THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO.349 OF 2020

(Arising from the Judgment of Wangutusi, J in High Court Civil Suit No. 204 of 2009(Commercial Division) dated 21st August 2019 at Kampala)

1. PROGRESSIVE GROUP OF SCHOOLS LTD
2. AB'MOOTI INVESTMEMNTS LTD
3. KAAHWA ERISA AMOOTI ::::::::::::::::::::::::::APPELLANTS

VERSUS

1. BARCLAYS BANK OF UGANDA LTD T/A ABSA BANK (U) LTD
2. LUYANZI ACADEMIC FOUNDATION::::::::::::::RESPONDENTS

CORAM: HON. JUSTICE RICHARD BUTEERA, DCJ
HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA
HON. MR. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF COURT

This is an appeal from the Judgment of the High Court of Uganda Commercial Division at Kampala by Wangutusi J. delivered on 21st August, 2022 in High Court Civil Suit No. 204 of 2009.

Background of the Appeal

The facts as can be garnered from the record of appeal are that the 1st appellant applied for a loan from the 1st Respondent. The 1st

Respondent evaluated the 1st Appellant's application and granted her (two) banking facilities as follows;

a. *Loan of UGX 650,000,000/= expiring on 25th October, 2013 with a 7 (seven) year loan repayment period including 1 (one) year grace period*

b. *Loan of 650,000,000/= expiring on 25th October, 2014 with a 8 (eight) year loan repayment period.*

c. *The facilities were subject to compliance by the 1st Appellant with terms and conditions of the facility letter including perfecting the security procedures for Plots 43, 72 and 89, Kyadondo Block 226 belonging to the 2nd appellant and Plot 966 Kyadondo belonging to the 3rd Appellant.*

The appellants in accordance with the terms of the loan facility executed securities as required and the 1st respondent commenced disbursements of the loan funds. It is however, alleged that the 1st Respondent only disbursed UGX 650,000,000/=. The 1st respondent then prepared a new offer letter for a loan facility upon the following terms;

(i) *Loan amount of UGX 1,395,092,871/=*

(ii) *Expiry date – 60 months with effect from 28th January, 2008 to 28th January 2013.*

The Appellants' claim that the 1st Respondent did not effect the disbursement of this new facility. As a result, the plaintiffs/Appellants claim they were unable to execute, implement

and complete the expansion and development project of the school as planned under the application.

Before the expiry of the term period under any of the facility letters and after receipt of substantial amount to offset the loan from the 1st Appellant, the 1st Respondent by its letter dated 5th November, 2008 made a final demand of the loan amount under the new (the second) facility letter. The respondents then commenced the enforcement of the mortgage and advertised the property for sale and eventually effected a sale. The Appellants claim that this sale was fraudulently done.

As a result, the Appellants lodged High Court Civil Suit No.204 of 2009 seeking among others protection against the enforcement of the mortgage and also lodged Miscellaneous Application No. 301 of 2009 for temporary injunctions to stop the sale. In its Ruling the trial court declined to grant the injunction and thereafter the 1st Respondent completed the sale of the securities/property of the Appellants in a sale agreement dated 27th August 2009. The Appellants were still in possession of the suit land at the time of lodging the suit, and of dismissal of their application for temporary injunction and of the execution of the sale agreement.

The Appellants further contended that the purported sale and transfer of the securities by the 1st Respondent as a mortgagee was illegal, unlawful and a breach of the loan and mortgage deed. Further that the Respondents fraudulently sold and transferred the securities

to the 2nd respondent. The particulars of illegality and fraud were stated in the amended plaint as follows;

"a. The sale was done without conducting a valuation to determine the reserve price

b. The sale was done secretly as opposed to a public auction

c. The sale was by private treaty without the consent of the plaintiffs as mortgagor

d. The sale was done contrary to and in contravention of the law and rules applicable to enforcement of mortgages by mortgagees

e. The terms and conditions of the sale agreement depict bad faith, ill will and insider collusion to dispossess the plaintiffs of their valuable properties and business.

f. The sale was done to defeat the plaintiffs' effort to protect their securities through court as at the time there was a pending application for an injunction

g. The sale under the terms of the contract was an act of preferential treatment and discrimination against the plaintiffs in favor of the 2nd defendant as the plaintiff was also capable of complying with the terms of the Agreement.

f. The sale was a clog on the plaintiffs' equity of redemption."

It was therefore the Appellants case that the 1st defendant breached the contract when it failed to disburse the full amount as per the loan agreement. That the failure to disburse directly affected the appellants' project and plans wherefrom the funds to repay the facility had been anticipated resulting in a cash flow crisis, loss of business income of the operating school, which had a high population, and loss of property.

In the amended plaint, the Appellants prayed for Judgment and orders against the Respondent/defendant for;

a. *A declaration that the purported sale and transfer of the plaintiffs' securities is illegal, unlawful and in contravention of the loan agreement.*

b. *Recovery of the securities mortgaged and cancellation of the transfers for properties comprised in Block 226 Plots 43, 72, 89 Kyadondo , Block 227 Plot 966, 1424 Kyadondo*

c. *An account be taken together with all the necessary inquiries and directions of all financial transactions on the bank loan Account No. 0341194075.*

d. *Compensatory, general and exemplary damages.*

e. *Costs of the suit.*

The 1st and 2nd respondent filed a joint written statement of defence. The 1st respondent in the amended written statement of defence contended that the new (2nd facility) was disbursed on 3rd March 2008 and was credited on the 1st Appellant's current account to offset the debit balance on the said account. It was the case for the respondent

that the appellants/plaintiffs failed to service the new facility in the agreed installments indicated in the loan facility or at all. They submitted that as of 5th November, 2008 the 1st Appellant was indebted to the 1st Respondent in the sum of 1,357,172,676/= (Uganda Shillings One Billion Three Hundred Seventy-Two Thousand Six Hundred Seventy-Six Only) prompting the 1st respondent to demand for settlement of the debt by its letter of 5th November, 2008.

Their claim was that the 1st Appellant took no heed of this demand and continued to default in servicing the facility, prompting the issuance by the 1st Respondent's lawyers of a demand letter on the 14th November, 2008 and Statutory Notices of Sale dated 14th November, 2009. Subsequent to these demands, the 1st Appellant wrote to the 1st respondent/defendant in a letter dated 19th February 2009 addressed to the 1st Respondent's Head of Business Support and recoveries authorizing the 1st Respondent to dispose of the securities comprised in Block 226 Plot 89 and Block 226 Plot 227. There was also an undertaking to make a payment of UGX 60,000,000/= (Uganda Shillings Sixty Million only) during the first school term ending April 2009 which payment was not made. Their case was that it is upon the Appellants total failure to service the indebtedness that the 1st Respondent advertised the securities for sale in the Monitor Newspaper of 23rd May 2009 at page 27.

That the 2nd Respondent in response to the newspaper advert placed its bid of UGX 1,500,000,000/= (Uganda Shillings One Billion Five Hundred Million and Three hundred only) which bid was accepted.

That the facility availed to the 1st Appellant was under its tenor, pursuant to the 1st Respondent's Standard terms and Conditions and under the security deeds repayable in full on demand or upon default and the securities were validly advertised for sell.

The 1st Respondent contended further that it was not in breach of the facility and of the security agreements by having proceeded with the realization of the securities. It was the case for the respondents that there was no fraud and illegality in the disposal of the securities as alleged in paragraph 5 of the amended plaint or at all. They further claimed that the terms on which the property was purchased were negotiated in an arm's length transaction and accordingly the allegations of bad faith are completely devoid of merit.

The respondents/defendants stated that the plaintiff was at liberty to redeem the securities, pursuant to the equity of redemption upon payment of the sums owed at any time before their sell. The respondents' claim was that the appellants did not exercise their rights prior to the sale and the properties having been sold and transferred, the equity of redemption could not be availed.

