THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

OS MISCELLANEOUS CAUSE NO 0012 OF 2015

IN THE MATTER OF LRV 1305 FOLIO 2 AND LRV 1305 FOLIO 4 NEBBI TOWN – PLOT NUMBERS 38 – 44 PAKWACH ROAD & PLOT NUMBERS 39-45 URINGI ROAD, NEBBI TOWN COUNCIL, NEBBI DISTRICT

AND

IN THE MATTER OF A LEGAL MORTGAGE, THE ABOVE PROPERTY IN FAVOUR OF UGANDA DEVELOPMENT BANK LTD

AND

IN THE MATTER OF AN APPLICATION FOR AN ORDER TO GIVE POSSESSION OF THE MORTGAGED PROPERTY

BETWEEN

UGANDA DEVELOPMENT BANK LTD}.....PLAINTIFF

VS

1. **RINGA ENTERPRISES COMPANY LTD}**
2. **PATRICK ALOYSIOUS OKUMU – RINGA.....DEFENDANTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff filed this suit by Originating Summons under the provisions of Order 37 rules 4 and 8 of the Civil Procedure Rules for determination of the following questions:

1. Whether the Defendants/Mortgagor is in breach of their obligations under the mortgage?

2. Whether the Plaintiff/Mortgagee should take possession of the mortgaged property comprised in LRV 1305 folio 2 and LRV 1305 folio 4 plots 38 – 44 Pakwach Road at plots 39 – 45 Uringi Road, Nebbi Town Council, Nebbi district.

3. Whether the Defendants/Mortgagor is should pay the costs of the suit?

The originating summons is supported by the affidavit of Dorothy Ochola, the Company Secretary of the Plaintiff/Mortgagee Bank. The facts in the deposition is that sometime in January 2012 the first Defendant/Mortgagor applied for a loan of Uganda shillings 700,000,000/= to finance the first phase of upgrading and completion of two commercial buildings in Nebbi town comprised in LRV 1305 folio 2 and LRV 1305 folio 4 plots 38 – 44 Pakwach Road at plots 39 – 45 Uringi Road, Nebbi Town Council, Nebbi district following a resolution of the board of directors to borrow. The resolution shows that on 27 July 2011 the first Respondent's board of directors authorised the board to borrow Uganda shillings 1,500,000,000/= and to mortgage the company's commercial property, the subject matter of the suit.

The property was to be offered to the Plaintiff as security to enable the company to borrow against the security from the Plaintiff. On 11th January 2012 the Plaintiff/Mortgagee approved the application and a loan agreement of Uganda shillings 700,000,000/= at an interest rate of 17% and was duly signed by the parties and monies were deposited on the first Defendant's account. Under the loan agreement the first Defendant was supposed to pay the loan with a monthly instalment of Uganda shillings 15,610,038.18/= inclusive of interest within a period of eight years (96 months). A legal mortgage was duly executed between the parties on the suit property as well as a debenture on 11th January 2012. The first Defendant handed over the certificates of title to the Plaintiff. The Plaintiff/Mortgagee duly registered a mortgage with the registrar of companies on 19 January 2012.

The first Defendant/Mortgagor failed to honour the repayment obligations under the loan agreement and by the 17th of May 2013, the Plaintiff/Mortgagee wrote to the first Defendant a letter which was duly received by the second Defendant notifying it of default and the fact that its account was not performing as agreed and arrears had accumulated to a sum of Uganda shillings 169,697,508.49/=. The first Defendant failed to act upon the notice. Upon the first

Defendant's failure to rectify the default, the Plaintiff/Mortgagee wrote a statutory notice of default to the first Defendant/Mortgagor on 9th July 2013 and it was received by the second Defendant on 23rd July 2013 notifying the first Defendant of its loan arrears of Uganda shillings 182,254,510.87/= and giving it 45 days within which to rectify the default failure for which, the first Defendant/Mortgagee would exercise its remedies under the law.

The first Defendant/Mortgagor failed to act on the notices whereupon the Plaintiff issued a notice of sale of the mortgaged property on 9 July 2013 giving the first Defendant/Mortgagor 21 days to pay the whole principal amount together with interest totalling to Uganda shillings 1,018,910,660.48/= or else the property would be sold to recover the outstanding amount.

The first Defendant never acted on the notices upon which the property was advertised for sale in the Daily Monitor issue of the 20th of May 2013. The first Defendant only paid back Uganda shillings 12,657,535/= and the outstanding loan amount inclusive of interest currently is Uganda shillings 1,239,010,705/=. The sale of the property to recover the loan has been hampered by the second Defendant who has resisted potential buyers from inspection of the property. The second respondent/Mortgagor together with his agents threatened to harm anybody who attempts to enter the property either as a potential buyer or as an agent of the Plaintiff/Mortgagee. In paragraph 15 of the affidavit of the Company Secretary she deposes that it is necessary for the Plaintiff to take possession to enable it recover the outstanding principal together with interest either by way of sale or collection of rentals or leasing.

In the reply, and affidavits of Mr Patrick Aloysius Okumu - Ringa, the Chairman of the board of directors/Managing Director of the first Defendant who is also the second Defendant was filed in opposition to the suit. He deposes that on 27th July 2011 the first Defendant Company passed a resolution for borrowing of money. He further agrees that on 11th January 2012 the loan agreement was executed between the parties to be paid within eight years.

On 16th July 2012 the Defendants wrote to the Plaintiff requesting for an additional Uganda shillings 650,000,000/= for completion of the works on the suit property. On 19th July 2012 the Plaintiffs wrote to the Defendants requesting for a fresh valuation report setting the funds invested to date and estimated cost of completing the project. On 30th November 2012, the valuation report was submitted to the Plaintiff stating that the current market value of the

Defendant's property was Uganda shillings 1,895,000,000/= and the estimated market value of the suit property upon completion would be Uganda shillings 2,765,000,000/=. The valuation report of 30th November 2012 made a recommendation to the Plaintiffs for additional funding of Uganda shillings 850,000,000/= in order to complete the outstanding works on the project. On 8th April 2013 the Defendants submitted a preliminary projection of an annual gross income of the first Defendant upon commencement of business operations at Uganda shillings 462,240,000/= for data analysis by the Plaintiff. On 29th November 2013 the Plaintiff proceeded to put up the Defendant's property for sale by public auction or private treaty in order to recover interest arrears.

On 4th December 2013 the Defendants requested the Plaintiff to restructure the loan to include the option of conversion into stock of Uganda shillings 700,000,000/= in the Defendant company or in the alternative to provide the additional funds required to complete the project. On the 9th of July 2013, a fact-finding meeting was held between the representatives of the Plaintiff and the Private Secretary of legal affairs to H.E. the President of the Republic and representatives of the Defendant with a view to arriving at an amicable solution. On 13th February 2015 the Presidential Advisor on Finance wrote to the Plaintiffs and advised that the matter had been referred to H.E. the President for consideration. On 22nd May 2015 the Defendants submitted a progress report to the Plaintiff indicating that work had resumed on the projects. The Plaintiff was further requested to withhold all legal action pending an amicable solution. On 16th June 2015 the Principal Private Secretary of Legal Affairs to H.E the President of the Republic requested the Plaintiff to halt the sale of the Defendant's property pending instructions on settlement of the debt. On 16th September 2015 two of the Plaintiffs representatives visited the project and the second Defendant conducted them on a tour of the ongoing work on the project. On 11th of November 2015 the Defendant submitted progress reports on the ongoing civil works on the suit property, which demonstrated the Defendants willingness and commitment to complete the project despite non-disbursement of additional funds by the Plaintiff.

