



**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL COURT DIVISION)**

**MISCELLANEOUS APPLICATION No. 568 OF 2020**

**(ARISING FROM HCCS No. 222 OF 2019)**

**MACDOWEL FOOD & BEVERAGES LIMITED::::::::::::::::::::::::: APPLICANT**

**VERSUS**

**1. STANBIC BANK UGANDA LIMITED**

**2. MYRIAD INVESTMENT CLUB LIMITED ::::::::::::::::::::::::::: RESPONDENTS**

**RULING**

The Applicant filed this application under Sections 34 and 98 of the Civil Procedure Act cap 71, Section 30 (1) and 33 of the Mortgage Act, Section 54 (1) of the Financial Institutions Act and Order 52 rules 1 & 2 of the Civil Procedure Rules S.I 71-1. The applicant is seeking for:-

- a) A declaration that the purported enforcement of the consent decree dated 22<sup>nd</sup> August 2019 by sale of the Applicant's securities was illegal and void.
- b) A declaration that the Applicant had to date deposited with the 1<sup>st</sup> Respondent and its lawyers' funds sufficient to satisfy the consent decree.
- c) An order for release of the certificates of title for the Applicant's securities comprised in: - LRV 3803 Folio 13 Plot 1 Works Close Luzira; LRV 4234 Folio 13 Plot 3 Works Close Luzira; LRV 4251 Folio 4 Plot 4 Works close Luzira; LRV 3681 Folio 14 Plot 5 Works Close Luzira, LRV 4079 Folio 19

Plot 6 Works Close Luzira; and LRV 4079 Folio 19 Plot 6 Works Close Luzira.

35 d) An order for vacation of the Respondents' mortgages or other encumbrances registered on the Applicant's aforesaid securities.

e) An order that the Respondent do jointly and severally pay general, exemplary, and punitive damages to the Applicant.

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The grounds upon which this application was premised are set out in the affidavit in support dated 6<sup>th</sup> September 2020 deposed by Francis Gimara, S.C, and a director of the Applicant. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent through Ms. Priscillah Ann Nakalembe and Mr Kenneth Kitungulu respectively deposed  
45 affidavits in reply in which they opposed this application as being an abuse of court process, misconceived and untenable in law.

#### **Background of this Application**

On 20<sup>th</sup> March 2019, Macdowel Foods and Beverages Limited (*the Applicant herein*) filed Civil Suit No. 222 of 2019 (*hereinafter referred to as the Civil Suit*) in this honourable Court against Stanbic Bank Uganda Limited (*the 1<sup>st</sup> Respondent herein*) seeking for an order of specific performance of the terms and conditions of the facility letter dated 14<sup>th</sup> October 2017, damages in lieu of specific performance, relief against the enforcement of the security documents and  
55 instrument issued by way of mortgages, debentures and guarantees under the facility letter, general damages for breach of contract and/or negligence and costs of the suit.

On 4<sup>th</sup> April 2019, Stanbic Bank Uganda Limited (*the 1<sup>st</sup> Respondent herein*) filed a defence to the civil suit challenging the claims raised by Macdowel Foods & Beverages Limited as being frivolous, vexatious and an abuse of Court process. In its defence, Stanbic Bank Uganda Limited *inter alia* stated that it fully complied with the terms of the facility letter and that all the necessary notices were served in accordance with the terms of the facility letter. Stanbic Bank  
65 Uganda Limited requested this honourable Court to dismiss the suit with costs.

On 20<sup>th</sup> August 2019, Macdowel Foods & Beverages Limited and Stanbic Bank Uganda Limited agreed to an amicable settlement of the dispute in the civil suit and entered into a consent which was endorsed by this honourable Court on  
70 22<sup>nd</sup> August 2019. In the consent judgement it was *inter alia* decreed that:-

75 a) **Macdowel Foods & Beverages Limited shall pay UGX 1,060,750,047/= (Uganda Shillings One Billion Sixty Million Seven Hundred Fifty Thousand Forty-Seven Only) to Stanbic Bank Uganda Limited in monthly instalments of UGX 30,000,000/= (Uganda Shillings Thirty Million Only) with 50% of the debt being paid by 31<sup>st</sup> December 2019 and the other half by 30<sup>th</sup> June 2020;**

80 b) **Should Macdowel Foods & Beverages Limited default to make any instalment in whole or in part or fail to rectify the default within the time stipulated in the consent judgment, Stanbic Bank Uganda Limited shall proceed to advertise and sale the properties comprised in:- LRV 3803 Folio 13 Plot 1 Works Close Luzira; LRV 4234 Folio 13 Plot 3 Works Close Luzira; LRV 4251 Folio 4 Plot 4 Works close Luzira; LRV 3681 Folio 14 Plot 5 Works Close Luzira, LRV 4079 Folio 19 Plot 6 Works Close Luzira; and LRV 4079 Folio 19 Plot 6 Works Close Luzira to the highest bidder after 30 days from the date of the advert without any requirement for notice or recourse to Court.**

90 According to the 1<sup>st</sup> Respondent, on 26<sup>th</sup> February 2020, in accordance with the terms of the Consent Judgment it sold all the securities mortgaged by the Applicant to the 2<sup>nd</sup> Respondent after the 2<sup>nd</sup> Respondent emerged as the highest bidder with an offer of UGX 1,050,000,000/= (Uganda Shillings One Billion Fifty Million Only).

