

The alleged particulars of fraud are set out in paragraph 6 of the plaint.

It was the further contention of the Plaintiff that he suffered special damages the particulars of which are set out in paragraph 7.

5

The Plaintiff also sought a declaration that the depositing of the balance from the sale on the account of Bonabana Margaret without informing him was in bad faith, was fraudulent and done in collusion with the said Bonabana.

10 Costs of the suit were applied for together with interest on the claimed market value of the property, general damages and costs of the suit at the rate of 20% per annum from the date of judgment till payment in full and any other remedy court may deem fit.

15 In its defence, the Defendant contended that the Plaintiff was not entitled to any of the reliefs sought and would be put to strict proof thereof.

That the Plaintiff was in default of the loan agreement for more than 30 days, which entitled the Defendant to recall the entire loan and or foreclose the security. The Plaintiff failed to pay and the Defendant foreclosed.

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The Plaintiff was duly notified about the default and the Bank's move to exercise its option to sell and recover the outstanding amount.

25 Upon sale of the security, the Bank applied the proceeds of the sale to the outstanding amount due from the Plaintiff, and paid the balance to the account of Bonabaana Margaret basing on the court order served. - Annexure A.

The Defendant valued the property and received a market price for the property which guided the sale.

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The property was sold at the highest price/bid received which was the market value at the time.

35 And that, in case of any default in the loan repayment, the bank could foreclose the property to recover the loan.

It was then prayed that the Plaintiff suit be dismissed with costs.

At the schedule conference, two issues were framed for determination by the court.

5

1) Whether the Plaintiff's property was lawfully sold.

2) Whether the Plaintiff is entitled to any remedies.

10 The issues will be dealt with in the same order.

Whether the Plaintiff's property was lawfully sold.

15 In determining this issue, court will take into account the duties of a mortgagee exercising the power of sale; and whether those duties were complied with or not.

It is trite law that the power of sale of mortgaged property is either statutory under the Mortgage Act or contractual under the Mortgage agreement.

20 The Mortgage Act prescribes the procedure of conditions precedent before the mortgagee can exercise the power of sale of mortgaged property.

Under S.19 (1) of the Mortgage Act, where money secured by a mortgage under this Act is made payable on demand, a demand in writing **shall** create a default in payment.

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Notice of demand in writing was given to the Plaintiff on 16.12.13, requiring him to pay the loan installments of Shs. 1,500,000/- together with interest and late payment charges within 30 days from the date of the letter or else the bank would recall the loan and recover the outstanding amount. – See Exhibit D4.

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Decided cases have established *“a lawful demand notice has to be made which is unequivocal and unconditional and it is for all the moneys owing; and has to be in writing to create a default in payment”*. – Refer to **General Parts (U) Ltd vs. Non Performing Assets and Recovery Trust SCCA 05/1999**.

This court finds that Exhibit D₄ was in the present case a demand notice within S.19 (1) of Mortgage Act and that it created a default in payment.

5 The notice was delivered to the address given by the Plaintiff (Mortgagor) to the Defendant (Mortgagee) at the time of entering into the mortgage as indicated in the offer letter and loan application form – Exhibit D₆. The notice was received by Margaret Bonabaana, the Plaintiff's wife, although no date of receipt is indicated.

10 Court notes that Exhibit P₂- the Bank Statement does not indicate how much was due and owing to the Bank from the Plaintiff at the time the demand notice Exhibit D₄ was made.

15 However, S.19 (2) of the Mortgage Act provides that, *“where the mortgagor is in default of any obligation to pay the principal sum on demand or interest or any other periodic payment or any part of it due under any mortgage or in the fulfillment of any covenant or condition, express or implied in any mortgage, the mortgagee may serve on the mortgagor a notice in way of the default and require the mortgagor to rectify the default within forty five (45) working days”*.

