THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 258 OF 2017

(Arising from High Court Civil Suit No. 344 of 2013)

Coram: Egonda- Ntende, Musota JJA & Kasule Ag. JA.

1. ANDREW BABIGUMIRA
2. WAVENETS COMMUNICATIONS LTD ::::::: APPELLANTS

VERSUS

1. GLOBAL TRUST BANK IN LIQUIDATION
2. JOHN MAGEZI
3. DAVID BASHAIJA :::::::::::::::::::::::::::: RESPONDENTS

JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA

This is an appeal against the judgment of the High Court before Hon Justice Christopher Madrama vide Civil Suit No. 344 of 2013 in which he dismissed the appellants suit for lack of merit.

Background

The 1st appellant was the registered proprietor of land comprised in and known as Kyadondo Block 194 Plot 45 land at Kungu.

The 1st Appellant as a registered proprietor of the suit land gave a power of Attorney to the 2nd Appellant to use the suit land as security for loan facility from the 1st Respondent.

The 2nd Respondent entered into negotiations with the 2nd Appellant and the 2nd Respondent agreed to advance a credit

facility of **UGX 100,000,000** to the 2nd Appellant and the 1st Appellant surrendered the certificate of title for the said land to be used as security for repayment of the said loan.

It's the Appellants' case that the sale of the mortgaged property was fraudulent and illegal as the 1st Respondent did not follow the law in selling the subject land to the 2nd Respondent as no notice of demand was ever served on the Appellants as required by law. The Respondents sat in the bank and sold off the property without notifying the Appellants, and the Appellants only came to know of the sale after the 2nd Respondent turned up at the suit land claiming that he was the registered proprietor of the suit land having purchased the same from the 1st Respondent. This in effect clogged the Appellant' right of redemption, which is illegal.

The Appellants also accuse the 1st Respondent of undervaluing the land at the time of sale and selling the mortgaged land cheaply to the 2nd Respondent. Property which was valued at UGX 200,000.000= and forced sale value at 140,000,000 /= in 2010 as per valuation report at page 195 of the Record of Appeal could not cost exactly the same price after a period of 1 year. The forced price was UGX 140,000,000 = and this was also exactly the purchase price of the same land to the 2nd Respondent. I note that the Mortgage Act 2009 had not come into force but the practice of revaluing the mortgaged land upon recall of the loan had already started which was not done in the instant case. The property in issue now stands at UGX. 1,000,000,000/=.

The Appellants further state that the 1st Respondent having agreed to release a sum of UGX 100,000,000/= and only released a sum UGX 98,000,000/= was in breach of the loan agreement, and the defence of retaining UGX 2,000,000/= as processing fees does not arise as such fees are deposited prior to disbursing the loan and does not form part of the loan. Processing fees does not come after disbursing the loan but before.

The crux of the dispute between the Appellants and the Respondents is the manner in which the 1st Respondent played with the 2nd Appellant's Loan account and the realization of the property when the 1st Respondent advertised and sold off the property to the 2nd Respondent without notifying the Appellants which in effect clogged the Appellant's equitable right of redemption.

The appellants were dissatisfied with the orders of the High Court as reflected in the grounds of appeal and filed this appeal on the following grounds;

1. The learned trial Judge erred in law and fact when he held that the second appellant was bound to pay the first respondent the principal sum of Ug shs 100 million only because it was bound by mortgage and credit facility agreements which it signed indicating that the said Ug shs 100 million only was loaned to the second appellant.
2. The learned trial Judge erred in law and fact when he held that time for repayment of the loan began to run even when the first respondent advanced Ug shs 98 Million only to the second appellant other than the agreed Ug shs 100 Million only.
3. The learned trial Judge erred in fact and law when he held that the mortgage property in this suit was properly and regularly dealt in by the respondents in accordance with the mortgage law.
4. The learned trial Judge erred in fact and law when he omitted to consider facts which pointed out that the second appellant transferred the subject property into his names through fraud.
5. The learned trial Judge failed to properly evaluate the evidence on court record hence reaching a wrong decision.
6. The decision of the learned Judge occasioned a miscarriage of justice.

