

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

HCCS NO 98 OF 2013

R.L. JAIN}.....PLAINTIFF

VS

- 1. LOY KOMUGISHA}**
- 2. RACHAEL NANTONGO}**
- 3. PAUL NUWAGIRA}.....DEFENDANTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff filed this action against the defendants jointly and severally for payment of a loan debt of Uganda shillings 64,830,000/=; further interest at 15% per month from 20th of February 2012 until full payment; general damages and costs of the suit.

The plaintiff's action against the defendant is based on a lender/borrower relationship. It is asserted for the plaintiff that the defendant executed a legal mortgage which was duly registered on the certificate of title comprised in Kyadondo Block 185 Plot 4222 at Namugongo in Wakiso district. The title was deposited with the plaintiff as security. The property is registered in the names of the second defendant Rachel Nantongo. In support of the action the plaintiff averred that the defendants on the 13th of May 2010 borrowed Uganda shillings 10,000,000/= at an agreed interest rate of 15% per month repayable within a month. Furthermore on 10th of June 2010 the first and second defendants borrowed Uganda shillings 20,000,000/= from the plaintiff at a similar interest of 15% per month. On the 19 July 2010 the first and second defendants further borrowed Uganda shillings 20,000,000/= from the plaintiff at the same interest rate of 15% per month. The loan was guaranteed by the third defendant. The

defendants failed to repay the money borrowed and at the time of filing the action the principal amount together with interest accrued was a total of Uganda shillings 64,830,000/=.

The second defendant filed a written statement of defence in which she denies the plaintiff's claims. She contends that she does not owe the plaintiff any money and she is ignorant of the amount in issue. The second defendant admits that on 10 June 2012 she borrowed Uganda shillings 20,000,000/= for the plaintiff at an agreed interest of 15% per month repayable within one month. The second defendant guaranteed the Uganda shillings 20,000,000/= and pledged her certificate of title comprised of Kyadondo block 185 plot 4222 at Namugongo in Wakiso district. The amount together with the interest was paid off within the agreed period. However the plaintiff further loaned more sums to the first and third defendants without her consent, consultation or knowledge and that is the subject matter of the suit. She asserts that her obligations ceased upon payment of the amount she guaranteed as borrowed on 10th of June 2010. Consequently the amounts claimed in the plaint are not recoverable against her. Lastly she contends that the interest rate that led to the claim of Uganda shillings 64,840,000/= is excessive, illegal and unconscionable and cannot be recovered through court process. She further prays for the return of her certificate of title described as Kyadondo block 185 plot 4222.

The first and third defendants did not file any defence to the action and the honourable registrar entered interlocutory judgement against the first and third defendants under the provisions of Order 9 rules 8 and 10 of the Civil Procedure Rules on the 28th of May 2012.

The plaintiff is represented by Counsel Magellan Kazibwe of Magellan Kazibwe and Company Advocates and Legal Consultants while the second defendant is represented by Counsel Simon Peter Kinobe assisted by Counsel Nantege Erina.

Issues:

1. Whether all the defendants breached the contract?

2. Whether or not the third defendant's guarantee was in respect of all the three loans?
3. Whether all the loan transactions were secured by the second defendant certificate of title?
4. Whether the transactions are exempted by the Moneylenders Act?
5. What remedies are available to the parties?

In the final address of the plaintiff's counsel, the plaintiff's counsel submitted that the plaintiff is a licensed moneylender. The facts are that on the 13th of May 2010 the first and second defendants borrowed from the plaintiff Uganda shillings 10,000,000/= at an agreed rate of Uganda shillings 10% per month repayable within one month. On 10 June 2010 the first and second defendants borrowed from the plaintiff Uganda shillings 20,000,000/= at an agreed interest rate of 15% per month repayable within one month. On these two loans the first and second defendants committed the second defendant's certificate of title comprised in Kyadondo block 185 plot 4222 situated at Namugongo, Wakiso district as security. A legal mortgage was executed between the parties and was registered.

On the other hand the second defendant's agreed that the first and second defendants procured two loans from the plaintiff on the 13th of May 2010 and on 10 June 2010 respectively for which the second defendant pledged the security of her title deed described above. The two loans were duly paid back. The controversy from the plaintiff's suit relates to the allegation that the defendants procured a third loan from the plaintiff on 19 July 2010 which has not been paid back. The second defendant in her defence contended that she was not a party to the third loan which was extended to the first defendant and she did not authorise or consent to the use of her title as security for the third loan.

The major contention is whether the second defendant who is the only defendant who filed a defence and adduced evidence in support of the defence was privy to or consented to a third loan. This is a question of fact that has to be considered from the evidence. However corollary to the question of fact is the important question of whether the transactions but particularly the third transaction which is the only transaction in issue was exempted by the Moneylender's Act. This is

the fourth issue agreed to by the parties and its resolution is crucial in determining the rest of the issues. On the one hand if the transaction is governed by the Moneylender's Act, there is a contention that it would be an illegality on account of the interest rates agreed upon being barred by a statutory provision. If the transaction is a mortgage as contended by the plaintiff's counsel, then the provisions of the Money Lender's Act would be inapplicable and the question of illegality of the transaction would not be considered from its provisions.

It is therefore important that the point of law should first be disposed off inasmuch as it also requires consideration of factual matters which involve evaluation of evidence. The question of whether the transaction is governed by the Moneylender's Act would substantially dispose of this suit. This is because inbuilt in the issue is whether the second defendant was privy to the third loan.

I will start with the submissions of counsel on the fourth issue as to **whether the transactions in question or as established are exempted by the Moneylender's Act** inasmuch as I will consider questions of fact as to whether the second defendant is bound by a third loan. The fact that a third loan was procured by the 1st defendant is not in dispute. In dealing with the questions of fact on this issue, the second issue of whether or not the third defendant's guarantee was in respect of all the three loans will be considered. Secondly the question of whether all the loan transactions were secured by the second defendant's certificate of title will also be considered.

