IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

COMMERCIAL DIVISION

Reportable
Miscellaneous Application No. 1295 of 2023

In the matter between

DAMALIE BYAKUSAAGA BISOBYE **APPLICANT**

And

1. BYAKUSAAGA BISOBYE SEBULIME BIKOSO

2. CLESSY BARYA KIIZA **RESPONDENTS**

Heard: 24 August, 2023.
Delivered: 02 January, 2024.

Civil Procedure *— Review — Review of a Consent Judgment — A review should not seek to challenge the merits of a decision but rather irregularities in the process leading up to the decision.*

Money lending *— As a general rule, a person who carries on a money lending business is one who is ready and willing to lend to all and sundry, provided that they are from his point of view eligible — The obtaining of security is a usual, though not essential, feature of a loan made in the course of a moneylending business — Whether a person carries on business of a money lender depends on the facts of each case — A court need only first see whether at the time of the loan, the party's business was that of moneylender — If not, the court then investigates if the person held themselves out as carrying on such a business — There has to be some repetition and some regularity in the pattern to establish the carrying on of a moneylending business — Temporary passive transactions would not normally constitute a money-lending business — A person who makes a business of lending money is not any less of a moneylender because he carries on some other business as well on a much larger scale — On the other hand, a friendly loan is a financial agreement between associates usually made between friends, family, or*

acquaintances — Friendly loans can be one-time loans or repeated loans spurred by a financial emergency or specific financial need.

Accord and Satisfaction *— Accord and satisfaction is a method of discharging a claim by settlement of the claim and performing a new agreement — an accord and satisfaction will discharge the original contractual obligation — The consideration for an accord is often the resolution of a disputed claim — The compromise of a dispute between parties will serve as consideration for an accord and satisfaction when the dispute is bona fide — Forbearance on a claim or defense relative to a dispute that is not made in good faith and is not reasonably doubtful is of no value — Accordingly, payment of a claim or debt that one already is obligated to pay, when the claim or debt is due and owing, ascertainable in amount, and not controverted, will not serve as consideration for an accord — An accord being an agreement that is made between two or more contracting parties in which the performance being of the arrangement will replace an original performance agreed upon, and satisfaction being the carrying out of that accord.*

RULING

STEPHEN MUBIRU, J.

Background:

[1] The applicant and the 1st respondent are husband and wife having solemnized their marriage at St. Paul's Cathedral, Namirembe on 13th April, 1991. During or around the year 2019, the 1st respondent faced financial difficulties by reason whereof he approached the applicant seeking her consent to obtain a loan from the 2nd respondent. It is the applicant's case that together they went to the 2nd respondent where the 1st respondent introduced the applicant as his wife and co-owner of the land comprised in Kyadondo, Block 204 Plot 289 constituting their matrimonial property. By an agreement dated 13th December, 2019 and using the title to that land as security, together they borrowed a sum of shs. 83,248,000/= in cash, though the agreement reflected a sum of shs. 246,000,000/= It was agreed that the difference of shs. 11,352,000/= constituted a 12% interest rate on the amount borrowed. Prior to that, the respondents had on 27th November, 2019 executed a loan agreement for the sum of shs. 258,000,000/= secured by the title

deed to the same matrimonial home. The applicant has since discovered that the respondent had multiple other transactions without her knowledge and consent.

[2] On the other hand, the 2nd respondent's case is that on or around 3rd October, 2019 and on multiple occasions thereafter, the 1st respondent borrowed sums of money from him with the consent of the applicant. When the 1st respondent defaulted on his loan obligations, the 2nd respondent instituted High Court Civil Suit No. 69 of 2022 wherein a consent judgment was entered on 28th April, 2022 in favour of the 2nd respondent against the 1st respondent. The 2nd respondent has since taken steps to execute the consent judgment b way of attachment and sale of the 1st respondent's immovable property.

The Application:

[3] The application by Notice of motion is made under the provisions of section 98 of T*he Civil Procedure Act*, section 33 of *The Judicature Act*, Order 46 rule 1 and Order 52 rules 1 and 3 of *The Civil Procedure Rules.* The applicant seeks orders that the consent judgment entered by the respondents in Civil Suit No.69 of 2022 be reviewed, set aside and all proceedings, actions arising thereunder be vacated and that the costs of the application be provided for.

[4] It is the applicant's case that without her consent, knowledge and involvement, the respondents on 27th November, 2019 executed a loan agreement for the sum of shs. 258,000,000/= secured by the title deed to the applicant's matrimonial home. The 1st respondent fraudulently signed on behalf of the applicant as guarantor of the said loan agreement, yet she never signed and/or consented to the use of their matrimonial home as security for the borrowing. The applicant only got to know of the court proceedings when the 2nd respondent served her with on eviction notice from the matrimonial home during execution of the consent decree. The applicant has since learnt that on 8th January, 2020 the 1st respondent executed another loan agreement with the 2nd respondent for a sum of shs. 43,000,000/= secured

by their family land comprised in Plot 2 at Nakiwogo, Entebbe. The applicant is named as a party to the loan agreement, however it is the 2nd respondent who signed in her place without her consent or authorization.

[5] The applicant has since discovered further that on the 18th February, 2020 the respondents entered into another loan agreement where a sum of shs. 19,200.000/= was advanced to the 1st respondent against security of title to land comprised in Busiro Block 448, Plots 267 and 268, but the applicant's signature to the loan agreement was forged. The applicant learnt further that on 27th November, 2019, another agreement was executed on basis of which their matrimonial home comprised Kyadondo, Block 204 Plot 289 was mortgaged for a sum of shs. 258,000,000/=. On the said loan agreement, the applicant is named as guarantor yet her signature thereon is a forgery. The applicant has discovered further that on 3rd October, 2019, the respondents entered into another agreement over the applicant's family land comprised in Busiro Block 448 Plot 267 and 268, to which she did not consent as co-owner and wife. Despite being named as a party to some of the said loan agreements, she was never sued yet she has been informed by her lawyers that she is entitled to a fair hearing before her properly can be alienated. The applicant contends that the 1st respondent fraudulently dealt with the 2nd respondent without her notice and involvement, to the extent of forging her signature on the stated agreements. The 2nd respondent is an unlicensed money lender who uses those tactics to extort money from his victims. The 2nd respondent always knew her address, name and signature but he intentionally and fraudulently chose to rely on the 1st respondent's signature as her own.

<u>The 2nd Respondent's Affidavit in Reply</u>:

[6] The 1st respondent did not file an affidavit in reply. In his affidavit in reply, the 2nd respondent avers that he is a businessman, dealing in real estate business under the name and style of M/s Savanna Agencies, which he operates from Kamukama Plaza, Entebbe Road, Kampala. He has lent money to his friends personally some

of them having been his lawyers like Muhame Alam and Twesigye Nicholas and this he has not done as a business but was only helping them. The applicant and the 1st respondent are well known to him as his friends for some time. The 1st respondent approached him around 3rd October, 2019 requesting for financial assistance. The 1st respondent told him he was processing a loan from M/s Cairo Bank Limited but that there were some requirements to be fulfilled before the loan could be advanced to him, which required money for processing and on that basis he requested that the 2nd respondent advances him a sum of. shs. 59,200,000/=The 1st respondent told him he would not require all the money for processing the loan at once, but that he would need it in phases since requirements to access the loan from the bank are done in phases. The 1st respondent undertook to repay the money borrowed from the 2nd respondent's all at once when the Bank eventually advanced him the loan.

