

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS CAUSE NO 16 OF 2015

NATTY NTARE}.....APPLICANT

VS

1. EQUITY BANK (U) LTD}

2. MERCY MAHE RUHINDA}.....RESPONDENTS

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant filed this application for review of the mortgage over land comprised in Kyadondo Block 220 Plot 602 and declares it void.

Secondly the Applicant prays that the costs of the application are provided for. The application was commenced under the provisions of section 34, 35 and 36 of the Mortgage Act No 8 of 2009 and Order 52 rule 1 and 3 of the Civil Procedure Rules.

The grounds of the application are that the mortgage was obtained in an unlawful manner in as much as the security is family land/matrimonial home and there was no spousal consent to mortgage the land. Secondly that it is just and fitting that the application is allowed. The application is further supported by the affidavit of Mr Natty Tony Ntare the husband of the second Respondent. The second Respondent is the registered proprietor of the mortgaged property. The Applicant deposes that he married the second Respondent at St. James Cathedral Ruharo Mbarara on 24 December 1998 and has since cohabited with her and they have two children according to a copy of the marriage certificate attached to the application in proof of the marriage. In 1989 they acquired land which was initially a kibanja without title but later on in 2012 the registered proprietor transferred the portion into the names of his wife while he was in Zambia doing his business.

Sometime in February 2015 when he went back home from work, he found a note from one Kitamirike specifying that he was a manager, Equity Bank Katwe Branch requesting him to call him on the number indicated on the note. He immediately called the number and the gentleman introduced himself and asked whether he was aware that his house had been mortgaged to Equity Bank in favour of Xtra Trucking (U) Ltd and they had failed to pay up the mortgage. His wife is a Captain in the UPDF and was training at a Senior Military Staff College and as such he could not reach her to find out the truth. He was notified by the Local Council Chairman of the village that officials of the first Respondent bank had approached him to allow them access to his home since there was no one there. The chairman refused but nonetheless the first Respondent broke the gate and got access to the compound. The house was also broken into by the officials. On 23 February 2015 he was advised to check the advertisement for sale of the property in the Daily Monitor Newspaper of 23 February 2015. And indeed the property was advertised in the Daily Monitor Newspaper of Monday 23rd of February 2015 by Messieurs Muramuzi Enterprises and Auctioneers and the sale was to occur after 30 days. He immediately lodged a caveat on the land to prevent any transfer or change in proprietorship. Eventually when he got to his wife, she informed him that Xtra Trucking (U) Ltd was bidding for the supply of some services and needed to get a bank guarantee

or performance bond. Having advertised the property for sale, he is bound to lose his interest in the property, which interest is protected by law.

On the advice of his lawyers Messieurs KGN advocates, he deposes that the mortgage was obtained unlawfully contrary to the provisions of the Land Act and the Mortgage Act since he did not consent to the transaction. Secondly the Mortgagee did not carry out any due diligence to satisfy itself that the property is occupied by his family. The letter of Xtra Trucking (U) Ltd which he obtained from the second Respondent demonstrates that the first Respondent was aware that his consent was necessary to be sought.

Furthermore he deposes that the court has powers to review the mortgages obtained in a manner containing a provision which is unlawful. In such an application for review, the court may declare the mortgage void for having been obtained in an unlawful manner. In the premises he deposes that it is just and equitable that this honourable court reviews the mortgage and declares it void, the Mortgagor and Mortgagee having failed to obtain his consent before the transaction.

The affidavit in reply is deposed to by the legal officer of the first Respondent working in the Respondents legal Department Mr Joseph Arocha. The deposition is that the first Respondent entered into a valid mortgage with the second Respondent to secure banking facilities advanced to Xtra Trucking (U) Ltd. He deposes that the contents of the affidavit in support of the application are false and the first Respondent would move court to disregard it.

Xtra Trucking (U) Ltd applied for banking facilities from the first Respondent and proposed to secure the facilities from the first Respondent by a mortgage created by the second Respondent. The first Respondent carried out the requisite due diligence in relation to the proposed security including but not limited to carrying out a valuation. The offer letter given to Xtra Trucking (U) Ltd required the second Respondent to provide the consent of a spouse to the transaction. Subsequently the second Respondent made a statutory declaration verifying her marital status and stated that she was not legally married and not required to furnish spousal consent according to the copy of a statutory declaration attached. The second Respondent executed a legal mortgage agreement with the first Respondent in respect of the suit property wherein she pledged her interest in the land to the first Respondent to secure the banking facilities applied for. She further executed a deed of personal guarantee wherein she undertook to pay all sums outstanding to the credit of Xtra Trucking (U) Ltd in the event that the latter fails to pay.

The second Respondent carried out the requisite due diligence on the proposed security and also had it valued. The second Respondent had also stated that the property was not matrimonial property and therefore not subject to spousal consent.

At the hearing of the application, the Applicant was represented by Counsel Gilbert Nuwagaba of KGN advocates while the first Respondent was represented by Counsel Ssenyonga Fred. Both Counsels addressed the court orally.