95 Subsequently, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent executed a sale agreement after the 2<sup>nd</sup> Respondent paid the bid price in full. On 24<sup>th</sup> June 2020, the 1<sup>st</sup> Respondent informed the Applicant that the securities had been sold.

100 The Applicant disputes the above claims by the 1<sup>st</sup> Respondent and contends that it was not informed of the alleged sale, no public auction was conducted and that the purported sale of the Applicant's securities to the 2<sup>nd</sup> Respondent was illegal.

105 In a twist of events on 13<sup>th</sup> August 2020, the lawyers of the 1<sup>st</sup> Respondent wrote a without prejudice letter to the Applicant's lawyers proposing a settlement of the dispute through cancellation of the sale of the Applicant's securities to the 2<sup>nd</sup> Respondent, a refund of the purchase price to the 2<sup>nd</sup> Respondent and return of the original certificates of title for the securities and issue release of mortgage instruments the Applicant.



On 17<sup>th</sup> August 2020, the lawyers of the Applicant replied to the letter of the 1<sup>st</sup> Respondent's lawyers and raised a counter proposal that *inter alia* included a compensation of UGX 3,000,000,000/= (Uganda Shillings Three Billion Only) for financial loss, embarrassment and anguish suffered on account of the 1<sup>st</sup> Respondent's egregious actions.

On 22<sup>nd</sup> October 2020, the parties to this application entered into a consent which was endorsed by Court on the same date. In the said consent it was agreed that:

**1. The 1<sup>st</sup> Respondent shall debit the sum of UGX 940,986,287/= (Uganda Shillings Nine Hundred Forty Million Nine Hundred Eighty Six Thousand Two Hundred and Eight Seven Only) from the Applicant's account number 9030008716578 which shall be in full and final settlement of the 1<sup>st</sup> Respondent's claims under the consent decree dated 22<sup>nd</sup> August 2019.**

**2. Upon credit of the sums in clause 1) above to the Applicant's loan account number 9030017764364 held with the 1<sup>st</sup> Respondent, the 1<sup>st</sup> Respondent shall hand over to the Applicant the certificates of title together with release of mortgage instruments for the securities comprised in LRV 3803 Folio 13 Plot 1 Works Close Luzira; LRV 4234 Folio 13 Plot 3 Works Close Luzira; LRV 4251 Folio 4 Plot 4 Works Close Luzira; LRV 3681 Folio 14 Plot 5 Works Close Luzira; and LRV 4079 Folio 19 Plot 6 Works Close Luzira.**

**3. The partial consent decree is without prejudice to the determination of the issues in clause 4.**

**4. The following issues are referred for determination by the Court;**

**a) Whether the Applicant is entitled to general, punitive, and exemplary damages**

**b) Whether the Applicant is entitled to costs.**

**The Dispute between the Parties**

With the above background the issues that remain unsettled, thus warranting the determination by this honourable relate to ***whether the Applicant is entitled to general, punitive, exemplary damages and costs.***

150 This honourable Court issued directives to the parties to file written submissions addressing the above issues which they adhered to.

On 19<sup>th</sup> November 2020, when this matter came up for oral highlights of the parties' submissions. The Applicant was represented by Counsel Nelson Nerima and Counsel James Katono while Counsel Barnabas Tumusingize appeared for  
155 the 1<sup>st</sup> Respondent and Counsel Ivan Gitta represented the 2<sup>nd</sup> Respondent.

Counsel for the 1<sup>st</sup> Respondent raised a preliminary point of law concerning the submission by counsel for the Applicant challenging the legality of the sale of the Applicant's securities by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent.

160 Counsel for the 1<sup>st</sup> Respondent submitted that all matters pertaining to the above-mentioned sale are now moot. He argued that considering the Partial Consent Decree of the Parties dated 22<sup>nd</sup> October 2020, all matters relating to illegalities are also moot since they relate to the sale, which the Applicant conceded was moot. To buttress his argument, he cited the case of **Human Rights Network for Journalists and Another v Uganda Communication Commission and 6 Ors, HCMC No. 219 of 2013**, where Court held that, "*The doctrine of mootness is part of the general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question...*"  
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170 Counsel for the 1<sup>st</sup> Respondent also submitted that the issues of illegality of the sale are non-existent. That it is no longer a live issue between the parties. That since the titles have been handed over to the Mortgagor, there cannot be any sale between the Respondents, and neither can the way the non-existent sale was conducted remain an issue even if it is to justify damages. He also argued  
175 that to invite this honourable Court to deal with anything associated to a non-existent sale, is a waste of this Court's time.

In reply counsel for the Applicant submitted that the questions of law and fact are to be determined by the Court but not by counsel for the 1<sup>st</sup> Respondent.  
180 There is a live dispute between the parties, and it is not moot as alleged. Counsel also submitted that the exchange of settlement proposals did not result in any settlement. There is no relevance of those correspondence even considering that they were written without prejudice.

185 I have carefully considered the preliminary points of law raise by Counsel for

the 1<sup>st</sup> Respondent and the submission in response by Counsel for the Applicant. I have also perused the record and chronological events leading to and pertaining to the consents that were signed and endorsed by this honourable Court.

