

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
CIVIL SUIT NO 518 OF 2007

AGNES BAINOMUGISHA).....PLAINTIFF

VERSUS

DFCU LTD).....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA

JUDGMENT

The plaintiff's suit against DFCU the defendant herein is for declarations that the mortgage agreement between the plaintiff's husband and the defendant is null and void as it contravenes the law in that no consent of a spouse under section 39 of the Land Act cap 227 had been obtained before mortgaging the suit land; for orders directing the Registrar of Titles to cancel the mortgage on the land comprised in Plot 15 Block 18 Folio 8 Volume 2514 Kashari Mbarara under mortgage instrument 326234; for a permanent injunction restraining the defendants from selling or claiming an interest in respect of the that land, general damages and costs of the suit. The defendant denies that the mortgage is invalid and contends in its written statement of defence that the mortgage was executed with the full participation of the plaintiff who is the spouse of the registered proprietor. The defendant further contends that the plaintiff is estopped from questioning the validity or legality of the mortgage the plaintiff had endorsed as a director/secretary on the ground of lack of consent of a spouse.

Kenneth Kakuru represented the plaintiff while Kabito Karamagi represented the defendant. When the case came for hearing before me, the counsels agreed on all the relevant facts and documents in their joint scheduling memorandum in which they also agreed that there was no need to call witnesses as the facts of the dispute were not in contention.

Agreed Facts:

The agreed facts and documents in the joint scheduling memorandum are as follows:

- a. The plaintiff has at all material times been a director and secretary in a company known as Bainebitamazire Mixed Farm Ltd (hereinafter referred to as 'the company'). Mr Frank Bitamazire Bainomugisha, the plaintiff's husband is her only co-director in the said company.
- b. The board of the said company convened on 3rd of July 2002 and authorised the company to apply and subsequently obtained an investment loan facility of Uganda shillings 150 million from the defendant.
- c. The company agreed to secure the repayment of the said facility by creating the following securities in favour of the defendant:
 - i. Legal mortgage dated 5th July 2002 in respect of land and developments comprised in LRV 2514 folio 8 plot 15 Kashari block Mbarara (the suit property) as well as land and developments comprised in LRV 1727 folio 12 plot 330 Kibuga block 23 at Kampala.
 - ii. Debenture deeds dated 5th July 2002 over all the movable assets of the company;
 - iii. Personal guarantees of the directors including the plaintiff.
- d. The plaintiff's husband and co-director in the company being the registered proprietor of the said land executed a power of attorney authorising the company to mortgage the said land to the defendant.

- e. The plaintiff being a director and secretary in the company duly executed the resolution authorising the borrowing as well as the mortgage and debenture deeds on the company's behalf.
- f. The company defaulted on its repayment obligations and upon receipt of a final demand dated 1st October 2005, the plaintiff and defendant co-operated in the disposal of the security comprised in LRV 1727 folio 12 plot 330 Kibuga block 23 in January 2006 and the proceeds there from applied towards the settlement of its outstanding loan monies.
- g. The company still failed to pay the balance of its loan after the sale of the above described security whereupon on 30th October 2006, the defendant enforced its rights in the debenture and the mortgage deeds by appointing a receiver/manager to realise its securities.
- h. The receiver/manager advertised the sale of the property in the Monitor Newspaper of 3rd November 2006 whereupon the plaintiff commenced this suit.
- i. The plaintiff placed a caveat on the property dated 19th December 2006 vide instrument number 375160 of 2nd January 2007.
- j. The property has since been disposed of following this court's ruling in miscellaneous application number 435 of 2007 and miscellaneous cause 13 of 2010 as well as the Court of Appeal ruling in civil appeal number 63 of 2007.

In addition the parties agreed on the documents to be relied on as exhibits these are:

- i. Board resolution dated fifth of July 2002
- ii. Personal Guarantee executed by the plaintiff
- iii. Mortgage deed executed by the company dated fifth of July 2002
- iv. Debenture deeds dated fifth of July 2002

- v. Kampala attorney and solicitors letter dated 21 October 2005
- vi. Defendants letter dated fourth of November 2005
- vii. Kampala attorney and solicitors letter dated fourth of November 2005.
- viii. Capital outdoor advertising company Ltd letter dated the 2 January 2006.
- ix. Advertising in the daily monitor newspaper of 3rd November 2006
- x. plaintiffs caveat dated 19th of December 2006
- xi. High Court ruling in miscellaneous cause 13 of 2010 – DFCU Ltd versus Agnes Bainomugisha
- xii. Court of Appeal ruling in civil appeal number 63 of 2007 Agnes Bainomugisha versus DFCU Ltd.

Agreed issues

- a) Whether the plaintiff was required to give spousal consent to give effect to the creation of the mortgage and, if so, whether the same was obtained.

- b) Remedies available.

As far as the agreed issues are concerned, I will deal with the first issue first as its outcome will determine what kind of remedies and for which party the remedy if any may be ordered.

Whether the plaintiff was required to give spousal consent to give effect to the creation of the mortgage and, if so, whether the same was obtained

Plaintiffs Submissions:

The plaintiff's written submissions in support of the suit as I have understood is that the Defendants main defence is that the mortgage deed in issue was executed with the full and active participation of the plaintiff who signed as a co-director and secretary of the company. The plaintiff position on the other hand is based on the interpretation of section 39 of the Land Act which provides:

S.39 (1) (a)

"no person shall sell, exchange, transfer, pledge, mortgage or lease any land;

(b) enter into any contract for the sale, exchange, transfer, pledging, mortgage or lease of any land;

39 (1) (c) (ii) " in the case of land on which a person ordinarily resides with his or her spouse, children... And from which they derive sustenance, without the prior written consent of response ".

Referring to the case of **Salmon v Salmon (1877) AC 22** the plaintiff's counsel contends that a company is a separate and distinct legal entity from its shareholders. This even has a statutory basis under section 15 of the Companies Act cap 110. In the case of **Standard Chartered Bank of Uganda Ltd versus Ben Kavuya and Barclays Bank (Uganda) Ltd High Court MA No. 350 of [2006] HCB Volume 1 at page 134** the principle of law that a company owns its own property separate from its members and its liability cannot ordinarily be enforced against individual shareholders and vice versa is spelt out. He further referred to the definition of a legal person by Hon. Mr. Justice Bamwine in the case of **Major Ronald Kakooza Mutale vs. Attorney General and Inspector General of Government Misc Application No. 665 of 2003** which case describes what a legal fiction of personality can do such as suing, in its own name and having rights and obligations, owning property etc and because it is a status conferred by law and it need not have all the attributes of a natural person.