The Applicant's Counsel submitted that the application was brought under sections 34, 35, and 25 of the Mortgage Act 2009 and the Applicant seeks orders to review a mortgage of Kyadondo Block 220 plots 602 and have it declared void with costs on the grounds in the motion as well as the affidavit in reply. The mortgage was obtained in an unlawful manner and the security is a matrimonial home and there was no spousal consent to mortgage the land. The evidence of marriage is attached and is annexure "A" being a marriage certificate of 1988 St James Cathedral Mbarara. Secondly there is a threat by the first Respondent to sell the property according to annexure "C" which is the advertisement of the Daily Monitor Newspaper of Monday the 23 Feb 2015. The Applicant accordingly lodged a caveat on grounds that the

property is family land/matrimonial property according to a copy of the attached caveat.

Section 33 of the Mortgage Act gives this court powers and gives the Applicant the right of relief by applying for review of the mortgage. Among the persons who can apply include a spouse or spouses of which the Applicant is one. Secondly section 34 gives the court powers to review certain mortgages. I.e. where it is obtained through fraud, deceit or misrepresentation by Mortgagor or where it contains an unlawful provision. Section 35 of the Mortgage Act does provide the procedure which is by an application to this court to exercise its powers under section 34. Section 36 of the Mortgage Act deals with the review itself and gives the court power to declare the mortgage a nullity.

The ground of the application is that the mortgage in question was obtained in an unlawful manner because it is family land or matrimonial property. Secondly the affidavit in reply concedes that there was no consent of the spouse. On that basis the transaction is illegal under section 39 of the Land Act cap 229. It is also illegal under section 5 of the Mortgage Act.

Attached to the affidavit in reply is a declaration sworn by the second Respondent stating that she is not a spouse. This court considered this issue in *Wamono Shem vs. Equity Bank HCMA 600 of 2010*. The Respondent relies on a statutory declaration for the assertion that the 2 Respondent was not married at the material time. It was the court's decision that a declaration sought can only be made in proof of marriage and in lieu of a certificate of marriage. This mortgage is illegal null and void and should be declared void under section 36 (1) (a) of the Mortgage Act and costs of the suit should be provided for.

In reply the Respondents Counsel submitted that he need not address the court on the provisions of sections 33 - 36 of the Mortgage Act with regard to powers of the court to review mortgages. The question that became apparent is that the second Respondent was actually married to the Applicant at the time of creation of the mortgage of the land. This is by reason of the marriage certificate attached to the application and Counsel proposed not to argue otherwise. The Applicant is married to the second Respondent.

The contention is whether the first Respondent discharged its obligations conferred by the Mortgage Act 2009 in establishing whether the second Respondent as an intending Mortgagor was married. The Respondent carried out a due diligence before accepting the creation of the mortgage. This included valuation of the property. It further required the second Respondent to prove her marital status and she stated that she was not married and the property not matrimonial property. Section 5 of the mortgage Act provides that a mortgage of a matrimonial home is valid if there is evidence that it has been consented to by the spouse of the Mortgagor. The section requires an intending Mortgagee to take reasonable steps to ascertain whether the Mortgagor intending is married and whether property intended to be mortgaged is matrimonial property. The expression "reasonable steps" has not been defined in the Act. The Mortgage regulations give a guideline. Regulation 3 (1) provides that for purposes of sections 5 and 6 the Mortgagee shall require the Applicant to state whether he or she is married. Under sub regulation 5 (1) (b), where she states she is not married she shall state it in a statutory declaration. In view of the regulation the first Respondent took reasonable steps to ascertain whether the second Respondent was married or not. With reference to the case of *Wamono Shem vs. Equity Bank and Another (supra)*, it was held that the duty to take reasonable steps is not satisfied by merely obtaining a statutory declaration. For instance it is not sufficient to investigate from the locality of the property whether it was matrimonial property and whether the Mortgagor was married. The Respondent went beyond the call of duty by taking the statutory declaration when she stated

that it was not matrimonial property. He contended that there is a requirement under the Mortgage Act and section 4 thereof for all parties to Act in good faith. The second Respondent breached this duty by concealing her marital status. Concerning the submission that a declaration can be in lieu of a declaration of marriage and otherwise, regulation 3 of the Mortgage Regulation allows a certificate to be taken in verification of marriage. In the case of Wamono Shem vs. Equity Bank the court interpreted the law in light of the old law. The court indicated that the mortgage was executed before the Mortgage Act 2009 came into force.

Lastly the Defendant's Counsel submitted that the old Mortgage Act cap 229 was silent on the duty of the first Respondent to ascertain status of the second Respondent. The current statute provides how a Mortgagee can establish how somebody was married. The situation is not perfect and the registry of marriage is not perfect or constituted. The first Respondent duly discharged her duty under the law in ascertaining the status of the second Respondent. The court should be pleased to find that the mortgage is valid and dismiss the application with costs.

In reply the Applicant's Counsel Mr. Gilbert Nuwagaba submitted that it was an illegality to mortgage family land and the court cannot sanction an illegality. Where the transaction was done bona fide on the side of the bank and the bona fide party can recover from the Mortgagor. The mortgage remains void. The decision in Wamono Shem turned on the fact that there was no proof of marriage and the application was dismissed because the Plaintiff failed to prove a customary marriage. In this case however the Respondent concedes that there is a legal marriage. It does not matter that the Respondent discharged its duty. If it turns out that there was a marriage then the transaction would be void under section 39 of the Land Act and the suit should be allowed with costs.

