THE REPUBLIC OF UGANJDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO. 149 OF 2010

1. ALICE OKIROR }

2. MICHAEL OKIROR }:::::::::::::::::::::::::::::::::::::: PLAINTIFFS

VERSUS

1. GLOBAL CAPITAL SAVE 2004 LTD}

2. BEN KAVUYA }:::::::::::::: DEFENDANTS

BEFORE HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

This suit was brought by the plaintiffs jointly and severally seeking for declaration that:- the plaintiffs have paid up the loan of Ug. Shs 53,000,000/= together with interest in full and the interest charged on the loan by the defendant is illegal, harsh and unconscionable; an order that the defendants do return to the plaintiff the Certificates of Title comprised in Kyadondo Block 253 Plot 863 at Lukuli in the name of Alice Okiror and Kyadondo Block 229 Plot 1253 land at Kireka Kamuli Zone in the name of Aguti Rose, special damages of Ug. Shs. 192,500,000/=, general damages, interest on the special and general damages as well as costs.

The defendants in their written statement of defence (WSD) denied the allegations in the plaint and contended that the 1st defendant advanced to the first plaintiff a medium term loan of Ug. Shs. 350,000,000/= repayable by 20th December 2008 which was secured by a legal mortgage created over land comprised in Mailo Register Block 253 Plot 863 at Lukuli Kampala. Further that the legal mortgage was duly registered vide Instrument No. KLA 423268 on 23rd July 2009. The defendants denied that they accepted or received Certificate of Tile for land comprised in Block 229 Plot 1253

land at Kireka in the names of Rose Aguti as security for the loan advances. The first defendant also contended that the first plaintiff failed to repay the loan in full and only paid the sum of Ug. Shs. 230,000,000/= leaving an unpaid balance of Ug. Shs. 120,000,000/=.

In their reply to the WSD the plaintiffs stated that they never received a sum of Ug. Shs. 350,000,000 from the 1st defendant and maintained that the legal mortgage relied upon was invalid and unenforceable as it was not executed by the mortgagee or at all. They contended that mere registration of an invalid mortgage does not validate it or make it legal and enforceable. The plaintiffs also averred that the 1st plaintiff signed a mortgage deed that was blank and the figures were only filled in by the defendants. Further that they initially gave the defendants a Certificate of Title for Block 229 Plot 1253 at Kireka as security for a loan of Ug. Shs 8,000,000 but when they sought for a loan of Ug. Shs. 53,000,000 they presented the title for Block 253 Plot 863 at Lukuli but the defendant refused to release the earlier title.

At the scheduling, the agreed facts were that the plaintiffs obtained a mortgage loan from the 1st defendant on the 26th day of February 2008. The loan was secured by land title comprised in Kyadondo Block 253 Plot 863 at Lukuli and a mortgage was duly registered. The parties also agreed that the plaintiffs have paid the defendants Ug. Shs. 230,000,000 in settling the loan. The defendants threatened to exercise a power of sale under the mortgage. The Certificate of Title to Kyadondo Block 253 Plot 863 is in possession of the defendants.

The parties agreed on the following issues for determination:

1. Whether the Mortgage Deed dated 26th February, 2009 between Alice Okiror & Global Capital Save (2004) Ltd was valid.
2. What was the amount of the loan advanced and secured by the mortgage?
3. Whether the 1st defendant charged any interest on the loan and if so how much?
4. Whether the interest charged by the defendants, if any, is unconscionable.
5. If so whether the plaintiffs have discharged their obligations.
6. Whether the plaintiffs are entitled to the remedies sought.

I find it necessary at this point to give chronology of events that took place between the time this matter was scheduled and set down for hearing and today when this judgment is delivered because they have a bearing on the conduct and progress of this case. At the scheduling, the parties agreed to adduce evidence by way of witness statements which was duly done. The plaintiff had scheduled to call three witnesses but only two filed witness statements which they were cross-examined upon. Similarly the defendant's two witnesses filed witness statements but only one witness appeared in court for cross-examination for reason that is elaborated here below.

On 6th April 2011 when this matter came up for hearing, the 2nd defendant was not in court. Counsel for the defendants informed court that he was still out of the country. Upon closure of the plaintiff's case on the same date, the defendants could not open their case due to the absence of the 2nd defendant who is also the Managing Director of the 1st defendant company. An adjournment was sought to enable him appear. Court granted the prayers and hearing of the defendants' case was adjourned to 8th June 2011.

On 8th June 2011 an accountant in the first defendant company who had filed a witness statement was present. The 2nd defendant who was the other witness was still reported to be out of the country despite the fact that a long adjournment was given to enable him return and testify. Court then ruled that the 2nd defendant's evidence be dispensed with and his witness statement be disregarded since he did not appear to be interested in giving evidence.

Court proceeded to hear the evidence of the accountant Mr. Sam Kamwada. He confirmed his witness statement already on court record and was cross examined upon it. During cross examination of DW1, counsel for the plaintiff prayed for orders that the witness produces receipts of various payments made in respect of the transaction and the demand note. Although this prayer was made belatedly, court granted it in the interest of justice and for reason that all relevant materials if made available to court would facilitate it to arrive at a just and fair decision. In any case the defendant's counsel had not shown that any prejudice would be occasioned to his clients by production of those documents. The matter was adjourned to 31st August 2011 for further cross examination and to enable DW1 produce the documents he undertook to furnish to court.

On the 31st August 2011, DW1 and counsel for the defendants did not appear in court. Counsel holding brief for the defendants' counsel sought an adjournment and the hearing of the case was adjourned. On 19th January 2012, DW1 appeared with only two of the documents and was cross examined and re-examined on his evidence. Both counsel sought to file written submissions and time lines were set within which the same should be done. The matter was then fixed for mention to ensure compliance and give a date for judgment.

On 16th March 2012, when the case came up for mention, counsel for the defendants did not appear. He had also not filed his written submission which court directed him to file by 23rd February 2012. The defendants were also absent and no explanation was provided for that turn of events.

Court then ruled that it would proceed to decide the suit on the basis of the evidence and submissions on court record in accordance with Order 17 rule 4 of the Civil Procedure Rules. The written submissions of the defendants were consequently dispensed with.

However, on the 30th May 2012 at around 4.00 pm as court was in the final stages of preparing the judgment, a copy of the defendants' written submission filed by their counsel the previous day 29th May 2012 at 4.30 pm was brought to court's attention. I found this rather unprofessional to say the least. For counsel to have waited for almost the eve of delivering the judgment and rushed to court with his written submission without first showing cause why he had in the first place failed to file it as directed, was in my view, conduct unbecoming of an advocate. This court had made an order to dispense with the defendants' written submission and that order had not been set aside. I therefore do not see how the submission could just be filed as if there was no court order dispensing with it.