The plaintiff submission on the 4th issue is that section 21 (1) (c) of the Moneylenders Act, cap 173 provides that the Act does not apply to any money lending transaction where the security for repayment of the loan and interest on the loan is a legal or equitable mortgage upon immovable property or of a charge upon immovable property. Secondly counsel submitted that the Mortgage Act 2009 and section 2 thereof defines a mortgage to include any chargeable lien on land or any estate or interest in Uganda for securing the payment of any existing or future or contingent debt or other money or money's worth or the performance of an obligation and it includes a second or subsequent mortgage.

The submission of the plaintiff's counsel also rests on the testimony of the plaintiff that on the 13th of May 2010 the second defendant executed a legal mortgage for her land comprised in Kyadondo block 185 plot 4222 situated at Namugongo, Wakiso district and deposited the duplicate certificate of title with him. The copies of the mortgage deed and certificate of title were admitted as exhibits P3 and P4 respectively. The mortgage deed was duly registered with the registrar of titles on 1 June 2010 when the Mortgage Act No. 8 of 2009 was in force. Furthermore counsel submitted that the testimony of the plaintiff during cross-examination was that the second defendant gave him the title as security when she was obtaining the first loan. When the plaintiff was referred to exhibit PE 8 he testified that both the first and second defendants surrendered the title when applying for the third loan. The title deed is still in possession of the plaintiff and was committed by the borrowers who were then in partnership. The plaintiff proved that the property was mortgaged to him and it covers all the loans.

Furthermore PW2 in his testimony in chief testified that he witnessed the second defendant executing exhibit P3 which is the mortgage deed and certificate of title. The plaintiff registered a mortgage on the title. Furthermore he testified that on 19 July 2010 the first and second defendants gave the plaintiff the same title as security for the payment of the third loan and also executed a promissory note exhibit P9.

In his testimony in cross examination PW2 testified that the title is held on a continuous mortgage. The evidence is that the first and second defendants secured all three loans with one form of security under a legal mortgage duly executed and registered. In the premises the plaintiff's counsel submitted that the three loan transactions clearly fell under the exemption of the provisions of section 21 (1) (c) of the Moneylenders Act. The plaintiff's counsel relies on the case of **Uganda Ecumenical Church Loan Fund Ltd versus Harriet Nankabirwa HCCS 307 of 2002** where Honourable Justice Lameck Mukasa held that a mere deposit of title deed where the law required the deposited instrument to be registered did not create an equitable mortgage which qualifies to be effectual security upon immovable property for purposes of the Moneylenders Act. It

indirectly meant that where there was a legal mortgage, it would be exempted from the provisions of the Moneylenders Act. In the premises the plaintiff's counsel submitted that the loan transactions were exempted by the provisions of section 21 (1) (c) of the Moneylenders Act.

In reply on the issue of **whether the transactions are exempted by the Moneylenders Act**, the second defendant's counsel disagreed with the plaintiff's submissions. He admitted that the second defendant executed a legal mortgage on the 13th of May 2010 in respect of a loan of Uganda shillings 10,000,000/= she obtained from the plaintiff. A legal mortgage was registered on her property comprised in Kyadondo block 185 plot 422 at Namugongo, Wakiso district. When the first loan was paid off and the second one procured, she testified that upon application, demand promissory note, a loan agreement and acknowledgement of receipt of money being signed by her, she accepted her title to be used by the plaintiff as security for the second loan obtained on 10 June 2010. The second loan was duly paid off to the plaintiff. The second defendant was unwavering about the fact that she did not obtain any other money/loan from the plaintiff.

Furthermore by admission PW1 and PW2 contrary to previous practice agreed that the loan application and demand promissory note for the alleged third loan were written and signed by the first defendant only. PW1 alleged in his evidence and re-examination that on all three occasions he dispensed money to the first and second defendant personally and jointly in his presence. This was in contradiction to the evidence of the other plaintiff witnesses who testified that the loan was dispatched to the first defendant upon the alleged approval of the second defendant on phone. Unlike the first two loans, for the alleged third loan, no acknowledgement of receipt of the said money was signed by the second defendant or furnished in court. The second defendant testified that she did not sign any document in respect of the alleged third loan.

It has been submitted and proven that the second defendant did not sign the alleged loan agreement in respect of the third loan but the same was altered by the plaintiff to create a case for himself. PW2 testified in court that there existed a loan agreement in respect of the first and second loan and he undertook to avail

the same to court at the next hearing date. He however failed to produce the document before court and instead changed his statement that the documents do not exist and were never executed. The conduct of PW2 is suspect and is of a person hiding the truth having earlier informed court that the loan agreement was part of the very important documents in relation to any loan transaction.

In the premises the second defendant was not a party to the third loan transaction extended to the first defendant having paid off the two loans to the plaintiff in which the second defendant was party and the plaintiff unlawfully holds the second defendant certificate of title as security. It follows that the transaction relating to the third loan is governed by the Moneylenders Act cap 273 because the third loan was not secured by any mortgage whether legal or equitable on any immovable property as provided by section 21 (1) (c) of the Moneylenders Act and the fourth issue should be resolved in the negative.

The second defendant's counsel further invited the court to note that it is important that in the transaction being governed by the Moneylenders Act, gives the court discretion to open it for consideration as the interest of 15% per month that was charged therein is unlawful and unconscionable. The second defendant's counsel relies on **Black's Law Dictionary, Seventh Edition at page 1526** which defines the term "unconscionably" to mean: "extreme unfairness" and 'unconscionable' as: "having no conscience, unscrupulous, affronting the sense of justice, decency or reasonableness."