Judgment

I have carefully considered the Applicant's suit which was commenced by originating motion under section 34, 35 and 36 of the Mortgage Act, Act 8 of 2009 for review of the mortgage comprised in Kyadondo block 220 plot 602 and declare it void on the ground that no spousal consent was obtained before the mortgage was executed.

The facts of the suit are not in dispute. The Applicant is the husband of the second Respondent. A loan application was made by Xtra Trucking (U) Ltd and the letter of offer dated 13th of December 2012 annexure "B" required security for the loan of Uganda shillings 145,000,000/=. The loan offer letter was duly endorsed by the Mortgagor who is the second Respondent and the wife of the Applicant/Plaintiff. The offer letter has space for assent by a spouse Annexure "V". It was not endorsed by any spouse. In annexure "C" to the affidavit in opposition to this suit, there is a statutory declaration in lieu of spousal consent. Paragraphs 4, 5 and 8 of the statutory declaration are pertinent and provides as follows:

"4. That the above described property is commercial property and is not family land or matrimonial property and there is no family member residing or deriving sustenance from the property.

5. That further I am not legally married under any form of marriage recognised in Uganda and as such I am not required to furnish a spousal consent before mortgaging the above described land and properties."

8. That I make this statutory declaration to confirm that I have no spouse and therefore not subject to furnish a spousal consent before pledging the above described property to Equity Bank Uganda Limited as security."

She further undertook to guarantee the credit facility of Uganda shillings 145,000,000/= and to fully repay the credit facility plus all accrued interest and costs as a Surety. Lastly a legal mortgage was executed and is duly signed by the Mortgagor who is the second Respondent/Defendant to this suit. The second Respondent/Defendant executed a personal guarantee, guaranteeing the repayment of the secured money.

It is not in dispute that there was a default in payment of the money and the first Defendant/Respondent attempted to realise its security through the sale of the mortgaged property. The sale was advertised in the Monitor Newspaper of Monday 23rd of February 2015. On 15 December 2014 the Plaintiff/Applicant had lodged a caveat forbidding any dealings in the suit property on the ground that it is family land and the subject to his claim or consent. In paragraph 3 of the declaration in support of the caveat he declared that the property comprises of the matrimonial home upon which he and the second Respondent together with their children reside.

At the hearing of the application, the Defendant's Counsel conceded that the second Respondent was indeed married and this information came after the event of the execution of the mortgage. The marriage certificate annexure "A" to the application proves that the Plaintiff was married at St James Cathedral Church in Mbarara on 24 December 1988. Last but not least the property is registered in the names of Mercy Mahe Ruhinda, the second Respondent. The second Respondent was not represented in this suit and the matter proceeded ex parte against her.

Secondly the only issue for consideration is whether the first Respondent bank/Defendant had carried out a due diligence sufficient to excuse it from the subsequent fact that in truth the Mortgagor was a married person. According to the Respondents Counsel, it was sufficient for the bank to obtain a statutory declaration to the effect that the Mortgagor was not married. Furthermore the court was addressed on a previous decision of this court in Wamono Shem versus Equity Bank Ltd (supra). Both Counsels addressed the court on the effect of the Mortgage Act 2009 and regulations. It was submitted in part that the decision in Wamono Shem versus Equity Bank Ltd (supra) was delivered on the basis of a repealed law namely the Mortgage Act Cap 229 (repealed) while the current matter falls under the provisions of the Mortgage Act, Act 8 of 2009. It was further submitted that the decision turned on the fact that the court was not able to establish whether there was a customary marriage of the Applicant to the Mortgagor. No marriage was proved in that case while in this case marriage has been proved.

I have carefully considered the provisions of the law. At the end of the submissions of both Counsels the court has to consider section 5 and section 6 of the Mortgage Act, Act 8 of 2009 as well as the regulations on the question of whether the bank took reasonable steps to ascertain whether the intending Mortgagor was married before executing the mortgage. On the other hand the Plaintiff's Counsel submitted that it was an illegality per se to mortgage family land and the court cannot sanction an illegality. Even if the bank acted bona fide, its remedy was to recover from the Mortgagor because the mortgage agreement remained void. In other words his contention is that section 39 of the Land Act makes the transaction illegal where any of the parties is married and no spousal consent has been obtained in respect of matrimonial property.

By raising the provisions of section 39 of the Land Act cap 227 on the question of illegality, it is imperative that the provisions of the Land Act has to be read in conjunction with the relevant provisions of the Mortgage Act, Act 8 of 2009.

Starting with the Land Act Cap 227 as amended by the Land Act Amendment Act, it is a statutory requirement for a

spouse to seek the consent of his family before mortgaging land among other transactions. In the case of Wamono Shem versus Equity Bank (supra), I considered the provisions of section 39 of the Land Act prior to its amendment and after amendment.

