

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

CIVIL SUIT NO 432/2009 FORMERLY 417 OF 2007

HAJJ HARUNA SEMAKULA}PLAINTIFF

VS

STANBIC BANK (U) LTD}..... DEFENDANT

JUDGMENT

BEFORE HON JUSTICE CHRISTOPHER MADRAMA IZAMA

The Plaintiffs matter has had a very long and protracted history. The facts averred in the plaint spun a period of about two decades. They give the story of the plaintiff in which he has been in court for about two decades. For a full appreciation of the background to the dispute, it is necessary to set out the pleadings of the parties in this judgement.

The Plaintiffs action against the defendant bank as reflected in the plaint is for an order that the defendant pays general damages arising out of breach of a temporary injunction in High Court civil suit number 386 of 1993 and its obligations as a mortgagor. Secondly the plaintiff seeks an order that it is reinstated as the registered owner of the suit land. Thirdly that an order issues that the plaintiff is entitled to possession of the duplicate certificate of title in custody of the court. The plaintiff further seeks costs of the suit and any other remedy as the court may deem fit to grant.

The facts averred in the plaint are that in 1990 he mortgaged the land to Gold Trust Bank Ltd now succeeded by DFCU bank Ltd for an overdraft by deposit of titles and mortgaged was duly registered with the registrar of titles. In 1991 the titles were returned to him by the then Gold Trust Bank Ltd and it secured the balance of unpaid overdraft by remaining securities of the houses and property on block 208 plot 1141 and 1330 which later became the subject of litigation in High Court civil suit number 433/96. The plaintiff claims that he had duly discharged his obligations in respect of the suit lands and the certificate of title to both lands was duly handed over to him. In 1991 he mortgaged the suit property to Uganda Commercial Bank and the mortgage was duly registered. On 16 July 1991 a manager of Gold Trust Bank Uganda Ltd wrote to the manager Uganda Commercial Bank in which he stated that they had no further interest on block 208 Plot 279 and 280 the subject matter of the suit. Consequently the certificate of title for block 208 plot 279 and 280 were included in a number of securities handed over to Uganda Commercial Bank for a loan by the plaintiff. In June 1993 Key Agencies and

Auctioneers advertised several of the plaintiff securities with UCB in the newspapers for sale upon instructions of Uganda Commercial Bank. The plaintiff filed an application for a temporary injunction in High Court civil suit number 386 of 1993 and a temporary injunction was issued restraining Uganda Commercial Bank from disposing of the properties including the suit property till disposal of the main suit. The temporary injunction is dated 20th of July 1993. Judgement in the main suit was delivered on the 12th of May 1998. The attached order and copy of the judgement shows that the suit was filed by Uganda Commercial Bank and the Non-Performing Assets Recovery Trust against General Parts (U) Ltd a company in which the plaintiff is a shareholder and director. General Parts Uganda Ltd appealed to the Court of Appeal in civil appeal number 020 of 1998 and the Court dismissed the appeal. Messieurs General Parts Uganda Ltd further appealed to the Supreme Court in civil appeal number 005 of 1999 and the appeal was allowed on 2nd of March 2000.

Additionally the plaintiff avers that sometime in an application for review, the Supreme Court upheld its earlier judgement with slight modifications. Sometime on 5 December 1995 a deed of assignment was executed between Uganda Commercial Bank Ltd and the Non-Performing Assets Recovery Trust wherein certain properties were assigned to the Trust but this did not include the suit property. Thereafter the Non-Performing Assets Recovery Trust advertised for sale a number of properties for sale and the plaintiff filed High Court civil suit number 1470 of 2000 and resisted the sale. Judgment was delivered in favour of the plaintiff. The non-performing assets recovery trust appealed to the Court of Appeal and eventually withdraw the appeal and an order was made to hand over the titles which had been advertised for sale to the plaintiff. Thereafter the plaintiff embarked on the process of recovering his titles and respective release of mortgages.

Since the plaintiff requested for the return of titles from the defendant herein, he was not handed over his title without any satisfactory explanation. The plaintiff avers that around 2007 he learnt that the title deeds to the suit land were in the custody of the defendant as mortgagor for another client and that the title had been transferred from the plaintiff's names into that of Nagadya Josephine and later transferred to Pearl Oils Uganda Limited. This prompted the plaintiff to file High Court civil suit number 417 of 2007 in the land division of the High Court. Thereafter the suit property title deeds were deposited in the High Court.

Consequently the plaintiff avers that it handed over title to the defendant's predecessor when it was in his names and therefore it should be handed over to him when it is still in his names or with an order of court directing so. Consequently the plaintiff pleads that the alleged transfer into the names of Nagadya Josephine was illegal, unlawful, fraudulent or null and void ab initio. The plaintiff claims to have been deprived of the use of the certificate of title by way of using them as security for overdraft/loan advances for which he claims general damages from the defendant. Secondly he avers that he suffered damages because of the fraudulent illegal and unlawful acts of

the defendant. This is because he just got vacant possession of his land recently. Secondly his land cannot be used as security or collateral for lack of titles which are in court custody.

In its amended written statement of defence the defendant denies being a successor to the defunct Uganda Commercial Bank. Secondly the defendant was not privy nor did it have any knowledge of the facts averred by the plaintiff in the plaint. Alternatively the defendant contends that according to the records of the land registry the plaintiff was the registered proprietor of the land comprised in block 208 plot 279 and 280 situated at Kawempe until 6th November 1996 when the property was registered in the names of Josephine Nagadya upon a sale of the land by Gold Trust Bank Ltd as a first mortgagee. The mortgages in favour of gold trust bank appeared on the title deed encumbrance page as first mortgages. The mortgages were discharged or removed by the Registrar of Titles. The defendant denies that the plaintiff was discharged of his obligations by Gold Trust Bank Ltd and denies the effect of the letter from Gold Trust Bank purporting to state that it had no further interest in the suit property. The defendant asserts that there was no release of mortgage. Because there was no release of mortgage Uganda Commercial Bank was registered as a second mortgagee on the suit property. Gold Trust Bank Ltd continued to enjoy rights as the first mortgagee in respect of the property. The advertisement by Key Agencies and Auctioneers was done on behalf of UCB in its capacity as a second mortgagee. The defendant denies that the suit property was the subject matter of the suit between General Parts Uganda Ltd and Uganda Commercial Bank and therefore the injunction to restrain Uganda Commercial Bank from disposing of the company's property which was the subject of the advertisement referred to in the plaint. Furthermore the defendant avers that the interest of Gold Trust Bank Limited as a first mortgagee had never been disputed in any court of law consequently Gold Trust Bank Ltd disposed of the land to Josephine Nagadya. Additionally the defendant avers that Uganda Commercial Bank did not sell the land and was only a second mortgagee and its interest was discharged or removal upon sale of the land by Gold Trust Bank Ltd. Judgement in High Court civil suit number 386 of 1993 was delivered on the 12th of May 1998 during which time UCB abided by the injunction against it and did not attempt to exercise its right as the second mortgagee in respect of block 208 plot 279 and 280 at Kawempe. While the suit was still pending in court the property was disposed of by Gold Trust Bank Ltd on 6 November 1996 as the first mortgagee. And therefore the appeals mentioned by the plaintiff had nothing to do with the block 208 plot 279 and 280 at Kawempe.

The defendant avers that the deed of assignment between Uganda Commercial Bank and Non-Performing Assets Recovery Trust included the suit property at Kawempe. This is because the assignment was in respect of all assets, rights and obligations that constituted in part the unpaid loan account of General Parts Uganda Ltd and the assignment and therefore included the second mortgage in respect of block 208 plot 279 and 280 at Kawempe together with any rights enjoyed by UCB as a second mortgagee. Consequently the rights of UCB with respect to the suit property were vested in the Non-Performing Assets Recovery Trust. Without prejudice therefore UCB as a second mortgagee did not have a right to hold in its custody the certificate of title in respect of

the suit property. The alleged contempt of court by the Non-Performing Assets Recovery Trust had nothing to do with the property comprised in block 208 plot 279 and 280 by which time it had been sold to Josephine Nagadya by Gold Trust Bank Ltd as a first mortgagee on 6 November 1996. The plaintiff has no cause of action against the defendant seeking return of the title deeds vested in the non-performing assets recovery trust upon the assignment. The defendant avers that it was not privy to the sale and transfers of the property the subject matter of the suit. Additionally the defendant denies any right or obligation to arrest the certificates of title presented to the defendant in 2007 by Pearl Oils Uganda Limited as a registered proprietor thereof. Additionally Uganda Commercial Bank as the second mortgagee had no right or obligation to dispute the sale of the land by Gold Trust Bank Ltd. The defendant is not privy to the alleged fraudulent or illegal transfer of the property to Josephine Nagadya by DFCU Bank Uganda Limited. Certificates of title were sent to Uganda Commercial Bank by Gold Trust Bank Ltd for purposes of registering a second mortgage. The property was advertised in April 1996 by Gold Trust Bank Ltd and the plaintiff never objected to it. Finally the defendant indicated that it would object to the suit for being misconceived, frivolous and vexatious and an abuse of the process of court or that the amended plaint did not disclose a cause of action or reasonable cause of action against the defendant and therefore it would raise a preliminary objection to the suit seeking it to be dismissed or the plaint to be struck out with costs. Alternatively that the suit is dismissed with costs.

