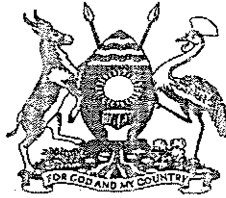

THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT KAMPALA

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

CIVIL APPEAL NO. 219 OF 2013

BETWEEN

1. NECTA (U) LIMITED
2. JOHN NDYABAGYE .... APPELLANTS

AND

CRANE BANK LIMITED .... RESPONDENT

[Appeal from the Judgment of the High Court of Uganda (Mulyagonja Kakooza, J) in Misc. Application No. 470 of 2001 & Civil Suit No. 197 of 2003 (Both arising from Consolidated Civil Suits 595 & 598 of 1998)]

JUDGMENT OF MONICA K. MUGENYI, JA

A. Introduction

1. Necta (U) Limited ('the First Appellant') and Mr. John Ndyabagye ('the Second Appellant') lodged this First Appeal in this Court, challenging the Judgment and Orders of the High Court of Uganda sitting in Jinja ('the Trial Court') in **Consolidated Miscellaneous Application No. 470 of 2001 & Civil Suit No. 197 of 2003** dated 6th March 2012. The First Appellant is a private company limited by shares, in which the Second Appellant is a subscriber and director.

2. The Appellants initially filed **Miscellaneous Application No. 470 of 2001** against Crane Bank Limited ('the Respondent') under sections 35 and 40(3)(i) of the Judicature Act, as well as the then section 35 (now section 34) of the Civil Procedure Act (CPA). They sought declarations that the sale of the First Appellant's property and developments on Plot 94, High Street in Mbarara was null and void.

3. Thereafter, vide **Civil Suit No. 59 of 2002** in the High Court of Uganda in Mbarara, the First Appellant sued the Respondent and the buyer of the said property (Mr. John Kirimi Tumwebaze) in trespass. It is that suit that was re-registered as **Civil Suit No. 197 of 2003** following its transfer to the High Court of Uganda in Jinja.

4. On 23rd October 2003, **Miscellaneous Application No. 470 of 2001** and **Civil Suit No. 197 of 2003** were consolidated by Ogoola, J (as he then was). The Trial Court subsequently dismissed the consolidated suit with costs to the Respondent and allowed the latter's counterclaim, hence the present Appeal.

5. For clarity, given the multiplicity of suits in relation thereto, a brief factual background to the Appeal is pertinent.

B. Factual Background

6. On 2nd March 1996, an overdraft facility was advanced to the Second Appellant and secured by a Mortgage Deed over LRV 363 Folio 18 Plot 94, High Street, Mbarara. The said property was at the time registered in the names of the First Appellant, which company was designated a surety under the Mortgage. Under further charges created between the First Appellant and the Respondent on 24th July 1996 and 8th July 1997

respectively, it was agreed that the First Appellant would on demand in writing by the Respondent pay all monies due and owing by the Second Appellant in the event of the latter's default on payment. The total sum of monies advanced to the Second Appellant under the three separate credit facilities was Ushs. 70,000,000/=.

7. The foregoing credit was on 25th November 1997 renewed by the Respondent Bank for a six-month period expiring on 24th May 1998. However, before its expiration, the Respondent froze the facility, demanded payment from the Second Appellant and advertised for sale the First Appellant's property that had been pledged as security.

8. On the premise that the mortgaged property could not be sold unless it, as surety, had failed to pay the outstanding amount, the First Appellant lodged **Civil Suit No. 595 of 1998** in the High Court. It was averred, in the alternative, that the charges created between the Respondent and First Appellant were devoid of authority, having been executed without a company resolution sanctioning the same.

9. The Second Appellant did also separately lodge **Civil Suit No. 598 of 1998** in respect of the same subject matter. He faulted the Respondent for freezing the overdraft facility despite it having been secured with the property at Plot 94, High Street – Mbarara, as well as blank cheque that was to be cashed upon the expiration of the facility. Interestingly, the Second Appellant also laid claim to ownership of the said property.

10. Both suits sought a permanent injunction against the sale of the same Mbarara property. They were later consolidated and a consent decree executed in the Respondent's favour in the sum of Ushs. 105,840,411/=, to be jointly paid by the Appellants. Following their failure to pay the decretal sum and pursuant to an attachment order arising from the consent decree, the said property was advertised for sale.

11. The Appellants then jointly lodged **Miscellaneous Application No. 176 of 2000** seeking to stop the sale of the property. Upon the dismissal of that application, they filed **Miscellaneous Application No. 355 of 2001** in which they unsuccessfully sought a stay of execution pending an appeal against the decision in the former application. The mortgaged Mbarara property was in the meantime sold to and registered in the names of Mr. Kirimi Tumwebaze.

C. **Trial Court Proceedings**

12. Aggrieved by the Respondent's actions, the Appellants lodged **Miscellaneous Application No. 470 of 2001**, in which they sought the following remedies:

    i. A declaration that the Decree in **HCCS 595/598 of 1998** was fully satisfied.

    ii. A declaration that the purported sale of their (Appellants) property at Plot 94 High Street – Mbarara was null and void.

    iii. An injunction restraining the Respondent from disposing of their property and threatening the Second Appellant with arrest.

    iv. Costs of the application.

13. The Appellants did also institute **Civil Suit No. 197 of 2003** challenging the sale of the property, and seeking the following remedies:

    i. An order of eviction.

    ii. Special damages of Shs. 12,000,000/= per month.

    iii. General damages.

    iv. Punitive damages.

    v. Costs of the suit.

14. In a joint Defence with Mr. Tumwebaze, the Respondent averred that the Second Appellant had made no effort to settle the monies secured by overdraft, hence the sale of the suit property and his subsequent eviction from it. Urging the dismissal of the suit with costs, the Respondent raised a counterclaim against the Appellants, asserting that the First Appellant had, with the acquiescence of the Second Appellant, acquired an overdraft facility from it pledging the suit property as security. It was further averred that following default on payment by the First Appellant, the Respondent had sold the mortgaged property to Mr. Tumwebaze but the Company declined to surrender vacant possession. This had prompted the Respondent to forcefully evict it at significant loss and inconvenience to it. It thus sought the following orders as against the Appellants:

i. General damages.

ii. Interest on the general damages at bank rate from the date of filing the counterclaim until payment in full.

iii. Interest on the decretal sum (in the counterclaim) at court rate from the date of judgment until payment in full.

iv. Costs of the suit/ counterclaim.

15. At trial the two matters were consolidated and the following issues framed for determination:

i. Whether the mortgage secured against the property comprised in LRV 363 Folio 18, Plot 94 High Street – Mbarara was valid.

ii. Whether the sale of the said property to the Second Defendant (Mr. Tumwebaze) was valid.

iii. Whether the decree in Civil Suit No. 595 and 578 of 1998 was satisfied and, if not, to what extent the judgment debtors were still indebted to the First Defendant (Respondent herein).

iv. Whether the parties are entitled to any remedies.

16. The Trial Court adjudged the sale of the mortgaged property to have been valid; dismissed the claims for mesne profits, general and punitive damages, and awarded the costs of the consolidated suit to the present Respondent and Mr. Tumwebaze. The court allowed the recovery by the Respondent of the outstanding decretal amount in **Consolidated Civil Suit 595/598 of 1998** in the sum of Ushs. 218,144,745/= as at 14th September 2004, but its claims for general damages and interest were disallowed for non-proof.

D. The Appeal

17. Dissatisfied with the Trial Court's decision, the Appellants lodged this Appeal before this Court, preferring the following grounds of appeal:

I. **The learned trial judge erred in law and in fact in holding that a resolution 'not in the hands of all the Directors' was a valid resolution of the 1st appellant.**

II. **The learned trial judge erred in law and in fact in holding that:**

'I am therefore unable to find that the loan advanced to Mr. Ndyabagye was not for the benefit of his company or that the resolution of the company was wrongly used by the bank to provide credit facilities to Mr. Ndyabagye.'

III. **The learned trial judge erred in law and in fact in holding that '*the company knowingly sanctioned the granting of the loan to Mr. Ndyabagye.*'**

IV. **The learned trial judge erred in law and in fact in holding that:**

'As to whether another or other resolutions ought to have been drawn to sanction the further charge and mortgage and the 2nd further charge and mortgage, I do not share in the view that this was necessary.'

V. **The learned trial judge erred in law and fact in holding that:**

'My understanding of S. 148(1) RTA is that the parties, i.e the persons to be bound by the instrument or POA are required to append their signatures in Latin character on the instrument. The rule does not necessarily apply to witnesses as long as they indicate that they fall within the ambit of those prescribed by S. 147(1) of the RTA.'

VI. **The learned trial judge erred in law and fact in holding that '*the seal of Necta (U) Ltd was affixed to the deed'* dated 24th July 1996.**

VII. **The learned trial judge erred in law and in fact in holding that the second further charge and mortgage dated 8th July 1997 signed not in Latin character by only one director and bearing only part of a stamp not disclosing full name was valid.**

VIII. **The learned trial judge erred in law and in fact in holding that the sale of the mortgaged property under the mortgage deeds was valid.**

IX. **The learned trial judge erred in law and in fact in holding that:**

> *'I therefore find that though no written notice was specifically addressed to the plaintiffs, 2 written notices were issued to the whole world in the newspapers ... The notices complied with the provisions of the RTA.'*

X. **The learned trial judge erred in law and in fact in holding that:**

> *'The complaint that the sale took place under a mortgage that was not properly executed cannot stand for the further charge and mortgage and the 2nd further charge and mortgage were duly executed and registered.'*

XI. **The learned trial judge erred in law and in fact in holding that the 2nd appellant, who was a subscriber to the company's memorandum and articles of association, in order *'to prove that he was a member and shareholder in the company, he had to produce either information from the register of members or share certificates issued to him under Article 16 of the Articles of Association of the company.'***

18. At the hearing of the Appeal, the Appellants were represented by Dr. Joseph Byamugisha (SC) assisted by Mr. Richard Bwiruka, while Mr. Moses Adriko (SC) appeared for the Respondent. The Parties solely relied upon written submissions filed in the matter.

E. Determination

Ground 1: *The learned trial judge erred in law and in fact in holding that a resolution 'not in the hands of all the Directors' was a valid resolution of the 1st appellant.*

19. It is the Appellants' contention that Article 41 of the First Appellant Company's Memorandum and Articles of Association (MEMARTS) requires a resolution that is passed without a meeting of directors to be evidenced in writing '*under the hands of all the Directors.*' The impugned Resolution in this case was signed by the Second Appellant as Chairman and Elizabeth Ndyabagye as Secretary, and is thus opined to have contravened that Article of the MEMARTS. In addition, it was argued in submissions that

that the seven persons that were considered by the Trial Court to have been the Company's directors were in fact its subscribers, there being no evidence whatsoever on record as to who the directors of the Company were for purposes of signing the resolution.

20. Article 41 is reproduced for ease of reference.

> <u>PROCEEDINGS OF DIRECTORS</u>
>
> 41. Articles 98, 100 to 106 (both inclusive) of table 'A' shall apply but so that a resolution determined on without any meeting of Directors and evidenced by writing under the hands of all the Directors shall be as valid and effectual as a resolution duly passed at a meeting of the Directors.

