

**THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA  
CIVIL APPEAL NO. 057 OF 2010**

**RANCHHODBHAI SHIVABHAI PATEL LTD  
JAYANTILAL V. PATEL .....APPELLANTS**

**VERSUS**

**HENRY WAMBUGA  
(LIQUIDATOR OF AFRICAN TEXTILE MILL LTD)  
MUKWANO ENTERPRISES LIMITED.....RESPONDENTS**

**CORAM:**

**HON MR. JUSTICE RICHARD BUTEERA, JA**

**HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA**

**HON. MR. JUSTICE KENNETH KAKURU, JA**

**JUDGMENT OF THE COURT**

5

This appeal arises from the Judgment and orders of the High Court of Uganda (Commercial Division) sitting at Kampala delivered on 18<sup>th</sup> December by Hon. Justice Geoffrey Kiryabwire, J (as he then was) in High Court *Civil Suit NO. 094 of 2008*.

10

**Brief Background**

This appeal has a long and checkered history. We find it undesirable to layout its long history, choosing instead to give a brief background of the relevant facts that gave rise to it.

15

Sometime prior to 1996 the appellants held 49 percent shares interest in African Textiles Mills Ltd (ATM) and the government of Uganda held 51 percent shares. Later in 1996 the government of

Uganda diverted its shareholding in the company to the first  
20 appellant company.

In 1998, the company ATM borrowed money from the Co-operative  
Bank to revamp the company. Soon after the Co-operative Bank went  
into liquidation and its operations were taken over by the Bank of  
25 Uganda. The company ATM negotiated with the Bank of Uganda a  
loan repayment schedule but failed to raise the money to repay the  
loan because of shortage of working capital among other reasons.

On 13<sup>th</sup> May 2005 by special resolution the directors of ATM decided  
30 to voluntarily wind up the company under *Section 276(1)* of the  
Companies Act (Cap 110).

In the same resolution, Mr. Clive Mutiso was appointed as the  
liquidator of the company. On 22<sup>nd</sup> July 2005 Mr. Mutiso was by  
35 special resolution of the company replaced with Mr. Henry Sylvester  
Wambuga the first respondent herein.

On 26<sup>th</sup> July 2005 the Co-operative Bank (in liquidation) discounted  
the debt owing to it from ATM to shs. 1,000,000,000/= (one billion  
40 shillings) and demanded its immediate settlement. The company  
ATM still failed to raise this money.

On 10<sup>th</sup> April 2006, Crane Bank Ltd offered a credit facility of US\$  
800.000 to ATM a company that was in voluntary liquidation. This  
45 loan was to be repaid in a period of 6 months. The loan was secured  
by the following securities.

***“The above facility will be secured by securities listed below:***

- 50
- 1. Demand promissory note***
  - 2. Letter of continuing security***
  - 3. Debenture covering floating charge on all assets  
of the company.***
  - 4. Registered mortgage of the following properties:***



55 (a) Plot no 78-96, Palisa Rd, Mbale (leased for 96 years  
from 1.8.1969) in the name of M.s African Textile Mills Ltd  
(b) Plot No 1: Kitintale Way, Mbuya, Kampala (leased for  
49 years w.e.f 1.9.1995) in the name of M/s Art Investments  
Ltd, Kampala:

60 (c) Plot no 3 Kitintale Way Mbuya, Kampala (leased for 49  
years w.e.f 1.9.2002) in the name of M/s Art Investments  
Ltd; and

65 (d) Plot no 152, 6<sup>th</sup> Street, Kampala (leased for 98 years w.e.f.  
1.4.1957) in the names of Ms Kajal Patel and Mr. Keval  
Patel (minor)

70 **5. Personal guarantee of following :**

- 70 (i) Mr. J.V Patel  
(ii) Mr. P.R Patel  
(iii) Mr Ashwin Pate  
(iv) Mr. Thakore V Patel;  
(v) Mr. Henry \Wambuga (receiver) and  
75 (vi) Mr. Ravi C Patel

**6. General form of guarantee from M/s Art Investments Ltd.”**

80 The Company on 18<sup>th</sup> December 2006 obtained another facility from  
Crane Bank of Uganda. 1,500,000,000/=. The purpose of both credit  
facilities (loans) was stated to be “to pay off creditors” to facilitate the  
sale of the factory at Plot 78-96 Palisa Road Mbale.”

85 The securities were the same as for the earlier loan except that Plot  
156, 6<sup>th</sup> Street, Kampala was excluded. The company appears to have  
paid off the loan it owed to the Co-operative Bank remaining with  
that of Crane Bank.