In reply to the amended written statement of defence the plaintiff asserts that the defendant is a successor in title to the defunct Uganda Commercial Bank and liable for the plaintiffs cause of action set out in the amended plaint. Consequently the defendant was privy or had full knowledge of the matters alleged in the plaint either directly, indirectly or by necessary implication. The plaintiff repeats that its debt to Gold Trust Bank Ltd was fully discharged and the titles to the suit property handed over to the plaintiff who went ahead to pledge it as additional security with Uganda Commercial Bank. The plaintiff relies on a letter indicating that Gold Trust Bank had no further interest in the suit property whereupon Uganda Commercial Bank went ahead to include the suit property among securities in a mortgage executed on 12 August 1991. The plaintiff denies that Uganda Commercial Bank was a second mortgagee. Furthermore, that the suit property was affected by the order of temporary injunction issued by the High Court. The plaintiff relied on the written statement of defence filed by DFCU Bank, a successor Title of Gold Trust Bank Ltd. He also avers that UCB was never registered as the second mortgagee. UCB advertised the suit land and was stopped by court according to the copy of a temporary injunction attached. Judgement in High Court civil suit number 386 of 1993 was delivered on the 12th of May 1998 and the temporary injunction remained in place until then. That the suit property was a subject matter of the various appeals referred to in the plaint. That UCB as a mortgagee was in custody of the certificate of title as a mortgagee and not second mortgagee. Gold Trust Bank ceased to have interest in the property in 1991 and the alleged sale of the suit property to Josephine Nagadya was illegal/unlawful. Uganda Commercial Bank was under obligation to question how Pearl Oils Uganda Limited acquired the titles and ought to have

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confiscated the title deeds. The plaintiff was the defendant liable for the deprivation of the plaintiff's use of the certificates of title to the suit property.

At the hearing of the suit the plaintiff was represented by learned Counsel Moses Kuguminkiriza of Messrs Kuguminkiriza and Company Advocates where the defendant was represented by learned Counsel John Fisher Kanyemibwa of Messrs Kateera and Kagumire Advocates.

In a joint scheduling memorandum signed by counsels for both parties dated 20th of February 2012 and filed on court record on 21 February 2012 the admitted facts are the following:

1. The Plaintiff Hajji Haruna Semakula was the registered proprietor of the suit land comprised in Block 208 Plot 279 and 280.
2. The plaintiff before 1991 used the certificate of title to the suit property among other things as collateral/security to secure a loan from Gold Trust Bank (U) Ltd (now DFCU Bank Ltd).
3. The certificate of title to the suit land was handed over to Uganda Commercial Bank by Gold Trust Bank Ltd after it expressed no further interest in the suit land (Block 208 Plot 279 and 280) among others.
4. The mortgage in favour of Gold Trust Bank remained reflected as encumbrance on the suit titles.
5. The certificates of title were among other properties General Parts (U) Ltd used as security to secure a loan from Uganda Commercial Bank on 12 August 1991.
6. A mortgage deed was executed between the plaintiff and Uganda Commercial Bank (U) Ltd on 12 August 1991.
7. In June 1993 Uganda Commercial Bank advertised for sale a number of properties in New Vision of 21st of June 1993 through Key Agencies and Auctioneers and the suit properties were amongst those advertised for sale.
8. The sale of the suit property was challenged culminating in HCCS 386/1993 UCB versus General Parts (U) Ltd.
9. A temporary injunction was issued by court in HCCS 386/1993 by honourable Mrs Justice M Kireju on 20 July 1993, restraining Uganda Commercial Bank from disposing of the property of General Parts (U) Ltd.
10. Judgment in HCCS 386/1993 was delivered by the Principal Judge honourable Justice J.H Ntabgoba on the 12th of May 1998 in favour of Uganda Commercial Bank.
11. General parts (U) Ltd appealed against the judgment and orders in HCCS 386/1993 to the Court of Appeal of Uganda vide Court of Appeal civil appeal number 020/1998 in which the appellate court dismissed the appeal.
12. General Parts (U) Ltd appealed against the Court of Appeal judgment vide Supreme Court civil appeal number 005/1999 in which the appeal was allowed.

13. There was an application for review of the judgement of the Supreme Court in SCCA 005/1999 vide SCMA 008/2000 in which the Supreme Court upheld its earlier decision with a slight modification.
14. On 5 December 1998 a deed of assignment was executed between UCB and Non-Performing Assets Recovery Trust. (This was later amended by the plaintiff as far as the date is concerned to reads 5th of December 1995) there is no controversy about the date of the deed of assignment.
15. The certificates of title in respect of the suit properties were not part of the schedule to the said assignment Deed.
16. The plaintiff and General Parts (U) Ltd challenged the actions of Non-Performing Assets Recovery Trust and its Administrator of advertising for sale the properties of General Parts (U) Ltd and the plaintiff culminating in the institution of HCCS 1470/2000.
17. HCCS 1470/2000 was decided in favour of the plaintiffs (Hajji Haruna Semakula and General Parts (U) Ltd).
18. There was an appeal lodged against the judgement and orders in HCCS 1470/2000 vide Court of Appeal CA No. 029/2003 which was eventually withdrawn by the appellant (Non-Performing Assets Recovery Trust).
19. The plaintiff wrote several letters to Non-Performing Assets Recovery Trust demanding for the return of his titles including those of the suit property.
20. The certificates of title are in court custody but are still in the names of Josephine Nagadya.
21. The plaintiff is the Managing Director of General Parts (U) Ltd.

Learned counsel for the defendant John Fisher objected to the suit as framed on 12 March 2012 on the ground that the plaint discloses no cause of action against the defendant and ought to be rejected under order 7 rules 11 of the Civil Procedure Rules. Alternatively he contended that the plaint does not disclose a reasonable cause of action against the defendant. Firstly as far as breach of a temporary injunction is concerned, he contended that the plaintiff in the action was General Parts (U) Ltd and there was no averment that it was acting as an agent of the current plaintiff. So the plaintiff had no locus standi to complain about breach of the temporary injunction. Secondly the defendant is not the registered proprietor of the suit property and an action for cancellation of title or for vacant possession could not be maintained against the defendant. Thirdly allegations were made against parties who are not parties to the suit. The objections of the defendant were partly upheld by the court on 23 April 2012. The court said at page 23 of the judgement as follows:

“Much as the plaintiff pleads that the defendant ought to explain what happened to his title, he also avers that he has been in possession of the land. Can it be said that he has been deprived? Having said that, I would leave it as a matter for trial in this suit. In the premises the defendant's objection substantially succeeds with costs. As far as the claim for the duplicate certificate of title, possession, or cancellation of title is concerned the

plaint discloses no cause of action or any reasonable cause of action against the defendant and that part of the plaint is rejected with costs.

As far as the causes of action for any alleged breach of injunction or duties under the mortgage are concerned, this part of the plaint shall be heard on merits and the defendant's objection thereon is overruled with costs to abide the outcome of the trial."

The summary of the conclusions of the court is that the question of whether the plaintiff has been deprived of land or interest in land as a consequence of the defendant's actions remained a matter for trial in the suit. This flows from the alleged obligations under the mortgage contract. Secondly the cause of action for alleged breach of injunction or duties under the mortgage was to be heard on the merits. It follows that only part of the suit survived. The conclusion of the court is that an action for recovery of land only could be maintained against the registered proprietor. It followed that an action for vacant possession or any matters related to the recovery of land lay against third parties not before the court. Consequently, there were two main areas remaining for resolution by the court and these were; whether there was a breach of duties under the mortgage by the defendant. Secondly whether there was a breach of injunction by the defendant.

