

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL SUIT NO.2193 OF 2016

1. LEGIA SIKUBWABO MUKIA

2. ATTITUDE

LIMITED=====PLAINTIFFS

VERSUS

HOUSING FINANCE BANK =====DEFENDANT

BEFORE: JUSTICE GODFREY NAMUNDI

JUDGMENT

The Plaintiffs brought this suit against the Defendant bank seeking orders for;

- a) A declaration that the purported sale of the property comprised in Block 257 Plot 672 and Block 257 Plot 973 land at Munyonyo acquired through a mortgage loan was illegal and unlawful and for which the Plaintiffs are entitled to restitution,
- b) A declaration that the bank acted in breach of contract when it converted a personal house mortgage of the 1st Plaintiff to a business loan for the 2nd Plaintiff without authorization thereby compelling the 1st Plaintiff to sell it at Ugx 500,000,000/= and for which the Plaintiff is entitled to restitution,
- c) A declaration that the bank acted in breach of its fiduciary trust and contract against the Plaintiffs for which the Plaintiffs are entitled to general damages,
- d) A declaration that the Plaintiff is not indebted to the bank,

- e) An order that the mortgage instruments endorsed on the securities be cancelled there from,
- f) An order that the Plaintiffs be handed over the securities comprised in Kyadondo Block 248 Plot 586 Kawuku held by the bank,
- g) A permanent injunction against the Defendant against the intended sale of property comprised in Kyadondo Block 248 Plot 586 at Kawuku,
- h) special damages,
- i) interest
- j) costs of the suit.

The plaint sets out the facts constituting the cause of action as;

That sometime in March 2011, the 2nd Plaintiff was manipulated to enter into an overdraft and term loan facilities with the Defendant for allegedly Ugx 1,056,000,000/=.

The 1st Plaintiff under the said facility pledged her titles viz Bukoto Plot 11 Middle close Kampala, Kyadondo Block 257 Plot 672 at Munyonyo, Kyadondo Block 248 Plot 586 at Kawuku and Kyadondo Block 257 Plot 673 at Munyonyo upon which the defendant bank created legal mortgages.

That the said facility was also secured by a debenture of Ugx 231,000,000/= over the 2nd Plaintiff's fixed and floating assets and the 1st Plaintiff's personal guarantee for the same amount. The purpose of the said facility was to finance the Plaintiffs' working capital requirement which was a hoax.

The Defendant executed a mortgage for a commercial short term loan in consolidating the long term loan mortgage whose agreement was not terminated and out of the purported Ugx 1,056,000,000/= the Plaintiffs only received about Ugx 180,000,000/=.

Further, that the loan which was obtained under the mortgage worth Ugx 260,000,000/= was irregularly consolidated as working capital.

That the Defendant forced the Plaintiffs to start selling off the securities and forced them to accept prices below the forced sale values. That the Defendant bank also wrongly advised the Plaintiffs to agree to enter a contract of sale of the mortgaged property that Kyadondo Block 257 Plot 672 and 973 at Munyonyo to the Bank itself. The 1st Plaintiff under duress and coercion has since handed over the title and possession of the said property, a warehouse to the Defendant.

The Defendant filed a written statement of defense in which it contends that the Plaintiff is not entitled to the remedies sought and will be put to strict proof. The Defendant also counterclaimed for;

- a) An order for the payment of the outstanding loan amount of Ugx 548,901,337.81/=.
- b) Interest thereon at the rate of 25% per annum from 16th June 2014 until payment in full,
- c) General damages
- d) Costs of the suit.

In reply, the Plaintiffs aver that they received in cash about Ugx 180,000,000/= out of the alleged total loan facility which was all paid off by the deposits into the account. Secondly that by the time the 2nd Plaintiff's property comprised in Kyadondo Block 248 Plot 586 at Kawuku was advertised, the Plaintiffs were not in default. Furthermore the Plaintiffs deny any misuse of the loan facility.

That the Defendant purported to have availed the Plaintiffs Ugx 1,056,000,000/= yet the Plaintiffs actually received Ugx 180,000,000/= which was supposed to be used to finance the facility at 20% interest rate and therefore no working capital was extended as agreed in the loan agreement.

