THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Barishaki Cheborion & Muzamiru Kibeedi, JJA)

Civil Appeal No. 151 of 2012

(Arising from High Court (Commercial Division) Civil Suit No. 149 of 2010 at Kampala)

BETWEEN

Global Capital Save 2004 Ltd ========== Appellant

AND

Alice Okiror ========== Respondent No.1

Micheal Okiroro ========== Respondent No. 2

(Appeal from the Judgment of the High Court of Uganda, Commercial Division, (Obura, J.,) delivered on the 14th June 2012 at Kampala)

Judgment of Fredrick Egonda-Ntende, JA

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

[2] As Muzamiru Kibeedi, JA, agrees, this appeal is dismissed with costs.

Dated, signed and delivered at Kampala this 29th day of June 2020

Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Barishaki Cheborion and Muzamiru Kibeedi, JJA]

Civil Appeal No. 151 of 2012

1. GLOBAL CAPITAL SAVE 2004 LTD]
2. BEN KAVUYA] ═══ APPELLANTS

AND

1. ALICE OKIROR
2. MICHAEL OKIROR ═══ RESPONDENTS

(An appeal from the decision of the High Court of Uganda at Kampala (Commercial Division) before Lady Justice Hellen Obura dated the 14th day of June 2012 in Civil Suit No.149of 2010.)

Judgment of Muzamiru Kibeedi, JA

I have had the advantage of reading in draft the Judgment prepared by my Lord Cheborion Barishaki, JA and I concur with the Orders he has proposed.

Dated at Kampala this 29th day of June 2020

Muzamiru Kibeedi

Muzamiru Kibeedi
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 151 OF 2012

CORAM: Hon. Mr. Justice F.M.S Egonda -Ntende, Cheborion Barishaki and Muzamiru M. Kibeedi JJA

1. **GLOBAL CAPITAL SAVE 2004 LTD**
2. **BEN KAVUYA** **APPELLANTS**

Versus

1. **ALICE OKIROR**
2. **MICHAEL OKIROR** **RESPONDENTS**

(An appeal from the decision of the High Court of Uganda at Kampala (Commercial Division) before Lady Justice Hellen Obura dated the 14th day of June, 2012 in Civil Suit No. 149 of 2010.)

JUDGMENT OF CHEBORION BARISHAKI, JA.

Background

The respondents jointly sued the appellants seeking for a declaration that they had overpaid a loan of 53,000,000/= and the interest charged by the appellant was illegal, harsh and unconscionable. They sought for return of the certificate of Title comprised in Kyadondo Block 254 plot 863 at Lukuli and Kyadondo Block 229 Plot 1253 at Kireka in the names of Aguti Rose to the plaintiffs which had

been used to secure the loan . They also prayed for 192,500,000/=as special damages, general damages, interest on the special and general damages as well as costs.

The appellants contended that the 1st appellant had advanced to the 1st respondent a loan of 350,000,000/= repayable by 20th December 2008 and secured by a legal mortgage created over plot 863 at lukuli Kampala. That the mortgage was registered under instrument no KLA 423268 on 23rd July 2009. According to the appellants, the respondents failed to repay the loan in full having paid only 230,000,000/= leaving an unpaid balance of 120,000,000/=.

The respondents denied receiving 350,000,000/= and maintained that the legal mortgage relied on by the appellants was invalid and unenforccable because it was not properly executed by the mortgagor.

The learned trial Judge found for the plaintiffs now respondents hence this appeal on the following grounds:

1. *The learned trial judge erred in law and in fact when she held that the legal mortgage dated 26th February, 2008 was a loan agreement requiring execution by all parties thereto and was invalid for lack of execution by the first appellant.*
2. *The learned trial judge erred in law and in fact when she held that the Legal Mortgage (Exhibit D1) was not attested.*

3. *The learned judge erred in law and in fact when she failed to properly evaluate the evidence of the respondents on record thereby wrongly concluding that the mortgage was void for lack of written spousal consent.*
4. *The learned judge erred in law when she admitted oral evidence of the respondents to contradict the terms and contents of the Legal Mortgage. (ExhibitD1).*
5. *The learned trial judge erred in law and in fact when she awarded the respondents special and general damages on the basis of inadmissible oral evidence.*

Representation

At the hearing of the appeal, learned counsel Peter Nkuruzinza represented the appellants while the respondents were represented by learned counsel Gilbert Nuwagaba.

