

advised to enter into a separate agreement with the 1st defendant which agreement according to her formed the basis of her granting the power of attorney to borrow the loan.

She deposed further that she did enter into that agreement with the 1st defendant and handed over her certificate of title to the 1st defendant which was fully verified by the plaintiff but prior to the disbursement of the loan funds, on 1st March 2010 she attended the registrar land registration where she and Mr. Edward Mayinja, an advocate of the plaintiff were told that the original white page in the registry was missing and all the mortgage documents went missing. After suspecting fraudulent dealings on her title between the plaintiff and the 1st defendant she communicated to them her withdrawal from the mortgage transaction and she told them she was lodging a caveat to stop it. She did lodge the caveat but discovered that the plaintiff in another special arrangement entered with the 1st defendant disbursed money on 11th June 2010 after she had lodged a caveat forbidding the mortgage without her consent or approval.

An affidavit in rejoinder was sworn by Mr. Pius Olaki the Senior Legal Officer of the plaintiff and a further affidavit in rejoinder was sworn by Mr. Edward Mayanja a clerk working with the plaintiff's lawyers' firm. Both deponents denied the averments in the affidavit in reply and gave their versions of what transpired in the transaction.

The background of this suit as stated in the affidavit in support of the originating summons sworn by Mr. Pius Olaki is that sometime in 2009 the 1st defendant applied for a loan of Shs. 135,000,000/= from the plaintiff which was to be secured by property comprised in Block 216 Plot 614 Land at Buye registered in the name of the 2nd defendant. The 1st defendant signed a mortgage deed in favour of the plaintiff and also deposited the certificate of title of the said property with the plaintiff who in turn registered an equitable mortgage by lodging a caveat to the property and advanced the money to the 1st defendant in two installments. The defendants subsequently defaulted in their repayment obligations and the outstanding balance claimed by the plaintiff is now Shs. 118,974,492/= which is alleged to continue attracting interest. The plaintiff now brings this suit as an equitable mortgagee against a mortgagor in default seeking to foreclose and sell

the suit property either by public auction or private treaty to recover the monies due from the defendants.

Mrs. Olivia Kyalimpa Matovu appeared for the plaintiff while Mr. Tebusweke David Mayinja appeared for the 2nd defendant. There was no appearance for the 1st defendant despite being served through its directors so the matter proceeded ex parte as against the 1st defendant. Court directed counsel for the parties to file written submissions within an agreed timelines. However, counsel for the plaintiff delayed to file the submissions and so counsel for the 2nd defendant filed his before she did so. This created an unusual situation where each of the counsel filed a rejoinder to the others submission. Be that as it may, in the interest of justice, I have considered all the submissions and the rejoinders in this judgment. I also wish to observe that the submission of counsel for the 2nd defendant was not based on the four issues raised in the originating summons for determination by this court. It was only his rejoinder that tried to address those issues.

Issues 1 & 2

Counsel for the plaintiff argued the 1st & 2nd questions together. She submitted that the plaintiff as an equitable mortgagee of the suit land is entitled to foreclose and sell the suit property by either public auction or private treaty to recover all monies due from the defendants the 1st defendant having defaulted in its loan obligation despite the plaintiff's demands. She argued that it is not in dispute that the plaintiff disbursed the loan to the 1st defendant as stated in the affidavit in support of the originating summons and its annexures.

Counsel submitted that an equitable mortgage is created when the legal owner of property constituting the security enters into some instrument or does some act which demonstrates a binding intention to create a security in favour of the mortgagee. She pointed out that the mortgage in the instant case was created before the Mortgage Act 2009 came into force and as such is governed by the provisions of the Mortgage Act, Cap. 229 (hereinafter referred to as Cap. 229) which was in force at the time and the relevant provisions of the Registration of Titles Act, Cap 230 (hereinafter called the RTA). She alluded to section 44 (3) of the Mortgage Act 2009 which provides, inter alia, that any right or interest acquired or accrued

before the coming into force of the Act shall be governed by the law applicable to it prior to the coming into force of the Act.

She referred to section 129 (1) of the RTA and the case of ***Barclays Bank of Uganda Ltd v John Hilton Northcote and Another [1976] HCB 34*** which state that an equitable mortgage can be created, inter alia, by; mere deposit of title deeds with a clear intention that the deeds should be taken or retained as security for the loan; an agreement to create a legal mortgage; or mere equitable charge of the mortgagor's property.