In respect to the counterclaim, the Defendants / Counter Plaintiffs contend that they are not indebted to the Plaintiff / Counter Defendant as claimed in the counter claim and in the alternative but without prejudice to the above, the Defendants / Counter Plaintiffs shall aver that they claim Ugx 996,000,000/= from the Plaintiff / Counter Defendant.

The issues will be addressed in the order as submitted upon by the counsel in their submissions;

1. Whether the Defendant bank was in breach of its fiduciary trust and duty/obligations in dealing and transacting with the Plaintiffs under the terms of the loan and mortgage contracts
2. Whether the Defendant disbursed to the Plaintiffs the loan facility of Ugx 1,056,000,000/= as agreed in the letter of offer/overdraft agreement of 23rd March 2011
3. Whether the Plaintiffs breached the repayment terms of the loan facility of Ugx 1,056,000,00/= extended to them and owe the Defendant an outstanding loan balance of Ugx 548,901,337.81/= as at 16th June 2014.
4. Whether the sale of the Plaintiffs' property at Bukoto Plot 1 Middle close Kampala was unlawful and irregular and if so whether the Plaintiff is entitled to restitution of its value.
5. Whether the Defendant's purchase of the warehouse comprised in Mailo register Kyadondo Block 257 Plot 672 together with land adjacent to Block 257 Plot 673 at Munyonyo from the 1st Plaintiff was lawful.
6. Whether the Defendant is entitled to the counterclaim for the outstanding loan balance and whether the Defendant is entitled to sell the mortgaged land and property comprised in Mailo register Kyadondo Block 248, Plot 586 at Kawuku to recover its outstanding loan balance.
7. What remedies are available to the parties.

Considering that issue 3 and 6 are related, I shall address them together.

Issue No. 1

Whether the Defendant bank was in breach of its fiduciary duty/obligations in dealing and or transacting with the Plaintiffs under the terms of the loan and mortgage contracts.

In paragraph 4 (a) of the Plaint the Plaintiffs plead that sometime in March 2011, the 2nd Plaintiff was coerced and manipulated to enter into an overdraft and term loan facilities with the Defendant for allegedly Ugx 1,056,000,000/=.

In her testimony, PW1 stated that a sales representative of Housing Finance Bank, Mary Kansiiime approached her and lured her that Housing Finance Bank would support her to expand her business and bring in more containers with support of Ugx. 1.2 billion. That the purpose of the money was to facilitate moving capital for her business. She further stated that the Defendant gave her a letter of offer of Ugx 1,056,000,000/=.

She also testified that her long term house mortgage was moved from 20 years to 3 years. She stated that she was paying Ugx. 3,400,000/= to Housing Finance Bank and similar amount to Standard Chartered Bank per month but after the consolidation had to pay Ugx 30,000,000/= per month way above her capability.

In cross examination, PW1 stated that Housing Finance Bank promised it would give her money for six containers.

PW1 in re-examination stated that Mary Kansiiime gave her the form to fill and apply for Ugx. 1,200,000,000/= and that she filled and signed the form. She further stated that the marketing agent offered consolidation of Ugx. 500,000,000/= and a short term loan from Standard Chartered Bank of Ugx. 84,000,000/=. She emphasized that she expected to use the balance out of the Ugx. 1,200,000,000/= to capitalize her business

but the offer letter instead came with Ugx. 1,056,000,000/=. It was her testimony that the money available after the deduction was only Ugx. 176,000,000/= which was not enough for her business.

DW1 stated they offered two facilities that is a term loan for three years at Ugshs 825,000,000/= and an overdraft facility for Ugshs 231,000,000/= for twelve months. He also stated that the key terms were an interest rate of 20% on Ugx. 825,000,000/= payable in equal installments for three years and the overdraft was at 20% interest for twelve months. He also testified that the installment for the loan was about Ugx. 31,000,000/= per month and that the Plaintiff accepted the facility and signed off the letter of offer, the loan agreement and the overdraft agreement.

DW1 admitted on cross examination that the purpose in the business application form was to consolidate in one bank and have better cash flow.

Counsel for the Plaintiffs submitted that the bank acted in breach of its fiduciary trust and contract against the Plaintiffs. Counsel relied on the case of **AVI Enterprises Vs Orient Bank Ltd & Anor HCCS No.147 of 2012** for the proposition that a banker/customer relationship is based on contract law and the terms are implied by banking practice. It was not a contract which was ordinary but with extended liabilities in offering other services such as collecting services. Liabilities for other services are based on other relationships such as the duty of care and principal/agent relationship.

