

IN THE SUPREME COURT OF UGANDA

AT MENGO

**Coram: Odoki C.J., Tsekooko, Karokora, Mulenga, and Katurebe
JJ.S.C.**

CIVIL APPEAL NO.9 OF 2005

BETWEEN

1. **GENERAL PARTS (U) LTD.**
2. **HARUNA SEMAKULA :::::::::::::::::::::::::::::::::::APPELLANTS**

AND

NON-PERFORMING ASSETS RECOVERY TRUST:::::::::RESPONDENT

*[Appeal from the judgment of the Court of Appeal (Okello, Mpagi-
Bahigeine & Byamugisha JJ.A) in Civil Appeal No.49/04 dated 19th
August 2005]*

JUDGMENT OF MULENGA JSC.

This appeal originates from a suit instituted in the Non-Performing Assets Recovery Tribunal, hereinafter referred to as “the Tribunal”, by the above-named respondent. The respondent sued as an assignee of a non performing asset in form of a debt of shs.2, 288,821,473/- that the 1st appellant above-named owed to Uganda Commercial Bank, hereinafter referred to as “UCB”. It claimed that the debt was secured by, *inter alia*, equitable mortgages over the appellants’ plots of land hereinafter collectively referred to as “the mortgaged property”, and moved the Tribunal to grant orders against the appellants as mortgagees, (a) to foreclose their right to redeem; and (b) to sell the

mortgaged property to realize the debt. The Tribunal granted the orders. The appellants' appeal to the court of Appeal was dismissed. Hence this second appeal.

The following background facts are not in dispute. In the late 1980's the 1st appellant maintained a bank account with UCB on which it had overdraft facilities secured by a floating debenture over its assets. In 1991 it agreed with UCB to convert part of the outstanding balance on the overdraft into a short-term loan and to reschedule its repayment on condition that it provided, as further security, a legal mortgage of the mortgaged property. Only some of the property belong to the 1st appellant, but most of the land belongs to the 2nd appellant, who is Managing Director of the 1st appellant. The title certificates of the mortgaged property were accordingly surrendered to UCB. The 1st appellant and UCB executed a mortgage instrument, which was then registered in the land registry and entered on the titles as a legal mortgage. Subsequently, however, in a litigation that started earlier, to which I will refer presently, this Court observed that the mortgage was not enforceable as a legal mortgage.

I should mention at this stage that prior to the application that is the subject of this appeal, two unsuccessful attempts to recover the debt led to two distinct litigations, which feature in this appeal so prominently, that I have to briefly describe them first. The first attempt was initiated by UCB on 21st July 1992, when, upon the 1st appellant's default, it appointed a Receiver/Manager, to take possession of the 1st appellant's assets and recover there from, and if necessary from the sale of the

mortgaged property, all the outstanding debt. The appellants, however, prevented the Receiver/Manager from taking possession. That prompted UCB to sue the 1st appellant in High Court Civil Suit No. 386 of 1993, for a declaration that the Receiver/Manager was properly appointed and should execute the mandate to recover the debt by the sale of the assets and the mortgaged property. Later, after being assigned the debt as “a non-performing asset” the respondent joined in the suit as co-plaintiff. In the ensuing appeals, however, it was the sole respondent. The suit was ultimately concluded in Civil Appeal No.5 of 1999, in which this Court held, on 2nd March 2000, that the appointment of the Receiver/Manager was improper because it did not conform to the terms of the debenture. In the same judgment (as modified on review in a ruling dated 18th October 2000), this Court observed that the mortgage instrument was not proved to have been validly executed. Thus the first attempt to recover the debt failed.

After the judgment of this Court, the respondent made a second attempt when, through agents, it advertised the mortgaged property for sale. That precipitated High Court Civil Suit No.1470 of 2000 whereby the appellants sued the Trust Administrator, an employee of the respondent, jointly with the two sale agents. The appellants claimed that the attempt to sell the mortgaged property was illegal and in bad faith. On 28th October 2000, Okumu-Wengi J. entered judgment for the appellants holding that as the sale was not authorized by a legal mortgage, the instruction of the 1st defendant to the co-defendants to sell the property was improper. The Trust Administrator appealed to the Court of Appeal in

Civil Appeal No. 29 of 2003, but withdrew it five years later, on 18th May 2005. The second attempt thus came to naught. Meanwhile, the respondent had initiated the third attempt on 25th February 2003 when it applied to the Tribunal for foreclosure. The Tribunal heard the application and as I have already stated, granted it on 12th February 2004.

The appellants appealed to the Court of Appeal against the Tribunal's decision, in Civil Appeal No.49/04. For a considerable time, both Civil Appeal No.49/04 (the subject matter of this appeal) and Civil Appeal No.29/03 (the Trust Administrator's appeal) were pending together in the Court of Appeal, until 18th May 2005 when the latter was withdrawn. The former was dismissed three months later on 19th August. During all the time the two appeals were pending in the same court, neither the court nor any party to either appeal sought to relate the two appeals either for consolidation or for stay of one pending disposal of the other. Be that as it may, the main contention in this appeal is the concurrent holding by the Tribunal and the Court of Appeal that the respondent is entitled to an order of foreclosure. The appellants ask this Court to reverse that holding.

Counsel on both sides submitted written arguments under r.93 of the Rules of this Court. In their submissions, Messrs Byenkya, Kihika & Co. Advocates, acting for the respondent, raised a preliminary issue concerning the contents of the record of appeal. They contend that the inclusion of parts of the record contravenes r.82 of the Rules and that those parts ought to be expunged or disregarded. I am constrained to comment first on the timing of raising the issue. In my opinion, it ought to have been taken out prior to the hearing of the appeal. This is implicit in r.82, which prescribes in sub-rules (1) & (2) the content of the record of appeal; and provides in sub-rule (3), for the Court of Appeal to make

directions on inclusion or exclusion of any document. Sub-rule (3) of r.82 reads –

“A judge or a registrar of the Court of Appeal may, on the application

of any party, or of their own motion, direct which documents or parts

of documents should be included or excluded from the record; and an

application for the direction may be made informally.”

