THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Geoffrey Kiryabwire, Monica Mugenyi, JJA & Remmy Kasule, Ag, JA)

CIVIL APPEAL NO. 216 OF 2013

EAST AFRICA FOAM LIMITED::::::::::::::::APELLANT

VERSUS

1. **THE ATTORNEY GENERAL**
2. **THE EAST AND SOUTHERN TRADE AND DEVELOPMENT BANK**
3. **FULGENCE MUNGEREZA**

:::::RESPONDENTS

(Appeal from the High Court Judgment of Hon Lady Justice Hellen Obura (as she then was) dated 16th July, 2013 in High Court of Uganda at Kampala (Commercial Court Division) Civil Suits No.1567 of 2000 and No. 292 of 2002 (Consolidated)

Judgment of Remmy Kasule, Ag.JA

Introduction

The Appellant appealed to this Court against the High Court Judgment of Hon. Lady Justice Hellen Obura, (as she then was) in **High Court Civil Suits No.1567 of 2000** and **No. 292 of 2002 (Consolidated)** at Kampala, dated 16th July, 2013 whereby the two suits were dismissed with costs against the Appellant in favour of the Respondents.

Background

The Appellant is a private limited liability company duly registered in Uganda. It changed its name from EA Foam Limited to its present name of East Africa Foam Limited. A Gazette Notice to that effect was published on 20th August 1993. The Appellant carried on the business of manufacture of foam. Mr. Silas Majyambere was a director in the said company.

At all material time, the Appellant was registered proprietor of the land comprised in LRV 2101 Folio 18 Plot 9-11 Eighth Street, Kampala City, measuring 1.457 hectares.

The first Respondent is under the laws of Uganda the one who is suable in Courts of law for and on behalf of the Uganda Government while the second Respondent is a Trade

and Development Bank of the COMESA Region, commonly known as the PTA Bank. The third Respondent is both an Accountant and Auditor in private practice in Uganda and acted as the Receiver/Manager appointed by the second Respondent.

On 12th November, 1996, with Mr. Silas Majyambere, as director of the Appellant at the centre of the application and negotiations, the second Respondent, availed a loan and import facility of US$ 316,384, to a borrower represented by Mr. Silas Majyambere as a director, on condition that the same had to be secured by a debenture. A debenture was executed with Mr. Silas Majyambere, as a director, being one of the signatories for and on behalf of the borrower, who was described in the debenture as "East African Foam Limited". The second Respondent as lender also executed the debenture. A legal mortgage was also executed on 14th November, 1996 between the stated borrower and the lender in respect of the land property: LRV 2101 Folio 18 Plot 9-11, Eighth street, Kampala city. In the mortgage, the mortgagor/borrower was stated to be East African Foam Limited.

The executed debenture made reference to an earlier loan and Facility Agreement dated 24th October 1996 between another company in Asmara, Eritrea, by the name of Eritrea Foam Industry Limited. The same Mr. Silas Majyambere also presented himself as a director in the said Eritrea Company.

The second Respondent disbursed the loan sum to the borrower and over time repayment became due. There was default on repayment. The debenture and the mortgage charges crystallized. The second Respondent appointed on 4th February, 1998, the third Respondent and another as Receiver/Manager under the stated debenture and mortgage. The Receiver/Manager, found it necessary to close down the foam making factory that was situate on Plot 9-11 Eighth Street, Kampala City, that the Appellant owned, though the certificate of Title of the same was in the names of East African Foam Limited as registered proprietor. Later, the Receiver/Manager sold the said land property tendered as security under the debenture and mortgage to a third party so as to be able to recover the money due to the second Respondent under the debenture and the mortgage.

The Appellant then lodged in the High Court at Kampala **Civil Suit No. 1567 of 2000** against the second and third

Respondents contending that as "East Africa Foam Limited" he had never been a party to the debenture and mortgage agreements executed by "East African Foam Limited" who was very different from the Appellant. The Appellant thus claimed the value of the properties sold by the third Respondent as Receiver/Manager and other damages from the Respondents.

HCCS No. 292 of 2002 was also later lodged by the Appellant against the first Respondent, representing the Uganda Government, seeking special, general and aggravated damages because, according to the Appellant, the Registrar of Titles, Ministry of Lands, Government of Uganda, had in the course of such employment as Registrar of Titles, wrongfully removed the Appellant's caveat on the suit land upon which the Appellant's foam factory plant was situate and thus enabled the second and third Respondents to sell and transfer the same to a third party, Metropolitan Properties Limited. This was purportedly done pursuant to the debenture and/or mortgage in respect of which the Appellant claimed not to be a party to.

The three Respondents denied the claims of the Appellant in the two civil suits. They maintained that the Appellant's

lawful and authorized officials and/or agents particularly Mr. Silas Majyambere had presented and acted in such a manner showing that the names: **EAST AFRICA FOAM LIMITED and EAST AFRICAN FOAM LIMITED** belonged to one and the same company, that is the Appellant. Therefore, the Appellant was liable under the debenture and the mortgage executed with the second Respondent.

