THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

HCT-03-CV-CS-035-2010

KIBEEDI ZAAKE WANUME::PLAINTIFF

VERSUS

EQUITY BANK LTD::DEFENDANT

Civil Suit

Held: *The Plaintiff has failed to prove all his claims against the Defendant. In the result Judgment is entered for the Defendant/Counterclaimant in terms set forth in this Judgement.*

BEFORE: HON. JUSTICE DR. WINIFRED N NABISINDE

JUDGMENT

The Plaintiff brought this suit against the Defendants for the Declaratory Order that the Defendant declares the fate of the vehicles impounded and how much was realized from the sale of the Plaintiff's vehicles, how much is due on the loan. He also claimed trespass against the Defendants and return of money the Defendant's removed from the Plaintiff's house; and was seeking the following reliefs:-

1. Special damages for loss of US $ 30,000.00 with interest at a rate of 27% per annum from the 4/3/2010 till payment in full.
2. General damages for the mental torture, inconvenience and embarrassment.
3. A declaration that the Defendants' act of impounding the vehicles without a court order was illegal and unlawful
4. That the Defendant accounts for the said vehicles.
5. That the Defendants declare the amount of loan balance due.
6. Costs of the suit.

His claim is that in or around May 2008, the Plaintiff obtained a loan of Shs. 48,000,000/= from the Defendant and in attempt to recover the said loan, the Defendants employees and in the course of their employment with the

Defendant in or around May 2009 impounded the Plaintiff's vehicle known as Toyota Hilux, UAJ 801K estimated at a value of shs.30,000,000/- and in July 2009 impounded another vehicle of the Plaintiff Reg. No. UAH 050U, Mitsubishi Delica estimated at a value of Shs.25, 000,000/=. That the Defendants impounded the said vehicles without any court order and have since not accounted to that Plaintiff and the Defendants continued demanding more money with threats that failure to pay, the Defendants would embarrass him as a Member of Parliament by either arresting him or carrying away his house properties. That in a letter dated 4/1/2010 he wrote to the Defendants promising to pay the loan in installments and to avail him with the actual loan balance due or loan settlement.

That on the 4/3/2010, the Defendant's employees and in the course of their employment with the defendant, in the compound with a press man and without prior notice stormed the Plaintiff's house , and collected the Plaintiff's properties and loaded them on a pick-up and that the Defendants employees also took US $ 30,000.00. That to date, the Defendants have not availed the Plaintiff with the status of the loan.

BRIEF FACTS

The brief facts according to learned counsel for the Plaintiff are that in May 2009, the Defendant's agents /employees impounded the Plaintiff's motor vehicle UAJ 801K valued at of shs.30,000,000/- and UAH 050U, Mitsubishi Delica estimated at a value of Shs.25,000,000/=. The details of the circumstances under which this matter arose are detailed in the Plaint.

In reply, the brief facts according to learned counsel for the Defendants are that that the Plaintiff/Counter Defendant was a customer of the Defendant/ Counter Claimant. On 7/3/2008 the Plaintiff/ Counter Defendant applied for and was granted a loan by the Defendant/Counter Claimant to a tune of **UGX 48,000,000 (Uganda Shillings Forty Eight Million).**

The loan was to be repaid within a period of 24 months at a monthly installment of UGX 2,834,300/=. The loan was secured by several chattels which included motor vehicles, furniture, electronic and other fittings.

The Plaintiff/Counter Defendant grossly defaulted on his loan obligations prompting the Defendant/Counter Claimant to commence recover process to recover the loan sums owed to it.

The Defendant/Counter Claimant foreclosed on some of the securities, particularly pledged motor vehicles; thus partial foreclosure left the

Plaintiff/Counter Defendant indebted to the Defendant/Counterclaimant to the tune of **UGX 43,912,104.25/= (Uganda Shillings Forty Three Million Nine Hundred Twelve Thousand One Hundred Four, and Twenty Five cents)** as at 10th May 2010.

On 11th May 2010, the Plaintiff/Counter Defendant filed this suit challenging the foreclosure on grounds of trespass and the Defendant/Counter Claimant filed a defence disputing the allegations in the suit. That defence incorporated a Counter Claim wherein the Defendant seeks to recover the sum of UGX 43,912,104.25 /= plus accrued/accruing interest left outstanding on the loan from the Plaintiff/ Counter Defendant.

ISSUES

The following are the issues that were agreed upon during the Scheduling of this case:-

1. Whether the Plaintiff is still indebted to the Defendant, and if so to what tune?
2. Whether the Defendant is entitled to a refund of the debt sum if any?
3. Whether the Defendant is liable in trespass?
4. Whether the Plaintiff has a claim to US $30,000?
5. What remedied are available to the parties?

REPRESENTATION

When this case came up for hearing before me, the Plaintiff was represented by learned counsel Mr. Martin Asingwire of M/S. Asingwire & Partners, Advocates & Legal Consultants, while the Defendants were represented by Counsel Fredrick Mpanga of M/S. AF Mpanga Advocates.

THE LAW

The position of the law and the burden of proof in Civil Cases; it is well settled per **Sections 101,** which provides that;

"(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.

Section 102 provides that;

"The burden of proof in a suit or proceeding lies on that person who would fail if at all were given on either side."

Section 103 further provides that;

"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The above was solidly reinforced in the case of ***Dr. Vincent Karuhanga t/a Friends Polyclinic vs. National Insurance Corporation & Uganda Revenue Authority, HCCS No.617 0f 2002 (2008)ULR 660 at 665,*** cited with approval by the Court of Appeal in ***Takiya Kaswahili & A' nor vs. Kajungu Denis, CACA No.85 of 2011,*** it was held, inter alia, that;

"...The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When that party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof that is, his allegation is presumed to be true unless his opponent adduces evidence to rebut the presumption."

On the other hand, the balance of probabilities is discharged/satisfied if there is greater than 50 per cent that the proposition is true and not 100 percent. Lord Denning, in ***Miller v Minister of Pension [1947] All E R 373*** described it simply as *"more probable than not".* For the above reason, errors omissions and irregularities that are too minor and do not go to the root of the matter and occasion a miscarriage of justice may be disregarded. See ***Dr. Vincent Karuhanga vs National Insurance Corporation & Anor H.C.C.S No. 617/2002 and Sebuliba v Co-Operative bank (1982) HCB 129****.*

Further, in the proof of cases, unless it is required by law, no particular form of evidence (documentary or oral) is required and no particular number of witnesses is required to prove a fact or evidence as per **Section 58 Evidence Act** and **Section 133 Evidence Act**.

The **Evidence Act** defines a fact to mean and include:-

(1) Anything, state of thing, or relation of thing capable of being perceived by senses as per Section 2 1 (e) (i) Evidence Act.

Having stated the position of the law and rules of evidence, I will now turn to the substantive issues raised in this case as captured above and proceed to evaluate against the evidence on record.

RESOLUTION OF THE ISSUES

ISSUE 1: Whether the Plaintiff is still indebted to the Defendant, and if so to what tune?

It was submitted by learned counsel for the Plaintiff that **Default created deliberately.** The Defendant adduced evidence **through DW1 Sseremba John Bosco** who stated that the Plaintiff still owes UGX 43,912,104.25/- to the Defendant. The Witness failed to explain how this amount accrued. First, he stated that he started working in Jinja Branch where the entire transactions were managed in 2013 when even the court case had commenced. Everything he said, he had been told, and was not present when the vehicles were impounded.

That **DW1** further testified that the loan was disbursed on March 7, 2008 and he was supposed to start payments on April 2008, but the statement **DE4 (a**) clearly shows that the disbursement was made in September 2008. This means that the loan repayment period should not have started until October 2008. By October 2008, the Defendant claimed that the Plaintiff was already in default, before the start of the repayment date. The Defendant however went ahead and considered the documented date of April 2008 as the date of paying the first installments. This means that the defendant deliberately caused default on the part of the plaintiff to accumulate penalties and illicitly increase its pocket size.