On the basis of advice from his lawyers Mr Patrick Aloysius Okumu - Ringa deposes that by the Defendants fulfilling all the conditions of the Plaintiff for the grant of a loan facility it implied that the Plaintiff created a security on all of the Defendant's assets. The only way the Defendants could afford to pay the interest due on the loan was after completion and commissioning of the

project to generate income and pay the loan with reference to article VII at page 6 of the loan agreement and the registered mortgage charge on the suit property. That the first Defendant Company has suffered irreversible business and other commercial losses on monthly income namely rental income from 20 shops, daily income from accommodation and daily income from restaurants and bars.

The Defendants continued with the civil works using limited resources and completed all structural work on the complex and are waiting the fixing of doors and windows, fixing toilets and fittings, fixing tiles and paintings; and furnishing for the project to be operational. Furthermore the current rate of United States dollars against the Ugandan shillings is depreciating. This would lead to escalating costs of materials due to inflation. The Defendants require an additional Uganda shillings 950,000,000/= to complete structural works, paintings, fittings and furniture in order for the hotel to become operational.

On the basis of advice of his lawyers the Chairman/Managing Director of the first Defendant deposes that the Plaintiff as a national development bank has a duty to provide a long-term development loan facility to finance critical investments in the sector such as the hospitality industry to create jobs in the West Nile sub-region. Secondly the Plaintiff refused to grant additional funds for the completion of the project and this may be construed as frustration of the loan agreement executed between the parties. The security provided by the Defendant was more than sufficient to facilitate restructure of the loan and provide additional funds for completion of the project. Furthermore on the basis of the advice of his lawyers, the mortgage regulations require the Plaintiff to have valued the suit property and submitted a valuation report six months prior to the sale of the suit property. On the basis of advice of his lawyers the Plaintiff's instructions to Tropical General Auctioneers for sale of the suit property by public auction or private treaty which was advertised in the daily monitor newspaper of Wednesday 20th of May 2015 offend the provisions of the Mortgage Regulations and the Mortgage Act. Secondly the request that the Plaintiff/Mortgagee to take possession of the mortgaged property should be denied on account of failure to follow the procedure stipulated in the law. On that basis the Plaintiff's suit ought to be denied with costs. On the basis of additional advice of his lawyers, the second Defendant deposes that the Plaintiff's refusal to restructure the loan facility has caused the

Defendant irreversible loss of business, rental, commercial, as well as huge inconveniences for which the Defendants should be paid damages/costs.

At the hearing of the suit the Plaintiff was represented by Counsel Godfrey Himbaza while the Defendants are represented by Counsel Patricia Okumu Ringa. Upon application of the Defendant's Counsel, the Company Secretary of the Plaintiff Dorothy Ochola was cross examined on her affidavit whereupon the court was addressed in written submissions.

The gist of the address of the Plaintiff's Counsel is that there is no longer a requirement as held by this court in several other authorities for a Mortgagee to seek a court order to foreclose the right of the Mortgagor to redeem the mortgaged property under the Mortgage Act 2009 (see **Messrs Karmic Foods International Ltd versus Musa Muliika HC OS 13 of 2014, GT Bank Uganda Ltd versus Richline International Ltd and another HC OS 10 of 2014 and Ecumenical Church Loan Fund versus Ways KM Uganda Limited OS No. 11 of 2014**). However the Plaintiff seeks for determination of certain questions which are specified in the originating summons. The facts are as set out above and need not be repeated. The Plaintiff's grievance is that while a mortgage was duly executed and registered on the title of the Defendant's property which has been described above, the Defendants failed to honour the terms and obligations of the mortgage by the 17th of May 2013. Since that time arrears have been accumulating and the Defendants have been in default. The Plaintiff on 17th May 2013 wrote to the first Defendant a letter which was duly received notifying it of default in its account and not performing as agreed that arrears had accumulated to the tune of Uganda shillings 169,697,508.49/= and the Defendants failed to act on the notice. Upon the first Defendant's failure to rectify the default, the Plaintiff/Mortgagee wrote a statutory notice of default to the first Defendant on 9th July 2013 and it was received by the second Defendant on 23rd July 2013. This statutory notice notified the first Defendant of its loan arrears of Uganda shillings 182,254,510/= and gave the first Defendant 45 days within which to rectify the default failure of which the Plaintiff would exercise its remedies under the law. Subsequently upon failure to rectify, the property was advertised for sale. The first Defendant only paid Uganda shillings 12,657,525/= and the outstanding loan amount inclusive of interest currently stands at Uganda shillings 1,239,010,705/=. It is alleged that the second Defendant resisted the process of sale and potential

buyers were prevented from inspection of the property. Secondly there is a threat by the Defendants to harm anybody who attempts to enter the property as a potential buyer.

The first question is **whether the Defendants/Mortgagors are in breach of their obligations under the mortgage?**

The Plaintiff's Counsel submitted that there is no dispute about the loan facility obtained by the first Defendant under a loan agreement, a debenture deed and mortgage deed duly executed by the parties. The Defendant was required to pay a monthly instalment of Uganda shillings 15,610,038.18/= inclusive of interest within a period of eight years. Under the loan agreement which was executed on 11th January 2012, the Defendant was supposed to pay the loan in eight years from the date of disbursement of the loan. Article 5 and section 5.01 provides for interest to be paid at the rate of 21% in arrears on a monthly basis on the anniversary date of the first disbursement of the loan. Under article 11 and section 11.02 of the loan agreement, it is an event of default if the Defendant fails to pay on the due date all or any part of the loan or any interest on the loan and such failure continues for a period of 30 days.

Secondly it is an event of default if the first Defendant fails to observe or perform its obligations or any of the obligations under the agreement and such failure continues for a period of 30 days. Furthermore the mortgage deed provides under section 1.1 thereof that the first Defendant would pay the Plaintiff the principal with interest in accordance with the loan agreement. Under article 4 of the loan agreement the amounts to be repaid are to be ascertained by the monthly loan statements issued by the Plaintiff and the loan statements shall be good and sufficient evidence in court and elsewhere of the company's liability. The Plaintiff's Counsel relies on the loan statements attached to the affidavit in support of the application and concluded that upon the various defaults which were referred to in the affidavit, the loan was recalled and the outstanding principal together with interest currently is Uganda shillings 1,239,010,705/=. This figure was not challenged by way of affidavit and cross examination and there is no refutation of the fact of default on the repayment of the loan.

The Plaintiff's Counsel further submitted that the Defendant conceded that the loan was disbursed and a loan agreement was duly executed. Furthermore the Defendant requested for an additional loan of Uganda shillings 650,000,000/= on 16th July 2012. He contended that in the

event that the Defendant was in arrears on the first loan of Uganda shillings 169,697,508/=, the Plaintiff was unable to advance additional funds. There is nothing in the loan agreement by the Plaintiff that puts it under an obligation to disburse additional funds when the first loan was in arrears. The obligation of the Plaintiff to make any disbursement under the loan is subject to certain conditions under article 111 and section 3.03 of the loan agreement.

In view of the facts the first Defendant was in breach of its obligations under the loan agreement, the mortgage deed and the debenture agreement to repay the loan according to the terms agreed upon.

