

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO. 466 OF 2013

5 **HAJAT NURIYAT MEMETEBIKULWA KIWANUKA ---- PLAINTIFF**

VS

1. MICRO FINANCE SUPPORT CENTRE LTD

2. HAJI KAMADI KIWANUKA ----- DEFENDANTS

10 **BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN**

JUDGMENT

BRIEF FACTS:

The Plaintiff sued the Defendants seeking a permanent injunction to restrain the attachment and sale of her matrimonial property comprised in LRV 932 Folio 3, Plot 156, Block 262, land at Makindye, Kampala. The property was mortgaged to the First Defendant by Uganda Academic Enhancement Co. Ltd and the Second Defendant as security for a loan of Shs. 280,000,000/-, without the Plaintiff's consent.

The property registered in the names of the Second Defendant was given to the Uganda Academic Enhancement Company Ltd, through a power of Attorney to create a mortgage and obtain a loan facility from the First Defendant, which was done.

The loan facility fell in arrears and the First Defendant moved to realize the security hence the suit.

The Plaintiff contends that she stands to lose her home through irregular and illegal processes, which will cause her untold inconvenience, suffering, 5 embarrassment and loss!

By this suit, she seeks the following remedies:-

- 1) A declaration that the mortgage by the Defendants, on her matrimonial home was irregularly and illegally secured, and is therefore a nullity.
- 2) A permanent injunction against the Defendants restraining them from selling 10 the matrimonial home in satisfaction of the impugned mortgage.
- 3) An order releasing any encumbrance put by the Defendants on the said matrimonial home placed upon the title to the Plaintiff's said land that is meant to secure the Defendant's interest arising from the mortgage.
- 4) An order for general and punitive damages against the Defendants.
- 15 5) Costs of the suit.

In its defence, the First Defendant stated that it carried out due diligence on the suit property before approving the loan and the Second Defendant affirmed in a duly registered statutory declaration that he was not married as per the laws of Uganda. The Second Defendant hence authorized Uganda Academic 20 Enhancement Co. Ltd to pledge the property as security for the loan facility.

The Second Defendant denied mortgaging the suit property to the First Defendant contending that it was Nancy Twashaba Rwabirindore, who hoodwinked him to surrender the certificate of title by entering into a memorandum of understanding promising to redeem the property by issuing a

cheque for Shs.170,000,000/- as security, hereby obtaining for herself and Uganda Academic Enhancement Co. Ltd a loan from the First Defendant.

The First Defendant prayed for the dismissal of the suit with costs.

At the joint scheduling memorandum, the following issues were framed by the parties:-

- 1) **Whether the Plaintiff and the Second Defendant have a subsisting valid marriage under the Marriage and Divorce of Mohammedans Act.**
- 2) **Whether the suit property was lawfully engaged as security for a mortgage by the Defendants.**
- 3) **Whether the Plaintiff is entitled to the remedies sought.**

The Plaintiff and Defendants testified and written submissions were filed for the Plaintiff and the First Defendant.

The issues will be resolved in the same order.

Whether the Plaintiff and the Second Defendant have a subsisting valid marriage under the Marriage and Divorce of Mohammedans Act.

Under S.2 of the Marriage and Divorce of Mohammedans Act, *“all marriages between persons professing the Muhammedan religion, ... celebrated or given according to the rites and observances of the Mohammedan religion, customary and usual among the tribe or sect in which the marriage or divorce takes place, are valid”*.

The Act does not prescribe any ceremonies or formalities or rites and observances to solemnize the marriage. In the case of Mist. Momtaz Begum vs. Anowar Hossain, Supreme Court of Bangladesh SCCA 139/2003 Pg 11-12. It was stated that *“The Mohammedan law does not insist upon any particular form in which the contractual performance should be effected or*

that the union should be evidenced by any writing, nor is the presence of witnesses essential for its validity”.

