

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL SUIT NO.149 OF 2013

BBAALE SAMUEL WAKULIRA:.....:PLAINTIFF

VERSUS

1. CAIRO INTERNATIONAL BANK LIMITED

2. COMMISSIONER OF LAND REGISTRATION

3. KYALIGONZA DAPHINE:.....:DEFENDANTS

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

This suit was first filed in the High Court Commercial Division under Civil Suit No.143/2013 and on March 26, 2013, it was referred to this division by the Registrar Commercial Division for reasons that it was wrongly filed in that division as it is a land matter.

The background of this matter is that, the Plaintiff a customer of the 1st Defendant bank under Account No. 12272 and a former proprietor of land comprised in Kyadondo Block 221 plot 1172 at Nalyako obtained a loan of Ushs 90,000,000/- only (*ninety million shillings*) on the security of the above mentioned land and a mortgage deed was executed between the Plaintiff and the 1st Defendant on May 28, 2010. That the Plaintiff then undertook to pay the said loan in 33 (*thirty three*) equal monthly installments of Ushs. 3,751,788 from August 28, 2010 to 28, April 2013. That in or about June or July 2011, the Plaintiff and the Defendant had a misunderstanding over the reconciliation of the exact balance on the Plaintiff's loan account which prompted the Plaintiff to seek recourse in the Chief Magistrates Mengo vide CS No. 2587 of 2011 which resulted in a consent judgment between the Plaintiff and the 1st Defendant wherein it was agreed that the outstanding balance on the Plaintiff's account as at January 28, 2012 was Ushs. 77,437,963/- only (*seventy seven million, four hundred thirty seven thousand, nine hundred sixty three shillings*) and also agreed that the Plaintiff should pay the said outstanding balance in two

instalments namely; - 20,000,000/- only (*twenty million shillings*) on or before April 30, 2012 and the balance on the principal and the accumulated interest to be paid within a period of 5 months (*five*) from April 30, 2012.

It was the Plaintiff's case that after paying the first installment, and in order to pay off the remaining balance, he sold off his land at Kawala and all the developments thereon which he before sale informed the 1st Defendant and also took the 1st Defendant's lawyer Ronald Oine in October 2012 in order to show his seriousness. That without any default on his part, the 1st Defendant through its lawyers *M/s Tumusiime, Kabega & Co. Advocates instructed Kanu Auctioneers & Court Bailiffs* to sell the suit land which was accordingly advertised in the New vision on Monday 8th October 2012. The Plaintiff avers that after selling his land at Kawala by an agreement dated December 18, 2012, he proceeded to pay the monies on his loan account at Bugolobi only to find that the account had been blocked/closed by the 1st Defendant with an intention that he fails to redeem the mortgage and enable the 3rd Defendant unknown to him, had purchased the suit land and paid a deposit of 30,000,000/- only (*thirty million shillings*).

The Plaintiff continues to state that in order to conceal their fraud, the 3rd Defendant hurriedly proceeded to register and transfer the suit land into her names with the help of the 1st and 2nd Defendants upon a void transfer on January 11, 2013, only a week after completing the purchase price. That the said transfer took place despite the closure of the land registry for business to the public and that the transfer was effected before the mortgage release and transfer instruments were duly declared by Uganda Revenue Authority on January 14, 2013. With this the Plaintiff pleaded connivance and collusion on the part of the officials of the land registry.

Further, that the 1st Defendant caused the suit land to be under-valued in order to complete their fraud so that the suit land is disposed of at a give-away price to the 3rd Defendant whom the Plaintiff claims was aware of the undervaluation. The Plaintiff states that the 1st Defendant deliberately blocked his account to facilitate its preconceived fraud with the 3rd Defendant so that the Plaintiff does not access the said loan account to settle the mortgage obligations and also fail to redeem the mortgage, that such unilateral closure of the loan account without notice to the Plaintiff is not only a breach of the banker customer (contract), but also a ploy calculated to defeat the Plaintiff's equity of redemption in relation to the suit land.

