

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 123 OF 1994

U.C.B.....PLAINTIFF

VERSUS

**MRS. BUSHUYU (ADMINISTRATRIX OF
THE ESTATE OF JOHN WILSON BUSHUYU)..... DEFENDANT**

BEFORE: THE HON. MR. JUSTICE G.M.. OKELLO

JUDGMENT:

This suit was brought by Originating Summons under O.34 r.7 of the CPR and under section 7 and 8 of Decree 17/74. It was supported by the affidavit deposed to by Caleb Babihuga of U.C.B. on 18/2/94 and by a supplementary affidavit of Tugumisirize Livingstone a Bank manager with U.C.B. Kabale Main Branch deposed to 27/4/94. The issues set out in the summons for determination by the court were:-

- (a) Whether the Plaintiff after default of loan repayment is entitled, to foreclosure and then subsequently to sale so as to realise the principal interest and cost on the loan that was given as AGRO/044/55 on 6/11/88 to FREMI AGENCIES LTD.
- (b) Whether it was secured by a mortgage of the defendant's property aforesaid with their consent, authority and power of attorney.
- (c) Whether the failure to repay is evidenced by the Bank statement which is annexed to the affidavit of Caleb Babihuga of U.C.B dated 18/2/94 hereto attached and marked "B"

The background to this suit appears to be as follows: The plaintiff Bank appears to have on 6/11/88 granted a loan to a company known as "FREMI AGENCIES LTD under AGRO/044/55

on the security of John Wilson Bushuyu's property on plot 28 and 28A Kabale Road. FREMI AGENCIES LTD is a family company of John Wilson Bushuyu now deceased, The certificate of title of the said property was deposited with the Bank on the authority of the said John Wilson Bushuyu. Along with the Certificate of title was also deposited a power of Attorney executed by the said late John Wilson Bushuyu appointing FREMI AGENCIES LTD his attorney to borrow money on the security of his said property described as "Leasehold Register Volume 973 Folio measuring approximately 0.051 Hectares.

Due to some confusion in the UCB at Kabale caused by shifting of documents following amalgamation of the two branches in Kabale, the certificate of title deposited with the Bank disappeared from the Bank. Then there was default in the loan repayment. The Bank now seeks a remedy of foreclosure and sale of the security.

The defendant who is the Administratrix of the estate of the late John Wilson Bushuyu filed an affidavit in Reply, deponed by her on 18/4/94. In that affidavit, the defendant denied knowledge of the existence of FREMI AGENCIES LTD nor that her late husband John Wilson Bushuyu was director in the company. She also denied that there was ever a deposit of the certificate of title of the said loan. The duplicate certificate of title of the land had ever been secured in her house. If there was such a loan facility it was unsecured.

On whether the certificate of title of the property in question was ever deposited with the Bank with intention to create a Mortgage, it was contended for the plaintiff that this was so. Reliance was placed on the supplementary affidavit of Tugumusirize the Bank Manager with UCB Kabale. Paragraphs 3, 4 and 5 of this affidavit are relevant.

Paragraph 3 of the affidavit shows Annexure 'J' a letter from the Deputy Chief credit Manager UCB. The letter is to the effect that application by Fremi Agencies Ltd, for a loan of 2m/= was successful. The loan was granted on the security of Leasehold Reg. Vol. 973 Folio 4 Plots 28 and 28A Kabale Road on security the letter said:-

"Please ensure that all security documentations are finalised before funds are released".

That letter was addressed to the Manager Kabale 'B'. The above quotation instructs the Manager to complete security documentations before releasing the loan funds. Then there is annexure 'L' a letter from, the Chief Manager Lime Credit Group UCB HQS. It is addressed to the Managing Director of FREMI AGENCIES LTD to express the Banks displeasure at the addressee's delay in the loan repayment despite the extension of time. It gave a date line when repayment was to be made To the Bank Manager Kabale 'B' branch the letter said:-

“By a copy of this letter, we are asking the Manager Kabale 'B' to send us your latest balance and a copy of your security so that we can foreclose”.

The above quotation suggested that the company's loan security was already in the Bank. According to paragraph 8 of the supplementary affidavit of Tugumusirize the following were the documents related to the security for loan in this case.

Annexure 'M' is a copy of the Memorandum and Articles of Association of FREMI AGENCIES LTD. Annexure P + R are two valuation Reports dated 19/1/88 and 22/8/88 respective on the property on plot 28 and 28A Kabale Road; Annexure 'S' is the power of Attorney dated 23/2/88 executed by John Wilson Bushuyu appointing FREMI AGENCIES LTD his attorney to mortgage the property on plot 28 and 28A Kabale Road for a loan.