During the pendency of the appeal, the 2nd respondent passed on and the 1st respondent obtained Letters of administration for his estate as administrator.

While counsel for the appellants filed written submissions, the respondents adopted their conferencing notes as their submissions.

Mr Nkurusinza argued grounds 1 and 2 together. He submitted that the loan was secured by a mortgage which was duly registered. That during the trial the plaintiffs/respondents did not specifically plead that the mortgage was invalid or

was not properly executed or attested but had only raised these issues in their reply to the WSD. He contended that the mortgage which was admitted as Exh.D1 was not a conventional agreement embodying terms and conditions in respect of both parties but was a valid and properly executed mortgage deed. According to counsel, even if the mortgagee had not signed it, it would not be void as there was no requirement for the mortgagee to sign a mortgage. He relied on **General Parts (U) Limited versus Non Performing Recovery Trust SCCA NO.5 of 1995** to support this proposition.

Counsel submitted that the mortgage was attested to in accordance with the Registration of Titles Act and relied on **Grovindji popathal vs Nathoo Visandjee [1960]1 EA 361** to say that it was not necessary for the attesting witness to appear and prove the attestation.

On ground 3, counsel submitted that the respondents did not plead lack of spousal consent and it was an agreed fact that the respondents had agreed to mortgage the land to the appellants. Counsel added that since the mortgage had been registered by the commissioner land registration, the burden was on the respondents to prove that there was no spousal consent.

On grounds 4 and 5 counsel faulted the learned trial judge for admitting oral evidence to contradict the contents of the mortgage deed and for awarding the respondents special and general damages on the basis of inadmissible oral evidence.

Regarding interest, counsel submitted that the mortgage deed did not specify any rate of interest and the parties were at liberty to agree on any rate of interest.

Counsel further faulted the trial judge for applying interest rate of 12% per month when establishing how much refund was to be made to the respondents and for awarding special damages of 192,500,000/=.He contended that the loan was secured by a mortgage and as such , the money lenders act was not applicable. He referred to section 22 of the Money Lenders Act cap 273 and cited **Namusisi vs Ntabazi [2006]1 EA 273.**

In reply counsel Nuwagaba submitted that the construction of the mortgage deed constituted an agreement between the mortgagor and mortgagee. That it was evident in the said document that the parties agreed on various issues. He contended that reference by counsel for the appellants to the case of **Olinda Desouza Figuerredo vs Kassamali Nanji [1963]1 EA 381** was an attempt to ignore the provisions of the repealed Mortgage Act Cap 229 which was good law at the time as it defined a mortgage to also include a loan agreement.

He further submitted that the signature of the mortgagee was necessary and mandatory to give it legal efficacy to the loan agreement.

On ground 2, counsel submitted that the provision of S. 147 (1) of the RTA apply only where execution and attestation of the deed were not disputed. That section 147 (2) of RTA envisaged a situation where the person qualified to attest under S.147 (1) (a) was not present at the execution of the document. In which case

any person would witness the signature but the witness would had to obtain a certificate as proof of due execution of that document. He contended that the appellants failed to prove that Mr. Agaba Kakoni Michael who signed as witness was present at the time of execution by the mortgagor.

Counsel submitted that spousal consent was a legal requirement absence of which rendered the mortgage or any other transaction regarding family land void. That the 2nd respondent never consented to his wife borrowing 350,000,000/= by mortgaging the matrimonial property. That S.39 (1) of the Land Act requires such consent and the registrar is specifically prohibited to register any transaction where consent is required and not produced.

On the fourth ground which faults the trial judge for admitting oral evidence by the respondents which contradicted the terms of the mortgage, counsel submitted that the appellant misapplied the provisions of S.92 of thc Evidence Act because the respondents pleaded want of due execution of the document, had also pleaded and proved illegality in mortgaging the property without spousal consent, want of consideration for the purportedly received 350,000,000/=. That the appellant had not shown any evidence which the judge wrongly admitted. Counsel contended that the figure of 350,000,000/= was merely inserted after signature by the parties and no evidence was led by the defendant/appellants to controvert this fact.