A joint scheduling Memorandum was filed by the parties where the agreed facts were stated as follows;

"5. Agreed Facts

i. The 1st appellant approached the 1st respondent for loan facilities in the year 2004.

ii. *The 1st appellant's facilities were secured by legal mortgages over the suit properties.*

iii. *The 1st respondent made demands on the 1st appellant as principal debtor to settle the monies owed and further issued statutory notices for sale of the securities. The securities were subsequently advertised for sale.*

iv. *The securities were sold and transferred to the 2nd respondent which is presently in possession and occupation thereof."*

In the same Joint Scheduling Memorandum which was adopted by court it was agreed that the facts in dispute were as follows;

"6. Facts in dispute

i. *That the 1st appellant ever received the said consolidated facility worth UGX 1,395,092,871/=.*

ii. *The 1st appellant defaulted on the repayment of its loan*

iii. *That the sale and transfer of the securities was lawful."*

The matter proceeded on the basis of interparty witness statements were filed and witnesses cross examined. Trial Judge considered and addressed the following issues;

1. *Whether the Plaint discloses a cause of action against the 2nd Defendant?*

2. *Whether the defendant was in breach of the loan agreement and if so in which respect?*

3. *Whether the 1st Plaintiff was in default of settling the monies owed to the 1st defendant?*
4. *Whether the 1st defendant was entitled to have recourse to the securities in recovery of the debt?*
5. *Whether the purported sale and transfer of the plaintiffs' securities was unlawful and;*
6. *What remedies are available to the parties?*

The trial Judge then gave judgment dated 21st August 2019 in favor of the respondents in the following terms;

> *"...It is evident that upon default in their loan obligations, the 1st Respondent notified the plaintiffs of their default. The formal demand, statutory notices of sale and sale were therefore within the law.*
>
> *This issue of notification by way of statutory demand and notices of sale together with advertisements were all fulfilled by the 1st Defendant as is clearly admitted by both parties in the agreed facts of the scheduling memorandum.*
>
> *For these reasons, the Court finds no merit in the suit and it dismisses it with costs."*

The appellants were dissatisfied with the judgment and orders of the trial court and lodged this appeal against the whole decision of the court on the following grounds;

1. ***The learned trial judge erred in law and fact when he made a finding that the 1st appellant was indebted to the***

1st respondent to the tune of UGX 1,357,172,676/= (Uganda Shillings One Billion Three Hundred Fifty-Seven Million, One Hundred Seventy-two thousand six hundred seventy-six) as of 5th November 2008 thereby occasioning a miscarriage of justice.

2. *The learned trial judge erred in law and fact when he failed to properly evaluate evidence of the 1st appellant's statement of the account to wit annexture G1 thereby arriving at a wrong decision.*

3. *The learned trial judge erred in law and fact when he made a finding that the money stipulated in exhibit D3 was money received and spent by the 1st appellant thereby occasioning a miscarriage of justice.*

4. *The trial judge erred in law and fact when he held that the sale of the suit property by the 1st respondent to the 2nd respondent was lawful.*

5. *The learned trial judge erred in law and fact when he ignored and/or failed to pronounce himself on allegations of fraud committed by the respondents at the time of sale of the suit property thereby occasioning a miscarriage of justice.*

6. *The trial Judge erred in law and fact when he made a finding that the 1st respondent did not breach the facilities*

agreement entered into with the 1st appellant thereby occasioning a miscarriage of justice.

7. ***The learned trial judge erred in law and fact when he made a finding that the sale of the properties went towards the repayment of the 1st appellant's indebtedness to the 1st respondent thereby occasioning a miscarriage of justice.***

8. ***The learned trial judge erred in law and fact when he relied on the evidence of bid documents not produced before the court thereby occasioning a miscarriage of Justice.***

The Appellant proposes that this Court orders that;

a. ***The appeal be allowed***

b. ***The whole Judgment and orders of the High Court be set aside.***

c. ***The plaintiffs' prayers in the High Court be granted.***

d. ***The appellants be awarded all the costs in this court and in the Court below.***

Representations/appearances

At the hearing of the appeal, Mr. Ntende Fredrick Godfrey, Mr. Balondemu Godfrey, Mr. Ruzima Derrick and Mr. Emwogu Gerald

appeared for the Appellants. Mr. Ssembatya Ernest of MMAKS Advocates appeared for the respondents.

The parties adopted their submissions and conferencing notes which they had filed and served and the court allowed.

Appellants' submissions

Counsel for the Appellant dealt with Ground 1,2 and 3 jointly. In his submissions he was at odds with the finding that the 1st Appellant was indebted to the 1st Respondent in the sum of UGX. 1,357,172,676. Counsel argued that the 1st appellant did not receive the additional facility No.2 contesting that the Learned Trial Judge should have looked at the 1st appellant's current account showing the actual financing. Counsel further relied on Christine N Kibirango's evidence in her admission that there's no credit and disbursement to the 1st appellant account. Counsel submitted that the 1st respondent never adduced any instruction drawn by the 1st appellant to prove disbursement.

Counsel criticised the Learned Trial Judge in admitting the unverified content of the 1st Appellant's Bank ledger in a manner not envisaged under section 4(2) of the Evidence (Banker's Books) Act Cap 7 and invited court to exclude the said evidence.

Counsel further faulted the Learned Trial Judge in overlooking the 1st appellant's statement of current account that ranged from 31/05/2009 to 03/032010 while finding the actual sums due to the 1st respondent. Counsel argued that court is bound to take into

consideration the evidence as a whole on issues that have to be determined. **Kiiza Samuel v Uganda CCA No. 0102 of 2008.** The appellant Counsel disagreed with the Learned Trial Judge in upholding the unconscionable 37.7% interest rate which was over and above the agreed interest rate of 20% and the penalty interest of UGX. 13,661,063.32 arguing that the said charges were unlawful and invited court to invoke **section 26 of the CPA.**

In his submission, the appellant Counsel faulted the Learned Trial Judge for failing to observe that the 1st respondent unlawful transacted on the appellants account relying on 1st appellant's statement of current account that shows that on the 28/05/2008, the 1st respondent debited the 1st appellant with profit and disbursement fees. Counsel invited court to consider decision by **Hellen Obura J (as she then was) in Golf View Inn (U) Ltd v Barclays Bank (U) Ltd, HCCS (Comm Div) No. 358 of 2009 citing Gomba Holdings (UK) Ltd & Others v Minories Finance Ltd & Others No.2 (1992) 3 WLR**

As regards Ground No. 4 and 8, Counsel considered the Grounds concurrently and criticized the Learned Trial Judge's finding that the formal demand, notice of statutory sale and sale were within the law. The appellants' counsel contested the illegality of the entire procedure before conducting the sale and faulted the Learned trial Judge for failing to establish the validity of Mortgage deeds in respect of **Block 226 Plot 43 7 89, 72 & 996; Block 227 Plot 1424.** Counsel reiterated that the Mortgage deed should not have formed the basis

of sale of the appellant's properties because it was invalid for want of execution and for its noncompliance with the law and prayed that court finds the said sale invalid. **Section 115 & 148** RTA, **Fredrick J.K Zaabwe v Orient Bank & Ors SCCA No.4 of 2006.Macfay v United Africa Co. Ltd (1961) 13 ALLER 1169**."……if an act is void, then it is a nullity and every proceeding which is founded on it is also incurably bad..."

The Learned Counsel contended with the decision of Trial Judge for his failure to detect the illegality committed by the 1st respondent in selling and causing the transfer of Kyadondo Block 227 Plot 1424, Block 226 Plot 43 without advertising and prayed that court finds the sale to have been invalid. **Cuckmere Brick Company Ltd & Ors v Mutual Finance Ltd SCCA 1971**..." It's trite that a court of law cannot sanction that which is illegal..."

He further argued that the sale and transfer of **Kyadondo Block 227 Plot 756** without obtaining a foreclosure order from the court was illegal since the mortgage deeds did not include **Block 227 Plot 756.** Counsel contended that the aforesaid property was deposited by the appellants to the 1st respondent as security for the loan creating an equitable mortgage. **UCB v Mrs Bushuyu (Administratix of the Estate of John Wilson Bushuyu) HCCS No.123 of 1994 pp.414-418 LOA. ....**Court held that a deposit of a certificate of title to a land by or with authority if it is with the registered proprietor intent to create security creates equitable mortgage.

The appellants' counsel in his submission questioned and invited court to hold the sale of the suit properties two months after the advertised date invalid. **Emerald Hotel Ltd & Ors vs Barclays Bank of Uganda Ltd 7 Ors HCCS 0170-2008.**

The learned Counsel further challenged the Trial Judge in admitting that the sale was within the law notwithstanding the inconsistency in the respondent's pleadings without amending them where they, denied the appellant's claims about the manner of sale. The respondents pleaded in their amended WSD that, "The *1st defendant/respondent shall also aver and contend that the property was sold by public auction and not by private treaty or secretly as alleged, and accordingly the plaintiff/appellant's consent was never required."* Counsel reiterated the inconsistent with the respondents case without amending their pleadings when they submitted that; "*My lord, it was by private treaty reason being public auction is by fall of the hammer. There was no fall of the hammer."* Contrary to **O.6 r 7 CPR** which provides that a party is bound by their pleadings.

It was Counsel's submission that the learned Trial Judge erred in law and fact when he corroborated the unavailable evidence of bid documents with the sale agreement. **Cross on Evidence 7th Edition p.242,** corroboration means confirmation or support of that already given and that in order to amount to corroboration, evidence must emanate from a source independent of the witness to be corroborated."