In reply the Defendants rely on the affidavit in reply of honourable Patrick Aloysius Okumu Ringa which has been detailed above. The Defendants Counsel addressed to the first issue of whether the Defendants/Mortgagors are in breach of the obligations under the mortgage deed by relying on the definition of the word "breach" in **Black's Law Dictionary fourth edition 1891** at page 235 as "the breaking or violation of a law, right, or duty, either by commission or omission". She further defined breach of duty to include the neglect or failure to fulfil it in a just and proper manner the duties of one of his fiduciary employment. It is also the violation, by a trustee, of an equitable duty whether wilfully, fraudulently or with negligence or due to oversight or forgetfulness. She submitted that for there to be an obligation, there must be a contract and a breach would be the violation of contractual obligations by failure to fulfil one's own promise, by repudiating it or by interfering with another party's performance. Counsel further relied on **Ronald Kasibante versus Shell Uganda Limited HCCS 542 of 2006 [2008] ULR 690** for what amounts to breach of contract. Furthermore **Black's Law Dictionary** (supra) at page 225 writes that the breach arises when there is failure without legal excuse to perform any promise which forms the whole or part of the contract.

The Defendant’s Counsel contends that the breach of obligation under the mortgage deed and the loan contract was occasioned by the Plaintiffs. She contends that the loan agreement and particularly article 1 and section 1.02 stipulates that the Uganda shillings 700,000,000/= was disbursed for the completion of the first phase of the project intended to upgrade and complete two commercial buildings. The company sought to borrow Uganda shillings 1,500,000,000/= as a long-term facility using the property as security and this is reflected in the company resolution which has not been denied by the Plaintiff. In other words the contention is that the Defendants

expressed an interest in borrowing funds worth Uganda shillings 1,500,000,000/= for completion of two projects. The logic was that the Defendants had expected the Plaintiff to disburse the full amount and the disbursement of only Uganda shillings 700,000,000/= secured by property worth Uganda shillings 1,200,000,000/= was unfair and prejudicial to the Defendants who anticipated additional funds to be disbursed. The Defendants were frustrated by the fact that they could not use the security to obtain another loan facility since the Plaintiff had created securities in the form of the debenture and mortgage over all fixed and immovable assets of the Defendants.

Notwithstanding failure to obtain additional funds, the Defendants use their own resources to complete the project and submitted several progress reports to the Plaintiff. The expected revenue derived from accommodation on the premises would be Uganda shillings 462,240,000/= which revenue can be utilised to pay back the loan and the interest accruing thereon. The Defendant's case is that failure to repay the loan and interest accruing was a direct consequence of the Plaintiff’s failure to disburse the second phase of the loan according to the loan agreement. Furthermore failure to restructure or have alternative remedies as suggested such as conversion into stock of the loan amount. Under article 5 and section 5.01 of the loan agreement, interest was to be paid at the rate of 21% per annum. The Defendant contends that interest due on the loan amount was deliberately varied from 17% to 21% by the Plaintiff without communication to the Defendants. The Company Secretary of the Plaintiff in the testimony in cross examination admitted that this was an error on the documents but failed to confirm the correct interest rates the Plaintiffs relied upon in the suit.

The Defendants Counsel relies on the case of **Shariff Osman versus Hajji Haruna Mulangwa SCCA 38 of 1995** where it was held that interest rate agreed to by the parties would be respected by the court because the court respects the sanctity of freedom of contract and does not make contracts for the parties and only gives effect to the clear intention as may be gathered from the agreement. The valuation of interest rates by the Plaintiff contravenes Regulation 8 (a) and (b) of the Bank of Uganda Financial Consumer Protection Guidelines, which require the bankers to notify the consumer of any change in interest rates regarding the product or service. In the premises the Defendants Counsel prayed that the first issue should be resolved in favour of the Defendants.

Resolution of the first issue:

Whether the Defendants/Mortgagors are in breach of their obligations under the mortgage deed?

I have carefully considered the above issue and was couched in a manner that leads only to one conclusion. Implicitly the issue boils down to whether the Mortgagor has fulfilled its obligations to pay the monthly instalments as stipulated in the loan agreement?

The fact that the Mortgagor is in arrears has not been denied. The Defendant pleads that it is unable to pay because it has not completed the project. The Defendant proposes that because it sought additional funds which was not disbursed, it could not pay back as envisaged by the parties because it could not complete the project and presumably start earning the funds which would pay back the loan.

The basis of the relationship between the parties is a loan agreement dated 11th January 2012 between the Plaintiff and the first Defendant. The purpose of the loan is provided for under article 1 thereof. The parties agreed that the loan was extended to finance the first phase of upgrading of completion of two commercial buildings in Nebbi town in Nebbi district. Under article 2 the Plaintiff agreed to lend to the first Defendant and the first Defendant agreed to borrow from the Plaintiff a loan in the aggregate amount of Uganda shillings 700,000,000/=. Under article 3 and section 3 the first Defendant was required to furnish the Plaintiff with the copy of the resolution of the board of directors certified by the registrar of companies approving the transaction contemplated in the loan agreement. Secondly the company was to ensure that the security under the agreement had been duly created and perfected. To submit a copy of the memorandum and articles of Association certified as true. To engage competent and trained staff to supervise, manage and operate the business.

Article 4 provided for repayment of the loan. It is provided that the first Defendant would repay the loan in eight years calculated from the date of first disbursement of the loan. The repayment period shall be inclusive of the grace period of two years calculated from the date of first disbursement. The amount to be repaid would be ascertained by the Plaintiff in monthly loan statements. It was agreed that the loan statements would be good and sufficient evidence to the court and elsewhere of the company's liability. Article 4 (b) provides that upon demand for payment by the Plaintiff, if the first Defendant shall pay less than the full amount due and

payable to the Plaintiff, Defendant shall have the right to allocate and supply such payment in any way manner and for such purpose or purposes as the Plaintiff would in its sole discretion determine.

Events of default are provided for under article 11 of the loan agreement. Article 11 provides that if the Defendant failed to pay, when due, any part of the loan or any interest on the loan, and any such failure continues for a period of 30 days, it would be an event of default. Another event of default occurs when the Defendant Company fails to observe or perform any of its obligations under the agreement and the failure continues for a period of 30 days after the Plaintiff notifies the first Defendant of the failure.

Article 11 and section 11.01 provides that in the event of default or carrying and its continuation whether voluntary or involuntary, the Plaintiff may by notice to the first Defendant, require the first Defendant to repay the loan or such part as shall be specified in that notice. It further provides that upon receipt of such notice, the first Defendant shall immediately pay the loan or the parts specified in that notice and all interest accrued on it and any other amounts then payable under the agreement. The first Defendant waived any right it might have to further notice, presentment, demand or protest in respect of that demand for immediate payment.

Article 5 provides inter alia that interest will be payable in arrears on a monthly basis, on the monthly anniversary date of the first disbursement of the loan. Article 7 provides that the principal sum of the loan, the interest and other charges shall be secured by a legal mortgage on land and developments comprised in leasehold register volume 1305 folio's 2 & 3, Nebbi town, Nebbi district.

The fact that the first Defendant Company is in default of its payment obligations to the Plaintiff seems not to be in issue.

The evidence which has been presented is not controversial. The second Defendant admitted in paragraph 9 of the affidavit in reply that on 29th November 2013 the Plaintiff wrote to the first Defendant and the letter is attached as annexure "F" giving notice of the sale of the property by public auction/private treaty. In that letter it is alleged that the Plaintiff begun demanding for payment of interest arrears from June 2012 and from that time to date the company has been reminded of the unpaid interest obligations to no avail. The Plaintiff also relied on the mortgage

agreement executed on 30th September 2011 and clause 1 (IV) as well as clause 3 subsection (iii) thereof. The Plaintiff alleged that it had exhausted all reasonable options to collect interest in arrears and on 20 November 2013 the bank outsourced the recovery on the loan to a third party agent who then advertised the property for sale.

