

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO. 226 OF 1992
IN THE MATTER OF GUOSTAR ENTERPRISES (U) LTD

AND

IN THE MATTER OF THE LAND COMPRISED IN KYADONDO BLOCK 244
PLOT 2809
ARISING FROM AN EQUITABLE MORTGAGE

BETWEEN

GOLD TRUST BANK (U) LTD (Now DFCU BANK LTD) :::::::::::::::::::: PLAINTIFF

VERSUS

JOSEPHINE ZALWANGO NSIMBE, ADMINISTRATRIX

OF THE ESTATE OF SAM NSIMBE (Now Deceased) :::::::::::::::::::: DEFENDANT

BEFORE: THE HONOURABLE AG. JUDGE REMMY KASULE

JUDGMENT

This suit was originated in this Court by Originating Summons under Order 34 Rules 3A and 7 of the Civil Procedure Rules and also Under Section 2 of the Mortgage Decree, 1974.

At first the suit was brought by Gold Trust Bank (U) Ltd as the Plaintiff. In the course of time, after the institution of the suit, Gold Trust Bank (U) ceased business and its affairs were taken over by DFCU Bank Limited, who thus became plaintiff.

There has also been change of Defendant. The Original Defendant was Sam Nsimbe. He unfortunately died after institution of the Suit. The surviving widow, Josephine Zalwango Nsimbe, is now the administratrix of the deceased's estate and in that capacity she has become the Defendant to the Suit.

In the Suit, the plaintiff, claims to be a mortgagee, of the property comprised in Kyadondo Block 244 Plot 2809, land at Kisugu, Kyadondo, Kampala District. The said land is registered in the

names of Sam Nsimbe, now deceased, and was the original Defendant to the suit. The said Sam Nsimbe is alleged to have executed a power of attorney in favour of Guo Star Enterprises, who, in turn, mortgaged the property to the plaintiff.

The plaintiff applies by these Originating Summons for court to determine the following questions;-

- a) Whether the Mortgagor has failed to pay the loan monies; and
- b) Whether the plaintiff as the mortgagee of the property is entitled to foreclose and sale off the said property.

There are several affidavits filed in the Suit. Opio Anna, credit Manager of the plaintiff deponed to an affidavit dated 3rd March 1999, accompanying the Originating Summons.

Sam Nsimbe Tomusange, the original Defendant, deponed to an affidavit in reply to that of Opio Anna. The same is dated 7th July 2000.

Each of the affidavits filed in the suit has a number of annexures to it.

No other evidence was adduced in the case apart from these affidavits.

Counsel for both parties opted for written submissions.

Before going into the merits of this case it is necessary to say a word about three other court civil actions pending in this court, having a bearing to this suit.

The first of these is H.C.C.S No. 347 of 1997 at Kampala: Edward Kivumbi Mukasa V. Sam Nsimbe Tomusange. In this case judgment and Decree was entered, on 18th May 2000, against the Defendant (Sam Nsimbe Tomusange) in favour of one Edward Kivumbi Mukasa for various amounts of money. In execution of the Court Decree, the Judgment creditor applied to, and the court ordered, attachment and sale by public auction, of the suit property. The attachment is still pending.

The second Civil action is High Court Miscellaneous Application No. 1039 of 2004: Josephine Zalwango Nsimbe V. Edward Kivumbi Mukasa and DFCU Bank Ltd.

In this application the applicant, now Defendant in this suit, seeks a stay of execution of the Court Decree in C.S. No. 347 of 1997 until the final disposal of this suit i.e. 226 of 1992; on the ground that the DFCU Bank Ltd, is illegally holding the title of Kyadondo Block 244 Plot 2809 because the same was mortgaged to the Bank Contrary to the powers of Attorney granted to the Mortgagor. The holding of the title was depriving the applicant from raising money to satisfy the court decree in Civil Suit No. 347 of 1997. An interim Order to stay execution of the Decree in Civil Suit No. 347 of 1997, pending disposal of Civil Suit No. 226 of 1992 was granted to the applicant by this court on 15th December 2004.

