THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

CIVIL SUITS NO. 292 AND 67 OF 2002

EAST AFRICA FOAM LIMTED::::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

1. ATTORNEY GENERAL]

2. THE EAST AND SOUTHERN TRADE

AND DEVELOPMENT BANK]

3. FULGENCE MUNGEREZA] ::::::::::::DEFENDANTS

BEFORE: HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

The plaintiff's claim against the defendants jointly and severally is for return of its property alleged to have been fraudulently sold and transferred to an entity not party to these proceedings. The plaintiff avers that the land with developments thereon was formerly comprised in LRV 2101 Folio 18 Plots 9-11 8th Street Kampala and is presently comprised in LRV 2833 Folio 16 Plots 9-11 8th Street Kampala (hereinafter referred to as the suit property). The plaintiff also claims for nullification of the sale and cancellation of the title to the suit property presently registered in the names of Metropolitan Properties Limited. The plaintiff further seeks general and special damages as well as costs of the suit.

I should point out from the onset that Metropolitan Properties Limited was also a defendant to the suit however the case against it was withdrawn prior to commencement of hearing this suit. The remaining three defendants filed Written Statements of Defence (WSD) in which they dispute the plaintiff's claim.

The facts agreed upon in the joint scheduling memorandum are as follows:

1. By a facility agreement dated 21.10.96, the 2nd defendant extended an import facility to M/s Eritrea Foam Industry Ltd.

2. On 21.10.96 the 2nd defendant entered into a loan agreement with East Africa**N** Foam Limited.
3. On 12.11.96 the 2nd defendant entered into a debenture with East Africa**N** Foam Limited.
4. On 14.11.96 the 2nd defendant entered into a legal mortgage with East Africa**N** Foam Limited.
5. The said debenture and mortgage were guaranteed for the loan agreement and the facility agreement to Eritrea Foam Industry Ltd
6. The 2nd defendant appointed the 3rd defendant as receiver over the plaintiff's said Foam factory.
7. The 2nd defendant lodged a caveat on LRV 2833 Folio 16 claiming interest as equitable Mortgagee.
8. During the pendency of H.C.C.S. No. 1567 of 2000 the plaintiff unsuccessfully applied for a temporary injunction against the sale of its property under the impugned receivership.
9. The plaintiff then appealed to the Court of Appeal, followed by an application for stay of execution vide Civil Application No. 99 of 2000.
10. When the said application came up for hearing before a single Justice, Twinomujuni, JA. on 20th December 2000, counsel for the 2nd and 3rd defendant Prof. Frederick E. Ssempebwa made an undertaking not to sell the property.
11. On 15th June 2001 the suit property was sold to M/s Metropolitan Properties Limited.
12. On 20th June 2011 the property was transferred into the names of M/s Metropolitan Properties Limited.
13. On 16th November 2000, the plaintiff had lodged a caveat on the suit property to protect its interests.
14. On 23rd February 2001, the Chief Registrar of Titles wrote a Notice to East Africa Foam Limited to remove the caveat on Plot No. 418 Nakawa Industrial Area, Leasehold Register Volume 2536 Folio 6.
15. East Africa Foam Limited did not own and was not registered proprietor for the said Plot 418 Nakawa Industrial Area, LRV 2536 Folio 6.
16. On the 4th day of June 2001 the plaintiff's caveat on LRV 2833 Folio 16, Plot 9-11 8th Street was removed by the Commissioner for Land Registration, on the basis of the notice to remove the caveat on plot 418, Nakawa Industrial area LRV 2536 Folio 6.

The following issues were framed for trial:-

1. Whether the plaintiff has a cause of action against the defendants.
2. Whether the said facility and loan agreements were valid and enforceable.
3. Whether the said mortgage and debenture were valid and enforceable.
4. Whether the appointment of the 3rd defendant as receiver by the 2nd defendant is valid.
5. Whether the plaintiff's caveat was lawfully removed.
6. Whether the sale of the plaintiff's property was valid and/or lawful.
7. Whether the plaintiff is entitled to the remedies prayed for.

At the hearing, the plaintiff was represented by Mr. Frederick Samuel Ntende, Mr. Edgar Tabaro and Mr. Edwin Tabaro. The 1st defendant was represented by Mr. Philip Mwaka a Principal State Attorney while the 2nd and 3rd defendants were represented by Mr. Arthur Kunza Ssempebwa, Mr. Brian Emuron and Mr. Kizza Busingye. The plaintiff called two witnesses while the defendants called four witnesses. Following closure of hearing evidence, the parties filed written submissions which I have considered in this judgment.

Issue 1: Whether the plaintiff has a cause of action against the defendants?

PW1, Mr. Silas Majyambere the Managing Director of the plaintiff company testified that he and other business partners started a foam making industry which was incorporated in 1992. In that respect, he tendered Exhibit P36 being a Certificate of Incorporation. During cross examination, PW1 stated that the foam mattresses industry was situate at plot 9-11 8th street and this was the very property that was sold off pursuant to the instructions of the 2nd defendant. He stated that Exhibit P34 in the third paragraph shows the proper plaintiff's name as indicated on the company seal on the lease agreement embossed on the first title.

The plaintiff's counsel submitted that DW1 testified during cross-examination that the industry in which he spent three years as a receiver was the very factory located at 8th Street Kampala and made returns to the company registry in the same

company file subsequent to selling off plant and machinery of the plaintiff company. He contended that DW1 admitted that the returns exhibited as P37 show land, plant and machinery belonging to the plaintiff company as opposed to EAST AFRICAN FOAM LIMITED and that it was the 2nd defendant who appointed him as receiver. Further, that DW1admitted in his witness statement and identified P13 at page 124 of the trial bundle as his letter of appointment.

Counsel for the plaintiff further relied on the evidence of PW1 who stated that the land on which the plaintiff company factory was built was unlawfully and wrongfully sold off by the 3rd defendant yet there was a caveat**.** According to PW1, he never ever received a notice of intended removal of that caveat from the offices of the 1st defendant. The land was sold off under an equitable mortgage registered by the officers of the 1st defendant without the sanction of court.

The plaintiff's counsel referred to the case of ***Auto Garage v. Motokov (No. 3) (1973) EA 514*** and argued that the plaintiff had a right i.e. ownership of the suit property; the right was violated when the property was sold off by the 3rd defendant under void and illegal documents drafted by the 2nd defendant; and the defendant is liable. He contended that the agents of the 1st defendant on the instructions of the 2nd defendant then without just cause transferred the said property to a third party in spite of protest by PW1 and thus the plaintiff has a cause of action against the defendants severally and jointly.

For the 2nd and 3rd defendants, it was pointed out that PW1 testified that the plaintiff company was incorporated in June 1992, but that at incorporation the plaintiff's name was EA Foam Ltd as per Exhibit P25. It was argued for the defendants that the certificate of title shows that on 15 January 1993, East Africa**n** Foam Ltd was registered at the Lands Registry as the proprietor of the suit property. According to the 2nd and 3rd defendants, the claim of PW1 that East Africa Foam Ltd was the registered proprietor of the suit property is clearly contrary to the information on the face of the title.

It was further argued that after East Africa**n** Foam Ltd was registered as proprietor of the suit property; seven months later, that is, on 20 August 1993, the plaintiff company changed name to East Africa Foam Ltd but the Lands Registry was not given notification regarding any mis-description of proprietor in the certificate of

title of the suit property. Thus any search at the Land Registry regarding the suit property would therefore result in information that the rightful proprietor was East Africa**n** Foam Ltd. It was submitted that the genesis of the erroneous impression that a company by this name existed and owned the suit property, therefore, began with the indolence of the plaintiff.