Representation

At the hearing of the appeal, Mr. Kiiza Simon appeared for the appellant while Mr. Bitaguma Deo appeared for the 2nd respondent and Mr. Kalibbala Bwogi appeared for the 1st and 3rd respondents.

Submissions of the appellant

Counsel submitted that whereas the issue of validity of the mortgage deed was not in issue at the trial court, it is the subject of the entire dispute for reasons that it was not properly executed. The 1st respondent signed the mortgage deed through its manager as indicated on the mortgage deed. The manager's signature is however not in Latin characters as required under section 148 of the Registration of Titles Act which vitiates the mortgage and the subsequent sale of the mortgage property.

Counsel relied on the decision in **Fredrick Zaabwe Vs Orient Bank and 5 others S.C.C.A No. 4 of 2006** on the guiding principles for attestation of instruments in Latin Character. Counsel also relied on **General Parts (U) Ltd Vs Non Performing Assets Recovery Trust Civil Appeal No. 5 of 1999** on the proposition that where a signature to a mortgage is not in Latin character, the mortgage is invalid. Execution of the mortgage by the 1st respondent did not comply with section 148 above hence the mortgage deed was unlawfully executed. An illegality once brought to the attention of court cannot be ignored.

Counsel further argued that the trial Judge erred in holding that the appellant had not commenced payment at the time the security was sold or when the loan was recalled yet in the 1st respondents written statement of defence, it was pleaded that the appellant was servicing the loan. The outstanding loan was 106,592,019/= and a sum of 36,500,000/= was deposited which left a balance of 70,092,019/= and there is no way the loan could have risen to 120,000,000/= in a short period of time. Counsel argued that even though the mortgage has an express power of sale, it ought to have been done in

accordance with the law. The trial Judge implied that the power to sale upon default is absolute and that there is no procedural law in advertising and sale.

Counsel submitted that the parties under the mortgage deed clause 19 agreed on the circumstances through which the mortgagee could take vacant possession of the security. The letter written to the appellants lacked the Bank letterhead and did not have the name of the mortgagor which was contrary to clause 17. Counsel argued that a number of clauses were breached in the mortgage deed which rendered the sale illegal.

Submissions of the 1st and 3rd respondents

Counsel submitted that the mortgage deed as well as the credit facility agreement was not in dispute and the terms of those documents included the amount disbursed, the repayment installments, and the period and commitment fee. The appellants admitted that they failed to service the loan and were under obligation to pay back the same by virtue of the legal mortgage agreement. Counsel further argued that the appellants did not service the loan and the suit property was advertised for sale after the appellants were in default according to the terms of the credit facility agreement.

The 1st respondent as the mortgagee was entitled to realize the suit property to recover its monies in light of the default of the appellants. The mortgage property was not dealt with irregularly by either the 1st respondent or the 3rd respondent.

Submissions of the 2nd respondent

Counsel submitted that the appellants made a payment of Ug. shs. 12,000,000/= on 29th May 2010 which commenced the loan re-payment. However after that, the appellants failed/refused or neglected to deposit the loan repayment as earlier agreed. The 2nd appellant failed to service the loan despite several reminders and the

loan was recalled on 15th July 2010 when the outstanding amount was UG. shs. 106,592,019/=. The 2nd appellant was bound to pay all the monies he had signed for together with the 2% commitment fee but paid only one installment of 12,000,000/= until the loan was recalled. The law is that the mortgage gives express power to the mortgagee to sale without applying to court and it should be by public auction. The 2nd respondent bought the property legally, honestly and *bonafide* with no knowledge of any fraud. Counsel prayed that the appeal be dismissed with costs.

Consideration of the appeal

This is a first appeal and the duty of this Court as a first appellate court is to re-evaluate the evidence, weighing conflicting evidence, and reach its own conclusion on the evidence, bearing in mind that it did not see the witnesses testify. (See ***Pandya v R [1957] EA p.336 and Kifamunte v Uganda Supreme Court Criminal Appeal No. 10 of 1997 and COA Criminal Appeal No. 39 of 1996.*** In the latter case, the Supreme Court held that;

> *"We agree that on a first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial Judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."*

I have kept these principles in mind in resolving this appeal.

