

IN THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION
HCT-00-CC-CS-432 2009

SEMAKULA HARUNA..... PLAINTIFF

VERSUS

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

BEFORE HONOURABLE MR JUSTICE CHRISTOPHER MADRAMA

RULING

This ruling arises from an objection to the plaint on the ground that it discloses no cause of action. The amended plaint of the plaintiff filed on 19 January 2012 is an action against the defendant 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; for an order that the plaintiff be reinstated as the registered owner of the suit land; for an order that the plaintiff is entitled to possession of the duplicate certificate of title now in custody of the court; costs of the suit and any other remedy as the court deems fit to grant.

The plaint avers that the plaintiff was the legally and lawfully registered proprietor of land comprised in block 208 plot 279 and 280 situated at Kawempe. It is averred that around 1990 the plaintiff mortgaged the suit lands to the then Gold Trust Bank Ltd (now DFCU bank Ltd) for an overdraft they way of deposit of titles and the said mortgage was duly registered on the property. Sometime in 1991 or thereabouts the plaintiffs titles were returned to him by the then Gold Trust Bank Ltd and the bank secured the balance of unpaid overdraft by way of

the remaining securities of the house property on block 208 plots 1141 and 1330 which later became the subject of court litigation according to the copy of the ruling attached and marked "A".

The plaint avers that the plaintiff was duly discharged of its obligation in respect of the suit lands according to a letter dated 16th of July 1991 annexure "B" on the certificate of title to both property were handed over to the plaintiff. In 1991 the plaintiff who used the suit lands to secure an overdraft from the then Uganda Commercial Bank and mortgage agreement thereof were attached to the plaint. In the letter dated 16th of July 1991 a then gold trust bank (U) Ltd wrote to the manager Uganda Commercial Bank in which it is stated that it had no further interest in property comprised in block 208 plot 279 and 280 among others. The suit property was amounts those submitted to the then Uganda Commercial Bank as additional securities for a loan. Sometime in June 1993 in number of properties were advertised by Key Agencies and Auctioneers including the suit property for sale upon instructions of Uganda Commercial Bank.

The sale of the property was resisted and resulted in High Court civil suit number 386 of 1993 in respect of which a temporary injunction was issued by Court restraining Uganda Commercial Bank from disposing of the properties including the suit property until disposal of the main suit. Judgment was delivered on the 12th of May 1988 consequently the properties could not have been sold in 1996 of 1997. Judgment was delivered against the plaintiff. Judgment in HCCS 386/1993 was appealed by General Parts (U) Ltd the Court of Appeal of Uganda in civil appeal number 020 of 1998 wherein the Court dismissed the appeal. The appellant appealed to the Supreme Court in Supreme Court civil appeal number 005/1999 in which the appeal was allowed. There was an application for review of the Supreme Court judgement in Supreme Court miscellaneous application number 008/2000 in which the Supreme Court upheld its earlier decision with a slight modification.

On 5 December 1985 in deed of assignment was executed between Uganda Commercial Bank Ltd and Non-Performing Assets Recovery Trust. In the deed of assignment a number of properties were assigned to the Non-Performing Assets

Recovery Trust for recovery of outstanding monies but the certificates of title for the suit properties were not included or transferred. The plaintiff avers that after conclusion of the Supreme Court civil appeal number 005/1999 and miscellaneous application 008/2009 non-performing assets recovery trust wrongly and in contempt of court advertised for sale in number of properties which again was resisted by way of High Court civil suit number 1474/2000 in respect of which judgement was delivered in favour of the plaintiff. This decision was appealed in civil appeal number 029/2003 which was eventually withdrawn and an order was made by the court of appeal to hand over the titles to the Respondent/Plaintiff herein. The plaintiff avers that ever since requesting for the titles to the suit properties from the defendant or its authorised agents, employees, servants or any other authorised persons the titles have never been handed over to the plaintiff not be reasonable and/or satisfactory explanation given way they could not handover the said titles.

The plaintiff avers that around 2007 he learnt that the titles the suit land where in the custody of the defendant as mortgagor for another client and the said titles had already been transferred from the plaintiffs names to those of Nagadya Josephine and later to Pearl Oils Uganda limited who became the registered proprietor prompting the institution of High Court civil suit number 417/2007 in the Land Division of the High Court of Uganda. The suit property was made thereon deposited in the court following a court order.

The plaintiff asserts that he handed over the titles the defendant's predecessor when it was in his names and therefore it should be handed over to him when it is in his names or with an order of the court directing so.

The plaintiff further avers that the alleged transfer into the names of Nagadya Josephine was illegal, unlawful/fraudulent and/or null and void ab initio for the reasons that:

- (a) The plaintiff was not indebted to the then DFCU bank which Oscar Associates purportedly advertised the suit property is for sale.
- (b) The plaintiff was discharged of any obligation when the said DFCU bank

- (c) The plaintiff had an existing caveat on the suit land from 1993 – 1998 and no legal sale would have taken place for another bank DFCU because the plaintiff was not indebted to DFCU bank.
- (d) The certificate of title had been released to the defendant's predecessor UCB.