The two suits HCCS No. 1567 of 2000 and HCCS No. 292 of 2002 were by consent of the parties to the same consolidated through High Court Miscellaneous Application No. 98 of 2007 on 28th June 2011 (Page 120 of the Record of proceedings). The consolidated cases were then heard and determined by the High Court, (Hon Lady Justice Hellen Obura, J) (as she then was), a Judgment delivered on 16th July 2013. The High Court dismissed the Appellant's case and held that the sale of the Appellant's property was valid and lawful. The Respondents were awarded costs of the suit.

Dissatisfied, the Appellant lodged this Appeal.

Grounds of Appeal

The Appellant had 19 grounds of Appeal in his Memorandum of Appeal. A number of grounds were repetitive. At scheduling the following were set down as the issues for determination arising out of those grounds of Appeal.

"1. Whether the learned trial Judge erred in holding that the two names East Africa Foam and East African Foam limited are the same.

2. ***Whether the learned trial Judge erred in law and in fact in holding that the mortgage and loan Agreements were enforceable.***
3. ***Whether the learned trial Judge erred in law and fact in holding that the Appellants caveat was lawfully removed.***
4. ***Whether the Appellant is entitled to the remedies prayed for".***

Legal Representation:

At the hearing, Counsel Tabaro Edwin represented the Appellant, while learned Principal State Attorney Philip Mwaka, was for the first Respondent and Counsel Mugarura was for the second and third Respondents.

Submissions:

Submissions of Appellant's Counsel:

Issue 1:

Counsel for the Appellant faulted the learned Trial Judge for holding that **East Africa Foam Limited** and **East African Foam Limited** are one and the same entity. He contended that the attachment and sale of the suit land property: LRV 2101 Folio 18 Plot 9-11 Eighth street was wrong because the Appellant, as owner of that property, never executed the debenture and the mortgage with the second Respondent. The Appellant was not **EAST AFRICAN FOAM LIMITED** who executed the said debenture and the mortgage. Counsel relied on **National Social Security Fund v Alcon International Ltd Civil Appeal No. 15 OF 2009 (SCU)** and also to the persuasive High Court authority of **Quick Cargo Handling Service V Iron Steel Wares Ltd and Two Others: HCCS No.328 of 2002 [2003] KALR 315,** (Kibuuka Musoke, J) for the submission that in company law, a company upon incorporation is known and acts only by its name that is on the Register of Companies.

Counsel for the Appellant thus prayed this Court to hold in favour of the Appellant on issue one of the Appeal.

Issue 2:

Appellant's Counsel submitted in respect of issue two that Mr. Silas Majyambere, having testified at trial as Pw1, that he was illiterate in the English language, the language in which he was literate being only French, then the loan and mortgage agreements were unenforceable in law because they were executed by him contrary to the **Illiterates Protection Act, Cap 78.**

Sections 2,3 and **4** of the said **Illiterates Protection Act** had been violated. There was no evidence that was adduced that a person literate both in English and French had written his/her full and true names and address as a witness to the documents of those agreements certifying that those documents had been translated to Pw1 in the language he understood and that he, Pw1 had instructed that his names be put thereon only after he had confirmed that he had understood all the contents therein. Thus the none compliance with the said Sections amounted to a commission of a crime under section 4 of the same Act by those who executed those agreements with Pw1.

Counsel referred Court to **Bostel Brothers Limited v Hurlock (1984) 2 ALL ER 312,** where Court held that a contract executed in violation of a statutory provision is void.

It followed therefore that the debenture and mortgage agreements relied upon by the second and third Respondents in their respective defences, were, void. Learned Counsel further submitted that the said debenture and mortgage agreements were also never sealed by the seal of the Appellant. or anyone else so authorized by the Appellant. Relying on **General Parts (U) Ltd v NPART SCCA No. 55 of 1995** (SCU), Counsel submitted that the said agreements of debenture, loan and mortgage, purportedly executed by the Appellant were null and void in law and therefore unenforceable.

Appellant's Counsel prayed Court to resolve issue two in favour of the Appellant.

Issue 3:

In respect of issue three, Appellant's Counsel faulted the Trial Judge for not having found that the Registrar of Titles, Dw4, had deliberately acted, with others, to conceal the removal of the caveat so as to facilitate the third Respondent

to sell the suit property to Metropolitan Properties Limited, to the prejudice of the Appellant.

Counsel further faulted the Trial Judge for finding that the undertaking made by Counsel for the second Respondent not to sell the suit property until the disposal of the appeal in the Court of Appeal, was rightly withdrawn without the consent of Court. According to Counsel, the Trial Judge ought to have held, on the facts of the case before her, that such a sale was illegal, null and void.

Counsel for the Appellant thus prayed Court to hold in favour of the Appellant as regards issue three.

Issue 4:

On issue 4, Appellant's Counsel contended that the Appellant is entitled to general damages of UGX. 10billion as well as, aggravated damages. Special damages for the loss of income at UGX. 50 million per month with interest thereon at the commercial rate from the date the property was placed into receivership, had also been proved and the same ought to be awarded to the Appellant.

Counsel prayed for issue four to be resolved in the Appellant's favour.