Counsel for the 2nd and 3rd defendants pointed out that on 12th November 1996, a debenture and a mortgage of the suit property, as security for disbursements made pursuant to a loan agreement, and import facility agreement with Eritrea Foam Industry Ltd, were executed in the name of East Africa**n** Foam Ltd. It was argued that if the plaintiff wishes to maintain that East Africa Foam Ltd and East Africa**n** Foam Ltd are separate and distinct entities, then the plaintiff by this admission becomes a stranger to the suit property and has no cause of action against the defendants.

However, it was contended for the 2nd and 3rd defendants that such a contention flies in the face of the fact that;
1) Both the import facility and loan agreements make specific reference to the plaintiff by its correct name.
2) Fulgence Mungereza (DW1) testified in cross-examination that he presented his receivership documentation titled East Africa**n** Foam Ltd to PW1 and PW1's wife and they all worked together to run the factory for several months.
3) The High Court of Eritrea in the second paragraph of its ruling (Exhibit P27) takes note of PW1's acknowledgment and reliance on the fact of rightful receivership of East Africa Foam Ltd by the 2nd defendant.
4) In the first civil suit, that is, H.C.C.S No. 366 of 1998, instituted by the plaintiff against the defendants, the plaintiff described itself as East Africa**n** Foam Ltd in Exhibit D4.

It was further submitted for the 2nd and 3rd defendants that all the parties had not the slightest doubt that East Africa Foam Ltd as represented by PW1 was the issuer of the debenture and mortgage and, in doing so, was providing the intended security as a condition precedent for the 2nd defendant's disbursement under the Eritrean transaction. It is their case that the history of these transactions strongly suggest that the use of East Africa**n** Foam Ltd instead of East Africa Foam Ltd in the material documentation was, at best, an honest clerical error and, at worst, a

deliberate fraud orchestrated by the plaintiff. According to the 2nd and 3rd defendants, the plaintiff's claim that the 2nd defendant was dealing with another company is a blatant attempt at misleading court.

Counsel for the 2nd & 3rd defendants concluded their submissions on this issue by inviting this court to find either that the plaintiff and East Africa**n** Foam Ltd are distinct entities and the plaintiff, being a stranger to the suit property, has no cause of action and no *locus standi* in the present consolidated suit; or the various names used, that is, EA Foam Ltd, East Africa**n** Foam Ltd, and East Africa Foam Ltd, refer to one and the same entity, that is, the plaintiff.

The 1st defendant did not make any submission on this issue on the ground that the primary issues which affect him are only Nos. 5 & 6.

In rejoinder to the 2nd & 3rd defendants' submissions, the plaintiff's counsel reiterated their earlier submissions and argued that it is erroneous for the defendants to claim that the use of the words EAST AFRICA FOAM LTD and EAST AFRICA**N** FOAM LTD in the transactions was a clerical error orchestrated by PW1. It is the plaintiff's case that a distinction must be made on the clerical errors on the certificate of title and the alleged clerical error on the transactions' documents because in both instances neither PW1 nor his officers were the authors of the documents and could not therefore have made the so called errors.

The plaintiff's counsel also pointed out that the documentation that culminated into the transaction exhibited as P4, P5, P7, facility agreement, legal mortgage, debenture and loan agreement were prepared by the 2nd defendant's lawyer, Mr. David Mulira Senior of Mulira, Lubulwa & Co. Advocates together with the 2nd defendant's legal department and thus it is wrong for the 2nd defendant to claim that PW1 misled it. It was argued further that PW1 could neither understand nor read English and therefore he could not mislead competent lawyers and senior bank executives who have standard operating procedures. They submitted that the 3rd defendant sold off the land and made a return to the Registrar of Companies showing land belonging to the plaintiff company after he had realised that indeed the true owner of the land was the plaintiff.

I have reviewed the pleadings, documents and all the evidence in relation to the first issue. This issue was framed as a result of the disparity in the name on the certificate of title of the suit property and the plaintiff's name. The plaintiff company was first incorporated as E.A. Form Ltd on 4th June 1992 and subsequently by a gazette notice dated 20th August 2003 the name was changed to East Africa Foam Limited. However, when the plaintiff was entering into the transaction in dispute it presented itself as East Africa**n** Foam Limited. While the plaintiff would want this court to believe that this was an error made by the 2nd defendant bank, the documents on record show the contrary.

The plaintiff's Managing Director does not dispute signing the Debenture marked Exhibit P4. I note that next to his signature is a company stamp for East Africa**n** Foam Limited which clearly corresponds to the name of the company on whose behalf he was signing that document. Other documents that attest to this fact of use of East Africa**n** Foam Limited are Exhibits 8 (i) & 8 (ii). Exhibits 8 (i) is the company resolution by East Africa**n** Foam Limited to amend article 36 of its Articles of Association to authorise its directors to borrow money and mortgage or charge its undertaking, property and uncalled capital.

Meanwhile Exhibits 8 (ii) is a resolution by East Africa**n** Foam Limited to authorise securing of project loan by its sister company Eritrea Foam Industries Ltd on its assets by issuing two securities, namely; a first debenture on the movable assets of the company and a first legal charge on the immovable property of the company.

Even if this court were to be convinced that the plaintiff company name was erroneously written by the bank on the agreements and the debentures, what would be the explanation for the appearance of the stamp next to the plaintiff's Managing Director's signature on Exhibit P4 and the reference to the company as East Africa**n** Foam Limited in Exhibits P8 (i) & 8(ii) which were never written by the bank? I am not at all convinced that those were mere coincidences. In my view, the name East Africa**n** Foam Limited was deliberately used for a reason which I hope to discover in the course of dealing with the other issues.

For the above reasons, I am more inclined to agree with the 2nd and 3rd defendants that there are only two ways of looking at this issue. Either the plaintiff and East Africa**n** Foam Ltd are distinct entities in which case the plaintiff would have no

cause of action against the defendants as it is not the registered proprietor of the suit property or the various names used, that is, EA Foam Ltd, East Africa**n** Foam Ltd, and East Africa Foam Ltd, refer to one and the same entity, that is, the plaintiff company.

The plaintiff company has vehemently denied the contention that the name East Africa**n** Foam Ltd has been used interchangeably to refer to it. If this court believed the plaintiff's version, it would be its finding that the plaintiff company was not the registered proprietor of land comprised in LRV 2833 Folio 16 Plots 9-11 Eighth Street Kampala which was in the name of East Africa**n** Foam Ltd at the time of sale. As such the plaintiff would have no locus standi to sue in respect of the same and it would be the finding of this court that there is no cause of action maintainable by the plaintiff against the defendants in respect of that property and that would lead to automatic dismissal of this suit.

However, I have taken into account the evidence on record which is contrary to what is alleged by the plaintiff. I therefore do not share the plaintiff's view because both the documentary and oral evidence suggest that EA Foam Ltd, East Africa**n** Foam Ltd, and East Africa Foam Ltd were used interchangeably and the parties at all material times knew they were referring to the plaintiff company. On that basis, I find that a cause of action is disclosed and for that reason, I would proceed to consider this suit on its merits by turning to the next issue.

Issue 2: Whether the said facility and loan agreements were valid and enforceable?

The plaintiff's counsel submitted that the loan and facility agreements marked Exhibit P5 and the loan agreement Exhibit P6 are unenforceable based on evidence adduced at the trial. Counsel for the plaintiff highlighted the testimony of PW 1 and argued that the loan and facility agreements were entered into with a non-existent company, Eritrea Foam Industry Limited. It was also submitted that this fact was proved by PW1 and DW2 who respectively tendered in evidence a ruling/decree marked P27 from the High Court of Eritrea in a case where the 2nd defendant attempted to recover the loan from the said Eritrea Foam Industry Limited. An extract from the ruling states as follows:

> "*The court on its part has examined the arguments of the parties. The first defendant as stated in its preliminary objection when the loan*

was granted; it was not a juridical personality. Therefore the court has accepted the preliminary objection and given a decision to strike out the first defendant from the suit."