DW1 deliberately tried to read into the statements what doesn't exist. The explanations that he gave were intended to contradict and add to the statements. The statements clearly show that mistakes were made and in some panic, the defendant tried to quietly sort their mess in the statement and want to simply explain it away. **Sections 91** and **92 of the Evidence Act** forbids introducing oral evidence to add to or vary a written document that has been produced and proved.

Further, that it is not surprising that **DW1** stated on many occasions that he did not trust the statement and that there were inaccuracies. It is clear therefore, that default was created through manipulation and or faults of the defendant, to lead to the events complained of. **DE4 (a)** was not stamped or authored officially by the defendant and with all its faults, they used it against the Plaintiff. The loan statement does not reflect any balances that are outstanding, and given the fact that demands for account balance were ignored, it's clear from the evidence that the Defendant has never known how much was the outstanding balance.

He argued for the Plaintiff that how therefore, can the plaintiff be indebted? As there are loan agreements, chattels mortgage, etc., there has to be a clear employment of deposits made, reflecting the outstanding balances and the amounts paid. An unsigned statement where payments are reflected and deleted in equal measure, coupled with changes in disbursement dates without altering the repayment schedule all confirm that the Defendant has not proved its counterclaim and the Plaintiff does not owe the defendant any loan. It also follows without say, that the difference in the loan balances are proof that the defendant just made up a figure. There is no explanation on how it accrued.

Valuable security seized

Counsel added that **PW1** led evidence that the Plaintiff hired a driver in the names of Mukama Sulaiman, who testified as **PW3** and stated that the Mitsubishi Delica was removed from him while he was transporting tourists from Soroti. This means that the same was in good condition and any evidence that it was worthless should be rejected. That the second vehicle was depreciated deliberately as if the purpose was for payment of income tax. The value was UGX 30,000,000/- and they instead found a land valuer to give it a wrong value.

That the evidence reflects that the chattels were not registered under the **Chattels Transfer Act cap 70 which was then in force**. **Section 7** of the said act required any such instrument to be registered in 21 days from the date of creation, and under **Section 19**, the instrument only takes effect from the day of registration.

Under **Section 15** of this act, an instrument that is not registered is void in respect of the chattels comprised in the instrument. The law was also very clear, that the instruments remained the property of and in the possession of the grantor (Plaintiff) until registration (See **Section 16**.)

The issue of the statement was well discussed. The statements were never given to the Plaintiff, but purported to have been given to the office of the Speaker of Parliament, a third party. More so, the statements as seen in evidence were a huge distortion.

Importantly, impounding the cars and selling them without notice or a court order was violent, aggressive and unacceptable by all standards. The Plaintiff’s cars therefore were valuable enough to cover whatever amounts of money were in default.

In addition, that it should be noted that no evidence was led by the Defendant to prove that the valuation was done by a professional, clearly indicating the method used. It was not shown where the vehicles were taken and how the money was employed in reducing the loan.

They prayed that the court finds that the Plaintiff is not indebted to the defendant and the amount has not been proved, and find the first issue in the negative.

In reply, learned counsel for the Defendants/Counter Claimants submitted that the Plaintiff/Counter Defendant is indebted to the Defendants/ counterclaimants. That the Plaintiff/Counter Defendant's indebtedness to the Defendants/ Counter Claimants arises from Plaintiff/Counter Defendant's breach of the loan agreement or contract between the Plaintiff/Counter Defendant and the Defendants/Counter Claimants, wherein the Plaintiff/Counter Defendant borrowed **UGX 48,000,000 (Uganda Shillings Forty Eight Million)** from the Defendants/ Counter Claimants on 7/3/2008.

Further, that the Defendant through **DW1,** testified in chief that the Plaintiff borrowed the money and defaulted on his obligations to fully repay the loan sums and is thus still indented to the Defendant **(see paragraphs 10 to 31 of DW1's Witness Statement filed 29th September 2020.** This evidence was not controverted by the Plaintiff/counter defendant.

Furthermore, that in **DEXH.7 (letter dated 4/14/2009)** and **P.Exh.5 (letter dated 4/1/2010),** the Plaintiff admits to the default on his loan obligations. Particularly, in **DEXH.7** the Plaintiff wrote to the Defendant that:

"I would like to first of all apologize for delay in arrears clearance..."

That similarly, in **P.Exh.5** the Plaintiff wrote the Defendant that:-

"Let me also convey apologies for the bad repayment of my loan..."

In addition, that despite the promises to repay the arrears and the loan in **D.Exh.7 (letter dated 4/4/2009)** and **P.Exh.5** and all accommodation of the Plaintiff by the Defendant, the Plaintiff refused to repay the loan and instead sued the Defendant vide the instant suit on 29th April 2010.

Further to the above, that **PW1** admits in paragraph 4 of his Witness Statement filed on 4/4/2018 and in cross-examination that the Plaintiff/Counter Defendant borrowed the aforesaid monies from the Defendants/Counter Claimants. **PW1** also admits in cross-examination that

the Plaintiff/Counter Defendant defaulted on his obligations, **at page 47 starting at paragraph 1300 of the record of proceedings, PW1** testified thus:

"Katumba: Mr. Nkuutu the agreements you have just looked at, it is true to say the plaintiff defaulted on repaying the loan

PW1: He did default

Katumba: He did not pay as agreed in the clause here that is true.

PW1: It is true.

Katumba: In your statement Mr. Nkuutu you say in para.4 of the 1st statement that he was supposed to repay the loan within 24 monthly equal installments, is that what is in para.4.

PW1: Exactly.

Katumba: And you would agree with me that he did not do that.

PW1: Yes.

Katumba: Mr. Nkuutu allow me to take you to PE.5. My Lord it is a letter dated 4/1/2010. In fact if you look at para.2 the plaintiff agrees that he has badly repaid the loan, is that true?

PW1: Yes.

Katumba: Please confirm that the letter is signed faithfully by the Plaintiff on the 2nd pg.

PW1: It is."

They concluded that the upshot of all the above is that the Plaintiff did not fully repay the loan as per the loan documents and is still indebted to the Defendant; and uninvited court to answer the sub issue in the affirmative.

(b) <u>If so, to what tune?</u>

Learned Counsel for the Defendants/ Counter Claimants argued that owing to the Plaintiff's default, **DW1** in **paragraph 31 of his Witness Statement** testified that as at 10th May 2010, Plaintiff/Counter Defendant was indebted to the Defendants/Counter Claimants to the tune of **UGX 43,912,104.25 /= (Uganda Shillings Forty Three Million Nine Hundred Twelve Thousand One Hundred Four, and Twenty Five cents),** with the said

monies still attracting interest at the contractual rate in the loan and chattels mortgage documents signed by the Plaintiff until paid in full.

Further support its case, the Defendants/Counter Claimants adduced uncontroverted evidence in the form of the Plaintiff's Loan Statement – **D.Exh.4A** and the Plaintiff's Bank Statement-**D.Exh.4B** (These are in the Defendants/ Counter Claimants Trial Bundle filed on 29/9/2020).

The Defendant further provided an electronic printout of the breakdown of the loan sums due from the Plaintiff/Counter Claimant as at 3/5/2010-**D.Exh.6** at pg. 33 of Defendants/ Counter Claimants Trial Bundle.