[7] On or around 27th November, 2019, the 1st respondent with his wife, the applicant, went to the 2nd respondent and they told him they needed a sum of shs. 258,000,000/= for the phase they were going to in regard to the bank loan processing. They told the 2nd respondent that the applicant would be guarantor and they had a statutory declaration, which they handed over to the 2nd applicant. The couple handed over to the 2nd respondent the certificate of title to their land comprised in Kyadondo Block 204 Plot 289, land at Kawempe, as security and thereafter the 2nd respondent advanced the money to them, and the agreement to that effect was duly signed. On 13th December, 2019, the couple borrowed a further sum of shs. 94,600,000/= secured by the same property and a second agreement was executed. Between January and June 2020, the couple came for more money for the remaining phases of the process.

[8] At the beginning of February, 2021, the 1st respondent informed the 2nd respondent that he had failed to secure the bank loan with M/s Cairo Bank Ltd and that they should now sit down, add all the loans outstanding and find a total figure which they should put into one agreement and then the 2nd respondent should give him

about one (1) year to clear the amount. On 10th February, 2021, in the presence of their respective lawyers, the two respondents undertook a reconciliation and consolidation of all the outstanding agreements and the total was shs. 694,000,000/= which they mutually agreed would be paid in instalments between the months of April, 2021 and April, 2022. The 1st respondent intimated to the 2nd respondent that the applicant was unwell and would not be available to execute the consolidated agreement but the parties went ahead to sign it in the presence of her lawyer. Since the 2nd respondent knew the applicant, he did not bother when the 1st respondent decided to sign on her behalf. They further agreed that security for all loans advanced be maintained as security under the debt settlement agreement which certificates of title were all in the 2nd respondent's possession as before.

[10] The couple defaulted on the agreed terms and only paid shs. 160,000,000/= whereupon the 2nd respondent took an effort to remind them by way of calling and texting them on several occasions about their indebtedness. By a letter dated 14th January, 2022 written by their lawyer, the couple construed the reminders to be threats and harassment. The 2nd respondent subsequently obtained information that the couple had indeed obtained the loan from M/s Cairo bank Ltd but refused to pay him his money, contrary to what they had told him. Thus he moved to court seeking redress. Subsequently on 7th March, 2023 the 2nd respondent saw an advert in the Daily Monitor newspaper run by a law firm on behalf of M/s Cairo bank Ltd, which confirmed the information the 2nd respondent had received was indeed true and that couple are serial debtors with intent to cheat their lenders. The applicant was not joined as a party to the suit since she was not a party to the debt settlement agreement which was the basis of the cause of action. The properties which were mentioned in the consent judgment and whose certificates of title were in the 2nd respondent's possession are all owned by the 1st respondent in his individual capacity and none is family property. In the alternative, the applicant had given express consent by acting as guarantor and issuing statutory declaration.

[11] The land comprised in Busiro, Block 448, Plots 267 and 268 at Nkumba – Ssabaddu has since been sold off and transferred after execution proceedings pursuant to a warrant of this Court dated 6th July, /2022.by Mugume Stevens, Court Bailiff's t/a Bemug Strict Auctioneers & Court bailiffs by agreement dated 19th September, 2022 whereby shs. 105,000,000/= was paid in partial fulfilment of the decretal sums under the consent judgment. The second warrant issued by this Court on 10th February, 2023 expiring on 11th April, 2023 by which land comprised in Kyadondo Block 204, plot 289 at Kawempe was attached and sold at shs. 105,000,000/= already paid. Pursuant to the judicial sale without any objection either from the applicant or the two certificates of title were transferred to the buyer, a one Mugenyi Frank Dixon, who became registered owner on 3rd November, 2022. The said two plots have been sold off and are no longer available, unless execution in respect of those plots is set aside which is not the prayer of the applicant in this case.

Affidavits in Rejoinder:

[12] In her two affidavits in rejoinder, the applicant contends that although the 2nd respondent states that he deals in real estate business, in most of the agreements, he refers to himself as a lender charging interest. Apart from the agreement dated 13th December, 2019 the applicant never consented to any other loans and was never been party to or aware or gave her consent lo the subsequent loans between the respondents concerning her matrimonial properties. She was never a party to the loan agreements dated 27th November, 2019, 28th April, 2022, 8th January, 2020, 3rd October, 2019 and 18th February, 2020 wherein her signature was forged. The applicant never received any demand notices regarding the payment of the loan that she took will the 1st respondent and has never aware of the court proceedings until the 2nd respondent served her with an eviction notice from her matrimonial home during execution. The 2nd respondent received payment of the loan through his DFCU and Stanbic banks which is more thon what is owed in the

agreement dated the 13th December, 2019 to which the applicant was party and hence the 2nd respondent was fully settled regarding the matrimonial home. The title for land comprised in Kyadondo, Block 204 Plot 289 must be released as all monies were paid. The purported judicial sales ore not conclusive since the some were conducted fraudulently and illegally for which court has power to set them aside.

Submissions of Counsel for the Applicant:

[13] Counsel for the applicant submitted that by an agreement dated 13th December, 2019 the applicant and the 1st respondent obtained a loan from the 2nd respondent in the sum of shs. 94,600,000/= secured by the land title to their matrimonial home comprised in Kyadondo Block 204 Plot 289 land at Kawempe. However, the respondents entered into subsequent agreements and the same land title was used as security without the applicant's knowledge and consent. The applicant was never aware of the existence of the said subsequent loans until the 2nd respondent served her with an eviction notice from their matrimonial home. The respondents varied the agreement when they entered into further loan agreements without the consent of the applicant having been a party to the initial agreement whose security was their matrimonial home. The variation was a major / material term of the contract since it changed the sum initially borrowed. The 2nd respondent did not take reasonable steps to ensure that the applicant was aware of any variations and yet he is aware of the applicant's address but only decided to serve her with the eviction notice during execution.

[14] The subsequent loans were fraudulent and illegal for lack of consent by the applicant having been a party to the initial agreement. By virtue of clause 9 of the loan agreement dated 13th December, 2019, the parties' intention was never to have any variation without the express consent of all the parties, and as such the subsequent variation would have no legal effect. The 2nd respondent received money over and above the amount that was loaned out in the first loan agreement

of shs. 94,600,000/= the payments are evidenced by the bank statements and bank transfers attached to the applicant's affidavit in reply to the supplementary affidavit. The loan amount secured by the matrimonial home was fully cleared and hence the purported sale by the 2nd respondent was illegal and fraudulent and ought to be concealed by this Honourable Court. If this application is not granted the applicant will be left homeless with her children as a result of the fraudulent actions of the respondents.

