

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

(COMMERCIAL DIVISION)

HCT-00-CC-CS-0170-2008

1. EMERALD HOTEL LTD.

2. CHRISTAL WAY LTD.

3. JULIANA NAKITYO

4. ABBEY MUTEBE.....PLAINTIFFS

VS.

1. BARCLAYS BANK OF UGANDA LTD.

2. KABIITO KARAMAGI

3. HERBERT WAMALA

T/A DEBT MASTERS

4. SHUMUK PROPERTIES LTD.

5. MUKESH SHUKLA.....DEFENDANTS

BEFORE: THE HON. MR. JUSTICE LAMECK N. MUKASA

REPRESENTATIONS:

Mr. Benson Tusasirwe Counsel for 1st Plaintiff

Mr. David Kaggwa Counsel for 2nd, 3rd and 4th Plaintiffs.

Ms. Ruth Sebatindira }
Ms. Olivia Kyalimpa } Counsel for 1st, 2nd, and 3rd Defendants

Mr. Deogracious }
Mr. Musoke Kibuuka } Counsel for 4th and 5th Defendants

Ms. Jackie Busingye – Court Clerk

JUDGMENT:

The parties' final pleadings in this case were the 3rd Amended Plaintiff drawn jointly and filed on 18th February 2010 for the Plaintiffs; the 1st, 2nd and 3rd Defendants' Amended Written Statement of Defence and Counter-Claim filed on 2nd March 2010, the 4th & 5th Defendant's Written Statement of Defence filed on 24th February 2010 and the Reply to the Written Statements of Defence and the 1st Defendants Counter-claims filed 23rd March 2010.

The plaintiffs; Emerald Hotel Ltd, Christal Ways Ltd, Juliana Nakityo and Abbey Mutebe filed this suit against the defendants; Barclays Bank of Uganda Ltd, Kabiito Karamagi, Herbert Wamala t/a Debt Masters, Shumuk Properties Ltd, and Mukesh Shukla jointly and/or severally seeking the following declarations that:-

- The 1st Defendant, M/s Barclays Bank of Uganda Ltd. breached its loan contract with the 1st Plaintiff, Emerald Hotel Ltd;
- The 1st Defendant wrongly/unlawfully terminated and recalled its loan to the 1st Plaintiff;
- The 2nd Defendant, Kabiito Karamagi, was wrongly/unlawfully appointed as Receiver/Manager of the 1st and 2nd Plaintiffs and/wrongfully/acted as one;
- The 2nd Defendant wrongfully took and retained possession of the 1st, 3rd and 4th Plaintiffs' Property

and assets comprised in Emerald Hotel, LRV 2383 Folio 17, Plot 3 Semiliki Walk, Kampala.

- The 3rd Defendant, Herbert Wamala, wrongfully/unlawfully purported to sell the suit property to the 4th Defendant, Shumuk Properties Ltd.
- The purported management arrangement between the 2nd and 4th Defendant, was wrongful, illegal and void.

The 1st, 3rd and 4th Plaintiffs also seek:-

- i. Cancellation of the purported sale;
- ii. Removal of a Caveat lodged by the 5th, Defendant, Mukesh Shukla.
- iii. Vacant possession and return of the suit land's Certificate of Title free from encumbrances.
- iv. Permanent injunction against the defendants,
- v. Special damages to 1st Plaintiff of Ugshs. 7,587,174,958/=.
- vi. An order that the Defendants jointly and/or severally pay the 1st Plaintiff shs. 432,691,025/= for every month for which they remain in possession of the suit property/business from 23rd June 2009 until handover and vacant possession of the hotel.
- vii. General damages
- viii. Interest on special damages (v) at the rate of 20% per annum from the date of breach and on special

damages (vii) at the court rate from the date of judgment, until payment in full.

ix. Costs.

The Plaintiffs' case is that the 1st Plaintiff embarked on construction of a hotel, the Emerald Hotel, on land comprised in LRV 2383, folio 17, Plot 3, Semiliki Walk Kampala (hereinafter referred as the suit land) registered in the names of the 3rd and 4th Plaintiffs. In September 2005 the 1st Plaintiff sought to access Apex funds from Bank of Uganda, which funds were attracting an interest rate of about 10% per annum. The 1st Defendant Bank asked the 1st Plaintiff to channel its application for funds through the 1st Defendant Bank. Though the 1st Defendant Bank received the 1st Plaintiff's application, its officers neglected/refused/failed to process the same and instead the 1st Defendant Bank advanced the 1st plaintiff a Commercial loan attracting interest at the rate of 21% per annum. The terms of the 1st loan tranche, of Ugshs. 2,700,000,000/=, were set out in the facility letter dated 4th November 2005.

Subsequently in early 2006 the 1st Plaintiff agreed with the 1st Defendant to raise the loan limit for Phase 1 of the project to Ugshs. 3,600,000,000/=. That the 1st Defendant failed to operationalise the revised arrangement until in February 2007 by way of a facility letter which the 1st Defendant bank dated to 30th November 2006, which letter on execution constituted the loan contract and

stipulated that the facility was for a period of 7 years with a one year grace period.

That despite execution of the above agreement raising the loan limit no fresh funds were actually advanced to the 1st Plaintiff and in August 2007, after Phase 1 had been completed by funds raised by other means, the 1st Defendant's officers informed the 1st Plaintiff that the interest accruing on the initial disbursement of shs. 2,700,000,000/= had brought the 1st Plaintiff indebtedness to the 1st Defendant to the limit of shs. 3,600,000,000/= without any fresh funds being advanced.

The plaintiff contended that the following documents drawn to secure the indebtedness were never fully executed/processed/registered by the 1st Defendant and/or its lawyers:-

- Collateral debenture dated 30th December 2005.
- Legal Mortgage dated 30th December 2005
- The amended Legal Mortgage dated 26th June 2007.
- Further Debenture and Further Charged dated 26th June 2007.
- Power of Attorney backed dated to 20th November 2005 and void for want of attestation registered on 27th January 2007.

The Plaintiffs further claim that the 1st Defendant committed itself in various letters to avail a further, Ugshs 2,000,000,000/= towards

the completion of Phase II of the Hotel project but the 1st Defendant extricated itself from the commitment.

That because of financial hardship arising from the delay in disbursing the agreed funds the 1st Defendant allowed the 1st Plaintiff to draw from its Current Account with the 1st Defendant a sum Ugshs. 275,000,000/= to be settled partly from the loan tranche for Phase II. The 1st Defendants then turned around and charged punitive interest on the said sum, which it then purported to settle by using the moneys supposedly advanced as additional funds for Phase I, with the result that the funds supposedly advanced were swallowed back by the 1st Defendant and were never actually received by the 1st plaintiff.

By letter dated 16th June 2008, addressed to the 2nd Plaintiff, the 2nd Defendant gave notice that he had been appointed Receiver/Manager of the 2nd plaintiff but served it on the 1st Plaintiff.

In the New Vision Newspaper dated 16th June 2008 the 1st and 2nd Defendants through their agent the 3rd Defendant advertised the mortgaged property for sale on the 16th July 2008. On 19th June 2008 the 2nd Defendant published in the New Vision a “Notice of Appointment (as) Receiver/Manager of Christal Way Limited (formerly known as Emerald Hotel Ltd).”

The plaintiffs further claim that on the 23rd day of June 2008 the 2nd Defendant forcefully took over the suit property/business and in

disregard of the Court Order in Miscellaneous application No: 653 of 2008 sold of the suit property/business to the 4th Defendant, Shumuk Properties Ltd. for the sum of Ugshs. 2,200,000,000/= of which Ugshs. 100,000,000/= was supposedly paid. The 2nd Defendant executed a “management agreement” with the 4th Defendant was given powers run, supervise, direct and control the management aspects of the hotel in return from which the 4th Defendant would purportedly pay the 2nd Defendant a sum of Ugshs. 10,000,000/= per month as **“management fees”**.

In the meantime the 5th Defendant, Shukla Mukesh, lodged a Caveat on the suit property, registered in the names of the 3rd and 4th Plaintiffs, claiming to be the “registered proprietor” thereof.

The 1st Plaintiff contends that the conduct of the 1st Defendant was wrongful and unlawful and amounted to breach of its contract with the 1st Plaintiff and were effected in bad faith, with a view to forcing the 1st Plaintiff into receivership.

Particulars of Breach and Bad faith.

- a) Delay in advancing the funds for Phase I of the project.
- b) Making the 1st Plaintiff sign facility documents without actually advancing funds to the 1st plaintiff.
- c) Failing/refusing/neglecting to avail funds for Phase II of the project, leaving the project incomplete, unattractive to customers and incapable of servicing the partial loan advanced.

- d) Recalling the loan facility on improper or no grounds.
- e) Unilaterally imposing punitive interest on the 1st Plaintiff and by so doing, rendering the 1st Plaintiff incapable of servicing the loan facility.
- f) Failing to honour the promise to write off the punitive and/or excessive interest imposed on the facility.
- g) Preventing the 1st Plaintiff from soliciting alternative funds by appointing a receiver and advertising the security offered by the 1st Plaintiff.
- h) Generally undermining, the operations and project of the 1st Plaintiff with view to forcing it into receivership.

The 1st and 2nd Plaintiffs averred that the appointment of the 2nd defendant as Receiver/Manager was void and of no effect in that:-

- i. The 2nd Defendant was purportedly appointed as Receiver for the 2nd Plaintiff, a different corporate entity from the 1st plaintiff, but proceeded to hold himself out as a Receiver of the 1st Plaintiff.
- ii. The 2nd Defendant was supposedly appointed as a Receiver for the 2nd Plaintiff under a Notice of Appointment registered on 16th June 2008, basing on instruments to which the 2nd Plaintiff was not a proper party or at all.
- iii. As at the date of filing this suit no instrument had been registered with the Registrar of Companies and none had been served on the 1st Plaintiff.

- iv. The “*debentures*” under which the 2nd Defendant was appointed, dated 30th December 2005 and “*a further debenture*” dated 26th June 2007 were null and void on the grounds that:-
- a. They are in Choate.
 - b. They were not signed and sealed by the 1st Defendant.

The 1st Plaintiff avers that the 2nd Defendant acted wrongfully and unlawfully in that:-

- a. He purported to exercise the powers of a Receiver when no instrument appointing him was in existence and/or none had been registered and or served on the 1st Plaintiff.
- b. He asserted that “**All assets and business understandings of the 2nd Plaintiff are now vested in him**” which were beyond those prescribed in the debenture under which he was supposedly appointed, such as it was which limited itself to management of “**the premises**” of the borrowers.

The first Plaintiff contends that by reason of the failure to disburse the finance for Phase II of the hotel the 1st Plaintiff lost an anticipated net income of Ug.shs 2,395,746,658/=.

The 1st Plaintiff averred and contended that the 1st Defendant was not entitled to recall the loan in the sum claimed or at all and the

2nd Defendant was not entitled to exercise the powers of a Receiver as sought to be exercised by him or at all.

Further the Plaintiffs averred that the purported sale was illegal, wrongly and void and further it was a Sham and a fraudulent attempt to present the plaintiffs and Court with a fail accomplish and by so doing, frustrate and defeat justice, in that:-

- a. The purported appointment of the 2nd Defendant as Receiver of the 2nd Plaintiff and his purported undertaking of Receiver's duties without giving notice to the 1st Plaintiff was illegal and void.
- b. The Receiver's own appointment and actions being void, his appointment of the 3rd Defendant as Auctioneer to advertise and sale the property was itself void, so to their actions;
- c. The instruments on the basis of which the 3rd Defendant was appointed and supposedly derived their powers to sell the property were incurably defective and of no legal effect.
- d. The 3rd Defendant having initially advertised the sale to take place on 16th July 2008, in at his offices, which slated sale was stayed by court until the 17th July, in 2008, Misc. Appl. No. 653 of 2008 - arising from Land Division HCCs No: 284 of 2008, he was obliged to re-advertised the sale, setting a new date, time and venue,

to pave way for a competitive and transparent sale, which was never done.

- e. Given that no fresh sale was advertised, the 4th and 5th Defendants, if they did buy, could only have done so in connivance with the 1st, 2nd and 3rd Defendants.

The 1st, 2nd and 3rd Defendants denied the 1st Plaintiffs allegation of breach of the loan agreement. The Defendants averred that the 1st Plaintiff obtained three (3) credit facilities from the 1st Defendant under which she obtained loans totaling to Ugsh. 4,800,000,000/=. The credit facilities were secured by a Mortgage and further charge over the suit property and a Debenture and Further Debenture over the assets of the 1st Plaintiff. The Defendants averred that the 1st Plaintiff defaulted on her loan repayment obligations, despite several demands, upon which the 1st Defendant exercised her powers under the Mortgages and Debentures to appoint the 2nd and 3rd Defendants to realize its securities. The Defendants contend that the 1st Defendant lawfully enforced its rights under the mortgages and debentures and lawfully appointed the 2nd and 3rd defendants to undertake the realization of the securities.

That the 2nd Defendant properly exercised its powers as Receiver in taking over possession of the 1st Plaintiffs business and in executing a Management Agreement with the 4th Defendant.

The 4th and 5th Defendants denied the plaintiffs' allegations and averred that the 1st Plaintiff's agents executed the suit property Sale Agreement whereon the 4th Defendant deposited a commitment fee

of shs. 100,000,000/= and the balance of Ughs, 2,100,000,000/= was deposited to her fixed deposit account at the Crane bank as a sign of commitment to the completion of the purchase and to minimize their costs as a company policy and also to respect the court order she executed a Management Agreement with the 2nd Defendant. That they prudently lodged a Caveat to protect her interests of the suit property.

The 4th Defendant further averred that she is a bona fide purchaser and was buying the property from the open market and was not a party to any fraud or any prior contractual arrangement between any parties. That there was a sale though not completed as a result of a court order. The 4th Defendant as a law abiding person stayed the sale while waiting for court to lift the said order.

That the 4th Defendant rightly entered into a Management Agreement with the 2nd Defendant as Receiver/Manager of the 1st Plaintiff to manage the business of the 1st Plaintiff which was under receivership by the 1st Defendant.

That the 5th Defendant diligently lodged the Caveat as a direction of the 4th Defendant to protect her interest pursuant to the uncompleted sale that was stopped by court.

The 1st Defendant counterclaimed for Ugshs. 5,136,000,000/=, interest on the decretal sum at the commercial lending rate in full, general damages for breach of contract and obtaining loan through deception and costs of the suit. In defence to the Counter-Claim

the 1st Plaintiff/Counter-defendant denied the allegations therein and contended that the 1st Defendant /Counter-Claimant was not entitled to the claim of Ugshs. 5,136,000,000/=.

At the Scheduling/Conference the parties Joint Scheduling Memorandum, was adopted wherein the following facts were agreed:-

- The 1st Plaintiff and 1st Defendant executed a facility letter dated 4th November 2005 for Ugshs. 2,700,000,000/=.
- The 1st Plaintiff and the 1st Defendant executed a facility letter dated 30th November 2006 for Ugshs. 3,600,000,000/= for the purpose of completing Phase I of the Hotel at Plot 3 Semiliki Walk Way.
- The 3rd and 4th Plaintiffs are the Registered Proprietors of the suit land comprised in LRV 2383 Folio 17, Plot 3 Semiliki Walk Way Kampala as tenants in Common.
- The 3rd and 4th Plaintiff executed a Power Attorney and a Legal Mortgage dated 30th December 2005 in respect of the suit land in favour of the 1st Defendant to secure the, 1st Plaintiffs' borrowing of Ugshs. 2,700,000,000/=.
- The 1st, 3rd and 4th Plaintiffs executed a Further Charge dated 26th June 2007 in respect of LRV 2383 folio 17 Semiliki Walk Way in favour of the 1st Defendant to secure the 1st Plaintiffs additional borrowing of Ugshs. 900,000,000/=.

- The 1st Plaintiff executed a Collateral Debenture dated 30th December 2005 in favour of the 1st Defendant to secure the 1st Plaintiffs borrowing of Ugshs 2,700,000,000/=.
- On 2nd March 2008 the 1st Defendant gave a formal demand to the 1st Plaintiff to repay the loan in sixty (60) days.
- By letter dated 18th March 2008, the 1st Defendant gave the 1st Plaintiff up to 31st May 2008 to pay up.
- On 16th June 2008, the 1st Defendant appointed the 2nd Defendant as Receiver/Manager.
- On 23rd June 2008, the 2nd Defendant as Receiver/Manager took over control and possession of the 1st Plaintiffs' hotel compressed in LRV 2383 folio 17 Plot 3 Semiliki Walk Way, Kampala.
- On 16th March, 2009, Court granted an injunction against 1st and 2nd Defendants restraining them from selling the property comprised in LRV 2383 folio 17, Plot 3 Semiliki Walk Way, Kampala.

The parties agreed on the following issued for courts' determination:-

1. Whether the 1st, 3rd and 4th Plaintiffs have a cause of action against the 4th and 5th Defendant?
2. Whether the 1st Defendant advanced the sum of Ushs. 3,600,000,000/= to the 1st Plaintiff?

3. Whether the 1st Plaintiff obtained its loan from the 1st defendant through deception, manipulation and dishonesty?
4. Whether the 1st Plaintiff is indebted to the 1st Defendant and if so, by how much?
5. Whether the 1st Defendant wrongly recalled the loan facility?
6. Whether there was a breach of the loan contract between the 1st Plaintiff and 1st Defendant, and if so, by whom?
7. Whether the appointment of the 2nd Defendant as Receiver/Manager of the 1st and 2nd Plaintiffs was lawful?
8. Whether the 2nd Defendant's take over the land and property comprised in LRV 2383 folio 17 Plot 3 Semiliki Walk and the Business and Assets thereon was lawful?
9. Whether the sale of the property comprised in LRV 2383, folio 17, Plot 3 Semiliki Walk to the 4th Defendant was lawful and effectual?
10. Whether the lodgment of a Caveat on the suit property by the 5th defendant was lawful?
11. Whether the Management Agreement executed between the 2nd and 4th defendants and the latter's takeover of the suit premises were valid and or lawful?

12. Whether the parties are entitled to any of the remedies prayed for (respectively)?

Before I proceed to resolve the above issues I want to make a general comment on the documents exhibited by consent of the parties. The admission of documents at the scheduling conference does not mean that each side agreed with the contents or the evidential value thereof. No admission is at this stage made as to the contents of such documents as facts not contested. The only facts agreed upon are the facts the parties specifically mentioned as facts agreed upon by the parties.

In the Co-operative Bank Ltd. in liquidation v/s Shell Kasese Service & Other HCT-00-CC-CS-0140-2005

Justice Egonda Ntende stated:-

“.....The consent is to admission of the document into evidence and not admission of the truth of its content. At this stage what the parties dispense with only, unless by specific agreement indicated in the agreed facts portion of the scheduling conference proceedings the parties have otherwise agreed is the duty to prove the making of the documentary evidence,....”

Issue No. 1 – Whether the 1st, 3rd and 4th Plaintiffs have a cause of action against the 4th and 5th defendants?:

To determine whether there is a cause of action court has to look at the plaint and not beyond. The plaint must disclose three elements:

- That the plaintiff enjoyed a right
- That the right has been violated and
- That the defendant is liable.