The appellant Counsel challenged the validity of the sale for lack of proof of authority on the part of the executors as the duly appointed attorneys' contrary to **section 1469(1) & 132 RTA.** In his submission Counsel pointed out that Angelina Namakula Ofwono, a signatory to the impugned sale agreement was not one of the specified persons in the POA dated 18/08/2006 registered under I.N 8486/05.

That the 1st respondent and their agent failed to carry out a pre-sale expert valuation of the suit property and proceeded to sell the same at less than fair market value. **Cuckmere Brick Company Ltd & Ors v Mutual Finance Ltd** (SCJCA). Referring to the Trial Judge noting. That .....*as for valuation of the properties, Counsel for the defendant/respondent conceded that no valuation was done."* **Glossary of Terms of International Valuation Standards, 6th Edn** defines market value as .... the estimated amount for which an asset or liability should exchange on the valuation date... **SableBrook Pty Ltd v Credit Union Australia Ltd (2008) QSC 242 and Pendlebury v Colonial Mutual Life Assurance Society Ltd (1912) 12 C.L.R 676.** The mortgagee was held liable for loss occasioned by the sale for failing to adequately advertise the sale, omission to take obvious precautions to ensure a fair price; and failure to get a proper valuation.

While arguing ground 5, counsel submitted that the sale without a pre-sale expert valuation at an undervalue, non-advertisement of some of the properties, sale of the equitable mortgage property

without foreclosure orders of court, non-remittance of the proceeds of sale to debt settlement, exclusion of business part, non-compliance to statutory requirements and misrepresentation of the 1st appellant actual indebtedness to Uganda Development Bank ought to be construed as fraud. He relied on **Fredrick Zaabwe v Orient Bank Ltd & Ors (supra) "....***fraud includes; all acts, omission and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another or by which an undue or unconscientious advantage is taken of another. All surprise, trick, cunning, dishonest, dissembling and other unfair way that is used to cheat anyone...".*

Additionally Counsel disagreed with the fact that the 2nd respondent was a bonafide purchaser for value without notice arguing that the 2nd respondent participated in defrauding the appellant of the suit property. Referring to the unadvertised Block 226 Plot 43 and Block 227 Plot 1424, which was purchased by the 2nd respondent. Counsel further faulted the 2nd respondent for purchasing the suit property without ascertaining the duly authorised executors and willingly shutting her eyes to the absence of pre-sale expert valuation thus failing to undertake the requisite due diligence. Referring to **section 176(c) RTA** as well as **Alice Okiror v Global Capital Save**, ...*if the purchaser in fact becomes aware of any facts showing that the power of sale is not exercisable or that there is some impropriety in the sale then notwithstanding the statutory provision that the purchaser's title is not to be impeachable, he gets np good title on taking the*

conveyance. To hold otherwise would be to convert the provisions of the statute into an instrument of fraud.

Regarding Ground No.6 Counsel in his submission argued that the 1st respondent breached the agreement they had with the 1st appellant through the different irregularities including but not limited to; non-disbursement of the 2nd Facility to the 1st appellant, sale of property without expert valuation, illegal sale of property on equitable mortgage gave rise to a claim for damages. Counsel reiterated that the Bank's act(s) of violation of its contractual obligation falls within the definition of breach as reflected in **Esso Petroleum Company v UCB SCCA 14 OF 1992** and **Black's Law Dictionary 9th Ed.p/213**

As regards Ground No.7 Counsel criticised the Learned Trial Judge's finding that the proceeds of sale of the mortgage property went towards settlement of the mortgage debt. The sale agreement indicated that payment was to be effected into the respondents' Firm Bank account, notwithstanding the respondents' failure to adduce evidence of transfer or deposit contradicts **section 11** Mortgage Act Cap 229. **Emerald Hotel Ltd & 3 Ors v Barclays Bank of Uganda** **"....**where the proceeds of sale of mortgage property are deposited onto the law firm account and not remitted to the creditor, then the same has not been utilised in recovery of the debt..." Counsel prayed that the appeal be allowed, and the judgment and orders of the Learned Trial Judge be set aside.

Respondents' Submissions

In reply, Counsel began by pointing to court the appellants' attempt to smuggle documents into the record of appeal and prayed that they are expunged having not been part of the evidence at trial. The Respondent Counsel through his submission argued Grounds No. 1, 2 and 3 jointly and agreed with the finding of the Learned Trial Judge that the 1st appellant was indebted to the 1st respondent in a sum of UGX 1,357,172,676. Counsel referred to **Erisa Kaahwa Amooti** extracts during cross-examination were he confirmed the unsettled advancement made to the 1st appellant and his failure to controvert the evidence in relation to the advancement of the aforesaid money. Counsel further referred to the unequivocal knowledge of the 1st appellant indebtedness to the 1st respondent through a letter dated **19th February 2009** were Erisa Kaahwa Amooti wrote to the 1st respondent head of Business Support & Recoveries acknowledging its indebtedness and commitment to settle the said money.

Counsel in his submission argued that the learned Trial Judge properly evaluated the 1stappellants statement of account date and the money set out in **the 3rd Facility letter** was already received referring to Erisa Kaahwa Amooti's cross-examination were he acknowledged taking the said money. Counsel highlighted the duty of the appellant court limited to re-evaluating evidence on record and arriving at its own conclusion and prayed that court disregards the appellant issues which were not pleaded at trial including allegation on forged documents, wrongful interest rate, unjust enrichment,

allegations of forged documents , wrongful debiting of the appellants accounts, misrepresentation and falsified accounts.

In regards to ground No. 4 and 5, Counsel submitted that it's trite law that parties are bound by their pleadings. They are only required to disprove that which has been proved as against it and that allegations of fraud must be strictly proven. **Julius Rwabinumi v Hope Bahimbisimwe SCCA No. 10 of 2009. "...** the court of appeal should have restricted its decision to matters that were pleaded by the parties in their respective petitions...." Counsel in rebuttal argued that the appellant's claim against the validity of the mortgage deed cannot be raised on appeal since it was not pleaded at the trial neither was it a contested issue.

It was Counsel's submission that the mortgaging of Kyadondo Block 227 Plot 756 and Kyadondo Block 227 Plot 1424 was not a contested issue and the same was consistent with the appellants' pleadings. Counsel agreed with the Learned Trial Judge finding and argued that he pronounced himself on the appellants' fraud allegations having been pleaded with no evidence. He relied on **Section 102 of the Evidence Act** which provides **".....***The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side*". Counsel, in rebuttal, contended with the appellants' failure to adduce a valuation report in support of their allegations that property was sold at undervalue. Counsel, in rebuttal to the appellant, cited the case of **Rachhobai Shivanbhai Patel Ltd & Anor v Henry Wambuga & Anor SCCA No.**

6 of 2017 and Bbaale Samuel Wakulira v Cairo International Bank & 2 Others HCCS No. 149 and argued that they relate to a sale at an under value as opposed to a sale without valuation.

It was Counsel's submission that the 1st respondents power to sell was set out in the Mortgage Deeds and could either be by public auction or private treaty **section 10**, the appellants further reiterated their consent to disposing of some securities by letter dated **19 February 2009**. Counsel in rebuttal to the allegations that the 1st respondent did not have the power to sell argued that it was not pleaded issue and prayed for court to disregard it. The 1st respondent complied with the law through issuing the undisputed notices requiring the mortgagors to settle the monies owed under the mortgages.

Duty of this court as a first appellate court.

This is a first appeal arising from the decision of the High Court in exercise of its original Jurisdiction. It is therefore important for this court to remind itself of its duty as a first appellate court. The duty of a first appellate court is well settled. In the case of ***Kifamunte Henry v Uganda (Supreme Court Criminal Appeal No.10 of 1997)*** it was held that

> *"The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness*

should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses. However, there may be other circumstances quite apart from manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen. See Pandya vs. R. (1957) E.A. 336 and" Okeno vs. Republic (1972) E.A. 32 Charles B. Bitwire ys Uganda - Supreme Court Criminal Appeal No. 23 of 1985 at page 5.

The duty of the Court of Appeal to re-appraise evidence on an appeal from the High Court in its original jurisdiction is set out in ***rule 30 Rules of the Court of Appeal*** as follows;

"30(1) on any appeal from a decision of a High Court acting in the exercise of its original jurisdiction, the court may;

(a) re-appraise the evidence and draw inference of fact,

(b) in its discretion, for sufficient reason take additional evidence or direct that additional evidence be taken by the trial Court or by commissioner;

(2) .....

(3) ....."

We shall abide by this duty as we resolve the issues in this appeal.

