THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT KAMPALA

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

CIVIL APPEAL NO. 105 OF 2013

BETWEEN

JEANE FRANCES NAKAMYA ..... APPELLANT

AND

1. DFCU BANK LIMITED
2. ALEW JANYARE DONATUS ..... RESPONDENTS

(Appeal from the Judgment of the High Court of Uganda at Kampala (Obura, J) in Civil Suit No. 813 of 2007)

JUDGMENT OF MONICA K. MUGENYI, JA

A. **Introduction**

1. Ms. Jeane Frances Nakamya ('the Appellant') lodged this Appeal in this Court, challenging the Judgment and Orders of the High Court ('the Trial Court') in **Civil Suit No. 813 of 2007**, which decision is dated 17th May 2003. The facts giving rise to the Appeal are as follows.

2. The Appellant had mortgaged her property comprised in Kyadondo Block 265 plots 1861, 1862 and 5036 situate at Bunamwaya to the DFCU Bank Limited ('the First Respondent') as security for cumulative credit (loan and overdraft) of Ug. Shs. 15, 000,000/= (fifteen million). She defaulted on her repayment obligations whereupon the First Respondent, in exercise of its power to foreclose and sale as mortgagee, appointed Mr. Alew Janyare Donatus ('the Second Respondent') to realize the security in order to recover the monies due and owing from the Appellant.

3. On or about the 27th January 2005, the mortgaged property was sold to Mr. Francis Iga at Ushs. 40,000,000/= (forty million), which proceeds were applied to clearing the outstanding sums due from the Appellant and recovery costs, and the balance in the sum of Ushs. 8, 446,371/= was remitted to her.

4. Aggrieved by the manner in which the sale was conducted and the price at which the property was sold, the Appellant instituted **Civil Suit No. 813 of 2007** against both Respondents in the Trial Court.

B. **Trial Court Proceedings**

5. It was her contention that the First Respondent had caused her financial loss and damage by selling her property at a paltry price, and sought the following reliefs jointly and severally against both Respondents:

    I. Special damages of Ushs. 190,000,000/=.
    II. Interest on the special damages at commercial rate of 20% p.a from the date when the cause of action arose till payment in full.
    III. Costs of the suit.

6. The Respondents filed a joint Written Statement of Defence in which they averred that the First Respondent had properly exercised its right of sale to recover monies that were long overdue from the Appellant. It was further averred that the sale had been conducted in good faith and all reasonable steps were taken to ensure that the property fetched the best possible price. The Respondents thus sought the dismissal of the suit with costs.

7. At trial, and pursuant to the scheduling conference held on 1st July 2011, the following issues were framed for determination:

    i. Whether the sale of the suit property by the defendants to Francis Iga was lawful.

    ii. Whether the property was undersold.

    iii. What remedies are available to the parties?

8. The Trial Court adjudged the sale of the mortgaged property to have been lawful in exercise of the mortgagee's right of foreclosure; found that the property had not been underpriced given that the property was encumbered with squatters and graves, and dismissed the suit as against the Respondents with costs.

C. **The Appeal**

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

    I. The learned Trial Judge erred in law when she failed to scrutinize the Mortgage deed on record and thereby arrived at the wrong conclusion that the said mortgage deed was valid.

    II. The learned Trial Judge failed to properly evaluate the evidence and hence erred when in law and fact by holding that there was no need for an extensive advertisement of the suit property by the respondents.

    III. The learned Trial Judge erred in law and fact when she held that the sale of the suit property was lawful.

IV. The learned Trial Judge erred in law and fact when she held that the suit property was sold in good faith and at the best price.

V. The learned Trial Judge erred in law and fact when she improperly rejected the evidence of the appellant's Valuer and the Chief Government Valuer's assessment for stamp duty and thereby arrived at the wrong decision.

VI. The learned Trial Judge erred in law when she dismissed the Appellant's case with costs.

10. At the hearing of the Appeal, the Appellant was represented by Mr. David Kaggwa and Mr. Sam Ogwang, while Mrs. Oliva Kyalimpa Matovu appeared for both Respondents. The Parties solely relied upon written submissions filed in the matter. Both Parties argued *Ground 1* separately; *Grounds 2, 3* and *4* together and, similarly, canvassed *Grounds 5* and *6* jointly. This judgment, however, considers *Ground 1*; *Grounds 2, 3, 4* and *5* together, and concludes with the separate determination of *Ground 6* of the Appeal.

D. **Determination**

11. This being a first Appeal, this Court is enjoined to reappraise the evidence and draw its own inferences of fact therefrom. *See Rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions, SI 13-10.* In so doing, the Court must be mindful of the fact that it has not heard the witnesses who gave testimony first hand. This position was articulated in **Selle v Associated Motor Boat Co. (1968) EA 123** as follows:

> **An appeal ..... is by way of retrial and the principles upon which this Court acts in such an Appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to**

estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.

12. It is on that basis that I propose to interrogate the following grounds of appeal.

Ground 1: *The learned Trial Judge erred in law when she failed to scrutinize the Mortgage deed on record and thereby arrived at the wrong conclusion that the said mortgage deed was valid.*

13. The Appellant faults the learned Trial Judge for not evaluate the mortgage deed because its validity was not contested at trial, the contention being that had she done so she would have discovered that it contravened sections 115, 147(1)(a) and 148 of the Registration of Titles Act, Cap 230 (RTA). The Court was further referred to the cases of **Makula International v Cardinal Nsubuga & Another (1982) HCB 11** and **National Social Security Fund & Another v Alcon International, Civil Appeal No. 15 of 2009** in support of the proposition that as long as there is an illegality, it can be raised at any time even on appeal as a court of law cannot sanction what is illegal, therefore an illegality once brought to its attention would override all questions of pleadings, including admissions made thereon.

14. It is argued that although the First Respondent's Managing Director and Secretary executed the mortgage deed, they neither did so under power of attorney by the Bank nor was their execution thereof witnessed by any attesting witnesses as required by section 147(1)(a) of the RTA. In addition, the signature of the mortgagor is contested for not having been in Latin character as required by section 148 of the RTA. The Appellant relied upon the decision in **General Parts (U) Ltd v Non-Performing Assets Recovery Trust (NPART), Supreme Court Civil Appeal No. 5 of 1999** that signatures to a mortgage that are not in Latin character would invalidate a mortgage deed. This decision is opined to have been confirmed in **Fredrick J. K. Zaabwe v Orient Bank Ltd & 5 Others, Supreme Court Civil Appeal No. 4 of 2006**, where it was held 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**.'