See: Auto Garage & Others v/s Moloko(3)[1971]EA 514, Tororo Cement Co. Ltd vs. Froronkina International Ltd. (2001) KALR 182

In paragraph 9(b) of the 3rd Amended Plaint it was pleaded that the 3rd and 4th Plaintiffs were at all material times and are still the registered proprietors of the land comprised in LRV 2383, FOLI 17, Plot 3, Semiliki Walk Way, Kampala, an agreed fact. As such they have a right of proprietorship and accruing interests. In the same paragraph it is pleaded that the 1st Plaintiff constructed a hotel, the Emerald Hotel, on the suit land. It is further generally pleaded that the 1st Plaintiff carried on a hotel business in the premises at the suit land. The 1st Plaintiff thereby pleaded enjoyment of interests in the suit land and a right of possession and occupation of the suit land property. It is pleaded that the 1st Defendant in June 2008 wrongfully and unlawfully appointed the 2nd Defendant as a Receiver/Manager of the suit land and of the assets and business of the 1st Plaintiff and that the 1st and 2nd Defendants wrongfully and unlawfully appointed the 3rd Defendant to advertise and sell the suit land and the hotel business and assets thereat. That the 2nd and 3rd defendants acting wrongfully and unlawfully took possession

and the 3rd Defendant purported to sell the said suit land and hotel business to the 4th Defendant. It is further pleaded that the 4th and 5th defendants connived with the 2nd and 3rd Defendants to buy the suit land and hotel business.

The Plaintiffs contest the management agreement executed between the 2nd and the 4th Defendant in defiance of the court order halting all further processes with the suit by which the 4th Defendant took possession and defacto ownership of the suit land and hotel business

It is further pleaded that the 5th defendant lodged a Caveat on the suit land without just cause and falsely claimed proprietorship of the suit land when he is not.

I find that the 1st Plaintiff claims a right in the suit land and hotel business and that her rights are infringed by the 4th and 5th Defendants. Also the 3rd and 4th as registered proprietors of the suit land have a proprietary right in the suit land which is claimed to be infringed upon by the respective defendants including the 4th and 5th Defendants. I accordingly find that the 1st, 3rd and 4th Plaintiffs, respectively have a cause of action disclosed in their pleadings against the 4th and 5th Defendants, respectively.

Issue No 2: - Whether the 1st Defendant advanced the sum of Ugshs. 3,600,000,000/= to the 1st Plaintiff?

The loan arrangements between the 1st plaintiff and the 1st Defendant are contained in two offer letters. In the facility letter dated 4th November 2005, exhibit P2, the 1st Defendant extended the 1st Plaintiff a loan facility of Ugshs. 2,700,000,000/=, while the facility letter dated 30th November 2006, P3 indicates a loan facility of Ugshs. 3,600,000,000/=. Samuel Edem Maitum, the Head of Business Support and Corporate Recoveries of the 1st Defendant Bank (DW2), testified that by 9th August 2007, a total of Ugshs. 3,600,000,000/= had been drawn from the Loan Account into the 1st Plaintiffs Current Account where the 1st Plaintiff would access the loan funds. In his witness statement, the witness gave a summary of the loan amounts drawn out of the Loan Account Number 1191513 transferred into the Corporate/Current Account No. 1191505, wherein he stated that the 1st Plaintiff would draw it out. The summary shows that as of 16th May 2006 a total of 2,700,000,000/= had been transferred from the Loan Account to the Current Account and by the 9th August 2007 a total of shs. 3,600,000,000/= had been transferred from the Loan Account to the Current Account. He testified that the monies left the Loan Account, they hit the Current Account for the 1st Plaintiff to access and use on the hotel constructions.

It is an agreed fact that the 1st Plaintiff and the 1st Defendant executed the two facility letters, exhibit P2 and P3. In his testimony Anthony Wakabi Kiwanuka, the Managing director of the 1st Plaintiff Company, stated that by the letter exhibit P2, the 1st Defendant granted the 1st Plaintiff a Loan facility of shs.

2,700,000,000/= and it was duly disbursed. That by the letter exhibit P3 the 1st Defendant offered to raise the loan limit from shs., 2,700,000,000/= to shs. 3,700,000,000/= by an advance of an additional sum of 900,000,000/=. He however contended that eh additional sum of shs. 900,000,000/= was not disbursed to the 1st Plaintiff. He testified that instead, pending the disbursement of the additional loan sum, the 1st Defendant allowed the 1st Plaintiff to make overdraft withdraws to the tune of shs 275,000,000/= which at a high interest rate of 30% per annum made a total of shs. 600,000,000/=.

He further testified that on 9th August 2007, there was a transfer of shs. 300,000,000/= from the Loan Account into the Current Account but contends that this was a paper transfer of funds not accessed by the 1st Plaintiff.

Counsel for the 1st Plaintiff acknowledges the advance of Ushs. 2,700,000,000/= but disputed the additional advance of Ushs. 900,000,000/=. That the additional funds were used by the 1st Defendant to settle accrued interest on the initial loan disbursed by way of a book balancing operation.

Counsel submitted that PW1 demonstrated and the 1st Defendant's own financial records show, that the 1st Defendant only played around with paper figures and interest computation, to create a debt of Ushs, 3,600,000,000/= on the part of the 1st Plaintiff but without having to part with any funds. Counsel argued that Ughs. 275,000,000/= was released as an overdraft by way of honoured

cheques drawn by the 1st Plaintiff which attracted interest computed to create a new debt of shs. 600,000,000/=, then a paper advance of shs. 300,000,000/= on 8th August 2007 to create the total of shs. 900,000,000/= reflected under the second offer letter exhibit P3.

The Initial Loan of Ug.shs 2,700,000,000/= is not disputed by the 1st Plaintiff. In cross-examination Mr. Wakabi stated that the letter exhibited P3 of Ug.shs. 3,600,000,000/= enhanced the initial loan of Ugshs. 2,700,000,000/= by an additional offer of Ugshs. 3,600,000,000/=. It is his testimony that the letter exhibited P3, is dated 30th November 2006.

The Statements Records show that on 21st December 2005, a sum of shs. 600,000,000/- was paid back from the current account into the Loan Account which was stated:

“ To manage 1st Plaintiff drawings”

This was before the execution of the second facility letter. Further prior to the execution of exhibit P3, the 1st Defendant records show amounts drawn from the Loan Account into the Current Account in the total sum of shs. 900,000,000/= between 6th June 2006 to 9th August 2007. This shows that before the execution of exhibit P3 on 30th November 2006 there were over draws from the loan Account to the 1st Plaintiffs Current Account. Exhibit P2 and P3 show that the initial loan of Ughs. 2.7 billion plus the overdraws in the form of accrued dues were negotiated into a new loan of Ugs. 3.6bn/=

evidenced by the second facility letter exhibit P3. This position is acknowledged by the 1st Plaintiff in their Business Plan dated August 2006, exhibit D17 where in they were seeking from the 1st Defendant Ughs. 2billion in addition to the existing loan balance of 3.3bn.

Therein at page 4 is stated:

“To date the promoters have so far made a total investment of over Ushs. 8.8 bn in the project out of which 3.3bn is a loan from Barclays Bank, on top of which the additional loan of Ushs. 2BN is sought.....”

I must point out that, save for cash or cheque withdraws and deposits most bank transactions are paper transactions. On the above 1st Plaintiff and 2nd Defendant evidence I find that the 1st Plaintiff was advanced a loan in sum of 3,600,000,000/= by the 1st Defendant.

Issue No 3: Whether the 1st Plaintiff obtained its loan from the 1st Defendant through deception, manipulation and dishonesty?

In paragraph 9 of its Written Statement of Defence the 1st Defendant contended that the 1st Plaintiff obtained the loan from the 1st Defendant through deceptions, manipulations and dishonesty and detailed out the particulars thereof. Deception, manipulation and dishonesty are elements of fraud. Black’s Law Dictionary 6th Ed. Defines fraud as:-

“An intentional perversion of the truth for the purposes of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false whether it is by direct falsehood or innuendo by speech or silence, word of mouth or look or gesture..... A generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling and any unfair way by which another is cheated. “Bad faith” and “fraud” are synonymous and also synonymous of dishonesty, infidelity, faithlessness, perfidy, unfairness etc.....”.

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As distinguished from negligence, it is always positive, intentional. It comprises all acts, omissions and concealments involving a breach of a legal or equitable duty and resulting in damage to another. And includes

anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or by silence by word of mouth or by look or gesture.....”

This definition was found illustrative by Hon. Justice Bart Katureebe in Fredrick J.K Zaabwe v/s Orient Bank Ltd. and Other SC Civil Appeal No: 4 of 2006.

In Kampala Bottlers Ltd. v/s Damanico (U) Ltd. SC Civil Appeal No: 22 of 1992 Wambuzi CJ stated:-

“.....it is generally accepted that the ground must be proved strictly, the burden being heavier than on a balance of probabilities generally applied to civil matters.”

Also JWR Kazzora v/s MLS Ruluba Sc Civil Appeal 13 of 1992 it was held:

“As to standard of proof the law is that allegations of fraud must be strictly proved, although the standoff proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere probability is required. See Ratlal G Patel v/s Dalji Makayi [1951] EA 314 at 317”.

The 1st Defendant must produce evidence to show that the directors of the 1st Plaintiff acted deceitfully and dishonestly when applying for the loan from the 1st Defendant bank. Further that its officers were induced into offering the loan facilities by the alleged fraudulent conduct of the 1st Plaintiff. Such inducement must be before and not after the event. In the instant case the fraudulent conduct of the 1st Plaintiff must have taken place and acted upon by the 1st Defendant before the offer of the loan facility.

The initial loan was vide the letter exhibit P2 dated 4th November 2005. It is an undisputed fact that by then there were two companies in the Company Registry under the name Emerald Hotel Ltd. As an element of fraud the 1st Defendant names incorporation of two companies with the same name to confuse lenders s to the true identity of the borrower.

The evidence shows that the 1st Plaintiff Company was incorporated on 5th April 2005 by three promoters, namely Rita Bahemuka, Pius Kasajja and Anne Mary Murungi. There was an earlier incorporated Company, on 2nd September 2004 under the same name Emerald Hotel, which by Resolution dated 1st September 2006 changed its name to Chrystal Way Limited. The promoters thereof were Abbey Mutebe (4th Plaintiff) and Juliana Nakityo (3rd Plaintiff). The 1st Defendant's dealings with respect to the loan facilities were with the promoters and Directors of the 1st Plaintiff Company, the Emerald Hotel Ltd. incorporated on 5th April 2005 and not the earlier Emerald Hotel Ltd. (now Chrystal Way Limited). There is no

evidence adduced to show the promoters of either of the companies were party to the incorporation of the other company. The two companies cannot legally be stated to belong to the same people.

The second element is concealing from the 1st Defendant the existence of another Company called Emerald Hotel Ltd.

The 1st Defendant contends that the shareholders of the two Emerald Hotel Ltd. have participated in the loan acquisition process but did not bring the existence of the two companies with the same name to the attention of the 1st Defendant. The facility letter exhibit P2 shows that the offer was to Emerald Hotel (attention of Ms. Rita Bahemuka) and exhibit P3 shows that the offer was to Emerald Hotel Ltd. (attention Pius Kassajja, Rita Bahemuka and Anne Mary Marungu). That shows the 1st Defendant Bank dealing with the promoters/shareholders/ Directors of the 1st Plaintiff who was the Principal Debtor. It is an undisputed fact that at the time of grant of the loan Juliana Nakityo and Abbey Mutebe were the Registered proprietors of the Land at LRV 2383 Folio 17 Plot 3 Semiliki, where the suit projects is located and which was offered as security. The relationship between the 3rd and 4th Plaintiff with the 1st Plaintiff was that of Donors of a Powers of Attorney to the 1st Plaintiff and of Mortgagors as between them and the 1st Defendants. The Donors/Mortgagors Company, Emerald Hotel Ltd (now Crystal Ways Ltd.) was not a party to the transactions. Also the earlier dealings with Edimu Ltd and DFCU Bank Ltd were with the 3rd and 4th Plaintiff in their individual capacities as proprietors of the suit

land and not their company now Christal Ways Ltd. I find no evidence adduced to show that the shareholders/directors of the 1st Plaintiff were aware of the 3rd and 4th Plaintiff earlier incorporation of a company in similar names let alone its existence as at the material time. This is clearly born out in the suit land sale Agreements exhibits D6, 7 and 8. The related transactions were clearly brought to the attention of the 1st Defendant who participated by using part of the 1st loan monies to discharge the 3rd and 4th Plaintiff liability with DFCU Bank Ltd. on the instructions of the 1st Plaintiff. The Directors of the 1st Plaintiff could not have concealed information which has not been proved to have been within their knowledge.

The third element is that the Plaintiffs deceptively manipulated and exploited the existing banking relationship between the 1st Defendant and Rita Bahemuka to advance their application for the loan. In his testimony DW2 referred to the 1st Plaintiff Business Plan of August 2006, exhibit D17, wherein it is stated that Rita Bahemuka had spent 10 years operating her own successful business including a Tour and Travel Company in the names of Swift Link Tours and Travel Ltd. Rita Bahemuka was one of the promoters in the 1st Plaintiff Company with a majority shareholding of 50 shares at the 1st Plaintiff Company's incorporation on 5th April 2005. On 15th February 2007 the 1st Plaintiff notified the 1st Defendant that Rita had left Management of the Company as indicated in the letters exhibits 44 and D45. DW2 contended that the 1st Plaintiff deceptively used and exploited the existing banking

relationship between the 1st Defendant and Rita Bahemuka which relationship he argued was material in the pre-lending evaluation process conducted by the 1st Defendant prior to grant of the loan to the 1st Plaintiff. Counsel for the 1st Defendant submitted that the good customer – banker relationship that existed between Rita Bahemuka and the 1st Defendant and her presented experience in hospitality business was a material factor that contributed to the 1st Plaintiffs’ successful obtainment of the loan. That PW1 knew that and exploited it while preparing the business plan.

Counsel for the 1st Plaintiff submitted, and I agree, that the Business Plan, exhibited D17, was presented in August 2006 as a basis for the top-up of Ugshs. 2bn in addition to the existing loan balance of shs. 3.3 bn. It was not for the initial loan vide exhibit P2 dated 4th November 2005. There is no evidence adduced to substantiate Rita Bahemuka’s past relationship with the 1st Defendant Bank and the initial 1st Plaintiff’s proposal the basis of the initial loan offer was not presented to court.

The proposal exhibit D17, was post the initial loan grant. In the premises the 1st Defendant has failed to prove beyond a balance of probabilities that the 1st Plaintiff manipulated and exploited the relation between the 1st Defendant and Rita Bahemuka to obtain the loan facilities from the 1st Defendant.

The fourth element present is the Plaintiffs failure and/or refusal to change the ownership of the suit property into the names of the 1st Plaintiff whereas that was the representation made to the 1st

Defendant. It is an agreed fact that the 3rd and 4th plaintiffs are the Registered Proprietors of the suit land. Counsel for the 1st Defendant submitted that the evidence show that the 1st plaintiff has acquired the suit property but had failed or refused to pursue its obligation to pursue the transfer of the land into its names.

The Agreements, exhibit D6 and D7 show that the 3rd and 4th plaintiff on 14th June 2004 being the Registered Proprietors of the suit land agreed to sell the land and developments comprised in Plot 3, Semiliki Walk to Rita Bahemuka and Pius Kasajja, the appointed promoters of Emerald Hotel Ltd. (1st Plaintiff) and undertook to execute a transfer of the property to Emerald Hotel Ltd. upon such payment of the purchase price as per the instructions agreed upon in Clause 2 of the Sale Agreement (exhibit D6) as supplemented by the Supplementary Memorandum of Sale of Land (exhibit D7). By the Transfer Deed, exhibit D8, the 3rd and 4th Plaintiff's executed a transfer of the land in favour of Emerald Hotel Ltd. On being offered the credit facilities by the 1st Defendant the 1st Plaintiff instructed the 1st Defendant vide the letter, exhibit D9 to:-

“-----debit Ug.shs 1,200,000,000/= (One Billion two hundred million shillings only) to our account and by Draft or Bank Cheque pay that amount (Ugx. 1.2bn) to Ms. DFCU Bank and in return receive from Ms. DFCU Bank Certificate of Title for Plot 3 Semiliki Walk together with the instruments already held by them for transfer of

***proprietorship of title to the names of Emerald Hotel Ltd.-
-----“.***

It is apparent that the 1st Defendant complied with the 1st Plaintiffs above instructions. By letter dated 17th November 2005, Exhibit D10, DFCU Bank forwarded to the 1st Defendant the following documents:-

“1. Duplicate Certificate of Title (Original Owners’ copy) in respect of LRV 2303, folio 17, Plot 3 Semiliki Walk, Kampala.

2. Releases of Mortgage in respect of DFCU Bank’s interest in LRV 2383, folio 17, Plot 3 Semiliki Walk, Kampala (3 copies in original form).”

But not the Transfer Deed. Counsel for the 1st Defendant submitted that this shows that the 1st Plaintiff falsely represented to the 1st Defendant that DFCU Bank Ltd. held the instrument of transfer yet that was not the case. That against such a representation, the 1st Defendant paid off the facility in DFCU Bank with the understanding that the company they were financing owned the project property.

DFCU had not yet exercised its right to recover the loan by sale of the security so was not in position to execute a transfer of the property. Further DFCU bank had no business holding a Transfer Deed executed by the Registered Proprietor. Had the 1st Defendant Bank exercised due diligence it would have established which

documents, in respect to the land, were in possession of DFCU Bank and subject to release to it upon payments.

The 1st Defendant further argued that by the 1st Plaintiffs' failure to transfer the suit property into its name thereby denied or deprived the 1st Defendant of its security. The evidence adduced shows that the 1st Defendant was given security in the form of the same suit land. The loan was secured by a Legal Mortgage over the suit land in favour of the 1st Defendant by the 3rd and 4th Plaintiffs (exhibit D28) and by a Further Charge by Emerald Hotel Ltd. as Donee of Powers of Attorney from the 3rd and 4th Plaintiffs (exhibit D29).

The loan facilities remain so secured.

The 1st Defendant further claimed that the Plaintiffs at all times concealed the fact that Mr. Anthony Wakabi, at all the time an employee of the 1st Defendant and former employee of DCFU Bank, was the Principal Beneficiary of the 1st Plaintiff and the loans. It is an undisputed fact that PW1 was up to 4th February 2005 an employee of DFCU Bank. His Curriculum Vitae attached to his letter of Employment by Barclays Bank Ltd., exhibit D112, in his Personal Profile, shows that he was by then employed as Head of Corporate with DFCU Bank where he resigned a 4th February 2005.

It is also an undisputed fact that from 11th April 2005 to 23rd September 2005 PW1 was employed by the 1st Defendant as shown by exhibits D112, P61 and P62.