Be that as it may, when this matter came up for judgment on 31st May 2012 counsel for the defendants appeared and prayed that the order to dispense with the defendants' submission be set aside and the defendants' written submission that was already filed be accepted. The ground of this prayer was that counsel fell sick soon after the matter was adjourned for submissions and this prevented him from filing the submission in time and appearing in court on the date of mention. He prayed that in the interest of justice the inordinate delay caused by his ill-health should not be visited on his clients.

Counsel for the plaintiffs left the matter for court to decide but prayed that in the event that court was inclined to accept the submission, he should be allowed to make a rejoinder.

In the interest of justice, court set aside the order and accepted the submission. It observed that getting submissions from both sides would facilitate it to come up with a just and fair decision having fully listened to both sides of the dispute. Counsel for the plaintiffs was allowed to file a rejoinder and a new date for judgment was set. Counsel for the plaintiffs filed his rejoinder as allowed.

With that background highlighted, I now proceed to consider the issues agreed upon.

ISSUE 1: Whether the Mortgage Deed dated 26th February, 2008 between Alice Okiror & Global Capital Save (2004) Ltd was valid.

On this issue, the 1st plaintiff, Mrs. Alice Mary Anyait Okiror (PW1) stated in her witness statement that she is the registered proprietor of the property comprised in Kyadondo Block 253 Plot 863 comprising of a bungalow and a flat where she has lived with her family since 1997. PW1 informed court that with her husband they approached Mr. Kavuya sometime in 2008 for a short term loan of Ug. Shs 12,000,000/= which they secured with the title of land comprised in Kyadondo Block 229 Plot 1253 at Kireka.

It was her evidence that the Certificate of Title in the name of Aguti Rose was retained by Mr. Kavuya and that later on in February 2008 they sought to borrow and amalgamate a loan of Ug. Shs 41,000,000 from Mr. Kavuya with the earlier loan of Ug. Shs 12,000,000/= to make it a total of Ug. Shs 53,000,000/=. Further that Mr. Kavuya demanded for another security upon which she gave him the title for their home comprised in Kyadondo Block 253 Plot 863 at Lukuli.

The mortgage deed was marked as Exhibit D1. It was also the evidence of PW1 that she made requests in writing for extension of the loan but the words in the requests were at all times dictated by the second defendant who did not want her to state the amount owed in her requests. She further

stated that she handed over the Certificate of Title for Block 253 Plot 863 to the accountant of the 1st defendant.

Michael Okiror, PW2 in his evidence kept insinuating that he was part of the transaction and yet the agreement shows that it was his wife who was a party and not him. He however corroborated the evidence of PW1 on the amount that was lent and that a mortgage was created over the property in dispute. He also stated that although he had agreed with his wife to borrow money, they agreed to use PW1's Certificate of Title as security for Shs. 41,000,000/= only which was borrowed from the defendants and consolidated with an earlier loan obtained using their daughter's Certificate of Title to make a total of Shs. 53,000,000/=.

On the other hand, DW1 stated that Exhibit D1 was signed by the 1st Plaintiff, the 2nd defendant and witnessed by a one Agaba Kakoni Michael. He also stated that the security offered to the company was the property comprised of Kyadondo Block 253 Plot 863 which was mortgaged. DW1 admitted that Exhibit D1 was a photocopy and hence it bore no company seal.

Mr. Gilbert Nuwagaba for the plaintiff submitted that the first issue is multi faceted and divided it into the following four sub-issues in his submission and I will also consider them in that manner.

(a) Whether the mortgage was executed.

Counsel for the plaintiff submitted that on page 9 of Exhibit D1, there is a signature of a lender represented by the scribbled signature purportedly of Ben Kavuya, the 2nd defendant. He contended that there was no indication that the same was sealed by the company. Counsel relied on section 132 of the Registration of Titles Act Cap. 230 (RTA) which states;

> *"A corporation for purposes of…dealing with any land under the operation of this Act or any lease or mortgage, may, in lieu of signing the instrument for such purposes required affix thereto its common seal…"*

He argued that since the 2nd defendant was not signing as a donee of power of attorney granted by the 1st defendant he should have affixed the company seal.

Mr. Paul Kalemera argued for the defendants basing on the authority ***Olinda De Souza Figueiredo v Kassamali Nanji [1963] 1 EA*** and section 115 of the RTA that there was no strict requirement that the mortgagee should sign the mortgage and therefore failure to follow the proper format does not affect the legal efficacy of the mortgage.

Counsel for the plaintiffs distinguished the case ***Olinda De Souza Figueiredo v Kassamali Nanji*** (supra) from the instant one by first of all submitting that the decision in that case was made before the enactment of the Mortgage Act in 1974 which was intended to address the loopholes that were in the RTA regarding mortgages. Secondly, that unlike in that case, the construction of the mortgage in the instant case was a form of a loan agreement between the two parties, that is, the lender and the borrower with each party having obligations under it. He submitted that as such, both parties had to make a commitment by signing it to make it binding. In essence, he submitted that unlike in the case of ***Olinda De Souza Figueiredo v Kassamali Nanji*** (supra) where the signature was not necessary, in the instant case it was necessary.

He referred to the Mortgage Act Cap. 229 which defines a mortgage as:

> "***Mortgage means any mortgage, charge, debenture, loan agreement or other encumbrance whether legal or equitable which constitutes a charge over an estate or interest in land in Uganda or partly in Uganda and partly elsewhere and which is registered under the act*". (Emphasis added).**

He emphasized that with the enactment of the Mortgage Act the provisions of section 115 of the RTA could not be considered as mandatory in view of the above definition of a mortgage.

It is true that the provisions of section 132 of the (RTA) gives a corporation an option to either sign an instrument or affix its seal thereto in lieu of signing. In the instant case the second defendant

signed as a director of the first defendant, the lender. It was the evidence of PW1 that the second defendant signed on behalf of the first defendant. DW1 confirmed this fact.

Exhibit D1 bears no company seal. It is a photocopy that was certified as a copy of the original by Mr. Cornelius Henry Mukiibi on the 10th May 2010. This means that it was a true reflection of the original copy. No reasons were advanced for non-production in evidence of the original mortgage deed. The burden of proving that the original mortgage deed bears the company seal squarely fell on the defendants who miserably failed to discharge it. The evidence of DW1 that the original bears a company seal is unbelievable since it was neither produced in court nor was his evidence corroborated.