Submissions of Counsel for the 2nd Respondent:

[14] Counsel for the 2nd respondent submitted that the property comprised in Kyadondo Block, 204 Plot 289 is liable and available for attachment both as property of the 1st respondent (Judgment debtor), secondly as security for the repayment of the outstanding debt against the 1st respondent and thirdly as property to which the applicant consented that it be used as security in favour of the 2nd respondent. The applicant signed as a guarantor. The debt settlement agreement dated 10th February, 2021 stated that the debt was secured by the same land title. The applicant consented to the using of this property as security for the repayment of the debt and therefore there was no need to ask for her consent under the debt settlement agreement which was maintaining the same property as security and the same money had remained unpaid. Due to the subsequent material changes made to the original agreement, the applicant was discharged from liability under the loan agreement. Since the principal borrower, the 1st respondent does not deny indebtedness, the 2nd respondent has all rights to apply for attachment of property given as security for the loan to recover his money. The 2nd respondent lent money to the applicant and the 1st respondent, as well as two of his lawyers Alan Muhame and Twesigye Nicholas as his friends, at no interest. The 2nd respondent is not engaged in lending money as a business.

[15] The applicant is conniving with the 1st respondent to deny the 2nd respondent the outstanding monies under the debt settlement agreement dated 10th February,

2021. The applicant was well aware that the 1st respondent was not honouring the loan obligations to the contrary of what she states in her affidavit in rejoinder. The 1st respondent has adamantly refused to say anything regarding the matter; he did not file his affidavit in reply to the application as a respondent. On 24th August, 2023, when the application was fixed for hearing, the 1st respondent was at court but when the matter was called for hearing the applicant was absent and the 1st respondent moved away which clearly shows connivance with the applicant to defeat the ends of justice of this case. There is no evidence to show that the land sold on 19th September, 2022 comprised in Busiro Block 448 Plots 267 and 268 at Nkumba-Ssabaddu was their matrimonial home. The applicant does not adduce any evidence to prove that the said land was matrimonial home.

The Decision:

[16] Review connotes a judicial re-examination of the case in order to rectify or correct grave and palpable errors committed by court in order to prevent a gross miscarriage of justice. According to section 82 of *The Civil Procedure Act*, any person considering himself or herself aggrieved; - (a) by a decree or order from which an appeal is allowed by the Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by the Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit. The person applying under that provisions needs only to be one whose interests, rights, or duties are inevitably adversely affected by the decree. The section does not impose any conditions on the exercise of that power.

[17] In *Kinyara Sugar Ltd v., Hajji Kazimbiraine Mahmood and others, H. C. Misc. Application No. 003 of 2020*, it was held that the Court's powers of review under section 82 of *The Civil Procedure Act* are wider than those under Order 46 of *The Civil Procedure Rules*. Under Section 82 of *The Civil Procedure Act*, it suffices that the applicant's interests, rights, or duties are adversely affected by the Decree or

Order sought to be reviewed. The section does not impose any conditions whatsoever, on the exercise of Court's power thereunder.

[18] However Order 46 rules 1 of *The Civil Procedure Rules*, is not that wide. It empowers this court to review its own decisions where there is an "error apparent on the face of the record" or "discovery of a new and important matter of evidence," or "for any other sufficient reason," which has been judicially interpreted to mean a reason sufficient on grounds, at least analogous to those specified in the rule. For applications based on the first ground, the error or omission must be self-evident and should not require an elaborate argument to be established. This means an error which strikes one on mere looking at the record, which would not require any long drawn process of reasoning on points where there may conceivably be two opinions (see *Nyamogo & Nyamogo Advocates v. Kago [2001] 2 EA 173)*. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under order this Order and rule. In exercise of the jurisdiction under this provision, it is not permissible for an erroneous decision to be reheard and corrected.

[19] A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. A review should not seek to challenge the merits of a decision but rather irregularities in the process towards the decision. Some instances of what constitutes a mistake or error apparent on face of record are: where the applicant was not served with a hearing notice; where the court has not considered the amended pleadings filed or attachments filed along with the pleadings; where the court has based its decision on a ground without giving the applicant an opportunity to address the same; and violation of the principles of natural justice.

[20] A consent Judgment is a judgment of the court in terms which have been contractually entered into by parties to the litigation, and validated by Court under Order 50 rule 2 and Order 25 Rule 6 of *The Civil Procedure Rules* (see *Brooke Bond Liebeg (T) Ltd v. Mallya [1975] E.A 266*). A consent judgment once recorded or endorsed by the Court, becomes the judgment of the Court and binding upon the parties. It is however unique in that it is not a judgment of the Court delivered after hearing the parties. It is an agreement or contract between the parties. As such it can only be set aside for a reason which would enable the court to set aside or rescind on an agreement.

[21] In *Hirani v. Kassam [1952] EA 131,* followed in *Attorney General and another v. James Mark Kamoga and others, S. C. Civil Appeal No. 8 of 2004*, it was held, inter alia, that;

> *Prima facie*, any order made in the presence and with the consent of counsel is binding on all the parties to the proceedings or an action, and it cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court…..or if the consent was given without sufficient material facts, or in general for a reason which would enable a court to set aside an agreement....It is a well settled principle therefore that a consent decree has to be upheld unless vitiated by a reason that would enable Court to set aside an agreement such as fraud, Mistake, Misapprehension or Contravention of Court policy. The principle is on the premise that a consent decree is passed on terms of a new contract between the parties to the Consent Judgment.

[22] Similarly in *Babigumira John and Others v. Hoima Council [2001 – 2005] HCB* 116, it was held, *inter alia,* that a consent order or judgment can be set aside if it was given without sufficient material facts or in misapprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside such an agreement. In *Pavement Civil Works Ltd v. Andrew Kirungi, High Court Misc. Application No. 292 of 2002,* it was held that a consent Judgment and decree cannot be set aside by appeal but rather by a suit, or by an application for a review

of the Judgment sought to be set aside. But that the more appropriate mode is by an application for review. The reasons that would enable court to set aside a consent judgment are fraud, mistake, misapprehension or contravention of court policy.

[23] It is contended in this application that the consent judgment entered by the respondents in Civil Suit No.69 of 2022, ought to be reviewed and set aside on grounds that the 1st respondent fraudulently dealt with the 2nd respondent without the applicant's notice and involvement, to the extent of forging her signature on a number of the underlying loan agreements, and that despite being named as a party to some of the said loan agreements, the applicant was never sued, yet she is entitled to a fair hearing before her properly can be alienated. It is contended that those are grounds sufficient to justify the grant of this application.

i. <u>Whether the consent judgment is vitiated by illegality in the loan agreements.</u>

[24] It is the applicant's case that the 2nd respondent engaged in the business of money lending yet he was unlicensed, rendering the loan agreements illegal and unenforceable. The 2nd respondent's case is that he is not engaged in lending money as a business, but rather lend the applicant and the 1st respondent, and a couple of other people as friends; hence these were friendly loans.

[25] It is trite that only businesses appropriately licensed under *The Tier 4 Microfinance Institutions and Money Lenders Act, 18 of 2016* can carry out money lending as a business. By virtue of section 84 (1) (a) of the Act, any person who carries on business as a moneylender without a money lending license commits an offence and is liable, on conviction, to a fine of two hundred currency points. It must be noted that in an illegal moneylending transaction, that is to say a moneylending transaction by an unlicensed moneylender, even the principal may not be recoverable. Hence, if a friendly loan is deemed to be a moneylending transaction

and the lender does not have a moneylending license, the lender may not be able to recover the loan given. Being found to be in the business of moneylending can have serious consequences, as any loan provided by a person involved in this business is deemed a moneylending transaction. If the lender is not in possession of a license under the *he Tier 4 Microfinance Institutions and Money Lenders Act*, such a transaction would violate the MLA. Violating the Act renders a loan agreement based on an illegal moneylending transaction void and unenforceable. The Court has discretionary power to decide whether to order the return of the loan. If both parties were aware of the illegality, the Court may not order the return of the loan (see *Patel v. Mirza [2017] AC 467*).

