

**THE REPUBLIC OF UGANDA,**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**CIVIL SUIT NO 228 OF 2016**

**YAKO MICROFINANCE LTD}..... PLAINTIFF**

**VS**

**1. BOAZ KAFUZA}**

**2. WINNIE KIIZA}**

**3. JAMES MBAHIMBA}.....DEFENDANTS**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**RULING**

The Plaintiff is described as a limited liability company engaged in the business of microfinance support services. The first Defendant is described as an adult male Ugandan and a borrower of the loan the subject matter of the suit. The second Defendant is a female Ugandan and a woman Member of Parliament of Kasese district and has been sued as a guarantor of the first Defendant's loan. The third Defendant is a male adult person also sued as a guarantor for the first Defendant's loan.

The Plaintiff brings this action against the Defendants jointly and severally for recovery of Uganda shillings 277,710,000/= by 21 March 2016, further interest on that amount at the rate of 10% per month from 21 March 2016 and till full payment; general damages for breach of contract and costs of the suit.

The basic facts alleged in the plaint are that on the 26<sup>th</sup> of May 2015 the first Defendant applied for and obtained a loan of Uganda shillings 125,000,000/= from the Plaintiff payable within one month at an agreed interest rate of 8% per month. On the same day the first Defendant executed a demand promissory note in which he undertook to pay to the Plaintiff within one month a sum of Uganda shillings 135,000,000/= being the total of the principal and one month interest. The

second and third Defendants executed personal guarantee deeds or undertaking to pay the loan debt in the event of default of the first Defendant. The first Defendant also mortgaged to the Plaintiff his own property comprised in Busiro block 265 plot 6464 at Kikumbi zone, Zzana, Bunamwaya in Wakiso district and deposited the certificate of title with the Plaintiff. He also deposited the Plaintiff's copy of a lease agreement for PALL SUITES bar, Lodge and restaurant located in the same zone.

On the 27<sup>th</sup> of May 2015 the first Defendant instituted a formal loan agreement with the Plaintiff in which she undertook to pay Uganda shillings 125,000,000/= only within one month which was to elapse on 27<sup>th</sup> June 2015.

The Plaintiff avers that the first Defendant defaulted to repay the loan within one month as agreed and belatedly and after several reminders paid a sum of Uganda shillings 47,000,000/=. On 10<sup>th</sup> March 2016 the Plaintiff issued to the second and third Defendants notices of enforcement of guarantees requiring them to pay the loan balance together with accumulated interest amounting to Uganda shillings 227,100,000/= only by 21<sup>st</sup> March 2016.

The Plaintiff alleged that the Defendants jointly and severally are liable to repay the loan debt to the Plaintiff and their refusal to do so is deliberate because they have the capacity to repay even after they were given a notice of intention to sue. Prior to this several notices had been served on the Defendants demanding payment. The Plaintiff's case is that the refusal of the first Defendant or the neglect of the first Defendant to repay the loan amounts to breach of contract for which it claims damages. Secondly the actions of the second and third Defendants in refusing or neglecting to repay the loan which they guaranteed amounted to breach of the personal guarantees for which the Plaintiff claims damages. Lastly the Plaintiff avers that the loan transaction was a transaction of a commercial nature and further interest ought to be ordered on the debt at a rate of 8% per month until full settlement thereof. The loan transaction is exempted by the Money Lenders Act and therefore the interest charged at the rate of 8% per month is conscionable, lawful and recoverable.

By affidavit of service of Mr Norman Pande, court process server of this court sworn to on the 25<sup>th</sup> of May 2016, the Plaintiff served the Defendants. By letter dated 26<sup>th</sup> of May 2016 and filed on court record on the 27<sup>th</sup> of May 2016 the Plaintiff's counsel Messieurs Magellan

Kazibwe & Company Advocates and Legal Consultants, the Plaintiff applied to the Deputy Registrar, Commercial Division and accordingly interlocutory judgment was entered under Order 9 rules 8 and 10 of the Civil Procedure Rules and the main suit was set for formal proof.