I wish to point out at this juncture that counsel for the plaintiff submitted that the defendant through DW1 attempted to produce a mortgage deed bearing the seal of the first defendant. He argued that the seal was placed thereon after the plaintiffs raised the issue of non execution by the first defendant in reply to the defence. However, I need to correct the impression that there was an attempt to produce the mortgage bearing a company seal. All that DW1 testified about during cross-examination was that Mr. Ben Kavuya signed the mortgage and affixed the company seal to it. He then stated that he did not have a copy of the mortgage which bears the seal but he could produce it later. Counsel for the defendants did not re-examine DW1 on this point and so the matter stopped at the witness saying he could produce a copy later and nothing was produced.

Indeed what is on court record which was marked as Exhibit DW1 at the scheduling conference is a photocopy of the mortgage deed that does not bear any company seal. That is the document this court has considered in this judgment.

In the case of ***Rosetta Cooper v Gerald Nevill and Another [1961] E.A 63*** it was held that it was not open to the Court of Appeal to adopt a speculative explanation without evidence to support it. Hence determination of this issue on the basis of the original copy of the mortgage deed which was never produced in court would be merely speculative.

In the circumstances, I find that Exhibit D1 is the only evidence adduced by the defendant and I conclude that it lacks the company seal. I agree with counsel for the plaintiffs' submission that this is contrary to the provisions of section 132 of the RTA. This leads me to consider the question as to whether the 2nd defendant had a power of attorney to sign on behalf of the 1st defendant.

I agree with the submission of counsel for the plaintiff that the director could sign on behalf of the company without affixing a company seal when he is in possession of a power of attorney having been appointed under the seal of the company in which case he would be signing as an attorney appointed for that purpose. In addition, it would also suffice for the director to sign without affixing a company seal if there is a resolution authorizing him to execute the mortgage. In the instant case there is no evidence of such a resolution.

In the case of ***General Parts (U) Ltd v Non Performing Assets Recovery Trust SCCA No. 5 of 1999***; Mulenga, JSC (as he then was) interpreted the effect of section 141 (the current section 132 (1)) of the RTA to mean that for the appellant in that case to duly execute the mortgage document as mortgagor whether in the capacity of registered proprietor or of donee of a power of attorney, it had to affix its common seal to the document or to act by its attorney appointed for the purpose. In my view, that interpretation does apply to the instant case insofar as execution of a document by a company is concerned. It does not matter that the facts in the instant case is different from those in that case in that here the company is a mortgagee and not a mortgagor.

Section 115 of the RTA provides that:

> ***"The proprietor of any land under the operation of this Act may mortgage that land by signing a mortgage of the land in the form in the eleventh schedule to this Act".***

That section is in pari materia with section 114 of the repealed Registration of Titles Ordinance (Cap. 123 of the Laws of Uganda) which was interpreted by the Court of Appeal of East Africa in the case of ***Olinda De Souza Figueiredo v Kassamali Nanji*** (supra). The court in that case held that:-

> ***"The mere fact that a form provides for the signature of a party does not make it mandatory that such party shall sign in order to give the instrument legal efficacy; thus when the signature is not, apart from the form, necessary the requirement of the form does not make the signature a matter of substance".***

I have carefully examined the legal mortgage executed by the parties and I agree with the submission of counsel for the plaintiffs that it doubled as a loan agreement as well. It contains obligations for both parties and has phrases like "*it is hereby agreed*". Unlike the construction in the form of mortgage in the eleventh schedule of the Registration of Titles Act which begins as follows; "*I ………, being the registered proprietor of the land………*", the mortgage in the instant case begins as follows;

> ***"This legal mortgage is made this 26th day of February 2008 BETWEEN ALICE OKIROR of P.O. Box ATUTUR-KUMI hereinafter called the borrower…………and GLOBAL CAPITAL SAVE 2004………. (hereinafter called the lender)…." (emphasis added).***

In ***General Industries (U) Ltd v Non Performing Assets Recovery Trust, S.C.C.A. No. 5 of 1998***, ***Mulenga JSC***, in the leading judgment observed that:

> ***"Ordinarily a limited liability company executes a document by affixing its common seal which is witnessed or authenticated by the two directors or one director and the company secretary. Where execution is by agent(s), as was done by UCB, the agent(s) is/are named and stated to sign on behalf of the principal".***

In light of the fact that the mortgage in the instant case doubled as a loan agreement, I find that both parties to it needed to have properly executed it to make it valid. The signature of the mortgagee was therefore necessary unlike in the case of ***Olinda De Souza Figueiredo*** (supra). As such, the common seal of the 1st defendant should have been affixed or if at all the 2nd defendant was signing as an agent of the 1st defendant it should have been stated so clearly. In the circumstances, since none of

the above was done, I find that the mortgage was not duly executed by the mortgagor as a limited liability company in accordance with the provisions of section 132 of the RTA.

(b) Whether the mortgage deed was attested.

PW1 testified that she was made to sign documents including the mortgage deed which had blank spaces. She stated that at the time she signed the mortgage deed there was only the second defendant and the accountant, known as Sam (DW1). She denied knowledge of a one Agaba Kakoni Michael who is indicated as having attested the mortgage.

For the defendants, DW1 testified that the advocate who handled the mortgage deed was Kakoni Michael. Indeed Exhibit D1 bears a signature and a stamp with the name of Agaba Kakoni Michael, indicating that he is an Advocate.

Counsel for the plaintiff submitted that under section 147(1) of the RTA, instruments and powers of attorney under that Act signed by any person and attested by one witness shall be held to be duly executed. He referred to the definition of the word "attest" in ***Bryan A. Garner's Black's Law Dictionary 8th Edition***, as:

> ***"(1) To bear witness; testify; (2) To affirm to be true or genuine; to authenticate by signing as a witness".***

Further that "attesting witness" is defined as, *"one who vouches for the authenticity of another's signature by signing an instrument that the other has signed"*. In other words, attestation entails a testator duly witnessing the signing of the document and is able to testify to it.

He referred to section 67 of the Evidence Act Cap. 6 which provides that;

> ***"if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its***

> ***execution, if there is an attesting witness alive, and subject to the process of the Court and capable of giving evidence."***

He submitted that this position of the law is that a person who attests to a document should prove its execution if the document is to be used as evidence. He pointed out that no explanation was made as to why the defendant did not call Mr. Agaba Kakoni an advocate the purported attesting witness to testify in court as required by the provisions of section 67 of the Evidence Act.

The provisions of section 67 of the Evidence Act prima-facie appears to be inconsistent with section 147 (1) of the RTA. While the former requires the attesting witness to be called to prove execution of a document, the latter provides that; *instruments and powers of attorney under that Act signed by any person and attested by one witness shall be held to be duly executed*". This court is well aware of the provisions of section 2 (1) of the RTA which provides that; "*except so far as is expressly enacted to the contrary, no Act or rule so far as inconsistent with this Act shall apply or be deemed to apply to land whether freehold or leasehold which is under the operation of this Act*".