In ground 5 counsel submitted that the appellants did not state what constituted inadmissible oral evidence. That court interpreted the contract/mortgage deed

and found that the interest was charged on the respondents though not stated and that the evidence produced by the respondents was to support the agreement not to vary it. He contended that the court accepted the respondents' view that only a sum of 53,000,000/= was advanced to the 1st respondent at an interest charged at 12% per month which was deemed unconscionable.

According to the respondents counsel the agreement was invalid for want of consideration for the 350,000,000/= and court had invoked the provisions of the Money Laundering Act to assist to reach a decision as there was no evidence of receipt of 350,000,000/= by the respondents.

Resolution.

The duty of this Court as a first appellate court is to reappraise the evidence on record and draw its own inferences. **See: Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions S.I 13-10.**

Grounds 1 and 2 were argued together and I will resolve them as such.

The learned trial judge is faulted for holding that the mortgage deed was a loan agreement requiring execution by all the parties thereto and was invalid for lack of execution by the first appellant. Further that the legal mortgage was not attested to.

It was submitted for the appellants that it was an agreed fact in the pleadings that the loan was secured by a land title and a mortgage was duly executed not a loan agreement. That the respondents never pleaded that the mortgage was

not properly executed or attested and in any case there was no legal requirement for the mortgagee to execute the mortgage in order for it to be valid.

The respondents supported the judges finding that the mortgage/loan agreement had to be executed by both parties in order for it to be construed as a valid mortgage and the signature of the mortgagee was necessary and mandatory to give it legal efficacy. That in this case this had not been done.

In resolving this issue, the trial judge held thus;

> *"I have carefully examined the legal mortgage executed by the parties and i agree with the submission of counsel for the plaintiffs that it doubled as a loan agreement as well.It contains obligations for both parties and has phrases like" it is hereby agreed".Unlike the construction in the form of mortgage in the eleventh schedule of the Registration of Titles Act which begins as follows;" I.....,being the registeed proprietor of the land.....", the mortgage in the instant case begins as follows;*
>
> *"This legal mortgage is made this 26th day of february 2008 BETWEEN ALICE OKIROR of P.O.Box ATUTUR-KUMI herein afer called the borrower.....and GLOBAL CAPITAL SAVE 2004.....(hereinafter called the lender)...."*

A photocopy of the legal mortgage on record shows that it was drawn by Ms Magezi, Ibale and Co. Advocates. Altough it is headed a legal mortgage, in the body, it uses language which is ordinarily applied in agreements eg ' it is hereby agreed' . It is made between the 1st responent Alice Okiror as borrower and the 1st appellant Global Capital Save 2004 limited as the lender and the 2nd appellant signed as Director of the 1st appellant. The trial judge went at great length to establish whether the mortgage/agreement had been sealed by the 1st appellant but no evidence was availed to court to prove so.

Ordinarily a limited liability company executes a document by affixing its common seal which is witnessed or authenticated by a director or the company secretary.Where execution is by an agent, then the agent is named and stated to sign on behalf of the principal see **Genaral industries (U) Ltd v Non Performing Assets Recovery Trust,SCCA No.5 of 1998.**

Section 132 of the RTA requires that a corporation for purposes of dealing with any registered land or any lease or mortgage may in lieu of signing the instrument affix thereto its common seal.

Sections 146(1) and (4) of the RTA provide that the proprietor of any land under the operation of that Act or any lease or mortgage may appoint any person to act for him or her in dealing with the land by signing a power of Attorney.

There was no evidence to show that Ben kavuya the 2nd appellant had authority of the 1st appellant to sign on its behalf. In the absence of Powers of Attorney , the 2nd appellant could not validly execute the mortgage on behlf of the 1st appellant.

Counsel for the appellants relied on the authority of **Olinda De Souza Figueiredo v Kassamali Nanji [1963] 1 EA and section 115 of the RTA** to submit that there was no strict requirement that the mortgagee should sign the mortgage and therefore, failure to follow the format in the .....schedule did not affect the legal efficacy of the mortgage.