The third and last of the court actions is H.C.C.S No. 1043B of 1997: Gold Trust Bank Ltd V. Guo Dong filed in the Commercial Division of the High Court, Kampala. The Plaintiff in this suit sues the Defendant as guarantor of a loan of shs.81,000,000/= advanced to Guo STAR Enterprises (U) Ltd by Gold Trust Bank Ltd, on 7th July 1997, which loan the borrower failed to pay. The suit property was the security tendered for repayment of this loan.

The determination of the two questions stated in the Originating Summons in Civil Suit No.226/1992 depends on resolving the issue of whether or not one Guo Dong was vested with powers by the power of Attorney, dated 13th May 1997 granted to him by Sam Nsimbe Tomusange, to tender to Gold Trust Bank Ltd as security, Kyadondo Block 244 Plot 2809, to guarantee repayment of a loan advanced to a company, Guo STAR Enterprises Limited.

By the said power of Attorney, Sam Nsimbe Tomusange, the donor, being Registered Proprietor of Kisugu Block 244 Plot 2809, appointed, Nominated, ordained and authorized, Mr. Duo Dong of Guo Star Enterprise, P.O.Box 4289 Kampala, to be his true and lawful attorney to execute the following:

- i) To take possession of the Certificate of Title of the stated land;

- ii) To pledge, mortgage or charge the said land to obtain a loan, overdraft, or any financial assistance whatsoever from any Bank or Financial Institution in Uganda.
- iii) To sign or execute all documents and deeds that may be necessary or expedient in obtaining the said loan
- iv) To do any acts that may be necessary in executing the objects of the given powers.

The power of Attorney was duly witnessed and registered with the Registrar of Documents on 14th May 1997.

On 30th July 1997, the donor revoked the same; because the Donee had tried and failed to obtain a loan/overdraft from any bank or financial institution in Uganda. The revocation was also registered with the Registrar of Documents.

A power of Attorney is an Instrument conferring authority of the principal to the agent where such authority is required to be conferred by a deed, or where, in any other circumstances, it is desired formally to appoint an agent to act for the principal in one transaction or a series of transactions, or to manage the affairs of the principal generally.

The person conferring the authority is the donor of the power, and the recipient of the authority, the donee.

A power of attorney is construed strictly by the courts according to well recognized rules of construction: See: Halsbury's Laws of England, Fourth Edition: Re issue: Volume 1(2) Butterworth's, paragraph 46.

In applying the strict construction regard is first had to the recitals in the power of Attorney which show the general object, and control the general terms in the operative part of the deed. General words are construed as limited by reference to the special powers conferred.

Incidental powers necessary for carrying out the authority will be implied: See **Midland Bank Limited V. Reckitt [1933] AC 1 at 16. The Privy Council in the case of BRYANT, POWIS, AND BRYANT LIMITED V. LA BANQUE DU PEUPLE [1893] A.C.170 at 177** expounded

the meaning of the phrase “Powers of Attorney are to be construed strictly.” Their Lordships of the Privy Council stated:-

“Nor was it disputed that powers of Attorney are to be construed strictly — that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, 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.”

In Jacobs V. Morris [1902] A.C.816, a case where a loan to an agent was made on the basis of a power of Attorney that did not confer powers to borrow, and the principal was held not liable for the same, their Lordships of the court of Appeal, England, expounded that there must be strict adherence to the authority conferred by a power of Attorney. If the agent in pretended exercise of his authority acts in excess of and outside the reasonable scope of his special powers, the third party will be unable to make the principal liable.

Bearing the above principles in mind, the court will proceed to examine the power of Attorney, the subject of this suit.

The subject matter of the power of Attorney is land comprised in Kisugu Plot 2809 Block 244, 0.10 Hectares.

The donor of the powers is Sam Nsimbe Tomusange of P.O. Box 125 Kampala; registered proprietor of the land.

The donee is an individual person by the name of Duo Dong whose address is of Guostar Enterprises of P.O. Box 4289 Kampala.

The specific powers given to the attorney are:-

- i) To take possession of the certificate of title of the land.