It is the contention of the plaintiff's counsel that admission of decisions of foreign courts is permitted under the **Evidence Act S. 86** of the **Evidence Act Cap 6** which particularly provides:

"That the court may presume that any document purporting to be certified copy of any judicial record of any country not forming the commonwealth is genuine and accurate, if the document purports to be certified in a manner which is certified by any representative of any government of the commonwealth in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records."

It is the plaintiff's submission that the loan and facility agreements entered by the 2nddefendant with the said Eritrea Foam Industry Ltd are invalid because the company has never had a corporate personality and can therefore not contract or has never contracted.

Counsel submitted that in the event that court finds the company was in existence, the said facility and loan agreements would still be invalid, *void ab initio*, and unenforceable because they were written in a language the plaintiff's Managing Director did not understand. The plaintiff's counsel relied on the evidence of PW1 who testified that he signed on behalf of the company but did not understand the contents of the documents as he was not proficient in English. He also stated that the documents were drafted and given to him by Ngondwe, Bizabigomba and Martin Ogang who was PTA Bank President. He further stated that these officials did not explain the contents of the documents yet they were aware of his illiteracy in English.

Counsel for the plaintiff referred to section 1 of the Illiterates Protection Act Cap 78 for the definition of an illiterate and submitted that before PW1 appended his signature to the documents, they were never read to him and explained in accordance with section 2 of the Illiterates Protection Act. The plaintiff's counsel argued that a document that does not conform to the provisions of the Illiterates Protection Act is a nullity and cannot be enforced. This position, according to

counsel for the plaintiff was best stated in ***Kasaala Growers Co-operative Society v Kakooza & Anor Civil Application No. 19 of 2010***, where it was held that failure to comply with a statutory requirement is fatal. They referred to the case of ***Musiime James & Anor v Mubezi James &Ors HCCS No. 180 of 2005,*** and submitted that Tuhaise, J. in agreeing with the above decision, found that failure to comply with the Illiterates Protection Act rendered the agreement in question invalid and inadmissible.

For the 2nd & 3rd defendants, it was submitted that a borrower-lender relationship existed between PTA Bank and Eritrea Foam Industry Ltd which existed at the time of those transactions. The defendants therefore maintain that the mortgage and debenture are binding on the plaintiff at law and in equity. Counsel referred to the evidence of David Mulira (DW3) to the effect that a number of transactions occurred between the 2nd defendant and Eritrea Foam Industry Ltd and that PW1 represented the Eritrean company in the dual capacity of Chairman and Managing Director. Further, that DW3 also told the court that PW1 and the 2nd defendant agreed that part of the security for these Eritrean transactions was to be provided by the plaintiff company in which PW1 performed the dual role of Chairman and Managing Director.

It is the view of counsel for the 2nd & 3rd defendants that PW1made five key admissions in his testimony that corroborate DW3 as follows—

1. that letters of credit were opened by the 2nd defendant in favour of Eritrea Foam Industry Ltd in June 1996;
2. that, following this, an import facility was executed between PTA Bank and Eritrea Foam Industry Ltd on 24 October 1996;
3. that a loan agreement was executed between PTA Bank and Eritrea Foam Industry Ltd on 24 October 1996;
4. that Eritrea Foam Industry Ltd fell back on its payments implying that some payments were previously made; and
5. In cross-examination, PW1 admitted that the signatures on all the documents and correspondences relating to the Eritrean transactions were genuinely his and were not forgeries.

It is the defendants' case that the plaintiff is estopped, in law and equity, from proving the non-existence of Eritrea Foam Industry Ltd on the basis of Section 114 of the Evidence Act Cap. 6

Counsel for the defendants also contended that a finding that the plaintiff and East Africa**n** Foam Ltd are one and the same entity, leads to the deduction that the acts of filing resolutions, Exhibit P8 (i) and P8 (ii) authorising PW1 and Jehoash Sendege to execute a debenture and mortgage in relation to the Eritrean transaction; subsequent execution of the debenture and legal mortgage containing direct and indirect representations to the 2nd defendant of the ability of Eritrea Foam Industry Ltd to repay the monies; and provision by Jehoash Sendege of a legal opinion, (Exhibit P10) on the validity of the transactions amounted to the giving of assurances and representations that Eritrea Foam Industry Ltd actually existed.

In addition, the defendant's counsel submitted that during his cross-examination, DW3 clarified that the legal opinion from Jehoash Sendege was part of the fulfilment of the 2nd defendant's due diligence and that the 2nd defendant, in reliance upon those assurances and representations, made the requested disbursements and suffered considerable detriment as a result and hence the plaintiff is estopped by law and equity in this litigation from proving the non-existence of Eritrea Foam Industry Ltd.

For that position the defendants' counsel referred to the decision of the Court of Appeal for Eastern Africa in ***Nurdin Bandali v Lombank Tanganyika Limited [1963] EA 304 (CA)*** in which Newbold JA stated that where a party has made a representation which another party believes to be true and acts on it then the representation cannot be denied.

Alternatively, it was argued for the defendant that although pre-incorporation renders the agreements unenforceable against Eritrea Foam Industry Private Limited Company; the agreements remain inherently valid and enforceable as against Silas Majyambere and East Africa Foam Ltd. The defendants agree that it is trite that a contract executed prior to a company's incorporation is not binding on that company nor is it even possible for the new-formed company to ratify it but argued that the unenforceability of the contract is not against the new company and does not speak to the validity of the agreement itself. Counsel for the

defendant cited the case of ***Kelner v Baxter (1886) LR 2 CP 174*** where it was held that an executed contract entered into with a company prior to its incorporation may not bind the new company, but remained *valid* and was *enforceable* against the person or persons who purported to sign the contract as representatives of that company. This principle was affirmed by the Supreme Court of Uganda in ***National Enterprises Corporation v Nile Bank Ltd SCCA 17 of 1994 (reported in [1995] KALR 406)*** where the NEC had purported to negotiate a loan contract and debenture with Nile Bank on behalf of an unincorporated entity named NEC-Bakery Ltd. **Odoki JSC** (now CJ) had this to say:

> *"It is well settled that a contract made before a company is formed cannot bind the company formed afterwards. Nor can a company by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before it came into existence."*

His Lordship with respect to the validity of the agreements in themselves however, went on to add that:

> *"There is ample authority for holding that if a person contracts ostensibly as an agent for a non-existent principal, for instance a company which is yet to be formed, he can be held personally liable*."

According to the defendants' counsel the immunities conferred by that principle, do not as of necessity extend to entities already in existence at the time of the transaction, that is, PW1 and the plaintiff.
Thirdly, it was the 2nd and 3rd defendants' argument that at the time the Eritrean transactions occurred PW1 was sufficiently knowledgeable of the English language and was aware of their nature and consequence. In that regard, counsel for the defendants submitted that the general rule of contract law is that a person is bound by his signature to a document whether he reads/understands it or not thereby making the doctrine of *non-est-factum* unavailable to PW1.

Counsel submitted that the applicable principle in English law is laid down in ***Saunders v Anglia Building Society [1971] AC 1004 at 1016 (per Lord Reid)***

where the House of Lords held that the defence of *non-est-factum* is only available to persons –

> "*who are permanently or temporarily unable through no fault of their own to have, without explanation, any real understanding of the purport of a particular document whether that be from defective education, illness or innate incapacity...*"

In retort, the plaintiff's counsel reiterated their earlier submissions and added that the defendants are estopped from alleging estoppel when they did not plead it. It was also argued for the plaintiff that the doctrine of *non-est –factum* applies to PW1 for reasons that: he stated that he does not understand English which evidence was not contested and this was also confirmed by his use of an interpreter during hearing; the impugned facility agreement to Eritrea foam is written in English and all the documents were prepared by Mulira, Lubulwa & Co. Advocates as he proved in cross-examination. It is counsel's contention that PW1 was unshakable and clarified that the documents were brought to him by Martin Ogang, Ngondwe and Bizagomba all officers of the 2nd defendant who asked him to sign including Exhibit P3 the letter allegedly written by him. He stated that he was not the author and merely signed whatever was brought to him. Counsel wondered how an illiterate person can make representation in a document that was not prepared by him.

