

THE REPUBLIC OF UGANDA

(LAND DIVISION)

CIVIL SUIT NO. 487 OF 2012

5 SHIRE PETROEUM CO. LTD.....PLAINTIFF

VERSUS

1. WAMALA PETER

2. KIBWIKA GEORGE

10 3. ABC CAPITAL BANK LTD.

Before: Lady Justice Alexandra Nkonge Rugadya

JUDGMENT

Introduction:

15 The plaintiff is a limited liability company duly registered in Uganda, dealing in the business of supply and distribution of petroleum products in East Africa. The 1<sup>st</sup> defendant is the registered proprietor of land comprised in Private Mailo **Kyadondo Block 107, Plot 565**, land situate at Kiwanda Nakyesanja with a fuel station thereon.

20 The suit land was managed by the 2<sup>nd</sup> defendant on the authority of the 1<sup>st</sup> defendant and offered to the 3<sup>rd</sup> defendant as security for a loan facility.

It is the plaintiff's claim that the 2<sup>nd</sup> defendant on behalf of the vendor (1<sup>st</sup> defendant) committed the 3<sup>rd</sup> defendant to write to the 2<sup>nd</sup> defendant guaranteeing to release the certificate of title to suit property, upon depositing on the bank account held by the 2<sup>nd</sup> defendant in the 3<sup>rd</sup> defendant bank, a sum  
25 of **Ugx 100,000,000/=** (Uganda shillings one hundred million only).

On the 3<sup>rd</sup> of April, 2012 the 1<sup>st</sup> defendant entered into a sale of land agreement with the plaintiff for the sale and purchase of the suit land. In fulfilment of part of the obligation, the plaintiff deposited **Ugx 100,000,000/=** on the account on the 2<sup>nd</sup> defendant.

- 5 It is the plaintiff's further claim that before the said purchase, the plaintiff carried out due diligence on the suit property and discovered the interest of the 3<sup>rd</sup> defendant for a facility advanced to the 2<sup>nd</sup> defendant.

10 However, to this date, the defendants, jointly and severally, have still not released the title deed of the suit land for the plaintiff despite several reminders of the same and hence this suit.

**Defence by the 1<sup>st</sup> and 2<sup>nd</sup> defendants:**

The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a joint defence in which the 1<sup>st</sup> defence admitted that he had authorized the 2<sup>nd</sup> defendant to utilize the suit land as part of the securities for a loan facility advanced by the 3<sup>rd</sup> defendant bank.

- 15 The two defendants denied liability, and claimed that the interest of the 3<sup>rd</sup> defendant bank had been disclosed to the plaintiff before the purchase.

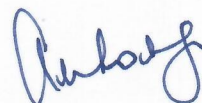
That the plaintiff was fully aware of business relationship between the 1<sup>st</sup> and 2<sup>nd</sup> defendants and between the 2<sup>nd</sup> and 3<sup>rd</sup> defendant and the terms of the release of the title to the plaintiff.

- 20 The two defendants however never turned up in court to testify.

**Defence by the 3<sup>rd</sup> defendant:**

- 25 The 3<sup>rd</sup> defendant denied the plaintiff's claims in this suit contending that the said company did not approach or secure any agreement or arrangement with the 3<sup>rd</sup> defendant bank for the release of the certificate of title and mortgage prior to purchasing the suit property from the 1<sup>st</sup> defendant.

That the 3<sup>rd</sup> defendant who was neither party nor privy to the terms in the sale agreement between the plaintiff and the 1<sup>st</sup> defendant never guaranteed the



release of the certificate of title; and to date conditions for the release of title in the mortgage deed have not been fulfilled by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

The 3<sup>rd</sup> defendant while acknowledging that the **Ugx 100,000,000/=** was deposited on the 2<sup>nd</sup> defendant current account, alleged however that several  
5 cheques over **Ugx 100,000,000/=** were issued and the said account remains overdrawn to date.

That the refusal to release the certificate of title was justified since the conditions for its release had not been fulfilled and thus its actions were legal and lawfully done in exercise of its contractual powers as a legal mortgagee.