After the ruling, the parties agreed that they would file witness statements and cross examine the witnesses. Indeed the plaintiff filed one witness statement which is the witness statement of Hajj Semakula Haruna the plaintiff in this action. The defendant relied on one witness statement by Ms Gertrude Wamala Karugaba, the Company Secretary of the defendant. The second witness who testified orally by consent of the parties and is Mr. Vincent Kaunde the proprietor of Oscar Associates said to be responsible for the sale of the suit property. All the witnesses were cross examined and learned counsels agreed to file written submissions as final address to court on the remaining issues.

First of all I would like to lament about the length of the written submissions. The plaintiff filed written submissions in 18 pages of typescript. The defendant's Counsel replied in a voluminous typescript of 69 pages. Thereafter the plaintiff's Counsel filed a rejoinder which is even longer than his original written submissions and is 21 pages of typescript. Consequently the court is expected to read through the record of proceedings, the pleadings and documents and typescript of about 108 pages before coming up with a decision on the narrowed down controversy between the parties. The controversy was narrowed down in the ruling of the court in April 2012. I would therefore have to consider the narrower issues by establishing the implications of the ruling of the court in April 2012 on the issues originally framed by the parties.

The ruling of the court on the preliminary point of law on whether there was a cause of action against the defendant came after the agreed issues in the joint scheduling memorandum.

In his written submissions the plaintiff's counsel addressed court on the following issues:

1. Did defendant breached the temporary injunction in civil suit number 386 of 1993?

2. Is the plaintiff entitled to damages arising out of a violation of the temporary injunction in civil suit number 386 of 1993?
3. Whether the defendant is a successor to Uganda Commercial Bank?
4. Whether the plaintiff secured a release of mortgage in respect of the suit land from Gold Trust Bank Ltd?
5. Whether the alleged sale of the suit land by Gold Trust Bank Ltd to Josephine Nagadya was lawful?
6. Whether the plaintiff is entitled to possession of the duplicate certificate of title.
7. Whether the plaintiff should be reinstated as the registered owner of the suit land.

The defendant too, more or less, submitted on the same issues in its final address to the court.

I have carefully evaluated the issues and the submissions of counsel. The first observation I have to make is that questions of fact are not very much in dispute. Consequently the dispute would be resolved on interpretation questions rather than on factual controversy. These issues have been dramatically affected by the testimony of DW 1 Mr. Vincent Kawunde of Oscar Associates who testified that he got instructions from Kavuma Kabenge and Company Advocates to recover the monies owed to Gold Trust Bank whereupon he advertised the suit property namely Kyadondo block 208 Plot 279 and 280 at Kawempe. He testified that he advertised the properties and sold them. The property was advertised in the New Vision Newspaper of Wednesday 3rd of April 1996 and the date of auctioning is indicated in the advert. The advertisement by Oscar Associates was adduced in evidence by agreement of the parties before the testimony of DW 1. The advertisement is exhibit P 34 in the plaintiffs trial bundle at page 183. It is at page 6 of the New Vision of April 3, 1996. According to the advertisement the date of sale was to be 3 May 1996 at 10 AM. It shows that they were duly instructed by Kavuma Kabenge and Co Advocates on behalf of their client Gold Trust Bank Ltd.

If this evidence is to be taken as true, then the issues as framed have to be handled differently. There is no reason for the court to indulge in a lot of issues if it is proven that the property was sold by Oscar Associates as a question of fact.

The first question for determination is therefore whether the property was sold by Oscar Associates in May 1996. In considering this issue, the court will in effect dispose of issues numbers 1, 2 and 4. These issues are:

- 1. Did defendant breached the temporary injunction in civil suit number 386 of 1993?**
- 2. Is the plaintiff entitled to damages arising out of a violation of the temporary injunction in civil suit number 386 of 1993?**
- 3.**
- 4. Whether the plaintiff secured a release of mortgage in respect of the suit land from Gold Trust Bank Ltd?**

A resolution of the question of fact would substantially dispose of the suit in that several other issues submitted on by the parties would be rendered irrelevant. The plaintiff's testimony in this matter is that sometime between 1989 and 1990 he received overdraft facilities from Gold Trust Bank Ltd whereupon he deposited securities with the bank. These included Kyadondo block 208 plots 279 and 280 the subject matter of this suit. He testified that by 1991 three securities were returned to him after being discharged by the bank. These were block 208 plots 829, 279 and 280. The titles for the three different plots were handed over to him physically. The balance of the debt on the overdraft facility with Gold Trust Bank remained secured with other land titles for block 208 plot 1141 and 1330. The three titles which include the suit property namely plots 829, 279, and 280 were titles used in the mortgage of 12th of August 1991 between the plaintiff and General Parts Uganda Ltd on the one hand and Uganda Commercial Bank on the other hand. His testimony is that on 3 April 1996 when the Gold Trust Bank facility accumulated arrears of **shillings 15,132,128/=** Messieurs Oscar Associates advertised the property for sale and included plots 829, 279 and 280 although the title deeds had been returned to him and given to Uganda Commercial Bank. This fact was well-known to DFCU Bank Ltd, the successor of Gold Trust Bank Ltd. This fact was well-known to Gold Trust bank who wrote a letter dated 16th of July 1991 to the manager UCB confirming that they had no further interest in the three properties mentioned therein. The letter was admitted in evidence as exhibit P2. The letter is dated 16th of July 1991 on the letterhead of Gold Trust Bank Ltd. It is addressed to the Manager Uganda Commercial Bank, Corporate Division, Kampala. It is on the subject of plot 279, plot 280, and plot 829. The letter reads as follows:

"As we have no further interest in the above-mentioned deeds, we have no objection to our names as mortgagees being deleted from them.

Yours faithfully,

GENERAL MANAGER"

Consequently the plaintiff testified that there was no confusion as to this letter which was written in response to a letter by UCB exhibit P7. Exhibit P7 is dated 1st of July 1991 and it is on the letterhead of Uganda Commercial Bank, Corporate Banking Division. It is addressed to the Managing Director, General Parts Uganda Ltd. The letter reads as follows:

"LOAN ACCOUNT CB 98 IN CORPORATE BRANCH

Further to our letter of even referenced dated 25th of June 1991, you are requested to formally accept the terms and conditions as laid down in our letter of 14th of June, 1991 which was addressed to your lawyers and copied to you.

You should also call at the office of the undersigned for purposes of executing powers of attorney in respect of the titles you lodged with us on 26th of June, 1991.

Valuation reports and insurance policy covers for the stocks should as a matter of urgency be submitted to this office.

Needless to say, the first instalment is expected to have been paid on 1 July, 1991.

Please note that three of the titles that is block 208, plots 829, 279 and 280 bear mortgages of Gold Trust Bank and unless those mortgages are removed we shall not treat them as forming part of the security.

Yours faithfully,

ASST GENERAL MANAGER”

On 22 May 1996 Gold Trust Bank Ltd filed an action in the High Court namely HCCS No. 433 of 1996 against Wheels (U) Ltd by originating summons for recovery of **15,132,128/= Uganda shillings** in which judgement was given in its favour for recovery of a sum by way of foreclosure of property comprised in block 208 plot 1141 and 1330. The debt was paid by Wheels (U) Ltd and the property was redeemed. The titles from Gold Trust Bank Ltd were therefore returned to him. No money was owed and the issue of sale of the property deposited with the bank did not arise. Additionally the property comprised in block 208 plot 829 was also returned to him according to the Court of Appeal order exhibit P 19. Exhibit P 19 is a matter between the plaintiff and General Parts Uganda Ltd as respondents and the Trustee of the Non-Performing Assets Recovery Trust as appellants civil appeal number 029 of 2003.

The additional evidence of the plaintiff is that his relationship with UCB fell apart because of their failure to fund the company because they claimed that the titles he had given them was for securing an old debt which debt he claimed was secured by a debenture. He contended that the mortgage was supposed to enable the bank extend him further funding. Because no such funding was done by UCB, the bank wrongly closed his business and after seven months went to court seeking declarations that it properly appointed a receiver. The suit was HCCS No. 386 of 1993 between Uganda Commercial Bank and General Parts (U) Ltd. An injunction was granted restraining UCB from selling the property after it was advertised by Key Agencies and Auctioneers on behalf of UCB.

Consequently it is a question of fact and law that UCB was a restrained from selling the property pending the final disposal of the suit. The plaintiff further testified that the ruling in the main suit was given in favour of UCB on 12 May 1998 and as evidenced by exhibit P 12 the judgement of the Principal Judge then honourable Ntabgoba. The honourable judge held that the plaintiff properly appointed a receiver/manager namely Key Agencies and Auctioneers. Secondly that they could go ahead and execute the power conferred upon them by the plaintiff. The defendant was ordered to pay the costs of the suit. Subsequently the defendant in that case Messrs General Parts (U) Ltd appealed. The Court of Appeal affirmed the orders of the High Court in its judgment in C.A. No. 20 of 1998. General Parts (U) Ltd further appealed against the judgement

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of the Court of Appeal to the Supreme Court in SCCA number 005/1999 and the Supreme Court ruled in favour of the appellant. The orders of the High Court and Court of Appeal were set aside.