90 Again the company failed to pay Crane Bank, prompting the Bank to  
instruct its lawyers by letter dated 11<sup>th</sup> June 2007, to recover the  
money. On the 14<sup>th</sup> June 2007, Crane Bank’s lawyers, Nangwala,  
Rezida & Co. Advocates wrote to Mr. Wambuga the liquidator of the  
company demanding payment. Again the company failed to pay

prompting Crane Bank's lawyers to instruct Auctioneers to sale  
95 the company's mortgaged securities. The Auctioneers M/s.  
Frobisher B-Majambere wrote to the liquidator Mr. Wambuga  
demanding payment and went ahead to advertise the properties on  
3<sup>rd</sup> August 2007. Earlier on 12<sup>th</sup> February 2007, the liquidator  
had advertised the ATM properties for sale; it appears, in order to  
100 pay off the loans. The plaintiffs blocked the sale by Court order.  
The appellants and the liquidator mutually agreed as follows:-

***" a) Miscellaneous Application 141 and the interim order  
issued under 142 of 2007 be withdrawn.***

105

***b) That the main suit No. 155 of 2007 be withdrawn;***

***c) That the liquidator shall not sale and or advertise for  
sale the property comprised plot 78-90 Palisa Road  
110 Mbale;***

110

***d) That the guarantors to the credit facility with Crane  
Bank continue to cover the security for the loan till 23<sup>rd</sup>  
April 2007.***

115

The suit and the above orders were withdrawn on 3<sup>rd</sup> April 2007 by  
consent for parties.

On 4<sup>th</sup> September, 2007 the liquidator sold LRV 786 Folio 12 Plot 78-  
98 Palisa Road, the company land, including the building and the  
120 machinery for US\$ 1,200.000/=.

Following the sale, the appellant instituted a suit at the High Court  
commercial division seeking the following orders:-

***"A declaration that the sale and transfer of the suit land  
developments thereon comprised in LRV 786 Folio 12 plot  
125 78-96 Palisa Road, Mbale measuring up to 9.19 Hectares***

*by the first defendant to the second defendant was fraudulent, illegal, irregular and therefore unlawful.*

*An order that the sale of the suit property comprised in LRV 786 Folio 12 Plot 78- 96 Palisa Road Mbale be nullified and the property revert to M/S African Textile Mill Ltd.*

*Recovery of the suit land comprised in LRV 786 Folio 12 Plot 78-96, the factory, machinery, the buildings and other developments thereon.*

*General damages.*

*A permanent injunction severally and jointly against the defendants, their agents, servants and or workmen from interfering with the suit property or taking possession of the suit property.*

*An order for a temporary injunction jointly and severally against the defendants, their servants, agents and/ or workmen for wasting, damaging, alienating or transferring the suit property to the third parties.*

*Costs of the suit.*

The suit was heard and dismissed on 16<sup>th</sup> December 2009. The appellants being dissatisfied with the decision of the High Court appealed to this Court on the following grounds:-

- 1. The learned trial Judge erred in law and fact when he held that the sale of the suit property to the 2<sup>nd</sup> Respondent by the 1<sup>st</sup> Respondent wasn't unlawful and fraudulent.*

155 2. **THAT the trial Judge erred in law and fact when he held that the 2<sup>nd</sup> Respondent is a bonafide purchaser for value of the suit property.**

160 3. **THAT the trial Judge erred in law and fact when he held that the 1<sup>st</sup> Respondent should only pay the Appellant's costs of the suit without considering the damage inflicted on the Appellants and the suit property due to the irregularities.**

165 4. **THAT the learned trial Judge erred in law and fact when he rejected the Appellant's application to produce an additional witness to support their case in regard to the Consent Order that restricted the powers of the liquidator as to the sale of the suit property.**

170 5. **The learned trial Judge erred in law and fact, when he failed to construe that the clause of confidentiality in the sale Agreement between the liquidator and 2<sup>nd</sup> defendant imputes fraud and conniving on part of the parties other than honesty.**

175 6. **The learned trial Judge erred in law and fact, when he failed to appraise the evidence on record and held that the company was insolvent.**

180 7. **The learned trial Judge erred in law and fact, when he failed to appraise and evaluate the evidence on record which indicated that the 2<sup>nd</sup> defendant connived with the guarantors in the purchase or sale of the suit property.**

185 **8. The learned trial Judge erred in law and fact, when he failed to hold that the suit property was governed by the law of Mortgages at all times.**

190 **9. The learned trial Judge erred in law and fact, when he failed to hold that impropriety of the liquidator in carrying out his duties in a voluntary liquidation amounted to an illegality which couldn't be sanctioned by court other than being a procedural error.**

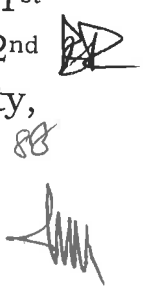
195 **10. The learned trial Judge erred in law and fact in his evaluation and appreciation of the evidence on record in respect to the issues and disputes and thereby arrived at a wrong decision and conclusion.**

200 When this appeal came up for hearing on 3<sup>rd</sup> May 2016. The parties requested and were granted leave to file written submissions, which they did. This Judgment therefore follows the written submission of counsel as no oral submissions were made.