Submissions for Respondent:

Issue 1:

As regards issue 1, learned Counsel for the Respondent contended that the trial judge did not hold that the names **EAST AFRICA FOAM LIMITED** and **EAST AFRICAN FOAM LIMITED** are the same. What the Trial Judge held was that the two names were deliberately used interchangeably in reference to the Appellant. The certificate of incorporation referred to the Appellant as **East Africa Foam Limited,** while the Gazette Notice referred to the Appellant as **East African Foam Limited**. In spite of this disparity in the stated names, the Appellant, knowingly through its authorized officials/agents entered into the various transactions representing itself as **East African Foam Limited** and executed agreements, including the debenture, mortgage and other loan agreements in the same name. The suit land was also registered as to proprietor in the same names of **EAST AFRICAN FOAM LIMITED**. So were a number of company resolutions and documentations.

Counsel for the Respondent contended that the Appellant having led the Respondent and others to believe that it is known as **East African Foam Limited**, cannot

subsequently elect to avoid liability where it used that name. The Appellant is so estopped from doing so.

Counsel prayed for Issue one to be resolved against the Appellant.

Issue 2:

Counsel for the Respondent, contended that the learned Trial Judge rightly found that the debenture, mortgage and other agreements of the loan were enforceable. This is because the Trial Judge found, on the evidence adduced, that Mr. Silas Majyembere, the Managing Director of the Appellant who executed the debenture and mortgage as well as other agreements and documents on behalf of the Appellant was literate in the English language. He had written and signed in his own handwriting to the second Respondent on 24th June, 1996, in the English language requesting for a facility for another company that he owned.

Further, on 14th November, 2000, Mr. Silas Majyambere swore an affidavit in support of a caveat, both the caveat and the supporting affidavit being in the English language, with no evidence whatsoever on the said documents, showing that Mr. Majyambere was illiterate in the English language. The Trial Judge rightly concluded from this evidence and

also from the personal observation of Mr. Majyambere in Court that he was literate in the English language and could not claim protection under the **Illiterates Protection Act**.

On the sealing of the mortgages and the debenture, Counsel for the Respondent contended that both the debenture and the mortgage agreements were validly executed since the Appellant executed a company resolution authorizing Mr. Silas Majyambere and Jehoash Sendege to execute the same on behalf of the Appellant. The resolution to this effect was never disputed by the Appellant.

Counsel prayed for Issue two to be resolved against the Appellant.

Issue 3:

Respondents Counsel argued that the removal of the caveat from the suit property was lawful as the Appellant was duly notified that the caveat was going to be vacated unless the Registrar of Titles obtained an order stopping the removal within the set period of time, as required by law. The Appellant opted not to take any step to address the issue, thus allowing the removal of the said caveat to go ahead.

As for the undertaking by the Respondent's Counsel not to sell the suit property, Counsel for the Respondent asserted

that the said undertaking was properly withdrawn by Counsel for the Respondent filing in Court a Notice of withdraw of the said undertaking in the Civil suit, the subject of this Appeal. The withdrawal was necessitated by the fact that the Appellant had failed to take any steps to pursue his case in Court for a period of two months after the undertaking had been made to Court. The Appellant had done nothing to move Court not to allow the withdrawal of the undertaking. The Appellant also offered no credible reasons for the failure to take any positive steps to prosecute their case in Court during the two months after the undertaking had been made by the Respondents' Counsel.

Counsel for Respondents then invited court to dismiss Issue three against the Appellant.

Issue 4:

Counsel for the Respondent prayed Court to uphold the Trial Court's decision to the effect that the Appellant was not entitled to any remedies and dismiss the whole Appeal with costs.

Decision of the Court:

I have carefully considered the Judgment of the learned Trial Judge, the Trial Court proceedings, reviewed the

evidence that was adduced and considered the submissions of Counsel for all the parties to the Appeal and also both the statutory and case law authorities relevant, so as to arrive at the correct decisions on the issues in this Appeal.

The duty of this Court as the first appellate Court is provided for under **Rule 30 (1) of the Court of Appeal Rules**. This Court is duty bound to re-appraise the evidence and draw its own conclusions of fact. The Supreme Court in **Kifamunte Henry V Uganda: Supreme Court Criminal Appeal No 10 of 2007** held that:

"...the first appellate Court has a duty to review the evidence of the case and to reconsider the materials before the trial Judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it".

I shall keep the above principles in mind while resolving each Issue of this appeal.

Issue 1:

In respect of issue 1, the learned trial Judge found and held in her Judgment that, on the basis of the evidence adduced

the names **East Africa Foam Limited,** and **East African Foam Limited** were used interchangeably by the Appellant as referring to only the Appellant Company.

This is because the evidence adduced conclusively established that the Appellant elected to use the name **East African Foam Limited** through its managing director Mr. Silas Majyambere, who executed the debenture and the mortgage for and on behalf of the Appellant by using the name and stamping those documents with the stamp bearing the name **East African Foam Limited**. Yet, it was the very Appellant Company, **East Africa Foam Limited** that, at all material time, was the beneficiary of all the proceeds of the debenture and the mortgage loan agreements.