- ii) To pledge, mortgage or charge the land to obtain a loan, overdraft or any financial assistance whatsoever from any Bank or Financial institution in Uganda.
- iii) To sign or execute all documents and deeds that may be necessary or expedient in obtaining the said loan.
- iv) To do any acts that may be necessary in executing the objects of the powers.

The donor undertook to ratify and confirm all that the donee would lawfully do or cause to be done in execution of the powers given.

The powers would remain effective until expressly revoked by the donor in writing.

The main specific power of the powers of Attorney is the one of the donee pledging, mortgaging or charging the land as security to a Bank or Financial Institution in Uganda for the purpose of the donee obtaining a loan, overdraft or financial assistance.

There is nothing in the power of Attorney vesting the Attorney with powers to tender as security the land, the subject of the power of Attorney, to guarantee the repayment of a loan granted by the Bank to some other third party, other than the Attorney.

The undisputed evidence on record is to the effect that on the 7th July 1997 the donee tendered the certificate of title of the land to the plaintiff as security guaranteeing the plaintiff to a limited liability company, GUOSTAR Enterprises (U) Limited.

The said borrowing company failed to pay the loan and the plaintiff proceeded to dispose of the security land by way of sale of same to recover the loan money.

The defendant resists the sale of the land contending the power of Attorney donated to the donee never authorized the donee guaranteeing repayment of a loan taken by a third party from a bank.

Counsel for the plaintiff has contended that although the land was securing a borrowing by Guo Star Enterprises (U) Limited, Guo Dong, the donee of the power of Attorney, was responsible for the loan. He deposited the title on behalf of Guo Star and went further to execute a guarantee

undertaking to be liable for the full indebtedness of Guo Star. In the circumstances, counsel further submits, the corporate veil of Guo Star Enterprises Limited should be lifted to show that the plaintiff Bank was essentially dealing with the same person Guo Dong of Guo Star who opted to conduct his borrowing through Guo Star.

There are, with respect, serious flaws, in plaintiff Counsel's above submission.

The submission wrongly assumes that Guo Dong, the individual, is the same as Guo Star, an unregistered entity, and Guo Star Enterprises (Uganda) Limited, a company registered with limited liability, and thus a distinct legal entity.

The Defendant, as donor, donated specific powers of the use of his land as security only to the donee, Guo Dong, and only in respect of a loan or financial security advanced by a bank to Guo Dong, as an individual. It is Guo Dong, as an individual borrower, and beneficiary of the loan/financial facility that the Defendant trusted so as to give power regarding dealing with his land, and no one else.

If the Defendant intended that Guo Dong be able to use the land to guarantee repayment of other peoples' loans, the power of Attorney would have expressly stated so. It did not.

It is contended for the plaintiff that since the power of Attorney provided that:-

“ ----- Do Hereby appoint, nominate, ordain and authorize Mr. Guo Dong of GUO STAR Enterprises of P.O. Box 4289, Kampala, to be my true and lawful attorney -----“,

the Defendant must be taken to have known, and to have had it in mind, that Guo Dong was to borrow money through Guo Star Enterprises and not in his personal capacity.

This submission is not factually correct. There is no evidence that Guo Dong borrowed any moneys through the name and style of Guo Star Enterprises. The borrowing was by a distinct legal entity in the form of a Company with limited liability by the name of Guo Star Enterprises

(Uganda) Limited. Guo Dong together with one JING HONG guaranteed the repayment of this loan. There is no evidence that the Defendant was aware, let alone consented having his land used as security by way of guarantee to repay a loan taker by a third party over whom the Defendant, as donor of the power of Attorney, could not exercise any powers with regard to obligations to repay the said loan.

It is submitted by plaintiff's counsel, albeit without requisite evidence such as memorandum and Articles of Association, or any company Returns, that Guo Dong is a shareholder and Director of Guo Star Enterprises (U) Ltd; and that therefore the Defendant knew while granting's the power of Attorney that the loan would be advanced to Guo Star Enterprises (Uganda) Limited. In the considered view of this court this submission is not tenable. First, there is no evidence from which to conclude that the Defendant knew the loan was to be advanced to the company. The Defendant himself, in his affidavit in reply of 7th July 2000, paragraph 9 thereof, emphatically denies ever giving power to the company to use his title to borrow money or for any other purpose. Secondly, Guo Dong, the individual, is separate and different from Guo Star Enterprises (U) Ltd, the company.