Counsel also cited the case of **Woods Vs Martins Bank [1959] 1QB 55** where it was held that it was within the scope of the bankers business to advise them with reasonable care and skill.

Counsel further submitted that the defendant purported to lend money to the Plaintiff as working capital yet the large sum was used to buy off loans from other banks. Counsel referred to the testimony of PW1 where she stated that she was approached

by one Mary Kansiime an employee of the Defendant bank who liked her transactions and promised to secure for PW1 about Ugx 1,200,000,000/= to enable her get enough working capital after consolidating all the loan facilities in the Defendant bank.

Counsel referred to the **Advanced Learners Dictionary 7th Edition 2010** for the definition of proactive selling as *“a policy of controlling a situation by making things happen rather than waiting for things to happen and then reacting to them.”*

Counsel pointed to Exhibit D3 the Plaintiffs’ application for the loan in which the Plaintiff applied for Ugx 1,200,000,000/= as working capital to consolidate in one bank and have a better cash flow according to the purchase of the facility/brief description of the project for the facility applied for.

It was counsel’s contention that the Defendant’s marketing agent who became the 1st Plaintiff’s relationship manager promised to avail the Plaintiffs with adequate working capital of about Ugshs 480,000,000/- to 500,000,000/= if the agreed amount was approved of Ugx 1,200,000,000/= as promised by the said relationship manager.

However only about 170,000,000/= was advanced as working capital and no further capital was provided to the Plaintiff to be able to pay the fixed monthly loan repayment installment of Ugx 30,000,000/= per month. He cited the case of **AVI Enterprises (supra)** for the proposition that a bank is liable for the actions of the officer of the bank who misled the Plaintiff/ customer.

In reply counsel for the Defendant submitted as follows;

The defendant bank did not breach any duty as it professionally dealt with the plaintiffs as it does with any other person that approaches it for a financial facility. He emphasized that the contract documents respectively, the letter of offer/overdraft agreement, exhibit P2, the loan agreement, exhibit P1 and the mortgage deed, exhibit

P3 all pointed to the contractual nature of the relationship between the Plaintiffs and the Defendant bank.

Counsel submitted that none of the documents or their recitals said or suggested that the Defendant was a financial advisor. The Defendant is licensed under the Financial Institutions Act 2004 and conducts financial institutions business which is defined under section 1 of that Act.

He further submitted that advising on financial matters was and is clearly not part of the business of the Defendant bank and that the central bank had not also under any instrument prescribed giving of financial advice as the business of financial institutions.

He also contended that the authority of **AVI Enterprises Ltd v Orient Bank** cited by counsel for the Plaintiffs to buttress their allegations supports the Defendant's case.

Counsel argued that the Plaintiffs disclosed in their facility application, exhibit D3 that they wished to consolidate themselves in one bank and that a higher installment payment was a natural consequence of the consolidation. Counsel stated that the Plaintiffs tried to link their fate on their relationship manager by putting her in the position of a financial advisor and yet this was not part of her duties as outlined by DW1 her then supervisor.

Counsel further argued that in their pleadings and evidence on record, the Plaintiffs acknowledged that they understood and appreciated the kind of arrangement which they had entered into.

In conclusion, counsel submitted that whereas the Plaintiffs blame their failure on the Defendant and thus the allegation that it breached its duty of care, this was far from the truth. He referred to Exhibits P8, P10, P11, D19, D20 and D21 as the evidence of the actual reasons the Plaintiffs attributed to their failure.

In rejoinder, counsel for the Plaintiff submitted that the businesses listed by the Defendants under the Financial Institutions Act all imposed a duty of care to their customers in dealing with them to conduct such businesses.

Counsel argued that the **AVI Enterprises** case was decided in favor of the Plaintiff customer therein and the Defendant bank was ordered to release the security held. Counsel pointed out that the dismissed claim only related to vicarious liability of the bank in as far as theft by its employees was concerned.

I have carefully considered the evidence adduced by the parties and the submissions of counsel in regard to this issue.

The Plaintiffs' case is that the consolidation of the earlier loans into the new loan terms led to high interest rates which reduced the available working capital and that this was a manipulation by the Defendant bank. Their argument is that they were not made aware of the consolidation of the 20 year house mortgage into the three year loan terms and the resultant high monthly interest payment of Ugx 30,000,000/= at the time of negotiations with the said Mary Kansiime.