However, this seems to depend on the particular sect of Islam as can be discerned from the writing of some scholars who have stated that ***“though among the Sunnis the presence of witnesses is considered necessary for the validity of a marriage, their absence only renders it invalid, which is cured by consumation”.*** – **Mohammedan Law, 6th Edition, by Sued Ameer Ali, following Fata wan Akungirir, Vol II P.209 and Radd-UL-Muhtar Vol II P.429.**

10 It has also been observed that ***“A marriage contract ... as a civil instrument rests on the same footing as other contracts. The parties retain their personal rights against each other as well as against strangers...”***

The following have been stated to be the pillars of the Moslem marriage:-

- 15 a) Ejab-o-kubool – that is offer or proposal by one party to the marriage and acceptance by the other party.
- b) The free and mutual consent must be expressed in clear and unambiguous words.
- c) Presence of two witnesses is required for example if the parties are Hanafis or Sunnis, but no witnesses are needed if the parties are shias.
- 20 d) Both the bride and groom must have attained puberty (not necessarily the legal age of majority).
- e) Both the parties, that is, the bride and groom or when minor, their guardians, must be of sound mind;
- The marriage should not be as forbidden by the rules of blood relationship, 25 affinity or fosterage or religion of the parties, prescription of iddat in case of

re-marriage of a woman, depending on the sect to which the parties belong. -
Authors and Scholars in Islamic law.

Bearing the above in mind, court evaluates the evidence in the present case. Pw1, the Plaintiff testified that she got married to Sowedi Mukasa, a brother of the Second Defendant, in the 1940s, when she was about 16 years of age. After her husband's death, she fell in love with the Second Defendant three years later, and they got married in 1961 at a marriage ceremony conducted at Uganda Muslim Supreme Council, Old Kampala near Mengo, but she could not recall the name of the Sheik who conducted the marriage.

Pw1 introduced the Second Defendant to her brother, as the person she had chosen to be her husband. The Second Defendant gave her brother a tunic (Kanzu) and a cock. They went to the Mosque where the ceremony was held and her brother received the mahare (dowry) of Shs. 2000/-.

The Second Defendant (Dw2) confirmed that the Plaintiff is his wife. And in cross examination by Counsel for the First Defendant stated that he and the Plaintiff got married at the time Uganda got independence. Though no certificate was issued to them, they used to enter their names in the Register book. He could not recall signing any marriage certificate.

Pw3 testified that in the Islamic Faith, the marriage ceremony is conducted by any Mullah or Sheik of any level who is well versed with the faith.

Disputing that the Plaintiff and the Second Defendant are married, Dw3 testified that, the Second Defendant affirmed in a duly registered statutory declaration – Annexure C, that he is not married as per the laws of Uganda. And that the Second Defendant presented himself to the First Defendant who in verifying his marriage status established that he swore a statutory declaration to the effect that he was not married.

This court in considering the evidence of the parties finds that, Pw1's evidence that she was legally married to the Second Defendant under the Mohammedan Law was not seriously challenged by both Defendants.

As already stated in this judgment, such ceremony may be conducted at home, in a mosque, or any other formal wedding venue. And it may be conducted by an eminent member of the Moslem community, such as an Imam, or Sheik appointed to conduct the marriage. – Refer to **Momtaz Begum vs. Anowar Hossain (Supra)**.

Pw1's evidence indicates that she went through a marriage ceremony (Nikah) which is binding under Islamic law. There is no evidence to indicate that the necessary formalities already referred to in this judgment, required for conduct of a valid marriage were not fulfilled. Not remembering the name of the person who officiated the marriage does not affect the legality of the marriage. And neither does the Second Defendant's lie that he was not married.

Counsel for the First Defendant's submissions that the Second Defendant was under age at the time of the said marriage cannot be sustained either. This is because the Islamic Law under which the Marriage and Divorce of Mohammedan's Act was passed, applied to the Moslems as from 15th April, 1906. By then the parties to the intended marriage did not need to be of majority age of 18 years, as is currently required.

The requirements of such marriage already referred to parties having reached age of puberty, which could range as low as 12 years.

The Plaintiff and Second Defendant had lived together since 1962 and by Dw2's own admission, the Plaintiff is his wife.

Under S.48 of the Evidence Act, "*when court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to*

the existence of the relationship, of any person, who, as a member of the family or otherwise has special means of knowledge on the subject is a relevant fact,..”

The issue of marriage was also considered in the case of Ali s/o Pazi vs. Hamisi Mohamed [1968] EA 111 at P.1 P2 (S.50 of the Indian Evidence Act, 1872)-
5 *“There was evidence that the Appellant and deceased had lived together as husband and wife for several decades, but no marriage certificate was produced”*.

The couple had belonged to the Shafi Sect of Islam.