The Plaintiff relies on a letter of demand annexure "F" attached to paragraph 8 of the affidavit in support of this suit. The letter is dated 17th of May 2013 addressed to the first Defendant Company by the Bank Secretary of the Plaintiff. It is in response to a letter dated 6th of May 2013 from the first Defendant applying for additional funds. The Bank Secretary wrote that the loan account of the first Defendant is non performing and arrears escalated to Uganda shillings 169,697,508/= and that despite several demand calls to normalise the loan account, no effort had been made by the first Defendant to do so. The first Defendant was informed that the Plaintiff was not in a position to consider offering additional funding and the amount in arrears on the loan are settled. They demanded full payment of all outstanding arrears.

In paragraph 9 the affidavit of the company secretary deposes that the first Defendant's failure to rectify the default, the Plaintiff/Mortgagee wrote a statutory notice of default to the first Defendant/Mortgagor on 9th July 2013 which was received by the second Defendant on 23rd July 2013. The letter notifies the first Defendant of its loan arrears of Uganda shillings 182,254,510/= and give 45 days' within which to rectify the default. The letter annexure "G" gives a notice of default. It provides that if the default is not remedied within 45 days from the date of the notice, the bank would proceed to exercise the remedies provided for under the Mortgage Act, Act 8 of 2009 to recover the entire outstanding amount. Additionally in annexure "H" the Plaintiff gave the Defendant notice of default.

I have carefully considered the Defendants defence premised on the fact that several overtures were made firstly to obtain additional funding in order to complete the project. The Defendant's argument is that the bank would be able to recover its money if the project is completed. Efforts were made to seek intervention of the Office of the President to work out an amicable resolution of the problem. The argument makes economic sense but does not carry with legal contractual provisions. There is a conflict between the economic sense and legal provisions. This is the dilemma that the Plaintiff faces. If the plaintiff is funding development it should nurture the creature and make it produce the wealth. It would not kill the goose that lays the golden egg.

This depends on the funding and purpose of the Plaintiff. However the contract speaks for itself. The agreement of the parties provides for periodic payments and the first Defendant admits that it has been in default. The court cannot make an agreement for the parties by ruling on the refusal of the Plaintiff to advance additional financing for the Defendant's project. The agreement reviewed above clearly stipulates that there would be periodic payments of arrears of interest.

This is provided for under the loan agreement reviewed above as well as the mortgage deed. The mortgage deed is also dated 11th January 2012 and clearly stipulates that the Plaintiff agreed to grant to the Mortgagor a loan of Uganda shillings 700,000,000/= under a loan agreement dated 11th January 2012. Clause 1 of the mortgage agreement clearly stipulates that the Mortgagor covenanted to pay back the principal sum with interest and other charges thereon at the rate and in the manner and on the conditions specified in the loan agreement. Clause 1 (iii) of the mortgage agreement stipulates that in the event of default in the payment of any one or more of the instalments agreed upon, or the observations of performance of any of the covenants obligations of the Mortgagor written in the loan agreement, the whole of the monies payable or to become payable shall be deemed to be due.

In the premises as far as the written contract of the parties is concerned, the first issue is answered in the affirmative. The first Defendant/Mortgagor is in breach of its obligations under the mortgage deed by failure to pay instalment payments as agreed upon in the loan agreement as well as the mortgage deed. The mortgage agreement and the loan agreement have not been amended in writing or modified. The application for additional facilities is a matter of policy and prudence and is not provided for in the agreement. Payment is supposed to continue even if additional funding for further phases was contemplated. That notwithstanding the stipulation for periodic payment or instalment payment is the contractual provision and the first Defendant is in arrears and therefore in default.

Whether the Plaintiff/Mortgagee should take possession of the mortgaged property comprised in LRV 1305 folio 2 and LRV 1305 folio 4 plots 38 – 44 Pakwach road and plot 39 – 45 Uringi town Council, Nebbi District?

The Plaintiff's Counsel submitted that the first Defendant failed to honour the repayment obligations under the loan agreement by the 17th of May 2013 when the Plaintiff wrote to the first

Defendant a letter which was duly received by the second Defendant notifying the first Defendant of its default. Arrears had accumulated to a sum of Uganda shillings 169,697,508.49/=. The first Defendant did not act upon the notice.

Upon the first Defendant's failure to rectify the default, the Plaintiff wrote a statutory notice of default dated 9th of July 2013 which was received by the second Defendant on 23rd July 2013. In the notice the first Defendant was made aware of loan arrears of Uganda shillings 182,254,510.87/= and the Plaintiff gave the first Defendant 45 days within which to rectify the default. The first Defendant was also notified that upon failure to rectify the default, the Plaintiff would exercise its remedies under the Mortgage Act 2009. The Defendant subsequently upon default was served with a 21 day's notice of sale of the mortgaged property. The Defendant failed to rectify the default and the Plaintiff advertised the property through their agents Tropical General Auctioneers on the 20th of May 2015. The Plaintiff's Counsel further submitted that the Plaintiff complied with section 19 of the Mortgage Act by serving the relevant notices on the Defendants.

The Plaintiff argues that the Defendant failed to comply with the terms of the credit facility agreements and mortgage deed and failed to pay the monthly instalments for over two years. Counsel relied on the case of **Commercial Micro Finance Ltd versus Dovis Edgar Kayondo HCCS 2012 of 2006** in which it was held that it would be inequitable to give the Defendant another six months in which to make payment before the Plaintiff is granted the remedy when it was close to 2 years from the date the debt became due and the Plaintiff was granted the remedy of sale by private treaty/public auction. In **Jeane Frances Nakamya versus DFCU bank Ltd and another HCCS 813 of 2007,** Hon. Lady Justice Helen Obura judge of the High Court as she then was held that failure to perform any of the covenants in the mortgage was sufficient to give the Mortgagee the right to sue the Mortgagor to realise its remedies under the Act. Furthermore the Plaintiff requires possession for purposes of facilitating the sale of the mortgaged property because it is not possible to sell the property as the Defendants have frustrated the process of valuation and inspection of the property. Counsel further submitted that in the case of **GT Bank Uganda Ltd versus Richline International Ltd and another High Court Originating Summons Number 10 of 2014** as well as the case of **Ecumenical Church Loan Fund Uganda versus Ways KM Uganda limited Originating Summons Number 11 of 2014** this court held

that it has wide powers to order for the sale of mortgaged property in proceedings between a Mortgagee and the Mortgagor and the court has to ensure that the Mortgagee complied with the provisions of sections 19, 20 and 26 of the Mortgage Act 2009. The Plaintiff's Counsel reiterated submissions that the Plaintiff complied with the provisions of the Mortgage Act.

The Plaintiff's argument is that it is difficult to conduct the valuation of the property while the Defendant is in possession because they frustrated every effort to conduct the valuation. It was only reasonable that the Plaintiff can only conduct a sale of the mortgaged property while in possession of the property.

Furthermore the Plaintiff's Counsel submitted that the mortgagee may under section 24 of the Mortgage Act, and at the end of the period specified under section 19, after serving a notice of not less than five days of his intention to do so, enter into possession of the whole or part of the mortgaged property. The Plaintiff through its advocates gave the Defendants a notice of intention to sue and indicated that they would take possession of the suit property by seeking a court order if the Defendant did not deliver possession. Furthermore section 24 (2) (c) of the Mortgage Act 2009 gives a Mortgagee the right to enter into possession of the mortgaged property by an order of the court. Furthermore Counsel submitted that section 20 of the Mortgage Act 2009 gives alternative remedies to the Mortgagee who may enforce any or a combination of the remedies prescribed. Based on the evidence adduced the Plaintiff's Counsel submitted that the Plaintiffs are entitled to the remedy of taking possession of the mortgaged property.