On the basis of the above facts the 1st Defendant contends that the 1st Plaintiff concealed the fact that PW1 was the Principal beneficiary of the 1st Plaintiff and the loans. The 1st Defendant relied on the evidence of DW1 Kimbugwe Kalema and DW6 Solome Nagadya Ntanda which show that the PW1 had interest in the suit property and project while still with DFCU Bank Ltd. DW1 testified that he was the majority shareholder and Managing Director in A.K Super Savers Ltd. (now Kim Investments Ltd.). Their Company was the initial proprietor of the suit property and developer of the suit hotel project. In May 2003, PW1 was introduced to him as prospective buyer of the suit land and project. That he wanted to buy it with his partner one Robert Katuntu. Following the discussions with PW1 an agreement of Sale was concluded in favour of M/s Edimu Uganda Ltd, exhibit D1. He further testified that subsequent upon further payment, PW1 instructed him to change the Sale Agreement in favour of Abbey Mutebe and Juliana Nakityo introduced to them as relatives of PW1 and Robert Katuntu, exhibit D2. He further testified that he has never interfaced with Abbey Mutebe or Juliana Nakityo, that during the entire transaction from the sale of the suit land he dealt with PW1 and met Robert Katuntu only once. Further that PW1 informed him that money for payment of the balance of the purchase price was to be obtained from DFCU Bank Ltd. and indeed payment was made to them by Cheque at DFCU Bank.

Solome Nagadya Ntanda, the relationship Manager with DFCU Bank testified that she had handled an account entitled Edimu Ltd.

That PW1, then employed with DFCU Bank executed the loan offer letter to Edimu Ltd, as Head Corporate exhibit, D119 and Robert Katuntu as the Banks' General Manager executed the Credit Agreement, exhibit D120, and Mortgage Deed, exhibit D123.

PW1, in cross-examination, denied approaching DW1 for the sale of the suit property. The loan transaction with DFCU Bank was by Edimu Ltd. a Corporate entity distinct from the 1st Plaintiff Company and from PW1. True a limited Company conducts its business through its shareholders, directors or officers but there is no evidence adduced to show that PW1 held any such relationship with Edimu Ltd. Apart from DW1's word, which is denied by PW1, there is no independent evidence adduced in support of DW1's testimony as to in whose favor the agreements were to be executed.

In further support of the 1st Defendant's claim that PW1 was the owner of the Suit land and the Hotel Project the 1st Defendant sought to rely on the proceedings on HCCS NO: 498 of 2006 – Tile World Ltd. v/s Emerald Hotel Ltd. It was argued that the proceedings in the above case show that it was PW1 who was directly involved in the construction project of the Hotel from February 2005 and not the directors of Emerald Hotel Ltd and that he testified in the aforesaid case about how he was directly involved in supervising the construction works and that he pledged his personal property comprised in Block 244 Plot 2485 Kisugu. Counsel submitted that it is clear from Wakabi's dedicated involvement in that project and pledging of his personal property to

facilitate works on the hotel, he was the principal beneficiary and the other personalities in the documents were his “fronts”.

The proceedings in HCCS No: 498 of 2006 were not part of the proceedings in this case. PW1’s testimony in that case was not adduced or presented before this court.

Exhibit D35 referred to by the 1st Defendant’s Counsel in his submissions were only pleadings, that is the “Reply to the Defendant’s Written Statement of Defence, Counter-claim” and the Amended Plaintiff and Reply to the Written Statement of Defence and Counterclaim”.

In the reply to the “Defendants’ Written Statement of Defence, Counter-Claim” para 6 makes reference to Anthony Wakabi, while para 22 refers to Pius Wakabi. Para 4 of the Amended Plaintiff and Reply to Written Statement of Defence and Counter-claim makes reference to Anthony Wakabi who is described as the Chairman/Managing Director of Emerald Hotel Ltd. It is further therein pleaded that Pius Kasajja Wakabi and Rita Bahemuka were the other Directors of Emerald Hotel Ltd. Also in the Judgment, exhibit D116, the learned trial judge names Anthony Wakabi as Emerald Hotel’s Chairman and it is apparent thereon that the Wakabi was DW1 in that case. In my view the pleadings and judgment were subject to be proved before this court in line with the counsels’ submission relating to PW1, which was not done. Exhibit D35 are pleadings and statements therein were subjected to

be proved before court. The proceedings in HCCS NO: 498 of 2006 were before another judge, not before this court. In his testimony PW1 stated that he became the Managing Director of the 1st Plaintiff after March 2007, while the above suit was of 2006. That he was before then neither a Director nor shareholder in the 1st Plaintiffs company. As already shown above the 1st Plaintiff became a shareholder of Emerald Hotel Ltd. by a Transfer of shares dated 2nd September 2007 on transfer of 50 shares by Rita Bahemuka (exh. D76) and named Chairman and Managing director by Resolution dated 6th March 2007 (exhibit D74).

DW2, Samuel Edem Maitum, testified that when he was given the file he studied the background documents. That he studied the security documents and did not find any fault with them. That when the 1st Defendant noted some irregularities the 1st Defendant requested their external counsel to review the securities to determine whether it was safe to continue to lend and recommend any remedial remedies. That it was determined that the securities were enforceable in the form they were and on that basis the Bank continued to engage the 1st plaintiff to regularize the facilities. That the name of the 1st plaintiff was not a problem and the Bank did not investigate the particulars of the 1st plaintiff Company. That they comfortably continued dealing with PW1 when he took over from Rita Bahemuka . He stated:

“We were happily for us to deal with Mr. Wakabi”.

In the result I find that the alleged acts of deception, manipulation and dishonesty have not been proved to the required standard and it is clear that the 1st Defendant was not influenced any such conduct or acts to grant the 1st Plaintiff the two loan facilities.

Issue No: 4: - Whether the 1st Plaintiff is indebted to the 1st defendant and if so, by how much?

Counsel for the 1st Plaintiff submitted:-

“In absolute terms, the 1st Plaintiff is not indebted to the 1st defendant, because whatever amount the 1st Defendant is owed is far less than the quantum of the 1st Plaintiff’s claim against it. However, because the two claims would have to be off-set against each other, it has to be determined what the 1st Plaintiff owes the defendant.”

In principle, I find it thereby admitted that the 1st Plaintiff is indebted to the 1st Defendant. The 1st Plaintiff acknowledged receipt of the first facility funds of Ugshs. 2,700,000,000/=.

Counsel for the 1st Plaintiff acknowledges receipt of Ugshs. 275,000,000/= by way of Overdraft, when it was allowed to draw a series of cheques on the Current Account. This gives an acknowledged total of Ugshs. 2,975,000,000/=.

The 1st Plaintiff contends that the 1st Defendant is not entitled to claim the 900,000,000/= claimed to have been paid to the 1st Plaintiff to bring the first loan tranche to Ushs 3,600,000,000/= contending that no actual funds were paid in this regard, that the 1st Defendant only computed interest on the shs. 2,700,000,000/= that was advanced and reflected it on the books as money advanced, giving rise to shs. 600,000,000/= in paper transfer on the loan amount. I have however already held that the 1st Defendant advanced the 1st plaintiff a loan in the total sum of 3,600,000,000/=. So the issue is how much the 1st Plaintiff owes the 1st Defendant that is in terms of the principle and interest.

In the pleadings the 1st Defendant counter claims as follows:-

- Para 26 – the loan sums due and owing amounting to Ugshs. 5,136,000,000/=
- Para 28 – 1st Plaintiff indebtedness with the 1st Defendant which stood at shs. 4,800,000,000/= by 2nd November 2007 which was restructured into a Term Loan Agreement whereby the 1st Plaintiff was to pay monthly installments of Ushs. 53,333,333/= for 8 years at the interest rate of 23% per annum.
- Para 29 – the 1st Plaintiffs indebtedness to the 1st Defendant is claimed to be shs. 5,160,373,301/=.

I see contradictory claims in the above pleadings of the 1st Defendant.

In his evidence the 1st Defendant, Head of Business Support and Corporate Recoveries (DW2) testified that the 1st Defendant counterclaims shs. 4,800,000,000/= arising as follows:-

- a. Ushs. 3,600,000,000/= being the principal obtained out of the loan account which later became the second loan under facility letter dated 30th November, 2006 (exhibit P3).
- b. Ushs. 1,200,000,000/= taken to the loan account out of the current account which stood overdrawn by 1,478,313,001/= at 27th December, 2007.

The two figures in (a) and (b) above add up to Ushs. 4,800,000,000/= which became the new loan under the last facility letter of 2nd November 2007 (exhibit D25).

He contended that the loan sum of Ushs. 3,600,000,000/= plus interest of Ushs. 1,200,000,000/= altogether became the third loan of Ushs. 4,800,000,000/= which he claims to be truly owing and due to the 1st Defendant.

Counsel for the 1st Defendant argued that the 1st Plaintiff continued to default and the overdrawn position continued increasing and on 27th April 2008 had an overdrawn balance of Ushs. 348,398,203/=. He submitted that the total debt due from the 1st Plaintiff is therefore the total of the balance on the Current account as at April 2008 and the consolidated loan of Ushs. 4,800,000,000/= which is a total of Ushs. 5,148,938,203/=. He concluded that the

determination of the final balance can then be subject to the establishment of the monies recovered during the receivership, less Receivership expenses and Commission, which should be offset from the Ushs. 5,160,372,301/=, the amount pleaded in para 29 of the Counter-Claim.

The 1st Defendants' counter-Claim is for special damages which the law requires to be strictly proved. The 1st plaintiff acknowledged the first facility of Ushs. 2,700,000,000/=. This was topped up and reduced into the second facility of Ushs. 3,600,000,000/= which I have already held was the total sum advanced to the 1st Plaintiff.

This total advanced sum attracted interest which by the 1st Defendants' own computation amounted to Ushs. 1,200,000,000/= making a total of Ushs 4,800,000,000/= as of 27th December 2007. It is this figure which DW2 testified to as a truly owing and due to the 1st Defendant. The sum of shs. 4,800,000,000/= was a computation of the principal plus accrued interest as of that date. It was this figure which was reduced into a third facility evidenced in exhibit D5.

The third loan facility, exhibit D5 had the unfair effect of consenting the outstanding principal and accrued interest into a bigger loan of shs. 4,800,000,000/= thereafter to attract bigger sums by way of interest computed now on the paper principal of Ushs. 4,800,000,000/=.

It is this unfair computation which makes up the additional interest sum of 348,398,203/= to make up the total of Ushs. 5,148,938,203/= claimed by the 1st Defendants counsel, in his submission without any evidence to support that additional interest. I agree with the 1st Plaintiffs' counsel that it was incumbent upon the 1st Defendant to substantiate and strictly prove its claim for the sum of shs. 5,160,373,301/=.

In the circumstances I find that the 1st Defendant has only proved a Claim for Ushs. 4,800,000,000/= due and owing from the 1st Plaintiff as of 27th December, when the Loan account was closed.

Issue No. 5 – Whether the 1st Defendant wrongly recalled the Loan facility?

By its letter dated 6th March 2008 (exhibit D7) the 1st Defendant demanded from the 1st Plaintiff the;

“.....immediate repayment of a total sum of Ugshs. 5,160,372,301/= -----(Debit Balance), being the amount owing to the Bank by Emerald Hotel Ltd. as at the 6th March 2008, failure to comply with this demand within 14 days of the date of service of this notice the Bank will proceed to realize its securities without further hesitation and notice, holding you liable for costs”.

By letter dated 18th March 2008 (exhibit D75) the formal demand notice period was extended to 31st May 2008 subject to the

conditions stated therein default of any of which would result in the bank proceeding to realize its securities without further notice.

The 1st Defendant thereby recalled the facility. The reason for the recall given in exhibit D14 were:-

- 1st Plaintiffs failure to service the interest.
- The overdrawn position of the 1st plaintiffs' current account.
- 1st Plaintiff failure to provide a clear strategy towards clearing its outstanding liabilities.

Then in exhibit D75 it is the 1st Plaintiffs default of the conditions given therein, subject to which, the extension of the demand notice period was extended to 31st May 2008.

DW2 testified that the 1st Plaintiff never paid any interest as it fell due on its arrears on its current/corporate account as shown in exhibit D96 and 101. Further that the 1st Plaintiff had developed a pattern whereby whenever the grace period was near the end the 1st Plaintiff would seek a new facility so that it would always have a grace period where it would only be liable to pay interest and never the principal. So it was resolved that it was high time that the 1st Plaintiff started repaying the principal as well or at the very least, clears its overdrawn account by paying the outstanding on the current account but the 1st Plaintiff failed to clear its outstanding balance on the loan account and instead requested for a restructure. DW2 further contended that the 1st Defendant as a regulated business was required to fully provide for the 1st Plaintiff

account because of its non-performing status thereby necessitating a loan recall and enforcement of security. Further that the 1st Plaintiff made various undertakings to repay the loan none of which it honoured. He contended that the 1st Plaintiff, in the circumstances, became a high risk to the 1st Defendant in contravention of its risk management policy. The 1st Defendant given the 1st Plaintiffs' conduct decided to recall the loan. That the 1st Plaintiffs' repayment strategy and undertaking that its account would soon be in credit exhibit P19 never happened. Further that the 1st Plaintiff failed to work on the alternative strategy upon which the 1st Defendant extended the Notice period to 31st May 2008 as it did not comply with the conditions set therein by the 1st Defendant. The facility letters, exhibit P2 and P3, clearly stipulated for the payment of interest and the mode of repayment. Save the book recoveries as exhibited by the 1st Defendant, the 1st Plaintiff has not adduced any evidence of payment of interest or loan installments and has not adduced any evidence of compliance with the various repayment strategies put forward by it. Instead the 1st Plaintiff raised various reasons for its failure to comply with the loan terms which it blames on the 1st Defendant.

I intend to consider the issues raised by the 1st Plaintiff which in my view are contentions of breach of the loan contract, when resolving the next issue. To finally determine whether the loan facility was properly recalled or not will depend on resolution of the next issue.

Issue No: 6 – whether there was a breach of the loan contract between the 1st Plaintiff and the 1st Defendant, and if so, by who?

The 1st plaintiff pleaded that the 1st Defendant's conduct was wrongful, unlawful and amounted to breach of its contract. The 1st Plaintiff specified the particulars of breach as already outlined herein above.

On the other hand the 1st Defendant pleaded that it is the 1st Plaintiff who breached the terms of the loan agreement as detailed below:-

- Failing/refusing to pay any single monthly interest payment in the manner agreed upon under the facility letters.
- Deliberately failing/refusing to bank all cash from the Hotel Business with the 1st Defendant.
- Failing to complete work as outlined on the request for funds.
- Deliberately failing/refusing to account for Ushs. 50,000,000/= taken by Angela Muwanga on 29th January 2007.
- Deliberately refusing/failing to pay 1st Defendants' service fees and interest, repay the loan monies as agreed under the repayment schedule, honour various undertakings to repay the loan and regularize the 1st Plaintiffs current account.

- Deliberately refusing/failing to furnish personal guarantee of Anthony Wakabi as security for the loan and insurance cover for the suit property.

I agreed with the submission of counsel for the 1st Plaintiff that to determine whether there was a breach one has to look at what the responsibilities of each party were and the responsibilities of each party have to be deduced from the terms of the contract as contained in the various documents governing the relationship between the two parties.

I will start with the 1st Plaintiff's claim of breach of contract by the 1st Defendant pleaded in paragraph 10 of the 3rd Amended Plaint. The 1st Defendant in paragraph 9 of the 1st, 2nd and 3rd, Defendants Amended Written Statement of Defence denies each and every allegations contained in paragraph 10, contends that it is the 1st Defendant who acted in breach of the agreement save as pleaded by the 1st Defendant, the 1st Defendant did not make any specific denial, neither did the 1st Defendant key witness, DW2, adduce any evidence to contradict the alleged breaches on the part of the 1st Defendant nor did the 1st defendants counsel specifically submit in response to the alleged breaches on the part of the 1st Defendant. However, it is a trite rule of burden of proof that he who alleges or asserts a fact has a burden to prove the same. See: Sections 101-103 Evidence Act. The burden was upon the 1st Plaintiff to prove,

on a balance of probabilities, the alleged breaches of the loan agreement against the 1st Defendant.

(a) Delay in advancing funds for Phase I of the Project. The 1st Plaintiff relied on the Facility Period which with regard to the first facility letter, exhibit P2, for Phase I provided that the period was from the date of fulfillment of the conditions precedent in accordance with Clause 2.2 of the letter. Looking at the letter I believe the clause intended is Clause 3.2 of the letter which provides:

“Subject to Clause 3.1 above, the facility will be available to the client for drawing only upon receipt by the Bank of the following in form and substance satisfactory to the Bank”,

And in 3.2.1 to 3.2.9 spells out the conditions. The first Plaintiff contends that the conditions were satisfied and prompt payment was of essence to enable the 1st Plaintiff complete Phase I within a year and be able to service the loan at expiry of the grace period. There was one month's delay by the 1st Defendant before crediting the Ushs 2,700,000,000/= into the Plaintiffs' account. Further that the additional 900,000,000/= agreed upon for completion of Phase I was not immediately released and by execution of the second facility letter, exhibit P3, 600,000,000/= thereof had already been swallowed in interest computations. The remaining shs. 300,000,000/= was purportedly paid into the 1st Plaintiffs' account after the 1st Defendant had ensured that the sum would be

swallowed up by a unilaterally and wrongfully computed interest. Such conduct was unbecoming of a bank which had agreed with the 1st Plaintiff for the purpose of completion of the project from which funds for servicing the loan would be received by the 1st Plaintiff. However Clause 3.2 was clearly subject to Clause 3.1 of the letter which stipulated:

“At no time shall the Bank be obliged to make funds available to client”.

The second facility letter had some similar provisions in clause 3(exhibit P3). In light of the above express provisions of the facility letters, duly executed for the 1st Plaintiff, I find that the 1st Plaintiff has failed to prove that the 1st Defendants' delay in release of the loan funds were in breach of the loan agreement.

(b) Making the 1st Plaintiff sign facility documents without actually advancing funds to the 1st Plaintiff.

This has already been covered in my findings on respect to the above breach and on issue No: 2 above.

(c) Failing/refusing/neglecting to avail funds for Phase II of the project: Considering my analysis herein in respect of issue No:5 I find that the 1st Defendant had sufficient grounds for recall of the loan and thus rejecting to avail the 1st Plaintiff with funds for Phase II of the project.

(d) Recalling the loan facility on improper or no grounds:-

This alleged breach has already been considered under issue No: 5.

(e)Unilaterally imposing punitive interest on the 1st Plaintiff and
(f)Failing to honour the promise to write off the punitive and/or
excessive interest imposed on the facility.

The facility letters, exhibit P2 and P3, provided for interest chargeable and how it was payable which was at 21% per anum. The second facility letter (exhibit P3) clause 1 provides for penalty interests and Claus1.1 has the following provision:-

“.....provided that, the Bank shall be entitled in its sole and absolute discretion to charge interest at different rates on each particular type of banking facility made available to the Borrower and the bank shall be entitled in its sole and absolute discretion to determine the basis on which interest shall be calculated in relation to each particular type of banking facility and to vary from time to time the basis on which interest is calculated.....”