15. In a nutshell, the Appellant is understood to argue that the Mortgage Deed that was adduced before the Trial Court as Exhibit P4 did not bear attestation on the part of the

mortgagee, neither did the persons that executed it on the said Bank's behalf possess requisite powers of attorney to do so. The Deed is further impugned for bearing a mortgagor's signature that is not in Latin character. The invoked provisions of sections 115, 147(1)(a) and 148 of the RTA are reproduced below:

> Section 115
>
> **The proprietor of any land under the operation of this Act may mortgage that land by signing a mortgage of the land in the form in the Eleventh Schedule to this Act.**
>
> Section 147(1)
>
> **(1) Instruments and powers of attorney under this Act signed by any person and attested by one witness shall be held to be duly executed ....**
>
> Section 148
>
> **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.**

16. Conversely, the Respondents object to any questions as to the validity of the mortgage deed for having been abandoned by both parties at the trial. It is argued that raising the issue on appeal would be prejudicial to the Respondents, who would have had no opportunity to lead evidence on the subject. The case of **Alwi Abdulrehman Saggaf v Abed Ali Algeredi (1961) 1 EA 767 (CA)** was cited to buttress the contention that a point

of law not argued before a Trial Court cannot be considered on appeal. It is further argued that the trial judge did not pronounce herself on the issue therefore there is no judgment that would be subject to appeal; and the illegality of the mortgage was neither pleaded nor proved. In the alternative, learned Respondent Counsel supports the Trial Court's findings that the mortgage was duly executed on the premise of it having been sealed with the First Respondent's common seal, witnessed by the Managing Director and Company Secretary thereof and, in any event, there was no legal provision that would invalidate a mortgage that is not endorsed by the mortgagee.

17. Apposite direction on the execution of mortgages by corporate entities is to be found in section 132(1) of the RTA, which allows the substitution of a signature with the seal of a corporation in dealings with land (including mortgages) in the following terms:

> **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.** *(my emphasis)*

18. This position was reiterated in **General Parts (U) Ltd v NPART** (supra), where the Supreme Court proposed two possible options for the execution of a mortgage by a corporate entity: either by affixing its common seal or sign by its attorneys appointed by power of attorney for that purpose. It was held:

> **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).

19. That is precisely what happened in the present case where, as is reflected at page 53 of the Record of Appeal, the Mortgage Deed was sealed with the common seal of the First Respondent Bank. The question then is whether a corporate entity that opts to execute a mortgage by recourse to its common seal would be under the duty prescribed in section 147(1) of the RTA to additionally have a witness attest to the mortgage?

20. Section 147(1) succinctly makes mandatory provision for the attestation of instruments ***signed*** by any person. It seems to me that to the extent that section 132 of the RTA provides for recourse to a common seal ***in lieu of*** signature, a mortgage executed by affixation of a common seal would not require attestation. It need only abide by the dictates of Regulation 113 of Table A to the Companies Act (as amended) that '**every instrument to which the** (common) **seal shall be affixed shall be signed by a director and shall be counter-signed by the secretary or a by second director or by some other person appointed by the directors for the purpose**.' In the instant case, this was achieved by the signatures on the Mortgage Deed of Mr. John S. Taylor – the Bank's Managing Director and Mr. Willie Ogule, its Company Secretary. Whether the signature of directors and/ or the secretary of a company as prescribed in Regulation 113 would amount to the attestation of the instrument is, in my view, a matter of semantics. The more important thing to note is that to the extent that a company is incapable of *signing* an instrument as required by section 147(1) it is not bound by the requirement for attestation therein. That is the import of the decision in **Coast Brick Works v Raichand Ltd (1964) EA 187 at 195**, where it was observed:

> **It is inappropriate to speak of a company 'signing' a document and it is to be noted that the word used in the Registration of Titles Ordinance I relation to transfers, leases and charges is 'execute.' The intention to my mind is clear; an instrument executed by a company under its common seal is valid without the attestation required bys.58.**

21. In the instant case, as quite correctly proposed by learned Counsel for the Appellants, the mortgage in reference under section 115 of the RTA is statutorily prescribed to be in the format of the specimen mortgage provided in the Eleventh Schedule to that Act. That specimen *inter alia* makes provision for persons in whose presence a mortgage should be executed. In the instant case, in addition to the corporate seal and the signatures of Messrs. Taylor and Ogule, the Mortgage Deed was duly attested to by Mr. Frederick J. Mpanga on behalf of the Appellant. It thus becomes apparent that the Mortgage Deed did in fact comply with the Eleventh Schedule and (by implication) sections 115 and 147(1) of the RTA, as read with necessary adaptation to section 132(1) of the same Act. This should also resolve the Appellant's contestations on the purported execution of the Mortgage Deed by the Respondent Bank's officials without proof of powers of attorney

authorizing them to do so. As outlined above, the Mortgage Deed was executed under the Respondent Bank's common seal; it was not executed by Mssrs Taylor and Ogule. The case of **General Parts (U) Ltd v NPART** (supra), in which signature by persons designated by power of attorney was posited as an alternative means of execution of mortgages by a corporate entity, would be inapplicable to this Appeal in that regard.

22. I am aware that the first leg to Regulation 113 of Table A to the Companies Act does require corporate authorization before recourse may be made to the common seal of a corporate entity. It reads:

> **The directors shall provide for the safe custody of the seal, which shall only be used by the authority of the directors or a committee of the directors authorized by the directors in that behalf** ... *(my emphasis)*

23. However, first, no issue was made of this by the Appellant either in this Court or the Trial Court. Secondly, the validity of the mortgage was not in issue before the Trial Court, the Appellant's misgivings with the court's decision only pertaining to its purported non-resolution of what she considers an illegality. That being so, there would scarcely have been need for the Respondent Bank to avail the requisite corporate authority in evidence. This would therefore be an appropriate case for deference to the general rule in **Royal British Bank v Turquand (1856) 6 E & B 327** 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. In my judgment, the circumstances of this Appeal are such that the requisite corporate authorization for recourse to the Respondent Bank's common seal is to be presumed to have been granted.

24. I now turn to the Appellant's complaint that, in exercising its right of sale, the First Respondent relied on a Mortgage Deed that she supposedly did not execute in Latin character. Section 148(a) of the Act simply requires the signature of parties to any instrument to be in Latin character. In the **General Parts (U) Limited** case, the Supreme Court considered signature scribblings in the absence of the signatories' names to contravene section 148 (then section 156) of the RTA. It held (per Mulenga, JSC):

> **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 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 .... 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).