[26] Whether a person carries on business of a money lender depends on the facts of each case (see *Litchfield v. Dreyfus [1906] 1 KB 584*). The words "carries on business" implies a repetition of acts, and whether one isolated transaction carried amounts to carrying on business, within the meaning of the statute, must depend on the particulars or circumstances attending the transaction (see *Kirkwood v. Gadd [1910] AC 422*). Although the word "business" may often denote a degree of repetition and continuity, it need not always do so (see *Kenny v. Conroy and another [1999] 1 WLR 1340*). A court need only first see whether at the time of the loan, the party's business was that of moneylender. If not, the court then investigates if the person held themselves out as carrying on such a business. A person who makes a business of lending money is not any the less a money-lender because he carries on some other business as well on a much larger scale (see *North Central Wagon Finance Co. Ltd v. Brailsford [l962] 1 All E.R. 502 at 508B*).

[27] The requirement was intended to apply only to persons who are really carrying on the business of money-lending as a business, not to persons who lend money as an incident of another business or to a few old friends by the way of friendship. For example, in *Litchfield v. Dreyfus [l906] 1 KB 584* an art dealer occasionally advanced money to friends in the trade. Farwell J. said at 589; -

> Not every man who lends money at interest carries on the business of money-lending. Speaking generally, a man who carries on a money-lending business is one who is ready and willing to lend to all and sundry, provided that they are from his point of view eligible. I do not of course mean that a money-lender can evade the Act by limiting his clientele to those whom he chooses to designate as "friends" or otherwise; it is a question of fact in each case.

[28] It is therefore not enough merely to show that the 2nd respondent had on several occasions lent money at remunerative rates of interest, there must be a certain degree of system and continuity about the transactions (see *Newton v. Pyke [l908] 25 TLR 127*). There has to be some repetition and some regularity in the pattern to establish the carrying on of a business. To prove that the 2nd respondent carried on such a business at all, the applicant had to show that the 2nd respondent at the very least had made several transactions of loans at interest to others, over a relatively short period in a manner indicative of willingness to lend to all and sundry. It is the 2nd respondent's case that the available evidence is of lending to a couple of his lawyers, on friendly basis.

[29] Generally speaking, a person who carries on a money lending business is one who is ready and willing to lend to all and sundry, provided that they are from his point of view eligible (see *Investment Masters Ltd v. Ambrose Kagangure H. C. Civil Suit No. 312 of 2005; Solaglass Finance Co. (Pty) Ltd v. Commissioner for Inland Revenue [1991] 1 All SA 39 (A); Ndyareeba Ronald v. Joseph Arinaitwe H.C. Misc. Application No.173 of 2019* and *James Balintuma v. Dr. Handel Leslie H.C. Civil Suit No. 193 of 2013*). There must be a business-like undertaking involving some level of activity, time, and effort; consequently, temporary passive transactions would not normally constitute a money-lending business.

[30] On the other hand, a friendly loan is a financial agreement between associates. This type of financing is termed a friendly loan because the transaction is usually made between friends, family, or acquaintances. These types of agreements are made in good faith between closely associated parties. A friendly loan is a loan

between two persons based on trust. There may be an agreement such as an I.O.U. or security pledged to repayment but most important there will usually be no interest imposed (see *Tan Aik Teck v. Tang Soon Chye [2007] 5 CLJ 441*). There is typically no credit check involved, and the loan could come with a very low interest rate, or even no interest at all. Friendly loans can be one-time loans or repeated loans spurred by a financial emergency or specific financial need. Such loan agreements between friends or family, with a reasonable interest rate, are completely acceptable legal and enforceable financial agreements. Interest may be charged on friendly loans provided that the interest rates are lower than that of a licensed moneylender. Where trouble might come in is if the lender has lent money to multiple individuals, earning cash from interest, or operating like a business would.

[31] Hence, the existence of a moneylending business must be determined based on the specific facts of each case, as to whether the 2nd respondent's version of friendly loans or the applicant's version of moneylending is more probable or more likely, having regard to the course of natural events, human conduct and public and private business in their relation to the type of transaction in this particular case. This assessment and scrutiny cannot be done by taking one or two factors in isolation but has to be done by considering all the relevant factors and circumstances before coming to an eventual conclusion as to which version is more probable, though a factor or circumstance may have more weight than the others in the factual matrix of the case.

[32] A person alleging another to be a money lender is expected to corroborate the assertion with adequate documentary evidence in order to establish this as a fact. The person alleged to be a money lender should have identified himself as such on the face of facts. The evidence should disclose that the alleged money lender had clear policies and procedures for each loan application. The lending should be shown to be done based on a system or plan which discloses a degree of continuity in laying out and getting back the capital for further use and which involves a

frequent turnover of the capital. The obtaining of security is a usual, though not essential, feature of a loan made in the course of a moneylending business. Detailed loan applications and verification of the information submitted must be evident. Periodic monitoring of the loan such as in the review of financial statements and verification of the title to security will usually be required.

[32] There should usually be clear evidence that the alleged money lender sought or was receptive to borrowers generally. Finally, although not every loan involving interest automatically qualifies as a moneylending transaction, even a single loan with any interest levied thereon places the onus on the lender to prove that they are not engaged in the business of moneylending. The presumption aims to prevent illegal moneylenders from concealing their moneylending activities through seemingly legitimate written documents or agreements. By doing so, it ensures that any other illegal transactions, not related to moneylending, cannot be disguised in the same way through deceptive written agreements.

[33] The applicant has adduced evidence to show that on 4th August, 2014 the 2nd respondent lent a sum of shs. 2,200,000/= to a one Muhame Alam. Upon default, the 2nd respondent sued him for the recovery of that sum under Mengo Chief Magistrate's Court Civil Suit No. 1073 of 2016. On 15th August, 2015 the 2nd respondent lent a sum of shs. 24,400,000/= to a one Muwonge Stanislaus, whose repayment was guaranteed by Twesigye Nicholas and secured by the title deed to land comprised in Kyadondo Block 120 Plot 1437 at Namwezi. Upon default, the 2nd respondent sued the two of them for the recovery of shs. 15,700,000/= under Mengo Chief Magistrate's Court Civil Suit No. 1086 of 2015. On 27th July, 2016 the 2nd respondent lent a sum of shs. 43,400,000/= and on 12th August, 2016 a sum of shs. 2,600,000/= making a total of shs. 46,000,000/= to a one Rose Natukunda Rwanyekiro, whose repayment was guaranteed by Dorothy Muttu and Ampurire Fredrick and secured by the logbook to motor vehicle registration No. UAT 403 M. Upon default, the 2nd respondent sued the three of them for the recovery of shs. 12,500,000/= under Mengo Chief Magistrate's Court Civil Suit No. 487 of 2017.