190 In **Mukisa Biscuit Manufacturing Co vs. West End [1969] EA 696, at 701**, Sir Charles Newbold stated that; *"A preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is*  
195 *sought is extrinsic evidence of judicial discretion."*

In the consent which was executed by the parties herein and endorsed by this honourable Court on 22<sup>nd</sup> October 2020 the parties agreed on three major aspects of the case. These are;

- 200 i. the payment of the outstanding loan by debiting the bank account of the Applicant,  
ii. the return of the certificates of title together with release of mortgages instruments to the Applicant and  
205 iii. Reference to Court for determination of the two unresolved issues on damages and costs.

The consent judgment is silent on the issue of whether the impugned sale of the Applicant's securities by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent was illegal. Counsel for the Applicant invited this Court to make a pronouncement on this  
210 issue. Counsel for the Respondents have argued that this Court should not be inclined to make such a pronouncement because the same was resolved in the consent judgment and is therefore moot.

215 With due respect to Counsel for the 1<sup>st</sup> Respondent, I disagree with the assertion that the question of whether the sale of the Applicant's securities by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent raises merely a hypothetical or an abstract question. This is because this issue is in respect to facts that occurred whether the sale was reversed or not does not take away the need to determine that fact.

220 As already noted above, the issue of whether the sale of the Applicant's securities by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent was illegal was not conversed or agreed upon in the consent judgment. In raising this issue in his submissions Counsel for the Applicant is inviting this honourable Court to look into it which would call for an amendment to the issues for determination by this court.



225 Purposely to include an issue on the legality of the sale of the Applicant's securities by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent.

230 **Order 15 rule 1 (5) of the Civil Procedure Rules S.I 71-1** provides that the court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

235 In **Oriental Insurance Brokers Limited vs. Transocean SCCA No. 55 of 1995** Justice Karokora (JSC) (RIP) while agreeing with the decision of the other justices on the panel observed that under Order 13 Rule 5 (1) (*now Order 15 rule 5(1) of the CPR*) Court is empowered to amend the issues or frame additional issues on such terms as it thinks fit for the purpose of determining the matter in controversy between the parties, I think that where the Court amends the issues  
240 which parties had agreed upon, it is necessary to give the parties the right to adduce further evidence or address the Court on the amended issues.

In the instant case the issue concerning the legality of the sale of the Applicant's securities by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent was raised by Counsel  
245 for the Applicant in his written submissions. Counsel for the Respondents duly replied to this issue and subsequently at the hearing on this matter on 19<sup>th</sup> November 2020, counsel for all the parties herein addressed Court on this issue. Even if therefore, this issue is not among those that were agreed upon by the parties in the consent judgment dated 22<sup>nd</sup> October 2020, this Court has the  
250 mandate to amend the issues as long as the parties have been afforded an opportunity to address court on the same.

The issue of legality of the sale of the Applicant's securities by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent is therefore not moot. It is on this premise that I am inclined to overrule the objection raised by counsel for the Respondents.

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### **DETERMINATION OF THE ISSUES**

#### ***1. Whether the sale of the Applicant's securities by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent was lawful?***

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Counsel for the Applicant submitted that the sale of the Applicant's securities by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent was illegal and a violation of Section 30 of the Mortgage Act 2009 which prohibits such a sale without leave of Court.

265 He also submitted that the acts and omissions of the 1<sup>st</sup> Respondent and its employees who are shareholders/directors of the 2<sup>nd</sup> Respondent contravened the 1<sup>st</sup> Respondent's own Standard Bank Group Code of Ethics.

270 In reply, counsel for the 1<sup>st</sup> Respondent submitted that all matters pertaining to the above-mentioned sale are now moot. He argued that considering the Partial Consent Decree of the Parties dated 22<sup>nd</sup> October 2020, all matters relating to illegalities are also moot since they relate to the sale, which the Applicant conceded was moot.

275 In further reply by counsel for the 2<sup>nd</sup> Respondent, he challenged the assertion that the sale of the Applicant's securities by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent was illegal. He submitted that the 2<sup>nd</sup> Respondent is not an employee, agent, a person in a position to influence the matter directly, or indirectly; or a person in position or possession of any other privileged information with regard to the transaction. He argued that the restriction under  
280 Section 30(1) of the Mortgage Act does not extend to companies owned by employees of the Mortgagee and it's not the duty of this court to give it such a wide interpretation.

285 In support of his argument, he cited the case of **Crane Bank v Uganda Revenue Authority HCT-OO-CC-CA-18[2012] Court cited Sussex Peerage (1844) 8ER 1034 at 1057**, where it was held that;

290 *"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary that to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the law giver".*

295 He opined that the words of the Section 30 of the Mortgage Act 2009 are unambiguous and clear, and they indeed declare the intention of the law giver. That the provision clearly does not exclude the 2<sup>nd</sup> Respondent among persons precluded from purchasing mortgaged property under the law. He strongly submitted that Section 30 (1) of the Mortgage Act does not make a sale of property to the persons mentioned therein an illegality under the law but rather voidable as these persons can purchase mortgaged property with leave of court.  
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For clarity I will reproduce the relevant provisions of Section 30 of the Mortgage Act;

**30. Sale by mortgagee to himself or herself.**

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

**(a) a mortgagee;**

**(b) an employee of the mortgagee or an immediate member of his or her family;**

**(c) an agent of the mortgagee or an immediate member of his or her family;**

**(d) any person in a position to influence the matter directly or indirectly; or**

**(e) a person in position of any other privileged information with regard to the transaction.**

**(5) Where the mortgagee sells the mortgaged land in contravention of this section, the sale shall be voidable at the option of the mortgagor.**

The **Black's Law Dictionary 8<sup>th</sup> Edition at page 763** defines the term "**illegal**" to mean forbidden by law; unlawful. Similarly, illegality is defined to mean an act that is not authorised by law. In contrast, "**voidable**" is defined in the same dictionary at **page 1065** to mean valid until annulled; esp., (of a contract) capable of being affirmed or rejected at the option of one of the parties. This term describes a valid act that may be voided rather than an invalid act that may be ratified.