In ***Selle Vs Associated Motor Boat Co. [1968] EA 123*** it was held that:

> *"An appeal.....is by way of retrial and the principles upon which this Court acts in such an Appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif Vs Ali Mohamed Sholan (1955) 22 E.A.C.A 270 followed) ...."*

Consideration of the Appeal

We have decided to determine the grounds of Appeal in the order in which they have been stated in the Memorandum of Appeal.

Ground 1; The learned trial judge erred in law and fact when he made a finding that the 1st appellant was indebted to the 1st respondent to the tune of UGX 1,357,172,676/= (Uganda Shillings One Billion Three Hundred Fifty-Seven Million, One Hundred Seventy-two thousand six hundred seventy-six) as of 5th November 2008 thereby occasioning a miscarriage of justice.

On this ground of Appeal, the Appellants claim that only 650,000,000/= was disbursed. On the other hand, the 1st Respondent contends that all the sums were disbursed even prior to the signing of the facility letter. It appears this issue was the crux of the entire civil suit and yet in drawing the issues it was not directly addressed.

In our view, the question of how much money was actually disbursed is a question of fact, which can only be answered by examining the accounts of the bank. The main question is; did the respondents prove at the trial that they indeed disbursed UGX 1,357,172,676/= (Uganda Shillings One Billion Three Hundred Fifty-Seven Million, One Hundred Seventy-two thousand six hundred seventy-six) to the Appellants?

The trial Judge dealt with this issue at page 6 of the Judgment whilst determining the issue of whether or not the 1st Respondent had breached the loan agreement. The trial Judge stated thus;

> *"...On whether the defendant was in breach of the loan agreement is answered in this Judgment earlier it was the finding of this court that the Plaintiff borrowed money from the 1st defendant piecemeal whenever she needed money in her school expansion. These monies accumulated and were reduced into two facilities of UGX 650,000,000/= which were clearly spelt out in Exhibit D.1. It is also admitted by the plaintiffs that these two because of nonpayment were restructured by the execution of*

Exhibit D3 which laid down the terms of repayment. In essence it was money already received and spent by the 1st plaintiff.

Furthermore, the 1st plaintiff could only be considered for more money if she fulfilled the provisions of the repayment clause. The plaintiff failed to meet the terms of the repayment clause a position admitted by PW.1 during cross examination and which receives support by Exhibit D.8."

We were unable to find any other earlier discussion of the issue of breach of contract by the trial Judge that he referred to in the above quoted passage. It appears to us that the trial Judge took it as an obvious fact that where a loan facility letter or agreement has been proved money was indeed availed to the plaintiffs and they just did not want to pay the loan or failed to pay. In our view, the learned trial Judge ought to have given this matter much more attention in his Judgment.

We shall therefore go on to re-evaluate the evidence on whether or not the sums demanded were actually disbursed to the Appellants as contended by the Respondents.

PW1 Kaahwa Erisa Amooti, in the witness statement made the contention on the sums disbursed even more clearer. He explained that the sums demanded were not the actual sums disbursed or received by any of the Appellants. This evidence was further followed up by a more technical witness PW2, Obodha Bosco, a retired banker who had previously worked with the 1st Respondent between 1985 and 1995 and later as accounts officer of the 1st plaintiff. He

explained in his witness statement that Kibirige John an employee of the 1st Respondent bank is the one who persuaded the Appellants to take on the loan facilities of the 1st Respondent who paid off their loan with Diamond Trust Bank totaling 88,567,519 UGX so that they would take on the loan facilities with the 1st Respondent. That the 1st Respondent encouraged the Appellants to overdraw their accounts to the tune of 464,281,413/=. That thereafter the 1st Respondent bank credited their account with 100,000,000/=UGX which was reflected in the loan account statement. That the total sum outstanding then remained 364,281,413/= UGX.

PW2 Obodha Bosco further testified that the 1st plaintiff continued operating the account until 15th January, 2007 when the bank issued the 1st plaintiff with a facility letter reflecting two loan facilities of UGX 650,000,000/= each. That the above facility letter was supposed to be a formalization of the overdrawn amounts on the 1st Appellant's loan account. That thereafter, they received a bank accounts statement showing that they owed 1,286,377,080/=UGX. They complained to the 1st Respondent bank about it but the officials of the bank explained that the amounts included accrued interest and penalties for late repayment of the above sums. That the calculations were as follows;

A. Interest at 20% - 424,895,719/=

B. Interest at 38% - 396,251,907/=

C. Penalties -13,661,063/=

PW2 Obodha Bosco further testified that there was no formal agreement between the Appellants and the Respondents prior to the overdrafts of the amounts stated and neither was the 1st appellant informed of the increase in interest rates. That despite the facility letter providing for a grace period of one year before start of the repayment of the loan, interest kept accumulating during the grace period. That he firmly affirms that the school has never received the amounts claimed by the 1st Respondent.

In cross examination by Mr. Sembatya, the record of proceedings shows that PW1 confirmed that by the time they formalized the lending relationship the Appellants had drawn down a sum of 600 million. He further stated in cross examination that when Mr. Kibirige disappeared and the Bank did not give them any information on his whereabouts, they stopped accessing their loan account because Kibirige was the only authorized official of the 1st Respondent to approve all cheques and transactions on the account. He also confirmed signing of the loan facility letter of 1,395,937,562/= UGX but states that this money was never disbursed.

When cross examined on Exhibit D2 which is a bank statement of accounts it showed that there was a debit balance of 1,395,937,562/= which is an entry of 3rd March, 2008 but added that he does not agree with those bank statements. That the statement shows that they owed sums which he did not agree that they owed the bank because he did not receive the money. When questioned

further PW1 stated that the balance on the statement was - 477,280/= which had no "DB" written on it. He also emphasized when asked by the trial Judge that they had not drawn down some of the money even on the old facility of 650 million. That even in signing the loan facility the marketer from the 1st Respondent bank is the one who convinced them that there is money for them in place by the bank and that if they sign those documents, they would get a top up and continue with the process of developing the school. It also came out in cross examination that the PW1 claims that they were misled into accepting the money on the pretext that they were accessing money from an arrangement with Bank of Uganda named "Apex Loan" where they would access money at low interest rates and that is why they over drew their account before the apex loan was approved by Bank of Uganda. That the amount in total which they had drawn from the bank was about 644 million only of which they had made some payments including at the time of his testimony a sum of 45 million which was the last payment but not reflected in the bank statements.

In re-examination PW1 emphasized that he did not receive any other money from the bank apart from the about 644 million which he had previously overdrawn on the accounts.

In cross-examination the record shows that PW2 Obodha Bosco stated that the Appellants paid back the 88 million which the 1st respondent deposited to clear off the Diamond Trust Bank loan which was not a secured loan. He further emphasized that the 400 million

which was the overdraft limit was not credited on the 1st Appellant's accounts. That on the day when they moved in with John Kibirige the bank committed itself in writing as indicated on the document letter of offer saying "you people we are giving you 100 million shillings which you are going to use to settle Diamond Trust Bank and we are going to give you tentatively 400 million shillings to start the operations as we wait for the 650 million shillings to be approved by Central Bank to your account we agreed and signed the document in writing." That after the signing however, they only received the 100 million. He also states that the 100 million which they had asked for in May was given in September and had already accumulated interest.

The apex loan was expected to be at the interest rate of 2% instead of the 20% which the 1st Respondent would charge. That as at the time of signing the facility letter the Appellants were indebted to the tune of 264,062,050/= UGX. That at the time of restructure the sums owed to the bank by the 1st Appellant was in the region of 164,062,050/=.

In response to the testimony of the Appellants the 1st Respondent presented one witness, Christine N. Kibirango (DW1) the Manager Business Support and Corporate Recoveries of the 1st Defendant who stated that by a facility letter dated 15th January 2007 the 1st defendant formalized its lending relationship with the Bank and documented two facilities to be enjoyed by the 1st Plaintiff being UGX 650,000,000/= that had been already drawn by the 1st plaintiff as

Facility No.1 and an additional lending of the same amount as Facility No.2. That the new facility was disbursed on 3rd March 2008 and was credited on the 1st appellant's current account to offset the debit balance on the said account. That as of 5th November, 2008 the 1st appellant was indebted to the 1st Respondent in the sum of UGX 1,357,172,676/= prompting the 1st respondent to demand settlement of the debt by its letter dated 5th November, 2008.

DW1 Christine Nshemerirwe Kibirango Business Support, the only witness of the respondents, testified in cross-examination that she did not have proof of the advancement of the sums advanced by the 1st respondent. She also stated that the 650 million advanced included the 88 million which was paid off to Diamond Trust Bank. She also testified that when they gave the 650 million, they would deduct the sums as deposited to repay the Diamond Trust Bank Loan. When examined on the Exhibit D2 a statement of the bank account DW1 could not point out the disbursement of the 650 million. Regarding the second 650 million, the witness actually testified that it was not disbursed but alleged that the Appellants had been given overdraft facilities to allow them get the money. She however, was not able to show either on exhibit D1 or D2 on which dates the money was disbursed or utilized by the appellants but insisted the money was disbursed.