The plaintiff's counsel sought to distinguish the application of the ratio in ***NEC Enterprises Corporation vs. Nile Bank (Supra)*** from the present case stating that Nec Bakery before its incorporation borrowed money and fell back on its payments. One of its shareholders Nec Enterprises had its vehicles attached for the debt. They sued to contest the attachment for detinue and/or conversion. The court at pg. 5 and 6 held that

> *"In the present case the debenture was executed before Nec Bakery came into existence. In the circumstances, the learned judge was correct in holding that the debenture was a nullity as between the respondent and Nec Bakery in order to hold that the debenture was enforceable between the respondent and the first appellant, the learned judge lifted the veil of Nec Bakery and held in effect that this*

was one of the cases where the principles of corporate personality should not be used to defeat justice".

The plaintiff's counsel is of the view that the above case made a clear distinction between validity of the transaction or debenture agreement and its enforceability arguing that in the instant case the agreement is a nullity. Additionally, he contends that its enforceability cannot be against the plaintiff because the plaintiff is not a shareholder in Eritrea Foam Company Limited. If court were to lift the veil as in the Nec Bakery case it would only find PW1 not the plaintiff and yet PW1 is protected by the Illiterates Protection Act as argued.

I have analysed the evidence and submissions made on this issue and will start with the allegation of illiteracy. The evidence on record particularly that of PW1shows that he had a full and real understanding that the interactions between him and PTA Bank were of a business nature and that the purpose of the documents presented to him were for loan and import facilities. In my view, this knowledge removes him from the protective ambit of the doctrine of non-est - factum. Thus, I do not find the doctrine of non-est–factum applicable to PW1 in spite of his testimony that he does not understand English. On the contrary there is overwhelming evidence on court record showing that PW1 personally wrote and signed several documents prepared in English and there is no statement that someone else wrote it for him in accordance with section 3 of the Illiterates Protection Act. For example, Exhibit P3 is a letter written in June 1996 from the Eritrean Foam Industry Private Company Ltd to the 2nd defendant forwarding a cheque to cover an application for letters of credit facilities for importing machines for foam production. It is handwritten in English and signed by PW1 against his name. This letter has not been denied as having been authored by PW1. There is also no statement that someone else wrote it for him and explained its content prior to him appending his signature.

The second document that defeats the plaintiff's claim of illiteracy is Exhibit P32. It is a caveat that was lodged by the plaintiff company in respect to Plot 9-11, 8th Street Industrial Area. It is signed by PW1 on behalf of the plaintiff but again there is no statement that someone else wrote them for him. The same goes for Exhibit P33. I find it inconceivable for PW1 to claim that he did not understand the documents he was signing and yet he has been signing various documents written

in English. Still on that point, PW1 did not furnish any evidence to show that he objected to signing the documents that were prepared in a language he claims not to know.

It is my view that if at all the plaintiff did not know the English language as he claims, it was incumbent upon him to inform the 2nd defendant about that inability and seek for help given the magnitude of the transaction he was engaging in. In fact it would have been prudent for him to involve a lawyer or any other literate person in that transaction. The fact that he did not do so means he was competent to act on his own and he cannot now turn around to claim illiteracy especially after the deal went through and the 2nd defendant disbursed its funds. I must also observe that much as PW1 testified through an interpreter, I took notice of the fact that he fully understands the English language as on a number of occasions he started answering the questions before a translation was done in the local language. To my mind use of an interpreter was stage-managed merely to convince this court that PW1 does not understand the English language but he ended up betraying himself.

It is therefore my finding based on the above evidence and facts that PW1 signed the documents with the full understanding of their import. For those reasons there is no reason to doubt the validity of the facility and loan agreements on that basis.

On the argument that the loan agreement and the facility agreement were entered into with a non-existent company, Eritrea Foam Industry Limited, I have carefully studied all the documents on record plus the evidence and my conclusion is that PW1 purported to act on behalf of Eritrea Foam Industry Limited whom he presented as being in existence at the time of executing the agreements. All the correspondences signed by him on behalf of the plaintiff attest to that fact. See Exhibits P8 (i) & 8 (ii), P4 & P10 among others. If at all it turned out that the company does not exist, it is my firm view that the plaintiff that guaranteed its loan and even referred to it as a sister company in some of those documents and PW1 who held out as its representative cannot now deny its existence so as to escape liability especially after the funds were disbursed.

Based on the above analysis, I agree with the submission of counsel for the 2nd & 3rd defendants that section 114 of the Evidence Act comes into play to stop the

plaintiff from denying the existence of the company whose loan it guaranteed. That section provides as follows:-

> *"When one person has, by his or her declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she nor his or her representative shall be allowed, in any suit or proceeding between himself or herself and that person or his or her representative, to deny the truth of that thing."*

It must be noted that in applying the above doctrine, I did take into account the argument of counsel for the plaintiff that estoppel was not pleaded and so the submission of counsel on the same should be ignored. However, I am fortified by the decision in ***Kabu Auctioneers & Court Bailiffs & Muljibhai Madhvani & Co. Ltd v F.K. Motors Ltd*** SCCS No. 19 of 2009 in which Tsekooko, JSC observed as follows:-

> *"……..**Odd Jobs v Mubia [1970] EA 476** and **Nkalubo v Kibirige [1973] EA 102** are authorities for the view that a court may base a decision on an unpleaded issue if it appears from the course followed at the trail that the issue has been left to the court for decision…."*

In the instant case, I have carefully addressed my mind to the evidence adduced at the trail. PW1 admitted during cross examination that he signed an agreement for import finance facility and the loan agreement with PTA Bank on behalf of Eritrea Form Industry Ltd. DW3 also testified in cross examination that the bank disbursed money to the company based on good faith as a result of the confidence given by PW1 as well as a legal opinion given by the legal counsel of Eritrea Form Industry Ltd and East African Form Ltd. The course followed by both parties at the trial therefore invited this court to decide on the existence of Eritrea Form Industry Ltd the borrower and from the evidence on record, there is no doubt that the said company was presented to be in existence and the 2nd defendant acted on that fact. It is therefore my finding that much as estoppel was not specifically pleaded the issue was indirectly canvassed at the trial and this court can base its decision on it as I have done above.

It is therefore my considered view that the agreements would only be a nullity as against Eritrea Form Industry Ltd but would be enforceable against PW1 who presented Eritrea Form Industry Ltd as being in existence and signed all the documents on its behalf and the plaintiff company as guarantor. This finding and conclusion answers the 2nd issue in the affirmative.

Before I take leave of this issue, I wish to observe that the High Court of Eritrea adjudicated upon a dispute arising from this same transaction where PTA Bank sued Eritrea Form Industry Ltd jointly with Mr. Silas Majyambere (PW1) as the 2nd defendant. The certified translated judgment of that court was admitted in evidence as Exhibit C1 because this court requested for it. Earlier the plaintiff had exhibited a certified translated version of a ruling in an objection raised by the 1st defendant that at the time of the transaction it had not yet been incorporated as a juridical personality. The 2nd defendant had also raised an objection that the loan concerned a company and not the 2nd defendant. The 1st defendant's objection was upheld and it was struck out of the suit. The 2nd defendant's objection was overruled and he was ordered to enter into merit and give his reply (see details in the ruling marked Exhibit P27).