The effect of an illegality on the sanctity of a transaction, contract or agreement cannot be overstated, in the case of **Nipun Norattam Bhatia vs Crane Bank Ltd CA No 35 of 2006**, Justice Kakuru JA observed that that an agreement entered into in contravention of the law is a nullity and it is unenforceable. In **Makula International versus Cardinal Nsubuga [1982] HCB** Court held that that an illegality once brought to the attention of court overrides all questions of admissions and pleadings. A court of law cannot sanction what is illegal and illegality once brought to the attention of court overrides all questions of pleadings, including any admissions made thereon.

340 On the other hand, the effect of a voidable agreement, sale or contract in Uganda  
is traceable right from the Contracts Act 2010. **Section 2 of the Contracts Act**  
defines a voidable contract to mean an agreement which is enforceable by law  
at the option of a party to a contract but not at the option of the other party and  
a contract which ceases to be enforceable by law and which becomes void when  
345 it ceases to be enforceable.

**Section 30 (5) of the Mortgage Act 2009** provides that where the mortgagee  
sells the mortgaged land in contravention of this section, the sale shall be  
voidable at the option of the mortgagor.

350 The implication of the above provision of the Mortgage Act is that the sale can be  
avoided if the Mortgagor opts to commence legal action to that effect. As noted  
above where a contract or sale is voidable, the court has the power to annul the  
contract or sale which renders it unenforceable and thus void. In the instant  
case the 1<sup>st</sup> and 2<sup>nd</sup> Respondent took the easy way out and opted to rescind the  
355 sale of the Applicant's securities. This therefore makes it unnecessary for court  
to annul the sale because the same is non-existent however, this honourable  
court finds the acts of the 1<sup>st</sup>, 2<sup>nd</sup> Respondents and their respective officers were  
done in complete violation of the Section 30 (1) of the Mortgage Act .

360 It is very clear from the evidence on record contained in the affidavits in support  
of this application and rejoinder that the shareholders of the 2<sup>nd</sup> Respondent to  
wit; Lawrence Kaweesa, Allan Muhinda, Daisy Nitwe, Emmanuel Rukeeba,  
Kenneth Kitungulu, Maureen Kembabazi Katwebaze and Thaib Lubega who are  
also employees of the 1<sup>st</sup> Respondent on 3<sup>rd</sup> February 2020 opportunistically  
365 incorporated a sham or conduit company in the name of the 2<sup>nd</sup> Respondent with  
a hidden motive of purchasing the securities of the Applicant.

In **Jones v Lipman [1962] 1 W.L.R. 832** Lipman agreed to sell a property to  
Jones for £5,250, but subsequently changed his mind. He then formed his own  
370 company, which had £100 in capital, and made himself the director and owner.  
He then transferred the land, which he had agreed to sell to Jones, to this sham  
company for £3,000. To enable such a transaction, Lipman had borrowed over  
half the money needed by way of a bank loan, and the remainder was owed to  
other sources. The purchaser applied for specific performance to be carried out  
375 against the vendor and the vendor's company for the transfer of the property in  
question.

**Russell J** while passing an order for specific performance against Mr Lipman and the formed company observed that *"...the defendant company is the creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity..."*

Therefore it is my finding that the sale of the Applicant's securities by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent a company incorporated on 3<sup>rd</sup> February 2020, three months after the advert for sale of the securities in November 2019 and barely a month before sale of the securities on 26<sup>th</sup> February 2020 was merely a side show and a shabby disguise intended to circumvent the provisions of Section 30 of the Mortgage Act. The said acts by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent with the aid of the employees of the 1<sup>st</sup> Respondent mentioned above were done in complete contravention of the law and thus are found to have been illegal.

## **2. Whether the Applicant is entitled to general damages?**

Counsel for the Applicant submitted that damages are at large and cited the case of **Nabwami vs. Attorney General Civil Suit No, 117 of 2015** where Court held that general damages are such as the law will presume to be a direct natural probable consequence of the act complained of. He argued that the illegalities committed against the Applicant and the attempt to seize physical possession of the mortgaged property have occasioned stress and disruption of business operations. The Applicant had to deploy armed security at the properties, hire private investigators to investigate the alleged sale and also lodged caveats on the titles. The above cited acts and omissions of the 1<sup>st</sup> Respondents demonstrate a failure to abide by the Bank of Uganda Consumer Protection Guidelines key principles of fairness, reliability, and transparency.