In **General industries (U) Ltd v Non Performing Assets Recovery Trust,SCCA No.5 of 1998,** Mulenga JSC interpreted the effect of section 141 (the current section

132 (1)) of the RTA to mean that for the appellant to duly execute the mortgage document as mortgagor whether in the capacity of registered proprietor or donee of the power attorney, it had to affix its common seal to the document or to act by its attorney appointed for the purpose

The provisions of the repealed Mortgage Act Cap 229 which was good law at the time the parties undertook this transaction defined a mortgage as follows;

> *"Any mortgage, Charge, debenture, loan agreement or other incumbrance whether legal or equitable which constitutes a charge over an estate or interest in land in Uganda or partly in Uganda and partly elsewhere and which is registered under the act"*

An analysis of Exh P1 shows that it had tenents of a loan agreement as well as those of a mortgage. As a loan agreement it meant that both parties had to execute it to be valid. Neither did the 1st appellant affix its company seal to the document, nor did any one appointed as its attorney or authorized by way of company resolution sign the document on its behalf. What appears at the foot of the document is space provided for execution by the lender with the word 'director' written there under. The name of the signatory Ben Kavuya and his signature appear thereon. However, there is no evidence to show that he signed as the 1st appellant`s attorney or attorney appointed for purposes of the Registration of Titles Act. Thus, the case of **Olinda De Souza Figueired v Kassamali Nanji** (Supra) cited by the appellants is inapplicable.

On whether the mortgage deed was attested the trial judge held that section 147 (1) of the RTA only applies where execution of a document is not disputed.Once execution is challenged then section 67 of the Evidence Act is invoked in that the attesting witness would be called to prove execution of the instrument or possession of powers of attorney.

The 1st respondent PW1 Alice Okiror testified that when she signed the mortgage Agaba Kakoni who signed the mortgage deed as witness was not present although his signature and stamp appeared on it. DWI Mr. Sam Kawanda testified that he was present during the time of execution but did not sign it. The mortgage deed shows that the person who attested to it was Agaba Kakoni .

Section 148 (2) of the RTA requires the attesting witness to be present at the time of execution of the instrument. The rationale for this requirement is that if execution is challenged, the attestator would give evidence regarding the circumstances under which the instrument was attested. Agaba Kakoni Michael was not called as a witness to prove his presence during execution of the mortgage.

It is trite that failure by a party to call a material witness in a case where he is available and no explanation is given for failure leads court to draw an adverse inference against the party so failing. Since the appellants did not advance any reason for failure to call Mr Agaba , the trial judge was right to really on the evidence of the 1st respondent and rightly concluded that the mortgage deed was not attested.

In light of the above, I find that the document which the parties signed on the 26/2/2008 doubled both as a mortgage deed and loan agreement and as such was not properly executed.

Grounds 1 and 2 fail.

Counsel for the appellant in ground 3 faulted the trial judge for failing to properly evaluate the respondents evidence and as a result arrived at a wrong conclusion that the mortgage was void for lack of written spousal consent.

It was the appellants` case that the respondents never pleaded lack of spousal consent neither did they advance the argument that the mortgaged land was family land and for these reasons they should not have been permitted to depart from their pleadings.

In response it was submitted for the respondents that lack of spousal consent is a legal issue and could be addressed by court whether pleaded or not once it was bought to its attention.

In resolving the issue of lack of spousal the trial judge held;

> *"In the instant case, no written consent was adduced in evidence to prove that the second plaintiff consented to the mortgaging of the property.The property mortgaged is where the plaintiffs ordinarily reside with their children.It is in that sense family land.I agree with counsel for the plaintiffs that in absence of written spousal consent to mortgaging the property in issue for the amount stated in the mortgage, the mortgage created over it is void and i find so in this case."*

Section 39(1) of the Land Act Cap 227 as amended by the Land Amendment Act No. 1 Of 2004 provides that;

(1)No person shall-

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

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

(c) give away any family land, intervivos,or enter into any other transaction in respect of family land except with the prior consent of his or her spouse

Sub Section (4) of section 39 is to the effect that where the section 39 (1) is not complied with, the transaction shall be void.

Needless to emphasise that the above provisions of the law are mandatory and cannot be circumvented.

PW1 Alice Okiror stated in her witness statement that she never mortgaged her property for shs 350,000,000/= as stated in the mortgage deed and her husband could never consent to any loan of 350,000,000/= because they never needed it. She added that this was their family land where they ordinarily lived and couldnot put it at an unnecessary risk.

PW2 Micheal Okiror the husband of the 1st respondent stated that they never borrowed the 350,000,000/= because at that time they didnot need it. That Mr.Kavuya gave them documents to sign but he vividly recalls that he never

consented to a mortgage of 350,000,000/=. He recalled signing loan documents for 53,000,000/= plus interest and Ben Kavuya retained all the documents.

