

The Republic of Uganda

In the High Court of Uganda Holden at Soroti

Civil Suit No. 28 of 2021

(Arising from consolidated Civil Suit No. 58 of 2019 and Civil Suit No. 1053 of 2019)

10 1. Abuto Sarah

2. Eryaku Isaac

..... Plaintiffs

Versus

1. Stanbic Bank (U) Ltd

2. Abunyang Emmanuel

15 3. Commissioner Land Registration

..... Defendants

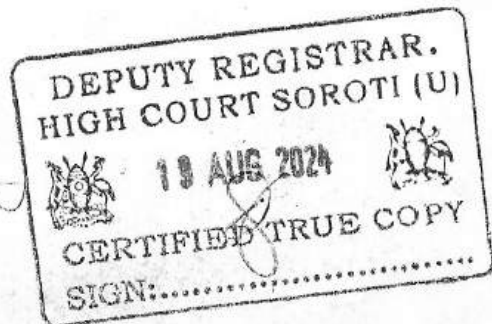
Before: Hon. Justice Dr Henry Peter Adonyo

Judgement

1. Introduction:

The plaintiffs brought this instant case against the defendants jointly and severally,
20 claiming for;

- A declaration that the 1st defendant's intended sale of the plaintiffs' Plot 37 Block 8 Olio Serere is illegal and unlawful,
- A declaration that the 1st defendants' attachment and sale of the plaintiffs' property comprised in plot 14 Akaikai Lane Soroti to the 2nd defendant was
25 illegal and fraudulent,



- 5 A declaration that the plaintiff does not owe the 1st defendant the amount of money claimed, a declaration that the defendants unlawfully attached and converted the plaintiffs' household properties,
- A declaration that the actions of the defendants were unlawful and highhanded,
- 10 - A declaration that the interest charged was high and was not agreed to if any, an account of all proceeds of the purported sale of the plaintiffs' property in settlement of the loan facility,
- A permanent injunction restraining the defendants, their agents, nominees or assignees from selling/alienating or doing anything on the plaintiffs' other
- 15 property, an order of compensation for all the household and commercial items and other properties attached and taken by the defendants,
- An order of compensation arising from the destruction, loss and theft of the plaintiffs' property during and after the illegal eviction of the plaintiffs from their premises,
- 20 - An order of cancellation of the purported sale of Plot 14, Akakai Lane to the 2nd defendant, an order of eviction of the defendants from the plaintiffs' property, damages for illegal and unlawful eviction from house/home,
- Special damages for goods and property lost amounting to over UGX 140,000,000, general damages for anguish, mental torture and inconvenience
- 25 caused,
- Payment of interest at Commercial rate of 30% p.a. Till payment in full and
- Costs of the suit.

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5 2. The Plaintiffs' case:

The plaintiffs averred that in 2011 the 2nd plaintiff obtained a home loan from the 1st defendant for home improvement using some of their properties like Plot 14 Akaikai Lane Soroti and Plot 37 Block 8 Olio Serere as collateral.

10 The plaintiffs averred that they had repaid the loan facility variously over the years and that at that time, no bank statement/loan statements were sent to his post office mailbox or electronic mail.



15 The plaintiffs further contended that their house on plot 14 Akaikai Lane was fraudulently and unlawfully sold below market value in 2016 to the 2nd defendant at about UGX 95,000,000/= (Ninety-five million Uganda shillings), and the money was allegedly deposited in Stanbic Bank(U) Ltd to offset the facility, but there was no evidence from the Bank Statement that the money was used to settle the loan.

The plaintiffs additionally contended that the property had an appreciated value of 150m over five years before the sale.

20 The plaintiffs agree that while they were informed of the intended sale by the 1st defendant's servants, who had asked the plaintiff to close the matter by paying the 1st defendant but that around July 2016, the defendants just entered their house and took out their household property and guest house equipment, purportedly on eviction orders of the court in the plaintiffs' absence and without any notice given to them and without any court order, which eviction proceeded crudely and in a high-handed manner as the plaintiffs' property was thrown on the streets of Soroti town, stolen and converted by the defendants and their agents and not identified, 25 counted or witnessed by the plaintiffs or their agents.

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- 5 The plaintiffs further contended that they lost all their property in the house to street hooligans who had come with the defendants and commanded them on behalf of the first defendant yet the 1st and 2nd defendants carried out the eviction well aware of a valid and existing court order of interim stay of execution pending Civil Suit No.18 of 2016 filed by the 1st plaintiff.
- 10 That the defendants performed the unlawful eviction without the plaintiffs, local authorities and witnesses, yet the offices of the LCI and LC2 Chairpersons were within the vicinity.

The plaintiffs' further argued that home property attached and taken were not part of the suit being executed yet they had fundamental rights to a home and to be treated humanely and that their rights were violated by the first and second defendants through the illegal eviction and damage to their property.

15 Accordingly, the plaintiffs seek the remedies in their plaint against the defendants.

3. The defendants' case:

The defendants denied the plaintiffs' claim and averred that the plaintiffs were not entitled to any of the remedies sought.

The defendants contended that on 27th October 2011, the 2nd plaintiff entered a mortgage agreement with the 1st defendant which advanced a loan of UGX 80,000,000 (Uganda shillings eighty million). That the loan was secured by the 2nd plaintiff's properties comprised in LRV 2819, Folio 6, Plot No. 37 at Serere ("the Serere property"), Block 8 and LRV 3481, Folio 9, Plot 14 Akaikai Lane, Soroti ("the Soroti property").



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5 That the 2nd plaintiff defaulted on his obligations, and on 05th August 2014, he was notified of his default and required to pay the sums outstanding under the mortgage lest risk foreclosure of the same.

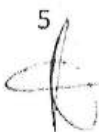
That on 12th November 2014, 16th March 2015, and 13th July 2015 (three times), the 2nd plaintiff was notified of the 1st defendant's intention to exercise its right of sale
10 under the Mortgage Agreement (Foreclosure) if he failed to pay the outstanding sum, but he successively failed to fulfil his obligations under the mortgage agreement.



That on 9th September 2015, the 1st defendant, through its agents, Century Associates, advertised the Soroti property for sale by public auction in' the *Daily*
15 *Monitor* newspaper.

That following the advertisement, the 1st defendant instructed valuers to make a valuation of the Soroti property in accordance with the Mortgage Act, which instruction was followed, and a report was presented to the 1st defendant on 25th April 2016.

20 That the 1st defendant received several bids for the Soroti property, which it duly evaluated. The 2nd defendant's bid emerged as the most valuable. The Soroti property was then sold to the second defendant for UGX 95,000,000 (Ninety-Five million Uganda shillings).

25 That the 1st defendant, through its bailiffs, requested the 2nd plaintiff to vacate the Soroti property so that the sale could be completed and the property could be handed over to the purchaser.

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- 5 That the 2nd Defendant, with the aid of the 1st Defendant's agents, Century Associates, took over the property and, in the presence of the area local Council Committee, took an inventory of the plaintiff's residual properties left behind, which were stored and handed over to the Plaintiffs.

10 That it was not true that the sale/or the eviction was effected during the subsistence of a court order because by the time the property was sold and the purchaser took possession of the same, the interim order had been vacated.

15 That in any event, the 2nd Defendant claimed he did not know of the interim order when he purchased the property and that no court order was necessary for the sale of the Soroti property as the sale was conducted under the Mortgage Act and regulations thereunder.

That the sale proceeds were inadequate to cover the outstanding sums under the loan and to pay for the foreclosure process.

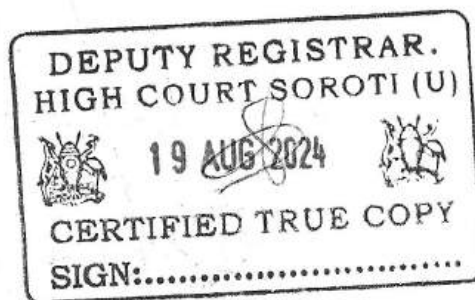
That the 1st defendant owed the 2nd plaintiff a tune of UGX 17,729,549, which the 1st Defendant intends to counterclaim for.

20 The first defendant contended that it is entitled to recover the sums outstanding under the loan facility together with continuously accruing interest and will dispose of the Serere property after this suit to recover the same.

The defendants prayed that the plaintiffs' suit be dismissed with costs.

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4. Representation:

Mr Omongole Richard, Ms Lilian Omurangi and Ekima Emmanuel represented the plaintiffs while Mr. Zeere James represented the 1st defendant, and Mr Joshua Okanya represented the 2nd defendant. The 3rd defendant never entered appearance and was not represented.

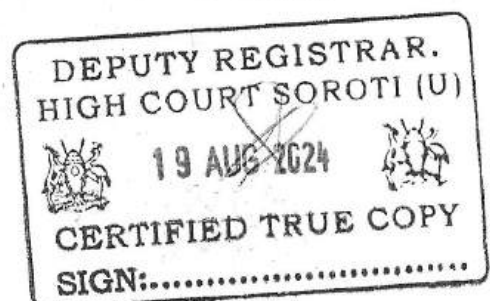
10 The plaintiffs adduced evidence of five witnesses, that PW1 Eryaku Isaac, PW2 Joseph Kibande, PW3 Richard Oita, PW4 Mwima Ramanzani and PW5 Abuto Sarah.

The 1st defendant presented one witness, DW1 Norris Mutahunga, the 2nd defendant presented two witnesses; DW2 Emmanuel Abunyang and DW3 Echodu Peter

15 5. Issues:

In the Joint Scheduling Memorandum filed in this court on 15th March 2022, four issues were proposed to resolve the dispute. On 22nd August 2023, the issues were amended to five and adopted by the parties, with the assistance of court thus;

- a) Whether the attachment and sale of property comprised in LRV 3481 Folio9 Plot 14 Akakai Lane Soroti to the 2nd defendant was illegal unlawful and fraudulent?
- b) Whether the defendants unlawfully attached and converted the plaintiffs' movable properties during the eviction and sale of LRV 3481, Folio 9, Plot 14, Akakai Lane, Soroti?
- c) Whether the plaintiffs owe the 1st defendant any money?
- d) Whether the intended sale of plot 37 Block 8 Olio Serere is lawful?
- e) What remedies are available to the parties?



-5 I find that these issues suffice for the resolution of the instant dispute, and such they are adopted accordingly.

6. Burden of Proof:

As for any civil suit, the plaintiffs herein have the burden of proof to prove their case on a balance of probabilities their case against the defendants. see: sections 101 and 102 of the Evidence Act, Cap 6 and *Nsubuga vs Kawuma [1978] HCB 307*.

Similarly, the plaintiffs must take into account the holding in the case of *Erumiya Ebyetu v. Gusberito [1985] HCB 64*, where it was held that;

“... where the plaintiff leaves his case in equilibrium, the court is not entitled to incline the balance in his favour. The plaintiffs must prove their case against the defendant to the required standard.”

7. Submissions:

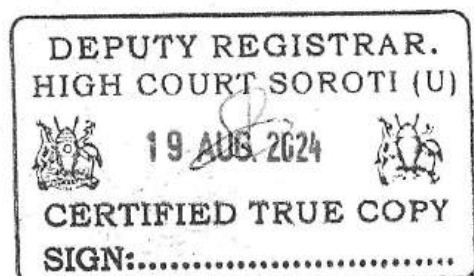
The parties filed written submissions, for which the court is grateful. The submissions have been considered in resolving the dispute before the court.

8. Resolution of issues:

a) Whether the defendants unlawfully attached and converted the plaintiffs' movable properties during the eviction and sale of LRV 3481, Folio 9, Plot 14, Akakai Lane, Soroti?

In resolving this issue, I will first deal with the touchy issue of whether the sale of land comprised in LRV 3481, Folio 9, Plot 14, Akakai Lane, Soroti; was illegal.

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5 From the pleadings, it is safe to conclude that it is not in contention that the 2nd plaintiff and 1st defendant entered into a Mortgage Agreement on 27th October 2011 as clearly DEX3 shows.

According to DEX3 the 1st defendant advanced a loan of UGX 80,000,000 (Uganda shillings eighty million) to the 2nd plaintiff which was secured by the 2nd plaintiff's
10 properties comprised in LRV 2819, Folio 6, Plot No. 37 at Serere ("the Serere property"), Block 8 and LRV 3481, Folio 9, Plot 14 Akaikai Lane, Soroti ("Soroti property").



Pursuant to Clause 2(1) (iv(a)) of the Mortgage Agreement (DEX3), the 2nd Plaintiff
15 was required to pay a monthly sum of Ugx 1,390,523 for a period of 240 or twenty years (See: The Loan Repayment Schedule (DEX4)).