Clearly, the primary purpose of this sub-rule is to provide a mechanism for ensuring that the record contains only what is permissible and necessary for determination of the appeal. The appellant may, in case of doubt, seek guidance by way of directions under the sub-rule. Equally, a respondent served with the record of appeal that includes any document whose inclusion he/she objects to, may similarly seek directions under the same sub-rule, for exclusion of that document. Adherence to that procedure ensures that this Court proceeds to hear an appeal based on a record that is devoid of or unclogged by irrelevant and/or immaterial documents. In their submission the respondent’s counsel appear to lament that the objection was raised at the late stage because the parties resorted to written submissions. In my view, however, irrespective of whether the appeal is to be argued orally or in writing, where the issue is not settled under r.82 as aforesaid, it is more appropriate to raise it separately rather than along with the substantive issues of the appeal. Be that as it may, the objection is sufficiently substantial to warrant my consideration before turning to the grounds of appeal.

The documents to which the respondent’s counsel objects are in four batches –

1. an assortment of correspondence and legal opinions, mainly on Civil Appeal No.29/03, exchanged among H.E. the President, the Solicitor General, Minister of State for Finance (General Duties),

the President's PPS, the 1st appellant and the NPART's Trust Administrator;

2. the record of proceedings and orders in Civil Appeal No.29/03;
3. a bundle of purported releases of mortgages/caveats dated 27th May 2005;
4. copies of law reports and judgments in cases listed as further authorities.

None of those documents were part of the record of the Tribunal in the original proceedings, and none was formally adduced as additional evidence in the Court of Appeal. The first batch was forwarded under cover of a letter to the Registrar of the Court of Appeal on 4. 5.05 in which Messrs Kuguminkiriza & Co., Advocates for the appellants stated: *"We hereby forward a set of correspondence and an opinion from the Solicitor General in respect of the above appeal which we intend to rely upon during hearing of the appeal. They should not be construed as forming part of the record of proceedings".* It is surprising, however that despite that intimation, the same advocates included the 'set' in the record of this appeal. The second and fourth batches were apparently introduced in the Court of Appeal record among the authorities. The same advocates informally forwarded the third batch to the Court of Appeal after the hearing of Civil Appeal No.49/04 and judgment was reserved. I am unable to deduce from the reply to the objection, any reasonable justification for the inclusion of the documents. The equivocal excuse that the documents were included because counsel relied on Civil Appeal No. 29/03, as an authority or because it was necessary to inform the Court of Appeal that *"Civil Appeal No.49/04 had been overtaken by events in Civil Appeal No.29/03"* is too naïve to warrant much discussion. It suffices to say two things. First, citing a decided

case, as an authority, does not entail producing the record of proceedings in that case, let alone third party opinions and correspondence about it. Secondly it is an elementary principle that an appellate court acts only on material that was properly before the trial court unless for good cause the appellate court gives leave to any party to adduce additional evidence on appeal. I find that all the documents objected to, which run into 300 pages, constituting about one third of the record of appeal, were included in the record of appeal in total disregard of that principle and of r.82 of this Court's Rules. I am constrained to reiterate what I said in ***General Industries (U) Ltd. vs. NPART***, C. A. No.25/98, that –

“it is improper for a party to seek to attempt to influence the decision of an appellate court with evidence which was neither properly adduced and admitted during proceedings in the lower court nor received by order of that appeal court”.

If the objection had been timely, I would not have hesitated to expunge the impugned documents and order that a fresh record of appeal be filed and the appellants be condemned in the thrown away costs. But all I can do now is to disregard the said documents, save any on which the Court of Appeal relied in arriving at its decision.

The appeal was on ten grounds but in the written submissions grounds 1 and 10 were abandoned. Ground 8 lacks substance. In it, the appellants complain that in the lead judgment, Okello J.A. stated that “*UCB appointed Receivers and Managers under the mortgage deed to sell the (mortgaged) properties*” whereas the appointment was under a debenture. I agree that the statement was inaccurate, but it was not in

anyway relied upon in, or otherwise material to the decisions of the court. I need say no more on it. Grounds 6 and 9 were consolidated, and the rest of the grounds were argued separately, but in a sequence that I don't find expedient to follow. I will instead consider the grounds in the following order of the issues that arise from them; namely whether –

- the institution of the suit occasioned a miscarriage of justice, (ground 2);
- the suit was time-barred, (ground 4);
- the subject matter was *res judicata*, or the respondent was precluded from suing by reason of the Trust Administrator's appeal, (grounds 3, 6 and 9);
- there were shortfalls in respect of the powers of attorney, (ground 5);
- the respondent released or waived its rights over the mortgaged property (ground 7).

Ground 2 reads as follows –

“2. The learned Justices ... of Appeal erred in law and fact when they

held that the wrong procedure of bringing the action adopted by

the applicant did not occasion a miscarriage of justice...”

The respondent instituted the suit in the Tribunal by Notice of Motion. The appellants contended, both in the Tribunal and in the Court of Appeal that the suit ought to have been instituted by Originating Summons pursuant to O. 34 r.3A of the Civil Procedure Rules (CPR). The Court of Appeal held that it was erroneous to institute the suit by Notice of Motion, but that the error was not fatal, as it did not occasion miscarriage of justice. In the lead judgment of the Court of Appeal,

Okello J.A. said –

“The Tribunal stated that Originating Summons is best suited for cases

where the contention between the parties do not involve disputed complex facts. I agree. Where the judge is of opinion that the dispute..

cannot best be disposed of on Originating Summons, he may either

adjourn it into court for taking oral evidence or refer the parties to a suit in the ordinary course, but certainly not by Notice of Motion.

In the instant case, my view is that the respondent erred in bringing the

proceedings by a Notice of Motion. The imposing question then is, did

that error ... prejudice the appellants or occasion a miscarriage of

justice?...”