I considered the affidavit of service as to whether all the Defendants had been properly served. However where judgment has been entered under Order 9 rules 9 and 10 of the Civil Procedure Rules it can only be set aside under Order 9 Rule 12 of the Civil Procedure Rules. This is because the court process server telephoned the first Defendant and was supposed to meet him on 19<sup>th</sup> April 2016 at Parliament. Secondly he also telephoned the second Defendant on a certain number and was requested to serve papers to her secretary in the Parliamentary Building. Furthermore he telephoned the third Defendant on his telephone and he was informed that he was in Kasese District and was to contact him again on 19<sup>th</sup> April 2016. He left copies of the summons, plaint and mediation summary in the office of the secretary to the second Defendant on 19<sup>th</sup> April 2016. After several other incidents he went together with the Plaintiff's Executive Director on 21<sup>st</sup> April 2016 to Parliament to look for all the Defendants but did not find any person. On 22<sup>nd</sup> April 2016 they both visited the first Defendant's residence and found the first Defendant and the third Defendant in a meeting. Whereupon he served the first and third Defendants after Mr A.K Sinha, the Executive Director of the Plaintiff identified them. Secondly the process server deposes that the first Defendant called the second Defendant who informed him that the second Defendant confirmed on phone that she had received court process on 19<sup>th</sup> April 2016 and was willing to attend a meeting with the Plaintiff on 23<sup>rd</sup> April 2016.

None of the Defendants acknowledged service of court documents on the return copy of the process server. Consequently there is no acknowledgement of service on the attached summons.

That notwithstanding the matter proceeded ex parte for formal proof and the Plaintiff produced one witness Mr Anchal K Sinha. The witness tendered in a written testimony and produced 11 exhibits in support of the claim.

The gist of the written testimony of the Executive Director of the Plaintiff Mr Anchal K Sinha is that the first Defendant as a former member of Parliament for Busongola South constituency in Kasese district for the Ninth Parliament, and the second Defendant as the current member of Parliament for the same district and the leader of opposition in the 10<sup>th</sup> Parliament and the third

Defendant as a former member of Parliament for Kasese municipality constituency in Kasese district were regular customers of the Plaintiff.

The facts constituting the cause of action are that on the 26<sup>th</sup> of May 2015 the first Defendant went to the offices of the Plaintiff with a handwritten application in which he requested for a short-term loan facility of Uganda shillings 135,000,000/= only for a period of one month and at an interest rate of 10% per month for purposes of acquiring a lease of a bar, lodge and restaurant called PAL SUITES. PW1 proved the loan after discussion and they agreed to the loan amount of Uganda shillings 135,000,000/= at an interest rate of 8% per month. The first Defendant signed a promissory note promising to pay the Plaintiff the principal sum with an interest of 8% per month dated 26<sup>th</sup> of May 2015. As security for repayment of the loan the first Defendant got two guarantors who executed guarantee undertakings on the 26<sup>th</sup> of May 2015 in the presence of PW1. The first Defendant additionally surrendered collateral security by way of a certificate of title comprised in Kyadondo block 265 plot 6464 situated at Bunamwaya where his home is located. On the same day that is the 26<sup>th</sup> of May 2015 the first Defendant executed a legal mortgage to secure the loan. The Plaintiff registered the mortgage on the certificate of title. The first Defendant also handed over a copy of the lease agreement he had instituted on the 26<sup>th</sup> of May 2015 with one Obed Tashobya who leased PAL SUITES to the first Defendant. On the same day the Plaintiff disbursed Uganda shillings 125,000,000/= in cash to this first Defendant in the presence of the second and third Defendants and also in the presence of Obed Tashobya. On the 27<sup>th</sup> of May 2015 the first Defendant came back and executed a standard loan agreement wherein he expressly acknowledged that he had received the loan amount from the Plaintiff of Uganda shillings 135,000,000/= repayable within one month namely on 27<sup>th</sup> June 2015 at an interest rate of 8% per month against the securities of a certificate of title and personal guarantees of the second and third Defendants.