[34] Furthermore, on 28th August, 2017 the 2nd respondent lent a sum of shs. 22,500,000/= to a one Ibrahim Kiriisa Kalinzi, whose repayment was guaranteed by Rebecca Babirye and Susan Kakibona and secured by titles to land comprised in Busiro Block 36 Plots 440, 441 and 442, land at Kasa and Senene registered in the names of Tom Odaak. Upon default, the 2nd respondent sued the three of them for the recovery of shs. 10,500,000/= under Mengo Chief Magistrate's Court Civil Suit No. 178 of 2018. On 14th November, 2017 the 2nd respondent lent a sum of shs. 11,400,000/= to a one Kenneth Kaawe, whose repayment was guaranteed by Pamela Nankunda and Linda Kisubi and secured by the logbook to motor vehicle registration No. UAT 627 W registered in the names of Kenneth Kaawe. Upon default, the 2nd respondent sued the three of them for the recovery of that sum under Mengo Chief Magistrate's Court Civil Suit No. 179 of 2018.

[35] Analysis of this evidence reveals that between 4th August, 2014 and 14th November, 2017 (a period of approximately three years), the 2nd respondent lent money to at least five different borrowers that defaulted, necessitating the filing of suits for recovery of the money lent. The first borrower neither had a guarantor nor provided security. The second borrower had one guarantor and provided security. The lending to the first three borrowers was without interest. The last three borrowers each was required to provide two guarantors and additional security; one of the borrowers provided title deeds to land as security while the two others provided log books as security and the lending was with interest upon default. The latter three loan agreements are titled "Friendly Loan Agreement," but are structured the same way in terms of paragraphs and language, and have similar content, while in respect of those signed on 4th August, 2014 and 27th July, 2017 standard forms were used and only customized to the transaction at hand. Similarly, standard forms were used as instruments of guarantee, only necessitating the filling in of information relevant to the particular loan agreement. Interest was levied on all loans so advanced. It is in this context that the 2nd respondent averred that has lent money to his personal friends some of them

having been his lawyers like Muhame Alam and Twesigye Nicholas (the latter only happened to have been a guarantor and not a borrower) and this he has not done as a business but was only helping them.

[36] On the facts of this case, there is no direct evidence that the 2nd respondent held himself out as a money lender. The evidence suggests that the fact that he had money available was known to only a few individuals with whom he was acquainted. There is no evidence of seeking out of borrowers, or a pattern of making funds available generally to potential borrowers. There is neither evidence to show that he advertised or was listed anywhere as a money lender, or that he held himself out to all and sundry as a money lender. The relationship between him and the borrowers and the circumstances in which the lending occurred though is not explained sufficiently, however the incidents of lending are too isolated so as to cast doubt to his claim that they were people he knew personally. Although the fact is that it is only his lawyer Muhame Alam who can be classified as an associate, the fact of lending to Muwonge Stanislaus, Rose Natukunda Rwanyekiro at no interest whatsoever corroborates his assertion that they too were his friends.

[37] The fact that money had on several occasions been lent at remunerative rates of interest of itself is not enough to show that the business of moneylending was being carried on. There is a certain degree of continuity about the transactions involving the charge of interest that would be required to establish the fact. It is true that the 2nd respondent frequently imposed exorbitant rates (the rate for the agreement of 28th August, 2017 is 15% per month upon default; for the agreement of 14th November, 2017 it is 15% per month upon default; for the agreement of 3rd October, 2019 it is 15% per month upon default; for the agreement of 27h November, 2019 it is 12% per month upon default for the agreement of 8th January, 2020 it is 12% per month upon default; for the agreement of 14th November, 2017 it is 15% per month upon default). Commercial banks' simple interest rates can serve as a benchmark for acceptable rates. The higher and more unreasonable

the interest rate, the more likely the Courts will perceive the transaction as moneylending rather than a friendly loan. However, in the instant case, there is no evidence to show that the 2nd respondent consistently set out to profit from moneylending activities. Interest was chargeable only upon default. The primary focus of lending therefore was not to earn interest on capital.

[38] Mere repetition of lending transactions does not necessarily change the character of the activity; the level of activity shown in evidence has to be indicative of the existence of a money lending business. There is no evidence of lending to a wide variety of persons, since the 2nd respondent advanced money only to non-arm's length parties. The adoption of standard forms of itself is not suggestive of readiness to lend money to the general public or any disinterested third parties. Lending to a relative, friend or associate for financial assistance, whether as a single occurrence or in multiple instances, and in the circumstances where the financial assistance is only given to the relative, friend or associate and no one else, does not constitute money lending business even though elements of continuity and repetition of similar transactions are apparent (see *Sureshraj Krishnan v. Pv Power Engineering Sdn Bhd and another [2023] 1 MLJ 632*). In the context of the rest of the facts of this case, these standard form contracts cannot be associated only with system, repetition and continuity of similar transactions necessary to constitute a business, and nothing else.

[39] I find on the facts of this case, that the totality of the loan transactions does not import the necessary element of system, repetition and continuity of similar transactions necessary to constitute a money-lending business. I have concluded that the 2nd respondent, in advancing funds to the applicant and the 1st respondent, was engaged in advancing friendly loans to associates, but was not carrying on the business of lending money in contravention of section 84 (1) (a) of *The Tier 4 Microfinance Institutions and Money Lenders Act, 18 of 2016*. The 2nd respondent did not engage in the business of money lending as an unlicensed moneylender, so as to render the loan agreements with the applicant and the 1st respondent

illegal and unenforceable. This therefore fails as a ground for reviewing the consent judgment.

ii. Whether the applicant should have been joined as party to the suit / consent judgment.

[40] The names of the parties as they appear on the consent judgment orders must be identical with the names as they appear on the proceedings from which it originates. In the instant case, by High Court Civil Suit No. 69 of 2022 the 2nd respondent sued the 1st respondent seeking recovery of shs. 534,000,000/= It was the 2nd respondent's case that by an agreement dated 10th February, 2021 the 1st respondent acknowledged the indebtedness of shs. 694,000,000/= which was to be paid in three instalments of shs. 245,000,000/= each on or before 30th April, 2022 but had only paid shs. 150,000,000/=, hence the claim for the outstanding balance. The suit was clearly based on an agreement to which the applicant was not a party. It is however common ground between the parties that the agreement of 10th February, 2021 was a consolidation of multiple prior agreements.

[41] While the applicant characterises the transaction between herself and the respondents as one agreement of borrowing to which she was a party, followed by multiple others to which she was not, the 2nd respondent characterises it as one transaction of borrowing to which she was only a guarantor, but split into multiple tranches, the majority of which were executed by the 1st respondent on behalf of the applicant. This divergence calls for an examination of the text of the various agreements. There are six agreements in all; one signed before and four others after that of 13th December, 2019. They are dated, 3rd October, 2019; 13th December, 2019; 27th November, 2019, 8th January, 2020; 18th February, 2020; and 10th February, 2021.