In reply the Defendants Counsel submitted that the default of the Defendant was occasioned by the Plaintiff’s failure to disburse additional funds for the completion of the project. Even after communication of the default, a number of steps were taken by the Defendants to try to rectify the default through meetings, correspondence and negotiations. While the Plaintiff maintained through the Company Secretary that she was not aware of any on-going negotiations, the Plaintiff did not deem it necessary to communicate the outcome of the negotiations to the Defendants.

Furthermore Counsel submitted that after the default was communicated, a number of steps were taken by the Defendant to rectify the default. This was not limited to continued civil works on the suit property. Secondly the Plaintiff was duly made aware of the progress of the civil works

through a number of monitoring visits conducted by the Plaintiff's officials. This was coupled with periodic submissions of reports by the first Defendant. The Plaintiffs witness acknowledged receipt of the progress reports during cross-examination. She further testified that Tropical General Auctioneers were instructed by the Plaintiff to sell the said property without a valuation report. Furthermore she confirmed that the Plaintiff did not carry out the proper operation of the property before advertisement of the property for sale on the 30th of May 2015. From that testimony, the Defendant's Counsel concluded that the remedy of foreclosure and sale was not available because the Plaintiff did not comply with the Mortgage Regulations 2012 particularly Regulation 11 which makes it mandatory for valuation and inspection of the suit property by the Plaintiff/Mortgagee before the sale of the property.

The Plaintiffs witness testified that the Plaintiff was unable to conduct valuation because they were denied access to the suit property by the Defendant. However the Defendant's Counsel contends that this is a false statement because the Plaintiff through its authorised agents conducted a number of quarterly monitoring visits on the suit property. These visits were conducted on 11th October 2013, 24th of June 2014, 16th of September 2015 and 31st of March 2016 respectively according to site visitors book such progress reports already attached to the second Defendant's affidavit in opposition to the application.

The visits demonstrated willingness of the parties to come to negotiations and amounted to a waiver of the rights to pursue the remedies of the Mortgagee. The parties had opted for an amicable settlement and the Plaintiff now seeks to deny that it participated. Counsel relied on the doctrine of waiver as defined by **Black's Law Dictionary 8th edition at page 1611**. She also relied on the case of **Agri-Industrial Management Agency Ltd versus Kayonza Growers Tea Factory Ltd and another HCCS number 819 of 2004** where Hon. Mr. Justice Kiryabwire held that the term "waiver" in contract is most commonly used to describe the process where one party unequivocally, but without consideration grants a concession or forbearance to the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of a term waived. The Plaintiff waited two years after the issuance of the notice of default before advertising the said property for sale without carrying out a proper valuation. In the premises the Plaintiff waived its right to seek the remedy of possession

provided for under the Mortgage Act and should not be allowed to claim otherwise as during that time, the parties entered into negotiations with a view to arriving at an amicable settlement.

The Defendant's Counsel further submits that the remedy sought by the Plaintiff in the suit in the circumstances of this case is not the best option available. The Defendant had tried to mitigate the default occasioned by the Plaintiffs or refusal to disburse funds by sourcing for its own funds to complete the project and as such consideration should be given to that fact.

The Defendant's Counsel relies on **Andes (EAS) Ltd Vakoong Mulik Systems Ltd & Another HCCS No. 184 of 2008** where the court relied on Chitty on Contracts agreed that whenever the innocent party, following the Defendants breach, is able to find substitute performance from a third party, the mitigation rules give him a strong incentive to accept the substitute. The first rule imposes on the Plaintiff the duty to take all reasonable steps to mitigate the loss and consequently upon breach bars him from claiming any part of the damage which occurred due to his neglect to take such steps.

The Defendants Counsel submitted that the first Defendant tried to mitigate the loss occasioned by the Plaintiff's refusal to disburse funds by sourcing its own funds to complete the project in order to generate revenue so as to repay the loan.

All the factors remaining constant, it was the Plaintiff's intention to frustrate the Defendant by denying it additional funds so that it would eventually sell the suit property. Considering that all possible avenues to remedy the default such as restructure of the loan and the possibility of converting the loan in stock were all rejected by the Plaintiff. Furthermore article 4 section 4.01 stipulates that the repayment period for the loan was eight years. The Plaintiff also rejected to grant the Defendant additional time to allow a third party offset their financial obligations.

The issues before the court of such a nature that it cannot be dealt with a summary and sold the Defendant seeks for such orders at the discretion of the court. Counsel relied on the case of **GT Bank Ltd versus Richline International Ltd and another High Court Originating Summons Number 10 of 2014** where the object of procedure by originating summons was considered. It was held that the procedure is primarily designed for summary and ad hoc determination of points of law or construction of certain questions of fact, or for the obtaining of specific directions, usually for the safeguarding or guidance of persons acting in a fiduciary capacity or

acting under the general directions of the court such as trustees, administrators or the court's own execution officers. In that case the court found that the procedure used was not appropriate for disposal of the matter in controversy. The court directed the parties to appear for hearing of the suit as an ordinary suit.

In the premises the Defendants Counsel prays that issue number two is resolved in favour of the Defendant.

In rejoinder the Plaintiff's Counsel submitted that the Plaintiff made site visits to the premises and the Defendants allowed the Plaintiffs officials to the site and this is because of the need for additional funding. They attempted to do evaluation of the property and were repulsed by the Defendants. That is why they advertised the property without valuation and therefore could not sell it.

Furthermore the Plaintiff's Counsel submitted that the Plaintiff is not seeking for the remedy of foreclosure as alleged in the submissions in reply but rather an order to take possession under section 24 (c) of the Mortgage Act which gives the Mortgagee a right to apply for a court order to take possession. In fact the Defendants conceded in their submissions that amicable settlement of this matter failed and the Plaintiff decided to seek for the court intervention. Furthermore the Plaintiff never waived its remedies under the Mortgage Act.

With reference to the submission that the procedure used by way of originating summons was inappropriate, Counsel submitted that there is a controversy about the rate of interest and in the worst case scenario should the court exercise its powers under order 37 rule 11, it should not dismiss the suit but rather direct the parties to appear for hearing of the suit as an ordinary suit and not having disposed off in a summary manner.

Resolution of issue number 2: Whether the Plaintiff/Mortgagee should take possession of the mortgaged property comprised in LRV 1305 42 and LRV 1305 folio 4 plot 38 – 44 Pakwach Road and plots 39 – 45 Uringi Road, Nebbi Town Council?

I have carefully considered the issues as framed. The question of whether the Plaintiff/Mortgagee should take possession of the mortgaged property partly depends on the resolution of the first issue as to whether the Mortgagor is in breach of its obligations under the loan agreement.

Having answered the first issue of whether the Mortgagor is in breach of its obligations under the loan agreement in the affirmative, the second issue is restricted to whether the remedy of taking possession of the mortgaged property is available to the Plaintiff.

The Defendant reiterated submissions that there were negotiations for alternative remedies of amicable resolution of the dispute. I have carefully considered the letters from the Office of the President in which overtures were made to have the matter resolved without having to resort to the remedies available to the Mortgagee. The only way that could come about was if there were binding directions on the Plaintiff. I will briefly review some of these letters from the office of the President as well as documents relating to the loan which are attached as evidence in the affidavit in reply of Patrick Aloysius Okumu Ringa.

