Application No. 193 of 2009 was filed in this court. Both parties however by agreement and consent filed in court settled the issues therein. The Court then issued a Consent Order by which the Plaintiffs undertook to furnish within 30 days from the 18<sup>th</sup> of may 2009, a schedule of the First Plaintiff's creditors to the Defendants who turn would cause to be issued an irrevocable guarantee in the sum of US \$ 1,700,000 agreed as being due to amongst others to the First Plaintiff's' creditors including but not limited to the remaining condominium title holders within 15 days thereafter of being presented with the creditors' schedule. The Plaintiffs state that

they presented the creditors schedule as agreed but the Defendants refused to pay stating that the schedule of creditors was not acceptable to them and have since then either not carried paid the consented amount nor furnished any bank guarantee to that effect.

Later the Plaintiffs sought to have the Consent order executed as against the Defendants. Two orders were subsequently issued by this court in that respect. The first order stopped the executions against the Defendants on the basis that it was the Plaintiffs who had not complied with the consent order by submitting an agreeable list of creditors to the Defendants. The second order dismissed with costs the Plaintiffs application for a temporary injunction for an order restraining the Defendants for dealing with property comprised in Block 244 Plot 970 and LRV 3831 Folio 22 Plot 970 at Kisugu and LRV 3835 Folio 25 Plot 971 Kisugu.

In regards to the Defendant's prayers in their counterclaim, the Plaintiffs contends that the Defendants claim should be taken as omnibus for the reason that it was 4<sup>th</sup> Defendant who being the Managing Director of the 1<sup>st</sup> Defendant which had in the first

place rescinded the agreement of 16<sup>th</sup> August, 2008 then turning around used another of his company to purport to buy the same property with the same listed creditors under a second agreement yet at the same time never raising the issue of misrepresentation as a ground for the rescinding the first contract.

The Plaintiffs therefore prayed that the Defendants' prayers in the counterclaim be dismissed with costs the First Defendant's withdrawal from the agreement of 16<sup>th</sup> August 2008 was illegal and amounted to a breach of contract and the agreements of 10<sup>th</sup> November 2008 for sale of plot 2 Colville Street and sale of plot 970 and 971 at Kisugu was void and that the Defendants should not be entitled to any damages or costs since they were entirely responsible for the dispute.

### **3. Defendant's Case**

The Defendant's agrees with the Plaintiffs that indeed on the 16<sup>th</sup> August 2008, the First Defendant and First Plaintiff entered into an agreement for the sale of Plot 2 Colville Street, a condominium property at a price of US\$ 5,000,000. This money was to be paid to creditors of the First Plaintiff. The Defendants made initial

payments of US\$ 361,000 only within the said 60 days period. However, the Defendants contend that during the period aforementioned, it became apparent that the First Plaintiff's creditors' claims as against the purchase price for Plot 2 Colville Street was in excess of that amount as the figure amount kept changing until all the schedules of the First Plaintiff's creditors became no longer accurate. This raised concerns of the First Defendant that with this ever changing amount it would lose out and not obtain the suit property as agreed. Fearing the worse, the First Defendant pulled out of the agreement.

However, a new arrangement came on board on the 10<sup>th</sup> November 2008, whereby the First Plaintiff and the Second Defendant entered into a new agreement yet for the sale of the same Plot 2 Colville Street for an agreed sum of US\$ 4,000,000. The parties in this agreement undertook to secure the entire Plaintiff's creditors demands. On the same date also, the First Plaintiff's sold off his interests in Plots 970 and 971 at Kisugu, Muyenga, also known as Hotel Diplomate for the sum of US\$ 630,000. He was paid US\$ 110,000 as deposit. Later, to effect this sale, the Second Plaintiff issued transfer forms and passed all

the relevant resolutions to enable the conclusion of the sale of the hotel to the Second Defendant.

All these sales were made to enable the First Plaintiff meet all his debt obligations.

As was the requirements of the agreements all relevant transfer forms and documents were signed by the parties and the properties were transferred into the names of the Second Defendant. All with payments were then made in the manner as directed by the First Plaintiff to third party claimants listed in a schedule.

The Defendants that indeed to date some of the scheduled payments have not been made but those unpaid payments were the subject of a consent order which related only to persons who held 27 condominium unit titles and are still based at Plot 2 Colville Street. The Defendants state that even so, the First Plaintiff no longer had any further right in any of the units on Plot 2 Colville Street since the Second Defendant had completed all payments in regards to each unit at plot 2 Colville Street which was held buy the First Plaintiff and took and is still in possession of the same excepting the 27 units.

The Defendants also state that Second Defendant took possession and started to operating Hotel Diplomate under its name Springs International Hotel Limited though it was illegally evicted by the Plaintiffs from it after was in occupation for over five months and this was in total breach of the sale agreement and as result the Second defendant has suffered financial loss.

In regards the mortgage charges over Banda Island properties, the defendants to allude to the fact that high need for finances the by the First Plaintiff when placed as against the payments for his already sold properties were excessive, led the Second Defendant and Third Plaintiff to enter into a mortgage agreement dated 27<sup>th</sup> February 2009 where land comprised in Plot 1 and plot 2, Block 135 Banda, Ssesse Islands was pledged as security for any sums that would be paid in excess to the Plaintiff or to his agents. The Second Defendant, however, has not to date made any claim made in respect of the said mortgage, though.

The Defendants concludes their case that this honourable court should find that all the agreements alluded to above were obtained validly and were fully enforceable since they were

obtained without any duress and so the Plaintiffs' claim should be rejected be rejected by court accordingly.

#### **4. Issues:**

The above summarise the dispute involving the parties before this court. It should be noted that this trial has been a very protracted one what with accusations and counter accusations by the parties, in court and out of court until this court had to set its foot firm and proceed to set it down for trial.

As part of the trial process parties filed separate trial bundles which included huge arrays of documents which were taken as exhibits. They also called in witnesses. All these are on record.

The issues formulated by this honourable court for disposition of this matter gleaned from those framed by parties as contained in their trial bundles are as follows.

##### **a. Plaintiffs' issues:**

2. Whether the agreement between 1<sup>st</sup> Plaintiff and 1<sup>st</sup> Defendant for sale of land and property comprised in plot 2 Colville Street Kampala dated 16<sup>th</sup> August 2008 was

effectively discharged by the 1<sup>st</sup> Defendant's letter of withdrawal, dated 10<sup>th</sup> November 2008.

3. Whether the 1<sup>st</sup> Defendant breached its said agreement with the 1<sup>st</sup> Plaintiff.
4. Whether the agreement executed between the 1<sup>st</sup> Plaintiff and the 2<sup>nd</sup> Defendant for sale of the land and property comprised in plot 2 Colville Street Kampala, dated 10<sup>th</sup> November 2008 was valid and binding.
5. Whether if so, the agreement was breached, and by which party.
6. Whether the agreement between the 1<sup>st</sup> Plaintiff and the 2<sup>nd</sup> Defendant for sale of plot 970 and 971 at Kisugu, executed on the 10<sup>th</sup> November 2008 was valid.
7. Whether if so, the agreement was breached by the 1<sup>st</sup> Plaintiff
8. Whether the loan agreement between the 1<sup>st</sup> Plaintiff and the 4<sup>th</sup> Defendant, executed on 16<sup>th</sup> January 2009 was valid.
9. Whether if so, the agreement between the 1<sup>st</sup> Plaintiff and the 4<sup>th</sup> Defendant, executed on 16<sup>th</sup> January 2009 was valid.
10. Remedies available.



**b. Defendant's Issues:**

- i. Whether or not any part of the suit is barred by law for being *res judicata*.
- ii. Whether the Agreement of 16<sup>th</sup> August 2008 in respect of plot 2 Colville Street was effectively discharged in accordance with its terms.
- iii. Whether the Agreement of 10<sup>th</sup> November 2008 in respect of plot 2 Colville Street was valid and binding.
- iv. Whether or not the 2<sup>nd</sup> Defendant validly acquired in the various interests in respect of Hotel Diplomate and whether if so the agreement was breached by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.
- v. Whether there was a valid mortgage created in favour of the 2<sup>nd</sup> Defendant in respect of plot 2 Block 135 land at Banda, Ssesse Islands.
- vi. Remedies.

**5. Documents:**

The parties also delivered as exhibits and filed on court record vast numbers of documents. They were all marked and taken into evidence as presented and are listed below.

**a. Plaintiff's Exhibits:**

**P.1:** Scheduling memorandum.

**P.2:** Certificate of the Title from LRV 131 Folio 1 plot 2 Colville Street Kampala.

**P.3:** Certificates of Title for 92 condominium units developed out of LRV 131 Folio 1 above, known as Unities No. 1-100 excluding unit No. 23, 25, 26, 27, 30,47,49,51 and 62.

**P.4:** Certificates of Title for LRV 3831, Folio 22, plot 970 Kisugu, Kampala.

**P.5:** Certificate of Title for LRV 3835 Folio 25, plot 971Kisugu Kampala.

**P.6:** Certificate of Title for Kyadondo Block 244, plot 970 at Kisugu Kampala.

**P.7:** Certificate of Title for Kyadondo Block 244, plot 971, at Kisugu, Kampala.

**P.8:** Certificate of Title for LRV 2462, Folio 13, plot 1 and 2 at Banda, Kalangala.

**P.9:** 1<sup>st</sup> plaintiff's letter of acceptance of 1<sup>st</sup> defendant's offer to purchase plot 2 Colville Street Kampala dated 15<sup>th</sup> August 2008.

**P.10:** Agreement between the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant, for sale of property comprised in plot 2 Colville Street, Kampala dated 16<sup>th</sup> August 2008.

**P.11:** Letter of the 1<sup>st</sup> defendant to the 2<sup>nd</sup> plaintiff, dated 29<sup>th</sup> September 2008.

**P.12:** Letter of the 1<sup>st</sup> defendant to the 3<sup>rd</sup> plaintiff, dated 10<sup>th</sup> November 2008, "withdrawing the purchase offer" for plot 2 Colville Street and demanding refund of US\$ 420,000.

**P.13:** Letter of Crane Bank Ltd to the 3<sup>rd</sup> defendant, dated 3<sup>rd</sup> October 2008.

**P.14:** Letter of Global Capital Save 2004 Ltd to the 1<sup>st</sup> defendant, dated 6<sup>th</sup> October 2008.

**P.15:** Letter of the 1<sup>st</sup> plaintiff to the 1<sup>st</sup> defendant's Managing Director, concerning payment to Mr. Ben Kavuya of Global Capital Save 2004 Ltd, dated 20<sup>th</sup> October 2008.

**P.16:** Letter of Okecha Baranyanga & Co. Advocates to the 3<sup>rd</sup> plaintiff's Managing Director, dated 28<sup>th</sup> August 2008.

**P.17:** Letter of Kwesigabo, Bamwine & Walubiri Advocates to the 3<sup>rd</sup> plaintiff's Managing Director, dated 14<sup>th</sup> January 2009.

**P.18:** Letter of the 3<sup>rd</sup> defendant to Mr. Virani, dated 24<sup>th</sup> February 2009.

**P.19:** Letter of Okecha Baranyanga & Co. Advocates, to the 2<sup>nd</sup> defendant, dated 18<sup>th</sup> February 2009.

**P.20:** Letter of Okecha Baranyanga & Co. Advocates, to the 2<sup>nd</sup> defendant dated 2<sup>nd</sup> December 2008.