Counsel then argued that when the defendants signed the mortgage deed and in particular when the 2nd defendant as the registered proprietor signed the mortgage deed and the certificate of title for the suit land was deposited with the plaintiff, an equitable mortgage was immediately created and an interest in land was also created in favour of the plaintiff as provided under section 129 (2) of the RTA. She pointed out that while the intention of the parties was to have the mortgage registered as a legal mortgage, the same could not be done following execution of the deeds due to the challenges encountered in the registry of lands. The plaintiff therefore proceeded to register a caveat on the land as required by section 129 (3) of the RTA.

Counsel submitted that the 2nd defendant's intention to create a security over the suit property in favour of the plaintiff is also confirmed by her affidavit in reply wherein she states that she had handed over her duplicate certificate of title for purposes of the mortgage and she entered the transaction to create a legal mortgage. She argued that by that the 2nd defendant mortgaged her property by executing the mortgage deed and handing over her certificate of title to secure the credit facility extended to the 1st defendant.

She argued further that the 2nd defendant's alleged cancellation of the transaction was never brought to the notice of the plaintiff prior to the disbursement of the loan and her action following the execution of the mortgage deed confirm that she duly approved the granting of the credit facility to the 1st defendant with her property as security. On the caveat that was alleged to have been lodged prior to disbursement of funds, counsel submitted that the caveat was lodged on 1st April 2010 and the

same was registered on 7th April 2010 after the 1st installment of the loan had already been disbursed on 16th March 2010. The 2nd installment was also paid on 12th April 2010 before the plaintiff knew about the 1st defendant's caveat in July 2010.

In reference to the 2nd defendant's contention that she had entered the transaction with the sole intention of benefitting Ushs. 50,000,000/= as agreed between her and the 1st defendant, counsel for the plaintiff argued that this was a ploy by the 2nd defendant to avoid her obligations under the mortgage deed because the loan facility was granted to the 1st defendant and according to annexures "A1" and "A2" to the affidavit in support it was sanctioned solely for the purpose of purchase and installation of Mobile Led Screen into a truck.

Counsel submitted that the 2nd defendant has obligation both as mortgagor and surety to ensure repayment of the 1st defendant's outstanding debt or the security be realized. She stated that the 2nd defendant was duly notified of the 1st defendant's default as per annexures to the affidavit. She argued that an equitable mortgagor's right to foreclose and sell the mortgaged property arises from the time of breach of the covenant to pay. She argued based on section 3 (c) of Cap. 229 and the cases of *Uganda Ecumenical Church Loan Fund v Mary Florence Nabyinja HCCS No. 01/05* and *Barclays Bank D.C.O v Gulu Millers Limited [1959] EA 540* that a mortgagee may realize his security by proceeding in any manner provided for under the law including foreclosure.

Counsel for the plaintiff concluded her submission on this issue by urging court to grant the plaintiff an order of foreclosure so that it can sell by public auction the security and recover the monies disbursed to the 1st defendant on the basis of that security.

Conversely, counsel for the 2nd defendant based his submission on the validity of the entire transaction. He argued that his client granted the power of attorney to secure the 1st defendant's loan on condition that she would benefit Ushs. 50,000,000/= but later withdrew her consent by lodging a caveat when she discovered that her owner's copy of the title and the mortgage were missing from the registry. It is further submitted that it was a term of the contract that the facility

would be available after fulfillment of the terms and conditions stated in the offer letter (annexture “A1”) and the loan agreement (clause 2 of annexture “A2”) to the affidavit in support of the originating summons but these terms and conditions were not fulfilled.

He argued that clause 8 of the loan agreement states that “before disbursement of the facility the security shall be executed, perfected and registered” but this was never done as the duplicate certificate of title and the mortgage deed went missing and the 2nd defendant withdrew her consent. It is contended that it was the duty of the plaintiff to halt the transaction by not disbursing the money until the title and the deed was recovered in which case the plaintiff would have again called back the defendants to confirm whether they still maintain their earlier position to the transaction.

