

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

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

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.

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 it's shareholding in the company to the first 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 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 13th May 2005 by special resolution the directors of ATM decided 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 22nd July 2005 Mr. Mutiso was by special resolution of the company replaced with Mr. Henry Sylvester Wambuga the first respondent herein.

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

On 10th April 2006, Crane Bank Ltd offered a credit facility of US\$ 800.000 to ATM a company that was in voluntary liquidation. This 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:

- 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:***

(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:

(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

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

5. Personal guarantee of following:

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

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

The Company on 18th 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.”

The securities were the same as for the earlier loan except that Plot 85 156, 6th 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.

Again the company failed to pay Crane Bank, prompting the Bank to instruct its lawyers by letter dated 11th June 2007, to recover the money. On the 14th 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 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 3rd August 2007. Earlier on 12th February 2007, the liquidator had advertised the ATM properties for sale; it appears, in order to 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.

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 Mbale;

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

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

On 4th September, 2007 the liquidator sold LRV 786 Folio 12 Plot 78- Palisa Road, the company land, including the building and the 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 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 16th 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 2nd Respondent by the 1st Respondent wasn't unlawful and fraudulently.*
- 2.** *THAT the trial Judge erred in law and fact when he held that the 2nd Respondent is a bonafide purchaser for value of the suit property.*
- 3.** *THAT the trial Judge erred in law and fact when he held that the 1st 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.*
- 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.*
- 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 2nd defendant imputes fraud and conniving on part of the parties other than honesty.*
- 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.*
- 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 2nd defendant connived with the guarantors in the purchase or sale of the suit property.*

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.*

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.*

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.*

When this appeal came up for hearing on 3rd 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

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 2nd respondent by the 1st 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.

It was submitted that the suit property had been valued at United States Dollars \$1,500,000 by the 2nd appellant which value the 1st appellant thought was low. Further, it was submitted that the 2nd respondent had offered to pay US\$ 3,500,000 for the suit property, which the appellants had rejected. Further that, soon after the rejection of that offer, the 1st respondent sold to the 2nd 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.

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It was further submitted that the second respondent paid the 1st 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.

Counsel contended further that because there was *malafide*, the 1st and 2nd 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 1st and the 2nd respondents. Counsel contended that the confidentiality clause amounted to collusion. Counsel submitted further that the 2nd 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 1st respondent he must have been aware that such sale was fraudulent and simply took advantage of it and as such on the authority of *Kampala Bottlers Ltd Vs Damanico (supra)* fraud in this transaction could be attributed to it.

Ground 2

Counsel submitted that the 2nd 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 2nd 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 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.

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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.

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Ground 3

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

Ground 4 was abandoned.

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 1st and 2nd respondents as fraud. 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 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

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 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.

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 annul a sale. It was 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.

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, 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 Companies Act a voluntary liquidator is not supposed to exercise the powers provided for under *Section 244(1) (a) (e) and (j)* 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 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

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.

It was again argued for the 1st 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.

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

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

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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 1st respondent then sold the property to the 2nd respondent, at best price that was offered. Counsel argued that the 1st respondent had acted lawfully and diligently in the circumstances.

The 1st respondent asked this Court to dismiss the appeal.

The 2nd Respondent's case

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 1st 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 was further contended that the sell had already been sanctioned by a special resolution of the company.

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 2nd 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.

It was the 2nd 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 1st respondent had sold the assets of the company below market value or that he believed that the assets had been undervalued.

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

Resolution of grounds of appeal

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.***

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We shall proceed to do so.

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.

Ground one

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

It was contended for the appellants on this ground that the sale of the suit property to the 2nd respondent by the 1st 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 impropriety of the 1st 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.

The appellants set out in detail the evidence on record which is not controverted, that the 2nd 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 asked us to find that the suit property was sold by the 1st respondent to the 2nd 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 1st respondent by the 2nd respondent outside the sale agreement as an inducement to have the property sold below its market value.

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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 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*.

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.

It is undisputed that the Company African Textile Mills Ltd (ATM) on 13th 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 1st respondent was 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

Bank Ltd which itself 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.