It can be surmised that the plaintiff never knew what happened to his title deeds after he used it as further security and deposited it with Uganda Commercial Bank. The sale allegedly took place when the title deeds were with Uganda Commercial Bank. I have considered basic comments of the plaintiff's counsel on the effect of the evidence of DW1. Learned counsel submitted that DW1 testified that he was instructed by Kavuma Kabenge and Company Advocates to advertise and sell a range of properties including the suit property. The date indicated in the advertisement is 3 May 1996. He submitted that at that material time the injunction was still subsisting and no valid sale could take place on that date. Secondly he attempted to show that the alleged sale was a sham because Gold Trust Bank was not in possession of the three titles by April 3, 1996 the date of the advertisement. How could Gold Trust Bank sell properties that were not in its possession, he asked? He contended that by the ruling in civil suit number 433 of 1996 exhibit P1, it is clear that by this time Gold Trust Bank Uganda limited had only titles for plots 1141 and 1330 on which it sought a foreclosure order to recover its outstanding money. Judgement in that suit was given on 1 November 1996 and if there was to be any advertisements to sell property, such advertisement should have come out after 1 November 1996 and not in April 1996 before judgement was delivered. Learned counsel for the plaintiff further sought to discredit the testimony of DW1 on the ground that he was evasive during cross examination on pertinent issues regarding the sale. He contended that the witness never saw the duplicate certificate of title but only saw photocopies and he did not know how much money was owed by Wheels (U) Ltd. He did not carry out a valuation of the properties before sale. He does not remember precisely how much Josephine Nagadya paid for the property but estimated it to be about Uganda shillings 8 million. He could not tell the court whether order five properties advertised were sold off and how much each of them fetched to satisfy the debt due and owing. He contended that the defendant was under a duty to observe the temporary injunction which by 1996 was still subsisting. Secondly the defendant was in possession of the titles and there is no plausible explanation how the title left its hands. He contended that no plausible explanation had been given by the defendant's witnesses. Further at the time the suit was instituted the defendant was in actual possession of the title deeds. Upon conclusion of civil suit number 1470/2000 as well civil appeal number 029/2004 in the Court of Appeal, the plaintiff demanded for the return of its titles but the suit properties were not among those returned. Consequently he submitted that the defendant violated the court order issued in civil suit number 383 of 1993.

In reply counsel for the defendant dealt with the issue of whether the plaintiff secured from Gold Trust Bank Ltd a release of mortgage in respect of the suit land. Secondly the issue of whether the letter of 16 July 1991 from Gold Trust Bank Ltd to the manager UCB amounted to a valid release of mortgage. In other words it is an assertion of the defendants that Gold Trust Bank Ltd had a subsisting mortgage on the suit property by the time it was sold.

Learned counsel for the defendant pre-faced his submission on this issue by looking at exhibits P2, which is a letter dated 16th of June 1991 purporting to release the mortgage. He relied on exhibit P7 where Uganda Commercial Bank brought to the attention of General Parts (U) Ltd that the titles had mortgages of Gold Trust Bank. Unless the mortgages were removed, UCB maintained that it would not use the title deeds as security. Counsel referred to exhibits P4 and P5 which reflected the encumbrances showing that Gold Trust Bank Ltd still had the mortgage interest registered on the encumbrance page. The defendant exhibited the photocopies of the title deeds as exhibit D1 and D2 and it reflected proprietorship and encumbrances on the title deeds. The duplicate certificates of title which are in court custody were also exhibited and marked court exhibits 1 and 2. Gold Trust Bank was registered as a Mortgagee on the 2nd of May 1990. The letter of Gold Trust Bank exhibit P2 dated 16th of July 1991 was not a release of mortgage because it did not comply with the legal requirements for release of mortgage under the Registration of Titles Act (RTA). Counsel goes on to quote and extensively elaborate on law regarding the discharge of mortgages under section 125 of the RTA. Learned counsel also submitted that the letter of Gold Trust Bank did to have a seal affixed thereto as prescribed by section 132 (1) of the Registration of Titles Act. Generally the defendants counsel submitted on the formal requirements for the discharge of a mortgage and showed that it was not complied with by the exhibit relied upon by the plaintiff. Because of failure to comply with the formal requirements counsel contended that Gold Trust Bank Ltd did not sign exhibit P2 as required by law. He concluded that this may explain why the plaintiff did not attempt to protest the advertisement of the suit property by Gold Trust Bank Ltd in exhibit P 33. Counsel further contended that the plaintiff only lodged a caveat on the suit land subsequent to the registration of Josephine Nagadya as proprietor of the suit land and he relied on exhibit P 25 at page 173 of the trial bundle.

The plaintiffs rejoinder is that to the parties to the letter of 16 July 1991, it operated as a release mortgage as their actions indicated. UCB went ahead to register a mortgage on the suit property according to exhibit P3. Secondly Gold Trust Bank Ltd did not make any application to have the suit property foreclosed. Thirdly the successor in title of Gold Trust Bank Ltd, DFCU bank, maintained the same position in its written statement of defence on court record. This was that Gold Trust Bank had no further interest in the land and released the certificates of title to the plaintiff.

For the moment it is unnecessary for me to deal with the formal requirements of release of mortgage the way counsels did. I have to first deal with an underlying issue which is whether the suit property was sold. This is a question of fact. Secondly the fact that UCB was registered on title deed as a mortgagee is also question of fact. Thirdly, whether the mortgage of Gold Trust Bank Ltd was released would depend on whether the release whether legal or not was registered. One can have all perfectly executed documents or instruments needed with regard to an instrument which ought to be registered under the Registration of Titles Act. So long as the instrument is not registered, it cannot purport to affect the title as far as the Registration of Titles

Act is concerned. The instrument can only operate as estoppels or a contract between the parties who are privy to it. Unless it is registered, it would be inoperative against third parties. This is evident from the provisions of the Registration of Titles Act section 54 thereof which provides:

“54. Instruments not effectual until registered.

No instrument until registered in the manner herein provided shall be effectual to pass any estate or interest in any land under the operation of this Act or to render the land liable to any mortgage; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be, the land shall become liable in the manner and subject to the covenants and conditions set forth and specified in the instrument or by this Act declared to be implied in instruments of a like nature; and, if two or more instruments signed by the same proprietor and purporting to affect the same estate or interest are at the same time presented to the registrar for registration, he or she shall register and endorse that instrument which is presented by the person producing the duplicate certificate of title.”

An instrument which is to be registered however framed cannot be effectual if it is not registered. Secondly, an instrument that is registered prior in time takes precedence over an instrument registered later in time. (See section 48 of the RTA).

It is a question of fact that a mortgage deed for block 208 plot 279 and 280 was executed or purported to be executed by the parties on 12 August 1991. Secondly this instrument was registered on the title deeds as can be seen by exhibit P3. Exhibit P4 is an encumbrance page showing that the mortgage was released upon sale by mortgagee. Exhibit P5 also shows that the mortgage was released upon sale by first mortgagee. There is no dispute that the first Mortgagee is Gold Trust Bank.

I have also examined the court exhibits 1 and 2. Court exhibit 2 is in respect of block 208 plot 280. The encumbrance page thereof shows that Gold Trust Bank was registered on the 2nd of May 1990 under Instrument No. KLA 140474. Subsequently Uganda Commercial Bank was registered under instrument KLA 148924 on 22 August 1991. The encumbrance page shows an additional entry on 6 November 1996 under instrument number KLA 184067 showing cancellation of mortgage. There is no memorial and one signature appears on the cancellation of the mortgage of UCB. The same instrument number appears for cancellation of the Gold Trust Bank mortgage and the UCB mortgage.

I have also examined court Exhibit 1 which is in respect of block 208 plot 279. The encumbrance page shows that Gold Trust Bank was registered as a Mortgagee on the 2nd of May 1990 under instrument number KLA 140474. It also shows that Uganda Commercial Bank was registered as Mortgagee on 22 August 1991 under instrument number KLA 148924. The mortgages were

apparently deregistered on the encumbrance page on 6 November 1996 under instrument number KLA 184066. There is no registration showing release of mortgage according to exhibit P2.

