

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
CIVIL SUIT NO 344 OF 2013**

- 1. ANDREW BABIGUMIRA}  
2. WAVENETS COMMUNICATIONS LTD} .....PLAINTIFFS**

**VERSUS**

- 1. GLOBAL TRUST BANK LTD}  
2. JOHN MAGEZI}  
3. DAVID BASHAIJA T/A ULTIMATE BAILIFFS & AUCTIONEERS}  
4. THE CHIEF REGISTRAR OF TITLES} .....DEFENDANTS**

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

**JUDGMENT**

The Plaintiff's action against the Defendants jointly and severally is for declarations that the sale of the property comprised in Kyadondo block 194 plot 45 land at Kungu hereinafter called the suit property by the first Defendant to the second Defendant was fraudulent, unlawful and illegal. Secondly, the suit is for a permanent injunction to restrain the second and fourth Defendants from any further dealings in the suit property. Thirdly, the suit is for a declaration that the first Defendant's actions on the second Plaintiff's account held with the first Defendant were unauthorised and unlawful. It is for an order for cancellation of the second Defendant as a proprietor of the suit property. It is also for a permanent injunction to restrain the Defendants from interfering with the suit property. In the alternative the Plaintiff prayed for a declaration that the sale of the suit land at Uganda shillings 124,000,000/= was grossly undervalued; an order for general damages for inconvenience and costs of the suit.

The suit was opposed by the Defendants though the fourth Defendant did not file a written statement of defence. The Plaintiff is represented by Messrs Nyote & Co. Advocates. The first and third Defendants are represented by Messieurs Masembe, Makubuya, Adriko, Karugaba & Ssekatawa Advocates. The second Defendant is represented by Messieurs Magezi, Ibale & Company Advocates.

The Plaintiff called one witness Mr Andrew Babigumira who testified as PW1, the first and third Defendants called two witnesses namely Mr. Allan Raymond Ntagi, the former group head of corporate & commercial banking of the first Defendant who testified as DW2 and Mr David Basaija, the third Defendant who testified as DW3. The second Defendant testified as DW1.

Some basic facts are not contentious and set out in the joint scheduling memorandum endorsed by all Counsels under Order 12 rule 1 of the Civil Procedure Rules as agreed facts which need not be proved. Some exhibits were also admitted by consent of the parties. The agreed issues on which the court was addressed in written submissions are the following:

1. Whether the sale and transfer of the land comprised in Block 194 Plot 45, Mengo Kyadondo was fraudulent or illegal?
2. Whether the first Defendant's actions on the second Plaintiff's account were unauthorised and if so whether it was unlawful?
3. What are the remedies available to the parties?

There are few areas of contention as far as the material facts of the dispute are concerned and I will straight away set out the written submissions of Counsels on the issues for determination which submissions refer to basic facts.

- 1. Whether the sale and transfer of the land comprised in Block 194 Plot 45, Mengo Kyadondo was fraudulent or illegal?**

#### **Submissions of the Plaintiffs Counsel on the first issue:**

The Plaintiff's Counsel submitted on the premises of unlawfulness and illegality of the transaction. He relied on paragraph 8 (a), of the plaint where it is averred that

the second Plaintiff was advanced Uganda shillings 98,000,000/= by the first Defendant according to documentary evidence agreed upon. This includes exhibit P1 which is the offer letter, exhibit P2 which is the Credit Facility Agreement, exhibit D3 which is the Mortgage Deed which support the contention that the first Defendant was supposed to advance Uganda shillings 100,000,000/= only to the second Plaintiff. The bank statement exhibit P3 demonstrates that only Uganda shillings 98,000,000/= was disbursed to the second Plaintiff on 16<sup>th</sup> October, 2009. According to the offer letter, the second Plaintiff was supposed to start paying back the money three months from the date the agreed money was disbursed. This is also stipulated in the Credit Facility Agreement and paragraph 5 thereof. The Mortgage Deed confirms that the suit property was to act as security for a loan of Uganda shillings 100,000,000/= only in paragraph 8 thereof. The security was to be sold if there was a default by the second Plaintiff.

DW 2 confirmed that only Uganda shillings 98,000,000/= was disbursed to the second Plaintiff by the first Defendant. He further testified that Uganda shillings 2,000,000/= was deducted as commitment fee. The Plaintiff submission is that until Uganda shillings 100,000,000/= is disbursed to the second Plaintiff, the term to begin paying does not start to run and any actions on the security relating to recovery were unlawful and illegal because they are premature. In paragraph 1 of the facility agreement it is written that the amount advanced to the borrower is Uganda shillings 100,000,000/=. This is a lie because of 29<sup>th</sup> September, 2009 when the agreement was executed or before, no money had been advanced to the second Plaintiff by the first Defendant. He further contended that an appeal and unless Uganda shillings 100,000,000/= in total is disbursed, nor interest is chargeable because the first Defendant is yet to fulfil its part of the bargain. Thirdly, DW2 could not positively state what transpired at the time the Credit Facility Agreement was executed by the second Plaintiff because he was not present at that time. The Plaintiff's Counsel further contended that paragraphs 22 and 24 of the Credit Facility Agreement does not stipulate that Uganda shillings 2,000,000/= only would be deducted from the agreed Uganda shillings 100,000,000/= only. He further contended that the fact of such a deduction is not

reflected in the bank statement. He contended that it may be argued that the Uganda shillings 2,000,000/= on default under paragraph 26 of the Credit Facility Agreement but because the first Defendant did not make such an allegation in its written statement of defence or give evidence in court, the court cannot become a witness and assume it. The agreement does not stipulate the fees which were charged and deducted as legal and valuation fees and no such legal work and valuation work is indicated as having been undertaken. It is not pleaded by the first Defendant that this was a recognised course of dealing between the parties were custom of the bank to deposit less money than that indicated in the loan agreement. In conclusion the Plaintiff's Counsel submitted that the first Defendant has not yet disbursed all the agreed money to the second Plaintiff and the time to start charging interest has not begun to run and therefore there was no default of the Plaintiff to pay back the loan.

The Plaintiff's Counsel further relies on the advertisement in the monitor newspaper dated second of April 2011, notifying the public about sale of the suit property without instructions and authority from the first Defendant. The third Defendant did not produce any instructions from the first Defendant bank. That is not evidence of instructions from the first Defendant bank or to Messieurs Mugenyi & company advocates were said to have instructed the same on behalf of the bank. The letter exhibit P7 dated 28th of April 2011 was written long after the advertisement had been published. No officer from the bank more from Messieurs Mugenyi & company advocates give evidence in court that the third Defendant received instructions. DW2 testified that he handed over the file to the credited risk Department when he ceased to participate in the recovery process. He consequently did not know how the third Defendant came to advertise the property for sale. It followed that the process by which the suit property ended up being sold was unlawful for want of instructions of the alleged seller.