Starting with the special resolution of the first Defendant company, it was resolved that the company would be authorised to borrow Uganda shillings 1,500,000,000/= from the Plaintiff. The property was valued at the material time at Uganda shillings 1,200,000,000/= and was supposed to be re-valued to obtain its current commercial value. The company would offer its property the subject matter of the suit as security for the borrowing. The resolution does not clearly specify the purpose for which the loan was to be obtained. It only provides that the company required additional capital immediately as a result of the improved security and business climate in Northern Uganda generally. The loan was to be a long-term loan facility. The special resolution was registered with the registrar of companies. The special resolution is dated 27th of July 2011. Nevertheless, the company documents indicate that there was a board resolution specifying the purpose of the loan dated 2nd of January 2012. It provides that the proceeds of the credit facility will be utilised for purposes falling within the capacity of the company. Finally in the loan agreement dated 11th of January 2012 it is recognised that the purpose of the loan and article 1 was the project which is the company business of building and construction among other things. Section 1.02 provides for the purpose of the loan as to finance the first phase of upgrading and completion of the commercial buildings in Nebbi town, Nebbi district.

Section 1.03 of article 1 provided that the company shall meet cost overruns associated with the project. Finally it was agreed that the company would borrow from the Plaintiff an aggregate

amount of Uganda shillings 700,000,000/=. Article 3 provided that the loan would be disbursed in three instalments.

Article 4 provided for the loan payment and prepayment. The first Defendant is required to repay the loan in eight years calculated from the date of first disbursement of the loan. The loan repayment period is inclusive of the grace period of two years calculated from the date of the first disbursement. Article 4.02 provides that the amounts to be repaid shall be ascertained by the monthly loan statements issued by the Plaintiff and the loan statements would be good and sufficient evidence in court on the liability of the first Defendant. Section 4.02 (b) of the loan agreement is to be considered very carefully. It provides that at any time upon demand for payment, the company shall pay less than the full amount due and payable; the Plaintiff shall have the right to allocate and apply such payment in any way or manner and for such purpose or purposes as in its sole discretion it would determine.

So far there is controversy on article 5.01 of the loan agreement which caters for interest at the rate of 21% per annum. The controversy arises from the offer letter dated 16th of December 2011 written by the Plaintiff to the first Defendant Company and to the attention of honourable Patrick Aloysius Okumu Ringa, the Chairman/Managing Director of the first Defendant as well as the second Defendant in person. In the offer letter paragraph 8 provides that the interest rate should be 21% per annum variable at the instance of the bank. The offer letter is accepted by the second Defendant and the other director Olivia Irene Okumu - Ringa. The controversy arose in paragraph 3 of the affidavit in support of the suit by Dorothy Ochola, the Company Secretary of the Plaintiff/Mortgagee. She deposes that on 11th January 2012 the Plaintiff/Mortgagee approved an application and loan agreement for Uganda shillings 700,000,000/= at an interest rate of 17% per annum. The Company Secretary was cross examined on the 19th of May 2016 on the issue of which interest was applicable to the transaction. She testified that it was an error on her part to write that the interest rate was 17% per annum and because the interest rate is stated at page 5 of the agreement. In re-examination he testified that it was a drafting error when she deposes that the interest rate was 17% because the other documents show that interest rate was 21% per annum.

The preliminary question raised in the submissions is whether this is an appropriate matter to be determined by originating summons. In my opinion the question in controversy relating to the

interest rates has been clarified. There is an agreement executed by the parties as well as the loan offer letter both of which indicated that interest agreed upon is 21% per annum. An affidavit of the Company Secretary cannot change the agreement of the parties. The interest rate agreed upon is therefore 21% per annum according to the express provisions of the loan agreement as well as the loan offer letter of the Plaintiff written above. The loan offer letter is dated 16th December 2011 while the loan agreement is dated 11th of January 2012. For emphasis my conclusion is supported by the best evidence rule contained in section 91 of the Evidence Act Cap 6 Laws of Uganda which provides as follows:

> "91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.
>
> When the terms of a contract or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence, except as mentioned in section 79, shall be given in proof of the terms of that contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

The loan agreement dated 11th of January 2012 has been agreed upon by the parties and is consequently proved. No other evidence is admissible about the terms of the loan agreement as contained in paragraph 3 of the affidavit in support of the originating summons by the Company Secretary Mrs Dorothy Ochola. In addition to the loan agreement, the offer letter dated 16th of December 2011 which is endorsed by the Chairman/Managing Director of the first Defendant honourable Mr Patrick Aloysius Okumu Ringa and the second Director of the first Defendant Mrs Olivia Irene Okumu Ringa also offers interest at the rate of 21% per annum.

With regard to the other correspondences relied on by the first Defendant through the Chairman/Managing Director who is also the second Defendant, it is an admitted fact that the mortgaged property has registered thereon a charge reflecting the Plaintiff's interest. There is evidence that there was an ongoing construction work and this is evidenced by annexure "C" dated 19th of July 2012 from the Plaintiff and attached to the affidavit of Patrick Aloysius Okumu Ringa. The acting director of development finance wrote to the first Defendant as in the first

Defendant with regard to its application for an additional loan of Uganda shillings 650,000,000/= to submit fresh revaluation report of the project at the earliest opportunity. They were also requested for a report indicating the estimated amount invested in the construction project and the estimated cost of completing the project. Subsequently in a report dated 30th November 2012 the first Defendant through Messieurs Bageine and company limited submitted a report of valuation of the suit property. On 8th April 2013 in a letter attached as annexure "E" the first Defendant wrote to the Plaintiffs giving preliminary gross income projection on the commencement of business operations of Ringa Enterprises Company Ltd. In a letter dated 29th of November 2013 the chief Executive Director of the Plaintiff wrote to the first Defendant attention to the second Defendant on intention to sell by public auction/private treaty of the mortgaged property. In that letter it is written that the bank started demanding for payment of interest and arrears from June 2012 and from that time the first Defendant did not fulfil its obligations therefore. It was written that the Plaintiff exhausted all reasonable options to collect interest in arrears and the bank outsourced the recovery of the loan to a third party who advertised the property.

The grievance of the first Defendant which is expressed in a letter dated 4th of December 2013 addressed to the Chief Executive officer of the Plaintiff is that the Plaintiff had abandoned the project. Therefore the company was denied opportunity to complete the project in time in order to service the loan being a fact acknowledged by the valuation surveyors of the Plaintiff bank in November 2012. The Chairman/Managing Director therefore proposed that the Plaintiff stops sale of the company security and halts loan recovery and the accumulation of interest up to 30th of June 2014. Secondly he requested the Plaintiff to give an opportunity to the first Defendant to outsource alternative funds to clear the Plaintiff and complete the hotel project. The letter was copied to the Senior Presidential Advisor Dr Ezra Suruma. Dr Ezra Suruma also wrote to His Excellency the President of the Republic of Uganda to consider rescue intervention to assist the first Defendant Company which had been given a boost to complete its development project by the Plaintiff. He advised that in an environment of underdevelopment high capital cost, it is essential that development banks pursue development rather than merely seeking short-term profit and that is the rationale for having development banks to invest in the public interest beyond the narrow bounds of private banks. The letter is dated 3rd of December 2013. Again on 13th February 2015 the Senior Presidential Advisor/Finance Planning Dr Ezra Suruma wrote to

the Plaintiff. He inter alia wrote to the bank that the first Defendant has appealed to His Excellency the President of the Republic of Uganda for intervention to save the project from bankruptcy. Secondly he requested the Plaintiff to hold execution of the loan recovery measures to enable the company provided tangible restructuring plan to refinance the completion of the hotel project.

This letter is also confirmed by a letter of the first Defendant and the Chief Executive officer of the Plaintiff giving the same facts. On 16th June 2015 the Principal Private Secretary to His Excellency the President wrote to Patricia Ojangole, Chief Executive Officer of Uganda Development Bank on the subject of the advertisement of the mortgaged property for sale. They again requested the bank to halt the sale. Furthermore they wrote as follows: "Honourable Okumu Ringa's financial obligations with the bank would be settled at the beginning of this financial year."