Section 12 of the Moneylenders Act gives court power to treat any interest that exceeds 24% per year or the corresponding rate in respect of any other period as excessive and the transaction as harsh and unconscionable. In such a case the court would then have the power under section 11 to reopen the transaction or any account already taken between the parties and relieve a party from the payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of the principal, interest and charges. Additionally the defendant's counsel relies on section 26 of the Civil Procedure Act Cap 71 for the provision that where an agreement for the payment of interest is sought to be enforced and the court is of the opinion that the rate agreed to be paid is harsh and

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unconscionable and ought not to be enforced by legal process, the court may give judgment for the payment of interest as it thinks just. The second defendant's counsel relies on the case of **Alice Okiror and Michael Okiror versus Global Capital Save 2004 Ltd and Ben Kavuya HCCS No. 149 of 2010**. Interest charged by the plaintiff is 180% per annum and the same is still compounded contrary to law. The second defendant's counsel contended that the plaintiff is unscrupulous and a shrewd moneylender out to prey on desperate, unsuspecting and ignorant members of the public and his actions should not go unpunished. Lastly the defendant's counsel prayed that the court should resolve the issue in the positive as the transaction involving the third loan fell under the Moneylenders Act Cap 273.

In rejoinder the plaintiff's counsel submitted that according to the document adduced in evidence as exhibit P15, the second defendant pledged her certificate of title to the plaintiff for use as security for the third loan. The defendant had created or executed a legal mortgage on the 13th of May 2010 and the mortgage was registered. The plaintiff appears on the encumbrance page as the mortgagee up to date. The second defendant went ahead to obtain a third loan based on the said mortgage and it became a continuing security applying to all the three loans. He submitted that this fact was not challenged in cross examination of any of the plaintiff's witnesses.

On the question of whether the second defendant signed any document in respect of the third loan, the plaintiff's counsel submitted that the second defendant did not deny her signature on all the pages of exhibit P 15. Throughout Counsel did not question or challenge the plaintiff's signature. It was not pleaded in the second defendant's defence that she did not execute exhibit P 15 or that her signatures were forged at all. Consequently the second defendant at this stage cannot make out or create a case when she duly executed the document pledging her certificate of title as security.

As far as the alleged contradictions in the evidence of PW2 about the loan agreement are concerned, the plaintiff's counsel submits that exhibit P15 explicitly depicts the second defendant as a party and no amount of evidence can

take away that fact. The second defendant is bound by all the terms and conditions in the said document. In the premises PW2 did not hide any truth but he insisted on the execution of the said exhibit P 15.

Concerning the application of the Moneylenders Act cap 273 to any loan or particularly the third loan, the plaintiff's counsel contended that there was a legal mortgage executed earlier on and the deposit of the certificate of title and the fact that there is still a mortgage on the title make the transaction one exempted by the Moneylenders Act.

As far as the discretion of the court under section 26 of the Civil Procedure Act is concerned, the plaintiff's counsel submitted that the parties agreed on the interests in exhibit P8, P9 and P 15. With regard to the case of **Alice Okiror and Another versus Global Capital Save 2004 Ltd and another HCCS 149 of 2010**, the case is inapplicable. In that case the trial judge whose decision is not binding based his judgment on the provisions of the Moneylenders Act because it was applicable. Whereas in the current suit under consideration the plaintiff's counsel maintains that the transactions in issue are exempted from the Moneylenders Act. Finally counsel contended that the case of **Sharif Osman versus Hajji Haruna Mulangwa SCCA 38 of 1995** is applicable. In that case the Supreme Court held that interest rate agreed to by the parties is lawful and the court respects the sanctity and notion of freedom of contract for which reason they do not make contracts for parties but only give effect to the clear intention as gathered from the agreement.

Resolution of Issues:

I have carefully considered the issue of **whether the transaction in question is exempted from the application of the Moneylenders Act.**

The entire issue can firstly be resolved on a question of fact as to whether the second defendant executed a mortgage with regard to the third loan transaction. The question of whether she executed a mortgage with regard to 2 previous loan transactions is not relevant to consider on the basis of the Plaintiffs admission of fact that the two loans were cleared and that what is in dispute is the third loan.

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Controversies first of all arise from pleadings. The plaintiffs claim is for a loan debt of **Uganda shillings 64,830,000/=** together with further interest from 20 February 2012 until full settlement of the amount claimed, general damages and costs of the suit. As far as may be relevant to the issue the plaintiff avers that on 10 June 2010 the first and second defendants borrowed Uganda shillings 20,000,000/= with interest of 15% amount payable within one month and as security the second defendant further pledged her certificate of title. Lastly on 19 July 2010 the first and second defendants further borrowed from the plaintiff **Uganda shillings 20,000,000/=** repayable within one month and the second defendant also pledged her certificate of title as security for the loan.

The second defendant does not deny having borrowed Uganda shillings 20,000,000/= on 10 June 2010. She denies having borrowed a further Uganda shillings 20,000,000/= on 19 July 2012. In her written statement of defence she asserts that the amount borrowed together with interest were paid off within the agreed period.

The plaintiff Mr J.R. Jain testified as PW1 and relied on a written statement which was admitted as his testimony in chief. In the written testimony, he confirmed that there were three loans. On the 13th of May 2010 the first and second defendants borrowed from him Uganda shillings 10,000,000/= at agreed interest rate of 15% per month repayable within one month. The documents were admitted as exhibits P1 and P2. The documents comprise of application letter and a promissory note. Furthermore on the same day the second defendant executed a legal mortgage and the mortgage deed and certificate of title of the second defendant were admitted as exhibits P3 and P4 respectively. On 10 June 2010 the first and second defendants obtained a loan of Uganda shillings 20,000,000/= at an agreed interest rate of 15% per month repayable within one month upon which they wrote and signed an application letter and promissory note to pay Uganda shillings 23,000,000/= which documents were admitted as exhibit P5 and P6 respectively. He further testified that on the same day the first and second defendants pledged the certificate of title deposited with him as security for the second loan. In paragraph 10 he testified that the first loan was fully paid up on 8

June 2010. In paragraph 14 he testified that the second loan was fully paid-up by the defendants.