[42] With regard to the agreement of 3rd October, 2019, the borrower is named as the 1st respondent, for the sum of shs. 59,200,000/= secured by the title deed to land

comprised in Busiro Block 448 Plots 267 and 268 registered in the name of the 1st respondent. With regard to the agreement dated 13th December, 2019, the applicant and the 1st respondent are named as borrowers for the sum of shs. 94,600,000/= secured by the title deed to land comprised in Kyadondo Block 204 Plot 289 at Kawempe registered in the name of the 1st respondent. With regard to the agreement of 27th November, 2019, the borrower is named as the 1st respondent and the applicant as guarantor, for the sum of shs. 258,000,000/= secured by the same title deed. With regard to the agreement of 8th January, 2020, the applicant and the 1st respondent are named as borrowers, but only signed by the 1st respondent, for the sum of shs. 43,000,000/= secured by the title deed to land comprised in Plot 2 Research road, at Lugonjo / Nakiwogo, Entebbe Municipality registered in the name of the 1st respondent. With regard to the agreement of 18th February, 2020, the borrower is named as the 1st respondent, for the sum of shs. 19,200,000/= secured by the title deed to land comprised in Busiro Block 448 Plots 267 and 268 registered in the name of the 1st respondent.

[43] In summary, the applicant is named as borrower in two of the six agreements; that dated 13th December, 2019 which she acknowledges to have signed, and that of 8th January, 2020 which was only signed by the 1st respondent. She is named as guarantor in only one; the one dated 27th November, 2019 which bears her signature as guarantor, but which she has denied having signed. The applicant's denial of her signature on this agreement is unbelievable based on the fact that on the same day she executed a statutory declaration that authorized the 1st respondent to use the title deed to her matrimonial home for borrowing a sum of shs. 258,000,000/= which is the amount sated in that loan agreement. The rest of the loan agreements were solely signed by the 1st respondent and she is neither named as borrower nor guarantor in any of the rest. The agreement of 10th February, 2021 specifically stated that;

> This agreement consolidates all the outstanding debts between the Creditor and the debtor to-date.

The Creditor and the Debtor have negotiated and agreed to settle the consolidated outstanding debts to-date under the following terms and conditions.

1. The parties agree that the terms of this agreement are the result of negotiations between them and constitute a final accord and satisfaction concerning the debts between them.
2. The Creditor and the Debtor agree that the current outstanding debt is UGX 694,000,000/= (Six hundred ninety-four million shillings only).

[44] An accord and satisfaction is an agreement to discharge a claim in which the parties agree to give and accept different performance which is usually less than what is required or owed. It deals with a debtor's offer of payment and a creditor's acceptance of a lesser amount than the creditor originally claimed to be owed. An accord and satisfaction is a substitute contract for settlement of a debt by some alternative other than full payment. The consideration for an accord is often the resolution of a disputed claim. The compromise of a dispute between parties will serve as consideration for an accord and satisfaction when the dispute is bona fide: that is, the dispute is asserted in good faith and the subject matter is reasonably doubtful. Forbearance on a claim or defense relative to a dispute that is not made in good faith and is not reasonably doubtful is of no value. Accordingly, payment of a claim or debt that one already is obligated to pay, when the claim or debt is due and owing, ascertainable in amount, and not controverted, will not serve as consideration for an accord.

[45] Accord and satisfaction is a method of discharging a claim by settlement of the claim and performing the new agreement. The accord is the agreement and the satisfaction its execution or performance (see *British Russian Gazette and Trade Outlook Limited v. Associated Newspapers Limited [1933] 2 KB 616* and *Phenny Mwesigwa v. Petro Uganda Limited, S. C. Civil Appeal No. 10 of 2019*). A new contract is substituted for an old contract thereby discharging an obligation or cause of action based on the old contract, which is settled. An accord being an agreement that is made between two or more contracting parties in which the performance being of the arrangement will replace an original performance agreed

upon, and satisfaction being the carrying out of that accord, an accord and satisfaction will discharge the original contractual obligation.

[46] The implication is that the agreement of 10th February, 2021 having been a consolidation and "a final accord and satisfaction concerning the debts between" the respondents, it effectively discharged the applicant, both as debtor and as guarantor. The 1st respondent henceforth undertook the sole obligation to pay up in full the sum of shs. 694,000,000/= out of which he paid only shs. 160,000,000/= hence the suit against him for the recovery of the balance. Having been previously discharged both as debtor and as guarantor, the applicant could not have been joined as a defendant to the suit nor the consent judgment which was subsequently executed on 28th April, 2022. Not joining the applicant to the litigation as a defendant was neither a fraudulent act nor an act of collusion between the respondents to defeat her interest or claim. This therefore too fails as a ground for reviewing the consent judgment.

iii. Whether the 1st respondent's mortgaging of the title deeds to the land comprised in Kyadondo, Block 204 Plot 289; Busiro Block 448, Plots 267 and 268 and Plot 2 Research road, at Lugonjo / Nakiwogo, Entebbe Municipality vitiates the consent judgment.

[47] It is the applicant's case that the land comprised in Kyadondo, Block 204 Plot 289 constitutes her matrimonial home, hence it is "matrimonial property," while that in Busiro Block 448, Plots 267 and 268, and Plot 2 Research road, at Lugonjo / Nakiwogo, Entebbe Municipality constitutes family land, both of which required her consent as the 1st respondent's spouse, before they could be used as security for his borrowing.

[48] Section 39 (1) (a) of *The Land Act* as amended by Act 1 of 2004 forbids any person from mortgaging "family land" which is defined by section 38A (4) of the Act to mean land; (a) on which is situated the ordinary residence of a family; (b) on which

is situated the ordinary residence of the family and from which the family derives sustenance (where land from which a family derives sustenance means; (i) land which the family farms; or (ii) land which the family treats as the principal place which provides the livelihood of the family; or (iii) land which the family freely and voluntarily agrees, shall be treated as the family's principal place or source of income for food); (c) which the family freely and voluntarily agrees shall be treated to qualify under paragraph (a) or (b); or (d) which is treated as family land according to the norms, culture, customs, traditions or religion of the family, except with the prior consent of his or her spouse . Each of these formulations will now be considers on basis of the facts of this case.

[49] The fundamental objective in statutory construction is to determine and carry out the intent of the Legislature. Courts will give effect to a statute's plain meaning and assume the Legislature means exactly what it says. The plain meaning can be determined from the statute's language and context, including related statutes that disclose legislative intent about the provision in question. A court will interpret a statute in light of the circumstances existing at the time of its enactment in giving effect to the intent of the Legislature. Non-technical terms that are not defined in a statute are given their ordinary meanings.

a) Land on which is situated the ordinary residence of a family.

[50] Section 38A (4) of *The Land Act* defines “ordinary residence” as “the place where a person resides with some degree of continuity apart from accidental or temporary absences; and a person is ordinarily resident in a place when he or she intends to make that place his or her home for an indefinite period.” Thus “ordinary residence of a family” refers to the residence in which the family’s lifestyle is centered i.e., in the ordinary course of its day-to-day life as a family, and to which the family regularly returns, if its presence is not continuous. A family’s ordinary residence depends on physical presence in a family setting in a place for an extended and regular basis, with an intention to live there on a more or less regular basis. It

involves both physical presence in a place for an extended time and an intention to reside there in the sense that the family's customary mode of life is centered in that place as contrasted with special or occasional or casual residence.