DW2 Mr. Ayub Sooma, a director of the 2nd Respondent, was a witness to testify about the suit land and how he purchased the same.

Our evaluation of the evidence before the trial court is that it was not sufficient to prove the fact that the money claimed by the bank was actually or at all disbursed. It appears only a portion of it was disbursed and the entire 650 million of the second facility appears to me on a balance of probabilities not to have been disbursed.

Counsel for the Appellants submitted to the trial court that the Appellants had only received 80 million, followed by 380 million, which in our view is the only sum provable to have been disbursed.

Considering that the contract/agreement was for disbursement of monies as agreed therein, failure to disburse the sums promised in the facility letter amounts to a breach of contract. It would therefore be inconsequential whether the procedure of sale was followed or not because the sale would automatically become unjustifiable. The Bank officers were not transparent with the Appellants on the agreement and the transactions which the Appellants had been caused to enter into. There was a lot of confusion and banks should not operate that way. There is expected a great deal of transparency and consumer/customer protection. What the bank did in this case, in our view, contravenes and is contrary to the Bank of Uganda Consumer Protection Guidelines and even the common expectations and standards of a prudent and respectable Banker.

The legal burden to prove the debt and therefore the sums disbursed by the 1st Respondent to the 1st Appellant is, in the instant case, lay on the 1st Respondent. Once the Appellants indicated they did not receive the funds, the basis on which the Respondents acted to

exercise the right of sale in the Mortgage, it was necessary for the 1st Respondent to prove the disbursements of the sums claimed.

Section 32 and 37 of the Evidence Act, Cap 6 are very instructive on this matter. **Section 32 of the Evidence Act, Cap 6** provides that entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the court has to inquire, but such statement shall not alone be sufficient evidence to charge any person with liability.

Section 37 of the Evidence Act, Cap 6 further provides, that when any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book or series of letters or papers as the court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances in which it was made.

These provisions mean that as the 1st Respondent wanted the court to believe that they disbursed the UGX 1,357,172,676/= (Uganda Shillings One Billion Three Hundred Fifty-Seven Million, One Hundred Seventy-two thousand six hundred seventy-six) they should have brought into evidence every relevant bank statement to demonstrate the fact of disbursement. The bank statements were even in the full control of the 1st respondent as the banker in this case.

To our assessment, the 1st Respondent did not furnish the Court with the sufficient evidence required to prove how the sum of UGX 1,395,937,562 was arrived at. In the absence of cogent evidence to prove this it is more probable than not that the sums were not disbursed as claimed. Specifically, it is beyond doubt that the 2nd loan facility of UGX 650,000,000/- was not disbursed even after the parties formalized their lending relationship by executing EXD1. It follows that it cannot be stated with certainty that the Appellants were indebted to the 1st Respondent in the sums claimed by the 1st Respondent.

In these conclusions and findings, we are strengthened by **Sections 4(1) & (2) of the Evidence (Bankers Books) Act, Cap 7,** which provide as follows:

> *1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it is further proved that the copy has been examined with the original entry and is correct. (emphasis ours)*
>
> *2) Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner or person authorised to take affidavits.*

We are inclined to find that the learned trial Judge indeed grossly erred in law and fact when he made a finding that the 1st appellant was indebted to the 1st respondent to the tune of UGX 1,357,172,676/= (Uganda Shillings One Billion Three Hundred Fifty-

Seven Million, One Hundred Seventy-two thousand six hundred seventy-six) as of 5th November 2008, thereby occasioning a miscarriage of justice.

For the reasons we have given herein above, we find merit in ground 1 of the appeal.

Ground 2; The learned trial judge erred in law and fact when he failed to properly evaluate evidence of the 1st appellant's statement of the account to wit annexture G1 thereby arriving at a wrong decision.

Annexture G1 referred to in this ground of Appeal appears to be the same as exhibit D1, which we have already assessed in dealing with ground 1. We would therefore still find and agree with the Appellants that the trial Judge did not properly evaluate the defence exhibits as evidence vis-à-vis the facts of the case.

The learned trial Judge erred in law and fact when he failed to properly evaluate evidence of the 1st Appellant's statement of the account to wit annexture G1 thereby arriving at a wrong decision.

We accordingly find merit in ground 2 of the Appeal as well.

Ground 3; The learned trial judge erred in law and fact when he made a finding that the money stipulated in exhibit D3 was money received and spent by the 1st appellant thereby occasioning a miscarriage of justice.

As we have found in resolving ground 1 of the Appeal, the money stipulated in D3 was not proved to have been received by the

Appellants. It follows therefore that the trial court and let alone this court has no basis to find that it was spent by the Appellants.

In our considered view, the learned trial Judge indeed erred in law and fact when he made a finding that the money stipulated in exhibit D3 was money received and spent by the 1st Appellant thereby occasioning a miscarriage of justice.

We find merit in ground 3 of the Appeal.

Ground 4; The trial judge erred in law and fact when he held that the sale of the suit property by the 1st respondent to the 2nd respondent was lawful.

This ground relates to the manner in which the learned trial Judge dealt with the issue on sale of the securities/lands in question.

In cross examination at the hearing of the case in the trial court, the Appellants' counsel challenged the Respondents' witness DW.1 to show who was the Mortgagor and DW1 confirmed that the space reserved for the mortgagor was not signed. The record of appeal also shows that the Appellants put forward arguments on the validity of the mortgages. The trial Judge observed that the mortgages were in contravention of the Zaabwe case (Supra). The trial judge found that the "mortgage deeds" where valid when he stated; -

> *"Whether the 1st Defendant was entitled to have recourse to the securities in recovery of the debt, the agreements that governed the Plaintiffs and the 1st Defendant were Exhibit D.1, Exhibit D.3 and the mortgage deeds.....The mortgage deed empowered*

the 1st Defendant to sell the properties even without recourse to the Court..."

In the Zaabwe case (Supra) it was stated as follows: -

"Therefore, as to whether the signature on the mortgage complied with S.148, I must note the following: The names of the signatories are not given, nor their capacity to sign on behalf of the company. One cannot tell whether they are directors, secretary or even officers of the company at all. There is no company seal or stamp at all.....

.....

In my view, the execution of the mortgage by the 2nd Respondent did not comply with the provisions of Sections 147 and 148 of the R.T.A. I agree with the decision in the General Parts case (supra) that such irregularity renders the mortgage invalid.....

The requirement for the signature to an instrument under the Act to be in Latin character is a matter of a substantive provision of the law, not a mere technicality.....

If a person is to be deprived of his property, then substantive justice requires that the law should have been followed in its entirety. To hold otherwise is to allow mere technicality to defeat justice. This Court cannot allow such miscarriage of justice to occur."

It is thus a legal requirement under **S.148 Registration of Titles Act** that the names of the parties to a mortgage must be stated in Latin character. The copies of the documents in the Record of Appeal show that the parties to the 1st document EXD4(i) are M/s Abamooti Investments (U) Ltd as Mortgagor, and Barclays Bank of Uganda Limited as Mortgagee. Further examination of the document shows that neither party to the document was named nor executed the same in Latin character. Accordingly, the said document did not satisfy the legal requirements under *Section 148 of the Registration of Titles Act.* The parties to the 2nd document Ex. D4(iii) are stated to be M/s. Barclays Bank of Uganda Limited as Mortgagee, and M/s. Kisembo Arnold as Mortgagor. The execution page shows that the Mortgagor signed in Latin character but the would be Mortgagee did not sign in Latin character.

As can be deduced from the Zaabwe case quoted earlier, and statutory provisions, the trial Judge erred in not relating the facts to the law, in the circumstances. This Court finds that the mortgages were not endorsed in the terms specified by **Sections 115 and 148 of the RTA** and were accordingly invalid.

Furthermore, EXD9, the advertisement of the sale shows that the 1st Respondent advertised its intention to sell only 4 of the properties which were Kyadondo Block 227 Plots 756 and 966 land at Bweyogerere registered in the names of Kaahwa Erisa Emooti; and Kyadondo Block 226 Plot 72 and 89 land at Bweyogrere both registered in the names of Abamooti Investments Ltd. The sale

agreement on record however, shows that in addition to the advertised properties listed above, the 1st Respondent sold to the 2nd Respondent an additional 2 properties. That is; Kyadondo Block 226 Plot 43 and Kyadondo Block 227 Plot 1424 land at Bweyogerere.