The 1st defendant led evidence to show that the 2nd plaintiff defaulted on his loan repayment obligations with Norris Mutahunga (DW1), the 1st defendant's Legal Rehabilitation and Recoveries, stating that on 5th August 2014, the 1st defendant notified the 2nd plaintiff through DEX10 of his loan repayment default and was
20 requesting him to remedy the default by paying the outstanding amount within 45 days.

DW1 further told the court that on 11th November 2014, the 1st defendant again notified the 2nd plaintiff through DEX7 of the intention to sell the mortgaged security if he failed to pay off the sums outstanding under the Mortgage Agreement (DEX3).

25 DW 1 further told the court that on 16th March 2015, the 1st defendant, as indicated in DEX8, notified the plaintiffs that they were in default of their loan obligations and requested them to clear the outstanding sums within 45 days of receiving the notice.

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5 DW1 told the court that again on 13th July 2015, the 1st defendant notified the plaintiffs that they would proceed to sell the mortgage property in accordance with the mortgage agreement if the plaintiff failed to pay the outstanding sums under the agreement (DEX9).

10 From the agreement of the parties and from the further evidence on record, it is not in contention that the second plaintiff defaulted on the loan repayments as scheduled, though the plaintiffs contended that the Soroti property, which was used as collateral for the loan, was illegally foreclosed on and sold to the 2nd defendant.

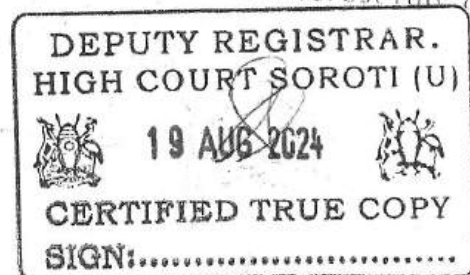
15 In making the case that the sale of land comprised in LRV 3481, Folio 9, Plot 14, Akakai Lane, Soroti; was illegal, counsel for the plaintiffs asserted that the 1st defendant in selling the said impugned suit land failed to uphold the principles of fairness, trustworthiness, and transparency as is provided for in the Bank of Uganda Consumer Protection Guidelines 2011 in addition to abusing its fiduciary relationship with the plaintiffs when it attached, sold, and transfer the property comprised in LRV 3481 Folio 9 Plot 14 Akakai Lane Soroti, which counsel contended
20 was tainted with illegalities.

The plaintiffs' counsel enlisted the allegations that surrounded the allegedly illegal and unlawful sale of the Soroti property as follows;

- i. The Variation of the interest rate from 20.5% to 23.5% without notice to the 2nd defendant and consent.

25 The plaintiffs' counsel submitted that the 1st defendant did not comply with Paragraph 6(8) of the Bank of Uganda Financial Consumer Guidelines of 2011 and Section 12 of the Mortgage Act when it unilaterally increased the interest rate and

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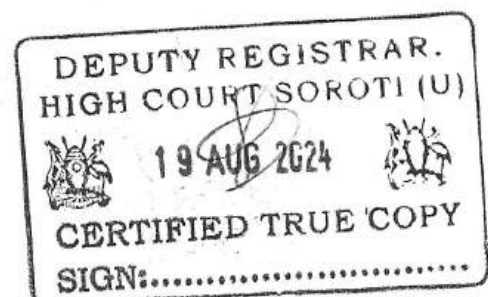
5 failed to notify the 2nd plaintiff that the rate had been varied from 20.5% to 23.5% and that it applied upon disbursement of the loan on 3rd November 2011.

The plaintiffs' counsel contended that DW1 conceded to this fact and told the court that it would be right for the party were notified of the change in the interest rate before the 1st disbursement of the loan as agreed but that nothing there was nothing
10 on record to show that the plaintiff was notified of the changed interest rate and that if he had been there, he would have advised the bank to notify the mortgagee legally.

The plaintiffs' counsel submitted that Richard Oita (PW3) confirmed the variation of the interest rate from 20.5% to 23.5% as per DEX3 which was done immediately
15 upon the disbursement of the loan as the same was used and applied to compute the monthly recoveries.

On the other hand, Isaac Eryaku (PW1) told court that the 1st defendant's officer-called Bumba Vincent had before he signed the Mortgage Agreement approached him with a loan offer at an annual interest rate of 20.5% and he signed an agreement
20 to that effect; but that instead; upon disbursement the interest rate was unilaterally increased from 20.5% to 23.5% without his consent.

The plaintiffs' counsel thus called upon the court to note this farcical act and exercise its discretion to declare the 1st defendant's allegedly unlawful increased interest rate without the consent and notice to the 2nd plaintiff contrary to the law; thus, the
25 court should set aside the whole mortgage agreement for having an illegal and unconscionable interest rate charged by the 1st defendant.

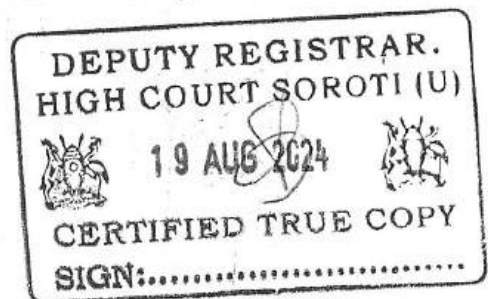



5 On the other hand, the 1st defendant contended that the plaintiffs' counsel's argument that the 1st defendant unilaterally increased the interest rate from 20.5% to 23.5% was a departure from the pleadings of the plaintiffs because to the 1st defendant's counsel, the plaintiffs under paragraph 4(p)(ii) of the Amended Plaint, pleaded the particulars of fraud/illegality regarding the issue of interest as "*Forging or causing to be forged a varying interest rate without the consent of the 2nd Plaintiff*"
10 and that the issue of variation of the interest rate without notice to the 2nd plaintiff was not pleaded.

The 1st defendant's counsel further contended that the submission that the 2nd defendant varied the interest rate without notice to the 2nd plaintiff instead of the
15 1st defendant forged a varying interest rate without the consent of the 2nd plaintiff is to the 1st defendant's counsel was a material departure from the pleadings as the 1st defendant is now required to prove that they issued the notice of variation to the 2nd plaintiff yet in the filed pleadings, the 1st defendant was only expected that they would be required to prove whether the consent of the 2nd plaintiff was obtained
20 before the variation of the interest.

The 1st defendant's counsel further submitted that regarding the question of variation of the interest rate without the consent of the 2nd Plaintiff, the 2nd Plaintiff was not entitled to consent to the variation of the interest because it was agreed in the Mortgage Agreement that the 1st Defendant reserved the right to amend the
25 interest rate in line with market trends as per paragraph 2(1)(i)(b) of the Mortgage Agreement.

To that end, counsel argued that it was misleading for the 2nd Plaintiff to argue that he was entitled to consent to a variation of the interest rate yet he had executed a



5 Mortgage Agreement in which he agreed that the 1st Defendant had the right to make amendments to the interest rate unilaterally.

The 1st defendant's counsel thus urged court to find that the Plaintiffs had not demonstrated to court how the said variation of the interest rates by the 1st defendant had affected the 2nd plaintiff's compliance with the terms of the mortgage agreement and that were it not for the variation, the 2nd Plaintiff would have not defaulted on his loan repayment obligations.

15 Addedly, the 1st defendant's counsel opined that this Honourable Court should only consider the raised question of variation of interest as relevant had the 2nd Plaintiff demonstrated that he defaulted on his loan repayments only because of the variation in the interest rates. But this was not the case since the 2nd Plaintiff defaulted even on the principal amount that was agreed in the Mortgage Agreement.

20 Accordingly, counsel for the 1st defendant urged this Hon Court to find that the 1st plaintiff was not debarred from implementing the Mortgage agreement even if he felt that the 1st defendant had unilaterally varied the applicable interest rate.

The plaintiffs' counsel in rejoinder, contended that whereas the 1st defendant's counsel submitted that the plaintiffs' had departed from their pleadings of "*forging interest rate not variation of interest without notice*," was not the issue but that an illegality had been cited and thus raised which a court cannot ignore or sanction once that illegality is brought to its attention as was held in the case of *Makula International Ltd Vs His Eminence Cardinal Nsubuga and Anor (1982) HCB 11*.



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5 That the illegal actions of varying the interest by the 1st defendant without notice to the 2nd plaintiff was something which cannot be said to be a departure from pleadings as the same occasioned the 1st defendant to collect an illegal interest of UGX 120,985 multiplied by 55 months and unlawfully enriched itself with that illegal amount right from the time of disbursement of November 2011 to May 2016 when
10 the loan was extinguished making it a total illegal interest of UGX 6,654,175 which was neither agreed to in the Home Loan Offer Letter (DEX2) nor in the Mortgage Deed (DEX3).

The plaintiffs' counsel thus prayed that the court finds that the 1st defendant unlawfully increased the interest rate without the consent and notice to the 2nd
15 plaintiff thus unlawfully enriching itself and as such the court should exercise its discretion and set aside the whole mortgage agreement as being illegal and unconscionable.

Before I delve into this issue, it is prudent to explain the principle of unlawful or unjust enrichment.

20 The general equitable principle that no person should be allowed to profit at another's expense without making restitution for the reasonable value of any property, services, or other benefits that have been unfairly received and retained.

The online Free Dictionary (<https://www.thefreedictionary.com/>) defines unjust or an illicit enrichment as a benefit by chance, mistake, or another's misfortune for
25 which the one enriched has not paid or worked and morally and ethically should not keep. If the money or property received rightly should have been delivered or belonged to another, then the party enriched must make restitution to the rightful

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5 owner. Usually a court will order such restitution if a lawsuit is brought by the party who should have the money or property.

Although the unjust enrichment doctrine is sometimes referred to as a quasi-contractual remedy, unjust enrichment is not based on an express contract.

10 Instead, litigants normally resort to the remedy of unjust enrichment when they have no written or verbal contract to support their claim for relief.

In such instances litigants ask a court to find a contractual relationship that is implied in law, a fictitious relationship created by courts to do justice in a particular case. Unjust enrichment has three elements.

15 First, the plaintiff must have provided the defendant with something of value while expecting compensation in return.

Second, the defendant must have acknowledged, accepted, and benefited from whatever the plaintiff provided.

Third, the plaintiff must show that it would be inequitable or unconscionable for the defendant to enjoy the benefit of the plaintiff's actions without paying for it.

20 A court will closely examine the facts of each case before awarding this remedy and will deny claims for unjust enrichment that frustrate public policy or violate the law.

In some circumstances unjust enrichment is the appropriate remedy when a formally executed agreement has been ruled unenforceable due to incapacity, mistake, impossibility of performance, or the Statute of Frauds.

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5 In certain states, for example, contracts with minors are voidable at the minor's discretion, because persons under the age of majority are deemed legally incapable of entering into contracts.

But if the minor has received a benefit from the other party's performance before nullifying the contract, the law of unjust enrichment will require the minor to pay
10 for the fair market value of the benefit received.

If the adult used duress or undue influence to induce the minor to enter the contract, however, the court will deny recovery in unjust enrichment because the adult lacked "clean hands."

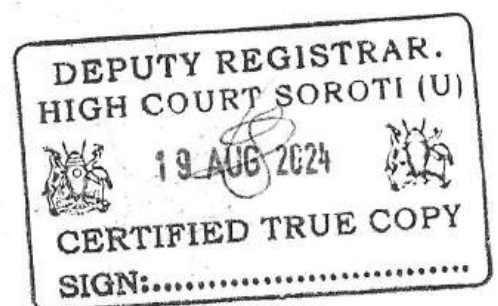
In other circumstances unjust enrichment is the appropriate remedy for parties who
15 have entered a legally enforceable contract, but where performance by one party exceeds the precise requirements of the agreement.

For example, suppose a homeowner and a builder have entered into a legally binding contract under which the builder is to construct a two-car garage.

One day the owner returns to her residence and discovers that in addition to
20 constructing a two-car garage, the builder has paved the driveway.

The owner says nothing about the driveway but later refuses to compensate the builder for the paving job.

The builder has a claim for unjust enrichment in an amount representing the reasonable value of the labor and materials used in paving the driveway.