The Plaintiff's Counsel further attacked the advertisement exhibit P7 and contended that it indicates that the third Defendant was to be the seller but the sale agreement exhibit D1 does not indicate the third Defendant as the vendor of the suit property. It followed that the suit property was unlawfully sold by a

person who did not advertise it for sale. In any case he contended that the advertisement does not indicate that the intended sale was for the benefit of the first Defendant. He further submitted that the sale agreement does not comply with the law in as much as it indicates that the seller is Global Trust Bank (the first Defendant). There is no seal of the bank or the name of the person who signed on its behalf. Apparently a person signed on behalf of the managing director of the first Defendant but there is no evidence of the authority of that person. None of the persons who signed for the bank testified as a witness. DW2 was not involved in the process of sale. The second and third Defendants do not mention the names of the person who signed on behalf of the first Defendant bank. He opined that this was a serious transaction which could not be handled in lackadaisical manner.

Evidence adduced indicates that the first Defendant bank received Uganda shillings 140,000,000/= only allegedly paid by the second Defendant for the suit property. The third Defendant admitted that the money was paid to him by the second Defendant and does not show any authority to receive the money under the sale agreement or otherwise. He claims to have passed on the money to Messieurs Mugenyi & company advocates but no evidence was adduced that they received the money. The witness testified. The Plaintiff's Counsel contended that since the property was sold, it could only have been unlawful if the first Defendant received the money for the first Plaintiff to seek any residual monies. He contended that the sale transaction was not lawful and could only have been lawful give the seller received the money but there is no evidence to that effect.

Furthermore the Plaintiff's Counsel contends that the transfer of the suit property into the names of the second Defendant was unlawful because there was no release of the property to him after the alleged sale under the mortgage. The Defendants have not adduced evidence of release of the mortgage. Exhibit D4 is a release to the first Plaintiff who is the registered proprietor but apparently the lease was not handed over to him.

The Plaintiff's Counsel further contended that the Credit Facility Agreement in paragraph 12 thereof, provided that the legal and auctioneers costs would be paid by the first Defendant and in the second Plaintiff's account would be debited. No such illegal and auctioneers fees are indicated as debited on the second Plaintiff's account and a demand made for payment of the same. Instead receipts attached to the evidence in chief of DW two indicated that Mugenyi & company advocates was paid Uganda shillings 10,000,000/= only while the third Defendant was paid Uganda shillings 6,000,000/= only. DW2 never participated in the sale of the property and the work was done by Mugenyi & company advocates. The work done by Mugenyi & company advocates and the third Defendant is not reflected as commensurate to the payments and this makes the whole transaction unlawful.

In conclusion, the Plaintiff's Counsel submitted that the sale and transfer of the suit land to the second Defendant the way it did was unlawful and illegal.

Alleged fraud by the second Defendant:

The Plaintiff's Counsel further submitted that the Plaintiff's evidence which has not been rebutted is that the second Defendant transferred the suit into his names when there was a caveat exhibited as exhibit P10. This is confirmed by the exhibit P 13 which is a letter that writes that by 12<sup>th</sup> October, 2011 the first Plaintiff was the registered proprietor and there was a caveat on the property in exhibit PE eight shows that the Defendant was registered as proprietor on 6<sup>th</sup> October, 2011. This point to some fraud on the part of the second Defendant who should have enquired about the first Defendant's interest. It also demonstrates that entries on the title deeds were backdated and the second Defendant cannot deny complicity. The second Defendant was registered as proprietor at 12.20 a.m. in the night and no bona fide transaction can be done at such time. Exhibit PE eight has never been submitted to the registrar of titles to rectify it if there were to be an anomaly. The second Defendant did not call the registrar of lands to explain lease. None of the Defendant called the one who made the entry and therefore it points to fraud.

Submissions for the second Defendant in reply on the first issue: **Whether the sale and transfer of the land comprised in Block 194 Plot 45, Mengo Kyadondo was fraudulent or illegal?**

In reply, the second Defendant relies on the joint scheduling memorandum filed on 5<sup>th</sup> August, 2016 where some basic facts are agreed namely:

The Second Plaintiff was indebted to the first Defendant. Secondly the second Plaintiff used the suit property as security for a loan from the first Defendant. Thirdly, the first Plaintiff was the proprietor of the suit property at the time it was given to the Defendant as security. Fourthly, the suit property was advertised for sale by the third Defendant. Lastly, the suit property was transferred into the names of the second Defendant who is the current the registered proprietor.

The second Defendant's Counsel submitted that in the Saturday Monitor of 2<sup>nd</sup> April, 2011, the first and third Defendants advertised for sale by public auction the suit property. After due diligence, the second Defendant in a letter dated fourth of April 2011 and addressed to the ultimate court bailiffs and auctioneers, expressed his interest in purchasing the property for a total of Uganda shillings 140,000,000/=. Accordingly the second Defendant, by sale agreement dated second of May 2011, purchased the property for the consideration agreed upon and the money was paid to the first Defendant admissions global trust bank was a Mortgagee in possession of the property with powers under the mortgage registered on 6 October 2009 under instrument number KLA 432467.

The second Defendant's defence is that the sale transaction and execution of the sale agreement was bona fide and legal with no intent to defraud the Plaintiffs of their property. The second Plaintiff mortgaged property to the first Defendant and was the registered proprietor of the suit property. The second Plaintiff executed a Credit Facility Agreement exhibit P2 with the Defendant. The Mortgage Deed and Credit Facility Agreement dated 29<sup>th</sup> of September, 2009 were admitted in evidence during the trial of the suit. The Mortgage Deed inter alia under clauses 8 and nine permitted the Mortgagee to sell without recourse to a court of law at the discretion of the Mortgagee by public auction. The

Mortgagee had power to rescind or value any contract for sale and the sale without being liable for any loss occasioned thereby.

The Credit Facility Agreement clause 7 thereof read together with clause 23 and 25 permitted the first Defendant to realise all securities offered by the borrower by public auction and without recourse to courts of law by attaching the borrower's salary or income. The Plaintiffs admitted under cross examination that they defaulted in the payment of money under the Mortgage Deed and the Credit Facility Agreement. The first Defendant through its lawyers Messieurs Mugenyi & company advocates, instructed the third Defendant to sell the mortgaged property by public auction. The Plaintiff's admitted in evidence having signed the Mortgage Deed and Credit Facility Agreement which empowered the first Defendant to take the acts that it lawfully did in accordance with the Mortgage Act Cap 229 and all other enabling legislation. The parties duly signed the sale agreement which stipulates the amount of Uganda shillings 140,000,000/= as the consideration and which was duly paid.