**The Appellant's Case**

205 It was submitted for the appellant on ground one that the learned trial Judge erred when he did not find that the sale of suit property to the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent was neither fraudulent nor unlawful. Counsel first set out the definition of fraud as set out in Black's dictionary. He also stated the principle set out in **Kampala Bottlers Ltd vs Damanico (U) Ltd (Supreme Court Civil Appeal No. 22 of 1992)** that fraud must be attributed to the transfer.

215 It was submitted that the suit property had been valued at United States Dollars \$1,500,000 by the 2<sup>nd</sup> appellant which value the 1<sup>st</sup> appellant thought was low. Further, it was submitted that the 2<sup>nd</sup> respondent had offered to pay US\$ 3,500,000 for the suit property,



220 which the appellants had rejected. Further that, soon after the rejection of that offer, the 1<sup>st</sup> respondent sold to the 2<sup>nd</sup> respondent the suit property at US\$ 1,200,000. Counsel contended that the sale agreement proves the existence of a fraudulent intent on both parties to the agreement.

225 It was further submitted that the second respondent paid the 1<sup>st</sup> respondent US\$ 300,000 so that the property is sold at less than its actual value. It was strongly contended that the evidence adduced at the trial in respect of the above payment which was a bribe, was never rebutted.

230 Counsel contended further that because there was *malafide*, the 1<sup>st</sup> and 2<sup>nd</sup> respondents included in the sale agreement a clause that required each party never to use, divulge to any person, public or disclose any secret or confidential information relating to the purchase of the suit property. This clause, it was submitted, was proof of fraudulent intent on part of both the 1<sup>st</sup> and the 2<sup>nd</sup> respondents. Counsel contended that the confidentiality clause  
235 amounted to collusion. Counsel submitted further that the 2<sup>nd</sup> respondent whose offer of US\$ 3.5 million had been rejected by the appellants, therefore when it purchased the same property at US\$ 1.2 million from the 1<sup>st</sup> respondent he must have been aware that such sale was fraudulent and simply took advantage of it and as  
240 such on the authority of **Kampala Bottlers Ltd Vs Damanico** (*supra*) fraud in this transaction could be attributed to it.

## Ground 2

245 Counsel submitted that the 2<sup>nd</sup> respondent was not an innocent purchaser for value without notice, because of the reasons already set out in ground one above. In addition counsel submitted that the evidence on record indicated that the 2<sup>nd</sup> respondent had paid only shs. 15,000,000/= (fifteen million shillings) as stamp duty on transfer of the said property and did not disclose the purchase value  
250 as set out in the contract sale. Furthermore the appellants' claim that the above stated amount paid as stamp duty would put the value of



the property at only Ug. Shs. 1.5 billion the stamp duty being 1 percent of the value of the property at that time.

255 Counsel contended that the fact that the respondents omitted to insert the actual sale value of the property on the transfer form points to a fraudulent sale.

260

### **Ground 3**

The third ground falters the learned trial Judge for failing to order the 1<sup>st</sup> respondent to pay damages to the appellants. The appellants contended that they suffered loss and damage resulting from the acts  
265 of the 1<sup>st</sup> appellant when he sold the suit property below their market value and as such the court ought to have ordered the 1<sup>st</sup> respondent to pay damages to the appellant.

**Ground 4** was abandoned.

270

### **Ground 5**

Under this ground the appellants contend that the learned trial Judge erred when he failed to construe the confidentiality clause in the sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> respondents as fraud.  
275 This ground was extensively covered in the first ground of appeal and we find no reason to repeat the arguments of counsel.

**Ground 6, 7 and 10** relate to the failure by the Judge to re-appraise the evidence. We find no reason to delve into the submission of  
280 counsel, in this regard, as this being a first appeal, we are required to re-evaluate all the evidence adduced at the trial and to come up with our own inferences on all issues of law and fact.

### **Ground 8**

285 On this ground it was submitted by appellants that the learned trial Judge erred in law and fact when he did not hold that the Mortgage Act governed the suit property at all times. It was argued that since



the suit property was a subject of a legal mortgage, the 1st  
respondent should never have sold it, as he had no power to do so. It  
290 is submitted further that it was Crane Bank, which was clothed with  
the power of sale. Further, it was submitted that it was the duty of  
Crane Bank as the mortgagor to protect the mortgagee's right of  
redemption.

295 **Ground 9**

The appellants contend that the learned trial Judge erred when  
having found that the 1st respondent having failed to carry out his  
duty as a liquidator in a process of voluntary liquidation of the  
company but instead acted as a receiver, did not a null a sale. It was  
300 argued that the error noted by the trial Judge ought to have been  
treated as a breach of law and not simply as a procedural error. It  
was submitted that the trial Judge ought to have annulled the sale  
of the suit property.