21. Particularly noteworthy for present purposes in so far as they illuminate the Directors' decision-making procedure are Regulations 98 and 106 of Table A of the Companies Act[1], as referred to in Article 41 of the MEMARTS. They read as follows:

> <u>Regulation 98</u>
>
> (1) The directors may meet regularly for the dispatch of business, adjourn, and otherwise regulate their business, as they think fit.
>
> (2) Questions arising at a meeting shall be decided by a majority of votes.
>
> (3) Where there is an equality of votes, the chairperson shall have a second or casting vote.
>
> (4) A director may, and the secretary on the requisition of a director shall, at any time summon a meeting of directors.
>
> (5) It is not necessary to give notice of a meeting of directors to any director for the time being absent from Uganda.
>
> <u>Regulation 106</u>
>
> A resolution in writing, signed by all the directors for the time being entitled to receive notice of a meeting of the directors, shall be valid and effectual as if it had been passed at a meeting of the directors duly convened and held.

22. Conversely, the Respondent contests the Appellants' interpretation of the MEMARTS on the basis of the decision in **<u>Royal British Bank v Turquand (1856) 6 E & B 327</u>**, where it was held:

[1] Act No. 1 of 2012.

A party dealing with a company is bound to read the company's deed of settlement (Memorandum of Association) but he is not bound to do more. In this case a third party reading a company's documents will find not a prohibition from borrowing but permission to do so on certain conditions. Finding that the authority might be made complete by resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done.

23. The impugned Resolution was thus opined to have been valid given that it had been drawn on the First Appellant's letter head, signed by its Chairman and Secretary, and Articles 35 and 36 of the Company's MEMARTS did indeed mandate directors to borrow. The cited provisions of the MEMARTS provide as follows:

<u>BORROWING POWERS</u>

35. The Board of Directors may from time to time at their discretion borrow and secure the payment of any sum or sums of money for the purpose of the Company.

36. The Board of Directors may secure the repayment of such moneys and upon such terms and conditions in all respects as they deem fit and in particular subject to article 3 hereof by the issue of debentures or debenture stock of the Company charged upon all or any part of the property of the Company (both present and future) including the uncalled capital for the time being.

24. I do also deem it necessary to reproduce the provisions of section 21(1) of the Companies Act. It reads:

Subject to this Act, the memorandum and articles shall, when registered bind the company and the members of the company to the same extent as if they had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.

25. As quite correctly argued by learned Respondent Counsel, Articles 35 and 36 of the MEMARTS do empower the Board of Directors to borrow for and in the interests of the Company. However, given the binding effect of the MEMARTS as articulated in section 21(1) of the Companies Act, such a decision would have to abide the directors' decision-

making procedures as articulated in Article 41 of the MEMARTS. Thus, the Company's Board of Directors would either have taken the decision attributed to it by the Respondent under a vote in a directors' meeting as articulated in Regulation 98 of Table A above or, in the absence of such meeting (as argued by the Appellants), by a resolution in writing signed by all the Company's directors as outlined in Article 41 of the MEMARTS and Regulation 106 of Table A.

26. I am alive to the general rule in **Royal British Bank v Turquand** (supra) that persons contracting with a company in good faith would be entitled to assume that corporate acts provided for in its constitutive documentation have been properly and duly performed, and are not bound to inquire whether such acts were duly supported by internal management. However, far from being a *carte blanche* for presumed corporate authority, that rule is grounded in the presupposition that sufficient inquiries have been made with regard to a company's constitutive documents before such corporate authority can be inferred. *See* ***Morris v Kanssen & Others (1946) 1 All ER 586***. Therefore, the unambiguous procedures outlined in the MEMARTS for Directors' decisions cannot be obviated by an inference of authority on the basis of permissive provisions in the same MEMARTS, without proof of due diligence by the Respondent Bank to sufficiently acquaint itself with the demands of those MEMARTS.

27. *Halsbury's Laws of England, Companies, Volume 14 (2016), para. 567* posits that '**a company's articles of association usually contain provisions as to the way in which directors at their meetings may conduct business and make decisions, including allowance for decisions to be taken instead by way of directors' written resolutions. ... If a power is given to directors by an article of association, the decision of the directors to exercise it should be in accordance with the true construction of the article of association.**' The duty upon directors in that regard would be two-fold: first, to operate within the express confines of the permissive provision and, secondly, to take action thereunder in accordance with the procedures outlined in the MEMARTS. Thus, Articles 35 and 36 having empowered the directors of the First Appellant Company to borrow on its behalf, they were nonetheless enjoined to exercise the authority granted to them in accordance with the processes outlined in the MEMARTS. It is therefore a question of fact and not conjecture whether indeed the Resolution that authorized the borrowing in issue presently was validly passed. The question then would be whether the

Company had more than two Directors so as to impute invalidity to the Resolution on account of only two of them signing it and, secondly, which Party bore the onus of proof in that regard?

28. Section 101(1) of the Evidence Act, Cap. 6 provides that '**whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he or she asserts must prove those facts.**' Therefore, the Appellants being the party aggrieved by the Trial Court's decision would bear the onus of proof of all the material facts that underpin this Appeal. They would thus bear the legal burden of proof, the incidence of which can often be deduced from the pleadings, '**it usually being incumbent upon the claimant to prove what he contends.**'[2] Stated differently, a plaintiff or appellant (the party desiring a court to take action) would bear the duty to satisfy the court that the conditions which entitle him or her to judgment have been satisfied. That duty is underscored by the fact that in the absence of any evidence whatsoever by either party, it is the claimant's case that would fail hence the burden of proof upon it as delineated in section 102 of the Evidence Act.[3] In respect of a particular allegation, however, the burden lies upon that party for whom the substantiation of that particular allegation is an essential component of his or her case.[4] Hence, the emphasis in section 103 of the Evidence Act that '**the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence.**'[5]

29. Consequently, the Appellants would bear the legal burden of establishing the totality of the present Appeal as against the Respondent. This would entail proof to the required standard of all the allegations that they impute to the latter. However, each party would bear the onus of proof of the specific allegations made by it that, if not substantiated, would leave the gravamen of its complaint or defence (as the case may be) unproven. Hence, as opined by *Halsbury's Laws of England*, the 'evidential burden' (or the burden of adducing evidence) in this Appeal '**rests upon the party who would fail if no**

[2] See Halsbury's Laws of England, Civil Procedure, Vol. 12 (2020), para. 697.

[3] Section 102 provides that '**the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**'

[4] Ibid. at para. 698.

[5] See section 103 of the Evidence Act.

evidence at all, or no further evidence, as the case may be, was adduced by either side.'[6] For the avoidance of doubt:

> **The evidential burden ..... will rest initially upon the party bearing the legal burden. ... If the party bearing the legal burden fails to adduce evidence, he has failed to discharge his burden and there will be no need for the other party to respond; however, if the party bearing the legal burden brings evidence tending to prove his claim, the other party may in response wish to raise an issue and must then bear the burden of adducing evidence in respect of all material facts.**[7]

30. It thus becomes abundantly clear that, having contested the validity of the Special Resolution acted upon by the Respondent for offending Article 41 of the MEMARTS, the Appellants bore the legal and evidential burden of proof of this contestation. They were under a duty to present such evidence in support of their case as, in the absence of evidence to the contrary, would materially prove that allegation against the Respondent. To that extent, they bore the primary duty to establish for a fact that the directors that signed the impugned Special Resolution did not represent the entire directorship of First Appellant Company. Upon their presentation of evidence that would *prima facie*[8] tend to prove their claims; the evidential burden would shift to the Respondent to establish evidence that supports its claim that the Resolution was indeed valid. Needless to say, this being a civil appeal, the Parties' evidence would be weighed for cogency on the balance of probabilities. It is against that background that I carefully reviewed the material on record.

31. The evidence that was presented to the Trial Court included affidavits in support of **Miscellaneous Application No. 470 of 2001**; affidavits in reply and rejoinder; oral cross examination and re-examination of some deponents, as well as extensive documentary evidence touching on this matter. The impugned Resolution itself was adduced in evidence as Exhibit 26. The Trial Court rendered itself as follows on this issue:

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[6] Supra at para. 697.
[7] Ibid. at para. 699.
[8] On the face of it, in the absence of evidence to the contrary.

Regarding the contention that the resolution was invalid because no meeting of the shareholders of Necta was held at which it was made, the Articles of Association of Necta (U) Ltd (Exh. 16 in the trial bundle) showed that it was not mandatory to hold a meeting before the directors could come up with a resolution. Article 41 provided as follows: ...... Now, the Memorandum and Articles of Association showed that there were 7 directors of the company but five of them were stated to be minors, and with no disclosure as to when they would cease to be minors. Indeed only two of the five minors subscribed to the document by signing besides their names probably indicating that the others could not do so. The fact that the two adults, Mr. and Mrs. Ndyabagye transacted business on behalf of the company and signed the resolution as well as the mortgage instruments after it is therefore not surprising. That Mrs. Ndyabagye signed as secretary also does not vitiate the resolution because she was also stated to be a director of the company in the contested mortgage deeds.

32. On that premise, the lower court concluded that it was unable to find that '**the resolution of the company was wrongly used by the bank to provide credit facilities to Mr. Ndyabagye.**'

33. I might observe here that the MEMARTS reveal that the First Appellant Company had seven subscribers namely John Ndyabagye, Elizabeth Ndyabagye, John Muganzi, Ida Kenkwanzi, Mark Mutaahi, Elizabeth Kebirungi and Robin Mugisha. The Trial Court erroneously equated the said subscribers to directors. Only John and Elizabeth Ndyabagye, the signatories to the impugned Resolution, are depicted as directors of the company in the documentary evidence on record. Under cross examination, however, the Second Appellant (John Ndyabagye) did attest to the Company having seven directors, five of whom were his children. Although it transpired in evidence that the children had been minors at its incorporation, being a private company,[9] the prohibition on the appointment of minors as directors in section 186(1) of the Companies Act would appear to be negated by the inapplicability of section 186 to private companies. Section 186(1) and (7) are reproduced below for ease of reference.

[9] See Article 2 of the Company's Articles of Association

(1) Subject to this section, no person shall be capable of being appointed a director of a company which is subject to this section if at the time of his or her appointment he or she has not attained the age of twenty-one, or he or she has attained the age of seventy.

(2) ....

(3) ....

(4) ....

(5) ....

(6) ....

(7) A company shall be subject to this section if it is not a private company

....

34. In any event, the evidence on record does not conclusively dispel the possibility (on the balance of probabilities) of the children that were minors at the incorporation of the company having come of age as at the date of the Resolution. It was the Second Appellant's affidavit evidence that there had been no Resolution authorizing the First Appellant Company to either borrow or give powers of attorney to him to mortgage its title to the property at Plot 94, High Street – Mbarara. He reiterated the same evidence in his affidavit in rejoinder, maintaining that the First Appellant had neither given him powers of attorney nor otherwise authorized his application for an overdraft facility from the Respondent. That evidence was not impeached under cross examination. On the contrary, as observed earlier herein, under oral cross examination the Second Appellant confirmed that the Company had seven directors in total, the additional directors being his children. The Second Appellant's testimony on the Company's directors is in general terms borne out by the MEMARTS, which depict five minors as the company's subscribers, in addition to the Second Appellant and his wife, Mrs. Elizabeth Ndyabagye.