**P.21:** Letter of the 2<sup>nd</sup> defendant to Mr. B.M. Virani, dated 2<sup>nd</sup> December 3008.

**P.22:** Letter of Shonubi, Musoke & Co. Advocates to the 1<sup>st</sup> plaintiff, dated 17<sup>th</sup> October 2008.

**P.23:** Letter of MAKKS Advocates to the Managing Director of the 1<sup>st</sup> defendant, dated 3<sup>rd</sup> October 2008.

**P.24:** Agreement between the 1<sup>st</sup> plaintiff and the 2<sup>nd</sup> defendant, for sale of property comprised in plot 2 Colville Street, dated 10<sup>th</sup> November 2008.

**P.25:** Loan Agreement between the 4<sup>th</sup> defendant and the 1<sup>st</sup> plaintiff, dated 16<sup>th</sup> January 2009.

**P.26:** Letter of the 2<sup>nd</sup> defendant to the Managing Director of the 1<sup>st</sup> plaintiff, dated 11<sup>th</sup> November 2008.

**P.27:** Letter of the 1<sup>st</sup> plaintiff to the Managing Director of the 1<sup>st</sup> defendant, dated 29<sup>th</sup> January, 2009.

**P.28:** Letter of the 2<sup>nd</sup> plaintiff to the 4<sup>th</sup> defendant, dated 28<sup>th</sup> February 2009.

**P.29:** Letter of the 1<sup>st</sup> plaintiff to the 3<sup>rd</sup> defendant dated 16<sup>th</sup> January 2009.

**P.30:** Valuation report for Hotel Diplomate, Muyenga, dated 22<sup>nd</sup> October 2007.

**P.31:** Summons and plaint in HCCS No. 110 of 2009; Arvind Patel v Boney Mwebesa Katatumba.

**P.32:** Marriage Certificate of the plaintiff and Ms Gertrude Namutebi.

**P.33:** Letter of Y.T.K Muyenga zone LC1 dated 16<sup>th</sup> March 2010.

**P.34:** Letter of Rubumba & Co. Advocates to the 1<sup>st</sup> plaintiff dated 31<sup>st</sup> March 2009.

**P.35:** Letter of the 1<sup>st</sup> plaintiff to the 4<sup>th</sup> defendant, dated 23<sup>rd</sup> September 2008.

**P.36:** Letter of the 1<sup>st</sup> plaintiff to Shonubi, Musoke &Co. Advocates, dated 23<sup>rd</sup> October 2008.

**P.37:** Letter of Lex Uganda Advocates to the 3<sup>rd</sup> defendant demanding return of Certificate of Title for block 135, plot 1 and 2 at Banda, dated 2<sup>nd</sup> April; 2009.

**P.38:** Letter of Lex Uganda Advocates to the 2<sup>nd</sup> defendant, dated 14<sup>th</sup> April 2009.

**P.39:** Letter of the 3<sup>rd</sup> plaintiff to the Managing Director, Crane Bank, dated 19<sup>th</sup> November 2008.

**P.40:** Letter of the 3<sup>rd</sup> defendant to the Managing Director Orient Bank, dated 16<sup>th</sup> October 2008.

**P.41:** Payments breakdown for plot 2 Colville Street.

**P.42:** Laboratory Report No. FS/D219/2013 dated 24<sup>th</sup> June 2013 with annexures thereto.

**P.43:** Letter of Kiwanuka & Karugire Advocates, dated 20<sup>th</sup> November 2008, with annexures thereto

**P.44:** Power of Attorney dated 7<sup>th</sup> September with annexures thereto.

**P.45:** Payments Verification Report by Kakande & Co., certified public Accountants, May 2009

**P.46:** Payment voucher number 001 with copy of cheque No. 000001 date 20<sup>th</sup> November 2008.

**P.47:** Letter of the 1<sup>st</sup> plaintiff to the 4<sup>th</sup> defendant date 27<sup>th</sup> April 2009.

**P.48:** Letter of the 3<sup>rd</sup> plaintiff Mr. Kakande Adam dated 15<sup>th</sup> May 2009.

**P.49:** Resolution of the Second defendant dated 1<sup>st</sup> October, 2010.

**P.50:** Consent order dated 20<sup>th</sup> May, 2009.

**P.51:** Letter of Lex Uganda Advocates to the defendants' advocates dated 8<sup>th</sup> June 2009.

**P.52:** Letter of Shonubi, Musoke & Co. advocates to the plaintiff's advocates, dated 8<sup>th</sup> June 2009.

**P.53:** Letter of Lex Uganda to the defendants' advocates, dated 11<sup>th</sup> June 2009.

**P.54:** Letter of Lex Uganda Advocates to Shonubi, Musoke & Co. Advocates dated 18<sup>th</sup> June 2009.

**P.55:** Letter of Shonubi, Musoke & Co. advocates to Lex Uganda Advocates, dated 26<sup>th</sup> June 2009.

**P.56:** Letter of Shonubi, Musoke & Co. Advocates to MMAKs advocates, dated 26<sup>th</sup> June 2009.

**P.57:** Letter of Criminal Investigations and intelligence Directorate Headquarters to Tusasirwe & Co. advocates, dated 12<sup>th</sup> May 2014.

**P.58:** Letter of Tusasirwe & Co. Advocates to the Commandment land Protection Unit CIID Headquarters, Kibuli dated 15<sup>th</sup> April 2014.

**b. Defendant's Exhibits:**

**D.1:** Transfer forms for mother title and condominium units.

**D.2:** Letter from Congregation of Holy Cross dated 15<sup>th</sup> September 2008.

**D.3:** Letter giving power of Attorney to Mukesh Shukla dated 5<sup>th</sup> November 2008.

**D.4:** Sale agreement dated 10<sup>th</sup> November 2008 for plot 2 Colville Street.

**D.5:** Circular dated 28<sup>th</sup> November 2008 notifying all tenants of change of ownership to Springs International Hotel Ltd.



**D.6:** Sale agreement dated 10<sup>th</sup> November 2008 for plot 971 Block 244, plot 971 Block 244 Volume 3835 Folio 25 and plot 970 Block 244.plot 970 Block 244 Volume 3831 Folio 22 Muyenga, Kampala.

**D.7:** Evidence from the Company Registry to the effect that Nilesh Patel is a director of the 3<sup>rd</sup> plaintiff.

**D.8:** Resolution by 2<sup>nd</sup> plaintiff to sell land at Kisugu to 2<sup>nd</sup> defendant.

**D.9:** Transfer forms for land at Kisugu from 2<sup>nd</sup> plaintiff to 2<sup>nd</sup> defendant.

**D.10:** Transfer forms for land at Kisugu and Muyenga from 1<sup>st</sup> plaintiff to 2<sup>nd</sup> defendant.

**D.11:** Consent forms from family members for transfer of land.

**D.12:** Proof of the 2<sup>nd</sup> defendant's occupation of land at Muyenga.

**D.13:** Letter by 1<sup>st</sup> plaintiff dated 8<sup>th</sup> January 2009 proving that the non-consular status of plot 2 Colville Street.

**D.14:** Letter introducing Mr. Moses Mugweri as an auditor.

**D.15:** Payments verification report.

**D.16:** Letter dated 3<sup>rd</sup> July 2009 from 1<sup>st</sup> plaintiff's bankers confirming willingness to issue irrevocable guarantee.

**D.17:** Eviction application and order dated 16<sup>th</sup> February 2010.

**D.18:** Letter dated 16<sup>th</sup> January 2009 giving plot 2 Banda Island as a guarantee for outstanding amounts.

**D.19:** Letters proving the plaintiffs continued requests for money outside the schedule.

**D.20:** Letter dated 18<sup>th</sup> September 2008 by the 3<sup>rd</sup> plaintiff's to its bankers proving its indebtedness.

**D.21:** Mother title for the condominium complex at plot 2 Colville Street.

**D.22:** Letter dated 9<sup>th</sup> December 2008 by 2<sup>nd</sup> plaintiff requesting bankers to release land titles for land at Kisugu to 2<sup>nd</sup> defendant with one signature of Bonny Mwebesa Katatumba as registered owner.

**D.23:** Letter dated 9<sup>th</sup> December 2008 by 2<sup>nd</sup> plaintiff requesting bankers to release land titles for land at Kisugu to 2<sup>nd</sup> defendant with two signatures of Bonny Mwebesa Katatumba as Chairman/Managing Director and of Ann Grace Katatumba as director.

**D.24:** Mortgage deed dated 27<sup>th</sup> February 2008, between 3<sup>rd</sup> plaintiff and 2<sup>nd</sup> defendant.

**D.25:** Letter dated 20<sup>th</sup> November 2008 from Kiwanuka and Karugire Advocates to Carne Bank Ltd and its attachments.

**D.26:** Laboratory report dated 28<sup>th</sup> March 2011.

**D.27:** Letter from Assistant Director of Public Prosecutions dated 17/11/09.

**D.28:** Criminal Investigations Department report dated 24/8/09.

**D.29:** Letter from Assistant Inspector General of Police/CIID date 18<sup>th</sup> January 2010.

**D.30:** Criminal Investigations Department report date 24/11/09.

## **6. Representation:**

Mr. Benson Tusasirwe of M/s Tusasirwe and Co. Advocates for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs and Mr. Jonathan B. Abaine of M/s Abaine-Buregyeya and Co. for 4<sup>th</sup> Plaintiff and for the Defendants jointly were Mr. Andrew Kibaya of M/s Shonubi Musoke and Co. Advocates and Mr. Augustine Kibuuka- Musoke of M/s Kibuuka-Musoke and Co. Advocates. Their exhibition of due diligence and professionalism is appreciated including those of previous counsels who represented the parties.

## **7. Issues:**

This court formulates the following issues as relevant for resolving the matter it;

- a. Whether or not part of the suit is barred by law for being *res judicata*.
- b. Whether the agreement between 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant for sale of the land and property comprised in plot 2 Colville Street, Kampala dated 16<sup>th</sup> August 2008 was discharged.
- c. If it was not discharged, whether any party breached the said agreement.
- d. Whether the agreement of 10<sup>th</sup> November 2008 between the 1<sup>st</sup> Plaintiff and the 2<sup>nd</sup> Defendant for sale of the land and property comprised in plot 2 Colville Street Kampala was binding.
- e. If so, whether the agreement was breached, and by which party.

- f. Whether the agreement dated 10<sup>th</sup> November 2008 the 1<sup>st</sup> Plaintiff and the 2<sup>nd</sup> Defendant for sale of plot 970 and 971 at Kisugu was valid.
- g. Whether or not the 2<sup>nd</sup> Defendant acquired the interests in plot 970/971 at Kisugu.
- h. Whether the agreement mentioned in issue number 6 above was breached by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.
- i. Whether the 2<sup>nd</sup> Defendant advanced a loan of US\$ 405,500 to the 3<sup>rd</sup> Plaintiff.
- j. Whether there was a mortgage created in favour of the 2<sup>nd</sup> Defendant in respect of the land comprised in plot 1 and 2 Block 135 at Banda.
- k. Remedies available to the parties.

The issues are discussed and as below.

**8. Issue 1: Whether or not part of the suit is barred by law for being *Res Judicata*:**

I start with this particular issue as its disposal would have ripple effect on the other issues or even on the suit as a whole.