While I do appreciate the fact that the Plaintiff is a Public Corporation, the question is, what the status of Uganda Development Bank Ltd is?

Uganda Development Bank Ltd is a statutory Corporation created by an Act of Parliament namely the Uganda Development Bank Act cap 56 laws of Uganda (UDB Act). The objects of the bank are stipulated under section 4 of the UDB Act which provides that:

> “4. Objects of the bank.
> The objects of the bank shall be—
> (a) to promote and finance development in the various sectors of the country’s economy —
> (i) by assisting in the establishment, expansion and modernisation of agriculture, industry, tourism, housing and commerce; and
> (ii) by furnishing or assisting in obtaining of managerial, technical and administrative advice and services to these sectors;
> (b) to provide finance in the form of short-, medium- or long-term secured loans by purchasing or subscribing for shares or other securities or by acquiring any other interest;
> (c) to acquire shareholdings in any company and to establish subsidiary companies;

(d) to make funds available for reinvestment by selling any investment of the bank when and as appropriate;

(e) to draw, accept or endorse bills of exchange for the purposes of the business of the bank; and

(f) to do any such other things as are incidental or conducive to the fulfillment of the objects of the bank."

Section 4 (a) particularly object (i) is quite relevant to the mandate of the Plaintiff in the relation to the business it undertook to fund under the mortgage arrangement under review. The Plaintiff is required by its objects to assisting the establishment, expansion and modernisation of agriculture, industry, tourism, housing and commerce. The housing, tourism and commerce falls within the objects for the loan advanced to the first Defendant. The first Defendant is a body corporate and section 2 thereof and may sue and be sued in its own. As far as the administration is concerned the board of directors are appointed under section 11 of the UDB Act. They include a chairperson and three other directors appointed by the Minister as well as the Secretary to the Treasury; and the Governor Bank of Uganda. Under section 23 of the UDB Act the Plaintiff may execute contracts with private persons which would be binding.

Finally section 24 of the UDB Act provides that where the government in its initiative instructs the bank to provide funds for a certain project or programme, the financing shall be secured by a government guarantee. In other words the government can instruct the bank/Plaintiff to halt the recovery of the loan provided that the financing affected by the instruction is secured by a government guarantee. The grievance of the first Defendants Chairman/Managing Director who is also the second Defendant is that the project would be able to generate the funds required to repay the loan of the Plaintiff if it can be completed. The first Defendant requires additional funds to be able to do so. The first Defendant has also committed its own funds in addition to the loan money to complete the project. To my mind the question is whether the government is willing to guarantee that the Plaintiff would get its money and assist the first defendant to complete the project and generate the money to pay back. Either kill the project or give it more life to generate the income.

From the correspondence, it is apparent that the government has an interest in ensuring that the first Defendant's project takes off. This is a policy matter. In the letter dated 16th of June 2015

and addressed to the Chief Executive Officer, Uganda Development Bank Kampala, the Principal Private Secretary to His Excellency the President requested the Plaintiff to halt sale of the first Defendant's property.

Finally I have carefully considered the submissions in rejoinder of the Plaintiff's Counsel which seems to renege from the earlier submissions and pleadings seeking to sell the first Defendant's property for settlement of the loan advanced to the first Defendant. In the rejoinder on the second issue the Plaintiff's Counsel clearly submitted as follows:

> "The Plaintiff is not seeking for a remedy of foreclosure as alleged in the submissions in reply, but rather for an order to take possession under section 24 (c) of the Mortgage Act which gives a Mortgagee a right to apply for a court order to take possession. In fact the Defendant conceded in their submissions that amicable settlement of this matter failed and the Plaintiff decided to seek for court's intervention."

I do not agree that an amicable resolution of this dispute has failed. The suit was filed on 30th July 2015. The Plaintiff adduced evidence to the effect that the property had been advertised in the Daily Monitor issue of the 20th of May 2015. It is alleged in the suit that the sale of the property to recover the loan had been hampered by the second Defendant who has resisted potential buyers from inspection of the property. First of all I do not have to consider whether the Plaintiff is pursuing sale of the property. This has been overtaken by the submission which is binding on the Plaintiff. However by the time the suit was filed, the Plaintiff was seeking one of the remedies of whether the first Defendant should be foreclosed of the right to redeem the mortgaged property. Subsequently the Plaintiff amended the originating summons in line with the ruling of the court that various authorities of this court have settled the position that under the Mortgage Act 2009, upon the fulfilment of the statutory conditions for the sale of the mortgaged property, a Mortgagee has a right of sale. Consequently the suit is for determination of three questions. The first question is whether the Defendants/managers are in breach of their obligations under the mortgage. This has already been determined. The second question is whether the Plaintiff/Mortgagee should take possession of the mortgaged property.

The remedy of taking possession of the mortgaged property is one of the remedies provided for by the Mortgage Act, Act 8 of 2009. I will briefly review the provisions of the Mortgage Act cited above.

Notice is issued under section 19 (1) of the Mortgage Act 2009 and gives the Mortgagor an opportunity to be notified of his or her default. It provides that where money secured by mortgage, and made payable on demand, a demand in writing shall create a default in payment. In this case there was a demand in writing creating a default in payment. Secondly section 19 (2) provides that where the Mortgagor is in default of any obligation and has been notified of default, the Mortgagee may additionally serve on the Mortgagor a notice in writing of the default and require the Mortgagor to rectify the default within 45 working days. The notice has to be in the prescribed form and shall adequately inform the Mortgagor of the nature and extent of the default; the amount that must be paid to rectify the default among other things.

Section 20 of the Mortgage Act provides that where the Mortgagor who is in default does not comply with the notice served on him or her under section 19, the Mortgagee may require the Mortgagor to pay all monies owing on the mortgage; appoint a receiver of the income of the mortgaged land; lease the mortgaged land or where the mortgage is of a lease, sublease the land; or enter into possession of the mortgaged land or sell the mortgaged property. These remedies are alternative remedies upon the default of the Mortgagor being established and upon the Mortgagor being given at least 45 days to rectify the default and failing to do so.

Upon failure to rectify the default, the Mortgagee would be entitled to exercise any of the remedies provided for under section 20 of the Mortgage Act 2009. The Plaintiff complied with the provisions of the statutory law. The statutory law permits the Mortgagor to exercise any of the remedies under section 20 of the Mortgage Act 2009 which include requiring the Mortgagor to pay all monies owing on the mortgage. Secondly by appointing a receiver of the income of the mortgaged land; thirdly by leasing the mortgaged land or where the mortgage is of a lease, a sublease of the land. Fourthly it gives it the Mortgagee a right to enter into possession of the mortgaged land and lastly it gives the Mortgagee power to sell the mortgaged land. All the remedies of the Mortgagee can only be exercised upon failure of the Mortgagor to rectify the default after notice to the Mortgagor has been given under section 19 of the Mortgage Act 2009.

Section 20 of the Mortgage Act merely lists the remedies available to the Mortgagee. The subsequent sections deal with each type of remedy. Section 21 provides for instances where the Mortgagee may sue for money secured by mortgage. Section 22 deals with the appointment, the powers, remuneration and duties of receivers. Section 23 deals with the powers of the Mortgagee to lease or sublease the mortgaged property. Finally section 24 deals with the power of the Mortgagee to take possession of the mortgaged land.