To my mind, section 147 (1) of the RTA only applies where execution of a document is not disputed. In my view, once execution is challenged like in this case then section 67 of the Evidence Act is invoked in that the attesting witness would be called to prove execution of the instrument or power of attorney.

In the instant case, while it was contended for the defendants that Agaba Kakoni witnessed the mortgage deed and it actually bears his signature and stamp, the 1st plaintiff alleged that when she signed the mortgage he was not present. On the face of it, the appearance of Agaba Kakoni's stamp and signature would mean that he attested to the document in issue. However for him to attest to the deed, he had to witness its execution by the parties to it. Now that one of the parties is alleging that he did not witness it, Agaba kakoni ought to have been called to prove that he did so.

However, it is curious to note that Agaba Kakoni Michael was not called as a witness to prove execution the mortgage and yet its validity and specifically lack of attestation was pleaded in paragraph 3 of the reply to the WSD. He should have been called as a witness to paint a clear picture

of how Exhibit D1 was executed. No reasons were advanced for his inability to give evidence on such an important matter. Instead it was DW1 whose evidence the defendants relied on to prove execution of the document. DW1 did not witness the document and so he is not competent to prove it in terms of section 67 of the Evidence Act. His evidence that PW1 signed the mortgage in the presence of Agaba Kakoni could have just been used to corroborate the evidence of Mr. Agaba Kakoni who is by law competent to prove execution of the mortgage. In the absence of Agaba Kakoni's evidence, I am more inclined to believe the testimony of PW1 that she signed the mortgage deed in his absence and I find so. This therefore means that the mortgage deed was not attested.

(c) Whether the signature was translated into latin character.

On this sub-issue, counsel for the plaintiff submitted that under section 148 of the Registration of Titles Act no instrument or power of attorney shall be deemed duly executed unless either;

(a) The signature of each party thereto is in Latin character or;

(b) A translation into latin character of the signature of any party whose signature is not in latin character and the name of any party who has affixed a mark instead of signing his name are added thereto by or in the presence of the attesting witness at the time of execution, and beneath the signature or mark there is instead a certificate in the form in the eighteenth schedule to this Act.

Page 9 of Exhibit D1 is the execution page bearing the signatures of the 1st plaintiff as borrower, second defendant as lender and the purported attesting witness. Counsel for the plaintiffs relied on the case of ***General Parts (U) Ltd vs NPART Supreme Court Civil Appeal No. 5 of 1999*** where ***Mulenga JSC***, held that for the appellant to duly execute the mortgage document as mortgagor, whether in the capacity of registered proprietor or of donee of power of attorney, it had to affix its common seal to the document or to act by its attorney or attorneys appointed for the purpose, *signing the document in the manner prescribed in section 156 set out above* (now section 148 RTA).

He submitted that the effect of non compliance with that provision was considered in the case of **Fredrick J.K Zaabwe v Orient Bank Ltd & 5 Others Supreme Court Civil Appeal No. 4 of 2006** where ***Katureebe, JSC*** relying on the case of **General Parts** (supra) held that non compliance with sections 147 and 148 is an irregularity that renders the mortgage invalid.

With due respect, in my view, the facts in the case of ***Fredrick J.K Zaabwe*** (supra) and that of ***General Parts*** (supra) are distinguishable from the instant case insofar as the requirement for the signature to be in Latin character is concerned. The signature of the borrower in this case was accompanied by her full name which is in legible form. Similarly, if it was not for the requirement of section 115 of the RTA as already discussed above, the signature of the lender would also be proper since the full name of the director also accompanied his signature. It is already in Latin character and so there is no need to translate it. I do not therefore find any merit in counsel for the plaintiffs' submission that the signatures should have been translated into Latin character. For that matter, that argument is rejected.

(d) Whether there was lack of written spousal consent

PW 1 testified that her spouse did not consent to mortgaging the title to their family home for the sum of Ug. Shs 350,000,000/=. PW2 also testified that he never consented to any mortgage of Ug. Shs. 350,000,000/=. He further testified that the interest he had in the property was that it was his home although registered in his wife's name.

Section 39 (1) of the Land Act Cap. 227 as amended by the Land Amendment Act No. 1 of 2004 prohibits the mortgaging of family land except with the prior consent of a spouse. Subsection (2) of that section provides that the consent required shall be in the manner prescribed by the regulations. Regulation 64 (1) of the Land Regulations 2004 prohibits the recorder or registrar from registering any transaction where the consent required under section 34 or 39 of the Act is not produced, except where there is an order of the tribunal or a court to dispense with that consent. Regulation 64 (3) provides that the consent shall be in Form 41 specified in the first schedule to the Regulations. In other words, the consent can only be in writing as specified in that form.

Counsel for the plaintiff submitted that under section 39 (4) of Cap. 230 where the section is not complied with the transaction shall be void. Section 38A (1) of the Land Act as amended by the Land Amendment Act, No. 1 of 2004 guarantees security of occupancy of a spouse on family land and family land is defined under subsection (4) of that section to mean inter alia land on which is

situated the ordinary residence of a family. The requirement for spousal consent is intended to provide security of occupancy on family land unless a spouse consents to doing away with it.

In the instant case, no written spousal consent was adduced in evidence to prove that the second plaintiff consented to the mortgaging of the property. The property mortgaged is where the plaintiffs ordinarily reside with their children. It is in that sense family land. I agree with counsel for the plaintiffs that in the absence of written spousal consent to mortgaging the property in issue for the amount stated in the mortgage, the mortgage created over it is void and I find so in this case.

On the whole, taking into account the conclusions made on the 1st, 2nd and 4th sub-issues which are fundamental for validity of a mortgage, the first issue is resolved in the negative.

I must however, point out at this point that the aspect of money lending agreement between the parties is not affected by this finding but it remains unsecured. The security that was erroneously taken from the plaintiff based on a void mortgage is accordingly discharged and must be returned to the 1st plaintiff.

In the circumstances, for purposes of determining the rest of the issues I will treat the transaction between the parties as an ordinary money lending agreement which is governed by the Moneylenders Act, Cap 273. This is because in paragraph 2 of the plaint the 1st defendant was described as a Money Lending Institution and this was admitted in the WSD. DW1 also confirmed this during cross-examination.

I will also henceforth refer to the “Legal Mortgage” as the “Agreement”.

Issue 2: What was the amount of the loan advanced as secured by the mortgage?

In order to avoid repetition, I prefer to handle the second issue together with the 3rd issue which is ***“Whether the 1st defendant charged any interest on the loan and if so how much?”***

It is the evidence of PW1 that in February 2008 they sought to borrow money from the second defendant to the tune of Ug. Shs 41,000,000 which was amalgamated with the earlier loan of Ug.