He contended that the case revolves on resolution of whether or not the defendant executed a valid legal mortgage in respect of land the suit property comprised in leasehold register volume 2514 Folio 8 plot 15 Kashari block 18 Mbarara. He contended that it is not in issue that the said property was protected by section 39 of the Land Act and it is not disputed that consent was necessary as required by law. The plaintiff's case is that there was no such consent and none should be implied. Once the court finds that there was no consent as envisaged by section 39 of the Land Act, the mortgage challenged in this suit would be invalid. Specifically he contended that the suit property in contention here is only the one of Kashari Mbarara referred to above as the other property referred to in

the same mortgage deed was sold with consent whereas not for the Kashari property.

Counsel for the plaintiff acknowledged that the plaintiff as director and secretary in the borrower company signed the mortgage deed on 5th July 2002 and other supporting documents related to the loan transaction as stated in the agreed facts but he contended that this did not comply with section 39 of the Land Act contrary to the contention of the defendant that it did.

The plaintiff's counsel submitted that in July 2002 the Land Act required prior written consent before a mortgage could be executed and this prior written consent had not been obtained. He contended that neither the plaintiff as an individual nor her husband ever applied for a loan. The loan was applied for by a limited company in which she was a director and it is in this context that she signed the mortgage deed and not as a spouse. Therefore the signing of the mortgage deed as the plaintiff did cannot even by stretching the language in any way constitute prior written consent. He contended that prior to its amended section 39 of the Land Act required a separate consent before a mortgage deed could be signed. Nothing more and nothing less and that anything less than this would contravene the law. That consent cannot be implied; it had to be express according to the wording of the relevant provision cited above.

Counsel's contention is that because no prior written consent was obtained, it followed that the mortgage in respect of the suit land was void and issue number 1 should be answered in favour of the plaintiff.

Touching on issue number 2 which is relevant to issue number 1 on whether the plaintiff is entitled to damages he contended that the transaction of mortgaging the suit property was null and void and the court should declare it so. He referred to the case of *Kisugu Quarries Ltd vs. Administrator General S.C.C.A. 10 of 1998 [KALR 437]* where it was held that:

“A court of law cannot sanction what is illegal because, *ex turpi causa non action oritur*. No court should enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of the

contract or transaction which is illegal if the legality is duly brought under section 2 of the land transfer providing that no lease may be obtained by a non-Africa without the consent of the Minister. In the instant case, the appellant had failed to prove that the lease was obtained with the required ministerial consent. Therefore, the subsequent lease was illegal and an enforceable"

Secondly, he contended that section 177 of the RTA cap 230 gives the High Court powers for the cancelation of a certificate of entry on the certificate of title in any proceedings by the person registered as proprietors thereof.

He prayed for the remedies set out in the plaint.

The defendant's written submissions in reply

That the plaintiff challenges the validity of the mortgage (DE2) registered under instrument No. 326234 of 23rd of July 2002 on the ground that the same was created without her consent as a spouse.

Submissions of the defendant on issue No 1 on whether the plaintiff was required to give spousal consent, and if so, whether the same was obtained is set out below.

That court has to interpret section 39 of the Land Act chapter 227 and establish whether the section was complied with. After setting out the section counsel submitted that in interpreting section 39 of the Land Act Cap to 227 the question firstly was on who section 39 imposes a requirement to obtain spousal consent. The defendants counsel disagreed that the mortgage of the suit land was void for lack of spousal consent as stipulated under section 39 of the Land Act. He emphasised the words: ""no person shall... mortgage... except with the prior written consent of a spouse." He further contended that the head note of the section shows that it relates to restrictions on transfer of land by family members. He contended that the evidence on record and admitted facts indicate that the mortgage (DE2) was created and executed by Bainebitamazire Mixed Farm Ltd as

mortgagor and it is not disputed that plaintiff's spouse is Mr Frank Bitamazire and not the company. Counsel agreed that a company is a distinct legal person from its members and as such the plaintiff was neither the company's spouse nor was the company her family member.

It is therefore the defendant's submission from the above premises that the plaintiff's consent was not required before Bainebitamazire Mixed Farm Ltd could mortgage the suit property to the defendant. He contended that the Court of Appeal of Uganda considered this argument during the appeal in Civil Appeal 63 of 2007 being an appeal from an interlocutory judgment of Hon. Mr. Justice Egonda – Ntende refusing to grant an interlocutory injunction. He referred to the lead judgment in the appeal delivered by honourable Lady Justice C.K. Byamugisha at page 6 and paragraphs 15 to 20 thereof which he quoted. The Court of Appeal doubted whether the plaintiff/appellant was the company's/mortgagor's spouse for purposes of section 39 of the Land Act. They further observed that the appellant/plaintiff was the mind of the company that mortgaged the suit property together with her husband. The court further observed that a strict interpretation of section 39 of the Land Act did not include the granting of powers of attorney as among those acts which required spousal consent.

The defendant's counsel submitted further that the plaintiff has not demonstrated that she is the company's spouse for purposes of section 39 of the Land Act. Counsel prayed that I uphold the reasoning of the Court of Appeal that the consent required would not relate to the company and was therefore inapplicable. Without prejudice if court is inclined to find that a spouse's consent was required in this transaction, then they would address the question of whether the consent was obtained.

He contended that in determining whether consent was obtained, it was paramount to define the word consent. He referred to Osborne's Concise Dictionary 9th edition at page 97 which defines consent as "agreement"; the Oxford advanced learners dictionary 5th edition at page 244 which defines

consent as "to give agreement or permission" and furthermore alternative words for "consent" in the Oxford compact thesaurus at page 85 which are:

"agreed to, comply, concur, accede, acquiesce, giving, permit, allow, approve, authorise..."

The defendants counsel contended that according to the definition of consent given above, any permission/approval/authorisation/agreement to something would suffice as consent. He invited court to disregard the plaintiff's submission emphasising the words "prior written consent" and that a separate consent was required. The word separate consent has not been used and should not be implied. What is material is that the plaintiff appended her signature to various documents relating to the mortgage and this signified her consent. He referred to Oxford advanced learners dictionary 5th edition page 1100 that once a person has endorsed a document with his or her signature, this would generally mean that the person who endorsed agrees with what the document says. He further cited Osborne's concise dictionary 9th edition which provides that:

"a document is signed when the relevant person writes marks something on it in token of that person's intention to be bound by its contents".