20 In the present case, Exhibit D₃ dated 17th January, 2014, was a notice of default and recall of the loan addressed to the plaintiff (mortgagor) notifying him that he had defaulted on payment of the loan installments and was required to pay **the entire outstanding amount of Shs. 13,880,507 plus accrued interest within 45 days from the date of the notice**. He was further notified that if the default was not remedied, the bank would be entitled to sell the mortgaged property to recover the loan amount, interest and costs.

25 The notice was again received by Margaret Bonabaana, although date of receipt is not indicated.

30 Exhibit D₃ was issued in compliance with S.19 (3) Mortgage Act and Regulation 22 of the Mortgage Regulations.

The Plaintiff having been in default of payment of the loan warranty the mortgagee (Defendant) to serve him with notice of default requiring him to rectify the default within the prescribed time and upon failure by the Plaintiff to rectify the default within the prescribed

tome of forty-five days which period was extended to two months, the Defendant (mortgagee) had the power to exercise the power of sale under the Mortgage Act.

This finding is fortified by the case of **Alliance Building Society vs. Share [1952] CH 581, ALL ER 1033** where it was held that *“as soon as the mortgage money has become due, that is, as soon as the date fixed for repayment has passed; the legal mortgagee has statutory power, which may be varied or extended by the parties or excluded all together, to sell the mortgaged property provided that the mortgage has been made by deed”*

The mortgage in the present case was by deed and the installment payments agreed upon by the parties had fallen due and the mortgagee (Defendant) moved to exercise the remedy of sale provided for under S.20 (e) of the Mortgage Act. The remedy is designed to allow a mortgagee recover the whole sum owed, and also thereby terminate the mortgage by sale of the mortgaged property.

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It should be noted however that, before the sale can be effected, there other requirements that must be complied with by the mortgagee. A mortgagee can only claim the principal or interest or both when outstanding and a notice claiming the wrong amount is invalid.

“Where the money secured by mortgage is payable by installments, the power of sale arises as soon as an installment is due and payable”. - See **Twentieth Century Banking Corporation vs. Wilkinson [1977] CH. 99. [1976] 3 ALL ER 361.**

It is not disputed in the present case that the installments payable by the Plaintiff were due and had not been paid. Although the Plaintiff claims that he held a meeting with the Defendants Officials on 18.02.14, to discuss the loan default and was allowed time to pay the loan arrears from 22.02.14, which he claims he did, although no specific amount was agreed. The Plaintiff asserts that he made payments of Shs. 50,000/-, Shs. 12,529/-, Shs. 687,471/-, Shs. 421,9000/- and Shs. 278,100/-.

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This means that the Plaintiff did not comply with the requirement to pay the loan installments. And the meeting he held with the Defendant’s Officials on 18.02.14, to discuss the loan default did not change much as the Plaintiff continued to be in default.

Regulation 11 (1) of the Mortgage Regulations requires the mortgagee before selling the property, to value the same to ascertain the current market value and the forced sale value of the property.

- 5 Under Regulation 11 (2), for the purposes of sub regulation (1), the valuation report shall not be made more than six months before the date of sale and

Regulation 11 (3) – the valuation shall contain the current pictures of the property.

- 10 *“One of the ways in which mortgagees – endeavor to ensure that they comply with the duty to sell for the market value is to ensure that they make an independent valuation of the property before selling it..... provided that reliance has been placed in a competent, qualified valuer... the mortgagee would have done all that was necessary”*. – See **Textbook on Land Law, Judith Anne Mackenzie & Mary Philips 14th Edith P.457 paragraphs**
15 **24.10.4**. The liability of the mortgagee is an equitable duty. – Refer to **Raja vs. Auctine Group (a firm) [2002] EWCA CIV 1965**.