His testimony is confirmed by PW2 Mr. Rajnish Jain, his son and personal assistant. His written testimony which was admitted as his testimony in chief in paragraph 10 thereof is that the first loan acquired by the first and second defendants was fully paid up on 8 June 2010. In paragraph 14 he testified that the second loan was fully paid-up by the defendants.

The remaining question of fact is whether the second defendant obtained a third loan from the plaintiff. PW1 was noncommittal about the participation of the second defendant in obtaining the third loan. In his cross-examination he testified that in the third loan he does not remember whether the defendants made the application together. Secondly he admitted that it was only Loy Mugisha who made the application. He further admitted that the promissory note was signed by Loy Mugisha alone. The agreement for the third loan was filled in 19 July 2010 and he did not remember whether it was filled after because he did not do himself. He further admitted that one of the parties/defendants may have signed on the same day and another one could have come and signed on another day. Thirdly cheques were given as security and were issued by Loy Mugisha who is the first defendant. Finally in the re-examination he testified that the title deed of the second defendant covered all the three loans.

It is an established fact admitted by PW1 and PW2 that the application for the third loan was made by the first defendant alone. The documents admitted in respect of the loan are exhibits PE 8 and P9. Exhibit P8 is a letter written by the first defendant and addressed to the plaintiff on the subject of an application for a short-term loan of Uganda shillings 20,000,000/=. The first paragraph of the letter is written in the singular in that she wrote as follows:

"I request you to give me a short-term loan of 20,000,000/= (twenty million only) at the interest of 15% per month."

In the second paragraph of the letter however she uses the plural form as the persons making the request and to quote:

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"As security, we are surrendering, title for plot 4222 and block number 185. If we fail to pay you, we authorises you to sell our property without any recourse to the courts of law to recover the loan amount with up to date interest."

PW2 testified that he personally witnessed the loan agreement. The second defendant gave her consent on the phone and he was personally present when the defendants signed the loan agreement. Finally to mitigate the risk, they managed to get the third defendant's guarantee for the loan as well. The mortgage deed remained the same. However the loan agreement was an additional agreement and it came with the third loan. PW2 testified that the loan agreement in question was filled in by the first and second defendants. The loan agreement is exhibit P15 and is dated 19th of July 2010 between the first and second defendants and the plaintiff. I have carefully studied the loan agreement in question. On the face of it purports to be signed by Rachel Nantongo as well as Loy Mugisha at every page except the cover page.

Furthermore PW3 Mr. Anchal Kumar Sinha testified that he is the plaintiff's accountant and was conversant with the transaction in question. He knew the first and second defendants as close friends and business partners. On 19 July 2010 he personally organised and prepared the loan agreement exhibit P15. The first defendant applied for the loan and also executed a promissory note for repayment of the amount within a month. On the same day at around 5 PM the second defendant came to the offices of the plaintiff and informed him that she was aware of the application for a loan of Uganda shillings 20,000,000/= by the first defendant and agreed to obtain the same using the second defendant's title which was already in the plaintiff's possession. The first and second defendants executed the document in his presence and he produced the original loan agreement where both the defendants signed.

For her part second defendant Rachel Nantongo denied knowledge of the third loan. In paragraph 14 of her written testimony, she testified that without her knowledge or consent the plaintiff extended a further loan to the first defendant

who solely applied for it and used her title as security. She discovered the third loan transaction only upon receiving a demand for payment from the plaintiff.

The testimony of the second defendant in cross examination remained the same. Her testimony under cross examination admitted that she pledged her title as security for the second loan. However it was the first defendant Loy Mugisha who was supposed to clear the loan. By 22 October the second loan had been cleared according to the statement. In her testimony in re-examination she further insisted that she found out about the third loan on 18 November 2011. The first defendant Loy Mugisha got the loan alone and did not tell her when she paid off the third loan. She did not meet PW3 until the 19 of October 2012.

DW2 Loy Mugisha testified in support of the second defendant's defence. She admitted the first and second loans which were duly paid off to the plaintiff. In paragraph 8 of her testimony she testified that on 19 July 2010 she solely applied for a further loan of Uganda shillings 20,000,000/= from the plaintiff without the knowledge or consent of the second defendant, Rachel Nantongo. By the time she procured the third loan on 19 July 2010 the second defendant had long terminated the joint business they were carrying on and they were barely in touch. Furthermore that the second defendant never made the application for the third loan and neither did she sign any documents pertaining to the third loan. Later on she failed to pay of the third loan and applied for extension of time within which to pay. In paragraph 14 of her testimony she states that on 22 October 2011 and in a meeting held at the plaintiff's home in the presence of Rachel Nantongo and her husband who is the 3rd defendant, the plaintiff accepted property she offered to replace that of Rachel Nantongo and promised to release her property from the mortgage. She further reiterated that the second defendant Rachel Nantongo had nothing to do with the third loan.

I have additionally considered her testimony in cross examination by the plaintiff's counsel. DW1 could not explain why her letter applying for the third loan referred to herself and another person in the plural when offering the security for the loan. She agreed that she offered the title deed of the second defendant as security for the third loan. She testified that she was not aware that Rachel Nantongo signed

for the third loan. She did not get the consent of the second defendant but the plaintiff said he would get it.