Further, that the transfer of the suit land is void in so far as the transfer instrument was not duly executed in accordance with the law and that the mortgage on the title was prematurely removed before the release instrument was declared to and cleared by URA. That after the purported transfer, the Defendants jointly and severally tried to evict the Plaintiff and his family from the suit land which caused him extreme suffering, loss, hardship, inconvenience, humiliation, embarrassment, and mental anguish. The particulars of fraud against the Defendants were spelt under Paragraph 9 of the plaint.

To prove his assertions, the Plaintiff attached the following pieces of evidence;- a copy of the certificate of title as annexure 'A', mortgage deed as annexure 'B', copy of the plaint in the Chief Magistrates Court Mengo as annexure 'C', a copy of the consent judgment/decree as annexure 'D', copy of the pay slips as annexure 'E', a copy of the advertisement in the new vision on 8th October/ 2012 as annexure 'F', copy of a sale agreement for land at Kawala as annexure 'G', copy of the sale of the suit land by the 1st Defendant to the 3rd Defendant as annexure 'H', payment of the balance by the 3rd Defendant as annexure 'I', copy of the release of the mortgage dated January 7, 2013 as annexure 'J', copy of a transfer to the 3rd Defendant as annexure 'K', a copy of acknowledgment receipt of declaration of release of mortgage as annexure 'L', acknowledgment receipt of declaration of instrument of release of mortgage as annexure 'M', the 1st Defendant's report of the valuer for the suit property dated November 7, 2012 as Annexure 'N', annexure 'O' is a copy of valuation done by the Plaintiff in March 2013.

The 1st and the 3rd Defendants filed their defences, but the 2nd Defendant did not appear to defend the suit.

It is trite that a party who after effective service on him/her fails to appear and defend the suit will be presumed to have put himself out of the jurisdiction of Court. See *Ssengendo versus Attorney General (1974) E.A 140*, since the 2nd Defendant (commissioner land registration) failed to enter appearance, it will be presumed that the 2nd Defendant put itself out of Court and the Plaintiff still had a duty to prove his case.

In its defence, the 1st Defendant admits to have advanced 90,000,000/- with interest repayable in monthly instalments of shs. 3,751,788/- starting the 28th April 2010 to the 28th April 2013 and also admitted the mortgaging of the suit property as security. That the Plaintiff made some repayments but defaulted on the schedule of repayment under the mortgage deed and that several

notices were issued and served on him, that subsequently, the suit property was advertised for sale in accordance with the mortgage deed. That the Plaintiff to frustrate the sale/redeem the property, he instituted CS No. 258 of 2011 in the Chief Magistrates Court Mengo which ended into a consent judgment and the Plaintiff was given more time to pay but he failed to pay

as agreed and that the property was re-advertised. That the suit property was sold to the 3rd Defendant after a fresh valuation has been carried out. The bank denies ever reaching any understanding with Plaintiff or its lawyers and avers that the Plaintiff at the time he attempted to make some deposits, the property had already been sold in a transparent and lawful process. The 1st Defendant denied any allegation of fraud and concealment on its part.

The 3rd Defendant in her defence denies any fraud as alleged and avers that she was only vigilant in acquiring the suit property, she claims to be the registered proprietor of the land having duly paid the entire consideration of 220,000,000/-, that she followed the due process of release of mortgage, paid all the due levies on transfer of property, stamp duty and registration fees and that the suit land was not encumbered by a caveat of the Plaintiff at the time of purchase.

The Plaintiff introduced 3 witnesses to wit; - **PW1** Bbaale Samuel Walakira, **PW2** Prossy Mukasa Bbaale, **PW3** Joseph Muhumuza.

The 1st Defendant only introduced 1 witness to which; - **DW1** Niwebwegamo Sckovick.

The 3rd Defendant proceeded by witness statements and introduced 2 witnesses who are; - **DW1** Joseph Mathew Cammusikky, **DW2** Kyaligonza Daphine.

During joint scheduling memorandum, the parties had no agreed facts nor issues, however, during submissions, the following issues were framed by each Counsel for determination by Court.