10 It was held by Hamlyn J that *“it is the law of the Shafi Sect of Islam, as of many codes, that there is a presumption of marriage where a man and woman have lived together as husband and wife for a considerable period of time”*.
The judge decline to accept the contention by Counsel for the Respondent that
“no such presumption arises in the law of Islam in general or that of the
15 *Shafi Sect in particular. To do so would be to lay upon the appellant a burden which he would almost certainly be unable to discharge after a considerable period of time”*.

Decided cases have further established that *“when a question arises whether a marriage has been contracted in due form...., unless the parties were*
20 *prohibited from intermarrying, it is in the following cases presumed that they were validly married, and the burden of proving that their cohabitation was illegal, shifts to the person who alleges it to be illegal; viz where:-*

- 1) *It is proved that the parties cohabited together continuously and for a long period, as husband and wife, and were treated as such by their friends; or*
- 25 (2) *either party has acknowledged that he or she was married to the other (and the other party has been confirmed, or acquiesced in, the acknowledgment”*. - See Mist Momtaz Begun vs. Anowar Hossain

(Supra) quoting Fainz.B Tyabju in Mohammedan Law, chapter on “**Proof and Presumptions of Marriage**” paragraph 81.

The Plaintiff in the present case proved that she was legally married to the Second Defendant having gone through a molsem marriage ceremony. She discharged the burden of proof placed upon her under S.101, 102 and 103 of the Evidence Act. The First Defendant on the other hand, except for Exhibit D₃ did not adduce any other evidence to rebut the presumption of marriage. The First Defendant thereby failed to discharge the burden of proof placed on it by its negative averment that the Plaintiff was not married to the First Defendant.

Another issue that arose within the first issue is **whether the irregularities in obtaining the marriage certificate which raised questions of its authenticity rendered the marriage invalid.**

The evidence of Pw1 in this respect was that she recognized the marriage certificate which she got from the Second Defendant. That their names appear in the book in the marriage was registered and it confirms the marriage. She asserted that she recalls appending her thumb print on the certificate although she could not recall the date. And she did not know if the Second Defendant could read a document written in English or not.

However, Pw3 Sheilk Khatwib Mukuluwakika identified Exhibit P₁ as the marriage certificate he issued the Second Defendant and the Plaintiff when they needed as evidence of having gone through the Islamic Marriage ceremony.

He confirmed that the marriage ceremony can be conducted by any Mullah or Sheilk of any level, who is well versed with the Faith. He told court that, when he issued the certificate, he kept a copy and gave one to the Plaintiff and to the Second Defendant.

The original certificate was availed to court and compared with the copy.

The witness explained to court that he was not the one who presided over the marriage ceremony of the Second Defendant and the Plaintiff, and he could not recall when he issued the certificate. But that, he filled the certificate based on the information from the person who asked for it.

5 Further that, he did not verify if the marriage was conducted and that the witness just appeared to sign the document.

The Defendants did not give any evidence concerning the marriage certificate. But when cross examined by Counsel for the First Defendant, Dw2 (Second Defendant) testified that, although no certificate was issued to them, the clerics
10 used to enter names in the Register Book. The witness could not recall signing any marriage certificate, but stated that, if it bears his signature, it would affirm the marriage of 1961.

Sections 5,6,7, and 8 of the Marriage and Divorce of Mohammedans Act give some procedural steps a party has to go through to have a Mohammedan
15 Marriage registered.

S.5 requires the marriage to be registered.

S.6 enjoins the Registrar to make inquiry on application being made to establish that such marriage was effected by or between the parties, and also to identify the parties.

20 S.7 provides that ***“if the Registrar is satisfied on the above points; and not otherwise, he/she shall make an entry of the marriage in the appropriate register”***.

S.8 provides for persons to sign the Register. That is: 1(a) the husband and wife or the guardians or wakil, as the case may be, and two witnesses to the marriage.

25 (2) All entries in the Registers shall be signed by the Registrar.

In the present case, Exhibit P1 the marriage certificate was secured by the Second Defendant.

The testimony of Pw3 indicates that there were lapses in the procedure, when the Second Defendant applied for the registration of the marriage. That is, when Second Defendant applied to have the marriage certificate issue, Pw3 went ahead to issue the same without verifying the information given to him. The witnesses who appended their signatures to the document only appeared to sign on the certificate.

However, such lapses do not render the marriage conducted under Islamic law invalid.