10 **Agreed facts:**

At the scheduling the following were identified as the agreed facts:

a) ***The 1<sup>st</sup> defendant is the registered proprietor of the suit land and the same was mortgaged by the 2<sup>nd</sup> defendant to the 3<sup>rd</sup> defendant.***

15  
b) ***The plaintiff through the 1<sup>st</sup> defendant and before purchasing the suit land committed the 2<sup>nd</sup> defendant to write to the 3<sup>rd</sup> defendant who confirmed that after depositing Ugx 100,000,000/= on the 2<sup>nd</sup> defendant's account the title would  
20 be released after fulfilment of the terms in the letter dated 28<sup>th</sup> March, 2012.***

25  
c) ***The plaintiff together with the 1<sup>st</sup> defendant later on executed a sale of land agreement, with the plaintiff purchasing from the 1<sup>st</sup> defendant the suit land.***

d) **The plaintiff deposited Ugx 100,000,000= on the account of the 2<sup>nd</sup> defendant held with the 3<sup>rd</sup> defendant as part payment for the purchase of land.**

5 e) **This was done to ensure the release of the title deed to the plaintiff by the 3<sup>rd</sup> defendant, which, despite the said consideration, has never released the said certificate of title.**

**Issues:**

The following issues were agreed upon:

10 1. **Whether the 1<sup>st</sup> defendant breached the terms of the sale agreement entered into with the plaintiff when they failed to fulfill all the conditions set by the 3<sup>rd</sup> defendant for the release of the title deed to the plaintiff.**

15 2. **Whether the 3<sup>rd</sup> defendant is under obligation to hand over the certificate of title to the suit land to the plaintiff.**

3. **Whether the plaintiff is entitled to the remedies sought.**

**Issue No. 1:**

20 **Whether the 1<sup>st</sup> defendant breached the terms of the sale agreement entered into with the plaintiff when they failed to fulfill all the conditions set by the 3<sup>rd</sup> defendant for the release of the title deed to the plaintiff.**

25 I have carefully read the pleadings, the evidence relied on by each side and submissions made by counsel, which I shall not reproduce in detail but which I will refer to in this judgment.

**Analysis of the law:**

**Section 101 of the Evidence Act Cap. 6** provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence

of facts which he or she asserts must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

5 The dispute in this suit is based on the question as to whether or not there was a contract enforceable against the 3<sup>rd</sup> defendant and if so, if the 3<sup>rd</sup> defendant's refusal to release the certificate of title constituted a breach.

In **section 10(1) of the Contracts Acts 2010** a contract is defined as:

10 ***'an agreement made with a free consent of parties with the capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound'***.

15 It is settled law that once a contract is valid, it automatically creates reciprocal rights and obligations between the parties thereto and when a document containing contractual terms is signed, then in the absence of fraud, or misrepresentation the party signing it is bound by its terms. (**See: William Kasozi versus DFCU Bank Ltd High Court Civil Suit No.1326 of 2000**).

According to **sections 42(1) and 67 of the Contract Act 2010**, a contract is to be performed either within a reasonable time or at that time provided by the applicable trade usage/ practice to the contract in question.

**Analysis of the evidence:**

20 In the present case, and in alignment with the above principles, the plaintiff company relied on the evidence of one witness, **Pw1**, Mr. Nsamba Abbas Matovu. He also presented several documents to prove that the 3<sup>rd</sup> defendant bank had made a commitment by which it agreed to release the certificate of title for the suit land, upon condition of payment of a specified sum of money and variation  
25 of the terms of the existing mortgage deed.

**PExh1** is the certificate of title for **plot 565, plot 107**, land at Nakyasanja (suit land) measuring 0.024 hectares, proof that the 1<sup>st</sup> defendant, Wamala Peter (who

got registered on the suit land at 6<sup>th</sup> January, 2011) was the rightful owner at the time of the sale of the suit land.

It is not disputed that at the time of this transaction the said title was kept at the bank under the mortgage obtained on 13<sup>th</sup> May, 2011 by the 2<sup>nd</sup> defendant who had the authority from the registered owner (1<sup>st</sup> defendant) to use it as security for both the mortgage and further charge, as reflected in the instruments.