*Res judicata* is governed by **Section 7 of the Civil Procedure Act,**

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court”.** This section is to

the effect that no court is to try any suit or issue which directly and substantially has been raised, heard and or finally decided by the same court or a court of competent jurisdiction. This issue was raised by the defence and it is arising from the decisions of this Honourable court in **High Court Miscellaneous Application Number 193 of 2009** (*which itself arising from this very suit*) which endorsed a consent agreement entered into by some of the parties in this suit. The orders and decision is on record as **Exhibit P.50.**

The defence argues that since the said consent order disposed of all the issues relating to this suit then, it is *res judicata*. The

Plaintiffs oppose this argument stating that the issue which the consent judgment dealt with did not resolve all the issues in this since the same arose from an interlocutory application and therefore could not determine substantively all the questions in issue in the main suit as the main suit has since had more parties added than those who were involved in that application that the said consent was only binding on the parties who were parties to it who were obliged to perform its command. That the interpretation of it as such would show that it not fall within the meaning of *res judicata* as provided for by **Section 7 of the Civil Procedure Act** which completely bars a court from trying a suit which the same court or another of competent jurisdiction had already conclusively decided or resolved in an earlier suit the points which again had been brought in court for resolution. That this was so because the Consent Order was to was a partial judgment and had been entered into between the First Plaintiff and First Defendant for US \$ 1,700,000 with specific orders on how the said sum was to be secured and paid to creditors of the First Plaintiff who had the duty to provide a list of to the First Defendant who then would seek guarantees for paying those

creditors. But that the order had no effect of barring this court from trying the issues which were pending before it and not yet resolved with the end result that all that the order meant was that that this court would when making its final decision take into account its directive notably that partially some of the issues had been resolved.

The defence was of a different view submitting that the implications of the Consent Order entered into on the 18<sup>th</sup> day of May 2009 was to the effect that there was no longer any issue remaining as regards the sale of the Plot 2 Colville Street as the order provided for payment of the balance due with the only remaining question for court to determine being that relating to the value at which the sale was made, either at US\$ 5,000,000 (plus US\$ 630,000 for Hotel Diplomate) or US\$ 4,000,000 (plus US\$ 630,000 for Hotel Diplomate) on the basis of the agreement dated 16<sup>th</sup> August 2008 and the 10<sup>th</sup> November 2008. That actually the consent order had replaced the terms of the agreements. The defence went on to argue that even if the court was to find that they themselves had failed to ensure that the US\$ 1,700,000 was paid, they were not culpable the 1<sup>st</sup> and 2<sup>nd</sup>



Plaintiffs were the ones who failed to provide a clear schedule of creditors as was directed by the court and even the court subsequently under its orders when the Plaintiffs wanted to execute the consent order indeed found so with a ruling to the effect that the Plaintiffs themselves had breached the consent order.

That based on the principle of judicial estoppel and since the Plaintiffs through their pleadings were still seeking declaratrons that they were still the owners of the suit properties would be barred accordingly and the main suit would have no further need to delve into the same since the issue of ownership had already been concluded as was held by Manyindo J (as he then was ) in the case of M.T .Oneka versus Wines and Spirits (U) Ltd & Another [1974] HCB 98 when the learned judge held that an application which had again been taken before Nyamuchoncho had already been considered and resolved and so was res judicata and needed not have been filed again for the court to try and resolve the already decided issues. Relating this finding to the instant matter, the defence submitted that the Oneka situation should be found to be similar to the instant one and this court should

similarly hold the same even if the matter had been ruled upon via an interlocutory application then that would still amount to determination of a matter in a former suit and hence no further litigation on matters is allowed.

I have perused the said holding but it is apparent that the circumstances of it appears not to be the same with the instant situation as in the instant situation, a consent was made while the parties to the main suit were yet in **Oneka's** case above, the court was being requested to consider a decision arising from a ruling but not from a main suit like. My view is that the consent order alluded to above only had effect on those particular issue which the court made a decision on and thus cannot affect the examination in whole and the final conclusion of all the issues surrounding the matter in dispute before this court.

However, even if that argument were to be bought, it is clear to me that the Consent orders involved parties who were not all parties now before this court and one cannot be condemned unheard.

It also imperative for this court to look at the bigger picture of the issues involved in that with the addition of new parties, then the

matter ceases to be simply confined to those parties to the consent whose implications must be examined on how it affects the new parties, since it trite that the new parties were not privy to the consequences of that consent order.

I would therefore think that this court has the duty to look at the whole aspect of the dispute between the parties before it and make the necessary decision from the evidence which has been brought before it.

The consent order is **Exhibit P.50**. It provides thus at Paragraph 2;

**“The sum granted (US\$ 1,700,000) shall be payable to the Plaintiffs’ creditors who shall include, but shall not be limited to the remaining condominium title holders on plot 2 Colville street and in accordance with such schedule as shall be submitted by the 1<sup>st</sup> Plaintiffs’ to the Defendants in a period of 30 days”.**

My reading of his provision is that did not envisage payment only to the condominium title holders. It did not even say the list must

include all the title holders. It only obligated the Defendants to pay in accordance with such schedule as the Plaintiffs came up with. Where then did the Defendants derive the right to reject the schedule and use that as a pretext for non-payment? The Defendants did not even point out which creditor was left out! So the Defendants simply breached the terms of Order when they refused to cause issuance of bank guarantee upon receipt of the schedule and when they refused to effect payment as per the schedule presented on them. This is a matter of breach, not a matter of *res judicata*.

The Plaintiffs argues that they provided the schedule in three parts (A, B and C) is in **Exhibits P.51 and P. 53**. These letters by themselves show they were duly received and acknowledge by counsel for the Defendants who, by the letter of Shonubi, Musoke & Co. Advocates dated 8<sup>th</sup> June 2009 though **Exhibit P.52** stated that the said letters did not cover all the condominium unit holders. The Plaintiffs submit that this was a misrepresentation of the order. I entirely agree with this position. As can be seen from the order itself it did not limit to as who would constitute the list

to be provided by the 1st Plaintiff. The defendants therefore had no right to reject the schedule and should have made the payments according to what the plaintiffs had provided rather than try to create new terms of the consent order.

The effect of the consent order as subject to various judicial pronouncements in this court including that made by my learned brother Christopher Madrama Izama, J in the case of **Shumuk Springs Development Ltd. & 3 Others versus Boney Mwebasa Katatumba, High Court Taxation Appeal No. 21 of 2012** where he alluded to the fact that the consent order had not been set aside following a purported interpretation of the registrar of this court where the registrar had stated in a letter which is on record that he had consulted the then trial judge who had stated that the said order has not disposed of the whole issues in the main suit. And similarly the decline by my other learned brother Masalu Musene, J in the matter of **Katatumba and others versus Shumuk and Others High Court Civil Application No. 530 of 2012** where he declined to allow the Plaintiffs herein to include its proposed amendment to pleadings the issue of the consent order have been argued by the defence

as having settled the issues of the sale of the properties and hence making any further inquiry into that *res judicata*.

While all those arguments in the respect of the decisions of the court may be true to the context under which those matters were brought before court, I am of the considered opinion that there is the latent issue of the failure of the parties themselves to implement the clear provision of the Consent Order which must be examined. It is indeed clear that the Consent order had a self life time specific provisions which ought to have been followed by the parties involved. It is clear to me that there was total failure by either side of the bargain, starting with the defendants to implement the order as it were making it fall on the way side and hence of no juridical value.

Therefore , in my view, once there was failure to implement the said order then no party before this court should be seen to cling to it to try to prevent this court from examining the real dispute of the parties in this matter.

I find therefore that the failure of the parties to implement the order within its terms and during the period it was supposed to

have effect created no ***judicial estoppel*** and hence there was no ***res judicata***.

The defence proposal that I should look at the matter of the sale of the properties has having been resolved therefore falls flat on its face given the total disabuse of the same and on this resolve that the non compliance and effluence of time disabled the said Consent order rendering it of no consequence. I do so find accordingly.

**9. Whether the Agreement between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant for sale of the land and property comprised in Plot 2 Colville Street, Kampala dated 16<sup>th</sup> August 2008 was discharged:**

Having found above I am not barred from dealing with the matters before me since I am not barred by the principle of *res judicata*, I will now turn to issue number two which in my view is the crux of the dispute before this court.

My first impression with the dispute now before this court is that very peculiar circumstances exist in that this is a case where two contracts were entered into for sale of the same property and between substantially the same parties. It should be recalled that there are established legal ways by which a contract may be lawfully discharged so as to release the parties from implementing obligations under a contract. In law a contract may be discharged by performance of what is provided in its terms or avoided if there is frustration.

In the instant case, both parties agree that the contract between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant was a written agreement with terms, entitlements, obligations and rights of the parties. The said document is **Exhibit P.10** and the acceptance of the fact of the written contract is further confirmed by the defence amended written statement of defence filed on the 5<sup>th</sup> day of June 2009 where the Defendants alludes in paragraph 6 (II), thereof that the said document constituted the agreement between the parties. This position is further strengthened by the defence pleadings in paragraph 6 (III) of its written statement of defence where it states that ***“it was a term of the agreement that the***



***consideration of US\$ 5,000,000 should be paid to the first Plaintiffs creditors as per the schedule attached to the agreement and that upon such payment, all condominium titles would be handed over to the 1<sup>st</sup> Defendant and vested in it***”.

This pleading when read in light of the said agreement surmises the effect of what the parties intended to do and what their obligations were. In my view, the Defendant was to enforce its rights upon payment of the full sum of the balance to the 1<sup>st</sup> Plaintiff’s listed creditors. However, what I find to be partly incorrect in the said pleading is the part which connotes to condominium titles or to their being hand-over. These are not mentioned at all in the agreement at all. It is actually derived from a document elsewhere which preceded the agreement. This would clearly fall short of the provisions of **section 91 of the Evidence Act** which provides that;-

***“when the terms of a contract... have been reduced to the form of a document... no evidence, except as mentioned in section 79, shall be given in proof of the terms of that contract ... except***

***the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained”.***

This section when read together with which in its provisions of **Section 92 of the same Act** which provides;-

***“...when the terms of any such contract ... have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms”***, then it would appear to me that there was now the intention to bring in matters which did not form part of the mind of the parties which were reduced into writing.

That is the essence of parole evidence rule which was initially a creature of case law but has since been given legislative force.

**See: Ramanbai Patel versus Madhvani International Ltd [1992-93] HCB 189,**

The net meaning of this rule is that contents of a document which are separate from and are not part of a the contract between parties cannot vary the terms of the contract so as to introduce an express term unless it has been acceded to as part of that agreement.

From my reading of the letter alluded to, it is clear that preceded the contract but the more important point to note is that was neither mentioned nor included as an addendum to the final contract between the parties and so since it precedes the contract it is not possible for it be called in proof of or an additional term to an agreement which was written and is silent about what it connoted to and thus irrelevant as the parties obligations can only be deduced from the contract they signed.