The Plaintiff's Counsel submitted on the following issues;-

1. Whether the transfer of the suit land is *void ab initio*?
2. Whether the transfer of the suit land is tainted by fraud?
3. Whether the 1st Defendant breached banker customer contractual relationship?
4. What remedies are available to the parties?

Issues raised by the 1st Defendant;-

1. Whether the suit is barred by res-judicata?
2. Whether the Defendant defaulted in the repayment of the loan and whether he has any action against the Defendants?
3. Whether the 1st Defendant lawfully sold the suit property to the 3rd Defendant?
4. Relief to the parties?

Issues raised by the 3rd Defendant;-

1. Whether the Plaintiff was in breach of making repayment under the mortgage agreement?
2. Whether the 3rd Defendant lawfully purchased the mortgaged property?
3. What remedies are available to the parties?

Although parties seem to raise different issues for determination, some of the issues look similar, therefore I will merge the issues as follows;-

- i. Whether the suit is barred by res-judicata?
- ii. Whether the transfer of the suit land is void ab initio?
- iii. Whether the transfer of the suit land is tainted by fraud? **or** Whether the 1st Defendant lawfully sold the suit property to the 3rd Defendant? **or**, whether the 3rd Defendant lawfully purchased the mortgaged property?
- iv. Whether the 1st Defendant breached banker customer contractual relationship?
- v. Whether the Defendant defaulted in the repayment of the loan and whether he has any action against the Defendants?

vi. What remedies are available to the parties?

Resolution of the issues;-

Issue 1

Whether the suit is a res-judicata?

On this issue, Counsel for the 1st Defendant submitted that, the Plaintiff filed Civil Suit No. 2587 of 2011 against the 1st Defendant challenging its foreclosure of the mortgage, that the Plaintiff admitted his breach of the terms of the mortgage deed through default and entered into a consent judgment with the 1st Defendant. That the Plaintiff cannot challenge foreclosure for the second time by filing a fresh suit when he had raised the same issue in the earlier suit. Further, that Section 7 of the Civil Procedure Act also bars this suit against the 3rd Defendant's liability because the 3rd Defendant's liability arises from the 1st Defendant's liability.

In reply, Counsel for the Plaintiff submitted that the issue of *res-judicata* was heard and dismissed by this Court in 2016 before the Plaintiff gave evidence in the presence of Counsel for both Defendants.

That raising *res-judicata* now after Court had overruled is not only an abuse of Court process but also barred by Section 7 of the Civil Procedure Act. It was Counsel's submission still that the cause of action in the earlier suit as per the plaint Exh D3 (4) is not the sale of the suit land to the 3rd Defendant, that the suit land was sold in December 2012 after the consent and that it could only be challenged after December 2012, that the sale could not have been a subject of the 2011 suit when it had not taken place.

Further, that the Mengo Court is not a competent Court to try both this suit and the earlier suit considering the loan amount shs. 90,000,000/- only (*ninety million shillings*) and the value of the suit land both exceed the pecuniary jurisdiction of a Chief Magistrate's Court of shs. 50,000,000/- only (*fifty million shillings*).

I will have to note that when the above matter came up for hearing on 7th July 2016, the trial judge ordered for the hearing of the preliminary objection indicated by defence. Counsel Mugabi Enoth for the 3rd Defendant said “*we withdraw the intended preliminary objection on point of res-judicata. We shall have it as one of the issues to be determined in the trial*”. With this statement, the preliminary objection was not overruled by Court but was only withdrawn at that moment to be later brought up during trial.

I resolve the issues as herebelow:

Section 7 of the Civil Procedure Act provides that;

“no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try the subsequent suit or the suit in which the issue has been subsequently raised and has been heard and finally decided by the Court”.