True in the 1st Defendants’ letter, exhibit P9, the 1st Defendant acknowledged the 1st Plaintiffs’ concerns that while the processing of the 1st Plaintiffs’ application was delayed excess interest was being charges to its account and responded, inter alia that;

“(iii) On the issue your raised regarding penalty interest charged to you account during the time taken processing your application it has been agreed that upon placements

of the sanctioned limits penalty interest which has been erroneously charged to your account during the time taken processing your application in excess of the normal interest applicable to your existing facilities shall be reversed out.”

Counsel for the 1st Plaintiff submitted that this was never done. However no evidence of excessive or erroneous interest charged was adduced by the 1st Plaintiff so as to warrant the reversion of interest charged.

The breaches in (g) and (h) are to be considered later while resolving the issue regarding the appointment of a Receiver/Manager.

I now proceed to consider the 1st Defendant's claims of breach.

(a) Failure/refusal to pay interest.

The facility letters (exhibit P2 and P3) provided for payment of interest. By the Legal Mortgage, exhibits P5 the and Further Charge exhibit P8, the 1st Plaintiff undertook to pay both the principal and interest thereon in the manner provided for in the said agreements DW2 testified that eh 1st Plaintiff never paid any interest as it fell due on its Current/Corporate accounts. Counsel for the 1st Plaintiff argued that the loan agreement did not obligate the 1st Plaintiff to pay interest before the expiry of the grace period. The 1st Facility letter (exhibit2) provided:

“Repayment. The facility is due for monthly installment repayment effective twelve months after drawdown”

While the 2nd facility letter (exhibit P3) provided:

“Facility Period: 7 years with one year grace period”, and also that loan of UGX. 3,600,000,000/= “reducing at UGX 42,857,142 per month after grace period”

Counsel for the 1st Plaintiff submitted that by the time the 1st facility vide the 1st facility letter exhibit P2 dated 4th November 2005 was terminated and replaced or replaced by the 2nd facility vide the 2nd facility letter exhibit P3, dated 30th November 2006 the loan repayments were not yet due on the 1st facility letter. Further under the new terms payment was again not due by the termination letters dated 30th July 2007 and 1st September 2007. I must point out that the above two letters, exhibits P14 and P15 did not amount to termination of the loan agreement. The loan facility was not terminated until 31st May 2008. Up to then the 1st Plaintiff has not adduced any evidence of any installment payment of either interest or principal save for book deduction payments effected by the 1st Defendant. I therefore find that the 1st Plaintiff was in breach of the loan agreement by failure to pay the monthly interest in the manner agreed upon.

(b)Deliberate failure/refusal to bank all cash from the Hotel Business with the 1st Defendant.

As an additional condition it was provided in clause 7.1 of the 2nd facility letter (exhibit P3) that:-

“All rental proceeds to come in through your Barclays Bank Account.”

The 1st Plaintiff did not adduce any evidence of banking its business proceeds in its account with the 1st defendant.

PW1 reasoned that any cash deposited into the account would be swallowed up by the false debits, yet the 1st Plaintiff needed to operate the account the normal way, including drawing funds from it to run its operations, as the Hotel was by then open and operational. It is in the effect thereby conceded that the condition for all rental proceeds to come in through their account with the 1st Defendant was breached.

(c) Failure to complete the works. The 1st Defendant has not adduced any evidence to show that the funds advanced by it were used otherwise than towards the project for which the same was borrowed. In fact the 1st Plaintiff adduced evidence that its directors raised their own funds to supplement the loan funds so as to complete the 1st Phase of the project. This evidence was not contradicted. I therefore find that the 1st Defendant failed to prove this breach.

(d) Failure refusal to account for Ushs. 50,000,000/= taken by Angela Muwanga on 29th January 2007. I agree with counsel for the 1st Plaintiff that this alleged breach was not substantiated by any evidence. Therefore not proved.

(e)Refusal or failure to pay the 1st Defendant's service fees and interest, repayment of the loan etc. The failure to pay the principal and interest have already been covered. The other condition not fulfilled were for restructuring of the loan which never materialized. I agree with counsel for the 1st Plaintiff that such demands were post loan agreement did not point to the existing loan relationship and failure to satisfy them did not amount to breach of the loan agreement.

(f)Refusal or failure to finish personal guarantee of Anthony Wakabi.

This was not a requirement under the facility letters exh. P2 and P3. This requirement was a further condition precedent in the 3rd facility letter dated 2nd November 2007 for the facility of Ushs. 4,800,000,000/=. This restructured facility was not effected and I have already declared this restructure unfair. Failure to comply with the conditions therein could not have been a breach of the loan agreement.

All in all I find that the 1st Plaintiff was in breach of the loan agreement when it failed to pay the loan principal and interest in the manner agreed upon and also when it failed to bank the proceeds from the Hotel Business in its account with the 1st Defendant.

Having so found I also in final resolution of issue No. 5 that the 1st Defendant lawfully recalled the loan facility.

Issue No:7 – whether the Appointment of the 2nd Defendant as Receiver/Manager of the 1st and 2nd Plaintiffs was lawful?

This issue will be subdivided into two:-

(a)Whether the Appointment of the 2nd Defendant, Kabiito Karamagi, as Receiver/Manager by the 1st Plaintiff, Emerald Hotel Limited, was lawful. Counsel for the 1st Plaintiff submitted that the 2nd defendant was not lawfully appointed as a Receiver/Manager of the 1st Plaintiff for three reasons.

Firstly that the 1st Defendant was not entitled to appoint a receiver unless and until an event of default had occurred. He contended that none had occurred.

Secondly that the powers to appoint a receiver had to be derived from properly executed and registered instruments. He contended that in the instant case the instruments were defective.

Thirdly, that the laid down procedures of appointment and taking office, so as to set about performing the functions of receivership had to be complied with. He contends that they were not in the instant case.

Events of Default:

The law in force when the loan agreements were executed was the Mortgage Act, Cap 229. It provided:

“Section 2(1)(b): Upon failure of performance of any covenant in a Mortgagee under the Registration of Titles

Act, the mortgage may realize his or her security under the mortgage in any manner hereinafter provided in this Act.”

And then section 3(a) provided:

“A Mortgage may realize his or her security under a mortgage by appointing a receiver clearly, therefore, the right to appoint a receiver under the mortgage Act only arise upon the failure of performing any covenant! It follows that the mortgage seeking to realize the security to prove that there has been failure of performance of a given condition contained in the mortgage.”

The 1st Plaintiff, who was the Principle Debtor, under the Legal Mortgage (exhibit D28) was under an obligation to pay the Principal sum and with interest, Clause 3(e) provided:

“The Principal Debtor agrees that if the Principle Debtor shall make default in the payment of any one or more of the said installments as indicated in Clause (d) above or other payments herein covenanted to be made at the time and in manner herein stated or in observance or performance of any of the covenants or obligations on the Principal Debtors part herein expressed or implied to be performed or to become payable hereunder shall be deemed to be forthwith due”

The clause 5 provided:

“(c) At any time after the whole of the money hereby secured shall have become payable under the provisions of clause 3(e) hereof or on becoming entitled to enter into possession of the Mortgaged Property, and without any previous notice to or concurrence on the part of the Mortgager:

(i).....

(ii) the Bank may without prejudice to paragraph 4 appoint such person or persons as it think fit to act as Receiver or Receivers of the income of the Mortgaged Property or any part thereof and may.....”

The Further Charge, exhibit D29, which was executed following the 2nd facility which increased the loan amount to Ushs. 3.600.000.000/=, also provides for the same kind of events of default.

The Collateral Debenture, exhibit D31, in clause 3, provides the events of default on the occurrences of which security shall become enforceable. These included (a) when the Borrower fails to pay when due any Principal of the loan or interest on the loan and (e) when any event of Default occurs in accordance with the Legal Mortgage executed between the parties or any other security Document executed between the Parties in respect of the transaction. And in clause 4(a) the lender is empowered to appoint a Receiver or Manager of the whole or any part of the charged

premises at any time the security shall have become enforceable. The Further Collateral Debenture, exhibit D52, in clause 9 provided:

“The principal money and interest hereby secured should immediately become payable without demand in the case of any the “Events of defaults” as specified in the facility letter”.

Counsel for the 1st Plaintiff argued that the Further Collateral Debenture (exhibit D32) did not lay down events of default. However, the second facility letter, exhibit P3, in clause 4 provides;-

“Security

All indebtedness and liabilities, actual or contingent, now or at any time incurred, owing or due by the Borrower to the Bank, will be secured in favour of the Bank by:

- Legal Mortgage of UGX 2.7 BN over LRV 2383 FOLIO 17 Plot 3 Semiliki Walk.***
- A Further Legal Mortgage Charge of UGX 900M over LRV 2383 Folio 17, Plot 3, Semiliki Walk.***
- Fixed and floating Debenture collateral to the above mortgage to cover UGX. 3.6 BN.***

.....”.

It is my considered view that by the above provisions the facility Letter, referred to in the Further Collateral Debenture, incorporated

therein the events of default as provided in the above documents. Therefore by inclusion the Further Collateral Debenture laid down similar Events of Default clauses.

Counsel for the 1st Defendant submitted that evidence was on record which shows that the 1st Plaintiff failed to pay the loan in accordance with the loan agreement DW2 testified on various undertakings which the 1st Plaintiff made to repay the loan, none of which it honoured. Counsel submitted that after all the events of default, summed up in the submissions, the logical thing for the 1st defendant to do was to recall the loan and enforce its rights as a debenture holder by appointing the 2nd Defendant Receiver/Manager over the 1st Plaintiffs” business and pledged assets.

On the other hand counsel for the 1st Plaintiff cited the Repayment clause in the 1st facility letter (exhibit P2) dated 4th November 2005 which provided:

“The facility is due for monthly installments repayment effective Twelve Months After Drawdown”.

Counsel interpreted this provision to mean after the full loan sum was drawn or received. He argued that the last portion of the sum was drawn down in June 2006. According to him it was after June 2006 that the repayment period would have started running from July 2007. He further argued that before this grace period had expired a new facility (exhibit P3) dated 30th November 2006 was

executed which he contends substituted the terms of the 1st facility by reconstructing the loan sum to shs 3.6 bn by an additional shs. 900,000,000/= payable over 7 years with a one year (12months) grace period to commence from the date of fulfillment of the conditions preceding clause 3 of the letter. He argued that the 1st Defendant did not advance any additional funds. That even when the paper credits were effected on 9th August 2007, the 1st Defendant had already given a notice of termination. He contended that by time of that notice there was no default as payment was not yet due because:

(i) The loan sum was not yet advanced.

(ii) The grace period to run after 9th August 2007 but even then the total sum of 900,000,000/= had not yet been debited in the 1st Plaintiff's account.

Secondly, counsel submitted that the event of default entitling the 1st Defendant to realize the security was only when the whole money had become payable, which he contended had not yet. He cited clause 5(c) of the Mortgage which provided:

“At any time after the whole of the money hereby secured should have become payable under clause 3(e) or on being entitled to enter into possession of the Mortgaged Property.....”

He also claimed that by the 6th March 2008 when the 1st Defendant wrote the formal demand for Ushs. 5,160,373,301/= the one year

grace period had not yet expired and that the whole monies had not become due. Counsel submitted that the only event of default relevant at the material time was failure to pay the entire sum when due and when demanded.

The 1st facility was, inter alia, governed by the 1st facility letter (exhibit P2), the Legal Mortgage (Exhibit D28) and the Collateral Debenture (exhibit D31). The 2nd facility Letter did not extinguish the 1st loan facility but only restructured it by enhancing the facility to shs. 3.6 bn. To secure the facility as increased, in addition to exhibit P2 and P3, the facility was among others secured by a Further Legal Charge (exhibit P8) and Further Collateral Debenture (exhibit P7). All the above must be considered together with the various correspondences between the two parties which resulted into the second facility letter. The testimony of DW2 shows that the amount drawn from the 1st Plaintiff Account to its Current Account was in the sum of 1,200,000,000/= on 22nd November 2005. That was the first drawdown date. By 16th May 2006 there had been a total draw down of shs. 2.7 bn from the Loan Account into the Current Account. So by 30th November 2006, the date of the 2nd facility letter, the grace period had already expired on 22nd November 2005, the date of draw down. There is no evidence of payment. Even after the Loan facility had been rekindled by the second facility letter there is no evidence of any installment payment by 6th March 2008, the date of formal demand. In several correspondences the 1st Plaintiff acknowledged default and made several proposals and strategies to clear its arrears/overdrawn

position on the current account which never materialized. I accordingly find, and as held in resolution issue 6, there was default to pay the principal and interest in the manner agreed upon. Under clause 3(e) of the Legal Mortgage default in payment of any one or more of the payment installments “the whole of the monies payable or to become payable hereunder shall be deemed to be forthwith due”. And on such occurrences without any previous notice the 1st Defendant was under clause 5(c) entitled to realize the security in the manner therein provided.

Validity of the security Instruments

Firstly the 1st Plaintiffs’ counsel submitted that the Legal Mortgage dated 30th December 2005, exhibited D28, was manifestly irregular and was not validly created in favour of the 1st Defendant because it was executed by the Registered Proprietors, Julian Nakityo, (3rd Plaintiff) and Abbey Mutebe (4th Plaintiff) as mortgagors to secure a loan incurred by the 1st Plaintiff. That they were not parties to the debt. Counsel contended that no consideration flowed from the Mortgagee (the 1st Defendant Bank) for them to be mortgagors yet they were not the borrowers and did not receive the loan amounts/money the subject of the mortgage. Counsel cited Dunlop Pneumatic Tyre Co. V/s Selfridge & Co. Ltd. (1915) Ac 847 at page 853 where Viscount Hard are L.C pronounced two fundamental principles:

- 1. Only a person who is a party to a contract can sue on it, and***

2. Only a person who has furnished consideration can enforce rights or suffer obligations under the contract.

On the second principle he stated:

“A second principle in that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or some other person at the promisor’s request. (emphasis mine).

He further stated:

“A third proposition is that a principle not named in the contract may sue upon it if the promisee really contracted as his agent. But again, in order to entitle him to sue, he must have given consideration either personally or through the promisee acting as his agent in giving it.”

It must be noted that he/she who has a right to sue under a contract he/she also has obligations under that contract.

Counsel also cited Wightman J statement in Tweddde v/s Alison (1861), quoted in Cheshire Fifoot & Furnishston’s Law of Contract 11th edition that:

“No stranger to the consideration can take advantage of a contract, although made for his benefit.”

Counsel submitted that the Mortgage Deed was a nullity for lack of consideration and consequently the loan to the 1st Plaintiff was an unsecured debt.

Counsel for the 1st Defendant describe the mortgage by which this loan was secured a third party mortgage and contended that it was lawful. He argued that a third party mortgage is to guarantee the payment of principal and interest and the performance of covenants on the part of the mortgagor. Counsel relied on Harsald Ltd. v/s Globe Cinema Ltd. & Other [1960]EA 1046 where Sheridan J quoted from Cootes On Mortgages (9th Ed.) Vol. 1 page 103 as follows:

“.....third persons are frequently made parties to the mortgage deed for the purposes of guaranteeing the payment of the principal and interest or ofit is usual practice that the surety should enter, jointly and severally with the mortgagor, into all the covenants and stipulations, the performance and observances of which the surety is intended to guarantee, and not that a provision should be inserted in the mortgage deed that, although as between the mortgagee, and the surety the latter is only a surety, yet that, as between himself and the mortgage, he shall be deemed a principal debtor and shall not be released by any subsequent transactions between the mortgagee and the mortgagor which would otherwise have that effect. The effect of such a provision

is materially to vary, and indeed, to a great extent, to exclude, the operations of the rules of law which, in the absence of expenses contract, regulate the relations of principal and surety as between them and the creditors.”

In that case the plaintiff as mortgagee had sued the first defendant as mortgagor and the other defendants as mortgagor and the other defendants as sureties under a mortgagee for the recovery of principal and interest. His Lordship cited the above quote and held that the other defendants were in no better position than the suit defendant.

In paragraph 4 of the Mortgage the 3rd and 4th Plaintiff, who are the Mortgagors, made several covenants which they were under obligations to undertake during the countenance of the security for and charged to the 1st Defendant for the principal and interest on the loan adduced to the 1st Plaintiff. Counsel for the 1st defendant submitted, and I agree, that such covenants were material representations and undertaking for the 1st defendant to be able to lend the loan sums to the 1st Plaintiff. By allowing and granting the loan to the 1st Plaintiff, the 1st Defendant provided consideration for the covenants the 3rd and 4th Plaintiffs are bound to in the Mortgage Deed. In that light, I must point out that now under the Mortgage Act 2009 the legality of third party mortgages is codified and recognized. In the circumstances I find that the 1st Defendant provided consideration from the 3rd and 4th Plaintiffs covenants in the Mortgage Deed whereby their land was received as security

given by the 1st Plaintiff for the loan sums advanced by the 1st Defendant.

Secondly the 1st plaintiff's counsel submitted that the Mortgage Deed was not signed by the Mortgagee. He contended that the 1st Defendant cannot claim to be a party to an instrument it did not execute. Counsel for the 1st Defendant submitted that it is not a legal requirement for the lender to execute the Mortgage. Counsel relied on Section 115 of the Registration of Titles Act which provides:-

“The proprietor of any land under the operations of this Act may mortgage that land by signing in the form on the 11th Schedule to the Act”

Counsel argued that by implication the statutory requirement is for the person pledging the property to sign the pledge document. Under the section it is the Registered Proprietor being the one conferring rights or his interest in the property to another so he or she must sign. In Olinda DeSounza Figueiredo v/s Kasamali Nanji (1962)EA 756 the plaintiff signed a mortgage of her property to secure an advance to her and the mortgage deed was not signed by the mortgagee and the plaintiff sought a declaration that it was void for lack of the Mortgagee's signature and attestation thereof. Sheridan J held that once the mortgage had been registered it could not, in the absence of fraud under Section 184 of the Registration of Titles Ordinance or in the exercise by the High Court of its powers under section 185 of the Ordinance, be impeached. Further the

learned judge held that the defendants had acted on the mortgage and although the form was statutory and not contractual, the defendant could not repudiate their liability on the ground that the plaintiff had not signed the mortgage. In the instant case 1st Plaintiff, as principal debtor, the 3rd and 4th Plaintiffs, being the registered proprietors had signed the mortgage deed and all the parties has acted on the mortgage. Counsel of the 1st plaintiff, in his submissions in reply, conceded to this position when he submitted that the 1st Plaintiff was not seeking to escape liability for the sum due by citing absence of execution of the mortgage by the lender. That the effecting of impeaching the mortgage deed would be that the debt of 2.7 bn remains but as an unsecured debt. I find that non-execution of the mortgage by the 1st defendant did not invalidate the mortgage Deed.

Thirdly, counsel for the 1st Plaintiff submitted that the execution by the Directors of the 1st Plaintiff did not comply with the requirements of section 147 and the 11th Schedule of the Registration of Titles Act in that:-

- i. The signatures were not translated into Latin character
- ii. Neither were they attested, and
- iii. Lacked seal of the 1st plaintiff Company.