As Appellant's Managing Director, Mr Silas Majyambere signed the debenture, Exhibit P4 and next to his signature, there is a company stamp with the name **"EAST AFRICAN FOAM LIMITED".**

Further, the suit land, LRV 2101 Folio 18 Plot 9-11 Eighth street, Kampala, though, according to Mr. Majyambere (Pw1) the Appellant's managing director, belonged to the Appellant, the certificate of Title of the same, Exhibit P2,

with knowledge and participation of the said Mr. Majyambere, is in the name of **EAST AFRICAN FOAM LIMITED** as the Registered proprietor. In **HCCS No. 366 of 1998 EAST AFRICAN FOAM LIMITED Vs SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK (a.k.a PTA BANK) and Two Others,** the Appellant, as plaintiff in that suit, claimed under the name of **"EAST AFRICAN FOAM LIMITED"** to be the owner of the stated suit land. The suit was struck out by reason of the said plaintiff being nonexistent in law. All this happened with the knowledge and full participation of Pw1, Silas Majyambere, the Appellant's managing director. **Section 114 of the Evidence Act, Cap 6**, estops this conduct on the part of the Appellant. It provides:

"114. Estoppel.

When one person, has, by his or her declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she nor his or her representative shall be allowed, in any suit or proceedings between himself or and that person or his or her representative, to deny the truth of that thing".

The Appellant cannot approbate and reprobate. Appellant presented himself as **EAST AFRICAN FOAM LIMITED** and executed the debenture and mortgage agreements and took benefit of them well knowing and well aware that his correct name was **"EAST AFRICA FOAM LIMITED".** He cannot now disclaim that he is a different entity known as **EAST AFRICA FOAM LIMITED** and is not responsible and liable for what he carried out as **EAST AFRICAN FOAM LIMITED**.

The holding by the trial Judge that, given the facts of this case, the Appellant was estopped from denying that the name "**EAST AFRICAN FOAM LIMITED"** did not apply to him, is in line with the persuasive decision of **HCCS No. 13 of 2002: Hima Cement Limited vs Cairo International Bank Limited.**

In that case, parties entered into an agreement under a name other than the legal name of one of the parties. The Trial Judge held that such an agreement can be admitted in evidence, as it is, with its apparent error in the names, and then the Court receives evidence as to whether the misdescription of the Company was a genuine mistake or not; and whether it misled anybody as to the identity of any party to the cause. Such evidence is not to add or vary or

subtract from any terms of the agreement where the misdescription of the company is. It is only to establish substantially the real and true identity of the party to the agreement.

In this case the subject of this Appeal, the uncontradicted evidence that was adduced was that the use of the names **"EAST AFRICA FOAM LIMITED"** and **"EAST AFRICAN FOAM LIMITED"** was with the participation of Mr. Silas Majyambere, who was the managing director of the company to which both names related. No evidence was adduced at trial that any one was misled by such use of both names by the same company. No evidence was led that the misdescription added, varied or subtracted any terms in the debenture, mortgage or any other agreements or documents, the subject of the litigation.

Having subjected all the evidence adduced at trial to a fresh re-appraisal and also having reviewed the relevant law on the subject, it is the finding of this Court that the Trial Judge was correct in her holding that the names **EAST AFRICA FOAM LIMITED** and **EAST AFRICAN FOAM LIMITED** were used interchangeably and the parties to the debenture, mortgage and other agreements, the subject of the suit

giving rise to this Appeal, at all material time, knew they were dealing with the same company, the plaintiff at trial and the Appellant in this Appeal. The Trial Judge rightly so held. Issue one is so resolved.

Issue 2:

The contention of the Appellant is that the Appellant's Managing Director, Mr. Silas Majyambere who executed the debenture, mortgage and other loan agreements, as representatives of the Appellant was illiterate in English, being literate only in French, and yet there was no compliance at the time of execution of the debenture, the mortgage and other loan agreements, with the **Illiterates Protection Act, Cap, 78.**

Sections 2 and 3 of that Act, had not been complied with and a crime had been committed in respect of the execution of those agreements under **Section 4** of that Act. Accordingly, the debenture, the mortgage and the loan agreements executed between the Appellant and the second Respondent were not enforceable in law.

The second and third Respondents maintained that Mr. Silas Majyambere, the Managing Director of the Appellant was literate in English. He understood all the contents in

the debenture and in the mortgage and each one of the other loan agreements that he executed for and on behalf of the Appellant with the second Respondent.

At trial, a hand written letter dated 24th June, 1996, Exhibit P3, was adduced in evidence. Mr. Silas Majyambere (Pw1) admitted, under cross-examination, that he willingly and freely signed that letter as Chairman of Eritrea Foam Industry Private Company Limited. The letter which was in the English language was addressed to the second Respondent in Nairobi, Kenya.

By the said letter, Mr. Silas Majyambere, as Chairman of Eritrea Foam Industry Private Company Limited, was forwarding to the second Respondent a Cheque of UGX. 450,000,000/= being a guarantee in respect of that company's request for financial facilities from the second Respondent.

Pw1, however denied writing or knowing the contents of the said letter, Exhibit P3, and claimed that the same was written by the lawyers of the second Respondent. He further asserted that he had given them the blank letter headed of his stated company to write on. He offered no explanation as to how he could not know the contents of a letter whereby

he was forwarding a Cheque of UGX. 450,000,000/= to the second Respondent as a guarantee for a loan facility.

The learned trial Judge found that Pw1 was not truthful with regard to this letter, Exhibit P3, and held that Pw1 had personally written in English and signed this letter. I uphold the decision of the Trial Judge.