Then the other thing of importance to consider is the pleadings by the defence when in paragraph 6(iv) of the amended written statement of defence, it is stated that ***“there was no default in the payment of the consideration to the agreement made on 15<sup>th</sup> August 2008 but rather that the 1<sup>st</sup> Defendant company decided to rescind the contract executed on 16<sup>th</sup> August 2008 because there had been gross fraudulent***

***misrepresentation by the 1<sup>st</sup> Plaintiff as to the magnitude of the amounts owed to the 1<sup>st</sup> Plaintiff and the list of creditors he owed money...”.***

This in my view is a clear admission that the 1<sup>st</sup> Defendant unilaterally rescinded the agreement on the basis of a claim that there was misrepresentation. Thus making it be believed by this court that in fact there was no discharge of the agreement but a breach of its terms as this was clearly a unilateral action on the part of the 1<sup>st</sup> Defendant. The said letter by which the 1<sup>st</sup> Defendant unilaterally terminate the agreement is on record as

**Exhibit P.12**

Strangely though, the First Defendant does not raise frustration as a ground for the rescission but rather claims that it exercised the right to rescind as a result of misrepresentation. This claim not borne from any evidence as PW1 explained in his witness statement at page 2, second last paragraph as follows;-

***In due course, I had discussions with the 4<sup>th</sup> Defendant who indicated that he was acting on his own behalf and also on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, of which he was the human arm, as***

***above mentioned. He made a thorough study of my assets and was fully aware of the nature of my interest in plot 2 Colville Street. He was aware of the condominium structure of the property. He even had discussions with some of the condominium owners and /or their representatives. He asked me for a list of the Plaintiff's creditors, which I happily provided as I considered the 4<sup>th</sup> Defendant a genuine friend keen on helping me solve my financial problems. By then I did not foresee how much grief he would cause me in a bid to enrich himself by ruthless means, at my expense.***

There is no doubt that the termination of the contract by the letter was illegal for being addressed to a party not privy to the agreement that is M/s Katatumba Properties Ltd and only made to state to the attention of Mr. Boney Katatumba in his capacity as a director of the addressee. This is because parties to the said agreement were clearly Boney Mwebesa Katatumba as the vendor and M/s Shumuk Springs Development Ltd as the purchaser. No other.

I therefore tend to agree with the submission of learned counsel for the Plaintiffs that this letter which was addressed to a 3<sup>rd</sup> party cannot amount to a notice of rescission of the agreement as the two are separate and distinct legal entities. Furthermore, the said letter even contained admissions of the failure as of its date, 10<sup>th</sup> November 2008 that about of the US\$ 5,000,0000 which was supposed to have been paid by the 15<sup>th</sup> day of October,2008 only US\$ 420,000 had by then been paid out of the agreed price of US\$5,000,000 .

Clearly by the 10th day of November 2008, the agreement was already dead by its having been discharged by breach and so there could have been nothing left of it for the 1<sup>st</sup> Defendant to withdraw from.

I also find that the Defendants' reference to their failure to get consent from all creditors with the value mentioned in the agreement to have been totally be misplaced being not based on the signed contract irrespective of what the alludes that being their preliminary condition before 16<sup>th</sup> October 2008.

The Defendants or any of the parties were not entitled to impose preliminary conditions which were not stipulated and reduced by writing into the agreement.

The reading of the letter in paragraph 2 thereof appears to throw light seems as to the real reason why the defendants breached the contract. The said paragraph was alluding to the facts that the 1<sup>st</sup> Defendant's financiers had failed to raise the money due under the contract as a result of to the **international financial turmoil**. While this could be the case, this particular new developments was not part of neither was it something which could have come all of a sudden such that the parties would not have taken it into account considering the huge amount of money involved when the contract was made merely two months before. The health of the international financial system cannot therefore be said to have come as a surprise to the defendants to make them bring it in as a condition precedent to their performance of the contract. If that was so the parties would have clearly put that in writing as a term of their contract. Incidentally, Mr. Mukesh Shukla, the defence witness DW1 and the 1<sup>st</sup> Defendant's Managing Director, confirmed twice that indeed the international

financial situation was not a condition precedent to the performance of the said contract. Yet strange enough while this same Mukesh Shukla went ahead to purportedly terminate the 1<sup>st</sup> agreement due to lack of funds, he turned around using another of his companies to sign another agreement to purchase the same property in the names of the 2<sup>nd</sup> Defendant and at even the same time.

This is really a fraudulent behavior to say the least since it was coming from a person who on the one hand was saying he has no money to fulfill a clear contract then turning around to say , oh I non the hand I have money but less which can pay for the same property. The fact of claiming to have money buy 0one of his companies and then another of his companies coming in to say that it can pay for the same property but at a lower price was a behavior intended to put pressure on the 1<sup>st</sup> Plaintiff to sell his property at a lower and unfair terms after noting that the first Plaintiff was in a desperate financial situation. The global financial crisis was therefore ruse but not a frustrating event as alleged. I find that the that the allegations of misrepresentation and international financial turmoil to properly orchestrated fraud to rip



the 1<sup>st</sup> Plaintiff of his property upon noting that he was in dire financial straits.

More so since even from my finding that the fact misrepresentation were not matters even pleaded in the defence as required under **Order 6 Rule 3 of the Civil Procedure Rules** which specifically requires particulars of misrepresentation to be stated and this is couched in mandatory terms since a notice of rescission as such must be unequivocal giving a clear basis upon which it is grounded and must be justified by the facts and these requirements were explained by **Lord Atkinson** in **Abram SS Co. versus Westville Shipping Co. Ltd [1923] AC 773** at **781** where he stated:

***“When one party to a contract express by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind including him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract ...”***

Therefore the facts themselves said to have been relied upon to withdraw from the contract where note as are listed Lord Atkinson in the **Abram's case** (above) resulting in the failure to extinguish the contract as a result.

In any case, it should be recalled that rescission is an equitable remedy and consequently, a party seeking to exercise rescission must satisfy the canons of equity whose one such canon is that such a party ought to come to it with clean hands. But considering the facts as I have found above, the defendants hands were soiled through and through when one disaggregate the facts in this matter, that is the contract itself providing that payment be made not later than 15<sup>th</sup> October 2008 but the 1st Defendant fails to do so yet at a later date writes stating that he has no funds and therefore not buy at that present point but maybe at a later in February 2009 upon his fortunes improving but then turns round the same day and seeks to buy the same subject matter using another of his company cannot be said to have been done with good intentions at all.

This was clearly a cleverly spun out ploy to take advantage of the 1st Plaintiff's vulnerabilities in order put him in such a dire

situation such that he would agree to anything considering the fact that he had his creditors breathing over his neck. The other maxim of equity is that delay defeats equity. A buyer cannot come up merely a month after the deadline by which he was to pay and claim that he now seeks to rescind a contract which he has barely fulfilled. He would be defeated by reason of lapse of time. Such a person cannot be said come before equity with clean hands since he would be seen untrustworthy and the court of law as the guarantor of equitable rights cannot and is the not playgrounds for illegal and fraudulent actions.

So from which ever angle one looks at the situation, the defendant's letter of 10<sup>th</sup> November 2008 could not have the effect of rescinding the contract since the contract had already been breached by the 1<sup>st</sup> Defendant itself upon failure to fulfill his part of the obligations by the date which it was expected to but let the date to fly by.

This results in the terms of the contract of 16th August, 2008 being left unfulfilled and my finding is that it ought to be concluded since it was a binding contract. Therefore I find that the parties to the contract were not by the action of the First

Defendant discharged from fulfilling their contractual obligations under the contract and so each ought to meet their part of the bargain and complete the contractual obligations unconditionally.

My answer therefore to this issue is that there was never a discharge of any of the parties not to fulfill their parts in the contract under any circumstances since the sale of Plot 2 Colville Street by the 1<sup>st</sup> Plaintiff to the 1<sup>st</sup> Defendant was complete and each one of them must carry out their obligations under the contract which is that that the 1<sup>st</sup> Defendant is obliged to pay all the moneys due under the contract and the 1<sup>st</sup> Plaintiff is obliged to hand over the suit property to the 1<sup>st</sup> Defendant upon the completion by the 1<sup>st</sup> defendant of all the payments under the terms of the contract as was indicated by the schedule attached to it bearing time and interests accruing thereto.

**10. Issue 3: if it was not discharged, whether any party breached the agreement:**

From the conclusions arrived at in the above issue, I have found that there was indeed a written agreement with the said agreement being identified and put on record as **Exhibit P.10**. It has h was express terms, obligations and rights and the parties to

it are the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant. No compelling evidence was is on record to prove frustration of the contract so that it cannot be implemented and in any case I find that no frustration was pleaded. From the wording of the contract, the payments were to be completed and then the vendor would deliver the Certificate of Title to the property with duly executed transfer forms. The said vendor would ensure that if there were any caveat on the titles, they were removed and all encumbrance to released before passing on the on the final documents to the purchaser in compliance with clause 6 of the contract providing that the vendor was to hand over vacant possession of the property free of all direct or indirect encumbrances to the purchaser upon completion of the purchase price. These clear and obvious meaning of the wordings of clauses 4 and 6 show that the 1<sup>st</sup> Defendant was bound to perform its obligation in full before it could call upon the 1<sup>st</sup>Plaintiff to in turn perform its obligations. Further, the said contract gave performance levels and time within which payment was to be made in an express way with even details of how the payments and the amounts to be paid being clearly provided. Yet at it were when the time came for the

1<sup>st</sup> Plaintiff to carry out his obligation that is on 15<sup>th</sup> October, 2008 no real steps had been taken by purchaser to complete the payments so that the vendor would then do his part of the bargain. What is of concern is that nothing was even brought on record to show that when the said payments were offered to the listed beneficiary any or all of refused to be paid the amounts which was indicated in the schedule.

Instead, what the evidence show is completely a different picture of what normally should be the concerns of parties to a contract. This is the fact o a by one the Defendants dated 29<sup>th</sup> September 2008 which is **Exhibit P11** in which there was a demand for all condominium lease/ sale copies, copies of all titles deeds and even further demand that the vendor's rental receipts paid directly into the account of the First Defendant at Crane Bank Limited. This demand was strange in that it was not originating from any of the terms of the contract which the parties had signed on the 16<sup>th</sup> August, 2008. Even the party to whom the letter was addressed who was the 3<sup>rd</sup> Plaintiff was not even a party to the 16<sup>th</sup> August, 2008 agreement. This made the whole thing cease being what it was that bound the parties but an

indication that the writer of the letter 1<sup>st</sup> defendant was then dictating terms onto the 1<sup>st</sup> Plaintiff in a manner which was well outside their undertakings.

The irrefutable fact of this matter is that as of 15<sup>th</sup> October 2008, the 1<sup>st</sup> Defendant had not performed its obligations in full. Its Letter of 10<sup>th</sup> November 2008, **Exhibit P.12** by which it sought to withdraw from contract proves this position. It even shows that as of that date only US\$ 420,000 had been paid out of the agreed US\$5,000,000, leaving a balance of US\$ 4,580,000 and to make matters worse this date was even well after the expiry date when payments should have been completed.

I find that this is clear evidence of non compliance with the provisions of the contract. It should also be recalled here at this point in time that the very background as to why in the first place the 1<sup>st</sup> Plaintiff went about selling properties was the fact that he had to make good his financial obligations to his creditors and this fact was known to the parties yet the manner in which the first Defendant went about to meet its part of the bargain was nothing more than one calculated to drive the 1<sup>st</sup> Plaintiff into desperation when put in the context that the 1<sup>st</sup> Plaintiff could not be tasked to

carry out his part of the bargain unless and until the 1st Defendant had paid the purchase price including those due to the listed debtors within the period which the agreement provided.