In the present case, the Plaintiff asserted that the property was sold by the Defendant at a mere cheap price. He attached the valuation report in support. PW₁ in his evidence did not
20 say anything about the said valuation report or mention the value of the mortgaged land. However, he tendered in Exhibit P₄ the valuation report made by Gabirari & Company Chartered Surveyors, Valuers and Estate Agents, dated 19.02.15, It is indicated on page 22 that the current market value of the property was Shs. 80,000,000/- while the forced sale value was Shs. 60,000,000/-. PW₁ was not cross examined on Exhibit P₄.

25 The Defendant in the written statement of defence paragraphs 5 (a) and 6 stated that the Defendant valued the property and got the market price at the time of sale. This is confirmed in the witness statement of DW₁ paragraph 10- where the attached valuation report Exhibit D₇ dated 22.07.14, shows that the open market value of the property was Shs. 70,000,000/-
30 and the forced sale value was Shs. 40,000,000/-. DW₁ was not cross examined about the valuation report.

It was the submission of Counsel for the Defendant that, since neither PW₁ nor the author of Exhibit P₄ testified to the alleged value of the land, the court should attach less weight to
35 Exhibit P₄ but instead attach more weight to Exhibit D₇.

He argued that since the Report was addressed to the Bank, DW₁ was competent to testify on it. And that his evidence that the Bank sold to the highest bidder at Shs. 45,000,000/- which was above the forced sale value of Shs. 40,000,000/- was not challenged.

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It can be discerned from the record that, the purported Exhibit P₄ was filed for identification purposes. PW₁ never led any evidence laying the foundation for its authenticity. The document was not formally proved and tendered into evidence and therefore could not be relied upon to arrive at a fair and just decision as regards the value of the property.

10

On the other hand, this court finds that Defendant testified that the property was valued before sale and laid the foundation for tendering in Exhibit D₇- the valuation report. The evidence, not having been challenged in cross-examination is taken as accepted. And the court finds that the mortgaged property was valued before sale as required by law.

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And further that the Defendant as mortgagee *“acted in good faith and took reasonable precaution to obtain the true market value of the mortgaged property at the date on which it decided to sell.* – Refer to the case of **Cuckmere Brick Ltd vs. Mutual Finance Ltd [1971] CH 949 [1971] 2 ALL ER 633.**

20

Another requirement before a mortgagee can exercise its power to sell the mortgaged property is *“to serve a notice to sell the mortgaged land on to the mortgagor in the prescribed form as required by S.26 (2) and (3) of the Mortgage Act and Regulations 25 of the Mortgagor Regulations, by giving the Mortgagor 21 working days. A copy of the said notice must be served on (a) a mortgagor; (b) any spouse (s) of the mortgagor in respect of any matrimonial home; (c) a surety; (d) an independent person as provided under the Act, or (e) in case of customary law; the children and the spouses(s)”.*

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In the present case, the notice of sell of the mortgaged property – Exhibit D₅ dated 05.04.14 is addressed to the Plaintiff. The notice was served on Margaret Bonabaana, the Defendants wife who was also a guarantor of the loan.

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Although there is no date of receipt of the notice and the Plaintiff denied any knowledge thereof, contenting that he was not personally served, he conceded that the stamp on the

notice is that of the LC of Kyaliwajala Kira Town Council, which he gave to the Defendant as one of his addresses of service of any notices.

5 The evidence indicates that there were three addresses of service availed to the Defendant (mortgagee) by the Plaintiff: 1) The physical address at Kyaliwajala, Kira Town Council, 2) the telephone number and 3) The Post Office Box number. Any of the 3 addresses could be used from purposes of service.

10 In cross-examination, the Plaintiff conceded to the address at which the notices were delivered and received by his wife. Therefore service was effected at the right address. The Plaintiff did not physically receive the notices as he were among in Karamoja where he had a job.

15 In the circumstances, the plaintiff was properly and adequately served with the notices of sale. There was effective service contrary to the submissions of Counsel for the Plaintiff.

20 The Mortgage Act S.28 (2) and Regulation 8 (2) and (4) of the Mortgage Regulations, require advertisement of the sale of the mortgage by public auction, to be made by the mortgagee for at least thirty days.