In **Jeane Frances Nakamya V DFCU Bank Ltd & Anor, CACA No.105 of 2013** this honorable court held that *the law on mortgagee's power of sale places the dual duties of good faith and reasonable care to obtain the true market value upon sale of the mortgaged property.*

In our view, it would be expected that once the 1st Respondent, a financial Institution, elected to advance credit against such collateral, it has assumed a calculated risk in respect thereof, well aware of the possibility of default in payment and the need to realize the security in a known market.

Sufficient advertisement of the property would undoubtedly be one of the indicators as to whether indeed as mortgagee the 1st Respondent took reasonable steps to secure the market value of the property. Otherwise, there is no other way that the market value would be realized if the property is not taken to the market itself so as to attract the most competitive bids. In the instant case the 1st Respondent did not sufficiently advertise the property sold since they failed to prove at trial that they advertised all the Plots sold.

It follows that it was unlawful for the 1st Respondent to dispose of the Appellants' properties in particular Kyadondo Block 227 Plot 1424 and Block 226 of Plot 43 without sufficient advertising. The said sale

was therefore illegally done. This Court cannot sanction an illegality per *Makula International Case.*

Further, the sale and transfer of Kyadondo Block 227 Plot 756 without first obtaining a Court order was unlawful. The Record of Appeal does not show that the Respondents adduced evidence by way of a mortgage deed in respect of Kyadondo Block 227 Plot 756 and the Respondents at paragraph 4.3.11 of their submissions in this appeal admit as much. **Section 66 of the Evidence Act, Cap 6** requires that documents must be proved by primary evidence except otherwise as provided for by the said Statute. In the instant case, the Respondents had a duty to adduce in evidence the Mortgage deed they sought to rely on. Having failed to do so, Court would, in the circumstances, be speculating on its existence since it was not an agreed fact.

We find that, that the registration of the Bank's interest as mortgagee did not cure the defect of their not having executed a valid Mortgage Deed. This means that following **Section 129 of the RTA Cap 230**, the nature of the transaction was equitable in nature as opposed to legal. Sale under equitable mortgages requires obtaining a foreclosure Order from Court as held in **Kyagalanyi Coffee Ltd Vs Francis Senabulya, CACA No. 41/2006** relied on by the Appellants.

The said order was not obtained by the Respondents in the instant case. In the same vein the said property should not have been advertised for sale without first obtaining a court Order. It was therefore an error in fact and law for the trial judge to uphold the

illegal sale in the presence of such evidence as we have re-evaluated above. As we earlier on stated this court should not sanction an illegality. See **Makula International Ltd Vs His Eminence Cardinal Nsubuga and Anor, Civil Appeal No.4 of 1981 [1982] HCB 11**

The record further shows that the 1st Respondent, acting through its lawyers advertised their intention to sell the Appellants' securities. The Newspaper advert for sale EXD9 indicated that the sale would be conducted on the 24/06/2009. The actual sale took place on the 27/08/2009 as shown by the Sale Agreement between the 1st and the 2nd Respondents.

At the hearing, the Respondents had this to say in respect to sale at a different date:

> *"My lord on the first issue, the sale could either be by public auction or private treaty. Public auction the sale had to be on that date. Private treaty it could be on a date other than that one. That is the essence of a private treaty my lord."*

However, according to EXD9, the intended sale was advertised to be by either Public Auction or Private treaty on the 24th June, 2009 at 11.00 am. There was never a distinction made as to different dates on the basis of the mode of sale. The said date applied whether the sale was by public auction or private treaty. We are inclined to therefore agree with the Appellants that upon adjournment of the sale, the 1st Respondent ought to have undertaken a fresh advertisement. In doing so other interested buyers would be put on notice of the new dates increase the number of potential purchasers

which did not happen in this case. We find that the entire sale of the Appellants properties on the basis of EXD9 was flawed and illegal.

Furthermore, the Appellants in their pleadings (paragraphs 5(b) and (c) of the amended Plaint), averred that the sale was done secretly as opposed to a public auction and that the sale was by private treaty without the consent of the Plaintiffs as Mortgagors. In reply, the Respondents stated in their Written statement of Defence that the property was sold by public auction and not by private treaty, or secretly as earlier alleged, and that accordingly the Plaintiff's consent was never required. This directly made the nature of the sale an issue for determination. At the trial however, the Respondents changed their case without amending their pleadings.

This is made clear by the Record of Appeal, where the Appellants referred to the Respondents' submissions at the trial wherein their counsel is said to have stated that; "*my lord, it was by private treaty reason being public auction is by fall of the hammer. There was no fall of the hammer*". This submission was not consistent with the written statement of defence yet under *Order 6 Rule 7 of the Civil Procedure Rules* a party is bound by their pleadings and are not allowed to succeed on a case not set up by them as held in ***Interfreight Fowarders (U) Ltd V East African Development Bank, (SCCA) No.33 of 1992*** *which was cited with approval in* ***Ms Fang Min V Belex Tours & Travel Ltd (SCCA) No.06 of 2013.***

It was indeed a grave error and misdirection for the trial Judge to find the sale was within the law. The Appellants' arguments on this issue were also not sufficiently responded to by the Respondents.

The question of amendment of pleadings is governed by **Order 6 Rule 7 Civil Procedure Rules SI-1** which reads as follows:

> *"No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading."*

In the case of **Interfreight Fowarders (U) Ltd V East African Development Bank, (SCCA) No.33 of 1992** relied on by the Appellants, Court held that:

> *"The system of pleadings is necessary in litigation. It operates to define and deliver it with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the double purposes of informing each party what is the case of the opposite party which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial..... Thus, issues are formed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof of the case so set and covered by the issues framed therein. A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not*

be allowed to succeed on a case not so set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings."

We also find that it is an error of law for the trial court to attempt to seek out corroborative evidence for documentary evidence, which has not been tendered in before it. We agree with the Appellants' submission in respect of the purpose of corroboration as espoused by **Cross on Evidence 7th Edition p.242** cited in support of their argument. Accordingly, it was improper for the learned trial Judge to make the finding that DW2 corroborated the unavailable evidence of bid documents with the Sale Agreement.

Further the execution of the sale agreement was left wanting. The Appellants rely on a Power of Attorney which they presented by way of additional evidence whose wording in my opinion is vital in the determination of this matter. The power of attorney adduced states as follows:

"And whereas the Bank hereby nominates and appoints Nick Mbuvi, David Mayeku, James Agin, Vivian Igundura, Anthony Kaggwa, John Kibirige, Charlotte Kaheru, Christopher Niyonzima and Edith Nagujja (hereinafter referred to as 'the Attorneys') ***any two of the said Attorneys to act jointly*** *as Attorneys and representatives of the said Bank in for and throughout Uganda for all or any of the purposes following that is to say"*

This shows that, the people appointed to act on behalf of the 1st Respondent were specified by the power of attorney and they were appointed with a condition that any two of the specified Attorneys had to act jointly. In our understanding, the import of this condition is that none of the attorneys could act solely or with a person not named or specified.

The evidence on record shows that the sale agreement entered into between the 1st Respondent and the 2nd Respondent reveals that it was executed by Vivian Igundura and Angelina Namakula Ofwono on behalf of the 1st Respondent. Further, it reveals that they did so acting under the authority of power of attorney, even though the details were not revealed. The record shows that there was no power of attorney produced at the trial to show the basis of authority for the specific signatories to the agreement.

In the case of **Fredrick J.K Zaabwe Vs Orient Bank & Ors, S.C.C.A No.4/2006**, court cited Black's Law Dictionary and defined a Power of Attorney as: -

> *"An instrument in writing whereby one person, as principal, appoints another as his agent and confers authority to perform certain specified acts or kinds of act on behalf of principal...an instrument authorizing another to act as one's agent or attorney...such power may be either general (full) or special (limited)."*

The authority of a proprietor of land to grant Power of Attorney is provided for under **Section 146(1) of the Registration of Titles Act**. It provides that: -

> *"The proprietor of any land under the operation of this Act or of any lease or mortgage may appoint any person to act for him or her in transferring that land, lease or mortgage or otherwise dealing with it by signing a power of attorney in the form in the Sixteenth Schedule to this Act."*

Therefore, for one to act under a Power of Attorney, they must be specifically appointed under the said instrument. In **Halsbury's Laws of England/Mortgage Volume 77 (2010) 5th Edn para 452** an express power of sale is only exercisable by the persons who are designated for that purpose in the power. The case of Zaabwe (supra) established that the authority conferred by a Power of Attorney is that which is 'within the four corners of the instrument either in express terms or by necessary implications. Similarly, in *Williams Vs Turner [2008] QSC 327*, the Queens Land Supreme Court held that a Power of Attorney was to be strictly construed. Further, that an act of an attorney outside the scope of the authority granted by the said instrument was void.

