



return of his property comprised in Kibuga Block 20, Plot 254 (hereinafter referred to as the “suit property”) which he claimed the respondent was illegally keeping as security for the said overdraft. He claimed he had given his title to one, George Mayanja who wrongly mortgaged it to the respondent bank as security for the loan to the company. He made repeated demands for the return of the title but all in vain. He therefore sought general damages, interest and costs in addition to the order for release of the mortgage and return of his title. The respondent contended that it was holding the title lawfully and that the appellant, as a signatory to the company bank account had drawn money from the said overdraft facility. The respondent further claimed that the appellant had signed an acknowledgment of the debt dated 20/4/1995 and November 1991 and that he had signed the mortgage with the said George Mayanja voluntarily and willingly. The learned trial Judge then held that the appellant was a signatory of the company but was not personally liable for the loan in that capacity. The trial Judge further held that the appellant had lawfully mortgaged his land to the respondent as security for the facility advanced to the company whereupon the appellant was not entitled to recover the suit property. It is upon that decision that the appellant brings this appeal.

The appellant formulated the following grounds of appeal for consideration by this Court:

- 1. The learned trial Judge erred in law and fact when she held that the land comprised in Kibuga Block 20, Plot 254 was lawfully mortgaged to the respondent by the appellant.**

2. The learned trial Judge erred in law and fact when she failed to properly evaluate the evidence on record and thereby came to a wrong conclusion that the appellant had mortgaged the property by Power of Attorney (Exh. P9) dated 9<sup>th</sup> April 1991.

The appellant was represented by Mr. Richard Mwebembesi of Bamwe & Co. Advocates while Mr. Semuyaba of Semuyaba, Iga & Co. Advocates appeared for the respondent. Counsel for the appellant however, chose to argue these two grounds together since they are related. We shall therefore adopt this order in resolving the appeal.

### **Arguments for the appellant**

Counsel for the appellant argued that the respondent brought out contradicting claims. First, that the appellant was sued as a signatory of the company bank account who drew money. Second, that the money was drawn by George Mayanja with the full knowledge and consent of the appellant. Third, that the appellant lawfully executed a mortgage of his land as a security for the loan. Fourth, that the appellant is personally indebted to the respondent bank and finally, that the respondent acknowledged indebtedness. In light of this, counsel for the appellant then submitted that the learned trial Judge erroneously went on to rely on an affidavit in reply by the respondent and the proceedings in an application for a temporary injunction in Civil Suit No. 78 of 1992 where it was claimed that the appellant had admitted to giving a Power of Attorney for his property comprised in Block 20, Plot 254 as security for the loan.

He relied on the case of **GENERAL PARTS vs NPART, SCCA No. 5 of 1999** where **Mulenga, JSC** held that a mortgage deed not properly executed is a nullity and

cannot be enforced. In this regard, counsel for the appellant pointed out that the mortgage deed in question (Annexure "B") was executed between the respondent and M/s Absimina Enterprises yet, it was signed by a person who was later said to be George Mayanja, and that the deed does not show in which capacity he executed the document nor was there the company seal. Counsel for the appellant further pointed out that there was no Power of Attorney by the company authorities. Counsel for the appellant relied on the Sections 114, 141, 154 and 156 of the Registration of Titles Act, Cap 230 (hereinafter referred to as "RTA") to support his submissions.

Further, counsel for the appellant relied on S. 148 of the RTA and the case of **FREDRICK ZAABWE Vs ORIENT BANK LIMITED & 5 Others, SCCA No. 4 of 2006**, where it was held that a valid and enforceable mortgage deed must be attested to by the persons named under that section, and who must sign in Latin characters. The rationale being that it enables the Land Registry to determine the capacity in which one makes the authorization to mortgage the land to avoid fraudulent transactions.

Counsel for the appellant then prayed that this appeal be allowed and the appellant's title to the suit property be returned by the respondent.

### **Arguments for the respondent**

Counsel for the respondent argued that the appellant lawfully mortgaged the suit property when he executed a Power of Attorney with the mortgagor company. Counsel supported the decision of the trial Judge and reiterated, as in the trial

court, that in HCCS No. 78 of 1992, Justice Tinyinondi in an earlier application for a temporary injunction brought by the appellant to stop the sale of the suit property, ordered the appellant to deposit Ug.shs. 65,283,477/= but the appellant defaulted leading to its dismissal for want of prosecution. The evidence relied upon by the trial Judge in that application was an affidavit sworn by the appellant to which he had attached a Power of Attorney in respect of the suit property. In essence, counsel for the respondent submitted that this created a mortgage on the suit property considering that the Power of Attorney was registered. He relied on the case of **OLINDA DE SOUZA FIGUEIREDO Vs KASAMALI NANJI [1962] E.A 756**, where it was held that once a mortgage has been registered, it cannot be impeached in the absence of fraud. In the instant case, no fraud at all was pleaded in the appellant's counterclaim.

Counsel for the respondent then prayed that this appeal be dismissed for lack of merit and the decision of the trial Judge upheld.

### **Resolution and decision of the Court**

This appeal was heard by a different panel of Justices of the Court of Appeal preceding this present one and because of unavoidable circumstances, the judgment remained reserved for a long time. However, during a special session where this appeal was brought for mention, learned counsel for the parties adopted their earlier submissions and arguments in their scheduling notes. These, therefore form the basis on which this Court makes its decision in this appeal.

This is a first appeal. The duty of this court on a first appeal is fairly well settled.

**Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions (SI 13-10)**

[hereinafter referred to as the “Court of Appeal Rules”] provides that:

*“...on any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may-*

*(a) Reappraise the evidence and draw evidence of fact and*

*(b) In its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner...”*

The Supreme Court in the case of **Kifamunte Henry V Uganda, Criminal Appeal No 10 of 1997** held that it is the duty of the first appellate court to rehear the case on appeal by reconsidering all the material which was before the trial court and make up its own mind. Furthermore, a failure by the first appellate Court to evaluate the material evidence as a whole constitutes an error in law. **(See also: Pandya v Republic (1951) EA 336; Bogere Moses & Another v Uganda, SC Criminal Application No.1/1997; Kakooza v Uganda, Criminal Appeal No.3 of 2008; Mugema Peter v Mudiobole Abedi, Election Petition Appeal No. 30 of 2011)**

Delving now into the merits of this appeal, it appears that the gist of contention relates to the Power of Attorney executed in respect of the suit property. **BLACK'S LAW DICTIONARY, 9<sup>th</sup> Edition, at page 1290** defines “**power of attorney**” as “***an instrument granting someone authority to act as agent or attorney-in-fact for the grantor... the authority so granted, specifically, the legal ability to produce a change in legal relations by doing whatever acts are authorized...***”

Such power may either be general (full) or special (limited). Indeed, pursuant to **S. 146(1) of the Registration of Titles Act**, “***the proprietor of any land under the operation of this Act or of any lease or mortgage may appoint any person to act for him or her in transferring that land, lease or mortgage or otherwise dealing with it by signing a power of attorney in the form in the Sixteenth Schedule to this Act.***”

Pursuant to this provision, the appellant is purported to have authorized the mortgagor company to secure the loan facility with the suit property to which he was the registered proprietor. The point to note here, is that the donee of a power of attorney acts as agent of the donor, and for the donor. He cannot use the power of attorney for his own benefit unless authorized to do so.

In the instant case, the learned trial Judge held that the suit property was mortgaged on the strength of a Power of Attorney (Exh.P9) dated 9<sup>th</sup> April 1991 which was executed by the appellant, the registered proprietor. The learned trial Judge further held that Exh.P9 was tendered in HCCS No. 78 of 1992 and that the appellant admitted to mortgaging the said property. However, having carefully perused the record of appeal, the requisite power of attorney was not attached and yet it was the basis upon which the learned trial Judge reached her decision

to conclude that there was a lawful mortgage entered into by the appellant and the mortgagor company. What only appears are the proceedings and ruling of HCCS No. 78 of 1992. It is imperative to note that, in exercise of this Court's appellate jurisdiction as enshrined under **Art. 134 (2) of the Constitution**, what it is concerned with is the record of the trial Court and all the evidence that was evaluated before it (including documents, exhibits and annextures).

In the instant appeal, the relevant Power of Attorney does not appear anywhere on the record. Exh.P9 (power of attorney) which the trial Judge relied upon is in respect of land comprised in Block 265, Plot 77 situate at Bunamwaya, Kampala district, and not the suit property which is Block 20, Plot 254 situate in Busega, Kampala. We are therefore inclined to agree with counsel for the appellant. The case of **FREDRICK ZAABWE (*supra*)** which was cited by counsel for the appellant is instructive in regard to how powers of attorney must be executed and construed. It was held that a power of attorney must be construed strictly. Citing the words of **Lord MacNaghten** in the case of **BRYANT, POWIS AND BRYANT LTD vs LA BANQUE DE PEUPLE**, the author of **FRIDMAN'S LAW OF AGENCY**, states at page 66:

***"In short, the authority conferred by a power of attorney is that which is within the four corners of the instrument either in express terms or by necessary implication."***

How then, can the express or implied terms of the relevant power of attorney be construed if it is not on the record? It is not sufficient to rely on the proceedings or the ruling in HCCS No. 78 of 1992 although they relate to the same matter. According to **Sections 61 and 63 of the Evidence Act, Cap 6**, documents are

proved by primary evidence, which is by the document itself. In the instant case, the exceptions to the primary evidence rule under **Section 64 of the Evidence Act** were not pleaded and therefore the power of attorney in respect of Block 20, Plot 254, situate in Busega, Kampala, ought to have been produced. The absence of that power of attorney becomes fatal to the respondent because it cannot properly be said to have received the suit property as security without establishing the authority of the mortgagor company in relation to the suit property which was registered in the names of the appellant. We are therefore unable to find that the appellant signed a power of attorney to the mortgagor company.

Further, the learned trial Judge held that during cross-examination, the appellant admitted to mortgaging the suit property on the strength of the power of attorney authorizing the mortgaging of the suit property by the mortgagor company. Respectfully, we do not agree with the trial Judge because this admission cannot hold in the absence of such a crucial document being produced in the trial Court.

In the circumstances, the validity of the power of attorney relating to the suit property has a substantial bearing in determining whether the appellant lawfully mortgaged the suit property to the respondent. Having found that the absence of the power of attorney relating to the suit property is fatal, we also find that a legal mortgage was not created in the suit property by the appellant to the respondent.

However, the liability of the mortgagor company remains to be settled by it and not by the appellant's property comprised in Block 20, Plot 254 situate in Busega,

Kampala. This appeal therefore succeeds with costs here and in the Court below. We set aside the judgment and orders of the High Court and substitute an order directing the respondent to return the appellant's title free of the said mortgage or if sold, the current market value of the same.

We so Order.

Dated at Kampala, this .....**28<sup>th</sup>** .... day of .....**October**..... 2014

**HON. JUSTICE A.S NSHIMYE, JA**

**HON. JUSTICE RUBBY AWERI OPIO, JA**

**HON. JUSTICE GEOFFREY KIRYABWIRE, JA**