This is because S.16 of the Marriage and Divorce of Mohammedan Act provides that *“nothing in this Act shall be construed to : a) Render invalid, merely by reason of its not having been registered, any Mohammedan marriage or divorce which would other be valid;*

b) Render valid, by reason of its having been registered any such marriage or divorce which would other be invalid;

c)....

d) Affect the religious rites of any persons in Uganda, and

e) Prevent any person who is unable to write from putting his/her mark instead of the signature required by this Act”.

In the present case, the Second Defendant and the Plaintiff attempted to register an already existing marriage.

The irregularity in the procedure adopted did not render the marriage invalid.

I am fortified in my holding by the case of Ali s/o Pazi vs. Hamisi Mohamed [1968] EAIII at P112 (E) where court held that: *“No can I agree that the*

absence of a certificate of marriage has any particular significance, other than (to some minor degree) supporting the Respondent's case. The failure to produce such written evidence may be accounted for in many ways after a period of some forty years. There is no magic in such a document, nor does its non-production necessarily raise a presumption that no marriage took place between the parties".

The non-registration and obtaining of a marriage certificate was not fatal to the validity of the Plaintiff and Second Defendant's marriage. Neither was the failure to produce any witness in court, who was present when the marriage was conducted.

The inconsistency in the Plaintiff's evidence as to number and names of the children she has with the Second Defendant could not affect the validity of the marriage either.

In absence of direct evidence on the point "*Muslim law presumes in favor of marriage*", **Mist Momtaz Begun vs. Anwar Hossein (Supra)**. But in the present case, evidence has been presented to show that the Plaintiff and Second Defendant have lived together as husband and wife for a long time.

The case of **Uganda vs. Abdulla Nasser [1982] HCB** relied upon by Counsel for the First Defendant, would only be applicable if there were grave inconsistencies in the evidence of the Plaintiff and if it was proved that she was deliberately untruthful.

The earlier findings that the marriage between the Plaintiff and Second Defendant was valid is maintained.

The next issue to determine is **whether the suit property was lawfully engaged as security for mortgage by the Defendants.**

S.38A of the Land Act provides for security of occupancy to a spouse on family land.

S.39 of the Land Act provides for restrictions on transfer of family land. Subsections (1) and (2) of S.39 prohibit family members to carry out certain transactions on the land without the consent of the spouse.

While S. 3 (1) and (3) of the Mortgage Act “*give discretion to a person holding land by instrument to mortgage his/her interest to secure the payment of an existing or future or a contingent debtor or other money or moneys worth or the fulfillment of a condition, that power shall be exercisable subject to any prohibition or limitation... imposed by any written law*”.

The Plaintiff in the present case contends that the suit land is family/matrimonial property that was mortgaged without her consent.

However, under S.5 (1), (2) and (3) of the Mortgage Act – Notwithstanding S.3 of the Land Act, “*A mortgage of a matrimonial home, including mortgage on customary land of a matrimonial home is valid if (a) any document or form used in applying for the mortgage is signed by or there is evidence from the document that it has been assented to by the mortgagor and the spouse or spouses of the mortgagor living in the matrimonial home*”.

(b) Any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the mortgagor and the spouse or spouses of the mortgagor living in the matrimonial home.

For the purposes of subsection (1) (a) An intending mortgagee shall take reasonable steps to ascertain whether an intending mortgagor is married and whether or not the property to be mortgaged is a matrimonial home.

b) An intending mortgagor shall make full disclosure to the intending mortgagee as to his/her marital status and whether or not the property mortgaged comprises the matrimonial home;

5 And the mortgagee shall be deemed to have discharged the duty under sub section (2), if the mortgagee obtains a marriage certificate issued in accordance with the laws of Uganda, and in the absence of it, a statutory declaration from the spouse or spouses of the mortgagor as proof of marriage.

10 In the present case, before the loan and mortgage agreements were executed by the parties, a valuation was carried out to establish the proprietorship, user and suitability of the suit land, on the instructions of the Defendants. The valuation report is dated 24.03.11- Exhibit D2.

It is indicated in the report that the property is residential and family home with signs of occupation. It was recommended that the property was subject to the provisions of the Land Act, as a family home.

15 By the power of attorney dated 19.10.11, the Second Defendant appointed Uganda Academic Enhancement Co. Ltd as his lawful Attorney, to take possession of the suit land, title deed etc and pledge the same to the First Defendant and obtain a loan on its terms.

20 In preparation of signing the mortgage agreement, the Second Defendant with the assistance of the First Defendant made a statutory declaration dated 06.12.11, contending that he was not married as per the laws of Uganda. Therefore, no consent to mortgage the property was obtained from the Plaintiff as required by law.

