THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-0307-2002

UGANDA ECUMENICAL CHURCH

LOAN FUND LIMITED ……PLAINTIFF

VERSUS

NANKABIRWA HARRIET ……..DEFENDANT

BEFORE: HON. MR. JUSTICE LAMECK N. MUKASA

RULING:

In this suit the plaintiff, Uganda Ecumenical Church Loan Fund, Ltd. Claims that in December, 1998 it advanced to the defendant, Nankabirwa Harriet, trading as "The New Generation" a loan facility of Ugshs49,800,000/= with a total interest on the principle loan of Ugshs8,442,000/= all payable within one year by twelve
Instalments effective 1st March 1999 until 30th March 2000. The plaintiff is claiming shs41,978,000/= being unpaid contractual due balance Shs. 6,510,000/= being unpaid contracted due interest on the principal loan, shs6,500,000/= being unpaid contractual surcharge on the aforesaid unpaid two totals.

When the suit came up for hearing Mr. Peter Katutsi, Counsel for the defendant, raised a preliminary objection that the plaintiff's suit was time barred by the provisions of section 19(I) of the Money Lenders Act. The subsection provides:-

> "19(I) No proceedings shall lie for the recovery by a money lender of any money lent by him or her after the commencement of this Act, or of any interest in respect of that money lent by him or her after the commencement of this Act, in respect of any loan made by the money lender unless the proceedings are commenced before the expiration of twelve months from the date on which the cause of action accrued"

Annexture A to the plaint is a Loan Agreement which shows that the loan was granted on 11th December 1998. The loan was payable within a period of one year commencing from 1st March 1999, that is not later than 30th March 2000. By letter dated 30th November, 1999 the defendant sought for the extension of the repayment period to up to December 2000. In the plaintiff's letter in reply dated 20th March 2000, the defendant's request was rejected and the letter stated:-

> *"--- Therefore, you are reminded to clear all dues owing of Ug. ECLOF not letter than 30th March 2000 in order to avoid the unpleasant legal action."*

Though not marked photocopies of both letters were annexed to the plaint and listed among the plaintiff's list of documents accompanying the plaint.

Counsel for the defendant argued that the last day of payment was 30th March 2000. That the defendant having failed to pay by then the plaintiff's cause of action arose on 30th March 2000. This suit was filed on 14th June 2002 after a period of two years and three months. In paragraph 1 of the plaint it was stated that the plaintiff is a company carrying on business of money lending in Uganda. Mr. Katutsi argued that the plaintiff was a money lender and had dealt with the defendant as such. He submitted that the plaintiffs suit was time barred by the provisions of section 109 of the Money Lenders Act and prayed that the suit be rejected. I was referred to O.7 rule 11 (d) of the Civil Procedure Rules and the case of *Peter Mangeni t/a Makerere Institute of Commerce Vs Department Asians Property Custodian Board (1998) VKALR 5*

Order 7 rule 11 (d) CPR provides that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. Under section 19(2) (b) of the Money Lenders Act the time limit for the commencement of proceedings shall not begin to run in respect of any payment from time to time becoming due to a money lender until a cause of action accrues in respect of the last payment becoming due under the contract. From the plaint and the annextures thereto it is clear that the last payment was due on 30th March 2000. By 14th June 2002 when this suit was filed the limitation period of twelve months under the Money Lenders Act had long lapsed. In *Peter Mangeni Vs DAPCB* (supra) the Supreme Court upheld a dismissal of the suit which had been filed six months outside the limitation period as required by section 2(I) (c) of the Civil Procedure and Limitation (Misc. Provisions) Act.

Mr. Kwemara- Kafuzi Counsel for the plaintiff, in his submission argued that the plaintiff's suit was saved by section 21(I) (c) of the Money Lenders Act. It provides.

> *"(I) This Act shall not apply ----*
> *(c) to any money lending transaction where the security for repayment of a loan and interest on the loan is effected by execution of a legal or equitable mortgage upon immovable property or of the charge upon immovable property or of any bonafide transaction of money lending upon such mortgage or charge."*

Counsel referred to annextures "C" and "D" to the plaint and argued that the two letters show that the defendant pledged immovable property as security for the loan. That the land being unregistered constituted an equitable mortgage at common law.