After recalling the courts’ duty to administer justice without undue regard to technicalities, the learned Justice of Appeal concluded –

“The Tribunal implied that it acted under section 14(3) of the NPART

Act to modify O.34 r.3A to hold that the procedure adopted by the respondent was proper in order to secure substantive justice.

I agree. S.14(3) of the NPART Act gives that power to the Tribunal.

The

facts of this case show that the appellants were not prejudiced by the

respondent's error when it adopted the wrong procedure. The appellants do not dispute their indebtedness to the respondent, a debt the respondent seeks to recover. From these circumstances of the case, substantive justice demands that the respondent be allowed to recover from the appellants the debt owing."

Counsel for the appellants contend that the respondent's suit ought to have been struck out because it was irregularly instituted. Allowing it to proceed was prejudicial to the appellants because they were thereby compelled to defend an incompetent suit. Furthermore because the suit involved complex issues of facts and law, proceeding summarily on affidavit evidence only, prejudiced the appellants who were thereby deprived of the benefit of full trial of all issues. Counsel also contend that S.14 (3) of NPART Act, did not vest in the Tribunal unlimited discretion to modify the CPR to the extent of applying a wrong procedure as a right one. On the other hand, while disagreeing with, but without cross-appealing against, the Court of Appeal holding that proceeding by Notice of Motion was erroneous, counsel for the respondent supported that court's holding that the Tribunal had discretionary power to modify O.34 r.3A of the CPR, and had rightly exercised it in the interest of substantive justice.

Before addressing the core holding that is subject of this ground of appeal, I find it imperative to make observations on two related holdings, concerning O.34 r.3A and s.14 (3) of the NPART Act. O.34 r.3A of CPR provides *inter alia*, that a legal or equitable mortgagee or mortgagor and

any person entitled to property that is subject to a legal or equitable mortgage or charge –

“may take out as of course an Originating Summons returnable before a judge in chambers, for such relief of the nature or kind following as

may be by the summons specified, and as the circumstances of the case may require;”

The rule lists the applicable reliefs, which include sale, foreclosure, delivery of possession by the mortgagor and redemption. The import of the provision is to permit any of the classified persons seeking any of the listed reliefs, to institute a suit by originating summons instead of any other mode of instituting a suit. It is trite that in civil matters the only modes of instituting suits are by plaint, originating summons and petition. A Notice of Motion is not an alternative mode of instituting any type of suit. Surprisingly, both in the Tribunal and in the Court of Appeal, counsel for the respondent sought to justify the resort to Notice of Motion under O.48 r.1 of the CPR in the instant case on the mistaken ground that the Mortgage Act, which provides for the right to apply for foreclosure, does not specify the form of exercising that right. That Act, however, is not concerned with rules of procedure. Proceedings arising from it are governed by the CPR and what was applicable in this case was O.34 r.3A not O.48 r.1. In my view, therefore, the Court of Appeal rightly held that the institution of the suit by Notice of Motion was erroneous.

With due respect, however, I do not agree with its holding that s.14 (3) of NPART Act vests power in the Tribunal to modify provisions of O.34 r.3A or of any other rule of the CPR. The section reads –

“The Tribunal shall, in the exercise of its jurisdiction under this Act,

have all powers of the High Court, and for that purpose, the

Civil

Procedure Rules applicable to civil actions before the High Court

shall, with necessary modifications, apply to the proceedings before the Tribunal.”

Essentially, this provision vests in the Tribunal the powers of the High Court and enjoins it to apply provisions of the CPR in its proceedings. To my understanding, the qualification that the CPR ‘*shall apply* (to the Tribunal’s proceedings) *with necessary modifications*’ is to permit the Tribunal to apply the provisions in the CPR with modifications necessitated by peculiarities of trial by the Tribunal. In applying the rules they should be read as if they were written for proceedings in the Tribunal. The provision is not a general license to the Tribunal to alter any of the rules at its discretion. For example in regard to O.34 r.3A, it is necessary to modify the expression ‘*returnable before a judge in chambers*’ to read ‘*returnable before the Tribunal*’. In my view, nothing concerning the exercise of the Tribunal’s jurisdiction in handling the instant suit necessitated modification of the mode of instituting the suit. With due respect, the view that the Tribunal had power to modify O.34 r.3A of the CPR is, to that extent, erroneous.

I now turn to the appellants’ contention that the institution of the suit occasioned miscarriage of justice. If the appellants had taken out a preliminary objection that the suit by Notice of Motion was irregular, they would undoubtedly have been entitled to an order striking it out. However, to make such order after trial, albeit on affidavit evidence only, or subsequently on appeal, would amount to having undue regard to technicalities to the prejudice of substantive justice. In his lead judgment, Okello JA correctly observed that the respondent seeks to recover a debt that is owed and that was not disputed throughout the diverse and protracted litigation. I should add that despite the wrong procedure, the appellants could have moved the court to have a full trial or to examine deponents of affidavits as witnesses, to ensure trial of all issues. They chose not to do so. In my opinion they were not prejudiced and no miscarriage of justice was occasioned. In the circumstances I think it was appropriate to invoke the principle preserved in Article 126(2)(e) of the Constitution that substantive justice should not be unduly impeded by technicalities. Ground 2 must fail.

Ground 4 reads –

“The learned Justices of ... Appeal erred in law and fact when they

held that the debt claim had not been proved to be time barred.”

The appellants’ contention on this ground is in the alternative, namely that either as a claim in contract for a debt, or as a foreclosure action, the suit was time barred as it was filed, in the former alternative more than six years, and in the latter alternative more than twelve years, after the cause of action accrued. With due respect, I find it unnecessary to discuss the farfetched arguments on the first alternative because clearly this is a foreclosure action. It is also clear from the provisions of sections 5 and 18(4) of the Limitation Act, that the limitation period for such cause of action is twelve years. The suit was filed on 25th February 2003, but neither party was clear on the date when the limitation period started to run. In support of their stance that the suit was time barred, counsel for the appellants, who insist that the suit was a claim in contract, relied on a general assertion that the default in repayment started in or prior to 1990.