The defendants counsel submitted that the plaintiff provided the said prior written consent by appending her signature as the director/secretary of the company on the documents exhibit DE1, DE2, DE3, DE4, and DE5A which relate to the formal documents for obtaining the loan and the mortgage deed itself. That the plaintiff consented to the creation of the mortgage (DE2) when she approved/authorised/permitted/accepted the transaction to continue through the following he endorsements on the agreed documentary evidence namely:

- a. That as secretary of the company, the plaintiff called a board meeting scheduled for 3rd of July 2002 to discuss the borrowing for the company and providing for security for the loan;
- b. Attending a board meeting one the 3rd of July 2002 which authorised the company to apply for an investment loan facility from the defendant and the pledging of security.

- c. Appending handwritten signature to resolution (D E1) on behalf of the company to secure the repayment of the facility by executing the contested mortgage, a debenture and personal guarantees.
- d. Executing the mortgage (DE2), (D E3) and (DE5A) deeds of the company's behalf by appending a signature as secretary/director
- e. Executing a personal guarantee (DE4) undertaking personal liability for the repayment of the loan sums by the company.
- f. Participating in the disposal of the security comprised in LRV 1727 folio 12 plot 330 Kibuga plot 23 (that was mortgaged to the defendant and obtained the now contested mortgage) in January 2006 when the company had defaulted on its loan repayment obligations.

The defendants submitted that the by appending her signature to the various documents listed above she signified her approval of the loan. That attempts by the plaintiff to deny consent, was an afterthought aimed at frustrating the defendant's recovery process.

Counsel further submitted that the plaintiff lied on oath in an affidavit in support of the mortgage that she did not know the circumstances under which the property had been mortgaged despite her personal participation in the creation of the mortgage and her co-operation in the disposal of one of the assets mortgaged under the same security document. Counsel invited court to hold that the plaintiff gave her consent and that to hold otherwise would be to prefer form over substance.

As far as the intention of legislature is concerned the defendant's counsel submitted that in the event that the court holds that the participation of the plaintiff in obtaining the loan did not amount to consent, the court should examine the intention of legislature in enacting section 39. That section 39 of the Land Act intended to prevent the disposal or mortgaging of a matrimonial home by a spouse without the knowledge or consent of the other spouse. By executing the relevant documents for the loan, the plaintiff exhibited knowledge of the transaction from start to finish and she is not the spouse the law intended to protect.

On the issue that the plaintiff signed as a director and not personally counsel for the defendant submitted that the argument was incongruous and defies biological dictates. It is the same as suggesting that the plaintiff possesses different faculties, for use as a director and another for use as a spouse. In any case, counsel submitted that the personal guarantee signed by the plaintiff guaranteeing the loan was executed in her personal capacity.

He cited the case of *Lennards Carrying Co. Ltd v Asiatic Petroleum Co. Ltd (1915) AC 705* for the proposition that the company can only think and act through the mind of its directors.

"A Corporation is an obstruction. It has no mind of its own any more than it has a body of its own, it's active and directing mind must be sought in the person of somebody..."

The plaintiff was the active and directing mind of the company together with her husband. Counsel contended that to suggest that the plaintiff as an active and directive mind of the company agreed to the transaction but as a spouse did not agree is a desperate attempt to literally divide the plaintiff into two persons with the two sets of completely different minds.

Counsel for the Defendant further referred me to MA No. 435 of 2007 the decision of Hon. Mr. Justice Engonda Ntende in the application for a temporary injunction by the plaintiff where he observed that the plaintiff and her husband were the actual mind of the mortgagor which mind mortgaged the suit property. Counsel further contended that the court of appeal upheld the interpretation of Hon. Mr. Justice Egonda Ntende.

Rejoinder of the plaintiff

In rejoinder the plaintiff's counsel asked me to disregard the submission of the defendant on whether the company could not be the plaintiff's husband as this was not pleaded. That the WSD acknowledges that the mortgagor was the plaintiff's husband. Without prejudice he submitted that the plaintiff's husband remained the registered proprietor of the suit property bringing it under the ambit of section 39 of the Land Act.

Plaintiff's counsel submitted that a donee of a power of attorney had to fulfil all the conditions that ought to be fulfilled by the donor and as held in the Supreme Court case of **Zzabwe versus Orient Bank and others SCCA No. 4 of 2006**. That the donee is an agent of the donor and acts on behalf of the donor. He cannot use the power for his own benefit to the detriment of the donor. He submitted that to suggest that by simply signing a power of attorney, a registered proprietor defeats the intention and express terms of an act of Parliament is untenable. He contended that if a donor of the power of attorney cannot mortgage without prior written consent of a spouse then the donee too cannot do so. The plaintiff's husband as a donor could not grant the company, the donee, powers he himself did not possess.

As far as prior written consent is concerned the plaintiff's counsel submitted that the consent must be in writing and must be obtained before the mortgage is signed or even negotiated and the two must constitute two separate transactions contained in two separate documents. That if both documents bear the same date but does not indicate time, oral evidence would need to be adduced to establish which of the two documents was written and signed before the other. In this particular case this was not necessary as it is admitted that there was never any separate written prior consent which in itself is an admission that the law was not complied with.

Judgment

I have carefully read through the written submissions of the parties and the authorities attached to the submissions.

On the first issue of whether the plaintiff was required to give spousal consent in the circumstances of the case, and whether the same was obtained, two stages of analysis may be involved. The first analysis addresses matters of law as to whether in the circumstances there was failure to give prior written consent which rendered the mortgage and subsequent transactions based on it null and void and in contravention of section 39 of the Land Act before its amendment by

the Land Act amendment Act 2004. In the second instance, whether in actual fact that consent was obtained or deemed to have been obtained. This is basically a mixed question of fact and law. I must first point out that it is an admitted fact that there was no controversy or disagreement about the sale of Land comprised in LRV 1727 Folio 12 plot 330 Kibuga Block 23 at Kampala pursuant to obligations of the parties under the impugned mortgage deed. The agreed facts are that the *“plaintiff and the defendant co-operated in the disposal of the security comprised in LRV 1727 folio 12 plot 330 Kibuga Block 23 in January 2006.”* Secondly the mortgage deed challenged in this suit as a nullity mortgages 2 properties in the same deed namely LRV 1727 Folio 12 Plot 330 Kibuga Block 23, Kampala and secondly, the suit property namely LRV 2414 Folio 8, Plot 15, Kashari Block 18, Mabarara. With respect to the plot in Kampala, the plaintiff pleads at paragraph 4 (e) that her husband also owned other property including land comprised in Leasehold Register Volume 1727, Folio 12, plot 3330, Kibuga Block 23, Kampala which was sold off by the defendant as it was not their matrimonial home.” At paragraph 4 (g) the plaintiff avers that she “became aware of the illegal transaction when auctioneers came to the property and informed her that the matrimonial home had been advertised for sale...”