35. It is noted that Regulation 75 of Table A of the Companies Act does mandate the signatories to the Memorandum of Association to be the first directors of a company. It reads:

> The number of the directors and the names of the first directors shall be determined in writing by the subscribers of the memorandum of association or a majority of them and until such determination, the signatories to the memorandum of association shall be the first directors.

36. The provision in that Regulation for the signatories to the Memorandum of Association to constitute a company's first directors would lend credence to the Second Appellant's evidence that the First Appellant Company had seven directors. On that account, therefore, his evidence was not entirely implausible. Although three of the minors did not sign the MEMARTS, two of them did. Consequently, the Appellants' evidence on record does on the face of it point to the First Appellant Company having had at least four directors as at the date of the Special Resolution. Perhaps more importantly, the Appellants' unimpeached evidence on this issue effectively shifts the evidential burden to the Respondent to counter it with evidence in support of its claim that the Special Resolution was valid or validly executed. Deferring to the proposition in *Halsbury's Laws of England,*[10] it seems to me that whereas the evidential burden initially lay with the Appellants (the party bearing the legal burden of proof), upon production of evidence tending to prove their claim, the Respondent was under a duty to establish the material aspects of its case. It would thus have been expected to either demonstrate that a directors meeting held in accordance with Regulation 98 of Table A did endorse the decision reflected in the Special Resolution or, in the absence of such meeting, establish that the two directors that signed the said Resolution constituted all the directors of the company in compliance with Regulation 106 of Table A. These are procedural prerequisites for directors' decisions as adopted in the Company's MEMARTS under Article 41 thereof.

37. In my considered view, the Respondent fell short on its evidential burden. I find no evidence whatsoever of any vote that might have underpinned the impugned Resolution, neither is there proof of any meeting in respect thereof on record. What I do find on record is the Second Appellant's testimony that the Resolution made no mention of a directors' meeting neither was any such meeting held on the date of the Resolution. Furthermore, no evidence was forthcoming from the Respondent that either established John and Elizabeth Ndyabagye as the only directors of the Company so as to validate the Resolution, or counteract the evidence of the Second Appellant with regard to the additional directors. His evidence therefore remained uncontroverted. Had the Respondent, for instance, wished to pursue the question of majority age, it would have been incumbent upon it to furnish proof that the two children that endorsed the MEMARTS

[10] Ibid. See para. 27 hereof.

were as at the date of the Resolution still minors. This was not done. Meanwhile, the evidence on record is that whereas the company was incorporated in November 1994, the Special Resolution is dated 1st February 1996. The juxtaposition of the Second Appellant's uncontroverted evidence on the Company's directors against the MEMARTS themselves yields two other signatories to the MEMARTS in addition to those that signed the Resolution. Against the backdrop of Regulation 75 of Table A, that evidence would lead to the inference I do draw that the company had four directors as at the date of the Resolution.

38. It thus becomes apparent, on the balance of probabilities, that the Appellants duly discharged the duty upon them to prove that the directors that signed the impugned Special Resolution did not represent the total number of Directors of the First Appellant Company. Although the Trial Court correctly held that a directors' meeting was not mandatory for purposes of generating a Resolution, it would appear to have overlooked the express provisions of Article 41 that required a Resolution so generated to be made '**under the hands of all the directors**.' This requirement is reinforced in Regulation 106 of Table A that was explicitly adopted into the MEMARTS by Article 41 and requires a Resolution generated in the absence of a meeting to be '**signed by all the directors for the time being entitled to receive notice of a meeting of the directors**.' I would therefore allow *Ground 1* of the Appeal.

Ground 2: *The learned trial judge erred in law and in fact in holding that* 'I am therefore unable to find that the loan advanced to Mr. Ndyabagye was not for the benefit of his company or that the resolution of the company was wrongly used by the bank to provide credit facilities to Mr. Ndyabagye.'

39. The Appellants opine that the Respondent Bank acted beyond the confines of the Special Resolution when it advanced credit to the Second rather than the First Appellant on the premise that he (and not the Company) held an account with it. It is the contention that whereas the Resolution authorized borrowing by the Company in accordance with Article 3(ll) of the Memorandum of Association, the Mortgage Deed wrongly designated it as a surety or guarantor of the credit facility, a function provided for under Article 3(bbb) of the Memorandum. The Appellants thus argue that, in its misapprehension of the Resolution, the Respondent Bank extended the overdraft to and for the benefit of the Second

Appellant not the Company; the latter's role being restricted to that of a surety not the borrower. Citing the case of **Fredrick J. K. Zaabwe v Orient Bank Ltd & 5 Others (2007) 1 ULR 98 at 113**, it is opined that the Trial Court's reliance on a technicality to decide otherwise was untenable. In that case, it was held:

> **If a person is to be deprived of his property, then substantive justice requires that the law should be followed in its entirety. To hold otherwise is to allow one technicality to defeat justice.**

40. Conversely, the Respondent contends that the credit advanced to the Second Appellant was in fact for the First Appellant's use, urging that a special resolution is the evidence required to prove that a loan has been acquired for a company. Citing section 91 of the Evidence Act that supposedly places more weight on documentary than oral evidence, it is argued that the Special Resolution in this case was sufficient evidence that the loan secured from the Respondent Bank was for the benefit of the First Appellant Company. The Respondent supports the Trial Court's finding that in so far as the advanced credit was intended to meet working capital requirements for a shop in Mbarara[11] and the First Appellant's main objective was the business of general merchants,[12] the Second Appellant admitting in cross examination that he did store some of his goods in the said property; the loan advanced to the Second Appellant was indeed for the benefit of the First Appellant. It further endorsed the Trial Court's deference to the explanation of Mr. Reghu Nair (the Bank's Head of Credit) that the overdraft sought could only be applied to the Second Appellant because, unlike the First Appellant, he held an account with the Bank.

41. To my mind, having found under the preceding ground of appeal that the Resolution dated 1st February 1996 was defective, that should have been the end of the matter. However, the Appellants raise what appears to be alternative arguments about the actions taken by the Respondent Bank in respect of the now discredited Resolution. I shall therefore consider *Ground 2* (as indeed the rest of this Appeal) on its merits. The gist of the complaint here is that the Respondent Bank acted beyond the contours of the Special Resolution itself when it advanced credit to the Second rather than the First Appellant;

[11] See Exhibit 4.
[12] See Article 3(a) of the Memorandum of Association.

and designated the company as a surety or guarantor of the credit facility. The Appellants specifically took issue with the following conclusion of the Trial Court:

> *I am therefore unable to find that the loan advanced to Mr. Ndyabagye was not for the benefit of his company or that the resolution of the company was wrongly used by the bank to provide credit facilities to Mr. Ndyabagye.*

42. In arriving at that conclusion, the court went to great lengths in its consideration of the Resolution and supporting credit documentation. Of the Special Resolution, it observed:

> *The resolution is clear that the company did resolve to offer the title as security for an overdraft. As to whether the overdraft was to be advanced to Mr. Ndyabagye the resolution was silent.*

43. I would agree with the Trial Court that the main import of the Resolution was to offer the First Appellant's property at Plot 94 High Street Mbarara as security for an overdraft. I do also agree with the finding that the Resolution was completely silent on Mr. Ndyabagye being the beneficiary of the overdraft. However, in response to the assertion that the credit extended was not for the Company but for Mr. Ndyabagye's personal use, the Trial Court held:

> *The credit facility letter issued by Crane Bank (Exh. 4) proved that the purpose for which the money was advanced to Mr. Ndyabagye was "to meet working capital requirements for a shop at Mbarara." Coincidentally the main object of Necta (U) Ltd was stated in clause 3(a) of the Memorandum of Association as the establishment and carrying on of the business of general merchants, and to import, export and sell either by wholesale or retail, various kinds of goods and merchandise. Indeed in his cross examination by counsel for Mr. Tumwebaze, Mr. Ndyabagye admitted that at Plot 4 High Street Mbarara there were stores in which he kept his goods.*

44. I am constrained to point out that the credit facility letter that was admitted in evidence as Exhibit 4 pertains solely to the Second Further Charge extended to the Second Appellant. Contrary to the position adopted by the Trial Court, it does not readily explain the Bank's reliance on the First Appellant's Resolution to advance credit to a third party in the person

of the Second Appellant. Be that as it may, the Trial Court apparently drew particular inspiration for its now contested decision – that the Respondent Bank correctly advanced credit facilities to Mr. Ndyabagye for the benefit of the Company – from its deference to the evidence of Mr. Nair. It observed:

> *However, the exact reason why the overdraft was advanced to John Ndyabagye and not Necta (U) Ltd was stated in Reghu Nair's statement dated 28/09/2004 in HCCS 595 and 598 of 1998 and Misc. Application No. 504 of 1998. That statement was attached to his supplementary affidavit filed in this application as Annexure "A." In paragraphs 2 and 3 Mr. Nair explained that though Mr. Ndyabagye was a customer of Crane Bank, Necta (U) Ltd was not. The bank therefore could not offer an overdraft to Necta (U) Ltd which did not run an account with her. The "overdraft sought" referred to in the resolution of 1/02/1996 therefore could not be in favour of the company; it had to be in the names of John Ndyabagye their customer or else nothing would have been advanced.*

45. With the greatest respect, I am unable to agree with the Trial Court's conclusions on this issue. Even assuming that the validity of the Resolution had not been impeached, I am hard pressed to appreciate why the Bank purported to act on it to advance credit to the Second Appellant. I find no nexus between the Company's objective of carrying out the business of general merchants and the advancement of credit to the Second Appellant for working capital – especially given the court's acknowledgement that he too was engaged in trade hence raising the supposition that he could have needed credit in his own right. That observation in itself would buttress the Second Appellant's affidavit evidence that he applied for the overdraft facility not as a director of or on behalf of the First Appellant Company but in his own right as an account holder in the Respondent Bank. Indeed, the fact of his having been an account holder in the Respondent Bank was corroborated by no less than Mr. Nair, its Head of Credit. I therefore find no factual basis for the conclusion by the Trial Court that the credit had been advanced to the Second Appellant for the benefit of the First Appellant Company.

46. For the avoidance of doubt, the impugned Resolution is reproduced below.

SPECIAL RESOLUTION

In pursuance of an overdraft facility from Crane Bank Ltd, the Directors of Necta (U) Ltd, on this day of 1st February 1996, resolve to offer the property title for Plot 94 High Street Mbarara to Crane Bank as the security for the overdraft sought.