**DExh 2** is the legal mortgage deed dated 9<sup>th</sup> May, 2011 between the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, secured by different titles, including that for the suit land. A further charge/ overdraft facility was granted by the 3<sup>rd</sup> defendant bank, on 19<sup>th</sup> December, 2011, **DExh 3**. The overdraft itself was secured by about six titles, including the one for the suit land.

Under the overdraft facility, the 1<sup>st</sup> and 2<sup>nd</sup> defendants and one Arinaitwe Amon were the registered proprietors of the titles pledged as security, with the 2<sup>nd</sup> defendant as the principal debtor.

By his counsel's submissions, the plaintiff maintained that a contract had been created when the bank committed itself to release the title upon payment of the amount demanded for.

Counsel's arguments were based on several correspondences made between the bank and the 2<sup>nd</sup> defendant. He referred to the specific contents of the letter dated 9<sup>th</sup> March, 2012, **PExh 2** to the Manager, ABC Capital Bank Ltd: **'Sale of plot 565 block 107 Mengo Kyadondo**, which I reproduce here, below:

*The above property has been sold to SHIRE PETROLEUM LTD C/O CRANE ADVOCATES.*

*I had mortgaged the property to you as security together with other securities to obtain a loan of **Ugx 400,000,000/=** (four hundred million) shillings.*

*The current outstanding loan is **Ugx 334,193,450/=**.*



This is therefore to request you to release the TITLE DEED for the above property on receiving **Ugx 100,000,000/=** (one hundred million only).

The balance of **Ugx 234,193,455/-** will remain secured with the remaining securities.

5 Hope my request will meet your quick response.

.....

Kibwika k. George

Cc NSAMBA ABBAS

CRANE ADVOCATES

10 **PExh 3**, was the response from the 3<sup>rd</sup> defendant bank, addressed to George Kibwika by which the bank having been notified of the sale between the plaintiff company and the 1<sup>st</sup> defendant, wrote back to state as follows:

‘ **Sale of plot 565 block 107,**

15 Reference is made to your letter dated 9<sup>th</sup> March, 2012 in respect to the sale of the above.

We have obtained approval to release plot No. 565 block ... Mengo Nakyasanja upon fulfilment of the following:

1. **Ugx 100,000,000/=** (shillings one hundred million only) should be credited into your current account number.....with ABC Capital Bank Ltd to be used to reduce your outstanding obligations with the bank;
2. Creation of a fresh mortgage to capture new security position to be drafted by our lawyers as all properties held for your existing obligations were created under one instrument number.

25 Upon fulfilment of the above, the above mentioned property will then be released.  
(emphasis mine).’



For the plaintiff, the argument in submission therefore was that whereas the first condition in that letter (**PEXh 3**) requiring the 2<sup>nd</sup> defendant to pay the deposit had been fulfilled, the second condition which required the bank to create a fresh mortgage to reflect the new undertaking was never fulfilled by the bank, whose  
5 duty it was to ensure that the necessary changes were made.

**The 3<sup>rd</sup> defendant's defence:**

In *paragraph 6* of the 3<sup>rd</sup> defendant's WSD, the bank specifically however stated that the certificate could not be released unless the conditions for release as stated in the mortgage deed were signed by the defendants.

10 The 3<sup>rd</sup> defendant's sole witness, **Dw1** Ms. Sauda Ucungi a Stressed Assets and Recovery Manager refuted any commitment between the bank and the plaintiff. She did not however indicate whether or not the bank took the trouble to invite its customer to enter into a fresh deed to reflect the variation in terms; or whether or not the defendants had signed the fresh deed and if not or the reasons why it  
15 did not.

Her claim was that the bank was never informed about the payment made specifically for that purpose; and that following the said payment of the deposit the bank had expected that it would receive communication from the plaintiff to that effect and no such communication had been made.

20 In *paragraph 12* of the WSD, the bank further claimed that the account was overdrawn and that as at 26<sup>th</sup> October 2012 it had an outstanding balance of **Ugx 500,000,000/=**.