Section 148 RTA states:-

“No instrument or power of Attorney shall be deemed to be duly executed unless either:-

- a) The signature of each party to it 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 or her name are added to the instrument or power of attorney by or in the presence of the attesting witness at the time of execution, and beneath the signature or mark there is inserted Certificate in the form in the 18th Schedule to this Act.”**

In Frederick Zaabwe v/s Orient bank & Ors, SCCA No: 04 of 2006,
Hon Bart Katureebe J.S.C stated:

“.....the rationale behind section 148 requiring a signature to be in Latin character must be to make clear to everybody receiving that document as to who the signatory is so that it can also be ascertained whether he had the authority or capacity to sign. -----“

He further held that the signature of instruments under the Registration of Titles Act must comply with section 148. That failure to so comply renders the mortgage invalid.

Counsel for the 1st Defendant argued that the 3rd and 4th Plaintiffs’ signatures being the Registered Proprietors of the land, as

Mortgagors were attested by Paul Asiimwe Advocate so as to render the mortgage validly executed by the mortgagors. Further that the directors of the 1st Plaintiff and signed and the seal of the 1st Plaintiff affixed. He therefore submitted that that is proper execution by a Company under the companies Act and the Registration of Titles Act. Section 132 RTA provides for execution by a Corporation Seal or signatures of the officials of the Company.

As to execution of the documents, Mr. Wakabi, in cross-examination, acknowledged that the Legal Mortgage (exhibit D28) was signed by Abbey Mutebe and Juliana Nakiyto as mortgagors and witnessed by Paul Asiimwe an advocate. That on the last page is a Seal of Emerald Hotel Ltd and there scribal which show Director/Secretary.

I have studied the Legal Mortgage, exhibit D28. The parties thereto are Abbey Mutebe and Juliana Nakityo, being the registered proprietors as Mortgagors, M/s Emerald Hotel Limited, the Principal Debtor and M/s Barclays Bank of Uganda Limited, the Bank which is the Mortgagee. The relevant parties who give force to a Mortgagee Deed are the Mortgagors, as Grantor, and the Mortgagee, as Grantee of the rights and interest in the Security. On the execution pages the names Abbey Mutebe and Julian Nakityo described as the Mortgagors are typed with signatures scribbled against each name. They are attested to by Paul Asiimwe an Advocate. This clearly conformed to the requirements. Section 148 RTA and the 11th Schedule by showing that the mortgagors were

indeed the registered proprietors with authority to execute the same. See Fredrick JK Zaabwe v/s Orient Bank Ltd.

In my view this Mortgage Deed would stand valid even without execution by the Emerald Hotel Ltd, the Principal Debtor. However it was duly Sealed by the Company Seal in compliance with section 132 of the RTA which provides for execution by a Corporation Seal or signatures of the officials of the Company. In consideration of all the above I find that the Legal Mortgage, Exhibit D28, was validly executed.

With regard to the Collateral Debenture, exhibit D31, Counsel for the 1st Plaintiff submitted that it was defective for the following reasons:-

- It was collateral or additional to the mortgage and as such could not stand alone in absence of a valid mortgage between the lender and borrower. That the only so called mortgage was with strangers.
- The date of the mortgage to which it was Collateral are left blank, so creates doubt as to which was the mortgage that it was collateral to.

Counsel submitted that a document founded on one that is a nullity is itself a nullity and cited Macfay v/s United African Co. Ltd. [1969]3 All ER 1169.

- The debenture was not signed and sealed by the Bank. He contended that the Bank never became a party to the debenture.
- Though stamp duty was paid the debenture was never registered as a charge under section 96 of the Companies Act as no Certificate of its registration was obtained pursuant to section 99 of the Act.

As to whether the Collateral Debenture was collateral to a document which was itself a nullity I have already held that the Legal Mortgage was validly executed.

As to the blank spaces in the Debenture counsel for the 1st Defendant submitted that debentures are effective even though the registered particulars are missing or inaccurate.

I have studied the Collateral Debenture. The paragraph before the execution part is headed “THIS DEBENTURE IS COLLATERAL TO” and in the paragraph the Legal Mortgage to which it is collateral is described to be over the property comprised in LRV 2383 folio 7 Plot 3 Semiliki Walk Kampala which was the same land over which a mortgage in exhibit D28 was created and which Mortgage Deed was executed by Emerald Hotel Ltd, described as the Company in the Debenture, as the Principal debtor and to secure a sum of Ugshs. 2,700,000,000/=. It must be noted that both the Legal Mortgage and Debenture were dated 30th December 2005. What was required to be filled in the bank spaces were the registration date of the Legal Mortgage. It is clear by the date of execution of both

instruments the Legal Mortgage could not have been registered as both documents were executed the same day. In the premises I find no doubt as to the Legal Mortgage which the Debenture was collateral to. It must be exhibit D28.

True the Seal and witness part of the Bank is left blank. It is an agreed fact that the 1st Plaintiff executed a collateral debenture dated 30th December 2005 in favour of the 1st Defendant to secure the 1st Plaintiffs borrowing of Ugshs. 2,700,000,000/=. Mr. Wakabi in cross-examination acknowledged the same as exhibit D31.

In the circumstances counsel for the 1st Defendant argued that a debenture is a security offered by the company as proof of its indebtedness and securing the debt. She therefore submitted that the 1st Defendant, being the lender, needed not execute it. I agree and so hold.

As to lack of a Certificate of Registration issued pursuant to section 99 of the Companies Act, DW5, Kabiito Karamagi, testified that the Debenture dated 30th December 2005, exhibit D31, was registered under Certificate No: 6392 and the Further Debenture, exhibit D32, as instrument No: 7238.

As to the effect of no-registration, counsel for the 1st Defendant cited Re Monolithic Building Co. [1915] 1Ch 643 where it was held that where a Charge is void for no-registration, a receiver may act safely unless and until challenged by a liquidator or other party able to invoke the lack of registration and that prior to such

challenge the recover can validly sell assets of the company. In the instant case lack of Certificate of registration was not pleaded. Lack of it was only brought out in the course of hearing and even then without any amendment of the pleadings.

All in all I find that the Collateral Debenture was valid.

With regard to the Further Charge, exhibit D29, it was between Emerald Hotel Limited (1st Plaintiff) as Mortgagor and Done of Powers of Attorney from Juliana Nakityo and Abbey Mutebe the registered proprietor of the security land and surety to this Further Charge, of the one part and M/s Barclays Bank Uganda Ltd. (1st Defendant) as the Bank (Mortgagee). In the paragraph before the execution part of it is described as follows:-

“THIS FURTHER CHARGE IS

Supplemental to:

A LEGAL MORTGAGE created in favour of the bank over the Mortgaged Property to secure a loan of Ugshs. 2,700,000,000/= -----advanced to the Mortgagor by the Bank and registered under Instrument November 362509.”

Counsel argued that this Further Charge was supplemental to the Legal Mortgage which he contended was a nullity. He cited Auto Garage v/s Motokov (No.3)[1971]EA 514 and submitted that it is trite law that you cannot amend a nullity which he contended that the Further Charge was to cure the defective Legal Mortgage. In

view of my earlier holding that the Legal Mortgage was valid this argument cannot stand.

Secondly, counsel for the 1st Plaintiff argued that companies being artificial persons can only sign documents by their seals being attached to the document in question.

That the Directors of the 1st Plaintiff Company only signed as witness to the seal but which was not attached.

He submitted that the 1st Plaintiff Company would not be bound by this Further Charge, which it never sealed. He cited Articles 44 and 45 of the 1st Plaintiff Company's Articles of Association (exhibit D13) which states:-

“44-----every instrument to which the Seal shall be affixed shall be signed by a Director and shall be countersigned by the Secretary or by a second Director or by some other person appointed for the purpose”.

“45 All deeds executed on behalf of the Company may be in such form ----- as the Directors shall think fit and in addition to being sealed with the Seal shall be signed by a Director and countersigned by the Secretary or by a second Director.”

However, it is an admitted fact that the 1st , 3rd and 4th Plaintiffs executed a Further Charge dated 26th June 2007 in respect of LRV 2383 Folio 17 Semiliki Walk Way in favour of the 1st Defendant to

secure the 1st Plaintiffs' additional borrowing of Ughs. 900,000,000/= (exhibit D29).

The same was registered as Instruments NO: 382865 of 10th July 2007. In Coast Brick Works v/s Richard Ltd. [1964] EA Sir Trevor Gould stated:

“I think that anyone who challenges the validity of a duly registered instrument (if he can do so at all) must discharge a substantial onus”

In the instant case the 1st 3rd and 4th Plaintiff having admitted execution of the Further Charge and not having challenged its validity until after the demand for the loan they cannot at submission turn round to challenge its validity.

In the Further Charge the 1st Plaintiff Company is now the Mortgagor being Donee of a Powers of Attorney by the Registered Proprietors. The Power of Attorney apparently prepared in 2007 states:

“This Power of Attorney is deemed to have come in effect on the 20th November 2005.”

The Legal Mortgage (exhibit D28) is made on 30th December 2005.

Counsel for the 1st Plaintiff challenged the Powers of Attorney on the grounds that:-

- It was back dated supposedly to cure the defects in the Legal Mortgage.

- It is void for being inchoate for it was undated, save for the Registration date of 22nd January 2007. Going by that date he contended that by the dates of the 1st Mortgage and Debenture the 1st Plaintiff did not have the power to mortgage or otherwise offer the property as security.

With or without the Power of Attorney the Legal Mortgage, exhibit D28, can stand and be enforced on its own. Therein the Mortgagors are the Registered Proprietors with the authority to create a mortgage over the land and not the 1st Plaintiff.

In the Power of Attorney the Registered proprietors constitute the 1st Plaintiff their Attorney in their name and on their behalf to mortgage the land to the 1st Defendant as security. Thus the 1st Plaintiff's execution of the Further Charge of Mortgage being the Donee of the Power of Attorney. Power of Attorney are given legal effect by registration. Though the date of execution was left blank its effective date by registration is clearly indicated.

In the Collateral Debenture the 1st Plaintiff, in addition to the land, charge its undertakings, property and assets including stocks whatsoever of the Borrower, both present and future. The charge is beyond the land, which was the subject of the 1st Legal Mortgage and the Power of Attorney.

So with or without the Power of Attorney the Collateral Debenture could stand on its own.

With regard to the Further Collateral Debenture Counsel for the 1st Plaintiff argued that it was undated with only the date of the Directors Resolution which was filled in as 29 day of June 2007” and the date of URA Tax Receipt of 29th June 2007. He further argued that there was no evidence of the Further Collateral Debentures’ Registration under sections 96(2) and 99 of the Companies Act, Cap 110. He submitted that the legal effect of no registration was that the debt it was meant to secure remained an unsecured debt. Counsel cited Capital Finance co. Ltd. v/s States [1968]3 All ER 625.

I have studied the Further Collateral Debenture, exhibit D32. I note that it is indicated therein that it is collateral, inter alia, to:-

“(ii) A further charge dated 27th day of June 2007 -----“

And bears a URA stamp of 29th June 2007. That is evidence which shows that the Further Collateral Debenture was superseded by a Further Charge dated 27th June 2007 and stamp duty for it paid on 29th June 2007. The unchallenged testimony of DW5 is that the Further Collateral Debentures was registered as Instrument No: 7238. I also find that my finding herein above with regard to the effect of the no-registration equally applies to the Further Collateral Debenture.

All in all I find the documents on which the right to appoint a Receiver/Manager of the 1st Plaintiff was founded were valid. The issue is whether in the above circumstances the appointment of Mr.

Kabiito Karamagi Receiver/Manager of the 1st Plaintiff was lawful. To resolve this issue court must determine:-

- Firstly whether the circumstances justified the appointment of a Receiver.
- Secondly, whether the appointment was in accordance with the provisions of the law.

The Legal Mortgage, exhibit D28, clause 5(a) provided:

“At any time after the whole of the moneys hereby secured shall have become payable under the provisions clause 3(e) hereof or on becoming entitled to enter into possessions of the Mortgaged Property and without any previous notice to or concurrence on the part of the Mortgagor.

(i)---

(ii) the bank may without prejudice to paragraph 4 appoint such person or persons as it thinks fit to act as Receiver or Receivers of the income of the Mortgaged Property or any part thereof and -----“.

The Further Charge, exhibit D29, provided:-

“5. At any time after payment of all the monies hereby secured has been deemed and the Mortgagor has defaulted in paying the same, the Bank, in addition to any other powers enjoyed by it hereunder or under the

Registration of Titles Act and the Mortgage Act or under the General Law, shall be entitled to:-

(b) Appoint by writing under the hand of any manager or officer of the bank under the seal of the Bank any person or persons whether an officer or officers of the Bank or not to be a Receiver or Receivers of the income of or from the Mortgaged Property or any part or parts thereof and may ----“

6. The power to appoint a Receiver or Receivers may be exercised at any time after default has been made of terms and conditions upon which the loan has been made to the Mortgagor, and -----“.

The Collateral Debenture, exhibit D31, Clause 4(a) entitled the Lender at any time the security shall have because enforceable to appoint a Receiver or Manager of the whole or any part of the Charged premises. Clause 3 laid down events of default upon which the security would become enforceable. It was similarly provided in Clauses 9 and 10 of the Further Collateral Debenture, exhibit D32

Considering the above provisions of the loan documents and in view of my finding hereinabove on the events of default I find that the circumstances justified the appointment of a Receiver.

Section 4 of the Mortgage Act, cap 224 provided:

“ A receiver may be appointed in writing either by the Mortgagee himself or herself under a power expressly provided in the mortgage in that behalf or by the court, upon application for the appointment by the mortgagee.”

In the instant case the appointment was not by court but by the Mortgagee of Receivers to be in writing. Counsel for the 1st Plaintiff contended that under the above statutory provisions firstly the appointment had to be in writing and secondly such powers must be contained in the mortgage itself. He submitted that the mortgage and debenture documents in the instant case were defective and void and could not form the legal basis for a valid appointment of the 2nd Defendant.

I have already hereinabove found the mortgage and debenture documents valid. The Mortgage and Debenture documents, as shown above, empowered the Bank (1st Defendant) to appoint a Receiver/receiver in the circumstances provided therein. I have already found that such events had accrued in the instant case. Section 4 above required the appointment.

Also the Further Charge, exhibit D29, required the appointed to be:

“by writing under the hand of any manager or officer of the Bank or under the Seal of the Bank-----“

In his testimony Kabiito Karamagi, the 2nd Defendant, testified that on 16th June 2008 he was appointed Receiver/Manager of Christal Way Ltd. (formerly known as Emerald Hotel Ltd.).

Regarding the appointment of Mr. Kabiito Karamagi Receiver/Manager on record are the following documents:-

- ***Exhibit D98(A) a letter dated 16/06/2008 by the Legal Counsel/company Secretary of the 1st Defendant to Kabiito Karamagi whereby he was appointed as “Receiver/Manager of Christal Way Ltd. (formerly known as Emerald Hotel Ltd.). In the body of the letter Christal Way Ltd. is stated to be in breach of the terms and conditions of the loan and the instructions are to recover all the outstanding sum of money owed by Christal Way Ltd.***
- ***Exhibit D98 (B) Kabiito Karamagi’s letter dated 16/06/2008 to the Directors of Christal Way Ltd. whereby he notified them of his appointment Received/Manager Christal Ways Ltd.***
- ***Exhibit 99 Company form A7 dated and registered on 16/06/2008 being “Notice of Appointment of Receiver/Managers of Christal Way Ltd.***
- ***Exhibit 101 an advert in New Vision of 19/06/2008 of appointment of Receiver/Manager. It is headed “Christal Way Limited (In Receivership (formerly Emerald Hotel Ltd).”***

- **Letter dated 16/06/2008 (but also bears the date 16/06/2007). It is by the 1st Defendants Retail Director and the Head of Compliance to Kabiito Karamagi. Re: appointment as Receiver/Manager of Emerald Hotel Ltd -----exhibit D103.**
- **Exhibit D104 Company form A7 dated 16/06/2008 but registered on 23/06/2008 being a “Notice of Appointment of a Receiver/Manager of Emerald Hotel Limited,” and**
- **Exhibit D106 an advert in New Vision of 25/06/2008 being “Notice of Appointment of Receiver/Manager of Emerald Hotel Limited.”**

By the letters dated 16/06/2006 exhibits D104 and D106 above I find that there was valid appoint of Mr. Katiibo Karamagi Receiver/Manager of the 1st Plaintiff Company.

(c) Whether the appointment of the 2nd Defendant, Kabiito Karamagi as Receiver/Manager of the 2nd Plaintiff Christal Ways Ltd, was lawful. As already noted Kabiito Karamagi testified that on 16th June 2008 he was appointed Receiver/Manager of Christal Way Ltd (formerly known as Emerald Hotel Ltd.). This fact is also evidenced by exhibits D98(A), D98(B), 99 and 101. The issue is whether there was any arrangement between the 2nd Plaintiff and the 1st Defendant justifying the appointment of the 2nd Defendant Receiver/Manager of the 1st Plaintiff.

Counsel for the 2nd, 3rd and 4th Plaintiff submitted, and I so find, that it is not in dispute that the 2nd Plaintiff had neither operated a bank account with the 1st Defendant nor borrowed any sums of money from it, let alone signing any loan agreement or debenture in favour of the 1st Defendant. He contended that it was therefore unlawful for the 1st Defendant to appoint the 2nd Defendant as Receiver/Manager of the 2nd Plaintiff without a Debenture or Mortgage authorising it to do so. Counsel for the 1st, 2nd and 3rd Defendants submitted that the appointment by the 1st Defendant of the 2nd Defendant as Receiver for all interests and purposes was meant to be in respect of the 1st Plaintiff. Counsel in fact concluded that the Appointment of the 2nd Defendant as Receiver/Manager of the 2nd Plaintiff was done in error. I therefore find that the appointment of the 2nd Defendant as Receiver/Manager of the 2nd Plaintiff was unlawful.

Issue No: 8- Whether the 2nd Defendants take over of the land and property comprised in LRV 2383, folio 17 Plot 3 Semiliki Walk and the Business and Assets thereon was lawful?

Regarding the takeover, the 2nd Defendant, Mr. Kabiito Karamagi testified that on 11th June 2008 Ms. Ligomarc Advocates, the firm of lawyers he works with, sent a Demand Notice, exhibit D83, to the Registered Properties of the security land, Ms. Juliana Nakityo (3rd Plaintiff) and Abbey Mutebe (4th Plaintiff). Demanding from them, as sureties payment of the accumulated indebtedness to the sum of

shs. 4,800,000,000/= in various loans due from Christal Way Ltd, trading as Emerald Hotel Ltd, failure to pay within 7 days the bank was to proceed to realize the security to recover the above sums. On the same day Herbert Wamala (3rd Defendant) was instructed to advertise and sale the land under the Mortgage Act. The 3rd Defendants' advert was run on 16th June 2008.

The 2nd Defendant (DW5) was, on the same day, 16th June 2008, appointed Receiver/Manager of Christal Way Ltd, (formerly known as Emerald Hotel Ltd.), (exhibit D98A).

