

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 477 OF 2011**

BANK OF AFRICA UGANDA}PLAINTIFF

VERSUS

- 1. GANYANA EDINA}**
- 2. KENNETH TULIRABA}DEFENDANT**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff, a financial institution registered in Uganda commenced this action against the first Defendant for recovery of Uganda shillings 79,998,104/= as an outstanding loan balance with interest at 22.5% per annum from the date of default. Secondly, the action against the second Defendant is for vacant possession of land and house pledged as security by the first Defendant and occupied by the second Defendant comprised in Busiro Block 306 Plot 1535 together with costs of the suit.

The first Defendant did not file a defence to the liquidated demand but the second Defendant filed a defence to the action. The Plaintiff's suit as disclosed in the amended plaint is that the Plaintiff was approached by the first Defendant sometime in August 2009 and requested for a loan of Uganda shillings 30,000,000/= and a mortgage deed was executed wherein the first Defendant mortgaged Busiro Block 306 Plot 1535 with a house thereon. The first Defendant sought more money by way of a further facility and the Plaintiff advanced Uganda shillings 40,000,000/= to the first Defendant and further charge was executed. The loan was secured by a land with a house thereon duly registered in the names of the first Defendant comprised in Busiro Block 306 Plot 1535. The Plaintiff registered its interests as encumbrances on the title deed under KLA 428896 and KLA 432796. The first Defendant duly executed the two facility credit documents where she agreed to the terms and conditions for the advance of the facility. The first Defendant defaulted on the monthly instalment payments since April 2010 and several reminders were written to her but she failed to respond. The Plaintiff demanded for payment of the loan facility according to a copy of the demand notice attached to the plaint. However when the Plaintiff attempted to realise its security by the sale of the mortgaged property and instructed its agents to sell the property, it failed to do so because the second Defendant was in possession of the suit house.

As far as the second Defendant is concerned, the Plaintiff alleges in the plaint that the second Defendant claims to be the rightful owner and contends that he acquired the mortgaged property from an Equitable Mortgagee namely Brac Microfinance Ltd which it held an alleged Equitable Mortgagee under a Kibanja sale agreement. The Bank contests the second Defendant's possession because according to the Plaintiff it is intended to defeat the interest of the Plaintiff in the registered mortgage. Consequently the Plaintiff prays for an order of vacant possession and eviction as against the second Defendant or his agents and servants.

In the amended written statement of defence the Defendant avers that he duly purchased the land from the former Mortgagees to whom the first Defendant mortgaged the suit property and is now in possession of the suit property. He attached a copy of a sale agreement of the suit property between him and 4 Creditors of the first Defendant. He prayed that the court dismisses the Plaintiff's suit with costs.

The Plaintiff is represented by Musa Ssekaana of Messrs Ssekaana Associated Advocates & Consultants while the second Defendant is represented by Counsel Sam Kiwanuka of Messieurs Sam Kiwanuka & Company Advocates.

In the joint scheduling memorandum endorsed and filed by both Counsels on 5th December, 2015 the following facts are agreed facts notified to court under Order 12 rule 1 of the Civil Procedure Rules namely:

1. The Plaintiff was approached by the first Defendant sometime in August 2009 and requested for advance of a sum of Uganda shillings 30,000,000/= and a mortgage deed was executed between the parties.
2. The first Defendant sought more money by way of a further facility and the Plaintiff advanced a further Uganda shillings 40,000,000/= and a further charge was executed.
3. The said loan was secured by land with a house duly registered in the first Defendant's names comprised in Busiro Block 306 Plot 1535.
4. The Plaintiff accordingly registered its interest as an encumbrance on the title vide Instrument KLA 428896 and KLA 432796 as a mortgage and further charge respectively.
5. The first Defendant duly signed the two credit facility letters wherein she agreed to the terms and conditions for advance of the said facility.
6. The second Defendant is now in possession of the house.

PW1 Mr Philip Kasirye, the Risk Prevention officer of the Plaintiff testified in a written statement giving the material facts of the dispute concerning the advance of the loans to the first Defendant and the issuance of reminders and a demand notices to her. Secondly, the Plaintiff failed to realise that security by sale of the mortgaged property on account of the second Defendant being in possession of the suit property hence this suit.

The second Defendant Mr Tuiraba Kenneth (DW1) generally testified that the first Defendant mortgaged the suit land situated at Nakawudde, Lubanyi LC1 Musaale Parish, Mumyuka Sub-county in Wakiso district together with a residential house thereon to Uganda Finance Trust Kalerwe Branch, Gatsby Micro Finance Ltd, Katwe Branch, Brac Microfinance Bulenga Branch according to copies of agreements between the first Defendant and the named financial institutions. She further pledged the chattels in the house located on the said land and did not mortgage the suit land and house thereon to Post Bank (U) Ltd. She failed to pay the loans whereof the 4 Microfinance Enterprises/Creditors decided to realise the security by selling off the mortgaged land and house to him after advertising it on 22nd November, 2010 and caused a notice of sale to be served on the Mortgagor and thereafter sold by public auction to the highest bidder on 22nd December, 2010. Both the Plaintiff's witness and the Defendant's witness were cross examined. The evidence of both parties are summarised in the written submissions of Counsels of both parties in their final address to court.

After evidence was adduced by PW1 and DW1 got the Plaintiff and the 2nd Defendant respectively the court was addressed finally in the written submissions.

I have carefully considered the written submissions and the agreed issues for resolution are as follows:

1. Whether or not the Plaintiff is entitled to recover Uganda shillings 79,998,104/= and interest thereon by realising the security comprised in Block 306 Plot 1535?
2. Whether an order for vacant possession and eviction ought or can be issued against the second Defendant or his agents/servants?
3. What are the remedies available in the circumstances?

I have carefully considered the submissions of the Plaintiff's Counsel. Part of the submission sought to impeach the credibility of the second Defendant and I do not have to deal with that part of the submissions as yet. Secondly the first two issues are intertwined because the first issue deals with whether the Plaintiff is a Mortgagee with a right of sale over the suit property which also resolves the second issue of whether an order of vacant possession and eviction ought to or can be issued against the 2nd Defendant. The two issues will be handled together.

The first issue is: **Whether or not the Plaintiff is entitled to recover Uganda shillings 79,998,104/= and interest thereon by realising the security comprised in block 306 plot 1535?**

The second issue is: **Whether an order for vacant possession and eviction ought or can be issued against the second Defendant or his agents/servants?**

Counsel Musa Ssekaana, the Plaintiffs Counsel addressed the court finally on the evidence and submitted that the two loans advanced by the Plaintiff to the first Defendant amount to Uganda shillings 70,000,000/=. The loans were secured by a private Mailo registered in the names of the first Defendant whose description has been given above. Mortgages were duly registered on the land on 9th September, 2009 under Instrument No KLA 428898 and the charge registered on 20th October 2009 Instrument No KLA 432796. Upon default of repayment of the loan by the first Defendant, the Plaintiff was entitled to recover the outstanding amount by foreclosure and sale of the mortgaged property described above. Under the Mortgage Act Cap 229 (repealed) which was the law applicable then, section 3 allows the Mortgagee to realise his or her security under the mortgage through foreclosure. Section 10 of the Mortgage Act Cap 229 provides that where the mortgage gives power expressly to the Mortgagee to sell the property without applying to court, the sale shall be by public auction unless the Mortgagor and encumbrancers subject to the mortgage, if any, consent to a sale by private treaty. The Plaintiff attempted to foreclose by way of attachment and sale. The property was advertised on 10th December, 2010 in the Monitor Newspaper. In the premises he submitted that the Plaintiff is entitled to realise its security under the mortgage by way of foreclosure and accordingly sale by foreclosure of the land comprised in Block 306 Plot 1535 registered in the names of the first Defendant should proceed.

On the second issue Counsel Musa Ssekaana submitted that the second Defendant derived or purports to derive his interest from four Microfinance institutions named in the sale agreement of the land in question. By the time the first Defendant mortgaged the kibanja/house she had already mortgaged it as registered land with a certificate of title in 2008 registered in her names. The proper question for determination for this court is whether the Plaintiff's mortgage of a 2008 title of land has precedence over the 4 Microfinance institution's purported mortgages. The first Defendant who mortgaged the land and house as a registered proprietor with a certificate of title issued in 2008 could not at the same time or later mortgage the same piece of land already registered in her names as an unregistered interest or kibanja. The first Defendant could not claim to have two interests over the same land i.e. registered interest and kibanja interest at the same time having acquired registered interest before the kibanja interest. The Plaintiff's registered interest cannot be defeated by the four Microfinance institutions whose interests were never registered and which interest is questionable.

Counsel Musa Ssekaana relied on the case of **Komassai Plantation Ltd vs. Bank of Baroda [2003] 2 EA 535** for the holding that an earlier unregistered agreement cannot vary or vitiate

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subsequent formal charges voluntarily executed by the parties and which deal with the registered interests in the land. It followed that the four Microfinance institutions cannot in anyway defeat the Plaintiff's interests. Secondly, the second Defendant did not derive any interest from the four Microfinance institutions. In the case of **Timothy UK M'mella vs. Savings and Loan (K) Ltd [2007] 2 EA 317** it was held that the official act of registration in the manner prescribed passes an estate or interest or renders the land liable as security. Notwithstanding the generality of the provisions of section 4 (1) NSW they are restricted in the application to the passing or creation of an estate or interest in law, and in equity, an instrument which is unregistered is by no means devoid of effect.

He submitted that the second Defendant's interest derived from the purported unregistered interest of the first Defendant did not exist and therefore is not known and could not be mortgaged or pledged as security by the first Defendant. In addition the four Microfinance institutions which purported to have accepted and mortgaged kibanja interest of the first Defendant in equity did not have any such interest in the mortgage. The whole transaction was none existent moreover the four Microfinance institutions never registered their mortgages and sought to recover or realise their security summarily without payment of the necessary taxed dues.

The question for determination is whether the second Defendant derived or acquired an interest protected by law. The second Defendant's interest in the land is derived from illegal mortgages created by 4 Microfinance institutions. By the time the land and house was sold to the second Defendant, the same had been advertised for sale by the Plaintiff on 10th December, 2010. The purchase of the kibanja on 22nd December, 2010 was intended to defeat the Plaintiff's foreclosure. Lastly, the second Defendant should be indemnified by the 4 Microfinance Institutions which purported to sell the house to him.

In reply Sam Kiwanuka, the second Defendant's Counsel, dealt with the second issue which is whether an order for vacant possession and eviction ought or can be issued against the second Defendant or his agents/servants? He submitted that the second Defendant is the true owner of the suit property and currently in possession and that is why the Plaintiff cannot realise its security. He was not aware that the first Defendant had mortgaged her property to the Plaintiff in anyway. The second Defendant duly purchased the suit property from the Microfinance Institutions who sold the land and whose particulars have been given above on 22nd of December, 2010 for a consideration of Uganda shillings 25,000,000/= . The agreement of sale was admitted as the Defendant exhibit D1. The loan agreements and mortgages between the first Defendant and the Microfinance institutions were also admitted in evidence. Because the first Defendant failed to pay the loaned amounts to the various creditors, the Mortgagees decided to realise their security by selling the mortgaged land after advertising it on 22nd November, 2010 and caused the notice of sale to be served on the Mortgagor and consequently selling it through public auction to the second Defendant who became the highest bidder. The second Defendant bought

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the suit land free from any encumbrances, adverse claims or effects whatsoever and the vendor/auctioneer passed good title to the second Defendant after consideration was fully paid. In the premises the second Defendant is the true owner of the suit property and the Plaintiff cannot proceed to realise the second Defendant's land as security for a loan advanced to the first Defendant.

Secondly, Counsel Sam Kiwanuka submitted that this honourable court cannot sanction an illegality. This is because the Plaintiff had not complied with section 7 (1) and 7 (2) of the Mortgage Act. He submitted that the Mortgagee had for purposes of realisation of his or her security in the mortgage a right to enter possession of the mortgaged land after giving at least 60 days notice of his or her intention to do so to the Mortgagor. Thirdly, Counsel Sam Kiwanuka submitted that the right of possession would be against the Mortgagor and any person deriving an interest in the mortgaged land through the Mortgagor where that interest is subsequent to that of the mortgage. In the premises he contended that an order for vacant possession cannot be issued against the Defendant.

Judgment

I have carefully considered the issues as framed. I will deal with the first and second issues at once. The first issue is: **whether or not the Plaintiff is entitled to recover Uganda shillings 79,998,104/= and interest thereon by realising the security comprised in Busiro Block 306 Plot 1535?** The second issue is: **whether an order for vacant possession and eviction ought to or can be issued against the second Defendant or his agents/servants?**

As far as the first issue is concerned, I have carefully examined the various documents exhibited for the Plaintiff. It is not in dispute that the first Defendant mortgaged her registered title comprised in Busiro Block 306 Plot 1535 to the Plaintiff according to exhibit P1 and the same was duly registered on the title deed and in the register. A further charge was registered subsequently by another agreement. The first loan was for Uganda shillings 30,000,000/= and the second loan for Uganda shillings 40,000,000/=. These encumbrances were registered on the title deed and registry for land titles and admitted in evidence as exhibit P4. Most importantly I have established that the first Defendant was registered on the title deed on 25th April, 2008 under Instrument No KLA 373644 at 9:30 AM.

Secondly, the first mortgage was registered on 9th September, 2009 under Instrument No KLA 428896. The further charge was registered on 20th October, 2009 under Instrument No KLA 432796. These instruments created a legal mortgage duly notified to the world as prescribed by the Registration of Titles Act Cap 230 Laws of Uganda (RTA).

Without going into the probative value of the 2nd Defendant's documents, I have considered the corollary issue as to whether the Defendant's defence is a reasonable defence which can stand on the pleadings and evidence led on it. This is because DW1 the second Defendant relies on

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documents which he is not competent to adduce evidence. Secondly, on the face of the documents they purport to be loan agreements between the first Defendant and certain other microfinance companies which loaned the first Defendant some monies. The first Defendant did not file a defence. Assuming that these documents were duly tendered in evidence and the Plaintiff does not dispute them, would the 2nd Defendant have a plausible defence?

In annexure "A" to the written testimony of the 2nd Defendant, the 2nd Defendant sought to rely on the loan agreement made on 19th of April, 2010 between the first Defendant and Uganda Finance Trust Limited in which the first Defendant borrowed Uganda shillings 3,000,000/=. It is provided that the first Defendant would secure the borrowing which a plot at Nakuwadde – Wakiso (presumably the suit property).

The second agreement is between Gatsby Microfinance Ltd in which the first Defendant executed an agreement on 16th July, 2010 wherein she borrowed against the security mentioned therein a principal sum of 5,000,000/= Uganda shillings at an interest rate of 30% per annum secured by a sales agreement (Land in Nakuwadde Wakiso District).

The third agreement is a mortgage agreement between the first Defendant and Brac Uganda and the property is described as a plot of land at Nakuwadde/Lubanyi Zone, Musaale A Nakabugo Zone, Wakiso District. The agreement was executed on 5th August, 2010.

The fourth agreement is between Uganda Micro Credit Foundation Ltd executed on the 24th of May 2010. The borrower (1st Defendant) borrowed Uganda shillings 3,500,000/=. It was secured by the borrowers land.

Finally by an agreement for sale of mortgaged land all the above 4 Microfinance companies are described in the agreement as having sold the property to the second Defendant. The agreement is dated 22nd of December 2010.

A court can strike out a written statement of defence which does not provide a reasonable answer to the Plaintiffs suit upon an application made to strike it out. Order 6 rule 30 (1) of the Civil Procedure Rules provides that:

"The court may, upon application, order any pleading to be struck out on the ground that it *discloses no reasonable cause of action or answer* and, in any such case, or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed or judgment be entered accordingly, as may be just. (Emphasis added)."

The above rule deals with striking out of pleadings and is inapplicable where the suit has been heard. What is however material is the fact that the defence can be struck out where it does not disclose a reasonable answer and judgment may be entered for the Plaintiff. Where evidence has

been led then the question of whether the defence is tenable is handled as a point of law and on the merits. That point of law is the gist of the Plaintiffs submission that despite the sale to the 2nd Defendant by the 4 Microfinance institutions, no interest could be or was passed to the 2nd Defendant. It follows that a point of law which would tend to dispose of the defence can be entertained at this stage of the proceedings as a preliminary point of law arising from the submissions and evidence as well as pleadings under Order 15 Rule 2 of the Civil Procedure Rules. It provides as follows:

"Where issues both of law and fact arise in the same suit, and the court is of the opinion that the case of any part of it may be disposed off on the issues of law only, it shall try those issues first and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined."

From the above facts including facts in support of the defence which are presumed to be true such as the sale by 4 Microfinance Companies of the suit property to the 2nd Defendant, the point of law can be determined.

From the facts it is apparent that the first Defendant purported to obtain a loan on the security of a piece of property which is not described. It is just a plot of land at Nakuwadde with a house. On the other hand Busiro Block 306 Plot 1535 is the property mortgaged by the first Defendant to the Plaintiff. It also has a house. Secondly, the first Defendant executed a mortgage deed and further charge which were variously registered on the title deed. Thirdly, the Plaintiff registered its interest on the title deed between September and October 2009 several months before any of the other 4 Microfinance institution creditors ever lent money to the first Defendant. Fourthly, none of the other creditors who are said to have sold the property to the second Defendant registered any subsequent mortgage on the tile deed or lodged a caveat in support of an equitable mortgage as prescribed by section 129 of the Registration of Titles Act cap 230 Laws of Uganda.

I agree with the Plaintiff's Counsel that a mortgage transaction consummated between September and October 2009 was subject to the Mortgage Act Cap 229 Laws of Uganda (repealed). The provisions of the Mortgage Act cap 229 are very explicit about the power of a Mortgagor to further mortgage a mortgaged property. Such a mortgage cannot be registered without taking into account the interests of the first Mortgagee. In any case it is a question of fact that none of the creditors, registered any of their alleged interests.

Section 7 (1) (2) of the Mortgage Act cap 229 provides that the right of possession of the Mortgagee is against the Mortgagor and any other person deriving an interest in the mortgaged land through the Mortgagor where the interest is subsequent to that of the Mortgagee. It provides as follows:

"7. Possession by Mortgagee.

(1) A Mortgagee may, for the purposes of the realisation of his or her security in the mortgage, enter into possession of the mortgaged land after giving at least sixty days' notice of his or her intention to do so to the Mortgagor.

(2) The right of possession by the Mortgagee under this section shall be against the Mortgagor and any person deriving an interest in the mortgaged land through the Mortgagor where that interest is subsequent to that of the Mortgagee.

If we go by the subsequent borrowing arrangement between the first Defendant and the other creditors described above, their interests are subject to the interest of the Plaintiff who is even a registered Mortgagee with a legal mortgage. Thirdly any borrowing instrument cannot affect the registered title of the first Defendant without registration under the Registration of Titles Act cap 230 laws of Uganda. Section 54 of the Registration of Titles Act provides that no instrument can make land liable to any mortgage without registration. It provides as follows:

“54. Instruments not effectual until registered.

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

Unregistered interest cannot make the registered interest liable to a mortgage. Fourthly, the registration of the mortgage interest of the Plaintiff as reflected in the title deed is conclusive proof and indefeasible against any other person under section 59 of the Registration of Titles Act. Section 59 of the RTA not only protects a registered proprietor but also any instrument affecting or protecting an estate or interest in land which is registered such as a mortgage interest and it provides as follows:

“59. Certificate to be conclusive evidence of title.

No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate, and every certificate of title issued under this Act shall be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register

Book, and shall be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power.” (Emphasis added).

The fact that the 1st Defendant had power to mortgage the suit property as a registered owner and the fact that the Plaintiff is a registered Mortgagee has been conclusively proved and is therefore seized or possessed of the interest of a Mortgagee with the powers of a Mortgagee whether statutory or contractual. The interest of the other creditors, if any, is not effectual to pass any interest of the creditor or to affect the registered interest of the first Defendant or Plaintiff. I am mindful of the fact that an equitable mortgage may be considered under section 129 of the Registration of Titles Act. However, even an equitable Mortgagee is required to cause a caveat to be entered on the title under section 139 of the RTA. In the absence of a caveat, the equitable mortgage cannot affect the title and does not operate as a notice to the whole world. Anybody dealing in the property is not affected by such an unregistered interest (mortgage interest). However, if a caveat is lodged by the equitable Mortgagee, it would operate to affect or make the title subject to the mortgage interest (equitable) subject of course to the first interest of the registered legal Mortgagee. Last but not least the first Mortgagee’s interest overrides that of subsequent Mortgagees until and unless all the outstanding monies secured by the registered title have been paid. Section 118 of the Registration of Titles Act provides that the property shall be subject to the charge until the outstanding amount secured by the mortgage has been paid. This is read together with section 7 (2) of the Mortgage Act Cap 229 which provides that the right of possession which is meant to secure the right of sale of the Mortgagee is good against the Mortgagor and any person deriving an interest in the mortgaged land through the Mortgagor where the interest is subsequent to that of the Mortgagee.

Even if the subsequent creditors were Mortgagees, their interest was subject to the overriding interests of the first legal mortgage. This is prescribed by section 121 of the Registration of Titles Act, Cap 230 Laws of Uganda which provides that:

“121. Certain qualities of the legal estate annexed to a first mortgage.

(1) In addition to and concurrently with the rights and powers conferred on a first Mortgagee and on a transferee of a first mortgage by this Act, every present and future first Mortgagee for the time being of land under this Act, and every transferee of a first mortgage for the time being upon any such land, shall, until a discharge from the whole of the money secured or until a transfer upon a sale or an order for foreclosure, as the case may be, has been registered, have the same rights and remedies as he or she would have had or been entitled to if the legal estate in the land or term mortgaged had been actually vested in him or her with a right in the Mortgagor of quiet enjoyment of the mortgaged land until default in payment of the principal and interest money secured or

some part thereof respectively, or until a breach in the performance or observance of some covenant expressed in the mortgage or by law declared to be implied in the mortgage.

(2) Nothing in this section shall affect or prejudice the rights or liabilities of any such Mortgagee or transferee after an order for foreclosure has been entered in the Register Book; or shall, until the entry of such an order, render a first Mortgagee of land leased under this Act or the transferee of his or her mortgage liable to or for the payment of the rent reserved by the lease or for the performance or observance of the covenants expressed or to be implied in the lease.”

The right of the first Mortgagee is protected until after the money secured has all been paid or until the Mortgagors right to redeem is foreclosed and the property sold to recover the outstanding sums. A subsequent unregistered mortgage cannot be set up against the Plaintiff’s right as a first registered Mortgagor with a subsisting interest in the security to sell.

Last but not least if the first Defendant's interest is that of a kibanja holder as suggested by the Counsels during preliminary hearings, that interest was converted to freehold interest when the first Defendant was registered on the title deed on 25th April, 2008. Furthermore even if the first Defendant’s interest was that of any other holding such as that of a bona fide occupant or lawful occupant as defined by section 1 (e) and 29 of the Land Act, that interest on registration of the first Defendant on 25th April 2008 converted to freehold known as Mailo land on transfer from the former registered owner. Among other rights section 35 of the Land Act Cap 227 provides that the bona fide or lawful occupant shall first offer for sale their interest to the Mailo Owner who has a right of first offer to buy. The provision demonstrates that the Mailo owner has a right of reversion or purchase of the Kibanja interest. Therefore where a Kibanja holder acquires the Mailo interest, his or her kibanja is converted to Mailo and he or she can only assert the registered title. A Mailo title and Kibanja title cannot reside in the same person over the same piece of land at the same point in time. One is a landlord and another is a tenant. Once the tenant acquires Mailo title, his or her tenancy is dissolved and only the Mailo title remains. The interest that the first Defendant mortgaged to the Plaintiff is a legal interest in the registered Mailo interest and may be described as the interest of the Landlord. She could not at the same time hold a tenancy either as a lawful or bona fide occupant. Once she mortgaged her Mailo interest, she exhausted her rights except to create another mortgage on the same Mailo interest.

Finally I agree with the decision of Nyamu J of the High Court of Kenya Commercial Division in **Komassai Plantations Ltd v Bank of Baroda Kenya Ltd [2003] 2 EA 535** that a former unregistered interest is superseded by a subsequent registered interest between the same parties which charge speaks for itself. He held that:

“Turning to the issue that the written agreement of 9th February, 1998 has been varied, amended or parted from without the knowledge, consent or authority of the Plaintiff I see no merit in this because the registered instruments being the charge and further charge as described in the further charge dated 18th May, 1998 at 140 and 141 of the affidavit in support clearly describe the securities held, the amounts covered and the terms upon which each security was executed.

The charges speak for themselves and they constitute the contract between the respective parties. An earlier unregistered agreement cannot vary or vitiate subsequent formal charges voluntarily executed by the parties and which deal with registered interests in land. Again I must remind myself that I cannot finally adjudicate on this which is a matter for trial.”

The learned judge followed the Kenyan Court of Appeal Decision in Kenya **Commercial Finance Co Ltd v Afraha Education Society [2001] 1 EA 86** where the Court of Appeal allowed an appeal against an injunction on the ground that the first and second respondents did not have a registered interest in the land and therefore no prima facie case for the court to proceed to consider other grounds to grant a temporary injunction. They could not sue on the basis of their alleged unregistered interest.

In this case the 4 Micro Finance Institutions as well as the second Defendant have no registered interest and cannot impeach the right of the Plaintiff to sell the property. It follows from the above that the second Defendant cannot derive and did not derive any title or interest in land from the 4 Microfinance Institutions which allegedly sold him the land. He is not bona fide purchaser for value of the registered interest. None of the instruments relied upon by the Defendant cites the registered title of the first Defendant. The Defendant therefore has no defence to the action and the Plaintiff’s suit succeeds without much ado and the following orders issue:

1. The suit against the first Defendant for the sum of Uganda shillings 79,998,104/= succeeds and the amount is awarded to the Plaintiff against the first Defendant.
2. Interest is awarded on item 1 above at the contractual rate of 22.5% per annum from May 2010 till the date of filing the suit as against the first Defendant.
3. Further interest is awarded at the rate of 19% per annum from the date of filing the suit till the date of judgment.
4. Interest is further awarded on the aggregate sums against the first Defendant from the date of judgment at the rate or 19% per annum till payment in full.

5. The suit against the first Defendant succeeds with costs.
6. As far as the 2nd Defendant is concerned the suit against the second Defendant succeeds with costs.
7. An order for vacant possession of the suit property and eviction issues against the 2nd Defendant or his agents or servants evicting him or any of them from Busiro Block 306 Plot 1535.

Judgment delivered in open court on the 24th of February 2017

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Counsel Musa Ssekaana for the Plaintiff

Counsel Kiwanuka for the second Defendant absent

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge

24th February, 2017