From this behavior of the 1<sup>st</sup> Defendant, it is my finding therefore it was one who did not implement its part in the agreement of 16<sup>th</sup> August, 2008 and by doing so breached it with impunity when it did not pay the money obligations it was required to make by 15th October, 2008 making any purported rescission of the said agreement by the letter **Exhibit P12** after the expiry of the contract performance period being of no consequence with no legal effect on the part of the 1st Plaintiff since the breach had already occurred.

There was no term in the agreement of 16<sup>th</sup> August requiring the 1<sup>st</sup> Defendant to get consent of the 1<sup>st</sup> Plaintiffs creditors as purported by Exhibit P.12, the agreement was clear in who had to do what at what time and at what costs. The consideration by each party was complete. Therefore the 1<sup>st</sup> Defendant cannot be allowed to breach the terms of the contract when it did not pay the required moneys and yet at the same time introducing



unpalatable and unconscionable terms which were totally outside the provisions of the contract.

From these above analysis, it is my finding and conclusion on this issue is that the agreement of 16<sup>th</sup> August, 2008 was not discharged as stipulated under its terms but was breached inordinately by the 1<sup>st</sup> Defendant.

**11. Issue 4: Whether the Agreement of 10<sup>th</sup> November 2008 between the 1<sup>st</sup> Plaintiff and The 2<sup>nd</sup> Defendant for Sale of Plot 2 Colville Street, Kampala was binding**

My finding in the immediate last issue show that the agreement between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant was not discharged but breached by the 1<sup>st</sup> Defendant. Indeed when the effect of said agreement is taken into the real perspective, then the fact is that during the tenancy of the agreement of 16<sup>th</sup> August, 2008, both parties were bound by its effect with the 1<sup>st</sup> Defendant being obliged to complete payments of the balance of the agreed purchase price of US\$ 5,000,000.

Upon doing so then the 1<sup>st</sup> Defendant would then be entitled to take over all the 1<sup>st</sup> Plaintiff's interests in the property as

stipulated in the agreement, namely the mother title and all the condominium units held by him together with those held by his creditors in the list annexed to the agreement once they were paid off.

However, the situation did not go on as agreed with the 1<sup>st</sup> Defendant paying the agreed price within the agreed period, leaving the 1<sup>st</sup> Plaintiff unable to fulfill his obligations under the contract. This non performance by the 1<sup>st</sup> Defendant, however, does not release him from meeting his contractual obligations with its attendant consequential liabilities arising thereafter on its his failure to meet his part of the bargain.

The fact is that agreement of 16th August, 2008 though breached by the 1<sup>st</sup> Defendant was still binding on the parties with all the attendant consequences making the agreement said to have been made on 10th November 2008 on the same subject matter to be illegal, void and unenforceable. This is a fact borne by not only the said stated breach but by even statements made to that effect in court by PW1. This witness gave testimony to the following facts;

**“On that day, the 10<sup>th</sup> of November 2008, just as he was purportedly terminating the agreement of 16<sup>th</sup> August 2008 for financial inability, the Managing Director/Executive Officer of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants (Mr. Mukesh Shukla) called me to his office and told me that if I still wanted the transaction to go on I had to accept a sum of US\$ 4,000,000 (United States Dollars Four Million only). On that very day, on which he served on me his purported cancellation of withdrawal from a contract that had been concluded and was already part performed, the 1<sup>st</sup> defendant presented to me another agreement for the same property, but this time with the 2<sup>nd</sup> defendant as buyer (which was just a gimmick as 4<sup>th</sup> defendants). The agreement was very disturbing, indeed, frightening. Not only did it reduce the consideration for the property from US\$ 5,000,000 to US\$ 4,000,000 without justification, but it actually provided that because the new consideration would now not cover my full indebtedness, I would have to**

**furnish securities for the assurance that the remaining claimants would all be paid from other sources. This was Mr. Mukesh's way ensuring that my other properties would also be sucked into the mess to his benefit.**

**The 4<sup>th</sup> defendant was very much aware that by this time, the creditors, whom I had informed of this transaction and who had been expecting payment from the 1<sup>st</sup> defendant, were by the day becoming very jittery about the non-fruit of the much promised payment and were threatening to realise the securities that had been created on the property, a move that would expose me to substantial losses and untold embarrassment. Secondly, because of the delay, those of the condominium owners who had agreed to be paid to surrender their interests had now began to lose interest or demand higher payment, as property prices in Kampala are ever on the rise. Thirdly, the defendants particularly knew that even if Crane Bank and the other creditors**

**(especially Mr. Ben Kavuya of Global Capital Save 2004 Ltd) did not immediately foreclose, still the interest rate levied by the creditors was increasing upwards each passing day, and would soon wipe out the proceeds of the sale.**

**(Witness shown documents number 13, 14, 14, 16, 17, 18, 19, 20, 21, 22 and 23 in the plaintiffs' trial bundle). These correspondences clearly show not only the pressure I was under, they also prove that contrary to his denials, the 4<sup>th</sup> defendant and, through him, the other defendant, were very much aware of the demands and pressures, which they took advantage of.**

In sum total, when this statement which went at length to show what took place and under what circumstances the 10<sup>th</sup> November, 2008 agreement was made, it is evident that the situation created by the 4<sup>th</sup> Defendant was such that a court of law, being a court of equity can 4<sup>th</sup> defendant who was all out to breach all known tenets of the contract which had earlier been

signed between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant in view of his superior financial position as against the 1<sup>st</sup> Plaintiff.

This very behavior and circumstances begs the question as to the legality and validity of the contract of 10<sup>th</sup> November 2008. The parties give different stories in that according to the Plaintiffs this it was unenforceable yet the defence on the other hand state claim that it was enforceable.

The subject matter in this contract Plot 2 Colville Street and this property had already been sold to the 1<sup>st</sup> Defendant under the 16<sup>th</sup> August, 2008 contract, a contract which was breached by the 1<sup>st</sup> Defendant as of the date of the signing of this new agreement. It was not available on that date for any other party for sale since by that date it still had legal encumbrances surrounding it .

To unpackage this further and to prove that there was fraudulent intention on the part of the 4<sup>th</sup> Defendant, while the parties in this second agreement were all well aware the subject matter was not available for sale on that date being the Managing Director of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was one and the same person, and who was the 4<sup>th</sup> Defendant and taking into account the fact that the 1<sup>st</sup> defendant was yet still to fulfill its obligation s under the That

contract of 16<sup>th</sup> August 2008 which was still valid and binding, the parties to the second ignored these glaring facts and still went on to purport to sign an agreement which clearly they knew would not carry the force of law being that there was nothing to buy and sell as of 10<sup>th</sup> November 2008.

This is what is called mistake relating to the identity of a subject matter which under common law renders a contract not just voidable but wholly void and this was the position as held in the case of **Kulubya Serwano Wofunira versus Singh [1963] EA 408** which was also adopted in the case of **Sheik Bros Ltd versus Ochksner [1975] EA 86** and many others. This position is even now enshrined in **Section 24 (i) of the Contracts Act** which provides that an agreement to an act which is impossible to perform is void with even Section **32 of the same Act** specifically providing that an agreement which is contingent upon the happening of an impossible event is void, whether or not the impossibility was known to the parties.

Relating this position of the law to the instant matter, I find circumstances surrounding it to make it so arising from the

uncontroverted evidence of PW1 who went on to elaborate the circumstances of the second contract in the following terms;

***“Secondly, no consideration was given to me for the promise to take a cut of US\$ 1,000,000 in the price of the property.***

***Thirdly, the agreement was a sham and a nullity because it was procured through duress and undue influence. This is because the 1<sup>st</sup> and 4<sup>th</sup> defendant firstly refused to perform their obligations under the first agreement and after doing so, then purported to walk out their agreement with me. Having thus piled pressure and left me vulnerable, they then left me with no option but to sign the unfair agreement or face untold ruin. This was coercion of the mind and spirit.***

***Fourthly, the defendants have themselves presented to court a letter dated 5<sup>th</sup> November 2008 (Annexures F to the defence), in which I supposedly appointed Mr. Mukesh as my Attorney for purposes of selling off the property and dealing with creditors. If***



***this was so, then selling the property to himself, and doing so at a price reduced by US\$ 1,000,000 was a blatant conflict of interest, as he was interested in his company buying at the lowest possible price, while his appointer was interested in the best possible terms! It was a breach of trust to sell to himself on those miserly terms.***

***Finally, the terms of the agreement, which was made by the defendant's lawyer, are so vague that the agreement is void for uncertainty. The terms are silent on what was to happen with the already agreed to arrangement. Paragraph 4 is meaningless, where it states: "First installment of US\$ 361,000 paid as payment for this agreement and balance... would be paid to Crane Bank/ all other encumbrances party list (as per Annexures- I to this agreement handover by the seller to the purchase...'. Likewise, paragraph 3 is meaningless, where it states that 4 million dollars "... will be paid by the seller and the purchase agrees to guarantee the said amount to seller through separate***

***loan from others Financial Institutions...”. Such meaningless provisions are not capable of being enforced.***

From this evidence there are clearly brought out issues of duress and undue influence. Under the common law duress is viewed as actual violence or threat of violence or what was then known as “legal duress”. Previously a litigant could not invoke duress to vitiate a contract unless he or she shows that there was a threat to do physical harm to his or her body. **See: Cheshire and Fifoot pages 297-8.**

However, this common law concept of legal duress, i.e. the use or threat of force to compel a person to make an undertaking, is no longer tenable as from the 1970’s onwards, the courts realised that some threats of a non-physical nature can be even be more serious and compelling than threats of bodily violence and could as well compel a party to enter into a contract that party would otherwise not think of doing so. Thus emerged the doctrine of economic duress and the sister doctrine of unconscionable bargains. Thus the law has since progressed and it is now accepted that where a party has been made to enter into a

contract through duress then the contract is void or at the very least voidable at the instance of the contradicting party because that party was not been a free agent.

Indeed under the doctrine of economic duress if a party compels another to enter into a contractual arrangement by putting that other person in such a position that the property or economic interests of that other party would be in jeopardy unless such a person accepts the proposed contractual arrangements he would otherwise not enter into under normal circumstances then the promises made by that other party under those conditions are not enforceable. This position is well illustrated by a whole chain of decided cases. For example in the case of **Universe Tankships Inc. of Monrovia versus International Transport Workers federation & Others (The Universe Sentinel) [1983] AC 383**, a Trade Union refused its officials to man a ship unless extra remunerations were paid to its members and so the ship was not be able to leave port. The effect was the unmanning of the ship was that ship owners would not be able to deliver goods of third parties as already contracted and this would come with disastrous consequences in terms of liability which the ship

owners were aware and as a result reluctantly agreed to pay the extra remunerations demanded by the Trade Union officials. The ship owners then signed a collective agreement which they though they strongly felt were unfair but had no other way. Later on the ship owners sought to recover the extra pay they had made and the court accepted and granted their request on the basis that in view of the serious financial consequences which the ship owners stood to face if the ship did not leave port the threats posed by their not paying the additional moneys as demanded by the union officials constituted economic duress. Likewise, in the case of **The North Ocean Shipping Co. Ltd versus Hyundai Construction Co. Ltd [1979] Q.B. 705**, the defendants who were shipbuilders agreed to build a tanker for the plaintiffs at a sum of US\$ 40 million payable in five installments. Upon the plaintiff paying one installment, the value of the dollar fell world-wide with the result that the defendant threatened not to proceed with constructing the ship unless the plaintiff agreed to increase the cost of constructing the ship by additional 10%. The plaintiff, with the knowledge that it had already entered into contracts to deliver fuels using the ship which was being constructed at a

given point in time and knowing that they would have to pay heavily in damages if it did not perform as required under the terms of those contracts, accordingly agreed to pay the remaining four installments in excess of the earlier agreed amounts. Later on it refused doing so citing duress. In the holding of the court, **Mocatta J**, held that the threat not to build the ship amounted to economic duress with the court, however, holding even if this was the case, the plaintiff was to pay the extra money having lost the right to set aside the contract by not seeking to set aside the said additional terms to the earlier contract within a reasonable period after the threat was gone as this amounted to affirmation of the contract.