The appellant submitted that the respondents neither pleaded lack of spousal consent nor that the mortgaged land was family property and a party will not be allowed to depart from its pleadings without amendment and court ought not to have given judgment on unpleaded matters.

It is trite that a party is bound by its pleadings but the supreme court went further in **Kabu Auctioneers &Court Bailiffs & Muljibhai Madvani & Co Ltd V F.K Motors Ltd SCCS No.19 of 2009** when Tsekooko JSC held that;

> *".....Odds Jobs v Mubia [1970] EA 476 and Nkalubo v Kibirige [1973] EA 102 are authorities for the view that a court may base a decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision....*

The issue of lack of spousal consent to borrow 350,000,000/= and the land being family land was raised by the respondents in their witness statements and not at the submission stage as alleged by the appellants. The appellants had opportunity to rebut this evidence in their witness statements and in their submissions more so when they ought to have known that its admission would render the mortgage void. They never did so. Admission of the evidence in my view did not occassion any miscarriage of justice to the prejudice of the appellants or at all.

Rule 2(2) of the Judicature (Court of Appeal) Rules Directions SI 13-10 provides that;

Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court or the highcourt, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any court caused by delay.

while adressing a similar matter as to whether the existence of a marriage was a legal issue that had to be determined by court even though it was not raised for resolution by the parties, Lillian Tibatemwa Ekirikubinza JSC in **Elizabeth Nalumansi v Jolly Kasande & 2 others SCCA No. 10 of 2015** held ;

"I note that Rule 98 (a) of the Supreme Court Rules prohibits the raising of a new ground or argument on appeal save with leave of the Court. The Rule provides:

At the hearing of an appeal—

no party shall, without the leave of thecourt, argue that the decision of the Courtof Appeal should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal, or support the decision of the Court of Appeal on any ground not relied on by that court or specified in a notice given under rule 88 of these Rules;

Although the rule is restrictive on the parties raising new grounds, this Court may on its own motion in exercise of its inherent powers in Rule 2 (2) of the Supreme Court Rules consider a legal issue not presented and agreed upon by the litigants.

The Rule provides thus:

Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, and the Court of Appeal, to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any court caused by delay."

Be that as it may, the unpleaded matter was an issue at the trial framed under issue No.1 thus; whether the mortgage deed dated 26th February,2009 between Alice Okiror & Global Capital Save (2004) Limited was valid. This being the case, the learned trial Judge was enjoined to determine the issue of spousal consent.

Ground 3 fails

Counsel for the appellants argued grounds 4 and 5 together. He faulted the trial judge for admitting the respondents oral evidence to contradict the terms of the legal mortgage and for awarding damages on the basis of inadmissible oral

evidence. That the learned trial judge should not have relied on Exh. P1 tendered by the respondents because it never originated from the appellants. Further that applying interest of 12% per month when establishing the amount of refund of 192,500,000/= to the respondents was an error on her part.

A reading of the record shows that the appellants did not specify any evidence which was wrongly admitted by the trial judge to contradict or vary the contents of the mortgage deed. Both parties referred to Section 92 of the evidence Act to support their arguments. The section provides that;

Exclusion of evidence of oral agreement.

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms; but—

any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law.

From the resolution of grounds 1, 2 and 3 it's clear that the evidence the respondents adduced was not to contradict or vary the mortgage deed which section 92 seeks to prohibit but it was to invalidate the mortgage for want of

due execution, illegality due to lack of spousal consent and lack of consideration for the 350,000,000/= which evidence is admissible

Regarding the actual amount borrowed by the respondents and interest charged, the respondents were consistent that they never consented to the borrowing of 350,000,000/= from the appellants but to only 53,000,000/=.They further gave evidence that the interest charged on the said sum was 12 % per month. The appellants allege that they loaned 350,000,000/= with an interest waiver.

In her witness statement PW 1 asserts that the document which she signed had blank spaces and when she wanted to fill them, Mr.Kavuya told her that he would have them properly filled and since he was offering her money which she urgently needed, she could not argue with him.

For purposes of clarity I will reproduce the relevant clauses of the mortgage deed on this matter;

(b).....and upon having the repayment of the facility secured with the mortgaged property to the borrower has agree to secure the said facility totaling Shs,350,000,000/=(shillings THREE HUNDRED FIFTY MILLION ONLY) plus interest thereon.