The trial Judge also found proof of the fact that Mr. Silas Majyambere was literate in the English language in a caveat by the Appellant placed upon the title of Plot 9-11 Eighth Street, Industrial Area, Kampala. The said caveat was also executed by Mr. Silas Majyambere for and on behalf of the Appellant. It is in the English language, signed on 14th November, 2000, with a supporting Affidavit also in English language deponed to by Mr. Silas Majyambere on the same date. In paragraph 8 of that supporting affidavit, Mr. Silas Majyambere, stated on oath:

"8. That whatever I have stated herein above is true and correct to the best of my knowledge and belief".

This caveat was tendered at the trial as Exhibit P32. Mr. Majyambere offered no explanation how the above was possible, when he did not in that affidavit claim anywhere that the contents of the caveat and the supporting affidavit

were first translated to him from English to French, the language that he claimed he was literate in.

The Trial Judge at P. 627 of the Record of proceedings stated in her Judgment that:

"I must also observe that much as Pw1 testified through an interpreter, I took notice of the fact that he fully understands the English language as on a number of occasions he started answering questions before a translation was done in the local language. To my mind, use of an interpreter was stage-managed merely to convince this Court that Pw1 does not understand the English language but he ended up betraying himself".

It is my conclusion, having considered all the evidence that was adduced at trial and the observations of the demeanour of Mr. Silas Majyambere, while testifying in Court, that the Trial Judge arrived at the right conclusion that Mr. Silas Majyambere was, at all material time, very literate in English and that he was fully aware of the contents of the debenture, the mortgage and each one of the loan Agreements and other documents that he executed for and on behalf of the

Appellant on the one hand and respectively with the Respondents on the other hand.

The evidence clearly established that Mr. Silas Majyambere, for and on behalf of the Appellant, had a full and real understanding that the dealings with the second Respondent were of a business nature. Further, that the debenture, mortgage and other loan documents and agreements, were for a loan advanced to the Appellant by the second Respondent.

The Appellant further contended that the debenture and the mortgage were never executed in accordance with the law and are accordingly a nullity because each one of them was never sealed with the seal of the Appellant.

It is necessary to re-appraise the evidence adduced on the subject so as to arrive at the correct decision as regards this contention of the Appellant. Exhibit P8(II) was tendered in evidence as a resolution dated 7th November, 1996, whereby the Appellant issued to the second Respondent, as securities by way of a first debenture on the moveable assets and a first legal charge on the immovable property of the Appellant. The Security and other related documents were to be executed by Mr. Silas Majyambere and Jehoash Sendege, for

on behalf of the Appellant. The resolution was signed by Mr. Silas Majyambere, the Chairman of the Appellant.

The resolution dated 5th November, 1996, Exhibit P8(1), and the other one dated 7thNovember, 1996, Exhibit P8(ii), were, as already held earlier on in this Judgment, by design of the Appellant, through Mr. Silas Majyambere, the Managing Director, made in the name of: **"EAST AFRICAN FOAM LIMITED"** as the Appellant and not in the correct name of **"EAST AFRICA FOAM LIMITED"**.

As already held **EAST AFRICA FOAM LIMITED** and **EAST AFRICAN FOAM LIMITED** was one and the same entity that is the Appellant. It follows therefore that through the same resolutions the Appellant appointed Mr. Silas Majyambere and Mr. Jehoash Sendege to execute the debenture, mortgage and other relevant documents with the second Respondent. These two executed the same and were stamped with the Appellant's stamp just next to the signature of Mr. Silas Majyambere, the Appellant's Managing Director. It follows therefore that the debenture and the mortgage were validly executed. See: **Bank of Uganda Vs Banco Arabe Espanol: Civil Appeal No. 8 of 1998 (SCU).**

The recitals in the mortgage and in the debenture acknowledged that they were securities for a loan and facility agreement between Eritrea Foam Industry Limited and the second Respondent, the provider of the security being a Ugandan company by the names of **EAST AFRICAN FOAM LIMITED,** but in reality being "**EAST AFRICA FOAM LIMITED"** the Appellant. It was this Appellant who was owner of the land in Plot 9-11, Eighth Street, Kampala, and the one who carried out and executed the necessary transactions with the second Respondent. The Resolutions, debenture and the mortgage were all properly registered with the Registrar of Companies and the land Registry in Uganda where they were accepted on their face value and placed on the company file of the Appellant.

This was constructive notice to the world at large that whatever had been done was duly authorized and those who did the acts were acting on behalf of the Appellant. Third parties, outside the Appellant were entitled to assume that the internal rules of a company had been complied with by the Appellant. Due diligence was satisfied upon examination of the documentation filed at the official Company Registry in Uganda in compliance with the indoor management rules

of companies. **See: Royal British Bank Vs Turquand (1856)6 E & B 327.**

The contention of the Appellant that the debenture, mortgage and other loan and facility agreements, were executed in respect of a non-existent Eritrea Foam Industry Limited Company lacks validity. Mr. Silas Majyambere (Pw1) the Appellant's Managing Director also purported to act as the chairman and owner of Eritrea Foam Industry Limited. He presented that company as being in existence at the material time.