The general legal relationship of bank and customer is a contractual relationship. In **Edward Thomas Foley Vs Thomas Hill and others (1948) 9ER 1002** the court stated that a banker/customer relationship is based on contract law and the terms are implied by banking practice.

The relationship being contractual in nature, it may therefore be said that a bank has a contractual duty to its customer to exercise reasonable care and skill. In **Karak Brothers Company Ltd Vs Burden (1972) All ER 1210** the court stated;

“A bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard

applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely.”

I am of the view that it does and this placed a duty on the defendant through their agent to act with skill and care during the negotiations with the Plaintiffs.

Where a skilled or professional person agrees to render certain services to his client in return for a specified or reasonable fee, there is at common law an implied term in law that he will exercise reasonable skill and care in rendering those services. **(See case of Go Dante Yap Vs Bank Austria Creditansalt AG [2011] SGCA 39)**

In her testimony PW1 stated that the marketing agent approached her and promised to help her secure about Ugx 1,200,000,000/= to enable her get enough working capital after consolidating all the loan facilities in the defendant bank. She also stated in re-examination that the said marketing agent offered consolidation of Ugx 500,000,000/= and a short term loan from Standard Chartered bank of Ugx 84,000,000/=.

The marketing agent Mary Kansiime held out as a person whose services can be relied on as one with the requisite skill or abilities to make careful enquiry and to give information and advice on the basis to the clients and therefore a duty arose. She ought to have availed sufficient information to the Plaintiffs as to the proper nature of the arrangement they were about to undertake since she was bound to exercise reasonable care and skill at this stage of the transaction.

Counsel for the defendant argued that the Plaintiffs disclosed in their facility application, exhibit D3 that they wished to consolidate themselves in one bank and that a higher installment payment was a natural consequence of the consolidation.

This poses the question as to whether the consolidation of a 20 year mortgage into a 3 year loan as an implied term in this contract between the Plaintiffs and the Defendant

bank passes the test set down in the case of **Southern Foundries (1926) Ltd Vs Shirlaw [1939] 2 KB 206**

In the said case, the court developed a technique for determining if an unexpressed condition was implied at the time a contract was drawn. Mackinnon LJ stated :

“Prima facie that which in any contract is left to implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common “Oh, of course!”

I believe something of this nature ought to have been elaborated upon by the bank’s agent Mary Kansiime since it greatly affected the essence of the transaction between the Plaintiffs and the bank.

The consolidation of the 20 year mortgage into the new loan terms resulting into the high interests rates was not proper since the bank through their agent had failed to exercise reasonable care and skill during the negotiations pertaining to the arrangement.

This issue is answered in the affirmative.

I find it important to point out that the Central Bank through the Bank of Uganda Consumer Protection Guidelines 2011 seeks to impose a similar duty of skill and care on financial institutions.

Issue No. 2

Whether the Defendant disbursed to the Plaintiffs the loan facility of UgShs 1,056,000,000/= as agreed in the letter of offer/overdraft agreement of 23rd March 2011.

PW1 stated that she had a mortgage with Housing Finance Bank in respect of a house at Bukoto Middle close Plot 11, an overdraft from Kenya Commercial Bank in respect of Bunga Kawuku and a short term loan from Standard Chartered Bank. She further stated that she executed a loan agreement with housing finance bank and in that loan agreement, the Defendant gave Kenya Commercial Bank Ugx 510,000,000/= so as to bring the title in respect of Kawuku Plot 586 under their custody. She also stated that that the bank gave Standard Chartered Bank Ugx. 87,000,000/= and also removed Ugx. 260,000,000/=.

In cross examination PW1, stated that it was true she had credit facilities from three other banks before she obtained one from the defendant bank. It was her testimony that she did not offer any other title other than the three titles for the credit of over one billion shillings. It was also her admission that the loan from Housing finance bank repaid all loans from the three banks.

In re-examination, PW1 stated that she used the securities of the titles for Bukoto, Munyonyo and Kawuku house and Bunga.

DW1 stated that the Plaintiff approached the bank in the late 2011 represented by the directors to obtain facilities for their business. He further stated that the said facilities were for refinancing existing loan facilities from other banks.