5 Notable cases regarding unlawful enrichment in Uganda is that of *Uganda v Geoffrey Kazinda (Session Case HCT-AC/CO 4 of 2016) [2020] UGHACD 3 (28 October 2020)*. In this case Geoffrey Kazinda, a former Principal Accountant in the Office of the Prime Minister, was convicted on three counts of illicit enrichment under the Anti-Corruption Act, 2009. This landmark judgment, delivered on October 28, 2020,
10 involved a significant sum of UGX 4,630,195,258 (over USD 1,252,600) and highlighted the application of Uganda's illicit enrichment law.

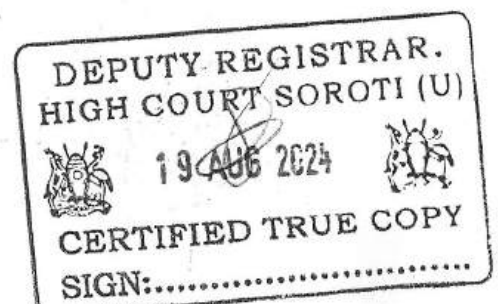
Another relevant case is that of *Kensheka v Uganda Development Bank (Civil Suit No. 469 of 2011) [2015] UGCommC 67 (19 February 2015)*.

In this case, the plaintiff sought the refund of UGX 84,000,000, which was paid under
15 a failed Trade Financing Agreement. The court ruled in favor of the plaintiff, emphasizing the principle of unjust enrichment, which require that a defendant which has been enriched at the expense of plaintiff and retained such illicit enrichment ought to be required to refund such illicit enrichment as it was unjust.

These cases illustrate how Ugandan courts address issues of unlawful and unjust
20 enrichment, ensuring that individuals and entities are held accountable for benefiting unfairly at the expense of others.

This issue raised here in this instant suit relates to a non-disputed unilateral change of agreed interest rate relating to a mortgage agreement entered into between the 2nd plaintiff and the 1st defendant, to the detriment of the 2nd plaintiff.

25 The position of the law as regard change of agreed interest under a mortgage is provided for by Section 12 (1) Mortgage Act, 2009, Act 8 of 2009. It provides as follows;



5 (1) The rate of interest payable under a mortgage may be reduced or increased by a notice served on the

mortgagor by the mortgagee which shall—

(a) give the mortgagor not less than fifteen working days' written notice of the reduction or increase in the rate of interest;

10 (b) state clearly and in a manner which can be readily understood, the new rate of interest to be paid in respect of the mortgage;


(c) state the responsibility of the mortgagor to take such action as he or she is advised by the notice to take to ensure that the new interest rate is paid to the mortgagee

Honourable Justice David Wangutusi while handling a similar matter in the case of
15 *Eden International School Ltd vs East African Development Bank Ltd Civil Suit No. 271 of 2015* had this to say about change in interest rates by a bank/mortgagee. He opined thus;

"... paragraph 8 of the Bank of Uganda Financial Consumer Protection Guidelines, 2011 which provides for notice of change to terms and conditions.

20 *Paragraph 8 obligates the financial services provider to notify its customers at least 30 days in advance before implementing any changes to the terms and conditions, fees or charges, discontinuation of services or relocation of premises of the financial service provider and immediately of any changes in interest rates regarding products and service.*

25 *The notification as I have stated above would only be operative on serving the Plaintiff a written advice by the Defendant of the changes in the interest rate applicable to the loan. There is no evidence on record even in the communications between the two parties that this was done. Even if the Defendant had done so using a different form of communication not stated in*

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5 the security instrument it would have been in contravention of the Loan Agreement.

10 The purpose of the notice to the borrower was to enable him know as quickly as possible its changed liability. Using any other method was not in accordance with the contract between the parties and therefore did not affect the rate of interest in that facility. While the Defendant had a right to vary its rate of interest, such notice of variation had to be given to the Plaintiff in the terms of the Loan Agreement and in all circumstances the Loan Agreement which had been signed by all parties and whose provisions were reconfirmed in clause 6 of the loan scheduling document dated 22nd October 2007.

15 Any attempt therefore to apply the change in interest rate retrospectively from the date of notification was wrong in law in as much as it breached the Loan Agreement and could only be effected from the first day of the month next after notification as provided for under paragraph 8 of the Bank of Uganda Financial Consumer Protection Guidelines, 2011 herein first mentioned."

20 For clarity purposes it is imperative to provide what Paragraph 8 of the Bank of Uganda Financial Consumer Protection Guidelines 2011 provide here. It states thus:

(8) Notice of Changes to Terms and Conditions:

A financial services provider shall ensure that a consumer is notified-

25 (a) at least thirty days in advance before implementing any changes to the terms and conditions, fees or charges, discontinuation of services or relocation of premises of the financial services provider.

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5 (b) immediately of any changes in interest rates regarding the product or service.

Applying the above to the instant matter, evidence has been undeniably received from the 2nd plaintiff vide DEX3 that the agreed interest rate which signed for between himself and the 1st defendant was 20.5% but that this rate was unilaterally increased by the 2nd defendant to 23.5% as seen from the Loan Repayment Schedule
10 (PEX24 and PEX 33).

The bank (1st defendant) does not controvert or dispute that it did unilaterally increased in interest rate but does not offer any evidence as to providing any notice to the mortgagor prior to the increase, in spite of, the provisions of the Mortgage Agreement as to its sole reservation to change the interest, notwithstanding the fact
15 that it was still obliged by Section 12(1) (a) of the Mortgage Act, 2009 and Paragraph 6(8) of the Bank of Uganda Financial Consumer Protection Guidelines, 2011 to notify the mortgagor of variation in interest which in this case it increased it unilaterally from 20.5% to 23.5% upon the disbursement of the loan to the 2nd plaintiff.

Given the clear legal position under Section 12(1) (a) the Mortgage Act, 2009 and
20 Bank of Uganda Financial Consumer Protection Guidelines, 2011, coupled with the holding in Eden International School Ltd (supra) which are the guiding legal regime for the Home Loan then offered to the 2nd plaintiff, I would respectfully disagree with the 1st defendant's contention that the question of variation of interest would only be relevant if the 2nd Plaintiff had demonstrated that he had only defaulted on
25 his loan repayments because of the variation in the interest rates as that would not a legal justification for departure by the 1st defendant from its obligation to implement the clear provisions of the law which governed the execution of DEX3 anyway (see particularly Clause 20 of DEX3).

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5 Arising from the fact that the position of the law was very clear and an unequivocal,
it is therefore my finding and conclusion that the 1st defendant bank breached its
legal obligation under the Mortgage Agreement signed with the 2nd plaintiff by
failing to notify him as the mortgagor of the changed interest rate which was a clear
violation of Section 12(1) of the Mortgage Act, 2009 read in tandem with the Bank
10 of Uganda Financial Consumer Protection Guidelines 2011.

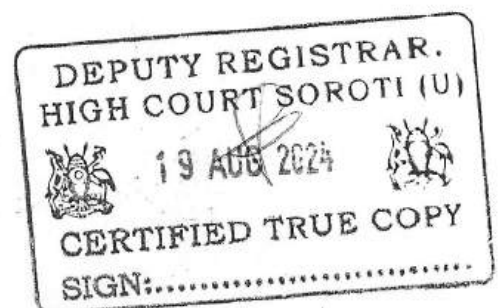
Accordingly, the variation of the interest rate from 20.5% to 23.5% on the Home
Loan Offer Letter (DEX2) and in the Mortgage Deed (DEX3); without notice to and
the consent of the 2nd defendant, is declared was illegal and any money due from
the said increase in the interest not forming part of the money due from the
15 mortgagor would be regarded as an illicit earning and it must be returned to the
2nd plaintiff.

ii. Failure to serve the mandatory notices to the mortgagor prior to foreclosure.

The plaintiffs' counsel's contention is that the relevant notices were not served to
them in the sequence provided and that even where service was made they were
20 not effectively done.

In making this assertion, counsel for the plaintiffs' c referred to the provisions of
Sections 19(2)(3) and (4) of the Mortgage Act which provides for manner of how
notices must be served on the mortgagor.

The plaintiffs' counsel further conceded that it was true that two notices were issued
25 by the 1st defendant on 5th August 2014 (DEX10) and 12th November 2014 (DEX7),
respectively.



5 However, the plaintiffs' counsel contended by the issuing the two notices, the loan account was normalised after the 2nd plaintiff paid the penalty accrued as is evidenced by DEX14 which meant that the 1st defendant was then supposed to issue fresh notices of default upon the 2nd plaintiff defaulting further on any of his loan obligation but this was not the case for after the 2nd plaintiff defaulted on his loan
10 obligation in 2015, he was never issued with the Mandatory Three Notices before the sale of his property because to counsel, the only notices which were served on the 2nd plaintiff were a notice for rectifying the default DEX 8 dated 16th March 2015 and the notice to sell the mortgaged property dated 13th July 2015 DEX 9.

To counsel, this meant that the 1st Defendant issued only two notices instead of the
15 three mandatory notices, hence denying the 2nd Plaintiff the opportunity to redeem his property.

In making this assertion, Counsel referred to the case of *Stanbic Bank (U) Ltd V Munwe Enterprises Ltd & Another Civil Suit No.0013 of 2022*, where Hon. Justice Stephen Mubiru pointed out that; "...the mortgagee's power of sale cannot be
20 *exercised in the absence of evidence of the fulfilment of the statutory requirements as to notice.*"

The plaintiffs' counsel asserted that once a mortgagor pays off any mortgage arrears, the earlier notices issued are waived, and any further default would require fresh notices and could not sit on the lap any previous issued notices.

25 The plaintiffs' counsel further asserted that notices issued in 2014 cannot suffice for a sale (foreclosure) conducted two years later.



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5 Counsel prayed that this court finds that failure to issue notices of default, to rectify the default and the sale of the Plaintiff's property in a proper sequence deprived the Plaintiffs of the opportunity to redeem their property and, therefore, the mortgage should be invalidated.

On the other hand, the 1st defendant's counsel contended that the Mortgage Act,
10 2009 requires that only two notices under Section 19 (2) and Section 26 (1) of the Act be issued before the mortgagee can exercise the right to sell.

PW1 told the court that he had neither received any document from box number 362, Soroti the address he had given the bank nor received any notification from Posta Uganda.

15 PW1, the 2nd plaintiff asserted that he only received communication after the bank had sold his property when he got a call from a one Ms Charlotte Among, Manager Recoveries of Stanbic Bank at the beginning of May 2016 informing him that the bank had sold Plot 14 Akakai Lane, Soroti.

The plaintiffs' counsel asserted that the 1st Defendant issued only two notices that
20 were merely sent to the 2nd Plaintiff's postal address, which is not effective service to the mortgagor since the three statutory notices are intended to notify the mortgagor of his default and give him time to redeem his property.

The plaintiffs' counsel contended that the spouse of the 2nd plaintiff, who is the 1st plaintiff, was never even notified about the sale of their matrimonial home, which is
25 contrary to section 26(3) (b) of the Mortgage Act yet she provided her address as plot 14 Akakai Lane in the loan application PEX10 and her workplace address were known to the 1st defendant, as Amuria District Local Government.



5 Counsel prayed that this court finds that the 1st defendant failed to comply with sections 19 and 26 of the Mortgage Act and thus meaning that the whole process of the sale of plot 14 of Akaikai Lane, Soroti resulting in being unlawful.

Section 19(1), (2),(3) and (4) of the Mortgage Act provides for notices to be served on the mortgagor. Section 19(1) of the Mortgage Act provides that where money
10 secured by a mortgage is made payable on demand and a demand in writing creates a default in payment.

This means that the mortgagee first issues a demand for payment of any arrears and upon the failure by the mortgagor to clear the arrears, the mortgagee issues a second notice of default requiring the mortgagor to rectify the default.

15 The second notice is issued under section 19 (2) and has to be in writing notifying the mortgagor of the default and requiring the mortgagor to rectify the default within 45 working days. The notice has to be in the prescribed form as per Section 19 (3) of the Mortgage Act.

20 According to Section 19(3)(d) of the Mortgage Act, if the default is not rectified within the time specified in the notice, the mortgagee will proceed to exercise any of the remedies referred to in section 20.

The Mortgagee may therefore sell the property by virtue of section 26 of the Mortgage Act, after the expiry of the time provided for the rectification of the default stipulated in the notice served on the Mortgagor under section 19.