Clause 1 (b)

PROVIDED ALWAYS: That the lender shall at all times advise the borrower of any change of the rate of interest so payable on the loan. Such change of interest shall be charged on

any principle and interest outstanding and will be recoverable as a whole without prejudice to the lender in any way whatsoever.

AND PROVIDED ALSO that the total moneys for which this mortgage constitutes a security shall not at any time exceed the sum of Shs 350,000,000/= (shillings Three Hundred Fifty Million only) together with interest at the rate aforesaid from the time of the mortgage debt becoming payable until actual payment thereof.

In interpreting agreements courts are enjoined to identify the intention of the contracting parties by applying an objective test.

In **Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, para 14** while addressing the power of courts in interpretation of contracts, Lord Hoffman had this to say;

> *"This is an objective test; the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean."*

In resolving the issue of interest, the trial judge held that;

> *"In my view I find that the interest was charged although the rate was not stated in the agreement for reason best known to the defendants.*
>
> *In addition, I am also constrained to comment on the provisions of clause 2 (b) reproduced earlier above. My interpretation of that clause is that the sum of Shs 350,000,000/= was the maximum that the defendant bound itself to charge the*

plaintiffs on the principle sum inclusive of interest. This, in my view, supports the plaintiffs argument that interest at 12% on the principal amount of 53,000,000/= that was lent was compounded and included in the amount of Shs.350, 000,000/= that was put in the agreement. If interest was yet to be charged on that amount there is no way the lender could have included that clause which puts Shs.350,000,000/= as the maximum amount inclusive of interest."

This in my view was an objective assessment and I agree with it.

The appellants disowned the statement of account Exh P1 but Alice Okiror PW 1 testified that the 2nd appellant provided it to them and it showed the amount of 308,631,375/= which they had paid. This was disputed by DW1 Kamwada Sam who testified that he neither printed out any statement from his computer nor was he instructed by Mr. Kavuya to do so.

The learned trial judge dealt with this issue at length and had this to say;

"To me charges indicated in a loan account statement are in line with the provisions of clause 2(b) of the agreement. Under that clause it was provided that the borrower would meet all costs, charges, expenses and other sums(lending, legal or otherwise) on a full and unlimited indemnity basis however incurred or to be incurred by the lender or by or through any receiver, advocate or agent of the lender or the company.

Clause 5 provided for costs, expenses and fees also strengthens the plaintiff`s case. Under 5 (ii) it was provided that the lender shall have the right at any time to debit the borrower`s account with interest, commission, charges ,fees and all

monies arising from the facility as well as all amounts and sums of money mentioned in the preceding sub paragraph (i) payable by the borrower. Sub-paragraph (i) provided that all costs and expenses including legal and auctioneers costs would be paid by the borrower to the lender.

It is more convincing that the lender (1st defendant) in line with the above provisions, debited the plaintiffs account with the caveat fees, mortgage fees, transfer fees, lawyers` fees and advertisement fees as indicated in the loan account statement. On that basis I am more inclined to believe the plaintiffs` version that they obtained Exhibit P1 from the defendants because to me it fairly represents what was in the agreement signed by the parties."

The mortgage deed / loan agreement mentioned a loan amount of 350,000,000/= plus interest. The lender was at liberty to make other charges to meet costs, commissions and other expenses. This was an open ended term without any specific amount. Exh P1 the loan account statement shows payments made, accrued monthly interest and monthly outstanding totals. The document supports the respondents evidence that the appellant advanced them a sum of 53,000,000/= and charged interest at the rate of 12% per month or 144% per annum.

PW2 in his statement stated that they discovered that the interest of 144% per annum was too high as compared to the normal bank rate or commercial rate of 20-25% per annum. The trial judge held that the rate of 144% p.a unconscionable.

Section 26 of the civil procedure Act cap 71 provides that;

Where an agreement for the payment of interest is sought to enforced and the court is of the opinion that the rate agreed to be paid is harsh and unconscionable and ought not to be enforced by legal process, the court may give judgment for the payment of the interest as it thinks.

Black`s Law Dictionary, Seventh Edition at page 1526 defines the term unconscionably to mean extreme unfairness and unconscionable as having no conscience, unscrupulous, affronting the sense of justice, decency or reasonableness.