That all these documents show consistently that the Plaintiff/Counter defendant is indebted to the Defendants/ Counter Claimants to the tune of **UGX 43,912,104.25/= (Uganda Shillings Forty Three Million Nine Hundred Twelve Thousand one Hundred and Four, and Twenty Five cents).**

They therefore submitted that the Plaintiff/Counter Defendant is still indebted to the Defendants/ Counter Claimant to a tune of UGX **43,912,104.25/= (Uganda Shillings Forty Three Million Nine Hundred Twelve Thousand one Hundred and Four and Twenty Five cents)** with the sum still attracting interest at contractual rate until repaid in full; and invited the court to find as such and determine issue 2 accordingly.

Issue 2: Whether the Defendant is entitled to a refund of the debt sum, if any?

It was submitted by learned counsel for the Plaintiff that this issue's resolution is dependent on the resolution of issue 1 above; and that if no money is owed, no refund is due.

In reply, learned counsel for the Defendant submitted that they are of the considered opinion that this issue is closely related to issue 1 above and issue 5 below which discusses the remedies available to the parties.

Pursuant thereto, they adopted *verbatim* our submissions made in respect of issue 1 above and issue 5 below (*especially the submissions on interest*) and submitted in conclusion that the Defendant is entitled to a refund of the debt sum totalling to **UGX 43,912,104.25/= (Uganda Shilling Forty Three Million Nine Hundred Twelve Thousand One Hundred Four, and Twenty Five Cents)**, plus interest at a contractual rate of 36% and default interest at a contractual rate of 3%.

They prayed that the Court finds and answers issue 2 in the affirmative.

I have found it more logical to handle both issues 1 & 2 concurrently. I have carefully examined the Plaint and Written Statement of Defence, the applicable law and all the evidence led by the Plaintiff and Defendant's witnesses in this case and taken into account the submissions of learned counsel for both parties as captured above.

The first Plaintiff's witness in this case was **Nkuutu Mohammad Musa (a male adult aged 53 years, a business man resident of Madhvani Road, Plot No.16 Jinja City, *(hereinafter referred to as PW1)*.** In his examination in Chief, he testified that. He is the lawful attorney of the Plaintiff Kibeedi Zaake Wanume in whose capacity he testified that the Plaintiff on 7/2/2008 obtained a loan of **UGX 43,912,104.25 /= (Uganda Shillings Forty Three Million Nine Hundred Twelve Thousand One Hundred Four and Twenty Five cents),** referred to as Uganda Microfinance Limited, which was to be paid in twenty four equal monthly installments of **UGX 2,834,300/=(Two Million Eight Hundred Thirty Four Thousand Three Hundred**) only as per Loan Agreement attached as **PE2**

That the Plaintiff's original Log books for Motor Vehicles No. UAH 050U Delica Mitsubishi estimated at Ush. 25,000,000 Twenty Five Million and UAJ 801K Toyota Hiace estimated at UGX 30,000,000 Shillings Thirty Million only were deposited with the Defendant by the Plaintiff as security per the memorandum of deposit dated 7/3/2008 and collateral form dated 3/3/2008 as per memorandum and collateral form attached as **PE3 & 4.**

That in /or about May,2009 the Defendants employees in the course of their employment without any court order impounded the Plaintiff's vehicle known as Toyota Hiace UAJ 801 and in July they impounded another vehicle of the Plaintiff Reg. No. UAH 050U Mitisubishi Delica and that since they were impounded, the Defendants have never accounted for them and continued demanding for more money.

That the Plaintiff for fear of public embarrassment as an Member of Parliament and the effect on his political career wrote to the Defendant a letter date 4/1/2010 attached as **PE5.**

Further, that on 4/3/2010, the Plaintiff received a phone call from his cousin brother Mwondha Baker Zivuga who informed him that the Defendants Officials were home loading his household properties on a pick-up and on

reaching his home, he found when the Defendants employees had loaded his household items with a TV Reporter.

That the properties were offloaded and upon inspection, it was discovered that USD 30,000 which his cousin Mwondha Baker Zivuga had kept with him for purposes of travel was missing to which the said Mwondha said that the Defendants Manager had taken the bag.

During cross-examination, PW1 answered that he got powers of Attorney in 2013 and that the events in his evidence in chief happened when he was not present; and the information in his Witness Statement was just told to him that he did not hear or did not see it.

He said he heard when it was happening that the Defendants employees entering the Plaintiffs house, **PW1** testified that he merely heard about it.

He further testified that in his additional statement, the Plaintiff had come back in August 2018 and told him things he wrote the additional statement; and that they weren't in his first statement because the Plaintiff had not told him about it.

That the Plaintiff was capable of coming back to Uganda however, he had not come back to testify in the case. He said that indeed his brother borrowed UGX.48 m from the Defendant according to the Loan Agreement **PW1** had brought in court and that he was supposed to pat the money back with interest and according to the term as of the Agreement which the Plaintiff signed to which **PW1** showed Court where the Plaintiff had signed.

He further testified that indeed **PW1** was the borrower and that he afraid to all the terms in the agreement and that the Plaintiff didn't deny having taken the money.

It was not also denied by the Plaintiff that he pledged M/V Reg. UAH 050U Delica Mitsubishi and a M/V Reg. Toyota UAJ 801K Toyota Hilux as security. **PW1** was not aware that the Plaintiff had also pledged chattels of fun fittings of furniture and electronic equipment.

He later, upon perusal of the document **PE2 PW1** testified that indeed the Plaintiff had signed a chattels agreement where he pledged 2 Log books on document **PE.3** where the Plaintiff deposited the 2 Log books of the two cars as security, furniture fittings, electronics and that upon default, the Plaintiff would pay 3% interest.

PW1 further testified that the Plaintiff defaulted on his loan. That he didn't pay as agreed in the clause; and that the Plaintiff was supposed to repay the loan in within 24 monthly installments and that he didn't do that.

He added that the letter dated 4/1/2010 that the Plaintiff admitted that he had repaid the loan badly and that in the he would pay all recovery charges met by him...

The Plaintiff's second witness was **Kibeedi Zaake Wanuume, a male adult aged 44 years old of Nile Garden, Jinja City *(hereinafter referred to as PW2).*** He testified that he made the Witness Statement of **PW2** on 18//11/2018 be allowed as far as it refers to paragraph 1, 5.

In the instant case, the Plaintiff/Counter defendant is indebted to the Defendant, the Defendant/counterclaimant made a counter claim that the Plaintiff/counter defendant is indebted to them at a tune of **UGX 43,912,104.25/= (Uganda Shillings Forty Three Million Nine Hundred Twelve Thousand one Hundred Four Shillings and Twenty Five cents only)** constituting of the principal, simple interest and compound interest, due and payable to the Defendant/Counterclaimant.

As to whether the Plaintiff/Counter defendant is indebted to the Defendant/counterclaimant in the sum prayed for at all, the Plaintiff/counter defendant's case is based on the evidence of

In resolving these two issues, I have carefully analyzed all the evidence of both sides and critically examined the various documents exhibited for the Plaintiff. I have found that it is not in dispute that the Plaintiff on 7/2/2008 obtained a loan from the Defendant amounting of **48,000,000 (Uganda Shillings Forty Eight Million)** as per **P. Exhibit 2.** This was also admitted and confirmed by his witness **PW1** on page 42 -45 of the record of proceedings.

For avoidance of doubt, **PW1 during cross examination** responded as follows:-

"Katumba: And he borrowed that money according to the loan agreement that you have brought to court is that correct?

PW1: Yes.

Katumba: Mr. Nkutu I am also correct that according to that agreement he was supposed to repay all that money back to the bank with interest.

PW1: You are correct.

Katumba: And in paying that money back he was supposed to fallow the terms of the agreement?

PW1: You are correct.

Katumba: And in paying that money back he was supposed to follow the terms of the agreement?

PW1: You are correct.

...

Katumba: Mr. Nkuutu in this agreement your brother is the borrower is that correct?

PW1: Indeed.