25. In the matter before me, the Mortgage Deed clearly depicts the mortgagor as having signed under both her name, Jean Frances Nakamya, as well as her signature. Therefore, I would respectfully abide the decision in **General Parts (U) Limited v NPART** (supra) to find that the mortgagor in this Appeal did comply with the requirements of section 148(a) of the RTA. I am satisfied that the impugned mortgage was validly executed and would accordingly disallow *Ground 1* of the Appeal.

Grounds 2, 3, 4 & 5: *The learned Trial Judge failed to properly evaluate the evidence and hence erred in law and fact by holding that there was no need for an extensive advertisement of the suit property by the respondents; erred in law and fact when she held that (i) the sale of the suit property was lawful and (ii) the suit property was sold in good faith and at the best price, and erred in law and fact when she improperly rejected the evidence of the appellant's Valuer and the Chief Government Valuer's assessment for stamp duty and thereby arrived at the wrong decision.*

26. The learned Trial Judge is faulted for her finding that the sale of the suit property to Mr. Francis Iga was lawful, the contention being that the Respondents owed the Appellant a duty of care to act in good faith and take reasonable steps to sell the suit property at the prevailing market value. It is argued for the Appellant that the Respondents failed to discharge that duty by their ineffective advertisement of the suit property. In the estimation of learned Counsel for the Appellant, on the authority of **Cuckmere Brick Finance**

Company v Mutual Finance Limited (1971)2 All ER 633,[1] had that been done the property would have attracted many more potential bidders on the date of auction. The case of **Tse Kwong Lam v Wong Chit Sen (1983) 3 All ER 55** was also cited as authority for the proposition that failure by the mortgagee to use reasonable care to optimally realize the mortgaged assets would entitle a mortgagor to recompense for the amount which the sale would have realized had due care been taken. It was held (per Lord Templeman):

> **Where a mortgagee fails to satisfy the court that he took all reasonable steps to obtain the best price reasonably obtainable and that his company bought at the best price, the court will, as a general rule, set aside the sale and restore to the borrower the equity of redemption of which he has been unjustly deprived. But the borrower will be left to his remedy in damages against the mortgagee for the failure of the mortgagee to secure the best price if it will be inequitable as between the borrower and the purchaser for the sale to be set aside.**

27. The Appellant thus seeks a refund of Ushs. 111,697,089/= representing the Ushs. 150,000,000/= valuation of the property less Ushs. 8,446,371/= that was refunded to her and the outstanding loan amount of Ushs. 29,856,540/=.

28. Conversely, it is the Respondents' contention that the impugned sale was legal as they not only advertised the suit property but also resorted to brokerage services in a bid to obtain the best possible price for the property. It is their contention that the encumbrances on the land in terms of squatters and grave yards inhibited the sale proceeds recoverable yet, in any event, they (the Respondents) were entitled to sell the property by private treaty. Arguing that the facts in the cases of **Tse Kwong Lam v Wong Chit Sen** (supra) and **Standard Chartered Bank Ltd v Walker & Another** (supra) are distinguishable from the present circumstances, the Respondents deferred to the decision in **Meah v GE Money Home Finance Ltd, ChD (2013) EHC 20** that '**whatever shortcomings there may have been in the marketing of the property, there is no evidence to establish even on a bare balance of probabilities that the price which was obtained for the property was less than the best price reasonably achievable**.'

[1] Court of Appeal of England and Wales

29. It is further submitted for the Respondents that there was no breach of any duty of care by them as the First Respondent did undertake the impugned sale after taking reasonable precautions as envisaged in **Cuckmere Brick Finance Company v Mutual Finance Limited** (supra). Reference in that regard was made to the efforts made to secure a better price for the property the encumbrances thereon notwithstanding, including the rejection of price offers that were deemed low and the 1-year time-frame they allowed to ensure that they secured a better price. In the Respondent's estimation, the reasonable steps taken to realize the true market value of the property include the issuance of demand notices prior to the commencement of the security realization process; the valuation of the property prior to its sale (unencumbered property at Ushs. 75,000,000/= on open market value and Ushs. 45,000,000/= forced sale value), and the advertisement of the property for sale and the additional efforts made to secure a better price. Maintaining that the foregoing efforts are indicative of good faith on their part, the Respondents cited the following observation in **Downsview Nominees Ltd & Another v First City Corporation Ltd & Another (1993) All ER 626 at 637** to buttress that position:

> **If a mortgagee exercises his powers of sale in good faith for the purpose of protecting his security, he is not liable to the mortgagor even though he might have obtained a higher price and even though the terms might be regarded as disadvantageous to the mortgagor.**

30. I carefully considered the material on record in this Appeal, as well as the cases that were exhaustively cited in support of the parties' respective cases. The Appellant's case is fairly straightforward. She contests the sale of her mortgaged property for what she perceives to have been the Respondents' breach of their duty of care to act in good faith, as well as take reasonable steps to sell the suit land at the market value prevailing as at the date of sale. The case of **Cuckmere Brick Finance Company v Mutual Finance Limited** (supra) that was extensively referred to by both sets of Counsel underscores the general rule that a mortgagee is entitled to exercise its power of sale whenever it chooses regardless, for instance, of whether a higher price could have been fetched by waiting or the auction is badly attended and the bidding exceptionally low, provided none of those adverse factors is due to any fault of the mortgagee. The court further adopted the position advanced in **Kennedy v de Trafford (1897) AC 180** that the moment it opts to realize a security, in addition to acting in good faith, a mortgagee is under a duty to take

reasonable care to obtain whatever is the true market value of the mortgaged property. Thus, in terms of the duty of care owed to a mortgagor by a mortgagee, it was held (per Salmon, LJ):

> **I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precaution to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty, the facts must be looked at broadly and he will not be adjudged to be in default unless he is plainly on the wrong side of the line.**

31. On his part (in the same **Cuckmere Brick Finance Company** case), citing with approval the decision in **McHugh v Union Bank of Canada (1913) AC 299**, Lord Justice Cross held:

> **There is no doubt that a mortgagee who takes possession of the security with a view to selling it has to account to the mortgagor for any loss occurring through his negligence or the negligence of his agent in dealing with the property from the date of his taking possession of it and the date of the sale, including ... steps taken to bring the property to the place of sale. It seems quite illogical that the mortgagee's duty should suddenly change when one comes to the sale itself and that at that stage if only he acts in good faith he is under no liability, however negligent he or his agent may be.**

32. In turn, Cairns, LJ – the third member of the coram in that case – similarly held that a mortgagee '**had a duty to take reasonable care to obtain a proper price for the land in the interest of the mortgagors**.'