In the judgment in the main suit (Exhibit C1), it was held that the 2nd defendant (Mr. Silas Majyambere) having admitted contracting the loan and having received the money was liable for the contracted loan. He was ordered to pay the loan amount together with court fees and bank interests. The court in arriving at that conclusion stated as follows:

> *"Lastly, the 2nd Defendant has argued that the documents presented by the Plaintiff are devoid of any authenticity.....The question is not whether the documents were properly authenticated or not, but what was the object of producing them. The object was to show that there was a loan. It is not denied that such a loan was given. There was no objection on the part of the 2nd Defendant at the first hearing. Since there was no objection, we see no reason to indulge in that discussion. Without entering into the discussion.....it is enough that the 2nd Defendant has admitted contracting the loan and of having received the money. In view of the reasons outlined above, we reject the arguments of the 2nd Defendant and we hold the 2nd Defendant,*

Mr. Silas Mayejembere, liable for the contracted loan and order him to pay Nfa 3.431.042=..."

I believe if the Eritrean court had jurisdiction over the plaintiff company it would have been joined as a defendant and the court would have found it jointly and severally liable to pay the loan with PW1 who also presented the plaintiff company as East Africa**n** Foam Limited with the hope of creating confusion and getting away with it.

It is quite interesting to note that in the instant case, PW1 during cross examination, denied being party to the Eritrean suit when the judgment specifically mentions him as the 2nd defendant. Indeed I found Mr. Silas Majyambere to be a very untruthful witness and I have treated his evidence with a lot of caution. It is clear from Exhibits P27 and C1 that he signed a loan agreement on behalf of an unincorporated company, Eritrea Form Industry Ltd. The evidence before me shows that the company was subsequently incorporated in a different name Eritrea Form Industry Private Company Ltd.

It is also curiously noteworthy that Mr. Silas Majyambere is the brain behind these companies that have issues. Could it be a mere coincidence? No. I believe this was motivated by intent to defraud the bank and this court is being asked to sanction it. Far be it from this court to do that! With this observation, I now turn to consider the 3rd issue.

Issue 3: Whether the mortgage and debenture are valid and enforceable

It was the contention of the plaintiff's counsel that no lawful guarantee can exist to a non-existent borrower arising from an unenforceable facility agreement and loan agreement. Counsel for the plaintiff submitted that the mortgage and debenture agreements were not valid because they were entered with a non-existent company which therefore has no capacity to contract and enter agreements.

In addition, counsel for the plaintiff argued that the plaintiff company has never entered any mortgage agreement with the second defendant or any debenture agreement since the 2nd defendant transacted with East African Foam Limited which is different from the plaintiff company. It was further contended for the

plaintiff that East Africa<u>n</u> Foam Limited was non-existent according to the search of the register made by the Registrar of Companies. The plaintiff's counsel also referred to Exhibit D 2, a decree arising from Civil Suit No. 366 of 1998 in which East Africa<u>n</u> Foam Limited sued the 2nd and 3rd defendants challenging the validity of the transaction and receivership and Arach-Amoko , J *(as she then was)* found that the company was not in existence.

The other argument raised by the plaintiff is that the mortgage and debenture were never executed in law and are therefore a nullity since Exhibits P4 and P7 were never sealed with the plaintiff's company seal, cannot bind the plaintiff and the 2nd defendant did not furnish any evidence to contradict PW1's evidence to the same effect. For that position reference was made to the case of ***General Parts (U) Ltd v NPART SCCA No. 55 of 1995***. The plaintiff 's counsel also cited the case of ***Alice Okiror & Anor v Global Capital Save 2004 & Anor civil suit no. 149 of 2010,*** where this court held that a mortgage which was not sealed with the common seal of the company was void in the absence of the signatory possessing a valid power of attorney.

Conversely, the defendants' counsel contended that the use of the name East Africa**<u>n</u>** Foam Ltd instead of East Africa Foam Ltd in the debenture and mortgage was an error of misdescription caused by the plaintiff. It was submitted that the plaintiff caused this mis-description by maintaining the property in the former names; by preparing resolutions bearing the erroneous name; and by proceeding to register these resolutions at the companies' registry.

Furthermore, the defendants' counsel argued that acting on the plaintiff's behalf, PW1 and Jehoash Sendege as signatories jointly executed a debenture in the names of East Africa**<u>n</u>** Foam Ltd and the debenture's recitals acknowledged that it was being given as security for a loan and facility agreement between Eritrea Foam Industry Ltd and PTA Bank. It was submitted that the import facility agreement in question in Article IX (e) (ii) identified the proposed provider of security as a Ugandan company identified as the plaintiff and the loan agreement identifies the security, in Section 3.01 (3) (b), as Plot 9-11 8th Street Kampala. According to the defendants' counsel, the cross-references contained in this documentation clearly show that the use of East Africa**<u>n</u>** Foam Ltd instead of East Africa Foam Ltd was

an honest clerical error on the part of the 2nd Defendant. In ***Hima Cement Ltd v Cairo International Bank HCCS 13 of 2002*** **Madrama J** ruled that,

> *"...evidence may be admitted as to whether the description of the company in [an exhibit] was a genuine mistake or not and whether it misled anybody as to the identity of the person addressed.... Such evidence will not add or vary or subtract from the term of the agreement, but deals with the identity of the party to any alleged agreement."*

The 2nd & 3rd defendants' counsel reiterated their submission that the names East Africa**n** Foam Ltd and East Africa Foam Ltd were taken by all parties concerned to mean and refer to one single entity, that is, the plaintiff.

It was also submitted for the 2nd & 3rd defendants that the debenture and mortgage were, on 7th November 1996, preceded by a resolution, Exhibit P8 (ii) authorising the issuance of a debenture and legal charge on the movable and immovable assets of East Africa**n** Foam Ltd. Counsel argued that even if the plaintiff disputes the resolutions claiming that no meetings were held at which the resolutions were passed and that one of the signatories, Jehoash Sendege, had no authority to sign, once both resolutions were lodged at the Registrar of Companies and the Registry accepted them as proper on their face and placed them on the company file, this amounted to constructive notice to the world at large that the acts specified in the resolutions and actors named were duly authorised to transact business on behalf of the company. They relied on the case of ***Royal British Bank v Turquand (1856) 6 E&B 327 (per Lord Jervis CJ)*** in which the English Court of Exchequer established the *indoor management rule* holding that people transacting with companies are entitled to assume that internal company rules are complied with even if they are not. This is because there is no need to look into the company's internal workings; rather due diligence is satisfied upon examination of documentation filed at the official company registry.

It was the view taken by the 2nd & 3rd defendants' counsel that they were entitled to rely on the veracity of these resolutions as indicating full compliance with the company's internal measures for execution of its resolutions and to take them as documents that validly and effectively clothed PW1 and Sendege with authority,

actual or ostensible, to act as agents of East Africa Foam Ltd in executing the debenture and mortgage.

As regards the plaintiff's contention that the debenture and mortgage are defective because they were not sealed, the defendants' counsel submitted that the resolutions passed and registered with the companies registry provided sufficient authorisation and made the additional affixation of a company seal non-essential. Referring to the case of ***Alice Okiror v Global Capital Save 2004*** (supra), it was argued that this court stated that if a company passes a resolution authorising a director to execute a mortgage, then the director may sign the mortgage without affixing a company seal.

Be that as it may, counsel for the 2nd & 3rd defendants maintain that the documents in question do bear the seal of the company. It was also the defendants' contention that the provisions of the Companies Act Cap 110 refer to two types of company seal, a common seal and an official seal. According to counsel for the 2nd & 3rd defendants the common seal is for domestic/national use, while the official seal is for international/overseas use. Counsel for the defendant cited section 36(1) of the Companies Act which prescribes that it is the official seal which must take the form of an embossed metal die. According to counsel, no embossment requirement is prescribed for the common seal. It was the submission of the defendants' counsel that a regular stamp can suffice as the 'common seal' of a company and so both debenture and mortgage bear the stamp of East Africa**n** Foam Ltd which is none other than the plaintiff company.