Counsel for the Applicant also submitted that the acts and omissions of the 1<sup>st</sup> Respondent and its employees who are shareholders/directors of the 2<sup>nd</sup> Respondent contravened the 1<sup>st</sup> Respondent's own Standard Bank Group Code of Ethics. The Applicant now has an adverse credit rating on account of the Respondent's illegal actions. Counsel further submitted that in the peculiar circumstances of this case, a sum of Shs 500,000,000/= (Uganda Shillings Five Hundred Million Only) would atone for the illegal actions of the Respondents jointly and severally.

In reply Counsel for the 1<sup>st</sup> Respondent submitted that it is trite law that general damages are designed to compensate for an established loss and not to provide



a gratuitous benefit to the aggrieved party. The object of damages is always to compensate the plaintiff for the loss one has suffered, not to punish the defendant. The loss or injury must be actual and not hypothetical. The Claimant must prove that there was an injury or loss for which damages are payable.

Counsel for the 1<sup>st</sup> Respondent argued that the fundamental principle by which the courts are guided in awarding damages is *restitutio in integrum*. The basis for general damages is that the Plaintiff must have sustained actual loss or injury.

Counsel for the 1<sup>st</sup> Respondent cited the case of **Waiglobe (U) Limited v Sai Beverages Limited, High Court Civil Suit No. 0016 of 2017** where Justice Stephen Mubiru held ~~that~~

“Damages are not awarded to enrich a plaintiff far beyond his actual losses nor should the plaintiff get far less than his actual loss. Therefore, when a claim for damages is made, the plaintiff is required to provide evidence in support of the claim and to adduce facts upon which the damages could be assessed. Before assessment of damages can be made, the plaintiff must first furnish evidence to warrant the award of damages. The plaintiff must also provide facts that would form the basis of assessment of the damages he would be entitled to. Failure to do so would be fatal to a claim for damages.”

Counsel for the 1<sup>st</sup> Respondent also submitted that in arriving at a decision on liability and quantum of damages, the court should consider whether the Applicant had by 30<sup>th</sup> June 2020 provided for all its obligations in accordance with the terms of the Consent Judgment of August 2019 and the effect of the partial consent of 22<sup>nd</sup> October 2020 on liability and quantum of damages. He further submitted that the Applicant is not entitled to an award of general damages because by operation of the partial consent decree dated 22<sup>nd</sup> October 2020, the Applicant was put in the position it would have been in had it complied with the terms of the Consent Judgment/Decree dated 22<sup>nd</sup> August 2019 that is, it paid the outstanding obligations and the securities have been released.

Counsel also argued that the net effect of Clause 1) and 2) of the Consent Judgment of 22<sup>nd</sup> October 2020 renders the question of general damages moot since the Applicant has now been put in the position it would have been in had

455 the contract of 22<sup>nd</sup> August 2019 been performed. To buttress his  
argument counsel for the 1<sup>st</sup> Respondent cited that the  
case of **Kamuntu Anthony v Hajat Zam Sendagire and Attorney General**  
**High Court Civil Suit No. 188 of 2019** where Court held that "*general damages*  
460 *are not intended to better the position of the claimant.*" He submitted that to  
award any damages to the Applicant would only be to better the position of the  
Applicant which is not the purpose of general damages.

I have scrutinised the submissions of counsel on general damages and taken  
into account the wealth of authorities advanced to their respective submission.  
465 General damages, according to Lord Macnaghten in the oft-cited case of **Stroms**  
**V. Hutchinson [1905] AC 515**, are such as the law will presume to be the direct  
natural or probable consequence of the act complained of.

The Applicant's basis for the claim of general damages is that the Respondents  
470 conspired to circumvent the law in order to sale and acquire the Applicant's  
securities for a credit facility obtained from the 1<sup>st</sup> Respondent. The Applicant  
alleges that the actions of the Respondents caused traumatic experience and  
instigated frantic efforts by the Applicant's director and guarantor to redeem the  
securities which diverted her from her other business activities. That the  
475 Applicant's director had to deploy security to safeguard the properties and also  
seek legal services.

Counsel for the Respondents have advanced various arguments and theories  
buttressed with authorities as to why the Applicant should not be awarded any  
480 general damages. I have painstakingly reviewed all these authorities and  
considered the principles on which they were decided. However, this Court on a  
balance of probabilities finds that the actions of the Respondents in respect of  
the Applicant's security indeed occasioned loss which can only be lawfully  
presumed to be the direct natural or probable consequence of the act complained  
485 of and thus warrant an award of general damages. Considering the nature and  
value of the properties in issue, it is my finding that an award of **UGX**  
**100,000,000/= (Uganda Shillings one hundred Million Only)** in general  
damages would suffice as to atone for the loss and anguish occasioned to the  
Applicant.

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### **3. Whether the Applicant is entitled to exemplary and punitive Damages**

On the claim for exemplary damages, Counsel for the Applicant submitted that  
exemplary damages may be awarded where the defendant's conduct was

calculated to procure him some benefit. They are meant to punish the defendant  
495 and deter him from repeating his wrongful act. He cited the case of **Obong vs. Municipal Council of Kisumu [1971] EA 91** in support of his submission.

Counsel for the Applicant further submitted that the Applicant has proved that  
500 the 2<sup>nd</sup> Respondent was used as a mask or veil by its shareholder/directors and secretary to illegally purchase securities being sold by their employer, the 2<sup>nd</sup> Respondent was incorporated as a special purpose vehicle to acquire the Applicant's securities on the cheap and to circumvent the law which prohibits a mortgage from directly or indirectly purchasing the mortgaged property. There is  
505 no record of bids received by the auctioneers on the auction date of 6<sup>th</sup> December 2019 despite the securities being commercial properties in the prime area of Luzira.