Section 39 (1) of the Land Act Cap 227 before amendment restricted transfer of land by family members without consent. Secondly section 39 (2) exempted the provisions of subsection 1 from applying to a Mortgagee who exercises powers of sale under a mortgage agreement. Subsection 39 (1) of the Land Act required prior written consent of a spouse before mortgaging family land. By the Land (Amendment) Act, 2004 section 39 was substituted by a new section and provides that no member of the family shall sell, exchange, transfer, pledge, mortgage or lease any family land or enter into any contract for the sale, exchange, transfer, pledging, mortgage or lease of any family land. In the case of Wamono Shem vs. Equity Bank, I held that the provision imposes a duty on family members not to carry out the prohibited transactions without having sought and obtained the requisite consent and the consent had to be given in a form and manner prescribed by regulations. An exception to the general prohibition is sale and transfer of mortgaged property by a Mortgagee exercising powers of sale under the mortgage. The sale per se by a Mortgagee is not mentioned. Only a transfer is mentioned. However a Mortgagee ordinarily signs a transfer after realising the security in the mortgage through the sale of the mortgaged property. In other words the registrar or recorder will note the transfer and record it where it is a transfer by a Mortgagee.

The conclusion is that where mortgages are concerned one should consider the provisions of the Mortgage Law and what it provides in the circumstances of this suit. The Land Act cap 227 and section 39 thereof prohibits family members and not a Mortgagee exercising powers of sale and transfer. On the face of it, section 39 of the Land Act cap 227 cannot be raised against a Mortgagee. The question therefore is what happens at the stage of mortgaging the property. The first conclusion is that there ought to be no mortgage of property by a Mortgagor of family property without the consent of a spouse. For emphasis section 39 of the Land Act Cap 227 as amended by the Land (Amendment) Act, 2004 provides as follows:

"39. Restrictions on transfer of family land

(1) No person shall—

- (a) sell, exchange, transfer, pledge, mortgage or lease any family land;
- b) enter into any contract for the sale, exchange, transfer, pledging, mortgage or lease of any family land; or
- c) give away any family land, inter vivos, or enter into any other transaction in respect of family land; except with the prior consent of his or her spouse.

(2) The consent required under subsection (1) shall be in the manner prescribed by regulations made under this Act.

(3) Subsection (1) of this section shall not apply to any transfer of land by the Mortgagee in exercise of powers under the mortgage.

(4) Where any transaction is entered into by a purchaser in good faith and for value without notice that subsection (1) of this section has not been complied with, the transaction shall be void but the purchaser shall have the right to claim from any person with whom he or she entered into the transaction, any money paid or any consideration given by him or her in respect of the transaction.

(5) A consent referred to in subsection (1) shall not be unreasonably withheld.

(6) Where the consent required by subsection (1) is withheld, a person aggrieved by the withholding of the consent may appeal to the Land Tribunal and the Tribunal shall require the spouse to show cause why the spouse cannot give consent and may, in its discretion, dispense with the consent.

(7) A spouse, not being the owner of the land to which subsection (1) applies, may lodge a caveat on the certificate of title, certificate of occupancy or certificate of customary ownership of the person who is the owner of the land to indicate that the property is subject to the requirement of consent under subsection (1).

(8) Notwithstanding subsection (2) of section 149 of the Registration of Titles Act, a caveat referred to in subsection (7) shall not lapse while the caveator's right to security of occupancy subsists.

(9) For purposes of subsection (4)—

"notice" means actual or constructive notice;

"purchaser" means a grantee, lessee, sub-lessee, assignee, Mortgagee, chargee or other person who acquires an estate or an interest or right in the land".

The prohibition to enter into any transaction in respect of land is provided for under section 39 (1) quoted above and it specifically applies to a person who wants to sell, exchange, transfer, pledge, mortgage or lease any family land; or enter into any contract for the sale, exchange, transfer, pledging, mortgage or lease of any family land; or give away any family land, inter vivos, or enter into any other transaction in respect of family land; except with the prior consent of his or her spouse. The presumption is that the person prohibited is a spouse though the section is neutral at the beginning and prescribes inter alia that: "No person shall..." do the above written prohibited action without the consent of his or her spouse. This includes mortgaging of the property. Secondly section 39 (3) excludes subsection 1 from applying to transfer of land by a Mortgagee. It provides that the subsection (1) "shall not apply to any transfer of land by the Mortgagee in exercise of powers under the mortgage." It however remains silent on how a mortgage is entered into in light of the fact that section 39 (1) (b) of the Land Act as amended prohibits pledging, leasing or mortgaging family land except with consent of a spouse.

It follows that the illegality alleged can only be imposed on a person duty bound to seek the consent of the other spouse for any of the transactions listed in section 39 (1) of the Land Act when read in context . Furthermore because the provision is silent on the duty of a Mortgagee and in fact excludes a Mortgagee from its application in the transfer of land by a Mortgagee, the obvious question is what happens when a spouse who is duty bound applies for a loan and intends to mortgage family land as security? What is the duty imposed on a Mortgagee as far as exercise of due diligence is concerned?