When the 1st Respondent granted authority to the persons provided in the Power of Attorney to "*act jointly*". This express wording of the power of attorney meant that only the persons so appointed could jointly exercise the power on behalf of the 1st Respondent. During the hearing of this appeal, the Respondents were given an opportunity to

address court on the issue relating to this power of attorney both in Court of Appeal Civil Application No. 490 of 2022 and in the main appeal. They did not deny authenticity of the said power of attorney. Instead, they argued that had the Appellants raised the matter at trial, the Power of Attorney pursuant to which the 1st Respondents attorney signed would have been tendered in evidence for the same to be articulated. I find the said argument untenable because it was the duty of the Respondents to adduce the power of attorney at trial under whose authority the two signatories acted when they executed the sale agreement. Further, the Appellants having introduced evidence of the power of attorney on appeal, it was incumbent upon the Respondents to clearly state their position on the same which they omitted to do.

In the circumstances, we find that execution of the impugned sale agreement in a manner not envisaged by the Power of Attorney and by a person not authorized under the said instrument was void. Accordingly, the sale agreement between the 1st and 2nd Respondents for the suit properties was tainted with illegality.

Further the Appellants contest the sale of their property for what they perceive to be a failure by the 1st Respondent to take reasonable care to ensure that the suit property was sold at its market value. They extensively relied on the cases of **Cuckmere Brick Company Ltd & Ors V Mutual Finance Ltd (SCJCA) 1971; Ranchhobhai Shivabhai Patel Ltd & Anor V Henry Wambuga (Liquidator of African Textile Mill Ltd & Anor, (SCCA) No.6 of 2017 and Jeane Frances**

Nakamya V DFCU Bank Ltd & Anor, CACA No.105 of 2013 which emphasize the mortgagee's duty when he/she decides to sell the mortgage property.

In this case on the issue of legality of the sale as against the alleged lack of valuation of the suit property and sale at undervalue, the trial court found as follows: -

> *"As for valuation of the Properties, Counsel for the Defendant conceded that no Valuation was done. He submitted that the transaction fell within the purview of the Mortgage Act, 2009. It is my view that while the mortgages were executed before the promulgation of the current Mortgage Act in September 2009, it is only prudent and reasonable that the 1st Defendant's auctioneers ought to have carried out a valuation of the properties to prevent the sale from being conducted below the forced sale value. It is also imperative that a vendor establishes the fair market value of the property before concluding the sale."*

After making the above observation however, the trial judge made the finding below:

> *"Another thing that dislodges the Plaintiff's claims is that they did not adduce evidence showing that they had carried out valuation of the properties and improvements or infrastructures on the mortgaged securities and found the value different or higher than what the 1st Defendant obtained in the sale of the property to the Second Defendant."*

The question of the need for valuation of mortgage property before sale is settled. In ***Ranchhobhai Shivabhai Patel Ltd & Anor V Henry Wambuga (Liquidator of African Textile Mill Ltd & Anor, (SCCA) No.6 of 2017*** court held that the Respondents had acted negligently when they sold the suit properties without a pre-sale valuation and as such, the sale was conducted unlawfully. In the ***English case of Pendlebury v Colonial Mutual Life Assurance Society Ltd (1912) 12 C.L.R. 676,*** it was held that the factors which are taken into consideration to determine whether the mortgagee has failed in his duty are; omission to take obvious precautions to ensure a fair price, failure to get a proper valuation, and failure to adequately advertise the sale.

In the instant case, without a pre-sale expert valuation of the suit property, the 1st Respondent could not determine with certainty the fair market price, and the forced sale value of the Appellants' property. In light of the trial Judge's finding that the 1st Respondent did not carry out a valuation before sale of the suit properties, and in view of the authorities above cited, it is my finding that the 1st Respondent breached their duty to ensure that the suit property was sold at its fair market value. The breach of duty extends to their omission/failure to advertise some of the properties sold and the failure to undertake a fresh advertisement when they adjourned the sale.

For the above stated reasons, we are inclined to find that the sale of the suit lands/securities was tainted with illegality. We find that the

trial judge erred in law and fact when he held that the sale of the suit property by the 1st respondent to the 2nd respondent was lawful

We would accordingly find merit in ground 4 of the appeal.

Ground 5; The learned trial judge erred in law and fact when he ignored and/or failed to pronounce himself on allegations of fraud committed by the respondents at the time of sale of the suit property thereby occasioning a miscarriage of justice.

Fraud was defined by Katureebe JSC in the case of ***Fredrick JK Zaabwe V Orient Bank Ltd and 5 Others Supreme Court Civil Appeal No.04 OF 2006 [2007]*** where he stated as follows;

> *"I find the definition of fraud in BLACK's LAW DICTIONARY 6TH Edition page 660, very illustrative. "An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth, or look or gesture.....A generic term, embracing all multifarious, means which human ingenuity can devise, and which are resorted to by*

one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated, dissembling, and any unfair way by which another is cheated. "Bad faith" and "fraud" are synonymous, and also synonymous of dishonesty, infidelity, faithlessness, perfidy, unfairness, etc. .....

As distinguished from negligence, it is always positive, intentional. It comprises all acts, omissions and concealments involving a breach of a legal or equitable duty and resulting in damage to another. And includes anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false whether it be by direct falsehood or by innuendo, by speech or by silence, by word of mouth, or by look or gesture.....

In terms of the definition of the term "fraudulent" in BLACK'S LAW DICTIONARY it means "To act with "intent to defraud". It means to act wilfully, and with the specific intent to deceive or cheat; ordinarily for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself."

It is trite law as stated by Katureebe JSC in the ***Zaabwe case (supra) that in Kampala Bottlers Ltd –Vs- Damanico (U) Ltd, (S.C. Civil Appeal No. 22/92)*** the supreme court decided that even if fraud is proved, *it must be attributable directly or by implication, to the*

transferee in order for it to be a ground for impeachment of title ***Wambuzi, C.J stated at page 7*** of his judgment that;

> *"... fraud must be attributable to the transferee. I must add here that it must be attributable either directly or by necessary implication. By this I mean the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act."*

"Further, I think it is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters."

The standard of proof for fraud is well settled. The law is that allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere probability is required. See ***Ratlal G. Patel vs. Baiji Makayi (1957) EA 314 at 317.***

It was the duty of the Appellants to prove their case with or without any evidence from the defendant as required by ***Sections 101 and 102 of the Evidence Act Cap 6.***

The particulars of fraud pleaded by the Appellant in his plaint were as follows;

> *"a. The sale was done without conducting a valuation to determine the reserve price*
>
> *b. The sale was done secretly as opposed to a public auction*

c. The sale was by private treaty without the consent of the plaintiffs as mortgagor

d. The sale was done contrary to and in contravention of the law and rules applicable to enforcement of mortgages by mortgagees

e. The terms and conditions of the sale agreement depict bad faith, ill will and insider collusion to dispossess the plaintiffs of their valuable properties and business.

f. The sale was done to defeat the plaintiffs' effort to protect their securities through court as at the time there was a pending application for an injunction

g. The sale under the terms of the contract was an act of preferential treatment and discrimination against the plaintiffs in favor of the 2nd defendant as the plaintiff was also capable of complying with the terms of the Agreement. The sale was a clog on the plaintiffs' equity of redemption."

In evaluating the evidence on record while determining the grounds of appeal, we have found that all the particulars of fraud pleaded in the plaint were actually proved. The actions of the 1st and 2nd Respondents and manner in which they handled the transactions for the sale of the land suggests that they connived to defeat the Appellants interest in the land and make them part with their valuable land and school thereon.

We therefore find that the learned trial Judge erred in law and fact when he ignored and/or failed to pronounce himself on allegations of fraud committed by the respondents at the time of sale of the suit property thereby occasioning a miscarriage of justice.

We are inclined to find merit in this ground 5 of Appeal as well and we hereby do so.

Ground 6; The trial Judge erred in law and fact when he made a finding that the 1st respondent did not breach the facilities agreement entered into with the 1st appellant thereby occasioning a miscarriage of justice.

This ground of appeal is connected and related to grounds 1, 2 and 3 of Appeal and we have already found that the 1st Respondent breached the contract when they failed to prove that the money, they sought to recover was in fact disbursed or utilized by the appellants.

The trial Judge erred in law and fact when he made a finding that the 1st Respondent did not breach the facilities agreement entered into with the 1st appellant thereby occasioning a miscarriage of justice

We therefore find merit in ground 6 of appeal.

Ground 7 The learned trial judge erred in law and fact when he made a finding that the sale of the properties went towards the repayment of the 1st appellant's indebtedness to the 1st respondent thereby occasioning a miscarriage of justice.