I will resolve the grounds of appeal in the order in which the parties argued them. `

The appellant raised an issue of validity of the mortgage deed and argued that the mortgage deed was signed contrary to section 148 of the Registration of Titles Act. Section 148 states;

> ***"148. Signatures to be in Latin character.***
>
> *No instrument or power of attorney shall be deemed to be duly executed unless either—*
>
> *(a) the signature of each party to it is in Latin character; or*
>
> *(b) a transliteration into Latin character of the signature of any party whose signature is not in Latin character and the name of any party who has affixed a mark instead of signing his or her name are added to the instrument or power of attorney by or in the presence of the attesting witness at the time of execution, and beneath the signature or mark there is inserted a certificate in the form in the Eighteenth Schedule to this Act."*

The appellant argues that the 1st respondent signed the mortgage deed through its manager but the manager's signature was not in Latin character and was not translated into Latin character according to section 148 of the R.T.A.

I have carefully looked at the copy of the mortgage deed which was produced in court and appears at page 301 of the record. The execution page shows for signatures and on behalf of the mortgagee, Global Trust Bank, was a signature of the Bank Manager but with no name affixed to it. Section 147(1) (a) (v) of the R.T.A authorises a bank manager to attest instruments.

The supreme court in the case of **Fredrick J. K Zaabwe Vs Orient Bank and others S.C.C.A No. 4 of 2006** Katureebe JSC (as he then was) addressed this issue extensively. He stated;

> *"So there may not have been doubt in the mind of the 1st respondent's manager that the persons signing before him were directors of the 2nd respondent. But that was knowledge between*

the Bank and its customer. However, it has to be appreciated that the mortgage was to be registered at the Land Office. It is a public document in which third parties may have an interest. How was the registrar to know that the scribbled signatures without names or capacity of the signatories, and in absence of the company seal, had the authority to sign on behalf of the 2nd respondent? In my view, the rationale behind section 148 requiring a signature to be in Latin character must be to make clear to everybody receiving that document as to who the signatory is so that it can also be ascertained whether he had the authority or capacity to sign. When the witness attesting to a signature merely scribbles a signature, without giving his name or capacity, how would the Registrar or anyone else ascertain that that witness had capacity to witness in terms of section 147 of the Registration of Titles Act?

.... Therefore, as to whether the signature on the mortgage complied with Section 148, I must note the following: The names of the signatories are not given, nor their capacity to sign on behalf of the company. One cannot tell whether they are directors, secretary or even officers of the company at all. There is no company seal or stamp at all. Furthermore, even the witness to the signatures has neither disclosed his name nor his capacity to witness instruments as provided by section 147 of the Act. In the circumstances, how would the registrar know that the persons who signed the mortgage deed on behalf of the company, had authority to execute that deed? Or that the attesting witness had the legal capacity to do so? It is to be noted that the company had opted for signatures instead of the company seal as would have been permitted under section 132 of the R.T.A.

In my view, the execution of the mortgage by the 2nd respondent did not comply with the provisions of sections 147 and 148 of the R.T.A. I agree with the decision in the ***General Parts*** *case (supra) that such irregularity renders the mortgage invalid."* (Emphasis added)

From the above excerpt, it is my considered view that the purpose of Section 148 of the RTA is to make it clear to the viewer of the document that the person who signed the document had capacity to do so.