25 On the same date, a mortgage agreement was executed between the First Defendant as the “Mortgagee” (lender) Uganda Academic Enchantment Co. Ltd

as the “Borrower” (beneficiary) and the Second Defendant as the “Mortgagor” (Donor).

Court has to determine **whether the First Defendant carried out the due diligence required before becoming a mortgagee of family property as required by the Mortgage Act.**

The requirement was meant to avoid some of the pitfalls that may be caused by undue influence that could be exerted on the spouse during the course of getting a loan, where the spouse’s equitable interest in the intended mortgage land can be postponed in favor of the mortgagee. By carrying out due diligence, the mortgagee would take steps to “**protect the**” vulnerable spouse, when facts that suggest a risk in the process to grant the mortgage are revealed.

Counsel for the First Defendant submitted that the second Defendant was not married, as per paragraph 5 of the Statutory Declaration of the Second Defendant.

But apart from ascertaining whether the intending mortgagor was married, the intending mortgagee had a duty to take reasonable steps to ascertain whether or not the property to be mortgaged was matrimonial property. And the intending mortgagor had a duty to make full disclosure to the intending mortgagee whether or not the property to be mortgaged comprised of the matrimonial home – S.5 (2) Mortgage Act.

Under S.4 (1) of the same Act, a mortgagor and mortgagee are obliged (a) to act honestly and in good faith and (b) in particular, disclose all relevant information relating to the mortgage.

It is an offence under S.4 (2) of the Act for a mortgagee or mortgagor who refuses, neglects or **fails** to disclose information relevant to a mortgage and which is in his/her possession.

From the evidence of Pw1 and Pw2 and the valuation report sanctioned by both Defendants, it can be discerned that the suit property was family property. The valuation report binds both Defendants and none of them can claim lack of notice actual or constructive or implied in assessing the risk of creating a mortgage on matrimonial or family home.

Secondly, the Second Defendant swore a false statutory declaration, meaning that he acted dishonestly and in bad faith, well knowing that the facts he was hiding were relevant to the decision whether to create a mortgage over the property or not.

This is coupled with the fact that, in his evidence Dw2 admitted that the Plaintiff is his wife and they stay together at the suit property in Makindye. His oral evidence was contrary to what he stated in the statutory declaration – Exhibit D3.

All these actions of the Second Defendant were contrary to S.4 (1) and 5 (2) of the Mortgage Act.

Basing on the statutory declaration, the power of attorney and valuation report, the First Defendant advanced the loan to Uganda Academic Enhancement Co. Ltd – Exhibit D4.

The First Defendant relies on those documents to argue that due diligence was carried out and it was established that the Second Defendant was not married and that the suit property was not matrimonial property.

However, the evidence of the First Defendant and the submissions of its Counsel are belied by the valuation report- Exhibit D2. The report as already mentioned in this judgment indicates that the suit property **was family property** **and** had signs of occupation.

The valuation report put the First Defendant on notice that it run the risk of advancing a loan on family property where no consent had been obtained by the mortgagor. The notice was ignored.

5 This may explain why it was the First Defendant that prepared the statutory declaration and later claimed to have obtained the same from the Second Defendant as proof of the non-existence of the marriage between the Second Defendant and the Plaintiff. The First Defendant, in these circumstances ought to have advised the Second Defendant to get independent legal advice to avoid the obvious conflict of interest.

10 The court finds that the First Defendant did not act in good faith or honestly. Having had notice by way of the valuation report, they ought to have appreciated that the property was not suitable to be pledged as security for a loan. The First Defendant did not comply with S.4 (1) of the Mortgage Act.

15 It is true as submitted by Counsel for the First Defendant and from the evidence of Dw1 that, under S.146 (D) of the Registration of Titles Act, (RTA) a proprietor of any land may appoint any person to act for him/her in transferring that land, lease or mortgage or otherwise deal with it by signing a power of attorney, as was done in this case.

20 But it is evident that, by the time the powers of Attorney were signed by Second Defendant on 19.10.11, there was already actual or imputed notice to the First Defendant that the property was burdened. By ignoring that notice and the parties going ahead to sign the loan and mortgage agreement on 06.02.12, on the basis of the same report, the power of attorney and statutory declaration, the parties acted in contravention of the law and equitable principles.