Signed

John Ndyabagye	*Elizabeth Ndyabagye*
Chairman	*Secretary*

47. A literal construction thereof would suggest that the First Appellant Company resolved to pledge its property at Plot 94 High Street Mbarara as security for an overdraft it sought with the Respondent Bank. Not only was it on the Company's letter head, the Resolution was silent on any other beneficiary. Interpreting the first line thereof against that background, it seems to me that it was Company itself that was '*in pursuance of*' the overdraft facility for which its property had been pledged as security. To that extent, the Resolution is couched in such terms as would support the Appellants' argument in submissions that it sanctioned the extension of credit to the First Appellant Company and not the Second Appellant, as transpired. However, it discredits the Second Appellant's evidence that there was no resolution authorizing the First Appellate Company to borrow, and the First Appellant Company did not apply for, execute or receive any funds under the overdraft facility in issue presently. Whereas no credit was apparently extended to it under the overdraft, by its Resolution above, the Company did evidently sanction the pledging of its security in pursuance of an overdraft it either sought or intended to seek. An overdraft does amount to credit and, therefore, borrowing.

48. The Second Appellant would appear to have sought by his evidence to negate the relevance of the Resolution to the overdraft facility, attesting to having personally sought and obtained for his benefit an overdraft from the Respondent Bank in the total sum of Ushs. 70,000,000/=. I revert to the questions arising from the Mortgage Deed later in this Judgment. For present purposes, however, I find no evidence to support the Trial Court's finding that the credit extended to the Second Appellant was for the benefit of the First Appellant Company, or that the Resolution was correctly used by the Respondent Bank

to extend credit facilities to the Second Appellant. I do therefore resolve *Ground 2* in the affirmative.

Grounds 3 & 4: *The learned trial judge erred in law and in fact in holding that* 'the company knowingly sanctioned the granting of the loan to Mr. Ndyabagye' ***and*** 'as to whether another or other resolutions ought to have been drawn to sanction the further charge and mortgage and the 2nd further charge and mortgage, I do not share in the view that this was necessary.'

49. Under *Ground 3* of the Appeal, it is the Appellants' contention that authority should have been secured from the Company before it could stand as surety for the loan advanced by the Respondent Bank to the Second Appellant. Such authorization should have been secured either in a directors' meeting or, failure of which, by a Resolution signed by all the directors. Neither option was pursued. On the other hand, the Respondent proposes that sufficient evidence of this is to be found in the Resolution given that it was on the Company's letter head and signed by two directors. It is argued that the Appellants did not discharge the evidential burden upon them to prove that there were any other directors by production of particulars of directors (Form 7) or an ordinary resolution of appointment of directors therefore recourse cannot be made to Article 41 of the MEMARTS. The Trial Court rendered itself as follows:

> *As will become apparent in the discussion about the validity of the instruments of mortgage, the company knowingly sanctioned the granting of the loan to Mr. Ndyabagye.*

50. Although the above finding was pegged to the validity of the Mortgage Deed and the further charges made thereunder, I propose to deal with the question of the authority granted by the Special Resolution under *Grounds 3* and *4*; separately from the issue of the validity of the mortgage instruments that arises under *Grounds 5, 6* and *7.*

51. To begin with, having held under *Ground 1* that the Appellants duly discharged the evidential burden upon them with regard to the Company's directors, I respectfully find no merit in the Respondent's argument to the contrary. Admittedly, the Appellants could have furnished particulars of directors or an ordinary resolution of appointment of directors. However, given that Regulation 75 of Table A makes provision for signatories

to a company's memorandum of association to be its first directors, Form 7 or a resolution cannot be deemed to be the only proof of directors. I am therefore disinclined to abide the Respondent's contrary propositions. Secondly, I find nothing in the Resolution that could have authorized the First Appellant Company to act as surety for any credit facility. A company's resolutions derive their legitimacy from and must of necessity comply with its MEMARTS. Article 3(bbb) of the First Appellant's Memorandum of Association spells out the following objective of the company:

> To give guarantee and/ or become sureties for any person or persons, firm or firms, corporation or corporations whether incorporated for moneys raised and/ or borrowed by him or them from any person or firm or corporation or for any purpose whatsoever...

52. Regulation 79(1) of Table A in turn authorizes the directors of a company to mortgage its property as security in the following terms:

> The directors may exercise all the powers of the company to borrow money, and to mortgage or charge its undertaking, property and uncalled capital, or any part of it, and to issue debentures, debenture stock, and other securities whether outright or as security for any debt, liability or obligation of the company or of any third party ...

53. In the impugned Resolution, the company pledged its property as security, and made no reference whatsoever to its standing as surety. Even if per chance it had not been the party that sought the overdraft thereunder, that Resolution did not in any way authorize the Company to stand as surety. On the other hand, Regulation 79(1) of Table A mandates the directors collectively as a Board to pledge the company's property as security for a debt. Board decisions are taken by resolution. To that extent, I am inclined to agree with the Appellants that such a decision would necessitate a Board Resolution. The impugned Resolution sought to achieve that but for the inherent defects therein as highlighted under my consideration of *Ground 1* hereof. More importantly, I did in my interrogation of *Ground 2* find that the Resolution did not authorize the extension of credit to the Second Appellant and was thus incorrectly used or relied upon by the Respondent Bank for that purpose. It follows then, and I have found no contrary evidence on record, that the Company did not by resolution knowingly sanction the extension of credit to the Second Appellant, as portended by the Trial Court. Accordingly, *Grounds 3* is allowed.

54. With regard to *Ground 4*, the Appellants contest the Trial Court's finding that the two directors having endorsed the mortgage instruments, there was no need for additional resolutions in respect of the additional borrowing. It is the contention that the Resolution of 1st February 1996 sanctioned 'an overdraft facility' not the additional credit that was extended to the Second Appellant and was similarly restricted to the initial mortgage of the company's property, making no provision for further mortgages and charges over its property. Articles 35 and 36 of the Company's MEMARTS were cited to delineate the directors' borrowing powers. Having reproduced those articles earlier herein, I do not deem it necessary to reproduce them here. It will suffice to note that in the Appellants' opinion, the further charges on the Company's property and the additional credit they represent were unauthorized and illegal, therefore the First Appellant was not liable for them.

55. Conversely, the Respondent supports the Trial Court's findings on this issue, arguing that there was no need for the company to sanction the further charges, the original Resolution authorizing borrowing having been valid. The Trial Court's conclusion on the matter was as follows:

> *As to whether another or other resolutions ought to have been drawn to sanction the further charge and mortgage and the 2nd further charge and mortgage, I do not share in the view that this was necessary.*

56. What would be the scope of the authority granted by the Resolution in question in the circumstances? I find apposite direction from the case of **Irvine v The Union Bank of Australia 2 App Cas 366**. Two separate lines of credit were extended under letter of credit No. 141 and 153 respectively. At a general half-yearly meeting of the company held on 13th October 1869, the directors' report for the period ending 30th June 1869 was ratified by the members of the company without reference to the letter of credit No. 153. Of the use of a specific authorization (ratification) to undertake similar albeit futuristic acts, the court observed:

> **There is a wide distinction between ratifying a particular act which has been done in excess of authority and conferring a general power to do similar acts in future. This distinction must be borne in mind in considering whether the ratifications at the half-yearly meetings of**

particular acts done previously to those meetings gave validity to acts of a similar character done subsequently. ... Their Lordships are of opinion that the ratification at a half-yearly meeting of a particular act in excess of authority would not extend the authority of the Directors so as to authorize them to do similar acts in future.

57. The court then held:

The Directors did not exceed the authority conferred upon them by the articles of association by obtaining the letter of credit; the excess of authority was in taking up upon it a sum in excess of the amount which they were authorized to borrow. .... Even if the adoption of the report mentioning the credit for 10,000l. authorized the borrowing at one time of the whole amount (which their Lordships are disposed to think it did not), it by no means follows that it authorized the renewal of the letter of credit and the acting upon it after the time originally limited had expired. There was nothing in the report to lead to the supposition that the Directors had any intention to renew the letter of credit or to borrow money upon it after the 29th March 1869.

58. Hence, in the absence of requisite authorization for the directors' action to obtain the letter of credit No. 153 after the letter of credit No. 141 had been paid off, the claim for 5,000l. was rejected. The foregoing decision underscores the vitality of the strict adherence to the express terms of corporate authority, whether by way of Board resolutions or ratifications of directors' decisions by the members of a company. In the matter before this Court, the Resolution in issue neither sanctioned the additional credit that was extended to the Second Appellant nor the further mortgages and charges over its property. I would therefore abide the position that the additional charges on the First Appellant Company's property and the further overdrafts they represent were unauthorized and illegal. *Ground 4* is thus resolved in the affirmative.

<u>Grounds 5, 6 & 7</u>: *The learned trial judge erred in law and in fact in holding that* 'my understanding of S. 148(1) RTA is that the parties, i.e the persons to be bound by the instrument or POA are required to append their signatures in Latin character on the instrument. The rule does not necessarily apply to witnesses as long as they indicate that they fall within the ambit of those prescribed by S. 147(1) of the RTA' ***and*** 'the seal of Necta (U) Ltd was affixed to the deed' *dated 24th July 1996.' The learned trial judge* (further) *erred in law and in fact in holding that the second further charge and mortgage dated 8th July 1997 signed not in Latin character by only one director and bearing only part of a stamp not disclosing full name was valid.*

59. These grounds of appeal pertain to the validity of the mortgage instruments. In their submissions under *Ground 5*, the Appellants only canvassed that aspect of the Trial Court's conclusion that pertained to section 148 of the Registration of Tiles Act (RTA), Cap. 230. The trial judge interpreted that legal provision to suggest that parties to an instrument are required to append their signatures on it in Latin character. It is the Appellants' contention that section 148 is inapplicable where the party to an instrument is a corporation, the correct legal provisions for that purpose being section 132 of the RTA and (for present purposes) Article 46 of the Articles of Association. I reproduce the cited provisions below.

<u>Section 132(1) of the RTA</u>

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.

<u>Section 148 of the RTA</u>

No instrument or power of attorney shall be deemed to be duly executed unless either –

(a) The signature of each party to it is in Latin character; or

54. With regard to *Ground 4*, the Appellants contest the Trial Court's finding that the two directors having endorsed the mortgage instruments, there was no need for additional resolutions in respect of the additional borrowing. It is the contention that the Resolution of 1st February 1996 sanctioned 'an overdraft facility' not the additional credit that was extended to the Second Appellant and was similarly restricted to the initial mortgage of the company's property, making no provision for further mortgages and charges over its property. Articles 35 and 36 of the Company's MEMARTS were cited to delineate the directors' borrowing powers. Having reproduced those articles earlier herein, I do not deem it necessary to reproduce them here. It will suffice to note that in the Appellants' opinion, the further charges on the Company's property and the additional credit they represent were unauthorized and illegal, therefore the First Appellant was not liable for them.

55. Conversely, the Respondent supports the Trial Court's findings on this issue, arguing that there was no need for the company to sanction the further charges, the original Resolution authorizing borrowing having been valid. The Trial Court's conclusion on the matter was as follows:

> *As to whether another or other resolutions ought to have been drawn to sanction the further charge and mortgage and the 2nd further charge and mortgage, I do not share in the view that this was necessary.*

56. What would be the scope of the authority granted by the Resolution in question in the circumstances? I find apposite direction from the case of **Irvine v The Union Bank of Australia 2 App Cas 366**. Two separate lines of credit were extended under letter of credit No. 141 and 153 respectively. At a general half-yearly meeting of the company held on 13th October 1869, the directors' report for the period ending 30th June 1869 was ratified by the members of the company without reference to the letter of credit No. 153. Of the use of a specific authorization (ratification) to undertake similar albeit futuristic acts, the court observed:

> There is a wide distinction between ratifying a particular act which has been done in excess of authority and conferring a general power to do similar acts in future. This distinction must be borne in mind in considering whether the ratifications at the half-yearly meetings of

> particular acts done previously to those meetings gave validity to acts of a similar character done subsequently. ... Their Lordships are of opinion that the ratification at a half-yearly meeting of a particular act in excess of authority would not extend the authority of the Directors so as to authorize them to do similar acts in future.