The Appellant is accordingly estopped by **Section 114 of the Evidence Act** from denying the existence of the said Eritrea Foam Industry Limited to the second Respondent, when the Appellant's duly authorized Managing Director presented to the second Respondent a situation whereby Eritrea Foam Industry Limited was in existence and the second Respondent acted accordingly on the basis of that presentation.

I find that, on the basis of the proper evaluation of the evidence that was adduced and on the proper application of the laws relevant to this issue, the Trial Judge was correct in holding that the debenture and the mortgage and any

other relevant agreements and/or documents executed by and/or for the Appellant with the second Respondent, in the transactions the subject of this litigation, were valid and enforceable.

Issue two is accordingly so resolved.

Issue 3:

It was contended for the Appellant that the caveat placed by the Appellant upon the suit land was unlawfully removed there from by the Registrar of Titles because the Notice of Removal of the caveat issued by the Registrar of Titles referred to a different land all together and, at any rate, the same was never received by the Appellant. All this was done by design of the Respondents so as to have the said caveat removed and the Appellant's land sold to a third party without the knowledge of the Appellant, the caveator.

The Notice of the Registrar of Titles dated 23rd February, 2001 that was sent to the Appellant, Exhibit P20, was addressed to the Appellant and was referenced: *Correspondence on: Please quote* ***No. LRV 2833/16"***.

However when it came to the subject sub-heading the same stated:

"Application to Remove Caveat, Plot No. 418 Nakawa Industrial Area, Lease hold Register Volume 2536 Folio 6".

The correct description of the subject matter land was Leasehold Register Volume 2833 Folio 16 (LRV 2833/16). There was thus a wrong description of the land property in this Notice. This was failure of the exercise of the duty of due care and diligence on the part of the office of the Chief Registrar of Titles.

The Registrar of Titles who issued the Notice testified as Dw4. He explained as to what he considered caused the apparent misdescription of the land property in the Notice.

He stated that the caveat in issue may have covered two land properties of the Appellant, and only one was described in the Notice, leaving out or instead of the one relevant to this case. Dw4 however insisted that to the extent that the Reference of the land property and the addressee of the Notice were correctly and clearly stated, the effect of the misdescription was greatly minimized.

It is noted that the Notice, inspite of the misdesrciption of the land property, stated the correct Reference Number of LRV 2833/16 referring to the land property and the Instrument Number of the caveat was also correctly stated. Mr. Silas Majyambere (Pw1), Managing Director and Chairman of the Appellant, acknowledged in paragraph 20 of his witness statement, that his lawyers received the said Notice from the Registrar of Titles, Ministry of Lands on the last day of its expiry period.

It has to be appreciated therefore that the Appellant's lawyers received the Notice to remove the caveat. This was when the Appellant had been placed under receivership and was thus aware of the steps being taken about that suit land property, so as to recover the loan money that the Appellant had guaranteed, but which the borrower and the Appellant, as guarantor, had failed to repay.

The Trial Judge concluded, in those circumstances, that on receipt of the said Notice to remove the caveat, the Appellant, through his lawyers or otherwise, ought to have swiftly acted upon the Notice by seeking clarification or protesting the same for misdescribing the land property, or taken other appropriate acts necessary in the circumstances.

There was no evidence that the Appellant acted in any positive way in response to this Notice. The Trial Judge thus concluded that the Notice adequately put the Appellant on notice about the removal of the caveat, but the Appellant did not in any way take any positive action in response to that Notice. The Appellant has himself to blame for this. The removal of the caveat was thus valid.

I have re-appraised the evidence and the law on this issue. I have no cause to disagree with the conclusion of the Trial Judge. I too hold that the caveat of the Appellant was lawfully removed from the suit land property.

Related to the issue of removal of the caveat was the assertion for the Appellant that, in the course of the trial, Counsel for the Respondents had made an undertaking not to sell the suit land property as long as Court of Appeal Civil Application No. 99 of 2000 was being prosecuted by the Applicant, now the Appellant, with speed and without unnecessary delay.

This undertaking was withdrawn by Counsel for Respondents on 23rd February, 2001 because from 20th December, 2000, when the said Application was adjourned

the Appellant did nothing to proceed with the prosecution of the same.

Counsel for the Respondents thus concluded that the Appellant had lost interest in the Application. A formal withdrawal of the undertaking was filed in the trial Court for and on behalf of the Respondents. Thereafter the suit land property was sold to a third party after removing the caveats thereon.

I am unable to find fault for the withdrawal of the undertaking since the same was formally lodged with Registrar of this Court of Appeal. It was up to the Appellant, if there were any sound reasons for the undertaking not to be withdrawn, to have moved this Court to make the necessary directions in the matter. The Appellant did not do so. I accordingly hold that the undertaking was properly withdrawn by the Respondents. The withdrawal of the said undertaking did not in any way make the removal of the caveat from the suit land property to be unlawful.

Accordingly, as to Issue three, this Court holds that the learned Trial Judge was correct in holding that the Appellant's caveat was lawfully removed from the suit land property of the Appellant.

Issue 4:

This Issue is as to remedies. For the reasons given in resolving Issues 1,2 and 3, this Court holds that the Appellant is not entitled to any remedies prayed for. It follows therefore that:

1. This appeal stands dismissed against the Appellant in favour of the first, second and third Respondents.
2. The Judgment of the High Court in the **High Court (Commercial Division) consolidated Civil Suits No. 1567 of 2000 and No. 292 of 2002** dated 16th July, 2013 is hereby upheld.
3. The Appellant is to pay each one of the Respondents costs of the appeal and those of the High Court.