In *Karia & Anor versus Attorney General & Anor, (2005) EA 83, Tsekooko JSC* outlined the minimum conditions to be satisfied to rely on the doctrine of res- judicata namely;-

- i. *There must be a former suit or issue decided by a competent Court.*
- ii. *The matter or dispute in the former suit should be between the parties and must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.*
- iii. *The parties in the former suit should be the same, or parties under whom they claim or any of them claim, litigating under the same title.*

It is not in dispute that there is a former suit which was concluded by a consent judgment, however, Court has to determine whether the interests of the parties given the loan amount and the nature of the suit land could be determined by that Court to deliver a binding judgment on all the parties in this current suit. Was the Court having competent jurisdiction over the subject matter? In the case of ***Lt. David Kabareebe versus Maj. Prossy Nalweyiso CACA No. 4 of 2003***, the Court of Appeal held that *res-judicata* simply means nothing more than that a person cannot be heard to say the same thing twice over in successive litigation.

Under Section 207 (1) of the Magistrates Court Act, Cap 16 it provides that a Chief Magistrate shall have jurisdiction where the value of the subject matter in dispute does not exceed Ushs.50,000,000/- only and shall have unlimited jurisdiction in disputes relating to conversion, damages to property or trespass.

In ***Doreen Otto Oya & 4 Others Versus Owera William HCCA No. 36 of 2013*** Justice Mutonyi Margret had this to say about jurisdiction

“Jurisdiction of Courts is statutory and cannot be exercised by convenience. Jurisdiction exercised without statutory legal authority is invalid and whatever order granted or issued by the Court which is not vested with jurisdiction is null and void abinitio”.

For the plea of *res-judicata* to be sustained, it must be established that the former Court had jurisdiction to try both the former suit and the latter suit. The pecuniary jurisdiction of the Chief Magistrates Court is at 50 million, as noted earlier, the Plaintiff and the 1st Defendant entered into a loan agreement of Ushs.90,000,000/- only, (*ninety million shillings*) and the suit land was security for the loan, both the loan amount and the security were way beyond the jurisdiction of a Chief Magistrates Court. Moreover, in the consent judgment, it was agreed that the Plaintiff owed the 1st Defendant Bank Ushs. 77,437,963/- only (*seventy seven million, four hundred thirty seven thousand, nine hundred sixty three shilling*).

In the recent decision of ***Opedo Patrick & 16 others Versus Kiconco Medard, Civil Revision No. 33 Of 2018*** the trial judge had this to say;

“it is my considered view that the jurisdiction of the Court should not only be determined from the cause of action or value of the subject matter where it applies, but also the remedies sought from Court as well”.

I find that this suit is not *res-judicata* since the Chief Magistrates Mengo had no competent jurisdiction to try both suits, as such, the plea of *res-judicata* is overruled.

Issue 2.

Whether the transfer of the suit land is void abinitio?

On this issue, Counsel for the Plaintiff submitted that the vendor's signatures on the transfer are scribbled as opposed to Latin character in violation of Section 148 of the Registration of Titles Act, secondly, that the transfer and mortgage release instruments were lodged in the land registry on 7th January 2013 and registered on 11th January 2013, unstamped without paying stamp duty yet they attract stamp duty. That stamp duty was paid on January 14, 2013 after the transfer had been effected.

Counsel argues that it is illegal for any public officer to act upon, register or authenticate any instrument chargeable with duty unless the instrument is duly stamped, he relied on Section 42 of the Stamps Act Cap 342 to support his argument. Further, that since the impugned transfer contravenes Section 148 of the Registration of Titles Act and Section 42 of the Stamp Act, that it is illegal null and void ab initio and of no legal effect. Both Counsel for the 1st Defendant and the 3rd Defendant did not reply to this issue.

Upon perusing the transfer instrument admitted as Exh.D3 (14), the names of the vendors are not seen but rather scribbled. This is in opposition of Section 148 of the Registration of Titles Act which gives a requirement for instruments affecting land to be duly executed when the signature of each party to it is in Latin character, and it is a mandatory requirement.