The Tribunal and the Court of Appeal differed in their conclusions on the issue. The Tribunal held that there was no limitation period in respect of application for foreclosure. The Court of Appeal rightly in my view, overruled that holding and decided the issue on the principle that the burden to establish a fact lies on the party that alleges it and the appellants had not discharged the burden. In the lead judgment, Okello JA said –

“In the instant case, it is the appellants who alleged that the respondent’s application was time barred. They therefore bore the

burden to establish that fact by showing the date when the cause of

action accrued and when the application was filed. This was not done.

There is no evidence, oral or by affidavit, showing when the cause of

action for foreclosure accrued to the respondent. It is only this that

would show (that) when the respondent filed this application ...twelve

years period had already elapsed...

In the circumstances, the appellants did not discharge the burden to

show that the cause of action before the Tribunal was time barred."

In my view, there is sufficient evidence on record, which shows that the suit was not time barred. I therefore need not decide conclusively whether the burden lay on the respondent to prove that its cause of action was subsisting and not extinguished by lapse of time, or on the appellants to prove that the suit was time barred. It is apparent that the equitable mortgages in respect of which the respondent applied for foreclosure were created in August 1991 when the appellants surrendered to the respondent the title certificates as additional security. I deduce this from the entries on the title certificates annexed to the respondent's application as well as from the lead judgment of this Court in Civil Appeal No.5/99 annexed to the Affidavit in Reply. The said judgment also makes it clear that the additional security was provided pursuant to an agreement to restructure the debt and reschedule its repayment. Any prior default must have been compromised by the reschedule. It follows that the cause of action arising out of those mortgages must have accrued after the mortgages were created in

August 1991 and not before, as submitted by the appellants' counsel. Furthermore, in the same judgment it is stated –

“The appellant continued to fail to service the loan. On 21.7.92 UCB in exercise of its power under the debenture deed, appointed Messrs Key Agencies & Auctioneers, in writing, to be Receiver/Manager of the assets and property of the appellant. On the same day, by separate letter, UCB instructed the same firm to take possession of, and sell by public auction, the appellant’s diverse assets charged under the debenture, and if the proceeds of sale did not liquidate the debt, to similarly sell the mortgaged land.”

This tends to show that the cause of action accrued in or about July 1992. In the circumstances I find, not only that the Court of Appeal did not err to hold that the suit was not proved to be time barred, but also that on a balance of probabilities, it was shown that when the suit was filed on 25th February 2003, the limitation period of 12 years had not expired. Ground 4 ought to fail.

I now turn to grounds 3, 6 and 9, which read as follows –

“3. The learned Justices of ... Appeal erred in law and fact when they held that the debt claim was not res judicata having been found so by the High Court in H.C.C.S. 1470/2000 which judgment was never challenged having withdrawn Court of Appeal C.S. 29/2004...

....

6. The learned Justices of ... Appeal erred in law and fact

**when they
held that the principle in S.6 of the Civil Procedure Act had
not been
brought to the attention of the Tribunal.**

....

**9. The learned Justices of ... Appeal erred in law and fact
when they
held that NPART did not claim under its employee in Civil
Appeal
No.29/2003. ”**

The three grounds revolve on provisions of sections 6 and 7 of the Civil Procedure Act. Section 6 prohibits a court from trying a suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit that is pending in a competent court between the same parties. Section 7 similarly prohibits a court from trying a suit in which the matter directly and substantially in issue was also directly and substantially in issue between the same parties, in a former suit that was heard and finally decided by a competent court, i.e. a matter that was adjudicated upon (*res judicata*). I find it expedient to combine the three grounds because they are all premised on the appellants' contention that the respondent's suit in the Tribunal, which culminated in this appeal, and the appellants' suit in the High Court, which culminated in the Trust Administrator's appeal that was ultimately withdrawn, were concerned with the same subject matter. With due respect to the learned counsel for the appellants, however, that contention is misconceived. While it is correct to say that both suits indirectly relate to the indebtedness of the 1st appellant to the respondent, the substantial issues for determination in the two suits were different. As I pointed out earlier in this judgment, in High Court Civil Suit No.1470/2000 the direct and substantial issue that the court had to determine was whether the Trust Administrator and the co-defendants were legally empowered to sell the mortgaged property.

The High Court held that in absence of a valid legal mortgage or a court order of sale the defendants were not authorized to sell the property. On the other hand, the substantial issue for determination by the Tribunal was whether the respondent, as an equitable mortgagee of the mortgaged property, was entitled to the relief of foreclosure. That issue was not directly or at all, for determination by the High Court in C.S. No.1470/2000. When it was raised and tried in the respondent's suit in the Tribunal therefore, it was neither pending for determination in a previously instituted suit nor was it *res judicata*. Furthermore, the two suits were not between the same parties. The respondent was not a party to the High Court suit, and contrary to submissions by the appellants' counsel, it did not claim under the Trust Administrator, or litigate on basis of the same title as the said Trust Administrator.

Much as no reference is made in the three grounds of appeal to the first suit, which culminated in Supreme Court Civil Appeal No.5/99, in the written submissions counsel for the appellants sought to rely on an opinion expressed by Okumu Wengi J., in his judgment in C.S. No.1470/00, that the respondent's claim became *res judicata* upon the decision of the Supreme Court in that appeal. Although the judgment of Okumu Wengi J., remains intact, the appeal against it having been withdrawn, I have no hesitation in discounting that opinion because, with due respect to the learned judge, it was misguided. The direct and substantial issue decided by the Supreme Court in that appeal was that the appointment of the Receiver/Manager by the respondent was invalid as it did not comply with the debenture under which it was made. In an obiter dictum the Court also held that the mortgage document between the respondent and the 1st appellant was not proved to have been

validly executed by the registered proprietors/mortgagors. In their separate judgments, the learned Justices of the Supreme Court went out of their way to clarify that the Court's decision did not relate to the indebtedness of the 1st appellant to the respondent. They also variously recognized the respondent's entitlement to equitable mortgage. For these reasons, I would hold that grounds 3, 6 and 9 ought to fail.