In his submissions, counsel for the Plaintiff submitted that the bank purported to lend money to the Plaintiffs as working capital yet the large sum was used to buy off loans from other banks.

In reply, counsel for the Defendant argued that the money paid had been got from the said banks for purposes of business/ working capital. Counsel referred to exhibits D9, D10, D11, D12, D13, D14 and D15 to show how the Plaintiff instructed the Defendant bank and how the disbursement was carried out.

In rejoinder counsel for the Plaintiffs argued that the Defendant erroneously argued that repayment of the Plaintiffs loans in other banks from which the money was borrowed were for purposes of business/working capital and that therefore the Plaintiffs received working capital and it was deceitful.

Exhibit D9 is a letter from Attitude Limited to the General Manager Housing Finance Bank regarding payment instructions in respect of Attitude Limited loans with Kenya Commercial Bank and Standard Chartered Bank.

For ease of reference, I will reiterate the contents of this letter hereunder;

*THE GENERAL MANAGER
Mortgage & Term Finance
Housing Finance Bank Limited
P.O. Box 1539*

KAMPALA

Dear Sir,

*RE: PAYMENT INSTRUCTIONS IN RESPECT OF ATTITUDE LIMITED LOANS
WITH KCB (U) LIMITED & STANDARD CHARTERED BANK (U) LIMITED.*

The above refers.

We write to give you authorization to pay off our loans with KCB (U) Ltd & Standard Chartered Bank (U) Ltd, and to, further, redeem the three title deeds in their possession for purposes of our business loan facility with your Good selves.

Thank you.

Undersigned are the directors of the 2nd Plaintiff who happen to be the 1st Plaintiff and a one Margaret Namweza Sikubwabo.

This letter clearly gives directions to the Defendant bank as to how the disbursements pertaining to sums from the loan facility it was availing were to be carried out. I also note that PW1 in her testimony stated that it was true she had credit facilities from three other banks before she obtained one from the Defendant bank and that she did not offer any other title other than the three titles for the credit of over one billion shillings. She also admitted that the loan from Housing finance bank repaid all loans from the three banks.

I also note that on page one of Exhibit D3 the Plaintiffs offered the Land titles for Bukoto Middle Close HSE 6A , Munyonyo Block 257 Plot 672 and 673, Kawuku, Bunga titles as securities for the loan facility.

My finding on this issue is that the defendant did indeed disburse to the plaintiffs the loan facility of Ugx. 1,056,000,000/= as agreed in the letter of offer/overdraft agreement.

Issue No. 3 and 6

- 3. Whether the Plaintiffs breached the repayment terms of the loan facility of Ugx. 1,056,000,000/= extended to them and owe the Defendant an outstanding loan balance of Ugx. 548,901,337.81/= as at 16th June 2014.**
- 6. Whether the Defendant is entitled to the counterclaim for the outstanding loan balance and whether the Defendant is entitled to sell the mortgaged land and property comprised in Mailo register Kyadondo Block 248 Plot 586 at Kawuku to recover its outstanding balance.**

In reply Counsel for the defendant submitted as follows;

He stated that there was no doubt that the Plaintiffs breached the repayment terms of the loan/overdraft facility. Counsel pointed to exhibits D9, D1, D2, D20 and D21 to show that the Plaintiffs were in breach.

Counsel submitted that arrears only arise when repayment of stipulated installment is not made. He referred to clause 8(a) of the loan agreement, exhibit P1 as well as 4 of the Mortgage deed, exhibit P3 which provided that failure to pay any installment was an event of default and arrears were a result of default.

Counsel further submitted the date of filing the Amended Written Statement of Defense, the outstanding sum was Ugx. 548,901,337.81/=. It was his contention that the Plaintiffs never paid the said sum and the trigger of this suit by the Plaintiffs was the fact that the Defendant demanded that they pay the then outstanding balance of Ugx. 475,147,861/=.

Counsel argued that the Plaintiffs relied on exhibit P5 which actually showed a debit balance of Ugx. 160,404,653/= as at 20th August 2013 and this implied that they were still indebted to the Defendant to that tune. Counsel referred to the testimony of DW1 who stated on cross examination that exhibit P5 is a loan account also known as a ledger account which is used for reporting purposes and that it is not a transaction account.

