THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO.41 OF 2006

KYAGALANYI COFFEE LTD==========APPELLANT

VERSUS

FRANCIS SENABULYA ==========RESPONDENT

CORAM: HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA

HON. JUSTICE S.B.K KAVUMA, JA

HON. JUSTICE A.S.NSHIMYE, JA

(Appeal arising from the judgement of High court of Uganda at Jinja (Anna Magezi. J.) dated 30th August 2005 case No. 0087 of 2001.)

JUDGEMENT OF THE COURT

This is an appeal from the judgement of the High court of Uganda at Jinja (Anna Magezi. J.) dated the 30th of August 2005 in which the court found for the respondent.

Background

The background to the appeal is that the respondent offered his property, comprised in Leasehold Register Volume 925 Folio 18 Plot 17, Bell Avenue West, Jinja, South Busoga District, as security for sums of money advanced to him and his business partners, trading as M/s Junior Traders, by the appellant. The security was by way of an equitable mortgage by deposit of the certificate of title.

The mortgagor defaulted in the repayment of the loan. The appellant, the mortgagee, then transferred and had registered the mortgaged property into its own names.

The respondent objected and instituted in court, High Court Civil Suit No. 0087 of 2001. He contended that the respondent had unlawfully converted the mortgaged property to itself. The learned trial judge ordered either a return of the property or payment of its value to the respondent together with mesne profits and costs. The appellant now appeals that decision to this court.

Grounds of appeal.

There are five grounds of appeal namely:

1. ***The Learned trial judge erred in both law and fact when she held that the transfer and sale of the suit property was unlawful and illegal whereas the same had been proved.***
2. ***The learned trial judge erred both in fact and law when she held that the written sale agreement was inadmissible in evidence thereby prejudicing the appellant's case and causing a miscarriage of justice.***
3. ***The learned trial judge erred both in law and in fact, when she shifted the burden of proof on to the Appellant in holding that the appellant had not proved lawful transfer of the suit property into its names.***
4. ***The learned trial judge erred both in law and in fact when she ignored and/or failed to properly and judiciously evaluate the evidence before court and she instead held that***
   - **(a)** ***The Appellant had unlawfully converted the suit property instead of following the foreclosure procedure.***
   - **(b)** ***There was no subsequent and independent sale and transfer of the suit property by the Respondent to the Appellant whereas this was expressly admitted in documents tendered before court.***
   - **(c)** ***The Respondent never opened an account and accessed any monies from Crane Bank.***
   - **(d)** ***The Respondent was entitled to mesne profits.***
5. ***The learned trial judge erred both in law and fact when she made orders that:-***

(a) ***The Plaintiff was entitled to recovery of the suit property where as the same was registered in the names of a third party who was not a party to the suit.***

(b) ***The Plaintiff was entitled in the alternative, to compensation of Shs. 105,500,000/= without taking into consideration the improvement made on the suit property by the Defendant and the third party and the nature of the valuation report.***

Representation

At the hearing of the appeal, Mr. Brian Othieno represented the respondent while Mr. Andrew Kibaya represented the Appellant. Ms Miranda Bouser, an official of the appellant, was in attendance.

The case for the appellant on grounds 1,2 and 3

Arguing grounds 1, 2 and 3, counsel for the appellant submitted that in concluding that the transfer of the suit property into the appellant's name was unlawful, the trial judge had erroneously shifted the burden of proof to the appellant.

He contended that the certificate of registration for the property, which was in the names of the appellant was, in the absence of fraud, conclusive evidence of its lawful title thereto. According to him, there was no evidence that at the time of the transfer of the property into the appellant's names, the appellant was a Non African. Counsel submitted that lack of ministerial consent was neither pleaded nor framed as an issue and, therefore, it could not be raised.

He criticised the learned trial judge on her finding that the sale agreement for the property was inadmissible in evidence. He contended that the same had been corroborated by the cheque and bank account exhibits. According to counsel, the respondent had also admitted the fact of the sale of the property. He prayed court to find in the affirmative on these grounds.