25 A third notice that pertains is couched in non derogable wordings in Sections 26(2) and (3) of the Mortgage Act with Section 26(2) of the Mortgage Act, providing that;



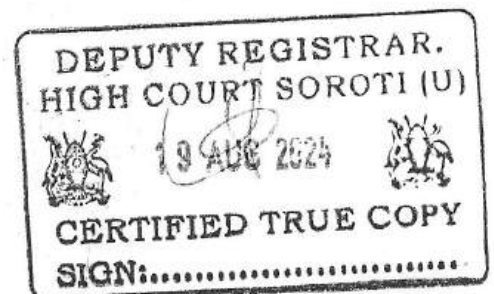
5 Before exercising the power to sell the mortgaged land, the mortgagee SHALL serve a
notice to sell in the prescribed form on the mortgagor and SHALL not proceed to
complete any contract for the sale of the mortgaged land until twenty-one working
days have lapsed from the date of the service of the notice to sell. [Emphasis Mine]

In light of the above clear provisions of The Mortgage Act, I would disagree with
10 the 1st defendant's contention that Sections 19(1) and 19(2) of the Mortgage Act do
not provide for two different notices but that one notice of default was required to
issue under Section 19; which to counsel, in this case was the notice issued by the
1st defendant on 16th March 2015 when the 2nd Plaintiff was notified that he had
15 defaulted on his loan obligations, the amount in default, the period for which he had
been in default and the amount he was required to pay to rectify the default.

By virtue of Sections 19(1) and 19(2) of the Mortgage Act, the mortgagee's
obligation is required to two notices, thus;

- The first notice is a demand in writing under Section 19(1) of the Mortgage
Act and is required to last thirty days from the date when the obligation to
20 pay became due as per Section 19(4) of the Mortgage Act,
- The Second Notice in Default is provided for under Section 19(4) of the
Mortgage Act and it lasts for 45 working days couched under Section 19(2) of
the Mortgage Act. (see also *Majid Akuze vs Centenary Rural Development Bank*
(Civil Suit No. 87 of 2015).

25 The third notice which is Notice of Sale is provided for under Section 26 of the
Mortgage Act.



5 Accordingly, after having examined all the notices issued by the 1st defendant to the 2nd plaintiff as the record shows, it is my finding that the 1st defendant (bank) only issued two (2) notices and not three (3) as required.

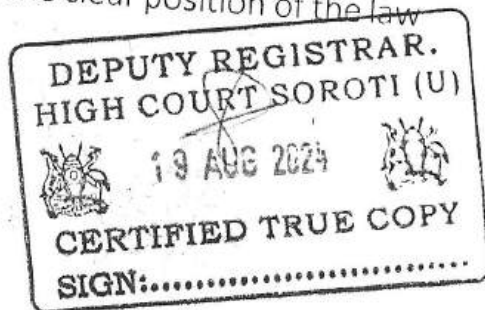
It did not issue a Demand Notice but only a Notice in Default yet under Section 19(1) of the Mortgage Act it was required to issue TWO (2) notices. It issued the Notice of Default on Mortgage one 16th March 2015 (PEX14) under Section 19(1) of the Mortgage Act and then a second Notice of Sale under Section 26 (2) of the Mortgage Act issued on 13th July 2015 (PEX15) when it decided by virtue of Section 20 (e) of the Mortgage Act to sell the Soroti property.

10 No first Demand Notice in writing as required under Section 19(1) of the Mortgage Act was issued yet that was required to be issued before the Notice of Default of 16th March 2015 (PEX14) was issued.

An argument may be advanced to support the fact that the Notice in default incorporate the demand notice. That would be misinterpreting the law for the law clearly provide for one notice to follow th other not combined.

20 Clearly, the neglecting to first issue the demand notice in writing meant that the whole process right from the start contravened the law which emphatically requires that two notices be issued prior to the notice of sale.

I have perused extensively and noted the authorities cited by the 1st defendant's counsel to support the proposition that only TWO NOTICES were required. I would
25 respectively distinguish and depart from those authorities and take exception to them as I find that those authorities did not put forward the clear position of the law which I have clearly cited above.



5 In conclusion, I would state that in this dispute, the notices envisaged by the mortgage law which were required to be served upon each of the plaintiffs were as follows;

- 10 a. The 2nd plaintiff as the mortgagor was required to be served with a Demand Notice in writing, Notice of Default and Notice of Sale. The record shows that he was served with only Notice of Default and the Notice of Sale. He was not served with the Demand Notice in writing.
- 15 b. The 1st plaintiff, being the spouse of the mortgagor was required to be served with the Notice of Sale as is provided for under section 26(3) (b) of the Mortgage Act given the fact that the mortgaged property was matrimonial property to which the 1st plaintiff had consented to its being mortgaged as a spouse. Evidence on record show that she was correctly served, through the known address of the 2nd plaintiff, the Notice of Sale.

20 Accordingly, in regard to this sub issue of whether the failure to serve the mandatory notices to the mortgagor prior to foreclosure rendered the said action illegal, I would declare that by the 1st defendant not issuing to the 2nd plaintiff all the Mandatory Three Notices, i.e., the Demand Notice in writing, Notice of Default and Notice of Sale as envisaged under the mortgage law, but only served the Notice of Default and the Notice of Sale, then the whole process of foreclosure was rendered illegal for failure to serve each and every mandatory notice.

25 iii. Whether the impugned notices were not effectively served onto the 2nd plaintiff and his spouse Abuto Sarah who the 1st plaintiff.



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5 I now turn to the the argument raised by counsel for the plaintiff that even the impugned notices were not effectively served onto the 2nd plaintiff and his spouse Abuto Sarah who the 1st plaintiff.

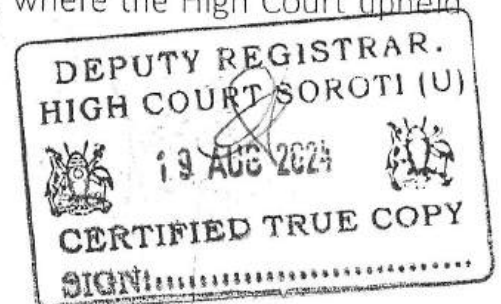
From the record, I note that two notices were served by the 1st defendant and they were issued to Post Office Box 362, Soroti. This Post Office Box number is the address which the 2nd plaintiff (the mortgagor) disclosed to 1st defendant (the mortgagee) in the loan application admitted on record and marked as exhibit DEX1 and is utilised in the Loan Offer Letter(DEX2) and the Mortgage Deed (DEX3).

The Notice of Default dated 16th March 2015 (PEX14) and the Notice of Sale (PEX15, DEX9) dated 13th July 2015 (DEX9) are accompanied by the bulk postal receipts dated 15 12/03/2015 and 20/7/2015 indicating that the said notices were posted to a one Isaac Eryaku (2nd plaintiff) of Postal Address Number 362.

As regards service of the Notice of Sale (DEX9) onto the 1st plaintiff, I note that a bulk postal receipt dated 20/7/2015 indicates that the same had been posted to Abuto Sarah c/o Isac Eryaku of Post Office Box 362, Soroti. Both plaintiffs did not dispute 20 possession or ownership of the Post Office Box 362, Soroti.

Given that none disputing of the fact that both plaintiffs did not controvert knowledge of Post Office Box 362, Soroti then by virtue of Section 35 of the Interpretation Act Cap 3, I would conclude that there was effective service as the law deems that the service of a letter containing a document is deemed effective 25 when properly addressed, prepaid and posted by registered post.

This position was well summarized in the of *The Cooperative Bank Ltd (in Liquidation) vs Shell Kasese and others Civil Suit No. 140 of 2005*, where the High Court upheld



5 that service of default notices on the mortgagor by way of postal service was effective service since the same address had been entered on the Mortgage deed showing the address of the mortgagor.

Consequently, I do find that the two notices issued by the 1st defendant which had the proper address, were prepaid and were posted by registered post as confirmed by the attached prepaid posting receipts which bore the plaintiffs' postal address and names,
10 were effective service as required by the law.

However, for completeness' sake, I will proceed to examine and determine the other singular contentions of the parties.

15 iv. Eviction of the plaintiffs from the mortgaged property in contempt of the court order:

The plaintiffs' counsel contended that on 30th June 2016, the court granted DEX 17 and PEX 22 being the Interim Order to Stay the Sale of the mortgaged property and that the 1st defendant was served with the said order but that the 1st defendant went ahead and in utter contempt of the Court Order and proceeded to sell and
20 thereafter evict the plaintiffs from their matrimonial home illegally.

The plaintiffs' counsel insisted that the 1st defendant had knowledge of the interim order of court as is shown by DEX 17 which has on its face the fact that the 1st Defendant on 5th July 2016 was served with the same as DEX17 bears the received stamp of the 1st defendant's legal department but the 1st defendant proceeded to
25 unlawfully evict the Plaintiffs from their home in contempt of that court order.

29 



5 That being so, counsel for the plaintiffs prayed that this court finds that the 1st Defendants acted unlawfully by evicting the Plaintiffs from their matrimonial property in contempt of a court order.

The 1st defendant argued that under the Mortgage Act there was no need for a court order as it could evict the plaintiffs' under that law.

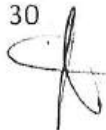
10 It is a settled position of the law that for contempt of court to be established against the contemnor, the following principles have to be demonstrated: (See: *Stanbic Bank (U) Ltd & Jacobsen Power Plant Ltd v The Commissioner General Uganda Revenue Authority HCMA 42 of 2010.*)

- a. Existence of a lawful order.
- 15 b. The potential contemnor's knowledge of the order and;
- c. The potential contemnor's failure to comply, that is, disobedience of the order.

Blacks' Law Dictionary 9th Edition defines Contempt of court, as;

- Disregard of, or disobedience to, the rules or orders of a legislative or judicial
20 body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body." Edward M. Dangel, Contempt § 1, at 2 (1939).
- Civil contempt. The failure to obey a court order that was issued for another
25 party's benefit.

30



5 In the matter before me, it is not in contention that a court order as shown by exhibit DEX17 does exist. What needs to be examined is whether the plaintiffs have demonstrated by evidence that the 1st defendant, as a potential contemnor, had knowledge of the existence of that court order.

10 Order 49 Rule 2 of the Civil Procedure Rules provides that ALL ORDERS, NOTICES AND DOCUMENTS required by the Act to be given to; or served on any person shall be served in the manner provided for the service of summons. [Emphasis Mine]

Order 49 Rule 2 of the Civil Procedure Rules, when read together with Order 5 Rule 16 of the Civil Procedure Rules, requires service of the order onto the contemnor.

15 Thus proof of knowledge of the court order can only be said to be true when such is accompanied by proof of service as provided for by the rules of civil procedure.

Under Order 5 Rule 16 of the Civil Procedure Rules, proof of service is ONLY by an affidavit of service which must state the time when and; the manner in which service was made and; the name and address of the person, if any, identifying the person served and witnessing the delivery of summons among other requirements.

20 Therefore, an affidavit of service deposed in the manner required by the rules is the only form of actual knowledge of the contents of the extracted order.

In respect of the impugned notice to the defendants of the existence of the court order (DEX17), it is evident to me upon my perusal of the record herein that there is NO affidavit of service to the effect that the 1st defendant was aware of the court order as required by the law. The evidence on record only shows that the said court



5 order as received by the legal Department of the 1st defendant and a stamp of the 1st defendant imprinted on it and that is all.

Consequently, on whether the eviction of the plaintiffs from the mortgaged property was carried in contempt of a court order, I find that there was no effective notice to the defendants of the existence of the court order (DEX17) for the reason that no
10 *affidavit of service was filed on the court record which would have brought the actual knowledge of the existence of any court order to the defendants.*

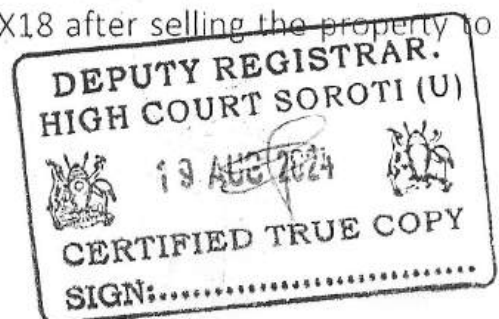
v. Failure to carry out the mandatory pre-sale valuation of the mortgaged property within six months before the sale:

The plaintiffs' counsel's contention is that the defendants in their consolidated
15 amended written statement of defence, admitted that the valuation of the impugned property was conducted on 25th April 2016 yet the sale of the same took place on 24th March 2016 as evidenced by PEX20 and DEX15 and expressly state at page 2 of the sale agreement DEX3.

To counsel for the plaintiffs, that the evidence on record shows that the impugned
20 property was sold without valuation as provided under Regulation 11 of the Mortgage Regulations meant that the 1st defendant illegally and fraudulently as it was done after the sale with the intention of depriving the plaintiffs of the right to redeem their property.