This finding was based on assumptions and not on any real evidence before the trial Judge. There was no proper bank statement of the

loan account to prove this fact. The additional evidence adduced by the Appellants of the bank statement of the loan account shows that not a single shilling was deposited on the account to offset the loan. Had this been done the Appellants would have remained with some balance on the account considering that the land was sold at a value above and beyond the alleged sums owed to the bank. Instead, the evidence of the bank statement shows that the loan account was closed on grounds that it had become a bad loan for nonpayment of the loan.

We are therefore inclined to agree with the Appellants that indeed the trial Judge erred in law and fact when he found without any evidence before him that the proceeds of the sale went to satisfy the loan.

We accordingly find merit in ground 7 of the appeal.

Ground 8 The learned trial judge erred in law and fact when he relied on the evidence of bid documents not produced before the court thereby occasioning a miscarriage of Justice.

We resolved this issue while resolving ground 4 of the appeal. The original bid documents ought to have been presented before the trial Judge and yet they were not. Accordingly, we find that the learned trial judge erred in law and fact when he relied on the evidence of bid documents not produced before the court thereby occasioning a miscarriage of Justice.

For these reasons, we find merit in ground 8 of the appeal as well.

Conclusion

For the reasons we have given the Appeal would wholly succeed on all grounds of Appeal.

It follows therefore that this court must determine the remedies available to the Appellants. In the High Court the Plaintiffs/Appellants prayed for compensatory, general and exemplary damages. The High Court did not consider these remedies. Given the long period this case has taken in the Courts from 2009 to 2022, and the consequences of the actions of the respondents, it is just that we determine and award them remedies.

Mesne Profits

At the trial, PW.1 stated in para 27 of his witness statement that the 1st and 2nd Defendants, evicted the Plaintiffs from the suit properties in 2009. In Para 28(a) therein, he stated that the school had 800 students at the time of the eviction. In Para 28(h) he indicated that the School had existed for 19 years at the time the eviction took place. This evidence was not controverted or challenged by the Respondents.

Further the 1st Appellant's Loan Application Exh. 'A' to the 1st Respondent for the credit facility in issue, shows that the school was officially opened in 1991. The said application also shows that at the time of making the loan application in 2004, the 1st Appellant's school had a student population of 870 Students. School fees was indicated to be 320,000/- for boarding students at the material time.

The Record of Appeal shows the Advert for sale indicated that; "The properties are developed with a fully functional Secondary School trading under the name and style of M/s Progressive Secondary School". The above evidence is corroborated by **EXD.9**, (*the Advert for sale*) (*p.136 ROA*) which clearly indicated that;

"*The properties are developed with a fully functional Secondary School trading under the name and style of M/s Progressive Secondary School*".

In light of the above, it is our finding that the 1st Appellant's School which was taken over in 2009 by the 1st Respondent and sold to the 2nd Respondent was operational and a going concern. In the case of ***Kyagalanyi Coffee Ltd V Francis Senabulya CACA No. 41 of 2006***, court held that where a defendant remains in wrongful possession, he is liable to pay *mesne profits* to the person entitled to possession.

Section 2 of the Civil Procedure Act, Cap 7, defines *mesne profits* as those profits which the person in wrongful possession of the property actually received or might with ordinary diligence have received from it, together with interest on those profits but shall not include profits due to improvements made by the person in wrongful possession.

The Appellants stated in their submissions that at the time of eviction from the suit School, the Appellant's profits were on the rise, averaging not less than Ugx 889,200,000/- (Uganda Shillings Eight Hundred eighty-nine million, two hundred thousand) per annum. They prayed for the same to be computed annually at a commercial

interest rate from the time of wrongful disposition that is 2009 till payment in full. The Appellants rely on a loss assessment report which is on the record.

Considering all the above, we find an award of Ugshs. 400,000,000/- (Uganda Shillings four hundred million) as appropriate in the circumstances for each year that the Appellants were deprived of the use of their land and business income from their school.

General damages

Appellants also prayed for an award of General Damages of at least Ugx 5,000,000,000 (Uganda Shillings Five billion) for inconvenience caused to them.

It is trite law that general damages are awarded in the discretion of Court. They are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the respondent. In **Kibimba Rice Ltd Vs Umar Salim, S.C.C.A No.17 of 1992**, it was held 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/he had not suffered the wrong.

Similarly, in **Uganda Commercial Bank Vs Kigozi (2002) 1 E.A. 305,** court gave guidance on how to assess the quantum of damages; that the consideration should mainly be 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.

The record shows that the Appellants were dispossessed of their property in 2009 to date which is 13 years. It is submitted for the Appellants that in 2009, the 2nd Respondent with the help of their lawyers acting together with court bailiffs forcefully evicted the Appellants from the suit properties. That the documents used to evict the school were fraudulently obtained and the same were successfully challenged by the school lawyers in HCCA No.12 of 2010 as per the ruling in the Supplementary record of appeal. That in the course of the said illegal eviction, the 1st Appellant lost all her official documents because they were left in the offices taken over by the 2nd Respondent. They listed several other properties said to have been lost in the process of the eviction including library books, laboratory equipment, student pass slips accumulated for 19 years, classroom furniture, beds among others. At the hearing, DW.2 testified that the 2nd Respondent found nothing at the school other than a bus. He however admitted that the bus disappeared from the school when the 2nd Respondent had taken possession. He further testified that whereas an inventory had been made of what the 2nd Respondent found at the school, he had not carried the same to court. the newspaper advertisement for sale of the suit properties provided as follows:

> "The properties are developed with a fully functional Secondary School trading under the name and style of M/s Progressive Secondary School."

Given the violent manner of eviction and as testified by PW.1, the 1st Appellant was not allowed to take any of their movable properties from the school, we find that the means through which the Appellants were dispossessed of their property led to a lot of pain, suffering, humiliation and anguish to the Appellants. We further find that this is a case where the Appellants should receive compensatory damages for breach of loan agreement, wrongful deprivation of property, and the conduct of the Respondents.

We find the claim for Ugshs 5,000,000,000/- (Uganda Shillings five billion) to be on the high side.

We would award UGX 200,000,000/- (Uganda Shillings Two Hundred million) as general damages which we find to be adequate. The reason being that we have already awarded the Appellants *mesne profits* for the deprivation of use of the land.

Punitive/exemplary damages

Appellants prayed for an award of exemplary damages. The rationale behind the award of exemplary damages is to punish the defendant and deter him from repeating his conduct. In the case of **Fredrick J.K Zaabwe v Orient Bank & Ors (supra)** the Supreme Court guided on the difference between general and exemplary damages as follows:

> *"The distinction is not always easy to see and is to some extent an unreal one. It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the*

defendant and this injury suffered by the plaintiff, as for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature. On the other hand, exemplary damages are completely outside the field of compensation and, although the benefit goes to the person who wronged, their object is entirely punitive."

The 1st Respondent is a financial institution standing in a fiduciary relationship with the Appellants. The 2nd Respondent is a private company dealing in Education Services.

Bearing in mind the above principles, we find an award of UGX 50,000,000/- (Uganda Shillings fifty million) sufficient as exemplary damages.

Consequently, we would make the following orders;

1. The appeal is allowed on all grounds of appeal
2. The Judgment, decree and orders of the High Court are set aside
3. The sale and transfer of the Appellants' suit properties by the 1st Respondent to the 2nd Respondent is hereby set aside.
4. The Registrar of Titles is hereby ordered to cancel the transfer and registration of the 2nd Respondent and reinstate the Appellants as the registered proprietors of the suit properties who shall be entitled to vacant possession thereof.
5. The 1st and 2nd Respondents shall jointly and severally pay to the Appellants UGX 400,000,000/- (Uganda Shillings Four hundred million) *mesne profits* for every year for which they

remain in possession of the suit property/business from August 2009 until hand over of vacant possession of the school to the appellants as compensatory damages.

6. The 1st and 2nd Respondents shall jointly and severally pay to the Appellants UGX 200,000,000/- (Uganda Shillings Two hundred million) general damages.

7. The 1st and 2nd Respondents shall jointly and severally pay to the Appellants UGX 50,000,000/- (Uganda Shillings fifty million) exemplary damages.

8. Interest on the mesne profits 25% per annum from the date of this judgment until payment in full.

9. Interest on the general damages at 6% per annum from the date of this Judgment until payment in full.

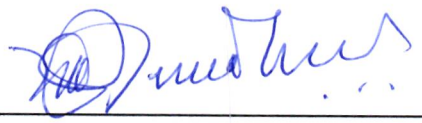
10. The 1st and 2nd Respondent shall jointly and severally pay the Appellants costs of this appeal and of the proceedings in the High Court.

We so order.

Dated this 2nd day of March 2023

Hon. Justice Richard Buteera, DCJ

Hon. Justice Catherine Bamugemereire, JA



Hon. Mr. Justice Stephen Musota, JA