This as noted by court, was about seven months after the bank had agreed to receive the payment and vary the terms of the deed. More intriguing however  
25 was the fact that the said sum of **Ugx 100,000,000/=** had by the said date of 26<sup>th</sup> October, 2012 already been deposited by the plaintiff on the account.

The 3<sup>rd</sup> defendant through the evidence of **Dw1** claimed in *paragraph 6* of her witness that the 3<sup>rd</sup> defendant bank never guaranteed the release of title to the



plaintiff or the 1<sup>st</sup> and 2<sup>nd</sup> defendants and that no contractual relationship existed between the plaintiff and the bank.

5 She also testified that as soon as the money was deposited on the account, the 2<sup>nd</sup> defendant started making withdrawals, and that the account is currently overdrawn.

Attached to the WSD were the two bank statements of the accounts held by 2<sup>nd</sup> defendant in the bank, tendered in as exhibits **DExh 1A and DExh 1 B**. The entries made did not indicate that either of the two accounts had been overdrawn.

10 Referring to a letter, **(PEXh.3)**, by which the bank had made its position known, the contention was that it was neither addressed to the plaintiff nor did it engage him or guarantee the release of the title.

15 That since there was no written commitment secured from the bank, it had no obligation to fulfill any of the terms as spelt out in that letter or purported sale agreement for that matter, which the plaintiff sought to rely on.

That during cross examination **Pw1** who is an advocate of experience himself admitted that the bank was not a party to the sale agreement **(PEXh 4)** between the plaintiff and the 1<sup>st</sup> defendant; and also admitted that the plaintiff did not engage the 3<sup>rd</sup> defendant bank at any time.

20 According to counsel therefore, the witness failed to state the premise of the alleged obligation owed to the plaintiff in law or fact. Under those circumstances, the bank therefore had rights under the mortgage deed to hold onto the title where the 2<sup>nd</sup> defendant had failed to fulfill his obligations to pay the outstanding sum, plus the interest to the bank.

25 That the title never passed on to the plaintiff and in any case, the 1<sup>st</sup> and 2<sup>nd</sup> defendants as pleaded were willing to refund the deposit, thus leaving the bank to pursue its legal right under the deed **(DExh2)** and further charge, **DExh3**, as it never utilized the said deposit.

Counsel referred to an authority where it was declared that an instrument can only operate as estoppel or a contract between the parties who are privy to it; and that unless registered it would be inoperative against third parties. (**Haruna Semakula vs Stanbic Bank (U) Ltd Civil Suit No. 423 of 2009**).

5 In that regard therefore, the unregistered sale agreement between the plaintiff and 1<sup>st</sup> defendant as suggested by the plaintiff in the submissions could not confer any obligation to the 3<sup>rd</sup> defendant to release the said title.

He further also referred to **sections 14 and 15 of the Mortgage Act** which spell out the circumstances under which the right of discharge and release of the  
10 mortgage by the bank, which rights could not however be exercised in this case since the debt owed was still due.

As noted by court, the deposit as agreed upon in **PEXh 3** had been made to the 2<sup>nd</sup> defendant's account, **DEXh 1 'A'** by the plaintiff but contrary to the 3<sup>rd</sup> defendant's pleadings, none of those bank statements showed any entries made:  
15 debit or credit, after the date of 25<sup>th</sup> October, 2012.

What is clear is that prior to the deposit, the closing balance was **Ugx 241,336,211.48/=**. When the deposit was made, even after deducting the monthly loan repayment the balance should have been more than three hundred million.

20 On 27<sup>th</sup> April, 2012 going by the last column for the closing, it is clear that more than **Ugx 150,000,000/=** had been deducted under circumstances which only the bank could explain. Even with the deductions, there was more than double the amount required by the bank to release the title.

This was sufficient proof that the 3<sup>rd</sup> defendant never told the truth about the  
25 account being overdrawn. Nowhere in the 3<sup>rd</sup> defendant's trial bundle was the said figure of **Ugx 500,000,000/=** reflected as the outstanding amount, which makes one wonder where the said figure had been picked from.

Besides is the fact that the bank could not account for the deductions that were made soon after the said deposit was made, which were not attributed to the 2<sup>nd</sup> defendant.

