

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE**

HCT-04-CV-CS-0038-2009

**FLORENCE MUDUWAPLAINTIFF
VERSUS**

- 1. CHARLES WANIALA**
- 2. THE LIQUIDATOR CO-OP BANK LTD.....DEFENDANTS**

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

The Plaintiff sued the defendants jointly and severally (under paragraph 4 of the plaint) for;

- a) A declaration that the mortgages created in favour of the second Defendant on the land comprised in RV 2133 Folio 19 Block 2 plot 77 land situate at Nakaloke Mbale amount to fraud.
- b) A declaration that the purported mortgage Deed executed on 28th August 1997 is illegal and/or ineffectual.
- c) A declaration that the intended realization of the mortgage by auction/sale of the suit property without recourse to court is illegal and in breach of the law.
- d) An order of removal of the caveat lodged by the 2nd Defendant on the Certificate of Title of the suit property.
- e) An order of removal of the mortgage lodged by the 2nd Defendant on the Certificate of Title of the suit property.
- f) An order that the 2nd Defendant delivers to the plaintiff the Certificate of Title of the suit property devoid of any encumbrance.
- g) A permanent injunction restraining the defendant, its agents, servants and/or persons deriving title or authority from them from interfering with, auctioning, selling, managing etc taking possession or dealing with the suit property.
- h) Damages
- i) Costs

1st Defendant did not file a defence. The 2nd defendants on the other hand denied the contents of paragraph 4 of the plaint above and put the entire claim in issue.

The parties then filed a joint memorandum of scheduling where they agreed as follows:

Agreed facts:

1. The Plaintiff had at all material times been the Registered proprietor of land comprised at LRV 2133 Folio 19 Block 2 Plot 77 at Nakaloke- Mbale (suit property).
2. The plaintiff executed a power of Attorney on 17th June 1995 in favour of the 1st Defendant, among others authorizing him to borrow from the 2nd Defendant and handed over her Certificate of Title to facilitate the process.
3. The 2nd Defendant in 2000 lodged a caveat to protect its equitable interest in the suit property.
4. The 2nd Defendant in 2009 registered a mortgage dated 28th August 1997 on Plaintiff's Title vide Instrument No 416348.
5. The 2nd Defendant, through its agents sold the suit property to a one **Galiwango Zubair**.

Issues:

1. Whether the plaintiff created a mortgage over the suit property in favour of the 2nd Defendant.
2. Whether the sale of the suit property by the 2nd Defendant was lawful.
3. Remedies/Reliefs available to parties.

With the agreed documents and witnesses, court heard evidence from **PW.1- Muduwa BACA**.

PW.2 Apollo Mutheserwa Mutalirwa and through those witnesses 12 sets of exhibits were admitted for the plaintiff.

The 2nd Defendant, did not appear to defend the matter and court proceeded under Order 16 r.4 of the Civil Procedure Rules to consider evidence on record and determine the suit immediately.

Given the evidence which was adduced by the plaintiff through PW.1, PW.2, and exhibits PE.1-PE.12, there was sufficient evidence placed before this court to prove on a balance of probability that:

1. The mortgages created in favour of second defendant on the land comprised in LRV 2133 Folio 19 Block 2 Plot 77 Nakaloke Mbale amounted to fraud. Evidence in proof of this was led through PW.1-PW.2 and evidence contained in Ex.11 and Ex.12.

There was evidence to prove further that the purported mortgage Deed executed on 28th August 1997 is illegal.

Evidence further showed that the plaintiff never authorized the execution of the mortgage and hence other dealings on her Title by defendants was fraudulent and illegal.

The plaintiff has shown by evidence in court that she executed a power of Attorney in favour of the 1st Defendant to enable him borrow money on her behalf and she handed to him her Certificate of Title to facilitate the process. She did not receive any money from the defendant but defendants fraudulently mortgaged her land and disposed it off illegally.

Sections 101, 102, 103, 104 of Evidence Act lists the different provisions on burden of proof in civil matters as squarely falling on *'the one who asserts a fact, must prove it.*

On record the Plaintiff has by the amended plaint made assertions which she has gone ahead to prove by calling evidence as above. On the other hand D.1 did not file a defence and did not attend court, D.2 filed a Written Statement of Defence but did not offer any evidence in support or proof.

Having assessed all evidence therefore, on the balance of probability I find that the Plaintiff has proved her case as against the defendants. I therefore find that on the issues framed;

1. Plaintiff never created the alleged mortgage in favour of the defendant 2.
2. The sale of plaintiff's suit property was unlawful.
3. The Plaintiff is entitled to all the reliefs sought in the plaint.

I therefore find that the Plaintiff's claim succeeds against both defendants. This Court enters Judgment for the Plaintiff against both defendants; in terms as prayed for in the plaint. Plaintiff is also awarded taxed costs of this suit against the defendants.

Compensation:

On the issue of compensation court will not award the same since no evaluation was done to guide court.

Loss of Income

PW.1 in evidence informed Court that she earned 8 million per year from the proceeds of the Orange Mast and Rent of about 2,000,000/= (two millions) per month- hence 24 million per year. These amounts were proved in court. I will therefore allow the Plaintiff to recover the same basing on evidence on record. I therefore award her Shs. 32 millions in lost income from date of the suit to date of judgment.

I will also grant shs. 1,000,000/= as punitive damages. I will allow the Plaintiff a further 1 million shillings (1,000,000/=) as general damages for pain and suffering.

The amounts in (i) and (j) will carry interest at court rate, from date of judgment to payment in full.

I so order.

Henry I. Kawesa

JUDGE

14.02.2017