The case for the respondent on grounds 1,2 and 3

In his reply, counsel for the respondent submitted that the nature of the transaction, with regard to the property in issue in this appeal, was that of an equitable mortgage. He contended that the appellant, being an equitable mortgagee, unlawfully took over the security and transferred it into its own names without a foreclosure order from court. On the claimed subsequent sale of the

mortgaged property by the respondent to the appellant, counsel submitted that this was not the case. According to him, even if it had been, it would have been illegal. He submitted, further, that the learned trial judge was right in her finding on the burden of proof. Counsel prayed court to find in the negative on these grounds.

Duty of court

It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions bearing in mind, however, that it did not see the witnesses testify.

See **Rule 30 of the Judicature (court of Appeal Rules) Directions S.I.13-10**. **Pandya VR [1957] EA 336, Okeno V Republic [1972] E.A 32 and Kifamunte Henry Vs Uganda SCCA NO. 10 of 1997** (unreported).

Courts resolution of grounds 1,2 and 3

The gist of these grounds is whether the claimed sale and the transfer of the mortgaged property into the names of the appellant was lawful and whether the learned trial judge erroneously shifted the burden of proof to the appellant.

The learned trial judge's finding on these grounds of appeal was that the transfer and registration of the mortgaged property in issue in the appellant's names was illegal for lack of a foreclosure order from court and the requisite minister's consent under the Land Transfer Act.

Our own review of the evidence on record leads us to the inference that the nature of the transaction between the appellant and the respondent over the property in issue was that of an equitable mortgage by deposit of the certificate of title for the said property by the respondent to the appellant.

For the appellant therefore, as an equitable mortgagee, to realise its security, it was necessary for it to obtain a foreclosure order from court which it did not. Simply taking over and registering the mortgaged property into its names, was, therefore, an illegality and no court of law would sanction that. See **Makula International Ltd vs His Eminence Cardinal Nsubuga and**

another, Civil Appeal No. 4 of 1981 [1982] HCB 11. It is a cardinal principle of the law that ***"once a mortgage always a mortgage."***

Lindley M R put it very well in **Stantley Vs Wilde [1899]2/ch** 474. His Lordship stated:

> ***"The principle is: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment of or discharge of such debt or obligation, any provision to the contrary notwithstanding…any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and therefore void…. A "clog" or "fetter" is something inconsistent with the idea of "security".***

This rule of equity is for the protection of a mortgagor against unscrupulous or unfair treatment by a mortgagee. It is amply summarized in the well known sentence.

The cases of **Reeve vs Lisle and others [1902]AC 461 and Mutambulire vs Yusufu Kimera (1972) ULR 150 Samuel vs Jerrah Timber and Wood Paving Corporation 1904 AC 232** cited to court and relied on by the appellant are both inapplicable to and distinguishable from the instant case. The two case were decided in 1902, 1972 and 1904 respectively before the law on mortgages in Uganda was amended by the Mortgagee Act, Cap 229 of the laws of Uganda.

Further, **Reeve vs Lisle Samuel Vs Jerrah** (supra) are about mortgages of Chattels in the form of a steamship and stock respectively and not land as is the case in the matter now before us.

For these reasons, in addition to fraud, as we shall readily show in this judgement, the certificate of title in the names of the appellant cannot pass as conclusive evidence of a lawful title of the appellant to the said property.

Paragraph 9 of the plaint states:

9.“The plaintiff avers that the Defendant’s actions were high handed, illegal and fraudulent and as such the Plaintiff claims the return of the property or the payment of its market value thereof and shall also claim exemplary/punitive damages as a result.

PARTICULARS OF ILLEGALITY AND FRAUD.