5 The relationship drawn between a banker and its customer is multifaceted. For once a person opens up a bank account and deposits some fund the two enter into a contractual relationship, with the bank primarily as the debtor and the customer as the creditor.

10 On the other hand, when the customer as in this case, takes up a loan with the bank, the bank is considered to be the creditor/trustee, with the customer as debtor and also beneficiary in respect of all the property as entrusted to the bank.

A trust has been defined as a relationship which is recognized by equity. It arises where property is vested in a person known as a trustee, who is under a duty to hold for the benefit of others known as *cestuis que trust* or beneficiaries.

15 Unlike a power which is discretionary, a trust is imperative. This means that if a person accepts to act as a trustee, he must do as the settlor directs. (***Equity & Trusts, David Bakibinga 2011, Law Africa, page 66***).

20 Another aspect of the relationship as created in that regard, is that of a principal and agent by which the bank becomes an agent and the customer as the principal.

Agency authority specific or implied, is conferred where the customer's actions indicate that it has given the bank permission to act on their behalf and in the customer's interests.

25 An agent must therefore satisfy the principal by making contracts on his behalf and by dealing with the principal's property. In short, the agent brings the principal into a relationship with third parties.

Such authority can be derived from the instrument or inferred. The bank in that regard acts therefore on the customer's behalf to manage and invest the assets entrusted to it- a fiduciary duty that would require it as the agent to serve in the best interest of the principal while applying reasonable care, skill and diligence in the management of its customer's affairs.

It ought not to use the position of trust and confidence to gain any advantage over its customer or derive benefits at the customer's expense. **(Ref: o Dr. Anjani Kant Faculty of Law : General Relationship between Banker and Customer www. Ikouniv.ac.in)**

10 All the above aspects as highlighted are in general terms based on trust.

**Pw1** in paragraph 9 of his statement admitted in fact that the plaintiff was only a buyer and not party to the mortgage or overdraft transactions. Indeed there is no disputing the fact that the arrangement as per the correspondences **PEXh 2 and PEXh 3** were made between the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. But behind it all was the plaintiff as the funder.

Although the bank had not been privy to the sale transaction between the plaintiff and the 1<sup>st</sup> defendant whose title it was holding as security for the mortgage, the plaintiff became party to that arrangement between the 2<sup>nd</sup> and 3<sup>rd</sup> defendants when through the 2<sup>nd</sup> defendant it offered and the 3<sup>rd</sup> defendant accepted the deposit of the agreed sums, in exchange for the release of the title.

The argument by the bank was therefore self-defeating. For on the one hand it claimed that upon depositing the required sum the plaintiff ought to have written to the bank. At the same time it denied any relationship or obligations towards the plaintiff and interestingly, this was after receiving the deposit.

25 Given the fact that in this case the 1<sup>st</sup> and the 2<sup>nd</sup> defendants had entrusted the bank with several securities, this court finds the suggestion hard to believe that in the normal course of bank lending business or repayment of bank loans its dealings are restricted to only account holders.

As per the sale agreement, **PEXh 4** the land was signed by the 1<sup>st</sup> defendant and the plaintiff on 3<sup>rd</sup> April, 2012 after the commitment under **PEXh 3** had been made in writing to the 2<sup>nd</sup> defendant.

5 The mortgage was already in existence. Both the plaintiff and the 2<sup>nd</sup> defendant had relied on assurances by the bank and through the deposit made by the plaintiff the bank accepted the payment from the plaintiff in fulfilment of their part of the bargain.

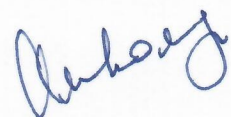
As correctly submitted by the plaintiff's counsel, what remained outstanding was for the bank to create a fresh mortgage to capture the new security position,  
10 which it failed to do.