57. The court then held:

> **The Directors did not exceed the authority conferred upon them by the articles of association by obtaining the letter of credit; the excess of authority was in taking up upon it a sum in excess of the amount which they were authorized to borrow. .... Even if the adoption of the report mentioning the credit for 10,000l. authorized the borrowing at one time of the whole amount (which their Lordships are disposed to think it did not), it by no means follows that it authorized the renewal of the letter of credit and the acting upon it after the time originally limited had expired. There was nothing in the report to lead to the supposition that the Directors had any intention to renew the letter of credit or to borrow money upon it after the 29th March 1869.**

58. Hence, in the absence of requisite authorization for the directors' action to obtain the letter of credit No. 153 after the letter of credit No. 141 had been paid off, the claim for 5,000l. was rejected. The foregoing decision underscores the vitality of the strict adherence to the express terms of corporate authority, whether by way of Board resolutions or ratifications of directors' decisions by the members of a company. In the matter before this Court, the Resolution in issue neither sanctioned the additional credit that was extended to the Second Appellant nor the further mortgages and charges over its property. I would therefore abide the position that the additional charges on the First Appellant Company's property and the further overdrafts they represent were unauthorized and illegal. *Ground 4* is thus resolved in the affirmative.

Grounds 5, 6 & 7: *The learned trial judge erred in law and in fact in holding that* 'my understanding of S. 148(1) RTA is that the parties, i.e the persons to be bound by the instrument or POA are required to append their signatures in Latin character on the instrument. The rule does not necessarily apply to witnesses as long as they indicate that they fall within the ambit of those prescribed by S. 147(1) of the RTA' ***and*** 'the seal of Necta (U) Ltd was affixed to the deed' *dated 24th July 1996.' The learned trial judge* (further) *erred in law and in fact in holding that the second further charge and mortgage dated 8th July 1997 signed not in Latin character by only one director and bearing only part of a stamp not disclosing full name was valid.*

59. These grounds of appeal pertain to the validity of the mortgage instruments. In their submissions under *Ground 5*, the Appellants only canvassed that aspect of the Trial Court's conclusion that pertained to section 148 of the Registration of Tiles Act (RTA), Cap. 230. The trial judge interpreted that legal provision to suggest that parties to an instrument are required to append their signatures on it in Latin character. It is the Appellants' contention that section 148 is inapplicable where the party to an instrument is a corporation, the correct legal provisions for that purpose being section 132 of the RTA and (for present purposes) Article 46 of the Articles of Association. I reproduce the cited provisions below.

Section 132(1) of the RTA

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 148 of the RTA

No instrument or power of attorney shall be deemed to be duly executed unless either –

(a) The signature of each party to it is in Latin character; or

(b) A transliteration into Latin character of the signature of any party whose signature is not in Latin character and the name of any party who has affixed a mark instead of signing his or her name are added to the instrument or power of attorney by or in the presence of the attesting witness at the time of execution, and beneath the signature or mark there is inserted a certificate in the form of the Eighteenth Schedule to this Act.

Article 46 of the Articles of Association

The Directors shall provide for the safe custody of the seal, which shall only be used by the authority of the Directors and every instrument to which the seal shall be affixed shall be signed by a Director and shall be countersigned by the Secretary or by a second Director or by some other person appointed by the Directors for that purpose. *(my emphasis)*

60. The Appellants further opine that, contrary to the Trial Court's finding, the Company's seal was not affixed to the Mortgage Deed, neither were the signatures appended to the instrument in Latin character as required by section 148 of the RTA.[13] They relied on the decision in **General Parts (U) Limited v Non-Performing Assets Recovery Trust (NPART), Civil Appeal No. 5 of 1999** (Supreme Court), where it was held (per Mulenga JSC):

> **To my understanding, the effect of those provisions, as far as the instant case is concerned, is that 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, signing the document in the manner prescribed in section 156 set out above. ... The names of the signatories are not added. 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**

[13] Ground 6.

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).

61. On the same premise, they fault the Trial Court for its finding that the Second Further Charge complied with the RTA, Companies Act and the Company's Articles of Association. It is argued that whereas a stamp was affixed to the instrument, the Company's name was not stated in full; only one person designated as a director signed it, and therefore the document was not legally executed nor could it be enforced as against the First Appellant.[14]

62. Conversely, arguing *Grounds 5, 6* and *7* together, the Respondent contends that the signatures under scrutiny are valid and, unlike the **General Parts (U) Ltd** case (supra), the mortgage was authorized by a duly executed resolution. In the Respondent's estimation, the mortgage, further charge and additional further charge were all duly executed under the First Appellant's stamp or seal, and witnessed by the Second Appellant and Mrs. Ndyabagye as directors of the Company. It supports the Trial Court's finding that '*an instrument sealed by the officers of a company is excluded from those that require the persons listed in s. 147(1) of the RTA to be attesting witnesses*' on the premise that if that were not so it would mean that the provisions of s. 113 of the Companies Act (the applicable law at the time), which reflects the material provisions of Article 46 of the Company's Articles of Association as reproduced above, would be overridden by section 147. In that regard, the Trial Court observed:

Moreover, regarding the attestation of instruments and powers of attorney, s. 147(1) of the RTA has its own requirements that are separate and distinct from

[14] Ground 7.

those in s.132 of the Companies Act. It is my view that an instrument sealed by the officers of a company is excluded from those that require the persons listed in s.147(1) of the RTA to be attesting witnesses. If that was not so it would mean that the provisions of s.113 of the Companies Act which require the seal to be affixed by a director and countersigned by the secretary, a second director or some other person appointed by the directors for that purpose would be overridden by s.147 RTA.

63. I am constrained to quickly dispose of some obvious errors in that position. To begin with, section 132 of the Companies Act has nothing to do with attestation or signing of instruments, the correct section for that purpose being section 132 of the RTA. Similarly, the legal provision that addresses the company seal is Regulation 113 of Table A (the First Schedule to the Companies Act) and not section 113 of the present or defunct Companies Act, as proposed by learned Counsel for the Respondent. It is particularly incorrect to suggest that Regulation 113 requires a seal to an instrument to be affixed by a director and countersigned by the secretary, another director et al. That provision categorically provides for the signatures of the designated persons as an additional measure where a seal has been affixed to an instrument.

64. Thus, placing the foregoing legal provisions in proper perspective, section 132(1) of the RTA literally provides for the substitution of a signature with the seal of a corporation in dealings with land, including mortgages. Article 46 of the First Appellant Company's MEMARTS, which mirrors regulation 113 of Table A, then outlines the manner in which that Company's seal may be used. Where it is affixed to an instrument, it is to be accompanied by the signature of a director and countersigned by the company secretary, another director or any other person appointed by the directors for that purpose. On the other hand, section 148(a) of the Act simply requires the signature of parties to any instrument to be in Latin character. Quite clearly, whereas section 148 does indeed peg the validity of instruments on the parties' signatures being in Latin character; where a corporate entity is party to an instrument, section 132 makes provision for the signature(s) designated in section 148 to be substituted with the company's common seal. In my view, the two legal provisions are not necessarily exclusive of each other. It would not be inconceivable, for instance, for a corporate entity to grant power of attorneys to directors or any other persons to execute an instrument without recourse to the company's seal.

This indeed is the import of the observation in **Fredrick J. K. Zaabwe v Orient Bank Ltd & 5 Others** (supra) that '**the company had opted for signatures instead of the company seal as would have been permitted under section 132 of the R.T.A.**'

65. I do respectfully abide the decision in **General Parts (U) Limited v NPART** (supra), where in interpreting sections 141 and 156 of the now repealed Registration of Titles Act, Cap. 205 (which are the equivalent of sections 132 and 148 of the current Act), the Supreme Court held that '**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, signing the document in the manner prescribed in section 156** (equivalent of section 148 of the RTA). That decision would appear to suggest that the affixing of a common seal under section 132 (then section 141) was sufficient for purposes of a corporate entity that is signatory to a mortgage deed.

66. Nonetheless, given the succinct provisions of section 21 of the Companies Act, the First Appellant Company in the instant case was obliged to comply with its MEMARTS. The provisions of Article 46 of the Company's Articles of Association are such that recourse to the company seal was to be mandatorily accompanied by the signatures of a director and secretary, other director or other person designated by the Board for that purpose. These are vital components of the instrument execution process. The Article is couched in such terms as would suggest that the signatures are as much a part of an instrument's execution as the Company seal. They thus do not represent witness attestation as envisaged under section 147(1) of the RTA but, rather, are co-execution measures. To that extent, the signatures envisaged under Article 46 would represent the corporate party's signatures as envisaged under section 148 of the RTA and had to abide the requirement therein for them to be in Latin character. I would therefore disallow *Ground 5* of the Appeal.

67. *Ground 6*, on the other hand, comprises two legs – the omission to affix the Company's seal to the Further Charge of 24th July 1996, the provisions of section 132 of the RTA notwithstanding, and the non-conformity of the appended signatures to Latin character as required by section 148 of the RTA. *Ground 7* also questions the validity of the Second Further Charge for bearing a stamp that did not reflect the Company's name in full, and

was only signed by one person designated as a director. The Mortgage Deed in question was admitted in evidence as Exhibit 1, while the two Further Charges in reference were adduced as Exhibits 2 and 3 respectively. I must point out here that the second leg to *Ground 6* of this Appeal was not captured in the memorandum of appeal, only arising in submissions. This approach to pleadings offends the requirement in rule 86 of the Court of Appeal's Rules of Procedure for grounds of appeal to specify with due precision '**the points which are alleged to have been wrongfully decided**.' It is bad practice, therefore, for a party to introduce issues in submissions that are not aptly reflected in its ground(s) of appeal. Be that as it may, given that the Respondent did have the opportunity to respond to the matter, I will address that ground of appeal holistically.

68. I carefully considered the Further Charges that are specifically in issue presently. The final clause of the Further Charge dated 24th July 1996 makes reference to the common seal of Necta (U) Limited having been affixed thereto but what is in fact depicted is a stamp titled 'Executive Director Necta (U) Limited.' It does also depict two signatures against the words 'director.' The Second Further Charge, meanwhile, bears one signature attributed to a director, another signature attributed to an advocate and a stamp bearing the Company's name. In respect of the question of a company seal viz a viz a stamp, the Trial Court held:

> *The definition given to a seal under Stroud's Judicial Dictionary is that it is an impression made with ink, by means of a wooden block and a stamp is such an instrument. I am fortified in coming to that conclusion here because in the case of Zaabwe, Katureebe JSC used the terms "seal" and "stamp" interchangeably when he observed that:*
>
> > *'the names of the signatories are not given, nor their capacity to sign on behalf of the company. One cannot tell whether they are directors, secretary or even officers of the company at all. There is no company seal or stamp seen.' (sic)*

69. With utmost respect, it seems to me that the context within which the terms seal and stamp were used by his lordship Katureebe, JSC (as he then was) in no way denotes the meaning attributed to them by the Trial Court, as shall be illustrated later in this judgment. Nonetheless, even if a company stamp were presumed to be akin to a common seal, an

Executive Director's stamp or a stamp attributed to the office of an Executive Director cannot by any shade of imagination amount to a stamp of the Company. Without belabouring the point, therefore, a stamp that is attributed to an office of the company rather than the company itself undoubtedly cannot be deemed to represent a common seal.