According to paragraph 4 of the same affidavit, the record in the book of security in the Bank shows that the Certificate of title to this property was received in the Bank on 7/11/88.

In paragraph 6 of her affidavit in reply, the defendant denied that the duplicate certificate of the title to the said land was ever deposited with the Bank for, security for loan. It had always been in their residence.

I have considered the above evidence vis-à-vis that denial. The annexure J, L, M, P, R and S coupled with paragraph 4 of the supplementary affidavit overwhelmingly indicate that 1 loan was granted to FREMI AGENCIES LTD on the security of the property on plots 28 and 28A Kabale Road.

Mr. Nangwala argued that the Book record of Bank security referred to in paragraph 4 of the supplementary affidavit should have been annexed to the affidavit. This is not necessary in my view because this is the source of the information contained in the affidavit. It can be checked if need be. It was not necessary that it should be annexed.

Mr. Nangwala further argued that those documents only show that there was preparation to obtain a loan on the security of the property. I do not share that argument. The annexures read together show more than that. They show that a loan was granted on the security of the property the certificate of title of which was already deposited with the Bank. From those I am more inclined to find that the certificate of title to the property was deposited with the Bank with intention to create a security for the loan granted to FREMI AGENCIES LTD on 6/11/88.

Mr. Zagyenda submitted that, the deposit of a certificate of title to the registered property with the authority of the proprietor with intent to create security for a loan was sufficient to create an equitable mortgage. With that I agree. Section 138 of the RTA says:-

“Notwithstanding anything in this Act contained, an equitable Mortgage of land may be made by deposit by the registered proprietor of his 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 herein after contained. Every equitable mortgage as aforesaid shall be deemed to create an Interest in land. Every equitable mortgagee shall cause a caveat to be entered as provided for by section 148 of this Act”.

A deposit of a certificate of title to a land by or with authority if it is with the registered proprietor intent to create security thereon therefore creates equitable mortgage.

Section 18 of the mortgage Decree 17/74 defines, mortgage as

“Any mortgage, charge, debenture loan agreement, or other encumbrance whether legal or equitable which constitutes a charge over an estate or interest in land in Uganda or partly in Uganda and partly elsewhere and which is registered under the Act”.

It was submitted for the defendant that the plaintiff could not enforce his rights under the mortgage because he did not enter a caveat as a mortgagee. Reliance was placed on **D. Jakana .v. C Senkandi (1988 – 90) HCB 167.**

In response to the above submission Mr. Zagyenda submitted that the word “register” in section 18 of Decree 17/74, under the rule of interpretation could only refer to land which was the last word listed. As for the case cited, Mr. Zagyenda sought to distinguish them on their facts.

I am impressed by the above forceful argument but I am of the view that to enforce an equitable mortgage in land, the mortgagee must register it either as a legal or equitable mortgage under the RTA. The word ‘register’ in section 18 of the Decree 17/74 in my considered view refers to a mortgage but not land because land which is partly elsewhere cannot be registered under this Act. e.g. land which is partly in Kenya can not be registered under the RTA. It must be a mortgage affecting those lands that is to be registered.

In **D. Jakana .v. C Senkandi** above Berko J. refused to allow the plaintiff to enforce his right under the mortgage because he did not register it under the RTA. The distinctions which Mr. Zagyenda sought to draw between that case and the instant case were not material. The defendant had borrowed money from the plaintiff. He deposited the certificate of title to his land with the Plaintiff’s Advocate. He intended to create a security.

Mr. Zagyenda argued that the deposit of the certificate of title with the Plaintiff’s Advocate indicated a friendly loan. I do not share that view, that transaction created an equitable mortgage between the parties. The Plaintiff however, did not register that mortgage under the RTA (S138). So Berko J. refused him to enforce his rights under the mortgage.

In the instant, case, there is no evidence of Registration of the mortgage. According to the supplementary affidavit of Tugumusirize, the certificate of title was found missing for registration. The mortgage was not registered. Clearly on the above Authorities, the plaintiff cannot enforce his right to register the same under the RTA.

It means the answer to question:-

(a) In the C/s is in the negative because of failure to register the mortgage as for question.

(b) The answer is in the positive. The loan was secured by security of the defendant's aforesaid property with the consent and authority of the late John Wilson Bashuyu. The authority is evidenced by the Power of Attorney but the suit stands dismissed because the mortgage was not registered U/RTA and the plaintiff can not enforce his rights under the mortgage. The plaintiff is to pay cost of this suit.

G.M. OKELLO

JUDGE

19/10/94