There was never an intention to auction as the auctioneer's role stopped at  
510 placing an advert for a sham auction. The subsequent bids received by the auctioneers were forwarded to the 1<sup>st</sup> Respondent for advice and acceptance long after the deadline had passed. The 1<sup>st</sup> Respondent did not value the securities as required by law to guide on the reserve price but sold the securities at a lowly price of UGX 1,050,000,000/= which was a serious breach of duty of care owed by the 1<sup>st</sup> Respondent to the Applicant solely for the benefit of its staff under  
515 veneer of the 2<sup>nd</sup> Respondent.

Counsel for the Applicant further submitted that the Applicant seeks punitive damages focusing on the Respondent's misconduct rather than the injury or loss suffered. He invited Court to consider the fact that the 1<sup>st</sup> Respondent is the  
520 biggest commercial bank in Uganda, a primary subsidiary of Stanbic Group a multi-national company. He requested Court to award damages in a quantum that is consistent with the 1<sup>st</sup> Respondent's dominant position and financial muscle. Counsel proposed an award of UGX 5,000,000,000/= (Uganda Shillings Five Billion Only) as exemplary damages against the Respondents jointly and  
525 severally. Counsel also prayed for costs of this application to be awarded to the Applicant

In reply counsel for the 1<sup>st</sup> Respondent submitted that the award  
530 punitive/exemplary damages are not available in the circumstances of this case. Punitive or exemplary damages are an exception to the rule that damages generally are to compensate the injured person.



These are awardable to punish, deter, express outrage of court at the defendant's egregious, high handed, malicious, vindictive, oppressive and/or malicious conduct. They are awardable with restraint and in exceptional cases because punishment ought, as much as possible, to be confined to criminal law and not the civil law of tort and contract. For the Applicant to succeed, it must prove that the acts complained of were tortious.

He cited the case of **Obongo and Another v Municipal Council of Kisumu [1971] EA 91 at P. 94** which provides for the exceptional circumstances in which punitive damages can be awarded. The three exceptional circumstances are:

- a) Oppressive, arbitrary, or unconstitutional action by servants of the government.
- b) Cases in which the defendant's conduct has been calculated to make a profit for himself which might well exceed any compensation payable to the claimant, and
- c) Situations where statute permitted it.

Counsel then argued that evidentially, since the 1<sup>st</sup> Respondent is not a servant of government and the Mortgage Act does not permit the grant of punitive damages, a) and c) above do not apply to the current situation. He referred this Court to the case of **Rookes v Bernard [1964] 1129 at Page 1227-1228 (Supra)**, where it was held that *exemplary damages can properly be awarded whenever it is necessary to teach a wrong doer that tort does not pay...First, the plaintiff cannot recover exemplary damages unless he is the victim of punishable behaviour. The anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence.*

According to counsel for the 1<sup>st</sup> Respondent, the Applicant is seeking for punitive damages under the second head which is that the conduct of the Defendant was to procure him some benefit. The 1<sup>st</sup> Respondent was entitled under the Consent of 22<sup>nd</sup> August 2019 to sell the securities to recover the debt owed by the Applicant and that the Applicant is not entitled to the prayer of exemplary damages.

On the issue of costs counsel for the 1<sup>st</sup> Respondent submitted that section 27 of the Civil Procedure Act states that costs are at the discretion of the court or judge. It was the 1<sup>st</sup> Respondent's submission that the circumstances of this

case are such that each party bears its own costs because the willingness of the 1<sup>st</sup> Respondent to resolve this matter expeditiously as evidenced by 1<sup>st</sup> Respondent's supplementary affidavit in reply dated 29<sup>th</sup> September 2020 and the Applicant's default. All this coupled with the fact that this situation could have been avoided by the Applicant had it simply complied with the Consent Judgment of 22<sup>nd</sup> August 2019 and that Counsel faulted the Applicant for rushing to file this application immediately after it had provided for the full decretal sums on 30 July 2020 instead of reaching out to the 1<sup>st</sup> Respondent.

He cited the case of **Future Stars Investment (U) Ltd v Nasuru, High Court Civil Suit No. 0012 of 2017** where Court held that *although under section 27 (2) of The Civil Procedure Act costs follow the event unless court orders otherwise, a successful litigant who has been guilty of some sort of misconduct relating to the litigation or the circumstances leading up to the litigation, may be denied costs*

Counsel for the 1<sup>st</sup> Respondent argued that the Applicant was guilty of misconduct relating to or leading to the litigation namely that it was in breach of the Consent Judgment of 22<sup>nd</sup> August 2019 and as such costs should be denied. In conclusion counsel submitted that the Applicant is not entitled to the claim of damages, both general and punitive because the circumstances complained of are hypothetical.

The submissions by Counsel for the 2<sup>nd</sup> Respondent are not different from those of the 1<sup>st</sup> Respondent however I will refer to them briefly. Counsel for the 2<sup>nd</sup> Respondent submitted that the general principle that conforms to the general policy of awarding damages which do no more than compensate the innocent party's loss, contemplates the recovery of true loss, and no more, by putting the innocent party, as far as money can achieve this, in the position which he would have occupied had the contract been performed.