25 Under S.43 of the Mortgage Act, *“the rules of cannon law the doctrines of equity applicable to mortgages, shall continue in force, in accordance with the*

provisions of the Judicature Act, except in so far as they are inconsistent with this Act”.

For the First Defendant (mortgagee) to acquire the land free from the existing equitable interest of the Plaintiff (spouse) as recognized by the Land Act and the Mortgage Act, it must prove that the interest in the land was acquired by it
5 bonafide, that is without notice. But as already pointed out in this judgment, court has found that the First Defendant had notice of such spousal interest as evidenced by Exhibit D2.

For the reasons already set out herein, the First Defendant (mortgagee) did not
10 act in good faith while entering the transaction, as it had notice of the equitable interest or should have been aware of the equitable interest and is therefore bound by it.

Although Counsel for the First Defendant contends that Pw1 and Pw2 were not present at the time the valuation was carried out, the report indicates otherwise.

15 The burden was upon the First Defendant to prove that although the property was a residential house, it was not matrimonial property envisaged under SS.38 A and 39 of the Land Act.

The submissions of Counsel for the First Defendant that the Second Defendant in his evidence departed from his pleadings, is upheld.

20 Dw2 stated in his evidence that it was his son Wahabi Musoke to whom he availed the certificate of title to use it to borrow money and that the son was hoodwinked by Nancy Twashaba Rwabrindore, is a departure from the pleadings.

The memorandum of understanding dated 20.02.12 was entered into between
25 the parties fourteen days after the loan and mortgage agreement was executed by the parties. The names of the said son of the Second Defendant did not

feature anywhere in the memorandum. The Second Defendant could not been heard to deny the execution of the mortgage agreement and then accepting execution of the memorandum of understanding.

All documents were for the same purpose.

5 *“The object of pleadings is of course, to ensure that both parties shall know what are the points in issue between them; so that each may have full information of the case they have to meet and prepare evidence to support their own case or meet that of their opponent. As a rule, relief not founded on the pleadings will not be given”.* – 0.6r7 C.P.R and the case of **Gandy vs. Caspar Air Cleaners Ltd [1956] 23 EACA 139.**
10

The submissions of Counsel also raise the issue whether the statutory declaration was incurably defective for failure to conform to S.66 and 67 of the Advocates Act.

Counsel for the Plaintiff argued that an illegal instrument cannot justify
15 anything.

Counsel for the First Defendant argued that SS.66 and 67 of the Advocates Act relate to instruments, and the Act does not define an instrument.

Referring to S.1 (h) of the Registration of Titles Act which defines an instrument to include any document in pursuance of which an entry is made in
20 the Register, Counsel contended that, a statutory declaration is not an instrument and therefore SS 66 and 66 of the Advocates Act do not apply to it. That the Statutory declaration sworn by the Second Defendant having been registered by the Registrar of Documents is a valid document.

S.66 (1) of the Advocates Acts specifies instruments which must not be
25 prepared by unqualified persons. Such documents relate to: movable or immovable property or any legal proceedings; formation of any limited liability

company whether private or public; making a deed of partnership or the dissolution of a partnership; and doing so amounts to an offence.

However, under Section 66 (2) subsection (1) does not apply to (a) any public officer drawing or preparing instruments in the course of duty;

5 (b) Any person employed merely to endorse any instrument, application or proceedings; or

(c) Any person in the full time employment of a limited liability company drawing or preparing instruments in the course of duty for and on behalf of the company.

10 Sub section (3) of S.66 sets out documents that are not included in the expression “**instrument**” for the purpose of S.66 and 67.

S. 67 of the Act requires a person who draws or prepares any instrument to which S.66 applies, to endorse their name and address. And any such omission to do so or false endorsement of such instrument amounts to an offence.

15 The purpose of the sections is “*to identify and punish unqualified persons who prepare legal documents for a fee or reward*” – **Kotecha vs. Mohammed [2002] EA 112 (CAU)**. Berko JA.

A look at Exhibit D3, the statutory instrument of the Second Defendant verifying his marital status, shows that it did not conform to the requirements of
20 S.67 (1) of the Advocates Act; it does not indicate the name and address of the person who drew it.

Be that as it may, the evidence of Dw1 shows that the statutory declaration was drafted by the Legal Department of the First Defendant, where she is an employee.

Therefore the omission to state the name and address of the person who drafted it does not render it invalid or incurably defective. The omission was a mere irregularity in form. Nonetheless, for reasons already stated herein, the document could not be relied upon to support the First Defendant's case.