The substantive part of ground 5 reads thus –

“5. The learned Justices of ... Appeal erred in law and fact when they

failed to address the legal shortfalls in respect of the Powers of Attorney ...”

According to the written submissions by the appellants' counsel, the 'legal shortfalls in respect of the powers of attorney', which the appellants complain were not addressed by the Justices of Appeal are that –

(a) there were no registered powers of attorney granted to the 1st appellant to validate creation of an equitable mortgage;

(b) the unregistered powers of attorney granted to the 1st appellant were

not for securing the existing indebtedness, but a fresh borrowing.

Since the 2nd appellant produced copies of the powers of attorney as annexure to his supplementary affidavit in reply, I take it that the first so-called shortfall is that they were not registered, and the second is that they were not intended for use in creating security for the overdraft.

However, the bottom line of the submissions by the appellants' counsel on this ground is the contention that no equitable mortgage by deposit of title certificates was created over the land owned by the 2nd appellant. Doing my best to understand the lengthy but, with due respect, not so clear submissions, I would summarize the thrust of the argument in support of the contention as follows –

- An equitable mortgage of land by deposit of title certificate is created only where the deposit is made by the registered proprietor or by a donee of powers of attorney to create a security for a specified purpose.
- In the instant case the 2nd appellant's title certificates were neither deposited by the registered proprietor nor by a donee of powers of attorney granted for the purpose of securing the overdraft of 1989-1990.
- The deposit of the said certificates by the 1st appellant or its Managing Director or other servant could not create an equitable mortgage to secure the overdraft because it was not supported by duly registered powers of attorney for that purpose.
- The powers of attorney, which the 2nd appellant granted to the 1st appellant on 12th July 1991 authorised the latter to mortgage the land for the purpose of securing a fresh loan, but not for securing the existing overdraft that was already secured by a debenture.

Counsel relied on the 2nd appellant's averment that he was not the borrower to support his submission that the title certificates were not deposited by the registered proprietor. In support of the assertion that the powers of attorney granted to the 1st appellant were only for

securing a fresh loan, counsel relied on the following stipulation in the text of the power of attorney, namely –

“... the powers herein granted shall be irrevocable before the repayment in full of any moneys borrowed under powers so granted”.

Counsel’s contention is that no money was borrowed under the powers granted on 12th July 1991, and consequently the intended security was aborted.

In the Court of Appeal, the so-called shortfall of the powers of attorney was neither raised as a ground of appeal, nor did it feature among the framed issues. However, in the written submissions on the 5th issue: *“whether there was an equitable mortgage interparte”*, counsel submitted that the Tribunal erred in holding that any equitable mortgage was created without proof of valid powers of attorney to “validate” the mortgage. There, the criticism stressed was that there was no power of attorney granted for purpose of securing the existing overdraft. In the lead judgment, Okello J.A. dealt with the issue summarily and answered it in the affirmative. He said –

“The next are issues No. 4 and 5. I have already dealt with these issues

when dealing with issues Nos. 1 and 2. Suffice to state that the cause of

action before the Tribunal was not resjudicata. The issue raised in the

application was the existence of an equitable mortgage between the

parties. This issue had not earlier been decided by any competent court between the parties. There was an equitable mortgage between the parties created by the appellant's deposit of the certificates of title with respondent."

The learned Justice of Appeal did not discuss if a power of attorney was a requirement to "validate" the equitable mortgage, let alone if the power of attorney granted was in respect of the overdraft. In my opinion, however, if he had, he would still have held that "*there was an equitable mortgage interparte*". I will elaborate briefly.

Section 129 of the Registration of Titles Act provides for the creation of an equitable mortgage by deposit of a title certificate thus –

"(1) Notwithstanding anything in this Act, an equitable mortgage of

land may be made by deposit by the registered proprietor of his or

her certificate of title with intent to create a security thereon

whether accompanied or not by a note or memorandum of deposit

subject to the provisions hereinafter contained."

(Emphasis added)

Haruna Semakula, the 2nd appellant, is both the registered proprietor of the land in question and the Managing Director of the 1st appellant through whom it transacted the business with UCB. Despite counsel's speculative submission that the title certificates may have been delivered

to UCB on behalf of the 1st appellant by any of its officials, I deduce from circumstantial evidence that the 2nd appellant was the person who deposited the title certificates as security for the 1st appellant's loan from UCB. Although in his affidavit in reply he averred that he was not the borrower, he did not in anyway suggest that someone else against his will or without his knowledge deposited the certificates. The fact is also confirmed in the decisions of this Court in Civil Appeal No.5 of 1999 and Miscellaneous Application No. 8 of 2000, in which it was found that he, together with UCB officials, had signed the mortgage document albeit that this Court held that the exhibited mortgage document did not appear to have been properly executed. Contrary to what counsel seems to imply in the written submissions, the 2nd appellant cannot in law be permitted to claim that he deposited the certificates as Managing Director but not as the registered proprietor. Nor does it matter that he was not the borrower. Clearly, for purposes of section 129 of the Registration of Titles Act, Haruna Semakula, the registered proprietor deposited the title certificates in question with intent to create security thereon in respect of the 1st appellant's loan from UCB.

Furthermore I am not persuaded that the deposit was with intent to secure repayment of a fresh loan that did not materialize and not the overdraft. Although the 2nd appellant's allegation to that effect in his supplementary affidavit in reply was not countered by way of rejoinder in any affidavit, the it is belied by the finding of this Court in Civil Appeal No.5/99 in the following passage of my judgment which was the lead judgment –

“In or around 1990 the appellant (General Parts (U) Ltd) obtained over-

draft facility from UCB. As security for the facility the appellant

executed a debenture creating a floating charge over its property in favour of UCB. Subsequently, because the appellant had difficulties in

servicing the overdraft it made proposals to the bank, which would lessen its burden. The proposals which centered on restructuring the

indebtedness into two components of what were called short-term and

long-term loans were discussed at a meeting between UCB’s Board of

Directors and the appellant’s Managing Director... accompanied by its

lawyer. Later UCB wrote to the appellant intimating that the Board had approved the proposal subject to terms and conditions specified in

the letter. After an exchange of correspondence to refine the agreed

structure and the new repayment schedule, the appellant accepted the

terms and conditions in writing. One of those was that the appellant

was to provide additional security in form of a mortgage of diverse plots

of land. The mortgage of the plots of land, some of which belonged to

the appellant and others to its Managing Director, was made and signed on 12-8-91. Although the appellant had requested for further funding, this did not feature in what the bank approved in writing, which became in essence, the restructuring and rescheduling agreement.