In her letter dated 7th November 1998 anexture D to the plaint, the defendant states:

> *This is to guarantee my House Plot No 5. Namawaya Zone, Mbiko, Njeru Town Council, Mukono District."*

And in her letter dated 27th November 1998, annexture "C" to the plaint, the defendant states:-

> *"I do hereby stake my house located in Namuwaya zone, Mbiko in Mukono District as Guarantor of THE NEW GENERATION GROUP"*

In his reply Mr. Katutsi argued that the suit is purely for recovery of money lent and interest thereon and not to enforce on agreement of security taken. Further that the defendant is being sued not as the borrower but as a guarantor and that the security for the repayment was by way of post-dated cheques.

Secondly, Counsel argued that the defendant has not mortgaged her property but merely pledged it. He submitted that a pledge is not one of the securities stated in section 21(I) of the Act. He argued that if the legislature had intended the above section to cover pledges as well, it would have specifically provided so.

Thirdly, that annextures "C" and "D" above did not constitute an equitable mortgage. Counsel submitted that section 129 of the Registration to Titles Act clearly specify what an equitable mortgage is and how it is created. He argued that an equitable mortgage can only be made on registered land whose title must be deposited by the registered proprietor to the mortgagee and the mortgagee must lodge a caveat thereon. Counsel also referred to sections 8 (2) (c) and 39 (i) (a) of the Land Act and submitted that even under the Land Act for a person to mortgage or pledge immovable property he or she must have a Certificate of Customary ownership or Occupancy under section 34(I) of the Land Act.

In paragraph 4 of the plaint it is stated that the plaintiff advanced money to Nankabirwa Harriet, trading as "The New Generation." But in paragraphs 2 and 5 of the plaint its specifically stated that the defendant is sued as guarantor and in the Loan Agreement Annexture "A" to the plaint the borrower is New Generation Group and the defendant is a party thereto only as Guarantor, and she therein pledges to pay both interest and

principal in case the borrower fails to pay. I therefore agree with Counsel for the defendant that the defendant is sued as guarantor of the loan and not as borrower.

Pursuant to the provisions of section 21 of the Money Lenders Act clearly the Act does not apply where security for repayment of the loan and interest there on is effected by the execution of legal or equitable mortgage upon immovable property. The plaintiff's counsel contends that vide the letters annex "C" and "D" to the plaint the defendant extended an equitable mortgage over her land. According to the defendant the letters only created a pledge as opposed to a mortgage, whether legal or equitable. The defendant contends that the security for the loan were post-dated cheques worth the total principal and interest.

Section 129 of the Registration of Titles Act makes provision for equitable mortgages. It states:-

> *"(I) Notwithstanding anything in this Act, an equitable mortgage of land may be made by deposit by the registered proprietor of his or her certificate of title with intent to create a security thereon whether accompanied or not by a note or memorandum of deposit subject to the provisions hereinafter contained.*
>
> (2) *Every equitable mortgage as aforesaid shall be deemed to create an interest in land.*
>
> (3) *Every equitable mortgagee shall cause a caveat to be entered as provided for by section 139"*

Section 139 of the RTA provides for the procedure for lodgement of caveats. Section 129 above pre-supposes land registered under the Act. It appears the defendant's land was not registered land under the Act.

The Land Act, which commenced in July 1998, provides for the following tenure systems:-

(a) Customary
(b) Freehold
(c) Mailo
(d) Lease Hold

Prior to the enactment of the Land Act it was only Freehold, Mailo and Leasehold interests which were registrable. The Land Act now provides for registration of customary holdings and for issuance of Certificate of Customary ownership which confers on the holder thereof the right, under section 8 (2) (c) of the Act, to mortgage or pledge the land where the certificate does not restrict it. As observed by John Tamukedde Mugusibwa in his book Principles of Land Law in Uganda at page 116, under section 8 (2) (c) of the Land Act, a holder of a Customary Certificate of ownership of land has a right to mortgage his or her land and under section 34(I) of the Act, a tenant by occupancy (a lawful or bonafide occupant) is entitled to pledge his or her occupancy. Since neither customary land nor tenancy by occupancy are registered under the Registration of Titles Act, the provisions of that Act do not apply to them. The Land Act does not prescribe the procedure for the creation of a mortgage over land owned under customary tenure or right to occupancy.

However, section 8(4) of the Land Act provides:-

> *"No transaction referred to in subsection 2(a), (c) or (f) shall have the effect of passing any interest in the land to which the transaction relates unless it is registered by the recorder under subsections (3)."*

Subsection 3 requires the holder of a Certificate of customary ownership who undertakes any transaction in respect of the land to which the Certificate relates to register a copy of the transaction with the recorder. Section 68 of the Land Act provides for the office of a recorder for each sub-county, each gazetted area and each division in the case of a city, responsible for keeping records relating to certificates of customary ownership and certificate of occupancy.