The effect of registration of a company is that from the date of incorporation, evidenced by issuance of a certificate of incorporation, the members of the company form a body corporate by the name contained in the Memorandum, capable of exercising all the functions of an incorporate company, having perpetual succession and a common seal. An incorporated company is a legal person separate and distinct from its share holders. ***See: MACAURA V. Nothern Assurance Co. Ltd [1925] AC 619.*** The property of the company belongs to the company itself; and not to the individual shareholders or directors. Thus the company's debts are the obligations of the company alone and cannot be enforced against individual shareholders or directors. Likewise debts of individual shareholders/directors in their individual capacities cannot be automatically passed over to the company merely by virtue of one being a shareholder/director in the Company : ***See Underwood Ltd V. Bank of liver pool and Martins Ltd [1924] 1KB 775.***

For the above reasons, plaintiff Counsel's above submission cannot be accepted by Court.

Plaintiff's Counsel then makes another submission. In paragraph 1 of "Plaintiff's Reply to Defendant's submissions" dated 4th March 2005, Counsel invites the court to lift the corporate veil of Guo Star Enterprises (Uganda) Limited so as "to show that the plaintiff bank was essentially dealing with the same person Guo Dong of Guo Star who opted to conduct his borrowing through Guo Star."

Learned Counsel for the plaintiff does not explain whether in submitting as he does, the entity "**Guo Star**" means and is the same thing as "Guo Star Enterprises (Uganda) Limited."

In the considered view of the court the two cannot be one and the same thing.

"Guo Star" or "**Guostar Enterprises**" (which is mentioned in the Power of Attorney) may be the name and style of some unincorporated entity with no corporate status. The same however cannot be said of Guostar Enterprises (Uganda) Limited, a company duly incorporated with limited liability and with corporate status.

While the lifting of the corporate veil would apply in case of Guostar Enterprises (Uganda) Limited, a corporate body, it cannot apply in cases of "Guo Star" or "Guo Star Enterprises" which are unincorporated entities.

Lifting the veil is to disregard the corporate entity of the company and go to the individual members owning the company, or in case of a controlling company, to the individual companies under the controlling company.

Courts will lift the veil if a corporate personality is being used as a cloak for fraud or improper conduct, where agency can be established to ascertain whether the acts of agents have been ratified, in criminal or quasi-criminal cases, where the acts are contrary to public policy or where in the circumstances it is necessary to lift the Corporate veil.

The court finds that the circumstances of this case do not warrant that the veil be lifted. It is not denied that the loan was given to a limited liability company, Guostar Enterprises (Uganda)

Limited. The power of attorney is clear in its language and description as to who the donee of the same is. There is no instance of fraud, deceit, Criminality or being against public policy against the donor of the power of Attorney. There is no evidence that the Defendant in any way used incorporation of Guostar Enterprises (Uganda) Limited as a cloak for fraud, criminality or against public policy. See: **SALIM JAMAL & TWO OTHERS V Uganda Oxygen Ltd & 2 others** : [1997] II KALR 38, and also **H.M.B KAYONDO V. SOMANI AMIRALI** [1995] IV KALR 78 as well as **NEC and 2 others V NILE BANK Ltd.** [1995] 1 KALR 138.

The court thus finds no basis for lifting the corporate veil of Guostar Enterprises (Uganda) Limited for the purpose of making the Defendant liable for what he did not expressly or implied by authorize in the power of attorney.

One of the issues the court is asked to determine by these originating summons is whether the Mortgagor has failed to pay the loan monies. The mortgagor is Guostar Enterprises (Uganda) Limited.

In order to resolve the above issue it is necessary to examine the evidence availed to court as regards the loan said to have been advanced by the plaintiff to Guostar Enterprises (Uganda) Limited in respect of which loan the Defendant's land is purported to have been mortgaged.