Section 24 of the Mortgage Act is the only relevant provision that deals with the second question in the originating summons. Before dealing with the law I make reference to the submissions of the Plaintiff's Counsel in rejoinder in which he quotes section 24 (2) (c) of the Mortgage Act 2009 for the submission that the Plaintiff is entitled to take possession of the mortgaged property. He further contended that according to the case of Jeane Frances Nakamya versus DFCU Bank and Another HCCS 813 of 2007 in which Honourable Lady Justice Helen Obura held that section 20 provides for alternative remedies and the Mortgagee can choose to enforce any or a combination of them.

Section 24 of the Mortgage Act gives power to the Mortgagee at the end of the 45 days prescribed under section 19 and after serving the notice of not less than five working days of an intention to do so, enter into possession of the whole or part of the mortgaged property. Section 24 (2) of the Mortgage Act confers upon the Mortgagee power to enter into possession of the mortgaged land. This includes power to enter into possession by order of the court. Furthermore section 24 (4) provides that a Mortgagee who has entered into possession may remain in possession without prejudice to his or her right to withdraw from possession so long as the mortgaged land continues to be subject to any liability under the mortgage. Additionally section 24 (5) provides for the rationale for retaining possession by the Mortgagee. If it is by occupation, the Mortgagee shall be entitled to manage the land and take all the profits of the land but is liable to the borrower for any act or omission by which the value of the land or any building thereon or permanent improvement of the land is impaired or the Mortgagor otherwise suffers loss. The Mortgagee may receive rents and profits and be accountable to the Mortgagor not only for the sums received by him or her but also for any additional sums which he or she might reasonably have been expected to receive by the prudent exercise of his or her powers. A Mortgagee in

possession shall apply all the monies received by him or her to the same payments and in the same order as applies to a receiver under section 22 (9) of the Mortgage Act.

A Mortgagee may withdraw from possession of the mortgaged land inter alia by order of the court or upon the appointment of a receiver under section 22 of the Mortgage Act or upon rectification of the default by the Mortgagor.

I agree that the court has powers to order for entering into possession of the mortgaged land by the Mortgagee. Secondly where there has been a default which has not been rectified after the notice provided for under section 19, the Mortgagee is entitled among other remedies to be contemplated, to enter into possession of the mortgaged property. The question of whether the Mortgagee should take possession of the mortgaged land is an exercise of discretionary remedies by the Mortgagee. It is not up to the court to decide whether the Mortgagee should take possession of the mortgaged property. However though the court has power to make the order for the Mortgagee to take over possession, the question to be determined is not whether the Mortgagee should take possession but rather it is upon the Mortgagee to ask the question as to whether there are grounds for taking of possession of the suit premises. Having resolved the issue as to whether the Defendant/Mortgagor is in breach of their obligations under the mortgage, it would follow that upon satisfying the court that the Mortgagee has given to the Mortgagor the requisite notices prescribed by section 19 of the Mortgage Act as well as the requisite notice of not less than five days after failure to rectify the default, the Mortgagee would be entitled to the order.

In this particular case the big question is whether the requirements of the law have been complied with. I am satisfied that the requisite notices of default was given in accordance with section 19 (1) of the Mortgage Act. Secondly notice to rectify the default was given in accordance with section 19 (2) of the Mortgage Act. Thirdly the first Defendant who is the Mortgagor did not rectify the default by paying the outstanding arrears. Fourthly I am satisfied that there has been an attempt by the government through the Office of the President to find an alternative remedy. There is no evidence that the government has guaranteed the first Defendant's loan obligations. It is the first Defendant's case that the property would earn sufficient income to pay off the loan. Fifthly the remedy of sale of the suit property is not available to the Plaintiff in this suit. The notices attached as evidence in support of the suit

namely Annexure "F" dated 17th of May 2013 attached to the affidavit of Dorothy Ochola, the Company Secretary of the Plaintiff is merely a letter giving notice of default and a reply to the first Defendant's application for additional funds. Secondly annexure "G" is the notice of default under the Mortgage Act 2009 and the Mortgage Regulations 2012 in which the Plaintiff gave notice to the first Defendant about the exercise of any of the remedies of the Mortgagee upon failure to rectify the default within 45 days. Subsequently in annexure "H" there is a notice of sale of the mortgaged property addressed to the first Defendant Company. The property was advertised in Annexure "I" being the daily monitor newspaper of the 20th of May 2015.

Section 24 (1) of the Mortgage Act provides as follows:

> "(1) A Mortgagee may, after the end of the period specified in section 19, and after serving a notice of not less than five working days of his or her intention to do so, enter into possession of the whole or in part of the mortgaged land."

Regulation 26 of the Mortgage Regulations stipulates that before taking possession of the mortgaged land under section 24 of the Act, the Mortgagee shall give notice to the Mortgagor in the Form 10 in Schedule 2. The prescribed form clearly provides among other things that the Mortgagee shall after five working days from the date of the notice, proceed to exercise the mortgagees right to take possession of the mortgaged property in accordance with section 24 of the Act.

No notice of intention to enter into possession was ever given to the first Defendant under section 24 (1) quoted above.

Before taking leave of this matter I was addressed on the valuation of the mortgaged property under regulation 11 of the Mortgage Regulations 2012. The said regulation is inapplicable to an application for a court order to take possession of the mortgaged property as this is not a requirement before taking possession of the suit property. Secondly possession of the suit property is a specific remedy which allows the Mortgagee to receive the income from the property and not to proceed to sell the property. Paragraph 15 of the affidavit in support of the suit sworn by Dorothy Ochola, the Company Secretary of the Plaintiff clearly stipulates that the Plaintiff would like to take possession which would be necessary to enable the Plaintiff/Mortgagee recover the outstanding principal together with interest whether by way of

sale or collection of rentals or leasing. As I have held above the remedy of sale of the suit property is not available to the Plaintiff in this suit. For emphasis possession cannot be taken for purposes of sale of the mortgaged property but only for management to receive the income thereon.

While the remedy of taking possession of the suit property is available, the requisite notice to do so has not been given. Last but not least a resolution of this suit cannot resolve the dispute of the parties conclusively. The absence of notice to the Mortgagor of taking possession of the suit property may result in a dismissal of the suit.

I have however considered the admission of the first Defendant not only that it took out a loan facility but that the outstanding amount is not in dispute. I have already ruled that there is no issue as to the agreed interest of 21% per annum. What is left is for the exercise of the remedies of the Mortgagee against the Mortgagor. In the premises the suit shall be allowed conditionally on the following terms namely:

1. The First Defendant has leave of court to further pursue the obtaining of a guarantee from the Government of Uganda within a period of three months from the date of this order. Alternatively the government should give it an appropriate remedy to redeem the property if that is what it intended. This is pursuant to a letter from the Office of the President halting the intended sale of the first Defendant's property by the Plaintiff. That would be the only basis to stop the Plaintiff as a Public Corporation from exercising further rights of the Mortgagee to take possession and manage the property to pay off the loan obligation of the first Defendant.

2. Secondly should the first Defendant fail to obtain a guarantee of the loan in terms of section 24 (2) of the Uganda Development Bank Act Cap 56 laws of Uganda from the Government of Uganda, or any other appropriate action of the Government of Uganda within the period granted above, the Mortgagee would be entitled to issue a notice to take possession of the suit property for purposes of realising income from the mortgaged property in the repayment of the loan.

3. The suit against the second Defendant is redundant because the remedies being sought are remedies of the realisation of the security of the mortgaged property. The suit against the second Defendant is accordingly dismissed with costs.

4. I have considered the submissions on costs the Plaintiff is entitled to costs as against the first Defendant which shall be realised from the mortgaged property. Costs shall be calculated and then computed as part of the outstanding costs charged on the mortgaged property.

Judgment delivered in open court on the 19th of August 2016

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Godfrey Himbaza for the Plaintiff

Patricia Okumu Ringa for the Defendant

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

19/08/2016