I have carefully considered the evidence. The plaintiff proved that the second defendant signed the loan agreement exhibit P15 on 19 July 2010 on the balance of probabilities. Once the plaintiff presented the original of exhibit P15 which is the loan agreement, the burden shifted to the second defendant to prove that her signature was either inserted fraudulently or was a forgery. The second defendant did not make any attempt to seek forensic assistance or demonstrate in any meaningful way that she did not sign the loan agreement for the third loan transaction. How did her signature appear on the agreement which was exhibited in the original? And how were the dates of 19th July 2010 and 19 August 2010 inserted? If she filled a blank loan agreement, she did it at her own peril. Most importantly the second defendant did not discharge the burden of disproving exhibit P15. She merely disputed the document and said she had never signed a third loan agreement. However her signature appears on the original and the burden to prove that it was a forgery shifted on her. Furthermore exhibit D5 which is a letter written to the plaintiff by the first defendant confirms in paragraph 2 thereof that the second defendant assisted Mrs Loy to secure the loan using a title deed. In that letter she was requesting the plaintiff to discharge the title of the second defendant and pleading that she was always the one who was supposed to pay the loan. She further proposed to replace the title deeds deposited with the plaintiff belonging to the second defendant Mrs Rachel Nantongo with another title deed. In other words DW2 who is the second defendant's witness admitted that the title deed of the second defendant was used as security for the third loan. This admission coupled with the second defendant's signature on the loan agreement exhibit P15 confirms the plaintiff's assertion that the second defendant pledged her title deed which had been earlier deposited as security for the 3rd loan as well.

In the premises Mrs Rachel Nantongo having signed the third loan agreement which the plaintiff has proved on the balance of probabilities, the Moneylenders

Act does not apply to the transaction on the basis of section 21 (1) (c) of the Moneylenders Act cap 273. Section 21 (1) (c) provides that:

“21. Saving.

(1) This Act shall not apply—

... (c) to any moneylending transaction where the security for repayment of the loan and interest on the loan is effected by execution of a legal or equitable mortgage upon immovable property or of a charge upon immovable property or of any bona fide transaction of moneylending upon such mortgage or charge.

(2) The exemption provided for in this section shall apply whether the transactions referred to are effected by a moneylender or not.

(3) Any person who lends money only by means of the type of transactions set out in subsection (1) and by means of no other type of transaction shall be deemed not to be a moneylender for the purpose of this Act.”

The mortgage deed executed by the second defendant is dated 13th of May 2010 and was admitted in evidence as exhibit P3. It is not in controversy. Exhibit P4 is the title deed of Kyadondo block 185 plot 4222 registered in the names of a Rachel Nantongo. The encumbrance page shows that on the 21st of May 2010, a mortgage was registered in favour of the plaintiff under instrument number KLA 455732. Subsequently in exhibit P15 the plaintiff executed another loan agreement with the defendants which purports to agree that it is against the security of plot 4222 and block 185 being land at Namugongo. The subsequent agreement was not registered with the Commissioner for land registration. That notwithstanding, it pledges immovable property to secure the loan and amounts to a mortgage as defined by section 2 of the Mortgage Act 2009 which provides as follows:

““mortgage” includes any charge or lien over land or any estate or interest in land in Uganda for securing the payment of an existing or future or a contingent debt or other money or money’s worth or the performance of

an obligation and includes a second or subsequent mortgage, a third party mortgage and a sub mortgage;”

In the premises the provisions of the Moneylenders Act Cap 273 are inapplicable to the 3rd loan transaction.

The fourth issue is accordingly resolved in the negative in that the transactions are exempted by the Moneylenders Act by excluding the application of its provisions to the transaction.

Secondly issue number three as to **whether all the loan transactions in question were secured by the second defendant certificate of title** is answered in the affirmative. According to exhibit P 15 all the loan transactions were secured by the second defendant’s certificate of title which had earlier been pledged and a mortgagee registered on the title deed thereof.

Going back to the first issue of **whether all the defendants breached the contract**, the question is complicated by the fact that the first defendant and the third defendant never filed a defence to the action. Consequently interlocutory judgement was entered against the first and third defendants and the suit was fixed for formal proof. The first defendant Loy Mugisha only testified in support of the defence of the second defendant. In theory the first and third defendants cannot be heard in defence of the action as they had put themselves “out of court” and have no locus standi. In the case of **Sengendo v Attorney-General [1972] 1 EA 140**, the defendant’s counsel filed no defence and applied to be heard in the proceedings whereupon Phadke J held on the matter as follows:

“I drew his attention to the decision of the Court of Appeal in Kanji Devji v. Damodar Jinabhai & Co. (1934) 1 E.A.C.A. 87 where it was held that a defendant who fails to file a defence puts himself out of court and no longer has any locus standi and cannot be heard. I pointed out to Mr. Matovu that this decision of the Court of Appeal is binding upon me, and subject to any submission by him which might persuade me that it was not applicable, I would follow it and decline to permit him to take part in the hearing as he proposed to do.”

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I agree with the position endorsed by the High Court then that the remedy of the defendant was to seek leave of court to file a written statement of defence out of time. In the absence of that, the first and third defendants put themselves out of court and cannot be heard. Initially the plaintiff's counsel objected to the participation of the first defendant as the second defendant's witness. In my ruling I noted that the second defendant was entitled to call any witness on matters of fact and the question of being a party to the proceedings was a separate matter. The first defendant testified as DW2 on matters of fact in support of the second defendant defence. The plaintiff's counsel was worried that she would be permitted to defend herself indirectly if she was allowed to testify and contended that it was an indirect defence to the plaintiff's claim against her. There is some substance in that objection though it could not hold against the right of the second defendant to call her any material witness on matters of fact. DW2 was a material witness who knew about the transaction. There is substance to the complaint only to the extent that the claim of the plaintiff is against the three defendants jointly and severally. There is a possibility that proof of facts by any of the parties can support or disprove a co-defendant's defence.

There was a lot of cross examination about whether the money owes in the testimony of DW1. The only matter in question for me to consider is whether the second defendant's certificate of title was used to secure the third loan. The second defendant's defence is that she is not aware of the third loan and therefore the question of the amount is not in controversy. Paragraph 5 of the second defendant's written statement of defence avers as follows:

"The second defendant shall aver that any obligations incurred after the guaranteed sums were paid, were at his own peril and not recoverable as against the second defendant."