Counsel further submitted that it is an agreed fact that the second Plaintiff was indebted to the first Defendant at the time of realisation of the suit property. The second Plaintiff in clause 8 (b) of the Mortgage Deed irrevocably consented to the first Defendant's power to sale in case of persistent breach. The testimony of DW3 was that he initially received instructions from Messieurs Mugenyi & Company Advocates on 1<sup>st</sup> April, 2011 which was later followed by written instructions admitted as exhibit D7 on 28<sup>th</sup> April, 2011. Both instructions were received prior to the realisation of the security. In any event, the advertisement was clear in as far as it could be deduced that the principal was a financial institution being the registered Mortgagee which was never denied. DW3 attested to the sale agreement with the highest bidder who was second Defendant. The other signatories other than that of the second Defendant is that of the first Defendant's officials. The second Defendant by sale agreement dated 2<sup>nd</sup> of May, 2011 purchased the suit property in consideration of Uganda shillings 140,000,000/=.



Regarding the contention that the signatories to the sale agreement did not write their names, the second Defendant's Counsel submitted that section 148 of the Registration of Titles Act Cap 230 limited the requirement for Latin Characters to instruments and powers of attorney. An instrument is defined by section 1 (h) of the RTA to include any document in pursuance of which an entry is made in the register. The requirement was not necessary for the sale agreement. The testimony of DW2 is that the property was sold for Uganda shillings 140,000,000/= out of which Uganda shillings 124,000,000/= was used to offset the loan and Uganda shillings 16,000,000/= were the illegal and bailiffs costs for recovery. Further evidence is exhibit P3 (a) and P3 (b) which add the second Plaintiff's bank statements which should not be deposits of Uganda shillings 70,000,000/= on the 9th of May 2011, Uganda shillings 38,000,000/= on 4<sup>th</sup> July, 2011 and Uganda shillings 16,000,000/= on 26<sup>th</sup> July, 2011.

The law is that where the mortgage gives express power to the Mortgagee to sale without applying to the court, the sale shall be by public auction unless the Mortgagor and encumbrancers subsequent to the Mortgagee, if any, consent to a sale by private treaty. It followed that the second Defendant bought the property legally, honestly and bona fide. He had no knowledge of any fraud and was not party to any fraud. It paid the full purchase price which has been acknowledged by the first and third Defendants. Secondly, the first Defendant legally and without any fraud exercise its legal right to sell the mortgaged property pursuant section 10 of the mortgage act cap 229 which authorised the Mortgagee to sell the mortgaged property read together with the Mortgage Deed and the Credit Facility Agreement. The Plaintiff's did not lead any evidence to demonstrate that the first Defendant had no right of sale of the property at the time and for the price it was sold for. Counsel relied on the case of CR Patel versus the Commissioner Land Registration and Two Others HCCS No. 87 of 2009 where Honourable Justice Murangira given the elements of a bona fide purchaser without notice of fraud and held that a bona fide purchaser must prove that he or she holds a certificate of title; secondly, purchase the property in good faith; thirdly had no knowledge of any fraud; fourthly purchased for valuable

consideration; fifthly the vendor's had apparent valid title; sixthly purchased without notice of any fraud and was not privy to the fraud.

Finally the second Defendant's Counsel submitted that in the case of Barclays bank of Uganda Ltd versus Livingston Katende Luutu Civil Appeal Number 22 of 1993 the learned justice of the Court of Appeal held that it was immaterial whether the property mortgaged is of a greater value than the loan. Secondly the terms of the agreement had to be upheld and as a sale by public auction or private treaty had been agreed to by the Plaintiff, that could not lead to irreparable loss.

Submissions of the first and third Defendants Counsel in reply to the first issue of: **Whether the sale and transfer of the land comprised in Block 194 Plot 45, Mengo Kyadondo was fraudulent or illegal?**

In reply to the contention that the full facility of Uganda shillings 100,000,000/= was never advanced to the second Plaintiff and therefore the time never begun to run and interest was not chargeable, and other submissions in the relation to not being liable to repay the loan, Counsel addressed the court on whether the full credit facility was disbursed and whether time to pay commenced. He submitted that the transactions in issue were all done during the validity of the Mortgage Act Cap 229 save for the transfer dated 6<sup>th</sup> of October, 2011. The relationship between the first and second Plaintiffs and the first Defendant is a contractual relationship governed by the two agreements which included the credit facility letter exhibit P2 and the Mortgage Deed which two documents are dated 29th of September 2009. Clause 31 (I) of the Credit Facility Agreement duly executed by the second Plaintiff stipulates that: "until otherwise replaced or the agreement terminated by the bank and facility repaid", it therefore superseded the offer letter exhibit P1 dated 28th of September 2009.

The Plaintiff borrowed a sum of Uganda shillings 100,000,000/= with the said purpose being payment of an outstanding loan with Hamwe Investments. The loan was repayable quarterly inclusive of interest and principal at the rate of Uganda shillings 11,927,703/= over a period of 36 months commencing three

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months from the disbursement. Under clause 24 (i) (a) of the Credit Facility Agreement it is provided that the borrower undertakes to effect payment of fees/commission charges which will include but not be limited to a commitment fee of 2% of the credit facility amount on each of the credit facilities granted to the borrower.

PW1 confirmed that he signed the loan documentation and indeed they mortgaged the property to the first Defendant. He further confirmed that he was a holder of bachelors of commerce degree and understood the law of contract which was part of the business law he had studied. The Credit Facility Agreement applied to him and equipment runaway from it. He cannot seek to depart from his own evidence and assert that they do not agree to the commitment fee being deducted from the credit facility. Counsel relied on the court of appeal case of Muwonge Peter versus Musonge Moses Court of Appeal civil appeal number 77 of 2001 was cited with approval Phipson on evidence, 14<sup>th</sup> edition page 109 paragraph 37 - 12 that: "when parties have deliberately put their agreement in writing, it is conclusively presumed between themselves and their privies that they intended the writing to form a full and final settlement of their intentions and one which will be placed beyond the breach of future controversy, bad faith or treacherous memory."