I will start the analysis of law by considering the provisions of the Mortgage Law and particularly sections 5 and 6 of the Mortgage Act 2009 which were relied upon by the Respondent's Counsel. Section 5 of the Mortgage Act cap 2009 provides that:

"5. Mortgage of matrimonial home

(1) Notwithstanding section 39 of the Land Act, a mortgage of a matrimonial home, including mortgage on customary land of a matrimonial home is valid if—

(a) any document or form used in applying for the mortgage is signed by or there is evidence from the document that it has been assented to by the Mortgagor and the spouse or spouses of the Mortgagor living in that matrimonial home;

(b) any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the Mortgagor and the spouse or spouses of the Mortgagor living in that matrimonial home.

(2) For the purposes of sub section (1)—

(a) an intending Mortgagee shall take reasonable steps to ascertain whether an intending Mortgagor is married and whether or not the property to be mortgaged is a matrimonial home;

(b) an intending Mortgagor shall make full disclosure to the intending Mortgagee as to his or her marital status and whether or not the property to be mortgaged comprises the matrimonial home.

(3) The Mortgagee shall be deemed to have discharged the duty under subsection (2), if the Mortgagee obtains a marriage certificate issued in accordance with the laws of Uganda, and in the absence of it, a statutory declaration from the spouse or spouses of the Mortgagor as proof of marriage."

The first conclusion is that a mortgage shall be valid notwithstanding the prohibition of section 39 (1) of the Land Act as amended by the Land (Amendment) Act 2004 if there was compliance with the provisions of section 5 of the Mortgage Act 2009 at the time the land was mortgaged. There are some salient elements which should constitute a checklist for the Mortgagee in an exercise of due diligence in this effort.

The first is that the mortgage shall be valid if the document used to apply for it is assented to by a spouse of the Mortgagor who lives in the matrimonial home sought to be mortgaged. We shall in due course define what a matrimonial home is. What should be emphasised here is the fact that the document has to be assented to or signed by a spouse of the Mortgagor who is living in the matrimonial home. The element of living in a matrimonial home will be further explored.

Secondly it is provided that the form or document used to grant the mortgage should be assented to by the Mortgagor and the spouse or spouses of the Mortgagor living in that matrimonial home.

Thirdly and under section 5 (2) (a) of the Mortgage Act, Act 8 of 2009, an intending Mortgagee shall take reasonable steps to ascertain whether the intending Mortgagor is married and whether the property intended to be mortgaged is a matrimonial home. The sub issue would be how a Mortgagee would take reasonable steps to ascertain whether the intending Mortgagor is married and the property is their matrimonial home. What are reasonable steps in ascertaining those facts?

Fourthly section 5 (2) (b) provides that an intending Mortgagor shall make full disclosure to the intending Mortgagee as

to his or her marital status and whether or not the property to be mortgaged comprises the matrimonial home. There are two other grounds upon which to impose the duty on the intending married Mortgagor. The first which has been discussed arises from the provisions of section 39 (1) of the Land Act as the duty to seek consent of a spouse. The second basis of the duty is the duty to make a full disclosure to the Mortgagee and I agree with the Respondent's Counsel that this is a duty imposed by section 4 of the Mortgage Act which provides that:

"4. Duty to disclose information

(1) A Mortgagee and Mortgagor shall—

(a) act honestly and in good faith; and

(b) in particular, disclose all relevant information relating to the mortgage.

(2) A Mortgagee or Mortgagor who refuses, neglects or fails to disclose information relevant to a mortgage and which is in his or her possession commits an offence and is liable on conviction to a fine not less than forty eight currency points but not exceeding one hundred and twenty currency points or imprisonment not less than twenty four months but not exceeding sixty months or both."

The duties are imposed on both the Mortgagor and the Mortgagee. They have a duty to act honestly and in good faith to one another. Secondly both have a duty to disclose relevant information. In this case the relevant information is whether the intending Mortgagor is married and whether the property is a matrimonial home. Thirdly a Mortgagor or Mortgagee who refuses or neglects to disclose relevant information commits an offence. Finally how would the Mortgagee ascertain whether the intending Mortgagor is married and secondly whether the property is matrimonial property subject to the consent of a spouse of the intending Mortgagor under section 39 (1) of the Land Act cap 227 as amended?. What is the due diligence required?

One of the duties imposed on a Mortgagee is to ascertain whether an intending Mortgagor is married or not. I agree with the Respondent's Counsel that rule 3 of the Mortgage Regulations, 2012 gives the method of ascertaining whether an intending Mortgagor is a married person.

Regulation 3 of the Mortgage Regulations 2012 provides as follows:

"3. Ascertaining marital status of Applicant.

(1) For the purpose of sections 5 and 6 of the Act and for the purposes of establishing whether an Applicant for a mortgage has a spouse, a Mortgagee shall require the Applicant to state whether he or she is married and—

(a) where the Applicant for a mortgage states that he or she is married, he or she shall make a statutory declaration to that effect stating the name and address of his or her spouse; or

(b) where the Applicant states that he or she is not married, the Applicant shall state so in a statutory declaration.

(2) Where a person applying for a mortgage states that he or she is married, under sub regulation (1) (a) the spouse of that person shall also make a statutory declaration to that effect.

