

15 **BANK OF BARODA (UGANDA) LTD.:..... DEFENDANT**
BEFORE: HON MR. JISTICE BASHAIJA K. ANDREW

JUDGMENT.

20 suit against Bank of Baroda (U) Ltd (*hereinafter referred to as the “defendant”*) seeking a
declaration that the mortgage registered in favour of the defendant on the land comprised in LRV
2705 Folio 6, Plot No. 40 Bungokho Road, Mbale (*herein referred to as “the suit property”*) is
illegal, null and void for fraud and illegality; a declaration that the guardianship order issued to
the 2nd plaintiff in respect of the 1st and 3rd plaintiffs’ rights as registered proprietors of the suit
25 property was contravened by the defendant, a permanent injunction restraining the defendant
from selling the suit property, general damages, and costs of the suit.

Background:

30 proprietors of the suit land. The defendant bank advanced a credit facility of Shs. 200,000,000/= to M/s. Era Shine Ltd., which was secured by a mortgage deed over the suit property. The 2nd

plaintiff obtained a Guardianship Order from the High Court authorizing her to mortgage the suit property for the benefit of the 1st and 3rd plaintiffs, who were then both infants. M/s. Era Shine Ltd. defaulted on the repayment of the said overdraft facility and the defendant commenced
35 foreclosure process on the suit property.

The plaintiffs contend that the loan monies; the subject of the mortgage, were not disbursed or applied as agreed between the plaintiffs and defendant. Further, that the attempt by the defendant to foreclose is illegal and contrary to the spirit and letter of the agreement of the parties and to the detriment of the plaintiffs, hence this suit seeking the declarations and orders stated above.

40 The parties and their counsel jointly agreed on the following issues for determination;

1. *Whether the plaintiffs have a cause of action against the defendant.*
2. *Whether the mortgage registered on the suit land by the defendant is illegal.*
3. *Whether the guardianship order issued to the 2nd plaintiffs in respect to the suit property was contravened by the defendant.*
- 45 4. *Whether the plaintiffs are entitled to the remedies prayed for.*

Resolution of the issues:

Issue No. 1: Whether the plaintiffs have a cause of action against the defendant.

It is settled law that in determining whether or not a plaint discloses a cause of action, the court must look only at the plaint and its annexures if any, and nowhere else. See: *Kapeeka Coffee Works Ltd & Another vs. NPART CACA No.3 of 2000; Mulindwa Birimumaso vs. Government Central Purchasing Corporation CACA No.3 of 2002.*
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To establish a cause of action, the plaintiff must demonstrate in his or her pleadings that he or she suffered a legal grievance, and that the defendant is liable. In the now *locus classicus* case of *Auto Garage vs. Motokov [1971] EA 514*, it was held, inter alia, that if a plaint shows that the

55 plaintiff enjoyed a right, the right has been violated, and the defendant is liable; then a cause of action is duly established.

The reading of the plaint in the instant case, in paragraph 6(a), (b) & (c), shows that the plaintiffs clearly disclose their right as registered proprietors of the suit property. Further, in paragraph 6 (e) (f) and (g), the plaintiffs' averments are to the effect that their right was violated when the
60 proceeds from the overdraft facility were misapplied/misused by M/s. Era Shine Ltd., under the watchful eye of the defendant. The plaintiffs contend that this prejudiced their rights to suit property which apparently is now threatened attachment and sale arising from the foreclosure following the default by M/s. Era Shine Ltd.

Clearly, the plaintiffs' cause of action which is premised on the tort of fraud is duly pleaded and
65 particularized as against the defendant in the plaint. The plaintiffs invariably aver that the defendant is liable for violating the terms of the Guardianship Order and for the fraudulent transactions arising from the proceeds of the overdraft. Given the applicable law and the facts as pleaded in the plaint, the plaintiffs have satisfactorily demonstrated sufficient material to disclose a cause of action against the defendant. *Issue No. 1* is answered in the affirmative.