According to the affidavit of Opio Anna, credit manager, of the plaintiff, dated 3rd March 1999, and the statement of account showing the transactions of the loan annexure "D" to the said affidavit, a sum of shs. 252, 000,000/= was credited to the debtor's i.e. Guo Star Enterprises, account with the plaintiff by UCB inward cheque No. 832635 on 16th July 1997.

However the said same amount was debited from the same account by way of return of the same cheque in the same amount on 17th July 1997. On the face of it therefore no loan money was ever passed over to the borrower because what was credited on 16th July 1997 was debited from the same account on 17th July 1997. The plaintiff has not given any explanation to throw light on this transaction.

A memorandum of deposit of title by the borrower, Guo star Enterprises (Uganda) Limited, of P.O. Box 4289 Kampala, to the plaintiff bank is stated to have been executed on 7th July 1997. The same is annexure “B” to the affidavit of Opio Anna.

The Memorandum is “signed, sealed and Delivered by the said Guo Dong and Jing Hong in the presence of Guostar Ent. (U) Ltd.”

If it is taken that Guo Dong and Jing Hong signed, sealed and delivered the Memorandum for and on behalf of Guo Star Enterprises (Uganda) Limited, then it is the same company that also witnessed its execution of the Memorandum because the space on the memorandum for the advocate to witness the execution is blank.

There is also nothing in the Memorandum of Deposit to show that what was deposited to the plaintiff Bank was the Defendant’s land title comprised in Kyadondo Block 244 Plot 2809, land at Kisugu. The space where such particulars should be filled up in the Memorandum is blank and empty.

The said “Memorandum of Deposit” on its page 2, first paragraph, third sentence states;

“And I/we hereby declare that the document now deposited is all that is in my possession or control relating to the property or properties mentioned in the schedule here under and that I am/we are the owner(s) of the property or properties which is/are not charged or encumbered in any way whatsoever.”

The above quoted part of the Memorandum of Deposit is false in two significant aspects. First, as already pointed out, there was no property mentioned in the schedule to the Memorandum of Deposit. Second, Guostar Enterprises (Uganda) Limited either through the power of Attorney or otherwise, never owned the Defendant’s land, which the plaintiff Bank claims to have been the subject of the “Memorandum of Deposit.”

On the same day of 7th July 1997, Guo Dong and Jing Hong executed a guarantee to the plaintiff bank the payment and satisfaction of any loan money not exceeding Shs. 250,000,000/= that may

be loaned to Guostar Enterprises (Uganda) Limited. This guarantee does not in any way refer to the suit land of the Defendant being used as security for the guarantee. Indeed the guarantee states on its page one paragraph five, that:-

“This Guarantee is to be in addition and without prejudice to any other securities or guarantees which you may now or hereafter hold from or on account of the Debtor -----“

The court deduces from the above that the quaranteeing of the loan repayment by Guo Dong and Jing Hong was a decision taken by the two, independent of a consideration that the Defendant’s land was to be used as security for the quarantee. Were it to be otherwise, the guarantee document would have stated so.

It has been further submitted for the Defendant that the plaintiff cannot rely on the Memorandum of deposit of title and the Guarantee because the two documents were not registered under the stamps Act, cap 342.

To this submission counsel for the plaintiff has submitted to court a copy of the guarantee duly stamped under the stamps Act, cap. 342. He has also counter argued that failure to stamp a document is not fatal as the document can be stamped any time, depending on the directions of the court.

The court is satisfied that stamp duty was paid in respect of the guarantee. As regards the Memorandum of deposit of title deed, the same, is part and parcel of the alleged contract of guarantee consisting of two documents: the memorandum of deposit of title and the Guarantee. To the extent that the two documents constitute the same contract, the law deems the guarantee contract to be duly stamped: See section 42 (c) Stamps Act, cap. 342.

The court thus accepts the Memorandum on deposit of title and the guarantee as proper documentary evidence.

Counsel for the Defendant has contended that the power of Attorney had already been revoked by the time the plaintiff bank received the title of land as security. Counsel bases this argument on the fact that the deed of revocation of the powers of Attorney was executed on 30th July, 1997, lodged and registered with the Registrar of Documents on the 30th October, 1997, under Instrument No. X 167965. The plaintiff bank registered the caveat on the title on the 5th November 1997, Under Instrument Number 192056 after the deed of revocation had already been registered.