The plaintiff has been deprived of the use of the certificate of title by way of using them as security for overdraft and/or on advances for which he claims general damages from the defendant. The plaintiff avers that the Registrar of Titles should be directed to effect changes in the register book and restore the plaintiff as the registered owner thereof. The plaintiff further avers that it has suffered damages because of fraudulent and illegal and unlawful acts of the defendant for which he seeks for damages. This is because he had just got vacant possession of his land recently. His land cannot be used as security or collateral for lack of titles which are in court custody. Where for the plaintiff is for orders that:

- (a) The defendant pays general damages arising out of breach of a temporary injunction in High Court civil suit number 386/1993.
- (b) An order that the plaintiff be reinstated as the registered owner of the suit land.
- (c) An order that the plaintiff is entitled to possession of the duplicate certificate of title to the suit land now in custody of the court.
- (d) Costs of the suit
- (e) Any other remedy as this honourable court deems fit to grant.

On 12 March 2012 learned counsel John Fisher Kanyemibwa represented the defendant while Kugumikiriza Moses represented the plaintiff.

Learned counsel John Fisher objected to the suit on the ground that the plaintiff discloses no cause of action against the defendant and ought to be rejected under order 7 rules 11 of the Civil Procedure Rules. Alternatively, learned counsel contended that the plaintiff does not disclose a reasonable cause of action against the Defendant.

He submitted that the plaintiff is a former registered proprietor of the suit property. He brought this suit for recovery of general damages for breach of a temporary injunction in HCCS No. 386 of 1993, an order to be reinstated as the registered proprietor of the suit land, and an order for the court to give him the duplicate certificate of title of the suit property.

He contended that the plaint does not disclose a cause of action. Concerning the relief for breach of an order of the temporary injunction, the parties are Uganda Commercial Bank and General Parts and the plaintiff is not a party to that suit. The then plaintiff General Parts acted in person in entering a deal over the suit property with UCB. There is no averment that General Parts was an agent of the plaintiff for the plaintiff to have a basis to sue on the temporary injunction. Counsel concluded that the plaintiff had nothing to do with the order of the temporary injunction and the ruling.

Secondly, learned counsel submitted that the judgement of the Supreme Court in civil appeal number 5 of 1999 shows that the Court found that the plaintiff did not duly executed the mortgage in question. At the court found that the present plaintiff and General parts were acting separately thus the plaintiff cannot take any benefit under the ruling of General Parts. Learned counsel for the defendant contended that this was not a question of evidence as it was necessary to aver that General Parts were acting on behalf of the plaintiff under the order for the temporary injunction.

Thirdly learned counsel for the defendant contended that the plaintiff is seeking an order for reinstatement as the registered proprietor. In effect he is acknowledging that he is not the registered proprietor, and is seeking cancellation of title of a person who is not a party to the suit before this court. This is not legally tenable. Under S.176, 177 of the RTA, an order for cancellation of title is against the registered proprietor. It is legally untenable to seek an order against UCB which is not averred to be the registered proprietor. He submitted that under paragraph 25 of the plaint, the alleged facts of fraud are aimed at one Nagadya Josephine and Gold Trust Bank. Learned counsel referred to the case of **Caroline Turyatamba and 4 Others vs. Attorney General and Uganda Land**

Commission, a decision of the Constitutional Court. It was held that it is legally untenable to maintain an action against persons who are not parties to the suit as it is against principles of fair trial enshrined in the Constitution.

Learned counsel referred to the encumbrance pages of the title deeds of the suit property attached to the amended plaint. He contended that the mortgage registered by UCB was cancelled. That entry shows that UCB never sold the property. Annexure G at is a letter from Gold Trust Bank showing that Gold Trust Bank had no further interest in the suit property. Learned counsel submitted that this letter did not amount to a release of the mortgage .Moreover the letter is not attested, contrary to S. 125 of the Registration of Titles Act. S. 147 thereof provides for persons who can attest. UCB only registered a second mortgage because that was no release of the first mortgage. Annexure R the newspaper advert shows that the advertisement for sale was made on behalf of Gold Trust Bank. Thus in the absence of a release of mortgage, Gold Trust Bank advertised the property for sale.

From the above facts learned counsel submitted that the plaint does not disclose any cause of action. The plaintiff could not sold the defendant over the property in the names of the third-party .There is a pleading, paragraph 24 of the plaint to the effect that the plaintiff handed over title to the predecessor in title of the defendant. Learned counsel submitted that it sounds in breach of contract. The sale by Gold Trust bank was in 1996 and thus would be in breach of contract in as far as the plaintiff knows that the title is not in the defendant's names.