33. It seems to me, therefore, that the law on mortgagees' power of sale places the dual duties of good faith and reasonable care to obtain the true market value upon sale of the mortgaged property. Accordingly, the emphasis on good faith in **Downsview Nominees Ltd & Another v First City Corporation Ltd & Another** (supra) would only be tenable where there is no negligence in respect of the duty to take reasonable care to obtain a

proper price for the land. As was aptly observed in **Cuckmere Brick Finance Company v Mutual Finance Limited** (supra) as follows (per Salmon LJ):

> **The mortgagor is vitally affected by the result of the sale but its preparation and conduct is left entirely in the hands of the mortgagee. The proximity between them could scarcely be closer. Surely they are 'neighbours'. Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment of sale which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of the sale.**

34. In the instant Appeal, with regard to the legality of the sale of the suit property viz the allegedly insufficient advertisement of the suit property and low sale price, the Trial Court rendered itself as follows:

> *In the instant case, the plaintiff irrevocably gave her unconditional consent to the 1st defendant or the receiver appointed to exercise its absolute and unfettered power of sale by private treaty without recourse to court in clauses 12 and 13 of the Mortgage Deed as well as the choice of the purchaser and the price. The 2nd defendant as the agent of the 1st defendant duly exercised that power. It is the view of this court that there was no need for an extensive advertisement that would only increase the plaintiff's liability in a sale by private treaty. It was the testimony of the 2nd defendant that when the first advertisement did not attract many bids they decided to use land brokers to source for buyers. I therefore find that the sale of the suit property to Iga Francis in exercise of the powers given by the Mortgage Deed was lawful and this answers the first issue in the affirmative.*

35. With specific regard to the low price or alleged under-pricing of the suit property, the court held:

> *If indeed this property was as marketable as the plaintiff would have this court believe, why did she have to try to sell other properties to settle her obligation? If at all the 1st defendant was acting in bad faith, would it have sent three*

demand letters in a span of over six months and then after giving a final demand waited for over three months to enforce its absolute and unfettered right of sale under the Mortgage Deed? Would it and the 2nd defendant have patiently waited for a year to sell the suit property upon advertising it for sale and would they have allowed the plaintiff to look for a buyer as well? Would it have bothered to carry out a valuation of the property shortly before its sale? This court would answer all those questions in the negative based on the firm that the patience exhibited by the defendants as highlighted above is not consistent with bad faith. Instead it was in exercise of due care to ensure that the interest of the plaintiff was protected as the 1st defendant exercised its rights under the Mortgage Deed. ... the evidence on record does not support the allegation of bad faith and negligence.

36. With the greatest respect, it seems to me that the Trial Court dwelt solely on the question of good faith with little, if any, consideration for the corresponding duty of care upon the First Respondent to obtain the true market value for the mortgaged property. It falls to this Court, therefore, to re-evaluate the evidence on record to determine whether indeed the sale of the Appellant's property was executed with due regard for the duty upon the Respondents to act both in good faith, as well as in exercise of reasonable care to obtain the property's true market value.

37. In terms of good faith, I am inclined to agree with the lower court that the Respondent Bank acted magnanimously towards the Appellant in electing to serve several demand letters upon her before invoking its power of sale. Clause 4.6(i) of the Mortgage Deed had, in the following terms, dispensed with the requirement for notice on demand upon default in payment:

> That the Mortgage Debt and interest hereby secured shall immediately become payable without demand and the statutory power of sale of THE BANK shall forthwith become exercisable without any notice:
>
> (i) If the Borrower shall commit a breach of any terms and conditions of the Agreement (including any covenants and agreements for the payment of the Mortgage Debt or the interest thereon) on the part of or the Borrower herein expressly provided or implied.

38. The Bank's preferred course of action, its rights under the Mortgage Deed notwithstanding, does signify good faith. In addition, permitting the Appellant to source a buyer of her own was also an act of good faith on the Bank's part. It is indeed arguable, as well, that the Bank's refusal to accept lower bids of Ushs. 20,000,000/= to Ushs. 35,000,000/= reflects a relative degree of good faith. I now turn to the question as to whether the Bank did also take reasonable steps to obtain the true market value upon sale of the mortgaged property.

39. The evidence on record is that whereas the Appellant had offered to secure a buyer willing to pay Ushs. 40,000,000/= for 1 acre of the suit property to pay off the mortgage debt; after waiting for 1 year to secure a buyer, the Bank sold off the entire approximately 3.6 acres of land at that price (Ushs. 40,000,000/=) without notifying her of the impending sale. The sale on or about 27th January 2005 was preceded by a one-off advertisement of the property for sale in one local daily newspaper[2] on 8th January 2004 (Exhibit D9); a statutory notice to the Appellant dated 30th January 2004, receipt of which was not acknowledged (Exhibit D8); the valuation of the property in December 2004 (valuation report is Exhibit D13), and marketing of the property through brokers and engagement of potential buyers.

40. In the case of **Roger Michael & Others v Douglas Henry Miller & Another (2004) EWCA Civ 282** the court[3] addressed the duty of care owed by a mortgagee to a mortgagor as follows:

> **It is a matter for the mortgagee how that general duty is to be discharged in the circumstances of any given case. Subject to any restrictions in the mortgage deed, it is for the mortgagee to decide whether the sale should be by public auction or private treaty, just as it is for him to decide how the sale should be advertised and how long the property should be left on the market. Such decisions inevitably involve an exercise of informed judgment on the part of the mortgagee, in respect of which there can, almost by definition, be no absolute requirements. Thus ... there is no**

[2] The Daily Monitor Publications.
[3] Court of Appeal of England and Wales.

absolute duty to advertise widely. ... 'What is proper advertisement will depend on the circumstances of the case.'