In ***Fredrick Zaabwe versus Orient Bank Ltd & 5 Ors SCCA No.4 of 2006***. The guiding principle and rationale for attestation of instruments in Latin character pursuant to Section 148 of the Registration of Titles Act, were set out. *Katureebe JSC* (as he then was) held that;

“In my view the rationale behind section 148 requiring a signature to be in Latin character must be to make clear to everybody receiving that document as to who the signatory is so that it can also be ascertained whether he had the authority or capacity to sign. When a witness attesting to a signature merely scribbles a signature without giving

his name or capacity, how would the Registrar or anyone else ascertain that witness had capacity to witness in terms of section 147 of the Registration of Titles Act?"

Relying on the above principles and applying it accordingly, there is no doubt that the execution of the transfer instrument did not comply with Section 148 of the Registration of Titles Act hence transfer instrument was unlawfully executed. To add, there is no transliteration into Latin character of the signatures of the bank officials. Both the bank officials (vendors) and the purchaser merely scribbled signatures without including their names. This is greatly contrary to the mandatory requirements of the law and it cannot be condoned.

Secondly, it was the Plaintiff's case that the 3rd Defendant delivered unstamped transfer instrument and mortgage release to land office for registration on January 7, 2013, that the said instruments were registered on January 11, 2013 without stamps, that after being registered, the 3rd Defendant paid stamp duty on January 14, 2013.

In reply, Counsel for the 1st Defendant submits that the Plaintiff seeks to attack the process of registration as fraudulent, that he did not led evidence and no witness was called by the Plaintiff to prove that the land office was closed, and that the 3rd Defendant's documents were not stamped.

In *Yakoyada Kaggwa versus Mary Kiwanuka & Anor (1979) HCB 23*, it was held that an instrument on which duty is chargeable is not admissible in evidence unless that instrument is duly stamped.

According to the copy of the certificate of title, the encumbrance page shows that the mortgage was released on January 11, 2013 and the 3rd Defendant was registered on the suit land on the same day (11th January 2013), however, on the face of it, a copy of a receipt from Diamond Trust Bank shows that stamp duty was paid on the 14th/Jan/2013, these are 3 (*three*) days after registration of the 3rd Defendant on title had already been effected and the mortgage had been released.

Under Section 42 of the Stamps Act Cap 342, it provides that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of the parties authority to receive evidence, or shall be acted upon, registered, or authenticated by any such person or by any public officer, unless the instrument is duly stamped. (*Underlining is for emphasis*).

The act by the 2nd Defendant of registering the 3rd Defendant and releasing the mortgage thereon without duly stamped transfer and mortgage release instruments was in contravention of the above law which gives a mandatory requirement, I find that this was illegal.

In the English case of; *Napier versus National Business Agency Ltd (1951)2 ALLER 264.* Sir Raymond Evershed M.R. said at p. 266: that;

“There is a strong legal obligation placed on all citizens to make true and faithful returns for tax purposes and if parties make arrangements which is designed to do the contrary i.e. to mislead and to delay it seems to me, impossible for this Court to enforce that contract at the suit of one party to it.”

Further still, in *Sam Mubiru & Another versus Byensiba & Another (1985) HCB 106* Karokora J (as he then was) held that;

“The mode of acquisition of the Title deed in question was tainted with fraud and illegality because bona fide include without fraud or without participation in wrong doing.... The effect of its illegality was to prevent the first Plaintiff from recovering under the contract which he secured illegally. The Title procured by the first Plaintiff was therefore void because of fraud.”

In *Sinba (K) Ltd & Ors versus Uganda Broadcasting Corporation, SCCA No. 3/2014,* Court relied on *Kanoonya David versus Kivumbi & 2 Ors HCCS No.616/2003* for the principle that an illegality vitiates the transfer of title with the result that the sold property remains the property of its owner, in this case, the property cannot vest in the owner and at the same time in the purchaser the 2nd Defendant.

I find that the 2nd Defendant never passed to the 3rd Defendant good title since it was obtained through violation of the law.

I therefore answer this issue in the affirmative.

Issue 3.

iii) Whether the transfer of the suit land is tainted by fraud? or Whether the 1st Defendant lawfully sold the suit property to the 3rd Defendant? or whether the 3rd Defendant lawfully purchased the mortgaged property?