305 Counsel asked Court to allow the appeal on all the grounds.

**The 1st Respondent's case**

In response to ground one it was submitted for the 1st respondent  
that at all material times, with the full knowledge of the appellants,  
310 pursuant to a company resolution the 1st respondent had full powers  
to conduct the business of the company as provided for under *Section*  
*301(1)* of the Companies Act.

It was submitted that whereas under *Section 301 (1) (a)* of the  
315 Companies Act a voluntary liquidator is not supposed to exercise the  
powers provided for under *Section 244(1) (a) (e) and (f)* without  
sanction of a special resolution of the company, under *Section 301(1)*  
*(b)* a liquidator is empowered, without any sanction to exercise all the  
powers of a liquidator appointed by Court in a winding up by court  
320 other than those saved under *Section 301(1) a*.

It was submitted further that the 1st respondent that under *Section*  
*244(2)* of the Companies Act he had power to sale the company assets

325 by auction or public treaty with power to transfer to someone else all  
the assets of the company. The allegations of fraud therefore, it was  
submitted, were untenable and the Judge correctly held so.

330 It was again argued for the 1<sup>st</sup> respondent that although there was a  
procedural error in the process of sale, there was nothing unlawful  
or fraudulent and as such the sale was valid and the purchaser  
obtained good title.

335 On ground 2 as to the whether the 2<sup>nd</sup> respondent was a *bonafide*  
purchaser for value without notice, it was submitted that, the good  
title had been passed as the 1<sup>st</sup> respondent had committed no  
fraudulent act.

340 It was submitted further, that the appellants had failed to redeem  
their property although they had been given sufficient time to do so.  
The plaintiffs having failed to redeem the property from being sold by  
the Bank of Uganda, Crane Bank instructed its lawyers to sell the  
mortgaged property under the Mortgage Act. It was submitted further  
that during all this time the appellants tried and failed to find anyone  
who could purchase the property this being the case the 1<sup>st</sup>  
345 respondent then sold the property to the 2<sup>nd</sup> respondent, at best price  
that was offered. Counsel argued that the 1<sup>st</sup> respondent had acted  
lawfully and diligently in the circumstances.

350 The 1<sup>st</sup> respondent asked this Court to dismiss the appeal.

### **The 2<sup>nd</sup> Respondent's case**

355 It was submitted for the second respondent that no case had been  
made out for presentation of a new point of law. It was further  
submitted that at all the time the 1<sup>st</sup> respondent being the liquidator  
of the company had powers under Section 301(1) f (b) of the  
Companies Act without any sanctions to sell assets of the company,  
the sell being conducted under *Section 244* of the Companies Act. It

360 was further contended that the sell had already been sanctioned by  
a special resolution of the company.

365 It was submitted that the company had failed to pay its debts and  
thus the sale of its assets were inevitable, in the circumstances. The  
2<sup>nd</sup> respondent submitted further that the sell was legally conducted  
and the assets of the company were sold for value without any fraud,  
collusion or connivance.

370 It was the 2<sup>nd</sup> respondent's case that company assets were sold for  
good consideration and the sufficiency or adequacy of the  
consideration would not vitiate the sell. In this case, it was argued, it  
was not proved that the 1<sup>st</sup> respondent had sold the assets of the  
company below market value or that he believed that the assets had  
been undervalued.

375 Lastly it was submitted that the sale was genuine and there was no  
fraud and as such the 2<sup>nd</sup> respondent had obtained good title.

#### **Resolution of grounds of appeal**

380 This is a second appeal and as such we are required to re-appraise  
the evidence and to come up with our own inference on all issues of  
law and fact. See: ***Eric Tibebaga Vs Fr. Narsensio Begumisa,***  
***Supreme Court Civil Appeal No. 17 of 2002.***

We shall proceed to do so.

385 We shall determine this appeal according to the grounds set out in  
the memorandum of appeal and not the issues set out in the parties'  
conferencing notes.

#### **390 Ground one**

***The learned trial Judge erred in law and fact when he held  
that the sale of the suit property to the 2<sup>nd</sup> Respondent by  
the 1<sup>st</sup> Respondent wasn't unlawful and fraudulent.***

395 It was contended for the appellants on this ground that the sale of  
the suit property to the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent was  
fraudulent and unlawful. The appellants in their written submission  
did not point to any law that was contravened in the sale process,  
under this ground. However, they raised in ground 9 the issue of  
400 impropriety of the 1<sup>st</sup> respondent in carrying out his duties as a  
liquidator in a voluntary liquidation. We shall revert to that in ground  
9. Suffice it to say, that in respect of ground one we find no  
sustainable argument on the question of illegality. The second leg of  
this ground refers to fraud and it is on this that the appellants dwelt.  
405

The appellants set out in detail the evidence on record which is not  
controverted, that the 2<sup>nd</sup> respondent had at different times prior to  
the sale, expressed interest to purchase the suit property at a much  
higher price than that, at which the property was sold. The appellants  
410 asked us to find that the suit property was sold by the 1<sup>st</sup> respondent  
to the 2<sup>nd</sup> respondent a price that was far less than its market value  
through connivance. Further that US\$ 300,000 (Three hundred  
United States Dollars) was paid to the 1<sup>st</sup> respondent by the 2<sup>nd</sup>  
respondent outside the sale agreement as an inducement to have the  
415 property sold below its market value.