(Emphasis

is added)

This obviously shows the purpose of the mortgage to be additional security for the overdraft that was restructured into loans, and not for unapproved further funding. The powers of attorney, which the 2nd appellant granted in respect of each plot of land, were to enable the 1st appellant to execute that mortgage. The only rational way to construe the stipulation that those powers *would be irrevocable before payment of moneys borrowed there under* must be in the context of the agreement to restructure the overdraft into two loans and reschedule the repayment thereof. The restructured loan in that context is deemed to have been “borrowed” under those powers. The fact that after realizing that the request for further funding was rejected, the 2nd appellant did not attempt to withdraw or revoke the powers he had granted, fortifies me in that view. It also gives me the impression that the claim that the powers were granted in respect of a fresh loan is an afterthought designed to avoid liability.

I would summarise my conclusions as follows. First, I am satisfied that the 2nd appellant deposited with UCB the title certificates in respect of

his plots of land in question with intent to create security thereon. Secondly I am also satisfied that the security was for repayment of the 1st appellant's restructured loan. Thirdly, although it was intended to create a legal mortgage, failure to properly execute the necessary instrument rendered the status of the security an equitable mortgage by virtue of s.129 of the Registration of Titles Act. Fourthly, the powers of attorney granted to the 1st appellant were to empower it to execute necessary instruments but were not components for creation or validation of the equitable mortgage. Lastly, it is apparent from the copies of the title certificates annexed to the respondent's notice of motion, that after the decision of this Court in Civil Appeal No.5/99, in 2000, the respondent lodged a caveat on the titles in question obviously on strength of the equitable mortgages. Accordingly I would uphold the finding that equitable mortgages binding on the 2nd appellant were created on his plots of land in question. The alleged so-called "shortfalls" of powers of attorney were not substantiated. Ground 5 also ought to fail.

Ground 7 reads -

“ The learned Justices of ...Appeal erred in law and fact when they held without evidence that ‘the respondent has never voluntarily released or waived its said equitable right of action over these properties’ between the parties yet there was an order of Court in Civil Appeal 029/2003 approved by the Respondent therein for the

release by Court of the certificates of title for the suit properties.”

This ground of appeal rests on the summation that the respondent released or waived its rights over the mortgaged property when, following the withdrawal of the Trust Administrator’s appeal (Civil Appeal 29/03), the Court of Appeal ordered that the title certificates, which had been exhibited in court, be returned to the appellants. That summation is in turn drawn from the proceedings in that appeal, which I have held were not properly adduced as evidence before the Court of Appeal. That would have been sufficient reason for me to hold that the ground ought to fail. However, in the interest of clarity, I am constrained to say more, showing other reasons why the ground must fail.

Until this second appeal, the appellants did not raise the plea that the respondent had released or waived its equitable rights over the mortgaged property. If they desired to rely on such plea the onus lay on them to prove it. They neither alleged nor adduced any evidence at the trial or additional evidence in the Court of Appeal to discharge that onus. Accordingly, whether the respondent released or waived its said rights was not an issue at the trial. Even at the pre-hearing conference before the Registrar of the Court of Appeal held on 15th July 2005, it was not included among the six issues that the parties framed and agreed upon for determination by the Court of Appeal. The closest to it was *whether the Tribunal had erred in deciding the respondent’s application before the disposal of the Trust Administrator’s appeal*. Under that issue, the appellants canvassed the point that the respondent having permitted the title certificates to be exhibited in the Trust Administrator’s case, and thereby parted with possession, they *ipso facto* could not exercise the right to foreclose. The complaint in ground 7 is against the court’s holding on that point. It is useful to put the holding in proper context. In the lead judgment, Okello J.A. posed the question “*whether by tendering*

a document in court as evidence a party thereby surrenders or releases to the court or the other party proprietary rights over the document?" After reviewing authorities cited by counsel on the issue, the learned Justice of Appeal concluded –

"It seems clear to me ...that to release or waive a right of action or interest in property, legal or equitable, requires an express or implied

agreement of the person entitled to that right. Where the agreement is express, it has to be under seal or supported by valuable consideration.

An implied agreement, if acted upon by the other party, would operate on the principle of estoppel.

In the instant case, there is no evidence showing either an express or

implied agreement by the respondent to release or waive its right of

action under the equitable mortgage between the parties.

There is also

no evidence of any consideration for an express agreement, if any, nor

evidence of an agreement by conduct of the respondent.

Mere permit-

ting the certificates of title of the suit properties to be exhibited in court

as evidence did not extinguish the respondent's equitable right of

action. This was neither an express nor implied agreement of the

respondent to release or waive the right." (Emphasis is added)

I agree that the fact of permitting the use of the certificates of title, as court exhibits in the Trust Administrator's case, cannot be construed as

evidence of release or waiver of the respondent's rights over the certificates, let alone the mortgaged property. The learned Justice of Appeal went on to add –

“In my view, even the order of the court returning the certificates of

title to the suit properties to the appellants when CA 29 of 2003 was

withdrawn did not affect the respondent's right. The reasons are firstly

that the respondent was not a party to that appeal. Secondly, that was

not a voluntary action of the respondent.”