41. It was further observed:

> **In so far as the exercise of the mortgagee's power of sale calls for the exercise of informed judgment by the mortgagee, whether as to market conditions, or as to market value, or as to some other matter affecting the sale, the use of a bracket – or a margin of error – must in my judgment be available to the court as a means of assessing whether the mortgagee has failed to exercise that judgment reasonably.**

42. It would appear from the above decision that a determination as to whether or not a mortgagee would have taken reasonable steps to obtain the true market value of a property should be made on case-by-case basis, taking into account the circumstances of a case and the (reasonable) exercise of informed judgment by the mortgagee. In that case (**Roger Michael & Others v Douglas Henry Miller & Another**), two entities run the advertising campaign in respect of the mortgaged property – a company called *Strutt and Parker* and, subsequently, an individual called Mr. Hexter. Building on the company's previous campaign, Mr. Hexter run what was described by the trial judge as a 'minimal' campaign. This 'minimal campaign' was characterized by a full-page advertisement in Country Life publication and a quarter-page advertisement in Farmers Weekly publication, together with advertisements in the national press. Dismissing the allegations of negligence, the court observed:

> **Mr. Hextall was placed in a difficult position in having, in effect, to take over the marketing campaign initiated by *Strutt and Parker*. He had to exercise his professional judgment in difficult circumstances that were not of his, or the respondents', making. I can see no basis for concluding that he failed to exercise his judgment reasonably. In particular, his decision not to advertise for a second time in Country Life is not one which could possibly be characterized as unreasonable, in my judgment.**

43. The court in that case exonerated Mr. Hextall of negligence on account of the difficulties he had encountered in building upon a previous advertising campaign, and would appear

to have approbated his decision not to run an additional advertisement on that premise. Indeed, although an expert witness called by the mortgagee therein conceded that the marketing campaign undertaken by Mr. Hextall would not have been sufficient on its own, he opined that when it was considered in addition to the marketing previously undertaken by *Strutt and Parker*, the sold property had been sufficiently exposed to the market. By contrast, in the matter before this Court, the mortgaged property was advertised only once, together with six other properties in a half-page advertisement that was run in only one daily newspaper and bore no pictures of the land. If the additional advertising campaign that was run by Mr. Hextall in the **Roger Michael** case above was considered insufficient by an expert witness and adjudged to have been a 'minimal' campaign by the court, how then would the more limited advertisement employed in the instant Appeal compare?

44. Admittedly, the property in issue presently is not as developed as the Housing Estate in the **Roger Michael** case. However, would that exonerate a mortgagee that accepts title to such property as security for a mortgage from the duty to obtain its true market value when exercising its power of sale? In my view, it would be expected that a financial institution that elects to advance credit against such collateral has assumed a calculated risk in respect thereof, well aware of the possibility of default in payment and the need to realize the security in a known market. Sufficient advertisement of the property would undoubtedly be one of the indicators as to whether indeed a mortgagee took reasonable steps to secure the market value of the property. Otherwise, how else would the market value be realized if the property is not taken to the market itself so as to attract the most competitive bids?

45. In the instant case, it was the Respondents' contention that the mortgaged property was a hard sale given the presence of graves and squatters with developments on it. Indeed, it is on record that the Appellant's own efforts to secure buyers for the property did not yield immediate results. As highlighted earlier in this judgment, the valuation reports on record do both make reference to the presence of graves and at least one squatter's house on the property. The sufficiency of the advertisement adopted by the Respondents would be evaluated against that background so as to deduce whether indeed all reasonable steps were taken to secure bids for the property or there was negligence on the mortgagee's part. As quite rightly opined in the **Roger Michael & Others** case, the

duty to advertise widely depends on the circumstances of a given case. Meanwhile, in **Kennedy v de Trafford** (supra),[4] the House of Lords took the view that negligence on the part of the mortgagee would be negated where such mortgagee does not "**fraudulently or willfully or recklessly' sacrifice the interests of the mortgagor**' in the exercise of its power of sale.

46. Given the Appellant's involvement in securing buyers for the mortgaged property, it can scarcely be proposed that her interests were willfully or recklessly sacrificed by the First Respondent. Furthermore, over and above the advertisement undertaken, sale by private treaty and/or brokerage services was also undertaken by the Respondents in accordance with the Mortgage Deed. This would not denote fraudulent sacrifice of the Appellant's interests either. It is appreciated that more intentional advertisement might have attracted more competitive bids for the property, probably closer to the forced sale value of Ushs. 78,000,000/= adjudged herein. However, the fact that no better offer was readily available despite the Appellant herself and the Second Respondent engaging the market directly, would dispel the notion that low advertisement was directly responsible for the low interest expressed in the property or that a better price could have been secured.

47. Consequently, I would defer to the approach adopted in **Meah v GE Money Home Finance Ltd** (supra) and take the view that whatever the shortcomings in the Respondent's advertisement, there is no evidence on the balance of probabilities that the price that was obtained for the mortgaged property was not the best price reasonably achievable in the circumstances of this case. In the result, I am satisfied that the mortgaged property was sold in accordance with the duty upon a mortgagee to take reasonable care to obtain a proper price therefor. *Grounds 2, 3 and 4* are resolved in the negative. Having so held, it follows that the trial court did not arrive at a wrong conclusion as contended in *Ground 5* of the Appeal. However, for completion this being a first appellate court, I deem it necessary to consider the question as to whether the valuation evidence by the Appellant and the office of the Chief Government Valuer does have probative value in this case.

48. The Appellant and First Respondent each adduced a valuation report in evidence as Exhibits P7 and D13 respectively. Exhibit D13 describes what was found on the land in

[4] Per Lords Herschell and Macnaghten.

more detail than Exhibit P7, specifically stating that there were several graves on plot 1861, while plot 1862 and part of plot 5036 were occupied by squatters with semi- and permanent residential buildings. It proposes that the property's unencumbered market value as at December 2004 (free from 'kibanja' developments and interests) was Ushs.75,000,000/= with a forced sale value of 45,000,000/=. On the other hand, Exhibit P7 simply describes the property as undeveloped save for a tomb on plot 1861 and a small house on plot 1862, and values the land at Ushs. 220,000,000/= as of July 2005. Meanwhile, without visiting the property, the office of the Chief Government Valuer attributed a value of Ushs. 150,000,000/= to the mortgaged property for purposes of stamp duty.

49. No witness was called to explain the basis of the valuation by Chief Government Valuer's office but I would not entirely disregard it owing to the vast experience of that office in the valuation of properties. In my considered view, in principle, the more judicious approach would have been to evaluate the cogency of that estimated value against the valuation reports on record. Be that as it may, it seems to me that having upheld the legality of the sale, the trial court in effect deferred to the forced sale valuation of Ushs. 45,000,000/ = proposed in D13 over Exhibit P7 and the Government Valuer's estimation that were both silent on the mortgaged property's forced sale value. I would therefore answer *Ground 5* in the negative.