PW2 confirmed that monies were indeed advanced to the second Plaintiff on 16<sup>th</sup> October, 2009 as agreed less the commitment fee of 2%. The 2% commitment fee on the credit facility of Uganda shillings 100,000,000/= is Uganda shillings 2,000,000/=. This is consistent with the entry on the bank statement exhibit P3 (a) which shows the credit of Uganda shillings 98,000,000/= on 16 October 2009 marked as loan advance. The second Plaintiff does not denied that Uganda shillings 98,000,000/= was disbursed or that he used the facility. It is further agreed that the Plaintiffs are indebted to the first Defendant. The Plaintiffs therefore submit mistakenly that because Uganda shillings 98,000,000/= only was advanced to the second Plaintiff, the second Plaintiff's obligations to pay has not yet commenced because the full amount was not disbursed. The Plaintiff further contended that realisation of the security was therefore unlawful and illegal

because it was premature. This was after they have taken the benefit of both the Credit Facility Agreement and the Mortgage Deed.

The submissions of the Plaintiff's Counsel are misleading when there is a clear and unequivocal obligation of the Plaintiffs under the Credit Facility Agreement. The submission is also an attempt to appropriate and reprobate the Credit Facility Agreement and Mortgage Deed which should not be permitted. The Defendants Counsel relies on Halsbury's laws of England fourth edition reissue volume 16 (2) paragraph 962 for the submission that the concepts closely related to estoppels, approbation and reprobation express two propositions. The first proposition is that the person in question, having chosen between two courses of contract, is to be treated as having made an election from which he cannot resile. Secondly, the person will not be regarded, in general at any rate, as having so elected unless he has taken the benefit under or arising out of the course of conduct which he has first pursued and with which by subsequent conduct is inconsistent. It is further written that a party who has accepted some benefit granted to him by deed cannot disregard the conditions on which the benefit was expressed in the deed to be conferred and it is an example of the principle that the person cannot both approbate and reprobate.

Additionally DW2 testified that the second Plaintiff made a payment on 7<sup>th</sup> January, 2010 of Uganda shillings 12,000,000/= and it is admitted by the Plaintiff's in paragraph 8 (a) of the amended plaint filed on the 29<sup>th</sup> of May, 2015. The Plaintiffs contend that they requested for an adjustment of the repayment terms. A deposit was made on the second Plaintiff's account on 4<sup>th</sup> October, 2010 of Uganda shillings 36,500,000/= and this deposit is referred to in paragraph 11 of the amended plaint. DW2 clarified that the bulk of the deposit of Uganda shillings 26,899,127/= was used to bring the account back from an overdrawn position and the remaining balance of Uganda shillings 9,000,000/= was withdrawn by the first Plaintiff according to the bank statement exhibit P3 (a). The parties are bound by their pleadings and the Plaintiff confirmed in paragraph 8 (B) and 11 of the amended plaint that the second Plaintiff was servicing the loan. They are estopped from submitting that their obligation to repay has not arisen.

There was an attempt to exclude the testimony of DW2 on the ground that he was not present when the agreements were executed. The Plaintiff additionally challenged the first Defendant's instructions to the third Defendant, the execution of the sale agreement, receipt of the sale proceeds by the first Defendant and costs of the realisation exercise. In reply the first and third Defendants Counsel submitted that DW two testified in cross examination that he joined the first Defendant in 2010 and the second Plaintiff's file was given to him. He confirmed that he was appointed with the file. The high court dealt with a similar situation in the case of Spear House versus Barclays bank of Uganda Ltd HCCS No. 236 of 2008 where honourable justice Geoffrey Peter Adonyo accepted transactions of the witness on the ground that the Defendant was a legal fiction and a witness was familiar with the facts because he was in custody of the relevant files which contained information relevant to the case. He was therefore a competent witness with information in his custody. In the premises DW2 was the head of corporate and commercial banking of the first Defendant at the time and custodian of the second Plaintiff's credit file could properly testify on behalf of the first Defendant.

The first and third Defendants Counsel further submitted that the second Plaintiff was indebted to the first Defendant at the time of realisation of the suit property. Under clause 8 (B) of the Mortgage Deed, the second Plaintiff irrevocably consented to the first Defendant's power to sale in the case of persistent breach. DW3 had clear instructions. He initially received or instructions from Mugenyi and company advocates on 1<sup>st</sup> April, 2011 which were followed by written instructions exhibit D7 with 28<sup>th</sup> April, 2011. Both instructions were received prior to the realisation of the security. The advertisement of the property was clear that the principal was a financial institution which is the registered Mortgagee. The property was sold to the highest bidder. Counsel reiterated submissions of the second Defendant's Counsel on the issue of whether the sale agreement did not have the names of the signatories.

He further reiterated submissions on the amount at which the property was sold and the evidence in the bank statements for deposits made.

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Regarding the legal and auctioneers costs, the first and third Defendant's Counsel relied on clause 12 of the Credit Facility Agreement and submitted that it should be read and construed as a whole. The clause particularly clause 12 (ii) permits the first Defendant to recover those expenses from the second Plaintiff's account. In the premises, issue number one ought to be answered in the negative as the first Defendant rightly realise the security following continued default on the part of the second Plaintiff.

### **Submissions of the Plaintiff's Counsel in rejoinder:**

The Plaintiffs Counsel reiterated earlier submissions. He agreed that the Defendants and Plaintiffs must be bound by the contents of the contracts. Secondly courts cannot make contracts for the parties nor can they import terms into the contracts. He submitted that in the present matter the documents regulating the relationship between the Plaintiffs and the first Defendant are the Credit Facility Agreement, the Mortgage Deed and the Offer Letter. None of the said documents stipulates that the money to be advanced the second Plaintiff was to be less 2% of the amount borrowed. There is no indication either on the bank statement of the second Plaintiff or anywhere that the first Defendant had deducted that sum of money. On the contrary it was a condition precedent according to the offer letter that until 2% of the money to be borrowed was paid nothing could be advanced and the fact that any money was advanced is evidence enough that the advance money was made by the second Plaintiff. He contended that there is no evidence that the said condition was waived by the first Defendant and any attempt by the Defendant to explain this cannot be sustained.

Regarding the contention that the Plaintiffs benefited from the money advanced, the Plaintiff's Counsel said this was denied and the question is when the Plaintiffs should begin paying back the money? He contended that it should be after the expiry of three months from the date when the whole sum of Uganda shillings 100,000,000/= is advanced to the second Plaintiff. Because this was not done, efforts geared towards recovery were and are illegal.

On the contention that the Plaintiffs admitted being indebted, the court should look at the justice of the case based on the facts. It is the Plaintiff's case that they did not pay back the money which was received and that is the default they mean. It did not admit liability.

Concerning the contention as the persons who signed the agreement of sale of land on behalf of the first Defendant, Counsel agreed with the provisions of section 148 of the registration of titles act regarding Latin Characters. He contended that there is nothing in the agreement to show that the officers of the bank signed it. It would be strange that the signatories had to conceal their identity and the question of who signed the transfer forms remained. He reiterated submissions that hiding of the names pointed to some fraud.