If there has been an offer to enter into legal relations on definite terms and that offer is accepted the law considers that a contract has been made. Whether there has been an acceptance of an offer may be inferred from words or documents that have been passed between the parties or from their conduct. (**Ref. J.K Patel vs Spear Motors Ltd Civil Appeal No. 4 of 1991**).  
15

In this instance and in effect therefore, the correspondence **PEXh2** was an offer from the 2<sup>nd</sup> defendant (as agent of the 1<sup>st</sup> defendant) and the plaintiff on the one hand; and **PEXh3** was the acceptance of the offer by the 3<sup>rd</sup> defendant, which resulted into an enforceable contract against the litigants in this suit.

20 The said tripartite arrangement had been sanctioned by the bank. The variation in the mortgage conditions/assets could not therefore be avoided. Once the 2<sup>nd</sup> defendant and the plaintiff had fulfilled their part of the obligation it became incumbent upon the bank to play its part in concluding the transaction, if not, reject the deposit.

25 Counsel for the plaintiff referred to **section 51 of the Contracts Act, 2010** which stipulates that:



***Where the parties to a contract agree to substitute for a new contract or rescind or alter the original contract, the original contract need not be performed.***

5 Having agreed to bring the plaintiff on board, the bank could not therefore afford to ignore the plaintiff's interest and revert to the enforcement of the old terms upon receiving the deposit.

10 Another argument was raised by the bank that the 2<sup>nd</sup> defendant had withdrawn the money before it could serve the intended purpose and that the account was overdrawn. As earlier noted by this court, nothing could have been further from the truth.

15 A close look at the entries made on **DExh 1A** indicates that the charges, loan repayment of **Ugx 17, 432,901/=** and payment of debt of **Ugx 17,225,000/=** to **IFO LIBYA OIL** after the deposit was made did not substantially affect the balance. As a matter of fact, several credit entries were made on 27<sup>th</sup> April, 2012 which left a closing balance of only **Ugx 181, 679,112.48/=**. Thus even with the various transactions by the 2<sup>nd</sup> defendant as alluded to, there was still more than enough to facilitate the enforcement of the contract.

20 Even if one were to believe that the bank did not utilize the deposit (which could not have been correct), following that undertaking, a bank lien could have been placed on the available sum of **Ugx 100,000,000/=**, not only for the purpose of protecting the bank's interest in the deal but also to honor its customer's request.

As it turned out however, the bank did not offer any explanation for the unaccounted for deductions made soon thereafter, which were not traceable to its client's debits or withdrawals.

25 This therefore lends credence to the suggestion by counsel (through his rejoinder) that the 3<sup>rd</sup> defendant bank had appropriated the sums for the intended purpose, but still refused to release the title.

I could not agree more therefore with the plaintiff's argument that parties in civil matters are bound by what they say in their pleadings. So is the court therefore. **(Kitaka and 12 others vs Mohamood Thobani CA No. 20 of 2021 UGHCLD 177).**

5 Thus having agreed that the specific amount paid by the plaintiff would clear the outstanding sums required for the final release of the title for the suit land, refusing to oblige to its client's wishes was not only a betrayal of trust but also perceived by this court as an attempt to defeat the plaintiff's interest in the suit property.

10 Since the plaintiff was not an account holder and therefore (according to the bank) not privy to that arrangements under **PExh 2 and PExh 3**, then it should not in the first place have taken the trouble or the initiative to secure the necessary approvals and even write to its customer with assurances that it would accept the deposit from the plaintiff.

15 Within that context therefore, the argument by the 3<sup>rd</sup> defendant that the plaintiff did not conduct due diligence did not hold any merit. Whether or not a party was a *bonafide* purchaser for value without notice the question poised is whether the defendant honestly intended to purchase the suit property and did not intend to acquire it wrongfully. **(David Sejjaka Nalima vs Rebecca Musoke SCCA No. 20 12 of 1985).**

The plaintiff's efforts in this case and its attempts to engage the bank are proof that it intended to purchase the suit property and did not intend to acquire it wrongfully.

25 The circumstances as outlined above in this case create the unfortunate impression that upon receiving what was required from the 2<sup>nd</sup> defendant through the plaintiff's efforts, the bank went against its own word.

It retained both the deposit and the certificate of title, contrary to the intentions of its customer and the plaintiff who deposited the money, out of which the 3<sup>rd</sup> defendant bank had gained benefit.