(3) Where a person declares that he or she is married for the purposes of this regulation, that person shall attach a

certified copy of the marriage certificate or any other evidence of the marriage to the declaration."

It is the duty of the Mortgagee bank or financial institution to require the Applicant to state whether he or she is married or not. Where the Applicant discloses that he or she is married, the Applicant is required to state the name and address of his or her spouse in a statutory declaration. Similarly where the Applicant informs the Mortgagee that he or she is unmarried, the Applicant shall give this information in a statutory declaration.

On the other hand where the Applicant states that he or she is married, the spouse of that person shall also make a statutory declaration to that effect. The intending Mortgagor Applicant who declares that he or she is married shall also attach a copy of the marriage certificate or any other evidence of the marriage in the declaration.

In the case of *Wamono Shem vs. Equity Bank* (supra) the issue of whether the Plaintiff was married arose. Firstly that suit was decided on the premises that the Mortgage Act 2009 and Mortgage Regulations 2012 did not have retrospective effect on the transaction and the repealed Mortgage law was considered instead as the applicable law. For that reason the conclusions in that case cannot be applied to this suit where the specific and relevant provisions of the Mortgage Act, Act 8 of 2009 and the Mortgage Regulations 2012 are applicable. Having said that I need to emphasise that in the case of *Wamono Shem vs. Equity Bank* (Supra) the issue of how the Mortgagee would ascertain that the intending Mortgagor was married arose and was considered. In that case the Mortgagor had made a statutory declaration that she was not married. The Plaintiff who claimed that he is her husband subsequently filed a suit for review of the mortgage to have it declared void on account of want of consent of a spouse. This is what I held:

"As far as the declaration is concerned, the parties addressed the court on the requirements of section 5 of the Mortgage Act 2009. Section 5 (2) (a) provides that an intending Mortgagee shall take reasonable steps to ascertain whether an intending Mortgagor is married and whether or not the property to be mortgaged is a matrimonial home. Secondly in (b) an intending Mortgagor shall make full disclosure to the intending Mortgagee as to his or her marital status and whether or not the property to be mortgaged comprises the matrimonial home. Lastly section 5 (3) of the Mortgage Act provides that the Mortgagee shall be deemed to have discharged the duty under subsection 2 if the Mortgagee obtains a marriage certificate issued in accordance with the laws of Uganda, and in the absence of it, a statutory declaration from the spouse or spouses of the Mortgagor as proof of marriage. The submission of the first Respondent is that it carried out a due diligence and established that the second Respondent was not married. On the other hand the Applicant contended that this statutory declaration was not a statutory declaration and ought not to be relied upon by the court. Starting from the last point, a declaration under section 5 (3) imposes a duty on the Mortgagee to obtain a marriage certificate. Noted that the duty is for the Mortgagee, or in this case, the first Respondent to take reasonable steps to ascertain whether the intending Mortgagor is married and whether or not the property to be mortgaged is a matrimonial home. The provision is inapplicable where the party/Mortgagor is unmarried. Secondly a statutory declaration under subsection 3 is obtained from the spouse or spouses of the Mortgagor as proof of marriage. Where it is asserted that the Mortgagor is unmarried, the question of obtaining a statutory declaration for his or her does not arise. The duty to take reasonable steps by investigating whether the intending Mortgagor is married or not is not satisfied merely by obtaining a statutory declaration from the intending Mortgagor. As to what reasonable steps are would depend on the circumstances of the parties. For instance, would it not be sufficient to investigate from the locality of the property whether it was matrimonial

property and whether the Mortgagor is married?

Furthermore, the submissions of both Counsels were premised on facts that occurred before the Mortgage Act 2009 came into force. In those circumstances, the particular requirement under section 5 which puts the duty on the Mortgagee to take reasonable steps to ascertain whether an intending Mortgagor is married and whether or not the property to be mortgaged is a matrimonial home is inapplicable. This is because the mortgage offer relied upon by both parties is dated 17 March 2011. Secondly the power of attorney annexure "B" to the affidavit in reply was executed on 15 March 2011. The so called "declaration as to marital status" which was witnessed by an advocate is dated 17th of March 2011. It is apparent that the transaction complained about occurred before the coming into force of the Mortgage Act 2009. According to statutory instrument 2011 number 44 namely the Mortgage Act, 2009 (Commencement) Instrument, 2011 the Minister of Lands, Housing and Urban Development exercising powers under section 1 of the Mortgage Act 2009 appointed the 2nd day of September 2011 as the date on which the Act come into force. Consequently any duties and obligations at the time of execution of the mortgage in question were made under the Mortgage Act cap 229."