In Govindji Poptlal Vs Premachand Rainchaud Ltd (1963) EA 69., in November 1957, the respondent, a money lender made a loan to the appellant which purported to be secured by an equitable deposit of title deed on a piece of land, accompanied by a memorandum of equitable mortgage. The memorandum was not registered, registration not being required under Section 59 of the Land Titles Ordinance until it was amended retrospectively by Section 9 of the Land Titles (Amendment) Ordinance, 1959 which came into force on January 1961. Section 9 of the Land Title (Amendment) Ordinance provided that the amendment to Section 59 shall be deemed to have come into operation on the date upon which section 59 came into force, which was 1910. It was argued that the equitable deposit of title deeds had created a valid security and that accordingly the Money – Lenders Ordinance by virtue of Section 3(I) (b) thereof, had no application to the transaction Section. 3(I) (b) above was similar to our section 21(I) (C) of the Money –Lenders Act.

It was held that by virtue of section 9 of the Land Titles (Amendment) Ordinance 1959, the amendment to Section 59 of the Land Titles Ordinance must be deemed to have been operative at the time of the loan transaction, that is 1957, and it was accordingly held that the memorandum of equitable mortgage was invalid for want of registration. It was further held that by virtue of section 59 of the Land Titles Ordinance (as so amended) the deposit deeds did not effectively create a valid mortgage and the purported equitable mortgage therefore was not an effective security “upon immovable property” for the purposes of section 3(I) (b) of the Money Lenders Ordinance with the result that the loan transaction was exempted from the operation of the later Ordinance by the provisions of section 3(I) (b) thereof.

To mortgage or pledge land is a transaction referred to in Section 8 (2) (c) of the Land Act and it was required to be registered by the Recorder under section 9(3) of the Act and if not so registered such transaction would pursuant to subsection 4 not pass any interest in the mortgage or pledge. On the authority Govindji Popatlal Vs Precurchard Rainchard Ltd (supra) such a mortgage or pledge would be invalid for want of registration with the Recorder and would not create a valid equitable mortgage and

therefore not qualified to enjoy the protection of section 21(I) (c) the Money Lenders Act.. In the instant case there is no evidence or pleading to show that the charge created by the defendant was registered. Equally there is no evidence to show that the defendant had registered her interests in the land pursuant to the provisions of the Land Act in which case the provisions of Section 8 of the Act would not apply to such land.

The defendant does not appear to hold a Customary Certificate of ownership of the land or a certificate of occupancy. I have not been helped with any evidence to show, and I am not aware either, that such certificates and / or the recorder are in place yet. Mr. Katutsi further argued that the transaction between the plaintiff and the defendant was not a mortgage but a pledge. Section 21(I) (c) of the Money – Lenders Act relates to "legal or equitable mortgage" or "charge" Counsel submitted that as a pledge the transaction was not saved from the provisions of the Money Lenders Act by section 21(I) (c) thereof.

Mr. Kwemara Kafuzi for the plaintiff contends that the transaction created an equitable mortgage.

A pledge is a bailment of personal property as a security for some debt or engagement. It is distinguishable from a transaction of mortgage in two main ways. The first distinguishing factor is that the property pledged should be actually or constructively delivered to the pledgee, whereas on a mortgage the property passes by assignment and possession by the mortgagee is not essential in every case. A pledge involves a transfer of possession of the property deposited as security for the debt to the pledgee and the property whole reverts to the person who has pledged the property on discharge of the debt or engagement. Secondly for a mortgage the mortgagee acquires by assignment an absolute interest in the property subject to a mortgagors right of redemption and it is also subject to the super added equity. A mortgage may be made without any transfer of possession of the property See Halsbury's Law of England 4th Ed. Reissue paras 312 page 152; Words and Phrases Legally defined Vol. 3 page 330

In the instant case there was no security given in the Loan Agreement, Annexture A to the plaint, save the guarantee by the defendant. Against the defendants signature she stated:

> *"I pledge to pay ECLOF both interest and principle in case the project fails to pay"*

In annextures "C" and "D" the defendant does not deliver possession of her house at Mbiko to the plaintiff. The wording of the plaint does not indicate anywhere that possession of the said house, actual or constructive, was ever passed to the plaintiff. The transaction between the plaintiff and the defendant therefore could not have been a pledge as it lacked that necessary element of passing possession.