Finally the first Defendant defaulted to repay the loan in full within one month. He belatedly effected payment in instalments of a total of Uganda shillings 47,000,000/= only leaving a balance of Uganda shillings 227,100,000/= by 21<sup>st</sup> March 2016. The Executive Director of the Plaintiff called the first Defendant and met him at Parliament and in his offices in December 2015 and in February 2016 and requested him to use his Parliamentary emoluments to repay the loan in full because the interest was increasing very fast every month but did not commit himself

on the exact date when he would comply. Accordingly the Plaintiff instructed lawyers to commence recovery measures and enforce the loan agreement or personal guarantees. On 18<sup>th</sup> of March 2016 the lawyers wrote final demand notices to repay the loan but the first Defendant ignored it and refused to pay.

The Plaintiff's contention is that the first Defendant breached the promise to pay. Secondly the breach occasioned the Plaintiff deprivation of working capital from 27<sup>th</sup> June 2015 up to date; reduction in the business ratio to be able to lend to other potential customers on a short-term basis and thereby caused loss of interest that could have been generated from other borrowers. Secondly that the breach led to setbacks as the Plaintiff had to borrow funds from other bankers who filled the liquidity gap created by the first Defendant withholding of Uganda shillings 125,000,000/=. The borrowing attracted interest which the Plaintiff was not initially prepared to incur. The breach also led to unwarranted inconveniences in that the Plaintiff had to incur expenses of recovery of the loan by sending a credit officer to Parliament, Kasese and the first Defendant's business premises on different occasions to look for the first Defendant.

The Plaintiff's executive director also communicated by telephone to the second and third Defendants and requested them to fulfil their obligations but in vain. PW1 testified that it was their business and normal practice that any outstanding principal sum attracts further interest at the same rate agreed upon in the loan agreement and therefore the outstanding balance on the suit property attracted further interest which led the Plaintiff to incur as at 21<sup>st</sup> March 2016 interest at the rate of 227,100,000/=. Finally the provision of the Money Lenders Act does not apply because the first Defendant executed a mortgage and deposited his title with the Plaintiff.

The Plaintiff's counsel addressed the court in written submissions that I have duly considered. The summary of the written submissions addresses the following issues:

1. Whether the Defendants breached the contract and personal guarantees?
2. Whether the Plaintiff is entitled to the remedies sought in the plaint?

### **Issue No. 1: On whether the Defendants breached the contract and personal guarantees?**

Counsel's written submission addresses the evidence as summarised above. The result is that the first Defendant refused to fulfil the promise he expressly made in the promissory note PEX-3 and

is in breach thereof. Secondly Counsel relied on **Section 10 of the Contract Act, No. 7 of 2010** for the definition of a contract and based on that definition submitted that PEX-8 is a contract for a loan of Uganda Shillings 135,000,000/= between the Plaintiff and the 1<sup>st</sup> Defendant. With reference to **Section 35 of the Contracts Act** and the case of **Nakawa Trading Co. Ltd versus Coffee Marketing Board, HCCS NO. 137 of 1991 (unreported)** and judgment of Byamugisha J as she then was, breach of contract occurs when one or both parties fail to fulfil the obligations imposed by the terms of the contract.

The 1<sup>st</sup> Defendant refused to fully repay the loan within the agreed time and is in breach of the contract terms. Secondly the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants also breached their personal guarantees when they refused to repay the loan debt in full upon default of the 1<sup>st</sup> Defendant as they had undertaken in their personal guarantees and were in breach of their obligations there under.

**Issue No. 2: On whether the Plaintiff is entitled to the remedies sought in the plaint?**

The Plaintiff's counsel prayed for the payment of the loan debt being Uganda shillings 227,710,000/= as at 21<sup>st</sup> March, 2016, interest at the rate of 8% per month on the loan debt, general damages of Uganda shillings 30,000,000/= and Costs of the suit under **Section 27 of the Civil Procedure Act**.