Ground 6: *Available remedies.*

50. The Appellant sought to have the Trial Court's judgment set aside with the following orders:

    I. A declaration that the mortgage deed dated 21st October 2002 is invalid, null and void.

    II. A declaration that the sale of the Appellant's land by the Respondents was unlawful.

    III. Payment of a sum of Ug. Shs. 111, 697, 089/= as a result of the under sale.

    IV. General damages of Ug. Shs. 30, 000, 000/=

V. Costs.

51. Having held as I have in respect of *Ground1*, I decline to grant a declaration that the Mortgage Deed dated 21st October 2002 is illegal, null and void. Given my findings on *Grounds 2, 3* and *4*, I would similarly decline to grant a declaration that the sale of the Appellant's land was unlawful. Furthermore, having held as I have on *Grounds 2, 3* and *4*, the prayer for the net amount that the Appellant would have received had the property been sold at its market value would clearly be untenable, as would be the prayer for general damages. I would therefore decline to grant the relief sought in paragraph 54(III) above.

E. **Conclusion**

52. The Appellant having been unsuccessful in all the grounds hereof, the Appeal would fail. It is trite law that costs should follow the event unless a court for good reason decides otherwise. *See section 27(2) of the CPA*. Therefore, as the successful party in this Appeal, the Respondents are entitled to the costs thereof.

53. The upshot of this judgment is that the Appeal is hereby dismissed with costs in this Court and the trial court to the Respondents.

It is so ordered.

Dated and delivered at Kampala this 23rd **day of** Aug **, 2021.**

KKMugenyi

Hon. Lady Justice Monica K. Mugenyi
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 105 OF 2013

(Appeal from the Judgment of the High Court of Uganda at Kampala (Obura, J) in Civil Suit No. 813 of 2007)

Jean Frances Nakamya::::::::::::::::::::::::::::::::::::Appellant

Versus

1. DFCU Bank Limited
2. Alew Janyare Donatus **::::::::::::::::::::::::::::Respondents**

Coram: Hon. Mr. Justice Geoffrey Kiryabwire, JA

Hon. Lady Justice Monica Mugenyi, JA

Hon. Mr. Justice Remmy Kasule, Ag JA

Judgment of Remmy Kasule, Ag.JA

I have had the benefit of reading through the draft Judgments of Hon. Justice Geoffrey Kiryabwire,JA, and that of Hon. Lady Justice Monica Mugenyi,JA.

I agree with the decision that the appellant's appeal be dismissed with costs to the Respondents. I have nothing useful to add.

Dated at Kampala this..19th.. day of July..2021.

Remmy Kasule

Ag. Justice of Appeal

THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA

AT KAMPALA

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

CIVIL APPEAL NO. 105 OF 2013

BETWEEN

JEANE FRANCES NAKAMYA ..... APPELLANT

AND

1. DFCU BANK LIMITED

2. ALEW JANYARE DONATUS ..... RESPONDENTS

(Appeal from the Judgment of the High Court of Uganda at Kampala (Obura, J) in Civil Suit No. 813 of 2007)

JUDGMENT OF THE HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

Introduction

I have had the opportunity of reading the Judgment of the Hon. Lady Justice Monica Mugenyi, JA in draft for which I thank her. The Hon. Mr. Justice Remmy Kasule, Ag. JA concurs with the final decision of the Hon. Lady Justice Monica Mugenyi, JA. I, also concur with the final decision of the Hon. Lady Justice Monica Mugenyi, JA and wish add a few thoughts of my own as well.

Brief facts

The facts of this Appeal are well laid out in the Judgment of the Hon. Lady Justice Monica Mugenyi, JA. Nonetheless, I will recap the salient facts of this Appeal. The Appellant had mortgaged her property comprised in Kyadondo Block 265 plots 1861, 1862 and 5036 situate at Bunamwaya (hereinafter referred to as the "Suit Property") to the DFCU Bank Limited as security for cumulative credit (loan and overdraft) of Ug. Shs. 15, 000,000/= (fifteen million). She defaulted on her repayment obligations whereupon the First Respondent, in exercise of its power to foreclose and sale as mortgagee, appointed Mr. Alew Janyare Donatus ('the Second Respondent') as a Receiver to realize the security in order to recover the monies due and owing from the Appellant.

On or about the 27th day of January 2005, the suit property was sold to Mr. Francis Iga at Shs. 40,000,000/= (forty million), which proceeds were applied to clearing the outstanding sums due from the Appellant and recovery of costs, and the balance in the sum of Shs. 8, 446,371/= was remitted to her.

Aggrieved by the manner in which the sale was conducted and the price at which the property was sold, the Appellant filed **Civil Suit No. 813 of 2007** against both Respondents at the Trial Court.

At trial, the following issues were framed for determination:

i. Whether the sale of the suit property by the defendants to Francis Iga was lawful.

ii. Whether the property was undersold.

iii. What remedies are available to the parties?

The Trial Court found and decided that the sale of the mortgaged property was lawful and that the property had not been underpriced given that the property was encumbered with squatters and graves, and dismissed the suit as against the present Respondents with costs.

Dissatisfied with the Trial Court's decision, the Appellant lodged this Appeal before this Court, with the following grounds of Appeal:

1. **The learned Trial Judge erred in law when she failed to scrutinize the Mortgage deed on record and thereby arrived at the wrong conclusion that the said mortgage deed was valid.**
2. **The learned Trial Judge failed to properly evaluate the evidence and hence erred when in law and fact by holding that there was no need for an extensive advertisement of the suit property by the Respondents.**
3. **The learned Trial Judge erred in law and fact when she held that the sale of the suit property was lawful.**

4. **The learned Trial Judge erred in law and fact when she held that the suit property was sold in good faith and at the best price.**
5. **The learned Trial Judge erred in law and fact when she improperly rejected the evidence of the Appellant's Valuer and the Chief Government Valuer's assessment for stamp duty and thereby arrived at the wrong decision.**
6. **The learned Trial Judge erred in law when she dismissed the Appellant's case with costs.**

At the hearing of the Appeal, the Appellant was represented by Mr. David Kaggwa and Mr. Sam Ogwang, while Mrs. Oliva Kyalimpa Matovu appeared for both Respondents. Given the Covid period limitations, the Parties solely relied upon written submissions filed in the matter.

Both Parties argued *Ground 1* separately; *Grounds 2, 3* and *4* together and, similarly, canvassed *Grounds 5* and *6* jointly. I, like my learned Brethren, shall consider *Ground 1*; *Grounds 2, 3, 4* and *5* together, and conclude with the separate determination of *Ground 6* of the Appeal.

I shall now proceed to resolve the Appeal accordingly and thereafter make a final determination.

Role of a first appellate court.

This is a first Appeal and this Court is charged with the duty of reappraising the evidence and drawing inferences of fact as provided for under Rule 30(1) (a) of the **Judicature (Court of Appeal Rules) Directions SI 13-10.** This Court also has the duty to caution itself that it has not heard the witnesses who gave

testimony first hand. This position was well articulated in the Appeal of **Selle v Associated Motor Boat Co. [1968] EA 123** where it was held: -

"An appeal ..... is by way of retrial and the principles upon which this Court acts in such an Appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270 followed)..."