Lastly on the question of deposit of money on the account of the second Plaintiff, the bank statement does not show that it was money from the sale of the suit property and there is no basis for implying it.

#### **Resolution of issue number one:**

#### **Whether the sale and transfer of the land comprised in Block 194 Plot 45, Mengo Kyadondo was fraudulent or illegal?**

I have carefully considered the evidence, the pleadings of the parties, the written submissions and the law on this issue. What is being challenged is the sale and transfer of the property comprised in block 194 plot 45 Mengo Kyadondo. Were these documents fraudulently or illegally contrived?

The documents were admitted in evidence. The land sale agreement dated second of May 2011 was admitted as exhibit D1 though it had been marked by the Plaintiff as exhibit P10. It was signed for the Managing Director Global Trust Bank (U) Ltd and witnessed by the Secretary in the process of Florence Obua. It was also signed by the purchaser who is the second Defendant and witnessed by a Notary Public Mr Silver A Owaraga. Additionally it was witnessed by Mr David Basaija the third Defendant of Messieurs Ultimate Court Bailiffs and Auctioneers. Objection was taken by the Plaintiff to the failure to disclose in the sale

agreement the names of the Managing Director and Secretary of Global Trust Bank (U) Ltd. I have carefully considered the amended plaint filed on court record on the 29th of May 2015. The first prayer sought by the Plaintiff against the Defendants jointly and severally is for a declaration that the sale of the land by the first Defendant to the second Defendant was fraudulent, unlawful and illegal.

In paragraph 8 in support of the cause of action pleaded, the Plaintiff admits that the first Plaintiff mortgaged the suit land to the first Defendant and was advanced the sum of Uganda shillings 98,000,000/= to the second Plaintiff by way of deposit on the account CA 0320300003.

The gist of the first issue concerns the sale and transfer of the land and whether it was fraudulent or illegal.

The Plaintiff started his argument with submissions that there was unlawfulness and illegality in the transaction. The first point of illegality or unlawfulness was that the bank disbursed Uganda shillings 98,000,000/= instead of Uganda shillings 100,000,000/=. The fact that there was a Mortgage Deed as well as a loan agreement is not in dispute. The contention is that upon failure to disburse Uganda shillings 100,000,000/=: the second Plaintiff had no obligation to commence payment agreed under the credit agreement and the Mortgage Deed. The offer letter dated 28<sup>th</sup> of September, 2009 and was exhibited as exhibit P1 provided that the facility was a commercial loan in the amount of Uganda shillings 100,000,000/= and the purpose of the loan was to pay Hamwe Investments and the period of the loan was 36 months. The payment terms was that the loan was to be paid in 12 equal quarterly instalments of Uganda shillings 11,907,703/=. The Plaintiff's Counsel submitted that the commitment fee of 2% of the facility amount payable upfront could not be part of the 100,000,000/= because it was to be paid prior to the disbursement of the loan. The offer letter provides as follows: "2% flat of the facility amount, payable upfront."

The second document is the Credit Facility Agreement which was executed on 29<sup>th</sup> September, 2009. For purposes of chronology the offer letter was also executed on 29<sup>th</sup> September, 2009. In clause 1 thereof the principal credit amount



advanced to the borrower is stated to be Uganda shillings 100,000,000/= and the purpose of the loan remains the same.

I have carefully considered the submissions of Counsel and I agree with the Defendants Counsel's that there is no merit in the contention. It is true that the Plaintiff was advanced Uganda shillings 98,000,000/= according to the bank statement. The Plaintiff admitted that the second Plaintiff received this amount and it is reflected in exhibit P3 as a transaction on 16<sup>th</sup> October, 2009 being loan advance. The Plaintiff went ahead and utilised this amount and that is not in dispute. I do not agree that the Plaintiff was not in default for failure to pay the outstanding amount. Having obtained Uganda shillings 98,000,000/= as a loan advance, the Plaintiff was under obligation to repay the loan according to the terms of the agreement. Even if the first Defendant withheld Uganda shillings 2,000,000/= it can be sorted out in the reconciliation of accounts. A Mortgage Deed was executed between the parties on 29<sup>th</sup> September, 2009 and in the recitals it is provided that the credit facility shall be made available to the Mortgagor upon executing a Credit Facility Agreement and a Mortgage Deed and registration of the mortgage in favour of the Mortgagee. The credit agreement was to be construed as one with the mortgage agreement. Under clause 3.1 the Mortgagor undertook to pay on demand all monies advanced for the use of the Mortgagor inclusive of charges incurred on account of the Mortgagor or for monies whatsoever which may then be due and owing to the Mortgagor and Mortgagee as principal.

Upon disbursement of Uganda shillings 98,000,000/=, which money the Plaintiffs acknowledged as having received and utilised, they were under obligation to pay back the same by virtue of the legal mortgage agreement which was duly registered on the suit property. Moreover the first Defendant was entitled to charge the Plaintiffs for whatever services it provided as expressly stipulated. I do not need to conclude the issue of whether Uganda shillings 2,000,000/= was actually disbursed to the Plaintiffs. I can conclude from the testimony of DW2 Mr. Allan Raymond Ntagi that the second Plaintiff failed to service the loan despite several reminders and the loan was recalled by the first Defendant on 15<sup>th</sup> July,

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2010. At the time of the recall the amount outstanding was Uganda shillings 106,592,019/=. The Plaintiff's Counsel objected to the testimony of DW2 on the ground that he was not there when the transaction took place. However, DW2 testified that he was conversant with the matters pertaining to the circumstances of the case and he had the record of the second Plaintiff. His testimony was not hearsay and I agree with the authorities cited by the Defendants Counsel that as a person having custody, he could testify on behalf of the first Defendant which is a Corporation with perpetual succession. He was testifying about the acts of the first Defendant as well as the records of the first Defendant. DW2 Mr Allan Raymond testified in cross examination that the 2,000,000/= was charged as commitment fee of 2% under the Credit Facility Agreement.