Shs 12,000,000/= to make a total of Ug. Shs 53,000,000/=. PW1 denied ever borrowing Shs 350,000,000/= and insisted that she borrowed Shs. 53,000,000/= at an interest rate of 12% per month although the agreement did not indicate any interest rate to be charged.

During cross examination PW1 stated that she signed on every page of the agreement although she had not read its content. Further that she saw that it had blank dotted lines and when she tried to fill in the amount borrowed the 2nd defendant told her not to mind but to just sign it and he would fill in the figure later. She also testified that she later complained to her husband that she was made to sign a document where the amount borrowed was not indicated.

PW2 stated in his witness statement that sometime in February 2008, with his wife they approached the second defendant for a short term loan of Ug. Shs 12,000,000/= which they were given at an interest rate of 12% per month. They secured that loan with a title for land comprised in Kyadondo Block 229 Plot 1253 at Kireka in the name of Rose Aguti their daughter. It was also his evidence that subsequently they approached the second defendant for a further loan of Ug. Shs. 41,000,000/= which they secured with the title of their family home at Lukuli comprised in Kyadondo Block 253 Plot 863. He testified that the two loans were consolidated to make a total of Ug. Shs. 53,000,000/=. The evidence of PW2 corroborates what PW1 stated.

Exhibit P1 which was disputed by the defendants is a loan account statement allegedly generated by the defendants and given to the plaintiffs. It bears the plaintiffs' names and shows the principle sum lent on 26th February 2008 as 53,000,000/= and the interest as 6,300,000. The statement shows that on 2nd June 2008 the plaintiffs paid Ug. Shs. 10,000,000 and on 20th October 2008 paid Ug. Shs. 32,000,000/= and the outstanding balance as at 26/12/2009 was Shs. 308,631,375/= inclusive of the principal amount, interest, fees and other related expenses. The defendants denied issuing that statement to the plaintiffs.

It is the defendants' case that the loan advanced was Ug. Shs 350,000,000 as reflected on Exhibit D1. DW1 testified that he was present at the signing of the agreement and all he did was to disburse cash of Ug. Shs. 350,000,000/= to the plaintiffs. During cross examination DW1 testified that receipt of Ug. Shs. 350,000,000/= (cash) was not acknowledged. He testified further that the first defendant

deals in property and lends money on a small scale and short term basis. He further stated that the 1st defendant company lends money for a profit which is in the form of interest but the interest for the transaction in dispute was to be agreed upon later on. He denied ever preparing Exhibit P1.

Counsel for the plaintiffs submitted that the agreement did not contain any clause regarding how much interest was to be charged. Counsel for the defendants argued the 2nd, 3rd, 4th and 5th issues together. He argued that the amount lent was Shs. 350,000,000/= and no interest was charged. He contended that it was bizarre to say the least that a well seasoned business person like the 1st plaintiff could act so carelessly with wanton disregard of the dangers of signing a blank mortgage deed. This argument was in reference to the contention of the 1st plaintiff that she signed the agreement which had dotted lines with no figures of the amount lent inserted.

Upon scrutinizing Exhibit D1, I find that while it refers to interest being charged on the amount lent, no interest rate was indicated in it. That is quite odd for a company that lends money for a profit which ordinarily would be earned upon payment of interest. Such a company would be keen on the interest rate to enable the borrower know how much they are supposed to pay in total. How then would the 1st defendant as a money lending company make profit if no interest was charged?

Contrary to the evidence of DW1 and the submission of counsel for the defendants that interest was not charged in the transaction in dispute, clause (b) of the preamble to the agreement stated the amount plus interest thereon. Likewise, the first two provisos to clause 2 (b) at page 3 also refer to interest.

The 2nd proviso reads as follows;

> ***"AND PROVIDED ALSO that the total moneys for which the mortgage constitutes a security shall not at any time exceed the sum of Shs. 350,000,000/= (Shillings Three Hundred Fifty Million only) together with interest at the rate aforesaid from the time of the mortgage debt becoming payable until actual payment thereof"*** **(emphasis added).**

Clearly, from those phrases in the agreement, the lender intended to charge interest although the rate was never stated. According to the parole rule, oral evidence that interest was not charged cannot be adduced to contradict what the parties had stated in the agreement that the amount lent would attract interest. For this court to find that no interest was charged would be contrary to the intention of the parties as clearly stated in that agreement.

The principal that govern interpretation of contracts is that courts must give effect to the intention of parties. To this end, ***Kim Lewison*** in his book entitled ***"The Interpretation of Contracts, 2nd Edition"*** at page 4 states that:-

> ***"For the purpose of the construction of contracts, the intention of the parties is the meaning of the words they have used. There is no intention independent of that meaning"*** **(emphasis added).**

Chitty on Contracts Volume 1 at ***paragraph 12-070*** at page 615 cautions that:-

> ***" It is not open to the court to revise the words used by the parties, or to put upon them a meaning other than that which they ordinarily bear, in order to bring them into line with what the court may think the parties really intended or ought to have intended. But if, from the document itself and the admissible background, the intention of the parties can reasonably be discerned, then the court will give effect to that intention even though this involves departing from or qualifying particular words used" (e*mphasis added).**

In view of the above, I find that interest was charged although the rate was not stated in the agreement for reasons best known to the defendants.

In addition, I am also constrained to comment on the provisions of clause 2 (b) reproduced earlier above. My interpretation of that clause is that the sum of Shs. 350,000,000/= was the maximum that the defendant bound itself to charge the plaintiffs on the principle sum inclusive of interest. This, in my view, supports the plaintiffs' argument that interest at 12% on the principal amount of

53,000,000/= that was lent was compounded and included in the amount of Shs. 350,000,000/= that was put in the agreement. If interest was yet to be charged on that amount there is no way the lender could have included that clause which puts Shs. 350,000,000/= as the maximum amount inclusive of interest.

The evidence of the 2nd defendant would have been of essence in determining the aspect of interest charged. However, despite him being directly involved in negotiations with the plaintiffs concerning this transaction he avoided court like a plague. He did not appear in court at any one time.

I therefore find the plaintiffs' side of the story that interest was charged at the rate of 12% per month more believable given that it was supported by Exhibit P1. The loan was only for a short period of time. It was borrowed on 26th February 2008 and was to be repaid by 28th December 2008. It is common practice for money lenders to charge a high interest rate for a short period of time and I believe that is how they sustain themselves in business. For most borrowers because of their desperation, they do not also mind paying such interest over a short period of time.

To my mind the evidence of DW1 on this issue is unconvincing and unbelievable. On cross-examination he testified that; *"in her case (read 1st plaintiff) the company decided to meet all the costs/charges and did not even charge interest"*. At first he had testified that the interest was to be agreed upon later but when he was asked whether it was done he changed his position.