5 The doctrine of estoppel operates under **section 114 of the Evidence Act, Cap. 6** as a shield in enforcing a cause of action by preventing a defendant from denying the existence of some facts which may be essential to establish the cause of action. (**Ref: Dawson Bank Ltd vs Japan trading cotton co. [1935] AIRPC 79 (unreported)**). See also: **Namyalo Josephine vs National Curriculum Development Centre, HCCS No. 122 of 2008 (unreported)**.


10 Thus a party to a deed or instrument or who has by his conduct or words caused another to act in a certain manner cannot afterwards tell an inconsistent tale to the prejudice of such other person. That party is bound by the language of the deed.

15 In the final result, a breach of a contract would therefore occur where one party to a contract fails to carry out a term of the said contract; or when a party neglects, refuses or fails to perform any part of its bargain or any term of the contract, written or oral, without a legitimate legal excuse. (**See: Ronald Kasibante vs. Shell Uganda Ltd HCCS No. 542 of 2006 [2008] ULR 690**).

20 In response to the first issue, it follows therefore that the guilty party in this case the 3<sup>rd</sup> defendant, is said to be in breach of the contract, which would entitle the plaintiff as the innocent party to a remedy.

**Issue No. 2: Whether the 3<sup>rd</sup> defendant is under obligation to release the title.**

25 The 3<sup>rd</sup> defendant in denying its obligations to hand over the title relied on **sections 14 and 15 of the Mortgage Act, Cap.2009** which provide for the right to discharge and release of mortgage. I need not reproduce the texts, for two main reasons:





In the first place, and with all due respect to counsel's argument, none of the said provisions is relevant to the present circumstances or can be interpreted as barring the mortgagor and the mortgagee from making alterations or variations in the deed as originally crafted.

5 Particularly so as in this case, where the offer was made by the customer and accepted by the bank so as to allow the plaintiff to deposit the money and in exchange, have the title released.

But more importantly, these provisions were in existence and well known to the bank at the time when it made the promise to release the title. I would therefore  
10 also reject the argument as weak and flawed, that the bank never received any communication from the 2<sup>nd</sup> defendant or plaintiff for that matter, given the fact that several correspondences were made to that effect.

**PExh7**, a letter dated 26<sup>th</sup> June, 2012, was addressed to the three defendants by the plaintiff's counsel, **M/s Crane Associated Advocates**. It reads:

15 .....*We act on behalf of Shire Petroleum Co. Ltd.....*

*We refer to your verbal undertakings, the sale agreement between yourself and our client, Kibwika Kairu George's letter dated 9<sup>th</sup> March, 2012 and ABC Capital Bank's letter ref. ABC/CR/28/03 dated 28<sup>th</sup> March, 2012 wherein you jointly undertook to release the title to the above described  
20 property as soon as our client deposited the money onto Kibwika Kairu George's account in ABC Capital Bank.*

The above letter was a reminder to the bank to release the title to the lawyers or the plaintiff.

Another correspondence on this matter was **PExh 8**: dated 6<sup>th</sup> July, 2012 by the  
25 2<sup>nd</sup> defendant, George Kibwika: to the Credit Manager of the Bank. This was less than a month after the first reminder.

As per that letter, the request was made to the bank to release the title to **M/s Crane Associated Advocates**, counsel for the plaintiff. Going by the contents of that correspondence that was enough proof that if the title had been released, the bank would still be able to recover the outstanding sums from the remaining securities.

The argument therefore that there was an outstanding debt owed to the bank may be the truth today but it did not hold any merit at the time the contract was made.

Where there is betrayal of trust by a bank owed to its customer as a beneficiary as in the instant case, the argument about the customer's willingness to refund the deposit to the one affected would not help to redeem the bank's errors.

In response to the 2<sup>nd</sup> issue as to whether or not therefore the 3<sup>rd</sup> defendant was under obligation to hand over the certificate of title, the response is in the affirmative.

**Extent of liability of the 1<sup>st</sup> and 2<sup>nd</sup> defendants:**

As noted by court the 1<sup>st</sup> and 2<sup>nd</sup> defendant filed a defence but did not turn up during the trial.