The third prayer for an order that the plaintiff be given the duplicate certificate of title which is in the possession of court, learned counsel repeated the submissions above. It is not legally tenable for the plaintiff to seek those orders from court. An order was made by this court that the Registrar of Titles hands over the titles to court. This is known to the plaintiff and also the fact that the titles are not in the defendant's names is also known to the plaintiff and thus seeking that relief is untenable.

Learned counsel relied on the case of **Auto Garage v. Motorkov [1971] EA**. He submitted that order 7 rule 11 (a) is mandatory the plaint should be rejected if it discloses no cause of action.

In the alternative, learned Counsel adopted the same submissions for the objection that the plaint discloses no reasonable cause of action and should be struck out. I pray for costs.

In reply learned counsel for the plaintiff Moses Kuguminkiriza submitted that the points of law raised had no merit. *Auto Garage v. Motokov [1971] EA* states that there are 3 essential ingredients of a cause of action. These are, 1 that the plaintiff had a right, 2 that the right was violated, and 3 that the defendant is liable.

As far as the point on temporary injunction is concerned, he contended that the suit was between UCB V. General Parts. One of the issues was whether Stanbic is a successor in title to UCB. Counsel has not submitted on that. The temporary injunction which expired in 1998 shows a cause of action against Stanbic bank because it relies on a sale of 1996. The mortgage was between Hajj Haruna as an individual with UCB. The disputed properties were securities in that mortgage. The subsequent events affected the plaintiff and General Parts. The principle in agency is that Hajj Haruna as a registered proprietor remains with his interest in the property even after it is given to the agent. In this case, he is suing as a former registered proprietor. This issue clearly comes out. The plaint shows how the property relates to the plaintiff. The cause of action clearly sustains against the defendant.

Counsel relied on Annexure D which he contended is the genesis of this whole action. In it Gold Trust bank was forwarding those titles to UCB. The subsequent events after that letter have to be addressed. In the Supreme Court judgment, the Supreme Court was interpreting what amounts to a demand. He contended that the interpretation given as to whether it amounted to a release of mortgage is a question of evidence. It is not denied that UCB got the titles but there is no explanation how they got out of UCB. It is a right of the plaintiff to demand the return of this title as a mortgagee, in his names. As to how they got out of his

names, is for the defendant to explain. That is the nexus of how the plaintiff seeks an order from court for return of the titles.

The transfer to Gold Trust Bank is denied. The titles are in court but when they were coming to court, they were in the hands of the plaintiff. MA No. 229 of 2008, arising from CS No. 417 of 2007, which was in the land division. The application was heard by the registrar land division. It was served on the defendant and it was not contested. The titles were rectified and that alone is an admission that the prayer for the return of the titles is a remedy that can be pursued by the plaintiff against the defendant.

Learned Counsel submitted that Gold Trust Bank acknowledged that the titles were handed over to the defendant. Then that becomes an issue to be determined by facts. In paragraph 4, 5, 6 of the pleadings, there is clear evidence that the plaintiff took to Gold Trust Bank as security 5 properties and 3 were returned and 2 were retained. There is a ruling at Annexure PE1. Gold Trust Bank went for the 2 properties it retained and foreclosed on these. The question of the other 3 is an issue for the court to try.

The plaint raises issues which should be investigated on both law and fact and thus to determine the matters on points of law would be an injustice. How Gold Trust Bank sold to Nagadya is an issue for investigation. He prayed that the suit be allowed to proceed as it discloses a cause of action.

In rejoinder learned counsel for the defendant John Fisher submitted that his learned friend failed to answer the preliminary objection. He failed to show how the plaintiff, not a party to the order of the temporary injunction can sue for its breach, he submits that the plaintiff is a co-party thus the mortgage affects the plaintiff, there is no averment that General Parts was acting on behalf of the plaintiff. The plaintiff has failed to show whether the document was attested.

When the documents were brought to court, they were in the names of Pearl Oils (U) Ltd. The plaintiff persuaded court to cancel the title. In this case, they are in the names of Nagadya. It is untenable that the plaintiff seeks reliefs against UCB that is not the registered proprietor of the suit land.

Ruling:

I have duly considered the submissions of learned Counsels for both parties and the authorities to which I was referred. I have also perused the amended plaint and attachments referred thereto.

As far as the law is concerned, in determining whether a plaint discloses a cause of action or a reasonable cause of action only the plaint and attachments to the plaint are referred to or considered. The court assumes that the facts pleaded in the plaint are true. In the case of **Ismail Serugo vs. Kampala City Council and the Attorney General Constitutional Appeal No.2 of 1998**, the Supreme Court and in the Judgment of Wambuzi CJ held that in determining whether a plaint discloses a cause of action under Order 7 rule 11 or a reasonable cause of action under order 6 rule 30 (rule 29 before revision of the rules) only the plaint can be looked at. The Supreme Court exhaustively defined what a cause of action is in the case of **Major General David Tinyefunza vs. Attorney General of Uganda Constitutional Appeal No. 1 of 1997**. The principles for determining whether a plaint discloses a cause of action are the following:

- The plaint must disclose all the necessary fact which if assumed to be true and taken with the applicable law would entitle the plaintiff to judgment.
- In determining the question of whether the plaint discloses a cause of action or reasonable cause of action only the plaint and attachments thereon may be perused.
- The court does not consider the defence of the defendant in determining whether a plaint discloses a cause of action.