He further argued that in a futile attempt to try to convince court that no money was owed, the Plaintiffs called to aid, the testimony of PW2 who in cross examination it became evident had misconstrued the figures in the various statements thus misguiding the Plaintiffs into believing that no money was owed. Counsel invited court to disregard his report since it was false and misconceived.

On the question of the validity of the mortgage

Counsel for the Plaintiffs in rejoinder argued that the Defendant's submission of indebtedness should be disregarded as the Plaintiffs had showed they were not indebted to the defendant as per Exhibits PExh 4 and PExh 5.

Counsel also argued that Exhibit D9, D10, D11, D12 D20 and D21 were all written by mistake basing on misrepresentations and misapplication of the Plaintiffs loan account to create a debt which never existed.

It was counsel's contention that exhibit P12 (a) demanding Ugx 475, 147, 861/= is challenged as illegal entries on the Plaintiffs' loan accounts and was not explained by the Defendant and as such no outstanding balances exist.

Counsel concluded that no other Plaintiffs accounts were kept by the Defendant in respect these transactions other than exhibit P4 and P5 which showed that there was no outstanding loan balance.

Exhibit PExh5 shows the balance to be Ugx. 160,404,653.19/= as at 24th May 2014. It was DW1's admission on cross examination that Exhibit P5 was the loan account that reflected the principal balance on the loan.

On re-examination DW1 stated that the current outstanding balance owed to the bank accrues interest on a daily basis. I am reluctant to consider the said accrued interest as a result of the manipulation by the bank of the Plaintiffs through the improper consolidation that resulted in the high interest rates payable by the Plaintiffs.

It is my finding that the bank is entitled to the counterclaim to the tune of Ugx. 160,404,653.19/=.

As to whether the bank can sell the property comprised in Mailo register Kyadondo Block 248 Plot 586 at Kawuku to recover its outstanding balance. I will address this issue in the remedies.

Issue No. 4

Whether the sale of Plaintiff's property at Bukoto Middle Close Kampala was unlawful and irregular and if so, whether the 1st Plaintiff is entitled to restitution of its value.

In his submissions, counsel for the Plaintiffs stated that PW1 told court that the Defendant proposed to her to sell off property worth more money which was taken on sale for only Ugx. 500,000,000/= due to undue pressure from the Defendants.

Counsel further submitted that at the time the Plaintiffs were told to sell off the Bukoto property, both facilities were not in arrears and the Defendant bank wrongly claimed that the facilities were in arrears which forced them to sell off the Bukoto property.

Counsel for the Defendant submitted that the 1st Plaintiff is legally estopped from claiming that the property was mortgaged without authorization because she was the registered proprietor who as director of the 2nd Plaintiff offered the property to the Defendant as security for the consolidated loan facility. Counsel also submitted that the loan agreement, the letter of offer/ overdraft agreement as well as the Mortgage deed were all freely executed by the 1st Plaintiff with full knowledge that the Bukoto Plot 1 Middle Close would be used to secure the loan facility by which she would have all her liabilities consolidated within one bank.

He further submitted that the 1st Plaintiff enjoyed a benefit in that her personal liability was covered by the lending made to the 2nd Plaintiff.

Counsel also argued that the Defendant did not sell any of the mortgaged property either in exercise of its rights as a mortgagee or otherwise. It was counsel's contention that the Defendant would only sell a mortgaged property upon issuing a notice of default and a notice of sale per section 19 of the Mortgage Act 2009.

In conclusion, counsel submitted that the 1st Plaintiff sold the property comprised in Bukoto Middle Close on her own, took the Certificate of Title, enjoyed part of the money and is accordingly not entitled to any restitution for its value.

In rejoinder, counsel for the Plaintiffs argued that the 1st Plaintiff cannot be said to be estopped from claiming breach of fiduciary duty and duty of care owed to her by the Defendant bank leading to wrongful sale of the Bukoto Middle Close property to pay off perceived arrears of the loan which never existed.

Counsel contended that estoppel was an equitable remedy which can only be availed to party with clean hands. He stated that the Defendant had been shown to have gotten involved in illegal entries on deducting monies from the Plaintiffs account, terminated a long term mortgage facility of this Bukoto property and contracted another with short term injurious business terms which bars the principle of estoppel to be availed to the defendant.

My findings in issue one has a bearing on this issue.

I agree with the submissions of counsel for the Defendant that the Defendant did not sell any of the mortgaged property either in exercise of its rights as a mortgagee or otherwise.