**Ruling**

I have carefully considered the written submissions of counsel, the pleadings of the Plaintiff as well as the evidence adduced. This suit proceeded in default of a defence by all the three Defendants. It had been fixed for formal proof after interlocutory judgment had been entered by the registrar of this court under Order 9 rules 8 and 10 of the Civil Procedure Rules on the 27<sup>th</sup> of May 2016. The suit was heard on 23<sup>rd</sup> June 2016 whereupon the Plaintiff called one witness, the Executive Director of the Plaintiff who relied on a written testimony that was admitted in evidence on oath.

Issue number one addressed by the Plaintiff's counsel is whether the Defendant's breached the contract and personal guarantees? The second issue is whether the Plaintiff is entitled to the remedies sought in the plaint?

From the evidence the Plaintiff has established as far as the first issue is concerned that the first Defendant is in default of its payment obligations as required by the documents adduced in evidence. These documents are the loan application form exhibit P1 dated 26<sup>th</sup> of May 2015 which is handwritten and written by the first Defendant. The second document is an application for a short-term loan by the first applicant exhibit P2. The third document is a promissory note exhibit P3 dated 26<sup>th</sup> of May 2015 signed by honourable Kafuda Boaz, the first Defendant. Last but not least as far as the first Defendant is concerned, the Plaintiff adduced a loan agreement dated 27<sup>th</sup> of May 2015. Paragraph 3 thereof provides that the borrower shall deposit his land title/ vehicle or other security to be transferred into the names of its nominees or purchaser on private treaty without resort to any court of law. On such default of payment, the agreement shall be construed as a sale agreement. Clause 3 reads as follows:

"As security for the said disbursement, the borrower shall deposit with the lender a land title. The lender, in the event of default by the borrower to pay on 27<sup>th</sup> June 2015 shall cause land/vehicle or any other security item to be transferred into the names of its nominees or purchaser on private treaty, without resort to any courts of law. On such default of payment, this agreement shall be construed as a sale agreement."

In paragraph 4 of the loan agreement it is provided as follows:

"In case the landed property has been offered as security by the borrower or his guarantor, to the lender for the said disbursement and the borrower defaults payment on demand or expiry of the agreed period, the lender is at liberty to sell the same after giving the required statutory notice. After the property has been sold on default on demand verbal or written the borrower/guarantor shall give vacant possession of the same to the lender or purchaser within seven days from such notice.

There are several other clauses that I do not need to refer to. What the Plaintiff has proved is that upon giving the first Defendant a demand notice for the sum of Uganda shillings 227,710,000/=, the Defendant defaulted in payment. Resolution of this issue does not determine whether the Plaintiff is entitled to the total sum claimed in the plaint. Secondly the loan was for a period of one month only at an interest of 8% per month. The borrower/first Defendant had borrowed a sum of Uganda shillings 125,000,000/=. The second aspect of the issue relating to the second and

third Defendants shall be considered separately. It depends on resolution of the issue as to whether their obligations as guarantors could be enforced against them in the facts and circumstances of this suit. Saving that therefore the first issue could be answered in the affirmative in so far as the first Defendant is in breach of his loan agreement by default in payment of the loaned amount within one month as had been agreed between the parties. A conclusion of this issue has to await another issue as to whether the Plaintiffs claim falls under the Money Lenders Act cap 273 or the Mortgage Act 2009.

**The second issue: Whether the Plaintiff is entitled to the remedies sought in the plaint?**

In the pleadings and in the evidence the Plaintiff maintains that the transaction, which is a loan transaction between the Plaintiff and the first Defendant and which is also guaranteed by the second and third Defendants was not subject to the Money Lenders Act Cap 273 laws of Uganda. I agree with the Plaintiff's counsel that the contract or the transaction between the Plaintiff and the first Defendant is not subject to the Money Lenders Act because the first Defendant deposited his title and the parties registered a mortgage deed as security for the loan and by virtue of section 21 (1) (c) of the Money Lenders Act Cap 273, the Money Lenders Act Cap 273 does not apply to the money lending transaction. The question is whether the transaction is governed by the Mortgage Act.