Further, the general principle of compensation may be justified on grounds of fairness and reasonableness by encouraging the innocent party to disclose the facts which indicate loss. As stated by court **Firdoshali Madatali Keshwani & Anor Vs Departed Asians Property Custodian Board & 2 Ors Miscellaneous Cause No.11 of 2019**, "the plaintiff must understand that if they bring actions

for damages, it is for them to prove their damage; it is not enough to write down particulars and so to speak, throw them at the head of the court, saying, "This is what I have lost, I ask you to give these damages" They have to prove it.

Counsel for the 2<sup>nd</sup> Respondent's submitted that the Applicant has not made out any case for damages to be awarded both in their affidavit in support and submissions. That the 2<sup>nd</sup> Respondent is not an employee, agent, a person in a position to influence the matter directly, or indirectly; or a person in position or possession of any other privileged information with regard to the transaction. The restriction under Section 30(1) of the Mortgage Act does not extend to companies owned by employees of the Mortgagee and it's not the duty of this court to give it such a wide interpretation. As was stated in **Crane Bank v Uganda Revenue Authority HCT-OO-CC-CA-18[2012] Court cited Sussex Peerage (1844) 8ER 1034 at 1057**, where it was held that;

*"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary that to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the law giver".*

Counsel for the 2<sup>nd</sup> Respondent submitted that the words of the Section 30 are unambiguous and clear, and they indeed declare the intention of the law giver. The said provision clearly does not exclude the 2<sup>nd</sup> Respondent among persons precluded from purchasing mortgaged property under the law. That even if court is inclined to treat the 2<sup>nd</sup> Respondent as a person within the confines of section 30, according to paragraph 6 of the 2<sup>nd</sup> Respondent's affidavit in reply, it submits that Section 30 (1) of the Mortgage Act does not make a sale of property to the persons mentioned therein an illegality under the law as stated by the Applicant under paragraph 17 of its affidavit in rejoinder to the 1<sup>st</sup> Respondent's affidavit in reply and their submission but rather voidable as these persons can purchase mortgaged property with leave of court.

Section 30(5) provides that where Section 30 is contravened, the sale shall be voidable at the option of the mortgagor which is to avoid the contract entered into by the mortgagee. Under **Chitty's Law of Contract Vol. 1, 28<sup>th</sup> Ed. Pg. 23**, "a voidable contract is one where one or more of its parties by manifestation of election to do so, avoid the legal relations created by the contract or by affirmation of the contract to extinguish the power of avoidance..."



The mortgagor indeed exercised its remedy to avoid the sale by lodging caveats on the suit property, denying access to the 2<sup>nd</sup> Respondent. Further the 2<sup>nd</sup> Respondent has since rescinded the purchase and returned the properties to the 1<sup>st</sup> Respondent. Section 30 (5) of the Mortgage Act provides this as remedy to the mortgagor to void the transaction but this does not make it illegal. Counsel for the 2<sup>nd</sup> Respondent further submitted that the case cited by the Applicant; **Nagongera Millers and Farmers Ltd & Anor v Gold Trust Bank Ltd HCCS No. 1329 of 1999** is not applicable under the circumstances of this case as the principles therein do not apply under the current legal regime of Section 30 of the Mortgage Act. The Privy Council in the case of **Tse Kwong Lam v Wong Chit Sen and Others** held that *a sale by a mortgagee to a company in which he is interested will not be impugned if the mortgagee exercises the power in good faith for the purpose of obtaining repayment and shows that he took reasonable precautions to secure a proper price.*

With regards to **Section 39 (2)** which stipulates that;

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

Counsel for the 2<sup>nd</sup> Respondent submitted that that neither the 2<sup>nd</sup> Respondent nor its members have been convicted of any criminal offence pertaining to the contravention of section 39 of the Mortgage Act. That the said provision doesn't apply to the current case and has been quoted out of context and the same should be ignored and or disregarded by this court. Further the 2<sup>nd</sup> Respondent contends that it did not act in contravention of Section 30 of the Mortgage Act as submitted by the Applicant since it is not an employee of the 1<sup>st</sup> Respondent and in any case, the contract for purchase of property between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent was rescinded and hence no performance of the same or acquisition of any legal rights in respect of the property.

Counsel for the 2<sup>nd</sup> Respondent argued that the Applicant has failed to prove any loss or injury occasioned by it as a consequence of the actions complained of and failure to do is fatal to the claim for damages. It is trite law that damages are compensatory in nature and are aimed to put the innocent party back into the position he would have been in had he not suffered the wrong.

In rejoinder, Counsel for the Applicant submitted that the natural consequence of loss of property is stress and fear that motivated deployment of armed security guards. Not to mention the loss of reputation before stakeholders, embarrassment and stigma upon advertisement, plus adverse information shared by the 1<sup>st</sup> Respondent with the credit reference bureau. It is preposterous to require the applicant's directors to tender evidence of mental anguish and stress or to suggest that compensation to victims of shylock type impunity is unjust enrichment.

Counsel cited the case of **Grace Tibihikira Makoha vs. Standard Chartered Bank (U) Limited** where Court awarded UGX 1 billion as general damages for unlawful dismissal and submitted that the modest sum of UGX 500,000,000 they prayed for is 50% of what Court awarded yet the acts complained of are of a graver magnitude.