Lastly, that a clause was inserted in the sale agreement binding the  
parties to secrecy regarding all matters relating to the sale of the suit  
property. The appellants asked us to find that the above constituted  
420 fraud as defined by various decisions of the Supreme Court notably  
***Kampala Bottlers Ltd vs Damanico (U) Ltd: Supreme Court Civil***  
***Appeal No. 22 of 1992.***



425 We have carefully perused the Court record and the authorities cited to us. We have also studied the submissions and conferencing notes of each of the parties. We have already set out above the background to this appeal and we find no reason to reproduce it here.

430 It is undisputed that the Company African Textile Mills Ltd (ATM) on 13<sup>th</sup> May 2005, by special resolution of the directors voluntarily wound up under *Section 276(1) (b)* of the Companies Act Cap 110, which was the operative law at the time. It appointed one Clive Mutiso to be the liquidator of the company. However, Mutiso resigned soon after and by another special resolution the 1<sup>st</sup> respondent was  
435 appointed to replace him. At the time the company was put under voluntary winding up by its directors, it was limping to say the least. It appears to have had assets but it also had liabilities and was short of operating capital. It had an outstanding loan of shs. 1,200,000,000/= with the defunct Co-operative Bank Ltd which itself  
440 was under liquidation. This loan had been obtained in 1998 and it was still outstanding in 2005 when the company went into voluntary winding up. During this period 1998-2005 the company had been trying to find ways and means of paying off the loan and revamping its business without success.

445 However, in July 2005 it successfully negotiated with the Co-operative Bank (in liquidation), which agreed to have its outstanding loan reduced to shs. 1,000,000,000(one billion) only provided the loan was paid off immediately. The company did not  
450 have that money, so it approached Crane Bank Ltd for a loan in order to pay off the Co-operative Bank. This was the proverbial borrowing from Peter to pay Paul. Even then, it did not get the loan from Crane Bank Ltd until 10<sup>th</sup> April 2006 when it was granted a loan of US\$

800,000. The loan was to be paid within 6 (six) months. It was  
455 secured by the suit property. This loan was not paid. On 18<sup>th</sup>  
December 2006 the Company again borrowed further shs.1,  
500,000, 000/= from Crane Bank Ltd. The company failed to pay this  
money within the stipulated time of six months. This prompted Crane  
460 Bank to demand payment by letter dated 3<sup>rd</sup> April 2007 which reads  
as follows:-

**CB: ADV: 2007**

465 **Mr. Henry Wambuga- Liquidator**  
**African Textile Mills Ltd.(In-Liquidation)**  
**P.O. Box 28276,**  
**KAMPALA**

470 **Dear Sir**

**RE: DEMAND NOTICE FOR REPAYMENT OF DEMAND LOAN**  
**OF USH 1,500,000,000 GRANTED TO AFRICAN**  
**TEXTILE MILLS LTD (IN LIQUIDATION)**

- 475 **1. On the 24.11.06, your Company applied to us for a**  
**fresh demand loan of Ush.1,500,000,000 for the**  
**purpose of paying off the company's creditors to**  
**facilitate sale of the factory at Plot 78-96, Palisa**  
**Road, Mbale.**
- 480 **2. The same was sanctioned through our sanction letter**  
**dated the 18.12.06 terms and conditions of which**  
**were accepted under your seal and signature.**
- 485 **3. Although the sanction letter specified that the loan**  
**shall be repaid in one bullet payment in six (6)**  
**months, it also specified that the repayment period**  
**granted is subject to the demand nature of the**  
**advance.**
- 490 **4. In your discussions with the bank, you had outlined**  
**various sources of repayment, none of which seems to**  
**be materializing, causing great concern to us,**

495 **especially your ability to adhere to the repayment schedule.**

500 **5. Considering what is stated at (4) above, it has become imperative for the bank to commence recovery action to secure repayment of the debt within the agreed period and it is within the bank's right to so move, considering what is stated in (3) above.**

505 **6. We therefore, hereby demand that you repay the entire liability with interest till date of full repayment on or before 23.4 07. The amount to be repaid as on date is Ush. 1,500,000,000 in your demand loan account and US\$ 134, 108.14 in your current account, both with interest till 31.3.07.**

510 **7. You are further put to notice that failure to comply shall trigger summary recovery proceedings at your cost and consequence.**