As far as a reasonable cause of action is concerned an application to strike out the plaint or dismiss the suit is made under order 6 rule 30 (1) of the Civil Procedure Rules which provides as follows:

“The court may, upon application, order any pleading to be struck out on the ground that it *discloses no reasonable cause of action or answer* and, in any such case, *or in the case of the suit or defence being shown by the pleadings to be frivolous or vexatious*, may order the suit be stayed or

dismissed or judgment be entered accordingly, as may be just." (Emphasis added)

The Court may either strike out the pleadings on the ground that it does not disclose any reasonable cause of action or that it is frivolous or vexatious. The court may also dismiss the suit or stay proceedings or enter judgment as the case may require. In the English case of **Winlock versus Maloney [1965] 2 All ER 871** the Court of Appeal of England, considered the English RSC, Ord 18, r 19, which is similar to order 6 rule 30 and provides:

"(1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that (a) it discloses no reasonable cause of action or defence, as the case may be; or (b) it is scandalous, frivolous or vexatiousor (d) it is otherwise an abuse of the process of the court; and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

In interpreting this provision the Court held per Danckwerts LJ stated at page 874:

"The practice under the former rule, b RSC, Ord 25, r 4, and under the inherent jurisdiction of the court, was well settled. Under the rule it had to appear on the face of the plaintiff's pleading that the action could not succeed or was objectionable for some other reason. No evidence could be filed. In the case of the inherent power of the court to prevent abuse of its procedure by frivolous or vexatious proceedings or proceedings which were shown to be an abuse of the procedure of the court, an affidavit could be filed to show why the action was objectionable.

The plaintiff's case has had a long and chequered history. Initially the suit was filed against five defendants. In Miscellaneous Application number 542 of 2011 the plaintiff withdrew the suit against the four other defendants namely: Josephine Nagadya, DFCU Bank (U) LTD, Pearl Oils (U) LTD and the Registrar of Titles. The current defendant who was the 4th defendant then strongly opposed the application. By that time the first defendant Josephine Nagadya had already

passed away and no administrator of the estate had been appointed. The court allowed the withdrawal against the estate since no prejudice would be occasioned to the estate with the question of costs stayed and to be resolved after the appointment of an administrator to the deceased's estate. DFCU bank on the other hand filed a written consent withdrawing the suit against them. Pearl Oils (U) Ltd conceded to the application. As far as the Registrar of Titles was concerned, they had not filed a defence and the plaintiff was at liberty to withdraw against them and the application for withdrawal was allowed. The suit therefore survived against the fourth defendant, now the current and only defendant.

In that application learned counsel John Fisher prayed that the court dismisses the suit against the fourth respondent inter alia on the ground that the plaintiff would disclose no cause of action against the fourth defendant now the current defendant. I held that this was a matter to be resolved at the hearing of the suit as the application before court was for withdrawal. Considering the submissions of learned Counsel John Fisher counsel for the fourth defendant it is clear that part of this submission shows that the plaintiff's case has been prejudiced by his withdrawal of the suit against for instance the first defendant Josephine Nagadya and the other defendants.

Learned counsel for the Respondent/Defendant contended that the plaintiff could not sue for damages for breach of the temporary injunction in High Court civil suit number 386 of 1993 because the parties thereon are Uganda Commercial Bank and General Parts (U) Ltd. His contention was that the plaintiff has nothing to do with the order of the temporary injunction and the ruling. This order is dated 20th of July 1993 and is annexed to the plaint. The temporary injunction was entered in High Court civil suit number 386 of 1993 between Uganda Commercial Bank as plaintiff and General Parts (U) Ltd as defendant.

In reply learned counsel for the plaintiff submitted that the temporary injunction which expired in 1998 shows a cause of action against Stanbic bank because it is the successor in title of the defunct Uganda Commercial Bank. Secondly learned counsel referred to the mortgage which was between the plaintiff as an individual

and Uganda Commercial Bank. This mortgage is annexure "C" to the amended plaint. The mortgage is between the plaintiff as an individual and General Parts (U) Ltd as the registered proprietors of several plots of land. Under the mortgage the money was lent to General Parts (U) Ltd. Paragraph 4 of the plaint shows that the property the subject matter of the dispute is block 208, plot 279 and 280 situated at Kawempe. Perusal of the ruling in which the temporary injunction was granted shows that the application was made by General Parts Uganda Ltd. The property involved was however not described in the ruling of the court. The registration however is found at paragraph 10 of the plaint annexure "E". Annexure "E" is a letter dated 26th of June 1991 addressed to the General Manager Uganda Commercial Bank by the plaintiff as General Manager of General Parts Uganda Ltd. The letter shows that plots 280 and 279 are registered in the names of the plaintiff.