What these two cases demonstrate is that once the court is convinced that there was an illegitimate application of pressure from wherever then any resulting agreement is void or at best voidable at the instance of the victim.

Indeed, the Privy Council of the United Kingdom has since laid down the ingredients of what can constitute duress. This was in the subsequent holding in the case of **Pao On versus Lau Yiu Long [1980] AC 614** where it stated at **page 635** that;-

***“Duress, whatever form it takes, is a coercion of the will so as to vitiate consent”.***

With Lord Scarman at **page 636**, going further to lay out the ingredients of economic duress as to be;-

***“The commercial pressure alleged to constitute such duress must however be such that the victim must have entered the contract against his will, must have had no alternative course open to him...”***

The same law lord went further to state that;

***“Recently, two English Judges have recognised that commercial pressure may constitute duress, the pressure of which can render a contract voidable....***

Both cases stressed that the pressure must be such that the victim’s consent to the contract was not a voluntary act on his part with their Lordships’ viewing there was nothing contrary to principle in recognizing economic duress as a factor which may render a contract violable provided always that the basis of such recognition is that it must amount to coercion as the contract entered into was not done through a voluntary act. I find these decisions to be persuasive and applicable to the instant matter

where , a contract was purportedly signed well knowing that another existed and at a reduced amount.

In persuasive English case of **Barton versus Armstrong [1979] AC 104**, the court dealt with the burden of proof in cases where coercion is alleged. In this case, it was the holding of the court that a victim only has to show that improper and or illegitimate pressure was exerted on him. He does not have to show that if it were not for the threats he would not have entered into the agreement but once he has proved the existence of the threat then the burden shifts to the coercive party to show that the pressure he exerted did not contribute to the victim's entering into the impugned agreement. The court further in the case of **Barton versus Armstrong (supra)** that one need not plead coercion as the sole factor that induced him/her to enter into the contract but that it was sufficient to show that it was one of several factors in that direction.

In our own courts here, these same decisions were relied upon by Geoffrey Kiryabwire, J (as he then was) in the case of **Liberty Construction Company Limited versus Lamba Enterprises Limited HCCS No. 215 of 2008**. In that case, the plaintiff had

contracted to construct fish landing sites and an aquaculture centre for the Government of Uganda. It then sub contracted the defendant to do the works. The subcontractor did not perform and the plaintiff sought to take over the sites and complete the contract. The subcontractor then demanded a sum of money which the contractor considered to be excessive and even refusing leave the site unless it was paid. This would mean that the main contractor could not access the sites with the dire consequence that the time for performance of the contract would lapse putting the main contractor in serious trouble. The contractor was forced to enter entered into a memorandum of understanding to pay the sub contractor more money in order for it to access the sites so that the contracts could be completed in time. However, it later refused to honour the payments of the additional money and the court agreed to its position stating that the unfair conditions the sub-contractor had created amounted to economic duress which vitiated the memoranda of understanding. These above decisions are at fours with the present case. It is clear that the 1st Defendant being well aware of the dire economic trouble in which the 1<sup>st</sup> Plaintiff was decided to



purportedly not only perform its part of the 16<sup>th</sup> August, 2008 contract but using the tactic that it was withdrawing from the same forced the 1<sup>st</sup> Plaintiff to sign another contract whose very terms were not only very unfavorable to him considering the fact that he had certain and agreed financial obligations to meet putting him in such a dire financial situation considering his already impatient creditors that the 1<sup>st</sup> Plaintiff was left with no alternative but to sign the all subsequent agreements which clearly were not done out of his own free will.

Thus my finding is that there occurred a situation of desperation on the part of the 1<sup>st</sup> Plaintiff orchestrated by the Defendants such that the 1<sup>st</sup> Plaintiff who was sinking when offered even an old string which he believed would be his life saver had to grab it being that he had no immediate alternatives to settle his economic woes. This action makes the circumstances under which the second contracts to be procured to fall squarely within the meaning of economic duress and the 1<sup>st</sup> plaintiff would not be obliged to honour them with the decision in the **Lamba case** being very much applicable.

With the above in mind, I would find and hold that the agreement of the 10<sup>th</sup> November, 2008 signed between the 1st Plaintiff and the 2<sup>nd</sup> Defendant for sale of Plot 2 Colville Street, Kampala to be void as the said sale was obtained not out of the free will of the 1<sup>st</sup> Plaintiff but through economic duress following the unfavorable circumstances under which he was made to fall in after the first Defendant failed to honour its obligations arising from the contract of 16<sup>th</sup> August, 2008 so forcing him considering the mental anguish he was in at that time to be left with no other option but act as he did. I do so hold the agreement of 10<sup>th</sup> November, 2008 were not validly obtained and therefore unenforceable for having been obtained through economic duress notwithstanding that there was already in place a valid agreement. I do hold accordingly.

**12. Issue 5. Whether the Agreement as breached, and by which party:**

This issue by virtue of my finding in the preceding issue falls on its face since as I have already found that that there were no valid agreement entered into on 10<sup>th</sup> November 2008 in respect of Plot

2 Colville Street, it follows that there was nothing to breach. I do so hold accordingly.

**13. Issue 6: Whether the Agreement dated 10<sup>th</sup> November 2008 between the 1<sup>st</sup> Plaintiff and the 2<sup>nd</sup> Defendant for Sale of Plot 970 and 971 at Kisugu was valid:**

I have already dealt with authorities which are to the effect that an agreement obtained by economic duress is void and I have also already shown that the circumstances the 1<sup>st</sup> Plaintiff was put in as of 10<sup>th</sup> November 2008 which circumstances amounted to economic duress. The Defendants through the 1<sup>st</sup> Defendant with deliberate intentions put the 1<sup>st</sup> Plaintiff through such a situation that he was made to continually become depended on the whims of the Defendants in trying try to resolve his economic woes making whatever action he would take only making his situation worse. This is to the effect that whatever action he was taking from then on he was never going to resolve his economic problems meaning that he had to continue dispose of more and more properties at whims of the Defendants before he could gather that minimum capacity to settle all his indebtedness to his

creditors. To highlight this position the statement of the 1<sup>st</sup> Plaintiff is telling. He states, and I quote;

**“ I need to explain why I signed such terrible documents and in effect put myself and the companies at the mercy of the defendants.**

**Firstly, considering my social status position as Consul for the Islamic Republic of Pakistan, I was desperate to contain the negative publicity that was bound to result from several creditors all coming out at once to stake their claims. I had made an honest arrangement to take care of the claims, through the agreement of 16<sup>th</sup> August 2008, but Mr. Mukesh had now frustrated the same and left me in an extremely precarious position. Secondly, I had to consider how my family would fare in such a situation. Thirdly, it was clear that as soon as the creditors learnt that the sale of plot 2 Colville Street had fallen through, they would come down hard on me to foreclose and sale the securities I had offered them. Their patience had worn thin, and they would not waited for me to**

**restart the process of looking for buyers, which would have taken months. Of course the 4<sup>th</sup> defendant was aware of this. Finally, my health was in jeopardy. I suffer from asthma and high blood pressure. As soon as the 4<sup>th</sup> defendant informed me of his decision to torpedo the sale agreement of the 16<sup>th</sup> August, 2008, my blood pressure shot up and I was hospitalized. I do not think I would have survived if I did not sign those agreements and buy some breathing space, hoping that the defendants would exercise basic decency.”**

This said agreement when put in the context of the **Lamba case** earlier cited and where the 1<sup>st</sup>Plaintiff’s was clearly not in the free condition of mind to sign resulting with ***consensus ad idem*** is void.

The nine points further given by PW1 proves it all. He states thus;

**“Firstly, it claimed to be what it was not. It claimed to be a sale, while the parties had agreed to the creation of a security.**

**Secondly, it was procured through duress and undue influence. The defendants took advantage of my precarious position, which they themselves had deliberately brought about by torpedoing the agreement of 16<sup>th</sup> August 2008, so as to leave me vulnerable.**

**Thirdly, in its description of the property the subject matter thereof (paragraph 1 of the agreement), it described both the leasehold estate and the mailo estate. I have already explained that the mailo interest in the said property belonged to the 2<sup>nd</sup> plaintiff, not me, yet the 2<sup>nd</sup> plaintiff was not a party to the agreement, neither did it approve the sale. I had no capacity to contract over in my names. I have read the defendant's counterclaim wherein they seek specific performance of the contract. I do not see how a court can order specific performance in respect of a subject matter that is wrongly described.**

**Fourthly, the consideration of US\$ 630,000 was ridiculously low, which is the proof not only that this**

**was not a genuine sale, but that I did not enter into the agreement as a free agent. There is no way I could have sold their property at the alleged price of US\$ 630,000 (United States Dollars Six Hundred and Thirty Thousand only) when the same had been valued by M/s Knight Frank for US\$ 2,000,000 (United States Dollars Two Million only) a year earlier. (Witness shown valuation I am talking about, dated 22<sup>nd</sup> October 2007. By November 2008, the value was even higher.**

**Fifthly, like the one for sale of plot 2 Colville Street, this agreement was uncertain, vague and meaningless, not only in the way it described the subject matter as above explained, but also in the its paragraph 4. In the so called “seller’s deliveries (sic) upon payment,” it obligates me to deliver, upon payment, “all the encumbrances documents”. No one can tell what this means. How, then would one perform such an unfathomable obligation?**

**Sixthly, the agreement is void at law on the ground that it seeks to defraud the revenue, by releasing the purchaser from the obligation to pay taxes in respect of the transaction. This is contained in paragraph 5 of the agreement.**

**Seventhly, the agreement is signed by myself and a one Nilesh Patel as vendors. I do not know what Nilesh was selling. He has no interest at all in either the mailo or the leasehold properties. He is not even a director in any of the plaintiff companies and has never been.**

**Eighthly, the signatures of all parties were never witnessed. In his hurry to defraud me the 4<sup>th</sup> defendant did not even bother to complete the agreement. I do not see how the defendant s can enforce such an incomplete instrument.**

**Finally, I have already explained that the property is my matrimonial home with the 4<sup>th</sup> plaintiff, and has consent sought or obtained. I did not seek her consent because Mukesh and I had agreed this was**



**mere creation of a security, not a sale. Again in his rush to defraud, the 4<sup>th</sup> defendant did not seek her consent either. Of course he would not have obtained it”**

When the first point above is considered it is clear that the 1<sup>st</sup> plaintiff and the 2<sup>nd</sup> and 4<sup>th</sup> defendants set out to create in as far as plot 970/971 were concerned a security or assurance that should the amount payable for Plot 2 Colville Street fail to cover all the creditors of the 1<sup>st</sup> Plaintiff then this said interests would be sold as a last resort to make good the balances unpaid. This is even my reading of the testimony off DW1. Unfortunately the documents were eventually styled to be a sale and the Defendants proceeded to treat them as such. But because the properties were held as security the 1<sup>st</sup> Plaintiff had not even given the necessary transfer instruments such as a company resolution, family member’s consents and transfer forms to the Defendants. The ones which were put on record were proved by evidence of PW3, a handwriting expert as not having been made by the parties who allegedly made them and hence were forged.