70 ***Issue No.2: Whether the mortgage registered on the suit property by the defendant is legal.***

It is noted that at the time the mortgage deed, *Exhibit P5*, was executed and created over the suit property, the 1st and 3rd plaintiffs were minors. The explicit content of the mortgage deed, particularly at page 1 thereof, describes the 1st and 3rd plaintiffs as minors then all registered proprietors of the suit property. They were collectively referred to as "sureties". Further, in
75 clause 6 of the mortgage deed, the contractual duties of the sureties including the minors are duly prescribed. The deed further provides that a receiver so appointed shall be the agent of the sureties and the sureties alone shall be liable for his acts, defaults, and remuneration. Clause 8

(supra) also provides that the sureties irrevocably appointed the bank or any receiver as their agents.

80 The implication is that the stated contractual provisions in the deed would effectively bind all sureties including the 1st and 3rd plaintiffs who were minors. Under section 11(1) (a) of the Contract Act 2010, however, a person has no capacity to contract unless that person is eighteen years or above. That invariably means that in the instant case where the mortgage deed purports to have been entered into with minors is illegal and void *ab initio*.

85 In addition, section 2 of the Mortgage Act, 2009, defines a surety as a person who offers security in the form of money or money's worth to ensure the payment of any monies secured by mortgage and includes a guarantor. Also, Black's Law Dictionary 8th Edition defines a surety as a person who is primarily liable for paying another's debt or performing another's obligation. Therefore, in the instant case, by the defendant creating contractual obligations of suretyship for
90 the 1st and 3rd plaintiffs well aware that they were minors contravened the law.

The Guardianship Order which was the essence of the deed only authorized the 2nd plaintiff to mortgage the suit property. It nevertheless did not to bind the minors as sureties who had no legal capacity to enter into contractual obligations. Accordingly, the mortgage deed intrinsically exceeded the terms of the Guardianship Order; which rendered the deed null and void. Such a
95 deed cannot be enforced by any court of law as no lawful obligations can flow from it. No court of law can lend itself to illegalities.

Apart from the foregone, the mortgage deed is also illegal for want of proper execution by the defendant. A closer scrutiny of the mortgage deed easily reveals that it also passes as a loan agreement. At page 1 thereof, it is stipulated that the mortgage deed is made between the
100 registered propitiators of the suit property on the first part; M/s. Era Shine Ltd., on the second

part and the defendant of the third part. It bears obligation of the bank such as to grant an overdraft of Shs. 200,000,000/= sanctioned for working capital for business of M/s. Era Shine Ltd. Further, at page 22 of thereof, whereas the 1st and 2nd parties signed mortgage deed, the bank did not sign it. That was a legally fatal irregularity as far as the authenticity of the mortgage deed
105 is concerned which also rendered it invalid.

Section 3 (1) of the Mortgage Act (supra) provides that a person may by any instrument in the prescribed form, mortgage his interest in land to secure a debt. Under the 2nd Schedule of the Mortgage Regulation, 2012, the prescribed form requires the signatures of both the mortgagor and the mortgagee and for their respective witnesses. The failure to sign is a fatal defect. This
110 position was reaffirmed in the case of ***Diana Nansikombi Bbosa vs. Stanbic Bank (U) Ltd., HCCS No. 406 of 2014*** and also in the case of ***Alice Okiror & A'nor vs. Global Capital Save, 2004 Ltd.*** In both cases the court held that where a mortgage deed doubles as a loan agreement, both parties to it need to properly executed it to make it valid, and that the signature of the mortgagee is necessary.

115 As applicable to the facts of then instant case, the failure to sign by the defendant rendered the mortgage invalid. Therefore, the defendant bank cannot derive any powers from an invalid mortgage to sell the suit property.

Issue No. 3: Whether the Guardianship Order issued to the plaintiff in respect to the suit land was contravened by the defendant.