He on the same day filed Company Form A7 with the registrar of Companies (exhibit D99). On 17th June 2008, the 2nd Defendant with the 3rd Defendant (DW3) met Mr. Wakabi (PW1) at Emerald Hotel where the 2nd Defendant informed PW1 of his appointment and handed him the letter dated 16th June 2008 (exhibit D98B) wherein the Directors of Christal Way Ltd were required to prepare and submit a statement of Affairs as per the Companies Act. He contends that vide the letter dated 17th June 2008 (exhibit D58) which PW1 handed him in their meeting at the Hotel, the 1st Plaintiff acknowledged the 2nd Defendant's appointment as Receiver/Manager. That thereafter he notified all banks of his appointment and froze all bank transactions of the 1st Plaintiffs' bank Accounts. On 19th June 2008 he received a call from PW1 that the company could not access his accounts on account of his freezing instructions. The 2nd Defendant went to the Hotel where the Accounts Assistant, Caroline Anjo informed him that they required

shs. 2,895,000/= for hotel purchases required for hosting a workshop booked at the Hotel. He gave her the money out of a Standing Receivership Emergency Disbursement Fund capitalized by the 1st Defendant Bank of the Management of the Receivership. In the evening, with PW1's acknowledgment, he delivered and left with the Receptionist of what he called an Amended Notice of Appointment and demanded for a Statement of Affairs, exhibit D105. This was a letter by him notifying the directors of Emerald Hotel Ltd, of his appointment as Receiver/Manager. As already indicated above, also on record is the letter dated 16th June 2008, (exhibit D103) whereby he was appointed Receiver/Manager of Emerald Hotel Ltd, Company Form A7 (exhibit D104) registered on 23/06/2008 being notice of Appointment of a Receiver/Manager of Emerald Hotel Ltd, and an advert, exhibit D106 of 25/06/2008 in respect of this appointment. The 2nd Defendant testified that service of the letter exhibit D105 on the 1st Plaintiff should have been followed by a Statement of Affairs within 14 days but that most times debtors do not cooperate. In this case PW1, thereafter could not receive the 2nd Defendants' calls and eventually totally switched off his phones. He started encountering hostility from the staff at the Hotel. On 21st June 2008 Ms. Anjo and Ms. Angela Manager came to his officer and handed him a letter and a Cheque in refund of the monies he had advanced to finance the hotel purchases, exhibits D59 and D60. He testified that the Hotel was taken over on 23rd June 2008. That he went to the hotel with Herbert Wamala (3rd Defendant) escorted by a team of Ms. Saracen

Guards and asked the remaining Hotel staff to leave the premises and took over the Hotel at around 4.30 p.m. On the 24th June, with the Saracen guards who had remained to watch over the premise in night, carried an inventory of the hotel property.

The 3rd Defendant, Herbert Wamala, testified that he is a Court bailiff and auctioneer trading as Debt Masters. On 16th June 2008 the 1st Defendant Bank instructed him to sell the mortgaged property comprised in LRV 2383, folio 17 plot 3 Semiliki Walk to recover 4,800,000,000/= due from Emerald Hotel Ltd vide the letter exhibit D83. He advertised the sale in an advert run on 16th June 2008, exhibit D102. He testified about their meeting of 17th June 2008. Kabiito/Wamala with Wakabi and Angela Muwanga.

It must be noted that the letter exhibit D82 named the debtor to be Ms Christal Way Ltd, trading as Emerald Hotel. The advert, exhibit 102 was notice of intended sale by public auction or private treaty the mortgaged land **“....unless the mortgagor, Mr. Abbey Mutebe and Ms. Julian Nakityo pay is full the outstanding loan monies.....”**

He also testified that at their meeting of 17th June 2008, Mr. Kabiito gave PW1 a letter with a notice of his appointment Receiver/Manager. He however stated:

“Although Mr. Wakabi initially refused to accept the letter and the notice arguing that it was not addressed to

the right Company he did accept but refused to sign on it.-----“.

He further testified that consequently on 23rd June 2008, Mr. Kabiito and himself took over the hotel and placed it under the watch of Saracen Guards.

In cross-examination the 2nd Defendant acknowledged that the letter, exhibit D103, appointing him Receiver/Manager of Emerald Hotel Ltd. was actually written on 17th June 2008 but back dated to 16th June 2008 to correct an error. He also acknowledged that though exhibit D104, the Notice of his appointment as Receiver/Manager of Emerald Hotel, was dated 16th June 2008 it was not prepared on that date and was registered on 23rd June 2008 the date on which he took over Emerald Hotel Further that the advert of his appointment, Exhibit D106, was run on 25th June 2008, two days after they had taken over the Hotel. Also DW3 acknowledged in cross-examination that apart from the instructions from Ligomarc Advocates, dated 11th June 2008(exhibit D82) and the advert placed on 16th June 2008 he did not get any other instructions and did not place any other advert.

In an affidavit sworn in reply in Misc. appl. No. 318 of 2008 arising from this suit Mr. Kabiito Karamagi avers to have been appointed Receiver/Manager of Emerald Hotel Ltd. (the applicant in that application) on 16th June 2008, he notified Mr. Wakabi Kiwanuka (PW1) of his appointment on 17th June 2008. Subsequently he took

over the management of the hotel business and even financed its operations following the freezing of its accounts.

On 23rd June 2005 he was compelled to shut down the operations of the hotel. He further therein state:

“The hotel premises, which are now firmly under my control, have since remained closed and guarded by Ms Saracen guards on my instructions.”

He on 25th June 2008 advertised his appointment in the New Vision Newspaper.

An analysis of the above evidence shows that the 2nd Defendant took over the land and the business assets thereon on 23rd June 2008. He had earlier from 17th June 2008 interfered with the operations of the business.

Between 17th and 23rd June 2008, there is no evidence adduced of his appointment as Receiver/Manager of the Emerald Hotel Ltd. It is his evidence in cross-examination the Appointment as Receiver/Manager of Emerald Hotel Ltd. was written on 17th June 2008 and registered on 23rd June 2008 (the date he finally took possession). In summary his evidence is that he was appointed Receiver/Manager of Emerald Hotel Ltd. on 17th June 2008, he left Notice of this appointment with the Receptionist on 19th June 2008 and advertised on 25th June 2008. Counsel for the 1st Plaintiff submitted, and I so find that on 23rd June 2008, when the 2nd Defendant took over possession the only appointment in place was

that relating to Christal Way Ltd, which was neither a debtor nor the mortgagor. There is no lawful appointment in relation to Emerald Hotel Ltd. Further the back dating the Receiver/Manager appointment documents to 16th June 2008 had the effect of falsifying the documents whereby they told a lie about themselves. I agree with the 1st Plaintiff's counsel that such a document is non-exhibit in the eyes of the law. With due respect to Mr. Kabiito Karamagi such falsification was not the appropriate way to correct an error.

Counsel for the 1st, 2nd and 3rd defendants argued that although the Company names in the instruments of appointment of the Receiver/Manager was Christal Way Ltd, this was a genuine mistake in names caused by the plaintiff, in substance, the appointment was for the 1st Plaintiff and that all parties were aware of that. That the 2nd Defendant testified that the 2nd Instrument of appointment was merely issued to correct the name and this did not change the effective date of appointment that is why the date was the same. She accordingly submitted that the first Defendant made a fresh appointment, exhibit D103 and the 2nd Defendant filed a fresh notice, exhibit D114 and a fresh receiver notice made in the names of the 1st Plaintiff and contend that his court ought to find that no injustice was suffered by the plaintiffs.

Regarding the error the 2nd Defendant testified that following the meeting with PW1 further search was conducted in the company

Registry and it was discovered that there was another Emerald Hotel Ltd, file on which, among other, were :-

- Certificate of incorporation of Emerald Hotel Ltd.
- Memorandum and Articles of Association of Emerald Hotel Ltd signed by Pius Kassajja, and Anne Mary Murungi - Exhibit D14.
- Gazette of Notice of Change of name from Emerald Hotel Ltd, to Christal Way Ltd.
- Resolution indicating reasons for the change of names.

Tendered in evidence were the following:-

- Exhibit D11 Memorandum and Article of Association of Emerald Hotel Ltd. promoted by Abbey Mutebe and Juliana Nakityo dated 9/09/2003.
- Exhibit D12 Certificate of Incorporation of Emerald Hotel Ltd. as No: 66511 dated 9/09/2004.
- Exhibit D13 – Memorandum and Article of Association of Emerald Hotel Ltd. promoted by the Rita Bahemuka, Pius Kasajja and Anne Mary Marungi of 2005.
- Exhibit D14 – Certificate of Incorporation of Emerald Hotel Ltd. as No. 70952 dated 5/04/2005.

The above exhibit show incorporation of the two companies under the same name Emerald Hotel Ltd. by different promoters, one as No: 6651 of 9th September 2004 and the other as No: 7051 of 5th April 2005.

There are also the following exhibits:-

- Exhibit D21 (a), Resolution dated 1st September 2006 signed by Abbey Mutebe and Juliana Nakityo (the promoters of the Emerald Hotel Ltd. NO: 6651 of 9/09/2006) whereby Emerald Hotel Ltd. was changed to Christal Way Ltd.
- Exhibit D15 Certificate of Change of Name dated 24th October 2006 from Emerald Hotel Ltd. to Christal Way Ltd.
- Exhibit 21(b) Resolution signed by Abbey Mutebe and Juliana Nakityo on 1st September 2006 giving reasons for the change of name and shows, inter alia; that following a letter from the Registrar General's Office addressed to the Emerald Hotel Ltd. incorporated on 5/04/2005 (the 1st Plaintiff Company) a joint of meeting the two Companies was held and, among others, agreed that the Company of Abbey Mutebe and Juliana Nakityo changes its name Emerald Hotel Ltd. to Christal Way Ltd. to leave the exclusive use of the name to the 1st Plaintiff Company.

It is the evidence of the 2nd Defendant that he was on 16th June 2008 appointed Receiver/Manager of the Christal Way Ltd. (formerly Emerald hotel Ltd.). There had been two Emerald Hotel Ltd, one promoted by Abbey Mutebe and Juliana Nakityo incorporated under No: 66511 of 9/09/2004 and the other

promoted by Rita Bahemuka, Pius Kasajja and Anne Mary Marungi incorporated under No: 70951 of 5/04/2005.

By the appointment of the 2nd Defendant Receive/Manager the Emerald Hotel Ltd. incorporated under No: 66511 had changed to Christal Way Ltd. thus his appointment as Receiver/Manager of Christal Way Hotel (formerly Emerald Hotel Ltd.). By then the only Emerald Hotel Ltd. in the company Register under that name was the Emerald Hotel Ltd. incorporated under No: 70951 of 5th April 2005. It is the evidence of the 2nd and 3rd Defendants that Notice of the 2nd Defendant's Appointment as Receiver/Manager of Christal Way Ltd. (formerly Emerald Hotel Ltd.) was served on PW1. The 3rd Defendant testified that PW1 first refused to accept the notice arguing that it was addressed to a wrong company and that when he accepted to take the notice he refused to sign.

The 1st Plaintiff's lawyer had clarified this position in reply to the letter of the 1st Defendant's lawyer. M/s Ligomarc Advocates letter dated 4/04/2008, exhibit P25 addressed to M/s Christal Way Ltd. (formerly Emerald Hotel Ltd.) demanded for payment of shs. 4,800,000,000/= due to the 1st Defendant Bank.

M/s Tusasira & Co. Advocates, on the instructions of the 1st Plaintiff, in reply there to wrote:

“Your letter addressed to M/s Christal Way Limited” but served on Emerald Hotel Ltd, our clients -----has been

passed to us with instructions to reply thereto as follows:-

That in the first place your letter was wrongly addressed. The loan in question, giving rise to your instant claim, was made to Emerald Hotel Ltd, -----and not to Christal Way Ltd -----. Please kindly address your demands correctly in future to avoid unnecessary misunderstandings over the name(s).

-----“

So by 16th June 2007 when the 1st Defendant made the Appointment, exhibit D98(A), the 1st Plaintiff had already vide the communications between the parties respective advocates indicated that eth 1st Plaintiff Company was not Christal Way Ltd. That it was wrong to address to it communications intended to be served on the Christal Way Ltd.

It is the 2nd Defendant's evidence that to rectify the error a fresh appointment, exhibit D103, was made but back dated to the date of the first appointment. Counsel for the 1st Plaintiff submitted that by 23rd June 2008, when the 2nd Defendant took possession, the only appointment in place was that relating to Christal Way Ltd, which was neither a debtor nor the mortgagor. Counsel argued that by the date he took possession the 2nd Defendant already knew the truth, that his appointment in respect of Christal Way Ltd was wrongful. He contended that the solution was for the 2nd Defendant

to halt the entire process, retract the wrongful appointment and cause a proper one to be made, a notice thereof served on the 1st Plaintiff Company to give it 14 days to comply. Also register the appointment with the Registrar of Companies, publish the same, before moving to the stage of taking possession.

I agree with the submission of counsel for the 1st Plaintiff. Further it must be noted that the mortgagors were the 3rd and 4th plaintiffs, not their Company.

There is no evidence to show that they had ever been shareholders or officials in the 1st plaintiff Company. That put aside a limited Company is a corporate entity independent of its shareholders and directors. To argue that although the instrument was in respect to Christal Way Ltd. court should accept it as Notice of the 1st Plaintiff Company due to the confusion in names cannot stand. Though the 1st Defendant's right to appoint a Receiver had accrued, an appointment in respect of a different entity cannot be held to be valid and effective appointment in respect of the 1st Plaintiff. The instant case is distinguishable from the English case of Re: The Mihalis Angelos [1971]1 Q.B,[1970] All ER 125 as in the instant case it was not an initial premature appointment but an invalid appointment.

Counsel for the 1st, 2nd and 3rd Defendants submitted that the 1st Plaintiff is estopped from challenging the validity of the appointment because it dealt with the 2nd Defendant as receiver. Counsel cited Bank of Baroda v/s Panessor [1986]3 All ER 751

where Walton J held that the period between an invalid appointment and a subsequent fresh demand and valid appointment did not preclude the application of the doctrine of stopped barring the debtor from challenging the validity of the original appointment when the debtor had dealt with the receiver and the debenture holder and accordingly refrained from serving a fresh demand and making a new appointment. In the instant case it must be noted, and it is the evidence of the 1st 2nd and 3rd Defendants, that Mr. Kabiito Karamagi, was counsel working with M/s Ligomarc Advocates who were counsel dealing with the 1st Plaintiff in respect to the 1st Defendant's claim. It cannot in the circumstance be argued that from the meeting of 17th June 2008 PW1 dealt with the 2nd Defendant as Receiver/Manager to the exclusion of his being counsel for the 1st Defendant.

To infer notice in respect of Christal Way Ltd. to be notice to the 1st Plaintiff Company was an attempt by the 1st, 2nd, and 3rd Defendants' counsel to lift the 1st Plaintiff Company corporate veil without pleading and leading evidence on the same.

As I held earlier in Misc. appl. No,0318 of 2008 the Notice with respect to the 1st Plaintiff advertised in the New Vision Newspaper of 25th June 2008, was after the 2nd Defendant's takeover of the hotel on 23rd June 2008. Thereby denying the 1st Plaintiff the 14 days provided for under section 355 of the Companies Act, within which to submit a statement of Affairs of the company. It is actually the 2nd defendant's evidence that he did not get a statement of affairs

from the 1st Plaintiff. I find that the requisite notice under section 103 and 356 of the Companies Act were not given following 2nd Defendants appointment as Receiver/Manager of the 1st Plaintiff Company. The issue is what is the effect of lack of such notice to the appointment of a Receiver/Manager and the exercise of his functions as such. In the Kenya case of Siminyu v/s Housing Finance Company of Kenya [2001] 2EA 540 Ringera J held:

“----Without compliance with these statutory commands there can be no valid exercise of the power of sale and accordingly it cannot be said that the chargors equity of redemption is extinguished in any sale conducted in breach thereof. Neither can it properly be contended that the chargors remedy if any such sale has taken place is in damages as provided in section 77(3) of the Act. Without compliance with those conditions precedent the purported sale would be void and liable to be nullified at the instant of the Chargor -----.”

Considering all the above, I find that the 2nd Defendant’s takeover of the land LRV 2883 Folio 17 Plot 13 Semiliki Walk and the business and assets thereon was unlawful in that all due process was not effected.

Issue 9: whether the sale of the property comprised in LRV 2383 Folio 17 Plot 3 Semiliki Walk to the 4th Defendant was lawful and effectual?

Counsel for the 1st Defendant submitted, and I have so held, that the 1st Defendant's Mortgage and Charge over the suit land was valid and enforceable. Further that the 1st Plaintiff breached the Loan Agreement and consequently the 1st Defendant was entitled and exercise its rights under the mortgages within the powers under the Mortgages and Further Charge and the Mortgage Act, Cap 229 Under Clause 5(c) of the Mortgage Exhibit D28 and 5(a) of the Further Charge, (Exhibit D29), the 1st Defendant had power to sell the mortgaged property without recourse to court at any time after the monies secured had become payable and due, either by public auction or private contract/treaty. In Housing Finance Bank Ltd. & Another v/s Edward Musisi: SCCA No. 22 of 2010 Justice Kitumba, JSC, stated:-

“-----where payment of mortgage debt is payable by installments, the mortgage has the right to sell when the mortgagor fails to pay any of the installments.”

Counsel for the 1st Plaintiff submitted that the sale was unlawfully, firstly because it was founded on defective documents. Secondly that the 2nd Defendants appointment was void and consequently he never acquired the power or authority to sell. Thirdly, the sale was tainted with manifest irregularities and conducted in bad faith.

On the law relating to the duty of a receiver or mortgagee selling property pursuant to a power of sale contained in a mortgage both counsel cited Cuckmere Brick co. Ltd. v/s Mutual Finance Ltd. [1971] Ch. 949 where the Court stated:

“It is well settled that a mortgagee is not a trustee of a power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realize his security by turning it into money when he likes. Nor in my view is there anything to prevent a mortgagee from accepting the best bid he can get at an auction even though the auction is badly attended and the bidding exceptional low, providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes. If the mortgagee’s interest as he sees them conflict with those of the mortgagor, the mortgagee can give preference to his own interests, which of course he could not do were he a trustee of the power of sale for the mortgagor. -----I accordingly conclude both in principle and authority, that a mortgagee in exercising his power of sale does owe a duty of care to take reasonable precaution to obtain

the true market value of the mortgaged property at the date on which he decided to sell it. No doubt in deciding whether he has fallen short of that duty the facts must be looked at broadly and he will not be adjudged to be in default unless he is plainly on the wrong side of the line. (emphasis mine).

In Moses Jim Jjagwe v/s Standard Chartered Bank (U) Ltd, HCT-00-cc-cs-0375-2004 while referring to his judgment in National Bank of Commerce Ltd & 2 others HCCS NO. 0496 of 2003 Justice Yorokamu Bamwine stated:

“-----one of the fundamental equitable principles for enforcement of mortgages and the protection of borrowers is that the powers confirmed on a mortgagee must be exercised in good faith for the purpose of obtaining repayment. The burden is on the mortgagee to show that it had taken all reasonable steps to obtain the best price reasonably obtainable on the sale of the property”. (emphasis mine).