On the basis of its evaluation this Court must then decide whether to or not to support the decision of the High Court as illustrated in **Pandya v R [1957] EA 336** and **Kifamunte Henry v Uganda Supreme Court Criminal Appeal No.10 of 1997.**

On the basis of the above authority I shall proceed to address the Grounds of Appeal.

Ground 1: The learned Trial Judge erred in law when she failed to scrutinize the Mortgage deed on record and thereby arrived at the wrong conclusion that the said mortgage deed was valid.

It had been argued for the Appellant that the Mortgage Deed executed by the Appellant was not valid. The Appellant had raised this objection on the grounds that the Mortgage Deed was invalid by reasons of Sections 115; 147 (1) (a) and 148 of the Registrations of Titles Act, Cap 230 (hereinafter referred to as

"RTA"). Counsel for the Appellant faulted the Mortgage Deed on two counts. First, that the Mortgage Deed was signed by the Managing Director and Company Secretary without evidence of the first Respondent Bank having given them a power of attorney to do so. Secondly, the Appellant signed the Mortgage Deed without doing so in Latin character and that this was contrary to Section 148 of the RTA.

It is significant to observe that these objections to the validity of the Mortgage Deed were not raised during the hearing at the trial Court. However, counsel for the Appellant argued that these objections were illegalities that can be brought to the attention of Court at any time thus overriding all questions of pleadings and admissions made. In this regard this Court was referred to the cases of **Makula International v. Cardinal Nsubuga & Another (1982) HCB 11** and **National Social Security Fund & Another v. Alcon International, Civil Appeal No. 15 of 2009.**

I am inclined to agree with the Hon. Lady Justice Monica Mugenyi that a re-evaluation of the facts of this Appeal does not bear out the objections raised. First, the Mortgage Deed was executed by first Respondent Bank by way of a Seal within the meaning of Section 132 of the RTA which provides for recourse to a common seal in lieu of signature. I further agree that a mortgage executed by affixation of a common seal would not require attestation. It need only abide by the dictates of Regulation 113 of Table A to the Companies Act, 2012 (as amended) that: -

'every instrument to which the (common) seal shall be affixed shall be signed by a director and shall be counter-signed by the secretary or by a

second director or by some other person appointed by the directors for the purpose.'

From the evidence on record (Page 53 Record of Appeal) this was achieved by the signatures of Mr. John S. Taylor – the Bank's Managing Director and Mr. Willie Ogule (RIP)- its Company Secretary, on the Mortgage Deed. This first part of the objection to validity of the Mortgage Deed is over-ruled.

As to how the Appellant signed the Mortgage Deed, again the facts are at variance with the objection raised. The Appellant's names are written in Latin character (at P. 53 of the Mortgage Deed) in the Mortgage Deed. The second part of the objection is also over-ruled.

Clearly this ground was nothing more than an afterthought and or an exercise in fishing. Grounds of Appeal must point the Appellate Court to the facts that the trial Court failed to take into account or failed to evaluate. However, in this ground the objection and the facts are at variance and ground No.1 is accordingly disallowed.

<u>Grounds 2, 3, 4 & 5</u>: The learned Trial Judge failed to properly evaluate the evidence and hence erred in law and fact by holding that there was no need for an extensive advertisement of the suit property by the respondents; erred in law and fact when she held that (i) the sale of the suit property was lawful and (ii) the suit property was sold in good faith and at the best price; and erred in law and fact when she improperly rejected the evidence of the Appellant's Valuer and the Chief Government

Valuer's assessment for stamp duty and thereby arrived at the wrong decision.

Under these grounds, the Appellant faults the process and procedure used to sell the suit property under the Mortgage. Central to these grounds is the application of the principle of good faith placed on the mortgagee bank in realizing its security in the event of default by a mortgagor. Put differently, it is the case for the Appellants that her suit property was wrongly sold to her detriment.

The law governing the sale of mortgages in Uganda was well canvassed in the case of **Epaineti Mubiru V Uganda Credit and Savings Bank** [1978] HCB 109 at 112. There **Ssekandi J** (as he then was) held (at Para 9) that: -

The law governing the sale of mortgaged property by a mortgagee is that: -

"...

(1) The mortgagee exercising his statutory power of sale does not act as a trustee for the mortgagor. The mortgagee exercises the power for his benefit to realize his security by turning it into money whenever he likes;

(2)Upon concluding the sale, the mortgagee must account for the proceeds to the mortgagor, it is the mortgagor who takes the excess over the balance on the mortgage and makes good the difference if the sale falls short;

(3)Consequently, if Lord Atkin's neighbour principle is applied there is a proximity between the mortgagee and mortgagor which gives rise to a duty to take reasonable precautions in the conduct of the sale so as to obtain the true market value from the property. The mortgagee must not only act in good faith but also as a reasonable man would behave in the realization of

his own property so that the mortgagor may receive credit for the fair value of the property sold..." (Emphasis mine).

I accept this to be a good exposition of the law. In the English case of **Cuckmere Brick Co Ltd and Leslie Arthur Fawke V Mutual Finance Ltd** [1971] EWCA Civ 9. In that decision **Lord Justice Salmon** also addressed his mind to the duty of the mortgagee to the mortgagor when realizing a security and found as hereinafter.

He found on the strength of several earlier decisions (especially in ***Tomlin V Luce*** 41 Chancery Division 573 and 43 Chancery Division 191) that there was in existence a duty of care as between the mortgagee and mortgagor when it came to the sale of a mortgaged property. In further discussions of the existing case law on this said duty of care he further found as follows: -

"...It also appears to have been the view of Lord Justice Lindley at the time of his judgment in Farrar v. Farrars Ltd. (40 Chancery Division 395). That judgment was so interpreted by the Judge of first instance in Kennedy v. de Trafford (1896 1 Chancery 762), but on the Appeal in that case, Lord Justice Lindley said (at page 772) that when he had referred, in Farrar's case, to a mortgagee's duty to take reasonable precautions, he had meant merely that the mortgagee must not act fraudulently or wilfully or recklessly; and in the House of Lords (1896 Appeal cases 180, at page 185) Lord Herschell said that he thought it would be unreasonable to require the mortgagee to do more than act in good faith, that is, not wilfully or recklessly to sacrifice the interests of the mortgagor. These expressions of opinion in the Court of Appeal and in the House of Lords were, however, not necessary to the decision. Lord Justice Lindley said that the mortgagees "acted from first to last in an honourable

and businesslike manner without in the least sacrificing the interests of the mortgagors". Lord Herschell said:

"My Lords, it is not necessary to give an exhaustive definition of the duties of a mortgagee to a mortgagor because it appears to me that if you were to accept the definition of them for which the Appellant contends, namely that the mortgagee is bound to take reasonable precautions in the exercise of his power of sale, as well as to act in good faith, still in this case he did take reasonable precautions"...."