25 The Plaintiff contends in this case that, he only got to see the notice of advertisement of the mortgaged property – Exhibit P₃, when he visited the premises after it had been deserted by his wife Margaret Bonabaana and sold. The sale was advertised in the Saturday Monitor Newspaper of 22.04.14, by Kabuturamba Agencies.

30 The advertisement was in line with the statutory requirement of the Mortgage Act and Regulations already referred to herein above. By virtue of the advertisement of sale and earlier notice of intended sale served upon his wife, the Plaintiff is deemed to have been given sufficient notice to enable him to exercise his right of equity of redemption.

35 The Plaintiff admits that, on his departure from the mortgaged property, he did not inform the bank (mortgagee) of the change in his physical address as required by Regulation 7 of the Mortgage Regulations.

35 The Regulation requires:-

1. A mortgagor to notify the mortgagee in writing of any change of address of the mortgagor. The regulation is mandatory.

5 And under Regulation 7 (2) – an act or proceeding taken by the mortgagee shall not be affected by the mortgagor’s claim of a subsequent change in address that was not notified to the mortgagee.

While the Plaintiff was working in Karamoja, the Newspaper where the advertisement for sale of his property was placed is one that is circulated widely in Uganda. It is not disputed
10 that the property was advertised and sold on 30th September, 2014, - Exhibit D₂. The sale took place approximately two months after the valuation of the property and five months after the advertisement of the sale.

15 Although Counsel for the Plaintiff argued that it was wrong for the sale to be conducted after the thirty days, this court finds that this did not adversely affect the Plaintiff in anyway.

The procedure followed by the Defendant before conducting the sale was very transparent. Valid notices were served on the Plaintiff as required by the Mortgage Act. The sale was
20 advertised in the Saturday Monitor Newspaper of 22nd August, 2014, Exhibit D₈ dated 1st August, 2014, and 25th July, 2014, respectively, shows that there were two bidders who responded to the advertisement for sale of the property. There is nothing to show that there was any collusion by the Defendant with the successful purchaser.

25 Under the Mortgage Act and Regulations, the mortgagee **may** upon fulfilling the foregoing conditions already referred to in this judgment, proceed to exercise its power to sell the mortgaged property **at any time** thereafter and at any price obtainable in the market by public auction which is what was done in the present case- Refer to SS. 20 (1) 28 (1) (a) and (d) of the Mortgage Act and Regulations 8(1) of the Mortgage Regulations.

30 Counsel for the Plaintiff’s submission that the sale was adjourned and the property should therefore have been re-advertised in line with Regulation 13(2), (3) and (7) of the Mortgage Regulations cannot be sustained.

This court finds that there was no such adjournment of sale as Counsel for the Plaintiff would wish court to believe. Under Regulation 13 (2), (3) and (7) of the Mortgage Regulations, the sale can /may only be adjourned if there is a bidder.

5 In the present case at the end of the 30 days after the advertisement for sale- Exhibit P₃, there were no bidders at all.

The sale was conducted no earlier than the 30 days from the date of the first advertisement. The sale of the property was advertised on 22nd April, 2014, and the bids were received on
10 15th July, and 1st August, 2014, respectively. And as already indicated, the sale was made in September 2014.

I have taken note of the case of **Rosemary Eleanor Karamagi vs. Angoliga Mailmood MA No. 733/2005** relied upon by Counsel for the Plaintiff to contend that the sale without re-
15 advertisement was illegal, and find that it is not applicable to the circumstances of the present case. In that case, the sale was done without the duplicate or special certificate of title being lodged in court as required by S.48 (1) (2) and (3) of the CPA. And the sale was done after the warrant of attachment and sale had expired, and the Applicant had made certain payments in court.

20 The warrant had also been extended for fifteen days which necessitated advertisement unless the Judgment Debtor waived the requirement, which was not the case.