70. With regard to the signatures, I respectfully abide the decision in **General Parts (U) Limited v NPART** (supra). In that case, like in the one before this Court, the instrument in question bore two scribbled signatures supposedly attributed to the company's directors and the names of the signatories were not added. To compound matters, in that case as in this one, there was no proof of requisite authority to execute the mortgage on behalf of the company or, indeed, any indication as to whether they signed as the company's attorneys appointed for purposes of the RTA. Consequently, the mortgage was held to be 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**.' The Supreme Court thus sought to enforce the requirement in the current section 146(1) of the RTA for land transactions by 'third parties' to be duly anchored in a power of attorney by the proprietor of the land. Section 146(1) reads:

> **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.**

71. In the present Appeal, there was no evidence on record that any such power(s) of attorney had been granted to the persons that executed the Further Charge. On the contrary, in re-examination, the Second Appellant did clarify that the First Appellant Company did not extend to him powers of attorney in respect of the mortgaged property. The execution of the Further Charge in the absence of the requisite power(s) of attorney was a fundamental defect in the said instrument. Additionally, vide its decision in the **General Parts (U) Limited** case, the Supreme Court would appear to have considered signature scribblings in the absence of the names of the instrument's signatories to contravene section 148 (then section 156) of the RTA. That being the case in the present Appeal, I would similarly

find that the scribblings that appeared on the Further Charge in the absence of the signatories' names did violate the requirement in section 148 of the RTA for signatures to be in Latin character. Accordingly, *Ground 6* of the Appeal is allowed.

72. I now turn to the Second Further Charge, which depicted one signature attributed to a director, another signature attributed to an advocate and (unlike the Further Charge) bore a stamp bearing the Company's name. To my mind, whatever definition of a seal were adopted, a corporate seal and stamp cannot mean one and the same thing given their usage. *Black's Law Dictionary*[15] defines a common seal as '**a seal adopted and used by a corporation for authenticating its corporate acts and executing legal instruments.**' Thus, documents that need to be executed as deeds (as opposed to simple contracts) are legally executed under the company's common seal. A company stamp, on the other hand, is not a legal requirement but its usage has evolved from the need by corporate entities to give a semblance of officialdom to documents that would not legally require an official company seal. Quite clearly, a stamp cannot be a substitute to the common seal as recognized at law, neither would it have the effect of authenticating a document to which it is affixed. In the instant case, therefore, the stamp affixed to the Second Further Charge was of no legal value to that document. It neither authenticated nor validated it. The presence of a stamp notwithstanding, the Second Further Charge had no seal affixed to it. In the absence of a power of attorney authorizing the persons that purported to execute it, coupled with the fact that their signatures were indiscernible scribbles, that instrument suffers the same fate as the (first) Further Charge. In the result, I am satisfied that the Second Further Charge was defective for non-compliance with sections 146(1) and 148 of the RTA. *Ground 7* is resolved in the affirmative.

[15] Second Edition.

Grounds 8, 9 & 10: *The learned trial judge erred in law and in fact in holding that the sale of the mortgaged property under the mortgage deeds was valid; that:* 'I therefore find that though no written notice was specifically addressed to the plaintiffs, 2 written notices were issued to the whole world in the newspapers ... The notices complied with the provisions of the RTA,' *and that* 'The complaint that the sale took place under a mortgage that was not properly executed cannot stand for the further charge and mortgage and the 2nd further charge and mortgage were duly executed and registered.'

73. In the Appellants' estimation, the further charges and mortgages having been defective, the sale of the mortgaged property thereunder was invalid. It is on that premise that they similarly contest the Trial Court's finding that '*the complaint that the sale took place under a mortgage that was not properly executed cannot stand for the further charge and mortgage and the 2nd further charge and mortgage were duly executed and registered.*' With regard to the notice of sale in this case, it is opined that although clauses 3(b) and 4 of the Second Further Charge prescribed payment by the surety and borrower respectively upon demand in writing by the Bank, no such notice was served upon them. That omission by the Bank was also opined to contravene sections 116 and 117 of the RTA, the contention being that failure of the requirements of a notice under both the security documents and the law invalidated the sale and rendered it illegal.

74. Conversely, the Respondent supports the Trial Court's finding that there was no need to issue three months' notice before effecting the sale as section 116 of the RTA did not specify the duration of a notice thereunder, such period left to the mortgage terms. Acknowledging that a demand for vacant possession should ordinarily be preceded by a demand notice for payment, reference was made to notices that had been admitted in evidence as Exhibits 36 and 37 as proof of such demand for payment having been made but ignored. That documentary evidence was purportedly supported by Mr. Reghu Nair's evidence by way of a witness statement and cross examination, as well as the Second Appellant's concession under cross examination that he did see the advertisement for sale. In the Respondent's opinion, the notices referred to above did comply with the cited provisions of the RTA.

75. On its part, the Trial Court did not rely on the notices produced under Exhibits 36 and 37. Rightly so, in my view, since they pre-dated the consent Judgment in **Consolidated Civil Suit 595/598 of 1998**, which is dated 22nd February 1999. They had therefore been overtaken by events. However, the contested property sale did not transpire under the consent decree either, that process having been reportedly halted by the Respondent Bank itself by a letter dated 11th November 2000 by M/s Freight Auctioneers. In deciding that notices in respect of the sale had been issued to the whole world in newspapers, the Trial Court *inter alia* relied on a notice, the material provisions of which I reproduce below.

> *"We shall sell by Public Auction/ Private Treaty the property and all the developments comprised in Leasehold 363 Folio 18 Plot 94 High Street Mbarara unless the debtor(s) pays all the monies due to the Creditor, Lawyers, our fees and costs of execution within 30 days from the date of this publication.*
>
> *Note: All tenants should vacate the said premises within seven days from the date of this publication ...."*

76. I commence my interrogation of the present issues from the premise that my findings on the preceding grounds of appeal were that the two further charges were defective for non-compliance with sections 146(1) and 148 of the RTA. In **Zaabwe v Orient Bank Ltd & Others** (supra), citing with approval the decision in **General Parts (U) Limited v NPART** (supra), defects of this nature were held to render the mortgage invalid. It follows then that the ensuing sale of the mortgaged property would similarly be illegal and thus a nullity. This principle was aptly expounded in **Benjamin Leonard MacFoy v United Africa Company Limited (1962) AC 152** as follows (per Lord Denning):

> **If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad.**

77. In the instant case, in so far as the property that was sold had been pledged as security in respect of an invalid mortgage, the purported sale would similarly suffer the fate of invalidity. The Court cannot be seen to sanction an illegality. I would therefore resolve *Grounds 8* and *10* in the affirmative.

78. Whereas my finding on the foregoing grounds of appeal should dispose of any contestations as to the validity of the property sale that is in issue presently, for completion, I shall consider *Ground 9* on its merits. It essentially challenges the Trial Court's finding that two written notices 'issued to the whole world' were in fact sufficient notice upon the Appellants as envisaged under the Further and Second Further Charges, and the applicable provisions of the RTA. For ease of reference, it is necessary to reproduce the pertinent clauses of those Charges. Clause 3(b) of both the Further Charge and the Second Further Charge makes provision for demand notices as follows:

> THE SURETY HEREBY COVENANTS AND CONFIRMS with the Bank that it will on demand in writing made to it by the Bank pay to the Bank or to one of the cashiers of such a Bank (appointed by the Bank) the loan (together with such interest thereon) AND that the loan bears compound interest at the rate payable thereon and shall be debited monthly as aforesaid. *(emphasis mine)*

79. Clause 4(i) then provides for the sale of the property as follows:

> At any time after payment of the monies hereby secured has been demanded and the Borrower has made default in paying the same the Bank may in addition to any other powers enjoyed by it hereunder or under the general law and without previous notice to or concurrence on the part of the Borrower:-
>
> (i) Sell or concur with any person or persons in selling the mortgaged property or any part or parts thereof in one or more lots by public auction or private treaty and subject to such terms and conditions as the Bank shall think it fit with power to rescind or vary any contract for sale or resale in manner aforesaid without being liable for any loss occasioned thereby and the Borrower hereby consents to the carrying out of any such sale or resale by private treaty.

80. In my judgment, there is a clear distinction between the letter and import of the two provisions. As encapsulated in the then section 117 of the RTA, clause 3(b) renders the credit facility thereunder payable on demand, such demand in writing to also constitute a demand notice in respect of payments that are in default for purposes of the then section 116 of the same Act. Obviously, a notice under that clause would of necessity be personally addressed to the borrower from whom payment is sought. Clause 4(i), on the other hand, addresses a scenario where a borrower remains in default after a demand notice has been served upon him/ her personally and the Bank seeks to exercise its right

of foreclosure. That provision requires no further notice to the borrower while the former necessitates personal notice of demand upon him/ her. It is against that yardstick that I would consider the notices relied upon by the Trial Court in deciding that a written notice '*issued to the whole world*' did comply with the terms of the Further Charge and the Second Further Charge, as well as the applicable provisions of RTA.

81. With respect, I am not inclined to agree with the Trial Court's findings. My construction of section 117 of the RTA is that the demand for payment of the loan could contemporaneously serve as a demand notice in the event of default. It would thus be in writing and addressed to the borrower in person. The '*notice to the whole world*' in this case did not abide that description or purpose. In my understanding, it primarily represents a clear recourse to foreclosure as delineated in clause 4(i) of the Charges, provision for payment by the debtor being perfunctory and secondary to the notice of vacant possession and sale. In my considered view, it does not represent the demand notice that the Respondent Bank was obligated to issue under clause 3(b) of the Further and Second Further Charge as applicable under section 117 of the RTA. Accordingly, *Ground 9* is resolved in the affirmative.

<u>Ground 11</u>: *The learned trial judge erred in law and in fact in holding that the 2nd appellant, who was a subscriber to the company's memorandum and articles of association* 'to prove that he was a member and shareholder in the company, he had to produce either information from the register of members or share certificates issued to him under Article 16 of the Articles of Association of the company.'