5 In conclusion, this court finds that the suit property was not lawfully pledged as security for the loan facility. And the mortgage deed of 06.02.12 was not properly executed as it was in pursuance of an illegal transaction.

What remedies is the Plaintiff entitled to?

The remedies sought by the Plaintiff five in number were set out at the beginning of this judgment. Before I consider the remedies in the order that they were sought, I wish to note that, I am aware of the legal right of a mortgagee to sale mortgaged property upon default. The right is recognized under S.20 (e) of the Mortgage Act. But the remedies available to the mortgagee under the section presuppose the existence of a valid mortgage. The burden of proof was on the Plaintiff to establish the grounds that negative the First Defendant's right over the mortgaged property. This court has already held that the Plaintiff discharged the burden; hence consideration of the remedies she is entitled to.

1) (a) A declaration that the mortgage of her matrimonial home by the Defendants was irregularly, fraudulently and illegally secured.

The Plaintiff proved on a balance of probabilities that she is a wife of the Second Defendant. That her consent was not obtained before the suit property was mortgaged to the First Defendant; and therefore the property was not lawfully mortgaged as security.

25 The Plaintiff's right as a spouse is granted by the Land Act and the Mortgage Act.

While normally under S.59 of the Registrar of Titles Act, S.3 A (3) of the Land Act and S.3 (4) of the Mortgage Act, once the mortgagee is registered on a title, indefeasibility of title will not only protect the mortgage but the mortgage debt. Indefeasibility will not assist where the mortgagee acted dishonestly, lacked
5 good faith and had notice of the statutory equitable interests of the aggrieved party but ignored them, as was proved in the present case.

The declaration sought by the Plaintiff is accordingly granted.

1) (b) Review of Mortgage:

An oral application was made by Counsel for the Defendant to review the
10 mortgage under S.34, 35 and 365 of the Mortgage Act. He relied on the case of **Aisha Kiwanuka vs. Microfinance Support Center Ltd & Imam Kiwanuka Misc. Cause 21/2013.**

S.34 of the Mortgage Act provides that “*where a mortgage has been obtained: (a) through fraud, deceit, or misrepresentation by the mortgagor; or (b) in a
15 manner containing a provision which is unlawful; the court may review the mortgage in the interests of justice on application of the mortgagor or mortgagee*”. – Refer to S.35 (1) (a) of the Mortgage Act.

“*In reviewing the mortgage, the court may (a) declare it void, and (b) direct that the mortgage shall have effect subject to such modifications as the court
20 shall order; or (c) require the mortgagee to repay the whole or part if any sum paid under the mortgage or any related or collateral agreement by the mortgagor or any surety or other person who assumed an obligation under the mortgage whether it was paid to the mortgagee or any other person*”. – S.36 (1) Mortgage Act.

25 (2) *The court shall not declare a mortgage void unless it is satisfied that the circumstances justify it;*

(3) Where an application is made on the grounds that the mortgage contains any provisions which is unlawful, unconscionable or extortionate the court shall to the greatest extent possible, uphold the mortgage with the omission of the unlawful, unconscionable and extortionate provision.

5 *(4) Where an application is made on the grounds of the exercise of undue influence or other unconscionable conduct, and two or more persons are joint mortgagors or mortgagees, and those grounds are proved to the satisfaction of the court, the court shall uphold the mortgage to the extent of the interests of the joint mortgagors or mortgagees upon whom undue influence was not*
10 *exercised.*

In the present case, it was argued that, if court finds that the suit property is matrimonial property, the circumstances do not justify a declaration that the mortgage is void.

This court has already declared the mortgage null and void for reasons set out
15 herein. The circumstances justified that declaration and the decision cannot be changed.

Nonetheless, that does not affect clause 12 of the loan agreement. Though the borrower was not made a party to the suit and the First Defendant did not issue a Third party notice to the borrower, the Defendants can still file a suit against
20 the borrower who was a beneficiary of the loan amount and failed to repay it; to enforce paragraph 12 of the loan agreement.

2) Permanent Injunction:

Since court has already declared that the Plaintiff's matrimonial home was wrongfully mortgaged, it is in order for a permanent injunction to issue against
25 the Defendants, restraining them from selling the property in a bid to realize the secured amount. It is so ordered.