In rejoinder, the plaintiff's counsel wondered why if the names were a misnomer, the 2nd and 3rd defendants' lawyers refused to accept to change the certificate of title into the plaintiff's names when requested by the registrar of titles. The second question paused by the plaintiff was why the third defendant sold the land but made returns on the files of the plaintiff company. According to the plaintiff, this showed that they were treading carefully as they had realized that the debenture and mortgage agreements showed that the defendant had transacted with a different company from the owner of the property there described as LRV 2883 Folio 18 Industrial Area which they desired to attach.

It was further submitted for the plaintiff that the rule in *Turquand* was applied selectively because if one were to search at the company registry, one ought to have found that the company changed name from E.A. Foam Limited to East Africa Foam Limited way back in 1993 and these changes were manifest on the file as per Exhibit P1. It is also the plaintiff's argument that the second defendant conveniently failed to produce as a witness a lawyer from the firm of Sendege, Senyondo & Co. Advocates yet PW1 denied ever instructing that firm to prepare the resolutions. The plaintiff's counsel further argued that the defendant's counsel misapplied the case of ***Alice Okiror Global Capital Save 2004*** (supra), because it talks about a power of attorney from company directors and not just a resolution. Counsel for the plaintiff submitted that the Companies Act makes no reference to a stamp and thus the defendants' counsel also misapplied the provisions of the Act on seals. The plaintiff maintains that the debenture was never sealed and is therefore invalid and unenforceable.

I have reviewed the pleadings, documents and all the evidence relating to this issue. First of all, I agree with the argument that the plaintiff caused mis-description of the parties in the documents by maintaining the property in the name of East African Form Ltd; by preparing resolutions bearing the erroneous name and by proceeding to register these resolutions at the companies' registry. I have not found any issue with the resolutions adduced in evidence because the plaintiff has not exhibited any other resolution that it could have made in relation to that transaction. Neither has it exhibited its Articles of Association to assist this court in assessing whether or not the resolutions on record actually contravened the company's internal rules and procedures. Exhibit P8 (ii) is that resolution that authorised the issuance of a debenture and legal charge on the movable and immovable assets of East Africa**n** Foam Ltd. It was signed by PW1. It states:

"*THE REPUBLIC OF UGANDA*
EAST AFRICAN FOAM LIMITED

RESOLUTION

At the meeting of the board of directors of East African Foam Limited duly convened and held at the company's Head Office at Plot 9-11 Eighth Street Industrial Area,

IT WAS RESOLVED THAT*:*

1. *In consideration of PTA Bank extending a Loan of UAPTA Two Hundred Seventy-Seven Thousand (UAPTA277,000) to* ***ERITREA FOAM INDUSTRIES LIMITED a sister company to EAST AFRICAN FOAM LIMTED, EAST AFRICAN FOAM LIMTED*** *has authorised the project loan on its assets by issuing the following securities:-*
   (a) A first Debenture on the moveable assets of the company.
   (b) A first Legal charge on the immovable property of the company.

2. ***The Security and other related documents be executed by SILAS MAJYAMBERE and JEHOASH SENDEGE on behalf of the company. (****Emphasis mine****)***

Certified true copy of the original resolution.

SIGNED: Chairman
DATE: 7th November 1996"

It is clear from clause 2 of the resolution that indeed Silas Majyambere, the plaintiff's Managing Director and Jehoash Sendege were duly authorized to execute security documents on behalf of the company. In light of the rule in Turquand's case, this resolution is constructive notice that all internal procedures of the company had been complied with. Silas Majyambere acting on that authority went ahead to execute the debenture, Exhibit P4 and the legal mortgage, Exhibit P7. I therefore agree that the persons who executed the security documents were already appropriately empowered to execute the documents. The fact that there was no common seal on them is immaterial. In the circumstances, I have no basis for not finding these security documents validly executed. I am fortified by the decision of the Supreme Court of Uganda in the case of ***Bank of Uganda v Banco Arabe Espanol in Civil Appeal No. 8 of 1998***.

The facts of that case are that the Uganda Government borrowed US $ 1,000,000/= from the respondent, a Spanish Bank according to terms and conditions set out in a loan agreement. The appellant guaranteed repayment of the loan and a representative of the Bank of Uganda signed the agreement. The Uganda Government defaulted on repayment of the loan whereupon the respondent made demands to the appellant to pay the debt as guarantor. When no payment was made, the respondent sued the appellant as a guarantor. The appellant denied liability to pay the debt, and contended, inter alia, that the loan agreement was unenforceable against it as it was not executed under seal. Kanyeihamba JSC (as he then was) rejected the argument that for the loan agreement to be validly effected, it had to comply with the Bank of Uganda bye - laws requiring the fixing of a seal. The Court found that the effect of a power of attorney which is duly signed and sealed in accordance with the regulations of a corporation and granted to that corporation's authorized agent to travel abroad on a contractual mission is to enable that agent, without further ado, to contract and enter into a binding and enforceable agreement with a named party.

In the instant case, by a company resolution, the plaintiff company duly empowered PW1 its Managing Director and Jehoash Sendege to sign the security documents and there was no need for the common seal. In any event, PW as the Managing Director affixed the company stamp next to his signature and in my view that would suffice in the circumstances of this case. It is therefore my finding and conclusion that the mortgage and debenture were valid and enforceable. The third issue is answered in the affirmative.

Issue 4: Whether the appointment of the 3rd defendant as receiver by the 2nd defendant is valid?

On the fourth issue, it was submitted for the plaintiff that the appointment of the 3rd defendant as receiver by the 2nd defendant was invalid because Exhibit P13, the instrument purporting to give power to the receiver was *void ab initio* having derived authority from Exhibit P4. According to the plaintiff the said debenture is void by virtue of the decision in ***General Parts (U) Ltd*** (supra).

Without prejudice to the foregoing, the plaintiff's counsel submitted that a closer look at the said letter of appointment indicates that he was appointed as a receiver

over property of a different company from the plaintiff since the said company is called East African Foam Company Limited.

The plaintiff's counsel referred to section 3 of the Mortgage Decree 17 of 1974, then in operation, which provides for the appointment of a receiver under a power expressly provided in the mortgage in that behalf. Reference was also made to Section 5 (4) of the same Act which states that any such appointment not in writing or in conformity with that section is void and of no effect.

In that regard, it was submitted that the plaintiff did not enter into any mortgage; neither did it give a debenture to the 2nd defendant because the 3rd defendant was armed with powers of a receiver for a wrong company. According to the plaintiff, the receiver did not have any written letter of appointment for East Africa Foam Limited as provided under section 3 and thereby offended section 5 (4) of the Mortgage Decree.

The plaintiff contends that it was incorrect for the 3rd defendant to state that PW1 did not object to the takeover because he was "aware of what was going on" yet PW1's evidence was that he only conceded to the 3rd defendant's taking over the plaintiff's factory because he came with policemen.

For the 2nd & 3rd defendants, it was submitted that by virtue of Exhibit P.13, the 2nd defendant exercised powers granted under clause 8 of the debenture created by East African Foam Ltd and appointed Fulgence Mungereza and Eryeza Kaggwa as receivers and managers over all the property and assets charged by the debenture. It is also the defendant's case that since the receivers were appointed under a debenture, the plaintiff's reliance on the dictum in the case of ***General Parts (U) Ltd v NPART*** (supra), concerned with appointment under a mortgage is misplaced. It was argued that Fulgence Mungereza (DW1), the appointed receiver testified that when he came to take over the plaintiff company PW1 accepted his receivership and for the ensuing months he ran the business with both PW1 and PW1's wife without them contesting the validity of the receivership. Further, that the challenge was only resorted to when the receiver decided to sell the suit premises. The 2nd & 3rd defendants' counsel therefore submitted and invited court to find that the appointment of the receiver was valid and proper in all respects.