On the other hand if it is the mortgaging of the property per se, the plaintiff does not dispute the mortgage of the Kampala property or its sale under the challenged mortgage deed on the ground that it is not matrimonial property but does so with the Mbarara property.

I must first note that the Court of Appeal in Civil Appeal No. 63 of 2007 between the same parties and on the same subject matter has partially interpreted section 39 of the Land Act upon which interpretation the resolution of the controversy in this case revolves. Because this suit revolves on the interpretation of section 39 of the Land Act, it is necessary to consider carefully what the Court of Appeal has said about the matter before I proceed to deal with the controversy.

The plaintiff had previously appealed from the decision of Honourable Mr Justice Egonda-Ntende refusing to grant a temporary injunction on 20 September 2007. Honourable Mr. Justice Egonda-Ntende dismissed the plaintiff’s application for a

temporary injunction. Between pages 2 – 3 of his ruling in MA 0436 of 2007 he observed that:

"Section 39 of the Land Act (chapter 227) as amended by the Land (Amendment Act) 2004 bars, inter alia, mortgaging 'family land' without consent of a spouse. Family land was substituted for the original phrase in the chapter 227 which are referred to 'any land' or 'land on which the person ordinarily resides with his or her spouse and from which they derive their sustenance'. The input of this change is yet to be clear. And can only be addressed I suppose after a full trial of the matter, to determine if the suit land is indeed the nature of the land protected under the provisions of the law."

When the honourable judge dismissed the plaintiff's application for a temporary injunction, the plaintiff appealed the decision to the Court of Appeal. The lead judgment of the Court of Appeal in Civil Appeal No. 63 of 2007 was delivered by Lady Justice C.K. Byamugisha J.A. In the judgment she made some interpretative comments on section 39 of the Land Act between pages 6 and 8 of the judgement which I set out below. Hon. Lady Justice C.K. Byamugisha J.A. said:

"My understanding of the provisions of this section I have reproduced was to impose restrictions on spouses from dealing with family land in the manner described in this section without the consent of the other spouse. Consent also involves knowledge. However I do not think that consent under this section applies to a company even if the company is owned by family members. The framers of the section did not envisage the company having a spouse or owning family property/land. In my view this section can only apply in circumstances where one spouse is going to deal with family property/land with third parties. Such spouse would require consent of the other spouse in accordance with the regulations. The transaction that is now under dispute was entered into by a company called Bainebitamazire Mixed Farm Ltd. The principal officers of the company who signed all the documents were the appellant and her husband as the Director/Secretary and Managing Director respectively. Normally company matters are

conducted through the officials of that company since a company is a legal fiction.

The appellant and her husband convened a board meeting of the company on 3 July 2002 and passed a resolution authorising the company to borrow money and offer this suit property as one of the securities. The same resolution authorising the Managing Director and another Director or Secretary to execute the securities and all other relevant documents for and on behalf of the company. On the strength of this resolution the appellant and her husband signed the mortgage deed, a debenture and a personal guarantee.

As the learned judge rightly observed, the appellant was the "mind" of the company that mortgaged the suit property together with her husband. Both of them ought to have sought consent on behalf of the company if any consent was required.

Contrary to the allegations made by the appellant in the chamber summons and supporting affidavits that it was her husband would mortgage the suit property without her knowledge and consent, the evidence on record it does show that the husband boarded the suit property or that she did not know about the transaction. All that the husband did was to grant powers of attorney as the registered proprietor of the suit property to the company to mortgage the same to the respondent as security for the loan. Granting powers of attorney is not mentioned in this section as requiring consent of the spouse.

In order for the appellant was succeeded in her application she filed in the High Court she had to plead and show prima facie that she is the spouse of the mortgagor whose consent was required under section 39 of the land act. As already pointed out the mortgagor was Bainebitamazire Mixed Farm Ltd and *I doubt whether the appellant is its spouse for purposes of this section. This is a matter that would be determined at the trial....*" (Emphasis added)

It is important to note that the lead judgment of the Court of Appeal left it open for the High court trial judge to determine whether the plaintiff could be deemed to be a spouse of Bainebitamazire Mixed Farm Ltd as envisaged under section 39 of the Land Act cap 227. The next judgment which also comments on section 39 of the Land Act is that of Hon. Lady Justice L.E.M. Mukasa – Kikonyogo DCJ and should in my view be carefully considered in this matter. It in addition to the lead judgment of the court it adds some additional interpretative remarks about section 39 of the Land Act cap 227. In upholding the judgment of the High Court dismissing the plaintiff’s application for temporary injunction the learned DCJ held at page 2 of her judgment:

“The appellant having signed a personal guarantee for the loan and the debenture cannot turn around and deny knowledge of the loan. Further, as rightly pointed out by counsel for the respondent, the appellant signed the resolution both as director and secretary. There were no triable issues. The provisions of section 39 of the amended Land Act were complied with. *The circumstances in which the transaction was carried out did not necessitate consent of the appellant. Both the appellant and her husband, called a board meeting of the company and passed a resolution allowing the company to borrow money and offer the suit property as one of the securities.* With regard to the remaining issues I concur with the conclusions reached by Byamugisha J A in the lead judgement. (Emphasis added)

To a large extent therefore comments made by the Court of Appeal as regards the interpretation of section 39 though binding on me are generally considered in the context of an interlocutory application without prejudice to the trial of the main controversy in this suit. As to whether I am free to examine all aspects of the legal provision as suggested by Hon. Mr. Justice Egonda – Ntende judge of the High Court as he then was and Hon. Lady Justice C.K. Byamugisha of the Court of Appeal remains a narrow path in view of the comments of the learned Deputy Chief Justice which comments should be given their due weight. My task is to explore the law and see whether I will come to the same result as the Court of Appeal in an understanding of the law and facts of the case. It must also be emphasised that the resolution of the suit revolves on interpretation of section 39

of the Land Act and thus far, this section has not been conclusively interpreted for purposes of the trial of the main suit and this is the only road I am entitled to walk without desecrating the doctrine of precedence.