This court did not however find any evidence of breach or other form of liability against the two defendants. Failure to conclude the contract was attributable solely to the bank which by its refusal to release the title caused a breach.

**Issue No. 3: Remedies:**

The plaintiff's prayers were for an order for specific performance; general and punitive damages; interests and costs.

**Specific performance:**

**Section 64 of the Contracts Act** provides that where a party to a contract is in breach the other party may obtain an order of court requiring the party in breach to specifically perform his or her promise under the contract.

I would reject the argument by the 3<sup>rd</sup> defendant that the order for the release of the certificate of title would cause a lot of hardship to the bank. Two main reasons:

Whether intentionally or inadvertently, the bank did not reveal to court the actual status of the loan amount due at the time, for repayment by the 2<sup>nd</sup> defendant.

Secondly, it is clear from the evidence adduced by the plaintiff that at all material times the bank had the credit required to release the title as per the undertaking it made, and provided no evidence to prove that the account had insufficient funds.

For these and other reasons, and given the fact that the bank admitted that it had custody of the title; and this court having found that there was a breach of the contract, a case was made out by the plaintiff company for an order for specific performance to be granted under **section 64 of the Contracts Act.**

**General damages:**

**Black's Law Dictionary 9th Edn at page 445** defines damages as the sum of money which a person wronged is entitled to receive from the wrong doer as compensation for the wrong. It is trite law that damages are the direct probable consequence off the act complained of. Ref: *Storms versus Hutchison* (1905) AC 515.

In the case of ***Assist (U) Ltd. versus Italian Asphalt and Haulage & Anor, HCCS No. 1291 of 1999 at 35*** it was held that; *the consequences could be loss of profit, physical, inconvenience, mental distress, pain and suffering*'.

Where there is a breach of contract the party who suffers the breach is entitled to receive compensation for the loss or damages occasioned through the breach. General damages follow the ordinary course or relate to all other terms of damages whether pecuniary or none pecuniary, future loss as well as damages

for paid loss and suffering. (**See; Uganda Commercial Bank Vs Deo Kigozi [2002] EA 293**).

5 It was submitted in this case and I do agree, that on account of the breach of the bank's obligation to release the title, the plaintiff had suffered 11 years of litigation, denial of the full enjoyment of ownership of its land and inconvenience.

This court has the discretion to award as I hereby do, a sum of **Ugx 12,000,000/=** estimated per year for the period of 10 years from 2012, amounting to **Ugx 120,000,000/=**, to be a fair compensatory award to the plaintiff company, following the breach.

10 **Punitive damages:**

Counsel relied on **Lubowa Gardens Ltd and Mr. T-Shirt (U) Ltd vs Equity Bank Ltd HCCS No. 111 of 2013** to support the claim that the bank in its actions in reneging on its promise acted oppressively and with highhandedness.

15 In this case the 3<sup>rd</sup> defendant bank benefitted from the plaintiff's deposit and yet refused to release the title. The award of **Ugx 20,000,000/=** against it was therefore justified.

1 would accordingly make the orders as follows:

- 20
1. **The 3<sup>rd</sup> defendant bank is under obligation to release the certificate of title for plot 565 block 107 Mengo Kyadondo to both, with immediate effect, to enable the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the plaintiff to finalise any outstanding obligations between them in relation to the sale transaction;**
  2. **An award of general damages of Ugx 120,000,000/= is granted to the plaintiff, payable by the 3<sup>rd</sup> defendant bank;**
- 25

3. **Punitive damages of Ugx 20,000,000/= are awarded to the plaintiff in atonement for delay and inconvenience occasioned through the high handed actions of the 3<sup>rd</sup> defendant bank;**

5 4. **Interest at commercial rate of 25% is payable per annum, in respect of the punitive and general damages as awarded, from date of delivery of this judgment till payment is made in full;**

10 5. **The 3<sup>rd</sup> defendant shall pay costs of this suit.**

  
**Alexandra Nkonge Rugadya**

**Judge**

15 **22<sup>nd</sup> June, 2023**

*Delivered by mail  
A. Nkonge  
22/6/2023.*