120 The terms of the Guardianship Order clearly authorized the 2nd plaintiff to mortgage the suit land on behalf of and for the benefit of the minors. The proceeds from the loan were to enhance the family business in order to raise money to continue maintaining the minors who were still studying. From the evidence of the plaintiffs, there are clear instances of contravention of the

Guardianship Order. One such instance is that whereas the mortgage deed provided, in recital 3
125 at page 3 thereof, that the overdraft facility of Shs. 200,000,000/= was to be sanctioned for
working capital for the business, uncontroverted evidence adduced in *Exhibit P7*, the bank
statement of M/s. Era Shine Ltd, shows that on the contrary and without informing the plaintiffs,
a sum of Shs.30,00,000/- was utilized by the defendant to pay an outstanding loan for Dominic
Waburoko; and another Shs. 50,000,000/- was paid to the same person for his use.

130 The other instance is that whereas M/s. Era Shine Ltd is described as a shoe manufacturing
business, the unchallenged evidence of PW1 is that all the disclosed money totaling to Shs.80,
000,000/- was never used for that particular business. It was misapplied by paying the said
Dominic Waburoko for his own use.

There is also evidence of other withdrawals in the names of Lawoko James and other employees
135 of a clinic who were all paid on 30th and 31st August 2013 respectively. These were payments
made out that were not denied by the defendant. It is premised on these particular withdrawals
that the plaintiffs pleaded and proved the alleged fraud against the defendant. Indeed, despite
having had actual notice and being acutely alive as to the terms of the Guardianship Order, the
defendant, nevertheless, went ahead and honored the withdrawals and disbursements.

140 It is therefore in no doubt that the actions of the defendant amounted in law to fraud. The term
“fraud” was given judicial interpretation in *Kampala Bottlers Ltd vs. Damanico (U) Ltd, SCCA
No.22 of 1992*. Citing the case of *Waimiha Saw Milling Co. Ltd vs. Waione Timber Co. Ltd
(1926) AC 101* at page.106, the Supreme Court held that it is a well-established law that fraud
means actual fraud or some act of dishonesty.

145 Similarly in the instant case, not only was it dishonest of the defendant to blatantly misapply the monies otherwise intended for the use of a shoe business, it was also a breach of the defendant's fiduciary duty to the plaintiffs as a banking institution.

Black's Law Dictionary, 9th Edition, at page 1402, defines a fiduciary relationship to mean one in which one person is under a duty to act for the benefit of another on matters within the scope of
150 the relationship. In the instant case PW2 testified that he defendant's manager approached her at her home and managed to convince her to sign the mortgage deed. The manager claimed to have had a prior visit to M/s. Era Shine Ltd and assessed its business as good and capable of repaying the loan once contracted. Acting on the basis and in trust of the defendant's manager's word, the 2nd plaintiff duly signed the mortgage deed; thus creating a fiduciary relationship with the
155 defendant bank.

In ***Fredrick Zaabwe vs. Orient Bank, SCCA No.4 of 2006***, the Supreme Court held that where a bank has been put on clear notice that the property to be used as security for a loan did not belong to the borrower, a fiduciary relationship existed between the bank and the owner of the property which required the bank to make full disclosure in so far as the loan is concerned failure
160 of which it would amount to fraud.

In the instant case, evidence shows that the 2nd plaintiff was a wife to Dr. Dominic Waburoko. The two had at the time of executing the deed separated. The 2nd plaintiff was in need of a source of income to pay school fees for the six children whom she was single handedly taking care of after the separation. Evidence also shows that the defendant had earlier on advanced a loan to Dr.
165 Dominic Waburoko which he had not fully discharged. This crucial fact was never disclosed to the plaintiffs prior to execution of the deed. Clearly, the defendant intentionally kept this vital information, which was well within their knowledge, from the plaintiffs in order cause the

plaintiffs to mortgage their property for an overdraft to M/s. Era Shine Ltd. The pretext that the defendant would advance working capital to M/s. Era Shine Ltd was a clear scheme to defraud
170 the plaintiffs of their property. As it turned out, the proceeds were largely retained by the defendant bank and applied only to clear an existing indebtedness of Dr. Waburoko.