Delegation by Power of Attorney:

On the question of whether the mortgagor company was a spouse within the meaning of section 39 of the Land Act, we need first to examine the nature of a power of attorney. Firstly I have great sympathy for the submission of Counsel Kenneth Kakuru that a power of attorney is a document that delegates powers which submission is in the main valid and supported by authorities. For reasons of precedence I will refer to authority of the Supreme Court on this matter. The comments of the Court of Appeal as to whether the plaintiff can be deemed to be a spouse of the mortgagor, a limited liability company, need to be put in context in light of the nature of a power of attorney. Obviously a power of attorney must be examined on its terms before other aspects of this matter can be analysed. This is supported by the judgment of the **Supreme Court in Frederick J.K Zzabwe vs. Orient Bank and 5 Others Supreme Court Civil Appeal No. 4 of 2006** and particularly the judgment attached of Justice Bart Katureebe JSC at page 4 thereof:

"the point to note here is that the donee of the power of attorney acts as an agent of the donor, and for the donor. He cannot use the power of attorney for his own benefit. The privy Council decision, on appeal arising from the Supreme Court of Canada, in the case of **Imperial Bank of Canada versus Begley [1936] 2 ALL ER 367** is good authority for the principle that where an agent, who has been given a power of attorney to do certain things, uses the power to do something for a proper purpose, but the act done is for the agent's own purposes to the exclusion and detriment of the principal, the actions of the agent will be outside the scope of the power of attorney and are not even capable of ratification by the principal."

A power of attorney is a document that creates an agency with the donee company as the agent while the principal is the donor. In this case the principal is the husband of the plaintiff who also happens to be the registered proprietor of

the suit property at the time of the transactions in question. The first principle of law from judicial precedent that is worthy of mention is that a principal or grantor of a power of attorney is vicariously liable as a principal for the acts and even frauds of the attorney who acts in his name and for him. In the case of **Lloyd V Grace, Smith & Company 1912 AC 716** it was held that a principal is liable for the fraud of its agent acting within the scope of its authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. Furthermore in the case of **Percy V Glasgow Corporation 1922 AC 299**, per the decision of Viscount Haldane at page 306 last paragraph thereof it has been held that the principles of vicarious liability operates in agent/principal relationships.

To conclude this point I agree with Counsel Kenneth Kakuru that a donor of a power of attorney firstly cannot grant powers that he does not have. Secondly, a donor of a power of attorney only expresses the power granted in an instrument or deed which specifies the powers and perhaps limitations of the power granted. The court examines the express terms of the power of attorney to determine what it specifies to reach a conclusion as to what powers possessed by the donor have been delegated to the attorney. The need to examine the power of attorney to reach a conclusion is illustrated by the Privy Council cited below which case also referred to in the **Supreme Court case of Zzabwe** above. This is the case of **Bryant Powis and Bryant vs. La Banque Du Peuple (1893) AC 170** at page 180. Their Lordships of the Privy Council held at the last paragraph page 180 that: *whenever the very act of the agent is authorised by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such an act is binding on the constituent..”*

It becomes necessary to examine the terms of the power of attorney. Though I have not come across the power of attorney in the documents of the plaintiff or the defendant there is evidence and it is an agreed fact that the company was granted a power to mortgage the suit property by the registered proprietor. Paragraph D of the agreed facts provides that: *“the plaintiff’s husband and co-director in the company being the registered proprietor of the said land executed a power of attorney authorising the company to mortgage the said land to the*

defendant.” It is the only imperfect thing to do which is to find that the plaintiff’s husband as the registered proprietor of the suit property granted a power of attorney to Messrs Bainebitamazire Mixed Farm Limited (hereinafter referred to as the company) to mortgage the property without the benefit of reading the power of attorney. By a roundabout route it is my conclusion that the company acted only for and on behalf of the plaintiff’s husband. In other words it was the agent of the plaintiff’s husband by power of attorney and it exercised powers to mortgage as if it had the same powers as that of the plaintiff’s husband which powers were expressly delegated. I have no doubt in my mind that the power of attorney was given by the husband of the plaintiff who was required to seek the necessary consent to mortgage the property.

In other words the plaintiff’s husband Mr. Frank Bitamazire could not mortgage the suit property without consent of his spouse. He therefore could not delegate powers which he did not possess. His power to mortgage the property was subject to the right of his spouses consent. The duty to seek consent should be applied at the point of granting the power of attorney. It is my finding that the company had no power to mortgage the property which power did not reside in the plaintiff’s husband. This power granted to the company required the husband of the plaintiff to first seek the consent of the plaintiff as his spouse before delegating the power to mortgage. Behind this finding is the implied fact in the agreed facts and submissions of the parties that the property in issue was matrimonial property. The concern of the learned judge Hon. Mr. Justice Egonda Ntende was about the changes in the wording of section 39 of the Land Act read in context. Because of the implications of the submissions of the parties on whether consent was given or not, there is no need to determine the question as to whether suit property was protected by law as envisaged under section 39 of the Land Act. It is assumed or implied by both parties that section 39 of the Land Act applies to this property. Having held that the power of attorney only delegated powers the plaintiff’s husband had, I have not yet resolved the question as to whether the consent was necessary or deemed to have been given in the circumstances of the cases. Before I do that I need to make some more

comments about the route taken by the Learned Justices of the Court of Appeal whose decisions are binding on me.

The Court of Appeal examined the intention of legislature from the clear wording of section 39 of the Land Act cap 227. Before I make these comments, I need to determine which provision of section 39 of the Land Act applied at the material time in question. Section 39 of the Land Act Cap 227 was amended by the Land (Amendment) Act 2004. However the transaction in question concerning LRV 2514 Folio 8 plot 15 Kashari Block 18 Mbarara with registered proprietor as Mr. Frank Bitamazire Bainomugisha, namely the mortgage deed was signed on the 5th of July 2002. The mortgage deed also specifies in the preamble “A” that the borrower company is the donee of powers of attorney dated 5th of July 2002 “from the registered proprietor FRANK BITAMAZIRE BAINOMUGISHA. It follows that as far as the specific transaction is concerned, there is no need to examine the Land Act (Amendment) Act 2004 which substitutes section 39 of the Act. Furthermore what can only be in contention is the validity of the mortgage deed. Once the mortgage is valid, the powers it grants the mortgagee to sell the property would not be in issue. In any case section 39 (2) expressly provides and I quote: “Subsection (1) shall not apply to any transfer of land by a mortgagee in exercise of powers under the mortgage”.

The Court of Appeal approach is also influenced by the head note and wording of section 39 (1) of the Land Act cap 227 Laws of Uganda 2000 edition. Section 39 provides as follows:

39. Restrictions on transfer of land by family members.

(1) No person shall—

(a) sell, exchange, transfer, pledge, mortgage or lease any land;

(b) enter into any contract for the sale, exchange, transfer, pledging, mortgage or lease of any land; or

(c) give away any land inter vivos, or enter into any other transaction in respect of land—

(i) in the case of land on which the person ordinarily resides with his or her spouse and from which they derive their sustenance, except with the prior written consent of the spouse;

(ii) in the case of land on which a person ordinarily resides with his or her dependent children of majority age, except with the prior written consent of the dependent children of majority age;

(iii) in the case of land on which a person ordinarily resides with his or her children below the age of the majority, except with the prior written consent of the committee;

(iv) in the case of land on which ordinarily reside orphans below majority age with interest in inheritance of the land, except with the prior written consent of the committee.