Halsbury`s laws of England 4th edition reissue volume 12 (1) is to the effcct that; the rate of interest agreed to will be thc measure of damages no matter what inconvenience the plaintiff has suffered from the failure to pay on the day payment was due. The only cxception being that where it is not a genuine pre-estimate of the damage, the court has discretion to strike it out.

I find that the compounded interest of 144% p.a was unconscionable and this court cannot sanction it

Regarding the award of special damages, the respondents contended that they fully paid up the loan and prayed for a refund of 192,500,000/= as the amount they paid in excess. Counsel for the appellant objected to interest applied by court in establishing refund of the money to the respondents and that the

learned trial judge erred when she exercised powers under the Money Lenders Act to order the refund.

Section 11(1) of the Money Lenders Act Cap 273 relied on by the trial judge provides that;

Where proceedings are taken in any court by a moneylender for the recovery of any money lent after the commencement of this Act, or the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give relief, the court may reopen the transaction, and take an account between the moneylender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of the principal, interest and charges, as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise or alter any security given or agreement made in respect of money lent by the moneylender, and if the moneylender has parted with the security may order him or her to indemnify the borrower or other persons sued.

Section 12 (1) which deals with Harsh and unconscionable interest rates provides that;

(1) Where, in any proceedings in respect of any money lent by a Money lender after the commencement of this Act or in respect of any agreement or security made or taken after the commencement of this Act in respect of money lent either before or after the commencement of this Act,

it is found that the interest charged exceeds the rate of 24 percent per year, or the corresponding rate in respect of any other period, the court shall presume for the purposes of section 11, that the interest charged is excessive and that the transaction is harsh and unconscionable, but this provision shall be without prejudice to the powers of the court under that section where the court is satisfied that the interest charged, although not exceeding 24 percent per year, is excessive.

(2) The powers of a court under section 11(2) may, in the event of the bankruptcy of the borrower, be exercised at the instance of the trustee in bankruptcy, notwithstanding that he or she may not be a person liable in respect of the transaction.

(3) The powers of a court under section 11(2) may be exercised notwithstanding that the moneylender's right of action for the recovery of the money lent is barred.

Having found that interest of 144% pa was not legally justifiable the trial judge applied the provisions of the Money Lenders Act and ordered a refund of 192,500,000/= being the amount paid in excess as a result of the unconscionable interest charged. Under section 12 of the money lenders Act

interest exceeding 24% per annum is deemed harsh and unconscionable. Section 7 prohibits compound interest.

Paragraph 2 of the plaint described the 1st defendant as a limited liability Company carrying on business as a Money Lending Institution and the 2nd defendant as a Director of the 1st defendant Company. The appellants did not object to being described as such. They cannot therefore, object to the application of the law which regulates money leading business.

Having found that the mortgage between the parties was void, the learned trial judge exercised her discretion under section 26 of the Civil Procedure Act to order an interest of 25% p a. and arrived at 192,500,000/= as the amount paid to the appellants in excess.

In view the provisions of section 12 of the Money Lenders Act, I consider an interest rate of 20% p.a. appropriate. This would reduce the amount to be refunded to 154,000,000/=

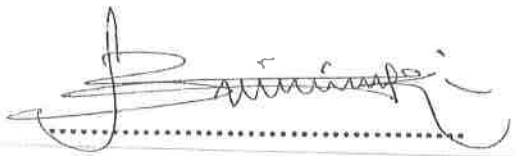
On general damages I find that the conduct of the appellants towards the respondents was oppressive right from the time of signing the mortgage deed, calculation of interest up to time of payment. At the insistence of the 2nd appellant unsigned spaces were left in the deed to be filled by the appellants alone, compounding of interest was not clearly stated and the repayment time for this huge amount was not reasonable. Clearly the appellants took advantage of the respondents vulnerability because they needed money for fees urgently.

This practice of taking advantage of people in difficult situations to charge exorbitant interest by money lenders is becoming very common in the country and should be discouraged. I find the sum of 30,000,000/= awarded by the trial judge as general damages appropriate.

Grounds 4 and 5 fail

In light of the above findings, this appeal fails, I would uphold the decision of the learned trial judge and, I would award costs to the respondents in this court and in the court below.

Dated at Kampala this 29th day of June 2020.



BARISHAKI CHEBORION
JUSTICE OF APPEAL