On the other hand the plaintiff maintains that the 3rd defendant sold off a land under the debenture and mortgage agreements that were invalid and unenforceable. It is the plaintiff's case that the debenture in question would have created a valid appointment if it had been lawfully created.

I have given due consideration to the evidence and arguments made for and against this issue. I wish to note from Exhibit P4 that the second defendant was empowered to appoint a receiver in writing if the Debenture became enforceable. As earlier found in the preceding issue the Debenture was valid and enforceable having been properly executed. Acting under this instrument the second defendant wrote Exhibit P.13 by which the 3rd defendant as well as Eryeza L. Kaggwa were appointed as receivers of all the property and assets charged by the Debenture. In addition, a legal mortgage was also validly executed in favour of the 2nd defendant on property comprised in LRV 2101 Folio 18 Plot 9-11, 8th Street Kampala. This is the same property that the receiver sold off. Having found that the security documents were properly executed, I do not have any reason to fault the appointment of the receiver there under. Indeed evidence on record shows that PW1 was served with the notice of appointment of the receiver and he worked with them without raising any objection. The subsequent challenge of the receivership was clearly an afterthought that should not be used by the plaintiff to run away from its obligations. The argument that PW1 conceded to the receivership because the receiver came with policemen lacks merit because he could have still challenged the receivership in courts of law, immediately like he did much later on. For those reasons, I find the appointment of the 3rd defendant as receiver valid and that answers the fourth issue in the affirmative.

Issue 5: Whether the plaintiff's caveat was lawfully removed?

Counsel for the plaintiff submitted that the caveats in Exhibit P32 and P33 were unlawfully removed because DW4 issued an erroneous and misleading notice in contravention of the standard of care then expected of him. This was because the notice purportedly issued by DW4 either deliberately or erroneously referred to a property different from the subject of the caveat or civil suit alluded to in the affidavit of the caveator as per Exhibit P20. It is also the plaintiff's case that this notice was never received by the company. Further, that DW4 was negligent or knowingly issued a misleading notice so as to have the caveat removed without the

knowledge of the plaintiff/caveator. It is also the plaintiff's argument that such a notice cannot have legal effect because it was never meant for the plaintiff and as such was never received.

For the 1st defendant, it was argued that the plaintiff's claim of not receiving the notice is false and should be viewed in light of the other general denials by the plaintiff's General Manager. According to the 1st defendant, the quotation of the reference which described the suit property and the subject which alluded to another property was sufficient to put the plaintiff on notice and impel it to make further inquiry. It is therefore contended for the 1st defendant that its officials removed the caveat lodged on the property in accordance with the law and established procedure, the statutory days having lapsed and without any intervention of the plaintiff or court. The 1st defendant further argued that considering the time lag and related correspondence, it was apparent that the plaintiff indeed had notice of the removal of the caveat.

For the 2nd and 3rd defendants it is submitted that if the caveats in question were fatally defective at law and a nullity, then in law there was no subsisting caveat requiring removal since a nullity is a nullity ab initio. According to counsel for the 2nd & 3rd defendants, the plaintiff contended strongly in its submissions that if a document which is prepared on behalf of an illiterate person fails to conform to the requirements of the Illiterates Protection Act, then that document is a nullity and is so fatally defective that it becomes inadmissible as evidence. He invited this court to note that the caveats referred to as plaintiff's Exhibits P32 and P33 are supported by affidavits sworn by PW1 yet these affidavits do not express the jurat required under the provisions of the Illiterates Protection Act attesting to the fact that the document was read over and explained to PW1. Going by the strength of the plaintiff's own submission on a point of law, it was argued for the 2nd & 3rd defendants that this would render the caveats in question invalid and unenforceable at law as well as being inadmissible as evidence in the present suit. It was also contended for the 2nd & 3rd defendants that Exhibit P32 was further flawed in that it lacked the instrument number, the date and time of lodgement, the name of the executing Registrar, and the memoria.

The plaintiff's counsel reiterated their argument that the notice was lacking, inadequate and was therefore not issued; any action arising there from is invalid.

Insofar as lack of a jurat is concerned, the plaintiff's counsel submitted that the Illiterate's Protection Act is meant to protect illiterates not be used against him because it is a shield not a sword. He argued in the alternative that the omission to put a jurat was a mistake of counsel that cannot be meted on the litigant.

The plaintiff's counsel also argued that there is no proof that the said notice was sent to the plaintiff by registered mail as is the practice and that even if an address of the plaintiff had been used; the plaintiff was not an interested party in that particular property; the property described not being its property it would not reasonably be expected to respond to the notice. This is premised on the fact that the plaintiff neither owned Plot No. 418 Nakawa which was mentioned in the notice to remove caveat nor was the correct Leasehold Register Volume and Folio number cited.

In determining this issue, I have considered Exhibit P20 being the notice that was sent to the plaintiff. DW4 testified that he did notify the plaintiff that there was an application for removal of its caveat and also indicated that its caveat will be removed unless 60 days lapse. The notice (Exhibit P20) was referenced as follows:

> *"CORRESPONDENCE ON SUBJECT PLEASE QUOTE NO.* ***LRV.2833/16"***

However, on the subject the property was described as ***"PLOT NO. 418 NAKAWA INDUSTRIAL AREA LEASE HOLD REGISTER VOLUME 2536 FOLIO 6"*** instead of ***LRV 2833 Folio 16*** its correct description.

I do agree with the plaintiff that there was a wrong description of the property as indicated on the subject of that letter and I also agree that a registrar ought to exercise due care and diligence in executing his work. However, I have also considered the testimony of DW4 who issued the notice and his explanation of the two possible reasons why the error occurred. He attributes the error to two alternatives, namely; either the plaintiff company owned two properties encumbered by the same caveat but he failed to include the description of the 2nd property in the letter or files were mixed up and the notice went to the right people but showing a different property. He emphasised that both the reference of the property and the addressee were correctly referred to.

PW1 in paragraph 20 of his witness statement stated that his lawyers received the said notice on the last day of its expiry although the property was wrongly described. I find that even if there was a misdescription of the property in the subject of that notice, the reference number correctly referred to the property and the instrument number of the caveat intended to be removed were also correct. Most importantly, the fact that it was received by the plaintiff's lawyers leaves no doubt that it served the intended purpose. It was upon the plaintiff to swiftly act upon it and seek clarification or even protest the misdescription of the property. This was not done and so the plaintiff has itself to blame.

The plaintiff was also very much alive to the fact that it was under receivership and was aware of the steps being taken to recover the loan it guaranteed. Its failure to take the appropriate action should not invalidate the notice on the pretext that it was lacking in form. In the result, I do find that the notice to remove the caveat though made a wrong description of the property under the subject, it quoted the correct reference and instrument number that was adequate to put the plaintiff on notice about the application for removal of the caveat. The removal of the caveat was therefore valid.

Issue 6: Whether the sale of the plaintiff's property was valid and/or lawful?

Counsel for the plaintiff submitted that the sale of the plaintiff's property was invalid and/or unlawful because the 2nd and 3rd defendants ought to have applied to court for foreclosure before disposing it off but such permission was not sought. They referred to the evidence of DW4 to the effect that going by Exhibit P16 the 2nd defendant only had an equitable mortgage and not legal mortgage. Further, that no evidence was led by the 2nd or 3rd defendants about applying to court for foreclosure before selling off the plaintiff's property to Metropolitan Properties Ltd. The plaintiff's counsel cited the case of ***Barclays Bank DCO v Gulu Millers Limited [1959] 1 EA 540*** where it was decided that the primary remedy of an equitable mortgagee is foreclosure under order of the court. It therefore follows that the said disposal of the plaintiff's land was unlawful without foreclosure.