Despite my earlier finding that the record of proceedings in the Trust Administrator's appeal ought to be disregarded, I am constrained to observe, in view of this holding, that the learned Justice of Appeal could have added that the order made in Civil Appeal No.29 of 2003, for the “return” of the title certificates to the appellants, had no legal basis. It was not made in consequence of a judicial investigation and adjudication on who was entitled to possession of the certificates. When the appeal was withdrawn, the *status quo ante* ought to have been restored. Since in the judgment from which the appeal had arisen the High Court had not adjudicated on the matter, the certificates ought to have been returned to the party that produced them as exhibits. Counsel did not advance any ground for the request that the certificates be given to the opposite party; nor did the court give any reason for its order that the certificates be returned to the appellants. I am not persuaded by counsel for the appellants' strenuous argument that the respondent consented to the order through its legal officer in whose presence the order was made. That order was obviously made in error and cannot be basis for an inference that the respondent released or waived its right to foreclose

the equitable mortgages.

In the circumstances, I find no justification whatsoever to fault the Court of Appeal for holding that the respondent did not release or waive its rights over the mortgaged property. Ground 7 ought to fail.

In the result I find no merit in the appeal. I would dismiss it with costs to the respondent here, in the Court of Appeal and in the Tribunal.

DATED at Mengo this 14th day of March 2006.

J.N. Mulenga

Justice of the Supreme Court.

THE REPUBLIC OF UGANDA

**IN THE SUPREME COURT OF UGANDA
AT MENGO**

**(CORAM: ODOKI, CJ, TSEKOOKO, KAROKORA, MULENGA AND
KATUREEBE, JJ.SC.**

CIVIL APPEAL NO. 9 OF 2005

BETWEEN

- 1. GENERAL PARTS (U) LTD}**
- 2. HARUNA SEMAKULA} ::::::::::: APPELLANTS**

AND

NON-PERFORMING ASSETS TRUST} ::::::::::: RESPONDENT

*{Appeal from the judgment of the Court of Appeal at Kampala
(Okello, Mpagi-Bahigeine and Byamugisha JJ.A) dated 19th August
2005 in Civil Appeal No. 49 of 2004)}*

JUDGMENT OF ODOKI, CJ

I have had the benefit of reading in draft the judgment of my learned brother, Mulenga JSC, and I agree with him that this appeal should be dismissed.

As the other members of the Court also agree, this appeal is dismissed with costs here and the Courts below.

Dated at Mengo this 14th day of March 2006

B J Odoki
CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

[CORAM: ODOKI, CJ.,TSEKOOKO, KAROKORA, MULENGA AND
KATUREEBE.JJ.S.C.]

CIVIL APPEAL No.9 OF 2005

BETWEEN

1. GENERAL PARTS (U) LTD]

.....

APPELLANTS

2. HAJI HARUNA SEMAKULA]

AND

NON - PERFORMING ASSETS RECOVERY TRUST ... RESPONDENT

*[An Appeal from the judgment of the Court of Appeal at Kampala
(Okello, Mpagi-Bahigeine and Byamugisha, JJ.A) dated 19th
August, 2005 in Civil Appeal No.49 of 2004]*

JUDGMENT OF TSEKOOKO, JSC

I have had the advantage of reading in draft the judgment prepared by my learned brother, Mulenga, JSC and I agree with his reasoning and his conclusions that this appeal should be dismissed. I also agree with the orders which he has proposed.

I wish to make brief comments on three matters. The first is adherence to the Chief Justice's Practice Direction No.2 of 2005. The parties filed written arguments under rule 93 of the **Rules of this Court**. Mr. Kugumikiriza of Kugumikiriza & Co. Advocates, represents the appellants. Both in his original written arguments in support of the appeal and in the rejoinder to the response to his arguments by Mr.E. Byenkya, counsel for the respondent, Mr. Kugumikiriza breached the guidelines

set out in **Practice Direction on Presentation of Both Oral And Written Submissions And Arguments in the Supreme Court** issued by His Lordship the Chief Justice on 13th April, 2005. (Practice Direction No.2 of 2005). Instead of the ten pages in respect of arguments in support of the appeal and three pages in rejoinder, learned counsel filed 14 pages and 10 pages respectively without leave of court as required by the Practice Direction.

There are sound reasons why the Practice Direction set these limits. One of such reasons is to enable counsel to focus on material issues which are in dispute and required resolution by the Court.

The other reason, among others, is to minimise repetitive arguments.

The second comment is on ground two of this appeal.

The complaint by the appellants is that the Court of Appeal erred when it held that wrong procedure by which the respondent instituted foreclosure proceedings, did not occasion a miscarriage of justice.

The appellants counsel argued that since the Court of Appeal found that the Trust erred in instituting the foreclosure proceedings by notice of motion instead of by originating summons under **0.34 Rule 3A of CP Rules**, the Court should have allowed the appeal, instead of upholding the decision of the NPART Tribunal on the basis that the decision did not occasion a miscarriage of justice. The respondent's counsel supported the reasoning and conclusions of the Court of Appeal.

Ordinarily a mortgagor or a mortgagee would enforce his or her rights through court by a procedure known as originating summons as prescribed by **Order 34 Rule 3A of the CP Rules**, which rule reads as follows: -

"Any mortgagee or mortgagor, whether legal or equitable or any person entitled to or having property

subject to legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons returnable before a judge..... for such relief of the nature or kind following as may be by the summons specified and as the circumstances of the case may require that is to say Sale, foreclosure....."

The Tribunal's opinion was that because of the use of the words "***may take out as of course,***" in the rule, it was not mandatory for the respondent to institute foreclosure proceedings by use of originating summons and, therefore, the respondent was justified in instituting the foreclosure proceedings by notice of motion. The Tribunal held further that what was important under the **Non Performing Assets Recovery Trust Statute** (NPART Statute) which created the Tribunal, was for the Tribunal to observe the rules of natural justice. The answer to this matter lies on which view one takes of two sections of the statute which complement each other and are relevant on this matter.