Arising from this and from the pieces of evidence on record, it is apparent the parties agreed to put in place an equitable mortgage to secure contingent liabilities. What happened later was that a sale agreement was signed. It is trite law that such a document, which is intended as a mortgage but ends up taking away the mortgagor's equity of redemption, is void and this is prohibited under **Section 8 of the Mortgage Act, Act 8 of 2009** which provides that a mortgage which goes beyond operating as a security is void.

Even under the old law **Section 116 of the Registration of Titles Act** prohibited a similar situation in that it provided that **a mortgage shall not operate as a transfer of the property thereby mortgaged.**

This has also always been and is the position of law which is even reflected by case law as held by **Lindley, MR** in **Santley versus Wild (1899) Ch 474-5** where he stated;

**“The security is redeemable on the payment or discharged of such debt or obligation, any provision to the contrary notwithstanding. Any provision inserted to prevent redemption of payment or**

**performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void. It follows from this that “once a mortgage, always a mortgage”**

The Defendants therefore not rebutted that there although they state there was concluded a sale. This argument, however, would fail the test of reality checks when the whole saga is put to scrutiny. Firstly that , it would not have made any sense at all to sell these additional properties yet the proceeds of Plot 2 Colville Street were yet to be been fully paid. Secondly, the sale could not have occurred even the transfer of all the necessary documents making sale for Plot 2 Colville Street was yet to be made and no indebtedness of the 1<sup>st</sup> Plaintiff after the said sale was due to require the conversion of the equitable interests of the 1<sup>st</sup> Plaintiff in this property into a sale. This kind of behavior smacks of attempts to grab the properties of the 1<sup>st</sup> Plaintiff without any clear obligations on the part of the Defendants having been met in the first place what with the tactic employed by the Defendants where would spread deposits of money over the various assets so

as if to imply that they had already acquired all the assets at once yet there was the understanding that first the obligations under the first asset had to be met first and foremost and where there was any shortfall then the other assets would be used to cover the same.

Indeed these transactions similar to what I have already found earlier in respect of Plot 2 Colville Street were void by virtue of falling squarely under the auspices of economic duress with the same factors used in arriving in that decision being alive here.

As regards misdescription of the subject matter, the Defendant, by way of their counterclaim, seek specific performance of the contract of sale. This is contained in prayer number (d) in the Defendants' counterclaim. However decided cases and all academic discourse in relations to this matter show that when there has been a misdescription of a subject matter then the remedy of specific performance cannot be available to the party who claims it. **Prof. David J. Bakibinga** in his book **Equity and Trusts** at **page 133** has this to say on the same;

***“...where the property which has been agreed to is incorrectly described in the contract, this means that***

***the vendor cannot fulfill his promise to transfer (the) property... For instance a contract is not fulfilled by contradicting to sell the Muyenga Plot and then transferring the Ntinda plot”.***

To put matters in the correct perspective, it is apparent that the Defendants wish for this court to order specific performance would clearly result in the 1<sup>st</sup> Plaintiff to transfer interests of a distinct corporate entity which was not a party to a contract he was supposed to have made with the defendants. This is not tenable. It should be noted that if there was to be any sale at all then the 1st Plaintiff could only sell his which was the mailo interest but not the leasehold interest. It is unfortunate that all these were ignored in the rush to make the 1<sup>st</sup> Plaintiff do the undoable considering the desperate situation he was in.

Regarding the 4<sup>th</sup> ground of the price attached to the property, it is trite law that while consideration need not be sufficient for there is nothing to stop a man from selling his house even for a match-stick so long as he does so voluntarily, it is the position of the law that where insufficient consideration is pleaded then that pleading would point the fact of the absence of genuine

consent. Thus **Section 20(3) and (4) of the Contracts Act 2010** has codified the law in this respect, where it provides:

**“(3) An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate.**

**“(4) Notwithstanding sub section (3), the inadequacy of consideration may be taken into account by the court in determining whether the consent of the promisor was freely given’.**

So when this situation is applied to the instant matter and there were clear pleadings that there was insufficient consideration, the courts finding would take that into consideration.

I have left out the fifth ground as not really worth considering but in regards the 6<sup>th</sup> ground, it should be noted that in law, where a party is by law obliged to pay tax on the benefits which he realises from an agreement and the agreement provides for the tax pay tax on the benefits which he realises from an agreement and the agreement provides for the said tax be refunded to him the entire agreement be would contrary to public policy and hence illegal since an obligation to pay tax cannot be made that

such tax is paid to the person who has such obligation as a refund but to the authorities concerned. Thus the case of **Miller versus Karlinski [1945] 62 TLR 85** where an employee was engaged upon a contract of service which terms entitled him to a weekly salary and reimbursement of expenses which among others was a claim for PAYE paid on his weekly salary, in an action to recover the expenses and salary arrears, it was held that the contract was illegal as it constituted a fraud on the revenue accruing from such a contract that he could not even recover the salary arrears as they were not severable from the claims for expenses.

Relating the same situation to the instant matter, paragraph 5 the said contract purported to shield the 2<sup>nd</sup> Defendant from taxes incidental to the transaction. This would clearly render the agreement illegal by virtue of the authority cited above.

Also on the signatures of the directors of the 2<sup>nd</sup> Plaintiff having been obtained and put on the agreement and hence making the sale appropriate, the fact is that the purported signatures of the directors of the 2<sup>nd</sup> plaintiff was not witnessed even if I was to be agreed that two of the directors a of the 2<sup>nd</sup> Plaintiff signed the

document including Nilesh Patel as that second signing would be still immaterial since the sale was by the 1<sup>st</sup> Plaintiff as an individual and Nilesh did not sign as his witness but as a director of the 2<sup>nd</sup> Plaintiff. This would still make the sale as not having been made by the 2<sup>nd</sup> Plaintiff. And since the signature of the vendor and the purchaser's officers remained un-witnessed in regards as to the part of the witnesses which is clearly sign blank, the agreement would be an inchoate document and therefore unenforceable.

The other very pertinent was that of the absence of spousal consent. Both PW1 and PW2 explained that the 1<sup>st</sup> Plaintiff's family with the 4<sup>th</sup> Plaintiff has lived on the said property since 1980 as their residence with the other bigger part being their main source of livelihood. This piece of evidence was corroborated by the very existence of the interests of the family members on this property vide the leaseholds and mailo interests. The defence did not even disprove this point bringing at the fore front the issue family proprietary rights as provided by **Section 39 of the Land Act. Cap 227 Laws of Uganda**. This law requires that spousal consent be granted before a family property is sold. During the



hearing of this matter the Defendants tried in vain to disconnect the family residential rights in the property on the basis of the 4th Plaintiff testimony that the family of the 1<sup>st</sup> plaintiff only resided in the said property since once in a while since they also would reside in such other places like at their rural home at Mbarara and at some point also reside at Black lines House.

The intermittent short stays outside the property in question cannot in themselves deny the fact that this property was clearly testified to and proved to be the main residence of the 1st Plaintiff's family so to make it any less of a matrimonial home or as **The Land Act** would describe it a family property because the fact on record remains that that this was the house in which the family ordinarily resided and from which it derived its livelihood. Indeed a family does not need to live in a particular house for every single day of their lives for such a property to be considered a family property.

There was indeed in respect of this property no evidence spousal consent with the so called spousal consent being properly rebutted as not being that of the spouse who ordinarily lived the said property and in the absence of any such spousal consent the

said contract would collapse on its face since the 4th Plaintiff who was the spouse to have given the consent never did so and neither was sought from her.

What is clear is that, whereas the Defendants are said to have received all the certificates of titles for both Plot 2 Colville Street and Plots 970 and 971 Kisugu at the same time in November 2008 the transferred Plot 2 Colville Street was done immediately but that of Kisugu was done until much later in 2009 indicating that there were missing certain things like spousal consent before such a transfer could take place. This is further proof that the titles for Kisugu land were merely held as securities.

Indeed the situation was made more pathetic as testified to by PW1 who stated that when it came to transferring the said property, the Defendants soon realised that they needed the spousal consent which they had not obtained prior to making the sale agreement and so the transfer could not take place as seen from the witness's testimony when he said thus;

**“I have since discovered that the 4<sup>th</sup> defendant perpetrated serious acts of fraud in transferring the properties into his names, because he knew he could**

**not secure necessary signatures and consents to the wrongful transactions. I am already pursuing criminal prosecution of the culprit. The letter of his lawyers, Kiwanuka & Karugire Advocates, shows he sent them a number of documents, to effect the transfers. (witness show document number 43 in the trial bundle, at page 234). This is letter, with the documents attached.**

**On looking at the documents, I found that the signatures thereon were forged. I instructed a handwriting expert to examine them against known signatures of the purported signatories, and he has confirmed that indeed they were forged. Witness shown document number 42, at page 211 of the trial bundle). This is the laboratory report, proving the forgeries.”**

To make matters fall on their face, there were attempts by either party to bring to court evidence of investigations by police or not of the various claims made against each other. This in my view would not make any case for either party to prove the sale of the

property since a sale as such must bear the terms under which a contract must be made legally.

In light of the foregoing, I hold and find that not only did the stated agreement for sale of plot 970/971 at Kisugu was not only a contrary to public policy but it was illegal as it was vitiated by economic duress, unenforceable for specific performance, unconscionable, lacked certainty of expression, inchoate and above all lacked the necessary prior spousal consents which it was supposed to get in the first place and hence it was an invalid sale.

**14. Issue 7: Whether or not the 2<sup>nd</sup> Defendant acquired the interests in Plot 970/971 at Kisugu**

Arising from the above findings, it is a matter of fact and law that since the contract said to be for sale and or purchase of plot 970/971 at Kisugu was void then it follows that the 2<sup>nd</sup> Defendant never acquired any interest in it since even such interests would only pass as stipulated to a purchaser upon completion of payment. In regards to this said payment, the evidence was clearly brought PW1 that no payment was ever been received though DW1 insisted that some of the payments were made by

the defendants for plot 970/971 and relied on payment vouchers contained in the defendants' trial bundle. However, when these were perused they were found to have not been signed by the 1<sup>st</sup> Defendant signifying receipt of funds and considering the fact that the defendants were still under the primary obligation to pay for Plot 2 Colville Street there could not be any payments as yet for Plot 970/971.

Even if that was so, the sale by the 2<sup>nd</sup> defendant of its leasehold interest was out of the question since it never passed the appropriate resolution to sell and neither were the signatures of the directors witnessed to prove so. The 1<sup>st</sup> Plaintiff could not purport to transfer what did not belong to him with the legal principle of ***nemo dat quod non habet*** would come in since one cannot pass a better title than he holds.

In relation to the so called acquisition of the mailo interest, this never came to pass since not only was the agreement void but more so in that the 2<sup>nd</sup> Defendant has never paid for the property so as to acquire interest therein.