The plaintiffs' counsel conceded that the 1st defendant had genuinely valued the
25 property on 18th November 2015 as per DEX 5 (CMT valuation report) with the market value being UGX. 200,000,000/= and the forced sale value 150,000,000/=, but instructed Semaganda and Associates vide PEX18 after selling the property to

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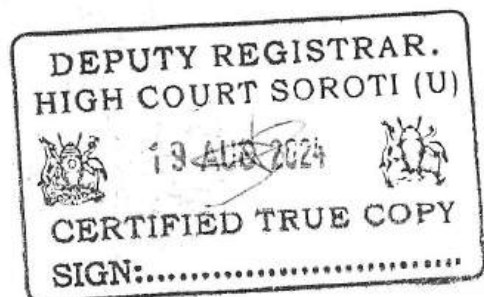
5 have it undervalued to accommodate the lower sale value of the 2nd defendant of UGX 95,000,000/= which is illegal.

On top of that illegality, counsel for the plaintiffs' counsel contended that according to PEX46, which is a letter from the Surveyors Registration Board, Silver Cheboi and Henry Mulwanira, who carried out the Valuation and signed the report (PEX 18) on behalf of Semaganda & Associates, were not registered Valuation Surveyors and Land surveyors on the Register of Registered surveyors adding to the illegality of selling the impugned property before valuation and then relying on the valuation report of someone who was not a valuer or surveyor.

The plaintiffs' counsel thus insisted that the 1st defendant's agents, Century Associates and Sebalu and Lule Advocates, sold the plaintiffs' property at plot 14 Akaikai Lane at a giveaway without undertaking a valuation since the Valuation by CMT of 2015 DEX 5 had been overtaken by events such as appreciation of land, developments on the land and inflation rates among others and thus did not exercise a duty to take reasonable care to obtain whatever the true market value of the mortgaged property at the sale. The plaintiffs' counsel prayed that this court finds that the 1st Defendant unlawfully and negligently sold the Plaintiff's property without subjecting it to the mandatory pre-sale valuation, which is contrary to the Mortgage Act and Regulations.

Inversely, the 1st defendant's counsel submitted that according to the sale agreement (DEX15), the Soroti property was sold on 16th May 2016 after the 1st Defendant had contracted a valuation company to undertake a valuation of the Soroti property and a report dated 25 April 2016 (DEX6) was provided.

33



5 The 1st defendant's counsel argued that the plaintiffs' counsel submission that the sale took place on 24 March 2016 as per paragraphs B and 2.1 of the sale agreement DEX15 is not true and that no evidence was adduced to support that allegation.

10 Regulation 11(1) and (2) of the Mortgage Regulations, S.I No. 2 of 2012 is to the effect that before selling any of the mortgaged property, the mortgagee must the same value to ascertain its current market value and the forced sale value of the property with such valuation report thereto to a detailed description of the property, and shall not be made more than six months before the date of sale.

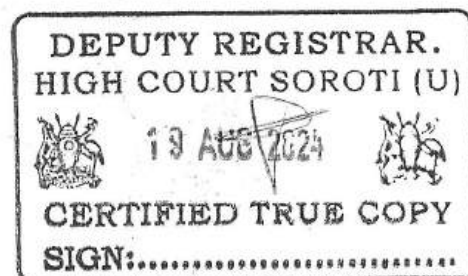
15 From the evidence adduced on record, it is clear that there are TWO valuation reports pertaining the transaction; ONE which was conducted by M/s CMT (DEX5), Valuation Report dated 18th November 2015 and a SECOND by M/s Semaganda and Associates (DEX 6) dated 25 April 2016.

According to paragraph 4.8 of the amended written statement of defence filed on 2nd November 2021, the 1st defendant instructed valuers to make a valuation of the Soroti property to which a report was furnished to them on 25 April 2016.

20 The pleadings coupled with evidence adduced through the witnesses and the submissions of counsel, the considered valuation dated 25th April 2016 was by M/s Semaganda and Associates (DEX6).

25 The 1st defendant contended that the valuation happened prior to the sale of the mortgaged property as the sale of the impugned took place on 16th May 2016 as reflected by the Sale Agreement (DEX15).

34



5 Contrariwise, the plaintiffs' counsel contended the valuation report dated 25th April 2016, happened after 24th March 2016 when the mortgaged property was sold by the 1st defendant as per DEX 15.

The perusal of the agreement for the sale of land and developments comprised in LRV 3481, Folio 9, Plot 14, Akaikai Lane, Soroti measuring approximately 0.195
10 hectares i.n.o Isaac Eryakul to the 2nd defendant (DEX15) shows that it was made on 16th May 2016.

However, in its preamble at paragraph B, the same documents state thus;

15 *"The Mortgagor exercising its powers of sale and foreclosure sold the said property on the 24th March 2016 by way of public auction and the purchaser emerged as the highest and capable bidder for the property."*

Unmistakably, the dates of 16th May 2016 and 24th March 2016 in (DEX15) are not only the same but are inconsistent and ambiguous as to when the Soroti property was sold.

This is because while the 1st defendant avers that the property was sold on 16th May
20 2016 as per DEX15 when the agreement was made, the plaintiffs' points out that the same DEX15 point to the impugned property being sold on 24th March 2016, a date which explicitly appears in the preamble of the sale of agreement stating when the property was sold.

The defendant's claims that the date of 24th March 2016 as reflected on DEX15 was
25 erroneous.

35



5 However, upon the careful examination of the same shows that both parties represent contents from DEX15 as representing the truthful position as to the sale of the impugned property.

My observation, firstly is that the plaintiffs are not privy to the Sale Agreement (DEX15) as the same was executed between the 1st defendant and the 2nd defendant, in exclusion of the plaintiffs although the subject matter was the property previously owned by the plaintiffs.

15 In my view since ambiguity or inconsistency is derived in the same document to which the 1st defendant submitted on record, taking the view that the Soroti property was sold on 16th May 2016 when the agreement was made which is a benefit, and the same defendants rendering a view that 24th March 2016 was erroneous and should be disregarded which is a loss to the plaintiffs.

In light of this, I am minded of the doctrine of approbation and reprobation which echoes the principle that a person cannot both approve and reject an instrument. The 1st defendant, one of the architects of DEX15 seeks to approbate and reprobate the agreement between itself and the 2nd defendant to the negative consequence of the plaintiffs who were not privy to it. This raises a very interesting problem of having your cake and eating it at the same time. Such approach is barred by law as it is estopped.

25 In the case of *Male Mabirizi K Kiwanuka vs Attorney General HCMA No.089 of 2022*, Justice Boniface Wamala, in a persuasive decision, while discussing the effect of the doctrine of approbation and reprobation, observed that;



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5 "I further find that such approach would be barred in law for being contrary to
the settled principle of law which guards against approbation and reprobation.
Under the law, the principle guarding against approbation and reprobation is
said to be a species of the doctrine of estoppel. According to Halsbury's Laws of
England, Vol. 47 (2014) [paragraph 312 under Estoppel], the principle that a
10 person may not approbate and reprobate seems to be intermediate between
estoppel by record and estoppel by representation.

The principle expresses two propositions:

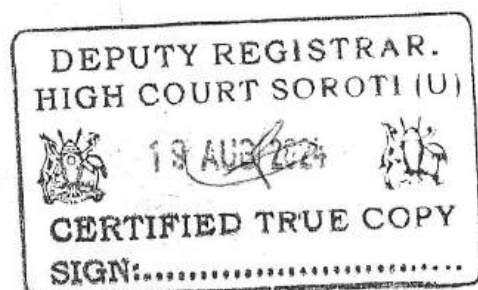
(i) that the person in question, having a choice between two courses of conduct,
is to be treated as having made an election from which he cannot resile (spring
15 back or rebound); and

(ii) that he will not be regarded, in general at any rate, as having so elected
unless he has taken a benefit under or arising out of the course of conduct which
he has first pursued and with which his subsequent conduct is inconsistent."

Aligning with the decision above, it is my firm considered view that the 1st defendant
20 and the 2nd defendants cannot approbate and reprobate DEX15 contents
contemporaneously in regards to the date when the impugned Soroti property was
sold.

This is because no cogent evidence was received in court either from the pleadings
or during the hearing of this matter that supported the 1st defendant's view that the
25 impugned Soroti property was not actually sold on 24th March 2016 but on 16th May
2016 as the agreement thereto (DEX15) clearly provides for the two dates.

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5
+ Consequently, in absence of any cogent evidence attributing that reflection of 24th March 2016 was an error, it is my finding that the Soroti property according to DEX15 was sold on 24th March 2016, meaning that the valuation (DEX6) was conducted after the sale of the property contrary to Regulation 11 of the Mortgage Regulations.

10 This means that the valuation (appraisal report)- DEX6 that is relied on by the 1st defendant of which a report was received on 25th April 2016, was after the sale had been conducted on 24th March 2016, and thus an although making the sale base on no valuation report illegal and irregular.

15 *On whether the failure to carry out the mandatory pre-sale valuation of the mortgaged property within six months before sale rendered any subsequent sale of the Soroti property illegal, I find that this is so on the basis that the proved evidence on the record (DEX15) show that the Soroti property was sold on 24th March 2016 with its valuation (DEX6) illegally conducted after its sale in total contravention of Regulation 11 of the Mortgage Regulations.*

20 vi. Failure to obtain consent from the mortgagor before conducting a sale by a private treaty:

The plaintiffs' counsel submitted that the 1st defendant advertised the plaintiff's property for sale through private treaty/public auction in their advert dated 9th September 2015 (DEX11) while at same time there another advert dated 24th February 2016 of the 2nd defendant (DEX19).

25 That these confusing mechanisms of advertising, one private and another public was aimed at dodging the provisions of Regulation 10 of the Mortgage Regulations and that doing so invalidates the sale of the plaintiffs' property.

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5 That there occurred at one point in the process the act of not at any one point the act of advertising the property of the mortgagor for sale by way of a private treaty before the obtaining of his written consent rendered the whole process unlawful which this Honourable Court should find so and declare the eventual sale of the plaintiffs' property to the 2nd defendant *void ab initio*.

10 Counsel for the 1st defendant submission was that the sale was by public auction and thus did not require consent and insisted that the sale of the impugned Soroti property was conducted by way of a public auction in line with Section 28(2) of the Mortgage Act and Regulation 8 of the Mortgage Regulations and not by private treaty as claimed by the plaintiffs' counsel.

15 That the 1st defendant ran two adverts, with the first being run in September 2015 (DEX11) and the second being ran in February 2016 (DEX19). He contended that following the advert in DEX19, the 1st Defendant received bids as reflected in DEX12 and selected the highest bid which was offered by the 2nd Defendant on 6 May 2016.

20 Regulation 10 of the Mortgage Regulations makes provision for consent by the mortgagor to a sale by private treaty. It provides as follows:

Sale by private treaty:

- (1) A mortgagee exercising a power of sale under the Act may, with the consent of the mortgagor, sell the mortgaged property by private treaty.
- 25 (2) For purposes of sub-regulation (1) consent of the mortgagor shall, subject to section 26 of the Act, be by written notice.



5 (3) For the avoidance of doubt, a mortgagor's consent shall not be retrospective.

By the very provisions of the law as cited above, when a sale is by private treaty, the notice in writing to the mortgagor is a must as the law itself is couched with the words "shall".

This position was highlighted in the case of *Letshego Uganda Limited vs Felix Kulaigye*
10 *O.S. No. 5 of 2022* thus:

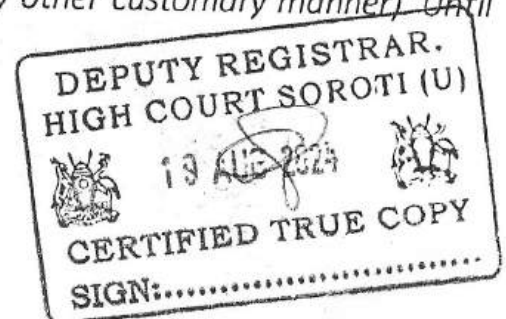
*"Looking at the provisions under Regulation 10 of the Mortgage Regulations, it appears to me that the consent has to be specifically given by notice issued by the mortgagor, and the same must not be retrospective. This means that the consent shall not have been made or given prior to the time of sale. Consent
15 expressed by the mortgagor at the time of executing the mortgage agreement is definitely retrospective and is outlawed by the provision under Regulation 10 (3) cited above. As such, they said consent expressed in the mortgage deed cannot be relied upon by the Court to permit a sale by private treaty."*

Furthermore, in the case of *Miao Huaxian vs Crane Bank Limited & Another*
20 *Miscellaneous Application No.78 of 2016* Justice Christopher Madrama while distinguishing sale by public auction and private treaty had this to say:

"According to the Oxford Dictionary of Law, Fifth Edition, an auction is a method of sale:

*A method of sale in which parties are invited to make competing offers (bids) to
25 purchase an item. The auctioneer, who acts as the agent of the seller until fall of the hammer, announces completion of the sale in favour of the highest bidder by striking his desk with a hammer (or in any other customary manner). Until*

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then any bidder may retract his bid and the auctioneer may withdraw the goods. The seller may not bid unless the sale is stated to be subject to the seller's right to bid.