In ***General Parts (U) Limited –Vs- Npart Civil Appeal No 5 of 1999*** it was held that;

> *"To my understanding, the effect of these provisions, as far as the instant case is concerned, is that for the appellant to duly execute the mortgage document as mortgagor, whether in the capacity of registered proprietor or of donee of power of attorney, it had to either affix its common seal to the document or to act by its attorney or attorneys, appointed for the purpose, signing the document in the manner prescribed in section 156 set out above. (Emphasis added)*
>
> *The mortgage document was produced in evidence as Exh.P9. On the face of it, it is a mortgage wherein Haruna Semakula and the appellant, both recited therein, as registered proprietors of the lands listed, mortgaged the lands to UCB. However, the appellant did not affix its common seal to the document, nor did any one, appointed as its attorney, sign the document on its behalf. What appears at the foot of the document, in the space provided for execution by the mortgagor, are two scribbled signatures, with the word 'director' written under one of them, and the word 'secretary' written under the other. The names of the signatories are not added. Even if it be assumed from the evidence of Haruna Semakula, that one of the signatures is his, and that the second one is of another official of the appellant, there is no evidence to show that they, or either of them, signed as the appellant's attorneys or attorney appointed for purposes of the Registration of Titles Act. The mortgage, therefore, is defective in two respects. The signatories did not only fail to comply with the requirements of section 156 of the RTA, but also, they did not sign by virtue of*

any registered power of attorney pursuant to section 154(1) of the Act."

The Supreme Court decision in General Parts (U) Ltd (supra) states that for one to duly execute a mortgage document, it had to either affix its common seal to the document or to act by its attorney by signing the document in the manner prescribed in section 148. In the current case, the mortgage deed was signed on behalf of the mortgagee by the manager with a stamp and the company seal for Global Trust Bank (U) Ltd. The name of the manager was not included as required by section 148 of the RTA however the seal and stamp were affixed together with the capacity in which the signature was made and in my view, this served the purpose laid out in Fredrick Zaabwe (supra). In that regard, the appellant's issue of whether the mortgage deed was validly executed is answered in favour of the respondents.

Grounds 1 and 2

The appellant argues that they were not bound to pay the said Ug. Shs. 100 million shillings advanced by the 1st respondent by virtue of the credit facility agreements which indicated that the said Ug. Shs. 100,000,000/= was loaned to the 2nd appellant. Clause 24 of the Credit facility agreement stated that the borrower would pay a commitment fee of 2% of the loan amount granted to the borrower. The appellants were however obliged to pay the Ug. Shs. 100,000,000/= loan facility advanced by the 1st respondent. The learned trial Judge held that the loan repayment commenced at the time the appellants received the loan of Ug. Shs.100,000,000/= less the 2% commitment fee.

The testimony of PW1 confirmed that he signed the loan agreement and mortgaged the property to the 1st respondent. PW2 also confirmed that the money was advanced to the 2nd appellant on 16th October 2009 less the commitment fee of 2%. This evidence was consistent with the entry on the bank statement exhibited as P.3 (a)

which showed that a total of Ug. Shs. 98,000,000/= was advanced to the 2nd appellant according to the credit facility documents that had been duly signed by the appellants. The appellants cannot now turn around and claim that because Ug. Shs. 98,000,000/= was advanced by the 1st respondent, the 2nd appellant's obligation to pay had not yet commenced simply because the full Ug. Shs. 100,000,000/= was not advanced.

The learned trial Judge found that;

> *"The plaintiffs were therefore in default and this was admitted as a matter of fact by the testimony of PW1 who agreed that he had not paid back save for the excuse that the plaintiff had not received the entire Uganda shillings 100,000,000/=...*
>
> *He testified that the contract had not started because he had not received the Uganda shillings 2,000,000/= on top of the Uganda shillings 98,000,000/=which was acknowledged as having been disbursed to the plaintiffs. I find the argument preposterous and entirely dishonest. It is a lame excuse of the plaintiff to avoid the contract in which she undertook to pay back monies disbursed to him from time to time under the mortgage deed..."*

I therefore agree with the learned trial Judge's finding that '*obligation to pay arises immediately upon disbursement of the loan facility*'. In addition, the appellants had paid an installment of Ug. Shs. 12,000,000/= and are therefore estopped from denying that the obligation to pay had arisen by virtue of the reduction of 2% commitment fee. Grounds 1 and 2 therefore fail.