It is so ordered.

Dated this.....5th.....day of.....Oct.....2021.

.....

Remmy Kasule,
Ag, Justice of Appeal

17th July 2021

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 216 OF 2013

EAST AFRICA FOAM LIMITED ========== APPELLANT

VERSUS

1. **ATTORNEY GENERAL**
2. **THE EAST AND SOUTHERN TRADE AND DELELOPMENT BANK**
3. **FULGENCE MUNGEREZA**

========== RESPONDENTS

[An appeal from the decision of the High Court of Uganda at Kampala (Commercial Division) before Hellen Obura, J. (as she then was) dated the 16th day of July, 2013 in Civil Suits No.1567 of 2000 and No. 292 of 2002(consolidated)]

CORAM: HON. MR. JUSTICE GEOFFREY KIRYABWIRE, J.A.

HON. LADY JUSTICE MONICA MUGENYI, J.A.

HON. MR. JUSTICE REMMY KASULE, Ag. J.A.

JUDGMENT OF HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

I have had the opportunity of reading the draft Judgment of the Hon. Mr. Justice Remmy Kasule, Ag. J.A.

I agree with his Judgment and I have nothing to add. Since the Hon. Lady Justice Monica Mugenyi, J.A. also agrees, we hereby order that:-

1. The Appeal is dismissed.
2. The Judgment in High Court Civil Suits No. 1567 of 2002 and No. 292 of 2002 (consolidated) is hereby upheld.
3. Costs of this Appeal and those in the High Court are awarded to the Respondents.

It is so ordered.

Dated at **Kampala** this ..... day of .....2021.

.....

HON. MR. JUSTICE GEOFFREY KIRYABWIRE
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM: KIRYABWIRE, MUGENYI, JJA AND KASULE, AG. JA

CIVIL APPEAL NO. 216 OF 2013

BETWEEN

EAST AFRICAN FOAM LIMITED ..... APPELLANT

AND

1. **THE ATTORNEY GENERAL**
2. **THE EASTERN & SOUTHERN TRADE & DEVELOPMENT BANK**
3. **FULGENCE MUNGEREZA ..... RESPONDENTS**

[Appeal from the Judgment of the High Court of Uganda (Obura, J) in Civil Suits No. 1567 of 2000 & 292 of 2002 (Consolidated)]

JUDGMENT OF MONICA K. MUGENYI, JA

A. Introduction

1. I have had the benefit of reading in draft the judgment of my brother, Hon. Justice Kasule in this Appeal. I do agree with the findings and conclusions arrived at in respect of *Issues 1* and *3* of the Appeal, but deem it necessary to posit my perspective with regard to *Issue No. 2*. The factual background to the Appeal is so well articulated in the lead judgment, it is not necessary to repeat it here. The nineteen (19) grounds of appeal arising therefrom were subsequently narrowed down into four issues for determination as follows:

    I. Whether the learned trial Judge erred in holding that the two names East Africa Foam and East African Foam Limited are the same.

    II. Whether the learned trial Judge erred in law and in fact in holding that the mortgage and loan agreements were enforceable.

    III. Whether the learned trial Judge erred in law and fact in holding that the appellant's caveat was lawfully removed.

    IV. Whether the appellant is entitled to the remedies prayed for.

2. Under *Issue No. 2*, it is the contention that although Mr. Silas Majyambere who executed the mortgage and loan agreements on behalf of the Appellant was at the time illiterate in the English language, no effort was made to ensure compliance with sections 2 and 3 of the Illiterates Act. The Court was referred to the case of **Bostel Brothers Limited v Hurlock (1984) 2 All ER 312** in support of the proposition that failure to comply with a statutory provision in execution of a contract would render it null and void. The Appellant further faults the trial court for endorsing the validity of debenture and mortgage agreements that were not sealed by it or otherwise executed by persons with authority to do so. The case of **General Parts (U) Ltd v Non-Performing Assets Recovery Trust (NPART) Civil Appeal No. 55 of 1995** (Supreme Court) was (mis)cited by learned Counsel for the Appellant as authority for the illegality of the said documentation. It will suffice to point out here that the correct citation for that authority is **General Parts (U) Ltd**

v Non-Performing Assets Recovery Trust (NPART), Civil Appeal No. 5 of 1999. Consequently, all references to that case would be in respect of the corrected citation.

3. Conversely, it is the Respondents' contention that the evidence on record was that Mr. Majyambere was conversant enough with the English language to have written some correspondence and deposed an affidavit in that language without disclosing or demonstrating any apparent difficulties. On the other hand, the mortgage and debenture documentation are opined to have been validly executed by dint of a company resolution issued by the Appellant, which authorized Mssrs. Majyambere and Jehoash Sendege to execute them on its behalf.

4. It is well established law that a first appellate court is required to re-evaluate the evidence and any other materials that were before the trial court then draw its own conclusions therefrom, with appropriate regard for the *bona fides* of the judgment appealed from. Perhaps more poignantly, even where the appellate court unearths errors, it should only interfere with the trial court's judgment where the errors have occasioned a miscarriage of justice. See **Henry Kifamunte v Uganda, Criminal Appeal No. 10 of 1997** (Supreme Court).