10

Merely to advertise an auction does not bind the auctioneer to hold one. However, if he advertises an auction without reserve and accepts bids, he will be liable if he fails to knock the item down to the highest outside bidder.

An auctioneer who discloses his agency promises to a buyer that he has authority to sell and that he knows of no defect to the seller's title; he does not promise that the buyer of a specific chattel will get a good title.

15

As far as the auction is concerned, the contract is made on the falling of the hammer and not by private treaty or a written agreement.

According to Halsbury's laws of England fourth edition reissue volume 2 and paragraph 901 and 'Auction' and 'auctioneer' is:

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“ An auction is a manner of selling or letting property by bids, usually to the highest bidder by public competition. The prices which the public are asked to pay are the highest which those who bid can be tempted to offer by the skill and tact of the auctioneer under the excitement of open competition. Although the word 'auction' is derived from the Latin auction, an increase, a 'Dutch auction' is one where the property is offered at a certain price and then successively at lower prices until one is accepted.”

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The distinction that comes out in the above definition is that between a private contract and a public auction. The two are not the same thing. A contract in an

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auction is made when a bid is accepted by the falling of the hammer. The offer is made and the bidder gives a price. The price is determined when the hammer falls and is binding on the auctioneer. On the other hand, a private treaty means that the contract is made in writing giving the terms and price of the goods or property."

10 Relating the above positions to the instant matter, the manner of the sale of any mortgaged property are entrenched under Section 28(2) of the Mortgage Act and Regulation 8 of the Mortgage Regulations.

In the instant matte, the 1st defendant by admission, ran two adverts, one in September 2015 (DEX11) and another in February 2016 (DEX19). I have examined
15 both DEX11 and DEX19, while DEX11 was in September 2015, some months' way above the 30 days permitted for the sale by public auction, that advert is not controverted by the plaintiffs.

The advert of February 2016 (DEX19), which the 1st defendant and 2nd defendant relied on for the sale of the impugned mortgaged property, is upon my scrutiny does
20 not have the date attributed to it which the defendants contend was the date it was published on as there is no date on the advert, which creates doubt as to whether this second advert actually was made on the date mentioned and whether it actually did exist.

Even though DW2 stated that he responded to an advertisement that was run in the
25 Daily Monitor on 24 February 2016 as DEX19 which when shown to him, he confirmed that it was the very one, during cross-examination and my own examination of the bids of the 2nd defendant, I note that is one dated 9th March 2016 and referenced the advert in the *Daily Monitor* newspaper of February 2016, yet the

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DEPUTY REGISTRAR.
HIGH COURT SOROTI (U)
13 AUG 2024
CERTIFIED TRUE COPY
SIGN:.....

5 bid allegedly relied on for impugned transaction which was dated 6th May 2016 did not make any reference to any specific date or month to which it was written in response of.

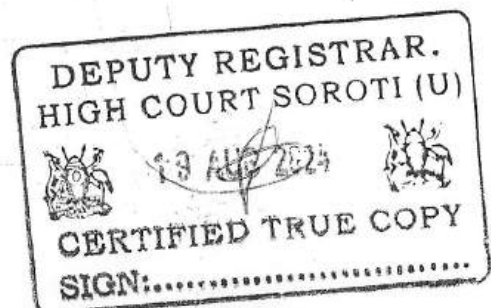
While I am mindful of the fact that no law entrenches the contents of bids, it is prudent to relate a bid document to an advert specific so as to remove any doubts and since DEX19 bears no date, then it cannot be said to have originated from the *Daily Monitor* newspaper as was alleged by the defendants.

On the other hand, the advert DEX11 which contained all the relevant information including the newspaper from which it was extracted from cannot be relied upon by the defendants for the very reason that it was published in September 2015 and this was more than Seven (7) months' away from the 30 days permitted for the sale by public auction, in this case the one which allegedly occurred on 6th May 2016 which was in any case could not even be said to be a public auction for the reason as Madrama J said above in *Miao Huaxian vs Crane Bank Limited & Another* (above), to which I entirely agree by paraphrasing that;

20 *"...the mere advertising an auction does not bind the auctioneer to hold one liable...and if he advertises an auction without reserve and accepts bids, he will be liable if he fails to knock the item down to the highest outside bidder.*

25 *A contract in an auction is made when a bid is accepted by the falling of the hammer. The offer is made and the bidder gives a price. The price is determined when the hammer falls and is binding on the auctioneer. On the other hand, a private treaty means that the contract is made in writing giving the terms and price of the goods or property."*

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5 Where none of the above process is carried out is done then it is not a public auction but a private one and as such any insistence that it was a public auction would make such a transaction not only irregular but outside the law.

Relating the above of the instant mater, I would find that since there is no evidence that after offers were made by bidder who gave their prices and the eventual sale
10 of the impugned property of the plaintiffs was by determined the fall of the hammer fall in a public space, then the alleged sale was a private one which would equally fail on the basis that the mortgagor was not given any written notice to that fact in accordance with Regulation 10 of the Mortgage Regulations.

*Accordingly, I would find that the sale of the impugned property of the plaintiffs by the
15 1st defendant and or its agents was neither by public auction nor private treaty given the fact that the provisions of the Mortgage Regulations were not followed.*

vii. Under declaration of value by the 2nd Defendant in order to defraud government of its revenue and pay less stamp duty in the process of acquiring the Title of Plot 14 Akaikai Lane Soroti.

20 The plaintiffs' counsel submitted that the 2nd defendant admitted in his witness statement at paragraph 21 that there was a discrepancy in the declaration of the value of the purchase of the said suit land and that it was an error of his agent and not a deliberate attempt to cheat the government.

Counsel further submitted that the Registrar of Titles, PW2 Joseph Kibande at Soroti
25 zonal offices during cross-examination stated that he reviewed the file around 1st March 2022 and found that there was an under-declaration and concealment of facts which could vitiate the validity of the title.

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5 Counsel further submitted that Abunyang Emmanuel (the 2nd defendant) who testified as DW2 during cross-examination told court that his agent told him that there were developments on the suit land and that it was wrong for him to have stated a wrong amount of money in the declaration for purposes of stamp duty because there was a house on the suit land, with counsel pointing out that DW2
10 could not run away from the action of his agent since anyone who acts through an agent indeed acts for himself.

In response to this assertion, counsel for the 2nd defendant's submitted that the said mentioned error of the agent of the 2nd defendant did not amount to fraud and relied on the case of *Mohammed Abdallah Garelnabi vs Diana Irene Nayiga, Civil*
15 *appeal No. 23 of 2019* for the position that stating a wrong amount of money in the declaration for purposes of stamp duty is not fatal.

Counsel further stated that the 2nd defendant was not aware of the declarations that were made on the application for Consent to Transfer (PEX 23) and that he simply handed over the documents of transfer to his attorney to handle after he had
20 received them.

Counsel thus submitted that given the narration of the sequence of events which he has labour to point out as above, then this Honourable Court should find that the plaintiffs have not proved fraud on the part of the 2nd defendant to the required standard since the evidence did not point to the transferee, who is the 2nd defendant
25 in this case.

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DEPUTY REGISTRAR.
HIGH COURT SOROTI (U)
 19 AUG 2024 
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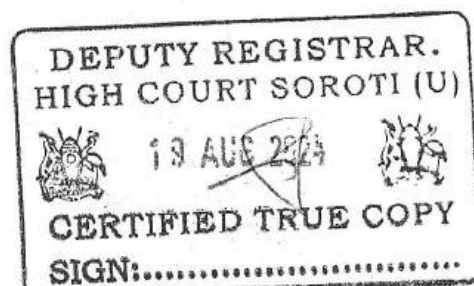
5 Counsel also submitted that the complaint of under declaration did not prejudice the plaintiff and that it was the government of Uganda and not the plaintiffs that was affected.

10 In the case of *Betty Kizito v David Kizito and 7 others SCCA No. 8 of 2018*, the Supreme Court held that the declaration that there were no developments on the land to evade the payment of taxes and therefore defrauding the government of revenue constitutes fraud and as such The Supreme Court found the transfer of the land into the names of the respondent *void* for fraud.

15 The Court of Appeal in *Mohammed Abdallah Garelnabi vs Diana Irene Nayiga, Civil appeal No. 23 of 2019* followed suit the Supreme Court case of *Betty Kizito v David Kizito and 7 Others SCCA* (above) and posited at pages 16-17 that:

20 "...the value as assessed by the Chief Government Valuer finally settles the necessary Government tax to pay regardless of whether the purchaser states a lesser value on the form. For as long as the purchaser pays a duty assessed by CGV, it cannot be evidence of fraud attributed to a purchaser. However, if the lands office finds that a higher duty could have been paid had the CGV conducted a proper assessment, then a minute should be entered on the file and the concerned party should be notified to pay the stamp duty as would have been commensurate. I find the decision in *Betty Kizito v David Kizito and 7 others SCCA No. 8 of 2018* distinguishable since the whole context involved and was riddled with fraudulent transactions. In this particular case the issue of fraud was not pleaded and neither has it been proved and the facts are distinguishable.

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5 *In my considered opinion, failure to pay the correct stamp duty is breach of a legal duty. The proper remedy would be to order the person in breach to pay the appropriate stamp duty or the difference. Not all irregularities amount to fraud per se otherwise the concept of bona fide purchasers would be defeated and justice would not be served.*" (Emphasis is mine)

10 According to paragraph 5 under the particulars of fraud/illegalities of the amended consolidated plaint, under line VI, the plaintiffs aver that "defrauding government of revenue through wrong declarations".

I would agree with the submissions of counsel for the plaintiff that the principle that he who acts through an agent acts for himself because also the 2nd defendant agrees that his agent stated that there were no developments on the land and that it was an error of his agent. I find that the 2nd defendant assiduously and consciously, through his agent declared that there were no developments on the land and from the Supreme Court decision in *Betty Kizito v David Kizito and 7 others SCCA No. 8 of 2018* (above), such declaration amounts to fraud. Here the holding by the court of Appeal in *Mohammed Abdallah Garelnabi vs Diana Irene Nayiga* (above) is distinguishable as the fraud herein was imitated and agreed to by the 2nd defendant as arising through his agent and not through the fault of the Chief Government Valuer.

25 Accordingly, I find that fraud has been proved with the principle of agency bringing it squarely into the lap of the transferee; who is the 2nd defendant.

I am not persuaded by counsel for the 2nd defendant's argument that because the party affected is government, the illegality should be ignored by this court. That



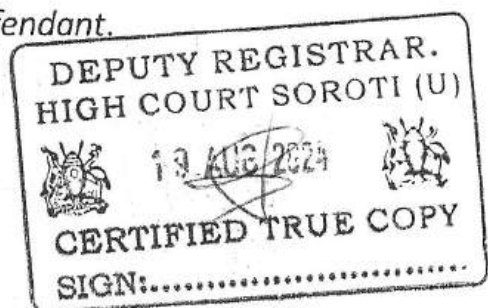
5 argument is not in public interest and a court of law being part of government
cannot merely shut its eyes to such despicable illegality yet here was a situation
where a party before court was admitting to an illegality which according to the
holding in *Makula International Ltd V His Eminence Cardinal Nsubuga & Anor [1982]*
UGSC 2 was held that *"once an illegality is brought to the attention of court, it*
10 *overrides everything else."*

I am mindful of the fact that the plaintiffs' counsel also submitted on the following
isolated transactions/activities or illegalities to which the defendants' counsel also
rebutted.

The alleged illegalities are; breach of Regulation 14(1) of the Mortgage Regulations
15 by the Defendant's failure to pay in time; failure by the defendants to conduct a
lawful public auction; failure by the 1st defendant to re-advertise the property and
giving notice to the mortgagor after adjourning the sale and Sale of the property
below the forced sale value.

However, having considered the already determined contentions with the outcome
20 of the sale being vitiated for not following the proper procedure on notices, it is my
view, that determining these isolated incidents is inconsequential.