515 **Yours faithfully,**

**Reghu S. Nair**  
**Head of Credit**

520 The money was not paid as demand prompting the Bank to issue a formal demand notice through its lawyers Nangwala, Rezida and Co. Advocates on 3<sup>rd</sup> April 2007. The Company and its guarantors the appellants still failed to raise the money to pay Crane Bank. The Lawyer for Crane Bank then put in motion a recovery process and instructed M/S. Frobisher-B. Jambere Court bailiffs and Auctioneers  
525 to sell the suit property under the Mortgage Act. On 3<sup>rd</sup> July 2007 the bailiffs advertised the properties, after having given 7 (seven) days' notice to the company. This was not the first time the suit property was being advertised for sale. It had earlier been advertised for sale on 12<sup>th</sup> February 2007 in the Monitor Newspaper and on 13<sup>th</sup>  
530 February 2007 in the New Vision Newspaper. The 1st appellant, however, had placed those advertisements, in the media in his capacity as a liquidator of the company. This intended sale appears



to have been stopped by mutual agreement between the appellants and the 1<sup>st</sup> respondent.

535

Apparently the appellants had filed a suit at the High Court (Commercial Division) *vide* High Court *Civil Suit No. 155 of 2007* against the 1<sup>st</sup> respondent. They were able to obtain an interim order stopping the sale. That interim order was later set aside by mutual agreement of parties following a meeting on 3<sup>rd</sup> April 2007. A letter dated 30<sup>th</sup> March 2007 to the 2<sup>nd</sup> appellant's lawyers gives a hint at what was agreed between the parties. The letter reads as follows; -

540

**March 30 2007**

**"OUR REF:AAA/ATM/CO/07**

545

**Mr. JV PATEL  
African Textile Mill Ltd (In liquidation)  
P.O Box 242 Mbale**

550

**Dear Sir,**

**RE: AFRICAN TEXTILE MILL LTD (IN LIQUIDATION)**

**The above subject refers:**

555

**Following our meeting held on the 20<sup>th</sup> March 2007 with Mr. Ashwin Patel and yourselves regarding the above captioned matter, it was agreed mutually between the parties that:**

560

**a) Miscellaneous Application 141 and Interim Order issued under 142 of 2007 be withdrawn.**

**b) That the main suit No. 155 of 2007 be withdrawn.**

565

**c) That the liquidator shall not sale and or advertise for sale the property comprised in plot 78-90 Palisa Road Mbale.**

570 **d) That the Guarantors to the credit facility with Crane  
Bank continue to cover the security for the loan till  
23<sup>rd</sup> April 2007.**

575 **As discussed and agreed please find herewith forwarded  
a signed copy of consent withdrawal.**

**Yours truly,**

**Ahamya Associates & Advocates**

580 **C.c PR Patel**

**C.c Ashwin Patel**

**C.c Henry Wambuga (the liquidator)"**

585 It is clear to us that in paragraph (d) of the above letter the parties  
agreed to stay the sale of the property until 23<sup>rd</sup> April 2007. The  
consent withdrawal that followed sets out the agreed terms as  
follows; -

590 **CONSENT WITHDRAWAL**

**This matter coming up for final disposal this 03<sup>rd</sup> day of  
April 2007 Before His Worship Vincent Emmy Mugabo in the  
presence of Ahamya Sam Counsel for the plaintiffs, it is  
hereby ordered by consent of both parties as follows;**

- 595
- 1) That the miscellaneous application 141 and Interim  
Order issued under 142 of 2007 be withdrawn.**
  - 2) That the main suit No. 155 of 2007 be withdrawn.**
  - 3) Each party bears its own costs.**
- 600

**Dated this 3<sup>rd</sup> day of April 2007**

Nothing is mentioned of the restriction on the 1<sup>st</sup> appellant's powers in that consent order. In any event the suit having been withdrawn  
605 no conditions binding any of the parties could have followed.

We find from the evidence on record that by the time the 1<sup>st</sup> respondent sold the suit property to the 2<sup>nd</sup> respondent several attempts had been made by all the parties involved to raise capital to  
610 re-capitalise and revamp the company but had failed. The attempts to raise money and re-capitalise the company started in 1998 when the company borrowed money from the defunct Co-operative Bank. By 2004, it had failed to pay back the loan. It borrowed money from Crane Bank in 2006, "*in order to pay off creditors and facilitate the sale of the factory*". It is therefore not true as submitted for the  
615 appellants that the company was solvent and capable of paying its creditors. It could only do so upon liquidating all its assets and that appears to be the sole reason why its directors put it under voluntary liquidation.

620 During the period between 2004 and 2007 the company together with the appellants were frantically looking for viable financing and/ or joint venture partners to buy and take over the company as a going concern.