(2) Subsection (1) shall not apply to any transfer of land by a mortgagee in exercise of powers under the mortgage.

(3) Where consent is required to be given by a person other than the committee under subsection (1), the consent shall be given to the committee by the person giving the consent.

(4) Where any transaction is entered into by a purchaser in good faith and for value without notice that subsection (1) has not been complied with, the transaction shall be void; but the purchaser shall have the right to claim from any person with whom he or she entered into the transaction any money paid or any consideration given by him or her in respect of the transaction.

(5) A consent referred to in subsection (1) shall not be unreasonably withheld.

(6) Where the consent referred to in subsection (1) is withheld, a person aggrieved by the withholding of the consent may appeal to the land tribunal; and the tribunal shall require the spouse or children of majority

age or the committee, as the case may be, to show cause why they cannot give consent and may, in its discretion, dispense with the consent.

(7) The spouse or children of majority age, not being the owners of any land to which subsection (1) applies, may lodge a caveat on the certificate of title or certificate of customary ownership of the person who is the owner of the land to indicate that the property is subject to the requirement of consent under subsection (1).

(8) The committee may, on behalf of the children below majority age or orphans below majority age and not being owners, take action similar to that described in subsection (7).

(9) In this section—

(a) “notice” means actual or constructive notice;

(b) “purchaser” means a grantee, lessee, sublessee, assignee, mortgagee, chargee or other person who acquires an estate or an interest or right in the land.”

The head or side note of section 39 gives an indicator of the intention of parliament. It deals with restrictions on the transfer of land by family members. The amendment of 2004 introduces a subtle change to this section. It provides “restrictions on transfer of family land”. The amendment can be applied to any body in addition to family members. However as noted above the amendment does not apply to this case as the transaction was executed by deed before the amendment came into force. It is only section 39 before amendment which applies and will be examined in this judgment. Section 39 (2) provides that the restriction of family members to transfer land without consent does not apply to a mortgagee exercising powers under the mortgage. In this case however the issue is whether the mortgage itself was valid. Furthermore to conclude the above point section 39 of the Land Act bars family members from mortgaging property without consent of the other spouse. The property affected by the bar in section 39 (1) is defined by section 39 (1) (c) (i) of the Land Act as:

“in the case of land on which the person ordinarily resides with his or her spouse and from which they derive their sustenance, except with the prior written consent of the spouse;”

The court of Appeal premised its definition within the intent of the Act that the provision bars family members and the company cannot by any stretch of the imagination be a family member barred by the section. I agree for the reasons that the plaintiff's spouse who granted the power of attorney had to seek the consent of his wife/plaintiff before donating a power to mortgage property falling under the statutory protection or bar in section 39 of the Land Act. However it is now open to me as advised by the Judgment of Hon. Lady C.K Byamugisha J.A to conclude whether the company can be a spouse required to obtain consent as envisaged by section 39 (1) of the Land Act. I have already held that a power of attorney is an instrument that delegates powers. It cannot delegate more than the giver has. Moreover a husband cannot delegate his rights or some of his obligations as a spouse to a legal fiction. For purposes of consistency with the remarks for the Court of Appeal, it is my humble finding that it is not the company which is restricted but the husband of the plaintiff who was restricted. It followed that the act of granting a power of attorney should be the act to be subjected to scrutiny and censorship in the circumstances of this case. I say this because the plaintiff's spouse cannot say in a manner of speaking that: *“Since I cannot mortgage without my spouses consent, let me give a power of attorney to another company to mortgage on my behalf in order to do away with the requirement for consent”*. Such a position would clearly contravene section 39 of the Land Act cap 227 before its amendment in 2004. Where a spouse is restricted from mortgaging or selling the family property protected by section 39 of the Land Act cap 227, such spouse cannot escape liability by circumventing the law and delegating through power of attorney to a non member of his or her family or even to a company to transact on family land in a manner barred by section 39 of the Land Act. It is my humble conclusion that if the delegate escapes liability, the spouse cannot yet the delegate only acts on behalf of the principal. This is also consistent with the doctrine of vicarious liability.

My holding does not yet take care of the core issue in this case as to whether the transaction challenged in the suit which transaction is the mortgage of property protected by section 39 of the Land Act is void. A finding on the core issue requires an examination of all the facts and circumstances of the case.

The thrust of the submissions of the plaintiff's counsel is that section 39 of the Land Act prescribes prior written consent of a spouse before the property can be mortgaged. He further submits that the consent has to be in writing. He relies on the phrase, "except with the prior written consent of the spouse" under section 39 (1) (c) (i) of the Land Act cap 227. Without such prior written consent he submits that the transaction is void for illegality. He goes on to submit that the mortgagor company is a legal person which a distinct and separate legal existence from that of its members. That the resolutions of the board of Bainebitamazire Mixed Farm Limited consisting of the plaintiff and her husband only and the various documents she signed as director/secretary in support the mortgage did not amount to consent as stipulated by section 39 of the Land Act.

On the other hand the defendant submitted that section 39 of the Land Act imposes a duty on a spouse or bars only a spouse from mortgaging family property without the other spouse's consent. The plaintiff is not a spouse of the company which mortgaged the property. Consent of the plaintiff was not required before Bainebitamazire Mixed Farm Ltd could mortgage the property.

The defendant further submitted that it is the ruling of the Court of Appeal that the plaintiff cannot be a spouse of the company.

Alternatively the defendant submitted that the consent was obtained. He went on to define what consent was and that consent meant to "concur, to agree, accede to, and acquiesce". That there was no need for a separate consent to be given in the circumstances of the case. That by appending her signature to all the documents involved in obtaining the loan, the plaintiff had consented to the mortgaging of the suit property. Particularly the plaintiff had actively participated in the following transactions namely: As secretary of the company, called board meeting and on 3rd of July 2002 as a director with her spouse co-director they authorised the company to apply for an investment loan facility from the

defendant and to use the suit property as security. She went ahead and signed on the board resolution, mortgage deed, debenture deed and personal guarantee for the loan. She participated in selling one of the securities under the mortgage deed.

Counsel for the defendant submits that the strong evidence on court record shows that the plaintiff appended her signature to the documents signifying approval of the creation of the mortgage, before and during its execution, it will be fallacious suggest that there was no written consent to the transaction.