On the sub issue of whether the under declaration of value of the suit property by the
2nd Defendant defrauded government of its revenue as less stamp duty was paid in
the process of acquiring the Title of Plot 14 Akaikai lane Soroti., I would find and
25 *conclude that concrete and admitted evidence by the 2nd defendant that his agent did*
actually under declared that there were no developments on the impugned suit land,
with the result that less stamp duty was paid amounted to fraud which is an illegality
which invalidates the whole registration process of the impugned title in regard to Plot
14 Akaikai Lane Soroti into the names of the 2nd defendant.



5 b) Whether the defendants unlawfully attached and converted the plaintiffs' movable properties during the eviction and sale of LRV 3481, Folio 9, Plot 14, Akakai Lane, Soroti?

10 The plaintiffs' counsel submitted that the first defendant failed to uphold the principles of fairness, reliability, and transparency as provided for in the Bank of Uganda Consumer Protection Guidelines 2011 thus resulted into abusing its fiduciary relationship with the plaintiffs when it attached, sold, and transferred property comprised in LRV 3481 Folio 9 Plot 14 Akakai Lane Soroti City yet the whole process from the beginning to the end was tainted with illegalities. Invariably counsel urged this Honourable Court to find so and declare the whole process illegal.

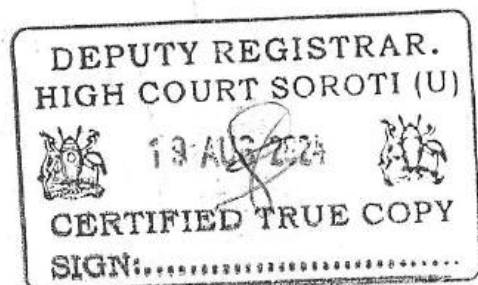
15 The defendants denied this assertion.

My finding of fact which is not disputed is that the 2nd plaintiff and 1st defendant entered into a mortgage agreement on 27th October 2011 (DEX3) in which the 1st defendant advanced a loan amounting to UGX 80,000,000 (Uganda Shillings Eighty Million) to the 2nd plaintiff.

20 The said loan amount was secured by the 2nd plaintiff's properties comprised in LRV 2819, Folio 6, Plot No. 37 at Serere ("the Serere property") and Block 8 and LRV 3481, Folio 9, Plot 14 Akakai Lane, Soroti ("Soroti property").

According to Clause 2(1) (iv(A)) Of The Mortgage Agreement (DEX3), the 2nd Plaintiff was required to pay a monthly sum of Ugx 1,390,523 for a period of 240 or twenty years as per the Loan Repayment Schedule (DEX4). The first plaintiff being the spouse of the 2nd plaintiff consented to the properties pledged by the 2nd plaintiff to the 1st defendant as securities for the loan.

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5 The 1st defendant led evidence to show that the 2nd plaintiff defaulted on his loan
repayment obligations with Norris Mutahunga (DW1), the 1st defendant's officer,
Legal Rehabilitation and Recoveries, stating that upon the 2nd plaintiff defaulting on
his loan repayment on 5th August 2014, the 1st defendant notified the plaintiffs
through DEX10 that the 2nd plaintiff had defaulted on his obligations under the
10 mortgage he had executed and the plaintiff was requested to remedy the default by
paying the outstanding amount within 45 days.

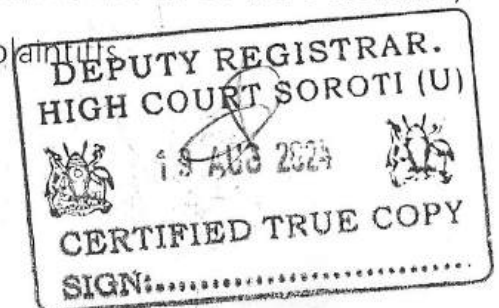
DW1 further told the court that on 12th of November, 2014, the 1st defendant
notified the plaintiffs through DEX7 that they would sell the mortgaged security if he
failed to pay off the sums outstanding under the mortgage (DEX3).

15 DW1 told the court that on 16th March 2015, the 1st defendant as indicated in DEX8,
notified the plaintiffs that they were in default of their loan obligations and
requested them to clear the outstanding sums within 45 days of receiving the notice.
DW1 told the court that on 13th July 2015, the 1st defendant notified the plaintiffs
that they would proceed to sell the mortgage property in accordance with the
20 mortgage agreement if the plaintiff failed to pay the outstanding sums under the
agreement (DEX9).

It is also not in contention that the 2nd plaintiff defaulted on his loan repayment as
scheduled, though the plaintiffs contend that the Soroti Property, which was used
as collateral for the loan, was illegally foreclosed and sold to the second defendant.
25 The plaintiffs' counsel enlisted the allegations that surrounded the allegedly illegal
and unlawful sale of the Soroti property.

Counsel for the plaintiff submitted that most of the items in PEX 24 were stolen by
the defendants in the illegal process of evicting the plaintiffs.

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5 That no court licensed bailiffs handled the process except a group of street goons paid by the defendant and his lawyer.

That the 1st and 2nd defendants are liable since the 1st defendant's lawyers' of M/s Sebalu & Lule Advocates were agents appointed by the 1st defendant to carry out the sale and evict the mortgagor yet even the household or movable items did not
10 form part of the mortgage executed between the 2nd plaintiff and the 1st defendant.

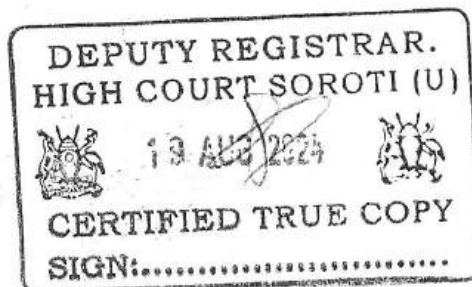
The 1st defendant's counsel submitted that the plaintiff failed to prove that the property claimed to be lost as reflected in PEX 24 was actually in the Soroti property at the time of eviction and that it is more probable that this property though, purchased, could have been in any other homes of the 1st plaintiff.

15 Counsel further submitted that the defendants were not liable to whatever happened to the property since the plaintiffs were informed that the property was sold and were informed to collect their property which they did not.

That even the removal of property was witnessed by local leaders with DW2 incurring exorbitant expenses of finding a safe place in which to store them and
20 further that the plaintiffs had not demonstrated the steps they undertook from 2016 to 2019 when they filed the suit to recover their property and equally failed to demonstrate that the movable properties were attached and or converted by the defendants.

That this means the plaintiffs abandoned those properties and could not hold the 1st
25 and 2nd defendants liable for their loss, if any.

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5 Counsel for the 2nd defendant additionally submitted that DEX27 showed the inventory of the items that were actually recovered from the said premises and bears the stamp of the Local Council Authority.

Counsel submitted that conversion did not arise in the circumstances since the property that was obtained was properly stored until the plaintiffs sent a truck to
10 collect them and as such the intention to deprive the plaintiffs of such good was not proved.

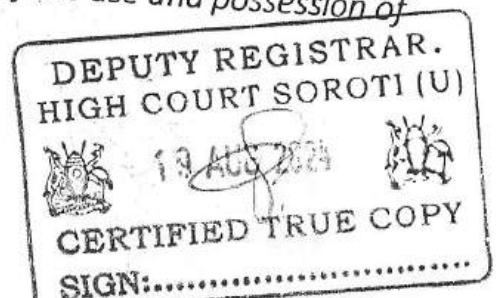
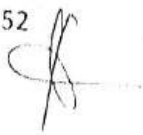
Counsel relied on the case of *Nalubega Ruth vs DL Properties Ltd & Francis Drake Lubega civil suit No. 294 of 2021* for the proposition that receipts could be proof of purchase, but not necessarily proof of availability of stock or goods in the store given
15 the time frame between the purchase in April and September 2020.

This issue touches on conversion of household items belonging to the mortgagor and or his spouse into mortgaged property.

In the case of *Victoria Candles Limited Vs Attorney General & E others Civil Suit No. 367 of 2019* Justice Musa Ssekana opined that;

20 *"Conversion is the wrong committed by dealing with the goods of a person which constitutes an unjustifiable denial of his rights in them or the assertion of rights inconsistent with such right. (see: Winfield and Jolowicz on Tort 15th edition page 588).*

25 In *Moorgate Mercantile Company Ltd Vs Finch and Read [1962] 1 QB 701*, the court set out the key elements of conversion as an act of willful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another and thereby that other is deprived of the use and possession of



5 it. The two elements are the dealing with the chattel in a manner inconsistent
with the right of the person entitled to it and secondly the intention in so doing
to deny the person's right or to assert a right which is in fact inconsistent with
such right. (see; Barclays Mercantile Business Finance Ltd and Another vs Sibec
Developments Ltd and Others [1993] 2 All ER 195, Departed Asian Property
10 Custodian Board vs Issa Bukenya SCCA 92 of 1992."

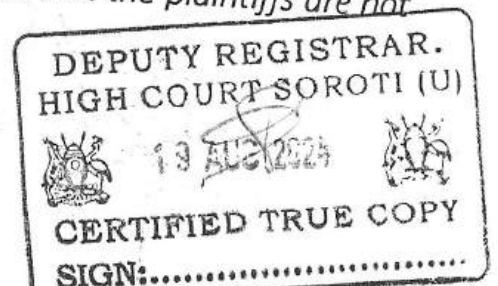
From the evidence and submission of counsel above, I find that the plaintiffs have
totally failed to prove that they possessed the properties claimed to be missing or
that before the eviction, all those alleged missing property were actually in the said
premises.

15 I associate myself with the holding in the case of *Nalubega Ruth vs DL Properties Ltd
& Francis Drake Lubega Civil Suit No. 294 of 2021* that the mere existence of receipts
of purchase does by themselves demonstrate the existence of the property at the
time of the eviction as the burden of proof was higher with the plaintiffs required to
demonstrate that those properties existed at the time of the eviction and that the
20 defendants took the property and willfully refused to return the same.

On the other hand, I am satisfied with the evidence adduced on record that the 2nd
defendant took such excellent steps as to secure whatever he found in the Soroti
property kept the property found and eventually handed them to the plaintiffs. The
claim that some other property went missing was not substantially proved by the
25 plaintiff.

*On whether the defendants unlawfully attached and converted the plaintiffs' movable
properties during the eviction and sale of LRV 3481, Folio 9, Plot 14, Akakai Lane, Soroti
, I would from the evidence adduced in court, find and hold that the plaintiffs are not*

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5 entitled to any compensation from the 1st and 2nd defendants for any alleged unlawful
attachment and conversion of any of the plaintiffs' movable properties during the
eviction and sale of LRV 3481, Folio 9, Plot 14, Akakai Lane, Soroti given the fact that
all the properties which were removed from the said premises were secured and
handed over to the plaintiffs who received them and even got transported them to
10 their own destination.

c) Whether the intended sale of plot 37 Block 8 Olio Serere is lawful?

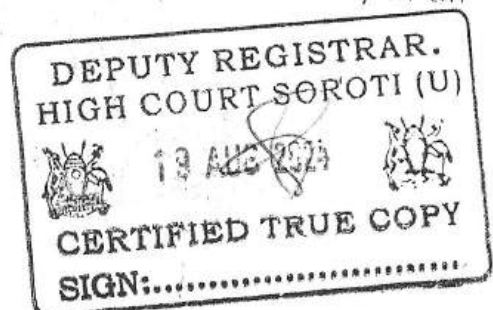
From the resolution in issue one above, particularly the component that the process
of charging an interest without notification which I have already found to be illegal
for both LRV 3481, Folio 9, Plot 14, Akakai Lane, Soroti and plot 37 Block 8 Olio
15 Serere, I need to go further to examine this issue but would direct as follows;

*Having already found as above that the sale of LRV 3481, Folio 9, Plot 14, Akakai Lane,
Soroti City was illegal on the basis that the 1st defendant unilaterally increased the
interest in regard to the Home Loan rendered to the 2nd plaintiff in disobedience of the
law, equally the intended sale of plot 37 Block 8 Olio Serere, would be illegal:*

20 *As a consequence, I am constrained to similarly find and conclude that the intended
sale plot 37 Block 8 Olio Serere is illegal because any intended sale is only legal where
the mortgagee follows the law and the provisions of any signed Mortgage Deed
between the parties.*

d) Whether The Plaintiffs Owe The 1st Defendant Any Money?