My conclusion that it was not enough to rely on a statutory declaration was not based on the Mortgage Act 2009 and the Mortgage Regulations 2012. The decision in Wamono Shem vs. Equity Bank (supra) is therefore clearly distinguishable. With the Mortgage Act having come into force and the procedure for ascertaining whether an intending Mortgagor is married having been laid out the relevant provisions speaks for itself. Regulation 3 of the Mortgage Regulations is now the applicable law in ascertaining the marital status of an intending Mortgagor. The duty imposed by section 4 of the Mortgage Act to give an honest and full disclosure of all relevant facts and to act in good faith applied. The duty to act in good faith and honestly to the other party to the contract is backed by a penal provision. Section 4 (2) of the Mortgage Act 2009 makes it an offence punishable by a fine or imprisonment or both fine and imprisonment to lie about ones marital status and provides as follows:

"(2) A Mortgagee or Mortgagor who refuses, neglects or fails to disclose information relevant to a mortgage and which is in his or her possession commits an offence and is liable on conviction to a fine not less than forty eight currency points but not exceeding one hundred and twenty currency points or imprisonment not less than twenty four months but not exceeding sixty months or both."

The duty to act in good faith cannot be over emphasised. It is the linchpin that assures that the transaction complies with the law and avoids breach of section 39 (1) of the Land Act Cap 227 as amended. It ensures that family land or matrimonial property can be mortgaged without controversy. It further protects a financial institution such as the Respondent/Defendant in this suit from fraud perpetuated by spouses. Spouses can collaborate to declare that they are not married and that the property intended to be mortgaged is not matrimonial property. Subsequently after getting a loan and enjoying the benefit thereof, one of the spouses comes up and claims that the Mortgagor lied that he or she was not married. In a suit to have the mortgage reviewed on the ground of lack of consent of the Plaintiff/Applicant the bank or Mortgagee would be in a tight corner if the duty is imposed for them to go beyond the declaration of the intending Mortgagor that he or she is not married. Furthermore who should bear responsibility for a fraudulent spouse who does not disclose all relevant information to the Mortgagee and who acts in bad faith both to the Mortgagee and to the Spouse who is affected thereby? What is the intention of legislature? Such a spouse commits an offence. In the case of Wamono Shem vs. Equity Bank (supra) I further held that section 39 (1) of the Land Act cap 227 as amended by the Land Amendment

Act 2004 imposed the duty on a spouse to seek consent of the other spouse not being the registered owner of the property. It is my further conclusion that a spouse and intending Mortgagor who lies about their marital status to the Mortgagee in an application to mortgage matrimonial property is circumventing section 39 (1) of the Land Act as amended. In other words it is such as spouse who is accountable to the family and not the bank. Finally with reference to the case of Wamono Shem vs. Equity Bank (supra) I held that if there is any constructive notice of marriage it has to be that of a marriage that is registered. I had considered the requirement to register a customary marriage under section 6 of the Customary Marriage Registration Act cap 248 within six months of the marriage ceremony. Last but not least I considered the issue of whether property which is agreed by the family to be matrimonial property can be ascertained by the Mortgagee. I came to the conclusion that an agreement between spouses cannot be considered in relation to whether they agreed to have a certain property other than a matrimonial property to be considered as matrimonial or family property. This is based on the provisions of section 38 A (4) of the Land Act cap 227 as amended by the Land Act amendment Act 2004 which defines "family land" being the land that enjoys statutory proportion of a spouse who is not the owner or registered proprietor thereof in the following terms:

"family land" means land—

(a) on which is situated the ordinary residence of a family;

(b) on which is situated the ordinary residence of the family and from which the family derives sustenance;

(c) which the family freely and voluntarily agrees shall be treated to qualify under paragraph (a) or (b); or"

The land Act clearly provides that where a family and particularly a spouse who is not registered wants to have property considered as matrimonial property, he or she may lodge a caveat for that interest to be noted on the title deed. This is provided for under section 37 (7) of the Land Act Cap 227 as amended by the Land Act amendment Act 2004 which provides that:

"(7) A spouse, not being the owner of the land to which subsection (1) applies, may lodge a caveat on the certificate of title, certificate of occupancy or certificate of customary ownership of the person who is the owner of the land to indicate that the property is subject to the requirement of consent under subsection (1).

Where there is no caveat there cannot be constructive notice that the property in question is subject to consent. This is because not all property of married persons is also property subject to consent. The property subject to consent of a spouse is specifically defined as matrimonial or family property. I have already set out the definition of family land under the Land Act cap 227. I wish to wind up by quoting the definition of matrimonial property under the Mortgage Act 2009.

Section 2 of the Mortgage Act, Act 8 of 2009 defines matrimonial home to mean:

"matrimonial home" means a building or part of a building in which a husband and wife or, as the case may be, wives, and their children, if any, ordinarily reside together and includes—

(a) where a building and its curtilage are occupied primarily for residential purposes, that curtilage and outbuildings on it; and

(b) where a building is on or occupied in conjunction with agricultural land or pastoral land, any land allocated by one spouse to his or her spouse or in the case of a husband, to his spouses for his, her, or their exclusive use;"

The family has to reside in that home or it should be primarily occupied for residential purposes. Where the building is occupied in conjunction to agricultural land, it should be for the exclusive use of the family. The definition avoids for instance a business person such as a real estate dealer from seeking the consent of his or her spouse to do his or her real estate business which may include conveyances.