The civil jurisdiction of NPART Tribunal is governed by section 16 of the NPART ACT. In so far as relevant, S.16 (3) states: -

"The tribunal shall, in the exercise of its jurisdiction under this statute have all the powers of the High Court and for that purpose, the Civil Procedure Rules applicable to civil action before the High Court shall, with necessary modifications, apply to civil proceedings before the tribunal"

It is quite obvious that the **Civil Procedure Rules** regulate the conduct of

civil proceedings in the Tribunal. Where it is necessary, modification to any Civil Procedure Rule can be made by the Tribunal to suit the necessity of any particular civil proceedings. The question which then arises is whether modification permits a party and or the Non-Performing Assets Recovery Trust (NPART) to institute foreclosure proceedings by a notice of motion rather than by an originating summons. The appellants' counsel arguments are that use of Notice of motion would not allow opportunity to the appellant to conduct its defence properly. In effect he contends that the procedure adopted put his client at a disadvantage.

Mr. Byenkya supported the opinion of Court of Appeal and submitted in summary that the appellants were afforded opportunity to defend themselves which they did. I do not agree that modification of rule 3A should be construed to mean that a party is free to substitute a mode of institution of a proceeding prescribed by the CP Rules. The Court of Appeal relied on S.18 for its opinion to the effect that the mode adopted in this case is proper.

That section relates to general conduct of disputes in the NPART Tribunal and in so far as relevant, S.18 (1) reads as follows:

"The Tribunal shall in the exercise of its functions under this statute be guided by the rules of natural justice."

The Tribunal relied on this provision to hold that it should not be bogged down by technicalities. Technicalities or no technicalities, the question that arises then is how can section 16 (3) be read together with S.18 (1). In my view the latter section simply stresses the necessity of affording parties to a dispute an opportunity to present their respective contentions. The former section indicates the rules governing the conduct of civil disputes. So the two sections are simply complementary to each other. At the trial level in the Tribunal, it would have been proper in this case for the Tribunal to order the respondent to use originating summons (or indeed a plaint) to commence the

proceedings. However, on the facts of these proceedings, I do not think that the appellants suffered any injustice as argued by their counsel.

I will next comment on the compilation of the record of appeal.

I agree with the observations of my learned brother, Mulenga, JSC, in respect of the conduct of counsel for the appellant who it would seem, does not understand the requirements of **subrule (2) Rule 82** of the rules of this Court.

The rule very clearly enumerates the materials that should constitute the contents of a record of appeal. The unjustifiable introduction at the stage of lodging a second appeal in this Court of documents occupying 300 pages of material which were neither produced nor admitted at the trial as part of the record nor as evidence, has no basis whatever. In my opinion even the inclusion in the record of appeal of full judgments cited in the Court of Appeal has no basis and is improper. The practice of disregard of our rules generally and rule 82 in particular is increasingly becoming common and, therefore, it must be curbed. Needless to say this Court is expected to consider the opinion of the Court of Appeal on the material presented to it for consideration and nothing else. These materials are specifically set out in Rule 82. Court Rules of Procedure serve an important purpose namely to ensure that ordinarily the conduct of litigation or appeals is done in an orderly and known fashion. Moreover I think that exclusion of extraneous and or irrelevant materials is based on sound reasons. Such materials tend to take valuable time of the Court by making justices spend time to peruse a lot of irrelevant materials which are not necessary for the decision of court. I think it is incumbent upon members of the bar to study properly our rules and lodge appeals in conformity with the rules of this Court.

Time has come when any advocate who indulges in the exercise of not conforming to requirements of our rules to be ordered under **Rules 102**

of the Rules to personally pay costs occasioned by the inclusion in the record of appeal of irrelevant material. This will help in curbing the practice by advocates in including in the record of Appeal a lot of irrelevant materials.

I agree that the appellants must pay to the respondent its costs here, in the Court of Appeal and in the Tribunal.

Delivered at Mengo this 14th day of March 2006

J.W.N.Tsekooko
Justice of the Supreme Court

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

**(CORAM: ODOKI, CJ TSEKOOKO, KAROKORA, MULENGA
AND KATUREEBE, JJSC.).**

CIVIL APPEAL NO. 9 OF 2005

B E T W E E N

- 1. GENERAL PARTS (U) LTD;**
- 2. HAJJI HARUNA SEMAKULA; :::::::::::::::::::: APPELLANT**

AND

**NON-PERFORMING ASSETS
RECOVERY TRUST: :::::::::::::::::::: RESPONDENT**

**(Appeal from the decision of the Court of Appeal at Kampala
(Okello, Mpagi-Bahigeine and Byamugisha, JJ.A) dated 19th
August 2005, in Civil Appeal No. 49/2005).**

JUDGMENT OF KAROKORA, JSC:

I have had the benefit of reading in draft the judgment prepared by my learned brother, Mulenga, JSC, and I agree with him that the appeal should be dismissed. I also agree with the orders he has proposed.

Dated at Mengo this 14th day of March 2006

**N. KAROKORA
JUSTICE OF THE SUPREME COURT**

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA

AT MENGO

**(CORAM: ODOKI, CJ TSEKOOKO, KAROKORA, MULENGA
AND KATUREEBE, JJSC.).**

CIVIL APPEAL NO. 9 OF 2005

B E T W E E N

3. **GENERAL PARTS (U) LTD;**
4. **HAJJI HARUNA SEMAKULA; :::::::::::::::::::: APPELLANT**

AND

**NON-PERFORMING ASSETS
RECOVERY TRUST: :::::::::::::::::::: RESPONDENT**

*(Appeal from the decision of the Court of Appeal at Kampala
(Okello, Mpagi-Bahigeine and Byamugisha, JJ.A) dated 19th
August 2005, in Civil Appeal No. 49/2005).*

JUDGMENT OF KATUREEBE JSC:

I have had the advantage of reading in draft the judgment prepared by my learned brother, Mulenga, JSC, and I agree with him that this appeal should be dismissed with costs for the reasons well articulated in that judgment. I have nothing useful to add.

Dated at Mengo this 14th day March 2006.

B. M. Katureebe
Justice of the Supreme Court