625 It may be true, that technically the company was solvent as declared by its directors on 28<sup>th</sup> April 2005 under Section 276 of the Companies Act, but in actual fact it was unable to run as a profitable business as it was heavily indebted. It found itself in a position in  
630 which it was unable to pay its debts from its operating business necessitating it to sell its assets.

From the evidence on record the attempts to liquidate the assets of the company begun as far back as 22<sup>nd</sup> June 2005 when Uganda  
635 Ginnery and Cotton Exporter's Association in a letter to the 1<sup>st</sup>

respondent the liquidator of the company offered to purchase land, building and machinery at US\$ 5,500,000. On 5<sup>th</sup> May 2007 Global Diaspora Advisory Council offered to take over the Company by paying US\$ 5,000,000 through Agro-group Industries Ltd.

640

On 30<sup>th</sup> August 2007 General Caleb Akandwanaho Minister of State for Finance, Planning and Economic Development (Micro-finance) wrote to CITI Bank (Uganda Limited) requesting them to “rescue” the company financially.

645

On 29<sup>th</sup> March 2005 the Minister of Tourism Trade and Industry wrote to the Minister of Finance Planning and Economic Development requesting to intervene and stop the Bank of Uganda from selling the assets of the Company to recover loan owed to the Co-operative Bank (in Liquidation) and to help restructure and recapitalize the company.

650

On 24<sup>th</sup> May 2007 again the Minister of State for Industry and Technology wrote to the Minister of State for Finance (investment) the following letter.

655

**24<sup>th</sup> May 2007**

**Hon. Prof. Kiwanuka Semakula  
Minister of State for Finance (Investment)  
Kampala**

660

**Dear colleague,**

665

**RE: AFRICAN TEXTILE MILL LTD (ATM)**

**The bearer of this letter, Mr. P.R. Patel is the Managing Director of African Textile Mill Ltd in Mbale.**

670 ***His Company borrowed Shs. 2.Billion from Crane Bank and  
Crane Bank has advertised to sell the factory because the  
company could not repay the loan on time.***

675 ***African Textile Mill Ltd is owed substantial amount of  
funds arising from consent judgment against the Attorney  
General.***

680 ***The purpose of this letter is therefore to introduce Mr. P.R.  
Patel to you with an appeal for the Ministry of Finance,  
Planning and Economic Development to intervene so that  
the African Textile Mill factory is saved from collapse.***


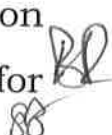
685 ***Signed  
Prof. Ephraim Kamuntu (M P)  
MINISTER OF STATE FOR INDUSTRY & TECHNOLOGY”***

On 15<sup>th</sup> of September 2006 the company entered into a joint-venture agreement with Afric-coo-operative society in which the later was to pay 17 billion shillings to the former and acquire 46% of its shares.

690 On 10<sup>th</sup> February 2007 the 1<sup>st</sup> respondent received an offer of shs. 1.25 billion to purchase the suit property from one Magoba Timothy and another offer of shs. 1.5 billion from Byansi Godfrey. As earlier noted the 2<sup>nd</sup> respondent had been interested in purchasing the property at 5.5 million dollars sometime in 2004/2005, but this did not materialize. Except for the last two bids from Mr. Magoba and

695 Mr. Byansi the rest appear to have been very serious attempts to rescue the company for its financial woes. All those attempts failed. The Crane Bank loan remained unpaid and the bank kept on pressing the company and the appellants who were its guarantors for

700 payment.



By 3<sup>rd</sup> August 2007 when the court bailiffs, on the instructions of the Bank's lawyers advertised the suit property for sale, the company and its guarantors had failed to raise the money to pay off the loans that  
705 had been outstanding for a long time. The advertisement stipulated that the property would be sold after 30 days of its publication unless the debtors or the sureties paid mortgage holder all monies owed. The debtor referred to in the advert was African Textiles Mills Ltd (in liquidation). The sureties referred to were the guarantors, the  
710 appellants herein.

Following the advert the liquidator had only 30 (thirty) days to find a buyer, and he did. Had he not done so he would have risked having the property sold by the bank probably at a much lower price than  
715 he eventually did. There is no evidence that there was any other buyer willing to pay a higher price. The proposals for funding that were on going at the time the property was sold could not be said to amount to any serious offers taking into account the fact that none of such proposals had materialised in the three years that the  
720 properties were on sale.

There is no evidence that the 1<sup>st</sup> respondent sold the property in haste and secrecy and deliberately denying the company a chance of better offers. This property was already on sale, having been advertised by  
725 Crane bank. The appellants were at all times at liberty to pay the bank and redeem the property. They failed to do so.

It was submitted strongly for the appellants that the 1<sup>st</sup> respondent  
had no power to sell the suit property without their prior consent.

730 This was a voluntary wind up and as such it is deemed to have  
commenced on the date of passing the resolution. Once the  
resolution had been passed there was no relating back.