I said no interests in the said properties legally passed for the reasons I have given above.

**15. Issue 8: Whether the Agreement for Plot 970/971 at Kisugu was breached by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs**

This issue is resolved by virtue of the foregone two issues and hence falls flat on its face for the reasons given therein.

**16. Issue 9: Whether 2<sup>nd</sup> Defendant advanced a Loan of US\$ 405,500 to the 3<sup>rd</sup> Plaintiff.**

It is trite law that parties are bound by their pleadings. I find nowhere in the defendant's written statement of defence and counterclaim where it is alleged that such a sum was advanced. Indeed, in cross examination, DW1, the 4<sup>th</sup> defendant admitted as much. This is what he stated.

***“There was no loan agreement for US\$ 405,500. There was no loan agreement for that amount. The loan was not in the future. It was paid. I do have the figure but that may be for the finance department. I do not know whether it was advanced”***

His rather confused testimony was proof enough that no loan was ever advanced. Indeed he referred to that fact that it would only be made proven by persons from the Defendant's Finance

Department but none was called leaving us to rely on his testimony alone and even no agreement for a loan was ever tendered by or for the defendants to prove any advance of funds other than in relations to payment for Plot 2 Colville Street. Even no counterclaim was made for the so called loan money. This issue therefore is not proven.

**17. Issue 10: Whether there was a mortgage created in favour of the 2nd Defendant in respect of Plot 1 and 2 Block 135 land at Banda Island**

A document said to be a mortgage deed was tendered on record as **Exhibit D.24** to show the 3<sup>rd</sup> Plaintiff as the mortgagor and the 2<sup>nd</sup> Defendant as mortgagee in this respect. However, in his witness statement and in cross examination, PW1 disowned the said mortgage as he explained that he explained that he had deposited one of the two Certificates of Title for the land at Banda as security in respect of a promised loan of Ug. Shs 100,000,000/= by the 3<sup>rd</sup> Defendant. This document is **Exhibit P.25**. The loan appears to have not been processed to end as the 3<sup>rd</sup> Defendant did not execute the agreement and no money was advanced, nevertheless, it appears that the Defendants kept the

land title without giving any consideration for it. However Defendants adduced a document to show that the same titles were security for a mortgage created for a loan amounting to US\$ 405,500 but DW1 admitted did this loan never existed and was never advanced to this date. Even if the mortgage deed we were to assume that it was duly executed, there is no way such a deed would be legal since there was no consideration was given in its respect as the loan it was to secure was never followed through. The existence of this document itself was even made more doubtful since a document which was tendered in court and said to be the one was on examination of handwriting expert found to have to not been signed by Mr. and Mrs. Katatumba who are the directors of the 3<sup>rd</sup> Plaintiff. That testimony was unshaken in cross examination and was found by to be truthful.

From the forgoing, I would find that the 3<sup>rd</sup> Plaintiff never mortgaged the land at Banda to the 2<sup>nd</sup> Defendant and more importantly I would find that even if mortgage deed was executed , it was not discharged for lack of consideration since even no funds were advanced as contemplated in it and DW1 even denied its existence.



## **18. Issue 11: Remedies**

The remedies sought by the plaintiffs are set out in the amended plaint.

### **a. The agreement of 16<sup>th</sup> August 2008 for plot 2 Colville Street**

I have already found that this contract was valid when its terms and obligations therein and since it is valid, valid in respect of the 1<sup>st</sup> Defendant was bound to perform it. But as I have already also found out, the 1st Defendant breached it by not performing his obligations therein and I hold him responsible for that breach with the declaration that as he failed to pay the balance when due when due and demanded during the tenancy of the contract he ought to make good the amount remaining and due.

**I would therefore make the following orders;**

- i. specific performance be carried out done by the parties as regards the agreement of the 16<sup>th</sup> August ,2008 with the 1st Defendant with a declaration that title to the property would remain vested in the 1<sup>st</sup> Plaintiff with the 1st Defendant account for all the**

**proceeds of his unlawful possession of the property from the time he breached the contract to date.**

**ii. He is further ordered to revert possession of the 27 units which he wrongfully took possession of back to the 1<sup>st</sup> Plaintiff till such a time when full payments for the same are made. Upon that being done then the 1<sup>st</sup> Defendant would be entitled to have the properties transferred into its names.**

**b. The agreement of 10<sup>th</sup> November 2008, for plot 2 Colville Street**

This agreement was void *ab initio* as the subject matter to which it relates to had already been sold to the 1<sup>st</sup> Defendant in an agreement which was still valid. Also having found that the said agreement was rendered void by the virtue of economic duress met onto upon the vendor by the 4<sup>th</sup> Defendant's breach of his fiduciary duty as an attorney of the 1<sup>st</sup> Plaintiff when he caused the property to be sold to a company under his own control, for his own benefit and also having found that the uncertainty of the its

terms and the absence of consideration for the 1st Plaintiff's agreeing to forfeit a colossal amount of US\$ 1,000,000 was tantamount to making a normal person walk naked during broad daylight. In any event I have already found that the said agreement was voided of no effect.

In the premises,:

**I do order the cancellation of any instruments by which the Certificates of Title relating to the property at plot 2 Colville Street in respect of any transfer into the names of the 2<sup>nd</sup> Defendant to be cancelled accordingly.**

**c. The Agreement of 10<sup>th</sup> November 2008, for sale of plot 970/971 at Kisugu.**

As regards the agreement in respect of Plot 970/ 971 Kisugu, I find that the same was invalid;

**I order that the instruments transferring the Certificates of Titles for the two plots (both Mailo and leasehold) plot 970/971 at Kisugu. be cancelled forthwith.**

**d. The mortgage on plot 1 and 2 Block 135 at Banda**

From my earlier finding evidence, it is clear that the Defendants had no interests in this property having admitted that no loan was

advanced for which the mortgage of the property was intended and the Plaintiffs having proved that the Certificates of Title had been given for the purpose of securing a loan of Ug. Shs. 100,000,000/= which was not advanced and that the mortgage deed upon which this money was to be advanced in lieu having been found invalid;

**I hereby order the mortgage the cancellation of the mortgage in relations to plot 1 and 2 Block 135 at Banda and also order that the certificate of title to the said property be delivered by the defendants free of all or any encumbrances.**

**19. Consequential orders:**

By this judgment, I order the Registrar of Titles ;

To cancel the all the various entries/instruments by which the Defendants caused to be registered on the certificate of title for plot 2 Colville Streets (and the condominium units thereon) and this order to be in place till full payments by the 1st defendant is made to the 1<sup>st</sup> plaintiff's creditors and the 1<sup>st</sup> Plaintiff has signed and given all the documents signifying the transfer of the situ property to the 1<sup>st</sup> defendant

As regards Plot 970/971 at Kisugu and Plot 1 and 2, Block 135 at Banda, I order the Registrar of Titles to cancel the all the various entries/instruments by which the Defendants caused to be registered on the certificate of title

I also issue a permanent injunction restraining the Defendants, their agents, servants and all persons deriving claim from them, from effecting any dealings with the plot 970/971 at Kisugu and, plot 1 and 2, Block 135 at Banda and from entering, remaining on or otherwise interfering with the Plaintiffs enjoyment of them.

## **20. Damages**

General damages are in the court's discretion. The court ought to exercise its discretion taking into consideration the suffering the Plaintiffs have been subjected to for over six years as a result of the Defendants' unreasonable actions. The PW1 has, in his witness statement, made a claim for Ug. Shs. 2,000,000,000/= (Two Billion) in general damages. I however find this to be excessive. I would suppose that an award in terms of general damage of 300,000,000/= to be justifiable in the circumstances taking into account the position of the 1st Plaintiff in society and the suffering he was made to go through all these years.

## **21. Interest and costs**

An award of interest is at the discretion of court with guidelines having been developed over the years for determining what interest the court may award. The instant matter was a commercial matter which should have been executed with the haste it deserves and following holding in decided cases in commercial transactions, the general agreement is that interest at the prevailing bank lending rate would be in the interest of the matter. **See: ECTA (U) Ltd v versus Geraldine Namirimu, SCCA No. 29 of 1994.**

In the instant case, the Defendants were clearly aware that the sale of plot 2 Colville Street was for the intention that the 1st Plaintiff would meet his debtor's credits. The said payment was to have been effected within sixty (60) days but has up to now, a period of six (6) years not been completed. It is clear that the delay by its necessity created the ballooning of the creditor's demands. I would therefore order that the Plaintiffs be cushioned from such high expectations by the Defendants being made to a commensurate interest on the unpaid balance at the rate of 24% per annum from 16<sup>th</sup> August 2008, till payment in full.

The interest on general damages would however be at the court rate of 6% per annum from the date of judgment till payment in full.

**22. Costs of the suit.:**

As regards cost, it follows the event in that the Plaintiffs are awarded the costs of this suit.

**23. Orders:**

Overall, I find that the Plaintiffs have proved their case on a balance of probability and therefore judgment is entered in their favour upon the following terms;

- i. I order specific performance be carried out by the parties as regards the contract signed on the 16<sup>th</sup> of August 2008, in regards to Plot 2 Colville Street, Kampala,**
- ii. I declare that title to Plot 2 Colville Street, Kampala to remain vested in the 1<sup>st</sup> Plaintiff till (i) above is performed,**

- iii. I order the 1<sup>st</sup> Defendant to account for all the proceeds of his unlawful possession of Plot 2 Colville Street from the time it breached the contract to date, excepting lawful costs as regards the management of the property.**
- iv. I order that possession of the 27 units which were wrongfully taken by the 1<sup>st</sup> Defendant to revert to the 1<sup>st</sup> Plaintiff till such a time when full payments for the same are made and then when only when the 1<sup>st</sup> Defendant would be entitled to have the properties transferred into its names.**
- v. I do order Registrar of Titles to cancel of any instruments by which the Certificates of Title relating to the property at plot 2 Colville Street in respect of any transfer into the names of the 2<sup>nd</sup> Defendant to be cancelled accordingly.**



- vi. I do order the registrar of Titles to cancel any instruments as regards Plot 970/971 at Kisugu and Plot 1 and 2 Block 135 at Banda by which the Defendants caused to be registered on the certificates of title of these properties.**
- vii. I do issue a permanent injunction restraining the Defendants, their agents, servants and all persons deriving claim from them, from effecting any dealings with the Plot 970/971 at Kisugu and Plots 1 and 2 Block 135 at Banda and from entering, remaining on or otherwise interfering with the Plaintiffs enjoyment of them**
- viii. I hereby order the cancellation of any the mortgage in relations to Plot 1 and 2 Block 135 at Banda and also order that the certificate of title to the said property be delivered by the defendants free of all or any encumbrances.**

- ix. I do make an award in terms of general damage of 300,000,000 for the 1<sup>st</sup> Plaintiff .**
- x. I award interests at the commercial rate of 24% per annum in regards to the balance unpaid for the agreement signed on the 16<sup>th</sup> August 2008, from the date of filing this suit till payment in full
- xi. I award interests on general damages at the court rate of 6% per annum from the date of judgment till payment in full.**
- xii. I also award the costs of this suit to th plaintiffs in any event.**

I do make all these orders at the High Court of Uganda at the Commercial Division, Kampala this 3rd day of November, 2014

**Henry Peter Adonyo**  
**Judge**