My observation is that DW1 was a well calculated untruthful witness who tried very hard to guard the truth from coming out in court but his demeanor betrayed him. He also tried to fill in the evidence which should have been given by the 2nd defendant who negotiated the terms of the loan agreement thereby giving hearsay evidence. For example, he testified that the 2nd defendant told him that interest would be agreed upon later. This court cannot accept such hearsay evidence since it does not fall within the exceptions to the general exclusionary rule.

The loan account statement that was disowned by the defendants also supports the plaintiffs' contention and to me it makes more business sense. If the defendants case was to be believed, the practical question would be which money lender here on planet earth would lend money at no

interest and even meet all the related fees, costs and expenses? Surely, what would be the consideration? Would such a transaction without interest make any commercial sense?

I am fully persuaded by the decision of ***Arach- Amoko, J*** (as she then was) in the case of ***Atom Outdoor Limited v Arrow Centre (U) Limited [2002-2004] UCLR 67 at pages 69-70***, where she quoted from ***LS Sealy & RJA Hooley*** in their book, ***TEXT AND MATERIALS IN COMMERCIAL LAW, Butterworth's, pages 14-15*** in the following words:-

> ***"……………there is only one principle of construction so far as commercial documents are concerned and that is to make, so far as possible, commercial sense of the provision in question, having regard to the words used, the remainder of the document in which they are set, the nature of the transaction, and the legal and factual metrix" (e*****mphasis added).**

To me the charges indicated in the loan account statement are in line with the provisions of clause 2 (b) of the agreement. Under that clause it was provided that the borrower would meet all costs, charges, expenses and other sums (lending, legal or otherwise) on a full and unlimited indemnity basis however incurred or to be incurred by the lender or by or through any receiver, advocate or agent of the lender or the company.

Clause 5 which provided for costs, expenses and fees also strengthens the plaintiffs' case. Under 5 (ii) it was provided that the lender shall have the right at any time to debit the borrower's account with interest, commission, charges, fees and all monies arising from the facility as well as all amounts and sums of money mentioned in the preceding sub paragraph (i) payable by the borrower. Sub-paragraph (i) provided that all costs and expenses including legal and auctioneers costs would be paid by the borrower to the lender.

It is more convincing that the lender (1st defendant) in line with the above provisions, debited the plaintiffs' account with the caveat fees, mortgage fees, transfer fees, lawyer's fees and advertisement fees as indicated in the loan account statement. On that basis I am more inclined to believe the

plaintiffs' version that they obtained Exhibit P1 from the defendants because to me it fairly represents what was in the agreement signed by the parties.

The loan account statement shows that the principle sum lent was 53,000,000/= and the monthly interest charged was Shs. 6,300,000 from 26th February 2008 to 26th October 2008. However, from 26th November 2008 the interest kept changing implying that the lender started compounding it. As at 26th December 2009 the principal amount plus accrued interest was Shs. 308,631,375/=. This amount is less the total of Shs. 42,000,000/= paid by the plaintiffs on 26th June 2008 (Shs. 10,000,000/=) and 26th November 2008 (Shs. 32,000,000/=). When the amount outstanding is added to the amount so far paid, it comes to a figure of Ug. Shs. 350,631,375/=. This amount is close to the figure indicated in the mortgage deed as lent.

I also noted with keen interest the evidence of DW1 that he merely disbursed a sum of Ug. Shs. 350,000,000/= in cash to the 1st plaintiff just on the basis of a mortgage deed whose validity could be challenged like was done in this case. At least receipt of the money should have been separately acknowledged either by making her sign a payment voucher or something of the like. Shs. 350,000,000/= is a large sum of money which cannot just simply change hands like that. The defendants are in the business of lending money and it is incredible that they would just casually give away such a colossal sum of money. Besides, that amount cannot be described as small to support the evidence of DW1 that the 1st defendant company lends money on a small scale basis. The defendants' story cannot be believed for they appear to hide the truth from the court. There is more than meets the eye.

Before I make my final conclusion on this issue, I wish to comment on the contention of counsel for the defendants that it was bizarre for the 1st plaintiff as a seasoned business person to act carelessly by signing a mortgage that did not indicate the amount lent. It was the 1st plaintiff's testimony that she had never signed any agreement apart from the one in dispute. She also testified that when she tried to insert the figure lent the 2nd defendant told her not to mind because he would do it. She further testified that upon defaulting to pay when she was advised by the 2nd defendant to make a request for more time in writing and she drafted a letter where she indicated the amount borrowed but he tore it and dictated to her what to write.

I have looked at the two letters (Exhibits 2 (a) and 2 (b)) written by the 1st plaintiff to the C.E.O of the 1st defendant and they all have the same format (standard) and bear more or less the same content save for the dates when they were written and the period of extension sought. No amount was stated.

I wish to make a general observation based on my experience in handling cases that involve money lenders that there are common features that appear almost in all cases that are brought to court. First of all, most borrowers allege that they operate on the basis of trust. Secondly, money lending businesses appear to thrive on the "ignorance" of the borrowers never mind that some of them are well educated. Thirdly, most borrowers claim that they did not read what they signed and therefore money lenders take advantage of the poor reading culture in this country even among the elite. Fourthly, there is always secrecy in handling loan documents with most of the borrowers complaining that either they were never allowed to read the document before signing or were denied a copy after signing or even both.

Could it be that borrowers are merely making these allegations just to avoid their liability or there is something about money lending business that needs to be deeply dug into? I believe this could be a good topic for academic research as well a good area for government to investigate for the good of its economy and citizen.

Be that as it may, for purposes of adjudication of disputes which I am now faced with, I believe the circumstance of each case should be looked at and determined on its merit. With that in mind, I have looked at the circumstances of this case as a whole and I find that the defendants did not handle the transaction in dispute with transparency. First of all as already elaborated above, while interest was said to be charged in the agreement, the rate was never disclosed in that document. It was left to anybody's guess.

Secondly, there was a deliberate lie that all the costs and expenses related to the agreement were met by the defendants when it was elaborately stated in the agreement that it would be met by the 1st plaintiff. Thirdly, the 2nd defendant whose evidence would have clarified most of the hazy issues chose to avoid court from day one until court was constrained to dispense with his evidence.

Fourthly, as already alluded to under issue number one, even the attesting witness was never called to prove execution of the alleged mortgage when clearly its attestation was disputed.

All the above observations in my view, confirms lack of transparency in the whole process and lends credit to the 1st plaintiff's contention that she was made to sign a document where the amount lent is not indicated. Besides, I do not see any justification why the amount was not just printed in figures and words before the parties signed it. In the absence of an explanation by the defendants, I would believe the 1st plaintiff's story that the amount was inserted later.