But in the present case, the advertisement for the sale of the mortgaged property by public
25 auction was made for the required thirty days after which the sale could take place. The necessary notices were given to the Plaintiff and the sale took place after the required thirty days.

Court wishes to observe that the requirement for sale under the CPA and the Mortgage Act
30 are not the same.

Court now proceeds to determine **whether the property was sold for less than the market value.**

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Decided cases have established that *“a mortgagee is under a duty in equity to take reasonable precautions to obtain the “fair” or “true market value” or “proper price” for the property at the date of sale”*. And that *“in conduct of the sale, the mortgagee must not unduly rush the transaction or sell at a low price that will simply cover the mortgage debt”*.

5 According to the case of **Pack’s Mortgage Services Funding PLC [1993] CH. 330 at pp337-** Lightnon J- stated that *“ the mortgage “must take proper care” whether by fairly and properly exposing the property to the market or otherwise, to obtain the best price reasonably obtained at the date of sale”*.

10 The Plaintiff contends in the present case that the property was sold at a price less than the market value. Therefore under SS 101 and 103 of the Evidence Act, the burden of proof was upon the Plaintiff (mortgagor) to establish that the property was sold for less than the true market value at the time of the sale.

15 The onus of the mortgagee in the circumstances was *“to show on a balance of probabilities that the sale was bonafide and that perceptives were taken to obtain the best price reasonably obtained”*. – See **Bank of Nova Scotia vs. Rosegreen and Others, Claim No. CL. 1998/B240 (delivered on November, 10th 2008)**.

20 The Plaintiff (mortgagor) in the present case failed to prove to court that the property was sold for less than the true market value. The valuation report relied upon was prepared a year after the sale and reflected the value of the property as of that date but not at the time the sale took place. As already indicated in this judgment, the valuation report was not proved in evidence.

25 On the other hand, the mortgagee (Defendant) established that, before the sale took place, reasonable steps were taken to obtain the best price on the market, by valuing and advertising the property for sale.

30 The alleged disparity between Exhibit P₄ - the valuation report of the Plaintiff dated 19.02.15 and Exhibit D₇ the Defendant’s valuation report dated 22.07.14, cannot be relied upon to declare the sale illegal as the value could not have been expected to be the same months after the sale of the property.

It is the finding of this court that the Defendant took reasonable care to obtain the “**true market value**” of the property at the time of the sale and that the Plaintiff failed to establish that the Defendant acted in breach of its contract or equitable duty owed to the Plaintiff in exercise of its power of sale.

5

It was the further contention of the Plaintiff’s Counsel that, by the Defendant allowing the purchaser to pay the purchase price in three equal installments was illegal, dishonest or done in bad faith.

10 Under Regulation 14 (1) of the Mortgage Regulations, the person declared purchaser must within one working day, pay a deposit of at least 30% of the purchase price to the officer conducting the sale; and under sub regulation 3, the balance of 70% must be paid within 21 working days. The provisions are mandatory.

15 In the present case, the Defendant received payments in installments of Shs, 15,000,000/- from the purchaser on 7th August, 2014, 29th August, 2014 and 30th September, 2014 totaling to Shs. 45,000,000/-- Exhibit P₂. The Defendant signed the contract with the purchaser on 30th September, 2014 – See Exhibit D₂.

20 If court were to believe that there was a repudiatory breach of non-payment of the contract price, it then would appear from the circumstances of this case that the mortgagee/Defendant accepted the late performance by waiver by accepting the purchase price in those installments. The contract thereby remained in existence and the purchaser tendered performance.

25

Once the vender submitted to postponement of the date of payment, it could not “**any longer**” insist that time was of the essence.

30 Court observes that in this case, the condition specified under Regulation 14 (1) of the Mortgage Regulations was not even included in the sale agreement and the duplicate certificate of title had also not been delivered within the twenty one days.

The submissions of Plaintiff’s Counsel that the Defendants allowing the purchaser to pay the purchase price in three equal installments was illegal, dishonest and in bad faith is
35 accordingly rejected for all those reasons.