Additionally, the plaintiff raised the argument that even if the plaintiff was the real company under receivership, in acting as receiver, the 3rd defendant at all material times viewed himself and acted as an agent of the 2nd defendant, which is contrary to the law. The plaintiff's counsel highlighted the evidence of the 3rd defendant who testified during cross examination, that a*s a receiver he was an agent of the bank and sold in the interest of the bank he was serving.* In that regard the plaintiff submitted that the 3rd defendant who presented himself as an expert in receivership was throughout the entire process either ignorant or deliberately lied with regard to his primary duty as a receiver yet section 4 (1) of the Mortgage Decree is couched in mandatory terms when it stipulates that the receiver shall be the agent of the mortgagor.

Basing on the decision in the case of ***Moses Jim Jagwe Vs Standard Chartered Bank HCCS 375/2004*** where Justice Yorokamu Bamwine J. held that receiver has to take reasonable care to get the highest price, counsel for the plaintiff faulted the 3rd Defendant for rushing to sell at the lowest price of Ug. Shs 390,000,000/= far below the price that was fixed by the government valuer which was Ug. Shs 500,000,000/=. They argued that the sale was also unlawful in that it was done in violation of an undertaking bfore the Court of Appeal yet judicial decisions have held that undertaking by counsel binds the client to actions of the defendant.

Counsel for the 2nd and 3rd defendants in response submitted that the appointment of the receiver and sale of the property was conducted according to the rights granted under the debenture and not the mortgage. While relying on covenant 1 of the debenture, the defendants' counsel argued that the plaintiff charged in favour of the 2nd defendant all its property and assets whatsoever both present and future; and under covenant 2 it created a fixed charge 'as regards the present and future immovable property of the company. It is the 2nd & 3rd defendants' contention that unlike the mortgage, these charges under the debenture were not affected by the expiry and renewal of the lease. Additionally, it was submitted for the defendants that the 2nd defendant's appointment letter to DW1 empowered the receivers to exercise all and any other powers set out in the debenture particularly in clause 9 and without limiting any general powers conferred upon them by law.

It was also argued that the transfer was well after the 60 days prescribed under the Registration of Titles Act, thus making the sale lawful from start to finish because the transfer deed (Exhibit P21) expressly states that it was effected by the plaintiff acting through Fulgence Mungereza being the receiver 'appointed by the Eastern and Southern African Trade and Development Bank pursuant to a Debenture dated 12 November 1996. Exhibit P20 also shows the notice to show cause concerning the caveat was issued in February of 2001 and Exhibit P21 shows that the transfer was effected in June 2001.

It is also the defendants' case that due to the plaintiff's dilatory conduct of taking no step to have the application scheduled for hearing, on 23 February 2001, the defendants wrote to the Registrar Court of Appeal withdrawing the undertaking not to dispose of the property until the application was heard vide Exhibit D1 which was duly copied to the plaintiff's lawyers. The 2nd & 3rd defendants, therefore, submitted that the withdrawal of the undertaking is solely attributable to the dilatory conduct of the plaintiff in failing to apply to have its appeal heard as a matter of urgency.

For the 1st defendant, it was submitted that the sale was by the receiver duly appointed by the plaintiff and the 1st defendant cannot be held liable for its actions. It was also argued that by a scrutiny of the documents presented by the receiver acting as an agent of the plaintiff/mortgagor and specifically accountable to the 3rd defendant mortgagee under the provisions of section 5 of the Mortgage Act, the registrar made sufficient enquiry and duly transferred the property in accordance with the law. In conclusion, the 1st defendant highlighted the 2nd and 3rd defendants' submission that the sale of the property was by virtue of the Debenture and not the mortgage.

In rejoinder, the plaintiff reiterated that the debenture did not provide basis for a lawful sale. As far as the undertaking not to sell is concerned, the plaintiff's counsel submitted that the authenticity of the withdrawal is in doubt as DW2 was not the author and did not satisfy court that he knew about it arguing that counsel who wrote the letter did not have authority to do so.

It was the plaintiff's argument that the 1st defendant is liable for acts of mistakes or omissions of the Registrar of Titles who enabled unlawful transactions to deprive

the plaintiff of its property. In this particular instance the plaintiff's counsel argued that it was utter recklessness and/or gross or deliberate negligence and possible purposeful mis-description that the Registrar of Titles accepted the Transfer Deed *(Exh. P.2)* in which the powers to transfer the plaintiff's land were purportedly derived from a legal mortgage *(which had lapsed in September 1998 alongside the lapse of the grant in LRV 2101 Folio 18).*

The plaintiff's counsel relied on **Section 1(b) of** the **Mortgage Act, Cap 229** which defines a **Mortgage** as "Any **mortgage, charge, debenture**, loan agreement or other encumbrance whether legal or equitable which constitutes a charge over an estate or interest in land in Uganda ...and which is registered under the Act". It was then submitted for the plaintiff that by the said definition, the debenture under which the receivers purported to dispose of the plaintiff's registered interest in Plot 9- 11, 8th Street lapsed as correctly alluded to in paragraph 8 of David Mulira's affidavit in support of the caveat in Exhibit P16. It was the plaintiff's contention therefore that the Registrar of Titles was under duty to scrutinise whether there was proper authority for the receivers to deal in the land in the manner they did. It is the contention of the plaintiff that having abysmally failed in his duty of care the Registrar of Titles caused to the plaintiff immense loss of land in the heart of the city with a large building, offices and modern foam factory.

The plaintiff invited this Honourable Court to follow the example as laid out in the decision of the Court of Appeal in ***Kyagalanyi Coffee Ltd Vs Francis Senabulya (CACA No. 41 of 2006)*.** The facts in the said decision are in some respects similar to the ones in the instant case. The Court of Appeal found that illegalities had been committed and therefore could not be overlooked. The said Honourable Court ended up condemning the appellant in damages and compensation.

Having reviewed the evidence and submissions on this issue, first of all, I do not find any basis for the contention that counsel who signed Exhibit D1 had no authority to withdraw the undertaking not to sell the property. The document was prepared by David Mulira from the firm of M/s Mulira & Lubulwa Advocates. This firm represented the 2nd & 3rd defendants at the time and as such had authority to withdraw the undertaking which they had earlier made conditionally. In the

premises, I agree that there was no undertaking at the time of sale of the suit property the same having been withdrawn.

Secondly, I do not agree that paragraph 8 of David Mulira's affidavit in support of the caveat in Exhibit P16 indicates that the debenture had lapsed. The affidavit clearly shows that it was the lease on property comprised in LRV 2833 Folio 16 Plot 9-11 8th Street Kampala that had expired for which extension of the lease was granted. It is noteworthy that while the legal mortgage that expired with the lease was in respect of all the registered proprietor's estate and interest in the land as per clause one of that mortgage, the debenture was a charge by the plaintiff company in favour of the bank on all its undertakings, goodwill, property and assets whatsoever and wherever both present and future as per clause 2 of the debenture. I therefore do not agree with the argument that the debenture also expired with the lease because it is based on a wrong principle.

For that reason, I am not convinced that the sale of the suit property was under a lapsed debenture. It was valid and still subsisting. The 2nd defendant was empowered under clause 8 of the debenture to appoint a receiver which it did and the receiver had power to sell under clause 9. All in all, I find that the sale of the plaintiff's property was valid and/or lawful as I have no reason to fault it.

Issue 7: Remedies

In view of my findings on all the above issues, the plaintiff is not entitled to any of the remedies sought. In the result, this suit is dismissed with costs.

I so order.

Dated this 16th day of July 2013.

Hellen Obura

JUDGE

Judgment delivered in chambers at 4.00 pm in the presence of Mr. Edgar Tabaro for the plaintiff and Mr. Brian Emuron for the 2nd & 3rd defendants. No appearance for the 1st defendant.

JUDGE
16/07/13