This was without doubt a breach of the defendant's fiduciary duty to the plaintiffs. It amounted to nothing short of fraud. As was held in the ***Fredrick Zaabwe vs. Orient Bank*** (supra) fraud is an intentional perversion of the truth for the purpose of inducing another in reliance upon it to
175 part with some valuable thing belonging to him or to surrender a legal right. Similarly, what the defendant did in this case amounted to actual fraud. The overdraft facility was to be utilized to pay Dr. Waburoko's indebtedness. If all the facts within the knowledge of the defendant had been disclosed to the 2nd plaintiff, she would certainly never have pledged the suit property which is also a residential home in which the family resides as security to the defendant. No
180 doubt the 2nd plaintiff was unduly influenced by the defendant's bank manager to enter into the now botched transaction.

Issue No. 4: Whether the plaintiffs are entitled to the remedies prayed for.

In the case of ***Lloyds Bank Ltd vs. Bundy [1974] 3 ER 737*** Lord Denning MR held that;

185 ***“English Law gives relief to one, who without independent advice into a contract upon terms that are unfair, or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired because of his needs or desires or his ignorance or infirmity, coupled with undue influence or pressures brought to bear on him or for the benefit of the other”.***

In that case the court held that where a bank has a conflict of interest with its customer and a
190 third party who mortgages his property, it gives rise to a fiduciary relationship where the bank

has a duty to advise the owner of the property about the implication of mortgaging it. Failure to discharge this duty, the bank would not be able to obtain any advantage from it.

As applicable to facts of the instant case, the defendant had loaned money to Dr. Dominic Waburoko who defaulted on payment. The bank had an interest to have that loan paid off.

195 Through thrift means they created another loan for that purpose but secured it with the suit property owned by the plaintiffs who were not part of M/s. Era Shine Ltd. The defendant's manager deliberately did not disclose the defendant's interests and hence got the 2nd plaintiff to execute the mortgage deed through cunning, dissembling and dishonest means. With that in mind, the defendant grievously offended the terms of the Guardianship Order for which they
200 must bear the sole responsibility.

The plaintiffs also prayed for a declaration that the mortgage deed is null and void. Having found as above, it is declared that the mortgage registered on land comprised in LRV 2705, Folio 6 Plot No. 40 Bungokho Road, Mbale District is null and void.

A consequential order doth issue directing the defendant to immediately release the duplicate
205 certificate of title it holds in respect of the illegal transaction to the plaintiffs free of any incumbrances.

A permanent injunction doth issue restraining the defendant from selling the suit property or at all enforcing the illegal contractual terms of suretyship.

The plaintiffs also prayed for general damages in the sum of 100,000,000/=. The position of the
210 law is that general damages are in the discretion of the court but are always as the law will presume to be the natural and probable consequences of the loss or injury occasioned.

The Court of Appeal in *Takiya Kashwahiri & A'nor vs. Kajungu Denis, CACA No. 85 of 2011*, held that general damages should be compensatory in nature in that they should restore some

satisfaction, as far as money can do it, to the injured plaintiff. The plaintiff should, however, lead
215 evidence as to what damage he or she suffered at the instance of the defendant.

In the instant case, however, there is little or no evidence of the plaintiffs for this court to base
upon to grant general damages. Court is reluctant to award the same for want of cogent evidence
as the basis for the same.

The plaintiffs also prayed for the award of costs. Section 27(2) CPA provides that costs are in the
220 discretion of the court but shall follow the event unless for good reasons court directs otherwise.
Having found that the plaintiffs are successful parties, they are awarded costs of this case.

225 ***BASHAIJA K. ANDREW***
JUDGE
02/05/2017

Mr. Lukwago Aubruy holding brief for Mr. Kaggwa David Counsel for the plaintiffs present.

Mr. Muhangi Noel Counsel for the defendant present.

Parties absent.

230 Mr. Godfrey Tumwikirize Court Clerk present.

Court: Judgment read in open Court.

235 ***BASHAIJA K. ANDREW***
JUDGE
02/05/2017