It follows therefore that the temporary injunction concerned the subject matter of the mortgage which included property registered in the names of the plaintiff and of General Parts (U) Ltd. As indicated above, the mortgage of the property was for the benefit of the company which was the borrower. The arguments of the defendants counsel are complex because it does not deal with doctrine of a party privy to a contract that only may enforce it. It deals with who is a proper party to enforce the terms of the temporary injunction and also who can be in breach of the temporary injunction? In other words can the plaintiff who was not a party to the suit sue for breach of the temporary injunction? The first leg of the consideration is the fact that the plaintiff in this suit is seeking damages for breach of the temporary injunction against the successor in title of Uganda Commercial Bank. Learned counsel did not dwell on whether the defendant as a successor of UCB is liable as such for any alleged breach committed by UCB.

This objection would therefore be determined on the question of whether the plaintiff has locus standi to file an action for breach of the temporary injunction in which he was not a party and consequently the question of whether he can seek damages for the said alleged breach. Learned counsels did not refer to any authorities for or in support of the objection. My little research only yielded cases that deal with the question of whether an injunction can be enforced against a

third party in the sense of a third party being liable for breach of the same. In the case of **Attorney General v. Times Newspapers Ltd and another [1991] 2 All ER 398**, the House of Lords considered the liability of third parties for breach of a temporary injunction. In that case Mr Peter Wright a former officer of the British Secret Service published a book called *spycatcher* in breach of his duty of confidentiality as a Secret Service agent of the British Crown. The Attorney General tried to prevent the publication of the book. In the High Court the Vice Chancellor gave judgement on a preliminary issue and held that the publishers and editors of the newspapers were both parties to the confidentiality actions nor subject to the injunction granted in them and their actions did not constitute a criminal contempt of court. The Attorney General appealed to the Court of Appeal and the Court of Appeal allowed the appeal. On further appeal to the House of Lords by the defendants Lord Brandon of Oakbrook held at page 402:

“... The question for decision is not whether such an injunction is binding on a third person, C, who is not a party to the action and is not referred to in the injunction. Clearly such an injunction cannot be binding on C and it has never been contended for the Attorney General that it could. ...The question for decision is quite another one. It is whether, in the situation assumed, it is a contempt of court for C, with the intention of impeding or prejudicing the administration of justice by the court in the action between A and B, himself to do the acts which the injunction restrains B from committing.

The court made the distinction between a civil contempt and criminal contempt. Criminal contempt deals with interference with the due administration of justice. The court agreed with the law as stated in the case of **Z Ltd v A and others [1982] 1 All ER 556** where Eveleigh LJ of the Court of Appeal said at 566–567 that:

“(1) the person against whom the order is made will be liable for contempt of court if he acts in breach of the order after having notice of it. (2) A third party will also be liable if he knowingly assists in the breach, that is to say if knowing the terms of the injunction he wilfully assists the person to whom

it was directed to disobey it. This will be so whether or not the person enjoined has had notice of the injunction.

As far as the third party is concerned his Lordship held at page 567 that the third-party is liable for the acts which he commits himself even though not a party to the action in which the order is made. He said:

“He is liable for contempt of court committed by himself. It is true that his conduct may very often be seen as possessing a dual character of contempt of court by himself and aiding and abetting the contempt by another, but the conduct will always amount to contempt of court by himself. It will be conduct which knowingly interferes with the administration of justice by causing the order of the court to be thwarted.

The judgment does not directly address the controversy before court. Before court it is a third party in a civil action who is trying to obtain damages for breach of an injunction the proceedings to which he is not a party. The ruling in which the temporary injunction was ordered does not indicate that the property the subject matter of the suit was part of the order. It is only an inference of fact from the facts disclosed that the temporary injunction arose out of a mortgage deed executed by the plaintiff and General Parts Uganda Ltd as mortgagors and Uganda Commercial Bank as the mortgagee. There is no doubt in my mind that the rights of the plaintiff were affected by the injunction in that he was a party to the mortgage considered by the court and the basis of the acts of the bank. The mortgaged property is registered in his names and his titles were used for Messrs General Parts Uganda Ltd to obtain an Overdraft from the Bank. Any breach of the injunction by the defendant's predecessor in title would injuriously affect the plaintiff's interests but would this give him locus standi to sue? I have tried to compare and analogously draw from the definition of the term "a person aggrieved" under section 82 of the Civil Procedure Act. **In Re Nakivubo Chemists [1979] HCB P.12** the High Court relied on an English precedent for a definition of the term "a person aggrieved". The High Court held that the terms "any person considering himself aggrieved" mean a person who has suffered a "legal grievance". What a "legal grievance" is was defined in the case of **Ex parte Side**

Botham in re Side Botham (1880) 14 Ch. D 458 at 465 per James L.J where he states:

“But the words “*person aggrieved*” do not really mean a man who is disappointed by a benefit which he must have received if no other order had been made: A person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully affected his title.”