Katumba: So Mr. Nkuutu I am correct to say in signing the agreement and taking the proceeds of the agreement your brother agreed to all the terms that are in the agreement is that correct?

PW1: It is correct.

Katumba: In fact Mr. Nkuutu it is not denied in this case that he took the money.

PW1: It is not.

Katumba: And again he also pledged MV Reg. UAJ 801 Toyota Hilux as security.

PW1: It is correct.

...

Katumba: 2 log books, furniture, fittings, and electronics. Do you see what is stated in that clause?

PW1: Yes I have seen.

Katumba: Again Mr. Nkuutu I will refer you to the same agreement. Look at pg. Clause 2 repayments. The agreement says that if Plaintiff is to default on any repayment he shall pay default interest of 3% do you see it there?

PW1: I am seeing it there.

Katumba : So it is true that is what he had agreed correct?

PW1: Yes.

Furthermore, on pages 48-49 of the record of proceedings of 6/11/2019 that:-

Katumba: In your statement Mr. Nkuutu you say in paragraph 4 of the 1st statement that he was supposed to repay the loan limit within 24 monthly equal installments is what is in para.4?

PW1: Exactly.

Katumba : And you would agree me that he did not do that?

PW1: Yes.

Katumba: Mr. Nkuutu allow me to take you to PE.5. My Lord it is a letter dated4/1/2010. In fact if you look at para.2 the plaintiff agrees that he has badly repaid the loan is that true?

PW1: Yes.

Katumba: Please confirm that the letter is signed faithfully by the Plaintiff on the 2nd page

PW1: It is

Katumba: Now Mr. Nkuutu back to PE.2 the loan agreement. Look at 2nd page borrower's obligation it is agreed therein that if the Plaintiff defaults all the recovery charges shall be met by him, do you see it?

PW1: Yes.

Katumba: Mr. Nkuutu you say in your statement that the defendant came to recover the loan money with a court order is what you say?

PW1: Yes

Katumba: And you say it was wrong?

PW1: YES

Katumba: Mr. Nkuutu I wish to refer you to still on that same page of the loan agreement I want to look at the 3rd clause. Mr. Nkuutu I think you can read English is that correct?

PW1: Yes

Katumba: And remember you told the court that the borrower here is the plaintiff so these are his obligations look at clause 3 can you read English

PW1: Yes

Katumba: You read it

PW1: It is hereby agreed that if any of the monies is for the time being owing to UML are not forthwith paid the demand UML shall sale the borrowers pledged property without request to court by either private treaty or by public auction whichever UML deems necessary and the borrower irrevocably gives his unconditional and complete consent.

Katumba: Now Mr. Nkuutu from that clause I am correct that the money was not supposed to. From this clause I am correct to say that the plaintiff was supposed to pay the money as agreed in the agreement that is correct.

PW1: He was supposed to pay

Katumba: Even the earlier clause he was supposed to pay. The clause says THAT HE WAS Not supposed to be in default at any time is that correct?

PW1: It is

From the above, it is therefore not in dispute that the Plaintiff took the loan in question from the Defendant and not only mortgaged his motor vehicles M/V Reg. UAJ 801 Toyota Hilux and M/V Reg. UAH 050U Delica Mitsubishi according to exhibit **P. Exht. 3**, but also his household items.

Further, the Plaintiff/Counter Defendant gave the Defendant/Counter Claimant's his car's log books in respect of the said motor vehicles.

The cumulative effect of all these actions of the Plaintiff/Counter defendant show that there was an intention to enter a binding contract. I have arrived at the above finding in line with the decision in ***Bristol Cardiff and Swansea Aerated Bread Co. Ltd vs Maggs (11890) 44 Ch. Div. 616*** where court held that;

"It is necessary to look into the whole of the correspondences between the parties to see if they have come to a binding agreement."

The Loan Agreement clearly states in **paragraph 11** that upon default of repayment of the loan by the Plaintiff, the Defendant was entitled to recover

the outstanding amount by foreclosure and sale of the mortgaged vehicles described above.

The motor vehicles were valued as per Appraisal Report for Vehicle Registration No.UAJ 801K Toyota Hiace which was valued by S-M Cathan Property Consult as per **Exhibit DID 1** and for the Mitsubishi Delica ST Wagon, REG.NO.UAH O50U, KD PE8W(1994 valued by Professional Valuers Ltd that received instruction from Armstrong Auctioneers as per **Exhibit DID3.**

In the premises I therefore concur with learned counsel for the Defendant/Counter Claimant's submissions and add that looking at the whole conduct between the parties, it can easily be discerned that there was intention to enter into a valid contract.

In conclusion therefore, I find that the Defendant/Counter Claimants have proved the alleged indebtedness and I find that the Loan Agreement was binding. It is also not in dispute that the Defendant/Counter Claimant was entitled to realize its security under the mortgage by way of foreclosure and accordingly, Sale by Foreclosure of the Motor Vehicles registered the names of the Plaintiff was effected.

As to whether the Defendant is entitled to a refund of the debt sum if any, after a careful analysis of the evidence of both sides, I have examined the copies of the statements from the Defendants/ Counter claimants showing the extent of the interest and what was realized after the sale by foreclosure.

It is clear from the evidence that the terms of the Loan Agreement included interest to the tune of the contractual rate of 36% and default interest at a contractual rate of 3%.

Following up on that, I will indicate the final figures in issue 5 on remedies.

ISSUE 3: Whether the Defendant is liable in trespass ?

Learned Counsel for the Plaintiff submitted that the undisputed facts are that the defendant sent people to the premises of the Plaintiff, and seized the plaintiff's goods, in the presence of news reporters. **DW1** stated that he was not present and no witness was called to dispute the facts of the incident. Police was called, and the household items and other chattels were then released. Court is therefore asked to examine whether this physical entry and disruption was done legally.

They added that the evidence reflects that the chattels were not registered under the **Chattels Transfer Act cap 70** which was then in force. That **Section 7, 15, 16 and 19 of this Chattels Transfer Act** clearly show that the actions of the Defendant were illegal and cannot be sanctioned by this court.

Further, that it therefore goes without say that the Defendant's entry into the Plaintiff's home was founded on an illegality and the presence of reporters was sinister, translating into one thing, trespass. By extension, the impounding of cars without notice and sale of the same was illegal. They relied on the case of held in ***Oketha Dafala Valente vs Attorney General HCCS 69 of 2004*** where it was held that that trespass to goods consists the unlawful disturbance of the possession of the goods by seizure, or by a direct act causing damage to the goods. The wrongful interferences with the Plaintiffs goods at home and vehicles, impounded and vandalized amounted to trespass.

In reply, learned counsel for the Defendant argued that the Plaintiff claims that the acts of the Defendant of entering the Plaintiff's premises and impounding household furniture, fittings, and motor vehicles pledged to the Defendant to secure the loan availed by the Defendant to the Plaintiff amounted to trespass. Contrary to the Plaintiff's said claim, it is the Defendant case that the Defendant committed no trespass, no trespass has been proved against the Defendant, and the Defendant is thus not liable in trespass. They relied on the definition by the learned authors of **Oxford Dictionary of Law, 5th Edition (2003) at page 507** define "*trespass*" to mean:

*"A wrongful direct interference with another person or with his possession of land or goods. In the middle ages, any wrongful act was called a trespass, but only some trespasses, such as trespass by force and arms (vi et armis), were dealt with in the King's Courts. The distinguishing feature of trespass in modern law is that it is a direct and immediate interference with person or property, such as striking a person, entering his land, or taking away his goods without his consent. Indirect or consequential injury, such as leaving an unlit hole into which someone falls, is not trespass. Trespass is actionable per se, i.e. the act of trespass is itself a *tort and it is not necessary to prove that it has caused actual damage."* **[Emphasis added].**

Important to note from the definition of trespass is that there can only be trespass, be it to land or person or property, if the *"interference"* claimed is "*without consent*".