It was Counsel for the Plaintiff's submission that the 1st Defendant prematurely instructed Kanu Auctioneers to sell the suit land 2 days before the Plaintiff's due date for payment under the consent judgment.

I have noted Counsel's submission as regards the consent judgment, but in view of my finding, all proceedings related to the consent judgment vide CS No 2587 of 2011 at the Chief Magistrates Court at Mengo were a nullity for want of jurisdiction.

It was Counsel for the Plaintiff's submission still that the 1st Defendant together with its lawyer deceived the Plaintiff to go ahead and sell his alternative land at Kawala to pay off the loan balance without telling him that Cairo bank had already given instructions to sell the land.

Under paragraph 6 (a) of the 1st Defendant's WSD, it avers that it was after the suit property was re-advertised for sale that the Plaintiff started making endless promises and that no specific agreement or understanding was ever reached with him and the bank or its lawyers.

I note that, the claims by the Plaintiff that he went to the 1st Defendant and together with the 1st Defendant's lawyer visited the alternative land and convinced him to sell it so that he could clear the loan balance has not been ably denied by the 1st Defendant. Section 59 of the Evidence Act gives the basis for oral evidence to be direct, therefore, by action to advertise the suit property

and subsequently sell it off well aware that the Plaintiff was also selling another land at Kawala intended to settle the loan debt was contrary to the oral agreement entered into by the 1st Defendant Bank and the Plaintiff.

Indeed, according to 'PE7' the land at Kawala was sold on December 18, 2012 at shs. 54,000,000/- only (*fifty four million shillings*), five days after the suit land was sold to the 3rd Defendant on December 13, 2012 in instalments. This was an act of deceit by the 1st Defendant intended to defraud the Plaintiff.

In addition to the above, a mortgagee has a duty to take reasonable care to obtain the true market value of the property at the time of sale. It was the Plaintiff's submission that the land was sold at a low price, that Exh.P2 shows that the market value is shs. 400,000,000/- only (*four hundred million shillings*) yet it was sold at paltry Ushs. 220,000,000/- only (*two hundred twenty million shillings*).

In reply, Counsel for the 1st Defendant contends that the valuation report by professional consultants and surveyors gave a market value of Ushs. 350,000,000/- only (*three hundred fifty million shillings*) and a mortgage value of Ugsh 210,000,000/- only (*two hundred ten million shillings*). That comparing it with the Plaintiff's valuers who gave a market value of 400,000,000/-, that the difference of 50,000,000/- only on this property cannot be taken as an undervaluation.

Further, that the Plaintiff accepted professional consultants and surveyor's value of Ushs. 350,000,000/- only (*three hundred and fifty million shillings*) and took the loan of Ushs. 90,000,000/- only (*ninety million shillings*) based on the said valuation of the 1st Defendant without complaining, that he should not be heard to complain about the value of the property after his default and after the property has been sold to the 3rd Defendant

It is trite that securities are valued before lending, see *Mathiya versus Housing Finance Company of Kenya and another [2003] 1 EA 133* and they are also valued in case of default to

assess the current market price before any sale. Counsel's argument that the Plaintiff accepted professional consultants and surveyors value of Ushs. 350,000,000/- and took the loan of Ushs. 90,000,000/- based on the said valuation of the 1st Defendant without complaining is baseless.

In the case of **Greenland Bank Ltd (in Liquidation) versus Wasswa Birigwa HCCS No. 26 of 2004** Hon. Justice Egonda-Ntende held that;-

'In effecting the sale of the mortgaged property the mortgagee or his agents are under a duty to act with reasonable care. The duty is not to sale the mortgaged property at the best price possible but at a reasonable price. In that case he found that the Plaintiff/mortgagee acted negligently in failing to obtain a pre-sale valuation of the property and proceeding to sell the same by private treaty without the benefit of competition that a public auction provides'.

Also in **Epaineti Mubiru versus Uganda Credit and Savings Bank HCCS No. 567 of 1965** cited with approval from **Jeane Frances Nakamya Versus DFCU Bank Ltd & anor CS No. 813 of 2007**, Ssekandi J noted that;

'if Lord Atkin neighbor principle is applied, there is proximity between the mortgagee and the mortgagor which gives rise to a duty to take reasonable precautions in the conduct of the sale so as to obtain the true market value from the property'.