Exhibit D14 shows that the 1st plaintiff notified the Defendant bank that she had agreed to sell her property to a one Somani.

PW1 in her testimony stated that she had to sell off the house as a result of the undue pressure from the Defendant.

I agree, the Plaintiff could have been in arrears but the conduct of the bank led to the Plaintiff into this position. As I stated in issue one, the high interest rates resulting from the improper consolidation of the loans by the bank led to the arrears which caused the sale of the property by the Plaintiff.

Considering the improper consolidation of the loans and the misconduct of the bank, I hold that the Plaintiff is entitled to compensation.

Issue No. 5

Whether the Defendant's purchase of the warehouse comprised in Mailo Register Kyadondo Block 257 Plot 672 together with land adjacent to Block 257 Plot 673at Munyonyo from the 1st Plaintiff was lawful

In her testimony, PW1 stated that there was an agreement on page 51 of the trial bundle about the sale of the warehouse between her and housing finance bank. DW1 in cross examination stated that he did not participate in the purchase of the warehouse by the bank and that the Plaintiff is the one who proposed the purchase to the bank in writing. Considering the evidence of PW1, DW1 and exhibit P14 this sale did indeed take place. The question to be answered here is whether the transaction between the Plaintiffs and the Defendant was lawful.

Counsel for the Plaintiffs submitted that evidence on record shows that it is not in dispute that the impugned sale took place and or occurred between the 1st Plaintiff and the Defendant. He further submitted that PW1 confirmed in her testimony that the Defendant's officers lured her and tricked her to sell off the warehouse property to them so that she can get working capital.

Counsel further submitted that the provisions of **Section 30** of the **Mortgage Act** prohibits a mortgagee from purchasing mortgaged property in whatever circumstances except with an order of court sanctioning such a purchase.

Counsel argued that as a result of the extreme pressure from the Defendant's officers, the 1st Plaintiff succumbed to sell off the warehouse at a lesser price to the Defendant.

In reply, counsel for the Defendant submitted that the Defendant lawfully purchased the warehouse from the 1st Plaintiff on the basis of willing seller and willing buyer in April 2012.

Counsel argued that the warehouse was sold by the 1st Plaintiff in her capacity as a registered proprietor and that as a mortgagor she had the right to sell and transfer the warehouse to anyone with the consent of the defendant as per clause 1.10 of the Mortgage Deed exhibit P3.

He further argued that there was nothing in exhibit P3 or the law that barred the Defendant from purchasing the warehouse. It was his contention that the only restriction against buying mortgaged property by a mortgagee (the Defendant) is in circumstances where it is exercising its right of sale, upon default by the mortgagor and that there was no exercise of the right of sale of by the Defendant as mortgagee in this case.

Counsel for the Plaintiffs in rejoinder, argued that the sale was not on a willing buyer willing seller terms. He argued that at all material times, the Plaintiffs were literally at the mercy of the Defendant and that it was the Defendant who expressed interest in the property.

Illegality was defined in the case of **Ntabazi Vs Walusimbi Civil Appeal No. 101 of 2012** to mean;

- 1. An act that is not authorized by law*
- 2. The state of not being legally authorized*
- 3. The state of being unlawful*

Section 30 of the **Mortgage Act** provides as follows;

- (1) The following shall not be permitted to purchase the mortgaged land without leave of court-*

- (a) a mortgagee;*
- (b) Employee of the mortgagee or an immediate member of his or her family;*
- (c) An agent of the mortgagee or an immediate member of his or her family;*
- (d) Any person in a position to influence the matter directly or indirectly; or*
- (e) A person in position of any other privileged information with regard to the transaction.*

(2) A court shall not grant leave to a person mentioned in subsection (1) unless the court is satisfied that sale of the mortgaged land to that person is the most advantageous way of selling the land so as to comply with the duty imposed on the mortgagee by section 27 (1)

This section clearly prohibits the mortgagee from purchasing the mortgaged property unless with leave of court. There is no evidence on court record to show that any such permission was obtained from court before this transaction was undertaken. The actions of the Defendant bank also amount to an offence according to **Section 39 (2)** of the **Mortgage Act**.

Section 39 (2) states;

“A person who purchases mortgaged property in contravention of section 30 commits an offence and is liable on conviction to a fine not less than forty eight currency points but not exceeding one hundred and twenty currency points or imprisonment not less than twenty four months but not exceeding sixty months or both such fine and imprisonment.”