In this regard counsel for the 1st Defendant pointed out that the 1st Defendant though its Counsel, M/s Ligomarc Advocates commenced the security realization process. The 3rd Defendant, as Auctioneers, was appointed by the 1st Defendants’ counsel to conduct the sale of the suit property by virtue of the mortgage, (Exhibit D82). Subsequently, the 3rd Defendant advertised the suit property for sale as per exhibit D102. That while the sale was

slated for 16th July 2008, it did not proceed due to an interim order issued on 15th July 2008 obtained by the 2nd, 3rd, 4th Plaintiffs. The said interim order was extended to 25th July 2008. Upon its expiration, the plaintiffs did not renew the same. Consequently, the sale of the suit property was conducted by private treaty on 15th August 2008. By the terms of the sale Agreement the property was sold at Ushs. 2,200,000,000/= and the purchaser paid a non-refundable commitment fee of Ushs. 1,000,000/=. The balance of Ushs. 2,100,000,000/= was payable within thirty (30) days.

Counsel therefore submitted that the 1st Defendant properly exercised its right, exercise reasonable care to obtain the best possible price and that the sale was proper and effectual at the time it was conducted.

Counsel for the 3rd and 4th Defendants argued that the 1st Defendant was permitted to make a private contract of sale of the property to the 4th Defendant pursuant to the terms of the Mortgage and that there was no impediment to the sale. He contended that the 4th Defendant after completion of the sale is free to secure specific performance from the 1st Defendant on payment of the full price of shs. 2,200,000,000/= which the 4th Defendant is willing to do as soon as the court lifts the injunction on the sale transaction.

The 3rd Defendant's advert to sell the suit property was run on 16th June 2008. It was a notice of intended sale by "Public Auction/Private Treaty".

The terms of sale were indicated to be;

“(a) Subject to reserve price.

(b) Payment of full price upon acceptance of the offer.

(c) Offer subject to acceptance from Ms Ligomarc Advocates.”

The date of sale was indicated to be 16th July 2008. It is the 3rd Defendants testimony that there was no other advert ran before the sale to the 4th Defendant.

The above advert shows that the above terms of sale applied whether the sale was by public auction or private treaty. Those were the term of sale brought to the notice of the mortgagors and the public.

As evidence of bad faith, counsel for the 1st Plaintiff pointed out that the 3rd Defendant’s advert of sale gave a specific date and time of sale of 16th July 2008. Evidence shows that the sale took place on 15th August 2008. I agree with counsel that the intended advertised sale lapsed on 16th July 2006. As of the date of the Agreement of sale nearly a month after, there was no Notice of Sale. Justice demanded that where Receiver/Manager adjoined an advertised sale for such a long time the same should have been re-advertised.

In Yosiya Sajabi v/s Musa Umar Anireliwalla [1956]23 EAC 7 Brigg, AgP of the East African Court of Appeal stated:-

“The English rule that although a mortgagee, in selling is not a trustee for the mortgagor, he must sell in good faith and at a reasonable price, applies in Uganda. It obviously requires that a mortgagee must not take a lower price than he knows to be obtainable. It also, I think, leads to the conclusion that if the mortgagee acts in secret and conceals what he is doing from the mortgagor, he may expose himself to some suspicions of not acting in good faith.

This suspicions must at least be increased if the mortgagee sell in secret with knowledge that the validity of his notice of sale is challenged on grounds (which are) not prima facie unreasonable.” (emphasis mine).

In the instant case there were two pending cases wherein the advertised sale was being contested. The 2nd Defendant testified that about a day or two after the takeover, which was on 23rd June 2008, he was served with a plaint and an application for an interim order filed by 1st Plaintiff Company against the bank and himself. Further that not long after, in July 2008 they were also served with a plaint and an application for an interim injunction commenced by the 2nd, 3rd and 4th Plaintiffs. Though I agree with counsel for the 1st, 2nd and 3rd Defendants that by the date of the Agreement of sale, 15th August 2008, the court Interim Order of stay had expired on 17th July 2008, the defendants were aware of the main two suits, one before the Commercial Division, and another before the Land

Division, where the sale was being challenged on grounds, which I find not prima facie unreasonable. I am however alive to the Supreme Court holding in J.W.R Kazoora v/s Rukuba SCCA 13 of 1992 that there is no law in our land that forbids dealings in land which is a subject of a pending suits.

The advert, exhibit D102, stated that the sale was subject to reserved price. There is no evidence adduced of the reserved price, however the 3rd defendant testified that the defendant testified that the defendant bank appointed Byokusheka & Company Valuers who issued a Report dated 4th July 2008. The Report, exhibit D111B, put the Market Value at Ushs. 3,875,000,000/= and the forced Sale Value at Ushs. 2,650,000,000/=.

The 2nd Defendant testified that after the advertisement of sale of the property and the Receivership they received several offers from interested buyers who included:-

- Hajji Kiyimba who offered USD. 1.500.000/= (approx shs.3bn/=) but withdrew his offer pending he conclusion of the Court cases.
- Mr. Mo, a Chinese, who offered US# 1,000,000/= payable in installments spread over two months. His offer was considered low. This offer was considered attractive by the Bank.
- Shumuk Investments Ltd. (4th Defendant, who offered 2.200.000.000/=.

The above testimony is corroborated by that of the 3rd Defendant. The 2nd Defendant stated:-

“In the absence of any legal impediment, a sale agreement was executed between Mr. Wamala and Shumuk with respect for the immovable assets for a sum of shs. 2,200,000,000/= out of which shs. 100,000,000/= was paid a non-refundable deposit while the balance would be paid within 30 days. It was expected that the moveable assets would be sold under a different arrangement.”

However the above testimony is contradicted by DW7 Mukesh Shukla who stated:

“Land and development comprised in the land extends to furniture being development ‘as is’. That is everything on the site. Sofa sets are linked to business. There was no separate agreement for movables like furniture. There was no separate agreement for the purchase of business of good will. The hotel business was part of the developments-----.”

Paragraph 4.2 of the Sale Agreement, exhibit P38, indicated that the property was sold and bought “as is”.

Mukesh Shukla’s evidence and the provisions of the agreement shows that the sale extend to property which was outside the Mortgage and Further Charge under which the 3rd Defendant was

appointed an agent to sale. This was outside the scope of the property advertised for sale by the 3rd Defendant.

Both counsel for the plaintiffs argued that the price sold at was unfairly arrived at in view of the fact that the Valuation before the sale had put the face sale Value at shs. 2,650,000,000/= (exhibit D111B). The sale was as per the advert subject to a reserved price. The defendants have not adduced evidence of the reserved price. In absence thereof I consider the Forced Sale Value to be the reserved price and the sale had to be at or above that price yet the agreement shows a purchase price of shs. 2,200,000,000/= .

In cross-examination the 3rd Defendant stated:

“Terms of sale were that it was subject to Reserved Price. I did not have a Reserved Price. Reserved Price means the base and it was shs. 2,650,000,000/=.....”

I find it unreasonable for the defendants to have sold the suit land plus immovable business assets at a price far below the Forced Sale Value of the suit land and fixtures thereat. This was against the duty owed in equity to obtain the best price.

The advert provided for payment of a full price upon the acceptance of the offer but the Sale Agreement shows that the 4th Defendant paid a merger from sum of shs. 1,100,000,000 against the total purchase price of shs. 2,200,000,000/= the balance to be paid within 30 days from the execution of the agreement. In McHugh v/s Vision Bank of Canado [1913] AC 299 the Privy Council stated:

“It is well settled law that it is the duty of a mortgagee when realizing the mortgaged property by sale to behave in conducting such realization as a reasonable man would behave in the realization of his own property, so that the mortgage may receive credit for the fair value of the property sold.”

Though the law doesn't prohibit payment by installments, the mode of payment agreed upon in the agreement was against the terms of payment as made open to the Mortgagors and the public in the advert. In cross-examination the 4th Defendant admitted that the Sale Agreement was not in conformity with the terms of sale in the advertisement because it was not payment in full.

The amount paid of shs. 100,000,000/= as against the agreed sum of shs. 2,200,000,000/= was too small in the circumstances. It is strange that under sale by private treaty where the agreed purchase price was Ugshs. 2,200,000,000/= an agreement was executed upon payment of only a sum of shs. 100,000,000/= with the balance payable within thirty days. Thereby closing out all other would have been potential buyers. Further the money received pursuant to the sale was meant to liquidate the 1st Plaintiff's indebtedness to the 1st Defendant. The evidence adduced shows that the shs. 100,000,000/= cheque was received by the 2nd Defendant who banked it on his law firm account where funds remained for ten (10) months. This money was not remitted to the 1st Defendant so not utilized in recovery of the debt. Though the

agreement of Sale, exhibit P101, provided that there was a “non-refundable commitment fee,” the undisputed evidence is that on 16th June 2009 the 2nd Defendant refunded the sum to the 4th Defendant.

The 2nd, 3rd and 4th Defendants testified that the balance was not paid within the agreed period of 30 days because there was a Court Order stopping the sale.

The 30 days were expiring on 15th September 2008. The evidence adduced shows that on 14th September 2008, a period considered to be within the 30 agreed days, the 4th Defendant purported to pay the balance by cheque in the sum of shs. 2,100,000,000/= made payable to Ligomarc Advocates (exhibit P79). Such a cheque in the above sum was issued against the standing Bank of Uganda Registrations which do not allow third party cheques of more than shs. 20,000,000/=.

Both the 2nd and 5th Defendants admitted, in cross-examination, that they were aware that such a cheque was incapable of being paid. Therefore with the defendants’ respective knowledge the cheque was issued and accepted well knowing that it was of no payment effect. In cross-examination the 3rd Defendant stated and counsel submitted that this cheque was issued as security for the balance. In Sembule Investments Ltd. v/s Uganda Baati Ltd, M.A No. 664 of 2009 Justice Mulyagonja held that:

“The practice among businessmen and women in Uganda issuing cheques as security with the instructions that they should not be banked or negotiated should be strongly discourage because it goes against the very nature of such negotiable instruments.”

The 2nd Defendant referred to the cheque as an instrument of conformity which gave him comfort. This defeats logic.

Counsel for the 2nd, 3rd, and 4th Plaintiffs argued that the 4th Defendant was not an independent buyer but a client of Ligomarc Advocates who were also the lawyers for the 1st Defendant. It was the 2nd Defendants testimony that he is also a partner in Ligomarc Advocates, yet the Receiver/Manager in the same case. Such relationship put the fairness of their discussions in doubt.

The Agreement of sale, exhibit P101, provided that the deposit sum was a “non-refundable commitment fee”. However it is the evidence of the 2nd Defendant that on 16th June 2009 he refunded the sum to the 4th Defendant who accepted the same. Counsel for the 2nd, 3rd and 4th Plaintiff submitted that the sale whose price was refunded stands repudiated. This Court Order stayed the sale pending the conclusion of the suit. It did not terminated the sale. Refund of the deposit sum was in violation of the terms of the sale agreement and doing so in the pendency of the suit the sale and were overtaken by the event of repudiation thereof. Therefore as the case proceeded on there was no Agreement of sale of the suit property to adjudicate

on. In the circumstances the 4th Defendant cannot demand specific performance of a repudiated agreement.

Where the duty of the mortgagee and his agent is breached in Tse KwongLam v/s Wong Chit Sen [1983] 3 All ER 54 the Privy Council held;

“Where a mortgagee fails to satisfy the court that he took all reasonable steps to obtain the best price reasonably obtainable --the court will, as a general rule, set aside the sale and restore to the borrower the equity of redemption of which he has been unjustly deprived.”

In the above circumstances I find the 1st Defendant and her agents did not act in good faith and did not obtain a fair market price. Further the agreement has been rescinded by the refund of the deposit towards the purchase price. So there was no lawful and effectual sale of the suit property.

Issue No: 10 – Whether the lodgment of a Caveat on the suit property by the 5th Defendant, Mukesh Shukla was lawful.

The Caveat, exhibit P54, was placed by Mukesh Shukla, in his own name, claiming an interest as registered proprietor of the land. As a requirement under section 139 of the Registration of Titles Act the caveator must claim an “estate or interest” in order to be entitled to lodge a caveat. It is an undisputed fact that the registered

proprietors, of the suit at all material times, were the 3rd and 4th plaintiffs (Juliana Nakityo and Abbey Mutebe).

It was therefore an obvious falsehood for Mukesh Shukla to claim interest in the land as Registered Proprietor whereas not. In the circumstances the Registrar should not have proceeded to register the caveat.

As required by section 139(3) a Caveat must be supported by a Statutory Declaration. Therein, however, Mukesh Shukla stated that he is ***“the Director of Shumuk Properties Ltd. the purchase of the above mentioned land in that capacity I make this declaration.”***

I agree with counsel for the 4th and 5th Defendant that the caveat should be read together with the Statutory Declaration. Counsel contended that the two documents read together show that it is the 4th Defendant who bought the property caveated and the 5th Defendant was only the human agent who carried out the lodgment of the caveat on behalf of the 4th Defendant. Further that the Registrar of Titles should have entered the caveat lodged by the 4th Defendant and not by the 5th Defendant. Counsel submitted that this was an error which court should order to be rectified under Article 126(e) of the Constitution.

True a corporate entity acts through its directors or officers. However, still the caveat exhibited a falsehood as it indicated the caveator's interest or estate in the property to be that of a

Registered Proprietor. Neither the 4th Defendant nor the 5th Defendant was a Registers Proprietor. In paragraph 3 of the Statutory Declaration it is stated:

“That on the date of the purchase the terms of the payment were duly agreed upon as Uganda shillings Two Billion Two Hundred Million (2,200,000,000/=) which the purchaser duly paid.”

The evidence considered hereinabove clearly shows that this was a false averment. In the jurat the statutory declaration is undated therefore incurably defective. These were not mere technicalities to be accommodated under Article 126 (e) of the Constitution. In the circumstances I find that the caveat was unlawfully registered as it did not satisfy the statutory requirements.

Issue No.11- Whether the Management Agreement executed between the 2nd and 4th the suit premises were valid and or lawful.

In Miscellaneous Application No. 0318 of 2008 this Court ordered:-

1. Conclusion of the agreement of sale and transfer of the land at LRV 2383 Folio 17 Plot 3 Semiliki Walk Kampala is stayed until the final disposal of HCT-00-CC-CS-0170-2008.
2. The 2nd Respondent shall not exercise his power of sale under the Debenture until the final disposal of the said suit.
3. Pending the disposal of the said suit the 2nd Respondent shall continue to control and manage the Hotel business and other assets of the Applicant which are the subject of the Debenture.

In the premises the hotel should immediately be re-opened for operation.

4. No further construction shall be carried out on the land until the final disposal of this suit.

Mr. Kabiito Karamagi, the 2nd Defendant, testified that to capitalize the operations of the hotel he agreed with the 1st Defendant officials to source a local entrepreneur who would be ready to capitalize the operations and operate the hotel. That Shumuk Properties Ltd, who had expressed interest in purchasing the property as a Compromise position indicated its readiness to capitalize the operations of the hotel and operate manage the same on his behalf. In the result the Management Agreement, exhibit D113, dated 9th September 2009 was concluded. The agreement, inter alia, provided:

“1.1 The Receiver hereby appoints Shumuk to manage the Hotel by performing on site management and operations functions of the Hotel, run, supervise, direct and control the management aspects of the Hotel.

2.1 Shumuk will pay a monthly fee to the Receiver of shs. 10,000,000/= ---VAT inclusive and payable every month in advance.”

4.0 Shumuk shall, with the exercise of utmost diligence, manage Emerald Hotel Ltd. for and on behalf of the Receiver for an initial period of six (6) months from the

handover date, with the option to renew the arrangement every six(6) months by initial agreement of the parties.

8.1 In the performance of its duties, Shumuk shall act solely as agent and for the account of the Receiver. Nothing in this 'Agreement shall constitute or be construed to be or create a partnership or joint venture between Shumuk and the Receiver or constitute or create a property interest of Shumuk in the Hotel-----."

Counsel for the 1st, 2nd and 3rd Defendants submitted that the Management Agreement was valid and lawful as the same was executed by the 2nd Defendant in exercise of his powers as Receiver. He quoted from the Debentures, exhibits D31 and D32 which provided that the Receiver/Manager shall have powers of taking possession of, getting in, carrying on, selling, leasing and dealing with the property and assets of the borrower Under Clause 10(xii) and 5(6), n of exhibits D31 and D32 respectively, the Receiver/Manager was empowered to execute and do all such acts, deeds and things as to the Lender or any Receiver that appear necessary or proper for or in relation to any of the purposes aforesaid. Counsel submitted that the Receiver was empowered to exercise his discretion to determine the suitable and best course of actions to take in carrying on the business of the Borrower. That the Management Agreement was lawful because under it the 2nd Defendant was indeed carrying on or concurring in the carrying on and dealing with property or assets of the 1st plaintiff with the 4th

Defendant acting solely as agent and for the account of the 2nd Defendant, the Receiver.

On the other hand counsel for the 1st Plaintiff contended that the 2nd Defendant acted wrongfully when, in defiance of the order of court made a 16th March 2009 in Misc. appl. No. 318 of 2008, he refused to immediately reopen the hotel himself and after six months, instead handed over the hotel and all the plaintiffs' property to the 4th and 5th Defendants under what counsel termed the so-called Management Agreement. Counsel submitted that the Management Agreement was unlawful and void. That in substantive terms, the arrangement between the 2nd, 4th and 5th defendants was coached in bad faith, unreasonable, and unfair on the plaintiff and in further breach of the 2nd Defendant duties.

In his submission counsel for the 2nd, 3rd and 4th Plaintiffs disputed the submission of counsel for the 1st, 2nd and 3rd Defendants, that the Management Agreement was in line with the Court Order of 16th March 2009 and that it is in line with the hotel industry practice to operate hotels under management agreements/arrangements.

Counsel contended that the 2nd Defendant with the consent of the 1st Defendant parted with the possession of the hotel and the land to the 4th Defendant. Counsels submitted that the 1st Defendant was party to the contemptuous and illegal decision to hand over the hotel to the 4th Defendant.

Counsel for the 4th and 5th Defendants argued that there was no way the 2nd Defendant could have re-opened the hotel other than contracting it out to a Competent Manager.

To resolve this issue court has to consider the intention of the parties to the Management Agreement. This can be deduced from the wording of the agreement, the events, or conduct of the parties pre and post the execution of the Agreement. In his testimony the 2nd Defendant stated:

***“It would seem that Shumuk got to learn of the proposals we were making to the players in the hotel industry and instead accused the bank of acting in badfaith Shumuk also contended that it had a valid agreement with the bank’s agents and further indicated that it was ready to pay the balance as it was not party to the application wherein the orders of stay had been issued.*”**

Shumuk also indicated that it has expressed interest in purchasing the property because it had a strategic decision to expand into the hospitality industry. As a compromise position, Shumuk indicated that it was also ready to capitalize the operations of the hotel and manage the same on my behalf. It is then that the management agreement was concluded.”

The plaintiffs' evidence shows that following the execution of the agreement the 4th defendant fielded a press Conference/interview whereat the 4th Defendant's directors claimed that Shumuk Group had bought the hotel. Exhibit P43 is an article on the New Vision of 12th October 2009, therein is an article entitled "Shumuk buys Emerald Hotel." Therein the reporter, Chris Omony wrote:

"The Shumuk Group has bought the multi-billion Emerald Green Hotel on Bombo Road in Kampala....."

The hotel will be managed by Shumuk Properties, the group's subsidiary company.