They further relied on the learned authors of **Oxford Dictionary of Law, 5th Edition (2003) at page 106** explain "*consent*" to mean:

"Deliberate or implied affirmation."

That even better, the learned authors of **Black's Law Dictionary, 8th Edition (2008) at page 323** in their definition of the term "*consent*" explain that "*consent*" is an affirmative defence to the Tort of Trespass. They define "*consent*" thus:

"Agreement, approval, or permission as to some act or purpose, especially given voluntarily; legally effective assent. Consent is an affirmative defence to assault, battery, and related torts, as well as such torts as defamation, invasion of privacy, conversion, and trespass. Consent may be a defence to a crime if the victim has capacity to consent and if the consent negates an element of the crime or thwarts the harm that the law seeks to prevent... " [**emphasis added].**

Still on the matter of consent, Mulenga JSC in ***Justine E.M.N. Lutaaya v Stirling Civil Engineering Co. Ltd, Civil Appeal No. 11 of 2002 (SC),*** described trespass [to land] thus:

"Trespass to land occurs when a person makes an unauthorised entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land." **[Emphasis added].**

Counsel for the defendants finally submitted that the upshot of the all the foregoing is that *"consent"* is a complete defence to any claim of trespass, whether the trespass is to land or person or goods.

"*Consent*" as a general defence to torts is explained by the learned authors of **Clerk & Lindell on Torts 22nd Edition (2018) at pages 242 to 243** thus:

*"**Consent and liability** "One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong". Consent on the part of the claimant, negating liability in tort may take two forms:*

(1).the claimant may authorise the doing of the act which would otherwise constitute an invasion of his interest. For example….; or

(2) the claimant may consent to assume the risk of a tort being committed (e.g. …).

The classic term volenti non-fit injuria (no wrong is done to one who consents) is sometimes used to cover both types of case…"

Learned Counsel for the Defendant further submitted that the said learned authors while discussing *defences to trespass to goods* stated at **page 1288** of their book **Clerk & Lindell on Torts 22nd Edition (2018)** that:

"***(e) Defences***

Consent and self-help. *Trespass to goods may of course be justified by the express or implicit consent of the possessor."*

They submitted that applying the above principles to the instant case, the Defendant led evidence, both in chief and through cross examination of the Plaintiff's witnesses, which proved that the Plaintiff did not only expressly consent to the Defendant's entry onto the Plaintiff's premises on which the pledged property is situate, but also consented in writing to the Defendant taking and/or seizing and foreclosing the Plaintiff's pledged property to recover the sums due from the Plaintiff under the loan availed by the Defendant to the Plaintiff.

That it is not disputed that the relationship between the Plaintiff and Defendant was that of borrower-lender and/or mortgagor-mortgagee. This relationship was created by contract, to wit, a Loan Agreement dated 07th March 2008 – **PExh.2**, the chattels mortgage dated 07th March 2008 – **PExh.7**., among other documents admitted on the Court record. These loan documents expressly authorised the Defendant to enter upon the Plaintiff's premises where the pledged/mortgaged/ charged property are and get access to the pledged property and further seize that pledged property. For emphasis, clause (I) at page 2 of the **PExh.7** provides:

"PROVIDED ALWAYS AND IT IS HEREBY MUTUALLY AGREED AND DECLARED as follows

(1) it shall be lawful for the Mortgagee or its agents/servants to enter upon the premises in which the property are or shall be and seize or take possession of the whole or any part thereof and after expiration of 14

days from the date of such seizing/taking possession to sell it either by public auction or private treaty without recourse to Court and for the purposes of this instrument the Mortgagor hereby appoints the Mortgagee or any receiver as its duly constituted agent and attorney with irrevocable powers in the same and on behalf of the Mortgagor to execute and do any assurances, acts or things and exercise all powers of the Mortgagee herein provided."

They argued that the person referred to as the mortgagee in the above clause is the Defendant (formerly Uganda Microfinance Ltd.). ***See page 1 of the Chattels Mortgage-Pexh.7.***

That contrary to the Plaintiff's claim in the suit the above-cited clause of **PExh.7** expressly provides that act(s) of entering onto the Plaintiff's premises and seizing or possessing pledged property and foreclosing pledged property that "*it shall be lawful*".

Further, that the fact that the Plaintiff gave the Defendant authority or consent to enter upon his premises and seize the property pledged to the Defendant was confirmed by Plaintiff's own witnesses in cross-examination, including **Nkuutu Muhammad, PW1**. Having given consent in writing to the Defendant to do what the Defendant did, it follows therefore that the Plaintiff's claim in trespass is not only misconceived but raises no cause of action against the Defendant. Consent being an affirmative and complete defence to the tort of trespass, the Plaintiff's suit ought to fail.

That the Plaintiff further sought to claim that the Defendant needed to obtain a Court Order to enter onto the Plaintiff's premises to seize the pledged property. In response thereto, the Defendant submits that, going by the loan documents executed by the Plaintiff himself, this claim is also misconceived and ought to fail.

That the Loan Agreement dated 07th March 2008-**PExh.2** *expressly* states at page 2 thereof that:

*"**Borrower's Obligations***

8. The ……..

9. The ……..

11. It is hereby agreed that if any of the moneys for the time being owing to the UML are not forthwith paid on demand or having payable without

demand, UML shall sell the Borrower's pledged property without recourse to court, by either private treaty or public auction, whichever UML deems necessary and the Borrower irrevocably gives his unconditional and complete consent thereto." **[Emphasis added].**

Similarly, that clause (I) at page 2 of the **PExh.7** provides for the power of the Defendant bank to sell *without recourse to court*. It provides:

> *"PROVIDED ALWAYS AND IT IS HEREBY MUTUALLY AGREED AND DECLARED as follows*:-
>
> *(1) it shall be lawful for the Mortgagee or its agents/servants to enter upon the premises in which the property are or shall be and seize or take possession of the whole or any part thereof and after expiration of 14 days from the date of such seizing/taking possession to sell it either by public auction or private treaty without recourse to Court and for the purposes of this instrument the Mortgagor hereby appoints the Mortgagee or any receiver as its duly constituted agent and attorney with irrevocable powers in the same and on behalf of the Mortgagor to execute and do any assurances, acts or things and exercise all powers of the Mortgagee herein provided."*

That according to clause 11 of **PExh.2** and clause (I) of **PExh.7**, it is very clear that the Plaintiff as mortgagor or grantor gave the Defendant as mortgagee or grantee the power to sell the pledged property *without recourse to court.* The phrase "*without recourse to court*" has severally been interpreted and applied by Courts to mean "*without applying to court for a court order*".

That in the case of ***Barclays Bank of Uganda v Livingstone Katende Luutu, SCCA No. 22 of 1993,*** the Supreme Court explained the effect of the "*power to sell without recourse to court*" thus:-

> *"The Bank did not require leave of court to realise its security since by the terms of the mortgage the mortgagor irrevocably expressly consented to the sale without recourse to court in event of failure to repay the loan."*

Similarly, in the case of ***Katusiime Elias v Arncy Holdings Limited, HCT-00-CC-MA-0272 of 2005 Yorokamu Bamwine J. (as he then was)*** while discussing the "*power to sell without recourse to court*" opined thus:

"It is trite that the right to sell can be exercised without recourse to Court where such a right is expressly reserved in the mortgage agreement. Otherwise, the sale must be conducted with the sanction of the Court. The law as I understand it is that if the mortgagee has the power of sale without a Court order, the Court has no power to order other remedy or post pone the sale. The only way the mortgagor can redeem his land would be to repay the loan."