- ***Transferring the said property into its names contrary to the Powers of Attorney given in the matter.***
- ***Dealing in the said property in a manner inconsistent with the Plaintiff’s rights as owner of the property.***
- ***Transferring the said property into its names well knowing that it had not paid any consideration to the Plaintiff for the same.***
- ***Transferring the said property in complete disregard of the mortgage law.***
- ***Selling the said property to a third party as owner and not as an equitable mortgagee.***
- ***Failing to and intentionally not getting a foreclosure order from a Court with competent jurisdiction before conducting any sale.***
- ***Violating the Plaintiff’s equitable right of redemption.”(sic)***

According to this paragraph and the evidence on record regarding the process leading to the appellant becoming the registered proprietor of the property, there is sufficient pleading and proof of fraud in the transaction on its part. This too, vitiates its title to the property at the material time.

The appellant claimed that it became the registered proprietor of the property in issue through an agreed sale of the same by the respondent to itself subsequent to the mortgage. It called to its aid a document headed ‘Agreement Of Sale’ dated the 31st May 1996 yet the transfer and registration of the property into the appellant’s name it seeks to support and prove was effected on the 13th Feb 1996. The document was not exhibited and it is a photocopy. It is neither properly witnessed nor does it give the name and address of its drawer. The signature thereon was also denied by the

respondent. We, therefore, find no evidential value in and we confer none to it. We do not fault the learned trial judge on her finding on this sales agreement.

The Bank statement and cheque relied upon by the appellant to corroborate the sale agreement are themselves equally suspicious.

Bank account No. 0401247009 over which the bank statement, D14 relied upon by the appellant to prove that the respondent was paid consideration for selling his property is denied by the respondent. He maintains that his own account was No. 0491247009. The bank official, DW1, who testified before court, failed to satisfactorily explain the discrepancy in the account numbers. For two years prior to the case, the bank had failed to respond to enquiries by the respondent himself and by his counsel about his bank account. Further, the cheque said to have been cleared through the respondent's bank account is shown to have been deposited on an un approved bank account strange to the respondent. Exhibit D14, shows the cheque was deposited thereon on the 1st of June 1996 yet the account was approved on the 4th June 1996. There is no evidence to show that the respondent received the proceeds of the cheque in issue. We, therefore, find no corroborative evidential value in these documents as contended by the appellant. In any case, the sale agreement sought to be corroborated itself is inadmissible and of no evidential value.

What purported to be a transfer form, presumably through which the property was transferred and registered into the names of the appellant falls far too short of an effective legal document to support the transaction. The transfer, exhibit D20, which is a photocopy of a photocopy, is incomplete. It does not show any consideration paid and it is not dated. It is neither witnessed nor sealed. It bears no endorsement to show that any stamp duty was paid on it. Apart from this document, we have not been able to find any other instrument of transfer on record. We are, therefore, unable to fault the learned trial judge in her conclusion that no proper transfer instrument was executed to support such a transaction of sale as claimed by the appellant. Clearly there was no sale.

In her judgement, the learned trial judge found that even if there had been a transfer instrument duly executed and used to effect a transfer and registration of the property in issue into the names of the appellant, such agreement and transaction would have been illegal. She based this

conclusion on the absence of a ministerial consent to such transfer as required by the Land Transfer Act.

We are in full agreement with the trail judge on this matter. At the time of the transaction which culminated into the transfer and registration of the property in issue into the appellant's names, the Land Transfer Act was still good law on the country's statute book. Its section **2** provided for a mandatory requirement of a ministerial consent where property, like the property in issue here, was to be transferred and registered into the names of a Non African. See **Mulbhai Manji vs Khotrgid Begum EA408, 1957 EA 101, Signgh vs Kulubya [1963] E.A 408 Kisugu Quarries Ltd vs Administrator General S.C.CAA 10 of 1998**.

Acting in disregard of that mandatory requirement of the law, as the appellant did, rendered the transaction an illegality. Any illegality, once brought to the attention of court, cannot be sanctioned or tolerated by a court of law. **Makula International Ltd** (supra).

It is not absolutely necessary that an illegality has to be pleaded. It is enough that it is brought to the attention of court at any time before the conclusion of the proceedings before it.