***Godfrey Ochiel, the General Manager disclosed that the hotel would be re-named Shumuk Emerald Green Hotel. ---
-----"***

On the 21st August 2013, this Honorable Court visited the locus and among others Court found the following:-

- A burner one floor above the Reception Area with the following at the top"
"SPRINGS INTERNATIONAL HOTEL LTD"

Below that were also the following:

(i)"SPRING INTERNATIONAL HOTEL – KASESE
PLOT 1-5 KILEMBE RD"

(ii) "EMERALD HOTEL KAMPALA, PLOT 3 OFF – BOMBO ROAD"

(iii) “SPRINGS INTERNATIONAL APARTMENTS – KAMPALA
(PLOT 2 COLVILLE STREET)

- Another banner on which was a logo with words;
“SHUMUK the Aluminum People”.

The party to the Management Agreement was Shumuk Properties Ltd. however in cross-examination the 2nd Defendant admitted that Shumuk Group of Companies had been their clients for over ten (10) years and have Springs International Hotel Ltd. as a subsidiary which runs the Group hotel business. He conceded that as Managers he expected Shumuk to avail him with operations amounts and the management account. That he had received Management accounts of 2012 which however covered the entire businesses of Shumuk Properties Ltd. Exhibited 105 an Annual and Financial Statements for the year ended 31 December 2012 is entitled:

“Shumuk Properties Ltd.

(Trading as Emerald Hotel)”. Therein it is stated:

“Emerald Hotel is a business branch of Shumuk Properties Limited operation as a semi-autonomous business under a management contract-----.”

The agreement provided that the Manager will pay the 2nd Defendant a monthly fee of shs. 10,000,000/= . Counsel for the 1st Plaintiff argued that the common undertaking of a “manager” is that the proprietor employs him to do the given jobs and in consideration

the employer pays him a wage, allowance or salary. In the instant agreement it was the manager to pay its employer. In normal circumstances the manager would have accounted to the 2nd Defendant and from the management proceeds or income to be paid for its services an agreed sum or commission. The Financial Statements show that the 4th Defendant carried on business in total independence from the 2nd Defendant, generated its own income and paid the 2nd Defendant only the agreed monthly sum of shs. 10,000,000/= which in its records is termed “rent”. Counsel for the 1st Plaintiff observed that the 4th defendant was not accountable to the 2nd Defendant for the income generated from the business save for the obligation to pay the agreed monthly sum.

As of the date of the locus visit the 4th Defendant was clearly running businesses at the suit premises, yet no evidence was adduced of the 6 monthly renewals provided in clause 4.0 of the Management Agreement.

The above evidence shows that the 2nd Defendant and the 4th Defendant concluded the Management Agreement in furtherance of the 4th Defendant’s plans to buy and own the property and business thereat. After the conclusion of the Agreement the 4th Defendant proceeded to operate the business and manage the property as part of the 4th Defendants larger business family. In the circumstances I find the Management agreement and consequent entry into possession of the suit premises and business by the 4th Defendant unlawful.

Issue No: 12 – Whether the parties are entitled to any remedies prayed for respectively?

The Plaintiffs prayed for judgment against the Defendants, jointly and severally for:-

- (a) A declaration that the 1st Defendant breached its contract with the 1st Plaintiff in the way it handled its loan agreement with the 1st Plaintiff.
- (b) A declaration that the 1st Defendant wrongfully recalled the partial loan advanced to the 1st Plaintiff.
- (c) A declaration that the purported appointment of the 2nd Defendant as Receiver and his seizure and takeover of the property comprised in Plot 3 Semiliki Walk were wrongful and/or unlawful and void.
- (d) A declaration that the purported sale of the hotel was wrongful and void.
- (e) A declaration that the purported Management Agreement between the 2nd and 4th Defendant was wrongful, illegal and void.
- (f) A declaration that the 5th Defendant wrongfully lodged a caveat on the suit property.
- (g) An order of cancellation and of removal of the said caveat from the suit Certificate of Title.
- (h) A permanent injunction to restrain the 1st Defendant from seeking to realize the securities given by the 1st, 3rd and 4th

Plaintiffs in respect of the loan advanced by the 1st Defendant to the 1st Plaintiff.

- (i) A permanent injunction restraining the 2nd Defendant from exercising the powers of Receiver/Manager over the business, assets, understandings or other interests of the 1st and 2nd Plaintiffs.
- (j) A permanent injunction to restrain the 5th Defendant from taking possession, ownership or otherwise being involved in the affairs, businesses and operations of Emerald Hotel or the suit property and business.
- (k) An order for vacant possession of the suit premises.
- (l) An order for the return of the 3rd and 4th Plaintiff's Certificate of Titles from the suit land, free of encumbrances.
- (m) Special damages to the 1st Plaintiff of Ug.shs 7,587,174,958 (Uganda shillings seven billion, five hundred eighty seven million, one hundred and seventy four thousand nine hundred fifty eight only) as set out in paragraphs 9, 13 & 14 in the plaint.
- (n) An order that the Defendants do jointly and/or severally pay the 1st Plaintiff the sum of shs. 432,691,025 for every month which they remained in possession of the suit property/business from 23rd June 2009 until handover and vacant possession of the hotel.
- (o) General damages.

(p) Interest on (m) above at the rate of 20% per annum from the date of breach and or (n) above at court rate from the date of justice, until payment in full.

(q) Costs.

The 1st Defendant prayed for:

1. The Counter-claimed outstanding loan sum due and owing amounting Shs. 5,136,000,000/=.
2. A declaration that the 1st Defendant is a secured Lender entitled to enforce its security in the suit property.
3. In the alternative, that the 1st Defendant holds an equitable mortgage and is entitled to foreclose.
4. Interest on the decretal sums at the commercial lending rate from July 2008 until payment in full.
5. General damages for breach of Contract and obtaining the loan through deception.

The 1st, 2nd and 3rd Defendant jointly prayed for dismissal of the suit and costs.

The 4th and 5th Defendants prayed for:

1. Dismissal of the suit with costs.
2. The sale be completed.

Resolution of this issue must be in line with my findings and holdings herein. These are:-

1. The 1st, 3rd and 4th plaintiffs have in their respective pleadings disclosed a cause of action against the 4th and 5th Defendants.
2. The 1st Plaintiff was advance a loan in the total sum of Ushs. 3,600,000,000/= by the 1st Defendant Bank.
3. The alleged acts of deception and dishonesty have not been proved to the required standard and the 1st Defendant was not influenced by any such conduct to grant the 1st Plaintiff the two loan facilities.
4. The 1st Plaintiff is indebted to the 1st Defendant in the sum of Ugshs. 4.800.000.000/= as of 27th December 2007 when the loan account was closed.
5. The 1st Defendant Bank lawfully recalled the loan facility.
6. The 1st Plaintiff was in breach of the loan agreement when it failed to pay the loan principal and interest in the manner agreed upon and when it failed to bank the proceeds from the Hotel Business in its account with the 1st Defendant Bank.
7. (a) The appointment of the 2nd Defendant as Receiver/Manager of the 1st plaintiff was valid and lawful.
(b) The Appointment of the 2nd Defendant as Receiver/Manager of the 2nd Plaintiff was in error and unlawful.
8. The 2nd Defendants takeover of the land in LRV 2383 folio 17 Plot 3 Semiliki Walk and business and assets thereon was unlawful in that al due process was not effected.
9. There was no lawful and effectual sale of the suit property.
10. The Caveat was unlawfully registered on the suit property as it did not satisfy the statutory requirements.

11. The Management Agreement and consequential entry into possession of the suit premises and businesses by the 4th Defendant were unlawful.

In view of the above findings and holdings I make the orders herein below:-

1. The Prayers by Shumuk Properties Ltd. (4th Defendant) and Shukla Mukesh (5th Defendant) fail.
2. M/s Barclays Bank Uganda Ltd. (1st Defendant), Kabiito Karamagi (2nd Defendant and Herbert Wamala (3rd Defendant's) prayer to dismiss the plaintiffs' case fail.

3. Judgment is entered in favour of Barclays Bank Uganda Ltd. (1st Defendant/Counterclaim) on the Counter-claim in the following terms:-

(a) A declaration that the 1st Defendant/Counter-Claimant is a secured lender entitled to recover its security in suit property.

(b) The 1st plaintiff proved indebtedness in the sum of shs. 4,800,000,000/=.

(c) The case of Robinson v/s Hararwe (1848) 1 Exch 850 sets the main principle for awarding general damages as being the compensatory principle whose aim is to put the injured party so far as money can do it, in the same position as he would have been in had the contract been performed. The loan amount held proved and awarded above included shs. 1,200,000,000/= interest

earned by the 1st /Defendants as a result of the 1st Plaintiff failure to pay. As testified by the 2nd Defendant upon appointment of a Receiver interest ceased to accrue. In the circumstances the 1st Defendant is awarded nominal damages for breach of the loan agreement the sum of shs. 100,000,000. No interest is awarded.

4. Judgment is entered in favour of M/s Christal Way Ltd. (2nd Plaintiff) in the following terms:

- Declaration that the appointment of the 2nd Defendant, Kabiito Karamagi as Receiver/Manager of the 2nd Plaintiff was in error and unlawful.

5. Judgment is entered in favour of M/s Emerald Hotel Limited (1st Plaintiff) , Julian Nakityo (3rd Plaintiff) and Abbey Mutebe (4th Plaintiff) in the following terms:-

(a) Declarations that:-

- i. The 2nd Defendants takeover of the property comprised in Plot 3 Semiliki Way was wrongful and/or unlawful and void.
- ii. The Purported Sale of the suit property was wrongful and void. The sale of the suit property is accordingly set aside and the 1st, 3rd and 4th Plaintiffs” equity of redemption is hereby restored.
- iii. The purported Management Agreement between the 2nd and 4th Defendant was wrongful, illegal and void.

iv. The 5th Defendant, Mukesh Shukla, wrongfully lodged a Caveat on the 'suit property; the Registrar of Titles is accordingly ordered to cancel and remove the Caveat from the Certificate of Title.

(b) The 4th Defendant, Shumuk Properties Ltd. is restrained from taking possession, ownership or otherwise being involved in the affairs, business and operations of Emerald Hotel or the suit property and business. The 4th and 5th Defendants are accordingly ordered:-

(1) To vacate the suit property and business forthwith.

(2) Handover the suit property and business in as is state, as at the date of this judgment, to the 1st Plaintiff.

(c) The 2nd Defendant is restrained from exercising the powers of Receiver/Manager over the suit property, business, assets, undertakings or other interests of the 1st, 3rd and 4th plaintiff until all the legal and statutory process of taking possession, appointment of Receiver, foreclosure and sale are complied with.

(d) Special damages:- Special damages must be specially pleaded, strictly proved and properly assessed by the trial court.

The 1st Plaintiff prayed for Ugshs. 7,587,174,958/= as detailed in paragraphs 9,13, 14, 15, 16,17 and 18 of the Plaint. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in his/her pleadings.

In paragraph 9(j) of the Plaintiff, the 1st Plaintiff claimed that as of June 2008 when the 2nd Defendant forcefully took possession and occupied the premises Phase II construction material valued at Ushs. 266,210,000/= were seized by the 2nd Defendant. PW1's testimony was that Saracen Guards were arrested with construction materials stolen from the site. However no evidence was adduced to prove the alleged theft. The Plaintiff relied on exhibit P35 which is a Consolidated Statement of Affairs as at 22nd June 2008 apparently prepared by the 1st Plaintiffs "Directors, Anthony Wakabi Kiwanuka and Ann Mary Manafulu. In the schedule thereto the Phase II Construction Materials are merely listed among "Other Assets" without any supportive documents. I find this claim not proved to the required degree.

In paragraph 13 of the Plaintiff the 1st Plaintiff claims that due to the 1st Defendant's failure to disburse the finances for the construction of Phase II of the hotel the 1st Plaintiff lost an anticipated net income as projected at the time of the initial agreement being the sum of Ughs. 2,395,746,658/= as per the cash Flow Projection, exhibit P34. This claim would arise where the 1st Defendant was in breach of disbursement of funds for Phase II of the constructions. In resolving issued No.6 I have held that the 1st Defendant was not in breach. In the premises this claim cannot be sustained.

In paragraph 16 the 1st Plaintiff claimed that on 16th April 2009 the 2nd Defendant transferred a sum of Ugshs. 14,000,000/= from the

1st plaintiffs account with Stanbic Bank and transferred the same to his Law Firm of Ligomarc Advocates. This is evidenced by the Bank Statement, exhibit P36 and the same is not disputed by the 2nd Defendant. In view of my holding on the Receivership, I find this claim proved and the sum stands refundable to the 1st Plaintiff and I so hold.

In paragraph 17, the 1st Plaintiff prays for loss of business on the operational Phase I of the hotel since the takeover. By the 1st Plaintiffs' computations, exhibit P32, for the period of one year – i.e. 23/06/2008 – 23/06/2009, - the 1st Plaintiff lost revenue to the tune of shs. 4,168,000,000/=, this would translate into shs. 347,400,000/= per every subsequent month. The 1st Plaintiff therefore claims Ughs, 347,400,000/= per month from 23/06/2008 until the Defendants vacate the premises. The plaintiff did not adduce any documents to support this computation. However, through the 2nd Defendant, the plaintiff adduced Shumuk Properties Ltd, Report and Financial Statements for the years ending 31st December 2010, 31st December 2011 and 31st December 2012 (exhibit P104 and 105). These reports were acknowledged by the 2nd Defendant and Mukesh Shukla. The schedules to the Income Statements particularly show Emerald Hotel operations. When this court visited the locus it found the hotel operational. The 4th Defendants Financial Statements show that the Hotel business was running and income generated. My study thereof have particularly found the following:

No.		2010 (shs.)	2011(shs.)	2012 (shs.)
1.	Revenue	567,200,447/=	975,760,073/=	908,605,258/=
2.	Cost of sale	248,063,886/=	577,256,999/=	529,944,916/=
3.	Profit before over head costs	319,136,561/=	398,503,074/=	378,658,342/=
4.	Profit after overhead costs	48,651,250/=	81,172,391/=	17,179,675/=

Taking the three years as the benchmark the 4th Defendant's average annual revenue from the Emerald Hotel operations was Ugshs. 817,187,926/= translating into monthly income of Ugshs. 68,098,994/=. Going by the 4th Defendants' Revenue statements the 1st Plaintiff is awarded special damages in the sum of 6,537,503,408/= for the periods from 23/06/2008 to 23/06/2016, and for the period thereafter a monthly sum of Ugshs. 68,098,994/= until the defendants vacate the suit premise.

In the paragraph 18, the 1st Plaintiff claims tied up capital in the uncompleted Phase II of the project in the sum of shs. 4,446,210,000/= on which it claims to be losing a sum of Shs. 1,022,628,300/= per year of the 4th Defendants' occupation computed at the 1st Defendant's lending rate as per exhibit P32. I have already held that the 1st Defendant was not in breach when it did not release further funds for the construction of Phase II of the

project. So the defendants cannot be held liable for capital tied up in the uncompleted Phase II of the project. Accordingly this claim fails.

Further the 1st Plaintiff specifically claimed for a sum of Ugshs. 432,691,025/= for every month the defendants remained in possession of the suit property. Counsel submitted that this sum is computed basing on the computed annual income for the first year (Ugshs. 5,191,425,300/=), less the expenses that would have been incurred over each year by way of operational expenses, the resulting net annual income is then divided by twelve, to arrive at a monthly net income. I however find this claim a double claim by the 1st Plaintiff as the claim in paragraph 17 already resolved above. This claim therefore fails.

General Damages: - By the Defendants' actions the plaintiffs were wrongfully deprived of their property rights. The 1st Plaintiff was put out of business. In Fredrick J.K. Zaabwe v/s Orient Bank Ltd. & Others, Court found that the appellant should receive enhanced compensatory damages not only for the unwarranted and wrongful deprivation of his property but also because of the conduct and apparent arrogance of the respondent. The 2nd Defendant is a lawyer who acted in disregard of the law. There was unjustified enrichment of the 4th Defendant on property and business it had no claim. In all their conduct the 2nd and 3rd Defendants were acting as agents of the 1st Defendant. The advertisement of the 2nd Plaintiff as a loan defaulter in absence of any loan liability must

have negatively affected its business, reputation and good will. The 2nd Plaintiff was tarnished as loan defaulter. In the circumstances, counsel for the 1st Plaintiff prayed for an award of Ugshs. 2,000,000,000/= in general damages. While counsel for the 2nd, 3rd and 4th Plaintiff prayed for an award of Ugshs 5,000,000,000/=. Considering all the above I find the following proportionate awards of general damages appropriate:

- The 1st Plaintiff – Ugshs. 982,725,501/=.
- The 2nd Plaintiff – Ugsh. 100,000,000/=.
- The 3rd and 4th Plaintiff – Ugshs. 60,000,000/=.

Interest: The Plaintiffs prayed for interest on the decretal sum.

Counsel for the 1st Plaintiff submitted that in Commercial disputes interest should be at or about the prevailing bank rate from the date when the sum accrued till payment in full. See ECTA (U) Ltd. v/s Geraldine Namiriime & Anor SCCA No: 9 of 1999. Counsel prayed for interest at the rate of 23% per annum, being the prevailing Commercial Bank interest rate.

Under section 26 of the Civil Procedure Act, interest is at the discretion of court. The plaintiffs are awarded interest on the decretal sums at the rate indicated herein below.

Costs follow the event. The plaintiffs are awarded costs of this suit.

In the final result, I make the following Orders:-

1. Judgment is entered in favour of the plaintiffs against the defendants jointly and severally, in the terms herein below:-
- 2 I make the declarations and orders in 5(a)(i)-(iv), (b) and (c) above
3. The 1st Plaintiff is awarded the following special damages:
 - (i) Ugshs. 14,000,000/=
 - (ii) Ugshs. 6,537,503,408/= for the period from 23/06/08 to 23/06/2016.
 - (iii) Ugshs. 68,098,994/= per month from 23/06/2016 until the defendants vacate the suit premises.
4. The plaintiffs are awarded general damages in the sums indicated below:-
 - (i) 1st Plaintiff – Ugshs 982,725,510/=.
 - (ii) 2nd Plaintiff – Ugshs. 100,000,000/=.
 - (iii) 3rd & 4th Plaintiff – Ugshs. 60,000,000/= (jointly).
5. The 1st Plaintiff is awarded interest on the special damages as indicated below:-
 - (i) On 3(i) above at the bank rate of 23% per annum from 16th April 2009 till payment in full.
 - (ii) On 3(ii) and (iii) above at the bank rate of 23% per annum from the date of judgment till payment in full.
6. The Plaintiffs are respectively awarded interest on the general damages at the court rate from the date of judgment till payment in full.
7. The plaintiffs are awarded costs of this suit.

8. On the counter-claim judgment is entered against the 1st Plaintiff, in favour of the 1st Defendant – Claimant in the sum of Ugshs. 4,800,000,000/=, the same to be set-off from the 1st Plaintiff's decretal sums awarded.

Dated this15th.....day of.....July.....2016.

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LAMECK N. MUKASA

JUDGE

K&K | Kaggwa & Kaggwa
Advocates