Lastly, that a clause similar to clause 11 of **P.Exh.2** was considered in the case of ***Ssekandi Paul v Equity Bank Limited, Civil Suit 80 of 2012*** in which **Eva Luswata J.** held:

"In the instant case, the document executed by the plaintiff gave the defendant bank power to sell the pledge without recourse to court in case of default. Clause 11 of the loan agreement provided that;

"It is hereby agreed that if any of the moneys for the time being owing to the UML are not forthwith paid on demand or having become payable without demand, UML shall sell the borrower's pledged property without recourse to court, by either private treaty or by public auction, whichever UML deems necessary and borrower irrevocably gives his unconditional and complete consent thereto.''

There is evidence.....

In conclusion I find that, PEX 1 and 2 executed by the plaintiff gave the defendant power to sale the motor vehicle which was the pledge for the loan, without recourse to court in case of default, which was done. It was a lawful and proper sale and the second issue is thus resolved in favour of the defendant.

They submitted that in the instant case, the Plaintiff, in clause 11 of **P.Exh.2**, gave the Defendant power to sell the pledged property without recourse to Court; and that in light of the above explained legal position on "*sale without recourse to court*", the Plaintiff's argument that the Defendant should have obtained a Court Order in order to foreclose its security is misconceived.

In the premises, they invited the Court to find that the Defendant acted lawfully and within the terms of the **P.Exh.2** and **P.Exh.7** when it sought to foreclose the said pledged property without recourse to Court.

I have carefully analyzed this issue and I agree with the law on trespass as submitted upon by both counsel, it is clear that this is a case where the

Plaintiff pledged property in question and did so by consenting in writing to the Defendant taking and/or seizing and foreclosing the Plaintiff's pledged property to recover the sums due from the Plaintiff under the loan availed by the Defendant to the Plaintiff.

This was confirmed by Plaintiff's own witnesses in cross-examination, **Nkuutu Muhammad, PW1**.

The relationship between the Plaintiff and Defendant was a contract of borrower-lender and/or mortgagor-mortgagee and this is not disputed as it was evidenced by the Loan Agreement dated 07th March 2008 – **PExh.2** and the chattels mortgage dated 07th March 2008 – **PExh.7**.

I have had an opportunity to critically analyzed the said exhibits and it is not denied that they expressly authorised the Defendant to enter upon the Plaintiff's premises where the pledged/mortgaged/ charged property are and get access to the pledged property and further seize that pledged property. This was well cited by learned counsel for the Defendants in his written submissions and I see no need to repeat it here.

The above amounts to lawful entry and as such, since the fact that the Plaintiff gave the Defendant authority or consent to enter upon his premises and seize the property pledged to the Defendant which was clearly put down in writing, then under the law, there was no need for the Defendant to obtain a Court Order to enter onto the Plaintiff's premises to seize the pledged property.

Secondly, as rightly submitted by learned counsel for the Defendant, clause 11 of **P.Exh.2**, gave the Defendant power to sell the pledged property without recourse to Court.

Having found as I have, I agree with the submissions of learned counsel for the Defendant and add that the Defendant in this case cannot be found liable in trespass.

Issue 4: Whether the Plaintiff has a claim to US $ 30,000?

Learned Counsel for the Plaintiff / Counter Defendant argued that it was not disputed that the Defendants agents came to the Plaintiff's house and removed household items without giving any notice and without any court order and that Police only stopped them from carrying them away.

That **PW1** stated that he gave USD 30,000 to the Plaintiff for business in Dubai. **PW4** confirmed knowledge of this money being with the Plaintiff for his brother to be used in Dubai. That **DW1** did not present any contrary evidence except for stating that he was not present nor was he aware of the events of the day that the entry was made.

They prayed the court allows the Plaintiff's case and dismiss the counterclaim.

In reply, learned counsel for the Defendant submitted that it is the Defendant's case that the Plaintiff does not have a claim of US$30,000. The claim for USD 30,000 is as unbelievable as it is preposterous.

That **Section 101 of the Evidence Act, Cap. 6** provides the burden of proof of any claim lies with he who alleges; and submitted that the Plaintiff did not discharge the burden on him to prove the claim to US$30,000.

(a) Reliance on hearsay evidence

In respect of the above, they submitted that first, only **PW1** and **PW2** sought to testify about the purported claim of the USD 30,000. However, their evidence in chief relating to this purported claim of USD 30,000 is nothing but hearsay and is for that reason inadmissible and worthless. This is evident from their Witness Statements as well as their cross-examination by the counsel for the Defendant. That starting with **PW1** who was brought as the Plaintiff's star witness, he testified during cross examination about his knowledge of facts of the case stated in his witness statement thus:

"Katumba: Mr. Nkuutu I am correct that when the events that you talk about in your witness statement were happening you were not present?

PW1: Yes.

Katumba: Mr. Nkuutu again I am correct to say that the information you included in your statements was just told to you. Is that correct?

PW1: Yes.

Katumba: You did see this information?

PW1: No

Katumba: You did not hear this information?

PW1: I heard

Katumba: Leave alone when they were telling you and you were hearing. When it was happening you were not there to hear it?

PW1: I heard when it was happening.

Katumba: For example, when you say that the defendant's employees entered into the property of the plaintiff. Did you hear what they were saying when they were entering?

PW1: I was told what they were saying.

Katumba: So I am correct to say that when the events you are talking about were happening at that exact time you did not hear what was happening?

PW1: I did not hear.

Katumba: Mr. Nkuutu in your additional statement you say the plaintiff came back in August 2018 and told you the things you wrote in the additional statement. Is that correct?

Court:Where are you getting it?

PW1: Yes

Katumba: My lord it is para.4 of the additional statement.

Katumba: In para.4 you say that whatever you wrote in this statement was told to you by the plaintiff when he came back in August 2018.

PW1: Yes

Katumba: And I am correct to say that because he had not told it to you before, you could not put it in your 1st statement that you prepared because you did not know it.

PW1: Yes. "

Similarly, that the evidence of **PW2, Mwondha Baker Zivuga**, in paragraph 8 of his witness statement is hearsay and is inadmissible. Paragraph 8 states:

"8. The sum of money was USD 30,000 as we got to know from my cousin brother……"

During cross-examination on paragraphs 1 to 8 of his Witness Statement, **PW2, Mwondha Baker Zivuga**, who was very evasive was pressed by the

Court and he ultimately admitted that he was only told about the USD 30,000 and he neither saw it nor conceived it with his senses. For emphasis, **PW2** testified thus:

"Court: Let me help him. In paragraph 8 you say the sum was USD 30,000 as we got to know from my cousin brother.

PW2: That is true."

When pressed by Court to confirm whether he testifies in paragraphs 1 to 7 of his witness statement that he saw the USD 30,000, **PW2**, Mwondha Baker Zivuga, testified thus:

"Court: Mr. Mwondha. I want you to listen to the questions that are asked to you. Look at paragraphs 1 to 7. Show court where you say that you saw the money.

PW2: It is not there that I saw the money."

They submitted that **Order XIA rule 7(2) and paragraph 5 of Schedule 2 of the Civil Procedure (Amendment) Rules, 2019** provide that evidence by way of witness statements shall follow the same rules for taking oral evidence in court. One of the rules for taking oral evidence in Court is that the rule against hearsay evidence and that oral evidence must be direct.

That **Section 59 of The Evidence Act, Cap. 6** provides that oral evidence must in all cases be direct. So far as is relevant to this case, **Section 59** defines *"direct"* thus:

"59. Oral evidence must be direct.