The actions of the Defendant bank in purchasing the property comprised in were a breach of the law since they faulted on the requirement to seek leave of court before the purchase.

A mortgagee is always in a superior position as to the mortgagor. The essence of **Sections 30** and **39(2)** of the **Mortgage Act** were to act as safeguards against

situations where the mortgagee uses their superior position to influence the mortgagor in terms of their property.

There are clearly set parameters within which a mortgagee can purchase mortgaged property and unfortunately the defendant bank did not adhere to them.

This court as a court of justice is very jealous of persons taking securities for a loan, and converting such securities into purchases.

It is my finding that the purchase of the warehouse comprised in Mailo Register Kyadondo Block 257 Plot 672 together with land adjacent to Block 257, Plot 673 at Munyonyo from the 1st Plaintiff was unlawful

Issue No. 7

What remedies are available to the parties

Considering that I have found the purchase of the warehouse comprised in Mailo Register Kyadondo Block 257 Plot 672 together with land adjacent to Block 257, Plot 673 at Munyonyo from the 1st Plaintiff was unlawful, I find that cancellation of the Defendant bank from the titles of the said property should follow since a court of law cannot be seen to enforce an illegality.

As the result of the conduct of the Defendant bank, the Plaintiffs were disadvantaged. According to **Halsbury's Laws of England 3rd Edition Volume 11 at page 268**, *no damages are recoverable from any loss, injury or damage which is not a direct, immediate or proximate consequence of the act or omission complained of. Damage which is an indirect consequence is said to be too remote.*

The damage and loss suffered by the Plaintiff was a direct, immediate and proximate consequence of the Defendant bank's wrongful and unlawful consolidation of all the mortgages. Counsel prayed for an award of Ugx. 175,000,000/= as compensation to

the Plaintiff for the suffering occasioned by the Defendants improper and wrongful acts and I award the same.

The Plaintiff also prayed for special damages of Ugx. 996,000,350/=. The principle of law is that special damages must be specifically pleaded and proved, but strictly proving does not mean that proof must always be documentary evidence. Special damages can also be proved by direct evidence. **(Ref: Gapco (U) Ltd Vs A.S Transporters (U) Ltd CACA No.18/2004)**

I award the Plaintiff special damages of Ugx. 310,000,000/=.

I award the Plaintiff the costs of the main suit.

As regards the counter claim:

- a) The Defendant bank is entitled to the balance according to PExh 5 which is Ugx. 160,404,653.19/=.
- b) It is also entitled to recover the sum of Ugx. 320,000,000/= which was realized from the purported purchase of property comprised in Mailo Register Kyadondo Block 257 Plot 672 together with land adjacent to Block 257, Plot 673 at Munyonyo which this court has found to be illegal and has cancelled the said transaction.

This brings the total amount due to the Defendant bank to Ugx. 480,404,653/=.

The Counter-Claimant/Defendant also claimed damages but counsel for the Defendant did not address this court as to the quantum.

The Counter-Claimant/Defendant also prayed for interest at 25% p.a on the main sum in the counter claim.

Considering the misconduct on the part of the bank during their dealings with the Plaintiffs, I decline to award the interest claimed.

Considering the amounts due to each of the parties, I find that the sums shall offset themselves.

The property comprised in Mailo Register Kyadondo, Block 248 Plot 586 at Kawuku is to be returned to the Plaintiffs without any further encumbrances.

The Counter-Claimant/Defendant also prayed for the costs of the counter claim. I decline to award the costs claimed.

I accordingly order as follows;

1. That the purported sale of the property comprised in Block 257 Plot 672 and Block 257 Plot 973 land at Munyonyo acquired through a mortgaged loan was illegal and unlawful.
2. The cancellation of the Defendant bank from the Certificates of Title for land comprised in Block 257 Plot 672 and Block 257 Plot 973 land at Munyonyo and the same should be returned to the Plaintiffs.
3. The award general damages and special damages mentioned in this Judgment above shall offset the sum due to the Defendant bank in the counter claim.
4. The Plaintiff is awarded the costs of the main suit.
5. The Counter-Claimant/Defendant will meet their own costs of the counter claim.

GODFREY NAMUNDI

JUDGE

DATE: 30th August, 2018