For purposes of establishing the law applicable the issue is whether the Mortgage Act is applicable? The Plaintiff's counsel relied on section 10 of the Contracts Act 2010 as well as section 33 (1) of the Contracts Act. Section 10 of the Contracts Act defines what amounts to a contract. On the other hand section 33 (1) of the Contracts Act provides that parties to a contract shall perform their respective promises. The issue of whether the first Defendant performed its obligations was considered in the first issue. The first Defendant is in breach of his obligations. The question that remains is how the Plaintiff is supposed to execute or enforce its rights. This is because the Plaintiff has an undertaking of the guarantors who are the first and second Defendants as well as a mortgage as security. Firstly under the law the provision of section 21 of the Money Lenders Act cap 273 is relevant. It provides as follows:

21. Saving.

(1) This Act shall not apply—



(a) to any moneylending transaction where the security for repayment of the loan and interest on the loan is effected by execution of a chattels transfer in which the interest provided for is not in excess of 9 percent per year;

(b) to any transaction where a bill of exchange is discounted at a rate of interest not exceeding 9 percent per year;

(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.”

As far as is relevant, section 21 of the Money Lenders Act provides that the Act shall not apply to any money lending transaction where the security for repayment of the loan and interest on the loan is effected by the execution of a legal or equitable mortgage. In this case the Plaintiff specifically pled that the transaction was for repayment and was effected by the execution of a legal mortgage. Secondly, the exemption of the Money Lenders Act applies whether the transaction was carried out by a money lender or not. Thirdly, any person who lends money using a manner exempted by the Act shall be deemed not to be a money lender. The converse is that a person who lends money in a manner that is not exempted by section 21 is deemed to be a money lender. It follows that where the transaction is effected by way of a mortgage as security for the lending, it is governed by the Mortgage Act, Act 8 of 2009. A mortgage was registered under instrument number WAK 0006 8277 and specified that it was registered to secure the repayment of Uganda shillings 135,000,000/= according to a copy of the title deed admitted in evidence as exhibit P6. While I have not seen a copy of the mortgage deed, a Mortgagor can create a mortgage by deposit of title with the Mortgagee and the Mortgagee may lodge a caveat with the Registrar of Titles on the title deed to protect the equitable interest. In paragraph 7 of the

written testimony of PW1, Mr Sinha testified that he made the first Defendant execute a legal mortgage to secure the loan which it did and later caused the registration of the said mortgage on the certificate of title and it was clearly reflected as an encumbrance on the encumbrance page. Section 3 (1) of the Mortgage Act 2009 provides that:

"A person holding land under any form of land tenure, may, by an instrument in the prescribed form, mortgage his or her interest in the land or a part of it to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfilment of a condition.

I have not seen any instrument creating a mortgage in the prescribed form. Secondly, section 3 (4) provides that the mortgage created under subsection (1) shall only take effect when registered. There is sufficient evidence that a mortgage has been registered on the title deed adduced in evidence and which is registered in the names of the first Defendant. For the moment the Plaintiff has proved that an encumbrance was registered on the title deed of the Defendant and that it purports to be that of a mortgage securing payment of Uganda shillings 135,000,000/=.

I have carefully considered the provisions of the Mortgage Act 2009. The Mortgagee is required to serve two notices before exercising any of the remedies available to it. The first notice is a notice of default which is in the form of a demand notice. The demand notice which if not paid creates a default. The second notice is a notice to rectify the default. The essence of a notice under section 19 (2) of the Mortgage Act 2009 is to give the Mortgagor an opportunity to be notified of his or her default. Upon the default being established, the Mortgagor is entitled to 45 days notice to rectify the default. The statutory provision clearly envisages two things before a Mortgagee may exercise any of the remedies provided for in the subsequent section 20 or 21 on remedies available to a Mortgagee who complies with section 19 of the Mortgage Act. Where money is secured by a mortgage under the Act, a demand in writing shall create a default in payment. Secondly, where a Mortgagor is in default of any obligation to pay the principal sum on demand or interest or any other periodic payment or any part thereof, the Mortgagee shall give the Mortgagor a notice of 45 days to rectify the default. 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 or may file an action for the money under section 21 of the Mortgage Act 2009.