Consequently the letter of Gold Trust Bank Ltd dated 16th of July 1991 and addressed to the manager Uganda Commercial Bank showing that it had no interest in the plot 279, 280 and 829 is not a release of mortgage and does not purport to be. It is a letter addressed to the manager of UCB indicating that Gold Trust Bank Ltd has no objection to the names of Gold Trust Bank Ltd being deleted or deregistered from the title deeds. It shows that, further formalities were required for it to be deregistered. In other words it was notice that Gold Trust Bank Ltd had no further interest in that security. It was upon the mortgagor to obtain a release of mortgage because he was interested in using the title deeds as further security for a facility in UCB. It is a factual point that no release of mortgage instrument was executed or registered. Consequently Gold Trust Bank remained on the encumbrance page as a mortgagee. Secondly, the encumbrance page shows that the same instrument was used to release the mortgage of Gold Trust Bank and Uganda Commercial Bank. If we are to take the submissions of the parties on the formal requirements for release of mortgage, it would be presumed that Uganda Commercial Bank signed a formal release of mortgage before the instruments releasing both encumbrances was registered. Apparently one instrument was used to deregister two encumbrances. Was this regular in law? I will address this question presently

Quite appropriately it is the submissions of learned counsel for the defendant which is pertinent. Section 125 of the Registration of Titles Act expressly provides the manner of releasing of mortgage. It is quoted for ease of reference:

“125. Discharge of mortgages.

Upon the presentation for registration of a release from any registered mortgage or charge in the form set out in the Twelfth Schedule to this Act signed by the mortgagee or his or her transferees and attested by one witness and discharging wholly or in part the lands or any portion of the lands from the registered mortgage or charge, the registrar shall make an entry of the release upon the original and duplicate certificate of title and upon the original mortgage and duplicate, if any, and on the date of such registration as defined in section 46(3) the land affected by the release shall cease to be subject to the registered mortgage or charge to the extent stated in the release.”

The release is signed by the mortgagee or his or her transferees and attested by one witness. No release of mortgage instrument has been produced in evidence. We only have evidence of registration of an instrument. We shall critically examine this evidence. Starting with the exhibits produced by the plaintiff namely exhibit P4. The equivalent of exhibit P4 which is the encumbrance page should have had an equivalent page in the court exhibits 1 and 2. However the two documents are not alike in every respect. First of all the signatures of the registrar are clearly not the same. Court Exhibit 2 in respect of block 208 plot 280 has no signature of a

registrar signifying release of mortgage. The release of mortgage only has an instrument dated 6th of November 1996 KLA 184067. Compared to the other exhibit P5 has a handwritten instrument number KLA 184066. It is the same instrument number in respect of exhibit P4 which is KLA 184066. The photocopies of the equivalent white pages were produced by the defendants. This is exhibit D1 which is also equivalent to exhibit P4. The instruments KLA 184066 dated 6th of November 1996 is the instrument registering Josephine Nagadya as registered proprietor. On the encumbrance page the same instrument is used to deregister the two mortgages of Gold Trust Bank and UCB. Words are inserted showing that the mortgage was satisfied upon sale by mortgagee and that is with regard to the first mortgage. The handwritten notes continued to show that the second mortgage was removed upon realisation of the sale by first mortgagee with first priority. The signatures that registered the mortgages are over written by another signature of the person who certified the document on 17 November 2000. It could be assumed that the signature is that of the persons who registered Josephine Nagadya as the registered proprietor on the white page and this appears to be the case. This is in respect to plot 279. Secondly we have exhibit P2 which is in respect plot 280. In it the ownership page shows that Josephine Nagadya was registered on 6 November 1996 under instrument number KLA 184067. On the encumbrance page however instrument number KLA 184066 is used to deregister the first mortgage and the second mortgage. It is written in handwriting and is not typescript. It is signed by the person who registered the transfer to Josephine Nagadya. This is the same person who certified the document as a true copy dated 17th of November 2000.

As far as the duplicate certificate of title in custody of the court is concerned instrument number KLA 184066 registered on 6 November 1996 affects block 208 plot 279 and Court exhibit 1. However the signature on the original duplicate certificate of title is different from that photocopied from the white page exhibit P4. The only signature which is the same is in respect of the registration of the mortgage and not release of mortgage. What is even more alarming is that the photocopied white page has another signature superimposed on the signature of the registrar who registered the mortgages. However that signature is clearly of a different person from that on the duplicate certificate of title which is in court custody.

To make some conclusions on the basis of the glaring evidence reviewed in the exhibits, the provisions of law are that any release of mortgage should be executed by the mortgagee and attested as stipulated in section 125 of the RTA set out above. Secondly it must have a separate instrument number as each deals with a different interest and a different mortgagee. The separate instrument number is duly registered under section 46 of the Registration of Titles Act. And the Memorial of the registration of the release is entered on the page reflecting the title deed i.e. the encumbrance page and endorsed by the registrar who registers the instrument. Section 46 (2) of the RTA is very pertinent. It provides as follows:

“46. Effective date of registration; the duly registered proprietor

(1) Subject to section 138(2), every certificate of title shall be deemed and taken to be registered under this Act when the registrar has marked on it—

(a) the volume and folium of the Register Book in which it is entered; or

(b) the block and plot number of the land in respect of which that certificate of title is to be registered.

(2) Every instrument purporting to affect land or any interest in land, the title to which has been registered under this Act, shall be deemed to be registered when a memorial of the instrument as described in section 51 has been entered in the Register Book upon the folium constituted by the certificate of title.”

Upon the presentation of an instrument for registration, it will be deemed to be registered when the Memorial of the instrument is entered in the register book upon the folium constituted by the certificate of title. This is popularly known as the white page. The Memorial will indicate the instrument number, and the type of instrument and it will be authenticated by the registrar's signature. Section 51 further defines what a memorial is and provides as follows:

“51. Memorial defined.

Every memorial entered in the Register Book shall state the nature of the instrument to which it relates, the time of the production of that instrument for registration and the name of the party to whom it is given and shall refer by number or symbol to the instrument, and shall be signed by the registrar.”

The memorial shall have the instrument number, the description of the instrument i.e. "release of mortgage" and the signature of the registrar. It also bears the date and time of registration. This is because a document registered first in time takes priority over a document registered later. It can therefore be concluded that there is no evidence whatsoever that UCB signed a release of mortgage. Secondly one instrument cannot be used to release two different mortgage encumbrances of two different mortgagees. The matter is not made easier by the witness statement of DW 2 the Company Secretary of the defendant. In paragraph 20 of her witness statement, she says that the first mortgagee has a priority right of custody of a certificate of title securing the indebtedness to the mortgagees thereof. However the evidence shows that the title deeds were with UCB. In her testimony, she asserts that the encumbrance of the mortgage of UCB was removed upon sale by the mortgagee with first right as reflected by the exhibits. A simple question remains as to whether, sale by a first mortgagee, does away with the interest of a second or subsequent mortgagee. What is pertinent is that a mortgagee has to protect his or her interest by getting interested in any transaction which may affect the mortgages rights. In this particular case, the interest of UCB was the subject of an ongoing case. In that case UCB had a vested interest in the property. In fact, it had filed an action and had advertised the property for sale. The plaintiffs company General Parts Uganda Ltd applied for a temporary injunction to

restrain it from selling the suit property. Before that the suit was disposed of, the property was advertised for sale. What would be the purpose of the suit if the property the subject matter of the suit is sold? Should UCB feign ignorance? A strong submission was made that the plaintiff should have taken steps to prevent the property from being sold. That submission ignores the interest of the mortgagee, namely UCB who had advertised the same property for sale and had only been restrained by an order of the court on the application of the plaintiffs company or the company where the plaintiff is a managing director namely General Parts (U) Ltd. The matter went up to the Supreme Court where the decision of the High Court that the appointment of a receiver was proper was set aside. This brings me back to the testimony of DW 1 of Oscar Associates. He produced exhibit D7 which is a letter dated 28th of November 1996. The letter is addressed to The Corporation Secretary, Uganda Commercial Bank, Head Office, Kampala.

It is in respect of subject matter: KYADONDO BLOCK 208 PLOT NUMBERS 279, 280, 289, 1330 AND 1141 AT KAWEMPE; REGISTERED PROPRIETOR HARUNA SEMAKULA. I will reproduce the letter for ease of reference. One Vincent Kawunde, who testified as DW1 wrote as follows:

"I received instructions from Gold Trust Bank Ltd (the first mortgagee) to its advocates Messrs Kavuma Kabenge and Co Advocates to sell the above mortgaged properties to recover money owed to them under the relevant mortgages registered on the 2nd of May 1990 and instrument number KLA 140474.