Coming back to the facts of the suit, the Plaintiff's case is that the property which had been advertised for sale by the Defendant bank is matrimonial or family land. He was not aware that his property had been mortgaged. In paragraph 14 of the affidavit in support of his application he deposes that his wife did not inform him of the mortgage and did not seek his consent. Secondly in paragraph 15 of his affidavit he deposes that when he eventually got to his wife and asked her she informed him that Xtra Trucking (U) Ltd was bidding to supply some services and needed to get a bank guarantee or performance bond. He deposes that his interest is protected by law.

It is true that the Plaintiff/Applicant's interest is protected by the law I have quoted extensively above. The only question is who is responsible for his predicament. His own spouse who is the Mortgagor signed and gave the Respondent/Defendant bank a statutory declaration declaring that she is not married and that the property is not matrimonial property. The statutory declaration is annexure "C" to the affidavit of Arocha Joseph, an advocate of the High Court and an Officer in the Legal Department of the Respondent. Paragraphs 4, 5 and 8 of the affidavit of the second Respondent Mercy Mahe Ruhinda deposes as follows:

"4. That the above described property is a commercial property and is not family land or matrimonial property and there is no family member residing or deriving sustenance from the property.

5. That further I am not legally married under any form of marriage recognised in Uganda and as such I am not required to furnish a spousal consent before mortgaging the above described land and properties.

8. That I make this statutory declaration to confirm that I have no spouse and therefore not subject to furnish a spousal consent before pledging the above described property to Equity Bank Uganda Ltd as security"

The Respondent complied with regulation 3 (1) (b) of the Mortgage Regulations 2012 wherein the Applicant declared that she was not married. There was no need to require her to produce evidence of marriage. She further declared that the property was not matrimonial property or family property. By telling lies she allegedly committed an offence under section 4 (2) of the Mortgage Act 2009. Secondly she as a spouse of the Applicant/Plaintiff in this suit was in breach of section 39 (1) of the Land Act Cap 227 as amended. She is fully liable to her spouse for the transaction.

As far as the argument that the transaction is an illegality is concerned, the Respondent complied with all the statutory provisions and did not commit an offence. Secondly section 39 (3) of the Land Act cap 227 as amended by the Land Amendment Act 2004 excludes the provisions of subsection 1 of the same section which prohibits mortgaging of family land from applying to a Mortgagee exercising power of transfer of the mortgaged property. It provides as follows:

"(3) Subsection (1) of this section shall not apply to any transfer of land by the Mortgagee in exercise of powers under the mortgage."

The Acts of the Mortgagee are not illegal and the first Respondent/Defendant is protected having taken reasonable steps to ascertain whether the second Respondent was married.

In the premises the following orders and declarations shall issue namely:

1. The circumstances of the mortgaging of Kyadondo Block 220 Plot 602 by the second Defendant/Respondent one Mercy Mahe Ruhinda do not justify having the mortgage declared void in terms of section 36 (2) of the Mortgage Act 2009.
2. The Second Respondent is liable under section 39 (1) of the Land Act cap 227 as amended and section 4 (2) of the Mortgage Act 2009 for not seeking the consent of the Plaintiff/Applicant and lying to the first Respondent/Defendant Bank that she is not married and that the property mortgaged is not subject to the requirement of section 39 (1) of the Land Cap 227.
3. The Applicant/Plaintiff is entitled to recover the value of the property, if it is sold from the second Respondent for purposes of getting another matrimonial home on which the Applicant and the second Respondent would have the same interests prior to the mortgaging of Kyadondo Block 220 Plot 602 by the second Defendant/Respondent.
4. In the premises the application/suit succeeds in part as ordered above against the second Respondent/Defendant but fails against the first Respondent/Defendant bank.
5. The suit/application against the first Respondent/Defendant is dismissed with costs which shall be realised as follows.
6. Costs shall be realised from the mortgaged property. If the mortgaged property is not sufficient to satisfy both the outstanding **amount and the**

2. The Second Respondent is liable under section 39 (1) of the Land Act cap 227 as amended and section 4 (2) of the Mortgage Act 2009 for not seeking the consent of the Plaintiff/Applicant and lying to the first Respondent/Defendant Bank that she is not married and that the property mortgaged is not subject to the requirement of section 39 (1) of the Land Cap 227.
3. The Applicant/Plaintiff is entitled to recover the value of the property, if it is sold from the second Respondent for purposes of getting another matrimonial home on which the Applicant and the second Respondent would have the same interests prior to the mortgaging of Kyadondo Block 220 Plot 602 by the second Defendant/Respondent.
4. In the premises the application/suit succeeds in part as ordered above against the second Respondent/Defendant but fails against the first Respondent/Defendant bank.
5. The suit/application against the first Respondent/Defendant is dismissed with costs which shall be realised as follows.
6. Costs shall be realised from the mortgaged property. If the mortgaged property is not sufficient to satisfy both the outstanding amount and the costs, it shall be borne by the second Respondent as undertaken in her guarantee to be personally liable.

Judgment delivered in open court on the 25th of September 2015

Christopher Madrama Izama
Judge

Ruling delivered in presence of:
Counsel Gilbert Nuwagaba for the Applicant.

Counsel Arocha Joseph holding brief for Ssenyonga Fred Counsel for the 1st Respondent.
Charles Okuni: Court Clerk

Christopher Madrama Izama
Judge

25th September 2015