Lord Denning L.J. expanded this term in the case of **Attorney General of Gambia - Vs- N’jie [1961] AC p 617 at p. 634 Privy Council** where he held referring to the case of **Side Botham** (supra):

“The definition of James L.J. is not to be regarded as exhaustive. Lord Esher M. R. pointed out in *ex parte. Official Receiver in re Reed, Bowen & Company* that the words “*person aggrieved*” are of wide import and not subject to a restrictive interpretation. They do not include of course a mere busy body that is interfering in things, which do not concern him, but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests.”

To advance this point further, the plaintiff would have been entitled to be heard in the matter of the temporary injunction or any order that would injuriously affect his interests as a mortgagor. This interest was presumed at that stage of the proceedings. He is a joint mortgagor and a suit filed by his fellow mortgagor affected his interests provided this suit affected his right as the registered proprietor to the particular property of which he is the registered proprietor. He could have been added as a party to this suit. However the legal rights of the parties under the mortgage agreement relied on by the plaintiff was further defined in the Supreme Court Civil appeal number 5 of 1999 decided on 2 March 2000.

The most interesting and peculiar point about the mortgage dated 12th of August 1991 is that it is signed or executed by the plaintiff allegedly on behalf of General Parts Uganda Ltd as a director. Secondly, on the face of the deed, it shows that it

is jointly executed mortgage by the registered proprietors namely the plaintiff and General Parts (U) Ltd. Thirdly, the plaintiff is also a registered proprietor of the suit property in this suit. Last but not least the plaintiff was assumed to be a mortgagor under a valid legal mortgage in High Court civil suit number 386 of 1993. Perusal of the ruling of the court shows that the injunction was to restrain Uganda Commercial Bank and inter alia their agents Messrs Key Agencies and Auctioneers who had advertised the defendant's properties (the plaintiff and Messieurs General Parts Uganda Ltd) for sale on 15 July 1993. The power of sale was under the mortgage deed. As noted above the plaintiff is described as a party to the mortgage deed. Additionally, the advertisement of Messieurs Key Agencies and Auctioneers which is annexure "GI and GII" shows that the mortgaged property included that of which the plaintiff **is the registered proprietor** namely plots 279 and 280 the subject matter of the suit.

Civil appeal number 5 of 1999 between General Parts Uganda Ltd and Non-Performing Assets Recovery Trust further shows that the multiplicity of suits complicated the position of the plaintiff with respect to the property to which he is registered and the subject matter of this suit. In the appeal honourable Justice Mulenga JSC in the lead judgement of the court considered ground 6 (a) of the appeal which reads as follows:

"The learned Judges erred in law in holding that (a) the validity of the mortgage was not an issue or, at the very least, in issue at the trial of the case in the High Court, and that the Mortgage Deed was properly executed by the registered proprietor; and"

The Supreme Court considered whether the mortgage deed had been properly executed. After reviewing the evidence and the judgment of the Court of Appeal on the matter, at page 14 of his judgment Mulenga JSC held:

"In view of all the foregoing, I would hold that the mortgage document was not validly executed by the registered proprietor (s)/mortgagor (s), and that the Court of Appeal erred in holding that it was properly executed. Ground 6 therefore ought to succeed.

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.

Learned counsel on the basis that there was no averment the General Parts were an agent of the plaintiff to have the basis to sue on a temporary injunction granted submitted that the plaintiff has nothing to do with the temporary injunction and the ruling.

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.

Taking into account the duty of the court to administer substantial justice without undue regard to technicalities under article 126 (2) (e) of the Constitution of the Republic of Uganda, it is my holding that this is a proper case in which the said article should be applied to avoid injustice. This is because of the following reasons. Uganda Commercial Bank accepted the plaintiff's property as security under an equitable mortgage implied by law. The mortgage deed was drawn by Uganda Commercial Bank. In the proceedings for a temporary injunction the point of the capacity of General Parts Uganda Ltd to bring proceedings for all the property was not raised. So long as it was an order of the court, the plaintiff being a person having a legal interest in the property advertised for sale could sue for breach of the court order. To put it in another way a suit by the plaintiff which brings about a breach of the terms of an order that secured his equitable interest ought not to be defeated on the ground that he was not a party to the proceedings. In equity, the proceedings were also brought on his behalf as a beneficiary to any reversion of this title after redemption of the property. Having a beneficial interest in the property protected by the court order, and his rights alleged to be injured as alleged by any breach thereof, the alleged cause of action for breach can be determined on the merits.