From the evidence on record (paragraph 2 of Opio Anna's affidavit of 3rd March, 1999) which is not controverted, the certificate of title of the Defendant's land was deposited as security with the plaintiff bank on 7th July 1997. By this date the power of Attorney had not yet been revoked. The caveat by way of mortgage on the land title was registered on the 5th November, 1997, after the deed of revocation had been registered on the 30th October, 1997. Section 54 of the Registration of Titles Act, Cap 230 provides, in as much as it is relevant to this case, that:-

“No instrument until registered in the manner herein provided shall be effectual to pass any estate or interest in any land ----- - or to render the land liable to any mortgage; but upon such registration the estate or interest comprised in the instrument shall pass or ----- the land shall become liable in the manner and subject to the covenants and conditions set forth and specified in the instrument -----“.

Section 146 of the Registration of Titles Act requires every power of Attorney, like the one in this suit, to be registered in accordance with the Registration of Documents Act, and once so registered the same is presumed to be in force at the time of its registration unless its revocation has been previously registered under that Act.

It follows from the above provisions of the law that as between the plaintiff bank and the Defendant, by the time the purported mortgage was registered by way of caveat on 5th November 1997, so as to affect the interest of the Defendant in the suit land, the power of Attorney, upon which the mortgage was based had already been revoked on 30th October 1997. The Defendant was no longer under obligation to be bound by the Attorney.

The court is now in a position to answer the two questions of these Originating Summons.

As to the question whether the mortgagor has failed to pay the loan monies, this Court leaves this issue to be resolved in H.C.C. S. No. 1043 B of 1997: Gold Trust Bank Ltd V. Guo Dong, now pending for resolution in the Commercial Division of this court; and/or in some other suit in which the mortgagor is a party to the suit. The Mortgagor is not a party to this suit and therefore this court cannot determine any issue concerning him.

For reasons already stated, the finding of this court is that at the material time and given the powers stipulated in the power of Attorney, no mortgage could have been created with the Defendant's suit land as security on the basis of the said power of Attorney executed by the Defendant in favour of one Guo Dong.

The second question of whether the plaintiff bank as the mortgagee of the property is entitled to foreclose and sell off the Defendant's land, the answer is that this court finds that the power of Attorney never authorized Guo Dong to use the Defendant's land as security to guarantee a loan to a third party. The plaintiff ought to have found out this from the deed of the power of Attorney itself.

Thus this court holds that no valid mortgage was ever created with the Defendant's land as security on the basis of the said power of Attorney between the plaintiff and Guostar Enterprises (Uganda) Limited.

Further, but independent of the above, the court holds that, at any rate, by the time the mortgage was registered by way of caveat so as to affect the interests of the Defendant in the suit land, the power of Attorney had already been revoked, and the revocation duly registered, thus fixing the plaintiff with notice of the revocation.

The plaintiff is thus not a legitimate mortgagee of the property and as such is not entitled to foreclose and sale off the said property.

The end result of the holdings of this court is that the plaintiff has no legitimate right to have possession of the defendant's title to the land comprised in Kyadondo Block 244 Plot 2809. This court orders that he relinquishes the same to the Defendant free of any encumbrances by him (plaintiff) on the basis of the alleged mortgage.

This suit is decided in favour of the Defendant against the plaintiff.

The defendant is to have the costs of the suit payable by the plaintiff.

Before taking leave of this case the court wishes to express its concern at the most casual, unprofessional and careless way the predecessor to the plaintiff, prepared, interpreted, handled and treated the legal documents concerning this transaction.

Hardly any attention was paid to the power of Attorney as to what powers the donor vested into the donee; and whether the same were still operative or revoked.

The Memorandum of Deposit and the guarantee documents seem to have been drafted and executed in such a careless and casual way as if they were of no importance at all; and as if they were not affecting and affixing responsibilities to anyone.

The court hopes that higher professional standards from financial institutions will be exhibited in the future in this regard.

Remmy Kasule

Ag. Judge

9th December 2005