On exemplary and punitive damages, Counsel for the Applicant also submitted that the Respondent's directors are liable on conviction to a minimum 2-year jail sentence and attendant criminal record. The purpose of sentencing is deterrence and retribution. Accordingly, this lengthy sentence should be reckoned in assessment of the exemplary damages claimed for this criminal conduct.

In considering the arguments for and against the claim for general damages I have taken into account the observations of Court in **Butterworth V. Butterworth & Englefield [1920] P 126** where McCardie J. noted that, *"Simply put, the expression exemplary damages mean damages for 'example's sake'. These kinds of damages are clearly punitive or exemplary in nature. They represent a sum of money of a penal nature in addition to the compensatory damages given for the pecuniary or physical and mental suffering."*

The award of exemplary damages was also considered by the House of Lords in the landmark case of **Rookes V. Barnard [1964] ALLER 367 at 410** Lord Devlin stated that in his view there are only three categories of cases in which exemplary damages are awarded, namely:

- a) where there has been oppressive, arbitrary, or unconstitutional action by the servants of the government.
- b) where the defendant's conduct has been calculated by him to make a profit which may well exceed the compensation payable to the plaintiff; or

725 c) where some law for the time being in force authorises the award of  
exemplary damages.

I have considered all the submissions by counsel in respect of exemplary  
damages and the evidence presented to support the case of either party. As  
730 pointed out by McCardie J (Supra) exemplary damages are clearly punitive or  
exemplary in nature. They represent a sum of money of a penal nature in  
addition to the compensatory damages given for the pecuniary or physical and  
mental suffering. This court finds the conduct of the Respondent in respect of  
the Applicant's property in the circumstances they chose to operate under to be  
735 unacceptable and a blatant violation of the rights of the Applicant in respect to  
the securities.

**Section 30 (1) (b) of the Mortgage Act** provides that *"the following shall not be  
permitted to purchase the mortgaged land without the leave of court—*

740 *(b) an employee of the mortgagee or an immediate member of his or her family..."*

It is very clear despite the submissions advanced by Counsel for the 2<sup>nd</sup>  
Respondent that the employees of the 1<sup>st</sup> Respondent contrary to the provisions  
of **Section 30 of the Mortgage Act 2009** used their positions to create a sham  
745 or conduit in the name of the 2<sup>nd</sup> Respondent purposely to sale the securities of  
the Applicant to themselves but this time under the insulation of company law.  
To turn a blind eye to the acts of the 2<sup>nd</sup> Respondent which were masterminded,  
orchestrated and executed by the employees of the 1<sup>st</sup> Respondent using their  
influential positions in the 1<sup>st</sup> Respondent would be injudicious disregard of the  
750 mischief which Section 30 of the Mortgage Act was enacted to deal with.

It is my finding that the 2<sup>nd</sup> Respondent which was incorporated after the advert  
for the auction of the Applicant's securities is a creature of the employees of the  
1<sup>st</sup> Respondent as a device and a sham, a mask which the employees of the 1<sup>st</sup>  
755 Respondent who are also directors and shareholders of the 2<sup>nd</sup> Respondent chose  
to shamelessly place upon their faces in an attempt to circumvent the provisions  
of Section 30 of the Mortgage Act 2009.

It would create an absurdity if this Court allowed the Respondents to walk away  
760 scot free from the ruins of an illegal bungled sale they orchestrated at the  
expense and loss of the Applicant.

This is one of those cases where this Court is constrained to exercise its  
discretion to award exemplary or punitive damages to send a message and an



example to all persons in positions such as those of the Respondents to desist from engaging in transactions that are designed to circumvent the law at the expense of their vulnerable customers.

In the premise I award UGX 300,000,000/= (Uganda Shillings three Hundred Million Only) to the Applicant as exemplary or punitive damages.

#### **4. Whether the Applicant is entitled to costs**

Section **27 of the Civil Procedure Act** deals with costs in Civil matters; it reads; quote;

#### **27. Costs.**

*"(1) Subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, the costs of an incident to all suits shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid.*

In **Ismail Karmali & 2 Ors vs Shailesh Ruparelia, HCMA No. 121 of 2012 (Commercial Division), Arising out of HCCS No. 406 of 2009**; Justice Kiryabwire observed that the costs in any matter, action or cause shall follow the event.

In the premises, the Applicant has succeeded on all the issues as resolved above, I am however mindful of the steps that were taken by all the parties to have this matter resolved and will therefore mitigate the burden of the costs on the Respondents. I accordingly award the Applicant 30% of the costs in this application.

#### **Final declaration and orders**

1. The acts of the Respondents in the bungled illegal sale of the Applicant's securities by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent in the manner it was done contravened the provisions of Section 30 of the Mortgage Act.

- 800 2. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall jointly and severally pay to the Applicant  
UGX **100,000,000/= (Uganda Shillings one hundred Million Only)** in  
general damages.
3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall jointly and severally pay to the Applicant  
UGX **300,000,000/= (Uganda Shillings three Hundred Million Only)** in  
805 exemplary and punitive damages.
4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall jointly and severally pay to the Applicant  
30% of the costs in this matter.

810 Delivered at Kampala by email to Counsel for the respective parties and signed  
copies for the parties placed on file this 12<sup>th</sup> day of February, 2021.

  
.....  
815 **RICHARD WEJULI WABWIRE**  
**JUDGE**