It would appear to me therefore that the test for the mortgagee to discharge is that he/she/it exercised a duty of care in the sale of a mortgaged property is that of good faith meaning that the mortgagee did not act fraudulently, wilfully and recklessly to the detriment of the mortgagor. In doing so the mortgagee therefore must take reasonable precautions as would a reasonable person.

So, taking the above authorities into consideration, did the respondents fail in their duty to follow the correct procedures and then obtain the true market value of the suit property? I find not for the reasons hereinafter.

As to Statutory Notice being issued under Sections 116 and 117 of the RTA the trial Judge found as follows (pages 551 to 552 Record of Appeal): -

"... Clause 4.6 of the Mortgage Deed provides that the mortgage debt and interest thereon shall immediately become payable without demand upon breach of the terms of the agreement including default in payment and the statutory power of sale of the bank shall forthwith be exercised without notice. That clause dispensed with the requirement for demand and notice, since the applicant (sic) does not contest the validity of the mortgage deed she would be bound by its provisions.

Be that as it may, according to the documentary evidence on record, when the plaintiff defaulted, the 1st defendant wrote the first demand on 19/03/2003 (Exhibit D4), the second one on 4/09/2013 (sic 2003 Exhibit D5) and the final one by the company secretary was written on 26/09/2003 (Exhibit D6). The final demand also indicated in the last paragraph that the whole amount had become due and should the plaintiff fail to meet the demand, the bank would proceed to enforce recovery without further notice.

It is important to note that counsel for the plaintiff did not make submissions on these important demands but concentrated on the one by the auctioneer (Exhibit P5 [D8]). From the above documentary evidence, it can be seen that the 1st defendant was indeed very lenient on the plaintiff by giving her several demands for payment, yet the law provides for just one. I am therefore satisfied that by the time the auctioneer wrote Exhibit P5 (D8) the statutory notice stipulated under sections 116 and 117 of the RTA had already been duly served on the plaintiff by the 1st defendant and I so find..."

Based on the documentary evidence, the facts and the law, I find that I cannot fault the trial Judge in her findings and accordingly agree with her. Indeed, this approach by the banks to provide for an auto default clause but at the same time going a step further to comply with Sections 116 and 117 of the RTA on the issue of a statutory notice is very common in the cases that come before us. In my view there is nothing wrong with that approach as this is evidence of good faith by the bank.

On the issue of exercising reasonable precaution in selling the mortgaged property the trial Court found as follows: -

"...It is noteworthy that the 1st defendant did not actually act immediately much as the final demand was not complied with. The receiver was actually appointed on 8th January 2004 more than three months later.

The suit property was advertised for sale on 8th January 2004. The appointed date of sale according to that advertisement was 8th February 2004. It was the testimony of the 2nd defendant (DW2) that the suit property remained on the market as they searched for a buyer until January 2005 when he sold it to one Iga Francis at Shs 40,000,000/= which according to him was reasonable in the circumstances given that they had failed to get a better offer for one year and in any case a valuer instructed by the 1st defendant had put its open market value at Shs 75,000,000/= and a forced sale value of Shs 45,000,000/=. He also testified that he received some offers which his client declined to accept as too low. During cross-examination the plaintiff also stated that the sale process started in March 2004 when she asked the bank to allow her get a buyer but by December 2004 she had not got a buyer. During cross examination she stated that she got a buyer around June 2005. This was long after the sale (had) taken place and moreover she had taken over one year to get that alleged prospective buyer. Exhibit D32 also shows the plaintiff tried to sell other properties in Mukono jointly with the 1st defendant in a desperate effort to settle her obligation with the bank...if indeed this property was as marketable as the plaintiff would have this court believe, why did she have to try to sell other properties to settle her obligation? If at all the 1st defendant was acting in bad faith, would it have sent three demand letters in a span of three months...would it and the 2nd defendant have patiently waited for a year to sell the suit property...would they have allowed the plaintiff to look for a buyer as well? Would it have bothered to carry out a valuation of the property shortly before its sale? This Court would answer all these questions in the negative

based on the firm patience exhibited by the defendant as highlighted above is not consistent with bad faith. Instead it was in exercise of due care to ensure that the interests of the plaintiff was protected as the 1st defendant exercised its rights under the Mortgage Deed..."

Once again I agree with the trial Judge on her evaluation of the evidence in this matter. The Respondents clearly, in my view, discharged their duty of care while selling the suit property and got its reasonable market value in the process. It is even becoming usual for banks to try to sell mortgaged properties together with the mortgagor and this points to good faith and transparency as well. Interestingly, the Appellant during cross examination submitted that she had found a buyer after the sale had been concluded by the first respondent bank; but even then no details of this buyer were availed. Transparency is further evident by the Appellant being credited with the excess of the proceeds from the sale of the suit property. As is clear in the authorities cited above, the mortgagee does not act as a trustee of the mortgagor but ultimately has to realize the security to recover lent money and unclog the flow of credit.

I also agree with the trial Judge that valuation at the request of the Appellant of M/s Oringo & Co of Shs 220,000,000/= (with no forced sale value attached to it) dated August 2005 after the sale of the suit property was merely an afterthought. Equally the Chief Government Valuer's value on the Transfer form (Exhibit P13) of Shs 150,000,000/= in the part of the Transfer form titled "**For Official use**" was for purposes of Stamp Duty only as is the normal practice. The considerations for taxation being quite different from the sale.

All in all, I find that Grounds 2, 3, 4, and 5 must fail.

Those being my findings I would find that this Appeal fails on all grounds and should be dismissed with costs. That resolves Ground number 6 as well.

Final Orders

Since The Hon. Lady Justice Monica Mugenyi, JA and The Hon. Mr. Justice Remmy Kasule agree that this Appeal be dismissed with costs it now hereby ordered as follows: -

1. This Appeal is dismissed
2. Costs of this Appeal and in the trial Court are awarded to the Respondents

It is so Ordered

Dated at Kampala this..23rd..day of .....Aug.....2021

HON. MR. JUSTICE GEOFFREY KIRYABWIRE

JUSTICE OF APPEAL