3) The Cancellation and Release of encumbrances lodged by the First Defendant on the Plaintiff's matrimonial home certificate of title is also allowed for the same reasons. The property was wrongfully mortgaged without the consent for the Plaintiff as required by law.

5 **4) General Damages:**

According to decided cases, "*general damages ...are what court may award when the court cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man*". – See Haji Asumani Mutekanga vs. Equator Growers (U) Ltd SCCA 07/1995 Oder

10 JSC, as he then was.

I agree with the evidence of the Plaintiff and the submissions of her Counsel that she was greatly inconvenienced by the Defendant's action of mortgaging her matrimonial home without her consent.

The property was advertised for sale in the New Vision Newspaper of 07th August, 2013 at P.39, which is an indicator that the threat was real. The Plaintiff is therefore entitled to an award of general damages.

Counsel for the Plaintiff proposed an award of Shs. 150,000,000/- as general damages. While Counsel for the First Defendant proposed a nominal sum of Shs. 2,000,000/-. The amount proposed by Counsel for the Plaintiff is too high, while that proposed by Counsel for the First Defendant is too low.

Considering the circumstances of the case, court grants the sum of Shs. 10,000,000/- as general damages also taking into account that the Plaintiff is going to earn interest on the sum.

5) Exemplary Damages:

“Exemplary or punitive damages are additional to an award which is intended to compensate a Plaintiff fully for the loss suffered, both pecuniary and non-pecuniary. They are intended to punish and deter.” – Refer to **Kuddus (AP) vs. Chief Constable of Leicester shire Constabulary [2001] UK HL 29**

5 House of Lords.

Counsel for the Plaintiff prayed for a sum of Shs. 80,000,000/- as exemplary damages.

The Plaintiff is entitled to exemplary damages as she was a victim of punishable behavior. Both Defendants were joint wrong doers. Both their conduct was
10 wanting in that they failed to follow the law, common law and equitable laid down procedures before mortgaging the matrimonial home of the Plaintiff. They also told deliberate lies when the First Defendant assisted the Second Defendant to make a false statutory declaration.

The First Defendant as the lender was set to benefit from the mortgage
15 transaction from the interest earned on the principal amount. The Second Defendant was also set to benefit from the loan, as the evidence available indicates that he is a shareholder and Director in the Uganda Academic Enhancement Co. Ltd, the beneficiary of the loan.

Both Defendants’ conduct was calculated to make a profit for themselves or for
20 a party where they derive benefit, at the expense of the Plaintiff. But since the property has not been sold, and the Plaintiff has also been awarded general damages, Shs. 10,000,000/- will be awarded as exemplary damages. The Shs. 80,000,000/- proposed by Counsel for the Plaintiff is excessive.

6) Cost of the Suit:

25 Counsel for the Plaintiff prayed for costs of the suit, while Counsel for the First Defendant prayed for dismissal of the suit also with costs.

It is trite law that *“costs follow the event and that a successful party is entitled to costs unless for good reason court decided otherwise”*. – S.27 (1) and (2) of the Civil Procedure Act and the case **of Departed Asians Property Custodian Board vs. Jaffer Brothers [1999] IEA 12r.**

- 5 The Plaintiff being the successful party in this suit is therefore entitled to costs and they are hereby granted.

Judgment is hereby entered for the Plaintiff against the Defendants jointly and severally in the following terms:-

- 1) (a) It is hereby declared that the mortgage created by the Defendants on
10 LRV 932, Folio 3, Plot 156, Block 262, land at Makindye, the matrimonial home of the Plaintiff, for secure a loan facility of Shs. 280,000,000/- advanced to Uganda Academic Enhancement Co. Ltd, was irregular and illegally secured and is therefore null and void.
- 2) A permanent injunction does issue against the Defendants restraining them
15 from selling the said described property in satisfaction of the mortgage debt, without the prior consent of the Plaintiff.
- 3) It is hereby directed that the mortgage instrument lodged on the said property as an encumbrance on the title shall be canceled and removed and the title released to the Plaintiff to note her interests.
- 20 4) General damages of Shs. 10,000,000/- are awarded to the Plaintiff.
- 5) Exemplary damages of Shs. 10,000,000/- are awarded to the Plaintiff.
- 6) The Plaintiff is awarded interest on item 4 at the rate of 12% per annum from the date of judgment unto payment in full.
- 7) Taxed costs of the suit are also awarded to the Plaintiff.

FLAVIA SENOGA ANGLIN

JUDGE

09.03.18

5