On another note, counsel for the 2nd defendant submitted that the persons who witnessed the deed on behalf of the 1st defendant had to indicate the capacity in which they signed and the document had to be sealed by the company seal as per the decision in *Frederick J.K. Zaabwe v Orient Bank Ltd & 5 Others Civil Appeal No. 04 of 2006* but none of these happened to the three deeds preceding the transaction. He submitted further that there was no resolution authorizing the 1st defendant to borrow that money. On the basis of the above submissions, it is argued for the 2nd defendant that the mortgage deed was not valid and as such no enforceable mortgage was created whether equitable or legal.

Counsel for the plaintiff in rejoinder submitted that the formal requirement for a legal mortgage as was held in *Frederick J.K. Zaabwe* (supra) do not apply to equitable mortgages like in the instant case. She reiterated her earlier submission that an equitable mortgage is created when the legal owner of property constituting the security enters into some instrument or does some act which demonstrate a binding intention to create a security in favour of the mortgagee.

As regards the argument by counsel for the 2nd defendant that the plaintiff should have inquired into what interest the 2nd defendant had in the transaction and how it would be secured, counsel for the plaintiff argued that unlike in the case of *Frederick J.K. Zaabwe* (supra) where the appellant merely issued a power of

attorney and did not personally participate in the loan and mortgage transaction, in the instant case the 2nd defendant signed the documents both as mortgagor and surety. As surety, the 2nd defendant's obligation was to ensure the payment of the loan by the 1st defendant failing of which she would be responsible.

On the alleged arrangement for the 1st defendant to benefit from the loan, counsel for the plaintiff maintained that as far as her client is concerned the purpose of the loan was stated in annexures "A1" and "A2" to the affidavit in support of the originating summons and as such the plaintiff was not privy to any other private arrangement between the defendants. Neither was the plaintiff under a duty to inquire into the interest of the 2nd defendant or her relationship with the 1st defendant since she had by her own will agreed to provide security and even stand as surety and personally executed the documents.

On the alleged lack of a resolution authorizing borrowing and the company seal on the document, counsel for the plaintiff submitted that there was a resolution and attached a copy of the same to her submission. She also submitted that contrary to the 2nd defendant's allegation, the mortgage deed was sealed and upon this court's direction she produced the original in court in the presence of counsel for the 2nd respondent who conceded that it was indeed duly sealed.

As far as the allegation of the 2nd defendant's withdrawal from the transaction is concerned, counsel for the plaintiff reiterated her submission that the same was never brought to her client's attention but her client only learnt about the 2nd defendant's caveat in July 2010 after the funds had already been disbursed in March and April 2010.

I have carefully perused all the affidavits and their annexures as well as considered the submissions of both party. I agree with the submission of counsel for the plaintiff on how equitable mortgages are created as per section 129 (1) of the RTA and the rights of an equitable mortgagee as stated in the cases she referred to. In the instant case the intention of the parties was to create a legal mortgage but this was prevented by the mishap of the duplicate certificate of title and the mortgage deed going missing from the file. This is a common phenomenon in the land registry and according to the plaintiff it secured its interest as an equitable

mortgagee by lodging a caveat on the white page of the title in accordance with the provision of section 129 (3) of the RTA. This was done on 15th March 2010 and the same was registered on 16th March 2010.

The 2nd defendant raised a number of issues that relate to the validity of the mortgage whether equitable or legal as already summarized herein above. As regards the alleged withdrawal by the 2nd defendant from the transaction, it is the plaintiff's case that it was neither notified of the 2nd defendant's withdrawal from the transaction nor did it become aware of the defendant's caveat prior to the disbursement of both installments. Indeed the records show that the plaintiff upon lodging a caveat on the suit property went ahead to disburse the 1st installment of Shs.100,000,000/= to the 1st defendant on 19th March 2010 before the 2nd defendant had lodged a caveat on the property. The 2nd and last installment of Shs. 35,000,000/= was advanced on 12th April 2010 after the 2nd defendant's caveat had been lodged.