The law permits the Mortgagee to exercise any of the remedies provided for under section 20 of the Mortgage Act 2009 which include requiring the Mortgagor to pay all monies owing on the mortgage. Secondly appointing a receiver of the income of the mortgaged land; thirdly, leasing the mortgaged land or where the mortgage is of a lease, sublease the land. Fourthly, it gives it the right to enter into possession of the mortgaged land and it gives the Mortgagee power to sell the mortgaged land. Under section 21 of the Mortgage Act the Mortgagee may sue for recovery of the money and I will specifically deal with that. All the remedies of the Mortgagee are exercisable upon failure of the Mortgagor to rectify the default or upon notice to the Mortgagor having been given under section 19 of the Mortgage Act 2009.

The above being the case I have carefully considered the evidence. PW1 testified that he personally met with the first Defendant at Parliament and in his office between December 2015 and February 2016 and requested him to use his parliamentary emoluments to repay the loan in full. Secondly he instructed his lawyers who wrote on 10<sup>th</sup> March 2016 to the second and third Defendants the notices of enforcement of personal guarantees. On 18<sup>th</sup> March 2016 the lawyers wrote to the first Defendant a final demand notice to fully repay the loan debt. Specifically the notice is exhibit PE 11. Exhibit P11 partly reads that unless the first Defendant within seven days pays the loan debt in full of Uganda shillings 227,710,000/= plus the legal recovery fees of Uganda shillings 22,771,000/=, the Plaintiff would institute court proceedings against the first Defendant and the second and third Defendants respectively and would publicise the case in the media.

No notice to rectify the default as prescribed by the Mortgage Act has been given. Notices are prescribed by section 19 of the Mortgage Act which provides as follows:

“19. Notice on default.

(1) Where money secured by a mortgage under this Act is made payable on demand, a demand in writing shall create a default in payment.

(2) Where the Mortgagor is in default of any obligation to pay the principal sum on demand or interest or any other periodic payment or any part of it due under any mortgage or in the fulfilment of any covenant or condition, express or implied in any mortgage, the Mortgagee may serve on the Mortgagor a notice in writing of the default and require the Mortgagor to rectify the default within forty five working days.

(3) The notice required by subsection (2) shall be in the prescribed form and shall adequately inform the Mortgagor of the following matters—

(a) the nature and extent of the default made by the Mortgagor;

(b) where the default consists of the non-payment of any monies due under the mortgage, the amount that must be paid to rectify the default, which amount may be the whole of the monies due under the mortgage, and the time, being not less than twenty one working days, by the end of which the payment in default must have been made;

(c) where the default consists of the failure to perform or observe any covenant, express or implied, in the mortgage, the action the Mortgagor must take or desist from taking so as to rectify the default and the time, being not less than twenty one working days, by the end of which the default must have been rectified;

(d) that if the default is not rectified within the time specified in the notice, the Mortgagee will proceed to exercise any of the remedies referred to in section 20 in accordance with the procedures provided for in this Part.”

The notice is required to be in the prescribed form and shall notify the borrower of the nature and extent of the default. Most importantly there has to be a notice to rectify the default within 45 days. The Plaintiff gave the first Defendant only seven days notice. Secondly an action cannot be commenced in court for recovery of an amount secured by a mortgage until the Mortgagee has given the prescribed notices to the Mortgagor. This is provided for under section 21 (2) of the Mortgage Act 2009 and the wording thereof which provides as follows:

“21. Mortgagee’s action for money secured by mortgage.

(1) The Mortgagee may sue for the money secured by the mortgage only in the following cases—

(a) where the mortgage deed provides that if there is default by the Mortgagor, the money secured by the mortgage becomes payable in full;

(b) where the Mortgagor is personally bound to repay the money;

(c) where a surety has agreed to be personally liable to repay the money in circumstances that have arisen;

(d) where the Mortgagee is deprived of the whole or a part of his or her security or the security is rendered insufficient through or in consequence of the wrongful act or default of the Mortgagor.

*(2) An action shall not be commenced under subsection (1) until the time for complying with a notice served under section 19 has expired.*

(3) The court may, on the application of the Mortgagor or a surety, order a stay of any proceedings brought under this section, until the Mortgagee has exhausted all his or her other remedies against the mortgaged land, unless the Mortgagee agrees to discharge the mortgage on payment of the money secured by the mortgage.” (Emphasis added).

In the premises because the action of the Plaintiff purports to be an action to recover money secured by a mortgage under section 21 (1) of the Mortgage Act 2009, the action is barred for being premature. The question of course is whether the Plaintiff is a Mortgagee. One cannot have his or her cake and eat it at the same time. The Plaintiff by pleading and in the evidence excluded the provisions of the Money Lenders Act from this transaction. Paragraph 5 of the plaint provides that the Plaintiffs claim against the Defendants jointly and severally is for recovery of a loan debt of Uganda shillings 227,710,000/=. The problem the Plaintiff has is one of election. In paragraph 6 (b) of the plaint, the Plaintiff relies on a promissory note. Secondly in paragraph 6 (c) of the plaint, the Plaintiff relies on personal guarantees of the second and third Defendants respectively. In paragraph 6 (d) of the plaint the Plaintiff further relies on a mortgage. Lastly the Plaintiff relies on a loan agreement. Where the loan has been secured by a mortgage or a mortgage why should the Plaintiff proceed against the guarantors for instance prior to exhausting

his remedies against the Mortgagor? Specifically section 21 (4) of the Mortgage Act provides that the Mortgagor or the surety may apply for stay of proceedings against them until the Mortgagee has exhausted all its remedies on the mortgaged land. The statutory provision recognises the right of the surety or the Mortgagor to insist on the security of the mortgaged land. I have further considered the provisions of the Mortgage Act in relation to the loan agreement which purports to operate as a transfer of mortgaged land upon default of the Mortgagor. The provisions relating to the transfer of the mortgaged land in the loan agreement are null and void under the provisions of section 8 of the Mortgage Act 2009 which provides that:

“8. Mortgage of land to take effect as security only.

(1) On and after the date of the commencement of this Act, a mortgage shall have effect as a security only and shall not operate as a transfer of any interest or right in the land from the Mortgagor to the Mortgagee; but the Mortgagee shall have, subject to this Act, all the powers and remedies in case of default by the Mortgagor and be subject to all the obligations conferred or implied in a transfer of an interest in land subject to redemption.

(2) Where a Mortgagor signs a transfer as a condition for the grant of a mortgage under this Act, the transfer shall have no effect.

(3) A Mortgagee who requires a transfer as a condition for the grant of a mortgage under this Act, commits an offence and is liable on conviction to a fine not exceeding four thousand currency points.

(4) In the case of the mortgage of a lease, the Mortgagee shall not be liable to the lessor for rent or in respect of the covenants and conditions contained or implied in the lease to any greater extent than he or she would have been if the mortgage had been by way of a sublease.”

The loan agreement dated 27<sup>th</sup> of May 2015 and clause 3 thereof provides that the borrower shall deposit his land title or vehicle or other security to be transferred into the names of its nominees or purchaser on private treaty without resort to any court of law. On such default of payment, the agreement shall be construed as a sale agreement. Clause 3 reads as follows:

"As security for the said disbursement, the borrower shall deposit with the lender a land title. The lender, in the event of default by the borrower to pay on 27<sup>th</sup> June 2015 shall cause line/vehicle or any other security item to be transferred into the names of its nominees or purchaser on private treaty, without resort to any courts of law. On such default of payment, this agreement shall be construed as a sale agreement."

According to the evidence adduced, exhibit P6 is the land title the subject matter of clause 3 of the loan agreement. In other words considered together with the evidence, the first Defendant deposited his land title and therefore the agreement is in breach of the provisions of section 8 of the Mortgage Act. Furthermore I will again cite clause 4 of the agreement which provides as follows:

"In case the landed property has been offered as security by the borrower or his guarantor, to the lender for the said disbursement and the borrower defaults payment on demand or expiry of the agreed period, the lender is at liberty to sell the same after giving the required statutory notice. After the property has been sold on default on demand verbal or written the borrower/guarantor shall give vacant possession of the same to the lender or purchaser within seven days from such notice.

While clause 4 requires a notice to be given, it purports to read as if the agreement is a mortgage agreement. As I have noted above the Plaintiff did not adduce any deed or instrument signed by the first Defendant mortgaging his property and which was the subject of registration of a mortgage on the first Defendant's title in evidence.

I have further noted that exhibit P6 which is the title deed purports to have registered a mortgage encumbrance of the Plaintiff. It is a presumption of law that the mortgage was duly registered under the Registration of Titles Act Cap 230 Laws of Uganda. Sections 46 of the RTA provides as follows:

46. Effective date of registration; the duly registered proprietor.

(1) Subject to section 138 (2), every certificate of title shall be deemed and taken to be registered under this Act when the registrar has marked on it—

(a) the volume and folium of the Register Book in which it is entered; or

(b) the block and plot number of the land in respect of which that certificate of title is to be registered.

(2) Every instrument purporting to affect land or any interest in land, the title to which has been registered under this Act, shall be deemed to be registered when a memorial of the instrument as described in section 51 has been entered in the Register Book upon the folium constituted by the certificate of title.

(3) The memorial mentioned in subsection (2) shall be entered as at the time and date on which the instrument to which it relates was received in the office of titles together with the duplicate certificate of title and such other documents or consents as may be necessary, accompanied with the fees payable under this Act.

(4) The person named in any certificate of title or instrument so registered as the grantee or as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate or instrument shall be deemed and taken to be the duly registered proprietor of the land.

The mortgage instrument is deemed to have been registered and the Mortgagee is deemed to have the interest of a Mortgagee in the land under the provisions of section 46 (2) and (4) of the Registration of Titles Act.

In the premises the promissory note exhibit P3 only promises to pay the amount secured by the mortgage. Because the amount secured by the mortgage was not paid as agreed, the first Defendant was in default. Lastly the Plaintiff opted to file an action and did not pray for default judgment under Order 9 rules 6 of the Civil Procedure Rules for a liquidated amount but chose to prove the claim by adducing evidence. Secondly the Plaintiff filed a suit in which it is clearly pled that the borrower/Mortgagor created a mortgage in favour of the Plaintiff. The Plaintiff clearly and specifically pled in paragraph 10 of the plaint that the transaction was a loan transaction secured with a legal mortgage, the deposit of a certificate of title and a lease agreement and is exempted from the provisions of the Money Lenders Act. Paragraph 10 of the plaint provides as follows:



"The Plaintiff further avers that since the loan transaction was secured with a legal mortgage, the deposit of a certificate of title and a lease agreement, it is exempted by the Money Lenders Act hence the interest agreed and here in claimed at the rate of 8% per month is conscionable, lawful and recoverable."

In other words the Plaintiff clearly says that the Money Lenders Act is avoided. Secondly by providing that there was a mortgage in order to avoid the application of the Money Lenders Act, the Plaintiff still purports that the transaction is a mere contract. The Plaintiff has to elect to choose either having the transaction under the Money Lenders Act Cap 273 or The Mortgage Act 2009. Where the Mortgagor is in breach of the contract or the promise in the loan agreement or promissory note, the matter goes for enforcement of the security. What remain is the realization of the security and the remaining issue deals with whether the suit can be maintained. In the premises The Mortgage Act is applicable. It follows that the action is barred by section 21 of the Mortgage Act for non-compliance with the provisions of section 19 of the Mortgage Act. In the premises I do not need to consider further whether the Plaintiff is entitled to the remedies prayed for.

The suit of the Plaintiff is premature and is accordingly struck out with no order as to costs because it proceeded in default of the defence of the Defendants.

Judgment delivered in open court on the 19<sup>th</sup> of August 2016

**Christopher Madrama Izama**

**Judge**

**Ruling** delivered in the presence of:

Magellan Kazibwe Counsel for the Plaintiff

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

**19/08/2016**