[51] The applicant has not placed before Court any evidence regarding the family's composition and lifestyle on basis of which it can be determined that this family's life is centered on this land. The Court is not in position to say that this is the residence where the family lives continuously, or to which the family regularly returns, if its presence is not continuous. The applicant has not adduced any evidence in support of the assertion that either Busiro Block 448, Plots 267 and 268, or Plot 2 Research road, at Lugonjo / Nakiwogo, Entebbe Municipality constitutes the family residence or is the place where this family has centralized its existence.

b) Land on which is situated the ordinary residence of the family and from which the family derives sustenance.

[52] Use of the word "and" in the phrase "ordinary residence of the family and from which the family derives sustenance" is unambiguously conjunctive. Read in the context of the Act as a whole, and in light of its undisputed purpose, the use of the word "and" merely signifies that this provision applies to land serving a duo purpose. This category of land is one on which the family has both a residence and a derivation of sustenance by way of; (i) farming the land; or (ii) treating it as the principal place which provides the livelihood of the family; or (iii) by freely and voluntarily agreeing that it shall be treated as the family's principal place or source of income for food.

[53] Apart from the applicant not having placed before this Court any evidence regarding the family's composition and lifestyle on basis of which it can be determined that this family's life is centered on this land, there is absolutely no evidence to show that the family derives any sustenance from this property. The

Court is not in position to say that either Busiro Block 448, Plots 267 and 268, or Plot 2 Research road, at Lugonjo / Nakiwogo, Entebbe Municipality constitutes the residence where the family lives continuously, or to which the family regularly returns, if its presence is not continuous, and which also serves as its source of sustenance.

c) Land which the family freely and voluntarily agrees is to be treated to qualify either as land on which is situated the ordinary residence of the family, or one that has both the ordinary residence of the family and from which the family derives sustenance.

[54] This provision applies to land which despite not in fact being that which serves either as the family residence, or the duo purpose of family residence and derivation of sustenance, it should be deemed so by virtue of the free and voluntary agreement of the family. This sub-section implicitly admits that the land in question does not fit the description of family land as per the foregoing provisions, but by virtue of the free and voluntary agreement of the family, it shall be taken as if it were family land although it is not or there is doubt as to whether it is.

[55] The provision is applicable to land which by virtue of the voluntary agreement of the family, is deemed to have qualities that it does not have in fact. By virtue of the free and voluntary agreement of the family, such land is taken to be family land even though there are no objective facts by which it may be categorized either as the family residence, or one that serves the duo purpose of family residence and derivation of sustenance. Although such agreement may be implied from the conduct of the family, the applicant has not adduced evidence of any such free and voluntary agreement of the family in support of the assertion that either Busiro Block 448, Plots 267 and 268, or Plot 2 Research road, at Lugonjo / Nakiwogo, Entebbe Municipality by the free and voluntary agreement of the family, constitutes the family's principal place or source of income for food or as land on which is situated the ordinary residence of the family.

d) Land which is treated as family land according to the norms, culture, customs, traditions or religion of the family.

[56] This provision applies to land which by virtue of the norms, culture, customs, traditions or religion of the family, is either deemed to have qualities that it does not have in fact or is categorized as family land when it would not otherwise have qualified as such. By virtue of norms, culture, customs, traditions or religion the community to which the family belongs, such land attains a character not ordinarily associated with it, and is taken to be family land. The essential purpose of this provision is to allow for diversity in the characterization of family land coloured by community-based variations based on localized practices, behaviours and beliefs. Considering that the notion of family land may vary on account of norms, culture, customs, traditions or religion, thus rendering a uniform conception of family land almost impossible, this provision creates the flexibility needed to avoid damaging confrontations between the Court and such communities, thereby enabling the Court to balance the black letter of the Act with local norms and values.

[57] If there are any norms, culture, customs, traditions or religion of the community to which the family belongs on basis of which this land could be characterised as family land, none have been brought to the attention of the court by the applicant. No evidence has been adduced evidence of any such norms, culture, customs, traditions or religion of this family. I therefore find that it has not been proved that the applicants consent was required for the mortgaging of either Busiro Block 448, Plots 267 and 268, or Plot 2 Research road, at Lugonjo / Nakiwogo, Entebbe Municipality.

[58] As regards Kyadondo, Block 204 Plot 289 the expression “matrimonial home” is a word of art with a legal meaning. It is determined more or less on basis of objective facts than on the subjective views of the spouses. The subjective elements are determined objectively, since the meaning to be attributed to enacted words is a

question of law, being a matter of statutory interpretation. It follows that a matrimonial home is the house where a husband and wife ordinarily live in as a married couple. Matrimonial property has also been defined as a property acquired by one or other spouse before or during their marriage, with the intention that there should be continuing provisions for them and their children during their joint lives (see *Nimrod Kurwijila v. Theresia Hassan Malongo, Civil Appeal No. 102 of 2018 (T*). It is common ground between the parties that indeed it is on that land that the applicant and the 1st respondent have their matrimonial home.

[59] The power to give or deny consent is an instrument that facilitates the maintenance of control by the unregistered spouse over transactions of sale, gifts *inter vivos,* exchange, transfer, pledge, mortgage or lease of family land that is registered in the name of one spouse. Section 39 (2) of *The Land Act,* as amended by Act 1 of 2004, requires the consent provided for under subsection (1) to be in the manner prescribed by regulations made under the Act. Form 37 specified in the First Schedule to *The Land Regulations, 2001* is the prescribed form for such consent. It requires the consenting spouse to state his or her age, marital status, nationality, address, the location of land the subject of the transaction, its approximate area in hectares, a specification of its particulars of registration, the nature of use or occupation of the land, the nature of the transaction, and the fact that the spouse grants consent to the transaction. The consenting unregistered spouse must then sign and date it.

[60] Instead of adopting Form 37 specified in the First Schedule to *The Land Regulations, 2001* but in satisfaction of the requirements of 39 (2) of *The Land Act,* the applicant signed a statutory declaration dated 27th November, 2019 in the following terms;

> 1. THAT with my consent, Mr. Bisobye S. K. Byakusaaga intends to secure a Loan Facility of UGX 258,000,000/= (Two Hundred Fifty-Eight Million Uganda Shillings) using our matrimonial property comprised in Private Mailo Block 204 Plot 289 Kyadondo measuring

approximately 0.0990 hectares from Kiiza Clessy Barya for which, "*inter alia*," proof of my marital status is required.

2. THAT I am legally married to Mr. Bisobye S. K. Byakusaaga a resident of Kawempe and an adult of sound mind. (Attached hereto is a copy of our marriage certificate).
3. THAT, Mr. Mr. Bisobye S. K. Byakusaaga and I got married on the 13th day of April, 1991 by way of church wedding at St. Paul's Cathedral Namirembe
4. THAT Mr. Bisobye S. K. Byakusaaga is the registered proprietor of property comprised in Kyadondo Private Mailo Block 204 Plot 289 Kyadondo measuring approximately 0.0990 hectares.
5. That I together with my husband Mr. Bisobye S. K. Byakusaaga reside on the above mentioned property.
6. The said property is matrimonial property.
7. THAT I am consenting to the use of Property comprised in Kyadondo Private Mailo Block 204 Plot 289 Kyadondo measuring approximately 0.0990 hectares.