Property comprised in plot number 279 and 280 block 208 at Kawempe measuring 0.28 acres and 0.27 acres of which you are a second mortgagee under instrument number KLA 148924 registered on 22 August 1991 was sold to Josephine Nagadya of PO Box 3470, Kampala at shillings 8,000,000/= which proceeds were passed on to the first mortgagee less my fees and lawyers fees.

The first mortgages interest in the mortgages is shillings 15,132,128/= inclusive of interest.

You may contact the first mortgagee about the same or declare the extent of your mortgage interest in the properties to me so that they are catered for.

Yours faithfully,

Vincent Kawunde"

The letter shows that it was copied to the legal officer, Non-Performing Assets Recovery Trust, Kampala. Secondly it was copied to the Registrar of Titles, Kampala.

I have carefully considered the implications of this letter. The testimony of the witness regarding this letter is that he wrote to UCB to contact the first mortgagee to see how they could share the proceeds. On cross examination the witness said he remembered selling plots 279, 280, 1330 and

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1141. The witness further said that he did not sell the property on 3 May 1996 but rather on 6 August 1996 according to his returns. The witness did not actually sell by private treaty himself but forwarded the buyers to the advocates. Money was paid to the advocates. His role was only to find a buyer. The witness did not remember who signed the transfers. There was no sale agreement and the buyer just got a receipt. The photocopies of the title deed were got from the advocates who gave instructions to sell. This takes the matter back to the testimony of the plaintiff.

The plaintiff testified that there was a case between Wheels (U) Ltd which was one of his companies and Gold Trust Bank Ltd in which they sought to foreclose on the securities that they retained other than the suit property namely plots 280 and 279. Exhibit P1 is the ruling in that case namely civil suit number 433 of 1996. The application was filed on the 22nd of May 1996. It was an application by originating summons to determine the respondent's indebtedness to the applicant. And whether the defendant has a right to redeem its mortgaged land or whether it should be foreclosed and sold by private treaty or public auction to satisfy the applicants debt secured by the mortgage. The background given by the learned judge in that case is that on 5 April 1990 the respondents Wheels (U) Ltd mortgaged land comprised in block 208 plots 1141 and 1330 to the applicant to secure an advance of shillings 10,000,000/= with interest. The balance payable on the loan was 15,132,128/= the subject matter of the suit. I must pause here to assert that this is the same amount of money referred to by DW1 being the amount in which the plaintiffs company was in default. On 1 November 1996 the Hon. Judge give his ruling in which he ordered that the respondent shall pay the costs of the suit and that the applicant was free to foreclose and sell the mortgaged land to recover its debt. The conclusion of in the ruling is as follows:

"I hold that the respondent is liable to paying the sum of shillings 15,132,128/=. I therefore order that this amount be paid within a period of 14 days from the date hereof with interest at the rate of 27% per annum. I order that unless payment is made within the said 14 days period, the applicant shall be free to foreclose and sale of the mortgaged land to recover its debt. I also order that the respondent shall pay the costs of this case consequent thereupon.

J.H. Ntabgoba

Principal Judge."

The plaintiff claims that he redeemed the property and got back his title deeds. He contended that the issue of sale of the property by Gold Trust Bank cannot arise. He shows that subsequently Block 208 plot 829 was also returned to him according to the Court of Appeal order exhibit P 19. Furthermore, plots 279 and 280 were returned to him and he gave them to UCB. The ruling of the Honourable Principal Judge referred to above proves one important point which is that Gold Trust Bank had filed an action in respect to only two plots of land namely

Block 208 plots 1141 and 1330. This was to secure the entire indebtedness of Wheels (U) Ltd for the sum of 15,132,128/= which is the same sum DW1 claims to have sold the property for. DW 1 made the sale without reference to a court order. He relied on instructions of advocates referred to in his testimony above. Pursuant to the ruling of the Hon. Principal Judge, which ruling is dated 1st of November 1996, why does DW1 contend that the property was sold in August 1996? In his examination in chief, he was asked when this property was due for sale and he said it was on 3 May 1996. He claims to have written to the company secretary on 8 November 1996. Exhibit D7 is the letter. The letter does not indicate when the property was sold. Finally the witness testified that his returns show that he sold the property on 6 August 1996. He specifically repeated that he made the return of the sale on 6 August 1996. The title deeds show that Josephine was registered on 6 November 1996 under instrument number KLA 184066. This is the same instrument number used for cancellation or release of mortgage. This evidence is on court Exhibit 1 in respect of block 208 plot 279.

The conclusion is inevitable. The property was sold or purportedly sold before conclusion of the case between wheels (U) Ltd and Gold Trust Bank Ltd. In other words there was an application to foreclose on two plots of land belonging to the plaintiff namely plots 1141 and 1330. This was not the subject matter of the current suit. DW1 purported to sell a different plot of land in which Gold Trust Bank had written a letter stating that they had no interest namely plot 279 and 280. Thirdly, the instruments used for release of mortgage bear the same instrument number for registration of Josephine Nagadya on 6th of November 1996 in respect of plot 279. This instrument was used to deregister the mortgages on plots 279 and 280. The release of mortgage was irregular and unlawful. It did not comply with the legal provisions submitted on by the learned counsel for the defendant. It may be assumed that foreclosure and sale automatically extinguishes the mortgage, a proposition of law that has merit. However, the same instrument cannot be used for two different plots to extinguish 4 different mortgage interests. That would be highly irregular and illegal.

As far as joint mortgagees are concerned, the position of the defendant is that the first mortgagee has priority over subsequent mortgagees. He relied on the priority of registration under section 46 of the RTA. There is however no specific statutory provision under the RTA in support of any proposition of law that the first mortgagee may ignore the subsequent mortgagees when conducting a foreclosure action. Subsequent mortgagees have to be registered with the consent and concurrence of the first mortgagee. This would subject the land to subsequent interests which have to be taken into account. Section 127 of the RTA provides as follows:

“127. First mortgagee to produce title for registration of subsequent instrument

When any instrument subsequent to a first mortgage is made by the proprietor of any land, and the proprietor or the person entitled to the benefit of the subsequent instrument desires the registration of the subsequent instrument, the first mortgagee, if he or she holds the duplicate certificate of title which comprises the land in the subsequent

instrument shall upon being requested to do so by the proprietor of the land or the person entitled to the benefit of the subsequent instrument, but at the cost of the person making the request, produce the duplicate certificate of title to the registrar so that the subsequent instrument may be registered.”

Registering a subsequent mortgage implies that the property is sufficient to discharge both obligations/interests or other subsequent obligations/interests. The position of the common law is that in any action concerning the first mortgage or any mortgage, all co - mortgagees have to be joined in the action. According to Edward F Cousins and Sydney Ross in the textbook "The Law of Mortgages", London, Sweet and Maxwell 1989 at page 255:

"If there are several persons beneficially interested in the mortgage moneys, they must all be represented in the action; in accordance with the general rule, trustees and personal representatives sufficiently represented the persons for whom they act. In the case of mortgagees all must be joined; if they are willing to conquer in the proceedings, they would be made plaintiffs; if not, they must be made defendants. If the land has been mortgaged to several, mortgagees, there will be a statutory trust and foreclosure must take place through the trustees."

I agree with the general statement of law. The rationale for the law is very clear that other persons beneficially interested in the mortgage money should be represented in any action. This would give them an opportunity to take appropriate action. In the very least they have to be notified. This is a statutory requirement that any person who is registered on the encumbrance page should be notified of any action or matter that may affect their registered interest. A registered mortgage is notice to the whole world that the property is subject to the encumbrance. The first mortgagee cannot therefore deal with the property to the prejudice of subsequent mortgagees. This is supported by the provisions of the Mortgage Act cap 229 sections 9 and 10 thereof which read as follows:

“9. Sale by foreclosure.

(1) A sale consequent upon an order of foreclosure shall be by public auction, unless the mortgagor and all encumbrancers subsequent to the mortgagee and of whom the mortgagee has notice at the date of the order of foreclosure agree to a sale by private treaty and the terms of the sale are approved by the court.

(2) A sale under this section shall not take place until the expiration of thirty days from the date of the order of foreclosure.

(3) Prior to the sale under this section the mortgagee shall give to the mortgagor and every encumbrancer referred to in subsection (1) reasonable notice, being not less than thirty days, of the date and the place of sale.”