The plaintiff is contending that he has been injuriously affected in his interests when the temporary injunction was allegedly breached by sale of the property. I am alive to the fact that the temporary injunction is also an omnibus injunction and is deemed to affect all the property advertised for sale inclusive of the plaintiff's property irrespective of the legality of the mortgage deed. As to whether the plaintiff can prove damages on the basis of any alleged breach or whether there was any breach is a matter on the merits and will be determined as such. As far as standing to make the allegation is concerned, it is my holding that the plaintiff should be heard in the matter before a final judgement is made on the merits. In the premises, the objection on the ground of locus standi of the plaintiff is overruled but with no order as to costs which should abide the outcome of trial of the alleged cause of action.

The second objection is based on the right of the plaintiff to proceed against the defendant under section 176, and 177 of the Registration of Titles Act for

cancellation of title. I have carefully considered the submissions of both parties. It is not in dispute that the property is registered in the names of a third-party not before the court. The property was registered in the names of Josephine Nagadya (deceased) and later transferred to Pearl Oils Uganda Limited. The registration of Pearl Oils Uganda Limited was later cancelled and the property reverted back to Josephine Nagadya (deceased). Learned counsel for the plaintiff submitted that Josephine Nagadya had no interest in the property because she bought when there was a temporary injunction.

I agree with counsel for the defendant on two points. The first point is that this court cannot adjudicate on the rights of a party who is not before the court as this would offend article 28 of the Constitution of the Republic of Uganda. The article provides that in the determination of civil rights and obligations or any criminal charge, one is entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. In the case of **Caroline Turyatamba and 4 others vs. Attorney General and Uganda Land Commission Constitutional Petition number 15 of 2006**, the Constitutional Court held that a court before whom a hearing is being conducted should give the parties an opportunity to be heard before judgment affecting their rights is made. The court noted that the registered proprietors were not parties to the petition and the order being sought would disentitle third parties not before court without being heard. The court said:

"However, there are also reliefs prayed for in the petition whereby this court is asked to make orders cancelling the leases and certificates that already have individual third parties as the registered proprietors of the respective suit lands. The registered proprietors are not parties to this petition. In other words, the petitioners are seeking from us orders to disentitle these third parties of their respective interests in the suit lands, when such parties have not been heard. We are unable to do that, as to do so, would be to condemn such third parties, without having availed to them a fair hearing, which act would be contrary to article 28 of the constitution."

The plaintiff on his own volition decided to withdraw the suit against the registered proprietor's estate. No action can be maintained against the defendant for cancellation of title or for orders that the title revert to the plaintiff. It is not sufficient for the plaintiff's counsel to submit that the title had been handed over to the defendants and it was up to the defenders to explain what happened to the title deed as far as possession and reversion is concerned. Whether the defendant's may be obliged to explain what happened to the title deed, this does not give the right to cancellation of title in the names of the third-party not before the court. Such a suit would offend article 28 of the Constitution of the Republic of Uganda.

The second point on which I agree with learned counsel for the defendants which further bolsters the first point is the provisions of section 176 of the Registration of Titles Act and judicial precedents on the point. This is a point of law, as to when a cause of action will be disclosed for cancellation of the title of a registered proprietor. It has been established by the Supreme Court in interpreting section 176 of the Registration of Titles Act that a suit for impeachment of title can only be made in certain circumstances stipulated by the section. Paragraph 25 of the plaint pleads that the transfer into the names of Josephine Nagadya was illegal, unlawful/fraudulent and/or null and void ab initio. It tries to put the defendant at fault and seeks an order that the plaintiff is entitled to possession of the duplicate certificate of title to the suit land now in the custody of the court. The word cancellation of title has been deliberately omitted in the plaint. The court cannot order possession of the duplicate certificate of title in the names of the registered proprietor who is not before the court. Secondly, for the plaintiff to be entitled to possession of the duplicate certificate of title, it should show that it is entitled to ownership or proprietorship. In other words it is entitled to cancellation of title. It cannot impeach indirectly the title of the estate of Josephine Nagadya without a hearing. As far as fraud is concerned, the material fraud under section 176 cited above is a fraud of the transferee in title. Unless impeached on the ground of fraud every certificate of title registered under the Registration of Titles Act shall be received in every court as conclusive proof of title. As far as judicial precedents are concerned, it was held by the Supreme Court in the case of **Kampala Bottlers**

v Damanico (U) Ltd SCCA No.22/92 that under section 59 of the Registration of Title Act, that the production of a certificate of title in the names of a party is sufficient proof of ownership of the land in question unless the case falls within the provisions of section 176 of the RTA. Particularly section 59 provides that a certificate of title shall be received in all courts as conclusive evidence of title of the registered proprietor named therein. In this case the court is satisfied that the registered proprietor of the suit property is Josephine Nagadya a party who is not before the court and whose estate is yet to be lawfully administered.