735 The company ceased to carry on its business expect so far as may  
have been required for its beneficial winding up.

In this case the duty of the liquidator was to sell company assets, pay  
off its debts and distribute the remaining money to the shareholders.  
Upon appointment of a liquidator in a voluntary winding up, all the  
740 powers of the directors cease except so far as a general meeting or  
the liquidator sanctions their continuance.

We agree with the learned trial Judge that the 1<sup>st</sup> respondent carried  
out his duty as a liquidator in accordance with the law. We find that  
745 there was no legal requirement for him to seek prior consent of the  
Directors or members before selling the suit property to the 2<sup>nd</sup>  
respondent or to any other person.

This is acknowledged by the appellants when in a letter dated 30<sup>th</sup>  
750 March 2007 from their lawyer to the 1<sup>st</sup> respondent reproduced above  
they requested the 1<sup>st</sup> respondent not to sell the suit property before  
23<sup>rd</sup> April 2007.

755 The suit property was sold in September 2007; the agreed restriction  
had long ceased. In any event it was never made part of the consent  
order and was therefore not binding on the 1<sup>st</sup> respondent. The  
consent order was later withdrawn.

We find no evidence that the 1<sup>st</sup> respondent was paid US\$ 300,000  
760 outside the contract of sale. Even then the company is still at liberty  
to recover this money from him, as he is required to fully disclose

everything to the General meeting of the Company. This on its own would not vitiate the contract of sale concluded with a third party such as the 2<sup>nd</sup> respondent.

765

We find that the 1<sup>st</sup> respondent lawfully sold the suit property to the 2<sup>nd</sup> respondent who obtained good title. This ground has not merit and hereby dismiss it.

770 **Ground 2**

Having held as we have on ground one, that there was no fraud committed by the 1<sup>st</sup> respondent in the process of sale, we find that the 2<sup>nd</sup> respondent obtained good title. The issue raised in this ground of appeal regarding none disclosure of the contract sum in the transfer documents and paying less stamp duty on the sale agreement is a matter that ought to have been reported and investigated by the Tax Authority. On its own this would not vitiate the contract, but it would probably attract legal sanctions under Tax Law.

780

**Ground 3**

We find this ground strange. The appellant's suit having been dismissed, the trial Judge could not have awarded them any damages. This ground is misconceived.

785

**Ground 4.**

This ground was abandoned by the appellants in their submissions.

**Ground 5.**

790 We find that the appellants misconceived the issue of the confidentiality clause. The 1<sup>st</sup> respondent as an agent of the company had a duty to disclose to the company directors everything



relating to the sale agreement and could not in any way hide behind  
the confidentiality clause. The confidentiality clause related to third  
795 parties. Its existence therefore cannot be construed as imputing  
fraud and connivance on the part of the respondents. This ground  
has no merit.

**Ground 6 and 7**

800 We find no merit in these two grounds as the learned trial Judge  
properly evaluated the evidence at the trial and arrived at the correct  
conclusion. As a second appellate Court, we have re-appraised the  
evidence and we have come to the same findings as the learned trial  
Judge. We find no merit in both grounds and we dismiss them.

805

**Ground 8**

We agree with the appellants that the suit property was a subject of  
a legal mortgage and therefore was governed by the Mortgage Act. We  
find that the 1<sup>st</sup> respondent sold the suit property subject to  
810 encumbrances including the mortgage. The Bank obviously  
permitted the sale to proceed subject to the mortgage and that is why  
the property including the land title was transferred to the buyer. The  
debentures and mortgage must have been released upon payment. A  
mortgagor has right at all times under the law to sell the mortgaged  
815 property subject to the mortgage. The application of the Mortgage Act  
in this transaction could not have been a hindrance to the sale. This  
ground is misconceived and we dismiss it.

**Ground 9 and 10**

820 These two grounds have been dealt with and determined together  
with ground one. We find no merit in both of them and we dismiss  
them.

825 In conclusion, we find no merit in this appeal, and we hereby dismiss it with costs to the 2<sup>nd</sup> respondent.

We make no orders as to costs in respect of the 1<sup>st</sup> respondent because of the history of this case which we have endeavored to reproduce earlier in this Judgment.

830

Dated at Kampala this 29<sup>th</sup> day of March 2017.

835

*Kaushita*

840

HON. JUSTICE RICHARD BUTEERA  
JUSTICE OF APPEAL

*SBB*

845

HON. LADY JUSTICE SOLOMY BALUNGI BOSSA  
JUSTICE OF APPEAL

850

*Kakuru*

HON. JUSTICE KENNETH KAKURU  
JUSTICE OF APPEAL

29/3/2017

Christopher Bwamba & Tommy Amantwe  
for 2<sup>nd</sup> Respondent

26  
Nampanga Daniel for Appellants  
Nampanga Susan etc

Cl. Judgment read at court  
*[Signature]*