The provision is explicit about the concurrence of other mortgagee registered on the title deed where there is a sale by court order. Other mortgagees are supposed to concur to a sale by private treaty. Secondly prior to the sale, every encumbrancer is entitled to reasonable notice of not less than 30 days of the date and place of the sale. Where the sale is not to by court order, the sale shall be by public auction as provided for by section 10 of the Mortgage Act. Section 10 provides as follows:

“10. Sale otherwise than by foreclosure.

Where the mortgage gives power expressly to the mortgagee to sell without applying to court, the sale shall be by public auction unless the mortgagor and encumbrancers subsequent to the mortgagee, if any, consent to a sale by private treaty.”

Even if there is an express power of sale conferred on the mortgagee to sale without applying to court, the first mortgagee is under the above provision, required before sale by private treaty, to seek the consent of subsequent mortgagees. Such consent should be obtained in writing. No such consent is in evidence and the conclusion is that no such consent was obtained from UCB.

More so, the evidence shows that Gold Trust Bank had no further interest in the property. When the property was advertised by UCB for sale, they never took any action to indicate their interest. UCB was aware despite the formal mortgage on the deeds that Gold Trust Bank had no further interest in the property and this could be proved in evidence. In other words Uganda Commercial Bank did not need to obtain the consent of Gold Trust Bank Ltd.

The property remained the subject matter of a civil action in the High Court and subsequently in the Supreme Court. What is material is that UCB who had filed an action to regularise receivership with regard to the suit property had a matter pending in court and it had been restrained from dealing in the property. In the advertisement by Key Agencies and Auctioneers in the New Vision dated 21st of June 1993, the suit property was advertised by UCB. The advertisement is exhibit P8 at page 43 of the trial bundle. Item number 6 in the advertisement includes plot 279 and 280 block 208 Kawempe. It reads that Messrs Key Agencies and Auctioneers were duly instructed by Uganda Commercial Bank to sell by public auction/private treaty the properties on 15 July 1993 starting at 10 AM on the basis of a default by Messieurs General Parts (U) Ltd. It shows that the plots are approximately 0.220 ha and was suitable for industrial development. Subsequent to this development, General Parts (U) Ltd applied for a temporary injunction which was granted on 20 July 1993 and the order thereof is exhibit P 10. The injunction restrained Uganda Commercial Bank, its members, officers, agents or servants from disposing of the defendant/applicants property until the disposal of the suit. The ruling of the court exhibit P9 was delivered by honourable Mrs Justice M Kireju. At page 1 of the ruling she indicated that the property had been advertised by Key Agencies and Auctioneers and were supposed to be sold on 15 July 1993. The date of 15th of July 1993 is the date on the advert when the sale was to take place at 10 AM.

Lastly, High Court civil suit by way of originating summons number 433 of 1996 filed on the 22nd of May 1996 according to annexure P1 expressly showed that the outstanding money of 15,132,128/= was secured by block 208 plot 1141 and 1330 in which UCB presumably had no interest at that material time. This strongly corroborates the testimony of the plaintiff that Gold Trust Bank had released the titles of plots 279 and 280 to him. Even though there was no formal release of mortgage, the letter of Gold Trust Bank dated 16th of July 1991 showing that it had no interest in the property is consistent with the filing of civil suit number 433 of 1996 for foreclosure on plots 1141 and 1330 only by Gold Trust Bank. In other words, any purported sale of plots 279 and 280 for purposes of realising an outstanding sum of shillings 15,132,128/= was highly irregular and inconsistent with the acts of Gold Trust Bank Ltd. This is confirmed by their own written statement of defence in which they declared through DFCU bank, the successor company that they had no interest in the property at the time of its purported sale.

As far as issue number one is concerned, any concurrence in the sale of plots 279 and 280 by UCB would be in breach of the temporary injunction in High Court civil suit number 386 of 1993 between UCB as plaintiff and General Parts (U) Ltd as defendant. Judgment in that suit was delivered on 12 May 1998 according to exhibit P9 and therefore confirming that any sale or purported sale occurred when the temporary injunction was in force. I must add that the submissions of the defendants counsel supporting the sale or concurring with the sale on the basis that the first mortgagee had priority avoids the issue. UCB had to concur with the sale on two grounds. Firstly to secure its interest so that the best price is obtained and secondly it was in parallel pursuing the same property in High Court civil suit number 386 of 1993 which went up to the Supreme Court. That evidence would suggest that UCB could have been ignorant of the sale which was contrary to its interest. Nonetheless, if it concurred with the sale, that would be in violation of the temporary injunction. Its duty was to stop the sale to protect its interest. This issue cannot however be fully resolved without resolution of the question of whether the defendant is liable for the acts of UCB. Issue number two should also await the outcome of the second issue. As far as issue number four is concerned, there was no formal release of mortgage by Gold Trust Bank Ltd. However, Gold Trust Bank Ltd had notified UCB that it had no further interest in the property. Consequently, failure to formally release the mortgage interest of the first mortgagee only made it possible for other persons to purport to sell the property. As far as UCB is concerned, it knew or ought to have known that Gold Trust Bank Ltd had no further mortgage interest in the suit property.

Whether the suit property were part of the assets assigned to the Non-Performing Assets Recovery Trust.

Secondly whether the defendant is a successor of Uganda Commercial Bank.

I have carefully considered the written submissions of both counsels on the above two issues. These two issues can be handled concurrently.

Firstly the plaintiff's counsel submitted that the evidence of the plaintiff is that STANBIC bank is the successor because General Parts Uganda Ltd was the former client of Uganda Commercial Bank, which became Uganda Commercial Bank Ltd to which the defendant succeeded. DW2 the company Secretary testified that Uganda Commercial Bank evolved and became STANBIC bank. In reply the defendant submitted at length. He contended that Uganda commercial bank was originally a statutory corporation established by section 2 of the Uganda Commercial Bank Act chapter 55 laws of Uganda. Secondly the statutory corporation was divested by the government of Uganda under the provisions of the Public Enterprise Reform and Divestiture Act. Thirdly, a limited liability company Uganda Commercial Bank Limited was formed under that Act. Fourthly no evidence was adduced that the successor company property vested in the defendant. Fifthly Uganda Commercial Bank Ltd was listed for divestiture of the shares of government. UCB limited was incorporated in 1997. In 2002 evidence of the corporation Secretary of the defendant is that this company merged with STANBIC bank which took over its assets and disclosed liabilities thereof. Learned counsel contended that the high court civil suit number 386 of 1993 was not a disclosed liability and UCB Ltd was liquidated after the merger. Learned counsel concluded that the defendant is not a successor of UCB.

In rejoinder counsel for the plaintiff agreed with the law submitted on by the learned counsel for the defendant. He argued that the defendant indicated all liabilities of UCB. He wondered how the civil suit and appeals were not a disclosed liability. He further contended that what was the "disclosed liabilities" of UCB Ltd was not indicated in the testimony of DW 2.

I have carefully considered the provisions of law submitted on by the defendants counsel. Both counsels premised the submission on whether the suit property was a liability. The question of whether this property was a liability remained in dispute until after the Supreme Court decided the matter in the year 2000. The judgment of the Supreme Court is exhibit P 13 in which Mulenga JSC (RIP) delivered the lead judgment on 2 March 2000. The issue in the suit was whether the appointment of a receiver was lawful. The court found that the appointment of a receiver was not lawful. In my ruling on the preliminary point of law on whether the suit discloses the cause of action against the defendant, I pointed out that the Supreme Court did not rule out the existence of an equitable mortgage. This is in page 17 of my judgment of April 2012 which I will quote as follows:

“At page 26 of the judgement the court further holds:

"I have held that the mortgage document was not validly executed. This only means that the intention to create a legal mortgage was not perfected. The fact that the appellant deposited several certificate of title as far as security for the indebtedness was not in dispute at any stage of the case." (Emphasis added)

The court rejected the declaration of the High Court that UCB properly appointed Key Agencies and Auctioneers as a Receiver/Manager and that it executes powers conferred through it for that appointment.

...The conclusion is inevitable. The fact that the plaintiff was not a party to the proceedings where the injunction was ordered or granted is a technical point of law dealing with proper parties to a suit and therefore enforcement of orders. The injunction is an order of the court however founded. Whichever way the court looks at it, the injunction directly benefited the plaintiff as the registered proprietor. Moreover the Supreme Court found as a question of fact that it was not disputed that the plaintiff and the company deposited several title deeds as security for the indebtedness of the company. The court did not rule out any equitable mortgage. The court only excluded the power of appointment under the alleged mortgage deed. In the premises, the Supreme Court has knocked out any arguments founded on the basis of the mortgage deed. In equity however, the plaintiff remained an interested party and the court order was made without the benefit of the Supreme Court ruling which came much later in time. The plaintiff's title deeds were used to secure an equitable mortgage for the benefit of General Parts (U) Ltd. What is even material is the fact that the mortgage which secured the plaintiffs property for sale under the terms of a legal mortgage was not duly executed as held by the Supreme Court."