82. The Appellants invoked section 27(1) of the Companies Act to argue that the Second Appellant having been listed in its MEMARTS as a subscriber, became a member of Premier Lottery Limited upon the said company's registration. Section 27 reads:

> (1) **The subscribers to the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.**

(2) **Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company.**

83. Conversely, the Respondent supported the Trial Court's finding that the Second Appellant had not proved that he was a shareholder in Premier Lottery Limited (a company whose proceeds in the Respondent Bank had purportedly been assigned to pay the decretal sum from **Consolidated Civil Suit 595/ 598 of 1998**). The Respondent augmented its position by reference to the decision in **National Westminster Bank plc & Another v Inland Revenue Commissioners (1995) AC 111 at 126**, where it was held that '**allotment confers a right to be registered as a member and therefore a person becomes a shareholder or a member of a company if allotment is followed by registration.**' Mr. Sudhir Ruparelia, testifying for the Bank, proposed that although the Second Appellant had been allotted 5% shares in Premier Lottery Limited, he did not pay for or subscribe to them.

84. For avoidance of doubt, I am in general agreement with the position advanced in **National Westminster Bank plc & Another v Inland Revenue Commissioners** (supra) that allotment in itself would not render membership upon an allotee. Indeed, in the same case, a distinction was drawn in English law between allotment as an enforceable contract for the issue of shares and the actual issue of shares that is completed by registration on the register of members. It was held (per Lord Templeman):

> **Allotment confers a right to be registered. Registration confers title. Without registration, an applicant is not the holder of a share or a member of the company: the share has not been issued to him .... No person can be a shareholder until he is registered. A person who is not a shareholder by registration cannot claim that the share has been issued to him.**

85. Therefore, at Common Law, the term 'issue' in relation to shares means something distinct from allotment. The allotment creates an enforceable contract for the issue of shares but the shares only stand duly issued when an allotment has been completed by entry of an allotee on the register of members. A share certificate would then constitute proof to the whole world of paid-up shareholding to the extent mentioned therein. Under Ugandan law, the question of corporate membership is addressed under section 27 of the

Companies Act. Section 27(1) clarifies that subscribers or promoters of a company are upon its registration entered as members in its register of members. They thus inevitably become members of the company by virtue of their being subscribers at the company's incorporation. On the other hand, persons that were not subscribers of a company at its incorporation but subsequently acquire shares therein are covered by section 27(2). They would only become members upon registration as such pursuant to the process of allotment and purchase of or payment for the shares.

86. Turning to the instant case, the MEMARTS of Premier Lottery Limited were adduced in evidence as Exhibit 15. The Second Appellant is indeed reflected in the Memorandum of Association as a subscriber to 5% shares therein, the outstanding shareholding being attributed to Mr. Sudhir Ruparelia. By the fact of his having been a subscriber of Premier Lottery Limited at its incorporation, the Second Appellant would *ipso facto* have become a member of that company pursuant to section 27(1) of the Companies Act. Whereas it is acknowledged herein that a share certificate would be conclusive proof of his shareholding, a subscriber that aptly demonstrates that fact by the production of a company's MEMARTS reflecting him/ her as such would (in the absence of contrary evidence) have discharged the burden of proof of membership. Therefore, non-production thereof or indeed of the members' register would not in principle necessarily negate a subscriber's membership in the company. To that extent, *Ground 11* as framed would be resolved in the affirmative. As to whether the Second Appellant herein was, in fact, a shareholder or member of Premier Lottery Limited (his subscription notwithstanding), it is observed that a declaration to that effect is sought from the Court. I therefore propose to determine that question under the ensuing consideration of the appropriate remedies in this matter.

F. **Remedies**

87. The Appellants sought to have the Trial Court's decree set aside with the following orders:

   I. The Respondent pays general and aggravated, exemplary and/or punitive damages for taking over and selling its land.

   II. Interest thereon at the rate of 15% per annum from the date of taking over the property by its agents until payment in full.

III. A declaration that the Second Appellant is a shareholder of Premier Lotteries Limited.

IV. Costs in this court and in the court below.

V. Further or alternative relief.

88. The claim for damages thus brings to the fore two questions: first, the Appellants' right of claim in that regard and, secondly, whether the circumstances of this case would warrant an award of the damages sought. It is common ground herein that the First Appellant was the registered proprietor of the property described as LRV 363 Folio 18 Plot 94, High Street, Mbarara. That party stood as surety for credit advanced to the Second Appellant, pledging the property as security. On his part, the Second Appellant was (on his own testimony) a director in the First Appellant Company, a role that he served in alongside his wife and children. It was his evidence that he did as such, together with his wife, knowingly execute the Resolution and mortgage instruments that underlie the present mortgage transaction. As a director in the Company, the Second Appellant undoubtedly owed it a fiduciary duty, not least to act in its best interests. How then did he exercise this duty?

89. The evidence on record is that, in full knowledge of the dictates of Article 41 of its Articles of Association, the Second Appellant executed a Resolution that offered the Company's property as security for an overdraft that, on his own admission, was entirely for his benefit. He then executed the Mortgage Deed and additional charges on that basis, only to turn around and seek to halt the sale of his property for being illegal. With due respect, I find this conduct inconsistent with the renown maxims of equity. Whereas this Court cannot sanction the illegality it has unearthed with regard to the mortgage transaction, it cannot sanitize the prayers of a litigant that comes to equity with unclean hands either. That would be to perpetuate a gross injustice. It is abundantly clear that the Second Appellant sought and secured credit from the Respondent Bank in the total sum of Ushs. 70,000,000/=. Not only did his gerrymandering with corporate authority contribute to the defects in the mortgage transaction (as highlighted above), his default on payment of the credit is the direct cause of the dispute between the Parties. In equity, a court should not look on or, worse still, be invited to endorse a situation where a party knowingly secures credit from a financial or credit institution then turns around and seeks to hide behind

illegalities to deprive the institution of its funds. *Halsbury's Laws of England, Restitution and Unjust Enrichment, Volume 88 (2019), para. 424* posits as follows:

> **Where the claimant and the defendant are in a contractual relationship, the contract regulates the rights and liabilities of the parties until such time as the contract is discharged or set aside. ... However, once the contract has been discharged, the law of unjust enrichment may and often does determine the remedial consequences of the discharge or the setting aside of the contract.**

90. Claims that are rooted in unjust enrichment may arise from the discharge of a contract by breach or frustration, or where it has been set aside on account of duress, undue influence, mistake, misrepresentation, incapacity or illegality. It is recognized herein that a party does have recourse in those circumstances to a claim in contract for damages. However, that does not negate the availability of a claim in unjust enrichment to that party to recover the value of the benefit it conferred on the opposite party, unless such a claim is expressly or implicitly excluded or forbidden by the contract. Simply stated, the law of unjust enrichment entails the reversal of a defendant's unjust enrichment at the claimant's expense through the award of restitution.[16] In the instant case, the mortgage instruments do reflect a contractual relationship between the Parties. As the borrower, the Second Appellant was under a duty to make good his contractual obligations of payment of the overdraft to the Respondent Bank. He reneged on that obligation but, whereas the Bank did raise the outstanding dues as a counter-claim before the Trial Court, the issue did not arise on appeal. Nonetheless, in exercise of the inherent powers of court as encapsulated in Rule 2 of this Court's Rules of Procedure, the principle of unjust enrichment is hereby invoked *suo moto* to uphold the decretal sum of UShs. 218,144,745/= that had been awarded by the Trial Court, and specifically decline to award any damages to the Second Appellant.

91. The First Appellant, on the other hand, is the wronged party having lost its property in this debacle. This brings the Bank's role therein into purview. In **Zaabwe v Orient Bank Ltd & Others** (supra), where a Bank was found to have been on notice that the property being pledged as security did not belong to the borrower, it was held to have been under a duty

[16] Halsbury's Laws of England, Restitution and Unjust Enrichment, Vol. 88 (2019), para. 401.

to disclose that fact to the proprietor of the property.[17] No evidence was presented that established that this was done in this case. However, in a marked departure from the circumstances that pertained to the **Zaabwe** case, it is observed that two of the First Appellant Company's directors did execute the mortgage instruments herein. The Bank was thus aware that the borrower and his wife were directors in and had signed on behalf of the Company that was designated as surety in the mortgage instruments.

92. As a general rule, whenever the relationship between a debtor (or borrower) and a proposed surety is one where the surety reposed trust and confidence in the debtor, a mortgagee is required to take reasonable steps to satisfy itself that the surety's consent to stand as such has not been procured by undue influence, misrepresentation or other misconduct by the debtor. *See Halsbury's Laws of England, Vol. 77 (2010), 5th Ed., paras. 147, 148*. Such a relationship would *inter alia* be deemed to exist where '**it was the duty of one party to advise the other or to manage his property for him.**' *See* ***Allcard v Skinner (1887) 36 Ch D 145***. Given the duty upon the two directors to manage the First Appellant Company in its best interests, the Respondent Bank would have been required to take reasonable steps to satisfy itself that the surety's consent to stand as such has not been procured by undue influence, misrepresentation or other misconduct by the Second Appellant. More so, given that the second director that endorsed the impugned mortgage instruments was his wife thus raising the possibility of undue influence.[18] There is no evidence on record that it discharged this duty. The implications of this omission on the Bank's part were aptly stated in **Royal Bank of Scotland plc v Etridge (No 2) (2002) 2 AC 773** as follows (per Lord Nicholls):

> ***O' Brien's*** **case has introduced into the law the concept that, in certain circumstances, a party to a contract may lose the benefit of his contract, entered into in good faith, if he ought to have known that the other's concurrence had been procured by the misconduct of a third party.**[19]

93. Meanwhile, in *Sealy, L. S & Hooley, R. J. A, Commercial Law: Text, Cases and Materials, Oxford University Press (4th Ed.), 2008, p. 663* it is proposed that undue influence,

[17] Reported in Uganda Law Reports (2007) 98 at 110
[18] See Royal Bank of Scotland plc v Etridge (No. 2) (2002) 2 AC 773.
[19] Barclays Bank plc v O'Brien (1994) 1 AC 180 cited with approval.

misrepresentation and misconduct would be deemed to have been duly established in the following circumstances:

> **Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing evidence to the contrary, to discharge the burden of proof.**

94. In the instant case, the two signatories to the mortgage instruments having been directors in the First Appellant Company did establish the relationship of trust between themselves viz the Company in relation to the management of the latter's affairs. The pledging of the Company's property as security under that mortgage transaction should thus have orchestrated due inquiry by the Respondent Bank on the *bona fides* of the transaction. In the absence of any evidence to the contrary by the Bank, the misrepresentation that underlay the impugned mortgage transaction was duly established in this Appeal. That being so, the Bank would forfeit its contractual benefits under the mortgage. See ***Royal Bank of Scotland plc v Etridge*** *(supra)*. This would further underscore the illegality of the consequential sale of the mortgaged property at the Bank's behest. Accordingly, I am satisfied that the Company is entitled to damages as against the Bank.