Oral evidence must, in all cases whatever, be direct; that is to say—

(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it;

(b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he or she heard it;

(c) if it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he or she perceived it by that sense or in that manner;

(d) *if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds…"*

That it is trite that hearsay evidence is inadmissible and the Court ought to reject it and exclude it. In the case of ***Uganda v Bogere Banuli, High Court Criminal Session Case No. 0437 of 2010*** the Court opined that:

"This brings in the issue of hearsay evidence alluded to by the defence as stated above. Hearsay evidence is evidence which the witness is merely reporting and not what he himself or herself saw or heard or came under the immediate observation of his or her bodily senses, but what he or she learnt respecting the fact through the medium of a third person.

Hearsay evidence is inadmissible, and the court is under duty to exclude it from the evidence. Hearsay evidence which ought to have been rejected cannot be used as corroborative evidence. If the fact to be proved could be seen, heard, touched, tasted, or smelt, the testimony could be of that person who actually saw, heard, touched, tasted, or smelt it."

They submitted that in the instant case, the evidence adduced by the Plaintiff's to support the purported claim of USD 30,000 offends the rule against hearsay evidence. Pursuant thereto, the Defendant prayed that the Court rejects it and excludes it; and that the Court finds that the Plaintiff failed miserably to prove the purported claim of USD 30,000.

(a) Reliance on inconsistent and contradictory evidence

It was submitted that the Plaintiff sought to rely on the evidence of **PW1** and **PW2** to prove the claim to/of USD 30,000. However, the said evidence of **PW1** and **PW2** with respect to the alleged having of the USD 30,000 and the alleged taking/stealing of the USD 30,000 and the person who allegedly took/stole the money is gravely inconsistent and contradictory.

That in *paragraph 15 of his witness statement* **PW1** testifies that "*.. our cousin brother Mwondha Baker Zivuga confirmed seeing the Defendant's manager take the bag which contained the money in the course of his employment*". This is contradicted by **PW2**, Mwandha Zivuga, who testified in *paragraph 7 of his witness statement* that *"They off loaded the properties and put them back in the house and upon my cousin brother checking the bag which had the money, the US$ were missing"*.

Further, that it is not possible that in one instance a bag is taken and/or stolen but in the other instance it is available to be checked by the Plaintiff! Put differently, one cannot "*eat cake and then purport to claim to still have it*".

Additionally, and in further contradiction between the evidence of **PW1** and **PW2, PW2** does not testify anywhere of a "*defendant's manager*" taking any money. In fact, **PW2** does not testify anywhere that the Defendant or any of its officials took or stole any money from the Plaintiff. **PW2'**s evidence about the USD 30,000 is contained in *paragraphs 7 and 8 of his witness statement*, and cursory perusal of these paragraphs shows that they do not mention taking/stealing money nor do they mention the Defendant or any of its officials taking money. For emphasis *paragraphs 7 and 8 of PW2's witness statement* state:

"7. They off loaded the properties and put them back in the house and upon my cousin brother checking the bag which had the money, the US $ were missing.

8. The sum of money was USD 30,000 as we got to learn from my cousin brother and it had been given to him by Mr. Nkuutu Mohammed he is also my cousin brother for safe custody to be used by Mr. Nkuutu Mohammed to travel to Dubai."

They argued that clearly the above evidence does not say that the Defendant and/or any of its officials took or stolen money from the Plaintiff. Therefore, **PW1**'s evidence that **PW2** "*confirmed seeing the Defendant's manager take the bag which contained the money"* is a deliberate lie/falsehood. The above evidence of **PW2** coupled with the inconsistencies and contradictions between **PW1** and **PW2**'s evidence cast doubt as to whether the Plaintiff had the USD 30,000 as claimed and/or whether the alleged money was indeed stolen as alleged.

That it is settled law that a grave inconsistency and/or contradiction like the one in **PW1** and **PW2**'s evidence will result in the evidence of witnesses being rejected. The gravity of the inconsistency and contradiction depends on the centrality of the matter it relates to. In the instant case, we submit that the alleged taking or stealing of the alleged money is central to the matter of whether the Plaintiff had the alleged USD 30,000 as claimed and/or whether it was indeed stolen as alleged. Wherefore, we pray that the Court accordingly rejects the evidence of **PW1** and **PW2** on the issue at hand and rejects the Plaintiff's claim to USD 30,000.

That they are fortified in the above submission by the case of ***Kinalwa Fred & Angello Kasirye v Albert Banda Kamulegeya, CACA No. 217 of 2013*** in which the Court of Appeal dismissed the appeal on grounds that the Appellants' evidence was inconsistent and contradictory and thus incredible and unbelievable.

(b) Incredible and unbelievable evidence

Further to above, they submitted that the evidence of **PW1** and **PW2** was grossly discredited in cross-examination to the extent that it is not credible and is thus incapable of being believed. Hence, the purported claim of USD 30,000 remained unsubstantiated and unbelievable and it should fail.

That the Plaintiff's evidence on the claim to USD 30,000 is incredible and unbelievable because of all the Plaintiff's witnesses, none of them testified to seeing the alleged USD 30,000 or the person alleged to have stolen it. Secondly, none of Plaintiff's witness named the person alleged to have stolen the alleged money. Thirdly, while in para. 14 of **PW1**'s witness statement and in para. 6 of **PW2'**s Witness Statement it is said that there were Police Officers and bodyguards at the premises, no arrests were made of the persons it is alleged stole the alleged USD 30,000.

Fourthly, that the Plaintiff and/or **PW1** put no proof before Court whatsoever of existence of the USD 30,000, be it an acknowledgment of receipt of that money by the Plaintiff from **PW1**, or the source of that money by **PW1**, a complaint to Uganda Police of the alleged theft of the alleged money, arrest of the persons alleged to have stolen the alleged money, etcetera.

That it is not commonplace that money to a tune of USD 30,000 is stolen and no criminal complaint is made to the Police or the suspects are arrested and investigated.

Lastly, that while it is alleged that the USD 30,000 was to travel to Dubai, no evidence whatsoever was brought to prove this, be it a Visa or any other travel documentation. That the absence of all the above makes the Plaintiff's claim regarding the USD 30,000 incredible and unbelievable. Save for the bare statement that US$ 30,000 was stolen, no evidence whatsoever was adduced by the Plaintiff to prove the existence of this alleged US$ 30,000 and/or its theft.

(c) Defendant's uncontroverted evidence

It was submitted that the Defendant, through **DW1,** testified in *para. 32 of the DW1's witness statement* that the Defendant and/or any of its employees did not take any money from the Plaintiff's premises as claimed or at all. This evidence was not controverted by the Plaintiff in cross-examination.

That all in all, for all the reasons explained hereinabove, the Plaintiff does not have a claim of US$30,000; and invited the Court to find as such and determine issue 3 in the negative.

In resolving this issue, I will first delve into the evidence of **PW1** where he testified on **Pg.19-20 line 26-68** of the record of proceedings of 15/10/2020; **PW1 during cross-examination** testified that;-

"*.....FM: There is nothing to show that you had USD 30K to give to Plaintiff either from account.*

PW1: case was filed 10 years ago but there is.

PW1: NO.

FM: There is nothing to show that you were going to travel to Dubai for example air ticket.

PW1; Nothing

FM: There is nothing to show that you reported loss of USD 30K to anyone before court.

PW1: Personally I did not complain. It was not got from me. It was in the Plaintiff's possession do it as got.

FM: A report of theft is not part of the evidence by the Plaintiff-Theft by branch manager.

PW1: I do not have it here.

FM: I n your witness statement paragraph 15, is there police report of Mwodha Baker Zivuga.

PW1: M Not to my knowledge.

FM: You are owner of money not Plaintiff and you who owned money have not sued bank or lodged a complaint.

PW1: I have not.

FM: Because you are owner of money you are the right person entitled.

PW1: I am entitled through Mr. Kibeedi because I had no dealings with the bank and I have to get.

FM: Between you and Plaintiff owner of money entitled refund, you are entitled to.

