

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT)

CIVIL SUIT NO. 506/2001

YUDA LUTTA MUSOKEAPPLICANT

VERSUS

GREENLAND BANK (IN LIQUIDATION)DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE JAMES OGOOLA

RULING

Plaintiff challenges Defendant’s WSD and counterclaim on the grounds that they are both premised on a wrong presumption of law — namely, that Defendant holds a banker’s lien and/or an equitable mortgage over the suit property.

The facts of the case are stated to be as follows. Pursuant to J. Lutta Inc.’s indebtedness to the Defendant Bank, Jamada Lutta Musoke (joint proprietor with his wife: of the suit property), offered his part of the land as security — see para 5(b) of the Counterclaim. Plaintiff contends that Jamada did so without the consent of his wife and co-proprietor; and that, accordingly, no lien or mortgage could have been thereby created in this joint property. For his authority, Plaintiff relied on the case of **Figuerido v Talbot [1962] EA 167** in which it was held that:

“where more than one person is registered as proprietor, unless all join in the deposit of the title deed, a deposit by one is ineffective to create an equitable mortgage or to make the other party (parties) liable.”

See also Lutaya v Striling International Civil Engineering Ltd, Court of Appeal Civil Appeal No. 62199; and also United Bank of Kuwait v. Sahib & Ors [1995] 2 ALLER 973.

While conceding to the above case authorities, learned counsel for the Defendant (Mr. Mpanga) contended that this Court cannot determine as a matter of law that the co-proprietor’s consent was not obtained. Any such determination would require the adducing of evidence by the parties

and their witnesses; consideration of that evidence by the Court; and the application of the law to that evidence. In short, the instant application is premature. It has been brought too early in the process of hearing this matter. For his authority, learned counsel relied on the case of **Mukisa Biscuit v Western Distributors [1969] EA 696** in which SIR CHARLES NEWBOLD, P held that a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

In the light of the above opposing contentions, it is evident that the real issue at hand is whether this Court should determine the preliminary objection now, or should wait for the substantive hearings to take off, in the course of which evidence would be adduced on the particular issue(s) now in contention. On this, I think Court should be guided by the observations of SIR CHARLES NEWBOLD P which he made in the **Mukisa Biscuit** case (*supra*) at p.701 — namely:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.” [emphasis added]

In the instant case, I can conceive of no prejudice, mischief, or injustice that would attend the Plaintiff if his contentions are determined by the Court after a proper evaluation of the facts to be ascertained by evidence properly adduced on both sides of the dispute.

Accordingly, the preliminary point of law now raised is overruled. It will be entertained in the course of the substantive proceedings as and when evidence is adduced in that behalf. In other words, it is quite premature to entertain the matter at this stage.

Ordered accordingly.

James Ogoola

JUDGE

27/06/02

DELIVERED IN OPEN COURT, BEFORE:

John Kiwuwa, Esq. — Counsel for the Plaintiff

David Mpanga, Esq. — Counsel for the Defendant

J.M. Egetu — Court Clerk.

James Ogoola

JUDGE

27/06/02