[61] I find that the statutory declaration meets the requirements of both Section 39 (2) of *The Land Act,* as amended by Act No.1 of 2004, and Form 37 specified in the First Schedule to *The Land Regulations, 2001*. That the applicant did not execute a Form 37 type consent is only a matter of form not substance. No departure from the form or mode prescribed by law, renders a document invalid, unless it has as a result not substantially complied with and observed the true statutory intent thereof. According to section 43 of *The Interpretation Act*, where any form is prescribed by any Act, an instrument or document which purports to be in such form shall not be void by reason of any deviation from that form which does not affect the substance of the instrument or document or which is not calculated to mislead (see *Namboowa Rashida v. Bavekuno Mafumu Godfrey Kyeswa and another, C.A. Election Appeal No. 69 of 2016; Emerson v. Bannerman, (1891) 19 S.C.R. 1* and *Najjuma Jesca and five others v. Moses Joloba and another, H. C. Misc. Application No. 770 of 2019*). We have here a statutory declaration which deviates from Form 37 specified in the First Schedule to *The Land Regulations, 2001*, the deviation not affecting the substance or calculated to mislead. The intention of the legal provision and the prescribed form for spousal consent is to elicit an unequivocal consent. The statutory scheme was substantially met by the use of a statutory declaration instead.

[62] After making that statutory declaration, the applicant went ahead to sign as guarantor to the agreement dated 27th November, 2019 where the amount borrowed was shs. 258,000,000/= secured by the title deed to land comprised in Kyadondo Block 204 Plot 289 at Kawempe registered in the name of the 1st respondent. Over a month later the applicant again signed the loan agreement dated 13th December, 2019 as borrower, where the amount borrowed was shs. 94,600,000/= secured by the same title deed. This time round though she did not execute another instrument of spousal consent.

[63] With a general consent of the unregistered spouse, the registered spouse is given broad authorisation or permitted to undertake a defined set of actions or carry out various transactions in general. It does not restrict the decisions the registered spouse can take in carrying out the various permitted transactions. On the other hand, with a special or limited consent given by the unregistered spouse, the registered spouse has specific powers limited to a specified transaction under specific, clearly laid-out limits. A special consent would typically outline the transaction that the registered spouse is authorised to undertake in specific terms, with the details of the subject matter. When the registered spouse does things that the special or limited consent does not permit, they will be deemed to have been undertaken without the requisite consent. There must be strict adherence to the authority conferred by a special or limited consent. The authority is limited to acting solely on a specified transaction. The registered spouse's authority ends after the transaction is completed. If the registered spouse in pretended exercise of the permission granted acts in excess of and outside the reasonable scope of his or her special authorization, the third party will be unable to enforce the resultant agreement of sale, gift *inter vivos,* exchange, transfer, pledge, mortgage or lease of family land, which is registered in the name of one spouse.

[64] Where an act purporting to be done under a special or limited consent is challenged as being in excess of the authority conferred by the instrument, it is necessary to show that on a fair construction of the whole instrument the authority in question is

to be found within the four corners of the instrument, either in express terms or by necessary implication. The special or limited consent by way of the statutory declaration dated 27th November, 2019 did not expressly nor by necessary implication authorize the 1st respondent to use the title deed to secure additional loans in excess of the shs. 258,000,000/= in respect of which the applicant gave her special or limited consent. The implication would have been that any further unilateral borrowing by the 1st respondent would not be secured by that title deed. However, the additional borrowing of 13th December, 2019 in the sum of shs. 94,600,000/= was done jointly by the applicant and the 1st respondent. By doing so, the applicant by conduct waived the monetary restriction or cap she had placed on her special or limited consent. Consequently, the 1st respondent's mortgaging of the title deeds to the land comprised in Kyadondo, Block 204 Plot 289; Busiro Block 448, Plots 267 and 268 and Plot 2 Research road, at Lugonjo / Nakiwogo, Entebbe Municipality does not vitiate the consent judgment, since the former was with the consent of the applicant and the latter couple did not require her consent.

[65] The contention by the applicant concerning the validity of the mortgage and its discharge sound only in an action for foreclosure, which High Court Civil Suit No. 69 of 2022 is not. A loan may be secured or unsecured. Where it is secured, there are two agreements; the loan agreement and the collateral agreement. The mortgage is a subsequent separate collateral contract, the consideration for which is the entry into the loan agreement, which is the principal contract. What the 2nd respondent is enforcing is the principal contract and not the collateral one. A collateral contract is a separate contract altogether and is related to the principal contract only in the sense that the entry into the principal contract furnishes its consideration. Each of the two contracts has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract (see *Heilbut, Symons & Co. v. Buckleton [1913] A.C. 30 at 47*). The invalidity or imperfections of the collateral agreement do not affect the loan agreement (see *Strongman (1945) Ltd. v. Sincock, [1955] 2 Q.B. 525; [1955] 3 ALL. E.R. 90*). The applicant has not

presented any challenge to the principal contract, apart from stating that she should have been joined to it as a party.

[66] In any event, the applicant's matrimonial home is at peril not as a result of enforcement of the mortgage, but due to attachment and sale in execution of the consent judgment, which does not depend on the existence of a prior mortgage of the property in issue. Section 44 of *The Civil Procedure Act* prescribes the property which can and cannot be attached in execution. Several types of property are liable for attachment and sale in execution of a decree like lands, houses or other buildings, goods, money, banknotes, checks, bills of exchange, government securities, bonds or other securities etc., "and ……. all other saleable property, movable or immovable, belonging to the judgment debtor, or over which or the profits of which he or she has a disposing power which he or she may exercise for his or her own benefit, whether the property be held in the name of the judgment debtor or by another person in trust for him or her or on his or her behalf."

[67] In short, property liable to attachment and sale in execution of a decree is the "property belonging to the judgment debtor" or the property over which, or the profits of which, he or she "has disposing power which he or she may exercise for his or her own benefit." All land comprised in Kyadondo, Block 204 Plot 289; Busiro Block 448, Plots 267 and 268 and Plot 2 Research road, at Lugonjo / Nakiwogo, Entebbe Municipality is "property belonging to the judgment debtor" or property over which the 1st respondent "has disposing power which he may exercise for its own benefit." Section 44 (1) of *The Civil Procedure Act* does not exempt matrimonial homes or matrimonial property from attachment and sale in execution of decrees for the recovery of money, nor does it require the prior consent of the unregistered spouse for its disposal by judicial sale.

[68] Therefore, there is no legal basis for excluding from attachment or setting aside the sale of Kyadondo, Block 204 Plot 289; Busiro Block 448, Plots 267 and 268 and Plot 2 Research road, at Lugonjo / Nakiwogo, Entebbe Municipality in execution of the

consent decree, as sought by the applicant. Since the applicant has failed to establish any ground upon which the consent judgment may be reviewed and set aside, it is in the interest of justice that the consent judgment be maintained and upheld by this Court in order to bring finality and closure to litigation between the parties. Consequently, the application is dismissed with costs to the 2nd respondent.

Delivered electronically this 2nd day of January, 2024……...Stephen Mubiru……

Stephen Mubiru
Judge,
2nd January, 2024.

Appearances

For the applicant : M/s S. K. & Partners Advocates,

For the 2nd respondent : M/s Pearl Advocates & Solicitors.