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 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 10th April 2006 when it was granted a loan of US\$ 800,000 The loan was to be paid within 6 (six) months. It was secured by the suit property. This loan was not paid. On 18th 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 Bank to demand payment by letter dated 3rd April 2007 which reads as follows

CB: ADV: 2007

**Mr. Henry Wambuga- Liquidator
African Textile Mills Ltd.(In-
Liquidation)**

**P.O. Box 28276,
KAMPALA**

Dear Sir

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

- 1. On the 24.11.06, your Company applied to us for a fresh demand loan of ug.sh. 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.**
- 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.**

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.

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, especially your ability to adhere to the repayment schedule.

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.

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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 ug.sh. 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.

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

Yours faithfully,

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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 3rd 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 to sell the suit property under the Mortgage Act. On 3rd 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 12th February 2007 in the Monitor Newspaper and on 13th 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 1st respondent.

Apparently the appellants had filed a suit at the High Court (Commercial Division) *vide* High Court Civil Suit No. 155 of 2007 against the 1st 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 3rd April 2007. A letter dated 30th March 2007 to the 2nd appellant's lawyers gives a hint at what was agreed between the parties. The letter reads as follows; -

**March 30
2007**

"OUR REF:AAA/ATM/CO/O7

Mr. JV PATEL

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

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Dear Sir,

RE: AFRICAN TEXTILE MILL LTD (IN LIQUIDATION)

The above subject refers:

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

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.

c. That the liquidator shall not sale and or sale the property comprised in plot 78-90 Palisa Road mbale.

c) That the Guarantors to the credit facility with Crane Bank continue to cover the security for the loan till 23rd APRIL 2007.

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

Yours truly,

Ahamya Associates & Advocates

C.c PR Patel

C.c Ashwin Patel

C.c Henry Wambuga (the liquidator)”

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

CONSENT WITHDRAWAL

This matter coming up for final disposal this 03rd 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;

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.

Dated this 3rd day of April 2007

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

We find from the evidence on record that by the time the 1st respondent sold the suit property to the 2nd respondent several attempts had been made by all the parties involved to raise capital to 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 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.

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

It may be true, that technically the company was solvent as declared by its directors on 28th 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 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 22nd June 2005 when Uganda Ginners and Cotton Exporter's Association in a letter to the 1st respondent the liquidator of the company offered to purchase land, building and machinery at US\$ 5,500,000. On 5th May 2007 Global Diaspora Advisory Council offered to take over the Company by paying US\$ 5,000,000 through Agro-group Industries Ltd.

On 30th 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.

6 On 29th March 2005 the Minister of Tourism Trade and Industry wrote to the Minister of Finance
7 Planning and Economic Development requesting to intervene and stop the Bank of Uganda from
0 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.

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

24th May 2007

Hon. Prof. Kiwanuka Semakula
Minister of State for Finance (Investment)
Kampala Dear colleague,

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

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.

Signed

Prof. Ephraim Kamuntu (M P)

MINISTER OF STATE FOR INDUSTRY & TECHNOLOGY”

On 15th of September 2006 the company entered into a joint-venture agreement with Afric-co-operative society in which the later was to pay 17 billion shillings to the former and acquire 46% of its shares. On 10th February 2007 the 1st 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 2nd 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 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 payment.

By 3rd 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 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 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 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 materialized in the three years that the properties were on sale.

There is no evidence that the 1st 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 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 1st respondent had no power to sell the suit property without their prior consent.

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.

The company ceased to carry on its business except 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 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 1st respondent carried out his duty as a liquidator in accordance with the law. We find that there was no legal requirement for him to seek prior consent of the Directors or members before selling the suit property to the 2nd respondent or to any other person.

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

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 1st respondent. The consent order was later withdrawn.

We find no evidence that the 1st respondent was paid US\$ 300,000 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 2nd respondent.

We find that the 1st respondent lawfully sold the suit property to the 2nd respondent who obtained good title. This ground has no merit and hereby dismiss it.

Ground 2

Having held as we have on ground one, that there was no fraud committed by the 1st respondent in the process of sale, we find that the 2nd 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.

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.

Ground 4.

This ground was abandoned by the appellants in their submissions. **Ground 5.**

We find that the appellants misconceived the issue of the confidentiality clause. The 1st respondent 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

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

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.

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 1st respondent sold the suit property subject to 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 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

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.

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

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

Dated at Kampala this 29th day of March, 2017

HON. JUSTICE RICHARD BUTEERA JUSTICE OF APPEAL

**HON.LADY JUSTICE SALOMY BALUNGI BOSSA
JUSTICE OF APPEAL**

**HON.JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL**