PW1: Yes through him because it was got from him.

FM: In paragraph 11-15, Plaintiff came with police men and bank officials and people who saw the bank official did not tell the police officers.

PW1: Reported but this is what they told me. I have no factual knowledge.

FM: As businessman 30k is a lot of money and the fact that someone took money and they let them go away, is not conduct that is reasonable to show theft.

PW1: They might have reported. I do not agree that it is unreasonable.

FM: Which?

Court: Would you allow as a reasonable person, allow a thief to go.

PW: NO".

From the foregoing, whereas it is true that the Defendant /Counterclaimant's agents went to the Plaintiff/Counter Defendant's residence, it is clear that it was for the sole purpose of securing the chattels Mortgaged under the Chattels Mortgage Instrument between them and the Plaintiff.

I have not found any proof of theft as alleged by the Plaintiff/Counter Defendant as it is clear that all that he is relying on are unsubstantiated hearsay evidence which is not enough to satisfy court to the standard required by law. The evidence of both **PW1** and **PW2** as submitted by learned counsel for the Defendants and parts of which I have captured in this Judgement is indeed classified as hearsay evidence.

I therefore find it unbelievable and I did not find any iota of evidence to prove that there was an amount of USD 30,000 that was taken by the agents of the Defendants. The evidence clearly shows that the agents were arrested and stopped by Police at the scene and were stopped from taking away the properties they had come to get.

Since the evidence proves that Police was called in to arrest the situation before the agents had time to take the properties they had come to seize, it necessarily means that they were searched at the scene or soon thereafter as is the practice of Police when an arrest is made and whatever they may have picked would have been found on them at that point.

There is no evidence of this and to make matters worse, for the Plaintiff/Counter Defendant, given the huge amount of money involved allegedly stolen, it is surprising that there was no report of a Criminal case regarding it or any investigations about the culprits (who were clearly known and arrested from the scene) that has been led by the Plaintiff/Counter Defendant or any of his witnesses.

I therefore find that this is a baseless counter accusation as seen from the evidence above, which has not been supported by any evidence and I believe that this is merely alleged by the Plaintiff/Counter Defendant as a mechanism to down play his indebtedness to the Defendant /Counter Claimant.

To this end, this issue is answered in the negative.

Issue 5: What remedies are available to the parties?

Having resolved all the previous issues as I have, I have calculated the amount of the loan facility, what was repaid and what was realized after the sale by foreclosure and arrived at the following:-

The Plaintiff sought the following remedies;

a) Special damages for loss US$ 30,000 with interest rate of 27% per annum from 4/3/2010 until payment in full
b) General damages for the mental torture, inconvenience and embarrassment
c) declaration that the Defendants' act of impounding the vehicles without a court order was illegal and unlawful
d) That the Defendant accounts for the said vehicles.
e) That the Defendants declare the amount of loan balance due.
f) Costs of the suit.

In the Counterclaim, the Defendants/Counterclaimants sought the following remedies:-

a) Dismiss the Counter-Defendant suit and the Counter Defendants prayers sought with costs;
b) Enter Judgment against counter defendants for Ug.Shs.43,912,104.25/= and interest thereon until payment in full;
c) Grant Counter Claimant costs in the Counterclaim
d) Order any other relief that this Honourable Court shall deem fit

In view of my findings in respect of the previous issues in this case, I have already made a finding that **UGX 43,912,104.25/= (Uganda Shillings Forty Three Million Nine Hundred Twelve Thousand one Hundred Four Shillings and Twenty Five cents only)** and owing to the Defendant/Counterclaimant. Accordingly the Defendant/Counter Claimant is entitled to the said sum from the Plaintiff and therefore dismiss the Plaintiff/ Counter Defendant's suit.

The Plaintiff /Counter Defendants pay the amount due with the Principal interest rate of 3% per month from date of default till payment in full. In ***Haji Asuman Mutekanga vs Equator Growers (U) Ltd SCCA No. 7 of 95***, the Hon. Justice Musalu Musene (as he then was) defined general damages to mean;-

General damages consist, in all, items of normal loss which the plaintiff is not required to specify in his pleading in order to permit proof in respect of them at the trial" Its distinction from special damages was defined by Lord Wright in ***Monarch S.S. Co. v Karlshanus Oliefabriker (1949) AC, 196 at 221*** *as being:*

"Damages arising naturally (which means in the normal course of things) and cases where there were special and extra ordinary circumstances beyond the reasonable provision of the parties. In the latter event it is laid down that the special fact must be communicated by and between the parties."

With regard to proof, general damages in a breach of contract are what a Court (or jury) may award when the Court cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man".

See also *Prehn v. Royal Bank of Liverpool (1870) L.R. 5 Ex. 92 at 99-10*

The settled position is that the award of general damages is in the discretion of court, and is always as the law will presume to be the natural and probable consequence of the defendant's act or omission. **See: *James***

Fredrick Nsubuga v. Attorney General, H.C.C.S No. 13 of 1993; Erukan Kuwe v.Isaac Patrick Matovu & A'nor H.C.C.S. No. 177 of 2003 per Tuhaise J.

Also, in the assessment of the quantum of damages, courts are mainly guided by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered. **See: *Uganda Commercial Bank v. Kigozi [2002] 1 EA. 305***. A Plaintiff who suffers damage due to the wrongful act of the Defendant must be put in the position he or she would have been if she or he had not suffered the wrong**. *See: Charles Acire v. Myaana Engola, H.C.C.S No. 143 of 1993; Kibimba Rice Ltd. v. Umar Salim, S.C.C.A. No.17 of 1992.***

The party claiming general damages is expected to lead evidence to give an indication of what damages should be awarded on inquiry as the quantum. ***See: Robert Cuossens v. Attorney General, S.C.C.A No. 8 of 1999; Ongom v. Attorney General. [1979] HCB 267.***

In the instant case, the Plaintiff/Counter Defendant having acted in breach of the loan agreement and the Defendant/Counter Claimant has satisfactorily demonstrated that they suffered great inconvenience at the instance of the Plaintiff/Counter Defendant.

I therefore agree with learned counsel for the Defendant/Counterclaimant and find that they are entitled to general damages. In the circumstances of this case, the Defendant/Counter Claimant is awarded a sum of **UGX 20,000,000/= (Twenty Million Shillings)** as general damages, which I have found to be sufficient and adequate in this case in view of the economic situation to compensate the Defendant/Counter Claimant for the inconvenience and loss occasioned to him by the Plaintiff/Counter Defendant.

As for interest, it is awarded on the on the agreed rate in the loan agreement at 3% per month from the date of breach till payment in full.

Further interest of 5% is awarded as the general damages from the date of judgment till payment in full.

The Defendant/Counterclaimant is also awarded full costs of the suit.

In the result Judgment is entered for the Defendant/Counterclaimant in the following terms;

a) Award of the sums due and owing i.e. UGX 43, 912,104.25/= (Uganda Shillings Forty Three Million Nine Hundred Twelve Thousand one Hundred Four Shillings and Twenty Five cents only).
b) Award of General Damages of UGX 20,000,000/=.
c) Interest of 3% p.a on (a) as per the Loan Agreement in (a) from date of breach till payment in full.
d) Interest of 5% p.a on General Damages in (b) from the date of reading this Judgement till payment in full.
e) Costs of the suit.

I SO ORDER

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JUSTICE DR. WINIFRED N NABISINDE
JUDGE
07/03/2024

This Judgment shall be delivered by the Honorable Magistrate Grade 1 of the High Court Jinja attached to the Chambers of Justice Dr. Winifred N Nabisinde who shall also explain the right of appeal against this Judgment to the Court of Appeal of Uganda.

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JUSTICE DR. WINIFRED N NABISINDE
JUDGE
07/03/2024