Secondly in paragraph 6 of the second defendant's written statement of defence it is averred that the interest chargeable on the basis of which the plaintiff had a claim of Uganda shillings 64,840,000/= is excessive, illegal, unconscionable and therefore unrecoverable. In other words the amount of Uganda shillings 64,840,000/= is only attacked by the second defendant on the ground that the

interest rate of 15% is excessive, illegal, unconscionable and therefore not recoverable.

I would therefore confine myself to the pleadings of the parties before the court. Under order 15 rules 1 of the Civil Procedure Rules, issues arise when a material proposition of law or fact is affirmed by the one-party and denied by the other. Material propositions are in the pleadings. Order 15 rule 1 (3) of the Civil Procedure Rules provides that each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. Without amendment, the only issues to be considered in the judgment arise from the pleadings of the plaintiff and the second defendant. Trial of the issues and judgment on each controversy is confined to the triable issues generated by the pleadings unless there are matters of law which need not be pleaded. In the premises it is not in issue what the amount that owes or is claimed is. That amount is premised on the formulae of the 15% interest per month. The question is only whether the amount of Uganda shillings 64,840,000/= on the basis of which the plaintiff sued the defendants jointly and severally is excessive, illegal, unconscionable and therefore not recoverable.

On the question of illegality, the defendant's counsel relied on the provisions of section 12 of the Moneylenders Act cap 273 which prohibits harsh and unconscionable interest rates. It provides inter alia that the interest rates which exceed 24% per year may be struck down. Because the Moneylenders Act is inapplicable, the argument cannot be considered on the basis of that provision. Secondly the defendant's counsel in the alternative argued that the court has jurisdiction to strike out interest which is harsh and unconscionable under the provisions of section 26 (1) of the Civil Procedure Act. Section 26 (1) of the Civil Procedure Act provides that:

"Where an agreement for the payment of interest is sought to be enforced, and the court is of the opinion that the rate agreed to be paid is harsh and unconscionable and ought not to be enforced by legal process, the court may give judgment for the payment of interest at such rate as it may think just."

The plaintiff's case is that it is entitled to recover the agreed interest on the loan extended to the first and second defendants on the basis of the express terms of exhibit P 15 because the Moneylenders Act does not apply to the transaction. As far as section 26 of the Civil Procedure Act is concerned, the plaintiff's counsel submitted that the award of interest is at the discretion of court and depends on the circumstances of each case. He relied on the case of **Andrew Tusiime vs. Hajj Kassim Mulamba HCCS No. 578 of 2012** where Honourable Lady Justice Helen Obura allowed an interest rate of 20% per month since the plaintiff was a businessman and it was a contractual provision. Similarly the plaintiff's counsel relied on the case of **Sheriff Osman versus Hajji Haruna Mulangwa SCCA number 38 of 1995** and submitted that in that case the court held that the interest rate agreed upon by the parties was lawful and the court respects the sanctity of the doctrine of freedom of contract and the court's duty is to give effect to the contract and not to make a contract for the parties.

For the defence the main submission relies on the Moneylenders Act and section 26 of the Civil Procedure Act. Having held that the Moneylenders Act is inapplicable, I can only consider other provisions of law.

As far as the submission that the parties are bound by their own contract is concerned, section 26 of the Civil Procedure Act permits the court to strike down any contracted interest for being harsh and unconscionable. Section 26 (1) of the Civil Procedure Act is Legislation enacted by Parliament that permits the court to look at the facts and circumstances of each case and decline to enforce any harsh and unconscionable rate of interest. Such an interest would have been contracted or agreed upon. In considering exhibit P 15 it is apparent that the interest of 15% per month was originally meant to apply for one month only. However upon default, it was supposed to levied as a compounded rate per month until the loan amount together with accumulated interest is fully paid. The duration of the default depends on the circumstances of the plaintiff and the defendant. As far as the defendant is concerned, they undertook to repay the loan within one month. The interest after any default beyond one month was further compounded. The words of paragraph 2 of the agreement are as follows:

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"The amount of Uganda shillings 23,000,000/= shall be paid by the borrower to the lender within a period of one month from the date of this agreement and for the avoidance of doubt the said amount shall lapse on 19 July 2010. Thereafter it will be subjected to interest at 15% per month... till the amount is fully paid. That means that the interest would be accumulated and becomes the principal for the future month till the debt is fully settled."

In other words if the plaintiff was paid promptly, the interest of 15% per month would not be applied except for one month and it had been calculated at Uganda shillings 3,000,000/=. However upon default for whatever reason, the charged interest would be about 180% per annum simple interest. However because it is compounded interest, the interest would be colossal. I have duly considered the provisions of the Mortgage Act 2009. Section 2 defines a mortgage inter alia as any charge or lien of land or any estate or interest in land in Uganda for securing the payment of an existing or future or a contingent debt or other money. It is not concerned with the loan agreement but with the security for securing a debt. Consequently section 12 of the Mortgage Act 2009 provides for variation of mortgage by increase or reduction of interest through notice or through a memorandum between the parties.

Finally the agreement was for one month and going by the strict wording of clause 2 of the agreement exhibit P15 quoted above, interest at 15% per month would be Uganda shillings 3,000,000/= for the amount of Uganda shillings 20 million which was the principal. The parties included Uganda shillings 3 million for payment by 19 August 2010. Thereafter interest would accumulate on the 23 million Uganda shillings. The next month interest is payable at 15% on Uganda shillings 26,450,000/=. In the 3rd Month interest would be payable on 30,417,500/=. On the 4th Month interest is payable on 34,980,125/=. In the 5th Month interest is payable on Uganda shillings 40,227,143.75. In the 6th Month interest is payable on Uganda shillings 46,261,215.3. In other words after 6 months after receiving Uganda shillings 20,000,000/= from the plaintiff, the plaintiff would be obliged to pay about Uganda shillings 26,261,215.31 in addition

to the principal if the defendants had not reduced the amount by paying some money. This would be more than 100% profit/interest for six months only. I have further calculated the interest on the hypothetical assumption of non payment by the defendant for a period of one year for demonstration purposes of what was contracted.