In. Words and Phrases legally defined Vol. 3 at page 179 an equitable mortgage is defined as a charge which creates a charge on the property but does not convey any legal estate or interest. Its operation is that of an executionery assurance which, as between the parties, and so far as equitable rights and remedies is equivalent to an actual assurance and is enforceable under the Courts equitable jurisdiction.

In both letter, annexture "C" and "D" the plaintiff used the word "Stake" In annexture "C" she states:-

> *" I do hereby stake in my house --- as Guarantor --- "*
> And in the annexture "D" the subject is stated as:- "Re: stating property for New Generation Project"

The letters were written by the defendant prior to the execution of the loan agreement. In the loan agreement beside her signature the defendant states:-

> *"I pledge to pay to ECLOF both interest and principals in case the project fails to pay."*

The plaintiff must have written the two letters with an intention to create some form of bailment of her house and /or land as security for the loan granted to New Generation Project. In *Y Mutambulire Vs Yosefu Kimera H.C.C. Appeal No: 37 of 1972* as security for a loan the respondent offered his Kibanja and house. Sekandi Ag J. held that the transaction was a mortgage and was guaranteed by the law regulating mortgages. I accordingly find that the transaction created between the plaintiff and the defendant was a mortgage.

In the Muta*mbulire Vs Kimera case* (supra) Court held that in Uganda the law regulating mortgages is two fold. If the land mortgaged is regulated by the Registration of Titles Act, then that Act applied. In the case of unregistered interest in land the applicable law was the common law and the doctrine of equity. The respondent's interest in that case was a Kibanja and was unregistered. Court held that the law applicable was the common law and the doctrine of equity. See also *Waswa Vs Kikungwe (1952-6) ULRI*

In the instant case the defendant's interest in the land was not registered under the Registration of Titles Act. Therefore the requirement of registration of the equitable mortgage under the act did not apply to this transaction. Also there is no evidence to show or pleading that the land was registered under the Land Act therefore the requirement for registration of a mortgage with the recorder under the Land Act did not apply to this transaction either. However since judgment in *Mutambulire Vs Kimera* (supra) the Mortgage Act has also been enacted and it came into force on 9th August 1974.

Section 1(b) of the Mortgage Act defines "mortgage" to mean:-

> *"any mortgage , charge, debenture, loan agreement or other encumbrance, whether legal or equitable which constitutes a charge over an estate or interest in land in Uganda or partly in Uganda and partly elsewhere and which is registered under the Act."*

The Land Act section (5) implies that the provision of the Mortgage Act applies to a mortgage of Customary Land made under the Mortgage Act. However, the definition of "mortgage" appears to imply that the Mortgage Act only applies to registered and equitable mortgages created over land registered under the Registration of Titles Act since the Mortgage Act came into force in 1974 yet Land Act came into force in 1998. The Mortgage Act presupposes that any Mortgage, be it legal or equitable, be registered under the Act.

In the instant case there was no registration of the transaction of any form. In the premises I find that though the transaction was an equitable mortgage, it was not a mortgage under the provisions of the Mortgage Act so as to enjoy the protection of section 21(I) (c) of the Money Lender Act. The Mortgage Act is the principle law which now governs mortgages in Uganda. In *Govindji Popatlal Vs Premachard Raichant Ltd (Supra)* court found that mere deposit of the title deed where the law required the deposited instrument to be registered did not create an equitable mortgage as effectual security upon immovable property for purposes of the Money Lenders Act. The result was that the loan transaction was not exempted from the operation of the Act.

In his submission Mr. Kwemara – Kafuzi arged Court on morality and public policy to invoke the provisions of Article 126(2) (e) of the Constitution to waive the provisions of the Money Lenders Act concerning limitation. In *Attorney General Vs Obote Foundation (1994) KALR 47* Ntabgoba PJ (as he was) held that Court's inherent powers are not invoked where a matter is time barred by limitation. In *Francis Nansio Michael Vs Nuwa Walakira (1993) VI KALR 14* it was held by the Supreme Court that clearly if the action was time barred then that was the end of it.

All in all I find that this suit was time-barred by the provisions of Section 19(I) of the Money –Lender Act. It is accordingly rejected and dismissed under Order 7 rule 11 (d) of the Civil Procedure Rules with costs to the defendant. I so order.

Hon. Mr. Lameck N. Mukasa

JUDGE

28th November 2006