Ground 3 and 4

The appellants case is that the service of the notice under clause 17 of the mortgage deed required service by proof of posting which was not done in this case. The respondents on the other hand argue that the appellants failed to service the loan and the suit property was advertised for sale in accordance with the credit facility agreement.

Upon default in payment, the 1st respondent instructed the 3rd respondent to sell the mortgaged property by public auction which was carried out and the 2nd respondent purchased the property.

Clause 17 of the mortgage deed provided for proof of any notice by posting which was not in the present case. The evidence of Allan Ntagi who testified for the respondent was that he personally served the 2nd appellant's managing director with the recall letter and he acknowledged receipt of the same. The appellants however do not deny service of the recall letter and indebtedness to the 1st respondent. The fact that service of the recall letter was not done by posting does not, in my view, vitiate the realization of the mortgaged property.

There was a credit facility advanced to the appellants by the 1st respondent which the appellants defaulted in payment. The appellants were notified of the default and the loan was recalled and the property subsequently sold by public auction. I do not find any fraud proved by the appellants against the respondents in the process. The sale was done by public auction after a newspaper advert was placed in the New Vision paper. The learned trial Judge held that;

> *"For that reason the plaintiff has no cause of action against the second defendant because it is proven that the plaintiff/mortgagor was in default. The mortgagee was the registered mortgagee and exercised the option of sale after advertisement in the newspapers. In the premises the mortgagor/plaintiff cannot prove fraud against the mortgagee merely because the first plaintiff who is the registered proprietor lodged a caveat after the mortgage was registered and after defaulting in the payment of the loan. There was therefore no fraud and they could not in the circumstances, be any fraud on the part of any of the defendants."*

I find no reason to depart from the learned trial Judge's finding and therefore find for the respondents on grounds 3 and 4.

Grounds 5 and 6

For the reasons I have outlined in this judgment, it is my finding that the learned trial Judge properly evaluated the evidence on court record and reached the correct decision. In the final result, no miscarriage of justice was occasioned.

In the premises, I would dismiss this appeal for lack of merit and with costs here and the court below.

Dated this 20th day of July 2020

Stephen Musota, JA.

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Coram: Egonda-Ntende, Musota & Kasule, JJA*]

Civil Appeal No 258 of 2017

(Arising from High Court Civil Suit No. 344 of 2013)

BETWEEN

Andrew Babigumira==========Appellant No.1
Wavenets Communications Ltd==========Appellant No.2

AND

Global Trust Bank in Liquidation==========Respondent No.1
John Magezi==========Respondent No.2
Bavid Bashaija==========Respondent No.3

(Appeal from the Judgment of the High Court of Uganda (Madrama, J.) sitting at Kampala and delivered on 20th January 2017)

Judgment of Fredrick Egonda-Ntende, JA

[1] I have had the opportunity to read in draft the Judgment of my brother, Stephen Musota, JA. I agree with it and have nothing useful to add.

[2] As Kasule, JA, agrees, this appeal is dismissed with costs, here and below.

Dated, signed, and delivered at Kampala this 20th day of July 2020

Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA

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At Kampala

Civil Appeal No. 258 of 2017

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1. Andrew Babigumira
2. Wavenets Communications Ltd :::::::::::::::::::::::::::: Appellants

Versus

1. Global Trust Bank in Liquidation
2. John Magezi
3. David Bahaija ::::::::::::::::::::::::::::::::::::Respondents

Coram: Hon. Justice Egonda-Ntende, JA
Hon. Justice Stephen Musota, JA
Hon. Justice Remmy Kasule, Ag. JA

Judgement of Hon. Justice Remmy Kasule, Ag. JA

I have carefully gone through the draft Judgement of my brother, Hon. Justice Stephen Musota, JA.

I concur in the reasoning and the conclusion he has reached in finding the grounds of the appeal to be without merit and thus dismissing the appeal with costs of the appeal and those in the Court below to the respondents.

I have nothing useful to add.

Dated at Kampala this 20th Day of July 2020

Remmy Kasule
Ag. Justice of Appeal