The sale was by public auction and no evidence of foul play was established by the Plaintiff. By exercising the power of sale, the Mortgagee/Defendant not only sold its legal estate but also the equity of redemption of the mortgagor/Plaintiff. Once the contract of sale came into
5 force, the equity of redemption was extinguished.

Granted, where a mortgagee exercises the right to take possess, it is subject to very stringent control. The money received from the property must be used solely to reduce the interest or capital due under the mortgage. A mortgagee is accountable for the actual receipts from the
10 property – See **Park vs. Mortgage Service Funding PLC [1593] 2 WLR 415.**

In the present case, the Plaintiff contends that there were unlawful deductions made by the Defendant/mortgagee from the amount realized from the sale of the security.

15 He asserts that Shs. 12,300,000/- was paid out by the Defendant to Margaret Bonabaana - as per the court order Exhibit D₁₁. The sum was the balance from the proceeds of sale of the mortgaged property – which was matrimonial property and under which Bonabaana had guaranteed repayment of the loan.

20 The description of the plot differs in the different documents presented to court in respect of the Block No. Exhibits D₁ and P₃- refers to Block 299, Exhibits D₆ refers to Block 233, Exhibit D₇ and D₂ refer to Block 223. However, the Plot No. 1838 is the same in all those documents at the land is at Nabwojo, Namugongo, Wakiso District, (referred to also as land at Kyadondo).

25 The error in Block numbers appears not to have been noticed by either court or any of the parties to the matter.

The Defendant went ahead and acted on the court order.

30 The correct description of the property is Block 223 Plot 1838, Kyadondo, land at Nabwojo, Namugongo. It is the same property that was mortgaged by the Plaintiff.

Since the property mortgaged was the property actually sold, the error in description of the property did not in my view fundamentally affect the resultant sale and orders of court to pay the balance of the proceeds to Bonabaana.

5 There is nothing to indicate that the error was ever brought to the notice of the court. And as long as the Plaintiff who claims to have been affected by the order did not bring the error to the notice of court to be rectified, the order had to be obeyed as long as it existed. - Refer to **Stanbic Bank & Another vs. The Commissioner General Uganda Revenue Authority HCMA 42/2010** by Lady Justice Irene Mulyagonja. There is no evidence to suggest that the
10 Defendant bank deliberately misdescribed the property. The error can still be corrected under S. 98 of the CPA.

S. 3 (1) of the Mortgage Act, provides for the allocation of proceeds of sale for the mortgaged property in the following order of priority:-

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a) In payment of any rates, rent, taxes, charges or other sums owing and required to be paid on the mortgaged land;

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b) In discharge of any prior mortgage or other encumbrance subject to which the sale was made;

c) In payment of all costs and reasonable expenses properly incurred and incidental to the sale or any attempted sale;

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d) In discharge of the sum advanced under the mortgage or so much of it as remains outstanding, interest, costs and all other monies due under the mortgage, including any monies advanced to a receiver in respect of the mortgaged land under S.2;

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e) In payment of any subsequent mortgages in order of their priority; and

f) The residue, if any, of the money received **shall** be paid to the person who, immediately before the sale, was entitled to discharge the mortgage.

35

In the case before court, Margaret Bonabaana is the undisputed wife of the Plaintiff. She had guaranteed repayment of the loan out of which the mortgage arose. The property was said to

be matrimonial property, and under S.29 of the Land Act, she had a beneficial interest of the mortgaged property.

5 And since she had guaranteed the payment of the loan, I believe that immediately before the sale, she was entitled to discharge the mortgage.

For those reasons, this court finds that the balance on the purchase price was rightly paid to her under S.31 (1) (f) of the Mortgage Act.

10 There was no need for the Defendant /mortgagee to apply to court for deductions in this respect. The payment of the money to Bonabaana did not in any way unfairly prejudice the Plaintiff/mortgagor.