The Plaintiffs were therefore in default and this was admitted as a matter of fact by the testimony of PW1 who agreed that he had not paid back save for the excuse that the Plaintiff had not received the entire Uganda shillings 100,000,000/=. I have considered this evidence in cross examination in which certain basic facts are admitted in his testimony. He admitted that the Plaintiff received Uganda shillings 98,000,000/= though the Plaintiff applied for Uganda shillings 100,000,000/=. Secondly the Plaintiff mortgaged its property. The first Plaintiff is a shareholder and director of the second Plaintiff. The last encumbrance registered on the title deed of the suit property is that of Global Trust Bank. In cross examination when he was asked whether he remembered having paid back the loan received, he said he had never paid namely that he had never commenced payment. He was asked whether he had paid even a single instalment and he said not. There is no authority or law quoted by the Plaintiff's Counsel suggesting that if no full amount was disbursed; the Plaintiff would have no obligation to pay back the loan until the full amount is disbursed. Obligation to pay arises immediately upon disbursement of the loan facility. He testified that the contract had not started because he had not received the Uganda shillings 2,000,000/= on top of the Uganda shillings 98,000,000/= which was acknowledged as having been disbursed to the Plaintiffs. I find the argument preposterous and entirely dishonest. It is a lame excuse of the Plaintiff to avoid

the contract in which she undertook to pay back monies disbursed to him from time to time under the Mortgage Deed. On the basis of the disbursements, a legal charge was registered on 16<sup>th</sup> October 2009 on the security provided by the Plaintiffs. It is my holding that Uganda shillings 2,000,000/= which was withheld by the first Defendant, could be considered in the reconciliation of accounts between the parties and has not avoided the Credit Facility Agreement or the Mortgage Deed.

The submissions of the Plaintiff's Counsel that the Credit Facility Agreement has a lie that the amount advanced to the borrower is Uganda shillings 100,000,000/= is untenable. The agreement speaks for itself and cannot be varied by an oral testimony. It clearly stipulates that the borrower was disbursed Uganda shillings 100,000,000/= which contention is consistent with the testimony of DW 2 Mr Allan Raymond that the 2,000,000/= Uganda shillings constitutes the commitment fee agreed upon. The applicable law is 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.

Exception 1: When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he or she is appointed need not be proved.

Exception 2: Wills admitted to probate in Uganda may be proved by the probate.

Explanation 1: This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation 2: Where there are more originals than one, one original only need be proved.

Explanation 3: The statement, in any document whatever, of a fact other than the facts referred to in this section shall not preclude the admission of oral evidence as to the same fact.

Under section 91 the credit agreement gives the terms of the contract between the first Defendant and the second Plaintiff/Mortgagor. It is clearly stipulated, with the exception of section 79 of the Evidence Act that no evidence will be given in proof of the terms of the contract except the document itself. In explanation 3, oral evidence may be given which proves the same fact in the contract. The Credit Facility Agreement in clause 1 provides as follows:

"The principal Credit Facility amount advanced the borrower is Uganda shillings 100,000,000/=..."

Secondly, clause 4 of the Credit Facility Agreement provides that the credit facility has been extended to the borrower for a period of 36 months from the date of the agreement or the date the credit facility will be credited into the borrowers account held with the bank. Thirdly, clause 5 of the Credit Facility Agreement provides that the borrower undertakes to effect quarterly payments of Uganda shillings 11,927,703/= for the entire credit facility period commencing three months after disbursement. In the circumstances, the oral testimony of PW1 to the effect that the repayment period has not commenced, or that the amount advanced is not Uganda shillings 100,000,000/=, or that the Plaintiff is not obliged to commence repayment, is excluded by the Evidence Act section 91 thereof

because it contradicts the terms of the written contract between the parties and the stipulations under the contract as summarised above. I therefore agree with the submission that the Plaintiff was in default and this is brought out clearly by the testimony of PW1 that he had not commenced payment. The loan was disbursed on 16<sup>th</sup> October, 2009. Three months from 16<sup>th</sup> October 2009 is 16<sup>th</sup> January, 2010. The property was therefore advertised for sale after the Plaintiff was in default in terms of the Credit Facility Agreement exhibit P2.

I have further considered the submission that the third Defendant advertised the property in the monitor newspaper of 2<sup>nd</sup> April, 2011 without instructions and authority from the first Defendant. It is the first Defendant's contention in the amended written statement of defence paragraph 8 thereof that the Plaintiffs having failed to service the loan, the bank exercised its powers of sale under the Mortgage Deed and lawfully sold off the property to the second Defendant. The first Defendant also contended that the Plaintiff was served with notice of intended sale and the sale of the security was advertised as required by the law.

I cannot see how the Plaintiff can speak for the Defendant who admits that it authorised the transaction and clearly pleaded it. I find this submission is untenable on that basis because the first Defendant which is the principal whose authority is being challenged has admitted that it authorised the transaction. The authority of the third Defendant to advertise the property on instructions and authority of the first Defendant cannot be challenged.

Regarding submissions that the sale agreement does not comply with the law, inasmuch as it indicates the seller was Global Trust Bank when that is neither has the seal nor the name of the person who signed on behalf of the first Defendant.

Both Counsels agreed with the provisions of section 148 of The Registration of Titles Act Cap 230 Laws of Uganda which provides as follows:

148. Signatures to be in Latin character.

No instrument or power of attorney shall be deemed to be duly executed unless either -

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(a) the signature of each party to it is in Latin character; or

(b) a transliteration into Latin character of the signature of any party whose signature is not in Latin character and the name of any party who has affixed a mark instead of signing his or her name are added to the instrument or power of attorney by or in the presence of the attesting witness at the time of execution, and beneath the signature or mark there is inserted a certificate in the form in the Eighteenth Schedule to this Act.”

The provisions of the Registration of Titles Act deal with instruments or powers of attorney. The relevant sections are found under Part VIII of the Registration of Titles Act which deals with “POWER OF ATTORNEY AND ATTESTATION OF INSTRUMENTS”. Section 148 deals with the presumption of whether they were duly executed on the basis of the principles under section 148 (supra). The document in question is the sale agreement and the Defendants Counsel submitted that the provision does not apply to the sale agreement which they contended is not an instrument envisaged by this section. Section 148 of the Registration of Titles Act is preceded by section 147 (1) which gives a hint of what an instrument is because it provides as follows:

“147. Attestation of instruments and powers of attorney.

(1) Instruments and powers of attorney under this Act signed by any person and attested by one witness shall be held to be duly executed, and that witness may be - ...”

It provides for attestation of instruments and powers of attorney under the Registration of Titles Act. The begging question is what "instruments and powers of attorney "are in the context of the Registration of Titles Act. Section 1 (h) defines an instrument inclusively to include documents for which an entry may be made in the register. It provides as follows:

“(h) “instrument” includes any document in pursuance of which an entry is made in the register”

I agree that section 148 deals with the due execution of an instrument which may be entered into the register. A sale agreement does not have to be entered into the register. An instrument which may be entered into the register includes a Mortgage Deed or a transfer, a power of attorney, a caveat etc. It does not apply to the sale agreement whose validity can only be contested by the first Defendant whose signatories in the sale agreement on the part of the first Defendant have been called to question. The first Defendant does not deny the due execution of the sale agreement on its own behalf and therefore the submissions of the Plaintiff's Counsel are untenable. Secondly, the Plaintiff does not have any evidence as to who signed on behalf of the first Defendant other than the persons who purported to sign on behalf of the managing director and secretary of the first Defendant.

Counsel further submitted that there is no evidence to indicate that the Defendant bank received Uganda shillings 140,000,000/= paid by the second Defendant. The first Defendant bank acknowledges in the proceedings that it received the money and the Plaintiff has no locus standi to question that transaction because the money was accounted for by DW2 and it offset the indebtedness of the second Plaintiff.

The Plaintiff's Counsel further submitted that the transfer of the suit property into the names of the second Defendant was unlawful because there was no release of the property to him after the alleged sale under the mortgage. He contended that there is no evidence of such a release. He further submitted that exhibit D4 is the release to the first Plaintiff who is the registered proprietor but apparently it had not been handed over to him.

After the alleged sale of the suit property, the property could not be released to the Plaintiff because it had been sold to the second Defendant. The discharge of mortgage was a formality only executed by the Mortgagee/first Defendant. It is effected under section 125 of the Registration of Titles Act which provides that:

#### 125. Discharge of mortgages.

Upon the presentation for registration of a release from any registered mortgage or charge in the form set out in the Twelfth Schedule to this Act signed by the Mortgagee or his or her transferees and attested by one witness and discharging wholly or in part the lands or any portion of the lands from the registered mortgage or charge, the registrar shall make an entry of the release upon the original and duplicate certificate of title and upon the original mortgage and duplicate, if any, and on the date of such registration as defined in section 46(3) the land affected by the release shall cease to be subject to the registered mortgage or charge to the extent stated in the release.”

The discharge in the context of section 125 is a discharge of the mortgage but not the handing over of title to the Mortgagor as such. The vendor/Mortgagee is under obligation to discharge the mortgage after selling the property to a buyer upon default of the Mortgagor. The mortgage may also be discharged when the Mortgagor pays off the loan. I have duly considered exhibit D4 which is the release of mortgage. It was executed by the first Defendant bank on 26<sup>th</sup> July, 2011. The Plaintiff's Counsel relies on the wording of the release mortgage to suggest that the property was released to the Plaintiff. The part of the release document reads as follows:

"GLOBAL TRUST BANK (U) LTD of P.O. Box 727-47 Kampala, mean registered Mortgagee in the above - mentioned land under instrument number KLA 432467 dated 16/10/09, in consideration of all the monies due to for the principal and interest on the mortgage having been paid to us, the receipt of which we acknowledge, hereby RELEASE and DISCHARGE the registered proprietor and the land comprised in the above particulars from all claims under the mortgage (s)."

A release of mortgage is supposed to be in the form prescribed in this 12<sup>th</sup> Schedule to the Registration of Titles Act. The release of mortgage is prescribed as having been made under section 125 of the Registration of Titles Act and the forming part reads as follows:



“Twelfth Schedule.

Release of Mortgage or Charge.

Register Book No. .... Folio No. ....

I, ... being ... registered in the above-mentioned folio as owner of a mortgage dated ... and registered on .....[or being transferee of a mortgage dated ... and registered on (date of registration)] in consideration of all monies (or as the case may be) due for principal and interest on the mortgage having been paid to me, the receipt of which I acknowledge, hereby release and discharge the registered proprietor and the lands (or portion, as the case may be) comprised in the folio from all claims under the mortgage.”

Exhibit D4 is a written in the form in the 12<sup>th</sup> Schedule to the Registration of Titles Act. It is not a release of the property to the principal as such, just as the wording of the schedule suggests, but it is the discharge of the security from the encumbrance of the mortgage. It also acts as de-registration of the mortgage that had been entered by instrument in the encumbrance page of the title deed. In the premises the submission that exhibit D4 which was meant to release the mortgage or the property to the Plaintiff was the registered proprietor but was not handed over to him has no merit. It is the encumbrance that was discharged and it was meant to free the title from the charge of the bank.

Finally the Plaintiff's Counsel submitted that the costs of the exercise of sale or realisation of the security amounting to Uganda shillings 16,000,000/= ought to have been debited on the second Plaintiff's account and a demand made for payment of the same. The submission runs counter to the express terms of the Credit Facility Agreement exhibit P2 and clause 12 thereof which provides that all costs and expenses whatsoever including legal and auctioneers costs connected with the recovery or attempted recovery of monies owing under the facility as well as the contesting of any involvement in any legal proceedings of whatever nature by the lender, are payable by the borrower on demand on a full indemnity

basis, together with interest. It further provides that the bank shall have the right at any time to debit the borrowers account. However the mortgaged property was sold and the money was in possession of the first Defendant or its agents and therefore deducted without having first to have been paid to the Plaintiff who was in any case indebted. The Plaintiff suffered no prejudice by the costs of the lawyers had being deducted or the costs of the exercise of advertisement and sale being deducted from the proceeds of the sale because this was expressly agreed to be an expense to be borne by the Plaintiff. In the premises the submissions of the Plaintiff's Counsel lacks merit.

The conclusion is that the sale and transfer of the suit property to the second Defendant was not unlawful or illegal.

The second leg of the Plaintiff submission is that there was fraud by the second Defendant. The basis of the submission of the Plaintiff's Counsel is that the property was transferred into the names of the second Defendant when there was a caveat exhibit P10 lodged by the Plaintiffs. It is the contention that on 12<sup>th</sup> October 2011, the first Plaintiff was the registered proprietor with a caveat thereon according to exhibit P8. The second Defendant was registered as proprietor on 6<sup>th</sup> October, 2011. This pointed to fraud according to the Plaintiff's Counsel.

I have carefully considered the submissions for and against the question of whether there was any fraud. The caveat of the Plaintiff was lodged on 13<sup>th</sup> July 2011. The statutory instrument in support of the caveat is dated 18<sup>th</sup> of July 2011 but purports to have been registered on 13<sup>th</sup> July 2011. I have further considered the letter dated 12<sup>th</sup> October, 2011 addressed to the Plaintiff's Counsel from the Commissioner for Land Registration. It showed that an encumbrance was registered under instrument number KLA 508146 on 19<sup>th</sup> July, 2011. The property had been advertised for sale in the monitor newspaper of 2<sup>nd</sup> April 2011. The caveat was therefore lodged after the advertisement of the property for sale. Secondly the first Defendant was registered as a Mortgagee on 5<sup>th</sup> October 2009. Finally the second Defendant Mr John Magezi was registered on 6<sup>th</sup> October,

2011. By the time he was registered there was a subsisting caveat on the suit property lodged by the Mortgagor.

Generally, the law is that no entry shall be made in the register book while a caveat continues in force prohibiting the registration of any other interests on the property. This is provided for by section 141 of the Registration of Titles Act which provides as follows:

“141. No entry to be made in Register Book while caveat continues in force.

So long as any caveat remains in force prohibiting any registration or dealing, the registrar shall not, except in accordance with some provision of the caveat, or with the consent in writing of the caveator, enter in the Register Book any change in the proprietorship of or any transfer or other instrument purporting to transfer or otherwise deal with or affect the estate or interest in respect to which that caveat is lodged.”

Apparently, the subsistence of the caveat contradicts the mortgage instrument which was also lodged on the title deed. I have carefully considered the issue and the question is whether the Mortgagee can sell the property when there is a caveat of the Mortgagor. The Registration of Titles Act is quite explicit about the question and the import of its provisions is that the Mortgagee has a good title as against the Mortgagor when there is a foreclosure. This is the import of section 128 of the Registration of Titles Act which provides as follows:

“128. Title to land brought under this Act subject to mortgage to be held good in favour of Mortgagee, etc. applying to bring land under the Act after foreclosure or sale.

When any land has been brought under this Act subject to any mortgage, and the Mortgagee or any person claiming under the Mortgagee applies for a certificate of title to the land foreclosed or purchased, the mortgage shall be deemed to have conferred upon the Mortgagee or the purchaser under the power of sale contained in the mortgage the right to be registered as proprietor of the same estate in the land as that for which the Mortgagor

was registered, and the only inquiry into title shall be as to the validity of the foreclosure or sale and of any subsequent transfers of title to the applicant, and no caveat which might have been or which was lodged against the original application shall be lodged or renewed in respect of the same estate or interest against the application of the Mortgagee or any person claiming under the Mortgagee.”

A caveat cannot be lodged against the Mortgagees interest and the Mortgagee is entitled to foreclose and transferred the title to the purchaser. While the above provision seems to apply to unregistered interest, it is equally applicable to a registered interest of the Mortgagor which has been mortgaged to the Mortgagee. The contention is supported by the Mortgage Act cap 229. Section 2 of the Mortgage Act cap 229 provides that where there is breach of contract or covenant by the Mortgagor, the Mortgagee may among other things realise the security in the mortgage. Furthermore security may be realised under section 3 thereof through foreclosure of the right of the Mortgagor to redeem the property. Finally I have considered section 10 of the Mortgage Act Cap 229 which provides as follows:

“10. Sale otherwise than by foreclosure.

Where the mortgage gives power expressly to the Mortgagee to sell without applying to court, the sale shall be by public auction unless the Mortgagor and encumbrancers subsequent to the Mortgagee, if any, consent to a sale by private treaty.”

The section allows the Mortgagee under express power of sale conferred in the agreement between the Mortgagee and Mortgagor to sell the property by public auction without recourse to court. The caveat by the Mortgagor under circumstances where an express power of sale under mortgage has been registered cannot be entertained because it contradicts the very instrument of the Mortgage Deed that had been registered as well as the Credit Facility Agreement. I agree with the Defendants Counsel that the Mortgagee had an express power of sale under clause 25 provides as follows:

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"All securities offered by the borrower are enforceable/realisable by the bank upon default by private treaty or public auction and without recourse to the courts of law or by attaching the borrower's salary or income."

With regard to the repealed provisions of the Mortgage Act Cap 229, the Mortgage Act, Act 8 of 2009 and section 1 thereof provides that the Act would come into force on a date to be appointed by the Minister. The Minister appointed the commencement date by statutory instrument namely the Mortgage Act, 2009 (Commencement) Instrument, 2011 Statutory Instrument 2011 No. 44. Section 2 thereof provides that the 2<sup>nd</sup> of September, 2011 is appointed as the date on which the Mortgage Act could come into force. The transaction in question was executed under the old Act. The sale agreement in question is dated 2<sup>nd</sup> of May, 2011. The challenged sale therefore took place before the Mortgage Act; Act 8 of 2009 came into force. That notwithstanding, the Mortgage Act 2009 and particularly section 20 thereof allows the Mortgagee upon default of the Mortgagor among other remedies to sell the mortgaged property. Secondly, section 26 of the Mortgage Act 2009 preserves the right of the Mortgagee to sell the mortgaged property after compliance with the requisite notices.

It is therefore my holding that a caveat by a Mortgagor who is in default under a Mortgage Deed is untenable in law and the exercise of the Mortgagee of any power of sale cannot be encumbered by the Mortgagor's caveat. Moreover the Plaintiff has not challenged the mortgage. For that reason the Plaintiff has no cause of action against the second Defendant because it is proven that the Plaintiff/Mortgagor was in default. The Mortgagee was the registered Mortgagee and exercised the option of sale after advertisement in the newspapers. In the premises the Mortgagor/Plaintiff cannot prove fraud against the Mortgagee merely because the first Plaintiff who is the registered proprietor lodged a caveat after the mortgage was registered and after defaulting in the payment of the loan. There was therefore no fraud and they could not in the circumstances, be any fraud on the part of any of the Defendants.

Finally the Plaintiff's Counsel addressed issue number two on whether the first Defendant's action on the second Defendant's account were unauthorised and if so whether they were unlawful.

The brief submission of the Plaintiff's Counsel is that Uganda shillings 100,000,000/= was not disbursed to the second Plaintiff by the first Plaintiff. It followed that the transactions on the second Plaintiffs account were unauthorised because they relate to interest chargeable and withdrawals in the first Defendant's favour which were not lawful.

Upon resolution of the first issue, the second issue is resolved in favour of the Defendant because as earlier on held; the Plaintiff cannot contradict the written instrument being the Credit Facility Agreement as well as the Mortgage Deed. The transactions on the second Defendant's account were therefore lawful and authorised.

In the premises, the Plaintiff's suit against all the Defendants has no merit and is dismissed with costs.

Judgment delivered in open court on 20<sup>th</sup> January, 2017

**Christopher Madrama Izama**

**Judge**

**Judgment** delivered in the presence of:

Counsel Bwogi Kalibala for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants

Counsel Magezi John appears in person

The first Plaintiff Mr. Andrew Babigumira who is also Director of Second Defendant is in court

Charles Okuni: Court Clerk

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Julian T. Nabaasa: Research Officer Legal

**Christopher Madrama Izama**

**Judge**

**20/January/2017**