Further, that the mortgagee must not only act in good faith but also act as a reasonable man would behave in the realization of his own property so that the neighbor may receive credit for fair value of the property sold.

I hold that the 1st Defendant failure to revalue the suit property before sale and sold the Plaintiff's property basing on the valuation report acquired at the time of getting a loan given the fact that land continues to appreciate in value each day, the 1st Defendant acted in bad faith to defraud the Plaintiff of his land. According to a valuation report admitted as PE 2, the suit property was valued at 400,000,000/- only (*four hundred million shillings*) at the time.

Further, it was Counsel for the Plaintiff's submission that the 3rd Defendant did not bother to meet or talk to the Plaintiff who was in possession of the suit land that they only met for the 1st time in this Court. Counsel contends that failure or refusal to make inquiries from the person in possession is constructive fraud.

In answer to this, Counsel for the 1st Defendant contends that the 3rd Defendants under Section 29 of the Mortgage Act is not under such obligation where he/she has purchased the property from a mortgage under Section 26, mortgage Act.

It has to be noted that due diligence is a requirement of law under Section 201 of the Registration of Titles Act Cap 230 also in the case of *Nabanoba Desiranta & Another versus Kayiwa Joseph & Another, HCCS No. 496 of 2005* quoting the case of *UP&TC versus Abraham Katumba [1997] IV KALR 103*, it was held that as the law now stands, a person who purchases an estate which he knows to be in occupation and use of another other than the vendor without carrying out the due inquiries from the persons in occupation and use commits fraud. And negligence to conduct a search shows lack of good faith (see *Lusweswe Robert versus G.W. Kasule & Anor (1987) HCB 65*).

To add, I do not agree with Counsel for the 1st Defendant's submission that the 3rd Defendant was not under obligation to do due diligence, in such a transaction, a search is done to find out whether the mortgage was duly executed (*Fredrick Zaabwe (supra)*), whether the mortgaged land is that in question, who is in occupation among others. Due diligence is a very important aspect, had the 3rd Defendant done the required due diligence, she would have discovered that the Court from which the consent judgment which was the basis of sale to her did not have jurisdiction to deal with the dispute surrounding the mortgage and the suit land.

Issue 4.

Whether the 1st Defendant breached banker customer contractual relationship?

It was the Plaintiff's case that the 1st Defendant bank had no right in law and fact to block the Plaintiff from operating his account with the bank. That it had no right to allow the third party to

access and operate the Plaintiff's account without his permission. That a customer has a right to deposit monies on his account and the bank has no power to stop him from doing so.

In reply, Counsel for the 1st Defendant contends that there was no evidence led by the Plaintiff whether by letter or electronic mail to prove that fact and that no dates were given as to when he was prevented. That in any case, he had already defaulted in contempt of the terms of the consent judgment. I find this statement an admission of the fact that the Plaintiff account was block because he was in default.

It was the Plaintiff's allegation that the bank breached its duties as banker to customer when the bank without the customer's consent blocked him from accessing his account. It is not in dispute that the Plaintiff has a bank account with the 1st Defendant and the 1st Defendant has been offering the Plaintiff financial services.

In *Grace Patrick Mukubwa*, in his *Essays in Africa Banking Law*, he noted that the relationship of banker customer relating to the carrying out of the customer's payment instructions, dealing with securities deposited with the bank and the way the bank handles information concerning the affairs of the customer.

The Plaintiff argues that the 1st Defendant blocked him from accessing his bank account after he had sold his property at Kawala on 18th December 2012 to settle the loan, however that the 3rd Defendant was not able to access the account when she paid Ushs.30,000,000/- only (*thirty million shillings*) on 13th December 2012 and later paid 190,000,000/- only (*one hundred ninety million shillings*) on 02 January 2013. To prove his case, the Plaintiff attached a sale agreement of the Kawala land dated December 18, 2018 as proof that he had sold his property and that he had money at that time.