95. The Appellants seek general, aggravated, exemplary and/or punitive damages for the Respondent's conversion of its property. In **Rooks v Barnard & Others (1964) AC 1129**, which was cited with approval in **Obongo v Kisumu Council (1971) EA 91**, the classes of cases where exemplary damages may be awarded was clarified as follows:

> **First, where there is oppressive, arbitrary or unconstitutional action by the servants of the government and, secondly, where the defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff.**

96. That scenario does not arise in the present Appeal therefore an award of exemplary damages is unwarranted. General damages, on the other hand, generally seek to compensate a claimant for loss suffered on account of an act of the defendant that is complained of. Aggravated damages, like general damages, are compensatory in nature

but would only accrue where aggravating circumstances exist that would enhance the damages otherwise awardable to a party. Thus, aggravated damages would appear to be general damages that are enhanced on account of established aggravating circumstances. *See* ***Uganda Development Bank vs. Florence Mufumba, Civil Appeal No. 241 of 2015*** *and* ***Basiima Kabonesa & Others v Attorney General & Another, Civil Appeal No. 196 of 2018*** *(both, Court of Appeal)*. The aggravating circumstances to be taken into account were espoused in Obongo v Kisumu Council (supra) to include factors such as '**malice or arrogance on the part of the defendant and the injury suffered by the plaintiff, as for example, by causing him humiliation or distress**.'

97. The property in question in the instant case was a commercial building, the forced value of which had been estimated at Ushs. 64,000,000/= (sixty-four million) as at 14th September 2000, and which earned rental dues of Ushs. 1,500,000/= per month. This was the affidavit evidence of the Second Appellant, which was neither controverted nor impeached under cross examination. In the **Fredrick Zaabwe** case where (as in the present Appeal) the appellant's property was wrongfully sold, an award of aggravated damages was allowed by the Supreme Court in the sum of Ushs. 200,000,000 (two hundred million), attracting 10% interest from the date of judgment until payment in full. As in that case, the aggravating circumstances in this case are the ineptness with which the Bank approached a matter as serious as a mortgage transaction grounded upon a third party's security. I take the view that commercial banks and other credit institutions would do well to heed the clarion call made in the **Zaabwe** case that '**if a person is to be deprived of his property, then substantive justice requires that the law should have been followed in its entirety**.' Consequently, drawing inspiration from the apex court's handling of those remedies albeit with due regard for inflationary levels owing to the passage of time, I would award the First Appellant in this case aggravated damages in the sum of Ushs. 250,000,000 (two hundred and fifty million) at 10% interest from the date of this Judgment until payment in full. I do also award 6% interest on the decretal sum awarded by the Trial Court, the decree in respect thereof having been silent on the applicable interest rate.

98. With regard to the declaration sought, the evidence on record does not seem to support a finding that the Second Appellant was indeed a member of Premier Lottery Limited, his subscription notwithstanding. It was his affidavit evidence of 10th October 2001 that he

had assigned Ushs. 264,382,000/= (two hundred and sixty-four million three hundred and eighty-two thousand) on that company's account in the Respondent Bank as full and final settlement of the decretal sum owing to the Bank. The assigned monies purportedly represented the company's lottery profits. However, the same affidavit evidence attested to the assigned monies including '*the proceeds of sale of the 2nd Applicant's shares in premier lotteries limited, which shares had been allotted and duly paid for.*'[20] Conversely, in an affidavit in reply deposed on 7th November 2001, Mr. Ruparelia averred that the Second Appellant had never been a shareholder of the company, given that although he had been allotted 5% shares at its incorporation, he had never subscribed for them. Mr. Ruparelia testified that Premier Lottery Limited had never declared dividends nor shared any profits but, even if it had, the Second Appellant would not have been a beneficiary thereof owing to his non-subscription to the shares allotted to him.

99. The Second Appellant sought to rebut Mr. Ruparelia's evidence with an affidavit in rejoinder in which he maintained that he had paid for all the shares he had been allotted, and reiterated that the Ushs. 264,382,000/= that he had purportedly assigned to repay his debt had been his contribution to recapitalize the company, '*paid by supply of goods from Danze Enterprises, through a company known as SUMACO to Mr. Sudhir Ruparelia.*' Under cross examination, on the other hand, the Second Appellant attested to having had '*an overwhelming belief that there is money and I still know that there is money unless it has been stolen by somebody else because we collected 17 billion put it on record my lord and we were only two shareholders and two directors.*' He did concede, however, that he might still owe the Bank some money if the assignment of the monies supposedly owed to him from the Premier Lottery had not been effected.

100. Given the blatant inconsistencies in the Second Appellant's evidence, I do not find it cogent, credible or sufficient to sustain his contestations on either his membership of Premier Lottery Limited or the full payment of the decretal sum by him. Whereas, on his own admission he initially attests to having sold his shares in the company, which in itself would negate the declaration sought from the Court that he was still a member of the company; under cross examination he sought to access what he perceived to be the existence of proceeds from the company's lottery profits, claiming to have recapitalized it

[20] See para. 9 of the Second Appellant's affidavit of 10th October 2001.

through the supply of goods. It seems to me that if the subscribed shares had been sold that would have been the end of his dealings with the company; the question of recapitalization would thus not arise. Secondly, if indeed the Ushs. 264,382,000/= represented proceeds from the share sale and supply of goods, I would think those proceeds would have been on an account of the Second Appellant in the Bank and not on Premier Lottery's account therein, as deposed in the affidavit of 10th October 2001. Therefore, whereas the Second Appellant was indeed a subscriber of Premier Lottery Limited at its incorporation, the evidence on record would lend credence to the conclusion I do draw that he might have since relinquished his membership thereof. I certainly cannot state with any degree of certainty that he is still a member of that company and would, consequently, decline to grant a declaration to that effect.

G. Conclusion

101. The gravamen of this Appeal lies in the sale of the First Appellant's property on the basis of a demonstrably invalid mortgage and further mortgages. It is not readily apparent whether payment of the decretal sum has since been made by the Appellants but the sum itself was not contested on Appeal. In the result, all but one of the grounds of appeal having been upheld, the Appeal is hereby allowed. The contrary finding on *Ground 5* does not go to the root of the dispute as between the Parties. It is trite law, on the other hand, that costs should follow the event unless a court for good reason decides otherwise. *See section 27(2) of the CPA*. In the case of **Attorney General of the Republic of Burundi v the Secretary General of the East African Community & Another, EACJ Appeal No. 2 of 2019**, re-echoing the principle in section 27(2) of the CPA,[21] the general principles governing the award of costs were most persuasively restated as follows:

> **One, costs are in the discretion of the Court and two, in exercising such discretion, the Court bears in mind that costs follow the event and that a successful party may only exceptionally be deprived of costs depending on the particular circumstances of the case such as the conduct of the parties themselves or their legal representatives, the**

[21] As reflected in Rule 127(1) of the East African Court of Justice Rules of Procedure, 2019.

nature of the litigants, the nature of the proceedings or the nature of the success. *(my emphasis)*

102. Whereas undoubtedly the Second Appellant's pre-trial actions contributed quite considerably to the present dispute, that is no reason to deny him costs given that the Respondent does similarly bear some responsibility for the illegalities adjudged herein. Therefore, as the successful party in this Appeal, both Appellants would be entitled to the costs thereof.

103. The upshot of my determination is that the Appeal succeeds, with the following orders:

I. The First Appellant is awarded Ushs. 250,000,000/= as aggravated damages for the sale of its property comprised in LRV 363 Folio 18 Plot 94, High Street, Mbarara.

II. Interest at the rate of 15% per annum is awarded on the aggravated damages in clause (i) above from the date of this Judgment until payment in full.

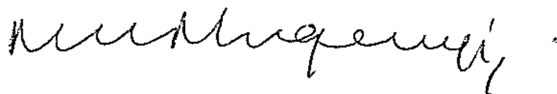
III. The Appellants shall jointly pay the decretal sum of UShs. 218,144,745/= that had been awarded by the Trial Court, if not so paid to date.

IV. The decretal sum in clause (iii) above shall attract interest at 6% per annum from the date of this Judgment until payment in full.

V. The Respondent is condemned to the costs in this Court and the court below.

It is so ordered.

Dated and delivered at Kampala this ....8th.... day of ....June...................., 2021.



Hon. Lady Justice Monica K. Mugenyi
<u>**JUSTICE OF APPEAL**</u>

5

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

SITTING AT KAMPALA

CIVIL APEAL NO. 219 OF 2013

10 *(Appeal from the Judgment of the High Court (Mulyagonja-Kakooza, J) in Miscellaneous Applications No. 470 of 2007 and High Court Civil Suit No. 197 of 2003, both arising in turn from Consolidated High Court Civil Suits Nos 595 and 598 of 1998)*

1. Necta (U) Limited
15 **2. John Ndyabagye** } :::::::::::::::::::::::::::::::::::: **Appellants**

Versus

Crane Bank Limited ::**Respondent**

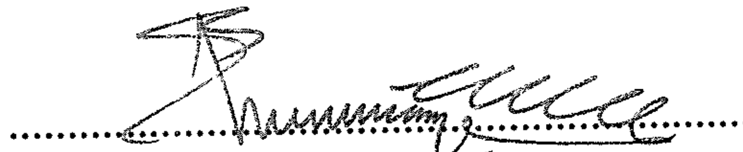
20 **Coram: Hon. Mr. Justice Geoffrey Kiryabwire, JA**
Hon. Lady Justice Monica K. Mugenyi, JA
Hon. Mr. Justice Remmy Kasule, Ag JA

Judgment of the Hon. Justice Remmy Kasule, Ag. JA

25 I have had the benefit of reading in draft the lead Judgment of the Honourable Lady Justice Monica K. Mugenyi, JA.

I am in agreement with the analysis of the issues and the facts of the case as well as the law. I agree with the conclusions, the decisions and orders she has made including those as to costs. I
30 have nothing useful to add.

Dated and delivered at Kampala this 8th.. **day** of ....June....... **2021.**



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35 **Remmy Kasule**
Ag. Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO.219 OF 2013

(An Appeal arising from the Judgment of the High Court of Uganda (Muiyagonja-Kakooza J) in Miscellaneous Application No.470 of 2007 and High Court Civil Suit No. 197 of 2003,both rising in turn from Consolidated High Court Civil Suits No. 595 and 598 of 1998)

1. NECTA(U)LIMITED
2. JOHN NDYABAGYE============================APPELLANTS

VERSUS

CRANE BANK LIMITED==============================RESPONDENT

CORAM HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

HON. LADY JUSTICE MONICA K. MUGENYI, JA

HON. MR. JUSTICE REMMY KASULE, Ag. JA

JUDGMENT OF HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

I have had the benefit of reading in draft the Judgment of my learned sister, Hon. Lady Justice Monica Mugenyi, JA. I agree with her reasons and conclusions.

Since the Hon. Mr. Justice Remmy Kasule, Ag. JA, also agrees, accordingly, it is now hereby ordered as follows;

I. The First Appellant is awarded Ushs. 250,000,000/= as aggravated damages for the sale of its property described as LRV 363 Folio 18 Plot 94, High Street, Mbarara.

II. Interest at the rate of 15% per annum is awarded on the aggravated damages in clause (i) above from the date of this Judgment until payment in full.

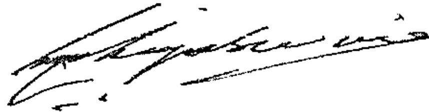
III. The Appellants shall jointly pay the decretal sum of UShs. 218,144,745/= that had been awarded by the Trial Court, if not so paid to date.

IV. The decretal sum in clause (iii) above shall attract interest at 6% per annum from the date of this Judgment until payment in full.

V. The Respondent is hereby condemned to the costs in this Court and the court below.

It is so ordered.

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



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HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA