



(vi) costs of this suit

The facts as got from the pleadings are that the Plaintiff and the Defendant who were husband and wife lived on the Property from 2003 to date and were blessed with one child. The Property was their matrimonial home and had been so for the last 10 years. It is the Plaintiff's claim that without her knowledge, the 2<sup>nd</sup> Defendant who was the title holder of the Property and managing director of the 3<sup>rd</sup> Defendant executed Powers of Attorney in favour of the 3<sup>rd</sup> Defendant to use the property to get a bank guarantee from the 1st Defendant to secure supply from Uganda Breweries Limited.

The 1st Defendant executed security documents with the 3<sup>rd</sup> Defendant who defaulted in payments and the Property was advertised by the 1st Defendant for fore closure and recovery.

It is the Plaintiff's contention that she never gave the required spousal consent to have the property mortgaged. She further contends that the mortgage or pledge transactions between the Defendants in respect of the Property are void, fraudulent and illegal. That this being a matrimonial home, any steps towards mortgaging it required her consent in writing.

In its defence, the 1st Defendant contends that the mortgage was lawfully executed. That on 11 Dec 2011, upon a tripartite mortgage requested by the 2<sup>nd</sup> Defendant, the 1st Defendant advanced to the 3<sup>rd</sup> Defendant (Principal Debtor) a sum of Ugx 80,000,000/=.

That the 3<sup>rd</sup> and 2<sup>nd</sup> Defendant defaulted in payment and the 1st Defendant moved to foreclose on the pledged property. In filling its defence, the 1<sup>st</sup> Defendant also cross claimed against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. In the cross claim, it sought Ugx104,195,415/= which it stated was the current figure arising from the principal of Ugx80,000,000/= and accrued interest.

It is the 1<sup>st</sup> Defendants claim that it placed reliance on the statutory declaration of the 2<sup>nd</sup> Defendant to advance the loan. That by the 2<sup>nd</sup> Defendant executing a statutory declaration denying having a wife, he acted fraudulently and misrepresented the fact of marriage upon which the money was disbursed. That because of this misrepresentation, the 1<sup>st</sup> Defendant did not seek spousal consent and as such advance money based on an enforceable mortgage. The 1<sup>st</sup> Defendant therefore sought against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, jointly and severally, a payment of

Ugx104,195,415/= being the principal and accrued interest from the loan facility. The 1<sup>st</sup> Defendant also seeks interest of 26% p.a. on the sum above stated, with costs.

In his defense, the 2<sup>nd</sup> Defendant contended that he was not involved in the mortgage transaction and that in any case the issue of marriage was raised after the mortgage had been executed. That in any case it was a mere formality to fulfill an existing check list. More so, that even if he guaranteed, it was only to the extent of UgX100,000,000/=.

As for the 3<sup>rd</sup> Defendant, it contended that the cross claim by the 1st Defendant was premature since the sum advanced to it was miss-appropriated by UBL with which it had entered into a product distributorship agreement. And that a Civil Suit No.118 of 2012 in respect of the distributorship agreement was on going in Masindi Court and as such foreclosure could not take place.

And lastly, that the 1<sup>st</sup> Defendant had not given it the requisite notice for foreclosure. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant therefore sought for the dismissal of the suit and cross claim against them.

The issues for resolution as agreed between the parties are:

- (i) whether the memorandum was legally created;
- (ii) whether the 1<sup>st</sup> Defendant can legally foreclose on the mortgaged property?;
- (iii) whether the 2nd defendant is liable to the 1<sup>st</sup> Defendant?, and
- (iv) what remedies are available to the parties

On the first issue on whether the mortgage was legally created, it is an agreed fact between all the parties that the 2<sup>nd</sup> Defendant issued a Power of Attorney in favour of the 3<sup>rd</sup> Defendant which enabled the 1<sup>st</sup> and 3<sup>rd</sup> Defendant to execute a mortgage over Kyadondo Block 224, Plot 423 land at Namugongo. It is also an agreed fact between the parties that the Plaintiff did not grant spousal consent to the Defendant, although the 2<sup>nd</sup> Defendant executed a statutory declaration in which he declared that he was not married; none of the Defendants has refuted the fact that 2<sup>nd</sup> Defendant was married to the Plaintiff. It is clear in his proceedings, that the Plaintiff was a wife to the 2<sup>nd</sup> Defendant. It is also not in dispute that the Plaintiff and the 2<sup>nd</sup> Defendant lived on Kyadondo Block 224, Plot 423 land at Namugongo, which was their matrimonial home. It is also not in dispute that it was this very property upon which the 2<sup>nd</sup>

Defendant gave Powers of Attorney to the 3<sup>rd</sup> Defendant, who proceeded to execute a mortgage in favour of the 1<sup>st</sup> Defendant. It is also not in doubt that spousal consent was a requirement before the Property could be mortgaged.

The 1<sup>st</sup> Defendant contends that since the 2<sup>nd</sup> Defendant executed a statutory declaration claiming that he was not married, the mortgage was lawful.

While the 2<sup>nd</sup> Defendant had the power to create a mortgage under Section 3 of Mortgage Act, he could only do so acting honestly and in good faith and disclosing all relevant information relating to the mortgage. This duty also fell upon the 1<sup>st</sup> Defendant as provided under Section 4 of the Mortgage Act.

Section 5 of the Mortgage however required spousal consent and it was the duty of the Mortgager, in this case the 2<sup>nd</sup> Defendant, to disclose truthfully his marital status which he hid by executing a statutory declaration indicating that he was not married.

It was also the duty of the Mortgagee, in this case the 1<sup>st</sup> Defendant to take reasonable steps to ascertain whether the 2<sup>nd</sup> Defendant was married and whether or not the property to be mortgaged was a matrimonial home.

In my view, taking reasonable steps to ascertain included visiting the Mortgors home and surrounding areas to inquire in the marital status of a man of the 2<sup>nd</sup> Defendants age. This, the 1<sup>st</sup> Defendant did not do and I am certain that he did not visit the area and inquire into the marital status based on the evidence of Sserunjoji Henry, PW3, who was the Local Council Chairman of the area in which the Plaintiff and 2<sup>nd</sup> Defendant resided. Sserunjoji said he knew them very well as husband and wife because they had stayed in his area of jurisdiction for the last 12 years and he told court that they moved into his area after constructing their permanent house. He further added that the Plaintiff carried on a small scale farming project on the property. He also told court that he on many occasions he confirmed matters of residence and assisted financial institutions in verifying residences and marital status but in this case the Plaintiff never approached him for verification. This evidence was not disputed.

It is therefore my finding that the 1<sup>st</sup> Defendant did not exercise due diligence as was expected of him. Furthermore, the mortgage was executed on the 11<sup>th</sup> day of December 2011 while the

statutory declaration was executed on the 13<sup>th</sup> day of December 2011. This means that the mortgage was executed without the spousal consent and the statutory declaration. The mortgage was therefore null and void *ab initio*. Therefore, it is clear that the 1<sup>st</sup> Defendant did not even rely on the statutory declaration before executing the mortgage.

The sum total is that since the 2<sup>nd</sup> Defendant did not obtain spousal consent and the purported mortgage facility were executed before the statutory declaration; this mortgage was unlawfully created and unenforceable.

On the second issue of whether the 1<sup>st</sup> Defendant can legally foreclose on the mortgaged property, I have already found herein above that the mortgage was illegally created and therefore the 1<sup>st</sup> Defendant cannot foreclose on the mortgage property.

On whether the 2<sup>nd</sup> Defendant is liable to the 1<sup>st</sup> Defendant, Patrick Kato, DW1, testified on behalf of the 1<sup>st</sup> Defendant that he was a recoveries officer of the 1<sup>st</sup> Defendant. That on perusal of the 3<sup>rd</sup> Defendant's file he established that the 3<sup>rd</sup> Defendant had defaulted on its facilities. The records indicated that the 2<sup>nd</sup> Defendant as director and shareholder of the 3<sup>rd</sup> Defendant Company entered into contract with the 1<sup>st</sup> Defendant signing an offer letter and a tripartite mortgage facility on the 11<sup>th</sup> December 2011. The offer letter, Exhibit P14 and the tripartite mortgage, Exhibit P10 were not disputed.

On the 15<sup>th</sup> December 2011, the 2<sup>nd</sup> Defendant guaranteed the 3<sup>rd</sup> Defendant's facility with a bank guarantee. This came two days after the 2<sup>nd</sup> Defendant had signed a statutory declaration. These assurances by the 2<sup>nd</sup> Defendant can only be viewed as the basis upon which the 1<sup>st</sup> Defendant extended a loan facility to the 3<sup>rd</sup> Defendant.

From the foregoing, one visualizes the 2<sup>nd</sup> Defendant assuring the 1<sup>st</sup> Defendant that the land is available in event of default, that there would be no spouse to interfere with foreclosure and that in event of the 3<sup>rd</sup> Defendant's failure to pay, he would make good the default. The foregoing placed the 2<sup>nd</sup> Defendant in the arena of liability. He is found squarely liable. It is therefore my finding that the 2<sup>nd</sup> and the 3<sup>rd</sup> Defendants are jointly and severally liable to the 1<sup>st</sup> Defendant in the sums prayed for.