It is my view that since the 3rd Defendant had not paid the full amount of 220,000,000/- only (*two hundred twenty million shillings*) as at 13th December, 2012 but had only paid an instalment of 30,000,000/- only (*thirty million shillings*) the Plaintiff still had a chance of redeeming his property since the balance of 190,000,000/- only (*one hundred ninety million shillings*) was paid on 2nd January 2013 and the Plaintiff had all the money by 18th December 2012. By blocking the Plaintiff from accessing his account yet the purported purchase had not even deposited the loan

amount due to the Plaintiff's loan account, the 1st Defendant acted mal-fide and in breach of the customer/banker relationship.

Guideline 6 (7) (a) of the ***Bank of Uganda Financial Consumer Protection Guidelines*** provides that where a customer has a bank account or loan account with a financial service provider, the financial service provider shall provide the customer with statements of his/her or loan account showing what transpired since the last statement that affected the account of the customer, including balance changes, payments, disbursements and costs.

To this end, the 1st Defendant breached its duty when it blocked the Plaintiff's account without his knowledge, and though the Plaintiff was in default which fact he admits, the 1st Defendant could not deny him access of his account without prior notice. Guideline 6(10) (*supra*) is to the effect that a financial service provider shall not close an account of a customer without giving the customer 14 days' notice from the date of receipt of such notice.

The bank also had a duty to notify the borrower/Plaintiff of the intention to foreclose within a specific period of time before advertising the property for sale for the second time. The bank is faulted for this failure.

Remedies.

- i. The sale and transfer of the Plaintiff's land was illegal *null* and *void*.
- ii. The Registrar of titles to cancel the transfer and ownership of the suit land in the names of Kyaligonza Daphine.
- iii. The Registrar of titles to restore the ownership of the suit land to the Plaintiff.
- iv. Permanent injunction.
- v. General damages.

This Court is also aware that;

“In 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 versus Kigozi [2002] 1 EA 305** and that;-

“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. **Uganda Revenue Authority versus Wanume David Kitamirike; CA 43 of 2010.** It was Counsel for the Plaintiff’s submission that the 1st Defendant misled the Plaintiff to pay off the loan balance and he sold his property at Kawaala cheaply at 54,000,000/- only (*fifty four million shillings*) far below its market value. The Court therefore finds as herebelow:

i) General damages:

The general principle is that damages are compensatory in nature. The entire saga was orchestrated by the 1st Defendant. It’s only fair that the 1st Defendant reimburses the Plaintiff and also makes good 3rd Defendant’s loss.

The Court is not given guidance on how much damages are suitable, save that they were pleaded. However, in view of the time lost by the Plaintiff, the loss incurred in selling another property to redeem another, only to be frustrated by the 1st Defendant, Court considers General damages of shs. 50,000,000/- only (*fifty million shillings*) as sufficient to be paid by the 1st Defendant.

ii) Exemplary Damages.

The Court also awards shs. 20,000,000/- only (*twenty million shillings*) as *exemplary damages for the pain and suffering by the Plaintiff to be paid by the 1st Defendant.*

iii) Re-imburement;

The 1st Defendant should also re-reimburse to the 3rd Defendant the amount received from the illegal sale of the Plaintiff’s property.

iv) Costs:

The Plaintiff is awarded costs of the suit.

v) Interests:

Interest allowed at a Court rate from the date of Judgment till payment in full by the 1st Defendant.

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Henry I. Kawesa

JUDGE

10/07/2019

10/07/2019:

Kiiza Moses Kikomeko for Daphine Kyaligonza.

Kabafuzaki Brian for Cairo International Bank.

No representation of 2nd Defendant.

Kiiza:

I have instructions from Enoth Mugabi to represent them. We are ready to receive the Judgment.

Court:

Judgment is ready and is duly communicated to the parties above.

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Henry I. Kawesa

JUDGE

10/07/2019

Right of Appeal explained.

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Henry I. Kawesa

JUDGE

10/07/2019