In conclusion on the second and third issues, I find that the plaintiffs have on a balance of probability proved that the money lent to the 1st plaintiff was Shs. 53,000,000/= at an interest rate of 12% per month.

Issue 4: Whether the interest was unconscionable.

It was submitted by counsel for the plaintiff that the interest of 12% per month charged by the 1st defendant was even compounded as shown by Exhibit P1. While the principle sum remained Shs. 53,000,000/= up to 26th November 2008, thereafter it started changing on a monthly basis. He singled out one instance on 26th November 2008 when the principle sum was reduced to Shs 62,330,000/= upon payment of Shs. 32,000,000 by the plaintiff. On the 26th December 2008 the principle again rose to Shs. 69,809,600 and the figure kept on rising just as the interest until 26th December 2009 when the principle sum plus interest added up to Shs. 308,631,375/=.

Counsel for the defendants in response submitted that since no interest was charged, the issue of unconscionable interest could not arise.

Black's Law Dictionary, 7th Edition at page 1526 defines unconscionability to mean extreme unfairness and unconscionable as having no conscience, unscrupulous; affronting the sense of justice, decency or reasonableness.

In the case of ***Dembe Trading Enterprises Ltd vs. Welcome Impex Ltd HCCS No. 0246 of 2006*** Mukasa J. adopted the definition of unconscionable as laid down in the Money Lenders Act Cap. 273.

Section 12 of the Moneylenders Act gives court power to treat any interest that exceeds 24 percent per year, or the corresponding rate in respect of any other period as excessive and the transaction as harsh and unconscionable. In such a case court would then have power under section 11 of the Act to reopen the transaction or any account already taken between the parties and relieve a party from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of the principal, interest and charges.

Section 26 of the Civil Procedure Act Cap. 71 (CPA) provides that where an agreement for the payment of interest is sought to be enforced and the court is of the opinion that the rate agreed to be paid is harsh and unconscionable and ought not to be enforced by legal process, the court may give judgment for the payment of interest as it may think just.

In the case of ***Juma v Habibu [1975] E.A 103*** referred to by counsel for the plaintiffs, the High Court of Tanzania basing on the provisions of the Tanzania CPA which is similar to section 26 of our CPA, set aside the interest rate apparently agreed upon by the parties for reasons that it was inherently excessive and unconscionable.

In the case of ***Attorney General v Sam Semanda Supreme Court Civil Appeal No. 8 of 2006*** *Tsekooko, JSC* noted that under section 26 of the Civil Procedure Act, unless interest is provided by agreement and is not harsh and unconscionable, courts exercise discretion in awarding interest.

A bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience. See ***Multiservice Bookbinding Ltd and Others v. Marden, [1978] 2 All ER 489, 502.***

In the instant case interest charged at 12% per month would translate to 144% per annum. It is harsh and unfair for a money lender to charge such amount of interest in disregard of the Moneylenders

Act. In circumstances like this, the court is obliged to exercise its discretion to award reasonable interest.

The Supreme Court of Uganda had earlier considered the principles that courts should consider before awarding interest in ***Sietco v Noble Builders SCCA No. 31 of 1995***. The general principle for the award of interest was stated to be premised on the fact that the defendant has taken and used the plaintiff's money. Consequently the defendant ought to compensate that plaintiff for the money. Based on that principle, the plaintiffs should compensate the defendants for the use of their monies, the first defendant being in the business of money lending. The question that now remains would be how much should have been charged.

Counsel for the plaintiffs submitted that PW2 in his statement stated that the interest rate of 144% per annum was way above the commercial rate which is between 20-25% per annum. He submitted that this statement was not challenged by the defendants. This court was invited to take that rate as the commercial rate.

From the foregoing analysis, I find that the interest charged by the 1st defendant was harsh and unconscionable and I instead exercise the discretion given to this court by the provisions of the above stated laws and award an interest of 25% per annum as proposed by the plaintiffs. This answers the 4th issue in the affirmative.

Issue 5: Whether the plaintiffs have discharged their loan obligation.

It was the evidence of PW1 that the second plaintiff was responsible for paying off the loan. According to PW2 he made payments totaling Shs. 272,000,000/= towards payment of the loan. I believe this was an internal arrangement between the plaintiffs as husband and wife but under the agreement it was the borrower who had the obligation to pay. During re-examination he maintained that the amount lent to them was Shs. 53,000,000/= and that in total Shs. 272,000,000/= had been paid to the defendants.

My finding using simple arithmetic is that interest on the amount of 53,000,000/= at the rate of 25% per year for the two years (from 26th February 2008 when the money was lent to 29th January 2010 when Shs. 230,000,000/= was paid by the 2nd defendant) would be (53,000,000 x25/100) x2= Shs. 26,500,000/=. When you add the principal amount you get (53,000,000+26,500,000) = Shs. 79,500,000/= which I find to be the total amount that was payable by the 1st plaintiff.

When you offset that amount from the Shs. 272,000,000/= which was proved as paid, that is, (272,000,000-79,500,000) you get Shs. 192,500,000/= as the excess payment made by the plaintiffs.

I therefore find that the 1st plaintiff who is the borrower has proved that she discharged the loan obligation and even paid in excess of Shs. 192,500,000/=. That disposes the 4th issue which is answered in the affirmative.

Issue 6: whether the plaintiffs are entitled to the remedies sought.

(a) Declarations:

The plaintiffs are seeking for declaration that they have paid up the loans of Ug. Shs 53,000,000 together with interest in full, and a declaration that the interest charged on the loan by the defendant is illegal, harsh and unconscionable. From my findings on issues 4 and 5, the plaintiffs are entitled to the declarations sought and for avoidance of any doubt I accordingly declare that the interest charged by the 1st defendant was harsh and unconscionable and the loan plus accrued interest was not only paid in full but paid in excess.

(b) Orders

The plaintiffs sought an order that the defendants do return to the plaintiffs the Certificates of Title comprised in Kyadondo Block 253 Plot 863 at Lukuli and Kyadondo Block 229 Plot 1253 land at Kireka Kamuli Zone in the names of Aguti Rose.

It was the evidence of PW1 that they obtained a loan of Ug. Shs 12,000,000/= from the second defendant and secured it with a title for Kyadondo Block 229 Plot 1253 land at Kireka Kamuli Zone in the name of Aguti Rose. It was also her evidence that Aguti Rose signed all the documents and the

same were retained by the second defendant. The defendants denied possession of the title in the names of Aguti Rose.

Since it was the evidence of PW1 that the title was in the name of Aguti Rose and she was the one who signed all the documents, I find that she should have been made a co-plaintiff in this suit. Short of that she would have to sue on her own to recover that title because no evidence was adduced before this court to prove that the defendants have the Certificate of Title for Kyadondo Block 229 Plot 1253 land at Kireka Kamuli Zone. I am therefore unable to order the defendants to return to the plaintiffs the above named Certificate of Title since there is no evidence to support the assertion that the same is in their possession.