## Remedies

The Plaintiff also prayed for general damages for breach of contract and interest thereon. It is trite law that damages are the direct probable consequences of the act complained of. Such consequences may be loss of use, loss of profit and physical inconvenience among others; **Kampala District Land Board & George Mitala Vs Venansio Babweyana, Civil Appeal No. 2 of 2007.**

In *Katakanya & others vs. Raphael Bikongoro HCCA No.12 of 2010* where Court observed that,

*“General damages are awarded at the discretion of Court, and are as always as the law will presume to be the natural consequences of the Defendant’s act or omission. In the assessment of the quantum of damages, courts are guided mainly inter alia by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach..... Further still, general damages need not be specifically pleaded, particularized and proved before they can be awarded since they are as the law will presume to be the direct natural or probable consequence of the act or omission complained of.”*

The Plaintiff’s did not give court a rate on which to base however the measurement of the quantum of damages is a matter for the discretion of the individual Judge which of course has to be exercised judicially; **Southern Engineering Company Vs Mutia [1985] KLR 730.**

This Court is also aware that in assessment of the quantum of damages, courts are mainly guided by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered; **Uganda Commercial Bank Vs Kigozi [2002] 1 EA 305.** Also that a Plaintiff who suffers damage due to the wrongful act of the Defendant must be put in the position he or she would have been if she or he had not suffered the wrong. **Charles Acire Vs Myaana Engola, HCCS 143/1993, Kibimba Rice Ltd Vs Umar Salim, SCCA 17/1992 and Hardley Vs Baxendale (1894) 9 Exch 341.**

In the instant case the Plaintiff was put in constant fear of being evicted and remaining homeless. It certainly caused her to run up and down to instruct counsel and following up the case to save her matrimonial home which consumed her time. This exposed her to great inconvenience, psychological suffering and mental anguish.

Having considered all the circumstances of the case, it is this court's finding that general damages of Ugx10, 000,000/= would be sufficient. It is hereby awarded to the Plaintiff with interest at court rate per annum from date of judgment till payment in full. The Plaintiff is also awarded costs of the suit.

Having considered the general damages it is necessary to decide who of the three defendants is liable to pay them. It has been analyzed earlier in this judgment that the 3<sup>rd</sup> Defendant through its director and shareholder 2<sup>nd</sup> Defendant, applied for the loan. The 2<sup>nd</sup> Defendant was the mind and brain of the 3<sup>rd</sup> Defendant. He signed the impugned mortgage facility, he declared the availability of the property as security, he cushioned this with his personal guarantee, he lied that he was not married and concretized it by a statutory declaration. His actions can therefore not be ignored. There is no evidence to suggest that the 1<sup>st</sup> Defendant was aware of the falsehood. In my view it is right to say that 2<sup>nd</sup> Defendant's misrepresentation led to the advancement of the loan. And that it is that misrepresentation that led to this suit. Because of the fore going, I find the 2<sup>nd</sup> Defendant solely liable to the Plaintiff in damages as awarded.

In **conclusion** judgment is entered and it is declared and ordered in favour of the Plaintiff against the Defendants as follows;

- (a) that the property comprised in Kyadondo Block 224, Plot 423 is Matrimonial Property.
- (b) that the mortgage or pledge of Kyadondo Block 224, Plot 423 Namugongo, is illegal and unenforceable.
- (c) The suit property is discharged and be released from the mortgage or any other charge by the 1<sup>st</sup> Defendant.

- (d) An injunction restraining the Defendants, their agents, servants or persons claiming under them from evicting the plaintiff or interfering with the Plaintiff's occupation and use of the suit property.
- (e) General damages UGX 10, 000,000= to be paid by the 2<sup>nd</sup> Defendant.
- (f) Interest on (e) at court rate from judgment till payment in full.
- (g) Costs of the suit to be paid by the 2<sup>nd</sup> Defendant.

**Turning** to the cross claim of the 1<sup>st</sup> Defendant, judgment is entered in its favour against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as follows;

- (a) Payment of Ugx104,195,415/=
- (b) Interest on (a) at 26% p.a. from 11<sup>th</sup> day of March 2014 until payment in full.
- (c) Costs of the cross claim be paid by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to the 1<sup>st</sup> Defendant.

Dated at Kampala this 27<sup>th</sup> day of February 2017.

.....

Hon. Justice David Wangutusi

**JUDGE OF HIGH COURT**