While the 2nd defendant alleges that she withdrew from the transaction and informed the plaintiff and the 1st defendant, she does not produce any letter to prove that allegation. It is now her word against that of the plaintiff. Due to the absence of evidence to prove that allegation, I am more inclined to believe the plaintiff's case that it was not notified of the withdrawal. This is because the 2nd defendant ought to have known that since she had already granted power of attorney to the 1st defendant, signed the mortgage documents and deposited her duplicate certificate of title with the plaintiff the transaction was already on course. If at all she later changed her mind then it was incumbent upon her to immediately notify the plaintiff in writing to halt the loan processing and disbursement to the 1st defendant. She should not have just quietly lodged a caveat moreover after the 1st installment had already been advanced because the plaintiff is not privy to information in the land registry unless formally brought to its attention.

The alleged lack of due diligence on the part of the plaintiff by failing to call back both parties to confirm whether they were still committed to the transaction, in my view does not arise at that stage because all the necessary documents were already signed and all that was required was registration of the legal mortgage. The 2nd defendant contends that she suspected fraudulent dealings with her duplicate

certificate of title when she found it missing on 1st March 2010 when she and the plaintiff's advocate one Edward Mayanja attended the registrar lands for purposes of verifying her signature. She however does not state whether she raised that concern with the plaintiff in writing.

On the contrary, Mr. Edward Mayanja who deposed the further affidavit in rejoinder states that when he presented the 2nd defendant before the Registrar of Titles on 1st March 2010 for purposes of verifying her signature, the white page was at the desk of the Registrar of Titles and she duly verified the same and the Registrar of Titles advised that the transaction would proceed. According to him, it was the duplicate certificate of title that was missing from the file and not the land registry file/white page.

Having considered the submission of both parties and the evidence, I find that the 2nd defendant's purported withdrawal from the transaction was never brought to the plaintiff's attention before the loan was advanced to the 1st defendant. It is my considered view that the 2nd defendant cannot now raise it as a defence to defeat the plaintiff's interest as an equitable mortgagee seeking to recover its money.

The other complaints regarding lack of company resolution by the 1st respondent authorizing the borrowing and lack of the common seal of the 1st defendant company on the mortgage deed were conceded when the plaintiff produced a copy of the resolution and the original mortgage deed bearing the 1st defendant company seal. In any event, the strict requirements for execution of mortgages apply to legal mortgages and not an equitable mortgage which is created merely by deposit by the registered proprietor of his or her certificate of title with intent to create a security thereon.

On the whole, I agree with the plaintiff that the formalities for creating equitable mortgage were complied with and as such it became an equitable mortgagee. The next question is therefore whether the plaintiff can foreclose and sell by private treaty or public auction the suit property to recover its money together with interest and other charges incidental thereto.

In answering this question, I have addressed my mind to section 8 of Cap. 229 and the relevant case law. Section 8 (2) of Cap. 229 provides;

“Upon an application by the mortgagee under this section, the court shall determine the amount due to the mortgagee and may fix a date, not exceeding six months from the date of the failure to pay, within which the mortgagor shall pay the amount due”.

Section 8 (3) of Cap. 229 then provides;

“If the mortgagor fails to pay on the date fixed by the court under subsection (2), the court shall order that the mortgagor be foreclosed of his or her right to redeem the mortgaged land and that the land be offered by the mortgagee for sale in accordance with section 9.”

Applying the above provisions to this case, I am satisfied that the mortgagor is indebted to the plaintiff to the tune of Shs. 118,974,492 /= as stated in the originating summons and the supporting affidavit. I therefore determine that sum as due to the plaintiff. I order the 1st defendant as the mortgagor and the 2nd defendant who guaranteed the loan and deposited her certificate of title as security to pay the said amount to the plaintiff within three months (3) from today and in any case not later than 3rd December 2013. In the event of default, the plaintiff shall come back before this court for an order of foreclosure.

The plaintiff is directed to notify the 1st defendant of this order by placing the same in a newspaper with wide national circulation since the 1st defendant did not appear in court despite being served through its directors.

In view of the above conclusion it is not necessary to deal with the remaining issues now as they shall be appropriately dealt with in the event of default by the defendants.

The plaintiff's costs of these proceedings shall be paid by the 1st defendant.

I so order.

Dated this 3rd day of September 2013.

Hellen Obura

JUDGE

Judgment delivered in chambers at 3.40 pm in the presence of Mrs. Olivia Kyalimpa Matovu for the plaintiff and Mr. Tebusweke David Mayinja for the 2nd defendant.

JUDGE

3/09/ 2013