Commencing on this, **Lindley L.J. in Slaughter and May vs Brown Doering MC NAB and Company [1882]2QB728,** his Lordship stated:

> ***"No court ought to enforce or allow itself to be made an instrument of enforcing obligations alleged to rise out of contract or transaction which is illegal if the illegality is duly brought to the notice of the court and if the person invoking the aid of the court is himself implicated in the illegality"***

In **Phillips vs copping [1935] 1KB 15** Scrutton L.J. said at page 21:

> **"But it is the duty of court when asked to give judgement which is contrary to a statute to take the point although the litigants may not take it."**

See also **Makula International Ltd** (Supra)

Be that as it may, however, we are not, like the trial judge was not, persuaded that the matter of lack of a ministerial consent was neither pleaded nor framed as an issue as contented by the appellant. Paragraphs **7, 8** and **9** of the plaint in **HCCS No. 0087 of 2001** state:

7. ***"The Defendant however with undue regard to the law and the Mortgagee Decree in particular did advertise the Plaintiff's property for sale amid various protests from the Plaintiff. A copy of an advertisement to this effect in the New Vision issue of 25th October 1994 is herewith attached as Annexture "D" and a caveat and protests from the Plaintiff's hitherto lawyers marked as Annexture "E" collectively.***

8. ***"The Defendant went ahead to illegally transfer the said property to itself and subsequently transferred the same to Uganda Aids Commission. Attached herewith marked Annexture "F" is a copy of a letter from the Defendant's lawyers laying ground for the illegal transfer and Annexture "G" is a copy of the Certificate of Title and "H" a copy of the transfer to the said Uganda Aids Commission."***

We have already reproduced paragraph 9 above and we shall not repeat it here.

Clearly, the unlawful nature of the entire transaction or its illegality was pleaded. That, in our considered opinion, was sufficient to cover the lack the of ministerial consent in the pleadings. It was sufficient to put the appellant on notice of what he had to expect as involved in the case it had to face.

The appellant, in its written statement of defence paragraphs **7, 8** and **9** stated:

7. ***"Paragraph 7 is denied to the extent that the said advertisement was of no consequence as both parties decided not to go further with sale pursuant to it.***

   Further, following protests by the Plaintiff's annexture "E" to the plaint, the plaintiff wrote a letter Annexture "A" hereto refuting the contents of his lawyer's letter.

8. ***Paragraphs 8 is denied in toto due to the fact that the Plaintiff voluntarily sold his property to the Defendant on the 31st May, 1996 as evidence by Annexture "B" hereto after several attempts to pay back the loan by him had come to naught.***
9. ***Paragraph 9 is denied in toto and the Plaintiff shall be put to strict proof thereof. The particulars of fraud are denied."***

The appellant clearly denied the contents of the respondent's plaint in paragraphs 7, 8 and 9 (supra). The denials clearly put the question of the unlawfulness or illegality of the transaction, as pleaded by the respondent, in issue. Further, the record taken during the scheduling conference at the trial court under the sub heading 'points of agreement' item 3 thereof states:-

> ***3 "Whether the defendant illegally transferred property into his names."***

Furthermore, our perusal of the written submissions of the plaintiff and the defendant at the court below show the following among the agreed issues to be resolved:

> ***1 "Whether the transfer and sale, if any, of the property to the defendant was lawful."***

From the defendant's written submissions there is the following:

> **1.** ***"Whether the transfer and sale of property was lawful."***

It is, therefore, our view that the issue of illegality, which also covers the lack of the requisite ministerial consent, was sufficiently framed as an issue. The matter could, therefore, be appropriately raised.

The appellant submitted that there was no evidence to show that at the time of the transfer and registration of the mortgaged property into the appellants name, it was a Non African.

Our thorough study of the record revealed to us that during cross examination, DW3,Miranda Bowser, the Administrative Officer of the appellant, testified that at the material time, 75% shareholding of the appellant was held by M/s Volcafe, a Swiss company and therefore, a Non African. She also stated she was not aware of any ministerial consent having been obtained. Indeed, none was ever produced in evidence despite the strong challenge from the respondent.

This testimony confirms our own conclusion that actually, there is evidence that at the time of the claimed sale and transfer of the property in issue into the names of the appellant, it was a Non African and that there was no evidence of the existence of the requisite ministerial consent. Since 75% of the shares of the appellant was, at the material time, held by a Non African and in the absence of a ministerial consent, and since Dw3's evidence was not contraverted, the transaction was illegal. This was the issue brought to the attention of court by that testimony. Turning a blind eye to that revelation by the court would be sanctioning an illegality centrally to law. **Makula International Ltd**. (supra)

We do not fault the learned trial judge on her handling of the question of the burden of proof when it came to her consideration of the legality or otherwise of the transfer and registration of the mortgaged property into the names of the appellant.

It is trite that before evidence is given on a matter before court, the burden of proof is on the party who asserts the fact. Once, however, evidence is given requiring a rebuttal of such a fact, the burden shifts to the party who would lose the case should no further evidence be adduced.

J.K Patel vs Spear Motors Ltd Civil Appeal No. 4 of 91 SC.

In the instant case, in our view, once the question of lack of the ministerial consent was raised in evidence, the burden of proof of the existence of such a consent shifted to the appellant. Similarly, when the matter was raised that it was unlawful for the appellant to transfer and register the mortgaged property into its names without complying with foreclosure procedures, it became incumbent on the appellant to show that the transaction was lawful. The burden to prove so, therefore, shifted to it. Either way, the appellant did not discharge that burden and the learned trial judge was, in our view, right to so find.

The appellant criticized the learned trial judge for finding that the claimed sale, transfer and registration of the property in issue in the names of the appellant was unlawful since the respondent had admitted the same in an earlier suit and by correspondence on record. We reject that line of argument because no amount or type of admission or pleading or even conduct of a party to court proceedings can turn an illegality into a legality **Makula International Ltd** (Supra.)

In view of what we have stated above, we are unable to fault the learned trial judge on her findings on grounds 1,2 and 3, on each of which, we find in the negative.

The case for the appellant on grounds 4 and 5

Counsel for the appellant submitted that the learned trial judge was biased in her evaluation of the evidence and had reached the wrong conclusions. According to him, the judge depended on assumptions rather than the evidence adduced in court contrary to the principles of fair trial and natural justice. In counsels' view, it was not necessary for the appellant to follow the foreclosure procedure because there was a subsequent and independent sale of the mortgaged property to the appellant.

Counsel contended that exhibit D18 and DW1 confirmed that the respondent received consideration from the sale vide a cheque deposited on his account in Crane Bank.

He contended further that the respondent had not proved his case to warrant the award of the remedies mentioned in ground 5 of the appeal. The property is registered in the names of Aids Information Centre, a third party, which is not a party to the proceedings in court. No fraud was alleged and proved against the Aids Information Centre, which was, in counsel's view, for all intents and purposes, a bonafide purchaser for value. He emphasized that the learned trial judge did not address herself to the improvements on the suit property when assessing the shs. 105,500,000 as an alternative remedy.

The case for the respondent on grounds 4 and 5

Counsel submitted that the learned trial judge had properly evaluated the evidence before her and had reached correct conclusions. He argued that clearly the law required a foreclosure order and whatever the appellant did without such an order was illegal. He emphasized that as long as an equitable mortgage subsisted, as it did in the instant case, there could not be an independent sale of the mortgaged property to the appellant by the respondent. He contended that the cases relied upon by the appellant were inapplicable to the instant case.

On ground 5, counsel for the respondent submitted that his client had proved his case to warrant the remedies and it was not necessary to address the issue of improvements effected on the property. He contended that the respondent was entitled to mesne profits since he had been

wrongly dispossessed of his property by the appellant. He prayed court to find in the negative on grounds of appeal Nos. 4 and 5 and to dismiss the appeal with costs.

Court resolution of grounds 4 and 5

The gist in these two grounds is the appellant's complaint that the learned trial judge did not properly evaluate the evidence before court thus coming to the wrong conclusions and making erroneous orders in granting the remedies she did.

We have already covered most of the points raised in these two grounds during our resolution of grounds of appeal Nos. 1, 2 and 3 above. We need not repeat those here. We, therefore, consider the uncovered points as below.

Section 2 of the Civil Procedure Act, Cap 71, defines mesne profits as those profits which the person in wrongful possession of the property actually received or might with ordinary diligence have received from it, together with interest on those profits but shall not include profits due to improvements made by the person in wrongful possession.

In **Busiro Coffee Farmers & Dealers Ltd vs Tom Kayongo & 2 others HCCS No. 532/92**, a High Court decision we quote here with approval, the court held that where a defendant remains in wrongful possession, he is liable to pay mesne profits to the person entitled to possession. The learned trial judge was, on account of this authority, correct to award mesne profits though not necessarily, in our view, for the shs 20,000,000/=.

In the instant case, the appellant wrongfully dispossessed the respondent of his property on 13th February 1996. The appellant remained in such possession until the 28th August 1998 when it transferred the property into the names of M/s Aids Information Centre. This was a period of 30 months. According to a copy of the tenancy agreement on record, the respondent had rented out the property in issue at a monthly rent of Shs 230,000/= way back on 10th August 1993. The evidence on rent was not challenged. Taking the figure of 30 as a multiplier this will give a sum of shs 6,900,000/= It is possible the monthly rent could have been adjusted upward. However the sum of Shs 6,900,000/= is awarded on account of mesne profits. It will carry interest at 25% per anum for the period of the wrongful possession by the appellants.

With regard to the recovery of the property in issue by the respondent, we find that at the time of the appealed decision, the same was already registered into the names of a 3rd party, the Aids Information Service. There is no evidence that M/s Aids Information Centre was a party to any fraud leading to its being so registered. It was not even a party to the proceedings before court.

However, we find the alternative remedy of compensation to the respondent by the appellant for the value of the mortgaged property the most appropriate one in the circumstances. The property, according to the valuation report on record, was valued at shs 75,000,000/= as on 25 July 1995. This, in our view, can be appropriately considered as part of the remedies to the respondent although the property could have appreciated in value. It is not necessary, on the facts of this case and the evidence on record, to take into account whatever improvements might have been carried out on the property.

In conclusion to those two grounds therefore, we do not find cause to fault the learned trial judge in her evaluation of the evidence before her and the alternative remedy of the respondent being compensated for the value of the property. The respondent was dispossessed of his property way back in February 1996. He has remained so dispossessed for the last 14 years. The means through which his property was dispossessed of him was illegal, most high handed, unscrupulous and causing a lot of pain, suffering and anguish to the respondent. He, in our view, should be adequately compensated in general damages for this.

In the final result, we dismiss this appeal and make the following orders:

The respondent shall be paid:

(a) shs 75,000,000/=(seventy five million) with interest thereon at 25% per anum from the date of the filing into court of HCCS NO. 0087 of 2001 till payment in full, as compensation for his property.

(b) Shs 6,900,000=(six million nine hundred thousand) mesne profits with interest thereon at the rate of 25% from the date of his wrongful dispossession of his property till payment in full.

(c) Shs 100,000,000/=(One hundred million) general damages with interest thereon at 25% per annum from the date hereof till payment in full.

(d) Costs here and at the court below.

We so order

Dated at Kampala this …***20th*** …day of…***September***…..2010

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A.E.N. MPAGI-BAHIGEINE

JUSTICE OF APPEAL

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S.B.K KAVUMA, JA

JUSTICE OF APPEAL

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A.S.NSHIMYE, JA

JUSTICE OF APPEAL