As far as parties not before the court is concerned, the Supreme Court held that the fraud is a serious allegation and the reputation of parties not before the court should not be compromised in their absence. Justice Platt JSC held at page 5 of his judgment in **Kampala Bottlers Ltd (supra)** that:

Had that been the Respondent's case, he should have brought the land office officials and Town Council officials before the court. It is important that before some ones reputation is besmirched, he has had an opportunity to defend himself. The officials here might have explained the confusion in their action. Even incompetence might not have been fraudulent. It must be understood from the nature of the defence, that the unspecified fraud must be primarily directed against the party in the case, against whom the defence is made. That is to say, that primarily, the Respondents allegation of fraud must relate to the way in which the Appellant gained registration, as the Appellant was the only other party in the case. (Emphasis added)

Wambuzi CJ as he then was held that the transferee in title whose title is sought to be impeached must be guilty of some fraud. In other words, that fraud could not be proved against a party who is not the registered proprietor to obtain the relief of cancellation or impeachment of title.

Paragraph 25 of the plaint which alleges fraud avers that the plaintiff was not indebted to DFCU bank on whose behalf the suit property was advertised for sale. In other words, the plaint clearly avers that the suit property was advertised for sale on behalf of DFCU bank. The suit was withdrawn against DFCU bank. Apparently DFCU bank is the successor in title of Gold Trust Bank Ltd on whose

behalf Oscar Associates advertised the property for sale. The plaintiff's case against the defendant hinges on the release of title to Uganda Commercial Bank and the mortgaging of the property to it notwithstanding the alleged advertisements of the suit property for sale. What is even material is that the encumbrance page shows that two mortgages were registered. The particulars show that Gold Trust Bank was a registered on the 2nd of May 1990. The mortgage was cancelled upon satisfaction by sale on 6 November 1996. The particulars registered by the registrar reads: "removed upon realisation of the sale by first mortgagee with first priority".

The plaintiffs claim is an assertion that Uganda Commercial Bank Ltd ought to have known how the title ended up transferred to third parties. This does not solve the problem of the title being in the names of the third-party not in court. In any case no remedy can be granted which may impeach the title of the third-party. I will further address this point when dealing with a claim for damages in the plaint. In the premises, paragraph 3 (b) and (c) of the plaint cannot be granted in so far as it seeks reinstatement as the registered owner of the suit land and a declaration that the plaintiff is entitled to possession of the duplicate certificate of title in custody of the court. This is a point of law and is not a matter of evidence as submitted by learned counsel for the defendant on a point of whether the suit property was sold by the first mortgagee Gold Trust Bank Ltd or the defendant as a second mortgagee. The question of release of the title to UCB is not material for purposes of cancellation of title or possession.

As far as the claim for damages is concerned, damages flow from a finding of ownership or right of interest in the property. This has to be established by proving a right to registered ownership which has been infringed by the defendant. As far as the registered ownership of the property and a claim for reinstatement or possession of the suit land is concerned or of the title, the plaint discloses no cause of action against the defendant.

Before concluding this matter I must comment that the problem of the plaintiff is caused by the pleading itself. Paragraph 3 which describes the plaintiffs cause of action against the defendant only seeks general damages for breach of a

temporary injunction in civil suit number 386/1993 and its obligations as mortgagor. In the prayers in paragraph 30 (a) of the plaint the plaintiffs claim is for general damages arising out of breach of a temporary injunction only. Considering the submissions of learned counsel for the plaintiff, it can be discerned that the plaintiff's case apart from seeking cancellation of title indirectly, is also a complaint that the plaintiff handed over the titles to the property to UCB and UCB ought to have known what happened to the titles. Negligence is not pleaded. Only the duties of the defendant as a mortgagee are pleaded. Apart from the plaintiff seeking any other remedy as the court deems fit to grant, this suit would have failed at this point had it not been for allegation of breach of a temporary injunction. Secondly there is an allegation of breach of the mortgage. I have already held that the pleading that there was a deposit of title by the plaintiff and the ruling of the Supreme Court discloses that there was an equitable mortgage in which the plaintiff deposited his property with UCB for the benefit of General Parts Uganda Ltd. The duty under the mortgage is a matter on the merits and discloses a cause of action for any remedy which the court may deem fit to grant if at all it succeeds. Last but not least, the provisions of section 178 of the Registration of Titles Act cap 230 laws of Uganda permits compensation of persons deprived of land through the registration of another person.

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 is 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.

Ruling delivered in open Court on the 23rd of April 2012

Hon. Mr. Justice Christopher Madrama

In the presence of:

Moses Kugumisiriza Counsel for the Plaintiff,

Plaintiff in court

John Fisher Kanyemibwa for defendant

Carol Luwagga Defendants Legal Officer.

Gaetano Ojambo Makoha Court Clerk

Hon. Mr. Justice Christopher Madrama