- On the 7th Month the defendant would be obliged to pay Uganda shillings 53,200,397.60/.
- 8th month Uganda shillings 61,180,457.24
- 9th month Uganda shillings 70,357,525.83
- 10th Month Uganda shillings 80,911,154.70
- 11th month Uganda shillings 93,047,827.91
- 12th month Uganda shillings 107,005,002.10.

The principal together with interest would be Ugandan shillings 107,005,002.10/- for a period of 12 months only. The defendant in addition to Uganda shillings 20,000,000/= principal borrowed would be obliged to pay an additional Uganda shillings 87,005,002.1 as interest for this period. This at the end of 12 months on the assumption of non payment and it amounts to over 425%, simple interest, per annum.

More than a year later, the amount of money had not yet been fully repaid. For a contract with a performance period of one month, a delay of about two months would seem to be reasonable but thereafter the amounts become colossal.

I have further considered the testimony of DW2 Mrs Loy Mugisha who was charged with repaying the loan. First of all as between the first and second Defendants (a matter that is of no concern to the plaintiff) she accepted full responsibility for repaying the 3rd loan. DW2 furthermore admitted that she was the person who applied for the loan as if she applied with another person. She admitted having pledged the second defendant's title. As far as the loan agreement for the third loan is concerned, she agreed that it was to be paid by 19 August 2010. The amount had not been paid by 19 August 2010. She testified under cross examination that she paid the interest and wrote a letter seeking

extension of time and the plaintiff agreed to the extension. However she did not pay the loan amount plus the interest within the agreed period. She further agreed that the loan was supposed to attract further interest if it was not paid on time. Finally she testified that the loan was fully paid in 2011 but she could not remember the date. She claims to have settled the last amount in October 2011. The last instalment was Uganda shillings 10,000,000/=. DW2 was in difficulties in paying the interest on the principal. She testified that her business has gone down and the interest was too high for her. On 20 September 2010 in exhibit P10 DW2 who is also the first defendant wrote to the plaintiff seeking extension of time within which to repay the loan. She wrote that she had not been operating her business for one month due to a delivery period as she had been operated on 10 September 2010. She hoped to recover and resume her business and be able to pay back by 20 October 2010. Subsequently on 13 February 2012 in exhibit P 14 the plaintiff's lawyers wrote a final notice of intention to sue. The first defendant's application for extension of time demonstrates that the period envisaged by the parties was approximately one month. When the first defendant sought an extension of time, she prayed for an additional amount within which to repay the loan upon recovering from an operation and resuming her business. In the circumstances stretching the interest of 15% per month for a period of more than three months would in my opinion be harsh and unconscionable. Specifically clause 2 of the memorandum of understanding/loan agreement exhibit P5 dated 19th of July 2010 prescribes compound interest in that it prescribes that any unpaid interest becomes part of the principal.

I have duly considered the case of **Andrew Tumusiime versus Hajji Mulamba Kassim HCCS No. 578 of 2012**. The court ordered interest at 20% per month based on the peculiar circumstances where the plaintiff had purchased land but was not able to get it from the defendant and it was agreed that the money would be refunded with interest. The court took into account the appreciation of the property. Furthermore the court considered section 26 of the Civil Procedure Act and whether it should be applied in the circumstances of the case. The case is distinguishable in the sense that in the current suit there was a loan transaction

and the first defendant paid off part of the loan. Secondly the interest is compounded according to clause 2 of the agreement exhibit P 15.

I have further considered the case of **Sharif Osman vs. Haji Haruna Mulangwa Supreme Court Civil Appeal Number 38 of 1995** which were cited by the plaintiff's counsel for the proposition that interest rate agreed to by the parties is lawful and the courts respect the sanctity and notion of freedom of contract for which reason they do not make contracts for the parties but only give effect to the clear intention gathered from the agreement. The decision was cited out of context and does not do what the plaintiff's counsel purports it to do. In that case the respondent filed an action against the appellant seeking specific performance of a contract of sale of land, mesne profits, special damages, general damages for breach of contract, vacant possession of the suit premises and interest on the decretal amount at bank rate of 45% per annum. The agreement was quoted by the court and nowhere in the entire agreement was there any agreement or clauses of the agreement for the payment of interest at any rate. In the premises the decision is distinguishable on the ground.

Finally section 26 (1) of the Civil Procedure Act permits the court to consider whether interest contracted is harsh and unconscionable. I have duly considered the fact that under section 12 of the Moneylenders Act cap 273, interest exceeding 24% per annum is deemed harsh and unconscionable. Secondly section 7 of the Moneylenders Act prohibits compound interest. These are statutory guidelines to moneylenders and give useful indicators on the matter. Whereas the Moneylenders Act section 21 thereof excludes the provisions of the Act where a moneylender secures payment for a debt through a mortgage, the plaintiff's case is peculiar in that the question about the application of the Moneylenders Act arose from the defence. Otherwise in paragraph 6 of the plaint the plaintiff describes himself as a person engaged in the business of money lending to earn interest in the following words:

"The loan transactions were of a commercial nature and the plaintiff is engaged in the business of money lending to earn interest, hence the

defendants are jointly liable to pay the accumulated and further interest on the consolidated loan balance herein sought."