25 That the 2nd plaintiff owes money to the 1st defendant is as of now a matter of
conjecture given the fact that I have already found that the 1st defendant unlawfully
foreclosed and sold the property of the 2nd plaintiff and took some money in an



5 effort to recover what is owed to it, all of which actions have been found to have been carried out illegally and cancelled as above.

As a result, the money owed to the 1st defendant is at this stage not ascertainable unless a lawful foreclosure process is carried out after a forensic reconciliation of the loan repayment account in respect of the loan granted to the 2nd plaintiff after

10 refunding what was paid by the 2nd defendant to the 1st defendant arising from the illegal sale of the plaintiffs LRV 3481, Folio 9, Plot 14, Akakai Lane, Soroti City. In accordance with the persuasive holding in *R.L. Jain v Komugisha & 2 Ors. Civil Suit No. 98 of 2013* per Madrama J (As he then was).

15 I, therefore do order the 2nd plaintiff and the 1st defendant, their own cost, to have carried out a forensic reconciliation of the impugned loan account to ascertain the any or all the amounts payable by the 2nd defendant in respect of the home loan for on 27th October 2011, the 2nd plaintiff entered a mortgage agreement with the 1st defendant which advanced him a loan of UGX 80,000,000 (Uganda shillings eighty million).

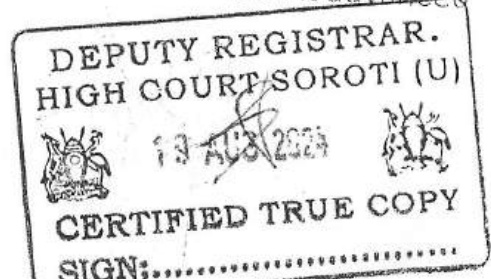
20 That the loan was secured by the 2nd plaintiff's properties comprised in LRV 2819, Folio 6, Plot No. 37 at Serere ("the Serere property"), Block 8 and LRV 3481, Folio 9, Plot 14 Akakai Lane, Soroti ("the Soroti property") and if thereafter there would still be any money owing on the account of the loan, then the 1st defendant, if it so wishes, may foreclose on the basis of any amount unpaid and follow all the legal

25 processes I have outlined above in the recovery of any unpaid amount.

9) What remedies are available to the parties?

From the resolution of the issues above, and as I noted above while resolving the issue that mandatory notices that were not followed, I find that all the steps which were undertaken by the 1st defendant in its attempt to recover the loan it advanced

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5 to the 2nd plaintiff were not in accordance with the law and consequently, I would declare the whole process a nullity and thus cancelled with only consequential orders as against the 3rd defendant.

10) Conclusion:

10 Arising from my finding that on a balance of probability the plaintiffs proved their case as against the defendants on the basis of illegality, I would find a case in the favour of the plaintiffs and make the following declarations and orders accordingly.

1) Declarations:

- 15 i. Having determined that a key notice was not served onto the mortgagor, the sale of property comprised in LRV 348 Folio 9, plot 14 Akaiikai Lane Soroti is hereby found to have been illegally carried out illegal.
- 20 ii. ✖ On the sub issue of whether the variation of the interest rate from 20.5% to 23.5% without notice to and the consent of the 2nd ^{Plaintiff} defendant, I do declare that the increased interest charged on the Home Loan Offer Letter (DEX2) and in the Mortgage Deed (DEX3) was illegal and any money due from the said increase in the interest not forming part of the money due from the mortgagor would be regarded as an illicit earning and it must be returned to the 2nd plaintiff.
- 25 iii. On the sub issue of whether the failure to serve the mandatory notices to the mortgagor prior to foreclosure rendered the said action illegal, I would declare that by the 1st defendant not issuing to the 2nd plaintiff all the mandatory Three Notices of the Demand Notice in writing, Notice of

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Default and Notice of Sale as envisaged under the mortgage law, only tendered a Notice of Default and the Notice of Sale , then the whole process of foreclosure was rendered illegal for failure to serve each and every mandatory notice.

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iv. On the sub issue of whether the two notices served on the plaintiffs were effectively served in accordance with the law, I do find that the two notices which were issued by the 1st defendant and which had the proper address, were prepaid and were posted by registered post as confirmed by the attached prepaid posting receipts which bore the plaintiffs' postal address and names, were effective service as required by the law.

15

v. On whether the eviction of the plaintiffs from the mortgaged property was carried in contempt of a court order, I find that there was no effective notice to the defendants of the existence of the court order (DEX17) for the reason that no affidavit of service was filed on the court record which would have brought the actual knowledge of the existence of any court order to the defendants.

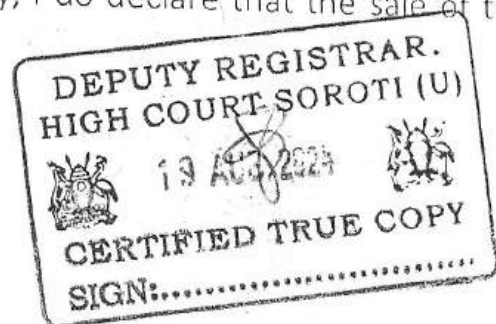
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vi. On whether the failure to carry out the mandatory pre-sale valuation of the mortgaged property within six months before sale rendered any subsequent sale of the Soroti property illegal, I declare so on the basis that the proved evidence on the record (DEX15) show that the Soroti property was sold on 24th March 2016 with its valuation (DEX6) illegally conducted after its sale in total contravention of Regulation 11 of the Mortgage Regulations.

25

vii. On whether the failure to obtain consent from the mortgagor before conducting a sale by a private treaty, I do declare that the sale of the

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impugned property of the plaintiffs by the 1st defendant and or its agents was neither by public auction nor private treaty given the fact that the provisions of the Mortgage Regulations were not followed.

✚ viii. On whether there was fraudulent declaration by the 2nd ^{defendant} plaintiff of the value of the suit property which resulted into less stamp duty being paid, I do declare that the under declaration of value of the suit property by the 2nd Defendant defrauded government of its revenue as less stamp duty was paid during the process of changing the title of Plot 14 Akaikai Lane Soroti into the names of the 2nd defendant and as such the whole registration process of the Title in regard to Plot 14 Akaikai Lane Soroti into the names of the 2nd defendant is declared invalid for fraud.

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ix. On whether the defendants unlawfully attached and converted the plaintiffs' movable properties during the eviction and sale of LRV 3481, Folio 9, Plot 14, Akakai Lane, Soroti , I do not find so and would declare that the plaintiffs are not entitled to any compensation from the 1st and 2nd defendants for any alleged unlawful attachment and conversion of any of the plaintiffs' movable properties during the eviction and sale of LRV 3481, Folio 9, Plot 14, Akakai Lane, Soroti for all properties removed from the said premises were secured and handed over to the plaintiffs who received them and even got transported them to their own destination.

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2) Orders:

a) It is hereby declared that the sale of property comprised in comprised in LRV 348 Folio 9, plot 14 Akaikai Lane Soroti by the 1st defendant to the 2nd

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5 defendant was illegal for failure to follow the lawful process as provided for under the Mortgage Act, 2009. It is therefore, cancelled.

b) the 2nd plaintiff and the 1st defendant, their own cost and within Six (6) months, ordered to carry out a Forensic Reconciliation of the impugned Loan Account to ascertain if there are any amounts due and payable by the 2nd Plaintiff in respect of the Home Loan for advanced on 27th October 2011 for which the 2nd plaintiff entered the mortgage agreement dated with the 1st defendant which advanced him a loan of UGX 80,000,000 (Uganda shillings eighty million).

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15 *X* c) The 1st ^{Defendant} plaintiff is hereby advised, if it so wishes, to carry out a fresh foreclosure of the mortgage it entered into with the 2nd plaintiff to obtain any due and unpaid money as from the time of actual default and in accordance with the agreed payable legal interest payable thereto.

d) The 1st defendant is ordered to refund the 2nd defendant, all such monies which he paid to it for the bungled purchase of LRV 348 Folio 9, plot 14 Akaikai Lane Soroti which arose from an illegality together with an interest of 6% per annum from the date of filing this suit.

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25 e) The 3rd defendant (The Registrar of Titles), is ordered to cancel the names of the 2nd defendant from the certificate of title of the property comprised in comprised in LRV 348 Folio 9, plot 14 Akaikai Lane Soroti Land and reinstate the names of the 2nd plaintiff.

f) Costs of the suit are hereby awarded to the plaintiffs.

It is so ordered.





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Hon Justice Dr Henry Peter Adonyo

Judge

13th August 2024

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Counterclaim

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The Republic of Uganda

In the High Court of Uganda Holden at Soroti

Civil Suit No. 28 of 2021

(Arising from consolidated Civil Suit No. 58 of 2019 and Civil Suit No. 1053 of 2019)

Stanbic Bank (U) Ltd Counterclaimant

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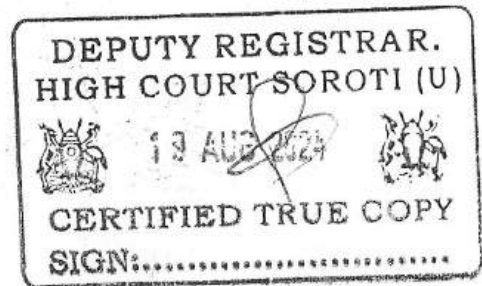
Versus

Eryaku Isaac Counter defendants

1. The 1st defendant's Counterclaim:

The 1st defendant/counter-claimant's claim against the plaintiff is for recovery of
25 UGX 17,729,549 (Seventeen million Seven hundred twenty-nine thousand five
hundred forty-nine Uganda Shillings only) interest thereon at 23% from the date of

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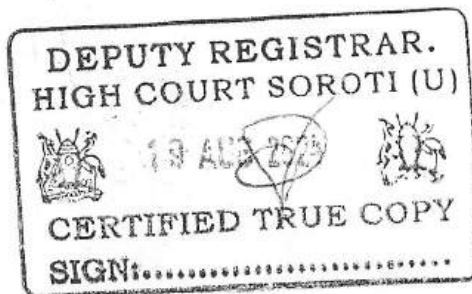
5 default until payment in full and costs of the suit arising from the breach of terms of
the mortgage agreement.

The counterclaimant averred that on 27th October 2011, the plaintiff/Counter-
Defendant entered a mortgage agreement with the 1st defendant/Counter-Claimant
under which the 1st Defendant/Counter-Claimant advanced a loan of UGX
10 80,000,000 to the Plaintiff.

The Plaintiff/Counter-Defendant defaulted on the terms of the mortgage agreement
by failing to pay the instalments required. The 1st Defendant/Counter-Claimant
subsequently lawfully exercised its right to sell the mortgaged property, but the
sums recovered from the sale were inadequate to discharge the liability of the
15 Counter-Defendant to the 1st Defendant/Counter-Claimant. The Plaintiff/Counter-
Defendant remains indebted to the 1st Defendant/Counter-Claimant to the tune of
UGX 17,719,549 (Seventeen million Seven hundred and twenty-nine thousand five
hundred and forty Uganda Shillings only) together with interest. The 1st
Defendant/Counter-Claimant shall contend that the Counter-Defendant/Plaintiff
20 has no defence to the debt and is liable to pay the sums immediately.

2. Counter defendant's reply:

The counter-defendant contended that he faithfully paid his loan amounts until the
Uganda Revenue Authority (URA) unfairly closed their business, which made it
difficult for the defendants by counterclaim to meet their obligation. The same was
25 communicated to the counterclaimant, but they adamantly went ahead to
fraudulently and unlawfully sell the counter-defendants' property in Soroti and
threatened to sell the Serere property.

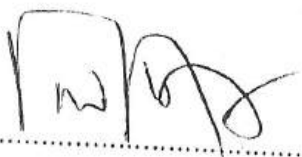


5 The counter-claimant unlawfully and illegally undervalued the value of the property and sold the plaintiff's property to the 2nd defendant, with whom the 2nd plaintiff had confided about some of his problems.

The counter defendant is/are not indebted to the counterclaimant to any sum of money or interest and the counter defendant is not liable to pay any sums.

10 In, my view, the claims of the counterclaimant have been overtaken by events due to the determination of the head suit as above in the plaintiffs' favour because the process of sale of the Soroti mortgaged land upon which the counterclaim is based has been declared illegal, with parties directed to implement the orders made above. It thus lapses accordingly as it is ordered.

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Hon. Justice Dr. Henry Peter Adonyo

Judge

13th August 2024

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DEPUTY REGISTRAR.
HIGH COURT SOROTI (U)
19 AUG 2024
CERTIFIED TRUE COPY
SIGN:.....