15 The moneys paid to the Plaintiff's wife and guarantor of the loan are not recoverable from the Defendant.

Further sums debited on the Plaintiff's account after payment of the sums due and owing:

20 Under S.31 (1) (c) payment of all costs and reasonable expenses properly incurred and incidental to the sale or attempted sale can be recovered from the proceeds of sale.

25 This position is fortified by the case of **Write vs. City of London Brewery Co. (1889) 42 CH D 237 at 242** where it was held that *"a mortgagee is entitled to charge the expenses of any actual or attempted sale of the mortgaged property"*.

30 In the present case- the sum of Shs. 1,484,000/- was paid by the Defendant as auctioneers fees- Exhibit P2. Shs. 450,000/- was paid as professional fees for valuation of the property and Shs. 1,170,000/- was paid as refund of advertisement fees. This figures above brought the total costs and expenses in relation to the sale of the property to Shs. 3,104,000/-.

The sum was not disputed by the Plaintiff and it was properly charged on the proceeds from the sale of the property.

As regards the sum advanced under the mortgage and how much of it remained outstanding, together with interest, costs and all other monies due under the mortgage, different / conflicting figures were stated as due as at the time of sale.

- 5 The notice of sale dated 05.04.14 indicates that the entire amount due then was Shs. 13,880,507/- Exhibit D₃. It is stated that the amount was attracting interest up to the date of sale.

10 The sale of the mortgaged property took place on 07.08.14. And the final agreement of sale was signed on 30.09.14. However, Exhibit P₂ indicates that on the date of sale of the property, the amount outstanding inclusive of interest was Shs. 12,500,000/-. Exhibit P₂ is the bank statement and therefore more readily acceptable as indicating the right amount due at the time of sale.

- 15 Therefore upon payment of the first installment of the purchase price of Shs. 15,000,0000/- by the purchaser on 07.08.14, the mortgagee/Defendant was obliged to deduct the sum of Shs. 12,500,000/- then the outstanding amount including interest.

20 If that had been done, Shs. 2,500,000/- would have been the sum remaining on the Plaintiff's account.

After the payment of the last two installments of Shs. 30,000,000/- by the purchaser, the total amount paid was Shs. 45,000,000/-.

- 25 Shs. 30,000,000 plus the earlier balance of Shs. 2,500,000/- would leave a total amount of Shs. 32,000,0000/- on the Plaintiff's account.

30 Upon taking off the costs and other expenses of the sale of Shs. 3,104,000/- the balance would have been Shs. 29,396,000/-.

After the Plaintiff's wife was paid Shs. 12,380,000/- as earlier indicated, the balance on the Plaintiff's account would have been Shs. 17, 096,000/-.

- 35 However, it is the Plaintiff's contention that the Defendant further debited his account of the sum of Shs. 500,000/- on 08.08.14 (automatic loan payment). And on 01.09.14 a further sum

of Shs. 1,603,942/- was debited and on 02.10.14 another sum of Shs. 15,000,000/- for purchase of land at Nabwojo was debited leaving on the account Shs. 7,292,058/-.

5 The question therefore is, if the outstanding sums due from the Plaintiff had already been paid after the property was sold on 07.08.14, why were further debits made on the account, even after the costs and other expenses of the sale had been debited?

10 This court finds that, the loan become extinguished on the day of the sale of the mortgaged property. The amounts debited after the debt had been repaid by sale and costs and expenses of the sale deducted and Shs. 12,380,000/- paid to his wife were therefore irregularly debited. It is only fair and just that they be refunded to the Plaintiff. A balance of the 17,096,000 remained as explained herein above.

What remedies if any is the Plaintiff entitled to?

15

The Plaintiff in the present case claimed special damages on the ground that the property was undervalued. That it ought to have been worth 80,000,000/- with a forced sale value of Shs. 60,000,000/- - Exhibit P₄. However, I have already found in this judgment that Exhibit P₄ was not proved as required and therefore, this court could not rely upon it to place the market value on the property. The Defendant's Exhibit D₇ was accepted.

25 This court also found that the mortgaged property was legally and properly sold following the laid down procedure under the Mortgage Act, the amount due taken off, together with the lawful costs and other expenses of sale. And that the Shs.12,300,000/- was lawfully paid to the Plaintiff's wife and guarantor of the loan. And that a balance of Shs. 17,096,000/- would have been the balance due to the Plaintiff.

30 This is the amount that was proved by the Plaintiff as required by law. – Refer to **Robert Coussens vs. Attorney General SCCA 08/1999** and the case of **Hajji Asuman Mutekanga vs. Equator Growers 9U) Ltd SCCA 07/1995**.

The Shs. 17,096,000/- should be paid to the Plaintiff as special damages.

35 **General damages:** The Plaintiff also sought general damages of Shs. 30,000,000/- contending that the failure to return the balance that remind on his account after payment of

the debt and taking off all expenses and costs of the sale and further unlawful debiting of his account made him suffer loss and mental anguish.

5 Further that, the Defendant acted in breach of its trust by the irregular way it dealt with the surplus proceeds of the sale of the mortgaged property and is therefore liable to the Plaintiff in general damages.

10 *“General damages are those losses, usually but not exclusively non-pecuniary, which are not capable of precise quantification in monetary terms, as they arise naturally and in the normal course of events, since there are various unknown and uncertain factors such that the general damages have to be calculated at large”*. – Refer to the case of **Robert Coussens vs. Attorney General (Supra)**.

15 Be that as it may, this court finds that, since the Plaintiff is going to be paid the amount that was due as balance on his account after the sale of the property as already indicated, he is not entitled to general damages. *“Injury is not done to a willing person”*. If the Plaintiff had repaid the loan as agreed, then he would not have had to suffer the inconvenience of having his property sold and suffering all the attendant consequences that arose as a result.

20 **Interest:** The Plaintiff sought interest on the sums claimed in damages at the rate of 20% per annum.

25 *“Interest is allowed by law as compensation for delay in paying a fixed sum....”* Blacks Law Dictionary, 9th Edition P.887.

Under S.26 (2) of the CPA, the court has discretionary powers to award interest on the decretal sum if not agreed upon. – Refer also to **Crescent Transportation Co. Ltd vs. SB.M Technical Services Ltd CACA 25/2000** which is to the effect that *“where no interest rate is proved, the rate is fixed at the discretion of court”*.

30 *“An award of interest is discretionary. It seems to me that the basis of an award of interest is that the Defendant has kept the Plaintiff out of his money and the defendant had had use of it himself. So he ought to compensate the Plaintiff accordingly”*. - See **Harbutts Plasticine Ltd vs. Wyne Tank & Pump Co. Ltd [1970] I CL B 447**.

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Bearing the circumstances of this present case in mind, this court exercises its discretion to grant interest on the special damages at the court rate of 6% per annum from 30.09.14 when the last installment of the purchase price was paid in full, till payment in full.

5 **Costs:** Costs follow the event unless for good cause court decides otherwise.

The Plaintiff in the present case has partly won the suit. He is accordingly granted half the taxed costs of the suit.

10 Judgment is entered for the Plaintiff in the following terms:-

1) While the Plaintiff's property was lawfully sold for the reasons set out in this judgment, the Plaintiff is entitled to special damages of Shs. 17,096,000/- which was the balance due to him after the loan had been repaid by sale, costs and expenses arising out of the sale
15 deducted and Shs. 12,300,000/- paid to his wife and guarantor of the loan.

2) Interest is granted on the sum of Shs.17,096,000/- at the court rate of 6% per annum from the 30.09.14 when the last installment was paid till payment in full.

20 3) Half the costs of the suit are granted to the Plaintiff.

Flavia Senoga Anglin

JUDGE

25 **20.11.17**