The defendant also submitted that the intention of legislature in enacting section 39 of the land act was to prevent property being mortgaged without the other spouse's knowledge. They submitted that the plaintiff had knowledge of the transaction and actively participated in it. They also submitted that the plaintiff's personal capacity and her mind were not separate from that of the company which is a fiction. That a company cannot do what an individual can do but can only do such acts through its own directors. Referring to the case of **Lennards Carrying Co. Ltd v Asiatic Petroleum Co. Ltd (1915) AC 705** where it is noted that:

"A Corporation is an abstraction. It has no mind of its own any more than it has a body of its own, it's active and directing mind must be sought in the person of somebody..."

I have carefully considered these submissions and the documents signed by the plaintiff. It is necessary to go through the said documents for an appreciation of the argument and to answer the question how to separate the mind and will of an individual director/secretary of a company from the mind and will of the individual herself i.e. as a spouse of the registered proprietor. We also need to examine a more absurd proposition to the effect that since the company is separate from the directors, and it had powers from one of the directors, it needed consent of the family spouses to mortgage the property in the circumstances of this case.

The board resolution exhibit DE 1 of the defendants documents, of a board meeting convened on July 2002 is signed by the plaintiff as director/secretary.

Paragraph 3 thereof provides that the loan facility shall be secured by inter alia Leasehold Register Volume 2514 Folio 8, plot 15 Kashari Block 18 Mbarara and also the personal guarantees of the directors. It should be noted that this was firstly to obtain a loan a first ranking legal mortgage, and secondly to secure the repayment thereof by the suit property and a personal guarantee.

The second document is a mortgage deed exhibit DE2 of the agreed defendant's documents. It is dated 5th July 2002. The preamble thereof notes that the borrower Bainebitamazire mixed Farm Ltd is the donee of power of attorney granted by Frank Bitamazire Bainomugisha. The company intended to borrow 150 million Uganda Shillings. Should be noted that the property which is mortgaged are two but include LRV Volume 2514 folio 8 Plot 15, Kashari Block 18, Mbarara the subject matter of the suit. The plaintiff signed as director/secretary of the company.

The third document is the debenture exhibit DE3 dated 5th July 2002 between the company and the defendant. Paragraph 6.0 thereof recognises that the defendant has a first fixed charge over the suit property and it is also signed by the plaintiff as a director/secretary of the company.

Of further scrutiny and interest is exhibit DE 4 entitled "*Personal Guarantee*" and dated 3rd or 5th of July 2002 (the number 3rd is written in such a way as to mistaken to be the 5th . however no prejudice is occasioned whether it is the 5th or 3rd). In the preamble it provides and I quote: "(b) as part of the said Agreement I, MRS AGNES MIREMBE BITAMAZIRE ("the Guarantor") a Director in the Borrower, am required to execute a guarantee in respect of my assets." It guarantees the prompt payment of dues under the loan agreement between the company and DFCU Bank. Paragraphs 3 and 4 of the personal guarantee by the plaintiff are worthy of special mention and are quoted below:

"3. As a separate stipulation, unconditionally agree that if for any reason a sum is not recoverable by DFCU under the foregoing guarantee, it shall nevertheless be recoverable on the basis that I am sole or principal debtor; and"

- “4. Agree that I shall whenever required by DFCU execute a proper transfer of such assets as are capable of being transferred together with the Power of Sale and all other necessary powers for securing and enforcing the payment of the said loan; and;”
- “5. Waive any right I may have of first requiring DFCU to proceed against the borrower;”

The plaintiff signed the mortgage deed as director and secretary. She signed the mortgage deed. She was aware that her husband had given a power of attorney to the company in his personal capacity. This is because the mortgage deed specifically quotes the power of attorney to mortgage the suit property by the company issued by Frank Bitamazire, her spouse. The mortgage deed further cites the property secured which property is the suit property. The debenture deed also cites the suit property. Last but not least, I need to mention the personal guarantee document. Paragraph 3 of the personal guarantee documents notes that the personal guarantee contract is a separate contract as if the plaintiff is the principal debtor under the loan agreement with the bank in case of default by the principal borrower (the company in which she is a director). Paragraph 4 binds the plaintiff as a guarantor to sign whatever is necessary to be signed in exercise of the power of sale of DFCU under the loan agreement. This power of sale is found under the mortgage deed which mortgages the suit property to the Bank/Defendant paragraph 11 thereof. Last but not least the guarantor/plaintiff waived any right to first ask the mortgagee to proceed against the company. The mortgagee would proceed directly against her.

As far as the doctrine for the personal guarantee is concerned, a guarantee is a contract by which the guarantor undertakes responsibility to the creditor for the liability of the principal debtor to the creditor. **(Crowell Encyclopaedia of banking Law, E-securities par.2001)**. A guarantee agreement is also defined as a secondary agreement in which a person **(the guarantor)** is liable for the debt or default of another (the principal debtor) who is the party primarily liable for the debt. **(The Oxford Dictionary of Law, 6th Edition at page 246)**. Hon. Mr. Justice Lameck Mukasa In the case of **PAN AFRICAN INSURANCE COMPANY LTD VS**

INTERNATIONAL AIR TRANSFER ASSOCIATION HCCS NO.0667/2003 defined it as a contract to pay a debt owed by a third party who notwithstanding remains primarily liable for such payments. In **YEOMAN CREDIT LTD VS LATTER AND ANOTHER (C.A.) (1961) 2 ALLER 294 at 296 HOLROYD PEARCE L.J** defined a contract of guarantee as a contract to answer for the debt, default or miscarriage of another who is to be primarily liable to the promise.

There therefore cannot be a contract of guarantee unless there exists an obligation of the principal debtor to which the guarantee is ancillary or secondary. It follows that the personal guarantee of the plaintiff supports and agrees with the mortgage deed and consents to it. Secondly it is a guarantee in a personal capacity and has nothing to do with the veil of incorporation. In other words the plaintiff as an individual and a spouse of the donor of the power of attorney to the company guaranteed the mortgage loan and gave it her full blessing and even agreed to become personally liable for it. The case of **Moschi V Lep Air Service ltd and others, (1973) AC 331 348 Lord Diplock** laid down the duty of the **guarantor** under the contract of **guarantee as**

“the contractual promise of a **guarantor** to guarantee the performance by a **debtor of** his obligations to a creditor arising out of a contract gives rise to an obligation on the part of the guarantor to see to it that the debtor performs his obligations to the creditor”.