The property remained an asset in the main suit and all proceedings in the court after the Supreme Court and back to the High Court. There is no evidence on record about the merger between Uganda Commercial Bank Ltd and Stanbic bank Uganda limited. The suit property was an asset in which Uganda commercial bank was claiming money by appointing a receiver under the mortgage. Because the mortgage was pronounced invalid, it did not rule out following up indebtedness on the basis of an equitable mortgage by deposit of title. What was impeached was appointment under a mortgage deed. Moreover the Non-Performing Assets Recovery Trust was joined in the place of Uganda commercial bank on the ground that the assets had been assigned to it. This appears from the judgment of Mulenga JSC at page 2 thereof. He noted that the appellants appeal had been dismissed by the Court of Appeal hence the appeal to the Supreme Court. The Non-Performing Assets Recovery Trust succeeded in the suit. As far as the subject matter of this suit and appeals are concerned, it included the property in this suit. What is even more material, subsequent to the decision of the Supreme Court, is that the plaintiff and General Parts Uganda Ltd filed High Court civil suit number 1470 of 2000 against the Trustee of the Non-Performing Assets Recovery Trust contesting the advertisements and intended sale of certain properties. The plaintiffs succeeded in the suit and the Trustee appealed. Judgment of the High Court was delivered on 22 October 2002. The appeal went to the Court of Appeal and was withdrawn on the 18th of May 2005. In all these proceedings, the list of property was not indicated. The plaintiff relied on the assignment deed exhibit P 20 which did not include plots 280 and 279. The conclusion is that the Non-Performing Assets Recovery Trust succeeded to all

the assets the subject matter of HCCS No. 386 of 1993 as a party to the subsequent proceedings in the Court of Appeal and the Supreme Court. By the time the proceedings terminated in the withdrawal of the subsequent action in the Court of Appeal, Uganda Commercial Bank had faded out of the picture. There was no need for express assignment of the property to the Non-Performing Assets Recovery Trust, the assignment of the property occurred by inheritance of the suit as a party by NPART. I will however further deal with the question of whether the property was assigned.

Learned counsel for the defendant submitted that the suit property was assigned by law under section 9 (2) of the Non-Performing Assets Recovery Trust Act cap 95 to the trust. This is because the provision provides that all assets, rights, liabilities and obligations attached to a non-performing assets transferred by the bank to the trust shall vest in or subsist against the trust. Counsel contended that the debts of General Parts (U) Ltd were non-performing assets. Counsels also referred to the deed of assignment which does not mention the suit property. He contended that the property was vested by law and not by any deed of assignment as such as submitted by counsel for the plaintiff. The deed of assignment was executed on 5 December 1995 while the suit was still pending. When UCB was successful in High Court civil suit number 386 of 1993 against General Parts (U) Ltd, the court ordered that the proceeds of the judgment are paid to the Non-Performing Assets Recovery Trust and not UCB. Consequently the court recognised that all assets which were the subject of the injunction including the suit land were vested in the trust. Thereafter all rights were exercisable by the trust mentioned above. Consequently the submission by the plaintiff that the certificates of title to the suit land were not part of the assignment is not legally tenable. Consequently the conclusions of the defendants counsel is that the suit property whether mentioned in the deed of assignment or not remained vested in The Non-Performing Assets Recovery Trust. Further evidence was that the property plot 829 was vested in the trust. UCB could not make a partial assignment of assets and rights. Plot 829 was eventually surrendered by the Trust to the plaintiffs company.

Learned counsel for the plaintiff relied on the assignment deed exhibit P 20 which included plot 829. However plots 280 and 279 remained in limbo because they were not expressly mentioned. I agree that there was no assignment in terms of section 9 of the Non-performing Assets Recovery Trust Act. The definition section defines non – performing assets as non performing assets assigned under section 9 by UCB. There was no express assignment of plots 280 and 279. I have already held that plots 279 and 280 were part of the subject matter of the suit namely High Court civil suit number 386 of 1993. An examination of the assignment deed exhibit P6 at page 128 to page 130 of the trial bundle has been made. The preamble to the assignment deed reads as follows:

"WHEREAS in compliance with the provisions of the Non-Performing Assets Recovery Trust Statute, 1994, the assignor hereby assigns all assets, rights and obligations attached to the non-performing assets described herein below to the assignee."

Plot 280 and 279 were not mentioned in the annex. This however remained the subject of the suit to which the Non-Performing Assets Recovery Trust succeeded Uganda Commercial Bank as a party. It is a question of fact that the physical possession of the title deeds remained with Uganda Commercial Bank. Subsequently, they were found in possession of the defendant when there were subsequent dealings. There is no evidence as to whether the defendant obtained the title deeds from Uganda Commercial Bank.

Having held that the Non-Performing Assets Recovery Trust succeeded Uganda Commercial Bank in the suit, orders for return of property in that suit is binding on the Trust which is obliged to return the plaintiffs property or title deeds. I must add that even though there was no express assignment of the property to the Trust by UCB, that assignment occurred by implication of assignment of the suit which contained the suit property as the subject matter for adjudication by the court. What is even more significant is the fact that UCB faded out of the picture while the matter remained pending.

It must be noted that there were subsequent proceedings between Pearl Oils Uganda limited and Josephine Nagadya. The question of subsequent dealings in the property cannot be tried in this suit. This is because the plaintiff withdrew the action against DFCU bank, Pearl oils Uganda limited, and Josephine Nagadya. Such a withdrawal is not on the merits and I will not prejudice the plaintiff's rights if any to bring any appropriate proceedings for any remedies.

All in all, any action for breach of injunction would have been against the Non-Performing Assets Recovery Trust. Secondly, an action for breach of any equitable mortgage would be against the Non-Performing Assets Recovery Trust. Before I conclude this matter, the decision of Justice Okumu Wengi exhibit P17 High Court civil suit number 1470 of 2000, in which the Hon. Judge held that plot 280 was not part of the mortgage to UCB and that there was no legal mortgage between UCB and the plaintiffs. He further held that no enforceable mortgage was thereby created. The High Court also declared that the first defendant (NPART) improperly instructed the defendant's to sell the plaintiffs property. When an appeal was withdrawn in the Court of Appeal from this decision, it obliged The Non-Performing Assets Recovery Trust to return all the property the subject matter of the purported legal mortgage. This includes plots 280 and 279. The question of the right of the plaintiff to have possession of the title deeds as against the Non-Performing Assets Recovery Trust was finally concluded in that action. As to whether the order can be enforced against NPART in practical terms is another matter because the title deeds are now in possession of the court from the land division. What I can say is that, the plaintiff is entitled to possession of the title deeds by virtue of the ruling of the High Court in civil suit number 1470 of 2000 to which my attention was not drawn in my ruling on the preliminary objection.

Having said that, the defendant cannot be held to be in breach of the temporary injunction in HCCS No. 386 of 1993. The defendant in this action is not liable for breach of the terms of any equitable mortgage. The final result is that the plaintiff's action proceeded on wrong premises

Decision of Hon. Mr. Justice Christopher Madrama

but subsequent evidence emerged showing who could be responsible for the sale. The defendant's suit is accordingly dismissed in relation to the claims for damages against the defendant.

Having considered, the protracted nature of the proceedings, and the fact that the plaintiff did not know who had possession of his title deeds, I hold that it would be unjust to order costs against the plaintiff in the circumstances of this case. I also need to observe that Uganda commercial bank, if it was pursuing its mortgage interest, stood equally to lose. However, proceedings terminated against the successor of Uganda commercial bank in the suit.

Moreover, the title deeds were found in possession of the defendant before they were handed over to the court. In the premises each party shall bear his/its own costs of the suit. If the plaintiffs so desires, he can maintain an action against the appropriate persons for the cancellation of title. Cancellation of title proceedings can only be maintained against the registered proprietor and accomplices as I have held in my ruling on the preliminary objection and I cannot revisit that ruling.

Ruling delivered in open court the 7th day of December 2012

Hon. Christopher Madrama Izama

Ruling delivered in the presence of:

John Fisher Kanyemibwa for the defendant

Moses Kuguminsiriza for the plaintiff

Plaintiff in court.

Charles Okuni: Court Clerk.

Hon. Christopher Madrama Izama

7th December 2012