As regards the certificate of title for Kyadondo Block 253 Plot 863 at Lukuli it is not in dispute that it is in possession of the defendants. In the circumstances, I order the defendants to return it to the 1st plaintiff with immediate effect.

(c) Special Damages

The plaintiffs also prayed for special damages of Ug. Shs. 192,500,000/= being the amount over paid to the defendants. The principle on special damages is that they must be pleaded and strictly proved by the claimant as observed by Byamugisha JA, in ***Eladam Enterprises Ltd v S.G.S (U) Ltd & others Civil Appeal No. 20 of 2002 [2004] UGCA 1.***

The plaintiffs pleaded special damages alleging that it arose as a result of excessive payment made by the plaintiffs towards their loan obligation with the defendants. The court has a duty to protect against unjust enrichment as noted by ***Mukasa J***. in the case of ***Stanbic Bank (U) Ltd v Sino Africa Health Ltd HCCS No. 137 of 2004.***

Unjust enrichment is defined by ***Black's Law Dictionary 7th Edition*** as a benefit obtained from another, not intended as a gift and not legally justifiable for which the beneficiary must make restitution or recompense. In the case of ***Busoga Growers Co-operative Union Ltd v Non-Performing Assets Recovery Trust HCCS No. 240 of 2004*** *Egonda-Ntende J*. found that for the excess payment to remain with the defendants would amount to unjustified unjust enrichment.

In my view the defendants in the instant case could not legally justify the payment of 144% interest per annum on the money lent to the plaintiff. It would amount to unjust enrichment of the defendant at the expense of the plaintiffs.

In the case of ***Alfa Insurance Consultants Ltd v Empire Insurance Group Supreme Court Civil Appeal No. 9 of 1994*** Manyindo, D.C.J. (as he then was) observed that the principle of quantum meruit is applied as a possible measure of restoration in case of unjust enrichment or measure of payment where a contract has no fixed a price.

In a circumstance like this, section 11 of the Moneylenders Act empowers court to reopen the transaction or any account already taken between the parties and relieve a party from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of the principal, interest and charges.

As already found, the amount paid in excess as a result of the unconscionable interest charged was Shs.192,500,000/=. I therefore exercise the power given to this court by sections 11 and 12 of the Moneylenders Act and order the defendants to refund the excess amount of Shs.192,500,000/= paid to them to the 1st plaintiff with immediate effect.

d) General damages

Paragraph 812 of Harlsbury's Laws of England Vol. 12(1) states that general damages are losses, usually but not exclusively non-pecuniary which are not capable of precise quantification in monetary terms.

In the case of ***Stroms v Hutchinson [1905] A.C 515*** Lord Macnaghten held that general damages are as such as the law would presume to be the natural or probable consequence of the act complained of on account of the fact that they are its immediate, direct and proximate result.

In her witness statement PW1 stated that they were served with a letter, Exhibit P3 requiring them to give vacant possession to the auctioneers. She stated further that her children were traumatized by

the incident as auctioneers had come with various people to inspect the house and told the family that they were going to throw them out. These developments disturbed her children. The advertisement of the property comprised in Kyadondo Block 253 Plot 863 home is also confirmed by the DW1 in his witness statement. The purpose of the advertisement was to evict the plaintiffs from their family home and to auction the same purportedly to meet the plaintiffs' loan obligations.

I agree with the submissions of counsel for the plaintiffs that in spite of having discharged the loan, the plaintiffs were continuously harassed by the defendants for more money amidst threatened eviction. The advertisement of their property for sale, the humiliation of auctioneers visiting their home and threatening to evict them and the anxiety of losing a family home all visited untold inconvenience on the plaintiffs who had paid the defendants over and above the amount lent to them with interest. It was submitted that aggravated damages in the sum of Ug. Shs 50,000,000/= would suffice.

According to ***paragraph 811 of Harlsbury's Laws of England Vol 12(1)*** , in certain circumstances the court may award more than the normal measure of damages, by taking into account the defendant's motives or conduct. Such damages may be aggravated damages which are compensatory in that they compensate the victim of a wrong for mental distress or injury to feelings, in the circumstances in which that injury has been or increased by the manner in which the defendant committed the wrong of the defendant or the defendant's conduct subsequent to the wrong.

In the instant case, the second defendant's conduct and motive throughout this transaction cannot be ignored. The lack of transparency with which he handled the entire transaction put the plaintiffs in a very vulnerable position which he took advantage of. Such conduct went a long way in aggravating the injury suffered by the plaintiffs. The second defendant was afforded various opportunities to explain these claims but he chose to keep away from court. Taking into account the circumstances of this case as highlighted above, I find the sum of Ug. Shs 30,000,000/= appropriate to compensate the plaintiffs the wrongs suffered at the defendants' hands.

(e) Interest and costs

The plaintiffs prayed for interest on the special and general damages as well as costs. Like interest, an award of costs is a matter of discretion of court as was noted by ***Okello, J*** (as he then was) in the case of ***Superior Construction and Engineering Ltd v Notay Engineering Industries (Ltd) High Court Civil Suit No 702 of 1989***.

Since the defendants have kept the plaintiffs' money that was paid in excess for over two years now, I award interest on the special damages at court rate as prayed for by the plaintiffs from the date of filing this suit until payment in full. Interest is also awarded on the general damages at court rate from the date of this judgment until payment in full.

Cost of this suit is awarded to the plaintiffs as the successful party.

In the result, judgment is entered for the plaintiffs in the following terms:-

1. **It is declared that the 1st plaintiff has paid up the Shs. 53,000,000 lent to her together with interest in full.**
2. **It is also declared that the interest charged on the money lent by the 1st defendant was illegal, harsh and unconscionable.**
3. **The defendants are ordered to return to the 1st plaintiff certificate of title for land comprised in Kyadondo Block 253 Plot 863 at Lukuli with immediate effect.**
4. **Special damages of ug.shs.192,500,000/= are awarded to the plaintiffs.**
5. **General damages of Shs. 30,000,000/= is awarded to the plaintiffs.**
6. **Interest at court rate is awarded on the special damages from the date of filing the suit till payment in full and on the general damages at court rate from the date of this judgment till payment in full.**
7. **The plaintiffs are awarded costs of the suit.**

I so order.

Dated this 14th day of June 2012.

Hellen Obura

JUDGE

Judgment delivered in chambers at 3.00 pm in the presence of Mr. Gilbert Nuwagaba for the plaintiffs and Mr. Paul Kalemera for the defendants. The 2nd plaintiff was present. The 1st plaintiff and the defendants were absent.

JUDGE

14/06/2012