As far as section 39 of the Land Act cap 227 before its amendment in 2004 is concerned, it puts restrictions on family members. This means that the issue of mortgaging has to be raised against a spouse. If we followed the arguments of the plaintiff, what the concerned spouse/husband of the plaintiff did was to grant a power of attorney to the plaintiffs company to mortgage. He did not mortgage directly. It is an agreed fact that the plaintiff and her husband were the only directors of the company. In other words the plaintiff as the director/secretary of the mortgagor had the duty if any to seek the consent to mortgage the property from herself. This is simply because her husband who granted the power of attorney to the company was the principal or donor of powers of attorney to mortgage the property. The company had to seek consent if necessary from the

plaintiff and to make this position clearer; it is the plaintiff who should have sought the consent as director from herself. No position could be more absurd or untenable in law or in equity. I agree with the defendants submissions that the plaintiff by appending her signature to the mortgage and more so to the personal guarantee document did not have to ask herself for consent to mortgage the property in question.

A statutory provision cannot be interpreted in this fashion neither should the court permit a provision of the law to be used as an instrument of fraud. To hold otherwise would open financial institutions and banks to frauds by family members. As in this case, the husband and his wife are the sole directors of the company. They as the company decide to mortgage the family property. They brazenly admit that the company owed the bank but that consent of a spouse has not been obtained. This spouse happens to be a director of the company and a mind of the company. I agree with the court of appeal that the plaintiff as director was the will of the company though the veil or incorporation may be applied in appropriate cases. The veil of incorporation cannot be used to defraud a bank and its customers of their money.

It is the plaintiff and her husband who as directors acted as the mind/will and nerve centre of Bainebitamazire Mixed Farm Limited to obtain a loan. They admit as directors/secretary that they defaulted in the repayment of the loan. They admit pledging family property on the basis of a power of attorney authorising mortgaging. A very strict interpretation of the law would put the duty of seeking consent on the husband/spouse of the plaintiff. The plaintiff has not deemed it fit to sue her husband. The husband is somewhere in the background waiting to see the outcome of their strategy and technical and robotic interpretation of section 39 of the Land Act.

Before I wind up this matter we need to further show how inequitable the kind of strategy used by the plaintiff is. Agreed document paragraph 7 (xi) of the joint scheduling memorandum is the caveat of the plaintiff. It is marked in the defendants documents attached to the submissions as Exhibit DE 8 and is dated 19th December 2006 and provides that the plaintiff claims an interest under

section 39 of the Land Act. It caveats the suit property. In the affidavit in support the plaintiff swore that she had been given notice to vacate the suit property. In paragraph 3 thereof she avers that she has never consented to any contract of sale, exchange, transfer, pledging, mortgage or lease of the above described land. She further avers in paragraph 4 of her affidavit in support of the caveat that it is her husband Mr. Bitamazire Frank Bainomugisha who mortgaged the property to the defendant. Finally where the matrimonial home is sold off illegally she would suffer irreparable loss.

It is a rule of equity applied by the English courts that courts will not allow a statute to be used as an instrument of fraud. In the case of **Rochefoucauld v Boustead [1897] 1 Ch 196** the claimant sold land to the defendant who had orally agreed to hold the land in trust for the claimant. The defendant later argued that because the purported trust was not evidenced in writing, according to the Statute of Frauds there was no valid trust. The Court of Appeal refused to allow the statute to be used as an instrument of fraud and held that it is a fraud for a person who has knowingly had land conveyed to him as trustee to later deny the trust and claim the land for himself. In such cases, oral evidence will be allowed to establish a trust. **Lindley LJ** held and I quote:

It is further established by a series of cases, the propriety of which cannot now be questioned, that the *Statute of Frauds* does not prevent the proof of a fraud; and that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parole evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, in order to keep the land himself.

The plaintiff should not be allowed to use the veil of incorporation to mask the transaction which she knowingly entered into as a director/secretary of the company. The plaintiff by the personal guarantee agreed with the transaction and

I will follow the reasoning of Hon. Lady Justice Mukasa – Kikonyogo that it was not necessary to obtain a written consent in the circumstances of the case. I also agree with the submissions of the defendant that the plaintiff and her husband as the only agreed two directors of the company cannot hide behind the cloak of incorporation to defraud a bank by a technical approach to the interpretation of section 39 of the Land Act. The issue here is not that the banks have a duty to inquire but the fact that the plaintiff to whom a right could have resided participated actively in mortgaging the property. She further lied on oath that the property was mortgaged without her notice. The mind of the plaintiff cannot by any conceivable fiction of law be separated from the mind of the director she was when she signed the mortgage deed as a director/secretary and when she further supported the mortgage with her own personal guarantee.

I agree with the dictum in *Lennards Carrying Co. Ltd v Asiatic Petroleum Co. Ltd* (1915) AC 705 that a corporation is an abstraction without a mind of its own and that its active mind should be sought in someone else. I wish to add the words of Lord Denning in **HL BOLTON CO V TJ GRAHAM AND SONS [1956] 3 ALL ER 624**, Lord Denning said at page 630:

A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such.”

The plaintiff had no need to go and seek permission or consent from herself. She was one of the minds of the company and the fiction of corporate personality cannot be taken to absurdity to separate her acts as a director from her acts as a spouse in the sense of her knowledge and agreement to the transaction. In any case she and her husband cannot be permitted to hide behind the veil of

incorporation to avoid liability for a loan had and admitted on the grounds of section 39 of the Land Act before its amendment by the Land Amendment Act 2004. The spirit of article 126 (2) (e) of the Constitution of the Republic of Uganda 1995 is that substantial justice shall be administered without undue regard to technicalities. To stretch the fiction of artificial legal personality the way it has been done by the plaintiff to separate her mind as director to a family company from her mind as a spouse would be an undue technicality. Finally section 39 before amendment put a duty on the spouse who together with the plaintiff executed the necessary documents mortgaging the suit property and not on the company Messrs Bainebitamazire Mixed Farm Ltd. I wholly follow the holding of the Court of Appeal in Civil Appeal No. 63 of 2007 between the parties and on the same subject matter of interpretation of section 39 Land Act cap 227 before its amendment as aforesaid.

For the reasons given above, there is no need for me to consider the submissions of the parties on the second issue of available remedies. I accordingly dismiss the plaintiff's suit with costs.

Judgment read and delivered in court on the 20th of May 2011.



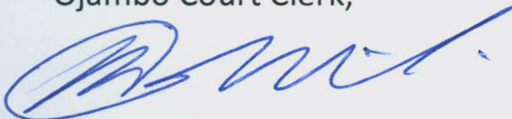
Hon. Mr. Justice Christopher Madrama

Judgment delivered this 20th day of May 2011 in the presence of:

Patson Arinaitwe for the defendant,

Counsel for the plaintiff Mr. Kenneth Kakuru being absent and in Mbarara, but the plaintiff Mrs Agnes Bainomugisha in court:

Ojambo Court Clerk,



Hon. Mr. Justice Christopher Madrama