5. I carefully re-considered the material on record in this matter. Two Resolutions by the Appellant company address the contestations in *Issue No. 2* – one dated 5th November 1996 amending Article 36 of the Memorandum and Articles of Association (MEMARTS), and another dated 7th November 1996 that authorizes the execution of the security documentation. They are reproduced below.

> Resolution of 5th November
>
> *The Directors may exercise all the powers of the company to borrow any amount of the money and to mortgage or charge its undertaking, property and uncalled capital or any part thereof and to issue debenture, debenture stock whether outright or as security for any debt, liability or obligation of the company or any third party.*
>
> Resolution of 7th November
>
> *The Security and other related documents related thereto be executed by* ***Silas Majyambere*** *and* ***Jehoash Sendege*** *on behalf of the Company.*

6. The second Resolution is particularly pertinent to the present Appeal in so far as it succinctly authorizes Messrs. Majyambere and Sendege to execute the mortgage, debenture and related documentation on behalf of the Appellate company.

7. Be that as it may, I am alive to the decision in **General Parts (U) Ltd v NPART** (supra) where it was held (per Mulenga JSC):

> **For the appellant to duly execute the mortgage document as mortgagor, whether in the capacity of registered proprietor or of donee of power of attorney, it had to affix its common seal to the document or to act by its attorney or attorneys, appointed for the purpose. .... Even if it be assumed from the evidence of Haruna Semakula, that one of the signatures is his, and that the second one is of another official of the appellant, there is no evidence to show that they, or either of them, signed as the appellant's attorneys or attorney appointed for purposes of the Registration of Titles Act. The mortgage, therefore, is defective in two respects. The signatories did not comply with the requirements of section 156 of the RTA, but also, they did not sign by virtue of any registered power of attorney pursuant to section 154(1) of the Act. .... Consequently, notwithstanding Haruna Semakula's admission, the signature(s) did not constitute execution by the recited registered proprietors or either of them. In my view, this was not a mere irregular execution of the document, as submitted by Mr. Nkurunziza. It was a failure of execution on the part of the registered proprietor(s)/ mortgagor(s).** *(my emphasis)*

8. That decision proposed two alternate modes of execution of mortgages by corporate entities: affixation of the common seal or signature by persons appointed for that purpose under a power of attorney. In this Appeal, a seal was not affixed to the cited security documents as proposed in section 132 of the Registration of Titles Act, Cap. 230 (RTA), nor do I find evidence of a power of attorney conferring authority upon Messrs. Majyambere and Sendege to execute the documents as

provided in section 146 of the same Act. For ease of reference, both statutory provisions are reproduced below:

Section 132(1)

A corporation, for the purpose of transferring or otherwise dealing with any land under the operation of this Act, or any lease or mortgage, may, in lieu of signing the instrument for such purpose required, affix to the instrument its common seal.

Section 146(1)

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.

9. It would appear that recourse was made to the company resolution dated 7th November 1996, rather than a power of attorney, to authorise the execution of the security documentation. As quite rightly observed in **General Parts (U) Ltd v NPART** (supra), this was a failure of execution on the part of the registered proprietor/ mortgagor. The question is would this error be fatal? I would think not for the ensuing reasons.

10. To begin with, I am acutely mindful of the constitutional duty upon me under Article 126(2)(e) of the Uganda Constitution to administer substantive justice without undue regard to technicalities. The duty upon courts in that regard would require that their judgment be exercised judiciously with a view to engendering a just judicial result as between the parties. Against that backdrop, it seems to me that the mischief of section 146(1) of the RTA is to ensure that only persons with demonstrable authority to bind a company should be allowed to do so. That statutory provision is couched in directional (rather than mandatory) terms, urging the utilisation of a power of attorney as demonstration of due corporate authority in dealings with land. Therefore, as was quite rightly held in the **General Parts** case,

aside the execution of documents under the common seal of a company (which was not done in this case), the absence of such corporate authority would invalidate the documents so executed.

11. In the instant case, such authority presented itself in the form of the company resolution of 7th November 2021. That Resolution unequivocally authorised the persons mentioned therein to execute the security documentation in issue presently, which they did. Accordingly, it is to my mind inconceivable that the Appellant company that resolved as it did would seek to obviate the letter and import of that Resolution on the basis of the provisions of section 146(1) of the RTA. I would therefore respectfully decline the Appellant's invitation to invalidate the mortgage and debenture agreements in this Appeal on that basis.

12. In any event, I agree with the lead judgment's disposition on Issues 1 and 3 of the Appeal and, finding no miscarriage of justice in the trial court's decision, would accordingly refrain from interfering with it. *See* ***Henry Kifamunte v Uganda*** *(supra)*.

13. In the result, I concur with the lead judgment's conclusions on the Appeal and would similarly resolve it in the affirmative. Being in further agreement with the conclusions on *Issue No. 4*, I do respectfully abide the decision that the Appeal be dismissed with costs in the terms set out therein.

It is so ordered.

Dated and delivered at Kampala this ..5.. day of ..Oct....., 2021.

Hon. Lady Justice Monica K. Mugenyi
JUSTICE OF APPEAL