Furthermore in paragraph 5 of the plaint, the plaintiff avers that by failing to repay the loans in the agreed periods of one month each, the defendants breached the contract which entitles the plaintiff to general damages. Moreover it is apparent from clause 2 of the contract that in exhibit P 15 the parties agreed to the payment of interest at the rate of 15% per month which was compounded upon failure of the borrower to pay. In other words the compounded interest at 15% per month after the first month is a consequence of breach of contract and as pleaded in paragraph 5 of the plaint. The question is whether the covenanted consequence of breach by non-payment within the covenanted period is a genuine pre-estimate of the damage naturally occurring from the breach. The precedent on this issue can be found in the discussion in **Halsbury's laws of England fourth edition reissue volume 12 (1) paragraph 1065 at page 486** where it is provided that:

"The parties to a contract may agree at the time of contracting that, in the event of a breach, the party in default shall pay a stipulated sum of money to the other. If this sum is a genuine pre-estimate of the loss which is likely to flow from the breach, then it represents the agreed damages, called liquidated damages, and it is recoverable without the necessity of proving the actual loss suffered."

The plaintiff in paragraph 5 not only averred that there was breach of contract by failure to pay but in the body of the plaint claimed the consequence of breach as damages and the payment of interest at 15% per month. The inquiry of the court would be confined to the question of whether the 15% per month is a genuine pre-estimate of loss likely to flow from the breach. Where it is not, the common law is that such a clause is likely to be struck out as a penalty. According to **Lord Mustill** in the case of **Lombard North Central plc verses Butterworth [1987] 1 All ER 267 at page 271:**

“A term of the contract prescribing what damages are to be recoverable when the contract is terminated for a breach of condition is open to being struck down as a penalty, if it is not a genuine covenanted pre-estimate of the damage”.

The question of whether the interest prescribed by the parties as the consequence of non-payment within one month is harsh and unconscionable can be considered from the point of view of whether it is a genuine covenanted pre-estimate of the damage flowing from the breach. If it is not, it can be struck out as a penalty or on the ground that it is harsh and unconscionable. The interest prescribed by the parties is the covenanted damage. According to **Halsbury's laws of England fourth edition reissue volume 12** (1) Para 1063 at 484, upon breach of the contract to pay money due, the amount recoverable is normally limited to the amount of the debt together with such interests from the time when it became payable under the contract or as the court may allow. In other words the payment of interest upon breach of contract to pay money due is a consequence of the breach as covenanted by the parties in clause 2 of exhibit P15. On the other hand the court retains a discretionary power to consider whether the interest is harsh and unconscionable under section 26 (1) of the Civil Procedure Act which provision is a statutory route that may achieve the same result as the common law doctrine explained above. Contractual interest is enforceable unless shown to the satisfaction of Court under section 26 (1) of the Civil Procedure Act that it is in the words of section 26 (1) “*harsh and unconscionable and ought not to be enforced by legal process*”. This is further consistent with the common law as reflected in **Halsbury's laws of England fourth edition reissue volume 12** (1) that the rate of interest agreed to will be the measure of damages no matter what inconvenience the plaintiff has suffered from the failure to pay on the day payment was due. The only exception being that where it is not a genuine pre-estimate of the damage, the court has discretion to strike it out.

From what I have considered about the rate of interest under clause 2 of the agreement exhibit P 15, my conclusion is that it is not a genuine pre-estimate of the damage. Beyond three months of delay in the payment of the loan, it

amounts to a harsh and unconscionable interest that cannot be enforced through legal process.

In the premises clause 2 of the contract in so far as it provides for compounded interest at 15% per month upon default to pay back the loan of Uganda shillings 20,000,000/= within a month and beyond a delay of three months is harsh and unconscionable and is hereby struck out. After three months of delay in the payment of interest at 15% per month without compounding, the rate of interest shall be 24% per annum and the same shall be substituted for the compounded interest.

In the premises there shall be a reconciliation of accounts between the parties. The first and second defendants were and upon this order liable to the plaintiff to only pay simple interest at 15% per month for three months upon default. For the avoidance of doubt, this is for the months of 20th August to 19th September 2010, 20th September to 19th October 2010 and 20th October to 19th November 2010. After 20th of November 2010, the interest of 15% per month is struck down as harsh and unconscionable and for not being a genuine pre-estimate of the damage flowing from the breach for non payment of the borrowed money. In other words the defendants shall pay interest at a rate allowed by the court which is hereby ordered at 24% per annum from 20 November 2010 up to the date of filing this suit. If the defendants had paid the requisite amount according to the reconciliation ordered herein, the plaintiff's suit shall stand dismissed with costs by this order.

In case there is still owing to the plaintiff some money due from the defendants after the reconciliation ordered in this judgment, the suit shall be allowed with costs for the amount of money established through the reconciliation of accounts of the parties. Any such amount established through reconciliation, if any, shall carry interest at 24% per annum from the date of filing the suit up to the date of judgement. Further interest shall be at the rate of 21% per annum on the aggregate sum from the date of judgement till payment in full.

The registrar of the commercial court shall have the accounts reconciled by an officer of this court or an official referee. The reconciliation shall take Uganda shillings borrowed on the 19th of July 2010 of Uganda shillings 20,000,000/= as the principal. Interest was already calculated at Uganda shillings 3,000,000/= by the parties being 15% for the month for the period 19th July to 19th August 2010. Thereafter interest for the period of 20th August to 19th September is Uganda shillings 3,000,000/=. For the Period 20th September to 19th October 2010 interest is Uganda shillings 3,000,000/=. Finally for the period 20th October 2010 to 19th November 2010, interest is Uganda shillings 3,000,000/=.

With effect from 20th November 2010 to the filing of the suit interest is calculated at 24% per annum on the balance owing after deducting any payments made by the first defendant till the filing of the suit and date of judgement. The court official directed to carry out the reconciliation shall take into account all payments made to the plaintiff which are agreed according to the statement of account on record supplied by the plaintiff. The referee shall ignore any compounded calculation but only extract amounts paid by the defendant in settlement of the 3rd Loan, the subject matter of this suit.

The orders of the court shall abide the outcome of the reconciliation ordered above.

Judgment delivered in open court on the 14th of April 2015 at 2.30 pm

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Magellan Kazibwe Counsel for the plaintiff

Nantege Erina for the Second defendant

Parties absent.

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:*

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

14th April 2015